The Malawi Parliament Does Not Have Plenary Power Over the Judicial Power of the Superior Courts of Malawi

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Prior to its passage, various constituencies of the public called upon the Malawi Government to abandon its obsessive desire to enact the Civil Procedure (Suits by or Against the Government or Public Officers) (Amendment) Bill 2010 (hereafter the 'Bill'); the call of course fell on deaf ears. Subsequently, and in the wake of the Bill's approval by legislators (in spite of eloquent cautionary statements from independent minded legislators including my professional senior Mr DH Phoya), select parties have announced their intention to challenge the constitutionality of the Bill. The introduction of this Bill and its approval have ignited the passions of many a Malawian both within and beyond the borders of Malawi. In fact some of the exchanges traded by Malawians on account of the Bill have been nothing short of incendiary.

So far, and listening to those that oppose the Bill, it is clear that their rejection of the Bill focuses on the threat the Bill poses against fundamental rights of individuals to seek a just and effective remedy from the Courts whenever the rights of the individual are potentially threatened or actually trampled upon. I wholly agree with this approach and from where I stand IT IS A VERY COMPELLING ARGUMENT. Potential scenarios illustrating how the infringement of rights could possibly come about have eloquently been described by many including a very persuasive example I read given by Raphael Tenthani in his weekly piece which appears on the online Maravi Post. I would, however, want to draw attention to an alternative way of looking at the potential impact of the Bill. I will nail my colours to the mast. I do not approve of this Bill because it represents a 'very clear and present danger' to the rule of law. The Bill violates very clearly stated statements of constitutional principle outlined in the Constitution of Malawi. Here is the explanation why I feel the way I do.

A compelling argument may equally be made against the Bill on the basis of the constitutional principle of separation of powers. In other words, the argument would be whether the Parliament of Malawi has the constitutional authority to exercise plenary power over the jurisdiction, competence, and more especially, the judicial power of the Courts. Plenary power in simple terms may be defined as a power or authority to act that is vested in or granted to a body or an individual in absolute terms in relation to a given subject matter. The question that ought to be confronted here is whether Parliament has exclusive, absolute or limited power to determine and decide for, and on behalf of the Judiciary, what constitutes the legitimate area for the Judiciary to exercise its judicial power. I say categorically that the answer is NO!

Comparative constitutional case law from the United States of America, Canada and Ireland throws light on this question. Generally, the accepted view is that attempts by the legislature to impose limitations on the

capacity of the judiciary must be based on very clear textual constitutional authority. The text of Article III of the United States Constitution appears to give Congress the authority to insulate specific areas from the scrutiny of the Supreme Court in the exercise of its judicial power. However, this is not a matter that has been exhaustively settled in the United States, and from my understanding of events there, politicians have refrained from insisting that it is within their power through Congress to interfere with the scope of judicial power. The position in Malawi though is very different in that the words of the relevant and equivalent provisions do not grant the legislature such plenary power. Sections 103, 104 and 108 of Chapter IX of the Malawi Constitution provide the indisputable basis for the observation I have made. In particular section 103 (2) provides as follows;

> The judiciary shall have jurisdiction over all issues of judicial nature and shall have exclusive authority to decide whether an issue is within its competence.

This section presciently anticipates the proposal that is contained in the Bill and rejects it outrightly. The section categorically and in very clear emphatic terms stipulates that only the judiciary, and the judiciary only, has the power to decide whether an issue is within its competence. The Bill, contrary to the letter and spirit of Chapter IX, seeks to fetter the discretion that the judiciary is given by the Constitution to decide whether an issue brought before the courts is of a judicial nature or not. In attempting to impose such a fetter the Bill is violating a cardinal principle of the Constitution; the separation of powers between the executive, the legislature and the judiciary. This is an attempt to undermine the rule of law.

Finally, I observed that in responding to questions put to him by Capital FM the Minister responsible for Justice and Constitutional Affairs, Dr Chaponda, advanced a rationale for seeking the enactment of the Bill. He argued that the Bill had been prepared in the light of practical expediency. He explained that the Malawi Government does not have enough lawyers to handle legal suits on its behalf. In other words, the Government lawyers are overwhelmed by legal suits. No doubt this view deserves sympathy. However, this rationale does not constitute a compelling constitutional reason capable of trumping established constitutional principles and rights. The rationale advanced by Dr Chaponda is a policy reason and he is asking Malawians to acquiesce in his misguided project of subordinating entrenched constitutional principles to mere policy considerations. My argument can be put differently here; has the Minister drawn the attention of Malawians to a constitutional principle which clearly underpins and supports his position other than mere expediency? My view is that he has not done so and neither does he appear to have directed his mind to the requirement of establishing a constitutional reason for his action. To borrow the words of Justice Bastarache of the Supreme Court of Canada the Minister wishes to privilege policy considerations and that can only lead to the undermining of the rule of law.

Furthermore, there is the question of the proportionality test which the Minister ought to have directed his mind to. The proportionality test requires the Minister to respond to the following questions. (a) Is the

objective of the Bill sufficiently important or legitimate? (b) Is the Bill as a means of attaining the policy objective stated by the Minister rationally connected to the said objective? In other words, is the issue of the shortage of lawyers likely to be addressed by what the Bill proposes? (c) Since the Bill obviously restricts the right to access justice and the principle of separation of powers can it be shown by the Minister that the Bill is the 'least restrictive means' of attaining his objective. In other words, is there any other more effective means of addressing the policy issue which impinges less on the right and principle in question? For example the Minister can simply appoint more lawyers. (d) Finally, the severity of the infringement to the right to access justice or the principle of separation of powers must be proportional to the objective or public good that the Minister wishes to attain. In other words, is the price to be paid through the infringement of the right or the principle too high a price to pay for the benefit that is expected to be realized by the proposal in the Bill?

The actions of the Malawi Government in this instance suggests that Parliament and the Cabinet collectively chose to conveniently forget that the current Malawi no longer operates under parliamentary supremacy; we subscribe to the principle of constitutional supremacy, and therefore, the Constitution as the final arbiter on all matters ought to and must be granted the respect that it deserves.

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