



**SHADOW REPORT ON THE IMPLEMENTATION OF THE AFRICAN
CHARTER ON HUMAN AND PEOPLES' RIGHTS (ACHPR) BY MALAWI**

**SUBMITTED TO THE AFRICAN COMMISSION ON HUMAN AND
PEOPLES RIGHTS AT THE 68TH ORDINARY SESSION, 2021**

SUBMITTED BY:

**THE CENTRE FOR HUMAN RIGHTS
UNIVERSITY OF PRETORIA
FACULTY OF LAW
HATFIELD 0028
SOUTH AFRICA**

MARCH 2021

Contents

1. INTRODUCTION	3
2. ANALYSIS OF THE STATE REPORT	3
a. The outlook of Access to Information in Malawi	3
b. Freedom of Expression Outlook in Malawi	6
3. QUESTIONS	9
4. RECOMMENDATIONS	9

1. INTRODUCTION

The Centre for Human Rights (the Centre) takes note of the periodic report submitted by the government of Malawi to the African Commission on Human and Peoples' Rights (the Commission) covering the period from May 2015 to March 2019. Malawi submitted the report in fulfilment of its obligations under Article 62 of the African Charter on Human and Peoples' Rights (the African Charter). This shadow report provides an analysis of Malawi's compliance with Article 9 of the African Charter which guarantees freedom of expression and access to information. The Centre notes commendable developments that Malawi has achieved in advancing the rights under Article 9 of the African Charter and highlights areas of critical concern. Finally, the report outlines key questions and proposes recommendations for the Commission and particularly the Special Rapporteur on Freedom of Expression and Access to Information to consider in its concluding observations to the government of Malawi.

2. ANALYSIS OF THE STATE REPORT

a. The outlook of Access to Information in Malawi

i) Access to Information Act, 2016: The Centre welcomes the operationalization of the Access to Information Act (ATI), 2016 on 30 September 2020. This comes after a long journey to have a law that conforms to section 37 of the Constitution of Malawi and Article 9 of the African Charter on the right of access to information. However, the Centre is concerned that the government has not yet appointed information officers (IOs) as required under section 12 of the ATI Act. The absence of IOs is a barrier to access to information because section 18 stipulates that a request for information must be addressed to the information officer.

Furthermore, under section 7 of the Act, the Malawi Human Rights Commission (MHRC) is responsible for the oversight role in the implementation of the Act. However, the MHRC remains underfunded by the government. MHRC has expressed concern over the government's decision to reduce its funding in the 2020/2021 national budget.¹ The Centre is concerned about the likelihood of the failure of the MHRC to perform its roles under section 12 of the Act. The Declaration of Principles on Freedom of Expression and Access to Information in Africa (the Declaration) underscores the importance of providing adequate resources to the oversight mechanisms. Principle 34(2) requires states to enact laws to ensure the independence of the oversight mechanism, which shall among other things, provide for a transparent and inclusive appointment process, adequate remuneration and funding sources, and accountability measures to parliament.

¹ T Sangala 'Malawi Human Rights Commission decries 'low' funding' *Times Group* 17 September 2020 <https://bit.ly/3exvVpr> (accessed 4 March 2021).

The Centre applauds section 50 of the ATI Act, which provides for the protection of whistleblowers. This provision protects, among other things, the disclosure of information on corruption and human rights violations. However, there is a need for Malawi to enact a comprehensive whistleblower legislation to guarantee the safety of whistleblowers who essentially disclose information in the public interest. Principle 35 of the Declaration provides that states must ‘adopt laws to establish protected disclosure regimes’.²

ii) Limited access to internet services

The Centre welcomes the third Malawi Growth and Development Strategy (MGDS III), which is being implemented from 2017 to 2022. MGDS III focuses on developing safe, affordable, reliable and sustainable Information and Communications Technology (ICT) infrastructure in Malawi³. The Centre also commends the new Optic Fibre Backbone Project⁴ that was completed by Huawei, a Chinese company, in April 2018. The project promises to deliver faster internet services in Malawi. This partly aligns with Principle 37(3)(b) of the Declaration on the provision of universal, equitable, affordable and meaningful access to the internet. However, it is important to highlight that Malawi has one of the lowest and slowest growing rates of internet access in Africa.⁵ As of January 2020, internet penetration stood at 15%.⁶ Mobile phone penetration was also low at 39%.⁷

However, the Centre is concerned about the exorbitant cost of access to the internet in Malawi. As of February 2020, users of both Airtel Malawi and Telekom Networks Malawi (TNM) paid approximately US\$22 for a monthly data bundle of 10GB.⁸ The high cost of internet services undermines citizens’ access to information and freedom of expression.

² African Commission on Human and Peoples' Rights: “Declaration of Principles on Freedom of Expression and Access to Information in Africa 2019” 35(2).

³ The Government of Malawi ‘Malawi Growth and Development Strategy III 2017-2022’

⁴ N Tobor ‘Malawi to enjoy faster Internet speeds as the Malawi National Optic Fibre Backbone Project nears completion’ *iAfrikan* 2 February 2018 <https://www.iafrikan.com/2018/02/02/malawi-national-optic-fibre-backbone-project/> (accessed 5 March, 2021).

⁵ Freedom House ‘Freedom on the Net 2019: Malawi’ <https://freedomhouse.org/country/malawi/freedom-net/2019> (accessed on 8 March 2021).

⁶ S Kemp ‘Digital Malawi: 2020’ <https://datareportal.com/reports/digital-2020-malawi> (accessed on 8 March 2021).

⁷ W Kumwembe ‘Mobile money users base down by 13.0%’ *The Times* 19 February 2020 <https://times.mw/mobile-money-users-base-down-by-13-0/> (accessed 8 March 2021).

⁸ Freedom House ‘Freedom on the Net 2020: Malawi’ https://freedomhouse.org/country/malawi/freedom-net/2020#footnote3_gnxflm (accessed on 1 March 2021).

iii) Internet shutdown

The Centre would like to bring to the Commission's attention that on 21 May 2019, Election Day, the government of Malawi implemented a partial internet shutdown.⁹ Malawi Telecommunications Limited, fiber optic network, SimbaNET and ICT infrastructure operator, Malswitch, experienced internet disruption.¹⁰ In terms of Principle 38 of the Declaration, States shall not 'disrupt access to the internet and other digital technologies for segments of the public or an entire population.' Guideline 27 of the Guidelines on Access to Information and Elections in Africa provides that a shutdown is only permissible in exceptional cases and should 'be authorised by law, serve a legitimate aim and be necessary and proportional in a democratic society.' The stated shutdown did not meet the standard set by the Commission. It is therefore a violation of the right of access to information and freedom of expression and should not be adopted by the government particularly during the critical time of elections.

iv) Lack of transparency in the COVID-19 management

In regards to the COVID-19 management, the information from government to the public was largely limited to daily updates on COVID-19 cases. Since the beginning of the COVID-19 government response strategy, it is hard to tell how much funds in total the government had acquired and spent on COVID-19 response including procurement of COVID-19 Personal Protective Equipment (PPE) and treatment.

Most public institutions operated in secrecy and did not proactively make the information on expenditures available to the public. The 2020 Ombudsman's investigation report titled 'Misplaced Priorities' established gross abuse of funds. The report also uncovered lack of transparency, inflated price of goods by procuring entities, payment of unjustified allowances to public officers, and use of questionable receipts among others anomalies.¹¹

In 2021, most public institutions failed to provide reports to the Presidential Task Force on COVID-19 on how they had spent 6.2 billion MWK (US\$7.9 million), two weeks after the President had ordered them to do so¹². As of February 2021, most public institutions had not accounted for 17 billion MWK (US\$ 21 million) that the central government had disbursed. In February 2021, President Chakwera suspended several heads of public institutions for failure to report on their use of funds.¹³

⁹ AL Dahir 'An internet cutoff during Malawi's vote count affected its electoral commission's backup network' *Quartz Africa* 22 May 2019 <https://qz.com/africa/1625291/malawi-internet-cut-off-after-polls-close-on-election-day/> (accessed on 8 March 2021).

¹⁰ Netblocks 'Internet disrupted in Malawi on election day' <https://netblocks.org/reports/internet-disrupted-in-malawi-on-election-day-Q8oOrl8n> (accessed on 25 February 2021).

¹¹ IOI 'Ombudsman releases report on "Misplaced Priorities"' <https://www.theioi.org/ioi-news/current-news/ombudsman-releases-report-on-misplaced-priorities> (accessed on 8 March 2021).

¹² W Gwede 'More heads roll in Malawi civil service' *Nyasa Times* 17 February 2021 <https://www.nyasatimes.com/more-heads-roll-in-malawi-civil-service-10-ps-28-dcs-interdicted/> (accessed on 8 March 2021).

¹³ L Masina 'Malawi President Sacks COVID-19 Fund Heads over Alleged Abuse of COVID Funds' *VOA* 15 February 2021

Principles 29(1) and (2) of the Declaration are instructive that public bodies should proactively make information including budget expenditures available to the public.

b. Freedom of Expression Outlook in Malawi

Sections 34 and 35 of the Malawi Constitution and Article 9 of the African Charter guarantee freedom of opinion and expression. However, in practice, freedom of expression online and offline have faced significant restrictions in Malawi. Use of criminal defamation and cyber security laws, arbitrary arrests of journalists, physical attacks, and censorship of media are serious issues of concern on the realization of freedom of expression in Malawi.

i) Shrinking of media space

The Centre is concerned about the MACRA's attempt to ban phone-in programs in Malawi.¹⁴ This violates the independence of the media as provided under Principles 12 and 14 of the Declaration. Also, the Centre is concerned about the failure by the government of Malawi to ensure safety of journalists in the conduct of their duty to avail information to the public. There have been reports of attacks on media practitioners in Malawi. On 8 January 2020, three journalists, Golden Matonga, Steven Zimba and Francis Chamasowa were detained by the police at Kamuzu International Airport when they attempted to cover a story on the return of the European Union observer mission to Malawi.¹⁵

The Centre condemns the experience of Henry Mhango in the hands of the police. He was reportedly assaulted by security officers in Lilongwe using pipes and sticks at Bwalo la Njobvu on 22 January 2021 while in the process of gathering information.¹⁶ Principle 20 of the Declaration provides that, 'States shall guarantee the safety of journalists and other media practitioners.'

The Government has also at times used enforcement agencies to target critical private media. In October 2019, Malawi Revenue Authority (MRA) sealed offices for the Nation Publications Limited due to unpaid tax arrears.¹⁷ Similarly, on 12 January 2017, MRA seized the property of Times Groups and closed their offices on allegations of unpaid taxes.¹⁸ Times Group had been critical of the government on a major

<https://www.voanews.com/africa/malawi-president-sacks-covid-19-fund-heads-over-alleged-abuse-covid-funds> (accessed on 8 March 2021).

¹⁴ AL Dahir 'An internet cutoff during Malawi's vote count affected its electoral commission's backup network' *Quartz Africa* 22 May 2019 <https://qz.com/africa/1625291/malawi-internet-cut-off-after-polls-close-on-election-day/> (accessed on 8 March 2021).

¹⁵ CPJ 'Malawi detains, charges 3 journalists seeking to cover EU delegation's return' <https://cpj.org/2020/01/malawi-detains-charges-3-journalists-seeking-to-co/> (accessed on 8 March 2021).

¹⁶ MISA 'MISA Malawi condemns assault of journalist Henry Mhango by police officers' <https://malawi.misa.org/2021/01/22/misa-malawi-condemns-assault-of-journalist-henry-mhango-by-police-officers/> (accessed on 8 March 2021).

¹⁷ N Mlageni 'Malawi Revenue Authority pounces on Nation Newspaper's Blantyre office over MK1billion evasion tax' *Maravi Post* 18 October 2019 <https://www.maravipost.com/malawi-revenue-authority-pounces-on-nation-newspapers-blantyre-office-over-mk1billion-evasion-tax/> (accessed on 8 March 2021).

¹⁸ T Sangala 'MRA seals Times Group offices' *Times Group* 13 January 2017 <https://times.mw/mra-seals-times-group-offices/> (accessed on 8 March 2021).

corruption scandal, 'maize-gate' implicating a Cabinet Minister and senior government officials in irregular procurement of maize from Zambia.

ii) Criminal defamation laws

The Penal Code of Malawi criminalizes defamation under section 200(1). The government also uses sedition laws in sections 50 and 51(3) of the Penal Code to crack down on critics of the government or the president. Section 50 of the Penal Code describes seditious intention as, among other things, 'to bring into hatred or contempt or to excite disaffection against the person of the President, or the Government.' Such provisions on sedition are outdated and subject to arbitrary interpretation and application.

On 21 August 2018, police arrested Manes Hale, a United States citizen and charged her with insulting the president under section 4 of the Protected Flag, Emblems, and Names Act for remarks she wrote concerning the president on Facebook.¹⁹ In February 2016, three political opposition members were arrested and charged with sedition for a WhatsApp conversation allegedly plotting against former President Mutharika.²⁰ Principle 22(2) of the Declaration provides that states must 'repeal laws that criminalise sedition, insult and publication of false news.'

iii) Electronic Transactions and Cyber Security Act, 2016

The Centre is concerned that the government of Malawi misuses the Electronic Transactions and Cybersecurity Act of 2016 (the Cyber Act) to restrict freedom of expression online. Section 87 of the Act criminalizes offensive communications and imposes stiff penalties of 1 million MWK (US\$ 1 300) and up to 12 months imprisonment. In April 2019, Tumpale Mwakibinga was arrested after he posted on his Facebook page a picture allegedly likening the first lady, Gertrude Mutharika, to a cartoon character. He was charged with insulting the modesty of a woman, as well as violations under the Electronic Transaction and Cybersecurity Act of 2016.²¹ This is an unwarranted encroachment on citizens' freedom of expression. Principle 22(5) of the Declaration provides that freedom of expression shall not be restricted on public order or national security grounds unless there is a real risk of harm to a legitimate interest and there is a close causal link between risk of harm and the expression.

¹⁹ W Chiuta 'US citizen arrested for insulting President Mutharika: UTM members celebrate Abiti Manice release' *Nyasa Times* 22 August 2018 <https://www.nyasatimes.com/u-s-citizen-arrested-for-insulting-president-mutharika-utm-members-celebrate-abiti-manice-release/> (accessed 27 February 2021).

²⁰ W Gwede 'Kabwila arrested: Malawi police may arrest more Whatsapp coup plotters' *Nyasa Times* 22 February 2016 <https://www.nyasatimes.com/kabwila-arrested-malawi-police-may-arrest-more-whatsapp-coup-plotters/> (accessed 21 February 2021).

²¹ E Phimbi 'Police arrest man for likening Malawi First Lady to a cartoon on Facebook' *Nyasa Times* 22 February 2016 <https://www.nyasatimes.com/police-arrest-man-for-likening-malawi-first-lady-to-a-cartoon-on-facebook/> (accessed 25 February 2021).

Section 31 of the Cyber Security Act provides that an online content provider shall display details of the address, email, phone number of the editor. This is contrary to Principle 40(1) and (2) of the Declaration which expresses that, ‘everyone has the right to privacy, including the confidentiality of their communications and the protection of personal information.’ Further, persons have the right to use tools that ensure their anonymity and confidentiality online.

iv) Abuse of State Media, Malawi Broadcasting Corporation (MBC)

The state broadcaster, the Malawi Broadcasting Corporation (MBC), continues to face undue political interference seen in politically-motivated appointments and biased coverage. In its news bulletin on 16 January 2020, MBC described the Human Rights Defenders Coalition (HRDC), a human rights group, as a ‘terrorist organization’.²² HRDC had organized protests demanding electoral justice in the disputed 2019 Presidential elections. Public service media must be independent in accordance with Principle 22 of the Declaration.

v) Safety of Journalists and Other Media Practitioners

Section 37 of the Malawi Constitution guarantees freedom of the press. The Centre is concerned about the safety of journalists in Malawi. Attacks against journalists remained rife particularly during elections and civil protests with the police identified as the major culprits. On 2 July 2019, Idris Ali Nassah, a newspaper columnist, was assaulted by the ruling party cadres for his criticism of the government²³.

On 4 May 2019, the ruling party cadres invaded Parliament during the State of Nation Address and assaulted journalists including a cameraman working for the privately owned, Times Groups. No action was taken by the police²⁴. Principle 20(1) of the Declaration stipulates that States shall guarantee the safety of journalists and other media practitioners.

vi) Community Media

The Centre notes the granting of operating licenses to new radio stations by Malawi Communications Regulatory Authority’s (MACRA) as referenced in the country report. As of 2016, Malawi had 41 private community radio stations across the country. However, the Centre highlights the sluggish process in granting licenses. Principle 15 (b) of the Declaration is instructive that the licensing processes should be “simple, expeditious and cost effective, and guarantee community participation” .

²² T Sangala ‘Macra summons MBC over ‘terrorist’ remarks’ *Times Group* 25 January 2020 <https://times.mw/macra-summons-mbc-over-terrorist-remarks/> (accessed 25 February 2021).

²³ The World News ‘DPP cadets assault veteran journalist Idris Ali Nassah’ <https://theworldnews.net/mw-news/dpp-cadets-assault-veteran-journalist-idris-ali-nassah> (accessed on 9 March 2021).

²⁴ O Khamula ‘Speaker orders unruly DPP cadets out of Malawi Parliament as President delivers SONA’ *Nyasa Times* 4 May 2018 <https://www.nyasatimes.com/speaker-orders-unruly-dpp-cadets-out-of-malawi-parliament-as-president-delivers-sona/> (accessed 9 March 2021).

3. QUESTIONS

The Centre implores the Commission' Special Rapporteur on Freedom of Expression and Access to Information to ask the government of Malawi the following questions arising from the concerns that have been raised:

1. When will the Government publish the guidelines for facilitating public access to information as required by section 9 of the ATI Act?
2. What measures have been taken to appoint information officers in accordance with section 12 of the ATI Act?
3. What steps have been taken to provide adequate funding for the Human Rights Commission to fully discharge its mandate in accordance with section 8 of the ATI Act?
4. What steps have been taken to raise awareness on the right of access to information and the ATI Act?
5. What steps have the government taken in enacting a comprehensive whistleblower protection legislation?
6. What steps have been taken by the government to guarantee the safety of journalists and media practitioners?
7. What steps have the government taken to hold the police accountable for excessive use of force against journalists and media practitioners?
8. What measures have the government taken to ensure that the Malawi Broadcasting Corporation (MBC) is transformed into a public service broadcaster that is protected against undue political influence?
9. What measures have been put in place to ensure that MACRA does not violate media independence through arbitrary content regulation of the media?
10. To what extent is the government of Malawi equipping citizens including children with digital skills and ensuring they have access to online learning during the COVID-19 pandemic in accordance with Principle 37(5) of the Declaration?
11. What steps have the government taken to ensure affordable cost of internet data and communication services for the public?

4. RECOMMENDATIONS

The Centre makes the following recommendations. The government should:

1. Guarantee freedom of expression and access to information online and offline without discrimination.
2. Ensure that the ATI Act is fully implemented and all public bodies and relevant private bodies are in full compliance in proactively providing information regularly in accessible formats.
3. Hasten efforts to provide equal access to technology and communications to all citizens, including disadvantaged and marginalized groups of the population. This can be done by removing barriers to access and improving affordability, as well as expanding infrastructure and desisting from internet disruptions.
4. Provide adequate resources to the MHRC to ensure it discharges its oversight role over the implementation of the ATI Act.
5. Appoint information officers to ensure access to information as required by section 12 of the ATI Act.
6. Comply with Principle 15 of the Declaration which calls on States to ensure that the licensing of community media should be simple, expeditious and cost effective, and guarantee community participation.
7. Transform the MBC into a public service media that guarantees balanced media coverage in accordance with Principle 13 of the Declaration.
8. Enact whistleblower protection legislation.
9. Repeal sections 200 on criminal defamation and sections 50 and 51 on sedition of the Penal Code.

**Centre for Human Rights, University of Pretoria Shadow Report for Malawi, ACHPR Submission,
Session 68**

10. Repeal sections 24(2)(e) and (f) of the Electronic Transactions and Cyber Security Act of 2016, which are a barrier to the enjoyment of freedom of expression online.
11. Adopt measures that guarantee the safety of journalists and media practitioners as provided under Principle 20 of the Declaration including security sector reforms that ensure adequate safety of journalists. Further, the government should investigate and prosecute cases on attacks on journalists.
12. Desist from internet disruptions during elections or any other time.
13. Proactively disclose information on expenditure on COVID-19 relief funds.