

# MALAWI

## 1. INTRODUCTION

Malawi is among the world's least developed and most densely populated countries. Established in 1891, the British protectorate of Nyasaland became the independent nation of Malawi in 1964. After three decades of one-party rule under President Dr. Hastings Kamuzu Banda and after intense local and international pressure, the country held multiparty elections in 1994, under a provisional constitution that came into full effect the following year.<sup>1</sup>

Apart from constitutional advances, the mid-1990s also saw a new age of press freedom in Malawi, with the success of new independent newspapers and radio broadcasters.<sup>2</sup> In addition Malawi experienced important transitions in the regulation of the national broadcaster through the establishment of the Malawi Communications Regulatory Authority (MACRA).<sup>3</sup>

The United Nations views civil society as necessary element to the maintenance of peace, security, and prosperity around the world.<sup>4</sup> The media is often considered a part of civil society<sup>5</sup> and the struggle for press freedom dates back to Eighteenth Century Britain and France. Today, the same struggle is taking place throughout the developing world in countries like Malawi.<sup>6</sup>

The Constitution of the Republic of Malawi provides that human rights and freedoms are the main feature of any democracy. It is founded first and foremost on democratic principles and it acknowledges the significant role that freedom of expression and information play in building a transparent and accountable government, it is not surprising then that the Constitution guarantees press freedom.<sup>7</sup>

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<sup>1</sup> Chirwa D *Human Rights under the Malawian Constitution* 1<sup>st</sup> ed. (2011) 1.

<sup>2</sup> Limpitlaw J *Media Law Handbook for Southern Africa* vol1. (2012) 161.

<sup>3</sup> Limpitlaw (2012) 161.

<sup>4</sup> Journalists for Human Rights *Human Rights Handbook for Journalists Malawi* (2003) 17

<sup>5</sup> According to Journalists for Human Rights (2003) 17, 'The media's role is linked to civil society because it, holds governments accountable, informs citizens about their rights, informs citizens truthfully about what is going on in their societies, educates citizens on democratic participation and creates a culture of space for debate'

<sup>6</sup> Journalists for Human Rights (2003) 17

<sup>7</sup> Section 36

So while Malawi follows mainly progressive constitutional principles, it is, true that certain laws which limit the ability of the press to inform the public about matters of the day, still exist. In some respects it may be argued that ‘the media environment in Malawi is not in accordance with international standards for democratic media regulation’.<sup>8</sup>

The following research study was launched by the regional secretariat of southern Africa (MISA) in February 2012 and partially conducted by its Malawi Chapter from 9<sup>th</sup> to 19<sup>th</sup> September in the same year. It is concerned with the laws that criminalise freedom of expression in Malawi specifically it is concerned with criminal Defamation (incl. libel) and insult laws as they appear in the Penal Code of Malawi,<sup>9</sup> as well as the Protected Flag, Emblems and Names Act.<sup>10</sup>

The respondents, who contributed a substantial part to the study, were selected randomly from a pool of lawyers, journalists and media managers (see 6.0 the situation on the ground). The facts and presentation of opinions in later parts of this country report remain the ideas of well-known and informed respondents on the subject matter.

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<sup>8</sup> Limpitlaw (2012) 161.

<sup>9</sup> Cap. 7:01 of the Laws of Malawi.

<sup>10</sup> Cap.18:03 of the Laws of Malawi.

## 2. LAWS GUARANTEEING FREEDOM OF EXPRESSION

Article 19 of the United Nations Human Rights Declaration states that, *‘Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers’*.

When it comes to the implementation of certain International Human Rights principles at the national level, governments usually do so through constitutions. Moreover Constitutions are most successful at upholding human rights when they define the rights in concrete terms and where there is a separation of power within the government.<sup>11</sup>

The Constitution of Malawi predominantly contains important provisions in Chapter IV that deal with “Human Rights”. Additionally, the Constitution contains a number of provisions, including provisions that protect the right to freedom of expression, the right to access to information, and the right to freedom of the press, which directly and indirectly protect the media.<sup>12</sup> These provisions also assist the media as it reports on issues in the public interest.<sup>13</sup>

### 2.1) Freedom of Expression

Article 19 (2) of the International Covenant on Civil and Political Rights (ICCPR) reads that... *“Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice”*.

States parties to the ICCPR are expected to guarantee the right to freedom of expression.<sup>14</sup> The right to freedom of expression includes ‘the expression and receipt of communications of every form of idea and opinion capable of transmission to others, subject to the provisions in article 19, paragraph 3, and article 20. It includes political discourse; commentary on one’s own and on

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<sup>11</sup> Journalists for Human Rights (2003) 17

<sup>12</sup> This includes publishers, broadcasters, journalists, editors and producers

<sup>13</sup> These rights include section 21 (privacy), section 32 Freedom of Association, section 34 (Freedom of opinion) section 37 (Access to Information), and section 43 (Right to administrative justice).

<sup>14</sup> Human Rights Committee, General Comment No.34 12 September 2011

public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse'.<sup>15</sup>

In Malawi freedom of expression is provided for by section 35 of the Constitution which states that '*every person shall have the right to freedom of expression.*'

This provision provides that:

- "All persons in Malawi are entitled to the enjoyment of the right of freedom of expression".<sup>16</sup>
- "Freedom of Expression is not limited to speech (oral or written) alone but also extends to non-verbal or non-written expression(s). There are many different interpretations of this, including physical expression (such as mime or dance), photography or other forms of art".<sup>17</sup>
- In addition to section 35, the Constitution also provides other rights that also protect freedom of expression either directly or indirectly.<sup>18</sup>

## 2.2) Access to Information

The United Nations General assembly holds that "*Freedom of information is a fundamental human right and [...] the touchstone of all freedoms to which the United Nations is consecrated.*"<sup>19</sup>

The right to access of information is linked to the right to hold, receive and impart opinions<sup>20</sup>, the right to freedom of expression and the right to freedom of the press.<sup>21</sup>

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<sup>15</sup> Human Rights Committee, General Comment No.34 12 September 2011

<sup>16</sup> Limpitlaw (2012) 165.

<sup>17</sup> Limpitlaw (2012) 165.

<sup>18</sup> Among these provisions which guarantee these rights are section 36 which provides for freedom of the press, section 34 which guarantees every person the right to right to freedom of opinion, including the right to hold opinions without interference to hold receive and impart opinions. To the extent that expression may take various forms, the Constitution also further guarantees freedom of expression by entitling everyone to freedom of assembly and demonstration, as well as the freedom to use the language and participate in the culture of his or her choice. See [Kanyongolo F Legal Regulation of Freedom Of Expression And The Media In Malawi \(2008\) 4](#).

<sup>19</sup> UN General Assembly, (1946) Resolution 59 (1), 65th Plenary Meeting, December 14. See also ADC 'Access to Information: An Instrumental Right For Empowerment' (2007) available at <http://www.article19.org/data/files/pdfs/publications/ati-empowerment-right.pdf> (accessed on 8th April 2013).

<sup>20</sup> 'Opinions are usually based on facts and evidence and may thus qualify as information'. Chirwa (2011) 364

Section 37 of the Constitution of Malawi reads that, *‘every person shall have the right of access to all information held by the State or any of its organs at any level of Government in so far as such information is required for the exercise of his rights’*.

‘All information held by the state or any of its organs’ as it is used in s37 of the Constitution seems to imply that the information envisaged need not only be information concerning any aspect of the state.<sup>22</sup>

The word ‘information’ as it is used in s37 is a wide-ranging expression that ‘may include the reasons for a decision, the decision itself, facts, data, documents and records, however stored and held’.<sup>23</sup>

It should be noted however that section 2(1) of the Access to Information Bill<sup>24</sup> provides that *‘information ’ means any material which communicates facts, opinions, data or any other matter relating to the management, administration, operations or decisions of a public authority, regardless of its form, characteristics or when it was created’*.

In addition to defining the term ‘information’ the Access to Information Bill under section 5 provides that “every person shall have the right of access to information which is under the control of a public authority.” In the same vein the in terms of section 2 of the Bill a ‘public authority’ is defined as *‘ including Government Ministries and Departments, National Assembly, local authorities, institutions where government is a majority shareholder, public*

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<sup>21</sup> Chirwa (2011) 364 see also ADC ‘Access to Information: An Instrumental Right For Empowerment’ (2007) available at <http://www.article19.org/data/files/pdfs/publications/ati-empowerment-right.pdf> (accessed on 8th April 2013).

<sup>22</sup> Chirwa (2011) 365

<sup>23</sup> Chirwa (2011) 365

<sup>24</sup> In 2003, the Media Institute of Southern Africa in along with other civil society organizations drafted an “Access to Information Bill in Malawi. The objectives of the Bill are, ‘providing for the right of access to information, defining the scope of information which the public has a right to access, establishing an (Independent) Public Information Commission and defining its functions and promoting transparency and accountability among public authorities.’ Sentala K *Access to Information Legislation in Malawi: A Paper Presented at the African Network for Constitutional Lawyers Symposium on Access to Information* (17-18 June 2008) available at [http://www.publiclaw.uct.ac.za/usr/public\\_law/.../ppai.doc](http://www.publiclaw.uct.ac.za/usr/public_law/.../ppai.doc) (accessed on 8 April 2013).

*corporations, quasi government organizations, courts and tribunals, private bodies carrying out public functions and religious and sporting organizations in receipts of public funds.*<sup>25</sup>

From the above it is clear that the Access to Information Bill in Malawi places a responsibility on public authorities to make available to the general public or, on request, any information which is under its control. In addition all public authority must ‘make available to the general public or, on request to any person access to its meetings and places where information may be obtained.’<sup>26</sup> Chirwa notes that, ‘The UN Special Rapporteur on the promotion of the right to freedom and opinion and expression has observed that the right to access to information cannot be limited simply because the release of particular information will embarrass the government’.<sup>27</sup> Reasons for limiting access to information must be clearly defined by law.<sup>28</sup>

Even though much mention has been given to the Access to information bill, it is important to note that since its inception in 2003 it has undergone a number of reviews from a wide range of stakeholders, including MPs, civil society organisations, government ministries and judicial officers, and has not yet been enacted into law.<sup>29</sup>

### 2.2.1. Why is the right to access of information important?

The right to access of information is important in Malawi because:

- ‘Accessible information is vital for citizens to make informed decisions and participate meaningfully in all matters of national interest’.<sup>30</sup> Simply access to public information guarantees meaningful participation in a democracy.<sup>31</sup>

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<sup>25</sup> Sentala K *Access to Information Legislation in Malawi: A Paper Presented at the African Network for Constitutional Lawyers Symposium on Access to Information* (17-18 June 2008) available at [http://www.publiclaw.uct.ac.za/usr/public\\_law/./ppai.doc](http://www.publiclaw.uct.ac.za/usr/public_law/./ppai.doc) (accessed on 8 April 2013).

<sup>26</sup> Sentala K *Access to Information Legislation in Malawi: A Paper Presented at the African Network for Constitutional Lawyers Symposium on Access to Information* (17-18 June 2008) available at [http://www.publiclaw.uct.ac.za/usr/public\\_law/./ppai.doc](http://www.publiclaw.uct.ac.za/usr/public_law/./ppai.doc) (accessed on 8 April 2013).

<sup>27</sup> Chirwa (2011) 365

<sup>28</sup> Chirwa (2011) 365 see also Misa *Research Report: Obstacles to Access to Information in Malawi* (2012) 13

<sup>29</sup> OSISA ‘Institutional Support and Campaign for Access to Info Legislation’ available at <http://www.osisa.org/hrdb/institutional-support-and-campaign-access-information-legislation> (accessed on 8th April 2013).

<sup>30</sup> OSISA ‘Institutional Support and Campaign for Access to Info Legislation’ available at <http://www.osisa.org/hrdb/institutional-support-and-campaign-access-information-legislation> (accessed on 8th April 2013). See also MISA *Research Report: Obstacles to Access to Information in Malawi* (2012) 1

- ‘The right for citizens to access public information exists in the Constitution of Malawi; Malawi is also a signatory to various United Nations’ charters regarding the access to information as a primary right. Malawi’s media environment should thus be conducive to accessing information’.<sup>32</sup>
- Access to information is necessary to public accountability it goes without saying that laws that shield government secrecy conceal abuses of power and corruption.<sup>33</sup>
- Access to information is particularly crucial to fostering a culture of human rights, this is because when a person has the information on which a decision was made, he/she might be able to appreciate the basis on which that decision was made and decide whether to accept or challenge it. Without such information, violations or abuses of human rights or power might go unnoticed.

### 2.3) Freedom of the Press

Guaranteeing freedom for the media around the world is a main concern for the International Human Rights Community.<sup>34</sup> This is because “independent, free and pluralistic media are central to good governance in democracies that are young and old, can ensure transparency, accountability and the rule of law; promote participation in public and political discourse, and contribute to the fight against poverty”.<sup>35</sup>

Even though freedom of the press is an important component of freedom of expression, it is recognised by the Constitution of Malawi as an independent right.<sup>36</sup> In terms of section 36 ‘*the press shall have the right to report and publish freely, within Malawi and abroad, and be accorded the fullest possible facilities for access to public information*’.

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<sup>31</sup> ‘It is not possible for people to make informed choices in a democracy or to contribute meaningfully and constructively to the affairs of the state if they know little or nothing about their government’. Chirwa (2012) 364

<sup>32</sup> OSISA ‘Institutional Support and Campaign for Access to Info Legislation’ available at <http://www.osisa.org/hrdb/institutional-support-and-campaign-access-information-legislation> (accessed on 8th April 2013).

<sup>33</sup> Chirwa (2011) 365

<sup>34</sup> United Nations *Press Freedom* available at <http://www.un.org/en/events/pressfreedomday/background.shtm> (accessed on 17th April 2013).

<sup>35</sup> United Nations *Press Freedom* available at <http://www.un.org/en/events/pressfreedomday/background.shtm> (accessed on 17th April 2013).

<sup>36</sup> Chirwa (2011) 360.

In terms of s36, the ‘press’ refers both to journalists individually and to media organisations as corporate bodies.<sup>37</sup> Press as it is used in s36 can also be understood to mean all forms of media—print, electronic, audio and visual.<sup>38</sup> Section 36 plainly states that the press has the right to report and publish freely within Malawi and abroad, because of this right it is argued that, the fact that a journalist has embellished a story or caused provocation is not enough to warrant limiting his or her right to freedom of the press.<sup>39</sup>

This effectively means that s36 provides:

- “For the protection of both the reporting rights and the publishing rights of the press”<sup>40</sup>
- “That the protection of both the reporting rights and the publishing rights of the press extends to the international media reporting on Malawi, both inside and outside of the country”<sup>41</sup>
- “That the political role of the press in providing information to the public is recognized in s.36 in that the press should be provided with access to public information”.<sup>42</sup>

### 3. LIMITATIONS ON FREEDOM OF EXPRESSION

Not all Human Rights and freedoms are absolute, meaning they are subject to certain limitations.<sup>43</sup> Freedoms are restricted for varying reasons, which include, reasons based on “public interest on grounds of national security, to preserve public order, to protect public health, to maintain moral standards, to secure due recognition and respect for the rights and freedoms of others or to meet the just requirements of the general welfare of a democratic society”.<sup>44</sup>

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<sup>37</sup> Chirwa (2011) 361.

<sup>38</sup> Chirwa (2011) 361 see *Alsojersid v Denmark* application No 15890/89 at para. 31.

<sup>39</sup> Chirwa (2011) 361. See also *Limbe v. Minister of Justice* (1993) 16 (1) MLR 249 (HC), where the banning of the Malawi Democrat, a campaign mouthpiece of the Alliance for Democracy (AFORD) in the run-up to the first democratic elections in Malawi was held to be an unjustifiable limitation on freedom of expression and information.

<sup>40</sup> Limpitlaw (2012) 165.

<sup>41</sup> Limpitlaw (2012) 166.

<sup>42</sup> Limpitlaw (2012) 166.

<sup>43</sup> Limpitlaw (2012) 164. See also BIHR “Human Rights in action—a toolkit for change” available at <http://www.bihar.org.uk/human-rights-in-action/chapter-3-different-rights-a-balancing-act>. (accessed on 2nd April 2013).

<sup>44</sup> Dr. Cooray M “Human Rights Aren’t Absolute” available at <http://www.ourcivilisation.com/cooray/btof/chap225.htm> (accessed on 2nd April 2013).



Governments need to be able to limit rights and freedoms in order to serve key societal interests; but this should be done in accordance with a constitution where the constitution is supreme.<sup>45</sup>

Although the right to freedom of expression is provided for in the constitution, it is not an absolute right in Malawi, which means in some instances it, can be restricted.<sup>46</sup>

Section 45(2) of the Constitution of Malawi provides that:

*“There shall be no derogation, restrictions or limitation with regard to-*

*a) The right to life;*

*b) The prohibition of torture and cruel, inhuman or degrading treatment or punishment;*

*c) The prohibition of genocide;*

*d) The prohibition of slavery, the slave trade and slave-like practices;*

*e) The prohibition of imprisonment for failure to meet contractual obligations;*

*f) The prohibition on retrospective criminalization and the retrospective imposition of greater penalties for criminal acts;*

*g) The right to equality and recognition before the law;*

*h) The right to freedom of conscience, belief, thought and religion and to academic freedom; or*

*i) The right to habeas corpus”*

In addition s44(1) provides 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 by law, which are reasonable, recognized by international human rights standards and necessary in an open and democratic society”.*

Essentially because the right to freedom of expression is not one of the rights listed under s.45 (2), limitations can be placed upon it through Acts of Parliament or government enacted laws in terms of s.44 (1).

A number of laws in Malawi place both criminal and civil restrictions on Freedom of Expression.<sup>47</sup> Examples of the criminal restrictions which this study is focused on include the

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<sup>45</sup> Limpitlaw (2012)

<sup>46</sup> Kondowe E *An Analysis Of The Role Of Courts In The Promotion Of Freedom Of The Press In Malawi Since 1994* (Unpublished Dissertation, University of Malawi 2009) 9.

Penal Code<sup>48</sup> which creates the offence of sedition,<sup>49</sup> publication of false news likely to cause fear and alarm to the public,<sup>50</sup> communication of false statements which may be published generally outside Malawi<sup>51</sup> and threatening violence.<sup>52</sup> In addition, the Censorship and Control of Entertainment Act<sup>53</sup> authorises the Censorship Board to ban any publication deemed to be undesirable<sup>54</sup> and makes it a criminal offence to import, print, publish or disseminate any publication which has so been declared.<sup>55</sup>

In light of the above legal restrictions, the question is, are the laws that restrict media in Malawi actively applied? In 2012, The United States' State Department released its annual human rights report and it noted that although 'Malawian law provided for freedom of speech and press; at times the government tried to limit these rights by sometimes threatening the use of colonial-era anti-sedition and treason laws to suppress any criticism'.<sup>56</sup>

It should be acknowledged, however, that there have been some developments under the leadership of the newly inaugurated President Joyce Banda, who called on members of Parliament in May 2012, to repeal laws that are repressive and deny Malawians their right to freedom of expression guaranteed by the Constitution. Following this statement, Section 46 of the Penal Code was repealed by Parliament on 30 May 2012 and signed by the president on 12 July 2012 and finally gazetted on 27 July 12.<sup>57</sup> Section 46 had given the Minister of Information 'absolute discretion' to 'prohibit the publication or importation of any publication' deemed 'contrary to the public interest'.

### 3.1 Laws Criminalizing Free Speech

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<sup>47</sup> Chirwa (2011) 358.

<sup>48</sup> The Penal Code, as amended in 2010, Chapter 7:01 of the Laws of Malawi.

<sup>49</sup> Section 50 and 51.

<sup>50</sup> Section 60.

<sup>51</sup> Section 60 A.

<sup>52</sup> Section 86.

<sup>53</sup> Cap 21:01 of the Laws of Malawi.

<sup>54</sup> Section 24.

<sup>55</sup> Section 23.

<sup>56</sup> U.S Department of State '2011 Human Rights Report: Malawi' available at <http://www.state.gov/j/drl/hrrpt/2011/af/186215.html> accessed on 19 March 2013.

<sup>57</sup> Section 46 Penal Code Amendment Act

Despite efforts to repeal certain laws that place a restriction on freedom of expression, laws, which criminalize free speech, including criminal defamation and insult, can still be found in the Penal Code of Malawi; as well as in the Protected Flag emblems and Names Act.

#### **a) The Penal Code, Act 22 of 1929**

Chapter XVIII of the Penal Code deals with defamation.

The chapter begins by defining criminal libel under section 200. Here the crime of Libel is constituted when *‘Any person who, by print, writing, painting, effigy, or by any means otherwise than solely by gestures, spoken words, or other sounds, unlawfully publishes any defamatory matter concerning another person, with intent to defame that other person’*.

In addition in terms of Section 201 of the Penal Code a defamatory matter *‘is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or likely to damage any person in his profession or trade by injury to his reputation. It is immaterial whether at the time of the publication of the defamatory matter the person concerning whom such matter is published is living or dead’*.

Section 51 of the Penal Code, which can also be found under the heading ‘Treason and other offences against the government’s authority’, provides that

*‘1) Any person who—*

*(a) does or attempts to do, or makes any preparation to do any act with a seditious intention;*

*(b) utters any seditious words;*

*(c) prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication;*

*(d) 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 £400 and to imprisonment for five years and for a subsequent offence to imprisonment for seven years; and any seditious publication shall be forfeited’*.

In addition in terms of section 50(1), one has a seditious intention when he or she intends to:

*‘(a) to bring into hatred or contempt or to excite disaffection against the person of the President, or the Government;*

*(b) to excite the subjects of the President to procure the alteration, otherwise than by lawful means, of any other matter in the Republic; or*

*(c) to bring into hatred or contempt or to excite disaffection against the administration of justice in the Republic; or*

*(d) to raise discontent or disaffection amongst the subjects of the President; or*

*(e) to promote feeling of ill-will and hostility between different classes of the population of the Republic’.*

An act however is not seditious if it is carried out with the intention to show that ‘i) the President has been misled or mistaken in any of his measures; or

(ii) to point out errors or defects in the Government or Constitution or in legislation or in the administration of justice with a view to the remedying of such errors or defects; or

(iii) to persuade the subjects of the President to attempt to procure by lawful means the alteration of any matter in the Republic; or

(iv) to point out, with a view to their removal, any matters which are producing or have a tendency to produce feelings of ill-will and enmity between different classes of the population of the Republic’.<sup>58</sup>

Like section 50, Section 60(1) of the Penal Code can also be found under the heading ‘Treason and other offences against the government’s authority’. It provides, that ‘*any person who publishes any false statement, rumour or report which is likely to cause fear and alarm to the public or to disturb the public peace shall be guilty of a misdemeanour*’.<sup>59</sup>

Section 61 of the Penal Code falls under the heading ‘Offences affecting relations with foreign states and external tranquility’, it reads that ‘*Any person who without such justification or excuse as would be sufficient in the case of the defamation of a private person publishes anything intended to be read, or any sign of visible representation, tending to degrade, revile or expose to hatred or contempt any 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, shall be guilty of a misdemeanour*’.

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<sup>58</sup> Section 50 (1) of the Penal Code

<sup>59</sup> section 60(2) however provides that, ‘It shall be a defence to a charge under subsection (1) if the accused proves that, prior to publication, he took such measures to verify the accuracy of such statement, rumour or report as to lead him reasonably to believe that it was true’.

### **b) The Protected Flag, Emblems and Names Act**

In terms of section 4 of the Protected Flag, Emblems and Names Act, it is an offence when, ‘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’.

### **c) Censorship and Control of Entertainments Act,<sup>60</sup>**

In terms of section 23(1) of the Censorship and Control of Entertainment Act,

‘1) Any person who—

(a) imports, prints, publishes, manufactures, makes or produces, distributes, displays, exhibits or sells or offers or keeps for sale any publication, picture, statue or record; or

(b) publicly plays any record, which is undesirable or which has, under section 24 been declared by the Board to be undesirable, shall be guilty of an offence’

Section 23(2)(b)(ii) provides that a publication will be deemed to be undesirable if it is ‘likely to bring any member or section of the public into contempt’.

In terms of section 32, the penalty for this offence is a fine and imprisonment.

## 3.2 Effects of Criminal insult and defamation laws on Media Freedom

It is suggested that laws, such as the ones illustrated above, in effect can, and in some instances do, punish editorial comment, political discussion and opposition from which a government wishes to exclude the public.<sup>61</sup> Insult laws, in particular, offers excessive protection to public officials from reporting and commentary, which deliberately aims to elevate officials above the citizens that they govern. ‘Having sought public office public officials are servants of the public and not their masters’ and are subject to a higher scrutiny.’<sup>62</sup>

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<sup>60</sup> Cap.21:01 of the Laws of Malawi.

<sup>61</sup> Delany S and Limitlaw J ‘Call for an insult law insults media freedom’ available at <http://www.blive.co.za/opinion/2012/12/18/call-for-an-insult-law-insults-media-freedom> accessed (2nd April 2013).

<sup>62</sup> Delany S and Limitlaw J ‘Call for an insult law insults media freedom’ available at <http://www.blive.co.za/opinion/2012/12/18/call-for-an-insult-law-insults-media-freedom> accessed (2nd April 2013).

The laws in Malawi that criminalise free speech are vague, for instance the meaning attached to words like ‘insult’, ‘ridicule’, ‘disrespect’, ‘degrade’, ‘revile’, ‘expose to hatred’, ‘contempt’, ‘peace and friendship’ is not clear and seems to be left up to interpretation.<sup>63</sup>

The scope of conduct generally as it appears within these laws is either ambiguous or too broad and the interests that these provisions seek to protect are not always clear. Criminal insult and defamation laws in Malawi may be used at any time to suppress the publication of news, information and mismanagement, corruption or abuse of power.

#### **4. LAWS GUARANTEEING DUE PROCESS**

Journalists who are accused of criminal defamation and insult are often subject to a violation of their due process rights. In particular, there are numerous complaints of ‘arrest and release’ tactics used by the police where a journalist has published information that is considered unfavourable to the ruling elite.

Malawi adopted a new constitutional order in 1995 which contains a bill of rights that is in line with international standards, it is for this reason that the criminal justice system in the country has aimed to uphold the fair trial and human rights standards set out in the Constitution. In addition the bill of rights has created substantial obligations for the state to ensure the full enjoyment of due process rights, in other words the rights a citizen is entitled to in terms of the treatment s/he receives while going through the normal judicial system.<sup>64</sup>

The criminal justice system in Malawi has strived to ensure full enjoyment of due process rights, and much progress has been made in reform efforts. For example, the recent amendment to the Criminal Procedure and Evidence Code (CPEC)<sup>65</sup> has brought fundamental changes to the law governing pre-trial custody time limits.<sup>66</sup> This amendment seems to be a practical step towards a significant reduction in the number of pre-trial detainees in Malawian prisons and is essentially built on the basis of constitutional guarantees of fair trial and personal liberty.<sup>67</sup>

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<sup>63</sup> Kanyongololo F ‘Legal Regulation of Freedom of Expression and the Media in Malawi’ (2008)

<sup>64</sup> Kayira P ‘The Legislative framework for pre-trial detention’ in OSISA Pre-trial Detention in Malawi: *Understanding caseload management and conditions of Incarceration* (2011)34-42.

<sup>65</sup> Amended by Act No.14 of 2010 CAP 8:01 of the laws of Malawi.

<sup>66</sup> Kayira (2011) 35.

<sup>67</sup> Kayira (2011) 35.

Notwithstanding the above, it is evident that the realisation of rights, such as the presumption of innocence and the right to be released on bail pending trial, difficulties in ensuring the speedy conclusion of criminal cases and the alarming numbers of pre-trial detainees remain challenges for the Malawian criminal judiciary.<sup>68</sup>

#### 4.1 Journalists, Arbitrary Arrest and the Right to Due Process

The Constitution forbids arbitrary arrest and detention; in spite of this, it is evident that the Malawian government does not always observe the prohibitions placed by law. In fact it is recorded that especially in 2011 the “government arbitrarily arrested persons, sometimes using colonial-era anti-sedition and treason laws to stifle criticism. Journalists were harassed, intimidated, and threatened with arrest...”<sup>69</sup>

According to a report in 2011 police assaulted and temporarily jailed reporter Kingsley Jassi of private media group Blantyre Newspaper Limited after he took photos of officers beating a man, and another police officer beat freelance journalist George Thawe with the butt of a gun six times.<sup>70</sup>

Also in 2011, after spending five days in prison the Malawi court released Nyasa Times online journalist Collins Mtika, arrested for covering Malawi's 20 July anti-government demonstrations. The Mzuzu senior resident magistrate court granted Mtika unconditional bail after police prosecutors failed to charge him with any offence.<sup>71</sup>

Mtika and over 60 others arrested for various offences, including unlawful assembly, appeared before different courts in Mzuzu and were represented by three lawyers that were hired by a civil society group to represent those arrested in connection with the demonstrations. It is reported that a lawyer representing the journalist, George Kadzipatike of Jivason & Company said it was

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<sup>68</sup> Kayira (2011) 35.

<sup>69</sup> UNHCR “2011 Country Reports on Human Rights Practices Malawi” available at <http://www.unhcr/refworld/publisher,USDOS,,MWI,ufc75a83c,o.html> (accessed on 22 March 2013)

<sup>70</sup> IFEX ‘Journalists arrested and attacked, media censored’ (2011) available at [http://www.ifex.org/malawi/2011/07/27/journalists\\_arrested/](http://www.ifex.org/malawi/2011/07/27/journalists_arrested/) (accessed on 20<sup>th</sup> March 2013)

<sup>71</sup> Gondwe G ‘Malawi: Court releases journalist unconditionally’ available <http://www.bizcommunity.com/Article/129/466/62241.html>. (accessed on 20 March 2013) see also The Malawi Democrat “Court Frees Nyasa Times Reporter, hundreds charged over riots” available <http://www.malawidemocrat.com/2011/07/26/court-frees-nyasa-times-reporter-hundreds-charged-over-riots/> (accessed on 19<sup>th</sup> March 2013).

a constitutional right for his client to be given bail since he had already spent over 48 hours in custody.<sup>72</sup>

In that same year, Independent "Nation" reporter Kondwani Munthali told the Committee to Protect Journalists (CPJ) that he was among a group of nine journalists who were beaten by police in a church in Lilongwe, a few journalists suffered severe head injuries while others remain in detention without charge.<sup>73</sup>

In early 2012, it was reported that a journalist with one of Malawi's major publishing houses, Blantyre Newspapers Limited, Clement Chinoko, was arrested for writing a story that appeared in *The Sunday Times* of 20 May 2012. Nicholas Gondwa a police spokesperson for the southern region confirmed the arrest saying "Chinoko has been charged with "conduct likely to cause breach of peace" and that he would be taken to court soon".<sup>74</sup> Reports indicate that by Monday 28 May 2012, Chinoko had not been released on bail or taken to court.<sup>75</sup>

In late 2012, an online editor for *Malawi Voice*, Justice Mponda was charged with libel, insulting the president and false publications. Mr. Mponda was arrested and taken to holding cells that were 300km's from his home where he had remained in custody for up to three days before he was charged and released on bail.<sup>76</sup>

#### 4.2 How does the law in Malawi protect against arbitrary arrest

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<sup>72</sup> Gondwe G 'Malawi: Court releases journalist unconditionally' available at <http://www.bizcommunity.com/Article/129/466/62241.html>. (accessed on 20 March 2013). See also Lee R 'Media under attack in Malawi' available at <http://www.osisa.org/media-and-ict/malawi/media-under-attack-malawi> (accessed on 20th March 2013).

<sup>73</sup> IFEX 'Journalists arrested and attacked, media censored' (2011) available at [http://www.ifex.org/malawi/2011/07/27/journalists\\_arrested/](http://www.ifex.org/malawi/2011/07/27/journalists_arrested/) (accessed on 20<sup>th</sup> March 2013)

<sup>74</sup> Xindex 'Malawi: Journalist arrested for article on same-sex marriage' available at <http://www.indexonensorship.org/2012/05/malawi-journalist-arrested-for-article-on-same-marriage/> (accessed on 19<sup>th</sup> March 2013) see also AllAfrica 'Malawi: Journalist Arrested for Article on Same-Sex Marriage' available at <http://www.allafrica.com/stories/201205290124.html> (accessed on 19th March 2012).

<sup>75</sup> Xindex 'Malawi: Journalist arrested for article on same-sex marriage' available at <http://www.indexonensorship.org/2012/05/malawi-journalist-arrested-for-article-on-same-marriage/> (accessed on 19<sup>th</sup> March 2013) see also AllAfrica 'Malawi: Journalist Arrested for Article on Same-Sex Marriage' available at <http://www.allafrica.com/stories/201205290124.html> (accessed on 19th March 2012).

<sup>76</sup> Kaonga V 'Malawi: Online Journalist Arrested for Allegedly Insulting the President' available at <http://www.globalvoices.org/2012/10/17/malawi-online-journalist-arrested-for-allegedly-insulting-the-president/> (accessed on 20<sup>th</sup> March 2013).



In terms of article 9 of the United Nations Universal Declaration of Human Rights no one may be subjected to arbitrary arrest, detention or imprisonment. In other words no one has the right to put you in prison, to keep you there, or to send you away from your country unjustly or without good reason.<sup>77</sup> All defendants have the right to a fair trial but in many countries, people are held without due process and prisoners are convicted in unfair trials.

#### 4.2.1. Who is entitled to due process rights in Malawi?

It is important to note that before a person can claim any due process right, he or she must fall within the definition of a ‘detained’, ‘accused’ and/or ‘arrested’ person.

In terms of Malawian law a detained person is defined as one who has been completely deprived of his or her liberty.<sup>78</sup> Detention evidently includes imprisonment or being placed in confinement or custody, but it does not necessarily entail incarceration, and may also occur in the open.<sup>79</sup> The difference between detention and arrest lies in the fact that a detention need not always occur in connection with criminal proceedings or charges it may occur for civil detention such as psychiatric reasons, rehabilitation from alcohol and drug abuse, public health reasons, and immigration control whilst ‘arrest’ entails a total loss of liberty in connection with a criminal offence and is thus a form of detention.<sup>80</sup>

Journalists who are arbitrarily arrested in Malawi fall within the meaning of a detained or an arrested person and are thus entitled to due process.

#### 4.2.2. What are due process rights in Malawi?

Section 42 of the Constitution provides for what are collectively known as fair trial rights and extends these to people in detention giving everyone the right:

- To be charged within 48hrs

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<sup>77</sup> Office of the United Nations High Commissioner for Human Rights ‘The working group on Arbitrary Detention: Fact sheet no.26’ available at <http://www2.ohchr.org/english/about/publications/docs/fs26.htm> (accessed on 25 March 2012).

<sup>78</sup> *Tembo v. Attorney General* (1995) 1 MLR.

<sup>79</sup> *Kanyemba v. Malawain Hotels Ltd* (1991) 14 MLR 157, 162 (HC).

<sup>80</sup> Chirwa (2011) 417.

This right involves being promptly brought to a court after arrest. The right to be promptly brought to court is made up of three independent rights: the right to be brought before an independent and impartial court of law within 48 hrs of arrest; the right to be charged or informed of the reasons for continued detention; the right to be released from detention.<sup>81</sup> This requirement provides for an opportunity for the detained person to be charged without delay or at least to be informed of the reasons<sup>82</sup> for his arrest.<sup>83</sup> In addition, it is an opportunity for the state to continue detaining a suspect with the authorisation of the court, in that way ensuring that such detention is lawful. Furthermore, it offers the court an early opportunity to assess the evidence against a suspect and whether there is any justification whatsoever for continued detention.<sup>84</sup>

- To be released where the arrest is unlawful

Section 42 (1) (f) of the Constitution provides that a detained person has the right to be released if his or her detention is unlawful. Even though this section does not state when the release must happen, the importance of the right to personal liberty would require that the release takes place without delay, and not at the convenience of the state.<sup>85</sup>

- To be presumed innocent and the right to bail

The right of a suspect to be presumed innocent is an important aspect of a fair criminal justice system.<sup>86</sup> This is a right that influences the treatment an accused person experiences from the investigation to the trial to the final appeal.<sup>87</sup>

In Malawi an accused person is presumed innocent by the law until his or her guilt has been proved in a court of law and a court should grant bail to an accused unless this is likely to prejudice the interests of justice, it should not withhold bail as a form of punishment.<sup>88</sup> An

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<sup>81</sup> Kayira (2011) 35.

<sup>82</sup> Read together with the right to personal liberty and the right to freedom and security of the person enshrined in sec18 and 19 (6) of the constitution respectively, that constitutes a minimum guarantee of procedural fairness for persons deprived of their liberty... Chirwa (2011) 417.

<sup>83</sup> Chirwa (2011)417.

<sup>84</sup> Chirwa (2011)417.

<sup>85</sup> Chirwa (2011) 422.

<sup>86</sup> Kayira (2011) 36.

<sup>87</sup> Kayira (2011) 36.

<sup>88</sup> Amon Zgambo v Republic MSCA Criminal Appeal No.11 of 1998 (unreported).

accused person is also presumed innocent until he or she pleads guilty to the offence they are charged with.

The granting of bail in Malawi is governed by the Constitution, the Criminal Procedure and Evidence Code (CPEC)<sup>89</sup> and the Bail (Guidelines) Act.<sup>90</sup> In terms of these laws a detained person can be granted bail either by the police or by the courts.

- The Right To Be Tried Within A Reasonable Time

In terms of s42 (1), all accused people have the right to be tried within a reasonable time.

- The Right To Consult With A Legal Practitioner

Section 21 (1) (c) of the Constitution protects three interrelated rights relating to legal representation.<sup>91</sup> The first right is the right to be informed promptly of the right to consult with a legal practitioner of ones' choice, here it is assumed that the accused is entitled to be informed of this right at time of arrest or detention or as soon as is reasonably possible thereafter.<sup>92</sup>

The second right is the right to consult confidentially with a legal practitioner of one's choice, and this right does not apply only when a person can afford a legal practitioner but also when he or she is represented by state counsel.<sup>93</sup> And the third is the right to be provided with the services of a legal practitioner by the state 'where the interests of justice so require'.<sup>94</sup>

- The Right To Challenge One's Detention

In terms of section 42 (1) (e) of the Constitution every detained person has the right to challenge the lawfulness of his or her detention in person or through a legal practitioner before a court of law. This right is critical to guaranteeing the protection of the right to personal liberty and it gives expression to the idea that a person cannot be arbitrarily deprived of his or her liberty.<sup>95</sup>

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<sup>89</sup> As amended by Act No.14 of 2010, Chapter 8:01 of the Laws of Malawi see section 118.

<sup>90</sup> Bail (Guidelines) Act 2000, Chapter 8:05 of the Laws of Malawi.

<sup>91</sup> Chirwa (2011) 421.

<sup>92</sup> Chirwa (2011) 421.

<sup>93</sup> Chirwa (2011) 421.

<sup>94</sup> Chirwa (2011) 421.

<sup>95</sup> Chirwa (2011) 422.

Section 42(1) (e) unconditionally protects the right to freedom from indeterminate detention. Meaning that the state has no obligation to justify any form of detention, and any failure by it to provide the means by which a detained person can challenge his or her detention may constitute a violation of s 42(2) (e), read with s18 of the Constitution which enshrines the right to personal liberty.<sup>96</sup> Section 42(1) (e) does not expressly require the state to assist a detained person to challenge his or her detention.<sup>97</sup>

#### 4.3. Conclusion

Like freedom of expression and freedom of the press, due process rights can be restricted or limited in terms of Section 44(1) of the Constitution of Malawi but these limitations should be prescribed by law in accordance with the Constitution.

The Constitution of Malawi emphasizes that ‘Laws prescribing restrictions or limitations shall not negate the essential content of the right or freedom in question shall be of general application’.<sup>98</sup>

Although due process rights are provided by the Constitution, journalists still find themselves being arbitrarily arrested and are kept incarcerated for longer than 48hrs without being charged. They are not always given reasons either for their detention.

### **5. CASE LAW ON FREEDOM OF EXPRESSION IN MALAWI**

Sometimes journalists find themselves in disagreements with private individuals, politicians, other people in positions of authority and institutions, because of the kind of work they do.<sup>99</sup> In many instances, such disagreement usually leads to them being taken to court. This in itself is argued to be a threat to freedom of the press.<sup>100</sup>

There are most likely a good number of decided cases that relate directly to the topic at hand but which cannot be accessed due to the fact that they have not yet been reported in the Malawi Law

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<sup>96</sup> Chirwa (2011) 422.

<sup>97</sup> However According to Chirwa (2011) 422, ‘the right to challenge one’s detention would be meaningless if the state was not obliged to assist detainees, for example, by providing stationary, relevant legal materials and transportation, tracing witnesses and facilitating access by the detainee to his or her family or legal representatives.’

<sup>98</sup> Section 44(2).

<sup>99</sup> Kanyongololo F ‘Legal Regulation of Freedom of Expression and the Media in Malawi’ (2008)

<sup>100</sup> Kanyongololo F ‘Legal Regulation of Freedom of Expression and the Media in Malawi’ (2008)

Reports or because they are difficult to obtain from the courts where they were decided. For this reason this study has been limited to a few decided criminal libel cases that the researcher was able to access.

1. Makande & Kamlepo Kaluwa v Republic Criminal Appeal Case No.15 of 2009 (unreported)

The high court quashed the convictions of the appellants on charges of sedition and inciting violence in connection with utterances they made at a political rally in the run-up to the 2009 presidential and parliamentary elections. It held that statements made during electoral campaigns must be interpreted knowing that candidates and their supporters aim to persuade the electorate to vote for them or the people they support, and that exaggerations and emotional or inflammatory language will often be employed. It therefore held that the use of the words 'aka kangwazi' by one of the defendants in reference to the incumbent President Bingu wa Mutharika was not seditious or intended to demean the president.

1. Chakufwa T Chihana v. Republic Criminal Appeal No 2 of 1992 (unreported)<sup>101</sup>

In Chakufwa T Chihana v. The Republic, the appellant a freedom fighter was convicted in the High Court of importing and possessing seditious publications.

On appeal to the Malawi Supreme Court of Appeal, it was held that ss50 and 51 of the Penal Code, which created the offence of sedition and under which the appellant was convicted, were not unconstitutional. Furthermore, the court found that the criticism of the way in which the government under the one-party regime was run was seditious and could thus not be protected as free speech irrespective of whether it was fair or based on correct facts.

2. Republic v. Mabvuto Banda, Raphael Tenthani And Horace Nyaka

There is a sustained attack on press freedom in Malawi. In 2005, a journalist Mabvuto Banda of *The Nation Newspaper* and Raphael Tenthani of the British Broadcasting Corporation (BBC) were both arrested for writing that President Bingu wa Mutharika was not spending nights at the

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<sup>101</sup> Chirwa (2011) 358.

State House because it was haunted by ghosts<sup>102</sup>. Another journalist, Horace Nyaka, who worked for the Vice-President, was arrested on suspicion of having conspired with the two journalists to write the story<sup>103</sup>.

The above mentioned journalists were arrested on March 15<sup>th</sup> 2005 in Blantyre and were taken to the capital Lilongwe. Mabvuto Banda, Raphael Tenthani and Horace Nyaka were working for *The Nation* newspaper, BBC and the office of the State Vice President respectively and were charged with ‘publishing false information that is likely to cause breach of peace’ and defamation. The arrest was based on speculation that the president (late Bingu Wa Muthalika) was being haunted by ghosts in the state house. As such their stories attracted a law suit under the Protected Flag and Emblems Act. The story was regarded as an insult to the late President.

The arrest saw many human rights activists joining hands with MISA-Malawi in organising a solidarity march, calling for the release of the three journalists. MISA-Malawi hired a lawyer for Tenthani and Nyaka while *The Nation* hired a lawyer for Banda.

The three journalists were finally released.

For full alert; [www.misa.org](http://www.misa.org) march 15, 2005.

### 3. Republic v. Alex Moses (Black Moses)

The police took into custody Alex Moses, the president of an organisation known as Youth for Freedom and Democracy (YFD) on grounds that he published and distributed a publication which the police claimed was seditious.

According to police, the publication known as the ‘political update’ was insulting the late President Bingu Wa Mutharika. Moses was being hunted alongside Robert Chasowa, the organisation’s vice-president. Chasowa was also an engineering student at University of Malawi’s Polytechnic.

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<sup>102</sup> This was reported by both *The Nation* and the BBC, see <http://www.news.bbc.co.uk/2/hi/Africa/4350667.stm>. See also Ntata Z *Trappings of Power: Political Leadership in Africa* (2012) 72.

<sup>103</sup> This was reported by *The Daily Times* and by the Zodiak Broadcasting Station. See also the article on [http://www.ifex.org/malawi/2005/03/18/journalists\\_ordered\\_to\\_report\\_to/](http://www.ifex.org/malawi/2005/03/18/journalists_ordered_to_report_to/).

Chasowa was found dead on 24 September 2011 at the college campus. It is against this background therefore that the death and arrest of Chasowa and Moses respectively was politically motivated.

For full alert; [www.misa.org](http://www.misa.org) September 26, 2011

#### 4. Republic v. Gabriel Kamlomo

Gabriel Kamlomo, the then online editor for Zodiak Broadcasting Station (ZBS) was arrested on Tuesday morning of 7 July, 2008 for publication of what the police said was false information likely to cause public fear and alarm, contrary to section 60 (1) of the Penal Code.

For full alert; [www.misa.org](http://www.misa.org) July 2009

## **6. OBSERVATIONS FROM QUESTIONNAIRES**

A questionnaire designed to establish the practical situation for journalists on the ground was administered to a group of 16 respondents, which comprised four (4) lawyers, five (5) media managers and seven (7) journalists from various media houses in Malawi.<sup>104</sup>

In general the questionnaires indicate that Malawian media practitioners have varying degrees of knowledge in terms of the actual application of defamation and insult laws, or the threat thereof. Some of the practitioners questioned have examples at hand whilst others think that there have not been any defamation or libel cases for decades.

Although Journalists in Malawi are aware of the existence of criminal defamation and insult laws, not many understand criminal defamation laws in detail, especially with regard to how such laws are applied by the courts and very few journalists and media houses have legal representation, while others depend on MISA Malawi and the Media Council of Malawi for protection.

Some of the practitioners interviewed suggested that even though media practitioners face threats of litigation on numerous occasions, the intervention of media bodies like MISA-Malawi and

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<sup>104</sup>See Annexure I-VII for selected Questionnaires

Media Council of Malawi make the issues to be resolved quietly and amicably. In other instances, they sometimes comply with demands of the complainant to withdraw stories. In other cases, they offer an apology.

The questionnaires highlight the view that criminal defamation laws have resulted in extreme self-censorship, thereby denying the media their right to report or publish freely. Media houses in Malawi have different editorial policies, which ensure both media transparency and accountability and at the same time trying to avoid law suits, which arise from criminal defamation and insult laws. It seems some participants are of the view that some criminal defamation cases are deliberately instituted for monetary gains by some sectors of society just to rip off media houses.

Generally, the consensus seems to be that there is need for an intensive campaign to repeal criminal defamation and insult laws in Malawi in a bid to have a free media environment.

## **7. CONCLUSIONS AND RECOMMENDATIONS**

### **7.1 Conclusion**

Criminal Defamation and Insult laws breach the guarantee of freedom of expression.

Malawi has a Constitution that explicitly protects freedom of speech and freedom of expression and although these freedoms are subject to certain limitations, it goes without saying that these limitations must be made or given in light of the Constitution.

Criminal defamation and Insult laws are the secular equivalent of blasphemy and apostasy laws.<sup>105</sup> The laws used to criminalise freedom of expression in Malawi have no clear objective or standard. It appears that they are designed to punish truths, falsehoods, statements of opinion and factual assertion.<sup>106</sup>

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<sup>105</sup> Delaney S and Limpitlaw J 'Call for an insult law insults media freedom' available at <http://www.bdlive.co.za/opinion/2012/12/18/call-for-an-insult-law-insults-media-feedom>. (accessed on 2nd April 2013).

<sup>106</sup> Prof Walden R 'Insult Laws: An Insult to Press Freedom' (2000) available at <http://www.wpfc.org/site/docs/pdf/Insultlaws-text.pdf> (accessed on 2nd April 2013).



When Joyce Banda was sworn in as Malawi's new president on April 7 2012, following two days of political uncertainty after the sudden death of the late Bingu wa Mutharika, there was much hope for a fresh start for Malawi. Her government has pledged to take and has taken positive steps to create a better media freedom environment, including signing the repeal of section 46 of the Penal Code (Amendment) Act.

However notwithstanding the achievement made by President Banda's government in terms of repealing "bad laws", it must be remembered that so far under her term in office, Justice Mponda an online journalist was charged with criminal libel, insulting the President and false publications using the very same outdated insult and criminal defamation laws that still exist in Malawi and that were used under the rule of Bingu wa Mutharika.

Daniel Nyirenda, deputy editor of *The Daily Times* and editor of *The Business Times*, notes, 'it will take more than a transition of power to translate into improved media freedom'.<sup>107</sup> While it is true that in Malawi criminal defamation and insult laws are rarely used, and there are few reported criminal cases in this respect, the fact that these laws still appear in the legislative books, means that journalists still face the threat of arbitrarily being arrested should they print or write a story that is understood correctly or incorrectly, to define or be about any member of government.

## 7.2 Recommendations

This study has shown that journalists, media workers and experts are aware of the existence of criminal defamation laws. These laws have, to a certain extent, affected the operations of the media. Realising the need to protect the media and members of the public from criminal defamation and insult laws, media bodies such as MISA-Malawi and the Media Council of Malawi, in collaboration with human rights groups, have played a pivotal role in ensuring media freedom and freedom of expression in Malawi in the past.

These bodies will continue to campaign for the repeal of criminal defamation and insult laws. Here's what is required, in order to further support the cause:

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<sup>107</sup> Gall K "Press Freedom in Malawi" available at <http://www.thestar.blogs.com/africa/2012/05/succession-uncertainty-journalists-unconvinced-transition-of-presidentialpower-alone-will-translate.html> (accessed on 20th March 2013).

- There is an increased need for awareness among journalists, media workers, government the judiciary and civil society on the existence of criminal defamation and insult laws in Malawi
- A repeal act should be adopted by government repealing provisions that criminalise free speech in Malawi in line with the rights guaranteed by the Constitution of Malawi
- MISA Malawi in partnership with other like-minded bodies should continue campaigning for the repeal of criminal defamation and insult laws
- MISA should make concrete efforts to provide publications and other relevant documents on criminal defamation and insult laws to media houses across the country.

## ANNEXURE I

The following table by Fidelis Edge Kanyongolo provides a summarised analysis of the legal provisions that criminalise free speech in Malawi and has been restricted to criminal defamation and insult laws only. It looks at the effects such laws have and the proposed changes that can be made in this regard.

<b>Legal Provision</b>	<b>Effect on Media Freedom</b>	<b>Suggested Changes</b>
Penal Code (Cap. 7:01): Section 113 (d) makes it an offence for any person to use any speech or writing which may prejudice any person in favour of, or against, any party in pending judicial proceedings, or is calculated to lower the authority of any person who is due to preside over judicial proceedings.	The section does not make exception for circumstances in which the public interest in freedom of the press and freedom of expression outweigh the fair trial interests of individual parties in pending judicial proceedings or persons presiding over judicial proceedings.	Amend the section, in order to allow publication if it is in the public interest, notwithstanding that the publication has a prejudicial effect on the interests of the parties due to preside over the proceedings.
Protected Flag, Emblems and	The State interests that the	The Provision should be

<p>Names Act (Cap.18:03):</p> <p>Section 4 makes it an offence to “do any act or utter any words or publish or utter any writing calculated to insult, ridicule or to show disrespect’ to the President, the national flag, armorial ensigns, the public seal or any other protected emblem or likeness.</p>	<p>provision seeks to protect are not clear. In an open and democratic society, highly critical and unflattering comments about the President or national symbols must be permitted. Yet the provision could easily be used to criminalize such comments through expansive interpretation of rather vague and overly broad terms such as “insult”, “ridicule” or “disrespect”</p>	<p>repealed</p>
<p>Penal Code (Cap.7:01):</p> <p>Section 60A makes it an offence, punishable by up to five years imprisonment, to publish any false statement, information, report or rumour outside Malawi. Any news which may be harmful to the interests or “to the good name of Malawi.”</p>	<p>“...harmful to the interests or to the good name of Malawi” is too subjective a test to be the basis of a reasonable limitation of the human rights to freedom of the press and freedom of expression.</p>	<p>Repeal the provision</p>
<p>Penal Code (Cap.7:01):</p> <p>Section 61 makes it an offence punishable by a fine and imprisonment for up to two years, for any person to publish anything tending to</p>	<p>The key concepts in the provision such as “degrade, revile or expose to hatred and contempt” and “peace and friendship between Malawi and (other countries)” are too vague and broad to be</p>	<p>Repeal the provision</p>

<p>“degrade, revile or expose to hatred and contempt” any foreign prince, potentate, ambassador or other foreign dignitary with intent to disturb the peace and friendship between Malawi and the country to which the foreign personality belongs.</p>	<p>considered reasonable limitations of freedom of the press.</p> <p>In any case, the provision is redundant since other laws such as that of defamation, conduct likely to cause a breach of the peace are available for use to protect whatever legitimate interest the state has in the circumstances envisioned by the provision.</p>	
<p>Penal Code (Cap.7:01): Section 60 makes it a criminal offence to publish any false statement, rumour or report that is likely to cause fear or alarm among the public or disturb the public peace.</p>	<p>The scope of conduct prohibited by the provision is so broad that the provision is inconsistent with the constitutional guarantee of the right to freedom of the press. The prohibition cannot be necessary in an open and democratic society, in which publishers of falsehoods may be sued or be subjected to professional ethical sanctions.</p>	<p>Repeal the Provision</p>
<p>Penal Code (Cap.7:01): Section 182 prohibits the use of insulting language in a manner likely to provoke another person to breach the peace or to commit any</p>	<p>“insulting language” is so broad that it makes the provision inconsistent with the Constitution’s guarantee of freedom of the press and freedom of expression. In any</p>	<p>Repeal the provision</p>

offence against the person. Courts have attempted to limit the scope	case, conduct likely to cause a breach of the peace is already provided for under the penal code.	
Penal Code (Cap 7:01): The criminal offence of criminal libel is created by section 200 of the Code and consists of publishing defamatory material in written or some other permanent form.	Criminalizing libel is an unnecessary limitation of freedom of the press and freedom of expression, particularly since any person who alleges that he or she has been libelled may sue for compensation.	Repeal the provision and sections 201-206 which provide for various aspects of the crime.

**ANNEXURE II**



**Media Institute of Southern Africa (MISA Regional Secretariat)**

**Questionnaire**

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**PROJECT TITLE: THE REPEAL OF CRIMINAL DEFAMATION**

**AND INSULT LAWS IN THE SADC REGION**

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In regard to criminal defamation and public insults, which laws are currently in place in your country?

- ***The Protected Names and Emblems Act.***
- ***Defamation***

How are these laws practically affecting the people on the ground, at their workplaces and in the field?

***There are several human rights violations and mal administration tendencies among duty bearers towards rights holders. It is usually difficult to take them to task and let them account for their actions.***

How are they affecting the operations of journalists, i.e. the reporting and publishing of possibly defamatory or offensive material?

***Mostly people have tended to abuse the Defamation Law such that when journalists report on malpractices down by people in authority they tend to threaten to sue them for defamation. Usually this is done with intentions of intimidating the journalists against reporting on issues that touch on their integrity vis a vis their discharge of duties.***

Would you say that media practitioners in your country are actually aware of the implied dangers that come with such laws? (Please substantiate your answer)

***Yes they are. Where some media managers have emphatically spoken on this, there have been attempts by media practitioners to meet senior government officials, politicians and other individuals in authority.***

Are media practitioners in your countries regularly faced by threats of litigation?

***Not very regularly.***

What has been the practical experience on the ground, how do media practitioners deal with upcoming threats and who usually supports them?

***Most media houses have company lawyers who represent them when sued. They can also find solace from various media organisations like the Journalists Union of Malawi, Media Council of Malawi and the Media Institute of Southern Africa – Malawi Chapter, who can help connect them with relevant legal authorities and institutions.***

Should a threat of litigation be turned into a reality, is legal representation affordable? Are legal aid practices in place in your country?

***Legal representation is not affordable and media houses struggles if they are to go through any such process through the courts. Legal aid services are available but are not usually the best option because, due to capacity limitations they usually have a huge workload and tend to delay provision of legal services.***

**ANNEXURE III**



**Media Institute of Southern Africa (MISA Regional Secretariat)**

**Questionnaire**

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**PROJECT TITLE: THE REPEAL OF CRIMINAL DEFAMATION**

**AND INSULT LAWS IN THE SADC REGION**

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In regard to criminal defamation and public insults, which laws are currently in place in your country?

**With the greatest respect, there is no offence or anything in Malawi called “Criminal Defamation”. The terminology of “criminal defamation” is therefore incorrect and inappropriate. The offence created by section 200 of the Penal Code in Malawi is called, “Criminal Libel”. For this proposition, see the case of *Rep –Vs- Mbisa 1991 14MLR 434 (HC)*.**

**However, the law on defamatory matters is contained under Chapter XVIII of the Penal Code, (Sections 200-207) Cap. 7:01 of the Laws of Malawi.**

**On insults, the law is contained in Section 4 of the Protected Flag, Emblems and Names Act, Cap. 18:01 of the Laws of Malawi.**

How are these laws practically affecting the people on the ground, at their workplaces and in the field?

**They make them to engage in excessive negative self-censorship for those that are aware of them. However, some journalists and citizens do not seem to care about them and they get away with anything. In recent past, these laws have not been enforced by state authorities.**

**However, there are some reported cases on criminal libel in the “Malawi Law Reports”, which shows that the law on “Criminal Libel” was used especially in the 1990s.**

**I cannot however remember any recent case or cases on criminal libel against journalists or media practitioners.**

**On insulting laws, I also cannot remember any recent case or cases where it was applied. However, the late President Bingu wa Mutharika threatened to use the Protected Flag, Emblems and Names Act especially the section that creates the offence of ‘insulting the President’ to protect himself against persons who were allegedly insulting him in social media. He died without invoking it.**

How are they affecting the operations of journalists, i.e. the reporting and publishing of possibly defamatory or offensive material?

**I have no direct information on this. However, I would be quick to point out that ordinarily, journalists are not supposed to report and publish defamatory or offensive material against any person. I am not aware of any journalist in Malawi who has been charged with the offence of ‘criminal libel’ or insulting the President in recent times. Please, refer to my answer in question 2.**

Would you say that media practitioners in your country are actually aware of the implied dangers that come with such laws? (Please substantiate your answer)

**I think they are aware. They have been advocating for their repeal for quite some time now arguing that such laws are not necessary in a democratic state and that they are a legacy of the colonialists. As I said to you, you also need to engage with the mischief that these laws are trying to cure. Why were**



**they enacted? If they are repealed as suggested, are there enough safeguards to achieve the purpose for which they were enacted? Is repeal the right strategy? Or challenging their constitutionality in court would be the right strategy?**

Are media practitioners in your countries regularly faced by threats of litigation?

**Litigation or prosecution? In everyday parlance, litigation is understood in the context of civil cases while prosecution is criminal, hence the question since the research is supposedly on “Criminal Defamation”. Litigation in the sense of civil cases then, yes, several threats in fact. We read and see many of such threats. If “litigation” is understood in the sense of “criminal” then I am not aware of any such threats.**

What has been the practical experience on the ground, how do media practitioners deal with upcoming threats and who usually supports them?

**Supporting them in terms of what? Moral support? Financial support?**

**In cases of threats of a civil nature as I understand, ‘litigation’, they sometimes comply with demands of the complainant to withdraw stories. In other cases, they offer an apology. In other cases, they settle the matter through an out-of-court settlement. Some media houses do pay for legal fees incurred in defending a media practitioner. In other cases, MISA MALAWI has a small fund which may be used for defending media practitioners in court. In yet other cases, MISA MALAWI urges complainants to refer the threats to them or Media Council of Malawi for appropriate action. Morally, the media practitioners visit each other in prison or police cells and report or cover stories of their colleague or colleagues.**

Should a threat of litigation be turned into a reality, is legal representation affordable? Are legal aid practices in place in your country?

**Legal representation is affordable and not affordable. Some media houses have legal counsel that can defend media practitioners in courts of law in which case, the legal counsel may not have to be paid separately for the defence as it is part of his or her job. Legal representation may not be affordable if the individual media practitioner will be expected to raise all the fees by himself. Legal Aid Practice is in place in Malawi. However, it is heavily inundated with clients such that the quality of legal services offered is compromised.**

## ANNEXURE IV



### Media Institute of Southern Africa (MISA Regional Secretariat)

#### Questionnaire

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**PROJECT TITLE: THE REPEAL OF CRIMINAL DEFAMATION**

**AND INSULT LAWS IN THE SADC REGION**

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In regard to criminal defamation and public insults, which laws are currently in place in your country?

**Section 200 of the Malawi Constitution is probably the major law on defamation. In theory it is considered criminal if you defame someone protected by law while the rest is treated as civil. The fines are pretty harsh as the cases of Moto Publications, the Democrat, etc indicate.**

How are these laws practically affecting the people on the ground, at their workplaces and in the field?

**Though not many people have sued and succeeded, media have withdrawn or withheld stories after following threats of litigation. This implies that not the whole truth is told and not all the facts are known by the public.**

**A form of censorship exists in Malawi out of fear of defamation. In the early days of Malawi's return to democracy, several newspapers folded as a result of defamation. One example is the Democrat.**

How are they affecting the operations of journalists, i.e. the reporting and publishing of possibly defamatory or offensive material?

**Journalists are hypersensitive about what to write. Editors are more of monitors against defamatory stories than coaches. Recently a column was removed from the Nation newspapers reportedly because the editor was irked and feared the president might withdraw advertising.**

Would you say that media practitioners in your country are actually aware of the implied dangers that come with such laws? (Please substantiate your answer).

**Yes. Since 1994 journalists in Malawi have been trained in laws that potentially would curtail their freedom. Although I don't have quantitative data, several stories are withdrawn or withheld. The number and frequency of apologies needs to be studied consistently to ascertain the level of knowledge as expressed through withdrawn stories.**

Are media practitioners in your countries regularly faced by threats of litigation?

**Yes.**

What has been the practical experience on the ground, how do media practitioners deal with upcoming threats and who usually supports them?

**By withdrawing and withholding stories and by often consulting lawyers for direction on whether to publish or not. Apart from MISA Malawi, and Human Rights groups, no major institution exists to legally support journalists.**

Should a threat of litigation be turned into a reality, is legal representation affordable?

**Legal representation is not cheap. That is why in most cases, editors just withhold or remove or apologize for stories that carry any indication of defamation related litigation.**

Are legal aid practices in place in your country?

Yes. There is an ill-staff and underfunded department of legal aid, whose track record is difficult to describe.

## ANNEXURE V



### Media Institute of Southern Africa (MISA Regional Secretariat)

#### Questionnaire

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**PROJECT TITLE: THE REPEAL OF CRIMINAL DEFAMATION**

**AND INSULT LAWS IN THE SADC REGION**

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In regard to criminal defamation and public insults, which laws are currently in place in your country?

***-There's a law attached to emblems and national flag, to do with insulting the head of state (Malawi's 1967 Protected Names, Flags and Emblems Act prohibits any person from insulting or ridiculing Malawi's flags, emblems and 'protected names', which include the name of a sitting president).***

***Heads of state have used this to clamp down on journalists e.g. fallen president late Bingu wa Mutharika on the ghost story by Raphael Tenthani and Mabvuto Banda.***

***-The other law was recently repealed and it had something to do with banning publications deemed in bad taste by Information Minister. There were also proposals to have journalists tried under traditional courts for defamation issues.***

***DEFAMATION OF FOREIGN PRINCES — PENAL CODE, ACT 22 OF 1929***

***'Offences affecting relations with foreign states and external tranquility'. It essentially makes it an offence to publish anything tending to degrade, revile, expose to hatred or contempt any foreign prince, potentate, ambassador or other foreign dignitary with intent to disturb the peace and friendship between Malawi and that person's country.***

How are these laws practically affecting the people on the ground, at their workplaces and in the field?

***-Just like the Zuma cartoon caused a stir in RSA, the ghost story ruffled some feathers at House No.1 to the extent that the two journalists behind the story ended up in jail.***

How are they affecting the operations of journalists, i.e. the reporting and publishing of possibly defamatory or offensive material?

***In light of the recent oil exploration tirade between Malawi and Tanzania, the media was now and again being cautioned to choose words carefully when covering the issue which I feel made things a bit uncomfortable for most media houses. This only exposed that certain laws such as DEFAMATION OF FOREIGN PRINCES — PENAL CODE, ACT 22 OF 1929 need to be reviewed.***

Would you say that media practitioners in your country are actually aware of the implied dangers that come with such laws? (Please substantiate your answer)

***They are definitely aware as such matters are incorporated in the media curriculum of most institutions of higher learning (Media Ethics and Media Law) and bodies such as the Malawi Human Rights Commission have in the past held sensitization meetings for the media.***

Are media practitioners in your countries regularly faced by threats of litigation?

***Yes, most media practitioners have been threatened with litigation on numerous occasions, only that at times, the issues are resolved amicably, especially with the intervention of Media Council of Malawi***

What has been the practical experience on the ground, how do media practitioners deal with upcoming threats and who usually supports them?

***Most media houses have dealt with cases on their own, especially with support from their legal counsel (identified by the Media Houses themselves). Though others might have shown solidarity, they seldom offer material support such as provision of legal counsel especially where the scribes involved are freelance***

Should a threat of litigation be turned into a reality, is legal representation affordable? Are legal aid practices in place in your country?

***I feel legal representation is not quite affordable for most media practitioners, especially considering that their salaries or earnings are just too little to afford them the services of a lawyer. The same can be said for most media houses who do not have a special fund in case of lawsuits.***

ANNEXURE VI



**Media Institute of Southern Africa (MISA Regional Secretariat)**

**Questionnaire**

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**PROJECT TITLE: THE REPEAL OF CRIMINAL DEFAMATION**

**AND INSULT LAWS IN THE SADC REGION**

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In regard to criminal defamation and public insults, which laws are currently in place in your country?

***There are many political attached suits that are brought forth to the work of journalist in Malawi. Some of them include Protected Names, Flags and Emblems Act (1967) which prohibits the insulting the national flags president and other emblems. However it is noted over time and again that these laws are applied with a motive behind mostly political.***

***Also the penal code, chapter 18 & 22 OF 1929 checks the defamatory statements made by other persons as a suit in the court of law.***

How are these laws practically affecting the people on the ground, at their workplaces and in the field?

***These laws i.e. Protected Names, Flags and Emblems Act and penal code, chapters 18 & 22 affect the reporting in general in the Malawi as journalist are afraid to report a complete story, cant access information or are sometimes detained or are told that they will be sucked out of work.***

***Mostly the laws may be also be influenced by political and socio-economic vendettas which tend to affect the stories and media agendas in Malawi.***

How are they affecting the operations of journalists, i.e. the reporting and publishing of possibly defamatory or offensive material?

***The news that journalist write is not balanced, incomplete and does not have impact on the audience.***

***The audience cannot make a well informed decision as they have untimely news due to fears the journalist has to publish a possible defamatory statement.***

***Coverage of issues is biased towards the people who the reporter fears most i.e. in the current situation reporters are a bit scared to write the negative of people's party which is the ruling party. But they write all sorts of stories about the democratic progressive party which is the former ruling party. This is one of the reasons that have greatly affected the operations of Malawi Broadcasting Cooperation (MBC) as a public broadcaster.***

Would you say that media practitioners in your country are actually aware of the implied dangers that come with such laws? (Please substantiate your answer)

***Yes, as they write with conscious minds. For example, in the recent Tanzania-Malawi Lake Malawi boundary wrangle the president called upon media houses managers to advise them on how they can comment of the issue in order not to incite violence. Also on 20<sup>th</sup> July 2011, the media houses were also told not to broadcast live on the mass demonstration which led to almost 20 people being killed. The media houses in the two instances are afraid to lose adverts from government or even getting banned or revoke their licenses if they do not a bid to the directives from government.***

***All in all editors, producers and reporters are aware of such challenges and they consider them as they carry on their duties from day to day.***

Are media practitioners in your countries regularly faced by threats of litigation?

***Yes, media practitioners face threats of litigation on numerous occasions, but the intervention of media bodies like MISA-Malawi and Media Council of Malawi make the issues to be resolved quietly and amicably.***

What has been the practical experience on the ground, how do media practitioners deal with upcoming threats and who usually supports them?

***Like I said in question above; media bodies help media house and journalist if they happen to be in such situations. Also they consult their private lawyers to pursue the cases, though it is quite expensive for an individual journalist of a freelancer journalist.***

Should a threat of litigation be turned into a reality, is legal representation affordable? Are legal aid practices in place in your country?

***Yes. There is underfunded department of legal aid, whose track record is difficult to describe. But it provides that minimal support. But surely most media houses seek their own expensive legal counsel.***

## **ANNEXURE VII**



## **Media Institute of Southern Africa (MISA Regional Secretariat)**

### **Questionnaire**

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**PROJECT TITLE: THE REPEAL OF CRIMINAL DEFAMATION**

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In regard to criminal defamation and public insults, which laws are currently in place in your country?

**Criminal defamation statutes still remain in Malawi books. There is also the Protected Names, Emblems and Flags Act, that still criminalises, for example, the negative references to the President.**

How are these laws practically affecting the people on the ground, at their workplaces and in the field?

**Obviously, they affect work in the public domain, e.g. media and politics**

How are they affecting the operations of journalists, i.e. the reporting and publishing of possibly defamatory or offensive material?

**The distinction between honest criticism and assessment of those in office, e.g. the President and insults is very blur; hence creating fear from journalists and other social commentators.**

Would you say that media practitioners in your country are actually aware of the implied dangers that come with such laws? (Please substantiate your answer)

**Yes, they are aware and oftentimes they would shun direct criticism of those in authority or engage in heated debates in the newsroom on how they should refer to the authorities**

Are media practitioners in your countries regularly faced by threats of litigation?

**At Nation Publications, we get litigation all the time, but it is always a factor of having the facts and managing the legal processes that is a challenge and it takes much of our time**

What has been the practical experience on the ground, how do media practitioners deal with upcoming threats and who usually supports them?

**The major source of litigation is those in power, ministers and MP in particular, as well as some touchy, unscrupulous businessmen. We use our lawyers and support ourselves. Namisa has been useful in the past, especially in defending individual journalists, but the fund dried up.**

Should a threat of litigation be turned into a reality, is legal representation affordable? Are legal aid practices in place in your country?

**Litigation is real in Malawi. The fees are exorbitant, but when you are in business you cost this and factor it into your budget. The only problem is that it disturbs the cash-flow. That is where external help can be handy**