

THE 1994 MALAWI CONSTITUTION AND THE ROLE OF THE JUDICIARY

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*“THE PEOPLE OF MALAWI –
recognizing the sanctity 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 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...”¹*

1. Introduction

The Constitution is the supreme law of the land². It creates and organizes the State and government. It sets parameters and limits the operations of organs of government, action of people and institutions and in cases of conflict with other laws inferior to the Constitution³, it controls it⁴. At the time of the drafting of the 1994 Constitution there were fears that if proper safeguards were not created, the Constitution itself would be in danger of being perverted and distorted by the government that would be in power. The Constitution therefore created an independent and impartial judiciary⁵ as one of the Constitutional safeguards,⁶ with a mandate to interpret, protect and enforce the Constitution and all laws⁷.

The focus of this paper is upon the separate status, functions and duties of the three arms of government, (executive, legislature and the judiciary) the independence of the judiciary, supremacy of the Constitution, judicial review and referrals, fundamental principles and ouster laws. This paper will also identify possible areas of conflict between the judiciary and the other arms of government and the way forward. It is noted that our Constitution is democratic as it enshrines democratic principles. Thus, in a Constitutional democracy, courts are the primary protectors and final arbiters of Constitutional interpretation. Section 12 of the Constitution makes provision for the subjection and legitimization of government by the will and consent of the governed.

¹ The Preamble of the Constitution of the Republic of Malawi, 1994.

² See section 5 of the Constitution which makes provision for the supremacy of the constitution

³ Legislation, customary law and international law.

⁴ Malawi Constitution, Section 5.

⁵ Malawi Constitution, Section 103.

⁶ See Jane Ansah “The Right to Development and the Malawian Law”, PhD Thesis, (Nottingham; University of Nottingham, 2002), at 164.

⁷ Malawi Constitution, Section 9.

2. Separation of Powers

Although in the 1994 Malawi Constitution there is no explicit mention of the doctrine of separation of powers, however, due to the Republic of Malawi's background, which displays a history in which the judiciary was muzzled and could not protect the Constitution or the people of Malawi effectively, the concept of separation of powers featured highly in all discussions pertaining to the drafting of the Constitution.⁸ It was recommended that it be included in the Constitution in order to have "distinct delineation of powers among the three organs that constitute a State: the Legislature, the Executive and the Judiciary."⁹ This, clearly encapsulate what Montesquie wrote in 1748, in his book, *The Spirit of the Laws*, that if power is accumulated in few hands, liberty is in jeopardy. The Constitution has captured this doctrine in the provision for separate status, functions and duties of the three organs of the State.¹⁰ Thus, the three functions of governing the country, making laws and presiding over cases in accordance with the law, should be performed by different institutions. It is observed that the focus is not on power but on function, duties and responsibilities. The dictionary meaning of function is; purpose, role, job, occupation, task and utility and the dictionary meaning of power is authority, control, influence, supremacy, rule, command, clout, sway and dominance. It is argued that the drafters of the Constitution envisaged a government that would not focus on controlling the people of Malawi but will discharge its duties solely for the benefit of the people in accordance with section 12 of the Constitution which is based on the doctrines of both social contract and social trust. Social contract theory entail that people delegate and entrust authority to some individuals among them to govern social trust entails social interaction and interdependence to attain a common goal.¹¹

Sections 7, 8 and 9 of the Constitution makes provisions for the separate functions of the three arms of government. These sections are examined briefly below:

Section 7 reads:

"The executive shall be responsible for the initiation of policies and legislation and for the implementation of all laws which embody the express wishes of the people of Malawi and which promote the principles of this Constitution."

In this section, the executive has the responsibility to **initiate policies and legislation and also ensure the implementation of laws**. In executing these responsibilities, it must introduce laws that embody the express wishes of the 'people' of Malawi. The executive is required to discharge its functions and duties consistently with the Constitution.¹²

Sections 8 and 48 of the Constitution spell out the function and duties of the legislature to the exclusion of the other two arms of government. The sections read:

" The legislature when enacting laws shall reflect in its deliberations the interests of all the people of Malawi and shall further the values explicit or implicit in this Constitution."

⁸ See Malawi Law Society, (1994), 2. See also the Scottish Faculty of Advocates (1992), 25, and NCC (1994), 4.

⁹ See Legal Resources Centre, Constitutional Symposium, Blantyre, 3-5 February 1994, Recommendation. Page 2.

¹⁰ See Malawi Constitution, Act 20 of 1994. sections 7, 8 and 9 of the Constitution.

¹¹ See Garton Kamchedzera, 'Access to Property, the Social Trust, and the Rights of the Child', PhD Dissertation, (Cambridge; University of Cambridge, 1996), at 39.

¹² Malawi Constitution, section 5.

"All legislative powers of the Republic shall vest in Parliament which shall have powers and responsibilities set out in this Constitution"

The legislature is required to reflect in its deliberations the interests of 'all' the people when passing laws. Where there is a claim that the 'interests of all the people' are not reflected in the deliberations or that the 'values' in the Constitution are not being furthered, section 9 of the Constitution gives the courts jurisdiction to interpret and enforce the Constitution. This, by implication, provides for judicial review of legislative actions thereby achieving the required checks and balances in a democracy.

It is observed that the acts of the arms of government are to be in conformity with the Constitution as provided in Section 5 of the Constitution which makes provision that "Any act of the Government or any other law that is inconsistent with the provisions of this Constitution shall, to the extent of such inconsistency, be invalid."¹³ This provides for judicial review of the actions of both the Executive and the legislature to ensure that they operate within the bounds established by the Constitution thereby achieving the required checks and balances in a democracy¹⁴.

Section 9 of the Constitution reads:

"The judiciary shall have the responsibility of interpreting, protecting and enforcing this Constitution and all laws in accordance with this Constitution in an independent and impartial manner with regard only to legally relevant facts and the prescriptions of law."

Section 9 gives the judiciary the responsibility of interpreting, guarding and enforcing the Constitution. It further stresses the judges' independence and impartiality and requires them to decide cases on the legally relevant facts and in accordance with the law. Judicial independence in the country is secured by section 103¹⁵ of the Constitution. In view of this, there is no excuse for the judiciary to fail to act independently in the course of exercising its Constitutional powers, duties and functions.

Section 9 is an important section because of the history of Malawi. Prior to the 1994 Constitution, the judiciary in Malawi was not independent. The tenure of office for judicial officers was not secured. Judges could be transferred by a presidential order from the courts to any ministry within the executive branch of government and then moved back again.¹⁶ Further, Court's judgments were seldom respected by the government and

¹³ See also Malawi Constitution, section 108(2) which reads;

Section 108 (2) reads: "The High Court shall have original jurisdiction to review any law, and any action or decision of the government, for conformity with this constitution, save as otherwise provided by the constitution and shall have such other jurisdiction and powers as may be conferred on it by this constitution or any other law."

¹⁴ See the case of *A.G v M.W.Lunguzi, Appeal no. 23/94*.

¹⁵ See Section 103 reads: "(1) All courts and all persons presiding over those courts shall exercise their functions, powers and duties independent of the influence and direction of any other person or authority.
(2) The Judiciary shall have jurisdiction over all issues of judicial nature and shall have exclusive authority to decide whether an issue".

¹⁶ See Scottish Faculty of Advocates, (1992), 39. Also see for example, former Chief Justice Hon. Friday Makuta started off with a presidential appointment as the Director of Public Prosecutions. He then, by presidential appointment, was promoted to the position of Judge of the High Court. From the bench, by another presidential appointment, he became the Attorney General. Later, by a further presidential appointment, he was moved to the Office of the President, as the Permanent Secretary to the Office of President and Cabinet, the most senior civil servant post. Then he was appointed as the Chief Justice and suffered a salary drop because the position of the Chief Justice was below the position of the Secretary to the President contrary to what should happen in a democracy where the Chief Justice's position as head of the Judiciary is at par with the Heads of Executive and Legislature. He was again appointed as Minister. He resigned in 1993 due to interference of the executive with court work.

there was interference by the executive in the adjudication process. This background precipitated the call for the independence of the judiciary that was echoed at every forum that discussed the drafting of a new Constitution for Malawi. There was a unanimous agreement that the Constitution should provide for an independent judiciary.¹⁷ The people of Malawi envisaged a judiciary that **would be empowered to uphold the supremacy of the Constitution, enforce respect for human rights and declare legislation and other governmental acts null and without effect**¹⁸ insofar as they have infringed the Bill of Rights and the provisions of the Constitution.¹⁹ It appears that the judiciary is the final authority on the interpretation of the Constitution. This is what was discussed at the Constitutional symposium and was recommended by the Legal Resource Centre that "Court decisions should not be subject to review by the Executive or Legislature. It is worth mentioning that the aspiration that the judiciary should have the final say on the Constitution and all matters pertaining to it is not peculiar to Malawi only. The adoption of the South African Constitution involved the Constitutional court which had the final say through the certification process (see below) and also through legislative referrals.

It is observed that Malawi has no specialized Court like the Constitutional court of South Africa. The Conference may consider the establishment of a special Constitutional Court.

3. Judicial review

The major characteristic of the 1994 Malawi Constitution is an attempt to address the excesses of the previous regime. The AFORD draft Constitution's preamble explicitly read "...to provide for an independent judiciary....as a guarantee against the abuse of governmental power and of fundamental human rights."²⁰ The judiciary is envisaged to be the true guardian of the ultimate will of the people - the Constitution. This is emphasised in South Africa by the mandate given to the Constitutional Court, where it was involved in the process of the adoption of the South African Constitution through the certification process. Only the court was mandated to certify the draft Constitution after it had been adopted by the Constitutional Assembly, that it complied with the prescribed Constitutional principles. Only then did the South African Constitution come into force²¹. Although the Malawi judiciary was not involved in the adoption of the 1994 Constitution, nevertheless, the people of Malawi have similar expectation that the Constitution, laws and amendments should be in agreement with the Constitution as envisaged section 4 and section 108(2) and the judiciary is the watchdog through the process of judicial review. That notwithstanding, the absence of a provision on automatic procedural judicial review before legislation becomes law and even before a Constitutional amendment is effected has meant that, some legislation and amendments have become law while they are in conflict with the Constitution. In a country where there is poverty and illiteracy rate is high, the values and basis of the Constitution are slowly being eroded, for the court will not move unless it is so moved by litigants. Further, it is argued that the absence of the certification of the Malawi Constitution was an oversight. The need for the certification is clearly revealed in the non-inclusion of most of the wishes of the people of Malawi as articulated at the Capital Hotel Constitutional Conference that were to be incorporated before the Malawi Constitution according to section 212 became law at the expiry of 12 months from the date of its adoption by Parliament. However, the judiciary has power of judicial review of executive and legislative acts²² to ensure that they comply with the Constitution. The process of judicial review allows the judiciary to discharge its

¹⁷ See Kirby, in NCC, (1994), 3-4.

¹⁸ Own emphasis.

¹⁹ See Scottish Faculty of Advocates, (1992), 25.

²⁰ AFORD Draft Constitution, unpublished, on author's file.

²¹ See Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996, Case CCT 37/96, p. 30-33.

²² See sections 5 and 108 of the constitution.

function of protecting and enforcing the Constitution and also provides checks on the other two arms of the government, the executive and the legislature as long as litigants bring cases to court.

3.1 What is Judicial Review?

Judicial review is the power of a court to review a law or an official act of a government employee or agent for Constitutionality or for the violation of basic principles of justice. In many jurisdictions, the court has the power to strike down that law, to overturn the executive act, or order a public official to act in a certain manner if it believes the law or act to be unConstitutional or to be contrary to law in a free and democratic society. In some jurisdictions, such power goes further, and it may be possible to strike down a decision simply because it ignored relevant and material facts.

Our Constitution makes implicitly and explicitly provision for the ordinary judicial review in sections 5, 43, and section 108 for judicial review which is wider than it is in other jurisdictions in that it extends to the actions of the legislature. It is pertinent to mention that the 1994 Malawi Constitution has guaranteed the right to administrative justice in its section 43 this too is special and wider than the normal judicial review under Order 53 of the Rules of the Supreme Court. However, it is narrower than the one provided for in section 108. In section 43, the duty holder is restricted to one organ of the State, the Executive.

Section 108 makes provision for the review of any law and any action or decision of the Government whether they are compatible with the Constitution. The judicial review envisaged in this section includes the actions of the legislature. Judicial review of the actions of the legislature being a new ground has not gone very well in Malawi due to uncertainty as to whether the actions of an elected body should be subjected to examination and limitation by an unelected institution²³. It is argued that these provisions are commonplace in most democracies where there is Constitutional supremacy. All organs of the State are bound by the Constitution²⁴, and this includes the judiciary which must discharge its functions and duties in accordance with the Constitution.²⁵ The Constitution leaves to the courts of law the question of whether there has been any excess power, and requires them to pronounce as void any act which is *ultra vires* or in conflict with the Constitution as was the case in the case popularly known as the *Press Trust*²⁶ case where the learned judge said "The Press Trust Reconstruction Act is, therefore in contravention of the Constitution....as well as on the principles which the Constitution stands for."²⁷ In another case on the amendment of the crossing floor section 65, justice Chipeta in his judgment said that "Accordingly, therefore, having in terms of the jurisdiction of this Court under Section 108 of the Constitution reviewed and found the amendment to section 65(1) of the Constitution, as embodied in Act No. 8 of 2001, being unConstitutional....in terms of section 5 of the Constitution inconsistent with the Constitution....I now duly declare the same unConstitutional and invalid, as prayed."²⁸

In conclusion, It is clear that the Constitution has entrusted to the judiciary the task of construing the provisions of the Constitution and of safeguarding the fundamental rights of the citizens. Therefore when a

²³ See *The State and The Speaker of National Assembly ex-parte Mary Nangwale*. Misc civil cause No. 14 of 2005 (Lilongwe District Registry)

²⁴ Malawi Constitution, Act 20 of 1994 Section 4

²⁵ Malawi Constitution, Act 20 of 1994 Section 9.

²⁶ See *Malawi Congress Party and Others vs The Attorney General and The Speaker of National Assembly civil case nos. 2074 of 1995 and 1861 of 2003.*

²⁷ *Civil case no 2074 of 1995, page 71.*

²⁸ *The Registered Trustees of the Public Affairs Committee and the AG, The Speaker of National Assembly, Civil case no. 1861 of 2003, page 61- 62.*

statute is challenged on the basis that it has been passed without authority or unconstitutionally and is in conflict with Constitutional provision it is the duty of the courts to determine the dispute and decide whether the law so passed is valid or not. It should be born in mind that just as the Legislature has legislative functions and duties, and the Executive has also its own functions and duties to the exclusion of the other organs, the judiciary has the functions and duties of adjudication. If in the execution of its function the judiciary declares any action of the other two organs or any law invalid it is never suggested that their function is usurped by the judiciary for adjudication of disputes is entrusted exclusively to the judiciary. This is also true with Presidential Referrals under section 89(h). The judiciary has jurisdiction under section 89(h) as read with section 9 in its interpretative function to interpret the Constitution.

4. Judicial independence

The Constitution makes explicit provision for the independence of the Judiciary and other institutions specifically created for the promotion and protection of human rights.²⁹ The courts and all persons presiding in the courts are to operate independently as provided in sections 103, of the Constitution. This independence is enforced by remuneration of judicial officers which must not be reduced without their consent³⁰, security of tenure³¹, and that protected Fund may be withdrawn for the benefit of judicial officers³²

The idea of judicial independence probably flowed naturally from the doctrine of separation of governmental powers; but the special nature of the judiciary requires that it be free and independent of the other organs of Government, especially the executive. To ensure respectability of its decisions and their compliance, it is important that the court must be fair and impartial to both parties to a dispute. It is also important that the Court must clearly be seen to be fair and impartial. That can only be achieved if the officer presiding over the Court is not under the influence or control of one of the parties to a dispute.

The principal Constitutional function of the judiciary is to ensure that government is conducted according to law by ensuring that government officials do not abuse or exceed their powers, in the course of discharging their duties. In this country, it is also the duty of the judiciary to ensure that Parliament, in making the law, does not contravene the provisions of the Constitution. It is, therefore, the Constitutional duty of the judiciary to ensure the rule of law and compliance of the rules of natural justice. To properly and adequately exercise that onerous function the judiciary must remain free and independent of the other organs of Government. In a Constitutional democracy judicial independence is indispensable.

Judicial independence in the country is secured by section 9³³ and 103³⁴ of the Constitution. The sections read, respectively,:

"The judiciary shall have the responsibility of interpreting, protecting and enforcing this Constitution and all laws and in accordance with this Constitution in an independent and impartial manner with regard only to legally relevant facts and the prescription of law."

²⁹ See sections 120, 129, 132 and 137. These are the Ombudsman, Human Rights Commission, the Law Commission and the National Compensation Tribunal.

³⁰ Malawi Constitution, Act 20 of 1994. section 114

³¹ Malawi Constitution, Act 20 of 1994. section 119

³² Malawi Constitution, Act 20 of 1994. section 183(3)(b).

³³ See page 1 above

³⁴ See page 1 above

"(1) All courts and all persons presiding over those courts shall exercise their functions, powers and duties independently of the influence and direction of any other person or authority."

(2) The Judiciary shall have jurisdiction over all issues of judicial nature and shall have exclusive authority to decide whether an issue is within its competence."

In view of the provision of this section, there is no excuse for the judiciary to fail to act independently in the course of exercising its Constitutional powers, duties and functions.

It is observed that although the Constitution has adequately provided for judicial independence, in practice there has been a hitch with the application of section 114³⁵ which has almost brought the judiciary in conflict with the other organs of the State. Something has to be done concerning maintenance of the original value of judicial officer's remuneration.

5. Constitutional Principles

Section 12 of the Malawi Constitution indicates the Fundamental Principles that provide the basis for the government's authority to govern. It is a statement of values and goals which must be adhered to at all times and section 13 of the Malawi Constitution although it is programmatic, it provides the aspirations of the people of Malawi. The fundamental principles are based on the doctrine of social contract. As regards the interpretation of the Constitution, it provides a "coded guidance to the judiciary". Section 12 is discussed below.

5.1 Section 12(i)

Section 12(i) provides for the source of 'legal and political authority' in Malawi. This is also found in section 6 of the Constitution, although the wording is slightly different. Section 6 makes provision for the authority to govern. However, no one can govern without legal and political authority. It is, therefore, implied that the people of Malawi give the legal and political authority to some individuals to govern the country. Section 12(i) confirms and strengthens the social trust that is in section 6 of the Constitution.³⁶ The power that is given by the people to the elected members of parliament is to be exercised in accordance with the Constitution for the purpose of serving and protecting the authority givers, the people of Malawi. The government's acts are restricted; it is to govern in the best interest of the people.

5.2 Section 12(ii)

Section 12(ii) expands the theory of social trust relationship between those in authority and the governed. The power to govern is limited to lawful authority only. The question is who decides what is lawful and what is not lawful. Considering the separate status and the distinct functions given to the three separate organs of the State, it is evident that this role is that of the judiciary in its mandate of judicial review.

³⁵ Section 114(2) reads; "The salary and any allowance of a holder of judicial office shall not without his consent be reduced during his or her period of office and shall be increased at intervals so as to retain its original value and shall be a charge upon the Consolidated Fund."

³⁶ Section 6 reads: "Save as otherwise provided in this Constitution, the authority to govern derives from the people of Malawi as expressed through universal and equal suffrage in elections held in accordance with this Constitution in a manner prescribed by an act of Parliament."

5.3 Section 12(iii)

Section 12(iii) adds a dimension to the two paragraphs that have already been dealt with above. The authority to exercise power in the State will continue as long as the people in authority enjoy the trust of the people of Malawi. It is observed that the enjoyment of trust by the people in political and legal authority is accompanied by the duty and responsibility to be open, accountable and transparent in all dealings. It is not surprising that the drafters of the Constitution included section 64, the recall provision, in the Constitution, to deal with situations where one has lost the trust of the people. On those with legal authority, loss of trust would result in the impeachment of the judicial officer in question. The measuring stick for the sustainability of the trust is through the maintenance of an open, accountable and transparent Government and an informed democracy, just as it is declared in the preamble.³⁷

5.4 Section 12(iv)

The impetus to draft a new Constitution in Malawi was, *inter alia*, the restoration of "human dignity and worth of each human being,"³⁸ through the provision of extensive human rights guarantees. Section 12(iv) puts a duty on the State and on individuals³⁹ to unconditionally "recognise and protect fundamental human rights and afford the fullest protection to the rights and views of all individuals, groups and minorities..."

5.5 Section 12(v)

This paragraph deals with two pertinent issues, equality and limitations of rights. Limitations upon lawful rights are permitted by section 12(v) if they have two elements *viz*:

- (i) necessary to ensure peaceful human interaction
- (ii) in an open and democratic society.

All this depends on the judiciary which acts as a watch-dog through judicial review; but then, that depends on a number of other things such as people's awareness of their human rights taking into consideration the high illiteracy rate in Malawi, access to courts, and judicial activism. It is observed that the Malawi Judiciary unlike the Indian Judiciary, which recognises public action,⁴⁰ will not move unless it is moved.

5.6 Section 12(vi)

Section 12(vi) calls for "all institutions and persons" to respect the Constitution and the rule of law. The paragraph reiterates and strengthens the supremacy of the Constitution. The emphasis is on granting power to the people and ensuring that the powers of the President and Parliament are limited.⁴¹ The judiciary should be guided by the principles of national policy as it interprets and applies the provisions in the Constitution to determine the validity of the decisions and acts of the executive and legislature.

6.0 Interpretation

It is noticeable that the Constitution does not have the same detail as an ordinary legislation. Therefore, the judiciary is mandated to interpret the Constitution on a large scale, using the interpretative tools provided for in section 11.

³⁷ This is the meaning of an 'open and democratic society, a term used in section 11(2).

³⁸ Section 12 (iv).

³⁹ The Malawi Law Commission has recommended that individuals should have duties.

⁴⁰ In Public Action cases, newspaper articles or a letter are taken to be petitions on which the courts move.

⁴¹ See Scottish Faculty of Advocates, (1992), 21

6.1 General Framework

The Malawi general framework of Constitutional interpretation is based on section 11 which provides the general approach to be followed by the judiciary. Section 11 reads:

"(1) Appropriate principles of interpretation of this Constitution shall be developed and employed by the courts to reflect the unique character and supreme status of this Constitution.

(2) In interpreting the provisions of this Constitution a court of law shall-

- (a) promote the values which underlie an open and democratic society;
- (b) take full account of the provisions of Chapter III and Chapter VI; and
- (c) where applicable, have regard to current norms of public international law and comparable foreign case law.

(3) Where a court of law declares an act of the executive or a law to be invalid, that court may apply such interpretation of that act or law as is consistent with this Constitution."

The Constitution provides a basis, through its enforcement by the courts, to obligate the executive and the legislature to act in accordance with its provisions. They are to refrain from acting or passing laws that retard or undermine the rights guaranteed in the Malawi Bill of Rights⁴². The position is comparable to that under the South African Constitution. In a South African case dealing with applicability of Principles of State Policy in that Constitution, Kriegler J said:

" We do not operate under a Constitution in which the avowed purpose of the drafter was to place limits on governmental control. Our Constitution aims at establishing freedom and equality in a grossly disparate society."⁴³

For the Malawian Judiciary too, the spirit and tenor of the Constitution that is expressed through the fundamental principles and principles of national policy must permeate the process of judicial interpretation and judicial review to bring out the aspirations of the nation as envisaged by the drafters, cutting across ill-conceived policies and legislation that impact people's lives negatively. Section 9 of the Constitution, as already discussed above, gives a unique duty to the judiciary to interpret, protect and enforce the Constitution.

Evidently, the interpretation of the Malawi Constitution should take into consideration the fact that the intention behind the adoption of the Constitution was to disassociate the country from its past which was tainted with disrespect for the Constitution, first generations rights and all that it stood for.

6.2 Section 11(2) Constitutional Tools of Interpretation

Surrounding local and international values and norms also, as the case maybe, have to be taken into consideration. Hence section 11(2) directs the courts on what tools to use in the interpretation of the Constitution. Section 11(2) reads:

"In interpreting the provisions of this Constitution a court of law shall-

- (a) promote the values which underlie an open and democratic society;
- (b) take full account of the provisions of Chapter III and Chapter VI; and
- (c) where applicable, have regard to current norms of public international law and comparable foreign case law."

⁴² See Jane Ansah "The Right to Development and the Malawian Law", PhD Thesis, (Nottingham; University of Nottingham, 2002), at 162.

⁴³ *Du Plessis v De Klerk*, 1996 (5) BCLR 658.

6.2.1 Values which underlie an open and democratic society

Section 11(2)(a) provides for the first tool to be employed by the courts in the interpretation of the Constitution. This is "the values which underlie an open and democratic society." What values constitute "an open and democratic society"? And where can they be found? The European Court of Human Rights case of *Lingens v Austria* is a leading case on this point. In that case, the applicant, who was a journalist, published in Austria an article in which he criticised a prominent politician in very strong language. He was charged with criminal libel and was convicted. He took the case successfully to the ECtHR where the Court pointed out that freedom of expression is an important element in a democracy. Other values are pluralism, tolerance and broadmindedness. This is an area which, at times cause friction between the judiciary and the organs of the government as the judiciary exercises its duty to protect and enforce human rights.

7.0 Quasi legislative Powers

Section 11(3) reads:

"Where a court of law declares an act of the executive or a law to be invalid, that court may apply such interpretation of that act or law as is consistent with this Constitution."

This paragraph should be read together with section 5 which, by implication, provides for judicial review of executive acts and legislation. In this section, the court is required in its interpretative function not to completely disregard an act or law that is partially inconsistent with the Constitution. The court is instead to apply the part that is consistent with the part of the Constitution that is under consideration. The court is to act this way because, by virtue of section 5 of the Constitution, the inconsistent part of an act or legislation is already invalid by reason of its inconsistency.

Section 11(3) can also be read as having a second, additional and parallel unusual meaning that is not found in other Constitutions. It endows upon the judiciary legislative powers through judicial interpretation. When the court has declared an act or law invalid, it is mandated to apply an interpretation of the invalid act or law in such a way that it is consistent with the Constitution. It is submitted that this provision by implication empowers the court to redraft an invalid act or law in order to bring it to a level where it is consistent with the Constitution. Therefore, the court in a limited way, through interpretation, is empowered to legislate and to initiate policy. This strange and unusual provision goes against the principle of separation of powers. However, it is necessary in a country like Malawi for the purposes of the process of checks and balances. The drafters had a certain amount of confidence in the judiciary that it would not be dragged too far into the legislative arena. Reliance was placed on the innate conservatism of most judicial systems with regard to playing politics. Further, it was envisaged that the awareness of the Constitutional requirement for the separation of powers and the substantive and extensive interpretative content of the Constitution would restrain the courts from going beyond their functions as provided in the Constitution. The notion of remission of legislation to the executive and the legislature for re-drafting was, therefore, ignored. This was because there is no guarantee that the act or law in application would be changed. In the absence of the power given to the courts to redraft legislation no further action would be taken after the courts' decision interpreting the legislation as unconstitutional. This would be especially unfortunate in a country where there is extreme poverty,⁴⁴ the illiteracy rate is very high and few people have access to courts which limits the bringing of any test-case, class action, group action etc.

6.2.3 Ouster Laws

Section 11(4) reads:

⁴⁴ See UNDP, (2000), 181. Malawi is one of the least developed countries.

"Any law that ousts or purports to oust the jurisdiction of the courts to entertain matters pertaining to this Constitution shall be invalid."

This subsection reaffirms the supremacy of the Malawi Constitution that has already been discussed. It also asserts the jurisdiction of the courts which can never be eroded by any Act of Parliament. The judiciary is distinct and separate from the other two organs of the Government. The existence of a State depends on the existence of the three organs of the Government: the executive, legislature and the judiciary. These organs of the Government as already provided in sections 7, 8 and 9,⁴⁵ have separate and distinct functions that are interrelated and must be present at all times. The function of the court is adjudication and the provision of remedies to victims. With regard to 'ouster' clauses, they render the court ineffective and unavailable and, therefore, not able to discharge its duties. This state of affairs cannot be allowed in any democratic state. Hence, the African Commission on Human and Peoples Rights, in its decision on admissibility in the Nigerian cases, *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria*,⁴⁶ said that:

"...ouster clauses render local remedies non-existent, ineffective or illegal. They create a legal situation in which the judiciary can provide no check on the executive branch of government."⁴⁷

Further, the Commission said that:

"Citizens who cannot have recourse to the courts of their country are highly vulnerable to violation of their rights. The nullification of the suits in progress thus constitutes a violation of Article 7(1)(a)."⁴⁸

Section 11(4) of the Malawi Constitution requires the courts to declare invalid any law that takes away its jurisdiction.

7.0 Conclusion

In conclusion, the courts are not subject to any organ of the government. They are subject to the Constitution⁴⁹ to the people of Malawi by virtue of section 12⁵⁰ and by virtue of being courts of record. However, it is observed that the Constitution does make the High Court a court of record. It is submitted that it is an omission which needs to be rectified. The other two arms of government the executive and the legislature are similarly accountable to the Constitution and to the electorate⁵¹. That notwithstanding, their actions are reviewable by the judiciary.

⁴⁵ See above 5-6.

⁴⁶ *Communications Nos. 140/94, 141/94, 145/95, Kigali (Rwanda), 15th November, 1999, in IHRR, vol. 8 no. 1 (2001), 218-224. (Nigerian Cases)*

⁴⁷ *Nigerian Cases*, 221.

⁴⁸ *Nigerian Cases*, 222, 33. Article 7 ACHPR guarantees the right to fair trial.

⁴⁹ See section 4 of the constitution.

⁵⁰ Malawi Constitution, Act 20 of 1994. section 12(i)

⁵¹ See section 12 above.