

Can the Inspector General of the Malawi Police Service Investigate Crime Informally?

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In the past weeks much has been said and written about academic freedom and national security and no doubt there is much still to debate about. I am, however, puzzled by the response the Inspector General of the Malawi Police Service, Mr. Peter M. Mukhito, gave to the CCASU (Chancellor College Academic Staff Union) in his attempt to explain the nature of his meeting with Dr Blessings Chinsinga. The CCASU in its petition alleges that Mr. Mukhito breached Dr Chinsinga's constitutional right to academic freedom. The breach, as I understand it, stems from attempts made by Mr. Mukhito to establish whether Dr Chinsinga, a Chancellor College lecturer, in the course of giving a lecture did or attempted to incite 'students to engage in strikes and related actions to bring down the constitutionally constituted government of the Republic of Malawi'.

The CCASU suspects that the Malawi Police Service has planted informants in the lecture halls of the University of Malawi. In CCASU's view, the alleged planting of informants, and the actions of Mr. Mukhito in his attempt to establish whether a crime had been committed, are classic examples of conduct prohibited by the Malawi Constitution. The Inspector General does not appear to reject the substance of the observation that he attempted to establish whether a crime had been committed, and that towards that end, he arranged to meet with Dr Chinsinga. I will neither focus on whether Mr. Mukhito and the Malawi Police Service breached academic freedom nor dwell on whether it was within Mr. Mukhito's right as a police officer to investigate the possible commission of a crime in the specific circumstances of this case. I want to focus on the expectation that the Constitution creates in Malawians when a police officer finds him/herself in a situation as Mr. Mukhito's.

My concern here is with the manner in which Mr. Mukhito characterized his meeting with Dr Chinsinga. I believe this is also an issue that raises profound constitutional and legal issues which are relevant to the way the members of the Malawi Police Service go about their lawful duties in investigating crime. In my opinion, it is clear that the meeting Mr. Mukhito had with Dr Chinsinga was part of an official investigative process. If I am correct in this view, then it is disingenuous for Mr. Mukhito to characterise the meeting as an 'informal' one. Furthermore, if my view is correct, and I am assuming that it was necessary for Mr. Mukhito to adhere to specific matters of constitutional and legal procedure, it appears to me that he may not have complied with such procedures. The incorrect characterisation and the apparent lack of compliance with procedure may not necessarily have been down to ill-will or maliciousness on the part of Mr. Mukhito but due to sheer ignorance or confusion on the part of Mr. Mukhito regarding the correct procedure.

In order to put my concern in its proper perspective it is necessary that I quote verbatim the three relevant paragraphs of the Inspector General's response to the CCASU's petition.

It is indeed true that I, in my capacity as the Inspector General of the Malawi Police Service invited Dr. Blessings Chinsinga to my house in Zomba on 12th February 2011. This was not to interrogate him as it is being alleged but rather discuss informally the balance of national security and academic freedom.

You may wish to know that ensuring that there is national security by maintenance of public safety and public order is one of many functions the Malawi Police Service has been accorded with by the laws governing the land.

Dr. Chinsinga was invited in pursuance of the Judges Rules which guide us in our day to day activities as Police Officers. The rule in question is number one which states that "[sic] When a police officer is trying to discover whether, or by whom, an offence has been committed he is entitled to question any person, whether suspected or not, from whom he thinks that useful information may be obtained.

In the first paragraph Mr. Mukhito admits inviting Dr Chinsinga to his official residence in Zomba in his 'capacity as the Inspector General of the Malawi Police Service'. Then Mr. Mukhito proceeds to categorically state that his meeting with Dr Chinsinga was 'informal' and was not interrogative in its purpose. In the subsequent two paragraphs Mr. Mukhito makes statements which can only suggest that far from being 'informal' and not intended 'to interrogate', the nature of the meeting was 'formal' and that it was intended to establish whether the law had been breached. In other words, it was an interrogative meeting.

Interrogation, may include, 'formal or informal questioning' and its scope is 'broad enough' to 'include conversations or actions which could reasonably be expected to elicit a response which would be considered the equivalent of formal questioning'. Read together the paragraphs in Mr. Mukhito's response are inherently paradoxical in their intention, and in my opinion, appear to communicate a confused legal message. Mr. Mukhito seems to suggest that he was at once acting 'formally' and 'informally'. An important question is whether a police officer, in Mr. Mukhito's position, is legally and constitutionally permitted to assume such a paradoxical status; *to interact with a potential suspect or witness and to discuss with the potential suspect or witness the material aspects of an investigation while assuming a status that is at once formal and informal*. In my view, the applicable law cannot be interpreted in a way that allows a police office to act at once 'formally' and 'informally'.

Dr Chinsinga was no doubt a person at the center of events that Mr. Mukhito wished to get to the bottom of. To that extent, the law cannot and must not be read in a way that allows Mr. Mukhito (and indeed any police officer in a similar position) to clothe his meeting with the robe of informality. In the rest of this piece I will attempt to clarify what in my opinion are the legal obligations imposed on a police officer in Mr. Mukhito's shoes. For the sake of clarity, a potential suspect or witness is here understood to mean a person in whose respect the police have not made up their mind whether they are a suspect or would be useful as a

witness. To borrow a euphemism that has been used elsewhere I am referring to 'people that assist the police in an investigation' by answering questions put to them by the police.

Section 42 of the Constitution addresses the required procedure to be followed by police officers when dealing with persons who are arrested, detained or charged. It appears to me that the section, unless I am advised differently, does not *expressly* address the procedure to be followed by police officers when they deal with persons who may or may not be suspects in the course of investigating the possible commission of crime and this has two implications. First, it may be argued that section 42 says when questioning a person who is or is not a suspect a police officer is not required to inform the person of their entitlement to the rights listed therein. For example, the section says a detained person is entitled to be told why they are being detained and questioned, and also to be warned that anything they say in answering the questions put to them may be used against them in a subsequent prosecution. Secondly, it may be argued to the contrary that when questioning a person who is or is not a suspect, a police officer is in fact required to inform the person of their section 42 entitlements. It appears to me that in denying that the meeting he had with Dr Chinsinga was formal, and in also denying that the nature of his approach to it was investigative, Mr. Mukhito may *either willfully, or inadvertently*, be subscribing to the first argument.

In arguing that the meeting was informal Mr. Mukhito is saying that he was under no obligation in law to remind Dr Chinsinga that he had certain rights under section 42 and that he was at liberty to invoke them should he wish to do so. I say this because it is readily apparent that Mr. Mukhito was moved to set up this meeting because he wanted to get to the bottom of an allegation that a crime had been committed. Mr. Mukhito was not doing this because he was motivated by his desire to delve deep into the esoteric niceties of academic freedom and national security, an exclusive preserve of those that consider themselves to be intellectually inclined. For Mr. Mukhito this was serious business.

However, I do not think that this is in fact the position that ought to be associated with Mr. Mukhito because he explained that at all times during the course of the meeting with Dr Chinsinga he was guided by rule 1 of the Judges Rules. In my view, this is further evidence to suggest that the meeting Mr. Mukhito had with Dr Chinsinga was formal since the rule in question relates to investigation of crime. Moreover, this is also the ultimate evidence that Mr. Mukhito does not believe suspects and non-suspects ought to be denied the constitutional safeguards that are due to detained or arrested or charged persons. It is perhaps pertinent at this stage to note that Mr. Mukhito's response to the CCASU's petition *omitted* to outline the complete Rule I of the Judges Rules. The omitted part reads as follows;

This is so whether or not the person in question has been taken into custody so long as he has not been charged with the offence or informed that he may be prosecuted for it.

Rule 1 of the Judges Rules covers the case of Dr Chinsinga who at the relevant time was neither arrested, in custody, charged nor was he informed of any pending prosecution. Therefore, I would strongly disagree

with the Inspector General that his meeting was informal and that it was not interrogative in nature. Such a view simply flies in the face of the facts that are evident in Mr. Mukhito's own response to CCASU. I also suggest that Mr. Mukhito ought to have informed Dr Chinsinga of his constitutional rights as provided for under Article 42 of the Constitution before proceeding to engage Dr. Chinsinga in the lofty discussion on the finer points of the balance between academic freedom and national security. After all, had Dr. Chinsinga said something that was self-incriminating, or had Mr. Mukhito satisfied himself that a crime had been committed, I assume that Mr. Mukhito would have been tempted to press charges accordingly. However, the incriminating information that he would have obtained through the 'informal' discussion would likely be challenged as inadmissible in a subsequent prosecution because of failure to warn Dr. Chinsinga that he was entitled to certain rights.

I hope this article highlights an important salutary lesson; a police officer must never regard themselves as engaging in informal and non-interrogative activity because the person they are dealing with in the course of an investigation is 'simply assisting the police'; meaning that they have not been arrested, detained or charged or that they are a suspect or not. However, a question that comes to my mind is which section of the Constitution provides the constitutional basis for rule 1 of the Judge's Rules. As I pointed out it is not very clear to me whether section 42 applies to persons who are 'simply assisting the police'. Nonetheless, I also hold the view, that the law cannot be interpreted here to mean that suspects or non-suspects must be treated differently from arrested, detained and charged persons. Any attempt to do so would very likely be implicated in the charge of unconstitutional discrimination. Superior courts of comparable jurisdictions including Ireland and the United Kingdom do not distinguish between arrested, detained and charged persons and persons who are suspects or not. Consequently, in my view there is no reason why the Malawi Constitution, the judiciary and the Inspector General should make such a distinction; or should they?

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