



Attorney General's Statement

Lilongwe, MALAWI
15 February, 2021

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Chikosa M Silungwe: 15 February, 2021

I INTRODUCTION

On 29 January, 2021, I clocked seven months in office since the President appointed me to serve as the Attorney General of the Republic of Malawi on 29 June, 2020. In that time, I have not formally engaged with the wider membership of the Malawi Law Society (the 'Society'). I have mostly dealt with the Executive Committee of the Society. In this Statement, I will share my thoughts on: a) the relationship of my office with the legal profession; b) aspects of civil practice in Malawi; c) aspects of the criminal justice system in Malawi; d) the discipline of members of the Society; and e) mental health and wellness of members of the Society.

Before I delve into those five areas, what may appear as mundane may not be as mundane. For example, what is the sphere of an Attorney General of the Republic?

Section 98 (1) of the Constitution of Malawi (the 'Constitution') establishes the public office of the Attorney General. The office may be held by a Cabinet Minister or by a public officer. The Attorney General is the principal legal adviser to the Government. The Attorney General is responsible for advising the Government on all legal matters and conducts civil litigation for, and on behalf of, the Government. The Attorney General may be removed from office by the President only on the grounds of incompetence, incapacity or being compromised in the performance of his duties to the extent that he is no longer able to give impartial legal advice. In other words, the performance-meter of an Attorney General is the quality of legal advice they provide to Government.

Under section 50 of the General Interpretation Act, Chapter 1:01 of the Laws of Malawi, the Attorney General and the Solicitor General are the Law Officers of the Government and any power conferred or duty imposed by any written law on the Attorney General may, unless a contrary intention appears, be exercised or performed by the Solicitor General if a) the Attorney General is unable to act owing to illness or absence; or b) the Attorney General authorizes the Solicitor General to act in any particular matter or class of matters. Indeed, as a Law Officer, the Attorney General is the custodian of the Constitution; the Laws of the land, and the values that underpin our legal system. During my tenure, I am devoted to be the fierce guardian of the *ethos* of our Constitution and our laws.

Under section 3 (1) of the Civil Procedure (Suits By or Against Government or Public Officers) Act, Chapter 6:01 of the Laws of Malawi, the Attorney General is also entrusted with the mandate and power to institute and defend proceedings on behalf of the Government.

The Attorney General provides general or special directions to the Director of Public Prosecutions and, in this regard, the Attorney General may be summoned by the Legal Affairs Committee of Parliament to account for the exercise of the powers of the Director of Public Prosecutions as conferred on the Director under the Constitution.¹

The Attorney General is the Chairperson of the Board of Commissioners under the Estate Duty Act, Chapter 43:02 of the Laws of Malawi. The Board is responsible for the administration of the Estate Duty Act and the collection of estate duty.²

¹ See section 101(2) of the Constitution.

² See section 3 of the Estate Duty Act.

The Attorney General is head of the legal profession in Malawi.³ In this regard, and in liaison with the Society, he oversees the regulatory matters governing the legal profession in this country. He is responsible for making an application to the High Court for an order striking off the Roll, suspending or admonishing a legal practitioner. The Attorney General also appoints members of the Disciplinary Committee under the Legal Education and Legal Practitioners Act, Chapter 3:04 of the Laws of Malawi (the 'LELPA').⁴

The Attorney General is a member of the Honours Committee of the Society under the LELPA.⁵ The Honours Committee recommends to the President the conferment on a legal practitioner the honour of Senior Counsel.⁶

The Attorney General is also Chairperson of the Council of Legal Education.⁷ The Council provides general supervision and control of legal education in Malawi.

The Attorney General also serves as a member of the Advisory Committee on the Granting of Pardons under the Advisory Committee on the Granting of Pardons Act, Chapter 9:05 of the Laws of Malawi.

II THE ATTORNEY GENERAL AND THE LEGAL PROFESSION

During my tenure, I shall pursue a reformist agenda that shall place precedence on the following five areas: First, review of, and enhancement of, the management of the Ministry of Justice and Constitutional Affairs; second, review of, and enhancement of, the relationship with the legal profession for heightened integrity and trust within and without the profession; the relationship with the Judiciary in terms of case management, especially delivery of rulings and judgments, and wider judicial reform focusing on the process of appointment, ethics and retirement of judges, and an institutionalized judicial service commission; fourth, review of, and development of, a coordinated law enforcement system; and, finally, review of law reform requirements from 1994 to 2020 through existing or new proposals for reform.

At the end of the day, an Attorney General is a member of the Malawi Bar first. We state in the Strategic Plan of the Society that we are the collective friend of the underprivileged; we shall safeguard the rule of law; we shall ensure public awareness in matters pertaining to law; we shall foster cooperation among members of the Society; and we shall (always) improve the image of the legal profession.

We have also stated in the Strategic Plan that the Society is independent; that it is professional. We have guarded our independence and professionalism – fiercely so – in the past. We must continue to do so. These testaments we make place obligations on each member to honour in relation to the profession, to clients and the general public respectively.

I have said it before but I will say it again: A structured continuing professional development programme run by the Society is extremely important. I realize that perhaps a number of us attend the various modules under the programme to satisfy the requirements for renewal of our practicing licenses. There is nothing wrong with such a mechanical reaction to a (legal) phenomenon. However, beyond the tyranny of law, continuing professional development in the profession is critical because it must define us, individually, as *counsel*. We are counsel

³ See section 33 of the Legal Education and Legal Practitioners Act (Cap. 3:04) (the 'LELPA') on the order of precedence of legal practitioners. The LELPA was enacted in 2018, as Act Number 31 of 2018, and it came into force on 1 January, 2019.

⁴ See generally sections 89 and 90 of the LELPA.

⁵ See section 57 of the LELPA.

⁶ See section 52 of the LELPA.

⁷ See section 6 of the LELPA.

because we profess expert knowledge of the law. We profess that we realize we are fiduciaries. We epitomize high integrity. All these tenets coalesce under competence. Competence is like breathing. It is important for our life as lawyers. Without our competence, we are dead. A continuing professional development programme is central to our achievement of competence.

Twenty years or so into the Twenty–First Century C.E., I can see green shoots of specialisation. I notice that we are slowly and steadily building a Commercial Law Bar, a Criminal Law Bar, and a Personal Injury Bar. I believe that the present impetus of specialisation is practical necessity. The conversation may have to switch to the formalisation of the minimum standards of each specialisation.

Further, and alongside specialisation, we must create the space to critique our own work; our own sense of professionalism. In recent years, the periodic publication of the *Malawian Lawyer*, and the *Malawi Law Journal* provided the requisite space. These two publications are now on the brink of, if not outright, demise. We must resuscitate these spaces. Peer review forces all of us to strive to produce high quality research whether in relation to statements of case; commercial agreements; family or probate papers; or journal articles.

There are changes underway that relate to the LELPA and the necessary promulgation of subsidiary legislation in order to operationalise some parts of the LELPA. These changes should be finalised in time for the June sitting of Parliament (in relation to amendments to the LELPA); and before Easter, 2021 (in relation to the promulgation of subsidiary legislation to the LELPA).

III ASPECTS OF CIVIL PRACTICE IN MALAWI

In 2017, a major shift occurred in the civil law practice of this country. The Honourable the Chief Justice promulgated the Courts (High Court) (Civil Procedure) Rules under section 67 of the Courts Act, Chapter 3:02 of the Laws of Malawi (the ‘CPR, 2017’). The CPR, 2017 resolved the confusion that ensued in our courts after the promulgation of the Civil Procedure Rules, 1998 (of England and Wales).

I note that under Order 36 of the CPR, 2017, the Rules are now overdue for review. I will engage the Honourable the Chief Justice regarding the review of the CPR, 2017.

There are changes equally underway to make the appointment of panellists that sit in the industrial relations courts optional.

Judgment Debts: The bulk of the letters my office receives from colleagues in private practice relates to reminders of unpaid judgment debts. We simply did not have a system of payment of judgment debts.

As at 30 October, 2020, the total amount the Government of Malawi owes in judgment debts is **MWK150, 056, 338, 649. 63 (MWK150.05 billion)**. I have provided a chronological list of the judgment debts to the Secretary to the Treasury. This chronological list shall be followed when making payments relating to the judgment debts. The list has also been made available to the Secretariat of the Society. I am confident that the use of the chronological list should bring order to the payment of judgment debts.

IV ASPECTS OF THE CRIMINAL JUSTICE SYSTEM IN MALAWI

On 7 January, 2021, the Government launched the Law Enforcement Coordination Strategy. The Strategy shall facilitate close cooperation and rich information sharing required for effective investigation, prosecution and asset forfeiture in line with international best practice

and government policy. The ability to exchange information and cooperate effectively would empower the State to efficiently investigate and prosecute the perpetrators as well as trace, seize and confiscate proceeds of crime.

V DISCIPLINE OF MEMBERS OF THE SOCIETY

As the Society, we espouse the following values: Integrity; Professionalism; Honesty; Decorum; Ethics; and Efficient delivery of service. Our record of the discipline of our membership is a measure of the extent to which we uphold our own values.

The status of disciplinary matters against members of the Society is based on three reports of the Disciplinary Committee of the Society covering a) 2017–2018; and b) 2019–2020. The Disciplinary Committee has had to consider some disciplinary matters dating back to 2002. In a majority of this backlog of disciplinary matters, the complainants could not be traced.

The Disciplinary Committee has recommended to me the admonition of legal practitioners in five disciplinary matters; the suspension of legal practitioners for one year in two disciplinary matters; the suspension of a legal practitioner for two years in one disciplinary matter; and the striking off the Roll of Legal Practitioners in three disciplinary matters. In the working week beginning 22 February, 2021, I will be making the application to the High Court for orders striking off the Roll, suspending or admonishing the legal practitioners concerned respectively.

The Disciplinary Committee has also recommended the prosecution of one legal practitioner for embezzlement. This matter has since been referred to the Director of Public Prosecutions who has already commenced the necessary steps that should culminate in the prosecution of the legal practitioner in question.

The Disciplinary Committee ordered the restitution of moneys amounting to K128, 298, 514. 39 (K128.3 million) against errant legal practitioners in 49 disciplinary matters. In 24 disciplinary matters, the orders of restitution were honoured and the errant legal practitioners paid K77, 159, 603.72 (K77.1 million) to complainants. In 25 disciplinary matters, the errant legal practitioners dishonoured the orders of restitution and K51, 139, 010.67 (K51.1 million) remains unpaid.

The Disciplinary Committee is yet to hold disciplinary hearing relating to 65 disciplinary matters. This excludes the cases of errant legal practitioners who, having been heard, failed to honour the order of restitution against them. The 25 disciplinary matters where the errant legal practitioners failed to honour the order of restitution shall, I am advised, be heard afresh.

V MENTAL HEALTH AND WELLNESS OF MEMBERS OF THE SOCIETY

As the Society, we have not paid much attention to mental health and wellness of members of the Society. It is time we paid attention. I note that the Executive Committee has developed a draft Welfare Policy which seeks to provide support during sickness or bereavement. I urge us, with the leadership of the Executive Committee, to seriously reflect on mental health and wellness of members of the Society.

V CONCLUSION

I urge all of us to remain professional as we discharge our skills to the people of Malawi in our various portfolios.