

Mutharika defends repressive law

By Gregory Gondwe: @Kalipochi

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President Bingu wa Mutharika has defended the amendment of Section 46 of the Penal Code which gives the information minister power to ban any publication or its importation should the minister deem it harmful to the public.

Donors and all other development partners have frozen aid to Malawi to, among other things, force it to reverse this amendment as they claim it infringes media freedom in the country.

Mutharika through his legal counsel, Allan Ntata, starts with an observation that in recent times the government has come under attack on the amendment of Section 46 of the Penal Code and therefore sees it fit to protect the public from such confusion and deliberate misrepresentation of the truth behind the legislation.

"There have been concerns in the press and from various stakeholders asserting that the amendment to the Penal Code of the section could be used to restrict freedom of expression," says Ntata.

The president's legal office picks on a particular article that appeared in the *Sunday Times* (27 November 2011) which asserted that the amendment is "startling to the survival of newspapers and independent journalism" and suspected that the purpose of the legislation is to harass journalists in a "relentless campaign to conceal the truth from the people".

"It therefore seems necessary to enlighten these armchair "analysis" along with the rest of the Malawian public," says Ntata, according to a press release.

Amendment is intended to improve

Mutharika's legal counsel describes the amendment as not only a simple matter, but also a desirable one for that of newspapers and those in favor of democracy and good governance. He says if anything, the amendment is intended to improve on the old Section 46 of the Penal code.

The old section reads: "If the Minister is of the opinion that the importation of (a) Any publication; or (b) All publications published by any person would be contrary to the public interest, he may, in his absolute discretion, by order, prohibit the importation of such publication or publications, and in the case of a periodical publication may, by the same or subsequent order, prohibit the importation of any past or future issue thereof."

The section has now been amended to: "If the Minister has reasonable grounds to believe that the publication or importation of any publication would be contrary to the public interest, he may order published in the Gazette, prohibit the publication or

important of such publication."

The president's legal office says that in the previous Section 46, the minister was given "absolute discretion" to ban any publication, while the amended section takes away this unfettered discretion and gives the minister the power to ban a publication only if the minister has reasonable grounds to believe that the publication or important of any publication would be contrary to public interest.

Subject to the minister's decision

Ntata says apart from fettering the ministers' discretion, this section, unlike the previous one, allows for the minister's decision to be subject to judicial review.

"The Minister's decision can thus be overturned. It is also useful to note that the Constitution under Section 43 requires that the Minister must give reasons for his decision in writing," he says.

Ntata says to "simply join the ignoramuses' bandwagon and claim that the amendment is intended to conceal truth from the people exposes the fact that the claimant has either not read the legislation or has miserably failed to understand the amendment and is desperately uninformed as of its background".

Mutharika says it is not his government that is changing this law. The work on the bill started in 1994 when British legal experts were asked to assist Malawi to reform the criminal justice system. Following the recommendations of these experts, a special law commission on criminal justice reform was appointed in 1998 to review a number of criminal statutes, which included the penal code.

The president's office went on to mention the members which included Justice Leonard Unyolo as chairman; Justice Twea as deputy chairman; Justice Singini, former law commission chair and Anthony Kamanga as solicitor general who represented the Malawi law society then.

"There were also other legally reputable citizens on this commission. There are men of unimpeachable legal standing. With assistance from the British experts they gave us Section 46 as amended," says Ntata.

Power taken from the minister

He said in the commission's own words 'the unamended (old) Section 46 gave too much power and discretion to the Minister', as it used words like 'opinion' and 'absolute discretion' and in view of the need to protect fundamental freedoms in the constitution like freedom of expression and freedom of opinion, the very freedoms that protect newspapers, it was recommended that the section be amended.

"The amendment under discussion is what the learned commissioners recommended in June 2000, after extensive consultations with the public and competent stakeholders," he said.

The president's office has since appealed to all to understand the legislation for what it is.

"It is illogical for an apparently competent journalist to suggest that a piece of legislation or any government measure is designed to prevent journalists from finding the truth. Such a suggestion immediately begs the question: what truth?" argues Ntata.

He says first, a good journalist will always find the truth and secondly, this particular piece of legislation is aimed primarily at the important and productions that are contrary to public interest.

Reversing the amended section is one of the points that civil society leaders demanded government to comply with, failure of which led to the 20 July 2011 mass demonstration that led to the death of at least 20 people when the police shot at them

to calm the situation.

ABOUT GREGORY GONDWE: @KALIPOCHI

Gregory Gondwe is a Malawian journalist who started writing in 1993. He is also a media consultant assisting several international journalists pursuing assignments in Malawi. He holds a Diploma and an Intermediate Certificate in Journalism among other media-related certificates. He can be contacted on gregorygondwe@gmail.com. Follow him on Twitter at @Kalipochi.

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