

REPORT ON STAKEHOLDER ENGAGEMENT MEETING ON THE STATE OF FREE EXPRESSION IN MALAWI AND STRATEGIC LITIGATION AGAINST PUBLIC PARTICIPATION (SLAPP)- LILONGWE MALAWI

Prepared by: Angela Mkandawire, CFE Malawi Correspondent

INTRODUCTION

The Campaign for Free Expression (CFE) is a non-profit organization dedicated to protecting and expanding the right to free expression for ALL, and enabling everyone to exercise this right to the full, whether by speaking out, protesting, revealing information, blowing the whistle on wrongdoing, arguing, debating, writing, painting, composing or just by shouting out an opinion. As a non-partisan and independent organization, CFE strives on promotion of free speech by ensuring that people including practicing journalists and members of the Civil Society are able to freely express their views within the civic spaces without any impediments. Freedom of expression is one of the fundamental human rights and CFE believes wherever a person wants to express themselves if it is legal then that expression has to be defended, expressed, argued and fought for. And if anyone or any circumstance is blocking a person from free expression, CFE will do anything it can to expose and unblock it. It might be in the streets, in the workplace, at public meetings, on campus, in any public space; it might be an individual or a vast mob of people; it might be just shouting out a thought, or singing, waving a sign with a message, or making provocative gestures with hands – CFE is there to try to ensure that people are able to express themselves and take part in public life freely and openly. In this quest of promoting freedom of expression CFE plans on expanding its reach to Malawi where it has partnered two Civil Society Organizations namely; Centre for Human Rights and Rehabilitation (CHRR) and Youth and Society (YAS) on matters of Freedom of Expression and Strategic Litigation for Public Participation (SLAPP) which is another crucial area in safeguarding free expression.

CONSULTATIVE MEETING IN MALAWI

On 29 February, 2024, CFE team led by Executive Director Anton Harber and Programs Manager Thokozani M'bwana organized a day long Consultative meeting with local journalists, independent media, citizen journalists and representatives of Civil Society Organizations in

Lilongwe, Malawi. The consultative meeting was held in collaboration with CFE partners Youth and Society (YAS) and the Centre for Human Rights and Rehabilitation (CHRR). The agenda of the convening was to share ideas and knowledge by discussing issues related to freedom of expression and steps that can be taken when faced with SLAPP suits -legal action aimed at silencing journalists and other critics. Are journalists and CSOs in Malawi free to express themselves? How are SLAPP cases handled? How best can they be countered? The meeting aimed at capturing insights from responses to these questions. 27 individuals including representation from the national media body MISA Malawi chapter were in attendance.

INTRODUCTION TO SLAPP SUITS

Renowned legal practitioner Charles Martin Mhone from Maxon Arnold & Associates made a presentation on how SLAPP suits can be understood, identified and countered. He also explored their impact on freedom of expression. SLAPP suits can be identified as legal tactics that challenge the balance between right to free speech and right to seek redress through the courts. The SLAPP suits serve to censor, intimidate and silence critics and in some cases burdening the critics with hefty legal costs. SLAPP suits do exist in Malawi and can easily be identified as such:

- There's usually a lack of substantial legal merit as they are not filed to seek justice or redress for genuine harm, but rather to intimidate, burden and silence opposition.
- SLAPP suits target people that are exercising their freedom of speech including journalists and members of the civil society as they usually voice opposition and engage in advocacy on matters of public interest.

In most cases, defendants of SLAPP suits face psychological and financial stress from the legal battles which usually take long. They also bring out a chilling effect on free speech and activism, as apart from the individuals or organizations directly involved in the suit, others are also adversely deterred from speaking out on matters of public interest for fear of being caught in the same situation.

WHAT SLAPP SUITS ARE NOT

There are similarities between SLAPP suits and legitimate defamation/libel suits in a sense that both involve legal actions concerning alleged harmful statements. The difference between the two is in their intent, purpose and substance of the claims made.

Legitimate defamation- They are filed with intent to seek redress for genuine harm caused by false statements that damage an individual's or entity's reputation.

SLAPP Suits – Their primary intent is not to rectify genuine harm but to intimidate, burden and silence someone through the threat or use of lengthy and costly litigation. Mostly targeting those exercising their right to free speech, often on matters of public interest. Such suits usually do not have merit. Note that *Intent* and *legal merit* are the distinguishing factors. Malawi does not have laws that cover SLAPP suits, but there are laws that cover defamation. Elements of defamation include; false stories, publication to third party other than the claimant and injury to reputation.

FIGHTING SLAPP SUITS

Counsel Mhone in his presentation noted that it is crucial to fight back against SLAPP suits in order to preserve the foundational democratic principles of free speech and public participation. This is against a background that such suits pose a significant threat to individuals and organizations engaged in advocacy, journalism and public disclosure who cannot defend themselves in courts. However, combating these lawsuits require multi-faceted approach, including robust legal defenses, heightened public awareness and the active involvement of media and NGOs. Such engagements like the one facilitated by CFE would help bring law reform such as anti-SLAPP legislation that would help bring back democratic principles of free speech and public participation.

TESTIMONIES FROM VETERAN JOURNALISTS ON SLAPP CASES

From 1964 -1994 Malawi was a one-party state and was being led by Dr. Hastings Kamuzu Banda. The era was dominated by limitations on freedom of expression. The political landscape changed in 1994 after a referendum for multi-party democracy was held which changed the political landscape. The multi-party system of democracy led to the birth of a lot of political parties which in a way also opened up freedom of speech. Two veteran journalists summarized the media environment pre-democracy to present period.

Martines Namingha is a veteran Malawian journalist who practiced during the time Malawi just attained its democracy from one-party era that was being led by late Dr Hastings Kamuzu Banda. He worked for the defunct Chronicles and later Dispatch newspapers. Namingha argues that during the dawn of multi-party there was an influx of publications. Most of the journalists that worked

for most of the publications then, were untrained, as there were no journalism schools. Training was on the job. Most of the journalists that were practicing around that time were not aware of the laws on what was to be published, despite those in government being knowledgeable of the law. According to Namingha, academia played a big role in imparting knowledge on the plural media on several key issues including matters of defamation, libel and slander. The Access to Information ATI (2016) was non-existent then.

Peter Jegwa Kumwenda is another seasoned journalist and media trainer who worked for The Chronicle newspaper. He recalled that after Malawi attained multi-party there were over 60 newspapers in the country, but most of the practicing journalists then, were learning on the job. Due to lack of background training, mistakes leading to defamation, libel, and slander suits were inevitable. Kumwenda cited a lawsuit The Chronicle newspaper found itself in after publishing a story on a Mafia-like businessman then, Marshall Dukes, whom the newspaper informant said had a case at the police for assaulting a girlfriend. Dukes invaded the newspaper newsroom and threatened to drag the paper to court for defamation. The mistake was made because the publisher of the story relied on information provided by the informant without verifying the details. Jegwa also cited an example of how people with power can influence and control decisions of a media house. He gave an example of how a debate to discuss merits and demerits of a third term bid by then president Bakili Muluzi on one of the local radio stations was stopped, despite organizers paying for airtime for live broadcasting.

THREATS ON MEDIA POST ONE-PARTY ERA

Namingha shared that major threats that the media continue to encounter are threats of litigation. That is, if a media institution exposes any vice, they cannot proceed publishing a story without looking at the legal implications. This in most cases leads to the abortion of stories for fear of legal suits/costs. Namingha cited a practical case at his Dispatch newspaper which published an article on former President Bakili Muluzi's third term bid, where the paper questioned the rationale of having a sitting president ask for a third term bid against the provisions of the constitution. Journalists at the institution were intimidated, computers were snatched by the military and offices had to close. The Dispatch also published a story on former Reserve Bank governor Dr. Mathews Chikaonda and the paper was asked to pay K80million for defamation. Just like Namingha, Peter Jegwa agrees that SLAPP threats come to promote and make one feel afraid and intimidated by

people that have power. SLAPP suits are meant to specifically silence journalists and other people that are involved in advocacy. There is currently an ongoing case involving investigative journalist Gregory Gondwe, who has been forced to flee the country after receiving threats from the military for busting a mis-procurement syndicate by some Malawi Defence Force senior officials. This is a practical example of a SLAPP case attempt that is meant to wield fear and silence journalists.

DISCUSSIONS ON THE CATALOGUE (Putting together anti-media laws)

The media in Malawi led by MISA Malawi had put together anti-media laws, but there's a need for journalists and media bodies to work together to have some clauses in these anti-media laws reviewed or repealed. These laws include:

- The Electronic Transaction and Cyber Security Act 2016
- The Protected Flag, Emblems and Names Act 2014
- The Criminal Defamation law

The Access to Information ATI (2016) law is one such piece of legislation that has been successful in advancing freedom of the press although it is being underutilized. "The ATI law provides for the right to access information in the custody of public bodies and relevant private bodies; the processes and procedures related to obtaining that information; and to provide for matters connected therewith or incidental thereto".

Commissioner Teresa Ndanga former MISA Malawi Chairperson and current Commissioner for the Malawi Human Rights Commission MHRC, suggested the need to have a catalogue on media-related laws that would help handle SLAPP cases in the country. Ndanga recalled engaging the Attorney General's office during her tenure where they looked at how often the available pieces of legislation are used to curb SLAPP suits against journalists in the country. Some of the laws currently being used, include; (1) the protected names and emblems law, which for instance is used when people make fun or misuse the name of the President and (2) the criminal defamation law. According to Ndanga, MISA Malawi asked the Attorney General to call for the review of these two laws, but while accepting the review of the Protected Names and Emblems Act, the AG outrightly refused to review the Criminal Defamation Law. Government however, continues to use the Criminal Defamation Law to silence or intimidate people; with cases currently in court involving philanthropist Joshua Chisa Mbele and Anti-Corruption Bureau ACB Director General

Martha Chizuma where the two were arrested for defamation. Ndanga said MISA Malawi joined Chisa Mbele's criminal defamation case to claim that the courts should not use the criminal defamation law in a democracy like Malawi where free speech is guaranteed. This is an ineffective law to be used in modern democracy, because if it can be used on influential people like the Chizumas and Mbeles it means the common man is also in trouble.

THE ACCESS TO INFORMATION (ATI) LAW (2016)

There is not much utilization of the law. Some public officers are abusing the law by broadly quoting a provision in the law that says you can provide part of the information a person asks for. The public officers usually ask what right a person is going to enjoy by having the information. The law says you need to express what right you are going to enjoy by having the information. However, there are a lot of provisions within the same ATI law which one can enjoy to avoid SLAPP suits e.g the not revealing informants' clause. Some provisions within the same law can also be utilized at a point where one is being threatened by SLAPP suits.

LOCAL SUPPORT FOR JOURNALISTS UNDER SLAPP THREATS

Ndanga said during her tenure as MISA Malawi chair efforts were being made to engage the Malawi Law Society to at least utilize their pro-bono time to assist journalists when faced with SLAPP suits. There was interest amongst some lawyers to offer their pro bono time.

SUGGESTIONS

- Current MISA Malawi leadership should follow up and formalize the agreement with Malawi Law Society on pro-bono services for journalists. This would be the first step in fighting SLAPP suits as journalists will be guaranteed legal services if faced with SLAPP suits. Lawyers that are members of the Malawi Law Society have 24 hours pro-bono time per lawyer, per year and journalists should utilize this privilege.
- When a media house is faced with a SLAPP suit, some media houses should come in to support.
- There is a need to have a domestic mechanism that would swiftly respond to attacks on journalists and frontliners.
- There is a need to robustly engage development partners for investment in the protection of journalists.

- There is a need to establish anti-SLAPP law.
- There is a need to put in place a fund to support litigation for journalists that are facing SLAPP suits.
- Malawi to join a regional and global movement on anti-SLAPP cases which is already being pushed in other countries like South Africa and Eswatini.

STRATEGIES IN WORKING TOGETHER ON SLAPP CASES AND PROMOTION OF FREEDOM OF EXPRESSION

Anton Harber said the Campaign for Free Expression (CFE) aims at creating a network across several countries in the SADC region. CFE is also working with a London-based organization called Media Defence, which provides financial support for litigation for journalists facing SLAPPS. This year summits are expected to be held in Eswatini, Botswana, Zimbabwe and South Africa and there are also prospects of having one in Malawi. The agenda of the summits is set depending on the prevailing issues in a particular country drawn from the consultative meetings.

DOES MALAWI NEED CFE PRESENCE? WHAT ARE THE ISSUES THAT WILL NECESSITATE CFE PRESENCE?

Discussions

Peter Jegwa Kumwenda [journalist]: Malawi is a place where CFE needs to have its presence because the country is grappling with issues of freedom of expression and a movement that would advance issues of freedom of expression would be crucial. He cited the July 20, 2011 issue where some people were killed simply for exercising their right to demonstrate over poor leadership. This he said is a strong case that Malawians are yet to discover their right to free expression at least 30 years after attaining democracy.

Mallick Mnela [journalism innovator and journalist]: - As a journalist and innovator, through his start-up iHubOnline, he is working on developing an Artificial Intelligence [AI] tool that will, among other things, help journalists detect defamatory content in their work prior to publication. This innovation will also work to assist journalists at the global level, and having such a forum in Malawi, CFE will provide easy integration of the activities into what iHubOnline will also be advancing.

*Martines Namingha, Journalist:-*Malawi is moving down on the graph of freedom of expression. There have been changes in certain laws that are affecting freedom of expression. Therefore, we need such a summit to change the current narrative.

*Charles Kajoloweka YAS:-*Democracy overall is backsliding in Malawi. Some of the laws being introduced such as 'The Cyber Security law' and 'The NGO Act' have an overall negative impact on democracy and freedom of speech. There's a need to be alert in ensuring that such laws are countered all the time and collaborations with CFE can greatly contribute to the growth of democracy. As we look at the gaps, we should also look at opportunities that will be there if lawyers, journalists, and CSOs work together through a network driven by prevailing issues. There's a need to robustly engage development partners for an investment in the protection of journalists. We need to have a domestic mechanism to respond to SLAPPS concerning journalists and other frontliners.

Michael Kaiyatsa:- Malawi is heading towards a "very difficult" elections period. The political tensions that have already started blowing up are a sign that even the political space will be very volatile during the election period. We need to have such a forum like a summit for the protection of the fundamental freedoms that the media and citizens need to enjoy.

ELECTIONS FREEDOM OF EXPRESSION ISSUES

- Robust constitution but with ineffective implementation.
- Encryption illegality (section 52 of the Cyber Security Act)
- NGO Act amendment. The Non-Governmental Regulatory Authority (NGORA) has too much power to the extent of deregistering NGOs and prohibiting politicking
 - Criminal liability for board members or directors
 - NGO staff are barred from political involvement
 - Political co-opting of civil society leaders and journalists
- State's inability to safeguard free expression

ELECTIONS AND FREE EXPRESSION MATTERS IN MALAWI

During the meeting regarding Malawi, the subsequent points were raised in context of the upcoming 2025 elections;

1. Legislation

- Despite the strong constitutional backing for free expression, government frequently employs certain legislation to restrict such rights. Specifically, the Legislation on Cyber Security and Electronic Transactions law has been used in this context.
- The legal framework in place currently bans the encryption of end-to-end communications. This has potential of rendering platforms like WhatsApp illegal or allowing for their misuse based on section 52 of the Cyber Security Act.
- The amendment of the NGO Act clearly forbids NGO leadership from engaging in political activities, thus hampering their ability to provide effective oversight in political debates or discussions.
- Furthermore, the NGO Act introduces criminal liability for board members accused of engaging in political activities, thereby dampening free speech on sensitive issues.

2. Governance and Political Influence

- The strategy of politically co-opting outspoken CSO leaders is employed to diminish public opposition to political wrongdoings or misconduct. Malawi has on record, a number of activists, that played a role in the 2019 tripartite elections—who were given positions in government’s parastatals on appointments and some were sent to embassies as a way of silencing them.

3. Government Engagement

- The government demonstrates significant intolerance towards political discourse and free expression.
- Authorities often resort to excessive force during public demonstrations, highlighting the need for a revision of public order management guidelines.
- There are notable legal inconsistencies concerning free expression that require resolution.

- The government frequently uses punitive measures against dissenters as a deterrent to others considering criticism of the state.

4. Media Activism

- The Media landscape is compromised by political influences, with parties vying for premium media exposure, leading to biased coverage
- The prevailing situation results in media bias during the election period, favoring those with substantial advertising budgets and providing them with dedicated reporters.
- A related issue is the prevalence of “brown envelope journalism,” where media coverage is skewed towards politicians who provide financial incentives.

5. Litigation

- There is a significant gap in collaborative efforts concerning litigation on matters of free expression, leaving affected individuals to cope alone. There is a pressing need for joint resources and strategic planning in anticipation of legal challenges related to free expression ahead of the 2025 elections.

These discussions shed light on the complex landscape of media freedom and freedom of expression in Malawi. They show the challenges faced by journalists, civil society organizations, and individuals exercising their right to free speech. The meeting offered veterans and the current crop of journalists the opportunity to highlight the critical need for collaborative efforts to address these challenges and safeguard democratic principles.

In conclusion, participants remarked that the consultative meeting organized by the Campaign for Free Expression (CFE) provided a platform for stakeholders to exchange ideas, share experiences, and strategize on how to promote and protect freedom of expression in Malawi. Anton Harber said insights gained from the meeting will inform future initiatives aimed at combating SLAPP suits, advocating for legal reforms, and fostering a conducive environment for free speech and public participation.