

Affirmative Action in the Publicly Funded Universities of Malawi: Unpacking the Role of Equality Part I

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Introduction

In an article published in the online Daily Times edition of 28 July 2012, the Vice-Chancellor of the University of Malawi (UNIMA), Professor Emmanuel Fabiano is credited with a call to Malawians to engage in a 'reasoned, open and fact-based discussion' on access to third level education generally, and in particular, on the University Quota System Policy (the UQS). I am delighted to respond to Professor Fabiano's challenge. The previous Government implemented the UQS and rationalised it as a tool for 'equal access' to, and for addressing 'under representation' in, public universities. We were informed that some groups experience difficulty accessing public universities and are consequently under represented. The UQS is intended to be an affirmative action policy and Section 20(2) of the Constitution does authorise affirmative action assuming certain conditions are met. Media reports suggest that the UQS Policy allocates and guarantees a specified number of places in publicly funded universities (assuming the merit criteria is met), and the 'remaining (unfilled) places are allocated on the basis of a district's population size and set criteria. Failure by a district to meet its quota will result in the quota being shared by neighbouring districts located in the same region as the failing district. The article is essentially an evaluation of the implementation of the UQS Policy.

Furthermore, the previous head of state charged, on record, that some groups cheat their way into public universities. It is not clear whether the alleged cheating causes the access difficulties, and ultimately, the under representation. The UQS, it appears, identifies those with access problems as all Malawians excluding Northern Malawians. The allegation of fraud strongly suggests the fraudsters are exclusively Northern Malawians. It also seems that the regional and district divide which anchors the UQS Policy is used by it as a code for ethnicity. Although Section 20(2) does anticipate affirmative action measures the operation of the UQS raises serious doubts about its constitutionality.

Equality as a Prescriptive Value

Equality is an important public value, and also a standard against which public or private conduct can be measured and ultimately declared acceptable or not. Equality in this sense is prescriptive and is crystallised in the Constitution and written laws of Parliament. In this way, the Constitution and the laws of Parliament indicate what the constitutional policy and a government's public policy positions on a specific equality concern are or ought to be. Therefore, constitutional provisions, the laws of Parliament and public policy directives are coercive tools a government will use to extend entitlements or withdraw privileges for the benefit or to the disadvantage, respectively, of specific groups in society. Significantly, the design of a public policy implementing mechanism must be sound because it is at the point of implementation that a public policy actually

touches the lives of people in real and significant ways. At this point, the tensions, dilemmas and contradictions embodied in the policy get into contact with the Constitution. In the following section I will suggest that the means for putting into practice a public policy preference, and in this case the UQS, ought to be, constitutionally, sound.

Implementation of Policy

This concern has both procedural and substantive aspects. Procedurally, the issue is whether the means for putting into practical operation the UQS conforms to the requirements of the Constitution. Substantively, the issue is whether the type of equality remedy in the UQS, and the design of the remedy, coincide with the type of equality remedies and the design of policies envisioned by the Constitution. Failure to take into account these concerns has the potential to derail the implementation of the UQS on the basis that it is unconstitutional. The implementation of equality, its meaning, its function and also its scope will to a large extent depend on the specific words used in the relevant constitutional provision. The Constitution uses the concept of non-discrimination in order to advance its equality agenda but it does not define it. A helpful definition of discrimination is provided by the Supreme Court of Canada. Discrimination may be understood as 'a distinction, intentional or otherwise, which involves prejudice or imposes disadvantage. The distinction, must, relate to personal characteristics; impose burdens, obligations, or disadvantages on an individual or a group which are not imposed on another individual or group. Alternatively, the distinction must effectively withhold or limit access to opportunities, benefits, and advantages on an individual or a group which are available to another individual or group. A distinction made on the basis of an individual's merits and capacities will rarely be characterised as discrimination.' What follows next is an explanation of the content of Section 20 of the Constitution and an evaluation of the implementation of the UQS on the basis of the Constitution.

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Section 20 of the Constitution on Equality

Section 20 (1) lists prohibited grounds of discrimination but impliedly it also has grounds that are non-listed (analogous grounds). The wrong that Section 20(1) seeks to address is illegal or unfair discrimination. Section 20(1) in part reads '...all persons are, under any law, guaranteed equal and effective protection against discrimination...' The phrase 'under the law' requires that 'equals should be treated equally'; people in a similar position ought to be treated in the same way. The phrase also requires that unequals should be treated unequally; those in a different position ought to be treated differently.

Section 20 (2) permits a government to eliminate inequality by extending opportunities, benefits or advantages to one group and at the same time

withholding or limiting the same from others. This implies that discrimination, may, in some cases be legal and this is also called affirmative action. Affirmative action is, in many respects, the essence of substantive equality which may justify treating an individual or a group more favourably than another individual or group because the targeted beneficiary individual or group comparably has less resources or advantages than another individual or group. The UQS claims to do this. The next section addresses the nature of equality envisioned in Section 20(2).

The Nature of Equality in Section 20(2)

An affirmative action measure rolled under Section 20(2) may be explained as the extension to a member of a particular group of opportunities, benefits or advantages denied to a member belonging to another group, in order to eliminate inequality, so long as it is established that unequal or unjustifiable discriminatory treatment is the cause of the lack of opportunities, benefits or advantages. Consequently, an affirmative action measure must comply with the discrimination test and also other tests required under Section 44 of the Constitution collectively referred to as the proportionality test.

An affirmative action measure must establish that because an individual belongs to a particular group, the individual is then subjected to unjustifiable discriminatory treatment which results in a specific inequality. It simply is not enough to show that an individual belongs to a particular group which lacks an opportunity, a benefit or an advantage and to use this fact alone, as a basis for extending the opportunity, benefit or advantage while denying others the same. Secondly, an affirmative action policy must show that the remedy chosen must have a 'real and relevant' link to the objective of the policy in question. For instance, a government is justified in giving women maternity leave and denying men the same because there is a real and relevant difference between women and men that justifies the different treatment. Women are biologically different from men; women do fall pregnant and men do not. The objective of the maternity policy is to allow women to have babies, and also, to ensure that women maintain their employment when they temporarily withdraw from their employment during their maternity leave and the remedy is maternity leave.

Thirdly, the UQS is also required that it does not unnecessarily limit the existing rights of others. The method chosen for implementing the UQS must be one that impairs existing entitlements the least. Fourthly, the benefits that the UQS seeks to attain must be proportional to the adverse effects that it imposes on affected non-beneficiary groups. The question here is whether the UQS is using a hammer in order to crack a nut. Inevitably, an affirmative action measure imposes 'burdens, obligations, or disadvantages' on a non-benefiting or non-targeted individual or a group', and therefore, failure to establish the tests mentioned above will be fatal to it. What follows next is an evaluation of the implementation of the UQS, particularly its failures, on the basis of considerations required under Sections 20(2) and 44 of the Constitution.

Applying Section 20(2) to the Implementation of the University Quota System Policy

(i) The Requirement of Legislation

Section 20 (2) expressly grants a government authority to institute measures, where ever it sees fit, and subject to the Constitution, that address past disadvantage caused by discrimination. A government is not obliged to do so and it retains discretion whether to create instruments that address inequalities. However, should a government decide to undertake affirmative action, Section 20 (2) insists that such a measure be implemented through a law passed by the Malawi Parliament. This, in my opinion, excludes the introduction of affirmative action measures on the basis of administrative instruments such as a cabinet directive. To my knowledge, legislation was not passed giving the previous Government authority to implement the UQS. This, in my opinion, means that the UQS is unconstitutional.

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Applying Section 20(2) to the Implementation of the University Quota System Policy

(ii) The Substantive Constitutional Issues raised by the UQS Policy

The UQS does not appear to have established unjustifiable discrimination. It has no past 'inequality' feature that distinguishes a member of a group other than the beneficiary group targeted by the UQS, and who has similar characteristics as a member from the beneficiary group. What exactly is the inequality suffered in the particular situation the UQS seeks to address? The UQS does not appear to objectively establish that the prospective students from Thyolo District, on account of belonging to the ethnic groups of Thyolo District, have systematically been discriminated against, and that as result, access difficulties and under representation have come about. It is also not clear how the UQS deals with the ethnic groups in regional and district borders including the Tonga who live on either side of the line dividing the Districts of Nkhata-Bay and Nkhota-kota. In the absence of the relevant distinction and discriminatory conduct, the UQS is engaging in unjustifiable discrimination.

The UQS uses a flawed merit distinction as criteria for affirmative action. A distinction based on natural merits or capacities will not suffice. For example, in choosing athletes to compete in the 800 metre race at the Rio de Janiero 2016 Olympics, it cannot seriously be suggested that fast athletes begin the qualifying race 40 seconds late in order to allow the slower athletes to compete fairly. It would be absurd. There is a real chance that a prospective student or student group that meets the merit criteria created by the UQS in the first and subsequent rounds of place allocation will be denied access to third level education simply because of the way the Policy was designed. It is not clear how this is justified.

An affirmative action measure must be designed in such a way that it can be explained rationally; explain the link between the objective of the policy (access by specified groups) and the remedy given to the beneficiary (establishment of quotas). The allocation of university places on the basis of districts or regions and also the limiting of allocation of places to those from a neighbouring district have, in my view, no rational connection to the specified objective of the UQS. While its objective is clear, the UQS ends up limiting the access of non-targeted groups and to ignore members of non-targeted groups who qualify as beneficiaries.

The UQS Policy impairs the rights of others much more than is necessary to accomplish the desired objective of making third level education accessible. What it ends up doing is to potentially impede others from enjoying the same access that it wants to attain. All students want to improve their life chances through education and they also have a reasonable expectation that their effort will be recognised on the basis of a clear and fair merit principle. This is a constitutionally protected right and it flows from the constitutionally guaranteed right to education. However, the UQS potentially impairs this reasonable expectation to a constitutionally unnecessary extent. For example, the operation of the guaranteed 10 places principle, the 'remaining places' principle and the neighbouring places principle, individually and collectively, have the real potential effect to withhold third level education from students who otherwise would be perfect candidates for such education. Put differently, have other ways of addressing the perceived lack of access without resorting to such severe withholding or limiting access to opportunities, benefits, and advantages of others been exhausted?

Serious doubt also has to be raised whether there is proportionality between the adverse effects and the benefits of the policy measure; the limiting of the right of access of non-targeted groups on the one hand and the objective of the policy to facilitate access of targeted groups on the other hand. Is the price to be paid by those from whom opportunities, benefits, and advantages of third level education are withheld or limited, or on whom the burdens, obligations or disadvantages of losing third level education are imposed, too high a price to pay for the sake of benefiting the targeted groups in the manner suggested by the policy measure? In this respect, the UQS potentially limits entrenched constitutional entitlements, including the right to education. There is a generally recognised constitutional rule which dictates that entrenched constitutional entitlements ought not to be interfered unless there are compelling reasons. In my view, the UQS does a very poor job of enlightening and explaining to Malawians what the compelling reasons for sustaining the UQS in its current form are.