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***UNDUE RESTRICTIONS:
MEDIA PERSPECTIVES OF THE CONSTITUTION
OF MALAWI***

PAPER BY

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Undue Restrictions: Media Perspectives of the constitution of Malawi

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An Overview of International Protection of Media Freedom

“There are three Estates in Parliament; but, in the Reporters’ Gallery yonder, there sits a Fourth Estate more important far than they all”. (Edmund Burke speaking in the House of Commons in England in 1774 .

Since then, there has been remarkable growth in the last century of spirited declarations by people acknowledging the essential need for freedom of expression and freedom for the media to operate. In the southern Africa context the important declaration of principles that has been accepted, if not adopted, by SADC member states is **The Windhoek Declaration on Promoting an Independent and Pluralistic Media.**

This affirms that the establishment, maintenance and fostering of an independent, pluralistic and free media is essential to the development and maintenance of democracy in a nation. The Declaration urges African states to take positive measures to guarantee the establishment of media freedom.

The South African Constitutional Court has held that the media bears an obligation to provide citizens with a platform for the exchange of ideas, which is crucial to the development of a democratic culture¹. In addition, the media performs the role of a watchdog over government on behalf of the governed. As such, it should ferret out corruption, dishonesty and graft wherever and whenever it may occur and to expose the perpetrators.

¹ *Khumalo and others v Holomisa* 2002 5 SA 401 at 417.

Media freedom, coupled with freedom of expression, is guaranteed in all major international human rights instruments, which emphasize the importance that the media is accorded in democratic societies. The freedom is guaranteed in a number of UN human rights instruments such as the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), and regional human rights instruments such as the African Charter on Human and Peoples' Rights (ACHPR), the American Convention on Human Rights (ACHR) and the European Convention on Human Rights (ECHR).

In brief, these instruments guarantee media freedom in the following terms:

Universal Declaration of Human Rights (UDHR)

At its inception, the Declaration was seen as a simple statement defining human rights and fundamental freedoms and its force was to be of a moral rather than of a legal nature. It was taken to indicate goals rather than impose precise obligations upon states. Article 19 of the UDHR provides:

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”.

Article 19 is very broad and protects both the right to freedom of opinion and expression. The Article refers to “freedom of expression”, and it is generally accepted that the term “expression” includes either speaking or writing whether ordinarily (that is, in a private context) or in the print or electronic media. It also protects musical and artistic expression.

Media freedom is therefore protected and the last part of the article, “...*impart information and ideas through any media and regardless of frontiers*”, is pertinent to the media.

At face value, this Article appears to guarantee an absolute right to media freedom. The formulation of the provision has thus been criticised for its failure to balance the twin concepts of freedom and responsibility as laid down in the UN Resolution 59 (1) of 1946. Under this Resolution, the exercise of freedom of expression, which includes media freedom, is subject to the following responsibilities:

- a) Willingness and capacity to exercise the freedom without abuse; and,
- b) The moral obligation to seek facts without prejudice and to spread knowledge without malicious intent.

Article 19 must however be read in conjunction with Article 29, which provides for a limitation on freedom imposed by certain responsibilities. This Article permits restrictions on the freedom of expression solely for the purpose of securing respect for the

rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Furthermore, the rights set forth in the Declaration may not be exercised contrary to the purposes and principles of the United Nations.

Although the UDHR is not binding on states, it has had a tremendous impact on the development of both international and national human rights law. It is used as a yardstick to measure the content and standard of observance of human rights and almost all human rights treaties adopted by UN bodies since 1948 elaborate principles set forth in the Declaration.

International Covenant on Civil and Political Rights (ICCPR)

The ICCPR is an elaboration of the civil and political rights set forth in the UDHR and aims at transforming the rights spelt out in the latter into legally binding obligations. Media freedom is protected under Article 19 (2): *“Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice”*.

The text of this Article is based on Article 19 of the UDHR and as such, it also uses the term freedom of expression to denote the freedom to seek, receive and impart information and ideas. The forms of communication protected under this Article are broad and varied.

It mentions not only oral, written and printed communication, but also “other media” and this is important for both radio and television.

Media freedom is therefore expressly protected under this Article. The exercise of media freedom carries with it duties and responsibilities. Under Article 19 (3), freedom may be restricted to ensure respect for the rights or reputations of others and for the protection of national security or of public order or of public health or morals. Where a state party imposes certain restrictions on the exercise of freedom, these must not be put in jeopardy the right itself. Such restrictions must satisfy the conditions laid down in Article 19 (3), that is,

(i) the restriction must be provided by law;

(ii) must be imposed for one of the purposes set out in sub-paragraphs

(a) and (b); and

(iii) must be justified as necessary for that state party for one of those purposes.

African Charter on Human and Peoples’ Rights (ACHPR)

The Charter’s protection of freedom of expression is set forth in Article 9 (2) which provides:

“Every individual shall have the right to express and disseminate his opinions within the law”.

A notable anomaly with the text of this Article is that it does not expressly cover expression and dissemination of information, which is probably the main concern of the

media. Some commentators on the Charter have, however, argued that expression and dissemination of information is implied.

The uncertainty surrounding Article 9 has now been cleared. The African Commission on Human and Peoples' Rights, which is the organ responsible for the enforcement of the Charter has now developed principles to inform the application, and guide the development, of Article 9. These principles, the Declaration of Principles on Freedom of Expression in Africa, were adopted in October 2002 and are drawn from a comprehensive range of international standards and jurisprudence.

Article 1 (1) of the Declaration of Principles makes it clear that media freedom is guaranteed under Article 9 of the Charter. Another peculiar feature of the Charter is that Article 9 does not include any express restrictions on media freedom. Article 9 must however be read subject to the restrictions set forth in Articles 27/29, the most pertinent of which requires the individual to exercise protected freedoms "*with due regard to the rights of others, collective security, morality and common interest*".

The Declaration of Principles provides that any restrictions on media freedom must be provided by law, serve a legitimate interest and be necessary in a democratic society.

American Convention on Human Rights (ACHR)

Article 13 (1) sets forth the positive protection of media freedom in the following terms:

“Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice”.

The Article is identical to Article 19 of the ICCPR, save that it also protects freedom of thought. The arguments on the extent to which media freedom is protected under the ICCPR are equally applicable here.

The ACHR goes further by expressly prohibiting any form of prior censorship of the media. It further prohibits indirect methods of restricting expression, such as unfair allocation of newsprint or broadcasting frequencies, and prohibits such methods by private persons as well as by governments.

Restrictions on media freedom are only permitted by way of subsequent imposition of liability. Such restrictions must be expressly established by law to the extent necessary to ensure:

- (i) the respect for the rights or reputations of others; or,*
- (ii) the protection of national security, public order, or public health or morals.*

Article 13 (4), however, permits prior censorship of “public entertainments” for the sole purpose of protecting the morals of children and youths, provided such is prescribed by

law. States parties are also required to prohibit war propaganda and advocacy of national, racial or religious hatred.

Another novel provision in the ACHR is Article 14, which protects the “right to reply”. Anyone injured by inaccurate or offensive statements published by the mass media has a right to reply or to make correction using the same media organ.

European Convention on Human Rights (ECHR)

The Convention for the Protection of Human Rights and Fundamental Freedoms, otherwise known “*as the European Convention on Human Rights*”, is the oldest of the human rights treaties discussed here and its implementation procedures are the most developed. Article 10 (1) guarantees media freedom in the following terms:

“Everyone has the right to freedom of expression. This right shall include the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises”.

The phrase “*freedom of expression*” as used in the Article extends to all types of expression, which impart or convey opinions, ideas or information, irrespective of content or the mode of communication.

This, therefore, means that media freedom, even though not expressly mentioned, is covered. Further, the ECHR has held in several landmark judgments that the principles of freedom of expression are of particular importance as far as the press and other media are concerned. The Court has stressed the importance of media freedom in a democratic society to ensure proper discussion of matters of public interest.

The Convention applies a double standard in its treatment of the print and the broadcast media. The position is justified by reference to the third sentence in Article 10 (1). This, therefore, means that, while on the one hand any form of censorship of the press is likely to amount to a breach of Article 10, on the other hand, broadcasting may be subjected to some form of censorship or controls without breaching Article 10.

In confirming this double standard, the Court in *Informationsverein Lentia and others v Austria* stated:

“...Technical aspects are undeniably important, but the grant or refusal of a licence may also be made conditional on other considerations, including such matters as the nature and objectives of a proposed station, its potential audience and the obligations deriving from international legal instruments”.

States do not have an unlimited margin of appreciation concerning the licensing of the broadcast media. The Convention requires states' licensing systems to respect the requirements of pluralism, tolerance and broadmindedness, which are essential in a

democratic society. Any licensing system that is manifestly arbitrary or discriminatory will be contrary to the principles of the Convention and thus in breach of Article 10. In regulating broadcasting, a state is also not allowed to infringe the right of a person to receive information.

Media freedom under Article 10, as in other human rights treaties, is not absolute. The exercise of the right carries with it duties and responsibilities. Article 10 (2) allows restrictions on the exercise of media freedom and these restrictions can broadly be classified into:

- (i) Those designed to protect the public interest (national security, territorial integrity, public safety, prevention of disorder or crime, protection of health or morals);*
- ii) Those designed to protect other individual rights (protection of the reputation or rights of others, prevention of disclosure of information received in confidence); and,*
- iii) Those that are necessary for maintaining the authority and impartiality of the judiciary.*

Not only must a restriction be justified on the basis of any of the above categories, it must also be prescribed by law and be necessary in a democratic society. In order to meet the requirement that the limitation is prescribed by law, the ECHR has held that the law need not be written, but must be expressed with sufficient clarity to enable the citizen to know with reasonable certainty what consequences a given action would entail.

On what is “*necessary in a democratic society*”, the Court has stated that Article 10 protects material that is likely to offend, shock or disturb a sector of the population within the bounds of pluralism, tolerance and broadmindedness – features of a democratic society.

Consideration of this issue involves a margin of appreciation for the contracting state and this is important especially in matters involving morals where there is a likelihood of widely differing views among contracting states. The margin of appreciation goes hand in hand with the Court’s supervision, which ensures that the national margin of appreciation is circumscribed by the interest of democratic society ensuring and maintaining a free media.

Despite the importance of media freedom in a democratic society, the protection that freedom is accorded in international law is not absolute. The exercise of the freedom must be reconciled with the protection of other equally important social interests. However, international law requires a delicate balance to be struck between the exercise of media freedom and any restrictions that are imposed.

In trying to strike this balance, the international human rights instruments discussed above set forth essentially the same three-part test for determining the legitimacy of restrictions:

First, any restriction must be prescribed by law; Secondly, it must serve one of the legitimate purposes expressly enumerated in their text; and Thirdly, it must be necessary.

There is some variation among the UDHR, ICCPR, ACHR and ECHR concerning the legitimate purposes for which media freedom may be restricted. Article 29 of the UDHR permits restrictions to the freedom only to secure “*due recognition and respect for the rights and freedoms of others – the just requirements of morality, public order and the general welfare*”.

The ICCPR is more detailed, adding such matters as national security and public health. The ACHR follows the language of the ICCPR. The ECHR, on the other hand, provides a longer list of permissible restrictions, which includes protection of territorial integrity, protection of information received in confidence and the authority or impartiality of the judiciary.

International law provides minimum standards of human rights below which no member of the international community should fall. Ideally, all states should guarantee media freedom in accordance with international law standards and restrictions on the freedom should comply with the three-part test.

A law will be regarded as unduly restrictive on media freedom if it does not comply with the three-part test.

The Case of Malawi

Media freedom is expressly guaranteed in Malawi and the limitation clause derogating from it is subject to the standards contained in international human rights instruments. But Malawi, paradoxically, has not taken the required steps to ratify the ICCPR or ACHPR in its domestic law. However, judicial officers do take cognisance of them and thus they play a role in the evaluation of domestic law.

Despite this ostensible attempt to create a favourable climate for the adjudication of issues involving fundamental rights and freedoms, Malawi has on its statute book a number of laws that not only unduly restrict media freedom, but in some instances confer arbitrary powers on the authorities to ban or take other action against the media.

The restrictions are mostly described in wide, vague and frequently subjective terms that are likely to seriously inhibit the practice of journalism. They also range over a wide variety of communications activity.

They start with a requirement to register publications in advance with a fine being imposed for failing to do so; censorship of films and other entertainment; strict restrictions on the disclosure of official secrets which results in government officials being unwilling to supply information to the media; ministerial powers to ban publications “not in the public interest”; prohibitions on the publication of seditious and obscene material or matter that is prejudicial to public security or which undermines

confidence in government; and false news likely to alarm the public. Defamatory matter about foreign diplomats or dignitaries is also prohibited.

Journalists can be ejected from parliament if they are deemed to be “strangers”, the courts can be closed and the police are compelled not to discuss their investigations with reporters.

Broadcasting is regulated by a government appointed board consisting of at least two important civil servants and publications can be declared unsuitable for use in schools.

Protection of Media Freedom under the Constitution

Malawi is one of the countries in the SADC region that expressly guarantees media freedom in its constitution. Section 36 provides:

The press shall have the right to report and publish freely, within Malawi and abroad, and to be accorded the fullest possible facilities for access to public information.

It is submitted that while the provision makes reference to the press, the term is used in a wider sense to cover all sectors of the media. The guarantee of media freedom is subject to section 44, which is the general limitation clause on all rights and freedoms guaranteed under the Bill of Rights. The relevant portions of the general limitation clause read:

(2) Without prejudice to subsection (1), no restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law, which are reasonable, recognized by international human rights standards and necessary in an open and democratic society.

(3) Laws prescribing restrictions or limitations shall not negate the essential content of the right or freedom in question, shall be of general application.

The constitution of Malawi fully embraces the international law three-part test with regard to derogations from fundamental rights and freedoms. The constitution requires that restrictions must be prescribed by law and should be reasonable and necessary in a democratic society. In the determination of the latter issue, the constitution expressly stipulates that the courts must apply the principle of proportionality.

The constitution does not spell out the interests that may justify limitations to media freedom. However, the limitation clause provides that limitations on the rights and freedoms guaranteed must be in accordance with international human rights standards. It is therefore submitted that restrictions on media freedom in Malawi will only be legitimate if they protect those interests spelt out in international legal instruments such as the ICCPR.

Status of International Human Rights Instruments

The status of international human rights treaties in the domestic law of Malawi is regulated by section 211 of the constitution, which reads:

(1) Any international agreement ratified by an Act of Parliament shall form part of the law of the Republic if so provided for in the Act of Parliament ratifying the agreement.

(2) International agreements entered into before the commencement of this Constitution and binding on the Republic shall form part of the law of the Republic, unless Parliament subsequently provides otherwise or the agreement lapses

In terms of subparagraph (1), it appears that for an international treaty to have direct force in the domestic law of Malawi, an Act of Parliament must ratify it. The constitution thus adopts a dualist approach. While Malawi has acceded to the ICCPR and ratified the ACHPR, none of these international treaties have yet been ratified by an Act of Parliament. It, therefore, means that these instruments cannot be directly invoked in the domestic courts. This does not mean that the instruments have no relevance in the country. Malawian courts occasionally seek guidance and inspiration from these instruments when interpreting the domestic law.