ARTICLE 19

South Sudan: Media Authority Bill

June 2012

Legal analysis

Executive summary

In June 2012, ARTICLE 19 analysed the Draft of the Media Authority Bill 2012 of South Sudan (Bill No. 52) that is currently pending an approval by the Council of Ministers and the Legislative Assembly of South Sudan. The Draft Media Authority Bill 2012 is a part of media reform legislation also comprising of the Right to Information Bill and the Southern Sudan Broadcasting Corporation Bill.

ARTICLE 19 welcomes the initiative of the Government of South Sudan to create a legal environment and regulatory framework supportive of freedom of expression. In general, the Draft Bill shows that the drafters intended to pay respect to international standards on freedom of expression, and in several parts (especially the provisions on procedural rules) the Bill complies with the respective international standards on freedom of expression.

Nonetheless, ARTICLE 19 believes that the Draft Media Authority Bill requires several improvements in order to create a safe legal environment for the media in the country. In particular, the analysis relies on international standards for freedom of expression and broadcasting that stipulate that the media regulatory body should be independent from government, should have precisely circumscribed powers, and must take measures prescribed by law. Legal remedy should be secured against all decisions of the authority.

In view of the international standards, ARTICLE 19 points out that the Media Authority, as proposed by the Draft Media Authority Bill, will not be independent from the government for a number of reasons. Firstly, its members would be appointed by the joint action of the Minister for Information and Broadcasting, the Council of Ministers, and the President, and can be removed by the President, on the recommendation of the Minister. ARTICLE 19 notes that although apparently more participants contribute to the process, they are all from parts of the government. Furthermore, the Media Authority budget shall depend on government approval; it may accept grants from the government, thereby opening a door for undue influence. The Draft Media Authority Bill also gives the Ministry and governmental entities the right to initiate legal procedures by the Authority, which invites politically motivated procedures against media providers, and means an interference with the Authority's independence.

Moreover, ARTICLE 19 recommends that the Draft Media Authority Bill must clarify the limits of the powers of the Media Authority. The scope of rules that the Media Authority may enforce through investigation and sanctioning, proposed in the Draft Bill, is too vague at present. The role and the powers of the committees within the Authority, and how their members get appointed, also need further clarification and a declaration that they cannot decide on behalf of the Authority. More precise definition of the sanction "suspension of service" is recommended. We suggest making it clear that internet content providers need not register.

ARTICLE 19 suggests that certain powers of the Authority should be limited. We are deeply concerned because of the Authority's power in the field of content regulation. The Authority should not participate in defining content rules. Investigative rights should only extend to holding meetings and requesting documents. Its powers should not extend to the printed press in any way.

We were especially concerned about the two appeal bodies set out in the Bill. We consider the appeal mechanism substantially flawed and recommend abolishing both kinds of appeal

bodies, while strongly urging that a full and independent court review of all decisions is secured. None of the appeal bodies would be able to fulfil the task of providing an independent and efficient review, primarily because of the appointment mechanism, and secondly because of the restrictive rules that would limit their power to accept and examine complaints. Court review should be explicitly made possible, without restrictions on the grounds of complaints, or the tools of evidence to be applied in the procedure.

Although ARTICLE 19 finds the provisions on frequency planning and licensing rules largely consistent with the international standards for freedom of expression, we suggest inserting certain guarantees to ensure that the rights of applicants or licensees are not violated. Firstly, the Bill should declare that the Authority may exercise its right to define specific licence conditions only prior to announcing the tender. The Bill should explicitly declare the obligation of the Authority to only decide tenders on the basis of the criteria that were defined either in the law or in the announcement of the tender. Amendment of the licence conditions at a later point in the tendering phase or during the licence period should be explicitly excluded, unless it is mutually agreed by the authority and the licensee.

Summary of recommendations:

- Although ARTICLE 19 welcomes and appreciates most of the Principles of the Draft Bill, we recommend their revision. Those principles that are retained should be given full effect through the provisions of the Bill.
- No registration should be required for any internet outlets.
- The Board members of the Media Authority should be elected by the Parliament. A qualified majority and the agreement of more political parties than the governing parties should be required for their election.
- The Draft Bill should provide an opportunity for civil organisations, and organisations of journalists and of broadcasters to participate in the nomination process of the Board Members.
- Guarantees to prevent political and economic influences should be added by extending the prohibition of holding a political or economic position to several years before and after a Board membership.
- The Draft Bill should stipulate that only individuals who have relevant expertise and/or experience should be eligible for appointment as Board members. The membership overall should be required to be reasonably representative of society as a whole, including minorities.
- The rules about removal of Board members should be further elaborated. In particular, the Draft Bill should stipulate that dismissal from the mandate should be permitted for those members who have been convicted, after due process in accordance with internationally accepted legal principles, of a violent crime, and/or a crime of dishonesty, unless five years have passed since the sentence was discharged. The Bill should also explicitly stipulate that the dismissal of members prior to the completion of their mandate should be subject to judicial review.
- The role of the committees of the Media Authority should be defined without ambiguity, and pay respect to the principles governing the consistency of a media supervisory body: transparency, accountability and independence.
- The Authority or its committees shall only act on the basis of laws rather than on codes of ethics and guidelines, which are tools of the self-regulation regime.

- Investigative rights of the Media Authority should be limited to the examination of documents and holding meetings. These should be set out narrowly, with respect to freedom of expression and the integrity and privacy of journalists and media outlets.
- The Draft Bill should clarify in which cases the Media Authority may bring an action before court, and in which cases it may start an administrative procedure itself. The two sets of cases should not overlap.
- The powers of the Media Authority in respect of enforcement rules should be defined with more precision.
- All rules that the Media Authority may implement should be defined clearly in the Bill and be accessible to the public.
- The power to impose a fine should be stated explicitly in the Draft Bill and the conditions should be specifically defined. A limit on fines should be laid down in law, rather than a decision by any authority.
- The powers of the Media Authority with regards to the access to information laws should be defined precisely.
- Passing decisions in the name of the Board of the Media Authority should not be delegated to any group of the Board members or any officers. The scope of the functions that may be delegated (e.g. administrative matters or preparation of decisions) should be defined precisely and the scope of persons who are allowed to receive such a mandate should be defined.
- Collected fines should not be used for the direct operation of the Media Authority, but to subsidise some other field of the media or society instead.
- The government should only be allowed to provide grants to the Media Authority for specific tasks or projects in the public interest.
- All grants and donations should be provided in a transparent manner, and only for specific tasks or projects in the public interest.
- Industry stakeholders should be excluded from giving grants or donations to the Authority.
- The budget of the Authority should be approved by the National Assembly rather than the government as should be the case with other budget parts of the central administration in South Sudan.
- Licence conditions should be defined in the announcement of the tender, and the Media Authority should decide on the basis of those criteria.
- The Bill should explicitly state that all unilateral changes to the licence conditions should only be applicable in the following licence period.
- Cable or satellite providers should not be required to hold a licence. Keeping a register of these providers should be satisfactory to the State.
- The Draft Bill should stipulate that the Programme Code is also developed in close cooperation with the broadcasters themselves and in consultation with the general public, and is reviewed regularly.
- The printed press should not be overseen by the Authority. The Advertisement Code should only apply to broadcast media.
- The upper limit for the suspension of a licence should be defined in the Bill.
- The Media Appeals Board should be abolished.
- The Authority's decisions should be reviewed either by an independent forum of second instance or directly by the court.
- In case an independent appeals body is created, it should be independent from the government on the one hand, and from those who pass the first instance decisions on the other.

- All administrative decisions, even second instance decisions, should be allowed to have a full court review, without restrictions on the grounds of the review or the tools of evidence.

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About ARTICLE 19

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.

On the basis of these publications and ARTICLE 19's overall legal expertise, the Law Programme publishes a number of legal analyses each year, and comments on legislative proposals, as well as existing laws that affect the right to freedom of expression. This analytical work, carried out since 1998 as a means of supporting positive law reform efforts worldwide, frequently leads to substantial improvements in proposed or existing domestic legislation. All of our analyses are available online at http://www.article19.org/resources.php/legal/.

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Introduction

In June 2012, ARTICLE 19 analysed the Draft Media Authority Bill 2012 of South Sudan, or Bill No. 52 ("Draft Bill"),[1] from a freedom of expression perspective. The Draft Bill is currently pending approval by the Council of Ministers and the Legislative Assembly of South Sudan, and is a part of media reform legislation also comprising of the Right to Information Bill and the Southern Sudan Broadcasting Corporation Bill.

ARTICLE 19's analysis is based on international standards on freedom of expression, in particular the standards set by Article 19 of the International Covenant on Civil and Political Rights, the General Comment no. 34 of the United Nations' ICCPR, the Declaration of Principles on Freedom of Expression in Africa adopted by the African Commission on Human and Peoples' Rights, and Article 9 of the African Charter on Human and Peoples' Rights. It is also based on best practice standards as reflected in key ARTICLE 19 publications, namely, *A Model Public Service Broadcasting Law*,[2] and *Access to the Airwaves: Principles of Freedom of Expression and Broadcast Regulation.*[3]

ARTICLE 19's analysis acknowledges the positive elements of the Bill, and includes detailed recommendations on how the Bill should be amended to meet the international standards for freedom of expression.

ARTICLE 19 has extensive experience of working on freedom of expression issues in Africa, including Sudan. For example, ARTICLE 19 has also analysed Draft Media Legislation in Southern Sudan, as well as two drafts of the Draft Press and Printed Press Materials Bill of Sudan. We also published a report, *Mapping the Void*,[4] which addresses the practical as well as legislative situation for journalism in Sudan. We welcome the opportunity to contribute to the legislative process of this important piece of legislation, and hope that the legislators will incorporate our comments into the final draft of the Bill.

From the outset, ARTICLE 19 very much appreciates that the Draft Bill demonstrates the intentions of the drafters to adopt legislation that is in line with international standards. Nonetheless, the Draft Bill in its current form must be improved, and several important elements that endanger the democratic operation of the media supervisory system must be eliminated.

ARTICLE 19's concerns are primarily related to the lack of independence of the Media Authority from the government. We suggest clarifying the limits of the powers of the Media Authority, among others, in the field of investigation. ARTICLE 19 is also concerned by the Media Authority's power in respect of content regulation. Furthermore, we consider the appeal

[1] A copy of the Draft Bill is available from ARTICLE 19 Law Programme upon request.

[2] A Model Public Service Broadcasting Law, ARTICLE 19: London, June 2005; available at http://www.article19.org/data/files/pdfs/standards/modelpsblaw.pdf.

[3] Access to the Airwaves: Principles of Freedom of Expression and Broadcast Regulation, ARTICLE 19: London, March 2002; available at http://www.article19.org/pdfs/standards/accessairwaves.pdf.

[4] http://www.article19.org/data/files/pdfs/publications/sudan-mapping-the-void.pdf

mechanism against the Authority's decisions to be substantially flawed; we recommend abolishing both kinds of appeal bodies, while strongly urging that a full and independent court review of all decisions is secured.

ARTICLE 19 hopes that this analysis will assist the legislators in finalising the Draft Bill, and that our recommendations will further improve the supervisory mechanism so that it is both functional and fully in line with international standards. We stand ready to further support the drafting process and work with the local stakeholders on media reform in the country.

International and regional standards on media authorities

The right to freedom of expression and freedom of information is a fundamental human right. The full enjoyment of this right is central to achieving individual freedoms and to developing democracy, particularly in countries transitioning from autocracy to democracy. Freedom of expression is a necessary condition for the realisation of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of all human rights.

The Draft Bill engages a number of international human rights provisions that form the basis of the legal analysis in the following section. This section identifies the international human rights provisions that are most relevant to the protection of freedom of expression, and in particular, broadcasting regulation.

International standards

The *Universal Declaration of Human Rights*[5] ("UDHR") is generally considered to be the flagship statement of international human rights standards. Although this document is not a compulsory legal rule, it has become part of the customary international law since its adoption in 1948. As South Sudan became a Member State of the United Nations on 14th of July 2011, this document should serve as a reference point for its legislation. Article 19 of the UDHR guarantees the right to freedom of expression in the following terms:

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

The *International Covenant on Civil and Political Rights* ("ICCPR") is an international treaty that imposes legally binding obligations on State Parties to respect a number of the human rights set out in the UDHR.[6] Article 19 of the ICCPR guarantees the right to freedom of opinion and expression in terms very similar to those found in Article 19 of the UDHR. Article 19 of the ICCPR is the most detailed description of the relevant human right in the context of the South Sudanese Media Authority Bill 2012.

> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

[5] Adopted by the UN General Assembly on 10 December 1948, Resolution 217A(III).

[6] 1966 UN General Assembly Resolution 2200A(XXI) of 16 December 1966, in force since 23 March 1976.

> 3. 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.

South Sudan has not yet joined this treaty.[7]

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. The UN Human Rights Committee, the body established to monitor the implementation of the ICCPR, has stated: "The right to freedom of expression is of paramount importance in any democratic society."

General Comment No. 34 of the UN Human Rights Committee[8] constitutes an authoritative interpretation of the minimum standards guaranteed by Article 19 of the ICCPR. General Comment No. 34, *inter alia*, stipulates that:

> 39. States parties should ensure that legislative and administrative frameworks for the regulation of the mass media are consistent with the provisions of paragraph 3. Regulatory systems should take into account the differences between the print and broadcast sectors and the internet, while also noting the manner in which various media converge. [...]
>
> States parties must avoid imposing onerous licensing conditions and fees on the broadcast media, including on community and commercial stations. The criteria for the application of such conditions and licence fees should be reasonable and objective, clear, transparent, non-discriminatory and otherwise in compliance with the Covenant. Licensing regimes for broadcasting via media with limited capacity, such as audiovisual terrestrial and satellite services should provide for an equitable allocation of access and frequencies between public, commercial and community broadcasters. It is recommended that States parties that have not already done so should establish an independent and public broadcasting licensing authority, with the power to examine broadcasting applications and to grant licenses.

Regional standards

The *African Charter of Human and Peoples' Rights*[9] ("African Charter") guarantees freedom of expression in Article 9 in the following terms:

> 1. Every individual shall have the right to receive information.
> 2. Every individual shall have the right to express and disseminate his opinions within the law.

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[7] For the list of signatories, see http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en. Sudan became a member on 18 March 1986.

[8] Adopted on 21 June 2011 by Human Rights Committee, 102nd session, Geneva, available at: http://www.article19.org/resources.php/resource/2420/en/general-comment-no.34:-article-19.

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

South Sudan is regarded as being party to this Charter by the African Commission,[10] as expressed in one of its documents.[11] South Sudan became a member of the Organization of the African Union ("OAU") on 2 July 2011.

As a member of the OAU, South Sudan should also consider the Declaration of Principles on Freedom of Expression in Africa ("African Declaration")[12] when legislating on media reform. In particular, the African Declaration stipulates that the following principles are relevant for the purposes of this Draft Bill:

V. Private Broadcasting:

2. 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.

VII. Regulatory Bodies for Broadcast and Telecommunications

1. Any public authority that exercises powers in the areas of broadcast or telecommunications regulation should be independent and adequately protected against interference, particularly of a political or economic nature.

2. The appointments process for members of a regulatory body should be open and transparent, involve the participation of civil society, and shall not be controlled by any particular political party.

3. Any public authority that exercises powers in the areas of broadcast or telecommunications should be formally accountable to the public through a multi-party body.

IX. Complaints

1. A public complaints system for print or broadcasting should be available in accordance with the following principles:
   - complaints shall be determined in accordance with established rules and codes of conduct agreed between all stakeholders; and
   - the complaints system shall be widely accessible.

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[10] The African Commission on Human and Peoples' Rights (African Commission), at its 51st Ordinary Session held from 18 April - 2 May 2012 in Banjul, The Gambia.

[11] "Considering that the States of Sudan and South Sudan are parties to the African Charter..." http://www.achpr.org/sessions/51st/resolutions/219/- although South Sudan is not shown among the signatories on the official site: http://www.africa-union.org/root/au/Documents/Treaties/List/African%20Charter%20on%20Human%20and%20Peoples%20Rights.pdf. (Sudan became a member on 18 Febr. 1986).

[12] adopted by the African Commission at its 32nd Session, 17 - 23 October, 2002, Banjul, The Gambia; available at http://www.article19.org/data/files/pdfs/tools/africa-foe-checklist.pdf

2. Any regulatory body established to hear complaints about media content, including media councils, shall be protected against political, economic or any other undue interference. Its powers shall be administrative in nature and it shall not seek to usurp the role of the courts.

3. Effective self-regulation is the best system for promoting high standards in the media.

ARTICLE 19 also notes that similar guarantees for the right to freedom of expression to those in the African standards are provided by Article 13 of *the American Declaration on Human Rights*[13] and Article 10 of *the European Convention for the Protection of Human Rights and Fundamental Freedoms*.[14] Although the decisions and authoritative statements adopted by regional human rights bodies outside of the Americas are not binding on South Sudan, they provide persuasive precedents for the scope and implications of the right to freedom of expression.

[13] Adopted 22 November 1969, in force 18 July 1978.

[14] Adopted 4 November 1950, in force 3 September 1953.

Analysis of the Media Authority Bill 2012 of South Sudan

This section provides a detailed overview of the Draft Bill. While the main purpose of this section is to draw attention to those points where improvements are recommended or necessary, ARTICLE 19 also points out the positive features of the Draft Bill.

Guiding Principles of the Draft Bill

Positive aspects

The Draft Bill starts with a list of "Guiding principles". Both an elaboration on the Guiding Principles, and the overall approach reflected in the Principles are highly positive aspects of the Draft Bill. They demonstrate the commitment of the drafters to freedom of expression and should be maintained. It is unfortunate that many of the Principles do not fully prevail in the provisions of the Draft Bill.

The role of underlying principles of legislation is to provide guidance for the interpretation of the law, helping the implementation of the law for both those subject to the law and those whose duty it is to implement it. ARTICLE 19 believes that this goal should be kept in sight. In the current Draft Bill, several of the principles appear to be addressed to the legislator, rather than to other bodies, and thus, the applicability of these principles to the implementation of the law is diminished.

ARTICLE 19 welcomes the fact that the first eight Guiding Principles of the Draft Bill contain references to international treaties. Principles (10) and (12) are also very relevant and appropriate in the Preamble of the Draft Bill. These Principles can be understood as guidelines addressed to the regulatory body on how to apply the law in question. The same can be said about Principles (13) a), b), g), h), and i), which declare important values while providing useful guidelines for the Media Authority in exercising its powers.

ARTICLE 19 also welcomes Principles (13) f) and m). Principle (13) f) declares journalists' right to keep their sources confidential, without adding exceptions that would compromise this right. This section is exemplary and very encouraging for all free speech advocates. We also appreciate the formulation of the right to self-regulation, as laid down in Principle (13) m), which states that "the government shall have no role in this process". At the same time, we note that this right appears to be compromised by the involvement of the Media Authority in drafting the Programme and the Advertisement Codes, and in imposing sanctions in cases of violation of these Codes (Sections 45-47 of the Bill). We urge the drafters to retain the Principle and enforce it in the substance of the Bill, leaving as much as possible to self-regulation.

In a similar fashion, Principle (13) n) declares that the print media shall not be subjected to statutory regulation. Yet by adding that a "media complaints council shall be established", the immunity from regulation appears to be lifted.

ARTICLE 19 also commends Principle (13)(e) of the Draft Bill which reflects the standard of the "three-part test" on restrictions to freedom of expression.[15] Although it is also addressed to the legislator, it may instruct the Media Authority on which rules to apply in its procedures. Again, however, the Bill empowers the Authority to define restrictions on content, which is contrary to this principle in Explanatory Note Chapter VIII,[16] and in Chapter VIII Section 40.[17] ARTICLE 19 believes that the content of the Bill should be adjusted in order to reflect the Principles fully.

Principle (14) (a) declares the value of promoting freedom of expression, open standards and open access in the field of new media. Subsections d), e), g), h) and i) define important principles for the exemption of internet service providers. These provisions are commendable.

Negative aspects and areas for improvement

ARTICLE 19 suggests that the following Principles are revised before adopting the final version of the Draft Bill:

- The second part of **Principle (13) c)** can be understood as requiring the legislature to adopt regulations against hate speech, defamation and intrusion of privacy. These rules are not necessarily part of the function of a media regulatory body, and do not fit with the principles of this particular Bill. ARTICLE 19 therefore recommends their omission.

- Several other principles also do not seem to fit with the purpose of the Draft Bill. Namely, **Principles (9), (11), (13) j) and k)** apply to public service broadcasting, which is not the subject matter of this Bill. Principle (13) k) assigns a function to the Media Authority that is not mentioned at other points of the Bill.[18] This issue should be clarified; if the Media Authority is indeed assigned to this responsibility, this should be listed among its functions.

- **Principle (13) l)** deals with defamation cases. While ARTICLE 19 appreciates that the drafters want to provide for issues such as the defence of the truth, and reporting in the public interest, in good faith and in a fair and balanced manner as defences, it is questionable whether this should be in this Bill. We believe that these issues should be determined by separate legislation and the courts, and not by a regulatory body.

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[15] Principle 13e states: "Any provisions restricting freedom of expression and media shall be incorporated within the law, to be specifically and narrowly defined and subject to tests of necessity, proportionality and pressing social need as defined by courts."

[16] The respective provisions stipulate that "This chapter empowers the Authority, in consultation with journalists, broadcasters, media service providers and other interested stakeholders, to draw, review and amend the Advertisement and Programme Codes."

[17] Chapter VIII Section 40 reads: "The Authority shall, in consultation with broadcasters, publishers, journalists and other interested stakeholders, draw up and from time to time review and amend the Advertisement and Technical Codes for media and broadcasters."

[18] Principle (13) k) states that "... The Media Authority shall be responsible for ensuring that editorial independence of the Public Service Broadcaster is maintained, and that public service broadcasters adhere to modern democratic standards of public service broadcasting."

- **Principle (13)(p)** is an issue of major concern for ARTICLE 19. Its last subsection provides very strong powers to the Media Authority "to establish ...any other independent agencies and regulatory bodies" and stipulates that the "creation of independent news agencies is encouraged". Since the Media Authority itself is not fully independent from the government (see below for more details), ARTICLE 19 submits that an agency established by it would not be independent. We point out that a regulatory body should draw its legitimacy from the highest institution of people's sovereignty - the parliament. Moreover, the Principle does not elaborate on what the functions and powers of such agencies or regulatory bodies would be, or in which cases it would be deemed "necessary" to establish them. The final part of the Principle also seems to encourage the creation of independent news agencies, while it is unclear what the relationship between creating "regulatory bodies" and "news agencies" is. We believe that the independence of news agencies is best served by the non-interference of the authorities, rather than by any kind of encouragement. We strongly recommend omitting this subsection completely.

- **Principle (14)** (on the Internet and new media), includes some positive aspects but raises a number of questions. Firstly, the Draft Bill does not deal with the internet, new media or even digital television. Principle (14) is unclear about the registration requirement (Principle 14 b), and no further information is found in the Bill about this, as this topic is not discussed. Subsection d) appears to declare that no registration is necessary for information and content publishers "solely for the reason that they reside on the Internet". Principle (14)e) declares that internet service providers shall be able to offer internet services without prior approval, which is positive. Yet subsections b) and f) set out the conditions of registration. Although registration requirements shall be kept to an "absolute minimum necessary for essential operation", ARTICLE 19 is of the opinion that none of the registration requirements are necessary for essential operation. The purpose of the legislation would be better served by consistency in not demanding registration.

  Principle (14) (h) is also questionable. It is generally acceptable that when internet service providers provide content themselves, they shall be treated as content providers to the extent they act as such, rather than enjoying the neutrality and exemption that they enjoy in their role as internet service providers. The Draft Bill says that such content shall be "subject to the policy regarding content". By speaking of policy, one would think of a specific set of rules, which is, however, undefined more narrowly. ARTICLE 19 recommends that the word "policy" is defined more clearly.

Recommendations:

- **Although ARTICLE 19 welcomes and appreciates most of the Principles of the Draft Bill, we recommend their revision. Those Principles which are retained should be given full effect through the provisions of the Bill.**
- **Principles (13) c), d), p) should be abolished.**
- **Principles (9), (11), (13) j), and k) should be omitted or listed among the tasks of the Media Authority.**
- **Principle (13) l) represents an important value of freedom of expression, however, it should be made clear that the Media Authority has no competence in deciding defamation cases; that is the duty of the courts.**
- **Only the first part of principle (13) n) should be retained ("There shall be no statutory regulation of the print media"), and the rest should be omitted.**

- **No registration should be required for any internet outlets. Therefore, Principles (14) b) and f) should be abolished. The term "policy" in Principle 14 (h) should be defined more clearly.**

Chapter II: Establishment of the Media Authority

The Draft Bill provides for the establishment of the Media Authority on behalf of which the Board of Directors will make decisions. The nine members of the Board are appointed by the President upon approval by the Council of Ministers. The nomination is made by the Minister (sections 8-9). The Authority shall consist of specialised committees: the Draft Bill lists seven of these, plus the Legal Counsel (section 7). The Board may delegate any of its functions to any of its officers or ad-hoc committees that are established by the Board as necessary (section 19).[19]

Positive elements

The Draft Bill provides that one third of the Board of the Media Authority shall consist of women, which is a positive aspect from a diversity and gender equality point of view. Furthermore, ARTICLE 19 finds it positive that various social groups are represented in a body which decides on media matters. Rotating membership (as stipulated in Section 10 (2)) is also beneficial both from the perspective of independence and from that of functionality.

Selection of the Chairperson and the Vice-Chairperson from among the members gives room for independence and enforcement of the democracy principle within the Board itself.

Negative aspects and areas for improvement

Appointment of the Board Members of the Media Authority

ARTICLE 19 finds that the appointment mechanism, set up by the Draft Bill, does not provide sufficient guarantees that members of the Board are protected against political interference.

ARTICLE 19 recalls that the African Declaration (in Section VII. 1.) requires the appointment process to be open, transparent, and involve the participation of civil society, and it should not be controlled by any particular political party. We note that although the Draft Bill envisions various actors to participate in the appointment, all of these participants belong to the government. They include the President, the Minister, and the government (Council of Ministers) itself. This means that the Board's constitution depends entirely on the government, which is usually set up by the winning political party. Furthermore, it is not envisioned that civil society will participate in the appointments process. Although sections 9(3)(b-c) provide for the political and economic independence of the individual members, further safeguards should be added in order to guarantee such independence.

ARTICLE 19 recommends that the Board of the Media Authority should be elected by the Parliament. In order to avoid domination by the governing party, a qualified majority of the votes should be required, and the agreement of more than one parliamentary party. Civil society should have a role in the process. This requirement can be fulfilled in more than one

[19] Although this is in Chapter III of the Bill, it affects the consistency of the Board.

way: for example, nomination of the members may be made by several political parties and civil organisations, primarily the organisations of journalists and broadcasters. Alternatively, a certain number of civil society appointees shall be elected by the Parliament.

Further guarantees for the independence of the membership may be added by extending the prohibition of holding a political or business position to several years before and after the Board membership.

Oath

ARTICLE 19 also welcomes the fact that Board members can avoid swearing to God when taking the oath, as this omission is allowed at the beginning of the oath. Nonetheless, it is unclear whether the same option is offered at the end of the oath. The final words of the oath "*so help me God*" should also be made subject to individual choice, as a manifestation of freedom of conscience and of expression.

Rules of incompatibility

Section (9) (3) stipulates who can be nominated for the membership of the Media Authority.

ARTICLE 19 points out that international standards require that the membership of the regulatory authorities consists of people with proven expertise who are suitably qualified to provide the regulator with the necessary knowledge to effectively regulate the various industries. They should also be required to be independent from government, political parties, and the regulated industry so that the independence of the body is not questioned. A member of an independent regulator may not be an employee of government or public service, an official of a political party or an employee of a broadcasting or telecommunications company. The members should also be persons with integrity that can be relied on and trusted. Therefore, those who have been convicted of a serious crime may not serve in the governance bodies of the regulator.

These requirements are only partially fulfilled by the Draft Bill, as it is silent about the expertise of nominees. It would be useful if the Draft Bill set this as one of the criteria for appointment by stipulating that only individuals who have relevant expertise and/or experience should be eligible for appointment, and the overall membership should be required to be reasonably representative of society as a whole, including minorities.

Removal of Members of the Board

ARTICLE 19 also recommends that the Draft Bill should provide more specific rules on the reasons for removal of the Chairperson, Vice-Chairperson or a Board Member of the Media Authority.

Section 10(3) of the Draft Bill provides that the Chairperson, Vice-Chairperson or a Member may be removed by the President (on the recommendation of the Minister) on the grounds of "gross neglect of duty, incapacity or violation of the law". We note that these reasons are too vague and overbroad to meet international standards in the area for the following reasons:

- We assume that the Draft Bill wishes to ensure that members of the Board are persons with integrity. Yet the possibility of dismissal based on such vague terms as

those provided in Section 10(3), can be interpreted very broadly and provides the possibility for abuse and interference. We note that ARTICLE 19's Principles recommend that this possibility should be limited to being convicted after due process in accordance with internationally accepted legal principles, of a violent crime, and/or a crime of dishonesty, unless five years have passed since the sentence was discharged.

- Although the Draft Bill (in Section (10) (4)) stipulates that members who are removed must be provided with written reasons for their removal, the Bill is silent on the possibility of a judicial review of the dismissal of the members. We note that judicial review should serve as an important guarantee against the possible arbitrariness of such decisions, and is necessary in order to ensure the full independence of the Board members. Care should also be taken to see that the principle of assumption of innocence is respected and no final decision is taken in the case of criminal violations before a court decision has found someone guilty.

Committees and their powers

From the outset, ARTICLE 19 notes that the roles and powers of the various committees are not defined in the Draft Bill. The same has to be said about their membership; various membership issues are mentioned for several committees inconsequently, but for most committees, no reference whatsoever is made to their membership (see Chapter II, section 7. (6)-(13)).

There is also serious confusion about the actual names of the committees, as the names of various committees vary every time they are mentioned. This also raises questions about whether the Appeals Board, the Media Appeals Committee and the Media Appeals Board are all the same or different entities. In the case that it is the same body in each case, it is not clear why it is regulated in two different sections of the Bill (see Section 7(8)(a-d) and Sections 48-54). For the purpose of this analysis, we treat the Media Appeals Committee and the Media Appeals Board as two separate bodies (while recommending they should be abolished – see below).

ARTICLE 19 also observes that the committees represent various fields of expertise. We assume that they would consist of employees of the Media Authority. Although members of these committees will participate in the preparation of decision-making, the final decision would always be taken by the Board. This approach allowed us to view them like the departments of an organisation, and their existence and functions as organisational necessities. Hence, their tasks are treated as those of the Media Authority for the purposes of this analysis.

Nevertheless, even with this approach, we observed a collision between the powers of the Press and Complaints Committee and the Hearings Committee on the one hand, and the Complaints and Monitoring Committee on the other. All of these committees may discuss complaints, while the Hearings Committee shall hear only those that could not be resolved by the Press and Broadcast Complaints Board.

A different interpretation would raise serious concern due to the lack of transparency of the committees' consistency, their power, and their accountability. One cause for our doubt is the wording of Section 7(6)(f) of the Draft Bill that states that the Press and Complaints

Committee shall have *jurisdiction* over all complaints against the media and the journalists. Another potentially misleading formulation appears in Section 7(12)(a) of the Draft Bill that orders the Legal Counsel to represent the Authority in cases brought before the various committees – as if the committees themselves would not be representations of the Authority. We highly recommend that this ambiguity is clarified in the Draft Bill, by paying respect to the principles governing the consistency of a media supervisory body: transparency, accountability, independence.

The functions of individual committees

The Bill provides that the **Press and Complaints Committee** shall promote and adopt codes of ethics and guidelines for professional conduct for print and broadcast journalists. These codes of ethics are then taken as the basis for legal procedures, as set out in later parts of the Draft Bill (in Section 6.(f-h), 7.(7)(a)).

ARTICLE 19 reiterates that ethical issues and professional guidelines should not serve as the basis for legal procedures, as their place is in self-regulation, in which – as rightfully stated by Principle (13)(m) of the Draft Bill – the state shall have no role. It is therefore not appropriate for the Media Authority (or its committees) to adopt ethical and professional rules, which are then enforced by the Authority's legal power. The Media Authority should act strictly on the basis of legal rules, rather than codes of ethics and professional guidelines.

Similarly, in our view the promotion of the formation of media and journalist associations by the Media Authority does not support press freedom (Section 7(6)(e) of the Draft Bill). On the contrary, any state interference into civil matters derogates civil initiative, as promoted organisations might remain dependent on the state.

The Press and Complaints Committee is further empowered to provide counsel on broadcast licensing.[20] It comes as a surprise that the Press and Complaints Committee, which – except for this point – appears to be concerned primarily with printed press and ethical issues, would have expertise in broadcasting licensing. More importantly, ARTICLE 19 believes that this activity would frustrate, rather than promote the principle of equal treatment of the applicants. The law may provide for holding a public meeting between publication of the call for tender applications, and the deadline of their submission, to clarify issues and questions of the potential applicants. It is also possible that the Authority would specify an official to reply to enquiries in relation to licensing. Nonetheless, providing legal counselling would extend beyond the obligation of the Media Authority to provide equal treatment to each applicant. Therefore, we recommend that sections 7(6)(a,d,e) are omitted.

The **Media Appeals Committee** appears to be an internal, second instance decision-maker of the Authority, while its review power is limited to sanctioning decisions. Nevertheless, being part of the Media Authority, it is questionable whether independent review of the decisions of the Board of the Authority is possible. We note that this committee is entitled to make law enforcement agencies enforce the upheld decisions thereby depriving the party of the possibility of court review. Furthermore, Section 7(8)b) of the Draft Bill is confusing, as it is

[20] ARTICLE 19 understands this function as the provision of counselling to applicants and responding to other enquiries.

not at all clear to which Board it refers or whose decisions shall be delivered in writing. The relationship between the Media Appeals Board and the Media Appeals Committee is equally unclear.

ARTICLE 19 points out that all decisions of the Media Authority should be allowed to be challenged in court. For this reason, we recommend that the Media Appeals Committee and also the Media Appeals Board (providing it is a separate entity) are abolished. This is for the same reasons; a body that is dependent on the Board of the Authority would not be able to effectively supervise the decisions of the Authority. Either the Board should perform the review of first instance decisions passed by the individual committees, or appeals shall be directly forwarded to the court. Court review should be enabled in all cases.

Additionally, ARTICLE 19 is concerned about the Media Authority's duty to "promote awareness in the judiciary, the police and government officials in order that they understand their roles and responsibilities in supporting a free open and democratic press" (Section 7(11)(d) of the Draft Bill). We are aware that education about the nature of democracy, human rights and specifically freedom of expression is necessary and important. Yet care should be taken to see that this task is carried out authentically and impartially. It might be better to leave this duty to educational institutions and bodies or the self-regulatory organisations of the press. We believe that the Media Authority is not an impartial actor in this context. We have found that in our experience, regulatory authorities often overemphasise the harmful effects of the media, as they are only engaged in dealing with the problematic issues. ARTICLE 19 points out that police and government officials should play no role whatsoever in supporting a free press. On the contrary, these governmental institutions serve best through their non-interference with media matters. Nonetheless, raising awareness of the principle of non-interference may be beneficial.

Hence, it is recommended that this section is amended so that it promotes non-interference by police and government officials, or abolished completely.

Recommendations:

- **The Board members of the Media Authority should be elected by the Parliament. A qualified majority and the agreement of more political parties than the governing parties should be required for their election.**
- **The Draft Bill should provide an opportunity for civil organisations, and organisations of journalists and of broadcasters to participate in the nomination process of the Board Members.**
- **Guarantees to prevent political and economic influences should be added by extending the prohibition of holding a political or economic position to several years before and after a Board membership (section 9).**
- **The option to omit legions to God should be allowed for an entire oath.**
- **The Draft Bill should stipulate that only individuals who have relevant expertise and/or experience should be eligible for appointment as Board members. The membership overall should be required to be reasonably representative of society as a whole, including minorities.**
- **The rules about removal of Board members should be further elaborated. In particular, the Draft Bill should stipulate that dismissal from the mandate should be permitted for those members who have been convicted, after due process in accordance with internationally accepted legal principles, of a violent crime, and/or a crime of dishonesty, unless five years have passed since the sentence was discharged. The Bill**

should also explicitly stipulate that the dismissal of members prior to the completion of their mandate should be a subject of judicial review.

- **The role of the committees of the Media Authority should be defined without ambiguity, and pay respect to the principles governing the consistency of a media supervisory body: transparency, accountability and independence.**
- **The Authority or its committees should only act on the basis of laws, rather than on codes of ethics and guidelines, which are tools of the self-regulation regime.**
- **Sections 7(6)(a,d,e) of the Draft Bill should be omitted.**
- **Section 7(8) of the Draft Bill should be omitted. The Draft Bill should provide for the court to review the Media Authority's decisions.**
- **Section 7(11)(d) should be amended in order to promote non-interference of police and government officials. Alternatively, this section should be removed from the Draft Bill completely.**

Chapter III. Functions and Powers of the Media Authority

ARTICLE 19 welcomes the declaration that the Media Authority shall act in a manner that is consistent with constitutional and international guarantees for freedom of expression, and that promotes the public interest. We also welcome provisions prescribing impartiality and transparency, and excluding criminal punishments.

Despite the positive elements of this Chapter of the Draft Bill, ARTICLE 19 submits that the power structure of the Media Authority suffers from a number of substantial problems and should be revised.

Investigation (Section 16(d) and 18)
The regulation of investigatory powers has some positive aspects. For example, the action can only be taken after the breaching party is given notice of the investigation, and a breaching party has an opportunity to respond (reiterated in section 46[1]). Furthermore, a written report must be produced on each investigation, and a copy must be provided to the party who is being investigated. The reports must also be published.

Investigative rights generally represent a grave interference with the private sphere of commercial media companies. An investigation results in a restriction of rights, such as the rights to privacy, and it may derogate the protection of confidential sources. ARTICLE 19 notes that in most countries, even police authorities have limited investigative power, e.g. entering into premises or private houses is only allowed following a court order. In addition, police investigate cases where there are indications that a criminal offense has been committed.

In the case of the Draft Law, the investigative powers are granted to the Media Authority in administrative and civil matters. We note that the dangers posed to the society by violations of the media law are minor. In fact, the threat of extensively curtailing the freedom of media outlets or journalists presents a greater danger to the development of a free society than transgressions by members of the media themselves. Therefore, we believe that the Media Authorities' investigative rights should be limited to the examination of documents and holding meetings. They should not possess coercive power, and we would welcome this being explicitly stated in the Bill.

ARTICLE 19 is also concerned that the Ministry (or a governmental entity) is entitled by the Bill to initiate an investigation by the Media Authority. In our view, accepting orders from the Ministry or a governmental entity would endanger the independence of the Authority, and be contrary to international standards, which prescribe that the Authority should be an independent entity, free from any political, governmental influence. Having a legal obligation to act upon initiation by the Ministry entities is no different from accepting orders from them. We believe that the Authority should only act upon its own initiative, or upon the initiative of third persons, who are supposed to be civil consumers of media content.

Recommendations:

- **The investigative rights of the Media Authority should be limited to the examination of documents and holding meetings. These should be set out narrowly, with respect to freedom of expression, and the integrity and privacy of journalists and media outlets.**
- **Provision 16(1)(d) of the Draft Bill should not entitle the Ministry or governmental entities to initiate a procedure by the Authority, and the Authority should not act upon initiation by the Ministry or governmental entities. Reference to this from section 16(1)(d) of the Draft Law should be omitted.**

Powers of the Authority (Section 17)

ARTICLE 19 suggests clarifying the right of the Media Authority (in Section 17) to start legal procedures in court.

We agree that the Authority should be allowed to initiate legal action in court in cases where its order or regulation has been violated [Section 17(3)]. Yet we assert that the next subsection of Section 17 opens up this possibility to any cases, since it allows the Authority to bring an action before any court in cases of the violation of "any of the Media and Right to Information Laws". We believe that this would enable the Authority to choose whether it should start a procedure and impose a sanction itself (using the power it is given in section 47), or bring the case to court.

ARTICLE 19 is concerned about the legal insecurity that this may cause; media outlets and journalists may not be clear about the consequences of their actions. Hence, we suggest that it is clarified in which cases the Media Authority may bring an action before court, and also specified which court it should be.

Recommendations:

- **The Draft Bill should clarify in which cases the Media Authority may bring an action before court and in which cases it may start an administrative procedure itself. The two sets of cases should not overlap.**

The scope of the Authority's power with regards to other laws

ARTICLE 19 is concerned about the wide and unlimited sanctioning powers of the Media Authority set in Section 18(2). These provisions allow the Authority to sanction violations of any media law, including the access to information laws of South Sudan, as well as to impose sanctions in cases where an order of the Information Commissioner is not respected.

ARTICLE 19 believes that if the Authority can impose sanctions on the basis of another law, that law should be precisely defined in the Bill. Not having information about which laws may

come into question, it is not possible to formulate an opinion on whether this would be a violation of freedom of expression. We note, however, that this hinders transparency and endangers legal security.

ARTICLE 19 is further concerned that the relationship between the Media Authority and the Information Commissioner (or the laws on access to information) is not clarified. We find it theoretically acceptable – although unusual – that the Media Authority has the power to investigate any breach of the access to information laws. Yet if such power is given to the Media Authority, that should be declared explicitly, and a precise definition of the nature and the limits of this power should be provided. The other laws that contain the substantial rules should be formally assigned. In particular, the possibility to impose fines and their upper limits should be defined by law. Since ARTICLE 19 is not aware of a final version of the Law on access to information, it is not possible to form an opinion on whether the sanctioning right would be a violation of the right to access to information, or that of freedom of expression.

Recommendations:

- **The powers of the Media Authority with regards to enforcement rules should be defined with more precision.**
- **All rules that the Media Authority may implement should be clearly defined in the Bill and accessible to the public.**
- **The power to impose a fine should be stated explicitly in the Draft Bill, and the conditions should be specifically defined. A limit on fines should be laid down in law, rather than a decision by any authority.**
- **The powers of the Media Authority with regards to the access to information laws should be defined precisely.**

Committees (Section 19)

Under Section 19 of the Draft Bill, the Board of Media Authority may establish committees as it deems necessary, consisting of only two or more members. Any functions may be delegated to any officers or committees. This raised our concern for the following reasons:

- Firstly, the Board members are supposedly elected by an open and transparent procedure, and are accountable to the National Assembly (see recommendations for the selection of the members). They perform an important public duty and bear responsibility for their actions. Allowing a delegation of their duties to any officers or any committees would substantially flaw the principle of transparency and democracy.

- Secondly, this practice may result in a situation where other members of the Board are excluded from participating in the decision-making. In the case of a multi-party Board membership, this practice would present the opportunity for delegates of one party to pass decisions without delegates from the other party, and introduce a political bias in decisions. This poses a significant threat to freedom of the media.

While we agree that it may be necessary to assign certain tasks to one or two specified persons for efficient discharge of the functions, it should be made clear that the decision-making and the responsibility remains with the Board. The scope of functions that may be delegated (or those that may not be delegated) and the scope of persons who may receive such delegations should be defined.

Recommendations:

- **Passing decisions in the name of the Board of the Media Authority should not be delegated to any group of the Board members or any officers.**
- **The scope of functions that may be delegated (e.g. administrative matters or preparation of decisions) should be defined precisely.**
- **The scope of persons who are allowed to receive such a mandate should be defined.**

Chapter IV. Funding and Reporting of the Authority

Sources of Funding (Section 21)

The funding system for the Media Authority is, in general, in compliance with the international standards on freedom of expression. Some elements of the Draft Law, however, may pose a threat to the Authority's independence.

ARTICLE 19 is concerned that if fines collected by the Media Authority form part of its budget, the Authority may become interested in collecting as many fines as possible, in order to create more resources for its own operation. This practice would compromise the impartiality of the Authority. We suggest that collected fines should be used for another purpose, for example, one that is in connection with the media industry, such as the operation of the public service media, or education about media literacy, or giving grants to produce public service content, publication, research or other materials of public value. It is strongly advised that the collected fines should not be used for the direct operation of the Authority.

Furthermore, we believe that an unlimited possibility for receiving grants from the government threatens the independence of the Media Authority. For example, the government might exercise a constant pressure on the Authority by setting the yearly budget allowance low, and supplementing the missing funding through grants. Grants should only be allowed by the government for certain specific tasks or projects in the public interest, if at all. This is already formulated in 21(4) of the Draft Bill, but it does not apply to all government grants as it should.

For similar reasons, all grants should be treated with the greatest care, in order to avoid certain financially powerful industry stakeholders trying to influence the Authority's attitude through generous donations. As the African Declaration puts forth, regulatory authorities must take care not to be influenced by economic or any other undue interference.[21]

ARTICLE 19 strongly recommends that the budget of the Authority should not be dependent on the government. In most countries, it is the parliament that approves the annual budget of the country. We recommend the same system for South Sudan. Sections 21(1) and(3) should be amended accordingly.

Recommendations:

[21] IX. 2. Any regulatory body established to hear complaints about media content, including media councils, should be protected against political, economic or any other undue interference.

- **Collected fines should not be used for the direct operation of the Media Authority but to subsidise some other field of the media or society.**
- **The government should only be allowed to provide grants to the Media Authority for specific tasks or projects in the public interest.**
- **All grants and donations should be provided in a transparent manner, and only for specific tasks or projects in the public interest.**
- **Industry stakeholders should be excluded from giving grants or donations to the Authority.**
- **The budget should be approved by the National Assembly, rather than the government, as should be the case with other parts of the budget of the central administration in South Sudan**.

Chapters V-VI-VII. Frequency Planning and Licensing, General and Specific Licensing Conditions

ARTICLE 19 acknowledges that the Draft Bill's rules on frequency planning and licensing procedures strive to fulfil the requirements of transparency, diversity and equal treatment of all the parties, as required by international standards on broadcasting regulation. We welcome that at least the minimum content requirements of tender applications are set out in the Bill, and that reasoning shall be provided about the tender decisions to each applicant. Imposing specific licence conditions is restricted by Section 39 of the Draft Bill in the interests of the media industry or the public. We approve that the "silence" or non-responsiveness of the Authority allows media outlets to carry on their activities [Section 29(5), 38.(1)].

There are only a few issues that need further clarification. Most importantly, ARTICLE 19 is not convinced that a unilateral amendment of the licence conditions during the licensing period is safely excluded from the Bill. We are of the opinion that amendment of the licence conditions should only take effect in the next licensing period, unless the amendment happens with the agreement of the licensee. During a licence period, amendment to the licence conditions should be explicitly excluded. Although this may have been the intention of the Legislator, this is not entirely clear from the Bill (Sections 34-38.)

The Legislator's intention to secure fair and solid business conditions for licensees is shown by Section 36 – 'No Retroactive Application for a Licence'. Nonetheless, this does not exclude changes that apply to licences in effect at the time of the change. Especially licences that are awarded for a fixed period; commercial media enterprises need to be able to calculate their costs, income and other important circumstances in advance.

We welcome that the fees shall be widely publicised [subsection (2)], however, the principle of legal certainty also requires that annual licence fees are fixed in the licence for the whole licence period. Therefore, section 34(1) is a cause for concern in stating that the Authority may define annual licence fees "*from time to time as it deems necessary*". We agree that in certain cases a country's economic conditions would make it practical and necessary for the licence fee to be changed during the licence period. Even in those circumstances, it is possible to define the licence fee in the licence in advance by a moving rate bound, for example, to inflation, GDP, or some other variable factor. In this case, the licensee would know in advance the changing nature of the fee and calculate the risk within its business risks. As this variable depends on a circumstance independent from the Authority, no suspicion of unjust interference or pressure would emerge.

Section 35(1) of the Draft Law similarly states that the Media Authority may "*from time to time*" adopt regulations setting out general licence terms and conditions. Section 37 states that the Authority may attach such specific conditions to broadcasting service licences "*as it deems necessary*".

While we appreciate the list of reasons that the Bill offers for the Authority to take into consideration in deciding whether or not to issue a broadcasting licence to an applicant, we believe that the Authority should decide primarily on the basis of the information that it required in the tender. The Authority may, as set out in section 37, define certain specific licence conditions, however, these should be defined and publicised in the tender, and not amended later. The Authority should decide on the basis of the information given by applicants in their tender applications.

Section 25(4)(e) of the Draft Bill mentions cable or satellite service providers among potential applicants for licences. We would like to draw attention to the fact that these service providers do not use terrestrial frequencies, which are a scarce public resource, and which primarily justify state regulation. Any number of cable or satellite providers could start their operation without hindering others in providing media content. Therefore, there is no justification for requiring licences from them. The requirement for notification or registration is generally accepted, however, the registration process is a simple administrative process compared to a tender procedure.

Recommendation:

- **Licence conditions should be defined in the announcement of the tender, and the Media Authority should decide on the basis of those criteria.**
- **The Draft Bill should explicitly state that all unilateral changes to the licence conditions should only be applicable in the following licence period (with regards to sections 34, 35, 37, 38).**
- **Cable or satellite providers should not be required to hold a licence. Keeping a register of these providers should be satisfactory to the State.**

Chapter VIII. Advertisement, Programme and Technical Codes

Chapter VIII grants the powers to the Media Authority to develop Advertisement, Technical and Programme Codes. Section 40 (1) states that the Advertisement and Technical Codes shall be developed in consultation with publishers, broadcasters, journalists and other interested parties, and should be reviewed "from time to time" and widely disseminated. No such requirement is, however, set up for the development of a Programme Code (Section 42 only states that requirement for the content of the Programme Code).

With respect to the Programme Code, ARTICLE 19 notes from the outset that the content of broadcasts should be subject, first and foremost, to the same rules which apply to any other form of expression, such as defamation law or obscenity law. Nonetheless, because of their great impact and intrusiveness – they are beamed straight into the living room – it is generally accepted that the broadcast media may be subjected to more extensive regulation, usually through the adoption of a code of conduct or similar instrument. The purpose of such a code is not to constrain broadcasters' editorial freedom through a body of law, rather the aim is to guide broadcasters in how to navigate necessarily difficult and changing issues, such as the

appropriate level of violence on television or what children are comfortable viewing. In keeping with this idea, the code is usually drawn up by, or through extensive consultation with, the broadcasters themselves, and revised periodically. It is enforced through a system of graduated sanctions – relying where possible on moral pressure, such as a simple warning, and then resorting to progressively heavier sanctions.

We note that the provisions of Section 43 do not meet these requirements. In particular, we recommend that the Programme Code should be developed in close cooperation with the broadcasters themselves, and in consultation with the general public. Not only does this secure buy-in from the sector and its audience, it also allows standards to be described in much more detail than is possible in a law. For example, the most recent UK broadcasting code[22] runs to 134 pages. It contains numerous explanatory boxes where the meaning of various terms is illuminated in a way that is understandable to members of the public.

Furthermore, ARTICLE 19 finds it rather confusing that the Draft Bill stipulates that the Advertisement Code, adopted by the Authority, shall apply also to print advertising. While only Section 40 subsections (a-c) would really apply to printed outlets, and the restrictions themselves cannot be objected, the fact that these rules are supervised and sanctioned by the Media Authority makes inclusion of the printed press problematic. We reiterate that freedom of expression is best served by subjecting printed press to nothing other than the courts' jurisdiction. Even if specific rules apply in relation to advertising or, for example, defamation, these should only be supervised by the judiciary rather than a governmental entity or a media authority.

Recommendations:

- **The Draft Bill should stipulate that the Programme Code is also developed in close cooperation with the broadcasters themselves, and in consultation with the general public, and is reviewed regularly.**
- **The printed press should not be overseen by the Authority. The Advertisement Code should only apply to broadcast media.**

Chapter IX. Breach of Licence Conditions

Section 46 of the Draft Bill sets out that the Authority shall provide the licensee adequate written notice of any allegation of breach, provide a reasonable opportunity to make representations, finish the procedure within sixty days, and publish a reasoned decision. These provide procedural guarantees to all parties to the procedure. ARTICLE 19 welcomes these provisions as a regulation in line with international standards and customs. Nevertheless, we have the following comments to Chapter IX:

Section 47. Sanctions

ARTICLE 19 welcomes the rule that the Authority should apply the sanction of a fine only after repeated breaches of the licence conditions, and that the upper limit of the fine is defined. The upper limit appears to be set rather high (2% of the licensee's total revenue of

[22] See http://stakeholders.ofcom.org.uk/binaries/broadcast/831190/broadcastingcode2011.pdf.

the previous year), and care should be taken to ensure that the principle of gradation is applied in imposing fines.

We also welcome that the suspension or termination of a licence is only allowed in cases of repeated and gross breaches of the licence conditions, however, we recommend that the maximum time for the suspension of a licence should be defined in the Bill.

Some parts of this section require further elaboration. Subsection (1)(d) says that the Authority may order the licensee to take such action or desist from taking such action "as it deems necessary to rectify or prevent repetition of the breach". ARTICLE 19 believes that this leaves the door open for the Authority to impose any kind of obligation on the licensee beyond the list of sanctions in (a-c) and (2-3). Obviously, the authority may be allowed to oblige the licensee to abstain from repetition of the breach of law, and even to rectify a violation of content rules, if it seems appropriate. The rule could be reframed so that it does not extend beyond these obligations.

Subsection (4) shows the intention of the Legislator to leave fining and suspension, and the termination of a licence, as exceptional sanctioning methods. This approach is very much appreciated by ARTICLE 19 and should be retained. It also requires that other, lesser sanctions, to be applied first. Nevertheless, saying in the same sentence "except as shall be decided by Members of the Board", weakens this rule significantly. This formulation gives the impression that it is the discretionary right of the Board (or even individual Members of the Board) to decide against the general rule of non-application of such sanctions. The original principle could be better realised by setting out in which cases the Board should make an exception.

Most importantly, the Media Authority should not sanction the violation of rules that were issued by the Authority itself, such as the Advertisement, Programme and Technical Code, as discussed above. As said correctly by this Bill, violation of the regulations and orders of the Authority should be brought to the courts [17(3)].

Recommendations:

- **The upper limit for the suspension of a licence should be defined in the Bill.**
- **Reframe 47(1)(d) so that the sanction clearly does not extend beyond the obligation to refrain from repeated violation or to rectify a statement.**
- **The wording "except as shall be decided by Members of the Board" should be omitted and other condition(s) inserted into 47(4)instead.**

Chapter X. The Media Appeals Board

While we acknowledge that the appellate body is obliged to respect the internationally recognised broadcasting best practices and human rights standards, democracy, the rule of law, and protection of freedom of expression [section 48(4)], the body's consistence and operation are essentially flawed and should not be maintained in its present form of the Draft Bill.

ARTICLE 19 submits that an appellate body, in general, ought to be independent from the body whose decisions it supervises, and also from the government.

Neither of these conditions is met in the case of the Media Appeals Board, as its candidate members are nominated by the Board, then selected by the Minister and finally appointed by the President. All media supervisory bodies should be independent from the government, even the Board, as discussed above. In addition, in the case of an appellate body, it does not appear practical that its members are nominated by the body whose decisions they are allowed to overrule. Loyalty to the body that nominated them – especially so that their tenure may be renewed for two additional terms – might prevent them from acting in a truly independent manner in the performance of their functions as members of an appellate body.

Furthermore, the nominating process might be flawed, as the nominating members are disinterested in creating a body critical of their own decisions. In addition, the Appeal Board is financed from the Authority's budget, and may accept other grants only with approval of the Board. While it is not without precedent that an administrative authority reviews its own decisions, the second instance decision is usually passed by the person(s) on top of the administrative hierarchy. The Appeals Board would, however, be subjected to the Board of the Authority in both organisational and financial terms, which deprives it of the supremacy that would be necessary to effectively change or annul the Board's decisions. Moreover, the Appeal Body is not accountable to the public in any way, which is a requirement on any such authority.[23]

ARTICLE 19 is further concerned because the Appeals Board's decisions are considered final and can be reviewed only by the Supreme Court "*in accordance with applicable law".* We note that in several countries, the cases that can be brought to, or the reviews made by the Supreme Court, are restricted to certain circumstances. We do not know if that is the case in South Sudan, or if the Supreme Court indeed performs a full legal review of every case that is submitted to it. It is of major importance that all decisions of any administrative body may be appealed in court, and be subject to a full legal review. This principle is also declared in the African Declaration, IX. 2.[24]

As we recommend that the Media Appeals Board is abolished, we devote only short comments to the detailed rules on the procedure of this board.

According to section 52.(3), the review carried out by the Board is not a full review but is limited to accepting new information which was not available when the first decision was passed, or if any substantive or procedural mistake was committed by the Authority when passing the first decision. Furthermore, the Media Appeals Board has an almost unlimited right to reject appeals without a hearing, among others, all appeals that are not grounded on either procedural or substantive error – which would include those that refer to new facts too. These very restrictive rules prevent an effective review in merit, which all administrative decisions would deserve. This is especially a cause for concern in light of the restricted court review – a negative Appeal Board decision might finally shut the door for further reviews, thereby violating the right to a fair procedure.

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[23] African Declaration, VII. 3. "Any public authority that exercises powers in the areas of broadcast or telecommunications should be formally accountable to the public through a multi-party body."

[24] "Any regulatory body established to hear complaints about media content, including media councils, shall be protected against political, economic or any other undue interference. Its powers shall be administrative in nature and it shall not seek to usurp the role of the courts." African Declaration, IX. 2.

Recommendations:

- **The Media Appeals Board should be abolished.**
- **The Authority's decisions should be reviewed either by an independent forum of second instance, or directly by the court.**
- **In case an independent appeals body is created, it should be independent from the government on the one hand, and from those who pass the first instance decisions on the other.**
- **All administrative decisions, even second instance decisions, should be allowed to have a full court review, without restrictions on the grounds of the review, or the tools of evidence.**