

Malawi - Independent Judiciary ?

Claire Martin

Secretary to the Trustee Committee, CHRI

Developments in relation to the independence of the judiciary in Malawi have recently been a cause of concern to the Commonwealth Human Rights Initiative (CHRI) and other Commonwealth NGOs, for on 31st October 2001 it was reported that the Malawian Parliament was planning to impeach three judges for alleged misconduct.

The Constitution of Malawi guarantees the independence of the judiciary and maintenance of the rule of law, keeping in mind the fundamental political values of the Commonwealth. It is a party to the African Charter on Human and Peoples' Rights, major international human rights agreements, and, in particular, the United Nations Basic Principles on the Independence of the Judiciary. The principles of natural justice should also be born in mind.

When the issue of the judges' impeachment was initially debated in Parliament, it resolved to refer the matter to the Judicial Services Commission (JSC). The JSC has the power not only to nominate persons for judicial office to the President, but can also take disciplinary action against judicial officers. According to Section 119 (2) a person holding the office of judge may only be removed from office for incompetence in performing his duties or for misbehaviour.

The procedure for removing a judge from office is laid out in subsections (3) and (4) of the same section. Essentially, the President in 'consultation' with the JSC can remove any judge from office when a motion petitioning the removal on the grounds of incompetence has been submitted by the Parliament. This motion needs to have been debated in the National Assembly, passed by members of the Assembly and presented as petition for the removal of the judge concerned. It is important to note that this entire procedure is subject to the proviso that the removal of the judge is in accordance with the principles of natural justice.

The JSC met on 10th November to discuss the matter but agreed to adjourn until 10th December, as the judges involved needed time to get their legal representation in order. However, the Parliament dissatisfied with the postponement proceeded to move the motion to impeach the judges. This was in spite of a court injunction granted against the petition and a request from the JSC to Parliament to stay the matter until it had carried out a full investigation of the allegations.

In protest, opposition MPs refused to participate in the debate or vote on the motion and walked out of the Parliament, but this failed to prevent the inevitable. The motion was passed and sent to the President who has the power to decide whether or not to proceed with the impeachment. The President referred the petition back to the JSC who met on 19th December to hear the cases against two of the judges, the third case being dropped without explanation! This meeting was further adjourned until 16th January 2002, the outcome of which is still pending.

It is apparent that the procedure has been followed but there was no constitutional requirement that the Parliament should have ceded the JSC on issues relating to judicial officers. It is the circumstances surrounding the procedure in this case that should have been subject to scrutiny and condemnation.

Indeed, this situation questions the very pith and substance of the Malawi Constitution and highlights the problems that arise as a result of vaguely drafted constitutions. A matter referred to the JSC then and then subsequently withdrawn is contrary to the principles of natural justice and due process. Why then mandate an organisation to deal with a matter and then withdraw it before giving it the opportunity to conduct an adequate and fair investigation?

The Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence³ stipulate that disciplinary procedures leading to the removal of a judicial officer should involve the right to representation before an independent and impartial tribunal. The judges were summoned to appear before the Parliament to answer their case. Their refusal to appear was based on the grounds that the JSC was already stripped of the matter, that an injunction against the petition had been granted and that they needed time to secure legal representation. This can be easily understood. The Parliament was arguably acting as '*judge, jury and executioner*' in the matter,

overriding the traditional separation of powers between the executive, parliament and the judiciary and effectively running roughshod over well established principles of natural justice specifically mentioned within the Constitution, Commonwealth principles and other international obligations.

It should be noted that there is also a political element in this situation. The three judges involved in the impeachment proceedings had each made decisions, which were perceived to be against the interests of the ruling United Democratic Front party (UDF) and in favour of the opposition. It has been argued that the government is trying to create insecurity of tenure, compromise the independence of the judiciary and create an atmosphere where judges will be reluctant to rule against the government for fear of being impeached.

Obviously, 'pro-government' judges could replace those who are removed because of an apparent 'bias' against the UDF. Bearing in mind the Harare Principles and the recommendations made in the Latimer House Guidelines, the Commonwealth should be closely monitoring such situations and, where necessary, be proactive in order to preempt any further deterioration and compromise to judicial independence around the Commonwealth. The Malawi

Government and the Commonwealth should avoid at all costs the disastrous consequences that have arisen out of similar events, which have occurred in Zimbabwe, another Commonwealth and SADC country.

Latimer House Guidelines for Parliamentary Supremacy and Judicial Independence

Dr Karen Brewer

Secretary General, CMJA

Sponsored and supported by the Commonwealth Secretariat, Commonwealth Foundation and British Foreign and Commonwealth Office in 1998, four Commonwealth Associations (Commonwealth Lawyers Association, Commonwealth Legal Education Association, Commonwealth Magistrates & Judges Association and Commonwealth Parliamentary Association) drafted the “*Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence*” for consideration to the Heads of Governments.

The Guidelines are geared to assuring a balance and separation of power and function amongst the executive, legislative and judicial branches of government. They affirm the fundamental political values of the Commonwealth as enunciated in the Harare Declaration, in particular, the rule of law, independence of the judiciary, just and honest government, & fundamental human rights, etc. and cover a wide range of issues including the functions of Parliament and Judiciary, preserving judicial independence, independence of parliamentarians, gender balanced representation in the Parliament, accountability and ethics etc.

Respect for the Separation of Powers

The Latimer House system is designed to provide positive support for the achievement and maintenance of good practice in implementing the Harare Declaration. The Guidelines insist *each institution must exercise responsibility and restraint in the exercise of power within its own constitutional sphere so as not to encroach on the legitimate discharge of constitutional*

functions by the other institutions, as rightly stated in the Guidelines. Events since its adoption again underline the need for better implementation of the Harare Principles and Millbrook Plan of Action. In a number of instances the independence and personal safety of judicial officers and parliamentarians has been threatened. The situations in Fiji, Sierra Leone and Pakistan continue to give rise to grave concern. Of even more concern is the overwhelming

evidence of breaches of the Harare Principles in countries which are *not* in conflict or under military rule and which ostensibly maintain a democratic system under the rule of law (eg, recently the Gambia, Sri Lanka, and Zimbabwe).

As the Harare Declaration and the Millbrook’s Action Plan stand today, they are devoid of an operational mechanism for implementation. Acceptance of the Guidelines, together with their proposals for evaluating good and bad practice, will go some way to eliminate this weakness and broaden the existing CMAG mandate by including a statement of best practice in order to measure compliance with the Harare Principles.