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**JUDICIAL (IN)ACTIVISM IN MALAWI? A CRITICAL ANALYSIS OF THE IMPACT OF  
CONSTITUTIONAL JURISPRUDENCE ON CONSTITUTIONALISM AND THE RULE OF  
LAW**

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**Thesis Submitted for the degree of PhD in Law**

**In the Faculty of Law, School of Oriental and African Studies (SOAS), University of  
London**

**September 2012**

**Prepared under the supervision of Prof Mashood Baderin and Dr Alex Fischer**

## DECLARATION

I have read and understood regulation 17.9 of the Regulations for students of the School of Oriental and African Studies concerning plagiarism. I undertake that all the material presented for examination is my own work and has not been written for me, in whole or in part, by any other person. I also undertake that any quotation or paraphrase from the published or unpublished work of another person has been duly acknowledged in the work which I present for examination.

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Date: 15.05.13

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## **ABSTRACT**

The vital role of the judiciary in enhancing constitutionalism cannot be overemphasised. This attains particular significance in Africa where the failures of constitutionalism are well documented. This thesis explores the impact of constitutional jurisprudence on constitutionalism and rule of law in Malawi. Any such study, of necessity, contends with the concept of judicial activism. By drawing upon scholarship and jurisprudence from other common law jurisdictions this thesis proposes a basis for concluding that judicial activism may sometimes undermine constitutionalism.

Though there is an independent judiciary in Malawi, constitutionalism has not fully materialised. In this context, it is proposed that the reason for such deficiency is not the lack of judicial activism on the part of the Courts in Malawi; rather an insufficient conception of the judicial role suited to the Malawian context. The study seeks to demonstrate that such insufficiency has resulted in the courts adopting a liberal democratic approach to constitutional adjudication in a jurisdiction more suited to a social-trust-based approach. To the extent that the liberal democratic approach is at odds with the norms, traditions and values indigenous to Malawi it has served to undermine constitutionalism. In this context, the thesis highlights other relevant studies establishing that the social-trust based paradigm has a legal basis in the Malawi Constitution as well as other primary governance legislations such as the Corrupt Practices Act.

This thesis identifies the importance of judicial training tailored to defining the judicial role within the peculiar socio-political context in a specific jurisdiction in order to preserve the democratic imperative of autochthony at the root of legitimate constitutionalism. It is argued that without such a deliberate approach the judicial role (even through innovations of judicial activism) could end up being another elitist tool employed to hijack the democratisation agenda embodied in the current Constitutional order by reason of the courts advocating values which are alien to the Malawian socio-political order. While conceding that training alone can never produce certainty, it is proposed that in this case it would enhance a more appropriate appreciation of the peculiar judicial responsibility espoused under the Malawian constitution.

**Keywords:** Judicial activism, constitutionalism, judicial deference, governance, democracy, judicial process, constitutional interpretation.

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## Chapter 1

### Introduction

*'... it is not the existence of ...office [and power] holders and ordinary citizens ... that produces popular demand for [citizens participation in governance], it is what office holders do to ordinary citizens, what people with power do to those without it.'*<sup>1</sup>

#### 1.1 Statement of the research problem

Ideally, the citizens of a country should identify with its written constitution if the constitution is to have a 'social reality' beyond that of a written legal document;<sup>2</sup> if it is to be a binding declaration of whom the people of that country are or aspire to be, of the values which they represent and will strive to have enforced; if its observance is to become a common and shared motivation amongst them.<sup>3</sup> The constitution needs to be infused with philosophies and/or ideologies that the citizenry identify with if they are to be respected.<sup>4</sup> It is precisely in all these foregoing areas that the Constitution that Malawi adopted in 1994 fails the test.

In 1994 Malawi adopted a liberal democratic constitution, which has been described 'as one of the most liberal' constitutions in the world.<sup>5</sup> However, as pertinently pointed out by Kanyongolo<sup>6</sup> and affirmed by Nkhata,<sup>7</sup> liberal democracy has no indigenous ideological, philosophical and historical roots in Malawi. The adoption of a constitution infused with an ideology or democratic theory that is at odds with the Malawi nation has been traced to the short-comings in its drafting process that was not adequately consultative of the majority of Malawians.<sup>8</sup> Existing literature on the status of governance and constitutionalism in Malawi attributes the failure to entrench good governance and constitutionalism in Malawi largely to the failure of the people of Malawi to identify with the liberal democratic values entrenched in

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<sup>1</sup> M Walzer, *Spheres of Justice: A Defence of Pluralism and Equality* (Basic Books, 1984) xii.

<sup>2</sup> DJ Goldford, *The American Constitution and the Debate Over Originalism* (CUP, 2005) 3; see also MJ Nkhata, 'Rethinking Governance and Constitutionalism in Africa: The Relevance and Viability of Social Trust-Based Governance and Constitutionalism in Malawi' (University of Pretoria: PhD Thesis, 2010) 1 – 283, 66 (pointing out that it is only when the 'citizenry identifies with a particular constitutional document and is animated to see its implementation' that constitutionalism can be entrenched in a country) available at <http://upetd.up.ac.za/thesis/available/etd-06202011-092912/unrestricted/03chapter3.pdf>.

<sup>3</sup> Ibid.

<sup>4</sup> Nkhata (n 2) 155 – 177 (arguing for the adoption of a new democratic paradigm suited for Africa to replace 'liberal democracy').

<sup>5</sup> D Chirwa, 'Democratisation in Malawi 1994 – 2002: Completing the Vicious Circle' (2003) 19 *South African Journal of Human Rights* 316, 317 – 318.

<sup>6</sup> FE Kanyongolo, 'Courts, Elections and Democracy: The Role of the Judiciary' in M Ott, B Immink, Mhango eds., *The Power of the Vote: Malawi's 2004 Parliamentary and Presidential Elections* (Kachere Series, 2004) 206.

<sup>7</sup> Nkhata (n 2) 155 – 177.

<sup>8</sup> Ibid; see also Kanyongolo (n 6).



the Constitution.<sup>9</sup> Further, in general, the bad news that existing literature delivers is that ‘the liberal democratic paradigm has failed Africa and is currently failing Malawi as well’<sup>10</sup> and that fact cannot be disputed ‘even by the most optimistic and committed of its disciples or evangelists.’<sup>11</sup> In that context, Kanyongolo has argued for a reconsideration of the liberal democratic foundations of the Constitution of Malawi with the aim of replacing them with constitutional principles that are indigenous but without losing the essence of what democracy constitutes as a concept.<sup>12</sup> In essence, as put by Nkhata, it can be said that Kanyongolo recommends ‘the repeal of the 1994 Constitution and the adoption of a new Constitution.’<sup>13</sup>

Heeding Kanyongolo’s call, but in appreciation of the improbability of achieving a ‘political consensus ... for the repeal of the 1994 and the adoption of a new Constitution’, Nkhata proposes an alternative approach. That is, the 1994 Constitution remains the Constitution that binds the Malawi nation to date and in the foreseeable future. Therefore, proceeding on existing findings that show that democracy as a concept ‘is not alien to Africa [and to Malawi] while liberal democracy [as a theory of democracy] is’,<sup>14</sup> Nkhata proposes a ‘social trust-based governance’ model that infuses democracy as a form of governance with values that are prioritised by the citizenry in accordance with ‘established culture, traditions and history.’<sup>15</sup> Since the proposed approach is meant to work within the very framework of the 1994 Constitution as it stands, Nkhata calls on the Malawi Judiciary to ‘seriously reflect on their role in the democratisation of Malawi’, and ‘to create jurisprudence that addresses Malawian problems from a “Malawi-centric” perspective.’<sup>16</sup> In essence, the work of the judiciary in this context entails interpreting the constitution in a manner that allows the ‘social trust-based governance model’ to, more or less; override the dominance of liberal democratic theories in the Malawi Constitution.

In a related work, Chirwa, among other things, calls for the courts to develop a ‘truly indigenous constitutional jurisprudence, reflecting the history and shared values and ideals

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<sup>9</sup> Such as Nkhata (n 2) and Kanyongolo (n 6).

<sup>10</sup> Ibid (Nkhata); see also H Englund, ‘Winning Elections, Losing Legitimacy, Multi-Partyism and the Neo-Patrimonial State in Malawi’ in M Cowen and L Laakso eds., *Multiparty Elections in Africa* (Palgrave Macmillan, 2002) 172 – 185.

<sup>11</sup> F Nyamnjoh, ‘Liberal Democracy in Africa: The Need for Alternatives’ in B Immink *et al* eds., *From Freedom to Empowerment: Ten Years of Democratisation in Malawi* (Forum for Dialogue and Peace, 2003) 85 – 86.

<sup>12</sup> FE Kanyongolo, ‘The Limits of Liberal Democratic Constitutionalism in Malawi’ in KM Phiri and KR Ross eds., *Democratisation in Malawi: A Stocktaking* (CLAIM, 1998) 369.

<sup>13</sup> Nkhata (n 2) 2.

<sup>14</sup> See C Ake, ‘Rethinking African Democracy’ (1991) 2 *Journal of Democracy* 32, 34.

<sup>15</sup> Nkhata (n 2) 1 – 283, 176.

<sup>16</sup> Ibid 241.

of the Malawian people.<sup>17</sup> However, both Chirwa and Nkhata appear to exhort the courts in Malawi to employ judicial activism as part and parcel of their approach to the interpretation of the Constitution.<sup>18</sup>

It is within this context that the current research seeks to contribute to the development of 'Malawi-centric' constitutional theories aimed at promoting constitutionalism and rule of law in Malawi, by analysing the manifestations of judicial activism (if any) in constitutional jurisprudence in Malawi. However, previous research studies have shown that when the fundamental aim is the entrenchment of constitutionalism and rule of law in a particular society, it is erroneous to 'fit all human experience within a particular projection.'<sup>19</sup> In response to that, the main argument of this thesis is that lessons need to be drawn from the Malawian experience with liberal democracy when calls are made for the Malawian judiciary to practice judicial activism. To that end, the main research question therefore is:

Whether judicial (in)activism is a solution or a hindrance to the entrenchment of constitutionalism and the rule of law in Malawi?

## 1.2 Literature Review and Definitions

### 1.2.1 Background information

Theories that posited law as a self-contained body of knowledge whose development and nature is independent of the 'social conditions in which [it] exists,' have been significantly challenged by those which have exposed a complex relationship between law and attendant social conditions.<sup>20</sup> For instance, the common law, which has been adopted by or largely

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<sup>17</sup> DM Chirwa, *Human Rights Under the Malawian Constitution* (JUTA, 2011) 23 – 38, 33.

<sup>18</sup> For instance Nkhata argues that Malawian courts practised 'judicial activism' between 1993 and 1996 but subsequently resorted to a cautious approach, and then calls on the judiciary to be 'a vehicle for social transformation' (see 233 – 242); and Chirwa calls on the courts to employ 'the purposive, generous and contextual rule of constitutional interpretation' as opposed to 'the literal rule' which he argues is 'the least useful in interpreting constitutional rights,' (see 38).

<sup>19</sup> Nkhata (n 2) 172.

<sup>20</sup> Theories such as 'deconstructionism' and 'postmodernism' advanced for example by authors such as J Derrida, 'Force of Law: The "Mystical Foundations of Authority"' in D Cornell, M Rosenfeld and DG Carlson, *Deconstruction and the Possibility of Justice* (Routledge, 1992) 3 – 67. For a summarised critical discussion of postmodernism and deconstructionism and its impact on earlier legal theories, see R Cotterrell, *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy* (LexisNexis, 1989) 1, 236 – 247, discussing how dominant 'Anglo-American' legal theories about the nature of law and its institutions advanced by almost all that are considered as authoritative legal philosophers in modern times (e.g. Bentham, Austin, Hart, Kelsen, Fuller, Pound and Dworkin) must of necessity 'ally [themselves] with [demands to study law and its development in its social and historical context as opposed to the level of abstraction so far advanced] if [they] are to retain relevance in contemporary legal conditions.'

influenced the nature of law in about 54 Commonwealth countries,<sup>21</sup> including the United States of America, is in actual fact 'rooted in centuries of English history' and can be 'more accurately' described as 'a residue of immutable [English] custom'.<sup>22</sup> It was in appreciation of the complex relationship between law and social conditions that the people instrumental in the establishment of the United States as we know it now whilst maintaining the common law system chose to abandon the concept of parliamentary supremacy in favour of constitutional supremacy and resolved to have a written constitution.<sup>23</sup> Thus, though American liberal constitutional democracy and relevant constitutional theories have been adopted by or largely influenced the development of democratic governance in developing countries,<sup>24</sup> they themselves are rooted in centuries of American history, and social and political realities.<sup>25</sup> As aptly pointed out by Cotterrell, much of what is now considered as 'modern jurisprudence'<sup>26</sup> on the nature of law and related matters, is really 'Anglo-American legal philosophy' and had 'better [be] understood as reflecting specific responses in legal philosophy to pressures, developments and conditions arising *in particular times and places*' and not 'as timeless' as has 'tend[ed] to be portrayed'.<sup>27</sup>

Similarly, it is that realisation, among other reasons, that has prompted some scholars to call for a distinction to be made between 'the concept of democracy and theories of democracy'.<sup>28</sup> Democracy as a concept has attained near universal consensus,<sup>29</sup> namely, that democracy is the best form of government and for the law and its institutions to obtain

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<sup>21</sup> See Commonwealth Secretariat, Introduction on the 'Legal and Constitutional Affairs Division (LCAD)', at <http://www.thecommonwealth.org/Internal/151470/lcad/>; for a world map showing which countries have the common law, see University of California at Berkeley, 'The Common Law and Civil Law Traditions', The Robbins Collection, p. 4 at <http://www.law.berkeley.edu/library/robbins/CommonLawCivilLawTraditions.html>

<sup>22</sup> Cotterrell (n 20) 21.

<sup>23</sup> See D Oliver and C Fusaro, *How Constitutions Change: A Comparative Analysis* (Hart Publishing, 2011) 382 - 383 (explaining that on the adoption of an 'independence Constitution' the US abandoned the British system of Parliamentary Supremacy in favour of Constitutional Supremacy); see also Goldford (n 2) 1 - 30 (explaining the intricate connection between the development of the US Constitution and attendant constitutional theories on one hand and fundamental political conflict within American society and the search for the definition of American identity on the other hand).

<sup>24</sup> CM Fombad, 'The separation of powers and constitutionalism: the case of Botswana,' (2005) 25 *B.C. Third World Law Journal* 301, 318.

<sup>25</sup> Goldford (n 2) 1 - 30.

<sup>26</sup> As in the contributions of legal philosophers considered influential in modern times in many countries of the world, such as Maine, Bentham, Austin, Hart, Kelsen, Fuller, Pound, Dworkin, Rawls, etc. who are all Anglo-American, see Cotterrell (n 20) vii.

<sup>27</sup> Cotterrell (n 20) viii, emphasis added.

<sup>28</sup> SWR de A Samarasinghe, 'Democracy and Democratisation in Developing Countries', Data for Decision Making Project: Series on Democracy and Health, Harvard School of Public Health, July 1994, p. 6 at <http://www.hsph.harvard.edu/ihs/publications/pdf/No-7-1.PDF>, citing D Beetham, 'Liberal Democracy and the Limits of Democratisation' (1992) 40 *Political Studies* 40, 40 - 53.

<sup>29</sup> For scholarly research that shows that democracy also has non-western (beyond Greece) origins see for instance, D Held, 'Democracy: From City States to Cosmopolitan Order?' in D Held ed., *Prospects for Democracy: North, South, East, West* (Polity Press, 1993) 16.

legitimacy for their respective authority in the regulation of the citizenry appears to have been won a long time ago.<sup>30</sup> However, there is no universal agreement on the best theory of democracy,<sup>31</sup> which pertain to questions of how to make the concept of democracy operational- e.g. 'by prescribing how democracy might be realized, in what institutional form,' and in what form (e.g. liberal democracy).<sup>32</sup> That is, the origins of theories of democracy are themselves contextual in that they are traceable to ideologies of particular places and times.<sup>33</sup> Thus a distinction indeed must be drawn between the suitability of democracy as a concept and the various theories of democracy, in a particular country. As has been discussed previously, studies in Africa have shown that liberal democracy is failing in Africa due to the differences in social and political contexts, whereas democracy itself remains the best form of government even for Sub-Saharan African countries like Malawi.

Democracy's advantage as a concept over the other forms of government is the role it promises the citizen in governance. Democracy promises the citizen participation in governance. That is, it represents a 'mode of decision-making about collectively binding rules and policies over which the people exercise control, and the most democratic arrangement to be that where all members of the collective enjoy effective equal rights to take part in such decision making directly - one, that is to say, which realizes to the greatest conceivable degree the principles of popular control and equality in its exercise.'<sup>34</sup> However, as aptly put by Walzer, 'if all citizens had literally the same amount of influence, it is hard to see how any clear-cut decision could ever be reached'.<sup>35</sup> It is that fact that makes it imperative even in a democracy to vest in institutions or officials the 'power' of state for purposes of maintaining and enhancing the peaceful co-existence of individuals in a

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<sup>30</sup> See E Chemerinsky, 'The Price of Asking the Wrong Question' (1983 – 1984) 62 *Texas Law Review* 1207, 1258 – 1260; for arguments about the desirability of democracy See C Ryan, *Democracy and the Ethical Life: A Philosophy of Politics and Community* (CUA Press, 1990); and A Ross, *Why Democracy?* (HUP, 1952) 96 – 902.

<sup>31</sup> In actual fact, even the distinction between democracy as a concept and as a theory is not universally accepted as some scholars use the word 'concept' when in fact they are discussing democracy as a theory see for instance AH Wingo 'Fellowship Associations As A Foundation for Liberal Democracy in Africa' in K Wiredu ed., *A Companion to African Philosophy* (Blackwell Publishing Ltd, 2004) (stating that 'the word "democracy" is a conceptually vague word...') 451.

<sup>32</sup> Samarasinghe (n 28) 6; for more debate on which is the best form of democracy, see R Gargarella, 'Theories of Democracy, the Judiciary and Social Rights' in R Gargarella, P Domingo, T Roux eds., *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Ashgate, 2006) 13 – 34; arguing that pluralist and participatory democracies are not the best when it comes to social and economic rights enforcement, rather the best is what she calls 'deliberative democracy'.

<sup>33</sup> For instance 'liberal democracy' is traceable to ideological developments in what is now called the "West" (Western Europe and North America). For an illuminating discussion on 'liberal democracy' see Nkhata (n 2) 155 – 165.

<sup>34</sup> Beetham (n 28) 40.

<sup>35</sup> Walzer (n 1) 304.

society.<sup>36</sup> 'Power' in this sense is defined as the ability to determine matters with finality 'not only for oneself but for others' as well.<sup>37</sup>

It is within the context of political power that democracy as a concept intersects with the theories of democracy, for it is those theories that seek to prescribe how that 'power' should be allocated. For instance, liberal democracy advances the principles of separation of powers, and limited state powers.<sup>38</sup> In fact it is the liberal democratic theory of separation of powers that has been uncritically adopted as the dominant thesis in most African countries<sup>39</sup> with its emphasis on the courts as the restraint on the use of political power by the Executive and Legislative arms of Government.<sup>40</sup>

However, recent studies on the emergence of 'judicial power' in 'emerging democracies'<sup>41</sup> point to a need to abandon the narrow understanding of 'political power' as a phenomenon that is wielded only by the executive and legislative arms of government in preference for one in which courts 'are understood as part of existing configurations of political power.'<sup>42</sup> In other words, research in emerging democracies on judicial function has shown that courts are themselves wielders of political power which renders them equally liable to abusing that role.<sup>43</sup> Arguably, no type of judicial behaviour embodies the tension inherent in debates about judicial power like that reflected within the context of that which is loosely called 'judicial activism.' It is for that reason that this thesis would like to contribute to existing scholarship on the study of the role of the judiciary in a democratic society, especially emerging democracies, by focusing on the manifestations of 'judicial activism' (if any) in Malawian Courts. The significance of such a study might be reflected in the realisation that 'research on courts and judicial activity in Africa is scant.'<sup>44</sup>

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<sup>36</sup> Ibid 281 – 304.

<sup>37</sup> Ibid 287.

<sup>38</sup> Beetham (n 28) 41 (explaining that though the principle of separation of powers and that of limited state powers have their roots in 'liberal democratic theories', there is a general agreement that they are indispensable in any democracy regardless of the theory in practice and that differences only arise as to how to implement it in practice).

<sup>39</sup> IG Shivji, 'State and Constitutionalism: A New Democratic Perspective' in IG Shivji ed., *State and Constitutionalism: An African Debate on Democracy* (SAPES, 1991) 27.

<sup>40</sup> RL Ellet, 'Emerging Judicial Power in Transitional Democracies: Malawi, Tanzania and Uganda' (2008) *Public and International Affairs Dissertations*, paper 3, p. 26. <http://hdl.handle.net/2047/d10016120>.

<sup>41</sup> All countries that have embraced 'democracy' except those of Western Europe and North America (including Australia) that are considered as 'mature democracies'.

<sup>42</sup> Ellet (n 40) 26.

<sup>43</sup> U Baxi, 'Preface' in SP Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (OUP India, 2 edn. 2003) vi- xvii.

<sup>44</sup> Ellet (n 40) 26.

The study will seek to draw some lessons from the conclusions of others who have studied judicial power manifested through ‘judicial activism’ elsewhere, namely that the uncritical application of constitutional theories and definitions derived from perspectives and categories obtaining in other jurisdictions is erroneous as such theories and definitions cannot accurately ‘provide a road map for understanding’ the essential issues peculiar to the jurisdiction under study.<sup>45</sup> It is for the foregoing reason that this study subscribes to the ‘contextual approach’ to the study of ‘judicial activism’ in particular, and law, democracy, and their respective institutions in general.<sup>46</sup>

At the same time it is important to clarify that by adopting such a contextual approach this study does not necessarily subscribe to ‘antifoundationalism’ and its disregard for objective narratives of law.<sup>47</sup> As Cotterrell explains in a rather rhetorical fashion: ‘If our ways of thinking have no secure foundations, what can we know? How can we be sure of anything? Why is any view better than another?’<sup>48</sup> Rather, the proposed contextual approach seeks to avoid the inevitable mistakes arising from adopting a ‘one-size-fits-all’ approach<sup>49</sup> to governance issues since that fails to acknowledge ‘specific historical and cultural realities of the society in question.’<sup>50</sup>

### 1.2.2 Definitions

Most of the definitions in this section will be brief as they shall be discussed in more detail in subsequent chapters. The terms or concepts central to this study include (but are not limited to): constitution, judicial activism, constitutionalism, rule of law, and constitutional interpretive methodologies such as originalism, interpretivism (and non-interpretivism), literalism, and positivism.

However, it is important at the outset to echo what Cotterrell has stated elsewhere that:

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<sup>45</sup> U Baxi, ‘The Avatars of Judicial Activism: Explorations in the Geography of (In)Justice’ in SK Verma and K Kumar, *Fifty Years of the Supreme Court of India: Its Grasp and Reach* (OUP: New Delhi, 2003) 209.

<sup>46</sup> That is in their historical, social and political contexts see Cotterrell (n 20) ix.

<sup>47</sup> The approach to the study of law and related institutions that disputes the existence of objective or impartial foundations of law, see P Gabel and D Kennedy, ‘Roll Over Beethoven’ (1984) 36 *Stanford Law Review* 1, 47 – 48; also A Hunt, ‘The Big Fear: Law Confronts Postmodernism’ (1990) 35 *McGill Law Journal* 507, 521 – 522.

<sup>48</sup> Cotterrell (n 20) 238.

<sup>49</sup> Other Scholars such as Mamdani refer to this approach as ‘history by analogy’, see M Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton University Press, 1996) 9 – 11.

<sup>50</sup> KK Prah, ‘Democracy and the African Challenge: Does Liberal Democracy Work for Africa’ in K Matlosa, KK Prah, B Chiroro and L Toulou eds., *The State, Democracy and Poverty Eradication in Africa* (EISA, 1<sup>st</sup> edn, 2008) 22 (on how liberal democracy has not worked in Africa due to the fact that it was adopted without adjusting it in acknowledgment of differences in African historical and cultural realities from that of western societies from which it originated).

...potentially anything about law might become contested because law lacks secure foundation to put at least some matters beyond the possibility of disagreement. No objective criteria of truth or value provide an unchallengeable basis of legal...knowledge.<sup>51</sup>

This is very true pertaining to definitions of the words that are central to the analysis in this thesis. There is no universal agreement as to the definition of any of the terms highlighted above.

### **The 'constitution'**

There is no universally agreed definition of the word 'constitution' as constitutions are classified in various ways depending on the purpose for which the categorisation is sought.<sup>52</sup> At the most rudimentary there are written and unwritten constitutions; in that sense the Westminster constitutional order has no single document comparable to the US Constitution.<sup>53</sup> Constitutional values in Britain have evolved as a matter of practice and custom, with the Legislature occupying a central place in governance.<sup>54</sup> The Westminster model supports Parliamentary Supremacy; the American model on the other hand, is founded on the doctrine of Constitutional Supremacy.<sup>55</sup> Malawi adopted a written Constitution that clearly spelt out that all laws and acts of the executive and the legislature would have to conform to the constitution or be declared invalid by the courts-in short Malawi adopted the doctrine of constitutional supremacy as the organising principle of governance and reduced this into a written constitution.<sup>56</sup>

Nevertheless, there are various jurisprudential perspectives on such written constitutions and how they are made. Some classify them into three categories: the 'realist', the 'idealist' and the 'transitional' or 'new' perspective<sup>57</sup>. To the realist a constitution is an expression of 'the balance of power' at the time of its creation.<sup>58</sup> Thus it is deemed to reflect the strength of the negotiating positions of the various stakeholders, in the almost cynical sense that it

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<sup>51</sup> Cotterrell (n 20) 237 – 238.

<sup>52</sup> See C Fusaro and D Oliver, 'Changing Constitutions' in Oliver and Fusaro (n 23) 3 (pointing out that the word 'constitution', 'can refer to the fundamental document ...' or 'something wider' like constitutional law, or a 'system of government' itself).

<sup>53</sup> AW Bradley and Ewing K, *Constitutional and Administrative Law*, (Longman, 14<sup>th</sup> edn, 2006) 4.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

<sup>56</sup> Section 5 of the Malawi Constitution 1994.

<sup>57</sup> T Medhanie, 'Constitution-making, Legitimacy and Regional Integration: An Approach to Eritrea's Predicament and Relations with Ethiopia' (2008) DIIPER Research Series, Working Paper No. 9 p.3 <http://www.diiper.ihis.dk>.

<sup>58</sup> Ibid.

‘merely divides the spoils between political elites’.<sup>59</sup> According to the realist perspective a constitution has no mediating role in the process of social change or political transition.<sup>60</sup> For the idealist, however, a constitution is the ‘foundation of a new political order.’<sup>61</sup> The constitution in that respect serves a foundational function: it represents the end of an era and the creation of a new one.<sup>62</sup> In a similar context, Samuels argues that in a post conflict scenario the extent to which a constitution sets up a ‘democratic process’, other than merely reflecting ‘incumbent/ occupier dominance’ may impact the quality of democracy created and the viability of the state itself.<sup>63</sup>

Somewhere between the realist and idealist views lies what has been termed as ‘transitional constitutionalism’ or ‘new constitutionalism’.<sup>64</sup> Conceptually, transitional constitutionalism is closer to the idealist position; the difference being that it envisages a much wider and thorough appreciation of the peculiar role of the constitution in establishing and developing a new political order.<sup>65</sup> Transitional constitutionalism relates to ‘constitutional developments’ taking place following a substantial political change.<sup>66</sup> It is therefore a type of constitutionalism in which law (in the form of the constitution) is perceived to have ‘an extraordinary constituting role’<sup>67</sup> in the stabilisation of democratic governance. In this discourse it is proposed that Malawi’s transition from autocracy in 1994 can be characterised as such a radical regime change; the new Constitution ushered in a completely novel political dispensation. Thus, the transitional constitutionalism framework is appropriate in this case considering the political transition taking place within Malawi as it emerges from decades of political subjugation into a participatory democratic order.<sup>68</sup> The judicial process, especially when interpreting the Constitution therefore becomes an integral aspect of this transition. That is why this research is located within the transitional constitutionalism framework.

### **Constitutional democracy and constitutionalism**

If the mere existence of a Constitution was an end in itself then Malawi would not have needed to have a new Constitution in 1994. Malawi had a Constitution which legitimated Dr. Banda’s single-party state and his life presidency and hence paved the way for his

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<sup>59</sup> K Samuels, ‘Post-Conflict Peace Building and Constitution-Making’ (2006) 6 *Chicago Journal of International Law*, 663, 669.

<sup>60</sup> Medhanie (n 57).

<sup>61</sup> Samuels (n 59).

<sup>62</sup> Ibid.

<sup>63</sup> Samuels (n 59).

<sup>64</sup> Ibid, 4.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid, 6.

<sup>68</sup> See n 4 and 5.



authoritarian regime, where the government was not accountable to the people and there was minimal participation by the public in governance. Similarly, the mere existence of a democracy does not adequately describe what type of democracy it is: by way of example, a democracy can be parliamentary, such as the United Kingdom, where the legislature is not bound as a matter of law to some supreme overriding law. In this context, the people can only repudiate the decisions of the legislature through general elections, and 'until that time ... the courts [cannot] seriously undermine the legislative decisions made by a majority of the Commons.'<sup>69</sup> Thus parliament is supreme.

However, there is another type of democracy called Constitutional democracy. Even though there is no universally agreed definition for constitutional democracy, this study will adopt Nwabueze's descriptive definition of constitutional democracy which attempts to define the idea by making reference to its four key attributes: first, the people freely elect the government. Second, the powers of the government are limited by a written constitution which is itself the supreme law. Third, the constitution overrides all inconsistent legislative and executive acts. Fourth, the rulers (and the ruled) observe and respect the constitutional provisions in all government administration and political interactions.<sup>70</sup> The Constitution in this context, as even Magaisa further explains 'provides for the basic legal and institutional structures for the exercise of state power and its relationship with the citizens [the] ... antithesis is arbitrary rule where the state exercises its power without restraint or checks and balances.'<sup>71</sup> Thus in a constitutional democracy- as an aspect of separation of powers-the judicial arm of government is expected to be a non-partisan guardian of the constitution.<sup>72</sup> It is expected to act as a safeguard against arbitrary use of power by the executive and legislative branches. There is therefore a normative quality to constitutional democracy beyond the existence of a document that provides for the above structural arrangements. Fundamental values must underlie such a Constitution and these norms must be enforced accordingly by the courts. In political practice the maintenance of a constitutional democracy requires a continuance commitment to the enforcement of the Constitution and its fundamental values.

Malawi would readily fit the criteria of a democracy that holds regular elections.<sup>73</sup> Further, it has a written Constitution which provides that it is the supreme law of the land and purports

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<sup>69</sup> JH Garvey and TA Aleinikoff, *Modern Constitutional Theory: A Reader* (West Publishing Co., 4<sup>th</sup> edn, 1999) 39.

<sup>70</sup> B Nwabueze, *Constitutional Democracy in Africa: Volume 1* (Spectrum Books, 2003) xxvii.

<sup>71</sup> See generally AT Magaisa, 'Constitution without Constitutionalism: Negating Constitutionalism in Zimbabwe,' Sept. 2005, <http://www.kubatana.net/html/archive/opin/050902am.usp?sector=DEMGG>.

<sup>72</sup> A Hammerstad, 'African Commitments to Democracy in Theory and Practice, a Review of Eight NEPAD Countries,' AHSI Paper 1, June 2004, p.80, <http://www.africanreview.org/docs/paper1.pdf>.

<sup>73</sup> L Diamond and MF Plattner, *Electoral Systems and Democracy*, (JHU Press, 2006) 123.

to delimit the powers of the government;<sup>74</sup> however under the Constitution such limits are supposed to be enforced by the courts.<sup>75</sup> The question (which this thesis will also address) is whether the courts in Malawi exercise this function with any doctrinal consistency? Otherwise the very existence of constitutional democracy in Malawi might be at risk.<sup>76</sup> Thus, the fourth limb- of observing constitutional provisions would be correspondingly compromised. For instance in a recent constitutional interpretation referral the Malawi Supreme Court of Appeal said that ‘subsequent amendments to the Constitution, *once duly passed in the normal way by the National Assembly* and thereby becoming part of the Constitution, those provisions...cannot be invalidated or declared to be unconstitutional or inconsistent with the other provisions of the Constitution.’<sup>77</sup> This proposition is more akin to parliamentary and not constitutional democratic order that it warrants closer analysis. Does that mean the courts are not concerned to evaluate the substance of the amendment in order to determine their constitutionality? Such a doctrinal approach to adjudication would be in line with most judiciaries with a common law heritage; but as Oloka-Onyango aptly observes such a judicial approach is quite inimical to the protection and promotion of democratic guarantees and may increase the danger of the exercise of state power degenerating into arbitrariness.<sup>78</sup> It is the jurisprudential imperative for normative content that connects the notion of constitutional democracy with the phenomenon of constitutionalism.

Even though the definition of constitutionalism is not straightforward,<sup>79</sup> and many definitions have been proffered by scholars,<sup>80</sup> arguably Brandon’s definition illustrates the inter-linkage between constitutional democracy and constitutionalism well. According to Brandon, constitutionalism is a political theory that is concerned with the architectural structure and

<sup>74</sup> Section 5 of the Constitution.

<sup>75</sup> See section 108 (2) of the Constitution.

<sup>76</sup> JO Ihonvbere, ‘From Despotism to Democracy: The Rise of Multiparty Politics in Malawi’ (1997) 18 *Third World Quarterly* 225-247, 242.

<sup>77</sup> *In the matter of the presidential reference of a dispute of a constitutional nature under section 89(1)(h) of the Constitutional and in the matter of section 65 of the Constitution and in the matter of the question of the crossing of the floor by members of the National Assembly*, Presidential Reference No. 44 of 2006 (unreported) p.15 (Emphasis supplied).

<sup>78</sup> See J Oloka-Onyonga, ‘Judicial Power and Constitutionalism in Uganda,’ Centre for Basic Research, Working Paper No.30/1993, 49-50 (where he argues that a very compliant judiciary undermines rights of citizens and promotes an over-encroaching executive).

<sup>79</sup> see also LC Backer, ‘From Constitution to Constitutionalism: A Global Framework for Legitimate Public Power Systems,’ (2009) 113 *Penn State Law Review* 671, 672, 676.

<sup>80</sup> See for example JO Ihonvbere, ‘Constitutions without Constitutionalism? Towards a New Doctrine of Democratisation in Africa,’ in JM Mbaku and JO Ihonvbere eds., *The Transition to Democratic Governance in Africa, The Continuing Struggle*, (Praeger, 2003) 143 (stating that constitutionalism within liberal political discourse revolves around the two issues of limited government and individual rights); see also Shivji (n 40) 27-28 (explaining that the two issues of ‘limited government’ and ‘individual rights’ in turn encompass such broad topics like rule of law, separation of powers, regular elections, judicial independence, the right to property and the like).

basic values of a society and its government; it is therefore preoccupied with the problem of how the power of those who rule might degenerate into arbitrariness.<sup>81</sup> Modern constitutionalism is therefore a prescriptive doctrine that indicates how state power should be exercised and does not simply describe how governments exercise their authority in practice.<sup>82</sup> Currie and de Waal explain that constitutionalism is normative because it spells out the values that must prevail in the governing process. Such values go beyond the constitutional rules alone; they are supposed to influence the conduct of policy-makers, administrators and more importantly, judges.<sup>83</sup> It is in this context that the constitutional jurisprudence from the Malawi Courts will be analysed with particular focus on whether it can be said that the courts have displayed judicial activism or not and how that has impacted on the development of a culture of constitutionalism in Malawi.

In analysing the constitutional jurisprudence from Malawi courts, the study will propose the conceptual framework advanced by Backer which posits constitutionalism also as a normative framework for evaluating the form, substance and legitimacy of the constitution itself.<sup>84</sup> This approach is necessary since recent research on Malawi done by Nkhata has shown that the current constitution in substance lacks legitimacy in Malawi because the people of Malawi do not identify with its underlying values. Nkhata therefore proposes the adoption of 'transformative constitutionalism' for the Malawian context because of the emphasis it places on the role of the courts; this study endorses that proposal. In this context, though yet again there is no universally agreed definition, transformative constitutionalism is defined by Klare as:

...a long-term project of constitutional enactment, interpretation, and enforcement committed...to transforming a country's political and social institutions and power relationships in a democratic, participatory and egalitarian direction.<sup>85</sup>

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<sup>81</sup> ME Brandon, 'Home on the Range: Family and Constitutionalism in American Continental Settlement,' (2003) 52 *Emory Law Journal* 645, 655.

<sup>82</sup> J Elster, 'Constitutionalism and Democracy,' quoted in I Currie and J de Waal, *The New Constitutional and Administrative Law: Vol. 1* (Juta Publishers, 2001) 10.

<sup>83</sup> Ibid.

<sup>84</sup> Ibid, 106.

<sup>85</sup> K Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal of Human Rights* 146, 150.

Within the rubric of transformative constitutionalism theories, constitutional interpretation at times involves having recourse to value judgments that are 'external to the Constitution itself'.<sup>86</sup> However, as Nkhata pertinently states:

...under transformative constitutionalism, judges bear the responsibility of justifying their decisions not just by reference to authority but also by reference to ideas and values that the society prioritises.<sup>87</sup>

It is proposed that these observations which highlight the necessity for courts to accommodate the prioritised values and ideas of a given society renders the study of Malawian jurisprudence in the general framework of discourse on judicial activism quite pertinent.

### **Judicial Activism**

Arguably, nothing brings to the fore the complex role/function of the judiciary in respect to the consolidation of democracy, rule of law, constitutionalism and in safeguarding and enforcing the Constitution through constitutional interpretation as the discourse on judicial activism. It is not uncommon to come across scholarly articles that call upon judiciaries in respective jurisdictions, especially in Africa to practice judicial activism;<sup>88</sup> in that vein one could be excused for comprehending judicial activism ('JA') as a synonym for justice. But as a detailed analysis of the manifestations of JA in a subsequent chapter will show, in reality, the word or concept of 'judicial activism' is like an empty shell available for whosoever fancies it to fill in whatever content they want it to contain even if it were the exact opposite of what a prior speaker may have filled it with.<sup>89</sup>

This has led to calls from some scholars for the term 'judicial activism' to 'be exiled from educated discourse'.<sup>90</sup> It is proposed in this study that despite such strong and insightful observations however, judicial activism as a term cannot be so easily abandoned. As another commentator has aptly pointed out 'scholars who avoid seemingly indefinable terms like activism risk withdrawing their research from large public discussions about judicial

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<sup>86</sup> Nkhata (n 2)195.

<sup>87</sup> Ibid.

<sup>88</sup> For example, DCJ Dakas, 'Confronting the Poverty and Tyranny of Judicial Passivity in Nigeria: Bolstering the case for Judicial Activism with Reference to Jewish Law (1998) 10 *Sri Lanka Journal of International Law* 65; BO Okere, 'Judicial Activism or Passivity in Interpreting the Nigerian Constitution' (1987) 36 *International and Comparative Law Quarterly* 788.

<sup>89</sup> C Green, 'An Intellectual History of Judicial Activism' (2009) 58 *Emory Law Journal* 1196, 1202; for similar views, see also J Sackville, 'Activism' in M Coper, *et al* eds., *Oxford Companion to the High Court* (OUP, 2001) 6-7.

<sup>90</sup> T Campbell, *Prescriptive Legal Positivism: Law, Rights and Democracy* (Routledge-Cavendish, 2004) 115.

conduct.<sup>91</sup> Even if for arguments sake, JA were to be merely a political term, giving up on it 'on grounds of indeterminacy' would lead to a situation where there was 'precious little political discourse left.'<sup>92</sup> '[P]ublic reasoning and debates are central to the pursuit of justice'<sup>93</sup> and discussions of JA appear to gain momentum in the realm of public/political/legal debate.<sup>94</sup> Consequently, there is a compelling need to maintain the usage of the term 'judicial activism' in order to contribute to that debate. However, there is an equally important need to find a baseline for discussions on JA, especially one that could somehow minimise the opportunity for misinformation and misunderstanding. And no context is more ideal for this endeavour than a discussion on the work of the judiciary in a country undergoing a constitutional transition such as Malawi, which has itself been a target of calls for JA.<sup>95</sup>

JA discourse attains significance in this study because one theme that features highly in JA discussions is the appropriateness or inappropriateness of constitutional interpretation methodologies.

### **Constitutional interpretation theories**

If Constitutions only contained language that was very clear and amenable to one precise meaning, issues of constitutional interpretation would not arise for there would be only one outcome: the ordinary meaning. However, Constitutions also contain terms that are vague and ambiguous. In this context, speaking in his address to a recent constitutional review conference, one jurist pointed out the need for courts in Malawi to develop some doctrines in order to discharge their function of interpreting and protecting the Constitution with democratic fidelity.<sup>96</sup> Furthermore, one commentator has even suggested that the 1994 Constitution is a hybrid between parliamentary and presidential models.<sup>97</sup> But given the judicial controversy generated by such a view, the implications of such an understanding might need to be further explored in order to ascertain the correct judicial understanding of the Constitution.<sup>98</sup> It is a basic argument of this discourse that the court's interpretation of the Constitution is premised upon how it conceives of the Constitution: its vision of the document informs its approach to the subject of interpretation.

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<sup>91</sup> Green (n 89) 1261.

<sup>92</sup> Campbell (n 90) 115.

<sup>93</sup> A Sen, *The Idea of Justice* (Penguin Books Ltd, 2009) 122.

<sup>94</sup> Green (n 89).

<sup>95</sup> Such as those made by Nkhata (n 2) and Chirwa (n 17).

<sup>96</sup> G Erasmus, 'The Bill of Rights: Human Rights under the Malawian Constitution,' Paper presented at Constitutional Review Conference, (March 2006) p.4 <http://www.lawcom.mw/docs/billofrights.pdf>.

<sup>97</sup> P Mutharika, 'The 1995 Democratic Constitution of Malawi' [1996] 40 *Journal of African Law* 205, 213.

<sup>98</sup> *Fred Nseula-v- Attorney-General and Malawi Congress Party*, MSCA Civ. Ap. No. 32 of 1997 (unreported).

In their recent work Barber and Fleming provide a useful typology of the various approaches to constitutional interpretation that are reflected in the debates on the topic.<sup>99</sup> These are: (1) *Textualism*, which seeks meaning from the plain words of the document. (2) *Consensualism* draws meaning from the prevailing social consensus on what the words mean. (3) The *Philosophic approach* focuses on the broad concepts embodied in the words and draws meaning from the nature of things that the words refer to. (4) *Originalism*, on the other hand, aims to uphold the intentions or the original meanings which the framers or ratifiers or the founding generation ascribed to the document. (5) *Structuralism* focuses on the arrangement of offices, powers and institutional relationships as a guide to interpretation. (6) *Doctrinalism* accords primacy to judicial precedent and other doctrines of the courts. (7) *Pragmatism* seeks to give judicial meaning with reference to the preferences of the dominant political forces.<sup>100</sup> This discussion will explore whether originalism, structuralism or pragmatism would best reconcile the aspirations of transformational constitutionalism as a process of reconstituting the Malawian political landscape. By focusing on the public views gathered through the nationwide consultations undertaken as part of the constitutional review process<sup>101</sup>, it would be proposed that giving weight to the intentions of the framers (or founding generation)<sup>102</sup> represents an essential consideration in constitutional jurisprudence. However, in order to reflect the organic dynamism at the core of the current legal (and political discourse in Malawi) one would lean towards living constitutionalism as the proper framework of judicial interactions with the Constitution.

In fact jurists like Rehnquist recognised two major theories of constitutional interpretation today: namely originalism and living constitutionalism.<sup>103</sup> Traditionally these theories have been viewed as (almost) mutually exclusive in application.<sup>104</sup> Thus originalism has usually been associated with judicial restraint<sup>105</sup> while living constitutionalism has been allied with judicial activism. By defining the constitution as a basic structure framework, originalism seeks to uphold strictly the constitution as a social compact.<sup>106</sup> In broad terms adherents of originalism have tended to be either textualists or intentionalist, thus paying much attention

<sup>99</sup> SA Barber and JE Fleming, *Constitutional Interpretation: The Basic Questions*, (OUP USA, 2007) 64-65.

<sup>100</sup> See generally P Bobbit, *Constitutional Interpretation* (OUP, 1991).

<sup>101</sup> See for example the discussion of the death penalty in Malawi and the views gathered from the consultative process in M Chigawa, 'The death penalty under the laws of Malawi and the law of human rights,' (2009) 3 *Malawi Law Journal* 70, 84-85.

<sup>102</sup> In this case the reforms are in fact part of an ongoing political transformation that is not even 20 years old.

<sup>103</sup> Barber and Fleming (n 99) 16-25, discussing WH Rehnquist, 'The Notion of a Living Constitution,' (1976) 54 *Texas Law Review* 693.

<sup>104</sup> JM Balkin, 'Framework Originalism and the Living Constitution,' (Yale University, Public Law and Legal Theory Research Papers) Research Paper No. 182, <http://ssrn.com/abstract=1290869>.

<sup>105</sup> Oloka-Onyango (n 78) 50- identifying judicial restraint with the common law tradition which asserts that judges are subordinate to the other two arms of government because they are not elected.

<sup>106</sup> JN Rakove ed., *Interpreting the Constitution: The Debate over Original Intent*, (NUP, 1990) 25.

to the legal text of the constitution and the original intention of those who drafted and enacted the constitution when interpreting the provisions today.<sup>107</sup> On the other hand, living constitutionalism embraces pragmatic jurists who sometimes consider the consequences of a given interpretation and prefer to achieve justice by filling in what they perceive are gaps in the original text.<sup>108</sup>

In his recent work Balkin proposes framework originalism as a compatible theory with living constitutionalism.<sup>109</sup> In brief framework originalism views the Constitution as an initial framework for governance that sets politics in motion, and that must be filled out over time through constitutional construction (which encompasses things like amendment, interpretation and other issues which fit the general rubric of constitutionalism). According to this theory, in implementing the Constitution later generations are expected to uphold the basic framework through fidelity to the original meaning<sup>110</sup> (as opposed to the original expected application). This leaves room for possible constitutional constructions responsive to future (unforeseen or unforeseeable) developments in the society.<sup>111</sup> This conceptual space is taken up by living constitutionalism; whereby gaps in the original framework are filled through amendment and other processes.

According to Balkin, constitutional construction (as opposed to interpretation) is an on-going process which involves all the various political and civic actors at the centre of governmental authority. In the case of Malawi, it might be contended that the Constitution created such space for institutions like the Malawi Law Commission (an executive and not judicial body) to manage the process of constitutional construction (instead of the politically charged legislature). Other theorists on the other hand, adopt simpler categorisations of constitutional interpretation theories: for instance Brest adopts a dualist *originalist* and *nonoriginalist* classification.<sup>112</sup> Of course he further subdivides originalism into strict and moderate groups. Within the strict category fall what he calls 'strict textualism' (literalism) and 'strict intentionalism'. Literalism seeks to construe words and phrases very narrowly and precisely or literally. A strict intentionalist tries to ascertain and give effect to the intent of the framers unswervingly. Moderate originalism on the other hand acknowledges the authority of the Constitution; but in application the judges are more concerned with the general purposes of

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<sup>107</sup> W Brennan, 'The Constitution of the United States: Contemporary Ratification', in Rakove (ibid) 25.

<sup>108</sup> Barber and Fleming (n 99) 68-70.

<sup>109</sup> Balkin (n 104).

<sup>110</sup> Ibid, 4 - Balkin identifies five uses of the term 'meaning' and singles out the "semantic content (e.g. "what is the meaning of this word in English?") as the proper province of judicial interpretation.

<sup>111</sup> Ibid - proposing that the living constitution theory then takes up the space created by such dynamic originalism.

<sup>112</sup> P Brest, 'The misconceived quest for the original understanding,' (1980) 60 *Boston University Law Review* 204.

the framers as opposed to specific intentions.<sup>113</sup> According to the present study, any constitutional interpretation theory that purports to be purely originalist cannot stand the test of time, simply because no constitution can fully address matters that are unforeseen or unforeseeable. Judicial activism on the other hand is not the panacea to addressing those inherent conceptual inadequacies in devising a robust Constitution since judicial activism itself needs to be bridled within the bounds of constitutionalism.

That is, as has been previously discussed, judicial power is itself political power. Therefore the need to entrench constitutionalism of necessity demands that constitutional interpretation itself be subjected to the Constitution. Arguably it is in this context that Ely, in his seminal work framed the discourse in terms of *interpretivism* and *non-interpretivism* methodologies.<sup>114</sup> Interpretivism suggests that judges deciding constitutional issues should restrict themselves to enforcing norms that are stated explicitly or are clearly implicit within the written Constitution.<sup>115</sup> Non-interpretivism holds that courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document. Ely goes on to argue that interpretivism fits better the ordinary understanding of how law works: “if your job is to enforce the Constitution then the Constitution is what you should be enforcing, not whatever may happen to strike you as a good idea at the time.”<sup>116</sup>

All the above constitutional interpretive methodologies have been developed under Anglo-American jurisprudence hence it is necessary to critically analyse their applicability to Malawi. It is essential to appreciate that the development of such jurisprudence has not been the work of Courts alone, rather it has been a result of a multi-disciplinary effort whereby legal philosophers, anthropologists, sociologists (including those advancing theories of sociology of law) among others, each in their respective areas of expertise contributed to the discourse. It is in this context that this thesis will advance the argument that the responsibility to identify and arrive at the appropriate constitutional interpretive methodology for Malawi cannot be left to the judges alone. Rather, it must be a multi-disciplinary approach.

### **1.3 Methodology and Focus of the Research**

Initially, this research had aimed to conduct an empirical analysis of pertinent historical and jurisprudential data such as was held by Special Law Commission on the Review of the Constitution to highlight how dominant elite interests have undermined the legitimacy of the

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<sup>113</sup> Garvey and Aleinkoff (n 70) 133.

<sup>114</sup> JH Ely, *Democracy and Distrust: A Theory of Judicial Review*, (HUP, 1980) 1-9.

<sup>115</sup> TC Grey, ‘Do we have an unwritten Constitution?’ (1975) 27 *Stan Law Review* 703, 717 (‘*What distinguishes the exponent of the pure interpretive model is his insistence that the only norms used in constitutional adjudication must be those inferable from the text-that the Constitution must not be seen as licensing courts to articulate and apply contemporary norms not demonstrably expressed or implied by the framers*’).

<sup>116</sup> Ely (n 115).



constitution-making processes from the colonial inception of the country through the independence era to present so-called multiparty epoch. However, research conducted and concluded recently by other Malawian scholars<sup>117</sup> have dealt with the socio-historic issues from pre-colonial Malawi (then Nyasaland) to post-1994 Malawi in sufficient depth that it has been possible to conduct this research as desk research.

The focus of this research is premised on the assumption that '[a] constitution [should] enjoy a special place in the life of any nation. It [should be] the supreme and fundamental law [of the land, which] sets out the state's basic structure including the exercise of political power and the relationship between political entities and between the state and the people.'<sup>118</sup> The question being posed therefore is whether the courts are acquiescing in a process that is perpetuating a type of politics that is not answerable to a higher normative order. One aspect of the proposed study will therefore examine the qualitative impact of amendments<sup>119</sup> on the Constitution. A durable Constitution for Malawi should be fashioned along such terms as would directly address any peculiar socio-political tendencies which historically<sup>120</sup> tended to affect the public space by excluding certain key traditional forms of governance.<sup>121</sup> According to Sunstein constitutions should be designed to address those aspects of a country's history, culture and political heritage that make it liable to harm in the ordinary conduct of its affairs.<sup>122</sup> In the case of Malawi it bears highlighting that as early as 1997 (i.e. barely three years into the new constitutional era) Ihonvbere noted that 'the delay in establishing a senate...means that the checks and balances which the senate would have provided would be absent.'<sup>123</sup> In this context the abolition of the Senate from the constitution will be examined as a departure from the terms of the original contract. Since the Senate

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<sup>117</sup> Such as Nkhata 2011 (n 2) and Chirwa 2011 (n 17) which complemented earlier work by Kanyongolo (n 12), as well as M Chigawa, 'The Fundamental Values of the Republic of Malawi Constitution of 1994,' Concept Paper presented at Malawi Constitutional Review Conference of March 2006; and M Hara, 'Popular Involvement in Constitution-making: The Experience of Malawi,' A monogram for The World Congress for Constitutional Law, Athens, June 2007 available at <http://www.enelsyn.gr/papers/w1/Paper%20by%20Mabvuto%20Herbert%20Hara.pdf>.

<sup>118</sup> J Hatchard, M Ndulo, P Slinn, *Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and Southern African Perspective*, (CUP, 2004) 12.

<sup>119</sup> Such as the repeal of S. 64, and the amendment of S. 65 of the 1994; see N Patel, 'The Representational Challenge in Malawi,' in *Towards the Consolidation of Malawi's Democracy* (Konrad Adenauer Stiftung, 2008) 21.

<sup>120</sup> As per Chatsika, JA in *DPP v Dr Banda et al*, Crim. App. No. 21 of 1995, MSCA (unreported) 20 (stating that the 1994 Constitution tries to remove any evils to society which existed in the old Constitution).

<sup>121</sup> See National Democratic Institute (NDI), 'Traditional Authority and Democratic Governance in Malawi, A Report on NDI Program Activities with Malawi Chiefs in Preparation for the National Constitutional Conference,' February 1995, [www.ndi.org](http://www.ndi.org).

<sup>122</sup> Fombad (n 23) 318.

<sup>123</sup> Ihonvbere (n 76) (when he wrote this the Senate had not yet been abolished).

nominations were largely under the authority of local government authorities<sup>124</sup> the study will seek to demonstrate its abolition might well have sowed the seeds for the perpetual postponement of local government elections since 2005.<sup>125</sup>

Under the aegis of judicial activism we will examine whether the courts could have responded differently to such amendments.<sup>126</sup> Thus I propose to explore the legitimacy<sup>127</sup> of the current judicial interpretation of the Constitution in the light of the seminal observation that:

... the key to making an autochthonous constitution is to consult the people on its contents. This approach has several advantages; in particular its inclusiveness can help...enhance the chances of addressing, in the new constitution, issues of importance to the people.<sup>128</sup>

It is for that reason that this study will explore the existence of a suitable constitutional interpretation methodology in Malawi at present with a view to propounding the argument that judicial activism as a phenomenon must be bounded by constitutional accountability to curtail elitism that has historically undermined the inclusive democratic imperative at the root of indigenous governance philosophies; it is hoped that the ensuing discourse will contribute to a deliberative consideration of the subject of constitutional interpretation theory in general and judicial activism in particular.

#### **1.4 Scoping the current general discourse and the Malawian problem**

Ellet, as well as Van Doepp, has written on the emerging judicial power in Malawi.<sup>129</sup> Ellet clearly asserts that the Malawian courts are quite robust. They are not shy to make decisions contrary to the expectations of the ruling elites. In fact the presidential referral quoted above is one of her examples.<sup>130</sup> Ellet examines the level of internal and external autonomy and how those contribute to judicial independence as a democratic prerequisite. Van Doepp on the other hand discusses the question of corruption and how that affects judicial independence. Another interesting study has been undertaken by Hansen who explored the

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<sup>124</sup> Section 68 (1) of the Constitution.

<sup>125</sup> See 'Statement on the situation of Human Rights in Malawi at the 43rd Ordinary Session of The African Commission On Human And People's Rights,' pp1-2 at <http://www.chrr.org.mw/resources/Publications/CHRR%20statement%20at%20the%20African%20Commission.doc>.

<sup>126</sup> Balkin (n 104).

<sup>127</sup> A Olukoshi, 'Assessing Africa's New Governance Models' in *Africa's New Governance Models: Debating Form and Substance*, (Fountain Publishers, 2007) 1, 21 ('The social contract between the state and citizen is also a central factor in the production and re-production of legitimacy and consent').

<sup>128</sup> Hatchard, *et al* (n 118).

<sup>129</sup> Ellet (n 40); P VonDoepp, 'The Problem of Judicial Control in Africa's Neopatrimonial Democracies: Malawi and Zambia' (2005) 120 *Political Science Quarterly* 275.

<sup>130</sup> See (n 77).

need for judicial education in human rights.<sup>131</sup> In essence, Hansen's study concluded that judges from the 'old school' were less keen to cite human rights jurisprudence in their decisions because of lack of exposure.

On the regional scene Oloka-Onyango proposes that one way of entrenching constitutional government is to have a 'more definitive provision that confers courts with the power to reverse any actions that violate the provisions of the Constitution...whether these are Legislative or Executive.'<sup>132</sup> This observation is premised upon Oloka-Onyango's analysis of Ugandan jurisprudence; he noted that the courts (as part of the common law heritage) tended to be purely positivist and extremely restrictive in their application of constitutional guarantees of human rights.<sup>133</sup> In the context of Malawi there are such constitutional provisions that confer the bench with the mandate to assess all executive and legislative acts.<sup>134</sup> Like Uganda too, the Malawian bench has strong common law heritage (not to mention the experience of dictatorship).<sup>135</sup> The focus of my analysis will be whether such constitutional guarantees have been exploited by the court to consolidate constitutional government? If not, what are the factors that can account for such lack of vigilance? Furthermore, how much is such jurisprudence contributing to the governance deficit in Malawi?

For instance the extent to which incorrect jurisprudence may have contributed to the encouragement of a culture of legislative or executive 'unaccountability' will be explored. The study will also focus on how the original framers of the constitution proposed to deal with such inherent propensity of the ruling elites to consolidate their vested interests once they assume political power. How about the ease with which the original basic structures of the constitution were changed on the pretext of lack of money?<sup>136</sup>

In my view, the Malawi Judiciary's role in the system of checks and balances determines the existence of constitutionalism and hence the quality of constitutional democracy. At the heart of constitutional democracy is good governance in the sense of 'the provision of a mechanism for popular participation in governance and decision-making'.<sup>137</sup> In political discourse governance has been described as the institutionalisation of normative values that

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<sup>131</sup> TT Hansen, 'Implementation of International Human Rights Standards through the National Courts in Malawi' (2002) 46 *Journal of African Law* 31.

<sup>132</sup> Oloka-Onyango (n 78) 51.

<sup>133</sup> Ibid.

<sup>134</sup> Section 108 (2) of the Constitution.

<sup>135</sup> P Von Doepp, *Judicial Politics in New Democracies-cases from Southern Africa* (Lynne Rienner Publishers, 2009) 78-81.

<sup>136</sup> Ihonvbere (n 76)(noting that the Senate was abolished on the basis that there was no money).

<sup>137</sup> O Chukwumenje, 'Peer Review and the Promotion of Good Governance in Africa,' (2006) 32 *North Carolina Journal of International Law & Commercial Regulation* 49.

can motivate and provide cohesion to members of society at large.<sup>138</sup> In my view such cohesion can best be achieved by giving expression to the broadest spectrum of opinions within the political ‘power map.’<sup>139</sup> So far, from the colonial era<sup>140</sup> to the present constitution-making processes<sup>141</sup> that aspect of inclusiveness has been neglected to the detriment of good governance in Malawi.<sup>142</sup> It is in that context that the role of the judiciary in the transformative constitutionalism enterprise will form the central plank of the ensuing discourse.

## 1.5 Overview of Chapters

The work has been organised into eight chapters. At its most modest, this research seeks to fill an empirical gap by chronicling constitutional law developments in Malawi as part of the on-going democratisation process in sub-Saharan Africa. At a more ambitious level, I set out to interrogate the dynamic intercourse between constitution-making theories and constitutional interpretation methodologies.

**Chapter 1** states the problem, and the justification of the thesis. It also discusses broadly, the main concepts of judicial interpretation, rule of law, constitutional interpretation and constitutional making theories. This chapter notes the impact of judicial interpretation on transformative constitutionalism in order to lay out a clear conceptual foundation for critically analysing the role of the Malawi Judiciary in the promotion of rule of law and democracy. The discussion highlights the emerging critique on the notions of democracy and constitutionalism within a redefined philosophical emphasis suitable for a society like Malawi and how (if at all) such novel thinking has (or should) impact the relevant jurisprudence under the rubric of judicial activism.

**Chapter 2** seeks to introduce and elaborate upon the three key concepts around which the present research has been constructed, namely judicial activism, rule of law and constitutionalism. The discussion in this chapter analyses the various definitions and

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<sup>138</sup> G Hyden and M Bratton eds., *Governance and Politics in Africa* (Lynne Rienner Publishers, 1992) 269.

<sup>139</sup> Fombad defines a Constitution as ‘a power map which derives its authority from the governed and regulates the allocation of powers, functions and duties among the various agencies and officers of government as well as defines their relationship with the governed. It forms the main source and basis of governmental rulemaking and is primarily designed to check against capricious or arbitrary rulemaking. The fundamental essence of a constitution is to prevent both tyranny and anarchy.’ CM Fombad, ‘Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa,’ (2007) 55 *American Journal of Comparative Law* 1, 9.

<sup>140</sup> See PG Forster, ‘Culture, Nationalism and the Invention of Tradition in Malawi,’ (1994) 32 *The Journal of African Studies* 477, 488.

<sup>141</sup> See for a detailed discussion, Nkhata (n 2).

<sup>142</sup> The extent to which current political and constitutional ‘instability’ emanates from a lack of failure by the courts to enforce the new Constitution right at the outset will form an important part of my research.

manifestations of judicial activism ('JA') as the definitive conceptual basis on which the research discourse revolves, tracing its presence within different jurisdictions in order to highlight the persistent conceptual contradictions and inconsistencies of approach evident in its usage. By defining judicial activism as an incidence of judicial discretion, the study will propound the need to confine such jurisprudential approaches within the bounds of constitutionalism and the rule of law in order to prevent elitist tendencies in the relevant governance discourse.

**Chapter 3** delves into the historical, political and legal developments in Malawi in order to provide the relevant background to the discussions in subsequent chapters. This chapter provides a definition of 'elitism' and discusses how colonial elitism divided Malawi (then Nyasaland) into two societies- urban and rural, which resulted in the rise of 'nationalist elitism.' The ensuing discussion aims to highlight how though different in form, the two types of elitism (i.e. colonial and nationalist) effectively disrupted and distorted African governance systems which were largely participatory and consultative, and replaced them with a paternalistic type of governance model that largely excluded the non-elites; the aim is to show how both colonial and nationalist elitism served to hinder the development of constitutionalism and the rule of law within the Malawian society. Further, since manifestations of 'judicial activism' have been related to 'constitutional elitism' it is hoped that a discussion of the social transformative character of the 1994 Constitution and its emphasis on participatory democracy will provide an appropriate framework for an analysis of judicial (in)activism of the judiciary in Malawi by interrogating the impact of judicial decisions on the entrenchment of the rule of law and constitutionalism in Malawi.

**Chapter 4** seeks to bridge the discussion on judicial activism in Malawi with similar discussions from other comparable jurisdictions. As the discussion in chapter 2 demonstrates, the term JA has contradictory and irreconcilable definitions as well as results, which necessitated the proposal of a new definition in this thesis. However, the usage of the new definition proposed in this thesis to assess whether Malawian Courts have practised JA or not, would hinder comparative analysis. For this reason, this chapter will analyse whether the Malawian Courts have practiced JA or not using the 'criteria' discussed in chapter 2. The aim is to situate the behaviour of the Malawian courts on a comparable basis to Courts in other jurisdictions before proceeding to analyse the impact of such JA (if any).

**Chapter 5** proceeds from the premise that the 1994 Constitution placed the Bill of Rights at its centre.<sup>143</sup> As a consequence, post 1994 has seen a surge in Constitutional cases where the applicants sought to protect their rights as enshrined in the Constitution.<sup>144</sup> This development has encompassed rights and freedoms of significance to criminal law such as presumption of innocence and personal liberty. The developments appear to have led some scholars to assert that the 1966 Malawi Constitution as a document which ‘did not guarantee human rights.’<sup>145</sup> It will be argued that such a description does not represent the true legal position and may inhibit a proper appreciation of the evolution of judicially active jurisprudence within the area of criminal law under the ‘old’ and ‘new’ constitutions respectively.

**Chapter 6** acknowledges that the Malawi Judiciary has been recognised as being ‘probably the most credible branch of government in Malawi,’ for displaying remarkable independence ‘in spite of many political and economic pressures and constraints.’<sup>146</sup> This discussion will nevertheless propose that in spite of such demonstrable judicial independence the constitutional jurisprudence still bears remarkable signs of ‘inappropriate deference’ to the executive arm of government. While conceding that a comprehensive analysis of judicial independence and judicial deference may be beyond the scope of this study the aim, in this context, is rather to consider the concept of judicial deference in contradistinction to the notion of judicial activism in order to underscore the transformative potential of the latter within an emerging constitutional jurisprudence.

**Chapter 7** generally posits that within the context of transformative constitutionalism the jurisprudence emanating from the courts in Malawi has a direct bearing on either consolidating or eroding the gains made through the constitution making process.<sup>147</sup> In the light of observations to the effect that ‘the Malawi constitution is endowed with jurisprudentially transformative qualities’<sup>148</sup> how then have the Courts in Malawi discharged

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<sup>143</sup> DM Chirwa, ‘Upholding the Sanctity of Rights: A Principled Approach to Limitations and Derogations Under the Malawian Constitution’ (2007) 1 *Malawi Law Journal* 3.

<sup>144</sup> For example - *MCP and Others v. Attorney General* [1996] MLR 244 and *Mponda Mkandawire v. Attorney General* Miscellaneous Civil Cause No. 49 of 1996 (Unreported) among others.

<sup>145</sup> W Chirwa, N Patel and F Kanyongolo, ‘Democracy Report for Malawi’ in IDEA, *The State of Democracy: Democracy Assessment in Eight Nations Around the World*, 3  
<http://www.idea.int/publications/sod/upload/Malawi.pdf>.

<sup>146</sup> FE Kanyongolo, *State Of The Judiciary Report: Malawi 2003- IFES State Of The Judiciary Report Series*, April 2004. p. 51  
[http://www.ifes.org/~media/Files/Publications/Conference%20Papers%20and%20Reports/2004/148/SOJ\\_Malawi\\_Final.pdf](http://www.ifes.org/~media/Files/Publications/Conference%20Papers%20and%20Reports/2004/148/SOJ_Malawi_Final.pdf).

<sup>147</sup> S Banda, ‘Constitutional Mimicry and Common Law Reforms in a Rights-based Post –Colonial setting: The Case of South Africa and Malawi’ (2009) 53 *Journal of African Law* 142.

<sup>148</sup> Banda (n 2) 165; see also S Gloppen, and FE Kanyongolo, ‘Courts and the Poor in Malawi: Economic Marginalization, Vulnerability, and the Law’ (2007) 5 *International Journal of Constitutional Law* 258, 264.

their constitutional responsibility in the area of judicial review of the actions and/or decisions of Government to prevent ‘an overreaching executive undermining the rights of the citizens’?<sup>149</sup> The notion of constitutional review (as contrasted from ordinary judicial review) offers an interesting discussion point under the aegis of judicial activism given the prevailing narratives which tend to characterise any such judicial intervention as activist. The ensuing discourse should offer interesting insights on the philosophical imperative to refrain from universalist definitions of context-sensitive jurisprudential concepts.

**Chapter 8** will summarise the conclusions arising from this study. The discourse aims to show that legal culture and socialisation constrain legal outcomes irrespective of the substantive mandates entrenched in the constitution. It will be proposed that there is an urgent need for a deliberate investment in judicial training and research designed to generate appropriate appreciation of the peculiar capacity of the courts (embodied within their judicial-decision-making function) to consolidate constitutionalism. It would thus be useful to note how any present conclusions/findings may form the basis for future critiques of judicial decision-making in more thematic approaches.

Practically it is hoped that this work might play a role in encouraging a more thoughtful judicial approach to constitutional interpretation as well as efforts at entrenching a culture of constitutionalism in Malawi’s legal education, especially for those assuming judicial office.

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<sup>149</sup> Oloka-Onyonga (n 78) 49-50.

## Chapter 2

### The Definition of 'Judicial Activism': A Comparative Analysis

*'Judicial activism means different things to different people. It evokes responses which are not only dissimilar and divergent, but also inconsistent and incompatible...'*<sup>1</sup>

#### 2.1 Introduction

This chapter seeks to introduce and elaborate upon the three key concepts around which the present research has been constructed, namely judicial activism, rule of law and constitutionalism. The discussion in this chapter will analyse the various definitions and manifestations of judicial activism ('JA') as the definitive conceptual basis on which the research discourse revolves, tracing its presence within different jurisdictions in order to highlight the persistent conceptual contradictions and inconsistencies of approach evident in its usage; this somewhat unwieldy nature of judicial activism as a legal phenomenon has engendered calls from certain quarters for the outright abandonment of the usage of the concept as a jurisprudential description for its purported emptiness. Within the general context of such stern philosophical criticism of judicial activism this chapter sets out to demonstrate why engaging with the concept (JA) might be unavoidable for any research which seeks to honestly contribute to academic discourse on the judicial function or role as an integral aspect of a constitutional democracy. This chapter will contend that despite its alleged emptiness of meaning, the notion of JA is still gaining considerable prominence within literature analysing judicial decision-making around the globe. Therefore, in interrogating the apparent contradictory and inconsistent manifestations of JA, the aim is to identify a thread of commonality in all the varied discourses on JA so that one can thereby articulate something more conceptually coherent for purposes of the rest of the research analysis. In a similar fashion, due to the presence of a growing body of research which points out the urgency of the need to entrench the rule of law and cultivate a culture of constitutionalism in emerging democracies such as Malawi, this chapter will also devote some space to grapple with these two concepts with a view to offering a jurisprudential context for propounding an argument why appropriate or permissible judicial activism should by definition never be extra-constitutional. Some legal and other arguments for divorcing the definition of JA from value-judgments on judicial decision-making will be advanced in this chapter; the aim here is to try and offer some clear parameters for distinguishing the political (and somewhat dismissive) commentaries on judicial activism from the more legal or philosophical critiques which yield more interesting observations for present purposes.

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<sup>1</sup> D Banerjee, 'Judicial Activism: Need for a National Debate' in D Banerjee, A Subrahmanyam, and V. Vijayakumar, eds. *Judicial Activism: Dimensions and Directions* (Vikas Publishing House, 2002) 3.



## 2.2 'Judicial activism' within its historical context

There is no universal agreement on the definition of 'judicial activism' ('JA') both as a jurisprudential concept and even as a term of speech despite the fact of its being in use for centuries and that it has attained eminence in recent times.<sup>2</sup> In reality, the definitions that are available do not only vary in their substance, but are also patently contradictory and may even be irreconcilable as will be discussed below. As a concept, JA in the USA has been traced all the way back to the eighteenth century,<sup>3</sup> while in the UK its judicial origins are ascribed to the judgments of Lord Denning within the 20<sup>th</sup> century.<sup>4</sup> Prior to the more recent twentieth century discussions, scholars appear to have approached the notion of JA within the thematic context of what is sometimes loosely described as 'judicial legislation'.<sup>5</sup> Even within such debates, the scholars' definitions of the idea of 'judicial legislation' were quite varied. For Blackstone, it represented the very nature of the common law which empowered the judge to actively interpret the law and articulate his reasoning for his decision on given facts;<sup>6</sup> for Bentham, 'judicial legislation' was a 'usurpation of the legislative function' and a charade or 'miserable sophistry [by the Courts]'.<sup>7</sup> On the other hand for Austin, the notion of 'judicial legislation' characterized the power that judges exercised to make rules which obtained 'as law' through the 'acquiescence' of the 'sovereign' as the only authority and power entitled to make law.<sup>8</sup> To that end, there were divisions over a definition and more 'prominent authors took sides on either side of the debate'.<sup>9</sup>

As a term of speech (which is commonly used in ordinary discourse), 'Judicial Activism' is said to have been coined first in the USA in the year 1947 by Arthur Schlesinger in his article 'The Supreme Court: 1947'.<sup>10</sup> However, it has been correctly observed that Schlesinger did not set out to offer any definition of the term but rather presented his analysis as a simple profile of all the Supreme Court Justices in office at the time; his article therefore divided the Justices into two broad categories of 'judicial activists' and 'champions of self-restraint'

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<sup>2</sup> KD Kmiec, 'The Origin and Current Meanings of "Judicial Activism"' (2004) 92 *California Law Review* 1441, 1442 – points out that it in the period between 2000 and 2004 alone, a Westlaw search of 'judicial activists' and 'judicial activism' brought up not less than 1, 817 articles.

<sup>3</sup> Green Ch. 1 (n 89) 1202.

<sup>4</sup> Hon. Justice M Kirby, *Judicial Activism: Authority, Principle and Policy in the Judicial Method* (Sweet & Maxwell, 2004) 3.

<sup>5</sup> ER Thayer, 'Judicial Legislation: Its Functions in the Growth of the Common Law' (1891) 5 *Harvard Law Review* 172.

<sup>6</sup> B Bix, 'Positively Positivism' (1999) 85 *Virginia Law Review* 889, 907 citing RA Cosgrove, *Scholars of the Law: English Jurisprudence from Blackstone to Hart* (NYUP, 1996) 56- 57.

<sup>7</sup> Ibid.

<sup>8</sup> WL Morison, 'Some Myth About Positivism' (1958) 68 *The Yale Law Journal* 212, 215.

<sup>9</sup> Kmiec (n 2) 1445.

<sup>10</sup> Ibid 1446; Green (n 3) 1202.

based on his understanding of ‘the alliances and divisions among them.’<sup>11</sup> As this example shows, even as a term of speech, JA can be as divisive as it has as a jurisprudential concept. It has both proponents and opponents though there is no agreement in either camp as to its precise definition. Thus some scholars clearly spell out how they comprehend JA in the context of their discussion while others proceed with their discussions without any such definition most likely on the fallacious assumption that the reader must already know what the term means.<sup>12</sup> In order to avoid any such confusion it is essential, therefore, to analyze the various definitions so far available with the ‘ambitious’ aim of articulating a more coherent and comprehensive definition of judicial activism which will help to locate the ensuing discourse in the rest of the thesis within a comprehensible conceptual framework.

## 2.3 Navigating the intricate terrain of defining the term Judicial Activism

The inconsistencies and contradictions in the various definitions of JA come out most prominently when discussing the definitions by the different authors.

### 2.3.1 Is it when a Court ‘ignores’ Precedent?

The term JA has been applied to Courts that have, in the view of those using the term, ignored precedent.<sup>13</sup> The definition of JA as ignoring/disregarding precedent has provoked intense debate among scholars. The discussion has at times been so acrimonious that some commentators have accused those who adopt such a definition of advocating ‘strict adherence’ to the doctrine of precedent and have even gone so far as to call them ‘legal fundamentalists’ who do no more than claim ‘the prerogative of legitimacy for a conservative approach to administration and development of the law’ hence guilty of conducting themselves in a manner ‘unworthy of serious legal thinkers.’<sup>14</sup> However, some critiques do agree that a court that departs from ‘established precedent’ is involved in JA but they tend to disagree as to whether that is appropriate JA<sup>15</sup> or inappropriate JA.<sup>16</sup> Regardless, defining JA in terms of ‘ignoring precedent’ can be quite misleading: firstly that approach glosses

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<sup>11</sup> See Green (n 3) 1202 – 1207, on a detailed discussion on how Schlesinger failed to define the term or to offer helpful guidance on how to determine whether a court is judicially active or self-restrained.

<sup>12</sup> See for instance PS Reddy, ‘Judicial Activism: Misnomer or New Matrix of Justice’ in Banerjee (n 1) 45 – 52; see also VRK Iyer, ‘Judicial Activism and Administrative Autonomy’ in Banerjee (n 1) 149 – 154.

<sup>13</sup> W Wayne, ‘The Two Faces of Judicial Activism’ (1992) 61 *George Washington Law Review* 1, 3

<sup>14</sup> EW Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (CUP, 2005) 93 – 94.

<sup>15</sup> G Lawson, ‘The Constitutional Case Against Precedent’ (1994) 17 *Harvard Journal of Law and Public Policy* 23.

<sup>16</sup> See for instance, *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477 (1989) as per Justice Stevens; describing a lower court as having ‘engaged in an indefensible brand of judicial activism’ for refusing to follow a precedent set by the USA Supreme Court.

over fundamental adjudicative differences between Civil<sup>17</sup> and Common law systems with their distinctive treatment of precedent respectively and secondly the critique oversimplifies the complex process that judicial precedent is in a common law system.<sup>18</sup>

In the first place, it would be fair to suggest that those who define JA in simple terms of disregarding/ignoring precedent do not adequately account for the flexibility permissible within the common law doctrine of judicial precedent; in so doing they proceed from a definitional premise that renders it impossible to distinguish that approach from the kind of ‘unbridled’ departure from established legal principles (as embodied in previous judicial decisions) also characterized as judicial activism. Even though the common law doctrine of precedent<sup>19</sup> has been a subject of much debate in its own right<sup>20</sup> it must be acknowledged that it confers inherent flexibility to a common law court through the fundamental rule that decided cases must be followed unless they are *distinguishable* from the case at hand. By allowing decided cases to be distinguished or explained away as fundamentally different to the issues in question, the common law has a built in mechanism for judicial maneuver in adjudicating legal issues.<sup>21</sup> In saying this it is very pertinent to remember that in law ‘it is not everything said by a judge when giving judgment that constitutes a precedent,’ rather it is only the reason for the decision (*ratio decidendi*) that becomes a definitive or decisive point on the question or issue.<sup>22</sup> In practice, what constitutes such *ratio decidendi* may not be so easily distinguished from what is ‘a statement by the way’ (*obiter dicta*).<sup>23</sup> Much flexibility therefore emanates from the process of discerning which statements by the judges in decided cases constitute the *ratio* or *obiter* because though the ‘language of the deciding judge’ is the determining factor (in the case he determined), ‘the interpreter has as much to say as the speaker so far as the meaning of words concerned.’<sup>24</sup> In addition, what is *ratio*

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<sup>17</sup> In a civil law system, ‘court judgments have no binding force as precedents for other courts’, see P Arens, Summary (Translation of) ‘Die rechterliche Rechtsfortbildung in Deutschland als einem Land des Gesetzersrechts: Überblick und geschichtliche Entwicklung seit dem zweiten Weltkrieg unter besonderer Berücksichtigung des Zivilrechts’ in Reports on the *International Symposium on Judicial Law Making: Function of the Judicature in Today’s Society*, (Ritsumeikan University, 1988) 78 – 79, 79.

<sup>18</sup> See Kmeic (n 2) 1466 - 1471.

<sup>19</sup> Embodied in the latin term *Stare decisis* (‘to stand by that which is decided’).

<sup>20</sup> Some applaud it as ‘the life blood of the legal system’ for its contribution to the attainment of justice while others denounce it as ‘an imprisonment of reason,’ see CK Allen, *Law in the Making* (Clarendon Press, 7<sup>th</sup> edn, 1964) 243, and Thomas (n 14) 142, 161- 163 respectively; see also R Cross and JW Harris, *Precedent and English Law* (Butterworths, 5th edn, 1985) 56, explaining that precedent is rooted in the justice precept that like cases be treated alike.

<sup>21</sup> Kirby (n 4) 14 - 19 stating that flexibility is inherent in a common law system as differences between judges are bound to arise over perceptions on material facts among other things.

<sup>22</sup> Cross and Harris (n 20) 39, 40.

<sup>23</sup> *Ibid*, 41.

<sup>24</sup> *Ibid*.

*decidendi* in a given case is influenced by the relevant and particular facts of the case; yet it is obvious that minor differences of fact are bound to arise within any two cases which are otherwise similar and in consequence the room for distinguishing previous decisions cannot be completely eliminated within the ordinary exercise of the adjudicative function of the common law court.<sup>25</sup>

Secondly, those who define JA in terms of disregarding/ignoring precedent do not often make a distinction between vertical and horizontal precedent.<sup>26</sup> Complexities might further arise from the fact that the binding nature of precedent also depends on whether the case is one from a court of superior jurisdiction ('vertical precedent') or of the same level as the court deciding the case ('horizontal precedent').<sup>27</sup> In most common law jurisdictions, the binding nature of vertical precedent is more coercive than horizontal precedent. For instance, in the UK, the House of Lords clearly affirmed the centrality of the doctrine of precedent to common law adjudication by stressing that it provides 'some degree of certainty upon which individuals can rely in the conduct of their affairs as well as a basis for orderly development of legal rules';<sup>28</sup> nevertheless the House of Lords simultaneously explained that a common law court can 'depart from a previous decision when it appears right to do so' because it 'recognize[d] that too rigid an adherence to precedent may lead to injustice in a particular case and also unduly restrain the proper development of the law.'<sup>29</sup>

Further complexity may be attributed to the fact that the actual rules of precedent applicable in a particular jurisdiction vary from one common law jurisdiction to another. For instance, the USA with its written Constitution and federal system has a varied application of the doctrine of precedent, classified in a threefold scheme by Kmeic as 'constitutional precedent' (flowing from its written constitution) and 'common law precedent' (flowing from its foundation as a common law country), and 'statutory precedent (flowing from the courts' interpretation of Statutes).<sup>30</sup> Consequently, in order to appropriately classify a court's handling of precedent as JA (if at all), first and foremost there is need to identify the type of precedent in issue since not all such previous decisions are binding on the court under examination. However, it is proposed that the more appropriate issue to address in the context of a court's handling of precedent, is the level of *discretion* that a court has (or should have) in determining applicable case authority since barring 'incompetency,

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<sup>25</sup> Ibid 43.

<sup>26</sup> Kmeic (n 2) 1466 - 1471.

<sup>27</sup> Ibid 1466.

<sup>28</sup> Practice Statement (Judicial Precedent) [1966] 1 WLR 1234.

<sup>29</sup> Ibid.

<sup>30</sup> Kmeic (n 2) 1467.

dishonesty or legal heresy' genuine differences can and do arise.<sup>31</sup> In that vein, it would be legally incorrect to describe as judicial activism every instance of such departure from previous decisions.

### 2.3.2 Is it when the Courts invalidate legislative enactments?

One scholar defines judicial activism as 'any occasion where a court intervenes and strikes down a piece of duly enacted legislation.'<sup>32</sup> Even though this definition in its broad generalization does not represent the views of all academic commentators, a considerable number of scholarly articles from different jurisdictions have employed the invalidation of legislative enactments as a measurement of judicial activism (if only in part).<sup>33</sup> However, it is suggested that equating JA to all instances where a court has invalidated legislative enactments presents its own definitional hurdles. Firstly and paradoxically, the same term, 'judicial activism' has been applied to describe courts that have done the exact opposite, namely, declined to invalidate legislative enactments.<sup>34</sup> Secondly, such a definition could be misleading as it may not properly account for other relevant legal factors underlying the particular court decision invalidating the legislative enactments. A more thorough analysis of such a decision could alter the definition as one would then have to consider issues such as:

- (i) the rules of constitutional/statutory interpretation employed; (ii) the nature and content of the Constitutional and/or statutory provision(s) under consideration; (iii) the application of the doctrine of precedent (or lack thereof), just to mention a few of such peculiar legal features.

As such, one cannot help noticing that some scholars have applied the term JA to describe courts which upon careful analysis, adopted or employed judicial processes that contradict the definition of JA as given by other scholars. To illustrate, ignoring precedent (an aspect of iii above) has been proffered by some scholars as proof of JA in its own right.<sup>35</sup> If that definition were to be true at all times, then all instances where the court ignores precedent to arrive at its decisions should be referred to as JA. However, applying that definition alongside the definition of JA as invalidating legislation brings out an internal contradiction. For instance, some conservative courts in the USA have been known to ignore precedent set by liberal predecessors to decline to invalidate legislation, when a liberal judge through

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<sup>31</sup> Kirby (n 4) 19.

<sup>32</sup> G Jones, 'Proper Judicial Activism' (2002) 14 *Regents University Law Review* 141, 143.

<sup>33</sup> For example, see contributions in B Dickson ed., *Judicial Activism in Common Law Supreme Courts* (OUP, 2007); also LA Graglia, 'It's not Constitutionalism, It's Judicial Activism' (1996) 19 *Harvard Journal of Law and Public Policy* 293.

<sup>34</sup> FH Easterbrook, 'Do Liberals and Conservatives Differ in Judicial Activism?' (2002) 73 *University of Colorado Law Review* 1401, 1402.

<sup>35</sup> See Green (n 3); Kmiec (n 4).

adhering to such precedent would have accordingly invalidated it.<sup>36</sup> The inconsistency of judicial activism definitions becomes even more apparent when the foregoing observation is expressed another way: some courts in the USA, have employed 'judicial activism' (ignoring precedent- as defined by some) in order to decline a 'judicial activist' outcome (invalidating legislative enactments- as defined by others).<sup>37</sup>

### 2.3.3 Is 'judicial activism' a word of commendation or censure?

The following statements from different commentators offer an instructive point of departure in considering the value-laden content carried within the label of JA within different jurisdictions and other varied contexts:

According to Justice Kirby of Australia "... demonizing judicial honesty and integrity as "judicial activism" in the hope of restoring old doctrine and methodology [is] an endeavor that should be resisted..."<sup>38</sup> While S. Sinha as the Chief Justice of India once said that "judicial activism, during the last three decades, gave a new hope to justice starved millions. .... The courts by taking recourse to judicial activism are not encroaching upon the exclusive domain of the executive inasmuch as the go all of the courts is to render justice."<sup>39</sup> Another author P.P. Rao writing on JA in India states that 'initially [JA] meant judicial creativity,' but 'at times [it is] understood as dynamism on the part of judges who wield judicial power in an effective manner without crossing the constitutional limitations.'<sup>40</sup> However, Rao goes on to add 'there is yet another facet of judicial activism [in India]...' where the judges have 'assumed enormous powers beyond the contemplation of Constitution-makers...' which have been 'counter-productive' and risks the credibility of the judiciary.<sup>41</sup>

The above statements beg the question, what exactly should the listener/reader take the usage of the term 'judicial activism' to convey about a particular court? According to Justice Kirby, it is clear that the term JA should never be used to describe the work of judges with moral honesty and judicial integrity as the term connotes some impropriety of adjudicative methodology or doctrine. For Justice S. Sinha however, JA is synonymous with judges behaving justly and appropriately in discharging their constitutional function with due historical regard of a given socio-economic context being reflected in their decisions and

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<sup>36</sup> Eastbrook (n 34) 1401.

<sup>37</sup> RE Barnett, 'Is the Rehnquist Court an 'Activist' Court? The Commence Clause' (2002) 73 *University of Colorado Law Review* 1275, 1276.

<sup>38</sup> See Kirby (n 4) 13.

<sup>39</sup> S Sinha, 'Judicial Activism: Its Evolution and Growth' in Banerjee (n 1) 15, 23.

<sup>40</sup> See Lord Woolf of Barnes, who in his Paper 'The international Role of the Judiciary,' presented at the Commonwealth Law Conference, Melbourne, April 2003, stated that at <http://www.judiciary.gov.uk/media/speeches/2003/international-role-of-the-judiciary-melbourne>.

<sup>41</sup> PP Rao, 'Judicial Activism: Its Positive and Negative Aspects,' in Banerjee (n 1) 34, 43 – 44.

methodologies. On the other hand, Rao propounds a different perspective on the nature of judicial activism in that his comments suggest that JA can be synonymous with two diametrically opposed judicial realities: one scenario where the judges are behaving constitutionally by being judicially active and another where they are in fact acting unconstitutionally in the same name of judicial activism. This necessarily begs the question which is a more accurate representation of the meaning of JA? How is the term used in different countries or jurisdictions? Is it a word of commendation or censure or indeed can it be both all at once? In scoping the terrain of the relevant literature it emerges that different countries have different answers to these questions.

### 2.3.3.1 *The United States of America*

JA has both its supporters and critics in the USA. However, 'common to all definitions of judicial activism [in the US] is the concept of judicial overreaching,' which some defend as necessary for the protection of the rights of minorities,<sup>42</sup> even though JA in the USA has also been used to further entrench the oppression of minorities.<sup>43</sup> The general position however, is that disdain for JA unites liberals and conservatives even though the two sides do not agree on its definition, causing one judge to opine: - 'Everyone [in the USA] scorns judicial "activism."'<sup>44</sup> In essence both liberals and conservatives use the term to describe judicial decision-making that they perceive to be a departure from the norm or standard expected of judges without necessarily agreeing on what that norm or standard is or should be.<sup>45</sup>

An analysis done by scholars has shown that in the USA, where the term 'judicial activism' has been applied, the Court's conduct of the judicial process may be categorized into any or all of the following heads:

1. Striking down arguably Constitutional Acts of other branches
2. Ignoring precedent
3. Judicial legislation
4. Departures from Accepted Interpretive Methodology
5. Result-oriented Judging.<sup>46</sup>

Despite the existence of supporters of JA, there is a general agreement among scholars that in the USA the term is used as a condemnation not a compliment.<sup>47</sup> In that context, the

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<sup>42</sup> CG Buck, 'Judicial Activism,' in GA Anderson and K Herr eds., *Encyclopedia of Activism and Social Justice* (Sage Publications, 2007) 785 – 788 citing R Dworkin, *Taking Rights Seriously* (HUP, 1978).

<sup>43</sup> For instance in the infamous case of *Dred Scott v. Sandford* (1856) 19 U.S. 393, which has been described as the worst example of judicial activism, see Green (n 3).

<sup>44</sup> Easterbrook (n 34) 1403.

<sup>45</sup> Ibid.

<sup>46</sup> Kmiec (n 1); see also Green (n 3).

*Oxford Companion to the Supreme Court of United States*<sup>48</sup> defines 'Judicial activism' as 'the charge that judges are going beyond their appropriate powers and engaging in making law and not merely interpreting it.'<sup>49</sup>

Thus the position in the USA is aptly described by Justice FH Easterbrook:

"Activism" remains, however, a term of opprobrium. Everyone wants to appropriate and apply the word so that his favored approach is sound and it's opposite "activist." Then "activism" just means Judges Behaving Badly - and each person fills in a different definition of "badly."<sup>50</sup>

### 2.3.3.2 **Australia**

The Hamlyn lecture on JA by Justice Kirby<sup>51</sup> and an article by Wheeler and Williams<sup>52</sup> adequately capture the situation tenable in Australia. Justice Kirby writing on JA likened the usage of the term 'judicial activism' in the Australian context to describe judges' conduct as 'judge-bashing', or synonymous with 'a swear word.'<sup>53</sup> Further, Kirby records that the Australian public labeled the judges they perceived as being 'judicial activists' as:

'bogus' ... guilty of 'plunging Australia into the abyss,' a 'pathetic ... self-appointed [group of] Kings and Queens,' a group of 'basket weavers' ... unaware of [their] place ... 'needing a good behavior bond' ... 'undermining democracy'....<sup>54</sup>

Similarly, Wheeler and Williams state that the 'invocation of [judicial activism] is often a surrogate for direct criticism of a particular decision or result or methodology,'<sup>55</sup> and the term JA has thus become 'something of a proxy of judicial excess.'<sup>56</sup> In keeping with the lack of clarity that goes with most of the discussions on JA, Wheeler and Williams while stating that judicial activism is 'such an empty concept' went on to conclude that the High Court in Australia had displayed 'restrained activism' without even providing or proposing and definition of the concept. Regardless, even those who argue that the 'activism' of the

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<sup>47</sup> See T Sowell, 'Judicial Activism Reconsidered' (Hoover Institution Press, 1989); R Brown, 'Activism is not a Four-Letter Word' (2002) 73 University of Colorado Law Review 1257; Easterbrook (n 34); Graglia (n 33).

<sup>48</sup> KL Hall, JW Ely Jr., JB Grossman, and WM Wiemeck, *Oxford Companion to the Supreme Court of United States* (OUP USA, 1992) 545.

<sup>49</sup> Ibid, emphasis added.

<sup>50</sup> Easterbrook (n 34) [emphasis added]; see also Buck (n 42) 785 – 788 (emphasis added).

<sup>51</sup> See Kirby (n 4).

<sup>52</sup> F Wheeler and J Williams, "'Restrained Activism" in the High Court of Australia' in Dickson (n 33).

<sup>53</sup> Kirby (n 4) 52.

<sup>54</sup> Ibid 48.

<sup>55</sup> Wheeler and Williams (n 52) 67.

<sup>56</sup> Ibid 67, 19.



Australian High Court has been appropriate acknowledge that the application of 'judicial activism' to judges in Australia is generally depreciatory.<sup>57</sup>

### 2.3.3.3 *India*

Banerjea states that '... the [Indian] society is divided sharply, nay, acrimoniously... [on judicial activism]'.<sup>58</sup> As a result, descriptions of Indian judicial activism span the broadest possible spectrum ranging from the complimentary 'judicial creativity' to the denigrating 'judicial terrorism'.<sup>59</sup> Indian and international scholars and judges<sup>60</sup> are equally divided in their opinion on judicial activism in India though they do not necessarily agree on its definition.<sup>61</sup> Others have taken a middle position stating that the manifestation of JA may have a local dimension to it;<sup>62</sup> and that on a comparison of Supreme Courts in the common law jurisdictions, 'the jury is very much still out on whether the activism of the Indian Supreme Court has gone too far'.<sup>63</sup> However, an eminent Indian jurist has divided the JA periods in India into two categories: '1950 – 73,' and '1978- present' where he describes the '1950 – 73' period as a period of 'fairly principled and doctrinally sustainable approach' to activism and the '1978 – present' epoch as one of 'undisciplined and theoretically questionable activism'.<sup>64</sup>

The consequences of Indian JA have equally been mixed. For instance, JA in India (however defined) is said to have brought hope to the powerless, downtrodden and marginalized through the Court's adjudication on a variety of rights ranging from the right to education to the right to a clean environment.<sup>65</sup> However, in the very area of protection of human rights, in particular the right to property, Sathe states that JA in India has arguably led to the marginalization of the majorities who were landless and it is such activism that has served to further entrench the powerful status quo of the propertied minority.<sup>66</sup>

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<sup>57</sup> See for instance, Kirby (n 4); also Wheeler and Williams (n 52).

<sup>58</sup> Banerjea (n 1) 3.

<sup>59</sup> Ibid.

<sup>60</sup> For an examples of members of the Indian Judiciary criticizing 'judicial activism' of other members of the same judiciary see *M.P. Oil Extraction v. State of M.P* (1997) 7 SCC 592.

<sup>61</sup> For the different definitions, see individual contributions in Banerjea, Subrahmanyam, and Vijayakumar (n 1).

<sup>62</sup> See Lord Woolf (n 40) stating that he was 'initially .... astounded by the proactive approach of the Indian Supreme Court, but ... soon realised that, if that Court was to perform its essential role in Indian society, it had no option but to adopt the course it did ...'

<sup>63</sup> B Dickson, 'Comparing Supreme Courts' in Dickson (n 33) 12.

<sup>64</sup> V Iyer, 'The Supreme Court of India' in Dickson (n 33) 121, 122.

<sup>65</sup> See Banerjea, *et al* (n 1).

<sup>66</sup> SP Sathe, 'Judicial Activism: Historical Perspective' in SP Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (OUP India, 2 edn., 2003) 46 – 50 (finding fault with the constitutional interpretation of the Supreme Court that construed the requirement for compensation to be the market value- Ironically though, Sathe calls this type of JA, 'legal positivism with a vengeance').

Similarly, on the one hand, some scholars argue that ordinary citizens have confidence in the Supreme Court as a result of its JA.<sup>67</sup> That by abandoning 'traditional English writs or blinked rule of standing of British Indian vintage',<sup>68</sup> the Indian judiciary 'induced' public interest litigation (PIL), considerably increased access to justice for the underprivileged, oppressed and poor classes of people in India.<sup>69</sup> On the other hand, it has been reported that even though 'judge induced'<sup>70</sup> PIL 'provides a career path for many an entrepreneur in the market for human rights activism'<sup>71</sup> its intended beneficiaries have had to say to 'the Supreme Court of India: Physician heal thyself.'<sup>72</sup>

Some still maintain that where the executive and legislative arms of Government are 'guilty of apathy or abdication of responsibility' in the face of corruption in high places, massive election frauds, and where education has become too commercialized as is allegedly the case in India, then the judiciary has a responsibility through judicial activism to make up for the lack of action of the other two governmental arms.<sup>73</sup> However, an example of the practical and institutional limitations on the capacity and the risk to credibility of the judiciary when it seeks to make up for the failings of the two other branches of government may be found in the case of *Vineet Narain v. Union of India*.<sup>74</sup> In that decision the Indian judiciary by means of judicial activism set out to make up for the apparent lack of action on the part of the other arms of government. The case was brought by way of PIL by a journalist who was frustrated by the apparent reluctance of the Indian Central Bureau of Investigations (CBI) to carry out investigations into allegations of corruption involving 'high dignitaries.'<sup>75</sup> The main question before the court was: 'Whether it is within the domain of judicial review and it could be an effective instrument for activating the investigative process which is under the control of executive?'<sup>76</sup> The case centered on entries made into diaries and note books seized from the premises of a Mr. SK Jain and his relatives which allegedly pointed to corruption involving high profile politicians ('Jain Diaries'). The Indian Supreme Court decided to become directly involved in the investigations and monitored the CBI's conduct of investigations and 'only closed the case after the CBI submitted charge-sheets in the

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<sup>67</sup> For example PM Bakshi, 'Judicial Activism: Some Reflections' in Banerjee and others (n 1) 27 – 33; Reddy 9n 12) 45 – 52; Sihna (n 39).

<sup>68</sup> Krishna Iyer J. in *Municipal Council, Ratlam v. Vardhichand*, AIR 1980 SC 1622.

<sup>69</sup> DVN Reddy, 'Social Justice Through Public Interest Litigation' in Banerjee, *et al* (n 1) 331, 341.

<sup>70</sup> Ibid 340.

<sup>71</sup> Baxi Ch. 1 (n 43) vi- xvii.

<sup>72</sup> Ibid xvi.

<sup>73</sup> Reddy (n 69) 47; see also A Lakshminath, 'Judicial Activism: Retrospect and Prospect' in Banerjee and Others (n 1) 55, 61.

<sup>74</sup> (1997) 7 SCALE 656, also available at <http://www.indiankanoon.org/doc/1203995/>.

<sup>75</sup> Ibid, *per* Verma CJI, p. 1.

<sup>76</sup> Ibid.

criminal court concerned.<sup>77</sup> Interestingly, when the case went before the New Delhi High Court against the Jains and others, the case was dismissed for want of evidence among other reasons.<sup>78</sup> The CBI appealed and the matter was heard by a panel of three judges who upheld the decision of the trial court on the point that the evidence contained in the diaries was not admissible and reliable evidence in the absence of further evidence establishing the truthfulness of the entries.<sup>79</sup> In effect, investigations presided over by the Supreme Court of India resulted in an acquittal of the accused persons for insufficient and unreliable evidence. One may legitimately ask – does that not show that (contrary to popular sentiment) the CBI might have already properly assessed the evidence and found it wanting and hence decided not to proceed further with the matter? In other words the case buttresses the argument that certain public law domains may lie beyond the institutional and structural competence of the judiciary. Nevertheless some scholars have applauded the proactive approach of the Supreme Court in the *Vineet Narain* case as innovative despite the embarrassing outcome of the subsequent criminal trial and appeal.<sup>80</sup>

International scholarship, on the other hand, suggests that whilst ‘seeking to build great structures’ the Indian Supreme Court has actually shaken the foundations of ‘the 1950 Indian Constitution...to the extent that the Court’s judgments no longer carry the weight and respect they once did.’<sup>81</sup> Further, it is sometimes argued that for the people who should have benefited from PIL, the ‘manifestations of judicial activism merely mask the endless potential of all forms of state power for re-victimization of the already much violated.’<sup>82</sup> In other words, this line of argument proposes that judicial activism in India has just shown the oppressed masses of India that judicial power expressed in terms of judicial activism is itself another form of state power that can just as effectively be invoked to oppress and marginalize the majority of the people.

#### 2.3.3.4 **South Africa**

Possibly due to its terrible apartheid history, it appears that South Africa has been spared from the inconsistent and at times irreconcilable definitions of judicial activism that are present in other jurisdictions. The apartheid regime, a minority government of people self-classified as “‘European’ (later ‘white’)”<sup>83</sup> managed to set up a ‘constitutional arrangement’

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<sup>77</sup> Rao (n 41) 40.

<sup>78</sup> RC No. 1(A)/95 ACU (VI).

<sup>79</sup> *CBI v. V.C. Shukla and Others* (1998) 2 SCALE 84.

<sup>80</sup> Sinha (n 39) 23.

<sup>81</sup> Dickson (n 63) 12.

<sup>82</sup> Baxi (n 71) xvii; see also Rao (n 41) 34, 40 – 41 pointing out that ‘reputations once destroyed by judicial intervention cannot be revived or restored...’

<sup>83</sup> H Corder, ‘The Republic of South Africa’ in Oliver and Fusaro Ch. 1 (n 23) 263, 266.

(made up of a written Constitution, Acts of Parliament and subordinate legislation), that 'effectively excluded' the original inhabitants of the land (blacks) who constituted '80 per cent of the population.'<sup>84</sup> This meant that all the injustice and oppression occasioned on the original inhabitants of the land was all done in accordance with the law of the land.<sup>85</sup> Even though some people so affected challenged the actions of the apartheid regime in court, such as challenging constitutional amendments, the Appellate Division of the Supreme Court of South Africa, declined to invalidate the offending amendments among others.<sup>86</sup> As the apartheid regime became more oppressive, the judiciary justified its indirect endorsement of the oppression by declaring, 'we declare what the law is, we do not make it,'<sup>87</sup> and insisted that they were 'the strongest bastions of human rights' in spite of evidence to the contrary.<sup>88</sup>

It was in that context of oppression that calls for judicial activism in South Africa was initially made.<sup>89</sup> Those calls were generally directed at judges when construing statutory and constitutional provisions whose ordinary meaning would occasion injustice; in such a scenario they were encouraged to disregard the ordinary meaning or 'to construe the words in a manner that [would avert] any imminent injustice, [in order to] ensure that justice is done.'<sup>90</sup> The injustice practiced in apartheid South Africa challenges one commonly held view that judicial activism is counter-majoritarian.<sup>91</sup> That is, through constitutional amendments, 'the popular will' in South Africa (determined in terms of the electoral process) was in actual fact the will of a minority racist population, who through a combination of conquest<sup>92</sup> and subsequent legal reforms governing the electoral process, managed to exclude the 'will' of the majority population.<sup>93</sup> Judicial activism in South Africa, in order to

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<sup>84</sup> Ibid.

<sup>85</sup> Ibid 263.

<sup>86</sup> See for example *Ndlwana v. Hofmeyr NO*, 1937 AD 227, *R v. Ndobe* 1930 AD 484. For more information on the oppressive laws and the behaviour of the courts in the process, see J Dugard, *Human Rights and the South African Legal Order* (Princeton University Press, 1978); D Dyzenhaus, *Hard Cases in Wicked Legal Systems* (Clarendon Press, 1991).

<sup>87</sup> Report of The International Commission of Jurists, G Bindmann ed., *South Africa: Human Rights and the Rule of Law* (Pinter Publishers, 1988) 109, being a quote from a Supreme Court judge made in an interview on 25 February, 1987.

<sup>88</sup> L Berat, 'Courting Justice: A Call for Judicial Activism in a Transformed South Africa' (1992- 1993) 37 *St. Louis University Law Journal* 849, 851.

<sup>89</sup> Ibid.

<sup>90</sup> R Matemba, 'Judicial Activism: Usurpation of Parliament's and Executive's Legislative Functions or a Quest for Justice and Social Transformation?' (2011) 13 *European Journal of Law Reform* 83, 91.

<sup>91</sup> Baxi (n 71) also points out how some of Sathe's work (n 66) challenges Sathe's assertion that JA is counter-majoritarian.

<sup>92</sup> For a detailed account of the forcible displacement of the indigenous African population by the early European settlers, see L Thompson, *A History of South Africa* (Yale University Press, 3 edn., 2001).

<sup>93</sup> See Corder (n 83) and Berat (n 88).

bring about 'justice',<sup>94</sup> was in fact to be counter-powerful-minority. It is a sad fact of history that the South Africa justices however, disregarded those ennobling calls.<sup>95</sup>

However, change did arrive in the end, in the form of a new constitutional dispensation through the coming into force of the new South African Constitution.<sup>96</sup> The South African Constitution ('RSA Constitution') contains provisions which were adopted with the particular purpose of being a catalyst for social transformation.<sup>97</sup> It contains a Bill of Rights which includes civil and political rights as well as social and economic rights, and entrenches 'dignity, equality and freedom' as foundational to constitutional democracy.<sup>98</sup> In particular, the RSA Constitution contains Section 39 (2) which calls upon 'every court, tribunal, or forum,' 'when interpreting any legislation, and when developing the common law or customary law,' to 'promote the spirit, purport and objects of the Bill of Rights.' In effect, S. 39 (2) of the RSA Constitution, calls upon the Courts in RSA to do what has been defined in other jurisdictions as judicial activism.<sup>99</sup> Even so this explicit constitutional mandate has not stopped some commentators from arguing that South African 'top courts'<sup>100</sup> are practicing JA.<sup>101</sup> Other scholars however argue that those courts are anything but judicially active, especially when JA is conceived in terms of the courts being agents for social transformation.<sup>102</sup>

It would appear that those scholars, who have argued that the courts in South Africa are practicing JA, have used the term predominantly as a statement of commendation.<sup>103</sup> Such discussions use several notable cases to illustrate their favorable assessment of the South African judiciary.<sup>104</sup> For example in the case of *S v. Makwanyane*,<sup>105</sup> the RSA Constitutional

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<sup>94</sup> The word 'justice' is itself a word fiercely debated but in this context, for simplicity, it means whatever the authors who called for JA as a tool for 'justice' or acclaim the post-1994 RSA Courts as champions of 'justice' intend it to mean.

<sup>95</sup> Berat (n 88) 851.

<sup>96</sup> Initially there was a 'transitional' or 'interim Constitution of 1993 (the Constitution of the Republic of South Africa, Act 200 of 1993), and subsequently the 'final' constitution (current one) came into force in 1996 as the Constitution of the Republic of South Africa, Act 108 of 1996.

<sup>97</sup> H Corder, 'Judicial Activism of a Special Type: South Africa's Top Court since 1994', Dickson (n 33) 324 – 325.

<sup>98</sup> Ibid 331 – 351.

<sup>99</sup> Ibid 328 – 330; see also the various definitions of JA in kmiec (n 2).

<sup>100</sup> The Appellate Division.

<sup>101</sup> See for instance Corder (n 97) 330, arguing that the right term for what is happening in RSA is 'judicial activism of a special type' so as to distinguish it from 'the more usual use of the term in [other] ... jurisdictions' since indeed the Courts are predominantly giving effect to the text of the 1996 RSA Constitution.

<sup>102</sup> J Dugard and T Roux, 'The Record of the South African Constitutional Court in Providing an Institutional Voice for the Poor: 1994 – 2004' in Gargarella, Domingo, Roux Ch. 1 (n 32) 118 – 120; arguing that the courts have actually reduced 'access to justice' for the poor among other things through its decisions.

<sup>103</sup> See for example Corder (n 83); Corder (n 97) and Matemba (n 90).

<sup>104</sup> Such as *S v. Zuma and Others* 1995 (2) SA 642 (CC); *S v. Makwanyane and Another* 1995 (3) SA 391 (CC); and *Soobramoney v. Minister of Health (KwaZulu- Natal)* 1998 (1) SA 765 (CC). For more cases cited as JA see Corder (n 97) and Matemba (n 90).

Court ('CC') outlawed the death penalty when there was still a high likelihood of public controversy and in so doing promulgated the position that the RSA Constitution's right to life provision was 'ahead of the social consensus'.<sup>106</sup> In the case of *Government of the Republic of South Africa v. Grootboom*,<sup>107</sup> the CC rendered social-economic rights such as the right to housing directly enforceable in a court of law. This decision represented a radical departure from ordinary liberal democratic distinctions between justiciable and non-justiciable rights and reflects a judicial approach that deliberately seeks to remedy the historical injustices of apartheid and its exclusion of the majority from enjoying the economic benefits accruing within a given society. However, in all the above cases, it is very pertinent for present discussions to observe that in reality the South African Courts have merely given judicial effect to the provisions of the new RSA Constitution; as such even those who contend that there is JA do acknowledge that it is a 'special type of' JA which those courts are practicing.<sup>108</sup>

Other scholars however, propose that the RSA CC has in fact exercised judicial restraint and even avoidance in dealing with certain crucial cases in the context of transforming a hitherto exclusionary legal system and generally oppressive governance structure.<sup>109</sup> In order to highlight the restrictive way in which the South African CC has interpreted some pro-poor constitutional provisions, a comparison is made with the Indian judiciary.<sup>110</sup> Due to poverty of the majority in India whose access to justice was hampered by the high costs of bringing cases before Courts and stringent rules of standing before commencing a court case, the Indian Supreme Court relaxed, by interpretation, the applicable rules such that in essence even a letter by the aggrieved individual or another on their behalf to the Supreme Court has been deemed as sufficient to begin a cause of action before it.<sup>111</sup> The point to emphasize here is that the Indian Supreme Court extended the rules of standing and the mode of commencing or bringing a case before it to that extent without any express Constitutional provision upon which to found their very expansive approach. The situation in RSA is markedly different. In issue in this particular context is Section 167 (2) of the RSA Constitution which provides that:

National legislation or the rules of the Constitution Court must allow a person, when it is in the interest of justice and with leave of the Constitutional Court:

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<sup>105</sup> 1995 (3) SA 391 (CC).

<sup>106</sup> Corder (n 97) 339.

<sup>107</sup> 2001 (1) SA 46 (CC).

<sup>108</sup> Corder (n 97) 328 – 329.

<sup>109</sup> Dugard and Roux (n 102) 118 citing cases such as *S v. Dlamini* 1999 (4) SA 623 (CC); and *Moseneke v The Master* 2001 (2) SA 18 (CC) among others.

<sup>110</sup> Dugard and Roux (n 102) 111.

<sup>111</sup> Barnerjea (n 1) 8.

- a. to bring a matter directly to the Constitutional court,<sup>112</sup> or
- b. to appeal directly to the Constitutional Court from any court.

It is very remarkable that while some proponents of judicial activism routinely denounce positivism (understood as giving ordinary meaning to the text of a constitution), it is beyond dispute that a positivist reading of S. 162 (2)(a) should entitle even a poor litigant to approach the CC as a court of first and last instance.<sup>113</sup> In fact, it has been acknowledged elsewhere that 'ironically' the judicial positivism that was a problem in the apartheid era would in fact 'be an advantage in the new [constitutional] dispensation.'<sup>114</sup> However, unlike the Indian Supreme Court which "actively invites" cases to be brought to it as a court of first and last instance<sup>115</sup> the RSA CC has decided that it will not 'ordinarily deal with matters both as a Court of first and as one of last resort.'<sup>116</sup> Whereas in the case such as the *Christian Education South Africa v. The Minister of Education*<sup>117</sup> the applicants were not necessarily poor, the principle enunciated in that decision to the effect that the direct access procedure is 'an extraordinary procedure and that it should be granted only in exceptional circumstances'<sup>118</sup> has served to bar actually poor litigants from accessing the CC. Subsequent research done by Dugard and Roux<sup>119</sup> on the issue of access to the CC has revealed that 'unrepresented applicants [who are unrepresented because they are poor and thus cannot afford legal representation] are typically turned away...'<sup>120</sup>

Furthermore, the CC has specifically decided that 'it is ... not ordinarily in the interests of justice for a court to sit as a court of first and last instance, in which matters are decided without there being any possibility of appeal...'<sup>121</sup> In light of such a judicial statement it can be argued that the CC has in effect determined that the direct access provided for under S. 167 (2) (a) is itself contrary to the interests of justice. It is an interesting and significant historical oddity that the retrogressive heritage of the Appellate Division of the RSA Supreme Court from the apartheid era had in fact led to the creation of the CC to enable applicants to directly access the CC.<sup>122</sup> By its restrictive decisions on direct access, the CC has in effect

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<sup>112</sup> Emphasis supplied.

<sup>113</sup> Dugard and Roux (n 102) 111

<sup>114</sup> Corder (n 97) 329.

<sup>115</sup> Dugard and Roux (n 102) 112.

<sup>116</sup> See cases such as *Member of the Executive Council for Development Planning and Local Government, Gauteng v. Democratic Party* 1998 (4) SA 1157 (CC); and *Christian Education South Africa v. The Minister of Education* 1999 (2) SA 83 (CC).

<sup>117</sup> Ibid.

<sup>118</sup> Ibid para. 4.

<sup>119</sup> Dugard and Roux (n 102) 112.

<sup>120</sup> Ibid.

<sup>121</sup> *Bruce v. Fleetcytex Johannesburg CC* 1998 (2) SA 1143 (CC) para. 8

<sup>122</sup> Corder (n 97).

forced the majority of poor applicants back to the pre-1996 status, whereby they still have to go through the ordinary courts including the once infamous Appellate Division of the RSA Supreme Court, in order to seek constitutional redress;<sup>123</sup> and that judicial direction arrived at in what is arguably clear contradiction to the purport of section 167 (2)(a). Thus contrary to the acclaim of those who have described the RSA CC as practicing commendable judicial activism, others point out that in reality the court has exercised unabashed judicial restraint in 'its direct access and social rights jurisprudence,' which has in turn '... made it harder for the poor to litigate cases than the text of the 1996 Constitution would suggest.'<sup>124</sup> Even such critiques however, would seem to implicitly endorse the predominant South African understanding of JA as a tool for social transformation; in arguing that the judges have exercised judicial restraint, the critics are using the resultant capacity of the relevant court decisions to promote or inhibit access to justice by the poor as an essential criterion to measure the extent to which the present judicial approach significantly redresses the historical injustices of the disbanded pre-1994 legal regime.

This discussion shows that the term JA when applied to RSA jurisprudence is predominantly invoked as a word of commendation and this is very different from the way it is used in other jurisdictions such as the USA, Australia, and even India (in some contexts). This goes to emphasize the point that it is unwise to assume that the term has a universally applicable meaning in all literature at all times.

## 2.4 Refining the discourse on JA

The foregoing analyses have adequately shown that JA has at times been equated to judicial creativity and even judicial terrorism, and that it has been credited with the emancipation of the marginalised as well as denounced for the further marginalisation of the socio-historically disenfranchised sections of society. This apparent paradox of results indicates that JA has both positive and negative resonances as well as consequences. Such a realisation warrants a further analysis of some conceptual links that have necessarily arisen in our on-going efforts to trace the definitional contours within which the idea of judicial activism is experienced, discussed and critiqued.<sup>125</sup>

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<sup>123</sup> Dugard and Roux (n 102) 119.

<sup>124</sup> Ibid 118.

<sup>125</sup> See also Green (n 3) arguing that there is no essential link between JA and justice; also Corder (n 97) arguing that JA is not synonymous with liberalism; Baxi (n 71) disputing the assertion that JA is essentially counter-majoritarian.



### 2.4.1 Why JA is not synonymous with 'Judicial Creativity'

There are those who have made JA synonymous with 'judicial creativity' without further explaining or defining what 'creativity'<sup>126</sup> means. It is suggested here that discussing JA in terms of 'judicial creativity' only increases the chance of misinformation since it ignores an essential characteristic of common law adjudication.<sup>127</sup> 'Judicial creativity' is inherent 'in the very nature of common law.'<sup>128</sup> By operation of law there is an obligation on the common law judge to decide like cases alike.<sup>129</sup> It is almost axiomatic that 'so long as human language remains imprecise and human capacity to predict the future limited', unprecedented complex issues will continue to come before common law judges.<sup>130</sup> Within such a realistic scenario of legal disputes, the judicial creativity integral to the common law becomes an indispensable device for fashioning just decisions responsive to the manifest diversities of human problems; for the judge is nevertheless expected to articulate the 'law' applicable as '... [an] authoritative spokesperson' on the community's law derived from 'precedents and principles' which he deems relevant to a particular set of facts (as he has determined from the available evidence).<sup>131</sup> However, barring 'incompetence, dishonesty or legal heresy,'<sup>132</sup> genuine differences of judicial opinion do emerge concerning which facts are relevant, which precedent is applicable or distinguishable, and whether the questions arising are those of policy or law. It is in that process of discerning the justice of the case based on legally relevant facts that common law judges inevitably do develop the law subject to the subsisting requirement to furnish reasons for any decision taken- the need to articulate a legally coherent judicial determination is designed to 'discourage a naked usurpation of [legislative] power by judges.'<sup>133</sup> Thus though entitled to extrapolate new principles from existing ones in order to dispose of unprecedented cases, under the common law, the judge is not expected to be the '...original author of new ideas...' rather he must proceed as part of the

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<sup>126</sup> For instance, Thomas (n 14) calling 'JA' judges 'creative ... judges'; see also D Oliver and C Fusaro, 'Changing Constitutions' in Oliver and Fusaro Ch. 1 (n 2) 397 describing the case of *Marbury v. Madison* which has been cited by numerous authors as an example of USA as 'a highwater mark in judicial creativity.'

<sup>127</sup> For purposes of clarity, this research adopts the definition of 'Creative' as found in J Turnbull *et. al*, *The Oxford Advanced Learner's Dictionary* (OUP, 8<sup>th</sup> edn., 2010) namely that it means 'involving the use of skill and the imagination to produce something new.'

<sup>128</sup> Kirby (n 4) 14.

<sup>129</sup> R Cross and JW Harris, *Precedent in English* (Clarendon Press, 1991) 3

<sup>130</sup> Kirby (n 4) 30

<sup>131</sup> Cotterrell Ch. 1 (n 20) 25, 28.

<sup>132</sup> Kirby (n 4) 19.

<sup>133</sup> Kirby (n 4) 18.

‘community’ (representing ‘an evolving collective legal’<sup>134</sup> wisdom) of whom he becomes the ‘spokesperson’<sup>135</sup> through his reasoned decision.

It is now generally accepted that common law judges do ‘make law to some extent’;<sup>136</sup> the differences and questions arise in the context of articulating ‘how’ and ‘when’ and ‘to what extent’ they are justified in doing so.<sup>137</sup> It could be argued that the questions as to how, when and the extent to which a common law judge may or is justified in ‘making’ the law pertain more to an important issue of judicial discretion. In deciding which interpretive method is appropriate or not, whether facts are material or not, or whether a case authority is applicable or not, a judge exercises choice. Now, ‘[whenever] a judge makes a choice he or she effectively exercises discretion’; hence discretion is an integral part of the judicial decision-making process.<sup>138</sup> Common law allows for judicial discretion but restricts judicial creativity in the development of law in that the judge ‘must subordinate their own individual reasoning and values to those’<sup>139</sup> of the community of whose interests they are guardians.<sup>140</sup> Consequently, for purposes of avoiding misinformation, discussions on JA in courts should address the broader question of the nature of judicial discretion as opposed to ‘judicial creativity’ – what is (or should be) the scope and limits of judicial discretion vis-à-vis the development of law by judges?

#### 2.4.2 Why JA is not synonymous with ‘liberalism’ or ‘progressiveness’

It is not uncommon to come across a discussion on JA that casts the judge as deemed to be exercising JA as a ‘progressive’ or ‘liberal’ judge. Take for instance the words of USA Judge LM Swygert:

Judicial activism traditionally uses the principles built into the constitution and statutory law *to foster the ends of social justice. The term connotes a liberal approach* so as to read into legal norms the essence of due process and equal protection under the law.<sup>141</sup>

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<sup>134</sup> Cotterrel (n 131) 29.

<sup>135</sup> See *Ibid*, 25 explaining on the essential elements of Classic Common Law thought that have endured despite modern criticism, one of which is that of a common law judge as the spokesperson of the community.

<sup>136</sup> Campbell Ch. 1 (n 90) 115.

<sup>137</sup> Cotterrel (n 131) 29.

<sup>138</sup> Thomas (n 14) 202; for a contrary view, see R Dworkin, ‘The Model of Rules’ (1967) 35 *University of Chicago Law Review* 14, 32- 33.

<sup>139</sup> Cotterrel (n 131) 25,

<sup>140</sup> Kirby (n 4) 23.

<sup>141</sup> LM Swygert, ‘In Defence of Judicial Activism’ (1982) 16: 3 *Valparaiso University Law Review* 439, 439 (Emphasis supplied); vast literature exists that classifies JA in these terms, see also E McWhinney, ‘The Supreme Court and the Dilemma of Judicial Policy-Making’ (1955) 39: 7 *Minnesota Law Review* 837, 840-841; M

Compare those remarks to the views of New Zealand Judge EW Thomas who accuses 'legal fundamentalists'<sup>142</sup> of loving '[t]he phrase judicial activism' and using it with 'acidic delicacy' to taint with 'illegitimacy' the work of 'liberal and creative' judges. Both Judges Swygert and Thomas (like most who use that term in association with JA) make no attempt to define the word 'liberal.'

Is it 'liberal' in terms of liberal political theory which emphasizes a society founded on 'atomistic individual[ism]'<sup>143</sup> as a basis for freedom for the individual from coercion? If so, then equating such 'liberal' judges with the enhancement of freedom for the individual encounters difficulties- since, as some have pointed out, discourse on 'liberalism' hides a 'fundamental contradiction, ... the contradiction that individual freedom and autonomy are possible only under conditions of collective restraint and coercion.'<sup>144</sup> In addition, 'liberals ... fight to the death to prevent any law' impinging on individual autonomy such as abortion laws but yield to regulations and policies that restrict the ability of the State to cater for the poorer sections of society,<sup>145</sup> which would enhance individual autonomy in ways not embraced by 'liberals' since it concerns welfare issues.<sup>146</sup>

Further, as has already been noted, judges involved in judicial activism have invalidated 'socially progressive and economically distributive acts and policies' in the USA,<sup>147</sup> and brought about the further marginalization of the poor through their decisions in India.<sup>148</sup> Lastly but not least, judges classified as 'conservative' in the USA have also been actively involved in judicial activism during which time 'liberals opposed [such] interference by advocating judicial restraint'.<sup>149</sup> Therefore classifying the JA judge as 'liberal' or 'progressive' (whether to commend or denounce the implied converse) is both erroneous and misleading;

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Andrew, 'What Role Can South African Judges Play in Mitigating Apartheid- A Study of the Urban African Legal Regime' (1987) 2 *Wisconsin Law Review* 325, 342.

<sup>142</sup> Thomas (n 14) does not provide a definition of the term.

<sup>143</sup> S Levinson, 'Book Review: Escaping Liberalism- easier said than done' (1983) 96: 6 *Harvard Law Review* 1466, 1466- 1467.

<sup>144</sup> Cotterrell (n 131) 205.

<sup>145</sup> MA Graber, 'Towards Juristocracy: The Origins and Consequences of the New Constitutionalism- Does it really Matter? Conservative Courts in a Conservative Era (2006) 75 *Fordham Law Review* 675, 707- 708.

<sup>146</sup> See H Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (Princeton University Press, 2<sup>nd</sup> edn, 1996) arguing that the promotion and enforcement of certain basic social and economic rights is essential to enjoyment of Civil and Political rights.

<sup>147</sup> Corder (n 97) 330.

<sup>148</sup> Baxi (n 71) xvi – xvii discussing the negative side of judge-induced public interest litigation in India.

<sup>149</sup> Thomas (n 14) 99- 100. See also Graber (145) 681- 695, discussing in detail the concept of 'conservative judicial activism'.

the evidence on the ground suggests that ‘judicial activism lacks any essential link to progressive politics or liberty.’<sup>150</sup>

#### 2.4.3 Why JA should not be classified as ‘counter-majoritarian’

It is equally not uncommon to come across a discussion on JA that describes it as essentially ‘counter-majoritarian.’<sup>151</sup> Such discourse predominantly emanates from American democracy discourse. In that context, those who classify judicial activism (though not always taking the time to define the term comprehensively)<sup>152</sup> as ‘counter-majoritarian’ proceed from the premise that it protects minorities from the ‘tyranny’ of the majority.<sup>153</sup> In this context, judicial activism is generally construed as referring to the situation when the Court ‘goes beyond’ the text of a Constitution or ‘... adopt doctrines that contradict the text of the Constitution either to uphold or nullify a law.’<sup>154</sup> Most scholars in the USA whether they are for or against judicial activism appear to endorse a definition along those lines.<sup>155</sup> Those who oppose the idea of courts going against the written Constitution in the USA argue that in doing so the courts are actually ‘short-circuiting the electoral process and disenfranchising the people’<sup>156</sup> and others insist that the courts in that way are undermining democracy by going against the rule of the majority.<sup>157</sup> On the other hand, others such as Dworkin argue for or justify Courts going beyond the written text of the Constitution on the basis that not doing so ‘limits constitutional rights “to those recognized by a limited group of people at a fixed date of history.”’<sup>158</sup> Dworkin is highlighted here because his theories purport to put forward universally applicable principles and represent the current dominant legal theory on the judicial-making process.<sup>159</sup>

In this context, judges who go beyond the text of the Constitution are considered to be judges who take human ‘rights seriously’.<sup>160</sup> Thus Dworkin describes JA as ‘a program

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<sup>150</sup> Green (n 3) 1227; see also Corder (n 97) pointing out that JA is not to be associated with the advancement of liberal democratic values.

<sup>151</sup> Vast literature exists on this point. For example see Chemerinsky Ch. 1 (n 30) 1261; Baxi (n 71) 9 arguing that Sathe’s expose on JA in India challenges his (Sathe’s) classification of JA as counter-majoritarian.

<sup>152</sup> See for instance Chemerinsky (Ibid) – though this author did not take the time to define ‘judicial activism’ but writes of it in a manner that equates it with ‘constitutional judicial review.’

<sup>153</sup> Ibid 1210, and since Chemerinsky equates ‘judicial activism’ with ‘judicial review’ he supports his arguments with authors who discuss ‘judicial review’ in the context of it being ‘antimajoritarian’ such as A De Tocqueville, *Democracy in America* (Saunders and Otley, 1<sup>st</sup> English ed., 1838) 103; Judge Bork, ‘Neutral Principles and Some First Amendment Problems’ (1971) 47 *Indiana Law Journal* 1, 2-3.

<sup>154</sup> Barnett (n 37).

<sup>155</sup> See and compare Barnett (n 37); Eastbrook (n 34); Graglia (n 33) 296; Brown (n 47); and R Dworkin, *Taking Rights Seriously* (HUP, 1978); just to mention a few.

<sup>156</sup> Jones (n 32) 141 citing President R Reagan.

<sup>157</sup> G Mace, ‘The Anti-Democratic Character of Judicial Review’ (1972) 60 *Californian Law Review* 1140, 1145.

<sup>158</sup> Dworkin (n 138) 124 cited in Sowell (n 47) 8.

<sup>159</sup> Campbell (n 136) 116.

<sup>160</sup> See Dworkin (n 138).

[where] ... courts ... work out principles of legality, equality, and the rest, [and] revise those principles from time to time in the light of what seems to the court fresh moral insight...'<sup>161</sup> According to Dworkin and other 'legal realists' therefore, judges should not shy away from using 'their own moral beliefs' and disregarding written laws (including the Constitution) in order to 'protect individuals and minorities'.<sup>162</sup> Examples are given of how Courts in some jurisdictions such as Canada have added sexual orientation as 'a ground of discrimination' into the Canadian Charter of Rights contrary to the intention of the original framers.<sup>163</sup>

In this case, 'law' according to Dworkin 'is entirely a matter of interpretation' derived from pre-existing 'legal resources' in the form of principles and legal rules, where the principles control the application of legal rules.<sup>164</sup> For Dworkin, within pre-existing 'law' there is always an answer to every hard issue before the court, and the judges derive their authority 'from within law itself.' In interpreting the law, the fundamental duty of the judge is said to be the promotion and protection of human rights especially 'independent of the majority will.'<sup>165</sup> However, in interpreting the law, judges (according to Dworkin) are not supposed to be free-agents but should be guided by some fundamental values that underpin the relevant legal system and they must advance those values through their peculiar interpretive judicial mandate.<sup>166</sup> Therefore, according to this line of argument, it is those fundamental values that authorize the judge to go beyond the written text of a Constitution where doing so will advance the rights of individuals. As the following discussion will argue, this proposition of the expansive nature of the judicial interpretive mandate which purports to explain or justify judicial activism as a liberal democratic imperative may not be without its shortcomings.

#### 2.4.3.1 Why the 'counter-majoritarian' label cannot be of universal application

On the face of it, these arguments are very compelling<sup>167</sup> until their counter-arguments are carefully considered.<sup>168</sup> The principal counter-argument being that Dworkin's theses are

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<sup>161</sup> Dworkin (n 42) 137.

<sup>162</sup> W Sinnott-Armstrong, 'A Patchwork Quilt Theory of Constitutional Interpretation' in T Campbell and J Goldsworthy eds., *Judicial Power, Democracy and Legal Positivism* (Ashgate Pub Co, 2000) 315 – 316.

<sup>163</sup> K Roach, 'Judicial Activism in the Supreme Court of Canada' in Dickson (n 33) 92.

<sup>164</sup> Cotterell (n 131) 161- 172, providing a critical analysis of Dworkin's legal philosophy.

<sup>165</sup> Dworkin 1971, 159

<sup>166</sup> Dworkin 1986, 401

<sup>167</sup> For instance, Ronald Dworkin has been described as among others 'probably the most influential figure in contemporary legal theory,' see A Hunt, 'Reading Dworking Critically', in A Hunt ed., *Reading Dworking Critically* (Berg, 1992) 1; and 'The most famous critic of positivism..', see KE Himma, 'Substance and Method in Conceptual Jurisprudence and Legal Theory,' (2002) 88 *Virginia Law Review* 1119, 1187.

<sup>168</sup> A lot of literature exists critiquing theories such as Dworkin's from different perspectives. For instance for a detailed critique on the theories as they pertain to the judicial decision-making process see Thomas (n 14) 188 – 214; for their abstraction and lack of universal application see Green (n 3); for their failure to address a 'conflict of rights, see M Freeman, *Human Rights: An Interdisciplinary Approach* (Polity Press, 2002) 69 among others.

rooted in legal abstractions that are too far removed from the practical realities of judicial decision-making<sup>169</sup> and if anything they seem to be conceived with the US constitutional and judicial system in mind.<sup>170</sup> Though not exhaustive, some of the reasons for proposing the counter-argument will be outlined below.

#### 2.4.3.1.1 Preservation of the supremacy of the Constitution

Even those who support the idea of judges going beyond the text of the written Constitution point to the very Constitution or constitutional principles as a source of both the authority for the judges' power to go beyond the text and any subsequent extra-constitutional pronouncement.<sup>171</sup> To illustrate this point let us look at one seminal decision on the issue: when the US Supreme Court ascribed the power of judicial review to itself under the US Constitution in *Marbury v. Madison*<sup>172</sup> they did so by stating that judicial review was 'implied' within the Constitution.<sup>173</sup> Further, the Canadian Supreme Court added sexual orientation as a ground of discrimination under the Charter on the basis that 'unwritten constitutional principles' authorized them to do so.<sup>174</sup>

To reiterate, those who advocate for court's to interpret Constitutions so as to suit the changing times do not necessarily want 'the notion of a national Constitution with a uniform meaning throughout the country [to be] lost,'<sup>175</sup> even though they may still differ on what that 'meaning' is and how it may be arrived at.<sup>176</sup> This would point to the conclusion that regardless of their views on what constitutes a 'Constitution' (and its bona fide interpretation); nevertheless both sides of the debate are keen to preserve the supremacy of

<sup>169</sup> Thomas (n 14) 188 – 214 and Green (n 3).

<sup>170</sup> See for instance J Raz, 'Authority, Law, and Morality' in J Raz, *Ethics in the Public Domain: Essays in Morality of Law and Politics* (OUP USA, 2001) 210, 219 – 221; MS Green, 'Does Dworkin Commit Dworkin's Fallacy? A Response to Justice in Robes' (2008) 28 *Oxford Journal of Legal Studies* 33, 33; and RB Kar, 'Hart's Response to Exclusive Positivism' (2007) 95 *Georgetown Law Journal* 393, 401.

<sup>171</sup> Chemerinsky (n 151) 1218 (explaining the desire to preserve the concept of 'a national Constitution' since the extra-Constitutional pronouncements need the very authority of the Constitution to establish and enforce the rights and obligations so created).

<sup>172</sup> (1803) 5 US 137.

<sup>173</sup> Sathe (n 66); see also Oliver and Fusaro (n 126) 397.

<sup>174</sup> Oliver and Fusaro (Ibid); see also *Egan v. Canada* [1995] 2 SCR 513

<sup>175</sup> Chemerinsky (n 151) 1218.

<sup>176</sup> For instance, Dworkin though arguing for going beyond the Constitution as perceived by the framers, nevertheless refutes the legitimacy of judge's possessing what he calls 'strong discretion' (in the sense of power to 'make new law or change existing law') see Thomas (n 14) 202 analysing R Dworkin, 'The Model of Rules' (1967) 35 *University of Chicago Law Review* 14, 32- 33; See also C Fusaro and D Oliver, 'Towards a Constitutional Theory' in Oliver and Fusaro (n 126) 405; arguing that since not all jurisdictions have written Constitutions, the term 'Constitution' in contemporary discourse no longer applies strictly to 'written Constitutional texts' but rather broadly to 'constitutional arrangements' which include 'the entire set of written or unwritten rules which regulate the functioning of structures of the State...'

that document as foundational to all legitimate legal authority.<sup>177</sup> In other words the validity of any purported interpretation must be derived from its fidelity to the values which the document espouses. One view is that those values are explicit and must be strictly adhered to especially through judicial interpretation; the other view being that every constitution embodies values that might be implicit (such as the liberal democratic imperative of individual liberty) but just as definitive in its actualization which entitle courts to fashion judicial responses that necessarily promote those underlying values.

It is in this context that the Constitutional framework differences between the USA and other jurisdictions attain significance.

#### **2.4.3.1.2 The nature of a Constitution's foundational premise for protection of rights**

It is useful to indicate that the 'counter-majoritarian' JA discussions in the USA emanate from the fact that the constitutional system of the USA '...has a counter-majoritarian premise' whereby 'there are some areas of life a majority [is not allowed to] control...no matter how democratically it decides to do' so.<sup>178</sup> The premise of American constitutional democracy like most western societies is therefore based on an 'extreme form of individualism' whereas non-western societies seem to place more premiums on the individual within the context of a community.<sup>179</sup> Therefore if it could be shown that the Constitutions of such other nations do not embody an equally 'counter-majoritarian premise' any counter-majoritarian JA within such societies would (unlike in the USA) be in direct contravention of the very spirit and object of the Constitution purported to be enforced by such judicial decisions.<sup>180</sup> In other words such a judicial approach would be patently unconstitutional (besides being fundamentally undemocratic).

#### **2.4.3.1.3 The existence of constitutional limitation on a court's constitutional interpretive role**

The debate on judicial activism as counter-majoritarian in the USA has also given rise to conflicting theories of constitutional interpretation such as 'interpretivism'<sup>181</sup> and

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<sup>177</sup> Oliver and Fusaro (Ibid) 407; pointing out that the concept of 'a living constitution' should not be considered synonymous with the development of norms or principles that actually are in conflict with the 'written Constitution.'

<sup>178</sup> Bork (n 153) 2-3 cited in Chemerinsky (n151).

<sup>179</sup> T Koh, 'Does East Asia Stand for Any Positive Values?' in A Acharya ed., *Quest for World Order: Perspectives from a Pragmatic Idealist* (Times Academic Press, 1998) 349

<sup>180</sup> The Court's function of judicial review is aimed at enforcing the Constitution.

<sup>181</sup> The theory that a 'Court must confine itself to norms clearly stated or implied in the language of the Constitution', see Chemerinsky (n 151) 1208; see also JH Ely, *Democracy and Distrust: A Theory of Judicial Review* (HUP, 1980) 1.

‘noninterpretivism’<sup>182</sup> the comprehensive discussion of which is beyond the scope of this chapter. Suffice to say for present purposes however that the ‘authority to determine the meaning and application of [the US]... Constitution is no-where defined in the document itself.’<sup>183</sup> On the other hand, the written Constitutions of other jurisdictions such as Malawi do make specific provision to that effect.<sup>184</sup> This foundational difference arguably alters significantly the application of noninterpretivism to other jurisdictions as the document itself prescribes the parameters and principles of constitutional interpretation and specifically defines the limits within which the discretion of the court can legitimately be exercised in its interpretive mandate. It is argued that Dworkin does not adequately account for such differences between the US and Malawian Constitutions for example.

#### **2.4.3.1.4 The nature of fundamental values embodied in the written Constitutional framework**

If the principal check on the judicial power of interpretation is a set of fundamental values or rights, as espoused by Dworkin and others, then the fact that the fundamental values that govern a country’s Constitution may differ across various jurisdictions is very significant. For instance, private property is ‘[o]ne of the fundamental rights to be protected’ in the USA,<sup>185</sup> which could sadly explain the dreadful judicial activism of *Dred Scott v. Sanford*. To the extent that the courts (as interpretive agents of prevailing social values and rights) understood that blacks were the private property of their white slave masters, they saw the legislation abolishing slavery as an illegitimate limitation of that fundamental right. In this case, the South African Constitutional provision on the right to property may offer an interesting example of the constitutional tensions that arise within a society trying to transform itself from a hitherto exploitative and exclusive legal regime.

The 1996 South African Constitution expressly provides for the expropriation of private property (not limited to land) by the State for among other reasons, ‘land reform’ aimed at enhancing ‘equitable access’ to land by citizens, subject to certain conditions such as payment of compensation.<sup>186</sup> Indeed payment of compensation subject to ‘market value of the property among other things’ is one key precondition. Since expropriation by its very nature may mean taking without the owner freely offering their property for sale it makes sense that the nature of compensation offered should be a very essential element indeed.

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<sup>182</sup> The theory that a ‘Court may protect norms not mentioned in the Constitutions text or in its pre-ratification history’, see Chemerinsky (n 151) 1209.

<sup>183</sup> AM Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (YUL, 1986) 1.

<sup>184</sup> See Sections 9, 10, and 11 of the Constitution of Malawi- which will be discussed in subsequent chapters.

<sup>185</sup> F Fukuyama, ‘Future of History: Can Liberal Democracy Survive the Decline of the Middle Class’ (2012) 91 *Foreign Affairs* 53, 54.

<sup>186</sup> See Section 25.



However, not all governments especially those of developing economies will have sufficient resources to acquire land at the current market value.<sup>187</sup> Let us suppose therefore, that as in the case of India,<sup>188</sup> the South African government proposed to expropriate certain properties for purposes of redistributing to Black South Africans not in accordance with the principle of acquisition at the current market rate but purported instead to justify that on the basis of 'historical circumstances' (a factor which is also recognized by the Constitution).<sup>189</sup> Which is the fundamental value that the Court should protect at all costs: private property or equitable access? It may be instructive to note that a decision by the Supreme Court of India to subject expropriation of land for redistribution by the Indian Government to payment of compensation at 'market value' has been denounced by proponents of judicial activism as 'legal positivism with a vengeance'<sup>190</sup> concealing '...a hidden class bias.'<sup>191</sup> In their view, the historical, social and economic circumstances in India called for a lesser amount of compensation rather than the 'market value' which the Government then could not afford.<sup>192</sup>

Dworkin acknowledges that fundamental principles may sometimes conflict with each other and a balancing process may have to be undertaken by the judge.<sup>193</sup> In this case, which is the fundamental value which must prevail over the other to govern the interpretation of the South African Constitution?<sup>194</sup> Currently the South African Courts have recognized expropriation under current market value-<sup>195</sup> but what if the RSA Constitutional Court, choosing to pay regard to the oppressive history surrounding land acquisition in RSA was to decide to attach more weight to historical circumstances as opposed to the need for payment of market value? Further still, what if the judges took the position that the right to property of the 'landless' individuals far outweighed the competing interests of those who currently owned the property as a fundamental value protected under the 1996 RSA Constitution, hence decided to go beyond the very text of the 1996 Constitution and endorsed expropriation at nominal value? Now let us suppose in this case that such a judicial decision would receive enormous public support even internationally? On the face of it, rights indeed would have been taken seriously (those of the landless) but at the same

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<sup>187</sup> Sathe (n 66) 49.

<sup>188</sup> See *Kameshwar Singh v. State of Bihar* AIR 1951.

<sup>189</sup> In the case of South Africa the historical circumstances include European settlers originally by conquest taking land from the original inhabitants, later through legislation, bringing about their forced removals and relocations.

<sup>190</sup> Sathe (n 66) 48.

<sup>191</sup> Ibid 46.

<sup>192</sup> Ibid 49.

<sup>193</sup> R Dworkin, *Justice in Robes* (Belknap Press- HUP, 2006) 17 – 18.

<sup>194</sup> Vast literature exists on South Africa's Right to Property and the debates it has given rise to. See for example, H Mostert, *The Constitutional Protection and Regulation of Property and Its influence on the Reform of Private Law and Landownership in South Africa and Germany* (Springer, 2002).

<sup>195</sup> *South Africa v. Grootboom* 2001 (1) SA 46 (CC).

time, in protecting those rights, other rights would have been trampled upon (those who owned the property). In this case, it is the same right (access to land) that is in issue but the protection of which generates an irreconcilable conflict. When the right is the same and therefore of equal significance, which incidence is to take precedence over the other in the pursuit of justice where either choice may lead to patent injustice? That is, if the court were to insist on expropriation at market value, then the government would not afford hence land will not be redistributed according to need leaving many still without access to land (injustice according to some), but if acquired at nominal value, it would deprive the owners of safeguards provided for under the Constitution (injustice according to others). In this case, expropriation at market value would resonate well with an American audience and very likely with Dworkin himself, but not a developing country audience.<sup>196</sup> Thus it could be contended that in arguing for going beyond the Constitution, Dworkin presupposed a homogeneous interpretive community, which is not the case in real life.<sup>197</sup>

Consequently, these theories are conceptually deficient as they do not provide an adequate universal answer to the real issue of conflict of rights arising within different cultural and constitutional frameworks.<sup>198</sup> It is for this reason that discussions of JA as ‘counter-majoritarian’ have in turn generated debates on complex concepts/theories such as the very definition of a ‘Constitution’, constitutional interpretation methodologies, theories of democracy, and the nature of the judicial role/function (including specifically in a democracy).<sup>199</sup> This contested process has precluded the attainment of universal agreement on the essential elements of JA.

#### 2.4.4 The need to ask the right question

In this thesis it is proposed that some of the inconsistencies and contradictions on the elements of JA may have arisen because of addressing the wrong questions about the

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<sup>196</sup> E.g. Indian jurist Sathe appears to frown on the insistence of ‘market value’, see Sathe (n 66) 49.

<sup>197</sup> For instance, any assertions of fundamental rights that should have precedence on the basis that they are ‘universal rights’ have been criticized as ‘imperialistic’ and as a privileging of civil and political rights as the only set of ‘genuine human rights’ when there is no sound legal basis for doing so; see Freeman (n 168); see also Cotterell (n 131) 240 – 241 articulating deconstructionist theories that challenge the assertion of anything as ‘fundamental’ on the basis that what we consider fundamental or ‘subordinate, [or] peripheral...’ in law may actually be a result of ‘a privileging, in disguise, of one concept over another’ and ‘matters could have been different’ had such privileging not taken place.

<sup>198</sup> See Freeman (n 168) 69 – 70 pointing out that Dworkin’s theories in general fail to address the issue of conflict of rights.

<sup>199</sup> Vast literature exists on this. But to specifically single out discussions of interpretive methodologies etc, definitions of democracy and how that interacts with interpretive methodologies, see for instance Chemerinsky (n 151).

judicial role/function.<sup>200</sup> In this context, it is argued that the knowledge of which questions to ask and which ones to avoid decreases the likelihood of misinformation.<sup>201</sup>

To illustrate the point from a common place example: tourists visiting Malawi for the first time are often advised to refrain from asking locals, especially those in rural areas for the distance between two places because they will likely get the 'right' answer to their question which will often turn out to be the 'wrong' answer for their purposes. The transportation system is very poor in rural Malawi; as a result, many locals have to walk long distances as a matter of course, such that a one hour walk would be considered a very short distance. Stories are told of European tourists who have walked at great cost to their physical well-being after asking about the distance and getting a response of 'short distance' only to realise that by their standards it was an 'extremely long distance.' The likelihood of misinformation and misunderstanding increases with a discussion of JA because its 'critical elements ... are either subjective or defy clear and concrete definition.'<sup>202</sup> The solution therefore lies rather in identifying the fundamental issues raised in the discussions on JA and refining them so that 'something more precise can be articulated and evaluated.'<sup>203</sup>

However, a leading jurist<sup>204</sup> has called for the 'repudiation of any essentialist perspective on judicial activism' arguing that JA 'has no permanent "essence"' and that:

The world of judicial activism remains chaotic [and] [t]he politics of judicial desire that animates justices remains fragmented, given the disorder of their desires. That disorder shapes the moments of both triumphs and tragedy of ...judicial activism.<sup>205</sup>

And further that:

... [T]he telling of stories about the unfolding of diverse forms of judicial activism, [calls for] their ceaseless definitions and redefinitions. ... this ... subverts the model of an either/or choice: [and] narratives of judicial activism ineluctably de-privilege any 'right' way of describing, let alone defining its basic features and processes.<sup>206</sup>

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<sup>200</sup> Ibid.

<sup>201</sup> Ibid.

<sup>202</sup> DF O'Scannalian, 'On Judicial Activism: Judges and the Constitution Today' (2004) 3:1 *Open Spaces* quoted in Kmeic (n 2) 1476.

<sup>203</sup> Campbell (n 136) 115.

<sup>204</sup> Baxi (n 71) xii – xiii.

<sup>205</sup> Ibid xii.

<sup>206</sup> Ibid.

Similar sentiments have been advanced by authors who have called for the term JA to ‘be exiled from educated discourse’ on the basis that it is ‘an empty phrase’ since it means anything that the speaker wants it to mean, which could be the exact opposite of what a prior speaker may have stated it meant.<sup>207</sup> It is proposed here that despite such strong and insightful observations however, judicial activism as a term cannot be abandoned. As another commentator has aptly pointed out ‘scholars who avoid seemingly undefinable terms like activism risk withdrawing their research from large public discussions about judicial conduct.’<sup>208</sup> Even if for arguments sake, JA were to be merely ‘a term of political criticism’ giving up on it ‘on grounds of indeterminacy’ would lead to a situation where there was ‘precious little political discourse left.’<sup>209</sup> ‘[P]ublic reasoning and debates are central to the pursuit of justice’<sup>210</sup> and discussions of JA appear to gain momentum in the realm of public debate.<sup>211</sup> Consequently, there is a compelling need to maintain the usage of the term ‘judicial activism’ in order to contribute to that debate. There is an equally important need to find a baseline for discussions on JA, especially one that could somehow minimise the opportunity for misinformation and misunderstanding.

Even though ‘the notion of activism remains inescapably localized’<sup>212</sup> it is arguable that the possibility still remains for finding a common useful question. Regardless of differences in constitutional power arrangements, localized conceptions of the judicial function, and the social and economic conditions that impact on determination of fundamental values, one thing remains constant: the court always exercises a certain amount of discretion which cannot be denied. This judicial discretion pertains to determination of material facts, applicable case authority, interpretive methodology, fundamental values to give effect to and so on and so forth. Therefore, in order to have a baseline for determining the existence of JA we should take cognizance of the almost universal acceptance of the supremacy of the constitution as the supreme law of the land.<sup>213</sup> This then would peg the assessment of appropriate judicial discretion at the level of the Constitution.<sup>214</sup> Consequently, the right

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<sup>207</sup> Green (n 3); For similar views, see also J Sackville, ‘Activism’ in M Coper *et al* eds., *Oxford Companion to the High Court* (OUP, 2001) 6-7.

<sup>208</sup> Green (n 3) 1261

<sup>209</sup> Campbell (n 66) 115.

<sup>210</sup> Sen Ch. 1 (n 93) 122.

<sup>211</sup> Green (n 3).

<sup>212</sup> Baxi (n 71) xv.

<sup>213</sup> Oliver and Fusaro (n 126) discussing that even in situations of ‘unwritten constitutions’ such as the UK, there are restrictions on the interpretation the Courts can give to give effect to it- which points to ‘some limitations on discretion albeit varied’ in all jurisdictions.

<sup>214</sup> Where all judicial processes undertaken by the Court’s must serve to enforce the Constitution and not be the ones to infringe its provisions.

question may look something like this: what is the appropriate limitation (if any) to judicial discretion when interpreting constitutional provisions?<sup>215</sup>

## 2.5 Proposing a ‘universal’ definition of judicial activism

On the basis of the preceding discussion this chapter would like to propose the following definition of judicial activism; it is argued that this could have universal application for reasons that will be outlined shortly:

Judicial activism is a strategy adopted by a judge(s) to arrive at a decision which goes against a shared understanding of the members of a society<sup>216</sup> on the limits of judicial discretion.

### 2.5.1 Why ‘judicial activism’

In the main, this thesis proposes that it remains advisable to maintain the term ‘judicial activism’ even though there is much literature on the subject that is contradictory and incompatible because the only way to communicate new ideas at times, is to use old forms of expression.<sup>217</sup>

### 2.5.2 Why ‘a strategy adopted by a judge(s) to arrive at a decision’

First and foremost, discourse on JA is on the role and function of the courts, regardless of whether the court system in a jurisdiction is divided into divisions or not.<sup>218</sup> The ‘court’ despite also referring to the institution, when it pertains to judicial decision-making, specifically refers to the ‘human agents’ responsible for making the relevant decision.<sup>219</sup> In this case, the word ‘judge(s)’ is sufficient to cover situations where different jurisdictions have different compositions of judges deciding on cases, and or whether they follow a system of unanimous decision-making or not at the Supreme Court level.<sup>220</sup> Secondly, a primary function of the courts in any system is adjudication (decision-making). Consequently, even where a ‘judge(s)’ declines to hear a matter, that declining still takes the form of a judicial decision.<sup>221</sup>

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<sup>215</sup> See also Chemerinsky (n 151) 1261.

<sup>216</sup> Since in chapter 1 we have shown that transformative constitutionalism requires that judges prioritise the values and ideals that the people of a particular society prioritise, the shared understanding here refers to those people- but does not necessarily restrict itself to the majority.

<sup>217</sup> Sen (n 209) 122.

<sup>218</sup> For instance Dickson (n 33) concentrates on JA in Supreme Courts, but some individual articles include High Courts.

<sup>219</sup> Sen (n 209) 354- detailing research proving that the ‘working of democratic institutions, ... depends on the activities of human agents..’

<sup>220</sup> E.g Malawi Supreme Court always renders unanimous decisions without a dissenting judgment, whereas the practice of dissenting judgments is prevalent in the USA and UK.

<sup>221</sup> Such as in the determination of locus standi or justiciability.

The word 'strategy' is preferred due to the nature of the office of the judge. The person holding the office of the judge, always has their 'own sense of the proper judicial role' or 'institutional propriety' though differences may arise in that those perceptions may be 'formalistic or pragmatic' etc.<sup>222</sup> In that sense, every judge understands the need for continuity and stability in the 'totality of the law.'<sup>223</sup> Consequently, no matter how extreme or 'creative or imaginative' the judge's views might be when making a decision, he/she will craftily fashion his/her legal reasoning in a manner that 'integrate[s it] into a [pre-existing] legal context' in order to maintain the appearance of 'continuity with the existing body of law' to ensure its being 'received as credible.'<sup>224</sup> Every judge therefore, barring 'incompetency and dishonesty',<sup>225</sup> has a personal sense of the goals and objectives of the judicial decision-making process and how those may best be achieved.<sup>226</sup> It is in that context that judges identify the 'framework which [should] guide...' the determination of the issue before them. The frameworks in this case refer to the law that guides the judge in the determination of the material facts, applicable authority, interpretive methodology, whether an issue is a legal/policy/policy one etc. For that reason, it is argued that the word 'strategy' is ideal as one of its definitions is 'the framework which guides those choices that determine the nature and direction of something.' In this case the 'something' becomes the judicial decision-making process.

### 2.5.3 Why 'a shared understanding'

A shared understanding on any issue is essential for effective communication among human beings.<sup>227</sup> If human communication 'lack[ed] secure foundations to put at least some matters beyond the possibility of disagreement' then the very concept of 'law' or 'legal authority' would lose its validity;<sup>228</sup> for 'law' or 'legal authority' requires a foundation 'to give it identity and unity, [and] to fix its scope and limits and indicate the source of its authority.'<sup>229</sup> In the context of the judicial decision-making process what is beyond disagreement is that its primary responsibility is to do justice, even though differences emerge over what 'justice' constitutes in fact.<sup>230</sup> Suffice to say however, that

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<sup>222</sup> Thomas (n 14) 246

<sup>223</sup> Ibid 247.

<sup>224</sup> Ibid; see also discussion on 2.4.3.1.1

<sup>225</sup> Kirby (n 4).

<sup>226</sup> Thomas (n 14) 241- 247.

<sup>227</sup> Sen (n 209) 121.

<sup>228</sup> Cotterell (n 131) 238- challenging the foundations of 'postmodernism' its 'deconstruction' of legal theory.

<sup>229</sup> Ibid 244.

<sup>230</sup> Vast literature exists on this. For example See J Rawls, *A Theory of Justice* (HUP, 1971) defining justice in terms of 'fairness' manifested through the establishment of just institutions; see also Sen (n 209) xi defining it in terms of an empirical assessment of the actual life that 'people are able to lead.

‘... it is not merely of some importance but is of *fundamental importance*, that justice should not only be done, but should manifestly and *undoubtedly* be seen to be done.’<sup>231</sup>

This chapter will not go into an analysis of what that means in actual practice but argues that the manifest-justice principle impliedly points to the existence of observers of the judicial justice delivery process external to the judges for whom it is of ‘fundamental importance’ that they must see that justice is done. As already stated, the concept of justice has many definitions and redefinitions, but in the context of the principle that justice must be seen to be done, the criteria for substantive justice as advanced by Walzer attains significance.<sup>232</sup> Walzer states that the criteria for the determination of the existence of substantive justice in a society is the extent to which the exercise of allocated power is done in a manner that is ‘... faithful to the shared understanding of [the] members [of that society].’<sup>233</sup> In that context, ‘to override those understandings is to act unjustly.’<sup>234</sup>

It is for that reason that the definition of JA in this chapter refers to ‘a shared understanding’. Further, ‘shared understanding’ is preferred in recognition of the fact that the concept and effect of JA is ‘inescapably localized’<sup>235</sup> hence the participants in the ‘shared understanding’ will always be context-specific.

#### 2.5.4 Why ‘the limits of judicial discretion’

It has been argued that all debates on ‘judicial activism’ (regardless of the inconsistencies and contradictions of the attendant definitions) do evolve on the issue of the nature and scope of judicial discretion (or what should be). Further, it has already been identified by other scholars that ‘common to all definitions of judicial activism is the concept of judicial overreaching.’<sup>236</sup> The differences emerge in whether the overreaching is justified or not.<sup>237</sup> In order to discuss overreaching, first the right ‘reach’ must be articulated. This in essence involves a discussion of the ‘limits’ or ‘boundaries’ of authority. It would seem logical therefore that the issue in defining JA should be focusing on the ‘limits of judicial discretion.’

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<sup>231</sup> Originally stated by Lord Hewart in *Rex v. Sussex Justice, Ex parte McCarthy* [1924] 1 KB 256, 259 but has since become a fundamental principle in the administration of justice in Courts and tribunals (emphasis added).

<sup>232</sup> Walzer Ch. 1 (n 1) defining justice in terms of ‘faithfulness to shared understanding’.

<sup>233</sup> Ibid 312.

<sup>234</sup> Ibid.

<sup>235</sup> Baxi (n 71) xv- pointing to the differences in constitutional arrangements, ‘social constructions of the judicial role and function,’ and the ‘flows of political power’ which shape the various manifestations of JA

<sup>236</sup> Buck (n 42) 785 – 788.

<sup>237</sup> Refer to discussions on JA as counter-majoritarian.

For instance, when defining JA in terms of a court's handling of a legal/policy question, there is need to address the question whether the distinction between law and policy is always so clear-cut. Experiences in adjudication points to an answer in the negative.<sup>238</sup> Even the determination between which issues pertain to law and which ones to policy, which may be the domain best handled by other branches of government involves a choice that brings in questions on the appropriate exercise of judicial discretion.<sup>239</sup> Similarly, when defining JA in terms of a court's handling of precedent, as already discussed, there is need to draw a distinction between the level of discretion that is inherent in the rules governing the doctrine of precedent and the one that is considered 'activist'. Yet again therefore, the issue pertains to the limits of discretion. Similar arguments could be raised on issues of appropriate Constitutional interpretive methodologies (whether Court's should fill in 'gaps' not envisaged by the framers or whether Court's should use their interpretive role to bring about 'social change', or whether Court's should use their own moral, religious or ideological beliefs to determine the content and nature of rights enshrined in the Constitution).

Therefore, describing JA in terms of 'limit of judicial discretion' is broad enough to cater for differences in constitutional arrangements,<sup>240</sup> applicable authority,<sup>241</sup> conventions,<sup>242</sup> as well as cultural attitudes.<sup>243</sup>

## 2.6 JA in the context of democracy, rule of law and constitutionalism

The appropriate or inappropriate limits on judicial discretion can only be assessed in the context of democracy because it is generally accepted that it is the best form of government,<sup>244</sup> even though a discussion of democratic theories is beyond the scope of this research. One of the main reasons why democracy is the best form of government is its ability to promote the peaceful co-existence of individuals through the promotion of 'noncoercive exercise of government authority'.<sup>245</sup> Democracy achieves that through

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<sup>238</sup> See e.g. Kirby (n 4) 27 – 30; pointing out that '...constitutional courts get the most difficult of problems' in which the distinction between law and policy is not always 'incontestably clear'.

<sup>239</sup> Ibid 30.

<sup>240</sup> Whether there is a written or unwritten constitution; whether the constitution is 'national' or 'federal'; 'flexible' or 'rigid' (in terms of amendment procedures); 'pluri-textual' or 'mono-textual' etc. For a comparative analysis of constitutional arrangements see Oliver and Fusaro (n 126).

<sup>241</sup> Whether Common law or Civil law system, whether vertical or horizontal precedent, whether local precedent of international (comparative international law).

<sup>242</sup> For a discussion on how 'conventions' control legal interpretation by the courts see S Fish, 'Working on the Chain Gang: Interpretation in Law and Literature' (1982) 60 *Texas Law Review* 551 – 567.

<sup>243</sup> Ibid.

<sup>244</sup> Chemerinsky (n 151) 1259.

<sup>245</sup> Ibid citing HB Mayo, *An Introduction to Democratic Theory* (OUP, 1970) – 'Democracy makes unique provision for the peaceful adjustment of disputes, the maintenance of order, and the working out of public policies by means of its honest broker or compromise function.'



regulating the allocation of power to ensure that the 'powerful do not take unfair advantage of ... those vulnerable to the exercise of' that power.<sup>246</sup> In this case, 'power' is defined as the capacity to 'settle ... matters, not only for oneself but for others' with finality.<sup>247</sup> State power therefore, unless 'inhibited ... divided, checked and balanced' can become tyrannical.<sup>248</sup> In this context, the exercise of a judicial function or role is itself an exercise of state power.<sup>249</sup> It is in regulating the exercise of State power therefore that democracy preserves individual independence and freedom, and maximizes the chances of achieving equality and justice.<sup>250</sup>

The maintenance of the appropriate use of all forms of state power<sup>251</sup> to prevent its being used outside its limits however requires the existence of the rule of law,<sup>252</sup> though the concept has no universally agreed definition.<sup>253</sup> Similarly, '[c]onstitutionalism is a 'key mechanism in the control of state powers'<sup>254</sup> even though yet again, it is another concept that has no universally agreed definition.<sup>255</sup> In an apparent chicken-and-egg cycle however, the existence of 'the rule of law is an important test for constitutionalism'<sup>256</sup> and similarly, it is not possible to uphold the rule of law without constitutionalism as the foundational value underlying the democratization process.<sup>257</sup> It is for the foregoing reasons that this chapter will restrict the discussion on the limits of judicial discretion (and impliedly on any existence of JA) within the bounds of these two fundamental and mutually-reinforcing concepts: 'rule of law' and 'constitutionalism.'

### 2.6.1 The Rule of Law and its effect on the practice of JA

The proponents of 'going beyond the Constitution' JA appear to advocate for its universal application<sup>258</sup> as if the constitutional arrangements and attendant legal and social frameworks 'were the same for all jurisdictions as it is in the United States'<sup>259</sup> or their respective jurisdictions (if not the USA). These interlocutors appear oblivious to the fact that

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<sup>246</sup> Thomas (n 14) 394 - 395.

<sup>247</sup> Walzer (n 232) 287.

<sup>248</sup> Ibid 281.

<sup>249</sup> Baxi (n 71).

<sup>250</sup> Mayo (n 245) 228 – 230 and 237- 241.

<sup>251</sup> Executive, Legislative and Judicial powers.

<sup>252</sup> MS Ellis, 'Democratisation of Central and Eastern Europe: An Afterword' (1991 -1992) 7 *American University Journal of International Law and Policy* 743, 743- 747.

<sup>253</sup> Vast literature exists on this. See for instance Thomas (n 14) 225; and Hon M Kirby, 'The Rule of Law Beyond the Law of Rules' (2010) 33 *Australian Bar Review* 195.

<sup>254</sup> AH Chen, J Chong, Y Hasebe, and C Saunders, 'Asian Constitutionalism at Crossroads: New Challenges and Opportunities' (2010) 5 *National Taiwan University Law Review* 181, 192.

<sup>255</sup> Nkhata Ch. 1 (n 2) 58.

<sup>256</sup> Chen *et al* (n 254) 196.

<sup>257</sup> Nkhata (n 255).

<sup>258</sup> Such as Dworkin's theories in 'Taking Rights Seriously' (n 138).

<sup>259</sup> Thomas (n 14) 92.

‘going beyond the Constitution’ judicial activism<sup>260</sup> would only serve to undermine the ‘rule of law’ and hence threaten chances of strengthening democracy in some jurisdictions.<sup>261</sup> For instance, where the greatest need in a society is the need for the entrenchment of the rule of law, JA could serve to undermine the rule of law – for instance by driving the ‘voters [to] elect and re-elect officials who defy the court’ as a way of asserting their ‘political capacity’ against the courts whose ‘judicial activism’ they disapprove of.<sup>262</sup> The rule of law (‘RoL’) is of crucial importance because it is the best tool for promoting peaceful co-existence among members of society whose search for individual autonomy and expression often gives rise to ‘heated and significant ... disputes.’<sup>263</sup> That is, human experience has shown that ‘the only alternative to the rule of law are the power of money, influence and guns’, which are ‘corrupting influences’ and serve to uproot the very foundations of justice.<sup>264</sup> But what is the rule of law?

#### 2.6.1.1 What the rule of law entails

There is no universally agreed definition for RoL. However, it is acknowledged by ‘respected commentators’ that its most accurate description at the national level is the one contained in the eight elements espoused by Lord Bingham:<sup>265</sup>

- (1) The law must be accessible and, so far as possible, intelligible, clear and predictable;
- (2) Questions of legal rights and liability should ordinarily be resolved by application of the law and not by the exercise of discretion;
- (3) The law must apply equally to all, except to the extent that objective differences justify a relevant differentiation;
- (4) The law must afford adequate protection for fundamental human rights;
- (5) Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve;

<sup>260</sup> As defined in this chapter- thus in terms of going beyond the limits of shared understanding of judicial discretion whether in the adding rights to a Constitution or in the handling of precedent, or policy versus law question, or constitutional interpretive methodology etc.

<sup>261</sup> J Daley, ‘Defining Judicial Restraint’ in Campbell and Goldsworthy (n 162 ) 304.

<sup>262</sup> RV Rao, ‘The Apple Cart of Separation of Powers and Judicial Activism’ in Banerjee (n 1) 114 supporting his assertion with factual findings from India.

<sup>263</sup> Kirby (n 253) 200.

<sup>264</sup> Ibid. See also, PH Russell, ‘Toward A General Theory of Judicial Independence’ in PH Russell and DM O’Brien eds., *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World* (University of Virginia Press, 2001) 7 (giving examples of judges who rule against government ‘because they are in the pocket of organised crime’ or ‘are closely aligned with an opposition interest group’).

<sup>265</sup> Ibid (n 253) 196 citing R McCorquodale in M Andenas and D Fairgrieve eds., *Tom Bingham and the Transformation of Law: A Liber Amoricum* (OUP, 2009) 140.

(6) Ministers and public officials at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers;

(7) Judicial and other adjudicative procedures must be fair and independent; and

(8) There must be compliance by the state with its international legal obligations.<sup>266</sup>

In this context element 6 in Lord Bingham's list applies equally to judges who are themselves public officials and is 'the core of the rule of law principle' the obedience to which would take care of the rest.<sup>267</sup> For example, the exercise of judicial power 'without exceeding its limits' is what would ensure that '[q]uestions of legal rights and liability ... [are] resolved by *application of the law and not by the exercise of discretion*'; for the judge would then be mindful of the fine line between 'interpretation' and imposition of personal ideologies/values onto the law.<sup>268</sup> Similarly, it is what would ensure that a judge in the decision-making process does 'justice' without undermining the requirement for the law to be clear and predictable. The fact that decisions can get overturned by higher courts does go to show that an individual judge's conception of the 'just' resolution of the case can sometimes be erroneous.<sup>269</sup>

The foregoing is among the reasons why it is arguable that judges bear the greatest responsibility for the existence of RoL as outlined in the totality of the eight (8) elements because:

When the other agencies or wings of the State overstep their limits, the aggrieved parties can always approach the courts and seek redress against such transgression. When, however, the courts themselves are guilty of such transgression, to which forum would aggrieved parties appeal?<sup>270</sup>

To illustrate this quandary, take for instance the case of *Dred Scott v. Sandford*<sup>271</sup> which is universally acknowledged as an example of judicial activism (though the gone-horribly-wrong type).<sup>272</sup> The *Dred Scott* judicial activism, though universally condemned now, had a

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<sup>266</sup> Lord Bingham, 'Rule of Law' (2007) 66 *Cambridge Law Journal* 67, 69.

<sup>267</sup> Ibid 78 – 80.

<sup>268</sup> See for instance S Whittaker and R Zimmerman, 'Good Faith in Europe Contract Law: Surveying the Landscape' in S Whittaker and R Zimmerman eds., *Good Faith in Europe Contract Law* (CUP, 2000) 22 – pointing to the failure by scholars to define the criteria for separating 'interpretation' from 'judicial development' of the law.

<sup>269</sup> Sathe (n 66) stating that courts are not final because they are right, but rather that their being 'right' emanates from the fact that their decisions are final by virtue of the law.

<sup>270</sup> Justice J.R. Khanna cited in Reddy (n 12) 144.

<sup>271</sup> (1857) 60 US 393.

<sup>272</sup> Chemerinsky (n 151).

significant number of supporters in the USA during its time.<sup>273</sup> In brief, the US Supreme Court in 1857 invalidated a legislation abolishing slavery and held in essence that an African American (whether slave or born free) was not a citizen of the US and was the private property of their white slave owners hence the State could not deprive their owners of their 'property.' Following that decision, African Americans had to wait until the coming into force of the Fourteenth Amendment of the US Constitution in 1868 (effectively 1872) in order to obtain recognition as citizens and not to be considered 'private property.'<sup>274</sup> In effect, as a result of JA, African Americans for 11 years (1857 - 1868) were not citizens despite the USA being their land of birth and presumably the only land they had memory of. It is for this reason that it has been observed that 'of the different types of despotism, the judicial despotism is not only inexcusable, it is also the most...' unjust.<sup>275</sup> Hence the need to observe recognised limits to judicial power becomes all the more imperative.<sup>276</sup>

Consequently, the RoL calls for limits to judicial discretion in the determination and application of the 'law'. This begs the question- what limit (if any) does the RoL impose on judges' discretion to develop the 'law' or fill in gaps in the 'law'? In order to comply with the RoL the limits must inevitably be set by the law itself. Which 'law' then would this be?

Since the RoL requires that no one should be above the law, there should be a law in any jurisdiction which is independent of the judges; which law even they must be subject to hence not at liberty to interpret or apply it as they deem fit. In most jurisdictions, that 'law' is the written constitution which is the supreme law of the land and often providing that it is the 'final arbiter.' Therefore, it is the Constitution that must be taken to set the boundaries on the limits of judicial discretion in the interpretation and application of the law.

#### 2.6.1.2 The 'Constitution,' constitutional interpretive methodologies and RoL

Constitutions are classified in various ways depending on the purpose for which the categorisation is sought. At the most rudimentary there are written and unwritten constitutions; in that sense the latter is exemplified by the Westminster constitutional model, which has no single document whereas the former is exemplified by the US Constitutional model with a single document.<sup>277</sup> Constitutional values in Britain have evolved as a matter of practice and custom, with the Legislature occupying a central place in its governance

<sup>273</sup> P Finkelman, 'Scott v. Sandford: The Court's Most Dreadful Case and How it changed History' (2007) 82 *Chicago-Kent Law Review* 3, 5.

<sup>274</sup> See 'Slaughter-House Cases' (1872) 83 US 36 – which though not overturning the Dred Scott case itself nevertheless held in part that the US Fourteenth Amendment of 1868 overturned that case.

<sup>275</sup> Justice J.R. Khanna in Reddy (69) 144.

<sup>276</sup> Lord Bingham- and Sathe both denounce 'excessivism' and 'adventuresomeness' even though they do not define the terms.

<sup>277</sup> Bradley and Ewing Ch. 1 (n 53) 4.

matrix.<sup>278</sup> The Westminster model supports Parliamentary Supremacy; the American model on the other hand, is founded on the doctrine of Constitutional Supremacy.<sup>279</sup> In order to have constitutional supremacy however, there is need to maintain ‘fidelity to the stipulations of the [written] constitution.’<sup>280</sup> If Constitutions only contained language that was very clear and amenable to one precise meaning, issues of constitutional interpretation would not arise for there would be only one ordinary meaning of the text. However, Constitutions also contain terms that are vague and ambiguous, which require interpretation and this has resulted in the development of different and at times opposing theories of constitutional interpretation.

For instance, in their recent work Barber and Fleming<sup>281</sup> provide a useful typology of the various approaches to constitutional interpretation<sup>282</sup> that are reflected in the debates on the topic.<sup>283</sup> These are: (1) *Textualism*, which seeks meaning from the plain words of the document. (2) *Conceptualism* draws meaning from the prevailing social consensus on what the words mean. (3) The *Philosophic approach* focuses on the broad concepts embodied in the words and draws meaning from the nature of things that the words refer to. (4) *Originalism*, on the other hand, aims to uphold the intentions or the original meanings which the framers or ratifiers or the founding generation ascribed to the document. (5) *Structuralism* focuses on the arrangement of offices, powers and institutional relationships as a guide to interpretation. (6) *Doctrinalism* accords primacy to judicial precedent and other doctrines of the courts. (7) *Pragmatism* seeks to give judicial meaning with reference to the preferences of the dominant political forces.<sup>284</sup> 8) *Interpretivism* is where the court must restrict its interpretation of the Constitution to the norms plainly specified or implied in the language in it;<sup>285</sup> and by contrast *non-interpretivism* advocates for courts to protect values ‘not mentioned in the Constitutions text or its pre-ratification history.’<sup>286</sup> The arguments concerning appropriate constitutional interpretive methodologies are complex resulting in further divisions even within a given constitutional interpretive theory. To illustrate, advocates of non-interpretivism in the USA do so on the basis that most of the people in their generation or indeed most of their ancestors had no part in deciding the content of the USA

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<sup>278</sup> Ibid.

<sup>279</sup> Ibid.

<sup>280</sup> Nkhata (n 255) 66

<sup>281</sup> Barber and Fleming Ch. 1 (n 99) 64-65.

<sup>282</sup> Refer to discussion on definitions in chapter 1.

<sup>283</sup> Vast literature exists on this. See for example, Barber and Fleming (n 279); Goldford Ch. 1 (n 2) 103 – 107.

<sup>284</sup> Ibid. See Chemerinsky (n 151) or the opposites to; see also Goldford (ibid) 103 – 109.

<sup>285</sup> Chemerinsky (n 151) 1208.

<sup>286</sup> Ibid 1209.

Constitution.<sup>287</sup> However it is pertinent to note that whereas such arguments may have historical relevance within the USA- that the present generation did not participate in its adoption and ratification-the same would not necessarily hold in Malawi where the Constitution was adopted less than 20 years ago. This would suggest that the need to entrench the RoL precludes advocating for a one-size-fits-all approach to constitutional interpretive methodology, even though this chapter will not go into the merits or demerits of any of those methodologies since any attempt to do so would require a whole thesis on its own.

Suffice to say for our purposes that the proponents of the various theories of constitutional interpretation must take into account the differences in historical, political and social circumstances that exist between jurisdictions if their aim is to promote the wider objective of entrenching the rule of law. For instance, the USA with its 200+ years of constitutional democracy cannot be equated to, say, India with a history of only about 50 years of democracy. In the discourse on JA in the USA, the text of the Constitution is not disregarded nor is 'the conflict ... about whether the Constitution is the fundamental normative standard in the American political system'; but rather it is about how to separate the Constitution itself from its interpretation (that is 'interpretation' not 'fidelity').<sup>288</sup> On the other hand, in the case of India, it is the very text of the Constitution that stands to be undermined, and its fidelity challenged as a result of the JA of the Indian Supreme Court.<sup>289</sup>

Consequently, where the need is to entrench a written Constitution as an authoritative source of normative standards in a society, there is a compelling need to promote fidelity to the text in order to give effect to the transition into a constitutional democracy.<sup>290</sup> Further, the need for entrenching the RoL in emerging democracies therefore presents a stronger case for limiting a court's discretion in Constitutional interpretive methodologies so that a judge does not amend the constitution under the guise of interpreting it,<sup>291</sup> especially, where the written Constitution restricts the power of amendment.<sup>292</sup> In order to enforce those limits therefore, there is a corresponding need for a shared understanding among the citizenry as to the meaning of the constitutional provisions. This therefore requires looking to the meaning of the words of the Constitution alone as they would be interpreted by the

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<sup>287</sup> See MJ Perry, 'What is the Constitution? (And other Fundamental Questions)' in L Alexander ed., *Constitutionalism: Philosophical Foundations* (CUP, 2001) 101.

<sup>288</sup> Goldford (n 283) 106; see also R Dworkin, *A Matter of Principle* (HUP, 1985) 35

<sup>289</sup> Iyer (n 12).

<sup>290</sup> See for instance Corder (n 82) explaining that some scholars argue this point.

<sup>291</sup> Oliver and Fusaro (n 126) - arguing that even evolutive theories abhor amending the Constitution under the guise of interpreting

<sup>292</sup> Such as the Malawi Constitution.

contemporary man on the street.<sup>293</sup> For that reason and in those circumstances, there is a stronger case for the constitutional interpretive methods that are subject to intense debate in the USA such as (though not limited to) originalism, textualism, and interpretivism.<sup>294</sup>

However, the RoL and how it relates to the overarching objective of the primary duty of the law to be an instrument for justice has raised complex questions especially in the face of the practice of apartheid that was rooted in the legislation and constitutional amendments.<sup>295</sup> This has led to some courts holding that the 'law exists for the protection of minorities'.<sup>296</sup> But the RSA situation challenges that at its core- for in that case, it was the majority that needed protection against a powerful minority. Similarly cases in India point to the existence of powerful minorities whose source of power is economical.<sup>297</sup> This highlights the need to watch against always portraying minorities as 'powerless' – for blindness to that reality may create or perpetuate a scenario where the majority are in fact reduced into the 'vulnerable' group and the minority are so 'privileged' that they are the 'powerful' (and hence oppressive) group.<sup>298</sup>

This is the reason why any discussion on JA must avoid any essentialist approach for sources of power may vary considerably within different jurisdictions.<sup>299</sup> Thus it is contended that in the interests of the rule of law the advantages of restricting the judicial interpretation of the constitutions to norms articulated or implied in the language of a given constitution in emerging democracy far outweighs the disadvantages.

## 2.6.2 Constitutionalism and its effect on the practice of JA

The mere existence of a constitution does not point to the existence of a constitutional democracy in a country. Thus a distinction can be made between a constitutional democracy (in the liberal democratic sense) and a democracy in which the constitution may actually be used to legitimise absolute rule.<sup>300</sup> For instance, Malawi's Kamuzu Banda's dictatorship had a constitution which legitimated his single-party state and his life presidency.<sup>301</sup> There is therefore a normative quality to constitutional democracy beyond the existence of a constitution as a legal document. The normative essence emanates from the fact that

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<sup>293</sup> See RS Kay, 'American Constitutionalism' in Alexander (n 287) 29 – 32, pointing to a need for a shared understanding of the constitution for it to be adopted as a foundational document for ordering the relations between the state and the citizens, as well as the citizens themselves.

<sup>294</sup> Ibid; see also Goldford (n 283).

<sup>295</sup> See Corder (n 83).

<sup>296</sup> Cited in Kirby (n 253).

<sup>297</sup> Sathe (n 66).

<sup>298</sup> Baxi (n 71).

<sup>299</sup> See Russell (n 264).

<sup>300</sup> Nwabueze Ch. 1 (n 70) 4.

<sup>301</sup> Ihonvbere Ch. 1 (n 80) 146.

underlying constitutional democracy are some fundamental values aimed at regulating the exercise of state power and its relationship with the citizens. These include fairness, justice, equality, separation of powers, due process of law, etc.; the antithesis of which is arbitrary rule where the state exercises its power without restraint or checks and balances. It is generally acknowledged that the existence of 'constitutionalism' is the foundational stone for constitutional democracy without which there can be no 'principled balancing of the exercise of state authority';<sup>302</sup> even though there's no universally agreed definition of the term.<sup>303</sup>

Constitutionalism according to liberal democratic discourse essentially revolves around the two issues of limited government and individual rights.<sup>304</sup> In this context the focus is on safeguarding against arbitrary use of power by the executive and legislative branches as outlined below:

The idea of constitutionalism involves the proposition that the exercise of governmental power shall be bound by rules, rules prescribing the procedure according to which legislative and executive acts are to be performed and delimiting their permissible content – Constitutionalism becomes living reality to the extent that these rules curb arbitrariness of discretion and are in fact observed by wielders of political power, and to the extent that within the forbidden zones upon which authority may not trespass there is significant room for the enjoyment of individual liberty.<sup>305</sup>

Scholars have pointed out the deficiencies of the liberal democratic theory's conception of constitutionalism in that it ignores the impact of sociological factors on the constitutional development of a nation.<sup>306</sup> This thesis would also like to articulate an additional deficiency – namely that liberal democracy appears to exclude from its focus, the exercise of governmental power in the form of judicial acts. It appears liberal democratic discourse excludes judicial power from its assessment of 'political power'.<sup>307</sup> However, a broader understanding of 'political power' includes the exercise of judicial power especially in the context of judicial activism. That is, when a court makes determinations on matters of governmental policy as opposed to law, or in its interpretation goes beyond the shared understanding of the meaning of the text of 'posited rules,' it necessarily assumes political power. Further, as an arm of government itself under the doctrine of separation of powers,

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<sup>302</sup> Nkhata (n 255) 61.

<sup>303</sup> Ibid 143; see also Backer Ch. 1 (n 79) 672, 676.

<sup>304</sup> Ihonvbere (n 301).

<sup>305</sup> SA de Smith, *The New Commonwealth and Its Constitutions* (Stevens & Sons, 1964) 106.

<sup>306</sup> Nkhata (n 255) 60.

<sup>307</sup> As articulated in the de Smith definition.



the Judiciary should equally be subject to constitutional limits on the exercise of judicial power as it is itself state power that can be abused to the detriment of the rights of some individuals.<sup>308</sup>

In order to bring judicial power within the ambit of state power that must be controlled therefore, there is need to articulate clearly – which power? It is arguable that the greatest power wielded by the judiciary is the power of interpretation of the written constitution for as it is aptly postulated by Whittaker and Zimmerman:

[To date] we still have not managed to find a ... formula which defines the line to be drawn between what may be properly classified as 'interpretation' and what is usually referred to as 'judicial development' of the law.<sup>309</sup>

The written constitution in most jurisdictions provides that it is the supreme law of the land hence the final arbiter.<sup>310</sup> However, the judiciary is given the mandate to give effect to the provisions of that written constitution through interpretation.<sup>311</sup> As a consequence, there's an internal tension between constitutionalism and the judicial power of interpretation because constitutionalism's greatest 'virtue' is 'not merely in reducing [state authority, of which the judicial authority is one] but in effecting that reduction by advance imposition of rules.'<sup>312</sup> Constitutionalism requires that those prior rules be capable of being 'rationally known'<sup>313</sup> by 'the citizenry' whose understanding of the Constitution and desire to enforce the legitimate use of state authority is 'central to the entrenchment of constitutionalism.'<sup>314</sup> In this context, if as argued by others, judges are to be at liberty to add norms or values beyond those articulated or implied by the language of the constitution as 'rationally known' by the citizenry, then constitutionalism cannot be said to exist.<sup>315</sup> For in that case, there would be no regime of advanced rules regulating the judicial power of interpretation as *de facto* 'in such regime there is no identifiable constitution at all, merely a practice of [subjective] constitutional interpretation.'<sup>316</sup>

It is in this context that de Smith's description of constitutionalism becomes even more useful even though he himself did not apply it to judicial power of interpretation in that

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<sup>308</sup> Baxi (n 71).

<sup>309</sup> Whittaker and Zimmerman (n 268) 22.

<sup>310</sup> Kay (n 293).16

<sup>311</sup> Ibid.

<sup>312</sup> Ibid 23.

<sup>313</sup> Ibid.

<sup>314</sup> Nkhata (n 255) 66.

<sup>315</sup> Kay (n 293) 24 – 25.

<sup>316</sup> Ibid 25.

'constitutionalism becomes living reality to the extent that ... rules curb arbitrariness of [judicial] discretion [in the interpretation of the constitutional itself].'<sup>317</sup> Therefore, the appropriate limit to judicial discretion in the interpretation of the written constitution becomes the shared understanding of the governed of the norms articulated or implied in its language. An autochthonous constitution by definition enjoys democratic legitimacy because of the element of public participation in its creation. For that reason, it has been observed elsewhere that 'constitutionalism can never take root in Africa if there is no massive consultation with traditional culture, custom and legal precedents' by the judges.<sup>318</sup>

On that basis, this thesis submits that there is positive and negative JA even though all forms may involve the judge going beyond shared understanding of the limits of judicial discretion. Positive JA therefore occurs whenever the judge goes beyond the shared understanding of limits of judicial discretion within the fine subjective distinctions of law/policy, politics/legal, law/morality but still acts within the overall objective limits prescribed by the Constitution. Negative JA connotes that which goes beyond the shared understanding of the objective limits of judicial discretion as articulated or implied in the language of the Constitution- for it is that type of JA that undermines the RoL and constitutionalism. This becomes even more crucial in a state where the written constitution serves a transformational purpose marking the end of an era and the creation of a new one.<sup>319</sup> In that context fidelity to the shared understanding of the meaning of the constitutional text assumes a democratic imperative which should not be curtailed or otherwise compromised in the name of JA.

## 2.7 Conclusion

The power of the judicial branch of government to interpret laws, including the written constitution where that exists is itself a form of state power hence should be subject to restrictions independent of the judges themselves that are capable of being known by the governed. However, for as long human capacity to predict the future with certainty remains inadequate, judicial discretion in judicial decision-making is inevitable for purposes of the delivery of justice. Nevertheless, since the exercise of the judicial discretion may give rise to situations where judges fashion decisions that purport to expand the common understanding of certain fundamental values and rights under the guise of judicial activism, there is a compelling need to propose a principled approach within which such discretion is exercised. In the preceding discussion it has been shown that the twin mutually-reinforcing doctrines of rule of law and constitutionalism may offer democratically legitimate parameters for the

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<sup>317</sup> de Smith (n 305) 106, cited in Nkhata (n 255) 59.

<sup>318</sup> Nkhata (n 253) 62.

<sup>319</sup> Samuels Ch. 1 (n 59) 669.

exercise of such judicial discretion. To that extent, such an arrangement would provide adequate safeguards against the inappropriate manifestation of judicial activism which may otherwise be counterproductive within certain situations of constitutional transformation. Above all it has been proposed that such a principled conception of the exercise of judicial discretion provides a more comprehensible definitional content to the otherwise unwieldy phenomenon known as judicial activism. In other words it may make more sense to discuss judicial activism from the premise of judicial discretion since all judges exercise one form of choice or another whenever they adjudicate over a given dispute or issue. It is the incidence of such judicial choice within the applicable constitutional parameters that determines whether one court is practicing judicial activism or not; the fidelity of that decision to the shared understanding of what is constitutionally permissible determines whether such judicial activism is negative or positive depending upon how each decision impinges upon the corresponding notions of rule of law and constitutionalism. Such a definition of judicial activism would facilitate the creation of a more coherent narrative about a subject that has hitherto been inherently discordant and conceptually ill-defined.

## Chapter 3

### The Historical Interaction between Constitutional Reforms and Judicial Behaviour

‘Judicial decision making is not only affected by legal precedent, but also by changing political and historical trends’<sup>1</sup>

#### 3.1 Introduction

It has been acknowledged that legal culture has the potential to inhibit the transformative agenda of constitutional reforms.<sup>2</sup> In other words in order for one to fully appreciate the development of judicial power one needs to appreciate that it is affected by the historical path along which a given society has travelled. Thus it has been suggested that the decisions made and actions taken fifty or even one hundred years ago affect both the actions of and attitudes towards the judiciary.<sup>3</sup> Therefore, besides the usual influence of legal precedent on judicial choices, a keen awareness of the underlying political and historical trends will aid in forming a clearer view of the behaviour of the courts within a given context.

It is widely acknowledged that the governance, socio-economic and political problems of African countries like Malawi are ‘to a large extent rooted in [their] past’, especially colonial and several-decades-after-colonialism past.<sup>4</sup> Similarly generally accepted is the crucial importance of a ‘national Constitution’ in providing a foundational structure for good governance, rule of law and the protection of human rights. Interestingly, as will be discussed below, Malawi in terms of both its colonial<sup>5</sup> and even post-colonial past<sup>6</sup> has at every stage had a national Constitution that provided ‘the basic framework for governance’.<sup>7</sup> Regardless of the presence of such constitutional documents, Malawi’s history is riddled with unbridled colonial and nationalist despotism.

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<sup>1</sup> Ellet Ch. 1 (n 40) 56.

<sup>2</sup> Klare Ch. 1 (n 85) 146.

<sup>3</sup> B Malinowski, *Crime and Custom in Savage Society* (New Jersey, 1967).

<sup>4</sup> M Ndulo, ‘The Democratic State In Africa: The Challenges for Institution Building’ (1998-2000) 16 *National Black Law Journal* 70, 72; see also Nkhata Ch. 1 (n 2) 95, just to cite a few.

<sup>5</sup> First as a British Protectorate from 1891 to 1960, then later under the governance of the Queen of England with a Malawian Prime Minister (1960 – 1965).

<sup>6</sup> First under the One-Party rule (1966 – 1994) and later under multi-party democracy (1994 to date).

<sup>7</sup> Nkhata (n 4) 94.

This chapter therefore delves into the historical, political and legal developments in Malawi in order to provide the relevant background to the discussions in subsequent chapters. This chapter provides a definition of 'elitism' and discusses how colonial elitism divided Malawi (then Nyasaland) into two societies- urban and rural, which resulted in the rise of 'nationalist elitism.' The ensuing discussion aims to highlight how though different in form, the two types of elitism (i.e. colonial and nationalist) effectively disrupted and distorted African governance systems which were largely participatory and consultative, and replaced them with a paternalistic type of governance model that largely excluded the non-elites. In appreciation of the fact that the sense of ownership and the corresponding feeling of identification with a national constitution on the part of the citizens is 'central to the entrenchment of constitutionalism'<sup>8</sup> the aim is to show how both colonial and nationalist elitism served to hinder the development of constitutionalism and the rule of law within the Malawian society. Specifically highlighted in this context is how the High Court system, with its purported unlimited jurisdiction and the incorporation and enforcement of human rights (albeit in varied forms within the different Constitutions) only existed on paper for the ordinary (and large majority) African citizen. This further goes to show that the mere existence of a laudable Constitution is not sufficient to bring about the culture of the rule of law and constitutionalism as a democratic value.

Consequently, it is hoped that the discussion in this chapter will provide a basis for analysing the development (if any) of constitutionalism and rule of law in Malawi post-the 1994 Constitution. Further, since manifestations of 'judicial activism' have been related to 'constitutional elitism' it is hoped that a discussion of the social transformative character of the 1994 Constitution and its emphasis on participatory democracy will provide an appropriate framework for an analysis of judicial (in)activism of the judiciary in Malawi by interrogating the impact of judicial decisions on the entrenchment of the rule of law and constitutionalism in Malawi.

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<sup>8</sup> Ibid 66 citing L Hand, *The Spirit of Liberty* (University of Chicago Press, 1960) 189 – 190.

### 3.2 The Colonial Constitutional Transformation Process in Nyasaland: The rise of Colonial elitism, and judicial consolidation of Executive, legislative and judicial powers without the consent of the governed

#### 3.2.1 The labelling of non-European societies as 'savage' and 'primitive'

When Europeans arrived in non-European lands like Malawi, they found human beings living within societies unlike their own and formed their own views about those new societies largely arising from what has been described as 'excessive parochialism'.<sup>9</sup> Within such a prejudiced context, the general conclusion of the European was that such non-European societies were 'savage' and/or 'primitive' because they lived in societies without 'law' and 'order' and were only governed by their custom and traditions which they followed 'slavishly', 'unwittingly', through 'mental inertia' without ever desiring to break free.<sup>10</sup> In this case, the western<sup>11</sup> concepts of law, governance, government, etc. were taken to be the standard for 'civilised' so that in the end 'the distinction between "civilisation" ... and... "savagery" was not one of natures, but of laws, customs, or individual states of character.'<sup>12</sup> On that basis 'civilised' law and values were western law and values only and in order to be recognised as 'law' at all, the non-European systems had to 'fit' at least some basic criteria set by the Europeans in accordance with their 'habits of thought and language...'<sup>13</sup> Later, detailed studies by western anthropologists of the so-called 'savage' societies led them to conclude that indeed they had laws, governance structures and courts albeit being 'primitive' as opposed to 'civilised' and modern.<sup>14</sup> However, it was argued that such 'laws', 'governance structures' and 'courts' were only classified as such because they were made to 'fit' wherein their 'fitting' into those descriptions was really 'no more than the adoption of new terminology.'<sup>15</sup> Further, that all 'primitive' societies could not be said to have 'legal systems' since the appropriate usage of that term required that it 'be restricted to the small group of western nations 'who have developed a well-defined, organised, continuous body of legal ideas and methods, reaching the dignity and solidarity of a legal system.'<sup>16</sup>

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<sup>9</sup> EA Hoebel ed., *The Law of Primitive Man: A Study in Comparative Legal Dynamics* (HUP, 2006).

<sup>10</sup> ES Hartland, *Primitive Law* (Methuen & Co, 1924) 108 cited in Malinowski (n 3) 10.

<sup>11</sup> The term 'western' replaces "European" since once the "Europeans" had settled in other lands such as what is now the USA, Australia, and New Zealand just to mention a few, they are no longer referred to as 'Europeans'.

<sup>12</sup> HV Jaffa, 'What is Equality? The Declaration of Independence Revisited' (1987) 6 *Journal of Christian Jurisprudence* 95, 99.

<sup>13</sup> CL Black, 'Books Reviewed' (1955) 55 *Columbia Law Review* 766, 769; see also AS Diamond, 'Book Reviews' (1956) 5 *International and Comparative Law Quarterly* 617, 627 referring to European lawyers being 'startled' to have 'first-hand evidence of 'primitive societies having legal concepts 'similar to [their] own.'

<sup>14</sup> Hoebel (n 9).

<sup>15</sup> Black (n 13) 768.

<sup>16</sup> L Adam, 'Reviews' (1955) 64 *Yale Law Review* 1219, 1221 referring to the colonisation of other people's as being 'under European guidance.'

It is in that context that colonial elitism developed and flourished. The word 'elitism' has been defined in various ways but this thesis will adopt the definition by Jaworski and Thurlow which is:

Making a claim to exclusivity, superiority, and/or distinctiveness on the grounds of status, knowledge, authenticity, taste, erudition, experience, insight, wealth or any other quality warranting the speaker/author to take a higher moral, aesthetic, intellectual, material, or any other form of standing in relation to another subject (individual or group).<sup>17</sup>

Europeans thus considered that the advancement of their laws, institutions of governance and customs rendered them fit to govern over Africans even without their consent since they felt that they (Europeans) knew better and had better capacity to know what was good for the African (even better than the Africans themselves).<sup>18</sup> In that context, whereas the Europeans even in those days acknowledged that a 'just government' is one that derives power from the 'consent of the governed', this was not extended to the 'savage' because in their reasoning, 'neither ... savages, nor felons need be governed with anything denominated as their consent.'<sup>19</sup> In this sense therefore, the 'primitive' laws were to be 'civilised' through the adoption of western values systems, laws etc. For example, even though they claimed that the right to property was a fundamental value governing their 'civilised' laws, they did not recognise the communal property ownership systems of the 'savages' and went on to forcibly take the land away for distribution among themselves.<sup>20</sup> Thus colonialism thrived on the elitism of Europeans who felt entitled to rule without the consent and participation of the governed. Such colonial elitism was practiced in Malawi and also made its way into decisions of colonial Courts as will be discussed below.

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<sup>17</sup> A Jaworski and C Thurlow, 'Talking an Elitist Stance: Ideology and the Discursive Production and Social Distinction' in A Jaffee ed., *Perspectives on Stance* (OUP, 2009) 195 – 226 cited in MA Kang, 'At the Intersection of Elitism and Gender in Hong Kong: Advertisements of Luxury Residences' in J de Bres, J Holmes, and M Marra, *Igala 5 Proceedings: Wellington 2008* at [www.victoria.ac.nz/igala5/igala-proceedings-book.pdf](http://www.victoria.ac.nz/igala5/igala-proceedings-book.pdf).

<sup>18</sup> B Simpson, 'The Devlin Commission (1959): Colonialism, Emergencies, and Rule of Law' (2002) 22 *Oxford Journal of Legal Studies* 17, 18- 21 criticising Lord Devlin for describing the 'despotism' of the colonial rulers in Nyasaland as 'benevolent despotism' of 'a kindly father' which he (Devlin) claimed was a view shared by many in England at that time (around 1959).

<sup>19</sup> Jaffa (n 12) 99 in the context of US President Jefferson's reference to native Americans as 'Indian savages' whom the 'King' had 'endeavoured' to bring upon them for inclusion in their 'civilised' society..

<sup>20</sup> Worse still, these actions had the sanction of the Courts in Europe. For instance see *Cooper v. Stuart* (1889) 14 App Cs 286, 291 (Decision of Privy Council- holding that the territory that was subsequently named 'New South Wales in Australia, was 'practically unoccupied, without settled inhabitants or settled law, at the time when it was ... annexed to the British dominions). For an attempt at reversing the actions of European Settlers in Australia see *Mabo v. Queensland (No 2)* (1992) 175 CLR 1.

### 3.2.2 Colonial elitism and the colonial judiciary: the marginalisation of the governed African through judicial pronouncements

#### 3.2.2.1 Understanding the 'governed': the 'governance' and 'judicial decision-making' systems of pre-colonial Malawi<sup>21</sup>

Even though much of Malawi's history before the arrival of the Europeans remains unwritten and unknown,<sup>22</sup> it is now beyond dispute that when the Europeans arrived in Malawi they found its African inhabitants organised in tribal groups under the 'governance' of chiefs who in turn had *indunas* (advisors) to help them govern. The chief and the *indunas* were simultaneously the executive, legislature and the judiciary of their respective communities. Depending on the particular community, some chiefs were designated as paramount, meaning they had authority over other chiefs. The African chiefs administered what is now referred to as 'customary law' which was not codified.<sup>23</sup> Similarly, even though different in form from the European type of court system and judicial procedures, these tribal groups had their own court systems and procedures that applied the 'unwritten customary law' to settle disputes and punish the guilty.<sup>24</sup> The smaller disputes were initially heard by the family heads, and an appeal from that forum of first instance came to the village heads and subsequently to the chief where necessary. However, the village heads and/or chiefs did not exercise judicial power on their own but rather acted with advice from the chief's body of advisors. In a way therefore, through the application of established procedures and processes (albeit unwritten), a decision affecting the community could only be made after the community had been fully consulted; this aspect points to a form of 'democratic governance' even in the very exercise of judicial power.<sup>25</sup> As Nkhata has correctly pointed out, in this way judicial 'decision making in most pre-colonial Malawian societies was characterised by consultation and was very participatory.'<sup>26</sup>

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<sup>21</sup> Debates on whether non-European forms of governance and judicial decision-making could be recognised as such using European terminology occupied European anthropologists and lawyers to some extent in the early 20<sup>th</sup> Century. Later it was acknowledged that only 'excessive parochialism' could prevent the recognition of the existence of governance and judicial decision-making structures in non-European societies (then called 'primitive' or 'savage'). Considerable literature exists on this. But for an introduction to the topic see Hoebel (n 9).

<sup>22</sup> B Pachai, 'Introduction', in B Pachai ed., *The Early History of Malawi* (Longman, 1972) xv.

<sup>23</sup> Nkhata (n 4) 97 citing J McCracken, *Politics and Christianity in Malawi 1875 – 1940: The Impact of Livingstonia Mission in the Northern Province* (CUP, 1977) 30 – 32.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.



### 3.2.2.2 ‘Savages ... need [not] be governed with anything denominated as their consent’?<sup>27</sup>

The protectorate in Nyasaland was established without the full consent of those governed under it.<sup>28</sup> Even though in international law ‘there is no single and unified type of protectorate’,<sup>29</sup> for purposes of establishing a just government, however there is need for express authority to be given to the protecting State by the competent governing authority of the protected territory through a treaty.<sup>30</sup> In the context of Malawi (formerly called at first British Central Africa {BCA} and later Nyasaland)<sup>31</sup> despite the existence of paramount chiefs like the Chewa in the Central Region and the Ngoni in the North, there was no chief with overall authority over the whole territory. Nevertheless, although Harry Johnston (on behalf of the British government) only signed treaties with a handful of chiefs, a British Protectorate was nevertheless declared over BCA/Nyasaland including areas not covered under the existing treaties.<sup>32</sup> As Hara states, ‘the declaration of the protectorate (was) not based on some “social contract” among the various peoples in the territory.’<sup>33</sup> This means that the British Government did not have the ‘consent of the governed’ to declare a protectorate on some of the areas that they did in Nyasaland since they had lacked express authority from the governing authorities, namely chiefs. In fact, the rest of the land was acquired through land grabs backed by either warfare or other forms of coercion.<sup>34</sup>

The lack of consent however, did not end there as it extended to other crucial areas.<sup>35</sup> However, for present purposes the discourse will be restricted to ownership of land as it encapsulates and illustrates the problem adequately. Despite the existence of two distinct traditional governance systems in Malawi- the matrilineal and patrilineal systems-land ownership in both systems under customary law was (and still is) initially principally vested in the chief on trust for the entire community.<sup>36</sup> In turn the land vests in the family head on trust for the whole family.<sup>37</sup> In view of that, it could be argued that even those chiefs who signed

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<sup>27</sup> Jaffa (n 12) 99 in the context of US President Jefferson’s reference to native Americans as ‘Indian savages’ whom the ‘King’ had ‘endeavoured’ to bring upon them for inclusion in their ‘civilised’ society..

<sup>28</sup> See for instance, McCracken (n 23) on how ‘Europeans obtained land in Malawi through conquest in some areas and not by treaties with Chiefs as was the case in other areas.

<sup>29</sup> H Lauterpacht, *International Law Reports* (Cambridge, 1994) 25.

<sup>30</sup> Ibid.

<sup>31</sup> Pachai (n 22) cited in S Cross, and M Kutengule, ‘Decentralisation and Rural Livelihoods in Malawi,’ Ladder Working Paper No. 4 of 2001, 10 available at <http://www.odi.org.uk/projects/03-food-security-forum/docs/ladderwp4.pdf>, 14.

<sup>32</sup> ME Page, and PM Sonnenburg, *Colonialism: An International, Social, Cultural, and Political Encyclopaedia* (ABC-CLIO, 2003) 10.

<sup>33</sup> Hara Ch. 1 (n 117) 5, 6.

<sup>34</sup> McCracken (n 23) 148 – 150.

<sup>35</sup> Cross and Kutengule (n 31) 10.

<sup>36</sup> G Matchaya, ‘Land Ownership Security in Malawi’ (2009) 4 *African Journal of Agricultural Research* 001.

<sup>37</sup> Ibid.

treaties with Harry Johnston did not intend to sign away their judicial jurisdiction over land matters among others.<sup>38</sup> That however, did not stop the colonial British Government from appropriating for itself powers not contemplated or supported by the consent of the Africans.

To put this within its legal and historical context, formal British jurisdiction in Nyasaland was first exercised under the Africa Orders in Council 1889-1898. However, the most important and enduring instrument around which the colonial constitutional framework revolved was the British Central Africa (BCA) Order in Council of 1902 (hereinafter the '1902 OIC').<sup>39</sup> This statutory instrument is widely acknowledged as the first Constitution in Nyasaland<sup>40</sup> and although amended on several occasions, lasted in its application till 1961.<sup>41</sup> The document conferred on the Commissioner both executive and legislative jurisdiction in the Protectorate.<sup>42</sup> The 1902 OIC authorised the Commissioner to make Ordinances, inter alia, 'for the peace, order and good government of all persons in BCA.'<sup>43</sup> However, it placed a limitation on the legislative powers of the Commissioner by stipulating that in promulgating the ordinances '*the Commissioner shall respect existing laws and customs except so far as the same may be opposed to justice or morality* (original emphasis).'<sup>44</sup> Further, by its very nature as a protectorate, the true legal status of the territory of Nyasaland was that of a foreign territory and its inhabitants being foreigners for purposes of determining the scope of British jurisdiction in the territory. Strictly speaking therefore in law the British could not claim unlimited jurisdiction.<sup>45</sup> However, the 1902 OIC set up a High Court of unlimited jurisdiction over all persons and all matters, even though as discussed earlier, some chiefs had not signed away their judicial mandate or jurisdiction.<sup>46</sup> Clearly therefore, the constitutional order established by the 1902 OIC did not derive from the consent of the governed, especially the exercise of judicial power; rather it 'was predicated on the objectives of the colonial regime.'<sup>47</sup>

In the course of time, Harry Johnston successfully attracted 'a ... greater European presence'<sup>48</sup> which gave rise to 'the struggle for the control of'<sup>49</sup> land and natural resources

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<sup>38</sup> B Wanda, 'Colonialism, Nationalism and Tradition: The Evolution and Development of the legal system of Malawi,' PhD. Thesis, London, 1979, Vol VI, 235.

<sup>39</sup> Ibid.

<sup>40</sup> Nkhata (n 4).

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

<sup>44</sup> See Article 12(3) of the British Central Africa Order-in-Council as cited by Hara (n 33).

<sup>45</sup> HF Morris, and JS Read, *Indirect Rule and the Search for Justice* (OUP, 1972) 59.

<sup>46</sup> Wanda (n 38) 235.

<sup>47</sup> Hara (n 33) 5, 6.

<sup>48</sup> Page and Sonnenburg (n 32).

for economic gain.<sup>50</sup> The developments created a critical need among the European settlers for the introduction of private land, private goods and private property,<sup>51</sup> concepts which are alien to Malawian customary law even up to the present.<sup>52</sup> Further, they pressed for the Crown to extend its jurisdiction beyond mere protection, to jurisdiction over all spheres of the Protectorate's affairs.<sup>53</sup> The greatest hurdle to this imperial ambition was the jurisdiction of chiefs over their respective communities and land.<sup>54</sup>

The colonial authority therefore sought for ways in which it could alter the jurisdiction of the Chiefs and break their power over their subjects and land in order to enhance its own prestige and to consolidate its rule over Africans. This was however, done incrementally.<sup>55</sup> For instance, the Commissioner (later called Governor) was given authority to appoint and dismiss chiefs<sup>56</sup> despite the fact that under customary law, chiefs inherited the throne through established systems of matrilineal or patrilineal heirs.<sup>57</sup> That is to say, under the matrilineal system, the heir to the chieftaincy was the eldest child of the reigning chief's sister and in a patrilineal society it was the son of the reigning chief. Further, within the districts, District Collectors substantially took over the administrative and executive functions of the African chiefs.<sup>58</sup>

### **3.2.2.3 The role of the colonial judiciary in the marginalisation of the African: achieved by means of 'judicial activism'?**

The chiefs' jurisdiction over land however remained largely intact until the Consular Courts (precursor to High Court) had the opportunity to adjudicate on disputes relating to land in cases such as *Cox-v-African Lakes Corporation* (1901); *Paolucci-v- The Commissioner of Mines* (1904); and *Crown Prosecutor-v- The British Central Africa Company Ltd* (1904), all decided by Justice Nunan.

The learned judge declared in these cases that 'all land in this country is held either mediately or immediately from the Crown' and that the Commissioner as representative of

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<sup>49</sup> M Chanock, *Law, Custom and Social Order: The Colonial Experience In Malawi and Zambia* (Heinemann, 1998).

<sup>50</sup> Kanyongolo (n 12 in chapter 1 of this thesis) 354.

<sup>51</sup> Wanda (n 38).

<sup>52</sup> Ibid.

<sup>53</sup> Wanda (n 38).

<sup>54</sup> Ibid.

<sup>55</sup> See for instance, McCracken (n 32) 147 – 151; discussing how the colonial government changed the type of force used depending on locality of Christian missions- where there were no missions, they used guns to conquer and overpower e.g. Chewa Chief Mwasi of Kasungu; but for the Ngoni they used the strategy of refusing to recognise their sovereignty over their subjects and forced the people to take their disputes to 'the boma' instead.

<sup>56</sup> Practice codified under Administration (Native) Ordinance of 1912.

<sup>57</sup> Matchaya (n 36).

<sup>58</sup> Wanda (n 38).

the King of Britain had the sole ultimate jurisdiction in all native affairs.<sup>59</sup> Viewed within the context of land ownership and authority, it must be clear to see that the judgments of Nunan rendered nugatory the provision in the 1902 OIC which enjoined the Commissioner to 'respect existing native laws and customs....'<sup>60</sup> Although as regards lands held in private hands Judge Nunan's ruling on surrender of title by the natives to the colonial authority was rejected by the East African Court of Appeal,<sup>61</sup> it has been proposed elsewhere that the decision of the court in Bechuanaland (another British Protectorate)<sup>62</sup> on a provision identical to Article 12 (3) of the 1902 OIC significantly influenced the evolution of the conduct of the colonial government towards a heavy-handed treatment of natives in Nyasaland.<sup>63</sup> The case in point is that of *Tshekedi Khama and Bathoen v. The High Commissioner*,<sup>64</sup> where one of the main issues was what the meaning of a provision such as Article 12 (3) of the 1902 OIC was. In its decision the court held that the use of the word 'respect' did not mean that the High Commissioner was prohibited entirely from altering such law and custom, but only that he was required to treat it with some consideration.<sup>65</sup> Incidentally another question raised by that case was whether the Crown's jurisdiction was limited by a treaty; in answer to questions submitted by the Court, the Secretary of State stated that the Crown had unfettered and unlimited power to legislate. Oddly enough, the Court through its decision validated such powers<sup>66</sup> and in so doing consolidated the illegitimate colonial appropriation of state authority contrary to the constitutional provision limiting such powers to the extent of their compatibility with existent native laws and customs. As Morris puts it:

"... the judge, it would seem, found that the only ... course to follow was ... to evade the issue and to abandon any attempt to delimit the bounds of the executive's authority in these spheres ...virtually the [entire] ... judicial ... opinion ... was prepared to justify an expansionist policy in the field of jurisdiction ..."<sup>67</sup>

Some would describe the decisions of Judge Nunan and the court in the Khama Case as excessive judicial deference to the executive and as such would never fit the description of

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<sup>59</sup> *Paulocci v. Commissioner of Mines, and Crown Prosecutor-v-Augusto Paulocci* (1904) British Central Africa Gazette, 29<sup>th</sup> February 1904, 196 at 197

<sup>60</sup> Article 12(3).

<sup>61</sup> Wanda (n 38).

<sup>62</sup> See for reference on the tribal land disputes between the Bechuanaland chiefs and the European settlers, Calderdale Council, 'People: Bechuanaland Chiefs' at <http://calderdale.gov.uk/leisure/localhistory/glimpse-past/people/bechuanaland.html>

<sup>63</sup> Wanda (n 38).

<sup>64</sup> Extensively discussed in Benson, M. *Tshekedi Khama* (Faber & Faber, 1960) from 124.

<sup>65</sup> Ibid.

<sup>66</sup> Morris and Read (n 45) 5.9.

<sup>67</sup> Ibid.

judicial activism. However, other scholars like Campbell and Green disagree with the categorisation of excessive deference as 'judicial restraint' arguing rather that excessive judicial deference to either the executive or legislature is in actual fact judicial activism as it involves the court through judicial decree giving to the executive or legislature powers not envisaged by the express terms of a constitution.<sup>68</sup> In this context, since there is ample evidence to show that where it was necessary 'to annex African protectorates'<sup>69</sup> judiciaries in both protectorates and 'at the highest level in Britain'<sup>70</sup> interpreted the law (whatever its terms) in a manner that rendered the law 'sufficiently flexible to ensure full governmental powers in a protectorate,'<sup>71</sup> then Campbell and Green's characterisation of such judicial restraint as a form of judicial activism carries significant weight. Thus it is argued that the colonial courts through JA in the form of excessive deference to the Executive helped to consolidate the Executive and legislative powers of the colonial rulers.

Even going by the definition of JA as proposed in this thesis, the judges in the cases cited went against the 'shared understanding of the limits of judicial authority held by the governed', since the governed in this case were the Africans and these had not ceded the chiefs jurisdiction over land and judicial matters to the colonial rulers. That is, the Nunan judgements undermined and foiled any claim by Africans that they had any jurisdiction left in them to exercise over their lands or in any other spheres. In other words the jurisprudence served to consolidate British colonial rule over all matters including land at the expense of the Africans and their rulers.<sup>72</sup> The significance of this process is that it is the courts through their jurisprudence which seem to have substantially altered the applicable constitutional framework contrary to the initial protectorate agreements. Thus, original arrangements for the colonial rulers to respect native law and custom and to observe treaty terms were reduced to being binding in honour only. In fact, in Nyasaland, the colonial rulers went as far as stating that treaty obligations were not enforceable against the Crown if abrogated as a matter of an 'Act of State.'<sup>73</sup>

Even when the management of Nyasaland Protectorate 'passed from Foreign Office to Colonial Office Management'<sup>74</sup> in 1907, the plight of African chiefs did not improve.<sup>75</sup> Despite the fact that the Governor<sup>76</sup> (replacing the title of 'Commissioner') was to utilise traditional

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<sup>68</sup> Campbell Ch. 1 (n 90) 115; also Green Ch. 1 (n 89).

<sup>69</sup> Y Ghai, and JPW McAuslan, *Public Law and Political Change in Kenya* (OUP, 1970).

<sup>70</sup> Morris and Read (n 45) 5.9

<sup>71</sup> Ibid.

<sup>72</sup> Wanda (n 38) – Wanda's discussion is not in the context of JA.

<sup>73</sup> Wanda (n 38) 234.

<sup>74</sup> Page and Sonnenburg (n 32).

<sup>75</sup> ZD Kadzamira, 'Constitutional Changes in Malawi 1991-1965 a Brief Survey' cited in Hara (n 33) 6.

<sup>76</sup> New Administrative authority created under the 1907 Nyasaland Order-in-Council

leadership,<sup>77</sup> he still wielded unlimited authority over chiefs because he was the appointing (and firing) authority<sup>78</sup> contrary to traditional practice under customary law.

Subsequent developments in Southern Rhodesia further had an impact on the colonial administration of Nyasaland through the application of the doctrine of precedent.<sup>79</sup> That is, the highest court of appeal in Nyasaland at that time was the Judicial Committee of the Privy Council in England.<sup>80</sup> Several decisions of the Privy Council which applied under the settled doctrine of stare decisis and precedent elaborate the capacity of the courts to consolidate colonial jurisdiction beyond what was initially contemplated by the natives. Such developments are an interesting phenomenon in the context of constitution-making processes and the values which underlie the applicability and legitimacy of the governing authority as seen through judicial lenses.

In one case the court held that the Foreign Jurisdiction Act, 1890, which also applied to Nyasaland, gave the Crown absolute power to impose any law in a Protectorate as if the territory had been acquired by cession or conquest.<sup>81</sup> In *Re Southern Rhodesia*<sup>82</sup> it was decided that when the Crown as the protecting power became the conquering power in 1893 after the defeat of the local chief and by the authority of Orders in Council established its authority, sanctioning a system of white settlement and native reserves, it thereby acquired and exercised the right to dispose of all the lands not then in private ownership; thus by such acts the Crown appropriated to itself ownership of the land to all intents and purposes as completely as any sovereign could be owner of lands which were *publici juris*. In this way the Judicial Committee in effect sanctioned the breach of the initial agreements which conferred legitimate control to protect the natives in the first place. In the philosophy of the Privy Council, in *Re Southern Rhodesia* ‘[some peoples] are so low in the scale of social organisation [that it] would be idle to impute to such people some shadow of rights known to our [English] law.’<sup>83</sup>

In a subsequent decision the Privy Council held that the 1890 Foreign Jurisdiction Act made the jurisdiction acquired by the Crown in a protected country indistinguishable in legal effect from what might be acquired by conquest.<sup>84</sup> More significantly the court observed that it was implicit from its decisions in both *Crewe* and *Re Southern Rhodesia* that what was done by

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<sup>77</sup> Ibid

<sup>78</sup> Practice codified under Administration (Native) Ordinance of 1912.

<sup>79</sup> Wanda (n 32).

<sup>80</sup> N Mhura, *Legal Systems and Methods in Malawi* (UNIMA, 1990).

<sup>81</sup> *R v. The Earl of Crewe, ex parte Sekgome* [1910] 2 KB 576.

<sup>82</sup> [1919] AC 211.

<sup>83</sup> Ibid 233 - 234.

<sup>84</sup> *Sobhuza II v. Miller* [1926] AC 518.

the Crown could not be impugned since any Order in Council or proclamation made under that legislation was an act of State. Thus the Crown was not bound by any convention not to interfere with the rights, laws and customs of natives since such a convention could not legally interfere with the subsequent exercise of the sovereign powers of the Crown, nor could such a convention invalidate the subsequent Orders in Council.<sup>85</sup> Finally, in *The North Charterland Exploration Company* (1910) Ltd-v-R<sup>86</sup> it was held that the legislative authority of the Crown over a protectorate was the prerogative of the Crown; this prerogative was deemed unfettered except by the Imperial Parliament.

The impact of the judicial pronouncements was probably stronger in Nyasaland than in other places<sup>87</sup> due to the absence of treaties with native chiefs<sup>88</sup> which may have sought to restrict the exercise of the Crown's jurisdiction.<sup>89</sup> The legal position became abundantly clear since in the opinions of the Law Officers of 1895 and 1899 and the decisions of the Privy Council, the Government could deal with the land in any way it liked for the exercise of the Protectorate.<sup>90</sup>

However, as far as the land issue was concerned, the interests of the natives were always in conflict with those of settlers.<sup>91</sup> In this respect the British Government was faced with the delicate problem of reconciling its moral obligations towards the native populations and satisfying the expectations of the white settlers, most of whom wanted to emulate their kin in Canada, Australia, New Zealand, or even South Africa where native or aboriginal rights had been sacrificed in favour of the white settlers.<sup>92</sup> That is, in spite of the judicial decisions, the opinions of the Law Officers of the Crown, and the language of the Orders in Council themselves, there were compelling moral (if not actually legal) limitations on the jurisdiction of the British in Nyasaland, which they appear to have become conscious of.<sup>93</sup> The moral aspect was in relation to the question of the colonial government's claim to alienate 'Crown land' to private owners. The problem here was whether the so-called 'Crown lands' were at the disposal of the Government or whether they were merely held by the Government in trust and for the benefit of the native inhabitants.<sup>94</sup>

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<sup>85</sup> Ibid.

<sup>86</sup> [1931] 1 Ch. 169.

<sup>87</sup> Ibid.

<sup>88</sup> Page and Sonnenburg (n 32).

<sup>89</sup> Wanda (n 38).

<sup>90</sup> Ibid 243

<sup>91</sup> Ibid.

<sup>92</sup> Ibid.

<sup>93</sup> Ibid.

<sup>94</sup> Wanda (n 32).

It appears that in the final resolution of the land question, the moral obligation prevailed over the purely legal powers that the Crown might otherwise have exercised, and this moral obligation was translated into law in the form of the Nyasaland Protectorate (Native Trust land) Order in Council, 1936. This statutory instrument put it beyond doubt that what had been described as 'Crown land' over which the Government claimed to exercise unlimited jurisdiction, was in reality African trust land.<sup>95</sup> In light of that position I would have to concur with Wanda's view that the enactment of the African Trust Land Order in Council, 1936 suggests that although the Crown had acquired the widest possible jurisdiction in the Protectorate which effectively placed its acts beyond question in any British Court, nevertheless the exercise of such broad jurisdiction was usually tempered by certain moral constraints. Indeed, in a rather curious state of affairs, in the 1920s and 1930s the moral constraint was probably the strongest force operating more on the policy makers than on the judges.<sup>96</sup>

In fact, the position of judges did not change over time; it would seem that the courts of this period often championed the Crown's exercise of the widest possible jurisdiction. In a decision that had an impact on other African British Protectorates such as Nyasaland, Judge Griffin (who had been a Judge of the High Court in Nyasaland between 1906 and 1914) in 1930 when he was Chief Justice of Uganda, held that 'the terms of a treaty [between Europeans and African rulers] are not part of the municipal law' and that the treaty was not the creature of the legislature and was not made by legislative authority so as to bind the subject or afford the subjects rights in a court of law.<sup>97</sup> In a way, this decision can be likened to the US *Dred Scott* Case where the court stripped Scott of status under the Constitution since by refusing to acknowledge the legal validity of the treaties between the African rulers and European settlers, the judge in effect stripped Africans of status before the European laws that were enforceable in the High court. In essence, the judiciary adopted the position that matters relating to the treatment of natives by colonial authorities 'were not to be the subject of judicial scrutiny and were dealt with administratively. Moreover, individuals that had been subject to mistreatment had no rights and were not (to be) protected by the courts.'<sup>98</sup>

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<sup>95</sup> The Order vested this land in the Secretary of State in trust for the direct or indirect benefit of Africans, and declared that this category of land was unavailable for alienation. This Order preserved over ninety per cent of the land for African use and by it the power of total alienation exercised by the Governor was severely restricted.

<sup>96</sup> Wanda (n 32).

<sup>97</sup> *R v. The Baganda Cotton Company* (1930) 4 U.L.R. 34.

<sup>98</sup> Oloka-Onyonga Ch. 1 (n 78) 49-50; see also Ellet (n 1) 62; Kanyongolo (n 50).



Sadly, the culture endured and manifested itself even in the decision of a judge widely acclaimed as a champion of English judicial activism, Lord Denning.<sup>99</sup> In 1956, in the case of *Nyali Ltd-v-Attorney General*,<sup>100</sup> Lord Denning L.J. though affirming that the Crown's jurisdiction in a protectorate 'is limited to such jurisdiction as the Crown has acquired by treaty' among other 'lawful means' nevertheless went on to hold that:

Although the jurisdiction of the Crown in the protectorate is in law a limited jurisdiction, nevertheless the limits may in fact be extended indefinitely... [and when that happens,] The Courts themselves will not mark out the limits (for the Executive). They will not examine the treaty or grant under which the Crown acquired jurisdiction. The Courts rely on the representatives of the Crown to know the limits of its jurisdiction and to keep within it. Once jurisdiction is exercised by the Crown, the Courts will not permit it to be challenged.<sup>101</sup>

Even though the Nyali decision involved a Kenyan case, the principles pronounced in it as applying to the legal status of treaties vis-à-vis protectorates became of general application to all British Protectorates hence had an impact on Nyasaland as well. The treaties were thus, even by Lord Denning, stripped of any legal significance before British Courts. It is clear therefore that in Protectorates like Nyasaland, the Crown's jurisdiction was made unlimited through judicial pronouncements rather than by the treaties or agreements from which the original jurisdiction was derived.<sup>102</sup> The practical effect of such judicial decisions was that the colonial authorities could 'break agreements with African rulers'<sup>103</sup> and still 'avoid the embarrassment of having to justify (such) action in the court...'<sup>104</sup>

It is not surprising therefore that along the same period, in Nyasaland, the Federation of Rhodesia (now Zambia and Zimbabwe) and Nyasaland 'was imposed on the people of Nyasaland and Rhodesia despite (the) opposition from both politicians and traditional rulers' through the 1953 Federation (Constitution) Order-in-Council.<sup>105</sup> Such blatant disregard of the express wishes of the natives carried on even after Nyasaland ceased to be a British Protectorate in 1961 when 'the Lancaster House Constitutional Conference granted Nyasaland a responsible government.'<sup>106</sup> In fact, according to the available contemporary

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<sup>99</sup> See Thomas Ch. 2 (n 14) 93 – 94.

<sup>100</sup> [1956] Q.B. 1.

<sup>101</sup> Ibid 14.

<sup>102</sup> Wanda (n 38) 240.

<sup>103</sup> Ibid.

<sup>104</sup> Ghai and McAuslan (n 69).

<sup>105</sup> Hara (n 33) 6.

<sup>106</sup> Ibid, 8.

evidence, the people of Nyasaland were being described by the colonial rulers as 'backward and underdeveloped' and even 'primitive'.<sup>107</sup> The imperialist conduct of the colonial government in Nyasaland was justified by a reputable judge in England, Lord Devlin as 'benevolent despotism'.<sup>108</sup> The view of Lord Devlin, which he asserted as being 'sincerely held' in England, was that the standards of rule of law and good government as 'would be universally accepted as applicable' when governing people in Britain 'cannot be applied in the government of Africans' because 'the African ... is not troubled if [brutal actions of colonial rulers, such as the burning of his house] are not sanctioned by strict legal authority'.<sup>109</sup> Consequently, the express consent of Africans to be governed by the Europeans was not considered necessary since they considered themselves as 'a kindly father' [though despotic] who knew what was best for the Africans as opposed to the Africans themselves.<sup>110</sup> Thus the exclusion and non-consultation of the Africans (including their *bonafide* chiefs) in Nyasaland was premised on their poverty, illiteracy and application of unwritten customary laws.<sup>111</sup>

### 3.3 From Dependence to Independence: The subjugation of the post-colonial judiciary

#### 3.3.1 The Constitutional Interim Period (1960 – 1965): the replacement of colonial elitism with 'nationalist elitism'<sup>112</sup>

Natives of Nyasaland never relented in their rejection of the federation of Rhodesia and Nyasaland and the opposition reached its climax in 1959.<sup>113</sup> As a result, the colonial rulers conceded leading to the Lancaster House Constitutional negotiations in 1960.<sup>114</sup> An analysis of the negotiations sheds a lot of light on the subjugating developments that surrounded the judiciary in later years; these matters in turn also played a significant role in shaping the legal culture within the jurisdiction. Before 1960, the emphasis of western education, values and systems as a criterion for 'civilised' and 'elite' status gave rise to African elites who were products of missionary education efforts and who came to occupy the position of

<sup>107</sup> See for instance, CM Bean, 'The Human Crocodile Murder' (1963) 36 *Police Journal* 542, 542; see also WH Robson, 'Book Reviews' (1930) 24 *American Journal of International Law* 638.

<sup>108</sup> Simpson (n 18) 18.

<sup>109</sup> Ibid 21, quoting Devlin Report on Nyasaland, para. 291 and 293.

<sup>110</sup> Ibid.

<sup>111</sup> The poverty, illiteracy and application of unwritten laws has been implied in numerous articles as criteria for 'primitiveness', see for instance Hoebe (n 9); and A Samuels, 'Book Reviews' (1963) 26 *Modern Law Review* 474, 475.

<sup>112</sup> The term appears to have first been used by R Guha in relation to the results of British colonialism in India to describe the rise of 'elites' who were nationalists and who took over power from the colonial rulers in India at the expense of the 'ordinary' Indians whom he calls 'the subaltern'. See R Guha, 'On Some Aspects of the Historiography of Colonial India,' in R Guha and GC Spivak eds., *Selected Subaltern Studies* (OUP, 1988) 34 – 41.

<sup>113</sup> Hara (n 33) 7.

<sup>114</sup> Kanyongolo Ch. 1 (n 97) 356.

‘spokespersons to the colonial authorities and as representatives of their people.’<sup>115</sup> Some of these were instrumental in the nationalist movement that led to the formation of the Malawi Congress Party (MCP), which became a symbol of the nationalist movement.<sup>116</sup> The MCP members such as Orton Chirwa, Kanyama Chiume, and Aleke Banda formed the MCP under the leadership of Dr. Banda which later participated in the constitutional negotiations that heralded the advent of self-rule.<sup>117</sup> Through the MCP these people ‘established [themselves] as the undoubted champion[s] of the nationalist movement ... (and) assumed a monopoly of negotiating on behalf of the nationalist movement at the Constitutional talks.’<sup>118</sup> As Kanyongolo observes, this ‘militated against the inclusion of wider civil society interest groups in the talks and reduced the talks to a bargaining session between two parties with relatively narrow vested interests.’<sup>119</sup> For instance, despite their recognised socio-political role, the resulting 1961 Constitution made no specific provision for the role of chiefs with regard to their constitutional status or position, although some vague and meaningless tribute was paid to them at the 1960 Conference.<sup>120</sup>

The main preoccupation of the ‘departing colonial administration’<sup>121</sup> in the negotiations was to safeguard the property interests of the settler European population and ensure its protection ‘from possible oppression from unbridled African majority rule. [Whereas the nationalist elites were] keen to translate [the] almost unanimous public support [for MCP] into monopoly legal control of political, economic and social processes...’<sup>122</sup> The resulting 1964 Constitution therefore, was ‘a result of exclusive negotiations between the departing colonial administration and the MCP’ as represented by the nationalist elites.<sup>123</sup> A classic example of what Cass Sunstein cynically describes as ‘the sharing of the spoils’<sup>124</sup> in constitution-making theory.

The constitutional negotiations on the inclusion of a Bill of Rights for the protection of individuals and the political and economic stability of the territory appear to have proceeded

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<sup>115</sup> McCracken (n 23) 163.

<sup>116</sup> See RI Rotberg, *The Rise of Nationalism in Central Africa: The Making of Malawi and Zambia* (HUP, 1965) 308 – 312.

<sup>117</sup> See C Baker, *Chipembere: The missing Years* (African Books Collective, 2006) 28.

<sup>118</sup> Hara (n 33) 10.

<sup>119</sup> Kanyongolo (n 33) 356.

<sup>120</sup> Interestingly in the current constitutional set up the role of chiefs was entrenched through the Senate; the traditional leaders had been part of the constitutional-making process and yet when the politicians came to suspend the Senate the courts did not oppose the constitutional manipulation by the executive and legislative arms.

<sup>121</sup> Ibid.

<sup>122</sup> Kanyongolo (n 50).

<sup>123</sup> Hara (n 33) 8.

<sup>124</sup> Cited in Fombad ch. 1 (n 139) 7-8.

on the assumption that it was only the Europeans who needed their rights safeguarded. It was the United Federal Party (UFP) delegation, which urged strongly for entrenching a Bill of Rights in the Constitution and inclusion of a Council of State for the protection of European minority communities.<sup>125</sup> The UFP even proposed constitutional safeguards on the lines of the Scandinavian 'Ombudsman' and the establishment of a Council of Chiefs.<sup>126</sup> The MCP delegation on the other hand, and Dr. Banda as their leader personally opposed the inclusion of a Bill of Rights in the new constitution though their objections did not carry the day.<sup>127</sup> Dr. Banda's argument that the minority communities had nothing to fear from an African Government<sup>128</sup> shows that even he proceeded on the basis that the Bill of Rights was solely for the benefit of the Europeans. He further strongly opposed the suggestion of a Council of Chiefs which he regarded as a device likely to perpetuate racial divisions and undermine the responsibility of Ministers to the Legislative Assembly.<sup>129</sup> For similar reasons he objected to the suggestion that there should be an Ombudsman on the Scandinavian pattern, or to any idea of a second chamber, which to him a Council of Chiefs seemed to imply.<sup>130</sup> Regardless of Dr. Banda's and MCP's opposition, the 1964 Constitution did contain 'a comprehensive Bill of Rights.'<sup>131</sup> Further, it provided for the three arms of government: the executive, the legislature, and the judiciary. By virtue of this new Constitution, Malawi attained self-rule on 6<sup>th</sup> July 1964. However, the Queen of England was the head of State and Dr. Banda was the Prime Minister (head of the executive arm of government).<sup>132</sup>

The 1964 Constitution also established the High Court of Malawi,<sup>133</sup> whose civil and criminal jurisdiction was 'to be exercised in conformity with the Statutes of general application in force in England on 11<sup>th</sup> August 1902,'<sup>134</sup> except where the parties were Africans.<sup>135</sup> In the case of African parties, the applicable law was to be customary law provided 'the same was not repugnant to justice or morality.'<sup>136</sup> The jurisdiction of the High Court included:

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<sup>125</sup> Wanda (n 38).

<sup>126</sup> Ibid.

<sup>127</sup> Ibid.

<sup>128</sup> Ibid.

<sup>129</sup> Ibid.

<sup>130</sup> Ibid, 7, 8, para 19-20.

<sup>131</sup> Hara (n 33) 8.

<sup>132</sup> Ibid.

<sup>133</sup> Malawi Independence Order, Constitution of Malawi, Schedule II, s.75; s.1 1964, No. 916 of 23<sup>rd</sup> June 1964

<sup>134</sup> Wanda (n 38) 129.

<sup>135</sup> Ibid.

<sup>136</sup> Ibid.

- Determination of the validity of the elections of members of the Legislative Council and the vacation of seats therein.<sup>137</sup> The decision of the High Court in these matters was to be 'first and final (hence) not subject to appeal.'<sup>138</sup>
- Sole jurisdiction over matters arising out of the Bill of Rights pertaining to 'the protection of fundamental rights and freedoms of the individual.'<sup>139</sup> This meant that if in the process of hearing a matter by the subordinate courts, it was alleged that a violation of the provisions constituting the Bill of Rights had occurred the matter was to be referred to the High Court.<sup>140</sup>
- Jurisdiction to 'question or determine the legality or otherwise of any legislative enactment'<sup>141</sup> and the actions of the Legislative Assembly.
- Any such jurisdiction as the Legislative Assembly would 'confer upon the High Court'<sup>142</sup> to enable the High Court to effectively exercise its jurisdiction as was necessary under the same Section 15.<sup>143</sup>

Just like the colonial rulers before him who had considered themselves in a position of 'father' to the Africans, Dr. Banda appears to have considered himself in a similar position so that he could refer to his Cabinet colleagues as 'his boys.'<sup>144</sup> In his overall leadership over Malawians, Kamuzu Banda actually equated himself to God hence felt he should not have any opposition.<sup>145</sup> The situation was further compounded by the sad reality that his own 'countrymen trust[ed him] ... too much ... [to a point where he] ... believe[d] he is infallible' so that eventually 'he could not welcome alternative suggestions it [was] his idea or nothing.'<sup>146</sup> As a result, despite the laudable Bill of Rights and the corresponding jurisdiction of the High Court to hear matters arising out of those provisions, Africans never benefited from them, such that many citizens who opposed Dr. Banda were forced into exile and effectively denied recourse to the courts for the protection of their rights. For instance, barely three months after independence when the 1964 Constitution was already in force, a cabinet crisis erupted as a result of cabinet colleagues' criticism of Dr Kamuzu Banda's autocratic tendencies and other fundamental ideological differences like the recognition of Communist

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<sup>137</sup> Wanda (n 38) 122.

<sup>138</sup> Ibid, 128.

<sup>139</sup> S. 15 of the 1964 Constitution.

<sup>140</sup> Ibid.

<sup>141</sup> Ibid, 124.

<sup>142</sup> Section 15 (5) of the 1964 Constitution.

<sup>143</sup> The other subsections of the same Section 15.

<sup>144</sup> UNDP- State of Governance Report, 2003, 16

<sup>145</sup> He is quoted as saying that "there is no opposition in heaven. God himself does not want opposition-that is why he chased Satan away. Why should Kamuzu have opposition? In UNDP State of Governance in Malawi Report ,2003, 16.

<sup>146</sup> Dunduzu K. Chisiza, cited in UNDP – Malawi: State of Governance Report, 2003, p. 14

China over Taiwan.<sup>147</sup> The irony of it all was that one of the cabinet ministers who fell out with Kamuzu in this crisis, Kanyama Chiume was part of the MCP delegation that had opposed the inclusion of the Bill of Rights in the Constitution.<sup>148</sup> In an ominous foreshadow of his authoritarian governance model the Prime Minister promptly sacked the 'rebellious' ministers; and they were either forced into exile or disappeared in mysterious circumstances like so many others after them.<sup>149</sup>

By accepting the applicability of customary law to even criminal matters involving Africans, the colonial authority had arguably indirectly rendered the Bill of Rights inutile for affected Africans. Further, as already argued that their insistence on the inclusion of the Bill of Rights was only for the benefit of European settlers not Africans, it comes as no surprise that 'Banda's politics of intimidation and the country's drift into political violence and state-sanctioned murder'<sup>150</sup> during this period proceeded with hidden collusion from colonialists.<sup>151</sup> It is reported that 'they were in it up to their necks and when time came to choose sides, they chose Banda 'the dictator' over Chipembere and Chiume, (proponents of the cabinet crisis) the 'red' menaces.'<sup>152</sup>

It can thus be seen that for Africans, the High Court was available on paper and not in practice. There was a Constitution with a comprehensive Bill of Rights, nevertheless, Africans did not benefit from it, which points to a glaring absence of democratic cornerstones of the rule of law and constitutionalism in the nascent years of an independent Malawi.<sup>153</sup>

### **3.3.2 The Post-Independence Constitutional/One Party Period (1965 – 1994): The systematic aggregation of 'nationalist elitism' into one 'absolutist elite'**

At this stage one would like to invoke the puerile wisdom of an old nursery rhyme that may sound childish on the face of it but which in the view of this thesis adequately captures what took place in the Malawian political arena between the years 1965 to 1994. The nursery rhyme is about ten (10) children who were in a bed that was obviously overpopulated. Then one of them devised a way of getting rid of all his friends in order that he could have the bed all to himself. So the rhyme starts from 'they were 10 in a bed' and goes all the way down to just one in the bed. The reduction in numbers is brought about because the cunning little

<sup>147</sup> For a detailed analysis see C Baker, *The Revolt of the Ministers: The Malawi Cabinet Crisis 1964-1965* (IB Tauris, 2001).

<sup>148</sup> Baker (n 117) 18.

<sup>149</sup> Ibid.

<sup>150</sup> J Power, 'New Writing on Old Topics: Malawian Historiography Today' (2003) 37 *Canadian Journal of African Studies* 128, 132.

<sup>151</sup> Ibid.

<sup>152</sup> Ibid.

<sup>153</sup> Nkhata (n 4) 103 (stating that the Cabinet crisis had negative 'repercussions on constitutionalism and governance in Malawi').

one continually says 'roll over' and as they do one by one falls out of bed until he is left alone in the now spacious bed- at which point he gleefully remarks 'now that's better!'

### 3.3.2.1 There were ten....

The vanguard of Malawi's nationalist movement and the rise of the MCP as a powerful opposition to colonial rule was not the work of Kamuzu Banda per se but involved people like James Sangala, Orton Chirwa, Masauko Chipembere and Aleke Banda among others, who were actually politicking on ground.<sup>154</sup> The only challenge was that the vanguard nationalist leaders felt inadequate for the task of confronting the imperial authority and decided that:

What was needed was a man of about fifty or sixty, an intellectual, with a character combining nationalism with honesty, self-denial and a spirit of cooperativeness.<sup>155</sup>

At that stage they decided to draft Dr. Banda into their independence cause. It can thus be seen that from the onset Kamuzu Banda not only had won the political support, but also commanded absolute personal trust of the nationalist leaders.<sup>156</sup> Within such a heady scenario he was made the President of MCP.<sup>157</sup>

In that 'spirit of cooperativeness' (or appearances thereof) the constitution drafting process was conducted under the facade of consultation and consensus, and was subsequently passed off as modelled on African traditional forms of governance, yet nothing could be farther from the truth. Firstly in 1965, in order to foster the appearance of consultation and consensus, Dr. Banda as the Prime Minister appointed a Constitutional Committee with a mandate to research and consult on the Constitutional 'form which would be most appropriate within the Malawian socio-economic situation.'<sup>158</sup> However, chiefs and civil society were excluded from the membership of the constitutional committee, which was in fact comprised exclusively of MCP nationalist elites.<sup>159</sup> Further, 'the process of consultation was not significantly inclusive or comprehensive' and the nationalist elites only used the process 'to consolidate their power so that the power would be exercised without question.'<sup>160</sup> Secondly, the draft proposals submitted by the Constitutional committee were subsequently unanimously adopted by delegates to the Annual Convention of the MCP in 1965 after considering the whole draft for 'only one day' before receiving cabinet

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<sup>154</sup> Baker (n 117) 14 – 15.

<sup>155</sup> Ibid 15.

<sup>156</sup> See also the words of Dunduzu Chisiza in UNDP 2003

<sup>157</sup> Baker (n 117) 15.

<sup>158</sup> Hara (n 33) 9.

<sup>159</sup> Ibid.

<sup>160</sup> Ibid.

approval.<sup>161</sup> However, the unanimous approval should be taken in the context of the absolute trust spoken of by Dunduzu Chisiza, for had such trust not been reposed in Dr. Banda and the party elites, the misrepresentations of African governance models in their proposals may have been challenged or at least questioned along the way.

For instance, the Committee rejected the system tenable in the 1964 Constitution where there was a ceremonial Head of State and another political Head of State, on the basis 'that in African traditional systems, it was not usual to have one leader with purely formal and ceremonial powers and another leader with real executive authority: thus the new constitution would abolish the Prime Minister's office and vest the power of Head of State and Head of Government in one person.'<sup>162</sup> This was not an accurate representation of the position as it is common in traditional governance systems within Malawi (where the real chief is either a woman or a young child) for the *indunas* to appoint an uncle of the chief to exercise 'the real executive authority'<sup>163</sup> whilst the woman or child has the 'purely formal and ceremonial powers.'<sup>164</sup> Similarly, the Committee rejected proposals for the position of Vice-President on the basis that it would 'encourage an element of division' and that there was a 'need for a strong executive leader who would have sufficient (unbridled) constitutional powers to ensure national unity.'<sup>165</sup> However, as already discussed, there existed in Malawi some tribes who had paramount chiefs in authority over other chiefs and the existence of such divisions of power have not been shown to be prone to division; if anything, to date they tend to generate unity among people of even different countries.<sup>166</sup> On that flawed philosophy, which was not supported by the cultural context alleged to be the basis for the proposals, the Committee asserted that such a 'strong executive leader' was essential for 'a country comparatively undeveloped and inexperienced in nation-hood' as Malawi in order to achieve the necessary degree of unity, resolution and stability to permit the maximum fulfilment of the country's human and physical resources in the shortest period of time.'<sup>167</sup>

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<sup>161</sup> HJ Sindima, *Malawi's First Republic* (University of America Press, 2002) 188.

<sup>162</sup> Government of Malawi, *Proposals for the Republican Constitution of the Republic of Malawi* (1965)

<sup>163</sup> Hara (n 33).

<sup>164</sup> Ibid.

<sup>165</sup> Government of Malawi, *Proposals for the Republican Constitution of the Republic of Malawi* (1965).

<sup>166</sup> For instance Kalonga Gawa Undi, the Chewa Paramount Chief whose area of jurisdiction spanned across what is presently Malawi and Zambia still commands some authority over and unites the Chewas in Zambia and Malawi- for information see WT Kalusa and M Mtonga, *Kalonga Gawa Undi X: A Biography of an African Chief and Nationalist* (African Books Collective, 2010);

<sup>167</sup> See *Proposals for the Republican Constitution Malawi* (white paper 002, 1966), Zomba, Government Press, 1966) 3.



However, the considerations of the committee only served to 'pave the way for authoritarian rule'<sup>168</sup> contrary to the established African way of consultation and consensus.

Further and very poignant for the present discourse, it was felt that 'Constitutional provisions on human rights and fundamental freedoms tend to generate conflict and tension between the executive and the judiciary.'<sup>169</sup> As such, the committee recommended the omission of the 'Bill of Rights and the whole jurisdiction of the High Court in this respect in the Republican Constitution of 1966.'<sup>170</sup> Such a recommendation was also contrary to African values for though the term 'rights' may not have been used in Malawian languages, '*umunthu*' which is a fundamental 'African philosophy of life' embodied all that and more.<sup>171</sup> Even though '*umunthu*' as a philosophy considers the individual's wellbeing as being closely tied to that of the community, it is not necessarily in the detrimental sense of 'the privileging of the community over the individual'<sup>172</sup> but rather the inclusive protection of 'individual's and society's rights' together.<sup>173</sup> Such a conceptualisation of rights may be alien to liberal democratic ideology but that alone need not negate the fact that respect of individual or personal rights was actually practiced in societies like Malawi, previously regarded as 'primitive' by Europeans during colonial times.<sup>174</sup> In such societies where '*umunthu*' was the underlying philosophical tenet, leaders were accountable to the people for the way in which they exercised their authority albeit through traditional systems which were again different to those conceived in western societies.<sup>175</sup> Consequently, the assertion of the Committee for removing the Bill of Rights under the guise of avoiding conflict between the executive and the judiciary was in direct contravention of '*umunthu*' as a democratic tenet and was really motivated by the elites' desire to prevent judicial oversight of executive authority.

### 3.3.2.2 ... and they rolled over...

The nationalist elites who made up the Constitutional committee succeeded in having the Bill of Rights previously entrenched in the Constitution of 1964 removed.<sup>176</sup> The MCP was established by the new Constitution as the only political party in the country thereby

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<sup>168</sup> RE Kapindu, 'Malawi: Legal System and Research Resources' (2009) at <http://www.nyulawglobal.org/globalex/Malawi.htm>.

<sup>169</sup> Wanda (n 38) 125.

<sup>170</sup> Ibid.

<sup>171</sup> Nkhata (n 4) 32- 37 explaining how '*umunthu*'/'ubuntu'/'umuntu' etc represents the very essence of respect for an individuals' 'personhood, humanity, humanness and morality', and that it is more because it incorporates the importance of the community,

<sup>172</sup> Ibid 36 citing M Munyaka and M Motlhabi, 'Ubuntu and its Socio-moral significance' in MF Murove ed., *An Anthology of Comparative and Applied Ethics* (University of KwaZuluNatal Press, 2009) 63-68.

<sup>173</sup> Nkhata (n 4) 36.

<sup>174</sup> Ibid, pointing that it is time the concept of '*umunthu*' was explored with the aim of 'imbuing foreign concepts such as liberal democracy and constitutionalism, with a uniquely African favour.'

<sup>175</sup> Ibid 32 – 39.

<sup>176</sup> Wanda (n 38).

introducing a one-party system of Government. Dr. Banda became the 'strong executive leader' the Committee had desired such that the constitution expressly provided that 'except as otherwise provided by an Act of Parliament, in the exercise of his functions the President would act on his own discretion and would not be obliged to follow advice tendered by any other person.'<sup>177</sup> Although the 1966 Constitution established a High Court with 'unlimited jurisdiction to hear and determine any civil or criminal proceedings under any law',<sup>178</sup> nevertheless section 15(5) of the 1963 Constitution which had given the High Court power to question or determine the legality or otherwise of any legislative enactment was repealed under the 1966 constitutional amendment initiative.

The 1966 Constitution entrenched the power of Dr. Banda as the President to the extent that he effectively 'controlled all organs of government. Independence of the judiciary was an illusion, and the distinction between party and Government was at best extremely blurred.'<sup>179</sup> For instance, in relation to the Judiciary, the President enjoyed the exclusive mandate to appoint the head of the Judiciary (Chief Justice)<sup>180</sup> and also had constitutional powers to dismiss any judge 'where he considers it desirable in the public interest to remove him.'<sup>181</sup> This gave the president overriding power and discretion over the tenure of office of the judges. In relation to Parliament, the President had power to appoint and fire the Speaker of the National Assembly<sup>182</sup> and even to appoint an unspecified number of people as members of Parliament.<sup>183</sup> In that way, the President had power to interfere with the composition of Parliament through appointment of unelected legislative members. Dr. Banda further strengthened his grip on power through subsequent amendments to the Constitution, such as the one that made him a President for life.<sup>184</sup> Thus through the work of nationalist elites the 1966 Constitution took the power from the many and transformed it into the power of one- the consolidation of powers of state in one man- Dr. Kamuzu Banda as the first President and subsequently life President of Malawi.

### 3.3.2.3 ... roll over still ...

The contemplated friction between the judiciary and the executive that was cited to justify the removal of the Bill of Rights from the 1966 Constitution was in reality between Kamuzu and the courts as he later displayed an aversion to judicial supervision of executive authority.

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<sup>177</sup> Section 8 (3) of the 1966 Constitution of the Republic of Malawi.

<sup>178</sup> Section 62 (1).

<sup>179</sup> Kapindu (n 168).

<sup>180</sup> Section 63 (1) of the 1966 Constitution of Malawi.

<sup>181</sup> Section 64 (3)(b) of the 1966 Constitution of Malawi.

<sup>182</sup> Sections 25 (1) and (3)(c) respectively.

<sup>183</sup> Section 20 – for appointment of people directly to office of member of Parliament (MP) and by virtue of Section 19 (1)(c) which made every person appointed as Minister but not already MP, an MP.

<sup>184</sup> Section 9, as amended by Constitutional Amendment No. 35 of 1970.

Though even in that, he initially had the support of some of the leading nationalist elites such as Orton Chirwa and Aleke Banda.<sup>185</sup> A quick look at the developments surrounding the establishment of the notorious Traditional Courts in 1970 fortifies this assertion.

It should be remembered that much like the colonial set up the 1964 Constitution had also established a dual system of courts, one forum for non-Africans and another for application to Africans only.<sup>186</sup> The 1966 Constitution maintained such dual system through the establishment of local Courts as Subordinate Courts with criminal jurisdiction on criminal matters involving Africans, parallel to the non-African Subordinate Courts applying English Law.<sup>187</sup> Appeals from the Traditional Courts lay to the High Court of Malawi;<sup>188</sup> that was the position until the 'Chilobwe Murders'<sup>189</sup> of 1969.

Chilobwe was and still is a suburb in the City of Blantyre where most of the murders (approximately 27 in total) took place.<sup>190</sup> In those days it was believed that white men drank 'African blood and manufactured money from it.'<sup>191</sup> So rumours were circulating that the Banda Government was responsible for the murders and using the blood drained from the victims as a loan repayment to South Africa.<sup>192</sup> The Government therefore, was determined to bring the culprits to book and clear its name. Five people were charged with the murders before Justice Bolt of the High Court.<sup>193</sup> At the conclusion of the case, Justice Bolt found that the evidence presented by the witnesses was 'so manifestly unreliable that no reasonable jury could possibly convict'<sup>194</sup> and accordingly acquitted the accused persons. This incensed the State President and his Government. Now it must be explained that during this period (1969), all the judges of the High Court were expatriates (Europeans).<sup>195</sup> It is clear that the State President and his Government were of the view that the expatriate judges were frustrating the Government because their notions of justice were not consistent with the African notions of justice.<sup>196</sup> The President impliedly called for the resignation of the judge, 'if

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<sup>185</sup> Chanock (n 49).

<sup>186</sup> Ibid.

<sup>187</sup> D Newman, *Criminal Procedure and Evidence In Malawi* (UNIMA, 1982) 6.

<sup>188</sup> Ibid.

<sup>189</sup> P Brietzke, 'The Chilobwe Murders Trial' (1974) 17 *African Studies Review* 361.

<sup>190</sup> Ibid, 361.

<sup>191</sup> Ibid.

<sup>192</sup> Ibid.

<sup>193</sup> Ibid.

<sup>194</sup> Ibid.

<sup>195</sup> M Hara, 'Independence of Prosecuting Authority: The Malawian Experience,' paper presented at African Network of Constitutional Law conference on Fostering Constitutionalism in Africa (April, 2007)

[http://www.publiclaw.uct.ac.za/research/african\\_network/nairobi\\_07/](http://www.publiclaw.uct.ac.za/research/african_network/nairobi_07/)

<sup>196</sup> Ibid; see also Malawi Hansard *Report of Proceedings of the Seventh Session of Parliament* (1969) 50 – 57.

the judge had any conscience.<sup>197</sup> In the face of such overt attacks on the independence of the judiciary the judge and 'all his brother judges resigned in solidarity.'<sup>198</sup>

Aleke Banda was then made 'in charge' of the move by the Government to pass the Local Courts (Amendment) Act, 1969. He succeeded in doing so by arguing that the High Court system was 'governed by the practice in Britain' and that Malawians having gained their independence did not have to 'slavishly copy' such a judicial system.<sup>199</sup> In the end the 'local courts became Traditional Courts (and) the right of appeal to the High Court was abolished.'<sup>200</sup> These courts had jurisdiction to hear all offences involving capital punishment such as homicide and treason cases involving Africans,<sup>201</sup> and the President had direct supervisory powers over them.<sup>202</sup> Almost all the major treason cases of the time were heard by these traditional courts. A number of these cases which involved Banda's perceived political enemies (who were invariably former allies fallen from grace) such as *Rep v. Muwalo et al*<sup>203</sup> and *Chirwa et al v. Rep*<sup>204</sup> ended up in convictions being secured by the state on very tenuous evidence and capital punishments being pronounced. It must be emphasized that these courts were presided over by traditional authorities. These were appointed by the 'Minister' responsible for justice (in practice the President himself). They were also removable from office by the Minister. It is fairly clear from this constitutional and statutory arrangement that the tentacles of executive authority had at that stage no practical or legal limits whatsoever.

In this context, the formal/common law courts (the High Court system) were completely sidelined by the executive in general and the President in particular and at times the courts were even verbally attacked in public by the President. For example when Dr. Banda felt that the High Court was ineffective in dealing with cases of theft by public servants he attacked the judges publicly in the legislature:<sup>205</sup> 'If the judges who came from Lincoln's Inn and Gray's Inn and what not...quibble just because according to English law a man is innocent [until proved guilty] and all that, well, this is not England, Mr Speaker...English Law developed and evolved under very, very different conditions from which we live in this

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<sup>197</sup> Ibid.

<sup>198</sup> Ibid.

<sup>199</sup> Malawi Parliamentary Debates, November 1969 quoted in Chanock (n 49) 82.

<sup>200</sup> Brietzke (n 189).

<sup>201</sup> See Regional Traditional Courts (Criminal Jurisdiction) Order and Traditional Courts Act, cap. 3:03 of the Laws of Malawi (now repealed).

<sup>202</sup> Brietzke (n 189).

<sup>203</sup> See *Rep. v Muwalo et al*, Crim. Case No.1 of 1977, SRTC, (unrep)

<sup>204</sup> See *Chirwa et al v Rep.*, Criminal Appeal No.5 of 1983; NTAC (unrep)

<sup>205</sup> C Ng'ong'ola, 'Controlling theft in Public Service: Penal Law and Judicial Responses in Malawi,' (1988) 32 *Journal of African Law* 72.

country. Therefore we cannot judge cases here by the standards of English Common Law...And if those judges and magistrates quibble because they are trained in Gray's Inn, then I will remove cases of this kind; when they fail to convict, I will send [the cases] to the local courts, [and] the local courts will do something.'<sup>206</sup> Dr. Banda was not alone in his attack on the application of the 'foreign English law' and the call for the application of African law without the technicalities of English Common Law; he even had the support of nationalists such as Orton Chirwa (a barrister trained in England) and Aleke Banda.<sup>207</sup> However, what Orton Chirwa, Aleke Banda, Dr. Banda and many such party elites were doing was distorting the very nature of African customary law concepts of 'crime and punishment', what has been called elsewhere as 'neo-traditionalism'.<sup>208</sup> That is to say, the version of 'customary law' advocated by Dr. Banda and his party elites was in fact their own 'fabricated' version with minor modifications on the previous distortions imposed on it by the European colonial rulers.<sup>209</sup> Thus, Dr. Banda and his government distorted African law to serve their parochial interests just as much as the colonial rulers had done. What made the distortions of Dr. Banda and his government more reprehensible was the fact that they had the pretensions of authenticity (as it was being promoted by the nationalists who were actually displacing the imperialists in the name of self-rule).

Thus Dr. Banda as the State President systematically emasculated the Judiciary initially with the help of nationalist elites who had purported to speak as representatives of the people.<sup>210</sup> According to the nationalist agenda the High Court system was portrayed as inimical to the African tradition and a symbol of Malawi's colonial past.<sup>211</sup> However, one must never lose sight of the historical oddity that the so-called local courts which had originally been put in place by the colonial government to serve the needs of access to justice for the indigenous population eventually paved the way for the institutionalisation of one of the most repressive regimes with a facade of indigenised judicial processes.<sup>212</sup> It is a rather uncanny twist of life that nationalists like Orton Chirwa and Aleke Banda who were instrumental in the attack on

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<sup>206</sup> Ibid, quoting the 'Life' President in Hansard Proceedings.

<sup>207</sup> M Chanock, 'Neo-Traditionalism and The Customary Law in Malawi' Paper presented at the Annual meeting of the African Studies Association, November 1976, p. 80 – 81, [www.jlp.bham.ac.uk/volumes/16/chanock-art.pdf](http://www.jlp.bham.ac.uk/volumes/16/chanock-art.pdf)

<sup>208</sup> Ibid.

<sup>209</sup> Ibid.

<sup>210</sup> VonDoepp Ch. 1 (n 135) 79-81.

<sup>211</sup> Chanock (n 207) pointing to debates in the National Assembly that portrayed the provision of legal aid as a man paying for the defence of his offender.

<sup>212</sup> P Forster, 'Law and Society under a Democratic Dictatorship: Dr. Banda and Malawi' (2001) 36 *Journal of Asian and African Studies* 275.

the High Court system and in the establishment of the traditional courts, became themselves victims of the monstrous judicial system they had helped to create.<sup>213</sup>

In any event it is rather interesting that some current commentators would suggest that the existence of the traditional court system helped to ensure that the so-called formal court system was not tainted by the politicisation of law enforcement by the Banda regime.<sup>214</sup> The argument being that the regime processed all its politically motivated cases through the more pliant traditional court system; in that sense therefore the High Court stood aloof from the manifest abuses of the Banda autocracy. But this is not entirely accurate as 'judges from the common law system did participate in the traditional court system' in an 'advisory capacity' as lawyers and magistrates sitting alongside the traditional chairmen.<sup>215</sup> VanDoepp further asserts that in that role some judges participated albeit in a secondary role in some of Banda's iniquitous decisions.<sup>216</sup> The real issue is whether such silence was not maintained at great peril to nurturing a really robust judicial culture as well as the rule of law and constitutionalism.<sup>217</sup> For instance, it is not in dispute that the 1966 Constitution incorporated as part of the Laws of Malawi, the 'sanctity of the personal liberties enshrined in the Universal Declaration of Human Rights.'<sup>218</sup> And it was the High Court system (as opposed to the traditional courts) which was mandated to apply those laws. Yet again by circumventing the formal judicial system this otherwise useful legal protection existed more on paper than in reality for the Malawian. In any case it has been proposed that the 'judges had to align their legal thinking to dictates from on high' since 'subservience to executive was required in all matters [requiring] judges to operate with restraint'.<sup>219</sup> In summary the Banda regime fostered a legal culture that was characterised as compliant and not necessarily versatile in the face of constitutional subversions.

#### 3.3.2.4 ... now that's better? ...

They started off as a team of nationalists who had the best interests of their colonised nation at heart and became the self-appointed spokespersons and representatives of the people; then they unwittingly invited the power-hungry Dr. Banda to lead their nascent freedom movement. In their absolute trust in his 'self-denial and cooperativeness' they fought for and delivered to him the type of constitution that gave him absolute political power. Proceeding

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<sup>213</sup> See *Rep. v. Muwalo Qumayo* Civil Case No. 1 of 1977, SRTC (unreported) *Chirwa et al v Rep.*; see also VonDoepp (n 210) 80, and Chigawa Ch. 1 (n 101) 70, 71.

<sup>214</sup> For instance, Kanyongolo (n 50).

<sup>215</sup> VonDoepp (n 210) 80.

<sup>216</sup> Ibid.

<sup>217</sup> Ibid, 80-81.

<sup>218</sup> Section 2 (1)(iii) as confirmed by ruling in *Chakufwa Chihana v The Republic*, Criminal Appeal No.9 of 1992.

<sup>219</sup> VonDoepp (n 210).

as representatives of the people they distorted and misrepresented the nature of customary law in Malawi to suit their political purposes. They unwittingly helped Dr. Banda in excluding the majority of Malawians from participation in Government just as the colonial rulers had done. Then by means of the very systems they had helped to create and nurture, Dr. Banda through systemic intimidation, brutality and arbitrary arrests and detention and ultimately through the use of the traditional courts managed to eliminate from the political scene all the nationalist elites. The President thus consolidated his absolute power over all the other organs of the state, including the Judiciary. This arrangement was not compatible with some fundamental elements of constitutional law; namely separation of powers and the rule of law. However, it was the very provisions of the Constitution (1966) that undermined the separation of powers and everything that pertains to good governance, constitutionalism, and rule of law and was at odds with African governance systems that served 'to prevent tyranny and insisted on consultation and consensus in decision-making.'<sup>220</sup> Regrettably, the 1966 Constitution was the work of the very nationalist elites who had formed the vanguard of the liberation struggle.

### **3.4 The Rebirth of Multiparty Democracy: the need to avoid the rise of constitutional elitism**

#### **3.4.1 The Constitutional Making Process in a Nutshell**

Until the early 1990's Dr. Banda was able to run a very oppressive regime with the tacit approval of the western bloc because of his anti-communist stance. But with the demise of the Cold war came a change of political realities. Coupled with that was the publication of a pastoral letter by Malawian Catholic Bishops which for the first time dared to openly criticise the government for its abuse of human rights and disregard for the rule of law.<sup>221</sup> Of course it was initially greeted with consternation from the ruling MCP stalwarts who had to relent under pressure from international donors. The pastoral letter galvanised public discontent against the regime, precipitating the eventual change of systems. The pressure mounted and Dr. Banda gave in and announced in October 1992 that there was going to be a national referendum for Malawians to choose between continuing with the one-party system and life presidency and adopting a multiparty system of government.<sup>222</sup> In the referendum, Malawians voted by a majority of slightly over 63% for change from the one-party system to a multiparty system of government. Several legislative amendments were enacted to

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<sup>220</sup> Nkhata (n 4) 125 stating that 'there is overwhelming evidence that strongly points' to the existence of African customs and traditions that actually limited the exercise of 'societal powers' that in effect could be taken to have represented legislative, executive and judicature powers.

<sup>221</sup> VonDoepp (n 210) 81.

<sup>222</sup> Ibid.

liberalise the political space between then and May 1994 when the current constitution eventually came into force.<sup>223</sup>

The newly formed opposition demanded greater participation in shaping the process of democratization following the defeat of the MCP in the referendum. Political parties registered in Malawi were admitted into the Presidential Council for Dialogue to create an institutionalised negotiating council to implement the transition to democracy.<sup>224</sup> However, civil society organisations such as the churches, which had played a decisive role in the initial phase of democratisation and the public at large, were excluded from this subsequent process.<sup>225</sup> Thus the National Consultative Council (NCC), consisting of seven representatives of each of the parties that were registered before 30 November 1993, was established by an Act of Parliament *‘to oversee the transition from the one party political system to a multiparty political system in Malawi.’*<sup>226</sup> Its mandate ranged from participation in formulating of policies, the initiation of legislative measures necessary for the transition, the drafting of new electoral legislation suitable for a multiparty political system, through to the drafting of a new multiparty Constitution with a comprehensive Bill of Rights.<sup>227</sup>

Thus the initial draft Constitution was produced by the NCC working alongside international experts with an advisory function.<sup>228</sup> Under that arrangement the National Democratic Institute (NDI) of the USA advised the NCC on formulating the Constitution, highlighting problems and citing examples and alternatives from other countries. However it has been observed that ‘the external influence in the writing of the Constitution was great, since many members of the NCC had no knowledge of Constitutional Law, and thus no basis for comparison.’<sup>229</sup> In any case ‘the Constitution Committee had in its work oriented itself on the Constitutions of a number of Western countries (USA, the United Kingdom, Germany) as well as African models (Namibia, South Africa) because time was limited, and, because of a number of organisational problems, the Constitution was drafted in haste. The NCC approved the draft in a hurry; final changes were agreed a bare two weeks before the

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<sup>223</sup> For example Constitutional Amendment Act No. 25 of 1993 (Chapter 1A of the Constitution) incorporated a Bill of Rights back into the 1966 Constitution. The latter constitution was actually repealed on 16 May 1994, a day before the first multiparty elections since independence in 1964.

<sup>224</sup> P Mutharika, ‘Malawi: Reflections on the Democratisation Process, the Constitution and the Rule of Law’ (1994 – Malawi) pamphlet available in hard copy from Attorney General’s Library, Ministry of Justice Malawi.

<sup>225</sup> National Consultative Council Verbatim Report on the Kwacha Constitutional Conference held from 21<sup>st</sup> – 24<sup>th</sup> March 1994.

<sup>226</sup> Ibid (emphasis supplied).

<sup>227</sup> Ibid.

<sup>228</sup> NDI Consultants Report, ‘The Role of Parliament in Malawi’s Constitutional Democracy: An NDI Seminar’ (NDI Mw, 1994).

<sup>229</sup> Ibid.



Constitution was proclaimed. The MCP approved the draft with reservations. The Constitution was then to be passed by Parliament.<sup>230</sup>

However to the extent that the NCC membership was exclusive to nonelected political party representatives it could not sufficiently reflect the comprehensive views of the Malawian electorate. The significant influence of the 'international experts' in the drafting process substantially influenced the content of the Constitution.<sup>231</sup> Some of the recommendations of the international experts seem to reflect the Western Donor's views of the Constitution to be created.

The NCC attempted to cure this deficiency by arranging a seminar in March 1994 attended by various social groups.<sup>232</sup> The seminar was attended by various social groups, such as Churches, the Law Society, Trade Unions, Women's groups, Traditional Authorities, the legal fraternity, the University and the armed forces.<sup>233</sup> However, there was no ample time to meaningfully debate such an important document. One notable feature of this conference was that its focus was confined only to provisions of the Constitution that were perceived to be contentious.<sup>234</sup> These included the question of retaining the Senate as a second legislative chamber, which delegates voted to retain in the Constitution along with the right to re-call members of Parliament. They also endorsed a limit on the size of the Cabinet (presumably to curtail Presidential patronage) and rejected the creation of the Office of Second Vice President (which was clearly aimed at appeasing coalition partners).<sup>235</sup> At the end of the day, 43 out of the 63 resolutions were adopted unanimously.<sup>236</sup> Unfortunately when the Constitution came before Parliament, they simply ignored all the resolutions of the consultative Conference –especially those that did not serve their political designs. Thus the ruling coalition implemented their own amendment proposals by suspending the Senate (which they later purportedly abolished) the recall provision was repealed whilst the office of Second vice President was created against popular dissent. Thereafter the Constitution came into force permanently on 18 May 1995. Since the parliament exercised unbridled power in deciding the final content of the Constitution 'it can be clearly seen that the Conference, where the wider society had the opportunity to express their views on the form

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<sup>230</sup> Ibid.

<sup>231</sup> Ibid. See also Gardbaum, S. 'The Myth and Reality of American Constitutional Exceptionalism' UCLA Law School Public Law and Legal Theory Research Paper Series No. 08 – 33, stating that Malawi adopted the American Model of judicial review, available at [www.papers.ssrn.com](http://www.papers.ssrn.com).

<sup>232</sup> National Consultative Council Verbatim Report on the Kwacha Constitutional Conference held from 21<sup>st</sup> – 24<sup>th</sup> March 1994.

<sup>233</sup> Ibid.

<sup>234</sup> Hara (n 33) 9.

<sup>235</sup> Ibid.

<sup>236</sup> Ibid.

the Constitution should take, had virtually no impact on the Constitution-making process.<sup>237</sup> Thus the 1994 Constitution is largely the work of experts, mostly foreign, with input from the political parties that were actually the ruling parties then. But the question remains: Were the foreign experts' recommendations applicable to the specific circumstances prevailing in Malawi?

The 1994 Constitution of Malawi is said to be 'among the world's most liberal constitutions.'<sup>238</sup> Malawian jurists however have pointed out that the decision to make liberal democracy the foundational principle for the 1994 Constitution 'was not as a result of a conscious and collective reflection of the people of Malawi.'<sup>239</sup> Thus the very foundations of the 1994 Constitution lack legitimacy and feelings of ownership in the majority of Malawian people.<sup>240</sup> Further, Nkhata cautions on the potential capacity of the liberal democratic foundations of the 1994 to hinder any chances of entrenching constitutionalism in Malawi, especially 'transformative constitutionalism' which is urgently needed in a country with the history like that of Malawi.<sup>241</sup> Nkhata explains the points very well<sup>242</sup> and in summary they are as follows:

- a. The very concept of 'liberal democracy' embodies an internal tension in that the 'liberal ... component' epitomizes 'a fear of collective power' as a result of which 'liberals' advocated for and 'defended limited suffrage' whereas 'the democratic component' requires 'the promotion of majoritarian rule.'

How ably a society navigates and manages this internal tension is largely dependent on sociological and historical factors which vary amongst nations such that not even western nations themselves have one form of liberal democracy. In actual fact, some developed western democracies are themselves experiencing a citizen disenfranchisement because of their practice of liberal democracy.<sup>243</sup> Given the history of marginalisation and exclusion of the majority of Malawians by colonial and one-party regimes respectively, liberal democracy unless modified to suit the sociological and historical factors in existence in Malawi therefore threatens to bring about a repetition of history hence abort the change promised by the 1994

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<sup>237</sup> Ibid.

<sup>238</sup> Ibid.

<sup>239</sup> See for instance, Nkhata (n 4) 168; and Kanyongolo (n 50) 206.

<sup>240</sup> Nkhata (n 4) 168-170.

<sup>241</sup> Ibid 194- 196.

<sup>242</sup> Ibid 153 - 198

<sup>243</sup> Ibid.

Constitution. The general verdict seems to be that: 'The liberal democratic paradigm has failed Africa and is currently failing Malawi.'<sup>244</sup>

- b. The promotion of liberal democratic values as the 'true, immutable, timeless objective values for all men, everywhere and all times' is antithetical to the establishment and entrenchment of constitutionalism, especially transformative constitutionalism which requires the Constitution and governance institutions to promote 'ideas and values that the [relevant] society prioritises.' It is therefore recommended that particular societies be allowed room to develop their own ideal form of democracy without having 'a pre-fixed meaning [of democracy]' imposed on them 'loaded with particular [foreign imposed] values.'

### 3.4.2 The Transformative nature of the 1994 Constitution

#### 3.4.2.1 A new Era for the Judiciary and constitutionalism?

In spite of the short-comings in the negotiations and drafting processes that led to the adoption of the 1994 constitution (hereinafter 'the Constitution'), the Constitution has been widely acknowledged as representing the hope and promise of social, political and legal transformation in Malawi.<sup>245</sup> For instance, in appreciation of how both colonial and nationalist elitism resulted in the political disenfranchisement of 'the local population... almost completely', the Constitution 'has adopted the notion of participatory democracy, not simply representative democracy, as a fundamental constitutional principle.'<sup>246</sup> The Constitution has also entrenched the separation of the powers of the Executive, the Legislature and the Judiciary.<sup>247</sup>

In addition, the Constitution has ushered in a new era for the Judiciary in Malawi. In an obvious response to the inhibitive role of the first President and the Traditional Courts in the justice system prior to 1994, Section 103 of the 1994 Constitution provides that:

- (1) All courts and all persons presiding over those courts shall exercise their functions, powers and duties independent of the influence and direction of any other person or authority.

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<sup>244</sup> Nkhata (n 4) based on several prior studies. Citing for example, F Nyamnjoh 'Liberal Democracy in Africa: The Need for Alternatives' in B Immink & Others eds., *From Freedom to Empowerment: Ten Years of Democratisation in Malawi* (Malawi:Forum for Dialogue and Peace, 2003); SA de Smith, *The New Commonwealth and Its Constitutions* (Stevens, 1964); A Giddens, *A Runaway World* (Profile Books, 2000); and F Zakaria, 'The Rise of Illiberal Democracy' (1997) *Foreign Affairs* 76 (6).

<sup>245</sup> See for instance Gloppen and Kanyongolo Ch. 1 (n 148) 259; and AP Mutharika, 'Accountability for Political Abuses in Pre-Democratic Malawi: The Primacy of Truth' (2000 – 2004) *Third World Legal Studies* 203, 210-211.

<sup>246</sup> Chirwa Ch. 1 (n 17) 15, 379 (the entrenchment of participatory democracy 'is implicit ... in S. 12 (iii) of the Constitution...').

<sup>247</sup> Ss. 7, 8 and 9 of the Constitution.

- (2) The judiciary shall have jurisdiction over all issues of judicial nature and shall have exclusive authority to decide whether an issue is within its competence.
- (3) There shall be no courts established of superior or concurrent jurisdiction with the Supreme Court of Appeal or High Court.

The most important introduction though, is arguably the role given to the judiciary as ‘the ultimate guardian of the Constitution’<sup>248</sup> by S. 9 of the Constitution. This section provides among others, that ‘[t]he judiciary shall have the responsibility of interpreting, *protecting and enforcing* this Constitution...’<sup>249</sup> Thus it is contended that the judiciary has a very peculiar role to play in ushering in constitutionalism and the rule of law in Malawi.

#### 3.4.2.2 **An implied proscription of constitutional elitism?**

In the same way that an analysis of the impact of liberal democracy in developing countries has revealed the dangers of imposing a particular version of democracy ‘with a pre-fixed meaning’ and ‘loaded with particular [pre-determined] values’ as the only ‘immutable, universal, ... objective ... [type] for all men, everywhere and all times’,<sup>250</sup> the same argument can be made within the context of the discourse on judicial activism. Judicial activism (however defined) can only make meaningful contribution to the knowledge of the judicial role if contextualised (situated within a particular constitutional framework in light of the attendant social, political and historical factors).<sup>251</sup> This point can be illustrated with the following example: while it took what scholars have described as judicial activism (understood as a rejection of positivist approach to constitutional interpretation) for the US Supreme Court to introduce judicial review of executive acts by its decision in the case of *Marbury v. Madison*, it actually required the Indian Supreme Court to adopt a positivist approach to constitutional interpretation for it to exercise the same function since in India, judicial review has been expressly provided for within their Constitution.<sup>252</sup> Similarly, while it took what scholars have called JA (again understood as a rejection of positivist approach to constitutional interpretation) for the Indian Supreme Court to introduce public interest litigation within its courts, the South African Constitution contains express provisions for the same hence its Courts only need to take a positivist approach to attain a similarly beneficent result.<sup>253</sup> Given such a scenario, to describe the rejection of a positivist approach to constitutional interpretation as an ideal form of JA and as the only ‘immutable, universal...

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<sup>248</sup> Chirwa (n 246) 15

<sup>249</sup> Emphasis added.

<sup>250</sup> Nkhata (n 4) 164, 170.

<sup>251</sup> Baxi Ch. 1 (n 43) vi- xvii.

<sup>252</sup> SP Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (OUP India, 2 edn., 2003) 34.

<sup>253</sup> Baxi (n 251).

objective ... [type] for all men, everywhere and all times' could lead in some jurisdictions to courts depriving the majority of the citizenry from enjoying the full package of rights expressly accorded to them by the Constitution. In fact, some scholars have argued that this is the situation in South Africa despite the fact that the South African Constitutional Court has otherwise received 'international acclaim' as a court that practices judicial activism.<sup>254</sup> Further, it is noteworthy that despite the acrimonious debate on JA in the US, it is agreed on both sides that constitutionalism and the rule of law have not been undermined in the process.<sup>255</sup> However, it is equally generally acknowledged that the various and contradictory forms of JA on the part of the Supreme Court in India have served to undermine the very constitution the institution was set up to uphold and enforce.<sup>256</sup> This has occurred to such an extent that it is reported that the Supreme Court in India has actually lost legitimacy and its decisions carry the same weight as 'a mere academic dissertation'.<sup>257</sup> Such is the mixed story of JA; this necessarily points to the need to desist from loading the term with particular pre-determined values, especially when JA and its attendant discourse can so easily degenerate into constitutional elitism.

There is no universally agreed definition of constitutional elitism but loosely defined, it refers to the attitude of those who by virtue of their education feel that they are the more appropriate persons to decide on all matters pertaining to the Constitution (such as judges and lawyers) to the exclusion of those they consider the lay.<sup>258</sup> Constitution elitism, where it is practised, serves to exclude the majority of the citizenry from Constitutional discourse and hence serves to undermine the notion of participatory democracy.<sup>259</sup> However, the actual impact of constitutional elitism on constitutionalism is determined by the social, historical, and political realities of a particular society. For instance, Chapter 2 discussed the type of JA advocated by the likes of Dworkin which calls for judges to be unrestricted even by the Constitution itself by having recourse to the express or implied language, and/or the values prioritised by the majority in the society in question, and how it has been demonstrated that such an approach is anti-democratic (as in anti-majoritarian); yet it has been justified by some on the basis that the US Constitution itself has an anti-majoritarian premise being rooted in liberalism.<sup>260</sup> Further, as discussed also in Chapter 2, the USA Constitution does

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<sup>254</sup> J Dugard and T Roux, 'The Record of the South African Constitutional Court in Providing an Institutional Voice for the Poor: 1995 – 2004' in Oliver and Fusaro Ch. 1 (n 2) 119.

<sup>255</sup> Goldford Ch. 1 (n 2) 3.

<sup>256</sup> Dickson Ch. 2 (n 63) 12; and Sathe (n 252).

<sup>257</sup> Sathe (n 252).

<sup>258</sup> See for instance, B Jennings, 'On Authority and Justification in Public Health' (2003) 55 *Florida Law Review* 1241, 1251.

<sup>259</sup> Ibid pointing to how constitutional elitism leads to what he calls 'civic privatism' where the other members of society decide to 'let the experts decide' always.

<sup>260</sup> Vast literature exists on this. See discussion in chapter 2.

not expressly provide for how its provisions should be interpreted by the Courts,<sup>261</sup> whereas the Malawi Constitution does.<sup>262</sup> Nevertheless, it is worth mentioning the debates on the role of the Courts in the USA in the enforcement and interpretation of the Constitution and how these have given rise to concerns on the existence of constitutional elitism in the USA.<sup>263</sup> However it has been argued that where the citizenry is relatively well-educated and very aware of its rights and the duty owed by institutions such as the judiciary as in the USA, public scrutiny serves as a restraining force on the increase of constitutional elitism hence its inimical effect on constitutionalism is correspondingly contained.<sup>264</sup> But what of a society like Malawi with high illiteracy and poverty levels and a prior history of different forms of elitism that led to the exclusion of the majority of the population from participation in democracy?

Currently there appears to be no study in Malawi focusing on an analysis of whether constitutional elitism exists or not, and it is beyond the scope of this thesis to do so. However, this thesis would like to argue that the 1994 Constitution contains an implied proscription of constitutional elitism by virtue of the terms of Section 12 which as argued by other jurists, also implicitly prefers participatory democracy over and above representative democracy for the post-1994 Malawi.<sup>265</sup> Section 12 of the Constitution states that:

This Constitution is founded upon the following underlying principles-

- (i) *all legal and political authority of the state derives from the people of Malawi* and shall be exercised in accordance with this Constitution solely to serve and protect their interests;
- (ii) *all persons responsible for the exercise of powers of State shall do so on trust* and shall only exercise such powers to the extent of their lawful authority and in accordance with their responsibilities to the people of Malawi;
- (iii) *the authority to exercise the power of State is conditional upon the sustained trust of the people of Malawi* and that trust can only be maintained through open, accountable and transparent Government and informed democratic choice;

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<sup>261</sup> Chemerinsky (n 151).

<sup>262</sup> Such as S. 9 (calling on the Courts to have 'regard only to legally relevant facts and the prescriptions of law' when 'interpreting, protecting and enforcing [the] Constitution'); S. 11 (providing what the Courts may have recourse to when interpreting the provisions of the Constitution) just to mention a few.

<sup>263</sup> Vast literature exists on this. For example Jennings (n 258).

<sup>264</sup> PS Karlan, and DR Ortiz, 'Constitutional Elitism? Some Skepticism About Dogmatic Assertions' (1998 – 199) 30 *McGeorge Law Review* 117-124.

<sup>265</sup> Chirwa (n 246).

- (vi) all institutions and persons shall observe and uphold the Constitution and the rule of law and *no institution or person shall stand above the law*.

It can be argued that the framers of the Constitution were mindful of the history of disenfranchisement experienced by the majority of Malawians on the basis of their circumstances of life hence decided to curb the phenomenon by creating a trust-based constitutional arrangement. Some scholars (especially in the US) have argued that issues of judicial accountability to and legitimacy before the citizenry must not be given pre-eminence in discussions of judicial activism since such an approach favours the majority.<sup>266</sup> That line of argument cannot be sustained in similar discussions about judicial activism within the Malawian constitutional context. Section 12 specifically propagates a governance model that accords prominence to democratic accountability and sustained trust of the 'governed' for the 'governors'. Indeed that provision applies equally to all branches of government, the Executive, the Legislature and the Judiciary. That is, it binds the judiciary to accountability to the people of Malawi, and premises judicial legitimacy on sustaining that popular (not populist) trust. This leads to the conclusion that although the constitution gives the judiciary the role of being the 'ultimate guardian of the Constitution' it nevertheless proscribes the cultivation of an attitude on the part of judges and other legal experts that by virtue of their position and/or education, they are entitled to impose their views, ideologies, philosophies etc. on the people of Malawi (constitutional elitism). Rather, the Constitution binds the judiciary to ensure that in interpreting, protecting and enforcing the Constitution, it should have recourse to the values that the Malawian society prioritises.<sup>267</sup>

The implied proscription of constitutional elitism by Section 12 attains peculiar significance in Malawi where there is an urgent need to entrench transformative constitutionalism specifically.<sup>268</sup> 'Transformative constitutionalism' is another term that is nebulous. This thesis adopts the definition used by other scholars in the context of Malawi as originally defined by Klare:<sup>269</sup>

[Transformative constitutionalism is] ... a long term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to

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<sup>266</sup> Refer to discussion in chapter 2.

<sup>267</sup> Nkhata (n 4) - that constitutionalism can only be entrenched where the values prioritised are those the society does.

<sup>268</sup> Ibid 194 ('To properly harvest the promise of the Constitution of Malawi, it is necessary to ... embrace "transformative constitutionalism"').

<sup>269</sup> Ibid 194 – 197 citing Klare (n 2).

transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.

In this context, the judiciary can act as a facilitator of transformative constitutionalism if it subjugates its jurisprudence 'to ideas and values that the [majority of Malawians] prioritises.'<sup>270</sup> The emphasis on majority in this case emanates from the fact that currently, the very liberal democratic foundation of the 1994 Constitution is not owned by Malawians resulting from short-comings in its negotiation and drafting process as discussed previously.

In appreciation of the fact that constitutional interpretation is inevitably 'a political process ... [which] involves value judgments' Section 12 binds the Court in the exercise of such 'political powers' to act as the servants of the people of Malawi and not as their superiors-a position assumed for instance by Kamuzu Banda and other nationalist elites who defined African tradition and customs according to their own notions of what was for the good of Malawi and not what the people themselves considered good for themselves. The provision is thus a strong proscription of constitutional elitism and offers an innovative break with the country's hitherto exclusive politics and governance arrangements.

### 3.5 Conclusion

A careful historical study of jurisprudential developments within Malawi clearly shows that courts are an important agent for transformation of a legal order. It is hoped that the preceding discussion has amply shown that sometimes an activist judiciary may perpetrate injustice within a society if its jurisprudence is premised within an elitist model of governance. This was evidenced by the 'illegitimate' manner in which the courts appropriated land rights from the traditional leaders into the hands of the Crown in clear breach of the relevant legislative instruments upon which the colonial mandate was initially assumed in Nyasaland. In a similar vein it has been argued that such elitism was not confined to the imperialist government in the then Nyasaland; rather even the nationalist movement which negotiated the independence constitution displayed similar undemocratic tendencies once they assumed the reins of power. With respect to this phenomenon of nationalist elitism the whole transformative agenda of the independence constitution was subsequently perverted by Dr. Banda and his lieutenants who imposed their interpretation of local governance models in order to curtail genuine democratic participation of the ordinary populace. Thus the constitution was amended with the result that an autocratic regime was legitimised through legal means and on the pretext of promoting a 'Malawian form of democracy'. However, it is the conclusion of this discourse that contrary to prevailing wisdom democracy as a concept has a deep resonance with indigenous governance models. In that

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<sup>270</sup> Ibid 195.



regard it is proposed that the founding principles of a trust-based governance model espoused within the new constitution need to be adequately reflected upon by the courts as they perform their judicial function as mandated under the constitution in order to display fidelity to the notions of democratic governance aspired for by the people from whom the democratic mandate to govern originates.

## Chapter 4

### Judicial Activism in Malawian Courts: Using Old Forms of Expression

#### 4.1 Introduction

We all must be conformists of some kind to old forms of expression if we seek to be understood by the wider audience.<sup>1</sup> As has been discussed in chapter 2, the term JA has contradictory and irreconcilable definitions as well as results, which necessitated the proposal of a new definition in this thesis. However, the usage of the new definition proposed in this thesis to assess whether Malawian Courts have practised JA or not, would hinder comparative analysis. For this reason, this chapter will analyse whether the Malawian Courts have practiced JA or not using the 'criteria' discussed in chapter 2.<sup>2</sup> The aim is to situate the behaviour of the Malawian courts on a comparable basis to Courts in other jurisdictions before proceeding to analyse the impact of such JA (if any).

#### 4.2 If Judicial Activism was ....

##### 4.2.1 The Superior Court overturning its previous decisions

As discussed in Chapter 2, court's that have 'ignored precedent' have been described as courts that practise JA. This is especially the case for courts in a common law system where decisions of a superior court are binding on the superior court itself and lower courts.<sup>3</sup> Thus the ability of a superior court to depart from its previous decisions has been construed as a sign of JA on the part of that Court.<sup>4</sup> Whereas the House of Lords in the UK came out with a Practice Direction to authorise a departure from previous decisions, the Supreme Court of Malawi ('SC') did so through a subsequent judgment. The issue concerned the interpretation of Section 42 (2)(e) of the 1994 Constitution (providing the right to bail for detained or accused persons) vis-à-vis persons accused of murder. The section provides that:

Every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right-

To be released from detention, with or without bail unless the interests of justice so require otherwise.

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<sup>1</sup> Sen Ch. 1 (n 93) 122.

<sup>2</sup> Some of the criteria highlighted in chapter 2 include: 1) a Superior Courts overturning its previous decisions; 2) courts resolving disputes of a political nature; 3) courts going beyond 'ordinary' jurisdiction; 4) courts ignoring precedent; 5) courts invalidating legislation; and 6) result-oriented judging.

<sup>3</sup> The terminology differs amongst countries. In most Common Law jurisdictions, the superior court is referred to as the Supreme Court' but in the UK, it is the House of Lords.

<sup>4</sup> See for example Kmiec Ch. 2 (n 2).

In one of the earlier cases which was decided soon after the adoption of the 1994 Constitution (*MacWilliam Lunguzi v. The Republic*)<sup>5</sup> the Supreme Court stated that the right to bail provided for under Section 42 (2)(e) was not an absolute right hence the judge had discretion on whether or not, having regard to the 'interests of justice', bail was to be granted.. In the case of murder suspects, due to the seriousness of the offence among other factors, the SC held that bail should only be granted in very rare circumstances. The SC subsequently confirmed that position in another decision involving a murder suspect: that was the case of *Amon Zgambo v. The Republic*.<sup>6</sup> However, in doing so the SC expressly declared its reliance on a common law principle to the effect that bail in serious offences must be granted 'with extreme care and caution,' and further that in homicide cases the discretion was 'very unusual and rarely exercised.' Consequently, the apex court held that bail in Malawi was to be granted to a capital offender 'only in the rarest of cases and only on proof of exceptional circumstances.' Further, that the burden was on the accused person to prove the existence of such 'exceptional circumstances'. The principles enunciated in *Amon Zgambo* case were predominantly the law in Malawi for almost a decade,<sup>7</sup> until the case of *Fadweck Mvahe and others v. The Republic*.<sup>8</sup>

In that latter decision the three applicants who were charged with the offence of murder appealed against High Court decisions refusing to grant them bail on the ground that they had failed to show exceptional circumstances to entitle them to such bail. The SC in this case took the approach that the case had presented the court with an opportunity to 're-examine' its previous decisions on the subject. Even though the SC affirmed most of the principles enunciated in the *Lunguzi* Case, it also observed that 'the common law did not provide the right to bail as our [the Malawian] Constitution does.' For that reason, the SC overruled its earlier decisions in the *Lunguzi* and *Amon Zgambo* cases vis-à-vis the burden of proof being on the accused in a bail application. Thus the court stated that:

...we hold...that the requirement of proof of exceptional circumstances by a murder suspect applying for bail in the High Court is not the correct approach, and should no longer be followed.

In so doing, the SC has set a novel precedent to the effect that it can, where necessary, indirectly hear an appeal against its own 'erroneous' decisions. Though this appears to be

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<sup>5</sup> (1991) 1 MLR 632

<sup>6</sup> MSCA Crim. App. No. 27 of 2005 (unreported)

<sup>7</sup> S Baradaran, 'The Presumption of Innocence and Pretrial Detention in Malawi' (2010) 4 *Malawi Law Journal* 124, 128.

<sup>8</sup> MSCA Criminal Appeal No. 25 of 2005- the Supreme Court in this case consolidated three separate appeals into one, the other two were *Richard Chigeza v. The Republic*, MSCA Criminal Appeal No. 26 of 2005; *Roy Mangame v. The Republic*, MSCA Criminal Appeal No. 27 of 2005.

the only instance where the MSCA overturned its own decision in part, the decision revolutionised the right to be presumed innocent and the right to be released from bail in a country where long periods of detention before trial are a common experience. To the extent that such a judicial approach towards its own precedents was in fact unprecedented on the part of the SC it could be safe to describe the outcome as a manifestation of judicial activism of an interesting type.

#### 4.2.2 The Court resolving disputes of a political nature

Even though it has been asserted elsewhere that the distinction between the legal and the political is often times blurred especially when it touches on the right to political activity, that has not stopped some from asserting that courts that have been keen to adjudicate on issues of a political nature are practising judicial activism.<sup>9</sup> The judiciary in Malawi has not shied away from adjudicating on matters that were largely political in nature since the adoption of the 1994 Constitution such that it has been called the ‘democratic stronghold’ of Malawi.<sup>10</sup>

Malawi has even had a case that others have argued led to a presidential candidate securing his electoral victory more by the actions of the judiciary rather than by electoral votes.<sup>11</sup> The decision arose in the case of *Chakuamba, Kalua and Mnkumbwe v. Attorney General, the Malawi Electoral Commission and the United Democratic Front (UDF)*.<sup>12</sup> The case arose from the results of the 1999 general elections in Malawi whereby less than 100 per cent of registered voters had voted, and the leading presidential candidate (Muluzi) got 51% of the votes cast which in effect meant that less than 50% of the whole electorate had voted for him. The main question posed by the petitioners to the court was whether Muluzi had secured the vote of ‘a majority of the electorate’ as provided for under Section 80 (2) of the 1994 Constitution so as to warrant his ascension to the presidency. The Malawi Electoral Commission (‘MEC’) construed that phrase to mean the majority of the voters who

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<sup>9</sup> For instance, the US Supreme Court it has been argued by a considerable number of scholars, through ‘Judicial Activism’ made former President George W. Bush a winner as opposed to the electoral vote over Al Gore- see for instance MJ Karman, ‘Bush v. Gore Through the Lens of Constitutional History’ (2001) 89 *Californian Law Review* 1721 – 1765 (stating that ‘On December, 2000, the United States Supreme Court for the first time in its history, picked a President.’); and EA Young, ‘Judicial Activism And Conservative Politics’ (2002) 73 *Colorado Law Review* 1139.

<sup>10</sup> S Gloppen and EF Kanyongolo, ‘Judicial Independence and Judicialization of Electoral Politics in Malawi and Uganda’, Paper presented at the International Political Science Association (IPSA) Conference, Sao Paul, Brazil 2011 at [saopaul2011.ipsa.org/sites/default/files/papers/paper-1570.pdf](http://saopaul2011.ipsa.org/sites/default/files/papers/paper-1570.pdf); See also VonDoepp Ch. 1 (n 135) 85-100.

<sup>11</sup> See for instance Gloppen and Kanyongolo (ibid.) 4; see also VonDoepp Ch. 1 (n 135) 93-94; for a contrary view point, see C Ng’ong’ola, ‘Judicial Mediation in Electoral Politics in Malawi’ in H Englund ed., *A Democracy of Chameleons: Politics and Culture in New Malawi* (Nordic Africa Institute, 2001) 77.

<sup>12</sup> MSCA Civil Appeal No. 20 of 2000 (unreported) being an appeal from High Court Civil Cause No. 1B of 1999 (unreported).

actually cast their vote on polling day as opposed to the majority of the total number of registered voters (as was contended by the petitioners); the MEC therefore proceeded to declare Muluzi the winner of the 1999 elections. The petitioners, themselves presidential candidates in the contested elections, challenged the decision of MEC since they were of the view that ‘majority of the electorate’ should be construed to mean ‘an absolute majority of all registered voters.’<sup>13</sup> It has been argued elsewhere that JA courts when interpreting the Constitution tend to reject narrow, legalistic, or pedantic approaches in favour of broad and purposive approaches;<sup>14</sup> the High Court in this case arguably fits that description since it held that in interpreting provisions of the 1994 Constitution, the right approach required that:

...a Malawian Court must first recognise the character and nature of our Constitution before interpreting any of its provisions. ... [Since] Constitutions are drafted in broad and general terms...they call...for a generous interpretation avoiding strict legalistic interpretation. [Thus] the language of a Constitution must be construed not in a narrow legalistic and pedantic way but broadly and purposively.<sup>15</sup>

The High Court (HC) therefore, after analysing the ordinary meaning of the terms, and pointing out the need to avoid absurdity and to read the constitution as a whole made comparisons with other provisions in the Constitution which contained the requirement for ‘majority’. The court then asked among other things- ‘why should any weight at all be attached to a vote that will not have been cast?’ Consequently, the HC held that the ‘majority’ in Section 80 (2) referred to the larger number of people who had actually cast their vote and not that of registered voters. The petitioner’s appealed to the SC, which upheld the decision of the HC. Even though both the HC and the SC have been criticised for their decision in this case, other scholars have pointed out that ‘the judicial reasoning in this case is technically sound and legally defensible.’<sup>16</sup> Indeed, by adopting a purposive interpretation and rejecting a legalistic interpretation of the Constitution, this case falls into the definitions of JA preferred by scholars in other jurisdictions. The fact that others strongly criticised the result only lends credence to the arguments advanced in chapter 2 about the contested nature of JA and the controversy generated by judicial outcomes premised upon apparent activist reasoning.

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<sup>13</sup> Gloppen and Kanyongolo (n 9) 4.

<sup>14</sup> See discussion in Chapter 1.

<sup>15</sup> *Chakuamba, Kalua and Mnkumbwe v. AG, MEC, and UDF* (n 11).

<sup>16</sup> Ng’ong’ola (n 9); see also Ellet Ch. 1 (n 40).

The Courts in Malawi since 1994 to date have adjudicated on political disputes involving almost every stage of the electoral process and beyond. The picture has been aptly captured by Gloppen and Kanyongolo:<sup>17</sup>

- In the pre-election battles over ‘the rules of the game’ – the legal framework and institutional set-up for elections;<sup>18</sup>
- In the registration and education of voters and compilation of the voters roll;<sup>19</sup>
- In the nomination of candidates;<sup>20</sup>
- In disputes relating to political campaigning;<sup>21</sup>
- In relation to the conduct of the polling process on actual election day;<sup>22</sup>
- With regard to the vote count and integrity of the results;<sup>23</sup> and
- In the process of converting electoral mandate into political positions.<sup>24</sup>

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<sup>17</sup> S Gloppen and FE Kanyongolo, ‘The Role of the Judiciary in 2004 General Elections in Malawi’ (2004) *CMI Working Paper No. 16*, 4.

<sup>18</sup> See for instance *In Re Nomination of J.J. Chidule*, Civil Cause No. 5 of 1995 (HC determined that as long as a person is a registered voter in any constituency in Malawi, they cannot be barred from contesting for a parliamentary seat in any constituency even if they are not resident in that district); and *Malenganzoma v. The Electoral Commission*, Civil Cause No. 966 of 1994 (unreported) (affirming the authority of MEC to administer a language proficiency tests for prospective candidates to National Assembly positions).

<sup>19</sup> See for instance *Electoral Commission v. Richard Piriminta, Charles Fodya, Alex Rhodes Nkhope, Malawi Congress Party and United Democratic Front*, MSCA Civil Appeal No. 23 of 1996 (unreported) ; being an appeal from the High Court decision in Civil Cause No. 15 of 1996 (unreported) (The HC ordered the extension of the registration period by a day and the SC upheld it, when the petitioners alleged that some voters had been prevented from reaching the registration point); *Phambara v. Chairman of the Electoral Commission*, Civil Cause No. 34 of 1999 (unreported) (where the Court ordered MEC to register prisoners as voters).

<sup>20</sup> E.g. *Attorney General v. Gwanda Chakuamba and Chakufwa Chihana*, MSCA Civil Appeal No. 7 of 1999 (unreported) being an appeal from the High Court decision *Gwanda Chakuamba and Chakufwa Chihana v. Electoral Commission*, Civil Cause No. 25 of 1999 (unreported) (allowing for a presidential candidate to come from one party and the running-mate from another party).

<sup>21</sup> E.g. *Kafumba v. Electoral Commission and Malawi Broadcasting Corporation (MBC)*, Civil Cause No. 30 of 1999 (unreported) (where the HC ordered MBC as a State Broadcaster to provide coverage to opposition parties as well and not favour the ruling party).

<sup>22</sup> E.g. *Mgwirizano Coalition v. Malawi Electoral Commission, Attorney General and United Democratic Front*, MSCA Civil Appeal No. 14 of 2004(unreported) (where the coalition queried the presence of excess ballot papers, the HC ordered that the Court should obtain possession of the ballot papers and subsequently the SC overturned that order, among other reasons, on the ground that possession of ballot papers was not ‘a judicial issue for the Court’).

<sup>23</sup> E.g. *Chakuamba, Kalua and Mnkumbwe v. Attorney General, the Malawi Electoral Commission and the United Democratic Front (UDF)* (unreported); and *Ng’oma v. Chikhandwe and the Electoral Commission and Gaffar v. Kadzamira and Electoral commission*, Miscellaneous Application No. 22 of 2004(unreported) .

<sup>24</sup> For instance *Attorney General v. Chipeta*, MSCA Civil Appeal No. 33 of 1994 (where the AG appealed against the decision of the HC which held that a person did not become a Member of the National Assembly merely by virtue of appointment to the position of Minister- the SC overturned that decision); and *Attorney General v. Masauli*, Civil Cause No. 28 of 1998 (where the court intervened in the internal affairs of Parliament and ordered Parliament to disburse funds to the Malawi Congress Party, even though the Party was boycotting parliamentary sittings).

It must be appreciated that describing the hearing of political disputes of the nature above by Malawian courts as a form of JA is motivated by the need to communicate using old forms of expression since it could otherwise be argued that the language of the 1994 Constitution expressly confers upon the courts the mandate to do so. Section 10 (1) of the Constitution provides that:

In the interpretation of all laws and *in the resolution of political disputes* the provisions of this Constitution shall be regarded as the supreme arbiter and ultimate source of authority.<sup>25</sup>

The resultant effect of the judicial involvement in such political disputes has been that in addition to the courts carrying out their 'constitutional mandate to provide horizontal accountability' they have also performed a very crucial social function: the judiciary has served as 'a safety valve' within an otherwise tense political environment.<sup>26</sup> As Gloppen and Kanyongolo's research has revealed, by hearing and disposing of political disputes the Courts in Malawi have served to 'diffuse tension' whereby the lengthy court procedures and processes in practice served as cooling off periods for the warring factions and prevented the eruption of violence.<sup>27</sup>

#### **4.2.3 The Court expanding its jurisdiction and mandate into areas not traditionally considered the jurisdiction of the judiciary**

Where the Court in a particular jurisdiction has extended its powers beyond what is considered as the traditional reserve of the judiciary, some scholars have called that JA.<sup>28</sup> In that context, it could be argued also that the Courts in Malawi have practised that type of JA since the judiciary has expanded its mandate over political disputes to include 'intra-party disputes' in a manner described by Gloppen and Kanyongolo as 'unusual in comparative terms'.<sup>29</sup> The unusual nature of these disputes vis-à-vis judicial adjudication is that their resolution depended on the courts construing the constitutions of the relevant parties as opposed to the national Constitution.<sup>30</sup> It appears however that just like in India, where substantial failings in political and governance institutions led the people to turn to the

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<sup>25</sup> Emphasis added.

<sup>26</sup> Gloppen and Kanyongolo (n 9) 2; see also VonDoepp (n 9) 93-94.

<sup>27</sup> Ibid.

<sup>28</sup> For example, the Supreme Court of India, see Rao Ch. 2 (n 41) 34, 43 – 44 (accusing the judges of having 'assumed enormous powers beyond the contemplation of Constitution-makers').

<sup>29</sup> Gloppen and Kanyongolo (n 9) 1.

<sup>30</sup> For instance in the case of *Hon JZU Tembo and Hon Kate Kainja v. Attorney General*, Civil Cause No. 50 of 2003 (Mzuzu) the primary document being interpreted was the Constitution of the Malawi Congress Party (MCP).

judiciary,<sup>31</sup> the absence of robust dispute settlement mechanisms and intra-party democracy within political parties in Malawi among other reasons ‘facilitated the tendency towards taking intra-party disputes to courts for resolution.’<sup>32</sup> And these disputes mostly were on the selection of candidates to represent the various parties in the general election (‘primary elections’) where others complained of unfair processes.<sup>33</sup> The primary elections for the 2004 elections alone generated not less than ten (10) such cases involving all of the three major parties at the time, United Democratic Front (UDF), Malawi Congress Party (MCP), and National Democratic Alliance (NDA).<sup>34</sup>

Statements made by the judges in some of the cases involving intra-party disputes show their appreciation of the fact that such disputes are not within the traditional jurisdiction of the judiciary. One case in which the court was of the view that there were some intra-party disputes that were better resolved by the membership was that of *Re Constitution of Malawi Congress Party and Re Convention and Part 4 Article 40 of the Constitution of the Malawi Congress Party*.<sup>35</sup> The case arose out of divisions in the MCP over the leadership of the party (which had direct implications on who would be the presidential candidate in the impending national polls). On one side was Gwanda Chakuamba who had contested as the Presidential Candidate of MCP in the 1999 general elections, and on the other was John Tembo who had been the right-hand man of Dr. Kamuzu Banda and who most likely had considered himself the likely ‘heir’ to the leadership of MCP.<sup>36</sup> In the ensuing tussle for the mantle of leadership, instead of holding one convention and contesting against each other, the two sides held separate conventions purportedly under the party constitution; the resulting dispute inevitably ended up in the High Court. Even though the judge in that case

<sup>31</sup> See for instance D.V.N Reddy, ‘Social Justice Through Public Interest Litigation’; and A Lakshminath, ‘Judicial Activism: Retrospect and Prospect’ in Banerjee and Others (n 26) 331, 341 and 55, 61 respectively.

<sup>32</sup> Gloppen and Kanyongolo (n 9) 14; for an interesting discussion on the issue of intra-party politics in Malawi see generally SB Lembani, *The Influence of Institutional Arrangements on Intra-party Democracy in Malawi* (University of Western Cape, 2006).

<sup>33</sup> Gloppen and Kanyongolo (n 9) 13.

<sup>34</sup> See *Symon Bwanali v. United Democratic Front*, Civil Cause No. 429 of 2004; *David Banda v. United Democratic Front*, Civil Application No. 22 of 2004; *Lewis Kadammanja v. Shati and United Democratic Front*, Civil Cause No. 305 of 2004; *Rosemary Lapukeni v. Katsonga and United Democratic Front*, Civil Cause No. 436 of 2004; *Ludoviko Shati v. United Democratic Front*, Civil Cause No. 485 of 2004; *Wilson Ndomondo v. United Democratic Front*, Civil Cause No. 484 of 2004; *Kadzongwe v. Malawi Electoral Commission*, Civil Cause No. 13 of 2004 (querying MCP); *In Re Adden Mbowani*, Civil Cause No. 15 of 2004; *Kumachenga v. Majoni and Malawi Electoral Commission*, Civil Cause No. 18 of 2004 (querying MCP); *Fanwell Kwanjana v. MCP and E. Mwale*, Civil Cause No. 143 of 2004; *Jossy Nthani v. Regional Elections Coordinator (MCP) et. al.*, Civil Cause No. 140 of 2004; *Jodder Kanjere v. MCP and Kakhome*, Civil Cause No. 520 of 2004; and *Steven Maliko Tchauya v. Rose Mirriam Matchaya and National Democratic Alliance (NDA)*, Civil Cause No. 176 of 2004.

<sup>35</sup> Civil Cause No. 645 of 2001 (unreported).

<sup>36</sup> D Cammack and T Kelsall, ‘Developmental patrimonialism? The case of Malawi’, (APP Working Paper No12, July 2010) accessed at [www.institutions-africa.org/filestream](http://www.institutions-africa.org/filestream) on 18th January 2012.



declared the two conventions *void ab initio* he nevertheless declined to make any finding about who was the legitimate leader of MCP and directed that the leadership wrangle be resolved by the party itself. One of the leaders of MCP lodged an appeal in the Supreme Court which was unsuccessful. In dismissing the appeal, the SC affirmed the position taken by the HC in these terms:

The issue of who is the legitimate leader of the MCP is a political question which must be resolved by the generality of the membership of the MCP. This court can't be the proper forum to resolve the deep divisions that exist in the MCP.<sup>37</sup>

The MCP membership however failed to resolve the issue amicably resulting in the court getting involved in the case again on the same matter in 2002 though under different legal issues resulting finally in John Tembo (as the leader of his side) and Kate Kainja (as MCP Secretary General) being found guilty of contempt of court.<sup>38</sup> This case will be discussed in detail subsequently. Suffice to say at this juncture that the extended powers of the judiciary into intra-party political disputes has evoked alarm from some political observers who argue that the development 'makes the courts vulnerable' as 'the more major political battles are channelled into the legal arena, the more important it becomes to have control over the judicial branch.'<sup>39</sup>

#### 4.2.4 'Result-Oriented Judging'<sup>40</sup>

Though there is no agreed definition of what constitutes 'result-oriented judging' it could loosely be described as 'the actions of judges who do whatever is necessary to rule as they personally prefer' in a manner that 'departs from some "baseline" of correctness.'<sup>41</sup> The nature of this definition however, introduces significant subjectivity. That is to say, it is very difficult 'to establish a non-controversial benchmark' for 'correctness'.<sup>42</sup> In addition, it is equally difficult to distinguish between inadvertent errors in legal analysis and a deliberate departure from the 'correct' legal position in order to arrive at a desired result on the part of judges. Some decisions which would raise this difficulty in Malawi are the contradictory decisions of the High Court and the Supreme Court of Malawi in the cases of *Malawi*

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<sup>37</sup> *Dr. Peter Chiwona v. Gwanda Chakuamba*, MSCA Civil Appeal No. 40 of 2000 (unreported), quoted in Ellet (n 14) 300.

<sup>38</sup> High Court decision referred to but not cited in *Hon JZU Tembo and Hon Kate Kainja v. Attorney General*, Civil Cause No. 50 of 2003 (Mzuzu) available at <http://www.malawilii.org/mw/judgment/high-court-general-division/2003/54>.

<sup>39</sup> Gloppen and Kanyongolo (n 16) 3; see also VonDoepp (n 9) 86.

<sup>40</sup> See Kmiec Ch. 2 (n 2) 1475 – 1476.

<sup>41</sup> *Ibid* 1476.

<sup>42</sup> *Ibid*.

*Congress Party & Others v. Attorney General & Another (Press Trust I)*<sup>43</sup> and *Attorney General v. Malawi Congress Party & Others (Press Trust II)*<sup>44</sup> respectively. The two cases will be discussed in detail in a subsequent chapter. However, for this section, it is proposed that both the HC and the SC practised JA to arrive at their divergent decisions.

The Press Trust was a trust that had tentacles in almost every part of the Malawi economy.<sup>45</sup> It was created and incorporated at the initiative of Kamuzu Banda for the benefit of Malawians at the time when there was a thin line between the Government of Malawi and MCP as a party. The trustees of the Press Trust therefore, largely came from the MCP. In the multi-party dispensation therefore, the ruling party enacted legislation to reconstruct the Press Trust and replaced the old trustees with new ones. The displaced trustees and MCP challenged the Press Trust (Reconstruction) Act for being unconstitutional. The main legal question at trial seemed to revolve around the issue as to whom the right to property of the Press Trust was vested in view of Section 28 of the Constitution which protected that right by proscribing arbitrary deprivation of property without compensation.

The HC found that the Press Trust was a private trust though charitable and that since the legal title vested in the trustees, the right to property that had been breached was that of the trustees; further that since the charity had been private not public, the State could not reconstruct it without being guilty of arbitrary deprivation of property. Thus the HC found the Press Trust (Reconstruction) Act to be unconstitutional among other reasons for being an arbitrary deprivation of property. Chirwa has ascribed the incorrect position taken by the HC on the vesting of the constitutionally protected right to property in the Press Trust to 'a misunderstanding of the term "property".'<sup>46</sup> This thesis argues however, that the analysis of the HC on 'property' is technically justifiable hence does not point to a misunderstanding of 'property.' The HC's result-oriented activism, it is contended, emanates from the manner in which the trial court preferred to place emphasis on a liberal conception of the right to property in the face of evidence to the contrary requiring a different and more historically nuanced approach. That is, a liberal conception of the right to property emphasises on individual ownership and is blind to other forms of ownership hence attaches undue importance on due process of the law (ownership of legal title). The HC judge chose to ignore the true nature of the Press Trust in the context of Malawi's troubled and economically exploitative political past- how its establishment had its genesis in the

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<sup>43</sup> [1996] MLR 244.

<sup>44</sup> [1997] 2 MLR 181.

<sup>45</sup> JK van Donge, 'The Fate of an African "Chaebol": Malawi's Press Corporation after Democratisation,' (2002) *Journal of Modern African Studies*, 40 (4): 651-681.

<sup>46</sup> Chirwa Ch. 1 (n 17) 184 – 185.

investment of public funds, and its economic hegemony achieved through the utilisation of government subsidies among other things.<sup>47</sup> Further, the HC chose to attach no weight to the stated objective of the Press Trust, that of bringing about the economic development of the nation of Malawi and its people. In these stated instances, it is argued that the HC departed from the baseline correctness in determining property ownership in fact in order to arrive at its preferred conception of the right to property, the more liberal-oriented position.

The SC on the other hand, found that the Press Trust was a public trust held for the benefit of the people of Malawi. The SC found for the public nature of the Trust by attaching weight to its historical establishment through the use of public funds and the fact that it attained the economic hegemony through government subsidies among others. However, the SC itself departed from the baseline of correctness in its determination of the right to property by attaching weight to the beneficial interest to the exclusion of any other form of title.<sup>48</sup> Even though Chirwa yet again ascribes this departure from 'correctness' to 'a misunderstanding of the term "property",<sup>49</sup> it is arguable that the SC chose to attach very little weight to the legal title that vested in the trustees in order to arrive at their preferred conception of the right to property in view of the unique circumstances of the Press Trust. The emphasis the SC placed on the circumstances surrounding the establishment of the Press Trust, it is submitted, supports this argument. That is, in a bid to ensure that a Trust that was for all intents and purposes public should not become private by a positivist approach to the 'right to property', the SC chose to render the vesting of legal title in the trustees of no consequence.<sup>50</sup>

#### 4.2.5 Invalidating Legislation

In Malawi, the Constitution expressly provides for the power of a court of law to declare 'any act of Government or any law' invalid if it is found to be 'inconsistent with [its] provisions'.<sup>51</sup> However, since the mere decision to invalidate a legislative enactment by the court has been described as JA by a considerable number of scholars from various jurisdictions,<sup>52</sup> this section will highlight the cases in which Malawian Courts have invalidated a whole statute and specific provisions in some Statutes in order to place those decisions within comparative terms.

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<sup>47</sup> Ibid (pointing out that the public nature of the Press Trust, its utilisation of government subsidies and usage of public funds for investment was beyond dispute).

<sup>48</sup> Ibid 285.

<sup>49</sup> Ibid 285.

<sup>50</sup> See Chirwa (Ibid) for an argument on how a finding that the trustees has some form of right to property to the Trust 'would have affected the analytical approach, but not necessarily the outcome of the SC decision'.

<sup>51</sup> S. 5 as read with S. 11 (3).

<sup>52</sup> For instance from the USA, Canada and India, see discussion in chapter 2.

The first example of such cases is that of *Sidik Aboobaker v. Attorney General*.<sup>53</sup> The case dealt with the Forfeiture Act,<sup>54</sup> which like so many Acts enacted in the one-party regime, contained a provision which provided that any order made under it could not be challenged in any court of law. The 1994 Constitution most likely with the aim of curtailing such legislative practices in Section 11 (4) provides that '[a]ny law that ousts or purports to oust the jurisdiction of the courts to entertain matters pertaining to this Constitution shall be invalid.' On that basis, the Court declared the Forfeiture Act unconstitutional. It appears that this case is the only one so far, in which the Court has declared a whole Statute invalid; in the subsequent cases, it has only been dealing with specific provisions in some statutes.

In the case of *Rep. v Chinthiti and Others (1)*,<sup>55</sup> several accused persons were charged with theft by servant among other offences. The suspects raised preliminary objections including the admissibility of confession statements in criminal trials in general. In his analysis the trial judge focused on the law that governed the admissibility of confession statements in Malawi, namely Section 176 of the Criminal Procedure and Evidence code (CP&EC); especially subsections (1) and (3) that allowed the admissibility of involuntary confessions including those that may not have been given freely (such as where the suspect was under compulsion to give a confession statement). Before the 1994 Constitution, jurisprudence from the court developed principles upon which statements obtained by compulsion could be admissible upon establishing that the said statement was made by the accused and its contents were materially true.<sup>56</sup> The court in the *Chinthiti* case upheld the constitutionality and admissibility of voluntary confessions in criminal trials but pointed out that 'confessions obtained through compulsion are a thing of the past' and that Section 42 (2)(c) of the 1994 Constitution expressly provided that every accused person had a right 'not to be compelled to make a confession or admission which could be used in evidence against him or her.' Therefore, to the extent that Section 176 (1) and (3) allowed the admission of involuntary confessions, the court declared those provisions invalid. This case marked a significant break from the past- where the one party regime thrived on involuntary confessions obtained from accused persons. Similarly, in the case of *Director of Public Prosecutions v. Kamuzu Banda and Others*,<sup>57</sup> the SC invalidated Sections 313 and 314 of the CP & EC 'to the extent that they [did] not recognise the right of an accused to remain silent as provided for by

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<sup>53</sup> Civil Cause No. 964 of 1994 (unreported).

<sup>54</sup> Act No. 1 of 1966.

<sup>55</sup> (1997) 1 MLR 59

<sup>56</sup> For example, *Chiwaya v. Another v. Rep.* (1966 - 68) 4 ALR MAL 64; *Chiphaka v. Rep.* (1970 - 72) 6 ALR MAL 214; and *Rep. v. Nalivata and Another*, (1970 - 72) 6 ALR MAL 101.

<sup>57</sup> [1997] 1 MLR 7

section 42(2)(f)(iii) of the 1994 Constitution.<sup>58</sup> The SC found that Sections 313 and 314 of the CP&EC authorised the prosecution to comment on the decision of the accused person not to testify in a manner that was prejudicial to his right to remain silent. To that extent therefore, they were found to be unconstitutional and declared invalid. It is ironic that Kamuzu Banda, the authoritarian leader who had denied others access to the High Court, had recourse to that judicial forum when he found himself in conflict with the law and successfully challenged the very law his government had enacted.

Initially, cases challenging the constitutionality of statutes of their respective provisions were heard before a single judge of the High Court. Subsequently, the practice was amended to provide for the empanelling of a 'Constitutional Court' by the Chief Justice comprising of three judges of the High Court.<sup>59</sup> Thus subsequent cases in which provisions in statutes were invalidated emanated from the Constitutional Court. For instance, in the case of *Friday Jumbe & Humphrey Mvula v. Attorney General*,<sup>60</sup> the court invalidated Section 25B (3) of the Corrupt Practices Act ('CPA') on the ground that it violated the right to be presumed innocent and to remain silent as enshrined in Section 42 (2)(f)(iii) of the Constitution. The Constitutional Court (by a majority decision) determined that the provision could not be saved by Sections 42 (2) and (3) of the Constitution, which allowed for constitutional limitations to the rights enshrined in the same Constitution.<sup>61</sup> Section 25B (3) of the CPA created a reverse onus burden of proof for a person accused of corruption.<sup>62</sup> The decision of the Constitutional Court was a majority decision of 2-1. A detailed discussion of the case will follow in a subsequent chapter. Suffice to say at this juncture that the precedential value of the case may be limited due to the fact that the two judges who found unconstitutionality of the section substantially varied in their legal reasoning which though admirable in terms of judicial diversity, arguably introduces inconsistencies and uncertainty as to the ratio-decidenti for such a conclusion.

Another case decided by the Constitutional court is that of *Francis Kafantayeni and Others v. Attorney General*.<sup>63</sup> In that case, six prisoners who had been sentenced to death following a conviction for murder challenged the constitutionality of section 210 of the Penal Code which provided for death as a mandatory sentence in the event of a conviction for murder.

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<sup>58</sup> Ibid.

<sup>59</sup> Under S. 9 (3) of the Courts Act.

<sup>60</sup> Constitutional Cases No. 1 and 2 of 2005 (unreported).

<sup>61</sup> For a detailed discussion of the operation of the limitation clause within the Constitution see DM Chirwa, 'A Principled Approach to limitations under the Malawian Constitution,' (2007) *Malawi Law Journal* I (1):3.

<sup>62</sup> See MG Chipeta, 'The constitutionality of the reverse onus in cases of theft by public servant,' (2007) *Malawi Law Journal* I (1):33 for a commentary along similar lines in other offences.

<sup>63</sup> Constitutional Case No. 12 of 2005 (unreported).

Since Section 16 of the 1994 Constitution which provides the right to life has a proviso allowing for the imposition of a death sentence by 'a competent court of law' the Court found that indeed the Constitution permitted the death penalty in criminal proceedings 'not its mandatory imposition.'<sup>64</sup> Instead the Court held that the right to fair trial enshrined in Section 42 (2)(f) of the Constitution entailed a corresponding authorisation for judicial discretion in the determination of an appropriate sentence in the event of a conviction, and a subsequent right of appeal before a superior court against the sentence imposed by the trial court. The Court therefore observed that the imposition of a mandatory death sentence removed such discretion from both the trial court and the appellate court hence was to that extent, inconsistent with the right to fair trial.<sup>65</sup> Thus the court declared section 210 of the Penal code unconstitutional hence invalid. The Supreme Court has gone on to confirm the *Kafantayeni* case in subsequent cases.<sup>66</sup>

#### 4.2.6 Ignoring precedent from a superior court

Ignoring precedent on the part of a common law court has generally been described as JA even though distinctions are not usually made between horizontal and vertical precedent.<sup>67</sup> In this section we will restrict the discussion to incidents of ignoring vertical precedent (decisions of a superior court) since such decisions are binding upon the lower courts as distinguished from the discussion in section 4.2.1. above.

The jurisprudence from Malawian Courts on the issue of locus standi has attracted a lot of debate and controversy especially among Malawian scholars where most have argued that the courts have adopted a restrictive interpretation of the constitutional provisions on standing.<sup>68</sup> The Constitution provides for standing in two sections, namely Sections 15 (2) and 46 (2) respectively:

Any person or group of persons with sufficient interest in the protection and enforcement of rights under this Chapter shall be entitled to the assistance of the courts, the Ombusman, the Human Rights Commission and other organs of

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<sup>64</sup> Chirwa (n 46) 98

<sup>65</sup> For an interesting critique on the continuance of the death penalty under the Constitution see Chigawa Ch. 1 (n 101).

<sup>66</sup> *Twobo Jacob v. Rep*, MSCA Criminal Appeal No. 18 of 2006 (unreported); *Winston Ngulube & Michael Ngulube v. Rep*, MSCA Criminal Appeal No. 35 of 2006 (unreported); *Charles Vokhiwa v. Rep*, MSCA Criminal Appeal No. 6 of 2007 (unreported); and *Evince Namizinga & Stanley Phiri v. Rep*, MSCA Criminal Appeal No. 18 of 2007 (unreported).

<sup>67</sup> See discussion in chapter 2.

<sup>68</sup> MJ Nkhata, 'Public interest litigation and locus standi in Malawian Constitutional law,' (2008) *Malawi Law Journal* 2(2):209; F Kanyongolo, *Malawi justice sector and the rule of law: A review by AFRIMAP and Open Society Initiative for Southern Africa* (Open Society Foundation, 2006) 138-140

Government to ensure the promotion, protection and redress of grievance in respect of those rights.

And

Any person who claims that a fundamental right or freedom has been infringed or threatened is entitled-

- a. To make application to a competent court to enforce or protect such a right or freedom; and
- b. To make application to the Ombudsman or the Human Rights Commission in order to secure such assistance or advice as he or she may reasonably require.

One of the earliest jurisprudence that came from the SC on this issue arose in the case of *President of Malawi and another v. Kachere and others*.<sup>69</sup> In this case, several individuals styled as 'citizens of Malawi' brought an action in the HC<sup>70</sup> against the President and the Speaker of the National Assembly challenging the constitutionality of several of their actions carried out both in their official capacity and individually. Among the issues raised, was the issue of the appropriate procedure for amending the Constitution, the constitutionally appropriate candidates for the position of cabinet ministers (specifically whether Members of Parliament were not ineligible) and whether it was not a violation of the Constitution for the President and his cabinet not to declare their assets. The Attorney General raised preliminary objections in the matter including the issue of the standing of the 'citizens of Malawi.' The AG argued that 'citizens of Malawi' had no *locus standi* in the matters. The HC found that they had *locus standi* and the AG office appealed against that order before the SC.

Even though the 'citizens of Malawi' based their action on the provisions of the Constitution, the SC declared that the type of remedy sought (declaratory order) had its roots in English law and proceeded to apply English precedents to the dispute. As a consequence, the SC construed the issue of standing as requiring that the person(s) bringing the action must demonstrate 'a real interest which he wants to protect.' In order to qualify as 'real interest' the SC pronounced that the interest must not be 'too indirect and insubstantial [as to] give him any relief in 'any real sense.' Therefore, it was held that 'sufficient interest' is the one 'which is over and above the general interest.' To that end, the SC found that the 'citizens of Malawi' had no *locus standi* in the matter since they had 'not shown that their individual right ha[d] been infringed.' In effect, the SC construed 'sufficient interest' in a matter as requiring

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<sup>69</sup> [1995] 2 MLR 616.

<sup>70</sup> *Kachere and others v. President of Malawi and another*, Civil Cause No. 20 of 1995 (unreported).

that a claimant must demonstrate that 'he or she had suffered a particular harm as a result of alleged breaches of the Constitution.'<sup>71</sup> Many Malawian scholars have criticised this decision of the SC for setting a precedent which constitutes a restrictive approach to the interpretation of standing under the Constitution,<sup>72</sup> even though the SC recognised representative action.<sup>73</sup>

Not only scholars had problems with the restrictive approach adopted by the SC but even the HC bench; for contrary to established rules of precedent the HC (in some cases) proceeded to disregard the *Kachere* case and similar decisions.<sup>74</sup> In a jurisdiction which follows the common law doctrine of precedent that is rare and warrants close attention in this discussion. In order to show that this was not inadvertent, we will quote extensively from the judgments concerned. One such case was *Thandiwe Oleke v. Minister of Home Affairs (Controller of Immigration)*.<sup>75</sup> The HC did not even conceal its resolve to disregard SC precedent:

The matter of locus standi has been to the Supreme Court of Appeal...It is the conclusion [of the SC] that our citizens have no right under our Constitution to question fundamental human rights violations unless they have a sufficient interest in the matter that future generations may find very difficult to comprehend or justify.<sup>76</sup>

In a clear criticism of the SC's reliance on foreign jurisprudence on locus standi the judge highlighted the uniqueness of the Constitution thus:

It is fundamental therefore to consider the Constitution's wording, drawing much one can reasonably draw from what happened around constitutional change and what it brought out. A country's constitution must be understood in the wider context of the country's aspirations.<sup>77</sup>

Before proceeding with this particular case, it is worth noting that this particular judge made reference to the need for historical considerations and national aspirations when construing

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<sup>71</sup> Chirwa (n 46) 76.

<sup>72</sup> See for example, Chirwa (n 46).

<sup>73</sup> Mtegha J affirmed the position of Chatsika J that representative action must first demonstrate that the 'plaintiff ... represents the people of Malawi' and that such interest must 'not only [be]...some interest...but that, that interest is a public one.'

<sup>74</sup> See also judgment of Mtegha JA in *Attorney General v. Malawi Congress Party & Others* [1997] 2 MLR 181, 211.

<sup>75</sup> Miscellaneous Civil Application no. 73 of 1997, available at [http://www.sdn.org.mw/judiciary/civil/Thandiwe\\_Oleke\\_Min\\_Home.html](http://www.sdn.org.mw/judiciary/civil/Thandiwe_Oleke_Min_Home.html).

<sup>76</sup> Ibid. Please note: all the cases from the sdn and malawilii websites have no page numbers.

<sup>77</sup> Ibid.



the Constitution yet he ignored the peculiar historical situation of the Press Trust when construing the 'right to property' in the Constitution in an earlier decision. The judge went on to denounce the SC precedent by stating that:

Suggesting that only the person whose rights are violated has sufficient interest in the protection and enforcement of rights...is a restrictive and unjustified interpretation of Section 15 (2)...[and] is non sequitur.<sup>78</sup>

Accordingly, had they intended such a restrictive reading 'the framers would have used words like 'sufficient interest in the promotion and enforcement of "his or her", "ones or their" rights. Consequently, the judge concluded that S. 15 (2) confers standing before the court to 'any person or any group who [can] establish a sufficient interest in the protection and promotion of rights under [the] Constitution.'<sup>79</sup>

In another case, a different judge departed from the SC decisions in the *Kachere* and *Press Trust* Cases though for reasons different from the *Okeke* decision. In recognition of the implicit reliance which the SC placed on common law jurisprudence, the lawyers who argued for the case in *Registered Trustees of the Public Affairs Committee v. Attorney General & Another*<sup>80</sup> decided to highlight new developments in such jurisprudence with a view to inviting the HC to appreciate the evolving principle of standing before the common law courts. The plaintiff, a civil rights organisation, sought to challenge the constitutionality of the Act which purported to amend a constitutional provision on crossing the floor. The Attorney General yet again raised the preliminary issue of *locus standi*. Commenting on developments in the common law on standing, the HC observed that the position had significantly changed:

... at least as regards constitutional rights cases as opposed to ordinary cases...From the originally very strict common law position that *locus standi* only goes with possession, on a complainants part, of a personal grievance over and above that of the general public to a more liberal grant of standing.<sup>81</sup>

After such reflection, the judge made these observations on the previous SC precedents on standing:

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<sup>78</sup> Ibid.

<sup>79</sup> Ibid.

<sup>80</sup> Civil Cause No. 1861 of 2003, available at [http://www.sdn.org/judiciary/civil/PAC\\_vs\\_Attorney\\_General\\_Speaker.htm](http://www.sdn.org/judiciary/civil/PAC_vs_Attorney_General_Speaker.htm).

<sup>81</sup> Ibid.

I...will...definitely dare to think that if this new regime of case authorities had been put to the SC...as it has been...in this case, that Court might not in the famous *Kachere* and *Press Trust* cases have pronounced and maintained the inflexible...views they issued on *locus standi* in regard to Sections 15 (2) and 46 (2) as they did. In short... [I have] genuine reasonable doubts...whether our SC would stick to its current position on the issue...when fully exposed to the impact of these authorities.<sup>82</sup>

Thereafter the judge dropped the subtle approach of criticising the methodology adopted by the SC in its interpretation of the Constitution and became more overt in his dissent:

In Malawi, it is my view...that the Constitution is far from [being] ambiguous in its prescriptions on matters of standing in relation to presentation of complaints of violations of fundamental rights under it. It speaks so directly, and I believe without equivocation, that I tend to think that it is the style in which our Courts [read Supreme Court] have approached it that have complicated things. It strikes me that instead of being patient and sincerely listening to its direct message, Courts have rushed to put on old common law spectacles, and so to dig up ancient case law, before getting convinced that they can even begin to understand the document before them. This, with due respect, is what has tended to cloud the otherwise clear document and I think it is a fallacy....I find it difficult how in the *Kachere* and *Press Trust* cases [the SC] could have ended up with a narrow and legalistic, if not also pedantic, version of *locus standi* ...<sup>83</sup>

And in a style reminiscent of a superior court setting aside lower court decisions, the judge clarified how the SC had erred in its legal reasoning:

To begin with...the court in its interpretation...clung so unduly hard to strict old common law position and did not have a chance to note that even that position has somewhat changed. Secondly, it appears to me that no real effort was employed by the SC to first try and understand the plain wording of the provisions for what they truly stood for. Thirdly, it appears to me that undue attention was given to foreign precedents, which were not after all

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<sup>82</sup> Ibid, (emphasis original).

<sup>83</sup> Ibid.

directly interpreting this Constitution, to impose on the provisions under interpretation values [that] this Constitution [does not] propound.<sup>84</sup>

He thus went on to agree with the HC decision in the *Okeke* case discussed earlier and concluded that:

...with the greatest respect to my Superior Court...I have opted to differ from those two authorities as I believe them to harbour some serious faults.<sup>85</sup>

The fact that judges in the HC had ignored (distinguished?) binding precedent was not lost on the SC. The apex court used a subsequent decision of *Civil Liberties Committee (CILIC) v. Ministry of Justice & Registrar General*<sup>86</sup> to reassert its views in no uncertain terms. The plaintiffs in this case are a registered human rights organisation in Malawi; they were challenging the decision of the Registrar General (Ministry of Justice) to cancel the registration of an organisation called Chikonzero Communications and to ban its publication, the National Agenda. The HC (the same judge who had decided the *Okeke* case), dismissed the preliminary objections of the defendants which included that *CILIC* had no *locus standi* in the matter and granted *CILIC* leave for judicial review. The defendants appealed to the SC. The SC disagreed with the HC and held that *CILIC* had no *locus standi*, observing:

It may be pertinent at this juncture to comment on a recent HC decision in which [the court] deliberately refused to follow local case authorities...bearing on issues of *locus standi*...The first observation we wish to make is that it is unclear what standard for *locus standi* was the learned judge...advocating. We do not wish to believe that because of the wording of section 46 (2) of the Constitution it can be said that the Malawi Constitution totally removed the requirement for a plaintiff to establish standing before commencing a suit...We take the view that [the HC]'s interpretation of section 46 (2) of the Constitution in the *Public Affairs Committee* case was too simplistic and casual that it could not be correct. By destroying the concept of *locus standi* and rendering it totally irrelevant the learned judge's construction of the section produced a result which, we strongly believe, was not intended by the distinguished women and men who drafted our Constitution.<sup>87</sup>

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<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

<sup>86</sup> MSCA Civil Appeal No. 12 of 1999 (judgment delivered in 2004), available at [http://www.sdnw.org.mw/judiciary/civil/cilic\\_Min\\_Justice.htm](http://www.sdnw.org.mw/judiciary/civil/cilic_Min_Justice.htm).

<sup>87</sup> Ibid.

In this disagreement between the HC and SC Chirwa points out that both courts have erred in some respects.<sup>88</sup> The SC's position errs for leaving no room for representative action or actions in the purely general public interest.<sup>89</sup> For instance, where it would not be reasonably possible for any specific individual to adduce evidence of having 'suffered a particular harm as a result of alleged breaches of the Constitution', such as when challenging the constitutionality of proposed constitutional amendments.<sup>90</sup> The HC on the other hand has erred in that it has incorrectly presented the position as an unconditional opening for any person or organisation, to 'claim standing in every case disclosing a violation or threat of violation of a human right or other constitutional provision.'<sup>91</sup> Regardless of the patent error on the part of the HC, if as some scholars argue that disregarding superior court precedents is JA, then in that sense the HC has practised JA in the two cases discussed.

### 4.3 Appreciating the problem

The preceding discussions show that courts in Malawi have made decisions in a manner described by scholars in other jurisdictions as JA.

#### 4.3.1 Inconsistencies, contradictions and other incompatibilities

Furthermore the decisions also show inconsistencies, contradictions and/or possible injustice of JA similar to those highlighted in chapter 2 of this thesis. For instance, even though the HC (*Okeke* and *PAC* cases) ignored vertical precedent (JA) to expand the category of individuals and organisations with standing to protect and promote fundamental human rights, they did so by mostly invoking what they considered the plain meaning of the terms used in the constitution (legal positivism) and the intention of the drafters of the Constitution (originalism). Thus, while there appears to be a general presumption among most scholars who discuss JA in positive terms that JA requires a rejection of legal positivism and originalism, both the *Okeke* and *PAC* cases rebut that presumption; which rebuttal is consistent with the analyses in chapter 2 of this thesis. Similarly, often, it is adherence to 'legal positivism'<sup>92</sup> that is 'held responsible for ... the insensitivity of judges to the ... social realities' that should inform the just resolution of disputes in their courts;<sup>93</sup> it is thus presumed that judges who are sensitive to those social realities are activist judges.<sup>94</sup>

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<sup>88</sup> Chirwa (n 46) 75 – 76.

<sup>89</sup> Ibid.

<sup>90</sup> Ibid.

<sup>91</sup> Ibid.

<sup>92</sup> Generally understood as the judicial approach that emphasises adherence to the language and terms of 'the law previously laid down by other decision-makers' as opposed to attaching meaning to it that may have been prior to the relevant decision, 'unsuspected.' See TD Campbell, 'Preface' in T Campbell, and J Goldsworthy, *Judicial Power, Democracy and Legal Positivism* (Dartmouth, 2000) xiii.

<sup>93</sup> TD Campbell, 'Democratic Aspects of Ethical Positivism' in Campbell & Goldsworthy (ibid) 3.

<sup>94</sup> See discussion in chapter 2.

However, as a detailed discussion in a subsequent chapter will show, the HC decision in the *Press Trust I* though fitting that description of JA proceeded from a point of insensitivity to the socio-historical realities of the Press Trust that should have been taken into account by the judge in order to reach a just resolution of the case.<sup>95</sup>

In addition, the decision denounced as expressing a narrow view of the right to property for attaching importance to the beneficial interest, the *Press Trust II*, is the very decision that offers hope to many rural Malawians who only have a beneficial interest to customary land which has under liberal conceptions of land rights been considered insecure and not entitled to the same 'constitutional protection as ownership of registered or private land'.<sup>96</sup> Thus *Press Trust II* introduces another contradiction in that although the decision has been described as narrow and reserved (judicial restraint) in its approach to the interpretation of a constitutional right to property,<sup>97</sup> it nevertheless displays a peculiar sensitivity to the socio-historical realities within Malawi, a phenomenon which is principally associated with JA judges. This analysis points to the conclusion that it must not be presumed that a liberal interpretation of rights would necessarily lead to a just outcome in all circumstances. Further, it must also not be presumed that JA on one hand, and legal positivism and originalism on the other are always mutually exclusive and incompatible.

#### 4.3.2 Judicial Activism: A Matter of form over substance?

The preceding discussion raises the question whether, in general, discourse on JA does not exhort its form over its substance. In 1992, the Chief Justice of India, Justice Bhagwati spoke in glowing terms about JA by the Indian Supreme Court.<sup>98</sup> As an example, he discussed the JA of the India SC on the development of public interest litigation, he expressed pride in how the Indian SC 'started wielding judicial power in a manner unprecedented in its history' to bring about a revolution in the judicial process' and innovatively developed the 'strategy of Public Interest Litigation [PIL]'.<sup>99</sup> According to him, the purpose of the JA on PIL was to make 'human rights meaningful for the large masses of people in the country and making it possible for them to realise their social and economic

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<sup>95</sup> See ZJV Ntaba, 'Constitutional Interpretation: Judicial Activism or Restraint' (2008) 10 *European Journal of Law Reform* 251, 254 (applauding the Judge for protecting the right to property and offering 'a liberal view' and criticising the Supreme Court decision in *Press Trust II* for taking a 'reserved view) and *contrast* with Chirwa (n 46).

<sup>96</sup> See Chirwa (n 46) 286 – 287, on how the importance attached to beneficial interest in *Press Trust II* established a precedent that enabled the HC to 'elevate ownership of customary land to the same [status] ... as [that] of registered or private land'.

<sup>97</sup> See for instance Ntaba (n 95) 254.

<sup>98</sup> Justice PN Bhagwati, 'The Role of the Judiciary in the Democratic Process: Balancing Activism and Judicial Restraint' (1992) 18 *Commonwealth Law Bulletin* 1262 – 1267.

<sup>99</sup> *Ibid* 1266.

entitlements.<sup>100</sup> And in response to those who argued that JA could lead to ‘judicial arbitrariness culminating in judicial tyranny’ he dismissed those fears as baseless since there were ‘inbuilt restraints which keep the judges from straying away from their proper judicial function.’<sup>101</sup> Thus he defined JA in terms of the judiciary ‘appropriat[ing] increased power [for itself] ... as well as ... creati[ng] new concepts, *irrespective of the purpose which they serve*.’<sup>102</sup> Eleven years later, in 2003, as discussed in chapter 2, research shows that though ‘court induced’ PIL has created work for opportunistic human rights activists in India, as far as people who should have benefited are concerned, JA in India has just shown them that judicial power manifesting itself as JA is itself a form of state power that can be used to oppress and marginalize people.<sup>103</sup> This has occurred to such an extent that the masses have since cried out to the Indian SC ‘Physician heal thyself’,<sup>104</sup> and others have stated that the Indian SC has shaken the foundations of ‘the 1950 Indian Constitution.’<sup>105</sup> It can be proposed in this context that may be Justice Bhagwati’s speech had focused on the ‘form’ taken by JA in India, whereas the subsequent research a decade later has disclosed the real ‘substance’ of JA in that jurisdiction. In this sense therefore, even though in legal terms ‘form’ often pertains to the procedural aspects of the law whereas ‘substance’ often pertains to the substantive content of laws this section will deliberately adopt a simplistic definition of the terms. Consequently, ‘form’ will be taken to refer to ‘what something looks like, its external characteristics, its packaging’ and ‘substance’ will be taken to refer to ‘what it actually is, its essentials, what’s inside’ and what purpose it actually serves in the end.<sup>106</sup>

So, using the Indian example where JA is defined as the appropriation of extensive powers by the judiciary or the creation of new concepts, an analytical approach that emphasises form will only consider whether it can be observed that the judiciary has appropriated for itself such extensive powers and has developed any new legal concepts. An approach that emphasises the substance however will focus on the content of the decisions and the decision-making process using the applicable Constitution as a basis for such analysis, without neglecting the social, economic and/or historical circumstances of the relevant society.

In this context, it is submitted that most discourse about JA in emerging democracies tends to exalt the form over the substance. That is, whereas there appears to be a general

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<sup>100</sup> Ibid 1267.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid 1264.

<sup>103</sup> Baxi Ch. 1 (n 43) xvi – xvii; see also Ch. 2 (n 41) 34, 40 – 41.

<sup>104</sup> Ibid (Baxi) xvi.

<sup>105</sup> Dickson Ch. 2 (n 63) 12.

<sup>106</sup> Definition adopted from Debra Snider’s essay on ‘Form and Substance are not Synonyms’, available at [http://debrasnider.com/site/epage/46217\\_639.htm](http://debrasnider.com/site/epage/46217_639.htm).

agreement in developed countries that the term JA is a term a judge in those nations would hate to be attached to them,<sup>107</sup> it appears that articles pertaining to JA in emerging democracies tend to exhort judges in those nations to practice JA, even though the definitions in those calls are as varied as they are inconsistent.<sup>108</sup> It is appreciated that these calls are often made in the face of general abuse of power by the legislative and executive arms leading the population/scholars to look to the judiciary to remedy/check those abuses. This thesis is of the view that as noble as that may be, unless care is taken to interrogate the substance of JA as it currently stands, Malawi could end up with the Indian situation where the population has become cynical towards the court due to the perception that even the Indian SC has become part of the problem for abusing its power.<sup>109</sup>

It is with the aim of contributing towards avoiding the Indian scenario that this section is pointing out that the calls for JA appear to proceed on a basis that might be blind to the reality that judicial power is itself political power and is liable to abuse. By exalting form over substance, this thesis argues that the scholars are repeating the same mistake made by proponents of liberal democracy in Africa as discussed in chapter 3. In such a context the 'one-size-fits-all' approach to JA discourse could serve to undermine some constitutional frameworks; and in the case of regime change constitutions, such jurisprudence could undo the work that such a document aimed to accomplish in the first place.

Thus while some countries have 'independence constitutions',<sup>110</sup> others like Malawi have 'regime change constitutions'<sup>111</sup> instead. By its very nature, a regime change constitution not only aims to mark a new beginning, but seeks to break from the past hence often adopts a 'unique constitution' which represents the unique circumstances of the relevant country.<sup>112</sup> The uniqueness of the constitution emanates from the fact that it is not built on a pre-existing model, but rather borrows creatively from different jurisdictions in order to produce a document capturing the concerned country's peculiarities.<sup>113</sup> For example, a regime change constitution could specify certain values intending them to be taken literally, as per their plain, ordinary or natural meaning. However discourse on JA tends to denounce the constitutional interpretation methodology that emphasises plain, ordinary or natural meaning

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<sup>107</sup> See discussion in chapter 2 on USA, and Australia just as examples.

<sup>108</sup> See for example for calls to JA in Nigeria portraying JA only in glowing terms, BO Okere, 'Judicial Activism or Passivity in Interpreting the Nigerian Constitution' (1987) 36 *International and Comparative Law Quarterly* 788- 816.

<sup>109</sup> See n 103 in chapter 2 of this thesis.

<sup>110</sup> See D Oliver and C Fusaro, 'Changing Constitutions: Comparative Analysis' in Oliver and Fusaro Ch. 1 (n 2) 382- Constitutions that were adopted at the time that the concerned country attained independence.

<sup>111</sup> Ibid 383 – constitutions adopted at a time of 'internal regime change'.

<sup>112</sup> For example, RSA when it sought to break away from its apartheid past, see Ibid 383.

<sup>113</sup> Ibid 383.

of the terms of the constitution as out-dated and having no place in modern constitutional jurisprudence (a phenomenon otherwise known as ‘legal positivism’).<sup>114</sup> This characterisation of JA thus creates the incorrect impression that legal positivism can never lead to justice and/or promote constitutionalism. An analysis of some of the Malawian cases discussed above could help to clarify this point further.

Table 1 below intends to facilitate that analysis by providing a synopsis of the attributes attached to JA judges in comparison to those considered as practising ‘judicial passivity’, otherwise described as judicial conservatism or restraint.

**Table 1**<sup>115</sup>

<b>Type of Issue/Category</b>	<b>What has been labelled as Judicial ‘Activism’</b>	<b>What has been labelled as Judicial ‘Passivity’/‘Conservatism’/‘Restraint’</b>
Constitutional Interpretive Methodology <sup>116</sup>	<ul style="list-style-type: none"> <li>- Liberal</li> <li>- Purposive</li> <li>- Conceptual/contextual</li> </ul>	<ul style="list-style-type: none"> <li>- Conservative (more appropriately ‘non-liberal’)<sup>117</sup></li> <li>- Ordinary, plain or natural meaning</li> <li>- Originalism, legal positivism</li> </ul>
Law-making	<ul style="list-style-type: none"> <li>- makes law</li> <li>- invalidates legislation</li> </ul>	<ul style="list-style-type: none"> <li>- do not make law (leaves that to legislatures)</li> <li>- declines to invalidate legislation</li> </ul>
Policy choices	<ul style="list-style-type: none"> <li>- where appropriate willing to adjudicate on matters of policy</li> </ul>	<ul style="list-style-type: none"> <li>- unwilling to adjudicate on matters of policy since considers questions of policy strictly the ambit of other branches of government not the judiciary</li> </ul>
Political disputes	<ul style="list-style-type: none"> <li>- entertains political decisions in their courts</li> </ul>	<ul style="list-style-type: none"> <li>- do not entertain political decisions in their courts</li> </ul>
Creativity	<ul style="list-style-type: none"> <li>- creative/innovative (develops new concepts)</li> </ul>	<ul style="list-style-type: none"> <li>- not creative/innovative (unwilling to develop new concepts)</li> </ul>
Sensitivity to social realities	<ul style="list-style-type: none"> <li>- are sensitive to social realities (concerns themselves with the ends of the law)</li> </ul>	<ul style="list-style-type: none"> <li>- are not sensitive to social realities (do not concern themselves with the ends of the law)</li> </ul>

Using the attributes outlined in Table 1 above to analyse some of the Malawian cases discussed earlier would illuminate the inadequacy of using form to define JA. For instance,

<sup>114</sup> See for instance Thomas Ch. 2 (n 14).

<sup>115</sup> Though drawing from the definitions and manifestations of JA across various jurisdictions as discussed in chapter 2, this table is original to this thesis.

<sup>116</sup> The examples of Constitutional interpretive methodologies given are not exhaustive, but they illustrate the error of strict categorisation common in JA discourse.

<sup>117</sup> To explain that the labels ‘liberal’ and ‘conservative’ raise complex questions of definitions in jurisdictions where the political ideologies do not render themselves amenable to such strict categorisation such as in Malawi.



the *Press Trust I* has been applauded by many for its adoption of a liberal conception of the right to property as well as for 'representing the right approach [when] construing a constitutional provision.'<sup>118</sup> To that extent, the *Press Trust I* would fit into the JA form as far as constitutional interpretive methodology is concerned. However, the *Press Trust I* as already highlighted in this chapter and by other Malawian scholars, was insensitive to the socio-historical realities surrounding the establishment and growth of the Press Trust itself, such that had it been allowed to stand, it would have occasioned considerable injustice. To that extent, the *Press Trust I* fails the 'form' of JA in the sensitivity to social realities category and would need to be categorised as 'legal positivism'. While the converse is true of the *Press Trust II*; it fits the 'form' of judicial passivity/conservatism in the constitutional interpretive methodology category but fits the form of JA in the sensitivity to social realities category. What lessons can be drawn from this simple illustration? Should it be said that the judges displayed both JA and judicial restraint? It would be logical if one was to pay attention to the 'form' to state that indeed the lesson to be drawn is that some cases will represent a fusion of the two. However, it is argued that the more pertinent lesson to learn is that focusing on the 'form' when discussing JA can not only be very misleading, but may actually result in the promotion of injustice if such forms were allowed to carry the day. For instance, a liberal conception of the right to property has led to a failure on the part of the HC which disregarded the precedent set<sup>119</sup> in *Press Trust I* to confer constitutional protection to the 'right to property' of the beneficiaries' customary land.<sup>120</sup> Such a denial prejudices the rights of many rural Malawians since most of the rural land is under customary ownership. Consequently, though the HC decision qualifies as JA since it used a liberal approach to constitutional interpretive methodology as illustrated in Table 1, in reality, such jurisprudence would have perpetrated the same injustice that was occasioned on rural Malawians by the colonialists.

To illustrate the point further consider the case described above as an example of JA (in the sense of ignoring precedent of a superior court): when it came to interpretive methodology the judge impliedly propagated a fusion of the legal positivism (literalism), originalism and purposive constitutional methodologies when he stated among other things that:

It is the court's duty to interpret this Constitution understanding it ascribes to itself a potency and uniqueness not to be overshadowed by general considerations in other constitutional arrangements. It is fundamental

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<sup>118</sup> See Ntaba (94) 254.

<sup>119</sup> As earlier discussed, ignoring precedent is itself another 'form' of JA.

<sup>120</sup> *Henry Mbirintengerenji v. Traditional Authority Nsomba and Others*, Civil Cause No. 101 of 2007; see also discussion in this context by Chirwa (n 44) 287.

therefore to consider the Constitution's wording, drawing much one can reasonably draw from what happened around constitutional change and what it brought out. A country's constitution must be understood in the wider context of the country's aspirations. ... The words actually used are 'sufficient interest in the protection and enforcement of rights'. ... If they intended the interest to be in the protection and enforcement of' one's rights, the framers would have used words like 'sufficient interest in the promotion and enforcement of "his or her", "ones or their" rights'.<sup>121</sup>

Such a fusion of interpretive methodologies leads to a situation where it would be difficult to cast Malawian cases into JA definitions from other jurisdictions which presuppose the incompatibility of legal positivism (literalism) and originalism with the very notion of JA.

#### **4.4 Conclusion**

The discussion points to the conclusion that the 'one-size-fits-all' approach to calls for JA in a country like Malawi based on pre-existing definitions from other countries with different constitutional frameworks must be abandoned. Instead there must be a 'substantive' approach to JA reflecting the uniqueness of the relevant constitutional framework; recognising the social, historical and economic circumstances of the jurisdiction. In actual fact, the uniqueness of the Malawian Constitution demands that the courts develop an equally unique and truly indigenous constitutional jurisprudence, and constitutional interpretive methodologies suited to the Malawian context. This may actually necessitate the adoption of an unprecedented fusion of constitutional interpretive methodologies including those described elsewhere as out-dated such as legal positivism, originalism etc. in order to achieve justice.

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<sup>121</sup> See n 75 in this chapter.

## Chapter 5

### Judicial (In)Activism In Criminal Law

#### 5.1 Introduction

The 1994 Constitution expressly included the Bill of Rights, effectively placing it at its centre.<sup>1</sup> As a consequence, post 1994 has seen a surge in Constitutional cases where the applicants sought to protect their rights as enshrined in the Constitution.<sup>2</sup> This development has encompassed rights and freedoms of significance to criminal law such as presumption of innocence and personal liberty. The developments appear to have led some scholars to assert that the 1966 Malawi Constitution is a document which 'did not guarantee human rights.'<sup>3</sup> It will be argued herein that such a description does not represent the true legal position. Within its second schedule the 1966 Constitution contained Section 2 (1)(iii) stipulating that '...Malawi shall continue to recognize the sanctity of the personal liberties enshrined in the United Nations Declaration of Human Rights...' In essence, this provision the UDHR part of the law of the nation of Malawi.<sup>4</sup> It was now the duty of the courts to protect 'fundamental human rights' under that provision.<sup>5</sup>

The earliest case to discuss that provision was *Mwakawanga and Seven Others v. The Republic*.<sup>6</sup> The appellants were charged with preparing or conspiring to overthrow the government of Malawi by force or other unlawful means. The evidence before the court was that the appellants had met in a refugee camp in Tanzania with Malawian ex-ministers who told them of the plan to overthrow the Malawi government, to which they agreed. The appellants were convicted by the HC of treason and they appealed to the SC. Among other grounds of appeal it was alleged that the trial court had erred in not allowing Counsel for the defence to question the fitness of assessors to sit in the trial. However, none of the grounds of appeal directly referred to the rights of the appellants under the 1966 Constitution. Interestingly, Counsel for the State among other things argued that because the appellants had breached the trust of the Republic to which they owed allegiance they had thereby forfeited the right to claim any protection under its laws. In its judgment the SC held that in keeping with S. 2 (1)(iii) of the 1966 Constitution even a foreigner who 'violates allegiance he

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<sup>1</sup> Chirwa Ch. 1 (n 143) 3.

<sup>2</sup> For example - *MCP and Others v. Attorney General* [1996] MLR 244 and *Mponda Mkandawire v. Attorney General* Miscellaneous Civil Cause No. 49 of 1996 (Unreported) among others.

<sup>3</sup> Chirwa, Patel and Kanyongolo Ch. 1 (n 145) 3; see also generally, Nkhata Ch. 1 (n 2).

<sup>4</sup> The Supreme Court of Appeal in Malawi subsequently in the case of *Chakufwa Chihana v. The Republic*, M.S.C.A. Criminal Appeal No. 9 of 1993 expressly stated that this provision incorporated the UDHR to be part of the Laws of Malawi.

<sup>5</sup> Ibid.

<sup>6</sup> (1968 -70) ALR MAL 14.

owes to the State,' is entitled to 'the benefit of due process of law and his person and property continue to be protected by law.'<sup>7</sup>

Even though it is beyond dispute that the Court in the *Mwakawanga* case applied S. 2(1)(iii) of the 1966 Constitution, it may be debatable which legal authority the SC applied to afford equal protection to foreigners since the court did not expressly state which provision of the UDHR it was enforcing. This thesis submits that despite that omission, it was the provision on equal protection before the law. Thus the Court implicitly gave effect to article 7 of the UDHR which provides that 'All are equal before the law and are entitled without any discrimination to equal protection of the law...' Thus by virtue of a provision in the 1966 Constitution, the right to equal protection before the law was enforced in favour of Mwakawanga and others.

Further, albeit the *Mwakawanga* case being the only reported Malawian case that expressly applied S. 2 (1)(iii) between 1966 to 1989,<sup>8</sup> there are other decisions where other rights were enforced, although yet again the judges did not cite the particular law they were construing. For example, in *Saidi v. Republic*<sup>9</sup> the applicant was arrested on a charge of theft by servant and initially kept in custody for five weeks before being brought before a court. Upon being brought before the magistrate for plea taking, he applied for bail which was denied. Before trial could commence, the case was adjourned on several occasions at the instance of the prosecution team and on all those occasions' applications for bail were denied by the magistrate. The case was later referred to the HC for trial and the applicant once again sought bail pending trial. The HC held that 'every citizen has an inherent right to the freedom of his movement [and] the right can only be interfered with after certain matters have been proven.'<sup>10</sup> Further, even though the commission of an offence merited the limitation of the freedom of movement, the presumption of innocence called for a continuation of such freedoms provided certain conditions were met.<sup>11</sup>

It cannot be accurate therefore to assert categorically that the 1966 Constitution did not guarantee human rights. Nevertheless, a pertinent question arises – to what extent are the scholarly assertions that the 1966 did not guarantee human rights a reflection on the role of the Judiciary in the interpretation and enforcement of S. 2 (1) (iii) of that Constitution? Therefore, given such confusion from the commentators, it is imperative for judges to

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<sup>7</sup> Ibid 37.

<sup>8</sup> A Milner eds. *The African Law Reports Malawi Series: Index & Tables Vol 1 – 6* (Law Report International, 1994) 302; A Milner eds *The African Law Reports Malawi Series: Index & Tables Vol 7 –12* (Law Report International, 1994) 231.

<sup>9</sup> (1975 -77) 8 MRL 113.

<sup>10</sup> Ibid 115.

<sup>11</sup> Ibid.

appreciate that their approach to constitutional adjudication in any one particular case has far reaching ramifications. That notwithstanding, it is equally imperative for academics/scholars to accurately diagnose the problem if effective solutions are to be identified. In chapter 1, this thesis discussed how scholars have identified problems in the current constitutional praxis and called on the judiciary to practice JA in order to remedy the constitutionalism deficiency. However, in chapter 4, this thesis demonstrated how (using the comparative framework developed in chapter 2) it is inaccurate to assert that the judiciary in Malawi has not practised JA: it is therefore proposed that the source of the problem might lie elsewhere.

In order to highlight where the problem emanates from, this chapter will analyse the development of constitutional jurisprudence in the context of criminal law. The chapter is divided into three main sections. This first section has discussed the jurisprudence prior to the constitutional reforms of 1994 to show that in some way the lack of robust human-rights-orientated jurisprudence has more to do with the judicial approach the political realities than the law itself. Building on that theme, the second section focuses on one particular case which epitomizes that proposition. The significance of that decision lies in its precipitous influence on political transition in Malawi; but more significantly using the same legal instrument which had hitherto been considered as not protecting fundamental human rights the SC decided in the Chihana trial that the 1966 Constitution in fact incorporated the UDHR. The discussion further highlights the application of foreign case law and questions the tools with which such comparable jurisprudence can properly be exploited to enrich and not inhibit or subvert Malawi's peculiar jurisprudence. The third section zeroes in on the court's engagement with the fundamental tenet of criminal justice, namely the presumption of innocence within the context of our current constitution. The defining theme being how much there is any discernible principle (or set of principles) which the courts have or are developing in seeking to interpret the more patently benign human rights guarantees. The lingering question being whether there is any philosophical framework that takes full account of the democratic imperative which informs the entire reconstituting project embodied in the 1994 Constitution.

## **5.2 Pre-1994 Cases: The Chakufwa Chihana Case as a Turning Point?**

The lack of judicial elucidation on the rights espoused in S. 2 (1)(iii) of the 1966 Constitution in the cases of *Saidi* and *Mwakawanga* discussed earlier is arguably hard to account for in a jurisdiction exercising common law traditions as Malawi. As per Justice Kirby, the obligation on the common law judge to furnish reasoned decisions by providing 'legal reasoning'

attached to 'legal authority,' is one of the fundamental tenets of the common law.<sup>12</sup> It is postulated that the phenomenon (of lack of elucidation) reflects the influence of legal training on the judge's reasoning.<sup>13</sup> As has been discussed in previous chapters, the parliamentary supremacy model of the United Kingdom legal system has heavily impinged on Constitutional jurisprudence in Malawi Courts. However, as the Malawi political landscape opened up, the legal reasoning of the Courts appears to have been responding positively displaying greater boldness.<sup>14</sup>

Arguably, the most significant pre-1994 case is *The Republic v. Chakufwa Tom Chihana*.<sup>15</sup> That case marked a turning point in constitutional jurisprudence emanating from Malawi Courts; paradoxically it could also be the reason why scholars assert that the 1966 Constitution failed to guarantee human rights. The case came before the HC in the first instance and went on appeal to the SC. The case is significant because of its chronological place in the political transition of Malawi. It has been proposed that at the time the societal demand was for more openness which in turn meant that the SC felt emboldened to take a more rights based approach (albeit very minimal) in criminal law adjudication.<sup>16</sup> On the other hand, the return of a guilty verdict by the HC for sedition despite making a finding that Chihana's publications were factually true and made in the context of discussions on democracy could be the reason why scholars have concluded that the 1966 Constitution did not guarantee human rights.

Mr Chakufwa Chihana, a Malawian Trade Unionist, was the face of the transition movement in the early 1990s. In March 1992 he was the keynote speaker at a conference in Zambia on Multi-Party Democracy. Whilst there he made a press statement and subsequently gave four interviews on the BBC about Malawi's state of democracy. Upon his return home he was apprehended at the airport in April 1992 and subsequently charged.

### **The High Court Determination**

In the HC, Chihana faced three counts: (1) importing seditious publications; (2) unlawful possession of seditious publications; and (3) doing an act likely to be prejudicial to public order. The main issues that the court had to address were – (1) whether the materials were seditious, (2) whether the statements made by Chihana fell within the defences provided under S. 50 of the Penal Code, (3) whether the relevant provisions of the Penal Code were inconsistent with S. 2 of the 1966 Constitution. The charges were brought under Section 51

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<sup>12</sup> Kirby Ch. 2 (n 4) 18.

<sup>13</sup> Subsequent research by Hansen supports this assertion, see Hansen Ch. 1 (n 131).

<sup>14</sup> See generally -K.M. Phiri & K.R. Ross eds. *Democratization in Malawi: A Stocktaking* (CLAIM, 1998)

<sup>15</sup> Criminal Case No. 1 of 1992 (unreported)

<sup>16</sup> See (n 11).

as read with Section 50 of the Penal Code; the law, among others, defined as seditious any intention to incite contempt or excite disaffection against the President or government. Significantly the law stated that ‘an act, speech or publication is not seditious by reason only that it intends to show that the President has been misled or mistaken in any of his measures; or to point out errors or defects in the Government or Constitution or in legislation or in the administration of justice with a view to the remedying of such errors or defects.’

The HC concluded that the material objects of the case were documents carried by Mr Chihana. Interestingly Chihana’s assertions have subsequently have been well documented.<sup>17</sup> S. 2 (1)(iii) of the 1966 Constitution made article 19 of the UDHR applicable in Malawi. That right however is limited under article 29 (2) and (3) which provides that:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Despite the defendant’s argument that the offence charged was inconsistent with the 1966 Constitution ‘which guaranteed various rights and freedoms’ the HC made no attempt to discuss the implications of the UDHR provisions on the case. The HC never addressed its mind to questions such as the essential content of the right to freedom of expression and opinion and its justifiable limitations. As a result, it never discussed the seditious-limitation and its compatibility with S. 2(2) of the 1966 Constitution which allowed limitations ‘to the extent that the law in question is reasonably required in the interests of defence, public safety, public order or the national economy.’

In fact, the HC applied foreign case authorities inconsistently. For example, when the defence cited the English case of *R. v. Bow Street Magistrate’s Court, exparte Choudhury*<sup>18</sup> to propose the failure of the charge for lack of proof of intention to incite violence, the HC distinguished it on the basis that in England sedition is a common law offence whilst in Malawi it is statutory. Curiously, the court invoked English authorities to conclude that truthfulness of Chihana’s statements was ‘immaterial in so far as guilt is concerned.’<sup>19</sup> The HC never explained why one case was inapplicable and another applicable when both discussed the common law offence of sedition and not a statutory one. In addition, the HC

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<sup>17</sup> H Englund, *A Democracy of Chameleons: Politics and Culture in New Malawi* (Nordic Africa Institute, 2002)

<sup>18</sup> (1990) 91 Cr. App. R. 393.

<sup>19</sup> Citing *R v. Aldred* (1909) 22 Cox’s CC 1 and *R v. Lemmon* (1979) AC 617.

never discussed whether S. 2 (1)(iii) of the 1966 Constitution impacted on the applicability of such common law decisions in the Malawian scenario. That is, whether the provision could be a ground for distinguishing English cases.

Further, the HC invoked the Ghana case of *Wallace Johnson v. The King*<sup>20</sup> on the understanding that the Ghanaian Criminal Code was ‘mutatis mutandis, in pari materia with the provisions of Sections 50 and 51 of the Malawi Penal Code.’ However, the court did not consider whether the applicable Ghanaian Constitution contained a provision comparable to S. 2 (1)(iii) of the 1966 Constitution of Malawi. If not, then arguably the Wallace decision should have been distinguished for not bearing upon the limitations espoused under the Malawian law. Instead, it was invoked to conclude that lack of intention to incite violence was immaterial as far as guilt was concerned.

Similarly, the HC cited Malawian cases as binding authority for the proposition that violence was immaterial. However, the two decisions used, namely *Banda v. Regina*<sup>21</sup> and *Chipembere v. Republic*<sup>22</sup> were decided prior to the 1966 Constitution which made the UDHR part of the law of Malawi. Arguably, had the HC addressed its mind to that issue, it might have concluded that Chihana’s statements fell within the defences created under S. 50 of the Penal Code. For instance, the defence of pointing ‘out errors or defects in the Government or Constitution or in legislation or in the administration of justice with a view to the remedying of such errors or defects;’ would arguably include all the publications that Chihana produced highlighting the abuses of human rights and calling on Malawians to demand democracy. However, the court disqualified these statements from that particular defence on the basis that they were full of ‘mud-throwing and condemnation.’ The HC then convicted Chihana of importing seditious publications and being found in possession of seditious documents and acquitted him on the charge of doing an act likely to be prejudicial to public order.

### **The Supreme Court Determination**

Chihana appealed his conviction. The main argument on appeal ‘was that criticism of Government which calls for peaceful and democratic change cannot be contrary to the law of Malawi,’ especially in view of S. 2 (1)(iii) of the 1966 Constitution. In marked contrast to the approach of the HC, the SC concluded that ‘the UN UDHR is part of the law of Malawi and that the freedoms which that Declaration guarantees must be respected and can be

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<sup>20</sup> (1940) AC 231.

<sup>21</sup> (1961 -63) ALR Mal 11

<sup>22</sup> (1961 -63) ALR Mal 83



enforced in our Courts.’ Arguably, that was a bold step in the right direction and others have ascribed it to the changing political landscape.<sup>23</sup>

Nevertheless, the SC also failed to engage in an extensive elaboration of S. 2 (1)(iii) of the 1966 Constitution in relation to article 19 of the UDHR. The SC simply applied and distinguished several foreign cases in the process of determining whether or not S. 50 of the Penal Code was a justifiable limitation to the liberties enshrined in the UDHR. The cases were from the USA, Bermuda and Antigua, Nigeria and the UK. The SC held that S. 50 and S. 51 of the Penal Code were not inconsistent with the Malawi Constitution. In determining whether Chihana had indeed committed the offences he was accused of, the SC used a combination of the literal interpretation, history of the legislation, purpose and the mischief method of statutory interpretation.<sup>24</sup> Interestingly, in response to argument from defence Counsel that the court should disregard a particular decision for being decided during colonialism – presumably when white justices were more prone to convict Africans of sedition – the SC declined saying ‘*it is a species of judicial activism which must be resisted.*’<sup>25</sup>

The SC did not elaborate what it meant by judicial activism and which type (if any) would be acceptable. The court simply proceeded to hold that though true Chihana’s utterances aimed at inflaming or inciting ‘feelings of hatred and disloyalty ... against the person of the President’ hence were seditious.

The manner in which both courts, 1) omitted to analyse the contents of the relevant rights protected under S. 2 (2)(iii) of the 1966 Constitution; 2) applied foreign case law inconsistently- adopting decisions favouring the prosecution and distinguishing those exculpating the defendant; and 3) excluded the statutory defence of democratic justification under S. 50 of the Penal Code because they took great exception to the manner in which Chihana had spoken against Dr. Banda,<sup>26</sup> highlights the persisting disagreement among scholars on whether excessive subservience/deference to the Executive is judicial restraint or judicial activism.<sup>27</sup>

As discussed in chapter 2, some scholars propose that it is more accurate to describe excessive subservience to the Executive as JA instead of judicial restraint since it influences the manner in which the court deals with precedent (‘ignoring precedent’ strategically),

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<sup>23</sup> See (n 11).

<sup>24</sup> M.S.C.A. Criminal Appeal No. 9 of 1992.

<sup>25</sup> Ibid.

<sup>26</sup> The SC and the HC

<sup>27</sup> See chapter 2 of this thesis.

and/or aims at a particular result ('result-oriented judging').<sup>28</sup> As pointed out by Campbell, this type of JA results in the Court failing to give effect to constitutional provisions.<sup>29</sup> This thesis proposed that such JA occurred in the Chihana case. Though the UDHR was law in Malawi, it had little (or no) impact on both the initial and appellate decisions. In essence the courts declined to confer the UDHR and statutory defences onto Chihana's statements because of the political connotations of the criticism. The SC observed that 'the appellant's statements had crossed the line between political criticism and insult;' the HC dismissed Chihana's truthful statements<sup>30</sup> as not being constructive criticism for being 'full of rancour.' Such jurisprudence led commentators to conclude that the 1966 Constitution did not guarantee human rights.

### 5.3 Post- 1994 Cases: Presumption Of Innocence ('Pol') Brought Home?

There is no area of law that threatens an individual's rights as criminal law since it has the power to deprive an individual of liberty –with liberty comes the ability to enjoy all other rights. Criminal law also amplifies the conflict between rights and competing values – 'balancing the defendant's rights and community interests.'<sup>31</sup> The purposes of criminal law are complex, ranging from deterrence of offences through punishing wrongdoers whilst simultaneously 'avoiding the conviction of the innocent,' rehabilitation of offenders, and promoting the security of individuals and society.<sup>32</sup> Arguably these purposes may be simplified by describing the aim of criminal law as promotion of the peaceful co-existence of individuals through the proscription of certain actions or omissions classified as crime or offences and ascribing attendant punishment for disobedience.<sup>33</sup>

In order to strike the right balance between an individual's rights and public interest, the overarching principle of criminal law is the presumption of innocence.<sup>34</sup> However, the practical application of this principle depends upon the constitutional framework within which the criminal law operates.<sup>35</sup>

The 1994 Constitution of Malawi 'marks a break with its predecessors by placing the Bill of Rights at its fore.'<sup>36</sup> In Section 42 (2)(f)(iii) it provides the right to a person accused of crime

<sup>28</sup> See for instance Campbell Ch. 1 (n 90) 115; Green Ch. 1 (n 89).

<sup>29</sup> Ibid- describing it as 'negative judicial activism.'

<sup>30</sup> KM Phiri, 'A Case of a Revolutionary Change in Contemporary Malawi: The Malawi Army and the Disarming of the Malawi Young Pioneers' (2000) 1 *Journal of Peace, Conflict and Military Studies*.

<sup>31</sup> D Hamer, 'The Presumption of Innocence and Reverse Burdens: A balancing Act' (2007) 66:1 *Cambridge Law Journal* 142, 146.

<sup>32</sup> HM Hart Jr., 'The Aims of the Criminal Law' (1958) 23:3 *Law and Contemporary Problems* 401, 401.

<sup>33</sup> Ibid.

<sup>34</sup> Hamer (n 31) 148.

<sup>35</sup> Hart (n 32) 402 – 411.

<sup>36</sup> Chirwa (n 1) 3.

to be presumed innocent. The operation of this principle has come before the courts in Malawi in several cases. In order to appreciate the courts' interpretation of its scope and content, our focus will be on bail pending trial, and reverse onus provision cases. An examination of such jurisprudence may disclose whether Courts have progressed from the judicial methodology adopted in the Chihana decisions.

### 5.3.1 Rationale for Presumption of Innocence and Attendant Limitations

The principle of presumption of innocence has attracted extensive debate from practitioners, scholars and judges alike over the centuries and yet has eluded a comprehensive and concise definition.<sup>37</sup> The analysis has been from both a procedural and substantive perspective, as well as from a normative and descriptive position – illustrating its conceptual complexity.<sup>38</sup> Further, the complexity is compounded by the principle's intricate connections to standard and burden of proof in criminal proceedings.<sup>39</sup> Regardless, the principle is essentially an enquiry 'into the fundamental nature of criminality.'<sup>40</sup> Consequently, the rationale for the presumption of innocence is the need to protect the individual from wrongful convictions whilst at the same time enhancing the security of individuals in society through the effective identification and conviction of offenders.<sup>41</sup> Arguably, the practical application of the presumption of innocence involves an intricate combination of law, policy and fact hence its scope and content is heavily reliant on judicial interpretation.

As already indicated, the principle is intricately related to standard and burden of proof in criminal proceedings, the practical application of which is not free from complexity. For instance, the presumption of innocence has not stopped courts worldwide from authorizing the pre-trial incarceration of suspects in the interests of justice.<sup>42</sup> Further, the standard of criminal proof required is merely beyond reasonable doubt and not absolute certainty.<sup>43</sup> In

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<sup>37</sup> See JD Lawson, 'Presumption of Innocence' (1883) 4 *Criminal Law Magazine* 643; JA Seiff, 'Presumption of Innocence' (1934) 25 *Journal of American Institute of Criminal Law and Criminology* 53; M James, *Presumption of Innocence* (Carswell Legal Pubns, 1987); PJ Schwikkard, *The Presumption of Innocence* (Juta, 2000); AC Stumer, *The Presumption of Innocence: Evidential and Human rights Perspective* (Hart, 2010).

<sup>38</sup> See P Roberts, 'The Presumption of Innocence Brought Home? *Kebilene* Deconstructed' (2002) 118 *Law Quarterly Review* 41; I Dennis, 'Reverse Onuses and The Presumption of Innocence: In search of Principle' (2005) *Criminal Law Review* 901.

<sup>39</sup> See for example Hamer (n 31) Denis (n 38).

<sup>40</sup> Hamer (n 31) 145.

<sup>41</sup> Ibid.

<sup>42</sup> See Justice Policy Institute, 'factsheet: Pretrial Detention and Remand to Custody' derived from *Finding Direction: Expanding Criminal Justice Options by Considering Policies of other Nation – Australia, Canada, Finland, Germany and England and Wales*, April 2011 available at [http://www.justicepolicy.org/uploads/justicepolicy/documents/pretrial\\_detention\\_and\\_rem\\_and\\_to\\_custody.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/pretrial_detention_and_rem_and_to_custody.pdf)

<sup>43</sup> *Miller v. Minister of Pensions* (1947) 2 All E.R. 372, 373 – 374 per Denning L.J.

this sense, pre-trial detention and the standard of proof beyond reasonable doubt (and not absolute certainty) limit the principle. Arguably, the principle ‘aims to achieve a fair balance between a defendant’s rights and the public interest’<sup>44</sup> – the courts have the responsibility of striking that delicate balance appropriately in any given case.

### 5.3.2 Presumption of Innocence in Pre-trial Detention Cases

The application of the principle of Pol in criminal proceedings in Malawi predates the 1994 Constitution.<sup>45</sup> Accordingly, bail to suspects pending trial was provided for in the Criminal Procedure and Evidence Code (CP & EC). The Courts therefore had to develop the law regarding the applicable considerations when determining whether to grant or deny bail. Prior to the 1994 Constitution, the general rationale for bail was to release the accused from ‘physical confinement’ whilst binding him to appear at the time and place set for trial.<sup>46</sup>

It appears that in most common law jurisdictions, there are some common factors that courts usually consider in determining whether the ‘interests of justice’ would justify pre-trial detention such as the nature of the offence, the likelihood of abscondment by the accused person, and possible interference with police investigations or witnesses.<sup>47</sup> In most developed common law countries the likelihood of abscondment or interference with investigations or witnesses by suspects on bail is low. However, in Malawi, where there is no ‘system of personal and physical identification’ the likelihood (and instances of abscondment) of suspects on bail is very high.<sup>48</sup> Further, even where ‘an individual commits a crime ... he or she is extremely unlikely to be caught’ due to inadequate human and financial resource capacity of the police service.<sup>49</sup> Consequently, ‘the interests of justice’ in Malawian bail applications took on factors that are far removed from the situation tenable in developed common law systems. Presumably, that could help explain the development of jurisprudence in Malawi that advanced the general principle that caution was to be exercised

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<sup>44</sup> Hamer (n 31) 148.

<sup>45</sup> D Newman, *Criminal Procedure and Evidence in Malawi: Law Practice Series No. 3* (University of Malawi, 1982) 46.

<sup>46</sup> Ibid.

<sup>47</sup> U Raifeartaigh, ‘Reconciling Bail Law with the Presumption of Innocence’ (1997) 17 *Oxford Journal of Legal Studies* 1, 4.

<sup>48</sup> S Baradaran, ‘The Presumption of Innocence and Pretrial Detention in Malawi’ (2010) 4 *Malawi Law Journal* 124, 128.

<sup>49</sup> Ibid.

when considering the granting of bail to persons accused of serious crimes since they are more likely to abscond and/or pose a threat to society.<sup>50</sup>

#### 5.3.2.1 The development of post-1994 jurisprudence on pre-trial detention: the nascent stages

One of the earliest cases post the 1994 Constitution is *Daniel Tanganyika v. The Republic*.<sup>51</sup> The suspect was detained for two weeks before trial and later charged before a magistrate for making documents without authority contrary to S. 364 (a) of the Penal Code. The trial however could not commence since the prosecution were not ready and the defendant applied for bail. The magistrate denied him bail and he appealed to the HC. The HC in its determination discussed S. 118 (1) of the CP & EC under which the relevant offence was bailable. In addition, the HC discussed S. 42 (2)(e) of the 1994 Constitution which provided that any arrested or accused person has 'the right to be released from detention, with or without bail unless the interests of justice require otherwise.' Thus the HC decided that the detention of the defendant was lawful since it was at the instance of the magistrate court. However, the HC also considered whether indeed the interests of justice justified the denial of bail by the magistrate.

In making that determination, the court made reference to the Pol without citing the pertinent Constitutional provision.<sup>52</sup> It concluded that 'an innocent citizen is born with his freedom and meant to stay with it.' For that reason, 'an accused person until proven guilty is presumed innocent.' Thus the HC thought that 'provided the court is satisfied that an accused will appear for trial as and when he is required to do so,' it will grant bail. By necessary inference therefore, the court will deny bail if not so satisfied. The HC also stated that in determining that question, regard will be had to the gravity of the offence, and whether the accused would interfere with investigations or witnesses among other factors. Since the prosecution had not adduced any evidence to establish any of those factors, and as the initial fortnight sought for investigations had elapsed, the defendant was granted bail.

Arguably, despite coming post-1994 Constitution the *Daniel Tanganyika* decision applied similar principles to previous cases. Significantly, in *MacWilliam Lunguzi v. The Republic*<sup>53</sup> the SC categorically stated that:

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<sup>50</sup> See *Republic v. Allen* (1966 – 68) ALR Mal 549; *Njoloma v. Republic* (1971 – 72) ALR Mal 393; *MacWilliam Lunguzi v. The Republic*, MSCA Crim. App. No. 1 of 1995 (unreported); *Amon Zgambo v. The Republic*, MSCA Crim. App. No. 11 of 1998 (unreported).

<sup>51</sup> Misc. Crim. App. No. 1251 of 1994 (unreported) *per* Nyirenda J.

<sup>52</sup> Section 42 (2)(f)(iii).

<sup>53</sup> (1991) 1 MLR 632.

*S. 42 (2)(e) of the 1994 Constitution does not create a new right ... and ... does not create an absolute right to bail. (Emphasis supplied)*

The SC repeated that pronouncement in *Amon Zgambo v. The Republic*.<sup>54</sup> There the SC reaffirmed the defendant's right to Pol and stated that 'the courts should therefore grant bail to the accused, unless this is likely to prejudice the interests of justice.' In determining whether the interests of justice would require a denial of bail, the SC referred to the following factors, the seriousness of offence, the likelihood of reoffending or abscondment or interference with investigations and the health and safety of suspect if released on bail, among others.<sup>55</sup> Interestingly the court also invoked a common law principle that bail in serious offences must be granted 'with extreme care and caution,' and in homicide cases the discretion was 'very unusual and rarely exercised.' Consequently, it held that bail was to be granted to a capital offender 'only in the rarest of cases and only on proof of exceptional circumstances.' It can thus be seen that yet again the common law principles heavily impinged on Constitutional adjudication by the SC in Malawi.

In the *Amon Zgambo* case the SC did not distinguish its decision in *John Tembo and Others v. DPP*<sup>56</sup> where bail was given to murder suspects. Therefore, subsequent cases invoked either the *Lunguzi* or the *Tembo* decisions haphazardly.<sup>57</sup> Regardless, there were positive developments in the jurisprudence on circumstances justifying pre-trial detention, even though the principles enunciated in *Amon Zgambo* case were predominantly the law for almost a decade.<sup>58</sup> The positive developments included pronunciations in subsequent cases that the mere fact that the police had not concluded investigations was not proof that the accused was likely to interfere with witnesses;<sup>59</sup> and that where the incarceration is unlawful in the first place, the courts will dismiss the case in its entirety and not require bail.<sup>60</sup>

#### 5.3.2.2 **Mvahe v. The Republic: A unique approach?**

The Mvahe case represents a unique approach from the SC: the court was self-critical and overruled itself (another form of JA). The SC acknowledged that the *Lunguzi* and *Tembo* decisions had given rise to confusion in Courts when hearing bail applications for homicide suspects. Therefore, it proposed to clear the confusion and provide a 'clear authority on the

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<sup>54</sup> MSCA Crim. App. No. 27 of 2005 (unreported)

<sup>55</sup> Ibid.

<sup>56</sup> MSCA Crim. App. No. 16 of 1995

<sup>57</sup> *Mvahe v. The Republic*, MSCA Crim. App. No. 25 of 2005 (unreported) *per* Hon. Unyolo CJ, SC citing *Brave Nyirenda v. The Republic*, MSCA Crim. App. No. 15 of 2001 as having followed *Lunguzi* case, and *Dickson Zulu & 4 Others v. The Republic* Misc. Crim. App. No. 136 of 2001 (followed *Tembo* case).

<sup>58</sup> Baradaran (n 48).

<sup>59</sup> *Frizar Kum'bweza v. The Republic*, Misc. Crim. App. No. 69 of 2005 (unreported).

<sup>60</sup> *Roy Mangame v. The Republic*, MSCA Crim. App. No. 27 of 2005 (unreported); *Felix Chima v. The Republic*, Misc. App. No. 18 of 2008.

subject.’ First, the SC reaffirmed some principles from both cases, which represented common ground, including that the HC had authority to grant bail in all cases (including homicide), that the right to bail under S. 42 (2)(e) was not absolute but discretionary. In addition, the SC stated that the relevant factors when determining the interests of justice outlined in the *Tembo* case and comprehensively expounded in *Amon Zgambo* represented the accurate position of the law.

Further, the SC decided that the burden of establishing the interests of justice to deny bail fell upon the prosecution at all stages in the bail proceedings and did not shift to the accused person. Consequently, the SC overruled its own position in the *Lunguzi* and *Amon Zgambo* cases to the effect that a homicide suspect bore the responsibility of establishing exceptional circumstances when seeking pre-trial bail. The court observed that those decisions had erroneously followed a common law principle when the common law ‘did not provide the right to bail’ as the 1994 Constitution did. This is unique in that arguably, the SC has set a precedent to the effect that it can indirectly hear an appeal against its own decisions. This represents a rare and proactive approach to constitutional adjudication.

That said however, the SC adopted a rather pragmatic methodology and arguably omitted to articulate a more nuanced approach to determining the requirements of justice in different cases. For instance, are all factors to be given equal weight? If all but one of those militating factors is present, should the court deny or grant bail? For instance, the SC cited the safety of the suspect if released as a legitimate factor: yet, some have criticized the Magistrate’s court in *The Republic v. Steve Monjeza Soko & Tionge Chimbalanga Kachepa* for denying the suspects bail on that account. Further in *Willy Sambo & Edward Anafi v. The Republic* (decided after the Mvahe case), the HC denied the suspects bail on the ground that they were likely to commit similar offences since they were answering to other (similar) charges simultaneously. It is proposed that in the absence of a HC or SC decision articulating the appropriate significance of the various factors, both decisions in the *Monjeza/Chimbalanga* and *Willy Sambo* cases comply with the Mvahe position. This still leaves considerable room for inconsistency as much rests on the discretion of the presiding judge/magistrate.

#### **5.4 Presumption of Innocence in Reverse Onus Provision Cases**

The ‘golden thread’ running through criminal law is the prosecution’s duty to prove the guilt of a person accused of crime beyond reasonable doubt and that at no time does that burden ever shift to the accused during trial.<sup>61</sup> However, in some jurisdictions like Malawi, legislation

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<sup>61</sup> *Woolmington v. DPP* [1935] A.C. 462.

contains what are referred to as 'reverse onus' provisions. A distinction is made between a reverse evidential burden and a reverse legal burden,<sup>62</sup> where the former 'only requires the defendant to raise a matter of exculpation as a genuine issue' and the latter 'to prove his innocence on the balance of probabilities.'<sup>63</sup> It is the latter that patently falls foul of the right to Pol and warrants a determination of justifiability in different jurisdictions.<sup>64</sup> Whether or not such provisions are compatible with the Constitution depends on the wording of the relevant provision of the document in issue.<sup>65</sup> The HC constituted as a Constitutional Court<sup>66</sup> has had opportunity to consider a reverse onus provision vis-à-vis the right to fair trial in the 1994 Constitution which includes the right to be presumed innocent.<sup>67</sup>

#### 5.4.1 **Friday Jumbe & Humphrey Mvula v. Attorney General**<sup>68</sup>

The *Jumbe & Mvula* case is ground-breaking since it is the first reverse onus provision case decided by the 'Constitutional Court.'<sup>69</sup> The Plaintiffs challenged the constitutionality of S. 25B (3) of the Corrupt Practices Act (CPA) for violating their right to a fair trial (Pol and the right to remain silent) as enshrined in S. 42 (2)(f)(iii) of the Constitution. S. 25B (3) of the CPA was not a standalone provision, rather it went alongside any of the subsections of S. 25B CPA.

In this case S. 25B (1) was in issue, and it provided that:

Any public officer who uses misuses or abuses his public office, or his position, status or authority as a public officer, for his personal advantage or for the advantage of another person or to obtain, directly or indirectly, for himself or for another person, any advantage, wealth, property, and profit or business interest shall be guilty of an offence.

And S. 25B (3) provided that:

Where in any proceedings for an offence under this section the prosecution proves that the accused did or directed to be done, or was in any way party to the doing of, any arbitrary act which resulted in the loss or damage of any property of the Government or of a public body, or the diversion of such property to or for the

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<sup>62</sup> For a clear distinction see, *Sheldrake* [2004] UKHL 43 *per* Lord Bingham.

<sup>63</sup> Hamer (n 31) 143.

<sup>64</sup> Dennis (n 38).

<sup>65</sup> *FA Jumbe & HC Mvula v. Attorney General*, Const. Case No. 1 & 2 of 2005.

<sup>66</sup> Under S. 9 (2) of the Courts Act.

<sup>67</sup> S. 42 of the 1994 Constitution.

<sup>68</sup> Constitutional Cases No. 1 and 2 of 2005.

<sup>69</sup> Constituted by the Chief Justice under S. 9 (3) of the Courts Act as and when he certifies a matter as of a Constitutional nature.



purposes for which it was not intended, the accused shall, *unless he gives proof to the contrary, be presumed to have committed the offence charged.*<sup>70</sup>

There was agreement that S. 25B (3) was a reverse onus provision. The difference arose because the plaintiffs understood it as a legal burden (hence unconstitutional) while the Attorney General (AG) argued that it was an evidential burden (permissible under the limitation clause S. 44 (2) and (3) of the Constitution).

The final decision was by a majority of 2-1. The majority decided that S. 25B (3) CPA was unconstitutional for breaching S. 42 (2)(f)(iii) and was not saved by S. 44 (2) and (3) of the Constitution. However, the two judges who found unconstitutionality differed considerably in their legal reasoning which though admirable (in terms of diversity of approaches), arguably introduces inconsistencies and uncertainty inimical to principled constitutional jurisprudence.

#### **5.4.1.1 Interpretation of a Statute and Its Compatibility with the Rights in the Constitution**

Kapanda J and Katsala J declared that S. 25B (3) CPA was a 'reverse legal burden' provision since it relieved the prosecution of proving all elements of the offence and created the possibility of an accused person being convicted despite the existence of reasonable doubt as to his guilt. Interestingly, Kapanda J cited the history of forced confessions during the despotic era as a context for the fair trial rights in Malawi. Both judges concluded that the provision violated the right to be presumed innocent and to remain silent as enshrined in S. 42 (2)(f)(iii) of the Constitution.

In spite of such agreement in outcome the two judges varied in their approaches for arriving at that conclusion. For example, their use of comparable foreign cases was decidedly different. Kapanda J applied South African ('SA') cases only since its constitutional limitation clause (S. 36 (1)) was 'in pari materia' with S. 44 (2) of the Malawi Constitution.<sup>71</sup> However, he expressly excluded the applicability of cases from 'other so-called commonwealth countries ... cited by the AG...' (including Canadian cases) on the basis that their constitutions were different from the Malawian Constitution.<sup>72</sup> In direct contradiction, Katsala J found both Canadian and SA cases quite persuasive since S. 11(d) of the Canadian Charter of Rights and Freedoms, S.25 of the SA Constitution, and S. 42 (2)(f) of the Malawi

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<sup>70</sup> Emphasis supplied.

<sup>71</sup> Even though later on a different head the judge referred to the Canadian case of *Reg v. Oakes*, without explaining the discrepancy.

<sup>72</sup> *Jumbe v. Mvula*, 29.

Constitution (all on fair trial rights) were similar. These contradictory approaches raise a poignant issue: when examining the applicability of foreign cases, what establishes the comparative nexus, the substantive provision creating the right under consideration (Katsala, J) or the limitation clause (Kapanda, J)?

Further, how do you determine that two constitutional provisions (from different jurisdictions) are in *pari materia* as pronounced by Kapanda J?<sup>73</sup> There was no clarity as to whether the subject was simply that they are both limitation clauses? If that were the case, then most commonwealth countries have constitutions with limitation clauses and yet those were held inapplicable. Could it then be the wording of the provisions? Despite having similarities, arguably the two sections contain substantial differences. S. 36 (1) of the SA Constitution provides that:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including

- a. the nature of the right;
- b. the importance of the purpose of the limitation;
- c. the nature and extent of the limitation;
- d. the relation between the limitation and its purpose; and
- e. less restrictive means to achieve the purpose.

S. 44 (2) and (3) of the Malawian Constitution on the other hand provides that:

2) No restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law, which are reasonable, recognized by international human rights standards and necessary in an open and democratic society;

(3) Laws prescribing restrictions or limitations shall not negate the essential content of the right in question, shall be of general application.

A question might well arise: is there any legal significance to the manifest differences between the two limitation clauses? For example, on the authority of SA cases, Kapanda, J decided (among others) that in order to prove the legitimacy of the statutory aim, the State must produce empirical evidence before the courts, hence to allow S. 25B (3) CPA would

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<sup>73</sup> 'The rule '*in pari materia*' provides that when an Act relating to the same subject matter as another Act or Acts is ambiguous or uncertain, they may be construed together to make one harmonious system of law' quoted from 'Recent Cases [Legislation]' (1954 ) 38: 5 *Minnesota Law Review* 536, 560

promote laziness in investigations. The SA (and not the Malawian) Constitution catalogues the factors to consider when assessing the constitutionality of a proposed limitation – such as ‘the relation between the limitation and its purpose’ and the presence of ‘less restrictive means to achieve the purpose expressed.’ It is arguable therefore, that whereas empirical evidence might be necessary under the SA Constitution to address those express stipulations, it may not be imperative under the corresponding Malawian provision.

Further, Kapanda J arguably failed to consider whether the nature of the offences (in this case corruption) might raise grounds for distinguishing the situation. For instance, the AG raised the issue of the mental element in offences of abuse of office being hard for the State to prove. The judge did not undertake an analysis of what elements of S. 25B (1) CPA the State must establish vis-a-vis S. 25B (3) to appreciate whether it would be mental element or not. If it were, international conventions such as the UN Convention on Corruption arguably permit reverse onus provisions hence further judicial analysis should have yielded more apposite jurisprudence.<sup>74</sup> In addition, Kapanda J held that ‘in this day and age one cannot use a statute to water down civil liberties so that the State is given an easier option of proving corruption cases. That thinking is of the old order. It is dead and buried.’<sup>75</sup> In essence, he appears to categorically declare any reverse legal burden provision as impermissible and wholly unjustifiable without qualification – which arguably is at odds with international standards<sup>76</sup> and ignores the fact that the pertinent rights can be limited anyway.<sup>77</sup> Ironically, compatibility with international standards is one of the criteria for justifiable limitation under the Malawi Constitution.

Katsala J on the other hand addressed the question not from the need for empirical evidence from the State but rather by examining the principle of ‘rational connection between the proven facts and the presumed fact.’<sup>78</sup> To determine whether there was a rational connection between S. 25B (3) and the elements the prosecution would need to establish under S. 25B (1) to trigger the presumption, the judge was persuaded by comparative case law from several jurisdictions including the USA, Europe, SA and Canada. From his analysis the judge concluded that the presumption was ‘overbroad and over-inclusive’<sup>79</sup> hence fell afoul of S. 44 (2) of the Malawi Constitution (having considered all the elements of the limitation clause). Significantly, Katsala J also did not discuss international conventions that arguably allow for such reverse onus provisions

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<sup>74</sup> Article 28.

<sup>75</sup> 39.

<sup>76</sup> See for example, Articles 20 & 28 of the United Nation Convention on Corruption; Ashworth and Blake, “The Presumption of Innocence in English Criminal Law” [1996] *Criminal Law Review* 306.

<sup>77</sup> Not protected under S. 44 (2) of the Malawi Constitution.

<sup>78</sup> *Jumbe v. Mvula*, 74.

<sup>79</sup> *Ibid* .

The absence of agreement in the legal reasoning of the two judges arguably creates a gap in several substantive principles:

- i. There are lingering questions whether any reverse legal burden is wholly unconstitutional (as per Kapanda J) or the issue depends on the wording of the relevant provision – that is should not be ‘overbroad or over-inclusive’ (as per Katsala J). Further what are the criteria for permissible limitation—is there a general proposition or each case will be determined on its particular circumstances?
- ii. There is no discernible judicial principle on the criteria to use when determining the applicability of foreign cases – is it the wording of the substantive provision or the limitation clause, or both?
- iii. There is awkward silence on the adjudicative relevance of international conventions permitting reverse onus provisions in cases of corruption and whether those should not distinguish the applicability of cases on offences without similar international instruments such as possession of Indian hemp.<sup>80</sup>

This lack of clarity attains heightened significance in light of the dissenting judgment of Mkandawire J who firstly recited the applicable principles of Constitutional interpretation in the Malawi Constitution and expounded by the SC<sup>81</sup> - including that ‘the language of a constitution must be construed not in a narrow legalistic and pedantic way, but broadly and purposively.’<sup>82</sup> Thereupon the judge analysed the content of the right to be presumed innocent (being persuaded by cases from several jurisdictions including Ghana, SA). His conclusion on the content of the right to be presumed innocent was similar to the other two justices: it is meant to protect the individual from conviction ‘despite existence of reasonable doubt as to his guilt.’<sup>83</sup> He likewise found that S. 25B (3) CPA creates a reverse legal burden which palpably breached the right to Pol and to remain silent.

Mkandawire J (like Katsala J) thought the Canadian Charter of Rights and Freedoms and the SA Constitution cases were instructive for the particular case. Interestingly, he discussed the very same decisions applied by Katsala J such as *Regina v. Oakes*,<sup>84</sup> *S v. Bhulwana* and *S v. Gwadiso*,<sup>85</sup> and *State v. Zuma*, among others but arrived at a different conclusion to the

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<sup>80</sup> *S v. Bhulwana* and *S v. Gwadiso*, [1995](5) BCLR 5.

<sup>81</sup> Sections 10 & 11 of the Constitution; *The Attorney General v. Fred Nseula & MCP*, MSCA Civ. App. No. 32 of 1997, *The State & Malawi Electoral Commission – ex parte Ringtone Mzima*, MSCA Civ. App. No. 17 of 2004.

<sup>82</sup> Quoting *AG v. Nseula & MCP*.

<sup>83</sup> *Jumbe v. Mvula*.

<sup>84</sup> [1986] 1 S.C.R. 103.

<sup>85</sup> See (n 77).

one reached by Katsala J. He ascribed the difference to the 'fine differences' between the Malawi Constitution and the Canadian Charter and SA Constitution respectively.<sup>86</sup> He went on like his brother judges to state that the burden of proving on a balance of probabilities that the limitation complied with S. 44 (2) and (3) of the Constitution rested on the State.

The differences between Mkandawire J and Katsala J were their treatment of the policy objectives of the reverse legal burden. Mkandawire J, invoked Sections 13 (o) and 14 of Constitution in recognising the 'pressing' importance of the legislative objective to curb corruption through the enactment of S. 25B (3) CPA. Section 13 (o) enjoins the State to put in place measures that 'will guarantee accountability, transparency, personal integrity and financial probity and which by virtue of their effectiveness and transparency will strengthen confidence in public institutions.' He took judicial notice of the epidemic nature of corruption in Malawi and also referred to UN and SADC declarations on the State of corruption in African countries (including Malawi). Consequently he found that there was sufficient proof of the democratic importance of the objective of ensuring successful prosecution of corrupt public officials. It bears highlighting that Mkandawire J applied one of the provisions (S. 13) which introduces a 'social-trust based governance' framework in the 1994 Constitution.<sup>87</sup>

Furthermore, the dissenting judgment proposed that the next stage would be to examine the means adopted by parliament to achieve its objective to determine whether the same was reasonable. It proposed that the test is one of proportionality as discussed in Canadian cases: there must be a rational connection between the proven fact and the presumed fact. In determining rational connection, the judge considered S. 25B (4) CPA which defined an arbitrary act thus:

For purposes of this section, 'arbitrary', in relation to actions of a public officer concerning the duties of his office, includes the doing, or directing of doing, of anything contrary to –

- (a) procedures prescribed by or under any written law; or
- (b) established practice or any agreed rules or arrangement which is known or ought to be known to him or is, in relation to the matter under consideration, brought to his attention in writing or other sufficient means.

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<sup>86</sup> *Jumbe v. Mvula*, 108.

<sup>87</sup> Nkhata (n 1).

The judge held that where a public officer conducts himself in a manner described above 'then obviously that person is misusing or abusing his/her office.'<sup>88</sup> Mkandawire J, found a rational connection between the proven fact of an arbitrary act (as defined by S. 25B (4)) and the presumed fact of abuse of office (the offence under S. 25B (3)). He further held that the presumption could not be said to force an accused person to testify since even where he did not speak, the judge would need to determine whether the prosecution had proven its case beyond reasonable doubt. In this Mkandawire J differed with his brothers who held that the presumption would force the court to convict even if there was reasonable doubt as to the guilt of the accused person. Consequently, he held that the proportionality test was satisfied. Further, Mkandawire J undertook the other tests including 'recognized by international human rights standards' and not negating 'the essential content of the right,' and found S. 25B (3) CPA compatible with all those. He finally concluded that S. 25 B(3) was constitutional as it complied with the limitation clause of the Constitution of Malawi.

In summation - Kapanda J, purportedly proceeding on the basis that reverse legal burden provisions were anachronistic legal devices completely dismissed the AG's arguments concerning the rational connection between the offences of corruption and the pertinent reverse onus provisions. Katsala J, seemingly proceeding on the basis that reverse legal burden provisions may be constitutional depending on whether the State can prove a rational connection between the proven facts and the presumed fact, found that the State had failed to show such a connection. Mkandawire J, also proceeding on the basis that reverse legal burden provisions may be constitutional depending on whether the State can prove a rational connection between the proven facts and the presumed fact, found that the State had succeeded in proving that rational connection.

As a consequence, The *Jumbe and Mvula* case arguably leaves unanswered questions such as: which principles to apply when interpreting a particular statute and/or a constitutional provision, the principle to use when discussing/distinguishing constitutional jurisprudence from other jurisdictions – is it the substantive provision or the limitations clause? What weight to attach to the phrasing differences in constitutional provisions, and the nature of probative material (empirical evidence or policy statements?) necessary to explain the legislative justifications for a given limitation? What are the criteria for finding that a reverse legal burden provision complies with the limitation clause – is it the objective of the legislation and the proportionality test? Malawi is not alone in contending with these questions – though others seem to have made some headway.<sup>89</sup>

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<sup>88</sup> Ibid, 115.

<sup>89</sup> See Hamer (n 31), Dennis (n 38).

#### 5.4.1.2 Lessons that may be drawn

##### **Exhorting form over substance in JA discourse in Malawi may leave substantial issues unaddressed**

As discussed in chapter 4, the *Jumbe & Mvula* decision is an example of JA ('invalidation of legislative enactments'). To that extent Justices Katsala and Kapanda may be described as progressive or judicially active judges by some commentators, whereas Mkandawire J, maybe described as a conservative judge because he upheld that legislation. This thesis argues that such descriptions conceal the problems faced by Malawi in the entrenchment of constitutionalism and rule of law- in actual fact they may detract from the identification of appropriate responses and solutions. To illustrate, Chirwa expressing disappointment on how Malawian Courts have relied 'on foreign decisions too eagerly, often at the expense of express provisions of the Constitution and local jurisprudence', commended the approach taken by Mkandawire J, in the *Jumbe & Mvula* case.<sup>90</sup> Chirwa applauds that methodology as a valid response to concerns about Malawian courts displaying 'an inclination to focus merely on textual and semantic comparisons, without ... examin[ing] carefully profoundly the function that specific legal rules in issue serve in a particular legal system and *understand the underlying doctrinal, institutional, legal and cultural contexts in which those rules apply*.'<sup>91</sup>

As indicated above, it is only Mkandawire J who applied one of the social-trust based framework provisions of the 1994 Constitution in his legal analysis. Consequently, it is arguable that at the heart of the divergent judicial conclusions lie differences of a more fundamental nature: pertaining to the respective conceptual visions of the Constitution itself, the appropriate interpretive methodologies that reflect the uniqueness of the Malawian Constitution (as contrasted with other Constitutions), and the permissible bounds of judicial discretion in the choice of applicable precedent, especially foreign precedent, as well as the applicable methodology in assessing all the aforementioned issues altogether.

In that vein, the words of Justice Kirby are quite insightful:

Legal reasoning unlike political activism, must always remain attached to legal authority. Consistency and avoidance of purely personal idiosyncrasies require that tasks of interpretation commence with any relevant text and proceed with the assistance of any applicable history. [Inevitably], in important constitutional cases, and especially where novel issues are presented, such sources are insufficient. They do not take the mind of the

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<sup>90</sup> Chirwa Ch. 1 (n 2) 32.

<sup>91</sup> Ibid, emphasis supplied.

decision-maker far enough along the journey to the decision.<sup>92</sup> [Hence] ... in construing the words of a constitutional document judges have choices.<sup>93</sup>

This statement is very apposite to the Malawian situation since constitutional litigation/adjudication is still in its nascent stages necessitating the use of comparative foreign case law for purposes of drawing 'philosophical insights, underlying principles, and rationales which' might help judges in resolving novel cases. The main question therefore remains: how should the judges exercise that discretion/choice?

To recapitulate, all the three justices in *Jumbe & Mvula* competently attached their reasoning to legal authority within the context of what they deemed applicable history. However, as discussed earlier they differed significantly in their choice of what constituted applicable legal authority and relevant history. Thus this thesis submits that the foregoing discussion unearths fundamental jurisprudential issues demanding the development of Malawi-centric theoretical and/or philosophical frameworks to guide the exercise of judicial discretion on the part of judges.

## 5.5 Conclusion

The constitutional jurisprudence in Malawi in the area of criminal law has come a long way - from outright subservience to the government to bold declarations of unconstitutionality of penal provisions. A lot however, remains to be done in the articulation of guiding principles to inform the assessment of limitation of the rights of persons accused of crime. This lacuna has been consistent throughout all the legal areas examined so far.

In response to those who have proposed JA as a panacea to the problem, this chapter demonstrates that both outright subservience to government and the bold declarations of unconstitutionality would qualify as JA under the various definitions of that term. Further, the fact that those contrasting judicial behaviours can make use of the judicial discretion in the choice of applicable precedent does not help matters. In that context, using criminal judgments as case studies, this chapter has brought out one particular area for attention, the exercise of judicial discretion in the choice of applicable legal authority, history, facts etc. in the adjudication of constitutional cases. This finding supports the necessity of applying a definition of JA that zeroes in on judicial discretion as has been proposed in chapter 2 in order to author home-grown solutions to the judicial role in constitutionalism and rule of law. Further, this chapter has made reference to a study by Hansen that pointed to a lack of judicial training in human rights as one of the main reasons why judges fell short of what had

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<sup>92</sup> Kirby (n 12) 40.

<sup>93</sup> Ibid 41.



been expected of them in their enforcement of human rights provisions of the constitution. Thus the lacunas identified in this chapter strongly point to a similar need for training in legal theory specifically developed to assist the Courts to interpret the Constitution in a manner that reflects its uniqueness.<sup>94</sup>

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<sup>94</sup> In accordance with S. 11 (1) of the Constitution, which stipulates that 'Appropriate principles of interpretation of this Constitution shall be developed and employed by the courts to reflect the unique character and supreme status of this Constitution.'

## Chapter 6

### The Mixed-Bag of Malawian Judicial Activism? The Impact of Judicial Deference on Legislative Developments

#### 6.1 Introduction

The Malawi Judiciary has been described as being ‘probably the most credible branch of government in Malawi’<sup>1</sup> for displaying remarkable independence ‘in spite of many political and economic pressures and constraints.’<sup>2</sup> Thus the independence of the judiciary in Malawi is now widely acknowledged.<sup>3</sup> This discussion will nevertheless propose that in spite of such demonstrable judicial independence the constitutional jurisprudence still bears remarkable signs of ‘inappropriate deference’ to the executive arm of government, which has in turn had an impact on legislative developments in Malawi. As discussed in chapters 2 and 4, excessive deference is itself a form of JA as it can be a strategy deliberately chosen by a result-oriented court to produce a decision that represents its preferred sense of justice. This chapter seeks to show that the apex court in Malawi has in the past resorted to excessive/inappropriate judicial deference to effectuate the transformative potential of the Malawian Constitution; and further, that such deference has had a negative impact on subsequent constitutional legislative developments.

The work in this chapter aims at emphasizing the point that calling on the Malawian judiciary to practise JA without first identifying and addressing underlying factors that may impact upon its (JA’s) manifestations in practice may be counter-productive to the search for solutions to the lack of constitutionalism in Malawi. For instance, Nkhata in his thesis<sup>4</sup> proposes that ‘the courts should make better use of opportunities that exist within the Constitution and other laws to actualise the transformative potential that the Constitution contains. [However he adds that] where the matter at issue intimately involves questions that are better resolved by the executive or the legislature, the judiciary must be cautious in such matters.’<sup>5</sup> In proposing how, Nkhata suggest the ‘reasonable test’ approach to enable the courts to review the manner in which the executive or legislature has conducted itself ‘without necessarily substituting its own preferred’ solution.<sup>6</sup> In essence, despite calling on

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<sup>1</sup> Kanyongolo Ch. 1 (n 146) 51.

<sup>2</sup> Ibid.

<sup>3</sup> VonDoepp Ch. 1 (n 135); also Gloppen and Kanyongolo Ch. 1 (n 148).

<sup>4</sup> Nkhata Ch. 1 (n 2).

<sup>5</sup> Ibid 237.

<sup>6</sup> Ibid 238.

the courts to employ an 'innovative and expansive approach to [constitutional] adjudication',<sup>7</sup> Nkhata nevertheless also calls on courts to exercise judicial deference/restraint where appropriate.

Judicial deference to the executive or legislative arms of government has drawn conflicting academic reactions: while some scholars consider it a legitimate 'form of judicial restraint',<sup>8</sup> others describe it as a doctrine that elevates executive or legislative decisions to a level of 'de facto non-justiciability'.<sup>9</sup> Commentators from different jurisdictions have 'examine[d] the role of judicial deference in specific contexts',<sup>10</sup> including legal interpretations of the executive<sup>11</sup> and legislative enactments.<sup>12</sup> No similar studies appear to exist on Malawi. Consequently, in this study it is pertinent to consider the notion of 'judicial deference' in the context of judicial (in)activism in Malawi in order to explore the approach of the courts to their constitutional function of constitutional interpretation (and enforcement).

It must be conceded at the outset that a comprehensive analysis of judicial independence and judicial deference lies beyond the scope of this study. However, by demonstrating how the transformative potential of the Constitution can be actualised by resort to excessive judicial deference, this chapter will illustrate the existence of a more urgent need, namely to initially identify and address the factors that may impinge upon the ability of judges to employ appropriate deference in constitutional adjudication.

## **6.2 The compatibility of judicial deference with judicial independence and/or judicial (in)activism**

### **6.2.1 Benchmarks for measuring the existence of judicial independence**

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<sup>7</sup> Ibid.

<sup>8</sup> R Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978) 138.

<sup>9</sup> See CT Dienes, 'When the First Amendment Is Not Preferred: The Military and Other 'Special Contexts' (1987-1988) 56 *University of Cincinnati Law Review* 779.

<sup>10</sup> DJ Solove, 'The Darkest Domain: Deference, Judicial Review, and the Bill of Rights' (1999) 84 *Iowa Law Review* 941, 945.

<sup>11</sup> TW Merrill, 'Judicial Deference to Executive Precedent' (1992) 101 *Yale Law Journal* 969; M Herz, 'Deference Running Riot: Separating Interpretation and Law-making Under Chevron' (1992) 6 *Administrative Law Journal* 187.

<sup>12</sup> R. Clayton, 'Principles For Judicial Deference – Alba Summer Conference 2005 Paper' at <http://www.google.co.uk/#hl=en&xhr=t&q=what+is+judicial+deference&cp=19&pf=p&sclient=psy&aq=0&aql=&aqi=&oq=what+is+judicial+de&pbx=1&fp=fea2d7e29c7ebd8b>.

Despite the obvious definitional challenges surrounding the concept of judicial independence,<sup>13</sup> a number of scholars have propounded some useful attempts in light of its widely acknowledged importance in the consolidation of democracy.<sup>14</sup> Despite such laudable efforts however, it is still worth remembering that 'judicial independence is a dynamic concept that may be defined in different ways.'<sup>15</sup> In an attempt to find a common ground within the divergence of views on the meaning of 'the independence and impartiality of the judiciary',<sup>16</sup> the International Foundation for Electoral Systems (IFES) developed the 18 'Judicial Integrity Principles (JIP)'<sup>17</sup> which were endorsed in 'virtually all regions of the world.' These encompass matters of institutional and personal independence of judges, provision of adequate professional and infrastructural resources, security of tenure and clarity of jurisdiction as well as objective and transparent appointment processes, besides advocating high ethical standards for judicial office and access to judicial information by the judiciary as well as the public.<sup>18</sup> The observation that these principles 'capture the current state-of-the-art meaning of the term "judicial independence,"'<sup>19</sup> serves only to highlight the complexity of the term. Assessed on these standards, the Malawi Judiciary passed the test of 'judicial independence'.<sup>20</sup>

## 6.2.2 Judicial Deference in Judiciaries with Judicial Independence

Since 'the intricate interaction between a principle and its embodiment in practice most completely reveals all the shades and contours of its meaning;'<sup>21</sup> the assessment of the prevalence of judicial deference in Malawi cannot be made in isolation, without first learning from its manifestations within other jurisdictions.

### Definition of judicial deference

Despite attracting significant scholarly attention and having 'profound effects and ... wide scope in modern judicial review'<sup>22</sup> the concept of judicial deference 'remains malleable,

<sup>13</sup> J Rios-Figueroa, 'Judicial Independence : Definition, Measurement, and Its Effects on Corruption – An Analysis of Latin America' (2006) *New York University Papers* p. 2 at <http://homepages.nyu.edu/~jrf246/Papers/PhD%20Diss%20JRF.pdf>

<sup>14</sup> PH Russell & D O'Brien eds. *Judicial Independence in the Age of Democracy: Critical Perspectives From Around the World* (University of Virginia Press, 2001); SB Burbank & B Friedman eds. *Judicial Independence At the Crossroads: An Interdisciplinary Approach* (Sage Publications, 2002).

<sup>15</sup> FB Cross, 'Thoughts on Goldilocks and Judicial Independence' (2003) 64 *Ohio State Law Journal* 195, 196

<sup>16</sup> K Henderson ed., *Global Best Practices: A Model State of the Judiciary Report*, IFES Rule of Law White Paper Series, p 1 at [http://www.ifes.org/publication/20ef1c5bb97b3a464dc4d8bb4da18bac/WhitePaper\\_6\\_FINAL.pdf](http://www.ifes.org/publication/20ef1c5bb97b3a464dc4d8bb4da18bac/WhitePaper_6_FINAL.pdf).

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> Kanyongolo (n 1).

<sup>21</sup> Solove (n 10) 948.

<sup>22</sup> Ibid.

indeterminate, and not well-defined.<sup>23</sup> According to Cory, J 'judicial deference' means that 'the courts ... in carrying out their duties ... are not to second-guess legislatures and the executives.'<sup>24</sup> In other words 'they are not to make value judgments on what they regard as the proper policy choice' as that is the province 'for the other branches.' Thus while 'the courts are to uphold the Constitution' as expressly mandated therein 'respect by the courts for the legislative and executive role is as important as ensuring that the other branches respect each other's role and the role of the courts.'<sup>25</sup> Solove suggests that the idea of judicial deference dictates that 'the Court should not attempt to "second-guess" or "substitute" its judgment for the judgment of another decision-maker or pass on the "wisdom" of a policy or law.'<sup>26</sup>

According to Lord Hope there will be instances where 'it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is'<sup>27</sup> under review. Thus there is a democratic imperative underlying judicial deference. This view seems to resonate closely with that of Lord Steyn who propounded that 'just as there are circumstances in which an international court will recognise that national institutions are better placed to assess the needs of society, and to make difficult choices between competing considerations, so national courts will accept that there are some circumstances in which the legislature and the executive are better placed to perform those functions.'<sup>28</sup>

Clearly, despite such attempts to explain the concept, there appears to be no universally agreed definition of judicial deference. Nevertheless, as Edwards puts it, 'few would doubt that in a constitutional democracy there will be times when it is appropriate for a court ... to defer to the judgment of the other branches of government.'<sup>29</sup> The obvious point of agreement in this formulation of judicial deference (by the different proponents) is that such instances do not necessarily represent the norm of judicial review, rather an exception (sometimes made necessary by the functional competence realities as well as a democratic imperative premised on separation of powers).

## **Evidence of Judicial Deference in the USA and UK**

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<sup>23</sup> Solove (n 10) 945.

<sup>24</sup> *Vriend v Alberta* [1998] 1 SCR 493

<sup>25</sup> *Ibid.*

<sup>26</sup> Solove (n 10) 943.

<sup>27</sup> *R v. DPP ex p Kebilene* (2000) 2 AC 366, 381.

<sup>28</sup> *Brown v. Stott* [2003] 1 AC 681, 711.

<sup>29</sup> RA Edwards, 'Judicial Deference under the Human Rights Act' (2002) 65 *Modern Law Review* 859, 859.

It needs no mention that judicial review in the UK is very different from judicial review in the USA, the former being founded on parliamentary supremacy and the latter on constitutional supremacy. However, judicial deference though manifesting in different forms, is said to be 'the central principle of judicial review'<sup>30</sup> in both jurisdictions.<sup>31</sup>

In the UK, the principle of judicial deference has its foundations in 'principles of administrative law.'<sup>32</sup> However, even when deciding matters under the Human Rights Act, which has been deemed as having constitutional status,<sup>33</sup> the UK courts have adopted a 'deferential approach' without necessarily using the term 'deference'. For example in the case of *Brown v Stott* Lord Bingham said:

Judicial recognition and assertion of the human rights defined in the Convention is not a substitute for the processes of democratic government but a complement to them. While a national court does not accord the margin of appreciation recognised by the European Court as a supra-national court, *it will give weight* to the decisions of a representative legislature and a democratic government within the discretionary area of judgment accorded to those bodies.<sup>34</sup> (Emphasis supplied)

In the case of *Bellinger v Bellinger* the House of Lords declined to reconsider birth as a determinant of sex on the basis that '(that) would represent a major change in the law, having far reaching ramifications' (because) 'it raises issues whose solution calls for extensive enquiry and the widest public consultation and discussion.' In the opinion of the court 'questions of social policy and administrative feasibility' would 'arise at several points, and their interaction' would have 'to be evaluated and balanced.' In the wisdom of the Law Lords '(such) issues are altogether ill-suited for determination by courts and court procedures. They are pre-eminently a matter for Parliament.'<sup>35</sup> (Emphasis supplied)

Another instance of a deferential approach to the executive arose in *Secretary of State for the Home Office v Rehman* where the House of Lords was confronted with an issue touching on terrorism and counter terrorism strategies. In conceding the democratic imperative as well as the functional competence of the executive the court observed that where:

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<sup>30</sup> Ibid 949.

<sup>31</sup> See generally, Edwards (n 29); Clayton (n 12); and Solove (n 10).

<sup>32</sup> Clayton (n 12); see also dictum of Lord Hailsham on the purpose of the remedy of judicial review under English Law in *R v. Chief Constable of North Wales ex p Evans* [1982] 1 W.L.R 1155, 1160.

<sup>33</sup> J Jowell, 'Judicial Deference: Servility, Civility or Institutional Capacity' [2003] *Public Law* 592, 597

<sup>34</sup> [2003] 1 AC 681, 703

<sup>35</sup> [2003] AC 467 paras 36, 37.

‘... the cost of failure can be high. [It] underline[d] the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question ... *It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove.*’<sup>36</sup> (Emphasis supplied).

In the context of the USA, Solove succinctly captured the manifestation of judicial deference in judicial review cases before the USA courts thus:

‘It has become almost commonplace for the Court to declare that it will "defer to the expert judgment" of a government official,<sup>37</sup> that it will not "interfere" with the "internal operations" of an institution,<sup>38</sup> that it will not "substitute its judgment" for that of another decision-maker,<sup>39</sup> that it will not examine the "wisdom" of a regulation or law,<sup>40</sup> that the matter is within the "professional expertise" of another decision-maker, or that the matter is within a government official's "domain," "province" or "discretion."<sup>41,42</sup>

Therefore, judicial deference seems to be an accepted principle<sup>43</sup> of judicial review within ‘well established’ common law jurisdictions such as the USA, and the UK.<sup>44</sup> Case law from these jurisdictions appears to ‘demonstrate that there is no jurisprudential contradiction between the courts adopting a deferential approach’<sup>45</sup> in one area of the law, and ‘a more rigorous hard edged one’<sup>46</sup> in another.

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<sup>36</sup> [2003] 1 AC 153 para 62.

<sup>37</sup> *Pell v. Proconier* (1974) 417 U.S. 817, 827

<sup>38</sup> *Youngberg v. Romeo* (1982) 457 U.S. 307, 322

<sup>39</sup> *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.* (1989) 492 U.S. 257, 278

<sup>40</sup> *Heller v. Doe* (1993) 509 U.S. 312, 319

<sup>41</sup> *Marsh v. Oregon Natural Resources Council* (1989) 490 U.S. 360, 377

<sup>42</sup> Solove (n 10) 947.

<sup>43</sup> CE Borgmann, ‘Rethinking Judicial Deference to Legislative Fact-finding’ (2009) 84 *Indiana Law Journal* 1; see also Solove (n 10) and Edwards (n 29).

<sup>44</sup> Clayton (n 12).

<sup>45</sup> *Ibid* 8.

<sup>46</sup> *Ibid* 14.

### 6.2.3 Judicial Deference and Judicial (In)Activism

Judicial deference is ‘one of the most powerful normative guideposts of the judicial function’<sup>47</sup> in judicial review. On the other hand, ‘judicial activism is inherent in judicial review. Whether it is positive or negative activism...’<sup>48</sup> However, ‘judicial activism also has to operate within limits’<sup>49</sup> because ‘constitutional dangers exist no less in too little judicial activism as in too much.’<sup>50</sup> Judicial deference therefore may arguably provide the jurisprudential boundaries within which ‘appropriate’ judicial activism operates without losing the democratic legitimacy inherent in a constitutional democratic order.

## 6.3 Manifestations of Judicial Deference in Malawi

### 6.3.1 The Press Trust Case

The SC judgment in the case of *Attorney General v. Malawi Congress Party and Others*<sup>51</sup> (*Press Trust II*) arguably laid the foundations for judicial deference in post-1994 Malawi. The brief facts of the case were that on 6 November 1995 the government circulated to members of Parliament (“MPs”) a bill entitled ‘the Press Trust (Reconstruction) Bill.’ The next day the Minister of Finance put a motion to the MPs to dispense with the usual 21 day notice and proceeded to debate the bill. Despite strong opposition from the Malawi Congress Party (“MCP”)-which until 1994 was the only political party recognised under the 1966 Constitution but had now become the main opposition party-the motion was carried. A tea break followed from which the MCP MPs never returned (in protest). The subsequent debate and passage of the bill in the house was therefore done without them. The President promptly put his assent on the Bill despite applications for a HC injunction to stop him. The MCP and two of its MPs made an application to the HC for a declaration that the Act was null and void on grounds that the law was enacted without the requisite parliamentary quorum, the bill was in breach of the constitutionally prescribed notice and that parliament lacked the mandate to expropriate private property without compensation anyway. The HC (Mwaungulu, J) found in favour of the plaintiffs on all grounds and declared the Press Trust (Reconstruction) Act null and void. The AG appealed to the SC against the decision and succeeded.

#### 6.3.1.1 The Ownership of the Trust

One of the issues before both courts was the ownership of the Press Trust. It is this issue that adequately illustrates the complexity of deciding cases within the context of transitioning

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<sup>47</sup> Solove (n 20) 953.

<sup>48</sup> Sathe Ch. 3 (n 252) 5.

<sup>49</sup> Ibid.

<sup>50</sup> *R (International Transport Roth GmbH) v Secretary of State for Home Department* [2002] 3 WLR 344, 365 as cited in Edwards (n 29) 882.

<sup>51</sup> [1997] 2 MLR 181



from patrimonial politics – where previously there was no ‘difference between the private and public sphere’<sup>52</sup> and where the President was the Government.<sup>53</sup> The HC found that the Trust belonged exclusively to the first plaintiff the MCP and that those who had since left the party to join other parties had forfeited any rights they had in the property that they might have otherwise been entitled to as its members.

The SC on the other hand faulted the finding of the HC on all material points of ownership of the Trust. Even though (within its subsequent reasoning) the SC displayed ‘inappropriate’ judicial deference to both the executive and legislature its determination on the point of ownership of the Trust arguably reflects a more judicially active approach that resonates well with the transformative agenda underlying the 1994 Constitution. To that extent theirs would (as is being proposed in this study) represent the more just decision on the point as they articulate a social-trust based construction of the Press Trust (as opposed to the ‘exclusively’ liberal democratic conception of private property rights underlying the contested determination of the HC).

The evidence as to the background of the Press Trust was contained in the affidavit of the then Minister of Finance, Mr Aleke Banda, who had also been very instrumental in setting up the Press Trust and related companies during the MCP era. The SC criticised the decision of the trial judge for relying solely on affidavit evidence. The appellate court felt that ‘the [disputed facts] ... would have been properly and adequately dealt with if the proceedings in this case had been commenced by writ of summons or at least if the deponents of the affidavits used in this case had been cross-examined.’<sup>54</sup>

Indeed, contrary to Mwaungulu J’s assertions otherwise, his own reasoning would suggest that his conclusions on those factual matters formed the very basis of his determination on the constitutionality of the Act. In other words, the resolution of the question of the ownership of the Press Trust -which necessarily predicated how the trial court viewed the proposed ‘reconstruction’- was heavily dependent on some factual conclusions the court made about its historical genesis (and subsequent evolution).

### **Pre- 1994 MCP same as pre-1994 Government of Malawi?**<sup>55</sup>

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<sup>52</sup> G Erdmann, ‘Neo-Patrimonial Rule : Transition To Democracy has not Succeeded’ (2002) Development and Cooperation No. 1 available at <http://www.inwent.org/E+Z/zeitschr/de102-4.htm>.

<sup>53</sup> As manifested in the popular song of the Banda Regime “Angwazi ndi Boma” literally translated – “The President is the Government.” See also D Venter, ‘Malawi: the transition to multiparty politics’, in J Wiseman ed., *Democracy and Political Change in Sub-Saharan Africa* (London: Routledge, 1995) 156.

<sup>54</sup> *AG v. MCP and Others* [1997] 2 MLR 181, 207 - 208

<sup>55</sup> The dictatorial regime of Dr. Banda has been described as one of the ‘most repressive’, ‘corrupt’, ‘predatory’ and ‘violent’ political systems in Africa. See Venter (n 53) 156, 225.

The SC and the HC came to different conclusions on this question despite relying on the same affidavit evidence. The historical summary to the genesis of Press Trust was that the initial capital of £30 000-00 was raised from members of the MCP in 1960 as the vanguard for political agitation in pre-independence Malawi. Over the years Press Holdings Ltd (with Dr Banda holding majority of the shares) enjoyed preferential monopoly status in the Malawian economy (being touted as a vehicle for national development) and even had its loans guaranteed by the State. Eventually (in 1982) Dr Banda (having been paid a sum of K999 998-00 for the 499 999 shares he held in Press Holdings Ltd) created the Press Trust 'for the benefit of the people of Malawi' and the Minister of Finance was an ex officio trustee.<sup>56</sup> The contested legislation purported to 'reorganise' the trust to ensure continued government oversight of the beneficial interest (for the nation of Malawi).

In court the main issue for determination (though not acknowledged as such by both the HC and SC) was whether the pre-1994 MCP could in law and in fact be held to be the same as the post-1994 MCP (and therefore entitled to the trust by necessary continuance).

As Mtegha JA (pronouncing a unanimous appellate decision) observed, the HC appears to have 'go[ne] on to great lengths'<sup>57</sup> to find that the MCP had at all times been a political party, separate and distinct from the Malawi Government despite evidence to the contrary.<sup>58</sup> Firstly, contrary to recorded history,<sup>59</sup> the trial judge observed that the fact that the pre-1994 Constitution declared Malawi a one party State 'conferred no uniqueness on the first plaintiff [pre-1994 MCP]'.<sup>60</sup> Whether unwittingly or not the trial judge seems to have glossed over the fact that the 1966 Constitution expressly provided that 'the MCP was to be the only legally recognised political party in the country'.<sup>61</sup> Secondly, the trial judge acknowledged that the post-1994 MCP was legally incorporated under (new) applicable statute at the time of the judgment (1996). At the same time the court observed that there was no evidence to establish that it (the MCP) had been so incorporated before 1994.<sup>62</sup> Nevertheless, Mwaungulu, J still concluded that the pre-1994 and the post-1994 MCP were one and the same legal entity.

Thus the trial judge ignored the fundamental legal reality (which under established principles of evidence is a matter of judicial notice) that prior to 1994 the MCP had *de jure*

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<sup>56</sup> As outlined in *AG v. MCP and Others* (n 51) 185 – 187, but reflecting the same facts outlined in *MCP and Others v. Attorney General* [1996] MLR 244, 251.

<sup>57</sup> See (n. 54) 208.

<sup>58</sup> See Venter (n 53) 156, 225.

<sup>59</sup> See generally, KM Phiri and KR Ross eds., *Democratization in Malawi: A Stocktaking* (CLAIM, 1998).

<sup>60</sup> *MCP and Others v. Attorney General* [1996] MLR 244, 251.

<sup>61</sup> Section 4 of the 1966 Constitution as cited in Kanyongolo Ch. 1 (n 12) 359.

<sup>62</sup> See (n 60).

constitutional status in terms of Section 4 of the 1966 Constitution. Further, he neglected to consider the legal implications of incorporating the MCP post-1994 under an Act of Parliament as removed from its pre-1994 constitutional status – whether the incorporation did not in law create a new MCP distinct from its national predecessor. Thirdly, despite the fact that prior to 1994, ‘the distinction between ... the State and ... the party [pre-1994 MCP] became increasingly diminished,’<sup>63</sup> the HC still concluded that ‘whether a political party embraces everybody in a country, it is no more than an association of members’<sup>64</sup> hence not government. Fourthly, the trial judge further omitted to address the legal implications of the fact ‘that the person holding the position of the Minister of Finance was made the ex-officio trustee of the Press Trust.’<sup>65</sup>

Because he ignored significant historical and legal facts surrounding the dispute Mwaungulu J made an incorrect judicial conclusion, namely that the pre-1994 and the post-1994 MCP (the first plaintiff) were one and the same legal entity. This finding was clearly fundamental to the Constitutional questions before him since the main question was whether the Press Trust was a public or private trust.<sup>66</sup> In so doing, the trial judge contradicted himself since he had previously asserted that ‘the background to these institutions [The Press Trust] has little bearing to the questions that have to be determined in this application, questions of the constitutionality of the Press Trust Reconstruction Act.’<sup>67</sup> Subsequent statements in the HC judgment belie these sentiments:

The Minister of Finance traces the origin of the Trust to the first plaintiff [post-1994 Malawi Congress Party]. In his affidavit it is very clear that whatever the financial arrangements or organisations, they are at the aegis and interest of *the first plaintiff. It is the first plaintiff that obtained the funds and authorised all transactions, no matter how diverse, on the funds. The origin of the Press Trust is the first plaintiff.*<sup>68</sup>

The HC unquestioningly proceeded on the basis that the pre-1994 was the same as the post-1994 MCP hence ownership of the Press Trust had at all times vested in the MCP (pre- and post- 1994). However, in the same judgment, the judge places the ownership of the Press Trust in Dr. Banda – despite the fact that he had found as a matter of fact that some of the property that constituted the Press trust e.g. Malawi Press Ltd, was owned by the pre-

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<sup>63</sup> Kanyongolo (n 61) 360.

<sup>64</sup> See(n. 60).

<sup>65</sup> *AG v. MCP and Others* (n 54) 187.

<sup>66</sup> Nkhata (n 4).

<sup>67</sup> *Malawi Congress Party (MCP) and Others v. Attorney General (AG)* [1996] MLR 244, 251.

<sup>68</sup> *Ibid.*

1994 MCP and its members (the Malawi nation). Here the judge failed to distinguish between Dr Banda and pre- 1994 MCP – not surprising seeing as even the distinction between Dr Banda and MCP could have been said as being *de facto* non-existent.<sup>69</sup>

### **‘Ownership’ Analysed Further – MCP or Kamuzu Banda?**

Without expressly articulating the legal distinction between the pre-1994 and post-1994 MCP the appellate court in its judgment alluded to the fact that only ‘an outsider’<sup>70</sup> would construe the shareholding of Dr Banda in the Press Trust as his personal property.<sup>71</sup> Throughout its decision the SC made constant reference to the shareholding of Press Trust by the pre-1994 MCP officials (1969, 1970, 1974, 1980, and 1984) as being ‘on behalf of the Malawi nation.’<sup>72</sup> In the final analysis that would prove decisive in its conclusion about the constitutional validity of the ‘reconstruction’ efforts reflected in the challenged piece of legislation.

It would appear from a close reading of their judgement that the SC proceeded on the premise that the pre-1994 political entity was congruous with the government (and people) of Malawi; this legal reality was markedly different from the post-1994 MCP which was not only one of several political entities but was now the sole opposition party in the legislature (i.e. they no longer were in a position to ‘administer’ or ‘safeguard’ the ‘national interest’ embodied in the Press Trust). According to this view therefore the central role played by Kamuzu Banda in the Press Trust arose directly from him being ‘President of MCP’<sup>73</sup> and not as a private investor. On that basis the appellate court (without expressly stating so) places the continuation of the pre-1994 MCP role in Press Trust in the government of Malawi (which status the pre-1994 MCP had assumed *de facto*<sup>74</sup>).

Indirectly, the SC reproached the HC for taking an ‘outsider’s viewpoint’<sup>75</sup> in approaching the dispute. The significance of the trial court’s failure to address the issue of ownership appropriately was further manifested in that it even neglected to consider the ‘... issue of the locus standi of Dr Ntaba, Mr Chimango and the MCP to these proceedings’ even though ‘the erstwhile Attorney-General,’<sup>76</sup> had raised the issue in argument. In its determination the SC concluded that the post-1994 MCP lacked locus standi to raise issues of the property of the

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<sup>69</sup> For a ‘conventional’ liberal democratic commentary of the status of the Press Trust in the Malawian socio-political economy see Van Donge Ch. 4 (n 45).

<sup>70</sup> See (n 54) 186.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

<sup>73</sup> *AG v. MCP and Others* (n 54) 185.

<sup>74</sup> *Kanyongolo* (n 61) 360.

<sup>75</sup> *AG v. MCP and Others* (n 54) 186.

<sup>76</sup> Ibid 210.

Press Trust before the courts of Malawi. Among the reasons cited was the fact that the plaintiffs were neither trustees nor directors/representatives of the Press Trust and hence the mere fact that the pre-1994 MCP had a significant role historically in the creation of the press group [did not] give them ... “sufficient interest.”<sup>77</sup>

Ironically, neither the SC nor the HC drew out the legal distinction between the pre-1994 MCP and Dr. Kamuzu Banda. Both courts did not take the time to analyse whether any property in the Press Trust could be said to have been ‘jointly’ or ‘severally’ owned by pre-1994 MCP (and its members) and/or Kamuzu Banda in his personal capacity. On the one hand, the HC held that the Press Trust was owned by MCP (fusing pre-1994 and post-1994 MCP into one legal entity) and Kamuzu Banda – without elaborating any possibility of separate legal existence. On the other hand, the SC concluded that the Press Trust was owned by the pre-1994 MCP (synonymous with the pre-1994 Government of Malawi) on behalf of the Malawi Nation (its members) and to the extent that Kamuzu Banda held any shares, he did so as President and not as a private individual. The obvious point to make here is that neither court (at trial or on appeal) seems to have been alive to the patrimonial dynamics of the Banda regime and were thus unable to articulate a judicial commentary that could adequately account for the apparent ‘confusion’ surrounding the ownership of the Press Trust.

It may be argued therefore that the factual conclusion of both courts (the SC and the HC) on this most important point ‘tainted’ their judicial conclusions on the rest of the constitutional issues. It will be shown in the subsequent discussion that in exercising their judicial review function both the SC and the HC were consciously engaged in a process of righting (what they perceived to be ‘constitutional’ or ‘historical’) wrongs. The HC assumed the noble role of ‘disciplining an unaccountable executive’ by reference to ‘constitutional’ norms that ‘exclusively’ preserved the liberal democratic values of property. However, the trial court seems to have paid no regard to the ‘historical peculiarities’ of the creation of the Press Trust and thereby compromised the ‘legitimacy’ of its determination in the context of the social trust thesis espoused in sections 12 and 13 of the 1994 Constitution.

On the other hand the SC appears to have conceived its constitutional function as ‘judicially’ righting the ‘historical injustice’ of what has been termed ‘eating from the State’ or ‘politics of the belly’.<sup>78</sup> However, in discharging that function the appellate court appears to have been unduly deferential to both the executive and the legislative arms of government; in other words they failed to display ample fidelity to the ‘constitutional parameters’ of accountability

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<sup>77</sup> Ibid 211 – 212.

<sup>78</sup> Van Donge (n 69) 652.

and constitutional supremacy espoused in sections 5, 8 and 9 of the 1994 Constitution. Thus, in different ways, both the SC and the HC display an 'unsatisfactory' approach to constitutional adjudication. That said the SC approach at least took cognisance of the 'pervasiveness' of MCP as a socio-political entity with 'exclusive' economic hegemony prior to 1994. On that important score therefore, the appellate decision would pass the test of 'transformative constitutionalism' to the extent that the law was employed to rectify and not consolidate 'socio-economic' hegemony as a legacy of 30 years of autocratic rule.

#### 6.3.1.2 Supreme Court: 'The Executive Knows Best' – Notice of Legislative Proposals

The Press Trust Case occurred as Malawi was still in the early stages of transitioning from a 'totalitarian rule,'<sup>79</sup> where 'checks and balances were very limited and ineffectual. Absolute, unquestioning loyalty ... was expected of everyone who participated in public life.'<sup>80</sup> The President and (by necessary implication) the executive arm of government was deemed to know best and parliament agreed with all that the executive set as an agenda. According to Denis Venter 'the Malawian state was a strong and authoritarian state, dominated by a small, autocratic...political clique...an archetype of the "Leviathan" state [where] the ministerial and parliamentary structures were purely nominal and had the facile function of rubber-stamping and rationalising handed down policies.'<sup>81</sup> This is the 'autocratic' environment in which the Press Trust (and its legal predecessors) had been birthed and nurtured. Incidentally, it was within the same political reality of 'executive hegemony' that the appellate justices had come to first practice the law (and later assumed judicial office).<sup>82</sup>

The Press Trust case tested the willingness of the court to enforce constitutional accountability of the executive in the latter's exercise of its mandate to initiate legislation in Parliament.<sup>83</sup> Essentially the plaintiffs challenged the validity of the Press Trust (Reconstruction) Act ("The Act") on the basis that the executive had failed to give MPs adequate notice prior to tabling the antecedent Bill in violation of section 96 (2) of the Constitution which required such notice to enable 'canvassing' of 'public' as well as 'expert' opinions. In arguing this point it was conceded by the plaintiffs that the procedure followed by the Minister of Finance in introducing the Press Trust (Reconstruction) Bill ("The Bill")

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<sup>79</sup> KM Phiri and KR Ross, 'Introduction: From Totalitarianism to Democracy in Malawi' in Phiri and Ross (n 59)

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<sup>80</sup> Ibid.

<sup>81</sup> Venter (n 53) 156, 225.

<sup>82</sup> See Gloppen and Kanyongolo (n 3).

<sup>83</sup> Section 1 of the 1994 Constitution

before the National Assembly 'was permitted by the standing orders' ("SO") which allowed for 'dispensing with notice'.<sup>84</sup>

Specifically, Standing Order 114 provided for publication of a public Bill in the Gazette at least 21 days prior to first reading, unless in the opinion of the responsible minister the urgency of matter warranted a waiver of such notice.<sup>85</sup> In this instance the Minister of Finance had purported to act on the basis of this SO when he introduced the Bill in Parliament. The question then became which takes precedence, SO 114(4) or S. 96 (2) of the Constitution?

### **The High Court Determination**

The MCP argued before the HC that SO 114 (4) was inconsistent with S. 96 (2) of the Constitution because it allows the Minister to give no time at all; to that extent it should be declared null and void. Section 96(2) stipulated that 'in performing the duties and functions referred to in this section *the cabinet shall make legislative proposals available in time*, in order to permit sufficient canvassing of expert and public opinion.'<sup>86</sup> The respondent replied that SO 114 'was made under the (authority of) the Constitution' empowering 'the National Assembly to make rules to govern its own procedure'. This authority is elaborated in Section 56(1) of the Constitution to the effect that 'the National Assembly or the Senate may, by Standing Order or otherwise regulate its own procedure.'<sup>87</sup> Rather significantly as we shall see later, that rule making power to regulate procedure is given 'subject to this Constitution'.<sup>88</sup>

In addressing this axiomatic constitutional question, the HC employed an approach antithetical to that taken when determining the issue of ownership of the Press Trust by appealing to the 'historical realities' of Malawian politics in order to elucidate the democratic significance of the constitutional requirement for ample notice of legislative business. It was therefore observed that:

The framers of our Constitution ... were mindful of the history of our beloved country and the prospect of abuse. Our history shows that very onerous and unconscionable legislation had been rushed and passed through the National Assembly, with disastrous results to the ethos of our nation and people. ... The framers of our Constitution...did not provide for any rider to dispense with such notice in the event of urgency. They insisted on sufficient time.<sup>89</sup> ... *The history*

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<sup>84</sup> *MCP and Others v. AG* (n 67) 261.

<sup>85</sup> *Ibid* 261.

<sup>86</sup> (Emphasis supplied)

<sup>87</sup> *MCP and Others v. AG* (n 67) 262.

<sup>88</sup> See Section 56 (1) of the 1994 Constitution

<sup>89</sup> *Ibid* 263.

*of our country justifies a constitutional provision that requires time to be given.* In such a case, some time, albeit not a long time, must be given to enable canvassing of public and expert opinion.<sup>90</sup>

The HC agreed with the plaintiffs that in an ‘open and democratic society’ such notice is indispensable to ensure ‘popular participation’ in the legislative-making process. Thus in relation to Section 56 (1) the trial court stated that ‘the purpose of Standing Orders or statutes made under section 56(1) of the Constitution is to regulate procedure, not to create new powers.’<sup>91</sup> In other words ‘a constitutional provision that requires one to give time to enable sufficient canvassing of expert and public opinion is clearly not served by a provision that does not give such time. It could be served by a provision that gives less time, but not by one that gives none at all.’<sup>92</sup> The HC took the position that SO 114 (4) created new powers for the National Assembly contrary to what ‘the framers of our Constitution’<sup>93</sup> had ‘obvious[ly]’<sup>94</sup> intended. Therefore, the HC declared SO 114 (4) invalid. The trial judge concluded that ‘the first plaintiff and the two members of Parliament should have been given 21 days’ notice.’<sup>95</sup>

In effect therefore one would expect that the legislative business transacted pursuant to the purported ‘waiver of notice’ would have been accordingly ‘void’. Nevertheless the HC took the view that inadequacy of notice alone would not have led to the declaration of the Act as invalid; <sup>96</sup>a position similar to that of the appellate court.<sup>97</sup> As a matter of ‘transformative jurisprudence’ the HC rightly needed to pay attention to the history of the country in its application of S. 96 (2) of the Constitution to circumscribe the ambit of SO 114 (4). There was in that sense a valid recognition of the historical imperative which ‘motivated’ the stipulation of ample notice to precede the introduction of legislation in Parliament. Indeed it is axiomatic that constitutionalism demands accountability from the executive in legislative proposals. Conceptually, the requirement of time for consultations and participation would be legitimate democratic prerequisites within a social trust based governance framework.

### **The Supreme Court Determination**

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<sup>90</sup> Ibid 264 (emphasis supplied).

<sup>91</sup> Ibid.

<sup>92</sup> Ibid 262.

<sup>93</sup> Ibid 263.

<sup>94</sup> Ibid.

<sup>95</sup> Ibid.

<sup>96</sup> Ibid 290.

<sup>97</sup> Ibid 190.



The SC seems to have taken the approach that the executive ‘knows best’ and is (almost always) deemed to act within the law.<sup>98</sup> The SC chose to exploit the ambiguity in Section 96 (2) to justify deference to the executive by stating that the section did ‘not specify to whom legislative proposals should be made available, whether to members of Parliament or members of the public generally, or to both.’<sup>99</sup> The SC surprisingly went on to declare that there was no ‘nexus between section 96(2) and SO 114,’<sup>100</sup> despite the fact that both deal with issues of ‘time lines’ within the legislative process. It seems the SC was unwilling to even consider the compatibility of SO 114 (4) with the constitutional demands for notice under section 96(2)-which is the approach taken by Mwaungulu, J – but simply declared that ‘...failure to comply with section 96(2) cannot render SO 114(1) invalid, as Mwaungulu J held.’<sup>101</sup>

Had the SC stopped there, maybe the impact of its deference on subsequent legislative processes in Malawi would have been mitigated. However, the appellate court proceeded to create what is tantamount to a presumption of compliance with constitutional provisions on legislative processes in favour of the executive.<sup>102</sup> It pronounced that since ‘the process of legislation does not begin in Parliament ... [but] in Government departments ... it ha[d] almost become a rule ... for Government departments to consult the representatives of the interests affected before introducing a Bill into Parliament.’<sup>103</sup> Consequently, the SC held that it was ‘a mistake to look exclusively at what happens in Parliament,’<sup>104</sup> when deciding a question on whether the government had complied with constitutional provisions on the legislative processes. In so doing the SC somehow created a dubious presumption of adequate and representative consultation on legislative proposals in favour of the executive. There was no mention as to which evidence the SC had recourse to in order to find that it was now an ‘established rule’ that ‘government departments consulted widely’ before legislation was presented before parliament. In any event, that inquiry would have no practical impact on the Act since the SC held that ‘even if there was a breach of section 96(2)’ they ‘were of the view that that breach would not invalidate the Act.’<sup>105</sup> In their opinion

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<sup>98</sup> For a good account of how this phenomenon has continued to affect the judicial approach to Malawian constitutional review see BP Matumbi, ‘The Fallacy of the Presumption of Perfection: The Presidential Reference on Section 65 and its Ramifications’, (2007) 1 (2) *Malawi Law Journal* 247; CM Silungwe, ‘Courts Power of Review, Composition of the National Assembly and the Presidential Reference on Section 65,’ (2007) 1 (2) *Malawi Law Journal* 235.

<sup>99</sup> *AG v. MCP and Others* (n 54) 190.

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*

<sup>102</sup> Matumbi (n 98).

<sup>103</sup> *AG v. MCP and Others* (n 54) 190.

<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.*

'if the requirement under section 96(2) was necessary...for the purposes of legislation, it would have been included in section 48(1) of the Constitution [dealing with functions and duties of the legislature].'<sup>106</sup> As a matter of constitutional review the SC may just as well have 'deleted' S. 96 (2) from the Constitution-for that seems to be the legal effect of such a 'deferential' analysis of the provision *vis-a-vis* other aspects of the Constitution. It could even be argued that the 'subsidiary legislation' of Parliamentary (SO 114 (4)) effectively 'tramped' an otherwise clear constitutional provision.

It is rather curious to observe that in its deference to the executive, the SC interprets Constitutional provisions not as a whole but in isolation – there seems to be more importance given to the lexicographic arrangement of constitutional provisions than to their substantive import. To that extent the whole mandate of 'enforcing' and 'interpreting' the Constitution can be said to be 'lost' on the courts.

#### 6.3.1.3 SC: Quorum and Speaker's non-Justiciability

Another ground on which the plaintiffs sought the invalidation of the Act was that it had been enacted without the requisite quorum as provided by section 50 of the Constitution.

The Appellate court's approach to the question of quorum (even if it were to be correct) underscores their fundamental assumptions of constitutionality of legislation - a typically deferential position which conceptually seeks to avoid any 'conflict' by establishing an almost 'insurmountable' threshold of evidence in order to prove 'non-compliance'. However, in fairness to the SC, it must be conceded here that legitimate differences of opinion were inevitable in respect of the question of 'quorum' in the Malawi Constitution (prior to the 2001 amendment).

#### The High Court Determination

The HC proceeded on the basis that though a procedural issue the question of quorum needed to conform to fundamental constitutional values. As such it became a condition precedent to the validity of an Act of Parliament. It was observed that:

In a jurisdiction, like in the United Kingdom, where there is no written Constitution, *the doctrine of the supremacy of Parliament entails that the procedure affecting legislation can only be a product of Parliament itself and alterable by Parliament.* The immutability of the doctrine of supremacy of Parliament results in the inability of courts to question the validity of Acts of Parliament on any basis, including the procedure under which the Act was passed. *Where the fundamental law is a written*

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<sup>106</sup> Ibid 193.

*Constitution, however, the legislature cannot overlook the procedure laid by the Constitution for validity of its legislative actions or exercise of its legislative will.*<sup>107</sup>

In this case the legal dispute was whether the ‘absence’ of MCP MPs in the chamber when the Bill was actually debated meant that there was no quorum even though they had been there at the beginning of that day’s business. The pertinent legal issues therefore became ‘what was the requisite quorum and when is it computed’ (or more accurately for the second limb ‘what constitutes a sitting’)? Section 50 (1) of the Constitution provided that the quorum shall be formed at the beginning of the sitting by the presence of two-thirds of the members entitled to vote. Section 50 (2) stipulated that where the speaker was informed of the absence of the quorum he shall adjourn the chamber upon verification.

The HC quoted extensively and followed the judicial reasoning from various foreign jurisdictions. It concluded that the hallmark of a quorum was actual presence at the entire meeting and its ultimate purpose was to validate the whole proceedings from beginning to end.<sup>108</sup> Thus Sections 50 (1) and (2) must be read together since ‘the framers of our Constitution wanted to deal with the question of the quorum of the chambers in two stages, at the beginning of each sitting (S. 50 [1]) and during the sitting (S. 50 [2]).’<sup>109</sup> Consequently, SO 26 which provided for two-thirds quorum without reference to the beginning of the sitting signified the need for a quorum to be retained throughout the sitting.<sup>110</sup> The possibility of a minority government being held to ransom by the majority opposition represented a political question which required statesmanship and not legal resolution.<sup>111</sup> Hence Section 56 (2) stipulating that ‘Save as otherwise provided in this Constitution, [parliament] may act *unless more than two thirds of all their seats are vacant*’ could not modify the two-third requirement under section 50 since the issue of quorum determined the capacity of parliament to act qua-parliament.<sup>112</sup> The view of the HC was that ‘*the essence of democracy is the pluralism of ideas and debate*’ [such that] ‘the best of decisions can only come from a wider participation of those who are responsible for decision-making.’<sup>113</sup> Therefore, for the Speaker’s failure to adjourn proceedings once notified of the lack of forum, the Act was invalidated.<sup>114</sup>

The HC’s determination (except on S. 56[2]) entrenches the essence of representative democracy. It remains moot whether the refusal by the court to resolve a question that would

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<sup>107</sup> *MCP and Others v. AG* (n 67) 289 (emphasis supplied).

<sup>108</sup> *Ibid* 271.

<sup>109</sup> *Ibid* 273.

<sup>110</sup> *Ibid* 275.

<sup>111</sup> *Ibid*.

<sup>112</sup> *Ibid* 276 (emphasis supplied).

<sup>113</sup> *Ibid* 290 (emphasis supplied).

<sup>114</sup> *Ibid* 291.

be better handled by political dialogue would have forced Malawian politicians to learn the skills of dialogue and compromise which is essential in the consolidation of democracy.<sup>115</sup> However, it was arguably erroneous for the HC to state that S. 56 (2) of the Constitution did not affect the question of quorum when it patently alluded to the capacity of parliament to conduct business unless its members roll fell below one-third of the seats available (which would of necessity imply a valid quorum constituted by less than two-thirds of the entire membership as required under Section 50).<sup>116</sup> By failing to consider an alternative viewpoint, the HC missed an opportunity, within its excellent articulation of the purpose of a quorum, to outline the principles that should guide the application of S. 56 (2) of the Constitution. It would appear the HC was pre-occupied with preventing abuse from ‘an innocuous and reasonable provision’<sup>117</sup> that the trial judge opted to deprive it of legal effect – that of leaving it open to parliament to act with less than two-thirds of the members.

### **The Supreme Court Determination**

The SC overturned the HC on almost every point on the issue of the quorum. For instance, the SC stated that contrary to the HC conclusion section 50 ‘clearly requires a quorum at the beginning of the sitting’ only.<sup>118</sup>

While on the question of notice the SC court had ‘seen no nexus between’ a constitutional provision and a Standing Order,<sup>119</sup> now they could just as easily hold SO 26 as invalid for offending the constitution (S. 50 [1]). Arguably however, on the relationship between SO 26 and Section 50, the HC pronouncements appear to be more accurate – that SO 26 implemented S. 50 (2) of the Constitution hence could not be held to be inconsistent with S. 50 (1). It would appear that the SC in the earlier scenario took the view that insisting on the constitutional requirement for ample notice to accommodate consultations would have created ‘problems’ and undermined ‘executive business.’ Regrettably from the perspective of the democratic imperative to entrench constitutional accountability of the legislature, the SC reversed the HC finding that the Speaker should have adjourned the proceedings and granted the Speaker more or less absolute immunity.

In reaching that conclusion the SC applied S. 53 (5) of the Constitution which provides for the functional independence of the Speaker. The SC interpreted that provision to mean that

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<sup>115</sup> I Scholz, ‘Introduction: Malawi’s development Course on a Knife’s Edge – Do Politicians Care?’ in *Towards The Consolidation Of Malawi’s Democracy: Essays in Honour of the work of Albert Gisy German Ambassador to Malawi (2005- 2008)* p.1 - 6 , [Konrad-Adenauer-Stiftung](http://www.kas.de/mosambik/en/publications/13979/) at <http://www.kas.de/mosambik/en/publications/13979/>.

<sup>116</sup> *MCP and Others v. AG* (n 67) 276.

<sup>117</sup> *Ibid* 276.

<sup>118</sup> *AG v. MCP and Others* (n 54) 197.

<sup>119</sup> See n 101 – 106.

the Speaker had absolute immunity so that, he is protected from ‘challenges in [the] courts as a result of his exercise of the powers conferred upon him.’<sup>120</sup> According to the SC such a deferential interpretation of the Constitution was necessary because ‘if (they) construe[d] the Constitution strictly, no Government would be able to function properly, and this would be to the detriment of the nation as a whole.’<sup>121</sup> Thus political expediency was allowed to determine constitutional validity of legislative conduct.

#### **6.3.1.4 The Significance of the SC Approach**

This study proposes that on the ‘substantive question’ of the Press Trust Case, namely whether it was a private or public trust, legitimate difference of opinion may exist. Such differences may reflect the conceptual predispositions of different judicial officers to either ‘unsullied’ liberal democratic values or ‘transformative constitutionalism’ models which account for the ‘peculiar governance’ needs of Malawi.<sup>122</sup> Actually, this thesis is of the view that the decision of the SC represents the justice of the case by reason of its fidelity to social trust based formulations of constitutionalism. However, it is worth contending ‘the end does not necessarily justify the means’; it should have been possible for the SC to arrive at a just decision without undue deference to the executive and the legislature (indeed without recourse to the dubious ‘doctrine of necessity’).<sup>123</sup>

As subsequent developments have shown in Malawi, political parties appear to see no need for ‘political and social dialogue, concessions and compromise, for the benefit of the whole nation. Instead politicians in Malawi seem to be preoccupied with preserving power, gaining power and preventing others from getting power.’<sup>124</sup>

### **6.3.2 Cases Subsequent To the Press Trust Case**

#### **6.3.2.1 MCP Factionalism Cases**

When Kamuzu Banda indicated that he did not wish to continue with the Presidency of the MCP, the ‘heir apparent’ was perceived to be JZU Tembo. However, Dr. Banda left the mantle to Gwanda Chakuamba. After the MCP lost elections to the UDF in 1999, Tembo ascribed the losses to Chakuamba; hence leadership wrangles developed leading to the emergence of two factions. Subsequently, the two factions held two separate conventions which led to the case of *Re Constitution of Malawi Congress Party and Re a Convention*

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<sup>120</sup> *AG v. MCP and Others* (n 54) 196.

<sup>121</sup> *Ibid* 199.

<sup>122</sup> See generally Nkhata (n 4).

<sup>123</sup> For detailed commentaries on that aspect of the case see Chirwa Ch. 1 (n 143); and Hatchard & others Ch. 1 (n 118).

<sup>124</sup> Scholz (n 115) 2.

and Part 4 Article 40 of the Constitution of the Malawi Congress Party.<sup>125</sup> The HC whilst declaring the two conventions a nullity, refused to get drawn into choosing a leader for a political party. A vice-president of the MCP lodged an appeal to the SC in the case of *Peter Chiwona v. Hon. Gwanda Chakuamba*<sup>126</sup> against the decision of the HC. The SC upheld the findings of the HC.

Interestingly, the trial judge in the HC was the same judge as in the Press Trust Case (HC). The rationale for refusing to get involved was similar to his reasoning in the quorum decision – that politicians must resolve political stalemates amongst themselves. The SC however, appears to distinguish between political stalemates between the executive and the opposition (in which case the SC held the courts must intervene)<sup>127</sup> and political stalemates between or within political parties (in which case courts must not intervene).

#### 6.3.2.2 Cases cited in Research studies

A considerable number of scholars have analysed the decisions of both the HC and the SC on politically charged matters in the context of political studies.<sup>128</sup> The cases involved intra-party disputes, election disputes, and separation of powers.<sup>129</sup> Notable cases include - *Attorney General vs. Mapopa Chipeta*,<sup>130</sup> *Fred Nseula v. Attorney General and Malawi Congress Party*,<sup>131</sup> *the State v. Speaker of the National Assembly and the Attorney General ex parte Mary Nagwale*,<sup>132</sup> and *the State and the National Assembly ex part Hon Sylvester Kasambala and the Registered Trustees of the Public Affairs Committee (PAC)*.<sup>133</sup> The research findings show that 'while the court's decisions as a whole were balanced between the government and its opponents, high interest cases tended to go the government's way.'<sup>134</sup> As between the SC and the HC it is the SC that 'largely remained supportive of'<sup>135</sup> the executive.

Vondoepp argues that the decisions of the courts in Malawi including the SC have been motivated by 'ethno-regional identities.'<sup>136</sup> However, as Ellet responds to similar claims from other scholars, such arguments are misleading,<sup>137</sup> as they fail to take into account the

<sup>125</sup> High Court Civil Cause No. 645 of 2000 (unreported).

<sup>126</sup> M.S.C.A. Civil Appeal No. 40 of 2000 (unreported).

<sup>127</sup> See n 115.

<sup>128</sup> See generally, Ellet Ch. 1 (n 40); also Vondoepp (n 3); and Vondoepp Ch. 1 (n 129).

<sup>129</sup> Ibid.

<sup>130</sup> MSCA Civil Appeal No. 33 of 1994

<sup>131</sup> MSCA Civil Appeal No. 32 of 1997

<sup>132</sup> Misc. Civil Cause No. 1 of 2005

<sup>133</sup> Misc. Civil Cause No. 287 of 2005

<sup>134</sup> Vondoepp (n 3) 90.

<sup>135</sup> Ibid.

<sup>136</sup> Ibid 93.

<sup>137</sup> Ellet (n 128) 292.

consistent judicial reasoning of the SC. The SC has largely upheld the doctrine of parliamentary supremacy in most constitutional review cases which it considered to have high national interest implications. Even though the SC has not expressly employed the term ‘deference’ in any of its judgments, the application of the principle of ‘judicial deference’ is replete within the emerging jurisprudence. Whereas the allegations of ethno-regional tendencies may be worth analysing in the context of ‘judicial politics’ they are a misdiagnosis of the manifest ‘jurisprudential’ problem – this study suggests that the courts’ own ‘misapprehension’ of the new ‘constitutional dispensation’ offers a more apposite theoretical account for the consistently ‘inadequate’ jurisprudence (despite the strong evidence of judicial independence).

#### 6.4 Implications on Legislative Developments

Vondoepp records that the supportive tendencies of the SC were ‘not lost on the key players in Malawian politics’<sup>138</sup> especially the government. It is argued in this chapter that the subsequent legislative developments that followed emanated from such perceptions that were strengthened by the judicial deference adopted by the SC especially.

##### 6.4.1 The Abolition of the Senate

The 1994 Constitution originally provided for a second chamber called the Senate from sections 68 to 72.<sup>139</sup> Its functions included ‘the power to propose and pass legislation; to amend existing laws; and to indict or convict the President on impeachment.’<sup>140</sup> By Act No. 4 of 2001, the National Assembly abolished the Senate, through constitutional amendment (?). The main reason advanced was that the Senate would have been very expensive to run hence posing an unnecessary burden on already scarce government resources.<sup>141</sup> As a result, contrary to the Constitutional order envisioned by the 1994 Constitution, the country reverted to the pre-1994 order of a unicameral legislature.

The reaction of the public to the abolition of the Senate has been consistent condemnation coupled with a demand for its re-introduction.<sup>142</sup> At the time the amendment was being considered in parliament, there was strong condemnation from both civil society and opposition parties.<sup>143</sup> Civil Society organisations sought an injunction from the High Court to

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<sup>138</sup> Von Doepp (n 3) 92.

<sup>139</sup> M. Chigawa, ‘The Senate as the Second Chamber of Parliament in Malawi: Its Relevance, Composition and Powers’ – a Paper presented at the Conference for the launch of the Malawi Law Journal, 16 -17 July 2008, Blantyre Malawi (available as hardcopy conference paper).

<sup>140</sup> Ibid 2.

<sup>141</sup> Ihonvbere Ch. 1 (n 76) 225.

<sup>142</sup> Patel Ch. 1 (n 118) 25; Malawi Law Commission, (2007) *Report on the Review of the Constitution*, p. 34

<sup>143</sup> Ibid (Patel)

prevent the bill from being tabled. The grounds for challenging the abolition of the Senate were framed in Constitutional terms – section 45(8) of the Constitution provides that ‘under no circumstance shall it be possible to suspend this Constitution or any part thereof or dissolve any of its organs, save as is consistent with the provisions of this Constitution.’ It was argued that S. 45 (8) read with S. 196 (3) protected the Senate provisions from an amendment without a national referendum. S. 196 (3) provides that Parliament has power to amend a provision of the Constitution without a referendum only if ‘the amendment would not affect the substance or the effect of the Constitution.’

However, as the HC was taking its time deliberating on the matter, ‘the government moved with unseemly haste by tabling, debating and passing the bill.’<sup>144</sup> The dangers of haste, lack of consultations and disregard of the views of both the public and opposition parties by the Executive when passing legislation was an issue that the HC in the Press Trust Case had highlighted. In making reference to the autocratic historical experience whereby the Executive had been unaccountable such that Parliament ‘was largely a rubber stamp for decisions made by the executive’<sup>145</sup> Mwaungulu, J had admonished that such a trend could easily recur if the courts were to dispense with the need for notice as required by S. 96 (2) of the Constitution. As already discussed however, the SC effectively ‘deleted’ S. 96 (2) through its pronouncements in the Press Trust Case.<sup>146</sup> In so doing, the seeds were sown for a ‘return to the sins of the past’ so to speak.

Consequently, it should not be surprising that when amending a substantial provision of the Constitution, the Executive once more hastened the process brandishing the ‘national interest’ mantra of ‘cutting down government expenditure’ for good measure – arguably to invoke the judicial deference principle in their favour.

Further, the SC pronouncements on a quorum of two-thirds as being essential only at the beginning of the sitting may have undermined the bargaining position of the opposition in Parliament. It could also be argued that the SC decision in the Press Trust Case e.g. on S. 96 (2) may have discouraged civil society organisations from pursuing the matter beyond the application for injunction. These points are buttressed by the fact that the even Constitutional Review Commission was ‘generally sympathetic to the view that it is quite probable that the abolition of the Senate in 2001 by the National Assembly was not entirely consistent with the letter and spirit of the Constitution itself.’<sup>147</sup>

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<sup>144</sup> Ibid.

<sup>145</sup> Ibid 22.

<sup>146</sup> See n 101-105.

<sup>147</sup> Chigawa (n 139) 3.



The abolition of the Senate undermined a Constitutional framework that had taken into account the social, cultural and political arrangements that exist in Malawi. The Senate's composition had included Chiefs, and religious leaders who wield significance influence in their jurisdiction. Further, the Senate would have provided 'a forum for the representation of special interest groups such as the disabled and women,'<sup>148</sup> as well as expert input into matters of national importance since some senators were to be people who are experts in their fields.<sup>149</sup> As a consequence, the nation lost a Constitutional organ that would have served as an organ 'for checks and balances on both the National Assembly'<sup>150</sup> and the Executive (through its powers to impeach the President). Indeed, 'by abolishing the Senate, a vital mechanism for ensuring accountability was neutralised.'<sup>151</sup>

#### 6.4.2 The Recall Provision

The 1994 Constitution was a product of deliberations of a National Consultative Committee that was constituted to come up with a provisional Constitution which would later be adopted by the National Assembly as the new multi-party era Constitution.<sup>152</sup> One of the provisions in the provisional Constitution was Section 64 which had provided for the recall of members of parliament by their constituents.

By Act No. 6 of 1995, the National Assembly repealed S. 64 of the provisional Constitution hence when the Constitution came into effect, it did not have a recall provision. The coalition of UDF and AFORD used their numbers in parliament to repeal S. 64 of the provisional Constitution contrary to the express resolution of the National Consultative Conference on the provisional Constitution.<sup>153</sup> The Conference had been set up to discuss provisions that were perceived to be contentious, and one of those provisions was the recall provision.<sup>154</sup> The delegates came from wider society, including political parties, even some not represented in Parliament, the Churches, the Law Society, Trade Unions, Women's groups, Traditional Authorities, the legal fraternity, the University and the armed forces.<sup>155</sup> By express resolution, the delegates called for the retention of the recall provision (among others like the Senate), on the basis that it would enhance the accountability of members of parliament to their constituencies.<sup>156</sup>

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<sup>148</sup> Ibid 4.

<sup>149</sup> Ibid.

<sup>150</sup> Patel (n 142) 26.

<sup>151</sup> Ibid.

<sup>152</sup> M Kirby, 'Malawi: The Arrival of Multiparty Democracy' (1994) 20 *Commonwealth Law Bulletin* 675-678.

<sup>153</sup> Ibid.

<sup>154</sup> Ibid.

<sup>155</sup> Ibid.

<sup>156</sup> Ibid.

In a manner that displayed their blatant desire to fashion the Constitutional framework in a manner that consolidated their hold on political power by diminishing the accountability devices, the rationale given for the repeal of the recall provision was that ‘it could be abused by the constituents.’<sup>157</sup> Surely if indeed the concern was fear of abuse, parliament could have developed proper criteria for recall by way of legislation.

Now whereas the repeal of the recall provision was done before the SC decision in the Press Trust Case, it is proposed that uproar that followed the repeal should have exercised the court’s mind when dealing with the issues of notice, quorum and accountability of the Speaker before the courts. Somehow in deciding the issues in the Press Trust case as it did, the SC indirectly endorsed the conduct of the National Assembly in the repeal of the recall provision thereby entrenching unaccountability.

#### 6.4.3 Section 65: Crossing the Floor

The HC and SC decisions on S. 65 of the Constitution have been highlighted as evidence of the independence of the Malawi Judiciary.<sup>158</sup> However, it is also arguable that some aspects of the SC decision are another example of judicial deference and the impact it has had on legislative developments. Others have called the deference, ‘the presumption of perfection.’<sup>159</sup> The case in issue is that of *The Presidential Reference on S. 65*.<sup>160</sup>

In order to place the case in its proper context it may be necessary to elaborate that Section 65, also known as ‘crossing the floor provision,’ is one of the sections that were amended in 2001. The Original S. 65 as it was in the 1994 Constitution provided as follows:

‘(1) The Speaker shall declare vacant the seat of any member of the national assembly who was, at the time of his or her election, a member of one political party represented in the national assembly, other than by that member alone but who has voluntarily ceased to be a member of that party and has joined another political party represented in the National Assembly.

(2) Notwithstanding subsection (1), all members of all political parties have the absolute right to exercise a free vote in any and all proceedings of the national Assembly, and a member shall not have his seat declared vacant solely on account of

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<sup>157</sup> Patel (n 142) 26.

<sup>158</sup> For example, S Gloppen & FE Kanyongolo, ‘Judicial Independence and Judicialization of Electoral Politics in Malawi and Uganda’ – paper presented at the IPSA-ECPR Joint Conference, February 16 – 19, 2011 <http://saopaulo2011.ipsa.org/sites/default/files/papers/paper-1570.pdf>

<sup>159</sup> Matumbi (n 98).

<sup>160</sup> *In the Matter of Presidential Reference of a Dispute of a Constitutional Nature under Section 89(1)(h) of the Constitution and In the Matter of Question of The Crossing of the Floor in the National Assembly*, Presidential Reference Appeal No. 44 of 2006 (unreported).

his or her voting in contradiction of the recommendations of a political party, represented in the national Assembly, of which he or she is a member.’

By Act No. 8 of 2001, Parliament amended the S. 65 (1) but maintained S. 65 (2). The amendment, currently in force provides (amendments are italicized) –:

‘(1) The Speaker shall declare vacant the seat of any member of the national assembly who was, at the time of his or her election, a member of one political party represented in the national assembly, other than by that member alone but who has voluntarily ceased to be a member of that party *or has joined another political party represented in the National Assembly or has joined any other political party, or association or organization whose objectives or activities are political in nature.*

The first constitutional review of the amendment was the case of *The Registered Trustees of Public Affairs Committee (PAC) v. Attorney General*.<sup>161</sup> In that case, the HC was called upon to consider the constitutionality of the amended provision in view of the ‘right to freedom of association as guaranteed under the Constitution.’<sup>162</sup> The HC declared the amended version invalid on the basis that it violated the right to freedom of association, but upheld the original S. 65 (1) as valid and constitutional. Consequently, ‘the position of the law reverted to that which existed before’<sup>163</sup> the 2001 amendment.

The subsequent constitutional reviews of the section came by way of Presidential referral to the HC<sup>164</sup> under S. 89 (1)(h) of the Constitution which ‘empowers the President to refer disputes of a Constitutional nature to the High Court.’<sup>165</sup> Initially, it was surprisingly that the version that the Presidential referral was based on was the amended version of 2001 (which had already been invalidated by a HC judge).<sup>166</sup> Subsequent events however, have shown that the Referral was aimed at delaying the implementation of Section 65 by the Speaker as the party the President had formed upon taking office had no elected representatives in Parliament. The issues in the referral included<sup>167</sup> –

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<sup>161</sup> Civil Cause No. 1861 of 2003 (HC) (unreported)

<sup>162</sup> M Chigawa, ‘The Concept of Crossing the Floor Under the Malawian Constitutional Law’ (2008) 2 *Malawi Law Journal* 185, 198

<sup>163</sup> Ibid.

<sup>164</sup> *In the Matter of Presidential Reference of a Dispute of a Constitutional Nature under Section 89(1)(h) of the Constitution and In the Matter of Question of The Crossing of the Floor in the National Assembly*, Presidential Reference No. 2 of 2005 (unreported).

<sup>165</sup> Chigawa (n 139).

<sup>166</sup> See (n 164).

<sup>167</sup> Also cited in Chigawa (n 139) 199.

(1) Whether S. 65 (1) was not inconsistent with Constitutional provisions 32, 33, 35 and 40, which provided for freedoms of association, conscience, expression and political rights respectively.

(2) Whether an 'independent' member would be deemed to have crossed the floor where – (a) he or she joins a political party that is represented in the National Assembly; or (b) he or she joins a political party that is not represented in the National Assembly.

The HC upheld S. 65 (1) as amended in 2001 as Constitutional hence valid without at any point distinguishing the case of *The Registered Trustees of Public Affairs Committee (PAC) v. Attorney General*.<sup>168</sup> The fact that the President referred the matter to the SC<sup>169</sup> – effectively appealing against the decision of the HC, supports the assertion that the referral was aimed at simply buying him time. The SC upheld the finding of validity and constitutionality of the HC hence the law in force on crossing the floor is S. 65 (1) as amended in 2001.

However, whereas it was 'correct in principle'<sup>170</sup> for the SC to hold that 'courts had no power to invalidate a provision of the Constitution, which outlived the period of its provisional application'<sup>171</sup> [18<sup>th</sup> May 1994 – 18<sup>th</sup> May 1995]; the same cannot be said of its elaboration of the reasoning on the issue. The SC further held that:

Actually, it appears to us that even provisions of subsequent amendments to the Constitution, once duly passed in the normal way by the National Assembly and thereby becoming part of the Constitution, those provisions too cannot be invalidated or declared to be unconstitutional or inconsistent with the other provisions of the Constitution. We would therefore, with respect, query the correctness of the *Registered Trustees of Public Affairs Committee* case on this point. *The High Court had no jurisdiction to invalidate any of the amended section after the amendment was effected following due parliamentary procedure.*<sup>172</sup> (Emphasis supplied)

It can be argued that the main rationale for the decision of the SC to uphold the ruling of the HC on the *Presidential Reference* Case was its adoption of the principle of judicial deference even when it pertains to Constitutional amendment as signified by the quotation above. In effect, the SC pronounced beyond reasonable doubt that even when it pertains to

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<sup>168</sup> Point also highlighted in Chigawa (n 139) 199.

<sup>169</sup> See *Presidential Reference* case (MSCA) (n 164).

<sup>170</sup> Chigawa (n 139) 200.

<sup>171</sup> Matumbi (n 98) 247.

<sup>172</sup> See *Presidential Reference* case (MSCA) (n 139) 15.

Constitutional Amendments which the constitution stipulates must be made in compliance with its provisions Parliament will enjoy a form of supremacy.

## 6.5 Conclusion

In conclusion therefore it can be observed that by adopting an approach to its judicial mandate which is at odds with the clear intentions of the Constitution the apex court in Malawi has inadvertently 'reinstated' parliamentary supremacy as the definitive governance model in the jurisdiction. As has been acknowledged academically as well as in the court there were certain 'historical imperatives' that influenced the choice of 'regime' which the framers of the 'democratic' Constitution of 1994 adopted. Among other things, it was inherent in the despotic nature of Kamuzu Banda's 'regime' that institutional accountability was non-existent. Indeed, by design the post-independence constitutional order perpetrated the 'parliamentary supremacy' model practiced by the departed imperial authority.<sup>173</sup>

In a deliberate attempt to address the 'political perversions' which had 'manipulated' such a parliamentary system to install an unbridled one-man rule, the framers of the constitution entrenched a 'constitutional supremacy' model of governance. There were certain socio-political factors which they proposed to ameliorate by such an arrangement. However, there seems to be a body of jurisprudence emerging from the courts (especially at the apex) which would suggest that 'nothing changed' in terms of the place of the Constitution in the governance of the country. Within a jurisdiction exercising the common law principles of precedent generally and superior *stare decisis*, such an approach has the potential to inhibit the ability of the jurisprudence to play its anticipated role in articulating the transformative permutations embodied in the Constitution.<sup>174</sup>

Nevertheless, the picture for Malawi is not all bleak. As has been highlighted in the discussion of different approaches of the HC and the SC in the Press Trust case, there is no reluctance to employ judicial creativity where the courts deem it appropriate. In one instance the HC evidenced signs of 'judicial responsibility' in its keenness to enforce 'constitutional accountability' parameters no matter how unpalatable that would be to the 'powers that be'. Even though it reversed the HC, in doing so the SC showed remarkable 'judicial responsiveness' to the 'peculiarities' of Malawian socio-political developments by interpreting the relevant constitutional provisions in a fashion that promoted the 'transformative agenda' of dismantling the 'hegemonic' legacy of Kamuzu Banda and his 'chaebol'. In so doing prominence was given to the social trust based governance stipulations embodied within the

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<sup>173</sup> See generally Nkhata (n 4) 66.

<sup>174</sup> See B. Dickson (ed), *Judicial Activism in Common Law Supreme Courts* (Oxford University Press, 2007).

‘fundamental values’ of the new Constitution. Indeed the findings of other studies give the lie to any suggestion that the courts are ‘not independent’. As pointed out by Lord Hoffman:

In a society based upon the rule of law and the separation of powers, it is necessary to decide which branch of government has in any particular instance the decision-making power and what the legal limits of that power are. That is a question of law and must therefore be decided by the courts. This means that the courts themselves often have to decide the limits of their own decision-making power. That is inevitable.<sup>175</sup>

Consequently, priority must be given to identifying underlying factors that may impinge on the Court’s ability to appropriately determine when to exercise judicial deference or not, and if so to what extent, and in what manner. In that context, the proposition in this thesis is that ‘legal culture’ could as well account for the ‘consistently deferential’ approach of the apex court to its constitutional review mandate. The fact that, consistently, the SC seems to ‘reverse’ HC decisions which are less ‘deferential’ might be indicative of the difference in ‘outlooks’. It is thus pertinent to design training programmes that could address those ‘disparities’.

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<sup>175</sup> *R. (Pro-Life Alliance) v BBC* [2004] 1 AC 185; para. 75 – 76.

## Chapter 7

### Inability to distinguish between the ‘baby’ and the ‘bath water’? The Impact of Common Law Remedies and Precedents on Judicial Review Decisions in Malawi

*Legal analysts and policy makers who focus only on positivistic questions of textual gaps, fidelity of interpretation, application and enforcement of the Malawian Constitution perpetuate abstractionism which is unlikely to deliver effective answers to the question why after 18 years, the Constitution is honoured more in breach than compliance.<sup>1</sup>*

#### 7.1 Introduction

Malawi inherited its common law legal system with the attendant ‘emphasis on ... legal precedent and reliance on the body of cases decided in the past to guide the present decision of a judge,’ from Britain due to colonisation.<sup>2</sup> Soon after the independence of African countries including Malawi from Britain, around 1967, research by Gower revealed that ‘English Law was applied without consideration of its suitability to local conditions.’<sup>3</sup> A subsequent study in 1989 similarly showed that the application of English Law was done strictly ‘in accordance with English authorities,’ without ‘accommodating ... the specific problems’ arising in the relevant jurisdiction.<sup>4</sup> To the extent of accommodating specific problems when interpreting the Constitution, chapter 5 and 6 have demonstrated that Malawian Courts, post-1994 have made significant, albeit inconsistent/contradictory progress.<sup>5</sup>

However the same is not true of the courts’ application of foreign case law (including English authorities). Chapter 4 brought out how the HC and the SC post-1994 appear to think the problem of applying foreign case law without accommodating local peculiarities lies with the other not itself. For instance, the HC stated that the SC ‘rushed to put on old common law spectacles, and so to dig up ancient case law’, without first and foremost understanding the Constitution.<sup>6</sup> The SC on the other hand, pointed the figure back at the HC impliedly stating

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<sup>1</sup> FE Kanyongolo, ‘The Limits of Liberal Democracy in Malawi Revisited’, Paper presented at Conference on ‘The Malawian Constitution at 18: Constitutionalism, Diversity and Socio-Economic Justice,’ Blantyre Malawi, 25-28 July 2012.

<sup>2</sup> SF Joireman, ‘Inherited Legal System and Effective Rule of Law: Africa and Colonial Legacy’ (2001) 39 *Modern Journal of African Studies* 571-596, 573.

<sup>3</sup> LCB Gower, *Independent Africa* (HUP, 1967) 29, cited in Joireman (n 2) 576 -577.

<sup>4</sup> RB Siedman, ‘The Reception of English Law in Colonial Africa’ in YP Ghai, *et al* eds., *The Political Economy of Law* (OUP, 1989) 110.

<sup>5</sup> For instance chapter 6 has shown the HC in the Press Trust I sought to correct the problem of an unaccountable executive in the formulation of legislation but ignored the important social problem that the SC addressed, and the SC in the Press Trust II sought to correct the problem of abuse of public finances by politicians but equally ignored (and therefore left unaddressed) the problem that the HC had addressed.

<sup>6</sup> *Registered Trustees of the Public Affairs Committee v. Attorney General & Another*, Civil Cause No. 1861 of 2003, at [http://www.sdn.org/judiciary/civil/PAC\\_vs\\_Attorney\\_General\\_Speaker.htm](http://www.sdn.org/judiciary/civil/PAC_vs_Attorney_General_Speaker.htm).

that it is the HC itself that did not fully understand the relevant provisions of the Constitution.<sup>7</sup> On the other hand, chapters 5 and 6 read together demonstrate that both the HC and the SC in constitutional criminal law and adjudication touching on its oversight over the Executive and Legislature have actually placed undue weight on foreign case law without critically analysing the applicability of the same. In essence, the problem identified in 1967 and 1989 still remains.

In fact, chapters 4, 5, and 6 have demonstrated how that problem has in turn contributed to the inconsistent and contradictory phenomenon of judicial activism ('JA') in Malawi. In that context, chapters 5 and 6 pointed to a need to identify the underlying factors behind the inconsistencies and contradictions among the judges in their approach if effective solutions are to be identified and implemented. Consequently, this chapter seeks to build on that by focusing on judicial review of the Executive and Legislature in public appointments. It is hoped that in doing so, the underlying causes will become clearer.

## **7.2 Rationale for focusing on judicial review ('JR')**

### **7.2.1 JR in Malawi epitomises the complex relationship Malawi's future has with its past**

Yahalom<sup>8</sup> reports that 'the metaphorical phrase —don't throw out the baby with the bathwater', was first used in German literature, to describe people 'who by trying to rid themselves of a bad thing succeed in destroying whatever good there was as well.'<sup>9</sup> This chapter submits that consideration of the metaphor is a necessity in the face of research findings that the liberal democratic foundations of the current Malawian Constitution are at odds with the aspirations of the majority of Malawians. Even though those findings are accurate, it cannot be that there are no common values shared between the majority of Malawians and liberal democracy per se. For instance, in chapter 1, it was submitted in agreement with Beetham that though the principle of separation of powers and that of limited state powers have their roots in 'liberal democratic theories', there is a general agreement that they are indispensable in any democracy regardless of the theory in practice and that differences only arise as to how to implement it in practise.<sup>10</sup> This is particularly true of Malawi due to its history.

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<sup>7</sup> *Civil Liberties Committee (CILIC) v. Ministry of Justice & Registrar General*, MSCA Civil Appeal No. 12 of 1999 (judgment delivered in 2004), at [http://www.sdnw.org.mw/judiciary/civil/cilic\\_Min\\_Justice.htm](http://www.sdnw.org.mw/judiciary/civil/cilic_Min_Justice.htm).

<sup>8</sup> J Yahalom, 'Don't Throw Out the Baby with the Bath Water: On Optimizing Cure and Reducing Toxicity in Hodgkin's Lymphoma' (2006) 24 *Journal of Clinical Oncology* 544-548.

<sup>9</sup> M Spanier, *Thomas Murner's Narrenbeschwörung* (VEB Max Niemeyer, 1967) cited in Yahalom (ibid).

<sup>10</sup> D Beetham, 'Liberal Democracy and the Limits of Democratisation' (1992) 40 *Political Studies* 40, 41.



As discussed in chapter 3, the colonial administration's governance without accountability and abuse of power; as well as Dr. Banda's regime which was similarly characterised by lack of accountability and gross abuse of power, were at odds with traditional governance models of Malawi and the aspirations of the majority of Malawians. Consequently, even though the 1994 Constitution was predominantly the work of elites with insufficient consultation of the majority of Malawians, the fact that they 'structured [it] in a manner that attempts to address ... past abuses and prevent future abuses,'<sup>11</sup> entails that the 1994 Constitution has good things that need to be maintained and enforced. One area in which the drafters of the 1994 Constitution made 'a deliberate attempt' to remedy past mistakes was in including provisions that would prevent 'the concentration of power in the Presidency'<sup>12</sup> in key public sector position appointments. Thus the principle of separation of powers represents an indispensable 'baby' worth keeping in the pursuit of constitutionalism in Malawi. However differentiating the principle from its implementation in practice may not be so easy to do. JR is the means by which the court exercises oversight over the legislature and the executive. It is in this context that this thesis submits that JR embodies the difficulties that Courts in Malawi appear to encounter hence worth analysing in detail.

That is, in discourse on JA, the debate at times revolves around whether the courts should take positive action to address gaps created by omission on the part of the Executive or the legislature. In Malawi, such a question is brought to the fore in the arena of judicial review by the omission of the Executive to initiate the promulgation of legislation that would have governed the hearing of constitutional judicial review cases by courts in Malawi in the place of the Rules of the Supreme Court ('RSC') of England and Wales. To put in context, judicial review in Malawian courts is as old as the common law itself, dating back to 1902.<sup>13</sup> By virtue of the inheritance of the common law system from Britain, Malawi equally inherited the RSC as the rules governing civil procedure in the High Court and Supreme Courts of Malawi. Consequently, before the 1994 Constitution, applications for judicial review were brought under Order 53 of the RSC. Thus it has been observed that before 1992, the common law judicial review was there, 'the courts were there, the lawyers were there, [and] the litigants were there'<sup>14</sup> but no action was brought applying for judicial review in the courts,<sup>15</sup> until 1992.<sup>16</sup> The change since 1992 has been ascribed to the re-emergence of democratic forces

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<sup>11</sup> Mutharika Ch. 1 (n 97) 206.

<sup>12</sup> Ibid, 207.

<sup>13</sup> M Mazunda, 'The Quickening of Judicial Control of Administrative Action in Malawi, 1992 – 1994' in K.M. Phiri, K.R. Ross (ed.s) *Democratization in Malawi A Stocktaking* (Blantyre: CLAIM) 283 – 315, 283.

<sup>14</sup> Ibid 310.

<sup>15</sup> That is with the exception of the case of *Kapeta versus Lilongwe Municipal Council*, Civil Cause No. 308 of 1973 (unreported) cited in Mazunda (n 13).

<sup>16</sup> Mazunda (n 13) 283.

which emerged in that year, which left individuals feeling secure against the 'formidable opponent'<sup>17</sup> the government had come to represent.<sup>18</sup>

However, the 1994 Constitution through a reading together of Section 108 (2) and Section 43, expressly provided for what is referred to as 'constitutional judicial review':<sup>19</sup>

Section 108 (2): The High Court shall have original jurisdiction *to review any law, and any action or decision of the Government, for conformity with this Constitution*, save as otherwise provided by this Constitution and shall have such other jurisdiction and powers as may be conferred on it by this Constitution or any other law. (Emphasis supplied)

And

Section 43: Every person shall have a right to-

- (a) Lawful and procedurally fair administrative action, which is justifiable in relation to reasons given where his or her rights, freedoms, legitimate expectations or interests are affected or threatened; and
- (b) Be furnished with reasons in writing for administrative action where his or her rights, freedoms, legitimate expectations or interests if those are known.

Notwithstanding, the Constitution does not in its provisions provide for a procedure to govern the JR under it. Further, the legislature did not promulgate any legislation to provide rules to govern the JR adjudication under these sections. Under Order 53 of the RSC, court's power of review was restricted to the procedure of decision making and not the merits. Ideally, at the very coming into force of the Constitution a pertinent question should have been, in view of S. 108 (2) and S. 43 of the 1994, is Order 53 to be maintained in its totality or only in part? If the latter, which aspect is the 'bath-water'? And which arm of government decides? It appears that such questions were never raised. Rather the continuity of the application of Order 53 appears to have been presumed by not only the courts, but the lawyers. How then have the Courts in Malawi discharged this responsibility in the area of judicial review of the actions and/or decisions of Government to prevent 'an overreaching executive undermining the rights of the citizens'?<sup>20</sup> Has the judiciary responded to the transformations in

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<sup>17</sup> Ibid 311.

<sup>18</sup> Ibid.

<sup>19</sup> For a detailed discussion on this see Chirwa Ch. 1 (n 17 459).

<sup>20</sup> Oloka-Onyonga Ch. 1 (n 78) 49-50.

institutional arrangement and perspectives entailed by democracy by subjugating all actions, decisions and laws to the fundamental law?<sup>21</sup>

### 7.3 The Impact of Order 53 of RSC on public appointment cases

#### 7.3.1 *C.N. Chihana versus Council of the University of Malawi (UNIMA)*<sup>22</sup>

This case, as a pre-1994 Constitution case, will assist us in tracing the developments in the courts in this area. The facts of the case were that Mrs. Chihana, the wife of Chakufwa Chihana who was an early 1990s leading pro-democracy campaigner,<sup>23</sup> was employed by the University of Malawi (Unima) on 6<sup>th</sup> October 1985 on permanent and pensionable terms. On 21<sup>st</sup> March 1992, she received a letter from the Registrar of Unima informing her that he had 'been directed to inform'<sup>24</sup> her of the termination of her services 'with immediate effect.'<sup>25</sup> In her affidavit to the court attaching communication from her to the Registrar and the Vice Chancellor of Unima, she swore that prior to the letter of 21<sup>st</sup> March 1992 the Registrar had called her to his office to ask her 'to resign because of her husband's activities.'<sup>26</sup> The letter of termination came after her refusal to resign since 'she did not know what her husband's activities were.'<sup>27</sup> Her communication to the Unima authorities received no response.

Principally the application for judicial review sought to contest 'the validity and/or the legality of the termination of employment...'<sup>28</sup> Among others, the applicant specifically sought declaratory orders branding the termination as a breach of her rights under the constitution, setting aside the decision as a nullity and a further order for reinstatement into her job.<sup>29</sup>

Interestingly the Registrar of Unima swore an affidavit in opposition stating that the 'termination was without reasons'<sup>30</sup> and denied 'having given the applicant any reasons for the termination of her services as alleged.'<sup>31</sup>

On the purported authority of an English precedent<sup>32</sup> the trial court held that 'where there is an ordinary contractual relationship of master and servant, in the ordinary sense that we know it, the master can terminate the contract with his servant at *any time and for any*

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<sup>21</sup> Erasmus Ch. 1 (96).

<sup>22</sup> Miscellaneous Civil Application No. 20 of 1992 (unreported).

<sup>23</sup> See Chihana Case in chapter 5.

<sup>24</sup> C.N. Chihana v. Council of UNIMA, Civil Cause No. 308 of 1993 (unreported) 1.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> Ridge v. Baldwin (1963) 2 ALL ER 66

reason; he is not even obliged to give reasons for so doing. In that case, the servant cannot obtain an order of certiorari.<sup>33</sup> The HC then found that the termination of employment 'was not unlawful'<sup>34</sup> since the contract of employment between the Applicant and the Respondent provided for an option for termination of employment on either party by giving three months' pay in lieu of notice.

#### 7.3.1.1 Insufficient Rigorous Reasoning

Even at the very level of common law judicial review, the trial judge<sup>35</sup> in the *Chihana* case displayed surprising timidity in his analysis of the evidence before him. Despite referring to *Ridge v. Baldwin* the court failed to canvass pertinent legal and factual points raised by the Applicant in her affidavit as had been done by the House of Lords in the cited case. For instance 'who was the master in this case (who had made the decision to terminate)'? In her application Mrs. Chihana specifically required proof of any meeting that was held to decide the termination of her services. By asking in her affidavit 'at what occasion was the decision made,'<sup>36</sup> the question whether it was the Unima Council or not that actually took the decision became a crucial issue to resolving whether indeed the option to terminate had been lawfully exercised. In the case of *Ridge v. Baldwin* the fact that the decision to dismiss the Applicant had been made by the Police Watch Committee who were legally deemed not to be the Applicant's Master contributed significantly to the adverse finding of the House of Lords on the matter. Surprisingly the trial judge in the *Chihana* case appears to have dismissed the concerns of the Applicant as to who actually made the decision without so much as referring to them in his *ratio decidendi*.

It is significant to appreciate that the Unima Council is a creature of statute, the University of Malawi (UNIMA) Act, 1974. Section 11 of the Unima Act provides for the composition of the Council, one of the members being the Vice- Chancellor. It was in evidence that the Vice-Chancellor had been outside the country around the time in which her services had been terminated. Section 12 (3) of the Unima Act provided that one-third of the Council members shall constitute a quorum for purposes of holding meetings of the Council. Despite such statutory foundations, the court did not analyse the legislation in relation to the case at all. Further, the letter from the Registrar was part of the evidence before the court. The issue of being 'directed'<sup>37</sup> was right there before the court and yet the it decided not to inquire into that fact. The court did not inquire into whether indeed the Registrar in writing the letter had

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<sup>33</sup> Op. cit.

<sup>34</sup> Ibid.

<sup>35</sup> Justice Michael Mtegha.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

the authority of the Council of Unima – though in law and in fact it was the Council and not the Registrar who was in the position of Master over the applicant's employment.

### **Disregarding Evidence in Totality**

The trial judge completely ignored the uncontested assertions of the Applicant that the Registrar had intimated to her need to resign on the basis of 'her husband's activities.' It may well be that the court did not want to be drawn into political matters (as happened in her husband's trial).<sup>38</sup> In so doing, the court possibly missed an opportunity to set an important precedent to curb the intrusive role of politics in public sector appointments – a phenomenon that seems prevalent to date to the detriment of Constitutionalism as will be discussed subsequently.<sup>39</sup>

### **Total Disregard for International Instruments mentioned in the 1966 Constitution**

Despite the fact that the 1966 Malawi Constitution had no Bill of Rights, in its Article 2 (1), it made reference to the applicability of the Universal Declaration of Human Rights (UDHR) to Malawi. And yet, when the Applicant invoked Article 23 and Article 15 of the UDHR and the African Charter on Human and People's Rights respectively, the judge held that he did 'not propose to go into [that]'<sup>40</sup> since 'municipal law is supreme.'<sup>41</sup> Thus the court did not even attempt to distinguish the provisions of the UDHR which were expressly mentioned in the 1966 Constitution; contrary to the established judicial method for reasoned decision-making, the court simply made a blanket and unexplained dismissal of the international instruments.

Further, in so far as 'municipal law was supreme' the judge neglected to address the argument of the Applicant that the termination of employment breached her rights under the Constitution. In a period of considerable legal flux<sup>42</sup> the Court failed to avail itself of the legitimate legal invitation to examine whether the 1966 Malawian Constitution's reference to the UDHR did not by implication empower Malawian courts to give effect to rights under the UDHR. The judge dismissively asserted without any analysis that 'I see no violation of these rights.'<sup>43</sup> That statement begs the question: which rights were not violated? Nevertheless the court concluded that the Respondent had failed to observe the rules of natural justice in

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<sup>38</sup> Ng'ong'ola, C "Managing transition to political pluralism in Malawi" (supra) p95

<sup>39</sup> The poignant issue here is that in other respects the courts were seen to be willing to exercise more activism (see n. 23 and n 24.)

<sup>40</sup> Supra, p9

<sup>41</sup> Ibid.

<sup>42</sup> Ng'ong'ola, C "Managing transition to political pluralism in Malawi" (supra) p95

<sup>43</sup> Op.cit.

contravention of Statute XVII (c) of the University Statutes which governed the Contract between the Applicant and the Respondent.<sup>44</sup>

The court also failed to give discernible reasons for the conclusion that the case was distinguishable from the *Ridge v. Baldwin* precedent so that remedy of reinstatement was declined. It was simply stated that ‘in the present case, it is not a simple and pure case of master and servant.’<sup>45</sup>

### 7.3.1.2 A Reliance on Unquestioning Presumption

The Court seems to have simply assumed that the letter by the Registrar was written under the authority of the Council despite the fact that the evidence on record did not indicate any proof of the Council having met (or otherwise transacted) to consider the Applicant’s termination. Without furnishing any factual authority, the court bluntly refused to refer the matter to the Council on the basis that it would be nugatory as ‘the Council has already made up its mind not to hear her, and even if the Council heard her appeal, I doubt very much if its decision, which is final, will be any different.’<sup>46</sup> Yet the question of who exactly had made the purported decision was in issue before the court; somehow it was never properly inquired into. The Court did not even attempt to disclose what factors it had considered to determine that the Council’s decision on Mrs. Chihana’s employment would not have been any different.

Neither did the Court bother to explain why after refusing a reinstatement as sought by the Applicant; it found that the ‘best remedy’<sup>47</sup> was to award the Applicant damages for loss of salary to the age of her retirement in addition to a gratuity. In the final analysis, it could be argued that with unwitting judicial condonation, Mrs. Chihana was made to pay ‘for her husband’s pronouncements’<sup>48</sup> against the Banda regime. Indeed as subsequent developments have shown in the (premature and unexplained) removal of a Director of Anti-Corruption Bureau (2006), an Attorney General (2006), government does not seem to consider payment of lost earnings in form of prospective salary (no matter how substantial) and gratuity a realistic check whenever incumbents are deemed ‘dispensable’.<sup>49</sup>

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<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid 10.

<sup>48</sup> Mazunda (n 17) 295.

<sup>49</sup> Nkawihe, M. ‘Kaliwo’s Dismissal Breach of Law’ Public Appointments Committee chair confirmed that government paid Kaliwo all his dues, at <http://groups.yahoo.com/group/MALAWIANA/message/11138> accessed 30/11/10

### 7.3.2 In the Matter of the Removal of Mac William Lunguzi<sup>50</sup>

The case of Mr Mac William Lunguzi's removal from the position of Inspector General (IG) of Police provided an opportunity to entrench the transition from the pre – to the post- 1994 Constitutional order in the courts.<sup>51</sup> Mr Lunguzi was appointed IG on 27<sup>th</sup> April 1990 about 4 years prior to the 1994 democratic transition. Barely a week after assuming the Presidency Bakili Muluzi purported to remove Lunguzi from the post first by offering him a diplomatic appointment (which the latter declined) and secondly by assigning him to the new office of principal secretary in the Office of President and Cabinet (OPC). Lunguzi challenged the president's action as breaching the terms of section 43 (guaranteeing fair administrative action) and section 154 (prescribing circumstances under which president may remove IG) of the Constitution. The applicant sought a declaration that the president's decision was unconstitutional as it violated his rights; he thus prayed for an order of reinstatement and damages for unlawful dismissal. For the president it was argued first that since the applicant was appointed prior to 18 May 1994 (when the Constitution took effect)<sup>52</sup> he was hereby excluded from invoking its protection by reason of Section 206 which guaranteed continuity in office for persons in position by the effective date unless they were replaced or retired or otherwise removed in compliance with the 1994 Constitution. There was a proviso to cater for persons occupying offices which, by operation of the new Constitution would be renamed or otherwise reconfigured: in that case the incumbents would receive similar protection as outlined above. For purposes of a smooth swearing ceremony post the general elections subsection 2 explicitly confirmed that the sitting Chief Justice would be deemed to have been appointed under the 1994 Constitution.<sup>53</sup>

Thus the argument for Muluzi was that as the incumbent IG Lunguzi fell beyond the purview of section 206 since no such appointment was effected (a tenuous argument at best). In the alternative it was contended that neither could section 154 of the Constitution (prescribing grounds for presidential removal) protect the applicant because he had allegedly compromised his professional objectivity during the run up to the elections that resulted in Muluzi's UDF unseating the MCP. The relevant evidence to that effect being the formal correspondence between the applicant and the Malawi Electoral Commission; thus by operation of section

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<sup>50</sup> *In The Matter of the Constitution of the Republic of Malawi and In the Matter of the Removal of Mac William Lunguzi As The Inspector General of Police and In the Matter of Judicial Review*, Miscellaneous Application No. 55 of 1996 (unreported)

<sup>51</sup> M Chigawa, 'Fundamental Values of the 1994 Constitution' (2006) (mimeo)

<sup>52</sup> According to section 212 (1) the Constitution took effect on a provisional basis for a year.

<sup>53</sup> There was specific reference to section 52 (oath for new legislators) and section 81(1) (presidential oath of office) in section 212 (2).

154 (4) (b) the president would have been entitled to remove the applicant from his office legally.

In granting the application the HC (same justice who later acquitted Dr. Banda and others in the infamous Mwanza murders trial)<sup>54</sup> held that even though the applicant had been reassigned within the public service, the result was effectively his removal from the post of IG and section 206 could not exclude him from constitutional protection as contended. According to the trial court 'it is clear ...that section 206 is subordinate to and conditional upon other relevant provisions of the Constitution. One cannot properly invoke the provisions of section 206 without first satisfying the relevant provisions of the Constitution'.<sup>55</sup> In that vein therefore, there was a clear breach of natural justice in that the respondent acted without affording the applicant an opportunity to be heard. This clearly violated the guarantees of section 43 against unfair administrative action. The court found that the removal of the Applicant was 'unlawful and unconstitutional'.<sup>56</sup>

However the HC refused to order reinstatement of the Applicant to the position of IG on the basis that such would amount to usurpation of authority citing the English decision of *Chief Constable of North Wales Police v. Evans* as legal authority for that position. This is an interesting observation indicating a possible conceptual blurring of judicial review as conceived under common law generally-being merely about procedural propriety- and review for compliance with constitutional guarantees and the general provision guaranteeing 'effective remedies' under section 41 (3) of the Constitution.<sup>57</sup>

#### 7.3.2.1 Common law Judicial Review vs. Constitutional Review

The trial court in the Lunguzi case failed to properly address its mind to the fundamental question whether JR of executive action for conformity with the Constitution operates within the same narrow confines of procedural propriety as conceived under the common law remedy.<sup>58</sup> In essence – should a constitutional review only be concerned with 'reviewing not the merits of the decision, but the decision-making process through which the decision was reached?'<sup>59</sup>

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<sup>54</sup> JK Van Donge, 'The Mwanza Trials as a search for a usable Malawian Political Past' (1998) 57 (386) *African Affairs* 91

<sup>55</sup> P5 of High Court judgment (manuscript with the author)

<sup>56</sup> Lunguzi Case, p. 6 Misc. Application No. 55 of 1994

<sup>57</sup> Contrast with the approach of Justice Ndovi in Bongwe's case (infra)

<sup>58</sup> For an interesting dialogue on the on (in)direct horizontal enforceability of constitutional rights see Chirwa (n 11).

<sup>59</sup> Lunguzi Case, p. 3 Misc. Application No. 55 of 1994



The conceptual distinction between common law JR and what has been termed constitutional review<sup>60</sup> has been recognised by the HC in another case involving disputes about separation of powers where the court recognised ordinary judicial review (in English law) as distinct from constitutional review (as espoused in section 108, the ‘American rendition’).<sup>61</sup> The first difference is that whereas under common law judicial review may be time barred, the JR embodied under Section 108 (2) of the Constitution had no such time limits.<sup>62</sup> Secondly, whereas common law JR is about reviewing the procedural propriety in decision making processes (as opposed to the actual merits of the decision); the ‘American rendition’ of JR under Section 108 (2) entails a review of the substance of decision making processes as well.<sup>63</sup>

However in *Lunguzi*, despite the correct legal conclusion that the provisions of Sections 43 and 154 of the 1994 Constitution applied to the Applicant, the court refused to undertake the necessary substantive examination of the decision to remove Mr Lunguzi as IG. In its determination the court displayed some legal equivocation by still pronouncing that ‘under Section 154 (4) of the Constitution, the President was perfectly entitled to remove [Mr Lunguzi] but the right procedures were not followed.’ That provision stipulates that “A person holding the office of Inspector General of Police shall be subject to removal by the President *only by reason of that person being* –

- a. incompetent in the exercise of his or her duties;
- b. compromised in the exercise of his or her duties to the extent that his or her capacity to exercise his or her powers impartially is in serious question;
- c. otherwise incapacitated; and
- d. Over the age prescribed for retirement.”<sup>64</sup>

It is proposed here that by the phrase ‘only by reason of that person being’ the Constitution meant to restrict the removal of an Inspector General of Police to the prescribed scenarios. There is no unfettered presidential authority of removal as suggested by the court. Consequently, the court needed to make a clear factual analysis as to whether ‘the President being perfectly entitled to remove’ the applicant had complied with the substance of Section 154 (4) on the merits. By this adjudicative omission the court could be said to

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<sup>60</sup> Kavanagh, A. *Constitutional Review under the UK Human Rights Act*, Cambridge University Press, 2009

<sup>61</sup> Nseula vs. Attorney General [1996] Malawi Law Reports 403

<sup>62</sup> Ibid.

<sup>63</sup> Ibid (410)

<sup>64</sup> Section 154 (4) of the 1994 Constitution (emphasis supplied)

have abdicated from its responsibility under Section 9 of the Constitution<sup>65</sup> and like in *Chihana* unwittingly served to encourage the pre-1994 culture of unaccountable executive decision-making.<sup>66</sup> In this instance there seems to have been a considerable divergence between the stated ambitions of the constitutional reforms which culminated in the 1994 Constitution and the judicial application of that document.<sup>67</sup>

The constitutional reforms were aimed at bringing about a constitution that would 'lay the foundation for safeguarding basic human rights,'<sup>68</sup> and one in which 'presidential power would be limited ...and human rights effectively protected.'<sup>69</sup> The trial court in the *Lunguzi* case missed another opportunity to effectively protect human rights vis-à-vis public appointments. For example, the Applicant had sought the court to make 'any further or additional orders the Court may think just and expedient' – and yet the court did not award any damages after finding that the removal was unconstitutional on the basis that 'the first plaintiff is not claiming any damages.'<sup>70</sup> It could be that an uncritical adherence to the common law conception of JR led the court to operate under the restrictive procedure rules of civil pleadings and corresponding available remedies.<sup>71</sup> Could the judge have awarded damages as a 'just and expedient' remedy if the conceptual distinctive of constitutional review exercised his judicial mind?

#### 7.3.2.2 The Duty to Provide an Effective Remedy

It is certainly open to suggest that in refusing to re-instate Mr Lunguzi to the position of IG, the court failed to give an 'effective remedy' as contemplated in Section 41 (2) of the 1994 Constitution. Reinstatement as a viable remedy in the case of unconstitutional (as opposed to mere unlawful) dismissal was recognised in the celebrated case of *Bongwe and 11 Others versus Ministry of Education*<sup>72</sup> which will be discussed presently. The constitutional restriction on the removal of the IG was intended to limit the control of the President over the security services as had been the case in Kamuzu Banda's dictatorial regime.<sup>73</sup> Subsequent

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<sup>65</sup> Section 9 says 'The judiciary shall have the responsibility of interpreting, protecting and enforcing this Constitution and all laws in accordance with this Constitution in an independent and impartial manner with regard only to legally relevant facts and the prescriptions of law.'

<sup>66</sup> D Posner, 'Malawi's New Dawn' (1995) 6 (1) *Journal of Democracy* 131

<sup>67</sup> J Banda, 'The Constitutional Change Debate of 1993-95' in .M. Phiri, K.R. Ross (ed.s) *Democratization in Malawi A Stocktaking* (Blantyre: CLAIM) 316

<sup>68</sup> Ibid 320.

<sup>69</sup> Ibid 320.

<sup>70</sup> Lunguzi Case, 7.

<sup>71</sup> For a good discussion on the inadequacy of common law procedures and remedies in enforcing constitutional rights see Banda, S. "Constitutional mimicry and common law reform" (supra) pp145-46

<sup>72</sup> Civil Cause No.80 of 1997 (unreported)

<sup>73</sup> Wanda (n 8) 221 – 233.

developments would indicate that the lost opportunity to entrench such executive accountability has significantly compromised the practical effect of Section 154 (4) on the security of tenure (and hence professional independence) of the Police IG. Two subsequent Inspectors General of Police (Mr Aironi<sup>74</sup> – 2005, and Mr Kumbambe<sup>75</sup> – 2009) have been removed in remarkably similar scenarios.<sup>76</sup> Mr Kumbambe was reportedly removed for, among others, preventing the police band from performing at ruling political party rallies.<sup>77</sup>

However, unlike Lunguzi these two officers did not seek judicial intervention to contest their reassignment to diplomatic posts. It is moot whether the compliant precedent set by the court in the Lunguzi case could have discouraged any recourse to the courts on the part of these latter two police chiefs. Regardless, arguably and indirectly, the court seems to have connived in consolidating an unbridled presidential control over the position of IG of Police (and thereby the security apparatus) in a spirit inimical to the founding principles of the 1994 Constitution.

Whilst it is beyond the scope of the current thesis to undertake a comprehensive empirical analysis of the extent of political manipulation within the security machinery, yet recent press reports of academic material cited for sedition<sup>78</sup> and detention of a reporter for simply ‘asking the president tough questions’<sup>79</sup> at a press briefing do not augur well for the professional independence and functional integrity of the police. Such high-handed reaction to constructive dissent has prompted some keen observers to note that ‘sedition was widely used by late dictator Kamuzu Banda to trample on people's rights during the three decades of his autocratic rule from 1964 to 1994’.<sup>80</sup> When one considers that the alleged sedition related directly to a publication critical of the government’s policy on a quota-based admission to publicly-funded tertiary institutions as ‘lacking distributive justice’<sup>81</sup> the

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<sup>74</sup> G Kenya, ‘Malawi: No brooms’ (2004) 45 (16) *Africa Confidential* 1-8

<sup>75</sup> Centre for Social Concern “Malawi Press Review” (February 2008) accessed at <http://www.africamission-mafr.org/kanengofev09.htm> on 2/12/10

<sup>76</sup> Mr. Aironi was posted as Deputy High Commissioner in Nairobi, Kenya while Mr. Kumbambe was eventually sent to Maputo, in Mozambique also as Deputy High Commissioner.

<sup>77</sup> Centre for Social Concern (n 82).

<sup>78</sup> “Malawi Police charge writer with sedition” (February 2010) *The Malawi Post* accessed at [http://maravipost.com/index.php?option=com\\_content&view=article&id=2488:malawi-police-charge-writer-with-sedition&catid=54:politics&Itemid=124](http://maravipost.com/index.php?option=com_content&view=article&id=2488:malawi-police-charge-writer-with-sedition&catid=54:politics&Itemid=124) on 2/12/10

<sup>79</sup> “Police detain reporter after asking Bingu ‘tough questions’” (November 2010) *Nyasa Times* accessed at <http://www.nyasatimes.com/national/police-detain-reporter-for-asking-bingu-%E2%80%98tough-questions%E2%80%99.html> on 2/12/10

<sup>80</sup> See (n 85).

<sup>81</sup> “Malawi Writers Union criticizes government for sedition charges” (February 2010) *Nyasa Times* accessed at <http://www.nyasatimes.com/national/malawi-writers-union-criticizes-govt-on-sedition-charges.html> on 2/12/10

attempted justification of the police chief (who incidentally replaced Kumbambe)<sup>82</sup> that the material was deemed capable of inciting violence amongst the different sections of Malawian society<sup>83</sup> raises serious questions about the path of Malawi's nascent democracy.<sup>84</sup> A recent attempt to challenge the criminal offence of 'insulting the president'<sup>85</sup> has encountered a formidable hurdle in that the Chief Justice declined to certify the matter for consideration before the High Court as a Constitutional Court. The particular incident related to two young men who uttered remarks critical of the president as his convoy drove down the highway in the capital city. They were in fact apprehended by a traffic police officer who was creating way for the presidential motorcade when he overheard the 'insulting language'.<sup>86</sup>

### 7.3.3 **Bongwe and 11 others versus Ministry of Education**

In this trial the Court progressively developed the law on the remedies available in JR proceedings in Malawi. The twelve applicants in the case were teachers working under the Ministry of Education.<sup>87</sup> In July 1997 they were served with a letter from the ministry purporting to terminate their services in 'the public interest'<sup>88</sup>. It appeared that one of the reasons for the termination was the fact that they had joined a Teacher's Trade Union Association.<sup>89</sup> They applied to the court for JR of that decision alleging that it violated the constitutional guarantees to freedom of economic activity, right to fair labour practices and to participate in trade union activities as well as the right to procedurally fair and accountable administrative action. The ministry lodged no defence to the application (and from the judgment seems to have indicated its willingness to comply with any decision of the court).<sup>90</sup>

In upholding the application, Justice Ndovi observed that by virtue of section 108 of the Constitution the court clearly had jurisdiction to determine the question of the constitutionality as well as the legality of the purported dismissals. In his legal analysis the judge concluded that the authority to take such a decision was vested in the Public Service Commission and not the Ministry of Education (who had authored and conveyed the letters of termination). As

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<sup>82</sup> See (n 84).

<sup>83</sup> See (n 88).

<sup>84</sup> Posner (n 73) for a pointed discussion of the capacity deficiencies (technically and philosophically) to operate a democratic constitution prevalent in Malawian society when the 1994 Constitution came into force..

<sup>85</sup> See G Kalebonye, 'Thou shalt not insult the president' (February 2010) *Mmegi* accessed at <http://allafrica.com/stories/201002260840.html> on 2/12/10. In a well documented but brief piece the author exposes the use of this offence to victimize people on flimsy grounds in Botswana, Zimbabwe, DRC, Swaziland and Libya. For example three of thirteen people charged in Botswana were declared *persona non grata* (aside from paying the fine). Kalebonye also suggests that the charge is premised upon similar considerations as the sedition penal provision i.e. 'one should not insult the ruler'.

<sup>86</sup> *Rep v. Darren Jamieson & Collin MacAdam*, Criminal Case No.23 of 2009, Lilongwe Magistrate Court (author's personal knowledge as presiding magistrate)

<sup>87</sup> Civil Cause No. 80 of 1997 (unreported)

<sup>88</sup> Ibid.

<sup>89</sup> Ibid.

<sup>90</sup> Ibid.

such the latter had acted beyond its authority. In considering the appropriate relief the judge observed that the courts ‘cannot...stick to the rigorous common law principles when dealing with employment.’<sup>91</sup> Instead ‘the courts are called upon to accept the current changes enshrined in our Constitution...in dealing with employment law.’<sup>92</sup> Thus although ‘under common law reinstatement is not one of the remedies’<sup>93</sup> yet ‘with the development of labour law globally and with the new consideration in (Section) 46 of the Constitution this is available’.<sup>94</sup> The pertinent aspect of Section 46 grants power on the courts upon a finding of violation of ‘any rights or freedoms conferred by this Constitution...to make *any orders that are necessary and appropriate* to secure the enjoyment of those rights’ and where necessary ‘to prevent those rights and freedoms from being unlawfully denied or violated.’<sup>95</sup> In a creative judgment the court made constant reference to relevant international labour instruments on the basis of the constitutional provision that encourages consideration of ‘relevant norms of international law’<sup>96</sup> in seeking to propound ‘interpretation’ that ‘reflects the unique character and supreme status of (the) Constitution.’<sup>97</sup>

Nevertheless it is worth highlighting that in his otherwise progressive approach the judge made some doubtful conclusions about the nature of infringements the applicants had suffered. Justice Ndovi formed the view that ‘forced retirement for no apparent or justifiable reasons at reduced benefits must be cruel, inhuman or degrading treatment or punishment’<sup>98</sup> and ‘stressed...that the right’ was ‘non-derogable in terms of Section 44 (1) (b) of the Constitution’.<sup>99</sup> It is seriously debatable whether such characterization of unconstitutional removal from employment as cruel, inhuman or degrading treatment is legally sound. But such incoherent constitutional jurisprudence has been described elsewhere as ‘startling,’ ‘inexplicable’ and ‘disturbing’ because ‘the courts have thus far shown a random and unprincipled application’ of the constitutional provisions.<sup>100</sup>

### 7.3.3.1 Remedies Available under Constitutional Judicial Review

The legal dispute in *Bongwe* was very similar to the other cases brought for judicial review before the High Court under Order 53 of the Rules of the Supreme Court. Furthermore, as in previous cases the Applicants framed their claims around the human rights guarantees of

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<sup>91</sup> Ibid 12.

<sup>92</sup> Ibid 13.

<sup>93</sup> Ibid.

<sup>94</sup> Ibid.

<sup>95</sup> Constitution of Malawi (1994) Section 46 (3) (emphasis supplied)

<sup>96</sup> Ibid. Section 11 (3)

<sup>97</sup> Ibid. Section 11(1)

<sup>98</sup> *Bongwe and 11 Others vs. Ministry of Education*, Civil Cause No.80 of 1997.

<sup>99</sup> Ibid.

<sup>100</sup> DM Chirwa, ‘Upholding the sanctity of rights: A principled approach to limitations and derogations under the Malawian Constitution’ (2007) 1 *Malawi Law Journal* 3, 12,13,15

the 1994 Constitution as well as the UDHR. Since the action arose after the enactment of the Labour Relations Act of 1996 and the Public Service Act 1994, they also based some of their claims on those pieces of legislation.<sup>101</sup>

It is interesting to note that the trial Court in this case also applied the same principles of judicial review under common law and observed that the matter was “concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision-making process itself.”<sup>102</sup> Indeed the English precedent of *Chief Constable of North Wales Police -v- Erdus* was cited as authority for the familiar common law proposition that “it is important to remember in every case that the purpose of (the remedy of judicial review) is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is not part of the purpose to substitute the opinion of the judiciary or of the judges for that of the authority constituted by law to decide the matter in question.”<sup>103</sup>

In that context it is fair to suggest that thus far that the Courts in Malawi have tended to treat constitutional review of the actions and decisions of the government and its agents as nothing more than a form of Order 53-based judicial review governed by established common law principles. It is submitted that this is inadequate; for example the omissions of the court in *Chihana* are made all the more glaring by the analysis made by the court in the *Bongwe* Case. In *Bongwe* the trial Court first identified the Statute that was applicable to the case, which was the Public Service Act 1994. By applying the provisions of that Act, the Court found that civil servants under pensionable terms (such as the Applicants) could only be disciplined or have their services terminated by the Public Service Commission (the Master) and not the Minister of Education. No attempt was made in *Chihana* for a similar analysis (which might have yielded a more just result).

Furthermore, in *Bongwe* the Court found that in terminating the services of the Applicants in the ‘public interest’ it was ‘as bad as giving no reasons at all ... as enunciated in’<sup>104</sup> *Ridge - vs. - Baldwin*.<sup>105</sup> It is quite ironic that two judges faced with similar facts and citing the same English precedent on judicial review could come up with two different conclusions on the applicability of the remedy of *certiorari*. The difference could be attributed to the more refined factual analysis whereby the judge in the *Bongwe* case took the time to examine who the Master was; whereas in *Chihana* the court seems to have made an unsubstantiated factual

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<sup>101</sup> Op.cit.

<sup>102</sup> *Bongwe* Case, 9.

<sup>103</sup> (1982) 1 WLR 115 5 at 1160

<sup>104</sup> Op.cit.

<sup>105</sup> (1963) 2 ALL ER 66

presumption of the termination originating from the lawful Master. In all fairness it needs to be further acknowledged that *Chihana* predated the enactment of the 1994 Constitution. One can only speculate as to what influence (if any) the knowledge that the ministry of education would not contest and were keen to comply with any final court order had on the trial judge in *Bongwe*. All the same his final order, especially with regard to its express invocation of the enforcement mandate under Section 46 (3) to modify the common law remedies to encompass reinstatement for such a review was quite novel.

As a matter of contrast in *Lunguzi* the trial court found that Section 43 of the Constitution had been infringed but then refused to order either a reinstatement or any compensation. Again in another curious use of precedent the court in *Bongwe* made reference to the discussion of Section 43 guarantees of fair administrative action in the *Lunguzi* case and concluded that both cases represented breaches of such constitutional rights;<sup>106</sup> but unlike Judge Mtegha in *Lunguzi* Justice Ndovi decided that the only effective remedy would be an order of reinstatement as well as compensation. Indeed whilst the court in *Lunguzi* refused to nullify the appointment of Mr Lunguzi's successor (even though the purported removal was deemed unconstitutional) in *Bongwe* the court rightly censured the Ministry of Education for inappropriate conduct by advertising the positions of the Applicants (who had been unlawfully dismissed).<sup>107</sup> In justifying the order of *certiorari* (reinstatement), the trial court in the *Bongwe* stated that

In matters of practice and discretion it is essential for the courts to take into account all important changes ... [which] *have already crystallized in the form of the Constitution of 1994*. We cannot therefore stick to the rigorous common law principles when dealing with employment. ... Under common law reinstatement is not one of the remedies. However, with the development of labour law globally and with the new consideration in Clause 46 of the Constitution this is available.<sup>108</sup>

It needs to be pointed out that in this case, the Ministry of Education never entered a defence and expressed readiness to comply with the Courts decision.<sup>109</sup> The *Bongwe* case marked a welcome development in Constitutional review; for some reason its progressive approach to fashioning 'appropriate and necessary orders'<sup>110</sup> as part of the judiciary's

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<sup>106</sup> Bongwe Case, 8.

<sup>107</sup> Ibid 10.

<sup>108</sup> Ibid.

<sup>109</sup> Ibid 3

<sup>110</sup> Malawi Constitution (1994) Section 46 (3)

mandate to provide 'effective remedies'<sup>111</sup> seems to have been largely ignored in the subsequent significant judicial disputes on public appointments.

#### 7.3.4 In the Matter of Mary Nangwale<sup>112</sup>

It is submitted that by virtue of Section 4 and 5 of the 1994 Constitution 'government' encompasses the 'executive, legislative and judicial organs of the State at all levels.' To that extent it would seem that judicial review of 'government' actions as contemplated in Section 108 (2) extends to actions of the legislative branch as well. The High Court in *Nangwale* readily agreed that 'clearly therefore Parliament must act within the Constitution and where it does not it can be challenged before courts.'<sup>113</sup> It is the determination of the permissible remit of such judicial supervision that raises salient points of discussion in the context of constitutional review.

The applicant in the case, Mrs Mary Nangwale was appointed to the office of Inspector General (IG) of Police on 6 September 2004 'presumably'<sup>114</sup> under Section 154 (2) of the Constitution by the President. On 30<sup>th</sup> March 2005, the Government introduced a motion in the National Assembly for confirmation of the appointment pursuant to Section 154 (2) of the Constitution which stipulates that an appointment of the IG required confirmation by parliamentary majority.<sup>115</sup>

'As usual'<sup>116</sup> the application was brought under Order 53 RSC. The application was heard before a 'full' constitutional bench (three judges of HC). Her claim was based on the failure of parliament to confirm her appointment as IG. Part of the argument being that (in terms of section 43) she had suffered unfair administrative action, in that she had not been granted an opportunity to be heard during the confirmation proceedings (where adverse comments were made about her suitability) and legislators with an interest voted on the matter without disclosing their interest.

In dismissing the application the court held that Section 43 did not apply to 'legislative' (as opposed to 'administrative') action. The court took the view that as a matter of parliamentary privilege the courts could not (even under the new constitution) review the business of the legislature. In any event the duty for disclosure did not arise for lack of material interest.

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<sup>111</sup> Ibid. Section 41(3)

<sup>112</sup> Miscellaneous Civil Cause No. 1 of 2005 (unreported)

<sup>113</sup> Ibid 12.

<sup>114</sup> Ibid 2.

<sup>115</sup> Malawi Constitution 1994

<sup>116</sup> *Nangwale* case (n 112) 1.



#### 7.3.4.1 Internal Parliamentary Procedures versus Parliamentary Constitutional Substantive procedures

The 'Constitutional Court'<sup>117</sup> correctly concluded that just because Section 60 (1) of the Constitution recognised parliamentary privileges it did not follow that Parliament and its members were absolutely excluded from judicial oversight in the conduct of their parliamentary business. However, the Court determined that such judicial supervision would not include matters pertaining to internal proceedings of Parliament. The Court relied upon Section 56 (1) of the Constitution which says that 'subject to this Constitution, the National Assembly, may by Standing Orders or otherwise regulate its own procedure.'

In that light it was not for the courts to interfere in the internal procedures set by parliament because 'no doubt Parliament itself will do all possible to avoid internal procedures that undermine the Constitution.'<sup>118</sup> If that were true why would there be any need to explicitly declare that any such procedures must be 'subject to this Constitution'?<sup>119</sup> Is there no mechanism for ensuring that indeed the 'legislature...enact laws...that further the values explicit or implicit in this Constitution'?<sup>120</sup> One would understand the judicial 'responsibility of interpreting, protecting and enforcing (the) Constitution and all laws'<sup>121</sup> to be a sufficient mandate for courts to examine such parliamentary procedures especially where as in Nangwale an applicant is seeking 'an effective remedy....for acts violating rights and freedoms granted to (her) by (the) Constitution.'<sup>122</sup>

Yet again when confronted with an epochal scenario to 'develop appropriate principles of interpretation to reflect the unique character and supreme status of this Constitution'<sup>123</sup> the Court opted to confine its legal analysis to hackneyed common law judicial review principles. Thus the Court simply observed that 'we have come a long way and it is a well-trodden path that the remedy of judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made, but the decision-making process itself.'<sup>124</sup>

It is suggested that in adopting this approach the Court avoided its delicate but necessary Constitutional review responsibility. The Court completely ignored the distinction made between judicial review under common law and under the 1994 Constitution as discussed in

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<sup>117</sup> As constituted by the Chief Justice under S. 9 (3) of the Courts Act.

<sup>118</sup> Nangwale Case (n 112) 1.

<sup>119</sup> Section 56 (1) of the Constitution.

<sup>120</sup> Ibid. S. 8

<sup>121</sup> Ibid. S. 9

<sup>122</sup> Ibid. S. 41(3)

<sup>123</sup> Ibid. S. 11(1)

<sup>124</sup> Nangwale Case (n 112) 18

the case of *Nseula vs. Attorney General*.<sup>125</sup> Under the ‘American rendition,’<sup>126</sup> the review process delves into the substantive issues beyond just ascertaining mere procedural propriety.<sup>127</sup> Further, the court seems to have paid no heed to the wisdom of Justice Ndovi in *Bongwe* urging the courts to embrace the changes crystallised into the 1994 Constitution instead of a rigorous adherence to old common law remedies and restrictive principles in constitutional review matters.<sup>128</sup>

Arguably, in order to entrench constitutionalism, those changes should also apply to the parliamentary processes in matters of public appointment confirmations.

Additionally Section 61 (1) of the Constitution required legislators to declare any material interest in a subject being debated before the house (and in such a situation to be disqualified from the corresponding vote). Mrs. Nagwale claimed that legislators with an interest voted on the matter without such disclosure. Purportedly the decision of the Court turned on its finding as to the definition of ‘material interest.’ However, before deciding the meaning of ‘material interest,’ the Court had already determined that the voting process employed by parliament which resulted in the rejection of Mrs. Nagwale was an ‘internal procedure’<sup>129</sup> as such the Court ‘would be extremely cautious to intervene.’<sup>130</sup>

Internal procedures of Parliament are contained in the standing Orders of National Assembly. Order 88 of the Standing Orders provides that

No Member may vote on any matter in which he has a direct or indirect material interest without disclosing *the nature of that interest* and leave of the House obtained.<sup>131</sup>

The Court did not make reference to the standing orders at any point in their deliberations on the matter. The Court did not analyse whether Parliament in its voting procedure had complied with its own internal procedures as stipulated by Order 88. It is argued that the language of Standing Order 88 points to a meaning of material interest beyond just the ‘pecuniary interest’ held by the Court because it calls upon the relevant member to disclose the ‘nature of that interest.’ Such a position is supported by practice in other Commonwealth Countries such as Australia, where for example its Financial Management Act 1996 in

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<sup>125</sup> (1996) Malawi Law Reports 403, 410

<sup>126</sup> Ibid.

<sup>127</sup> Ibid. pp403, 410.

<sup>128</sup> Civil Cause No. 80 of 1997.

<sup>129</sup> Nangwale Case (n 112) 24.

<sup>130</sup> Ibid 25.

<sup>131</sup> Malawi Parliament, *Standing Orders* at

[http://www.parliament.gov.mw/docs/standing\\_orders/Standing\\_Orders\\_MARCH\\_25\\_2003.pdf](http://www.parliament.gov.mw/docs/standing_orders/Standing_Orders_MARCH_25_2003.pdf) accessed on 29/11/10 (emphasis supplied)

Section 4 defines material interest as either ‘a direct or indirect financial interest in the issue’<sup>132</sup> or ‘a direct or indirect interest of any other kind if the interest could conflict with the proper exercise of the member's functions in relation to the board's consideration of the issue.’<sup>133</sup>

The Court restricted ‘material interest’ to pecuniary interest referred to Erskine Mary’s *Treatise on the Law, Privileges, and Proceedings and Usage of Parliament* and stated – ‘it will not be us opening a floodgate of other possibilities.’<sup>134</sup> Once again the Courts in Malawi unquestioningly resort to English precedent premised on unqualified parliamentary supremacy to determine a novel constitutional dispute. In *Nangwale* the alleged conflict of interest related to several key opposition leaders who were subject to police investigations. The matter which the Court refused to examine was the very essence of the review – whether Section 61 (1) of the Constitution had been complied with. It is in declaring material interest where parliament can be held accountable for its decision on appointment. What are the chances that any member of parliament would ever have a pecuniary interest in the appointment of a public officer?

It is quite remarkable that one of the judges who presided over this matter lamented that ‘such provisions for checks and balances do not always work for the common good of the citizenry, as was envisaged in the Constitution.’<sup>135</sup> The judge even acknowledged subsequently that Mrs. Mary Nangwale was for ‘all intents and purposes...capable of delivering as Inspector General’, and that ‘no reasonable explanation was given for non-confirmation.’<sup>136</sup>

The logical outworking of *Nangwale* might well be that what was ‘envisaged in the Constitution’<sup>137</sup> as a mechanism for consolidating the tenet of separation of powers and democratic accountability of the executive towards the legislature (by subjecting certain appointments to confirmation) could be deployed without any sense of corresponding responsibility and the courts will stand aside and watch. Such a development however has a bearing on other aspects of governance, such as the enforcement of the criminal law

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<sup>132</sup> Section 4(a)

<sup>133</sup> [http://www.austlii.edu.au/au/legis/act/consol\\_act/fma1996164/s88.html#material\\_interest](http://www.austlii.edu.au/au/legis/act/consol_act/fma1996164/s88.html#material_interest)

<sup>134</sup> *Nangwale Case* (n 112) 30.

<sup>135</sup> I Kamanga, ‘Combating Corruption in Malawi : Challenges in the Malawi Legal System’ in *Resource Material Series No. 76*, United Nations Asia and Far East Institute (2008) 153  
[http://www.unafei.or.jp/english/pdf/PDF\\_rms/no76/18\\_p153-159.pdf](http://www.unafei.or.jp/english/pdf/PDF_rms/no76/18_p153-159.pdf).

<sup>136</sup> *Ibid* 158.

<sup>137</sup> *Ibid*.

because competent candidates could be excluded from appointments without any proper reasons being given.<sup>138</sup>

#### 7.4 Beyond separation of powers

On the face of it, it would be easy to blame the individual judicial officers for failing to give effect to the provisions of the Constitution that have introduced 'newer and expansive grounds for review than was the case under common law.'<sup>139</sup> Chirwa in his book attributes this development to the failure on the part of Malawian courts to fully comprehend the revolutionary effect of S. 43; and to 'the blind allegiance of the Malawian Legal profession to the law received from Britain.'<sup>140</sup> However, where research<sup>141</sup> shows that the approach applies to the both the HC and SC, as well as almost all judges including even those judges who as discussed in chapter 4 had criticised the SC for failing to understand the Constitution appropriately,<sup>142</sup> then the root cause of the phenomenon must be more fundamental than merely preference. The cause arguably also lies beyond a mere preference for deference when deciding on issues that touch on the doctrine of separation of powers. This thesis submits that the foregoing points strongly to the conclusion that the problem relates to inadequate exposure to Malawian legal theory.

As aptly put by Thomas:

Judges undoubtedly bring immense practical skills to the practise of their craft. ... The judge's practical skills are utilised to resolve and stabilise the facts of the case, to analyse and identify question in issue, to arrive at a decision on that issue and, then to justify with reasons the decision that has been reached. But practical skills are not enough. Those skills must be anchored in a conception of the judicial role. Legal theory is fundamental to that conception....To fulfil their judicial function, and to be able to assess whether they are fulfilling that function, judges must explore, examine and know the theoretical framework for their judicial thinking.<sup>143</sup>

By legal theory, Thomas means legal philosophy and jurisprudence- and arguably therein lies the problem for the Malawian judge. The author of this thesis is yet to come upon jurisprudence literature on Malawi. It is as if the Malawian judge is expected to be both a philosopher and a judge. However, other jurisdictions with constitutional law history

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<sup>138</sup> Ibid.

<sup>139</sup> Chirwa (n 19) 458.

<sup>140</sup> Ibid.

<sup>141</sup> Ibid 457 - 484.

<sup>142</sup> That is Chipeta J, and Mwaungulu J.

<sup>143</sup> Thomas Ch. 2 (n 14) 1.

exceeding a century nevertheless have seen the importance of establishing formal judicial schools.<sup>144</sup> These schools provide a forum in which judges' and other disciplines can have a dialogue on issues that affect judicial decision-making with the aim of equipping the judges with the relevant knowledge needed to discharge their responsibilities competently.

## 7.5 Conclusion

The key argument of this chapter is that there seems to be considerable divergence between the stated ambitions of the constitutional reforms which culminated in the 1994 Constitution and the judicial application of that document. The Courts appear to sacrifice the Constitution to common law principles – such that we have a Constitution on paper but its intended benefits have been severely restricted by the way the courts have construed its role vis-à-vis the other branches of government. The Courts have not shown a coherent doctrinal position of their own; instead the jurisprudence borrows uncritically from English precedents. This creates a lacuna in principles governing Constitutional Review resulting in considerable inconsistency of adjudicative approaches. Predominantly the Court has resorted to avoidance disguised as sticking to process not merits – cases like *Bongwe* have not been allowed to influence this area of constitutional law development.

To the question- is the behaviour of the Malawian courts analysed in this chapter judicial deference/restraint or JA? The answer would be- it depends. It depends on how one defines JA. Most of the decisions could fall into any category. They could be judicial deference by virtue of the fact that the Court declined to go into the merits of the decisions when the Constitution gives them the power to do so. But they could also be JA in effect, the Courts have brought back parliamentary supremacy and subsumed constitutional supremacy, this is the type of JA that Campbell refers to as negative JA. But the thrust of this thesis is that concentrating on whether or not the courts in Malawi have been practising JA risks diverting attention from the more urgent issue- that of facilitating the acquisition of appropriate knowledge by judges to enable them to discharge their duties competently.

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<sup>144</sup> See for a comparative analysis of the different approaches in various jurisdictions, C Thomas

## Chapter 8

### CONCLUSIONS AND RECOMMENDATIONS

*Judges undoubtedly bring immense practical skills to the practise of their craft. ... But practical skills are not enough. Those skills must be anchored in a conception of the judicial role. Legal theory is fundamental to that conception....judges must ... know the theoretical framework for their judicial thinking.<sup>1</sup>*

#### 8.1 Introduction

The main aim of this thesis was to highlight the need to avoid the repetition of past mistakes when exhorting the judiciary in Malawi to be an instrument for social transformation through the practise of 'judicial activism' ('JA') as a method for entrenching constitutionalism and good governance. In order to emphasise what those past mistakes were, this study drew on scholarly research conducted on or related to the status of Malawi's constitutionalism and good governance after the adoption of the 1994 Constitution. The research brought out various conclusions, some of which have formed the foundational blocks of this thesis.

Firstly, because liberal democracy (based on western values, traditions and customs) had worked well in western countries, it was assumed that it would work equally well anywhere else. As a result it was exported wholesale to Africa as the best form of democracy. Thus in 1994 Malawi apparently adopted one of the most liberal democratic constitutions in the world. Years on, research has shown that liberal democracy has failed Africa in general and Malawi in particular. One major factor for such failure is the lack of autochthony: thus the people of Malawi (and Africa generally), do not identify with liberal democratic values and ideologies as a result of which they have never had a collective motivation for the enforcement of a liberal democratic constitution. The first mistake of those who facilitated the adoption of such a constitution was their failure to critically assess the suitability or validity of liberal democratic values and ideologies to the Malawian context in view of its cultural, traditional, philosophical, historical and social peculiarities. The second mistake was their failure to distinguish between democracy as a concept and liberal democracy as a theory of democracy (which would have helped them to appreciate the need to adopt democracy in Malawi without imposing 'a pre-fixed meaning ... loaded with particular values.')

<sup>2</sup> The third mistake was that the constitution was drafted and adopted more by elites without sufficient consultation of the majority of Malawians in a country where decision-making by consultation

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<sup>1</sup> Thomas Ch. 2 (n 14) 1.

<sup>2</sup> Nkhata Ch. 1 (n 2).

is greatly valued traditionally. As a consequence, Malawi more than a decade on, has a constitution without constitutionalism and democracy without good governance.

Secondly, that in spite of the foregoing, constitutionalism and rule of law remains the foundational building blocks of any State that seeks to promote the welfare of its citizens; and a written constitution remains fundamental to the attainment of those two ideals. Even though the 1994 Constitution has legitimacy deficiencies, it is unlikely that sufficient political consensus would be achieved for its repeal in the foreseeable future. Therefore, the 1994 Constitution is the constitution that must be enforced if constitutionalism and the rule of law are to be entrenched in Malawi. The good news is that despite the dominance of liberal democratic values in the 1994 constitution, it contains fundamental provisions that this thesis has argued are its saving grace – Sections 12 and 13, since they introduce within the very constitution what Nkhata has lucidly described as a ‘social trust-based governance’ framework. Consequently, the solution to the challenge of entrenching constitutionalism lies within the very framework of the 1994 constitution in spite of its acknowledged shortfalls. To that end, scholars in various contexts have called on the Malawi Judiciary to practice JA in order to make the current constitution fulfil its transformative role in the Malawi nation. However, it appears that those calls emanate from the perception that the Malawi judiciary only practiced JA around the period between 1993 and 1996. Further, there seems to be an assumption that JA on the part of the judiciary would necessarily enhance constitutionalism and rule of law.

It is in response to such calls and perceptions that this thesis’ main argument was that lessons need to be drawn from the Malawian experience with liberal democracy when calls are made for the Malawian judiciary to practice judicial activism. And in this case, the main lesson drawn from Malawi’s experience is that the adoption of any concept or theory aimed at organising a society under the umbrella of the law must follow a critical appraisal of its suitability or significance to that society by paying due regard to its cultural, historical, philosophical and/or social peculiarities. It is in that context that the current thesis set out mainly to answer the question whether judicial (in)activism is a solution or a hindrance to the entrenchment of constitutionalism and the rule of law in Malawi.

## 8.2 Major Conclusions of this Thesis

### 8.2.1 The positive contribution of judicial activism to the constitutionalism must not be assumed

This thesis has discussed research findings which show that a presumptuous and uncritical approach to the democratisation of Africa in general and Malawi in particular, which resulted in the wholesale importation of liberal democracy, has contributed significantly to the deficiency of constitutionalism and good governance in Africa. When liberal democracy was deemed to have worked very well in some societies, certain sets of questions should have been asked when considering its importation– **Set 1:** what is liberal democracy? What are its fundamental elements or principles? **Set 2:** How did the social, cultural, historical and philosophical peculiarities of the societ(ies) where it worked contribute to its success? Are those peculiarities similar to those present in Malawi? If not, how are the differences likely to impact on its success if it is imported wholesale? **Set 3:** Is it the best model of democracy to adopt in Malawi? If regardless of the differences, it still remains the best model to import, how can it be modified to suit the society it is imported into in order to enhance its success?

It is only after liberal democracy had been imported and was seen not to be working that such questions were raised and attempts were made to address them.

Now that other scholars are of the view that the Malawi judiciary could discharge its responsibilities better if it practised judicial activism, similar questions need to be raised and addressed, even if only in part. The mere fact that questions raised may be addressed only in part does not discredit the contribution of this thesis to studies on constitutionalism or judicial activism among others, since at times ‘attempts to devise a theory or system that can answer all problems often suffer from indeterminacy, vagueness, [lack of] clarity and grandiosity.’<sup>3</sup>

#### 8.2.1.1 Addressing Set 1 questions

It may serve the interests of some to glorify the impact of *Marbury v. Madison* when discussing JA in the USA and completely ignore the ignominy of *Dred Scott v. Stanford*; or exalt the introduction of public interest litigation through JA in India and overlook the further marginalisation of the already marginalised that has come about in that jurisdiction due to the same JA; or even applaud the strides made in human rights protection due to JA in South Africa and completely disregard the formidable hurdles placed in the way of access to justice for the poor by means of the same process. However, it does not serve the interests

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<sup>3</sup>Ibid.



of those who seek to enhance constitutionalism and rule of law in a society deficient of those values to adopt such a biased approach to JA.

That is why chapter 2, through a comparative analysis approach, discussed the definitions and manifestations of JA in order to bring out both its positive and negative permutations.

### **What is judicial Activism and what are its fundamental elements or principles?**

Thus in chapter 2, it has been shown that the term or phrase 'judicial activism' may be likened to an empty shell available for anyone who desires to fill it with contents of their choice; those contents may not only be contradictory but even irreconcilable to those chosen by a previous person even within a single jurisdiction. Some have used it to describe the courts' handling of precedent, or choice of constitutional interpretive methodology, or preference for a particular result among other things. However, chapter 2 has demonstrated how such categorisations and/or definitions are superficial and unhelpful for purposes of drawing a conceptual framework adequately robust to apply across all jurisdictions. In addition, chapter 2 has shown how the positive and negative effects of court decisions classified as JA in different jurisdictions reveal that JA has no essential link to concepts such as justice, liberalism, progressiveness, etc.

As a consequence, there seems to be no agreement on the essential elements of JA. To reiterate, in the case of liberal democracy, no matter what differences of opinion of its appropriateness may exist among scholars, it is generally agreed that three of its fundamental elements/principles are separation of powers, the independence of the judiciary, and limitation of government powers. The same cannot be said of JA this far- its essential elements/principles remain entirely subjective. To that end, any user of the term who seeks to avoid misinforming or misleading others should use it in a manner that presents it as a value-free, judgment-free, and ideology-free concept, which has both positive and negative attributes.

#### **8.2.1.2 Addressing Set 2 questions**

### **How did the social, cultural, historical and philosophical peculiarities of the society(ies) where it worked contribute to its success?**

First and foremost the question to ask is whether JA can be said to have been successful. The parameters for determining success have not been spelt out in this thesis as that was beyond the scope of this study. Suffice to say however, that chapter 2 has demonstrated that the path of JA in jurisdictions such as Australia, USA, India, and South Africa has not been free from controversy due to its mixed results.

For instance, in the USA, it is accredited with the successful and commendable introduction of judicial review even though its practice over the centuries by judges in that jurisdiction has attracted criticism from different quarters at different times such that the term JA in the USA is a term of censure. Similarly, in Australia, it is credited with greater protection of human rights including remedying to some extent the past injustices occasioned to aborigines vis-a-vis land rights. Nevertheless, general usage of the term JA in Australia is that of censure other than of commendation. It is worth appreciating that in spite of the negativity attached to JA in both the USA and Australia, the constitutional frameworks of those countries have not been undermined. India on the other hand presents an entirely different picture. JA in India though instrumental in promoting access to justice and accountability of the usage of state powers, has also led to the further marginalisation of some sections of Indian society as well as undermined India's constitutional framework. In South Africa, JA is a term of commendation even though it is acknowledged that in the process of enhancing the enjoyment of human rights through JA, the Constitutional Court has nevertheless put hurdles in the way of access to justice for the poor. It can thus be seen that JA has brought about different results in different jurisdictions as far as the stability of the constitutional framework is concerned.

In that context, chapter 2 brought out the fact that legal, social, historical, philosophical and/or cultural factors have an impact on the manifestations and results of JA. These factors include (but are not limited to): the constitutional framework (which determines the distribution of state power, and defines its limitations {if any} among others); the cultural/social understanding of the judicial function/role; the fundamental values or philosophies that the given society prioritises; the historical and/or political developments in that society; and the commitment/will of the populace to ensuring that those entrusted with state power exercise it within its appropriate limits (which factor may be affected by the level of education/awareness of the populace to the prescribed limits, or the extent to which they identify with the constitution). To give an example, in the same chapter 2, it was demonstrated how regardless of which side of the debate on the appropriateness of JA scholars in the USA may stand, all of them uphold the supremacy of the USA constitution in the regulation of all power (including that of the judiciary), and none of them are keen to do away with the conception that it is capable of having one uniform national meaning. It thus may not come as a surprise that despite the heated debates on JA, the status of the USA Constitution as the supreme and final arbiter of all legal authority has withstood the test of time (300+ years).

### **Are those peculiarities similar to those present in Malawi?**

Chapter 3 set out to outline the social, historical, philosophical and cultural peculiarities of the Malawi nation. Just to highlight some of the factors outlined, this conclusion will use the USA (as discussed in chapter 2), to bring out some of the differences: 1) whereas the liberal democratic underpinnings of the USA Constitution reflect the values and ideologies that most of its citizens identify with and prioritise, the liberal democratic underpinnings of the Malawian Constitution were more or less imposed on the people of Malawi by elites and are at odds with the values and ideologies that the people prioritise; 2) whereas political power in the USA is more or less exercised with the consent and consultation of the governed, the situation in Malawi is quite the contrary- the majority of Malawians have been significantly excluded from participation in decision-making that affects their lives; in addition to this, chapter 3 has demonstrated how the governors in Malawi have continuously cast themselves as 'parents' of the rest hence in a position to know what is best for the rest even without consulting them; 3) the culture, philosophy and values of the majority of USA citizens is well documented, whereas the culture, philosophy and values of the majority of Malawian citizens remain largely undocumented hence largely contestable; this would require setting down methods by which to determine which values are really prioritised by the people and their appropriateness; 4) and USA does not have traditional governance structures that emphasise on unity of the community and operate parallel to the official government structures, whereas Malawi has traditional governance structures that promote communitarian values and operate parallel to the official government structures; and 5) the supremacy of the USA Constitution is largely unchallenged by those who hold political power; whereas those who hold political power in Malawi have consistently made efforts to be beyond its reach in one area or another.

### **If not, how are the differences likely to impact on its success if it is imported wholesale?**

Chapter 2 has demonstrated that currently, the term JA has no permanent essence and that divergent views on it have hindered the development of objective criteria to measure its success. Consequently, this thesis resolved to apply the various definitions and manifestations of JA emanating from various jurisdictions across the globe to the Malawian context in chapter 4, (as well as partly in chapters 5, 6 and 7). That process has demonstrated that contrary to the perceptions of some scholars in Malawi, the Malawi judiciary has actually practised JA beyond 1996. And again, that similar to the other jurisdictions, the manifestations of JA in Malawi have also been inconsistent and/or irreconcilable.

Just to highlight how the aforementioned differences in circumstance have impacted on JA in Malawi, the *Press Trust* Cases (I & II) and the *Jumbe & Mvula* case discussed in Chapters 4 and 5 respectively will be used.

In the *Jumbe & Mvula* case, which is a case where JA in the form of invalidating legislative enactments was practised, the issue is one of the applicability of foreign precedents to Malawians cases. It is now widely accepted that the drafters of the Malawian Constitution significantly drew on Constitutions such as those of South Africa and Canada to come up with the current document. Consequently, the Courts in Malawi have held that Canadian and South African Constitutional cases among others can be used to bear on the construction of the Malawi Constitution. As shown in chapter 5, even though Justices Kapanda and Katsala came to the same conclusion of invalidating a provision in the Corrupt Practices Act, their application of foreign precedent was contradictory and inconsistent. Ironically, even though Justices Mkandawire and Katsala came to opposing conclusions, their application of foreign precedents were somewhat similar. Thus the application of the social-trust based governance principles in the Constitution by Justice Mkandawire led him to an opposing conclusion to that of Justice Katsala even though they had applied the same foreign precedents. That is, two opposing conclusions in the same case both qualify as JA when two of the various definitions in use are applied. In other words, if the definition of JA as invalidation of legislative enactments is applied, the JA is that of Justices Kapanda and Katsala; whereas if we apply the definition of JA as sensitivity to social realities and/or application of social-trust based governance then the minority decision of Justice Mkandawire is the one that is JA.

Similarly, in *Press Trust* Cases, both the HC and the SC practised JA in the form of result-oriented judging' even though they came to opposing conclusions (the HC found for the Plaintiff while the SC found for the Defendant). The HC did so by giving prominence to the right to property in the liberal democratic sense whereas the SC highlighted the socio-historical realities in which the Press Trust had operated in order to override the legal ownership of the Trust by the Plaintiff. The HC emphasised individual ownership while the SC emphasised communal ownership which is a philosophy/value that is dominant in Malawian tradition. At the end of the day, the question would be, between the HC and the SC, which Court was faithful to the Constitution? Before addressing this question, there is need to recall that even though the Constitution in Malawi is dominated by liberal democratic values, it also includes Sections 12 and 13 which calls on those who exercise powers under it to do so with the welfare of the people of Malawi in mind among others. In that sense, the HC was faithful to the liberal democratic side of the Constitution whilst the SC was faithful to

the social-trust based governance side of the Constitution. The answer would then be that both the HC and the SC were in a way faithful to the Constitution albeit with irreconcilable results.

Further, using the same cases on the *Press Trust*, chapter 6 demonstrates that even though judicial deference may provide the jurisprudential boundaries within which ‘appropriate’ JA operates without losing the democratic legitimacy, excessive judicial deference is ‘inappropriate’ JA. Chapter 6 has shown that the SC also practised JA in the *Press Trust II* in the form of excessive deference to the Executive and Legislature in its determination on the parliamentary procedures prior to the introduction and discussion of legislation, which has been credited with undermining constitutionalism in Malawi. To recap, as stated, unlike the USA, Malawi has traditional governance systems that operate parallel to the government structures. The 1994 Constitution initially contained a provision on the Senate which included representation of chiefs among others who are the traditional rulers. However, politicians in Parliament removed that provision through a Constitutional Amendment in defiance of public support for the senate. Similarly, through a similar constitutional amendment, the recall provision (then S. 64), which would have empowered the people to hold members of parliament (‘MPs’) accountable was removed. Subsequently, S. 65 of the Constitution was amended in a manner that gave much control of MPs to their party leaders as opposed to the people. Chapter 6 has explained how all the aforementioned constitutional amendments that have served to undermine the constitutional accountability of the Legislature and the Executive, can be directly attributed to the SC decision in the *Press Trust Case I* in relation to appropriate procedures for enactment of legislation in parliament.

This strongly points to the conclusion that if the concept of JA is imported wholesale (with all its inconsistencies) without interrogation, it could lead to the same chaotic results that have been reported in other jurisdictions such as India, where the constitutional framework stands undermined.

#### **8.2.1.3 Addressing Set 3 Questions**

##### **Is judicial activism the best model of judicial conduct to adopt in Malawi?**

Even though the results of JA (however defined) have been chaotic, scholars in the process of using that term have been grappling with substantive questions pertaining to the judicial process and its role or significance in a democracy. Chapter 2 has thus shown that efforts to have answers to such questions under the banner of discussions on JA have gained momentum in public/political/legal debates and it is such debates that are central to

the pursuit of justice. Consequently, the usage of that term in relation to the Malawi judiciary cannot be abandoned; rather it is to be encouraged.

However, chapter 2 has also shown that there is no one particular 'model' of JA. Rather, there are so many- some of which are inconsistent with one another. Therefore, if the goal is to achieve some desired ends beyond having JA for its own sake, the initial step for Malawi should be an identification of a definition of the term JA that would serve as a baseline for all debates on JA or lack thereof. It is in this context that chapter 2 has proposed a definition of the term JA that could be of universal application aimed at reducing the likelihood of misinformation and misunderstanding.

**If regardless of the differences, it still remains the best model to import, how can it be modified to suit the society it is imported into to enhance its success?**

JA discourse in Malawi must take account of the following two opposing circumstances that introduce a peculiarity to the Malawian social/political/historical context: The priority given by Malawian tradition and culture to the consultation and participation of those likely to be affected by the decision in the decision-making process; and the tendency of those who hold political power to exclude those affected by their decisions from consultation and participation in their decision-making process. If the judiciary is to be a solution and not part of the problem, then its officers who hold political power in the form of judicial power must not perpetrate the same mistakes made by the Legislature and the Executive. The modification that must be made to JA discourse in order for it to suit the Malawian context therefore, is that the judiciary must consult and involve the people in its decision-making on whether or not JA is appropriate in Malawi or not, and if it is- in what form?

However, the consultations and involvement of the people must be such as would not undermine the independence of the judiciary, which is another fundamental principle for the entrenchment of constitutionalism. It is in this context that lessons can be learnt from other jurisdictions like the USA on how they have approached this topic. Among others, the discussion in chapter 2 brought out the fact that the development of constitutional jurisprudence of which JA discourse is an integral part, in some countries like the USA and Australia, has not been the work of the judiciary alone. Rather, a coordinated multi-disciplinary contribution from judges, legal philosophers, sociologists (especially those focusing on sociology of law), anthropologists etc.

One framework which has been used to facilitate a dialogue (among other things) between the judiciary, the public (including the other disciplines) and the bar in other jurisdictions

without risking the independence of the judiciary is that of establishing a Judicial Institute.<sup>4</sup> Though different jurisdictions have different approaches, in all jurisdictions studied by C Thomas,<sup>5</sup> the training content includes ‘the social context of law and the judicial process’, and in all common law jurisdictions studied, the judicial institute is linked to ‘a university and with multiple organisations involved in the delivery of training.’<sup>6</sup> One of the main recommendations of this thesis to be discussed in detail subsequently therefore, is that a formal Judicial School with strong affiliations to a university should be established in Malawi.

### **8.2.2 The existence of JA in courts is not central to constitutionalism rather an appropriate understanding of the endemic judicial role**

The discussion in this thesis has brought out several points that are relevant for this section: 1) that JA has both positive and negative consequences and resonance; 2) that courts in Malawi have practised JA though not with conceptual and/or doctrinal consistency; 3) that some of the JA practised by the Malawian judiciary has contributed to the failure of constitutionalism. These findings on Malawi when added to the result of JA in India, where it has undermined the constitutional framework point strongly to the conclusion that desirable as it may be, JA is not central to constitutionalism. What then is?

Chapter 1 and 3 discussed how the 1994 Malawian Constitution has made a break from the past by stipulating that it is the supreme law of the land and has entrusted the judiciary with the responsibility of enforcing its provisions. Thus whether or not the Constitution will in reality be the supreme law of the land depends primarily on how the judiciary will discharge this particular responsibility. Research shows that the accurate answer to this lies somewhere in the middle. Chapter 4 and 6 has demonstrated how the Malawi judiciary has acted as a safety valve in society and earned the confidence of Malawians, to the extent that its independence is now widely acknowledged. It has also been demonstrated how in spite of the accolade in the area of judicial independence, the doctrinal/conceptual/theoretical inconsistencies prevalent in Malawian constitutional jurisprudence is a source of concern to many including the author of this thesis.

For instance, as chapter 6 shows, the SC in most constitutional cases has upheld the doctrine of parliamentary supremacy when interpreting the constitution instead of the

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<sup>4</sup> For instance, the USA has the New York Judicial Institute established in 1952, for detailed information see <http://www.law.pace.edu/new-york-state-judicial-institute>; and the UK has the newly established Judicial Institute under the Faculty of Law of the University College London (UCL); and for a comparative study on Judicial Training approaches, see C Thomas, ‘Review of Judicial Training and Education in Other Jurisdictions’, Report prepared for Judicial Studies Board, May 2006 at [www.ucl.ac.uk/laws/socio-legal/.../Review\\_of\\_Judicial\\_Diversity.pdf](http://www.ucl.ac.uk/laws/socio-legal/.../Review_of_Judicial_Diversity.pdf).

<sup>5</sup> Ibid.

<sup>6</sup> Thomas (n 4) 6.

doctrine of constitutional supremacy. Even though other scholars attributed that to ethno-regional loyalties on the part of concerned judges, this thesis has contended that it is rather due to the courts' own misapprehension of the new constitutional dispensation. Some of the misapprehensions emanate from the application of English precedent on judicial review as discussed in chapter 7. In essence, the Malawian Courts appear not to have adequately grasped their role in determining the applicability of foreign precedent to the Malawian context among others. This deficiency seems to have struck at the very core of the judiciary's capability to develop Malawi-centric jurisprudence that would have contributed significantly to entrenching constitutionalism in Malawi. In this context, it is safe to conclude that an appropriate understanding of the endemic judicial role by individual judges is what is central to constitutionalism in Malawi.

### **8.3 Recommendations**

#### **8.3.1 There is need to prioritise tailor-made judicial training to prevent judges from fumbling along**

The finding that incoherence, inconsistency and unprincipled judicial-decision-making on matters impacting on policy and/or development of law proceeds from an insufficient conception of the judicial role, is not peculiar to this thesis. Similar findings have been made in other jurisdictions.<sup>7</sup> The unique contribution of this thesis therefore is to the extent that it brings to light a similar problem in Malawi. This study would therefore like to borrow from the wisdom of the study by Thomas which pointed to the need to ground judges in legal theory if they are to acquire a comprehensive conception of the judicial role.<sup>8</sup> The grounding would not be uncritical acceptance by judges of all theories advanced, rather a process of mutual influence where the judges benefit from the theoretical concepts advanced by legal theorists, and the legal theorists would benefit from the practical experience judges would bring. The legal theory referred to in Thomas' study, includes the work of western legal theorists such as Hart, Kelsen, Dworkin; whose work has contributed much to the understanding of the nature of law and/or the judicial process.

It is with the aim of applying those useful insights that this thesis recommends the urgent establishment of a judicial institute in Malawi linked to a university. The judicial institute would be instrumental in identifying the training needs of judicial officers as well as appropriate resource persons to deliver the trainings, among other things. As regards legal

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<sup>7</sup> See for instance Thomas Ch. 2 (n 14) xix- 15 (stating how he had 'observed that the value judgment a judge will make in a particular case [could not] divorced from the judge's perception of the function of law and the role of a judge').

<sup>8</sup> Ibid.



theory however, Malawi is in a different position from western nations such as the USA, Australia, and UK in that whereas Anglo-American jurisprudence (as developed by legal philosophers) is well-developed; Malawi-centric jurisprudence is in its embryonic stages. The embryonic stage of Malawi-centric legal philosophy should however, be taken as an advantage in that if the judicial institute were to be established with urgency, the interaction of judges and other disciplines under its auspices could result in an enriched and well-grounded constitutional jurisprudence. That is, the Malawian judges could benefit from the theoretical contributions of the Malawian legal philosophers, whilst the philosophers themselves could benefit from the judges practical insight.

#### **8.3.1.1 The underlying context for the urgency of tailor-made courses**

There are several reasons why judicial training in Malawi should be tailor-made and considered as a matter of urgency. However, for purposes of this thesis only two areas will be highlighted as warranting such prompt intervention primarily due to their perceived relevance to remedy the identified shortcomings in constitutional jurisprudence development:

##### **Donor-dependent training needs identification and provision**

Malawi is a donor-dependent country and this has negatively impacted on the ability of the Judiciary to implement its activities based on identifiable institutional capacity gaps and not ‘the priorities of donors.’<sup>9</sup> For example, the need to train judges on constitutional interpretation and related areas should have been a top priority as soon as the 1994 Constitution entered into force. However, before 2003, prioritised in-depth training focused on lay magistrates with funding from the UK Department for International Development (DFID),<sup>10</sup> whereas training for judges took the form of 1 – 7 days workshops mostly on human rights.<sup>11</sup> In 2003, the strategic plan developed by the judiciary identified ‘insufficient professional capacity and lack of staff development programmes’ as one of the strategic areas requiring immediate intervention.<sup>12</sup>

In that context, the Judiciary Development Programme (JDP) which was developed acknowledged the inadequacy of such workshops to meet ‘the long-term comprehensive training’ needs of judges;<sup>13</sup> and recommended that a permanent institution for purposes of training judges in judicial work be established, among other things.<sup>14</sup> A Judicial Training

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<sup>9</sup> Malawi Judiciary Strategic Plan 2010 – 2015, para. 6.7.

<sup>10</sup> Ibid.

<sup>11</sup> E Kanyongolo, ‘State of the Judiciary Report: Malawi 2003,’ IFES State of the Judiciary Report Series

<sup>12</sup> Malawi Judiciary Strategic Plan 2003 – 2008.

<sup>13</sup> Malawi Judiciary Development Programme 2003 - 2008, 11.

<sup>14</sup> Ibid, 30.

Committee was established, a Judiciary Training and Development Policy (JTDP)<sup>15</sup> developed whose ‘overall goal ... is to ensure systematic training of judicial officers ...’<sup>16</sup> The JTDP, expressly provided for ‘high priority’ training areas for the Judiciary on the basis that ‘demand for training often exceeds the capacity and resources available to undertake such training.’ The high priority areas were:

- ❖ Court Interpretation/Legal terms Interpretation;
- ❖ Case flow management;
- ❖ Lay Magistrates Training;
- ❖ Court Administration;
- ❖ Financial Management;
- ❖ Records Management;
- ❖ Customer Care;
- ❖ Computer Skills;
- ❖ Practical Skills for Court Reporting;
- ❖ Performance Management and Appraisal;
- ❖ Training function management;
- ❖ *Conference for judges on Constitution interpretation;*
- ❖ Change management;
- ❖ Induction for court clerks;
- ❖ Induction for Professional Magistrates;
- ❖ Research and Drafting Skills;
- ❖ Procurement management.<sup>17</sup>

Thus yet again the training for judges vis-a-vis the Constitution was restricted to another conference/workshop. Even though the JTDP provided that the Registrar and the Human Resource Management Section had the responsibility to ‘determine and update priority training and development areas’ in order to respond to new training needs, that has never been done. Consequently, as far as official training policy is concerned, the above areas have remained the priority areas. It may not come as a surprise therefore that training of judges has continued to be through workshops, predominantly yet again on human rights which have remained *ad hoc* and donor-driven.<sup>18</sup>

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<sup>15</sup> Malawi Judiciary Training and Development Policy

<sup>16</sup> Ibid, Foreword.

<sup>17</sup> Exhaustive list, emphasis supplied.

<sup>18</sup> Such as those organised by the Malawi Human Rights Commission (MHRC), and a variety of Non-Governmental Organisations with assistance from various donor agencies on topics such as ‘Child Rights’, ‘Economic, Social and Cultural Rights,’ and ‘The application of international human rights norms to the Malawian Context’.

Further, even though some old Government buildings in one of Malawi's cities, Zomba were allocated to house the 'Judicial Training College',<sup>19</sup> the College has never become fully operational, and no training curriculum specific for judges developed,<sup>20</sup> due to a shift in donor priorities.<sup>21</sup> Thus, even five (5)+ years after the adoption of the JTDP, at the institutional level, the training of judicial officers in Malawi is still not driven by their training requirements, rather by the areas which those with funds or expertise to facilitate or provide the training, are interested in. In fact, the Malawi Judiciary Strategic Plan for 2010 to 2015 implicitly acknowledges this by identifying as a general 'threat' to the implementation of the planned activities of the judiciary, the variance between those activities and the priorities of the donors.<sup>22</sup>

### **Apparent failure to appreciate the complexity of the training required**

The combined effect of the discussions in chapters 4 and 5 of this thesis has been to demonstrate that the training needs of the judges are much more complex than appears to have been hitherto recognised. As stated above, the JTDP was finalised in January 2005, long after most of the decisions discussed in this thesis (save three) had been rendered.<sup>23</sup> By then, it should have become evident as demonstrated in Ch. 4 that Malawian judges are generally aware of the various constitutional interpretive methodologies, and of the uniqueness of the 1994 Constitution. The difficulty they have grappled with, with inconsistent results, is how to 'borrow' from comparative foreign case law as stipulated in the same Constitution without compromising its uniqueness. It is in that context that this thesis has sought to argue that such a problem is essentially jurisprudential in nature and the JTDP should have reflected that had its developers accurately diagnosed the problem. In prioritising a 'conference for judges on Constitution Interpretation' only, and not reviewing that priority eight (8) years on, it strongly suggests that those responsible have failed to appreciate the jurisprudential nature of the training required.<sup>24</sup>

As discussed in preceding chapters, Malawian constitutional jurisprudence is very nascent, and if any lesson may be learnt from the evolution of western (and other interesting) jurisprudence, it is the complexity and multidisciplinary nature of such a process. The design of appropriate judicial training in Malawi would thus benefit considerably from the

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<sup>19</sup> See (n 15) 40 – this is not an academic institution yet and it is not attached to a University.

<sup>20</sup> Just to highlight a few problems.

<sup>21</sup> The Judicial Training College was to become fully operational with financial assistance from DFID. However, subsequently, DFID priorities changed and it did not provide the funds needed to operationalize the College.

<sup>22</sup> See (n 9) para. 6.7.

<sup>23</sup> *Mvula & Jumbe Case* (Ch. 5), *Mary Nangwale Case* (Ch. 7), and *the Presidential Referral Case* (Ch. 6).

<sup>24</sup> The MJDP 2010 – 2015 appears to have overlooked the need to either review or update the MTDP as it has only included in its 'Strategic Outcomes, Targets and Outputs' the implementation (not review) of the Policy (4.T1.OP4).

competencies of those with the requisite expertise and experience in developing such complex study programmes.

#### **8.3.1.2 Why the current training approach and provision is inadequate**

Here again there are several reasons, but only two will be highlighted:

##### **The uniqueness of the Malawian Constitution**

Malawi's constitutional peculiarity provides a unique challenge that requires the development of theory that could address the problem comprehensively (which would be possible under the Judicial Institute) as opposed to a case by case resolution (when judges preside over matters). The constitutional peculiarity referred to here is the one where the dominant philosophy of the Malawi Constitution is liberal democratic, but the same document contains fundamental governing principles that introduce a social-trust based governance framework. This thesis has referred to the work of Nkhata who calls on the judiciary to override the liberal democratic dominance in the Constitution by utilising the social-trust based framework provided in the Constitution. An analysis of the cases where the Malawi judiciary have indeed applied the social-trust based framework (Press Trust and Jumbe & Mvula cases) has demonstrated that a lucid principle that could guide future constitutional adjudication cannot be derived from them. In the Press Trust case, the SC applied questionable foreign precedent in the form of the doctrine of necessity and upheld the validity of a legislative enactment that was being challenged for unconstitutionality. In the Jumbe & Mvula case, Mkandawire J applied similar foreign precedents as Katsala J but came to different conclusions, in which it was in the minority decision of Mkandawire J where the legislative enactment that was being challenged was upheld. This raises several questions- is it a coincidence that in the two cases where the social realities were taken into consideration by the court, the courts reached a decision that upheld a legislative enactment otherwise questioned as unconstitutional? Or is this approach to be confined to the particular issues under consideration- economic empowerment of Malawians and prevention of corruption?

This points to a need to have a dialogue/research that would assist in the development of a theory on the circumstances in which the courts should emphasise on the social-trust based framework over the liberal democratic values in the constitution. Or does the mere fact that the liberal democratic values are at odds with most Malawians mean that they must be overridden when 'social realities' dictate it? How should a judge objectively ascertain when social realities so dictate? In fact, how should a judge identify those social realities? Or does it depend on the constitutional interpretive methodology chosen by the judge (s)? The

foregoing questions are only aimed at highlighting the need for a judicial institute that could encourage research into topical issues that may affect the work of the courts.

The fact that jurisdictions with centuries-old democracies and constitutions like the UK and the USA, and whose judges have a wealth of local precedents and legal theorists still see an increasing need for formal judicial schools, points to the centrality of such institutions in equipping judges to discharge their responsibility with competence and to remain up-to-date with emerging topics. What more a country like Malawi which is still in its nascent stages of democratisation and constitutionalism?

### **Diversification of judicial appointees' professional background**

The Constitution has broadened the legal professional backgrounds of judicial appointees. By virtue of Section 112, as long as a prospective appointee is entitled and has been entitled to practise in the High Court 'for not less than ten years', they may be appointed even if they hold an office that precludes them 'from practising in court' or 'does not hold a practising certificate'.<sup>25</sup> This entails that judges may come from positions of specialisation.<sup>26</sup> For instance, potential appointees may be drawn (and have been drawn) from private firms that are on the face of it non-specialised but whose legal practitioners tend to specialise in practice for efficiency; company secretaries, whose primary work has been primarily corporate law; and magistrates, whose primary work has been criminal law. In spite of such initial professional specialisation, with the exception of the specialised Commercial Courts Division, the High Court in Malawi is a Court of unlimited jurisdiction which means that its judges will be required to decide cases on any area of the law depending on the issues raised by the litigants.

Notwithstanding, there currently is no formal induction programme for newly appointed judges to the Malawi judiciary. Consequently, a training approach that focuses on 1 – 2 days' workshop on a substantive area of law may be largely inadequate to meet the training needs of judges.

### **8.3.2 Prioritise promulgation of legislation that impacts on the work of the Courts**

Constitutional provisions are by their very nature very broad and often require the detail to be provided in pertinent statutes and other subsidiary legislation or procedural rules.

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<sup>25</sup> Under Section 111 (2) of the Constitution Judges are appointed by the President on recommendation from the Judicial Service Commission which is chaired by the Chief Justice (by virtue of holding a Bachelor of Laws degree from a recognised institution) for ten years.

<sup>26</sup> This includes specialisation in postgraduate qualifications (as well as the fact that nowadays even in terms of the first degree the appointees may have obtained from different jurisdictions as diverse as Malawi, UK and Tanzania).

However, despite the constitutional provisions that establish constitutional judicial review in Malawi, no procedures for bringing such cases have ever been promulgated. As a consequence, parties have had to commence their proceedings under the procedural rules as found in the obsolete UK Rules of the Supreme Court (RSC). This fact alone could be the reason why Malawian courts have attached undue weight to English precedents on judicial review to Malawian judicial review cases when the former has parliamentary supremacy and the latter espouses constitutional supremacy. As a consequence, the transformative potential of the 1994 Constitution has not been realised fully especially in the area of judicial review.

Consequently, it is recommended that the identification and subsequent promulgation of legislation impacting on the ability of the courts to fulfil their constitutional mandate efficiently and effectively needs to be prioritised.

#### **8.4 Contribution to knowledge and areas for further research**

This thesis set out to answer several questions of which the main one was whether judicial (in)activism is a solution or a hindrance to the entrenchment of constitutionalism and rule of law in Malawi. The word '(in)activism' was chosen as at the beginning of the research, much of the existing literature on Malawi appeared to suggest that the Malawian Judiciary was not practising JA. Thus first and foremost, the aim was to verify those suggestions by analysing the definition of JA. That analysis has demonstrated that the term JA is an empty shell. Even though other studies have reached similar conclusions, they have not done so through a comparative analysis of JA definitions across various jurisdictions encompassing both established and emerging democracies. To the extent that this thesis analysed JA definitions across various jurisdictions to show how a 'one-size-fits-all' approach should be eschewed in the promotion of JA, it has significantly contributed to the current discourse on JA.

In addition, this thesis has demonstrated that going by the definitions of JA currently in use. Malawian courts have in fact been practising JA contrary to the impression created by some scholars. This highlighted the need to have some form of uniformity in the definition of JA to avoid misinformation and understanding. In a bid to provide a starting point in that direction, this thesis proposed a definition of the term. The definition chosen emanated from some facts that the thesis has demonstrated- 1) that judicial discretion is inherent in judicial decision-making therefore cannot be eliminated hence the discussion should be what its appropriate limits may be and how those may be established without impinging on the independence of the judiciary; 2) that the fundamental principle that justice must not only be done but must be seen to be done should not be restricted to administrative issues but the

constitutional adjudication as well if constitutionalism is to be entrenched in a society- and that this fact must inform any discourse on JA that seeks to promote it as 'courts going beyond the constitution'; 3) that justice can be seen by observers only if there is a shared understanding on its essential elements- and that this points to the importance of 'shared understanding' in society. The following demonstrated facts contribute to knowledge in that they bring out the factors the judiciary needs to pay particular attention to if indeed it is to be a solution and not part of the problem. That is, this thesis has contributed to knowledge by showing that if left unchecked, JA can itself be a tool for the marginalisation of people in preference for elitist notions.<sup>27</sup>

These factors are essential in a country like Malawi where the exercise of power beyond its limits appears to be the order of the day, and where the views of the people on matters of national importance are often ignored. If the judiciary were to follow the same path then the most credible branch of government would lose its credibility. A situation where the judiciary loses credibility must be avoided at all costs - and this thesis has contributed to knowledge by showing that the discourse of JA is indeed within the means of those engaged in public/legal/philosophical debates on the judicial role in society hence must be approached responsibly. In that context, the facts brought out by this thesis that some of that JA practised in Malawi has actually contributed to the lack of constitutionalism; enrich the study on the possible effects of JA in general.

Notwithstanding the foregoing, this thesis has also demonstrated that debates on whether or not JA is appropriate or not should to be encouraged in Malawi. The most important thing in Malawi right now for the entrenchment of constitutionalism is consultation and participation of those affected by the decisions. To that extent the proposed definition of JA and the recommendations in this thesis only provide a starting point for the discussions. However, in the process of analysing the term JA, its manifestations and consequences in Malawi, and making recommendations more questions have arisen that would require follow-up research as they were beyond the scope of this thesis. Some of the questions have been highlighted in Section 8.3.1 of this chapter.

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<sup>27</sup> Gloppen and Kanyongolo Ch. 1 (n 148) 289, (describing judges as part of the 'elite').

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