

## **The Meaning of the Constitutional Right to Privacy in the Light of Recent Developments**

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The online Malawi Daily Times newspaper of 25 July 2008 carried a news article that the Malawi Police Service (MPS) had arrested Mr N. and Ms M. on allegations of producing or possessing 'indecent' material with the intention of corrupting morals in contravention of section 179 of the Penal Code. It appears that prosecutors in the MPS intend to use criminal law to prosecute Mr N. and Ms M. The facts of this case as presented by the media (which may not be the full facts) will challenge the mind of any lawyer to evaluate their implications along multiple legal and constitutional dimensions. I will assume that the 'facts' are nothing more than mere allegations.

### **What are the Issues?**

For the sake of clarity the issues I have identified and which I will focus on in this case coalesce around the right to privacy and may be categorised into two. Under the first category there is the issue of the relationship the state has with an individual. In particular there is the question whether from a basic criminal law perspective Mr N. and Ms M. can successfully be prosecuted as charged – did Mr N. and Ms M. aim to corrupt morals through the use of the images at the centre of this intended prosecution. It is not clear whose morals were under threat and how they were threatened. A further question is whether, as the prosecution implies, images characterised as indecent cannot be produced, retained and enjoyed privately by an adult individual. These questions raise serious constitutional questions. Does the state have limitless power in this area? Does the authority of the state extend to the bedroom, for example?

Under the second category the case touches on the relationship that private individuals ought to have with each other. I intend to focus on the alleged conduct of the IT Centre and its nameless technician. Here a question may be asked whether the IT Centre ought to account for the violation of the constitutional right to privacy, for causing personal and material loss to both Mr N. and Ms M. in tort law and for breach of contract made with Mr. N in contract law. A further question is whether the members of the immediate families of Mr N. and Ms M. can also claim to have had their privacy violated and to have suffered personal damage in tort law on account of the alleged unprofessional conduct displayed by the IT Centre. Equally, under the second category, a question may also be posed whether the employers of both Mr N. and Ms M. have the competence to discipline Mr N. and Ms M. Should Mr N. and Ms M., be penalised as a result of events that are legal (in my opinion) and a consequence of exercise of an individuals' constitutionally protected autonomy and liberty?

These questions similarly raise serious constitutional questions regarding the values of personal dignity and liberty. I am inclined to view the decision by MPS to prosecute as another instance in a long line of examples where the 'authorities' appear to perform their duties mechanically, show a narrow appreciation of the complexities of law and unrelentingly aim to satisfy the demands of 'expediency' at the expense of the 'big constitutional picture'. I am also inclined to view the conduct of the IT Centre as an extreme case of breach of privacy. The rest of the article will focus on justifying my views.

### **The Big Constitutional Picture**

What do I mean by the 'big constitutional picture' in this context? With the passage in 1994 of the Republic of Malawi (Constitution) Act, (No 20 of 1994) Malawians made the assumption that a constitution has the important ideal role of developing a perfect framework for constituting a political community. In 1994 Malawians assumed consensually that a constitution sets down principles, norms and values by which a government ought to interact with people and how people must engage with each other. In 1994 Malawians also assumed that the political community to be constituted will have a legislature, a body elected to work for, and to represent the interests of, the general populace and an independent judiciary responsible for the administration of justice. Often in a situation like this people look up to the legislature and/ or the courts for clarification of these constitutional principles, norms and values. Indeed Malawi has a legislature and an independent judiciary. A further assumption made by Malawians in 1994 is that the legislature would pre-emptively or presciently use constitutional principles, norms and values to develop appropriate laws in anticipation of any given legal situation. The idea here is that in the task of formulating law the legislature will reflect upon and *actually use* constitutional principles, norms and values and not simply engage in parrot like recitals.

The Constitution simply gives broad principles, norms and values which either the legislature or the courts must use to translate the constitutional principles into concrete and clear rules which would be accessible to, and understood by, the general populace. The alleged events surrounding Mr N. and Ms M. bring into sharp focus the constitutional value of privacy which, in 1994, Malawians agreed each and every person living in Malawi is entitled to. To date the legislature has failed to reduce the constitutional value of privacy into concrete and clear rules and the courts, to my knowledge, have not had any or ample opportunity to clarify the nature, scope and limits of this value. The circumstances Mr N. and Ms M. find themselves in potentially present the legislature the space to make good on its constitutional obligation. Similarly, the courts may have the opportunity to begin to give the much needed clarity.

Much more significant, though, is the notion that the people of Malawi must have a full and frank conversation on the concept of privacy. Clarification must be given regarding where the line must be drawn between respecting individual autonomy and personality (as the human rights value of privacy requires) on the one hand and the safe guarding of the interests of individuals, specific groups or the public generally (which is also a value required by human rights) on the other hand. This is too important an issue to be ignored. Malawians must not allow this issue to be overridden by what I believe is the ill advised decision to prosecute Mr N. and Ms K. In a nutshell this is what I mean by the big constitutional picture.

### **Expediency**

I am suggesting that the decision to prosecute is being pursued because it is an expedient option. I am using the term expediency in this instance to mean the *use of methods that are advantageous rather than fair, just or principled*. Expediency here, in my estimation, implies that there is an 'undeclared force' which is preventing a deep, reasoned and rational debate on the constitutional meaning of the series of events. What are being overlooked here, by the authorities and by this expediency, are fundamental constitutional norms and established legal doctrine, conventions and methodologies. What I believe has not taken place here among the authorities is a reasoned and rational conversation on the implications for the big constitutional picture of the events surrounding Mr N. and Ms M.

Alternatively, my dismay over the intended prosecution may be turned on its head. The intended prosecution may yet turn out to be an advantage. Therefore, one can argue that I ought to welcome the prosecution because it will actually form the basis

the courts will enter the debate and in turn begin to test and outline the nature and scope of the constitutional value of privacy. The disadvantage here is that this type of conversation will be a conversation of adversaries. The authorities in this conversation would only be 'reacting' as opposed to being 'proactive'. Reaction is invariably costly to the taxpayer; it involves fire fighting and does not address an issue comprehensively. This conversation will only settle the problems of the immediate parties concerned but will not address the comprehensive constitutional picture.

### **The Authorities**

To be clear, I am using the term "authorities" both expansively and narrowly to refer either to the individual or collective capacities of state agencies and offices (without necessarily being exhaustive) which I believe have a vested interest in the reported facts of this case. These include the MPS, the Offices of the Attorney General (AG), Solicitor General (SG), the Director of Public Prosecutions (DPP), the Human Rights Commissioners (MHRC) and the Law Commissioner (LC) and the Parliament's Legal Affairs Committee (PLAC). It is without question a commonly accepted standard of modern public governance that there should be proactive joined up Government. In other words, different bodies of Government must anticipate events, consult each other, work together and ought to know what the other is doing in order to maximize efficiency, avoid unnecessary costs (e.g. through duplication) and generally to build confidence in people. It is essential that authorities must be in control, work towards similar goals and know what they are doing.

Admittedly, I was not privy to the conversation that obviously took place among the decision-makers in the MPS prior to the decision to charge Mr N. and Ms M. I am singling out the MPS because I am assuming that the decision to prosecute was an independent one. I also do find it difficult to believe that the other relevant state agencies would have gone along with this decision had they been consulted or had they acted proactively especially in the light of the apparent pitfalls prosecution is likely to face. To that extent, the fact that this commentary assumes the existence of such a 'conversation' then it is obviously speculative, at least, regarding the content of that conversation. However, a line ought to be drawn between informed, plausible and reasoned speculation on the one hand and uninformed and invalid speculation on the other hand. I believe my speculative endeavour here falls in the former camp because of the following explanation.

I once worked for the Ministry of Justice in Malawi as a Legal Aid Advocate and as part of my brief I interacted professionally with members of the criminal prosecution services in the MPS. An advantage of my job was that I gained insight in the way the criminal prosecution services worked. For instance, before a prosecution was embarked upon prosecutors held case conferences among themselves and with their superiors. Where 'important' prosecutions were concerned the DPP would either take over the prosecution or permit the police prosecutor to handle the matter but with the proviso that consultation should occur as the DPP saw fit. The haste with which the prosecution ball was set rolling suggests to me that there was no consultation made with the office of the DPP. Moreover, due to strong legal reasons, I find it hard to entertain the idea that the DPP sanctioned this prosecution. Unless standard operating procedures have so radically changed in the MPS it is reasonable to assume that a 'conversation' took place. Although a conversation may have taken place within the hierarchy of the MPS I hesitate to describe it as having been informed. I will maintain this position unless a contrary explanation is given.

### **The State and the Individual**

I have mentioned that this case raises the question of the relationship the state has with the individual. Assuming that I was an informed prosecutor in the MPS and that I

had concern for the big constitutional picture, I would have consulted the state's legal advisor on two issues. First, I would have sought guidance on the legality of constructing the private possession of 'indecent' images as evidence of an intention to corrupt morals. The facts of the case as presented in the media suggest that Mr N. had no intention whatsoever of publicly doing so. Rather it was the unprofessional conduct of the IT Centre which led to the images ending up in the public domain and which may be characterised as intended to corrupt public morality.

Secondly, I would also seek advise on the constitutionality of prohibiting the private production, retention and enjoyment of 'indecent' images by adults as the prosecution seems to suggest by their actions. It appears to me that section 179 of the Penal Code was not intended to prohibit this type of conduct. The purposive intention of section 179 is apparently to target the distributors/ publishers of such images for public consumption which *in fact* corrupts morals. There is a world of difference between the two. Assuming that in fact section 179 was intended to prohibit the private production, retention and enjoyment of such images the courts may still be asked to clarify whether such prohibition was constitutional. In other words, what good constitutional reasons are there for extending state authority to my bedroom? Do the rich and diverse cultures of the people of Malawi empower community elders to dictate how an individual behaves in the privacy of their own bedroom?

In my estimation there are good grounds for challenging the constitutionality of section 179 in the light of the constitutional right to privacy. Furthermore, the Malawi Constitution is a liberal democratic constitution and this carries with it some underlying presuppositions about individual autonomy and personality which sit uncomfortably with the interpretation that the prosecution appears to advance. The methodology of challenging the constitutionality of section 179 is provided for in the constitution itself. The Malawi Constitution expressly stipulates that no law is above it and that the judges are also bound by it. Obviously, in the final analysis the court will have to engage in a balancing exercise and the method for this is also provided for in the Malawi Constitution.

Indeed the swiftness that characterised the arrest does not create confidence in an informed observer that the decision to prosecute benefited from an informed and reflective process. The interface between the right to privacy and law generally is, to put it mildly, complex. In this particular case section 179 of the penal code will need to be tested against the Constitution. All too often past trends have suggested that prosecutors appear to act first and then think later about the implications of their actions and the result, unsurprisingly, is often very messy. Prosecutors often end up with the proverbial 'bloody nose' in the courts.

### **Private Relationships**

As I have observed earlier, questions over the relationship between private individuals arise. As I see it the big constitutional picture here has two strands. The first strand pertains to the constitutional rules applicable in a relationship between private individuals. The second strand relates to the rules applicable to the implications the apparent violation of the autonomy and privacy of Mr N. and Ms M. has for everyone who takes privacy seriously. Regarding the first strand Malawi constitutional human rights law requires that private individuals must be protected from the damaging effects of abuse of position, power and privilege by other private individuals. In so far as Malawi law is concerned this requirement is revolutionary and I will explain why.

Historically in states that follow the liberal democratic tradition it has been conventionally understood that human rights provisions of a bill of rights only apply in a relationship an individual has with the state. This is referred to as the vertical

application of human rights and the United States of America is an example of a country that subscribes to this approach (in the USA it is called the state action doctrine). Malawi and Namibia followed this approach before 1994, the Republic of South Africa before 1993, Germany before 1952 and Ireland before 1961. Malawi alongside these countries, among others, has explicitly chosen to break from the orthodox vertical tradition. Human rights provisions may now be used in a relationship that a private individual has with another private individual. This is referred to as the horizontal use of human rights.

The authority for the horizontal use of human rights is provided by section 15 of the Malawi Constitution. The elaboration by the Malawi Courts of the scope of this provision is only in its embryonic stages. In other words, although Malawi Courts have on a few occasions had the opportunity to apply human rights law to private relationships there are still more questions (that need to be responded to) than answers. However, Malawi does not need to reinvent the wheel but simply adapt it. There is no shortage of sources for comparison worldwide from which Malawi courts can learn. It is a constitutional fact that the Malawi Constitution expressly allows judges to learn from other jurisdictions.

In relation to the second strand, in my view, one thing is very clear. The alleged conduct of IT Centre and its nameless technician symbolises the essence of the problem that the framers of the Malawi Constitution intended to deal with as regards the right to privacy and the use of human rights provisions in relationships between private individuals. This is the abuse by private individuals or legal persons of their position, power and privilege with damaging effects for other private individuals. The IT Centre, it seems, abused their position, power and privilege and violated the privacy of Mr N. and Ms M.

The right to privacy is a composite of multiple entitlements. It includes the right not to be impeded or intruded upon without lawful reason either by the state or by a private individual. The right to privacy includes the entitlement to have one's dignity, respect and status intact and not violated by others. The IT Centre and its nameless technician, it seems, abused their position of trust and violated their duty of confidentiality which flowed from the contract made with Mr. N. As a result of this alleged conduct Mr N. and Ms M. suffered the violation of their respect, dignity and status which they are entitled to unless there is a good constitutional reason for them to be denied this entitlement. As a result of the alleged intentional acts of the IT Centre and its technician Mr N. and Ms M. may have suffered or may suffer psychological, physical and material damage. As a result of actions of the IT Centre and its technician the immediate members of the families of Mr N. and Ms M. may have suffered or may suffer psychological and physical damage. Contrary to some opinions, I maintain that from a legal and constitutional point of view Mr N. and Ms M. do not bear responsibility for the damage caused and suffered in this case. Moral responsibility is not the same as legal responsibility.

## **Conclusion**

The assumptions made in 1994 entail that Malawians were prepared to tolerate private expressions of individual autonomy and liberty. I suggested above that the prosecution appears to have been undertaken hastily. I also suggested that the prosecution appears to be informed by a yet 'undeclared force' that is impeding reasoned and rational debate. The prosecutorial decision appears to have been influenced by a cultural impellent. My interpretation of views expressed by some Malawians in public spaces (e.g. educated Malawians on the internet no less!) is that the hasty prosecutorial decision was driven by a deep seated cultural discomfort with the expression of sexuality and a corresponding, overriding and exaggerated sense of duty to repress display of what are only a human beings' innate tendencies toward

gratification of natural desires. What these views are actually saying is that we all must have imposed on us a homogenized sexual norm. We are all urged to have a single undifferentiated view on matters that are essentially about sexual preference. According to those promoting this view a culturally and socially palatable position is that we must all pretend that we are asexual beings. Each and every Malawian adult must pretend that he or she is not a being that has sexual desires and fantasies.

To illustrate my point, I have observed that the inevitable public discussion seems to equate the published images and any other act of private sexual conduct, with *ubve* or *utchisi* – translated in the vernacular Chichewa language to mean ‘disgusting behaviour’. Furthermore, discussion has revealed a tendency to deny the victims their humanity because against their will, their privacy and autonomy has been violated. These examples reveal contradictions and hypocrisy of massive proportions especially when one sociologically examines the sexual behaviour of many people in Malawi. For instance the tragedy of the HIV/AIDS epidemic in Malawi suggests that many people in Malawi are sexualized. Secondly, many of the so-called ‘well to do’ in both rural and urban Malawi continue to engage in polygamy or to maintain mistresses. Please let us get a grip on ourselves. We must begin to speak honestly and stop living in a fantasy world.

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