



**CONFERENCE AND ANNUAL GENERAL MEETING**

**8 November, 2011**

**KEYNOTE ADDRESS**

## **Law Reform as a Catalyst of Debate**

Honourable Justice of Appeal Elton M. Singini, SC  
*Malawi Supreme Court of Appeal and former Law Commissioner, Law  
Commission, Malawi*

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**The Honourable Minister of Justice and Constitutional Affairs of the  
Government of Malawi**

The Honourable Ephraim Mganda Chiume, MP

**The Honourable the Chief Justice,**  
Justice Lovemore G. Munlo, SC;

**The Chairperson of ALRAESA**

Mr. Sackey Shanghala, Chairperson of the Namibian Law Reform Commission;

**The Secretary General of ALRAESA**

Mrs. Gertrude Lynn Hiwa; the Law Commissioner, Law Commission, Malawi

**Heads and members of Law Reform Agencies of Eastern and Southern  
Africa, and other members of Law Commissions from the rest of the world**

**Justices of Appeal and Judges of the High Court of Malawi present,**

**The Chief Secretary to the Government,**  
Mr. Bright Msaka, SC;

**The Deputy Chief Secretary to the Government,**  
Mr. Necton Mhura;

**The Solicitor General and Secretary for Justice,**  
Mr. Anthony Kamanga, SC;

**The Clerk of Parliament,**  
Mrs. Matilda Katopola;

**Representatives of Government departments present,**

**Distinguished Delegates,**

**Members of the Press,**

**Ladies and Gentlemen**

First of all, I would like to express my deepest gratitude to the host and organizer of this year's ALRAESA Conference, the Malawi Law Commission, for what already appears to be very excellent arrangements made for this Conference. On my part, I do so with a sense of *déjà vu*. As some of you may be aware, I was Law Commissioner here for a decade and a bit; from January, 1996 to August, 2006. I then went back to the Bench. So, I am not exactly a stranger here. I recall with the great fondness the good times I shared with colleagues as part of ALRAESA and the Commonwealth Association of Law Reform Agencies (CALRAs), for which I was the founding Vice President and President, respectively.

Am I no longer involved with law reform? Well, I suppose the clarification by a good friend, colleague and eminent legal mind makes is quiet pertinent and appropriate here. The Honourable Justice Michael Kirby (retired) has pointed out that law reform ought to be construed more expansively and need not be restricted to the institutional setting of a law reform agency. He notes that law reform has always involved the maneuvering of judges and, I may add, that has happened with able assistance of lawyers bickering at the Bar.<sup>1</sup>

At the outset, let me say something about the Conference theme. The Conference theme centres on three pillars: constitutionalism, rule of law and democratic governance. Each one of these pillars could be a conference theme in its own right. I must commend the host and organizer of the Conference, the Malawi Law Commission, and the entire ALRAESA family, for their courage and craft in providing us with a forum to share our views on such thought-provoking terrain.

The global village is yet again at a crossroads: The events of what has been dubbed the 'Arab Spring'; the instability of the global economy and the resultant 'Occupy' movement; the global food crises and the ensuing land grabbing in the global South; climate change and the green movement; the struggles for recognition of minority rights; all these call for an *indaba* on what constitutionalism, rule of law and democratic governance entails. Indeed, our people – the governed – are increasingly placing more demands on those exercising State authority. The process leading up to the recent appointments of the Chief Justice and the Deputy Chief Justice to the Kenyan bench, for example, do show that it is no longer business as usual.

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<sup>1</sup> Michael Kirby 'Helping Yourself to Law Reform, Conference on 'Helping Yourself to Justice', May, 1981

As I speak to the theme of the Conference, I would like to do so under the umbrella of ‘Law Reform as a Catalyst of Debate’. Distinguished delegates, ladies and gentlemen, debate, in my view, should not presuppose the sharing of ideas as part of a zero–sum game. Rather, it ideally should seek to enrich knowledge of all participants to the debate. There need not be right or wrong answers. It is enough that there is a rhizomic interface of ideas. The purists would probably insist that what I am suggesting is therefore dialectics. They are probably right. However, whether we are talking about debate or dialectics, what is important is the *idea*.

I will make my observations on each of the three pillars of the Conference theme, that is: constitutionalism, rule of law and democratic governance. I will then highlight some of the sticking issues in law reform discourse as part of the (enduring) debate.

## I

### ON CONSTITUTIONALISM

Constitutionalism is an elusive, if not complex, concept. It is at once elusive and complex because constitutionalism is a site of ideology. That which is ‘constitutionalism’ defines the underlying *ethos* of governing in a polity. Having said that, however, I join those who have argued that constitutionalism does not depend on a constitution as text. There ought to be constitutionalism in a polity with or without a constitution.

If we are to properly contextualize where we are now, we have to go back in time. The journey into the past takes us to the turn of the 1990s. The Berlin Wall has fallen. The fall serves as a symbolic end of the Cold War. Elsewhere, in places such as sub-Saharan Africa, there is political seismic activity aplenty. Others call this the Second Wind of Change. The geopolitical terrain has changed. ‘Progress’ entails the abandonment of ‘independence constitutions’ of the 1960s and the adoption of largely liberal, democratic constitutions; sometimes referred to as ‘rights-based’ constitutions.

Keep in mind that liberal, democratic constitutionalism means, among other things, the superiority of the individual, accountable and transparent government, periodic elections, adherence to human rights, separation of powers and independence of the judiciary.

To what extent have our jurisdictions lived up to the promise of the new constitutions? Put it another way, have our polities embraced the notion that all legal and political authority derives from principles set out in our constitutions?

While most of our countries have embraced liberal, democratic constitutions, we have not gone beyond the text to inculcate a liberal, democratic *ethos* in our society. In Malawi, for example, our political parties have not translated the notion of periodic elections into intra-party democracy. None of the political parties have had truly free and fair elections of office bearers.

These few but critical challenges that we have in Malawi are symptomatic of the state of governing on our continent. In most cases, we have political party systems that are hardly democratic and yet they seek to operate in the context of a liberal, democratic constitutional order.

## II

### ON RULE OF LAW

This is yet another weighty concept. Professor Richard Fallon, Jr. has observed as follows:

The Rule of Law is a much celebrated, historic ideal, the precise meaning of which may be less clear than ever before. Significantly, however, the meaning of the phrase ‘the Rule of Law’ – which I shall refer to as ‘The Rule-of-Law-Ideal’ – has always been contested. Within the Anglo-American tradition, the best exposition came from a turn-of-century British lawyer, A.V. Dicey, who associated the Rule of Law with rights-based liberalism and judicial review of government action.<sup>2</sup>

This is also my preferred meaning of the rule of law as one will discover from some of my recent chamber rulings. It is also the exact definition appearing in one of my favourite law dictionaries; *Osborne’s Law Dictionary*.

Indeed, other scholars trace the modern concept of ‘rule of law’ all the way to Aristotle who considered rule of law as rule of reason.

In the last two decades, the article by Thomas Carothers ‘The Rule of Law Revival’ published in 1998 has achieved seminal status on the subject.<sup>3</sup> Professor Carothers’ piece is a cautionary piece. But if Professor Carothers was wary in 1998, his concerns remain today. The wary here is that it is well and good to re-write constitutions, laws, set up new institutions. This according to Carothers is the ‘easy part’. What are the deeper reforms that are being put in place? Put yet

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<sup>2</sup> RH Fallon, Jr. ‘“The Rule of Law” as a Concept in Constitutional Discourse’, *Columbia Law Review*, Volume 97, Number 1, January, 1997, 1,1[internal citation omitted]

<sup>3</sup> T Carothers, ‘The Rule of Law Revival’ *Foreign Affairs*, Volume 77, 1998, 95

another way, it is perhaps easier to develop the constitution as text. We must ask, to what extent is a polity endeavouring to attain the constitution as an ism?

Beyond the challenges of text and ism, there is yet another consideration certainly in the global South. The cultural context of a polity ought to define the nature of the 'law' that must rule. The linkage that has become automatic between rule of law and sustained economic growth in global geopolitics has regrettably essentialized or, perhaps, undermined the relevance of culture and context. I must add a caveat to the point: 'context' may be easier to define. 'Culture' is not so easy to define as it may be the subject of politicking, patriarchy and path dependence.

### III

#### ON DEMOCRATIC GOVERNANCE

Under liberal democratic tradition, the underlying norm as has been argued by scholars such as Thomas Franck is that those who govern do so with the consent of the governed. Hence, the understanding of democratic governance here is that it is premised on two pillars: citizen participation in the determination of government itself, and a 'rights platform' for the protection of individuals in a polity.

But then there is 'governance' everywhere. The term crops up in international diplomacy, climate change, the conduct of global business and I would not be surprised if there is a whole expert field on conference governance. The term is so ubiquitous and the clarity of its meaning is not as widespread. Indeed, a necessary question that must be raised here is this one: Is there a difference between governance and government? Distinguished delegates, ladies and gentlemen, I join proponents such as Mark Bevir who states:

The concept of governance evokes a more pluralistic pattern of rule than does government: governance is less focused on state institutions, and more focused on the processes and interactions that tie the state to civil society.<sup>4</sup>

The concept of democratic governance denotes, in part, that the State is no longer sole site of governing. Governing, in this day and age, means that there is a network of actors that define, or ought to define, the political, economic and social agenda of a polity. Hence, distinguished delegates, ladies and gentlemen, at the risk of appearing polemical, I assert that government without governance is perhaps long past.

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<sup>4</sup> M Bevir *Democratic Governance*, Princeton University Press, 2010

Democratic governance flourishes under a robust citizenry. The citizenry ought to be more proactive regarding the issues of governing in their polity. But there are challenges. For example, Let us take the issue of recall of parliamentarians under a national constitution; what is commonly understood as the ‘recall provision’. The constitutions of Nigeria and Uganda provide for recall provisions. In the Nigerian case, a recall may be based on loss of confidence in the senator or representative by the electorate. In Uganda, the recall may be based on physical or mental incapacity, misconduct or misbehaviour, or persistent desertion of the electorate. In Malawi, The provisional Constitution of 1994 provided, under section 64, for the recall of members of the National Assembly. The provision was repealed by the Constitution (Amendment) Act, 1995 while the Constitution was provisionally in force. Even though the Law Commission has recommended the adoption of a recall provision in the Constitution,<sup>5</sup> the matter remains in abeyance. Civil society organizations have continuously agitated for the amendment of the Constitution to include the recall provision. The inactivity here can be subjected to all manner of speculation. However, the principal remains that since the norm of a recall refuses to die, I suggest that this reveals the will of a people to hold their governors to account.

#### IV

#### WHITHER LAW REFORM?

Distinguished delegates, ladies and gentlemen, when we are called upon to cite the challenges that law reform agencies face in the delivery of their mandate, the usual suspects are: lack of material and human resources and lack of political will. In the context of the Conference theme, I would like to share my views on the following: subjectification and the court as a law reform agent.

On subjectification: I do not intend to engage in very deep espousal of the thoughts of Michel Foucault, Giles Deleuze and Félix Guattari. By ‘subjectification’, I merely intend to highlight the issue of the spaces which commend themselves to law reform. I will do this by way of rhetoric questions or examples. Can law reform delve into resolving ethnic, racial or religious tensions in a polity? Tensions of this nature are a reality in sub-Saharan Africa. There is the recurrent ethnic-religious tension in Nigeria; with the City of Jos in Jos State being the main theatre of bloodshed. And there is simmering racial tension in Zimbabwe in the wake of ‘fast track land reform’ since 2000.

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<sup>5</sup> Report of the Law Commission on the Review of the Constitution, Report Number 18, Malawi Government Gazette Supplement, 21 September, 2007, pp. 47–50

Further, who determines the subject of law reform? What influences the nature of a subject of law reform? I have in mind here the polarized debate – if I may call it thus – over the recognition of lesbian, gay, bisexual and transgender (LGBT) rights. There is a real time polarity on the issue based on ‘culture’, on the one hand, and ‘rights-based’ liberalism, on the other, in most of sub-Saharan Africa. In this scenario, to the question ‘*Who determines the subject of law reform?*’ – Is it those opposed to LGBT rights or those advocating for the recognition of LGBT rights? Similarly, to the question ‘*What influences the nature of a subject of law reform?*’ – Can the issue of LGBT rights ever be a *subject* of law reform in sub-Saharan Africa? This latter question also raises the issue of identity in law reform projects.

On the court as a law reform agent: I would like to underscore what has been termed the social question. Dissensus remains as to whether policy is matter for the adjudication of courts or that it should remain the purview of the Executive and the Legislature. There are very strong views on both sides of the argument. The matter has exercised the courts in South Africa (for example the *Grootboom* case) and in Malawi (for example *The State versus The President of the Republic of Malawi and Others ex parte Malawi Law Society – ‘The Judges’ Salaries’* Case). I suppose, what I would leave you with, distinguished delegates, ladies and gentlemen, is to ponder on whether given the socio-economic reality of sub-Saharan Africa, courts should or should not adjudicate on a social question.

## V

### CONCLUDING REMARKS

Let me end by saying that law reform agencies serve a crucial role in our society as catalysts of action and focused community debate. However, we must understand that law reform does not remain confined to the institutional setting of a law reform agency. Further, the relevance of law reform to constitutionalism, rule of law and democratic governance is dependent on the realization that these norms have evolved; they are not legitimized through the formal hierarchy of the State. These norms are increasingly people-centred.

I thank you all for your attention.

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