



**PEN International and Malawi PEN
Joint Submission to the UN Universal Periodic Review of Malawi**

For consideration at the 22nd session of the UN working group

15 September 2014

1. Malawi PEN and PEN International welcome the opportunity to contribute to the second cycle of the Universal Periodic Review (UPR) of Malawi. This submission focuses on Malawi's compliance with its international human rights obligations with respect to freedom of expression.

Executive Summary

2. In 2011, the government of Malawi accepted two recommendations on the steps necessary to bring its national legislation and practice in line with international freedom of expression obligations.^{1 2}
3. Since 2011, the Malawian government has taken a number of positive actions to advance protections for the right to freedom of expression. Although President Bingu wa Murtharika cracked down on the media in 2011 and early 2012, the situation improved markedly following the accession of President Joyce Banda in April 2012. Acting on the accepted recommendations from the first session of the UPR, under President Banda's government, in May of 2012 Malawi repealed section 46 of the Penal Code (Amendment) Act that empowered the Minister of Information to ban newspapers.
4. Notwithstanding these improvements, in light of the on-going harassment of journalists, delays in the adoption of the Access to Information Bill and the potential to limit freedom of expression of the draft E-Bill (art. 9 and 19), the monopoly of media coverage, and delays in the judicial process, concerns for free expression in Malawi remain.

Legislative restrictions to freedom of expression

Penal Code

5. PEN welcomes the repeal of the sweeping amendment to Article 46 of the penal code by the Government of President Banda in May 2012. In January of 2011, then

¹ "Take the steps necessary to ensure that laws protecting freedoms of expression, press, assembly and association are implemented and adhered to" (Norway); "Ensure the relevant constitutional provisions relating to freedom of the press are properly implemented and adhered to and that a free press, freedom of speech and assembly are allowed to thrive without undue interference" (United Kingdom).

² Malawi rejected one other free expression recommendation calling for the adoption and implementation of measures to provide for independent media free from any intimidation and suppression, in accordance with its international obligations (Slovakia).

President Bingu wa Mutharika signed into law the Penal Code Amendment Act, which altered Section 46. The amendment gave the Minister of Information and Civic Education the power to ban any publication which he deemed not to be in the public interest. Prior to the amendment, Section 46 only prohibited importation of publications considered seditious. The amendment essentially granted the minister the power to regulate publications, thereby contravening the constitutionally guaranteed freedom of the press under Section 36. Although it had yet to be implemented, the amendment created a chilling effect on the right to free expression and opinion.

Sedition Laws

6. Although freedom of expression is enshrined in Sections 34 and 35 of the Constitution, Sections 50 (Seditious intention) and 51 (Seditious offences) of the Penal Code include sedition laws that impede the right to free expression.
7. In the past, sedition laws have been utilised to arrest and try citizens for speaking out against the Malawian President and government. These laws were the basis for court injunctions that the government utilized to silence media criticism of the administration and critical coverage of financial dealings by governmental officials.³
8. In March 2012, President Bingu wa Mutharika's Press Officer, Albert Mungomo, issued a statement to the press, warning those who insult the President, attack the President's style of governance, or otherwise 'distort information' about the President to instigate panic in the nation and damage donor relations will risk being arrested or fined.⁴ The government cited the colonial-era Flags, Emblems, and Names Protection Act as authority for imprisoning and fining journalists. Both *Nation* newspaper and *Daily Times* were monitored for expressing hostility towards President Mutharika and his government. A member of the President's party, the Democratic Progressive Party (DPP) was quoted saying that the newspapers had not been writing positively about the president or the DPP and any civil servant seen reading it or advertising in it would be suspected. Not only did the ruling party tell the public in Malawi what to read, they also exported this advice overseas, as Malawian Health Minister Jean Kalirani urged Malawians based in the United Kingdom to not read the *Nyasa Times* as it did not write good things about the President.⁵

Criminal Defamation

9. Libel is both a criminal and civil offense in Malawi and criminal prosecutions carry a sentence of up to two years' imprisonment under Section 205 of the Penal Code. In May 2013, President Banda refused calls from regional press freedom activists to become the third African head of state to endorse the Declaration of Table

³ Mtende Mhango, "Repeal or Invalidate Sedition Laws because they are not consistent with the Malawi Constitution and democratic Principles", available from:

<http://www.legalbrief.co.za/article.php?story=20100128110325732>

⁴ Tom Rhodes, "A bad weekend for Malawi," <http://cpj.org/blog/2012/03/a-bad-weekend-for-malawi-journalists.php>

⁵ Ibid.

Mountain, which calls on African governments to abolish criminal defamation laws. Days earlier she had noted her displeasure with the press's criticism of her administration.⁶

Access to Information

10. Section 37 of the Constitution of Malawi includes a provision that gives Malawians the right to access information held by the government but since 2003 a draft Access to Information Bill has been stalled in parliament. Access to government information remains a considerable challenge for journalists. PEN welcomes the adoption, in January 2014, of an Access to Information Policy which should enable the swift introduction of Access to Information legislation.⁷

Digital Freedom

11. In October 2012, the Banda government introduced the draft Electronic Transactions and Management Bill which sets out a legal framework for regulating information and communications technology (ICT). The draft "E-Bill" was criticised for potentially limiting online freedom of expression. Among other provisions, the E-Bill would compel editors of online media platforms to make available their names, addresses, and telephone and registration numbers. It would also allow the government to appoint so-called cyber-inspectors to "monitor and inspect" websites and report "unlawful activity" to the regulator. Although it is commendable that the Malawian government recognized electronic rights, and created legislation for it, there are concerns about the draft E-Bill and its potential to restrict freedom of expression.

Media Regulation

12. The broadcast media in Malawi are licensed by the Malawi Communications Regulatory Authority (MACRA) which is funded by the government and led by a presidential appointee.
13. Under former president Bingu wa Mutharika, MACRA faced accusations of political bias in its operations. In July 2011, it ordered two stations to halt coverage of widespread anti-government protests. In November 2011, MACRA issued eight new broadcast licenses after an extended period of accepting applications; two of these went to Mutharika allies. Other applicants, most notably a religious group seen as hostile to the president, had their applications denied without explanation. PEN welcomes the fact that in July 2012, MACRA issued 15 new licenses to private and community radio and television stations. However, it notes that in August 2012 President Joyce Banda made new appointments to the board, including a chair who was a health rights activist with little media experience.⁸

Bias in media coverage during election periods

14. The Parliamentary and Presidential Elections Act states that all political parties should be given equal coverage from the public media outlets, and outline the rights of candidates and parties to express themselves during the campaigning period.

⁶ Freedom House, *Freedom in the World 2014*. Available from:

http://www.freedomhouse.org/report/freedom-world/2014/malawi-0#_U_8rufldV0t

⁷ Freedominfo.org, "Malawi Cabinet approves access to information policy". Available from:

<http://www.freedominfo.org/2014/02/malawi-cabinet-approves-access-information-policy/>

⁸ Freedom House, *Freedom in the World 2014*. <http://www.freedomhouse.org/report/freedom-press/2013/malawi#.VACSNPldV0s>

However, the state media has tended to display bias in covering the activities of the ruling party more than that of opposing parties. Under President Banda's regime, the Malawi Broadcasting Corporation has taken strides to give diverse perspectives airtime, including featuring opposition figures on its programmes. However, an election monitoring report of the media in Malawi by the Institute for War and Peace Reporting (IWPR) during the run up to the 2014 elections found that the media had been biased, giving significantly more coverage to ruling People's Party presidential candidate Joyce Banda than the other 11 presidential candidates.⁹

Harassment and intimidation of journalists and human rights defenders

15. Following the 16th session of the United Nations Human Rights Council in Geneva on 7 March 2011, at which 15 individuals reported on Malawi's human rights situation, these individuals were threatened with reprisals for cooperating with the UN. Then President Murtharika is alleged to have stated publically, "There is a group of 15 people roaming in Europe saying that there is a violation of human rights because we don't allow university professors to teach revolution... We are waiting for them to come back and to tell us what their agenda is."¹⁰
16. In July 2011, as the economic situation in Malawi deteriorated, anti-government demonstrations took place. Protesters exercising their freedom of expression and assembly were subject to the excessive use of force by security forces, resulting in 19 demonstrators being killed, many others injured and arrested. It is alleged that during the protests at least eight journalists had been specifically targeted by police who had beat them with the butt of their guns.
17. There was a crackdown on dissent from the media that covered the protests and criticized the government. Gumulira and Kondwani Munthali of *Nation Publications* and Leonard Sharra and Jacob Nankhonya of *Blantyre Newspapers* were other print journalists known to have been beaten by police during the demonstrations on 20 July 2011.
18. Journalist **Collins Mtika**, contributor to *Nyasa Times*, a UK-based online news site critical of the government, was arrested in Mzuzu on 21 July 2011 and held without charge for four days on anti-government accusations. According to Malawian law, detained individuals must be charged and given an opportunity for bail within 48 hours of arrest. Mtika was said to have been verbally but not formally charged. It is widely believed that Mtika's arrest was orchestrated to prevent further negative reporting on the Mutharika government. On 25 July after the police failed to produce any charges against Mtika, the Mzuzu Magistrate Court freed the journalist unconditionally
19. Following the July 2011 protests, the government's harassment and intimidation of dissident voices continued, in violation of the right to freedom of expression, resulting in a trend of self-censorship and a number of journalists going into hiding.

⁹ Institute of War and Peace Reporting (IWPR) "Malawi Reporting: Covering the Tripartite Elections" http://iw3.iwpr.net/cdn/farfuture/D29IOyJ-CyrjEx0DROgouHI_CkujiF6D-Ft9z4W8ZZg/mtime:1401982755/sites/default/files/malawi_2014_election_monitoring_-_first_report.pdf

¹⁰ International Human Rights Service (ISHR) Ending Reprisals: the role of national laws and policies in protecting those who cooperate with the United Nations. Available from: http://www.ishr.ch/sites/default/files/article/files/isshr_reprisals_report-09_13_updated.pdf

On 14 October 2011, police arrested and detained five human rights defenders, including **Brian Nyasulu**, who had been peacefully protesting outside parliament in Lilongwe. During the five-day detention, Nyasulu was denied medical attention despite being a diabetic.

20. Violence directed at journalists continued in 2013. On 24 August 2013, a journalist for the private Zodiak Broadcasting Station, Raphael Mlozoa, reported that Economic, Planning and Development Minister Ralph Jooma was attacked by Mangochi Muslims praying at a local mosque when he attempted to retrieve a camera that the Muslim community had confiscated from the state broadcaster who had been filming within the mosque. On 25 August 2013, the Minister objected to the reports and accused Mlozoa of falsely reporting on the incident. The Minister is alleged to have ordered his security staff to confront the reporter and take him to the police. The same day, the Minister's security personnel beat and assaulted the journalist for reporting on the incident and 'shaming' the Minister.
21. In December 2013, President Banda's Deputy Secretary General, Ireen Chikuni threatened that the party would "deal" with journalists who write or broadcast what she called "insults to President Joyce Banda." According to Chikuni, journalists from certain media houses were abusing media freedom by insulting the President.

Delays in prosecutions following Commission of Inquiry

22. PEN welcomes the Government's efforts to deal with the aftermath of the July 2011 protests. Setting up a Commission of Inquiry in 2012, publishing the findings of the inquiry in the 2013, and charging nine police officers with criminal offences ranging from manslaughter to murder has been a significant step towards accountability. However, as of July 2014, despite these efforts, there have not been any prosecutions.

Surveillance

23. PEN is especially concerned by claims that the government of Malawi monitors the social network accounts of private citizens for statements that display hostility towards and defamation of the President.
24. In 2011, MACRA attempted to implement a new "Consolidated ICT Regulatory Management System," ostensibly to monitor the performance of mobile-telephone companies more effectively. The move generated privacy concerns given the capacity of the system to access the call records of users, and media professionals warned that their ability to keep sources confidential could be compromised. Implementation of the system was temporarily suspended by the courts in mid-2011, and in September 2012 the High Court issued a ruling that halted implementation.

Linguistic Rights

25. Under international law, persons belonging to minorities have the right to use their own language, in private and in public, freely and without interference or any form of discrimination. States cannot deny the right to use one's own language.
26. While a state may provide education in the state's official language(s) for the majority population, members of minorities have a right to establish and maintain

schools where education is provided in their own language, provided that they conform with the minimum educational standards laid down by the state. Parents have a prior right to choose the kind of education that shall be given to their children.

27. State authorities should take positive measures: (a) so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue; (b) in order to encourage knowledge of the language of the minorities existing within their territory so that communities can take full and unrestricted part in cultural life, in line with recommendations by the UN Committee on Economic, Social and Cultural Rights).¹¹
28. Malawi's 1994 Constitution prohibits discrimination on the basis of language and guarantees that every person has the right to use the language and to participate in the cultural life of his choice (Art 20, 26, 42).
29. There are several indigenous languages spoken in Malawi including Chichewa, Chitumbuka, Chiyawo, Chilhomwe, Chisena, Kyangonde, Chitonga and Chilambiya. During the Banda dictatorship (1964-1994) Chichewa was declared the official language of Malawi and favoured over other indigenous languages.
30. The 2013 Education Act empowered the Minister of Education to choose any language as a medium of instruction in schools. The Minister established that English would be the sole language of instruction, replacing Chichewa and other local languages. PEN is concerned at the exclusion of mother languages in instruction as a child learns best in its mother tongue, especially at the early stage in education, and among linguistic minority groups.

Recommendations

PEN International and PEN Malawi call upon the government of Malawi to significantly improve the overall conditions for freedom of expression. In particular, the government of Malawi should:

- Ensure the welcome repeal of section 46 of the Penal Code is followed by a review of legal provisions dealing with media and freedom of the press to ensure that they respect constitutional provisions and Malawi's international obligations.
- Amend the Sedition Laws in sections 50 (Seditious intention) and 51 (Seditious offences) of the Penal Code so that they do not restrict the right to free expression.
- Expedite the adoption of the Access to Information Bill and ensure that its provisions and those of the "E-Bill" are in conformity with Malawi's international human rights obligations, including under the ICCPR.
- Protect journalists and human rights defenders from harassment and arbitrary arrests, prosecute those responsible and compensate the victims.

¹¹ Committee on Economic, Social and Cultural Rights, General Comment 21, para. 27, UN Document E/C.12/GC/21, 21 December 2009

- Take measures in the field of education in order to protect and promote linguistic diversity and ensure that children are provided with the opportunity to access mother language education.
- Decriminalize defamation and ensure that libel is a civil rather than criminal offence.
- Endorse the Declaration of Table Mountain, which calls on African governments to abolish criminal defamation laws.
- Ensure the political independence of appointments to MACRA.
- Ensure state-owned media grant equitable coverage to all political parties during election periods in accordance with the law.
- Expedite prosecutions of individuals suspected of human rights violations committed during the 2011 violence, particularly those identified by the Commission of Inquiry.
- Ensure that surveillance of communications is prescribed by law, necessary and proportionate and protects right to privacy.