



Malawi

1 Introduction

The Republic of Malawi is a densely populated country of approximately 19 million people.¹ The country was a British protectorate from 1891–1964 when it gained full independence from the United Kingdom. Malawi became a republic with a one-party system of government in 1966 when a range of constitutional changes was made. The then-president, Dr Hastings Kamuzu Banda, remained in power until the early 1990s when, bowing to intense local and international pressure, a national referendum was held in which nearly two-thirds voted for a multiparty system. A new constitution was enacted in 1994, and it includes a chapter on human rights, essentially a bill of rights.

The mid-1990s also heralded a new era of press freedom in Malawi, with independent newspapers and radio broadcasters flourishing in the urban centres. There have been significant changes in the regulation of the national broadcaster and, more broadly, by the establishment of the Malawi Communications Regulatory Authority. It is, however, true that several acts of parliament, as well as certain judicial rulings and regulations, continue to limit the ability of the press to inform the public about matters of the day. This is despite the Malawi Growth and Development Strategy, which ostensibly sees human rights ‘as a critical element of governance’² and obliges the Malawian government to protect both media freedom and freedom of expression. There is little doubt that, in certain respects, the media environment in Malawi is not in accordance with international standards for democratic media regulation.

Malawi is one of the world’s least developed countries³ with 50.7%⁴ of the population living below the poverty line and 25%⁵ of the population living in extreme poverty. Only 12.7%⁶ of the population has access to electricity, and a paltry 13%⁷ has access to the internet. But Malawi is one of only four Southern African Development Community (SADC) countries that have transitioned from analogue terrestrial television to digital terrestrial television (DTT).⁸ It was able to do this because the country had only eight transmitters which covered 80% of the population and so it was relatively easy, given the small number of transmitters, to transition to DTT.⁹

Political instability in Malawi has been highlighted recently with the country’s Supreme Court of Appeal upholding a lower court annulment of the May 2019 presidential election, won by the incumbent, Peter Mutharika. The court upheld the annulment saying that evidence of rigging was so widespread and blatant that ‘the integrity of the result was severely compromised’.¹⁰ The court ordered that Malawi hold a fresh presidential election in May 2020. The period immediately following the court order was characterised by further political instability which created difficult working conditions for journalists with reports of attacks on journalists by opposition protesters and by police.¹¹

The presidential election rerun was held in June 2020 and the leader of the opposition alliance, Lazarus Chakwera, was declared the winner.¹²

In this chapter, working journalists and other media practitioners will be introduced to the legal environment governing media operations in Malawi. The chapter is divided into five sections:

- ▶ Media and the constitution
- ▶ Media-related legislation
- ▶ Media-related regulations
- ▶ Media self-regulation
- ▶ Media-related case law

This chapter aims to equip the reader with an understanding of the main laws governing the media in Malawi. The hope is to encourage media law reform in Malawi, to enable the media better to fulfil its role of providing the public with relevant news and information better, and to serve as a vehicle for government-citizen debate and discussion.

2 The media and the constitution

In this section, you will learn:

- ▷ the definition of a constitution
- ▷ what is meant by constitutional supremacy
- ▷ how a limitations clause operates
- ▷ which constitutional provisions protect the media
- ▷ which constitutional provisions might require caution from the media or might conflict with media interests
- ▷ what key institutions relevant to the media are established under the Malawian Constitution
- ▷ how rights are enforced under the constitution
- ▷ what is meant by the ‘three branches of government’ and ‘separation of powers’

- ▷ whether any obvious weaknesses in the Malawian Constitution ought to be amended to protect the media

2.1 Definition of a constitution

A constitution is a set of rules that are fundamental to the country, institution or organisation to which they relate. For example, you can have a constitution for a soccer club or a professional association, such as a press council. Such constitutions set out the rules by which members of the organisation agree to operate. However, constitutions can also govern much larger entities, indeed, entire nations.

The Malawian Constitution was published in 1994 and came into force permanently in 1995; the Malawian Constitution has been amended several times since its adoption, most recently in 2010.¹³ The constitution sets out the basic rules for Malawi. These are the rules on which the entire country operates. The constitution contains the underlying principles, values and laws of Malawi. A key constitutional provision in this regard is section 12, which sets out the underlying values on which the Malawian Constitution is founded. In brief, these are the following

- (a) *The authority of the state derives from the people of Malawi, and state authority is exercised only to serve and protect their interests.*
- (b) *The authority of the state is conditional on the sustained trust of the people of Malawi, which trust can be maintained only through open, accountable and transparent government and informed democratic choice.*
- (c) *The inherent dignity and worth of all human beings require the state to recognise and protect fundamental human rights.*
- (d) *The only justifiable limitations on lawful rights are those necessary to ensure peaceful human interaction in an open and democratic society. All institutions and persons shall observe and uphold the constitution and the rule of law, and no institution or person shall stand above the law.*
- (e) *Every individual has duties to, among other things, other individuals, his or her family and society and the state. This includes the duty to respect others without discrimination, to exercise individual rights and freedoms with due regard to the rights of others, collective security, morality and the common interest.*

Importantly, section 13 of the Malawian Constitution also sets out principles of national policy that the state is to implement through legislation and other means. These are a statement of aspirational goals in areas including gender equality, nutrition, health, the environment, rural life, education, persons with disabilities, children, the family, the elderly, international relations, peaceful settlement of

disputes, the administration of justice, economic management, public trust and good governance.

2.2 Definition of constitutional supremacy

Constitutional supremacy means that the constitution takes precedence over all other law in a particular country, for example, legislation or case law. It is important to ensure that a constitution has legal supremacy. If a government passed a law that violated the constitution (was not in accordance, or conflicted, with a constitutional provision) such law could be challenged in court and could be overturned because it is 'unconstitutional'.

The Malawian Constitution makes provision for constitutional supremacy. Section 5 specifically states that 'any act of government or any law that is inconsistent with the provisions of this constitution shall, to the extent of such inconsistency, be invalid'.

2.3 Definition of a limitations clause

2.3.1 State of emergency derogations

Section 45(3) of the Malawian Constitution specifically provides for the derogation of human rights contained in Chapter IV during a state of emergency, except for a list of non-derogable rights set out in section 45(2). It is important to note that freedom of expression and access to information rights are not listed as non-derogable.

Section 45(3) specifically provides that the rights to, among others, freedom of expression and information may be derogated from during a declared state of emergency, provided this is not inconsistent with Malawi's obligations under international law and is strictly required:

- ▶ to prevent the lives of defensive combatants and civilians as well as legitimate military objectives from being placed in direct jeopardy in war or threat of war
- ▶ for the protection and relief of people in a widespread natural disaster.

2.3.2 General limitations

The second type of limitation is a general limitations provision. General limitations provisions apply to the provisions of a bill of rights or other statement setting out the fundamental rights. These types of clauses allow a government to pass laws limiting rights generally, provided this is done in accordance with the constitution.

The general limitations clause applicable to the chapter on human rights is found in section 44 of the constitution, Limitations on Rights. Section 44(1) provides that:

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, recognised by international

human rights standards and necessary in an open and democratic society.

The constitution also specifically states in section 44(2) that a limitation of human rights, such as the right to freedom of expression ‘shall not negate the essential content of the right or freedom in question’.

2.4 Constitutional rights that protect the media

The Malawian Constitution contains several important provisions in Chapter IV, Human Rights, which directly protect the media, including publishers, broadcasters, journalists, editors and producers. There are other provisions elsewhere in the constitution that assist the media as it goes about its work of reporting on issues in the public interest. These are also included in this section.

2.4.1 Freedom of expression

The most important basic provision that protects the media is Section 35, which states that: ‘every person shall have the right to freedom of expression’. This provision needs some explanation.

- ▶ This freedom applies to every person and not just to certain people, such as citizens. Hence, everybody enjoys this fundamental right.
- ▶ The freedom is not limited to speech (oral or written) but extends to non-verbal or non-written expression. There are many different examples of this, including physical expression (such as mime or dance), photography or art.

2.4.2 Freedom of the press

Linked to the right to freedom of expression but of more explicit importance for the media is Section 36, which provides that ‘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’.

This provision is very important because:

- ▶ it specifically and explicitly protects both the reporting and publishing rights of the press
- ▶ these reporting and publishing rights extend, not only to national media but also to the international media reporting on Malawi, both inside and outside the country
- ▶ the political role of the press in providing information to the public is recognised in the injunction that the press is to be provided with access to public information.

2.4.3 Access to information

Another critically important provision that protects the media is Section 37, which enshrines the right of access to information:

Every person shall have the right of access to 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 or her rights.

This right requires some explanation.

- ▶ The right of access is about state-held information and does not apply to information held by private individuals or corporations.
- ▶ The right exists only where the information is required for the exercise of another right. Consequently, there is no standalone right of access to state-held information. A person (or a member of the press) does not have an inherent right of access to state-held information and would have to show that the information is required for the exercise of some other right before being entitled to that information.

In an information age, where states wield enormous power, particularly concerning the distribution of resources, the right of access to information is one of the most important rights in ensuring transparency and holding public power — that is, government — accountable. If one considers that the media plays an enormous role in ensuring transparency and government accountability by providing the public with information, having this right of access to information is critical to enable the media to perform its functions properly. Unfortunately, the right of access to information in the Malawi Constitution is limited in the respects set out above, but it must be said that these limitations are not uncommon.

2.4.4 Right to administrative justice

Another important provision that protects the media is section 43, Administrative Justice. Section 43(a) provides that 'every person shall have the right to lawful and procedurally fair administrative action, which is justifiable concerning reasons given where his or her rights, freedoms, legitimate expectations or interests are affected or threatened'. Section 43(b) provides that: 'every person shall have the right to be furnished with reasons, in writing, for administrative action where his or her rights, freedoms, legitimate expectations or interest are affected'.

This right requires explanation. The reason why this provision is important for journalists and the media is that it protects them (as it does all people) from administrative officials who act unfairly and unreasonably and who do not comply with legal requirements. It also entitles them to written reasons when administrative action affects their rights or interests.

An administrative body is not necessarily a state body. These bodies are often private or quasi-private institutions. These constitutional requirements would, therefore, apply to non-state bodies too.

Many decisions taken by such bodies are administrative. This requirement of administrative justice is a powerful one, which prevents or corrects unfair and unreasonable conduct on the part of administrative officials. Furthermore, having a constitutional right to written reasons is a powerful tool in ensuring rational and reasonable behaviour on the part of administrative bodies, and aids in ensuring transparency and, ultimately, accountability.

2.4.5 Privacy

A fifth protection is contained in Section 21 of the constitution, Privacy. Section 21 specifies that every person has the right to personal privacy, which includes the right not to be subject to:

- ▶ searches of his or her person, home or property
- ▶ the seizure of private possessions
- ▶ interference with private communications, including mail and all forms of telecommunications.

In particular, the protection against seizure (of notebooks and cameras, for example) and the protection of communications (including letters, emails, telefaxes and telephone conversations) is an important right for working journalists.

2.4.6 Freedom of opinion

A sixth protection is contained in Section 34, which guarantees every person the right to freedom of opinion, including the right to hold, receive and impart opinions without interference. This freedom to hold and impart opinions is critical for the media as it protects commentary on public issues of importance. Importantly, the right also protects the public's right to receive opinions held by others, including the media.

2.4.7 Freedom of association

A seventh protection is provided for in Section 32, which grants every person the right to freedom of association, including the right to form associations.

This right, therefore, guarantees the rights of the press to form press associations, but also to form media houses and operations.

2.5 Other constitutional provisions that assist the media

There are provisions in the Malawi Constitution, apart from the human rights provisions, that assist the media in performing its functions.

2.5.1 Provisions regarding the functioning of parliament

Several provisions in the constitution regarding the functioning of parliament are important for the media. These include the following:

- ▶ Section 56(5), which specifically provides that the National Assembly shall give access to the press and members of the public, except where a motion is passed with reasons prohibiting public access in the national interest.
- ▶ Section 60(1), which specifically protects the speaker, any deputy speaker and every member of the National Assembly. Effectively, they cannot be sued civilly or criminally in respect of any utterance that forms part of the proceedings of the National Assembly.
- ▶ Section 60(2), which specifically gives privileged status to all official reports and publications or proceedings of parliament and any of its committees.

These provisions assist the media in two critical ways: First, they ensure that the media has a great deal of access to the workings of parliament — that is, the media is physically able to be in parliament. Second, they protect parliamentarians. The provisions allow members of parliament (MPs) and other people participating in parliamentary proceedings to speak freely during parliamentary proceedings, in front of the media, without facing arrest or civil proceedings for what they say.

2.5.2 Provisions regarding national policy on transparency and accountability

One of the important principles of national policy is Section 13(o) of the constitution, which requires the state ‘to introduce measures which will guarantee accountability, transparency, personal integrity and financial probity and which by virtue of their effectiveness and visibility will strengthen confidence in public institutions’.

There can be little doubt that the media plays a crucial role in assisting in making governmental action accountable and transparent, as well as in educating the population to participate meaningfully in a democracy. These provisions could, therefore, be interpreted as requiring media-friendly policies on the part of the state.

2.6 Constitutional provisions that might require caution from the media or might conflict with media interests

Just as there are certain rights or freedoms that protect the media, other rights or freedoms can protect individuals and institutions from the media. Journalists need to understand which provisions in the constitution can be used against the media. There are a number of these in the Malawi Constitution.

2.6.1 Right to dignity

The right to human dignity is provided for in section 19(1), which states that ‘the dignity of all persons shall be inviolable’. Dignity is a right that is often raised in defamation cases because defamation, by definition, undermines the dignity of the person being defamed. This right is one that is often set up against the right to freedom of the press, requiring a balancing of constitutional rights.

2.6.2 Right to privacy

Similarly, the right to privacy provided in section 21 (discussed above), is often raised in litigation involving the media, with subjects of press attention asserting their rights not to be photographed, written about, followed in public, and so on. The media does have to be careful in this regard and should be aware that there are always boundaries in respect of privacy that need to be respected and which are dependent on the particular circumstances, including whether the person is a public figure or holds public office, as well as the nature of the issue being dealt with by the media.

2.6.3 States of emergency provisions

It is also vital to note the provisions of section 45 of the Malawi Constitution, which deals with derogations and public emergencies, and which have already been dealt with above under the discussion on limitations.

2.7 Key institutions relevant to the media established under the Constitution of Malawi

Several important institutions concerning the media are established under the constitution, namely, the judiciary, the Judicial Service Commission (JSC), the Ombudsman and the Human Rights Commission.

2.7.1 The judiciary

In terms of section 103(2) of the Malawi Constitution, the judiciary shall have jurisdiction over all issues of judicial nature. It shall have exclusive authority to decide whether an issue is within its competence.

Chapter IX of the constitution sets out the hierarchy of courts in the country. In brief, these are:

- ▶ the Supreme Court of Appeal (the apex court), section 104
- ▶ the High Court, section 108
- ▶ the magistrates' courts and any other court established in terms of an act of parliament, section 110.

The judiciary is an important institution for the media as the two rely on each other to support and strengthen democratic practices in a country. The judiciary needs the media to inform the public about its judgments and its role as one of the branches of government, and the media is essential for building public trust and respect for the judiciary, which is the foundation of the rule of law in society. The media needs the judiciary because of the courts' ability to protect the media from unlawful action by the state and unfair damages claims by litigants.

Section 103(1) specifically provides that: 'all courts and all persons presiding over

those courts shall exercise their powers, functions and duties independent of the influence and direction of any other person or authority’.

Judges are appointed by the president, acting on the recommendation of the JSC, section 111(2). However, the Chief Justice is appointed by the president and confirmed by the National Assembly by two-thirds majority vote, section 111(1).

The Chief Justice appoints magistrates on the recommendation of the JSC, section 111(3).

The president removes judges in consultation with the JSC and after a motion passed by a majority of the National Assembly calling for the judge to be removed on the grounds of incompetence or misbehaviour, section 119(3).

2.7.2 The Judicial Service Commission

The JSC is a constitutional body established to participate in the appointment and removal of judges. The JSC is relevant to the media because of its critical role in the judiciary, the proper functioning and independence of which are essential for democracy.

In terms of section 117 of the Malawi Constitution, the JSC is made up of the Chief Justice, the chairperson of the Civil Service Commission, a judge or judge of appeal designated by the president after consultation with the Chief Justice, and such legal practitioner or magistrate designated by the president after consultation with the Chief Justice. Unfortunately, the president (albeit after consultation with the Chief Justice) has an enormous amount of say as to who sits on the JSC. The JSC in Malawi is therefore not particularly independent of executive influence.

2.7.3 The Ombudsman

The Ombudsman is important for the media because it, too, is aimed at holding public power accountable. The Ombudsman is established in terms of Chapter X of the Malawi Constitution. The main function of the Ombudsman is to:

investigate any and all cases where it is alleged that a person has suffered injustice and it does not appear that there is any remedy reasonably available by way of proceedings in a court ... or where there is no other practicable remedy — section 123(1).

In terms of section 125(c) of the Malawi Constitution, the Ombudsman is entitled to similar protection and privileges as are enjoyed by members of parliament. In terms of section 122, an ombudsman is appointed by the Public Appointments Committee of the National Assembly, after a public nominations process.

2.7.4 The Human Rights Commission

The Human Rights Commission is an important organisation in respect of the media. It is established in terms of Chapter XI of the Malawi Constitution. In terms of section 129 of the constitution, its primary functions are ‘the protection and

investigation of violations of the rights accorded by this constitution or any other law'.

Members of the Human Rights Commission are the Ombudsman, the law commissioner (also a constitutional office) and such persons nominated by organisations, which both the law commissioner and the Ombudsman believe to be reputable organisations representative of Malawian society, and which are concerned with human rights issues. The president officially appoints such persons after they have been referred to him by the law commission and the Ombudsman, section 131.

2.8 Enforcing rights under the constitution

A right is only as effective as its enforcement. All too often, rights are enshrined in documents such as a constitution or a bill of rights, and yet remain empty of substance because they cannot be enforced.

Section 15(1) of the Malawi Constitution provides that:

The human rights and freedoms enshrined in this Chapter [being Chapter IV] shall be respected and upheld by the executive, legislature, judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Malawi and shall be enforceable in the manner prescribed in this Chapter.

Section 15(2) provides that:

Any person or group of persons with sufficient interest in the promotion, protection and enforcement of rights under this Chapter shall be entitled to the assistance of the courts, the Ombudsman, the Human Rights Commission and other organs of Government to ensure the promotion, protection and enforcement of those rights and the redress of grievance in respect of those rights.

Section 15(1) of the constitution makes it clear that the chapter on human rights applies to all branches of government and all organs of government. Furthermore, it makes it clear that Chapter IV also binds a natural person (an individual) or juristic or legal person (such as a company) if a particular right is applicable in the circumstances.

While rights are generally enforceable through the courts, the constitution itself also envisages the right of people, including of the media, to approach a body such as the Ombudsman or the Human Rights Commission to assist in the enforcement of rights.

Perhaps one of the most effective ways in which rights are protected under the Malawi Constitution is by the provisions that entrench human rights. Section 196 of the constitution requires that a constitutional amendment to any of the provisions of Chapter IV either:

- ▶ be ratified by a majority vote in a referendum of the people of Malawi, as certified by the Electoral Commission; or
- ▶ be ratified by a two-thirds vote of the members of the National Assembly, where the speaker of the National Assembly has certified that the amendment would not affect the substance or effect of the constitution.

The effect of this is that amendments, for example, to clarify wording in Chapter IV could be passed by a two-thirds National Assembly vote. However, where parliament wanted to take away a right altogether or to diminish its protections, a national referendum supporting the proposed amendment would need to take place.

2.9 The three branches of government and separation of powers

It is generally recognised that governmental power is exercised by three branches of government, namely the executive, the legislature and the judiciary.

2.9.1 Branches of government

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The executive

In terms of section 88 of the Malawi Constitution, executive power vests in the president. Practically, the president exercises executive power with the Cabinet. In terms of section 92 of the constitution, the Cabinet consists of the president, the first and second vice-presidents and such ministers and deputy ministers as are appointed by the president.

Section 89 sets out the functions of the president as:

- ▶ assenting to and promulgating bills passed by parliament
- ▶ conferring honours
- ▶ making appointments
- ▶ granting pardons
- ▶ proclaiming referenda
- ▶ referring constitutional disputes to the high court
- ▶ answering questions in parliament
- ▶ generally exercising powers of his office.

Section 96 sets out the functions of the Cabinet as:

- ▶ advising the president
- ▶ directing, coordinating and supervising the activities of government departments
- ▶ directing, coordinating and supervising the activities of parastatal bodies
- ▶ initiating bills for submission to parliament
- ▶ preparing the state budget
- ▶ answering questions in parliament
- ▶ being responsible for the implementation and administration of laws.

Section 7 of the Malawi Constitution summarises the role of the executive as being 'responsible for the initiation of policies and legislation and for the implementation of all laws which embody the express wishes of the people of Malawi and which promote the principles of this constitution'.

The legislature

Legislative (that is, law-making) power in Malawi vests, in terms of section 48(1) of the Malawi Constitution, in parliament. In terms of section 49(1), parliament consists of the National Assembly, the Senate and the president.

It is important to note the provisions of section 8 of the Malawi Constitution, which specify that the legislature, when enacting laws, 'shall ensure that its deliberations reflect the interests of all the people of Malawi and that the values expressed or implied in this constitution are furthered by the laws enacted'.

In terms of section 48(2) of the Malawi Constitution, 'an act of parliament shall have primacy over other forms of law, but shall be subject to the constitution'.

In terms of section 62 of the Malawi Constitution, the National Assembly consists of such number of seats representing every constituency in Malawi, as determined by the Electoral Commission. Furthermore, each constituency freely elects a person to represent it as a member of the National Assembly.

In terms of section 68, the Senate is made up of 80 members, representing district councils, chiefs, and local community nominees. The Senate acts as a second chamber of parliament, and all bills are referred to it by the National Assembly for approval.

The judiciary

As already discussed in this chapter, judicial power in Malawi vests in the courts. Section 9 of the Malawi Constitution summarises the role of the judiciary as having the 'responsibility of interpreting, protecting and enforcing this constitution and all

laws in accordance with this constitution and independently and impartially with regard only to legally relevant facts and the prescriptions of the law'.

2.9.2 Separation of powers

It is important in a functioning democracy to divide governmental power between different organs of the state to guard against the centralisation of power, which may lead to abuses. This is known as the separation of powers doctrine.

The aim, as the Malawi Constitution has done, is to separate the functions of the three branches of government, the executive, the legislature and the judiciary, so that no single branch can operate alone, assume complete state control and amass centralised power. While each branch performs several different functions, each also plays a watchdog role in respect of the other. This helps to ensure that public power is exercised in a manner that is accountable to the general public and in accordance with the constitution.

2.10 Weaknesses in the constitution that ought to be strengthened to protect the media

There are two important respects in which the Malawi Constitution is weak. If these provisions were strengthened, there would be specific benefits for the media in Malawi.

It is disappointing that the constitution does not provide for an independent broadcasting regulator to ensure the regulation of public, commercial and community broadcasting in the public interest.

Similarly, it is disappointing that the constitution does not provide for an independent public broadcaster to ensure access to quality news, information and entertainment in the public interest by the people of Malawi.

3 The media and legislation

In this section, you will learn:

- ▷ what legislation is and how it comes into being
- ▷ legislation governing the operations of the print media
- ▷ legislation governing the making and exhibition of films
- ▷ legislation governing the broadcasting media generally
- ▷ legislation governing the state broadcasting media
- ▷ legislation governing signal distribution
- ▷ legislation governing online media
- ▷ legislation that undermines a journalist’s duty to protect sources
- ▷ legislation that prohibits the publication of certain kinds of information
- ▷ legislation that specifically assists the media in performing its functions

3.1 Legislation: An introduction

3.1.1 What legislation is and how it comes into being

Legislation is a body of law consisting of acts properly passed by parliament, which is the legislative authority. As we know, legislative authority in Malawi is vested in parliament, which is made up of the National Assembly, the Senate and the president.

As a general rule, the National Assembly, the Senate and the president are ordinarily involved in passing legislation. There are detailed rules in sections 49, 57, 196 and 197 of the Malawi Constitution, which set out the different law-making processes that apply to different types of legislation. Journalists and others in the media need to be aware that the constitution requires different types of legislation

to be passed in accordance with particular procedures. The procedures are complicated and need not be explained here. Journalists should, however, be aware that, in terms of the Malawi Constitution, there are three kinds of legislation, each of which has particular procedures or rules or both applicable to it. These are:

- ▶ legislation that amends the constitution; the procedures or applicable rules or both are set out in sections 196 and 197 of the constitution
- ▶ ordinary legislation; the procedures or applicable rules or both are set out in section 49 of the constitution
- ▶ legislation that deals with financial measures; the procedures or applicable rules or both are set out in section 57 of the constitution.

3.1.2 The difference between a bill and an act

A bill is a piece of draft legislation that is debated and usually amended by parliament during the law-making process.

In terms of section 73 of the Malawi Constitution, if a bill is passed by parliament in accordance with the various applicable procedures required for different types of bills as set out above, it becomes an act, once it is agreed to by the president. An act must be published in the Gazette and, in terms of section 74 of the Malawi Constitution, becomes law only when it has been so published.

3.2 Legislation governing the operations of the print media

The Printed Publications Act, Act 18 of 1947

The Printed Publications Act is a colonial-era statute that has not been repealed. There are several key requirements laid down by the Printed Publications Act in respect of books, the definition of which specifically includes newspapers and pamphlets:

- ▶ Section 5(1) prohibits any person from printing or publishing a newspaper (defined as any periodical published at least monthly and intended for public sale or dissemination) until there has been full registration thereof at the office of the Government Archivist. The registration includes the full names and addresses of the proprietor, editor, printer or publisher; and a description of the premises where the newspaper is to be printed. Note that every amendment to these registration details is also required to be registered. In terms of section 5(2), any failure to comply with the registration requirements is an offence that carries a fine as a penalty.
- ▶ Section 3(1) requires every book (the definition of a book specifically includes a newspaper) printed and published in Malawi to reflect the names and addresses of the printer and publisher thereof, as well as the year of publication. In terms of section 3(2), any failure to comply with the publication requirements is an offence that carries a fine as a penalty.

- ▶ Section 4(1) requires every book publisher to deliver, at his own expense, a copy of any book he or she has published in Malawi, within two months of publication, to the Government Archivist. In terms of section 4(3), any failure to comply with the delivery requirements is an offence that carries a fine as a penalty, and the court may also enforce compliance by requiring such delivery.
- ▶ Note that the relevant minister is empowered under the Printed Publications Act to make rules to exempt compliance from the requirements of sections 3 and 4 in particular circumstances.

3.3 Legislation governing the making and exhibition of films

3.3.1 Making of films

There are several constraints on the making of films in Malawi, something that affects the visual media, such as television. The key aspects of the main piece of legislation governing film, namely the Censorship and Control of Entertainments Act, Act 11 of 1968 (the Censorship Act), are as follows:

- ▶ In terms of section 19 of the Censorship Act, no person shall direct or even take part in the making of any cinematograph picture (defined as including any film) in Malawi (whether intended for exhibition or sale within or outside Malawi) unless a film permit has been issued by the board of censors authorising the making of the cinematograph picture. Any person contravening section 19 is guilty of an offence and is liable to a fine and imprisonment, in terms of section 32 of the Censorship Act. The board of censors is wholly appointed by the relevant minister in terms of section 3 and therefore operates as an extension of the executive branch of government.
- ▶ Section 20 of the Censorship Act requires an application for a film permit to be made in writing to the board of censors. It is to be accompanied by a full description of the scenes and the full text of the spoken parts (if any) of the entire film that is to be made. Should any part of the film be likely to endanger the safety of persons or animals, the applicant must state what precautions have been put in place. Should all, or part, of the film contain any written or spoken language other than English, an English translation, translated by a board of censors-approved interpreter, must accompany the application.
- ▶ Section 21 of the Censorship Act empowers the board of censors to issue a film permit subject to conditions, including that a bond is paid, the repayment of which is conditional upon the film being made in accordance with the conditions of the film permit. The board of censors may even order a person appointed by it to be present at the making of the film. Section 21(3) of the Censorship Act provides that any person appointed by the board of censors to be present at the making of a film has the authority to intervene and order the cessation of any scene which, in his opinion, is objectionable, endangers any person or property (other than the film producer's property) or is cruel to animals. In terms of section 21(1), the board of censors may refuse to issue a permit or may issue a permit subject to certain conditions, at its discretion.

3.3.2 Exhibition of films

The Censorship Act also regulates the exhibition of films (termed cinematograph exhibition in the Censorship Act).

- ▶ Section 9 makes it an offence for any person who uses or permits the use of any building, tent, or other erection or open space as a theatre (defined as including for the showing of films) unless a theatre licence has been obtained. The penalty for this offence is a fine and a term of imprisonment in terms of section 32.
- ▶ Section 9A(1) states that no person shall operate 'a premises' to let a film to the public on commercial terms unless a valid premises licence has been awarded by a licensing officer. Premises licences expire on the 31st of December following the issue of the licence; the licence can, however, with the approval of the board of censors be transferred to any other premises or can be amended by a licensing officer. Premises licence fees are paid annually. Any person who operates premises for the above purpose without a premises licence is guilty of an offence, the penalty for which is a fine or a term of imprisonment, Section 9A(2).
- ▶ Section 10 makes it an offence to exhibit a film unless the film has been issued with a certificate. The certificate is to be issued by a person authorised to do so by the board of censors, in terms of section 12 of the Censorship Act.
- ▶ Sections 11 and 12 set out requirements for an application for a film exhibition certificate, including that the application is in writing, set out full details of the film, the theatres it is to be exhibited at and be accompanied by the prescribed fee.
- ▶ Section 13 provides that the board of censors may authorise the issuing of a film exhibition certificate in accordance with various classifications and conditions including:
 - U — suitable for exhibition to persons of any age
 - A — suitable for exhibition to persons of any age, provided that persons under 14 are accompanied by a person aged 18 or older
 - AA — suitable for exhibition to persons aged 14 or older
 - X — suitable for exhibition to persons aged 18 or older.
- ▶ Section 27 also makes it an offence to display any poster of a film to be exhibited, unless that poster has been approved by the board of censors.
- ▶ Section 33 of the Censorship Act empowers the minister to grant exemptions from having to comply with the above provisions.
- ▶ Offences in terms of sections 10 and 27 carry a penalty of a fine and imprisonment, in terms of section 32 of the Censorship Act.

3.4 Legislation governing the broadcast media generally

3.4.1 Statutes that regulate broadcasting generally

Broadcasting in Malawi is regulated in terms of the Communications Act, Act 34 of 2016 (the Communications Act), which repealed and replaced the Communications Act, Act 41 of 1998. The Act established the Malawi Communications Regulatory Authority (Macra) and governs its functioning. The Communications Act also regulates the distribution and licensing of the broadcasting spectrum, general telecommunications, broadcasting/content services and postal services in Malawi.

3.4.2 Establishment of the Malawi Communications Regulatory Authority (Macra)

Section 4 of the Communications Act establishes Macra as a juristic person (the Communications Act refers to a body corporate) to perform the functions assigned to it under the Communications Act.

3.4.3 Main functions of Macra

In terms of section 6(1) of the Communications Act, Macra's general duty is to:

regulate and monitor the provision of communications services and ensure that, as far as it is practicable, reliable and affordable communications services are provided throughout Malawi and are sufficient to meet the demand for such services in accordance with the principles of transparency, certainty, market orientation, efficiency and consumer satisfaction.

Further, section 6(2) (a) gives Macra legal ownership of the broadcasting spectrum on behalf of the Republic of Malawi.

In terms of section 6(2), Macra's main broadcasting-related functions are:

- ▶ the granting of licences for the provision of communications services, the definition of which includes broadcasting
- ▶ advising the government on policy issues relating to the communications sector, including in respect of broadcasting
- ▶ the monitoring of activities of licensees to ensure compliance with the Act and the terms and conditions of their licences
- ▶ the receipt and investigation of complaints relating to communications services, including broadcasting.

3.4.4 Appointment of Macra members

Section 7 provides that Macra consists of nine members, three of whom are *ex officio* and six others appointed in accordance with section 8. In terms of section

11(11), the appointed members hold office for three years and are eligible for reappointment for one additional term. The *ex officio* members are:

- ▶ the secretary for Information or his or her representative
- ▶ the secretary to the Treasury or his or her representative
- ▶ the solicitor general or his or her representative.

Section 8(2) of the Communications Act provides that Macra's six appointed members must be Malawian citizens who possess qualifications, experience and expertise in the following fields, telecommunications technology, electronic communications, broadcasting, frequency planning, law, information communication technology, economics or finance. These members of Macra are appointed by the president, subject to confirmation by the Public Appointments Committee of parliament in terms of section 8(1). There is no public nominations process provided for in the Communications Act.

Section 9 of the Communications Act disqualifies members of parliament, ministers, deputy ministers or members of a political party from being an appointed member of Macra.

Section 10(1) of the Communications Act empowers the president to appoint one of the members of Macra as the chairperson, without the involvement of the Public Nominations Committee of parliament. Should the position of chairperson become vacant, it is the responsibility of the members of Macra to select, from amongst themselves, a member to exercise the power of chairperson until a new chairperson can be appointed by the president.

Section 15(1) of the Communications Act empowers Macra to establish committees and delegate any of its functions as it deems necessary to such committees. The chairperson of any committee must be an appointed member of Macra and shall not be an *ex officio* member, section 15(2). However, the chairperson may not also be a committee chairperson, section 15(3). Any committee member shall be paid through Macra funding, section 15(4).

In terms of section 19(1), Macra shall appoint a director-general who shall become chief executive officer and be responsible for day-to-day operations. The director-general shall be appointed for three years and is eligible to be reappointed for two additional terms in terms of section 20(1).

3.4.5 Funding for Macra

Section 28(1) of the Communications Act sets out the allowable sources of funding for Macra's operating and financial costs. These are:

- ▶ fees, levies and other monies payable to Macra under the Communications Act
- ▶ fines payable for breaches of licence conditions
- ▶ grants or donations

- ▶ monies appropriated by parliament, that is, monies specifically allocated to Macra in the national budget
- ▶ proceeds from the sale of assets or equipment.

3.4.6 Making broadcasting regulations

In terms of section 200 of the Communications Act, the minister, acting on the recommendation of Macra, makes regulations for better implementation of the provisions of the Communications Act. Effectively, this means that Macra has veto power in respect of the making of broadcasting-related regulations. In other words, the minister is unable to make regulations without Macra's recommendation.

However, it is also important to be aware of the provisions of section 5(1) of the Communications Act which empower Macra to 'seek the general direction of the minister as to how it should carry out its duties under the Communications Act, where necessary'. Any such directions are required to be published in the Gazette in terms of section 5(2).

This provision is important because it is not clear whether 'where necessary' is determined objectively or only in the subjective opinion of Macra. It is also not clear whether Macra has to comply with a ministerial direction once it has been published in the Gazette.

3.4.7 Licensing regime for broadcasters in Malawi

Broadcasting licence requirement

Section 99 of the Communications Act makes it an offence to provide a content service without a licence. The definition of content in section 1 is 'information in the form of sound, data, text or images, whether still or moving, except where transmitted in private communications', and it includes broadcasting. Similarly, section 187 of the Communications Act, makes it an offence to provide broadcasting services without a licence issued under the Communications Act. The penalty on conviction is a fine and imprisonment. The Communications Act appears to conflate a broadcasting service with a content service in numerous places although, in our view, a broadcasting service is narrower than a content service.

Categories of broadcasting licences and licensing process

Unfortunately, the Communications Act is extremely complex and confusing concerning licensing. It appears to have a bewildering array of different types of services with definitions that appear to either overlap or be contradictory. The overall licensing structure provided for in the Communications Act appears to be as follows:

- ▶ There are two types of licences provided for in the Communications Act:
 - ▶ Individual licences — these make use of scarce resources such as the radio frequency spectrum. All traditional broadcasting services (sound

and audio-visual) distributed making use of the radio frequency spectrum would, therefore, require an individual licence.

- ▶ Class licences — these do not make use of scarce resources such as the radio-frequency spectrum. Consequently, in this section, we focus on individual licences because all content licences are individual licences.
- ▶ Section 99 of the Communications Act sets out five types of content licences:
 - ▶ public content licence
 - ▶ commercial content licence
 - ▶ community content licence
 - ▶ subscription content management licence
 - ▶ any other licence type as Macra may determine from time to time.
- ▶ Section 6 of Schedule 1 to the Communications Act provides four categories of broadcasting services:
 - ▶ public broadcasting services
 - ▶ commercial broadcasting services
 - ▶ community broadcasting services
 - ▶ any other licence as determined by Macra.
- ▶ Confusingly, the Communications Act does not define these various terms and instead has definitions for the following which appear to be equivalent to, or overlap, various types or categories of broadcasting or content licences:
 - ▶ *public content service*, which is defined in section 1 as ‘any content service provided by the Malawi Broadcasting Corporation, or any other public state-owned enterprise holding a broadcasting service licence’.
 - ▶ *commercial broadcasting service*, which is defined in section 1 as ‘a broadcasting service operating for profit or as part of the profit entity, but excludes any public broadcasting service’. When considering an application for a commercial content or broadcasting service, Macra is required to take into account issues such as technical quality, experience and ethical business records of the applicant, section 101.
 - ▶ *community broadcasting service*, which is defined in section 1 as ‘a content service that serves a particular community or is carried on for non-profitable purposes, is fully controlled by a non-profit-making entity.’ When considering an application for a community content or broadcasting service, Macra is required to take into account issues such as the interests of the community and support by, and involvement in, programming of the community, section 102.
 - ▶ *subscription content service*, which is defined in section 1 as ‘a content service provided under a subscription contract’. We assume that the

considerations for granting a commercial broadcasting licence would apply in respect of a subscription content or broadcasting service licence too.

We do not set out the confusing provisions in detail. Suffice it to say that section 32 of the Communications Act empowers Macra to ‘make rules prescribing the types and categories of electronic communications licences.’ This has been done and is dealt with in more detail in section 4 below, the regulations section.

Part XIII of the Communications Act relates to the regulation of content services. This includes the licence requirements for providing such a service. Section 98 states that no person may provide a content service without a content licence issued by Macra. To provide a broadcasting service without a licence is an offence, the penalty for which is a fine and a term of imprisonment in terms of section 187.

The detailed provisions of the Communications Act concerning licensing are found in Part III. Confusingly this is headed Regulation of Electronic Communications Services, and, while the definition of electronic communications expressly excludes broadcasting, we think it important to include the general requirements for licensing set out in that section as they do not appear anywhere else. We are of the view that it is likely that they apply to broadcast or content services as well.

In terms of sections 34 and 35 of the Communications Act, applicants wishing to apply for a licence under the Act must be registered under the relevant written laws of Malawi and maintain a local shareholding of at least 20%. The effect of these provisions is to make it impossible for individuals, as opposed to a juristic person or corporate entity registered in accordance with Malawi law, to obtain a licence under the Communications Act. Further, such a corporate entity must have at least 20% Malawian shareholding. Besides these generally-applicable ownership restrictions, section 104 of the Communications Act, which applies only to content services, provides that a person who is not a Malawian citizen may not exercise control over a content service or have a financial interest or voting rights or paid-up share capital exceeding 20% in a content service. The effect of this is to require effective control by Malawian citizens and an ownership stake of at least 80% in respect of content or broadcasting services. Further, section 103 of the Communications Act prohibits the granting of any content licence to a political party, movement, organisation or alliance that is political.

Macra is required to publish in the Gazette and any other media, rules relating to each type or category of licence that may be issued under the Act in terms of section 36. This has been done and is dealt with in more detail in section 4, the regulations section, below.

A person wishing to apply for an electronic communications service licence shall apply to Macra in the prescribed manner in terms of section 37(1). Macra may then request additional information within 30 days, section 37(2), and shall either grant or reject the application within 60 days in terms of section 37(3). In the case where an application is rejected, Macra must provide reasons in writing for the rejection in terms of section 37(4). Importantly, section 38 of the Communications Act

specifies that where the operation of the service in question requires the allocation of scarce resources, for example, the radio-frequency spectrum, the granting of the licence is required to be done through a restricted procedure. Thus, it appears that all applications for an individual licence will be via such a restricted procedure and the objective criteria for the granting of a licence to the successful applicant must be known to all applicants in advance in terms of section 38(2) of the Communications Act.

Successful applicants must comply with the provisions of the Communications Act. They must be financially and technically capable of meeting its obligations and the terms and conditions of the licence in terms of section 39 of the Communications Act.

Section 40(d) of the Communications Act requires Macra to publish a notice in the Government Gazette that a licence has been issued but note that there is no requirement that a public notice and comment procedure be followed before the issuing of the licence

Section 41 allows Macra to amend a licence should it be necessary for more efficient management of the communications sector, provided the amendment will not cause substantial prejudice to the licensee if it is in the public interest or the licensee agrees to the amendment.

Section 42 of the Communications Act prohibits the transfer of a licence, or any rights thereunder, within twelve months of being granted the licence and unless the licensee has rolled out its services. Thereafter, a licensee may transfer the licence or any rights thereunder with the prior written consent of Macra and in accordance with the prescribed application for approval of transfer processes.

Frequency spectrum licensing

This is an important aspect of broadcasting because all terrestrial and satellite broadcasting signals are distributed through radio waves and, consequently, make use of the radio frequency spectrum.

Section 31 of the Communications Act specifies that a frequency spectrum licence is required in addition to an electronic communications licence where the provision of the service entails the use of radio frequencies.

Section 83 of the Communications Act makes it an offence to make use of the radio frequency spectrum without a licence unless exempted from doing so. The penalty on conviction is a fine and imprisonment.

Section 83(5) determines that Macra may, in respect of any frequency spectrum licence, determine and impose certain terms and conditions, including the area for which the frequency spectrum licence is valid. Section 84 of the Communications Act prohibits a licensee from transferring the right to use any frequency to any third party, but we presume this is subject to the licence transfer approval process provided for in the section immediately above.

3.4.8 Responsibilities of broadcasters under the Communications Act

Adherence to the Act and the licence conditions

Section 43(1) of the Communications Act empowers Macra to suspend or revoke a licence if this is in the public interest and the licensee:

- ▶ has failed to comply with the Communications Act
- ▶ has failed to comply with the terms and conditions of their licence
- ▶ has contravened the provisions of any other written law relevant to the communications sector
- ▶ has failed to comply with any rules or lawful orders given by Macra
- ▶ enters into receivership or liquidation
- ▶ takes any action for its voluntary winding up or dissolution, enters into any scheme of arrangement, other than in any such case for reconstruction or amalgamation, on terms and within a period as may previously have been approved in writing by the Authority
- ▶ is the subject of any order made by a competent court or tribunal for its compulsory winding-up or dissolution
- ▶ has ceased, however briefly, to fulfil the eligibility requirements under the Communications Act.

Section 43 of the Communications Act provides that, before the suspension or revocation of a licence, Macra shall inform the licensee by written notice, as soon as practicable, of its intention to suspend or revoke the licence and the reasons therefore. The affected licensee shall be given a reasonable opportunity to make written submissions to Macra within a period specified in the notice which shall be at least 14 days. Macra is required to consider such submissions before deciding concerning the suspension or revocation of the licence, and the suspension or revocation shall take effect only on the expiry of 30 days after the notice is given to the licensee. Macra is required to publish notice of the suspension or revocation of a licence in at least one daily newspaper, but failure or a delay in doing so does not affect the validity of the suspension or revocation.

Adherence to ownership and control limitations

Notwithstanding section 35 of the Communications Act, section 104 requires all content services licensees to maintain a local shareholding of at least 80%, thus limiting foreign shareholders to a 20% stake.

Adherence to content regulations

Section 107(3) requires Macra to regulate content services concerning the matters set out in Schedule 2 of the Communications Act. Section 1 of the second schedule

of the Communications Act gives Macra the power to make rules and to control the content provided through content services. The main principles of content regulation are set out in section 2 of the second schedule; these include:

- ▶ to protect the public from offensive and harmful content
- ▶ to exclude material that encourages illegal acts
- ▶ to present accurate, impartial news
- ▶ to present religious material in a balanced, responsible manner
- ▶ to protect children.

Adherence to local content regulations

Macra is authorised to issue rules that determine:

- ▶ the percentage of local, independent and original content that must be broadcast by content service providers and when this content must be provided, section 3 of the second schedule
- ▶ amounts to be expended on local content by television content licensees, if any are so imposed, section 5 of the second schedule
- ▶ the amount of local music to be broadcast by sound broadcasting services, section 6 of the second schedule.

Adherence to advertising and sponsorship regulations

Macra must issue rules concerning advertising on broadcasting services, section 7 of the second schedule.

In terms of section 8 of the second schedule, these may include:

- ▶ prohibiting or restricting advertising of specified services or products and the methods of advertising and sponsorships that can be used by advertisers or sponsors
- ▶ regulating the timing and prominence of advertisements and sponsorships.

Section 9 of the second schedule requires Macra to issue rules for political advertising on broadcasting services (including those exempted from carrying political advertising) and these are required to comply with section 11 of the second schedule dealing with issues such as the maximum coverage that may be given to political advertisements, the primacy of the principle of treating all political parties equally and fairly and that all political advertising is to cease being broadcast at least 48 hours before the commencement of the polling period.

Adherence to educational content regulations

In terms of sections 12 to 14 of the second schedule, Macra is required to issue rules and impose content obligations on specified classes of content licensees to provide content of an educational nature (to be defined by Macra) as a proportion of their broadcasting content. The educational content must be of high quality and suitable to meet the needs of Malawian society. Note that this may pertain only to particular types of content licensees and may not be universally applicable.

Adherence to the right of reply

Sections 15 to 20 of the second schedule deal with the right of reply or, to use the terminology used in that schedule, to the broadcast of a counter version in cases of false facts having been broadcast. It is critical to note that there is a great deal of drafting ambiguity as to whether the initial broadcast has been false or is asserted to have been false by the person or entity concerned, that is, the person about whom the broadcast was made. These sections are detailed and include the timing, cost and manner of the broadcast of the counter version.

3.4.9 Restrictions on broadcasting content

Sections 22 to 34 of the second schedule contain several provisions resembling a code of conduct for broadcasting services licensees concerning content.

General obligations

In terms of section 22 of the second schedule, broadcasting licensees shall:

- ▶ not broadcast any material which is indecent, obscene or offensive to public morals, or offensive to the religious convictions of any section of the population, or likely to prejudice the safety of the republic or public order and tranquillity
- ▶ exercise due care and sensitivity in presenting materials which relate to acts of brutality, violence, atrocities, drug abuse or obscenity
- ▶ exercise due care and responsibility to the presentation of programming, where a large proportion of the audience is likely to be children.

News obligations

In terms of sections 23 to 26 of the second schedule, news obligations of broadcasting licensees include:

- ▶ report news truthfully, accurately and objectively
- ▶ present news in an appropriate context and a balanced manner, without intentional or negligent departure from the facts
- ▶ clearly indicate where a report is founded upon opinion, supposition, rumour or allegation

- ▶ immediately rectify news reports where it subsequently appears that a broadcast report was incorrect in a material respect.

Comment

In terms of sections 27 to 29 of the second schedule, the provisions regarding fair comment are as follows:

- ▶ licensees are entitled to comment on and criticise any actions or events of public importance
- ▶ comment must be clearly presented
- ▶ comment must be an honest expression of opinion.

Controversial issues of public importance

In presenting a programme in which controversial issues of public importance are discussed, a reasonable effort must be made to present differing points of view, either in the same or subsequent programme in terms of section 30 of the second schedule.

Additionally, a person whose views, deeds or character have been criticised in a programme on a controversial issue is entitled to a reasonable opportunity to reply in terms of section 31 of the second schedule.

Elections

During an election, broadcasting licensees must ensure equitable treatment of all political parties, election candidates and electoral issues in terms of section 32 of the second schedule.

Privacy

Licensees shall exercise exceptional care and consideration in matters involving the private lives and concerns of individuals; however, the right to privacy may be overridden by a legitimate public interest, section 33 of the second schedule.

Payment for information

A licensee shall not pay criminals for information unless there is a compelling public interest to do so, section 34 of the second schedule.

3.4.10 Is Macra an independent regulator?

In certain respects Macra does have attributes of an independent regulator in that appointments are required to be confirmed by the Public Appointments Committee of parliament which is a multi-party body in terms of section 8(a) of the constitution. Additionally, section 5(3) of the Communications Act does contain wording stating it 'shall be independent in the performance of its functions'.

However, Macra's independence is compromised in the following ways:

- ▶ all of its members are appointed without a public nomination process
- ▶ a third of the members are *ex officio* representatives of the executive, giving the government a significant voice in the regulator.
- ▶ Section 5 of the Communications Act might also compromise Macra's independence if it is interpreted as allowing the minister to impose directions on it. The concern about the impact on Macra's independence is amplified when one considers that the wording in section 5(3) regarding its independence is subject to limitations provided for under the Communications Act 'and any other law'.

This means that Macra does not meet international best-practice standards in appointment requirements for independent bodies and institutional independence.

3.4.11 Amending the legislation to strengthen the broadcast media generally

There are several problems with the legislative framework for the regulation of broadcasting generally in Malawi:

- ▶ The overriding problem is that Macra is not a truly independent body.
- ▶ The Communications Act ought to be amended to deal with the following issues:
 - ▶ Macra members ought to be appointed by the president acting on the advice of the National Assembly after the Public Appointments Committee has drawn up a list of recommended appointees. As part of this process, the Public Appointments Committee should call for public nominations and should conduct public interviews
 - ▶ Macra should have no members who are members of government departments. This is particularly so of *ex officio* members as they cannot be removed from office unlike other members
 - ▶ Macra should not be required to seek ministerial direction in the performance of its duties.
 - ▶ The Communications Act should be adjusted to ensure that it is entirely independent and not include stipulations limiting the independence of Macra in accordance with either the Communications Act or any other law.

3.5 Legislation that regulates the state broadcast media

Part XIV of the Communications Act deals with the Malawi Broadcasting Corporation (MBC). One of the definitions of a public content service in section 1 of the Communications Act is 'any content service provided by the MBC or any other

state-owned enterprise holding a broadcasting service licence'. It is therefore clear that, in terms of the Communications Act, the MBC is seen as a public broadcasting service provider.

3.5.1 Establishment of the MBC

The MBC was established under the now-repealed Malawi Broadcasting Corporation Act, and its existence is continued by section 108 of the Communications Act.

3.5.2 The mandate of the MBC

The MBC's national public broadcasting mandate is broadly set out in section 109 of the Communications Act. There are several aspects to its mandate, including:

- ▶ provide programmes which educate, entertain and inform
- ▶ encourage free and informed opinion on all matters of public interest
- ▶ function without any political bias and independently of any person or body of persons
- ▶ reflect the wide diversity of Malawi's cultural life
- ▶ respect human rights, the rule of law and the constitution
- ▶ support the democratic process
- ▶ refrain from expressing its opinion (or that of its board or management) on current affairs or matters of public policy, other than broadcasting matters
- ▶ provide balanced election coverage
- ▶ have regard for the public interest.

3.5.3 Appointment of the MBC Board

A board of directors controls the MBC. In terms of section 111 of the Communications Act, the MBC board is made up of five appointed members and four *ex officio* members. The *ex officio* members are:

- ▶ the secretary for information or his or her representative
- ▶ the secretary to the treasury or his or her representative
- ▶ the solicitor general or his or her representative
- ▶ the secretary for education or his or her representative.

The president is also empowered to appoint all five non-*ex officio* members of the MBC, but this must be done in consultation with parliament's Public Appointments Committee (a multi-party body in terms of section 56(8) of the constitution). It

should be noted that the public appointments committee does not require a public nominations process to make an appointment.

Section 112(2) of the Communications Act sets out the criteria for appointment to the MBC board namely, Malawian citizens who possess qualifications and expertise in a variety of relevant fields including broadcasting, education, engineering, law, information, communication technology, business, finance and public affairs. It is important to note that section 112(3) requires that the president take account of gender equality and the need for continuity of service when appointing board members for the MBC. Importantly, section 112(5) sets out people who are disqualified from being appointed as members of the MBC board. These include anyone who:

- ▶ holds a position in a political party
- ▶ has in the prior three years been convicted of a crime which is punishable by imprisonment without the option of a fine
- ▶ is an undischarged bankrupt
- ▶ is a minor
- ▶ is a member of parliament
- ▶ is a minister or a deputy minister.

The chairperson of the MBC is appointed by the president from among the members of the board, section 112(6). Section 113 of the Communications Act limits membership on the board of the MBC to three years and makes provision for reappointment for only one additional term.

In accordance with section 117 of the Communication Act, the board of the MBC shall appoint the director-general of the MBC who shall be responsible for the day-to-day running of the corporation. The director-general is appointed for three years and can be reappointed for an additional two terms.

3.5.4 Funding for the MBC

Section 118 sets out the allowable sources of funding for the MBC. These are:

- ▶ monies appropriated by parliament — that is, specifically allocated to the MBC in the national budget
- ▶ grants, donations, subsidies, bequests, gifts, subscriptions, rents, interests and royalties
- ▶ proceeds from the sale of MBC property
- ▶ proceeds from television licence fees payable by every person owning a television set
- ▶ commercial advertising or sponsorships

- ▶ investments subject to any directions of a general nature by the Minister of Finance
- ▶ loans.

3.5.5 The MBC: public or state broadcaster?

There are many aspects of the regulatory framework for the MBC, which suggests that it is a public as opposed to state broadcaster. Importantly, a multiparty body (in this case the National Assembly's Public Appointments Committee) has to agree with the president before a person can be appointed to the MBC.

However, the fact that four members of the executive branch of government sit as *ex officio* members of the board does indicate a level of governmental involvement in the board, which is not appropriate and not in accordance with international best-practice standards.

Furthermore, while the MBC board compiles an annual report, this is not made to the National Assembly but rather to the minister, section 120. Thus, its accountability appears to be to the executive rather than to the public's elected representatives in the National Assembly.

3.5.6 Weaknesses in the MBC provisions of the Communications Act which should be amended

Three important weaknesses ought to be addressed:

- ▶ There should be no *ex officio* members of the MBC board.
- ▶ All MBC board members should be appointed by the president, in consultation with the Public Appointments Committee, but following a public nominations process.
- ▶ The MBC's annual report should be made to the National Assembly rather than to the minister.

3.6 Legislation that governs signal distribution

The Communications Act defines an electronic communications network as a transmission system and equipment that 'permits the conveyance of signals by wire, radio, optical or other electronic means'. Consequently, this includes a broadcasting signal distribution network which is used to transmit broadcasting signals. In terms of section 31(1) of the Communications Act, providers of electronic communications services require a licence. Section 31(3) makes it an offence to operate without a licence. Section 32 empowers Macra to prescribe the types and categories of electronic communications licences. We deal with the relevant signal distribution licences below in section 4, dealing with regulations. Electronic communications services are required to be 20% locally owned in terms of section 35.

Electronic communications services are required, under section 31(2) of the Communications Act, to have a frequency spectrum licence for any service that makes use of the radio frequency spectrum in addition to any other electronic communications licence they require.

Broadcasters are required to enter into agreements with signal distributors in terms of section 7 of the first schedule to the Communications Act. The rules governing the conditions under which content services (broadcasters) enter into agreements with signal distributors are determined by Macra in terms of section 97(4).

3.7 Legislation governing online media

Online content is regulated in Malawi by the Electronic Transactions and Cybersecurity Act, Act 33 of 2016 (the ETA).

The ETA defines online public communication as meaning ‘any transmission of digital data, signs, signals, texts, images, sounds or messages, of whatever nature, that are not private correspondence, by electronic communication means that enable a reciprocal exchange of information between an issuer and the receiver’. This obviously includes content such as web-pages, blogs, vlogs and social media communications such as are found on Twitter, Facebook, YouTube, Instagram, TikTok and the like, but it seems to exclude private communication such as direct messages on Twitter or Facebook, WhatsApp messages, emails and so on.

3.7.1 The regulatory framework for online content providers

The ETA regulates content providers which are defined in section 1 as ‘a person or organisation who supplies information for use on a website or an electronic media platform’. This is massively overbroad and includes individuals uploading information such as photographs onto Facebook or Instagram, video material onto YouTube or TikTok and posting tweets on Twitter.

The broadness of the definitions makes many aspects of the ETA entirely unworkable. For example, section 95 of the ETA makes it an offence, punishable (on conviction) by a fine and imprisonment, for an online content provider not to provide the information required in terms of section 31(1) on their webpage. In the case of a natural person, this information includes the name, address, telephone number and email address of the editor. In the case of a legal entity, the corporate name, postal and physical address of the registered office, telephone number, email address, authorised share capital, and registration number of the editor, where applicable, the name of the corporate officer appointed as director of the publication and the editor-in-chief. Online content providers must also provide the name, title, corporate name, postal and physical address of the intermediary service provider which is the person responsible for the provision of access to communications networks, storage hosting or transmission of information by communications networks.

It is clear that many online media publications, including major Malawian media

houses, are not complying with the requirements of section 31 and do not include information such as the authorised share capital, the registration number of the editor or the details of their intermediary service providers on their websites at all, much less on every webpage as is required by the ETA.

What makes this provision additionally unworkable is that many platforms are operated by global entities which Malawi cannot regulate, for example, a Facebook page is not required, under the Facebook platform rules, to be operated under the actual legal name of an individual or corporate entity.

This kind of regulation of the internet is typical of authoritarian governments which hope to encourage self-censorship by creating an atmosphere that discourages freedom of expression.

While section 24(1) of the ETA expressly provides that 'there shall be no limitations to online public communication', section 24(2) goes on to detail a range of content that may be restricted, including child pornography, incitement of racial hatred, xenophobia or violence and justifications for crimes against humanity. It also details content that may be proactively required, including content to promote human dignity and pluralism in the expression of thoughts and opinions and content that protects public order and national security.

Although section 102 deals with the minister's powers to make regulations for all matters for the better carrying out of the provisions of the ETA, we are not aware of any such regulations having been made as yet.

In terms of section 25 of the ETA, intermediary service providers are not liable in any civil and criminal proceedings for any information contained in an electronic message for which they provide services, provided the intermediary service provider has not initiated the transmission of the message, has no actual knowledge of the message and no knowledge of any facts or circumstances from which the likelihood of civil or criminal liability ought to have been known.

Surprisingly, section 32 grants any person who can be identified, directly or indirectly, in an online public communication, the right of reply without prejudice to his right to request correction or deletion of the content. The request is to be made to the editor-in-chief or, where the person editing an online public communication is anonymous, to the intermediate service provider. Section 32 is entirely unclear as to how an intermediary service provider is expected to actualise the right of reply. The online editor is required to publish the reply within 24 hours of receiving it. The ETA makes no provision for a situation where the original communication was factual, fair and accurate. It appears that anyone has the right of reply to any content published online. This is unworkable in practice.

3.7.2 The regulatory framework for online advertisements

Sections 40 and 41 of the ETA provide the regulatory framework for online advertising, namely that advertising must be clearly identifiable as advertising, as must the person for whom the advertisement has been placed. In the case of lotteries,

games and sweepstakes, the terms and conditions must be easily accessible and indicated clearly. Misleading advertising is prohibited.

3.7.3 The regulatory framework for domain name management

A registrar is appointed by Macra to administer and manage the .mw domain and any other Malawian names used for domain names in terms of section 75 of the ETA.

In terms of section 77(1), Macra may make recommendations to the relevant minister concerning policy on any matter relating to Malawian domain names.

Section 78 makes it an offence for any person to manage, administer or operate a second-level domain name without authority, and the penalty is a fine and a term of imprisonment. Section 76(b)(ii) empowers the registrar to publish guidelines on the requirements and procedures on domain name registration. We have not been provided with any such guidelines, and it is unclear if any guidelines have been published to date.

3.8 Legislation that undermines a journalist's duty to protect his or her sources

A journalist's sources are the lifeblood of his or her profession. Without trusted sources, a journalist cannot obtain information that is not already in the public domain. However, sources will often be prepared to provide critical information only if they are certain that their identities will remain confidential and will be respected and protected by the journalist. This is particularly true of so-called whistleblowers, inside sources that can provide journalists with information regarding illegal activities, whether by company or government personnel. Consequently, democratic countries often provide special protection for journalists' sources. It is recognised that, without such protection, information that the public needs to know would not be given to journalists.

Courts Act, Act 1 of 1958

The Courts Act was enacted before Malawi's independence but has been amended numerous times since then. Provisions of the Courts Act might be used to compel a journalist to reveal confidential sources.

- ▶ Section 49 of the Courts Act empowers a subordinate court to secure the attendance of any person in court for any purposes and to meet any demand, in such manner as may be prescribed. The effect of this is that a subordinate court is empowered, for example, to require a journalist to attend court and answer questions or produce his or her notebooks in any proceedings taking place before the court.
- ▶ Section 50 of the Courts Act empowers a subordinate court to order the imprisonment of any person who fails to comply with an order to attend court.

Penal Code, Act 22 of 1929

The Penal Code was enacted before Malawi's independence but has been amended numerous times since then. Part II of the Penal Code sets out a list of crimes. Chapter XI of the Penal Code (which is found in Part II, Division II) is headed Offences Relating to the Administration of Justice. Section 113 of the Penal Code falls under that heading and deals with offences relating to judicial proceedings. In terms of section 113(1)(b), it is an offence to refuse to answer a question or produce a document, having been called upon to give evidence in a judicial proceeding. The penalty is imprisonment and a fine.

Official Secrets Act, Act 3 of 1913

Section 11 of the Official Secrets Act makes it a misdemeanour for any person to refuse to give information on demand about any offence or suspected offence under the Official Secrets Act to the police commissioner, a police superintendent or any member of the Malawian armed forces. The penalty is a fine and imprisonment.

Preservation of Public Security Act, 1960

Section 9 of the Public Security Act empowers a police officer (or other authorised officer, such as a person with a commission in the armed forces) to order the production of any information, article, book or document from any person if he or she considers it necessary for the preservation of public security. The penalty for failing to comply with such an order is imprisonment.

These provisions might well conflict with a journalist's ethical obligation to protect his or her sources. It is, however, important to note that whether or not requiring a journalist to reveal a source is an unconstitutional violation of the right to freedom of expression will depend on the particular circumstances in each case, particularly on whether the information is available from any other source. Consequently, it is extremely difficult to state that these provisions are, by themselves, a violation of the right to freedom of expression under the constitution.

3.9 Legislation that prohibits the publication of certain kinds of information

Several statutes contain provisions which, looked at closely, undermine the public's right to receive and the media's right to publish information. These statutes are targeted and prohibit the publication of certain kinds of information, including:

- ▶ information relating to legal proceedings
- ▶ information relating to state security
- ▶ information constituting intimidation
- ▶ information obtained from public officers relating to corrupt practices

- ▶ information insulting the president, the flag and protected emblems
- ▶ information which is obscene or contrary to public morals
- ▶ information constituting defamation or causing contempt or defamation of foreign princes
- ▶ information likely to offend religious convictions
- ▶ information harming relationships between sections of the public
- ▶ information constituting commercial advertising involving traditional music.

3.9.1 Prohibition of publication of information relating to foreign exchange Prohibition on the publication of information relating to legal proceedings

Censorship and Control of Entertainments Act, Act 11 of 1968

Part VII of the Censorship Act deals with publications, pictures, statutes and records. Section 23(1) of the Censorship Act makes it an offence to import, publish, distribute, sell or offer any publication (which is defined in section 2 as including any newspaper, book or periodical or other printed matter) which is considered 'undesirable'.

Section 23(2) of the Censorship Act contains provisions that deem publications undesirable. In brief, section 23(2)(c) provides that a publication will be deemed to be undesirable if it discloses the following kinds of information concerning any judicial proceedings:

- ▶ Any matter which is indecent or obscene, or is offensive or harmful to public morals, including any indecent or obscene medical, surgical or physiological details the disclosure of which is likely to be offensive or harmful to public morals.
- ▶ Any particulars relating to divorce proceedings or proceedings for the restitution of conjugal rights other than:
 - ▶ names and addresses and occupations of parties and witnesses
 - ▶ a concise statement of evidence given (except where this would disclose indecent or obscene matters)
 - ▶ submissions on points of law arising in the course of proceedings and the decision of the court thereon
 - ▶ the judgment and any observations made by the court in giving judgment.

The penalty for such an offence is a fine and imprisonment, in terms of section 32 of the Censorship Act.

Section 23(5) allows for the board of censors to, on such conditions it deems fit, in

writing exempt any person or institution from any provision of section 23 for any period determined by it and may, in writing, withdraw the exemption for any of the provisions granted under this subsection.

Children and Young Persons Act, Act 7 of 1969

Section 8 of the Children Act makes it an offence to reveal the name, address, school or other particulars which may lead to the identification of any juvenile concerned in the juvenile court proceedings when reporting on such proceedings. The offence carries the penalty of a fine.

The minister is empowered to permit disclosure of such information should he determine such a disclosure is in the public interest.

Mental Treatment Act, Act 14 of 1948

Section 65 of the Mental Treatment Act makes it a crime to publish the names of vulnerable persons involved in court proceedings. The offence carries the penalty of a fine.

Penal Code, Act 22 of 1929

Part II, Division II of the Penal Code contains 'offences against the administration of lawful authority', and Chapter XI, which forms part thereof, is headed 'Offences Relating to the Administration of Justice'. Chapter XI, section 113 of the Penal Code deals with offences relating to judicial proceedings. In terms of section 113(1)(e), it is an offence to publish a report of the evidence taken in any judicial proceeding which has been directed to be held in private. The penalty is imprisonment.

3.9.2 Prohibition on the publication of information relating to state security

Censorship and Control of Entertainments Act, Act 11 of 1968

Part VII, section 23(1) of the Censorship Act makes it an offence to import, publish, distribute, sell or offer any publication (defined in section 2 as including any newspaper, book or periodical or other printed matter) which is 'undesirable'.

Section 23(2) of the Censorship Act contains provisions that deem publications undesirable. In brief, section 23(2)(b)(iv) provides that a publication will be deemed undesirable if it is likely to be contrary to the interests of public safety or public order.

The penalty for such an offence is a fine and imprisonment, in terms of section 32 of the Censorship Act.

Preservation of Public Security Act, Act 11 of 1960

Section 3 of the Public Security Act empowers the minister to make regulations which, among other things, prohibit the publication and dissemination of any

matter that appears to him to be prejudicial to public security. See section 4 on regulations, below.

Penal Code, Act 22 of 1929

Part II, Division I of the Penal Code contains 'Offences against Public Order', which are divided into several parts, including Treason and other Offences against the Government's Authority.

Prohibition on the importation of publications

Section 46 of the Penal Code deals with prohibiting the importation of publications. In terms of section 46(1), if the minister believes that a publication is contrary to the public interest, he may, in his absolute discretion, prohibit the importation of the publication or all publications published by any person.

In terms of section 47, any person who prints, imports, publishes or sells a publication that is prohibited from importation is guilty of an offence and is liable, on conviction for a first offence, to a fine and imprisonment and the publication is to be forfeited.

A clear problem with the provisions of section 46 of the Penal Code is that they are not objective. In other words, the publication does not have to pose a genuine, realistic or objective threat to the public interest; the minister just has to believe this is the case before he makes an order prohibiting the importation of a publication. This does not comply with internationally accepted standards for prohibiting the publication of information.

Prohibition of seditious publications

Section 51 of the Penal Code also falls under the heading 'Treason and other Offences against the Government's Authority'. It provides, among other things, that any person who prints, publishes, sells, distributes or even possesses a seditious publication is guilty of an offence and is liable to a fine and imprisonment. Furthermore, any seditious publication is to be forfeited to the state. Note that in terms of section 50(1), a seditious intention is an intention, among other things, to:

- ▶ excite disaffection against the president or government of Malawi
- ▶ excite the inhabitants of Malawi to procure the alteration, by illegal means, of any matter established by law
- ▶ excite disaffection against the administration of justice in Malawi
- ▶ raise discontent or disaffection among the inhabitants of Malawi
- ▶ promote feelings of ill-will or hostility between different classes of the population of Malawi.

However, section 50(1) also explicitly provides that a publication is not seditious by reason only that it intends to:

- ▶ show the president has been misled or is mistaken in any of his measures
- ▶ point out errors or defects in the government or Malawi constitution, or in the legislation or administration of justice in Malawi, to remedy these
- ▶ persuade the inhabitants of Malawi to attempt to procure changes by lawful means
- ▶ point out, with a view to their removal, any matters which are producing feelings of ill-will between different classes in the population.

Prohibition of false alarming publications

Section 60(1) of the Penal Code falls under Treason and other Offences against the Government's Authority and provides, among other things, that any person who publishes any false statement, rumour or report that is likely to cause fear and alarm to the public or to disturb the public peace is guilty of an offence. Note, however, that section 60(2) specifically provides a defence to this offence, namely that before publication, the person took: 'such measures to verify the accuracy of such statement, rumour or report as to lead him reasonably to believe that it was true'.

Official Secrets Act, Act 3 of 1913

Section 4 of the Official Secrets Act makes it a misdemeanour to communicate (other than to an authorised person) any information which relates to a prohibited place (defined in section 5 as including government-owned establishments), or which has been entrusted to him or her in confidence by any person holding government office. The penalty is a fine and imprisonment.

Protected Places and Areas Act, Act 6 of 1960

The Protected Places Act was enacted before Malawi's independence and has not been repealed. Although it does not directly prohibit the publication of information, section 4 of the Act makes it an offence for any unauthorised person (for example, a journalist) to be in a protected place (defined as a place which has been declared a protected place by the minister) without a permit. The penalty is a fine and imprisonment.

This provision has implications for the media, making it more difficult for journalists to perform their reporting functions.

Prisons Act, Act 9 of 1955

Section 83 of the Prisons Act makes it an offence to publish, whether whole or in part, a letter or document written by a prisoner, which has not been endorsed by a prison officer. The penalty is a fine and imprisonment.

3.9.3 Prohibition on the publication of information that constitutes intimidation

The Penal Code, Act 22 of 1929, sets out a list of crimes. Part II, Offences against Public Order, is divided into three parts, one of which is Unlawful Societies, Unlawful Assemblies, Riots and other Offences against Public Tranquillity. Section 88 makes intimidation an offence; that is, it is an offence to publish any writing threatening a person. The penalty is a fine and imprisonment.

3.9.4 Prohibition on the publication of information that is obtained from public officers and relates to corrupt practices

Although the Corrupt Practices Act, Act 18 of 1995, does not prohibit the publication of information, it is important to note certain prohibitions contained in the Corruption Practices (Prohibition of Abuse of Information Obtained in Official Capacity) Regulations, 1999, which are dealt with in section 4, on regulations, below.

3.9.5 Prohibition on the publication of information that insults the president, the flag and protected emblems

Section 4 of the Protected Flag, Emblems and Names Act, Act 10 of 1967, makes it an offence to publish anything liable to insult, ridicule or show disrespect to, among other things, the president, the Malawian national flag and the national coat of arms. The penalty is a fine and imprisonment.

3.9.6 Prohibition on the publication of information that is obscene or contrary to public morals

Censorship and Control of Entertainments Act, Act 11 of 1968

Part VII of the Censorship Act deals with publications, pictures, statutes and records. Section 23(1) of the Censorship Act makes it an offence to import, publish, distribute, sell or offer any publication (which is defined in section 2 as including any newspaper, book, periodical or other printed matter) that is deemed undesirable.

In brief, section 23(2)(a) provides that a publication will be deemed to be undesirable if it is indecent or obscene or is offensive or harmful to public morals. Note that none of these terms is defined. The penalty for such an offence is a fine and imprisonment, in terms of section 32 of the Censorship Act.

Electronic Transactions and Cybersecurity Act, Act 33 of 2016

Section 85(1) of the ETA prohibits child pornography (defined as representing or an image representing a person who is or is presented to be a person under 18 years of age engaged in sexually explicit conduct) in an electronic form. This is an offence punishable, on conviction, to a fine and imprisonment in terms of section 85(2).

3.9.7 Prohibition on the publication of information that constitutes defamation or otherwise causes contempt and defamation of foreign princes

Defamation — Penal Code, Act 22 of 1929

Part II, Division III of the Penal Code contains Offences Injurious to the Public in General and Chapter XVIII is headed Defamation. Section 200, which falls under that chapter, makes defamation a misdemeanour termed libel.

What is defamatory matter?

Section 201 of the Penal Code provides that 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 an injury to his reputation'.

When is the publication of defamatory matter unlawful?

Section 203 provides that any publication of defamatory matter will be unlawful unless:

- ▶ the matter is true, and publication was for the public benefit, or
- ▶ publication is privileged.

Two types of privilege are recognised under the Penal Code, absolute privilege and conditional privilege.

Absolute privilege

In terms of section 204 of the Penal Code, the publication of defamatory matter is absolutely privileged in the following cases:

- ▶ publications published under the authority of the president, Cabinet or National Assembly
- ▶ publications to and by a person having authority over an individual who is subject to military or naval discipline, about that person's conduct and is published by a person who has authority over that individual in respect of such conduct
- ▶ publications arising from judicial proceedings published by a person taking part in the proceedings in an official capacity
- ▶ fair reports of anything said, done or published in Cabinet or the National Assembly
- ▶ if the publisher was legally bound to publish the matter.

Once the publication of defamatory matter is absolutely privileged, it is immaterial if the matter is false or published in bad faith.

Conditional privilege

In terms of section 205 of the Penal Code, the publication of defamatory matter is conditionally privileged provided:

- ▶ it is published in good faith
- ▶ the relationship between the parties by and to whom the publication is made is such that the persons publishing and receiving the matter are under a legal, moral or social duty to publish or receive same, or has a legitimate personal interest in publishing or receiving same
- ▶ publication does not exceed, either in extent or subject matter, what is reasonably sufficient for the occasion, and in any of the following cases, namely, if the matter published:
 - ▶ is a fair and substantially accurate report of court proceedings, provided the court has not prohibited publication
 - ▶ is a copy or a fair abstract of any matter which has previously been published and which was absolutely privileged
 - ▶ is an expression of opinion in good faith as to the conduct of a person in a judicial, official or other public capacity or as to his personal character so far as it appears in such content
 - ▶ is an expression of opinion in good faith as to the conduct of a person as disclosed by evidence given in a public legal proceeding, or as to the conduct or character of any person as a party or witness in any such proceeding
 - ▶ is an expression of opinion in good faith as to the merits of any book, writing, painting, speech or other work, performance or act published or publicly made or otherwise submitted by the person to the judgment of the public, or as to the character of the person in so far as it appears in such work
 - ▶ is a censure passed by a person in good faith on the conduct or character of another person in any matter, where he or she has authority over that person
 - ▶ is a complaint or accusation about an individual's conduct or character made by a person of good faith to a person having authority over the individual and having authority to hear such complaints
 - ▶ in good faith for the protection of the rights or interests of
 - › the person publishing it
 - › the person to whom it was published.

Definition of good faith

In terms of section 206 of the Penal Code, a publication of defamatory matter will

not be deemed to have been made in good faith if it appears that:

- ▶ the matter was untrue, and the publisher did not believe it to be true
- ▶ the matter was untrue, and the publisher did not take care to ascertain whether it was true or false
- ▶ the publisher acted with intent to injure the person defamed in a substantially greater degree than was reasonably necessary for the public interest or for the protection of a privileged interest.

There is a presumption of good faith if defamatory matter was published on a privileged occasion, unless the contrary is proved, in terms of section 207 of the Penal Code.

Censorship and Control of Entertainments Act, Act 11 of 1968

Part VII, section 23(1) of the Censorship Act makes it an offence to import, publish, distribute, sell or offer any publication (which is defined in section 2 as including any newspaper, book, periodical or other printed matter) which is deemed undesirable.

In brief, section 23(2)(b)(ii) provides that a publication will be deemed undesirable if it is likely to bring any member or section of the public into contempt. Note that the term contempt is not defined, but it appears to imply a lowering of someone's standing in the community and would be similar to defamation. The penalty for such an offence is a fine and imprisonment in terms of section 32 of the Censorship Act.

Defamation of Foreign Princes — Penal Code, Act 22 of 1929

Section 61 of the Penal Code, although still forming part of Part II of the Penal Code, which sets out a list of crimes, and of Division I of Part II which contains Offences against Public Order falls under the heading Offences Affecting Relations with Foreign States and External Tranquillity. Essentially it 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.

3.9.8 Prohibition on the publication of information that is likely to offend religious convictions

Censorship and Control of Entertainments Act, Act 11 of 1968

Part VII, section 23(1) of the Censorship Act makes it an offence to import, publish, distribute, sell or offer any publication (which is defined in section 2 as including any newspaper, book or periodical or other printed matter) which is deemed undesirable.

Section 23(2) of the Censorship Act contains several provisions that deem

publications undesirable. In brief, section 23(2)(b)(i) provides that a publication will be deemed undesirable if it is likely to offend the religious convictions or feelings of any section of the public. The penalty for such an offence is a fine and imprisonment in terms of section 32 of the Censorship Act.

Penal Code, Act 22 of 1929

Part III of the Penal Code sets out a list of Offences Injurious to the Public in General, and Chapter XIV sets out Offences Relating to Religion. Section 130 of the Penal Code falls under that heading and makes it a misdemeanour to 'write any word or place any object' with the deliberate intention of wounding the religious feelings of any other person. The penalty is imprisonment.

3.9.9 Prohibition on the publication of information that harms relations between sections of the public

Part VII, section 23(2)(b)(iii) of the Censorship and Control of Entertainments Act, Act 11 of 1968, provides that a publication will be deemed undesirable if it is likely to harm relations between sections of the public. The penalty for such an offence is a fine and imprisonment in terms of section 32 of the Censorship Act.

3.9.10 Prohibition on the publication of information that constitutes commercial advertising involving traditional music

Section 4 of the Commercial Advertising (Traditional Music) Control Act, 1978, makes it an offence to publish any sound, cinematographic or photographic record of any Malawi traditional music or dancing for use in commercial advertising. This is defined in section 2 of the Act as music, dancing, singing or drumming performed in connection with any official celebration or act of public acclaim of the president or any other notable person or visitor to Malawi. The offence is punishable by a fine or imprisonment.

3.9.11 Prohibition of publication of information relating to foreign exchange

Section 8 of the Exchange Control Act, Act 17 of 1984 makes it an offence for any person to publish 'any information related to foreign exchange' unless done so in the process of compiling statistics or satisfying a court order. The definition relating to non-publishable material does not align with international best practice relating to freedom of expression in a democratic country.

3.10 Legislation that specifically assists the media in performing its functions

In countries that are committed to democracy, governments pass legislation that specifically promotes accountability and transparency of both public and private institutions. Such statutes, while not specifically designed for use by the media,

can be, and often are, used by the media to uncover and publicise information in the public interest.

3.10.1 Access to Information Act, Act 13 of 2017

The Access to Information Act (AIA) was passed to provide for the right of access to information held by public bodies and private bodies in certain circumstances.

In terms of section 3(1) of the AIA, the Schedule to the AIA sets out the information holders to which the Act applies. These are:

- ▶ the executive, all its organs and persons in their service
- ▶ the legislature, all its organs and persons in their service
- ▶ the judiciary, all its organs and persons in their service
- ▶ institutions and organisations in which the government holds shares or exercises financial or administrative control and persons in their service
- ▶ commissions established under the constitution or an act of parliament and persons in their service
- ▶ organisations contracted by the government to do work for the government and persons in their service
- ▶ NGOs constituted for public benefit and persons in their service.

This last inclusion is noteworthy as NGOs are not public institutions, and it is extremely unusual for private organisations such as NGOs to be expressly included in access to information legislation.

In terms of section 3(2) of the AIA, the following records are exempt from the provisions of the Act:

- ▶ Cabinet records and those of its committees
- ▶ court records before the conclusion of a matter.

Section 5 of the AIA is extremely interesting. Section 5(1) provides that any person has the right to access information that is required for him or her to exercise their rights which is under the control of a public body or a relevant private body to which the Act applies expeditiously and inexpensively. This requires some discussion. A 'relevant private body' is defined in section 1 as:

a body which would otherwise be a private body that is

- (a) wholly or partially owned, controlled or financed directly or indirectly by public funds; or*
- (b) carries out a statutory or public function or service but only to the extent of such function or service.*

The effect of this is that private bodies are not subject to the Act unless they are NGOs or private bodies engaged in providing public services or which are state-funded. Further, the restrictions regarding exercising rights mean that there is no blanket right of access to information held by public bodies. Instead, there is a hurdle of demonstrating that the information is required to exercise another right.

Part II of the AIA sets up an oversight mechanism for implementation of access to information. Section 7 designates the Human Rights Commission (HRC), set up in terms section 129 of the constitution, as the oversight body for implementation of the provisions of the AIA. In terms of section 8 of the AIA, the HRC, in performing its oversight functions, is empowered to:

- ▶ raise awareness of the right to access of information. This is expanded in terms of section 9 of the AIA, which requires the HRC publish:
 - ▶ the objects of the AIA
 - ▶ contract details of the HRC as it relates to the AIA
 - ▶ methods for applying for access to information through both the information holder and the HRC
 - ▶ the rights of the public and any available assistance available to them from the HRC as it relates to the AIA.
- ▶ advise the information holders on the management of information in their custody
- ▶ review applications for access to information and advise the information holders on those applications
- ▶ make recommendations to government regarding the declassification of information exempt from disclosure to enable access to that information
- ▶ review decisions made by information holders as they relate to the denial of requests for access to information.

Importantly, in terms of section 10 of the AIA, 'no civil or criminal proceedings' may be made against any staff member of the HRC or information holder to which the AIA applies for the disclosure of information done in good faith. This is important as it serves to encourage public servants to provide access by shielding them from court proceedings in the event of an incorrect granting of access to information done in good faith.

In terms of sections 15 to 17 of the AIA, information holders are required to publish certain information relating to their functions and operations; these include manuals, procedures, forms and annual reports. In terms of section 16(3) of the AIA, information holders are required to update and republish any of the required information in cases where material changes to the information have occurred.

In terms of section 25 of the AIA, in cases where an information holder refuses an application for access to information, they are required to inform the applicant of

their reasons why and specify the provisions in the AIA they have used to justify their decision. The information holder is also required to inform the applicant of the availability of a review process on the decision and how to lodge a request for review of a decision.

Sections 28 to 36 of AIA makes it clear that there are grounds for refusing access to information. Refusal to disclose the requested information may be done only in cases where the information requested:

- ▶ is specifically exempted from the provisions of the AIA, such as Cabinet records, section 28(1)
- ▶ would constitute an unreasonable disclosure of personal information of a third party, section 29
- ▶ can reasonably be expected to cause damage to the security or defence of Malawi or the defence of a foreign government and the information has been communicated in confidence, section 30(a)
- ▶ could compromise the identity, or reveal the existence, of confidential sources of information concerning the administration or enforcement of the law, section 30(b)
- ▶ could endanger the life, health or physical safety of any person, sections 30(b) and 31
- ▶ could cause substantial harm to the legitimate interests of Malawi concerning crime prevention, section 30(c)
- ▶ relates to an ongoing academic or recruitment process, and the release of the information could jeopardise the integrity of the process, section 33(1). However, in terms of section 33(2) of the AIA the information may be disclosed once the process has been completed
- ▶ contains trade secrets of the information-holder or third party, section 35(a);
- ▶ contains information relating to the information-holder or a third party that would substantially prejudice the legitimate interest of either of them, section 35(b)
- ▶ where the information-holder considers the request for access to information to be malicious, frivolous or vexatious. The information-holder must state the reasons for the refusal to disclose the information, section 36
- ▶ consists of confidential medical information between a medical practitioner and a patient, section 32(1)(a)
- ▶ consists of confidential communication between a lawyer and a client, section 32(1)(b)
- ▶ consists of confidential communication between a journalist and an informant,

section 32(1)(c). This is very important as it assists journalists and the media in the protection of their sources by guaranteeing a journalist's right to refuse to reveal information that pertains to his or her confidential informants

- ▶ would otherwise be privileged from production in legal proceedings, section 32(1)(d).

It is noteworthy that, in terms of section 32(2) of the AIA, privileged information regarding medical patients, legal clients, information sources or any other person entitled to the privilege of confidentiality of information can be released when the person either consents to, or a court order demands, the release of the information.

Section 34 of the AIA specifically relates to information that may be withheld for the protection of Malawi's international relations. This information is protected where:

- ▶ the information has been supplied by, or on behalf, of Malawi to another state or international organisation pursuant to an international agreement which requires the information to be held in confidence
- ▶ confidentiality is required under international law
- ▶ the information relates to positions adopted, or to be adopted, by Malawi or another state or organisation that relates to present or future international negotiations
- ▶ the information constitutes diplomatic correspondence
- ▶ the information would substantially prejudice the relations between Malawi and another state or international organisation.

Section 37 of the AIA is awkwardly drafted, but it appears to allow an information-holder to release third party information that would otherwise be exempt from disclosure if this is in the public interest (note this is not defined). This requires them to notify any affected third party of the impending release and inform them of:

- ▶ the right to have the decision reviewed
- ▶ to whom requests for review should be submitted
- ▶ the deadline for making an application for review.

Section 38 of the AIA provides that, in cases where an information-holder refuses to grant access to information, the information-holder must prove that:

- ▶ the information is exempted from disclosure under the AIA or
- ▶ harm would result from the disclosure of the information under the relevant exemption.

Part IX of the AIA is of importance to the media as it relates to the protection of whistleblowers. Section 50(1) of the AIA provides that no one may:

be penalised in relation to any employment, profession, voluntary work, contract, membership of an organisation, the holding of an office or in any other way as a result of having made or attempted to make a disclosure of information which the person obtained in confidence in the course of that activity if the disclosure is of public interest.

While public interest is not defined, section 50(4) sets out examples of such information including:

- ▶ violations of the law, including human rights violations
- ▶ mismanagement of funds
- ▶ conflicts of interest
- ▶ corruption
- ▶ abuse of public office
- ▶ risks and threats to public health, safety and the environment.

Any disclosures made to a law enforcement agency or an appropriate public agency under section 50(1) shall be deemed to have been made in the public interest, section 50(2).

Section 50(3) of the AIA provides that any person who has information they believe to be in the public interest and has a reasonable belief in the truthfulness of the information is required to disclose the information.

Section 50(5) of the AIA provides that a person shall be considered to have been penalised in cases where that person is:

- ▶ dismissed
- ▶ discriminated against
- ▶ made the subject of reprisal or another form of adverse treatment
- ▶ denied appointment, promotion or advantage that otherwise would have been provided if they hadn't acted as a whistleblower.

In terms of section 50(6) of the AIA, any term of any settlement that relates to the disclosure of information that includes any clause that imposes confidentiality on any of the parties involved concerning information that is accurate 'shall be unenforceable'.

Section 50(7) of the AIA provides that it shall be a defence in any proceedings held for the contravention of any statutory prohibition or restriction on the disclosure of information, that the disclosure was in the public interest or the disclosing official believed it was in the public interest.

Part X of the AIA sets out several different offences, the penalties for which are a fine or a fine and imprisonment. In brief:

- ▶ destroying, damaging, altering, concealing or falsifying a record, while trying to deny a right of access, section 51
- ▶ maliciously falsifying information intending to injure another person, section 52
- ▶ wrongfully refusing to disclose information, section 53
- ▶ using information granted to him or her under this Act for unlawful purposes, for a reason other than for the purpose for which the request was made (without the permission of the information-holder), or in a manner that is detrimental to the interests of public officers, the information-holder or the public interest, section 54.

3.10.2 The National Assembly Powers and Privileges Act, Act 4 of 1957 (Powers and Privileges Act)

The Powers and Privileges Act confirms the privileges and immunities that are given to members of parliament in terms of section 60 of the constitution dealt with above.

An important additional section in the Powers and Privileges Act is section 25 which protects anyone in civil proceedings from an adverse finding for reporting about parliamentary votes and proceedings and for publishing reports or extracts of reports, minutes or other matters in good faith and without malice.

3.10.3 The Courts Act, Act 47 of 1967 (Courts Act)

In terms of section 60 of the Courts Act, court proceedings should occur in open court to which the public should have access, but if, in the opinion of the presiding judge, it is in the interests of justice, the proceedings may be heard *in camera*. This means that journalists have access to judicial proceedings unless they are specifically refused access by the presiding judge.

3.10.4 The Criminal Procedure and Evidence Code Act, Act 36 of 1967 (Criminal Procedure Act)

In terms of section 71 of the Criminal Procedure Act, all court proceedings must be held in open court to which the public shall generally have access; however, the court has the power to hear all or part of a matter before them in a closed court, outside public viewing.

It should be noted that section 71(b) excludes matters before courts that include:

- ▶ proceedings relating to juveniles
- ▶ high court proceedings relating to people under the age of 18 years

- ▶ the deliberation of a jury in the course of any proceedings
- ▶ proceedings, other than a trial or inquiry that the Chief Justice directs, in writing, should be heard in a closed court.

In terms of section 71A of the Criminal Procedure Act in matters where evidence is being given by a victim of sexual assault, and upon application by a party to the proceedings or the victim of the assault, the presiding judge may require the evidence be held in a closed court.

These sections ensure that judicial proceedings are available to the public, and journalists may attend and report on court matters.

4 Regulations affecting the media

In this section, you will learn:

- ▷ what regulations are
- ▷ regulations governing the media generally
- ▷ regulations governing the broadcast media
- ▷ regulations governing digital terrestrial television broadcasting (DTT)

4.1 Definition of regulations

Regulations are subordinate legislation. They are legal rules that are made in terms of an empowering statute (for example, an act of parliament), and are made by a public functionary, usually a minister or a regulatory body.

4.2 Key regulations governing the media generally

The Public Security Regulations published in Government Notice 70 of 1964 (the Security Regulations) were passed in terms of the Public Security Act (see the section on legislation above). The regulations have significant implications for the media because they contain prohibitions on publication, as well as provisions that undermine a journalist's duty to protect his or her sources.

Section 4 of the Public Security Regulations makes it an offence to, and prohibits any person from, publishing anything likely to:

- ▶ be prejudicial to public security

- ▶ undermine the authority of the government
- ▶ promote feelings of ill-will or hostility between sections, classes or races of the inhabitants of Malawi.

The penalty is a fine and imprisonment.

Section 9 of the Security Regulations empowers an army or police officer or any other person authorised as an officer by the relevant minister or the Commissioner of Police to demand the production of or seize any information or document in a persons' possession if the officer considers it necessary in the interests of public security. Failing to comply is an offence punishable by imprisonment. It is important to note that the criterion here is not an objective one; it is based on the opinion of the officer and not on the objective test of actually being in the interests of public security. Consequently, this provision is not in accordance with international best practice.

4.3 Key regulations governing the broadcast media

4.3.1 The Licensing Regulations

The Communications Act, in section 6(2)(b), authorises Macra to grant licences for the provision of communication services in Malawi. This is expanded in section 32 of the Communications Act giving Macra the authority to dictate rules concerning the types and categories of communications licences that Macra will prescribe. In accordance with these provisions in the Communications Act, the Minister of Information and Communications Technology, on the advice of Macra, issued the Communications (Telecommunications and Broadcasting Licensing) Regulations published in Notice No. 32 Gazette No, 15A dated 25 November 2016 (the Licensing Regulations). For this chapter, we will focus on licences dealing with broadcasting and signal distribution.

Categories of licences

In its relevant part, the first schedule to the Licensing Regulations provides for the following classification of licences:

- ▶ *Broadcasting signal distribution licences* (category 2b): authorise licensees to provide broadcasting distribution services for terrestrial television and radio. Licences in this category are divided into two sub-categories, those provided with national signal coverage and those who are self-provisioning (that is broadcasters who are providing their own signal distribution). While national broadcast signal distributors are authorised to carry the broadcast signal of other broadcasters, self-provisioning broadcast signal distributors may only carry their own signal. The licences are individual licences and last for ten years. The fees associated with licencing include an application fee, an initial fee and an annual fee. Licensees are also required to pay a levy of 1% of their gross annual revenue to Macra.

- ▶ *Broadcast (content) services licences* (category 4): authorise licensees to provide broadcasting content services by satellite and terrestrial television and radio broadcasting. Licences in this category are divided into seven sub-categories, being national television and radio, public national television and radio, regional radio, community radio and subscriptions management services. The licences are individual licences and last for seven years. The fees associated with licencing include an application fee, an initial fee and an annual fee. Licensees are also required to pay a levy of 1% of their gross annual revenue to Macra.

Applications for licences

Part II of the Licensing Regulations focuses specifically on the licensing scheme. In terms of section 5 of the licensing regulations, Macra is authorised to issue licences in accordance with the above categories for the periods stated in the first schedule. This section also requires licensees to pay the fees outlined in the first schedule of the licensing regulations.

The Licensing Regulations are extremely poorly drafted and many of their provisions appear to contradict and be *ultra vires* the provisions of its governing legislation, namely the Communications Act. For example, the Communications Act, section 38, requires a restricted procedure for licensing electronic communications that require the allocation of scarce resources such as the radio frequency spectrum. However, the Licensing Regulations make no reference to a restricted licensing process and specifically make provision, in section 6(5), for a person wishing to provide an electronic communications service to apply for a licence making use of the prescribed forms at any time. If such a person wishes to make use of the radio frequency spectrum, then section 8(3) of the Licensing Regulations requires that a separate application for radio frequency licence be made after the electronic communications licence has been granted by Macra. The result of this is that it is extremely unclear how Macra conducts its processes in respect of broadcasting and signal distribution licences.

Modification of licences

Section 10 of the Licencing Regulations empowers Macra to modify or amend licences in the following circumstances:

- ▶ for the efficient management of the communications sector, as long as the amendment does not cause substantial prejudice to the licensee
- ▶ to comply with international agreements
- ▶ when the amendment is in the public interest
- ▶ with the agreement of the licensee.

Licensees may apply, in writing, for an amendment to be made to any term of their licence.

Before amending any provision of any licence, Macra must give the licensee and all interested parties notice of the amendment in the gazette, as well as an opportunity to make representations concerning the proposed amendment.

Section 10 also makes provision for Macra to conduct investigations regarding uses of licences that are not in the public interest as a precursor to potentially amending a licence to solve the identified problem.

Renewal of licences

In terms of section 11 of the Licensing Regulations, before renewing any communications licences, Macra must evaluate the licensee to determine that they:

- ▶ have performed in accordance with the obligations of their licence
- ▶ continue to meet the eligibility requirements
- ▶ continue to be financially and technically capable
- ▶ have not contravened any provisions of the Communications Act, the conditions of their licence or any other relevant laws issued by Macra.

Macra must also determine that the renewal would be in the public interest.

Unless otherwise stipulated, licensees must apply for the renewal of their licences six months before their expiry and Macra shall renew the licences on receipt of the prescribed fee. It should be noted that Macra may issue the renewal with little or no changes to the licence, or else issue an entirely new licence with new conditions, depending on the needs of the prevailing regulatory environment.

General conditions of licences

Part III of the Licensing Regulations, General Conditions, outlines the basic provisions of service to which all licensees must adhere to meet the requirements of their licences.

Section 12 outlines the first which is that, unless otherwise provided, a licensee is required to complete the rollout of its licenced services within 12 months of receiving the licence, should they fail to do so due to a *force majeure* reason, as determined by Macra, the licensee may request an extension. If Macra is satisfied with the *force majeure* reasons, they may issue an extension. If the licensee again fails to provide the licenced service, the licence will be revoked.

Within four months of the end of each financial year, licensees must give Macra audited financial statements certified by a qualified independent auditor. Macra may request other documentation to fulfil the provisions of these regulations, section 14.

Section 15 of the Licensing Regulations require that licensees do not intentionally interrupt or suspend the operation of a licenced service without informing Macra in writing and providing advance notice to any persons likely to be affected.

Section 17 is related to technical requirements with which licensees must comply. If Macra determines any facility operated by a licensee does not meet the required standards, they may seal the installation.

Licensees are required to ensure the privacy of any information it has obtained in the course of business and is required to keep sufficient records of confidentiality procedures to the satisfaction of Macra, section 18.

Section 21 requires that any licensee take all adequate safety measures to ensure that proper safety measures are taken to ensure the safe use of its equipment or installations.

Section 23 prohibits discrimination by licensees, and section 24 prohibits anti-competitive behaviour which Macra views as inhibiting or impeding fair competition.

Section 25 requires that licensees conform to the complaints handling requirements provided in the regulations made under the Communications Act and in complaints handling procedures issued by Macra. Licensees are required to file its complaints handling procedures with Macra.

Section 26(2) reaffirms the requirements laid out in the Communications Act that all licensees have a minimum of 20% local Malawian shareholding, except for broadcasting (content) services which are required to have an 80% local shareholding in terms of the Communications Act.

In terms of section 26(3), a licensee may not make any shareholder changes without the prior approval of Macra, and an application for approval is required to be made in accordance with the provisions of section 26(4). Any shareholding changes in a licensee made without the prior approval of Macra may result in the revocation of the licence in terms of section 26(5).

Transfer of licence obligations

Licensees are prohibited from transferring any of the rights or obligations licensed to them without the prior approval of Macra in terms of section 22(1). The transferee is treated as a new applicant in term of section 22(5).

Specific licence conditions

Part IV of the Licensing Regulations stipulate requirements specific to the categories of licences. Section 30 relates to broadcasting (content) services licences and requires that a licensee submits to Macra:

- ▶ its programme line up
- ▶ its human resource development created in terms of section 31 of the licensing regulations which requires that licensees make reasonable provisions to ensure that Malawian Nationals in their employment acquire the necessary skills and knowledge to discharge their duties effectively

- ▶ proof of qualified staff.

Enforcement and complaints

Section 32 of the Licensing Regulations outlines the procedure to be followed when a complaint is made against a licensee. Macra is required to investigate any matter where it suspects a licensee has contravened the terms of its licence. If Macra determines that there has been a contravention of the Communications Act, regulations passed thereunder or of the licence conditions, it must decide on the matter. Macra has the authority to give a licensee an interim order to stop specific conduct before an investigation has been undertaken or concluded.

Where Macra has determined that a licensee has contravened a provision of the Communications Act, a regulation or a condition of its licence, Macra must impose a sanction in line with the severity of the contravention and the licensee's history of contraventions, if any. Macra may consider mitigating factors.

Revocation of a licence

Section 33 of the Licensing Regulations empower Macra to revoke a licence where it determines that:

- ▶ there has been a substantial or continuing breach of a licence condition, a regulation or of the Communications Act
- ▶ the licensee has been declared insolvent
- ▶ the licensee has agreed, in writing, to the revocation of its licence.

Before revoking a licence, Macra must notify the licensee of the alleged breach and give the licensee 30 days to remedy the breach or show cause why the licence should not be revoked.

Where a licence is revoked, licensees are required to surrender their licence within 14 days.

4.3.2 The Broadcasting Regulations

The Communications Act, section 200, empowers the Minister of Information and Communications Technology, on the recommendation of Macra, to issue regulations relating, among other things, to broadcasting. The minister has passed the Communications (Broadcasting) Regulations published in Notice No 26 Gazette No 10A dated 28 June 2019 (Broadcasting Regulations). The Broadcasting Regulations deal with a broad range of issues as set out below. Where these regulations merely repeat provisions of the Communications Act, we do not include them in this section.

General broadcasting provisions

Part II of the Broadcasting Regulations relates to general provisions in broadcasting.

Sections 5 and 6 of the Broadcasting Regulations define the categories and associated fees and levies associated with the different types of broadcasting content licences. Failure to pay the fees prescribed by Macra is an offence, the penalty for which is a fine and a term of imprisonment in terms of section 52 of the Broadcasting Regulations

Section 7 of the Broadcasting Regulations requires that a successful applicant for a broadcasting licence is required to roll out its services within 12 months for television and six months for a radio broadcasting service. This period will not be extended, except on the ground of *force majeure*.

In terms of section 8 of the Broadcasting Regulations, licensees must publish a notice in a newspaper with wide circulation in the licensee's coverage area 14 days before the commencement of service.

Section 9 of the Broadcasting Regulations empowers Macra to amend a licence:

- ▶ to ensure efficient management of the communication sector
- ▶ to comply with any international broadcasting standards
- ▶ at the request of the licensee.

Section 10 of the Broadcasting Regulations requires licensees to apply for renewal of their licences six months before expiration. Where licences are renewed, licensees must pay the requisite fees.

Section 11 of the Broadcasting Regulations prohibits licensees from broadcasting discriminatory material. Additionally, broadcasters are required to:

- ▶ maintain editorial independence
- ▶ respect copyright obligations
- ▶ keep and store sound and video recordings of all programmes broadcast for a minimum period of three months or such further period as Macra may direct
- ▶ ensure the provision of programming that is accessible to disabled persons;
- ▶ annually file information with Macra showing their station identity and any changes thereto, ensuring that their station identity is unique and does not cause confusion; this identity must be broadcast every 60 minutes
- ▶ keep records as required by Macra
- ▶ state, at least twice within twenty-four hours, all the frequencies and channels on which the broadcasting station is licensed to operate
- ▶ free-to-air broadcasting licensees must provide the amount of local content as specified in the licence, news and information in its programming, as well as discussions on matters of national importance and adhere to any applicable code of conduct as well as its programming schedules.

In terms of section 12 of the Broadcasting Regulations, licensees are required to stipulate the broadcasting format it intends to provide on its licence application and ensure that its programming conforms to its broadcast format.

Obligations on specific categories of broadcasters

Public broadcasters

Section 16 of the Broadcasting Regulations sets out the responsibilities of a public broadcaster; these include the requirement that public broadcasters:

- ▶ provide independent and impartial broadcasting services of information, education and entertainment in English and Chichewa and other languages at the broadcaster's discretion
- ▶ conduct the broadcasting services impartially and consider the interests and susceptibilities of the different communities in Malawi
- ▶ provide and receive material to be broadcast, without changing their distinctive identity or failing to cater to audiences not catered for by other public broadcasting services.

Other regulations outlined in section 16 of the Broadcasting Regulations include where public broadcasters may generate their revenue and prohibits public broadcasters from transferring or leasing the frequency assigned to them for public broadcasting. On request by the public broadcaster, Macra may grant a public broadcaster a licence to provide a commercial broadcasting service. Public broadcasters are required to adhere to programming quotas outlined by Macra.

Commercial broadcasters

Section 17 of the Broadcasting Regulations sets out the responsibilities of a private commercial broadcasting licensee providing commercial free-to-air broadcasting services, including restrictions and quotas on programming. Macra, in consultation with the Minister of Information and Communication Technology, is authorised to license foreign commercial content broadcasters, subject to availability of frequencies or channels. Section 17 also sets out when advertisements are to be broadcast and how long broadcasters must keep records of the programming for inspection by Macra.

Community broadcasters

Section 18 of the Broadcasting Regulations provides for Macra to issue community content licences on geographical or interest-based categories. It also outlines the broadcasting requirements to which community broadcasters are required to adhere. Funding for community broadcasting licensees is required to ensure that all the funds generated from the operations of a community broadcasting station are reinvested in activities benefiting the community; this will be monitored by Macra.

Community Broadcasting Licensees must ensure that their services are available to the members of the community so that they can participate in the programmes, express their needs and wants or discuss issues of interest relating to their own community. It must be based within the community which it is serving or at a strategic location and be equally accessible by the entire community so that community members can reach the station and benefit from it. Community content broadcasters must be affordable, acceptable and accountable to the community they serve.

Subscription broadcasting services

Sections 19 and 20 of the Broadcasting Regulations provide for Macra to issue subscription broadcasting services licences for subscription broadcasting and subscription management services. Macra may require a licensee granted a licence to distribute broadcasting services, whether by cable or satellite within Malawi and provide a prescribed minimum number of Malawian broadcasting channels. Satellite subscription broadcasting service providers, whose signal originates from outside Malawi and who intend to provide its broadcasting services in Malawi, must provide such services through a person with a subscription management service licence.

Subscription broadcasting services or subscription management services licensees are prohibited from acquiring exclusive rights for the broadcast of any event which is classified to be in the public interest by Macra and must ensure the provision of 'free to air' broadcasting services on its bouquet as determined by Macra. Subscription broadcasting services, or subscription management services, are required to provide Macra with equipment and access to their services free of charge.

Special event broadcasting

Macra may issue a special event broadcasting licence to any person for any event not lasting for more than 30 days. The broadcasting of a special event without a licence is an offence the penalty for which is a fine in terms of section 21 of the Broadcasting Regulations.

Programming classification and the watershed period

Section 24 of the Broadcasting Regulations provides that the watershed period shall be from 22h30 to 04h30 and, besides allowing for the broadcast of content that is classified not suitable for children in this period, broadcasters may also broadcast promotional material which is unsuitable for children. Broadcasting of material which is unsuitable for children outside the watershed period is an offence the penalty for which is a fine or imprisonment.

News and opinion broadcasting

Sections 26 to 29 of the Broadcasting Regulations provide the requirements on licensees when broadcasting news programming. Licensees must ensure news is accurate and, where a news report contains an allegation against any person, they

must be given the opportunity to reply. Licensees must also ensure that reports or broadcasts from its station are based on facts and not opinion unless the broadcast makes this clear. In cases where there is sufficient reason to doubt the accuracy of a report, and it is not possible to verify the report, it must not be broadcast. In cases where a report broadcast is determined to be incorrect, the licensee must retract the report and announce the error with the same prominence as the original report; this retraction must take place within 48 hours of the original report.

Interviews

Section 31 of the Broadcasting Regulations provides that, in the case of interviews, the person being interviewed must be advised of the subject of the interview and informed before the interview takes place whether the interview is to be recorded or broadcast live. Children may not be interviewed without the consent of a parent or guardian. In cases where interviews are being conducted with the bereaved or survivors or witnesses of traumatic events, licensees must exercise all necessary sensitivity. Improper conduct of an interview is an offence, the penalty for which is a fine.

Advertisements and sponsorships

Section 37 to 40 of the Broadcasting Regulations provide for the regulation of advertisements and sponsored content. Where licensees have received sponsorship to air a programme, the licensee must retain ultimate editorial control and must ensure that sponsorship of an informative programme does not compromise the accuracy and impartiality of the content of the programme. Licensees may not discriminate unreasonably against any sponsor, and sponsorship of a programme must be acknowledged immediately before and after the programme broadcast. Sponsoring programmes in breach of regulations is an offence, the penalty for which is a fine.

Licensees must ensure that its advertisements are lawful, decent and in conformity with the principles of fair trade; they must also be sensitive to gender culture, religion and age, and must be prepared with a sense of responsibility to the audience. Advertisements may not contain misleading material or attack competitors. Licensees must, where reasonably possible, ensure the accuracy of advertisements. Licensees are required to exercise responsible judgment when scheduling advertisements that may be unsuitable for children. Broadcasting advertisements in breach of these regulations is an offence, the penalty for which is a fine.

Broadcasters are prohibited from broadcasting infomercials for more than four hours a day, or during the transmission of a children's programme. Infomercials must be distinguishable from other programming and must be lawful, decent and in conformity with the principles of fair trade and must be prepared with a sense of responsibility to the audience. Broadcasting infomercials in breach of regulations is an offence, the penalty for which is fine.

Audience participation

Where audiences are invited on air to react or participate in a programme or competition, section 41 of the Broadcasting Regulations provides that licensees inform the public of the full cost of a telephone call or short message service. Audience members must be apprised of the rules of any competitions.

Local content requirements

Section 43 of the Broadcasting Regulations provides that, for this regulation, local content shall mean content:

- ▶ made by authors, producers and persons who are Malawians
- ▶ produced under the creative control of Malawians
- ▶ where production is supervised and controlled by one or more producers established in Malawi
- ▶ where a co-production is not controlled by one or more producers based outside Malawi
- ▶ where the production originates from any other country, and the production is made exclusively by Malawians or in co-production with non-Malawians in that country.

A licensee shall, within a period specified by Macra, comply with the requirements on the broadcasting of minimum local content as specified in the second schedule. The requirements differ depending on the broadcasting licence:

- ▶ public television content broadcasting licensees — 50%
- ▶ commercial television content broadcasting licensees — 35%
- ▶ subscription television content broadcasting licensees — 8%
- ▶ public sound broadcasting licensees — 60%
- ▶ private sound broadcasting licensees — 40%
- ▶ community sound broadcasting licensees — 40%.

Broadcasting in breach of local content requirements is an offence, the penalty for which is a fine.

Political broadcasting

Part IV of the Broadcasting Regulations stipulates specific rules related to the broadcasting of political broadcasting and broadcasting during an election period. This includes the period in which such broadcasts may be aired, the duration of the broadcasts and the manner in which such broadcasts may be aired. Public broadcasters are required to carry political broadcasts, however other broadcast

(content) licensees may refuse to do so. Any broadcaster that transmits any political broadcast must provide equal opportunities for views from all political entities without prejudice.

Monitoring and enforcement of licence conditions

Section 50 of the Broadcasting Regulations requires that Macra monitor the compliance of licensees with the Communications Act. Macra may hold public hearings on any matter relating to the monitoring and enforcement of these regulations and before imposing any regulatory sanction on a licensee it must:

- ▶ notify the licensee in writing
- ▶ invite the licensee for a hearing
- ▶ invite the licensee to make representations on the matter.

In cases where Macra is satisfied that the licensee has contravened the Communications Act, regulations or the terms of its licence, it must inform the licensee of its findings and publish them as well as its reasons. Macra is authorised to make an interim order requiring the licensee to cease and desist immediately any broadcast that Macra deems to be in contravention, pending a full hearing of the matter.

Macra may, from time to time, issue guidelines in respect of any regulatory matter.

Revoking a licence

Section 53 of the Broadcasting Regulations provides that Macra may revoke a content licence for any material or continued breach of the Communications Act, regulations or licence conditions.

4.3.3 The DTT Regulations

Section 200 of the Communications Act empowers the Minister of Communications and Information Technology, on the recommendation of Macra, to enact regulations to carry out the provisions of the Communications Act, 2016 better. In accordance with this provision of the Communications Act 2016, the minister enacted the Communications (Digital Terrestrial Television) Regulations, published in Notice No 25, Gazette No 10A dated 28 June 2019 (DTT Regulations).

Macra's authority

Part II of the DTT Regulations outlines the powers Macra has concerning DTT. In accordance with the Communications Act, sections 4 to 6 of the DTT regulations set out the authority Macra has over the allocation of frequencies for signal distribution and the registration of signal distributors for DTT.

Obligations of signal distributors

The obligations of a signal distributor are outlined in section 7 of the DTT Regulations. Signal distributors are obliged to meet various broadcasting standards and provide Macra with reports of their services and annual rollout plans to ensure the development and provision of DTT services. Signal distributors are also obliged to enter into agreements with broadcasting content services to provide access to the frequencies with which they have been licenced. Should they refuse to enter into an agreement with a broadcasting content licensee, they are obliged to inform Macra of the reasons.

Obligations of broadcasting (content) service licensees

In terms of section 8 of the DTT Regulations, broadcasting (content service) licensees are also obliged to undertake certain responsibilities in accordance with the DTT regulations. These responsibilities include entering into agreements with signal distributors. They are required to provide their signal distributor with information relating to their programming and must ensure that the signal they provide to the distributor carries the station identification.

Sections 9 to 14 of the DTT Regulations outline the technical specifications required to be followed by a DTT operator, including video quality standard, network configuration, signal distribution capacity and quality of service. These standards are determined and monitored by Macra. The specific technical specifications for DTT signal distribution are set out in both the first and second schedules of the DTT Regulations.

5 Media self-regulation

The body responsible for the self-regulation of the media in Malawi is the Media Council of Malawi (MCM).

5.1 History of the Media Council of Malawi (MCM):

The MCM was established in 1995. It has had a tumultuous existence. In the past, the MCM issued press cards to permanent employees of media outlets and freelance journalists; this helped protect the public from unscrupulous journalists. The process of handing out and monitoring the press was done in conjunction with the media houses and the Ministry of Information. Unfortunately, this process faltered because the MCM had been dormant since 2010.¹⁴ Efforts to resuscitate the MCM began in 2018 and culminated in the recent re-launch on 31 December 2019. The re-launch aimed to educate the public, media houses and media owners of the new media self-regulation model that will be instituted by the MCM and provide a platform for stakeholders to offer direction to the MCM moving forward.¹⁵ From what we have been able to establish, no constitutional or self-regulatory provisions

have yet been adopted, so we assume that the former constitutional and self-regulatory code remains in effect.

5.2 The MCM Constitution

The MCM Constitution states that the MCM aims to uphold and maintain the freedom of the media in Malawi, including the freedom of expression and the public right to receive and impart information and opinion freely and to defend and protect the media from undue pressure from any source. They will also hold media practitioners to the highest possible standards with strict compliance to the code of ethics and assist journalists, both foreign and local, with accreditation in Malawi in conjunction with the relevant government agency. The MCM also aims to serve as an alternative dispute resolution mechanism on matters involving the media and the public.

5.3 Membership of the MCM

Membership is open to media houses, journalists, training institutions and press clubs. All members must meet the minimum prescribed standards set out by the MCM.

5.4 Functions of the National Governing Council

The National Governing Council (the Council) of the MCM consists of not fewer than seven and not more than 11 members chosen from paid up members of the MCM, as well as from other bodies including the Council for non-Governmental Organisations and the Malawi Law Society. The functions of the Council will be to establish committees, rules and procedures for the governing of media in Malawi.

5.5 Ethics, Complaints and Disciplinary Committee

The MCM will have an Ethics, Complaints and Disciplinary Committee (the Ethics Committee) responsible for updating, maintaining and promoting the Code of Ethics and professional standards for media practitioners, journalists and media organisations and responsible for receiving and adjudicating complaints and grievances as provided for in the rules of procedure. Adjudication will be the last resort if mediation cannot resolve the issue. The Ethics Committee may, upon completion of any adjudication proceedings:

- ▶ censure the journalist or media house against whom the complaint was made
- ▶ order an apology
- ▶ order publication of the corrected version of the article from which the complaint arose
- ▶ order full publication of the results of the hearing.

5.6 The MCM Code of Ethics and Professional Conduct

The MCM has published a Code of Ethics and Professional Conduct (the Code), which governs the conduct and practice of journalists in Malawi. The key aspects of the Code are summarised as follows:

5.6.1 The individual journalist

A journalist is responsible for providing the public with accurate information, shall conduct him/herself with propriety, shall dress decently and shall observe etiquette as the situation demands.

When conducting interviews:

- ▶ sources must be informed they are being interviewed for a story
- ▶ interviewees must not be insulted, abused or otherwise embarrassed
- ▶ interviewees are free to restrict what is to be published as well as what is to be attributed to them
- ▶ interviews are to be conducted in a language in which an interviewee is competent, or the journalist may arrange for an interpreter
- ▶ must avoid situations giving rise to conflicts of interest
- ▶ must observe his or her employer's editorial policy
- ▶ must not demand or accept payment for including or excluding material from a story.

5.6.2 The journalist's work

- ▶ All material produced by a journalist must be credible, balanced, fair, verifiable and must avoid unwarranted distortion and speculation, as well as discriminatory and inflammatory language involving, for example, racism, tribalism or religion.
- ▶ Headlines must reflect the gist of the story and must not be misleading.
- ▶ Pictures:
 - ▶ should not be traumatising, shocking or obscene
 - ▶ must be appropriate and must not be used for the sake of sales promotion
 - ▶ must not infringe on an individual's right to privacy.
- ▶ Quotations must be accurate.

5.6.3 General principles and issues

- ▶ Journalists must strive for accuracy, transparency, objectivity and thoroughness

in the reporting of news and avoid plagiarism. Whenever a significant inaccuracy, misleading statement or distorted report has been published, it should be corrected promptly and with due prominence, including an apology where appropriate. A distinction must be made between news reports, speculation and opinion. All sides of a story must be presented, and a fair opportunity provided for a reply.

- ▶ Advertising and public announcements must be accurate and clearly distinguishable from news.
- ▶ Legal reporting:
 - ▶ avoid practices which might interfere with the right to a fair trial
 - ▶ do not prejudice the outcome of a case when reporting on it.
- ▶ While facilitating the public's right to know, a journalist shall observe the following limits:
 - ▶ no identification of a victim of sexual assault unless the journalist is free to do so by law
 - ▶ no identification of any person under 13 years who are involved in sexual offences cases — as a victim, witness or defendant
 - ▶ avoid references to a person's race, colour, ethnic origin, religion, sex or sexual orientation, physical or mental illness or disability, unless this is relevant to the story
 - ▶ information or pictures may not be obtained by misrepresentation or subterfuge unless the material cannot be obtained by other means.

5.6.4 Relationship with the Public and other Journalists

- ▶ Give an opportunity to reply, allowing the public and institutions to respond to statements made about them in the media.
- ▶ Respect an individual's private life without intrusion or harassment.
- ▶ Strive for transparency at all times.

5.6.5 Media Houses shall ensure:

- ▶ journalists in their employ are properly dressed
- ▶ editorial policies shall not conflict with media ethics
- ▶ that they do not demand any financial inducement to publish or exclude material from publication
- ▶ that they publish rebuttals, as long as they are meant to clarify the issue at stake
- ▶ that rebuttals are run free of charge

- ▶ that they foster relations, exchange ideas, debate and discuss among themselves.

5.6.6 Professional misconduct

- ▶ An infringement of any of the provisions of the Code constitutes professional misconduct.
- ▶ The Ethics, Complaints and Disciplinary Committee shall be responsible for enforcing the observance of this code in accordance with the principles of natural justice (that is, with an unbiased adjudicator and observing the journalist's right to a hearing).

6 Case law and the media

In this section, you will learn:

- ▷ the definition of common law
- ▷ what is meant by judicial review, and in particular:
 - › the difference between a review and an appeal
 - › the various grounds for judicial review
- ▷ what the High Court of Malawi held in a case involving the judicial review of a decision to revoke a licence of a sound broadcaster in Malawi
- ▷ what the High Court of Malawi held in two cases involving the broadcast of criminal proceedings

6.1 Definition of common law

The common law is judge-made. It is made up of judgments handed down in cases adjudicating on disputes brought by people, whether natural (individuals) or juristic (for example, companies). In common law legal systems such as Malawi's, judges are bound by the decisions of higher courts and also by the rules of precedent. This requires that rules laid down by the court in previous cases be followed unless they were wrongly decided. Legal rules and principles are, therefore, decided on in an incremental, case-by-case basis.

This section considers three cases involving the revocation of a broadcaster's licence by Macra and two involving the broadcast of criminal proceedings.

6.2 Judicial review

6.2.1 The difference between a review and an appeal

When a court hears an application for judicial review of an administrative decision, this is not the same as hearing an appeal from a lower court. In an appeal, the court considers the facts and the law and essentially asks if the lower court came to the **correct** decision. In an application for judicial review, the court considers the facts and the law, but it asks a different question, namely, whether the **process** by which the decision-maker arrived at a decision being reviewed was flawed or not.

In a leading High Court of Malawi decision, *The State and the Malawi Communications Regulatory Authority ex parte Joy Radio Limited* (Miscellaneous Civil Cause No 143 of 2008, *Macra v Joy Radio*), the court reiterated that 'judicial review is not concerned with the merits of the decision ... Rather it is concerned with the decision-making process followed by the maker of the impugned decision'.

Traditionally, judicial review was concerned with purely common law principles. This has, however, changed where constitutions provide a right to administrative justice, as is the case in Malawi. Nevertheless, common law principles play a significant role in determining the scope of the constitutional right.

6.2.2 Grounds for judicial review

There is no absolute, closed list of grounds for reviewing and setting aside an administrative decision. However, in *Macra v Joy Radio*, the High Court of Malawi specified a number of grounds, namely:

- ▶ where a decision is *ultra vires*, that is, where the decision-maker goes beyond his/her or its legal authority or mandate to act when making a decision
- ▶ where a decision was taken in a manner that did not observe the principles of natural justice (that is, a duty to act fairly). Although not specifically enumerated by the High Court, in most common law jurisdictions this is distilled into at least two duties, namely, to ensure that the decision-maker is not biased and to give persons affected by a decision a hearing
- ▶ errors which undermine the process
- ▶ unreasonable decisions.

Besides these grounds, which are specifically listed in the judgment, it is widely recognised that there are other grounds for judicial review, including the following:

- ▶ ulterior purpose, this is where a decision is taken ostensibly for one reason but is in fact taken for another, illegitimate reason;

- ▶ failure to apply the mind, this is a broad ground of review that is usually evidenced by one or more of the following instances of failure to apply mind:
 - ▶ Taking direction. This is a where a decision-maker who is empowered to act does so, but at the instruction of a person or authority who or which is not empowered to take the decision.
 - ▶ Taking irrelevant considerations into account. This is where a decision-maker takes account of considerations which he or she is not empowered or required to take into account.
 - ▶ Failing to take relevant considerations into account. This is where a decision-maker does not take account of considerations which he or she is empowered and required to take into account.

6.3 What the High Court of Malawi held in a case involving the judicial review of a decision to revoke a licence of a sound broadcaster in Malawi

Macra v Joy Radio

Facts of the case as determined by the court

The facts at issue involved a radio station, Joy Radio, licensed by Macra to provide a broadcasting service. Macra had issued Joy Radio with two licences, a radio (frequency) licence and a broadcasting licence.

Over a period in 2008, Macra repeatedly asked Joy Radio for copies of broadcasts, usually after the coverage of opposition political party events. At some point, Joy Radio asked Macra for justifications for the numerous requests for copies of broadcasting material, but Macra did not respond.

In August 2008, Macra wrote to Joy Radio and threatened to revoke its licence. It accused Joy Radio of violating the provisions of the Communications Act in that:

- ▶ at least one of its shareholders was a significant opposition party politician, thereby violating the prohibition against political parties being granted licences
- ▶ it had failed to submit copies of broadcasts as requested.

In October 2008, Macra revoked Joy Radio's radio licence. Joy Radio approached the High Court for judicial review of the revocation.

Court finding

The High Court of Malawi made several findings on the process which Macra undertook in revoking Joy Radio's radio (as opposed to broadcasting) licence.

- ▶ The court found that the Communications Act makes it clear that revocation is

a penalty which Macra may impose only if a broadcaster has failed to comply with an order prohibiting it from broadcasting for 30 days.

- ▶ Such 30-day prohibition order can be made only after a process which involves granting the party concerned a hearing.
- ▶ It found that Macra had revoked a radio licence on the grounds that related only to broadcasting licences and had nothing to do with radio spectrum management. This was unsound, and *ultra vires* its powers under the legislation.
- ▶ It found that Macra had a duty to respond to Joy Radio's written request for an explanation as to the frequency of the requests for copies of broadcasts.
- ▶ It found that Macra's refusal to respond to Joy Radio's request for an explanation, coupled with its threat to revoke Joy Radio's licence, demonstrated a desire to intimidate.
- ▶ It found that, by not holding a hearing into its allegations that Joy Radio's shareholding was not in order, Macra had failed to comply with the Communications Act's procedures in dealing with purported non-compliance in this respect.

The High Court concluded that Macra's decision-making process 'was flawed through and through with irregularities'. The court used strong language in commenting on this: 'I find that Macra behaved most disgracefully and that it not only acted *ultra vires* the powers the law has vested it with but also without fairness in the sense depicted by the principles of natural justice.' The court set aside the revocation of Joy Radio's radio licence and ordered Macra to pay all costs of the lawsuit.

6.4 What the High Court of Malawi held in two cases involving the broadcast of criminal proceedings

6.4.1 *Times Television Limited and Another v the State and Others*

Facts of the case

The applicants, in this case, approached the High Court seeking leave to install cameras in the courtroom for the recording of criminal procedures against respondents McDonald Kumwembe, Pika Pascal Monondo and Raphael Kasmabara in Criminal Case 65 of 2013, concerning the unlawful shooting of Paul Mphwiyo. It was argued that the case was a matter of significant public interest as the shooting of Mr Mphwiyo led to revelations of looting of public funds dubbed 'cashgate'.

It was argued by the media applicants that Malawians had a legitimate public interest in the case and, as such, installing cameras in the courtroom to broadcast proceedings was in accordance with the right of access to information. The application was made under section 60 of the Courts Act, which provides that court proceedings should occur in open court to which the public should have access but, if in the opinion of the presiding judge, it is in the interest of justice, the proceedings may be heard *in camera*. The application was also made under section

71(1) of the Criminal Procedures and Evidence Code which provides that all proceedings, except those provided for by law, be carried out in open court.

The application was further made under sections 35 and 36 of the Republic of Malawi Constitution which guarantees the rights to freedom of expression and press freedom respectively.

The respondents claimed that it is a well-established principle in common law in Malawi that a court exercising judicial functions has an inherent power to regulate its own procedures unless it contradicts enacted law.

In this case, it was held that in exercising its control over the conduct of proceedings being heard before it, a court was entitled to derogate from the principle of open justice by sitting in private or permitting a witness not to disclose his name when giving evidence if it was necessary to do so in the due administration of justice.

Court finding

The High Court found that broadcasting of Criminal Case 65 of 2013 was in the public interest and allowed the televised and radio broadcast of the proceedings.

- ▶ The judgment stated that the applicants, their agents or their authorized representatives or both, be granted leave to set up their equipment to obtain and broadcast live audio-visual, audio recordings or both of proceedings in the delivery of judgment in Criminal Case Number 65 of 2013 between the State and MacDonald Kumwembe, Pika Pascal Manondo and Raphael Kasambara.
- ▶ The applicant was given leave to install four video cameras in the courtroom. The cameras focused on the judge, the accused, the Director of Public Prosecution, and the public gallery. Of these, the only camera allowed to be operated by broadcasting personnel was the one focused on the public gallery, except during the passing of judgment.
- ▶ The applicants were not permitted to take any still photographs in the courtroom neither were they permitted to use still images obtained from the audio-visual recordings of the proceedings.
- ▶ The applicants were required to make the feed from the authorised broadcasts referred to above available free of charge to other media houses wishing to broadcast the delivery of judgment with the usual acknowledgement that the feed was made available courtesy of the Times Group.
- ▶ The ruling included the provision that if the applicant, any media house or any officer or agent of any media house disobeyed this would be an offence punishable by a prison sentence or the seizure of assets.

Despite the opposition from the respondents, it appears that though the court chose not to allow the taking of still photographs, it did choose to uphold the open justice principle under section 60 of the Courts Act and section 71 of the Criminal Procedure and Evidence Code.

6.4.2 Zomba District Registry, Criminal Cause No 2 of 2014. *The Republic v Asward Lutepo*

Facts of the case

The following case is relevant, not because of the subject matter of the case, but because of the court ruling on the conduct of the media in the courtroom.

On entering the court, the presiding judges noted a large number of audio-visual cameras had been set up by numerous media outlets including Reuters News Agency and the Malawi Broadcasting Corporation. The court made the observation that the journalists were in court without their legal counsel present. Nevertheless, the court proceeded to address the matter.

The court requested the Director of Public Prosecutions (DPP) and the defence counsel to address the court on the permissibility of such media coverage *vis-a-vis* the principle of open justice, before continuing with the ordinary court proceedings. The DPP observed that cameras, or other forms of electronic recording devices, are generally not allowed in court. The DPP acknowledged that, in other jurisdictions, leave had been given to allow such devices in court stressing, however, that there are protocols in place for the broadcasting of court proceedings, namely that an application by the relevant media house should have been made to the Registrar of the High Court and Supreme Court of Appeal. The DPP acknowledged the important issue of principle brought into focus in the attempt made by the media, however, that it was unfortunate that procedures had not been followed and thus the media should not be allowed to broadcast the proceedings. The defence counsel was in full agreement with the DPP.

The Court noted that the principle of open justice contained in the Courts Act and the Criminal Procedure and Evidence Code potentially clashed with the right of the accused person and the prosecution to a fair trial.

Court finding

The Court ordered that without the leave of the Court granted on specific application being made to the Court, no person, including any media house, may record, broadcast or both, proceedings electronically, whether by audio, audio-visual or photographic means.

Notes

- 1 <https://www.worldometers.info/world-population/malawi-population/> [Last accessed on 27 January 2020]
- 2 Fidelis Edge Kanyongolo, *Legal Regulation of Freedom of Expression and the Media in Malawi*, University of Malawi (2018).
- 3 <https://www.un.org/development/desa/dpad/least-developed-country-category-malawi.html> [Last accessed 27 January 2019]

- 4 Malawi Economic Development Document, IMF Country Report no 17/184, July 2017, Pg 2 Section 7.
- 5 Malawi Economic Development Document, IMF Country Report no 17/184, July 2017, Pg 2 Section 7.
- 6 https://www.theglobaleconomy.com/Malawi/Access_to_electricity/ [Last accessed on 27 January 2020].
- 7 <https://www.internetworldstats.com/stats1.htm> [Last accessed on 27 January 2020].
- 8 <https://www.itu.int/en/ITU-D/Spectrum-Broadcasting/DSO/Pages/dataminer.aspx>
- 9 <https://crm.misa.org/upload/web/digital-terrestrial-television-migration-in-zimbabwe.pdf>, Digital Terrestrial Television Migration in Zimbabwe, Challenges and Opportunities, Pg 15 [Last accessed on 06/03/2020].
- 10 <https://www.bbc.com/news/world-africa-51369191> [Last accessed 24 February 2020]
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- 12 https://ipi.media/ipi-condemns-police-attacks-on-malawi-journalists/?mc_cid=6250a8efe4&mc_eid=e4b072033d [Last accessed 13 March 2020]
- 13 <https://www.eisa.org.za/wep/mal5.htm#fn1> [Last accessed on 25 February 2020].
- 14 <http://library.fes.de/pdf-files/bueros/africa-media/09541.pdf>, African Media Barometer, Malawi 2012, Friedrich-Ebert-Stiftung, Pg. 18.
- 15 <https://malawi.misa.org/2020/01/01/media-council-of-malawi-mcm-has-new-executive-director/> [Last accessed 11 March 2020].