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Judicial Review as a Tool for the Safeguard of Human Rights: Prospects and Problems of the U.S. Model in Malawi

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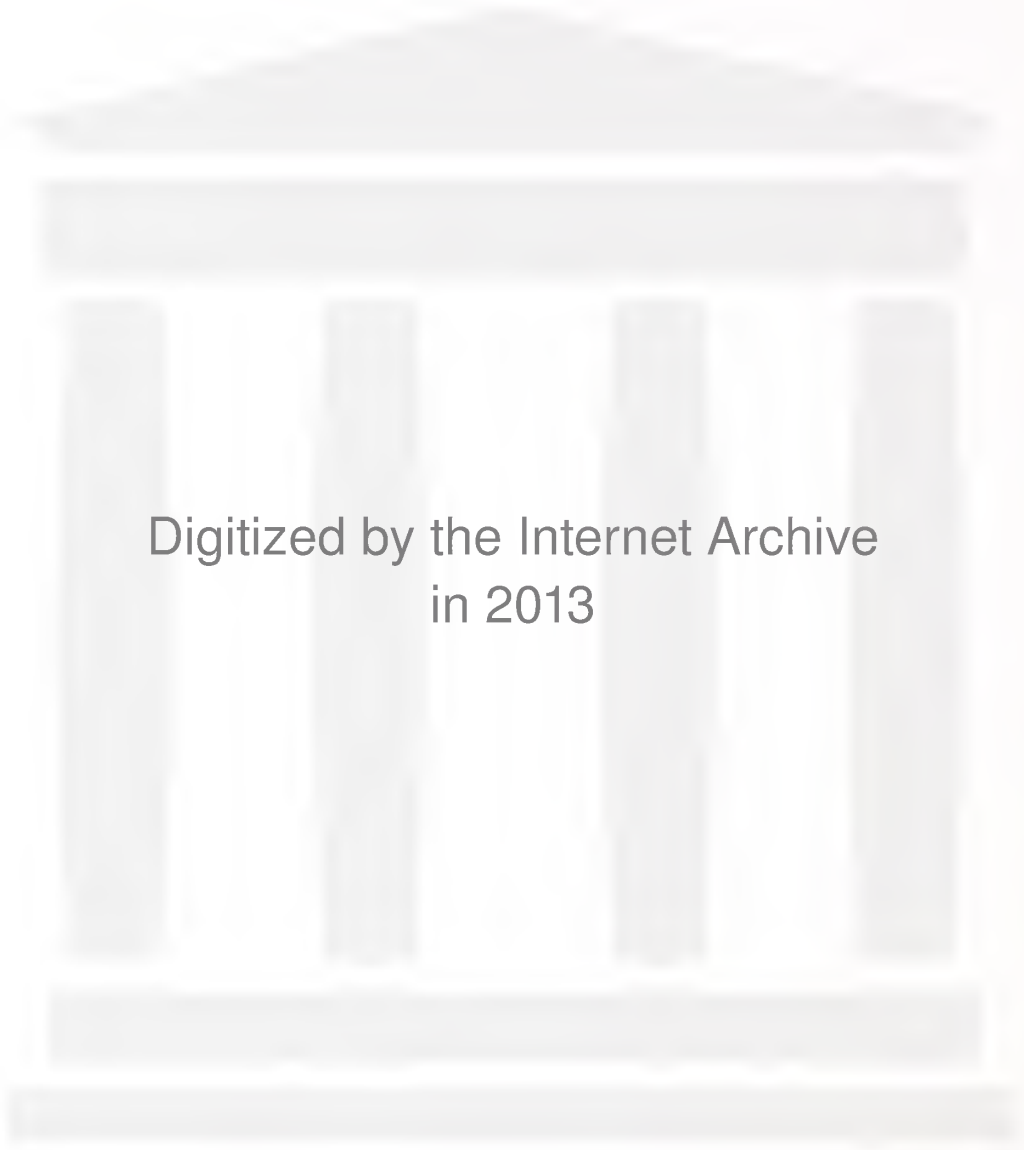

JUDICIAL REVIEW AS A TOOL FOR THE SAFEGUARD OF HUMAN RIGHTS: PROSPECTS AND PROBLEMS OF THE US MODEL IN MALAWI

by

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INTRODUCTION

'Judicial review' has been defined as 'any judicial action that involves the review of an inferior legal norm for conformity with a higher one, with the implicit possibility that the reviewing court may invalidate or suspend the inferior norm if necessary or desirable.'[1]This definition covers both review of legislative acts and executive acts. However, such review has not been a very significant concept of African constitutional law. Though it has been explicitly provided for in some of the written post independence African constitutions,[2] it has not evolved into a living principle of juridical democracy. The main reason for such lack of development was the emergence of dictatorships in the post colonial era. In the former British colonies the situation was further aggravated by the adoption of the Westminster Model of government which made parliament supreme and fused the two political branches of government, enabling these two branches to balance their joint power against the judiciary.[3]

The Malawian post colonial era experience though similar in most respects to the other African countries was materially different. The country adopted a constitution

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[1]Utter &Lundsgaard, *Judicial review in the New Nations of Central and Eastern Europe: Some Thoughts From a Comparative Perspective,* 54 Ohio St. L. J. 559 (1993).

[2]The 1960 Constitution of Nigeria, s. 116 (allowing advisory opinions with regard to legislation). See also the Ghana Constitutional Commission Proposals of 1968 par.451 at 120 (recommending advisory opinions after the bill had passed through the national Assembly but before assent).

[3]HARVEY, LAW AND SOCIAL CHANGE IN GHANA, (1966) (arguing that the basically democratic thesis of the British government was ultimately distorted by the emergency of autocratic tendencies in the post independence era).

that was a severely modified version of the Westminster Model.[4] Among other things this constitution didn't incorporate a Bill of Rights and the High Court's role was reduced to vague supervisory functions.[5] The position of the High Court was further weakened due to the constitutional amendments of 1969 which removed jurisdiction of the High Court in capital offenses to the local courts which were an arm of the executive government. The overall effect was the creation of a dependent judiciary and wanton violations of individual and human rights.

Fortunately this situation has been remedied by the 1994 Constitution.[6] This new constitution gives the judiciary a central position along the lines of the US constitutional system. It makes the court the guardian of the Constitution and an organ for the protection of rights against any arbitrary action by government.

Scope Of Thesis

With this background in mind, the thesis will examine the notions and practice of judicial review in the US constitutional system and weigh its viability in the new Malawi. We will look at this in the historical, socio-economic and political perspectives to highlight the impact of these factors on judicial review in Malawi. We will also consider the fact that the country has been exposed to about three decades of executive omnipotence and the effect of this exposure, if any, on the society and the judiciary in general.

This is a comparative study and our purpose is to attempt to indicate the strengths and weaknesses of the present constitutional set up and to propose that a religious

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[4]See MALAWI CONSTITUTION 1966 [hereinafter MAL.CONST.]

[5]The High Court power of judicial review extended only to the criminal proceedings from the subordinate courts and other administrative actions and decisions effected by the lesser officials in the executive branch.

[6]Adopted after the 1993 referendum adopting a multiparty system of government

copying of the form of the US model will work to the detriment of the society. Our proposal is that the Malawi judiciary should come up with a flexible and unique framework of judicial review in order to enhance the role of the courts as guardians of individual and human rights.

CHAPTER 1

THE HISTORICAL AND CONSTITUTIONAL BACKGROUND

The decline of colonialism and the ascendancy of independent nations in Africa opened a formative era in which the new nations attempted to fashion the legal structures in their own image[7]. This involved the task of incorporating both the colonial laws and the customary unwritten laws in the new legal structures. Malawi was no exception. The economy , the culture, the society and the law at independence[8] were pluralistic and it largely remains the same to this day. This situation was a result of the colonial administration which tended to separate the white settlers from the indigenous people, in terms of governing rules, residential areas etc[9]The British colonial style was to leave the African legal institutions to provide courts and customary law for the great majority of the population[10]. As a result customary law still governs the people in the rural areas, and these areas comprise 90 % of the population in the whole country. That is why when examining the institution of judicial review as a tool for the safeguard of human rights,

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[7] 19 Cliff F. Thomson, *The Sources of law in the New Nations of Africa: A case study from he Republic of the Sudan, in* AFRICA AND LAW (Univ. Wisconsin Press, 1968) at p 133

[8]Malawi attained independence on 6 July 1964 and republican status on 6 July 1966

[9]The white settlers were governed by British statutes introduced into the territory by Nyasaland order in Council of 1902 which allowed the application of British law "in so far only as the ircumstance of the territory and its inhabitants permit and subject to such qualifications as local ircumstances may render necessary."

[10]The African Studies Branch, *Judicial systems of the British territories in Africa, in* THE FUTURE OF CUSTOMARY LAW IN AFRICA (Universtaire pers Leiden 1956) (stating that in Nyasaland, which is a former name for Malawi, the colonial judiciary consisted of the High Court , Subordinate Courts and Native Courts). Emphasis mine.

human rights, one can not afford to ignore the continuing disparity in social and economic development between the people in the urban and the rural areas.

A) The Precolonial Traditional Society

i) The Social And Economic Matrix

When the colonial powers arrived in Africa in the latter part of the 19th Century, they found a sparse subsistence economy holding the continent in its implacable grip.[11] The first Malawi government attempted to improve this situation by providing a different legal framework to govern customary land holding since the technological basis of Malawi's economy is farming.[12] Thus, within three years of independence, parliament enacted three statutes: the first was the Customary Land Development Act, which provided for the ascertainment of rights and interest in customary land and for its conversion for better agricultural development; the second was the Registered Land Act which provided the machinery for registering titles to land, including allocated land; and finally there was the Local Land Boards Act which sought to control dealings in allocated land after registration.[13]

During the Parliamentary proceedings leading to the above enactments, former President Dr Banda , emphasized that the existing customs for holding and tilling the land was outdated, wasteful and totally unsuitable for the development of a country with agriculture as the basis of the economy.[14] In his opinion the major problem was the

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[11] Robert Seidman, *Law and Economic Development in Independent, English Speaking, Sub-Saharan Africa, in* AFRICA AND LAW 5 (1968).

[12] The country is land locked and has very few minerals.

[13] Acts Nos.5-7 of 1967, Caps 59:01, 58:01 and 59:02 of the Laws of Malawi.

[14] See Clement Ng'ong'ola, *The Design And Implementation of Customary Land Reforms In Central Malawi,* 26 Journal of African Law , 115 (1982).

absence of individual titles: "No one is responsible ... for the uneconomic and wasted use of land because no one holds land as an individual. Land is held in common . . . and everybody's baby is no ones baby at all."[15] He further noted that the only way to encourage individuals and institutions to provide loans for the development of land is by way of :

> accepting and recognizing the principle or idea of individual ownership of land and secondly by insisting that anyone who owns land, whether as an individual or as the head of his or her family, is strictly responsible for the economic and the productive use of his or her land; otherwise it must be taken away[16].

Despite these efforts there has not been a significant improvement in the standard of living for people in the rural areas during the past three decades,[17] so that it will not be an exaggeration to state that Seidman's observation of 1968 still holds true for the country, namely that, "the farmer and his wives people the rural scene, their feet straddled wide, leaning from the waist to hack the refractory soil with a heavy, short handled hoe and a matchet, almost the sole agricultural tools and that fertilizers are rarely used and productivity is very low."[18] This low level of economic productivity results in a pathetically low standard of living for people in the rural areas so that it will be absurd to expect these people to hire lawyers to pursue their infringed rights in court.

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[15] Hansard, Proceedings of the Malawi Parliament, 4th session, 1966-67, 403 and, generally, 399-412.

[16] *Id.*

[17] See *infra,* text in Chapter III.

[18] See *supra,* at note 11.

ii) The Customary Judicial Process

Many writers have emphasized that Courts are not a western invention. Every society evolves some institution or procedure by which disputes are heard and the community or its representatives partake in their resolutions.[19] The same is true of the traditional African societies. However the judicial function and process in these societies is quiet different to the notions found in western societies.[20]

Basically, there were three main kinds of courts or proceedings in the ancient customary law[21] and their existence depended largely on the type of society. These were: (i) arbitral courts; (ii) communal courts; (iii) judicial courts. The judicial courts were found in the most organized societies and were comprised of chiefs, headmen and elders (the chief in Council)[22]. This was the highest court in these societies since it comprised of the central authority of the land[23]. And its main characteristic was that it had the power to summon and compel the attendance of concerned parties, to investigate and decide on its own motion[24] and to enforce its judgments.[25] The power of such a tribunal to decide a case in the absence of any initiative by the aggrieved party is a characteristic of African customary law which can not be treated lightly when discussing the issue of judicial review in the new Malawian democracy. The importance of this characteristic

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[19] Thomas M. Franck, HUMAN RIGHTS IN THIRD WORLD PERSPECTIVE, Vol. 1 at p. 171.

[20] This has made some western writers to dub African Law primitive.

[21] The discussion is referring to the judicial systems before colonization.

[22] Allot, ESSAYS IN AFRICAN LAW 117 (1960) . See also A.N.E. Amissah, THE CONTRIBUTION OF THE COURTS TO GOVERNMENT 1 (1981) (stating that " [t]raditional African societies recognized a central authority and kept the judicial function as one of the roles of the governing Chief in Council").

[23] Amissah *id*, (calling it a supreme executive-cum-legislative body).

[24] This can be equated with declaratory judgments in western societies.

[25] Allot, *supra,* note 22 at p 68.

becomes especially obvious when one considers the US court's lack of judicial power in the absence of litigants.[26]

The communal courts were the equivalent of the judicial courts in centralized societies. These were found in societies with no chiefs.[27] The major characteristic of this court is that either the community as a whole or a large portion of it participated in the dispensation of justice.

And finally, there were arbitral courts which were common to all the societies in traditional Africa. These were lesser courts and were found at village, clan, kindred, and family levels.[28] These are still in existence in the rural areas in Malawi. It is important to note that the arbitral process constitutes the machinery for the settling of disputes by negotiation and agreement.[29] And hence the main concern of these courts was the settlement of disputes arising within families or other social groups which were most appropriately settled within the family by the family head. The procedure in these courts is slightly different from the judicial courts in that the arbiters work on persuasion. The emphasis is on the goodwill and consent of the parties instead of the use of force. The head would try hard not to impose a decision based on the strict interpretation of the law and would thus in most cases deviate from the applicable rules of law in order to restore harmony.[30] Thus, this approach makes customary law largely

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[26] See the requirements under the US CONST. Art. III infra text in Chapter II; See also, Georgia v. Stanton, 6 Wall 50,75 (Justice Thompson advocating to the rigid rule that courts of justice should only give relief to aggrieved persons where they present their allegations of violations of rights in some form of judicial proceedings.)

[27] Allot, *supra,* note 22 (giving as examples the Kingere and Kikuyu of Kenya).

[28] *id.*

[29] *id*, at 117.

[30] This makes customary law very flexible and that is why some of the main criticisms that have been leveled against customary law have been that "it is not fixed and certain, it is not sharp and precise in its application, it is not effectively complied with because there are no sanctions."

flexible and contrasts sharply with the rigid procedural rules which the US court has established as a check on its powers.

The other unique and quite important characteristic of the traditional judicial system is the mode of dispensing justice[31] in the settlement of disputes. The court's goal is to achieve reconciliation and restoration of harmony, rather than a desire to follow precedent.[32] Tthis is done by emphasizing duties instead of rights in adjudication. This has led some writers to point out, albeit erroneously, that "under African customary law an individual cannot appeal to 'the law' in defense of his 'rights' for the simple reason that it doesn't guarantee such rights".[33] The true position is that traditional African human rights are understood in a totally different context from the western human rights context.[34] And the courts role is more of an enforcer of morals for the community as a whole as opposed to the US constitutional system which emphasize individualism and whereby courts are deemed protectors of individual rights.[35] The question is whether a society schooled under such customary principles can appeal to the present court for the

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[31] Ann P. Munro, *Land law in Kenya*, in AFRICA AND LAW 77 (1968) (suggesting that "[t]he African juridical process was more concerned in bringing a disrupted social situation back to some sort of new equilibrium and that it was restitutive rather than punitive in motive").

[32] A.N. Allot, *African law,* in AN INTRODUCTION TO LEGAL SYSTEMS 145 (J D M Derrett ed, 1968).

[33] Munro *supra*, note 30 at p. 76 (quoting and indorsing Phillips views in, Report on Native Tribunals (1945) at p.276).

[34] Franck Mordene, *Human Rights and Post colonial Constitutions in Sub-Saharan Africa,* in CONSTITUTIONALISM AND HUMAN RIGHTS 315- 318 (Loise Henkin & Albert J. Rosenthal eds.,1990) (indorsing the view that there is no universal concept of human rights) See also GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 14-15 (Hurst Hannum ed 1992).(suggesting that "it is not possible for countries with different cultures political systems, and ideologies, and at different stages of economic development to have the same priorities regarding rights when there is some conflicts").

[35] Ziyad Motala, *Independence of the Judiciary, prospects and limitations of judicial review in terms of the US model in a new South African order: towards an alternative judicial structure,* 21 Comp. and Int'r. L. J. of S. Afr. 285, 288.

protection of individual rights, which is an alien concept to the customary system of governance.

Another feature which characterizes customary law is the procedure followed in very important decisions. A general meeting of all the people decides when an issue is deemed to be vital to the whole community.[36] This enhances one authors belief that in traditional African societies the judicial procedure reflects the common African principle that government and decision are ultimately by popular consent.[37] Consequently this practice gives traditional African judicial systems a measure of flexibility and simplicity which is absent in the western legal systems.

All the above factors reinforce our view that a wholesale adoption of the US model of judicial review will prove problematic for Malawi as the bulk of the population is still greatly influenced by customary principles of law. The fact that the judicial framework has always been liquid under customary law will be a big obstacle to the set of rigid flexible and procedural rules which is characteristic of the US model.

(iii) The Concept Of Human Rights

In the last sub topic it was pointed out that the concept of human rights in Traditional Africa is understood in a different context from the western concept. This is a result of the history, special characteristics of the societies and the human relationships within them.[38] The big difference is that, "ideologically, customary law is communal or socialist"[39] in approach, whereas in western societies human rights are based on the

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[36]K.A Busia, AFRICA IN SEARCH OF DEMOCRACY, 23 (1967) .

[37]S*upra,* note 10 , at p 69.

[38]For example "most traditional African societies had mechanisms for the redistribution of economic surpluses and have been viewed by some researchers as limiting private control of productive property. In addition land was distributed to families on the basis of collective need". See supra, text on pages 2-3.

[39]AJGM Sanders, *On African Socialism and the Rule of Law*, 15 Comp. & Int'r L. J. S. Afri. 299, 300

premise that a person has rights by virtue of his being an individual being. Rhoda Howard described the African approach in the following words: "the group is more important than the individual, and that decisions are made by consensus rather than by competition and economic surpluses are generated and disposed of on a redistributive rather than a profit oriented basis".[40] It is on the basis of these arrangements that the right to individual ownership is not encouraged.[41]

The importance of the communitarian ideal is illustrated by the commitments of some of the post independent African leaders. The former president of Tanzania endorsed the importance of the ideal in these words:

> The foundation and the objective of African socialism is the extended family.... Ujamaa, then, or familyhood describes our socialism. It is opposed to capitalism which seeks to build a happy society on the basis of the exploitation of man by man; and it is equally opposed to doctrinaire socialism which seeks to build its happy society on a philosophy of inevitable conflict between man and man. We in Africa, have no more need of being converted to socialism than we have of being converted to democracy. Both are rooted in our own past, in the traditional society which produces us. Modern African socialism can draw from its traditional heritage the recognition of society as an extension of the basic family unit.[42]

(1982) (distinguishing African socialism and communism, and stating that the former "does not view the state, the law, or religion as an instrument of oppression. But rather that it considers them indispensable elements of an ideal society which, like traditional African society, will again be characterized by religious feeling, a communal spirit and a belief in democracy based on government by popular discussion and consensus").

[40] *Is There An African Concept of Human Rights in* WORKING PAPER NO.4(A-8), 4 (1983)This arrangement provides a form of social-security system.

[41] Keneth Kaunda, A HUMANIST IN AFRICA 24 (1966) (stating that the "[t]he tribal community was a mutual society and that [i]t was organized to satisfy the basic human needs of all its members and therefore individualism was discouraged and that [social harmony was a vital necessity) Note that Kaunda was the first president of Zambia").

[42] See J.K. Nyerere, *Ujamaa The Basis of African Socialism*, in UJAMAA, ESSAYS ON SOCIALISM 11 (1966). See also Kaunda, *id.* CF.. Dr Banda's approach, *Supra*, text on pages 4-5.

Other African writers have also stressed the importance of the communitarian ideal. Ifeani Menkiti explains that personhood in traditional society can only be attained through an individual's participation in the society:

> Personhood is the sort of thing which has to be attained and is attained in direct proportion as one participates in communal life through the discharge of various obligations defined by one's situations ....It is the community which defines the person ... persons becomes persons only after a process of incorporation.[43]

This indicates that rights are contingent upon one's fulfillment of one's obligations in the society, and the subsequent granting of rights by the group.[44] It is this premise which has led some authors to conclude that the traditional African society does not guarantee the protection of individual rights.[45]

However it is important to note that "though the individual lacks many of the rights that are so highly valued in the liberal democratic state, he has a secure and significant place in his society" and "furthermore he has available regularized social protections of many of the values and interests which in the west are protected through individual and legal rights".[46] Nevertheless, though communitarian mode of thinking and behavior still remains prevalent in rural Malawi, it is true that the people in the urban areas have become increasingly motivated by ambition for individual advancement. Ali Mazrui has attributed this development to the social changes that have taken place in Africa since the European incursion:

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[43] *Person and Community in African Traditional Thought, in* AFRICAN PHILOSOPHY: AN INTRODUCTION, 2d ed.(Richard A. Wright, ed., 1979).

[44] J. Donelly, *Human rights and Human Dignity: An Analytical Critique of Non Western Conceptions of Human Rights,* 76 Am.Polit. Sc. Rev.Vol. 304 .

[45] See Munro, *supra,* note 31.

[46] Donelly, *supra,* note 44, at 304.

> Under the western impact, some reshuffling of principles of behavioral motivation took place. The pursuit of basic needs still remains primary in a westernized Africa. But next in importance now tends to be the pursuit of self advancement beyond basic needs. In other words, the basic needs of the wider clan are beginning to be subordinated to the imperative of personal advancement.[47]

These new pursuits have resulted in structural dislocations involving the family and the clan. And it will not be an exaggeration to suggest that it is this minority urban society which stands to benefit more from the American conception of human rights, which is based on judicial review of governmental acts, the constitutionality of statutes, and the guarantee of individual rights and freedoms against the intrusion of the state.

B) The Post Independence Juridical And Political Framework

The problem of safeguarding human rights through the judicial branch of government in Africa as a whole is fundamentally a problem of political philosophy and of the dominant ideology of government power. On paper, as noted earlier, Malawi adopted the Westminster system of parliamentary democracy.[48] The First Republican Constitution was based on the theory of institutionalism embodying the concept of limited and accountable government[49], separation of powers and open participatory government.[50] In reality, however, the country embraced what has been described as presidentialist executive system of government characterized by a dominant executive

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[47] Ali A. Mazrui, THE AFRICAN CONDITION 54 (1980).

[48] L.C.B. Gower, INDEPENDENT AFRICA: THE CHALLENGE TO THE LEGAL PROFESSION 4-34 (1967) (arguing that "all the former British colonies inherited a distorted version of the Westminster model of parliamentary democracy")

[49] MAL. CONST. (1966) cap. vii. .

[50] *Id,* Chapters iv-vi .

not subject to meaningful external institutional restraint, and hence, not publicly accountable.[51] Dr Kamuzu Banda, the first president of Malawi advised of his untouchable position in the following words as early as 1963 "Anything I say is law. Literally law. It is a fact in this country".[52]

i) The Institutional Set Up

On the surface, the institutional framework of the Malawi Republican constitution resembled the ideal Westminster scheme of government which it was supposed to emulate. It composed of the three separate organs: the executive , the judiciary and the parliament. The National Assembly was supposed to be the supreme organ of the government subject only to the will of the people[53], the executive subject to parliament, and the judiciary to be independent from the political branches of government. In addition to this there was a provision in the constitution acknowledging the fact that

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[51] Ibrahim J. Wani, *The Rule of Law and Economic Development in Africa*, E. Afri. J. of Peace and Human Rights 52, 55 (1993). See also Robert Seidman, *The Reception of English law In Colonial Africa Revisited* , 1 E.A. L. Rev. 47 (1969) (stating that "English law administered by the colonial governments in Africa was a truncated, narrow law whose juristic theme was contract unrestrained by either welfare state legislation or democratic institutions and that this greatly influence of presidential systems that emerged in post independent Africa"). Note also that most of the post independence African leaders evoked African tradition to legitimize deviation from parliamentary democracy and the concentration of powers in one executive. See Y. Ghai, *Law and Legitimacy in East Africa,* 14 Intl. Jnl. Soc. L. 179-208 (1986) (citing a memorandum from the president's office in Kenya asserting that " in order to meet the needs of the people, government should be personalized in one individual who is easily accessible, sympathetic, understanding and authoritative").See also J.R. Nyerere, *How much power for a leader,* AFRICA REPORT, 5 (July 1962) (Suggesting that "the traditional leader was chosen for his wisdom and that he was entrusted with all the necessary powers to do what he considered proper and necessary for the community").

[52] Banda, Speech at dinner for Lonrho executives, 8 November 1963, N.I.D. press release.

[53] Art 1(2) (vesting the powers of the Republic of Malawi in the peoples representatives in the National Assembly). See also Art. 2(2) (stating that "nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of [the constitution] to the extent that the law in question is reasonably required in the interest of defense, public safety, public order or the national economy").

government "recognized the sanctity of the personal liberties enshrined in the United Nations Declaration of Human Rights . . ."

Despite these arrangements, parliamentary democracy gave rise to executive omnipotence for a number of reasons. The first one was that there was no real separation of powers among the branches of government. The president and all the ministers were members of parliament.[54] And in addition, the president had powers to nominate people to the National Assembly where he considered it desirable to enhance the representative character of the Assembly, or to represent particular minority or other special interests in the Republic.[55] The result was that the executive, especially the President exerted controlling influence on the National Assembly.[56] This scenario was further aggravated by the fact that the president was the head of the Party[57] and no person could run for the National Assembly elections unless he or she was a member of the Malawi Congress party[58]. Through practice, this condition was developed to mean that a person had to be a staunch member of the party in order to be elected.[59] In addition to this, the president had implied powers to dissolve parliament at any time.[60] This setting operated to induce

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[54]MAL. CONST. (1966) art 18 &19.

[55]Art. 20 as amended by 8 of 1981.

[56]Note that Art. 37 of the Constitution allowed the president to take part in the Assembly's proceedings and in the proceedings of any Committee of the Assembly.

[57]Malawi was a one party state under Art. 4 of the 1966 Constitution.

[58]See Art. 10 (2) (d). Note that under Article 96 (1) (e) of the 1994 Constitution the Ministers are still members of Parliament. See The Attorney General V Mapopa Chipeta M.S.C.A Civil No. 33 Of 1994 (explaining that Article 96 requires ministers to be 'available' to parliament to answer questions concerning government policies and that this provision qualifies them to be members of parliament).

[59]For example all names submitted for elections were scrutinized by the president in his capacity as head of the party before giving approval.

[60]It is curious to note that President Dr Banda exercised this power often whenever parliament hesitated to indorse proposed government policies, yet Art. 28, which dealt with tenure of members of parliament only stated that "every member of the national Assembly shall vacate his seat... upon a dissolution of parliament" without specifying whether this dissolution was in relation to the completion of the 5 year

the parliament to support all governmental proposed policies in order to avoid conflicts with the government.

Perhaps not surprisingly, parliamentary democracy, or the attempt to create one, began to disintegrate soon after the adoption of the 1966 Republican Constitution. The powers of the Republic instead of deriving from the people as stipulated under Art.1 (2) of the Constitution[61] were abducted by the executive organ. The Government was able to push through National Assembly oppressive laws under the guise of protecting and advancing defense, public safety, public order or the national economy[62]. Such laws included the Decency in Dress Act which was a dressing code regulating mode of dressing, the Preservation of Public Security Act which authorized detentions without trial for indefinite periods, and the Forfeiture Act[63], just to mention a few.

The question that one may ask is, what role did the judiciary play in this setting? This takes us to the second reason for the failure of the parliamentary democracy to protect individual and human rights . In order to understand the position of the post independence judiciary it is important to examine factors that determine the efficiency and independence[64] of the judiciary, for example, the composition, appointing

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term or at the president's instance.

[61] See *supra,* note 52.

[62] Art. 2(2) of the 1966 Constitution gave Government unlimited powers to do anything as long as it was done under the authority of a law whether good or bad. The operating words of the provision was nothing shall be held to be inconsistent with the constitution.

[63] Act No.1 of 1966. The statute sought to expose certain persons to forfeiture of property and also provided for the subjection of such persons to further legal disabilities. The unfortunate thing was that it was drawn in very general terms. The principle section provided that :

> If the minister is satisfied that any person is, or has been, acting in a manner prejudicial to the safety or the economy of the state or subversive to the authority of the lawfully established government, irrespective of whether that person be within or without Malawi, he may by order published in the Gazette, declare such person to be subject to forfeiture.

[64] Judicial Independence is an important principle which ensures the safeguard of rights in western

procedures, tenure and termination of judgeship. Before even considering these issues it is pertinent to note that the colonial judiciary, which was the role model for the first Malawi judiciary, played a very limited role in government. In fact, it was regarded as part of administration and it was viewed as an instrument to facilitate colonial administration.[65]

The Judiciary under the first Republic consisted of the Supreme Court of Appeal which was the highest in the hierarchy, the High court and Subordinate courts.[66] The Supreme Court had only appellate jurisdiction and consisted of the Chief Justice , such number of justices of appeal (if any) as may be prescribed by Parliament, and the other judges of the High Court for the time being holding office[67]. The High Court had general jurisdiction over criminal and civil matters. It consisted of the Chief Justice and such number of judges, not being less than two, as may be prescribed by or under any written law.[68]

Section 63 (1) of 1966 constitution conferred on the president the power to appoint the Chief Justice. Such appointment was not subject to confirmation by any other body.[69] Furthermore the President had powers to appoint the other judges after consultation with the Judicial Service Commission[70] under Article 63(2) of the Constitution. This

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constitutional systems.

[65] *supra,* note 21 at 57.

[66] MAL. CONST. (1966) cap. vi.

[67] *Id*, Art.67 (2) (a) (b) (c).

[68] *Id*, Art. 62 (2).

[69] Cf the Nigerian Constitution of 1960 Section 211(1) which made the Chief Justice appointment subject to confirmation by a simple majority of the Senate.

[70] This was established under Art. 71 of the Constitution and it was supposed to be an independent body chaired by the Chief Justice. Its task was to balance the legal ability, temperament, courage, integrity and

amounted to placing the judicial appointments in the hands of the president, since it appeared to give him power to ignore the advice of the Commission.[71] This method established a fertile ground for political considerations in the appointing process since the president could hardly be expected to appoint people, however outstanding, whose views on matters of public policy were known to be radically different from his own.

In addition to this, the other weakness in the process was the composition of the Judicial Service Commission. As pointed out above, the Chief Justice, who was a sole presidential nominee, was the Chairman. The other members included the chairman of the Public Service Commission[72] who was also a presidential appointee and such justice of appeal or judge as may for the time being be designated in that behalf by the president acting after consultation with the Chief Justice.[73] Not only this, but the power to remove the persons serving in the Commission was vested in the president too.[74] Such an arrangement in the Commission casts doubt on the independence of the body from political influence, especially executive control. In fact the whole appointing process to the judiciary was not conducive to the attainment of an independent judicial body. The result was a judiciary which was more sympathetic to the governmental policies of the day.

The provisions for tenure and termination of judgeship were contained under Section 64 of the Constitution. The retirement age was 62, but the president had wide

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social respectability of a prospective appointee.

[71] Cf.. S.61(2) of the Constitution of Kenya which empowered the president to appoint puisne judges acting in accordance with the advice of the Judicial Service Commission.

[72] MAL. CONST. art. 87.

[73] *supra,* note 70.

[74] MAL. CONST. Art. 72(1).

discretion to retain a judge where he considered it desirable in the public interest.[75] Again, this brings in the issue of political considerations. In addition, Article 64 (3) empowered the president to remove any judge from office where he considered it desirable in the public interest.[76] This gave the president extreme power of summary dismissal which is not commensurate with a democratic society.

Similarly, the president could also transfer a person holding the office of judge to any other office in the public service where he considered it desirable in the public interest.[77] These provisions implied that there was no security of tenure for the judges, which in turn gravely affected the independence of the judiciary.

The Court's position was further weakened by the fact that there was no provision in the Constitution guaranteeing the protection of the salaries of the judges.[78] This made such salaries subject to the control of the legislative body just like the salaries of all public servants.[79] Despite these anomalies, the judges enjoyed a limited measure of independence under the common law tradition of judicial immunity, for any action arising directly from the performance of their function.[80] But it is worthwhile to mention

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[75]The wording was too broad and liable to be abused.

[76]The other grounds were misbehavior and incompetence the latter is too broad and may suggest a failure to meet a certain standard of proficiency which in turn brings back the issue of the independence of the body which sets and applies the standard.

[77]Article 64 (4). Note that due to the loose wording of this provision it could be utilized to achieve political goals.

[78]Cf. with the 1960 Constitution of Nigeria which charged such salaries on the Consolidated Fund thereby protecting the judges from the whims of the legislative bodies.

[79]This was a colonial legacy whereby courts were seen as part of administration and therefore were not really distinguishable from the public service i.e see supra text on p. 15.

[80]Lord Denning explained the common law tradition in the following fashion:

> The words which he speaks are protected by an absolute privilege. The orders which he gives, and the sentences which he imposes, cannot be made the subject of civil proceedings against him. No matter that the judge was under some gross error or ignorance, or was actuated by envy, hatred or malice and all uncharitableness, he is not liable to an action. The

that this immunity extended to civil suits from parties aggrieved by the court's decisions only and could not shield it from political pressure.

Having considered the factors that helped weaken the status of the judiciary, it is only logical to look at the residual role that the court was entrusted with. There was no provision either expressly or Impliedly in the constitution giving the court the power of judicial review to pronounce on the constitutionality of the acts of the other coordinate branches of government. Moreover, Article 2 (2) operated as a further disability for the courts because it gave the government unlimited powers.[81] Hence, the High Court had only supervisory jurisdiction over criminal and civil matters by virtue of Article 70 of the Constitution[82] and its power of judicial review was restricted to decisions emanating from the subordinate courts and to administrative actions and decisions of lesser officers of the executive branch or persons charged with the performance of public acts.[83] This

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reason is not because the judge has any privilege to make mistakes or to do wrong. It is so that he should be able to do his duty with complete independence and free from fear. See Sirros v Moore 3All E.R. 776 (1974)

[81] *Supra* , note 62.

[82] Note the Courts position was further weakened when Parliament enacted the Local Courts (Amendment) Act in 1969 which created a sophisticated form of Traditional Courts and gave these courts exclusive criminal jurisdiction in capital offenses like murder, manslaughter and treason. This came about as a result of an alleged lack of confidence in the judiciary as is evidenced by the parliamentary debates. Mr Khofi Phiri had this to say:

> "Sir, if there was any loophole at all in our government in the eyes of the ordinary villager... it was in this field of the judiciary system where something was still required to be done to prove to the villagers that the government was there for there protection .... many ,many criminals have been let free for the mere reason that there was not sufficient evidence to prove their guilty....."

Note that these courts were later used to deal with political opponents. See Jack Donnelly , *Cultural Relativism and Universal Human Rights, Human Rights Quarterly, 400, 412* (Suggesting that the only possible appeal in the traditional court was to the head of state).

[83] This position was borrowed from the British. See Michael Superstone and James Gourdie, JUDICIAL REVIEW 24 (1992) (describing judicial review as "the process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals and other bodies who carry out quasi-judicial functions or who are charged with the performance of public acts").

jurisdiction was exercised by the prerogative of the writs of mandamus , certiorari and prohibition, and it was regulated by statute and rules of court.[84]

Not surprisingly, even this limited power of judicial review was only theoretical since it could be overridden any time by the government due to the existence of Article 2 (2). The end result was that the judiciary was just a rubber stamp of the legislative body which in turn was controlled by the executive.

ii) Attempts At Safeguarding Human Rights

The Universal Declaration of Human Rights had a powerful influence on new African State constitutions. In fact it was used as a tool by many African leaders to challenge colonialism as a violation of internationally recognized human rights guarantees.[85] As a result many post colonial African countries incorporated bills of rights which generally reflected the Declaration.[86]

In Malawi, a national bill of rights was rejected in favor of constitutional declaration that the Government and the People of Malawi shall continue to recognize the sanctity of the personal liberties enshrined in the United Nations.[87] As Mordene rightly observed, the language appeared to be more a reflection of governmental intent to acknowledge the existence of individual rights than a formal constitutional guarantee to protect those rights.[88] Further this recognition of individual rights was rendered useless by the inclusion of subsection (2) in the provisions. The relevant words in this Article

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[84]RSC Ord 53 and the Statute Law (Miscellaneous Provisions) Act.

[85]Mordene, *supra*, note 34 at 324.

[86]See the constitutions of Burundi (1962); Cameroon (1961) and Senegal (1963).

[87]Art. 2 (1) (iii). See also Moderne, *supra,* note 34.

[88]Mordene, *id.*

were that a court could not hold that any governmental action done by the authority of the law was inconsistent or in contravention of Article 2 (1).[89] Consequently, this meant that any law passed by parliament, whether it was good or bad, was not challengeable in court as this provision completely barred such action.[90]

Hence with such a background in mind, it is not surprising that there was wanton disregard of human rights on the part of the government and this was made worse by the fact that Malawi was a one party state.[91] The desire to ensure the success of the party became a cause for draconian behavior. It inevitably led to a severe curtailment of rights and freedoms.[92]

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[89]This was a great disability for the courts.

[90]A good example is the Local Courts (Amendment) Act discussed under note 80 which barred legal representation in these courts though they were handling capital offences.

[91] The legislature was turned into a committee of the ruling party, its function becoming that of giving legislative form to decisions already taken by the party's national Executive Committee.

[92]Such freedoms included freedom of assembly and association, freedom of expression, and freedom against discrimination based on political grounds.

CHAPTER II

THE US MODEL OF JUDICIAL REVIEW

The power of the courts to determine the constitutionality of the acts of the other coordinate branches of government is an established component of the American system of government.[93] This power affords the citizens protection against the infringement of fundamental rights by governmental authority. The practice for the courts has been to use the Bill of Rights as a yardstick for measuring the constitutionality of governmental action. However no such power is expressly granted by the federal nor the state constitutions. How did the courts get this power? As Horace Davis would argue there is no logical necessity why the opinion of the judiciary, one of the three branches of the government, should override the action of the coordinate branches of government;[94] hence it is imperative to discuss the source of this power before considering its nature and scope.

A) Source Of The Federal Courts Power Of Judicial Review

The power of judicial review in the U. S. Courts was established in the landmark case of *Marbury vs. Madison.*[95] The brief facts were that William Marbury,

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[93] Note that over the years this power has been the subject of extensive debate. See Horace A Davis, THE JUDICIAL VETO (NY, Da Capo Press).

[94] *Id*, at p 2-3.

[95] 5 US (1 Cranch) 137, 2 L. Ed 60 (1803); See David J. Berderman, *Political Questions / Judicial Answers: Does the Rule of Law Apply to Foreign Affairs? Thomas F. Franck,* 7 Emory Int'l L. Rev. 693, 694 (1993) (suggesting that "Marbury vs Madson is the locus classicus of judicial review, and hence of American constitutional order").

was one of the people who was named a justice of the peace for the District of Columbia during last minute judicial appointments in 1801. This was at the close of the Federalist Administration of President John Adams. The Jefferson Administration which succeeded the Federalists chose to disregard those appointments for which formal commissions had not been delivered before the end of Adams' term. Marbury and others went directly to the Supreme Court to compel the Secretary of State to deliver the commissions by moving the court to issue a writ of mandamus. They invoked Section 13 of the Judiciary Act of 1789 as a basis for the direct route.[96]

The court was faced with a number of issues. The first question was whether Marbury had a right to his commission. In order to determine this the court had to decide whether the executive was subject to certain legal and constitutional restraints that the judiciary could enforce. The court relied on Article 3 of the Constitution which vests the judicial powers in the courts and extends such powers to all cases in finding in the affirmative on this point.[97] Furthermore, the court stressed that where a specific duty is assigned by law, and individual rights depends upon the performance of that duty, it seems equally clear, that the individual who considers himself injured, has a right to

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American constitutional order").

[96] The Judiciary Act establishes the judicial courts of the US and authorizes the Supreme Courts "to issue writs of mandamus in cases warranted by principles of usages of, to any courts appointed, or persons holding office, under the authority of the US".

[97] Article III (1) reads as follows: (1) "The judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and established . . ." and (2) states that :

> The judicial power shall extend to all cases, in Law and Equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority ;- to all cases affecting ambassadors, other public ministers and Consuls;- to all cases of admiralty and maritime Jurisdiction;-to controversies to which the United states shall be a Party.....

However note that the court conceded that there are some instances where the court cannot review executive acts due to what has become to be known as the "political question doctrine".see *infra* p50

resort to the laws of his country for a remedy.[98] In other words the court was emphasizing the importance of its role in the safeguarding of individual rights.

The other issue before the court was whether a writ of mandamus could issue in the Supreme Court in a case involving the Secretary of state in light of the second paragraph of Article III (2) which provides as follows:

> In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a state shall be a party, the Supreme court shall have original jurisdiction. In all the cases before mentioned, the supreme court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The court found that the authority conferred to the Supreme Court by the Judiciary Act of 1789 to issue writs of mandamus to public officers was in direct conflict with the provisions of the Constitution just quoted above.[99] Hence the court found Section 13 of the Judiciary Act to be unconstitutional on the basis of Article VI of the Constitution which establishes the supremacy of the Federal Constitution. It provides thus:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding .

Further, the court explained that "It is emphatically the province and the duty of the judicial department to say what the law is"[100] and therefore if two laws conflict with

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[98] Marbury, *Supra*, note 94. Note also that the Bill of Rights is entrenched in the US Constitution.

[99] The Act gave the Supreme Court original jurisdiction in an area where the Constitution conferred only appellate jurisdiction

[100] This statement has become the pillar which legitimize the courts' power of judicial review.

each other the courts must decide on the operation of each.[101] The principles expounded in *Marbury vs. Madison*[102] have established the US courts' powers of judicial review over coordinate branches of government.[103] The legitimacy to exercise this power derives from the fact that it is done in ordinary litigation.

B) Nature And Scope

The US Model is a diffuse model involving "incidental" review.[104] A key characteristic is that the jurisdiction to engage in constitutional interpretation is not limited to a single court.[105] It is exercised by both state and federal courts, and it is regarded as an inherent and normal incident of the process of case adjudication.[106] Thus, in the words of de Tocqueville's: "An American Court can only adjudicate when there is litigation; it deals with only a particular case, and it cannot act until its jurisdiction is invoked."[107] Review by the court, therefore , gives a judgement limited in principle to

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[101] See Archibard Cox, THE COURT AND THE CONSTITUTION 38 (1987) (explaining that "the Supreme Court assumed responsibility as the final authority on the interpretation of the Constitution without express Constitutional support.")

[102] Supra note 89

[103] Owen M. Fiss, *Introductory Remarks: Independent Judiciary*, 19 Yale J Int'l L 219 (1994) (suggesting that "though the US Supreme Court confronts doubts as to the legitimacy of judicial review on an on going basis, the court has a long and noble history and knows that it has a secure place in both the structure of the government and the minds of the American citizenry").

[104] All the courts involve in constitutional adjudication in the ordinary course of litigation.

[105] *Cf.* with the centralized system which is called the European model and is characterized by the existence of a special court, with exclusive jurisdiction of constitutional rulings. This model originated in Austria where such a court was created in the Austrian Constitution of 1920.

[106] The American Model has also been adopted by Canada, Australia, India and Japan.

[107] Alexis de Tocquelle, De la democratic en Amerique , 1835, collection 10/18 (Paris: 1963),p 78. This contrasts sharply with the European model where the constitutionality of a law is examined in the abstract. See Louis favoreu, *Constitutional Review in Europe,* in CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD (Louis Henkin & Arbort Rosenthal eds, 1990) (explaining that the reason for accommodating such abstract review is due to the fact that constitutional issues are generally raised by the public authority ie the government , members of

the particular facts of the case, although a decision by the Supreme Court has general binding authority for the lower courts.[108]

The ability of a court to be able to prevent the arbitrary exercise of government power involves a number of factors and it is heavily contingent upon the "independence of the judiciary".[109] This leads us to the other important element of the US model; the constitutional safeguards which ensure the independence of the judiciary. Larkins has defined "judicial independence" as follows:

> Judicial Independence refers to the existence of judges who are not manipulated for political gain, who are impartial toward the parties of a dispute, and who form a judicial branch which has the power as an institution to regulate the legality of government behavior, enact 'neutral' justice, and determine significant constitutional and legal values.[110]

The attainment of such a status is largely influenced by the following factors; the appointment procedures, tenure, termination procedures, and compensation of judges.[111] These in turn influence the exercise of the power of judicial review by the courts.[112]

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parliament, and not by individuals).

[108] Note that under the European Model the effect of the decision is erga omnes, i.e. applicable to all, absolute. See Favoreu id, (stating that "when a European constitutional judge declares an act unconstitutional, his act has the effect of annulling the act, of making it disappear from the legal order. It is no longer in force; it has no further legal effect for anybody, and sometimes the ruling of unconstitutionality operates retroactively").

[109] Christopher M. Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44 Am. J. Comp. L. 605, 606 (1996).

[110] *Id,* at 611.

[111] Note, however that there are other internal factors which may erode the independence of an individual judge, for example, where a judge is committed to an ideology, or to a particular faith to such extent that he forfeits the ability to do justice with that moderate degree of impartiality. See Ninian M. Stephen, *Judicial Independence- a Fragile Bastion, in* JUDICIAL INDEPENDENCE: THE CONTEMPORARY DEBATE (Shetreet and Deschenes eds, 1985).

[112] SUPREME COURT POLITICS: THE INSTITUTION AND ITS PROCEDURES 49 (Susan L. Bloch and Thomas G. Krattenmaker eds 1994) (explaining that "the kind and quality of the US Supreme Court work is largely affected by the character and ability of the justices themselves"). See also Larkins, *supra*, note

Article II, Section 2 provides that the president "shall nominate , and by and with the Advice and Consent[113] of the Senate shall appoint . . . Judges of the Supreme court".[114] The participation in the appointing process by the senate requires a simple majority vote.[115] Scholars have noted that this gives the Senate two distinct roles "an advisory role before the nomination has occurred and a reviewing function after the fact".[116] The above clause assumes a joint deliberative process concerning the composition of the court and this in turn prevents presidential monopoly of the process which "might lead to a lack of qualified" and "diffused" appointees, and to patronage and corruption and also to "insufficient attentiveness to the interest of different groups".[117] This process, therefore, brings about a healthy form of checks and balances[118] between the executive and the legislature.[119]

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109 (explaining that "without independence, the judiciary can be easily manipulated to prevent it from questioning illegal or arbitrary acts of state actors").

[113]Emphasis added.

[114]US Const. art. II, S 2. See also Bloch and Krattenmaker eds, id (Noting that in addition to the constitutionally prescribed actors, the American Bar Association plays an important role in the appointing process by investigating and evaluating Supreme Court nominees put forward by the president through its Standing Committee on the Judiciary)

[115]*Id.*

[116]David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution and Confirmation Process* 101 Yale L. J. 1491, 1495. See also Charles L. Black, Jr., *A Note on Senatorial Considerations of Supreme Court Nominees,* 79 Yale L.J. 657 (1970) (Arguing that "constitutional considerations demand enhanced senatorial scrutiny when giving advice and consent to judicial, as opposed to executive branch nominees").

[117] Strauss and Sunstein, *id* at 1496.

[118]Note that even the framers were greatly concerned with preventing presidential monopoly. See The Federalist No.76, at 457 (Alexander Hamilton stressing that "the president was bound to submit the propriety of his choice to the discussion and determination of a different and independent body").

[119]See Mackay and Parkinson in JUDICIAL INDEPENDENCE: THE CONTEMPORARY DEBATE 367 (Shetreet and Deschenes eds 1985) (suggesting that this process is highly political, but that nevertheless, there is little that the political branches can do to control the judge in day- to- day work).

While state and local courts[120] are essential elements of the United States judicial system, the federal courts are the more celebrated division of that system and are treated as the fullest embodiment of the ideal of judicial independence.[121] As Fiss would explain, the US can "boast of the political insularity of the federal courts and point to Article III of the Constitution, providing life tenure and protection against diminution of pay, as the essential guarantor of independence."[122] Article III provides in pertinent part: "the Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their services, a Compensation for their Services, which shall not be diminished during their Continuance in Office."[123]

It is clear that the protection against diminution of salary is an important bulwark against political control.[124] However many legal scholars have expressed reservations about the life tenure provisions.[125] As Aristotle pointed out, "that judges of important causes should hold office for life is disputable thing, for the mind grows old as well as the body". The Constitution further insulates the judiciary by ensuring that the work of

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[120]Note that the Judges to these courts are elected in most states and this makes them directly accountable to their constituencies.

[121] Owen M. Fiss, *The Limits of Judicial Independence*, 25 U. Miami Inter-Am. L. Rev 57,60 (1993).

[122]See Fiss, *id.* Cf Henry Monaghan , *The Confirmation Process: Law or Politics?* 101 Harv. L. Rev. 1202, (challenging Halmitons arguements for life tenure in the federalist No.78 and arguing that "what relieves a judge of the incetive to please is not the prospect of indefinite service, but the awareness that their continuation in office does not depend on securing the approval of the political branches" and therefore that "independence can be achieved by mandating fixed, nonrenewable terms of service").

[123] U.S. CONST. art III, s 1.

[124] However the art. III provisions leaves judges subject to inflationary pressure. See Atkins v. United States, 556 F. 2d 1028 (Ct.Cl.1977), cert. denied, 434 US 1009 (1978) (holding that Congress had not violated the art. III Compensation clause by failing to raise judicial salaries an amount equivalent to the rate of inflation).See also Fiss, *supra*, note 121, at 63 (suggesting that "a decision by Congress or the President to hold judicial salaries constant in the face of spiraling inflation can act as a severe sanction").

[125]See Monaghan, *supra*, note 122 (arguing further that the Courts workload is very heavy, and that "it is doubtful that many octogenarians would be able to devote the energy necessary to the task").

the federal judiciary can not be easily revised by the political branches. Thus, the courts constitutional decisions can only be revised through a cumbersome amendment process, which requires special majority in each house of Congress, and approval by three fourths of the states[126]. Hence Article v provides:

> The Congress whenever two thirds of both houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may proposed by the Congress . . .[127]

Not only these, but also the removal procedure from federal judicial office is rigid. Judges can only be removed from judicial office through the impeachment process which requires the concurrence of the two thirds majority of the members present.[128] This requirement ensures security of tenure for the federal judges. The procedure has been enhanced by the evolution of broad cultural understandings that further insulate the judiciary from political control.[129] Though the Constitution vests the power of impeachment in the Congress, it does not specify the permissible grounds for invoking it. By way of illustration, Article III speaks in the most general terms, providing that judges "shall hold their Offices during good behavior", and Article II section 4 provides

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[126]Note that in case of statutory interpretations, these can be easily reversed by a simple majority of Congress with the concurrence of the President. See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions,* 101 YALE l. J. 331 (1991).

[127]U.S. CONST. art V.

[128] U.S. CONST. art 1, sec 3 par.6.

[129]Fiss, *supra*, note 121 at 61.

for the impeachment of all civil officers of the United States for high Crimes and Misdemeanors.[130]

As Fiss rightly notes, an understanding has developed whereby "a judge can be impeached and removed only for violation of the most elemental duties of office, such as corruption or conviction of a crime not because the legislature disagrees with the judge on the merits of some decision."[131] Other American legal scholars have further buttressed their argument that the federal judiciary is independent from political pressure by referring to a few dramatic cases in which the Supreme Court defied the executive or the legislature.[132]

An earliest example include the decision of the court declaring illegal President Truman's seizure of the nations steel mills during the Korean war.[133] Another instance was in 1969 when the court issued an order to Congress requiring the House to seat a newly re-elected Adam Clayton Powell[134]; and also the court's controversial decision requiring President Nixon to surrender secret tapes of his conversations.[135] It is in light

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[130]U.S. CONST. art II s 4 provides: "The President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery or other high Crimes and Misdemeanors".

[131] Fiss, *supra*, note 121 at 61.See also Mark A. Hutchson, *Maintaining Public Confidence in the Integrity of the Judiciary: State Bar of Nevada V. Claiborne*, B.Y.U.L.REV283, 283-284 (1989) (suggesting that in recent years , federal judges have been impeached for tax fraud, bribery and perjury).

[132]Note that it is easy to counter argue that the court is not really independent by looking at the cases where it refused to decide cases by invoking 'the Political Question Doctrine' even though constitutional rights were involved. See *infra*, text on pages 50-53.

[133]Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[134]Powell v. McCormack, 395 U.S. 486 (1969).

[135]United States v Nixon, 418 U.S. 683 (1974).

of these constitutional measures[136] that the federal judges in the US are able to enjoy a hefty measure of political independence, and ably protect human rights.[137]

C. Framework Of Judicial Review

Under this subtopic we attempt to discuss the contemporary substantive, and jurisdictional and procedural ground rules that govern the exercise of the Federal Courts authority. We will therefore look at the methods of constitutional interpretation first and proceed to discuss the jurisdictional rules governing constitutional adjudication in the US. How do the courts conduct their business? What system of judicial review have the courts developed over the years?[138]

i. Method of Constitutional Interpretation

How do the US courts approach a constitutional question? Do the courts use the interpretivism method or the non interpretivism one? What is the basis for adopting the specific method? Throughout history the US courts have consulted the plain or historical meaning of the language in the text, the structure of the Constitution as a

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[136]These were designed by the founding fathers to create an independent federal judiciary to serve as an "excellent barrier to the encroachments and oppressions of the representative body" and as "the bulwarks of limited constitution against legislative encroachments". See The Federalist, No. 78, pp. 522, 526, respectively.

[137]Note that the structural independence is not a complete one. See U.S. CONST. art. III which leaves the structure and jurisdiction of inferior federal courts to the discretion of the Legislature. See also Eli M. Salzberger, *A Positive Analysis of the Doctrine of the Separation of Powers, or : Why Do We Have an Independent Judiciary?* 13 Int'l Rev. L. & Econ. 349, 355 (1993) (arguing along the same lines). For a discussion of cases involving the promotion of Human Rights by the Supreme Court, see, Archibald Cox, *Constitutional Adjudication and the Promotion of Human Rights,* 80 Harv. L. Rev. 91 (1966).

[138]This seeks to cover the following questions: 1.To what extent do the US judges confine themselves to the norms derived from the written constitution as opposed to principles of liberty and justice whose normative content is not readily available in the constitution? What are the appropriate circumstances for constitutional adjudication? 2. When may the US federal courts decide constitutional issues? 3. At whose behest? 4. At what stages of a dispute? 5. As to what issues?

whole, the intent of the drafters, purposes sought to be achieved by the provision and the deeply held values or notions of social policy in constitutional adjudication. A combination of all the above interpretive methods have progressively led the country to develop the non-interpretive form of judicial review. This means that in reviewing laws or acts for constitutionality the judges do not confine themselves to determining whether those laws or acts conflict with norms derived from the written Constitution but they also enforce principles of liberty and justice even where the normative content of such principles are not available in the Constitution.[139] This is despite the fact that the courts lack the express textual mandate from the Constitution to decide constitutional issues.

This form of judicial review is well demonstrated in most of the major cases decided by the courts over the years. The most prominent ones being *Roe vs. Wade,* [140] *Furman vs. Georgia,*[141] *Baker vs. Carr,*[142] and *Brown vs. Board of Education.*[143] In these cases reference to or analysis of the constitutional text plays a minor role.[144] The court relied heavily on large conceptions of governmental structure and individual rights whose content, as Grey would argue, is scarcely specified in the written Constitution.[145] Such conceptions include dual federalism, vested rights, fair procedure and equality before the law.

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[139]Thomas C. Grey, *Do We Have An Unwritten Constitution*, 27 Stan. L. Rev. 703(1975).

[140]410 U.S. 113 (1973) (The arbortion case).

[141]408 U.S. 238 (1972) (The death penalty case).

[142]369 U.S.186 (1962).

[143]347 U.S. 483 (1954) (The segregation case).

[144] Grey, *supra*, note 139.

[145]*Id.*

Fletcher vs. Peck provides a fitting illustration of this approach in its early stages of development. In that case, one of the alternative grounds given by the court for striking down a Georgia statute was that it violated general principles which are common to our free institutions, particularly the principle of the inviolability of vested rights.[146] Ever since, the courts has continuously invoked the generalities of the Constitution as a basis for its decisions in cases involving human rights. Thus in *Shapiro vs. Thompson,*[147] the Court concluded that "the right to travel" "was a constitutional right though the court has no occasion to ascribe the source of this right to . . . a particular constitutional provision".[148] Equally, in *Roe vs. Wade*,[149] the Court was able to find "the right to privacy" in the text of the Constitution. The Court stated that;

> The right of privacy, whether it be founded in the Fourteenth Amendments concept of personal liberty and restrictions upon state action, as we feel it is, or, as the district court determined, in the Ninth Amendment's reservation of rights to the people, its broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[150]

Grey has defined the Court's reference to the textual cover for the right to privacy in this case as strikingly casual.[151] Some scholars have even gone further and described Justice Blackmun's opinion for the court as dreadful.[152]

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[146] 10 US (6 Cranch) 87 (1810).

[147] 394 US 618 (1969).

[148] *Id,* at 630.

[149] *Supra*, note 140.

[150] *Id*, at 153.

[151] Grey, *supra* note 139, at 708-709.

[152] See C. Black, DECISION ACCORDING TO LAW 81 (1981); See also Sandalow, *Constitutional Interpretation,* 79 Mich. L. Rev. 1033 (1981).

A number of arguments have been advanced to justify this form of judicial review. Brest has explained that;

> the text of the Constitution is authority but most of its provisions are treated as inherently open textured. The original understanding is also important, but judges are more concerned with the adopters' general purposes than with their intentions in a very precise way.[153]

Are the courts justified in approaching constitutional questions in this manner? Chief Justice Marshall attempted to explain the rationale in the case of *McCulloch vs. Maryland*,[154] where the state argued unsuccessfully that the "necessary and proper"[155] clause authorized only legislation "indispensable" to executing the enumerated powers. He stated that the word "necessary" as used in the common affairs of the world, or in the approved authors, frequently imports no more than that one thing is convenient, or useful, or useful or essential to another.[156] He further added that "such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea".[157]

Brest has interpreted Marshall's statement to mean that "any reading of a provision without regard to its linguistic and social contexts will either yield unresolvable indeterminances of language or just nonsense."[158] Hence, the Courts in interpreting the Constitution always attempt to conform their decisions to the prevailing conditions and

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[153]Paul Brest, *The Misconcived Quest for The Original Understanding* in MORDEN CONSTITUTIONAL THEORY: A READER (Garvey and Aleinikoff eds, West Publishing Co., 1991) 60.

[154]17 U.S. (4 Wheat.) 316 (1819).

[155]Art 1 sec 8 of the US CONST.

[156]*Id,* at 413.

[157]*Id,* at 414.

[158]*Supra,* note 137.

the deeply held values in the society because that is the only way to achieve practical results. In addition, the Courts are justified in adopting such an open form of judicial review because of the wording of the Ninth Amendment. It states: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people".[159] Impliedly, the framers permitted whoever deals with constitutional issues to take into account other values held by the society in determining violations of fundamental rights.[160]

The advantage of this form of judicial review is that it adapts easily to the changing needs of the society because it has a very important characteristic that of creating a "living Constitution". And its best element is that the provisions restrain government in the name of basic rights, and yet at the same time due to unspecifity, permit the judiciary to elucidate the development and change in the content of those rights over time.[161]

ii. The Justiciability Doctrine And Its Concepts

The starting point is Article III of the Constitution which provides the foundation of this doctrine .[162] The first section of this provision creates one "Supreme Court" and leaves it to Congress to set the size of the court[163] and ordain and establish such

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[159]US CONST. Ninth Amend.

[160]See Grey supra note 139 (arguing that "the Ninth Amendment has no substantive content on its face but rather that it it is a license to to constitutional decision makers to look beyond the substantive commands of the constitutional text to protect fundamental rights not expressed in the constitution").

[161]Grey, *id.* (suggesting that "the equal protection clause was meant originally to prohibit some forms of state racial discrimination" and that "it is equally clear that the clause was not intended to guarantee equal political rights but that the latter has only been possible because of the noninterpretive model of judicial review").

[162]Note that a number of complex congressional statutes and Supreme Court Rules and practices have been built on the basis of the provisions of Article III.

[163]U.S. CONST. art III, s 1. Note that the number of justices has been set at nine since 1869.Legal

inferior courts as may be necessary. The second part extends the federal judicial power to (i) all cases arising under federal law, concerning admiralty, or affecting foreign ministers, and to controversies between certain parties, namely, the United States, states, foreign nations, and their citizens in specified situations.[164] This provision dictates the manner in which constitutional issues must arise if they are to be addressed by the court.[165] And the courts have developed a number of concepts to govern the Justiciability Doctrine[166] which limit the jurisdiction of the Court.[167]

A good explanation of the workings of the doctrine is found in *Baker vs. Carr.*[168] In that case the court set down a three prong test in determining justiciability. It suggested that a court inquiring into justiciability must decide (a) "whether the duty asserted can be judicially identified [and (b)] its breach judicially determined, [and (c)] whether protection of the right asserted can be judicially molded".[169] In other words, if the Article III requirements are not satisfied the court cannot take jurisdiction because it

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scholars have argued that the Congressional power over size is a potential source of political checks on the Court.

[164]U.S.CONST. art. III s.2, cl. 1 (emphasis added).

[165]See Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the Case or Controversy Requirement* , 93 Harv. L. Rev. 297 (1979) (explaining that "the case or controversy requirement which is also called the justiciability doctrine, includes more specialized notions of ripeness, mootness, and standing to sue, and prohibits constitutional considerations of issues except as a necessary incident to the resolution of a concrete case or controversy") . See also P. Bator et al , Hart Wechsler's THE FEDERAL COURTS AND THE FEDERAL SYSTEM 64-241 (2d ed. 1973).

[166]See, Note, *And Justiciability For All?: Future Injury Plaintiffs and the Separation of Powers*, 109 Harv. L. Rev. 1066 (1996); See also, Brilmayer, *id.*

[167]See Valley Forge Christian College v. Americans United for Separation of Church and State 454 U.S. 464, 471(Justice Rehnquist stressing that the judicial review power "is not unconditioned authority to determine the constitutionality of legislative all executive acts").

[168] 369 U.S. 186

[169] *Id.*

doesn't have the power to do so,[170] and sometimes it may decline to adjudicate constitutional issues even in cases within the reach of Article III for prudential reasons.[171]

In *Flast vs. Cohen,*[172] Chief Justice Warren explained the rationale of the justiciability doctrine. He stated that the requirement of "cases" and "controversies";

> limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case and controversy doctrine.[173]

The central concepts of justiciability are usually elaborated in specific categories, namely advisory opinions, standing, ripeness, mootness, political and administrative questions. Each of these will be looked at separately and it will be seen that the same concerns often can be found in the language of two or more of these categories.[174]

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[170] See, e.g., Jenkins V. McKeithen, 395 U.S. 411,421 (1969) (the court observing that although the lower court did not address the standing issue, Supreme Court must since it is a question of subject matter jurisdiction).

[171] See INS V. Chadha 103 S.Ct 2764 (1983).

[172] 392 U.S. 83.

[173] *Id,* at 95.

[174] For example in McCarney v. Ford Motor Co. 657 F. 2d 230, 233 (the court stated that "standing is part of the concept of justiciability which includes the questions of advisory opinions, mootness and ripeness").

aa) The Rule Against Advisory Opinions

Under the U.S. federal legal system, advisory opinions are banned. Two important questions arise: what are advisory opinions and what is the source of the advisory opinion ban?[175] These have been defined to mean answers given by the justices of the highest court of state to questions of law submitted by the house of the legislature or by the chief executive.[176] Three different theories for the ban of such opinions have developed: the separation of powers principle, the need for adverse parties in a concrete case, and finality. Professor Bickel called these theories the passive virtues of the Supreme Court.[177] Apart from arguing that the judicial power was limited by its nature, he further suggested that "the courts may make no pronouncements in the large and in the abstract, " and that the court "may give no opinions, even in a concrete case, which are advisory because they are not finally decisive, the power of ultimate disposition of the case having been reserved elsewhere".[178]

It is worthwhile to note that the court established the rule against advisory opinions as early as 1793 when the justices declined to help President George Washington with legal assistance in dealing with what was considered an issue of major

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[175]See Richard W. Westling , *Advisory Opinions and the Constitutionally Required Adequate Independent State Grounds Doctrine,* 63 Tul. L. Rev. 379(1988) (explaining that "the ban is a rule that goes to the core of the legitimacy of the Supreme Court both as an institution and in its exercise of judicial review")

[176]Note, *Advisory Opinions on the Constitutionality of Statutes*, 69 Harv. L. Rev. 1302 (1956). See also Westling, *id*, at 395 (explaining that in such a situation "no Article III case exists. No law suit has been commenced, and no parties are adverse" and that "the precise reason for the dialogue between the Supreme court and a coordinate branch of government whether legislative or executive is to secure the advice of the court on the statute or action contemplated").

[177]A. Bickel, THE LEAST DANGEROUS BRANCH-THE SUPREME COURT AT THE BAR OF POLITICS, 111-198 (2d ed 1986).

[178]*Id* at 114-115. Note that Bickel believed that these ideas were central to the reasoning in Marbury vs. Madison.

national concern, America's neutrality toward the on going war between England and France.[179] In adopting this position the court had the following to say:

> three departments of the government [being] in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extrajudicially deciding the questions alluded to, especially as the power given by the constitution to the president, of calling on the heads of departments for opinions, seems to have been purposely as well as expressly united to the executive departments.

Apparently, the earliest concerns of the court in turning down the presidents request was to protect the principle of separation of powers[180] and a fear that such action would undermine the independence of the judiciary by robbing it of the power to pronounce judicial decisions that are final[181] as opposed to the case or controversy principle.[182] Nevertheless, as Bickel would later suggest, the impermissibility of allowing advisory opinions relying on Art. III limitations can be found in *Marbury Case*. He states that if the power of judicial review "is deduced from the obligation of the

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[179]The presidents request and some of the questions accompanying it, and the justices refusal are reprinted in Hart & Wechsler, FEDERAL COURTS 65-67 (3d ed., 1988).

[180]See Hart and Welchsler, *id*, (Chief Justice Jay declined to decide extrajudicially the questions alluded to because of the lines of separation drawn by the constitution between the three departments of the government).

[181]The importance of pronouncing judicial decisions that were final rather than tentative, and not subject to revision by either the executive or the legislature was expressed in an older case: Hayburns , 2 Dall (2 US) 408 (1792) where justices had refused to certify eligible pension claimants to the Secretary of War on the ground that the statute authorizing such proceedings improperly assigned duties not of a judicial nature to the courts. The court explained that judicial actions might be "revised and controuled by the legislature, and by an officer in the executive department" and that it deemed such action "radically inconsistent with the independence of the judicial power which is vested in the court". See also C. & S. Air Lines v Waterman Corp., 333 US 103 (194 8) (indorsing the same principle).

[182]Note that some authors argue that the principle against advisory opinions derives from the framers intent. See Evan Tsen Lee, *Deconstitutionalising Justiciability: The Example of Mootness*, 105 Harv. L. Rev. 603, 644 (1992) (suggesting that "the advisory opinion doctrine has a constitutionally- mandated core and a large prudential curtilage").

courts to decide cases conformably to law", as Chief Justice Marshal argued, then Article III's extension of the "judicial power . . . arising under this Constitution limits the exercise of the power to the confines of a constitutional case".[183] This was further endorsed by the court much later in Flast case.[184] Hence, the U.S. Federal Courts are banned from deciding issues arising out of a controversy that is not real or in which the parties are not adverse.[185]

In addition the ban precludes the court from making pronouncements on issues that are "abstract, hypothetical or contingent".[186] These prohibitions, which are clearly justified by the failure of a case to satisfy the requirements of article III jurisdiction are strictly observed by the court and used to buttress the argument against advisory opinions.[187] As Justice (then Professor) Frankfurter stated "Every tendency to deal with constitutional questions abstractly, to formulate them in terms of barren legal questions, leads to dialects, to sterile conclusions unrelated to actualities".[188] It is on the basis of the issues discussed above that advisory opinions are not permitted in the US federal legal system.

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[183]Bickel , *supra,* note177,

[184]See the Flast case, *supra,* note 172 (suggesting that issues should be presented in an adversary context).

[185]See Flast *id.* See also South Spring Hill Gold Mining Co. V. Amador Medean Gold Mining Co., 145 U.S. 300, 301 (1982).

[186] Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 461 (1945). See also Westling, *supra* note 175, at 396.

[187]Notably the prohibitions against advisory opinion emanating from Art. III are substantially related to the rationales behind other doctrines of justiciability.

[188]see Bickel, *supra* note 177, at 115-116 (quoting Frankfurter, Advisory opinions, in ENCYCLOPEDIA OF THE SOCIAL SCIENCES 475,478 (1930)); see also Frankfurter, *A Note on Advisory Opinions*, 37 Harv. L. Rev. 1002 (1924).

bb) The U.S. Doctrine Relating To Standing

This doctrine seeks to decide the question, who has the "right to seek judicial enforcement of a claimed legal duty".[189] As Justice Scalia pointed out in *Lujan vs. Defenders of Wildlife*[190] in order for a claimant to gain access to the federal courts, he must satisfy hree elements of standing:

> First, the plaintiff must have suffered an "injury in fact"-- an invasion of a legally- protected interest which is (a) concrete and particularized[191]...; and b) "actual or imminent", not "conjectural" or "hypothetical" [192].Second there must a causal connection between the injury and the conduct complained of - the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... the result of the independent action of some third party not before the court".[193]Third, it must be "likely", as opposed to merely "speculative" that the injury will be "redressed by a favorable decision".[194]

It is apparent that there are three very important requirements; injury in fact, causation and redressability, and that these requirements purport to rest on the need to assure a sufficiently concrete record and sufficient adverseness, to aid the court in deciding constitutional issues. However it is not easy to achieve a uniform definition of these concepts. For example, the concept of "injury in fact" as David Logan observed, "can be described, but not defined with precision since what constitutes injury in fact is

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[189]William A. Fletcher, *The Structure of Standing* , 98 Yale L. J. 221 227 (1988).

[190]112 S.Ct. 2130 (1992).

[191]The court referred to Warth v Seldin 422 U.S. 490,508 and Sierra Club v Morton 405 U.S. 727, 740-741.

[192]The court referred to Whitmore v Arkansas 495 U.S. 149, 155 (1990) (quoting Los Angeles vs. Lyons, 461 U.S. 95, 102 (1983) .

[193] The court cited Simon v Eastern Ky. Welfare Rights Organization, 426 U.S. 26, 41-42.

[194] *Supra,* note 159 , at 2136.

an elastic concept that the court may construe broadly".[195] But, despite these anomalies, the courts at least require that the injury must be distinct and individuated.[196] Hence, the court is always reluctant to vindicate what it considers to be generalized claims regarding constitutionality, legality or the public interest.[197]

On the other hand the causation requirement entails that the plaintiff must show that the injury is traceable to the challenged action of the defendant[198]. However , case law indicates that the courts have used different formulations in order to determine causation, ranging from requiring a minimal showing of "a substantial likelihood of causation"[199] to a showing of "causation to a certainty".[200] Nevertheless, despite the failure to come up with a single formula, the court has granted standing where the causal connection between the parties is so remote at best.[201] The Supreme Court has also allowed third party standing where there is a substantial relationship between the parties, and the real party is unable to assert the claim, and that the constitutional right of the real party will be diluted if a third party were not allowed to invoke it.[202] The latter test

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[195]David A. Logan , *Standing to Sue: A proposed Separation of Powers Analysis*, (1984) Wisc. L. Rev. 37, 43.

[196]*supra*, note 190, at 501.

[197] *id.*

[198]Simon v Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41 (1976).

[199]See Duke Power Co. V Carolina Envitl. Study Group, 438 U.S. 59, 75 note 20 (1978).

[200]See Warth Case, *supra*, note 191, at 505.

[201]See United States V. SCRAP, 412 US 669 (1973) (students were granted standing to challenge ICC order regulating railroad rates because the agency action would increase the use of nonrecyclable commodities, thereby increasing consumption of natural resources that might have to be extracted from geographical areas in which SCRAP members lived, thereby increasing litter, and thereby impairing their enjoyment of the environment). See also Logan, supra, note 164, at 45 note 40.

[202]See Eisenstadt v. Baird, 405 U.S. 438 (1972) ; See also Sharon F. DiPaolo, *Getting Through the door: Threshhold Procedural Considerations In Right- to- Die Litigation,* 6 Risk: Health Safety & Env't 59, 66.

sets a very high standard and is definitely not productive in a young democracy like Malawi.

In a recent attempt to articulate further the basic requirements of standing, the courts have insisted that a showing of an injury in fact to the particular plaintiff who seeks to bring the case ensures concreteness. Such an approach was indicated by Justice Kennedy in his concurring opinion in *Lujan vs. Defenders of Wildlife*:

> While it does not matter how many persons have been injured by the challenged action, the party bringing the suit must show that the action injures him in a concrete and personal way. This requirement is not just an empty formality. It preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to a professed, stake in the outcome, and that, "the legal questions presented... will be resolved, not in the rarefied atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of the judicial action".[203]

Where an organization is the plaintiff , it can sue on behalf of its members if the following rules are satisfied, for example if (a) its members will have standing to sue in their own right; (b) the interest it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.[204] An organization may also sue in its

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(citing other old cases where this exception to the standing rule was recognized).

[203] *Supra* note 190, at 2147. Note that the court quoted Valley Forge Christian College v. Americans United for Separation of Church and State 454 U.S. 464 , 472.

[204] See Competitive Enterprise Institute V NHTSA, 901 F.2d. 107, 111 (D.C. Cir. 1990) (citing Hunt v Washington State Apple Advertising Commission, 432 U.S. 333 (1977)) Note that American legal Scholars have questioned whether this criteria truly promote the optimum conditions for constitutional adjudication. See Jaffe, *The Citizen as Litigant In Public Actions*: *The Non- Hohfeldin or Ideological Plaintiff,* 116 U. Pa. L. Rev. 1033 (1968). Cf Bickel, *Foreword: The Passive Virtues,* 75 Harv. L. Rev. 40 (1961).

own right where it can show some concrete injury to, for example, its activities or functions.[205]

What, then , are the reasons for such stringent rules ? The courts justify the rules relying on article III "Cases or Controversies" limitation.[206] The argument is that these rules preserve the system of separation of powers as enumerated in the Constitution since they ensure that the federal courts only decide "concrete cases" brought before them thereby restraining them from intruding in the ambits of the other two branches of government.[207] The other reason advanced for these stringent rules is that they ensure that the parties coming before the court have enough of an interest in the outcome of the case so that issues are presented in a vigorous and adversarial manner.[208]

In addition to these core constitutional requirements, the courts have also adopted prudential limitations barring a plaintiff from litigating "generalized grievances"[209] and from asserting rights of other people.[210] The rule against generalized grievance stipulates

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[205] See Havens Realty Corp. V. Coleman, 455 U.S. 363 (1982) (stating that mere allegations of "abstract social interests" will not suffice).

[206] See David A. Logan, *Standing to Sue: A Proposed Separation of Powers Analysis*, Wisc. L. Rev.37, 38(1984) (suggesting that "[b]y examining whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy, federal courts use standing to limit their jurisdiction in accordance with the rather enigmatic language of Article III that only cases or controversies are to be adjudicated").

[207] See Douglas L. Parker, *Standing to Litigate Abstract Social Interest in the United States and Italy: Reexamining Injury In fact*, 33 Colum. J. Transnat'l 259, 266(1995); see also Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers,* 17 Suffolk U. L. Rev. 881 (1983).

[208] See Baker v Carr, *supra,* note 142 at 186.

[209] See United States v Richardson, 418 U.S. 166 (1974). Note that in some constitutional cases where the plaintiff is suing under a statute the courts require him to be within the zone of interest of the underlying statute on which the claim is based, see Parker, *supra*, note 207, (citing Air Conference of America v Postal workers Union 498 U.S. 517 (1991); and Clarke v Securities Industry Assn., 479 U.S. 388 (1987)

[210] See Warth Case, *supra*, note 191. For an instance where a third party is permitted to bring a claim on behalf of another person, see Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982).

that, "when the asserted harm is a generalized grievance shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction."[211] In addition, the Federal courts may invoke these when the exercise of jurisdiction will be unwise , a typical example is where accepting a case will waste scarce judicial resources.[212] These prudential rules have been justified on the ground that they protect the autonomy of those who are not present.[213] However, since these rules are court created, they may be waived by a court or an act of Congress.[214]

cc) The Ripeness And Mootness Doctrines

Ripeness and mootness are additional requirements that the Federal courts consider when determining whether to grant jurisdiction or not to a party bringing a suit. These were originally viewed strictly as part of the constitutional case or controversy requirement of article III.[215] Of late the courts approach has indicated that these two doctrines, like the standing doctrine itself, have both constitutional and prudential

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[211] Warth, *id*, at 499.

[212] See Craig v Boren, 429 U.S. 190, 193-194 (1976) (declining to invoke third party limitation where it would cause inefficient use of judicial resources). See also Brian A. Stern, *An Argument Against Imposing the Federal "Case or Controversy Requirement" on State Courts,* 69 N. Y. U. L. Rev 77, 83-84 (1994).

[213] See Brilmayer, *supra* , note 165 (suggesting that "the core rules on standing, as well as the prudential ones, also protect the autonomy of nonparties"). Note that the rules regulating standing has been attacked by many scholars, questioning whether the goals allegedly served by the current rules are necessary for the courts to carry out their functions, see Susan Bandes, *The Idea of a Case*, 42 Stan. L. Rev. 227(1990); see also Cass R. Sustein, *Standing and Privatization of Public Law*, 88 Colum. L. Rev 1432 (1988).

[214] See Craig case, *supra* note211.

[215] See Liner v Jafco, Inc., 375 US 301, 306 n.3 (1964) (The court stating that "our lack of jurisdiction to review moot cases derives from requirements of article III of the constitution under which the exercise of judicial power depends upon the existence of a case or controversy").

underpinnings.[216] We will look at them together because they are corollary to each other and they determine when a party may bring an action in the federal courts.

The ripeness inquiry determines "whether the harm asserted has matured sufficiently to warrant judicial intervention".[217] This formula warrants the question: how ripe must a controversy be to present appropriate circumstances for judicial intervention? It has been noted earlier that the federal courts will not render "advisory opinions" on legal questions whatever the circumstances.[218] Hence, a plaintiff can not seek anticipatory relief, for example, by requesting a ruling on the legality of an action that he fears might be taken against him.[219] A good illustration of the ripeness doctrine at work is *Poe vs. Ullman,* [220] which was an effort to obtain a court ruling on the constitutionality of a Connecticut statute that criminally prohibited contraceptive use. Although the statute clearly threatened harm to the plaintiffs the court commented that "[t]he lack of immediacy of the threat described by these allegations might alone raise serious questions of non- justiciability"[221] and went ahead and found that since the

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[216]Compare Honig v Doe, 484 U.S. 305, 330 (1988) (Renhquist, C.J., concurring) (suggesting that mootness doctrine might not be derived from article III) (Scalia, J., dissenting) (arguing that mootness doctrine derives from constitutional case or controversy); see also 13A Charles A. Wright et al., Federal Practice and Procedure s 3532.1, at 112, 115-19 (1984) (arguing that ripeness has both constitutional and prudential origins).

[217]Warth case , *supra,* note 171, at 499.

[218]See text on pages 36-39.

[219]See United Public Workers v Mitchell, 330 U.S. 75 (1947) (where the plaintiffs suit was a mere desire to act contrary to the rule against political activity as expressed in the Hatch Act of 1940 which forbade such activities. The court rejected their claim on the basis that they were seeking advisory opinions upon broad claims of constitutional rights. The court went further to explain that "should the court seek to expand their power so as to bring under their jurisdiction ill-defined controversies over constitutional issues, they would become the organ of political theories"). *Cf* Adler v Board of Education, 342 U.S. 485 (1952).

[220]367 U.S. 497 (1961) (plurality opinion).

[221]See *id,* at 501. Note that the court cited the Mitchel case, *supra,* note 219.

statute had not been enforced in eighty years there was no reason to believe that it would be enforced against these particular plaintiffs. In other words the Court opined that there was no imminent threat to the plaintiffs to warrant judicial intervention. We find this approach highly lacking. The mere fact that the statute had never been enforced before did not mean that it was less of a violation since its existence threatened prosecution and hence influenced people's decisions.

While the ripeness inquiry asks whether the harm has come into existence, the mootness inquiry asks "whether the occasion for intervention persists".[222] The cases involve litigants who clearly had standing to sue at the outset of the litigation and are deprived of such due to events occurring after the lawsuit has gotten underway.[223] Hence, the doctrine requires that "an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed".[224] As some scholars have stated "mootness doctrine encompasses the circumstances that destroy the justiciability of a suit previously suitable for determination".[225]

Professor Diamond attempted to analyze the doctrinal dimensions of mootness as follows as early as 1946:

> [A] moot case is one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has actually been asserted and contested, or a judgment upon some matter

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[222] See warth's case, supra note191 , at 499 n 10 ; see also Diapolo, *supra*, note 202 (suggesting that "while mootness involves being too late, ripeness involves being too early").

[223] This can be due to changes in the facts or in the law which allegedly deprive the litigant of the necessary stake in the outcome of the case.

[224] Steffel v Thompson, 415 U.S. 452, 459 n.10 (1974) (citing Roe v Wade).

[225] C. Wright et. al, *supra,* note 134 , s.3533, at 211; see also Kates and Baker, *Mootness in Judicial Proceedings: Toward a Coherent Theory*, 62 Cal. L. Rev. 1385, 1387 (1974) (stating that the term "moot" should only be applied to "only those cases in which a justiciable controversy once existing between the parties is no longer at issue due to some change in circumstances after the case arose").

> which, when rendered, for any reason, cannot have any practical effect upon a then existing controversy.[226]

This formulation requires that the controversy should be "real and substantial [,]... admitting of specific relief through a decree of a conclusive character as distinguished from an opinion advising what the law would be upon a hypothetical state of facts."[227]Therefore, the central question in determining mootness is "whether decision of a once living dispute continues to be justified by a sufficient prospect that the decision will have a sufficient impact on the parties."[228]

Consequently, the court has attempted to generalize the causes of mootness by declaring a case moot when it finds either that the issues presented are no longer "live" or that the "parties lack a legally cognizable outcome."[229] The courts have generally dubbed these the "live issue" and "personal stake" requirements.[230] In order to satisfy the first test, a party must be able to show something more than abstract injury.[231] As the court stated in *Lyons Case*, the claimant should be able to show to the court that "he sustained or is immediately in danger of sustaining some direct injury as a result of the challenged official conduct" and the injury or threat of injury must be both "real and immediate" not "conjectural or hypothetical".[232]

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[226]Diamond, *Federal Jurisdiction to Decide Moot Cases*, 94 U. Pa. L. Rev. 125,127 (1946).

[227]See Aetina Life Insurance Co., v Haworth, 300 U.S. 227, 241 (1937).

[228]See Wright, *supra*, note 192.

[229]United States Parole Comm'n v. Geraghty, 445 U.S. 388, 396 (1980) (quoting Powell v. McCormack, 395 U.S. 486, 496 (1969); see also Corey C. Watson, *Mootness and the Constitution*, NW. Univ. L. Rev. 143, 148 (1991).

[230]See Franks v. Bowman Trans. Co., Inc., 424 U.S. 747, 753 n.5 (1976); see also Watson, *id.*

[231]City of Los angeles v. Lyons, 461 U.S. 95, 101-02 (1983).

[232]*Id.*

On the other hand, the "personal stake" criterion requires a "logical nexus between the status asserted and the claim sought to be adjudicated"[233] and in addition to this it requires a sufficient degree of contentiousness.[234] In other words, there ought to be a sufficient degree of adverseness and the plaintiff should be able to show to the court that he would benefit from the relief sought. But what is the source for the mootness principles? As Wright pointed out, "the mootness principle rests on three doctrinal foundations."[235] Firstly, as seen from the discussion describing the doctrine, it is apparent that the doctrine has some roots from the case or controversy requirement of Article III which has caused the courts to impose minimum standards of continuing life. A good illustration is the case of *Golden vs. Zwickler*[236] where Zwickler had violated a state law by distributing anonymous literature concerned with a member of Congress during a pending election campaign, and sought a declaratory judgment that the statute was unconstitutional. By the time of the judgment the person he had targeted for the campaign had left Congress for a seat on a state court. The court came to a conclusion that there was no longer an actual controversy.

Secondly, the mootness decisions are concerned mostly with the determination whether any effective purpose can still be served by a specific remedy.[237] This enables the court to exercise discretion in assessing whether the prospective benefit of an injunction, declaratory judgment, or other specific remedy is too slight to justify a decision.[238] A sufficient illustration of the remedial doctrine is *United States vs. W.T.*

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[233]Flast v. Cohen, *supra,* note 172 at 102.

[234]Roe v. Wade, *supra*, note 149, at 124 (1973).

[235]Wright et. al., *Supra*, s. 3533.1

[236]394 U.S.103 (1969).

[237]Wright et.al., *supra.*

[238]See *id.*

Grant Company,[239] where the court stated that in order to establish mootness, the defendant who has discontinued challenged activities must carry the heavy burden of demonstrating that there is no reasonable expectation of repeating the wrong. However, the court added that the party seeking relief remains obliged to satisfy the court that it is pertinent that he be granted relief due to "some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive."[240]

The final concern for the mootness doctrine involves discretionary judicial administration[241] which "focuses on the importance of deciding or avoiding decision, and the need to conserve judicial resources."[242] The argument is that the court squanders judicial resources if it resolves an issue that no longer affects anyone[243] and also when it dismisses a case involving issues which are most likely to recur and in which it has invested time and effort.[244] This self imposed constraint ensures that the courts are not involved in unnecessary judicial lawmaking and prevents the courts from making unwise decisions when nothing immediate seems to be at stake.[245] In addition, as Bandes has intimated, "these goals are instrumental and subsidiary to the normative end of enabling the court to give meaning to constitutional values."[246] It is worthwhile to

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[239]345 U.S.629 (1953).

[240]*Id* at 633. Note that the court may sometimes use its discretionary powers to withhold declaratory relief even in cases of actual controversy. See A.L. Mechling Barge Lines, Inc. V. United States 368 U.S.324 (1961).

[241]These emanates from the courts prudential rules as opposed to the constitutional origins.

[242]Wright et. Al., *supra.* See also David P. Currie, *The Supreme Court and Federal Jurisdiction: 1975 Term,* 1976 Sup. Ct. Rev. 183, 187-90 (1976).

[243]David P. Currie, FEDERAL JURISDICTION 26 (2d ed. 1981).

[244]Honig v. Doe, 484 U.S. 305, 332 (1988) (Rehnquist, J., concurring).

[245]Wright et. al., *supra* note 210.

[246]Bandes, *supra*, note 213 at 309.

note that doctrines of judicial administration run parallel to the remedial doctrines and mostly they attempt to spare courts and parties the burden of litigating and deciding mere debating points.[247]

There are four major exceptions to the mootness doctrine.[248] These exceptions enable the courts to hear the case despite the fact that there is no longer a live controversy. The first one involves wrongs capable of repetition yet evading review.[249] This covers injuries which occur and disappear so quickly that they will always be moot before the court litigation is over. *Roe vs. Wade* [250] is the case in point. The plaintiff was pregnant when she filed her complaint challenging a state law prohibiting abortion. By the time the case reached the Supreme Court, her pregnancy was completed she no longer sought an abortion. The court nonetheless decided the constitutional question presented and reasoned that laws prohibiting abortion would inflict wrongs in the future and that they would escape review because the time period for gestation is shorter than that for litigation.[251]

The second exception is where a secondary injury remains, for example, collateral consequences may exist after the disappearance of the primary injury. *Sibrone vs. New York*[252] illustrates this exception clearly. The Supreme Court stated that adjudication of the merits of a criminal case is permitted where "under either state or federal law further

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[247]U.S. v. R.J. Reynords Tobacco Co., D.C.N.J. 1976, quoted in s 3533 note 3.

[248]For a critique analysis of the exceptions see, Note, *A Unified Approach To Justice.*

[249]E. Chemerinsky, FEDERAL JURISDICTION 114-18 (1989).

[250]Wade, *supra*, note 149.

[251]*Id.* At 125; See also Erwin Chemirinsky, *A Unified Approach to Justiciability*,22 Conn. L. Rev. 677, 680 (1990) (arguing that by such reasoning, the complaint in City of Los Angeles v. Lyons, *supra*, note 230, presents a wrong capable of review and it should have been heard and decided by the Supreme Court).

[252]392 U.S. 40, (1968).

penalties or disabilities can be imposed . . . as a result of the judgment which has . . . been satisfied."[253]

The third exception is known as voluntary cessation. For example if the defendant stops the offending practice but can resume it at any time, the court does not dismiss the case as moot. As it was pointed out in *United States vs. W.T Grant Co.*, [254] "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not render the case moot." And finally, the court offers a liberal approach to the class action suits in relation to the mootness doctrine. For example in *United States Parole Comm'n vs. Geraghty*[255] the court spoke of "the flexible character of the Article III mootness doctrine".[256] Pursuant to this so called "flexible character", the court has developed a practice where by class action suits are allowed despite the fact that the named plaintiff no longer presents a live controversy.[257]

dd) The "Political Question" Doctrine

The doctrine emanates from the idea that there are certain subjects which are inappropriate for judicial review and that such subjects should be left to the political branches of the government, even though the jurisdictional and justiciability requirements discussed above are satisfied.[258] The general consensus is "[t]hat the

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[253] *id.*

[254] Grant Co. Case *supra*, note 239 at 632.

[255] 445 U.S. 388, (1980).

[256] *Id,* at 400.

[257] Note that such a preferential approach has come under intense attack from the scholarly community which has argued that such treatment should equally be afforded to class action suits that fulfill the article III requirements for standing too. For example, see Chemerinsinky, *supra,* note 218, at 682.

[258] See Chemerinsky, *supra* , note 251, at 142.

political question doctrine stems from Chief Justice Marshall's opinion in *Marbury vs. Madson.*"[259] In this celebrated case even as he claimed the power to decide questions of law authoritatively for all three branches of government, Chief Justice Marshall recognized limitations on that power:

> The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or the officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.[260]

Marshall's statement gave birth to constitutional law debate. The courts and academic commentators have struggled with the following two questions: what issues of law requires judicial decision and what issues are better left to the political branches of government.[261] The court attempted to come up with a definitive statement in *Baker vs. Carr,*[262] where qualified voters of certain counties in Tennessee sued under a federal civil rights statute alleging that a certain Tennessee statute deprived them of the equal protection of the laws as provided by the fourteenth amendment, as it debased the value of their votes.[263] The court found in favor of the complainants and stated that the issue did not present a "non justiciable" political question. The court further noted that the "nonjusticiability of a political question is primarily a function of the separation of powers."

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[259] See J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. Pa. L. Rev. 97, 102 (1988).

[260] *Supra*, note 94, at 170.

[261] Michelle D. Gouin, *United States V. Alvarenz-Machain: Waltzing with the Political Question Doctrine,* 26 Conn. L. Rev. 759, 766 (1994).

[262] *supra,* note 141.

[263] *Id.* at 187-88.

This statement indicates that there are other secondary reasons for adhering to the doctrine, and these can be found in Justice Brennan's further definition of the doctrine in the same opinion:

> It is apparent that several formulations ...may describe a political question, although each has one or elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable or manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of kind clearly for non judicial discretion; or the impossibility of the courts undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[264]

The long quotation above indicates that the additional factor that prompts a finding of the political question, is the courts' lack of clear standards for the adjudication of such issues.[265] In addition to the two criteria mentioned above, Justice Brennan in the same opinion quoted from *Coleman vs Miller* [266] in defining the political question: "In determining whether a question falls within [the political question] category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial

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[264] *Id*, at 217.

[265] *Cf* Champlin and Schwarz, *Political Question Doctrine And Allocation of the Foreign Affairs Power,* 13 Hofstra L. Rev. 215, 219 (1988) (suggesting that the absence of standards should not be a basis for finding a political question).

[266] 307 U.S. 433 (1937).

determination are dominant considerations".[267] This adds the "finality" requirement as a basis for a finding of a political question. Rather than present the arguments that have been developed elsewhere as to the logic and practicality of the courts' reasoning for the avoidance of constitutional adjudication of political questions,[268] it is sufficient here to note that the effect of the political question doctrine is to render certain constitutional provisions off bounds for the federal courts.[269]

For Malawi, we suggest that in exercising discretion in matters involving "political questions" the courts should be able to weigh the overall effect its decision may have on both the structure of government and on the society, since the courts are mandated to decide all constitutional issues by the text of the constitution. This approach seems feasible for Malawi because as opposed to the US where judges are free to avoid any constitutional issue where there is no pressing need,[270] the Malawi judges are obligated to deal with constitutional issues by the constitution itself.

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[267]Baker, *supra,* note141 at 210 (quoting Coleman, *id* , at 454- 55).

[268]See Linda Sandstrom Simard, *Standing Alone: Do We Still Need The Political Question Doctrine,* 100 Dick. L. Rev. 303; see also Gouin, *supra* note 229 ; Peter J. Mulhern, *In Defence of the Political Question Doctrine*, 137 U. Pa. L. Rev. 97, 109 (1988)(reporting that "L. Hand suggested that judges are free to avoid any constitutional issue when they find no pressing need to intervene since the power of judicial review is not grounded in the text or structure of the Constitution").

[269]See Chemerinsky, *supra* note 220, 694-695 (questioning if its proper for the courts to refuse to hear cases of alleged constitutional violations on the basis of this doctrine); for instances where the fedaeral courts invoked the doctrine see, Smith v Reagan, 844 F. 2d 195 (4th Cir. 1988), cert. denied, 488 U.S 954 (1988) (Iran- Contra scandal); Americans United for the Separation of Church and State v Reagan, 786 F. 2d 194 (3d Cir. 1986), cert. denied sub nom. American Baptist Churches v Reagan , 479 U.S. 914 (1986) (challenging the establishment of diplomatic relations with the Vatican); Mitchell v. Laird, 488 F.2d 611,616 (D.C. Cir. 1973) (challenging legality of Vietnam War due to lack of proper declaration).

[270]Mulhern, *supra*, note 244.

CHAPTER III

PROSPECTS AND PROBLEMS OF THE U.S MODEL IN MALAWI

As noted elsewhere, Malawi adopted a new constitution in 1994[271] which models itself after the US constitutional system. Article 5 makes the Constitution the supreme law of the land and states that "[a]ny act of government or any law that is inconsistent with the provisions of this Constitution shall to the extent of such inconsistency, be invalid."[272] This makes every action of government subservient to the Constitution[273]. Courts, however, are entrusted with the responsibility of interpreting, protecting and enforcing the Constitution and any laws under it. This responsibility manifests itself under the provisions of Article 108 which provides thus:

> (1) There shall be a High Court for the Republic which shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law. (2) The High Court shall have original jurisdiction to review any law, and any action or decision of the government, for conformity with this Constitution, save as otherwise provided by this Constitution.[274]

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[271] See the introduction.

[272] MAL. CONST. art 5 .

[273] Article 4 of the Constitution further stipulates in clear terms that it shall bind all executive, legislative and judicial organs of the state at all levels of the Government and all the peoples of Malawi are entitled to the equal protection of this Constitution and all laws made under it.

[274] Article 108 (1) and (2).

This is a very significant step in Malawian constitutional law since it enhances the position of the courts . And it was a direct reaction to President Banda's dictatorship of 30 years and a general dissatisfaction with the parliamentary system of government which failed to protect individual and human rights in the face of wanton violations. Judge Mwaungulu in the case of *Fred Nseula vs. Attorney General and Malawi Congress Party,*[275] after examining the debates and discussions of the Constitution endorsed this view by observing that "the main thrust of the 1994 Constitution is to forestall tyranny whether it is by the political will expressed in executive or legislative action",[276] and intimated that the "[t]he powers of [the] court under the Constitution are that it is the custodian of the Constitution and the ultimate preserver of human rights for the citizen".[277]

The framers of this Constitution should be commended for ensuring that rights should be protected by the courts. However, there are a number of hurdles that the judiciary and the society as a whole need to overcome in order to achieve optimum use of the institution of judicial review as a tool for the safeguard of these rights. These hurdles emanate from a) the ambiguity in some of the constitutional provisions b) the background of the nation, and c) the present political and socio-economic situation. Hence, this chapter looks at those elements in the society that make the US model viable, together with the likely negative characteristics inherent in the society and what needs to be done in order to remedy the problems. In our proposals we will rely heavily

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[275]Civil Cause No. 63 of 1996 (High Court Principle Registry).

[276]*Id*, at page 6.

[277]*Id*, at page 14. Note that the provisions under Articles 4 and 5 prompted the judge to observe that 'the 1994 constitution has brought into focus only one document and one institution that will ultimately determine the course of history and the affairs of men : the Constitution itself and the Courts.'

on the provisions of the Constitution and our own speculations due to the absence of adequate case law comprehensively interpreting the new provisions

A) The Structure Of The Judiciary

The 1994 Constitution creates a unified judiciary comprising of Supreme Court of Appeal, a High Court for the Republic, and subordinate courts as prescribed by Acts of Parliament.[278] The Supreme Court which is the highest in the hierarchy consists of a Chief Justice and not less than three other judges. The High Court is a court of general jurisdiction and has been given the explicit power of constitutional review. This court consists of such number of judges as may be prescribed by an Act of Parliament which should not be less than three at all times.[279] The Subordinate courts are presided over by Magistrates and are found in almost all the districts in the country.

The most notable feature about the set up of the court is the attempt to create an independent judiciary by insulating it from politics, and any harmful dependence upon either the legislature or the executive. The starting point is Article 103 (1) of the Constitution which states that "[a]ll courts and all persons presiding over those courts shall exercise their functions and duties independent of the influence and direction of any other person or authority."[280] This provision seeks to ensure judicial independence from both external and internal forces. The 1994 Constitution seeks to achieve this by providing security of tenure for judges. In western democracies, it is believed that an independent judiciary ensures the existence of a working democracy and of a

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[278]Articles 104, 108, 110.

[279]Note that Article 137 of the Constitution creates a National Compensation Tribunal with authority to hear claims relating to alleged criminal and civil liability of the former Government of Malawi. Its decisions are reviewable by the High Court.

[280]Article 103 of the Constitution.

government which respects individual liberties.[281] Though the present Malawian Constitution has adopted most of the relevant features from the US constitutional system, it has retained some of the older institutions from the previous Constitution. For example, the appointment process is basically the same, except with a few a changes to reduce presidential monopoly in judicial appointments.

In contrast to the US practice, whereby all nominees require Senate approval,[282] the Malawi National Assembly plays no role in the appointment of judges except in the appointment of the Chief Justice. The Constitution provides that a presidential nominee for the highest office in the judiciary requires confirmation "by a majority of two thirds of the members present and voting".[283] All the judges are appointed by the President "on the recommendation" of the Judicial Service Commission.[284] It is believed that such a body is generally supposed to be politically impartial and the judges nominated are considered on the basis of their professional excellence alone. This process looked more attractive to the people since it provides for a stringent rule and the major issue in the country was to insulate the judicial selection process from improper political considerations.[285] Presently, the president can only appoint candidates chosen by the Commission and this ensures that the court is not packed with presidential preferences thereby affording the judiciary some extent of independence from the executive.

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[281] See *supra,* note 109and accompanying text.

[282] Note that the defenders of the United States system of presidential appointment and Senate confirmation of judges have argued that this process helps ensure that the judges appointed will have views broadly consistent with the general population and thus more responsive to social needs.

[283] Articles 111(1).

[284] Article 111 (2) of the Constitution.

[285] Malawi has borrowed this idea from the following countries: Kenya, Zambia Lesotho Swaziland Gambia and Ghana. Note that Ghana discarded this in 1979 and adopted the US practice which requires Senate approval.

It is apparent that the whole purpose for creating the Commission is to achieve an independent judiciary. Therefore, though Malawi has taken a different route, the end result, hopefully, should be the same. Some Malawians express some doubt that the goal behind the creation of the Commission will be achieved. This is due to an alleged weakness in the present appointment process to this body, which has allegedly a significant potential of undermining the very advantages of using this system. The Commission is entirely formed by the president, hence the fear is that he might attempt to influence the choice of nominees for the judicial offices. The Constitution provides that the Commission shall consist of:

> (a) the Chief Justice who shall be the chairman (b) the chairman of the Civil Service Commission, or such other member as may be designated in that behalf by the chairman of the Civil Service Commission;[286] (c) such justice of appeal as may for the time being designated in that behalf by the president acting after consultation with the Chief Justice; and (d) such legal practitioner and such magistrate as may for the time being be designated in that behalf by the President acting after consultation with the Chief Justice.

However, it is only when one looks at the surface in considering this provision that it might appear that the president has complete control over the membership of the Judicial Service Commission. In practice, this is not the case due to the following reasons. Firstly, the Chairperson of the Commission is the Chief Justice, who is a nominee of both the President and the National Assembly.[287] Secondly, all the members of the Civil Service Commission, including the chairman are subjected to a strict parliamentary scrutiny before appointment. And, if we proceed on the basis that the Chief Justice is an independent officer, then the same arguments will seat well with the

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[286]Members of the Civil Service Commission are appointed by the president on satisfying the Public Appointment Committee of the National assembly as to their competence.

[287]See *supra*, note 283.

rest of the members of the Commission since he participates in their appointments. Hence, any potential threat of encroachment on judicial independence through this body is very minimal indeed.[288]

The other notable feature which enhances the independence of the judiciary in the present constitution is the tenure and removal provisions regarding judicial officers. The Constitution provides that a judge may vacate his office on attaining the age of 65 or such other age as may be prescribed by Parliament.[289] The provisions fix the mandatory retirement age for the judges. Though Parliament may change the current retirement age, the process for doing so is so cumbersome and heavily controlled by the electorate. Article 196 (1) provides that Parliament may amend such a provision if:

> (a)the provision to be amended and the proposed amendment to it has been to a referendum of the people of Malawi and the majority of those voting have voted for the amendment; and (b) the Electoral Commission has so certified to the speaker.

There is further requirement for a simple majority in the national Assembly after satisfying the above provision.[290] Hence, one can safely say that the tenure of judges is fairly independent from the control or manipulation of the Legislature. Furthermore, the president can no longer retain a judge in office on the pretext of serving the "public interest",[291] and this ensures that there is no court packing of judges sympathetic to the government of the day. However, a judge may be retained after attaining the retirement age only where it is "necessary to enable him deliver judgment or to do any other thing

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[288] *Cf* the weaknesses in the previous Judicial Service commission as discussed in Chapter 1.

[289] Article 119 (1) & (6).

[290] Article 196 (2).

[291] See *supra* note 75 and accompanying text.

in relation to proceedings that were commenced before him before he attained that age."[292]

The choice of a fixed mandatory retirement age for the judges is commendable. As we noted earlier, there are some drawbacks in giving judges life tenure,[293] and as Monaghan suggested, judicial independence can be equally "achieved by mandating fixed nonrenewable terms of service."[294] Hence, by mandating that the judges retire on attaining the age of 65, the judges are given a measure of security in their job and this will assist in building up their integrity and independence.

On the other hand the provision for the fixed tenure does not necessary mean that once appointed to judicial office, a judge can not be removed. The Constitution provides for exceptional circumstances which may warrant the removal of a justice and the procedure to be followed. Article 119 (2) states thus:

> A person holding the office of a judge may be removed from office _only[295]_ for incompetence in the performance of the duties of his office or for misbehavior, and shall not be so removed except in accordance with subsections (3) and (4).

And subsection (3) provides that:

> The president may by an instrument under the Public Seal and in consultation with the Judicial Service Commission, may remove from office any judge where a motion praying for his removal on the ground of incompetence in the performance of the duties of his office or misbehavior has been- (a) debated in the National Assembly (b) passed by a majority of the votes of all the members of the Assembly; and (c)submitted to the Assembly as a petition for the removal of the judge

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[292]Article 119 (1). Note that this provision allows the president to retain such a judge after holding consultations w Judicial Service commission.

[293]Monaghan, *supra,* note 125 and accompanying text.

[294]See *supra*, note 122.

[295]Emphasis added.

> concerned: Provided that the procedure for the removal of a judge shall be in accordance with the principles of natural justice.

It is apparent that the removal process differs from the US practice in material respects. For a Malawian Judge to lose office, he either must exhibit incompetence or should be found liable for misbehavior.[296] On the other hand, Article III of the US Constitution states that judges shall hold offices during good behavior.[297] It appears that a judge can stay in federal office in the US as long as he doesn't misbehave, inspite of being incompetent.

Several questions come to mind in reading the Malawi termination provisions: Is the requirement of competence to retain office a good thing ? Does it broaden the grounds for removal of judges and thereby making the judges susceptible to the political organs? Who initiates the removal process? Does a requirement of a mere majority votes in the house suffice to protect the judiciary from the whims of the National assembly?

The 'incompetence' requirement simply suggests a failing to meet a standard of proficiency. This contrasts sharply with the standards established in the US where a judge can only be relieved of his duties for misbehavior [298] and through the impeachment process which requires a two thirds majority vote of the members present.[299] As can be seen the Malawian standard of 'competence' can be easily abused because it is very lax. The provision is silent on who determines the standards of competence for the judges. Is it the Judicial Service commission or the Legislature? Since the Commission can only discuss the matter with the President after it has passed through the House, it implies that

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[296]Note Malawi has adopted these grounds from the 1966 Republican Constitution. See Article 64.

[297]See *infra,* note 298.

[298]The US Constitution limits the application of the section to treason, bribery, high crimes and misdeminours.

[299]*Supra*, note 128.

Parliament initiates the process for removal. It follows that the Legislature is supposed to set the standards for "competence" of the judges. This is a very dangerous scenario and can easily compromise the integrity of the judiciary.

The provisions requiring debate in Parliament can only offer limited assurance, since only a simple majority is required. Furthermore, the hurdle can be easily overcome by the present government since the ruling party is in the majority in the National Assembly. In addition, the President only need consult with the Judicial Service Commission before endorsing the will of the majority of the Parliament. This implies that the final decision is his and he is not bound to implement the views of the Commission. These observations indicate a major weakness in the termination provisions which creates a threat to the independence of the judiciary.

The proviso to article 119 (3) which requires that "the procedure for the removal of a judge shall be in accordance with the principles of natural justice" is meaningless since the procedure itself is faulty and susceptible to political manipulations. However, the provision regarding the salaries of judges is a good bulwark against political pressures and it is our belief that it will assist greatly in enhancing the independence of the judiciary. For example the constitution provides that all judicial officers shall receive a salary for their services to be determined by the National Assembly[300] and that:

> The salary and any allowance of any holder of judicial office shall not without his or her consent be reduced during his or her period of office and shall be increased at intervals so as to retain its original value and shall be a charge on the Consolidated fund.[301]

It is apparent that the Constitution not only protects the salaries of office holders from reduction by the legislature, but at the same time requires that the legislature should

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[300] Article 114 (1).

[301] Article 114 (2).

increase such salaries to retain their original value in the face of inflation. This makes it virtually impossible for the executive or the National Assembly to pressurize the judiciary through this avenue. Obviously, the Malawian Judges are in a better position compared to the US Federal judges in this respect since, as US scholars have observed, the Article III provisions of the US Constitution leaves judges to be subject to inflationary pressures.[302] The further requirement of charging the Judicial Salaries to the Consolidated Fund ensures the availability of funds for the judiciary for the whole year since the Fund is part of a yearly budget.

B) The Power Of Judicial Review

The new Malawi Constitution gives the judiciary broad , indeed unlimited, jurisdictional purview. It guarantees that "[t]he judiciary shall have jurisdiction over all issues of judicial nature and shall have exclusive authority to decide whether an issue is within its competence."[303] This is a very significant development because, as we noted earlier, the courts jurisdiction was severely limited by the 1969 amendments which gave away a big portion of the High court jurisdiction to the Traditional Courts, an arm of the Executive Branch.[304] It is clear that the language in the Article 103 provision leaves the jurisdiction issue to the discretion of the Court instead of making it subject to control by the Constitution as is the position in the US.[305]

Under the above quoted provision, the court is authorized to determine whether to grant jurisdiction or not in a particular matter. There is no requirement of "case or

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[302]See *supra,* note 124 and accompanying text.

[303]MAL. CONST. (1994) art. 103 (2).

[304]See *supra*, text on page 19.

[305]See supra, text in Chapter II (discussing the "justiciability Doctrine" which is a product of the "case or controversy" requirement of article III).

controversy". In addition, and most importantly, this Constitution gives the courts the power of judicial review expressly, as opposed to the US constitutional system where the courts has had to establish and develop the said power.[306] Article 108 (2) of the Constitution provides as follows:

> The High Court shall have original jurisdiction to review any law, and any action or decision of the Government, for conformity with this Constitution, save as otherwise provided by this Constitution and shall have such other jurisdiction and powers as may be conferred on it by this Constitution or any other law.[307]

Apparently, the High Court is granted more than just original jurisdiction. It may exercise "such other jurisdiction" and powers as may be conferred by the Constitution. An example of "such other jurisdiction" is Article 89 of the Constitution.[308] Under this provision, the President has power to refer disputes of a constitutional nature to the High Court. In what capacity will the Court determine such disputes? As a Court or just a legal advisor to the executive branch? What form will such a determination take: an advisory opinion or abstract review? These questions become pertinent when one recalls that "advisory opinions" are "answers given by the justices of the highest court of state to questions of law submitted by the house of the legislature or by the chief executive."[309] Does this mean that the Constitution allows the Court to issue advisory opinions? This is a debatable issue and will be explored in detail later in the thesis.

The grant of express power of review puts the Malawian judge in a better position as compared to the US one. However, there is a limitation to this broad powers of

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[306] *id.* Arguably the adoption of power of judicial review in the absence of constitutional mandate has been the major criticism of the US courts.

[307] MAL. CONST.(1994) art. 108 (2).

[308] MAL. CONST. (1994) art 89.

[309] Note, *supra*, note 176. Emphasis added.

judicial review. It is stipulated that the power is to be invoked "save as otherwise provided in the constitution."[310] It is not difficult to circumvent this limitation in issues involving the protection of rights since the Constitution is heavily tilted towards the protection of such rights.[311] The broadness of the provisions raise a number of issues since it appears there is no requirement of "case or controversy" nor does the Constitution state that the parties invoking this jurisdiction should be "interested parties."[312] Should the court adhere to the strict application of the justiciability rules in the face of such a flexible provision? The argument that the court should dispense with some of the procedural or the substantive rules observed in the US becomes especially attractive when we consider the fact that Websters Dictionary defines "jurisdiction" as "the administration of the law , (1) the legal power or authority to hear and decide cases: the power of executing the laws and administering justice. (2) the power or right of exercising authority . . ."[313] This indicates that the term 'jurisdiction' is not limited to cases or controversies. Furthermore, it is evident that the framers intended to prevent any unnecessary curtailment of the Court's jurisdiction by giving it "such other jurisdiction and powers . . ." to determine the constitutionality of governmental acts.[314] In addition the fact that the Court is given this power expressly by the Constitution dispenses with

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[310]*Supra*, note 309.

[311]See *supra,* Fred Nseula case, note 275, (Judge Mwaungulu stating that 'where there is a violation of rights of a citizen, be it to a member of the House or not, Courts will on the generality of the provisions in our Constitution be seised of the case if only to vindicate the rights of the citizen protected under the Constitution which the citizen alleges have been violated either by legislation or legislative action, resolution or decision').

[312]See *supra,* note 310 (The Constitution allows the president to refer disputes of a constitutional nature to the High Court).

[313]Websters Dictionary, 2nd ed.

[314]*Supra*, note 309.

all issues of legitimacy especially since the 1994 Constitutional Conference was attended by people from all the sections of the Malawi society.[315]

In view of the two provisions discussed above it appears that the Constitution, instead of just adopting the US system of constitutional review, has gone further to give the Malawi Courts very wide discretion in constitutional adjudication. Such loose language gives the Malawi Courts an opportunity to develop and establish jurisdictional and procedural rules that are suitable for the needs of the people, due regard being had to the political, cultural and historical situation of the country. That, this was the intention of the framers is evidenced by the wording of Article 11(1) of the Constitution which states that "[a]ppropriate principles of interpretation of this Constitution shall be developed and employed by the courts to reflect the unique character[316] and supreme status of this Constitution."[317]

The Constitution supplements the courts broad powers by supplying an enormously broad scope of legal resources and provisions that the courts may utilize. In particular , Article 11(2) provides that:

> In interpreting the provisions of this Constitution a court of law shall (a) promote the values which underlie an open democratic society; (b) take full account of the provisions of Chapter III[318] and Chapter IV[319]; (c) where applicable, have regard to current norms of international law and comparable foreign case law.[320]

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[315]The attendance included lawyers, women, chiefs, the disabled, etc.

[316]Emphasis added.

[317]MAL. CONST. art. 11(1).

[318]This deals with fundamental principles of government.

[319] The Bill of Rights.

[320]MAL. CONST.art. 11(2).

As can be seen, these are supposed to serve as guidelines in the courts' quest to promote democracy and human rights and indicate the Constitutions commitment to these values. However, some people have expressed concern about the breath of the judiciary's role and have suggested that it provides the court with an invitation to overreach. But this argument can be neutralized by pointing out that the judiciary's lack of enforcement power and a need to be accepted in the constitutional setting (legitimacy) are powerful tools to check any abuse of such powers by the courts.

C) Safeguarding Fundamental Rights And Freedoms

In the recent past Malawians have experienced some of the worst violations of human rights in Africa. This was mainly due to the lack of commitment by the previous regime to protect such rights. And this was compounded by the absence of specific provisions recognizing individual and human rights. As observed earlier, the government merely recognized the personal liberties enshrined in the United Nations Declarations Charter[321] and hence, there was no formal constitutional guarantee for the government to respect and protect these rights. In addition, the provisions under Article 2 (2) watered down any recognition on the part of government of the personal liberties since it allowed government to do anything as long as it was done pursuant to an enactment of Parliament regardless of whether rights were infringed or not in doing so.[322]

There is no doubt that the 1994 Constitution addresses these issues. Chapter IV adopts a detailed Bill of Rights incorporating individual, social and economic, and political rights.[323] By way of illustration, Malawi now has a multiparty system of government, and the Constitution guarantees various freedoms: speech, association,

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[321]See *supra*, note 86.

[322]See *supra*, note 88 and accompanying text.

[323]MAL. CONST. art 15-46

assembly, the press and various other human rights. These serve as a yardstick for the courts in measuring governmental action for conformity with the Constitution. Article 15 guarantees the protection of these rights as follows:

> The human rights and freedoms enshrined in this Chapter shall be respected and upheld by the executive, legislature and judiciary and all organs of the government and its agencies and, where applicable to them, by all natural and legal persons in Malawi and shall be enforceable in a manner prescribed in this Chapter.[324]

This indicates a commitment on the part of the government to uphold rights and freedoms, and also assures aggrieved parties some kind of remedy in case of violations. Pursuant to the foregoing, the Government is prohibited from making any law or taking any action which abolishes or abridges the fundamental rights or freedoms.[325] Furthermore, the Constitution stipulates that:

> Any person who claims that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled-
> (a) to make application to a competent court to enforce or protect such a right or freedom; and
> (b) to make application to the Ombudsman[326] or the Human Rights Commission[327] in order to secure such assistance or advice as he or she may reasonably require.[328]

In contrast to the US system, where the protection of Human Rights is entrusted with the Courts exclusively, the Malawi Constitution creates other independent bodies to

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[324]MAL.CONST. art. 15.

[325]MAL. CONST. art. 46 (1).

[326]Established under Article 20 of the Constitution.

[327]Established under Article 129 of the Constitution.

[328]MAL. CONST. art 46 (2).

assist the courts with this task. The only problem is that the provisions facilitating this multiple approach seem to be ambiguous. Apparently, an aggrieved party has several avenues to pursue in case of a violation. This, reflects the peoples distrust of rigid substantive and procedural court rules , and the need to blunt the influence of culture and the previous regimes dictatorship in the society in general. The disadvantage of having rigid rules governing the court is that it severely restricts accessibility to the courts. On the other hand, the culture cultivated over the past 35 years , combined with customary norms has gone a long way to make Malawians generally a passive people. However, the ambiguity inherent in the provisions regulating human rights in the Constitution, will give rise to a number of problems.

The above provision authorizes an aggrieved party to make application to a competent court and to make application to the Ombudsman or Human Rights Commission. It is not clear whether the applications to the latter two bodies should be done simultaneously with the application to the court. This ambiguity is further enhanced by the functions and powers entrusted with the Ombudsman which are quasi-judicial in nature. Article 123 of the Constitution provides as follows:

> (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.
> (2) Notwithstanding subsection (1), the powers of the office of the Ombudsman under this section shall not oust the jurisdiction of the courts and the decisions and exercise of powers by the Ombudsman shall be reviewable by the High Court on the application of any person with sufficient interest in a case the Ombudsman has determined.[329]

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[329]MAL. CONST. art. 123.

Notably, there are three instances where the Ombudsman can entertain an application from an aggrieved party. Firstly, the Ombudsman may act where it appears that no remedy will be available by way of proceedings in a court. This may cover situations where a suit is barred by the Limitation Act or where the issue involves a political question. The effect is to oust the jurisdiction of the court since the claimant has the privilege of choosing between the two forums, bearing in mind that the Ombudsman is the more attractive choice due to the absence of any rules regulating procedures. A better approach is to put all cases involving violations of human rights outside the realm of the Limitation Act thereby enabling the courts to have jurisdiction. In addition, the Ombudsman should not be allowed to determine issues involving political questions since they go to the core of any governmental system having separation of powers.

The second limb deals with situations where there is no remedy by way of appeal from the court. Considering the fact that most of the civil suits against government are instituted in the High Court, the provision greatly undermines the powers and functions of this Court. And in addition, it is meaningless since decisions of the Ombudsman are subject to review by the High court at the instance of an interested party.

And finally, the Ombudsman can take action where there is no practicable remedy. It is very difficult to imagine what situations the framers had in mind here, suffice to say the provision is not clear.

The inappropriateness of the functions of the office of the Ombudsman further becomes clear when one looks at the remedy provisions. Article 126 provides, among other things, that "where the investigations of the Ombudsman reveal sufficient evidence to satisfy him or her that an injustice has been done, the Ombudsman shall . . . (c) direct a court to adjudicate on an issue or on the quantum of compensation."[330] This is a direct

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[330]MAL.CONST. art. 126 (c).

contravention of Article 103(1) which authorizes court officials to act independently of the influence and direction[331] of any other person or authority.[332] It also contravenes subsection (2) of the same provision which empowers the judiciary to determine whether an issue is within its competence or not.[333]

The other body entrusted with the monitoring and protection of human rights is the Human Rights Commission. This Commission is established under Article 129 of the Constitution and its function is to protect and investigate violations of human rights. It consists of the Ombudsman and the Law Commissioner.[334] Regrettably, this body has no terms of reference. It is not surprising that it still has not been put in place after 3 years. Perhaps the present government realizes that it is redundant. The best thing is just to remove the provision creating this institution from the Constitution altogether.

While acknowledging the good intentions behind the adoption of a multiple system for the protection of rights and also appreciating the fact that the scenario helps ease the workload of the High Court, it is pertinent to mention that the overall effect is to undermine the position of the court in the constitutional setting, especially its role as the defender of the Constitution. On the other hand , if the Malawi courts opt to adopt the US model of judicial review in its entirety, they are bound to encounter a number of problems. These hurdles most probably will be a result of the rigidity of the

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[331]Emphasis added.

[332]MAL.CONST. art.103 (1).

[333]See *supra*, note 304 and accompanying text.

[334]Established under Article 132. The powers of the Law Commissioner Includes:

(a) to review and make recommendations regarding any matter pertaining to the laws of Malawi and their conformity to the constitution and applicable international law;
(b) to review and make recommendations regarding any matter pertaining to this Constitution;
(C)to receive any submissions from any person or body regarding the laws of Malawi or this Constitution; and
(d) to report its findings and recommendations to the Ministaer for the time being responsible for Justice who shall publish any such report and lay it before Parliament.

justiciability doctrines, the different cultures that subsists in the society, the present social-economic problems and the mentality of the judges due to their previous orientation with the parliamentary system of government.

i) Method Of Constitutional Interpretation

Over the years several methods of constitutional interpretation has been developed in different jurisdictions. The following modes are the commonly recognized; plain language, historical meaning of language in the text, intent of the framers, structure of the constitution, purpose of the provisions, precedent and the values and notions of social policy.[335] The Malawi Constitution gives the Court some guidelines in respect of methods of interpretation.[336] Article 11 (1) stipulates that "appropriate principles of interpretation of this Constitution shall be developed and employed by the courts to reflect the unique character and supreme status of the Constitution."[337] Obviously, the framers intended the courts to develop rules of constitutional interpretation that will be suitable to the Malawi society instead of just adopting principles that have been developed elsewhere.

Further, the courts are required in interpreting the provisions of the Constitution, to promote the values which underlie an open and democratic society and take full account of the provisions of Chapter III and IV dealing with fundamental principles and human rights respectively.[338] This provision to some extent mandates the courts to look beyond the constitutional provisions and take into account the social values in the society. This mandate points the courts to the non interpretive mode of judicial review. This mode will

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[335] MORDEN CONSTITUTIONAL THEORY: A READER (Garvey and Aleinkoff eds. ,1991) 26.

[336]MAL. CONST. Cap II.

[337]MAL. CONST. Art 11.

[338]MAL. CONST. Art. 11 (2) a & b.

be best for the country since it adapts easily to the continuously changing values in the society. The courts look at both the linguistic and the social context of a provision in interpretation. This is well illustrated by the way the equal protection thesis has developed in the US.[339] The other advantage for this mode of judicial review lies in the fact that its flexibility is analogous to the customary judicial process. This is so because the Court can interpret the basic law in accordance with the social values in the society which in turn results in social harmony which is the main goal in the customary judicial process. It is in the light of these factors that we suggest that Malawi should adopt and develop the non interpretative form of judicial review in such a way as to suit the special needs of the country in constitutional adjudication.

In addition, the Courts should avoid distinguishing the substantive and procedural provisions in interpreting the Constitution since such an approach dilutes the whole purpose of creating a constitutional document which is the supreme law of the land.[340] This observation is especially important in Malawi since the present Supreme Court is under the misguided impression that the procedural provisions in the Constitution are irrerevant and can be dispensed with by the government without any legal consequences.[341] This attitude does not comport with Article 9 which entrusts the judiciary with the responsibility of interpreting, protecting and enforcing the Constitution.[342]

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[339]Grey, *supra*, note 131.

[340]See *infra*, text on p.86-87.

[341]See *infra*, note 380.

[342]MAL.CONST.art.9.

ii) The Justiciability Doctrines For Malawi

aa) Advisory Opinions

We noted earlier that these have been banned in the US on the basis of three theories, namely , a)the separation of powers principle b) lack of adversity and c) finality.[343] There is no doubt that the present Malawi Constitution is based on the separation of powers principle to some extent, so that, the Court should be wary of encroaching in the realms of the other branches of government. However, the Court should appreciate the fact that the present constitutional set up is liable to abuse by the Government and should come up with a way to counteract such abuse when individual human rights are involved. The following are the reasons why it is easy for the Government to abuse its powers.

Firstly, the heads of government ministries (ministers) are also members of Parliament according to Article 96 (1) (e) of the Constitution.[344] Attempts to construe this clause narrowly so as to deny them the status of Members of Parliament was rejected by the Court in the case of *Attorney General vs Chipeta*.[345] This means that each government that comes to power is assured of a majority in Parliament at all times since it can achieve this by simply expanding its Cabinet. The incumbent president, Mr Muluzi, has already availed himself of this strategy by maintaining a Cabinet of 37 Ministers which is by far too large for a small country like Malawi and a great constraint on the meager resources in the country. The President has done this in disregard of the 1994 Constitutional Conference's recommendation to have the same portfolios reduced

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[343]See *supra*, text in chapter II.

[344]MAL. CONST. Art. 96 (1) (e). This is a legacy from the parliamentary system of government.

[345]MSCA Civil Appeal No. 33 (1994).

to 24.[346] The result is that though Malawi has adopted a multiparty system of government in theory, it is still a one party government in practice.

The second reason which in fact aggravates the above situation is that though the Constitution[347] provides for two houses of the legislature, only one exists presently. Attempts to create the senate as second chamber to check the Bills and policies has repeatedly been blocked by the incumbent government on the basis that it will be very expensive for the government to retain such a chamber.[348] The reason advanced by the government for refusing to create this second chamber borders on hypocrisy since it is willing to keep a large Cabinet at the expense of the same meager resources though some of the portfolios are redundant. Obviously, the reason for opting for the large cabinet is to ensure that there is no opposition in the real sense of the word and that, therefore, by blocking the creation of the Senate the government is assured of complete autonomy.

The only hope lies in the role of the Court. It is in this respect that we suggest that instead of banning opinions altogether, Malawi should allow these from the Court but they should take the form of declaratory opinions. Declaratory opinions are final and hence dispenses with the issue of lack of finality which is one of the main reason for rejecting advisory opinions in the US.[349] Secondly, the ban in the US emanates from the doctrine of separation of powers and the text of Article III of the Constitution. In contrast, a rigid separation of powers doctrine is absent in the Malawi Constitutional set up and there is no defined limit on the jurisdiction of the Court. Consequently, the Malawi Court will not be subjected to a lot of criticism if they issue declaratory

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[346] AI Bulletin vol. 35 No.2 (1995) 12.

[347] MAL. CONST. Cap VI.

[348] See AAI Bulletin vol.35 No 2, 1995 p12.

[349] See *supra*, text in Chapter II.

opinions since the theories relied on in the US to ban such is not grounded in Malawi's Constitutional law.

The declaratory opinions become especially important in Malawi because most of the people in the rural areas are still unaware of their constitutional rights, and are therefore, more prone to ignore governmental acts that infringes on their rights. This is a result of the socialization process under customary law which puts much emphasis on the duties of the individual to the society rather than on the individual's rights.[350] This means that if the courts are not allowed to intervene on behalf of such people , the government will get away with a lot of unconstitutional acts since the opposition is ineffective and there is no second chamber to counter check the government.

Further, the present Constitution more or less allows the Court to issue opinions. This is evidenced under Article 89 (1)(h) of the 1994 Constitution which authorizes the President "to refer disputes of a constitutional nature to the High Court."[351] This is an open provision and can mean anything ranging from seeking advice to resolution of constitutional disputes. This implies that the president may do this in his capacity as a public authority and hence, a third party in these situations. [352] Therefore, in order to ensure that such opinions are final the Court should issue only declaratory ones. This approach will ensure that no official in the executive can override the Courts decision.

bb) The Doctrine Relating To Standing

As observed under Chapter II, access to the Federal Courts is granted only where claimant satisfies the following three elements: injury in fact, causation and

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[350] See *supra* text in chapter 1.

[351] Artcle 89 (1) (h) of the Malawi Constitution.

[352] see *supra* note 176 for the definition of advisory opinions. This provision indicates that the framers did not envisage that constitutional disputes should be resolved in the normal course of litigation only.

redressability. The rationale is that these elements assure sufficient adversiness. This is evidenced by Justice Kennedy's statement in *Lujan vs. The Defenders of Wildlife*[353] where he pointed out that the "requirement is not just an empty formality" but that "it preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual . . . stake in the outcome . . . and that the legal questions presented . . . will be resolved . . ."[354] The Court's reasoning clearly points to the constraints imposed by the Article III text of the US Constitution. As mentioned earlier the Malawi Constitution do not impose such constraints in Constitutional adjudication. It simply gives the High Court power "to review any law, and any action or decision of the government, for conformity with [the] Constitution." In view of this loose and broad language it is our suggestion that any attempt to adopt a strict adherence to the standing rules obtaining in the US in constitutional litigation will be baseless and detrimental to the Malawi society. Restriction of access to the Courts through inflexible rules will only deteriorate the situation since most people are already restricted due to the social and economic situation in Malawi.

The social and economic conditions prevailing in Malawi presently call for flexible rules in Constitutional adjudication. According to the World Bank Reports, 60% of the people in the country lived below the poverty line in 1995 and there hasn't been any improvement since then. [355] These people survive on subsistence farming and account for 80% of food production in the country.[356]

In addition to this economic factor, there are some instances where an individual may be aware of an infringement but may lack the interest to pursue the matter due to,

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[353] supra, note 190.

[354] *Id*, at 2147.

[355] African Research Bulletin May 16-June 15th 1995. See also Malawi News 14-20 June 1997.

[356] *id.*

perhaps, passivity, which many Malawians acquired during Dr Banda's dictatorship. Dunduzu Chisiza defined Banda's dictatorship as a "dictatorship which the citizens choose to put up with."[357] A manifestation of such attitude was expressed eloquently by Mr Chipungu, the then Parliamentary Secretary of Health in the following words; "there is no opposition in heaven. God himself does not want opposition- that is why he chased Satan away. Why should Kamuzu have opposition?"[358] There are a lot of Malawians in the rural areas of the southern region who profess such loyalty to the present government.

Compounding the above attitude is the problem of illiteracy and ignorance which is very rampart in the rural areas.[359] This scenario has two consequences; a majority of the people are unaware of their constitutional rights and among the informed ones only few can afford to challenge governmental action in court due to poverty or lack of interest. This situation is aggravated by the fact that it is not easy to obtain legal aid because the legal aid offices are found only in the two cities of Blantyre and Lilongwe. To make matters worse, these offices have acute shortage of lawyers. Obviously, a strict adherence to the US justiciability rules discussed in Chapter two in constitutional litigation will leave a lot of aggrieved parties remediless.

The court should develop rules of standing in constitutional adjudication that will comport with the prevailing conditions and the nature of the Malawi society. This may take the form of a lesser standard than the one observed in the US which should allow other people to litigate interests of other people where it is obvious that the policies

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[357]Chisiza, OUTLOOK FOR CONTEMPORARY AFRICA, 43-44. Note that even Banda himself acknowledged the fact that he was dictator. He told visiting state department officials that " I am a dictator of the people. I dictate by permission, by consent." See Malawi News, 22 Feb 1963.

[358]Malawi News, 20 December 1964.

[359]See AI Bulletin Vol. 34, No 2 , 1994(reporting that less than half of the country's adult population is literate and that poverty is rampart particularly in the rural regions where most of the Malawians live).

adopted or a law passed by government infringes on the rights of the citizens but that such citizens are unable to litigate due to social factors like poverty, ignorance or illiteracy. This approach will also cover the vast number of governmental acts that are unconstitutional but do not affect any identifiable persons in a manner sufficiently direct to form the subject matter of a legal claim.

Our proposed approach is in consonant with the observation made by a renowned African scholar in the 1970s who stated that:

> [w]hile it may be undesirable to encourage the professional litigant and the meddlesome interloper to invoke the jurisdiction of the courts in matters that do not concern him, there is some paradox in the idea of a judge refusing, on the lack of standing, to entertain a challenge to a law he himself knows to be unconstitutional because it makes criminal the exercise of a right granted by the constitution.[360]

A similar concern was expressed by Justice Marshall in his dissenting opinion in *City of Los Angeles vs. Lyons,*[361] where the majority opinion declined to award declaratory and injunctive relief to a claimant on the basis that the allegation that the Los Angeles police routinely applied chokeholds in situations where they were not threatened by use of deadly force fell far short of allegations necessary to establish case or controversy. He stated,

> The Court today holds that a federal court is without power to enjoin the enforcement of the City's policy, no matter how flagrantly unconstitutional it may be. Since no one can show that he will be choked in the future, no one- not even a person who, like Lyons, has almost been choked to death- has standing to challenge the continuation of the policy.[362]

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[360]Nwabueze, JUDICIALISM IN COMMONWEALTH AFRICA 73 (1977).

[361]See *supra*, note 206.

[362]*id* at 113.

The Justice proceeded to dub such an approach to standing "unprecedented and unwarranted."[363] Professor Fletcher has suggested that the American law should shift its focus from injury, causality, and redressability and "the merits of a standing claim must always depend . . . on the meaning of the statute or constitutional clause upon which the plaintiff relies."[364] This means that the Court must identify the underlying substantive right involved and determine if the constitutional provision was intended to protect such right or prohibit the challenged conduct. Malawi should adopt this approach since it will help enhance the idea that the Court is there as a tool to safeguard the constitutional rights of individuals in the society as opposed to the role it played in the previous government.

cc) The Ripeness And Mootness Doctrines

The rules governing these doctrines determine when a party may bring an action in the Federal Courts. These requirements derive from both constitutional text and prudential limitations established by the US courts over a period of time. The basic formula for the ripeness doctrine is how ripe should a controversy be in order to warrant judicial intervention? The rationale is that the Federal Courts are not interested in issuing advisory opinions upon broad claims of constitutional rights.[365] This is understandable in view of the requirement of the "case or controversy" under Article III of the US Constitution. Should Malawi adopt this doctrine in the absence of the case or controversy limitation in the Constitution? We are inclined to answer this question in the negative for the reasons discussed below.

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[363] *id.* Note that this was a very close decision as it was a 5 to 4 one.

[364] *supra*, note 189.

[365] The Mitchell"s Case, *supra* note 194 and accompanying text.

Firstly , the power of judicial review for the Malawi Courts is grounded in the Constitution itself and this power is unlimited. In contrast, the US courts exercise such power in ordinary litigation which is heavily constrained by the limitations in the text of Article III. As was indicated earlier, this provision dictates the manner in which constitutional issues must arise if they are to be addressed by the court.[366] Thus, the US courts are prohibited from considering any constitutional issues except as a necessary incident to the resolution of a concrete case or controversy. On the other hand the High Court in Malawi has express power to review any law, and any action or decision of the government for conformity with the Constitution. This gives the court broad discretionary powers which should enable the Court to decide whether to grant jurisdiction or not when a claimant seeks anticipatory relief from unconstitutional acts of government.[367] We are strongly persuaded that in situations like the Lyons Case the Court should be able to pronounce declaratory judgments prohibiting any future illegal acts of the government since no one can sue if a strict adherence to the ripeness rule is adopted.

Furthermore, since the legitimacy of the exercise of the power of review by the courts in Malawi does not derive from the fact that it is done in the normal course of litigation, a strict adherence to the ripeness rule will be pointless as constitutional issues are given a higher status in the Constitution. This is evidenced by the fact the President is given powers to refer any disputes involving constitutional issues to the High Court and that the High Court itself is empowered to review any governmental acts for conformity with the Constitution. Considering the wording of these provisions it becomes apparent that the framers did not envisage the existence of a case or controversy

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[366]Brilmayer, *supra,* note 165.

[367]Note that Article 103(2) gives the High Court exclusive authority to decide whether an issue is within its competence.

in the rigid sense analogous to the US position at all times or the prerequisite of a claimant who should be hurt by the governmental actions first. It is in view of this that we suggest that instead of adopting the ripeness doctrine in its entirety, the Court should be able to exercise its discretion to determine whether to hear the matter or not depending on the importance of the issue in question and the consequences of refusing to hear the matter at all.

On the other hand, the mootness rule which has some roots in the "case or controversy" requirement of Article III should be adopted by the Malawi Courts. This is mainly because the rule serves other purposes emanating from prudential reasons which emphasize that it is pointless to hear a matter which does not exist any longer. The important inquiry under the rule is whether an effective purpose can be served by a specific remedy. This inquiry is very crucial because it determines whether the remedy will correct an existing wrong. Consequently, if the wrong no longer exist there is no purpose in granting a remedy like an injunction.

The other prudential reasons for the rule is that it prevents the waste of the courts valuable time and conserves judicial resources which might otherwise be squandered in a bid to resolve an issue that no longer affect anyone. This consideration is pertinent for Malawi since both the human and financial resources in the judiciary are inadequate. It will also prevent the courts from indulging in unnecessary judicial lawmaking and enable it to give meaning to constitutional values.[368]

dd) The Political Question Doctrine

In the US there are certain issues which are considered inappropriate for judicial review.[369] The reasoning being that such issues are sensitive and appropriately assigned

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[368]See Bandes, *supra*, note 213.

[369]See *supra*, Chapter II.

to the political branches of government. Chief Justice Marshall stated the Courts position clearly in *Marbury vs. Madison,*[370] where he stated that the province of the court is to decide on the rights of individuals not to inquire how the officers in the executive perform duties in which they have a discretion.[371] The doctrine is essentially a function of the separation of powers principle.[372] In *Baker vs. Carr*, [373] Justice Brennan explained the other secondary reasons for adhering to the doctrine which include the lack of judicially manageable standards for resolving such issues.[374]

The Doctrine is very important and necessary for Malawi because it assures respect for a coordinate branch of government and also recognizes that there are some issues that the court is not competent to handle due to unavailability of information. Nevertheless, a slightly different approach should be adopted by the Malawi courts since the judges are obligated to deal with constitutional issues by the constitution itself. In exercising discretion in matters involving "political questions" the court should be able to weigh the overall effect its decision may have on both the structure of government and the society.

D. The Mentality Of Judges

The other problem that the US model may encounter in Malawi may come from the judiciary itself. Professor Mauro Cappellati's observation, that the form that judicial review takes in a given society is dependent on a number of contingent variables,

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[370]See *supra,* note 93.

[371]*id* at 170.

[372]*Supra,* note 142.

[373]*id.*

[374]*id*, at 217

one of which is the kind of judges that the society has produced,[375] is highly relevant here. Though Malawi claims to have been a common law system since the attainment of independence, the truth is that the functions of the judges have been analogous to those of a civil law judge throughout. The legislature being supreme, enjoyed the exclusive prerogative of developing and shaping public policy. The judicial function in contrast was confined to the mechanical application of the laws and implementation of the legislative determined policies in the context of cases.

Hence, it will not be surprising to discover that most of the judges are greatly intimidated by the overwhelming power of judicial review that they have been entrusted with. This is especially true when one observes that almost all the judges forming the backbone of the present judiciary have been trained under the old parliamentary system of government.[376] The major weakness that these judges are bound to exhibit emanating from their training is a certain degree of reluctance or timidity to invalidate unconstitutional governmental acts.

A case in point here is *The Malawi Congress Party (MCP) and others vs. The Attorney General*.[377] The bone of contention in the case was the validity of the Press Trust Reconstruction Act, a statute which reconstructed the Press trust, a charitable private trust, controlling about 40% of the Malawi economy. The case involved a number of issues but the following are pertinent for our discussion. Firstly, MCP, the opposition party, challenged the constitutionality of the Press Trust Reconstruction Act on the basis that it had been passed without satisfying the notice and quorum

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[375]Mauro Cappelletti, *The Mighty Problem of Judicial Review and the Contribution of Comparative Analysis*, 53 S. Cal. L. Rev. 409, 411-12 (1980).

[376]Note that all the justices presently sitting on the Supreme Court were justices of the High Court in the previous regime and are very conservative and reluctant to pronounce a ruling that will displease the Government as compared to the more liberal officials of the present High Court.

[377]Civil Cause No. 2074 of 1995 (High Court).

constitutional requirements. Secondly, the Press Trust Reconstruction Act was challenged on the ground that it expropriated private property arbitrarily, which is a violation of a fundamental right under Chapter IV of the Constitution. Both challenges were successful in the High Court. It was found that the non compliance with the Constitutional requirement rendered the statute null and void. In addition, the Court found that the Act arbitrarily deprived private citizens of their property and that such deprivation was a violation of the fundamental rights under the Constitution. Thus, the court proceeded to declare the Act unconstitutional.

Though it was apparent that the statute blatantly violated constitutional requirements, the Supreme Court on appeal reversed the High Court decision and upheld its validity.[378] The court stated that breach of a constitutional provision as to procedure is not fatal and cannot render a statute void. Consequently, the Court found that Article 96 (2)[379] which requires the Cabinet to make legislative proposals available in time in order to permit sufficient canvassing of expert and public opinion (notice) not relevant to the issue of constitutionality. The Court stated that:

> Even if there was a breach of s.92 (2), we are of the view that, that breach would not invalidate the Act. In the first place ..., the section is under Chapter VIII, which deals with duties and functions of the executive, and not functions and duties of the legislature in Chapter VI of the Constitution The section is concerned with the formulation of legislative proposals, which, as we have seen, are formulated at a much earlier stage. If the requirement under S. 96 (2) was necessary, that is for the purpose of legislation, it would have been included in s. 48 (1) of the Constitution.

Hence, the Court found that compliance with Section 96 (2) is not a condition precedent to the validity of enacting. We find the Court's attempt to draw a rigid line

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[378]See Attorney General v The Malawi Congress Party and others, MSCA Civil Appeal No22 of 1996.

[379]MAL. CONST.art 96 (2).

between the role of the executive and the legislature in lawmaking artificial since for all purposes they are integrated by the Constitution itself. In addition, the Court attempted to distinguish procedural and substantive provisions despite the respondents' persuasive submission that Article 5 of the Constitution does not make such a distinction. It provides that "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 . . ."[380] The Court responded in the following manner:

> With respect, we do not subscribe to this general interpretation of the provisions of the Constitution by the respondents. As we have already pointed out, not all provisions in the Constitution and not all provisions made under the Constitution invalidate an act of Government if they are breached.[381]

Consequently, the Court concluded that the procedural requirements of the Constitution can be dispensed with without even citing any authority. Such casual attitude to the Constitutional procedural requirements robs the Constitution of its status as the supreme law of the land. It also encourages the government to ignore the constitutional procedural requirements when conducting business.

In relation to the lack of quorum dispute, the Court found that the lower Court's conclusion that a reading of Article 50 (1) and (2)[382] infers that the requirement of a quorum should persist throughout the deliberations of the bill was wrong. The Court reasoned that the provision only referred to quorum at the beginning of the sitting of Parliament and that it created a gap in that it was silent on the quorum for subsequent

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[380]MAL. CONST. art 5.

[381]*Supra*, note 276, at p.52.

[382]These provisions requires the two-thirds of members inorder to constitute a qouram and if there are less members than reqiured by the Parliamentary Standing Orders the Speaker shall adjourn the chamber.

meetings. The Court quoted *Attorney General vs. Jobe*[383] a very old English case in an attempt to justify its finding where Lord Diplock had this to say:

> Where . . . omissions by the draftsman of the law to state in express words what, from the subject matter of the law and the legal nature of the processes or institutions with which it deals, can be inferred to have been Parliament's intention, a court charged with the judicial duty of giving effect to Parliaments intention, as that intention has been stated in the law that Parliament has passed, ought to construe the law as incorporating, by necessary implication, which would give effect to such inferred intention, wherever to do so does not contradict the words actually set out in the law itself and to fail to do so would defeat Parliament's intention by depriving the law of all legal effect.[384]

Pursuant to this Case , the Court purported to effect the framers' intention by interpreting the Article 50 provision to mean that a quorum is required only at the beginning of a sitting. The Court further applied the doctrine of necessity in interpreting the Constitution and reasoned that since our Constitution is designed in such a way as to have a government in power which does not command a majority in the National Assembly it was necessary for the court to give an interpretation which would not create a legislative vacuum. With all due respect, we find the Court's fear about having a government which would not function if a strict interpretation was adopted unfounded for the simple reason that it is so easy for the government to have a majority in the Parliament through the expansion of ministerial portfolios.[385]

The Court also indicated that "the Courts are not concerned with purely procedural matters which regulate what happens within the four walls of the National Assembly" but that it will "most certainly adjudicate on any issues which adversely affect any rights

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[383] 1 AC 692, (1894).

[384] *Id*, at 702.

[385] *Supra*, text on page 75.

which are categorically protected by the Constitution . . ."[386] This approach appears commendable on the surface since it enhances the respect accorded to a coordinate branch of government. Nevertheless, the Court overlooked two important aspects in the present case. The procedure was required by the Constitution itself and that it was not one of those procedures purely adopted by the National Assembly as an institution. Secondly, there is no second chamber to check the business taking place in the lower house. This means that chances of Parliament violating procedural matters will be very high since there is no watchdog and no one can challenge it in Court.

It is our suggestion that instead of putting too much emphasis on the autonomy of the legislature, the Court should have exhibited a keen interest in the present Case since the procedures in question are provided by the Constitution. While we do not fault the Court's finding on the substantive issue, we find the court's casual treatment of the procedural matters disappointing. Impliedly, the Courts opinion suggests that some of the provisions in the Constitution are irrelevant. It is quiet obvious that the mode in which the statute was passed was illegal and the best course for the Court would have been to return the matter to Parliament so that the proper constitutional procedures should be followed. The Court appears to be more interested in protecting government interests instead of looking at the issues in question objectively.

This is not surprising since a trend has developed since the adoption of the new Constitution whereby almost all the cases involving the constitutionality of governmental acts that were challenged successfully in the High Court and went on appeal to the Supreme Court have been reversed by the Higher Court.[387] This is a cause for much concern. Without meaning to dramatize the situation, it appears that the

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[386] *Supra,* note 276.

[387] A few examples include Fred Nseula vs. Attorney General, *supra*, note 145, The Attorney General vs. Chipeta Civil Cause No. 1505 of 1994, and The Press Trust Reconstruction Act case, *supra*, note 314.

Malawian Supreme Court has adopted for itself a task of hindering the promotion and protection of human rights. The impression that one gets is that the Court is prepared to uphold governmental actions, no matter what, to the detriment of the individuals.

CONCLUSION

In 1994, the new Malawi nation was faced with the task of forming and adopting institutions to determine the shape of the future society. In order to achieve this the framers of the new Constitution borrowed ideas from the West. The most significant and very useful idea borrowed is the institution of judicial review and its collorary function as a guardian of individual human rights. Not surprisingly, the US model was the logical choice for Malawians since the US is an established democracy and has had centuries of experience. As Justice Utter and Lundsgaard rightly stated "[t]he choices actually made by any individual nation, . . .[in establishing the institution of judicial review] will necessarily be based upon local conditions and upon the objectives that the people of that nation set for their new governments."[388] And the Malawi Constitution makes it apparent that the objective of the Malawi nation is to achieve a democratic government through the promotion and protection of individual human rights.

This article has attempted to highlight some of the strengths and weaknesses of both the present Constitution and the Malawi society in general in order to determine the viability of the US model. Though the Constitution exhibits a deep commitment to the protection of individual rights there are significant problems with the additional mechanisms that have been adopted to ensure enforcement. In addition, since for the institution of judicial review to work successfully, it always depend on the local

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[388] Utter and Lundsgaard, *Judicial review in the New Nations of Central and Eastern Europe: Some Thoughts from a Comparative Perspercive,* 54 Ohio St. L. J. 559 (1993).

conditions, there is need to adapt its form to comport with the characteristics of the society itself.

The starting point should be to get rid of the other independent bodies discussed above, since basically, we find their functions both redundant and irrerevant. Such a move will enhance the courts' role in the protection of individual human rights. The next step should be for the Courts to capitalize on the broad provisions of Article 103 of the Constitution, dealing with jurisdiction of the courts and, Article 108, giving the High Court, arguably, unlimited express power of judicial review. The courts can do this by interpreting these two provisions generously and develop the non interpretive mode of judicial review as practiced in the US. By adopting such a liberal approach the courts should be able to establish and develop flexible rules, both substantive and procedural, to govern constitutional litigation. This will in turn make the courts more accessible to the citizens.

The Court should always bear in mind the statement made by Lord Diplock in *Attorney General vs Momodou Jobe* [389] and quoted in *Fred Nseula vs Attorney General:*[390]

> A Constitution and in particular that part which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction.[391]

This is in line with the approach advocated by Justice Mwaungulu in Nseula's case, namely that the overriding factor influencing the court's decision as to its

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[389](1984) 3 W.L.R. 174

[390]See *supra*, note 275

[391]*Id* at 5.

competence should be a determination of whether there is a violation of human rights or not. Thus the Judge stated that:

> [w]here there is a violation of rights of a citizen, be it to a member of the house or not, courts will on the generality of the provisions in our Constitution be seized of the case if only to vindicate the rights of the citizen protected under the constitution which the citizen alleges have been violated either by legislation or legislative action, or resolution or decision.[392]

And finally, there is need to orient the judges sitting on the Supreme Court as to the nature and purpose of the newly acquired power of judicial review. There is also need for civic education to the whole society in general to make the people aware of their constitutional rights and what they should do in case of a violation by the government. If an attempt is made to implement the propositions discussed above, then we can say there are some prospects for adequate protection of individual and human rights through the courts in Malawi.

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[392] *Id* at 14

REFERENCES

Books

Allot, Essays In African Law (1960).

Amissah, The Contribution Of The Courts To Government (1981).

Bator et al., Hart Wechsler's The Federal Courts And The Federal System 2ed (1973).

Black C., Decision According To Law (1981).

Supreme Court Politics: The Institution And Its Procedures (Bloch &Krattenmaker eds 1994).

Busia, K.A., Africa In Search Of Democracy (1967).

Chemirinsky Erwin., Federal Jurisdiction (1989).

Cox Archibard, The Court And The Constitution (1987).

Currie David P., Federal Jurisdiction 2ed (1981).

Davis Horace A., The Judicial Veto (1971).

An Introduction To Legal Systems (JDM Derrett eds 1968).

Franck Thomas M., Human Rights In The Third World Perspective (YEAR).

Modern Constitutional Theory : A Reader (Garvey & Aleinkoff eds 1991).

Gower L.C.B., Independent Africa: The Challenge To The Legal roffession (1967).

Harvey, Law And Social Change (1956).

Guide To International Human Rights Practice (Hurst Hannum ed, 1992).

Constitutionalism and Human Rights (Henkin & Rosenthal eds 1990).

African Philosophy : An Introduction (Richard A. Wright ed, 1979).

Law Reviews

Susan Bandes, *The Idea Of a Case*, 42 Stan. L. Rev. (1990)

David J. Berderman, *Political Question / Judicial Answers: Does the Rule of law Apply to foreign Affairs?* Thomas Franck. 7 Emory Int'l L. Rev. (1993).

A. Bickel, *Foreword: The Passive Virtues* , 75 harv. L. Rev. (1961).

Charles L. Black, Jr., *A note on Senatorial Considerations of Supreme Court Nominees*, 79 Yale L. J. (1970).

Lea Brilmayor, *The Jurisprudence Of Article III: Perspectives on the Case or Controversy Requirement.* 93 Harv. L. Rev.(1979)

Champlin and Schwarz, *Political Question Doctrine and Allocation of the Foreign Affairs Power* 13 Hof Stra L. Rev. (1988).

Erwin Chemirinsky, *A Unified Approach to Justiciability*, 22 Conn. L. Rev. (1990)

Archbald Cox, *Constitutional Adjudication and the Promotion of Human Rights,* 80 Harv. L. Rev. (1966)

Sharon Dipaolo, *Getting Through the Door : Threshold Procedural Considerations in the Right to Die Litigation,* 6 Risk: Health Safety and Env't. (1995).

Diamond, *Federal Jurisdiction to Decide Moot Cases,* 94 U.Pa. L. Rev. (1946)

William N. Eskeridge Jr., *Overriding Supreme Court Statutory Interpretation Decisions* 101 Yale L. J. (1991).

Owen M. Fiss, *The Limits of Judicial Independence* 25 U. Miam Inter-Am Rev. (1993).

Owen M. Fiss, *Introductory Remarks: Independent Judiciary,* 19 Yale J. Int'l. L. (1994).

William A. Fletcher, *The Structure of Standing*, 98 Yale L. J. (1988)

Frankfurter, *A note on Advisory Opinions*, 37 Harv. L. Rev.(1924)

Thomas Grey, *Do We Have an Unwritten Constitution,* 27 Stan. L. Rev. (1975).

Y Ghai, *Law and legitimacy in East Africa,* 14 Int'l J. Of Soc .L. (1986).

Mark A. Hutchson, *Maintaining Public Confidence in the Intergrity of the Judiciary: State bar of Nevada V. Claiborne*, B.Y.U.L. Rev. (1989).

Jaffe, *The Citizen as a Litigant in Public Actions: The non- Hohfeldin or Ideological Plaintiff* U. Pa L. Rev. (1968).

Christopher M. Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44 Am. J. Comp. L. (1996).

Evan Tsee Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 Harv. L. Rev. (1992).

David A. Logan, *Standing to sue: A proposed Separation of Powers Analysis*, Wisc. L. Rev. (1984).

Henry Monaghan, *The Confirmation Process: Law or Politics*, 100 Harv. L. Rev. (1988).

Ziyad Motala, *Independence of the Judiciary, Prospects and Limitations of Judicial Review in Terms Of the US Model In a New South African Order: Towards an Alternative Judicial Structure,* 21 Comp. & Int'l L. J. Of S. Afri. (1994)

Peter Mulhern, *In Defence of the Political Question Doctrine,* 137 U. Pa. L. Rev. (1988).

Clement Ng'ong'ola, *The Design and Implementation of Customary land Reforms in Central Malawi*, 26 J. Of Afri. L. (1982).

Douglas L. Parker, *Standing to Litigate "abstract Social Interests" in the US and Italy: Re examining Injury in fact*, 33 Colum. J. Transnational (1995).

Eli M. Salzberger, *A Positive Analysis of the Doctrine of Separation of Powers, or Why Do We have an Independent Judiciary*? 13 Int'l. Rev. L. & Econ. (1993).

Sandalow, *Constitutional Interpretation*, 79 Mich. L. Rev.(1981).

Strauss & Sustein, *The Senate, The Constitution and the confirmation Process,* 101 Yale L. J. (1992).

Linda Sandstrom Simard, *Standing Alone: Do We Still Need The Political Question Doctrine* 100 Dick. L. Rev. (1996).

Cass R. Sustein, *Standing and Privatization of Public law,* 88 Colum. L. Rev. (1988).
Kates & Baker, *Mootness In Judicial Proceedings: Toward a Coherent Theory,* 62 Cal. L. Rev. (1974).

Brian A. Stern, *An Argument Against Imposing the Federal "Case or Controversy" Requirement on State Courts*. 69 N.Y. U. (1994).

Robert Seidman , *The Reception of English law in Colonial Africa Revisited*, 1 E. Afri. L. Rev. (1969).

AJGM Sanders, *On African Socialism and the Rule of Law,* 15 Comp. & Int'l L. J of S. Afri. (1982).

Antonio Scalia, *The Doctrine of Standing as an Essential Element of the Separation of powers,* 17 Suffolk U. L. Rev. (1983).

Ibrahim Wani, *The Rule of Law and Economic Development in Africa*, E. Afri. J. Of Peace and Human Rights (1993).

Corey C. Watson, *Mootness and the Constitution*, NW. Univ. L. Rev. (1991).

Richard W. Westling, *Advisory Opinions and the "Constitutionally Required" adequate Independent state grounds Doctrine*, 63 Tul. L. Rev. (1988).

Note, *Advisory opinions on the Constitutionality of Statutes,* 69 harv. L. Rev. (1956).

Note, *And Justiciability for All? Future Injury Plaintiffs and the Separation of Powers*, 109 Harv. L. Rev. (1996).

Uteer & Lundsgaard, *Judicial Review in the New nations of Eastern Europe: Some Thoughts from a Comparative Perspective,* 54 Ohio St. L. J. (1993).

Other Documents

The United States Constitution

The Malawi Constitution (1994)

The Malawi Constitution (1966)