

## **MALAWI LAW SOCIETY**

# **LEGAL GUIDANCE PAPER ON MANAGEMENT OF THE CORONA VIRUS (COVID-19) PANDEMIC**

## **PART I: COVID-19 AND DISASTER MANAGEMENT**

### **I. Disaster Management**

1. In the governance of Malawi, the Constitution is the supreme authority<sup>1</sup> followed by an Act of Parliament<sup>2</sup> and no person or institution is above the law<sup>3</sup>. Pursuant to the Constitution Parliament enacted the Disaster Preparedness and Relief Act under which the President can declare a State of Disaster<sup>4</sup>. There is no other law that authorizes the President to do so.
2. Once a state of disaster has been declared, the law mandates the Minister Responsible for Disaster Preparedness and Relief to manage such disaster. It is not for the President or cabinet to manage a disaster. This is essentially for purposes of accountability both in terms of performance on the mandate as well as implementation and enforcement of the law. The Minister responsible

---

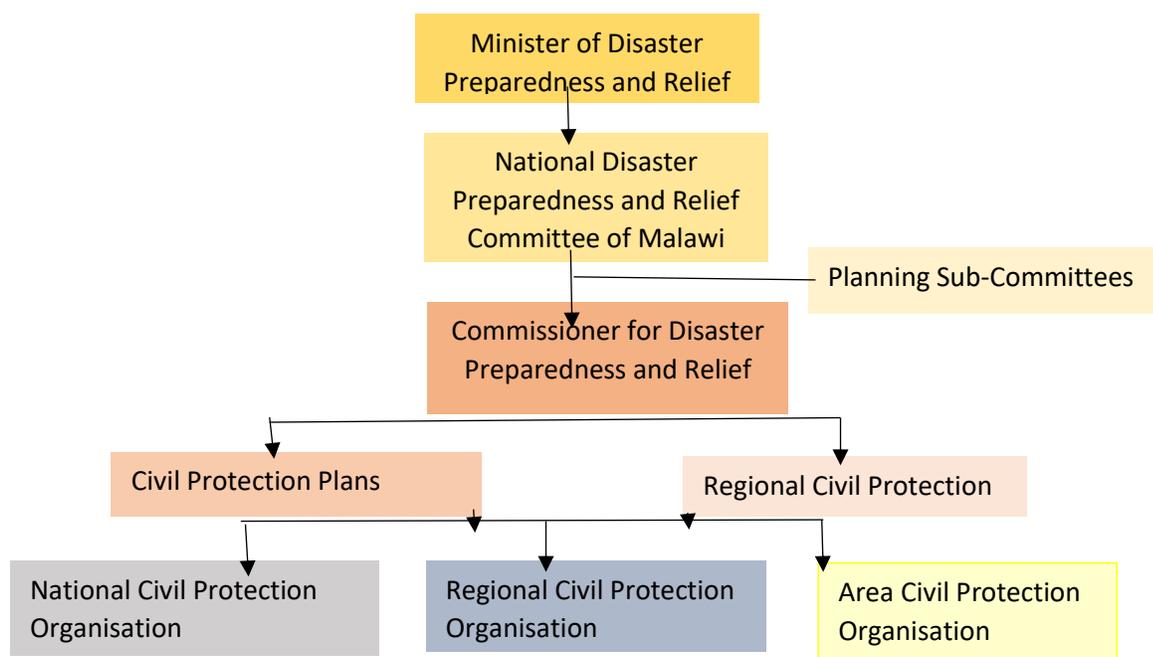
<sup>1</sup> Constitution, ss. 5, 10(1)

<sup>2</sup> Ibid, s.48(2)

<sup>3</sup> Ibid, s.12(1)(f)

<sup>4</sup> Disaster Preparedness and Relief Act, s.32

is the competent authority for the Disaster Preparedness and Relief Act; he or she is in charge for the performance of its mandate and enforcement. The Supervisory Authorities are the National Disaster Preparedness and Relief Committee of Malawi<sup>5</sup> in terms of strategic direction and the Commissioner for Disaster Preparedness and Relief<sup>6</sup> as Controlling Officer<sup>7</sup> (not the Principal Secretary)<sup>8</sup>. Graphically, the legal structure for managing a declared disaster is as follows:



3. Only for purposes of illustration it must be said that in South Africa at the apex of the management structure is the Intergovernmental Committee on Disaster Management<sup>9</sup> which has members of the Cabinet. That is not the case in

<sup>5</sup> Ibid, s.5

<sup>6</sup> Ibid, s.3

<sup>7</sup> Public Service Act, s.21 and if doubles, the Principal Secretary s.22

<sup>8</sup> Ibid, s.22

<sup>9</sup> South African Disaster Management Act, s.4

Malawi and if a similar arrangement is desirable then Parliament ought to be requested to make the appropriate amendments to the law.

4. The term ‘civil protection’ has been used in the diagram above. The Disaster Preparedness and Relief Act defines civil protection as “*any service provided or measure taken for the purpose of preparing for, guarding against or dealing with any actual or potential disaster*”<sup>10</sup> This term has been used in this write up in some cases without having to describe the actual service planned or provided.

## II. Covid-19: The Background:

5. Malawi is not in a State of Emergency<sup>11</sup> and therefore no Constitutional obligations or constitutionally guaranteed rights have been suspended or can be derogated. On 20 March 2020 His Excellency the President Professor Arthur Peter Mutharika declared a State of Disaster. This declaration, authorized by law, is subsidiary legislation and therefore to have the effect of law must be published in the *Gazette*<sup>12</sup>. In announcing the declaration, the President also announced “*new measures to come into force on Monday, March 23, which include a restriction of public gatherings of more than 100 people and closure of all schools, colleges and universities...restrictions apply to all gatherings including weddings, funerals, church, congregations, rallies, government meetings*”; and “*that the national security apparatus has been ordered into action to enforce the restrictions*”. The declaration only became lawful when it was subsequently gazetted.

---

<sup>10</sup> Disaster Preparedness and Relief Act, s.2

<sup>11</sup> Constitution, s.45

<sup>12</sup> Disaster Preparedness and Relief Act, s.32; General Interpretation Act, s.17

6. On 6 April 2020 the Ministry of Justice and Constitutional Affairs announced that the declaration was gazetted on 3 April 2020, therefore, the measures announced were not law from 20 March 2020 until 3 April 2020.
7. On 10 March 2020, before the declaration of a state of disaster, the Minister of Health announced that the President had set up a Special Cabinet Committee on Corona virus effective 7th March, 2020<sup>13</sup>. The mandate of the Committee he said included:
  - To receive updates on COVID-19 and ensure that the same is relayed to Malawians.
  - To recommend proactive measures to prevent the occurrence and subsequent spread of corona virus in Malawi. At the moment Malawi does not have any registered case of COVID-19.
  - To provide oversight for Cross-Government initiatives against the COVID-19 threat.
  - To facilitate implementation of activities aimed at mitigating the impact of the disease on the social-economic development of the country.
8. The membership comprises: Jappie Mtuwa Mhango, M.P., Minister of Health and Population (Chairperson); Everton Hebert Chimulirenji, Minister of Disaster Management Affairs and Public Events; Joseph Mwanamvekha, M.P., Minister of Finance, Economic Planning and Development; Hon Mark

---

<sup>13</sup> Malawi News Agency, MANA online <https://www.manaonline.gov.mw/index.php/sports/item/13723-statement-on-coronavirus-outbreakcovid-19>

Botomani, M.P., Minister of Information, Civic Education, and Communications Technology; Ibrahim Salim Bagus, M.P., Minister of Industry and Trade; Kondwani Nankhumwa, M.P., Minister of Agriculture, Irrigation and Water Development; Dr. William Susuwele Banda, M.P., Minister of Education, Science and Technology; Francis Kasaila, M.P., Minister of Foreign Affairs and International Cooperation; Nicholas Dausi, M.P., Minister of Homeland Security; Mary Thom Navicha, M.P., Minister of Gender, Children, Disability and Social Welfare; Chipiliro Mpinganjira, M.P., Deputy Minister of Defence and the Chief Secretary to the Government and Principal Secretaries drawn from these Ministries are automatic members by virtue of providing necessary technical support to the Committee.

9. Our view is that at law, upon the President's declaration of a State of Disaster, this Committee ceased to have any mandate over decisions, initiatives or activities for disaster preparedness and relief. By law, the declaration confers mandate on the Minister of Disaster Preparedness and Relief<sup>14</sup>, the National Disaster Preparedness and Relief Committee of Malawi<sup>15</sup>, and the Commissioner for Disaster Preparedness and Relief<sup>16</sup>. This is the only authority that the law has given the mandate to facilitate or manage a response during a State of Disaster. The law defines such response as "Civil Protection"<sup>17</sup>. The mandate that was given to the Special Cabinet Committee wholly falls within the mandates of the Minister, the Committee and the Commissioner for Disaster Preparedness and Relief.

---

<sup>14</sup> Disaster Preparedness and Relief Act, ss.4(h), 47 and generally as the Competent Authority for the Act

<sup>15</sup> Ibid, ss.5, 13

<sup>16</sup> Ibid, ss.3, 4

<sup>17</sup> Ibid, s.2 'civil protection'

10. Therefore, we consider that any decision, initiative or action taken by the Special Cabinet Committee after 20 March 2020 (technically from 3 April 2020) with regard to ‘Civil Protection’ on Coronavirus is without legal authority, or put differently, without any lawful excuse.
11. Ministers are not members of the Disaster Preparedness and Relief Committee of Malawi<sup>18</sup>; and until an amendment is made to the law several ministries are not on the membership of the said Committee including the Ministries of: Industry and Trade; Education, Foreign Affairs, Defence, and Homeland Security. The only responsibility of the Special Cabinet Committee after 20 March 2020 is to advise the President with respect to Government policies on Coronavirus, or Covid-19 and such matters relating to it as the President may refer to the Special Cabinet Committee<sup>19</sup>. In South Africa the law expressly places Cabinet members at the apex of disaster management in an Intergovernmental Committee which if it were in Malawi would have been above the Disaster Preparedness and Relief Committee of Malawi<sup>20</sup>.
12. Consequently, what should be of immediate concern is whether or how the funding for Coronavirus has been expended in compliance with section 173 of the Constitution; section 23 of the Public Finance Management Act; and sections 35, 36 and 38 of the Disaster Preparedness and Relief Act. How is the K15 billion fund that was set up by the President has been managed? At law, after 20 March 2020 this fund became the National Disaster Preparedness and Relief Fund and ought to vest in Hon. Everton Hebert Chimulirenji, as Minister of Disaster Management Affairs and Public Events who is a mere

---

<sup>18</sup> Disaster Preparedness and Relief Act, s.6

<sup>19</sup> Constitution, s.92

<sup>20</sup> South African Disaster Management Act, s.4

member of the Special Cabinet Committee<sup>21</sup>. The ancillary concern is that this fund may have been expended on volunteers like Civil Society Organisations without accountability mechanisms<sup>22</sup>.

### III. The Role of Statutory Interlocutors

13. This may not be the place to outline the amphibious character of the Malawi Law Society. Suffice to say the legislature created it hierarchically as a supervisory authority under dual competent authority<sup>23</sup> of both the Chief Justice and the Minister of Justice with functions akin to those of the controlling officer<sup>24</sup> in the public service, unlike the Supervisory Authority of the Legal Education Council which falls under the Executive<sup>25</sup>. Therefore, the Malawi Law Society straddles both the Judiciary and Executive. Horizontally the legislature delegated its oversight and some legislative responsibilities for the enforcement and practice of the law to the Chief Justice<sup>26</sup>, the Minister of Justice<sup>27</sup> and the Malawi Law Society<sup>28</sup>. In addition, the Malawi Law Society was specifically mandated to protect matters of public interest in Malawi<sup>29</sup>.
  
14. The competent authority<sup>30</sup> for delivery of health services is the Minister responsible for health but the Medical Council is the supervisory authority<sup>31</sup> mandated to assist in promoting and improving the health of the population of Malawi; to control and exercise authority over training as well as the

---

<sup>21</sup> Disaster Preparedness and Relief Act, s.35

<sup>22</sup> Ibid, ss.4(a), 26

<sup>23</sup> Legal Education and Legal Practitioners Act, ss. 63 and 121

<sup>24</sup> Public Service Act, s.21

25

<sup>26</sup> Legal Education and Legal Practitioners Act, ss.121

<sup>27</sup> Op Cit.

<sup>28</sup> Ibid, s.73

<sup>29</sup> Ibid, s.26(1)(d)

<sup>30</sup> Public Health Act, s.143; Medical Practitioners and Dentists Act, s.69

<sup>31</sup> Medical Practitioners and Dentists Act, s.3

performance of practices of diagnosis, treatment or prevention of physical or mental diseases, illnesses or deficiencies<sup>32</sup>. The Society of Medical Doctors has majority representation on the Medical Council.

15. Both the Malawi Law Society and the Society of Medical Doctors have expressed interest to participate in or provide suggestions for civil protection in the declared disaster. In this they are not begging the Government or the Cabinet Committee but merely reminding the authorities that the two institutions are major and critical stakeholders with legal mandate in the provision of civil protection in the declared disaster. They are mandated by Acts of Parliament which are authorized by the Constitution. It must be appreciated that the President is the head of Cabinet and therefore communication to either the President directly as was done by the Malawi Law Society or through the Cabinet Committee as was done by the Society of Medical Doctors is addressing the same institution. Therefore, once they have expressed this willingness the President has no option but to hear them, hear their proposals, or consult them and or involve them in the civil protection provided in the declared disaster. This is because section 88(2) of the Constitution imposes a duty on the President to provide executive leadership “*in accordance with this Constitution and the laws of the Republic*”. The laws of the Republic have given the mandate to the Malawi Law Society and the Society of Doctors (through the Medical Council) to provide to the people of Malawi legal and health civil protection.

---

<sup>32</sup> Ibid, s.10

16. To deny these two institutions any role in the provision of civil protection pursuant to the declaration of a state of disaster or to deny or ignore to consider their proposals through active consultation is to deny parliamentary oversight and to deny citizenship participation through Parliamentary representation in the response to Covid-19; and the provision of civil protection.
17. We recommend to the addressees that the measures announced by the President and all civil protection pursuant to the declared state of disaster need to be reduced into law; either as a substantive Act of Parliament, or subsidiary legislation. Failure to do so is to deny the people of Malawi participation in the response to the declared disaster on two fronts: first, there would be no consultative input from the people of Malawi, and second, the people will not be able to hold the President or the Special Cabinet Committee accountable.
18. The Legal Affairs Committee of Parliament is expressly mandated to scrutinize legislation including subsidiary legislation and any performance of the legislation's mandate. The Budget and Finance Committee of Parliament has the function, among others, of creating public awareness and involvement in the formulation of government budget, financial and economic policies including engaging the Minister responsible for finance in formulating and monitoring the budget. The Public Accounts Committee is charged with ensuring that expenditure is confined to the authority which governs it; the Parliamentary appropriation and treasury allocation. Most importantly it is to ensure that monies disbursed are legally available for and applicable to the service or purpose to which the funds are applied or charged. An especially important committee in the current state of disaster is on Governance Assurances which scrutinizes the assurances, promises, and undertakings given

or made by Ministers of government. But these assurances must be reduced into law or must have been made in the National Assembly. In our view failure to reduce civil protection (in this case failure to reduce into legislation the measures announced by the President or by the Special Cabinet Committee) is to circumvent these oversight committees and to short-change the people of Malawi and risk substantial legal claims.

#### IV. The Lawful Way-forward

19. On 2<sup>nd</sup> April 2020, the Malawi Law Society proposed to Government to enact appropriate legislation for civil protection against Covid-19. It suggested that the legislation could be on the template of the United Kingdom's Coronavirus Act 2020 but suited to local circumstances. The Malawi Law Society premised its proposal on the narrow but hugely emotive and all encompassing right to life<sup>33</sup>. It is a broader and fundamental right based on which all other rights find their existence. We maintain that proposal.
  
20. However, while a people lives, provision of civil protection against Covid-19 intersects a wider range of rights. Take for example the civil protection announced by the President: *“restrictions...on public gatherings...closure of all schools, colleges and universities...restrictions applying to all gatherings including weddings, funerals, church, congregations, rallies, government meetings”*. Add to this business and commerce. This places restrictions not only on the Constitution's fundamental principles<sup>34</sup>, but also on its principles of national policy<sup>35</sup> and on constitutionally guaranteed human rights<sup>36</sup>.

---

<sup>33</sup> Constitution, ss.13(c), 16, 45

<sup>34</sup> Ibid, especially s.12(1)(d), (e) and (f); s.13 and ss.16 - 43

<sup>35</sup> Ibid, s.13

<sup>36</sup> Ibid, ss.16 - 43

21. The Constitution requires such restrictions to be *“prescribed by law...reasonable, recognized by international human rights standards and necessary in an open and democratic society...not negate the essential content of the right or freedom in question, and...be of general application”*<sup>37</sup>.
  
22. The President is authorized to make a declaration of State of Disaster. That declaration in and of itself is subsidiary legislation. However, the law does not authorize the President to make any regulations. That is for the Minister responsible for disaster relief, in this case, Hon. Everton Hebert Chimulirenji<sup>38</sup>. Until the Minister responsible for Disaster Preparedness and Relief regularizes the pronouncements that have been made by the President and other Ministers into regulations, they remain pronouncements without legal authority, unless they have been made as regulations in other existing laws. This does not provide the Government security or a defence to claims and legal challenges relating to violation of rights.
  
23. Now that, but for the injunction in Judicial Review Cause No. 22 of 2020 at the High Court in Lilongwe, Malawi has arrived at the state of ‘Lockdown’ as South Africa did, there would be even more restrictions, in diverse fields of life, to ensure effective civil protection. And there, lies, the need for a comprehensive architecture of restrictions that the Malawi Law Society suggested the United Kingdom template of legislation. The two political arms of Government responsible for *“initiating policies and legislation and implementing of laws”* on one hand and *“for enactment of laws in deliberations*

---

<sup>37</sup> Constitution, s.44

<sup>38</sup> Disaster Preparedness and Relief Act, s.47

*reflecting the interests of all people of Malawi*” on the other, cannot avoid interaction and engagement in managing such a novel and mammoth crisis capable of affecting a cross-section of all Malawians

24. However, Malawi Government seems to have considered the route taken by South Africa, of issuing regulations in various areas of human interaction based on government departmental or ministerial jurisdiction. Of course, the advantage with this option is that each Ministry, Department or Agency would easily identify the civil protections it can offer and these would be reduced into regulations. Most of the Ministers and their Principal Secretaries have apparently already been involved with the Special Cabinet Committee and so they should be already aware of the possible interventions that would provide effective civil protection.
  
25. It is important to recognise the work that has already been undertaken. The Special Cabinet Committee announced, among other things, that *“Government, through the Ministry of Health and Population convenes Health Cluster meetings on a weekly basis...meetings involve different Government Ministries and partners including NGOs...Government has developed a cost Preparedness Plan. The total budget in this plan is about MK2.4 billion. Ministry is disseminating information to the general public about the outbreak and how to prevent or control it”*. These activities must and ought to be regularised through the framework, structures and institutions of Disaster Preparedness and Relief Committee of Malawi; Planning Sub-Committees<sup>39</sup>; sub-Committees<sup>40</sup> and established or to be established Civil

---

<sup>39</sup> Disaster Preparedness and Relief Act, s.16

<sup>40</sup> Ibid, s.14

Protection Organisations<sup>41</sup> at national, and when need arises at regional<sup>42</sup> or area<sup>43</sup> levels.

26. Clear guidelines or criteria must be set for the contribution of volunteers who are not already part of a civil protection organisation or how they can join a civil protection organisation. The statutory interlocutors in Malawi Law Society and Society of Medical Doctors ought to be given prominent space in the civil protection action plan. So far, only the Minister of Health has promulgated regulations to which we shall turn to evaluate in Part II of this Paper.

## V. **Legality of Government Expenditure on Covid-19**

27. There are a number of measures announced that the executive can handle within the current legal framework subject to availability of resources. However, the President announced several measures and instructions to the Treasury. Some of these have far reaching implications since they involve the Legislature.
28. It must be noted that the President's announcements or instructions do not amend section 173 of the Constitution which prohibits drawing funds out of the Consolidated Fund without Parliamentary appropriation. His pronouncements or instructions do not amend section 23 of the Public Finance Management Act which requires that an expenditure must be tied to an outcome or an output of the government Ministry, Department, or Agency as approved by Parliament.

---

<sup>41</sup> Ibid, s.4(a)

<sup>42</sup> Ibid, s.18

<sup>43</sup> Ibid, s.22

29. On 20th March 2020 the President announced that there was a fund established for the declared state of disaster at K15 billion. The 2019-2020 financial year budget underwent Mid-Year budget review in February 2020. It is not known whether the Minister of Finance tabled any supplementary budget for K15 billion to disaster management. The requirement of law is that such expenditure be done or endorsed by the National Disaster Preparedness and Relief Committee of Malawi. If it was then a request (not instruction) for these funds would have to be made by the Commissioner of Disaster Preparedness and Relief to the Treasury. And the funds disbursed thereby would be disbursed under section 36 of the Disaster Preparedness and Relief Act.
30. In the Mid-Year Budget Review Parliament approved an appropriation of K2 billion for disaster relief but some funds on this appropriation had already been spent leaving a balance of K643,875,000 for the second half in which the state of disaster has been declared. Legally treasury can only disburse this amount. However, this funding must have been made through vote number 240 which is for the Vice President's office. The total budget for the office approved by Parliament is K4,824,072,004.00 (K4.8 billion) but the office spent; actually overspent by K3,790,210,261.00 (K3.8 billion) by the time of the Mid-Year Budget Review leaving a balance of only K1,033,861,743.00 (K1 billion) for the second half of the year to 30<sup>th</sup> June 2020. Therefore, without supplementary appropriation treasury can only legally disburse K1 billion for the management of the declared disaster.
31. The Minister of Health announced on 10th March 2020 before the declaration of the state of disaster that the Treasury had disbursed K2.4 billion this is K1

billion above the budget appropriation. This amount would require a special request from the Commissioner of Disaster Preparedness and Relief<sup>44</sup> to the Treasury and Treasury would need to complete a special Funding Authority for this amount while the allocation would have to follow appropriate procedures for availment<sup>45</sup> and for unforeseen expenditure<sup>46</sup>. On the unforeseen vote which is vote number 278 Parliament had appropriated K2 billion but some expenditure had been made so that at the time of the Mid-Year Budget Review the balance was K1,450,241,633.00 (K1.4 billion).

32. Another instruction that the President issued to Treasury was the increase in the funding allocation to MEDEF from K13 billion to 15 billion. The Mid-Year Budget Review shows that Parliament only approved K1 billion under Vote number 020 miscellaneous payments to recapitalize MEDEF. This K15 billion is eerie; it first came out in the President's first pronouncement upon the declaration of a state of disaster as a fund to be set up; and then it resurfaces during the President's second pronouncements as capitalization of MEDEF. The Law Society considers that Parliament's approval is required for this. The Law Society also notes that in the meantime, the Special Cabinet Committee says it now has a budget for K125 billion.
33. All these developments raise serious matters as regards public finance and the legality of the disaster management scheme currently being pursued by the Malawi Government. While seeking to manage the national and international crisis that the corona virus has attained, prudence requires that no other crisis

---

<sup>44</sup> Public Finance Management Act, s.26

<sup>45</sup> Ibid, s.25

<sup>46</sup> Ibid, s.24

be created in order to manage another crisis. The nation cannot manage the corona virus crisis with a legal crisis for the consequences to the public purse could be as devastating or worse than the public health crisis itself. The Law Society therefore strongly recommends an urgent legal overview of the mechanism put up to contain the corona virus pandemic.

34. And it is at this point that we now turn in Part II to examine the only legal instrument that has so far been generated to specifically address the novel COVID-19 pandemic: the Public Health (Corona Virus Prevention, Containment and Management) Rules, 2020 (hereinafter “the Corona Virus Rules”).

**PART II: EVALUATING THE PUBLIC HEALTH (CORONA VIRUS PREVENTION, CONTAINMENT AND MANAGEMENT) RULES, 2020 (hereinafter “the Corona Virus Rules”).**

**VI. The Corona Virus Rules in Context:**

35. Parliament delegates to the executive or to the judiciary the power to make subsidiary legislation within the specification and for the purposes laid out in any Act, such subsidiary legislation is required be laid before Parliament. But Parliament has no power to delegate any legislative powers which would substantially and significantly affect fundamental rights and freedoms<sup>47</sup>. All subsidiary legislation should be published in the Gazette<sup>48</sup>.

---

<sup>47</sup> Constitution, s.58

<sup>48</sup> General Interpretation Act, s.17

36. Therefore, every piece of subsidiary legislation must be made by the appropriate person, body or authority as expressed in the main Act; it must be for the specific purpose and within the limits of the delegated authority.
37. In the Corona Virus Rules the Minister of Health indicates that on 1 April 2020 he declared that Covid-19 is a formidable disease under section 31 of the Public Health Act. This must be viewed according to the scheme of the Act. The Act categorizes disease in Part III as (a) notifiable,<sup>49</sup> in Part IV as (b) infectious; and in Part V as (c) epidemic or endemic. It is clear that the framers of this legislation intended that there should be a cumulative thread running through all three categories escalating the seriousness of the diseases as it moves from Part III to Part V. This is proved by the enumeration of diseases in Part V which are all reflected in and selected from Part III. This selection means provisions in Part III and Part IV sections 11 to 29 can only apply to those diseases in Part V that also appear in Part III. The diseases in Part III are (i) notifiable diseases listed in section 11 or (ii) an infectious disease so declared by the Minister by notice published in the Gazette. The Corona Virus Rules deal with only Part V and therefore, by the principle *expressio unius est exclusio alterius*, provisions in Part III and Part IV sections 11 to 29 do not apply to the formidable Covid-19 as declared by the Minister on 1 April 2020.
38. There is no structure for national response to an epidemic. The response to a notification of an infectious disease is confined to the area certified and if such area falls in more than one District then each District is responsible for the area certified within its jurisdiction.

---

<sup>49</sup> Section 11 of PHA

39. Since COVID-19 is not listed in the provisions of section 11 and was not declared as an infectious disease under section 12 Part III and Part IV sections 11 to 29 cannot apply to COVID-19 as an epidemic as declared under section 31. Therefore, only Part V and Part VI sections 30 to 41 would apply to try save the situation.
40. Section 14 delegates to the Minister legislative authority to make regulations for notification of infectious diseases listed in section 11 or declared under section 12. In accordance with section 2 and General Notice published in the *Gazette* G.N. 144/1948 last amended by G.N. 88/1971 these rules or regulations apply to the whole country. They are, however, regulations in “*respect of the notification of infectious diseases*”. This notification of infectious diseases is done under section 13. The regulations are triggered either by such notification or by a Medical Practitioner certifying that a person has died of a notifiable infection disease of its “*infectious nature and the precautions to be taken to prevent its conveyance to others*”. There then must be a declaration of the area of the infectious disease.
41. The process is replicated in the case of a formidable epidemic or endemic disease listed or declared as such by the Minister under section 30. The rules for the formidable epidemic or endemic disease are made by the Minister under section 31. In accordance with section 2 as read with section 31 the Minister must: (1) direct by notice published in the *Gazette* the part of the country to which the rules shall apply as exemplified by G.N. 196/1952; and then declare by notice published in the *Gazette* the part of Malawi that is defined as “an infected area” as exemplified by G.N.195/1952. Even for

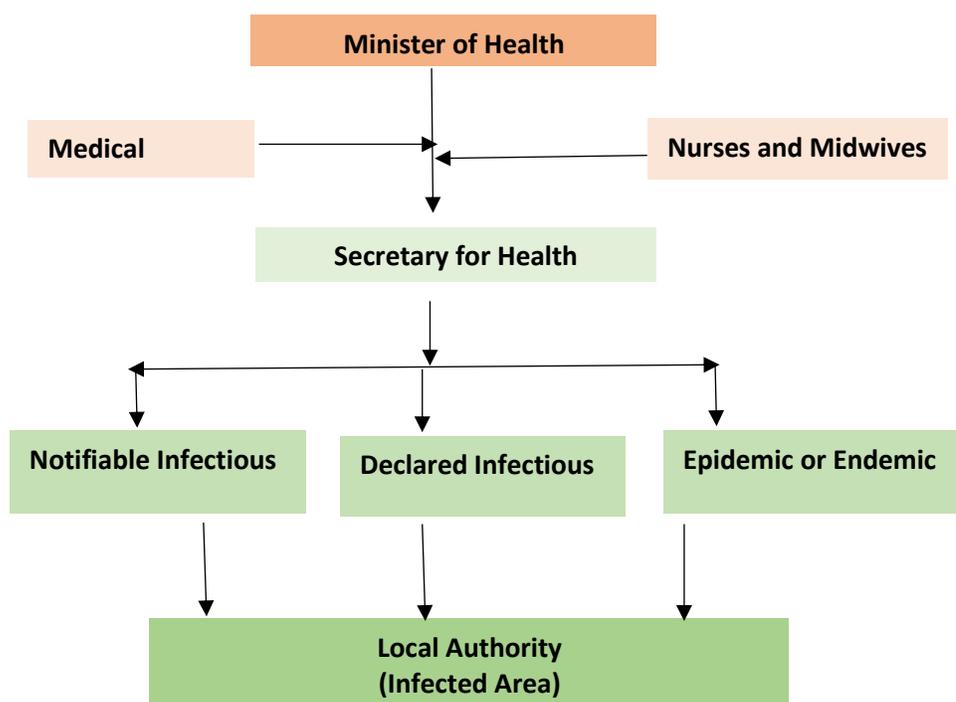
purposes of enforcement of prevention of introduction of infectious diseases at the border or on trains, the Minister must have published notice in the Gazette as exemplified by G.N. 182/1951 or G.N. 224/1963.

42. Section 29 delegates to the Minister legislative authority to make regulations for the prevention and suppression of infectious diseases. Section 31 delegates to the Minister legislative authority to make regulations dealing with formidable epidemic or endemic diseases. This provision has spatial lockdown. Lockdown only operates for the area infected. The Minister may regulate entry at the borders of the country for persons or animals by order under Part VI
43. Section 52 delegates to the Minister legislative authority to make rules for smallpox. Section 72 delegates to the Minister legislative authority to publish notice in the Gazette on prohibitions in respect of back-to-back dwellings and rooms without thorough ventilation under Part IX for Sanitation and Housing. Under that part sections 75 and 76 delegate the Minister legislative authority to make rules to confer powers and impose duties in connection with and the carrying out and enforcement thereof on local authorities; owners and others.
44. Section 95 delegates to the Minister legislative authority to make rules for the better carrying out of Part X on Sewerage and Drainage. Section 109 delegates to the Minister legislative authority to make rules under Part XIII on Water and Food Supplies and to make orders under Section 112 prohibiting the sale of milk or requiring the medical examination of any person engaged in the distribution or production of milk.

45. Section 143 delegates the Minister legislative authority for purposes of the Act especially with regards to hairdressers, wash-houses, crematoria, disposal and burial of corpses, fees and forms in regard to any matter prescribed.

## VII. Structure for Response to Epidemic Under the Public Health Act

46. Generally, the response to a notification of an infectious disease in cumulative escalation to epidemic or endemic proportions in through the following structure.



47. This structure must be contrasted with the structure at paragraph 2 above for delivering civil protection under a State of Disaster and involving a myriad Ministries and Stakeholders.
48. The Public Health Act, the Medical Practitioners and Dentists Act, and the Nurses and Midwives Act do not recognize or even mention ‘civil protection’

which is a term defined in the Disaster Preparedness and Relief Act as “*any service provided or measure taken for the purpose of preparing for, guarding against or dealing with any actual or potential disaster*”<sup>50</sup>. The Disaster Preparedness and Relief response, civil protection, structure delivers at national, regional and area levels while the epidemic response under the Public Health Act is delivered only at area level through local authorities.

49. The Corona Virus Rules are made under section 31 of the Public Health Act containing purported rules for the prevention, containment and management of the Corona Virus; Covid-19. The table of contents shows that all the items included in the rules need scrutiny; perhaps with the exception only of compulsory testing and detention, places of quarantine, and regulation of entry into Malawi.

### **VIII. The Corona Virus Rules: An Overview and Evaluation:**

50. It is recalled that, on 10 March 2020, before the declaration of a state of disaster, the Minister of Health announced that the President had set up a Special Cabinet Committee on Corona virus effective 7th March, 2020<sup>51</sup>. On 20 March 2020 President Professor Arthur Peter Mutharika declared a State of Disaster. On 6 April 2020 the Ministry of Justice announced that the declaration was gazetted on 3 April 2020 as Government Notice No.4. The Minister of Health in Rules in the Gazette of 9 April 2020 claims that on 1 April 2020 declared Covid-19 a formidable disease.

---

<sup>50</sup> Disaster Preparedness and Relief Act, s.2

<sup>51</sup> Malawi News Agency, MANA online <https://www.manaonline.gov.mw/index.php/sports/item/13723-statement-on-coronavirus-outbreakcovid-19>

51. In our considered view, the Corona Virus Rules are not lawfully promulgated primarily for being *ultra vires* section 58(1) for not being “*within the specification and for the purposes laid out in*” the Public Health Act and because it “*substantially and significantly affects the fundamental rights and freedoms recognized by this Constitution*”. It is in violation of section 21(1)(b) of the General Interpretation Act which prescribes that “*no subsidiary legislation shall be inconsistent with the provisions of any Act and any such legislation shall be of no effect to the extent of such inconsistency*”. It will be shown below that the Corona Virus Rules in Parts I and II (except rule 1) of the Notice are inconsistent with the Public Health Act and several other Acts of Parliament, and therefore in our view, according to section 21 of the General Interpretation Act, these Corona Virus Rules are not valid.
52. We consider that the overarching nullity is that the Minister of Health had no authority to make these rules as a response to Covid-19. In the sequence of actions, the President announced a State of Disaster in relation to the threat of Covid-19 on 20 March 2020. This did not preclude the Minister of Health from declaring that Covid-19 is a formidable epidemic infectious disease as authorized by section 30 of the Public Health Act. He claims that he did so on 1 April 2020. On 3 April 2020 the President’s declaration of State of Disaster relating to Covid-19 was gazetted as having been declared under section 32 of the Disaster Preparedness and Relief Act. At that point response to Covid-19 immediately became ‘civil protection’ as defined in the Disaster Preparedness and Relief Act; it moved from being mere formidable epidemic disease declared under section 30 of the Public Health Act to a Disaster under section 32 of the Disaster Preparedness and Relief Act. By operation of law jurisdiction over Covid-19 was taken away from the Minister of Health as the

Competent Authority with the Secretary for Health as the Supervisory Authority to the Minister of Disaster Preparedness and Relief as Competent Authority with the National Disaster Preparedness and Relief Committee of Malawi and the Commissioner for Disaster Preparedness and Relief as Supervisory Authorities in that order.

53. Indeed, the Secretary for Health who would be the sole Supervisory Authority for Covid-19 under the Public Health Act, now became only one of about between 16 and 18-member National Disaster Preparedness and Relief Committee of Malawi. This Committee includes, among others, the Chief Secretary to the President and Cabinet, the Secretary for Local Government, the Inspector General of Police, the Defence Force Commander and the Secretary for Community Services. Each member brings to the Committee the responsibilities and strategies from their institutions. Their institutions are part of the response to the disaster and these institutions or their officers do not need special legislation to discharge the functions of institutions or their duties. However, should there be a need for additional legislation the Legislature, by an Act of Parliament has authorised the Minister of Disaster Preparedness and Relief to make subsidiary legislation. This subsidiary legislation for Covid-19 has to be made under the Disaster Preparedness and Relief Act.
54. Therefore, it is in the opinion of the Law Society that from 3 April 2020 the Minister of Health has had no jurisdiction over response to Covid-19; his decisions and actions may be lacking the backing of the law where such decisions and actions should have been taken by the Minister of Disaster Preparedness and Relief; the National Disaster Preparedness and Relief Committee of Malawi; and the Commissioner for Disaster Preparedness and

Relief or his delegated officials. In our view in making rules for a response to Covid-19 the Minister of Health may have: (1) usurped the legislative authority delegated by Parliament to the Minister of Disaster Preparedness and Relief; and (2) made rules under the wrong statute because Parliament delegated the making of rules for response to a disaster to be under, and to be made within the specifications and scope of the Disaster Preparedness and Relief Act not the Public Health Act. Furthermore, the Minister may have acted gravely *ultra vires*. We therefore consider the Corona Virus Rules made and promulgated in Government Notice No.5 are therefore strictly speaking invalid.

55. Furthermore, the membership of the Secretary for Health, the Secretary for Local Government, the Inspector General of Police, and the Defence Force Commander on the National Disaster Preparedness and Relief Committee of Malawi obviates the need for inclusion of “enforcement officer” in rule 2 of the Corona Virus Rules for (a) a health officer; (b) a police officer; (c) a member of the Malawi Defence Force; (h) an area civil protection officer. The rules do not define how these officers are supposed to discharge their duties or deliver civil protection outside their institutions and without their reporting responsibilities. Therefore, it is our considered view that in all this the Minister of Health has created an implementing structure that is not only inconsistent with Disaster Preparedness and Relief Act but also with the Public Health Act.
56. The Public Health Act creates the structure to deliver a response to a formidable epidemic or endemic disease in three steps: first, the Minister must declare a formidable epidemic or endemic disease under section 30 which must be published in the Gazette; second, the Minister declares under section 31 the area that is infected by the disease which must also be published in the

Gazette; and third, where there are no rules, the Minister must make rules and publish them in the Gazette under section 31. Once this is done then the delivery of the response to the disease is the responsibility for the local authority in that area.

57. On this the Public Health Act provides in section 32:

*“The local authority of any area within which or part of which Rules made under this Part are declared to be in force shall do and provide all such acts, matters and things as may be necessary for mitigating any such disease, or aiding in the execution of such Rules, or for executing the same, as the case may require. A local authority may from time to time direct any prosecution or legal proceedings for or in respect of the wilful violation or neglect of any such Rules”.*

58. This structure is created by the substantive provisions of the Public Health Act and Corona Virus Rules as subsidiary legislation cannot amend or repeal section 32. The creation of “enforcement officer” under rule 2 of the Covid Virus Rules is therefore inconsistent with the Act of Parliament and the notice has no effect.

59. In addition, section 33 provides:

*“Any local authority or medical officer of health or any person duly authorised by any local authority or medical officer of health (Secretary for Health) shall have power of entry on any premises or vehicle, for the purpose of executing or superintending the execution of any Rules so made by the Minister as aforesaid”.*

60. The Minister of Health has not justified why the involvement in the response to the disease has been confined to “*enforcement officer*” enumerated in rule 2 of the Rules. In any event the substantive law mandates the Secretary for Health to authorise any person. Subsidiary legislation cannot limit this authority.
61. The Public Health Act creates offences in sections 34 and 36 with penalties prescribed in section 37. The offences are for failure to report the sickness or mortality of animals suspected of plague and the refusal without cause to allow the Secretary for Health requisition a building for purposes of the response to the epidemic. The offences created by Corona Virus Rules in rule 21, however, are based on the “*enforcement officer*” created under rule 2 which we have shown to be inconsistent with sections 32 and 33. This “*enforcement officer*” is inconsistent with the substantive provisions of the Public Health Act, is made without authority either under that Act or any other law and is therefore illegal. Consequently, we consider that Rule 20 of the Corona Virus Rules is therefore illegal, and *void ab initio*.
62. Rule 3(2) states that the rules are enforceable whether or not a state of disaster in relation to COVID-19 is in force under the Disaster Preparedness and Relief Act. It must be recalled that the President declared a State of Disaster on 20 March 2020 and the declaration was published in Government Notice No.4 of the Gazette of 3 April 2020. The rules were published in Government Notice No. 5 of the Gazette 9 April 2020. Therefore, on 3 April 2020 before the declaration of COVID-19 as a formidable disease this COVID-19 disease was already a declared disaster.

63. Three things therefore happened, by operation of law. First, COVID-19, although a disease subject to the Public Health Act, fell under the jurisdiction of the Disaster Preparedness and Relief Act which was enacted by Parliament, as stated in its preamble for: *“the co-ordination and implementation of measures to alleviate effects to disasters, the establishment of the office of Commissioner for Disaster Preparedness and Relief, the establishment of a National Disaster Preparedness and Relief Committee of Malawi, and for matters incidental thereto or connected therewith”*
64. Secondly, the Secretary for Health is a member of the National Disaster Preparedness and Relief Committee of Malawi which has primary responsibility for disaster, in this case, COVID-19 and therefore answerable to the Minister of Disaster Preparedness and Relief. This must be stressed that according to the law, the Secretary for Health who is the Supervisory Authority fell under the Minister of Disaster Preparedness and Relief as a competent authority and the National Disaster Preparedness and Relief Committee of Malawi as supervisory authority. Thus, the Secretary for Health is now not the sole Supervisory Authority for Covid-19 but a member of a collective institution as Supervisory Authority. *“Any service provided or measure taken for the purpose of preparing for, guarding against or dealing with”* Covid-19 is what has been defined as “civil protection” under section 2 of the Disaster Preparedness and Relief Act. Therefore, any service that can be offered under the Public Health Act to respond to Covid-19 must be done and is deemed to be done under the Disaster Preparedness and Relief Act.

65. Third, the Minister of Disaster Preparedness and Relief is the only authority delegated with the responsibility of making delegated legislation for civil protection. This civil protection cannot be delivered outside the framework of the Disaster Preparedness and Relief Act. In our view the Minister of Health has no authority to make rules for civil protection or response to COVID-19, a declared disaster. The Rules in the Corona Virus Rules are subsidiary legislation and cannot, therefore, repeal, suspend or amend the Disaster Preparedness and Relief Act, as substantive Act of Parliament, the primary source of law subject only to the Constitution. Rule 3(2) in Corona Virus Rules is therefore, in our view, illegal, and *void ab initio*.
66. Once again, the preamble to the Disaster Preparedness and Relief Act provides that it is for:
- “the co-ordination and implementation of measures to alleviate effects to [Covid-19] ...and for matters incidental thereto or connected therewith”*
67. ‘Measures’ has been underlined for emphasis. The rules are duplicating the mandate of the Disaster Preparedness and Relief Act and since they are made under the Public Health Act they are made without authority for Covid-19 as a disaster. They are therefore, in our opinion, illegal, and *void ab initio*.
68. The substantive provision for compulsory testing is section 16 of the Public Health Act and it only gives mandate to the medical officer of health who is the Secretary for Health or his delegate; it does not give mandate to a “health officer” whose definition includes a ‘health inspector’. However, rule 6(1) (a)

and (b) in the Rules extend this mandate to “enforcement officer” which includes a host of other persons who have no medical training, aptitude or orientation including; a police officer; a member of the Malawi Defence Force; an immigration officer; an airport commandant; an officer in charge of a railway station; an officer in charge of a port facility; and an area civil protection officer. We consider that that the inclusion of unqualified persons to the mandate is inconsistent with the substantive provision and therefore null and void.

69. The disinfection of premises or articles, the sequestration or destruction of articles has been given to the local authority under section 17 of the Public Health Act. This must be done on the certification of a medical officer of health or a health inspector. Rules 6(1)(c) and (d) in Corona Virus Rules have removed the responsibility of the local authority and removed the requirement for a certificate of a medical officer of health or a health inspector without giving justification. This is tantamount to repealing the substantive section 17 of the Public Health Act. We consider that the Minister of Health does not have the authority to repeal, suspend or amend provisions of the Public Health Act hence, in our considered opinion Rules 6(1)(c) and (d) in the Rules are *void ab initio*.
70. Section 21 of the Public Health Act mandates the local authority to remove and detain infected persons on the certification of the medical officer of health. Rule 6(1)(e) in Rules, removes this authority from the local authority and gives it to an “enforcement officer” who includes; a police officer; a member of the Malaŵi Defence Force; an immigration officer; an airport commandant; an officer in charge of a railway station; an officer in charge of a port facility; and

an area civil protection officer without medical training or qualification, aptitude or orientation. Further, the rule removes the requirement for medical certification. Not only is this inconsistent with the substantive section 21 of the Act but the Minister also does not have the authority to repeal, suspend or amend that section. Accordingly, Rules 6(1)(e) is ultra vires section 21 of the Public Health Act and therefore *void ab initio*.

71. Rules 6(2), 6(3), 6(4) and 6(5) are consequent upon rule 6(1) and since rule 6(1) is null and void and in parts void ab initio, these sub-rules are all void ab initio.
72. Section 36 of the Public Health Act confers authority on the Secretary for Health to identify and sequestrate buildings, vehicles and other articles or structure in connection with the threat or outbreak of an infectious disease. Rule 7 on the other hand takes away this mandate and gives it to the Minister. The Minister of Health has no authority to take authority that Parliament conferred on the Secretary for Health and to give it to himself. Rule 7 would for this reason be *void ab initio*.
73. Rule 8 in the Rules is consequent upon the legitimacy of the status of “*enforcement officer*”. Neither the Public Health Act nor the Disaster Preparedness and Relief Act recognise this institution. It has also been observed above that this institution is: (1) inconsistent with the substantive provisions of the Public Health Act, therefore of no effect according to section 21 of the General Interpretation Act; (2) without authority amending the

mandate of the local authority and certification of a medical health officer. In the circumstances, Rule 8 would, in our view be invalid.

74. Rule 9 is fiction. COVID-19 on the other hand is real and upon us. This rule creates stress between the Ministry of Health and the Ministry of Disaster Preparedness and Relief as well as between Ministry of Health and public officers in the Ministry of Disaster Preparedness and Relief. First, there is no information that the Minister of Disaster Preparedness and Relief has *“by order published in the Gazette and on the advice of the Commissioner, established civil protection regions or declare an area to be a civil protection region”* under section 18 of the Disaster Preparedness and Relief Act. This is a prerequisite for and there is no evidence that *“by order published in the Gazette, and on the advice of the Commissioner, established civil protection areas in civil protection regions or declared any area to be a civil protection area”* under section 22 of the said Act. Second, in accordance with section 23(2) of the Disaster Preparedness and Relief Act *“in performing their duties under the Act area civil protection officers and their assistants shall be subordinate to their respective regional civil protection officer and to the Commissioner”*. Third, the Minister of Health has no authority over a civil protection officer. Fourth, the Minister of Health has no authority to place a civil protection officer under any other supervisor other than the regional civil protection officer and the Commissioner. Fifth, the Minister of Health has no authority to place a civil protection officer, an office created by a substantive section of the Disaster Preparedness and Relief Act, under an “enforcement officer”, an office created by subsidiary legislation under the Public Health Act. This is tantamount to amending a provision of the Disaster Preparedness and Relief Act. The Minister of Health does not have such authority, the subsidiary

legislation is inconsistent with an Act of Parliament and we have shown that the creation of “enforcement officer” is ultra vires sections 16, 17 and 21 of the Public Health Act. It is also ultra vires sections 22, 23, and 47 of the Disaster Preparedness and Relief Act. Rule 9 is *void ab initio*.

75. Rule 2 of Corona Virus Rules defines ‘lockdown’ as the restriction of movement of persons declared under rule 11. Rule 11 provides that the Minister of Health may declare a ‘lockdown’ and publish the declaration in the Gazette. Several considerations must be highlighted with regard to lockdown.
76. First, a full reading of the Public Health Act reveals that it focuses on infectious diseases cumulatively and hierarchically graded from: (a) Part III section 11 Notification of Infectious Diseases; (b) Part IV section 16 Prevention and Suppression of Infectious Diseases; (c) Part V section 30 Formidable Epidemic or Endemic Diseases; (d) Part VI section 38 Prevention of Introduction of Infectious Diseases; (e) Part VII section 42 Smallpox; and (f) Part VIII section 53 Venereal Diseases. The law has expressly listed these infectious diseases in section 11. All these infectious diseases are notifiable diseases. However, in the case where an infectious disease has not been listed in section 11, the Minister of Health is authorised to add such diseases as a notifiable disease under section 12. From the list in section 11 is drawn a short list of epidemic or endemic diseases in section 30. An infectious disease not in section 11 may also be declared by the Minister as an epidemic or endemic disease under section 30. That the disease declared as an epidemic or endemic under section 30 must be an infectious disease is borne out by: (1) all the diseases listed in section 30 are infectious diseases from section 11; (2) for the

rules made under section 31 for diseases in section 30 including the declared disease the law provides:

*“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 make Rules for all or any of the following purposes, namely.... (d) for preventing any person from entering or leaving any infected area”*

77. Second, the disease declared by the Minister as an epidemic or endemic is also a notifiable disease. However, section 35 imposes the responsibility of reporting the notification to the Secretary for Health on the local authority. Notifications of infectious diseases is done under section 13 of the Public Health Act. Under that section: (a) the head of family or person in charge or person attending on a person suffering from an infectious disease must report it to the nearest medical officer of health; (b) the principal or person in charge of a school, orphanage or boarding house must report the infectious disease to the nearest medical officer of health; (c) a medical practitioner attending on a person suffering an infectious disease must forthwith on becoming aware that the patient is suffering from any notifiable infectious disease: *“send to the nearest medical officer of health a certificate stating the name of the patient, the situation of the building and the notifiable infectious disease from which, in the opinion of such medical practitioner, the patient is suffering”*
78. Furthermore, (e): *“every medical practitioner who becomes aware, by post-mortem examination or otherwise that any person has died of a notifiable infectious disease shall immediately furnish a written certificate thereof to the*

*nearest medical officer of health and shall also inform the head of the household or the occupier of the premises or any person who has been in attendance on such diseased person of the infectious nature of the disease and the precautions to be taken to prevent its conveyance to others”.*

79. Regarding epidemic or endemic disease section 35 provides: *“Every local authority shall immediately report to the Secretary for Health or the nearest medical officer of health by telegraph, or other expeditious means, particulars of every notification received by such authority of a case or suspected case of any formidable epidemic or endemic disease”*
80. Third, in view of the foregoing, the Minister omitted to declare COVID-19 an infectious notifiable disease under section 12 of the Public Health Act. This, like the declaration that COVID-19 is an epidemic should have been published in the Gazette. Following on this and on the declaration that COVID-19 was an epidemic or endemic disease under section 31 the Minister should have declared the part of Malawi that is the *“infected area”*. This too should have been published in the Gazette. There is precedent for this. It was done for the area of Chief Chapananga in 1952 under Government Notice No. 195/1952.
81. While rule 4 of the Corona Virus Rules has declared that it applies to the whole country, there is no information that any part of the country has been declared an *“infected area”*. Such declaration would reasonably be informed by the notifications received by the Secretary for Health under sections 13 and 35 of the Public Health Act. From recent Government updates such

notifications have been received from Area 9, Area 25B in Lilongwe; Limbe in Blantyre, Chikwawa District and Nkhota-Kota District. The Minister of Health, on following procedures, is authorised according to section 31(d) to “prevent any person from entering or leaving” Area 9, Area 25B, Limbe or the districts of Lilongwe, Blantyre, Chikwawa and Nkhota-Kota. This can be done upon the Minister publishing in the Gazette a declaration that these districts are “infected areas”. There is no information that he has done so.

82. However, the Law Society recognises that Corona Virus is novel pandemic and that restricted declaration would perhaps not have been ideal to protect the Malawi as whole. In that regard it would have been proper for the responsible minister to promulgate rules idea to the situation.
83. Section 31 and indeed the whole of the Public Health Act does not give the Minister of Health authority to legislate for any of the matters covered by Rules 12 to 19. Subsidiary legislation for these has been specifically authorised under the specific Acts of Parliament. We consider that these rules have been made *ultra vires* and therefore are *void ab initio*. Rules 12 and 16 are consequent upon the institution of “enforcement officer”; and it has been shown above that this institution is being established without authority. It is our considered opinion therefore that this renders rules 12 and 16 substantially *void ab initio*.
84. Furthermore, in our considered view, Rules 18 and 19 violate the Constitution and are therefore illegal, and unconstitutional. The starting point is section 7 of the Constitution. It provides that the Executive initiates policies and legislation but according to section 8 only the Legislature must enact laws. In addition, section 48(2) provides that an Act of Parliament shall have primacy

over other forms of law, subject to the Constitution. However, section 58 provides:

*“Parliament may, with respect to any particular Act of Parliament, delegate to the executive... power to make subsidiary legislation within the specification and for the purposes laid out in that Act”*

85. Section 21 of the General Interpretation Act provides that subsidiary legislation cannot be inconsistent with any Act of Parliament; such subsidiary legislation has no effect. The Executive therefore cannot enact any legislation that limits the power of Parliament to enact laws, not even in terms of procedure because the Constitution expressly states in section 56 that the National Assembly, may regulate its own procedure. The Constitution also expressly provides in section 5 that any law that is inconsistent with the provisions of the Constitution shall be invalid. Subsidiary legislation cannot repeal, suspend or amend substantive provisions of an Act of Parliament or the Constitution. Section 31 does not give the Minister the authority to limit Parliaments power to legislate or to limit its procedure. It is hard to ignore the imagery that Rule 19 evokes: that of the cliché “biting the finger that feeds you”. It is our considered opinion that the Minister of Health has no authority to make rule 19, it is *void ab initio*.

86. For similar reasons the delegated authority under section 58 of the Constitution to the Executive in a particular Act of Parliament to make subsidiary legislation for specified purposes of that Act cannot be used to make legislation that limits the mandate or procedure of the Judiciary. Section 103 of the Constitution expressly provides:

*“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”.*

87. Rule 18 subsidiary legislation contravenes this substantive Constitutional provision. The Courts Act delegates subsidiary legislative authority to the Chief Justice: (a) under section 7E to make rules to regulate practice and procedure in District Registries; (b) under section 59 to make rules of court regulating practice and procedure in subordinate courts; and (c) under section 67 to make rules of court. The Minister of Health has not been delegated any authority to make rules regulating the judiciary under section 31 of the Public Health Act. In fact, the Chief Justice already issued directive on measures to respond to Covid-19 upon the President’s declaration of State of Disaster. Rule 18 is therefore in contravention of the Constitution, the Public Health Act, and the Courts Act; it was made without authority, *ultra vires*, and *void ab initio*.

### **PART III:**

### **END NOTE- SECOND MLS CALL FOR A UNITED LEGAL FRONT AGAINST CORONA VIRUS**

88. The Malawi Law Society on 2 April 2020 proposed to the President the initiation of legislation which Parliament could enact on the template of the United Kingdom Corona Virus Act, 2020. This approach would obviate piecemeal subsidiary legislation under various Acts of Parliament. At the pace things have moved since 2<sup>nd</sup> April 2020, one of the challenges to that proposal, at the moment, could include time which is of the essence.

89. However, all the concerned institutions and supervisory authorities can easily identify measures in response to COVID-19 some of which have already been done. These should then be reduced into subsidiary legislation by the delegated person or authority under each particular Act of Parliament.
90. The Law Society is concerned that the Minister of Health who now works with a large Cabinet Committee on COVID-19 appears to have disregarded the Constitutional dictates of separation of powers and tramples on rule of law as has been done in the rules in promulgated Corona Virus Rules. Furthermore, it is common knowledge that Cabinet is headed by the President, this Special Cabinet Committee on COVID-19 reports to the President. It is therefore of graver concern to the Law Society that the President has allowed the structure under Ministry of Health to take over the coordination and management of the disaster while the same legal framework and structure is under the Disaster Preparedness and Relief Act. The framework of the Corona Virus Rules promulgated by the Minister of Health create unsavoury tensions between the three branches of Government. These rules do not foster unity even among the three organs of State: the Legislature, the Executive, and the Judiciary.
91. While corona virus remains a pandemic of worldwide proportions requiring urgent attention in order to protect the people of Malawi, its management in Malawi under the current arrangement's risks exposing the Malawi Government and the public purse to extensive and perhaps unbearable claims because of various illegalities identified above. In aid of its mandate under section 64(d) Legal Education and Legal Practitioners Act, the Malawi Law Society, therefore, recommends to the State President and the Office of the President and Cabinet, the Chief Justice as Head of the Judiciary and the

Speaker of the National Assembly, an urgent overhaul and realignment of the crisis management structure to mitigate the breaches already identified.

92. The new crisis management regime must build on what has already been done, regularise the serious irregularities identified, bring in the statutory interlocutors mainly the Medical Council of Malawi or the Society of Medical Doctors and the Malawi Law Society to play a professional role and for the political arms to settle political difference in legislative instruments reflecting need for Government to act lawfully and proportionately while grappling with the current emergency and pushing the nation on the path to recovery from the pandemic.
93. We re-iterate the sentiments from the Commonwealth Lawyers Association that it is essential that while looking after the population that emergency legislation must address the emergency and must not be used as an opportunity to pass laws which shore up government or political parties. The Law Society calls upon all authorities to see to the rule of law at all times in managing the emergency at hand.

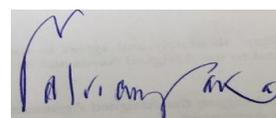
Signed and Dated this 20<sup>th</sup> day of April 2020



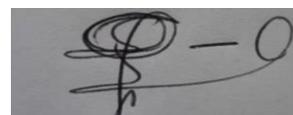
-----  
**Burton Chigo Mhango**  
**CHAIRPERSON**



-----



-----  
**Patrick Gray Mpaka**  
**VICE-CHAIRPERSON**



-----

**Martha Etta Kaukonde**  
**SECRETARY**



**Wesley Mwafulirwa**  
**CHAPTER REP(NORTH)**

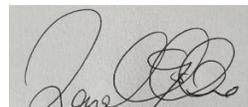


**Madalitso Kausi**  
**CHAPTER REP.(CENTRAL)**

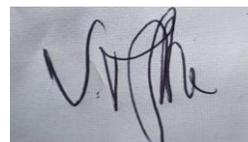


**Robert Nthewa**  
**EXECUTIVE MEMBER**

**Chrispin C. Ngunde**  
**TREASURER**



**Mwai Msungama**  
**CHAPTER REP(SOUTH)**



**Vitumbiko Gubuduza**  
**EXECUTIVE MEMBER**



**Edwin Dalo Mtonga**  
**EXECUTIVE MEMBER**

Delamere House,  
2<sup>nd</sup> Floor, Right Wing,  
P O Box 1712,  
Blantyre,  
MALAWI.

*Tel: +265 1 821 043 Fax: +265 1 824 635*

*Email: [info@malawilawsociety.net](mailto:info@malawilawsociety.net).....[www.malawilawsociety.net](http://www.malawilawsociety.net)*