
**THE REPUBLIC OF MALAWI**

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CONCEPT PAPER ONE.

# THE FUNDAMENTAL VALUES OF THE REPUBLIC OF MALAWI CONSTITUTION OF 1994.

by
DR. MSAIWALE CHIGAWA
University of Malawi, Faculty of law.

## PART ONE.

### HISTORICAL OVERVIEW UP TO 1994.

#### I. The Colonial Period

Malawi became an independent state on 6th July 1964. Before that time, the country was a British Protectorate that was proclaimed by the Colonial Office in London on 14 May 1891.[1] Between that time and 1907 the country was called British Central Africa. At that time, the country's constitutional order was based upon the Africa Order-in-Council of 1889.[2] However, on 11 August 1902, a new and separate constitution for British Central Africa came into force. This was the British Central Africa Order-in-Council of 1902, and for all practical purposes, it was the first written constitution for this country.[3] The most important feature of this constitution is that it embodied the essence of the concept of

[1] The Proclamation was published in the London *Gazette* of 14 May 1891.
[2] See s.28 of the British Central Africa Order-in-Council, 1902 which repelled the Africa Orders-in-Council; including the 1889 one.
[3] See s.1 of the BCA Order-in-Council which defines the territorial limits of the Protectorate.

separation of powers. It created, for the first time, an "administration" headed by the Commissioner and a "Court of Record" or High Court.[4] The High Court had "full jurisdiction, civil and criminal, over all persons and over all matters in the Protectorate".[5] However, the enactment of laws or " "Ordinances" was left within the powers of the Commissioner. In order to reflect the colonial status of the territory, the Commissioner had, in passing legislation for the Protectorate, to observe any special or general instructions of the Secretary of State for the Colonies in London.

There were no provisions in this constitution relating to human rights and fundamental freedoms.[6] Nevertheless, the constitution required that in making ordinances, "the Commissioner shall respect existing native laws and customs except so far as the same may be opposed to justice or morality".[7]

The next stage in constitutional development came in 1907 when the Nyasaland Order-in-Council was adopted.[8] Under this constitution, the name for the protectorate changed form British Central Africa to Nyasaland.[9] The concept of the separation of powers was carried a step further with the creation of a Legislative Council consisting of the Governor and at least two other persons. This body was given power to legislate for the Protectorate. However, in doing so, it had to observe any conditions, provisions and limitations prescribed by any instrument under His Majesty's Sign Manual and Signet. Moreover, the Governor was given the right of veto in the making and passing of such Ordinances. Professor Kadzamira has this comment to make on these constitutional developments-

> "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 practically hand-picked by him. Thus the legislature was subordinate to the governor and enacted legislation only on his instructions. In theory, the legislature had "power to make ordinances for the peace, order and good government of 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 African

[4] See ss.4 and 15 respectively.
[5] S.15(1) of the BCA Order-in-Council, 1902.
[6] See, further, Part Two, section III *infra* for a more detailed discussion on human rights.
[7] S.12 (3) of the BCA Order-in-Council, 1902.
[8] The first and main Nyasaland. Order-in-Council was adopted on 6 July 1907. There was another one, the Nyasaland Order-in-Council (No.2) which was adopted on 21 December 1907 and clarified the law to be applied by the courts in the Protectorate.
[9] See, the Preamble to the Order-in-Council of 1907.

opinion on various matters the governor relied officially on his administrative officers (district commissioners) and unofficially on the missionaries".[10]

The size of the legislative council increased over the years. By June 1955, there were a total of twenty-two members of the legislative council consisting of eleven officials and a further eleven un-officials. However, apart from minor constitutional amendments and changes in representation, the constitutional order of 1907 remained intact up to 1961. In that year, the Lancaster House Constitutional Conference gave Nyasaland a responsible government. This paved the way for eventual self–government in February 1963 and independence from the United Kingdom on 6th July 1964.

## II. The Period Between 1964 and 1966

At Independence, a constitution of 1964 retained the three organs of the state, namely; the executive, the legislature and the judiciary. However, the Head of State remained the Queen of England but the executive organ was headed by the Prime Minister.[11] It should be noted that one of the most important features of this constitution is that it contained a comprehensive Bill of Rights.[12] This guaranteed not only human rights and fundamental freedoms for all the people in Malawi, but also ensured a form of limited exercise of governmental authority on the part of the executive organ.

In July 1965, the Prime Minister announced that Malawi would become a republic in 1966. He appointed a Constitutional Committee which came up with draft proposals for the next stage of constitutional development.[13] These constitutional proposals were based on three primary considerations. The first one was that in African traditional systems, it was not usual to have one leader with purely formal and ceremonial powers and another leader with real executive authority. This meant, in effect, that the new constitution would vest the powers of head of State and Head of Government in one person. The result would be that the British crown would cease to be the Head of State in Malawi. The second consideration was that an elected executive president would strengthen the democratic and representative nature of the government of Malawi. The third one concerned the need for a strong

[10] Z.D. Kadzamira, "Constitutional changes in Malawi 1891-1965: A Brief Survey"
[11] See s.59 of the Constitution of 1964.
[12] See ss.11-27 of the Constitution of 1964.
[13] The Committee was chaired by Mr Aleke K Banda, then a close political ally of Dr. Hastings Kamuzu Banda, then Prime Minister of Malawi. However, the two men were not related by blood.

executive leader who should have such constitutional powers to ensure unity and stability in Malawi. The Committee stated the principle as follows:-

> "There is a need in a country comparatively underdeveloped and inexperienced in nation-hood for a form of government which will afford the necessary degree of unity, resolution and stability to permit the maximum fulfillment of the country's human and physical resources in the shortest period of time."[14]

The Committee further recommended that the republican constitution should not contain any Bill of Rights. It was observed that constitutional provisions on human rights and fundamental freedoms tend to generate conflict and tension between the executive and the judiciary.

The draft proposals for the republican constitution were presented to, and adopted by, the Annual Convention of the Malawi Congress Party in October 1965. They became a frame-work for a constitutional order that would remain in force for nearly a generation to come.

## III. The Period between 1966 and 1994.

On 6th July 1966, a new Republican Constitution came into force. It retained the three organs of the state – the Executive, the Legislature and the Judiciary. However, the main theme that runs throughout this constitution is that of strong executive authority that is vested in the president on the one hand and the monopoly of political control by the Malawi Congress Party on the other. The terms of s.8 of the Constitution of 1966 are as follows-

(1) There shall be a president who shall be the Head of State, the supreme executive authority of the Republic and Commander In-chief of the Armed Forces.

(2) The President shall, subject to this Constitution, have power

- (a) to constitute offices for the Republic, make appointments to any such office and terminate any such appointment
- (b) to appoint, accredit, receive and recognize ambassadors and other diplomatic officers, consuls and other agents
- (c) to confer honours and decorations
- (d) to exercise the prerogative of mercy, and

[14] See, Proposals for the republican Constitution of Malawi (White paper 002, 1966) (Zomba: Government Printer, 1966), p.3 .

(e) generally to exercise all such other functions as are by this constitution or by any Act of Parliament conferred upon or vested in the President.

(3) Except as may otherwise be provided by an Act of Parliament, in the exercise of his functions the President shall act in his own discretion and shall not be obliged to follow advice tendered by any other person."

The first president is specifically mentioned in the constitution and his tenure of office is also specified. The terms of S.9 of the Constitution of 1966 are as follows-

> "9. The first President, having been duly elected to that office in accordance with the elections of the First President of the Republic Act, 1966, shall be Ngwazi Dr. H. Kamuzu Banda, who shall hold the office of President for his lifetime".[15]

The Malawi Congress Party is specifically stated to be the only national party in the country.[16] This meant in effect, that all political activity had to be conducted within the framework and discipline of the Malawi Congress Party. In addition to being state President, Dr. Banda was also life President of the Malawi Congress Party. Throughout the period under consideration, Dr. Banda insisted and emphasized the fact that the Annual Convention of the Malawi Congress Party was the "Primary" parliament in Malawi. This meant, in effect, that the decisions and resolutions that were made by the Party took precedence over those of the National Assembly. This was confirmed by the fact that a number of legislative enactments, including the 1966 constitution itself, had their origins from Final Resolutions of the Party.

The net result of this constitutional order was to compromise, or even, obliterate, a number of fundamental values of constitutional law. The values that are associated with the concepts of limited and responsible government were seriously compromised by the absolute authority of Dr. Banda. Likewise, such values as respect for human rights or transparency and accountability were either non-existent in practice or strictly controlled by the President and his party. The following discussion demonstrates the various ways in which the constitutional law of the time was used to consolidate presidential powers and to place the office of the President above all the other organs of the state.

[15] See s.25 of the Constitution of 1966.
[16] See s.4(2) of the Constitution of 1966.

**A. The President and Cabinet Ministers.**

The Constitution of 1966 made provision for a cabinet consisting of the President and such Ministers as may from time to time be appointed by the President. The terms of s.53 are as follows –

> 53 (1) There shall be a Cabinet of Ministers as may from time to time be appointed as members of the Cabinet by the President.
>
> (2) The Cabinet shall be responsible for advising the President with respect to the policies of the Government and with respect to such other matters as may be referred to it by the President.
>
> (3) The Cabinet shall be collectively responsible to Parliament for all things done by or under the authority of any Minister in the execution of his office.

The President was also given power to assign to himself any cabinet post under s.54, which is in the following terms –

> 54. The President may, by direction in writing, assign to himself or any Minister or any Deputy Minister responsibility for any business of the Government, including the administration of any department of the Government.

The combined legal effect of s.53(2) and s.8(3) of the constitution was that Dr. Banda had a final say on all decisions that were made by the cabinet. The role of cabinet ministers was simply to advise him on the policies that had to be followed by the government. In making his decision on any such policy, he was not bound to follow the advice of any other Cabinet Minister.[17] This meant, in effect that Dr. Banda was above all other Cabinet Ministers in the decision making process. This was not entirely consistent with the concept of limited government that is based on collective responsibility. It meant in effect that every Cabinet Minister had to support the decision of the President even if he had different and opposing views on the matter.

It is also important to note that under the constitutional authority of s.54 cited above, Dr. Banda used to assign to himself virtually all the key ministries in the cabinet. This is demonstrated by the fact that for a considerable period of time, he was his own Minister of External Affairs; Minister of Justice; Ministe4r responsible for land matters; Minister of Agriculture; Minister of Works and Suppliers; and later on

[17] This point was confirmed by Messrs, Louis Chimango, Robson Chirwa and Edward Bwanali when they testified in *DPP v Dr Banda et al*, Crim. Appeal No.21 of 1995, MSCA (unrep) at p.16 of the judgment. The three men were some of the closest cabinet ministers of Dr Banda.

Minister of Women and Children Affairs. The policies and decisions that had to be followed in these Ministries had to accord with the personal wishes of Dr. Banda himself. Moreover, under the principle of collective responsibility, every other Minister had no other choice but to support the relevant policies and decisions. It is not entirely clear whether or not this kind of constitutional order was always in the national interest of all Malawians.

**B. The President and the National Assembly.**

It is quite arguable that during the period under discussion the National Assembly (or legislature) was subordinate not only to the Executive, but also to the Malawi Congress Party. In terms of constitutional law, this was reflected in a number of ways. Firstly, the President was given power to appoint the Speaker of the National Assembly as well as to dismiss him.[18] This, in effect meant that the head of the legislative organ of the state held his office at the pleasure of the President. Secondly, the President could appoint, as nominated members of the National Assembly, as many persons as he liked. These people held their office at the exclusive pleasure of the President. He had constitutional powers to direct that any such member should vacate his seat in the National Assembly.[19] Thirdly, all members of the legislature had to be members of the Malawi Congress Party.[20] If a member of parliament ceased to be a member of the party, he was required to vacate his seat in the National Assembly.[21] Fourthly, all members of the Assembly were required to support the President on a motion of confidence in the Government that may be tabled in the Assembly. Any member that voted against the President on any such motion was required to vacate his seat as a Member of the House.[22] Finally, the President had constitutional powers to dissolve the National Assembly at anytime.[23] He could also dissolve it if it passed a resolution that it had no confidence in the government.[24]

These wide-ranging powers of the President in relation to the National Assembly were not entirely consistent with certain fundamental values of constitutional law. The concept of checks and balances between the Executive organ and the Legislative organ could not be guaranteed. In practice, it was virtually non-existent. Executive proposals, including Bills and Motions, had either to be supported or the

[18] See s.25 of the Constitution of 1966.
[19] See s.28 (2) (i) of the Constitution of 1966.
[20] See s.23 (d) of the Constitution of 1966.
[21] See s.28 (2)(h) of the Constitution of 1966.
[22] See s.28 (2)(f) of the Constitution of 1966.
[23] See s.45 (2) of the Constitution of 1966.
[24] See s.45(4) of the Constitution of 1966

member risked losing his parliamentary seat. It is hardly possible to conclude that there was any form of limited government in Malawi under this kind of constitutional order.

### C. The President and the Judiciary

The Judiciary was completely subordinate to the executive during the entire period of one party rule. The head of the judiciary is the Chief Justice. Under the terms of s.63 (1) of the constitution of 1966, the President had exclusive mandate to appoint the Chief Justice. All other judges were appointed by the President after consultation with the Judicial Service Commission. This meant, in effect, that the President had constitutional powers to influence the composition of the courts of Justice in Malawi.

The superior power of the President over the judiciary is especially reflected in the constitutional provisions relating to tenure of office for judges, including the Chief Justice. The terms of s.64(3) are as follows –

> "s.64 (3) A person holding the office of Judge may be removed from office only
>
> (a) for misbehavior, or
> (b) for incompetence in the performance of the duties of his office, or
> (c) where the President considers it desirable in the public interest to remove him from such office,
> (d) and shall be so removed by the President by an instrument under the Public Seal"

The fact that the President had constitutional powers to dismiss any judge "where he considers it desirable in the public interest to remove him" left no doubt whatsoever about the overriding power and discretion of the president *vis a vis* the judiciary. The tenure of office for judges was at the pleasure of the President. Under these circumstances, it is very unlikely that any judge would do anything or make any ruling that would seriously compromise his position before the executive organ of the state.

In practice, however, the formal (or common law) courts were completely sidelined by the executive in general and the president in particular. As from 1969 onwards, the criminal jurisdiction of the customary courts was increased considerably. These courts (renamed Traditional Courts)[25] had statutory powers to hear and determine cases involving capital punishment such as treason, rape and murder. Almost all

[25] See the Traditional Courts Act, cap. 3:03 of the Laws of Malawi.

the major treason cases of the time were heard by these traditional courts. A number of these cases, such as *Rep v. Muwalo et al*[26] and *Chirwa et al v. Rep*[27] ended up in convictions being secured by the state and capital punishment being pronounced. It must be emphasized that these courts were presided over by traditional authorities. These were appointed by the Minister responsible for justice (in practice, the President himself). They were also removable from office by the Minister. It is fairly clear from this constitutional and statutory arrangement that the tentacles of executive authority had, in practice, no limits whatsoever. The President was clearly over and above the other organs of the state, including the Judiciary. It can be argued that this arrangement was not entirely compatible with some fundamental elements of constitutional law; such as those relating to separation of powers and the rule of law.

[26] See *Rep. v Muwalo et al,* Crim. Case No.1 of 1977, SRTC, (unrep).
[27] See *Chirwa et al v Rep.,* Crim Appeal No.5 of 1983; NTAC (unrep).

PART TWO.

## FUNDAMENTAL VALUES OF THE CONSTITUTION OF 1994

### I. Introduction

The period after 1993 witnessed unprecedented changes in the political and constitutional developments of this country. On 14 June 1993, a national referendum was held to determine the political future of Malawi. The majority of the electorate rejected the one party state and voted for a multiparty system of government. This, in effect, meant that the Malawi Congress Party lost the monopoly over political authority that it had enjoyed virtually unchallenged since the general elections of August, 1961. The constitution was amended so as to bring in a comprehensive Bill of Rights that had been rejected in 1966.[28] Presidential powers were also greatly reduced. For instance, the institution of "Life President" for Dr. Banda was removed from the constitution. Likewise, a number of other controversial laws were either repealed or amended. These included the Forfeiture Act,[29] the Decency in Dress Act,[30] the Preservation of Public Security Act,[31] and those sections of the Penal Code that proscribed the Jehovah's Witnesses Sect.[32] The entire process of transition from one party rule to multi-party democracy was overseen and managed by two un-elected bodies: The National Consultative Council (NCC) and the National Executive Committee (NEC).[33] The NCC and the NEC were given powers of legislation and administration respectively. All the emerging political parties that were registered under the Political Parties (Registration and Regulation) Act of 1993 were represented in both these bodies. The NCC and the NEC were established under the National Consultative Council Act of 1993. The NCC was mandated, under s.5 of the new Act, to prepare a draft of a new constitution that is suitable to a multi-party democracy. This was, in effect, a repudiation of the constitutional order that had been in place since 1966. A Constitutional sub-Committee of the NCC, whose members were drawn from the various political parties on the council, undertook the task of drafting the new constitution of the

[28] See Constitutional (Amendment) (No.3) Act of 1993. See further, Jande Banda, "The Constitutional Change Debate of 1993-1955" in Kings M Phiri and Kenneth R Ross (eds), *Democratization in Malawi: A Stocktaking* (Blantyre: CLAIM, 1998) p.316 *et seq*.
[29] Cap. 14:06 of the Laws of Malawi; repealed by Act No.22 of 1993.
[30] Cap. 7:04 of the Laws of Malawi; repealed in 1993.
[31] Cap. 14:02 of the Laws of Malawi. This was not repealed as such. However, substantial amendments to the law were made in 1993.
[32] See s.64(2)(ii) of the Penal Code, cap. 7:01 of the Laws of Malawi; and G.N. No. 235 of 1967/127 of 1969 entitled "Unlawful Societies Order" under which the sect was proscribed. This order was repealed in 1993.
[33] See, Jande Banda, "Constitutional Change Debate of 1993-1995" in Phiri and Ross (eds) *op cit* at p.321.

country. The transition period, in so far as it relates to the constitution, is best summarized by Prof. Mutharika as follows –

> "On 17 May 1995 the Malawi National Assembly adopted a democratic constitution. In terms of Malawi's post–colonial history, the adoption of the constitution was an unprecedented event. For a period of 30 years, Malawi had been subjected to a one-party dictatorship led by Dr. Hastings Kamuzu Banda. Supported over the years by the West because of its anti–communist rhetoric, the Banda regime found itself abandoned with the ending of the cold war and the collapse of apartheid in South Africa. Pressure from internal and external groups led to a referendum on the one-party state in June 1993 which the Banda regime lost and to the first multi-party elections in May 1994 which the regime also lost. A day before the 1994 elections, the Malawi National Assembly adopted a Provisional Constitution for a period of 12 months. Pursuant to s.212 of the Provisional Constitution, the National Constitutional Conference was held in February 1995 for the purpose of making recommendations to the National Assembly on a permanent constitution. Rather than replace or repeal the Provisional Constitution, the National Assembly decided in April 1995 to make modest amendments to it in order to address some of the more blatant deficiencies that were identified in the Constitutional Conference. During the coming years the Law Commission will make a detailed study of the entire document, make recommendations to the Minister of Justice and it is hoped, address some of the obvious drafting oversights."[34]

It is against this background of periodic constitutional review that the current constitutional conference is arranged and held in 2006. However, it should be noted and emphasized that the constitution of 1994, unlike that of 1966, embodies a number of fundamental values. These values must be continued in the next phase of constitutional development if the young and fledgling democracy in this country is to be sustained. They include the principle of the supremacy of the constitution. Under this value, no single person or organ of state is above the law. All are equal and bound by the same law. Other values include those of the rule of law, respect for human rights and fundamental freedoms, transparency and accountability by state officials and periodic and genuine elections. These values are best summarized under the terms of s.12 of the constitution as follows –

> "12. This Constitution is founded upon the following underlying principles -
>
> (i) all legal and political authority of the State derives from the people of Malawi and shall be exercised in accordance with this Constitution solely to serve and protect their interests;
>
> (ii) all persons responsible for the exercise of powers of state 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;

[34] See A. Peter Mutharika "The 1995 Democratic Constitution of Malawi" [1996] *Journal of African Law*, p.205.

(iii) the authority to exercise power of state is conditional upon the sustained trust of the people of Malawi and that trust can only be maintained through open, accountable and transparent government and informed democratic choice;

(iv) the inherent dignity and worth of each human being requires that the state and all persons shall recognize 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."

These values and principles have received judicial approval in a number of cases since 1994, and more recently in *ex parte Chilumpha.*[35] In this case, the First Vice-President of Malawi was removed from office by a letter signed by the State President. The letter stated that the President had accepted the constructive resignation of the First Vice-President since, among other things, he had stopped performing his duties since May last year (2005). The First Vice-President sought leave for judicial review of this Presidential letter dated 8 February 2006. This was granted by the court but the question was whether or not the said letter was still effective. The court said –

> "If, therefore, it is by the Constitution and the laws under it that the Applicant came into the office of first vice-president of Malawi, and as of now he has already secured the court's ear and hear and determine a dispute in which the president say he (the Applicant) has resigned from office, while the Applicant himself says the president is in fact unconstitutionally removing him from office by employing language that is meant to disguise that fact, and if indeed per section 12 (vi) of the Constitution Malawi is governed under the Rule of Law, where nobody and no institution is above the law, then I wonder what compelling reason there would be to disable this court from, according to the law, granting or extending an injunction against the implementation of the decision of the President that disturbs the status quo, until the said decision is effectively judicially resolved as per the mandate of the judiciary under sections 9 and 11 of the Constitution."[36]

It is therefore quite pertinent to discuss and analyse the essence and scope of these constitutional values. The logical starting point is the supremacy of the Constitution itself.

[35] Misc. Civil Cause No. 22 of 2006, H.C., (unrep).
[36] *Ex parte Chilumpha*, Misc Civil Cause No. 22 of 2006, HC (unrep), at p.27 of the judgment of 1 March 2006.

## II. Supremacy of the Constitution

This is probably the most important fundamental value of the Constitution of 1994. This supremacy is reflected in the Constitution as follows –

> "4. This Constitution shall bind all executive, legislative and judicial organs of the state at all levels of government and all the peoples 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."

The issue of constitutional supremacy over executive actions as well as legislative enactments has come before the courts of law in a number of cases. The general rule, which has been endorsed by the courts, is that executive decisions and actions must conform to the stipulations of the Constitution. Likewise, the courts have endorsed the principle that legislative procedures and enactments that are contrary to the Constitution are void.[37] The following few cases, which are cited by way of example only, illustrate the fact that all the organs of the state, including the executive, are subordinate to, and bound by, the Constitution as the supreme law of the land.

The first case is that of *Attorney General v Lunguzi et al*[38]. This case is authority for the proposition that the Executive organ of the state is bound to observe the provisions of the Constitution in making its political or administrative decisions. The facts were that Mr Lunguzi (the respondent) was appointed Inspector-General of Police on 27 April 1990 after serving in the Malawi Police Force for twenty-five years. On 24 May 1994, one week after the presidential elections in which Dr Banda lost political power, the new president, Mr Bakili Muluzi, verbally informed the respondent that he was being removed from his post as head of the police force. He was also told that he is being appointed a diplomat to be accredited to Canada. No reasons were given by the President for removing the respondent from his post as is required by s.43 of

[37] See, *Malawi Congress Party et al v Attorney General et al*, Civil Cause No. 2074 of 1995, HC (unrep). In this case, a High Court judge declared the Press Trust (Reconstruction) Act of 1994 null and void. The reasons were two fold – firstly in enacting this particular law, the legislature had not followed the necessary constitutional procedures; secondly, the law itself was contrary to s.28 of the Constitution of 1994 which guarantees the right to property. See, further, the discussion in section iv below.

[38] Civil Appeal No. 23 of 1994, MSCA (unrep) Judgment of 15 April 1996.

the Constitution of 1994. The trial court held that the respondent's removal from his post was unconstitutional. On appeal by the Attorney-General, the Supreme Court said –

> "To sum up, therefore, by failing, to give reasons for Mr Lunguzi's removal from his post as Inspector General of Police, the State President acted unconstitutionally since he violated the provisions of s.43 of the Constitution. As the trial judge quite properly observed, s.43 does nothing more than restate principles of natural justice that a man shall not be condemned unheard. … Just as Mkandawire J concluded, we too hold that the President acted unconstitutionally in removing the respondent from his post without giving reasons in writing."[39]

Never before was such a ruling made by the judiciary against the executive arm of the state. Apart from the issue of constitutional supremacy and the rule of law, this decision demonstrates the fact that the courts have now acquired a higher level of judicial independence as compared to the period before 1994. Judges no longer hold their offices at the pleasure of the president. Therefore, in appropriate cases such as the *Lunguzi case,* the courts are able to rule against the unconstitutional exercise of executive authority by the president. The ultimate aim is to defend some higher constitutional values, such as the rule of law or the law that relates to the protection of human rights.

The other case worth considering is that of the *Director of Public Prosecutions v Dr Banda et al* of 1997.[40] The case involved the former Head of State and a number of his close political and security officials. They were jointly charged, on the first count, with conspiracy to murder, contrary to s.227 of the Penal Code.[41] During the course of his long judgment, Chatsika J.A. had to rule on the constitutionality of ss.313 and 314 of the Criminal Procedure and Evidence Code.[42] These provisions required, as a matter of law, the accused to enter his defence upon the close of the prosecutions case. He said –

> "This country adopted a new Constitution in 1994. Generally, a new Constitution tries to improve, where necessary on the provisions of the old Constitution. It tries to remove any evils to society which existed in the old Constitution. In 1968, the Criminal Procedure and Evidence Code removed whatever rights an accused person had at the close of the case for the prosecution. His right to show that the prosecution had failed to make out a case against him sufficiently required him to make a defence and,

[39] *Attorney General v Lunguzi et al* Civil Appeal No. 23 of 1994, MSCA (unrep), at pp.5 and 6 of the Judgment
[40] Crim. Appeal No. 21 of 1995, MSCA (unrep). Judgment of 31 July 1997.
[41] Cap. 7:01 of the Laws of Malawi.
[42] Cap. 8:01 of the Laws of Malawi.

therefore, to remain silent, was removed by statute. He was required immediately after the close of the case for the prosecution to enter upon his defence."[43]

The learned Justice of Appeal went on to quote the terms of s.42 of the Constitution as follows–

> "The Constitution which came into force in May 1994 provides in section 42(2)(f)(iii):
> 42(2)(f)(iii) Every person arrested for or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right –
>
> > to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial."

The learned Justice of Appeal makes further observations as follows –

> "Sections 313 and 314 of the Criminal Procedure and Evidence Code which require an accused person to enter upon his defence immediately after the close of the case for the prosecution and which deny him the right, *inter alia*, to remain silent are in conflict with section 42(2)(f)(iii) of the Constitution. This gives an accused person the right to be presumed innocent and to remain silent during proceedings or trial and not to testify during trial. It is trite [law] that the Constitution is the supreme law of the land."[44]

The court finally concluded, on this issue, as follows –

> "Having found that sections 313 and 314 of the Criminal Procedure and Evidence Code are inconsistent with the provisions of section 42(2)(f)(iii) of the Constitution, it is hereby declared that sections 313 and 314 of the Criminal Procedure and Evidence Code are invalid to the extent of the inconsistency."[45]

It is fairly certain from this case that the supremacy of the Constitution extends to all legislative acts of parliament. Therefore, whatever parliament does must be consistent with the Constitution. Any Act of parliament that is inconsistent with the Constitution may be declared invalid by the courts of law.

## III. Limited Government or the Rule of Law

[43] *DPP v Dr Banda et al,* Crim. App. No. 21 of 1995, MSCA (unrep); at p.20 of the judgment.
[44] *DPP v Dr Banda et al,* Crim App. No. 21 of 1995, MSCA (unrep) at pp. 20-21 of the Judgment.
[45] *DPP v Dr Banda et al,* Crim. App. No. 21 of 1995, MSCA (unrep), at p.21 of the judgment. Chatsika J.A. who prepared and delivered the judgment never even signed it at all. He died of natural causes shortly afterwards

The general theme that runs throughout the Constitution of 1994 is that of limited government or the rule of law. The exercise of executive power is always subject to judicial review. The aim is to ensure that executive discretion is not allowed to override clear constitutional provisions. The concentration of power in the office of one person is no longer a feature of Malawian constitutional law.

The essence of the rule of law is that all citizens must be subject to, and below the power of, the supreme law of the land. It is also a requirement of the rule of law that in the particular country, there must be adequate safeguards against abuse of the rights and interests of the individual. The main elements of this doctrine, therefore, may be summarized as follows–

(a) That no man can be arrested except by the due process of law; thereby showing that the state recognizes the distinction and contrast between regular and arbitrary exercise of power.

(b) The rule of law guarantees equality before the law; all persons are subject to and bound by the same law. In particular, that state officials have no special privileges not possessed by the ordinary individual; nor are they exempt from the jurisdiction of the ordinary courts.

(c) That the Constitution, (where it is written) is part of the ordinary law of the land. This means that it can be amended in response to the changing wishes of the people as easily and by precisely the same legal process as that by which any other law can be enacted.

(d) That the ordinary law of the land must be certain and known to all the ordinary citizens. It must not depend on the whim or discretion of any one individual. Therefore retroactive imposition of rights and obligations is not consistent with a free society in which the rule of law prevails.

(e) That an independent judiciary and a free legal profession are indispensable requirements in a free society under the rule of law. Courts of law should be free to interpret the Constitution and other laws without fear of reprisals or dismissal from office. Likewise, every lawyer must feel himself able to make the best case he can for his client without fear of state intervention or loss of income, status or reputation.[46]

It can be stated that the foregoing elements of the rule of law are well reflected in the Constitution of 1994. The concept of judicial independence is specifically recognized under s.103(1) which is in the following terms –

> "103(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."

[46] See, J.F. Garner, *Administrative Law* (4th Edition) (London: Butterworths, 1974), pp. 17-20.

Likewise, the tenure of office for judges under s.119 of the Constitution has been greatly safeguarded by the process of checks and balances. The executive in general – and the president in particular – has no overriding discretion to dismiss any judge from office. A judge can only be removed from his office only for incompetence in the performance of his duties or for misbehaviour. He cannot be so removed unless and until a motion praying for his removal has been debated upon in the National Assembly and passed by a simple majority of votes of all the members of the house. These safeguards are necessary in a free and democratic society. Courts of law should feel able to interpret the law impartially; even in cases where the executive organ of the state is involved. As custodians of the law, they should be able to issue orders that shock, disturb or offend the executive; if the aim for doing so is to enforce respect for human rights and the rule of law. The recent rulings in the *Nangwale case*[47] and the *Chilumpha case*[48] appear to support the proposition that under the current constitutional order, courts of law have increased judicial independence *vis a vis* the executive organ of the state.

## IV. Respect for Human Rights

The Constitution of 1994 contains a comprehensive Bill of Rights that are enforceable by the courts of law. In interpreting the provisions of the Constitution, the courts are specifically required to take full account of the provisions of the Constitution that relate to human rights.[49] The actual rights and freedoms that are stipulated are quite diverse. They range from civil and political rights to economic, social and cultural rights. There is also scope for the enforcement of 'third generation rights' under s.30 of the Constitution. Although the 'right to development' is quite general under this provision, it specifically includes the right to food, the right to housing, the right to employment and the right to infrastructure such as roads. The values that underlie these rights cannot be overemphasized. These are basic necessities of life and, as the Constitution itself states, "[t]he state has a responsibility to respect the right to development and to justify its policies in accordance with this responsibility."[50] Therefore, it can be stated that, as a general rule, respect for human rights is a fundamental value of the current Malawian constitutional law.

[47] See, *Ex parte Nangwale,* Misc. Civil Cause No. 1 of 2005, HC (LL) (unrep.).
[48] See *Ex parte Chilumpha*, Misc Civil Cause No. 22 of 2006, HC (unrep.).
[49] See, s.11(2)(b) of the Constitution of 1994.
[50] See, s.30(4) of the Constitution.

However, there are certain human rights that are so basic to the survival of democracy and democratic institutions that they deserve some special treatment here. They include the right to equality and non-discrimination,[51] the right to freedom of opinion and expression,[52] the right to acquire and to own property,[53] and the rights that are associated with politics and government.[54]

It is not possible to have peaceful and proper human interaction in a society where one or more of these rights is not respected by those in power. It is therefore necessary to examine the legal provisions relating to these human rights; and to assess the various ways in which courts of law have interpreted them.

### A. Equality and Non-discrimination[55]

The concept of equality of peoples and non-discrimination is so fundamental to human rights law that it is regarded as being opposable *erga omnes*. The reason for this is that whether one views this area of the law in historical or contemporary perspective, a very high degree of violations or non-compliance is perpetrated on the basis of inequality and a firm belief in superiority. Few writers – both lawyers and historians would append reservations to the view that the highly profitable slave trade prior to the twentieth century was burdened on the black race because the slave-holders believed in their own racial superiority. In *Scott v Sandford,*[56] the Supreme Court affirmed the notion of black (or Negro) inferiority and went on to state that slavery was lawful under American constitutional law. More recently, the Nazi holocaust was partly due to the German (i.e Hitlerite) belief in the Aryan or Superior race. It is also said that in many parts of the world, women are often marginalized in many areas of human activity because men believe in their superiority. The same contrast can be made based on a number of other attributes such as language, religion, wealth, tribe or caste.[57] These distinctions are irreconciliable with any real commitment to the law of human rights. This is so because many of these rights attach to a human being by virtue of being human and cannot be alienated by any executive or other measures. An eminent writer summarizes the position as follows –

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[51] See, s.20 of the Constitution.
[52] See, ss.34-37 of the Constitution.
[53] See, s.28 of the Constitution.
[54] See, ss.40 and 77 of the Constitution.
[55] See generally, W. McKean, *Equality and Discrimination under International Law*, (Oxford: Clarendon Press 1983) *passim*.
[56] 19 How. 393; 60 US 691 (1857). (Judgment of 6 March, 1857).
[57] See generally M. Galanta, *Competing Equalities: Law and Backward Classes in India*, (Dehli: OUP, 1984) *passim*; Sieghart, *op cit:* p. 72 *et seq*.

> 'The principle of non-discrimination is fundamental to the concept of human rights. The primary characteristic which distinguishes 'human' rights from other rights is their universality: according to the classical theory, they are said to inhere in every human being by virtue of humanity alone. It must necessarily follow that no particular feature or characteristic attaching to any individual, and which distinguishes him from others, can affect his entitlement to his human rights, whether in degree or in kind, … except where the instruments specifically provide for this for a clear and cogent reason for example in restricting the right to vote to adults, or in requiring special protection for women and children. Strictly, therefore, it should not be necessary to include non-discrimination provisions in human rights instruments, let alone to draw up catalogues of grounds on which it is illegitimate to discriminate between individuals in securing or respecting their entitlement to or their exercise or enjoyment of the universal human rights.'[58]

Inspite of the foregoing observations, virtually all human rights instruments contain specific provisions on equality and non-discrimination. The Universal Declaration of Human Rights of 1948 sets the necessary standards in this area. It affirms the principle of equality before the law and the protection of everyone, without discrimination, by the law. It is further stated that the rights and freedoms enshrined in the Declaration should be accorded to everyone, 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[59] It is important to stress that these attributes are given by way of example only and that discrimination is, as a general rule, prohibited on any other basis.

National and international jurisprudence on the point has consistently affirmed the fact that the principle of equality and non-discrimination is recognized, and its value conceded, throughout the world. In *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970),*[60] the International Court of Justice said that discrimination on the basis of race was a violation of human rights law. The court said –

> '130 It is undisputed, and is amply supported by documents annexed to South Africa's Written statement in these proceedings, that the official governmental policy pursued by

[58] *Ibid,* p.75.
[59] Art. 2.
[60] ICJ Rep. (1971) p.16.

> South Africa in Namibia is to achieve a complete physical separation of races and ethnic groups in separate areas within the Territory...
>
> 131 Under the Charter of the United Nations, the former mandatory had pledged itself to observe and respect, in a territory having an international status, human rights and fundamental freedoms for all without distinction as to race. To establish, instead, and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on groups of race, colour, decent and national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter….'[61]

The above sentiments have been echoed in a number of cases at domestic level. In *Regents of the University of California v Bakke*[62] the court ruled that the Fourteenth Amendment to the American constitution protects not only blacks but also whites from racial discrimination. After analyzing the entire quota system for admission to the university's medical school, the court said –

> "In summary, it is evident that the Davis special admissions program involves the use of an explicit racial classification never before counternanced by this court. It tells applicants who are not Negro, Asian or Chicano that they are totally excluded from a specific percentage of seats in an entering class. No matter how strong their qualifications, quantitative and extra curricular including their own potential for contribution to educational diversity, they are never afforded a chance to compete with applicants from the preferred groups for the special admission seats. At the same time, the preferred applicants have the opportunity to compete for every seat in the class."[63]

In holding that the Davis Medical School's preferential programme was violative of the American Bill of Rights, the Court said –

> 'The fatal flaw in petitioners preferential program is its disregard of individual rights as guaranteed by the fourteenth amendment… which rights are not absolute. But when a state's distribution of benefits or imposition of burdens hinges on ancestry or the colour of a person's skin, that individual is entitled to a demonstration that the challenged classification is necessary to promote a substantial state interest. Petitioner has failed to carry this burden. For this reason, that portion of the California court's judgment holding petitioner's special admission program invalid under the fourteenth amendment must be affirmed.'[64]

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[61] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution* 276 (1970), ICJ Rep. (1971) p.16, para 130 of the Judgment.
[62] 438 US 265 (1978); Judgment of 28 June 1978.
[63] *Regents of the University of California v Bakke*, 438 US 265, at 319 (1978).
[64] *Regents of the University of California v Bakke* 438 US 265 at 320 (1978). The Fourteenth Amendment to the United States Constitution outlaws racial discrimination.

Earlier on in time, the same court had held in *Yick Wo v Hopkins*[65] that covert discrimination against persons of Chinese origin was a violation of the anti-discrimination rule enshrined in the fourteenth amendment to the federal constitution.

Likewise, English courts have held that it is against human rights law and good conscience to assign rights and obligations on the basis of race, colour, sex or language; except where legitimate affirmative action is the ultimate goal. In *Cummings v Birkenhead Corporation,*[66] Lord Denning said –

> "So here if this education authority were to allocate boys to particular schools according to the colour of their hair or for that matter the colour of their skin, it would be so unreasonable, so capricious, so irrelevant to any proper system of education that it would be *ultra vires* altogether and this court would strike it down at once. But if there were valid educational reasons for a policy, as for instance in an area where migrant children were backward in the English tongue and needed special teaching, then it would be perfectly right to allocate those in need to special schools where they would be given extra facilities for learning English. In short if the policy is one which could reasonably be upheld for good educational reasons it is valid. But if it is so unreasonable that no reasonable authority could entertain it, it is invalid.'[67]

Likewise, in *James v Eastleigh Borough Council*[68] the House of Lords held that a council scheme which favoured female pensioners over their male counterparts, without proper justification, was invalid because it was discriminatory on the basis of sex.

The Indian caste system has also given rise to a mass of case law in which the concept of equality and non-discrimination has been in issue. The 1951 Constitution of India recognizes the principle of equality and prohibits discrimination on the basis of several attributes including caste.[69] However, due to centuries of caste subordination and institutionalized neglect in the educational and economic sectors of the country, the lower castes are at a critical disadvantage in society. These people, mainly due to acute poverty and other social factors, are unable to compete effectively with the more advanced sectors of the society, such as those from the upper-class.[70] In the leading case of *Balaji v State of Mysore*[71] the supreme court held that college places may be reserved for those candidates that belong to the backward communities but in doing so the more qualified candidates should be guaranteed equal

[65] 118 US 356 (1886); Judgment of 10 May 1886.
[66] [1972] Ch. 12.
[67] *Cummings v Birkenhead Corporation* [1972] Ch 12 at 37.
[68] [1990] IRLR 288.
[69] *See State of Madras v Dorairajan* [1951]2 SCR 525.
[70] See, Galanter, *op cit passim.*
[71] [1963] Supp. 1 SCR 439; Judgment of 28 September 1962.

access to these educational institutions. This ruling was perfectly consisted with an earlier judgment of the same court in State of *Madras v Dorairajan.*[72]

In this case, it was held that a candidate from the upper class could not necessarily be discriminated against in the selection process to a medical college so as to give way to the candidates from lower class castes. Subsequent cases have followed the principles laid down in the *Balaji* case so that although positive discrimination is lawful under the country's constitutional law, the overriding considerations of equality and non-discrimination entail a delicate balancing of interests between the competing classes of people. In doing so, the court has consistently borne in mind the interests of those candidates that deserve to advance on the basis of their own demonstrated effort. In *Rajendran v State of Madras*,[73] the court annulled a quota system that distributed college places district wise. In so doing the court said –

> "It is true that Article 14 [of the Indian Constitution] does not forbid classification, but the classification has to be justified on the basis of the nexus between the classification and the object to be achieved, even assuming that territorial classification may be a reasonable classification. The fact, however, that the classification by itself is reasonable is not enough to support it unless there is nexus between the classification and the object to be achieved. Therefore, as the object to be achieved in a case of the kind with which we are concerned is to get the best talent for admission to professional colleges, the allocation of seats district wise has no reasonable relation with the object to be achieved.

The court went on to reason as follows –

> "If anything, such allocation will result in many cases in the object being destroyed and if that is so, the classification, even if reasonable would result in discrimination, in as much as better qualified candidates from one district may be rejected while less qualified candidates from other districts may be admitted from either of the two sources."[74]

These observations do confirm the proposition that the legal principle of equality and non-discrimination, particularly its force and value, transcends geographical and cultural barriers in the modern world. It is a rationalization of the fundamental rule that human beings are one and alike, that external attributes such as race, colour, sex, language, tribe or caste have no relevance to the intrinsic value, worth and potential of every person. At a philosophical level, this reasoning is amply fortified by the fact that all

[72] [1951] 2 SCR 525.
[73] [1968] 2 SCR 786; Judgment of 17 January 1968.
[74] *Rejendran v State of Madras* AIR (1968) SC 1012 at 1016 – 1017.

human beings have a common creator and father, and that as such, we should treat each other as brothers and sisters.[75] It is against this wide, global and philosophical background that Malawian constitutional law on the point should be understood. The principles of equality and non-discrimination in the Constitution of 1994 are not unique to this country. They emanate from similar rules in other Bills of Rights at national and international levels. Hence, in line with the legal mandate of the Constitution itself, case law from these other jurisdictions should prove to be of some considerable value in construing particular equality provisions.

It is important to stress the fact that the principle of equality and non-discrimination underlies the whole of the human rights provisions of the Malawian Constitution of 1994. However, the centrepiece of this law is embodied in s.20 which states as follows –

> "20. – (1) Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth or other status.
>
> (2) Legislation may be passed addressing inequality in society and prohibiting discriminatory practices and the propaganda of such practices and may render such practices criminally punishable by the courts."

Under 'Fundamental Principles' of the Constitution, it is stated *inter alia* that –

> "13. The state shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the following goals –
>
> **(a) Gender equality**
>
> To obtain gender equality for women with men through –
>
> (i) full participation of women in all spheres of Malawian society on the basis of equality with men;
> (ii) the implementation of the principles of non-discrimination and such other measures as may be required, and
> (iii) the implementation of policies to address social issues such as domestic violence, security of the person, lack of maternity benefits, economic exploitation and rights to property…"

[75] See, Jerome J. Shestack, 'The Jurisprudence of Human Rights' in Meron, (ed.) op cit, p.76.

The precise meaning of 'equality' and 'non-discrimination' continue to be elusive and obscure in the law of human rights. However, in its Advisory opinion of 10 September 1923 in *German Settlers in Poland*[76] case, the Permanent Court of International Justice said –

> "There must be equality in fact as well as ostensible legal equality in the sense of the absence of discrimination in the words of the law."[77]

This statement was endorsed in a subsequent Advisory Opinion in *Minority Schools in Albania*[78] in 1935. In this judgment, the court said –

> "It is perhaps not easy to define the distinction between the notions of equality in fact and equality in law; nevertheless, it may be said that the former notion excludes the idea of a merely formal equality, that is indeed what the court laid down in its Advisory Opinion of 10 September 1923, concerning the case of the German settlers in Poland." "Equality in law," the court went on to say, "precludes discrimination of any kind whereas equality in fact may involve the necessity of different treatment in order to achieve a result which establishes an equilibrium between different situations."[79]

Therefore, it can be stated that 'equality in law' under s.20 of the Constitution precludes the legislature in Malawi from enacting laws that apply differently or confer different rights and obligations to persons on the basis of their external attributes such as race, sex or tribe. It also imposes a duty on the legislature and the executive to repeal and abrogate all laws that have the effect of treating persons, in like situations, differently. This is indeed the basic rationale for the repeal of those provisions of the law that outlawed the Jehova's Witnesses Sect in this country; as well as those that proscribed the issuing of business licences to persons of Asian origin other than for trading within specified areas of the country's principal urban centres.

It must also be stated that under the present constitutional law, discrimination in law as stated above may not be possible. The provisions of s.5 of the Constitution, which make the Constitution of the Republic supreme over any other law, state as follows –

> "Any act of government or any law that is inconsistent with the provisions of this Constitution shall to the extent of such inconsistence be invalid."[80]

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[76] PCIJ Rep Ser. B, No.6, (1923); Judgment of 10 September 1923.
[77] *Settlers of German Origin in Territory ceded by Germany to Poland*, PCIJ Rep. Ser. B., No.6, (1923) at p.24.
[78] PCIJ Rep. Ser. A/B, No.64 (1935); Judgment of 6 April, 1935.
[79] *Minority Schools in Albania*, PCIJ Rep. Ser. A/B, No.64 (1935), at p.19.
[80] S.5, *See DPP v Dr Banda et al*, Crim. App. No. 21 of 1995, MSCA, (unrep), esp. at p.20 of the judgment.

It follows from this that any legislation that derogates or negates the essence of equality in law cannot be enforced by the courts of law. In *Malawi Congress Party et al v Attorney General et al,*[81] a High Court judge was prepared to hold that the Press Trust (Reconstruction) Act of 1995 was null and void on account of its inconsistence with the Constitution. Although the decision was reversed on appeal, the Supreme Court did not differ with the lower court on the basic reasoning that all enacted laws must be *intra vires* the law as is contained in the Constitution.

The real issue that requires clarification is whether or not customary laws that are discriminatory and therefore inconsistent with the Constitution are null and void to the extent of their inconsistency. It is fairly established in human rights law that the word 'law' includes both written and unwritten law.[82] It is on this basis that in so far as the common law or customary law may be certain and accessible, the courts of law in this country ought to take cognizance of it. Likewise, to the extent that these unwritten laws confer definite rights and obligations, their compatibility with the country's constitution must be determined.

On the crucial issue of gender equality, some of the country's customary laws and practices are not entirely compatible with the constitution. The institution of paying valuable consideration for marriage or dowry is fairly established in some parts of the country. This is done as a matter of law and it has been held by customary courts that patrilineal marriages are not valid unless dowry is paid in full or in part.[83] There is some evidence that suggests that women's rights in these marriages are not always on equal footing with those of men. The female spouse has very limited rights to matrimonial property both during marriage and at its dissolution. She is not entitled to determine the future of her children who are almost always affiliated to the patrilineal clan. In some of these marriages, a women's role in running family affairs is virtually non-existent. As a matter of law, the female spouse must submit to the dictates of her husband or risk expulsion from the matrimonial home. It is not entirely clear whether or not these laws and practices amount to a violation of the equality principle. It is in areas like these that some authoritative decisions of the courts of law are required.

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[81] Civil Cause No. 2074 of 1995, HC (unrep), Judgment of 1 July 1996.
[82] See *Sunday Times v United Kingdom* (Appl. No. 6538 of 1974) 2 EHRR 245, Judgment of 26 April 1979.
[83] See *Tembo v Chirwa*, civ App. Case No. 96 of 1977, NTAC (unrep). See also *Mwangobola v Mwangobola*, Civ App. Case No. 4 of 1980, NTAC (unrep). In the former case, the parties had cohabited for long period of time without regularizing their union by payment of dowry. They bore each other a total of 10 children. The National Traditional Appeal Court held that as dowry was not paid, there had never been any marriage between the parties. In the latter case, the appellant was asked to pay a total of K120.00 dowry for his marriage to the respondent. He made part-payment of K10.00 only. The National Traditional Appeal Court held that this sum was enough to validate the marriage between the parties.

On the other hand, equality in fact gives rise to some different considerations of policy. It is a cardinal principle of human rights law that equality in law should also be reflected in real or normative equality. Where there are clear inequalities between one section of the community and another, it may become necessary to adopt laws or policies on affirmative action.[84] This is presumably in line with the provisions of s.20(2) of the Constitution. Any such laws and practices are not necessarily a negation of the equality principles of the Constitution, the aim is to combat the existing inequality and restore real or normative equality. In the *South-West Africa cases (second phase),*[85] Judge Tanaka accepted this limitation on the prohibition against discrimination in human rights law.

### B. Freedom of Opinion and Expression

The right to freedom of expression, including freedom of opinion and that of the press, is provided for in ss.34 to 37 of the Constitution of 1994. The embodiment of this right in the national constitution removes any doubts that may have existed prior to 1994 as to its scope and status in Malawian constitutional law. Courts of law can now enforce this right as a binding legal rule, without necessarily referring to other legal documents such to the Universal Declaration of Human Rights of 1948.

The right to freedom of expression, or of speech, is widely acknowledged in national and international law. It forms the real basis for a democratic and responsible civil authority. Its development dates as far back as the closing years of the seventeenth century. While not making similar provision for the ordinary citizen on the land, the English Bill of Rights of 1688 provided that 'the freedom of speech and debate or proceedings in Parliament ought not to be impeached or questioned in any court or place out of parliament'.[86] In actual fact, however, courts of law expanded the scope of this right so as to include freedom of opinion and expression by private citizens.

The revolutionary years of the eighteenth century witnessed a further expansion of the right to free speech. The 1791 Bill of Rights in the United States was not so much concerned with the freedom of speech of legislators, it was actually aimed at limiting the power of congress in legislative matters that

[84] See *United Steel Workers of America v Weber*, 443 US 193 (1979); Judgment of 27 June 1979. There is also *dicta* to this effect in *Attorney General et al v Malawi Congress Party et al* Civ App. No. 22 of 1996, MSCA, (unrep); Judgment of 31 January 1997.
[85] ICJ Rep. (1966) p.6 Judge Tanaka delivered a dissenting opinion. The court did not rule on the merits of the case because it held that the parties (Ethiopia and Liberia) had no *locus standi*.
[86] Bill of Rights, 1688, quoted in Sieghart, *op cit* p.330

would stifle free speech on the part of the citizen.[87] The First Amendment stated that 'Congress shall make no law… abridging the freedom of speech, or of the press'. Further refinements of the formulation of this right was made in France following the Revolution of 1789. In the Declaration *des droits de l'homme et du citoyen* of that year, it was states as follows –

> 'The unrestrained communication of thoughts or opinions being one of the most precious rights of man, every citizen may speak, write and publish freely, provided he be responsible for the abuse of this liberty, in the cases determined by law.'[88]

The continued adoption of Bills of Rights throughout the world meant that freedom of expression, as a constitutional right, could be claimed by more people than was originally, envisaged.

The rise of international human rights law in the twentieth century resulted in the codification of the right in international treaties. Both the Universal Declaration of Human Rights of 1948 and the International Covenant on Civil and Political Rights of 1966 have provisions on the right to freedom of expression. The terms of Article 19 of the Covenant are quite representative of the exact scope and limitations of this right in modern international and constitutional legislation. This provision is in the following terms –

> "19 (1) Everyone shall have the right to hold opinions without interference
>
> (2) Everyone shall have the right to freedom of expression. This right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> (3) The exercise of the right provided for in paragraph 2 of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary.
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (*ordre public*), or of public health or morals."[89]

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[87] See First Amendment to the US Constitution of 1787. It provides as follows –
"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." This Amendment was adopted in 1791.

[88] Quoted in *Sieghart, op cit,* p.330.

[89] See I. Brownlie, *Basic Documents in International Law,* (Oxford: Clarendon Press 1983) p.279.

The available case-law on the point is uniforms in affirming the importance of this right. In *Handyside v United Kingdom*[90] the court stated that freedom of expression includes receiving and imparting information or ideas that offend, shock or disturb the state or any sector of the population. In *Sunday Times v United Kingdom,*[91] it was observed that the mass media have the task of informing the public on any issue of interest, and the public has a right to receive any such information without undue restrictions.

The Malawian law on this issue is without any special restrictions. However, the general limitation clauses in s.44 (2) and (3) are arguably relevant to this right. It is provided here that:

> " (2) … no restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law, which are reasonable, recognized, by international human rights standards and necessary in an open and democratic society.
>
> (3) Laws prescribing restrictions or limitations shall not negate the essential content of the right or freedom in question, and shall be of general application."

It is therefore quite arguable that in view of these constitutional provisions, and the high level of debate and candid publication of issues in the country since 1993, it is not entirely easy for the legislature to pass a law, or if passed to enforce any such law, that would 'negate the essential content of the right or freedom' of expression. It is for this reason that an amendment to s.5 of the Printed Publication Act[92] failed to receive the necessary presidential assent because it threatened to erode free speech in the country.[93] Even under the previous legal order prior to 1994, it was generally accepted by the courts of law that freedom to think and hold opinion was not proscribed by any law in Malawi.[94] Likewise, in *Chihana v Rep*[95] the court stated that people in Malawi were free to speak on any issue or any policy of

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[90] 1 EHRR 737. See also *Brind v SOS Home Department* [1991]1 AllER 720.
[91] 2 EHRR 245 See also *Derbyshire CC v Times* [1992]3 AllER 65.
[92] Cap 19:01 of the Laws of Malawi.
[93] The Material amendments to s.5 of the Act were as follows:-

> " (2) No person shall print or publish or cause to be printed or published any newspaper unless the full and correct names of every person who is the proprietor, editor, printer and publisher of such newspaper are printed and on every published copy, issue or edition of such newspaper.
>
> (3) Any person who contravenes this section shall be guilty of an offence and liable to a fine of K20,000 and imprisonment for two years."

The main argument against its adoption was that this requirement would threaten newspaper owners, editors and publishers from publishing stories that may be critical of certain aspects of government policy or certain behavioural traits of government officials, including the state president.
[94] See *DPP v McLuckie* [1971-72] MLR 301.
[95] Crim. App. Cas. No. 9 of 1992, MSCA, (unrep).

the government in line with the requirements of free expression. It can therefore be stated that the right to freedom of opinion and expression has strong foundations both in legal provisions and judicial pronouncements.

However, it is already evident that reasonable restrictions may be placed on the exercise of this right, in line with s.44(2) of the Constitution, and through it, article 19(3) of the International Covenant on Civil and Political Rights. In *Chihana v Rep*[96] itself, the court observed that the appellant had gone beyond fair comment and criticism in his written condemnation of the government and its policies. His conviction for sedition was therefore upheld.[97] In *Attorney General v The Editor of the Malawian Newspaper et al*[98] the court issued an injunction against the defendants. In his originating summons, the applicant contended that the continued publication of the photograph which portrayed the State President (Mr E.B. Muluzi) as a prisoner was calculated to insult and ridicule him.[99] This was possibly contrary to respect for the rights and reputations of others. Likewise, in *Mwaungulu v Malawi News et al*[100] the court held that the press had exceeded the proper limits of press freedom by alleging that the judiciary was heavily dominated by elite from the Northern region. In another land mark case, the court stated that it was not fair comment to allege that a cabinet minister was corrupt, that he had corruptly obtained MK20,000,000 by virtue of his official cabinet post.[101] These may be clear cases of transgressing the proper limits of the right to free speech and publication. However, it is always important to ensure that the courts of law are seen to protect free speech and not going further than is

[96] Crim. App. Cas No. 9 of 1992, MSCA, (nrep).

[97] However, his sentence was reduced because the court noted that public opinion towards the political system in the country had changed since his original conviction. Subsequently, Mr Chihana served as second Vice President of Malawi in the coalition government of his Alliance for Democracy and the United Democratic Front led by Mr B Muluzi. See *Dr Mkandawire et al v Attorney-General* Misc Civ. Cause no. 49 of 1996, HC (unrep), Judgment of 14 January 1997.

[98] Misc Civ. Cause No. 16 of 1994, HC (LL), (unrep), Order of 21 July 1994.

[99] In his originating summons, the Attorney-General averred, *inter alia* as follows –

> "(a) The action taken by the defendants in publishing the picture of the president as a prisoner in the Malawian newspaper of 20th July 1994 on the basis that the same will be used for a competition is unlawful as it is calculated or liable to insult, ridicule or disrespect the president and is, therefore, contrary to section 4 of the Protected Flag, Emblems and Names Act."

It is alleged that in or about 1968, Mr EB Muluzi stole government money amounting to £6.10d when he was working as a court clerk at Msinja Traditional court in Lilongwe district. He was brought before a court of law, convicted of theft by public servant and jailed for six months. These facts were admitted by Mr W Nakanga when he was Minister of Justice and Attorney-General in the UDF Government. See, Malawian, Tuesday, 18 October 1994, p.2 HE Dr Bakili Muluzi was inaugurated State President in May 1994. He is of Islamic faith, married to two wives and has several children.

[100] See, *Mwaungulu v Malawi News et al*, Civ Cause No. 518 of 1994, HC, (unrep).

[101] See *Mpasu v The Democrat et al*, Civil Cause No. 124 of 1995, HC, (unrep); Judgment of 14 July 1997.

absolutely necessary to control or limit the exercise of this right. This is particularly so in cases affecting press freedom under s.36 of the Constitution.

### C. Acquisition and Ownership of Property.

The right to acquire property is enshrined in s.28 of the Constitution of 1994 which states as follows:-

> "28. (1) Every person shall be able to acquire property alone or in association with others.
>
> (2) No person shall be arbitrarily deprived of property."[102]

Historically, this is one of the most important rights of an individual. Acquisition of property and its subsequent ownership or enjoyment is an intrinsic attribute of humanity. It is one of the distinguishing characteristics between a rational human being and other non-rational creatures inhabiting this earth. It has been even stated that one of the reasons for the formation of the modern state was that the central authorities should safeguard and protect private property.[103] More recently, the United States Declaration of Independence identified 'life, liberty and pursuit of happiness' as some of the intrinsic and inalienable rights of man.[104] It is therefore hardly surprising to note that the development of modern international and domestic human rights law has maintained the traditional focus on the acquisition and enjoyment of private property. It is for this reason that any government that does not respect private property breaches not only its own international commitments and national legislation in the area of human rights but also risks losing popular legitimacy and its hold on office. This is indeed true for those that are, for the time being, exercising executive authority in a number of African countries such as Malawi.

The right to acquire and to enjoy one's property has not always been adequately protected in Malawi. This is indeed true whether the issue is approached from a legal point of view or from the parallel executive action. The provisions of the Forfeiture Act[105] had the effect of negating the right to own

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[102] See *Mwenyedawa et al v Astaldi Malawi JV*, Civil Cause No. 1928 of 1997, HC (unrep). See also *Dr Banda v Attorney General*, Civ Cause No. 1830 of 1997, HC (unrep).
[103] See Jerome 'The Jurisprudence of Human Rights' in Meron (ed.), *op cit* p.78.
[104] The Declaration stated, in part, as follows –
"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness."
The Declaration was drafted by Thomas Jefferson and adopted by the Continental Congress in Philadelphia on 4 July 1776.
[105] Cap 14:06 of the Laws of Malawi.

property, which was expressly recognized under the Constitution of 1966 itself. The Act made provision for the seizure of the property of any person whose conduct was viewed as being prejudicial to public security or the national economy. In reality, however, the majority of the victims under this law were those persons that did not agree with the political ideas of Dr Banda and his Malawi Congress Party.[106] It has been stated that most of those that had their property seized were Asian traders and that this move was racially as well as politically motivated. It is for this reason that the credibility of Dr Banda's government suffered considerably, especially at international level, because it was allegedly perceived as neglecting or failing to fulfil its mandate under the Constitution then in force.

The present constitutional law on the right to property has already been examined by the courts of law in *Malawi Congress Party et al v Attorney General et al.*[107] The main issue in this case was the constitutional validity and legal effect of the Press Trust (Reconstruction) Act of 1995. This Act was passed without following the necessary constitutional and parliamentary procedures. For instance, there was no requisite majority in the National Assembly when the Bill was being debated. At the passing stage no vote was taken by the House. Prior to all this, the 21 days notice of the Bill was dispensed with although the nature and substance of the Bill did not warrant this to happen.[108]

On the other hand, the effect of the Act was to transfer property rights from the true owners – those tracing such ownership through the Malawi Congress Party – to those for the time being exercising executive authority in Malawi. In simple terms, the law was vesting the right to manage trust property in the ruling United Democratic Front. No compensation of any kind was paid to the Malawi Congress Party or the original trustees appointed by this party. One of the issues that was left to the court for determination was '[t]hat parliament does not have the constitutional competence to pass a law that expropriates private property arbitrarily'. In other words, that the Press Trust (Reconstruction) Act of 1995 was null and void because among others, it violated the provisions of s.28 of the Constitution of 1994. The High Court gave judgment for the plaintiffs and declared the Act null and void. In a long and thoroughly researched judgment, the court said –

> "Any law the result of which is deprivation of private property without compensation will be struck out by the courts of Malawi unless that deprivation is in exercise of the state police

[106] See, Africa Watch, *Where Silence Rules: The Suppression of Dissent in Malawi* (1990) p.61. One of those whose property was confiscated under the Forfeiture Act was Mr Lynold Chakakala Chaziya.
[107] Civil Cause No. 2074 of 1995, HC (unrep).
[108] See SO 114 para. 4 of the Standing Orders of the National Assembly of 7 November, 1994.

> powers. Our Constitution requires that no citizen should be deprived of that property arbitrary (sic). Our Constitution requires that expropriation should be with due notice and adequate compensation and a recourse to the courts to challenge the expropriation. It follows a *fortiori* in (sic) that any government action, whether be it by executive action of (sic) Legislation, that undermines these constitutional tenets will be struck down by the courts of Malawi.[109]

It is hardly credible to deny the fact that the above remarks represent the true position of the law in Malawi today. There is no statement in the judgment of the Supreme Court that contradicts the above propositions.[110] It can therefore be stated that under the present constitutional law in this country, neither the executive nor the legislature has the legal right to arbitrarily deprive any person of his private property. It follows from this that the verdict of the Supreme Court of Appeal in this particular case, far from developing the law in the right direction, made a retrogressive step both on procedural and substantive issues

## V. Democracy, Elections and Responsible Government.

Political and related rights have gained prominence in international human rights law since the end of the last great war. This is partly because the Nazi regime in Germany, together with other authoritarian dictatorships in Europe at the time, paid little regard to most elements of democratic governance. The same set of rulers got entrenched in positions of authority for long periods of time; without any real prospect for change even where such change was long overdue.[111] This state of affairs was paralled by a political order in which the residue of political rights and privileges were granted on the basis of race, language or sex. This meant that the university of political rights was greatly compromised because an unnecessarily disproportionate number of people – including eligible citizens – were excluded from the political process.[112] It is also true that in those countries where periodic elections were conducted the authenticity of elections themselves was not always guaranteed. These elections were either held on a single party ticket or were greatly controlled by one dominant political party. The result of all these

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[109] *Malawi Congress Party et al v Attorney General et al,* Civil Cause No. 2074 of 1995 HC (unrep) at pp. 58-59 of the judgment.

[110] See *Attorney-General v Malawi Congress Party et al*, Civil App. No. 22 of 1996, MSCA (unrep); esp. at p.107 of the judgment.

[111] For instance, Benito Mussolini became leader of Italy in 1922 and was not removed from office until his execution in 1943. Adolf Hitler remained Chancellor of Germany between 1933 and 1945. Likewise, Joseph Stalin ruled the USSR between 1924 and 1953. See, L.E. Snellgrove, *The Modern World since 1870* (Essex, England: Longman 1981) *passim.*

[112] In German, the Jews were the main victims of the Nuremberg laws passed from about 1935 onwards. See Sieghart, *op cit*. p.14.

considerations was that prior to 1950 many countries in Europe, including the USSR,[113] were governed by highly centralized dictatorships that had little or no connection with truly representative democracy.

However, the defeat in war of the main Axis powers in 1945 heralded a new era for democratic governance in Europe and the Far East.[114] The victorious powers, particularly the United States of America, had behind them a long history of representative government under which the will of the people was the real foundation of the decision-making process. It became the responsibility of these countries to ensure that their national democratic values were transmitted to the international community. The international law of human rights became a useful medium, through which this process could be achieved. This had the additional advantage of extending these values beyond the limited confines of European or other powers. A binding law of human rights on the point meant that western ideas of democracy and civilized governance could be eventually embraced by a wider and more representative section of the international community.

The Universal Declaration of Human Rights of 1948 is one of the earliest treaties in which ideas of politics and democracy were codified as rules of international law. This has been followed by other international treaties such as the International Covenant on Civil and Political Rights of 1966 and the African Charter on Human and Peoples Rights of 1981. However, the general content of these rights, both in their scope and substance, has remained substantially the same as originally formulated in 1948.[115] It is therefore important to approach the subject from the provisions of Article 21 of the Universal Declaration of Human Rights, which state as follows –

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[113] In the USSR, centralized authority took different versions. First, one-man dictatorship characterized the entire period of Stalinist rule. Secondly, collective leadership was adopted between 1953 and 1964 under the presidency of Nikita Khrushchev and finally, communist party dictatorship followed after 1964 when Khrushchev was deposed. After the death of Leonid Brezhnev in 1982, the communist party lost much of its influence over the Soviet society. Hence, the last soviet president, Mikhail Gorbachev, followed the western style democracy during much of his term of office.

[114] Japan was the main military power in the Far East prior to 1945. In December 1941, Prince Konoye, a civilian prime minister , was replaced by General Hideki Tojo. The military administration started the war with the USA on 7 December 1941 by destroying the American naval base at Pearl Harbour. See Snellgrove, *op cit.* p.176 *et seq*.

[115] The first international treaty to give effect to these standards was the European Convention on Human Rights of 1950. Article 3 of Protocol 1 states as follows –

> "3. The High contracting parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

All the member states of the Council of Europe, including the United Kingdom, are parties to this treaty.

"(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

(2) Everyone has the right to equal access to public service in his country.

(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent voting procedures."[116]

There are several distinct but connected rights that are stipulated under this provision. They include (a) the right to take part in government; (b) the right to democratic governance. (c) the right to vote and to be voted into office and (d) the right to equal access to public service, such as employment in the civil service. It is important to analyze each one of these rights in turn.

**A. Participatory Democracy.**

This is the most important element of political rights as it forms the basis of any democratic system of government. The essence of this right is that every individual should be seen to participate in the political running of the country. This is done either directly by the persons concerned or through their genuine representatives.[117] The focal point of this right is on the decision-making process and its legitimacy. It is a modern version of the social contract theory; with the result that those that exercise political authority, whether through the executive or legislature, must take into account the prevailing opinion of the people. It follows from this that where certain individuals are stripped of their political rights without any reasonable justification, courts of law may rule that there has been a breach of the right to take part in the government of one's country.[118]

The exercise of this right may be made subject to certain reasonable limitations. These are those that relate to capacity to take part in the government such as sanity or age on the one hand or eligibility for political office such as citizenship, residence or solvency on the other. Since a person who lacks capacity to take part in the decision making process, such as a lunatic or a child, cannot possibly arrive

[116] See I. Brownlie, *Basic Documents on Human Rights*, (Oxford: Clarendon Press, 1992), p.25. See also Sieghart, *op cit*. p.359.
[117] See *Denmark et al v Greece* (Appl. Nos. 3321-3/67; 3344/67), Yearbook of Human Rights, vol. 11, pp. 690 and 730; Decision of 5 November 1969, European Commission of Human Rights.
[118] See, *Weinberger v Uruguay*, (Appl. No. R 7/28) HRC 36, 114. See also *Massera v Uruguay* (Appl. No. R.1/5) HRC 34, 124; *Silva et al v Uruguay* (Appl. No. R.8/34) HRC 36, 130; and *Pietraroia v Uruguay* (Appl. No. R10/44) HRC, 36, 153.

at a well reasoned judgment, it is legally right that the law should place some restrictions on his participation in government. Likewise, a non-citizen may not be in a position to understand the needs of the people. His interests and sympathy may not be in line with the general public. Therefore, it is not against any rule of human rights law to curtail his participation in the decision making process. As long as these limitations are not given in a discriminatory or other arbitrary manner, courts of law will feel inclined to uphold them.

The law in Malawi is largely in line with the principles of participatory democracy. Although executive decisions are taken by the cabinet, these decisions are only legitimate in so far as they are consistent with the Constitution and other laws. Both the Constitution and statutory laws are enacted by Parliament. Since members of parliament are elected by the people throughout the country it may be stated that valid executive decisions ultimately emanate from the electorate. This is indeed in line with s.12 of the Constitution which states as follows –

> "12… (i) All legal and political authority of the state derives from the people of Malawi and shall be exercised in accordance with this Constitution solely to serve and protect their interests.
>
> (ii) All persons responsible for the exercise of powers of state 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 that trust can only be maintained through open, accountable and transparent government and informed democratic choice. "

Likewise, the legal requirements for any one to participate in government at cabinet level are not unduly restrictive. In particular, these conditions are not discriminatory or arbitrary in nature. Under s.94 of the Constitution, any person is qualified to be appointed to a cabinet post if he is a citizen of Malawi, who upon taking office, has attained the age of 21 years. He must also be able to speak and to read the English language, and must be a registered voter in a constituency. These are fairly rational conditions and the language element serves the additional purpose of uniting the people in a fairly heterogeneous society. It is indeed true that certain categories of people are specifically excluded from any cabinet appointment. These include foreigners; persons of unsound minds; convicted persons in case involving dishonesty or moral turpitude; and those that are bankrupt. These restrictions are quite reasonable and even necessary in order to ensure that decision makers are those of capacity and good behaviour. There is so far no suggestion that anyone is excluded from the decision making process on a

discriminatory basis or in an arbitrary manner. Therefore, it may be stated that the several restrictions contained in s.94(3) of the Constitution do not offend the principle of participatory democracy in human rights law.

## B. Democratic Governance

This is the main element and the underlying theme of the rights contained in Article 21 of the Universal Declaration and Article 25 of the International Covenant on Civil and Political Rights. It means that the will of the people freely expressed in genuine and periodic elections must be respected by the executive, legislative and judicial organs of the state. It follows from this that any action or policy of these organs, particularly the executive, that defeats or compromises the free expression of the will of the people cannot be supported in international human rights law. Likewise, any government action or policy that has the effect of overriding the freely expressed wishes of the people is a blatant violation of this right. It is a requirement of democratic governance that those in power should respect plurality of views. It is also essential that executive action and policy should be conditioned by the wishes of the majority of the people.

There are several ways in which the right to democratic governance may be seriously compromised. It is said that the institution of president for life is incompatible with this right.[119] This is because the electorate have no chance of expressing their will in matters affecting the presidency. It is also because the incumbent president may not always take into account popular opinion in the exercise of his powers because he is not amenable to the electoral process. In fact, it is probably true to say that the institution of president-for-life is the real genesis of dictatorship and unaccountable government in any one country. It has also been stated that this right is interfered with where there is a calculated postponement of elections for a period of ten years.[120] Likewise, where the executive organ has power to remove elected officials from their positions, such as where the president has authority to dismiss a member of parliament or to dissolve parliament, the right to democratic governance cannot be guaranteed. Elected officials should not hold their offices at the pleasure of the executive. As long as the electorate maintains its trust in the official in question, the executive has no legal right to determine his political or other career.

[119] See 4 Haiti, 69; decided under the American Convention on Human Rights of 1969 (in force, 18 July 1978).
[120] See Inter-American Commission of Human Rights, Annual Report, 1977, p.93. Sieghart, op cit. p.366.

It must be stressed that the plurality of political views, both in law and in fact, is the real test of democracy in the country. It follows from this that democratic governance requires that the executive authority should respect plurality of political views and plural politics. In *Nkumbula v Attorney General,*[121] the court agreed that the introduction of a one party state would be incompatible with the notion of plural politics or freedom of association that was then guaranteed under the Zambian Constitution. It is also clear from the Supreme Court judgment in *Chihana v Rep*.[122] that courts of law are prepared to defend and safeguard plurality of views in Malawi. People should have a real chance of changing the government, including the chief executive, through effective multi-party elections. The result is that democratic governance may not be real or possible where inter-party politics are nominal or non-existent. This point is amply exemplified by the entire period of one party rule in Malawi. During this time, the distinction between the party and the government was virtually non-existent. Some of the most important executive or legislative measures had their origins from party – i.e. the Malawi Congress Party – conventions. Those outside party ranks had no real chance of questioning these measures. It is true that some of the measure may have been good for the country – particularly those relating to economic and social development. However, others, like the proscription of the Jehova's witnesses sect could possibly not be fully justified. The fact is that these measures were carried out without any effective debate on them because at that time, there was no plurality of political views. Accordingly, the level of democratic governance was very low in Malawi under the leadership of the Malawi Congress Party.[123]

The period after 1994 has presented its own view challenges in the area of politics and democracy, including the way in which the country is governed. It can be stated that as far as the constitution is concerned, the concept of democratic governance is not only recognized but also greatly fortified. Political freedom is guaranteed to everyone.[124] The legislature has a fixed term of operation[125] and the chief executive has a fixed term of five years.[126] The element of political change is reflected in the fact that the President may serve in that capacity for no longer than two consecutive terms.[127] More significantly, the chief executive can be removed from office on impeachment if he is guilty of a serious

[121] (1972) ZR 205.
[122] Crim. App. Case No.9 of 1992, MSCA (unrep).
[123] A very critical analysis of the regime under Dr Banda is given by JLC Lwanda, *Kaumuzu Banda of Malawi* (Glasgow: Dudu Nsomba Publications, 1993) *passim*. For an earlier, more objective view see P.Short, *Banda* (London: Routledge and Kegan Paul Ltd, 1974) *passim*.
[124] See s.40 of the Constitution.
[125] See. s.67 of the Constitution.
[126] See s.83 of the Constitution.
[127] See. s.83(2) of the Constitution.

violation of the Constitution of the republic.[128] In addition to all these, the courts of law have effective authority to review any law or executive action in order to determine whether or not it is compatible with the Constitution.[129] These are formidable safeguards against any entrenchment of undemocratic governance in the country.

On the other hand, there is a mixed picture when it comes to the actual exercise of governmental power. There are certain positive and commendable elements of executive action that support the notion of democratic governance. Many people would agree that freedom of expression is tolerated and that few people are arrested or detained on account of their political views. Likewise, the level and intensity of genuine debate in the National Assembly has greatly improved. Members of parliament are free to speak out on any aspect of government policy.[130] Even those on the ruling side of the house have been known to speak against certain aspects of government policy or measures, such as the issue of introducing a partisan currency in Malawi.[131] In line with this trend, the judiciary has not hesitated to rule against any government measure that is unconstitutional or threatens democratic governance in the country.[132]

Despite the foregoing observations, certain actions by the government, particularly the executive organ, are irreconciliable with the concept of democratic governance. The virtual monopoly of the country's radio station by the ruling party and government is possibly undemocratic.[133] Since the majority of the people have no other medium of communication, the national radio is supposed to be made accessible to all the contending parties. This would ensure that plurality of political or economic views reach as many people as possible through the same medium of communication. Therefore, as long as dissenting opinions cannot effectively reach the majority of the people in the countryside, it is not possible to

[128] s.86 of the Constitution.
[129] s.108 of the Constitution.
[130] See *Dr Mkandawire et al v Attorney General,* Misc Civ. Cause No. 49 of 1996, HC (unrep). In recent sessions, free speech in the house has been taken to the extreme, with members accusing each other of suffering from epilepsy or some other chronic diseases.
[131] The session of the house in April 1996 was unanimous on the issue of neutral features on the currency. At that time a large volume of notes and coins bearing the portrait of the state president was about to go into circulation. Parliament agreed that this was improper in a multi-party Malawi as Heads of State are bound to change on a regular basis. The central bank appears to have accepted this reasoning with the result that a set of new bank notes on which the portrait of the state president does not appear has since been in circulation.
[132] See, for instance, *Attorney-General v Lunguzi,* Civil App. Cause No. 23 of 1994 MSCA (unrep). See also *Nseula v Attorney-General*, Misc. Civ. Cause No. 63 of 1994, HC, (unrep).
[133] This is a widely held view by human rights groups in Malawi and the international donor community, including the German government. Under s.14 of the Malawi Broadcasting Corporation Act of 1963, the Minister has wide powers of control over the national radio. At a February 1997 conference in Mangochi, the delegates agreed that a new Act must be passed which will guarantee non-partisan coverage of national issues.

achieve that level of democratic governance that is envisaged under the constitution or international treaties.

Likewise, cladenstine measures that are calculated to or have the effect of, silencing the opposition are a negation of democracy and democratic governance. This is indeed the case where opposition politicians are either intimidated or silenced through monetory or other incentives. This type of governing is undemocratic because the will of the people to have a plural society is not respected. A good illustration of this happening is where the chief executive purports to increase the voting power of his political party in the National Assembly by appointing into his cabinet those members of parliament that were elected on the opposition ticket.[134] It is true that under s.94(1) of the Constitution, the chief executive has power to appoint persons to fill vacancies into his cabinet. However, there is no constitutional provision, or any rule of law that gives him powers to appoint opposition members of parliament into the cabinet. On the contrary, plurality of political views and the concept of democratic governance demands that the chief executive should refrain from doing any act that may have the effect of weakening or destroying the opposition. It is a serious violation of the present constitutional and political order to follow a policy of disuniting the opposition. If the aim is to have a cabinet that is nationally representative, the chief executive has the right to appoint non-parliamentarians from those districts where his political party has no constituency seats. This would be perfectly lawful under the Constitution. Therefore, in so far as the present constitutional order requires plurality of political views, and since the practice of appointing into the cabinet members of parliament from the opposition side of the house has the long term effect of killing the opposition, it may be stated that in so far as it is done, any such practice amounts to undemocratic governance by the present rulers in Malawi.

The concept of democratic governance may also be extended to other state organs such as the National Assembly or parliament. This organ passes laws that are binding on all citizens and upon which executive action depends. It is the requirement of civilized governance that laws and regulations must be passed according to the procedure laid down by the constitution or standing orders of the

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[134] Following the end of the Coalition Agreement between AFORD and UDF on 2 June 1996, AFORD moved the following motion in the National Assembly on 27 June 1996 –

> "That AFORD deplores and condemns the continued stay in cabinet of some AFORD members of parliament after the abrogation of the coalition agreement, that AFORD believes that such conduct is calculated to facilitate an undemocratic increase of UDF parliamentary working majority by means other than parliamentary elections; distabilise AFORD and promote disunity in the country; and critically undermine the democratic values and culture that now prevails in the country."

See, *Dr Mkandawire et al v Attorney General*, Misc. Civ. Cause No. 49 of 1996, HC (unrep), p.6.

house. Plurality of views is also essential in this process. Although Bills are normally presented to the house by the government, debate on any such bill is necessary in order to determine the merits and demerits of the proposed law. Where a vote has to be taken on a Bill, the required majority must be present and the will of the majority in the house must be respected. It must be stressed that parliament has no legal mandate to enact a law that is unconstitutional.[135] These issues have been discussed in the *Press Trust* litigation. There was general agreement in this case that any law that is irregularly passed or that which discriminate against particular individuals in society without any justification, would be held null and void by the courts of law. At a political level, the enactment of a law without meeting the required legislative standard amounts to undemocratic governance. This is so because people will be expected to submit to legislation that is unconstitutional or grossly under representative in character. Therefore, the enactment of the Press Trust (Reconstruction) Act of 1995, at a time when the House had no requisite constitutional quorum and at which no formal vote was taken, does not speak very well for democratic governance in Malawi.

### C. Elections and Voting

The right to vote and to be voted into office has several inter related elements. Firstly, the element of time is important. People should feel fairly certain that at a certain period in time, they will be able to exercise their right to vote. The length of time between one election and the next does not matter. In some countries, elections to political offices are held every two years while in other countries, the period between two elections may be four or more years. For instance, presidential elections in the USA are held every four years while similar elections in France are held every seven years. In many African democracies including the Republic of South Africa, the interval between two presidential and parliamentary elections is five years. These disparities are not important from a legal point of view. What matters is that the executive should ensure that at a given period in time, these elections are held. Hence, continuous cancellation of scheduled elections, or their indefinite postponement by the executive, may have the effect of compromising the right to vote.[136]

Secondly, elections to political offices must be authentic and free from bias. Candidates should feel that they have an equal and real chance of winning the contested seat or office. This element of the right

[135] This is the essence of s.5 of the Constitution. In the context of American constitutional law, see *Marbury v Madison* 1 Cranch 137 (1803); *Fletcher v Peck,* 6 Cranch 87 (1810) and *Youngstown Sheet & Tube Co. v. Sawyer* 343 US 579 (1952).
[136] See, Sieghart, *op cit* p.366

outlaws discrimination of any kind in the voting process. It also outlaws vote – rigging by those conducting the elections or intimidation by the contesting parties. Elections that are marred by these malpractices may not be free and fair and may therefore negate the right to vote and to be voted into office.[137]

Thirdly, the suffrage must be universal and equal in order to guarantee a representative and fair result. The usual practice under this head is to assign one vote to one person. Certain exceptions are also accepted as legitimate in many civilized societies. For instance, non-citizens may not vote in some countries, children are also not allowed to vote; and persons with mental disabilities are also excluded. However disenfranchizement is only compatible with the right to vote if it is based on rational and tolerable basis. Hence, the right to vote and to be voted into office is violated where the withholding of voting rights is principally due to the governments desire to paralyse the opposition parties.[138] Likewise, where the basis of exclusion is apartheid or other racial considerations, courts of law may declare the practice undemocratic.[139]

Fourthly, all other conditions that may be attached to this right must be reasonable and capable of being met by the majority of the people. It is usual in some countries to require candidates to pay a certain sum of money before entering the contest for a political office. In yet other countries, candidates may be expected to be at a certain level of economic prosperity. If the aim is not to discriminate against some classes of people and if the majority of the eligible candidates are able to meet these conditions – there can be no suggestion of a serious violation of the right to be voted into office.

Finally, many political systems require that the voting process should be conducted in secret. A secret ballot ensures objectivity on the part of the voter. There is no one in the voting booth to influence his choice of candidates. There is no one to intimidate him into voting one-way or the other. Moreover, those that vote for losing candidates need not fear for their lives because their personal identity may not be known. At another level, it is also practically impossible or inconvenient to have an open voting

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[137] See, Ngubola G.T Kamwambe, *Post-Mortem of 1994 Elections in Malawi,* (Limbe: Montfort Press, 1994) pp.4 – 10.
[138] See, *Silva et al v Uruguay*, (Appl. No. R.8/34) HRC 36, 130.
[139] See, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution* 276 (1970), ICJ Rep. (1971), p.16 esp. para. 30 of the Judgment. Compare, *United Jewish Organisations v Carey* 430 US 144 (1977).

system, such as a show of hand or division into sub-groups.[140] This works very well for small, indoor elections with limited results. At national level, this is very difficult to do because the electorate is often very large and location very wide. Hence it may be stated that in order to guarantee some degree of authenticity and fairness, this right is best achieved through a secret voting system.[141]

The position in Malawi can best be appreciated by distinguishing between the two facets of this right, namely (i) The right to vote and (ii) the right to be voted into office. The right to vote is possibly respected both in law and in actual practice. The National Assembly on the one hand and the president on the other have a fixed term in office. After the expirely of the first five years, members of the National Assembly as well as the president must seek a new mandate in fresh elections. Therefore, since, as a general rule, the law provides for presidential and parliamentary general elections every five years, the element of certainty in voting times is satisfied. There is no suggestion that the scheduled elections – or any elections at all – will be cancelled or postponed by the executive. People have the right to go and vote at these elections and they are fairly certain that they will do so. It must be stressed that political institutions in this country have a fixed term in office and the provisions of s.67 (parliament)[142] and s.83 (presidency)[143] are possibly irreconciliable with any move that would have the effect of canceling or postponing general elections.

The concept of universal suffrage is recognized under s.77 of the Constitution of 1944. This provision states as follows –

> "77 – (1) All persons shall be eligible to vote in any general election, by-election, presidential election, local government elections or referendum subject only to this section.

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[140] The system of 'direct democracy' was practiced in ancient Greece. For instance, inhabitants of city state like Athens used to come together the purposes of choosing their rulers and enacting their laws. In modern times, the process of referendum on important national issues resembles 'direct democracy' in many ways. See *The Complete Reference Encyclopedia* (by Blitz Editors), (Leicester: Helicom Publishing Ltd, 1994) p. 256.

[141] See Art. 21 para. 3 of the Universal Declaration of Human Rights of 1948; and Art. 25 Para. (b) of the International Covenant on Civil and Political Rights of 1966.

[142] It is stated, in s.67(1) that 'The National Assembly shall last for five years from the date of its swearing in and then shall stand dissolved'. In subsection (2), it is stated that 'whenever the National Assembly is dissolved a general election of members of the National Assembly shall be held within sixty days of the dissolution…'

[143] The section provides in part, as follows –

"83 – (1_ The president or vice-president may serve a maximum of two consecutive terms."

Although it is possible for one person to serve as president for a total of fifteen years under this provision, the general consensus in Malawi is that no single person should serve in the presidency for longer than ten years. See A Peter Mutharika, 'The 1995 Democratic Constitution of Malawi' [1996] *JAL* 205 at 210-211.

(2) subject to subsection (3), a person shall be qualified to be registered as a voter in a constituency if, and shall not be so qualified unless, at the date of the application for registration that person-

(a) is a citizen of Malawi or, if not a citizen has been ordinarily resident in the republic for seven years;

(b) has attained the age of eighteen years, and

(c) is ordinarily resident in that constituency or was born there or is employed or carries on business there."

The section provides further as follows –

"(3) No person shall be qualified for registration as a voter in a constituency if that person –

(a) is under any law in force in the Republic adjudged or otherwise declared to be mentally incompetent;

(b) is under sentence of death imposed by a court having jurisdiction in the Republic, either before or after the appointed day or

(c) is disqualified from registration as a voter on the grounds of his or her having been convicted of any violation of any law relating to elections passed by parliament and in force at the time of or after the commencement of this constitution.

(4) where any person is qualified to be registered in more than one constituency as a voter, he or she may be so registered in one of the constituencies.

(5) No person shall exercise more than one vote in any one election."[144]

This law is in line with the general rules of voting in human rights law. Those restrictions relating to citizenship, age and residence are recognized in many other political system and have been held to be reasonable. In *X v United Kingdom,*[145] the requirement that a citizen must be resident in a constituency before he can be registered as a voter was considered. The tribunal held that this condition did not violate the right to vote under the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950.[146] It observed several reasons as justifying the residence requirement. Firstly, it was noted that a non-resident may not be directly or continuously interested in the affairs of the constituents. This is because he may not be fully aware of their day-to-day problems; or those of the locality. Secondly, parliamentary candidates may find it impracticable to present their

[144] Constitutional Amendment No.6 of 1995 states that s.77 of the Constitution is amended, in subsection 3, paragraph (c) by adding thereto the words 'but such disqualification shall be valid only with respect to registration for the election in question and the person so disqualified shall be qualified to be registered as a voter in the next or any subsequent election.'

[145] Appl. No. 7566 of 1976, Decisions and Resolutions, vol. 9, p.121.

[146] Adopted at Rome, 4 May 1950. See generally, M. Chigawa, *The Law of Human Rights: European and African Dimensions* (Cambridge: LLM Thesis, 1989) (unpublished) *passim*.

view points to citizens abroad and this might ultimately affect the freedom of expression of the will of the people. Thirdly, the residence requirement minimizes electoral fraud which is likely to occur on postal voting. Finally, the right of representation in the parliamentary vote has its correlation to the obligation to pay taxes to the government. This obligation is not always imposed on citizens living abroad, although they may be eligible to vote in parliamentary elections. These are formidable considerations and it is thought that they may be advanced to justify the residence and other requirements under s.77(2) of the Constitution of 1994.

The second element of this right, the right to be voted into office, has several inherent problems in Malawi. As a right of an individual, it means that every person, regardless of his external attributes should have an equal chance of being voted into office anywhere else in the country. In other words, this right is seriously compromised where the voter's choice of candidates is influenced by such characteristics as race, tribe, region, political allegiance, or even sex. It is the main electoral issues that must be considered by the electorate, such as those relating to the economy, good governance, external relations or internal security. Considerations of tribe, region, sex etc are outlawed by international human rights law, as well as s.20 of the Constitution of 1994.

The elections and by-elections that have so far taken place in Malawi show that candidates are voted into office principally because they belong to a particular tribe or locality.[147] The personal attributes of the candidates or other electoral issues such as the candidates views on the economy or good governance are rarely considered by the electorate. Is this not a negation of the right to be voted into office?

The above observations can be illustrated by the results of the 1994 presidential and parliamentary general elections. It has been stated that in both these elections, candidates were campaigning on a tribal ticket.[148] It was contended that if a 'tribesman' is in the presidency or holds a parliamentary seat he is likely to deliver the goods more efficiently. At another level, the three main political parties and their presidential candidates were closely associated with certain localities in the country. The then ruling Malawi Congress Party and its presidential candidate Dr H.K. Banda, secured a large electoral

[147] Kamwambe, *op cit* pp. 4-5.
[148] Elements of political intimidation were also observed. See Kamwambe, *op cit* pp.8 – 10.

following in the central region.[149] The Alliance for Democracy and its presidential candidate, Mr C Chihana, won a convincing vote in the northern region.[150] The United Democratic Front and its presidential candidate, Mr E.B. Muluzi, got an impressive vote in the southern region.[151] Within certain localities of the country the tribal element was even more evident. In Kasungu district, the northern part is inhabited by descendants of Ngoni invaders.[152] These people do not speak Chewa because the Ngoni people in the area eventually (i.e between 1900 and 1920) embraced the northern Tumbuka dialect. Hence, the people in northern Kasungu speak the Tumbuka language and are closely associated with the people of the northern region. The result is that all the constituency seats in the area were won by the Alliance for Democracy.[153] The same tribal element was also evident in Ntcheu and Salima districts where the majority of the people are non-Chewa.[154] These people voted for candidates belonging to the United Democratic Front because of its close connection with the migrant tribes.[155] On the other hand, the core Chewa/Nyanja areas of the southern region, particularly Chikwawa and Nsanje districts, gave a strong backing to Dr Banda and his party.[156] This state of affairs cannot be justified under any rule of human rights law.

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[149] According to official results, he got a total of 64.31% of the vote in the central region. See Malawi Government Gazette, vol XXXI, No.40, p.267, (24 June 1994).

[150] He got 87.80% of the vote in the Northern region. See *loc cit.*

[151] He secured 78.04% of the vote in the southern region. See *loc cit*.

[152] The Ngoni entered northern Malawi between 1840 and 1850. They conquered the Tumbuka (Nkhamanga) kingdom shortly afterwards and executed Chikulamayembe VIII. In Chewaland, they conquered Chulu and annexed his kingdom. They also wanted to conquer Chief Mwase of Kasungu but were defeated in 1875

[153] In Kasungu North constituency, an AFORD candidate (Mr Thapson RS Jere) won 70.064% of the vote. Likewise, in Kasungu North-North East constituency, an AFORD candidate (Mr GK Nyirenda) won 48.811% of the vote, while the MCP candidate (MR RP Sithole) won 44.173%. The remaining seven seats in the district were won by the MCP. In Kasungu South Constituency, where there are no Tumbuka speaking people, the AFORD candidate (Miss CR Ngwembe) won 0% of the vote, while the MCP candidate (Mr SJ Sutisi Nkhoma) won 85.179%. The remaining valid votes were won by the UDF candidate (Mr YY Chakhala). See *Government Gazette,* vol. XXXI, no. 40, p.268.

[154] In Ntcheu district, the majority of the people are Ngoni or of Ngoni origin. They entered Malawi in the middle of the last 19th century via Portuguese East Africa. On the other hand, the majority of the people in Salima district are Yao or of Yao origin. The Yao people extended their slave raids to this part of Malawi in the 1870s and 1880s after depopulating the Chewa population of the Shire Highlands. See M. Chigawa, *Ethnic Discrimination in Education in Malawi: A Study in Law and Social Justice*, (Oxford: DPhil Thesis, 1996), Chap. One.

[155] The UDF is a Yao-cum-southern region based party. In 1994, this party won 6 of the 7 parliamentary seats in Ntcheu and 2 of the 5 such seats in Salima. However, at presidential level, Mr B Muluzi secured a winning vote in both these districts.

[156] At presidential level, Dr Banda secured a winning vote in Nsanje district (52.89%) but lost in Chikwawa district (38.537%). At parliamentary level, the UDF won no seat in Nsanje district but secured a number of seats in Chikwawa district (5 out of 6).

It follows from this that the elections of 1994 were not free and fair because people's choice of candidates was based on tribe or other impermissible criteria.[157] It also means that the presidential vote was not representative at national level. The winner in those elections got less than 50% of the vote and in terms of electoral poll only 14% of the voters, most of the them from the southern region, voted for him.[158] Not even a single district in the northern region gave Mr Muluzi a winning vote.[159] The continued sceptism towards his leadership is also reflected in the collapse of the coalition government between the United Democratic Front and the Alliance for Democracy on 2nd June 1996.[160] It is also confirmed by some highly derogatory remarks by a local member of parliament in Karonga, directed at Mr Muluzi, towards the end of that year.[161] It is the view of this paper that unless these and other problems are legally and practically addressed, the right to be voted into office will continue to be illusory for non-locals in Malawian districts or constituencies.

## V. Transparency and Accountability

This value of constitutional law is reflected in the Constitution of 1994 at three different levels. These are theoretical practical and institutional levels. At all these levels, the aim of the law is to ensure that public officials and public institutions continue to command and enjoy the trust and confidence of all the people of Malawi. It is also the aim of the law to ensure that public officials should not use their positions for personal gain. They should, as much as possible avoid any conflict of interests between their private and official undertakings. It is therefore necessary to discuss, the relevant rules of constitutional law and to assess their relevance and importance to the Malawian society as a whole.

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[157] This is the conclusion reached by Mr Kamwambe. See Kamwambe, *op cit* pp. 4-5 where he states as follows–

> "The use and nature of tribalism as a vehicle for winning votes was a number one most serious blunder the leaders in the central and southern regions made as far as the derailing of the democratic principles and practice was concerned and this in turn meant disqualifying the elections as far as the 'free and fair' criterion was concerned. Nothing based on tribalism could be democratic as well as free and fair."

It is interesting to note that throughout his short book, the author is less critical of the leaders from the northern region. It is quite probable that his own sympathy lay with the AFORD or other northern based parties.

[158] See *Malawian,* Tuesday 18 October 1994, p.1. For full details of the votes and voting system, see *Malawi Government Gazette*, vol. xxxi, no.40, pp. 267 – 269.

[159] In Chitipa district, he won 1.822% of the vote. His main rival in the area, Mr C Chihana, won 88.257%

[160] See, *Dr Mkandawire et al v Attorney General*, Misc Civ. Cause no.49 of 1996 HC., (unrep).

[161] Mr NKS Mwafulirwa, member of parliament for Karonga south constituency, accused Dr Muluzi of having failed in his leadership of the country. He cited a number of the alleged failures, including the president's habit of making too many economic promises which he cannot implement. He further ordered those that were disputing his version of the story to keep quite because where the conference was taking place was not their home. The president replied by alleging that Mr Mwafulirwa was '*munthu openga'* or a madman. See, *Malawi News,* 2 – 8 November 1996, p.4 (Editorial comment) and p.1 of Tikambe Supplement (Full story in Chewa). These remarks were made on Saturday 26 October 1996, at a mass rally in Karonga district.

## A. Theoretical Level

The principles of National Policy are stipulated under s.13 of the Constitution of 1994. The relevant provisions on transparency and accountability are as follows–

> "13. The state shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the following goals –
> *(o) Public Trust and Good Governance*
> To introduce measures which will guarantee accountability transparency, personal integrity and financial probity and which by virtue of their effectiveness and transparency will strengthen confidence in public institutions."

The Constitution specifically states that these principles are "directory" in nature "but courts shall be entitled to have regard to them in interpreting and applying any of the provisions of this Constitution or of any law." [162] Courts of law are also entitled to take into account these principles in determining the validity of decisions of the executive organ of the state.

A number of cases have already come before the courts of law in which the issue of public trust or financial probity has been raised. The first case that may be noted involved a high – ranking official of the United Democratic Front (Mr John Chikakwiya). He was charged with theft and abuse of public funds when he was in charge of the Blantyre City Assembly. On 12 December 2005, the Supreme Court of Appeal upheld his conviction, relating to abuse of office and imposed upon him a sentence of nine months imprisonment[163]. This was possibly an affirmation of the need for accountability and financial probity on the part of public officials.

Another notable case involved Mr Yusuf Mwawa – a prominent politician and former Minister of Education in the current government. On 3 February 2006, a court in Lilongwe found him guilty of misusing MK160,550 from Special Clients Account in the Ministry of Education[164]. He was found to have used this money to pay for a private wedding reception at Mount Soche Hotel in Blantyre in March 2005. He was subsequently sentenced to a total of 5 years imprisonment. This case illustrates the terrible consequences that may befell a public official who does not adhere to the principle of personal integrity or financial probity.

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[162] S. 14 of the constitution of 1994.
[163] See, *Daily Times*, 2 January 2006, at p. 7.
[164] See, *Malawi News*, 4 – 10 February 2006, at p. 1.

## B. The Substantive Level

There are specific substantive provisions relating to transparency and accountability on the part of public officials. The terms of s.88 of the Constitution are as follows –

> "88 – (1) The President and members of the Cabinet shall not hold any other public office and shall not perform remunerative work outside the duties of their office and shall, within three months from the date of election or appointment, as the case may be, fully disclose all of their assets, liabilities and business interests, and those of their spouses, held by them or on their behalf as at that date; and, unless Parliament otherwise prescribes by an Act of Parliament, such disclosure shall be made in a written document delivered to the Speaker of the National Assembly who shall immediately upon receipt deposit the document with such public office as may be specified in the Standing Orders of Parliament.
>
> (2) Any business interests held by the President and Members of the Cabinet shall be held on their behalf in a beneficial trust which shall be managed in such manner as to ensure conformity with the responsibilities and duties of their offices.
>
> (3) The President and members of the Cabinet shall not use their respective offices for personal gain or place themselves in a situation where their material interests conflict with the responsibilities and duties of their offices."

These provisions relate to the President and Cabinet Ministers. However, it is quite arguable that all public officials should not place themselves in a situation where their business interests conflict with their official functions. The work of the Anti-Corruption Bureau (ACB) has already demonstrated this fact[165]. Their investigations aimed at checking corrupt practices have extended to non-political officials. Some heads of para-statal bodies and other government institutions that are suspected of malpractices have been called to account. It is just hoped that this work of the ACB and other bodies will shed some more light on the extent to which public officials adhere to the ethics and law relating to transparency and accountability in Malawi.

## C. The Institutional Level

This is an important aspect of the value of transparency and accountability. The Constitution provides for the establishment of public offices that are mandated to check mala-administration in the country. The most important of these is the office of the Ombudsman that is established under s.120 of the

[165] This body is not specifically mentioned in the Constitution of 1994. However, its activities are governed by an Act of Parliament.

Constitution. The powers and functions of this office under s.123 of the Constitution are stated as follows –

> "123 – (1) The office of the Ombudsman may investigate any and all cases where it is alleged that a person has suffered injustice and it does not appear that there is any remedy reasonably available by way of proceedings in a court or by way of appeal from a court or where there is no other practicable remedy."

It is quite arguable that using the above powers, the Ombudsman can investigate and rule upon some unconstitutional practices by public employers or other officials. For instance, a person may allege that he has been left out of employment at the recruitment stage, purely on tribal or ethnic lines. On the face of it, this is contrary to s.20 of the Constitution. Any such practice ought not to be practiced by any public official or institution. It is a negation of the concept of equality and non-discrimination. Therefore, with a view to enhancing transparency and accountability, the Ombudsman can rule that the relevant official or institution has acted unconstitutionally. He may proceed to grant the necessary remedy to the complainant.

Other institutions that may be noted are the ACB referred to above and the Human Rights Commission. Likewise, Non-Governmental Organizations (NGOs) can contribute to the task of ensuring greater awareness for the value of transparency and accountability. Apart from the ACB many of these institutions specialize in issues of human rights and personal freedoms. It is only when people know their human rights that they are in a position to detect mal-practices and lack of proper administration by public as well as private officials.

## VI. Respect for International Law

Malawi is part of a community of states that are governed by international law. The Constitution does recognize this factual situation. One of the principles of national policy is expressed in the following terms –

> "13…
>
> *(k) International Relations*
>
> To govern in accordance with the law of nations and the rule of law and actively support the further development thereof in regional and international affairs."

As a fundamental value of constitutional law, respect for international law must be reflected not only in the adherence or ratification of international instruments, but also their implementation at national level. Malawi is a party to a number of international instruments on human rights. The most important ones of these are the International Covenant on Civil and Political Rights, 1966 and the International Covenant on Economic, Social and Cultural Rights of 1966. Others include the African Charter on Human and Peoples Rights of 1981 and the Convention on the Rights of the Child of 1989. Malawi is required to comply with the provisions of these treaties. Where the relevant treaty requires periodic reports to be submitted, this obligation must be fulfilled. It is not enough to be a party to a treaty and not to fulfill some of its most important requirements.

Likewise, there is need to implement some of the provisions of human rights treaties at domestic level. People should be able to know their rights under these treaties and to be allowed to enforce them in the courts of law. Particular reference must be made to the Convention on the Rights of the Child of 1989 whose provisions are universally recognized and acknowledged.

## VII. Conclusion

Malawi has undergone a tremendous transformation in its constitutional history since independence in 1964. Unlike the Constitution of 1966, the Constitution of 1994 embodies a number of fundamental values of constitutional law. These include respect for the rule of law and human rights. The judiciary is more free and independent under the present Constitution than it was under any other previous constitutional order. Therefore the courts should seize this opportunity to defend human rights and fundamental freedoms. The survival of democracy and good governance depends to a large degree on maintaining and improving upon the commendable values that are enshrined in the Constitution of 1994.