

# 5

# Malawi



## 1 INTRODUCTION

The Republic of Malawi is a densely populated country of approximately 13 million people. 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 were 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 of voters pushed 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, through the establishment of the Malawi Communications Regulatory Authority. It is, however, true that a number of laws continue to limit the ability of the press to inform the public about matters of the day. There is little doubt that in certain respects the media environment in Malawi is not in accordance with international standards for democratic media regulation.

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 common law based on decided cases

The aim of this chapter is 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 better enable the media to fulfil its role of providing the public with relevant news and information, 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 Constitution of Malawi
- How rights are enforced under the Constitution
- What is meant by the ‘three branches of government’ and ‘separation of powers’
- Whether there are any clear weaknesses in the Constitution of Malawi that ought to be amended to protect the media

### 2.1 Definition of a constitution

A constitution is a set of rules that are foundational 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 Constitution of Malawi was published in 1994 and came into force permanently in 1995. The Constitution of Malawi sets out the foundational rules for Malawi. These are the rules upon 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 upon which the Malawi Constitution is founded. In brief these are the following:

- The authority of the state derives from the people of Malawi, and state authority is exercised only to serve and protect their interests.
- The authority of the state is conditional upon the sustained trust of the people of Malawi, which trust can be maintained only through open, accountable and transparent government and informed democratic choice.
- The inherent dignity and worth of all human beings requires the state to recognise and protect fundamental human rights.
- 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.
- Every individual has duties towards, among other things, other individuals, his or her family and society, and the state. This includes the duty to respect others without discrimination, and exercising individual rights and freedoms with due regard to the rights of others, collective security, morality and the common interest.

Importantly, section 13 of the Constitution of Malawi 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, for 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 with or conflicted with a constitutional provision – such law could be challenged in a court of law and could be overturned on the ground that it is ‘unconstitutional’.

The Constitution of Malawi makes provision for constitutional supremacy. Section 5 specifically states that '[a]ny 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**

It is clear that rights are not absolute as society would not be able to function. For example, if the right to freedom of movement were absolute, society would not be able to imprison convicted criminals. Similarly, if the right to freedom of expression were absolute, the state would not be able to protect its citizens from hate speech or false defamatory statements made with reckless disregard for the truth. Clearly, governments require the ability to limit rights in order to serve important societal interests; however, owing to the supremacy of the constitution this can only be done in accordance with the constitution.

The Constitution of Malawi makes provision for two types of legal limitations on the exercise and protection of rights contained in Chapter IV of the Constitution of Malawi, 'Human rights'.

### **2.3.1 State of emergency derogations**

Section 45(4) of the Constitution of Malawi specifically provides for the derogation of human rights contained in Chapter IV during a state of emergency, save 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.

Rights 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 of Malawi, 'Limitations on rights'. Section 44(2) provides that '[n]o 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'.

## **2.4 Constitutional provisions that protect the media**

The Constitution of Malawi contains a number of 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 included in this section too.

### **2.4.1 Rights that protect the media**

#### **FREEDOM OF EXPRESSION**

The most important basic provision that protects the media is section 35, which states that '[e]very 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.

#### **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 '[t]he 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 rights and the 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 of the country
- The political role of the press in providing information to the public is recognised in the injunction that the press be provided with access to public information

## ACCESS TO INFORMATION

Another critically important provision that protects the media is section 37, which enshrines the right of access to information. Section 37 provides that '[e]very 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 in relation to 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. So 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 with regard to 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 through providing the public with information, having this right of *access* to information is critical to enable the media to perform its functions properly. It is unfortunate that the right of access to information in the Malawi Constitution is limited in the respects set out above, but it has to be said that these limitations are not uncommon.

## RIGHT TO ADMINISTRATIVE JUSTICE

Another important provision that protects the media is section 43, 'Administrative justice'. Section 43(a) provides that '[e]very person shall have the right to lawful and procedurally fair administrative action, which is justifiable in relation to reasons given where his or her rights, freedoms, legitimate expectations or interests are affected or threatened'. Section 43(b) provides that '[e]very 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. Indeed, 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' in nature. 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.

## PRIVACY

A fifth protection is contained in section 21 of the Constitution of Malawi, '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.

## 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 opinion

without interference. The freedom to hold and impart opinion 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.

## 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.

### 2.4.2 Other constitutional provisions that assist the media

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

## PROVISIONS REGARDING THE FUNCTIONING OF PARLIAMENT

A number of provisions in the Constitution regarding the functioning of Parliament are important for the media. These include the following:

- Section 56(4), which specifically provides that the National Assembly shall provide 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 arrested, charged or 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 key 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.



## PROVISIONS REGARDING NATIONAL POLICY ON TRANSPARENCY AND ACCOUNTABILITY

One of the important principles of national policy is section 13(o), which requires the state '[t]o 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 to make 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.

### **2.5 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. It is important for journalists to understand which provisions in the Constitution can be used against the media. There are a number of these in the Malawi Constitution.

#### **2.5.1 Right to dignity**

The right to human dignity is provided for in section 19(1), which states that '[t]he 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.

#### **2.5.2 Right to privacy**

Similarly, the right to privacy (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, etc. 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.

#### **2.5.3 States of emergency provisions**

It is also vital to note the provisions of section 45 of the Constitution of Malawi,

which section deals with derogations and public emergencies, and which have already been dealt with above under the discussion on limitations.

## **2.6 Key institutions relevant to the media established under the Constitution of Malawi**

There are a number of important institutions in relation to the media that are established under the Constitution, namely, the judiciary, the Judicial Service Commission (JSC), the Ombudsman and the Human Rights Commission.

### **2.6.1 The judiciary**

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

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

- Supreme Court of Appeal (the apex court) – section 104
- High Court – section 108
- 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 because 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 a society. The media needs the judiciary because of the courts' ability to protect the media from unlawful action by the state and from unfair damages claims by litigants.

Section 103(1) specifically provides that '[a]ll 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)).

Magistrates are appointed by the chief justice on the recommendation of the JSC (section 111(3)).

Judges are removed by the president 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)).

### **2.6.2 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 Constitution of Malawi, 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.

### **2.6.3 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 Constitution of Malawi. 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 MPs. In terms of section 122, an ombudsman is appointed by the Public Appointments Committee of the National Assembly, after a public nominations process.

### **2.6.4 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 Constitution of Malawi. In terms of section 129 of the Malawi 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. Such persons are officially appointed by the president after having been referred by the law commissioner and the ombudsman (section 131).

## **2.7 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 Constitution of Malawi provides that ‘[t]he 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 ‘[a]ny 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 (an individual) or juristic 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 Constitution of Malawi is through the provisions of the Malawi Constitution 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.

## **2.8 The three branches of government and separation of powers**

All too often, politicians, commentators and journalists use political terms such as ‘branches of government’ and ‘separation of powers’, yet working journalists may not have a clear idea what these terms mean.

### **2.8.1 Branches of government**

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

#### **THE EXECUTIVE**

In terms of section 88 of the Constitution of Malawi, 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 Constitution of Malawi, in Parliament. In terms of section 49(1), Parliament consists of the National Assembly and the president.

It is important to note the provisions of section 8 of the Constitution of Malawi, 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, ‘[a]n 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.

## 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 in an independent and impartial manner with regard only to legally relevant facts and the prescriptions of the law’.

## 2.8.2 Separation of powers

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

The aim, as the Constitution of Malawi 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 is able to operate alone, assume complete state control and amass centralised power. While each branch performs a number of 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.

## 2.9 Weaknesses in the Constitution that ought to be strengthened to protect the media

There are two important respects in which the Constitution of Malawi 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 by the people of Malawi to quality news, information and entertainment in the public interest.

## 3 THE MEDIA AND LEGISLATION

In this section you will learn:

- What legislation is and how it comes into being
- Key legislative provisions governing the operations of the print media
- Key legislative provisions governing the making and exhibition of films
- Key legislative provisions governing the broadcasting media generally
- Key legislative provisions governing the state broadcasting media
- Generally applicable statutes that threaten a journalist’s duty to protect sources
- Generally applicable statutes that prohibit the publication of certain kinds of information
- Generally applicable statutes that specifically assist the media in performing its functions

## **3.1 Legislation: An introduction**

### **3.1.1 What is legislation?**

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 vests in Parliament, which is made up of the National Assembly and the president.

As a general rule, the National Assembly and the president are ordinarily involved in passing legislation. There are detailed rules in sections 49, 57, 196 and 197 of the Constitution of Malawi which set out the different law-making processes that apply to different types of legislation. It is important for journalists and others in the media to be aware that the Constitution of Malawi 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 Constitution of Malawi, there are three kinds of legislation, each of which has particular procedures and/or rules applicable to it. These are:

- Legislation that amends the Constitution – the procedures and/or applicable rules are set out in sections 196 and 197 of the Constitution
- Ordinary legislation – the procedures and/or applicable rules are set out in section 49 of the Constitution
- Legislation that deals with financial measures – the procedures and/or applicable rules 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 Constitution of Malawi, 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 assented 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 Statutes governing the operations of the print media**

The Printed Publications Act, Act 18 of 1947, is a colonial-era statute that has not been repealed. There are a number of 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: 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 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, as his own expense, a copy of any book he 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 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 Statutes governing the making and exhibition of films**

#### **3.3.1 Making of films**

There are a number of constraints on the making of films in Malawi – something that obviously 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, 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 a period of imprisonment, in terms of section 32 of the Censorship Act.

- 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 in, and the full text of the spoken parts (if any) of, the entire film that is to be made.
- Section 21 of the Censorship Act empowers the Board of Censors to issue a film permit subject to conditions, including that a bond be paid, the repayment of which is conditional upon the film being made in accordance with the conditions of the film permit. Indeed, 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.

### 3.3.2 Exhibition of films

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

- 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 be 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 a period of imprisonment, in terms of section 32 of the Censorship Act.

### **3.4 Statutes 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 41 of 1998, and in particular Part V of that act. The Communications Act also regulates telecommunications and postal services in Malawi.

#### **3.4.2 Establishment of the Malawi Communications Regulatory Authority**

Section 3 of the Communications Act establishes the Malawi Communications Regulatory Authority (MACRA) to perform the functions assigned to it under the Communications Act. Section 6 provides that MACRA consists of a chairperson, six other appointed members and two ex officio members, bringing the total number of members to nine, all of whom service in a part-time capacity. In terms of section 1(1) of the First Schedule to the Communications Act, the appointed members hold office for a period of four years and are eligible for reappointment.

#### **3.4.3 Main functions of MACRA**

In terms of section 4(1) of the Communications Act, MACRA's general duty is to ensure that 'as far as is practicable, there are provided throughout Malawi reliable and affordable communication services sufficient to meet the demand for them'. Furthermore, section 5(1) gives MACRA the power 'to regulate telecommunications, broadcasting, the use of radio frequencies, and the provision of postal services throughout Malawi'. For the purposes of this chapter, we shall focus on MACRA's broadcasting-related powers and functions. In terms of section 5(2)(k), MACRA's main broadcasting-related functions are to regulate broadcasting services through:

- Licensing broadcasters
- Advising the minister on regulations or policies
- Monitoring compliance with regulations and licence conditions

### 3.4.4 Appointment of MACRA members

The chairperson and the six appointed members of MACRA are appointed by the president. The two ex officio members are the secretary to the president and the Cabinet, and the secretary for information. Furthermore, the minister (although the specific minister responsible is not stated in the Communications Act, it is presumably the minister responsible for the administration of the Communications Act), appoints the director-general of MACRA, on the recommendation of MACRA.

There is no public nominations process and Parliament is not involved in the appointment process at all. Section 6(2) of the Communications Act sets out the criteria for appointment, namely, Malawian citizens who possess qualifications and expertise in a variety of relevant fields, including broadcasting, frequency planning, law and public affairs. Importantly, section 6(4) sets out people who are disqualified from being appointed as members of MACRA. These include MPs, ministers or deputy ministers, and any person who is a member of a political party committee at district, regional or national level.

### 3.4.5 Funding for MACRA

Section 12(1) of the Malawi Constitution sets out the allowable sources of funding for MACRA's operating and financial costs. These are:

- Licence fees
- 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 MACRA's assets or equipment

### 3.4.6 Making broadcasting regulations

In terms of section 57 of the Communications Act, the minister, acting on the advice of MACRA, makes regulations governing the provision of broadcasting services. Effectively, this means that MACRA has a veto power in respect of the making of broadcasting-related regulations. In other words, the minister is unable to make regulations without MACRA's consent.

### 3.4.7 Licensing regime for broadcasters in Malawi

#### BROADCASTING LICENCE REQUIREMENT

Section 46 of the Communications Act prohibits any person from providing a broadcasting service in Malawi, except in accordance with a licence issued by MACRA. Section 100(1) of the Communications Act makes this an offence.

#### CATEGORIES OF BROADCASTING LICENCES

Section 47(1) of the Communications Act makes provision for MACRA to issue licences for three kinds of broadcasting services:

- *Public*: Defined in section 1 as ‘any broadcasting service provided by the MBC [Malawi Broadcasting Corporation] or any broadcasting service provided under a licence which stipulates: national or local transmission, provision of regular news bulletins and access to the service for public information announcements or programmes’.
- *Private*: Defined in section 1 as ‘a broadcasting service operated for profit and controlled by a person who is not the holder of a public broadcasting licence’.
- *Community*: Defined in section 1 as ‘a broadcasting service which: (a) serves a particular community; (b) is carried on for non-profitable purposes; and (c) is fully controlled by a non-profit entity’.

#### BROADCASTING LICENSING PROCESS

Section 48(2) of the Communications Act requires MACRA to publish a notice in the Government Gazette and in two issues of a newspaper that it intends to issue a broadcasting licence. The notice must state the:

- Kind of broadcasting service that may be offered
- Coverage area of the service
- Relevant radio frequencies, including technical parameters
- Procedure by which an application can be made, including:
  - Information that applicants must provide
  - Assessment criteria
  - Closing date for applications

Note that in terms of section 49 of the Communications Act, MACRA cannot issue an invitation to apply for a public broadcasting service until:

- It has carried out a study of various aspects of the proposed service, including the demand for such a service and the effect of the proposed service, and
- The minister has approved.

Importantly, section 48(3) requires a public notice and comment procedure for all licensing processes – meaning that the public is invited to make representations on applications for licences.

Political parties or party-political associations, alliances or organisations may not be issued with a broadcasting licence, in terms of section 48(7) of the Communications Act.

## 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.

Part IV of the Communications Act deals with radio spectrum management. In terms of section 33, MACRA is required to regulate access to and the use of radio frequencies in Malawi to ensure efficient use of the radio frequency spectrum and to protect against interference.

In terms of section 34 of the Communications Act, MACRA prepares and adopts the radio spectrum plan, setting out the uses for various radio frequencies.

In terms of section 35 of the Communications Act, no person may operate a radio station (defined in section 1 as equipment used for radio communication) without a licence, unless exempted by regulation.

In terms of section 36, MACRA is required to publish a schedule setting out the different kinds of radio licences available and the fees payable for each. Note that there can be different procedures for different kinds of licences.

Section 38 of the Communications Act also clearly envisages a competitive tendering process, where a radio licence would grant exclusive rights for the use of particular frequencies. Such a process requires the prior written approval of the minister.

### 3.4.8 Responsibilities of broadcasters under the Communications Act

#### ADHERENCE TO LICENCE CONDITIONS

Section 42 empowers MACRA to revoke a radio licence if a licensee has failed to comply with the conditions of that licence.

Section 54 empowers MACRA to monitor compliance with the terms and conditions of broadcasting licences. Section 51(1) sets out some of the provisions that must be contained in a broadcasting licence. These include the:

- Radio frequencies to be used and the technical parameters thereof
- Broadcasting services that may be provided and the broadcast coverage area
- Period of validity, namely seven years

Section 51(3) sets out the kinds of licence conditions that may be imposed in any broadcasting licence for public or private broadcasting services. These include:

- Requiring balanced and equitable reporting during elections
- The provision of party political broadcasts during elections
- Broadcasting news and factual programmes
- Broadcasting programmes in support of the democratic process
- The preservation of broadcast material
- Provision of financial information
- Advertising limitations
- Limitation of foreign financial or voting interests to 40%

Importantly, the last three licence conditions may be imposed in a private broadcasting licence only if similar conditions are included in all private broadcasting licences.

In terms of section 54 of the Communications Act, MACRA may hold public hearings relating to the enforcement of broadcasting licences. It is entitled to make a number of orders, including:

- Requiring that particular information be broadcast
- Directing the licensee to comply
- Imposing a fine
- Directing the licensee to take remedial steps

If a broadcasting licensee does not comply with such an order, MACRA may prohibit the licensee from providing the broadcasting service for any period not exceeding 30 days for a first failure to comply.

## ADHERENCE TO THE OWNERSHIP AND CONTROL LIMITATIONS FOR PRIVATE BROADCASTING SERVICES

Section 50(1) imposes strict ownership and control limits on national private broadcasting services. A person may control, or be a director of the board of, only one national private broadcasting licensee. Section 50(2) imposes only slightly less strict ownership and control limits on local private broadcasting services. A person may control, or be a director of the board of, not more than two local private broadcasting licensees.

## ADHERENCE TO THE CODE OF CONDUCT FOR BROADCASTERS

Section 52 requires all broadcasters to comply with the Code of Conduct for Broadcasters set out in Schedule Three of the Communications Act. In summary, the code of conduct requires adherence to the following requirements:

### ■ General obligations

- 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.
- Broadcasting licensees shall exercise due care and sensitivity in presenting materials which relate to acts of brutality, violence, atrocities, drug abuse or obscenity.
- Broadcasting licensees shall exercise due care and responsibility to the presentation of programming, where a large proportion of the audience is likely to be children.

### ■ News

- Licensees shall report news truthfully, accurately and objectively.
- News shall be presented in an appropriate context and in a balanced manner, without intentional or negligent departure from the facts.
- Where a report is founded upon opinion, supposition, rumour or allegation, this must be clearly indicated.
- Where it subsequently appears that a broadcast report was incorrect in a material respect, this must be rectified immediately.

### ■ Comment

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



### ■ Controversial issues

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

### ■ Elections

- During an election, broadcasting licensees must ensure equitable treatment of all political parties, election candidates and electoral issues.

### ■ Privacy

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

### ■ Payment for information

- A licensee shall not pay criminals for information unless there is a compelling public interest in doing so.

## 3.4.9 Is MACRA an independent regulator?

MACRA cannot be said to be truly independent, despite the fact that section 4(3) of the Communications Act states that it ‘shall be independent in the performance of its functions’.

MACRA’s independence is compromised in the following ways:

- All MACRA’s members (apart from the *ex officio* members who are in any event members of the executive) are appointed by the president with no public nominations process and no involvement by Parliament.
- The minister is responsible for making broadcasting regulations, albeit on the advice of MACRA.

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

### 3.4.10 Amending the legislation to strengthen the broadcast media generally

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

- The overriding problem is the fact that MACRA is not an 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 National Assembly has drawn up a list of recommended appointees. As part of this process, the National Assembly should call for public nominations and should conduct public interviews.
  - The members of MACRA and not the minister should appoint MACRA's director-general.
  - MACRA should be empowered to make its own regulations.

## 3.5 Statutes that regulate the state broadcast media

Part IX of the Communications Act, 'Reconstitution of MBC', deals with the Malawi Broadcasting Corporation (MBC). One of the definitions of a public broadcasting service in section 1 of the Communications Act is 'any broadcasting service provided by the MBC'. It is therefore clear that, in terms of the Communications Act, the MBC is seen as a public broadcasting service.

### 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 86 of the Communications Act.

### 3.5.2 The MBC's mandate

The MBC's national public broadcasting mandate is broadly set out in section 87 of the Communications Act. There are a number of aspects to its mandate, including to:

- 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 on 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**

The MBC is controlled by a board of directors. In terms of section 89 of the Communications Act, the MBC Board is made up of a chairman, six appointed members and an ex officio member who is the secretary for information.

Section 90 of the Communications Act empowers the president, alone, to appoint the chairman of the MBC Board. The president is also empowered to appoint the six other members, but this must be done in consultation with the Public Appointments Committee. Section 1 of the Communications Act defines the Public Appointments Committee as a committee of the National Assembly, which is established in terms of section 56(7) of the Malawi Constitution. Note that this committee is required to be appointed by the National Assembly, with proportional representation of all political parties in the National Assembly.

Section 90(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, business, finance and public affairs. Importantly, section 90(2) sets out people who are disqualified from being appointed as members of the MBC Board. These include: anyone who has recently been sentenced to a term of imprisonment for more than six months for an offence involving fraud or dishonestly; an undischarged bankrupt; MPs; ministers or deputy ministers; and any person who is a member of a committee of a political party at district, regional or national level.

### **3.5.4 Funding for the MBC**

Section 94 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 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
- 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 a 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 the secretary for information sits as an *ex officio* member 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. 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 ought to be no *ex officio* members of the MBC Board.
- All MBC board members ought to be appointed by the president, in consultation with the Public Appointments Committee, but following a public nominations process.

- The MBC's annual report ought to be made to the National Assembly rather than to the minister.

### **3.6 Statutes that undermine a journalist's duty to protect his or her sources**

A journalist's sources are the life blood 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 confident that their identities will remain confidential and will be respected and protected by a journalist. This is particularly true of so-called whistleblowers – inside sources who are able to 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.

#### **3.6.1 Courts Act, Act 1 of 1958**

The Courts Act was enacted prior to 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 at 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 to imprison any person who fails to comply with an order to attend at court.

#### **3.6.2 Penal Code, Act 22 of 1929**

The Penal Code was enacted prior to 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 for up to three years and, if this takes place before the court, an additional fine.

### **3.6.3 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 a period of imprisonment.

Clearly, 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 in fact 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.

## **3.7 Statutes that prohibit the publication of certain kinds of information**

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

- Information regarding legal proceedings
- Information relating to public safety, order and security, or that otherwise undermines government's authority (such as sedition, alarm), protected or prohibited places, and prisons
- Expression which constitutes intimidation
- Expression which is obtained from public officers and relates to corrupt practices
- Expression which insults the president, the flag and protected emblems
- Expression which is obscene or contrary to public morals
- Expression which constitutes defamation or otherwise causes contempt or defamation of foreign princes

- Expression which is likely to offend religious convictions
- Expression which harms relations between sections of the public
- Expression which constitutes commercial advertising involving traditional music

### **3.7.1 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, statues 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 ‘undesirable’.

Section 23(2) of the Censorship Act contains a number of 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 in relation to 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.
- 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 a period of imprisonment, in terms of section 32 of the Censorship Act.

#### **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 a 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 for up to three years.

### **3.7.2 Prohibition on the publication of state security–related information**

#### **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 ‘undesirable’.

Section 23(2) of the Censorship Act contains a number of provisions that deem publications undesirable. In brief, section 23(2)(b)(iv) provides that a publication will be deemed to be 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 a period of 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 the section 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 a number of 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.

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, upon conviction for a first offence, to a fine and imprisonment for up to three years (or four years for a subsequent offence) 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 for up to three years (four years for a subsequent offence). 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 Constitution of Malawi, or in the legislation or administration of justice in Malawi, with a view to remedying 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

### **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 prior to 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 a period of imprisonment.

### **PROTECTED PLACES AND AREAS ACT, ACT 6 OF 1960**

The Protected Places Act was enacted prior to Malawi’s independence and has not been repealed. Although it does not directly prohibit the publication of information, section 4 of the Protected Places 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 a period of 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 a period of imprisonment.

### **3.7.3 Prohibition on the publication of expression 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 a period of imprisonment.

### **3.7.4 Prohibition on the publication of expression 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 the section on regulations below.

### **3.7.5 Prohibition on the publication of expression 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 a period of imprisonment.

### **3.7.6 Prohibition on the publication of expression that is obscene or contrary to public morals**

Part VII of the Censorship and Control of Entertainments Act, Act 11 of 1968, deals with publications, pictures, statues 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 ‘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 a period of imprisonment, in terms of section 32 of the Censorship Act.

### 3.7.7 Prohibition on the publication of expression 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 thereof 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
- 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.
- Publications arising out of judicial proceedings.
- 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/receive same, or has a legitimate personal interest in publishing/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
- Matter was untrue and the publisher did not take care to ascertain whether it was true or false
- 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 ‘undesirable’.

In brief, section 23(2)(b)(ii) provides that a publication will be deemed to be undesirable if it is likely to bring any member or section of the public into contempt. Note that the term ‘contempt’ is not defined, but it appears to connote 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 a period of 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’. It essentially makes it an offence to publish anything tending to degrade, revile, expose to hatred or contempt any foreign prince, potentate, ambassador or other foreign dignitary with intent to disturb the peace and friendship between Malawi and that person’s country.

### **3.7.8 Prohibition on the publication of expression 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 ‘undesirable’.

Section 23(2) of the Censorship Act contains a number of provisions that deem publications undesirable. In brief, section 23(2)(b)(i) provides that a publication will be deemed to be undesirable if it is likely to give offence to the religious convictions or feelings of any section of the public. The penalty for such an offence is a fine and a period of 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 thereof 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’ with the deliberate intention of wounding the religious feelings of any other person. The penalty is a period of imprisonment.

### **3.7.9 Prohibition on the publication of expression 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 to be undesirable if it is likely to harm relations between sections of the public.

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

### **3.7.10 Prohibition on the publication of expression that constitutes commercial advertising involving traditional music**

Section 4 of the Commercial Advertising (Traditional Music) Control Act, 1978 makes it an offence, for the purposes of use in commercial advertising, to publish any sound, cinematographic or photographic record of any Malawi traditional music or dancing (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 of any other notable person or visitor to Malawi). The offence is punishable by a fine or a period of imprisonment.

### **3.8 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 and often are used by the media to uncover and publicise information in the public interest.

Unfortunately, Malawi has yet to enact access to information or whistleblower protection legislation. In 2003, an Access to Information Bill was developed by civil society organisations, including the Media Institute of Southern Africa. However, the Malawian government has shown little inclination to enact it or even to introduce it in Parliament, despite access to information being a constitutional right.

## **4 REGULATIONS AFFECTING THE MEDIA**

In this section you will learn:

- What regulations or rules are
- Key regulations governing the media generally

### **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**

#### **4.2.1 Public Security Regulations, 1965**

The Public Security Regulations were passed in terms of the Public Security Act (see 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 (for more on this topic see the section on legislation).

#### **PROHIBITING PUBLICATION**

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 a period of imprisonment.

#### UNDERMINING A JOURNALIST'S DUTY TO PROTECT HIS OR HER SOURCES

Section 9 of the Public Security Regulations empowers a police officer (or other authorised officer, such 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 a period of imprisonment.

#### 4.2.2 Corruption Practices (Prohibition of Abuse of Information Obtained in Official Capacity) Regulations, 1999

Although the Corrupt Practices Act does not prohibit the publication of information, it is important to note certain prohibitions in the Corruption Practices Regulations:

- Section 3 of the Corrupt Practices Information Regulations prohibits any person who has obtained unpublished tender information from a government employee from communicating that information to any other person if he or she knows or believes that the information would be used for the purposes of dealing in any contract to which the information relates.
- Section 4 makes the contravention of section 3 an offence, the penalty for which is a fine and a period of imprisonment.

## 5 MEDIA SELF-REGULATION

The Media Council of Malawi (MCM) has published a Code of Ethics and Professional Conduct, which governs the conduct and practice of journalists in Malawi. The MCM has established an Ethics, Complaints and Disciplinary Committee to adjudicate complaints of breaches of the code. The key elements in the code are as follows:

- **The individual journalist**
  - Is responsible for providing the public with accurate information

- Shall conduct him/herself with propriety
  - Shall dress decently
  - 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
  - Shall observe his or her employers' editorial policy
  - Shall not demand or accept payment for including or excluding material from a story
- **The journalist's work**
- All material produced by a journalist must be credible, balanced, fair and verifiable.
  - Headlines must reflect the gist of the story and must not be misleading.
  - Avoid unwarranted distortion and speculation, as well as discriminatory and inflammatory language involving, for example, racism, tribalism or religion.
  - 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.
- **General principles and issues**
- Strive for accuracy, transparency and thoroughness in the reporting of news.
  - 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.
  - Strive for objectivity.
  - Distinguish between news reports, speculation and opinion.

- Balance:
  - Present all sides of a story.
  - Provide a fair opportunity to 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 is 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.
  - No obtaining information or pictures through misrepresentation or subterfuge unless the material cannot be obtained by other means.
  - Respect an individual's private life without intrusion or harassment.
- 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 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 COMMON 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

## 6.1 Definition of common law

The common law is judge-made law. It is made up of judgments handed down in cases adjudicating upon 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 clearly wrongly decided. Legal rules and principles are therefore decided on an incremental, case-by-case basis.

This section focuses on a single judgement that involved the judicial review of a decision by MACRA to revoke a broadcaster's licence.

## 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 the decision being reviewed was flawed or not.

In a leading High Court of Malawi decision, *The State and the Malawi Communications Regulatory Authority ('MACRA') 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 taking 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
  - 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 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 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 account of.
  - 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 account of.

### 6.2.3 High Court ruling in *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 of time in 2008, MACRA had repeatedly asked Joy Radio for copies

of broadcasts, usually after coverage of opposition political party events. At some point Joy Radio asked MACRA for justifications for the numerous requests for copies of broadcasting material. 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 a number of findings about the process which MACRA undertook in revoking Joy Radio's radio (as opposed to broadcasting) licence.

- The High 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 a 30-day period.
- 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 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 law suit.