1 April 2011

STATEMENT

Malawi: High Court Must Invalidate Government's Powers Over the Media

ARTICLE 19 is concerned about the recent amendment to the Penal Code of Malawi, conferring the Minister of Information with the power to ban newspapers, magazines, films and other publications. ARTICLE 19 calls on the High Court to uphold the constitutional challenge to the amendment and invalidate it as unconstitutional. We also call on the Malawian government to respect and protect freedom of expression by ensuring the power to control media content are conferred to an independent self-regulating body, and abolish imprisonment for press-related offences.

On 20 January 2011, Malawian President Bingu Wa Mutharika signed into law the amendment to the Penal Code adopted by Parliament in November 2010. The amendment confers on the Minister of Information powers to prohibit the publication or the importation of such publications, if the minister has reasonable grounds to believe that the publication is contrary to public interest.

On 10 March 2011, the Malawi Human Rights Commission challenged the constitutionality of the amendment before the High Court in Blantyre.

Despite national criticism[1] of the government's unrestricted control of the media in Malawi, the latest amendment to the Penal Code does not take away the powers of the Minister of Information to ban publications. ARTICLE 19 is seriously concerned about the preservation of these powers since the minister used them on numerous occasions in the past to ban the importation of foreign films and videotapes, magazines, books and music.[2]

The amended Section 46 of the Penal Code, permitting the government to ban publications, is not in compliance with international freedom of expression standards and should be declared unconstitutional. The amended Section 46 only limits the

[1] In its report of 28 June 2000, the Law Commission on the Review of the Penal Code noted that the section 36 left too much discretion to the executive branch of Government in controlling importation and production of publications. The Commission recommended the power of the Minister should be subjected to the test of reasonableness.

[2] Hanibal Goitom, Malawi: Law Enacted Giving Government Unfettered Power to Ban Local Publications, Global Legal Monitor, Law Library of US Congress, available at http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205402501_text

powers of the minister by increasing the minimum threshold for bans of publications. While previously any publication could be prohibited by the minister if he or she considered that it was "contrary to the public interest", the recent amendment provides that the minister should have "reasonable grounds" to believe that the publications would be contrary to the public interest.

Section 47, which remains unchanged, establishes criminal responsibility for persons who import, publish, sell, offer for sale, distribute, reproduce or are in possession of prohibited publications. Those who commit these offences for the first time are subject to fines and to imprisonment for up to three years. For reoffending, the sanction is imprisonment for up to four years.

ARTICLE 19 finds the amended Section 46 is problematic for several reasons:

- The criminal character of the regulation: It is not appropriate for administrative issues, such as competences of administrative bodies, including the minister of information, to be regulated in the Penal Code. In democratic countries, these matters are regulated by administrative laws rather than criminal laws. Criminal law deals with criminal responsibility of perpetrators of criminal offences rather than with ministerial powers.

- The powers of the minister of information to control the publication content: Section 46 confers regulatory powers to the minister of information. This is problematic as the minister is given an opportunity to control free speech, which also gives him/her a possibility to control voices opposing the government. We note that in democracies, the powers to regulate expression and media are conferred to bodies independent of political, commercial or other unwarranted influences. For example, in the *Declaration of Principles on Freedom of Expression in Africa* ("DPFEA"), adopted by the African Commission on Human and Peoples' Rights in October 2003, in laid emphasis on the importance of protecting the independence of regulatory authorities from political interference and influence.[3] Furthermore, content regulation is rarely a matter to bodies established by the state. Instead in view that content regulation concerns ethical and professional issues, the powers that control the media are usually given to media professionals and the public. They establish press councils to mandate journalistic standards and to redress unprofessional reporting, thus forestalling the need of government regulation. In this respect we also recall that the DPFEA[4] also emphasizes s that effective self regulation is the best system for promoting high standards in the media.[5]

- The criterion for banning publications: ARTICLE 19 considers the criterion for banning publications – when the Minister has reasonable grounds to believe that a publication is contrary to the public interest - is not in compliance with international law and the Constitution of Malawi. Under Article 19 para 3 of the International Covenant of Civil and Political Rights (ICCPR), which Malawi

[3] Article VII of the DPFEA.
[4] Adopted on 23rd October 2002 at the 32nd ordinary session of the African Commission on Human and Peoples Rights (ACHPR). As a state party to the African Charter Malawi should respect this declaration.
[5] Article IX (3) of the DPFEA.

ratified on 22 December 1993, only restrictions which have met a three-part test can be regarded as permissible. This test, which has been confirmed by the UN Human Rights Committee[6] and African Commission on Human and Peoples Rights[7], requires that any restriction must: a) be provided for by law; b) be required for the purpose of safeguarding one of the legitimate interests noted in Article 19(3); and c) be necessary to achieve this goal.

Similar safeguards for freedom of expression are set out in Section 44, subsection 1 of the Constitution of Malawi. The latter requires that restrictions or limitations on the exercise of the constitutionally recognised rights, including the right to freedom of expression and the freedom of the press may be placed only if they are 1) prescribed by law, 2) are reasonable, 3) recognised by international human rights standards, and 4) necessary in an open and democratic society.

Section 46 does not require prohibitions of publications to meet the above mentioned tests, set out by international law and the Constitution. Furthermore, it adopts a criterion for banning of publications which is contrary to all prongs of the tests. Interpreting the requirement that restrictions on freedom of expression are specifically provided for by law, European Court of Human Rights held that restrictions must be accessible and foreseeable and "formulated with sufficient precision to enable the citizen to regulate his conduct".[8] It also stated that "a law that confers a discretion is not in itself inconsistent with [the foreseeability] requirement, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference."[9]

Section 46 does not meet the requirement for foreseeability of the law because its wording is unclear. In support of this finding we point to the fact that the Penal Code does not define what is considered as "contrary to the public interest" and "reasonable grounds" for banning of a publication. Moreover, the scope of the discretion and the manner of the exercise of the powers of the Minister are not clearly defined.

Secondly, protection of "the public interest" is not recognised as legitimate interest justifying restrictions on the right to freedom of expression. Article 19 para 3 of the ICCPR lists the legitimate interests under which restriction of freedom of expression and media freedom are possible. These are respect of the rights or reputation of others, protection of national security or of public order, or of public health or morals. Finally, Section 46 does not require that a prohibition is necessary (see the next comment). In view of the failure of Section 46 to incorporate the international and constitutional safeguards for the right to freedom of expression we are concerned that the law can be used against

[6] For example, in *Mukong v. Cameroon*, No. 458/1991, views adopted 21 July 1994, 49 GAOR Supp. No. 40, UN Doc. A/49/40, para. 9.7.
[7] *Kenneth Good v Republic of Botswana,* Communication No 313/05 delivered at 47th ordinary session of the ACHPR 2010, paragraph 187.
[8] *Sunday Times v. United Kingdom*, 26 April 1979, Series A no. 30, 2 EHRR 245, para. 65.
[9] *Wingrove v. United Kingdom*, 25 November 1996, Application No. 17419/90, para. 40.

publications which elsewhere in the world would be considered as legitimate expressions.

- Banning publications or importation of any publication: The amended Section 46 is very restrictive as it provides for outright prohibition of publications without any consideration whether a least restrictive measure could be effectively applied. This is a violation of international law which permits sanctions on this right only if they are necessary. We note that in most cases legitimate interests – such as protection of reputation and rights of others, public morals and health – can be protected without prohibition of publications. A publication of a reply or correction will repair the damage. Banning a publication in such case will not be necessary. Consequently laws which regulate media provide for numerous sanctions and ensure that the most restrictive ones can be applied only when least restrictive measures are not possible. Foreign courts (for example, the US Supreme Court) have recognised the principle that the "least restrictive means" or "less drastic means" should be applied with respect to basic freedoms such as the right to freedom of expression.[10]

- Sanctions for violations of Section 46: ARTICLE 19 is concerned about the heavy sanctions for reproduction, importation and possession of prohibited publications. International law requires sanctions on the right to freedom of expression meet the aforementioned three-part legality test. In this respect disproportionate sanctions will be in violation of the right to freedom of expression. For example, according to the European Court of Human Rights, imposition of a prison sentence for a press offence is a very harsh restriction on freedom of expression which could be compatible with journalists' freedom of expression only in exceptional circumstances, notable where other fundamental rights have been seriously impaired, as in case of hate speech or incitement to violence.[11] We note with concern that Article 47 of the Penal Code gives powers to courts in Malawi to impose imprisonment not only in exceptional circumstances. If such sanctions are imposed, they will be in violation of international law.

Recommendations

ARTICLE 19 calls on the Malawi High Court to declare as unconstitutional Article 46 of the Penal Code. Furthermore, we call on the Government of Malawi:

- To remove the provisions concerning regulatory competences of administrative bodies from the Penal Code and include them in administrative legislation

- To revise the legislation to ensure that:
  - the powers to control media content are conferred to an independent body free from political pressure or control. At best this should be a self-regulatory body established by the media community itself

[10] *Shelton v. Tucker*, 364 U.S. 479, 81 S. Ct. 247, 5 L. Ed. 2d 231 (1960)

[11] *Mahmudov and Agazade v. Azerbaijan,* Judgment of 18 December 2008, Application no. 35877/04, para. 50

- the criterion for banning of publications is brought in line with Section 44 of the Constitution of Malawi

- laws regulating publications require balancing of the right to freedom of expression against other legitimate interests and ensure that least restrictive means are always applied to this right

- imposition of imprisonment for press related offences is permitted only in exceptional circumstances, such as in case of hate speech or incitement to violence.

END NOTES:

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- ARTICLE 19 is an independent human rights organisation that works around the world to protect and promote the right to freedom of expression. It takes its name from Article 19 of the Universal Declaration of Human Rights, which guarantees free speech.