

## Introduction

1. Digital rights including the right to privacy and the right to freedom of opinion and expression online are important issues in Malawi, and must be reflected in the recommendations made during the third cycle of the UPR in May 2020.
2. In the second cycle of the UPR, Malawi received 199 recommendations from 69 countries. Malawi supported 2 of 3 recommendations that were categorised as relating to Freedom of Opinion and Expression and/or Freedom of the Press. None of these recommendations explicitly mentioned the online sphere, although 3 are implicitly relevant.
3. As Malawi's online population grows, it becomes increasingly important for UPR recommendations to reflect explicitly the need for the right to freedom of opinion and expression and the right to privacy to be protected online as well as offline, in line with Malawi's obligations under Articles 17 and 19 of the International Covenant on Civil and Political Rights (ICCPR).

## Updates since the previous review

4. Since the second cycle review, the number of individuals online in Malawi has continued to grow. At the time of the second UPR review in 2014, only 4.1 in every 100 inhabitants had a mobile broadband subscription, but by 2017, the most recent year ITU data is available for, the figure had reached 25.5 in every 100.
5. The situation of freedom of expression online has improved slightly since Malawi's previous review, with no incidences of outright online censorship reported in 2017-18.
6. However, the broad 2016 Electronic Transactions and Cybersecurity Act has been criticised for empowering the government to crack down on online dissent and enforce sweeping internet shutdowns. The law penalises "offensive communication" via ICTs with penalties of fines or a maximum 12-month prison sentence. The law also places poorly defined restrictions on the use of encryption technologies.<sup>1</sup>
7. Malawi's President Arthur Peter Mutharika has additionally taken a hard public line on online expression, warning repeatedly that punitive action will be taken against online speech that was deemed "denigrating to others".

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<sup>1</sup>"Malawi, The | Freedom House." <https://freedomhouse.org/report/freedom-net/2018/malawi> Accessed on 12 September 2019

8. Although Malawi passed the Access to Information Act in February 2017, it has not been implemented as of September 2019. Civil society has called for the law to be implemented fully in order to provide citizens and journalists access to information, and allow them to hold the government to account.
9. A new National Optic Fibre Backbone Project was completed by Chinese company Huawei in April 2018, promising to deliver faster internet services to Malawian citizens.

## Freedom of Expression and Opinion

10. Section 34 of Malawi's constitution guarantees the right to freedom of opinion and Section 35 states that "every person shall have the right to freedom of expression." In addition, Section 36 makes provisions for the press to freely report and publish at home and abroad and "to be accorded the fullest possible facilities for access to public information." Furthermore, Article 9 of the African Charter on Human and Peoples' Rights (ACHPR), to which Malawi is a party, provides for citizens to express and disseminate opinions and views within the law.
11. Article 19 of the International Covenant on Civil and Political Rights (ICCPR) guarantees the right to freedom of expression and opinion. Despite these enabling provisions, in practice freedom of expression online and offline have faced restrictions in Malawi, with the government sometimes using anti-sedition and breach of peace laws to stifle criticism.
12. The government has used the Electronic Transactions and Cybersecurity Act of 2016 to restrict freedom of expression online. In recent years, the Minister of Information and government spokespeople have repeatedly warned that the government would begin to take punitive action against online speech that "abuses" social media.<sup>2</sup>
13. Section 87 the 2016 Electronic Transactions and Cybersecurity Act criminalizes "offensive communications", with tough penalties of a fine and or 12 months imprisonment. Meanwhile, the Protected Flag, Emblem and Names Act outlaws insulting the President and has on occasion been enforced.<sup>3</sup>

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<sup>2</sup> <http://www.maravipost.com/malawi-govt-warns-social-media-abusers/> Accessed on 12 September

<sup>3</sup> <https://www.nyasatimes.com/police-arrest-utm-vocal-social-media-activist-abiti-manice-accused-of-insulting-malawi-president/> Accessed on 12 September 2019.

14. In April 2017 Cecelia Kumpukwe, the sister to former president Joyce Banda, was arrested for allegedly forging a fake resignation letter from the former Vice President and circulating it on social media.<sup>4</sup>
15. In April 2019 the Malawian citizen Tumpale Mwakibinga was arrested after he posted on his Facebook page a picture likening First Lady Gertrude Mutharika to cartoon character Rango.<sup>5</sup> He was charged with insulting the modesty of a woman, as well as violations under the Electronic Transaction and Cybersecurity Act of 2016.
16. In February 2016, three political opposition members were arrested and charged with treason for allegedly plotting a coup through a WhatsApp conversation.<sup>6</sup> Charges against the three were later dismissed by the High Court in March 2017 due to lack of evidence.<sup>7</sup>
17. On August 21, 2018, police arrested Manes Hale, an American citizen of Malawian origin, while she was boarding an airplane departing the country. The government charged her with insulting the president under Section 4 of the Protected Flag, Emblems, and Names Act for critical remarks she wrote concerning the president on Facebook. She was released on bail two days later. On August 27, the government dropped the charges, and Hale flew to the United States the following day.<sup>8</sup>

## Freedom of information and censorship of content

18. The right to seek, access and receive information is guaranteed by Article 19 of the Universal Declaration of Human Rights, Article 9 of the African Charter on Human and Peoples' Rights, and Article 4 of the Declaration of Principles on Freedom of Expression in Africa. It is also recognised under Section 37 of the Malawi Constitution.
19. The government has so far failed to implement the 2017 Access to Information Act. Civil society groups have sharply criticised the government for its failure to implement the law.<sup>9</sup>

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<sup>4</sup><http://www.maravipost.com/another-arrest-vps-fake-resignation-letter-mrs-cecilia-kumpukwe-young-sister-pa-former-president-joyce-banda/> Accessed on 12 September

<sup>5</sup><https://www.nyasatimes.com/police-arrest-man-for-likening-malawi-first-lady-to-a-cartoon-on-facebook/> Accessed on 12 September

<sup>6</sup><https://www.voanews.com/africa/malawi-government-faulted-over-arrests-coup-suspects> Accessed on 2 October 2019.

<sup>7</sup> Nyasa Times, "High Court Dismisses MCP Treason Case", 29/03/2017, <https://www.nyasatimes.com/high-court-dismisses-mcp-treason-case-kabwila-seeks-hefty-compensation/> Accessed on 2 October 2019.

<sup>8</sup><https://mwnation.com/us-malawi-ties-on-edge/> Accessed on 2 October 2019.

<sup>9</sup> "Malawi, The | Freedom House." <https://freedomhouse.org/report/freedom-world/2019/malawi> Accessed on 12 September 2019.

- 20.** On May 20, 2019, one day before the 2019 general election, the Malawi Communications Regulatory Authority (MACRA) issued a public warning about disinformation on social media platforms. This notice read: “MARCA, as a regulator of the country’s communication sector, is working with various stakeholders to seek ways of countering the spread of fake news.”<sup>10</sup>
- 21.** Data from the internet monitoring NGO NetBlocks showed that multiple internet providers in Malawi experienced outages spanning several hours on the evening of election day on May 21, 2019, after Malawians voted to name the President, new MPs, and local councillors. Nationwide connectivity fell to 80% of normal levels during vote count and the announcement of initial polling results. Data shows that Malawi Telecommunications Limited, fiber optic network SimbaNET and Malswitch were affected, while access appeared to remain generally available via privately-owned internet providers.<sup>11</sup>

## Right to Equal Access and Opportunity

- 22.** Section 157 of the Communications Act of 2016 provides for Universal Services and Access to Telecommunications. Malawi’s telecommunications regulator, Malawi Communications Regulatory Authority (MACRA) is mandated “to ensure that the provision of universal services is made on affordable tariffs that are accessible to all.”
- 23.** While the number of people with access to the internet in the country improved from 9.6 percent in 2016 to 13.1 percent in 2018, the number remains low. The country has lower levels of internet access in comparison with regional neighbours such as Zambia, where internet penetration rates are around twice as high as those in Malawi.
- 24.** Currently the internet is priced beyond the reach of the majority of Malawians. The portion of the Malawian public that has access to the internet often experience poor quality of services that are unreliable, sluggish, and sporadic. Implementing the provisions of Universal Service Fund would be a practical and a good start in ensuring accessible internet in the country. There is also a need to draft and introduce a legal and policy framework which clearly recognises that the internet is not a luxury but a

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<sup>10</sup> Internet disrupted in Malawi on election day, <https://netblocks.org/reports/internet-disrupted-in-malawi-on-election-day-Q8oOrl8n> Accessed on 12 September 2019

<sup>11</sup> Internet disrupted in Malawi on election day, <https://netblocks.org/reports/internet-disrupted-in-malawi-on-election-day-Q8oOrl8n> Accessed on 12 September 2019

necessity and emphasises the government's duty to ensure that its citizens have affordable access to it.<sup>12</sup>

### **Right to data protection and privacy on the internet**

25. Privacy is enshrined in Section 21(1) of Malawi's Constitution; while Sections 72, 73, and 74 of the Electronic Transaction and Cyber Security Act of 2016 provide for limited data protections.
26. Privacy advocates have argued that existing protections are insufficient to guarantee users' rights to privacy, and argue that Malawi requires a specific data protection law, especially in the wake of the large-scale collection of citizens' data. Data collected on citizens in recent years includes the government's mandatory registration of SIM cards, as well as biometric national identity cards registration. Similarly, national and multinational companies are also collecting huge amounts of data on Malawian citizens with limited oversight.<sup>13</sup>

### **Proposed Recommendations**

27. In light of The Malawi's existing record on freedom of opinion and expression, freedom of the press, and the right to privacy online, the submitting organisations call on states to offer the following recommendations to Malawi:
- a. In compliance with international standards and the right to freedom of expression guaranteed under Article 19 of the ICCPR, guarantee the freedom of expression and opinion online as well as offline for media and individuals, including marginalised and discriminated groups. Refrain from implementing internet shutdowns or disruptions under any circumstances.
  - b. Ensure that the 2017 Access to Information Act 2017 is fully implemented and all public bodies are in full compliance in providing their data regularly in accessible formats.

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<sup>12</sup> Digital Rights, Internet Accessibility, and Affordability in Malawi – Part 2, <https://mwnation.com/digital-rights-internet-accessibility-part-ii/> Accessed on 12 September 2019

<sup>13</sup> Digital Rights, Internet Accessibility, and Affordability in Malawi – Part 1 2019, <https://mwnation.com/digital-rights-internet-accessibility-and-affordability-in-malawi-part-1/> Accessed on 12 September



- c.** Hasten efforts to provide equal access to technology and communications to all citizens, including disadvantaged and marginalised groups of the population, by removing barriers to access and improving affordability, as well as expanding infrastructure and desisting from internet disruptions.
- d.** Approve the legislation on personal data protection and privacy in order to provide safeguards on the use of personal data and to protect the right to privacy online.