

State of Internet Freedom in Malawi 2019

Mapping Trends in Government Internet Controls, 1999-2019

January 2020

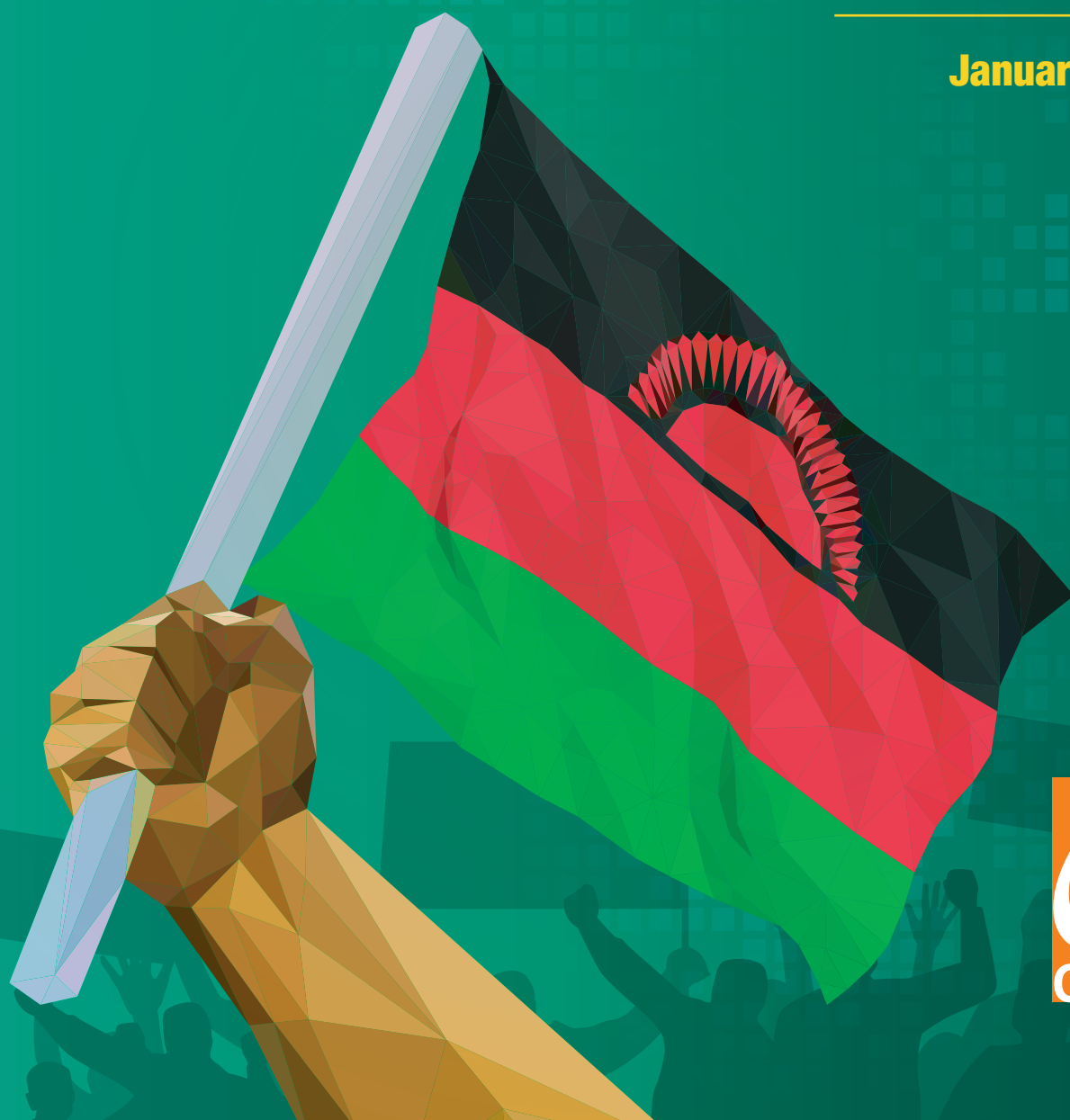


Table of Contents

1	Introduction	4
	1.1 Introduction	4
	1.2 Aim of the study	5
2	Methodology	6
3	Country Context	7
	3.1 ICT Status	7
	3.2 Political Environment	8
	3.3 Economic Status	8
4	Results	9
	4.1 Key Trends of Internet Control Over the Last Two Decades	9
	.1.1 Weaponising the Law to Legitimise Actions	9
	4.2 Disrupting Networks	14
	4.3 Key Positive Developments	14
5	Conclusion and Recommendations	16
	5.1 Conclusion	16
	5.2 Recommendations	17

Credits ---

This research was carried out by the Collaboration on International ICT Policy for East and Southern Africa (CIPESA) with support of various partners.

This research documents the trends in government internet controls, 1999-2019 in Malawi tracking key trends in recent years, analysing the key risk factors, and mapping notable developments on data protection and privacy legislation and violations, and users' understanding of protecting their privacy online. Other country reports for Botswana, Burundi, Cameroon, Chad, the DRC, Ethiopia, Kenya, Nigeria, Rwanda, Senegal, Tanzania, Uganda, and Zimbabwe. The research was conducted as part of CIPESA's OpenNet Africa initiative (www.opennet africa.org), which monitors and promotes internet freedom in Africa.

CIPESA recognises Jimmy Kainja as the main content contributor to this report.

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1

Introduction

1.1 Introduction

Over the past two decades, Information and Communications Technology (ICT) has revolutionised the way both the private and public sectors engage. It has allowed easy and accessible electronic money transactions through to enabling e-government and electronic voter registration, among others.

The ICT sector's exponential growth has, in part benefited from the telecommunication policy reforms of the 1990s. The reforms resulted in the liberalisation of the sector following the political reforms that transitioned Malawi from a one party system to a multiparty democracy.¹ The reforms led to the formation of Malawi Telecommunications Limited (MTL), which was registered as a limited company in 2000 when the government decided to split the parastatal Malawi Posts and Telecommunications Corporation (MPTC) into two entities, MTL and Malawi Posts Corporation (MPC), to allow the two to concentrate on their separate core businesses.²

Before the reforms, MPTC was the only telecommunications operator in Malawi, as well as the industry regulator. Donor pressure for reforms following political changes, and the poor performance of MPTC, were major factors that prompted reforms in the ICT sector.³ The reforms also led to the enactment of the 1998 Communications Act, as a legal framework for the industry. Section II of the Act establishes the Malawi Communications Regulatory Authority (MACRA) as the industry regulator.⁴

¹ George R. G. Clark, Frew A. Gabreab & Henry R. Mgombelo (200) *Telecommunications Reform in Malawi*: <https://bit.ly/2ZjMoaE> accessed 27 August 2019

² Malawi Telecommunications Limited: <https://bit.ly/3ds5qPi> accessed March 24 2020 ACC

³ George R. G. Clark, Frew A. Gabreab & Henry R. Mgombelo (200) *Telecommunications Reform in Malawi*: <https://bit.ly/2ZjMoaE> accessed 27 August 2019

⁴ *Communications Act, 1998*: <https://bit.ly/2Md4WBi> accessed 16 July 2019

However, improved access to and use of ICT, coupled with the aforementioned reforms have also allowed the government to adopt measures that curtail internet freedoms, including the criminalisation of online communication and massive collection of personal data. These measures are enabled in part by retrogressive provisions in the 2016 Communications Act and the 2016 Electronic Transactions and Cyber Security Act,⁵ and by the absence of data protection legislation to regulate the collection, processing and distribution of personal data. Thus, although the right to privacy is guaranteed under article 21 of Malawi constitution, it has come under increased threat by both state and non-state actors.⁶

While some sections of Malawian society welcome these measures as necessary to enhance the digital security and delivery of government services, the measures also enhance the government's surveillance capacity, which in turn affects citizens' digital rights such as privacy, expression and access to information. Besides, the implementation of these measures in the absence of key safeguards is a threat to the very rights sought to be protected. It is therefore important to contextualise the on-going discussions around digital rights by analysing the trends in how government policies and practices have shaped and restricted these rights in Malawi over the last 20 years. The study has been influenced by increasing efforts by governments across Africa to curtail internet freedom through the introduction of aggressive and sophisticated legal and economic measures.

1.2 Aim and objectives of the Study

This research documents how government controls have affected internet freedom in Malawi. It traces the trends of government regulation and control over a 20-year period from 1999 to 2019. The study focuses on the proliferation of retrogressive and repressive policies and laws, surveillance and surveillance capacity of governments; data collection and digitisation programmes; censorship; demands on private sector actors, and new frontiers like the introduction of internet use related taxes. The findings will inform key stakeholders such as policy makers, media, academia, technologists, civil society and researchers.

⁵ *Electronic Transactions and Cyber Security Act, 2016*: <https://bit.ly/33TCg7v> accessed 24 March 2020

⁶ *Article 21 of Malawi constitution says "Every person shall have the right to personal privacy"*

2 Methodology

This study employed qualitative research methods. Qualitative research was considered most appropriate because in large part the research sought to discover the correlation between policy and legal frameworks governing Malawi's ICT sector and the state of internet freedom in the country. The study used literature review and policy analysis to gain an in-depth understanding of factors that have shaped the telecommunication sector over the years.

Specifically, the study analysed the country's policy and legal frameworks governing the ICT sector. These documents include the Communications Act, 1998 the Electronic Transaction and Cyber Security Act, 2016, MACRA's National Survey on Access to and Usage of ICR Services in Malawi (2015), the National Statistics Office website, Malawi National ICT for Development Policy, 2013, the Ministry of Information's Communication Sector Policy Statement, the World Bank policy report on telecommunication reforms in Malawi, Article 19's report on freedom of expression in Malawi, 1999 and Article 19's memorandum on the Malawi Communications Act, 1998. The study also reviewed international instruments that Malawi is party to as well as constitutional provisions relevant to internet freedom.

In addition, the study engaged key informants drawn from public and private institutions as well as companies. These included the sector regulator MACRA, internet service providers and telecommunication companies such as Airtel and Telekom Networks Malawi (TNM), the Media Institute of Southern Africa (MISA), the ICT Association of Malawi, in addition to bloggers, academics, human rights defenders, legal experts and journalists.

3

Country Context

This section gives an overview of Malawi's ICT sector, then it briefly describes the political and economic environment in the country, insofar as it affects the development and governance of ICT.

3.1 ICT Status

The Malawi Communications Regulatory Authority (MACRA) regulates the country's telecommunication sector. It is mandated to make regulations and policies that govern the telecommunications sector.⁷ The regulator issues operating licenses, monitors and enforces compliance with regulations, hears and determines disputes and complaints brought by industry or members of the general public, plans, controls and manages the frequency spectrum efficiently in order to maximise frequency availability, and protects the interests of consumers, purchasers and other users of communication services from unfair business practices, poor quality services and harmful or inferior products.

According to the 2018 Malawi Population and Housing Census, the country has a population of 17.5 million people.⁸ According to the latest data from the International Telecommunications Union (ITU), Malawi has two mobile phone service providers - TNM and Airtel Malawi. As of 2018⁹ only 39% of the population had mobile phones. Individuals using the internet constitute 13.8% of the population, and broadband subscription rates stand at 27.2%. Further, households with computers comprise 6.3% of total households, and households with internet access at home are 11.1%.

⁷ George R. G. Clark, Frew A. Gabreab & Henry R. Mgombelo (200) *Telecommunications Reform in Malawi*: <https://bit.ly/2ZjMoaE> accessed 27 August 2019

⁸ 2018 Population and Housing Census, May 2019: <https://bit.ly/2JFhTCq> accessed 19 July 2019

⁹ ITU Malawi profile (2018), accessed March 24 march 2020: <https://bit.ly/2y4Lxh4>

3.2 Political Environment

Malawi is a landlocked country in southern Africa, bordering Zambia to the west, Tanzania to the north and northeast and Mozambique to the east, south and southwest. Malawi was a British protectorate between 1891 and 1964.¹⁰ The country's founding president, Hastings Kamuzu Banda, held absolute power for 31 years before he was forced by internal and external pressure to allow Malawians to decide between continuing with the authoritarian regime and adopting a democratic system of government. Malawians chose the latter option.¹¹ Currently Malawi has a five-year electoral cycle, electing a president, Members of Parliament and local councillors in what are called tripartite elections.

Malawi has been a relatively stable democracy, currently ranked as a hybrid democracy by the Economist Intelligence Unit's Democracy Index, meaning it has elements of democracy and authoritarianism.¹² The country has had peaceful transitions of power since the mid-1990s. However, the May 2019 presidential elections, which were perhaps the most tightly contested in the country's history,¹³ sparked mass protests followed by a Constitutional Court ruling that annulled the electoral results and called for fresh elections with 150 days.¹⁴ The court petitioners argued that the election had serious irregularities and agreed in its judgment, calling it "serious irregularities".

3.3 Economic Status

Malawi remains among the least developed nations in the world. As of 2018, Malawi ranked 171 out of 188 countries in the United Nations Development Programme's (UNDP) Human Development Index (HDI), which is "a summary measure of average achievement in key dimensions of human development."¹⁵ In April 2017, 71% of Malawians were living in extreme poverty "despite increased public spending on health and education, which are Malawi's priority areas." according a report from the United Nations Commission on Trade and Development (UNCTAD).¹⁶

The country's gross domestic product (GDP) per capita currently stands at USD 351.¹⁷ Roughly 83% of Malawians live in rural areas¹⁸ with agriculture as the mainstay of Malawi's economy and the primary economic activity for over 80% of its population.¹⁹ Agriculture contributes 28% to the country's GDP, manufacturing contributes 10.4%, while industry and trade contribute 15.9%.²⁰

¹⁰ *Pre-Independent Malawi*, September 2018: <https://bit.ly/32DPhRr> accessed 17 July 2019

¹¹ *Malawi: Between the Referendum and the Elections, May 1994*: <https://bit.ly/2xXaNCm> accessed 17 July 2019:

¹² *The Economist Intelligence Unit's Democracy Index, 2018*: <https://bit.ly/2ASGPi8> accessed 19 July 2019

¹³ *Malawi elections: a three-horse race too close to call, May 2019*: <http://bit.ly/2KYHTJw> accessed 25th August 2019

¹⁴ *Malawi top court annuls presidential elections results, February 2020*: <https://bit.ly/2UbMNHh> accessed 24th March 2020:

¹⁵ *Human Index for Everyone: 2018*: <https://bit.ly/2Gip80U> accessed 17 July 2019

¹⁶ *Poverty Levels Extreme in Malawi, April 4 2018*: <https://bit.ly/2GIDDRs> accessed 17 July 2019

¹⁷ *Malawi Gross Domestic Product, 2018*: <https://bit.ly/2XTxkPV> accessed 17 July 2019

¹⁸ *Malawi: Rural Population, 2018*: <https://bit.ly/2JIUJel> accessed 17 July 2019

¹⁹ *Malawi: Agriculture sector, April 11 2019*: <https://bit.ly/2Y5aTCo> access 17 July 2019

²⁰ *Agriculture, Value Added*: <https://bit.ly/2zZTHHC> accessed 17th July 2019

4

Results

This section traces the history, evolution, shifts and milestones of internet control measures in Malawi since 1999. The rationale is to provide a detailed understanding and deeper appreciation of the intersecting political and socio-economic considerations behind the different control measures introduced and applied by the government.

4.1 Key Trends of the Internet Control Over the Last Two Decades

4.1.1 Weaponising the Law to Legitimise Actions

Understanding the trends in internet controls in Malawi over the years requires an appreciation of two key issues within the country's policy and legal framework. The first issue is the lingering retrogressive legislation, which are not in line with the country's constitution, especially, Chapter IV – the Bill of Rights. While most of the legislation has been carried over from colonial and dictatorial eras, the government's reluctance to amend and repeal these laws indicates that it is not opposed to applying them either to enforce compliance or as a deterrent. Indeed, there are recent cases where retrogressive provisions in the Penal Code have been used to stifle the right to freedom of expression. Similarly, recently developed laws continue to include retrogressive provisions, despite the government having had an opportunity to align these new laws with the current constitution.

The second issue is that the government has enacted most of the recent legislations, especially on ICT, not entirely on its own volition but to follow regional trends and sometimes at the insistence of donors and development partners.²¹ This has been the case since the telecommunication reforms of the 1990s. The adverse effect of this kind of approach to law and policy making is that the provisions of these policies are not fully implemented. For example, the access to information law was passed and assented to in 2017 under pressure from various stakeholders, including the Media Institute of Southern Africa (MISA) Malawi, but three years after it became a law, the Act is yet to be operationalised.

²¹ Gregory Kunyenje & Wallace Chigona (2019) External Actors in Forming National ICT Policy in Malawi: A case for Concern In Low-Income Countries?, *The African Journal of Information Systems*: Vol. 11 : Iss. 1 , Article 2 <https://digitalcommons.kennesaw.edu/ajis/vol11/iss1/2>

It is important that the legal framework be improved so as to align it with international treaties Malawi is a party to, such as the International Covenant on Civil and Political Rights (ICCPR), as well as the country's constitution, which is the supreme law of the country. The constitution has safeguards in its Bill of Rights that protect people's democratic rights.

On the eve of the 21 May 2019 general elections, it is alleged that government through the telecommunications regulator MACRA, contemplated shutting-down the internet but fell short of doing so because the regulator's lawyers advised against the shutdown as they saw it. The lawyers reportedly saw the shutdown as "unnecessary."²² Had the lawyers advised otherwise, the internet shutdown could have legally been effected. Section 24(e)(f) of the Electronic Transaction and Cyber Security Act, 2016 empowers the government to restrict internet usage to "protect order and national security" and "facilitate technical restriction to conditional access to online communication."

While the public was spared an internet shutdown in 2019 elections, the regulator did not spare the broadcasting sector. Phone-in²³ and "live"²⁴ radio programmes were banned in the country following protests and demonstrations against the country's electoral body's announcement of electoral results.²⁵ MISA Malawi has since successfully obtained a court injunction against the ban pending a judicial review on MACRA's decision.²⁶ This may indicate that, at times of public protests, the government is more concerned with silencing radio than the internet as a medium of mass communication. Radio still remains the medium of choice by the majority of the population.²⁷

Although MACRA found it necessary to issue a press statement on the eve of the May 2019 elections indicating that it would not shutdown the internet, a section of Malawians²⁸ and other observers²⁹ in the region anticipated the shutdown, especially since the elections were tightly contested and the incumbent government was not guaranteed victory.³⁰ Furthermore, these fears were informed by trends on the continent and the region, particularly Zimbabwe, which experienced an internet shutdown during its 2018 elections.³¹ Despite MACRA's statement to not block the internet, NetBlocks reported an internet disruption in Malawi on the night of the elections.³² Nonetheless, technical internet outages are very common in Malawi due to poor infrastructure that is prone to vandalism and bad weather. However, the timing and circumstances around the outage could be more than a coincidence if the data from NetBlocks is anything to go by.

²² Southern Africa Litigation Centre (2019) *Navigating Litigation During Internet Shutdown in Southern Africa*, August 2019: <http://bit.ly/2MHnpY0> accessed 28 August 2019

²³ Precious Kumbukani (June 2019), *MISA, MACRA Meet on Phone-in Ban*, June: <http://bit.ly/2L1J0rZ> accessed August 2019

²⁴ MISA Malawi (August 2019), *Ban of Live Broadcasting Ill-Timed*: <http://bit.ly/2Zycoy7> accessed 28 August 2019

²⁵ Jimmy Kainja (August 2019) *Malawi's Maturing Democracy to be Tested Further by More Protests*: <http://bit.ly/2zq0kQY> accessed: 28 August 2019

²⁶ Happy Njalam'mano (September 2019) *MISA Obtains Injunction Against Phone-Ins Ban*: <https://bit.ly/2N63GzP> accessed 8 January 2020

²⁷ Josephine Appiah-Nyamekye & John P. Frinjuah (2018) *Long Way to Press Freedom in Africa*: <http://bit.ly/2ZGLwMA> accessed 28 August 2019

²⁸ Vincent Kumwenda (May 2019) *Circumvent Social Media Shutdowns during Malawi's Elections*: <https://bit.ly/30WknSO> accessed 23 July 2019:

²⁹ Southern Africa Litigation Centre (May 2019) *Malawi: The Internet Should Stay On to Help Ensure a Free and Fair Election in Malawi* <https://bit.ly/2Od45mJ> access 23 July 2019

³⁰ Jimmy Kainja (May 2019) *Malawi elections: A three-horse race too close to call*: <https://bit.ly/2y8otuG> accessed 23 July 2019

³¹ McDonald Dzirutwe (January 2019) *Internet shutdown during protests was illegal, Zimbabwe court rules*: <https://bit.ly/2Gry0l0> accessed 23 July 2019

³² NetBlocks (May 2019) *Internet disrupted in Malawi on election day*: <https://bit.ly/329qNPB> accessed: 23 July 2019

Alongside the retrogressive legal environment is a lack of state investment in ICT infrastructure and the taxation of the ICT sector. These have negatively affected the number of people with access to affordable internet. The issue of accessibility and affordability is very important insofar as internet freedom is concerned. It is important to emphasise that freedoms offline are also freedoms online. Access to the internet facilitates freedom of expression and access to information, among others. However, the laws and policies in Malawi do not facilitate an open environment where internet freedom can flourish and people can enjoy their democratic rights online.

Legalising Surveillance and Interception of Communication

There was no notable legislation on ICT in the country prior to the enactment of the Communications Act, 1998. Another set of laws were introduced in 2016 when the 1998 Act was amended, and in the same year the government enacted the Electronic Transactions and Cyber Security Act, 2016. The combination of these laws has paved the way for state surveillance, access restrictions to the internet and criminalisation of some forms of online communication.

The amendment of the Communications Act, 2016 was to provide for ICTs and other technological developments in the country. The changes included the introduction of the registration of generic numbers and SIM cards. The justification for this provision was to curb electronic crimes such as electronic fraud. Section 92(2)(a) of the Act provides that “where a potential subscriber is a natural person, obtain and fill in a form the following information – (i) the full name of the subscriber; (ii) the identity card number, or any other document that proves the identity of the subscriber; and (iii) the residential and business or registered physical address of the subscriber.”

As noted by Privacy International, SIM-card registration undermines people’s ability to anonymously communicate, organise and associate with others.³³ This impacts on the rights to privacy, freedom of expression and freedom of assembly which are protected by the country’s constitution. A national Identity Document (ID) is needed for one to register their SIM-card thereby linking the SIM-card to the national ID.

The government has managed to convince the public that mandatory SIM card registration is necessary in fighting electronic-based crimes. The potential security concern was allowed to override the privacy and data protection considerations. Currently, Malawi does not have a specific personal data protection law in place. The capacity for state surveillance is a big risk for human rights defenders, journalists and dissidents. Further, it deters whistleblowing, which should be promoted to encourage transparency and accountability in governance.

On the other hand, the objective of the Electronic Transactions and Cyber Security Act, 2016 was to “set up a responsive information and communication technology legal framework that shall facilitate competition, development of information and communication technology and the participation of Malawi in the information age and economy.” However, the Act has provisions that undermine digital rights. Section 24 provides that online public communication may be restricted to “protect order and national security” and “facilitate technical restriction to conditional access to online communication”.

³³ Privacy International (June 2019) *Timeline of SIM card Registration Law*: <http://bit.ly/2MIsD5y> accessed 28th August 2019

These provisions are vague and prone to abuse by authorities. For example, in 2016 three opposition politicians including an MP were arrested and charged with sedition over a WhatsApp conversation; the charged were later dropped.³⁴ In the run up to the May 2019 elections, Tumpale Mwakibinga, was arrested and charged with “insulting the modesty of a woman, cyber violation and offensive communication” for a Facebook post he likened the country’s First Lady to the cartoon character Rango.³⁵ Mwikibinga was later released on bail and cautioned not to post anything on Facebook relating to the first lady. He remains on bail and it is unlikely that his case will be continued. These arrests have a chilling effect, as it shows that the government has real intent and capacity to arrest people for their online content and activities. Such actions by government undermine anonymity, freedoms of expression, assembly and association online. These freedoms are guaranteed under the constitution of Malawi, and as asserted previously, freedoms offline are also freedoms online.³⁶

Rise of National Security as Justification for Repressive Laws

The protection of national security, preservation of public order and fight against terrorism have been widely used on the continent to enact repressive legislation. Moreover, terms such as “national security” and “public order” have not been clearly defined and are therefore ambiguous. In turn, these provisions are prone to abuse as those in the position of power look to protect their narrow personal interests and not the purported broader public interests.

In Malawi, section 24 of the Electronic Transaction and Cyber Security Act, 2016³⁷ provides that public communications could be restricted to, among others, protect public order and national security and facilitate technical restriction to conditional access to online communication. However, no definition of national security is provided.

There are other laws that were passed during colonial and dictatorship eras which are also used to curtail dissent and freedom of expression in the country. For example, article 4 of Protected Flag, Emblems and Names Act, 1967³⁸ makes it a crime to “insult, ridicule or show disrespect to the president. Additionally, section 181 of the Penal Code³⁹ section makes it a crime for anyone in public place to conduct themselves “in a manner likely to cause a breach of peace.” Politicians in Malawi often use these archaic laws to silence journalists and limit freedom of expression in the country.⁴⁰

³⁴ Wanga Gwede (2016) *Kabwila Arrested: Malawi police may arrest more 'WhatsApp coup plotters*, Nyasa Times:

<https://www.nyasatimes.com/kabwila-arrested-malawi-police-may-arrest-more-whatsapp-coup-plotters/> <https://bit.ly/2QD6vtK> accessed 24 March 2020

³⁵ Green Muheya (2019) *Tumpale released on bail, charged for likening Malawi First Lady to Rango Cartoon*, Nyasa Times: <https://bit.ly/2UzXLph> accessed 24 March 2020

³⁶ ARTICLE 19 at the UNHRC: “The same rights that people have offline must also be protected online” <http://bit.ly/2B5UQeQ> accessed 12 October 2019

³⁷ *Electronic Transactions and Cyber Security Act, 2016*: <https://bit.ly/33TCg7v> accessed 24 March 2020

³⁸ *Protected flag, emblems and names, 1967*: <https://crm.misa.org/upload/web/17-laws-of-malawi-protected-flag-emblems-and-names.pdf> accessed 24th March 2020

³⁹ *Laws of Malawi: Penal Code, Cap. 7:01*: <https://bit.ly/3bIt5z2> accessed 24th March 2020

⁴⁰ Tom Rhodes (2012) *A Bad Weekend for Malawian Journalist*: <https://bit.ly/33HVXib> accessed 24th March 2020

Malawi could possibly be the first African to impose taxes on ICTs and the internet. In 2015 the Malawi government imposed 10% exercise duty on text messaging and all data transfers. The government resisted calls from civil society organisations and MACRA to rescind the decision.⁴¹ The 10% exercise duty on text messaging and all data transfers and other taxes are among the main contributing factors that only 13.8% of Malawians are online compared to its regional neighbors. Freedom House' Freedom on the Net, 2019 report observed that access to the internet is very expensive for the majority of the people in Malawi due to high data tariffs, expensive devices and high service costs for consumers. In addition to the 10 percent on text messaging and all data transfers introduced in 2015, there is also 17.5 percent value-added tax on mobile phones and services, as well as a 16.5 percent value-added tax on internet services.⁴²

Excessive and Punitive Responses

Early civic action on the continent focused largely on civil and political rights as political actors demanded space to exercise their freedoms. In the post-2000 era, there appears to be a shift to focusing not just on civil and political rights, but also on economic, social and cultural rights. This shift has led to increased demands for government accountability on key issues such as corruption, fiscal transparency and accountability in areas such as education, health and social security. Media especially journalists and bloggers continue to come under attack for being outspoken on such issues.

In 2011, the government of Bingu wa Mutharika in Malawi initiated a media crackdown on media covering live demonstrations against deteriorating public services, shrinking democratic space and lack of respect for the rule of law.⁴³ The government also enforced section 46 of the Penal Code which empowers the ICT minister, a political appointee, to prohibit the publication or importation of publications considered to be contrary to the public interest.⁴⁴

Section 31(1) of the Electronic Transaction and Cyber Security Act, 2016 requires online content providers to conspicuously display on their webpage the full name, domicile, telephone number, and email address of the editor if a natural person; and in the case of a legal entity, the corporation name, postal and physical address of the registered office, telephone number, email address, authorised share capital and registration number of the editor.⁴⁵ This provision is very similar to colonial law, section 3 of Printed Publications Act, 1947. No one has been arrested or charged with this provision but it's very presence limits people's right to anonymity, more so that the provision carries a hefty punishment – a custodial sentence of 12 months and a heavy fine of K5,000,000 (USD 6,600).

⁴¹ Tom Sangala (2015), *Malawi Government to Review SMS, Internet Taxes*: <https://bit.ly/3dt9FKw> accessed 24 May 2020

⁴² Freedom House (2019) *Freedom on the Net: Malawi*: <https://bit.ly/331G7o> accessed March 24 2020

⁴³ Raphael Mweninguwe (2011) *Arguing with the Government*: <https://bit.ly/3doTKwF> accessed 24th March 2020

⁴⁴ Committee to Protect Journalists (February 2011) *Malawi Amendment bans news 'not in public interest'* <https://bit.ly/2GpWwTz> accessed 24 March 2020

⁴⁵ *Electronic Transactions and Cyber Security Act, 2016*: <https://bit.ly/33TCg7v> accessed 24 March 2020

4.2 Disrupting Networks

Over the years, network disruptions have emerged as a major technique that various African governments have employed to stifle digital rights. The disruptions are mostly ordered by governments eager to interrupt communications and curtail citizens' access to information as a move to limit what citizens can see, do, or communicate.

In 2011, editors of Malawi's widely read online publication Nyasatimes, experienced a distributed denial-of-service (DDoS) attack which took down their website during the demonstrations.⁴⁶ This was strongly suspected to have been done by government operatives trying to limit critical reporting of what was then a deteriorating political situation.

On May 21, 2019, NetBlocks reported an internet disruption in Malawi. This was an hour into vote counting following the closure of polling centres.⁴⁷ NetBlocks noticed that "nationwide connectivity fell to 80% of normal levels from around 16:30 UTC during vote counting and the announcement of initial polling results, with access only returning at around 22:00 UTC." The group added that "data showed that Malawi Telecommunications Limited, fibre optic network SimbaNET and ICT infrastructure operator Malswitch were affected, while access appeared to remain generally available via privately-owned internet providers."

4.3 Key Positive Developments

Despite the negative trends witnessed over the period of research, there were also notable positive trends that need highlighting. This section provides positive developments that occurred over this period. These developments including advocacy and push-back by non-state actors, the adoption of progressive legislation and the repeal of repressive legislation.

Robust Advocacy and Push-back by Non-State Actors

Civil society continues to play a key role in resisting unconstitutional laws and practices by governments. In 2011, civil society in Malawi organised a public campaign against bad governance and poor service delivery, which heavily relied on mobilisation social media via Facebook.⁴⁸

Further, MISA Malawi was instrumental in pushing for the enactment of the Access to Information Bill, which was eventually enacted in 2017. However, the law is yet to be operationalised. As such, the fight to ensure that the law is implemented is still on.

⁴⁶ Committee to Protect Journalists (2011) *Attacks on the Press in 2011*: <https://bit.ly/2LCfr1L> accessed 2 July 2019

⁴⁷ NetBlocks, (May 2019) *Internet disrupted in Malawi on election day*: <http://bit.ly/2MG6l23> accessed 12 October 2019

⁴⁸ BBC News (July 2011) *Malawi Army Deployed Over Anti-Mutharika Protests*: <https://bbc.in/2Gq1AY6> accessed 24 March 2020; Nyasa Times, May 2019, *MACRA Plans to Shutdown Phone, WhatsApp on Malawi Elections Days*: <https://bit.ly/2WEYfgH> accessed 24th March 2020

In the wake of the national ID registration process in Malawi, civil society in October 2018 called upon the government to ratify the Malabo Convention on Cybersecurity and Data Protection⁴⁹ to strengthen privacy and data protection in the country.⁵⁰ The Centre for Human Rights and Rehabilitation (CHRR) issued a press statement, calling for the enactment of a data protection legislation in the wake of biometric data registration.⁵¹ The press statement was picked up by some Malawian media, but in general received a muted response. However, CHRR reported to have received a response from the national registration bureau's spokesperson indicating that the bureau was equally concerned about the lack of data protection legislation in the country.⁵²

Adoption of Progressive Legislation

A positive factor for Malawi is that the country's constitution under Chapter IV provides a Bill of Rights, which guarantees all basic human rights and civil liberties. These include freedoms of opinion (article 34), press (article 36), association (article 32), assembly (article 38) and expression (article 35). Article 21 of the constitution provides for personal privacy; article 21(c) guarantees one's personal privacy regarding communications, including mail and all forms of telecommunications. Moreover, Malawi adopted its Access to Information Act in 2017.⁵³

⁴⁹ African Union Convention on Cyber Security and Personal Data Protection: <http://bit.ly/32fWfLw> accessed: 29th August 2019:

⁵⁰ A Call for Personal Data Protection Legislation in Malawi, a press statement by CHRR, 3rd October 2018

⁵¹ A Call for Personal Data Protection Legislation in Malawi, a press statement by CHRR, 3rd October 2018

⁵² Personal interview with Michael Kaiyatsa, CHRR's Programme Director, 23rd August 2019

⁵³ Access to Information Act, 2017: <http://bit.ly/2HtgH3q> accessed 24 March 2020

5 Conclusion and Recommendations

5.1 Conclusions

The study has established that internet freedom in Malawi has been affected by the limited state investment in ICT and internet infrastructure needed to facilitate affordable access to the internet. In addition, the taxes imposed on internet service providers and telecommunication companies further pose challenges to affordable access to the internet. It is clear that the responsibility to improve affordability falls squarely on the government, as it has the power to legislate and ensure the implementation of that legislation.

The government has not repealed or amended retrogressive laws from the colonial and dictatorship eras that undermine human rights and media freedoms. These laws are still in force, and in conflict with the country's constitution. Recent legislation has continued the trend, as it also carries vague and punitive provisions that undermine provisions of the country's constitution. Examples include the Electronic Transaction and Cyber Security Act, 2016, which allows the government to initiate limitations of online communication for national security, and the 2016 Communications Act that provides for mandatory SIM card registration.

The mandatory SIM card registration has followed a countrywide national ID registration. The national ID has since become the only acceptable form of identity for all Malawians – raising serious questions of privacy and state surveillance.⁵⁴ Without a data protection law, these mass data collection programmes are prone to abuse and could potentially undermine people's ability to communicate anonymously while enhancing the capacity of the government to conduct surveillance on its citizens. The capacity for surveillance endangers vulnerable communities including activists, dissidents, journalists and other critics of the state.

Civil society, though very vibrant in other areas of society, are not attuned to address issues pertaining to internet freedom and digital rights. This is still an emerging area for most of the civil society organisations and human rights defenders in the country. Looking at the period of research, it is unlikely that the government will improve the legislative framework willingly. It needs to be pushed, and this will require sustained advocacy work through a multistakeholder approach.

⁵⁴ Jimmy Kainja (August 2019) *Are Malawians Sleepwalking Into a Surveillance State?* <https://bit.ly/3056e6y> accessed 8th January 2020

5.2 Recommendations

The study makes the following recommendations targeting government, companies, civil society, media, and academia

Government:

- Repeal sections 24(e) and (f) in the Electronic Transaction and Cyber Security Act, 2016, which allow the government to restrict online communication. Also, repeal section 31(1), which demands that an online content provider must display their personal information online.
- Repeal section 92(1) of the Communications Act, 2016, which provides for mandatory SIM card registration, as this has the capacity to facilitate gross human rights violations contrary to the country's constitution.
- Amend all laws and legislation that are in conflict with the country's constitution, especially provisions on human rights and media freedoms.
- Ensure that legislation aimed at protecting citizens does not simultaneously violate human rights.
- Prioritise affordable access to the internet in policies and legislation.
- Ensure that MACRA implements Universal Access as provided for by the Communications Act, 2016.
- Operationalise the Access to Information Act, 2016.

Companies

- Adopt and implement the UN Business and Human Rights principles and safeguard the rights of customers by default.
- Require that government requests for internet control comply with rule of law, transparency and due process.
- Adopt terms and conditions of privacy and terms of service that are clear and open, and honour those agreements.

Civil Society

- Civil society in Malawi should engage more on issues pertaining to the advocacy of and protection of online rights.
- Be proactive, and not reactionary – it is better to stop punitive laws before they are legislated than try to get them amended or repealed.
- Demand the amendment and repeal of vague and punitive laws endangering internet freedom in the country.
- Demand that mass personal data collection should not be allowed in the absence of data privacy and protection legislation.
- Demand the enactment of a progressive personal data protection law.

Media

- Conduct civic education and awareness on issues of privacy and personal data protection.
- Familiarise themselves with issues of internet freedom and digital rights to provide thorough coverage and analysis of these issues.
- Online publications must not encourage the sharing and dissemination of information comprising people's personal and private information.

Academia

- Conduct evidence-based research and widely disseminate findings and recommendations to promote internet freedom.
- Include internet freedom in their curriculum to ensure students are made aware of relevant issues.
- Guide the government on the suitable legal and policy framework to ensure an open, accessible, and affordable internet in the country.



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