

ARTICLE 19

South Sudan: Broadcasting Corporation Bill, 2012

October 2012

Legal analysis

Executive summary

In October 2012, ARTICLE 19 analysed the Draft the Broadcasting Corporation Bill, 2012 (No. 53, “Draft Bill”) which envisages the creation of a national public service broadcaster, the South Sudan Broadcasting Corporation (“SSBC”). The Draft Bill was introduced to the South Sudan’s Council of Ministers in March 2012, as a part of a package of three media-related bills (alongside with the Draft Media Authority Bill (No. 52) and the Draft Right to Access Information Bill (No. 54)). These three laws shall be eventually submitted for an adoption by the National Legislative Assembly.

On the outset of this analysis, ARTICLE 19 is pleased to note that the Draft Bill is largely based on a proposal presented by us to the then southern Minister of Information in March 2006. Our earlier proposal was based in turn on the *Model Public Service Broadcasting Law* published by ARTICLE 19 in 2005, which seeks to encapsulate international best practice in a legislative format. Accordingly, we broadly welcome the Bill, which would translate much of this best practice into law in South Sudan.

Unfortunately, our assessment of the Draft Bill shows that it significantly differs from both, our 2006 proposal and from international standards in this area. In particular, we are concern that the biggest changes introduced relate to the process for appointing and dismissing members of the Board of Directors of SSBC, and that their effect is to place the broadcaster under the control of the President and Minister of Information and Broadcasting, rather than the National Legislative Assembly. A strong guarantee of independence from the executive branch is one of the key pillars of a democratic public service broadcasting law. With this pillar now taken from under the Draft Bill, it is very questionable whether the SSBC will be able to truly deliver on its otherwise well-defined mandate to serve the public – rather than the government.

ARTICLE 19 therefore recommends that the Draft Bill is reviewed for its compliance with international standards and in the light of our earlier proposal that fully incorporated these standards.

Overview of Recommendations:

- The Broadcasting Corporation Bill should state, either in the preamble or in Section 3, that all provisions must be interpreted in conformity with the guarantee of freedom of expression in Section 24 of the Transitional Constitution.
- Consideration should be given to referring to international guarantees of freedom of expression too.
- The Broadcasting Corporation Bill should expressly guarantee SSBC’s independence from the executive and should prohibit all attempts to influence the members or staff of SSBC in the discharge of their duties, or to interfere with the activities of SSBC, except as specifically provided for by law.
- Members of the Board of SSBC should not be selected and dismissed by the President, but by a two-thirds majority vote of the National Legislative Assembly. Any role for the President should be purely ceremonial.
- The nominations process should be open and the selection should be made through public hearings, after the public has been given an opportunity to comment.

- Persons who are employed in the civil service or any other branch of government should be ineligible for appointment to the Board.
- Consideration should be given to extending the term of Board members to six years.
- The Managing Director of SSBC should be selected by the Board with no involvement of the Government.
- A Board member who is removed should be guaranteed the right to appeal this decision in court.
- The annual report drawn up by the Board should be addressed exclusively to the National Legislative Assembly and the public.
- SSBC should be able to apply directly to the National Legislative Assembly for funding, rather than through the Minister of Information and Broadcasting.
- The remuneration of Board members should be set by the National Legislative Assembly rather than the Council of Ministers.



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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.

On the basis of these publications and ARTICLE 19's overall legal expertise, the Law Programme publishes a number of legal analyses each year, 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/>.

If you would like to discuss this analysis further, please contact Barbora Bukovska, Senior Director for Law at Barbora@article19.org. For more information about the work of ARTICLE 19 in Eastern Africa, please contact Henry Maina, Director of ARTICLE 19 Kenya and Eastern Africa at henry@article19.org.

Additionally, if you have a matter you would like to bring to the attention of the ARTICLE 19 Law Programme, you can contact us by e-mail at legal@article19.org or call us at +44 20 7324 2500.

Introduction

On 26 March 2012, Justice Minister John Luk Jok presented a package of three important media-related bills to South Sudan's Council of Ministers for their review and eventual submission to the National Legislative Assembly. Two of these legislative proposals, the Draft Media Authority Bill (No. 52) and the Draft Right to Access Information Bill (No. 54), have been the subject of previous analyses published by ARTICLE 19.¹ This analysis comments on the third proposal, the Draft Broadcasting Corporation Bill, 2012 (No. 53),² which envisages the creation of a national public service broadcaster, the South Sudan Broadcasting Corporation ("SSBC").

It should be noted that the three media bills have long been under discussion, with previous drafts presented by the Ministry of Information and Broadcasting as far back as May 2008. ARTICLE 19 welcomes the fact that new momentum has been injected into the discussion of these bills, and that a process of public consultation is now underway.

The Draft Broadcasting Corporation Bill ("the Draft Bill") draws extensively on a proposal presented by ARTICLE 19 to the then southern Minister of Information in March 2006.³ That proposal was based in turn on the *Model Public Service Broadcasting Law* produced by ARTICLE 19 (in cooperation with international experts) in 2005,⁴ and which seeks to encapsulate international best practice in a legislative format. Accordingly, we broadly welcome the Draft Bill, which would translate much of this best practice into law in South Sudan.

The present analysis focuses on those areas where the Draft Bill differs from our 2006 proposal and *de facto* with international standards on freedom of expression.

In principle, it is neither surprising nor problematic that the Draft Bill departs from the ARTICLE 19 proposal in some respects, since there is no single correct approach to the establishment of a public service broadcaster. However, we are alarmed to note that the Draft Bill did not look into other legislative practices in this area but merely removed the guarantees of independence of the SSBC. We observe that the biggest changes introduced relate to the process for appointing and dismissing members of the Board of Directors of SSBC, and that their effect is to place the broadcaster under the control of the President and Minister of Information and Broadcasting (executive branch), rather than the National Legislative Assembly (legislator). We highlight that a strong guarantee of independence from the executive branch is one of the key pillars of a democratic public service broadcasting law.

¹ ARTICLE 19, Analysis of South Sudan: Media Authority Bill, July 2012; available at <http://www.article19.org/resources.php/resource/3387/en/south-sudan:-media-authority-bill>; and ARTICLE 19, Analysis of South Sudan: Right of Access to Information Bill, July 2012; available at <http://www.article19.org/resources.php/resource/3419/en/south-sudan:-right-of-access-to-information-bill>.

² The Draft Bill is available on request from ARTICLE 19.

³ ARTICLE 19, Proposal for the Public Service Broadcastin Bill, South Sudan, March 2005; available at <http://www.article19.org/pdfs/analysis/southern-sudan-public-service-broadcasting-bil.pdf>.

⁴ ARTICLE 19, Model Public Service Broadcasting Law, London, 2005; available at <http://www.article19.org/pdfs/standards/modelpsblaw.pdf>

With this pillar now taken from under the Draft Bill, it is very questionable whether the SSBC will be able to truly deliver on its otherwise well-defined mandate to serve the public – rather than the government.

We hope that these comments will be used by the drafters to improve the final version of the Bill. The Draft Bill should be reviewed for its compliance with international standards and in the light of our earlier proposal that fully incorporated these standards. ARTICLE 19 continues to stand ready to assist the drafters and other stakeholders in South Sudan in adoption of legislation on media that meets international standards on freedom of expression and in creating an enabling environment for free, pluralistic and diverse media in the country.

Analysis of the Draft Bill

Preamble of the Draft Bill

The Draft Bill contains a very brief, perfunctory Preamble which refers to the legal basis for the enactment of laws under the Transitional Constitution. The 2006 proposal by ARTICLE 19 contained a longer text that set out the overriding goals of the bill, and placed it in the context of the need to give effect to constitutional and international guarantees of freedom of expression.

ARTICLE 19 believes that a more extensive preamble could be helpful as an interpretative aid to the law. We are conscious that including an elaborate preamble is not a universal practice, but do recommend incorporating a clear reference to the right to freedom of expression into the Bill, whether it be in the preamble or in the operative text. It is true that Section 4 already refers to Section 24 ('Freedom of Expression and Media') of the Transitional Constitution, but only as the provision "which grants the Government powers to legislate on matters of freedom of the press and other media". What we envisage is a statement that this Bill should be interpreted against the background of and in conformity with the right to freedom of expression as guaranteed in the Transitional Constitution. Ideally, mention would also be made of Article 19 of the *International Covenant on Civil and Political Rights* and Article 9 of the *African Charter on Human and Peoples' Rights*, to which South Sudan will hopefully accede in due course.

Recommendations:

- The Bill should state, either in the Preamble or in Section 3, that it must be interpreted in conformity with the guarantee of freedom of expression in Section 24 of the Transitional Constitution.
- Consideration should be given to referring to international guarantees of freedom of expression too.

Explicit guarantee of independence

Section 6(2) of the Draft Bill states that SSBC "shall enjoy operational and administrative autonomy". This is a positive provision as far as it goes, but it is a notable reduction of the wording contained in the 2006 ARTICLE 19 proposal, which went on to say:

"[F]rom 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 SSBC in the discharge of their duties, or to interfere with the activities of SSBC, except as specifically provided for by law. This autonomy shall be respected at all times."

It is possible that the provision was shortened simply in the interest of brevity. Other parts of the Draft Bill unfortunately suggest a different interpretation. As will be seen, the Government has introduced several provisions that seem designed to guarantee its influence over SSBC.

Whether or not this is the case, an explicit guarantee of SSBC's independence is such an essential part of the Bill that it should be drafted as clearly and definitely as possible. For that reason, we recommend reinstating the words quoted above in Section 6(2).

Recommendations:

- The Bill should expressly guarantee SSBC's independence from the executive and should prohibit all attempts to influence the members or staff of SSBC in the discharge of their duties, or to interfere with the activities of SSBC, except as specifically provided for by law.

Appointment of the Board

One of the biggest challenges in establishing a true public service broadcaster is equipping it to remain politically neutral – while ensuring it is still accountable to the public. The experience of democracies worldwide shows that attempts by the government or ruling majority to improperly influence coverage are almost inevitable.

Key to broadcaster's independence is the process by which the Board members who govern it are appointed. The 2006 proposal by ARTICLE 19 contained a range of safeguards in this regard; it foresaw an open nomination process, public parliamentary hearings and a possibility for anyone to comment on the candidates. Board members would need to be confirmed by a two-thirds vote of the National Legislative Assembly, making it impossible for a slender political majority to dominate the process. The term of Board members was set at 6 years, enabling them to take a longer-term view and reducing their vulnerability to political threats to block their reappointment. Moreover, the composition of the Board would have to represent, to the extent reasonably possible, a broad cross-section of Southern Sudanese society.

The Draft Bill dispenses with all these safeguards. Instead, it grants the President the power to hand pick each of the Board members from a list drawn up by the Minister of Information and Broadcasting (see Section 10), for a term of just four years.

If this arrangement seems intended to secure governmental control over SSBC, that impression is reinforced by numerous other provisions:

- The President also has the power to remove Board members, albeit on fairly limited and sensible grounds (Section 12(3) of the Draft Bill). There is no explicit right of appeal against such a decision.
- In contrast to the ARTICLE 19 proposal, the Bill does not bar civil servants and other officials from simultaneously serving on the Board (Section 10(3) of the Draft Bill).
- The Managing Director of SSBC, who is in charge of the day-to-day running of the broadcaster, will be appointed by the Council of Ministers, based on a recommendation from the Board to the Minister of Information and Broadcasting (Section 15(1) Draft Bill).
- The annual report of the SSBC's activities, which the Board is required to draw up, is intended primarily for the use of the Council of Ministers rather than the National Legislative Assembly or the general public (Section 9(5) of the Draft Bill).

The Government's attempts to put itself in charge of appointing and dismissing members of the SSBC Board, as well as reviewing their work and setting their compensation (as will be seen below), are a grave threat to the prospect for genuine public service broadcasting in South Sudan. The relevant provisions will need to be rolled back if SSBC is not to become a mouthpiece of the Government.

Recommendations:

- Members of the Board of SSBC should not be selected and dismissed by the President, but by a two-thirds majority vote of the National Legislative Assembly. Any role for the President should be purely ceremonial.
- The nominations process should be open and the selection should be made through public hearings, after the public has been given an opportunity to comment.
- Persons who are employed in the civil service or any other branch of government should be ineligible for appointment to the Board.
- Consideration should be given to extending the term of Board members to six years.
- The Managing Director of SSBC should be selected by the Board with no involvement of the Government.
- A Board member who is removed should be guaranteed the right to appeal this decision in court.
- The annual report drawn up by the Board should be addressed exclusively to the National Legislative Assembly and the public.

Funding and remuneration

The funding arrangements set out in the Draft Bill are broadly sensible, with SSBC able to generate income from advertising, sponsorship and commercial activities – subject to reasonable restrictions – topped up with a grant from the treasury as necessary (Section 21(3) of the Draft Bill). In the future, a Public Broadcasting Fee may also be introduced, if the economic situation in South Sudan so allows (Section 22 of the Draft Bill),

We do however have concerns in two areas.

- *First*, according to Section 21(1), SSBC is not able to apply to the National Legislative Assembly directly for a public subsidy, but must make its request part of the Government's budgetary system and rely on the Minister of Information and Broadcasting to present it.
- *Second*, the remuneration of Board members, consisting of sitting allowances and expenses, is set by the Council of Ministers (Section 13). In effect, both the SSBC and the members of its Board will rely on the Government's goodwill for their income. As the saying goes, "he who pays the piper calls the tune", and these powers could certainly be used to exert pressure on the public service broadcaster.

Recommendations:

- SSBC should be able to apply directly to the National Legislative Assembly for funding, rather than through the Minister of Information and Broadcasting.
- The remuneration of Board members should be set by the National Legislative Assembly rather than the Council of Ministers.