

Annex U



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14th November 2001

HIS Excellency The State President

CC: The Speaker of Parliament
CC: The Chief Justice
CC: Concerned Judges

Your Excellency,

WHITHER JUDICIAL INDEPENDENCE IN MALAWI?

1. INTRODUCTION

We, the Moderators and General Secretaries of CCAP General Synod, Blantyre Synod, Livingstonia Synod and Nkhoma Synod, have noted with great concern the gradual but concerted and effective moves to erode the independence of the judiciary in Malawi in many forms. The most recent incident which is still fresh in most people's minds is the recent move by Parliament to impeach three High Court Judges; Honourable Justice Dunstain Mwaungulu, Honourable Justice George Chimasula-Phiri and Honourable Justice Anacklet Chipeta for reasons that have been described by competent and highly respectable organizations like Malawi Law Society, Malawi Carer and others as political in nature. The real reason for the move is because the concerned Judges had ruled against Government's interest. These are competent organizations and highly respected and we would not wish to question their professional assessment of the move by Parliament nor wish to repeat what they have already eloquently stated but suffice to say that we too condemn the move by Parliament for the same reasons as given by those organizations.

Your Excellency, you will recall that three months ago we wrote a letter to you requesting, Your Excellency to consider seriously the righteousness of God. That letter has not been responded to, nor is there any tangible evidence that the appeal was taken seriously.

We would like to highlight to you, Your Excellency and the nation some salient issues surrounding this matter for enlightenment of the nation and to appeal to Your Excellency to protect and defend the independence of the judiciary. May we also remind Your

Excellency that in your oath of office you swore to defend and protect the Constitution with the help of God and the independence of the Judiciary is part of that Constitution.

2. THE BIBLICAL HISTORICAL CONTEXT OF OUR CONCERN

We would like to share with you this information. In 722 BC, that part of the Davidic-Solomonic Empire in Ancient Israel which seceded from the said empire and formed its own Kingdom known as Israel or Ephraim was defeated by the Assyrians. Most of its inhabitants were scattered throughout the Assyrian Empire by the imperial government. The remaining part of the Davidic-Solomonic Empire which was known as Judah was defeated by the Babylonians in 587 BC and its top political and religious brass were taken into exile in Babylon. If anyone asked for an explanation of these disastrous events, the answer was that *"it is because they forsook the covenant of the Lord, the God of their fathers which he made with them when he brought them out of the land of Egypt and went and served other gods and worshipped them... Therefore the Lord uprooted them from their land in anger and fury and great wrath and cast them into another land, as at this day."* (Deut. 29: 25 - 28).

According to this passage of the Bible, the two kingdoms of Israel and Judah fell because the people disregarded God's law which he gave to them through Moses at Mount Sinai. The unfortunate thing is that the writer of the books of Deuteronomy to 2 Kings blames the kings of Israel and Judah for these disastrous events. Of Abijah, a Judean king, the writer says: *"His heart was not wholly true to the Lord, his God."* (1 Kings 11: 4). And the kings of Israel were condemned because they followed the footsteps of their first monarch, Jeroboam, who helped to disunite the people of God by erecting another place of worship at Dan and Bethel to compete with the Jerusalem temple. The prophet Amos blames not only the political leadership, but also religious leaders and the private sector.

Your Excellency, you will have noticed that the writer of the Biblical book of Deuteronomy Chapter 29 verses 25-28 believed that the law of God should have been taken by the people as their supreme Law and that everyone should be subservient to that Divine Law. In fact, in his proposals for a reconstruction of society he laid special emphasis on the fact that the king or the political leadership should always read a copy of the Divine Law so that he will learn to fear God... and that his heart may not be lifted up above his brethren.

3. THE NATURAL LAW - THE LAW OF GOD

The views of the writer of the book of Deuteronomy resonate with the concept of Natural Law in politics, ethics and law and human behaviour. Peter J Stanlis, *Edmund Burke and the Natural Law*, 1986, p.7, has summarized the main basic principles of Natural Law as follows:

"Natural Law was an emanation of God's reason and will, revealed to all mankind. Since fundamental moral laws were self-evident, all normal men were capable 'through unaided 'right reason' of perceiving the difference between moral right and wrong. The Natural Law was an eternal, unchangeable and

universal ethical norm or standard whose validity was independent of man's will; therefore, at all times, in all circumstances and everywhere it bound all individuals, races, nations and governments. True happiness for man consisted in living according to the Natural Law. Whereas Natural Law came from God and bound all men, various positive laws and customs were the products of man's reason and will and applied only to members of particular political communities... Finally, no positive law or social convention was morally valid if it violated the Natural Law; moral sovereignty and justice, therefore, were intrinsic and not the product of power exercised by kings or popular legislatures."

Your Excellency, Sir, the concept of Natural Law has played a vital role in most important religious and political events of European history because it was closely tied up with the ideals of liberty, equality, order and justice. The English Revolution of 1688, the French Revolution of 1789 and the American Declaration of Independence in 1776 have their ideological roots in the concept of Natural Law. The same ideological roots were behind Rev Dr Allan Boesak when he said to the then President P. W. Botha of the apartheid South Africa: "I cannot give you unconditional obedience. If that is treason, then I am guilty." The same ideology compelled Archbishop Luwum of Uganda to challenge Idi Amin (of course Archbishop Luwum lost his life because of his boldness to challenge the secular political system in the name of obedience to Divine authority).

4. GOD IS THE SUPREME JUDGE

In this context, Your Excellency, God is known as the Supreme Judge who controls the history of all mankind. He judges with equity and justice. It is for this reason that in Luke 1: 46 – 53, Mary addresses God joyously saying:

*"My soul magnifies the Lord,
and my spirit rejoices in God my saviour,
for he has regarded the low estate of his handmaiden.
For behold, henceforth, all generations shall call me blessed;
for he that is mighty has done great things for me,
And holy is his name.
And his mercy is on those who fear him from generation to generation.
He has shown strength with this arm,
He has scattered the proud in the imagination of their hearts,
He has put down the mighty from their thrones,
and exalted those of low degree;
He has filled the hungry with good things,
and the rich he has sent empty away."*

If Amos blamed the political and the religious leadership and the private sector for the disaster that befell the two kingdoms of Israel and Judah we would not like to be blamed for any misfortune that may befall Malawi. We shall continue to play our part by shading that vital light upon the affairs of the nation pointing alternative ways forward and pointing out any pitfalls along the way.

5. JUDICIAL INDEPENDENCE: WHAT, HOW AND WHY?

Judicial independence is as old as democracy itself. The principle of judicial independence is intrinsically intertwined with democracy. It rests on the premise that Government comprises of three organs; the Executive (President and Cabinet), the Legislature (Parliament) and the Judiciary (Magistrates, Judges and Justices of Appeal). The wisdom of the fathers of democracy at that early stage was that there should be separation of powers between these three organs of Government. As between Judiciary and Legislature, the Legislature must make laws. The Judiciary must interpret all laws made by the Legislature. There is no limit to that role of interpreting those laws. If Parliament thinks the interpretation by the highest court is wrong it can go back and amend that legislation. Here again there is no limit to this power. In fact one expert in early days said, "*Parliament can do anything except turn a man into a woman.*" But that power is restricted to making laws. Parliament must not interpret or enforce laws. Parliament has no power to interpret laws made by it. That power is with the Judiciary. So too the Judiciary has no power to make laws. This is why even where the Judiciary does not like a particular law, it must interpret and enforce it the way it stands. It can not change the law. Each of these organs of Government need to know and respect each other's roles which are separate.

However it was also realized that if these three organs of Government act without checking each other in a Constitutional way, one could yield too much power over the subjects and therefore there will be no protection of the subjects. There will be no rule of law and the result would be that society would degenerate into a state of anarchy like in the law of the jungle. For example in the absence of a proper independent judiciary to check the Executive, the Executive could become autocratic and dictatorial to the subjects. So too in the absence of an independent judiciary, Parliament could pass laws that are unconstitutional and infringe basic human rights of people (i.e. the Natural Law). The Judiciary is there to check and interpret whether the laws made by Parliament do not infringe the Constitution. At the same time if the judiciary would not be checked they could become corrupt and thus compromise their duty to dispense justice according to the law. This is why Parliament has been given authority to be able to debate the motion to impeach a Judge if there is evidence of misconduct or incompetence for the protection of the society. All these, in constitutional law or political science, are called Democratic Checks and Balances. But all these checks and balances have to be done in a constitutional way following basic fundamental principles of justice and constitutional order. At this point we are concerned mainly with the independence of the judiciary.

As seen above for the judiciary to be able to check on the Executive and Legislature, they need to be truly independent. This is why under the Constitution of the Republic of Malawi certain safeguards to guarantee the said independence have been entrenched. Firstly, a judge before he/she commences his duties has to take an oath of office where he/she swears or affirms that he/she shall dispense justice without fear or favour or ill will. Hence where it is a case involving a Government Minister and a Cleaner, a judge must not look at the status of the parties involved but must dispense justice without fear or favour.

Secondly, the Constitution guarantees that a judge can not be removed from office except for reasons of misconduct and incompetence and after proper impeachment processes. This is to ensure that no individual should exercise power to remove a judge for fear that judges may be inclined to rule cases in favour of that authority to avoid being removed from office.

Thirdly, the salary of a judge is to be determined by Parliament and not the Executive or an individual. This again is to ensure that salaries are determined by an objective institution in the name of Parliament which has representatives from more than one party and after a proper debate on the issue in a transparent way and that once that has been decided no one should have authority to block or alter implementation of that decision. This again is to remove any economic pressure on the judges, which may force them to compromise their decisions to please the authority that determines their salary. All these are there to ensure that the judiciary is independent and that citizens have confidence in the judiciary.

6. GROUND AND PROCEDURE FOR REMOVING A JUDGE

The grounds and procedure for removing a Judge are clearly laid down in the Constitution. As stated above, this is necessary to ensure that the Judges are also checked by the other organs of Government to avoid them becoming omnipotent and corrupt and digress from their constitutional duty to dispense justice. There are only two grounds upon which a judge can be removed. These are misconduct or incompetence. However these are fluid terms with no precise definitions and subject to manipulation and capable of being used even in cases where the real motive is otherwise. For example the Judge by merely sitting on a weekend and outside working hours that can not be termed as misconduct as a lot of judges in Malawi and abroad do sit on a weekend because of the principle of justice which says "*Justice delayed is justice denied*".

Secondly, a party to a court case who loses should not label the judge who sat in that case as incompetent merely because he lost the case. If a party loses a case he has the right to appeal to the Supreme Court. In the final court of appeal (the Supreme Court) there are normally a minimum of three judges who sit to ensure a balance of opinion in the final decision making machinery for the particular case. Even where a judge makes an error in the decision, it should be appreciated that not all errors are a result of incompetence. Incompetence in our view would result from a consistent pattern of errors and as determined by the Judicial Service Commission.

The Constitution guarantees that the impeachment process must adhere to the principles of natural justice one of which principles says a person must not sit as a Judge in a case in which he is a complainant. There must be objective assessment of that incompetence or misconduct in a transparent way. In the present case Parliament is both Complainant, Judge and Prosecutor. To avoid this and to ensure objectivity in the assessment, it was anticipated by the Constitution that the Judicial Service Commission would sit and determine the incompetence or misconduct of a Judge. Thereafter it would lodge their report to Parliament. Parliament would then debate the matter and resolve or vote on it.

Our worry is that without a properly laid down procedure for trial of impeachment in the Act of Parliament the impeachment process would not be fair. Our view is that there should have been a special tribunal set up (as is the case in other countries) where cross examination of witnesses will be done and the accused will be represented by counsel and all rules of natural justice will be observed. That tribunal will then determine whether or not there is ground for impeachment. If yes, that report is sent to Parliament for debate and voting. In the present case, it is silent. So, at least the Judicial Service Commission should investigate and determine the issue and send the report to Parliament for debate.

In the particular present case the motion for impeachment that has come from Parliament or Members of Parliament as well as public comments by MPs clearly show that the real reason for the impeachment is because the three Judges on separate occasions ruled against Government's interest. Merely ruling against Government's interest can not qualify as incompetence or misconduct. To prove this when Justice Chiudza Banda granted an injunction over this matter, some MPs' comments were that he too is incompetent and must be added to the list of those to be impeached. And indeed he has now been summoned for impeachment. True, it is Parliament that is debating the matter not Government. But the ruling party that has formed Government is in majority in Parliament. That majority could have been increased by the recent expulsion from Parliament of the seven MPs, save that they are now back in Parliament due to an injunction.

Once impeachment debate is over the matter is put to a vote and therefore in the final analysis, it may ultimately depend on the numbers and not necessarily on the evidence. Once a decision to impeach is made that resolution and recommendation is taken through the Judicial Service Commission to the President who may or may not approve the impeachment.

Our worry is that because of the suspicious circumstances in which this impeachment motion has been commenced, it has sent signals of fear in the minds of the judges including those not on the firing list, whatever the result of this case. Secondly, there is no way the impeachment process will be fair as Parliament appear to have made a decision already. And we doubt if the three judges will be given a fair hearing as demanded by the Constitution.

Parliament has also called for the retirement of the Chief Justice on the grounds that he is failing to control his judges. But the retirement of the Chief Justice is a Constitutional matter that is not even debatable. Once he reaches retirement age he can be retired but he should not be retired for a reason like this which is not a constitutional reason.

7. LET HISTORY NOT REPEAT ITSELF

Your Excellency and the nation should be reminded that in 1967/1968 some High Court Judges in certain politically charged murder cases had ruled against Government and acquitted the alleged murderers. These judgements earned the concerned judges the wrath of Dr. Hastings Kamuzu Banda. Kamuzu publically castigated the judges and said he was not interested in the technicalities of English legal system and that it is wrong for an alleged murderer to be acquitted on a legal technicality. He said he would prefer the

traditional village type of dispensing of justice and he branded all lawyers as liars. Some of those judges were deported.

He immediately moved Parliament to amend the law and created the dreaded Regional Traditional Courts and the National Traditional Court of Appeal and thus created an Independent Judicial system parallel to the High Court system with no fusion at the top. From then on all murder cases, treason cases and serious cases like rape, armed robbery, etc were to go to the Regional Traditional Courts. There were severe restrictions on the appearance of legal practitioners in traditional courts. The chiefs who were sitting on these courts were Traditional Authorities (TA's) who were laymen and with only a magistrate as an advisor on the Bench. These took place in 1969/1970. What happened thereafter is well known to most Malawians. There was nothing but justice the Kangaroo court way and some of the present political leaders were actually tried in these courts.

Kamuzu could remove any judge or transfer him at will. Some of the present political leaders were judges who were removed or transferred by Kamuzu under these powers. There was no independence of the judiciary.

It was against that back ground that in 1993 Malawians said let us ensure that the judiciary is truly independent and let us adhere to international norms of dispensing justice. As a result the Regional Traditional Courts and the National Traditional Appeal Court were abolished and the serious cases reverted to the High Court system. Surely we would not want a repeat of that dark history in whatever form it may be.

The judges are now dispensing justice in accordance with the Constitution and Internationally accepted system of justice which is in accord with the Natural Law. Where justice demands Government is winning the cases and in some cases the Government is losing the cases. True, Government are not shouting at the judges as Kamuzu did and they are not labeling the judges and lawyers as liars but the net result of what Parliament is doing might be the same. That they have lost faith in the High Court system of justice as dispensed by the Honourable judges and now wish to send the signal to all the judges that they should be deciding cases according to the will of Parliament irrespective of what the correct interpretation of the law says. That could spell the end to the independence of the judiciary, which consequently mean the end of democracy. Parliament has clearly crossed the boundaries of separation of powers and has entered the exclusive domain of the Judiciary.

It is important that judges must not fear anything. They must not feel intimidated. They must not be pressured in any way for economic considerations and must not feel pressured for political favours. They must instead dispense justice without fear or favour or ill will. What Parliament is doing is to intimidate the judges (not only the three judges summoned for impeachment but all the judges). Malawians should guard against a return to the pre 1994 era.

8. THE FUTURE

We applaud the Judicial Service Commission for their request to Parliament not to debate the impeachment motion. They have taken a bold and justifiable move.

We are however gravely disappointed to learn that when the Judicial Service Commission asked Parliament for more time in the interest of justice, Parliament has rejected that request and has voted to proceed with the motions in Parliament today with or without the report from the Judicial Service Commission.

We are also gravely disappointed to learn that Parliament has voted to proceed with the debate on the motion notwithstanding that there is an injunction against it. Parliament is playing double standards because it has just complied with another court injunction (the one for the fired seven MPs). The judge who granted that injunction has not been labeled incompetent and has not been summoned for impeachment. This is clearly double standards. We call upon Parliament to respect all decisions of the Judiciary and abide by them not in a selective manner.

We are further worried that more and more allegations continue to be added to the motions for impeachment. How do the concerned judges prepare their defence? Some of these allegations have nothing to do with incompetence or misconduct and are clearly an abuse of the process.

We call upon Parliament to re-think the issue and ensure that whatever is done it should be in the interest of upholding and defending the sanctity of the principle of the independence of the Judiciary and that there should not be any intimidation or pressure on the judiciary in any form whatsoever for the sake of our young democracy.


We appeal to your Excellency to assure the judiciary of their independence, and that should Parliament proceed to pass the motion of Impeachment, your Excellency should not approve it for the sake of democracy and judicial independence. You have those powers Your Excellency under the Constitution.

We appeal to the judges of the High Court and the Justices of Appeal of the Supreme Court to put behind this incident and get on with their noble and commendable job of dispensing justice without fear or favour which they are doing in a commendable way.

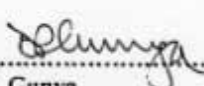
Yours in the Service of the Lord



Right Rev. Dr. F.L. Chingota
Moderator-General Synod


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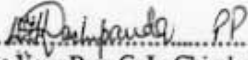
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