



Malawi Judiciary

REMARKS

BY

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GUEST OF HONOUR

AT

**THE REFLECTIONS ON THREE DECADES OF THE
CONSTITUTION OF THE REPUBLIC OF MALAWI CONFERENCE**

SUNBIRD MOUNT SOCHE HOTEL

26TH TO 27TH MAY, 2025

1.Salutations

- 2.It is an honour and a privilege for me to be here at the start of this historic event. I am truly grateful to the organisers for the generous invitation extended to me. My role today is narrow – to officially open this important and land mark conference. I, however, may have to say a few things.
- 3.Periodic and organized events to reflect on a nation’s Constitution are common place these days, whether in the form of anniversary celebrations or constitutional conference. I recall that there was a time when the South Africans had an elaborate celebration of the 20th anniversary of their Constitution. On 15th May, 2025 yours truly joined the Norwegians who celebrated their Constitution adopted on 16th May 1814, signed on 17th May 1814. They did it in style. Some of us present here would have been invited to join the United States of America as they celebrate 249 years of their Constitution on 29th May 2025, ratified in 1788 and in operation since 1789.
- 4.In my assessment, it is quite evident that there is a growing global acknowledgment that a civilized society must adhere to the dictates of its national constitution. There appears to be a realization that constitutionalism, rule of law, democratic governance and the protection of fundamental

human rights must hold society together for the well-being of every member. Conversations about the constitution of any given country and how it is observed are a common feature in both the developed and the developing world. There are casual readers and interpreters of the constitution in as much as there are serious readers and interpreters of it. Constitutional experts are of varying levels of understanding, such that varied interpretation even among them lead to divergence of opinions. Professor Edge Kanyongolo said to me on a number of times that he never wanted the Republic of Malawi Constitution to be any further than two feet away from him at any given time, a companionship that is a mark of a Constitutional Law Expert par excellence.

5. The event in the next two days must be comforting to all of us gathered here so that we may be able to share our reflections. The common interest should be to achieve a better governed democratic Malawi, through our 1994 Constitution. We ought to approach our assignment with mutual respect, whether we are true democrats, half-hearted democrats or simply clothed in clothes of a democrat.
6. A historical perspective of our country will show that on 14th May 1891, we were declared a British Protectorate, British Central African Protectorate

in 1893 and Nyasaland Protectorate in 1907, before we became part of the Federation of Rhodesia and Nyasaland in 1953. All this while, self-rule was farfetched until our forefathers and mothers made the ultimate sacrifice to attain independence in 1964 and Republican status in 1966. The nation of Malawi was thus birthed with the declaration of independence on 6th July 1964 under a new Lancaster House negotiated Constitution which was later replaced with a Republican Constitution on 6th July 1966. As a member of the community of nations, Malawi was to be governed by an own Constitution in a geopolitical environment characterized by a Cold War and an iron curtain between the West on the one hand and the Union of Soviet Socialist Republics on the other.

7. In times to follow, the world experienced a huge geopolitical shakeup that tore down the iron curtain and ended the Cold War in a dramatic way. A new world order was to emerge as the USSR broke up into many new states. Existing states had to reposition themselves and to dramatically transform into democratic states in a wave of change.

8. The winds of change that swept the USSR affected the continent of Africa and Malawi would not remain unchanged. The third wave of democratization that swept the African continent

in the late 1980's and early 1990's meant the rebirth of the nation of Malawi in what was described as a Second Republic. Widespread dissatisfaction with one-party rule was the catalyst for the introduction of multiparty democracy with the adoption of our present liberal and democratic Constitution in 1994. The clamour for multiparty democracy was unstoppable, until it triumphed over fierce resistance to its introduction.

9. The new 1994 Constitution for the Republic of Malawi marked a significant moment of rebirth of the Malawi Nation in the community of nations. There can be no meaningful reflection on the current Constitution without an appreciation of some of the historical background and the pain that preceded its adoption. I must congratulate all of you that have made it to this event even as we realize that there are many millions who have a stake in this Constitution and yet they are not here. Not too many of those who experienced the pains of the birth of the First Republic are still around. There are still a considerable lot of people who experienced the pains of the birth of the Second Republic. The current demographics largely consist of young people who must fully participate in the affairs of the country for their own well-being and for the well-being of generations to come. Malawi is both for today and the future, we cannot afford to be selfish. All of us

here present would do well to fully utilize the opportunity of being here so that these two days may turn highly productive.

10. A highlight of some features of the Constitution would inform the exercise we are on about. The Constitution of the Republic of Malawi is the people's document. They recognized the sanctity of human life and the unity of all mankind. They were guided by their private consciences and collective wisdom as they sought welfare and development, national harmony. They were desirous of creating a constitutional order based on the need for an open, democratic and accountable government. Contrary to the view of some proponents that the current Constitution was drawn up by a small group of people, in much the same way as was the Lanchester House Constitution, the truth is that this Constitution was a product of wide and intense consultation. So, also, was the technical review that was undertaken in 2006 and 2007. The promotion, protection and preservation of human dignity seems to be the threat that runs through the Constitution.

11. Some commentators have been able to observe that in 1994, Malawi adopted an unusually progressive Constitution, unprecedented in the country's political and constitutional history. It was this Constitution

that restored and entrenched a Bill of Rights that the 1966 Republican Constitution had abandoned. Many people familiar with Malawi's political and constitutional history will agree that the Malawi of the last 30 years is quite different from that which preceded the 1994 Constitution. There is greater enjoyment of freedoms and rights, a proliferation of laws consistent with tenets of democracy. There is now a multiplicity of political parties as well as organizations and associations that describe themselves as non-governmental.

12. This is by no means to suggest that we are living in a perfect world under the current Constitution. Sentiments have variously been expressed that as a society, we have placed a lot of emphasis on the exercise of rights, but have glaringly ignored corresponding duties on the part of rights holders. Terms such as rights holders and duty bearers have divided us the people in groups of them and us, ignoring that a right holder ought to exercise the right responsibly. There have been sentiments of frustration with the workings of our Constitution. Calls for review of the Constitution, including extreme calls for overhaul, continue to echo in many places.

13. It ought to be recognized that the strength of the Constitution of the Republic of Malawi lies in

its fundamental role as the supreme law of the land binding all government bodies and individuals within the aspirations of all the people of Malawi. It is a product of popular consultations. An entire Chapter III of the Constitution is devoted to fundamental principles upon which the Constitution is founded. The core principles of the Constitution include popular sovereignty where power to govern resides in the people. The entrenched doctrine of separation of powers serves to prevent tyranny of any one arm of government in a system based on the supremacy of the Constitution. The principle of checks and balances prevents any one arm of government from becoming too powerful and a law unto itself. The emphasis on constitutional supremacy, rule of law, democratic governance, transparency and accountability provide appropriate anchors for the Constitution. The independence of the Judiciary and judicial review of laws and administrative action that violate the Constitution strengthen the Constitution, constitutionalism, the rule of law and democratic governance. The entrenchment of fundamental rights and other critical provisions of the Constitution render the document a reliable partner in the pursuit of social well-being.

14. The past 30 years have seen the Constitution of the Republic of Malawi play an important symbolic and social role in a number of ways. It

has served as a symbol of the nation's shared values, history and aspirations, thereby fostering a sense of national identity. In many ways, the Constitution has reflected and shaped our nation's collective understanding of itself, its demographics, its history and its future, including Malawi 2063. For all its shortcomings, the Constitution has served as a catalyst for unity by providing a basis for diverse groups to come together around shared principles and values, with no one succeeding in portraying that they are more entitled to Malawi than the rest.

15. The critical subject of the application and interpretation of the Constitution is my next point of call. I believe that how we interpret and apply the Constitution has a bearing on its resilience and adaptability. Chapter II of the Constitution sets out principles of application and interpretation of the Constitution. This chapter II immediately follows section 9 of the Constitution which provides that:

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

Section 11(1) of the Constitution provides 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 this Constitution.”

16. One aspect of the unique character of the Constitution of the Republic of Malawi is that it is an amalgam of the Parliamentary system of government as obtains in the United Kingdom and the Presidential system of government as obtains in the United States of America. Over the past three decades, the Courts in Malawi have been actively engaged in the interpretation of the Constitution through the cases that have been brought before them. They have developed principles of interpretation that reflect the unique character and supreme status of the Constitution. These principles lay emphasis on promoting the values of an open and democratic society, upholding human rights provisions, while taking into account public international law and comparable foreign case law.

17. One of the leading cases on constitutional interpretation is Nseula v Attorney General & Another MSCA Civil Appeal No. 32 of 1997 reported in {1999} MLR 313. It is recommended that the judgment of the High Court be read alongside the judgment of the Supreme Court of Appeal for a fuller appreciation of the issues that fell for adjudication (Nseula v Attorney General &

Another {1997} 2 MLR 294 (HC). The Supreme Court of Appeal laid down many important principles of constitutional interpretation. The Court recognized that our Constitution is a special document which requires special rules for its interpretation and calls for principles of interpretation suitable to its nature and character.

18. The Court further stated that the rules and presumptions which are applicable to the interpretation of other pieces of legislation are not necessarily applicable to the interpretation of a Constitution. While recognizing that the Constitution is an amalgam of the Parliamentary system of government and Presidential system of government, the Court was also able to establish that the features of Parliamentary system of government are given greater prominence than the features of the Presidential system of government.

19. The Constitution is drafted in broad and general terms, laying down broad principles, thereby calling for generous interpretation that avoids narrow and legalistic interpretation, but require that Courts interpret Constitutional provisions broadly, expansively and purposively. The elementary rule of constitutional interpretation is that one provision of the Constitution cannot be isolated from others, or be

interpreted such as to destroy another provision of the Constitution. All the provisions bearing upon a particular subject must be brought to bear and be read as a whole, without one provision destroying the other, but sustaining it. That is the intention of Parliament and it must be given effect. The traditions, usages and conventions which are common features of the two systems must be taken into consideration.

20. The case of Chakuamba & Others v Attorney General {2000 – 2001} MLR 16 reaffirmed the position in Nseula v Attorney & Another {1999} MLR 313 that a Malawi Court must first recognize the unique character and nature of our Constitution before interpreting any of its provisions. An interpretation that gives effect to the intention of Parliament requires an appreciation of the character and nature of the document, the subject of interpretation. It is a basic principle of legal policy that law should serve the public interest. Therefore, Court must presume that the legislature intended so.

21. The case of Mbewe v Registered Trustees of Blantyre Adventist Hospital {1997} MLR 403 recognized that the Courts are enjoined to develop appropriate principles for interpretation of the Constitution in order to reflect the unique character and supreme status of the Constitution. The case also observed that Courts

ought to declare invalid any act of government or any law inconsistent with the Constitution to the extent of the inconsistency. The case made it clear that in the application and development of common law, Courts ought to have due regard to principles and provisions of the Constitution.

22. The case of The Trustees of Malawi Against Physical Disabilities v The State and The Office of the Ombudsman {2000-2001} MLR 391 described the Constitution as a document *sui generis*, calling for principles of interpretation of its own suitable for its unique character, without necessarily according acceptance of private law. Similarly, the case of Malawi Human Rights Commission v Attorney General {2000-2001} MLR 246 emphasized that Courts must give the words of the Constitution wider meaning to provide for wider demands of society and stop where the meaning might turn to absurdity. The Courts are called upon to employ generous approaches to the interpretation of fundamental human rights and freedoms in the Constitution, always bearing in mind that the Constitution is a logical whole with each provision as an integral part thereof, one part to be construed in the light of the other. On the matter of public interest litigation, the question of standing and interest in constitutional complaints and proceedings must depend on the substance and merits of the application and not on the procedural

technicality. (see also Zaibula v Council of the University of Malawi {1997} MLR 356; Attorney General v MCP and Others {1997} 2 MLR 181).

23. The case of Attorney General v Lunguzi and Another {1996} MLR 8 is authority, for the proposition that a President acts unconstitutionally when he or she violates a constitutional provision. Similarly, the case of The State, The President of Malawi and others ex-parte Malawi Law Society and others {2002-2003} MLR 409 is authority for the proposition that a Presidential decree doesn't amount to law and cannot be enforced. This proposition is designed to ensure that human rights are guaranteed.

24. As we talk about constitutional application and interpretation, we must also have regard to Constitutional resilience and adaptability. This is the ability of the Constitution to cope with attacks and with real crises. Judges think judicially or legally while politicians look at legislation with a political background in the perspectives of shaping the law. The stability of a system and the aggressiveness of the surrounding environment have a bearing on the resilience of the Constitution. There are many factors that may speak to the vulnerability of the Constitution and Constitutional justice. Erosion of democracy makes the rule of law vulnerable. On the other hand, strengthening the resilience of the rule of

law through democracy would translate in entrenchment of Constitutionalism. We need to be on the lookout as some may seek to invoke democratic justification to legitimize attacks on the rule of law that constrains their claims to express “the will of the people.”

25. A strong and resilient Constitution is built upon key principles earlier referred to in this speech, such as popular sovereignty, separation of powers, checks and balances and the protection of human rights. A resilient Constitution must be adaptable and flexible to address changing societal needs while remaining committed to the rule of law and the protection of fundamental human rights. The emphasis must remain that everyone is subject to the discipline and sanctity of the law and no one should assert themselves above the law at any given time.

26. This statement would not be complete if I did not briefly address the issue of constitutional amendment. The Constitution of the Republic of Malawi has been the subject of multiple amendments since 1994 when it first came into force. A comparison can be made with the Constitution of the United States of America which has been amended a mere 27 times since its ratification in 1788 and operationalization in 1789. The 27th Amendment was ratified in 1992, well before we adopted our 1994 Constitution. It

is also notable that more than 11,000 amendments to the US Constitution have been proposed, but only 27 have been ratified. The South African Constitution has been amended seventeen times since its adoption in 1996. The seventeenth amendment was made in 2012 and was aimed at strengthening the independence of the Judiciary. The Namibian Constitution adopted in 1990 has been amended three times in 1998, 2010 and 2014.

27. It is clear that the Constitution of the Republic of Malawi has been amended far more frequently than even our closest neighbours. It is suggested that going forward, we should reflect more deeply on proposals for Constitutional amendment than we have hitherto done.

28. The broad theme of this conference, **“Reflections on Three Decades of the Constitution of the Republic of Malawi”**, covers the work of many bodies and institutions beyond that of the Judiciary for the past 30 years or so. The work of the Legislative and the Executive arms of government, constitutional bodies and governance institutions must also be the subject of our reflections regarding how the 1994 Constitution has served us. The sub-themes **“Evolution of Constitutional Law and Constitutionalism in Malawi”**, **“The Constitution; Democratic Governance and**

Accountability”, “Human Rights, Socio-economic Justice and Inclusion”, “The Constitution and Economic Governance”, “The Courts, Legal Profession and Constitutional Interpretation”, “Accountability of the Judiciary and the Legal Profession”, “Electoral Administration and Dispute Resolution as well as “Constitutionalism in the Digital Era” are all very engaging. Experts have been engaged to lead discussions in all these very important and topical areas. I am confident that in the exercise of conducting the reflections we will not skirt around sticky issues. Whether there have been instances of dormancy or overreach, be it Judicial, Parliamentary or Executive, should exercise our minds. Whether the doctrine of separation of powers and the principle of checks and balances have been adhered to must concern us. We must reflect on the extent to which we have entrenched our Constitution, Constitutionalism, the rule of law and democratic governance. Whether the supremacy of the Constitution has been upheld and not undermined by the overreach of any arm of government, Constitutional body or oversight institution is a point for reflection. Regarding the increased oversight function of the National Assembly, one might wish to reflect on whether there are signs of Parliamentary supremacy at the

expense of Constitutional supremacy. Is the oversight function overshadowing the legislative function. Another point worthy consideration is whether we have seen increased judicialization of politics or politicization of the judiciary as some quarters would like to believe. To what extent have we progressed on socio-economic justice, environmental justice or indeed constitutional justice under the Constitution. Under this unusually progressive Constitution, have we experienced instances of tyranny of the majority or otherwise? To what extent have we lived up to the fundamental principle of the Constitution that all legal and political authority derives from the people of Malawi to be exercised in accordance with the Constitution solely to serve and protect their interests? I am sure that these and many other questions linger on our minds even as we start this conference. I have no intention whatsoever to steal the thunder from the presentations to be made by our esteemed resource persons. It is my hope that at the end of it all, we will have some answers. We have a duty to make our Constitution work for us now and for a better tomorrow.

29. I must thank the organizers for the excellent arrangements for this historic conference that is bound to shape our thinking and actions regarding constitutionalism, rule of law and democratic governance in this country. I

commend the esteemed resource persons and presenters for their willingness to share their reflections on the subject matter before us.

30. As I conclude, I wish to urge all the distinguished participants to get fully engaged in the business of the day so that the significance of this conference is felt beyond us, beyond this room and beyond this time for a better Malawi.

It is now my singular honour and privilege to declare this important and historic conference officially opened.

I thank you for your participation and for your kind attention.