JUDICIARY
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
JUDICIAL REVIEW CAUSE NO 19 OF 2020

BETWEEN

THE STATE (On application of Lin Xiaoxiao, Liu Zhigin, Wang Xia, Tian Hongze, Huang Xinwang, Zheng Zhouyou, Zheng Yourong, Jia Huaxing, Lin Shiling and Lin Tingrong) ……..... CLAIMANTS

AND

THE DIRECTOR GENERAL – IMMIGRATION AND CITIZENSHIP SERVICES ..... 1ST DEFENDANT

THE ATTORNEY GENERAL ..... 2ND DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Mr. Kaonga, of Counsel, for the Claimants
Mr. Chisiza, Senior State Advocate, for the Defendants
Mr. Henry Kachingwe, Court Clerk

RULING

Kenyatta Nyirenda, J.

1.0 INTRODUCTION

1.1 This is my ruling on an inter-partes application by the Claimants for continuation of an order of interlocutory injunction restraining the 1st Defendant by himself, his agents, servants or whosoever acting on his behalf from sending the Claimants out of the country and or stopping the Claimants from entering the country [hereinafter referred to as the "Claimants' Application"].

1.2 The background to the Claimants' Application is as follows. On 18th March 2020, the Claimants filed with Court an ex-parte application for

permission to commence an application for judicial review. The ex-parte application was brought under section 16(2) of the Statute Law (Miscellaneous Provisions) Act and Order 19, rule 20(3), of the Courts (High Court) (Civil Procedure) Rules [Hereinafter referred to as "CPR"].

1.3 Section 16(2) of the Statute Law (Miscellaneous Provisions) Act provides that in "an case in which the High Court of England is, by virtue of section 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, of the United Kingdom empowered to make an order of mandamus, prohibition or certiorari, the High Court shall have power to make a like order.". Order 19, rule 20(3), of CPR deals with, among other matters, the making of an application to the High Court for judicial review.

1.4 The decisions and actions of the 1st Defendant which the Claimants seek to be judicially reviewed [hereinafter referred to as the "challenged decisions"] are set out in the Notice of Application for Permission to Commence an Application for Judicial Review, otherwise known as "Form 86A". The challenged decisions read, and I quote them in full as they set forth very clearly the case for the Claimants:

> *"Decision*
>
> *1. The 1st Defendant's decision to refuse entry into the country on 18th March, 2020 of the Claimants into Malawi despite approving their application for a Visa earlier without even telling them reasons for such refusal.*
>
> *2. The 1st Defendant's decision to confiscate the letters of approval as well as the Claimants' passports upon arrival at the airport on 19th March, 2020.*
>
> *Action*
>
> *3. The 1st Defendant's action in booking the Claimants on a flight on Ethiopian airways at 3:30 pm to forcibly take them out of the Country*
>
> *4. The 1st Defendant's action to stop the Claimants from entering the country."*

1.5 The reliefs sought by the Applicants are also contained in Form 86A and the same are reproduced as follows:

> *"1. A like order of certiorari quashing the aforementioned decisions of the 1st Defendant.*

2. *A permanent order of injunction compelling the 1st Defendant to allow the Claimants entry into the country upon satisfying all immigration requirements.*

3. *An order of injunction restraining the 1st Defendant from expelling the Claimants from the Country.*

4. *A declaration that the implementation of the 1st Defendant's decision is unlawful as it does not comply with section 43 of the Constitution as no reasons for the refusal to enter the Country were given despite previously granting them a letter that they would get a visa on the point of entry.*

5. *An order for costs.*

6. *And that all necessary and consequential directions be given as this Court may deem fit in the circumstances."* – Emphasis by underlining supplied

1.6 Form 86A has a section entitled "**GROUNDS ON WHICH RELIEF IS SOUGHT**" and it may not be out of place to quote the relevant part of paragraph 4.0 of "**GROUNDS ON WHICH RELIEF IS SOUGHT**" in full:

"4.1 The Claimants contend that upon giving them approvals that they can come and would be granted a Visa on entry, the 1st Defendant has acted against his own actions by denying the Claimants entry into the country

4.2 The Claimants further contend that it was their legitimate expectation that they would be granted entry into the country upon arrival having made the necessary applications before.

4.3 The Claimants contend that the 1st Defendant has just refused them entry without giving them reasons so that they can argue their case if there is anything. The Claimants do not know of any reason why they would not be granted entry.

4.4 While fully appreciating that entry is not a right, having issued the proper letters and the Claimants having acted on them, the 1st Defendant is duty bound at law to provide reasons so that the Claimants can either appeal them or present their own side of the story. This the 1st Defendant has not done.

4.5 The decision of the 1st Defendant is therefore unreasonable and ultra vires the Immigration Act."

1.7 The matter was presented before my brother Judge, Justice Dr. Kachale on 18th March 2020 at 16:17 hours in the afternoon. He granted the

Claimants permission to apply for judicial review but refused to grant the interim injunction *"for being otiose at this hour"*

1.8 On 19th March 2020, the Claimants filed a supplementary statement in support of the application for an interlocutory injunction. The said supplementary statement was sworn by Warren Zeng and is worded thus:

> *"1. I swore sworn statement that was filed in the Court on the 18th March, 2020 which I adopt.*
>
> *2. I am a Travel agent and the agent who organized the travel of the Claimants and by reason whereof duly authorized to make this sworn statement.*
>
> *3. Of the 10 Claimants, the first claimants **LIN XIAOXIAO, LIU ZHIQIN, WANG XIA** and **TIAN HONGZE** are still within the Country as the plane was full and could not accommodate them.*
>
> *4. I am aware that the Judge was desirous of granting an order of injunction but only stopped because the Court was of the view that it would serve no useful purpose.*
>
> *5. However in light of the facts that the 4 are still within the jurisdiction, a grant of an order of injunction sought would not be otiose but serve an actual useful purpose.*
>
> *6. Wherefore I pray for the grant of the Order previously sought bu limited to the 4 Claimants stated above."*

1.9 The supplementary statement was taken before my brother Judge, Justice Dr. Kachale on 19th March 2020 at about 10 O'clock in the forenoon and he referred the matter back to Civil Registry. The explanation being that as he is a Judge in the Criminal Division, he only dealt with the issue on 18th March 2020 as a matter of necessity on account that it was an urgent matter and no Judge in the Civil Division was readily available.

1.10 Upon the matter being referred back to the Civil Division on 19th March 2020, I became seised of it and I proceeded to make the following Order:

> *"Based on the Supplementary Sworn Statement, an injunction is granted restraining the Defendants from sending the first four Claimants back to China. A further order is granted compelling the Defendants to allow the*

first four Claimants entry into the country. The injunction is in respect of both matters is valid up to the 26th day of March 2020 at 10 o'clock in the forenoon when the application shall be heard by the Court inter-partes. It so ordered.

1.11 Meanwhile, on 25th March 2020, the Defendants filed with Court an ex-parte application for an order discharging the interlocutory injunction that was granted on 19th March 2020. Having considered the application made by the Defendants, I ordered that it come by way of notice on 1st April 2020. Not much more will be said about this application in this Ruling because the Defendants decided to withdraw it. The withdrawal was formally done on 26th March 2020 during the hearing of the Claimants' Application.

1.12 During the hearing of the application, Counsel Kaonga began by giving the following explanation for the delayed service of the court process on the Defendants:

> *"The late service on the Respondents is because our client was living in extreme fear following the pronouncements by the Minister of Information, Honourable Botomani and other parties. We had to convince our client that it was very important to put the story straight by allowing the Court to determine the matter properly on its merits in the presence of the Defendants.*
>
> *We, as a firm representing the Claimants, were also interested [to have the matter determined by the Court] because we have also been attacked by the Minister and the lawyers forum.*
>
> *Our client came to us on Tuesday, 24th March, and we took a statement from him …"*

1.13 Taking his turn, the learned Senior State Advocate, Mr. Chisiza, confirmed (a) that the Defendants had indeed decided not to pursue the application to discharge the permission that was given for the Claimants to commence judicial review (b) that indeed a lot of things have been said on the lawyers forum regarding the interlocutory injunction granted to the Claimants by the Court he is a member of the lawyers forum and (c) that he had seen the statement attributed to the Minister although he had not verified its authenticity.

1.14 I think we are done with the introductory matters.

2.0 THE CLAIMANTS' SWORN STATEMENT

The Claimants' Application is supported by a statement sworn by Mr. Warren Zeng [Hereinafter referred to as the "Claimants' sworn statement"]. It is necessary that the Claimants' sworn statement be quoted in full:

"The Coming of the Claimants

1. *I am a Travel agent and the agent who organised the travel of the Claimants and by reason whereof duly authorised to make this sworn statement.*

2. *The 1st 4 Claimants are all in isolation in compliance with Ministry of Health and Population Advice on COVID-19 (Coronavirus disease) Travellers to Malawi whose copy is exhibited and attached hereto as* ***WZ1*** *and the other rest of the Applicants are all in China and can thus not make this sworn statement.*

3. *I depone to facts that I personally know.*

4. *The Claimants were all granted letters of approval of their Visas to be issued when they arrive. I attach copies of the letters and their passports as* ***WZ2.***

5. *Armed with such letters and the legitimate expectation that they would be allowed entry, the Claimants set off from China and made all their arrangements to be in Malawi for the period of their holiday.*

6. *The Claimants arrived in the country on the 17th March, 2020 in a group of 24 Chinese nationals among other nationalities that arrived on the 3:30 pm flight.*

7. *Of the Chinese, 10 had permits such as Business Residence Permits, Temporary Employment Permits.*

8. *On arrival, the Claimants were screened as is done and thereafter Immigration Department took all the passports from the Chinese nationals.*

9. *Around 5 pm, the passports of 10 nationals with business residence permits and temporary employment permits were returned to the owners who thereupon entered the Country.*

10. *The Claimants however were refused entry without any reason save that something was wrong with the letters shown in* ***WZ2.***

11. *The 1st Respondents officers then forcibly placed the Claimants in a small place calculated to break their resolve so as to force them back to China for no apparent reason.*

12. *On the 18th march, 2020 the 1st Defendant's officers sent back the last 6 claimants to China against their will and could not send the whole team as the flight was full.*

13. *The next day on the 19th march, 2020 the 1st 4 Claimants obtained an order and were granted entry into the Country.*

Steps Done by the Claimants

14. *As shown above, upon being granted entry, the Claimants have obeyed all guidelines as provided by Ministry of Health and they have undertaken self isolation as follows:*

    a. *Li Xiaoxiao and Liu Zhiqin have been in self isolation on property Alimaunde 49/1/2217;*

    b. *Wang Xia and Tian Hongze have been in self isolation on property 28/264, Kanengo.*

15. *The Claimants clearly told officers as to where they would be and should the officers so mind review them at the said places.*

Corona Virus Issue

16. *There has been much talk that the refusal of entry was to do with corona virus, but the same is a complete falsehood as I will show below:*

    a. *As of the date of arrival there was no travel ban into Malawi from China or indeed any other country. The State of Disaster was only announced on Friday the 20th march, 2020 when the Claimants arrived on the 17th march, 2020. I need to be informed as to whether laws or indeed this declaration has a retrospective effect, if it were then all classes done on Tuesday the 17th March, 2020 were done illegally;*

    b. *The Claimants were part of many people from diverse nations some even of European descent but none of them were stopped and forcibly detained at the airport. If anything, corona virus has gone down in China and is rising in European countries. May the 1st Defendant produce the manifest of all planes that landed last week and state if they forcibly detained every person who arrived from a country affected by Corona if Corona was and is the issue;*

    c. *Even of the Chinese nationals, only the Claimants were stopped and not the others Chinese nationals with business residence permits;*

    d. *For anybody who clearly uses their head, the only issue with the Claimants was to do with the visa letters prepared by the immigration office shown above as a differentiating factor.*

17. *(sic)*

Desire of the Claimants

18. By granting them authority to come, the Claimants had gone to extra expense to come to Malawi and to be told to go back when no reason has been given is very unfair and I am told not constitutional in this country.

19. The Claimants are desirous to be heard and have their issues resolved as this will negatively affect their future travels to other countries as well as Malawi. They need the matter resolved and the matter cannot be resolved if they are sent back to China.

20. They would like to be granted entry into the country so they have a chance to hear the charges or anything against them.

21. It is clear to me that unless stopped by an injunction, the Defendant will proceed to send the Claimants back and will also not allow them entry into Malawi.

22. The balance of convenience favours granting interlocutory injunction against the Defendants restraining them forcibly removing the Claimants who pose no security or any threat and no such issue was raised with them as either being a security threat.

23. The Claimants undertake to pay damages to the Defendants for the inconvenience or injury the injunction may cause to them if the Court later finds that the Claimant was not justified to be granted the injunction.

24. I acknowledge that if I have made a false statement in this statement I may have committed perjury and be liable to prosecution.

25. I make this affidavit conscientiously believing the same to be true, to the best of my knowledge and belief and pursuant to the Oaths, Affirmation and Declarations Act (Chapter 4:07) of the Laws of Malawi

***WHEREFORE,** I pray to this honourable court, that an interlocutory of injunction restraining the Defendants by themselves, their agents, servants or whosoever acting on their behalf from sending the Claimants back and a further Order compelling them to allow the Claimants entry into the country on such orders as the Court may grant."*

3.0 THE DEFENDANTS' SWORN STATEMENT

3.1 The Defendants are opposed to the Claimants' application and they have filed a statement in response to the Claimants' sworn statement, sworn by the Regional Immigration Officer, Mr. Limbani Chawinga [Hereinafter referred to as the "Defendants sworn statement"]. For

purposes of parity of treatment, I will also set out in full the Defendant's sworn statement. It reads as follows:

> *"2.* ***THAT*** *facts set out in this sworn statement are based on personal knowledge of this matter and some have passed on to me in my capacity as Regional Immigration Officer and are to the best of my knowledge and belief, true and correct.*
>
> *(a)* ***Procedure in applying for visas***
>
> *3.* ***THAT*** *I have read the sworn statement of Warren Zeng in support of an application for an injunction restraining the Defendants from sending the Claimants back to China. I understand that the basis of their application is that they were issued with letter of approval of their visas to be issued when they arrived.*
>
> *4.* ***THAT*** *I believe that the said visa letters were fraudulently and irregularly issued on the grounds expounded herein. The Department has instituted investigations of this matter.*
>
> *5.* ***THAT*** *to begin with, the Department stopped issuing visa letters on 7th October, 2020 and migrated to e visas (online) on 7th October, 2020. Since then the recognized application for a visa on arrival is online and not the manual visa letters.*
>
> *6.* ***THAT*** *secondly, no one is allowed to issue a visa to a foreign national without the knowledge, authority and approval of the Directory General of the Department or in his absence, his deputies.*
>
> *7.* ***THAT*** *when the Claimants landed at Kamuzu International Airport and were going through passenger assessment, they produced visa letters purportedly issued by the Department. We were surprised because the Department stopped issuing visa letters.*
>
> *8.* ***THAT*** *as head of Central region, I was supposed to be aware of the Claimants' visit. Yet, I did not know anything about such a visit. I then made a phone call to the Director General, Mr. Masauko Medi to find out whether he was aware of the letters and whether or not he had approved the same.*
>
> *9.* ***THAT*** *I repeat the foregoing and state that the Director General denied having granted approval to issue visa letters to the claimants. In fact he told me that he was not aware that the Claimants were visiting the country.*
>
> *10.* ***THAT*** *a decision was therefore made to send the Claimants back to China. We realized that 10 of the Claimants had a return ticket and we proceeded to book their flights. As regards the other 4, we sent them a quarantine as we were arranging to buy them tickets. However, before we could do so, we were served with an injunction herein.*

(b) ***The Threat of Covid-19 and the decision to Refuse the Claimants entry into the country.***

11. ***THAT*** *it is common knowledge that the corona virus started in China and has spread like wild fire across the globe. Currently, all the neighbouring countries of Malawi have at least registered the deadly corona virus case.*

12. ***THAT*** *Malawi has put in place mechanisms that aim to prevent its nationals from contracting and spreading the said deadly virus.*

13. ***THAT*** *as a Department, we came up with a resolution to refuse visas from all high risk countries. China is a high risk country for corona virus and therefore, no visa would be granted to all Chinese nationals until the war against the virus is won.*

14. ***THAT*** *I therefore believe that the decision to deny the Claimants entry is not unreasonable as the Claimants would like the court believe.*

15. ***THAT*** *the Claimants argued that they had gone through medical tests and that they are not a health threat. I am not a medical expert but the information about corona virus that is being shared on the radios, TVs and social media, which information I believe to be true, is that the virus can stay in people undetected for about 14 days and it can spread to other people within this period.*

16. ***THAT*** *it is my humble prayer that the injunction obtained herein be dismissed with costs."*

3.2 It is important to remark at this point that what is contained in the Claimants' sworn statements and the Defendants' sworn statement mark the totality of the evidence before the Court. As we will see in due course, the Court is enjoined to decide cases on the "*legally relevant facts*" before it – nothing more nothing less in terms of the facts.

4.0 SUBMISSIONS BY THE CLAIMANTS

4.1 Counsel Kaonga submitted that there are many triable issues in the present case. It may be convenient to set out in full the Claimants' Skeleton Arguments on this point:

"3.1.4 The Claimants were issued letters that they would be allowed entry into Malawi and they produced the same to the Immigration officers as is required under section 13(2)(b) of the Immigration Act.

3.1.5 The Immigration Officers proceeded to detain the applicants as if they were prohibited immigrants as per section 14 of the Immigration Act when they did not fall within a class of what would

be termed prohibited immigrants as sections 4 or 5 of the Immigration Act does not apply to them and no written reason was ever issued to them.

3.1.6 The Defendants claim that the Claimants were stopped from entering because of Health grounds. The Claimants were not examined or shown to be a risk and others like them on the same flight were allowed entry into the country. The disputes herein have to be resolved and cannot be resolved now.

3.1.7 It is clear therefore that there are factual disputes which cannot be resolved at an injunction stage as per ***Mwapasa and Another vs. Stanbic Bank Limited and Another HC/PR Misc. Cause no. 110 of 2003 (unreported)***

> *"a Court must at this stage avoid resolving complex legal questions appreciated through factual and legal issues only a trial can avoid and unravel".*

4.2 Regarding damages, Counsel Kaonga submitted that damages would not be an appropriate remedy because, to quote the relevant part of the Claimants' Skeleton Arguments:

> *"The issue herein is about exploring the beauty that Malawi is and with uncertainty as to travel arrangements now, there is no way of knowing what damages could be caused to the Claimants if they were forced to leave the country and as such damages cannot be an adequate remedy."*

4.3 The Claimants' Skeleton Arguments conclude by contending that the balance of justice tilts in favour of granting the application in that the Defendants seek to forcibly remove the Claimants who pose no security or any threat and, particularly, when regard is had to the fact that no such issues were raised with the Claimants:

> *"3.3.2 It is also principle of the law that it is not only the balance of convenience that needs to weighed, but also the risk of doing an injustice to one side or the other when injunction is granted or refused as stated in* ***Cayne v Global Natural Resources (1984) ALL ER,225****. See also* ***Benard Mauleti Kwandekha v Alli M'balaka (supra)***
>
> *3.3.3 The law also requires that where all other factors in considering the balance of convenience are evenly balanced, it is counsel of prudence to take such measures as are calculated to preserve status quo* ***(Henry Malista & Others v Village Headman Sakhama (Enock Mututu), Civil Cause no.66 of 2018)****. See also* ***American Cyanamid case****.*

3.3.4 The status quo has been held to be state of affairs existing before the Defendant started the conduct complained of unless there has been unreasonable delay where it is state of affairs immediately before the application ***(Candlex Limited v Katsonga (supra))***.

3.3.5 The Claimants are in the country. For them to litigate the case they have to be in Malawi. An order that they leave is tantamount to giving the Respondents a free pass and ensure that the matter is not determine on its merits."

4.4 In his oral submissions, Counsel Kaonga stressed the following points:

(a) by the time, the Immigration Department was issuing the Claimants letters of approval on 11th March 2020, the Department was aware of the outbreak of the corona virus;

(b) when the Claimants arrived at Kamuzu International Airport, they were detained without being given any reason and, as at the date of hearing this application, the reason had not been given;

(c) it is disingenuous for the Defendants to claim that the issue had to do with health purposes when other people, including Chinese from China, on the same flight were allowed entry into Malawi;

(d) as of 17th March 2020, there was no ban prohibiting anybody to enter Malawi on account of being infected with coronavirus;

(e) as to the resolution referred to in paragraph 13 of the Defendants' sworn statement, the matters covered therein cannot be made by resolution;

(f) the Claimants do not fall within section 4 of the Immigration Act;

(g) the Claimants requested the Immigration Department to furnish them with the passenger manifest for the flight but the Department has failed to do so;

(h) the alleged forgery is an internal matter within the Immigration Department and the same has to be

investigated without having to punish the Claimants who have nothing to do with the alleged forgery;

(i) the Immigration Department have not shown that the visa that were issued have since been cancelled and, in any case, cancellation cannot legally take place without giving the Claimants an opportunity to be heard;

(j) the Claimants were put in self-isolation, as recommended by Ministry of Health, which is a competent authority on such an issue unlike the Immigration Department; and

(k) the declaration of the state of disaster cannot have retrospective effect.

5.0 SUBMISSIONS BY THE DEFENDANTS

5.1 The Defendants are opposed to the application for the continuation of the interlocutory injunction. It is said that (a) there is no serious issue to be tried, (b) damages would be an adequate remedy and that (c) the balance on justice lies in favour of discharging the injunction. These points are discussed in paragraphs 3.11 to 3.20 of the Defendants' Skeleton Arguments. These paragraphs state as follows:

"(c) ***Analysis of the Law and Facts***

3.11 To begin with, the sworn statement of ***Limani Chawinga*** *has established that the visa letters issued herein were irregular and fraudulent.*

3.12 It has also been shown that the decision to send the Claimants back to China was in furtherance of the measures against the contracting and spreading the deadly corona virus. China is a high risk country for corona virus.

3.13 We contend therefore that such a decision is not unreasonable as the Claimants wants the Court believe. It is for the welfare of all Malawians and is currently being practiced across the world.

3.14 Our position is that there are no serious issues to be tried.

(d) ***Whether damages would be adequate remedy***

3.15 Even if the Court finds that there are serious issues to be tried, we contend that damages would be adequate remedy to the Claimants.

3.16 We therefore submit that in the instant matter, the wrong being complained of is reparable, within pecuniary compensation and damages are assessable.

(e) ***Balance of Convenience (Justice)***

3.17 We further contend that even if there issues to be tried, the balance of justice lies in favour of discharging the order of interlocutory injunction obtained herein.

3.18 Sustaining the injunction risks contracting and spreading of the corona virus that the Claimants may have. These people are still among Malawians and continue to pose a health threat to Malawians.

3.19 It is humbly submitted that the honourable court should find that the balance of convenience lies in favour of discharging the interlocutory that was granted herein.

3.20 In totality, our humble prayer is that the said injunction should be discharged with costs."

5.2 In his oral submissions, the learned Senior State Advocate more or less repeated what is set out in the Defendants' Skeleton Arguments, with focus on the balance of justice He argued that as Malawi is gripped with the fear of coronavirus, the best thing for the Court to do is to send the Claimants back to their own country. He said that it is not true that the Claimants cannot pursue prosecution of this case if they leave Malawi. He said that there are many cases which are in our courts even though the parties are not living in Malawi.

5.3 The learned Senior State Advocate concluded his oral submissions by commenting on the Immigration Act. He said that the Act is indeed very old, including the prescriptions in section 4 of the Act, but the Immigration Department is coping by innovating. It has managed to come up with very good things such as e-passport without having to rely on the provisions of the Act. Finally, he invited the Court to note that the Immigration Act is currently under review with a view to have it replaced.

6.0 RESPONSE BY THE CLAIMANTS

Counsel Kaonga said that he was baffled to hear that the Immigration Department does not follow the Immigration Act on account of its being outdated. This is the way he put it:

> *"This is a country of laws. We do what the law says. We cannot decide not to follow the law because the law is old. Section 13 (2)(b) of the Immigration Act, as read with regulation 5, provide for the examination of an immigrant by a medical doctor to see if he or she has a disease. In any case, the Claimants do not have any disease listed in or under the Immigration Act."*

7.0 ORAL APPLICATION TO AMEND THE DEFENDANT'S SWORN STATEMENT

7.1 For the sake of completeness, it has to be mentioned that soon after Counsel Kaonga had finished making their his reply, the learned Senior State Advocate made an oral application under Order 10, rule 2(2), of the CPR to amend the date, that is, 7th October 2020, appearing in paragraph 5 of the Defendants' sworn statement. His application was that "7th October 2020" be amended to "7th October 2020" because he remembered that when receiving instructions from Mr. Chawinga, Mr Chawinga had mentioned 7th October 2019 and not "7th October 2020". The instructions were given over the phone, so the Court was told.

7.2 I found the application to be untenable. The sworn statement was made by Mr. Chawinga. Even if it was prepared by the learned Senior State Advocate, the document still remains that of Mr. Chawinga. I reckon that I am not assuming too much by believing that Mr. Chawinga read and fully understood his own statement before signing it and having it sworn before Commissioner for Oaths, Chimwemwe K. Sikwese.

7.3 I am not prepared to accept that there a public officer out there holding a senior management position who signs a document, particularly a document for use in court proceedings, without reading and understanding what the document says. The sworn statement in question is a relatively short document with less than 18 brief paragraphs. If there was any mistake in the sworn statement, the mistake had to be corrected by Mr. Chawinga himself through a supplementary sworn statement, or, in the alternative, by coming before the Court and making the changes under oath.

7.4 In any case, the application was bound to fail. As already said, the application was made under Order 10, rule 2(2), of the CPR. This

provision has to be read together with Order 10, rule 9, of the CPR. The latter provision states thus:

> *"The Court may allow an oral application in a proceeding to be made where –*
>
> *(a) the application is for urgent relief;*
>
> *(b) the applicant undertakes to file an application in a proceeding within the time directed by the Court; and*
>
> *(c) the Court considers it appropriate –*
>
> *(i) because of the need to protect persons or property;*
>
> *(ii) to prevent the removal of persons or property from Malawi; or*
>
> *(iii) because of other circumstances that justify making the order asked for.*

7.5 Having used the word "and" to connect paragraphs (a), (b) and (c), an oral application has to meet all the conditions in rule 9 for it to be granted. In this case, most of the conditions, if not all, were not satisfied. As a matter of fact, the learned Senior State Advocate made no mention of Order 10, rule 9, of the CPR.

7.6 Before moving on, I believe that it is only fair that I make the following observations. We have learnt, what we already knew, that there is a great correlation amongst, workload, the time within which to do the work and the quality of the product therefrom.

7.7 What is the Court talking about? I have sympathy for the learned Senior State Advocate. I really do not know how he manages to find time to prepare for the many cases that he has to handle in a week. I will only recite cases in which the learned Senior State Advocate was scheduled to appear before me within the last two weeks:

23rd March 2020 - **The State v. Inspector General of Police & 2 Others ex-parte M.M & 18 Other**

25rd March 2020 - **The State v. Inspector General of Police & Another ex-parte Timothy Mtambo & 2 Other**

26th March 2020 - **The present Case** – this case was scheduled for 10 o'clock but we started more than 30 minutes late because the learned Senior State

Advocate had to appear first before another High Court Judge

26th March 2020 - **Nut Trust v. Attorney General** – the case was scheduled for 11 o'clock. Counsel for the Claimant waited for more than an hour. I decided to have the hearing of the matter postponed to a future date

27th March 2020 - **Felix Payesa v. Lilongwe City Council** – it was scheduled for 9 o'clock – The case failed to take place – The reason given was that the learned Senior State Advocate was attending to another case in Mzuzu (How it is that Lilongwe City Assembly is being represented by the Attorney General is a matter for discussion on another day)

27th March 2020 - **Yacus Ibrahim Laheri v. Lilongwe City Council** – it was scheduled for 11 o'clock – The case failed to take place – The reason given was that the learned Senior State Advocate was attending to another case in Mzuzu

7.8 It also has to be mentioned that there is a practice in this Court whereby each party (through Counsel of course) to submit soft copies in word of the party's sworn statements and skeleton arguments. This is meant to facilitate quick judgement writing. Counsel Kaonga e-mailed the Claimants' documents on the same day, that is, 26 March 2020. The Defendants' documents were e-mailed to me on 31st March 2020. The learned Senior State Advocate explained in the e-mail that the late submission was due to the fact that he had travelled to Mzuzu.

7.9 There we are. With that kind of workload, we should not be surprised when preparation for a case and the presentation thereof in court does not meet the required standards. For example, I real doubt that an objective innocent by-stander can confidently say that the present case does not raise triable issues. Let me not go there for now. But the point is that for someone looking at what is going on, from outside Capital Hill of course, there appears to be a problem. It could be heavy workload, distribution of the workload, etc. In short, I am only mentioning this so that the relevant authorities can look at the matter and see how it can be resolved. Even "a very patriotic Judge" cannot

keep on granting adjournments forever, at the expense of the interests of the other parties. Blind "patriotism" is not the answer.

7.10 By the way, the observation in paragraph 7.6that there is correlation between effort and results does not only apply to legal work. It is of general application. If ever you get free time, take time to look at a few press releases, issued by different organizations over the last few months. You do not need to be a trained journalist to know a well-thought press release and one that has been written in a hurry. You can easily tell if a press release contains truth, substance or it is just full of rhetoric and propaganda. I better move on to another issue - I run the risk of digressing from the application under consideration.

8.0 CONSTITUTIONAL CONTEXT

8.1 Let us go back to the basics – *"Constitutional Law 101"* (I hope Professor Garton Kachedzera and Professor Kanyongolo will be fair in marking my examination script: they will not biased for or against me on the ground that we were class-mates at the Law School – the class that graduated in1986 – all brilliant minds, legal luminaries).

8,2 To my mind, the key constitutional provisions are to be found in sections 5, 9, 12, 15, 18, 20, 41, 43, 44 and 45, 48, 108, 115 and 211 of the Constitution.

8.3 Section 5 of the Constitution provides for the supremacy of the Constitution:

> *"Any act of the Government or any law that is inconsistent with the provisions of this Constitution shall, to the extent of such inconsistency, be invalid."*

8.4 Section 9 of the Constitution provides for the separate status, functions and duty of the judiciary, it states as follows:

> *"The judiciary shall have the responsibility of interpreting, promoting and enforcing the Constitution and all laws and in accordance with the Constitution in an independent and impartial manner <u>with regard only to legally relevant facts and the prescriptions of law</u>."* – Emphasis by underlining supplied.

8.5 Section 12 of the Constitution sets out fundamental principles of the Constitution and paragraphs (d), (e) and (f) of subsection (1) are relevant. These paragraphs are framed thus:

> *"This Constitution is founded on the following underlying principles-*

”,”

(d) the inherent dignity and worth of each human being requires that the State and all persons shall recognise and protect human rights and protect human rights and afford the fullest protection to the rights and views of all individuals, groups and minorities whether or not they are entitled to vote;

(e) as all persons have equal status before the law, the only justifiable limitations to lawful rights are those necessary to ensure peaceful human interaction in an open and democratic society; and

(f) all institutions and persons shall observe and uphold this Constitution and the rule of law and no institution or person shall stand above the law.”

8.6 I have always believed that the concept of the rule of law cannot be properly understood without one digging into its history. Various accounts have been given by different scholars but my favourite is the one below:

“C. The Rule of Law

…

The king himself ought not to be under man but under God, and under the Law, because the Law makes the king. Therefore let the king render back to the Law what the Law gives him, namely, dominion and power; for there is no king where will, and not Law, wields dominion.” So wrote Henry de Bracton, “the father of English law,” about the year 1260, during the reign of Henry III. This teaching that law is superior to human rulers has run consistently through English politics and jurisprudence all the way down the centuries. It was rather belligerently asserted from time to time by the English colonies in North America.

This doctrine that no man is above the law applied not only to kings but also to legislative bodies and judges. Sir Edward Coke, we saw earlier, fiercely resisted not only attempts by King James I to interpret the law for himself but also Acts of Parliament that contravened the common law. Citing Bracton as an authority, he asserted that “the king must not be under any man, but under God and the law.” – James Mc Clellan, “Liberty, Order, and Justice: An Introduction to the Constitutional Principles of the American Government (2000)

8.7 Rule of law primarily refers, to the requirement that decisions and actions of those in authority are based on the law and not on their whims or arbitrary discretion. It also demands equality before the law and that no person is above the law.

8.8 The rule of law prevails where:

(a) the Government itself is bound by the law;

(b) every person in society, be it a citizen or not, is treated equally under the law;

(c) the human dignity of each individual, be it a citizen or not, is recognized and protected by law; and

(d) justice is accessible to all persons, be it citizen or not.

8.9 Rule of law is generally associated with several other principles such as the principle that laws shall not operate retrospectively and that all individuals are innocent until proven otherwise.

8.10 The rule of law has several pillars. The central pillar is that of legal equality. Under this pillar, all individuals are given the same rights without distinction to their social stature, religion, political opinions and so on: see section 20 of the Constitution. As Montesquieu, the French political thinker put it, "*law should be like death, which spares no one.*". It should be an equalizer.

8.11 One of the other pillars of the rule of law has to do with what an individual vis a vis a public officer can or cannot do in the absence of an express provision on the matter, Unless prohibited by law, an individual is entitled to do whatever he wishes.

8.12 Whenever I am called upon to explain this pillar, I refer to a statement made by Judge in an old English case whose parties and citation I do not remember now. However, I have no doubts that once I give the quotation from that case, many lawyers will remember the case. This was a personal injury claim brought at a time before the wearing of a helmet by motor cyclists was made mandatory. The Judge said something along the following lines "*the motor cyclist was free to ride the motor cycle without a helmet, free in the sense that a man is free to run his head into a break-wall although that is not a sensible thing to do*". There we are then: an act may be lawful but it does not mean that it is always sensible or reasonable. I know I am courting debate (or is it controversy) here. Let us move on.

8.13 The position regarding a public officer is, however, different. A public officer is only allowed to do such things as he or she is allowed by the law to do in his or her capacity as a public officer.

8.14 As demonstrated by testimony given during a recent inquiry, failure to grasp this distinction can have fatal consequences. Picture this! A public officer passionately claiming that he did what he did because there is no law prohibiting his office from doing what he did. No sir! It is the other way round. The rule of law requires that whatever you do as a public officer must be based on a particular law otherwise you are acting ultra vires. The matter was succinctly put by Mwaungulu, J. (as he then was) in **In the Matter of the State and Commissioner General of the Malawi Revenue Authority, ex parte the Estate of Mutharika, HC/PR Miscellaneous Civil Cause No. 3 of 2013 (unreported)**, when he issued a clarion call to all public officers "*to act legally within our powers where they exist and not to act where there are no such powers*".

8,15 It is also important to stress that an independent judiciary is an integral part of the "rule of law" system that should exist in any democratic state. This requires a judicial system that is independent and where courts interpret and apply the laws and regulations in an impartial, predictable, efficient, and transparent manner: see sections 9 and 103 of the Constitution.

8,16 With reference to the particular matter under consideration, the rule of law requires that emergency measures should be taken only in accordance with the law and that their legality, including their conformity with international law, should be capable of being tested in the High Court: see section 45(3) of the Constitution.

8.17 It is the role of the judiciary to safeguard the purity of the law and legally sanction any evasions or violations of the law by all individuals, including those in power if the rule of law is to thrive. A Judge who seeks to discharge his duties in this manner is just doing his or her job as enjoined by the Constitution. He or she is not acting mala fide. As such, accusing the Judge of being "unpatriotic" for refusing to defer to the whims of the executive or any other entity or person only goes to show the ignorance of the persons making the accusation of the constitutional framework governing the work of a Judge.

8.18 It is also important to bear in mind that the proposition advanced by the learned Senior State Advocate that provisions of an outdated Act, although not yet repealed, should not be acted upon by the concerned Ministry or Department but they should simply be innovative enough so that the welfare of the people of Malawi should not suffer lacks merit

and is very dangerous in so far as democracy and the rule of rule is concerned.

8.19 Allow me to digress a bit but I am still on point. My first exposure to movies from western world was in the 1970s. Apart from such movies as "*Samson*", "*Hercules*", "Tarzan" (the original one), etc, most of the films that we watched at Apollo Cinema, Rainbow, Masongola Hall and, of course, Mzuzu Community Hall, were what we fondly called "Western". In these western films, the story line usually centred on a fight between the bad guys (gangsters and bandits) and the good guys (the sheriffs and their assistants). Most of these western movies, such as "*Rock River Advocate"*, "*The Magnificent Seven*", "*True Grit*", would often reach their climax when the bandits have been cornered and the sheriff then barks at the top of his voice *"The law is the law!!! … come out with your hands in the air from wherever you are hiding!*" – those were the days when movies were movies.

8.20 The law is the law. Unfortunately, it is not just the Immigration Department that believes that an outdated law must be obeyed even though it is still on the statute book. This line of reasoning is familiar and it getting louder and louder. It is a recurring refrain that you usually get from the authorities whenever they have chosen not to act in accordance with the prescriptions of the law. A classic example is to be found in the judgement of the Constitutional Court in the case of **Dr. Saulos Klaus Chilima and Dr. Lazarus Mccarthy Chakwera v. Professor Arthur Peter Mutharika and Electoral Commission, Constitutional Reference No. 1 of 2019 (unreported)**, regarding the issue of constituency tally centres. The relevant passage is to be found at paragraph 834 and in paragraphs (i) and (j) of that part of the judgement containing findings and holdings:

> *"834. Mr. Munkhondya stated that in 2019 elections the 2nd Respondent introduced Constituency Tally Centres, There were no such centres in prior elections. The Constituency Tally Centres were introduced as a result of interaction between the 2nd Respondent and political parties. …. This introduction of Constituency Tally Centres was an innovation that was in reaction to the lessons learnt. Consequently, the 2nd Respondent decentralized the elections' administration to constituency level.*
>
> *…*
>
> *(i) We must emphasise at this stage that the Court finds no provision anywhere in the law establishing constituency tally centres. Section 96 of the PPEA does not state*

anywhere that the 2nd Respondent will determine the national result based on records from constituency tally centres. The 2nd Respondent is required by law, in the determination of the national result (at the National Tally Centre) to look at the full records from the polling stations and the district centres. The Constituency Tally Centre is unknown to the law. The Court was told by both the Respondents as well as the Petitioners that stakeholders agreed that the Constituency Tally Centre was a necessary step, apparently to address some concerns that arose out of the 2014 general elections. If the 2nd Respondent and the stakeholders thought that it was imperative to introduce the Constituency Tally Centres as a step in the process of determination of the elections under Chapter VIII of the PPPE, they should have moved Parliament to amend the law to introduce that step. This was such a major introduction in the electoral process that could not even be introduced under subsidiary legislation, let alone by stakeholders' resolution.

(j) The 2nd Respondent was the body that was under a constitutional duty under Section 76(2) (d) of the Constitution to ensure compliance with the provisions of Chapter VIII of the PPPE. The unlawful introduction of the constituency tally centre was such a flagrant and blatant breach of the 2nd Respondent's duty under section 76 (2)(d) of the Constitution. It was also an ultra vires act and an unconstitutional usurpation of the powers of the legislature." – Emphasis by underlining supplied

8.21 To my mind, the reasoning in the above-quoted dicta applies to the present case with equal force. As was rightly conceded by the learned Senior State Advocate, both the Public Health Act and the Immigration Act are very much outdated.

8.22 It is not uninteresting to note that almost all if not all Commonwealth Countries have replaced the Immigration Acts and Public Health Acts that they inherited at independence. For example, Botswana enacted its new Public Health Act in 2013. It is under this Act that the Government of Botswana promulgated a raft of Government Notices to introduce measures meant to combat the corona virus epidemic before a few weeks later promulgating a state of emergency in terms of section 17 of the Constitution of Botswana.

8.23 Botswana has to be applauded for the course it has taken for many reasons than one. Firstly, this is what authorities that believe in the rule of law do. It is foolhardy for authorities not to take the necessary

legislative measures in the hope that the judiciary will come in to blindly support ultra vires acts taken during the state of emergency. No Judge worth his or her name can be fooled by those who seek to play the "patriotism" card. It is cheap propaganda and the same has to be frowned upon with the contempt it deserves.

8.24 Secondly, Botswana prepared its supporting legal framework well before the outbreak of the corona virus. That is prudence. You do not have to wait until you are in a crisis to enact the necessary laws. We will revert to this issue later on in this Ruling.

8.25 Section 15(1) of the Constitution provides that human rights and freedoms enshrined in Chapter IV of the Constitution shall be respected and upheld by the executive, legislature, judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Malawi and shall be enforced in the manner prescribed in the said Chapter.

8.26 Section 18 of the Constitution accords every person the right to personal liberty. Section 20 (1) of the Constitution is a non-discrimination clause and the text thereof states that:

> *"Discrimination of persons in any form is prohibited and* all persons are, under any law, guaranteed equal and effective protection against discrimination *on grounds of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, disability, property, birth or other status or condition."*

8.27 Section 41 of the Constitution deals with access to justice and legal remedies and it states as follows:

> *"(1) Every person shall have a right to recognition as a person before the law.*
>
> *(2) Every person shall have the right of access to any court of law or any other tribunal with jurisdiction for final settlement of legal issues.*
>
> *(3) Every person shall have the right to an effective remedy by a court of law or tribunal for acts violating the rights and freedoms granted to him or her by the Constitution or any other law."*

8.28 Administrative justice is the subject matter of section 43 of the Constitution. The provision accords every person (not just a Malawian citizen) the right to:

> *"(a) lawful and procedurally fair administrative action, which is justiciable in relation to reasons given where his or her rights,*

freedoms, legitimate expectations or interests are affected or threatened; and

(b) be furnished with reasons, in writing, for administrative action where his or her rights, freedoms, legitimate expectations or interests are affected." – Emphasis by underling supplied

8.29 Section 44 of the Constitution makes provision regarding limitations on rights and the relevant states thus:

> *"(1) No restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law, which are reasonable, recognized by international human rights standards and necessary in an open and democratic society.*
>
> *(2) Laws prescribing restrictions or limitations shall not negate the essential content of the right or freedom in question, and shall be of general application.*" – Emphasis by underling supplied

8.30 Section 45 of the Constitution deals with derogation from rights contained in Chapter IV of the Constitution and it provides as follows:

> *"(1) No derogation from rights contained in this Chapter shall be permissible save to the extent provided for by this section and no such derogation shall be made unless there has been a declaration of a state of emergency within the meaning of this section.*
>
> *(2) There shall be no derogation with regard to –*
>
> *(a) the right to life;*
>
> *(b) the prohibition of torture and cruel, inhuman or degrading treatment or punishment;*
>
> *(c) the prohibition of genocide;*
>
> *(d) the prohibition of slavery, the slave trade and slave-like practices;*
>
> *(e) the prohibition of imprisonment for failure to meet contractual obligations;*
>
> *(f) the prohibition on retrospective criminalization and retrospective imposition of greater penalties for criminal acts;*
>
> *(g) the right to equality and recognition before the law;*
>
> *(h) the right to freedom of conscience, belief, thought and religion and academic freedom; or the right to habeas corpus.*

(3) The President may declare a state of emergency –

(a) only to the extent that it is provided for in this section;

(b) only with the approval of the Defence and Security Committee of the National Assembly

(c) only in times of war, threat of war, civil war or widespread natural disaster;

(d) only with regard to the specific location where the emergency exists, and that the declaration of a state of emergence shall be publicly announced;

(e) only after a the state of emergency has been publicly announced.

(4) Derogation from rights contained in this Chapter, other than the rights listed in subsection (1), shall be permissible during a state of emergence within the meaning of the section and to the extent that –

(a) such derogation is consistent with the obligations of Malawi under international law; and

(b) in the case of –

(i) war or threat of war, it is strictly required to prevent the lives of defensive combatants and civilian as well as legitimate military objectives from being placed in direct jeopardy;

(ii) a widespread natural disaster, it is strictly required for the protection and relief of those people and facilities whether in or outside the disaster area.

(5) The declaration of a state of emergency and the action taken in consequence thereof shall be in force for a period of not more than twenty-one days, unless it is extended for a period of not longer than three months, or consecutive periods of not longer than three months at a time, by resolution of the national Assembly adopted by a majority of at least two-thirds of all its members.

(6) The High Court shall be competent to hear applications challenging the validity of a declaration of a state of emergency, any extension thereof, and any action taken, including any regulation enacted, under such declaration.

(7) Where a person is detained under a state of emergency such detention shall be subject to the following conditions –

(a) an adult family member or friend of the detainee shall be notified of the detention as soon as is reasonably possible and in any case not later than fourty-eight of detention;

(b) the name of every detainee and a reference to the measures in terms of which he or she is being detained shall be published in the Gazette within five days of his or her detention;

(c) when rights entrenched in section 19(6)(a) or section 42(2)(b) have been suspended –

(i) the detention of a person shall, as soon as reasonably possible but not later than ten days after his or her detention, be reviewed by a court, and the court shall order the release of the detainee if it is satisfied that the detention is not necessary to restore peace or order;

(ii) a detainee shall at any stage after the expiry of a period of five days after a review under subparagraph (i) be entitled to apply to a court of law for a further review of his or her detention, and the court shall order the release of the detainee if it is satisfied that the detention is no longer necessary to restore peace or order;

(d) the State shall for the purpose of a review referred to in paragraph (c) submit written reasons to justify the detention or further detention of the detainee to the court, and shall furnish the detainee with such reasons not later than two days before the review.

(8) If a court finds the grounds for the detention of a person to be unjustified or illegal it shall order his or her release and that person shall not be detained again on the same grounds unless the State shows good cause to a court prior to such re-detention.

(9) Under no circumstance shall it be possible to suspend this Constitution or any part thereof or dissolve any of its organs, save as is consistent with the provisions of this Constitution." – Emphasis by underling supplied

Q: What is the meaning of the words *"widespread natural disaster"* in section 45(3)(c) of the Constitution?

Q: Does "corona virus", whether it is an epidemic or otherwise, fall within the term *"widespread natural disaster*" in section 45 (3)(c) of the Constitution?

Q: Has there been *"any regulation enacted*" under section 45 (3)(c) of the Constitution?

8.31 Providing a little context to section 45 of the Constitution might not be out of order. It is well recognized that the first duty of any government is to ensure the security of the State and the safety of its citizens whether threatened by events within or without its borders. The ordinarily powers of the police, immigration officers, and officials of local and central government are available for that purpose. In most circumstances, nothing more is required.

8.32 Once in a while, however, an extra-ordinary danger threatens or happens. Then, emergency powers are needed. It is significant to note, however, that emergency powers have both advantages and risks. I find "Emergency powers, International IDEA Constitution – Building Primer 18" by Elliot Bulmer very useful on this issue. The advantages are covered on page 6 as follows:

> *"Emergency provisions are necessary because they enable the State to respond effectively to the emergency while keeping the exercise of emergency powers within the rule of law. If they are well designed and properly applied, emergency provisions are a self-defence mechanism for democracy – a way of ensuring democratic resilience by providing the power needed to deal with serious threats and challenges within the framework of a democratic constitution.*
>
> *If a constitution did not contain such emergency provisions, then the state would have to either (a) stand with its hands tied, unable to undertake urgent actions necessary to deal with the emergency or (b) exercise such powers outside the law. Either of these outcomes could be very dangerous for democracy."* -

8.33 The major threat is that emergency powers are prone to abuse and the relevant passage is to be found at page 7:

> *" However, many government have used emergency powers inappropriately – needlessly prologing or renewing states of emergency, and using emergency powers not to restore democratic normality but to bypass normal channels of democratic accountability, harass dissidents, rig elections, restrict the press, and ultimately to set aside a nominally democratic constitution and impose a dictatorial regime … This means that emergency powers must be subject to proper constitutional guarantees and procedural safeguards"*

8.34 Special emergency powers may be needed to:

(a) harness, in a coordinated manner, the collective energies of the different state services, as well as ordinary citizens (the case of the Disaster Preparedness and Relief Act]:

(b) allow the executive to exercise additional powers;

(c) allow either Parliament or the executive to make laws or regulations which, in normal time, would be unconstitutional because they interfere with the rights of [citizens] in ways not permitted by the Bill of Rights.

8.35 Usually, constitutions deal only with matters in paragraph (b) and (c). As exemplified by section 45 of the Constitution, constitutional provisions allow government, by law (repeat by law), to derogate from some rights in time of grave emergency. Other rights, like the right to life, freedom from torture, etc, remain sacrosanct: see section 45 (2) of the Constitution.

8.36 As regards matters in paragraph (a), the legal authority is conferred by an ordinary Act of Parliament (such as, in our case, the Disaster Preparedness and Relief Act), in anticipation of a possible emergence.

8.37 Section 45(6) of the Constitution is most striking. On the face of it, the provision would appear to be otiose? Is there any person out there who would doubt the competence of the High Court to entertain applications challenging "*the validity of a declaration of a state of emergency, any extension thereof, and any action taken, including any regulation enacted, under such declaration*"? It would thought that there is none.

8.38 However, the framers of our Constitution were very intelligent, wise and fore-sighted people. They were very much aware of the possibility or threat of gross abuse of human rights during such periods of state of emergences or state of disaster, particularly if Government falls in wrong hands. They thus decided to err on the side of caution.

8.39 Fast forward to 2020, and then boom! The very things that the framers of our Constitution feared are upon us. Suddenly, there is a change of thought in the corridors of powers. Looking at what is taking place, it would appear the current thought is that a state of emergence or a state of disaster presents a situation for freezing the enjoyment of human rights willy nilly.

8.40 Otherwise, how do you start to explain how even a local authority can wake up one morning to make a *"by-law"* (I believe) banning wedding ceremonies only to make a partial U-turn within hours *"wedding*

ceremonies will now be allowed subject to strict adherence to precautionary measures such as …". My gosh! We are real jokers and making ourselves look foolish before the whole world. How are these by-laws made? Are there any requirements regarding notice and quorum? Do councilors have to meet to make these by-laws?

8.41 The following telephone conversation between councillor A and councillor B from a yet to be published play suggests that many people doubt that local authorities follow the laid down procedures in making by-laws;:

A: "Achimwene zabvutatu, nkhani yamawukwati ija anthu zakugwirizanayo"

B: "Ndiye titani?"

A: Basi! we just have to change, I think

B: Achimwene I agree we have to change

A: Ndiye muwawuzi anyamata alengezi ku Tv ndi kumaradio

8.42 Just like that, a "*by-law*" has been made and it is law. Do by-laws have to be published in the *Gazette* for them to have force of law? Further, what happened to the requirement that a law has to be certain and precise in its scope (a "*by-law*" with the words "such as" my foot).

8.43 With such happenings, it becomes ease to understand the importance of having section 45(6) of the Constitution. An independent and impartial High Court is essential for ensuring the rule of law, particularly in time of emergency.

8.44 I wish to say that a few lawyers have said to me that they find it difficult to fully understand sections 44, 45 and 46 of the Constitution. I have given my advice by referring them to the "Law Commission Report on the Technical Review of the Constitution": see General Notice No. 230 of 1998, Malawi Government *Gazette* dated 16th November 1998. The relevant passage is to be found at page 262:

"SECTION 44 and 45 (Limitation and derogation of rights)

The Commission devoted considerable time to the relationship between section 44 and section 45. It would be no exaggeration to say that the Commission had considerable difficulty with the wording of these sections. The prime difficulty concerned the distinction between the concepts of "limitation or restriction" of a right and "derogation" from a right. And the chief confusion was created by the fact that section 44 (1) gave a list of

matters from which there "shall be no delegation, restriction or limitation". This created the impression that derogation was simply a more extreme form of limitation or restriction. Moreover, by listing certain rights that could not be limited or restricted, the impression was created that rights were absolute, i.e, subject to no limitation or restriction in any circumstances whatever. Yet it is clear that many of the rights listed in section 44 (1) a not being subject "derogation, restrictions or limitation" are inevitably subject to limitation, e.g the right to life referred to in section 44 (1)(a) is clearly limited by the proviso to section 16 which makes a saving as regards the death penalty. Another example would be the right to academic freedom referred to in section 44 (1) (h) which is clearly properly subject to limitation to prevent hate speech, defamation, etc.

The Commission concluded after considering a detailed comparative analysis of the question by Professor Erasmus that a clear distinction had to be drawn between the limitation or restriction of rights and their derogation. It was important to realize that all human right were subject to limitation, i.e they were not absolute. Freedom of expression, for instance, was a vital right yet it was subject to limitations: libel, sedition or obscenity are not protected by this right. Of course, if the rights protected could be limited in any way at all then indeed the protection provided by the Constitution would be worthless. But this is not so: all limitations must pass the tests of section 44 (2) and (3) which require amongst other things, that all limitations must be " prescribed by law,….must be reasonable, recognized by international human rights standards and necessary in an open and democratic society" and that all limitations " shall be of general application". This is difficult test to pass; the protection offered to rights in the Constitution is far from worthless.

However, although no right is absolute, any right can be made not subject to derogation since this simply means that no decree made in a state of emergency could affect the protection of that right elsewhere in the Constitution. Thus the right to life (although limited by the lawfulness of capital punishment in terms of the proviso to section 16 is not subject to derogation. This simply means that right as it is in the Constitution cannot be changed by state of emergency."

8.45 A host of issues arise out of section 45 of the Constitution with the most notable ones being (a) whether or not there is a difference between a declaration of a state of emergence as envisaged in section 45 of the Constitution and a declaration of national disaster under the Disaster Preparedness and Relief Act, (b) whether or not the things that can be done under a state of emergence are the same as those things which can be done under a state of disaster? (c) if so, whether or not a national disaster can be declared without meeting the requirements of section 45 (3) of the Constitution, which include approval of the Defence and Security Committee of the National Assembly as a condition precedent to the declaration of a state of emergency? (d) what was declared, a

state of emergence or a state of natural disaster? and (e) what was publicly announced, a state of emergence or a state of disaster?

8.46 Enforcement of the rights accorded under Chapter IV of the Constitution is covered under section 46 which provides, in part, as follows:

> *"(1) Save in so far as it may be authorized to do so by this Constitution, the National Assembly or any subordinate legislative authority shall not make any law, and the executive and the agencies of Government shall not take any action, which abolishes or abridges the rights and freedoms enshrined in this Chapter, and any law or action in contravention thereof shall, to the extent of the contravention, be invalid.*
>
> *(2) Any person who claims that a right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled –*
>
> *(a) to make application to a competent court of law to enforce or protect such right or freedom;*
>
> *(b) to make application to the Ombudsman or the Human Rights Commission in order to secure such assistance or advice as he or she may reasonably require.*
>
> *(3) Where a court referred to in subsection (2)(a) finds that rights or freedoms conferred by this Constitution have been unlawfully denied or violated, it shall have the power to make any orders that are necessary and appropriate to secure the enjoyment of those rights and freedoms and where a court finds that a threat exists to such rights or freedoms, it shall have the power to make any orders necessary and appropriate to prevent those rights and freedoms from being unlawfully denied or violated.*
>
> *(4) A court referred to in subsection (2) (a) shall have the power to award compensation to any person whose rights or freedoms have been unlawfully denied or violated where it considers it to be appropriate in the circumstances of a particular case.*
>
> *(5) The law shall prescribe criminal penalties for violation of those non-derogable rights listed in section 44(1)."* – Emphasis by underling supplied

8.47 Section 48 of the Constitution vests all legislative powers of Malawi in Parliament and it also states that *"An Act of Parliament shall have primacy over other forms of law, but shall be subject to this Constitution*".

8.48 Section 58 of the Constitution deals with the making of subsidiary legislation and it is couched in the following terms:

> *"(1) Parliament may, with respect to any particular Act of Parliament, delegate to the executive or to the judiciary the power to make subsidiary legislation within the specification and for the purposes laid out in that Act and any subsidiary legislation so made shall be laid before Parliament in accordance with its Standing Orders.*
>
> *(2) Notwithstanding subsection (1), Parliament shall not have the power to delegate any legislative powers which would substantially and significantly affect the fundamental rights and freedoms recognized by this Constitution."*

8.49 What is the import of section 56(2) of the Constitution? Firstly, a person vested with the power to make subsidiary legislation under one Act cannot start making regulations or rules in respect of matters covered in another Act: the regulations or rules must be *"within the specification and for the purposes laid out in that Act"*.

8.50 Secondly, bodies, such as City Assemblies, vested with the powers to make subsidiary legislation (that is, rules, regulations, by-laws,) would be acting unconstitutionally if they were ever to purport to make subsidiary legislation that *"substantially and significantly affect the fundamental rights and freedoms recognized by this Constitution"*. Whether the recent measures introduced by some local authorities banning *"street vending, wedding receptions, parties, etc"* are caught by section 58(2) of the Constitution is a question for another day

8.51 Section 103 of the Constitution is couched in the following terms:

> *"(1) All courts and all persons presiding over those courts shall exercise their functions, powers and duties independent of the influence and direction of any other person or authority.*
>
> *(2) 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.*
>
> *(3) There shall be no courts established of superior or concurrent jurisdiction with the Supreme Court of Appeal or High Court." –* Emphasis by underlining supplied

8.52 Two important points emerge out of section 103 of the Constitution. Firstly, the section, as read with section 9 of the Constitution, makes it clear that in deciding cases the Court is enjoined to act independently and to take into account only legally relevant facts and prescriptions of the Court. To my mind, a Judge who decides a case contrary to the

requirements of sections 9 and 103 of the Constitution is not only unpatriotic but also a great threat to the rule of law.

8.53 Secondly, section 103(2) of the Constitution puts it in unmistakedly plain terms that the judiciary has exclusive authority to decide whether or not an issue is within its competence. The framers of the Constitution, in their own wisdom, chose to vest this authority exclusively in the hands of the judiciary.

8.54 Let me break down the provision in plain English for those who purport to have more knowledge of the Constitution than Judges yet their statements demonstrate ignorance of the highest order. The provision means that the authority given to the judiciary to decide whether an issue is within its competence lies solely with the judiciary, it is not (repeat not) shared with any other authority or person outside the judiciary.

8.55 What does this mean in practical terms in relation to the issue at hand? It is for the High Court to decide whether or not a case brought before it relating to a state of emergency or disaster is of judicial nature and falls within its competence. Once the High Court has determined that a matter falls within its jurisdiction, it must not hesitate to deal with the matter to its logical conclusion in accordance, of course, with the applicable law and procedures. Needless to say, this is jurisdiction that must be guided jealously by the judiciary – not to be relinquished anyhow.

8.56 I will add this much, the High Court must never (as in ever) shirk the duty imposed upon it by sections 9, 45 and 103(2) of the Constitution to determine issues of judicial nature, whether or not such issues touch upon war, threats of war, public disasters, etc. The High Court must be vigilant and resolute in this cause. Failure to do so would not only be wrong but might also unwittingly give the impression that the judiciary is succumbing to political pressure from the other branches of Government by ingeniously hiding behind a declaration of national disaster.

8.57 Section 108 of the Constitution states as follows:

> *"(1) There shall be a High Court for the Republic which shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law.*
>
> *(2) The High Court shall have original jurisdiction to review any law, and any action or decision of the Government, for conformity with this*

Constitution, save as otherwise provided by this Constitution and shall have such other jurisdiction and powers as may be conferred on it by this Constitution or any other law."

8.58 In terms of section 108(2) of the Constitution, a person who alleges that a particular action or decision of the Government is not amenable to judicial review bears the burden of establishing his allegation. He or she must pinpoint a provision in the Constitution which deprives, or takes away from, the High Court the power to review such an action or decision. The provision must be found within the four walls of the Constitution. A statutory provision is of no assistance: see sections 5 and 199 of the Constitution. I will not waste time discussing the position of the common law and customary law: see sections 48 and 200 of the Constitution.

8.59 I am fortified in my decision by the Latin maxim "expression unius est exclusion alterious", that is, the expression of one thing is the exclusion of another. Under this maxim, the mention of one thing within a statute, contract, will and the like implies the exclusion of another thing not so mentioned. The maxim, though not a rule of law, is an aid to construction. According to Baron's Law Dictionary, 9th Edition, the maxim has application when:

"in the natural association of ideas, that which is expressed is so set over by way of contrast to that which is omitted that the contrast enforces the affirmative inference that that which is omitted must be intended to have opposite and contrary treatment. Thus a statute granting certain rights to "police, fire, and sanitation employees" would be interpreted to exclude other public officers not enumerated in the statute. This is based on presumed legislative intent. As such, a court is free to draw a different conclusion where for some reason this intent cannot be reasonably inferred."

8.60 The maxim has been repeatedly applied by our courts. For example, in the case of the **Registered Trustees of the Public Affairs Committee v. Attorney General and the Speaker of the National Assembly and the Malawi Human Rights Commission, HC/PR Civil Cause 1861 of 2003(unreported),** Justice Chipeta used the maxim to arrive at the decision that amendment of section 65 of the Constitution does not require prior referendum:

"Section 196, as read with the schedule to the Constitution, is very clear on the provisions it directs to be amended after first referring the proposed amendment to a referendum. It very clearly covers amendments to Sections 32 and 40, among others, but it also very clearly does not cover Section 65 of the Constitution. I thus understand this provision to mean that where

Parliament wants to amend Section 32 or Section 40 directly, it has no option but to comply with the requirement of a prior referendum, unless it is otherwise proceeding by virtue of Section 196(3).

There is, it is to be noted, nothing in this provision extending the referendum requirement to amendments that indirectly affect rights arising from the provisions listed in the schedule. On this point I find the argument advanced on behalf of the defendants based on the maxim expressio unius est exclusio alterius i.e. the specific mention of one thing is the exclusion of the other, quite compelling and appropriate."

8.61 In the matter under consideration, I am satisfied that the maxim applies with equal force to section 108(2) of the Constitution. I am unable to find reasons for holding otherwise. As already observed, the saving ("saving" coined from the phrase *"save as otherwise provided by this Constitution*") in section 108(2) of the Constitution only relates to provisions in the Constitution.

8.62 I hasten to add that even if a party were to find such a provision in the Constitution, the battle will not have been won at that stage. There is another legal hurdle to be surmounted. This is what yours truly found out in **Attorney–General v. Fred Nseula [1997] 2 MLR 50**. I had conduct of this case on behalf of the Attorney General both in the High Court and the Supreme Court as Senior State Advocate.

8.63 The relevant facts in a nutshell were as follows. Mr. Fred Nseula was elected as United Democratic Front Member of Parliament for the Mwanza North constituency in the 1994 general elections. He challenged the Speaker's decision which had declared Mwanza North constituency's seat vacant on the basis that he had *"crossed the floor"* by joining the Malawi Congress Party which was also represented in the National Assembly. It was on the authority of section 65 of the Constitution and after a debate had taken place on the issue in the National Assembly, that the Speaker declared Mwanza North constituency's seat vacant. The issue before the High Court was for it to find whether or not Mr. Nseula had indeed *"crossed the floor"* in terms of section 65(1) of the Constitution.

8.64 The Attorney General raised a preliminary objection, namely, whether the High Court has powers to review a decision of the Speaker made in the course of the proceedings of the National Assembly. The objection was based on section 60 (1) and (2) of the Constitution. The subsections state:

"(1) The Speaker, every Deputy Speake, and every member of the National Assembly shall, except in cases of treason, be privileged from

> *arrest while going to, returning from or while in the precincts of the National Assembly and shall not, in respect of any utterances that forms part of the proceedings in the National Assembly, be amenable to any other action or proceedings in any court, tribunal or body other than Parliament.*
>
> *(2) All official reports and publications of Parliament or of its proceedings or of the proceedings of any committee of the Parliament shall be privileged and utterances made in the Parliament or in any committee thereof wherever published shall be protected by absolute privilege."* – Emphasis supplied by underlining

8.65 The High Court (Mwangulu J, as then was, presiding) ruled that the fact that the matters in the house were covered by absolute privilege did not take the case outside the purview of the court: see **Fred Nseula v. Attorney General & Another HC 1997 MLR 294**. Dissatisfied with the ruling, the Attorney General appealed to the Supreme Court of Appeal which held that parliamentary privilege, whether absolute or qualified, did not extend to constitutional interpretation:

> *"Courts have, therefore, a constitutional responsibility to review all constitutional decisions because they are the protectors and guardians of the fundamental law of our country. Courts have this responsibility not only on matters involving fundamental human rights of a member which, in our view, would restrict the constitutional powers of review by the courts. ...*
>
> *We are satisfied ... that the High Court has jurisdiction to review the Speaker's decision on any constitutional provision. ... Here the Speaker was clearly interpreting a constitutional provision and neither he nor the National Assembly itself can extend parliamentary privilege to the interpretation of the fundamental law of the country which is, and must remain, the constitutional responsibility of the courts."*

8.66 It is not difficulty to understand why the threshold for showing that a matter is not amenable to judicial review has to be that high. A comparative analysis of the Independence (1964) Constitution, the Republican (1966) Constitution and the new dispensation (1994) Constitution will show, among other notable things, that the first two Constitutions did not contain an express provision on judicial review. The absence of such a provision is thought to have contributed to obstructing access to justice, particularly access to effective remedies.

8.67 In this regard, the framers of our Constitution (I leave for another day the discussion of the distinction between being a framer of a constitution and being a drafter of one or more draft texts on one or two subject matters for discussion at a constitutional conference.) felt the need or necessity for having an explicit provision on the matter.

8.68 They were also very much alive to the danger of having a provision on judicial review that could easily be watered down or rendered useless through Parliament enacting statutes that would exempt actions or decisions of certain public offices from judicial scrutiny. It is for this reason that the provisions of section 108(2) of the Constitution were made robust enough to ensure that almost no action or decision by a public body escapes judiciary inquiry.

8.69 Developments within the last few years have shown a growing trend of claims being made left, right and centre to the effect that actions or decisions of certain constitutional or statutory bodies are not amenable to judicial review. Fortunately or unfortunately, they have been unable to find a provision in the Constitution to sustain their respective claims. With due respect, please stop wasting the Court's time by citing loads and loads of cases from foreign jurisdictions that do not have in their constitutions provisions on judicial review that are worded in the same or similar terms as section 108(2) of the Constitution. In terms of section 11(2) (c) of the Constitution, a court is enjoined, when interpreting the provisions of the Constitution to have regard, where applicable, to "current norms of public international law and comparable foreign case law." As already mentioned, our Constitution is unique in expressly stating the test to be met for an action or decision to be not amenable to judicial review.

8.70 Allow me to finish discussing section 108 of the Constitution on a rather personal and, I believe, lighter note. This other day, not in the distant past, in the course of Counsel making oral submissions in a judicial review case, I asked Counsel to enlighten me on their understanding of the phrase *"save as otherwise provided by this Constitution"* in section 108(2) of the Constitution", Counsel A (a lawyer with over 12 years of experience) was quick to say that he had hitherto never paid any special attention to the phrase. Counsel B (a lawyer of considerable experience as well) mumbled something about the need for the Court to read section 108(2) of the Constitution together with sections 7, 8 and 9 of the Constitution.

8.71 I have been on the bench long enough now (of course there are other Judges who have been there for much longer periods) to know from the answers being given by Counsel that he or she has a good grasp of the legal point being canvassed by the Court or not. With due respect to Counsel B, I could easily tell that the provision had not before then been the subject of his scrutiny.

8.72 Before others are mislead by the answer given by Counsel B, there is nothing in sections 7, 8 and 9 that provide otherwise than what is in section 108(2) of the Constitution regarding judicial review.

8.73 Chapter XIV of the Act makes provision regarding local government authorities, including their composition and jurisdiction, According to section 146, local authorities have responsiblity for:

> *(a) the promotion of infrastructural and economic development, through the formulation and execution of local development plans and the encouragement of business enterprise;*
>
> *(b) the presentation to central government authorities of local development plans and the promotion of the awareness of local issues to national government;*
>
> *(c) the consolidation and promotion of local democratic institutions and democratic; and*
>
> *(d) such other functions, including the registration of births and deaths and participation in the delivery of essential and local services, as may be prescribed by any Act of Parliament*.

8.74 Section 199 of the Constitution provides for the status of the Constitution. It states that the *"Constitution shall have the status of supreme law and there shall be no legal or political authority save as provided by or under this Constitution*."

8.75 Section 200 of the Constitution is a saving provision in respect of laws:

> *"Except in so far as they are inconsistent with this Constitution, all Acts of Parliament, common law, and customary law in force on the appointed day shall continue to have force of law, as if they had been made in accordance with and in pursuance of this Constitution:*
>
> *Provided that any laws currently in force may be amended or repealed by an Act of Parliament or be declared unconstitutional by a competent court."* Emphasis by underlining supplied

8.76 Finally, there is section 211 of the Constitution. The section deals specifically with the relationship between international law and municipal law. It provides thus:

> *"(1) Any international agreement ratified by an Parliament shall form part of the law of the Republic if so provided for in the Act of Parliament ratifying agreement.*

(2) *International agreements entered into before the commencement of this Constitution and binding on the Republic shall form part of the law of the Republic, unless Parliament subsequently provides otherwise or the agreement otherwise lapse.*

(3) *Customary International Law, unless inconsistent with this Constitution or on Act of Parliament, shall have continued application."*

9.0 STATUTORY FRAMEWORK

9.1 Disaster Preparedness and Relief Act (Cap.33:05)

9.1.1 The Act was enacted in 1991. It provides for the coordination and implementation of measures to alleviate effects of disaster and the establishment of an institutional framework for disaster management, declaration of a state of disaster and the creation and management of a disaster appeal fund.

9.1.2 The term "disaster" has been defined as meaning:

> *"an occurrence (whether natural, accident or otherwise) on a large scale which has caused or is causing or is threatening to cause-*
>
> *(a) death or disruption of persons, animals or plants;*
>
> *(b) disruption, pollution or scarcity of essential supplies;*
>
> *(c) disruption of essential services;*
>
> *(d) influx of refugees into or out of Malawi*
>
> *(e) plague or epidemic disease that threatens life or wellbeing of the community,*

9.1.3 It is not uninteresting to note that the Constitution, in section 45, restricts "disaster" to natural disaster only. In the premises, the question whether or not corona virus falls within the term "natural disaster" is a valid one.

9.1.4 Section 3 of the Act establishes the office of the Commissioner for Disaster Preparedness and Relief. His principal function is to coordinate all disaster preparedness and disaster relief activities in Malawi.

9.1.5 Part III of the Act contains provisions relating to, among other things, the establishment, composition and the functions of the National Disaster Preparedness and Relief Committee (NDPRC).

9.1.6 In terms of section 6 of the Act, NDPRC consists of:

"(a) the following ex-officio members-

(i) the Secretary to the President and Cabinet, or his representative;

(ii) the Secretary for Health, or his representative;

(iii) the Secretary for Community Services, or his representative;

(iv) the Secretary for Local Government, or his representative;

(v) the Secretary to the Treasury, or his representative;

(vi) the Secretary for Economic Planning and Development, or his representative;

(vii) the Secretary for Works, or his representative;

(viii) the Secretary for Agriculture, or his representative;

(ix) the Secretary for Forestry and Natural Resources, or his representative;

(x) the Secretary for Transport and Communications, or his representative;

(xi) the Inspector General of Police, or his representative;

(xii) the Army Commander, or his representative;

(xiii) the Secretary for Youth and Culture, or his representative;

(b) not less than three and not more than five other members representing the non-governmental sector appointed by the Minister."

Question: Can the membership/composition of NDPRC be changed other than through Parliament enacting an amendment to section 6 of the Act?

9.1.7 Section 10 of the Act provides that the Minister shall, by writing under his hand, designate one member of NDPRC to be the chairman.

9.1.8 The functions of the NDPRC are spelt out in section 13 of the Act. NDPRC is generally responsible for coordinating the implementation of measures to alleviate disasters in Malawi.

Question 1: Can the functions of NDPRC be changed other than through Parliament enacting amendments to section 13 of the Act?

Qusestion 2: Can these functions be taken away from NDPRC and be assigned to another body, at ministerial level or otherwise, other than through Parliament enacting necessary legislation? [No need for giving context to these questions – *res ipsa loquitur*]

Question 3: Does the responsibility for co-ordinating the implementation of measures entail being responsible for implementing the measures?

9.1.9 Below NDPRC is the National Disaster Preparedness and Relief Technical Committee.

9.1.10 Section 24 sets out functions of area civil protection officers and it states:

> *"(1) Subject to this Act, an area civil protection officer shall, within the civil protection area for which he has been appointed, be responsible for -*
>
> *(a) the establishment, maintenance and command of civil protection organizations;*
>
> *(b) the provision, operation and co-ordination of all civil protection services and activities;*
>
> *(c) giving such orders and taking such measures, during a state of disaster, as in his opinion are reasonably necessary in order to deal with such state of disaster;*
>
> *(d) co-ordinating the use of materials and services made available by government departments, local authorities, statutory bodies and other non-governmental organizations during a state of disaster; and*
>
> *(e) the preparation of reports on civil protection generally in his civil protection whenever he is required to do so by the regional civil protection officer or by the Commissioner or the committee.*
>
> *(2) In the exercise of his functions, an area civil protection officer may-*

(a) enter into arrangements, other than financial arrangements with any person whereby that person makes available or under-takes to make available his services or those of his staff, whether individually or in units under the control of that person, for the purpose of carrying out such civil protection measures and activities as may be agreed upon;

(b) cause personnel to be trained for civil protection purposes within the civil protection area under his jurisdiction;

(c) disseminate information and advice on matter relating to civil protection to local authorities or to the public generally.

(3) Whenever it is possible to do so, an area civil protection officer shall exercise his powers under this Act after consultation and in co-operation with the District Commissioner and the commanding officers of the Malawi Police Service and the Malawi Defence Force within his civil protection area

(4) Subject to any instructions given to him by the area civil protection officer for his area, an assistant to the area civil protection officer may exercise all the powers conferred, and shall perform all the duties imposed, upon and area civil protection officer under this Act."

9.1.11 Part VIII of the Act sets out the general powers of civil protection officers. The Part comprises sections 29 (Interpretation), 30 (Orders by civil protection officers) and 31 (powers of civil protection officers to requisition land and property).

9.1.12 Part VIII of the Act will be quoted in full:

"29. In this Part-

"Civil Protection Officer" includes a regional civil protection officer, an officer assistant to a regional civil protection officer, an area civil protection and an officer assistant to an area civil protection officer.

30. (1) Subject to this act, a civil protection officer may, by order in writing, direct any person-

(a) to supply him with information relating to the existence and availability of any service, facility or thing whatsoever which may be

used for or in connexion with civil protection and which is under the control or in the possession of such person;

(b) to maintain such specified stocks of fuel, food, water, medical supplies, for use during a state of disaster as he may reasonably be expected to maintain; and

(c) while a declaration of a state of disaster under this Act is in force, to perform any work or render any service which, as a result of the disaster, is reasonably necessary for the purpose of dealing with the situation.

(2) Every civil protection officer ad every person employed in a civil protection capacity shall keep secret and aid in keeping secret any information supplied in compliance with an order given under paragraph (a) of subsection (1).

(3) Any person aggrieved by an order given under paragraph (a), (b) or (c) of subsection (1) may appeal in writing against the order to the Minister.

(4) In any appeal under subsection (3), the Minister, after inviting the civil protection officer concerned to submit written representation in the matter and considering any representations so submitted, may confirm. Vary or set aside the order appealed against or give such other directions in the matter as he thinks appropriate.

31. (1) Subject to subsection (2), a civil protection officer may, while a declaration of a state of disaster under this Act is in force, take possession or control of any land or other property whatsoever for the purpose of dealing with the situation that has arisen.

(2) As soon as possible after taking possession or control of any land or property under subsection (1), a civil protection officer shall cause written notice of such taking to be served on any person owning or possessing such land or property;

Provided that, if it is expedient to do so, the civil protection officer shall cause such notice to be served before taking possession or control of the land or property concerned.

(3) Any person from whom possession or control of any land or property has been or is about to be taken in accordance with this section may, if he objects to such taking, notify in writing the civil protection officer concerned accordingly, and upon such notification the civil protection officer, if he does not accept the

objection, shall instruct the Attorney General to apply to the High Court for a determination of his right to exercise his powers under this Act to take possession or control of the land or property in question, and such application shall be made within thirty days after the written notification by the person objecting.

(4) On an application under subsection (3), the High Court shall, unless it is satisfied that the exercise of the power by the civil protection officer concerned was reasonably justified in the circumstances of the situation arising or existing as a result of the disaster concerned or giving rise to the declaration of the state of disaster for the purpose of dealing with that situation, order the civil protection officer to return any land or property which he has taken into his possession or control or to cancel his notice of intention to take possession or control thereof, as the case may be.

(5) When the continued possession or control by a civil protection officer of any land or property taken under this section is no longer required or is no longer reasonably justified for the purpose of this Act, that land or property shall, wherever possible, be promptly returned to the person entitled to its possession or control and as far as possible in the condition in which it was at the time of such taking of possession or control.

(6) Adequate compensation shall be paid promptly out of the Fund for -

(a) the taking of possession or control of any land or property under this section;

(b) where appropriate, any failure to return any land or property in accordance with subsection (4) and (5); and

(c) any damage to any land or property taken under this section.

(7) The owner or any other person entitled to the return of any land or property under subsection (5) or entitled to compensation under subsection (6) may apply to the High Court for the return of the land or property or for the determination of his right thereto or the amount of compensation, as the case may be, and the High Court shall make such order in respect thereof as it thinks fit.

(8) Part II of the Lands Acquisition Act shall, mutatis mutandis, apply in respect of a claim for compensation for land taken under this section.

(9) No land or other property owned or possessed by the Government shall be taken under this section without the consent of the Minister responsible for the land."

9.1.13 Part IX deals with declaration of a state of disaster and is consists of two sections, that is, sections 32 (Declaration of a state of disaster) and 33 (Communication to the National Assembly). These two sections are couched in the following terms:

> *"32 (1) If at any time it appears to the President that any disaster is of such a nature and extent that extraordinary measures are necessary to assist and protect the persons affected or likely to be affected by the disaster in any area within Malawi or that circumstances are likely to arise making such measures necessary, the President may, in such manner as he considers fit, declare that, with effect from a date specified by him in the declaration, a state of disaster exists within an area defined by him in the declaration:*
>
> *Provided that where such declaration has been made in any manner other than by notice in the Gazette, the President shall, as soon as possible after making it, cause it to be published in the Gazette.*
>
> *(2) The declaration of a state of disaster under subsection (1) shall remain in force for a period of three months from the date specified in the declaration as the commencement date of the state of disaster, unless the President by notice in the Gazette, withdraws such declaration before the expiry of such period:*
>
> *Provided that the President may, from time to time, extend or further extend such period by not more than another three months and shall do so by notice in the Gazette, published before the expiry of such period or any such extension thereof/.'*
>
> *33. Where a state of disaster has been declared under section 32, the Minister shall communicate such declaration to the National Assembly during the meeting next occurring after the declaration."*

9.1.14 We have to pause here. Those readers that are eagle-eyed as I am will have observed that what stands out like a sore thumb in these two sections is that this Part only gives the President the power to declare a state of disaster, witness the words "*the President may, in such manner as he considers fit, declare that, with effect from a date specified by him in the declaration, a state of disaster exists within an area defined by him in the declaration"*. Nowhere in the Act is the President given powers to impose or introduce measures to deal with the state of disaster so declared. It is to the other Parts of the Act, such as Parts VI, VIII and XI, that we have to look for the answer as to the measures that may be applied during a state of disaster.

9.1.15 There is also the matter concerning communication. Needless to say, clear communication is important at all stages of the emergency process. The following matters pertaining to a state of disaster must be communicated in clear language to all involved, that is, the administration, the judiciary, the legislature and the general public:

(a) the commencement date of and duration of the state of disaster;

(b) who has declared it?

(c) why has it been declared?

(d) perhaps more importantly, the law under which it has been made (we will revert to this issue)

9,1,16 Part XI of the Act provides for the emergency powers of the Minister (repeat "Minister" and not the President, Cabinet or ministerial committee). Section 42 of the Act allows the Minister to take over certain powers and duties during disaster. In terms of section 43 of the Act, the Minister may give directions in respect of burials, etc., during disaster. Part XI of the Act is worded thus:

> *"42. (1) Where a state of disaster has, under this Act, been declared to exist in any area and the Minister considers that the civil protection organization in that area is unable to provide adequate civil protection to meet the disaster, the Minister, on the advice of the Committee, may -*
>
> *(a) by notice published in such manner as he thinks fit-*
>
> *(i) take over, to such extent and for such purposes as he may specify in the notice, any power or duty conferred or imposed by or under this Act upon the area civil protection officer for the civil protection area concerned;*
>
> *(ii) confer or impose upon any person or authority any power or duty conferred or imposed upon an area civil protection officer or other person by or under this Act.*

Provided that if such notice has been made in any manner other than by publication in the Gazette, the Minister shall, as soon as possible after making the notice, cause it to be published in the Gazette;

(b) direct any person employed in the public service to render such assistance as the Minister may direct to any area civil protection officer or other person upon whom a power or duty is conferred by or under this Act.

(2) Where the Minister has, by notice under subsection (1) -

(a) taken over any powers or duties; or

(b) conferred or imposed powers or duties on any person or authority,

any reference in this act to the exercise of such powers or the performance of such duties by any person or authority shall be construed as reference to the exercise of the powers or the performance of the duties by the Minister or the person or authority upon whom he has conferred or imposed such powers or duties."

9.1.17 Section 47 of the Act empowers the Minister to "make regulations providing for all matters which, in his opinion, are necessary or expedient for giving effect to this Act". By the very nature of the subject matter covered by this Act, you would expect that a good number of sets of regulations would have been made under the Act since the Act came into operation on 16th March 1992. You can imagine my shock at finding out that no regulations at all have been made under the Act over the last twenty years (Regulations should not be confused with notices or direction referred to in the Act)

9.1.18 In conclusion on this Act, as already stated, the Act was enacted in 1991 but it came into operation in 1992. This is well before the adoption of the 1994 Constitution. No wonder, there are some glaring discrepancies in the Act particularly when it comes to the protection of human rights as enshrined in Chapter IV of the Constitution.

9.1.19 By way of illustration, a comparison of the powers given under the Act during a state of disaster and the provisions in section 45 of the Constitution relating to a declaration of state of emergency is telling. The Court has to be vigilant to ensure that no one resorts to the measures provided under section 45 of the Constitution when what has been declared is a state of disaster under the Act and not a state of emergency as envisaged by the Constitution.

9.1.20 A related matter to consider is what are the things that can be done under the Act following declaration of a state of disaster? To my mind, the answer is to be found in sections 24, 29, 30, 31, 42 and 43 of the Act. It will be interesting to see or hear during the substantive hearing of the judicial review proceedings whether the Act can be the legal basis of the different kinds of measures that various authorities have been purporting to impose upon the people in Malawi the last few weeks.

9.1.21 In 2014, a review of the Act was commissioned through the Department of Disaster Management Affairs and a draft Disaster Risk Management Bill has since been prepared but it has yet to be taken to the National Assembly for debate. Why such an exercise has to take ages before being brought to its completion is always a wonder.

9.2 Immigration Act (Cap.15:03)

9.2.1 The Immigration Act came into force in 1964. The purpose of the Act is to (a) regulate the entry of persons into Malawi, (b) prohibit entry into Malawi of undesirable persons and (c) make provision for the deportation from Malawi of undesirable persons.

9.2.2 Section 4 of the Act makes provision regarding prohibited immigrants. It has to be quoted in full:

> *"(1) Subject to this Act, the following persons shall be prohibited immigrants and their entry into or presence within Malawi shall be unlawful-*
>
> *(a) any person deemed by the Minister on economic grounds, or on account of standard or habits of life, to be an undesirable inhabitant or to be unsuited to the requirements of Malawi;*

(b) any person who is unable, by reason of deficient education, to read and write any one of any class of language as may be prescribed by the Minister by regulation to the satisfaction of an immigration officer;

(c) any person who at the time of his entry is likely to become a public charge by reason of infirmity of mind or body, or because he is not in possession, for his own use, of sufficient means to support himself and such of his dependants as he brings or has brought with him into Malawi;

(d) any idiot or epileptic, or any person who is insane or mentally deficient, or any person who is deaf and dump, or deaf and blind, or dumb and blind, or otherwise physically afflicted, unless in any such case he or a person accompanying him or some other person gives security to the satisfaction of the Minister for his permanent support in Malawi, or for his removal therefrom whenever required by the Minister;

(e) <u>any person who is infected, afflicted with or suffering from a prescribed disease, unless he is in possession of a permit issued by the Minister, or any person authorized by the Minister, to enter and remain in Malawi issued upon prescribed conditions and complies with such conditions;</u>

(f) any person who, not having received a free pardon, has been convicted of any offence prescribed by the Minister as an offence for the purposes of this section;

(g) any prostitute or homosexual, or any person, male or female, who lives or has lived on or knowingly receives or has received any part of the earnings of prostitution or homosexuality, or has procured men or women for immoral purposes;

(h) any person who, from information received through any official or diplomatic channels, is deemed by the Minister to be an undesirable inhabitant of or visitor to Malawi;

(i) any person who, after the date of commencement of this Act, has been deported from or ordered to leave Malawi; or

> *(j) the wife and the children under the age of eighteen years and any other dependants of a prohibited immigrant.*
>
> *(2) This section shall not apply to any person who is a citizen of Malawi.*
>
> *(3) If an immigration officer is of the opinion that any person who has entered Malawi, including any person who entered Malawi before the date of commencement of this Act, and who is not a citizen of Malawi, has become or is likely to become a public charge by reason of infirmity of mind or body, or because he is not in possession, for his own use, of sufficient means to support himself and such of his dependants as he has brought into Malawi, including dependants brought into Malawi by him before the date of commencement of this Act, the Chief Immigration Officer may apply to the Minister for a declaration that such person is a prohibited immigrant.*
>
> *(4) Before making any application in terms of subsection (3), the Chief Immigration Officer shall notify the person concerned of his intention to do so, and shall enquire of him as to whether or not he has any representation which he wishes to make to the Minister. Any such representations shall be reduced to writing and signed by the person concerned. The Chief Immigration Officer shall then make application to the Minister for a declaration and shall forward with the application any such representations as may have been made. On such application the Minister may declare the person concerned to be a prohibited immigrant and the decision of the Minister shall be final and conclusive and not subject to appeal to any Court.*
>
> *(5) Whenever the Minister exercises any power conferred upon him by this section, he shall cause written notice of that fact to be transmitted to the Chief Immigration Officer who shall notify the immigration officer and the person concerned."* – Emphasis by underlining supplied

9.2.3 The questions to ponder include whether or not (a) coronavirus is a prescribed disease in terms of section 4(1)(e) of the Immigration Act and (b) the Claimants were found to be "infected, afflicted with or suffering from" corona virus. It is significant to note that, in terms of the language of section 4(1)(e), the test to be satisfied is not that an immigration officer has "reasonable suspicion" that a person is infected, afflicted with or suffering from corona virus but that it has to be a matter

of fact that the person is so "infected, afflicted with or suffering from" corona virus.

9.2.4 Section 39 of the Act makes provision regarding the making of deportation order and it states as follows:

> *"(1) The Minister may, if he thinks fit, in any such case as is mentioned in subsection (2), make an order (in this Act referred to as a "deportation order" requiring any person (not being a citizen of Malawi) to leave and remain thereafter out of Malawi.*
>
> *(2) A deportation order may be made in the case of a person not being a citizen of Malawi in the following circumstances, that is to say-*
>
> *(a) if any court certifies to the Minister that that person has been convicted either by that court, or by an inferior court from which the case of that person has been referred for sentence or brought by way of appeal of any offence for which the court has power to impose a sentence of imprisonment and that the court recommends that a deportation order be made in the case of that person; or*
>
> *(b) if the Minister is satisfied that it is in the interests of defence, public safety, public order, public morality or public health to make a deportation order against that person.*
>
> *(3) Where any case in which a court has made a recommendation for deportation is brought by way of appeal against conviction or sentence before any higher court and that court certifies to the Minister that it does not concur in the recommendation, that recommendation shall be of no effect, but without prejudice to the power of the Minister to make a deportation order under subsection (2) (b)."*

9.2.5 Needless to say, the Immigration Act is archaic.

9.3 <u>Public Health Act (Cap.34:01)</u>

9.3.1 The Public Health Act was enacted in 1948 with a view to amend and consolidate the law regarding the preservation of public health. The last amendment to the Act was effected in 1975.

9.3.2 Three Parts of the Act, namely, Part III, Part IV and Part V, are relevant. Part II of the Act deals with notification of infectious diseases and the material provisions are to be found in sections 11(Notifiable diseases) and 12 (Declaration of notifiable diseases by the Minister):

> *"11. The provisions of this Act, unless otherwise expressed, shall, so far as they concern notifiable infectious diseases, apply to anthrax; blackwater fever; cerebro-spineal meningitis or cerebro-*

spinal fever; cholera; diphtheria or membranous croup; dysentery (bacillary); encephalitis lethargica; enteric or typhoid fever (including paratyphoid); erysipelas; hydrophobia or human rabies; influenza; measles; plague; acute primary pneumonia; acute anterior poliomyelitis; acute polioencephalitis; puerperal fever (including sepeticaemia, pyaemia, ceptic pelvic cellulitis or other serious septic condition occurring state); relapsing fever; scarlet fever or scarlatina; sleeping sick-ness or human trypanosomiasis; small pox or any disease resembling small pox; all forms of tuberculosis which are clinically recognizable apart from reaction to the tuberlin test; typhus fever; whooping –cough and yellow fever.

12. The Minister may by notice published in the Gazette-

(a) declared that nay infectious disease other than those specified in section 11 shall be a notifiable disease under this act;

(b) declare that only such provisions of this act as are mentioned in such notice shall apply to any such notifiable disease;

(c) restrict the provisions of this act, as regards the notification of any disease, to the district of any local authority or to any area defined."

9.3.3 Part IV of the Act contains provisions relating to prevention and suppression of infectious diseases and the provisions include:

(a) the powers of medical officers [section 16];

(b) cleansing and disinfection of premises and articles therein [section 17];

(c) provision of means of disinfection [section 19];

(d) provision of conveyance for infected persons [section 20]; and

(e) provision for removal to hospital of persons suffering from infectious diseases where serious risk [section 21].

9.3.4 It is necessary that these provisions be set out in full:

"16. A medical officer of health may at any time enter and inspect any premises in which he has reason to believe that any person suffering or who has recently been present, or any inmate of which has recently been exposed to the infection of any infectious disease, and may medically examine any

person in such premises for the purpose of ascertaining whether such person is suffering or has recently suffered from or is a carrier of any such disease and may cause a post-mortem examination to be made on any corpse for the purpose of ascertaining if the cause of death has been any infectious disease.

17. (1) If a local authority is satisfied upon a certificate of a medical officer or a health inspector that the cleansing and disinfection of any premises, and the disinfection and the destruction of any articles therein likely to retain infection, would tend to prevent the spread of any infectious disease, the authority shall give notice to the occupier of the premises that it will at his own cost cleanse and disinfect the premises and disinfect or, as the case may require, destroy any such articles therein.

(2) The authority may, twelve hours after the delivery of such notice, or at any time with the consent of the occupier, cause the premises to be cleansed and disinfected and the articles to be disinfected or destroyed, as the case may require, and may, if it thinks fit, recover from him the expenses reasonably incurred by it in so doing.

(3) Where a local authority has under this section disinfected any premises or article, or destroyed any articles, it may if it thinks fit, pay compensation to any person who has suffered damage by its action.

(4) For purposes of this section, the owner of unoccupied premises shall be deemed to be in occupation thereof.

19. Any local authority may provide a proper place, with all necessary apparatus and attendance, for the disinfection of bedding, clothing or other articles which have become infected, and may cause any articles brought for disinfection to be dealt with free of charge.

20. Any local authority may provide and maintain a conveyance or conveyances for the carriage of persons suffering from any infectious disease and may pay the expenses of carriage therein of any person so suffering to a hospital or other place of detention.

21. Where the local authority is satisfied on a certificate of medical officer of health that a person is suffering from an infectious disease and –

(a) that his circumstances are such that proper precautions to prevent the spread of infection cannot be taken, or that such precautions are not being taken; and

(b) that serious risk of infection is thereby caused to other persons; and

(c) that accommodation for him is available in a suitable hospital or institution,

the local authority may order him to be removed thereto and maintained at the cost of the authority, and to be there detained until such medial health officer of health is satisfied that he is free from infection or can be discharged without danger to the public."

9.3.5 Part V of the Act sets out special provisions regarding certain formidable epidemic or endemic diseases. Sections 30 (Forminable or endemic diseases) and 31 (Power to make Rules for prevention of disease) are relevant:

"30. This Part shall apply to small pox, plague, cholera, yellow fever, cerebro-spinal meningitis, typhus, sleeping sickness or human trypanosomiasis and any other disease which the Minister may by notice declare to be a formidable epidemic or endemic disease for the purpose of the Part.

31. Whenever any part of Malawi appears to be threatened by any disease described in the last preceding section, the Minister may declare such part an infected area and may take Rules for all or any of the following purposes, namely -

(a) for the speedy interment of the dead;

(b) for house to house visitation;

(c) for the provision of medical aid and accommodation, for the promotion of cleansing, ventilation and disinfection and for guarding against the spread of disease;

(d) for preventing any person from entering or leaving any infected area without undergoing all or any of the following-

Medical examination, disinfection, inoculation, vaccination or passing a specified period in an observation camp or station;

(e) for the formation and regulation of hospitals and observation camps or stations and for the placing therein and reception of persons who are suffering from or have been in contact with persons suffering from infectious disease.

(f) for the destruction or disinfection of buildings, furniture, goods or other articles, which have been used by persons suffering from infectious disease, or which are likely to spread the infection.

(g) for the removal of persons who are suffering from an infectious disease and persons who have been in contact with such persons;

(h) for the removal of corpses;

(i) for destruction of rats, the means and precautions to be taken on shore or on board vessels for preventing them passing between vessels and the better prevention of the danger of spreading infection by rats;

(j) for destruction of mosquitoes, the means and precautions to be taken in respect of aircraft arriving at or depart from Malawi and for preventing mosquitoes from passing from aircraft to land or from land to aircraft, and the better prevention of the danger of spreading infection by mosquitoes;

(k) for the removal and disinfection of articles which have been exposed to infection;

(l) for prohibiting any person from living in any building or using any building for any purpose whatsoever if in the opinion of a medical officer of health any such use is liable to cause the spread of any infectious disease; any Rules made under this section may give a medical officer of health power to prescribe he condition on which such a building may be used;

(m) for the compulsory medical examination of persons suffering or suspected to be suffering from infectious disease;

(n) for the registration of residents in an infected area;

(o) for the registration of vehicles in an infected area;

(p) for the compulsory confiscation and disposal of canoes and fishing gear used by any person in breach of any rule relating to the disease known as sleeping sickness;

(q) for the control of wood cutting in an infected area;

(r) for the restriction of residence in, immigration to or emigration from, an infected area;

(s) for the control of fishing and hunting in an infected area;

(t) for any other purpose whether of the same kind or nature as the foregoing or not having for its object the prevention, control or suppression of infectious disease;

and may by order declare all or any the Rules so made to be in force within the whole or any part or parts of the infected area."

9.3.6 It has to be noted that what is specified in section 31 of the Act are NOT rules but matters in respect of which the Minister has be given powers to make rules, as in subsidiary legislation.

9.3.7 Prevention of introduction of infectious diseases is the subject matter of Part VI of the Act. Sections 38 (Power to enforce precautions at borders of Malawi), 39 (Removal of infected persons from railway trains), 40 (Isolation or surveillance of persons exposed to infection) and 41 (Powers of medical officers of health to inspect railway trains and medically examine passengers) provide as follows:

"38. (1) For the purpose of preventing the introduction of infectious disease into Malawi the Minister may by order _

(a) regulate, restrict or prohibit the entry into Malawi or any part thereof any person or of persons of any specified class or description or from any specified country, locality or area;

(b) regulate, restrict or prohibit the introduction into Malawi or any specified part thereof of any animal, article or thing;

(c) impose requirements or conditions as regards he medical examination, detention, quarantine, disinfection, vaccination, isolation or medical surveillance or otherwise of persons entering, or examination, detention, or disinfection or otherwise of such persons as aforesaid or of articles and things introduced into Malawi or any part thereof.

(2) Any person who contravenes or fails to comply with any such order shall be liable to a fine of £50 and to imprisonment for six months.

39. (1) Where any person arriving in Malawi by railway train or other vehicle is found to be suffering from any infectious disease, and in the opinion of a medical officer of health cannot be accommodated or cannot be nursed or treated so as to guard against the spread of the disease or to promote recovery, the medical officer of health may order the removal of such person to a hospital or place of isolation for such period as may be necessary in the interests of the patient or to prevent the spread of infection.

(2) All expenses necessarily incurred in dealing with a patient under this section shall be a charge against the said patient and may be recovered from him as a debt due to the Government. In the case of a person unable to pay any or all of such expenses necessarily incurred on his behalf, such expenditure or balance thereof shall be a charge on the Consolidated Fund.

40. (1) Where any person arriving by railway train or other vehicle within Malawi is believed to have been recently exposed to the infection, or to be in the incubation stage of , any notifiable disease, a medical officer of health may require such person to be removed to some hospital or place of isolation until considered free from infection, or alternatively may allow such person to proceed to his place of destination and there report himself to the local authority for medical surveillance by such local authority until considered free from infection.

(2) The medical officer of health shall in each instance notify the local authority of the district of such person's destination, of the fact that such person is believed to have been recently exposed to infection and has been allowed to proceed to his destination.

41 (1) Any medical officer of health may at any time board any railway train or other vehicle arriving within Malawi, and inspect any portion thereof or anything therein, and may medically examine any person travelling by such train or vehicle and require any such person to answer any question for the purpose of ascertaining if such person is infected by or has recently been exposed to the infection of any notifiable infectious disease.

(2) Any person who refuses to allow such officer to board any railway train or other vehicle or to make any inspection or medical examination as aforesaid or otherwise obstructs or hinders any such officer in the execution of his duty, or who fails or refuses to give any information which he may lawfully be required to give, or who gives false or misleading information to any such

officer, knowing it to be false or misleading, shall be guilty of an offence."

9.3.8 Just like the Immigration Act, the Public Health Act contains provisions that are utterly obsolete. According to World Health Organisation, the National Health Bill is under review to replace the Public Health Act of 1948 (WHO "Country Cooperation Strategy at a Glance" http://www.who.int/countries/en)

9.4 Local Government Act (Cap.22:01)

9.4.1 The Act was enacted in 1998. It consolidates the law relating to local government.

9.4.2 Section 6 of the Act spells out the functions of assemblies. The functions include:

(a) to make policy and decisions on local governance and development for the local government area;

(b) to consolidate and promote local democratic institutions and democratic participation;

(c) to promote infrastructural and economic development through the formulation, approval and execution of district development plans;

(d) to mobilize resources within the local government area for governance and development;

(e) to maintain peace and security in the local government area in conjunction with the Malawi Police Service;

(f) to make by-laws for the good governance of the local government area;

9.4.3 Additional functions of the Assemblies are stated in the Second Schedule. The Minister may, on the written request of an Assembly, exempt the Assembly from any of the functions specified in the Second Schedule. Further, the Minister may amend the Second Schedule.

9.4.4 Section 101 of the Act makes provision regarding power of entry. It states as follows:

> *"Subject to the Constitution, any person duly authorized in writing for the purpose by the Assembly may at all reasonable entry times enter any premises within the local government area for the purpose of the performance of the functions of the Assembly specified in such authorization:*
>
> *Provided that admission to any 'dwelling house shall not be demanded as of right unless fourty-eight hours notice of the intended entry has been given to the occupant."*

9.5 General Interpretation Act (Cap.1:01)

9.5.1 Section 17 of the General Interpretation Act deals with publication and commencement of subsidiary legislation. It provides that no subsidiary legislation shall come into operation unless it has been published in the Gazette: See also section 58 of the Constitution. Section 17 of the Act further provides that where no date of commencement is expressly provided therein or in any other written law, subsidiary legislation shall come into operation on the expiry of the day immediately preceding the day of its publication in the *Gazette* or, where it is enacted either therein or in some other written law that subsidiary legislation shall come into operation on some specified day, subject to section 18, it shall come into operation on the expiry of the day immediately preceding that day.

Question 1: Can a local authority introduce any measure meant to bind the people in the local authority other than through making subsidiary legislation?

Question 2: Can subsidiary legislation made by a local authority have legal force without the same being published in the *Gazette?* [Press conferences held to announce the banning of "street vending, wedding receptions, parties, etc" on my mind]

9.5.2 It is important that the Court should not be misunderstood. The Court is not in any way questioning the necessity or otherwise for introducing these measures. For the Court, the point for consideration is whether the measures sought to be adopted are being introduced in the manner required by the law. Of course if these measures are being issued as guidelines, recommendation,

advice, etc, a press conference and publication in one or two daily papers might perhaps be enough. However, I entertain grave doubts that measures carrying legal consequences can be introduced in such a manner. A court that seeks to interrogate such matters does this in the quest of ensuring that Malawi abides by the rule of law. It is very myopic for one to suggest that by raising such question the Judge is "unpatriotic".

10.0 RELEVANT INTERNATIONAL INSTRUMENTS

10.1 The use of emergency powers has always attracted attention at the global level. This is primarily because the most grave and systematic human rights abuses happen during public emergencies. It is during such times that states employ extraordinary powers to address threats and perceived threats to public order. The point is graphical put by J. Criddle in "Human Rights, Emergencies, and the Rule of Law" as follows"

> *"It is no coincidence that many of the most egregious human rights abuses associated with the conflict in Sudan's Darfur region such as genocide and crimes against humanity followed Sudan's 1999 declaration of a state of emergency."*

10.2 Section 45(4) (c) of the Constitution brings into our domestic legal regime the dimension of international standards. Article 4(1) of the International Convention on Civil and Political Rights (ICCPR) states:

> *"In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the grounds of race, colour, sex, language, religion or social origin."* – Emphasis by underlining supplied

10.3 Having regard to Article 4(1) of ICCPR, the Court cannot shy away from considering the question whether or not the statements about the corona virus in relation to the Claimants were motivated by racism or some other reason.

10.4 Article 4(2) of ICCPR mirrors more or less the provisions of section 45(2) of the Constitution and Article 15 of the European Convention on Human Rights.

10.5 The following points emerge from international instruments about the meaning of a public emergency which threatens the life of a state:

(a) there must be actual or imminent emergency;

(b) its effect must involve the whole state;

(c) the continuance of the organised life of the nation must be threatened; and

(d) the crisis or danger must be exceptional, in that normal limitation of rights permitted for the maintenance of public safety, public health and public order are inadequate.

10.6 Regarding the procedure for declaring a state of emergency, it must be clearly laid down in the law. The declaration must be formally proclaimed and it must involve the political organs of the state, that is, Parliament and the executive: see, in the case of Malawi, section 45(3) of the Constitution.

10.7 As regards access to justice, international human rights instruments require that all ordinary and special remedies, such as habeas corpus, should remain operative during the period of emergency with a view to affording protection to the individual with respect to his rights and freedoms which are not or could not be affected during emergency, as well as other rights and freedoms which may have been attenuated by emergency powers.

11.0 WHETHER OR NOT THE INTERLOCUTORY INJUNCTION SHOULD BE CONTINUED?

11.1 The main issue for determination in the present application is whether or not the Court should order the continuation of the interlocutory injunction that was granted to the Claimants.

11.2 An interlocutory injunction is a temporary remedy which is available before the rights of the parties have been finally determined: See **American Cyanamid Co. v. Ethicon Limited [1975] A.C. 396** (**American Cyanamid Case**) and **Ian Kanyuka v. Thom Chumia & Others, PR Civil Cause No. 58 of 2003.**

11.3 In the **American Cyanamid Case,** Lord Diplock laid down the following procedures as appropriate in principle:

1. Provided that the court is satisfied that there is a serious question to be tried, there is no rule that the party seeking an interlocutory injunction must show a *prima facie* case

2. The court must consider whether the balance of convenience lies in favour of granting or refusing interlocutory injunction

3. As regards the balance of convenience, the court should first consider whether, if the plaintiff succeeds, he would be adequately compensated by damages for the loss sustained between the application and the trial, in which case no interlocutory injunction should normally be granted

4. If damages would not provide an adequate remedy the court should then consider whether if the plaintiff fails, the defendant would be adequately compensated under the plaintiff's undertaking in damages, in which case there would be no reason upon this ground to refuse an interlocutory injunction

5. Then one goes to consider all other matters relevant to the balance of convenience, an important factor in the balance, should this otherwise be even, being preservation of the status quo

6. Finally, and apparently only when the balance still appears even, it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence.

11.3 The criteria are not inflexible. They should be read in the context of the principle that discretion of the court should not be fettered by laying down any rules which would have the effect of limiting the flexibility of the remedy. As was aptly put in **R v. Secretary of State for Transport, Ex-parte Factortame Ltd & Others (No.2) (1991) 1 A.C. 603** at 671:

> *"Guidelines for the exercise of the court's jurisdiction to grant interim injunctions were laid down in the* ***American Cyanamid Co. v. Ethicon Ltd [1975] A.C. 396*** *in the speech of Lord Diplock in that case, with which the remainder of their Lordships concurred. The words "guidelines" is used advisedly, because I do not read Lord Diplock's speech as intending to fetter the broad discretion conferred on courts. On the contrary, a prime purpose of the guidelines established in the Cyanamid case was to remove a fetter which appeared to have been imposed in certain previous cases…"*
> - Emphasis by underlining supplied

11.4 It is also worth noting that the procedure governing the grant of interlocutory injunction is the subject matter of Order 10, r. 27, of CPR which provides as follows:

> *"The Court may, on application, grant an injunction by an interlocutory order when it appears to the Court-*
>
> *(a) there is a serious question to be tried;*
>
> *(b) damages may not be an adequate remedy; and*
>
> *(c) it shall be just to do so,*
>
> *and the order may be made unconditionally or on such terms or conditions as the Court considers just."*

11.5 In the present case, the foregoing analysis of the applicable law and the relevant facts leaves me in no doubt at all that there are numerous and very weighty legal issues which have to be interrogated at the hearing of the substantive judicial review proceedings. The issues include the following:

(a) the Claimants contend that they were detained upon arrival at Kamuzu International Airport without being given any reason. This contention has not been challenged in the Defendants' sworn statement. As already discussed hereinbefore, section 43 of the Constitution accords every person (not just a Malawian citizen) the right to fair administrative action. I, therefore, hold the view that there is a triable issue here;

(b) there is the question regarding discrimination. The uncontested evidence of the Claimants is that they were in a group of 24 Chinese nationals, among other nationalities, that arrived in Malawi on the flight in question and some of the people in this group, including Chinese, were allowed entry into Malawi. The Claimants believe that they were discriminated against on the basis of race, nationality or status: see section 20 of the Constitution and Article 4(1) of ICCPR. I am inclined to agree with them that the Court needs to inquire into the question of the real reason for denying them entry into Malawi;

(c) the Defendants state that the Immigration Department "*came up with a resolution to refuse visas from all high risk countries*": see paragraph 13 of the Defendants' sworn

statement. The mention of the resolution raises more questions than answers. The questions include (a) can entry into Malawi be prohibited by means of a resolution, (b) who in the Department actually made the resolution, (c) under what law was the resolution made?

(d) there is the small matter of section 4 of the Immigration Act. It is most questionable that this provision is applicable to the Claimants in that there is no evidence before the Court that the Claimants were *"infected, afflicted with or suffering from a prescribed disease"*. As the matter stands, no Government *Gazette* has been produced containing a Government Notice issued under the Immigration Act listing coronavirus as prescribed disease for purposes of the Immigration Act;

(e) there is also the related question whether or not the Claimants were given written reasons for their detention. This is still an issue despite the fact that the learned Senior State Advocate conceded when making his submissions that the Claimants were not given any reasons because the Immigration Department did not have enough time to do so. The concession was being made in submissions and not in the Defendants' sworn statement. It is trite that submissions do not amount to evidence: see **Urban Mkandawire v. Council for the University of Malawi, HC/PR Civil Appeal No 24 of 2007 (unreported)**.

11.6. As already indicated in paragraph 11.5, the above list of triable issues is not exhaustive. There are so many others which have not been listed therein.

11.7 Having regard to the foregoing, it is clear that the contention by the Defendants that this matter does not raise any serious issues is completely hollow. The sherry effrontery of this contention is quite astounding. Actually, that such a contention was made makes me wonder if the Defendants paid enough attention to this case.

11.8 Now that the first hurdle regarding the question whether the Claimants have an arguable case is out of the way, it is time to turn to compensability, that is, the extent to which damages are likely to be adequate remedy for each party and the ability of the other party to pay.

11.9 The issue of damages has greatly exercised my mind. I am inclined to

agree with Counsel Kaonga that in so far as the purpose of the Claimants' visit to Malawi was *"to explore the beauty that Malawi is*", that in itself means that damages cannot be an adequate remedy. Out of all countries in the world, the Claimants chose Malawi. They could have gone to any other country but they opted to come to Malawi. With due respect to the learned Senior State Advocate, I do not agree with him that refunding the Claimants the money they spent on the air-tickets, accommodation, etc., would constitute adequate remedy.

11.20 In any case, like the present one, where personal liberties of an individual, irrespective of the individual's nationality, race, sex, etc, is at stake, the standard question *"Are damages an adequate remedy"* has to be re-phrased to read *"Is it just, in all the circumstances, that a plaintiff should be confined to his remedy in damages?"*: see dicta of Sachs L.J in **Evans Marshall & Co. Ltd. v. Bertola S.A. [1973] 1 W.L.R. 349 at 379D**

11.21 There can be no debate that the personal liberties of the Claimants are at stake in the present case.

11.22 In these circumstances, it is my finding, and I so hold, that damages would be an inadequate remedy in the application before me. I am fortified in my holding by the decision of the Supreme Court of Appeal in the case of **Malawi Savings Bank v. Sabreta Enterprises Limited, MSCA Civil Appeal No. 44 of 2015 (unreported)** wherein the Court made the following pertinent observations:

> *"On the matter of adequacy of damages we think each case must be considered on its own facts. There is nothing like one principle fits all scenarios. We think it a little simplistic not to grant an injunction against an appellant just because it has deeper pockets. Just because it can afford to pay damages in case the injunction was erroneously granted. There will be instances, and we have a feeling this could be one of them, where damages will never suffice the fact that they can be afforded notwithstanding. <u>This case does not, in our judgment, seem to be about damages</u>."* – Emphasis by underlining supplied

11.23 In view of the foregoing and by reason thereof, it should by now be crystal clear that the balance of justice tilts in favour of preserving the <u>status quo</u>. Accordingly, the application for the continuation of the interlocutory injunction is allowed. The order will remain in force until the main action is determined or until a further order of this Court.

11.24 Costs will be in the cause.

12. CONCLUSION

12.1 This Court does not usually conclude its judgements or rulings in this way but variations here and there do not do any harm I suppose. I am constrained to include in the first part of my concluding remarks the following quotations:

> *"Malawi is a unitary State which has a unicameral legislature. [16] As already observed, until the mid 1990s, Malawi had a system of Government that essentially entrenched presidential dictatorship, with no checks and balances among the Executive, Legislature and Judiciary. There was no culture of openness and accountability to the people in respect of the exercise of the powers of State. Simply put, it was tyranny of the Executive. The 1994 Constitution brought about a paradigm shift – moving away from presidential supremacy to constitutional supremacy. In Fred Nseula v. Attorney General & Another , [17] Mwaungulu J expressed the raison d être of the new Constitution, stating that 'looking at the debates and discussions on the Constitution…the main thrust of the 1994 Constitution is to forestall tyranny whether it be by political will expressed in executive or legislative action."* - **Professor Justice Redson Edward Kapindu** in "Malawi: Legal System and Research Resources"

> *"Corona virus knows no borders. It is a global pandemic and our shared humanity demands a global response. We must come together. Only a global response will stop the spread of the virus everywhere."* – **COVID – 19 Explained – Save the Children**

> *"This crisis shows us how deeply we depend on each other. We will only come through this as a society with a huge collective effort. … At a time of crisis no-one is an island, no-one is self-made… At times like this we have to recognise the value of each other and the strength of a society that cares for each other and cares for all. …*
>
> *This virus knows no national boundaries ,,,.*
>
> *There's suddenly a realisation that we're only as healthy as the safety of our neighbour."* - **Jeremy Corbyn**, excerpts from BBC News (Politics)

"Ignorance and prejudice are the handmaidens of propaganda. Our mission, therefore, is to confront ignorance with knowledge, bigotry with tolerance, and isolation with outstretched hand of generosity. Racism can, will, and must be defeated." **- Kofi Annan**

"… because I tried to extend your liberties, mine were curtailed" – **Ngugi wa Thiong'o** – *"*Detained – A Writer's Prison Diary"

"I would rather have men ask why I have no monument than ask why I have one." – **Marcus Porcius Cato** also known as **Cato, the elder**

12.2 Allow me to say this. All well-meaning lawyers, within and without Malawi, will agree that the arrest and detention of the Claimants, leading to the present case, is a big blessing in disguise. Firstly, there is this Ruling. There can be no doubt that the analysis herein of the law governing declaration of state of emergency (the term used in section 45 of the Constitution) and declaration of state of disaster (the term used in the Disaster Preparedness and Relief Act) will go a long way towards the development of our jurisprudence on the subject matter of declaration of state of disaster or is it declaration of state of emergency (pick your poison).

12.3 Secondly, I believe enough has been said for one to safely conclude that the legislative regime governing Malawi's response to disasters, regardless of the nature and the extent of the disasters, is not only archaic and obsolete but it is also in total shambles. Almost all, if not all, applicable laws are completely outdated. Needless to say, the coronavirus epidemic has caught the authorities with their pants down - witness panic stations everywhere. How the authorities expect to effectively combat the epidemic in 2020 with laws enacted in 1948 (Public Health Act), 1964 (Immigration Act) and 1991 (Disaster Preparedness and Relief Act) boggles my mind. This is not the time to start questioning patriotism of fellow Malawians but to collectively pull up our socks so that we can fully apply our minds and energy to the preparation of the necessary legislation.

12.4 Then there is the issue of political will. Apart from the outdated laws referred to in paragraph 12.3, this Ruling also mentions, you will recall, the "Law Commission Report on the Technical Review of the Constitution". This report was completed in 1998 and it contains a

number of very important recommendations, including two draft Constitutional Amendment Bills. More than 22 years have passed without the recommendations, most of them if not all, seeing the light of day. To my mind, the problem cannot be that of lack of time by Cabinet to consider the draft Bills (22 years is almost an eternity) or that of inadequate technical expertise to finalise the preparation of the draft Bills for presentation to Parliament. The problem has to lie elsewhere.

12.5 Let me also use the Disaster Preparedness and Relief Act to illustrate my point. In 2014, the Government commissioned a review of the Disaster Preparedness and Relief Act, through the Department of Disaster Management Affairs. With financial support of the United Nations Development Programme (UNDP), a draft *"Disaster Risk Management Bill"* and a "*National Disaster Risk Management Policy*" were drafted. This is 2020 and the draft Bill has yet to be taken to Parliament. Perhaps these documents are not that important to be treated with urgency. You will also recall my remarking that the Disaster Preparedness and Relief Act does not have supporting regulations. 28 years in operation but no regulations made, not even one set of regulations. You do not have to wait until a disaster occurs for you to prepare the necessary regulations. That would not be disaster preparedness.

12.6 As remarked in paragraph 8.22, other countries, such as Botswana, moved swiftly to promulgate the necessary regulations to deal with the problem of coronavirus. These countries fully understand that the rule of law has to reign even during a disaster: see sections 44, 45 and 46 of the Constitution. Malawi also can tackle these disasters without compromising the rule of law.

12.7 Let us stop wasting our energies and time by being preoccupied with propagating false stories and seeking to score cheap political goals. No politician worthy his or her name would even dare to hoodwink his or her own people. Honestly, the very thought of declaring a state of disaster without even bothering to tell Malawians in clear terms the law under which the declaration is made is taking Malawians for granted. The framers of our Constitution knew pretty well that Malawi would, at some points in time, face disasters. They, accordingly, put in place constitutional provisions for handling such disasters. Let us give constitutionalism a chance to work in Malawi. Do not try to be clever and half.

12.8 Having taken the judicial oath and the oath of allegiance, I am duty bound to give this advice. As matters now stand, unless the Government moves with speed to take necessary legislative measures, the possibility of exposure by the State to pay colossal sums of money in compensation for violating human rights as a result of imposing measures not anchored in law is very high. My real worry relates to local authorities. It is common knowledge, by their own acknowledgement in public statements, that most if not all of them are struggling financially. I wonder how they will manage to source funds to pay huge compensation packages in the event that courts find that the invasion upon peoples' liberties and properties were not backed by law.

12.9 The concept of rule of law requires, at a minimum, public institutions (not just the judiciary) that decide disputes impartially and non-arbitrarily according to pre-established legal principles. However, emergencies and disasters may compromise legal order by generating political pressures to augment executive powers at the expense of the legislative and judicial institutions. In the apt observations by Associate Professors Evan J, Criddle and Evan Fox –Decent, the learned authors of "Human Rights, Emergencies, and the Rule of Law", (published in Human Rights Quarterly Vol,34), at page 46:

> *"Some commentators have lamented that courts often dial down the intensity of judicial review during emergencies in deference to the executive branch, enabling the executive to side step ordinary legal restraints. Once legal restraints are relaxed or abandoned, emergency powers can become permanently entrenched, facilitating the further abuse of public powers long after the crisis has passed."* – Emphasis by underlining supplied

12.10 The judiciary is enjoined by sections 9, 45, 103 of the Constitution to ensure that the rule of law is upheld at all times, be it before, during or after a state of emergence (or a state of disaster) has been declared. The Court is perfectly entitled to inquire into the legality of measures taken by the State in response to a state of emergency (or a state of disaster).

12.11 A declaration of a state of emergency (or a state of disaster) does not give the state (read executive) carte blanche to exercise power indiscriminately. The substantive and procedural limitations imposed by the law have to be observed. For example, I fail to understand (perhaps it is because I have legislative drafting background) how it is possible to make a momentous decision relating to a declaration of national disaster without citing the law under which the declaration is

being made. Was this just a case of inadvertence or the authorities were trying to patronize Malawians? From where the Court stands, the latter appears to be the case rather than the former.

12.12 Why does the Court say so? I have yet to hear an announcement of an appointment by the President of a person to a public office which announcement does not include the law under which the appointment is being done. However this was not done in the matter at hand. Why? Was it because citing the law would have placed the authorities between a hard place and a rock. On one hand, there is the route of section 45 of the Constitution with its strict conditions, which conditions include obtaining approval from the Defence and Security Committee of the National Assembly. On the other hand, resort could be had to the Disaster Preparedness and Relief Act which, as has already been observed is not only very much outdated (already raising the question of its compatibility with the Constitution) but its provisions are also not that useful apart from providing a forum where officials from different Ministries and about 5 or so representatives of non-governmental organization can discuss how to coordinate the implementation of measures. As the matters stands, there is no evidence before the court regarding the law under which the declaration of state of disaster was made.

12.13 It is also important to bear in mind that the onus lies on the State to give reasons for choosing one particular measure over other possible measures: see Silva et al v. Uruguay, Communication No. 34/1978, adopted 8 April 1981 wherein the UN Human Rights Committee that:

> *"A state's failure to provide a reasoned justification for particular emergency measures render those measures unlawful on their face"*

12.14 There is one more important thing to note. The Constitution has express provisions on the issue of state of emergence: see section 45 of the Constitution. As such, when authorities seek to deal with a state emergency, we expect them to go first to section 45 of the Constitution Let us not hear these arguments which seek to rely on provisions which are general in terms, e.g., sections 7. 8 or 88(2) of the Constitution.

12.15 By way of concluding (for good now), the Court will be the first in joining the State in the fight against the corona virus epidemic. The Court will help in ensuring that all necessary measures put in place, be it by the legislature or the executive branches, are enforced. However, it has to be made clear that the Court will not be part of a fight against the epidemic that is being waged outside the dictates of the law. Equally

true, the Court will not endorse measures that are unconstitutional and ultra vires. This country is founded on the rule of law: see sections 9, 12, 45(6) and 103 of the Constitution.

Pronounced in Chambers this 3rd day of April 2020 at Lilongwe in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE