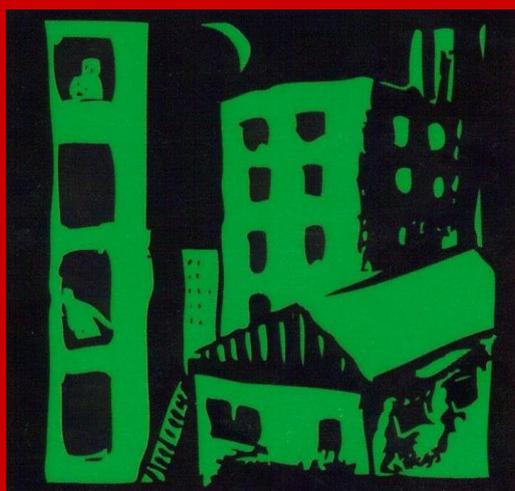


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**The High Court of
Malawi as a
constitutional court:
constitutional
adjudication the
Malawian way.**

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ABSTRACT

Constitutional adjudication in Malawi only became commonplace after the adoption of a new Constitution in 1994. Like many Anglophone countries, Malawi follows the decentralised model of constitutional adjudication. Under this arrangement, the High Court has unlimited original jurisdiction to hear any civil or criminal matters, including constitutional matters. The Courts Act, however, requires the High Court to sit with an enhanced quorum when it is seized of cases that substantively relate to, or concern the interpretation and

application of the Constitution. It is when the High Court sits with a reconfigured quorum that it is popularly referred to as the “constitutional court” (the Court). This article analyses constitutional adjudication in Malawi by focusing on the operation of the Court. Specifically, it analyses the scope of the Court’s jurisdiction, the type of constitutional review that it conducts, the regulation of access to the Court, the forms of decisions and remedies that it grants, and the Court’s independence.

Keywords: constitutional law, constitutional adjudication, High Court of Malawi.

1 BACKGROUND

Malawi has had three constitutions since it achieved independence from Britain in July 1964. The 1964 Independence Constitution, styled along the Westminster model, lasted for barely two years. Its successor, the 1966 Republican Constitution, was in force until 1994 when it was replaced by the current Constitution of the Republic of Malawi (the Constitution or the 1994 Constitution). The 1966 Constitution was deeply implicated in the political system that prevailed in Malawi between 1966 and 1994. This system was epitomised by the oppressive dictatorial regime led by Dr Kamuzu Banda. The 1966 Constitution obliterated fundamental constitutional values, such as, limited government, transparency, and accountability.¹ The 1966 Constitution did not provide for constitutional review. Unsurprisingly, for the entirety of the time during which the 1966 Constitution was in force, even judicial review of administrative action was practically non-existent.²

The 1994 Constitution clearly articulates the power of courts not only to conduct judicial review, traditionally understood, but also constitutional review.³ Under section 9, the Constitution has given the judiciary responsibility for “interpreting, protecting and enforcing” the Constitution and all laws in an independent and impartial manner. This authority has been conferred on the judiciary to the exclusion of any other institution or body.⁴ In relation to the High Court, section 108(2) of the Constitution gives it “original jurisdiction to review any law, and any action or decision of the Government, for conformity with [the] Constitution ... and such other jurisdiction and powers as may be conferred on it by the Constitution or any other law”. Additionally, Chapter X of the Constitution contains protections that are meant to guarantee the

¹ See Chigawa M “The fundamental values of the Republic of Malawi Constitution of 1994” *Africa Criminal Justice Reform* available at https://acjr.org.za/resource-centre/fundamental_values_constitution_full.pdf/view (accessed 24 March 2020). The 1964 Constitution had attempted to provide for limited government in line with the Westminster model but all these arrangements were eliminated by the 1966 Constitution.

² Nzunda M “The quickening of judicial control of administrative action in Malawi – 1992-1994” in Phiri K & Ross K (eds) *Democratisation in Malawi: a stocktaking* Blantyre: CLAIM (1998) 283 at 315. See also, per Kenyatta Nyirenda J in *The State (On application of Lin Xiaoxiao & others) and Director General, Immigration and Citizenship Services and Attorney General* Judicial Review Case No 19 of 2020, High Court, Lilongwe Registry.

³ Chirwa D “Liberating Malawi’s administrative justice jurisprudence from its Common Law shackles” (2011) 55(1) *Journal of African Law* 105 at 127.

⁴ Section 11(4) of the Constitution.

independence of the judiciary. Further, under section 5, the Constitution stipulates that any act of government or any law inconsistent with its provisions is invalid. This provision, which undergirds the supremacy of the Constitution, has made courts the ultimate arbiters as to whether any act, policy or law is in conformity with the Constitution.

In order to understand constitutional adjudication in Malawi, an appreciation of the country's court system is apposite. Malawi has a three-tiered court system. The Malawi Supreme Court of Appeal (MSCA) is the "most superior court of record" in the country.⁵ Its jurisdiction is appellate and it is mandated to hear appeals from the High Court and such other courts and tribunals as may be prescribed by an Act of Parliament.⁶ Directly beneath the MSCA is the High Court of Malawi (High Court). The High Court is established as a court of unlimited original jurisdiction both in civil and criminal matters.⁷ The lowest tier of courts are subordinate courts presided over by magistrates.⁸

Although the establishment and functioning of the courts is outlined in the Constitution, the details in terms of their operation are in the Courts Act.⁹ Under section 9(1) of the Courts Act, the quorum of the High Court is, ordinarily, one judge. In 2004, however, section 9 was amended. As a result, the High Court is required to sit with not less than three judges when it is dealing with any proceeding that "expressly or substantively relates to, or concerns the interpretation or application of the provisions of the Constitution". For the avoidance of doubt, neither the Constitution nor any other law establishes a constitutional court in Malawi. What is referred to as a constitutional court is simply the High Court sitting with a minimum of three judges, pursuant to section 9(2) of the Courts Act. Section 9(2) simply enhances the quorum of the High Court when it is seized of matters that substantively or expressly deal with constitutional interpretation or application.¹⁰ Any reference in this article, therefore, to a constitutional court in Malawi must be understood in the sense just outlined.

Comparative constitutional law has many dimensions.¹¹ It can, for example, involve the analysis of the use of foreign case law in adjudication, it can focus on analysing the text of constitutions, and it can also focus on systems of adjudication. Comparing patterns of constitutional adjudication is one of the most important topics in

⁵ Section 104 of the Constitution.

⁶ For example, under s 141 of the Defence Force Act, Cap 12:01, Laws of Malawi, an appeal from a court-martial goes directly to the MSCA.

⁷ Section 108(1) of the Constitution.

⁸ Section 110(1) of the Constitution.

⁹ Cap 3:02, Laws of Malawi.

¹⁰ *Moinuddin Mohammed Iqbar Sodogar v Attorney General and Reserve Bank of Malawi*, Constitutional Case No 1 of 2018, High Court, Principal Registry.

¹¹ See Barragia A "Challenges in comparative constitutional law studies: Between globalisation and constitutional tradition" *Boom Juridisch tijdschriften* available at <https://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2017/10/lawandmethod-D-17-00009> (accessed 8 April 2020).

comparative constitutional law.¹² This article is a contribution to comparative constitutional analysis and it focuses on constitutional adjudication in Malawi from the perspective of Malawi's High Court when it sits as a "constitutional court".

In terms of organisation, the article begins with a general discussion of constitutional courts and constitutional adjudication. Thereafter, it discusses the origins of Malawi's "constitutional court" and its mandate. Subsequently, the article analyses constitutional adjudication in Malawi by assessing the "constitutional court" in terms of the following: the scope of its jurisdiction; the type of constitutional review that it conducts; the regulation of access to the Court; the forms of decisions and remedies that it grants; and the independence of the Court. The last part of the article contains the conclusion.

2 CONSTITUTIONAL COURTS AND CONSTITUTIONAL ADJUDICATION

According to Brown and Waller, constitutional courts are primarily adjudicative structures assigned the task of clarifying a constitution's meaning.¹³ Sweet asserts that a constitutional court is a constitutionally established but independent organ of the State whose central purpose is to defend the normative superiority of constitutional law within a juridical order.¹⁴ Constitutional courts present themselves to citizens as bodies that render judgments in which a legal (and often political) dispute rests in part on how the constitution should be understood and applied.¹⁵

Constitutional courts have not, however, always been ubiquitous across the world. Many modern constitutional courts owe their ideological origins to 20th century constitutional theory in Western Europe, especially the work of Hans Kelsen.¹⁶ Prior to the Second World War, only a handful of courts around the world routinely exercised the power of constitutional judicial review.¹⁷ The rise of constitutional courts, especially in Europe, coincided with the fall of the notion of parliamentary supremacy.¹⁸ European experiences in the aftermath of the Second World War led many to adopt two positions

¹² See Passaglia P "Making a centralised system of judicial review coexist with decentralised guardians of the constitution: the Italian way" (2016) 2(2) *Italian Law Journal* 405 at 411.

¹³ See Brown N & Waller J "Constitutional courts and political uncertainty: constitutional ruptures and the rule of judges" (2016) 14(4) *International Journal of Constitutional Law* 817 at 819.

¹⁴ Sweet A "Constitutional Courts" in Rosenfield M & Sajo A (eds) *The Oxford handbook of comparative constitutional law* Oxford : Oxford University Press (2012) 817 at 817.

¹⁵ See Brown & Waller (2016) at 819.

¹⁶ See Bezemek C "A Kelsenian model of constitutional adjudication: The Austrian Constitutional Court" available at https://static.uni-graz.at/fileadmin/rewi-institute/Oeffentliches-Recht/ArbeitsbereichBezemek/Aufsaeetze/11BezemekAKelsenianModelofconstitutionaladjudicationZ_OER2012S115.pdf (accessed 16 November 2020). See also Lagi S "Hans Kelsen and the Austrian Constitutional Court (1918-1929)" available at <http://www.scielo.org.co/pdf/cohe/v9n16/v9n16a10.pdf> (accessed 16 November 2020).

¹⁷ See Sweet (2012) at 817.

¹⁸ Ginsburg T *Judicial review in new democracies: constitutional courts in Asian cases* Cambridge: Cambridge University Press (2003) at 2.

that fundamentally shaped constitution making in the post-war period.¹⁹ The first was that every constitution must enunciate basic rights and delineate a zone of autonomy for individuals; and the second, that special constitutional courts must be established to protect these rights. Constitutional courts, therefore, are established as protectors of democracy and they are favoured because they can be counter-majoritarian and can also protect the substantive values of democracy from procedurally legitimate elected bodies.²⁰

According to Sweet, constitutional courts styled along the Kelsenian model can be broken down into four constituent components.²¹ First, such constitutional courts are vested with a monopoly of power in relation to the invalidation of all infra-constitutional legal norms. Secondly, they are established for the primary purpose of resolving disputes pertaining to the interpretation and application of the constitution. Thirdly, such constitutional courts will have links with the other branches of government but will remain formally detached from them. Lastly, unlike ordinary courts, they are given the power to conduct abstract review of statutes. Abstract review permits constitutional courts to eliminate unconstitutional legal norms before they become part of the legal system. Examples of constitutional courts following the Kelsenian model are readily found in continental Europe though many countries have modified the original model to factor in country specific needs.²²

It is not all constitutional courts, however, that are styled along the Kelsenian model. The Kelsenian model corresponds to the centralised system of constitutional adjudication which should be contrasted with the decentralised model of constitutional adjudication. The decentralised model is inextricably linked to the courts' power of judicial review which, in common law systems, has always been understood as inhering in the judicial function.²³ Most Anglophone countries, especially in Africa, adopted this model at independence. Under this model, constitutional matters are dealt with during ordinary proceedings when a court is faced with concrete questions.²⁴ Due to the decentralisation, this model permits appeals from first instance decisions on constitutional matters to a superior court within the judicial hierarchy.

The archetypal example of the decentralised model of constitutional adjudication is the system obtaining in the United States of America. In the American system, constitutional review can be undertaken at every level of the court system though the

¹⁹ Ginsburg (2003) at 2.

²⁰ Ginsburg (2003) at 2.

²¹ Sweet (2012) at 818.

²² Comella V "The European model of constitutional review of legislation: toward decentralisation?" (2004) 2(3) *International Journal of Constitutional Law* 461 at 491.

²³ Fombad C "An overview of contemporary models of constitutional review in Africa" in Fombad C (ed) *Constitutional adjudication in Africa* Oxford : Oxford University Press (2017) 17 at 19-20.

²⁴ Fombad (2017) at 19-20.

United States Supreme Court remains at the pinnacle of all courts.²⁵ This system is premised on the understanding that the primary function of the judiciary is to interpret laws and apply them in concrete cases. In relation to constitutional adjudication, constitutional norms always prevail over contrary statutory norms. This means that any judge deciding a case must disregard a statutory norm that conflicts with a constitutional norm.²⁶ Since the power to determine constitutionality or lack thereof of laws, policies and action/inaction are dispersed, there is always a likelihood of inconsistent judgments.²⁷ The saving grace comes in the form of the doctrine of *stare decisis*. Under this doctrine, courts follow their prior decisions and are bound by decisions of superior courts. The existence of one supreme court, within a decentralised system, entails that there is one ultimate source of final determinations on the constitutionality or lack thereof of laws or policies.

The existence of a constitutional court, Sweet argues, is often the embodiment of compromises made during the adoption of a constitution.²⁸ The biggest compromise that constitutional courts stand for is whereby political actors choose to constrain their own future law-making authority. The nature of modern constitutions, therefore, justifies the existence of constitutional courts. Typically, modern constitutions are negotiated by political elites representing various interest groups. Constitutional contracting, the act whereby the various interest groups agree to a constitutional text, allows interest groups to constrain, at a future date, the power of their opponents to undermine the terms of the agreed upon constitutional order.²⁹ Viewed from this perspective, constitutional courts are accepted as part of the legal order because they offer an independent mechanism by which the various interests groups can secure the continuation of the constitutional order as negotiated. A constitutional court, therefore, is a trustee of the constitutional order since it operates to insulate the constitutional order from extra-constitutional alterations.³⁰

Seizure of a constitutional court follows different patterns depending on whether the system is centralised or decentralised. Additionally, even within the two models, different countries have implemented different variations to suit their particular needs. In centralised systems, constitutional courts can be seized in three principal ways: abstract review; concrete review; and constitutional complaint.³¹ Abstract review is the pre-enforcement review of statutes and is used to filter out unconstitutional laws before they are applied. Concrete review is initiated by the judiciary in the course of litigation.

²⁵ Ginsburg T & Versteeg M "Why do Countries adopt constitutional review?" *Chicago Unbound* available at https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=5621&context=journal_articles (accessed 7 April 2020).

²⁶ Finck D "Judicial review: the United States Supreme Court versus the German Constitutional Court (1997) 20 *Boston College International and Comparative Law Review* 123 at 126.

²⁷ Finck (1997) at 132.

²⁸ Sweet (2012) at 820.

²⁹ Sweet (2012) at 821.

³⁰ Sweet (2012) at 822.

³¹ Sweet (2012) at 823-824.

Under this approach, judges send questions to the constitutional court about the constitutionality of a legal norm or decision. The constitutional complaint approach allows individuals and organisations to petition the constitutional court when they believe their rights have been violated.

In decentralised systems, the power to determine the constitutionality of legislation or any action lies at all levels of the judiciary.³² A key distinguishing feature of the decentralised system is that courts always wait for a dispute as between parties before pronouncing themselves on any constitutional issue. Thus, decentralised systems, generally, have no mechanism for conducting abstract review. Additionally, since constitutional adjudication is conducted at various levels of the judiciary, decisions on constitutional review are open to appeal to the highest court within the system.³³

A caveat should be stated here. While systems for constitutional adjudication are generally classified as either centralised or decentralised, in reality constitutional adjudication mechanisms are not rigidly tied to this binary characterisation. Recognition must, therefore, be given to mixed or hybrid systems which combine aspects of the centralised system and the decentralised system.³⁴ Additionally, the practice of many constitutional courts has shown “considerable signs of convergence” which makes a rigid distinction between the centralised and decentralised systems unsustainable.³⁵

3 THE “CONSTITUTIONAL COURT” OF MALAWI: ESTABLISHMENT AND MANDATE

A Constitution “however comprehensive, fool proof, well written and well-meaning it may purport to be, is only as good as the mechanism provided within it to ensure that its provisions are properly implemented”.³⁶ It is this that, in part, motivates the creation of institutions meant to protect a constitution and guarantee its implementation. In the context of Malawi, the desire to ensure the implementation of the Constitution manifests itself in the prominent role that the Constitution has reserved for the judiciary. The judiciary has been designated as the Constitution’s interpreter, protector and enforcer.³⁷ The Constitution also outlaws any law that ousts or purports to oust the jurisdiction of the courts.³⁸

³² Finck (1997) at 126.

³³ See Harding A “The fundamentals of constitutional courts” *Idea* available at <https://www.idea.int/sites/default/files/publications/the-fundamentals-of-constitutional-courts.pdf> (accessed 24 March 2020).

³⁴ Fombad (2017) at 24.

³⁵ See Fombad (2017) at 41- 42. See also Chen A “The global expansion of constitutional judicial review: Some Historical and comparative perspectives” available at <https://hub.hku.hk/bitstream/10722/201916/1/Content.pdf?accept=1> (accessed 8 March 2020).

³⁶ Fombad (2017) at 17.

³⁷ Section 9 of the Constitution.

³⁸ Section 11(4) of the Constitution.

Although the Constitution has reserved a hallowed place and role for the judiciary, it was only in 2004 that a special formula for constitutional adjudication was devised. Section 9 of the Courts Act, in so far as is material, provides as follows:

“ (2) Every proceeding in the High Court and all business arising thereout, if it expressly and substantively relates to, or concerns the interpretation or application of the provisions of the Constitution, shall be heard and disposed of by or before not less than three judges.

(3) The Chief Justice shall certify that a proceeding is one which comes within the ambit of subsection (2), and the certification by the Chief Justice shall be conclusive evidence of that fact.”³⁹

A perusal of the memorandum from the Ministry of Justice and Constitutional Affairs supporting the 2004 amendment to section 9 of the Courts Act indicates that the establishment of the “constitutional court” was motivated by a desire to “attach deserving value to constitutional matters”.⁴⁰ This justification finds concurrence in the words of Nyirenda CJ who stated :

“ Section 9(2) is meant to allow opportunity to give appropriate guidance on the interpretation or application of a constitutional provision in deserving and selected proceedings, where the circumstances of the case expressly and substantively raise a constitutional matter for interpretation or application.”⁴¹

The mandate of the “constitutional court” is delineated by section 9(2) of the Courts Act. Its jurisdiction is limited to proceedings that expressly and substantively relate to or concern the interpretation and application of provisions of the Constitution. According to Nyirenda CJ, section 9 of the Courts Act raises three issues, insofar as constitutional adjudication is concerned.⁴² First, the section prescribes the composition of the High Court when it engages in the type of constitutional adjudication envisaged under section 9(2) of the Courts Act. Secondly, the section establishes the parameters that bring proceedings within the ambit of section 9(2). Thirdly, the section establishes the procedure that must be complied with before proceedings can be placed before the “constitutional court”.

The arrangement created by section 9 of the Courts Act notwithstanding, section 108 of the Constitution has vested the High Court with unlimited original jurisdiction to dispose of any civil or criminal matter. The relationship between section 108 of the

³⁹ Until 2016, s 9(3) read as follows: “A certification by the Chief Justice that a proceeding is one which comes within the ambit of subsection (2) shall be conclusive evidence of that fact.”

⁴⁰ Courts (Amendment) Bill 2003, Government Notice No 20 of 2008.

⁴¹ *In the Matter of Bakili Muluzi and the Anti-Corruption Bureau*, Court Reference No 2 of 2015, Malawi Supreme Court of Appeal, Principal Registry (*Bakili Muluzi* (2015)). The same reasoning was endorsed in *Frank Malaya v Attorney General*, Constitutional Case No 3 of 2018, High Court, Principal Registry (*Frank Malaya* (2018)).

⁴² See *Bakili Muluzi* (2015).

Constitution and section 9 of the Courts Act highlights the decentralised nature of constitutional adjudication in Malawi. Due to the unlimited original jurisdiction vested in all High Court judges, who ordinarily sit alone, the alteration of the quorum effected by section 9 has not divested individual High Court judges of their jurisdiction to interpret and apply the Constitution. As pointed out by Munlo CJ:

“ Section 108 of the Constitution gives the High Court unlimited original jurisdiction to hear and determine any civil or criminal proceedings, to review any law and any action or decision of the Government, for conformity with the Constitution. Section 9(1) of the Courts Act makes it clear that every proceeding in the High Court and all business arising thereout is to be heard and disposed of by a single Judge. The original jurisdiction of the High Court Judges is therefore intact and has only been tampered with by those cases which come within the narrow confines of section 9(2) and which need certification under section 9(3) of the Courts Act. In my view a single judge of the High Court has jurisdiction to interpret the Constitution.”⁴³

A similar conclusion was reached in *The Human Rights Commission v The Attorney General* where the Court reiterated the fact that “[t]he law is firmly settled then that a single Judge of the High Court has jurisdiction to interpret the Constitution in all the other cases that come before the High Court”.⁴⁴

To come back to the three issues that Nyirenda CJ intimated arose from section 9 of the Courts Act, the first, which relates to the composition of the constitutional court, is straightforward. The High Court must sit with no less than three judges when sitting as a constitutional court. The other two issues, however, have not proven to be very straightforward and they will now be addressed in turn.

First, in terms of the parameters that proceedings must fulfil before they can be considered by the “constitutional court”, section 9(2) of the Courts Act stipulates that the proceedings must expressly and substantively relate to, or concern, the interpretation or application of the provisions of the Constitution. The framing of section 9(2) of the Courts Act suggests that judges of the High Court, sitting alone, have been excluded from considering certain proceedings.⁴⁵ The “constitutional court’s” special jurisdiction does not, however, arise from section 9(2) itself. It is a jurisdiction which all High Court judges already have by virtue of section 108 of the Constitution. To establish that a matter expressly and substantively relates to, or concerns, the interpretation or application of the Constitution, a litigant must prove that the constitutional provisions invoked are the core issue for determination. It does not suffice to simply frame an argument that invokes constitutional provisions without demonstrating that the constitutional provisions are central to the resolution of the

⁴³ *Dr Cassim Chilumpha and Yusuf Matumula v The Director of Public Prosecutions* Criminal Case No 13 of 2006, High Court, Principal Registry.

⁴⁴ *The Human Rights Commission v The Attorney General* Civil Case No 79 of 2011, High Court, Principal Registry (*Human Rights Commission* (2011)).

⁴⁵ *Human Rights Commission* (2011).

proceedings. As noted by Nyirenda CJ, for a country with a permissive constitution like Malawi it is “unthinkable to have a matter before our courts that has no bearing” on the rights provided for in the Constitution.⁴⁶ In practice, therefore, constitutional interpretation and application are routinely before the High Court but it is only for matters caught within the terms of section 9(2) of the Courts Act that the law requires the “constitutional court” to sit.

Secondly, section 9(2) of the Courts Act requires a litigant, who claims that his case falls within the provision, to demonstrate to the Chief Justice that he has proceedings or business arising therefrom requiring the empanelling of the “constitutional court”.⁴⁷ Once the Chief Justice is satisfied that the matter indeed expressly and substantively relates to, or concerns, the interpretation or application of the Constitution, he/she issues a certificate confirming the fact. The Chief Justice’s certificate is conclusive. The irony of this scheme, however, is that if the Chief Justice refuses to certify proceedings, irrespective of how deeply the case implicates constitutional interpretation and application, it will have to be disposed of by a single judge of the High Court or even by a magistrate, if the request for certification arose from proceedings pending before a subordinate court.⁴⁸

4 AN ANALYSIS OF THE MALAWIAN WAY OF CONSTITUTIONAL ADJUDICATION

The focus of the analysis in this section is on the following thematic areas: the scope of the “constitutional court’s” jurisdiction, the type of constitutional review that it conducts, access to the “constitutional court”, the forms of decisions and remedies that it grants, and its independence.

4.1 Scope of jurisdiction

In terms of the scope of the jurisdiction of constitutional courts, generally, a distinction can, analytically, be made between primary jurisdiction and ancillary jurisdiction.⁴⁹ The primary jurisdiction of constitutional courts, in many countries with a common law tradition, is premised on a combination of three factors. First, the inherent power of judicial review incidental to the exercise of the judicial function. This power emphasises the fact that in a system governed by the rule of law, courts will be the natural arbiters

⁴⁶ Bakili Muluzi (2015).

⁴⁷ Human Rights Commission (2011).

⁴⁸ A good example here is the case of *The Republic v Steven Monjeza Soko and Tionge Chimbalanga Kachepa* Criminal Case No 359 of 2009, Chief Resident Magistrate Court, Blantyre. The Chief Justice dismissed an application for certification – *Steven Monjeza Soko and Tionge Chimbalanga Kachepa v The Republic* Miscellaneous Application No 2 of 2010, High Court, Principal Registry – whereupon the matter was remitted back to the Chief Resident Magistrate Court which proceeded to dispose of the matter without even alluding to the alleged constitutional implications of some of the issues before the Court.

⁴⁹ Fombad (2017) at 29-30.

on all questions pertaining to compliance with the constitution. Malawi's post-independence history, however, proves that relying on the courts' inherent power to justify constitutional review may be perilous when the general political climate is not supportive of an assertive judiciary. By way of illustration, in spite of the fact that English law was introduced to Malawi in 1902, ostensibly with the power of courts to conduct judicial review, it took over 90 years before the judiciary took full advantage of this avenue.⁵⁰

Secondly, primary jurisdiction can be inferred from provisions in a constitution vesting judicial powers in the courts. In the case of Malawi, sections 9 and 108 of the Constitution are key to establishing the power of constitutional review. According to section 9, the judiciary has the responsibility of "interpreting, protecting and enforcing the Constitution" and all other laws in accordance with the Constitution. Under section 108(2), the High Court has "original jurisdiction to review any laws and any action or decision of the government" for conformity with the Constitution. This constitutional scheme also confirms the decentralised nature of constitutional adjudication in Malawi. The power to interpret, protect and enforce the Constitution, as created by section 9 of the Constitution, has been conferred on the judiciary at large and not on any specific court.

Thirdly, primary jurisdiction of a constitutional court can be founded on the supremacy clause of a constitution. The supremacy clause offers one of the strongest bases for constitutional review in many Anglophone constitutions.⁵¹ In Malawi, section 5 of the Constitution is the supremacy clause, and it invalidates any act of government or any law that is inconsistent with the Constitution. Such a clear statement of principle automatically entails that courts have been given an authoritative mandate to conduct the assessment as to whether acts of government or laws are consistent with the Constitution.

The "constitutional court" has reiterated that its function is only to hear matters that expressly and substantively concern the interpretation and application of the Constitution.⁵² Accordingly, it is not part of its remit to engage in fact finding which may involve the hearing of witnesses. This point was reiterated by Nyirenda CJ, when he stated that the scheme created by section 9 of the Courts Act should not be converted into "a general trial scheme where the constitutional panel would be required to try ... cases in general, so long as an issue has arisen in the case that requires the guidance of a constitutional panel of the High Court".⁵³ The point was expressed slightly differently in *Von Gomani v The Republic* where the Court held that "factual issues in constitutional matters are not paramount ... they are outlined just for purposes of giving background

⁵⁰ Nzunda (1998) 283-315.

⁵¹ Fombad (2017) at 30.

⁵² See *Frank Malaya* (2018).

⁵³ *The State and the Director of Public Prosecutions Ex Parte Gift Trapence and Timothy Mtambo*, Constitutional Case No 1 of 2017 (Being Miscellaneous Civil Case No 16 of 2016), High Court, Zomba (Ruling on Certification) (*Ex Parte Gift Trapence* (2017)(Ruling on Certification)).

to the whole issue”⁵⁴. These sentiments notwithstanding, it is clear that in an appropriate case, the “constitutional court” can be turned into a trial court and may hear witnesses before disposing of a case. In *Dr Saulos Klaus Chilima & another v Peter Mutharika & another* the “constitutional court” heard numerous witnesses before delivering its judgment.⁵⁵

Since the “constitutional court” is simply a panel of the High Court, its decisions are subject to appeal to the MSCA like all other decisions of the High Court. The only alteration that was made simultaneously with the amendment to section 9 of the Courts Act was to section 3(a) of the Supreme Court of Appeal Act.⁵⁶ The result was that for purposes of dealing with appeals from the “constitutional court”, the MSCA was required to sit with no less than five judges. This requirement made sense when the default quorum of the MSCA was three judges. Presently, however, the MSCA sits with the entire bench or a minimum of seven judges when disposing of all appeals. Clearly, therefore, the amendment to section 3(a) of the Supreme Court of Appeal Act has been overtaken by events and appeals in constitutional disputes are treated similarly to all other appeals.

4.2 The type of review

In line with most decentralised systems, the “constitutional court” makes pronouncements using the concrete review approach. Thus, unlike constitutional courts in the Kelsenian mould, the “constitutional court” can only be called upon if the parties present a real case or controversy.⁵⁷

On this score, the “constitutional court” has been emphatic and consistent. For example, in *Maziko Sauti Phiri v Privatisation Commission and Attorney General* it emphasised that it does not exist “to give gratuitous legal opinions” and that it exists to decide “real disputes/issues” and not hypothetical ones.⁵⁸ A similar conclusion was reached in *James Phiri v Dr Bakili Muluzi and Attorney General* where the “constitutional court” held that it could not pronounce on the eligibility of the first defendant to run for the presidency before he had presented his nomination papers to the Electoral Commission.⁵⁹

The powers conferred on the President by section 89(1)(h) of the Constitution, however, require special mention. Under this provision, the President is empowered to “refer disputes of a constitutional nature to the High Court”. The framing of section 89(1)(h) entails that it is in the absolute discretion of the President to determine what type of constitutional dispute to refer to the High Court and when to make the referral.

⁵⁴ Constitutional Case No 1 of 2018, High Court, Principal Registry (*Von Gomani* (2018)).

⁵⁵ Constitutional Reference No 1 of 2019, High Court, Lilongwe Registry (*Saulos Klaus Chilima & another* (2019)).

⁵⁶ See Cap 3:01, Laws of Malawi.

⁵⁷ Cf. *Enelessi Simon, Triphonia Raphael and Esnart Frank v Attorney General*, Constitutional Referral Case No 9 of 2015, High Court, Principal Registry (*Enelessi Simon* (2015)).

⁵⁸ Constitutional Case No 13 of 2005, High Court, Principal Registry.

⁵⁹ Constitutional Case No 1 of 2008, High Court, Principal Registry.

Two points can be noted. First, the section 89(1)(h) avenue entails that the “constitutional court” can sit without there being a real dispute or controversy between litigants. In a sense, therefore, section 89(1)(h) introduces a form of abstract review in Malawi. Secondly, a referral made under section 89(1)(h) is exempt from the requirement of certification by the Chief Justice and the “constitutional court” can sit without requiring proof of certification. Section 89(1)(h) confirms the cross-fertilisation that has occurred between decentralised and centralised systems of constitutional adjudication and that the distinction between the two is not watertight.

In practice, the presidency has used section 89(1)(h) to seek judicial resolution of patently political disputes. Two examples suffice. First, in 2009, when the National Assembly adopted procedures aimed at facilitating the impeachment of the then President, Bingu wa Mutharika, he made a referral challenging the constitutionality of the procedures.⁶⁰ In truth, the dispute that the President had with the National Assembly stemmed from him having resigned from the political party that sponsored his election (the United Democratic Front - UDF) and forming his own political party (the Democratic Progressive Party - DPP) which did not have enough members of parliament to “protect” him in the National Assembly. Secondly, the referral that President Bingu wa Mutharika subsequently made in respect of section 65 of the Constitution, was also an extension of the fight between the UDF and the DPP in that the President’s party sought to bolster its numbers in the National Assembly by co-opting members of other political parties regardless of the restriction on floor crossing.⁶¹

The overt political nature of this dispute was manifested by the fact that the President appealed to the MSCA, lodging the appeal even before the “constitutional court” had made any pronouncement.⁶² Crucially, the very notion of appealing a constitutional referral, where, technically, there are no parties, also casts doubt on the propriety of the referral. Notably, after the 2009 General Elections, when President Mutharika’s DPP secured a majority in the National Assembly, the President’s penchant for making constitutional referrals disappeared.

4.3 Access to the “Constitutional Court”

Access to the “constitutional court” in Malawi implicates at least two key issues, namely, the *locus standi* requirement and the certification process. Each of these issues will now be addressed.

⁶⁰ *In the Matter of Presidential Reference of a Dispute of a Constitutional Nature under Section 89(1)(h) of the Constitution AND In the Matter of Section 86(2) of the Constitution AND In the matter of Impeachment Procedures Under Standing Order 84 adopted by the National Assembly on 20th October 2005*, Constitutional Cause No 13 of 2005, High Court, Principal Registry.

⁶¹ *In the Matter of Presidential Reference of a Dispute of a Constitutional Nature Under Section 89(1)(h) of the Constitution and in the matter of Section 65 of the Constitution and in the Matter of the Question of the Crossing the Floor by Members of the National Assembly*, Presidential Reference Appeal No 44 of 2006, Malawi Supreme Court of Appeal.

⁶² See Ellett R “Politics of judicial independence in Malawi” *Freedom House Organisation* available at https://freedomhouse.org/sites/default/files/inline_images/Politics%20of%20Judicial%20Independence%20in%20Malawi_1.pdf (accessed 20 February 2020).

4.3.1 *Locus standi*

The expression *locus standi* means “standing to sue”. Constitutional review systems have different approaches to the question of who has standing to bring a claim. In centralised systems, the choice is often very limited, for example, the original Austrian model of 1920 in which only State and federal governments could bring cases.⁶³ The other alternative is the permissive approach, for example, the current design of the German Constitutional Court in which not only political bodies but also individuals enjoy direct access. In the latter system, even ordinary judges may also refer constitutional questions.

In Malawi, access to the “constitutional court” is, in principle, quite wide. Individuals, non-governmental organisations and other courts can all have recourse to the “constitutional court”. Practically, however, individuals and non-governmental organisations must fulfil the test for *locus standi* in section 15(2) of the Constitution before they can move the Court. Section 15(2) provides as follows:

“Any person or group of persons, natural or legal, with sufficient interest in the promotion, protection and enforcement of rights under this Chapter shall be entitled to the assistance of the courts, the Ombudsman, the Human Rights Commission and other organs of the Government to ensure the promotion, protection and enforcement of those rights and the redress of any grievances in respect of those rights.”

According to the MSCA in *Civil Liberties Committee v Minister of Justice and Registrar General*,⁶⁴ section 15(2) requires a prospective litigant to prove that the conduct or decision complained of adversely affects his/her rights in order to establish *locus standi*. This interpretation of section 15(2) is remarkable for its insistence on the personal connection that a litigant must have to the subject matter of the litigation. Looked at critically, however, there is doubt as to whether this interpretation accords with the purport and intention of the Constitution.⁶⁵ It is arguable that by insisting on a personal connection between the litigant and the alleged wrongful conduct the MSCA set a higher, narrower and improper threshold for *locus standi* than that envisaged in the broader constitutional scheme.

Generally speaking, the insistence on a *locus standi* test before litigants can access the “constitutional court” is not, of itself, heretical. The *locus standi* requirement is a common test in all systems based on the English common law. However, as formulated by the MSCA, challenges emerge when the plaintiff is not the victim of the wrongful

⁶³ Ginsburg (2003) at 36.

⁶⁴ Civil Appeal No 12 of 1999, Malawi Supreme Court of Appeal. This decision was in line with two older decisions of the MSCA: *The President of Malawi & another v RB Kachere & others*, Civil Appeal No 20 of 1995, Malawi Supreme Court of Appeal, and *Attorney General v Malawi Congress Party & others*, (1997) 2 MLR 181.

⁶⁵ See Nkhata M “Public interest litigation and *locus standi* in Malawian constitutional law: have the courts unduly fettered access to justice and legal remedies” (2008) 2(2) *Malawi Law Journal* (2008) 209.

conduct. This can be the case in instances of public interest litigation or representative actions. The shrinkage of the space for public interest litigation due to the MSCA's understanding of *locus standi* is particularly catastrophic for constitutional litigation since it routinely raises issues that affect a cross-section of the population without causing any one individual special harm.⁶⁶ In practice, the application of the *locus standi* standard as developed by the MSCA has meant that patently meritorious cases have been dismissed simply because the litigants failed to prove that they were personally affected by the wrongful conduct in issue.⁶⁷

4.3.2 *The Chief Justice's certification*

A critical procedure that must be fulfilled before any case can be referred to the "constitutional court" is the certification by the Chief Justice. It is the act of certification that empowers the Registrar of the High Court to empanel the "constitutional court". Of all procedures in relation to constitutional adjudication in Malawi, the certification process has, probably, proved the most contentious. Two distinct practices are evident here. In the years immediately after the amendment to section 9 of the Courts Act, certification proceeded akin to a routine administrative chore by the Chief Justice. The certificate would be issued without having to hear the parties' arguments and no ruling would be delivered. Subsequently, however, a practice emerged whereby the Chief Justice required parties to submit arguments and appear before him/her before a ruling would be delivered either certifying the proceedings or not.

Over the years, especially before the repeal of the Courts (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules (Constitutional Court Rules), one of the most contentious issues that arose related to the nature of powers exercised by the Chief Justice during certification. Two views emerged: the one asserted that the powers were administrative, and the other stated that the powers were judicial or at least quasi-judicial. The implication of the difference is that if the powers were classified as administrative then they would be subject to judicial review like all other administrative powers. The irony though would have been that the action for judicial review would have to be commenced before the High Court to review the decision of the most senior judicial officer. Alternatively, however, if the powers were held to be judicial, then they, ordinarily, should have been open to challenge by way of appeal. Strikingly, no procedure existed for reviewing or appealing the decision of the Chief Justice during certification.

A number of cases grappled with the question of the nature of the powers exercised by the Chief Justice during certification. For example, in *Darren Jamieson and Collin MacAdam v The State and the Chief Justice*,⁶⁸ the applicants sought judicial review of the Chief Justice's decision denying them certification. Chirwa J held that under section 9 of

⁶⁶ See Chirwa D *Human rights under the Malawian Constitution* Cape Town : Juta & Co Ltd (2011) at 73-77.

⁶⁷ For example, *The Registered Trustees of the Women and Law (Malawi) Research and Education Trust v The Attorney General & others*, Constitutional Case No 3 of 2009, High Court, Principal Registry.

⁶⁸ Miscellaneous Civil Case No 15 of 2010, High Court, Principal Registry.

the Courts Act the discretion to certify proceedings vested solely in the Chief Justice and, on his analysis of the facts, saw no reason for judicially reviewing the Chief Justice's decision refusing certification. His *obiter dictum* remarks, however, clearly suggest that he did not think the powers of the Chief Justice, under section 9 of the Courts Act, were amenable to judicial review.

In *The Human Rights Commission v The Attorney General* the Court concluded that certification was a judicial and not administrative function.⁶⁹ In the Court's view, the law vested exclusive jurisdiction in the Chief Justice to certify proceedings with no possibility of appeal or review. It was argued that although section 9 of the Courts Act was framed as creating a discretionary function, the Chief Justice would have to examine the pleadings before him/her in order to certify or refuse certification. All this, the Court held, suggested attributes of a judicial and not administrative process. Accordingly, "certification of a matter by the Chief justice is not mechanical; it can never be an administrative function or a quasi-judicial function"⁷⁰. The Court fortified its position by alluding to the "absurdity" of having decisions of the Chief Justice being judicially reviewed by judges of the High Court who are all junior to him/her.

The practical effect of holding that certification was a judicial act was that the parties were, invariably, required to file arguments and appear before the Chief Justice to make submissions on whether or not there should be certification. The Chief Justice would then deliver a ruling to dispose of the matter. One effect of this was that certification ended up being a lengthy and time-consuming process.

One other effect of recognising certification as a judicial act was that it was open to the Chief Justice, when issuing the certificate, to frame the issues that eventually went to the "constitutional court" notwithstanding any earlier framing of the issues by, for example, the referring court or the parties.⁷¹ As recognised by Nyirenda CJ, however, this did not mean that the Chief Justice was at liberty to substitute his own issues over the ones referred by the original court or the litigants, but that he/she was entitled to "... judicially guide the scope and parameters of the issues to be certified for determination based on what is raised by the parties ...".⁷² The challenge with this approach, as Nyirenda CJ implicitly conceded, is that in judicially guiding the scope and parameters of the issues, the Chief Justice would be running the risk of substituting his own preference of the issues to go to the "constitutional court" over the issues that the original court or the parties had forwarded for certification.

In terms of the issues to be dealt with by the "constitutional court", subsequent to the Chief Justice's certification, a lack of clarity seems to be emerging. According to the

⁶⁹ *Human Rights Commission* (2011).

⁷⁰ *Human Rights Commission* (2011). A similar conclusion was reached in *Bakili Muluzi* (2015) with the Court stating that "In the nature of considerations under that Rule, the Chief Justice's role cannot be said to be merely administrative".

⁷¹ *The State and the Director of Public Prosecutions Ex Parte Gift Trapence and Timothy Pagonachi Mtambo*, Constitutional Cause No 1 of 2017, High Court, Principal Registry (Judgment).

⁷² *Ex Parte Gift Trapence* (2017)(Ruling on Certification)).

“constitutional court”, “[o]nce certification is complete, the chief justice passes the matters/issues so certified to the High Court constitutional panel to deal with them ... the mandate [of the ‘constitutional court’] is restricted to what has been passed on to them by the Chief Justice”.⁷³ The “constitutional court” has further stated that “the mandate of the Constitutional Court is to decide constitutionality of the certified issues by the Chief Justice”.⁷⁴ *Prima facie*, the emerging picture seems to suggest that the “constitutional court” is straight-jacketed by the Chief Justice’s certification of particular issues. However, the more reasonable position is that adopted in *Saulos Klaus Chilima & another*.⁷⁵ In this case, the Court held that “[o]nce the constitutional issues are certified, the referral Court is confined to deal with those constitutional issues, along with a determination of all other issues raised in the matter for final disposal”.⁷⁶ The nuance acknowledged in *Saulos Klaus Chilima & another* is that while respecting the issues certified by the Chief Justice the “constitutional court” must always determine all other issues raised by the case. The approach in *Ex Parte Trapence and Mtambo* and *Von Gomani v Republic*, taken literally, runs the risk of stifling the “constitutional court” in its adjudicative function.

Another recurrent issue in relation to certification has been whether the certification itself is necessary before the Constitutional Court can be empanelled. The authority to certify proceedings for hearing by the “constitutional court” derives from section 9 of the Courts Act. The procedure contained, previously in the Constitutional Court Rules, and now in the Courts (High Court) (Civil Procedure) Rules, only comes into play once the Chief Justice has certified the proceedings.⁷⁷ However, the relationship between section 9 of the Courts Act and the Constitutional Court Rules was never tidy and several judges highlighted this fact.⁷⁸ As a matter of fact, in March 2017, Nyirenda CJ conceded that the entire scheme for constitutional referrals including section 9 and the Constitutional Court Rules needed to be reviewed.⁷⁹

As to whether certification is always necessary before empanelling the “constitutional court”, Kenyatta Nyirenda J in *Geofrey Doff Bottoman and Peter Petros Tembo v The Republic* concluded :

“ There is no requirement in s.9 of the Act that a case expressly and substantially relating to, or concerning, the interpretation or application of the Constitution cannot be heard by the Panel unless there is certification by the Chief Justice under s.9(3) of the Act. It seems to me that it is very easy to

⁷³ *Ex Parte Gift Trapence* (2017)(Ruling on Certification)).

⁷⁴ *Von Gomani* (2018).

⁷⁵ *Saulos Klaus Chilima & another* (2019).

⁷⁶ *Saulos Klaus Chilima & another* (2019).

⁷⁷ *Human Rights Commission* (2011).

⁷⁸ For example, Kenyatta Nyirenda J in *Geofrey Doff Bottoman and Peter Petros Tembo v The Republic* Miscellaneous Criminal Application No 16 of 2013, High Court, Principal Registry (*Geofrey Doff Bottoman* (2013) and *Ex Parte Gift Trapence* (2017) (Ruling on Certification)).

⁷⁹ *Enelessi Simon* (2015).

imagine cases where there can be no doubt that such cases fall within s.9(2) of the Act. In such cases, the need for certification under s.9(3) of the Act does not arise.”⁸⁰

According to Kenyatta Nyirenda J, it is only in those matters where it is difficult to discern whether the proceedings meet the threshold in section 9(2) of the Courts Act that certification is necessary. Concurring with Kenyatta Nyirenda J, Mwaungulu J, although he reasoned differently, concluded that “[t]here is nothing in the wording of section 9(2) that suggests that the Chief Justice must certify all things or at all.”⁸¹ In his opinion, section 9(3) of the Courts Act merely states that a certificate by the Chief Justice is conclusive proof that the matter falls within section 9(2). According to Mwaungulu J, the High Court, by reason of its original jurisdiction under section 108 of the Constitution, is competent to determine whether a matter requires a constitutional panel without the intercession of the Chief Justice. The whole “controversy” about the necessity of certification, it is submitted, is largely due to the untidy framing of section 9 of the Courts Act. Other than this, the amendment to section 9 seems to have been clear on the involvement of the Chief Justice in the certification process.

The last issue to be addressed revolves around the effect of the certification. Section 9(3) of the Courts Act speaks of the Chief Justice’s certificate as being conclusive of the fact that the proceedings fall within section 9(2). The question that has arisen has been whether subsequent to the Chief Justice’s certificate, the High Court could disagree with the Chief Justice and de-certify proceedings. In *Maziko Charles Sauti Phiri v Privatisation Commission and Attorney General*, the “constitutional court” made the following observation:

“We think it necessary to point out in this judgment that we had trouble appreciating that it was necessary to bring this matter to this court. In our judgment, and despite protestations from the plaintiff, we were of unanimous view that the issues raised herein were not constitutional in nature. They could have been dealt with by a judge sitting alone. So serious were our foregoing sentiments we even explored the possibility of decertifying the matter. As it turned out, it was also our view that once duly certified as a matter fit for the constitutional court by the Honourable the Chief Justice a matter can only be decertified by his high office as well.”⁸²

The view that the certification by the Chief Justice cannot be undone by any other judge was confirmed in *James Phiri v Bakili Muluzi and Attorney General*.⁸³ However, in commenting on the reservations expressed by the Court in *Maziko Charles Sauti Phiri v Privatisation Commission and Attorney General*, - as to whether the Chief Justice had correctly certified the matter - Kenyatta Nyirenda J in *Geoffrey Doff Bottoman and Peter*

⁸⁰ *Geoffrey Doff Bottoman* (2013).

⁸¹ *Reserve Bank of Malawi v Finance Bank of Malawi Limited (In Voluntary Liquidation)* Constitutional Cause No 5 of 2010, High Court, Principal Registry.

⁸² Constitutional Case No 13 of 2005, High Court, Principal Registry.

⁸³ Constitutional Case No 1 of 2008, High Court, Principal Registry.

Petros Tembo v The Republic disapproved of the Court's questioning of the Chief Justice's decision.⁸⁴ In his view, once certification has been completed this is conclusive and the High Court is barred not only from de-certifying the proceedings but also from making any comments doubting the correctness of the certification. The finality of the Chief Justice's decision notwithstanding, it is clear that he/she is still under a duty to uphold the values underlying the Constitution in deciding on certification.

To date, the only decision that has departed from the above position is *Frank Malaya v The Attorney General*.⁸⁵ In this case, the "constitutional court" took the view that the proceedings before it, though duly certified by the Chief Justice, did not substantively involve the interpretation and application of the Constitution. The Court opined that it could only sit if the interpretation or application of the Constitution was the specific and fundamental issue before it. The Court further reiterated the fact that proceedings do not qualify for resolution by the "constitutional court" simply because one of the parties has chosen to frame his/her arguments by reference to constitutional provisions. Although this finding is monumental for departing from a consistent line of authorities, the Court *a quo* failed to highlight the precise reasons that justified its departure from the language of section 9(3) of the Courts Act especially about the conclusive nature of the Chief Justice's certification. It is also notable that the Court made no attempt to engage and distinguish the older cases which had confirmed the conclusiveness of the Chief Justice's certificate.

In the end, what is noticeable about the scheme in section 9 of the Courts Act is that it attempts to demarcate roles between the Chief Justice and the "constitutional court". The Chief Justice's function is to determine if the proceedings have reached the threshold that places them within section 9(2) of the Courts Act.⁸⁶ This is a function exclusively vested in the Chief Justice. Once he does that, the matter must be considered by the "constitutional court" which must resolve the substantive questions pertaining to the interpretation and application of the Constitution. Many of the concerns about certification have now been overtaken by the Courts (High Court) (Civil Procedure) Rules 2017 which have declared certification to be an administrative act.⁸⁷ As a result, the parties no longer have to submit arguments before the Chief Justice nor is there a need for a ruling on certification.

4.4 Types of decisions and remedies

Typical of many decentralised systems, the types of decisions that the "constitutional court" can render and the remedies that it can award are no different from those that the High Court can, ordinarily, render. The underlying motif is to ensure compliance with the Constitution. In pursuit of this objective the "constitutional court" has nullified

⁸⁴ Miscellaneous Criminal Application No 16 of 2013, High Court, Principal Registry.

⁸⁵ Constitutional Case No 3 of 2018, High Court, Principal Registry.

⁸⁶ *Human Rights Commission* (2011) and *Bakili Muluzi* (2015).

⁸⁷ Order 19 Rule 2(4), Courts (High Court) (Civil Procedure) Rules, 2017.

legislative provisions, ordered compensation, ordered the release of convicts and also nullified a presidential election. The “constitutional court” is also empowered to make “any orders that are necessary and appropriate” to secure the enjoyment of rights.⁸⁸

A random sample of the judgments of the “constitutional court” reveals the range of the remedies that it can issue. In *Evans Moyo v Attorney General*,⁸⁹ the applicant had been convicted of murder and sentenced to be detained at the pleasure of the President since he was a juvenile at the time of the commission of the offence. In an action challenging his treatment subsequent to his arrest as well as after his conviction, the “constitutional court” held that the State had violated his rights as a juvenile by incarcerating him together with adults and, generally, by failing to prioritise his best interests. The Court, while rejecting the applicant’s prayer for monetary compensation, ordered his immediate release.

In *Francis Kafantayeni and others v Attorney General*,⁹⁰ the plaintiffs challenged the mandatory nature of the death penalty as provided for in sections 209 and 210 of Malawi’s Penal Code. The “constitutional court” held, *inter alia*, that the mandatory death penalty violated the right not to be subjected to inhuman and degrading treatment as provided for in section 19 of the Constitution since it did not permit individualised sentences. The Court proceeded to declare section 210 of the Penal Code unconstitutional to the extent that it permitted the mandatory death penalty.

Another example of a case in which the “constitutional court” struck down legislation for being unconstitutional is *Mayeso Gwanda v The State*.⁹¹ In this case the applicant challenged the constitutionality of section 184(1)(c) of the Penal Code. The challenged provisions permitted police officers to arrest anyone found to be loitering and to charge them with the offence of being a rogue and vagabond. The Court held that section 184(1)(c) of the Penal Code violated the right to dignity and security of the person as provided for under section 19 of the Constitution and was not a justifiable limitation on constitutional rights.

In *Gable Masangano v Attorney General & others*, the applicant commenced the case on his own behalf and on behalf of all prisoners in Malawi.⁹² He alleged that the rights of prisoners were being violated and that they were being subjected to torture and cruel, inhuman and degrading treatment or punishment due to the conditions of their imprisonment. In its judgment, the “constitutional court” held that conditions in Malawian prisons were indeed violative of prisoners’ rights. According to the Court, it was the duty of the government to comply with the standards in the Prisons Act and the

⁸⁸ Section 46(2) of the Constitution.

⁸⁹ Constitutional Case No 12 of 2017, High Court, Principal Registry.

⁹⁰ Constitutional Case No 12 of 2005, High Court, Principal Registry.

⁹¹ Constitutional Case No 5 of 2015, High Court, Principal Registry. See also, *Friday Jumbe and Humphey Mvula v Attorney General* Constitutional Cases No 1 & 2 of 2005, High Court, Principal Registry, where the Court held that s 25B(3) of the Corrupt Practices Act was invalid for infringing s 42(2)(f)(iii) of the Constitution.

⁹² Constitutional Case No 15 of 2007, High Court, Lilongwe District Registry.

regulations made thereunder. The Court directed the government to comply with its judgment within 18 months by, among others, taking steps to improve prison conditions through decongestion of prison cells. The Court also ordered the National Assembly to ensure that adequate resources were availed to the respondents to ensure that they complied with the terms of the order as well as the stipulations in the Prisons Act.

The case of *Saulos Chilima & another v Peter Mutharika & another*⁹³ involved a challenge to the presidential elections of May 2019. The applicants alleged that the elections had been marred by irregularities such that it could not be said that the first respondent had been duly elected as President. In a wide-ranging judgment, the “constitutional court” upheld the applicants’ petitions, nullified the presidential election and ordered a fresh presidential election. The Court also ordered the National Assembly to adopt legislation to facilitate the holding of the fresh elections.

Insofar as the Court’s power to nullify unconstitutional laws is concerned, the MSCA judgment in *Amon Mussa v The Republic* deserves mention.⁹⁴ In this case, the MSCA held that only the “constitutional court” has the jurisdiction to declare a statute unconstitutional. Section 9 of the Courts Act was cited as the authority for this position. This position, however, is an overgenerous interpretation of section 9. The innovations, in relation to the High Court’s quorum, introduced by section 9 cannot truncate the unlimited original jurisdiction vested in the High Court by the Constitution. Administratively, it is preferable that constitutional matters should only be disposed of by the “constitutional court”. It is wrong, however, to approach section 9 of the Courts Act as if it somehow alters what is prescribed in section 108 of the Constitution.

4.5 Independence of the “constitutional court”

The mechanisms for the appointment of judges are always a critical issue when the establishment of a constitutional court is contemplated. Constitution designers are unlikely to support a mechanism for constitutional review unless they believe it will be carried out by impartial appointees.⁹⁵ In centralised systems this often results in the appointment of special judges to serve on the constitutional court. In decentralised systems, like Malawi, the independence of the “constitutional court” implicates the system for appointing judges at large, because there are no special judges designated to conduct constitutional adjudication. Generally, in terms of appointing judges, the objective ought to be to choose an appointment procedure that will insulate judges from illicit pressures while guaranteeing their independence and accountability.

The system for appointing judges in Malawi has been the subject of scholarly analysis before.⁹⁶ For purposes of the present discussion it suffices to note that the

⁹³ Constitutional Reference No 1 of 2019, High Court, Lilongwe Registry.

⁹⁴ MSCA Criminal Appeal No 2 of 2011 (Being High Court, Mzuzu Registry Criminal Appeal 43 of 2008).

⁹⁵ Ginsburg (2003) at 41.

⁹⁶ See Nkhata M “Safeguarding the integrity of judicial appointments in Malawi: a proposed reform agenda” (2018) 62(3) *Journal of African Law* 377 at 403 and Nkhata M “Spotlight on the guardians of

system reserves a central role for the Judicial Service Commission (JSC). Although judges are appointed by the President, this is done on the recommendation of the JSC. A major drawback of the system is its lack of transparency. Although the invitation for applications is publicly made, there is no way of knowing the names that the JSC recommends to the President for appointment. Relatedly, once appointments have been made, it is impossible to tell whether or not the President has followed the recommendations of the JSC. Such a secretive process has the potential for compromising the integrity and independence of the judiciary at large and the “constitutional court” in particular.

In practice, the “constitutional court” has ably acquitted itself thus far and no serious argument can be made to suggest that its independence has been compromised. As the cases discussed in this article illustrate, the “constitutional court” has resolved diverse issues and in the process it has made very far-reaching orders against diverse institutions.

5 CONCLUSION

The High Court of Malawi, when reconfigured in accordance with section 9 of the Courts Act, performs a special type of constitutional adjudication. It is only in this sense that it qualifies to be called a constitutional court. This model of constitutional adjudication is, clearly, the decentralised model of constitutional adjudication. As the analysis herein has shown, the system has its own peculiarities. These peculiarities strongly suggest that while countries may be agreed on the need for constitutional adjudication, they will, invariably, pick varying approaches depending on the prevailing context and their needs.

Overall, the “establishment” of the “constitutional court” in Malawi was a commendable development. Constitutional interpretation and application often has far-reaching implications. The enhanced quorum of the High Court, arguably, should work to ensure deeper and better reasoned constitutional jurisprudence. This, however, is not to suggest that a High Court judge, sitting alone, could never arrive at a deeply reasoned constitutional determination. It is simply to argue that multiple viewpoints on the same issue(s) can enrich the development of constitutional jurisprudence. Practically, however, the outcomes have been mixed and do not consistently bear out the benefits of multiple viewpoints on constitutional issues.

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