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*THE RELATIONSHIP BETWEEN THE EXECUTIVE AND THE
LEGISLATURE*

BY

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The Relationship between the Executive and the Legislature
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The Doctrine of the Separation of Powers

- ◆ Historically all states seem to start with one person (the King) exercising all power (generally unrestrained by law).
- ◆ But inevitably as societies become more complicated different kinds of governmental function emerge.
- ◆ Traditionally these have been recognised as legislative, executive and judicial functions.

The emergence of the doctrine

- ◆ Many constitutional theorists in earlier centuries held that was not just convenient but necessary for good government that these different functions should be exercised by different people.
- ◆ If the same person could make the law as administered it, the possibility of abuse of power was obvious and pressing.
- ◆ So: “Wherever the right of making and enforcing the laws is vested in the same man or the same body of men, there can be no public liberty” (Sir William Blackstone).
- ◆ “...there is no liberty if the judicial power is not separated from the legislative and the executive....” Montesquieu *The Spirit of the Law* (18th Century).
- ◆ The doctrine has been enormously influential in many constitutions (particularly that of the USA).
- ◆ It must be considered a fundamental constitutional principle of the modern age.

The Separation of Powers in Malawi

- ◆ The Constitution of Malawi clearly establishes the three separate branches of government.
- ◆ Section 7 - The Separate status, functions and duties of the executive
- ◆ Section 8 - The Separate status, functions and duties of the legislature

- ◆ Section 9- The Separate status, functions and duties of the judiciary

The Separation of Powers is not absolute

- ◆ Notwithstanding that the doctrine is accepted uncritically across the world, no constitution in the world would operate if the doctrine were applied absolutely.
- ◆ In the UK we pay lip service to the doctrine, but...
- ◆ The Lord Chancellor was until recently a judge, a member of the House of Lords, and a Cabinet member!

Responsible Government

- ◆ And, most importantly for current purposes, the doctrine is breached in the UK with the concept of responsible government.
- ◆ This is the idea that the executive government is responsible to the legislature, ie must account to the legislature for its conduct of the nation's affairs.
- ◆ But how is this accountability to be achieved?

Mechanisms of Responsibility

- ◆ Ministers of the Crown (and in particular the prime minister) have to be or become Members of Parliament.
- ◆ This is so they can be called before Parliament to give an account of what they have been doing. This is both before Parliament (and its committees) and by individual matters raised privately by MPs on behalf of their constituents.
- ◆ Even more important is the principle that if the Government loses the confidence of the House of Commons it must resign.
- ◆ And there will then generally be a general election or the prime minister resigns and the Queen asks someone else to form a government.
- ◆ All this can happen in days....

The breach of the doctrine

- ◆ But here we have Ministers (including the prime minister), ie, the heads of the executive government, being required to be legislators.

- ◆ It would be difficult to imagine a clearly and more far reaching breach of the doctrine.
- ◆ Moreover, without this mechanism, the executive government in the UK (being under the Queen (unelected)), would lack all democratic legitimacy.

More absolute visions

- ◆ So the doctrine is not applied absolutely. And you will not find me suggesting that Malawi should blindly adopt the doctrine in an absolute form.
- ◆ But it must be said that many countries and most prominently the USA are more rigorous in their application of the doctrine.
- ◆ We need to glance at these too...

The United States of America

- ◆ Separation of Powers is adopted far more deeply in the Constitution of the USA.
- ◆ The President (unlike the Prime Minister) is elected for four years and he is secure in that position.
- ◆ He may be impeached (for high crimes and misdemeanours) but this is very difficult. He may die or resign.
- ◆ But even if he loses the confidence of the legislature, he is secure in his office.
- ◆ This is as it should be because the President is elected by the people.
- ◆ But the President (and his Cabinet Officers) cannot be members of Congress.
- ◆ He may veto legislation (but can be overridden by two thirds of each House)
- ◆ He may address the Congress and is bound to in some cases.

Co-operation vital

- ◆ In the end every executive depends upon the legislature for legislation imposing the taxes (and approving the expenditure) essential for government.

- ◆ So in the end there has to be co-operation or else government would be impossible.
- ◆ In both the UK and the USA the party system is important in facilitating that co-operation.

What about Malawi?

- ◆ The President is directly elected and cannot be a member of Parliament (section 80(7)(e)).
- ◆ The president holds office for five years and can only be removed following impeachment (section 86).
- ◆ The Ministers he appoints are accountable to him (section 97).
- ◆ So far we are following the USA model of an executive president with strict adherence to the separation of powers.

But what else?

- ◆ If Malawi was following the US model then Ministers would not be able to be members of Parliament.
- ◆ A person is disqualified from membership if they “holds, or acts, in any public office”.
- ◆ The Malawian courts have held that ministerial office is not a “public office” and thus members of parliament can be ministers.

The Malawian Executive Today

- ◆ My understanding is that today every Minister is also a Member of Parliament.
- ◆ Thus it is as if Malawi is following de facto a UK model, clearly breaching the doctrine of the separation of powers..
- ◆ The truth is that Malawi is following a hybrid model with elements of both the UK and the USA (also SA).

Does this matter?

- ◆ Ultimately this is for Malawians to decide.
- ◆ The breach of the separation of powers is of little consequence, if the system works for Malawi.
- ◆ No prospect of a non-executive President.

- ◆ What about a Cabinet of all the talents including those outside Parliament? Might be the best form of government for Malawi.
 - ◆ But if the President were to form a government without MPs as ministers would is it likely that his budget would be approved?
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