

SOUTHERN AFRICA LITIGATION CENTRE

Introduction

1. This submission has been prepared by the Southern Africa Litigation Centre (SALC).
2. The issues relating to freedom of assembly, association and expression included in the report were raised during a regional summit hosted by SALC from 14-16 November 2018: Southern Africa Human Rights Defenders Summit - Reflecting on Closing Civic Spaces and its Impact on Marginalised Groups in Southern Africa.¹
3. The issues relating to health, stem from SALC's litigation and research in its Health Rights and Sexual and Reproductive Health Rights Programmes.

Right to Peaceful Assembly

4. Malawi's general elections in May 2019 produced results that were widely contested. There have been ongoing demonstrations since then by citizens demanding accountability for the manner in which the recent election process was managed. Opposition parties have contested the elections in court and raised concerns regarding irregularities.
5. Amidst the ongoing demonstrations, the leadership of the Malawi Human Rights Defenders Coalition (HRDC) reported receiving death threats directed at themselves and their families as a result of their participation in convening the aforementioned demonstrations. The head of the Malawi HRDC, Timothy Mtambo, experienced a petrol bomb attack at his home in August 2019.²
6. In August 2019, the Attorney General and Inspector General sued the organisers of the demonstrations seeking a declaration that the demonstrations were illegal since they related to the election disputes, which issue is currently before the courts. They further sought an injunction preventing the organisers from holding further demonstrations until they have financially compensated those who suffered damage during the demonstrations. The applicants further sought interim relief prohibiting further demonstrations relating to the elections dispute. The interim relief was denied in the High Court and appealed to the Supreme Court. The Supreme Court, in an order on 27 August 2019, urged the parties to explore out of court settlement within 14 days and to not organise further demonstrations during this period. After this period, protests were held in September 2019 after the High Court turned down the Attorney General's application to interdict further protests.³ The Supreme Court emphasised that the Police Act No. 12 of 2010 only requires giving notice of an intended demonstration and not asking for or being given permission to demonstrate. The Supreme Court emphasised that the "the reason for demonstrating need not be acceptable to the notice recipients."⁴
7. Whilst the Supreme Court's judgement provides useful guidance on the right to peaceful assembly, section 106(1) of the Police Act No. 12 of 2010, remains a concern. The section states that if any riot damage occurs as a result of the assembly, "every organization on behalf of or under the auspices of which the assembly or demonstration was held, the

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convener, and every person participating in the assembly or demonstration, as the case may be, shall be liable for that damage as a wrongdoer together with any other person who unlawfully caused or contributed to such riot damages.” This provision is overly broad and is used to curb freedom of assembly.

8. On 14 September 2017, Beatrice Mateyo, Executive Director of the Coalition for the Empowerment of Women and Girls (CEWAG), participated in a march against gender-based violence in Malawi. She and other protestors, at some point in the march, held posters written in Chichewa. Roughly translated, the poster entitled “to be born with a vagina is not a sin” intended to send a message against the objectification of women and encourage open discussion about the factors fuelling gender-based violence. She was arrested and detained at Lingadzi Police station and charged with the offence of “Insulting the modesty of a woman”.⁵ She was subsequently released on police bail, but the case has not been prosecuted since. Mateyo, represented by the Women Lawyers Association of Malawi, filed an application for judicial review of her arrest and detention, which case is ongoing. The offence with which she was charged was never intended to curb freedom of expression, and the need for its existence has subsequently been surpassed by the passing of the Gender Equality Act, which criminalises sexual harassment in a gender-neutral manner. The use of vague and outdated offences to target women HRDs is of concern.

Recommendations

- a. The Malawi government should ensure that laws regulating public assemblies are not overly broad.
- b. The Malawi government should protect the right to freedom of assembly and provide sufficient police resources to protect participants in such assemblies.
- c. The Malawi government should protect human rights defenders from violence and investigate threats of violence against human rights defenders.

Freedom of Association

9. The Malawi government released a draft NGO (Amendment) Bill in November 2018 without providing much space for civil society input. Human rights defenders accordingly approached the High Court to obtain an injunction against the passing of the NGO Bill.⁶ On 3 December 2018, the Court granted an injunction restraining the respondents from tabling the NGO (Amendment) Bill in Parliament until a further order from the Court.⁷
10. The Bill proposes to increase ex-officio membership of the Regulatory Authority adding more government representatives to the Authority, including the Solicitor General, Secretary of Local Government and Secretary of Home Affairs. The Minister no longer has to consult with CONGOMA in appointing members. The Bill stipulates that members of the Regulatory Authority, other than ex-officio members, must hold a bachelor’s degree (section 5(4)(i) of Bill). This limits the extent to which community members can be appointed to the Authority and potentially affects trust in the Authority.
11. The proposed amendment to section 34 of the Bill states that where the Act is contravened by an NGO, it is liable to a fine of K15m and imprisonment of 7 years of a director or

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trustee. Whilst such a penalty could be justifiable in the case of fraud and a gross breach of a director or trustee's fiduciary responsibilities, it would not be a proportionate sentence for lesser violations of the provisions in the NGO Act. As such, the section 34 is disproportionate and will have a chilling effect on freedom of association.

Recommendations

- a. The Malawi government should ensure proper consultation on the NGO Bill, and ensure that its provisions do not disproportionately limit the right to freedom of association.

Freedom of Expression

12. In line with its commitment at the previous UPR, Malawi passed the Access to Information Act in 2017, although the Act has yet to be properly implemented. The Act provides some protection for whistle-blowers. The Electronic Transactions and Cyber Security Act of 2016 contains some provisions on data protection and privacy.
13. A number of laws impact on freedom of expression, including the offences of sedition⁸ and spreading false news.⁹ In June 2018, the President of Malawi threatened to use the offence of insulting the President¹⁰ against his detractors.¹¹ The offence remains in use.¹²
14. Leading up to the election on 21 May 2019, there were rumours that the government was considering shutting down the internet on the day of the election. Several meetings between the government, and the Malawi Communications Regulatory Authority (MACRA) occurred where lawyers from MACRA resisted efforts by the government to shut down the internet, and stated that while they believed Malawi law gave them the authority to shut off internet access, they did not think that it was necessary. There were also reports that the government was directly pressuring individual ISPs within the country to shut off access.¹³ On the day of elections, there were reports that several of the major internet arteries between Blantyre and Malawi were cut. NetBlocks reported a 20% decrease in internet activity in the three hours following the closure of the polls.¹⁴ The government stated both that there was no internet shutdown, and that vandals had cut lines that caused some services to be down temporarily.
15. The Malawi Communications Act¹⁵ establishes the Malawi Communications Regulatory Authority. In terms of section 189, a licensee who fails to comply with an order issued by the Authority under the Act can be held liable for an offence which could attract a fine or imprisonment up to five years. The Malawi High Court has however previously held that "a limitation [to fundamental rights] does not become legal merely because it came from MACRA or indeed any regulator".¹⁶

Recommendations

- a. The Malawi government should pass regulations to implement the Access to Information Act.
- b. The Malawi government should repeal the offences of sedition and publication of false news.

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- c. The Malawi government should repeal the offence of insulting the President.
- d. The Malawi government should protect communications services from any disruptions and interference which limits the rights to freedom of expression and access to information.

Right to Health

16. Despite the existence of a national SRHR strategy in Malawi, and the Gender Equality Act, which provides for access to sexual reproductive health rights services, abortion law in Malawi is unreformed and lags behind international and regional practice. Malawi has ratified the Maputo Protocol and CEDAW but has not put in place measures to comply with its obligations as far as access to safe abortion is concerned.
17. Abortion is punishable under the Penal Code, in terms of sections 149, 150 and 151 of the Penal Code as read with section 243 of the Penal Code. The only exception where abortion may be allowed is to “preserve life”. There are no guidelines or interpretation of the law to clarify the proper circumstances where that exception applies. Unlike some of its neighbours in the region, like Zambia and Zimbabwe, Malawi does not have a stand-alone law regulating abortion and abortion access. This creates a very dire situation in a country with a high prevalence of rape and sexual assault. There are One-Stop Centres that are designed to offer assistance to victims of gender-based violence, but because of the state of the law, rape survivors, for example, do not have automatic access to safe abortion should they fall pregnant as a result of the rape.
18. In 2015, the Malawi Law Commission reviewed abortion laws, and recommended liberal reforms that would enable girls and women to access safe abortion on various grounds, including if the pregnancy is a consequence of a sexual assault and if the physical or mental health of the pregnant woman would be at risk. It is not clear when the law will come before parliament for debate, in the face of widespread resistance on religious and moral grounds.
19. Health services in Malawi are also not designed to accommodate the specific health needs of adolescents and as a result when adolescents seek medical assistance, they often experience many barriers including stigma and judgemental attitudes from healthcare personnel. As a result more child friendly programmes and services in relation to adolescent health are required, as well as an increase in support for reproductive health and family planning services including access to affordable contraceptive methods.
20. In August 2019, the Ombud published a report detailing findings of an investigation into allegations of negligence in the provision of maternal health services in State hospitals.¹⁷ The Ombud found that the Ministry of Health had failed in its duty to provide adequate staffing, staff supervision and regulation, resulting in poor sanitation and staff breaches of the duty of care. Thus some women developed infections and ruptured uteruses resulting in the removal of their uteruses. The Ombud recommended, in the short term, public dissemination of the laws and policies pertaining to access and regulation of health services by the government, urgent remedial works at the public hospitals to improve sanitation and water supply, and the disciplining of all errant health personnel. In the longer term the Ombudsman recommended finalisation of the review of staffing requirements in the public health facilities and budgetary allocations for expansion and improvement of infrastructure

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to cater for Obstetrics and Gynaecology and also increase in budgetary allocations for health and supply of medicines.

Recommendations

- a. Finalise the abortion law before parliament to ensure access to safe abortions.
- b. Decriminalise abortions or reform the criminal law so as to provide for lawful access to safe abortion.
- c. Provision of youth friendly health services in health centres.
- d. Compliance with the Ombud's recommendations.

Access to HIV Treatment

21. The Malawi government has made significant strides in its response to HIV, particularly in expanding access to HIV testing, treatment, support and care. Malawi's enactment of the HIV and AIDS (Prevention and Management) Act in 2018¹⁸ further showed regional leadership in the Legislature's rejection of certain coercive and rights-infringing measures initially proposed.¹⁹
22. However, weak health systems infrastructure continues to constrain universal and sustainable access to HIV services and treatment for some of Malawi's most vulnerable populations. We note in particular, the links between climate change, environmental degradation, socio-economic distress and gender inequality that have adversely affected the abilities of communities living in and around ecologically-sensitive areas to safely and reliably access HIV treatment.
23. In a 2019 Report on HIV treatment access for people living in the Lake Chilwa area, prepared by the Coalition of Women Living with HIV/AIDS in Malawi (COWLHA), the Gender and Justice Unit, and SALC,²⁰ a number of recommendations were made to ensure that barriers of this nature are appropriately identified and addressed.

Recommendations

- a. The Malawi government should work with communities, people living with HIV and civil society to develop sustainable and human rights-affirming methods to facilitate access to HIV treatment and services that takes into account the syndemic relationship between HIV and environmental degradation and the particular impact of these phenomena on women and girls.

¹ The Summit report and recommendations is available at https://www.southernafricalitigationcentre.org/wp-content/uploads/2018/12/Southern-Africa-HRD-Summit-Statement-and-Report_Revised-May-2019.pdf

² <https://www.southernafricalitigationcentre.org/2019/08/02/urgent-statement-for-the-protection-of-human-rights-defenders-in-malawi/>

³ <https://malawi24.com/2019/09/20/supreme-court-rejects-kaphales-application-to-stop-anti-ansah-demos/>

⁴ *Attorney General v Gift Trapence, Timothy Mtambo, Malawi Human Rights Defenders Coalition*, MSCA Civil Appeal No. 55 of 2019, 30 September 2019.

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⁵ Section 137(3) of the Penal Code.

⁶ *Centre for Human Rights and Rehabilitation and Others v Speaker of the Malawi National Assembly and Another*, Case No. 14 of 2018.

⁷ <https://malawi24.com/2018/12/04/csos-stop-tabling-of-ngo-bill/>; <https://www.nyasatimes.com/ngo-bill-case-court-grants-csos-wish-for-judicial-review/>

⁸ Section 50 of Penal Code.

⁹ Section 60 of Penal Code. In 2017, a land rights activist, Vincent Wandale, was arrested and charged with the offence for declaring a secession of certain lands subject to political dispute. He was detained for a number of months under the charge before being granted bail, the conditions for which included a restriction on all travel and a “gag order” preventing him from making any statements on the matters to which his arrest refers. Two years since his arrest, his trial has still not commenced (as of 3 October 2019) and he remains subject to the restrictive bail conditions.

¹⁰ Section 4, Protected Flag, Emblems and Names Act of 1967 makes it an offence to insult the President: “Any person who does any act or utters any words or publishes or utters any writing calculated to or liable to insult, ridicule or to show disrespect to or with reference to the President, the National Flag, the Armorial Ensigns, the Public Seal, or any protected emblem or protected likeness, shall be liable to a fine of £1,000 and to imprisonment for two years.”

¹¹ <https://mwnation.com/mutharika-warns-rebels-of-arrests/>

¹² <https://www.nyasatimes.com/malawi-teacher-convicted-insulting-president-mutharika/>

¹³ <https://www.southernafricalitigationcentre.org/2019/05/21/malawi-the-internet-should-stay-on-to-help-ensure-a-free-and-fair-election-in-malawi/>

¹⁴ “Internet Disrupted in Malawi on Election Day” NetBlocks (2019) available at:

<https://netblocks.org/reports/internet-disrupted-in-malawi-on-election-day-Q8oOrl8n>

¹⁵ Act No. 34 of 2016.

¹⁶ *Kimu v Access Malawi Limited & Others* (Commercial Case No. 54 of 2011) MWCCommC 1 (02 May 2012).

¹⁷ Office of the Ombudsman, Woes of the womb: A report on an investigation into allegations of medical malpractices resulting in removal of uteruses from expectant women in public health facilities, August 2019, SYS/INV/2/2019, <http://www.ombudsmanmalawi.org/files/pdf/woes%20of%20the%20womb.pdf>

¹⁸ ActNo. 9 of 2018.

¹⁹ See a statement from civil society on the passage of the law available here:

<https://www.southernafricalitigationcentre.org/2018/02/13/news-release-our-bodies-our-rights-activists-welcome-the-passing-of-the-malawi-hiv-and-aids-prevention-and-management-act/>.

²⁰ See, for example the report by SALC, the Coalition of Women Living with HIV/AIDS (COWLHA) and the Gender and Justice Unit (2019), Linking Climate, Gender and HIV Justice, available at:

<https://www.southernafricalitigationcentre.org/wp-content/uploads/2019/06/Report-Final-May-2019.pdf>.