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THE INDEPENDENCE OF THE JUDICIARY

Presented by:

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by The Hon. Justice L'E Unyolo, Chief Justice of Malawi

1 Introduction

It is widely accepted that the core functions of the judiciary in modern societies include interpreting and applying the law in specific cases, promoting the rule of law and good governance and protecting human rights. To perform these essential public functions properly and satisfactorily, the judiciary requires judicial independence. In his Paper entitled **Judicial Independence in Uganda**, Honourable Justice Odoki, Chief Justice of Uganda, expresses the crucial importance of the principle of judicial independence in the following glowing terms -

"The independence of the judiciary is a cornerstone of any democratic Government operating under the rule of law. Judicial Independence not only promotes impartiality in judicial decision-making, but it is a bedrock against arbitrary exercise of power by Government. Without it, there cannot be full enforcement and enjoyment of basic human rights."

It is submitted that the Chief Justice's statement correctly expresses the critical role that the principle of judicial independence plays in our judiciaries and, indeed, in our societies.

2 The Need for Judicial Independence

The importance of judicial independence in a modern democratic state is obvious from what has been said in the introductory remarks. Here, a few remarks will be

made simply to underscore some of the relevant reasons why the judiciary requires independence.

Judicial independence, as we have seen, promotes impartiality in decision – making. Impartiality advances the rule of law in that it is a prerequisite for the fair interpretation of the law as well as the unbiased securing of equality before the law and protection of human rights. An independent judiciary ensures that everyone will play by the rules.

It is only an independent judiciary that can challenge illegal acts of the Executive Branch of Government. To ensure that Executive power is not abused, that principles of natural justice are not violated and that the Government does not act in a manner that is *ultra vires*, the judiciary must enjoy a respectable degree of independence.

Again, it is an independent judiciary which would courageously safeguard the basic human rights of the individual and ensure that they are not violated by the improper exercise of Executive or Legislative power. It is recognized that having comprehensive human rights provisions in a constitution is one thing but ensuring their effective protection is a different thing altogether. It has been argued that the degree of human rights protection enjoyed in any State is to a large extent dependent on the quality of the judiciary and the judicial process rather than the promises made in a constitution document. A free and

independent judiciary provides sufficient safeguard against violation of human rights by both the Executive and the Legislature.

An independent judiciary must give the public, confidence and trust that the judiciary is the appropriate body to determine what is right or wrong. Confidence and trust in the justice system can be enhanced or undermined by the public's perception of the judiciary, and can suffer when the judiciary is regarded or perceived as being unethical, undisciplined and under the control of external influence. Public trust and confidence in the judiciary are raised where the judiciary is seen as independent both in practice as well as appearance.

3 Challenges Against Judicial Independence

Judicial Independence faces some problems as the judiciary interacts with other branches of Government and also as it relates to other stakeholders in society such as the civil society, the parties in opposition and the church. We must now turn our attention to some of the challenges faced by the principle of judicial independence in that regard.

4 Executive Power and Judicial Independence

The judiciary is quite frequently called upon to exercise its judicial power to check or control the exercise of Executive power when it is claimed that the Executive authority has exceeded or abused its power or otherwise acted unlawfully, illegally or contrary to principles of natural justice; that is usually the case in judicial review proceedings. Such cases usually test judicial independence. The

reaction of the Executive authority, where the decision does not go in its favour may be such that it undermines judicial independence. This is usually the case where the Executive authority refuses to recognise, accept or enforce the decision given against it in judicial review proceedings.

In Malawi we had a share of the problems of the Executive Branch refusing to respect Court decisions. Towards the end of the second term of his Presidency, the then State President sought to extend his stay in office. The people reacted by threatening widespread demonstrations. The former State President then ordered the army and the police to stop such demonstrations. An action in judicial review was brought before the Court and the Court's decision was that the Presidential order banning demonstrations was unconstitutional. The Presidential order was indefensible constitutionally as it included its ban on peaceful demonstrations which are expressly permitted by the Malawi Constitution. The former President reacted by organizing a public rally where he denounced the Court's decision as insensitive and irresponsible. We can imagine how the learned judge who handed down the judgment must have felt.

Another threat to judicial independence occurred in 2001. In that year, three High Court Judges became victims of Parliamentary impeachment proceedings. One of the Judges in question was accused of consistently deciding cases against the Government. The criticism against the other Judge was that he had granted bail to a leader of an opposition party in the evening on a Saturday. The ground for the removal of the third Judge was that he had published an article in

a magazine on a case that was then pending in Court. Observably, the Judge was at the material time doing post-graduate studies in the United States. This incident was a clear and frontal attack on the principle of judicial independence. Fortunately, the State President eventually refused to endorse the Motion.

Another challenge to the independence of the judiciary has to do with funding. The judiciary requires adequate funding and provision of essential resources to enable it to properly discharge its duties. Without such funding and resources the judiciary can feel so desperate and dependent on the Executive. This impacts negatively on judicial independence. Recently the judges in Malawi were reluctantly compelled to take strike action in order to force the Government to replace their dilapidated official vehicles. It was embarrassing to force the learned Judges to conduct a "wild cat strike" in order to get the resources they duly deserved from the Government. Judicial Independence does not thrive in such environment.

5 Legislative Power and Judicial Independence

The judiciary is sometimes called upon to examine pieces of legislation passed by Parliament and pass judgment on such legislation regarding its legality or constitutionality. Where a Court confirms the illegality or otherwise decides that the particular legislation is contrary to the Constitution, tension may emerge between the Legislature and the Judiciary. Such a scenario would not advance the cause of judicial independence.

In the wake of the July 7 Suicide London Bombings in which the lives of fifty-two innocent persons were lost Tony Blair, the British Prime Minister, announced tough anti-terrorism legislation. He further announced that he would secure broad cross-party parliamentary support for the legislation. Such legislation tends to get overwhelming public support. But the essential features of such legislation is the restriction or narrowing of the scope of human rights including long detentions without trial, draconian powers of arrest, search and deportation at ports of entry. In the event that such legislation is challenged in Court, on the ground that it violates basic human rights of the individual, the judge dealing with the matter may feel constrained to legitimise it in view of the overwhelming public and political support which it enjoys. Such a scenario presents an environment in which judicial independence would not prosper.

In Malawi, Courts are often criticized for passing lenient sentences in respect of violent crimes such as armed robbery and car highjackings. Some women activists and members of civil society join the chorus of public criticism in respect of lenient sentences passed for sexual offences. The introduction of minimum mandatory sentences prescribed by Parliament is often suggested as an option. The argument is often made that minimum mandatory sentences prescribed by Parliament are a fetter on judicial discretion and impact negatively on judicial independence.

6 The Free Press and Judicial Independence

A free and independent media is generally regarded as one of the pillars on which democracy rests. In an authoritarian regime the obvious casualties are the free press and an independent judiciary. It is natural that the judiciary must use its judicial power to protect the freedom of the media to bring about a good environment for the sustainable growth of democracy.

The judiciary may use the press to reach out to the general public to conduct public education on matters such as legal procedure and practice as well as some aspects of substantive law. It is necessary for the judiciary to conduct such public education in order to open up the Courts to the general public and making them more accessible and transparent. People must have a clear idea about what goes on in the Courts. The media can play the role of the eye and ear of the public regarding what goes on in the Courts.

However the relationship between the judiciary and the media must be handled with care. The Courts must not hesitate to discipline and punish the press when it abuses its press freedom and violates the rights and freedoms of others. The press must not be allowed to be used by some politicians or pressure groups to destroy the good reputations or the business or professional careers of other people. When it does that, the Courts must protect the victims of the abuse of press freedom and provide adequate remedies.

The press must also not be allowed to undermine judicial independence by reporting Court decisions negatively or negligently or by becoming a vehicle of unfair criticism of judges and their decisions. In Malawi, the Judiciary has had a fair share of negative press coverage. During the transition from the one-party rule to multi-party dispensation, the then leader of a pressure group called AFORD, was convicted of sedition and sentenced to a prison term of two years. The leadership of AFORD reacted by making a Press Release in which they denounced the learned Judge who presided over the case and called for his immediate resignation. The Judge refused to resign.

In a recent case the Malawi Supreme Court of Appeal disallowed a petition to nullify election results on the ground that the successful winner, who was a Deputy Speaker of Parliament, had used an official car during the campaign. Observably, she was entitled, under an Act of Parliament governing the Terms and Conditions of Service, to both public and private use of the car. The Court took the view that use of the official car, in all the circumstances of the case, was not sufficient ground to nullify the election results. The press was displeased with the Court's decision and claimed that the Court was sanctioning massive abuse of public resources during the campaign period and that the Courts were not helping to level the playing field during elections.

Then fairly recently the Malawi Judiciary became a victim of hostile press attack when His Excellency the State President hosted a dinner at State House for all the judges and their spouses. A daily newspaper ran an article headed

Government to bribe judges. But the occasion was just an ordinary Dinner where the President wanted to meet and get to know the Judges and their spouses. This was simply an unjustified and malicious attack on the Judiciary. Indeed, there had been occasions when the State President had hosted Dinners or Lunches for Members of Parliament, Cabinet Ministers and senior Government Officials, business captains and other groups.

7 The Opposition Parties and Judicial Independence

When we focus on the threat of the exercise of Executive power against judicial independence we usually forget that there is a real threat to the freedom of the judiciary, coming from the direction of opposition political parties. The advent of multi-party democracies, based on modern Constitutions, dominated by Bills of Human Rights, ensures that political parties in opposition enjoy broad rights and freedoms which enable them to wield some degree of political power and influence. Public criticism of the judiciary by the leadership of opposition parties does not promote judicial independence.

In Malawi, the Supreme Court reversed a High Court decision to the effect that the leader of the Malawi Congress Party and its Secretary General had committed criminal contempt of court, when they deliberately defied a court injunction against holding a party convention. The effect of the High Court decision was that the two individuals would lose their parliamentary seats and remain in the wilderness for seven years before they would be permitted to contest for a parliamentary seat. That certainly threatened to end their political

career. The Supreme Court held that the contempt was civil and not criminal. That decision saved the political careers of the two individuals. They both appeared on the national television and declared that they had always trusted the judiciary in the country as an independent and impartial body and held it in the highest esteem. Then, recently, the High Court had ruled in favour of the same leader of the Malawi Congress Party, that he could join as a party to a case challenging the results of Presidential Elections. The Malawi Supreme Court of Appeal reversed that decision. The appellate Court decided that he could not join an existing action two months after its commencement, when the relevant law prescribes a limitation period of forty-eight hours. The honourable gentleman a few days later told a gathering of party supporters at a mass rally to accept the Court's decision which he however described as political, not legal. It was clear that he no longer held the Court in the highest esteem.

In another case, a High Court Judge ordered a leader of yet another opposition party to pay K1 million as damages for disrupting a party convention, organized by a rival faction in the party. Certain members loyal to the party protested against the decision. They marched to the High Court to present a Petition to the Chief Justice claiming, additionally, that the High Court consistently made decisions against the Party. Considering that a Party in opposition is a Government in-waiting, threats to judicial independence originating from the opposition should not be taken lightly.

8 The Church and Judicial Independence

The Christian Church is very influential in Malawi. The Catholic Bishops, through their 1993 Pastoral Letter were instrumental in bringing about political change in Malawi. The Church continues to play a dominant role in the consolidation and sustenance of democracy in the country. The Church currently holds very strong views against homosexuality. In South Africa the Constitutional Court struck down anti-sodomy legislation on the ground that it violated the constitutional provision against discrimination.

In Malawi sodomy is a crime. If an application was brought requesting that sodomy should be decriminalized in Malawi, I can imagine the difficult situation the Court would find itself in if it allowed the application, considering the vigorous and sustained criticism that would come from the Church and which would enjoy overwhelming public support.

9 Use of Judges for Extra-Judicial Purposes

Judges are usually called upon to perform extra-judicial functions such as chairing commissions or public inquiries. The judges have the capability to perform such tasks. However, care must be taken to ensure that independence of the judiciary is not undermined by such use of judges.

Frequent use of judges to perform tasks outside the courts may weaken the judiciary in that judicial functions may not be efficiently and adequately performed. Again some of the commissions or inquiries may involve

controversial issues of a political nature and the judge involved in such commission or inquiry may be exposed to unfair criticism by those persons who may disagree with his report. Again use of judges to perform tasks of that kind may expose the judiciary to public criticism that the executive is using the judiciary for its own ends. That may have a negative effect on judicial independence.

10 Conclusion

The Independence of the Judiciary is so important to Africa today. It is one of the major benchmarks used to determine whether or not a given society is free and democratic. It has been referred to elsewhere as a priceless and intangible commodity which we must not take for granted. We have noted that it is however fragile. It is for this reason that the Governments and individual judiciaries should do all they can to promote it, passionately preach and teach it, jealously guard it and vigorously defend it.