

CONSTITUTIONALISM IN MALAWI 1994-2010:

A CRITIQUE ON THEORY AND PRACTICE

ABSTRACT

The various independent chiefdoms that make up present day Malawi had a new constitution imposed over all of them by the British government without their consent. This new superimposed constitution was never really embraced by the various tribal groups. Its tenets were never internalised by the people and this lack of internalisation has continued to this day. The elite of the day decided which principles would govern the country. Successive elite groups in different periods of Malawi's history have imposed their brand of constitutionalism on a hapless people. They have dutifully put in writing the constitutional principles without intending to apply them.

Malawi is a nation that embraced constitutionalism with one reason only, that is, to gain acceptance from its peers in the international community. Throughout its history from pre-colonial times to the present, the general population has never been involved in framing the principles which govern and shape the destiny of the nation. A small group of people has always decided what the constitution should contain.

The dominant man of the moment (the big man) and his political party decide what constitutionalism is to be. They govern the country through patronage. The president and a small group around him use state resources to promote their agenda often at the expense of the constitution they swore to uphold. The political leaders do not differentiate between resources of the state, the private sector and their ruling party and they often use them to peddle influence to promote their programs that are sometimes in violation of the constitution. When the president "donates" state resources to the poor communities, he tells them that he used his own money to buy the item he is donating, for example an ambulance, and nobody dares to contradict him.

Only in financial matters has the nation demonstrated some marked commitment to the rule of law. The incentive for the government to comply with the law is much higher because about 80 percent of its capital budget is financed from external sources through donations, loans and grants from western nations. Government tends to take action against public officers who do not follow constitutionally laid down principles. Its commitment to the rule of law on social and political governance issues is not consistent. It appears to pick and choose which constitutional principles it will adhere to.

In conclusion, it is difficult for Malawi to experience a government that adheres to the principles of constitutionalism because its widespread poverty helps entrench a system of patronage. This system has created a nation that tolerates serious abuses of its constitution. Transformative constitutionalism appears to offer the best hope for Malawi's future. The nation needs a judiciary that is more innovative and bold in interpreting, upholding and enforcing its own constitutional tenets. Only then will the nation be on a sound footing to realise the benefits of constitutionalism for its people.

DEDICATIONS

I would like to thank the following sincerely:

My God for enabling me to complete this manuscript

Professor Karin van Marle, my instructor, supervisor and encourager for your patience with me because of my endless questions and your commitment to academic excellence motivated me to think outside the box. You have an amazing gift because you help your students find what is within them. Thank you very much.

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1. INTRODUCTION

David Butleritchie says that constitutionalism is an ambiguous concept with descriptive applications ranging from restrictive, expansive, proscriptive, prescriptive and even pejorative.¹ He defines it as a set of formal legal and political concepts of western origin² to constrain and confine state authorities to create conditions necessary for the full actualisation of individuals.³ Jan-Erik Lane defines it as the political doctrine that states that political authority should be bound by institutions that restrict the exercise of power.⁴ Stephene L. Elkin calls it the dominant theme of western constitutional thought designed to limit the exercise of political power.⁵ All these thinkers are unanimous in the idea of curbing state power when dealing with its citizens. Montesquieu, one of the greatest proponents of limited government said:

Constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go. Is it not strange, though true, to say that virtue itself is in need of limits? To prevent this abuse it is necessary from the very nature of things that power should be a check to power. A constitution may be such that no man shall be compelled to do things which the law does not oblige him, nor forced to abstain from things which the law permits.⁶

¹ Butleritchie D (2004-2005)3

² *Ibid* 6

³ *Ibid* 13

⁴ Lane (1996)19

⁵ Elkin S L “ Constitutionalism: old and new” in Elkin S and Soltan K E (ed) (1993) *A new constitutionalism: designing political institutions for a good of society* 21

⁶ Butleritchie D (2004-2005)13

In what follows, I will critically examine the theory and practice of constitutionalism in Malawi from 1994-2010. Such an examination will take into account the notion of the perception gleaned from the behaviour of Malawi's rulers that Malawi is a conscript of constitutionalism, if I am to borrow and substitute from the title of David Scott's book *Conscripts of Modernity*.⁷ *Conscripts of Modernity* can be the other side of the coin with regard to Malawi's adoption of constitutionalism. Constitutionalism in Malawi can be compared to the product one gets when one mixes water with oil. This product cannot be consumed by human beings nor can vehicles use it. It is destructive to both. The colonized nations in Scott's book were forced to replace their traditional forms of governing their territories with western forms. Modernization was equated with the adoption of western forms of governance. Pre-colonial practices were seen as retrogressive and had to be replaced. For them it was like being conscripted to join a foreign army of occupation and to use weapons they were not familiar with. For all appearances they became what their colonizers wanted them to be - modern except at the core of their being.

Traditional dominant styles of governance by the few people at the top had been the norm and the populace had always played a subordinate role, sometimes no role at all in governance issues. This was accepted by all concerned that society functioned in that way.

The colonial masters had decided that their new subjects had to become modern even against their will. Similarly, Malawi had to embrace constitutionalism to become an independent nation and to be accepted by its peers in the international community as a properly constituted state. The leaders adopted it without ever intending to put it into practice.

⁷ Scott D (2005)2

Walter F. Murphy's statement that scholars, public officials and journalists are apt to conflate representative democracy, requiring government by popularly elected officials, with constitutionalism and its demands for limited government then further confuse constitution with constitutionalism.⁸ This potential confusion suggests a useful structure for this research paper. It will begin with Malawi's constitutional history. Thereafter I will discuss the general concepts of constitutionalism as they relate to Malawi and the theory and practice of constitutionalism during the multiparty era from 1994-2010. Finally, I will make suggestions about what Malawi needs to do to create a culture that will compel it to govern itself based upon its own laws. Since Malawi's postcolonial history from 1964-1994 mirrors that of South Africa given their long histories of human rights abuses and oppression, their constitutions put emphasis on the protection of human rights, the rule of law, and democracy and established institutions that would protect and enforce these ideals.⁹ Malawi's constitution enshrines a detailed bill of rights which was also largely modeled on South Africa's 1993 constitution.¹⁰ Karl Klare in his article, *Legal culture and transformative constitutionalism* makes arguments that apply to Malawi given the similarities between it and South Africa because of their violation of human rights and having judiciaries whose contribution to human rights protection, the rule of law and democracy can be said to have been shameful. Of the three branches of government, the judiciary offers the best hope for Malawi to eventually have a government of laws and not of "big men". Klare says that a conscientious judge in the new South Africa, more than anything else, he/she should promote and fulfill through his/her professional work the democratic values of human dignity, equality

⁸ Murphy W F "Constitutions, Constitutionalism, and democracy" in Greenberg D, Katz S N, Oliviero M B and Wheatley S C (eds) (1993) *Constitutionalism and democracy* 3

⁹ Kapindu RE(2008)226

¹⁰ Chirwa DM(2003)318

and freedom and he/she must work to establish a society that is based on democratic values, social justice and fundamental human rights.¹¹ He could have been writing about Malawi. A judiciary that views its role this way is what Malawi needs. Transformative constitutionalism appears to be the key that can unlock the nation of Malawi's potential.

¹¹ Klare K (1998)149

2. A BRIEF HISTORY OF CONSTITUTIONALISM IN MALAWI

Mr Augustine Titani Magolowondo has divided Malawi's politics and government into four phases.¹² These are the pre-colonial period on the land known as Malawi today prior to 1891, the colonial period, 1891-1964, the postcolonial period 1964 to 1993 and the multiparty era from 1993 to the present.¹³

2.1 *Pre-colonial period (prior to 1891)*

The land known as Malawi today was settled by various tribal groups. These groupings did not live as part of an organised state as we understand state formations today.¹⁴ Each tribal group governed itself following its own traditional norms, had its own local system and its laws and traditional norms of governance were binding on its members.¹⁵ Such norms established for each group the structure for its society, the distribution of political and legal power within it, including the rights and obligations for its members.¹⁶ These norms amounted to constitutions because they served as fundamental rules for the tribes that were socially and politically organised.¹⁷ These various tribal groups had constitutional features that were common to all of them. Firstly, these constitutions used unwritten customary laws to establish structures of authority which were based on hereditary kingships and chieftainships. Secondly, they established government structures which were centralised and did not have a concept of the separation of powers as we know it today. Finally they provided some measure of protection of human rights, although

¹² Magolowondo A T "Conceptuals and Contextual background" in Patel N and Svasand L (ed) (2007) *Government and politics in Malawi* 9

¹³ *Id* 9

¹⁴ Kanyongolo F E "The Constitution" in Patel N and Svasand L (ed) (2007) *Government and politics in Malawi* 27

¹⁵ *Id*

¹⁶ *Id*

¹⁷ *Id*

this was not based on individualism and gender equality but on entitlements based on communal solidarity and patriarchy.¹⁸ Pre-colonial Malawi was therefore basically a collection of chiefdoms with each running its affairs according to its traditions and structure.¹⁹

Malawi to this day has chiefdoms whose leadership succession remains hereditary according to a defined lineage. It should be understood that leaders were not accountable to their subjects and this continues to be the practice in modern day Malawi as the research paper will show in the coming pages.²⁰ Their social identity depended primarily upon clan membership.²¹ The chiefs exerted some kind of authority over their people through the demanding of tribute in the form of elephant tusks, leopard skins or lion skins killed in their respective territories.²² Some government functions were done by the chiefs through the settlement of disputes that arose among their people.²³ The advent of the colonial administration irrevocably changed the way the chiefs ran their respective territories. Power and real authority were taken away from them and were lost forever.

2.2 Colonial Period

The land we call Malawi today became a British protectorate on the 14th of May 1891.²⁴ This meant that the socio-political groups of pre-colonial Malawi were brought under the authority of a centralised body of constitutional rule and they became part of the British Empire.²⁵ Their tribal independence and autonomy

¹⁸ *Ibid* 28

¹⁹ Magolowondo A T (2007) 10

²⁰ *Ibid* 11

²¹ *Id*

²² *Id*

²³ *Id*

²⁴ Hara M H (2007) 5

²⁵ Kanyongolo F E (2007) 28

vanished without most of them realising what had happened. The superimposition of the centralised colonial constitution over the many pre-existing pre-colonial constitutions meant that it became the law of the land.²⁶ The chiefdoms had been conscripted into a type of constitutionalism they had not asked for and had not wanted. Between 1891 and 1907, the country was known as British Central Africa.²⁷

It has been argued that to constitute a legitimate state, constitutions are regarded as tools for establishing a sovereign state.²⁸ Constitutionalism in Malawi has been flawed from the beginning of its written history as a single centralised state. Malawi's history from 1891 to the present in the area of constitutionalism is rather tragic because successive governments have followed the pattern set by the British in 1891. Their declaration of authority on this territory was not based on any social contract between them and the various tribal groups they imposed their constitution on.²⁹ This new political order did not reflect the interests of the local people but reflected the objectives of the colonial government.³⁰ This pattern as the rest of the paper will show has led Malawi to have governments with constitutions without constitutionalism. The whole pattern, in the words of Hamlet, is "out of joint".³¹ The words of the constitutions and the hope engendered in the hearts of the people of Malawi have never been in sync with the world they have created.³² The result for the Malawian people has been and still is the Malawian political tradition, the

²⁶ *Id* 28

²⁷ Hara M H (2007) 5; Kanyongolo F E 28

²⁸ Kanyongolo F E "The limits of liberal democratic constitutionalism in Malawi" in Phiri K M and Ross K R (eds)(1998)*Democratisation in Malawi a stocktaking* 354

²⁹ *Id*

³⁰ *Id* 354; Hara M H (2007)6

³¹ Scott D. (2005)2

³² *Id* 2

institutionalised expectations that give the state its neopatrimonial character- the “big man syndrome” in all our presidents since independence to the present.³³

The 19th of August of 1902 saw a new constitution come into force on British Central Africa.³⁴ It was the British Central Africa Order-in-Council of 1902, which for all practical purposes became the first written constitution for Malawi.³⁵ This new constitution for the first time brought the concept of the separation of powers on this territory.³⁶ It created an administration which the Commissioner of the territory headed and also the High Court as the Court of Record was then known.³⁷ The High Court had full jurisdiction over Civil and Criminal and all matters of the people in the protectorate.³⁸ The enactment of ordinances as laws were then known was left within the ambit of the Commissioner and any new legislation, the commissioner had to follow the regulations of the Secretary of State for the Colonies in London.³⁹

In 1907 the Nyasaland Order-in-Council was adopted.⁴⁰ This new Constitution changed the name of the protectorate from British Central Africa to Nyasaland.⁴¹ It also extended the concept of separation of powers by creating the Legislative Council, this body had power to legislate over Nyasaland.⁴² The Governor of Nyasaland as he came to be known from 1907 had the power of veto when making and passing ordinances.⁴³ This new development had far reaching consequences

³³ Booth D et al (2006)xi

³⁴ Hara M H (2007)5

³⁵ *Id*

³⁶ *Id*

³⁷ *Id*

³⁸ *Id*

³⁹ *Id*

⁴⁰ *Ibid* 6

⁴¹ *Id*

⁴² *Id*

⁴³ *Id*

over the nation as will be seen later. Professor Kadzamira, a former Vice Chancellor of the University of Malawi has made this poignant observation:

The introduction of a legislative council did not reduce the authority of the Governor. In fact the Governor not only had the final word on all governmental matters but he also had complete control over the legislature since its members were handpicked by him. Thus the legislature was subordinate to the Governor and enacted legislation only on instructions. In theory, the legislature had power to make ordinances for the peace, order and good government for all persons in the protectorate. In practice, the main function of the Legislative Council was to consult European opinion especially from planters and traders. To get an African opinion on various matters the Governor relied officially on his administrative officers (district Commissioners) and unofficially on missionaries.⁴⁴

This new constitutional order would influence Malawi's thirty years of post colonial independence with disastrous consequences for the young nation.

The state exercised its authority and powers not on any constitutional principles that tried to limit its powers and guaranteed individual rights and liberties.⁴⁵ Naturally, in the absence of any constitutional principles, the question of constitutionalism did not feature at all in Malawi's early history.⁴⁶ The European dominant class developed social and power relations according to their interests and the standard was not the neutral constitution.⁴⁷

⁴⁴ *Id*

⁴⁵ Kanyongolo F E (1998)354; Hara M H (2007)7

⁴⁶ Kanyongolo F E (1998)354

⁴⁷ Kanyongolo F E (1998)354; Hara M H (2007)7

On the 1st of August 1953, the colonial settlers with the connivance of the British government passed the Federation (Constitution) Order-in-Council in spite of strong opposition from the African majority; ⁴⁸the authorities of the territories went on ahead anyway. Colonial administrators did not consider any form of popular involvement in the making of their new constitutional order.⁴⁹ This new Constitution had unforeseen consequences in that it galvanised the nationalist movement to seek independence. This pressure led to the Lancaster House constitutional talks which ended up granting Nyasaland responsible government.⁵⁰

2.3 *The Postcolonial Period*

Political consciousness among the native Malawians because of exposure to other countries especially South Africa led to the establishment of the first native association.⁵¹ The First World War (1914-1919) irrevocably altered the African psyche especially those who were conscripted into the British army to fight in its wars. The Second World War of 1939 to 1945 cemented this desire for self-determination for the African people. Their agitation for independence was so strong that Nyasaland became independent and adopted the name Malawi at independence in 1964.⁵²

The 1964 Malawi Constitution had a comprehensive Bill of Rights, retained the three organs of state, namely, the executive, the legislature and the judiciary and had the Queen of England as the Head of State.⁵³ The inclusion of the Bill of Rights guaranteed fundamental freedoms and human rights for all Malawians and also

⁴⁸ Hara M H (2007)7

⁴⁹ *Id*

⁵⁰ *Ibid* 8

⁵¹ Magolowondo A T (2007)13

⁵² Kanyongolo F E (2007)29

⁵³ Hara M H (2007)8

limited the executive organs' exercise of governmental authority.⁵⁴ It also guaranteed the right to form political parties and to participate freely in regular elections.⁵⁵

Most constitutions that are drafted as part of the transition process from colonial rule to independence are a result of negotiated compromises between the departing masters and the dominant nationalist party of the moment.⁵⁶ Malawi Congress party (MCP) was such a party for Malawi.⁵⁷ After winning a landslide victory in the elections of 1961, it assumed a monopoly of negotiating on behalf of the other nationalist parties at the constitutional talks.⁵⁸ This state of affairs

Militated against the inclusion of wider civil society interest groups in the talks and reduced the talks to a bargaining session between the two parties with relatively narrow vested interests. On the one hand was the departing colonial administration, whose main preoccupation was to ensure that the small settler population it was leaving behind would retain its property and be safe from possible oppression from unbridled African majority rule. On the other hand was the popular nationalist party keen to translate its almost unanimous public support into monopoly legal control of political, economic and social processes.⁵⁹

Such a constitution resulting from these compromises that had narrow vested interests from both sides cannot be said to have been based on any broad consensus on specific aspects of democratic and constitutional governance.⁶⁰ It did not include any broad public discussion in order to bring about some kind of

⁵⁴ *Ibid* 7

⁵⁵ Kanyongolo F E (2007)29

⁵⁶ Kanyongolo F E (1998) 356

⁵⁷ Hara M H(2007)8

⁵⁸ *Id*

⁵⁹ Hara M H (2007)8; Kanyongolo F E (1998)356

⁶⁰ Hara M H (2007)9

consensus on fundamental issues which could have set Malawi on sound footing from the beginning, and the constitutional issues of the nature and the limits of the power of the state over its citizens, the nature of the relationship between the various constitutive parts of the government and the nature of its international relationships would have helped Malawi avoid her tragic constitutional history.⁶¹ The leadership of the MCP, it would appear did not believe in the 1964 constitution but it suited them then to make the necessary compromises in order to achieve their goal of an independent Malawi.⁶² Just three months after independence, some cabinet ministers challenged DR. Kamuzu Banda's (the Prime Minister) autocratic leadership style and his stance on Communist China.⁶³

The sheer size of the MCP majority in parliament meant that any concessions it made during the constitutional talks would be reversed after the handover of power because these reversals would not arouse any opposition in parliament.⁶⁴ They would easily rationalise with some justification that the concessions had been made to an unpopular regime which had only sought to perpetuate European domination on the majority African People.⁶⁵

The Lancaster House Constitution was just a compromise document that reflected political realism between the two parties at the talks and therefore did not fully seek whole heartedly to enact neutral constitutional principles of governance that could have involved the populace in their deliberations.⁶⁶ In the end such important discussions about the fate of the nation were left to small delegations representing

⁶¹ *Id*

⁶² *Id*

⁶³ *Id*

⁶⁴ Kanyongolo F E (1998)357

⁶⁵ *Id*

⁶⁶ *Id*

narrow vested interests and after their compromises offered the Malawian people a *fait accompli* in the form of the 1964 Constitution.⁶⁷

There was no consensus on the fundamentals of the constitution, naturally the constitution lacked authority for want of popular legitimacy.⁶⁸ The men and women in authority did not feel bound to exercise the authority of the constitutional principles and the population did not care either way when there were constitutional violations by the holders of power. The leadership validated their exercise of power through some other criteria other than constitutionalism.⁶⁹ The Constitution was reduced to a mere symbol of independence like the national anthem and the national flag.⁷⁰

Malawi is still one of the poorest nations in the world. At independence, the assumption was that it was dreadfully poor; therefore the one objective with which the new rulers could justify their use of state power without adhering to the tenets of constitutionalism was the pursuit of economic development.⁷¹ In a nation where the majority of the people were dreadfully poor this approach to governance struck a chord with most Malawians because this was a problem that was immediately recognisable unlike trying to insist on upholding constitutional principles which they had no part in developing.⁷² The state's emphasis on economic development was such that it did not matter if the use of state power led to the disempowerment of the civil society and the complete domination of the state on its people as long as its economic goals were reached even if it meant a complete departure from the tenets of the constitution.⁷³ The preservation of national security at any cost even if it meant

⁶⁷ *Id*

⁶⁸ *Id*

⁶⁹ *Id*

⁷⁰ *Id*

⁷¹ *Id*

⁷² *Ibid* 358

⁷³ *Id*

trampling on the bedrock of constitutionalism was another piece of the jigsaw puzzle of justification.⁷⁴The MCP used their numerical dominance of the legislature to define the meanings of economic development and national security on its own terms.⁷⁵ The Constitution was excluded from defining the parameters within which the state could exercise its powers.⁷⁶There were no other principles to temper state power and the MCP leadership used the Constitution to justify and legitimize the expansion of its powers even though its exercise of these powers did not agree with the Constitution.⁷⁷

In July 1965, the Prime Minister, Dr.H.K. Banda announced that the new nation would become a Republic in 1966.⁷⁸The Prime Minister then appointed a Constitutional Committee composed of the party's leadership to consult the nation and do some research on the type of constitutional form that would be most appropriate for Malawi's social and economic realities.⁷⁹ The process of consultation was flawed from the start because the Prime Minister appointed the Constitutional Committee and this committee would do his bidding. Secondly, the committee took only two months to perform this mammoth task and to formulate the proposals for the principles of the new Constitution.⁸⁰Finally this process was neither inclusive nor comprehensive,⁸¹ there was no consensus from the populace on the form and content of the new constitution. Using their huge majority in the National Assembly, their proposals were unanimously adopted by the partisan MCP dominated

⁷⁴ *Id*

⁷⁵ *Id*

⁷⁶ *Id*

⁷⁷ *Id*

⁷⁸ Hara M H (2007)9

⁷⁹ Hara M H (2007)9; Kanyongolo F E (1998)359

⁸⁰ Kanyongolo F E (1998)359

⁸¹ *Id*

parliament and Malawi became a Republic on the 6th of July, 1966 under a new constitution, that was to guide Malawi for the next thirty years.⁸²

The new constitution did not pretend to contain the principles of limited or accountable government.⁸³ Liberal democracy was excluded. There was no Bill of Rights⁸⁴. The three organs of state were retained by the Constitution which are the executive, the legislature and the judiciary.⁸⁵

The Power of the President and the MCP was consolidated by several amendments to the constitution made subsequent to the coming into force of the constitution. The MCP was to be the only legally recognised party in the country. Dr. Banda was to be Head of State and Government for life. Subsequent presidents would only be elected from nominees of the MCP hierarchy. The President could nominate any number of members of parliament and had power to appoint the speaker of parliament as well. The government and the nation was to operate on unity, loyalty, obedience and discipline. It is important to note that these cornerstones were transplanted from the constitution of the Malawi Congress Party...the constitution could be amended by parliament without any popular involvement as the one Party Parliament was effectively a rubberstamp for president Banda's and the party's wishes...⁸⁶

I have tried to thrash out Malawi's history of constitutionalism in more detail because its conceptual problem of constitutionalism at present is like experiencing its

⁸² *Id*

⁸³ *Id*

⁸⁴ Hara M H (2007)10

⁸⁵ *Id*

⁸⁶ *Ibid* 10-11

reconstructed past which was supposed to create a future that was better than its past. Central in my analysis of the theory and practice of constitutionalism is our own postcolonial present from 1994-2010, our present after the collapse of the social and political hopes that went into the anti colonial imagining and postcolonial making of the new Malawi.⁸⁷

For 30 years, from 1964-1994, Malawi was under a centralised, one party and one man dictatorship. The national referendum of 1993 brought to an end this era of one party rule and ushered in multiparty democracy through the formation of new political parties. Malawians greeted referendum results and the subsequent general elections with optimism and hope for a better Malawi. Political commentators claimed that the voters' decision to change the system of government in the 1993 referendum was strong evidence that the one party system of government had failed to meet the expectations of the majority of the people...⁸⁸

There is general disillusionment with the present which in the words of David Scott is a dead-end present and the old utopian futures which are our present, which for a long time were the inspirations and sustainers of a change for the better for the Malawian people, a hope that many hoped against hope would come to fruition through the promises of the new constitutional order.⁸⁹ The situation of Malawi is in many ways tragic.⁹⁰ However as I think through this post colonial present (1994-

⁸⁷ Scott D (2005)2

⁸⁸ Chibwana C and Khaila S (2005)1

⁸⁹ Scott D (2005)1

⁹⁰ *Id*

2010), I must not accept the present conditions as normal because of the failures of the past attempts at constitutionalism theory and practice.⁹¹

Throughout Malawi's constitutional history, the thread of executive dominance on its political and social landscape runs from colonial times to the present. David Scott claims that we are all historians of the present, and he says that very little systematic consideration was given to what present it is that the past was being reimagined for.⁹² For Malawi's constitutional principles, the past has been repeated with such regularity that it is always the present. It must be stated at the outset that this research project is not an attempt to criticise postcolonial answers and postcolonial questions that the framers and actors in the constitutional history of Malawi were trying to use in order to make sense of the prevailing political conditions of their time.⁹³ My goal after critiquing the theory and practice of constitutionalism in Malawi is to demonstrate that the judiciary with a transformative mind can make its realisation (constitutionalism) possible and easier.

⁹¹ *Id* 2

⁹² *Id*

⁹³ Scott D (2005)3

3. General concepts of constitutionalism in relation to Malawi

Constitutionalism as a concept has progressively added new elements to constrain governments from hurting their own people. The following two main ideas dominate its definition: the limitation of State power against society in the form of respect for human rights, political as well as economic rights and the implementation of the separation of powers within the state.⁹⁴ Lane claims that the combination of these two ideas forms the core of constitutionalism.⁹⁵ Dante Gatmaytan's list of core elements of constitutionalism has five:

1. The recognition and protection of fundamental rights and freedoms
2. The separation of powers
3. An independent judiciary
4. The review of the constitutionality of law
5. The control of the amendment of the constitution⁹⁶

David Butleritchie refers to these concepts as the cornerstones of liberal political and the legal theory.⁹⁷ They are as follows: division and limitation of governmental powers, the recognition and the protection of certain individual rights, the protection of private property and the notion of representative government or democracy.⁹⁸ These writers are unanimous that the government is a potential monster that must not at any price be let loose without fetters, otherwise it will hurt the very people it is meant to serve and protect.

⁹⁴ Lane J (1996)25

⁹⁵ *Id*

⁹⁶ Gatmaytan D (2010)30

⁹⁷ Butleritchie D (2004-2005)6

⁹⁸ *Id*

I will not attempt to write a comprehensive history of the development of the concepts of constitutionalism because it is not the focus of this research paper. What I will do, however, is discuss briefly each concept because they are mentioned in the literature of Malawi Constitutional thought. They have tremendous influence on its theory of constitutionalism.

Constitutionalism is a concept whose main goals are to bring the government under control to limit its exercise of power.⁹⁹ This concept is anchored on the existence of certain limitations which are imposed on the state on how it should treat its citizens according to clearly defined values.¹⁰⁰ Another important fixture is the clearly defined mechanism to ensure that the limitation placed on the government can be legally enforced.¹⁰¹ Constitutionalists on the whole, are more pessimistic about the intentions of human beings who even though might mean well can act selfishly and abuse power.¹⁰² They are more comfortable when institutional restraints on substantive matters¹⁰³ are placed on governments to prevent lapses into an authoritarian or even a totalitarian system which is cloaked in the trappings of populism.¹⁰⁴ In situations where the government exceeds its limitations, it can be held into account using constitutionalism as a benchmark.¹⁰⁵ This concept allows political participation for the citizens of that government and that government must be controlled by substantive limits on what it can do.¹⁰⁶

Vicki Jackson has included other tenets on her definition of constitutionalism to include:

⁹⁹ Gatmaytan D (2010)30

¹⁰⁰ *Id*

¹⁰¹ *Id*

¹⁰² Murphy WF (1993)5-6

¹⁰³ *Ibid* 6

¹⁰⁴ *Id*

¹⁰⁵ Gatmaytan D (2010)31

¹⁰⁶ *Id*

Sufficiently shared willingness to use law rather than force to resolve disagreements; to limit government power and to protect human rights through law and defined processes; to provide a reasonable degree of predictability and stability of law that people may rely on as they structure their lives; and to maintain a government that is legitimate and effective enough to maintain order, promote the public good and control private violence and exploitation.¹⁰⁷

Man without clearly defined rules and parameters cannot manage his affairs harmoniously. Some go as far as establishing political institutions to take advantage of other people.¹⁰⁸ But a political institution that is properly arranged with all the safeguards in place can nip such attempts in the bud before arbitrariness and domination set in.¹⁰⁹ The goal is to maximise the protection of the citizens from one another and to minimise the opportunities for government to harm its own citizens.¹¹⁰

Scholars continue to examine this concept from different perspectives and refer to its tenets under various names like features, components, core elements, and postulates of constitutionalism and these concepts occasionally overlap with each other.¹¹¹ The features of constitutionalism that scholars have identified are as follows: the supremacy principle- that the government itself is not above the law; the limited government principle- that requires putting institutional limits on government to stop it from acting arbitrarily in its exercise of state power and to recognise and protect individual rights and freedoms and finally the entrenchment principle – meaning making it very difficult to change constitutional limitations on state power

¹⁰⁷ *Id*

¹⁰⁸ Elkin S L (1993)21

¹⁰⁹ *Id*

¹¹⁰ *Id*

¹¹¹ Gatmaytan (2010)31

by simple and routine political processes.¹¹² Mark Tushnet has identified three components of the concepts of constitutionalism and these are commitment to the rule of law and in this situation it means public power must be exercised according to the publicly known rules to engender certainty, a reasonably independent judiciary-one that is not under the thumb of the executive and finally holding reasonably free, regular and open elections with a universal franchise of the population.¹¹³

According to Fombad, the idea behind constitutionalism is to design constitutions that should be capable of promoting respect for the rule of law and democracy not just documents that are to be used by politicians to manipulate the people.¹¹⁴

Jackson adds that the goal is not just to produce a written constitution but to promote constitutionalism.¹¹⁵ Constitutionalism according to Gatmaytan cannot therefore allow a Constitution to be treated lightly through suspension, circumvention, or simply through being ignored by the political organs.¹¹⁶ He adds that it can only be amended by following proper procedures which are themselves constitutional.¹¹⁷

For purposes of this researcher project, I will only focus on the four concepts as outlined by David Butleritchie. Modern nations are said to be constitutional or not by using the four concepts as benchmarks he has outlined.¹¹⁸

3.1 *Divided and limited government*

This concept became prominent in the middle ages when it conceptualised an individual against the state in an antagonistic way.¹¹⁹

¹¹² *Id*

¹¹³ *Ibid* 31-32

¹¹⁴ *Ibid* 32

¹¹⁵ *Id*

¹¹⁶ *Id*

¹¹⁷ *Id*

¹¹⁸ Butleritchie D (2004-2005)6

R.W. Southern says:

The hatred of that which was governed, not by the rule but by will went very deep in the Middle Ages, and at no time was this hatred as powerful and practical a force as in the latter half of period...

Law was not the enemy of freedom: on the contrary, the outline of liberty was traced by the bewildering variety of law which was evolved during the period...

High and low alike sought liberty by insisting on enlarging the number of rules under which they lived.¹²⁰

Mainland Europe and England strongly supported this conception of law because it was separate from and was above the government.¹²¹

Constitutionalism in almost all of its formulations has two levels, legal and political.¹²²

The Constitution is the fundamental law and is on a higher plane than the political entity.¹²³ Under the fundamental law, are subordinate laws whose origin is the Constitution.¹²⁴ This is the hierarchy that gives modern constitutionalism its basic structure.¹²⁵ A government that does not have this structure does not have recognition from others states as legitimate and cannot base its governance on the rule of law.¹²⁶ This institutional arrangement depends on the understanding that a government should be limited by structural constraints which are contained in the

¹¹⁹ *Ibid* 7

¹²⁰ Hayek F A (1978)123

¹²¹ *Id*

¹²² Butleritchie D(2004-2005)8

¹²³ *Id*

¹²⁴ *Ibid* 9

¹²⁵ *Id*

¹²⁶ *Id*

Constitution.¹²⁷ These limitations are placed on the government machinery to protect individuals from the state.¹²⁸

Some constraints must be exerted on political power to have a typically constitutionalist notion.¹²⁹ For Locke, the political contract is the foundation of the state and the power of government.¹³⁰ He adds that since certain liberties come from law which is valid even before the constituting of the government, anyone can claim them.¹³¹ The following is the core of Locke's constitutionalism that since the rule of the law applies to the state of nature it will apply in every day life as well because the covenant confirms the liberties that are inherent in natural law.¹³² The covenant is a trust which means that its validity is dependent upon it being kept by the rulers, its violation will render it invalid.¹³³ Locke writes:

The liberty of man in society is to be under no legislative power but that established by consent in the commonwealth, not under the domination of any will, or restraining of any law, but what that legislation shall enact according to the trust put in it.¹³⁴

The person with authority to govern others is the agent and the populace is the principal and should the agent deviate from the agreement, the principal (populace) will lose trust in him and may choose to remove him from power.¹³⁵ This constitutionalistic concept is a notion of reciprocity between the agent and the

¹²⁷ *Id*

¹²⁸ *Ibid*1

¹²⁹ Lane J (1996)51

¹³⁰ *Ibid* 52

¹³¹ *Id*

¹³² *Id*

¹³³ *Id*

¹³⁴ *Id*

¹³⁵ *Ibid* 53

principal.¹³⁶ Locke has identified four constraints that restrain the exercise of state power:

1. Impartiality: they (governments) are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor.
2. The public interest: these laws also ought to be designed for no other end ultimately but the good of the people.
3. Representation: they must not raise taxes on the property of the people without the consent of the people themselves or their deputies.
4. Accountability: legislature neither must nor can transfer the power of making law to anybody else or place it anywhere but where the people have placed it.¹³⁷

The notion that government is a trust for the governed is part of a body of ideas that originated in England.¹³⁸ The origin of this notion is of particular interest to me because Malawi was at one time a protectorate of the United Kingdom. English law is part of received law in Malawi. This body of ideas emphasises that a government is a trust for the governed and the officers both elected and unelected are trustees for the citizens and therefore accountable to the people because they hold public offices and exercise public power.¹³⁹

Historically popular trusteeship included the assertion of popular sovereignty most likely as a reaction against the concentration of public power in the kings and queens

¹³⁶ *Id*

¹³⁷ *Id*

¹³⁸ Salevao I(2003)3

¹³⁹ *Id*

and the resulting alienation of the common people from the source of political power.¹⁴⁰ “Trust” for the purposes of this paper is synonymous with “fiduciary” and “government powers are fiduciary powers which must be exercised within the framework and constraints of a fiduciary relationship that not only confers rights but defines corresponding duties as well”.¹⁴¹ The fiduciary is the person who has been entrusted with an obligation to do a duty faithfully and responsibly toward another.¹⁴² This concept originated from the Courts of Equity to prevent people in authority from abusing their authority.¹⁴³ Should government use its powers improperly or arbitrarily, it will forfeit its authority.¹⁴⁴ This limitation on the exercise of its powers leads us to the core of trusteeship which is that the sole purpose of the existence of the government is to serve the interest of its citizens and this has a powerful limiting effect on what is allowed by law for the government to do.¹⁴⁵ In this case the government cannot arbitrarily curtail its citizen’s rights, seize their property, raise or imposes taxes without an act of parliament, deprive the judiciary of its inherent jurisdiction, give itself power not expressly given to it by the Constitution among other violations.¹⁴⁶ When the government does any or all of the above violations, it violates the terms of its existence and duties.¹⁴⁷

The American Declaration of independence document firmly puts the government in its place when it says:

¹⁴⁰ *Id*

¹⁴¹ *Ibid* 5

¹⁴² *Id*

¹⁴³ *Id*

¹⁴⁴ *Ibid* 7

¹⁴⁵ *Id*

¹⁴⁶ *Id*

¹⁴⁷ *Ibid* 8

We hold these truths to be self-evident: that all men are created equal; that they are endowed by their creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness. That, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; and that, whenever any form of government; becomes destructive of these ends, it is the right of the people to alter or abolish it, and to institute new government, laying its foundations on such principles, and organising its powers in such form, as to them shall seem most likely to effect their safety and happiness.¹⁴⁸

The rule of law binds both the governors and the governed because nobody is above the law.¹⁴⁹ The rule of law reinforces the idea that limited power is better than absolute power, and that should the government use coercive powers, it should publicly explain, justify, allow debates about the use of such powers, should defend its actions both on moral and legal grounds.¹⁵⁰

Montesquieu brings another concept that dilutes even further the notion of sovereignty by separating powers of government into different departments.¹⁵¹ His basic idea is that the state power should be held by different organs or persons is one of the most influential in constitutionalism.¹⁵²

The notion of limited and divided government to take hold on the political thinkers who have influenced our thinking went through the following phases:

1. Firstly a clear division between the state and the subject had to take place

¹⁴⁸ Lane J(1996)53

¹⁴⁹ Salevao I (2003)9

¹⁵⁰ *Id*

¹⁵¹ Butleritchie D(2004-2005)14

¹⁵² Lane J (1996)54

2. Sovereignty had to be separated from the powerful monarchs
3. This divested power from the monarchs had to be deposited in the people and to make sure that this power remained with the people, the mechanisms of divided government with the accompanying checks and balances had to be put in place.
4. Finally, the proper relationship between the subject and the weakened sovereigns came to be one of agency in which the goal of the nation state is to serve the needs of the individuals to attain private interest.¹⁵³

These structural constraints through the divided and limited government concept cannot provide all the protection people need from the state. Although, the government machinery has been weakened through dispersion of its functions, there is still some room through which government can take away man's liberty.¹⁵⁴ In the words of John Selden, "this little gap of man's liberty may in time go out".¹⁵⁵ To confine the government even further, the concept of individual rights and liberties provides an additional structure.¹⁵⁶

3.2 *Individual rights and liberties*

The first chief task of the Constitution is to state the separation of powers between state organs and public officers, the second equally important task of the same Constitution is to place limits on the overall state powers in relation to its individual citizens.¹⁵⁷ Its focus is with its external relationships especially with regard to the individual rights and duties.¹⁵⁸ This is the concept of modern constitutionalism's

¹⁵³ Butleritchie D (2004-2005)15

¹⁵⁴ *Ibid*16

¹⁵⁵ *Id*

¹⁵⁶ *Ibid*17

¹⁵⁷ Lane J (2004-2005)125

¹⁵⁸ *Id*

standard of fundamental human rights.¹⁵⁹ Due process rights is a proper place to start when talking about human rights, the kind of individual rights that originated in the English Habeas Corpus Act of 1679 which includes institutions that protect individuals against arbitrary arrest, detention and prosecution.¹⁶⁰

A constitutional government's primary reason of existence is to safeguard individual rights and its constitutionalism is crafted in such a way as to assure its citizens that their government is committed to respect those rights and any government illegitimate encroachment on individual rights can be resisted through the Constitution.¹⁶¹ So entrenched this idea of rights has become that rights talk has become synonymous with the modern conception of constitutionalism.¹⁶² According to John Locke, a civil society could not exist if the rights of life, liberty and property were not safeguarded and this came from his understanding of social contract between the sovereign and his subjects and the duration of this contract was dependent upon the sovereign keeping his side of the bargain.¹⁶³

These rights which should be known as constitutional rights are there to give room to individuals to pursue their own agendas of the good and to make sure that the state honours its commitment not to encroach on this space, it is important for the Constitution to explicitly define and acknowledge the basic rights of its people.¹⁶⁴

Robert Unger says:

This cluster of entitlements create an island of security against the predatory or reformist actions of the state, a haven in which some material or ideal

¹⁵⁹ *Id*

¹⁶⁰ *Id*

¹⁶¹ Butleritchie D (2004-2005)17

¹⁶² *Id*

¹⁶³ *Id*

¹⁶⁴ *Ibid*18

interest and the actual person who is its bearer can hide. So long as it remains within the protected zone, the interest cannot be struck dead. Conversely, this operation immobilises a parcel of the state's capacity to move and shake the social world.¹⁶⁵

A right is a powerful resource to use against any devices the government might use to disturb this vision of the good.¹⁶⁶

Nation states have become adept at including an enumerated list of certain rights in order to be accepted as legitimate by their peers on the international stage.¹⁶⁷ They know that if their document contains those rights their state is accepted as having made a legitimate attempt to incorporate the liberal notion of liberties regardless of whether in practice they adhere to their commitments or not.¹⁶⁸ The erroneous assumption is that liberty will flow as a natural and invariable consequence.¹⁶⁹

I now turn to the discussion of property rights which is closely related to human rights.

3.3 *Property Rights*

The western world values private property ownership to the point of linking it to freedom.¹⁷⁰ Thomas Jefferson insisted that freedom was inseparable from property.¹⁷¹ When he thought that private property rights were being whittled down, he argued that the framers of the American Constitution originally intended to protect private property and private property was conducive to progress, order and

¹⁶⁵ *Id*

¹⁶⁶ *Id*

¹⁶⁷ *Ibid*19

¹⁶⁸ *Id*

¹⁶⁹ *Id*

¹⁷⁰ Friedrich C J (1968)259

¹⁷¹ *Id*

justice.¹⁷² Even for John Locke, the right to own property was central to his notion of a liberal society.¹⁷³

The *French Declaration of the Rights Man and Citizen* in 1789 said the following on property rights:

- The aim of every political association is the preservation of the natural and inalienable rights of man; these are liberty, property, security, and resistance to oppression
- Every society in which the guarantee of rights is not assured or the separation of power not determined has no constitution at all
- Since property is a sacred and inviolable right, no one may be deprived thereof unless a legally established public necessity obviously requires it, and upon conditions of a just and previous indemnity.¹⁷⁴

There is deep distrust of the state in the west that their writers and thinkers argue that state constitutions must guarantee this right. A society cannot be called liberal if it does not recognise and protect private property to the point of protecting the individual from the state.¹⁷⁵ It is argued that the state's primary role is to ensure that individuals enjoy the use of their property without interference from others.¹⁷⁶ It is seen as the foundation of economic growth because people would be assured to enjoy the fruits of their labour on their property they knew no one would

¹⁷² *Id*

¹⁷³ Butleritchie (2004-2005)20

¹⁷⁴ Lane J (1996)60

¹⁷⁵ Butleritcherie D (2004-2005)21

¹⁷⁶ *Id*

confiscate.¹⁷⁷ The sovereign is seen as the protector of this right between the state and the individual.¹⁷⁸

Owning private property has a number of implications. Firstly, it protects the property owner from coercion and arbitrary political power from the public officials and it enlarges the space through which he can pursue his own economic or business interests without interference.¹⁷⁹

I will then discuss the final cog of the concept of Constitutionalism which for many people is contradictory to constitutionalism. It is democracy.¹⁸⁰

3.4 Democracy

Robert Dahl argues that democracy and constitutionalism are contradictory concepts.¹⁸¹ Democracy is a concept that follows a simple majority rule on the basis of the one man one vote principle and the outcome may collide with a number of constitutionalist ideas like separation of powers or minority rights.¹⁸² In case of problems, the solution is provided by judges through judicial reviews and these judges are not accountable to the electorate. Constitutionalism and democracy are in tension with each other.¹⁸³ Joel Colon-Rios, to illustrate the problem has given examples of two cases that had to go for a judicial review. In the *Reference re Secession of Quebec*, the Supreme Court of Canada considered the question of unilateral secession of Quebec. The Court, in an attempt to balance these two seemingly tenuous principles, held that the Canadian Constitution even with the

¹⁷⁷ *Id*

¹⁷⁸ *Id*

¹⁷⁹ *Ibid*22

¹⁸⁰ Butleritche D (2004-2005)28

¹⁸¹ *Id*; Lane J (1996)243

¹⁸² Lane J (1996)244

¹⁸³ Butleritche D (2004-2005)28; Colon- Rios J(2010)28

majority of the residents of Quebec wanting secession could not allow the province to secede. The court further said that the Canadian conception of democracy was not a mere system of majority rule but was always taken in conjunction with other constitutional principles.¹⁸⁴ Colon-Rios argues that the court's decision did not negate democracy but included constitutionalism to create an orderly framework that allowed the citizens to make political decisions: "Viewed correctly, constitutionalism and the rule of law are not in conflict with democracy; rather, they are essential to it."¹⁸⁵ The Venezuelan Court had to deal with the creation of a new constitutional regime through a procedure that had not been contemplated by the Constitution's amendment rule. Their decision accepted the existence of a tension between constitutionalism and democracy when they held that the limits established in their Constitution which concerned the congressional power of amendment were applicable only to that body and not to the people in exercise of their constituent power.¹⁸⁶ These two decisions reveal one problem: "Democrats find constitutions a nuisance and constitutionalists perceive democracy as a threat".¹⁸⁷ Democracy is about self government where citizens decide what laws govern their lives and regulate their conduct, implying that there can be no fixed law which is not subject to revision without a simple majority.¹⁸⁸ In a democracy, even fundamental laws can easily be changed.¹⁸⁹ This is in conflict with constitutionalism which limits the kinds of laws that can be created by legislative majorities and this limit is usually institutionalised through the inclusion of the judicial review of legislation.¹⁹⁰ Also,

¹⁸⁴ Colon-Rios J (2010)28

¹⁸⁵ *Ibid* 29

¹⁸⁶ *Id*

¹⁸⁷ *Id*

¹⁸⁸ *Id*

¹⁸⁹ *Id*

¹⁹⁰ *Ibid* 30

since constitutionalism is concerned with stability and supremacy of fundamental laws, it places limits and difficult conditions to change fundamental laws.

I am attempting to show a type of relationship between democracy and constitutionalism whose principles are not too far removed from Malawi's situation.

Constitutionalism has pre-existing restraints on the type of choices available to the governing authorities and this is the reason many people say it is in tension with democracy.¹⁹¹ It is argued that the Constitution can be written in ways that promote both concepts to work harmoniously with each other.¹⁹² Albert explains it well:

Where constitutional provisions balance the distribution of political power....where they provide self-interest reasons to co-operate even in the midst of political rivalry ...and where the democratic systems do a better job protecting rights and governing well, there is a greater likelihood that political actors will comply with democratic rules.

...compliance with the rules is a first step towards institutionalising democratic norms and practices. Democratic practices, in turn, represent institutionalised protections of citizen's rights and limits on government power.

...where democratic rules are widely respected, a democratic system is more likely to be characterised by greater freedom, more responsive government, predictable behaviour, and peaceful conflict resolution.

¹⁹¹ Gatmaytan D (2010)33

¹⁹² *Id*

The establishment of constitutionalism and democracy institutionalisation go hand in hand, and constitutions play a key role in either helping or hindering these processes.¹⁹³

Gatmaytan argues that constitutionalism and constitutions are inextricably linked and any amendments that undermine constitutionalism will not be automatically binding on the society.¹⁹⁴

The Strain between the two concepts is there but it should be noted that both of them accept the centrality of human dignity, their difference is on how best to protect that value.¹⁹⁵ Constitutionalism limits legitimate government action to minimise the risks to liberty and dignity to members of the polity while democracy tries to limit these risks by protecting the right to participate in the government process.¹⁹⁶ This shows that these two concepts need each other.¹⁹⁷ For example, the majority of the people in the country may try to limit the substantive and the social rights of a minority group within its community, the principles of constitutionalism would not allow this from taking place.¹⁹⁸

¹⁹³ *Id*

¹⁹⁴ *Id*

¹⁹⁵ Murphy W F (1993)6

¹⁹⁶ *Id*

¹⁹⁷ *Id*

¹⁹⁸ *Id*

4. Theoretical framework of Malawi constitutionalism

Constitutionalism is defined as the exercise of power within the parameters that are set by the Constitution.¹⁹⁹ The actual behaviour of political actors and the other public officials must correspond to the spirit and tenets of the unwritten or written Constitution.²⁰⁰ All public officials whether elected or unelected must promote and uphold the general principles in it.²⁰¹ There is no constitutionalism if the rules of the nation's formal Constitution are easily amended by public officials whenever they view them as obstacles to their agenda.²⁰²

Malawi adopted its current Constitution in 1994 and since then, constitutionalism has been undermined.²⁰³ The state officials have acted inconsistently with it through the violation of human rights, arbitrary abolition of offices set by the constitution, not following constitutional requirements procedurally in appointing people to public offices and their unprincipled amendments of constitutional provisions.²⁰⁴

The 1994 Constitution embodies a number of fundamental values which include the supremacy of the Constitution, the rule of law, respect for human rights and fundamental freedoms, transparency and accountability by public officials and the holding of periodic and regular elections.²⁰⁵ Section 12 of the Constitution summarizes them as follows:

Section 12 says this Constitution is founded upon the following underlying principles;

¹⁹⁹ Kanyongolo F E (2007)25

²⁰⁰ *Id*

²⁰¹ *Ibid* 26

²⁰² *Id*

²⁰³ *Id*

²⁰⁴ *Id*

²⁰⁵ Chigawa M (2006)11

- (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 the power of the state do so on trust and shall only exercise such power to the extent of their lawful authority and in accordance with their responsibilities to the people of Malawi;
- (iii) The authority to exercise power of state is conditional upon the sustained trust of the people of Malawi and trust can only be maintained through open, accountable and transparent government and informed democratic choice;
- (iv) The inherent dignity and worth of each human being require that the state and all the persons shall recognise and protect fundamental human rights and afford the fullest protection to the rights and views of all individuals, groups and minorities, whether or not they are entitled to vote;
- (v) As all persons have equal status before the law, the only justifiable limitation to lawful rights are those necessary to ensure peaceful human interaction in an open and democratic society; and
- (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.²⁰⁶

The logical step is to give brief analyses of the essence and scope of these constitutional values.

²⁰⁶ *Ibid* 11-12

4.1 *Supremacy of the Constitution*

The Constitution states this value as follows:

- 4. This Constitution shall bind the executive, legislature and judicial organs of the state at all levels of government and all the people of Malawi are entitled to the equal protection of this Constitution and the laws made under it.
- 5. Any act of government or any law that is inconsistent with the provisions of this Constitution shall, to the extent of such inconsistency be invalid.²⁰⁷

Chigawa claims that this is the most important fundamental value of the 1994 Constitution.²⁰⁸ This value has been endorsed by the courts of Malawi that all executive decisions and actions must not be contrary to the stipulations of the Constitution and voids all legislative procedures and enactments that are contrary to it.²⁰⁹

4.2 *Limited government or the rule of law*

This places the exercise of executive power subject to judicial review to constrain the executive discretion not to go beyond the clear constitutional provisions.²¹⁰

4.3 *Separation of powers*

The Constitution provides for the separation of power of the three branches of the government and delimits the powers of each organ.²¹¹ Section 7 gives power to the executive branch of government to initiate policies and legislation and to implement

²⁰⁷ *Ibid* 13

²⁰⁸ *Id*

²⁰⁹ *Id*

²¹⁰ *Id*

²¹¹ Msosa A S A “The use and abuse of the Constitution” in Immink B *et al* (eds) (2003) *From freedom to empowerment: ten years of democratisation in Malawi*165

laws.²¹² In section 8, the legislature is given the power to enact laws which reflect the spirit and tenets of the Constitution.²¹³ Section 9 provides that the judiciary is responsible to interpret, protect and enforce the Constitution and all laws of Malawi in an independent and impartial matter focusing only on the relevant legal and pertinent facts.²¹⁴ Justice Msosa has given the following meaning of the doctrine and is broken into three parts:

- a. That the same person should not form part of more than one of the three organs of government.
- b. That one organ of government should not control or interfere with the exercise of its functions by another organ, e.g. that the judiciary should be independent of the executive.
- c. That one organ of government should not exercise the functions of another, e.g. the executive should not have legislative powers.²¹⁵

Msosa argues that the doctrine prevents the executive and the legislature from discharging the same functions like interpreting laws that the same organ made because this would turn that organ into both the court and the legislature.²¹⁶ She adds that this doctrine prevents interference by one organ into another's functions because each one has functions that are constitutionally assigned to it.²¹⁷ Justice and fairness cannot be exercised if one organ does both functions.²¹⁸

It must be understood that the executive and the legislature have influence over each other but the doctrine does not allow either of them to exercise the whole

²¹² *Id*

²¹³ *Id*

²¹⁴ *Id*

²¹⁵ *Ibid* 166

²¹⁶ *Id*

²¹⁷ *Id*

²¹⁸ *Id*

power of another.²¹⁹ The organs can work together but none should discharge the functions of another. The law allows the executive to make subsidiary legislation, and the checks and balances on state organs are crucially important in such instances.²²⁰

4.4 *Democracy*

This right provides for all individuals to take part in the political running of their country, in our case, Malawi.²²¹ This can be done either directly by the individuals concerned or through their representatives.²²² One's age, sanity, citizenship, residency or insolvency can affect an individual's participation in this right.²²³ Any individual who does not have capacity to take part in the decision making process such as a child or a lunatic cannot make informed decisions.²²⁴ Non-citizens whose interests and sympathies may not be in line with the local populace cannot legitimately take part.²²⁵ Courts of law will uphold these limitations if they are not applied arbitrarily or in a discriminatory manner.²²⁶

The Malawi Constitution recognises and entrenches the concepts of democratic governance.²²⁷ All elected public officials in the executive and the legislature have fixed terms to allow for regular and periodic elections.²²⁸

²¹⁹ *Id*

²²⁰ *Id*

²²¹ Chigawa M (2006)34

²²² *Id*

²²³ *Id*

²²⁴ *Id*

²²⁵ *Id*

²²⁶ *Id*

²²⁷ *Ibid* 37

²²⁸ *Id*

4.5 Human Rights

The Malawi Constitution in chapter IV provides a framework of rules for the protection and enforcement of human rights.²²⁹ Every human being by virtue of being human has these rights that is why they are defined as entitlements.²³⁰ This guarantee of human rights in the Constitution has its basis in the philosophy of liberal individualism, which holds that people being autonomous individuals are free to behave as they wish as long as their actions are not harmful to other people.²³¹

Section 12 (v) says that “the only justifiable limitation to lawful rights are those necessary to ensure peaceful human interaction in an open and democratic society.”²³² Negative rights protect individuals from interference by the state or from other individuals.²³³ Positive rights entitle all individuals if they choose to proactively participate in various social, economic and political processes.²³⁴

Human Rights often have three classifications: civil and political rights, economic, social and cultural rights and solidarity rights.²³⁵ Civil and political rights are rights that consist of entitlements that define relationships between individuals and to the political processes.²³⁶ These include right to life, equality, freedom of expression, freedom of association, and freedom of conscience.²³⁷

²²⁹ Kanyongolo F E (2007)39

²³⁰ *Id*

²³¹ *Ibid* 40

²³² *Id*

²³³ *Id*

²³⁴ *Id*

²³⁵ *Id*

²³⁶ *Id*

²³⁷ *Id*

Secondly, economic, social and cultural rights are rights that relate to the survival and livelihoods of the citizens and they include rights to economic activity, education, health, and food.²³⁸

Finally, solidarity rights also known as group rights are rights that the community as a whole is entitled for their benefit.²³⁹ These include the rights to self determination, the right to development and the right to clean and sustainable environment.²⁴⁰

Not all rights guaranteed in chapter IV of the Constitution are absolute. Others are absolute because the Constitution provides that their enjoyment cannot be suspended or limited under any circumstance.²⁴¹ Such rights are also said to be “non-derogable” because they cannot be limited under any circumstances.²⁴² These include the right to life except those who have been sentenced to death by a court of law or are enemies of war; the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment or subjected to genocides; the right not to experience slavery and related practices; the right not to be imprisoned for merely failing to fulfil a contract; the right not to be punished for something that was not a crime at time it was done; the right to equality and recognition before the law; the right to freedom of conscience, belief, thought and religion.²⁴³ The rights in chapter IV that are not absolute, meaning they can be suspended during states of emergency are provided for in section 45 of the Constitution.²⁴⁴ The president can declare a state of emergency only in times of war or threats of war, civil war or in

²³⁸ *Id*

²³⁹ *Id*

²⁴⁰ *Id*

²⁴¹ *Ibid* 44

²⁴² *Id*

²⁴³ *Id*

²⁴⁴ *Id*

cases where the country is experiencing widespread natural disasters.²⁴⁵ His declaration of the state of emergency is subject to the approval of the Defence and Security Committee of the National Assembly and must in no way violate the nation's international law obligations.²⁴⁶

Any person whose rights are suspended in times of emergencies is entitled constitutionally to challenge its legality in the High Court.²⁴⁷ The rights which may be suspended in times of emergencies include: the right to freedom of expression, the right to freedom of information, the right to freedom of movement, the right to freedom of assembly, the right not to be detained without trial, and the right to be charged or released within 48 hours of being arrested.²⁴⁸

Limitations, suspensions or restriction of rights except for those which are non derogable, to be valid, must be lawful, reasonable and the international human rights standard must recognise such limitations, suspension or restrictions and must be seen to be necessary in an open and democratic society.²⁴⁹ In addition, this restriction, suspension or limitation must not be too extensive in range that it makes ineffective the essential content of the right in question.²⁵⁰ Any alleged suspension or limitation or restriction which does not fulfil any of the requirements discussed above may be invalid and may also be successfully challenged in a court of law.²⁵¹

²⁴⁵ *Id*

²⁴⁶ *Id*

²⁴⁷ *Id*

²⁴⁸ *Id*

²⁴⁹ *Ibid* 45

²⁵⁰ *Id*

²⁵¹ *Id*

5. Practical application of constitutionalism in Malawi

The Malawi Constitution in spite of its laudable provisions fails the people it is supposed to serve when the actual behaviour of the public officials is examined.

The preamble of the Constitution reads:

The people of Malawi-recognising the sanctify of human life and the unity of all mankind; guided by their private consciences and collective wisdom; seeking to guarantee the welfare and development of all the people of Malawi, national harmony and the peaceful international relations; desirous of creating a constitutional order in the Republic of Malawi based on the need for an open, democratic and accountable government: hereby adopt the following as the Constitution of the Republic of Malawi.²⁵²

Justice Msosa claims that the preamble captures the aspirations of the people of Malawi, gives a sense of Malawi's past and the desire of the nation that it must not repeat the mistakes of the past.²⁵³

In 1994, Malawi experienced political transformation. Malawi had a long a history of human rights abuses and oppression. The Constitution, although many have said it lacks legitimacy, has been described as one of the most liberal in the world.²⁵⁴ This Constitution strikes all the right notes like enshrining a detailed bill of rights.²⁵⁵ It has established several institutions to monitor and implement human rights, like the office

²⁵² Msosa S E (2003) 163-164

²⁵³ *Ibid* 164

²⁵⁴ Chirwa D M (2003) 318

²⁵⁵ *Id*

of the Ombudsman, the Inspectorate of Prisons, and the Human Rights Commission.²⁵⁶ Judicial independence is assured.²⁵⁷

The Constitution is supreme in the land.²⁵⁸ Although the framers of this Constitution were determined to prevent the nation's leaders from reverting to the pre 1994 behaviour of governing by putting safeguards in it, the reality is vastly different today. The blatant disregard of the constitutional principles by public officials started with the way it was framed in the first place.

Briefly, the account is as follows:

A select group of the leadership of the Malawi Congress Party (MCP) and that of the opposition were given the task of drafting the Constitution.²⁵⁹ This Constitution that sought to undo the legacy of a brutal dictatorship and create a future for the Malawian people that was rule based, was negotiated, drafted and adopted within a space of four months.²⁶⁰ There was not enough time to make meaningful consultation with the people throughout the country.²⁶¹ To mitigate the consequences of insufficient consultation time, the framers established a Constitutional Committee to receive proposals from Malawians.²⁶² The committee was tasked to organise a national education on the Constitution, consult, compile reports of the proposals that were to be received and to circulate them throughout the country and finally to convene a national conference that was representative of the nation.²⁶³ Parliament would then repeal, amend or replace the Constitution based

²⁵⁶ *Ibid* 319

²⁵⁷ *Id*

²⁵⁸ *Id*

²⁵⁹ Kanyongolo F E (1998) 364

²⁶⁰ Chirwa D M (1993)317

²⁶¹ *Id*

²⁶² *Ibid* 318

²⁶³ *Id*

upon the outcome of the exercise.²⁶⁴ Most Malawians were not even aware of the existence of the committee and the planned national educational program of the Constitution was not properly done and its impact can be said to have been negligible.²⁶⁵ It is safe to say that the Constitutional Review Conference which was convened in February of 1995 was elitist in its composition because of the groups that were invited to attend, and these groups included politicians, traditional leaders, professionals, businessmen, women's group, and the young people's association.²⁶⁶ Parliament disregarded a number of resolutions of the Conference when it endorsed the final version of the Constitution that came into operation on the 18th of May 1995.²⁶⁷ Chirwa claims that it is only fair to conclude that the Malawi Constitution is a document that lacks popular legitimacy and such a document cannot sustain meaningful democracy.²⁶⁸ This document which is the heart and soul of the nation does not have the popular support of the people and because of this, officials get away with its violations. In what follows, I will attempt to examine a number of areas where these violations are too blatant.

5.1 *Constitutional amendments*

The Constitution of Malawi which came into force in 1994 could be amended or repealed during the provisional application period to allow for wider consultations on its contents that had not been possible before it was adopted.²⁶⁹ The frequency with which the Malawi Constitution has been amended and the reasons given for these amendments suggest that the nation does not have a credible Constitution.

²⁶⁴ *Id*

²⁶⁵ *Id*

²⁶⁶ *Id*

²⁶⁷ *Id*

²⁶⁸ *Id*

²⁶⁹ Chirwa D M (2003) 320

Kanyongolo says that there is no constitutionalism whenever the holders of power amend the sections that are an inconvenient obstacle to their exercise of that power.²⁷⁰ He gives an example when in 2001 the National Assembly attempted to amend the Constitution in favour of the incumbent at the time, who was completing his two terms but wanted to extend his term of office beyond the limit set by the Constitution of two consecutive terms of five years each.²⁷¹

The Malawi Constitution has been amended so frequently since 1994 proving Kanyongolo's contention that there is no commitment to constitutionalism.²⁷² The political leaders could show commitment to this principle by renegotiating this defective Constitution to make it more legitimate in the nation.²⁷³

The practice of not consulting widely when the current Constitution was being drafted has been carried over by successive governments. In 1994, an amendment creating the office of the second vice president was done in the face of wide criticism from the civil society and others.²⁷⁴

Nandini Patel says that constitutional amendments of a substantive nature have been done by the National Assembly.²⁷⁵

Firstly, there is the recall provision which was provided for by section 64 of the 1994 Constitution to recall Members of Parliament (MP) by their constituents because of non satisfactory performance.²⁷⁶ This provision was put there to ensure that there

²⁷⁰ Kanyongolo F E (2007)26

²⁷¹ *Id*

²⁷² Chirwa D M (2003) 321

²⁷³ *Id*

²⁷⁴ *Id*

²⁷⁵ Patel N "The representational challenge in Malawi" in Chinsinga B *et al Towards the consolidation of Malawi's democracy* (2008) (essays in honour of the work of Albert Gisy, German Ambassador in Malawi (February 2005 – June 2008) 23

²⁷⁶ *Ibid* 24

was vertical accountability of MPs to their constituencies, the MPs, however, repealed it before its adoption in 1995 because they said it could be abused by their constituents.²⁷⁷ The provision could also be used by the “big men” of politics to change the legislature’s composition in their favour because patronage and personality politics are dominant in Malawi.²⁷⁸

Patel says that the passage of time since its repeal has not diminished the public’s demand for the recall provision.²⁷⁹ The provision was meant to force the MPs to serve their constituencies and not their political parties.²⁸⁰ The recall provision highlighted the fact that the people want to hold their elected officials accountable.²⁸¹

Secondly, the senate provision provided for by section 68 to 72 which was conceived with the goal of widening the people’s representation in the deliberative arm of government was repealed within one week of deliberation in 2000.²⁸² The move to repeal the provision was strongly opposed and condemned by the civil society and opposition parties as unconstitutional on the ground that the senate was protected by section 45(8) of the Constitution which states that “under no circumstances shall it be possible to suspend the Constitution or any part thereof or dissolve any of its organs, save as is consistent with the provision of this Constitution”.²⁸³ The abolition of the senate because it affected the very substance and effect of the Constitution and invoked section 196(3) which says that any amendment which affects the substance or effect of the Constitution requires a national referendum and because of this, the civil society argued that the abolition of the senate could not proceed without the

²⁷⁷ *Id*

²⁷⁸ *Id*

²⁷⁹ *Id*

²⁸⁰ *Id*

²⁸¹ *Id*

²⁸² *Ibid* 25

²⁸³ *Id*

proposed referendum.²⁸⁴ The senate would have provided a stabilising influence through the checks and balances on the National Assembly.²⁸⁵ The public demand for this institution is unabated.²⁸⁶

The final contentious provision is section 65 also known as the Floor Crossing Provision which states that:

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 party represented in the National Assembly, or has joined any other political party, or association or organisation whose objectives are political in nature.²⁸⁷

The underlined part was added by the constitutional Amendment of Act 8 of 2001 but was successfully challenged in the High Court in the case of the *Registered Trustees of Public Affairs Committee v. the Attorney General and others* where the court held that the extension was unconstitutional and therefore invalid.²⁸⁸ Parliament ignored the court because it did not revert to the original form of section 65.²⁸⁹

It is not easy to challenge constitutional amendments in court. A good example is the case of *Kachere v. the President*, where the amendment creating the office of the second vice president was unsuccessfully challenged and was dismissed by the

²⁸⁴ *Id*

²⁸⁵ *Ibid*26

²⁸⁶ *Id*

²⁸⁷ *Id*

²⁸⁸ *Ibid*27

²⁸⁹ *Id*

High Court on the grounds that the applicants lacked locus standi because they failed to show that they had suffered any harm by its creation.²⁹⁰

Every time the composition of the National Assembly changes, the dominant political party of the moment seeks to promote its agenda through constitutional amendments. Unless this behaviour is checked, Malawi will go through an endless cycle of amendments because as Chirwa says, they are aimed at achieving temporary political goals.²⁹¹

5.2 *Executive dominance*

There are situations where the executive acts above the law and sometimes unconstitutionally and the bodies to hold it accountable are simply ignored.²⁹² In October of 1997, a High Court judge ruled that an individual could not constitutionally hold two public offices at the same time, the government of Malawi simply ignored the decision.²⁹³ Another example is when the government illegally dissolved local government assemblies in 1995 and after dissolving them, it ignored its constitutional mandate to hold them that year citing financial constraints although the donor community had promised to cover the expense.²⁹⁴

In Malawi, to understand why the executive behaves the way it does, it is important to delve into its political culture.

Neopatrimonialism that dominates public life in Malawi influences how the executive behaves.²⁹⁵ The influence exerted on the political landscape without ugly

²⁹⁰ Chirwa D M (2003)322

²⁹¹ *Ibid* 21

²⁹² Browns S (2000) 19

²⁹³ *Id*

²⁹⁴ *Ibid*

²⁹⁵ Booth D et al (2006)16

repercussions is characterised by social relationships that are based on inequality and large power distance.²⁹⁶ This has been ingrained in the people that a community that is based on hierarchy is expected, and the people higher up in rank should have more resources and poorer members of that community are expected to depend on the more powerful.²⁹⁷ This creates concentration of authority in individuals and dependency becomes the norm.²⁹⁸ In rural areas, this large power distance undermines initiatives as the people wait for the chief or some other “big man” to tell them what to do or better still to do it for them.²⁹⁹ This has the negative consequence of encouraging corruption and influencing peddling by civil servants because the ordinary people rarely question the activities of people higher in rank than them.³⁰⁰ People live with the assumption that the leaders should act in a way that is different from them since they are not bound by the same rules or laws like ordinary people.³⁰¹ This “big man” syndrome has been evident in all of Malawi’s presidents with the current president Bingu wa Mutharika being no different from his predecessors:

According to recent speeches, the president views himself personally as the provider to Malawi’s people, with his personal qualities and views being decisive (e.g. press conference on return from Taiwan). Voters should support the president if they wish to get development (e.g. Thyolo by election speech). State resources are already being “donated” to communities during campaign rallies (e.g. an ambulance in Thyolo). He has installed himself in State House which was previously the home of parliament. A casual

²⁹⁶ *Ibid* 18

²⁹⁷ *Id*

²⁹⁸ *Id*

²⁹⁹ *Id*

³⁰⁰ *Id*

³⁰¹ *Id*

disregard for proper procedure and legal requirements in public appointment and procurement has been widely noted. The power and discretion being exercised by unaccountable and not very professional presidential aides has been seen as a disturbing element of continuity with previous regimes. The arrest of officials suspected of dishonest dealings has not so far been followed by legally proper and well prepared prosecutions.³⁰²

The government of Malawi's respect since 1994 for its own Constitution, legislation, regulation and internal procedures is inconsistent.³⁰³ In fiscal matters, the government's compliance with the constitutional provisions, legislative, regulations and procedures has demonstrated a marked improvement since 2004.³⁰⁴ The incentive for the government to comply with the laws to promote fiscal discipline is high because about 80 percent of its capital budget is financed from external sources through the western donors.³⁰⁵ Breaches in the area of finances by government functionaries appear to be taken seriously.³⁰⁶

On the other hand government's obedience to law in the areas of social and political governance is inconsistent and the disobedience of the laws appears to be motivated by premeditated actions.³⁰⁷ In 2002, the International Bar Association reported that the government ignored the court orders that were politically unpopular.³⁰⁸ The government appears to choose which court orders to obey or disobey depending on the subject matter in question.³⁰⁹ In situations that will make

³⁰² *Ibid* 40

³⁰³ Kanyongolo F E (2006)51

³⁰⁴ *Id*

³⁰⁵ *Ibid* 51-52

³⁰⁶ *Ibid* 52

³⁰⁷ *Id*

³⁰⁸ *Id*

³⁰⁹ *Ibid* 53

the government look bad politically, it has gone against the court order, like its defiance of the court order to allow people to demonstrate.³¹⁰

The few examples cited above show that it is possible for a nation to have a formal Constitution without having Constitutionalism.³¹¹

5.3 Legislative behaviour

Parliaments embody the will of the people that democracy will be responsive to their needs.³¹² It has been argued that the power and effectiveness of the legislature determines the quality of the country's democratisation process.³¹³ Malawi's parliament from 2004 is a battle of partisan interests by the various political parties represented in the house.³¹⁴ To bring clarity about legislative behaviour, I have cited three examples.

- *The first one involves the manner in which the legislature rejects the president's nominees for senior public offices.* Using their large numbers in parliament, opposition members have turned down proposed appointments and the reasons are just to settle political score with the president.³¹⁵ Reasons are often not given saying it is their privilege to do so.³¹⁶
- *The second one is about section 65 vs the budget saga.* The president asked the court to interpret the constitutional validity of section 65 which states that parliamentarians who leave the parties under whose ticket they were elected to the National Assembly and join another party represented in parliament

³¹⁰ *Id*

³¹¹ Kanyongolo F E (2007)27

³¹² Chinsinga B "Malawi democracy project at a crossroads "in Chinsinga B *et al* (2008) *Towards the consolidation of Malawi's democracy*11

³¹³ *Id*

³¹⁴ *Ibid* 12

³¹⁵ *Id*

³¹⁶ *Id*

lose their seats and must seek a fresh mandate from their constituents.³¹⁷ The opposition wanted the speaker of the house to invoke section 65, meaning that most parliamentarians who had joined the president's new party would lose their seats and the government would not let the speaker invoke it.³¹⁸ The government had to operate for close to three months without a budget because the opposition parliamentarians used it as a bargaining tool to force the government to allow the speaker to invoke section 65.

- *The third one involves the Malawi-Mozambique electricity interconnection bill scandal.* The president assented to a bill that had not been tabled and debated in parliament.³¹⁹ The integrity of the National Assembly had been compromised because one wondered how the bill could escape scrutiny throughout the stages it must pass before the president assents to it.³²⁰

5.4 Human rights

Malawi's dualist approach to international agreements means that an Act of parliament is required for an international treaty to become part of Malawi law.³²¹

Malawi displays commitment to international human rights standards but in the country there is little practical impact.³²² She has not gone beyond ratification of international conventions to give them domestic effect before and after 1994.³²³ Secondly, although she is a party to these bodies, she has consistently failed to give reports of her human rights record because the most common way of accountability

³¹⁷ *Id*

³¹⁸ *Id*

³¹⁹ *Ibid* 13

³²⁰ *Id*

³²¹ Chirwa D M (2003)327

³²² *Ibid* 328

³²³ *Id*

is the periodic sending of reports to certain human rights bodies.³²⁴ Thirdly, the High Court and the Supreme are reluctant to use international law, to interpret the Constitution and the Universal Declaration of Human Rights has rarely been featured in court judgements although in *Chakufwa Tom Chihana V R* it was held that it was part of Malawi law.³²⁵

Although Malawi has benefitted from having a Constitution with a comprehensive bill of human rights, there have been situations when human rights have not been respected.³²⁶ Justice Msosa has listed some of the freedoms that have suffered, and they are follows: Freedoms of association, opinion, expression, the press and freedom of assembly.³²⁷ The nation continues to witness wrongful arrests and detentions.³²⁸

The courts in some cases have done commendable work in ensuring that human rights are respected.³²⁹ In *Peter Kafisira v. the Republic* (misc criminal Application No 55 of 2003), the applicant was arrested in March of 1999 and detained without being charged or brought before the courts. Allegedly, the applicant had killed his wife. After about four years, the state had not yet decided whether or not to prosecute him. The applicant then applied to court seeking a declaration that his detention was unlawful and that his constitutional rights were not being respected. At the hearing, counsel of the state did not show up although he was informed about the application. The judge said the counsel for the state by not showing up had

³²⁴ *Ibid* 329

³²⁵ *Ibid* 330

³²⁶ Msosa ASA (2003)170

³²⁷ *Id*

³²⁸ *Id*

³²⁹ *Id*

demonstrated a lack of respect for the court and the rule of law.³³⁰ The judge's ruling is quoted, some excerpts:

Counsel has cited the case...where I insisted on the supremacy of the Constitution and urged all branches of government to adhere to the constitutional provisions and respect human dignity... the executive branch of government has no power to use pre-trial detentions as a means of punishment on a person who has not been convicted... there is no provision which takes away the dignity of man where he is suspected to have committed an offence...³³¹

The applicant was released unconditionally and the Kafisira case is just one of many cases the courts have decided on concerning abuse of human rights.³³²

5.5 *Judicial independence*

The 1994 Constitution does not provide sufficient safeguards to make the government accountable for its actions.³³³ The judiciary which is key to enforcing this accountability duty has its independence diminished by the current Constitution because it grants the president powers to remove any judge of the High Court from his /her position and reassign him/her to any position within the civil service.³³⁴ Although this provision only allows the president to exercise this power with the judge's consent and only when the president believes that moving the judge is in the public interest, the existence of this power is a potential threat to the security of tenure of the judges of the High Court and can negatively affect the ability of the

³³⁰ *Id*

³³¹ *Ibid* 171

³³² *Id*

³³³ Kanyongolo F E (1998)366

³³⁴ *Id*

judges to ask the government to account for its actions when it betrays a public trust.³³⁵

There have been instances of interference with the independence of the judiciary. In November of 2001, parliament ignored a court order not to debate the impeachment of three judges.³³⁶ The grounds for impeachment were allegedly for incompetence and misconduct but in fact the reasons were, political.³³⁷ The three judges had delivered a number of decisions that were unfavourable to the government and the ruling party.³³⁸ In December of 2001, the president cleared one of the judges of misconduct and the Judicial Service Commission dealt with the remaining two judges.³³⁹ Fortunately for the judges, section 118(3) of the Constitution does not grant the president absolute powers to remove the judge because the president has to consult the Judicial Service Commission after a simple majority of members of parliament approve the impeachment.³⁴⁰ One of the cleared judges angered the government by holding that the ban on demonstrations against the government's third term bill was unconstitutional.³⁴¹ The president then threatened to invoke section 119 (7) of the Constitution by reassigning the judge to another post.³⁴²

³³⁵ *Id*

³³⁶ Chirwa D M (2003)332

³³⁷ Kanyongolo F E(2006)12

³³⁸ Chirwa D M (2003)332

³³⁹ *Id*

³⁴⁰ *Id*

³⁴¹ *Id*

³⁴² *Id*

6. Conclusion

Malawi is a hybrid “neopatrimonial” state which has a framework of formal law and administration and is informally captured by networks of patronage.³⁴³ After elections, the main focus of the new office bearers is to share the spoils of office at the expense of the formal functions of state.³⁴⁴ The African variant and of Malawi in particular has the “big man” syndrome which produces strongly presidentialist political systems, sometimes irrespective of the Constitution.³⁴⁵

Malawi is a striking case of the big man syndrome under both Banda and Muluzi because the new president emulated the former president.³⁴⁶ The period when these men were presidents, there was a systematic failure to distinguish between resources of state, the private sector and of the ruling party.³⁴⁷ Mutharika, the current president, also styles himself as the “big man”.³⁴⁸

Malawi’s patronage-orientated political system is deeply entrenched.³⁴⁹ Although colonialism is gone, it left a legacy which is morally ambiguous towards laws and administrative rules that require honesty and professionalism in the public service.³⁵⁰ This explains why, generally, in Malawi the abuses of these big men are tolerated.³⁵¹

From the beginning of this research paper, I have demonstrated that the Malawian authorities know the principles of constitutionalism. The theoretical aspects and guidelines are contained in its constitutional documents. Pre-colonial Malawi was

³⁴³ Booth D *et al* (2006)viii

³⁴⁴ *Id*

³⁴⁵ *Id*

³⁴⁶ *Id*

³⁴⁷ *Id*

³⁴⁸ *Ibid* 40-41

³⁴⁹ *Ibid* viii

³⁵⁰ *Ibid* ix

³⁵¹ *Id*

dominated by chiefs and the tribesmen accepted their subordinate position. Postcolonial Malawi despite having constitutions with the necessary principles continues to be governed for the most part without constitutionalism. Literature by Malawian thinkers on constitutionalism is supportive of constitutional governments. Malawi was a British protectorate and most of its elite were educated in the west, lack of constitutionalism cannot be said to be a result of ignorance. The pre-colonial traits of leadership by the few through domination are ingrained in them and have been faithfully passed on to successive generations of leaders.

I have also demonstrated that with the advent of constitutionalism in Malawi, the judiciary has set aside some unconstitutional laws and actions. The executive and the legislature have devoted their energies to frustrating the constitutional principles.

The 1994 Constitution was an attempt to break with its past in order to create a culture of a government that obeys its own laws and respects the rights of its people. There have been improvements but the culture of dictatorship in some instances has been carried into the new dispensation. The missing ingredient, I believe, for Malawi to embrace the values of human rights and respect for the law, is transformative constitutionalism. In the words of Mureinik:

If the new Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification- a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case in defence

of its decisions, not the fear inspired by the force of its command. The new order must be a community built on persuasion not coercion.³⁵²

Transformative constitutionalism must become part of the long term project for Malawi's judiciary, private legal practitioners and legal academics. Karl Klare says that this should be a project that can initiate large-scale social change through non-violent political processes grounded in law. He adds that this can lead to transforming the country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.³⁵³ Judicial mindset must change. The men and women did not just draft a constitution that was intended to break with the past and then to have the same constitution interpreted by judges with the pre 1994 mindset. The lofty goals of the new constitutional order cannot be realised by the same mindset that has been socialized to think conservatively during the long period of executive dominance in Malawi.

Transformative adjudication is a scary thought because it implies asking judges who are not elected officials to attempt to accomplish political goals.³⁵⁴ The rule of law, however, strongly urges judges to leave their politics outside the court room. They are supposed to provide legal interpretation to constitutional texts without letting their personal and subjective views influence their decision.³⁵⁵ It should also be noted that legal texts do not self generate their meanings because they must be interpreted by judges who encounter problems with interpretation due to the indeterminacy of legal texts. I would be naive if I were to suggest that the judges' political values and

³⁵² Pieterse M (2005)61

³⁵³ Klare K (1998)150

³⁵⁴ *Ibid* 157

³⁵⁵ *Id*

sensibilities are totally excluded from their interpretive processes. This complete exclusion of their personal values from adjudication is impossible.³⁵⁶

Klare argues that judges and this includes advocates, academics and other legal practitioners make value-laden choices in their every day routine course of legal interpretation and this makes them responsible for the social and distributive consequences that result from these decisions. He adds that legal practitioners must simply acknowledge their political and moral responsibility in their interpretive work and in the interest of transparency; they must let the public know their role in constructing the social order through their adjudicative practices.³⁵⁷ Such openness by the judiciary can revolutionize the transformation of the nation. This can enable the general public to critically examine its political and moral assumptions that guide judicial adjudication which is currently shrouded in secrecy. This openness can also encourage the political processes to rework their legislation to make it more constitutionally acceptable, although this will always be subject to judicial review.³⁵⁸

Legal texts, particularly constitutions, are shot through with apparent and actual gaps (unanswered questions), conflicting provisions, ambiguities and obscurities. Indeed, it is frequently debated what the relevant text is, with respect to a particular legal problem, e.g., where multiple legal sources (drafting history, prior lines of interpretation, foreign authorities, etc.) are referenced, or where a document is sought to be elucidated or trumped by other cultural artifacts e.g., customs, accounts of popular morality, historical narratives, etc.). In the face of gaps, conflicts, and ambiguities in the available legal materials, what's

³⁵⁶ *Ibid* 164

³⁵⁷ *Id*

³⁵⁸ *Id*

a decision maker to do? Apart from abdication, there seems no option but to invoke sources of understanding and value external to the texts and other legal materials.³⁵⁹

Judges without a transformative mindset will focus on interpreting the contentious issues as narrowly as possible. There is often a marked deference to the executive. The impression one gets is that the judiciary is in cahoots with the executive. This might be because the judges and advocates misunderstand and underestimate the extent of legal indeterminacy to the point of genuinely believing that they are constrained by legal materials when further reflection would have revealed that they are not. The easiest path for most of them is denial because of their legal culture which has ingrained in them the ideals of legislative supremacy and the rule of law. Karl Klare says that this “insight threatens anxiety, role confusion and fear of professional censure and public disgrace. Denial is a strategy for repressing this anxiety, for wishing it away.”³⁶⁰

Klare defines legal culture as professional sensibilities, habits of mind, and intellectual reflexes: What are the characteristic rhetorical strategies deployed by participants in a given legal setting? What is their repertoire of recurring argumentative moves? What counts as a persuasive legal argument? What types of arguments, possibly valid in other discursive contexts (e.g., in political philosophy), are deemed outside the professional discourse of lawyers? What enduring political and ethical commitments influence professional discourse? What understandings of and assumptions about politics, social life and justice? What “inarticulate premises,

³⁵⁹ *Ibid* 157

³⁶⁰ *Ibid* 165

[are] culturally and historically ingrained in the professional discourse and outlook?³⁶¹

Participants are often unaware that their response to legal issues is dependent upon their legal socialisation.³⁶² Klare makes a powerful argument about the debilitating effects of this property on the development of substantive law. It influences lawyers on what types of questions to ask and the type of answers to expect. It negatively affects adjudication practices because lawyers become dependent upon the culturally available intellectual tools and instincts that they have learned from their seniors and this may negatively impact on constitutional interpretation. Lawyers become unreflective.³⁶³

Professor Karin Van Marle gives the meaning of transformative constitutionalism in her article *Transformative constitutionalism as/and critique* as an approach to the Constitution and law in general that is committed to transforming political, social, socio-economic and legal practices in such a way that it will radically change existing preconceptions or assumptions about law, politics, economics and society in general.³⁶⁴

The Malawi judiciary should make this commitment if Malawi is ever going to have a government that does not place itself above its own laws.

Awareness of this limitation by the judiciary can help them look for new tools and to devise new training methods for a new generation of legal practitioners. Even the seasoned lawyers steeped in the old traditions, once awareness sets in and through repeated training programs, they can play a powerful role in restructuring the nation.

³⁶¹ *Ibid* 167

³⁶² *Id*

³⁶³ *Ibid* 168

³⁶⁴ Van Marle K (2009) 288

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