ASSESSMENT OF THE LEGAL BARRIERS TO ACCESS TO INFORMATION AND FREEDOM OF EXPRESSION IN MALAWI

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LIST OF ABBREVIATIONS ACRONYMS

ATIA	Access to Information Act
Cap	Chapter
ETA	Electronic Transaction and Cyber Security Act
MCERT	Malawi Computer Emergency Response Team
MACRA	Malawi Communications Regulatory Authority
MSCA	Malawi Supreme Court of Appeal
MISA	Media Institute of Southern Africa
MBC	Malawi Broadcasting Corporation
NGO	Non-Governmental Organisation
BMC	Baseboard Management Controller

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The views expressed in this document are those of the authors and the consortium and do not in any way reflect the views of the European Union.

CONVENTIONS

Declaration of Principles of Freedom of Expression in Africa

African Charter on Human and Peoples Rights

Access to Information in Africa

TABLE OF CASE AUTHORITIES

Jumbe & Another. v Attorney General Constitutional Cases Nos. 1 And 2 Of 2005

Mwase & Anor. v Mwase & Another (Civil Cause No. 153 of 2017

Madanhire v Attorney General CCZ 2/14

MISA-Zimbabwe, et al. v. Minister of Justice, et al CCZ/07/15

Leston Mulli & Others versus Charles Kajoloweka and Another Civil Cause Number 262 of 2018

Lohé Issa Konaté v. The Republic of Burkina Faso App. No. 004/2013

R v Chihana ((MSCA) Criminal Appeal No. 9 of 1992

TABLE OF STATUTORY AUTHORITIES

Republic of Malawi Constitution, 1994.

Access to Information Act, 2016

Censorship and Control of Entertainments Act, Chapter 21:01 of Laws of Malawi

Corrupt Practices Act, Chapter 7:04 of Laws of Malawi

Corrupt Practices (Oath of Secrecy) Regulations

Electronic Transaction and Cyber Security Act, 2016

Export Incentives Act Chapter 39:04 of Laws of Malawi

Mines and Minerals Act Chapter 61:01 of Laws of Malawi

Malawi Police Act Chapter 13:01 of Laws of Malawi

Malawi Bureau of Standards Act Chapter 51:02 of the Laws of Malawi

National Statistics Act Chapter 27:01 of Laws of Malawi

National Archives Act Cap 28:01 of the Laws of Malawi

Local Government Act Chapter 22: 01 of Laws of Malawi

Official Secrets Act, Chapter 14:01 of Laws of Malawi

Town and Country Planning (Planning Committees) Rules

Public Audit Act Chapter 37:01 of the Laws of Malawi

Pesticides Act Cap 28:01 of the Laws of Malawi

Public Accounts Committee of the National Assembly

Printed Publications Act, Chapter 19:01 of Laws of Malawi

Preservation of Public Security Act, Chapter 14:02 of Laws of Malawi

The Penal Code Chapter 7:01 of Laws of Malawi

Protected Flag, Emblems and Names Act Chapter 18:03 of Laws of Malawi

1. BACKGROUND

1.1. Introduction

Access to public information and freedom of expression are human rights protected by both the Malawi Constitution as well as international law[1]. The Constitutional provisions, though, are in very general terms. More comprehensive conceptual framework of the jurisprudence has been covered under statutes, international law as well as case law.

For example, for the right to access to information, Malawi adopted and promogulated into law the Access to Information Act on the 16th February, 2017 but the commencement date was differed to the 30 September, 2020.

For one to freely express themselves, they need to have the right information. This is why freedom of expression is interrelated to the right to access information. Of course, it is trite that all human rights are interdependent and interrelated[2].

Both the right to access information and freedom of expression as provided by the Constitution are covered in general and broad terms. The Constitution does not expound on the actual parameters of these rights.

The ATIA sets some parameters for the right to access to information and this paper intends to use these considerations to investigate compliance of the other statutes. However, the ATIA itself has some worrisome gaps compared to international human rights standards.

Malawi's ATIA was modelled on the Model Law on Access to Information in Africa (or simply 'the model law') which was drafted with the support of the Special Rapporteur on Freedom of Expression and Access to Information created by the African Commission on Human and Peoples Rights.

Apart from the African Charter on Human and Peoples Rights, the African Union has the Declaration of Principles on Freedom of Expression in Africa which standardised the content of the Model Law.

1 Section 37 of the Constitution guarantees the right to access to public information and section 35 in very general terms guarantees the freedom of expression. In terms of international law, perhaps the most important.

2 Neves-Silva, P., Martins, G.I. & Heller, L. Human rights' interdependence and indivisibility: a glance over the human rights to water and sanitation. BMC Int Health Hum Rights 19, 14 (2019). https://doi.org/10.1186/s12914-019-0197-3

This study made the findings below after analysing the ATIA and its conformity to international human rights standards. The study then inquired into some of the legal instruments that affect full actualisation of the right to access information and freedom of speech. It further investigated some judicial approaches that have affected the exercise of the two rights. The analysis of the jurisprudence was on the basis that common law or judge made laws are a part of the laws of Malawi as per section 200 of the Constitution.

2. LIMITATIONS

The legal barriers that were analysed by the report were subjected to a further test to ascertain whether they pass the limitation tests as conceptualised below:

2.1. Limitation of freedom of expression and access to information

Section 45(3) of the Malawian Constitution specifically provides for the derogation of human rights contained in Chapter IV during a state of emergency, except for a list of non-derogable rights outlined in section 45(2). It is important to note that freedom of expression and access to information rights are not listed as non-derogable. Section 45(3) specifically provides that the rights to, among others, freedom of expression and information may be derogated from during a state of emergency, provided this is not inconsistent with Malawi's obligations under international law and is strictly required to prevent the lives of defensive combatants and civilians as well as legitimate military objectives from being placed in direct jeopardy in war or threat of war for the protection and relief of people in a widespread natural disaster.

2.2. Limitation of the right to access information and freedom of expression under the Declaration

In addition to the general limitation test, similar to the one under section 44 (1) of the Constitution, the Declaration has set the following two further standards that greatly influenced the analysis of this study:

a. Firstly, any law that seeks to limit freedom of expression and the right to access to information must be[3] :
    i. clear, precise, accessible and foreseeable;
    ii. applied by an independent body in a manner that is not arbitrary or discriminatory; and
    iii. effectively safeguards against abuse including through the provision of a right of appeal to the Courts.

3 See Article 11 of the Declaration

b. Secondly a limitation that is proportionate and reasonable in terms of restriction of freedom of expression must:

   i. originate from a pressing and substantial need that is relevant and sufficient;

   ii. have a direct and immediate connection to the expression such that it is the least restrictive means of achieving the stated aim; and

   iii. be such that the benefit of protecting the stated interest outweighs the harm to the expression, including with respect to the sanctions authorised.

2.3. Standards and tools for the analysis

Apart from the limitation tests already detailed above, the following standards were used in the analysis that is in the proceeding sub-chapter:

a. Under Article 4 of the Declaration of Principles on Freedom of Expression and Access to Information in Africa, the cardinal principle is that where legal provisions on access to information or freedom of expression seems to be in conflict, the provision that seems to be most favourable for the exercise of the two rights should prevail.

b. There should be special protection of Human Rights Defenders, apart from journalists and media practitioners[4].

c. The other standard and testing too is that criminalisation of sedition, libel and defamation does not meet international human rights standards[5].

d. The standards for defamatory laws, even civil laws, among other things, should reflect the principle that '...public figures shall be required to tolerate a greater degree of criticism...'[6].

e. Regulatory authority of broadcasting, internet and telecommunication ought to be non-partisan with its Board represented by multi-party stakeholders[7]. Likewise, national broadcasting stations ought to be non-partisan and should not monopolise broadcasting. Free speech during campaign periods also includes access to opposition political parties to media outlets[8].

4 See Article 5 of the Declaration
5 See Article 49 of the Declaration
6 See Article 46 (b) of the Declaration
7 See Articles 32 to 35 of the Declaration
8 See General Comment Number 34 of the UN Committee on Human Rights

f. Prohibited speech should clearly be defined and fit within set criteria of:

   i. prevailing social and political context;
   ii. status of the speaker in relation to the audience;
   iii. existence of a clear intent to incite;
   iv. content and form of the speech;
   v. extent of the speech- its public nature and size of audience; and
   vi. real likelihood and imminence of harm

3. FINDINGS

3.1. Gaps created by the ATIA

The following findings show that some legal barriers to the actualisation of the right access to information have been created by gaps within the access to information legal framework itself. The following findings, for example, prove that the ATIA itself, though modelled on the Model Law on Access to Information for Africa[9], left out some key elements of the model law, which reflects international legal guidelines, including the Declaration of Principles on Freedom of Expression in Africa[10].

Firstly, it should be noted that the ATIA was supposed to reflect international legal norms on access to information. The Act was supposed, as a minimum requirement, to mirror the model law on Access to information developed by the African Union.

Surprisingly, the ATIA has some the following critical gaps and points of departure which affect the actualisation of the right to access information:

a. Firstly, the Schedule to the ATIA , under section 3 (1) of the Act, lists bodies whose information the public may access under the Act. From the list, it is apparent that only information held by public bodies, government departments, NGOs can be accessed using the ATIA. Information held by private entities can only be accessed where they were contracted by a public body. There is a marked contrast between the ATIA and the model law whose threshold for disclosure of information held by private entities is whether such information is important for the exercise or protection of a human right[11].

9 Prepared by the African Commission on Peoples and Human Rights. Available at: https://www.chr.up.ac.za/images/researchunits/dgdr/documents/resources/model_law_on_ati_in_africa/model_law_on_access_to_infomation_en.pdf (Last accessed on 30 October 2021)

10 Prepared by the African Commission on Peoples and Human Rights. Available at: https://www.refworld.org/pdfid/4753d3a40.pdf (Last accessed on 30 October 2021)

11 See Article 3 of the Model Law.

b. On pro-active disclosure of public information, section 15 of the Act makes exceptions to the list of information that should be voluntarily and proactively be disclosed by information holders. Notably, information about subsidy programmes—which should be pro-actively disclosed, according to the model law—was struck off the list under section 15 of the Act. Arguably, this information is vital for a country like Malawi where subsidies are subject to abuse by politicians.

c. The model law expressly provides that the processing of requests for public information should be for free except where there is need for reproduction of some documents. Strangely, section 24 of the Act creates room for the Minister to come up with a scale of fees for submitting requests for access to information. The wording of the section does not limit the fees to reproduction of documents.

d. In terms of information that may not be available to the public, the Act has a shorter list than the model law. However, of great concern is that the Act falls short of clearly defining what should happen in the event that an information officer fails to find the information requested. By contrast, the model law outlines a clear procedure in terms of what the information officer should do in the event that the sought-for information cannot be found. Under the Act, an information officer can refuse information on the basis that it cannot be found. There is no need after that for the information officer to swear an affidavit that he could not find the said information.

e. Although the Declaration of Principles on Freedom of Expression and Access to Information in Africa recommends special protection of human rights defenders, journalists and other media practitioners when exercising both the right to access information and freedom of expression, the the ATIA only accords protection to whistle-blowers. It does not specifically protect journalists, media practitioners nor human rights defenders.

f. Further, it has been noted that the Minister gazetted the Access to Information Regulations, 2021 ('the Regulations'), which has some more specific provisions in terms of operationalisation of the ATIA. When analysed against the Model law and international norms, the Regulations may just need some polishing up, including on the following areas:

    i. Under regulation 21, on what an Information Officer should do when he can not find requested information, this study recommends that the approach under the Model law should be adopted. The information officer should be

obliged to make a sworn statement, under oath, or affirmation of all the steps that the officer took and why he is convinced that the information can not be found. The element of oath or affirmation gives the officer a greater burden not to be perjurious unlike a mere letter that states that the sought-for information could not be found.

ii. The other problematic area lies in the Schedule to the Regulations that prescribes arguably prohibitive fees. For example, fees for reproduction of the Commission Manual is MK10,000 which may not be affordable to most Malawians.

3.2. Judge made laws that affect freedom of expression and the right to access to information

Common law is a source of law in Malawi[12]. Malawi follows the doctrines of *stare decisis* which effectively mean judge-made laws apply unless reversed by an apex court or distinguished by a court of similar jurisdiction. Otherwise, court decisions are law.

The law of torts is mostly developed by judge-made laws. The obvious tortuous liability that has been accepted as reasonable limitation to freedom of expression in all common law jurisdictions is the tort of defamation. The courts have defined defamation as publication of statements that are untrue and capable of damaging the reputation of the Plaintiff.[13]

The court has stated that in contemporary human rights era that the tort of defamation balances the protection of reputation of the victim of a publication and freedom of expression of the publisher. [14] What has been worrisome, however, is the growing trend of courts issuing injunctive reliefs in favour of high-profile businessmen and politicians against bloggers and social commentators.[15]

General Comment number 34 of the UN Committee on Human Rights, just as article 46(b) of the Declaration, highly recommends judicial approaches that reflect high levels of tolerance by those in high political positions.

This study, however, finds that there has been a departure by Malawian court from this international standard. This study highly recommends a paradigm shift by the jurisprudence from the Malawian courts. Politicians should not easily find their way through courts to obtain injunctive reliefs against bloggers, journalists and other

12 See section 200 of the Constitution

13 See Mwase & Another. v Mwase & Another (Civil Cause No. 153 of 2017

14 Leston Mulli & Others versus Charles Kajoloweka and Another Civil Cause Number 262 of 2018

15 Leston Mulli case, supra; See also a story published on Nyasatimes regarding the court orders meted against social commentator, Joshua Chisa Mbele available at: https://www.nyasatimes.com/court-slaps-social-media-activist-joshua-chisa-mbele-with-k3m-damages-for-defaming-presidents-son/ (Last accessed on 30 October 2021)

social commentators. The balance of justice should always tilt in favour of freedom of speech and press freedoms in those cases. In extreme cases, perhaps, courts should consider nominal damages other than punitive damages as being sought in the case of **Mulli Brothers and Others versus Charles Kajoloweka and YAS**[16]**.**

The other controversial legal norm is that of 'contempt of court'. This norm is specifically provided for under our laws.[17] As already pointed out, the contemporary approach is to avoid laws that encourage *desecato* and non-critical comments against members of the judiciary while balancing with the need for judicial independence. This study recommends a clear judicial approach that does not necessarily hinder critical comments against members of the judiciary under the protection of *desecato* laws.

4. STATUTORY PROVISIONS THAT AFFECT THE RIGHT TO ACCESS TO INFORMATION

The right to access information reasonably needed for the exercise of human rights is protected by the Constitution and other human rights framework.

The following statutory provisions have been isolated to negatively effect the actualisation of the right to access information:

4.1. The Official Secrets Act (Cap 14:01)

This law dates as far back as the colonial period. It was first passed on 16th May, 1913 and was last revised in 1966 under General Notice No 137/1996.[18] Without doubt, this is a piece of legislation that reflects the colonial period and the autocratic one-party regime that was void of human rights, including access to information. The Act is long overdue for revision or repeal to align it with the democratised Constitution and the values the Bill of Rights represents.

In the first place, section 4 of the Official Secrets Act prohibits every person from disclosing a wide range of information, including any official information which one has accessed by virtue of the position he or she holds or has has held under the Government; or as a person who holds or has held a contract made on behalf of the Government; or as a person who is or has been employed under a person who holds or has held such an office or contract. The aforementioned section defeats the purpose of Malawi's Access to Information Act, whose main objective is to improve the flow of information from the government to citizens and ensure that citizens access the

16 Supra
17 See section 54 of the Courts Act; Order XXXI of the Subordinate Court Rules;
18 See the Laws of Malawi, Official Secrets Act, Cap 14:01 page 1 (specifically on the side notes to the long title)

information held by government. Maintaining such a provision may weaken the Access to Information Act as some public officers may deny Malawians legitimate access to information on the basis that Section 4(1) of the Official Secrets Act prohibits them from doing so.[19]

4.2. The Mines and Minerals Act

The revised Mines and Minerals Act is a new piece of legislation which came into force on 29th January, 2019. In comparison to the other laws discussed in this report, the Mines and Minerals Act came into effect after the 1994 democratic Constitution and the Access to Information Act which was passed in 2016. As expected, the Mines and Minerals Act makes provision with respect to searching for and mining of minerals and matters connected therewith. In many respects, it does not directly deal with issues under the Bill of Rights though it is still subject to the Constitution, including section 37 of the supreme law. Interestingly, the Act contains a provision which prevents individuals from accessing information on mining companies until two years after the expiry or termination of the mining license. Section 38(4) states that:

> *"Unless otherwise specified in this Act, any information submitted by the holder shall remain confidential for as long as the licence is valid and two (2) years after the expiry or termination of the licence."*

Keeping the reports, data or any other information submitted by the holder to a Government ministry, department or agency (MDA) confidential may conflict with the ATIA, because, under section 38, the information is submitted to MDAs but becomes confidential. This means under section 38(4), persons working in the Government MDAs are prohibited from disclosing such information to any person seeking access to the information. As such, section 38(4) is in conflict with the spirit and provisions of the Access to information Act.

4.3. Oaths of secrecy of some public officials

For security and other public interest concerns, some public officials swear oaths of secrecy.[20] What is worrisome is that some of the officials covered by oaths of secrecy are also, under the ATIA, exceptionally mandated to divulge information as information officers.

19 Malawi Public Participation Report, June 2021 page 29 accessed from https://chrrmw.org/public-participation-in-law-and-policy-making-in-malawi-june-2020/

20 Under section 49B of the Corrupt Practices Act, for example Anti-Corruption Bureau officials swear the oath of secrecy, and further refer to Corrupt Practices (Oath of Secrecy) Regulations made under the Corrupt Practices Act. Section 28 of the Malawi Police Act; Section 17 of the National Statistics Act

The study recommends synchronisation of the various Acts that provides for oaths of secrecy with the ATIA. For the avoidance of doubt, this study does not necessarily advocate removal of oaths of secrecy. However, what is worrying is that some of the statutes do not clearly distinguish what the oaths cover and what they do not. Even for the clear policies covered by the oaths, exceptions laid out under ATIA seems not clearly outlined by enabling Acts

4.4. Other miscellaneous provisions

Apart from the specific provisions discussed above, there are some statutory provisions and approaches that this study found to be restrictive to access to information is concerned. For example:

a. Rule 14 of the Town and Country Planning (Planning Committees) Rules, made under the Local Government Act is in the following words:

> *"Information on any matter discussed at a meeting of a committee or subcommittee which the committee or subcommittee may decide to be confidential shall be treated as confidential and shall not without the approval of the committee or subcommittee, as the case may be, disclosed to any person."*

b. The above provision was clearly not made in light of the exceptions under the ATIA. Arguably, provisions like this ought to be amended to reflect contemporary discourse on access to information.

c. Arguably, the legal regime allowing the disclosure of information held by the National Statistics officer under the National Statistics Act as per section 14 does not reflect a human rights approach especially in light of disclosure of public information. The exceptions created under the Act mostly relate to non-disclosure of private information. The Act provides for exception where the information may be needed for research purposes but does not include an exception where statistical information may be needed for enjoyment of human rights.

d. Likewise, sections 19 and 24 of the National Archives Act[21] provide for access to public records under National Archives with exception of information deemed secret or information ordered by a court order to be disclosed as evidence. The law was created before the 1994 Constitution and the ATIA. Essentially, the

21 Cap 28:01 of the Laws of Malawi

exceptions do not reflect the exceptions under the ATIA or contemporary human rights jurisprudence on access to public information.

e. Section 18 of the Pesticides Act[22] limits disclosure by the Board of information regarding applications to pesticides registration to information mostly related to business interests of the proprietor. There are some governance matters that may be subject to disclosure, for example, methods of disposal of pesticides. What is concerning, though, is that other further matters of governance are not specified as matters that the Board may disclose. For example, the ethical and human rights violation background of the proprietor. The study recommends an alignment of section 43 of the Act, with the ATIA in terms of disclosure of records under the Registry.

f. The culture of secrecy also seems to be hidden through some provisions that entrench old constitutional legal myths. For example, the Public Audit Act[23] creates the Public Accounts Committee of the National Assembly, a vital oversight establishment which monitors public expenditure.[24] However, under section 23 (5) of the Act, all the information that they receive during an inquiry of public expenditure is deemed confidential to the public. Arguably, the blanket shield against disclosure violates the spirit of section 37 of the Constitution as well the ATIA. The provision should have recognised limited access to such information by members of the public in line with limitations already created by the ATIA. Likewise, under section 25 of the Act all information that is passed on to the Auditor General is deemed absolutely confidential and *'the Auditor General or any employee shall not disclose to any person any information that shall come to the attention of the Auditor General or employee of the National Audit Office pursuant to this Act, and all such information shall remain confidential.'*

g. Under the Export Incentives Act[25] all information submitted by an exporter for registration under the Act and for his returns is absolutely confidential and can therefore not be disclosed[26].

Perhaps a better model is as provided for under the Malawi Bureau of Standards Act[27] which allows one to give confidential information '...such information is required under any written law or as evidence in any court of law..'[28] This caveat, arguably, gives room for exceptions under the ATIA.

22 Cap 35:03 of the Laws of Malawi
23 Cap 37:01 of the Laws of Malawi
24 See section 18 of the Act
25 Cap. 39:04
26 See section 21 of the Act
27 Cap. 51:02 of the Laws of Malawi
28 Section 48(1) of the Act

In summary, this study finds that most of public bodies were created prior to 1994 and their enabling laws have not been synchronised with human rights approaches, including contemporary approaches to access information. As a matter of concern, the old legal regimes sustain and justify a culture of secrecy within public service, including statutory corporations and boards, which contradicts the right and growing demand for access to information.

5. STATUTORY BARRIERS TO FREEDOM OF EXPRESSION

This section reports the key findings on statutory provisions that hinders full actualisation of the freedom of expression.

5.1. Printed Publications Act, Cap 19:01

The Printed Publications Act was passed in 1947, prior to the 1966 Constitution and the 1994 democratic Constitution which guarantees the right to freedom of expression. The Act makes provision for the registration of newspapers, the printing and publication of books and the preservation of printed works published in Malawi. Since its enactment, this law has not been repealed nor amended to align it with the constitutional provision of the right to freedom of expression.

Section 3(1) requires every book (the definition of a book, which specifically includes a newspaper) printed and published in Malawi to reflect the names and addresses of the printer and publisher thereof, as well as the year of publication. According to section 3(2), any failure to comply with the publication requirements is an offence that carries a fine as a penalty.

Section 4(1) requires every book publisher to deliver, at his own expense, a copy of any book he or she has published in Malawi, within two months of publication, to the Government Archivist. In terms of section 4(3), any failure to comply with the delivery requirements is an offence that carries a fine as a penalty, and the court may also enforce compliance by requiring such delivery.

Section 5(1) prohibits any person from printing or publishing a newspaper (defined as any periodical published at least monthly and intended for public sale or dissemination) until there has been full registration thereof at the office of the Government Archivist. The registration includes the full names and addresses of the proprietor, editor, printer or publisher; and a description of the premises where the newspaper is to be printed. According to section 5(1), every alteration or changes to the details provided is also required to be registered. Section 5(2), makes it an offence punishable to a fine of 100 pounds for any failure to comply with the registration requirements. In addition

to the above, the relevant Minister is empowered under the Printed Publications Act to make rules to exempt compliance from the requirements of sections 3 and 4 in particular circumstances.

In essence, the Printed Publication Act is a law that was enacted prior to the democratic Constitution and it is not in line with the constitutional provisions of the right to freedom of expression. This further means that any form of newspaper or print publication or every book has to be first registered before its publication. This is a restriction to the right to freedom of expression because failure to register is an offence. The Act can be used by Government to deny registration to citizens wishing to own their own print publications or newspapers, thereby restricting their freedom of expression. Freedom of expression must be exercised freely without laws that can be used as a tool to hinder that right. Any limitation to the rights enshrined under the Constitution must be in accordance with section 44 of the Constitution.

5.2. Electronic Transaction and Cyber Security Act (ETA)

This Act was enacted and came into force on 20th October, 2014 and it makes provision for electronic transactions; for the establishment and functions of the MCERT; to make provision for criminalising offences related to computer systems and information communication technologies; and provide for investigation, collection and use of electronic evidence. This Act further regulates online communication and content providers.

Section 2 of the ETA defines online public communication as meaning 'any transmission of digital data, signs, signals, texts, images, sounds or messages, of whatever nature, that are not private correspondence, by electronic communication means that enable a reciprocal exchange of information between an issuer and the receiver'. This includes content such as websites; blogs; vlogs and social media communications such as posts found on Twitter, Facebook, YouTube, Instagram and TikTok. However, it seems to exclude private communication such as direct messages on Twitter or Facebook, WhatsApp messages and emails.[29]

Section 2 of the Act further defines content providers as 'a person or organisation who supplies information for use on a website or an electronic media platform'. This is massively overbroad and includes individuals uploading information such as photographs onto Facebook or Instagram, video material onto YouTube or TikTok and posting tweets on Twitter.[30]

The Act includes a number of provisions that restrict or could be used to constrain

29 Media Law Handbook for Southern Africa Vol. 1 page 374
30 Media Law Handbook for Southern Africa Vol. 1 page 374

online freedoms. For instance, section 24(1) of the ETA guarantees freedom of online communications, stating that "there shall be no limitation to online public communication." However, section 24(2) seems to contradict that assertion by providing grounds under which online communication may be limited some of which are inconsistent with international law. Section 24 (2) provides that:

> *(2) Notwithstanding the provisions of subsection (1), online public communication may be restricted in order to__*
>
> *a. prohibit child pornography;*
>
> *b. prohibit incitement on racial hatred, xenophobia or violence;*
>
> *c. prohibit justification for crimes against humanity;*
>
> *d. promote human dignity and pluralism in the expression of thoughts and opinions;*
>
> *e. protect public order and national security;*
>
> *f. facilitate technical restriction to conditional access to online communication; and*
>
> *g. enhance compliance with the requirements of any other written law.*

In practice, when examined closely, section 24(2) (d) to (g) contain vague terms that give rise to a wide interpretation of its applicability to restricting online content. These clauses may allow government to limit access to internet or aspects of it, effectively denying free access to information that is vital for meaningful public participation in governance affairs. For example, how does a person define the restriction of online communication to protect public order and national security or to enhance compliance with the requirements of any other written law? Without clearly defining what constitutes public order, this provision can be used to restrict freedom of expression online in the name of protecting public order and national security. The provisions may, for example, enable the government to implement internet shutdowns, rendering internet-based communications inaccessible or effectively unavailable to the general public in violation of human rights standards.[31]

Any limitation to rights enshrined under the Bill of Rights must be in accordance with section 44 of the Constitution which states that:

> *(1) No restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed*

31 Malawi Public Participation Report, June 2021 page 34 accessed from https://chrrmw.org/public-participation-in-law-and-policy-making-in-malawi-june-2020/

by law, which are reasonable, recognized by international human rights standards and necessary in an open and democratic society.

(2) Laws prescribing restrictions or limitations shall not negate the essential content of the right or freedom in question, and shall be of general application.

The restrictions imposed by section 24 (2) (d) to (g) of the ETA on online communication is broad, vague and may be used to negate the essential content of the right to freedom of expression. Furthermore, Section 31(1) of the ETA requires online content providers to display personal information on their webpage and the display of such information is mandatory. The information includes, in the case of a natural person, the name, address, telephone number and email address of the editor. In the case of a legal entity, the corporate name, postal and physical address of the registered office, telephone number, email address, authorized share capital, and registration number of the editor. Where applicable, the information includes name of the corporate officer appointed as director of the publication and the editor-in-chief. Online content providers must also provide the name, title, and corporate name as well as postal and physical address of the intermediary service provider which is the person responsible for the provision of access to communications networks, storage hosting or transmission of information by communications networks.

Under section 95 of the ETA, failure to provide such information is a criminal offence punishable by a fine of MK5,000,000 or imprisonment to a term of seven years. It must be appreciated that in the world of digital technology, mandatory provision of such information by online content providers and criminalising the failure to provide such information is an impingement to the right to freedom of expression. Essentially, this means that an online content provider cannot provide any content online unless section 31 of the ETA has been complied with. Provision of such information may also expose them to being targeted by state authorities or non-state actors for their online activities. Journalists sometimes face physical violence while reporting on demonstrations or police activity. In September 2019, two journalists were attacked by marchers during anti-government protests in Lilongwe.[32] There have also various instances of restrictions on freedom of expression online with notable arrests and prosecution for allegedly insulting the President and First Lady on Facebook. In July 2019, the Minister of Information and Government Spokesperson warned that the ETA, 2016 would be used to take punitive action against online speech viewed as denigrating to others.[33] Furthermore, in the run up to the now annulled elections, MACRA issued a notice warning the public against disinformation on social media

32 https://ifex.org/journalist-assaulted-by-demonstrators-in-malawi/

33 https://cipesa.org/2020/02/malawis-democracy-and-digital-rights-record-to-be-spotlighted-by-the-human-rights-council-of-the-united-nations/

platforms.[34] The notice stated that the regulator would "work with various stakeholders to seek ways of countering the spread of fake news."[35]

5.3. Censorship and Control of Entertainments Act, Cap 21:01

This Act came into force on 2nd December, 1968, prior to the 1994 democratic Constitution. As such, it does entirely reflect the provisions of the Bill of Rights under the Constitution. The main purpose of the Act is to regulate and control the making and the exhibition of cinematograph pictures, the importation, production, dissemination of undesirable publications, pictures, statues and records, the performance or presentation of stage plays and public entertainments, the operation of theatres and like places for the performance or presentation of stage plays and public entertainments in the interest of safety.[36]

Part VII, section 23(1) of the Censorship Act makes it an offence to import, publish, distribute, sell or offer any publication (defined in section 2 as including any newspaper, book or periodical or other printed matter) which is 'undesirable'. Section 23(2) of the Censorship Act contains provisions that deem publications undesirable. In brief, section 23(2)(b)(iv) provides that a publication will be deemed undesirable if it is likely to be contrary to the interests of public safety or public order. The penalty for such an offence is a fine and imprisonment. While it must be appreciated that other provisions of section 23 (b) are couched in clear terms on what constitutes undesirable publications, section 23 (2)(b)(iv) is couched in vague terms. It is not clear what constitutes the interests of public safety or public order. As such, this wide and vague scope of wording is subject to abuse. The section can be used to limit or restrict freedom of expression through publication of books, newspapers and any print publication in the name of protecting the interest of public safety and order.

In addition, section 24 of the Act gives power to the Board to declare whether or not any publication, picture, statue or record is in the opinion of the Board undesirable within the meaning of section 23 (2). Such powers can be subject to abuse and used to limit people's freedom to expression through publications, pictures, statue or record in order to protect the interest of public safety and order, especially where the Board has power to make declarations which have a direct impact on the exercise and enjoyment of a person's right to freedom of expression.

5.4. Preservation of Public Security Act, Cap 14:02

This is another Act which was enacted prior to the 1994 democratic Constitution and

34 https://cipesa.org/2020/02/malawis-democracy-and-digital-rights-record-to-be-spotlighted-by-the-human-rights-council-of-the-united-nations/

35 https://cipesa.org/2020/02/malawis-democracy-and-digital-rights-record-to-be-spotlighted-by-the-human-rights-council-of-the-united-nations/

36 See the long title to the censorship and Control of Entertainments Act, Cap 21:01

has not been repealed or reviewed. Section 3 of the Public Security Act empowers the minister to make regulations which, among other things, prohibit the publication and dissemination of any matter that appears to be prejudicial to public security. Section 3 (2) provides that

> *The Minister may, for the preservation of public security by regulations—*
>
> (a) *make provision for the prohibition of the publication and dissemination of matter which appears to him to be prejudicial to public security, and, to the extent which appears to him to be necessary for that purpose, for the regulation and control of the production, publishing, sale, supply, distribution and possession of publications*

The provision can be used to prohibit freedom of expression through publications for purposes of public security. Public security is defined as including '*the securing of the safety of persons and property, the maintenance of supplies and services essential to the life of the community, the prevention and suppression of violence, intimidation, disorder and crime, the maintenance of the administration of justice and the prevention and suppression of mutiny, rebellion and concerted defiance of and disobedience to lawfully constituted authority and the laws in force in Malawi.*

5.5. The Penal Code Cap 7:01

The Penal Code is an Act of Parliament that establishes and creates criminal conduct in Malawi and provides for appropriate penalties for anyone found to be in contravention of its provisions. The Penal Code, therefore, provides for and promotes public order and protection to people against criminal conduct by other persons. This makes it one of the most important laws in Malawi. However, there are still some of its provisions that impinge on freedom of expression. Any person found to contravene such provisions us liable to penalty or fine or imprisonment. Even though it might be argued that some of the provisions in the Penal Code do not explicitly prohibit freedom of expression, the wording and vagueness of some of the provisions can be used to restrict freedom of expression, expressed through various mediums such as print publication and oral communications.

Section 51 (1) of the Penal code provides that any person who does or attempts to do, or makes any preparation to do any act with a seditious intention; utters any seditious words; prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication; imports any seditious publication, unless he has no reason to believe that it is seditious shall be liable for a first offence to a fine of K50,000 and to imprisonment for five years and for a subsequent offence to imprisonment for seven years; and any seditious publication shall be forfeited.

In terms of section 50(1), a seditious intention is an intention, among other things, to excite disaffection against the president or government of Malawi; excite the inhabitants of Malawi to procure the alteration, by illegal means, of any matter established by law; excite disaffection against the administration of justice in Malawi ; raise discontent or disaffection among the inhabitants of Malawi; promote feelings of ill-will or hostility between different classes of the population of Malawi.

Defamation is not just a tort (or civil wrong) in Malawi, but also a crime. It is a crime to defame 'foreign prince, potentate, ambassador or other foreign dignitary with intent to disturb the peace and friendship between the Republic and the country to which such prince, potentate, ambassador or dignitary belongs..'[37]

under general comment 34 of the United Nations Human Rights Committee, laws generally under the umbrella of lese majesty are considered against the spirit of article 19 of the ICCPR and therefore against international human rights standards on freedom of expression. Arguably, therefore, the above provision, just as anti-seditious provisions discussed below are unconstitutional.

Chapter XVIII further criminalises libel and defines criminal libel as '(1) A person publishes a libel if he causes the print, writing, painting, effigy or other means by which the defamatory matter is conveyed to be so dealt with, either by exhibition, reading, recitation, description, delivery, or otherwise, as that the defamatory meaning thereof becomes known or is likely to become known to either the person defamed or any other person. (2) It is not necessary for libel that a defamatory meaning should be directly or completely expressed; and it suffices if such meaning and its application to the person alleged to be defamed can be collected either from the alleged libel itself or from any extrinsic circumstances, or partly by the one and partly by the other means.'[38]

In addition to general criminal defamation, sections 50 and 51 of the Penal Code criminalise publication of seditious materials. A reading of the provisions clearly shows that the aim of the provisions is protect the office of the presidency from criticism.

Surprisingly, in **R v Chihana**[39] the Supreme Court refused to declare anti-seditious provisions unconstitutional. Perhaps the case has to be understood in light of the fact that it was decided just before the enactment of the 1994 Constitution. Nonetheless,

37 Section 61 of the Penal Code
38 See section 202 of the Penal Code
39 ((MSCA) Criminal Appeal No. 9 of 1992

the Supreme Court made an erroneous conclusion that the limitation of the freedom of speech is justifiable by anti-seditious penal provisions on the basis that our penal code's emphasis is the element of violence.

In practice, however, the provision has been used to silence political opponents for expressing views different from government policies[40]. Despite the analysis by the Supreme Court in the **Chihana case**, it is submitted that anti-seditious provisions should either be repealed altogether or narrowed down to only those provisions that seek to criminalise incitation of violence against the state. Clearly, both under the Declaration as well as contemporary human rights jurisprudence:

a. criminal defamation has been found to be proportional restriction to freedom of expression;

b. There is a movement to decriminalise anti-sedition laws.

5.6. Protected Flag, Emblems and Names Act Cap 18:03

Section 4 of the Protected Flag, Emblems and Names Act, Cap 18:03 makes it an offence to publish anything liable to insult, ridicule or show disrespect to, among other things, the president, the Malawian national flag and the national coat of arms. The penalty is a fine of K250,000 and imprisonment to two years. As such, any words, written or verbal, publication, artistical and musical works should not be liable to insulting or showing disrespect to the President or the Malawian National Flag or Court of Arms. This is clearly not in line with the 1994 Constitution, and it can be used as a tool for restriction of the right to freedom of expression.

Moreover, as already pointed out above, under paragraph 38 of General Comment 34 of the Human Rights Committee, the Committee was of the view that laws that proscribes against insulting 'flags' and emblems and imposes criminal sanctions for the same may not meet international human rights standards. In other jurisdictions, it has been heard that 'burning of a flag' is part of freedom of protest and should not be proscribed under *lese majesty* or laws protecting flags or symbols or emblems[41].

This study recommends that the laws that limit freedom of expression based on protection of flags or emblems through criminal proscriptions should be repealed and effectively removed from our laws.

40 In 2009, for example, Honourable (the late) Sam Mpasu was arrested for sedition for playing an audio that depicted an eminent arrest as politically motivated. See the story as published at:https://www.voanews.com/a/a-13-2007-01-15-voa3-66511477/553232.html (Accessed on 30 October 2021).

41 See Saunders, K. (2017). The Desecration of National Symbols and Lèse Majesté. In Free Expression and Democracy: A Comparative Analysis (pp. 173-200). Cambridge: Cambridge University Press. doi:10.1017/9781316771129.008

5.7. Communications Act, 2016

Section 86 of the Communications Act establishes the Malawi Broadcasting Corporation ('MBC') and in accordance with subsection (b), MBC is capable of suing and being sued in its corporate name. This entails that MBC is an independent public institution. However, under section 87 (2) (c) of the Act, MBC's autonomy to broadcasting is controlled by the Board. The said Board is appointed by politicians and subject to political authority.

As earlier pointed out, one of the cardinal principles of freedom of expression under the Declaration is the autonomy of state broadcasters. This study recommends giving MBC more autonomy from political interference through the enabling Act.

Likewise, the Communications Act creates under Part II, the Malawi Communication Regulatory Authority ('MACRA') which has, among other functions the powers to regulate electronic communications as well as broadcasting. Just like MBC, MACRA's Board is appointed by politicians and at times can be politically motivated and in the process negatively affect freedom of speech.

A good example of how political interference of MACRA affects freedom of expression is the leading case of **S v MACRA (ex parte NAMISA and Others).**[42] In the case, MACRA had issued a blanket ban on all radio broadcasters against broadcasting live phone-in programmes. The regulator used its powers under the Communication Act, but with political motivations. The High Court, sitting as a constitutional court, held that this blanket ban of phone-in programmes was unconstitutional as it violated freedom of speech and a free press.

This case demonstrates, however, how the powers conferred upon MACRA can easily be abused by the politburo to stifle a free press and freedom of expression. The study further finds that too much power in MACRA's hands is against the spirit of the Declaration as already pointed out above.

6. OTHER LEGAL BARRIERS

This section of the study reports some salient and subtle provisions that either directly or indirectly affect the actualization of the right to access to information as well as freedom of expression.

42 Constitutional Reference Number 3 of 2019

One such issue is data protection. Malawi has a draft Data Protection Bill, which is yet to be enacted into law. Without data protection law, freedom of expression online as well as access to 'accurate' information is at risk[43]. With data protection laws, one would be freely allowed to verify the data held by third parties to confirm that it is accurate and also protect against holding of data that is too private.

On the same issue of data protection, privacy and the balance of publication of data, it has been noted that the NGO Act[44] does provide for access to private data of trustees or directors of NGOs by state actors and reporting of quite some private information of financial statements of NGOs to the NGO Board, which is appointed by politicians[45]. Arguably, such legal provisions in a very subtle way, undermine the platform under which CSOs ought to operate freely. CSOs in Malawi have always been a platform for activists to speak out against mal-administration.

According to a report by the Malawi chapter of the Media Institute of Southern Africa (MISA-Malawi), another provision under our laws that is abused by state agents against freedom of expression is section 181 of the Penal Code, which proscribes 'conduct likely to cause a breach of peace'[46]. According to MISA-Malawi, this provision is abused by state agents to arrest and prosecute journalists who publishes news that seem critical of the state.

The right to assembly, as already pointed out above, is very integral to freedom of expression. Through freedom of assembly and peaceful demonstrations, citizens are able to freely express their opinion of how the state should be run.

In Malawi, the right to peacefully assemble and demonstrate is regulated by the Police Act[47]. Part IX of the Act has some provisions that are somewhat controversial and effectively limits the right to assemble or have the propensity to limit the right to assemble and effectively the freedom of expression.

For example, under section 96 of the Police Act, there is a requirement of giving 'notice' of intended demonstrations. However, this has been confused with seeking

43 For the link between access to accurate information and data protection, refer to Patricia A.H. Williams,In a 'trusting' environment, everyone is responsible for information security, Information Security Technical Report, Volume 13, Issue 4, 2008,Pages 207-215, ISSN 1363-4127, https://doi.org/10.1016/j.istr.2008.10.009. (https://www.sciencedirect.com/science/article/pii/S1363412708000538)

44 Cap. 5:05 of the Laws of Malawi

45 The reporting requirements are under section 22 of the Act. Section 22 (a), (b) and (c) all give a wide range of information that the Board may ask, including information about NGO officers '..as the Board may require'.

46 The summary is available on MISA-Malawi's website,malawi.misa.org (Last accessed on 15 Nov 2021)

47 Cap. 13:01 of the Laws of Malawi

of permission to the extent that some demonstrations have been 'refused' in the past by police authorities and the same 'refusals' being challenged through litigation. The other problematic provision is the burden on convenors of demonstration or demonstrators to bear liability for damage occasioned at demonstrations[48]. This provision, likewise, is restrictive of the right to demonstrate and effectively limits freedom of expression.

The provisions discussed under this sub-paragraph do not necessarily directly relate to freedom of expression or the right to access information however, they affect the actualization of the rights indirectly.

7. CONCLUSIONS AND RECOMMENDATIONS

Much as the creation and the coming into law of the ATIA has the propensity to help in the actualisation of the right to access to information, this study has found that the Act itself needs to be amended and as much as possible, conform to the model law, the Declaration and international legal norms on access to information.

In terms of freedom of expression, there are gaps in terms of the legal framework, apart from the legal barriers that have already been highlighted by this study. This study further recommends augmentation of the existing legal framework with international norms like the Declaration and the Table Mountain and riding of 'insulting laws' that have been expounded above. This study further recommends decriminalization of defamation.

Further, the study highlight the imperative for the country's courts to change their approach (or jurisprudence) of issuing 'gagging orders' against social activists especially on matters of public interest. In that regard, this study proposes an advocacy around the approach by the African Court on Human and Peoples' Rights in the case of **Lohé Issa Konaté v. The Republic of Burkina Faso**[49] where the court confirmed that public figures must tolerate more criticism than private individuals and the law should be slow to punish activists or journalists for critical comments against public figures. The court further went on to hold that generally criminal defamation is not proportional to the end it seeks to achieve and there does not meet the limitation test allowable by international human rights standards. This position is in line with principles under the Declaration.

48 Section 106 of the Police Act
49 App. No. 004/2013

In terms of freedom of expression vis-à-vis statutory legal framework, this study has also noted that there are several provisions, discussed in detail under the findings, that are archaic, having been legislated prior to the modern 1994 Constitution. Most of these provisions do not meet the constitutional test especially in terms of restrictive approaches to limiting freedom of expression. These include anti-seditious provisions, criminal defamation provisions, among others. This study recommends advocacy towards repeal of the laws or strategic public interest litigation as was the case in Zimbabwe and have the provisions declared unconstitutional.

This study concludes that the apart from several legal barriers to an effective implementation of the ATIA, and actualization of the right to access information, the Act itself has several gaps that would impede meaningful exercise of the right to access information.

Despite an attempt to use the model law as the blueprint for the ATIA, one would deduce an attempt to remove elements of the model law that would have ensured a more meaningful legal regime on access to information. Some of the provisions have been discussed in detail above but of note and concern is the ambit of which information holders can be requested to divulge information.

The study recommends that the ambit of information holders should be widened to include private institutions so long as the sought-for information would be necessary for exercise of human rights and does not infringe on other rights and confidential business interests. Information like sexual harassment policies, environmental protection policies, corporate criminal records, for example, should be sought for by interested parties. Likewise, this study recommends that political parties should be personalities whose information should be made public and they should comply with the ATIA.

The other finding in terms of the right to access to information is that some of the statutory provisions are either archaic, having been passed into law prior to the enactment of the 1994 Constitution and they are arguably unconstitutional. These include the provisions under the Official Secrets Act, for example. What is worrisome, though, is that even recently promogulated laws such as the Mines and Minerals Act have provisions that blocks access to information that should otherwise be accessible by the public.

This study recommends that such laws should be amended, repealed altogether or be challenged in courts of law for their inconsistency with the Constitution. Even more importantly, the study recommends that the various enabling Acts for public bodies should be amended to conform to the standards and the spirit of the ATIA.

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