CHALLENGING UNIMA COUNCIL'S EXTRAORDINARY DECISION PURPORTING TO DERAIL THE LEGALLY SANCTIONED REFORM OF UNIMA AND ITS CONSTITUENT COLLEGES

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25 January 2021

I. INTRODUCTION

On 20 January 2021, Council of the University of Malawi (UNIMA) convened an extraordinary meeting at which, according to UNIMA's Registrar, Council 'resolved to set aside the process of delinking the Constituent Colleges of the University of Malawi'. Furthermore, Council 'resolved that a Functional Review (sic) be conducted to guide Council on the way forward in addressing areas which require improvement and to embrace aspirations towards enhancing the efficiency of the University'.

This decision is an extraordinary act of sabotage of a legislatively sanctioned reform of UNIMA and its constituent colleges. It is not only retrogressive, but also manifestly unlawful and irrational. I intend to demonstrate the unlawfulness and irrationality of this decision in this opinion which I give *gratis* in the hope that it would be of assistance to the progressive members within UNIMA and Government to oppose the existing Council and lobby, if not compel, Government to respect and implement the law.

Public universities around the world face unprecedent challenges. There is a growing demand for access to higher education as the population is growing at a fast rate. In Malawi in particular, population growth has far outpaced the rate at which tertiary education institutions have been established and expanded. Furthermore, universities face stiff competition from bourgeoning private universities which at once raise concerns related to the upholding of academic standards in higher education and academic fraud. The rapidly evolving information technologies have enabled private tech companies in the West to exercise greater control over information resources and knowledge at the expense of public universities which produce such resources and knowledge. Universities in Africa and the developing world face particularly daunting

challenges. As Western universities are striving to adapt to the new realities and seeking to expand their reach to the developing world via online and blended learning programmes, the future of African public universities is bleak. There cannot be any doubt that African universities need to adapt quickly and to move with the times in order to have a chance to compete and survive. No country can achieve sustainable development if its higher education institutions are caught in a time warp.

The debate on the reform of UNIMA has exploded in this context. Much time has been lost since the idea was first mooted in 2015. While some important decisions were made at the end of 2018, a significant amount of time has been wasted to bring the much-needed reform to completion. There is much to be commended in the remarkable decision that Parliament made to reconfigure UNIMA and its three constituent colleges as three separate universities. This legislative reform promises to free the respective entities from the administrative bottlenecks of the federal structure of UNIMA. It holds prospects for greater competition within and expansion of the higher education sector, improved efficiency and agility, and enhanced access to and quality of higher education in the country. More importantly, it seeks to deepen specialisation of and within the respective disciplines.

This opinion focuses on the legal aspects of Council's resolution of 20 January 2021. It argues that:

- Council's decision constitutes an illegal act of sabotage of the reform process duly authorised by Parliament;
- Council relied on a legal opinion which was not directed to it and which did not identify all relevant legal facts and issues, thereby rendering its decision irrational;
- Council had legal authority in July 2017 to debate the issue of delinking or unbundling of UNIMA with or without regard to whether Senate had submitted a recommendation thereon to it;
- both Government and Parliament had constitutional authority to reconfigure UNIMA and to repeal the UNIMA Act of 1998 and to replace it with Acts 18, 19 and 20 of 2019.
- the Minister has a constitutional and legal duty to bring Acts 18, 19 and 20 of 2019 into force, failing which that office must be compelled to do so via the courts;

- Council acted in contempt of Parliament and abused its authority by purporting to sabotage the implementation of Acts 18, 19 and 20 of 2019;
- Government has a constitutional duty to implement Acts 18, 19 and 20 of 2019 and to provide resources to all relevant institutions to complete the reform; and
- that administrative authorities in the University Office and constituent colleges of UNIMA have a good faith duty to uphold the spirit and letter of Acts 18, 19 and 20 of 2019 and continue to work towards implementing the reform process as codified in the said Acts.

II. STATED RATIONALE OF COUNCIL'S DECISION

The Registrar's internal communication of Council's decision of 20 January 2021 reveals the ground upon which Council resolved to derail the reform of UNIMA to which considerable effort and resources have been devoted thus far. The communication alleges that 'the decision to delink the University taken during its 102nd Extraordinary meeting held on 10 July 2017 (Minutes 96 and 97/2017) was *ultra vires* and not in line with the powers and functions that two structures (Senate and Council) undertake under sections 10 and 18 of the Act (Cap 30:02)'.

This view seems to have been based on what appears to be a legal opinion given to Council. The legal opinion makes the following startling claims:

- that Senate had no power to recommend delinking to Council;
- that the government of Malawi (Government) 'appears not to have scrutinized nor concerned itself with the legality of the recommendation, coming as it did from council on the recommendation of Senate';
- that the Government 'is not obligated to carry through a process which was legally flawed from inception';
- that the Government 'ought to have taken to task the Council for abdicating its statutory responsibilities to the University'; and
- that 'the University' needs to restructuring, better skills and management to promote learning research and autonomy of Colleges but within the University' (sic).

None of these claims are substantiated. They seem to be the result of arbitrary exercise of the speculative powers of the mind.

I do not regard 'de-linking' and 'unbundling' as terms of art. The relevant Acts do not use either of these terms, and so when I use these terms, I do so only because they are implicated by Council's decision. I use them in this opinion interchangeably as a shorthand for the process to reconfigure and transform UNIMA and its constituent colleges into different and separate higher education institutions.

III. PRELIMINARY COMMENTS ON COUNCIL'S LEGAL OPINION

The legal opinion relied upon by Council is peculiar in several respects, the most important being that it is addressed to Government and that it is too brief for a complex legal and policy problem it purports to solve.

A. Legal Correctness of the Opinion and the Reasonableness of Council's Decision

That the opinion is directed to Government and not to Council means that Council was not justified in relying on it. The opinion did not specify the legal actions that Council was legally entitled to make in the light of its apparent conclusions. This places Council's decision of 20 January 2021 squarely in the arena of gross irrationality and unreasonableness. The claim the opinion makes that Senate did not have the legal authority to recommend delinking to Council and that Government did not scrutinise the implications of this does not automatically justify Council's decision to grind the reform of UNIMA to an abrupt halt. That Council did this constitutes irrational decision making.

The second problem arising from the fact that the opinion purports to be directed to the Government is that the Government has the Attorney General who is constitutionally empowered to advise it. If this legal opinion was not solicited by the Attorney General or Government, then it is gratuitous and of no consequence. Council was not obligated to consider it or to rely on it. More importantly, it should have been submitted to the 'Government'. It was then up to Government to consider the opinion and make appropriate decisions.

Somehow, the opinion seems to have ended up with Council. Unless the opinion was solicited by Government for the benefit of Council, Council had no valid legal opinion on which to act. In any case, the opinion does not direct Council to take any action. Rather, it addresses itself to Government. For these reasons, Council had no basis for its decision of 20 January. That decision is therefore arbitrary and unreasonable.

B. Shortcomings of the Legal Opinion

While brevity is a virtue in legal writing, it does not trump the legal duty of care and professional diligence in dispensing legal advice. The legal opinion in question is remarkable for its brevity and lack of attention to relevant legal issues and facts. It simply cannot form the basis of a weighty decision such as the one Council took on 20 January. For example:

- It does not summarise all the relevant facts and the context giving rise to a specific set of legal questions;
- It does not expressly identify the legal issue(s) it seeks to resolve;
- It fails to discuss and analyse the relevant law and to apply it to the relevant facts;
- It does not specify the client or entity that sought the legal opinion, and because of this, its recommendations appear to be directed at the wrong entity and to speak past the supposed client;
- Almost half of it is a 'cut and paste' job of statutory provisions on the powers of Council and Senate without any plausible analysis;
- There is a disconnect between the premises and the conclusions drawn from them. Apart from one conclusion, which is itself based on flawed or inadequate analysis, all other conclusions and implications are not supported by the law or facts;
- Some of the supposed conclusions venture into the terrain of policy making and yet the opinion does not make any attempt to engage with relevant policy arguments or considerations;
- The opinion is couched in a manner that evinces lack of familiarity with the workings of university institutions and the challenges facing UNIMA and universities in general.

Given these elementary shortcomings of the opinion, Council had no fully considered legal opinion on which to base its decision. By placing reliance on such a specious legal opinion, its decision is similarly irrational.

IV. MORE SPECIFIC FLAWS IN COUNCIL'S DECISION

In addition to these general shortcomings, there are more specific legal flaws that render Council's decision untenable.

A. *Ultra Vires* Action

The undisclosed legal question the legal opinion on which Council relied appears to address is whether Senate had legal authority to recommend to Council to delink or unbundle the colleges of UNIMA. The opinion quotes at length section 10 of the repealed UNIMA Act of 1998, but fails to analyse the relevant sections. In the end, it concludes rather rashly and surprisingly that Senate had no such authority.

The opinion is easily shown to be legally wrong. First, it ignores the specific provisions of section 10(1)(a) of the repealed UNIMA Act and other provisions of that section. Second, it is founded on insufficient understanding of the nature of the powers of council and senate and how they operate, or are supposed to operate, in practice within UNIMA and other public universities.

The opinion latches on to the vague provision of section 18 of the repealed UNIMA Act, which provides that '[T]he Senate shall perform such functions and exercise such powers as are prescribed by this Act or by the Statutes to be performed or exercised by the Senate', to conclude without any meaningful reflection that '[t]he powers of the Senate to recommend do not include the power to recommend de-linking'.

Granted, the repealed UNIMA Act does not specify the powers of Senate. Somehow, the opinion appears to accept that Senate has powers to recommend, but then claims that the power to recommend does not include to recommend delinking. No reason is given for this view. This is a paradigmatic case of misdirected preoccupation with semantics.

Clearly, if Senate has the power to recommend, there is no provision in the repealed Act that limits that power or precludes Council from making any recommendation pertaining to delinking, disestablishment or disposal of any academic entity. The conclusion that the power

of Senate to recommend does not include the power to recommend delinking is thus unsupported by the law cited in the opinion itself.

Although the repealed Act did not specify the powers of Senate, it is common knowledge that in every university, council is the custodian of governance while senate serves as the custodian of academic standards. This division is recognised in the practice of UNIMA and public universities throughout the Commonwealth.

Note however that this division of labour between the two key institutions is not rigid, precisely because the boundary between governance and academic matters is fluid and dynamic. Academic matters often have governance implications while governance issues often have academic consequences. This is why councils and senates throughout the world work hand in hand. This practice is in keeping with the spirit of accountable governance and responsive and participatory decision making, which are fundamental principles recognised under sections 12 and 13 of the Malawian Constitution.

In the opinion Council of UNIMA appears to have relied on, an unjustified sharp and rigid distinction is made between the powers of Council and those of Senate, ignoring the coordination and interdependence that obtains between the two bodies. The rigidity espoused by the opinion is demonstrably inconsistent with the express words of the repealed UNIMA Act which sought to promote collaboration, coordination and cooperation between Senate and Council.

Section 10(1)(a) of the Act, duly cited by the legal opinion but ignored by it, designated Council as the overall custodian of governance and management within UNIMA. In this respect, Council had broad powers to 'administer, dispose of and, save as hereinafter provided, to invest all the property, money, assets, and rights of the University, to manage the business and all other affairs whatsoever of the University, and to enter into engagements and to accept obligations and liabilities without any restriction whatsoever, in the same manner in all respects as an individual may manage his own affairs' [See section 10(1)(a) of UNIMA Act].

A proviso to this section underlined the interdependence and interrelation between Council and Senate. It stated:

> Provided that, before determining any question relating to the matters aforesaid which affects the academic policy of the University, the Council shall refer such matters to the Senate if it has not previously been considered by the Senate, and shall take into consideration any recommendation or report thereon by the Senate; …

As is clear from section 10(1)(a) and its proviso, Council had broad powers to administer and dispose of its assets, to enter into agreements, and to accept obligations and liabilities as it deemed fit. If any question pertaining to the exercise of this power was likely to have an impact on the academic policy of the University, Council had a legal duty to refer the matter to Senate. The proviso also suggests that Senate could deliberate on matters pertaining to the management and disposal of university assets of its own accord before Council made a final decision if the those matters implicated academic life of the University. The proviso expressly stated that Council had a duty to consider the recommendation or report of Senate. It did not say that Council was bound to accept Senate's recommendation.

Other provisions of section 10 of the repealed Act underlining the interdependence, intersection and interrelation between the work of Council and Senate include:

i. Subsection (1)(j), which enjoined Council to consult Senate in matters concerning the establishment, discontinuance of colleges, faculties, school and other academic sections of UNIMA and the assigning of any such academic entity to a 'specified College';
ii. Subsection (1)(k), which obligated Council to consult Senate in the determination of the terms and conditions of service for academic staff and related matters;
iii. Subsection (1)(p), which empowered Council to call for reports from Senate; and
iv. Subsection (1)(r), which empowered Council to determine fees to be charged to students 'after consideration of any recommendation or report thereon from Senate'.

These provisions undercut any view that suggests that Council and Senate operate in silos without consultation and coordination. As has been shown, such a view is not supported by the repealed UNIMA Act and runs counter to the established practice within UNIMA and other public universities worldwide. It is also inconsistent with the principles of good governance,

public participation, public power as a trust, fairness and the rule of law, all of which are enshrined in the Constitution of Malawi as said above.

More specifically, the conclusion that Senate had no legal authority to make a recommendation to delink UNIMA colleges is manifestly incorrect principally because section 10(1)(a), referred to above, clearly obligates Council to consult Senate on matters concerning the disposal of University Assets. A university college or department is a university asset. It could be disposed of by Council as it deemed fit. Since such a decision had a direct impact on the academic life of the University, it was incumbent on Senate to consider the matter and make its views known to council. The repealed Act did not contain any limit on the power of Council, exercised in consultation with Senate, to dispose of its assets in whatever manner it deemed fit.

The legal opinion ignores this subsection and makes the false claim that '[t]here is no power nor is it a function of the Council to receive recommendations from the Senate for de-linking of Colleges. The power to discontinue Colleges is not a power to recommend delinking.' The two sentences quoted here make the claim that delinking is not discontinuance, and yet section 10(1)(a) expressly empowers Council to dispose of its assets after consultation with Senate. The mischaracterization of delinking appears to have been made with the intention of avoiding the express terms of section 10(1)(a).

Moreover, the legal opinion makes the unstated assumption that the power to dispose of assets and the power to establish or discontinue colleges and other academic entities limit each other. The opinion does not give any reason the two powers mentioned above should be read to restrict each other. It is doubtful that there can be any such plausible reason. There is therefore no basis for saying that every case of discontinuing an academic entity requires that that entity be reassigned within the University. Some academic entities can be discontinued without reassignment. In this particular context, the crucial and decisive factor is that the redesignation and reassignment of colleges is a direct result of a comprehensive public sector reform programme which received parliamentary approval at the end of 2018.

The further suggestion that delinking had nothing to do with the core purposes of UNIMA as set out in the repealed Act is also dubious. The policy documents behind the delinking specify the merits of reimagining UNIMA and creating separate universities from its constituent colleges. Those documents stipulate the benefits of such policy decision. The goals and

objectives of such policy are clearly consistent with the goals and purposes of UNIMA as set out in the repealed Act.

Let it be noted by way of a footnote that the power to dispose of assets or to create a separate university from a constituent college of UNIMA has been exercised before. Bunda College, for example, was disposed of and transferred to Lilongwe University of Agriculture and Natural Resources following a policy and legislative process similar to the current one.

In view of these arguments, the claim that Senate had no legal authority to recommend delinking to Council is without legal foundation.

B. Failure to Consider the Question of the Legal Consequences of Senate's Alleged *Ultra Vires* Action

Even if Council was correct in its view that Senate had no legal authority to make any recommendation regarding the delinking of UNIMA colleges, Council and the legal opinion on which it relied failed to consider the legal consequences of such alleged *ultra vires* action. Because of this failure, Council made two untenable assumptions:

- That Council's own deliberations were unlawful;
- That Parliament acted unlawfully by adopting legislation reconfiguring UNIMA and its colleges as separate universities.

These two assumptions are of critical legal significance. The failure to consider their legal basis and implications exposes Council's decision to irrationality. Below is an elaboration of the two flaws introduced above.

i. Council's Authority to Adopt a Resolution on Delinking

It does not follow from the claim that Senate had no legal authority to make a recommendation to Council that Council had no authority to deliberate on the matter and to make a decision thereon. The opinion cites relevant empowering provisions that show that Council in fact had

the legal authority to discuss and decide matters pertaining to (a) the management and disposal of university assets and (b) the establishment and discontinuance of academic entities.

Irrespective of who initiated the proposal for delinking, it was within the power of Council to consider the issue. The legal opinion does not show that Council was fettered in any way by Senate's views, that Council did not exercise its free will, or that Council exercised its discretion improperly or irrationally. On its own terms, the legal opinion recognises that Senate only made a recommendation. There is no evidence to suggest that Senate forced Council to accept the recommendation. The decision of Council to consider the recommendation of Senate fell within its powers. There is nothing in the repealed UNIMA Act that prohibits Council from soliciting the views of any member of the University community. Any view suggesting that Council should barricade itself from the community it serves in a fiduciary capacity should be rejected as misplaced top-down governance that is inconsistent with the constitutional prescriptions on participatory, accountable, and responsive governance and on legal authority as deriving from the people which must be exercised in a fiduciary capacity to serve and protect their interests [See section 12 of the Constitution].

Given that Council had the power to consider the issue of restructuring and disposal of its assets, there is no basis for the suggestion that the 2017 resolution of Council to delink its colleges was unlawful. The resolution was perfectly lawful.

Even if it was unlawful, which is denied, Parliament had the constitutional authority to reform UNIMA and to establish other universities as it did on 15 December 2018.

ii. The Legal Authority of Parliament to Reorganise UNIMA and Establish New Universities

The most startling aspect of Council's decision is perhaps its utter disdain for Parliament, which is the supreme legislative organ in the country [Section 48 of the Constitution]. Council seems to think that its decision supersedes legislation and the following Acts, more specifically:

- the University of Malawi Act, No. 18 of 2019;
- the Malawi University of Business and Applied Sciences Act, No. 19 of 2019; and
- the Kamuzu University of Health Sciences Act, No. 20 of 2019.

These Acts gave legal effect to the reform of the UNIMA and its constituent colleges. Council has not challenged the legal validity of these Acts. The legal opinion it relied on does not make the slightest hint that these Acts are unconstitutional and invalid, although it makes unsubstantiated remarks on what Government ought to have done when Council adopted its resolution sanctioning the remaking of UNIMA.

It has been suggested that the reform of UNIMA was tainted by the involvement of politicians such that the three laws that resulted from the legislative process should not be implemented. I disagree with this view. The Constitution is clear that the power to initiate laws vests in the executive branch of government and the power to enact laws vests in the legislature [sections 7 and 8], both of which are political organs of the state that enjoy democratic legitimacy. Academics doubtless have the right to be consulted and to have a say in the reform process that affect their institutions, but elected officials have a critical role to play in policy and law making concerning public universities. The current legal reforms provide wide scope for academics to reimagine their colleges and transform them into thriving, agile and competitive autonomous universities. This is an opportunity that should be grabbed with both hands.

Given that the three Acts are valid law and that UNIMA Council has not challenged the legal validity of these Acts, Council has shown contempt for Parliament and for the rule of law. Council is not above the law. If it has any misgivings about a particular law, it has the right to challenge it before the courts of law. Since in this case it has not done so, it is bound to implement the law as it is.

It is undeniable that UNIMA was established by the repealed UNIMA Act. [Note that I call the 1998 Act repealed because it was validly repealed. What remains is just for the Minister to announce the date on which the repeal takes effect]. Parliament as the custodian of legislative power was entitled to repeal this Act. Parliament decided to exercise this authority on 15 December 2018 and repealed the UNIMA Act of 1998 and replaced it with the UNIMA Act No. 18 of 2019 and Acts 19 and 20 of 2019.

The legal opinion has not shown that Parliament had no authority to enact these changes, and there is no basis for making any such allegation. The power of Parliament to repeal, amend and enact new laws is very broad and subject only to certain substantive and procedural

constitutional constraints. It cannot be inhibited by any consideration of who first proposed a policy position codified in an Act. The legal validity of the three Acts can moreover not be vitiated by UNIMA's internal decision-making procedures. Thus, even if it was agreed that Senate and Council did not have legal authority to propose and approve the delinking of UNIMA colleges, this has no legal effect whatsoever on the law-making process that eventually unfolded and resulted in the enactment of the three Acts mentioned above. The three Acts do not even use the term 'delinking' or 'unbundling', rendering its use in the Council's legal opinion inconsequential.

In *re Presidential Reference Concerning Section 65 of the Constitution* [Presidential Reference Appeal No 44 of 2006], the Supreme Court of Malawi (MSCA) held in that any Act amending the Constitution in accordance with the procedures for enacting legislation is valid and forms part of the Constitution. This dictum is equally applicable to ordinary Acts duly passed by Parliament and assented to by the President.

More specifically, section 49(2) of the Constitutions defines a valid Act of Parliament as a bill which has been laid before Parliament, has been passed by a majority of Members of Parliament and has been assented to by the President. All the three acts named above were duly enacted by the legislature and assented to by the President on 29 April 2019. They are therefore valid law binding on the Government, the Minister responsible for higher education and all members of the UNIMA community including Council.

Council has not shown that there was any violation of the legal procedures specified in the Constitution and standing orders in the enactment of the three Acts. It has also not shown that there is any substantive ground upon which the three Acts can be challenged.

C. Other Flaws in Council's Decision

The Council of UNIMA has no authority to override parliamentary will and authority. As it had already deliberated on the issue of delinking or unbundling, it could not excise authority on that very issue on 20 January 2021 as it purported to do. Council was *functus officio*, which is legal jargon for the principle that once power has been exercised in relation to a specific issue, a decision cannot be reversed, retracted or amended unless expressly allowed by law.

This principle is rests on the rule of law which emphasises the need for certainty and finality in public decision making.

Since the three Acts were validly enacted and constitute valid law which the Minister has a duty to bring into force, the Council of UNIMA is conflicted and cannot be expected to act in the interests of all affected parties. This Council exists in the context of a transition to three autonomous universities. The current Council stands to lose control and oversight over three current constituent colleges of UNIMA. It is clearly partisan and has vested interests it seeks to protect. Its decision can therefore be presumed and proven to be actuated by self-interest and bias, and therefore impeachable under section 43 of the Constitution. The Civil Society Education Coalition, through its public statement of 22 January 2021, and Prof Garton Kamchedzera have documented the chequered history of the reform process and exposed the obstructive role that some current members of Council and the University Office played, all of which lends support to accusation of the lack of impartiality and *mala fides* on the part of Council.

Even if Council had the power to reverse or amend its previous decision, which is disputed, it has a legal duty to act fairly according to section 43 of the Constitution. Council decided to reverse its previous decision without hearing any of the affected parties. This is bad governance and autocratic leadership *par excellence*. The adoption of the three Acts and the previous decision of Council created a legitimate expectation and a legal right in favour of all affected colleges and employees that their respective colleges will be reconstituted into three separate universities. Such legitimate interest and legal right could not be terminated without giving them a hearing.

V. THE LEGAL OBLIGATIONS OF COUNCIL AND OTHER AUTHORITIES WITH REGARD TO THE IMPLEMENTATION OF ACTS 18, 19 AND 20 OF 2019

As seen above, Acts 18 – 20 of 2019 have superseded and repealed the UNIMA Act of 1998. They are valid law from the date they were duly assented to by the former President. From that date we are in a phase of implementation. The argument that these laws have no legal effect simply because they have not been brought into force is misconceived. Section 49, read with section 7 of the Constitution, clearly impose an obligation on the executive to implement all laws. The process of implementation starts with preparing the relevant institutions for the application of the legislation. I call this a good faith obligation. It means that no person can act in a manner that is inconsistent with the spirit and letter of the legislation.

The most important authorities bound by this good faith obligation are the Minister responsible for higher education, the Council of UNIMA, Government and the administrative authorities of each constituent college.

A. The Minister of Responsible for Higher Education

Since the three Acts were given presidential assent on 29 April 2019, all that remains is for the Minister responsible for higher education to publish their commencement date(s). The discretion of the Minister to decide on the commencement date is sharply limited. Firstly, such decision must be made within a reasonable time. Secondly, the relevant considerations in the exercise of that discretion are those related to readiness of all the affected institutions and stakeholders for the implementation of the relevant legislation. The Minister cannot postpone indefinitely the commencement of the legislation. Neither can the Minister thwart the operationalization process. The Minister is obligated by the respective Acts and Constitution to bring these Acts into force. Failure by the Minister do bring the Acts into force within a reasonable time would constitute a breach of the separation of powers and, more specifically, undermine the legislative autonomy and authority of Parliament.

I do not agree with the view that the practice of Parliament to delegate its authority to a Minister to determine the date on which an Act comes into force is necessarily unconstitutional. Often, and as is the case in this instance, such delegation to an administrative or executive official is

necessary to ensure a smooth preparation of the affected institutions for the application of the law and to avoid immediate non-compliance when the law takes effect. Such preparation requires political mobilisation, judgment, and oversight.

There is considerable comparative case law which shows that failure by a public authority to bring an Act into force or bringing into force an Act when the conditions do not permit can be reviewed by a court of law on grounds of legality and rationality [See *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC); *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC); *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 (6) SA 391 (CC)].

This comparative case law is eminently relevant in the Malawian context where the legal validity of an Act of Parliament is defined by section 49 of the Constitution and the delegation of the power to bring an Act into force is constrained.

In short, the Minister has a legal duty to bring the three Acts into force within a reasonable time. If the Minister does not do this within a reasonable time, she or he can be compelled via the courts to discharge this duty.

B. Government

Government has a duty to implement the three pieces of legislation and facilitate the completion of the delinking process. This duty arises from section 7 of the Constitution which obligates the executive to implement all legislation duly enacted by Parliament. The Government also has duties arising from the right to education protected under section 25 read with section 13(f) of the Constitution which specifically obligates the state to ‘provide adequate resources to the education sector’ and adopt programmes to ‘offer greater access to higher learning and continuing education’.

If the government does not like these Acts, it must with speed move to repeal them.

C. Council

Council has a critical role to play following the passage of the three university Acts of 2019 by Parliament and the subsequent presidential assent. It has specific obligations to facilitate the transfer of staff and assets to the three universities established by the Acts. These obligations do not depend on the commencement of the three Acts. They arise from sections 7, 8, 48 and 49 of the Constitution. Council cannot take action that frustrates the reform process or diminishes the assets of the constituent colleges. By the time the three Acts become operational, the three universities established by the three Acts should be in a state and have the resources and facilities envisaged by these Acts so that there is no non-compliance with these and other laws applicable to higher education at that time.

The Council of UNIMA has a duty to act in good faith and to refrain from adversely affecting the interests and rights of the constituent colleges which will become autonomous universities.

D. Administrative Authorities

The administrative authorities of the constituent colleges and the university office have a duty to ensure that the transitional provisions of the three Acts are respected and implemented. More importantly, they have a duty to work towards the full implementation of the three Acts and the completion of the reform process.

VI. Conclusion and Legal Options

It is too farfetched to think that UNIMA in its current form is going to become efficient and revamp itself to meet the higher education demands of the nation. The behaviour of the current Council underlines the retrogressive and backward mindset that weighs the institution down. The reform process, approved by Parliament on 15 December 2018, offers a singular opportunity for a fresh start and renewal. The challenges to the higher education sector are numerous and urgent. They require resolute action. There is no time to waste.

This opinion has shown that Council made a rash decision to derail the implementation of the reform process without consulting all affected parties and stakeholders and without reflecting on or bearing in mind the palpable conflict of interest that Council is entangled in following the enactment of the three Acts. By failing to hear all the affected parties who are adversely

impacted by its decision (especially the constituent colleges and the employees attached to them), Council acted in breach of the right to procedurally fair administrative action protected under section 43 of the Constitution. The question of conflict of interest goes to impartiality which also constitutes a breach of the same section 43. Council appears to have solicited a legal opinion which fails to consider all relevant facts and legal issues. What is more, the legal opinion fails to direct itself to Council. The inadequacy of the legal opinion means that Council's decision was uninformed and irrational.

Council's position that its previous decision was *ultra vires* because Senate had no power to recommend delinking to it is without any merit. The repealed Act shows that Senate had such power. Council's view that Senate should express no view on critical matters like this is troublesome from a governance and constitutional perspective. Council had no legal authority to reverse its previous decision. More importantly, it could not have reversed its decision without according procedural fairness to all affected parties as has been argued above.

Even if it were correct that Senate had no legal authority to recommend delinking of UNIMA to Council, the latter failed to consider the implications of this. Such lack of legal authority on the part of Senate did not render invalid the proceedings of Council or the acts of the Government to initiate appropriate law and of Parliament to enact such law. There is nothing in the repealed Act which prescribes who can submit issues for Council's consideration or which prevents Council from considering the views of any constituency of UNIMA in its decision making.

Furthermore, the lack of legal authority of Senate or the internal decisions of Council have nothing to do with the exercise of the power of the executive and the legislature in initiating and making policy and legal reforms pertaining to UNIMA. No argument has been made by Council to suggest that the executive and the legislature acted unlawfully in the manner in which they introduced and enacted the Acts in issue. As all procedures for the enactment of legislation were followed, Acts 18 – 20 of 2019 are valid laws. They have to be implemented.

At the very least, these Acts, read with sections 7, 8, 48 and 49 of the Constitution, obligate the Minister responsible for higher education to bring them into force so that the reform process can be completed. They also obligate all authorities within UNIMA to work in good faith towards completion of the reform process. Any suggestion that these laws have no legal effect

does not take seriously the authority of Parliament, the separation of powers, the rule of law and constitutionalism.

Given these conclusions, the following courses of actions suggest themselves:

- The Minister responsible for higher education must, without delay, promulgate the commencement date(s) of Acts 18 – 20 of 2021. If this does not happen, the Minister must be compelled by a court order to do so.
- Parliament must assert its will and hold Council accountable for its act of sabotage.
- Council's decision of 20 January of 2021 must be ignored by all relevant constituent colleges. Alternatively, this decision must be challenged in a court of law on grounds of irrationality, unlawfulness, abuse of authority and procedural fairness.
- All UNIMA structures and authorities must continue to carry out their due faith obligation to work towards the completion of the reform process codified in the three Acts.
- All progressive members of UNIMA must fight for the reform process to continue and for the implementation of the three Acts.
- The current Council must be dismissed on grounds of incompetence, sabotage, backwardness, conflict of interest and confusion mongering.
- The Government must allocate sufficient resources to complete the reform of UNIMA.
