DOES THE WATCHDOG BITE?

A comparative study of the judiciary as an accountability mechanism on high executive power in Malawi, Namibia and Seychelles

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DECLARATION

I, JOELLE SARAH BARNES, hereby declare that the work on which this thesis is based is my original work (except where acknowledgements indicate otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other university.

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ABSTRACT

This thesis examines the evolution of constitutional review powers in Malawi, Namibia, and Seychelles following the adoption of rights-based democratic constitutions in the 1990s. It investigates whether the courts in these jurisdictions have developed a coherent set of norms and principles to hold the President and Cabinet accountable for their use of high executive power. Despite their similar constitutional frameworks, significant differences emerge in how these courts have navigated their expanded roles. The study highlights that while the courts have established standards for reviewing executive conduct, there is variability in the predictability and clarity of their jurisprudence. A comparative analysis, including a case study on judicial responses during the COVID-19 pandemic, reveals that Malawi exhibits a robust but unpredictable jurisprudence, Namibia demonstrates emerging standards with largely predictable outcomes, and Seychelles faces systemic challenges that hinder effective judicial review. The findings underscore the necessity of contextual factors—such as judicial independence and public faith in the legal system—in embedding these powers effectively. This research contributes to the understanding of how legal frameworks can promote accountability and supports ongoing academic inquiry into the evolving relationship between the judiciary and executive power in modern African democracies.

ACRONYMS AND ABBREVIATIONS

AD	South African Appellate Division
AdminG	Administrator General
AG	Attorney General
BAS	Bar Association of Seychelles
CAA	Constitutional Appointments Authority (Seychelles)
CC	Constitutional Court
COI	Commission of Inquiry
DPP	Director of Public Prosecutions
EEZ	Exclusive Economic Zone
HC	High Court
JSC	Judicial Service Commission
MCP	Malawi Congress Party
MP	Member of Parliament
MSCA	Malawian Supreme Court of Appeal
NA	National Assembly
NCIS	National Central Intelligence Agency
NSC	Supreme Court of Namibia
PSC	Parliamentary Service Commission
RSC	Supreme Court Rules (UK)
SADF	South African Defence Force
SBC	Seychelles Broadcasting Corporation
SCA	Supreme Court of Appeal
SCoA	Seychelles Court of Appeal
SCS	Supreme Court of Seychelles
SCSWA	Supreme Court of South West Africa
SOE	State of Emergency
SWA	South West Africa
SWAPO	South West African People's Organisation
UDHR	United Nations Universal Declaration of Human Rights (UDHR)
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations

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CHAPTER ONE
INTRODUCTION

What is happening, some would say, is that the moral authority of the judiciary is expanding into the space vacated by the contraction of the moral authority of the executive and the legislature. ... And as the moral authority of the judicial system is expanding, so is what is conceived to be its core; so, that is to say, is its moral heart.... [T]hose judges who have given the moral lead have responded, case by case, to their instincts. To be justified, their responses have to be made coherent. Their ad hoc interventions need to be fashioned into a morality. The principles of judicial review that inform the new interventionism require intellectual shape. [1]

I. The new constitutional mandate on judiciaries in Africa

In the early 1990s a 'third wave of democratisation' swept across Africa, leading to wide-scale constitutional renewal.[2] This wave was a reaction to increasing international and domestic pressure and decreasing legitimacy of rulers-for-life with their one-party authoritarian regimes.[3] In 1989, 29 African countries were governed by some form of single-party government, yet not a single *de jure* one-party state remained a decade later.[4]

Three such newly constituted countries were Namibia, Seychelles and Malawi, which ushered in multiparty, democratic regimes with the adoption of new constitutions in 1990, 1993 and 1994, respectively. Seychelles and Malawi emerged from one-party regimes with long-ruling presidents, while Namibia gained independence from the South African apartheid regime. All three constitutions sought to reinvent their country as 'a sovereign, …, democratic … State founded upon the principles of democracy, the rule of law and justice for all.'[5]

The Namibian, Malawian and Seychellois constitutions (as well as many other African constitutions drafted in the next decade) were cut from the same pattern. This pattern of

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[1] Etienne Mureinik 'Administrative Law in South Africa' (1986) 103(4) *SALJ* 615, 618.

[2] Samuel P Huntington *The third wave: Democratization in the Late Twentieth Century* (1993).

[3] See H Kwasi Prempeh 'Marbury in Africa: Judicial review and the challenge of constitutionalism in contemporary Africa' (2006) 80 *Tulane LR* 1239, 1274 describing this period:

> 'As the 1990s approached, the verdict of thirty-something years of exclusionary and authoritarian politics was finally out, and from one African country to the next, the legacy, almost uniformly, was one of economic bankruptcy, social rift, and mass poverty and despair. Decades of bad government and failed promises, purchased at substantial cost to political and civil liberties, had finally exhausted the patience of even the most long suffering of Africans. The postcolonial African state had become, in the eyes of all but a tiny elite of its citizens, a predatory state.'

[4] This includes Kenya (1991), Ghana (1992), Eswatini (1993 replaced in 2005), Seychelles (1993), South Africa (Interim Constitution 1993 and Final Constitution 1996), Malawi (1994), Uganda (1995), Zambia (1996), Cameroon (1996), Botswana (1997) and Gambia (1997). See in this regard Michael Bratton & Nicholas Van de Walle *Democratic Experiments in Africa: Regime Transitions in Comparative Perspective* (1997).

[5] Constitution of the Republic of Namibia, 1990 (Namibian Constitution or Constitution of Namibia) art 1. The preamble to the Constitution of the Republic of Malawi, 1994 (Malawian Constitution or Constitution of Malawi) provides that an aim of the constitution is 'creating a constitutional order in the Republic of Malawi based on the need for an open, democratic and accountable government.' Similarly, the Constitution of the Republic of Seychelles, 1993 (Seychellois constitution or Constitution of Seychelles) provides in the preamble and art 1 for the establishment of a sovereign, democratic state subject to the rule of law.

constitutional design is fundamentally committed to the rule of law under a supreme, entrenched text.[6] The authority to exercise the different public powers is divided between three branches of state (legislative, executive and judicial). In turn, these branches implement checks on the others' use of power through mechanisms built into the structure of the state. In addition, independent constitutional 'guarantor' bodies, such as appointment authorities, Electoral Commissions, Ombudsmen and Auditors General, are established to perform constitutional functions independent of the three power-wielding branches of state.[7] The presence of these institutions in this type of constitution adds additional transparency and accountability into the system of separation of powers and has the potential to add durability to the democracy.

The defining characteristic of the new Malawian, Namibian and Seychellois constitutional texts is that they allocate the ultimate enforcement of the constitutional system to the courts where other political and constitutional checks and balances are unsuccessful.[8] Where any law or action is found to be inconsistent with the constitution, the courts are tasked with finding that act or action to be illegal and invalid.[9] It is striking that the courts are thus tasked with 'constitutional vigilance over the exercise of political power' and, as such, the courts have the power to 'sculpt[] democratic politics.'[10]

The legal mechanism designed to resolve these disputes is a new form of 'judicial review'[11] with two types of enhanced judicial review powers that were previously narrowly-construed, or off-limits entirely, to the judiciary: first, power to review legislation and strike it down where

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[6] See Stephan Gardbaum 'The new Commonwealth model of constitutionalism' (2001) 49 *American Journal of Comparative Law* 707, 714-15.

[7] See Tarunabh Khaitan 'Guarantor Institutions' (2021) 16 *Asian Journal of Comparative Law* S40-59 for a conceptual overview of the term 'guarantor institution'. Such institutions are also broadly described as 'integrity' institutions', 'fourth branch institutions' or 'institutions protecting constitutional democracy'. See Charles Manga Fombad, 'The diffusion of South African-style institutions? A study in comparative constitutionalism' in Rosalind Dixon & Theunis Roux (eds) *Constitutional Triumphs, Constitutional Disappointments* (2018) 359; Bruce Ackerman, 'The new separation of powers' (2000) 113 *Harvard LR* 633, 694, Alexander J Brown 'The integrity branch: A "system", an "industry", or a sensible emerging fourth arm of government?' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (2014) 302; Mark Tushnet 'Institutions protecting constitutional democracy' (2020) 70(2) The *University of Toronto LJ* 95.

[8] Under art 125(1)(a) of the Seychellois Constitution the Supreme Court has 'original jurisdiction in matters relating to the application, contravention, enforcement or interpretation of this Constitution'; in s 9 of the Malawian Constitution the judiciary has responsibility of 'interpreting, protecting and enforcing this constitution'; art 80(2) of the Namibian constitution vests the High Court (and Supreme Court on appeal) with jurisdiction for 'interpretation, implementation and upholding' of the Constitution.

[9] The Anglophone African constitutions generally contain a clause to this effect. See s 5 of the Malawian Constitution, art 1(6) of the Namibian Constitution and art 5 of the Seychellois Constitution.

[10] Samuel Issacharoff *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (2015), 10.

[11] I use the phrase 'judicial review' in its broadest sense here. See discussion in Chap Two. For discussions of the global expansion of judicial review see Doreen Lustig & JHH Weiler 'Judicial Review in the contemporary world – Retrospective and prospective' (2018) 16(2) *ICON* 315 and Wen-Chen Chang 'Back into the political? Rethinking judicial, legal, and transnational constitutionalism' (2019) 17(2) *ICON* 453,456.

it is found to be unconstitutional; and secondly, power to determine the constitutionality of actions of constitutional office bearers, including, and most notably, the elected executive branch. These forms of judicial review were created in addition to the existing common law powers of judicial review developed from English law, which considered the legality of judicial and quasi-judicial administrative acts. The Malawian and Namibian Constitutions also include a right to fair administrative justice, adding an additional layer of court scrutiny of executive acts.[12]

Comparative research shows that across Anglophone Africa, while common law judicial review powers did exist, in the period of the 1960s to 1990s they had rarely been used effectively against the executive. Cases brought challenging legislation or governmental actions were rare,[13] and the judges were 'supine in their posture toward laws challenged on constitutional grounds'.[14] The courts rarely made rulings against the legislature or the executive except in circumstances where the 'constitutional language permitted no choice' or where the cases involved individual property rights.[15] Bluntly put, across Africa, in the period between independence in the 1960s and constitutional democratisation in the 1990s, courts were 'singularly ineffective sentinels to protect the freedoms that purported to underlay African political systems.'[16] Malawi, Namibia and Seychelles were not different. Prior to the 1990s they had 'constitutions without constitutionalism,' which resulted in the court's failure to effectively check abuse of executive power.[17]

However, under their new constitutions, the courts in Namibia, Malawi and Seychelles were given a greater mandate and this undeniably altered the separation of powers in each of these countries – on paper, at least – as these countries transitioned from executive dominated politics to governance with powers split between the three branches of state.

The inherited precedent did not cater for the novel forms of judicial review introduced by their new constitutions, leaving courts in Malawi, Namibia and Seychelles to redefine their role in relation to the other branches of government. They had to fashion new standards for

[12] Malawian Constitution, s 43; Namibian Constitution, art 18.
[13] Robert B Seidman, 'Judicial review and fundamental freedoms in anglophonic independent Africa' (1974) 35 *Ohio State LJ* 820, 831.
[14] Ibid 825.
[15] Ibid 827.
[16] Ibid 850.
[17] HWO Okoth-Ogendo 'Constitutions without constitutionalism: Reflections on an African paradox' in Douglas Greenberg et al (eds) *Constitutionalism and Democracy: Transitions in the Contemporary World* (1993) 65.

reviewing the constitutionality of legislation and determine the extent of their constitutional authority to review executive conduct.

These judiciaries, as appointed watchdogs of the constitution, have a two-fold role: to enforce individual civil, political and socio-economic rights of the citizenry, and to uphold the collective right to open, transparent and accountable governance according to the rule of law as established by the constitutional regime.[18] This constitutional responsibility is part of the judiciary's inter-branch accountability function and stands in tension with the executive's democratic right to rule and the legislature's democratic authority to make laws. To perform their role well, the newly empowered courts must engage with the doctrine of the separation of powers in what broadly could be described as the Montesquieuian manner – as a tool of restraint, preventing the tyranny of the state[19] – as well as in the Lockean manner – as a tool of organisation of the state, which prioritises governmental efficiency.[20] These values, the rule of law and democracy are woven into the constitutional framework and coexist side by side in modern African constitutionalism, and this tension between subjecting the executive to the rule of law and enhancing effective democratic governance underlies all judicial conduct concerning the high executive in the countries studied.

Judicial review of legislation was accepted in Malawi, Namibia and Seychelles with little controversy, as it was across the region. This was aided by the South African Constitutional Court's jurisprudence and growing human rights protections in domestic legal systems reinforced by regional and international human rights instruments and tribunals.[21] Judicial

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[18] The use of the metaphor of the judiciary as the 'watchdog of the constitution' has become common in legal commentary since the late 1980s and early 1990s. Eg, in *Danson Macharia Muchiri v Republic* [1989] KEHC 117 (KLR) (Crim) the Kenyan High Court called the courts the 'the watchdog for the Constitutional rights of a citizen'. The metaphor has also been used in South African constitutional court cases, including *Certification of the Constitution of the Republic of South Africa* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at [91] and in *S v Mamabolo* [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) at [16] referring to the courts as 'the interpreter of the Constitution, the arbiter in disputes between organs of state and, ultimately, as the watchdog over the Constitution and its Bill of Rights — even against the state.' Similarly, in Eswatini, the Supreme Court in *Bhembe v Rex* [1997] SZSC 20 referred to courts as 'the watchdogs of human rights'. The metaphor has not commonly been applied in the countries in this study, however, except in the Seychellois case of *Fanchette vs Attorney General* [2014] SCSC 63 at [10] in which the judiciary was described as 'the watchdog of the Constitution and rights of the citizens.'

[19] Charles de Montesquieu *The Spirit of Laws* (1752).

[20] John Locke, *Two Treatises of Government* (1690) (Peter Laslett ed. 1988), 366-67. See also Michaela Hailbronner 'Constitutional legitimacy and the separation of powers' in Charles M Fombad (ed) *The Separation of Powers in African Constitutionalism* (2016) 385, Nicholas W Barber, 'Prelude to the Separation of Powers' (2001) 60 Cambridge LJ 59, Jeremy Waldron 'Separation of powers in thought and practice' (2013) 54 (2) *Boston College LR* 433-468.

[21] Christopher McCrudden 'Common law of human rights?: Transnational judicial conversations on constitutional rights' (2000) 20(4) *Oxford Journal of Legal Studies* 499, 500.

methods of interpretation developed rapidly with 'borrowing and transplantation' between the international, national and regional levels allowing domestic courts to learn from and consider the jurisprudence from other courts.[22] Constitutional texts themselves often encouraged a cross-pollination of approaches to the interpretation and protection of human rights and specifically included provisions to aid in the interpretation of the rights contained in the Constitution.[23] Thus enabled, the judges in Malawi, Namibia and Seychelles engaged in these transnational discussions as they developed their approaches to reviewing the constitutionality of legislation.[24]

However, the new constitutions provided little guidance on how to balance the power to determine the constitutionality of executive actions with the duty to enable efficient governance. The inevitable tension produced was just one of several factors that complicated the new judicial role.

The first factor relates to the deferential common law approach to executive power. As will be discussed in Chapter Two in more detail, the system of parliamentary supremacy introduced by British colonialism in Malawi, Seychelles and Namibia (and continued through South African occupation) relies primarily on Parliament to exercise control over the executive. Parliament holds the executive accountable through political mechanisms such as individual and collective accountability, parliamentary questions, inquiries of select committees, parliamentary censure and the requirement that the Prime Minister resign if they can no longer command the support of the majority of the House of Commons.[25] The role of the judiciary was secondary to that of Parliament. The new role for Malawian, Namibian and Seychellois judges requires that they hold the executive to account for its use of power by insisting that public powerholders are transparent and accountable ('disclose and justify' their actions). The new role also requires the judges to sanction political authorities when they 'overstep the boundaries for their power as defined in the constitution, violate basic rights or compromise

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[22] Ibid 501.

[23] See ss 11(2), 12, 44 of the Malawian Constitution, arts 47-8 of the Seychellois Constitution, arts 22 and 144 of the Namibian Constitution.

[24] See eg, in Malawi, *Sidik Aboobaker v Attorney General* Civil Cause No 964 of 1994 (unreported) and *Nseula v Attorney General & Anor* [1997] MWHC 26. In Namibia, *Minister of Defence v Mwandinghi* 1993 NR 63 (SC), *Government of the Republic of Namibia v Cultura 2000* 1993 NR 328 (SC), 340A-H. In Seychelles, *Seychelles National Party & Ors v Government of Seychelles & Anor; Dhanjee v Michel & Anor* [2015] SCCC 2.

[25] See SE Finer 'The individual responsibility of Ministers' (1956) 34 *Public Administration* 377, JAG Griffith, 'The Crichel Down Affair' (1955) 18(6) *Modern LR* 557, Wendy Williams *Windrush Lessons Learned Review* (2020) 23 available at https://www.gov.uk/government/publications/windrush-lessons-learned-review accessed on 30 January 2025. See also the opinion of Lady Hale in R *(Miller) v the Prime Minister, Cherry and Ors v Advocate General for Scotland* [2019] UKSC 41.

the democratic process.'[26] For judges trained in a legal tradition with pre-constitutional public law roots in British parliamentary supremacy and a common-law tradition of deferential judicial review (particularly with regard to the prerogative powers which were rarely subjected to judicial review prior to the 1980s), this philosophical shift in role from simply applying the law, to an active guardian of the law, poses an uncomfortable tight-rope.

The second factor is that the new constitutional responsibilities vis-à-vis the relationship with the executive are not always entirely straightforward. In Seychelles, the Constitution provides different mechanisms and standing requirements for challenging actions that violate human rights, on one hand, and the provisions of the Constitution which are not found in the Charter or Bill of Rights, on the other.[27] Furthermore, both Malawi and Namibia adopted a right to fair administrative justice.[28] In turn, a two-fold approach to judicial oversight of executive power has developed— the first relating to the breach of a substantive right to fair administrative decisions; and the second concerning the constitutionality of actions, omissions or decisions of the executive that arise as part of the constitutionally granted executive function. Additionally, none of these courts has a dedicated constitutional court and all three have had to grapple with how best to constitute a court to determine constitutional matters.

Moreover, one of the necessities of constitutional design further complicates this navigation of the courts' new role. For the sake of continuity, at the end of the colonial period, existing law would be presumed to be valid until repealed or overturned. This resulted in a new state in the 1960s receiving 'as part of its colonial bequest the authoritarian legal order – the full panoply of colonial legislation, orders, ordinances, by-laws and judicial precedents – upon which colonial authority had been based.'[29] In the 1990s, what remained of this colonial legal heritage was again passed to the new African democracies along with the orders, ordinances and laws from the one-party authoritarian regime from the prior two decades. These inherited laws and philosophies from the pre-constitutional legal order 'offered African elites real power and the bureaucratic machinery with which to exercise it effectively' whilst at the same time,

[26] Siri Gloppen 'The accountability function of the courts in Tanzania and Zambia' (2003) 10 *Democratization* 112, 112.
[27] For example, the Seychellois Constitution has different mechanisms and standards for approaching the court to challenge a potential breach of a Charter right (art 46) against a challenge to a potential breach of any other provision of the Constitution (art 130).
[28] Namibian Constitution, art 18, Malawi Constitution, s 43.
[29] Prempeh 'Marbury in Africa' op cit note 3, 1265.

placing the burden of ensuring the success of the constitutionalism and democratisation programme on the courts.[30]

The final factor, and perhaps the most important, is that the texts of the constitutions do not provide guidance on how to recognise actions of the executive that are inconsistent with the constitution and how to appropriately sanction unconstitutional conduct. It appears that there was an assumption that —

> having been granted unambiguous and plenary judicial review power, plus constitutionally protected tenure, and handed a democratic constitution with a modern bill of rights, Africa's judges should have had no difficulty playing their part in building and sustaining constitutionalism in postauthoritarian Africa. [31]

Theoretical writing on the separation of powers doctrine, fundamental jurisprudence to assist the courts, ranges from Montesquieu and the *Federalist* to Bickel but provides few practical tools for a judiciary in the 21st century.[32] Modern writing is usually descriptive and ends with the statement of how the separation of powers in each country will invariably differ according to the constitutional and legal regime and the particular history of that country.[33] Whilst this is undeniably true, it does not assist the judges in smaller jurisdictions who are grappling with implementing the role of the courts in developing standards and principles for holding executive power accountable under a modern constitution.

II. Assessing the coherence of the jurisprudence of the courts in holding the high executive accountable in Malawi, Namibia and Seychelles

(a) Scope and limitations of the project

This thesis investigates whether the courts in Malawi, Namibia, and Seychelles have effectively held their high executives accountable for their use of power over the past thirty years, and how their jurisprudence has evolved to meet this constitutional responsibility. At the heart of this inquiry lies a fundamental question: have the 'watchdogs' of the constitution—these newly empowered courts—truly 'bitten'? Specifically, have they developed coherent jurisprudence and clear principles for determining the constitutionality of high executive actions, and have

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[30] Okoth-Ogendo op cit note 17, 65-80. See also Prempeh 'Marbury in Africa' op cit note 3, 1266.
[31] Prempeh 'Marbury in Africa' op cit note 3, 1295.
[32] Alexander M Bickel *The Least Dangerous Branch* (1986), Montesquieu op cit note 19.
[33] See, for example, *De Lange v Smuts NO and Others* [1998] ZACC 6; 1998 (3) SA 785; 1998 (7) BCLR 779 [48]. Charles M Fombad (ed) *The Separation of Powers in African Constitutionalism* (2016) has taken some steps towards consolidating writing on this topic.

they effectively held executives accountable over the thirty-year period since the adoption of new constitutions?

Following transitions from regimes characterised by strong executive dominance, all three countries adopted new constitutions that introduced mechanisms for judicial review of executive action. However, these constitutional frameworks initially lacked clear guidance on how courts should exercise their new powers. The inherited common law review mechanisms, developed under autocratic governance, were primarily suited for administrative rather than high executive oversight and did not reflect the new constitutional commitments to openness, transparency, and limited government. This constitutional inheritance left the courts with the complex task of adapting or reinterpreting existing doctrines to fulfil their expanded constitutional role.

This thesis adopts a descriptive and evaluative approach, focusing on whether the courts have developed a coherent set of norms and principles for holding the executive accountable. It does not seek to prescribe a single ideal approach to executive oversight, recognising that there is no universally accepted, normatively 'best' model for constraining executive authority and that to attempt to develop such a model faces many challenges.[34] Different constitutional systems adopt distinct mechanisms for executive oversight, shaped by their own legal cultures, constitutional frameworks, and foundational laws, principles, and values. Instead, the thesis aims to describe and evaluate the development of judicial doctrine in each country, with particular attention to the coherence of emerging jurisprudence.

The study examines judicial developments over approximately thirty years following the adoption of new constitutional frameworks in each country, concluding on 1 January 2024. This temporal scope captures the evolution of judicial practice during a formative era for these democracies, allowing for assessment of institutional maturation as well as judicial and executive behaviour across multiple electoral terms. By focusing on this thirty-year period, the study provides meaningful insight into how these courts have adapted to their expanded constitutional roles over time.

The comparative lens of the study provides insight into the functioning and challenges of judicial branches within African third wave democracies. Each country features similarly empowered judiciaries, allowing for meaningful comparison of how different courts have

[34] Vicki C Jackson 'Methodological challenges in comparative constitutional law' (2010) 28 *Pennsylvania State International Law Review* 319, 321.

approached the challenge of executive accountability within broadly similar constitutional frameworks.

The forthcoming analysis will reveal that these courts faced significant difficulties involved in taking up an expanded constitutional role, including persistent resistance from executive branches.

(b) Choice of analytical lens: Coherence

The judicial-executive relationship in the three jurisdictions can be compared through various lenses, such as how judges balance the rule of law with democratic principles, how they navigate the tension between precedent and constitutional innovation, or how they clarify ambiguous legal standards such as reasonableness, legality and rationality. While these perspectives inform the broader discussion and suggest avenues for future research, the primary analytical lens here is coherence: whether the courts have begun to articulate a consistent and principled set of norms to guide executive accountability.

(c) What is coherence?

Coherence in law is a complex and debated concept, yet it is generally agreed that coherence is a valuable attribute of any legal system.[35] While the full discussion of coherence theory lies beyond the scope of this thesis, leading legal theories converge on certain core elements that permit a workable definition and assessment criteria.

The first requirement of legal coherence is logical consistency, meaning the absence of direct contradictions.[36] Consistency requires that two similar cases, with similar facts will be decided similarly.[37] However, law can be consistent yet incoherent where the underlying reasoning differs despite the consistent facts and outcome. Therefore, most theorists agree that

[35] Julie Dickson 'Interpretation and coherence in legal reasoning' in Edward N Zalta (ed) *The Stanford Encyclopedia of Philosophy* (2016), available at https://plato.stanford.edu/archives/win2016/entries/legal-reas-interpret/ accessed on 25 July 2025.
[36] Aldo Schiavello 'On "Coherence" and "Law": An analysis of different models' (2001) 14 *Ratio Juris* 236, 236.
[37] Ida Mae de Waal 'Coherence in law: A way to stimulate the transition towards a circular economy? A critical analysis of the European Commission's aspiration to achieve full coherence between chemicals legislation and waste legislation – and product legislation' (2021) 28(6) *Maastricht Journal of European and Comparative Law* 760, 763-4.

coherence demands something beyond mere logical consistency,[38] rendering consistency a 'necessary but not sufficient condition' of coherence. [39]

MacCormick proposes that coherence exists when legal norms are connected by underlying principles or values and 'make sense' as a whole.[40] Similarly, Raz states that the legal norms must have unity of principle through the realisation of the values, virtues and principles of the legal system.[41] This view is shared by theorists who argue that coherent legal systems require norms to derive from the same principles creating 'a "single justificatory rationale" that underpins the legal system and to which the functioning of the law consistently corresponds.'[42] 'Coherentism' also demands courts to provide intelligible and justifiable reasons for judicial outcomes.[43]

Legal coherence, therefore, transcends mere consistency; requiring that the law be unified by principles, justified by reason, and intelligible as a whole. Determining coherence involves examining both the absence of contradiction and the presence of rational connections and principled justifications throughout the legal system. Coherence theory, therefore, provides a standard for evaluating whether judicial decisions are justified.[44]

Amaya identifies two main perspectives on 'coherentism'—

> a systemic one, according to which coherence is a feature of the legal system, and an argumentative one, according to which the coherence of a particular ruling or interpretation serves as a justification of the ruling or interpretation in question.[45]

This thesis focuses on the first perspective to examine the law in the three study countries, primarily to identify whether their jurisprudence on high executive power demonstrates coherence.

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[38] Dickson op cit note 35, See also Robert Alexy & Aleksander Peczenik 'The concept of coherence and its significance for discursive rationality' (1990) 3 *Ratio Juris* 130, 130.
[39] Aleksander Peczenik 'Law, morality, coherence and truth' (1994) 7 *Ratio Juris* 167.
[40] Neil MacCormick 'Coherence in legal justification' in Aleksander Peczenik, Lars Lindahl & Bert van Roermund (eds) *Theory of Legal Science* (1984), 235; Neil MacCormick *Legal Reasoning and Legal Theory* (1978), 152.
[41] See Joseph Raz 'The Relevance of Coherence' in Joseph Raz *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (1994).
[42] De Waal op cit note 37, 764, Raz op cit note 41, 286.
[43] Jack M Balkin 'Understanding legal understanding: the legal subject and the problem of legal coherence' (1993) 103 *Yale Law Journal* 105, 157.
[44] See in this regard Amalia Amaya 'Coherence and systematization in law' in Giorgio Bongiovanni et al (eds) *Handbook of Legal Reasoning and Argumentation* (2018), 637, Amalia Amaya 'Legal justification by optimal coherence' (2011) 24(3) *Ratio Juris* 304.
[45] Amaya 'Coherence and systematization' op cit note 44, 637.

(d) The value of coherence for understanding constitutional governance

Coherence represents a positive aspiration for legal systems providing undeniable value by unifying the legal system as an intelligible whole.[46] Within constitutional governance, a coherence approach to the development of constitutional review enhances the rule of law and deepens democracy. A coherent system ensures consistent realisation of values and enhances predictability of court outcomes, legal certainty, and judicial legitimacy – all rule of law imperatives.

Furthermore, by providing clear and consistent standards for determining the constitutionality of high executive conduct, the government and civil society can anticipate judicial decisions. This in turn has the potential of making government actions more predictable. Citizens and officials can better understand their rights and duties which fosters trust in the legal system and the laws. Meanwhile, the requirement for complete and coherent reasoning enables external review and critique of the judiciary, fostering transparency and accountability.

Coherent legal frameworks ensure that the separation of powers and checks on executive authority are not undermined by *ad hoc* or contradictory rules. A set of coherently reasoned judicial decisions gains binding authority over future courts, creating a framework of precedent that exerts a coercive force on subsequent judges. This jurisprudential coherence constrains later adjudicators, making it more difficult for them to deviate from established reasoning—even when they might be tempted to do so out of timidity, political partiality, or fear of backlash. In this way, a coherent body of case law not only promotes legal certainty and equality before the law but also serves as a structural safeguard against the arbitrary or politically motivated judicial decisions that Landau and Dixon term 'abusive judicial review.'[47]

Finally, coherence ensures that different branches and levels of government interpret and apply the law in harmony, avoiding fragmentation and confusion, and enabling inter-branch dialogue. Developing coherence underpins better constitutional governance by promoting legitimacy, effective accountability, principled protection of rights, and adaptive yet stable

[46] Raz op cit note 41, 280.
[47] David Landau & Rosalind Dixon 'Abusive judicial review: Courts against democracy' (2020) 53 *UC Davis LR* 1313.

legal development. Coherence has the potential to transform the constitution from a patchwork of rules into a rational, unified system that guides and constrains the exercise of public power.

(e) Challenges to achieving coherence

Achieving coherence presents significant challenges precisely because laws are made by humans with differing intentions and perspectives.[48] While legislators have the power to implement comprehensive reforms, courts determine matters incrementally based on narrow issues and arguments before individual judges. This makes the development of coherent reasoning difficult even for the most diligent judges.

> Most legal cases that are litigated and appealed are of this nature, in that the facts can be ambiguous, incomplete, and contradictory; different rules, values, and principles can be invoked to support opposite conclusions; and the case at hand can be somewhat analogous to more than one previous decision.[49]

A judicial officer has to determine the case before the court, regardless of how it is brought or whether there are better ways for the case to have been brought that would have given the judge greater scope for coherent legal reasoning.

Another impediment to coherence arises when courts and judges act as politically strategic actors making decisions based on prevailing politics rather than the best legal fit for the case.[50] Such strategic decision-making can lead to incidents of incoherence.

Another difficulty for a judge seeking coherence in the law is that there might be no consensus about how the legal situation or the problem should be addressed.[51] This is particularly prevalent in developing areas of law. In such cases, chasing coherence may 'discourage[] experimentation' which could have led to a 'better' or more principled outcome.[52]

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[48] Raz op cit note 41, 289.
[49] Dan Simon 'A third view of the black box: Cognitive coherence in legal decision making (2004) 71 *University of Chicago Law Review* 511, 516 (footnote omitted).
[50] In his influential book *Towards Juristocracy* Hirschl argues that courts are often sites of sites of political negotiation. Ran Hirschl *Towards Juristocracy* (2004) See, also, Theunis Roux 'Constitutional courts as democratic consolidators: Insights from South Africa after 20 Years' (2016) 42(1) *Journal of Southern African Studies* 5, Conrado Hübner Mendes 'Fighting for their place: Constitutional Courts as political actors. A reply to Heinz Klug' (2010) 3 *Constitutional Court Review* 33, Mark Tushnet *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (2008), 23.
[51] Todd S Aagaard 'Environmental Law as a legal field: An inquiry in legal taxonomy' (2010) 95 *Cornell Law Review* 235.
[52] Ibid, 249.

Therefore, the complexity of the making of judge-made law means that the law cannot be expected naturally to display high coherence as it develops. However, over time, with accumulating cases, a trend towards coherence becomes possible as legal reasoning from previous cases becomes available for future adjudicators. This temporal dimension explains why a single instance of successful judicial challenge to executive authority is not indicative of the development of a strong judicial role.

(f) Constitutional and jurisprudential coherence

This thesis does not attempt to align different judicial approaches or make normative statements about how judges should develop their law of constitutional review. Instead, it seeks to identify whether coherent doctrine has developed in jurisprudence involving the high executive and presidents. This coherence operates on two levels: whether judgments are as consistent as possible with existing jurisprudence within the system (jurisprudential coherence), while also remaining coherent with principles underlying the constitutional text itself (constitutional coherence). These elements of external predictability and internal, principled consistency form the core of what this thesis describes as 'coherent' jurisprudence: a logical and consistent set of norms based on reasoning from similar principles and values, developing towards a unified whole.

Constitutional coherence requires judges to develop legal concepts in the light of the foundational legal principles of the constitutional system, such as the separation of powers, democracy and the rule of law. This occurs by favouring interpretations that are informed by and fit with these underlying principles so that the developing jurisprudence is 'both constitutionally appropriate and doctrinally coherent.'[53]

Judges develop jurisprudential coherence through systematic engagement with existing precedent, including borrowed principles from other jurisdictions. When borrowing legal precedent and principles, courts exercise their 'voice' to identify the scope of applicability of the principles, doctrines and values within their system.[54] This manifestation of voice as a process of localisation requires more than merely restating principles and relying on them but

[53] Kate O'Regan 'The Constitution and Administrative Law: Insights from South Africa's constitutional journey' *Admin Law Blog* 12 April 2017 https://adminlawblogorg.wordpress.com/2017/04/12/kate-oregan-the-constitution-and-administrative-law-insights-from-south-africas-constitutional-journey/ accessed 30 January 2025.
[54] Lustig & Weiler op cit note 11, 346.

requires an engagement with the content of borrowed norms and an explanation of how they become part of the legal system.[55]

Over time, existing or borrowed legal principles, values or doctrines of law can become outdated or even incompatible with the evolving foundations of the legal system – especially as legal reform and societal changes take place. At such a time, judges may choose to 'exit' from these norms by explicitly defying or rejecting them. While this process of discarding obsolete or irrelevant precedents helps to purge the law of unnecessary content, it also risks increasing incoherence within the legal system. Thus, it is crucial that judges manage this process thoughtfully, providing clear and reasoned justifications in their written opinions.

Given that constitutional norms are 'inherently and inevitably uncertain,' judges would want to avoid exacerbating that uncertainty through their judgments.[56] To maintain constitutional coherence, judges would carefully consider the clarity of their interpretations, particularly when articulating the scope of 'opaque and open-textured constitutional norms' which impacts how the executive respond and how constitutional dialogue develops.[57]

Pursuing coherence can, therefore, lead to better standardisation of the approach to judicial review of executive power within a particular legal system and promote the rule of law, reinforce the legitimacy of the judiciary, curb inappropriate judicial intrusion into the executive's discretionary space, assist the executive with exercising its power and encourage dialogical exchange with the legislature and the executive.

For newly empowered courts in transitional democracies, developing coherent approaches to executive accountability represents both a constitutional imperative and a practical necessity for institutional legitimacy and effective governance.

(g) Coherence in comparative analysis

There is no established standard to determine whether one system is more coherent than another.[58] This thesis investigates the coherence across the three countries by asking the same empirical questions in each jurisdiction and making evidenced-based findings about the

[55] Ibid 365. See Mila Versteeg 'Understanding the third wave of judicial review: Afterword to the Foreword by Doreen Lustig and JHH Weiler', (2019) 17(1) *ICON* 10, 12.
[56] Gabrielle Appleby & Anna Olijnyk 'Executive policy development and constitutional norms: Practice and perceptions' (2020) 18(4) *ICON* 1136, 1162.
[57] Mark Tushnet 'Policy distortion and democratic debilitation: Comparative illumination of the countermajoritarian difficulty' (1995) 94 *Mich LR* 245, 261.
[58] De Waal op cit note 37, 766.

coherence of the jurisprudence in each jurisdiction. The comparative dimension of coherence analysis operates on two levels. First, it examines whether each jurisdiction has developed internal coherence within its own legal system—the primary focus of this thesis. Secondly, the comparison seeks to identify the difficulties the jurisdictions face and the successful strategies for developing coherent approaches to executive accountability that emerge from the case studies.

Importantly, the comparative analysis does not assume that coherence requires uniformity across jurisdictions. Constitutional coherence must be assessed within each country's specific constitutional framework and legal culture. A principle that enhances coherence in one jurisdiction may prove inappropriate or incoherent in another, depending on constitutional text, institutional arrangements, and underlying values.

III. Methodology for the study

(a) Research design and approach

This thesis applies a combined doctrinal and comparative law methodology to examine the new form of constitutional review of high executive conduct in Malawi, Namibia and Seychelles.[59] The research design centres on applying legal coherence theory to assess how courts in these three jurisdictions have developed approaches to executive accountability. The doctrinal approach provides a systematic exposition of the legal rules operating in each jurisdiction, drawing primarily from case law and statutes, supplemented by academic writing and historical texts where available. This methodology is suited to studying legal jurisprudence and constitutional doctrines in jurisdictions where comprehensive legal analysis is often lacking. This three-case comparison enables theoretical insights about judicial development in under-studied contexts whilst respecting each jurisdiction's constitutional distinctiveness.

(b) Legal coherence theory as analytical framework

Through three country-specific chapters, significant decisions involving high executive accountability are examined to assess coherence in the judicial treatment of executive power across the three jurisdictions. This involves considering how the courts resolved the issues and

[59] Mark van Hoecke & Mark Warrington 'Legal cultures, legal paradigms and legal doctrine: towards a new model for comparative law' (1998) 47 *International & Comparative Law Quarterly* 495.

whether the judgments provide logically justified conclusions that promote jurisprudential coherence as well as constitutional coherence.

The coherence analysis of each chapter considers four questions that capture both the institutional performance and doctrinal development of these courts. The first relates to *institutional access and incidence*. It asks whether the courts have been called upon to review and scrutinise high executive actions? The second question relates to *institutional effectiveness*: Have the courts in fact held the high executive to account for their use of power, for instance by demanding explanations, ensuring transparency, or overturning executive conduct? The third question considers the *normative foundations* for the courts' decisions, enquiring into the legal or normative bases on which the courts grounded their decisions. What principles have guided their inquiries? The final key question considers *coherence of reasoning*. Do the norms and principles articulated in these cases form a unified, cohesive framework within the constitutional scheme, or are they marked by pluralism and inconsistency? This final question considers the jurisprudential coherence within the law on review of the high executive and constitutional coherence with the constitutional framework and its principles, values and norms.

The analysis traces how courts have developed and refined legal doctrines over time, examining whether principles articulated in earlier cases are consistently applied, refined, or abandoned in subsequent decisions. This reveals whether jurisprudence is developing toward greater coherence or becoming increasingly fragmented.

While respecting each jurisdiction's constitutional distinctiveness, the analysis identifies common challenges and successful strategies for developing coherent approaches to executive accountability. This comparative dimension reveals whether certain approaches promote more coherence in developing constitutional review of the high executive.

The analysis acknowledges that perfect coherence represents an aspirational rather than achievable goal. Therefore, the focus is on identifying trends toward or away from coherence, examining whether judicial reasoning is becoming more principled and consistent, and highlighting innovations that enhance systemic coherence.

(c) Data collection and sources

A thorough review of cases between 1989 and January 2024 involving the high executive (President, ministers and Cabinet) was conducted across all three jurisdictions. Primary sources

included online legal resources and printed law reports.[60] Specific searches targeted cases involving constitutional articles where executive conduct could be challenged, including cases in which constitutional review powers are invoked. More general searches examined legal concepts within jurisprudence such as the 'role of the court', 'powers of the courts', 'judicial review,' 'constitutional review', the 'separation of powers', 'executive power', 'presidential power' and 'prerogative powers.' Cases regarding the constitutional right to fair administrative action, and cases regarding common law judicial review were also studied to identify differences in judicial approaches to 'constitutional' judicial review. The search results were scrutinised to assess, from first principles, whether there is consistency and certainty in the approaches taken by the judges in these jurisdictions and to identify the inconsistencies.[61]

The scarcity of secondary materials, particularly in Seychelles, and to a lesser extent Malawi, required primary source collection, collation and analysis. Free online legal institutes are the primary publishers of the case law in Malawi, Namibia and Seychelles. However, they each have their own resource constraints, and none could be said to be complete repositories of the case law. As anticipated, it was difficult to obtain information and to assess its veracity without understanding the on-the-ground working of the courts and the legal institutional culture in Malawi and Namibia. Personal relationships with judges and practitioners in all three countries provided access to materials, such as case law and court rules, which are not readily available online. This access enabled deeper understanding of legal practice and identification of gaps between the 'law in books' and the 'law in action'.[62]

This thesis catalogues the development of judicial review of high executive conduct in the three jurisdictions by reference to its historical context and evolution. The space provided is far too short to do this topic full justice and, as such, as wide a selection of cases as possible has been included in the footnotes to facilitate future studies.

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[60] Online databases include, seylii.org, namibilii.org, malawilii.org, lac.org.na, judiciary.sc, judiciary.na, judiciary.mw, Namibian Law Reports (Jutastat epublications), hardcopy resources include *Malawi Law Reports*, *Seychelles Law Reports*.

[61] As Pretorius states, 'first principles – and the judicial origins of those first principles – provide a propitious place to start in an endeavour to understand how, and why, legal principles have developed along the lines that they have to their present incarnation…. [This] obviates superficial understanding of the law and will minimise decisions afflicted by lack of appreciation of the subtle nuances that make the law a scientific discipline.' DM Pretorius '"What's Past Is Prologue": An historical overview of judicial review in South Africa – Part 1' (2021) 26(1) *Fundamina* 128, 131.

[62] Roscoe Pound 'Law in books and law in action' (1910) 44 *American LR* 12, 15. I am particularly indebted to Justice Annabel Mtalimanja and Justice Fiona Mwale from Malawi and Justice Mathilda Twomey in Seychelles for providing resources that I would otherwise have struggled to access.

(d) Comparative methodology

The comparative analysis contributes to 'concept formation through multiple descriptions' through the study of the 'various manifestations of and solutions to roughly analogous constitutional challenges' across the three jurisdictions.[63]

A three-country study of this nature risks encountering a core difficulty in comparative constitutional law identified by Vicki Jackson as developing sufficient 'bilegalism' to fluently interpret foreign laws without oversimplification or misunderstanding.[64] This challenge is compounded where there is little existing literature on the study countries. To counter this risk, this thesis systematically documents the history, legal framework and jurisprudence in each country over a significant period to provide context and background as the basis for comparative findings.

This approach provides foundational 'mapping and taxonomy of the still under-charted terrain' of these jurisdictions within comparative constitutional law.[65] This background describes the context, values and historical traditions underlying the developing constitutional practice in each country and is extensively laid out to facilitate further comparative studies into these three countries.[66]

Laying this detailed descriptive foundation serves to comprehensively introduce constitutional review in three understudied jurisdictions enabling future studies to proceed from this basis. As Ginsburg stated, 'we cannot conceivably know whether any particular legal rule or institution will be of broader theoretical or practical interest until we know what it is we are looking at.'[67]

The methodology of comparative constitutional law is developing and contested.[68] This thesis is undeniably comparative in design by aiming to consider the concept of high executive

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[63] Ran Hirschl 'The question of case selection in comparative constitutional law' (2005) 53 (1) *American Journal of Comparative Law* 125, 129, Ran Hirschl 'Comparative methodologies' in Roger Masterman & Robert Schütze (eds) *The Cambridge Companion to Comparative Constitutional Law* (2019), 18.
[64] Vicki C Jackson 'Methodological challenges in comparative constitutional law' (2010) 28 *Pennsylvania State International Law Review* 319, 319.
[65] Hirschl 'Case selection' op cit note 63,127.
[66] Donald P Kommers 'The value of comparative constitutional law' (1976) 9 *John Marshall Journal of Practice and Procedure* 685, 689.
[67] Tom Ginsburg 'Studying Japanese law because it's there' (2010) 58 *American Journal of Comparative Law* 15, 15.
[68] See Hirschl 'Case selection' op cit note 63, Jackson 'Methodological challenges' op cit note 64 and Hirschl 'Comparative methodologies' op cit note 63.

oversight through the experience of three separate countries. This three-case comparison occupies the crucial middle ground for theory development between single-case studies that lack generalisability and large-N statistical studies that miss institutional nuance. The research demonstrates how small-N comparison can generate theoretical insights about judicial development in under-studied contexts. This is a foundational step toward the 'ultimate goal of social inquiry: theory building through causal inference.'[69]

A thesis structured as extensive doctrinal documentation followed by normative comparison can lead to 'conceptual stretching' where comparative claims are grafted onto essentially descriptive foundations.[70] However, in the context of this study, the thorough doctrinal analysis is not only acceptable but methodologically required. The jurisprudential development in under-chartered jurisdictions is a legitimate primary object of study. The comprehensive doctrinal analysis provides professional utility for academics, practicing lawyers and judges whilst enabling comparative findings that contribute to understanding post-third wave judicial-executive relationships in sub-Saharan African countries.

IV. Choice of comparative studies – Why Malawi, Namibia and Seychelles?

The selection of Malawi, Namibia, and Seychelles for this comparative study of judicial-executive relations is based on several compelling justifications that address both the analytical advantages of studying under-researched cases and the theoretical benefits of comparing similar institutional configurations.

The most immediate methodological justification lies in the significant academic gap regarding these three countries' judicial-executive relationships. Unlike the extensively studied 'usual suspects' (particularly South Africa and to a lesser degree Nigeria, Kenya, Ghana and Zimbabwe), these cases offer fresh empirical terrain for theoretical development.

The predominant academic focus on larger or more politically turbulent African states potentially creates a systematic bias in our understanding of judicial-executive relations on the continent.[71] By studying Malawi (seldom studied), Namibia (seldom studied), and Seychelles (never studied), this research challenges the implicit assumption that only crisis-prone or

[69] Hirschl 'Case selection' op cit note 63,131.
[70] See Giovanni Sartori 'Concept misformation in comparative politics' (1970) 64(4) *The American Political Science Review* 1033.
[71] See Barbara Geddes 'How the cases you choose affect the answers you get: Selection bias in comparative politics' (1990) 2 *Political Analysis* 131.

regionally dominant states offer meaningful insights into constitutional governance. By introducing new case studies into the academic dialogue this thesis provides information to 'resist the temptation to overgeneralize from single cases'[72] or 'result-oriented cherry picking' of friendly examples.[73]

The chosen case studies have 'plurality' and 'unity' to justify their selection – they are sufficiently different but not so much that no meaningful comparison is possible.[74] Malawi, Namibia, and Seychelles were chosen as comparator countries because they share many common traits. This shared legal complexity provides a natural control for legal system variables while allowing examination of how different constitutional designs manage similar institutional tensions.

The constitutional histories reveal striking parallels in democratic transition timing and constitution drafting clustered within the 'third wave' of democratisation. Malawi transitioned to multiparty democracy in 1994, Namibia received its independence and democratic transition in 1990 and Seychelles returned to multiparty democracy after autocracy with the adoption of its 1993 constitution. All were controlled by Britain at some point in their history resulting in transplanted British public law roots and all adopted similar multiparty democratic constitutions in the 1990s.[75] All three countries ascribe to the constitutional principles of democracy, upholding human rights, the rule of law and the separation of powers.

The chosen countries are all African, they all have similar constitutional systems: presidential systems, independent judiciaries that work in the English language, and they are all under-studied. Malawi and Seychelles were both colonised by the UK and were granted independence in the 1960s and 1970s.[76] Both transitioned into one-party, executive dominated states from the 1970s to the 1990s. Namibia was subject to the control of South Africa's apartheid regime until its independence in 1990. During this period, all three countries experienced overbearing and uncontrolled executive power and human rights abuses prior to the adoption of their current constitutions.

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[72] Michael Bratton & Nicholas van de Walle *Democratic Experiments in Africa: Regime Transitions in Comparative Perspective* (1997), 268.
[73] Hirschl 'Comparative methodologies' op cit note 63, 38.
[74] Catherine Valcke 'Comparative law as comparative jurisprudence: The comparability of legal systems' (2004) 52(3) *American Journal of Comparative Law* 713 at 721.
[75] When South Africa assumed control of South West Africa, it was still a part of the United Kingdom. The public law that was established during South African occupation was a hybrid of British laws and Roman Dutch laws. See Chapter 4 for a full discussion.
[76] Seychelles was first colonised by France.

Moreover, unlike many African states that have experienced constitutional crises, military coups, or fundamental constitutional overhauls, all three cases demonstrate remarkable constitutional stability over 30 or more years since the adoption of their constitutions. There have been no successful military interventions or constitutional suspensions in any of the countries. There have been peaceful transfers of power through legitimate electoral processes and incremental constitutional amendments rather than wholesale replacements. This stability provides ideal conditions for studying the evolutionary development of judicial-executive relations without the confounding effects of regime breakdown or constitutional rupture.

The apparent institutional similarities actually strengthen rather than weaken the comparative design by controlling for major institutional variables, isolating subtle but theoretically important differences and demonstrating how similar institutional configurations can produce different outcomes.

There are also significant distinctions between the countries. Despite their similarities, the three cases offer meaningful variation. The first dimension of difference is scale and complexity. While Malawi is a medium-sized state (20+ million inhabitants) with complex ethnic divisions, Namibia is a small state (2.6 million) with post-conflict reconciliation challenges and Seychelles is a micro-state (107,000) with concentrated institutional arrangements. While all have a population of less than twenty five million, they were specifically chosen to ensure a spread of jurisdiction size. Seychelles and Namibia are likely to be affected by their small size, a factor which is known to complicate democracy-building, particularly because of the proximity between the judges, politicians and public.[77] Executive micromanagement and strong presidentialism are common features in small states and oftentimes informal mechanisms are used to resolve matters which might otherwise become a legal dispute.[78] Although bigger in size, Malawi also has a small political and legal elite, strong presidentialism and characteristics of social proximity.

The countries rank differently on the Human Development Index with Seychelles scoring 'very high' on the index. Namibia ranks at the very top of the 'medium' ranking and Malawi

[77] See Jan Erk & Wouter P Veenendaal 'Is small really beautiful? The microstate mistake' (2014) 25(4) *Journal of Democracy* 135.

[78] Wouter P Veenendaal 'Democracy in microstates: why smallness does not produce a democratic political system' (2015) 22(1) *Democratization* 92, 99-106, Wouter P Veenendaal & Jack Corbett 'Why small states offer important answers to large questions' (2015) 48 (4) *Comparative Political Studies* 527, Jack Corbett '"Everybody knows everybody": practising politics in the Pacific Islands' (2015) 22(1) *Democratization* 51.

at the bottom of the 'medium' category.[79] Seychelles, similarly, scores highly on the Ibrahim Index of African Governance (IIAG) ranking first out of 54 African countries with a score of 75.3 out of 100 points, with Namibia scoring 63.9 points and Malawi scoring 55.2 points.[80] All three countries are ranked within the top 20 countries in Africa. Therefore, there is correspondence in the study between smaller size with higher development and governance ranking, however none of the countries is a very low performer in either development or governance. This is consistent with the choice of stable countries to eliminate variables that may complicate the jurisprudential development by introducing extreme socio-political factors.

The historical differences between the countries and the influence on their legal norms are significant. Each country's political history and legal origins shape the judicial response to executive power under constitutionalism. While Malawi has had presidents from different political parties since the advent of its Constitution until 2020, the Seychelles' executive was drawn from the same party that facilitated the coup d'état in 1977 until 2020. In 2020, a coalition of opposition parties secured enough votes to take control of the presidency and the legislature and assumed power peacefully. Namibia has only had one party in power since 1990. The laws in Malawi, Namibia and Seychelles, despite sharing common law roots, are different hybrids. Malawi draws its roots from English common law, colonial legislation and customary law. Namibian law was created from the law of the Cape Colony (Roman-Dutch law mixed with English common law influences), as well as South African apartheid law and African customary laws. Seychelles has French civilist private laws mixed with commercial and public law derived from English common law and supplemented by Mauritian colonial laws.

Moreover, the countries have differing political arrangements for selecting the high executive which also affects the relationship between the judiciary and the executive. Nevertheless, the countries are sufficiently similar to facilitate a comparison between them and their jurisprudence. The differences between the countries add a layer of richness to the comparison. The countries are therefore able to be described as a 'most different systems design' following Mill's method of difference.[81] This methodological approach identifies cases

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[79] United Nations Development Programme, *Human Development Index*, 2023 available at https://hdr.undp.org/data-center/human-development-index#/indicies/HDI accessed 6 July 2025.

[80] Mo Ibrahim Foundation *Ibrahim Index of African Governance* (IIAG) available at https://iiag.online/data.html?meas=GOVERNANCE&loc=MW-NA-SC&view=overview&subview=absoluteTrends accessed 6 July 2025.

[81] This approach was described by John Stuart Mill in *A System of Logic* (1843) and widely adopted in the study of politics and social sciences. See Ran Hirschl 'Case selection' op cit note 63,126 et seq.

that have difference on many variables but that match on key variables to identify common factors that lead to similar outcomes.

Moreover, this methodology has advantages relating to feasibility and access – the size of the jurisdictions enables in-depth research into the three countries. All of the countries publish their judgments in the English language, and there are online databases for all three countries.

This case selection strategy maximises both theoretical contribution and methodological rigour. By studying three institutionally similar but under-researched cases with uninterrupted constitutional development, this research addresses significant gaps in the literature while providing controlled conditions for comparative analysis. The combination of shared institutional heritage, similar transition timing, constitutional stability, and meaningful variation across key explanatory variables creates an ideal natural experiment for understanding judicial-executive relations in anglophone Africa.

The selection thus serves both a gap-filling function in the literature and a theory-building purpose in comparative constitutional studies, while maintaining the methodological advantages of focused comparison within a well-defined institutional context.

V. Purpose of this thesis

Within the field of comparative constitutional law, this thesis serves multiple interconnected purposes that extend beyond doctrinal analysis to broader scholarly and practical contributions. First, it performs a foundational exercise designed to comprehensively introduce three understudied jurisdictions—Malawi, Namibia, and Seychelles—to the international comparative constitutional law community. These jurisdictions have received limited scholarly attention despite their significant constitutional developments over the past three decades, representing a gap in comparative constitutional scholarship that this study seeks to address.

A further purpose of the thesis is to synthesise the doctrinal findings from these jurisdictions and identify developing trends and lessons to be learnt from these jurisdictions informing both domestic judicial practice and international comparative analysis. By surveying the experiences of these countries, the study considers factors that may weigh in favour of and against the development of more coherent jurisprudence regarding executive power while examining the ways in which the countries overcome the difficulties they faced. The analysis highlights inherent practicalities that affect judicial willingness and ability to hold the high executive to account for their actions.

Furthermore, this thesis contributes to the normative development of judicial doctrine by encouraging judges to focus on developing coherence in their jurisprudence. Having a clearer view of the jurisprudence that is developing in each country can lead to the internal standardisation of the approach to judicial review of executive power which, in turn, promotes the rule of law, reinforces the legitimacy of the judiciary, curbs inappropriate judicial intrusion into the executive's discretionary space, assists the executive with exercising its power and encourages dialogical exchange with the legislature and the executive.[82] This study highlights areas where the judiciaries could strengthen their jurisprudence particularly surrounding their role to play in their constitutional democracies.

The role to be played by the courts must be considered without placing too great an expectation on the judiciaries; they are only one branch of state. The relationships between the high executive and the legislature and the high executive and the 'fourth branch' or 'integrity institutions' also deserves careful consideration and reform, however, this is beyond the scope of this study.

By focusing on the development and coherence of judicial doctrine, this thesis seeks to illuminate both the achievements and the ongoing challenges faced by courts in Malawi, Namibia, and Seychelles as they navigate their crucial role in upholding constitutional governance and limiting executive power, while contributing these understudied jurisdictions to the broader comparative constitutional conversation.

VI. Significance of the study

The importance of the relationship between the courts and the executive is not uniquely African, nor is it uniquely Commonwealth. All countries in the world have some manner of doctrine of the separation of powers and their courts must play a role regarding the way that high executive power is used. Yet certain areas of the world remain underrepresented in academic libraries.

The study of African constitutionalism, particularly in this important area, is missing from current academic discussion despite the wide reforms during the 1990s. Having been based within the Office of the Chief Justice in Africa's smallest constitutional democracy, I have had an opportunity to experience the difficulties Seychelles has faced first-hand and have

[82] Kate O'Regan 'A forum for reason: reflections on the role and work of the Constitutional Court Helen Suzman Memorial Lecture: discourse and debate' (2012) 28 *SAJHR* 116,128.

developed a working knowledge of the other comparative jurisdictions from our interactions with the Chief Justices and judiciaries in my chosen jurisdictions. These countries have had to develop mechanisms and jurisprudential tools to take up this new role and combat the legal, political and social difficulties they face, often in the absence of accessible law reports, domestic or even regional academic writing on the topic. The lessons from these jurisdictions can contribute to the contemporary jurisprudential underpinnings of constitutionalism in a modern democracy. This study is the first detailed systematic engagement in this area of law for these jurisdictions. It serves as a point of reference for future judicial decisions and a starting point for future studies.

Aside from the high executive-judicial relationship, in general, judicial review in smaller African jurisdictions receives very little academic attention despite the growing interest in comparative law, with the focus resting firmly on the bigger African jurisdictions such as South Africa, Kenya and Ghana.[83] There is little comparative work on the types of judicial review across the jurisdictions in eastern and southern Africa outside of South Africa and Kenya. The dearth has been exacerbated by the relative difficulty of undertaking doctrinal research due to the lack of available primary legal sources outside of the country. With recent projects to promote the publication of online legal resources, it is now possible to undertake a comparative study of this sort. The thesis contributes towards the growth of academia in this marginalised area of scholarship by advancing the knowledge of the jurisprudence of these courts. The thesis shows that courts in micro-, small, and medium-sized African countries with populations of less than 25 million people face similar difficulties in exercising an effective horizontal accountability on the high executive despite their differing sizes.

This thesis is a foundational point for future research that examines the actual experiences of judiciaries in smaller, less-resourced African jurisdictions. Courts' role as an accountability mechanism for executive power is particularly understudied in these countries. To date, no other study has attempted to compare the role of the courts in relation to the executive in Malawi, Namibia and Seychelles, nor, to my knowledge, in the SADC region, excluding South Africa. An extensive search of the dissertations registered on the South African National ETD Portal, the Open Access Theses and Dissertations (OATD), EBSCO, EThos databases and Google Scholar revealed no other theses or studies currently researching the same topic.

[83] Prempeh 'Marbury in Africa' op cit note 3, 1247, see also Mary L Dudziak, 'Who cares about court – Creating a constituency for judicial independence in Africa' (2003) 101 *Michigan LR* 1622, 1630.

For completeness, the same databases were searched for dissertations considering constitutional judicial review in each of the countries individually (thus omitting the specificity of executive review and the comparative element), and found a handful of completed theses, no textbooks and few articles. This thesis is only the second Law PhD thesis written with a focus on Seychellois law, the first having traced the mixing of legal systems through Seychelles' history.[84]

The development of coherent jurisprudence is hindered when practitioners, professors and judges lack access to secondary legal materials like this thesis. These resources provide essential commentary, critique, and comparative analysis of legal developments, fostering deeper reflection and further advancements in the law. This thesis represents a modest yet significant step toward enhancing legal discourse in Malawi, Namibia and Seychelles.

VII. Overview and structure

The remainder of this thesis consists of six more chapters. Chapter Two engages with the way that the experience of these three countries fits within the growing literature on African constitutionalism. The first part of Chapter Two defines the high executive and considers the history of the executive and the rise of executive dominance in African constitutionalism. It considers the new role of the judiciary in holding the executive to account for its use of power, and the tension with the need to ensure that governing powers can be exercised efficiently. It also notes the other mechanisms in a constitutionalism that also ensure high executive accountability.

The second part of Chapter Two focuses on the mechanism of judicial review deriving from the law of England and Wales and considers its development as a judicial tool for holding the high executive accountable.[85] This discussion illustrates the inherent flexibility of judicial review and its development to cover executive discretionary acts and prerogative acts. This discussion facilitates an understanding of how judicial review was received and developed in its former colonies, particularly Seychelles and Namibia, that still rely on its principles today.

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[84] Mathilda Twomey *Legal Métissage in a Micro Jurisdiction: The Mixing of Common Law and Civil Law in Seychelles* (PhD Thesis, NUI Galway, 2015).

[85] The terms 'United Kingdom,' 'UK', 'English,' or 'British' are used throughout this discussion with an awareness that Scotland has its own distinctive system of administrative and public law. The term UK or British therefore refers to the public law governing Great Britain as a whole, and to the laws of England and Wales where Scottish law differs. The term 'English law' is also used to refer to the law of England and Wales. For the most part, the common law relating to judicial review of the executive that is discussed in this thesis applies to the United Kingdom as a whole. For a short introduction to the distinctions, see the address of Lord Clyde 'Public Law in Scotland' 2008 *Journal* 18. See also, JDB Mitchell *Constitutional law* 2ed (1968) 3.

The separate development of common law judicial review in Namibia and South Africa is also briefly discussed with its standard of rationality review posing an alternative approach to the review of executive powers. These legal origins are significant for understanding the mechanisms that the courts have developed with regard to the high executive since the 1990s.

Chapters Three, Four and Five consider the jurisprudence in Malawi, Namibia and Seychelles in more detail to illustrate different ways that courts have developed their review role over high executive conduct, the grounds of review, and the courts' function. Each chapter is divided into four general sections – history of the executive-judicial relationship; constitutional renewal in the 1990s and the provisions of the current constitution; a review of the jurisprudence of the courts when determining matters involving the high executive in the past 30 years; and an assessment of whether a clear account has emerged of the legal principles that the courts rely on to hold the executive accountable. Each chapter ends with an assessment of the development of coherence within that country's jurisprudence by considering the four questions identified in part III (b) above.

Chapter Three considers Malawi, the largest of the three countries, a country with a significant 'judicialization' of its politics and a high number of cases concerning the President and high executive. The survey of the cases reveals judges who are willing to hold the executive accountable even in the face of significant pushback from the executive. In exercising constitutional oversight over the executive, the Malawian courts are applying standards rooted in the rule of law, through the UK common law judicial review grounds of illegality, irrationality and procedural unfairness. Malawian judges' reliance on English legal precedent and procedure without appropriate domestication leads to the importation of confused principles and barriers to justice undermining coherence. Moreover, the constitutional right to fair administrative action has remained under-utilised. Clearer standards are beginning to develop in the court's exercise of their constitutional role, however, there is scope for the systematisation of the law which requires engagement from the bar, the bench and academia.

Namibia is the focus of Chapter Four. There are many cases brought under the article 18 right to fair and reasonable administrative action, but few cases against the high executive and the President perhaps because of the continued dominance of the ruling party, SWAPO. In the few cases brought against the high executive, the courts appear hesitant to address matters that directly question presidential conduct. However, they have developed the principle of legality, rooted in the rule of law, by which to hold the high executive accountable and have also broadly

applied the article 18 standards of 'reasonable and fair' to executive conduct. Overall, Namibian courts have taken steps towards developing a coherent set of principles based on the principle of legality. This is particularly well illustrated in the COVID-19 *NEF*[86] case discussed in Chapter Six.

The smallest jurisdiction, Seychelles, is the focus of Chapter Five. The Seychellois courts have developed their approach to executive accountability based on common law judicial review principles. However, the case law shows confused borrowings of foreign case law often with little contextualisation or localisation. Despite attempts at developing a coherent jurisprudence between 2007 and 2017, there is confusion in the recent jurisprudence that may have resulted in a reduction in cases. The high executive has not been consistently held to any coherent standards and recourse to the courts appears to be diminishing.

Chapter Six conducts an analysis of court cases related to the executive measures implemented during a crisis: the COVID-19 pandemic in 2020-2021. This analysis considers the distinct approaches taken by the courts when executives were required to take strong and decisive action to address a threat to the wellbeing of individuals and the financial interests of the nation. In Malawi, the cases illustrate the application of varying standards regarding presidential actions but a strong and clear approach by the constitutional bench of the High Court. Namibia's example indicates the emergence of a coherent jurisprudence, even when the President's actions are challenged. Conversely, the lack of cases in Seychelles suggests a troubling absence of trust in the judiciary to hold the executive accountable and to safeguard human rights during States of Emergency.

Finally, Chapter Seven analyses the findings from the four previous chapters and offers some suggestions on how the three jurisdictions might improve the coherence of their jurisprudence. Ultimately, it is possible to see efforts made by the courts in all three jurisdictions to establish the parameters of their role in holding the executive to account for use of power. The gaps and problems revealed in the jurisprudence are based on history, post-independence experience and other contextual factors. There is scope for academics, judges and legal practitioners to engage with the struggle of defining the constitutional role of the courts as an accountability mechanism over high executive power. This thesis serves as a starting point towards that engagement with this topic.

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[86] *Namibian Employers' Federation and Others v President of Republic of Namibia and Others* [2020] NAHCMD 248.

CHAPTER TWO
THE HIGH EXECUTIVE, THE IMPERIAL PRESIDENT AND THE ROLE OF THE COURTS IN MODERN AFRICAN CONSTITUTIONALISM

I. Introduction

At the heart of constitutional struggles in Africa lies the challenge of restraining the vast and often unchecked powers of the presidency. Exploring the emerging role of African judiciaries

vis-à-vis the high executive, especially the President, involves delving into various cultural and historical factors that have shaped this phenomenon. This chapter contextualises these themes within the broader literature on African constitutionalism and governance over the past century, setting the stage for detailed studies of Malawi, Namibia, and Seychelles. Accordingly, the discussion that follows primarily addresses constitutional law development in Anglophone Africa, though it also touches on aspects of the history of constitutionalism in Francophone and Lusophone African states.

The executive branch of government refers to that part of government responsible for leading and administering a country on a day-to-day basis, implementing legislation and performing functions and powers given to it under a constitution. The head of the executive is the Prime Minister (in parliamentary systems) or the President (in republican systems), in whom executive power is vested, including choosing the Cabinet, appointing non-elected persons and exercising emergency powers during national crises. In some African states, such as South Africa, the President is drawn from the ruling party in the Parliament, however, in the majority of African states, the head of the executive is directly elected by the population in a vote separate from the parliamentary elections.[1]

The executive figurehead is advised and supported by a Cabinet of ministers, who oversee government agencies or departments, are appointed by the executive figurehead and are not elected officials except in systems where ministers must be drawn from the Members of Parliament (MPs). The executive figurehead and the Cabinet form the 'high executive'. They determine the policy of the state and exercise constitutional powers, including engaging in foreign affairs and exercising constitutional powers that are implemented by legislation, such as legislation governing the granting of citizenship. Below the high executive is the administration of the government that consists of high-level appointees (heads of departments and principal secretaries) and public servants whose role is implementing legislation and high executive policies and whose tenure is not necessarily linked to the current political incumbent. While the high executive can become involved with the administration, the lower executive actors are usually unable to exercise the constitutional and policy powers of the high executive without express delegation.

[1] Muna Ndulo 'Presidentialism in Southern African states and constitutional restraint on presidential power' (2002) 26 *Vermont LR* 769, 772-773.

To understand the contours of the high executive-judicial relationship, it is necessary to consider the context in which this relationship exists. This chapter considers the historical development of the high executive and the emergence and persistence of 'imperial presidency' in Africa.[2] It then considers the role of the judiciary under prevailing African constitutionalism and how modern constitutions have developed a new role for the judiciary in reviewing the constitutionality of executive conduct. It considers the ways the judiciary may perform this role through the use of judicial review to limit executive conduct, but also to legitimise executive conduct and engage in a dialogue with the executive about the constitutional parameters of its powers. This discussion provides a background for the chapters that follow.

II. Historical development of the high executive, the emergence and persistency of 'imperial presidency' in Africa

The role of the 'ruler,' or executive figurehead, in African constitutionalism has progressed through various stages over history, however, for this thesis' purpose, the role of the executive figurehead since the end of colonialism is of interest. From that point control of political power in Africa has almost exclusively centred around a powerful executive figurehead: prior to independence, it was the Colonial Governor, then the autocratic President for Life and currently, the democratically elected President. Thus, a discussion of the executive in Africa must inevitably address the emergence of the phenomenon of the imperial president that occurred during the post-colonial period and persists today to varying degrees.

This section discusses general trends in constitutionalism across Africa, from colonisation to the present, drawing on numerous academic studies that encompass the experiences of both Francophone and Anglophone countries. It is recognised that African nations have experienced different colonial and post-colonial trajectories that may not fit neatly into this generalised discussion. This chapter provides a background for the in-depth discussions of Malawi, Namibia and Seychelles that follow, where specific nuances related to these themes will be examined.

(a) African constitutionalism from colonisation to independence

This discussion of constitutionalism in Africa begins at colonisation, although that is not to overlook the fact that governance existed in pre-colonial Africa and that the conception of

[2] The term 'imperial presidency' was popularised in the American context by Arthur M. Schlesinger, Jr *The Imperial Presidency* (1973).

power in pre-colonial African societies informs the acceptance of executive conduct to this day. The study of constitutionalism in pre-colonial Africa is precarious for several reasons, including the scarcity of unbiased sources and the risk of collapsing time into generalisations.[3] Gebeye makes a compelling argument that indigenous constitutional systems existed in pre-colonial Africa, that these gained normative force through custom and utilised traditional government as their institutional setup.[4] He posits that centralised and uncentralised pre-colonial political societies in Africa practiced an indigenous constitutionalism that included rule by consent, the rule of law, limited government and the recognition of rights.[5] However, these constitutional systems were demolished, replaced and reimagined by colonialism and the periods that followed.

While the Berlin Conference was by no means the beginning of constitutional governance in Africa, it did establish the international law framework for the colonisation of Africa and formalised the 'Scramble for Africa'.[6] International law did not recognise the sovereignty of existing indigenous societies and, as such, the key stakeholders in the Berlin Conference, those to be colonised, were not invited to it.[7] The right of western countries to colonise African states and the exclusion of indigenous voices were accepted norms of the prevailing western constitutionalism.[8] Thus, imperial and colonial laws, aided by international law, created new states without consulting or even informing the existing indigenous societies.

Different types of colonial constitutions were created and imposed in Africa. They resist generalisation as they developed according to the interests of the colonial state and the local circumstances.[9] In all contexts, the goal of colonialism was to rule and transform the society being colonised.[10] Thus, the colonisers imposed new theories of government and new

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[3] Berihun Adugna Gebeye *A Theory of African Constitutionalism* (2021), 36.
[4] Ibid 71.
[5] Ibid 36-48.
[6] Antony Anghie *Imperialism, Sovereignty and the Making of International Law* (2007) 90–92. The Berlin Conference of November 1884 – February 1885 was a meeting of European powers and the United States of America that established the rules for colonising Africa and accelerated the European expansion into the continent. The Conference was part of a larger set of international agreements regulating relations between colonising countries intent on African colonisation. See Matthew Craven 'Between law and history: The Berlin Conference of 1884-1885 and the logic of free trade' (2015) 3(1) *London Review of International Law* 31, 31-59.
[7] Gebeye op cit note 3, 49. See also Ibrahim J Gassama 'International law, colonialism, and the African' in Martin S Shanguhyia and Toyin Falola (eds) *The Palgrave Handbook of African Colonial and Postcolonial History* (2018) 554–59, Makau wa Mutua 'Why redraw the map of Africa: A moral and legal inquiry' (1995) 16 *Michigan Journal of International Law* 1113, 1121–22.
[8] Gebeye op cit note 3, 44-5.
[9] Sally Engle Merry 'Law and colonialism' (1991) 25(4) *Law & Society Review* 889, 891.
[10] Ibid 890.

conceptions of power on existing African societies, while simultaneously redesigning their societal structure and delegitimising their customary constitutional systems.[11]

Imperial and colonial laws were used to give shape to the new colonies. These laws created governance structures that best suited the imperial power's interests in that new colonial state and introduced legal infrastructure, including policing powers and criminal law, to protect, maintain and build imperial control.[12] Strategic choices were made by the colonisers about the extent of imposing new laws at the risk of causing social instability.[13] As such, elements of existing laws and institutions were often retained, but they were also overlaid with colonial laws and subject to repugnancy clauses.[14]

Traditional governments and customs were 'rejected, incorporated, invented and accommodated' according to the needs of the imperial rulers.[15] In both French and British colonies, traditional government structures were redesigned to administer and control the indigenous populations, transforming the relationship between native leaders and their societies.[16] Native authorities were appointed to act as a go-between for the colonial administration, and were instrumentalised as a means of 'exploitation, domination, and tribalization… fundamentally alter[ing] the nature of traditional government and the traditional conception of power in Africa.'[17]

From the mid-1950s, the atrocities of two world wars quickened a shift in global constitutionalism with the growing recognition of human rights in legal instruments and systems.[18] These values sat uncomfortably with the subjugation of colonised indigenous communities. This, coupled with post-war economic depletion and the rise of nationalist African calls for independence, led colonial powers to begin exiting Africa in the 1950s and 1960s, granting independence to their former colonies.[19] The departing colonisers designed

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[11] Gebeye op cit note 3, 48.
[12] Merry op cit note 9, 890. Martin Chanock *Law, Custom, and Social Order: The Colonial Experience in Malawi and Zambia* (1985) 4.
[13] Lauren Benton *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (2002), 2-3.
[14] For example, South Africa retained Roman-Dutch law, and Mauritius and Seychelles retained many aspects of French law. English public and procedural laws were introduced. See Olufunmilayo B. Arewa 'Legal imperialism and institutions' in *Disrupting Africa Technology, Law, and Development* (2021), 109-110.
[15] Gebeye op cit note 3, 52.
[16] Ibid 54.
[17] Ibid.
[18] The effect of the World Wars as a catalyst for changing human rights values is often exaggerated, however there was a significant but incomplete shift in the adoption of human rights after the 1950s. See eg Samuel Moyn, *The Last Utopia: Human Rights in History* (2010) 44-83.
[19] There were some countries that had received their independence earlier – such as Egypt in 1922 and Liberia in 1847.

independence constitutions for their former colonies in styles influenced by emerging constitutional ideals arising from the new international human rights discourse and the experience of other constitutional democracies.[20] This international influence led to African independence constitutions having similar institutional frameworks.[21] Independence constitutions emphasised centralised governance, democracy and democracy-promoting fundamental rights.

The independence constitutions were also deeply rooted in their colonial origins. These constitutions emulated features of the coloniser's system, thus the departing British introduced Westminster Parliamentary systems with allegiance to the monarch, and the French introduced presidential systems.[22] They also saved existing legal frameworks operating at the time of independence. Free and fair democratic elections were introduced as the legitimate means to obtain power, and institutional checks and balances between the legislature and the executive were incorporated. Moreover, first generation human rights were introduced to protect democracy through democratic liberties, such as free press and speech, freedom of association, protection against arbitrary detention and unlawful searches and seizures.[23] Armed with these constitutions, new African leaders took over the governance vacuum left by the departing colonisers. In 1978, Pfeiffer wrote of these early constitutions:

> In retrospect, one looks back upon those enthusiastic, early days of independence with more than a little bewilderment. Could it have seemed possible to the British authorities that the fledgling governments… politicised during years of unquestioned supremacy of the Colonial Governor, would be content to face the enormous tasks of nation-building inhibited by a constitution they did not write and judges they had neither appointed nor were able to legally remove?[24]

Pfeiffer's account, while highlighting the challenges faced by newly independent African states, oversimplifies the situation by underestimating the profound structural and institutional

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[20] Robert B Seidman 'Constitutions in independent, anglophonic, sub-Saharan Africa: Form and legitimacy' 1969 *Wisconsin LR* 83, 94.

[21] Ran Hirschl *Towards Juristocracy: The origins and consequences of the new constitutionalism* (2007), Charles M Fombad 'Internationalization of constitutional law and constitutionalism in Africa' (2012) 60 *AJCL* 439, 444–56. Gebeye op cit note 3, 43-44.

[22] Gebeye op cit note 3 at 48, VT Le Vine, 'The fall and rise of constitutionalism in West Africa' (1997) 35 *The Journal of Modern African Studies* 181, 184–87; YP Ghai 'Constitutions and the political order in East Africa' (1972) 21 *International and Comparative Law Quarterly* 403, 410–13; Seidman op cit note 20, 99–110.

[23] Robert B Seidman 'Judicial review and fundamental freedoms in Anglophonic independent Africa' (1974) 35 *Ohio St LJ* 820, 820.

[24] Steven B Pfeiffer 'Notes on the role of the judiciary in the constitutional systems of East Africa since independence' (1978) 10 *Case Western Reserve Journal of International Law* 11, 19.

legacies of colonial rule, which left behind centralised and exclusionary state systems ill-suited to inclusive governance.

(b) Independence and the post-colonial origins of the imperial president

The newly independent African countries faced the tension of building new democratic, constitutional institutions on colonial legal foundations. In 1963, Tom Mboya wrote:

> Africa is experiencing a critical social, political and economic transition. … Africans are struggling to build new societies and a new Africa and we need a new political philosophy – a philosophy of our own – that will explain, validify and help to cement our experience.[25]

The search for an African political philosophy led many newly-empowered African leaderships to reject Westminster-style democracy. In Anglophone Africa, this included a rejection of allegiance to a monarch. Limited governance was portrayed as alien to Africa and an inhibition to economic development.[26] During the 1960s and 1970s, across Africa, many independence constitutions were replaced with authoritarian republican regimes under the guise of pursuing nation-building and economic development.[27]

As post-colonial African states rejected the structure of the imposed independence constitutions, they sought to introduce an African solution to the executive figurehead. The solution blended two characters from African history: the King/Chief and the Colonial Governor. The King/Chief, as executive figurehead in 1960s rhetoric, relied on a particular conception of traditional African governance that romanticised the chief in African traditional governance as being 'personal, permanent, mystical and pervasive', holding roles as 'legislator, executive, judge, priest, medium, father, and more'. [28] This focus magnified the power given to the executive figurehead and overlooked the checks that traditional systems placed on the powers of kings and chiefs.[29]

The second source of inspiration for the executive figurehead came from the colonial state's autocratic 'practices, usages, laws and institutions'.[30] The Colonial Governor had reigned on

[25] Tom Mboya 'African socialism' (1963) 8 *Transition* 17, 17.
[26] BO Nwabueze *Constitutionalism in the Emergent States* (1973) 28-30.
[27] H Kwasi Prempeh 'Marbury in Africa: Judicial review and the challenge of constitutionalism in contemporary Africa' (2006) 80 *Tulane LR* 1239, 1274.
[28] H Kwasi Prempeh 'Presidential power in comparative perspective: The puzzling persistence of imperial presidency in post-authoritarian Africa' (2007) 35 *Hastings Constitutional Law Quarterly* 761, 764. See also Ndulo op cit note 1, 769, BO Nwabueze *Presidentialism in Commonwealth Africa* (1974), 106.
[29] See Gebeye op cit note 3, Chap 2.
[30] Prempeh 'Presidential power' op cit note 28, 802,

behalf of the sovereign without any meaningful separation of powers or checks and balances.[31] The Governor personally held executive power often combined with legislative and judicial powers.[32] The purported purpose of combining these powers was to enable the Governor to advance the development of the colony. This provided African leaders with a theory of government they were able to mimic, especially as the colonial laws still existed in the rule books, and lawyers in post-colonial states were typically trained in the laws of the colonising country.

In the autocratic constitutions of the 1960s and 1970s, executive power was consolidated 'along hierarchical and autocratic lines' in a re-imagination of the colonial Governor and King/Chief role.[33] The imperial president emerged. The political party and the state were subjected to the personal rule of the President; the separation of powers was collapsed, power was centralised and political dissent was suppressed.[34] The checks and balances contained in the independence constitutions were distorted and stripped of their efficacy by the centralisation of power in one party with a singular ruler who had unlimited access to state resources, police powers and information, and who controlled (*de jure* or *de facto*) appointments to, and removal of, members of the legislature and the judiciary.[35]

The new leadership 'centralized and personalized' presidential power and enabled individual strongmen to dominate the power and wealth in their states.[36] Along with this imperial presidency, 'neopatrimonialism' frequently took root, where access to the executive figurehead inferred access to resources and favourable presidential discretion.[37] The authoritarian governments, with a propensity to personal patronage, corruption and cronyism, showed 'a commitment to the idea of the constitution' while lacking in the characteristics of

[31] Ndulo op cit note 1, 788-89.
[32] Ibid 788-789, Gebeye op cit note 3, 91-92. For example, in Nyasaland, under the Nyasaland Order in Council, 1907, art 5 the Governor could 'do and execute all things that belong to his said office, according to the tenor of any Orders in Council relating to the protectorate and of such Commission as may be issued to him [by the Crown]', moreover he handpicked the two other members of the Legislative Council which he chaired. Msaiŵale Chigaŵa 'The fundamental values of the Republic of Malaŵi Constitution of 1994' *Law Commission Constitutional Review Conference, 2006* Capital Hotel, Lilongwe, 28-31 March 2006, 2.
[33] Prempeh 'Presidential power' op cit note 28, 802,
[34] Ibid 794-5, Gebeye op cit note 3, 94.
[35] Seidman 'Judicial review and fundamental freedoms' op cit note 23,820–50.
[36] Gebeye op cit note 3, 50. See also Robert H Jackson and Carl G Rosberg *Personal Rule in Black Africa: Prince, Autocrat, Prophet, Tyrant* (1982).
[37] Michael Bratton and Nicholas van de Walle *Democratic Experiments in Africa: Regime Transitions in Comparative Perspective* (1997), 61-96.

democratic constitutionalism, particularly limited governance and the protection of civil rights.[38]

African governance during the 1970s to 1990s became typified by authoritarianism, one-party statism, presidentialism and change of regime by military coup.[39] Many of these imperial presidencies also resulted in suppression and domination of opposition and minorities.[40] They were legitimated by a thin form of democracy manipulated by one-party politics that encouraged rule by law, rather than the rule of law.

(c) The rise of rights-based democracy and the persistence of imperial presidency

In most instances, the autocratic presidential systems failed to achieve their desired goals of nation-building or economic development.[41] By the late 1980s, these governments faced widespread domestic protest and struggle. Simultaneously, on the global stage, the fall of the Berlin Wall and the end of the Cold War led to a worldwide 'wave' of democratisation that symbolised the triumph of multiparty rights-protecting democracy over communism and socialism.[42]

From 1989, a new wave of democratisation reached the African continent, beginning in Francophone Africa with Algeria and Benin, and in Anglophone Africa with Namibia.[43] These countries started a constitutional renewal trend, and by 1994, 28 other African countries had also adopted new constitutions and 29 one-party autocratic regimes were replaced with multiparty democracy.[44]

The constitution-making of the 1990s focused on (re)introducing multiparty democracy and protecting against strongman presidentialism.[45] The constitutional design incorporated a more

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[38] HWO Okoth-Ogendo 'Constitutions without constitutionalism: an African political paradox' in Douglas Greenberg, SN Kartz, B Oliviero and SC Wheatley (eds) *Constitutionalism and Democracy: Transitions in the Contemporary World* (1993), 65.
[39] Prempeh 'Marbury in Africa' op cit note 27, 1277.
[40] Liisa Laakso and Adebayo O Olukoshi 'The crises of the post colonial nation-state project in Africa' in Adebayo O Olukoshi and Liisa Laakso (eds) *Challenges to the Nation-State in Africa* (1996) 11–16.
[41] Smokin Wanjala 'Presidentialism, ethnicity, militarism and democracy in Africa: The Kenyan example' in Joseph Oloka-Onyango et al (eds) *Law and the Struggle for Democracy in East* Africa (1996), 86.
[42] Samuel Huntington *The Third Wave: Democratization in the Late Twentieth Century* (1991).
[43] Namibia was, of course, an outlier in this narrative as it was receiving its hard-won independence from South Africa, Francesco Cavatorta *The International Dimension of the Failed Algerian Transition: Democracy Betrayed?* (2012), Thomas Bierschenk 'Democratization without development: Benin 1989–2009' (2009) 22 (3) *International Journal of Politics, Culture, and Society* 337–357. The Namibian experience is discussed in detail in Chap Four.
[44] Bratton & Van de Walle op cit note 37, 8.
[45] Ibid 246.

complicated system of checks and balances between the three conventional branches to counter how easily the independence constitutions had transitioned into one-party authoritarian regimes. This design also introduced new independent constitutional institutions (such as ombudsmen, electoral commissions, human rights commissions and judicial commissions) to support and protect the democracy.[46]

The new constitutions, which I call 'modern' constitutions as they are still the prevailing constitutional design, aimed to restrict the power of the high executive and limit the likelihood of recurrence. They introduced measures such as enumerated presidential powers, decentralisation of powers (in bigger countries) and the limitation of the number of presidential terms.[47] Modern constitutions also introduced justiciable charters of fundamental rights and granted new constitutional review powers to the judiciary. The courts emerged as the institution with the ultimate responsibility for ensuring that the constitution was upheld and implemented under constitutional supremacy clauses.

These measures were introduced to 'address the troubles of post-independence' including 'political instability, dictatorship, bad governance, grave violations of human rights, corruption and pervasive poverty.'[48] Rosenfeld refers to constitutionalism in post-colonial Africa as a 'dialectic' process where liberal constitutionalism has been repeatedly affirmed and absorbed, then negated and rejected within the evolving system of constitutional governance.[49] Seen in this way, post-autocratic African constitutionalism that embraces multiparty, rights-protecting democratic values and emphasises executive accountability is a dialectical response to the lack of executive accountability from the 1960s to 1990s.

As a result of this shift in constitutionalism, many African countries have experienced successful transference of power between successive political leaders, fair and peaceful elections, the acceptance of restricted presidential terms, the declaration of unconstitutional

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[46] Such institutions are broadly described as 'guarantor institutions' 'integrity' institutions', 'fourth branch institutions' or 'institutions protecting constitutional democracy'. See Bruce Ackerman 'The New Separation of Powers' (2000) 113 *Harvard LR* 633, 694, Alexander J Brown 'The integrity branch: A "system", an "industry", or a sensible emerging fourth arm of government?' in Matthew Groves (ed) *Modern Administrative Law in Australia: Concepts and Context* (2014) 302, Mark Tushnet 'Institutions Protecting Constitutional Democracy' (2020) 70 (2) *University of Toronto LJ* 95, 96, Charles Manga Fombad 'The diffusion of South African-style institutions? A study in comparative constitutionalism' in Rosalind Dixon & Theunis Roux (eds) *Constitutional Triumphs, Constitutional Disappointments* (2018) 359, Tarunabh Khaitan 'Guarantor Institutions' (2021) 16 *Asian Journal of Comparative Law* S40-59.

[47] Prempeh 'Presidential power' op cit note 28, 810.

[48] Gebeye op cit note 3, 52.

[49] Michel Rosenfeld 'Constitutional Identity' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (2012), 766.

legislation and actions, a growth in the protection of human rights and the emergence of a free media and civil society.[50]

However, the introduction of limitations on executive power in modern constitutions has not defeated the occurrence of the imperial president in Africa, although it is less 'flagrantly abusive'.[51] Prempeh and Gloppen both point to the failure of the new-style constitutions to dilute executive power and authority within the democratised state, which has resulted in 'winner-takes-all' politics and 'big men democracies' remaining a real possibility for the executive.[52] Prempeh notes that of the core values entrenched in modern African constitutions, 'democracy' enjoys more emphasis than 'constitutionalism,' 'the rule of law' or 'limited government.'[53]

> Now, as before, power at the center remains excessively concentrated in the bosom of the President. Africa's new constitutions have preserved the imperial presidency, with its vast powers of patronage and virtual monopoly of policy and legislative initiative.[54]

Van Cranenburgh's 2008 quantitative analysis of 30 African countries illustrates that modern constitutions still give presidents high levels of institutional power, which are well above the average levels found in studies of electoral democracies globally.[55] Moreover, van Cranenburgh's research suggests that the proliferation of Africa's 'big men' threatens democracy and governance.[56] In 2008, Ginsburg and Moustafa identified 'most' African states as alternating between 'unconsolidated democracy' and 'soft authoritarianism'.[57] The continued concentration of powers has been 'one of the greatest impediments to Africa's development and its attempts… to establish policies which promote constitutionalism, good governance, democracy and the rule of law.'[58]

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[50] Gebeye op cit note 3, 62.
[51] Prempeh 'Presidential power' op cit note 28, 772, H. Kwasi Prempeh 'Africa's "constitutionalism revival": False start or new dawn?' (2007) 5(3) *ICON* 469, 486–98. Prempeh 'Marbury in Africa' op cit note 27, 42–84; Okoth-Ogendo op cit note 38, 65–84; Nwabueze *Constitutionalism in the Emergent States* op cit note 26 300–7.
[52] Siri Gloppen 'The accountability function of the courts in Tanzania and Zambia' (2003) 10 *Democratization* 112, 119; Prempeh 'Marbury in Africa' op cit note 27, 1246. Bratton and van de Walle op cit note 37, 253.
[53] Prempeh 'Marbury in Africa' op cit note 27, 1275.
[54] Ibid 1293.
[55] Oda van Cranenburgh '"Big Men" rule: Presidential power, regime type and democracy in 30 African Countries' (2008) 15 (5) *Democratization* 952, 970.
[56] Ibid 971.
[57] Tom Ginsburg & Tamir Moustafa 'Introduction: The functions of courts in authoritarian politics' in Tom Ginsburg & Tamir Moustafa, (eds) *Rule by Law: The politics of courts in authoritarian regimes* (2008), 3.
[58] James Fowkes & Charles M Fombad 'Introduction' in Charles M Fombad (ed) *The Separation of Powers in African Constitutionalism* (2016) 1, 1, Charles Manga Fombad 'An overview of the crisis of the rule of law in Africa' (2018) 18 *African Human Rights LJ* 213, 240.

Writing 30 years after these constitutions were adopted, Gebeye notes that:

> Even though the post-Cold War African constitutions have had a better vitality and influence in terms of shaping and taming the actions and behaviours of African governments than the previous constitutions, they have carried over the authoritarian textures of their predecessors, negating their liberal constitutional promises and commitments… Despite these positive developments, multiple decades of these constitutional experiments have led to the development of dominant and single party systems, maintained authoritarian rules and practices, and faced the resurgence of personal rules and sometimes military coups.[59]

(d) Why do executive dominance and presidential imperialism persist?

Executive dominance is by no means a uniquely African phenomenon, however, despite the intentional adoption of constitutional frameworks to introduce greater mechanisms of accountability and more separation of powers in the post-1990s African constitutions, the President still wields the most power.[60] It is uncommon that presidential primacy is affirmatively granted in the provisions of modern African constitutions.[61] Yet, there are several reasons for the continued imperial presidency and executive dominance despite the constitutional safeguards against them. The power allocations among government structures shifted significantly during the autocratic period. The power-limiting aspects of the modern constitutional provisions and practices have not been emphasised, whereas the power-enabling provisions and practices tend to be magnified.[62] In practice, the executive only pays lip-service to the separation of powers but continues to emphasise its constitutional pre-eminence, thus, presidential and executive powers are not effectively limited under modern constitutions.[63] This results in 'a hyperactive and imperial executive and highly personalised executive power.'[64]

The other branches of state, the legislature and the judiciary, remain subordinate to the executive both by practices and by the practicalities of constitutional provisions.[65] The executive enjoys dominance in practice through its control of the national bureaucracy and administration, military strength, national intelligence and the budget. Ceremony such as

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[59] Gebeye op cit note 3, 52-3 (footnotes omitted).
[60] Charles M Fombad 'An overview of the separation of powers under modern African constitutions' in Fombad (ed) *Separation of Powers in African Constitutionalism* (2016), 70. Ndulo op cit note 1, 771.
[61] Prempeh 'Presidential power' op cit note 28, 815 noting that presidents in Angola, Cameroon, Congo and Tanzania are empowered to act with little restraint under their constitutions.
[62] Gebeye op cit note 3, 151 and Chap 3.
[63] Prempeh 'Africa's "constitutionalism revival"' op cit note 51, 497.
[64] Mazrui identified this as the 'personalization' and 'sacralization' of the executive. Ali A Mazrui 'The monarchical tendency in African political culture' (1967) 18 *The British Journal of Sociology* 231, 231. See also Gebeye op cit note 3, 151.
[65] Prempeh 'Presidential power' op cit note 28, 763.

honorific titles and higher protocol status, as well as higher salaries, cement the perception of executive primacy. Of those honoured, the President enjoys the greatest honour, coupled with personal immunity, control over appointments, security powers and emergency powers.[66] Moreover, the President is usually responsible for formally appointing judges and the leaders of the fourth branch institutions (even where they are recruited and recommended by independent appointment commissions, the President often still has a ceremonial appointment role). In addition to this, the executive draws up and controls the budget for the judiciary, the legislature and the fourth branch institutions.

As with other countries, executive powers in Africa have been enlarged in the past half-century through the necessity of modern governance with increased regulation, greater social welfare undertakings and more sophisticated national security needs.[67] This greater role for the executive has led to a greatly expanded bureaucracy and requires wide executive rulemaking through subsidiary legislation, often with little oversight by the legislature. Legislation often enables 'presidential administration' with the President being given direct policy-making powers and wide discretion.[68]

There is, of course, good reason for enabling the executive to take decisions decisively and efficiently to cater to the exigencies of modern governance. As Issacharoff astutely notes, '[t]he problem of creating democratic institutions and culture out of the ashes of authoritarianism, and in a fractured society, is that fragile democracies must navigate a dilemma at the heart of all successful liberal democracies: they must enable majority rule while also institutionally limiting it.'[69] Those limitations are difficult to establish given the historical concentration of power in high executive decision-makers – particularly the President.

Another reason for the persistence of presidential primacy is the combination of the head of state and head of government roles in a single executive figurehead, a remnant of

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[66] Gebeye op cit note 3, 161, Ndulo op cit note 1, 769-72, Charles Manga Fombad and Enyinna Nwauche 'Africa's imperial presidents: Immunity, impunity and accountability' (2012) 5 *AJLS* 91, 91–118.

[67] Renata Uitz 'Courts and the expansion of executive power: Making the constitution matter' in David Bilchitz and David Landau (eds) *The Evolution of the Separation of Powers Between the Global North and the Global South* (2018) 85–86.

[68] See eg Seychelles, s 5(1) of the Citizenship Act, cap 30 enables the President to grant citizenship to a person who, in their opinion, 'has done signal honour or rendered distinguished service to Seychelles'. The Children Act, cap 28, requires the President's consent in certain adoption cases: ss 37–38. For a discussion of 'presidential administration' see Mark Tushnet 'The Presidential Empire' (2015) 62(2) *Dissent* 101, 104-108 and Elena Kagan 'Presidential Administration' (2001) 114(8) *Harvard LR* 2245 for the American context.

[69] Samuel Issacharoff *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (2015), 3.

authoritarian constitutions that persists in modern African constitutional frameworks.[70] By merging the symbolic and ceremonial functions of the head of state, such as appointing judges and conferring honours, with the policy-driven, discretionary powers of a democratically elected president, such as appointing ministers and managing government affairs, the office can appear to wield almost unlimited authority over the nation.

Another reason for the persistence of the concentration of powers in the executive relates to the incorporating of legislation from colonial and authoritarian days, which was designed to reinforce executive discretion and power. For example, Presidents still hold the power to summon and prorogue Parliament, calling it to session and dissolving it.[71] This power serves to reinforce the perception of the dominance of the President and seems anachronistic in modern constitutions where Parliaments are directly elected. Such legislation may remain on the statute book as it goes unchallenged or may not be unconstitutional *per se*, and therefore, might not be open to challenge and invalidity. Thus, a strong executive and presidency persist in modern African constitutional practice despite constitutional design that seeks to limit such powers.

III. Executive accountability mechanisms

The doctrine of the separation of powers seeks to avoid oppression and tyranny resulting from the concentration of executive power by separating state powers between the three branches of government along functional lines.[72] Thus, modern constitutions empower other institutions to check executive conduct and to hold the executive accountable for its conduct. The three branches would check and balance each other's use of power. Modern constitutions add independent constitutional institutions to provide an additional safeguard against an overpowerful executive.[73] Constitutional litigation may be valuable to 'incubate nascent or fragile democracies', however, for the systems to work, the democracy requires 'the full array of institutional commitments', including strengthened capacity of civil society and the legislature.[74]

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[70] Prempeh 'Presidential power' op cit note 28, 790.
[71] Ndulo op cit note 1, 789.
[72] John Locke *The Second Treatise of Civil Government and a Letter Concerning Toleration* (1690) (JW Gough ed, 1948), Charles de Montesquieu *The Spirit of Laws* (1748).
[73] Khaitan op cit note 46, Mark Tushnet *The New Fourth Branch: Institutions for Protecting Constitutional Democracy* (2021).
[74] Issacharoff *Fragile Democracies* op cit note 69, 268.

(a) Legislature's struggle to check executive power

Under modern constitutions, the legislature's role is two-fold: the passing of legislation and protecting the constitutionalism through holding other branches of government accountable for their use of power. Constitutional provisions regularly require the approval of Parliament for presidential conduct (such as many appointments), and Parliaments have the power to launch inquiries into the conduct of the President, governmental departments and officials.[75] Yet, African Presidents are seldom controlled by the legislature.[76]

The primary reason for this is that the constitutional design of modern African constitutions, which emphasises party politics, enables a majority party to dominate the executive and the legislature simultaneously. The politicians who run as MPs often form part of the pool of hopeful candidates for high executive positions. Therefore, toeing the party line is essential for promotion within the party. Additionally, voting against the party line by individual MPs may be not permitted and could be sanctioned.[77]

Where the President's political party dominates the legislature, the party's MPs are likely to acquiesce to the executive's agenda and overlook misdeeds or legislation that seeks to consolidate executive power. Furthermore, where the Speaker of the legislature, who controls what business is done and who may speak, is also appointed from the ruling party, it is difficult for non-ruling party MPs to raise concerns about misuse of power. Therefore, most Parliaments 'do not exhibit much freedom to discuss, criticise and reject government legislation' or executive conduct.[78]

Research suggests that where the Parliament is not dominated by one party, this does not necessarily lead to greater accountability of the executive, but can lead to state paralysis, destabilisation and political crisis.[79] In Malawi in 2007, for example, constitutional crisis occurred when President Bingu wa Mutharika's former party controlled Parliament and refused to bring the President's budget to a vote, instead calling for MPs who defected to other parties

[75] Ndulo op cit note 1, 782.
[76] See eg Nandini Patel 'The representational challenge in Malawi' in *Towards the Consolidation of Malawi's democracy: Essays in honour of the work of Albert Gisy* (2008).
[77] Ndulo op cit note 1, 792. In Malawi, one popular interpretation of s 65 of the constitution is that cross-party voting amounts to vacation of one's seat. Nixon S Khembo 'The multiparty promise betrayed: The failure of neo-liberalism in Malawi' (2004) 29 *Africa Development* 80, 81-82.
[78] Ndulo op cit note 1, 785.
[79] Prempeh 'Presidential power' op cit note 28, 823-824 citing examples from Congo, Nigeria, Madagascar, Benin. Similar examples are seen in Malawi and Seychelles.

to be removed from Parliament.[80] In Seychelles in 2018, the opposition-dominated National Assembly refused to approve the appointment of the President's nominated ministers on the sole ground that the opposition party was calling for fresh presidential elections as it had failed to secure the presidency.[81] In both instances, the political tension between those who controlled the executive and those who controlled the Parliament led to deadlock and political crisis.

Legislative abdication of responsibility to check the executive contributes to the prevalence of imperial presidents.[82] This issue is compounded by a historical lack of accountability in African legislatures. During colonial times and under autocratic rule, these legislatures lacked the power to challenge the President. Consequently, the absence of accountability practices has led to 'path dependency,' where established patterns of interaction persist, resulting in uncritical acceptance of executive actions that are no longer constitutionally appropriate.[83]

In many African nations, directly elected Presidents diminish Parliament's ability to sanction presidential abuses. Impeachment processes intended for investigating or removing a President are often cumbersome, require super-majorities and lack clear procedural guidance, which leads to delays and confusion.[84] Additionally, legislatures are frequently under-resourced and lack legal advisors and adequate staffing for drafting and research.[85] While Parliament may pass legislation regarding budget distribution, actual control over budgeting and resource allocation lies with the Ministry of Finance. This is exacerbated by constitutional provisions that restrict the initiation and amendment of 'money bills' solely to the executive.[86]

Thus, in the years since the adoption of modern constitutions, African legislatures have not been effective in constraining the high executive because of constitutional design, as well as existing customs and practices.

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[80] 'Malawi leader suspends Parliament over budget row' *Mail & Guardian* 20 June 2008.
[81] 'LDS Blocks Nomination of Three New Ministers' *Seychelles Nation* 12 April 2018.
[82] Schlesinger op cit note 2, ix, Prempeh 'Presidential power' op cit note 28, 816.
[83] Prempeh 'Presidential power' op cit note 28, 819-20. See also Thandika Mkandaware 'Crisis management and the making of "choiceless democracies"' in Richard Joseph (ed) *State, Conflict and Democracy in Africa* (1999) 125.
[84] Ndulo op cit note 1, 794-796.
[85] Prempeh 'Presidential power' op cit note 28, 819.
[86] A money bill is a bill which concerns matters of taxation or affecting the state budget and spending. See Constitution of Malawi, 1994 s 57, Constitution of Seychelles, 1993 art 90, Constitution of Republic of South Africa, 1996 s 77. See Prempeh 'Presidential power' op cit note 28, 820.

(b) The potential of independent constitutional institutions and their failure to limit executive power

The African post-independence experience of autocratic presidentialism gave rise to the invention of constitutional design to supplement Montesquieu's three-branch separation of powers with the introduction of institutions to better guarantee constitutional democracy. The institutions include electoral commissions, human rights commissions, anti-corruption commissions and auditors general.[87] This inclusion has become a defining invention of modern African constitutions. Khaitan terms these institutions 'guarantor institutions' and defines them as 'tailor-made constitutional institutions, vested with material as well as expressive capacities, whose function is to provide a credible and enduring guarantee to a specific non-self-enforcing constitutional norm (or any aspect thereof)'.[88]

These institutions have a role in protecting the country's constitutional democracy, rooting out bureaucratic corruption and promoting accountability in government.[89] They can supplement the other branches by exercising extra-judicial pressure on the executive to comply with constitutional norms.[90] They also remove politics from certain state functions, such as judicial appointments or the conduct of elections.[91] Furthermore, they may be easier to access for the public than courts and can give advice and mediate the relationship with the government in ways that courts cannot.[92] For example, the Ombudsman is usually empowered to vindicate rights on behalf of people.

However, Tushnet remains sceptical about the efficacy of independent constitutional institutions.[93] Tushnet's research illustrated that they are seldom effective at systematically protecting constitutional democracy against executive dominance.[94] Such institutions may even be used to further executive abuse rather than counter it, by legitimising the conduct through their constitutionalised role.[95]

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[87] Tushnet op cit note 73, 1.
[88] Khaitan op cit note 46, S58.
[89] Fombad 'Diffusion of South African-style institutions' op cit note 46, 362. Ackerman op cit note 46, 694.
[90] Joelle Barnes 'Not the usual suspects: Executive dominance in Seychelles and the developing institutions that could counter it' in Maartje de Visser, Rosalind Dixon and Elizabeth Perham (eds) *Small State Constitutionalism* (forthcoming 2025).
[91] See Tushnet op cit note 73, ch 2.
[92] Fombad 'Diffusion of South African-style institutions' op cit note 46, 378.
[93] Ibid.
[94] Ibid 174.
[95] Fombad 'Diffusion of South African-style institutions' op cit note 46, 377. See eg the discussion of the political capture of the Constitutional Appointments Authority in Seychelles in Barnes op cit note 90.

Surveys of guarantor institutions show that they are often 'plagued by under resourcing, political apathy and political interference', which undermines their ability to hold the executive accountable for breaking constitutional norms.[96] They are not always sufficiently independent to resist capture, intimidation and manipulation by the executive.[97] Appointment of incumbents is susceptible to interference and allocation of funding may be used to blackmail them, and a lack of resources may be used to starve them.[98] They face intimidation for urging the executive to act constitutionally and frequently lack enforcement power, leading to their decisions being ignored.[99]

Independent constitutional bodies are designed to uphold specific constitutional norms, like free and fair elections, which the ruling party may seek to undermine. To function effectively, they require expertise, independence from the ruling party and accountability to those who can uphold these norms.[100] However, ensuring protections for these institutions remains a challenge in African constitutionalism and therefore, their ability to counter executive dominance is undermined.

IV. The judicial role in limiting executive power and developing review standards

Having identified the continued threat of executive dominance and imperial presidency tendencies in African constitutionalism and having also surveyed the difficulties faced by Parliaments and independent constitutional institutions to hold the President and high executive accountable, we arrive at the other central actor in this thesis: the judiciary.

African courts were weak institutions under previous constitutional regimes and particularly under the autocratic constitutions.[101] Reforms to the role of the courts that place courts at the centre of the constitutional structure are distinctive features of African modern

[96] Barnes op cit note 90, 15.
[97] Fombad 'Diffusion of South African-style institutions' op cit note 46, 372.
[98] Ibid 372-5.
[99] Barnes op cit note 90, 15.
[100] Khaitan op cit note 46, S44.
[101] See Seidman 'Judicial review and fundamental freedoms' op cit note 23, Prempeh 'Marbury in Africa' op cit note 27, 1242 describing pre1990s courts as 'marginal or inconsequential to the business of government in Africa'. Yuhniwo Ngenge 'International influences and design of judicial review institutions in Francophone Africa' (2013) 61(2) *American Journal of Comparative Law* 433, 445.

constitutions.[102] This development is also reflected in the changing role of the judiciary globally.[103]

Courts in Francophone and Lusophone African countries have faced similar difficulties to those in Anglophone African countries with redefining and developing their role.[104] This thesis focuses on the experience of three Anglophone countries, and accordingly the remaining discussion will examine the experience of judiciaries in Anglophone African democracies.

Under the Anglophone democratic constitutions of the 1990s, courts are granted powers to determine the constitutionality of legislation, as well as the actions of the executive, and to provide appropriate relief to affected parties.[105] However, the development of this additional role, and additional independence, has taken time to embed.[106] Judiciaries in Anglophone Africa entered the democratic era with insufficient jurisprudence to counter executive overreach and an embedded judicial doctrine of deference to the high executive. These factors, coupled with a statute book filled with repressive laws, provided stubborn challenges.[107] Judges have also been affected by the lack of clear guidelines in constitutional texts to assist them in this new role. Jurisprudential uncertainty about how to exercise the additional powers has slowed development of coherent judicial approaches. Furthermore, any such development is inevitably slowed by political attack against the judiciary because of the judicialization of politics under the new constitutions.[108]

(a) The role of the African court during colonialism, independence and authoritarianism

Courts were introduced in Anglophone Africa for the express purpose of implementing the colonial project, applying foreign law to foreign settlers and maintaining law and order.[109] They

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[102] Prempeh 'Marbury in Africa' op cit note 27, 1241.
[103] See eg Hirschl op cit note 21, Diana Kapiszewski, Gordon Silverstein & Robert A Kagan *Consequential Courts: Judicial roles in global perspective* (2013), Daniel M Brinks & Abby Blass 'Rethinking judicial empowerment: The new foundations of constitutional justice' (2017) 15(2) *ICON* 296, Wen-Chen Chang 'Back into the political? Rethinking judicial, legal and transnational constitutionalism' (2019) 17(2) *ICON* 453.
[104] See Lisa Heemann, Chadidscha Schoepffer & Anne Winter 'Judicial review and democratization in Francophone West Africa' (2018) 51(2) *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* 133, 134, Ngenge op cit note 101, 433-460. Fernando Loureiro Bastos 'An overview of judicial and executive relations in Lusophone Africa' in Fombad (ed) *Separation of powers in African Constitutionalism* (2016), 159-180.
[105] Prempeh 'Presidential power' op cit note 28, 827. Hirschl op cit note 21, 2.
[106] Charles Manga Fombad 'Constitutional reforms and constitutionalism in Africa: Reflections on some current challenges and future prospects' (2011) 59 *Buff L Rev* 1007.
[107] Prempeh 'Presidential power' op cit note 28, 828-30.
[108] See for example, Hugh Corder & Cora Hoexter '"Lawfare" in South Africa and its effects on the Judiciary' (2017) 10 *African J for Legal Studies* 105, 111-120.
[109] Prempeh 'Marbury in Africa' op cit note 27, 1269.

had little role in holding the Colonial Governor accountable for governance in the colony and their interaction with the executive was limited to reviewing decisions of the administration according to common law judicial review standards.

Judicial review is an English common law legal procedure that was transplanted into British colonies and enables courts to consider the lawfulness of the exercise of public power by subordinate tribunals and administrative bodies.[110] Administrative decisions or conduct can be reviewed on the grounds of being illegal, irrational or without procedural propriety (violating the rules of natural justice).[111] It focuses the courts' attention on *how* the decisions were made, not the substance of the decisions. Courts grant 'prerogative writs' such as certiorari (which compels the production of records for the court to review them), mandamus (which compels the body to perform an act as part of its official duties, or to refrain from performing an act) and declarator (a declaration of whether the decision was lawful). Once a decision was found to be illegal, it would be remitted to the decision-making body for redetermination or performance according to the law.

While the UK was granting independence to its colonies, judicial review in the UK was construed very narrowly with wide deference given to executive conduct and reliance on Parliament to hold the executive accountable.[112] At this time, judicial review was not available against the exercise of discretionary decision-making, and the high executive's prerogative powers were generally non-justiciable. This meant that a case could not be brought that challenged these decisions; it would be dismissed at a preliminary stage. The courts could determine the existence of the prerogative power, and the extent of a prerogative power, but were not able to review the way in which the power was exercised.[113]

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[110] For a history of judicial review in England and Wales, see Harry Woolf et al (eds) *De Smith's Judicial Review* 8ed (2018). The term 'judicial review' can also refer to determining the constitutionality of legislative provisions and as an umbrella term for the courts exercising accountability functions on the legislature or the executive. For the sake of clarity, throughout this chapter, where it becomes necessary to distinguish between different forms of review, I use 'common law judicial review' to signify this review mechanism that developed in English common law and was transplanted into its colonies.

[111] See in this regard *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223; *Council of Civil Service Unions v Minister for the Civil Service* [1984] UKHL 9 ('GCHQ') and *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532.

[112] HWR Wade and CF Forsyth *Administrative Law* 11ed (2014), 12. See also RP 'Administrative discretion and civil liberties in England: The Liversidge, Greene and Duncan cases' (1943) 56(5) *Harvard LR* 806-814, 808, Le Sueur et al (eds) *Public Law: Texts, cases and materials* 3ed 2016, 687. Courts may not invalidate legislation as a fact of the doctrine of parliamentary sovereignty.

[113] KD Ewing 'Prerogative. Judicial Review. National Security' (1985) 44(1) *Cambridge LJ* 1, 1.

At independence, Anglophone African courts took on expanded roles that went beyond judicial review. They were tasked with upholding the constitution and protecting the rights it contained, marking a significant and unprecedented change in their responsibilities.[114] Despite being given broad powers in the independence constitutions, the courts were 'thoroughly imbued with the formal conservatism of the legal and judicial culture of England' and manned by individuals who were themselves products of that culture.[115] Thus, the courts in newly-independent states inherited a jurisprudence that had the potential to hold the executive legally accountable, but also the cautious and deferential approach of the courts at the time.

Indeed, the post-independence African judiciary had a 'profound crisis of legitimacy' and lacked the skills and constitutional validity to perform any role in holding the executive accountable.[116] Prempeh describes the African courts as 'possessing neither the requisite socio-political legitimacy nor the support of influential allies or constituencies within post-colonial society… to countervail the political agenda of national elites.'[117]

Academics are often critical of the Anglophone African courts' performance in holding the executive to account in the post-independence period (prior to constitutionalism), which they blame on colonial overhang. Nwabueze identifies 'the primary reason for the "unsatisfactory" performance of Africa's postcolonial judiciaries' as their 'inherited common law attitude towards the judicial function.'[118] Seidman identifies the 'narrow legalistic reasoning' by Africa's appellate judges as a product of the judges' 'socialisation in the colonial legal order.'[119] However, it was not just judicial socialisation but also the prevailing law on judicial review that affected the courts' exercise of their powers.

Nonetheless, the post-independence judiciaries were granted little opportunity to develop their new role, as the creation of authoritarian regimes stripped courts of their independence and their role in any meaningful separation of powers.[120] The courts retained their common law

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[114] Pfeiffer op cit note 24, 13-17, Prempeh 'Marbury in Africa' op cit note 27, 1269. Some countries did not contain justiciable rights, but contained an affirmation of the nation's commitment to human rights.
[115] Pfeiffer op cit note 24, 16 (footnotes omitted).
[116] Prempeh 'Neither "timorous souls" nor "bold spirits": Courts and the politics of judicial review in post-colonial Africa' (2012) 45 (2) *Verfassung Und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* 157, 165.
[117] Ibid 174.
[118] BO Nwabueze *Judicialism in Commonwealth Africa: The role of courts in government* (1977), 310.
[119] Seidman 'Judicial review and fundamental freedoms' op cit note 23, 825.
[120] Charles Manga Fombad 'The struggle to defend the independence of the judiciary in Africa' in Shimon Shetreet, Hiram Chadosh & Eric Helland (eds) *Challenged Justice: In pursuit of judicial independence* (2021)) 223, 223.

judicial review powers but still lacked the power to question the prerogative acts of the executive.

Prior to the 1990s, in most countries in Anglophone Africa, very few cases of judicial review were successful and the courts consistently held in favour of the government.[121] It was only in the last years of one-party states, and shortly after the watershed UK case of *GCHQ,*[122] which extended judicial review to prerogative powers of the high executive, that the jurisprudence began to shift. Towards the end of the autocratic regimes, lawyers in Africa began successfully bringing cases challenging actions of the high executive and even the lawfulness of legislation to courts, using the existing common law mechanism of an application for judicial review to hold the executive to account.[123]

(b) The role of the court under democratic constitutionalism

The democratic constitutions of the 1990s reintroduced and extended the role that was granted to courts at independence, creating 'new form court-enforced constitutionalism'.[124] Modern constitutions created Constitutional Courts or tribunals, or granted constitutional jurisdiction to courts with the new role of interpreting and enforcing the provisions of the constitution and, especially, vindicating human rights.[125] Some countries created specialist constitutional jurisdiction within the High Court or Supreme Court,[126] while others created specific Constitutional Courts with or without exclusive jurisdiction over constitutional matters.[127]

To protect the courts, modern constitutions grant the courts independence to perform their roles free from any interference.[128] Judges are given protected tenure and safeguards against

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[121] Seidman op cit note 23, 827, Prempeh 'Timorous souls' op cit note 116, 16.
[122] *GCHQ* supra note 111.
[123] See for example, Matembo S Nzunda 'The quickening of judicial control of administrative action in Malawi 1992-1994' in Kings M Phiri & Kenneth R Ross (eds) *Democratization in Malawi* (2020) 314, Nico Horn 'An overview of the diverse approaches to judicial and executive relations – a Namibian study of four cases' in Fombad (ed) *Separation of Powers in African Constitutionalism* (2016) 300, 302, DM Pretorius 'What's past is prologue: An historical overview of judicial review in South Africa – Part 2' (2020) 26(2) *Fundamina* 424, 457-460, and in Seychelles *R v Passport Officer, ex parte Kathleen Pillay* (1990) SLR 250.
[124] Issacharoff *Fragile Democracies* op cit note 69*,* 241.
[125] Prempeh 'Marbury in Africa' op cit note 27, 1241.
[126] For example, in Malawi, Namibia and Seychelles, the High Court (called the Supreme Court in Seychelles) has jurisdiction to determine constitutional questions only when sitting as an especially constituted quorum court, called the Constitutional Court. Appeals from these courts are taken to the apex courts, which have appellate jurisdiction over constitutional matters.
[127] For example, the South African Constitutional Court is the apex court on constitutional matters, but High Courts and the Supreme Court have constitutional jurisdiction. In Zambia, under its Constitution of Zambia (Amendment) Act 2 of 2016, the newly created Constitutional Court is the only court with original constitutional jurisdiction, making it the first and last court to handle constitutional cases.
[128] See Fombad 'The struggle to defend' op cit note 120, 223.

arbitrary removal and salary reductions. Moreover, most judicial appointments are made by specialist appointing bodies (or judicial service commissions), which recruit and recommend appointments and handle misconduct complaints against appointees.[129]

i. Significance of the new role of the courts

The powers of Anglophone African courts to determine the constitutionality of acts of the legislature and actions of the executive are significant. These judicial powers vis-à-vis the high executive are novel and, given the history of imperial presidentialism, consequential. In each of these instances, the courts sit as watchdogs of the constitutional design, and the democratically elected branches of state fall within the remit of their constitutional authority.

Courts are not only interpreting and applying the constitution in individual cases, but, by holding the legislature and executive to account, the courts are also performing what Ely referred to as a 'representation-reinforcing' role in providing a forum for addressing malfunctions in the democratic process.[130] This role is grounded in the rule of law: the courts are ensuring that temporary elected officials are bound by the supreme, binding and continuing set of norms enshrined in the constitution. Moreover, the courts are also supporting other values of the democratic constitution, such as 'individual freedom, dignity…, formal and substantive equality, and a commitment to the rule of law.'[131] After three decades, this court-enforced constitutionalism remains the prevailing aspect of constitutional design in Anglophone Africa. This thesis investigates how successfully it has been adopted across three Anglophone African states.

ii. Five types of litigation under rights-based democratic constitutions

Under modern African Anglophone democratic constitutions, supremacy clauses establish the constitution as the supreme law and subject all legislation and executive conduct to it.[132] The conduct of the high executive or President may be challenged in court in several different ways which are explicitly provided for to supplement or replace common law review powers. These

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[129] See Nuno Garoupa and Tom Ginsburg 'Guarding the guardians: Judicial councils and judicial independence' (2009) 57(1) *The American Journal of Comparative Law* 103. On judicial appointments, see Oagile Bethuel Key Dingake et al 'Appointment of judges and the threat to judicial independence: Case studies from Botswana, Swaziland, South Africa and Kenya' (2019-2020) 44S *Illinois Univ LJ* 407.

[130] John Hart Ely *Democracy and Distrust: A Theory of Judicial Review* (1980), 103. See also, Rosalind Dixon *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age* (2023) ch 1.

[131] Dixon *Responsive Judicial Review* op cit note 130, 5.

[132] Anglophone African constitutions generally contain a clause to this effect. In the countries of my study, these clauses are found in s 5 of the Malawian Constitution, art 1(6) of the Namibian Constitution and art 5 of the Seychellois Constitution.

constitutional review powers are grouped below into five broad categories, reflecting the constitutional language and issues encountered by the judiciaries in Malawi, Namibia and Seychelles particularly, as well as other judiciaries. The distinctions courts make between these categories are grounded in the specific provisions and powers set out in their respective constitutions:[133]

1. *Fundamental rights litigation*: Litigation relating to breaches of fundamental rights. The constitutions contain specific interpretation provisions relating to fundamental rights and grant wide remedial powers to remedy a breach, including damages.[134]

2. *Constitutional review*: Determinations of the constitutionality of legislation and executive conduct.[135] Although this jurisdiction is usually created by one provision, it can be broken down further into review of legislation and review of executive conduct. This jurisdiction may include review of the constitutionality of conduct of other constitutional institutions. Courts are granted power to declare actions or legislation to be unconstitutional and invalid. If the constitution provides the court with wider remedial powers, it may grant other relief, too.

3. *Constitutional process litigation*: Litigation arising under specific constitutional processes, such as determinations of whether a President is properly elected, political parties properly registered or a State of Emergency properly declared.[136] These processes tend to be of public interest with wide implications. Courts are granted the power to determine whether the constitutional provisions regarding that process have been met, and if not, to declare them unconstitutional and invalid. If the court has wider remedial powers, it may grant other relief, too. A plausible argument could be made that constitutional review and constitutional process litigation are the same, however, courts have tended to treat litigation arising out of

[133] The High Courts' original jurisdiction over civil and criminal proceedings is omitted from this list, as developments since the 1990s in these areas have less bearing on the constitutional judicial-executive relationship. Common law judicial power is included as it directly implicates the relationship.
[134] See Malawian Constitution, 1994 s 46(2-4), Namibian Constitution 1990 arts 5, 25(1-4), Ugandan Constitution art 50, Seychelles Constitution art 46(1),(5). South African Constitution, 1996 ss 38, 39, 172.
[135] See Malawian Constitution, 1994 ss 9, 108(2), Namibian Constitution 1990 arts 64, 79(2), 80(2); Ugandan Constitution, 1995 arts 2, 137; Seychelles Constitution 1993, arts 5, 87, 125(1)(a), 130.
[136] Malawian Constitution, 1994 ss 45, 76(3),76(5), 142(1) (the constitutional provisions specifically call these process reviews 'judicial review'), Ugandan Constitution 1995 arts 86, 104, 255. Seychelles Constitution, art 51. South African Constitution, 1996 s 37(3).

specific process provisions as a constitutional case *sui generis* and often create rules of procedure specifically for these sorts of cases, for example, election petitions.

4. *Constitutionally sourced judicial review*: Supervisory jurisdiction, which is explicitly listed in the constitution under the courts' (usually High Courts) powers.[137] Some African constitutions specifically mention these powers in the constitutional text, thereby elevating judicial review powers from common law, inherent powers of the court to constitutionally entrenched powers. In other countries, judicial review powers also survive through the saved common law. This judicial review applies primarily to administrative decision-making by subordinate courts and tribunals; however, the high executive can be cited as a respondent. Under these supervisory powers, the courts are granted common law remedial powers, which include quashing unlawful conduct and reverting matters to the original decision-maker.

5. *Litigation arising out of the right to fair administrative action*.[138] This is a discrete fundamental right and attracts the remedies of fundamental rights litigation. It is often perceived as incorporating common law judicial review into the fundamental rights framework and supplementing the common law, rather than replacing it.[139] Not all constitutions include an explicit right to fair administrative action.

Some observations can be made from the different forms of cases envisaged by the constitution. The first is that all five forms of litigation facilitate courts reviewing the conduct of the high executive and determining whether its behaviour is constitutional or in violation of a fundamental right. Thus, the courts are deliberately set up in dialogue, and potential conflict, with the other branches of government, in particular, the executive.

A further observation is that constitutional review and constitutional process review focus on remedying unconstitutional use of legislative and executive power and, often on the face of the provisions, do not specifically require 'harm' to an individual litigant for the courts to

[137] See Malawian Constitution, 1994 s 108(1), Seychelles Constitution art 125(1)(c).
[138] Malawian Constitution, 1994 s 43, Namibian Constitution art 18, Ugandan Constitution, 1995 art 42. South African Constitution, 1996 s 33.
[139] Danwood Mzikenge Chirwa 'Liberating Malawi's administrative justice jurisprudence from its common law shackles' (2011) 55(1) *Journal of African Law* 105, 105–127.

declare unconstitutional conduct or legislation to be invalid.[140] Unconstitutional legislation and the unconstitutional use of executive powers can have wide-ranging effects on the population, including resulting in breaches of individual fundamental rights. This wide effect may account for the broader terminology used in constitutional texts in the creation of constitutional review and constitutional process review provisions.[141] However, procedural laws of common law African countries have no processes that recognise bringing suits without showing proof of a substantive interest in the case (standing). This means that some unconstitutional conduct could evade challenge because procedural laws do not facilitate the substantive provisions of the Constitution.

Moreover, courts hearing constitutional review cases often are not granted the same remedial powers as in fundamental rights cases. Having declared conduct or legislation to be unconstitutional, the courts are usually constrained by the doctrine of the separation of powers from correcting the error. The decision or legislation must be remitted to the executive or legislature, respectively, to address the unconstitutionality.

Additionally, there is considerable overlap between the subject matter of these causes of action. Unconstitutional conduct by the executive could also violate the fundamental rights of an individual, giving rise to multiple legal options to challenge the constitutionality of that conduct. For example, if the Minister of Immigration arbitrarily and unlawfully deports a citizen's spouse, that decision could be challenged as a violation of the spouse's right to dignity, equality and family life. The decision could also be impugned on grounds of unconstitutionality for failing to meet basic standards of rationality expected of a member of the executive. It may be challengeable on grounds of irrationality under common law judicial review, and, finally, the statute that empowers the Minister to make the decision may also be impugned if it enabled the Minister to breach the citizen's rights. The courts, being responsive by nature, cannot determine for litigants how they bring their cases, and must work within the constraints of the form of litigation chosen by the parties, even if it is not the 'best' option for vindicating the rights concerned or addressing the executive's conduct.

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[140] This is consistent with supremacy clauses that state that the constitution is supreme and any law or action that contravenes the constitution is to the extent of the contravention invalid. However, some constitutions do require that a litigant have an interest, eg art 130 of the Seychelles Constitution, requires that a person's interest 'is being or is likely to be affected' by the contravention of the Constitution' in order for such a case to be brought. Thus, the provision has a built-in standing requirement.

[141] See eg, s 5 of the Malawian Constitution simply says that 'Any act of Government or any law that is inconsistent with the provisions of this Constitution shall, to the extent of such inconsistency, be invalid.'

Furthermore, not all constitutional review requires the breach of a right. For example, a challenge to the Speaker of the Assembly's exclusion of members of the National Assembly for floor-crossing is actionable as unconstitutional without invoking a fundamental right.

Moreover, constitutional process litigation might ordinarily overlap with constitutional review; however, it is not necessary that it does so. A challenge to the valid election of a member of the National Assembly based on grounds of election irregularities is not a challenge to the constitutionality of executive conduct or legislation, but rather a determination of whether a process stands up to certain constitutional or legislative standards for which the court is given special constitutional jurisdiction.

Finally, a constitutional right to fair administrative action, which is justiciable under fundamental rights litigation, may also be vindicated under common law judicial review procedure. Thus, distinctions between these constitutional causes of action are not always clear-cut.

The categories outlined above aim to illustrate the different aspects of the judicial role as defined in the constitutional provisions of modern Anglophone constitutions. The different types of litigation potentially required new rules of court, processes and procedures, and jurisprudence to define their normative content. As the country discussions of Malawi, Namibia and Seychelles will show, courts and lawyers have often identified these different types of review but have had difficulty in drawing bright lines between approaches to the various types of litigation.

iii. Implementing the new role: a game of strategic borrowing

All but common law judicial review powers were new responsibilities for courts. Modern constitutions granted extensive powers to hold the executive accountable but lacked clarity on standards for determining constitutionality, court procedures and granting remedies. Consequently, courts have had to establish their own substantive and procedural norms to implement these constitutional provisions. These norms were required to establish standards for determining —

1. when rights are violated;

2. the constitutionality of actions and legislation, including the degree of appropriate deference to political actors and whether different levels of deference are justified (for

example, whether the President exercising a head of state function ought to be given less deference than when performing a head of government function, and whether administrative actions attract higher or lower scrutiny than high executive actions);

3. the appropriate remedies to grant, including declarators, injunctions, quashing orders, structural interdicts and damages; and

4. procedural requirements for case initiation, pleadings, standing and justiciability of causes.

In the absence of procedures and substantive law to specify how to bring constitutional cases and how to handle them, lawyers and judges looked to various external sources to inform the practicalities of implementing the new judicial role.

With litigation of fundamental rights, courts borrowed from the burgeoning fundamental rights protections in other domestic legal systems and regional and international human rights protections.[142] In determining whether a right had been breached, courts could look to the terminology of the right itself, the provisions on interpretation and limitation of rights, the preamble and the principles of governance found in the constitutional text. If the court remained in doubt about the content of the right or the justifiability of its limitation, the courts could look to foreign, regional and international interpretations of the same or similar rights for guidance. Similarly, with constitutional review of legislation, courts could analyse the words of the impugned provisions against the wording in the constitution, its underlying principles and interpretive provisions. Again, if textual analysis failed, courts could look to case law in similar countries.

However, courts have had more difficulty with developing standards and norms for determining the constitutionality of executive conduct, a process that is no doubt complicated by each country's own history and the continuing trend of presidential imperialism and executive dominance.

Theoretical scholarship in African constitutionalism is underdeveloped, leaving little to guide judges on how to conceptualise their role and craft their decisions.[143] When there is a

[142] See Christopher McCrudden 'Common law of human rights?: Transnational judicial conversations on constitutional rights.' (2000) 20(4) *Oxford Journal of Legal Studies* 499, 500 and Doreen Lustig & JHH Weiler 'Judicial review in the contemporary world – Retrospective and prospective' (2018) 16 *ICON* 315.
[143] Gebeye's *African Constitutionalism* op cit note 3 is a notable contribution.

lacuna in the law, courts inevitably consider foreign jurisprudence for assistance. However, academic theories of the judicial role that promote judicial approaches suited to developed democracies, such as judicial deference[144] and 'weak-form' judicial review,[145] are less suited to the unique dysfunctions that African judges face and are of limited support to courts developing their constitutional role.[146] Landau describes the newer developing democracies as facing several 'democratic dysfunctions', which are:

> (1) they are more likely to face erosion towards authoritarianism, or in other words are particularly "fragile"; (2) they suffer from problems in political representation, accountability, and capacity that make them function poorly even if they do not lead to democratic breakdown; and (3) they suffer from a general absence of constitutional culture – neither politicians nor the public cares about constitutional values.[147]

The difficulties faced by judges in Africa revolve around determining their role in the face of continued presidentialism and executive dominance, weak accountability institutions and shallow constitutional culture. The reliance on theory and jurisprudence emanating from more developed countries that do not face the same dysfunctions can result in a mismatch of values and principles.

iv. The influence of English law principles of judicial review

Courts with common law roots have tended to borrow norms and principles relating to executive accountability from the English system. English judicial review law evolved to establish grounds for holding executive bodies, particularly administrative bodies, accountable on grounds of legality, rationality and procedural propriety.[148] It also contains procedural rules relating to judicial review particularly, Order 53 of the UK Supreme Court Rules.[149] Prior to independence these norms, principles, precedents and procedures had been exported to the legal systems in Anglophone Africa,[150] where they have remained an influential source for

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[144] See Jeremy Waldron 'The core of the case against judicial review' (2006) 115 *Yale LJ* 1346, 1362.
[145] Mark Tushnet 'The relation between political constitutionalism and weak-form judicial review'(2013) 14 *German LJ* 2249, 2255-56.
[146] See Theunis Roux 'In defence of empirical entanglement: The methodological flaw in Waldron's case against judicial review' in Ron Levy et al (eds) *The Cambridge Handbook of Deliberative Constitutionalism* (2018), 203, and David Landau 'A dynamic theory of judicial role' (2014) 55(5) *Boston College LR* 1501, 1501-1513.
[147] Landau 'Dynamic theory of judicial role' op cit note 146, 1505-6.
[148] As summarised by Lord Diplock in *GCHQ* supra note 111, 410. He also discussed an emerging ground of proportionality.
[149] Order 53 of the Rules of the Supreme Court 1965 (RSC) as amended, is the section of the rules that governs applications for judicial review in English court procedure.
[150] With the exception of South Africa and Namibia which apply South African common law judicial review, see part (v) below.

jurisprudential borrowing.[151] Therefore, it is relevant to understand the development of English law and to assess its ongoing influence on the judicial-executive relationship in the countries in this study.

The English courts' powers of review find their origin in the inherent jurisdiction of the courts to prevent abuse of power by the executive.[152] The principle of parliamentary supremacy places legislative enactments outside of the review of the courts, and thus judicial review is used only for review of the executive and not the legislature.[153]

High executive powers in the UK are exercised by a constitutional institution called 'the Crown' comprised of the monarch advised by the most senior politicians: the Prime Minister, the Privy Council and the Cabinet of ministers.[154] Initially, the Crown had the unrestricted power to repress and oppress. The Crown has broad, inherent powers to rule and to reign without legislative authority. These are known as 'prerogative powers' and have wide application.[155]

Over time, many of the Crown's historical (or original) prerogative powers were transferred to ministers to exercise under legislative enactments. Other new executive powers were conferred upon ministers through acts of Parliament, which stripped away the Crown's prerogatives.[156] However, the Crown still exercises important and extensive powers, including the power to issue 'Orders in Council', which are a form of legislation made without parliamentary scrutiny or approval.[157]

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[151] For example, a search of Africanlii.org revealed reference to the *GCHQ* case (supra note 111) in 13 different African jurisdictions (including Namibia and South Africa) and over 1000 African court cases.
[152] Wade & Forsyth op cit note 112, 27.
[153] Ibid 26. In many European countries the term 'judicial review' refers primarily to review of legislation against legal and constitutional standards. See Mauro Cappelletti *Judicial Review in the Contemporary World* (1971); Lustig & Weiler op cit note 142.
[154] In modern convention, the monarch does not act without the advice of the ministers, although the Crown's legal powers must be exercised by the sovereign in person whether by Order in Council, letters patent or royal warrant. See in this regard Wade & Forsyth op cit note 112, 35 and 689 and *M v Home Office* [1994] 1 AC 377, 395, 408-412.
[155] William Blackstone *Commentaries on the Laws of England 1765-1769* (1765), 239.
[156] In *R v Secretary of State for the Home Department, ex p Fire Brigades Union* [1995] 2 AC 513, 552 Lord Browne-Wilkinson remarked that "[t]he constitutional history of this country is the history of the prerogative powers of the Crown being made subject to the overriding powers of the democratically elected legislature as the sovereign body'.
[157] *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Bancoult (No 2)* [2008] UKHL 61 contains a detailed discussion of Orders in Council and their reviewability. See also Richard Moules 'Judicial review of prerogative Orders in Council' (2009) 68(1) *Cambridge LJ* 14, 14-17.

Being non-statutory discretionary powers, the Crown's prerogative powers were originally viewed as non-justiciable.[158] However, jurisprudence of the early 18th century held that the Crown was subject to the common law and that Crown powers were to be used for societal benefit, not sovereign enrichment.[159] Furthermore, the courts' flexible prerogative writs were used to provide new solutions to persons who sought to redeem their rights against the actions of the high executive.[160] Thus, from the late 17th century to the early 20th century, judicial review became an effective form of legal accountability, alongside political accountability.[161]

In the first half of the 20th century, British society underwent significant transformation necessitating greater executive involvement in governance, leading to the establishment of many new administrative departments to oversee societal reform.[162] The executive branch expanded its role internationally, through negotiating treaties, establishing peace mechanisms, international criminal tribunals, and trade agreements; it expanded internally by safeguarding state secrets and combating espionage and terrorism. The Cabinet became the predominant force in British politics and the role of the Prime Minister became increasingly important.[163] As the Cabinet and Prime Minister gained prominence, courts became more cautious in reviewing executive decisions, developing a policy of deference that circumscribed political decisions as non-justiciable.[164] This period was described as 'the great depression' for the courts, who seemed to have abandoned their role of imposing law upon the government, leading to the overturning of settled case law and limiting their own powers, even when basic rights were affected.[165]

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[158] Dicey described prerogative powers as 'the residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the crown'. Albert Venn Dicey *Introduction to the Study of the Law of the Constitution* 10ed (1959), 282.

[159] *Customs, Subsidies and Impositions* (1607) 12 Co Rep 33, *Estwick v City of London* (1647) Style 42, Joseph Chitty *A Treatise on the Law of the Prerogatives of the Crown and the Relative Duties and Rights of the Subject* (1820, 1968 ed), 4. Blackstone op cit note 158, 237 citing *ex parte Bamesly* (1744) 3 Atk 167, 171 and *Rorke v Dayrell* 4 TR 410. See also, Paul Craig, *UK, EU and Global Administration Law: Foundations and Challenges* (2015), 46-47.

[160] Craig op cit note 159, 56.

[161] Wade & Forsyth op cit note 112, 11.

[162] This is evidenced by the introduction of acts establishing government involvement in the promotion and protection of social welfare and environmental planning. These include, amongst others, the Unemployed Workmen Act 1905, Old Age Pensions Act 1908, National Insurance Act 1911, Unemployment Act 1934, National Health Service Act 1946 and National Insurance Act 1946.

[163] Graham P Thomas *Prime Minister and Cabinet Today* (1998), 2.

[164] Le Sueur et al op cit note 112, 687.

[165] Patrick Devlin 'The Common Law, Public Policy and the Executive' in (1956) 9(1) *Current Legal Problems* 8, 14 and the opinion of Lord Reid in *Ridge v Baldwin* [1964] AC 40, 72. See eg *Liversidge v Anderson* [1942] AC 206.

During this period the courts were even more conservative with regard to reviewing the use of prerogative powers even when human rights and public interest matters were involved.[166] Additionally, the courts began to emphasise the weakness of their democratic credentials and the limitations of the adjudication process in determining complex public policy issues.[167]

Whatever the reason for the backsliding of the judicial role, the effect of the change in judicial attitude was felt across the English system, and in 1950, Allen wrote about how the result rendered it difficult to hold the executive to account for their action:

> By the process of leaving delegated powers solely to administrative discretion, statute after statute in recent years, aided by interpretation of the superior courts, and especially the House of Lords, has restrained the courts from reviewing anything which a Minister in his discretion may deem necessary or desirable. More and more ministerial determinations are adjudged to be purely administrative in character and therefore beyond the scrutiny of the courts. In our own time we have seen the tried and ancient touchstone of *ultra vires* virtually destroyed so far as executive acts are concerned.[168]

However, in the 1960s, the judicial attitude shifted and the courts expanded judicial review dramatically, recommitting to restraining executive actions under the law.[169] The grounds of review of legality, rationality and procedural propriety were reinforced and expanded and applied broadly to administrative bodies and bodies performing public functions.[170] The new judicial attitude showed a widespread 'conceptual and theoretical discontinuity' with the previous period of obsequious deference.[171] By 1986, Donaldson MR stated that the courts' prerogative writs had evolved to 'create[] a new relationship between the courts and those who derive their authority from the public law, one of partnership based on a common aim, namely the maintenance of the highest standards of public administration.'[172]

Despite these developments, the prerogative powers remained outside of the scope of the courts' powers of review until 1984. The process of widening judicial review to include the prerogative began before 1984[173] but it was not until the watershed case of *Council for Civil*

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[166] See eg *Greene v Secretary of State for Home Affairs* [1942] AC 284, *Duncan v Cammell, Laird & Co* (1942) AC 624, *Chandler v Director of Public Prosecutions* [1964] AC 763.
[167] *Wednesbury* supra note 111, 228.
[168] CK Allen 'Forward' in M A Sieghart *Government by Decree* (1950), xiii.
[169] TT Arvind & Lindsay Stirton 'The curious origins of judicial review' 2017 (133) *Law Quarterly Review* 91at 21. Of particular importance are the cases *Ridge v Baldwin* supra note 165, *Padfield v Minister of Agriculture* [1968] AC 997 and *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147.
[170] *R v Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] QB 815.
[171] Arvind & Stirton op cit note 169, 2.
[172] *R v Lancashire CC ex p Huddleston* [1986] 2 All ER 941, 945.
[173] See eg *Burmah Oil Company Ltd v Lord Advocate* [1965] AC 75 and *Laker Airways Ltd v Department of Trade* [1977] 2 All ER 182 CA.

Service Unions v Minister for the Civil Service[174] (the *GCHQ* case) that the House of Lords was explicit in accepting that prerogative powers may be judicially reviewed. However, in these circumstances, the court did not interfere with the decision in question since it had been taken on the grounds of national security. Thus, the House of Lords opened the door for judicial review of the use of the prerogative but retained a threshold question of the justiciability – whether the matter was suitable for judicial determination giving respectful deference to sensitive political issues.

Review of the prerogative powers became more widespread, including review of Orders in Council.[175] Even after it was found that prerogatives are reviewable, some have argued that the courts still show signs of an unwillingness to quash decisions of the high executive.[176] Cases such as *Bancoult II* and *GCHQ* have been described as a 'pyrrhic victory' for 'those who regard executive power as constrained by the rule of law.'[177] However, the Brexit prorogation case of *Miller II* is an exemplar of how far judicial review has expanded.[178] The Supreme Court reviewed and indeed overturned the advice of the Prime Minister to the Queen to prorogue Parliament in an Order in Council. The court held that 'the Order in Council which, being founded on unlawful advice, was likewise unlawful, null and of no effect and should be quashed.'[179] In her introduction to the judgment, Lady Hale acknowledged the flexibility of the legal tool of judicial review 'to enable us to reason to a solution.'[180]

The boundaries of justiciability have been pushed back over the years so that they exclude only highly discretionary decisions and 'even here the walls may be pierced by a sufficiently skilful argument that the government has acted unlawfully'.[181] Lord Cooke has described the courts' approach to judicial review of prerogative powers as a sliding scale of levels of scrutiny based on the subject matter.[182] In highly political questions, the courts grant greater deference to the executive, exercising 'light touch' review. Whereas, if the case touches on human rights

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[174] *GCHQ* supra note 111.
[175] *Bancoult II* supra note 157, [35].
[176] M Elliot & A Perreau-Saussine 'Pyrrhic public law: *Bancoult* and the sources, status and content of common law limitations on prerogative power' 2009 *PL* 697, 705-6.
[177] Ibid 705-6.
[178] *R (Miller) v the Prime Minister, Cherry and Ors v Advocate General for Scotland* [2019] UKSC 41.
[179] Ibid [69].
[180] Ibid [1].
[181] Paul Daly 'Executive power in the United Kingdom' (2021) Ottawa Faculty of Law Working Paper No. 2021-20 available at https://ssrn.com/abstract=3906218 accessed on 10 Feb 2023, 14.
[182] *Daly* supra note 111, [32].

issues, the courts are more willing to probe into the decision, applying the proportionality test, or 'anxious' or 'heightened' scrutiny, and requiring greater justification for the decision.[183]

Thus, in England, since the middle of the 20th century, the scope of judicial review and judicial attitude shifted significantly from the first half of the century. A new role for judges has developed within the structure of UK constitutionalism, which ensures that 'the exercise of governmental power must be controlled in order that it should not be destructive of the very values which it was intended to promote.'[184]

The UK courts' current greater role, which is both protective of the individual and dialogically engaging with the government, is an important part of the British constitutional system, upholding the rule of law by creating 'a normative benchmark for the evaluation of government action.'[185] Judicial review is also a manner of implementing the principles of UK constitutionalism and imposing the rule of law 'by ensuring that public officials and authorities act in accordance with the law.'[186]

English judicial review remains an influential 'cousin' to present-day law concerning the relationship between the executive and the judiciary in most Anglophone African countries. However, borrowing from English law should be carefully done. Judicial review in the UK has gone through both regression and transformation that entailed a fundamental shift of approach toward providing more protection against excesses of the executive and administration.[187] However, the judges and lawyers in the mid-1950s, at the time of colonial independence for most Anglophone African countries, had been trained in a narrow form of judicial review, limited primarily to policing the administration and avoiding sensitive 'non-reviewable' and 'non-justiciable' areas of public law. It was this narrower model of English judicial review that was exported to British colonies and was a likely contributor to the ineffectiveness of post-independence courts in countering authoritarianism.

English law of judicial review still holds several valuable lessons for African countries. The English approach of a sliding scale of judicial deference according to the political intensity

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[183] *R v Lord Saville of Newdigate, ex parte A* [2000] 1 WLR 1855, [37], see full discussion in Le Sueur et al op cit note 112, 724.
[184] Lord Steyn 'The weakest and least dangerous department of government' 1997 *PL* 84, 87-8. Young described this development as the 'dawning of the day of the judge,' Hugo Young 'The Dawning of the Age of the Judge' *The Guardian Newspaper* 19 December 1996.
[185] Jo Eric Khushal Murkens 'The quest for constitutionalism in UK public law discourse' (2009) 29 *Oxford Journal of Legal Studies* 427, 454-5 (footnotes omitted).
[186] Baroness Hale 'The Changing Legal Landscape' (2019) 19(4) *Legal Information Management* 217, 217.
[187] Arvind & Stirton op cit note 169, 92.

of the question could offer a valuable approach for African courts establishing norms for the high executive and administrative conduct within the framework of judicial review.[188] Moreover, the inherent flexibility of judicial review, as well as its ability to evolve over 400 years to respond to the needs of society to hold the executive accountable, even in the area of prerogative powers, can be a valuable source of inspiration for the development of executive review in modern Anglophone African states.

In the UK, courts engaging in judicial review interpret and give meaning to the terms used in statutory provisions and the underlying principles of the law in question. In doing so, the courts fill gaps in the law and engage in a dialogue with both the legislative branch and the executive or administrative entity about the appropriate use of powers.[189]

Related to this dialogic role, judicial review plays a role in ensuring accountability and transparency in the use of power. Litigants are empowered to demand rationalisation for a wide range of executive and legislative choices, which enables the general public and the affected litigants to understand the polycentric determinations at play.[190]

Lustig and Weiler further point to the role that judicial review can play in politics when used by organised minorities to sustain and restore their influence in domestic politics.[191] Here, the courts can potentially function as a platform for opposition politics to hold governments accountable. All of these functions of judicial review are part of the separation of powers role that is given to the courts in ensuring that public power bearers can be held accountable and the rule of law respected.

As a result of the UK courts' history of cautious deference in the mid-20th century, and the more recent expansion of judicial review, UK jurisprudence contains both appropriate and inappropriate precedent relating to the role of the courts in response to executive conduct. Before relying on English jurisprudence, African judges should carefully consider the

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[188] See the approach in *Daly* supra note 111.
[189] Craig op cit note 159, 63.
[190] Cf Lon L Fuller 'The Forms and limits of adjudication' 92 *Harvard LR* 353. Fuller argued that polycentric determinations are not suitable for adjudication. This notwithstanding, the judicial review *process* can enable litigants to understand the factors that affected executive decisions and determinations.
[191] Lustig & Weiler op cit note 142, 320 fn 87 see also Martin M. Shapiro, *Courts: A Comparative and Political Analysis* (1981); Martin Shapiro 'The Success of judicial review in constitutional dialogues in comparative perspective' in Sally J Kenney, William M Reisinger, & John C Reitz (eds.) *Constitutional Dialogues in Comparative Perspective* (1999); Jon Elster 'Forces and mechanisms in constitution making process' (1995) 45 *Duke LJ* 364; and Tom Ginsburg *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (2003).

persuasive value of each precedent to determine whether it appropriately reflects the modern constitutional role of courts in Africa.

Several other factors need to be considered in borrowing precedent from the English law of judicial review to apply to executive conduct in Africa. First, the UK Supreme Court's rules and procedures, including Order 53 of the RSC were introduced in many Anglophone African countries. However, barriers to review like leave procedures, strict time limits and standing requirements may not suit African constitutional democracies, especially for constitutional review of executive conduct and constitutional process review. These restrictions can stifle the courts' new role under modern constitutions. For example, there may be no individuals with clear standing to challenge unconstitutional conduct. Additionally, short time limits for bringing the action or the requirement of leave to review may not be prudent in the context of African states with developing civil societies and lacking alternative institutions for accountability.

The second consideration is that the underlying principles of judicial review were developed within the context of parliamentary sovereignty, not constitutional supremacy. Parliament is the primary means of executive oversight in the UK system and it plays a crucial role in holding the executive accountable through scrutinizing bills, ministerial accountability, Question Time and Select Committee reports.[192] Although the emergence of political parties has weakened this parliamentary oversight of the executive by diluting the opposition's opportunity to challenge and defeat the use of executive power,[193] these forums facilitate discussions on public interest and allow the government to explain its actions and policies to voters.[194] Moreover, the high executive is drawn from the Houses of Parliament, and if the Prime Minister loses majority support in the House of Commons, it is customary for him or her and the Cabinet to resign, allowing other parties a chance to form a majority. Parliament can criticise government behaviour via censure motions.[195] In the light of the role played by Parliament, British administrative law and constitutional principles developed in a way that places broad powers and trust in the state administration and facilitates their exercise of

[192] For detailed information on the work of the UK Parliament, see its website https://www.parliament.uk/.
[193] Anthony Staddon 'Holding the executive to account? The accountability function of the UK Parliament.' *The Economist* 30 June 2007.
[194] Ministers owe a duty to take the blame for any miscalculations or failings within their ministry, often with resignation as an expected sanction. See in this regard SE Finer, 'The individual responsibility of Ministers' (1956) 34 *Public Administration* 377.
[195] The importance of this political accountability was stressed in the opinion of Lady Hale in *Miller II* supra note 178.

power.[196] Historically, Parliaments in Africa have not successfully placed political limitations on the use of executive power or held imperial presidents to account for their use of power.

In most Anglophone African countries, Presidents have direct electoral mandates and are not elected through parliamentary elections. They are also not accountable in the same way to the Parliament as the English executive. Modern constitutions specifically mandate the courts to undertake a more active role in reviewing conduct of the high executive and the administration, even during their political mandate as a counterbalance to the President's greater democratic mandate. This should affect the way that an African judiciary perceives its role and the limits of its permissible intervention, which may require a reconsideration of the norms and principles underlying the adopted UK judicial review jurisprudence.[197]

Many African courts continue to rely on UK judicial review jurisprudence to develop their constitutional role, which can be both helpful or harmful in the development of the new role given to courts under modern constitutions. Malawi and Seychelles are two such jurisdictions and their experiences will be considered in detail in Chapters Three and Five, respectively.

v. Namibia and South Africa as anomalies

Namibia and South Africa do not fit neatly into the above discussion of constitutionalism in Africa and the rise of the imperial president. South Africa, which was then a dominion of the UK, seized South-West Africa (later Namibia) from Germany during the First World War and occupied it until 1990, effectively colonising it and attempting, on numerous occasions, to annex it into South Africa's territory. This relationship will be discussed in greater detail in Chapter Four. For the present purposes, it is worth noting the development of democratic constitutionalism in these two countries is very different from the experience of other African countries.

South Africa had a parliamentary system prior to 1993 which it imposed on Namibia along with its oppressive and authoritarian apartheid system. The South African legal system was built on Roman-Dutch law with a partial adoption of English laws. It was within this hybrid system that a mechanism of common law judicial review was developed, which is only partially influenced by English concepts.[198] Judicial review in the South African system is also built on

[196] WHB Dean 'Our administrative law – A dismal science?' (1986) 2 *SAJHR* 164, 164.
[197] David Landau 'Chapter 2: Institutional failure and intertemporal theories of judicial role in the global south' in David Bilchitz & David Landau (eds) *The Evolution of the Separation of Powers* (2018) 31-56.
[198] Pretorius op cit note 123, 132-133.

the inherent powers of the court but does not have specific prerogative writs. Procedurally, it was influenced by Order 53 of the UK Supreme Court Rules, which is reflected in Rule 53 of the South African High Court Rules.

Both Namibia and South Africa adopted a right to fair administrative action that has supplemented, but not completely replaced, common law review. Moreover, since 1990, both countries have developed standards and procedures for handling constitutional review of executive actions. In South Africa, the high executive is held to a 'rationality' standard, which is a lighter touch scrutiny level than the reasonableness, legality and procedural propriety standards of the common law and the Promotion of Administrative Justice Act, which apply to administrative acts.[199] The South African jurisprudence presents a principled approach to developing a 'constitutional baseline' for executive conduct through the requirement of rationality review of executive actions.[200] The standard of 'rationality review' has evolved over time to also incorporate a duty to give reasons and even procedural fairness.[201] Despite obtaining its new constitution prior to South Africa, Namibia has been influenced by the developments of standards of common law review and constitutional review in South Africa.

Therefore, South Africa and Namibia are outliers in African constitutional history for two reasons. The first is their different political history, which does not track the rise of autocratic imperial presidency from the 1970s to the 1990s. The apartheid regime was also authoritarian, oppressive and domineering, however, it emphasised rule by law within a distinctly legalistic parliamentary system. Secondly, Namibian and South African judicial review and constitutional review jurisprudence is not as closely tethered to English common law judicial review, although there are notable similarities.

Since adopting new constitutions in the 1990s until 1 January 2024, both Namibia and South Africa were dominated by one political party – SWAPO and the ANC, respectively. In

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[199] Act 3 of 2000. See *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 90 (rationality review as a minimum threshold requirement); *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC); *Judicial Service Commission v The Cape Bar Council* 2013 (1) SA 170 (SCA).

[200] Alistair Price 'The content and justification of rationality review' (2010) 25 *SAPL* 347, see also Cora Hoexter 'The principle of legality in South African administrative law' (2004) 3 *Macquarie LJ* 165; Theunis Roux 'Principle and pragmatism on the Constitutional Court of South Africa' (2009) 7 *ICON* 106; Sandile Ngcobo 'Sustaining public confidence in the judiciary: An essential condition for realising the judicial role (2011) 128 *SALJ* 5; Cora Hoexter 'The rule of law and the principle of legality in administrative law today' in Marita Carnelley & Shannon Hoctor (eds*) Law, Order and Liberty: Essays in Honour of Tony Mathews* (2011) 55; Hugh Corder 'Without deference, with respect: A response to Justice O'Regan' (2004) 121 *SALJ* 438.

[201] See Lauren Kohn 'The burgeoning constitutional requirement of rationality & the separation of powers: Has rationality review gone too far?' (2013) 130 *SALJ* 810.

the past 30 years, both countries have experienced struggles with executive dominance, personalised politics and even imperial presidency.[202] The earlier discussions regarding constitutionalism and persisting executive dominance therefore apply equally to these jurisdictions despite their differing histories of autocracy from the 1960s. The Namibian experience is discussed in detail in Chapter Four.

V. Conclusion

This chapter has discussed the greater role that is given to judiciaries in Africa under modern constitutions, which is directly related to constitutional design intent on diluting pre-1990s executive dominance. It has also discussed the continuing executive dominance that is seen in many African countries and the difficulties that the legislature and independent constitutional institutions have faced in holding the high executive to account for its use of power.

Studies suggest that post-1990s African courts can, and often do, fulfil their desired role in protecting democracy from backsliding.[203] Our assumption is that litigation, including cases concerning fundamental rights and constitutional review of executive conduct, can protect citizens against executive abuse and enable the government actors to understand the legal limits of their powers.[204] However, it is also noted that they can also be 'an instrument of oppression' and a 'defender of the status quo'.[205] Additionally, judges may still avoid direct conflict with political powers, particularly the high executive.[206]

In the chapters that follow, the courts in Malawi, Namibia and Seychelles are scrutinised to see how they have approached their new constitutional role, and how they have approached the various forms of cases that the constitution allocates to them. The focus of our enquiry is whether there is a developing coherence in the jurisprudence of each jurisdiction.

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[202] Particularly during Jacob Zuma's presidential term. For Namibia, see Hage G Geingob 'Drafting of Namibia's Constitution' in Anton Bösl, Nico Horn & André du Pisani (eds) *Constitutional Democracy in Namibia – A Critical Analysis After Two Decades* (2010) 83, 105-6 and Maximilian Weylandt 'The 2014 National Assembly and presidential elections in Namibia' (2015) 38 *Electoral Studies* 126, 127.

[203] Samuel Issacharoff 'Constitutional courts and democratic hedging' (2011) 99 *The Georgetown LJ* 961, 9-11, Rosalind Dixon & David Landau 'Transnational constitutionalism and a limited doctrine of unconstitutional constitutional amendment' (2015) 13 *ICON* 606, 612-13.

[204] Gabrielle Appleby & Anna Olijnyk 'Executive policy development and constitutional norms: Practice and perceptions' (2020) 18(4) *ICON* 1136,1140.

[205] Bertus de Villiers 'Breathing life into the constitution: The transformative role of courts to give a unique identity to a constitution' (2023) 9 (1) *Constitutional Review* 109, 111. See also David Landau & Rosalind Dixon 'Abusive Judicial Review: Courts Against Democracy' (2020) 53 *UC Davis LR* 1313.

[206] Issacharoff *Fragile Democracies* op cit note 69, 241.

Of course, the passage of time changes the role of courts as well.[207] Issacharoff notes that democratic institutions rarely mature together or quickly, and African judiciaries have had a relatively short period in which to mature.[208] Thus, we expect that even after 30 years, the courts' jurisprudence is still maturing and evolving.

In 1985 Chaskalson said of South African administrative law:

> Our law, …, is at a crossroads. The path which is now taken will determine whether the administrative process will be opened up to public scrutiny and judicial control, or whether it will remain secretive and in many respects beyond the control of the courts.... [T]he 'timorous view of the supervisory functions of the court' should not prevail.... [O]ur law can be developed to provide the protection which is needed against the abuse of power by the executive authorities. The question is: will this path be followed?[209]

This thesis now shifts to examine closely the developing judicial-executive relationship in Malawi, Namibia and Seychelles under their modern constitutions to see which paths they have followed, and what comparative lessons may be learned from their journeys.

[207] Issacharoff *Fragile Democracies* op cit note 69, 243.
[208] Samuel Issacharoff 'The corruption of popular sovereignty' (2020) 18 *ICON* 1109, 1112.
[209] Arthur Chaskalson 'Legal control of the administrative process' (1985) 102 *SALJ* 419, 433. Lord Reid coined the phrase 'the timorous view of the supervisory functions of the court' in the UK case of *Anisminic* supra note 169.

CHAPTER THREE
THE COURTS AS AN ACCOUNTABILITY MECHANISM FOR EXECUTIVE POWER IN MALAWI

I. Introduction – The courts and the executive in Malawi

From 1964 to 1994, Hastings Kamuzu Banda, the executive President-for-life of Malawi, dominated the other branches of state. Despite the introduction of common law judicial review during the pre-Banda colonial period, the judiciary proved ineffective in holding the executive accountable.[1] The 1994 Constitution[2] introduced 'open, democratic and accountable government' in Malawi where all legal and political authority is exercised 'in accordance with this Constitution solely to serve and protect' Malawian citizens.[3] However, 'personified notions of power' and 'neopatrimonialism' persist despite constitutional safeguards.[4]

Under the transformative agenda of the 1994 Constitution, the role of the judiciary has been significantly expanded. Over the last 30 years, the Malawian courts have been asked to play an increasingly more important part in holding the high executive accountable and protecting the democracy. A prime example of this is the 2019 election case in which the courts overturned the election results for illegalities committed in the electoral process.[5] The case was dubbed 'without question the most consequential judgment delivered since 1994'[6] and simultaneously affirmed the independence of the judiciary and endorsed the constitutional principle of limited

[1] Matembo S Nzunda, 'The quickening of judicial control of administrative action in Malawi 1992-1994' in Kings M Phiri & Kenneth R Ross (eds) *Democratization in Malawi* (2020) 314.
[2] Hereafter the '1994 Constitution' or 'Constitution of Malawi'.
[3] 1994 Constitution, preamble and s 11.
[4] Harri Englund 'Winning elections, losing legitimacy – Multipartyism & the neopatrimonial state in Malawi' in Michael Cowen & Liisa Laakso (eds) *Multiparty Elections in Africa* (2002), 172-186.
[5] *Chilima and Another v Mutharika and Another* [2020] MWHC 2 and *Mutharika & Anor v Chilima & Ano*r. [2020] MWSC 1.
[6] Danwood Mzikenge Chirwa 'Review article: Constitutions without constitutionalism, government without governance: Critique and hope for Malawi' (2022) 48 (6) *Journal of Southern African Studies* 1119, 1120.

and accountable use of public power.[7] Moreover, it was a strong recognition of the requirement of constitutional legality and rejection of state impunity for unconstitutional behaviour.[8]

In the years since the adoption of the Constitution, the Malawian jurisprudence is not always consistent and still speaks with an English accent, relying extensively on English law rules and procedures for judicial review even in determining cases relating to the enforcement of the Constitution and the acts of the executive. However, the jurisprudence reveals courts that are beginning to find their own voice.[9]

In this chapter, the relationship between the courts and the executive in Malawi will be considered through its pre-colonial, colonial and authoritarian periods of history. Next, the chapter considers the relevant provisions in the 1994 Constitution and the development of constitutional review of executive acts in the thirty years since the adoption of the constitution. In the last part of this chapter, it identifies areas of confusion and will briefly considers ways to strengthen the coherence of this area of Malawian law.

II. Historical overview – Governance in Malawi from pre-colonial to 1994

(a) Pre-colonial governance in Malawi

Prior to colonisation, Malawi was inhabited by indigenous populations living in semi-permanent, settled groups with their own social and political structures.[10] These societies varied in their arrangements but typically featured centralized governance and traditional norms.[11] Village groups experienced decentralised decision-making, local autonomy, and community-level governance involving chiefs, elders and regional rulers. Hereditary traditional leaders were responsible for settling disputes and furthering the community's social and political interests.[12] A chief's power depended on their charisma and ability to provide military

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[7] Kenneth R Ross, Asiyati Lorraine Chiweza & Wapulumuka O Mulwafu 'Introduction: A pivotal moment for governance in Malawi' in Kenneth R. Ross, Asiyati Lorraine Chiweza & Wapulumuka O Mulwafu (eds) *Beyond Impunity: New Directions for Governance in Malawi* (2022), 25.

[8] Garton S Kamchedzera 'Impunity versus constitutional legality in Malawi's 2019-20 Presidential Election Case' in Kenneth R Ross, et al *Beyond Impunity: New Directions for Governance in Malawi* (2022), 134.

[9] See Danwood Mzikenge Chirwa 'Liberating Malawi's administrative justice jurisprudence from its common law shackles' (2011) 5(1) *Journal of African Law* 105.

[10] Societies moved from place to place according to the availability of natural resources, to escape invading people groups and to seek shelter with friendly allies. Kings M Phiri 'Cultural and political change in the pre-colonial history of Malawi' (1977) 30(2) *The Society of Malawi Journal* 6, 6-7, John McCracken *Politics and Christianity in Malawi, 1875-1940: The Impact of the Livingstonia Mission in the Northern Province* 3ed (2000) 30-32.

[11] Mwiza Jo Nkhata *Rethinking Governance and Constitutionalism in Africa: The Relevance and Viability of Social Trust-Based Governance and Constitutionalism in Malawi* (LLD Thesis, University of Pretoria, 2010), 96.

[12] FE Kanyongolo 'Courts, elections and democracy: The role of the judiciary' in Martin Ott et al (eds) *The power of the vote: Malawi's 2004 parliamentary and presidential elections* (2006), 197.

protection and patronage, with communities often seeking leaders known for their generosity, wisdom, and impartial justice. [13]

Leadership was based on social trust and community consultation, which was essential for a chief's legitimacy and succession.[14] Tribes could overthrow cruel chiefs, thus, Nkonjera wrote in 1911, that contrary to popular belief, 'despotism [is]… foreign to the spirit of Bantu institutions.'[15] The British colonial governance that was later introduced relied on force rather than social trust, which changed Malawi's governance structures permanently.[16]

(b) Colonial governance in Malawi

The first European interests in Malawi came from Scottish missionaries and the establishment of foreign-owned commercial enterprises. The largest commercial enterprise was the African Lakes Company (the Company). Established in 1878, its proprietors claimed title to large tracts of land in the region.[17] Cecil John Rhodes' well-funded British South Africa Company took over the African Lakes Company and paid for the establishment of a British administration in 1893, named the British Central Africa Protectorate.[18] A 'protectorate' was an expedient and ambiguous invention of colonialism that enabled the British to assume jurisdictional control of an area without full colonial settlement. The British offered legal and military 'protection' to its own citizens living there and extended that protection to the indigenous people in return for their cooperation and tribute.[19] The territory was split in two with the Company ruling one part and the other part falling under the Protectorate administered directly by the British Foreign Office.[20] Harry Johnson, the Administrator of the Company, as well as the Commissioner and Consul-General of Nyasaland, was appointed with general administrative power over the whole region and had control of both the British and the Company's armed forces.[21]

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[13] Joey Power *Political Culture and Nationalism in Malawi: Building Kwacha* (2012), 12, Andrew Nkonjera 'History of the Kamanga tribe of Lake Nyasa: A native account' (1911) 10(39) *Journal of the Royal African Society* 331, 333-338.
[14] Nkonjera op cit note 13, 335-338. See also Owen JM Kalinga 'The British and the Kyungus: A study of the changing status of the Ngonde rulers during the period 1891-1933' (1978) 9(3) *Journal of Historical Society of Nigeria* 125, 126.
[15] Nkonjera op cit note 13, 335.
[16] See John McCracken *A History of Malawi: 1859-1966* (2012), 58.
[17] Ibid 49-50.
[18] Ibid 54.
[19] Lauren Benton & Adam Clulow 'Introduction: the long strange history of protection' in Lauren Benton, Adam Clulow & Bain Attwood (eds) *Protection and Empire: A Global History* (2017), 1-11.
[20] McCracken (2012) op cit note 16, 57.
[21] Ibid.

European settlers gained large tracts of land through dubious land transactions from African chiefs and headmen through the coercive powers of the Consul-General, who, in the process, claimed all residual land 'that was not approved for settler acquisition' for the Crown, 'by purchase, concession or forfeiture.'[22]

Johnson exhibited brutal military tactics against the indigenous tribes to ensure that he gained control of the territory.[23] Villages that resisted were burnt; men, women and children were indiscriminately bayoneted, shot or hanged, their villages looted and their livestock collared.[24] The effect of these severe actions was widespread and the destruction of grain and cattle led to severe food shortages in some areas.[25] The result of the British campaign of terror would be eagerly recalled to memory 80 years later during the calls for independence and freedom.[26]

In theory, British executive power in a protectorate was limited in nature. The authority of the Commissioner was supposed to extend to 'the management of external relations and the affairs of British subjects' only, leaving the Africans their internal sovereignty.[27] In practice, the Commissioner's powers were largely unchecked and were at all times enforced by the 'coercive power of the soldier'.[28]

In 1902, an Order in Council for British Central Africa came into effect that was in many ways a constitutional document.[29] It introduced a 'Court of Record' with full jurisdiction over all persons in the Protectorate.[30] The enactment of ordinances (legislative power) was granted to the Commissioner subject to the instructions of the Secretary of State for the Colonies in London, and subject to the requirement to 'respect existing native laws and customs except so far as the same may be opposed to justice or morality.'[31] The new court would apply English

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[22] Clement Ng'ong'ola 'The state, settlers, and indigenes in the evolution of land law and policy in colonial Malawi' (1990) 23(1) *International Journal of African Historical Studies* 27, 28.
[23] McCracken (2012) op cit note 16, 57.
[24] Ibid 63-65.
[25] Ibid 67.
[26] Ibid.
[27] Ng'ong'ola (1990) op cit note 22, 29.
[28] McCracken (2012) op cit note 16, 66-73. This was a prevailing idea. The new governor, George Smith, was reported as saying in 1915 'Nothing… would better benefit the Northern Ngoni "than to shoot a few down, burn their villages, deport their so-called chiefs and confiscate their cattle,"' 73.
[29] Msaiŵale Chigaŵa 'The fundamental values of the Republic of Malaŵi Constitution of 1994' *Law Commission Constitutional Review Conference, 2006* Capital Hotel, Lilongwe, 28-31 March 2006, 2; Nkatha (2010) op cit note 11, 99.
[30] British Central African Order 1902, arts14-15.
[31] Ibid art 12 (3).

law to all cases involving Europeans.[32] Cases involving only Africans could be resolved by the application of customary law, however, African judicial institutions were not formally recognised.[33] From the earliest cases, it was apparent that the new court would support the government over the interests of the native population.[34]

The Nyasaland Order in Council, 1907, changed the British Central African Protectorate into the Nyasaland Protectorate and remained intact until 1961. It renamed the 'Commissioner' as a 'Governor and Commander in Chief,' and created an Executive Council and a Legislative Council.[35] The Governor was appointed by the monarch, and was empowered to 'do and execute all things that belong to his said office, according to the tenor of any Orders in Council relating to the protectorate and of such Commission as may be issued to him' by the Crown.[36]

The Legislative Council consisted of the Governor and at least two other persons he selected. Thus, the Governor himself controlled the executive and the legislative branches of government with little accountability to any other entity. Legal dispute resolution in the Protectorate remained within the scope of the judiciary, which was separate from the executive and staffed by foreign judges appointed by the Foreign Office.

The Protectorate was hybrid in nature: it was subordinate to the imperial government but it also enjoyed semi-autonomy under the Governor's rule. After World War I, the Colonial Office took a more active role in initiating policy, however, Governors retained concentrated powers to pursue their own actions without attracting chastisement from London.[37] Governmental power was used to ensure that the exploitative aims of the colony were safeguarded.[38] During this period, judicial review would be the only mechanism for individuals to review executive conduct, and research shows that it was seldom invoked.[39]

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[32] Nkhata (2010) op cit note 11, 99.
[33] Ibid 100.
[34] Ng'ong'ola (1990) op cit note 22, 30 citing *Cox v The African Lakes Corporation*; and *Pettitt v. The African Lakes Corporation*, PRO FO 2/471, 29 July 1901. See also HF Morris and James S Read *Indirect Rule and the Search for Justice* (1972) 48-49.
[35] Colin Baker 'A hundred years ago: The Nyasaland Order in Council, 1907' (2007) 60(2) *The Society of Malawi Journal* 1, 2.
[36] Nyasaland Order in Council, 1907, art 5.
[37] Chigawa op cit note 29, 70.
[38] FE Kanyongolo 'The limits of liberal democratic constitutionalism in Malawi' in Kings M Phiri and Kenneth R Ross (eds) *Democratization in Malawi* (1998) 353, 390.
[39] Nzunda op cit note 1, 314.

In 1953, Nyasaland was joined with Southern and Northern Rhodesia to establish the Federation of Rhodesia and Nyasaland.[40] The creation of the Federation was intensely opposed by the African population,[41] and led to the growth in nationalist movements that culminated in a militant campaign for independence between 1959 and 1964.[42] Riots in 1958 led to a declaration of a countrywide State of Emergency, the detention of nationalist leaders and the banning of certain political movements.[43] This eventually resulted in the dissolution of the Federation and Malawi was given self-governance.[44]

(c) The impact of the colonial experience in Malawi

The governance framework during colonial rule was 'non-participatory by design'[45] – the colonial government not only made policy, but it also implemented it with no constitutional principles that limited the power of government or guaranteed individual rights and liberties.[46] Moreover, the colonial system subjugated indigenous governance structures and implemented a system designed to 'entrench colonial hegemony'.[47] Hatchard, Ndulo and Slinn describe the impact of colonial rule on traditional leadership as follows:

> As colonial rulers sought expedient collaborators, they distorted or destroyed pre-colonial governance systems by creating or encouraging arrangements such as indirect rule, which made local chiefs more despotic and created new ones (warrant chiefs) where none had previously existed.[48]

Moreover, colonial rule was built on centralised executive power, exploitation and political exclusion of most of the population couched as 'benevolent despotism.'[49] It modelled the collapse of the distinction between head of state and head of government powers in one individual office, resulting in a Governor who was empowered to pursue exploitative and

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[40] Federation of Rhodesia and Nyasaland (Constitution) Order in Council, 1953, Kanyongolo (1998) op cit note 38, 391.
[41] Brian Simpson 'The Devlin Commission (1959): Colonialism, Emergencies, and the Rule of Law' (2002) 22(1) *Oxford Journal of Legal Studies* 17, 19.
[42] Kanyongolo (1998) op cit note 38, 392-3.
[43] Nkhata (2010) op cit note 11, 102. Redson Kapindu 'Malawi : Legal system and Research Resources' GlobaLex Jan 2019 https://www.nyulawglobal.org/globalex/Malawi1.html accessed 13 Sept 2023. See also Ng'ong'ola op cit note 22, 43.
[44] Mwiza Jo Nkhata 'The struggle towards constitutionalism in Malawi' in Morris Kiwinda Mbondenyi, Thuto Moratuoa Hlalele and Tom O Ojienda (eds) *Constitutionalism and Democratic Governance in Africa: Contemporary Perspectives from Sub-Saharan Africa* (2013), 229.
[45] Nkhata (2010) op cit note 11, 114.
[46] John Hatchard, Muna Ndulo & Peter Slinn *Comparative constitutionalism and good governance in the Commonwealth: An Eastern and Southern African perspective* (2004), 14.
[47] Nkhata (2010) op cit note 11, 113.
[48] Hatchard et al op cit note 46, 14.
[49] Chifundo Jairus Kachale *Judicial (in)activism in Malawi?: A Critical Analysis of the Impact of Constitutional Jurisprudence on Constitutionalism and the Rule of Law* (PhD Thesis, SOAS University of London, 2012), 97.

extractive aims. Furthermore, British laws were applied by British judges in a setting that lacked a commitment to the protection of rights or the control of executive power.

Additionally, the colonial system created a class of 'elite' Africans, who were educated in Britain, well-schooled in politics and had knowledge of a legal tradition of domination through the imposition of law.[50] This elite would become the post-independence body of politicians, judges and lawyers.

The colonial legal foundations would influence the next constitutional orders throughout the Banda regime and leave a mark on constitutional democracy. Nkhata argues that at the time of independence, 'the mechanisms of state retained their colonial form and, in some cases, even consolidated their oppressive tendencies.'[51]

(d) Independence Constitution

In 1964, Nyasaland was given its independence and became 'Malawi.' The 1964 Independence Constitution was 'largely a compromise between the departing colonialists and the nationalist leaders of the day' that was offered to Malawi 'as a fait accompli.'[52] It introduced multiparty politics and contained a Bill of Rights that secured first-generation rights. Government was styled after the Westminster Parliament, with multiparty elections, a locally appointed Prime Minister as the Head of the Government and the British monarch remaining as the Head of State.[53] The 1964 Constitution established a High Court of Malawi, with civil and criminal jurisdiction in conformity with English law.[54] This law applied 'except where the parties were African' to whom customary law would be applied if it was 'not repugnant to justice or morality'.[55]

Nkhata notes that the 1964 Constitution was 'a product of the struggle for independence by Malawians' however it did not reflect a broad consensus on how Malawians would want governance to look in the new country.[56] Nonetheless, it would not remain intact long enough to be sufficiently tried and tested.

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[50] Ibid 97.
[51] Nkhata (2010) op cit note 11, 118.
[52] Ibid 116.
[53] Chigawa op cit note 29, 3.
[54] Constitution of Malawi,1964, s75(1).
[55] Kachale op cit note 49, 99.
[56] Nkhata (2013) op cit note 44, 230.

In the first election in 1964, the Malawi Congress Party won 22 out of 28 seats in the Legislative Assembly, and five out of ten positions on the Executive Council.[57] On 6 July 1964, Dr Hastings Kamuzu Banda became the Prime Minister of the newly named Malawi and formed the first Cabinet.

(e) The executive-judicial relationship under the regime of President Banda

The first test of Banda's tenure as Prime Minister came a mere seven weeks after independence. In what came to be known as the '1964 Cabinet Crisis,' Banda faced opposition from his own ministers; as a result, he dismissed four Cabinet members and saw a further three resign in solidarity.[58]

The Cabinet Crisis undermined Banda's new government, depriving it of 'a common legitimacy' and Banda retaliated to quash criticism with oppressive and exclusionary tactics.[59] All those who were suspected of opposing him or sympathising with the dismissed ministers were arrested and terrorised.[60] Those arrested were charged with treason or sedition and many are said to have been assassinated, tortured or assaulted. Following the Crisis, its proponents were forced into exile and opposition parties were banned. Multiparty democracy was aborted before it had a chance to take root.[61] Thereafter, the Cabinet was 'very subservient' and the Parliament was 'completely subjugated'.[62] Politics became about pleasing Banda, which was often by dealing harshly with his enemies.[63]

The strong response of Banda in the face of opposition consolidated his power, however, he remained obsessively suspicious of opposition throughout the rest of his rule and took 'draconian steps to stifle any opposition', turning Malawi into 'a police state'.[64] Banda —

> went on to run Malawi as his personal fiefdom, demanding not just obedience but servility. No other African leader imposed his personality with such vigour and force on the country he ruled. He insisted on directing even the smallest details of Malawi's affairs.[65]

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[57] Nkhata (2010) op cit note 11, 102.
[58] Q Jere 'From the 1964 Cabinet crisis to the 2014 Cabinet in Malawi: An assessment of the church's public role within a context-changing church and state relations' (2018) 38(2) *Acta Theologica* 87, 87.
[59] Nkhata (2010) op cit note 11, 104.
[60] McCracken (2000) op cit note 10, 83-84; Jere op cit note 58, 88.
[61] Nkhata (2010) op cit note 11, 103.
[62] Ibid 119-120.
[63] Harri Englund 'Introduction: The Culture of Chameleon Politics' in Harri Englund (ed) *A Democracy of Chameleons: Politics and Culture in the New Malawi* (2002) 11, 13.
[64] Nkhata (2010) op cit note 11, 119.
[65] Martin Meredith *The State of Africa: A History of Fifty Years of Independence* (2011) Chap 9.

In 1966, Banda initiated the adoption of the Republic of Malawi (Constitution) Act 1966 (the '1966 Constitution'), which was built on the principles of 'unity, loyalty, obedience and discipline' and enabled him to punish breaches of these principles with full military force.[66] Under this legislation, the Malawi Congress Party (MCP) was the only recognised party, and all other political parties were banned.[67] Its leader, Banda, was President, Head of State and Head of Government. The regime was built by the all-powerful Life President[68] under a 'cloak of secrecy' that undermined mechanisms of accountability from either the judiciary or the legislature.[69] The annual convention of the MCP became more important than the Parliament for originating legislation, including the 1966 Constitution itself.[70] This Constitution 'reflected the widening of state powers, the diminishing of guarantees of individual liberties, and the merging of the party and government into a centre of virtually absolute power.'[71] The 1966 Constitution created 'a very strong executive generally, and a very strong presidency, specifically' – it created an archetypical imperial president.[72]

Banda's Cabinet was merely advisory and Banda had the final decision on all matters of policy.[73] Banda's regime 'fermented a political culture of extreme disdain and intolerance for the rule of law, legality and the ways of the legal profession'.[74] Banda is quoted as saying '[a]nything I say is law. Literally law. It is a fact in this country.'[75] The courts were not empowered to review the constitutionality of laws or executive conduct, but they retained the inherited 'inherent power' to judicially review the administration.[76] However, in the atmosphere of tyranny and reprisal, common law judicial review was not invoked by litigants

[66] Republic of Malawi (Constitution) Act, 1966, s 2(1)(i). See also, the commentary of Nkhata (2010) op cit note 11, 106.
[67] The reason for this change was justified as follows: 'Experience over recent years has convinced the present Government that the country cannot afford the wasteful disunity which is engendered by the existence of a number of small parties in opposition to the major ruling party.' Government of Malawi *Proposals for the Republican Constitution of the Republic of Malawi* (1965), 7.
[68] The Republic of Malawi (Constitution)(Amendment) (No.3) Act 35 of 1970 created this title and bestowed it on Banda.
[69] Chirwa op cit note 9,105.
[70] Nkhata (2010) op cit note 11, 120.
[71] Kanyongolo (1998) op cit note 38, 396.
[72] Nkhata (2010) op cit note 11, 106.
[73] Chigaŵa op cit note 29, 6.
[74] Clement Ng'ong'ola 'Judicial mediation in electoral politics in Malawi' in Harri Englund (ed) *A Democracy of Chameleons: Politics and Culture in the New Malawi* (2002), 62.
[75] Meredith op cit note 65, 165.
[76] Chirwa op cit note 9, 105, common law judicial review had been incorporated into Malawian law from the common law, however, cases were seldom brought. Nzunda op cit note 1, 283.

to check executive abuse of power until it was apparent that the regime was in its twilight phase.[77]

Moreover, judicial independence was significantly undermined. The Chief Justice was appointed by the President at his sole discretion, and the other judges were appointed after consultation with the Judicial Services Commission.[78] The President was also empowered by the Constitution to dismiss any judge 'where he considers it desirable in the public interest to remove him.'[79] Judges could be moved to executive positions and ministries at the whim of the President[80] and were vulnerable if they took a strong approach to preventing the abuse of power by the President and his executive.[81]

Banda introduced 'Traditional Courts'[82] to circumvent the jurisdiction, rules and legality of the High Court with its 'undue regard to technicalities.'[83] Traditional Courts were created from the local or native courts of the colonial era, presided over by lay persons without legal training and were given jurisdiction to try the most serious crimes, including treason and murder for cases involving Malawians of African descent.[84] In these 'courts', the bulk of the criminal cases against political opponents were tried by bodies that were accountable to the 'executive in general and the President in particular', and were appointed and subject to removal by the Minister of Justice, often at the behest of the President.[85] These 'courts' implemented relaxed rules of evidence and had a general prohibition on legal representation. Control of these courts ensured that judicial powers were 'completely subordinate to the executive' during one-party rule.[86]

Thus, from the beginning of the colonial era until 1994, executive power had never been exercised to promote the best interests of the broader body politic but rather furthered the

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[77] Nzunda op cit note 1, 314.
[78] 1966 Constitution, s 63(1).
[79] Ibid s 64(3)
[80] For example, Friday Makuta was appointed by Banda as the Director of Public Prosecutions, Judge of the High Court, the Attorney General, Permanent Secretary to the Office of President and Cabinet, the most senior civil servant post. Then, he was appointed Chief Justice and then Minister. 'He resigned in 1993 due to interference of the executive with court work.' Jane Mayemu Ansah 'The 1994 Malawi Constitution and the role of the judiciary' Paper presented at The First National Conference on Review of the Constitution (Capital Hotel, Lilongwe, Malawi 28–31 March 2006), 5.
[81] Nkhata (2010) op cit note 11, 121.
[82] Traditional Courts Act, Cap 3:03 (1962).
[83] Ng'ong'ola (2002) op cit note 74, 64.
[84] Peter Mutharika 'The 1995 democratic constitution of Malawi' (1996) 40(2) *Journal of African Law* 205, 215. See also Nkhata (2010) op cit note 11, 121 fn 165.
[85] Chigaŵa op cit note 29, 8-9.
[86] Ibid 8.

interests of those wielding power. The courts had not stood as a bulwark against abuse of executive power but were accused of being complicit in the exploitation of the public, responding to the whims of the colonial powers and then to the imperial president.[87]

III. The 1994 multiparty, liberal, democratic constitution

Banda retained his presidency from 1966 to 1993, by which time there was growing domestic opposition to his oppressive rule and mounting pressure from the international community for Malawi to transition to multiparty democracy, as was happening in many other formerly autocratic African states.[88] In June 1993, Banda capitulated to the growing pressure and suffered defeat in a referendum where 63 per cent of the population expressed a desire to transition to multiparty democracy.[89]

The Constitution that would usher in the regime change was drafted rapidly with the input of foreign experts.[90] Two of the key talking points at the Constitutional Conference held in February 1994 related to reforming the presidency and the judiciary.[91] The prevailing political will was to reorient the governance of Malawi from authoritarian rule to democratic rule and to ensure the rule of law and human rights protections. The participants at the Constitutional Conference unanimously agreed that the country required an 'independent, courageous and uncorrupted judiciary' because 'the judiciary – as guardian of the Constitution – represents the fulcrum of the document and the assurance that its requirements will be fulfilled by all'.[92]

The 1994 Constitution of the Republic of Malawi was adopted by referendum three months after the Constitutional Conference.[93] Its objective is 'creating a constitutional order in the Republic of Malawi based on the need for an open, democratic and accountable government.'[94] It establishes a constitutional republican state with fixed presidential terms and specific executive functions.[95] The independent judiciary has jurisdiction over a justiciable Bill of

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[87] Kachale op cit note 49, 86.
[88] Nkhata (2010) op cit note 11, 107, H Kwasi Prempeh 'Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa' (2006) 80 *Tulane LR* 1239, 1274.
[89] Kachale op cit note 49, 111, Danwood Mzikenge Chirwa 'Democratisation in Malawi 1994-2002: Completing the vicious circle?' (2003) 19(2) *SAJHR* 316, 333, Kapindu op cit note 43.
[90] See Kachale op cit note 49, 113 and Ng'ong'ola (2002) op cit note 74, 65.
[91] Michael D Kirby 'What has been achieved?' Closing remarks of M.D. Kirby, the Conference Chairman of the Malawi Constitutional Conference held in Blantyre, Malawi 21-24 February 1994.
[92] Ibid 6.
[93] With 63.5 per cent of voters voting in favour of the adoption of the Constitution of the Republic of Malawi (hereafter the '1994 Constitution').
[94] 1994 Constitution, preamble.
[95] Ibid ss 6,7, 83.

Rights and power to review legislative acts and executive conduct for compliance with the constitution.[96] All three branches of government are subject to the Constitution and the laws of the land.[97]

The 1994 Constitution creates intersecting roles and responsibilities for the various branches and enlarges the roles of the judiciary and the legislature to act as a buffer against executive overreach. It also introduces independent constitutional institutions to protect and uphold the democracy.

(a) A more restricted executive

Under the 1994 Constitution, the President is directly elected and is the Head of State, Head of Government and the Commander-in-Chief of the Defence Forces.[98] The Constitution abolishes life presidency by imposing a two-term limit.[99] The President or Vice-President may be removed if they have been indicted and convicted by impeachment with a two-thirds vote of the NA on the grounds of 'serious violation of the Constitution or serious breach of the written laws of the Republic that either occurred or came to light during the term of office of the President.'[100]

The President's powers are specifically enumerated in the constitutional text and subject to forms of additional accountability. The President is responsible for the observance of the Constitution by the executive and for ensuring that the executive acts ' in the interest of national unity,' however, what that would mean in practice has not been clarified.[101] The President has the power to appoint (and remove) ministers and deputy ministers to run government departments and to prescribe their powers and functions subject only to restrictions on qualification for the position.[102] Ministers are accountable to the President for the administration of their departments and not to the NA.[103]

Section 89 of the Constitution lists the powers of the President. These include functions that would be performed by both the monarch (head of state) and the Prime Minister (head of

[96] Ibid chap 4, ss 4, 5, 6, 46 and particularly s 9 which provides that 'the judiciary shall have the responsibility of interpreting, protecting and enforcing this Constitution and all laws and in accordance with this Constitution in an independent and impartial manner'.
[97] Ibid s 4.
[98] 1994 Constitution s 78.
[99] Ibid s 83.
[100] Ibid s 86.
[101] Ibid s 88.
[102] Ibid ss 93-5.
[103] Ibid s 97.

government) under the Westminster constitutional system and the section makes no distinction between when the President acts as the head of state, as opposed to when the President acts as the head of the politically appointed government.

One way that presidential powers are limited in the Constitution is through the introduction of councils or committees to recommend or confirm the President's proposed actions. For example, pardons are granted on the advice of an Advisory Committee[104] and while the President has 'ultimate responsibility' for the Defence Forces of Malawi, the President is only entitled to act on the recommendation of an Army Council established under the Defence Force Act, which includes the Minister for Defence and the High Command of the Defence Forces.[105] The Army Council has the power to determine the operational use of the Defence Forces, and the appointment and removal of members under its empowering Act.[106] The President's exercise of powers relating to the Defence Forces is further accountable to the Defence and Security Committee of the NA, a permanent Standing Committee with proportional representation of the parties in the NA.[107]

Councils and committees also play a role in vetting, appointing and removing certain constitutional actors. For example, a Public Appointments Committee of the NA is set up to appoint, confirm appointments, recommend removal, remove and inquire into the competence of important public officials.[108] Judges, other than the Chief Justice, are appointed by the President upon recommendation of the Judicial Service Commission (JSC).[109]

The creation of these councils and committees shows the development of specialised separation of powers mechanisms to diffuse presidential power and to ensure that the President's use of power is accountable. However, the President still holds significant power despite the introduction of advisory bodies. For example, the empowering Acts for both the Defence Force and the Advisory Committee on Pardons grant the President control over the Pardon Committee and the Army Council, which undermines the effectiveness of these

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[104] Ibid s 89(2), established by the Advisory Committee on the Granting of Pardon Act, Cap 9:05 (1995).
[105] Ibid s 161. Defence Force Act, Cap 12:01 (2004).
[106] Defence Force Act s 10(2)(a).
[107] Ibid s 161(3).
[108] Appoints: Constitution, s122 (Ombudsman), s 144(4) (National Compensation Fund members); Confirms appointment: s 101(1) (Director of Public Prosecutions), s 190 (Ambassadors and diplomatic appointments); Recommends removal: s 75(4) (Electoral Commission member), s 151(2) (Local Government Finance Committee members); Removes: s 128 (Ombudsman); Inquires into competence: S 154(2) (Inspector General of Police), 166(1) (Chief Commissioner for Prisons), s 184 (Auditor-General), s 191 (Civil Service Commission).
[109] The Judicial Services Commission, however, is appointed by the President in consultation with the Chief Justice, granting the President influence on the appointment of judges. See Mutharika op cit note 84, 215.

advisory committees.[110] Moreover, the President appoints all four members of the JSC directly or indirectly, which undermines its independence.[111]

Some of the President's powers are exercised with the approval of the NA. For example, the President's power to declare a State of Emergency is subject to the approval of the Defence and Security Committee of the NA. It must be limited to specific instances of national risk and may only be in place for specific time periods.[112] Moreover, any declaration of a State of Emergency and any action taken under such declaration is subject to review by the courts.[113]

Shared responsibility is found in relation to other presidential powers, too. For example, the summoning and proroguing of the NA is performed by the President in consultation with the Speaker of the NA.[114] Moreover, the Chief Justice is appointed by the President and confirmed by the NA.[115]

The Constitution, therefore, uses shared responsibility to dilute presidential power by relying on other branches of government separate councils and committees to oversee the use of the power.[116] The President has residual powers but the exercise of these must be 'reasonably necessary and incidental to the functions of his or her office' and are subject to the Constitution.[117]

Broader executive responsibility is limited to 'the initiation of policies and legislation' and 'the implementation of all laws which embody the express wishes of the people of Malawi, and which promote the principles of this Constitution.'[118] Very little else is said about *how* the executive should carry out its function, however, sections 11, 12 and 13 provide content as to what constitutes 'the express wishes of the people of Malawi.' Section 11 provides the principles for the interpretation of the Constitution, section 12 lays out the fundamental principles of the Constitution and section 13 states the principles of National Policy. Taken together, these provisions could be a powerful manifesto for a government.

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[110] Advisory Committee on the Granting of Pardon Act s 3, the President handpicks the Committee and chairs it. The Defence Force Act, s 10(2)(a) makes the Defence Force Council 'subject to the powers of command' of the President.
[111] Ibid ss 117, 191.
[112] Ibid s 45.
[113] Ibid s 45(5).
[114] Ibid s 59.
[115] Ibid s 111.
[116] Mutharika op cit note 84, 207.
[117] 1994 Constitution 89(5).
[118] Ibid s 7.

The Constitution also includes restrictions on the President and members of the Cabinet from using their offices for personal gain, from holding other public office, and from conflicts of interest arising from business interests.[119] However, the President still enjoys primacy in the Constitution by virtue of holding head of state powers, and particularly, appointment powers of the judiciary and independent constitutional institutions. Social and political practice in Malawi also continue to grant the President high levels of respect and *de facto* power.[120]

Despite these safeguards, the executive in Malawi has been accused of promoting '[p]olitical violence and corruption' and having 'virtually monopolised the public media, undermined the Anti-Corruption Bureau, the Law Commission, the Human Rights Commission, the Office of the Ombudsman and the …National Compensation Tribunal' and engaging in 'politically corrupting and terrorising tactics among opposition members of parliament.'[121]

Malawian political parties are built around individual leaders who represent regional and ethnic groups rather than issue-based political ideologies.[122] Little ideological difference exists between the parties, which facilitates the creation of alliances to secure the majority in an election. Alliances have secured the presidency in all but the 2009 election.[123] Patel writes that '[p]olitical parties aligning, fragmenting and realigning has been an integral part of Malawi's multiparty democratic process.'[124]

Since 1994, Malawi has had six presidents from four different political parties with successful hand-overs of power between the administrations.[125] A 2022 Afrobarometer report found that only 26.5 per cent of Malawians trust the President, and the executive is the branch of government with the least public trust, behind Parliament with 33.2 per cent and the courts

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[119] Ibid s 88.
[120] Enoch MacDonnell Chilemba 'They keep saying, 'My President, my Emperor, and my All': Exploring the antidote to the perpetual threat on constitutionalism in Malawi' *Conference on Constitution-building in Africa,* University of the Western Cape, Cape Town, South Africa 6 September 2013, 19-20.
[121] Nixon S Khembo 'The multiparty promise betrayed: The failure of neo-liberalism in Malawi' (2004) XXIX (2) *Africa Development* 80, 83.
[122] Nandini Patel 'Political parties, alliance politics and the crisis of governance in Malawi' in Susan Booysen (ed) *Marriages of Inconvenience: The Politics of Coalitions in South Africa* (2021), 209; Stephanie Regalia 'Malawi: The road to the 2019 tripartite elections: Reflections on corruption, land and multiparty politics' French Institute of International Relations *Notes de l'Ifri* (January 2019), 21.
[123] Patel op cit note 122, 207.
[124] Ibid 209.
[125] Regalia op cit note 122.

with 61.7 per cent.[126] Nkhata traces the presidential excesses that have led to this distrust, which began at independence, with each successive president ensuring that they remain 'the most powerful office in the country' despite constitutional safeguards.[127]

(b) An expanded role for the National Assembly

The legislative branch in Malawi is elected separately from the presidency and was initially set up to be a bicameral parliament consisting of the NA and a Senate.[128] The NA has 193 directly-elected members who are elected for a five-year period to represent constituencies on a first past-the-post basis.[129] The Senate was never established, and constitutional provisions relating to the Senate were repealed by the NA in 2001.[130]

In addition to legislating, the NA is a mechanism of accountability on the executive branch. Its role is to 'reflect the interests of all people of Malawi' and further 'the values expressed or implied in this Constitution'.[131] All subsidiary legislation must be laid before the NA to ensure it is within the provisions of the empowering Act,[132] and the NA has the general power to call the President to attend Parliament in order to answer questions.[133] It may debate and vote on motions to indict and convict the President or Vice-President by impeachment.[134] If the President withholds assent on a Bill, the NA may debate the Bill again, and if it is passed again, the Bill shall be remitted to the President for assent, which shall be given within 21 days.[135] Thus, structurally, the NA has been strengthened to enable it to hold the President accountable. However, the President has the power to prorogue the National Assembly, which President Bingu wa Mutharika did for most of the 2007 session.[136]

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[126] Afrobarometer 'Summary of results: Afrobarometer Round 9 survey in Malawi, 2022' available at https://www.afrobarometer.org/wp-content/uploads/2022/08/MLW_R9_Summary-of-results_Afrobarometer-29Aug22-.pdf, accessed on 30 January 2025, 45-7.
[127] Mwiza Jo Nkhata 'The presidency and constitutionalism in Malawi: A case of absolute power consistently corrupting absolutely?' in Hopestone Chavula et al (eds) *The Oxford Handbook of the Malawi Economy* (2024), 56-7.
[128] 1994 Constitution, s 48.
[129] Ibid s 62.
[130] Constitution (Amendment) Act 2001.
[131] 1994 Constitution s8.
[132] Ibid s 58.
[133] Ibid s 89(4).
[134] Ibid s 66(1)(d).
[135] Ibid s 73.
[136] Nkhata (2024) op cit note 127, 46-7.

The 1994 Constitution places 'high demands and expectations' on the NA and presupposes its robust engagement.[137] However, this is not always possible when the majority has been secured by tenuous political alliances.[138] Malawian politics are described as 'strongmen politics' with party structures and allegiances built around securing power for individual party leaders.[139] Such an environment undermines the likelihood of a culture of robust engagement with the actions of the ruling party.

Moreover, the budgetary allocation to the NA is not representative of the expanded role expected of it and this weakens its ability to effectively perform its role.[140] Therefore, over the past three decades, the legislature has remained subservient to the incumbent executive.[141]

(c) A new role for the judiciary

The role of the judiciary is vastly changed by the 1994 Constitution. Kachale argues that the 'most important introduction in the 1994 Constitution' is the 'peculiar role' given to the judiciary as 'the ultimate guardian of the Constitution'.[142]

The 1994 Constitution intentionally redresses the courts' subversion under the Banda regime through emphasis on its role and independence.[143] Section 103 extends the jurisdiction of the Supreme Court and High Court to 'all issues of judicial nature' with exclusive authority to decide issues of jurisdiction. It prohibits the establishment of courts with concurrent jurisdiction.[144] Matters of first instance are brought to the Magistrates' Courts or High Court with appeal to the Supreme Court of Appeal.[145] The appointments of the Chief Justice and judges are through processes designed to diffuse the President's discretion through the involvement of the NA and the Judicial Services Commission, respectively.[146] Judges enjoy protected tenure and may be removed from office only for cause.[147] Disciplinary powers over

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[137] Nandini Patel 'The representational challenge in Malawi' in *Towards the consolidation of Malawi's democracy: Essays in honour of the work of Albert Gisy* (2008), 22.
[138] Patel (2021) op cit note 122, 209.
[139] Regalia op cit note 122, 21.
[140] Ibid 23 Regalia describes how '[t]he executive is well staffed, has access to expertise and is informed by its ministries, while the National Assembly must rely on an overworked and under-resourced support structure that lacks adequate capacity to render much needed support to legislative functions.'
[141] Patel (2021) op cit note 122.
[142] Kachale op cit note 49, 115.
[143] 1994 Constitution ss 9, 103.See also Mutharika op cit note 84, 215.
[144] 1994 Constitution ss 103-4, 108.
[145] Ibid s 104.
[146] Ibid s111.
[147] Ibid s119.

judges are exercised by the Judicial Services Commission and removal involves the NA and the President.[148]

Banda-styled Traditional Courts are prohibited and replaced by constitutional provisions enabling the NA to establish 'traditional local courts presided over by lay persons or chiefs' with jurisdiction limited exclusively to 'civil cases at customary law and to such minor common law and statutory offences as prescribed by an Act of Parliament.'[149]

The most important aspect of the judiciary's expanded role is its role as the 'fulcrum' of the constitutional text.[150] The judiciary has the responsibility of 'interpreting, protecting and enforcing this Constitution and all laws.'[151] Section 11 requires courts to develop principles of interpretation that 'reflect the unique character and supreme status of this Constitution' and must promote the values of 'an open and democratic society,' taking 'full account' of the fundamental principles of the Constitution in section 12, the principles of National Policy in section 13 and the rights contained in Chapter IV.[152] Thus, the courts are mandated to choose constitutional interpretations that promote limited and accountable government power under the Constitution, the rule of law, respect for human dignity and human rights and socio-economic advancement.

Section 200 saves the existing laws, common law, and customary law in force at the time of its enactment subject to constitutionality,[153] and grants the High Court its powers, procedures and jurisdiction from before the Constitution, including judicial review powers introduced by British law.[154] Section 108 allocates the High Court 'original jurisdiction to review any law, and any action or decision of the Government, for conformity with this Constitution'.[155] This provision, therefore, creates a constitutional review that captures every action or decision of the executive, not merely administrative or quasi-judicial decisions.

Section 43 creates a right to 'lawful and procedurally fair administrative action, which is justifiable in relation to reasons given where his or her rights, freedoms, legitimate expectations

[148] Ibid ss 118-19. Although, see fn 109 above.
[149] Ibid s 110. See also Mutharika op cit note 84, 215.
[150] Kirby op cit note 91, 6.
[151] 1994 Constitution s 9.
[152] Ibid s 11.
[153] Ibid s 200.
[154] Ibid s 103.
[155] Ibid s 108(2).

or interests are affected or threatened'.[156] Administrative action is not defined in the Constitution, leaving the courts to determine how it interacts with the review powers in section 108. As Chirwa points out, sections 43 and 108 'have made it a core business of the courts to keep the executive in check.'[157]

Additionally, the High Court has jurisdiction to hear judicial reviews of the exercise of the power of the Electoral Commission[158] and may decide constitutional referrals by the President under section 89(1)(h) (constitutional process reviews). To further bolster the courts' role under section 9, courts have the power to overrule attempts to oust the jurisdiction of the courts.[159]

Constitutional standing has also been enlarged. Section 41 grants every person the right to recognition 'as a person before the law' and the right to access courts and have effective remedies for the violations of the Constitution or any other law.[160] Furthermore, section 15(2) grants 'any person or group of persons with sufficient interest in the protection and enforcement of rights under this Chapter … to the assistance of the courts, the Ombudsman, the Human Rights Commission and other organs of Government to ensure the promotion, protection and redress of grievance in respect of those rights.'

The courts have, in fact, become a 'core stabilising institution for Malawi's fledgling democracy' with the introduction of fundamental rights litigation, constitutional review of legislation and executive conduct and constitutional process review.[161] The judiciary is now given the mandate to act as an accountability mechanism on the powers of the other branches.

(d) Independent constitutional institutions

The 1994 Constitution also introduced independent constitutional institutions to support and develop constitutional democracy. The Electoral Commission, the Ombudsman, the Human Rights Commission, the Law Commission and the Auditor General are all responsible for different realms of rights protection and exist to defend the rule of law.[162] The persons appointed into these positions can only be removed therefrom in terms of the Constitution.[163]

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[156] For a full discussion of this right and its potential see Chirwa's influential article op cit note 9, which is much quoted in jurisprudence, 105.
[157] Chirwa (2011) op cit note 9, 107.
[158] 1994 Constitution s 76(5)(3)(a).
[159] Ibid s 11(4).
[160] Ibid s 41(1-3).
[161] Rachel L Ellett *Politics of Judicial Independence in Malawi* Freedom House Report (2014), 5.
[162] 1994 Constitution, ss 75-6, 123, 129, 132, 184.
[163] See eg ss122, 128, s133, 134, 184.

These institutions are established to reinforce the constitutional structure through improving accountability and transparency of the government.

Academic writing is positive about the potential of such institutions to protect democracy, however, specific case studies on other jurisdictions provide sceptical findings regarding the implementation of these.[164] No studies have been published that examine the efficacy of such independent institutions in Malawi, although Chingaipe accused the independent institutions of failing to hold the government accountable for mismanagement of public finances.[165] Chingaipe alleges that the heads of the institutions are politically appointed and 'made to understand that their primary role [is] … to serve as retainers of their political masters.'[166]

IV. The judicial-executive relationship since 1994

The remaining part of this chapter will consider how the judiciary has understood its role since 1994 and whether coherent jurisprudential principles are applied when the judiciary undertakes its accountability role. Due to the depth of this study, it is not possible to consider all important cases; a selection of key cases is covered as a starting point for future analysis.

(a) The rise of the courts before 1994

Prior to 1992, Malawian courts were perceived as conservative and obsequious to the government.[167] Although common law judicial review was received in 1902, the legal profession did not utilise this mechanism until the final years of the Banda era.[168] Around 1992, legal practitioners began filing applications to judicially review the lawfulness of executive conduct under the procedure established by Order 53 of the UK Supreme Court Rules (RSC) and found a 'very beneficent remedy' available to them.[169] Judicial review was used to 'push[] back the boundaries of Banda's authoritarian regime, nudging the democratic door open' for the constitutionalism that would follow.[170]

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[164] See Mark Tushnet *The New Fourth Branch: Institutions for Protecting Constitutional Democracy* (2021).
[165] Henry Chingaipe 'A decade of governance as "roving banditry": The political economy of public finance mismanagement in Malawi 2010-2020' in Kenneth R Ross, Asiyati Lorraine Chiweza and Wapulumuka O Mulwafu (eds), *Beyond Impunity: New Directions for Governance in Malawi* (2022), 73.
[166] Ibid 73.
[167] Ellett op cit note 161, 18. See also Clement Ng'ong'ola, 'Managing the Transition to Political Pluralisms in Malawi: Legal and Constitutional Arrangements' (1996) 34(2) *Journal of Commonwealth and Comparative Politics* 85.
[168] Nzunda op cit note 1.
[169] *Chisa v The Attorney General* [1996] MWHCCiv 3, 5, Nzunda op cit note 1, 314.
[170] Ellett op cit note 161, 19.

Judicial review cases were brought relying on the English doctrines of natural justice and *ultra vires*.[171] The courts accepted without query that judicial review could lie against 'any person or body performing public functions,' including decisions of the high executive and the President.[172] The courts did not limit the applicability of the remedy to 'administrative' actors, as judicial review was taking root after the expansion of judicial review in the UK, and in particular, the watershed case of *GCHQ*.[173]

Section 2(1)(iii) of the 1966 Constitution recognised the sanctity of personal liberties enshrined under the United Nations Universal Declaration of Human Rights (UDHR) and in 1993 the courts found that the UDHR was, therefore, applicable law in Malawi.[174] As a result, the courts relied on this finding to review decisions of the government for constitutionality and legality.[175]

In *Du Chisiza v Minister of Education and Culture*, an artistic performer challenged, by judicial review, a ministerial decision banning outside entertainment in government schools.[176] The court found that this decision violated the applicant's rights to freedom of expression and association, as protected by the 1966 Malawi Constitution and the Universal Declaration of Human Rights (UDHR). This case exemplifies how human rights considerations were integrated into English common law judicial review.

Similarly, in *Mhone v Attorney General*, the court annulled a police directive that limited detainees' visitation rights with lawyers.[177] The ruling deemed the directive 'inhuman, *ultra vires,* unconstitutional, and illegal', relying on the UDHR's applicability within Malawi's constitutional framework to support its findings alongside the traditional legal grounds of illegality and irrationality.[178]

In *Chirwa v State*, judicial review was employed against a presidential proclamation that protected the City of Blantyre from legal action regarding an unlawful dismissal.[179] The court

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[171] See eg *Mhango and 5 Others v. Council of the University of Malawi*, [1993] 16 (2) MLR 605 (HC) and *Zodetsa & 3 Others v Council for the University of Malawi* [1994] MWHCCiv 18, 13, *Chisa* supra note 169.
[172] *Chisa* supra note 169, 6, *Du Chisiza v Minister of Education and Culture* [1993] 16 (1) MLR 81, *Mhone v Attorney General* Miscellaneous Civil Cause No 115 of 1993 (unreported), *Chirwa v State* Miscellaneous Civil Cause 155 of 1993 (unreported).
[173] *Council of Civil Service Unions & Others v Minister for the Civil Service* [1985] AC 374.
[174] *Chihana v Republic* [1993] MWSC 1.
[175] *Du Chisiza* supra note 172, *Mhone* supra note 172, *Chirwa v State* supra note 172.
[176] *Du Chisiza* supra note 172.
[177] *Mhone* supra note 172.
[178] Ibid 4, 9.
[179] *Chirwa* supra note 172.

declared the Proclamation 'unconstitutional, *ultra vires* the powers of the President and a denial of the [applicant's] right to claim redress and a denial of justice'.[180] The judgment referenced English law principles affirming that governmental powers should not obstruct access to justice, while also invoking articles from the UDHR that guarantee equal protection under the law.[181]

These cases between 1992 and 1994 show that judicial review of high executive conduct in Malawi, while rooted in UK common law, had a wide and distinctly Malawian application.[182] The blending of human rights grounds (breach of fundamental right or constitutional principle) and common law judicial review grounds (illegality, irrationality and procedural impropriety) enabled an effective remedy against unlawful high executive decisions, including abusive use of presidential prerogative powers.

(b) The courts' role 1994-2007

At inception, the 1994 Constitution entrenched executive accountability by the judiciary; it also granted judges secure tenure and institutional independence, which enabled them to act with less fear of reprisal.[183] Since then, the courts have built upon their past jurisprudence to develop a constitutional review of executive power that today is a hybrid form of review that encompasses common law and constitutional grounds.

i. Constitutional review of executive power by judicial review

Building on the earlier judicial review jurisprudence, it was held in an early case that '[w]here a person seeks to establish that a decision of a person or body infringes rights which are entitled to protection under public law he must, as a general rule, proceed by way of judicial review and not by way of an ordinary action whether for a declaration or injunction or otherwise.'[184] This established judicial review as the process for vindicating all public law rights — regardless of whether the matter concerned administrative action, constitutional review or fundamental rights. Moreover, the Malawian Supreme Court of Appeal (MSCA) held that as the guardians

[180] Ibid 5-6.
[181] Ibid.
[182] For a more detailed discussion, see Nzunda op cit note 1.
[183] Ibid 345.
[184] *Kalumo v Attorney General* [1995] 2 MLR 669, 671-672.

of the Constitution, courts have a duty to examine the constitutionality of all decisions made with its powers.[185]

Judicial review was brought under Order 53 of the RSC as incorporated into Malawian law until 2017, when new Court Rules replaced it. Among other procedural requirements, Order 53 required an applicant: to obtain leave to review prior to bringing the review; to bring the review within a three-month period from the date when the grounds arose; to show that they have standing to bring the case; and that they have an arguable case for review.[186]

The *Matter of the Removal of MacWilliam Lunguzi as Inspector General of Police* is one of the first cases in which the President's conduct was directly challenged and defeated by judicial review under the 1994 Constitution.[187] Almost immediately after the 1994 election, the new President had appointed the existing Inspector General of Police to a diplomatic post in Canada, thereby removing him from his position outside of the provisions of section 154, which protects the Inspector General of Police from arbitrary removal. The President's removal of Mr Lunguzi as the Inspector General of Police was held to be illegal and unconstitutional. This case was brought as judicial review under section 43 of the Constitution, the right to lawful and fair administrative action, rather than on the breach of the section 154 itself. Mkandawire J held that the President's decision violated Lunguzi's section 43 right and declared that the decision was unlawful because Lunguzi was not given a chance to be heard before the decision was taken and was also denied any explanation for the President's decision.

The ruling was upheld on appeal with the MSCA, establishing precedent for judicially reviewing the President's use of constitutional powers under section 43 and applying common law judicial review procedural fairness standards to the use of power.[188] The MSCA's rationale was that judicial review is intended to hold authorities accountable for their use of their powers and to ensure that these are used in a proper manner. At that time, section 43 was viewed as a restatement of the common law judicial review process found in Order 53. Order 53 provided both the procedure and the substantive grounds for judicial review, and did not require that the

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[185] *Attorney General v Fred Nseula and another* [1997] 2 MLR 50 (SCA). In that same case, however, the MSCA found that Standing Orders of Parliament are outside of the purview of judicial review.
[186] The purpose of requiring 'leave to review' is to 'eliminate at an early stage … applications which are either frivolos, vexatious or hopeless'. *State v Director of Anti Corruption Bureau Exparte Tayub and 4 Others* [2017] MWSC 24, 5.
[187] *In the Matter of the Constitution of the Republic of Malawi and In the Matter of the Removal of MacWilliam Lunguzi* [1994] 18 MLR 72.
[188] *Attorney General v Lunguzi and Another* [1996] 19 MLR 8.

decision being reviewed was 'administrative' in nature, but rather, that the decision-maker was exercising a public function.[189]

Shortly after *Lunguzi*, the President was again cited in the *Kachere* case,[190] which was an action by Originating Summons brought by plaintiffs describing themselves as 'citizens of Malawi' and seeking a declaration that certain conduct of the President and the Attorney General (AG) was unconstitutional. The case raised several questions for determination including:

- Whether the President and AG violated the Constitution by presenting the Executive Branch (Government) Bill and a Bill to amend the Constitution?
- Whether the high executive had violated the Constitution by not disclosing their assets, liabilities, business interests etc as required by section 88(3) of the Constitution?
- Whether the Attorney General, the Minister of Justice and other members of Cabinet could also be a member of Parliament?
- Whether the National Assembly had the competence to create high offices of state that are not elected and whether this breached the Constitution?
- Whether the government had breached the Constitution by not calling for local government elections?
- Whether the government had breached the Constitution by not establishing the Senate?

In response, the Government raised preliminary points of law including the correct joinder of the President and the Speaker of the NA, whether the matter ought to be brought in the name of the Attorney General, and whether the parties had locus standi (standing) to bring the case. The High Court dismissed the preliminary points and ordered the matter to proceed.

On appeal, the MSCA upheld the appeal on several grounds, including that the plaintiffs lacked standing to bring the case. Without addressing the potential reasons for expanding constitutional standing under the new constitutional regime, the Court relied on English law for the principle that a plaintiff must have a real interest, a 'legal right of substantial interest in the matter in which he seeks a declaration'.[191] Regarding an argument that every citizen ought

[189] For a more complete discussion, see Chirwa (2011) op cit note 9, 110-111.
[190] *President of Malawi and Ors v Kachere and Ors* [1995] MWSC 2.
[191] Ibid (no page numbers available on Malawilii.org).

to have standing to be able to ensure that the government acts constitutionally, the MSCA held that a strong belief or conviction that a law should be observed, or that conduct of a particular kind should be prevented is not sufficient to ground standing. Instead, it focused on section 46(2) of the Constitution, which permits 'any person' to make an application to court to vindicate the infringement of a *fundamental right*. The MSCA held that because no fundamental rights or freedoms were being raised in this case, the litigants lacked standing.

The approach of the MSCA did not engage with the prudential reasons for the common law rules on standing. Nor did it consider whether it is appropriate for these to apply in constitutional matters given the courts' mandate under section 108 and duty under section 11 to develop principles of interpretation that 'reflect the unique character … of [the] Constitution' and promote the values of 'an open and democratic society'. Moreover, this decision prevented several important constitutional questions from being considered, including the constitutionality of the appointment of NA members to the Cabinet, the failure to call local elections and the failure to establish a Senate. It is difficult to imagine any individual litigant who would be able to establish a 'substantial interest' to raise the matters in this case, although arguably, civil society might be permitted. However, the court did not identify how such a case could be brought, if at all.

Kachere has faced criticism for its restrictive approach to standing from academics and even the HC bench.[192] It has also resulted in confused jurisprudence; some judges persist in requiring that an applicant must have directly suffered the violation of a personal right or freedom as a ground for bringing an action,[193] and other judges seek to distinguish cases to avoid the severity of the MSCA jurisprudence.[194]

In *Press Trust I,* the MSCA again considered the constitutionality of high executive conduct in the introduction and expedited passing of a Bill in Parliament.[195] The Press Trust was a statutory body established during Banda's presidency to hold assets 'for the benefit of Malawians' and was closely linked to his Malawi Congress Party (MCP), the Trust's real

[192] See especially, *Okeke v Minister of Home Affairs & Ano* [2001] MWHC 36 in which Mwaungulu J specifically stated that the interpretation of the MSCA in *Kachere* was 'restrictive and unjustified interpretation …[and] non sequitur'. See also *Public Affairs Committee v Attorney General & Another* [2003] MWHC 71. Academic criticism includes Kanyongolo (1998) op cit note 38, 404 and Kachale op cit note 49, 135.
[193] *Civil Liberties Committee v Ministry of Justice & Anor* [2004] MWSC 1, *Chaponda & Anor v Kajoloweka & Ors* [2019] MWSC 1.
[194] *Kainja v Director of the Anti-corruption Bureau, Director of Public Prosecutions and Attorney General* [2023] MWHC 20, [59].
[195] *Malawi Congress Party & Others v Attorney General & Another (Press Trust I)* 1996 MLR 244; [1997] MWSC 1.

beneficiary. In 1995, the new government aimed to restructure the Trust through the Press Trust Reconstruction Bill, which was introduced to the National Assembly (NA) on 6 November 1995. The following day, the Minister of Finance attempted to expedite the Bill, bypassing the notice requirement under Standing Order 114(1), which mandates prior publication in the *Gazette*. The MCP members of the NA objected and walked out. The Bill was passed in their absence.

The former trustees of the Press Trust and the MCP challenged the constitutionality of the Press Trust Act on several grounds, including that the introduction of the Bill to the NA was unconstitutional and in breach of section 96(2) of the Constitution which requires that 'the Cabinet shall make legislative proposals available in time to permit sufficient canvassing of expert and public opinion.'

At the HC, Mwaungulu J considered the importance of providing adequate notice to Parliamentarians as being rooted in Malawi's past, during which 'very onerous and unconscionable legislation had been rushed and passed through the National Assembly with disastrous results to the ethos of our nation and people.'[196] The judge held, therefore, that the Standing Order that enabled the Minister of Finance to dispense with the duty to give adequate notice to the NA breached section 96(2) of the Constitution and that the Bill was unconstitutionally passed.

On appeal, the MSCA held that 'there is no evidence on record which would establish that the Cabinet did not comply with the provisions of section 96(2)'.[197] In making this finding, the MSCA relied on a 1966 English Administrative Law textbook, which stated that since the process of legislation begins in government departments, that is the practical place where public interests are discussed and considered, prior to introducing Bills to Parliament. The MSCA found that this created a presumption of constitutional compliance in the legislative process and held that since the Bill had passed, a court would presume that it had been introduced in complete conformity with the Constitution and the Standing Orders. It therefore did not breach section 96(2).

The MSCA overlooked the plain language of section 96, which guards against Bills being rushed through Parliament without granting NA members adequate time to thoroughly research

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[196] *Malawi Congress Party and Ors v Attorney General and Ano* (Civil Cause 2074 of 1995) 1996 MWHC 17, 16.
[197] *Press Trust I* (MWSC) supra note 195, 1.

the Bill. The MSCA did not justify its reliance on the English textbook or discuss whether it applied in Malawi's context. The paucity of the MSCA's reasoning appears like 'result-oriented activism', which exploited the ambiguity in section 96(2) 'to justify deference to the executive' and 'a dubious presumption of adequate and representative consultation.'[198] This decision also failed to lay down cogent principles by which the lawfulness of executive conduct could be assessed.

However, in other cases, where the conduct was very clearly an abuse of power without popular support, the courts have not shied away from finding that executive conduct was illegal, even when this involved allowing public interest litigation. At a rally in May 2002, the President issued a directive prohibiting demonstrations against a constitutional amendment extending the presidential term limit. The President also directed the Minister of Home Affairs, the Inspector General of Police and the Army Commander to 'deal' with anyone violating the directive. The Malawi Law Society and other civil society groups brought a judicial review of the directives to have them quashed and declared unconstitutional.[199] Twea J held that the President's directives were unconstitutional and unreasonable and granted the relief with costs.[200] Twea J asserted the directives of the President did not amount to law, and what they were attempting to do was unconstitutional and outside of the scope of presidential powers.[201] The judge ended his judgment by opining that 'very few Malawians want that kind of peace and quiet, law and order' that Malawi 'enjoyed' for 30 years and that was 'devoid of the rights and freedoms and social justice now enshrined in our Constitution.'[202]

In 2007, the Malawian Law Society again challenged the executive in a matter concerning the failure to implement the NA's revised terms and conditions of employment for the members of the judiciary.[203] The case was brought against the President and the Minister of Finance. The question for determination was: who had the authority to set the terms and conditions of employment for judicial officers, the NA or the executive?

The High Court, sitting as Constitutional Court, was guided by section 114(1) of the Constitution, which states that judicial officers are entitled to salaries and other benefits for their services and 'on retirement, such pension, gratuity or other allowance as may, from time

[198] Kachale op cit note 49, 129, 184-5.
[199] *Malawi Law Society & Ors. v State & Ors.* [2002] MWHC 54.
[200] Ibid [30-32].
[201] Ibid [21-24].
[202] Ibid [31].
[203] *State v President of the Republic of Malawi & Ors; Exparte: Malawi Law Society* [2007] MWSC 7.

to time, be determined by the National Assembly'. The latter part of the provision could be interpreted to apply to both the terms of condition during service and upon retirement, (as the Malawian Law Society contended), or only apply to the conditions upon retirement (as the respondents contented). The High Court held that the respondents' interpretation created an absurdity and that the correct interpretation was that the NA was responsible for setting the salaries and remuneration for judicial officers. Once the NA had determined the remuneration policy, it would be for the executive to implement the conditions. The Court held that the Minister of Finance had unlawfully and unconstitutionally failed to implement policies that the NA had set. Therefore, it granted a declaration that the failure to implement was unconstitutional, and granted a mandamus against the respondents, requiring them to implement the determination of the salaries and remuneration that was set by the NA. It also held that 'for the Executive to by itself determine or have the final say on the Terms and Conditions of Service for judicial officers would in effect make judicial officers subordinate to the Executive'.[204] This case illustrates a court upholding the separation of powers by enforcing the implementation of the NA's recommendations against the executive, even where this would have significant budgetary impact.

English law is the source of Malawian judicial review law, however, unquestioning reliance on English law precedent without localising it or discussing its applicability has resulted in the incorporation of English law concepts that may not be relevant for Malawi. For example, in *Ex Parte Muluzi & Anor*[205] the President's appointment of the members of the Electoral Commission in terms of the Constitution was reviewed. The High Court held that the President had failed to follow a 'constitutional convention' in making the appointments, and that, as conventions cannot be subject to court process, the court refused to enforce it.[206] Here the reliance on the non-enforceability of 'constitutional conventions,' a fundamentally English law concept developed in the context of its unwritten constitution, was adopted without considering whether it is appropriate to have conventions within the constitutional framework in Malawi. Furthermore, it did not engage with how such conventions arise and why it would be inappropriate for them to be enforced by the courts. The English law concept of 'constitutional conventions' has a very specific legal meaning – they are political conventions that have

[204] Ibid (no page numbers available on Malawilii).
[205] *Ex Parte Muluzi & Anor* [2008] MWHC 207.
[206] Ibid 28.

developed over centuries and are enforced through political channels, not through the courts.[207] It is undisputed that most countries have unwritten political customs that have gained normative status, like constitutional conventions. However, it is for each court to determine, in a principled manner, whether these should be justiciable.

In *Masangano v Attorney General and Ors*,[208] the High Court was faced with the question of whether it could properly take decisions that impact government policy and finances. This was a fundamental rights case brought by judicial review against the Minister of Home Affairs and Internal Security and Commissioner of Prisons by a prisoner on behalf of himself and all prisoners in Malawi alleging torture and cruel, inhuman and degrading treatment by virtue of the living conditions of prisoners. In considering whether the matter could proceed as judicial review under Order 53, or whether an originating summons was the proper procedure, the court took a flexible approach and held that '[a]part from the question of procedure we are unable to see the difference in substance on the remedies or reliefs sought under these judicial review proceedings.'[209]

Furthermore, when considering the duties of the government to provide suitable living conditions for prisoners, the Court cautioned against placing too much emphasis on the principle of non-justiciability for policy reasons where a complaint of human rights violations was concerned.[210] It stated that a court should examine each case and the circumstances before it excludes consideration on the grounds of non-justiciability, as this would be inconsistent with section 103(2) of the Constitution, which states that the judiciary has jurisdiction over all issues of a judicial nature and the exclusive authority to determine its competence.[211] The Court stated that '[n]o part of our Constitution is a no-go area for the courts' because section 9 of the Constitution places the responsibility of interpreting, protecting and enforcing the Constitution on the judiciary.'[212] The Court held that the prisoner's rights were being infringed and ordered the respondents to take concrete action to remedy the situation and to meet the standards of the Prisons Act.

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[207] Nicholas W Barber 'Laws and constitutional conventions' (2009) 125 *Law Quarterly Review* 294, 294, Albert Venn Dicey *Introduction to the Study of the Law of the Constitution* 10ed (1959) 445-6.
[208] *Masangano v Attorney General and Ors* (HC) Constitutional Case 15 of 2007 (9 November 2009) (unreported) available at https://acjr.org.za/resource-centre/Masangano.pdf accessed 11 July 2023.
[209] Ibid 36.
[210] Ibid 29.
[211] Ibid 30.
[212] Ibid 35.

This survey of cases from the first fifteen years of jurisprudence reveals judges that were, overall, willing to hold the executive to account for its use of power, including the President. The jurisprudence developed the use of judicial review as the applicable law for constitutional review of executive conduct and for fundamental rights litigation. The remedies available were those of judicial review coupled with declarations of unconstitutionality. Notably, this early jurisprudence addressed challenging political questions, including those directly involving presidential conduct and decisions that had policy and budgetary implications. However, cases such as *Kachere* and *Muluzi* do show that the courts relied on procedural technicalities in ways that pre-empted the thorough litigation of impugned decisions. *Press Trust I* also illustrated deference to the executive without good justification, perhaps as a result of the political interest in the case.

Two important themes emerged from this period of jurisprudence and deserve discussion: the first is the review of what the courts identified as 'prerogative powers' and the second is the ongoing difficulties with the appropriate standard for standing.

ii. Judicial review of 'prerogative' powers

Malawian courts held that the President's constitutional powers to appoint ministers (section 94) and to rearrange government departments (section 93) were non-reviewable exercises of prerogative powers.[213] *Mkandawire and Ors v Attorney General* was a review of the decision of the President to appoint two ministers and his refusal to remove other ministers after the dissolution of a coalition. The Court held that the powers to appoint and remove ministers were part of those 'special powers' whose origins can be traced to the prerogatives of the English monarch and cannot be the subject of judicial review.[214] The court listed 'the power to make treaties, the power relating to the defence of the realm, prerogative of mercy, the granting of honours and decorations and the dissolution of parliament… [and] the power to appoint ministers' and stated that these could not be the subject of judicial review and were non-reviewable under section 43.[215] The powers identified by the court here combine those found in section 89 and section 93 of the Constitution without explanation.

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[213] *Mkandawire and Others v Attorney General* [1997] 20(2) MLR 1, *Phiri and Others v Minister of State in the President's Office and Attorney General* Civil Cause 60 of 1997 (unreported).
[214] Mkandawire supra note 213, 12.
[215] Ibid.

The approach in *Mkandawire* with regard to the appointment of ministers, reflects a respect for the inherently political and discretionary aspect of those decisions, which are undoubtably head of government powers. However, whether the section 89 powers should be treated in the same way was outside of the scope of the case. The exercise of the prerogative of mercy, the prorogation of Parliament and the appointment of honours, amongst other powers traditionally performed by the head of state, are open to abuse and a blanket finding of non-reviewability undermines the courts' watchdog role.

Phiri also concerned inherently political decisions, namely the judicial review of the President's abolishment of the National Celebrations Council and the creation of a new National Celebrations Unit in the Office of the President and Cabinet. [216] The court declined to quash the decision, stating that '[e]xcept where the Constitution or any legislation otherwise so expressly provides regarding the creation of any public institution, organization or body, there are no general limitations, in law, on the exercise by the President of the Republic of his constitutional powers to create and run any department of Government for the carrying out of any particular function of the Government.'[217]

The reasoning in *Mkandawire and Phiri* regarding presidential power under sections 93 and 94, does not align with the jurisprudence from *Lunguzi* and a later case, *Chilumpha,* that involved the reviewing and quashing of the unconstitutional removal of individuals by the President.[218] However, the difference between the cases' outcomes can be explained by how the cases were brought. *Mkandawire* and *Phiri* were brought as judicial reviews of the President's conduct without illustrating any harm to individual rights or specific constitutional provisions. This might explain the courts reticence to intervene with the President's arrangement of the Government. However, in the latter two cases, where the exercise of the power to remove appointees directly affected the rights of individuals, or violated other constitutional provisions, the courts were willing to intervene.

Nonetheless, the introduction of the concept of 'non-reviewability' in *Mkandawire* was unnecessary and possibly incorrect. Even if the origin of the power was originally from Crown

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[216] *Phiri* supra note 213.
[217] Ibid 8.
[218] *Ex Parte Chilumpha* Misc Civil Cause No 22 of 2006 HC (unreported) Following a dispute between the President Bingu wa Mutharika and the Vice-President Chilumpha, the former informed the latter by letter that he was accepting the (constructive) 'resignation' of the the Vice-President. Chilumpha brought a judicial review to challenge the President's action, and the High Court, granted an injunction restraining the President from 'accepting' the 'resignation'.

prerogatives, the power to appoint ministers now derives its source from the Constitution, and section 108(2) enables constitutional review of the exercise of all powers. When reviewing the appointment or removal of officials, the likelihood of judicial deference in such matters is high because it involves the efficient running of the government, is highly discretionary and the Constitution does not place restrictions on the use of this power. In such cases, the grounds of unconstitutionality, illegality, irrationality and procedural fairness would be extremely difficult to prove.

iii. Strict standing requirements under Order 53

The question of standing has remained contentious as individual judges grappled with the strict approach set by the MSCA in *Kachere*. In *Okeke,* Mwaungulu J stated that 'the conclusion that our citizens have no right under our Constitution to question fundamental human rights violations unless they have a sufficient interest in the matter [is something] that future generations may find very difficult to comprehend or justify.'[219] Departing from the narrow interpretation of 'sufficient interest' in *Kachere*, Mwaungulu J argued that '[t]he interest can be public or private. The applicant can be a person, natural or artificial, or a group of persons. A group can be a political party, a pressure group or interest group. Our Constitution allows this liberality.'[220] The judgment stands as an exemplar of the court taking a principled approach to judicial interpretation. The judge also relied on comparative jurisprudence, particularly from the United Kingdom; however, he was careful to note that English law principles should not be permitted to 'supplant the wording of the Malawian Constitution.'[221]

In *Registered Trustees of the Public Affairs Committee v Attorney General and Another,*[222] Chipeta J also refused to follow the test of 'sufficient interest' for standing in constitutional cases, stating that this led to a 'a narrow and legalistic, if not also pedantic, version of locus standi.' He accused the MSCA of rushing 'to put on old common law spectacles, and to dig up ancient foreign case law' before trying to understand the Constitution. He held that 'the Constitution is far from ambiguous in its prescriptions on matters of standing' in fundamental rights cases and that the MSCA is at fault for overcomplicating the manner. [223] He traced the expansion of standing in English law and stated that the MSCA had 'clung so unduly hard to

[219] *Okeke* supra note 192 (no page numbers available on Malawilii).
[220] Ibid.
[221] Ibid.
[222] *Registered Trustees of the Public Affairs Commission v Attorney General & Anor* [2003] MWHC 71 (no page numbers available on Malawilii).
[223] Ibid.

the strict old Common law position' without realising that even the English position had changed.

Chipeta J focused on the Constitution as the embodiment of the wishes and aspirations of the people.

> The more genuinely we give it attention and the more sincerely we evaluate its enabling provisions without rushing to disable them by trying to force them to fit in some ancient and expiring doctrinaire concepts, the nearer we will get to the justice regime the framers of the Constitution contemplated for the people of Malawi.[224]

Chipeta J considered the 'plain wording of the provisions for what they truly stood for' and held that '[a]ny person or group of persons' in section 15(2) 'cannot mean anything other than what it says and that narrowing it to a special species of "any person or group of persons" violates the liberal and wide style of interpreting a Constitution.'[225] He therefore held that the registered trustees of the Public Affairs Committee had sufficient standing to pursue the case.

The MSCA's response came in *Civil Liberties Committee v Ministry of Justice & Anor*.[226] A human rights non-governmental organisation (CILIC) contested the decision of the Registrar General to cancel a communications company's registration, prohibit its newspaper and criminalise the printing of the newspaper. CILIC claimed it had 'sufficient interest' to bring the case under sections 15(2) and 46(2) of the Constitution, arguing that these provisions allow any party with 'sufficient interest in the promotion, protection and enforcement of rights' to approach the court.[227] As a human rights NGO, CILIC argued that it had sufficient interest in the protection and promotion of rights to bring the case. The High Court ruled that CILIC lacked standing and dismissed the application.

The MSCA upheld the finding, stating that '[c]ourts exist to conduct serious business' and that for a plaintiff to have standing in cases affecting the public interest, they must demonstrate that they have 'suffered damage of a special kind or greater degree than that suffered by the rest of the members of the public.'[228] The MSCA examined various comparative legal

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[224] Ibid.
[225] Ibid.
[226] *CILIC* supra note 193.
[227] 1994 Constitution, s 15(2) provides '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.' S 46(2)(a) provides: 'Any person who claims that a right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled and to make application to a competent court to enforce or protect such a right or freedom'.
[228] *CILIC* supra note 193 no page numbers available on Malawilii.org.

standards for standing and noted that, in contrast with stricter American and Commonwealth approaches, modern English law allows NGOs to challenge public interest decisions. The court argued that '[r]espectable democracies renowned for their respect of human rights such as [the] United States of America, some Commonwealth countries including Australia and a number of countries which are parties to the European Convention on Human Rights and Fundamental Freedoms', require stricter specific legal interest standing.[229] It is noteworthy that none of the precedent cited was from countries with similar constitutions or histories to Malawi.

The MSCA justified its stance by referencing section 41(3) of the Constitution, which states that: '[e]very person shall have the right to an effective remedy by a court of law or tribunal for acts violating the rights and freedoms granted to him or her by this Constitution or any other law'. The MSCA held a 'literal and casual' interpretation of 46(2) would undermine 'the full meaning and impact of sections 15(2) and 41(3) of the Constitution' and destroy the test of sufficient interest for determining standing.[230] 'To so hold would be allowing one section to operate to destroy the provisions of another section of the Constitution.'[231]

The MSCA, therefore, held that Chipeta J's interpretation of the constitution in *Registered Trustees of the Public Affairs Committee*[232] was 'too simplistic and casual that it could not be correct.'[233] The Court held that CILIC's assertion that they were an NGO established to promote, protect and enforce human rights, democracy and the rule of law, was not sufficient interest to bring the case. Rather, the Court held that sufficient interest required 'special or substantial interest or existence of a legal right or interest in the outcome of a suit'. The MSCA, however, did accept that an organisation specifically concerned with the rights and freedoms of speech and the press might argue that they had sufficient interest to bring the case.

The reasoning in *CILIC* overlooks the realities of litigation in Malawi. While the requirement of standing can certainly be justified in many countries, in this case, the MSCA fails to engage with Malawi's small civil society or the legitimate historical reasons why an individual might not feel safe challenging the executive's use of power. Moreover, a strict

[229] Ibid.
[230] Ibid.
[231] Ibid.
[232] *Registered Trustees of the Public Affairs Committee* supra note 222.
[233] *CILIC* supra note 193.

approach to standing overlooks the fact that litigation is too complicated and expensive for the majority of ordinary citizens to pursue. [234]

Narrow rules on standing restrict the ability of justice being secured for those who cannot directly secure it themselves. This point was raised later in the case of *Chaponda* and the court held that where the human rights of certain people are alleged to have been threatened or violated, it is a priority that the people directly affected should be allowed an opportunity to vindicate their rights and that 'it would be wrong, dangerous and unfair, if it became the practice of human rights defenders to snatch away cases from individuals who themselves are capable of complaining or bringing up actions in courts for redress.' [235] With respect, this approach underappreciates the costs and personal difficulties that an individual litigant faces when challenging executive acts in order to vindicate their rights.

The reasoning of the MSCA in *CILIC*, which uses other countries' approaches to standing to justify Malawi's, would have been improved if it addressed the underlying principles for standing and argued from first principles regarding its ongoing justification. As a result, the reasoning of the Court appears contrived and shallow.

In later litigation, corporate bodies, such as the Malawian Law Society, were granted standing. In *S v Lilongwe Water Board & Ors; Ex Parte: Malawi Law Society,* the Malawi Law Society was granted standing to judicially review the management of a water project based on its statutory duty to protect the public in matters of law under the Legal Education and Legal Practitioners Act.[236] Other organisations have also been allowed to represent litigants in constitutional cases, however, the precedent still enables courts to refuse standing on the grounds of not being convinced that an organisation has a special interest in the matter.[237]

(c) 2007- 2024: The development of constitutional review

As the courts began to mature into their new role, a new theme developed within the jurisprudence, which is drawing distinctions between constitutional review, judicial review

[234] Studies show that 61.7 per cent of Malawi's population is listed as living in 'multidimensional poverty'. National Statistical Office, Government of Malawi, *Malawi Multidimensional Poverty Index* 2021 available at https://ophi.org.uk/wp-content/uploads/Malawi_MPI_report_2021.pdf accessed 20 October 2023.
[235] *Chaponda* supra note 193, 55.
[236] *S v Lilongwe Water Board & Ors.; Ex Parte: Malawi Law Society* [2017] MWHC 135.
[237] See eg in *Chaponda* supra note 193.

under the common law and the right to fair administrative justice under section 43 of the Constitution.

The initial jurisprudence under the 1994 Constitution did not draw a distinction between the grounds or procedure for common law judicial review, judicial review of administrative action under section 43 of the Constitution and constitutional review of the executive acts. Courts adopted the approach that section 43 of the Constitution was a restatement of the common law.[238] In an influential review of the first fifteen years of democratic constitutional jurisprudence, Chirwa criticised the courts for failing to realise the true potential of sections 43 and 108 of the Constitution.[239] Chirwa noted that the courts were happiest to remain within the 'realm of the "*ultra vires* doctrine".'[240] As a result, he described the case law that had developed as 'a corpus of confused and incongruous jurisprudence.'[241] He encouraged courts to acknowledge their 'core business' to 'keep the executive and administrators in check.'[242] Chirwa focused his article on section 43 (the right to fair administrative procedure), but encouraged courts to make a distinction between judicial review in the constitutional sense and judicial review in the administrative law sense.[243] He argued that making such a distinction aids the development of an intensive review of administrative action under section 43, as well as a more appropriate level of review of executive acts and legislative enactments.

Chirwa's justification for having two levels of review was both textual and principled. He argued that according to the text of the Constitution, there is a distinction between sections 108 and 43, and that the core executive powers (such as those found in section 89) are not administrative action, therefore, should not be addressed under section 43.[244] He also argued that respect for the principle of the separation of powers supports this textual distinction.[245] The standard that Chirwa suggested is appropriate for constitutional review is that of legality, which is a 'less probing review', as it does not consider the rationality, reasonableness or

[238] *Lunguzi* supra note 187, confirmed on appeal in *Attorney General v Lunguzi* supra note 188, 11.
[239] Chirwa (2011) op cit note 9.
[240] Ibid 107.
[241] Ibid 111.
[242] Ibid 108.
[243] Ibid 117.
[244] Ibid 115.
[245] Ibid 118.

procedural impropriety involved in the case.[246] This article has been very influential and is often cited, particularly in the High Court.[247]

Mwaungulu J first employed the terminology of 'constitutional review' in a judgment in 2013 in the context of whether a matter ought to have been referred to a bench of three judges for the determination of the case in accordance with the Court (High Court) (Procedure on the Interpretation of the Constitution) Rules.[248] Mwaungulu J stated that judicial review under Order 53, premised on the general powers of the High Court, must be distinguished from constitutional review created by section 108(2) of the Constitution, which allocates the High Court exclusive power of 'constitutional review'.[249] This exclusive power only applies in two areas: (a) constitutionality of laws and (b) constitutionality of 'actions and decisions of Government.'[250]

Therefore, the Court held, where a question falls *within* the exclusive jurisdiction of the High Court to determine constitutionality, a three-judge bench should be empanelled to hear the matter. The judge went further to clarify the fifteen circumstances where the High Court exercises constitutional review, which include determinations of the constitutionality of customary law, international law, common law, legislation, government decision, government action, presidential referrals and appeals and judicial reviews from the Electoral Commission (in other words, the categories identified in Chapter Two as constitutional review and constitutional process review).[251] Where additional matters outside the exclusive jurisdiction of the High Court arise in the same case, the judge decides whether to refer the case to a constitutional panel of three judges. The categorisation of some forms of judicial review as 'constitutional' has since received judicial endorsement on several occasions.[252]

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[246] Ibid.
[247] See eg *The State (oao Admarc Limited) v The Ombudsman* [2021] MWHC 37, *S (On the application of Malawi Telecommunication Limited) v Ombudsman* [2022] MWHC 42, *S (on the application of the Malawi Law Society) v Prosecutor Mangani & 2 Ors* [2023] MWHC 37.
[248] *Reserve Bank of Malawi & Ors v Attorney General* [2013] MWHC 451 (no page numbers available on Malawilii). This was a topic that had caused the courts some concern. See eg, *Phiri v Muluzi & Anor* [2008] MWHC 4.
[249] S 9 provides that 'The judiciary shall have the responsibility of interpreting, protecting and enforcing this Constitution and all laws and in accordance with this Constitution in an independent and impartial manner with regard only to legally relevant facts and the prescriptions of law.'
[250] *Reserve Bank* supra note 248.
[251] *Reserve Bank* supra note 248 (no page numbers available on Malawilii).
[252] *S v Council, University of Malawi; Ex Parte: University of Malawi Workers Trade Union (Judicial Review)* [2015] MWHC 494, [2.4], *S v Judicial Service Commission and Another* [2019] MWHC 34, and *Malawi Law Society v Prosecutor Mangani* supra note 247.

Along with this distinction between judicial review and constitutional review, came a separating of the statutory basis for the procedure of the review. In 2015, it was held that judicial review of administrative action is available under Order 53, whereas constitutional review of executive conduct was to proceed under section 108(2) of the Constitution, where all legislation and government conduct could be reviewed for consistency with the Constitution and need not be administrative action.[253] Constitutional review of legislation was already being brought under section 108(2) by originating summons. However, this new approach did not clarify the grounds for constitutional review of executive conduct or the procedure for bringing these cases.

i. Reviewing presidential appointment powers

In the case of *R v State President & Another,* four parliamentarians challenged the President's decision to appoint a candidate as the Clerk of Parliament who was on the list of recommendations of the Parliamentary Service Commission (PSC) but was not their nominated candidate.[254] The judicial review was brought under Order 53. The PSC had informed the President of three candidates with percentage scores next to their names and recommended the candidate they considered most suited to the position. The President rejected the recommendation and appointed the lowest ranking applicant.

The question before the Court was whether the President acted lawfully in rejecting the recommendation of the PSC. The clerk is appointed by the President 'on the recommendation' of the PSC. The High Court held that to review the conduct of the President, the standard of behaviour was to be measured against *Wednesbury* reasonableness:[255] 'The court must be satisfied that no decision-maker properly directing his/her mind to the law and facts before him/her could have made such an absurd decision.'[256]

The judge considered the dictionary definition of a 'recommendation' and held that the President, as the appointing authority, had the right to exercise choice and was not required by law to appoint the PSC's favoured candidate.[257] The President, therefore, was entitled to

[253] *S v Council, University of Malawi* [2015] supra note 252 [2.4.].
[254] *R v State President & Anor* [2015] MWHC 439.
[255] The English case, *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, which established the standard of reasonableness required for reviewing a decision of a public body.
[256] *R v State President* supra note 254 [4.2].
[257] Ibid [7.10.3].

appoint a candidate of his choosing from the list of three, all of whom had already been tested by the PSC and proven to be competent.[258]

The judge held that the President's appointment powers derive from section 89(1) of the Constitution, and for a court to quash the appointment, it would need to see that the President had acted arbitrarily and unconstitutionally, and that there was evidence of 'abuse, unreasonableness and bad faith'.[259]

With regard to the outcome of the case, Wongani criticises the 'weakness' of the court in this case for 'disregarding the prevailing social context' and points out that the court's approach failed to take into account the history of abuse of appointment powers and the decades of 'nepotism, cronyism and patronage'.[260] One could argue that the court's endorsement of Presidential choice when appointing on recommendation from a specialist committee weakens the effectiveness of having that specialist committee. Considered alongside *Makandawire* and *Phiri*, this case demonstrates how the courts struggle with the appropriate standards to apply when dealing with presidential powers.

ii. 2017 Court Rules

The passing of new civil procedure rules in 2017 brought some clarity on the process for bringing constitutional cases. Constitutional matters consist of constitutional process review, constitutional review (of legislative and executive acts) and fundamental rights litigation. All three types of cases involve the convening of a constitutional bench consisting of three High Court judges, on certification by the Chief Justice that a constitutional matter has been raised.[261] Constitutional review of executive conduct (including presidential conduct) is included as a specific form of judicial review under Order 19 rule 20(1).[262] It expressly provides that judicial review shall cover the review of:

> (a) a law, an action or a decision of the Government or a public officer for conformity with the Constitution; or
>
> (b) A decision, action, failure to act in relation to the exercise of a public function in order to determine:

[258] Ibid [7.11.4], [8.03].
[259] Ibid [7.13] and [8.03].
[260] Mvula Wongani *Limiting Presidential Appointment Powers of Senior Government Officials: Lessons for Malawi* (LLM Thesis, Central European University, 2017), 23 – 25.
[261] Courts (High Court) (Civil Procedure) Rules, 2017, Order 19, part I.
[262] Ibid.

(i) Its lawfulness;

(ii) Its procedural fairness;

(iii) Its justification of the reasons provided, if any; and

(iv) Bad faith, if any,

where a right, freedom, interests or legitimate expectation of the applicant is affected or threatened.

The distinction between (a) and (b) gives effect to the distinction between constitutional review and 'public function' review, with the first focusing on conformity with the Constitution, and the second being open to wider grounds of review. The review in (a) refers to a narrower group of individuals – specifically the government or a public officer, whereas (b) refers to actions by any public functionary, which could also include the high executive and even the President. To bring any judicial review, parties must still show standing, proceed with permission of the court and bring the case within three months after the decision was taken. The implementation of these rules has not substantially affected the way that cases proceed or are decided in practice.

iii. Defining and refining constitutional review

In 2019, the MSCA addressed the President's power to appoint and remove ministers and Commissioners of Inquiry in *Chaponda v Kajoloweka.*[263] Chaponda was the Minister of Agriculture and Food Security who was implicated by allegations of corruption related to a government scandal involving the purchase of maize from Zambia. The scandal led to calls on the President to either dismiss Chaponda or require his resignation. The President declined to dismiss and Chaponda refused to resign. The President set up a Commission of Inquiry (COI), which included two civil servants to enquire into the allegations of corruption.

The respondents brought a judicial review to declare as unconstitutional, unreasonable and illegal: the President's decision not to suspend Chaponda pending the conclusion of the COI; the President's decision to appoint to the COI civil servants who were subordinate to Chaponda in the government and could be influenced or could be affected by his continued power in the government during the COI; and Chaponda's decision not to resign pending the COI. The matter was brought by an individual, Kajoloweka, and three NGOs that Kajoloweka appeared to run, whose stated mandates were to safeguard democratic and transparent governance. Leave to review was granted by Chirwa J and the respondents applied for that leave to be vacated,

[263] *Chaponda* supra note193, 29.

which was denied. The denial was appealed. A key issue in the appeal was whether the powers of the President in this case were reviewable on these grounds.[264]

The MSCA held that '[t]he parameters of what the courts should delve into in judicial review proceedings need to be defined or refined.'[265] The MSCA held that whilst constitutional review is available against some presidential powers, the powers of appointment of ministers or Commissioners of Inquiry are not amenable to review.[266] This is consistent with the previous jurisprudence in *Mkandawire*.[267]

The MSCA held that whether the exercise of presidential acts is reviewable will depend on the subject matter and justiciability of the matter.[268] Where the power is derived from 'royal prerogative' it will not always be reviewable, and those powers that have no 'statutory or constitutional underpinnings are by and large not amenable to judicial review'.[269] Additionally, the court held that the prerogative power would have to 'affect individual rights or deal with a justiciable question' to be reviewable.[270] The MSCA also held that where presidential powers are reviewable, it is a very limited review, restricted to legality.[271] This description of review appears even narrower than the dicta in *R v State President & Another,* which allowed review when there was 'abuse, unreasonableness and bad faith'.[272] The court, however, failed to provide any case law or reasoning to support this, did not analyse the new court rules, nor did it discuss why common law grounds of judicial review, which had previously been applied to presidential conduct, would no longer apply.

The MSCA did, however, rely heavily on the South African constitutional case of *President of South Africa v South African Rugby Football Union ('SARFU')*[273] in which it was held that the President was not performing 'administrative acts' within the meaning of section 33 of the Constitution when he appointed a COI under section 84 of the South African Constitution.[274] In *SARFU,* the Court had held that the exercise of the President's power was subject to the

[264] Ibid 14.
[265] Ibid 29.
[266] Ibid 46.
[267] *Mkandawire* supra note 213.
[268] *Chaponda* supra note 193, 40.
[269] Ibid 40-41.
[270] Ibid 36.
[271] Ibid 30.
[272] *R v State President* supra note 254.
[273] *President of South Africa v South African Rugby Football Union ('SARFU')* [1999] ZACC 11, [148].
[274] Section 84 of the South African Constitution is the equivalent empowering provision as section 89 of the Malawian Constitution.

doctrine of legality, which applies to all power exercised in terms of the Constitution. The Constitutional Court in *SARFU* also held that the President must act in good faith and must not misconstrue the nature of his or her powers.[275] The MSCA in *Chaponda* relied on the *SARFU* case for the finding that the courts are ill-suited to judicially review 'executive actions'.[276]

Moreover, the MSCA indulged in a discussion about justiciability, relying on the English cases of *Council for Civil Service Unions v Minister for Civil Service*[277] and *R v Foreign Secretary, ex parte Everett*[278], which both concerned the justiciability of the exercise of prerogative powers. In reversing leave for review, the MSCA stated that 'the power to appoint Ministers and Commissions of Inquiry is simply non-reviewable.'[279] Again, the MSCA failed to engage with how the threshold requirement of 'reviewability' fits within the context of section 108(2) of the Constitution.

Furthermore, the MSCA did not distinguish between the removal of ministers and the appointment of members of a COI. It could be argued that COIs perform a very different function from ministers, and that given the significant public interest in COI reports, the public has an interest in ensuring that the President acts rationally in appointing members of the COI.

The MSCA found that the President had not violated any provisions of the Constitution in not removing or suspending Chaponda.[280] The Court held that it would be judicial overreach to intervene with the President's use of the power to appoint and remove ministers, except in instances where the President acts contrary to the provisions of the Constitution.[281] The court applied a presumption of 'good faith' and 'good conscience' on the part of the President – a presumption which is at odds with Malawi's historical experience.[282]

Moreover, the MSCA stated that principles of constitutional policy found in the preamble and other introductory parts of the Constitution cannot be used to interpret the President's compliance with section 94 of the Constitution.[283] This obiter dictum was unnecessary in the context of the judgment and serves to set a regrettable precedent. This approach flies in the face of the MSCA's own approach to its constitutional role in *Chakuamba & Ors v Attorney*

[275] *SARFU* supra note 273, [148].
[276] *Chaponda* supra note 193, 39.
[277] *GCHQ* supra note 173.
[278] *R v Foreign Secretary, ex parte Everett* [1989] 1 QB 811.
[279] *Chaponda* supra note 193, 42.
[280] Ibid.
[281] Ibid 44.
[282] Ibid.
[283] Ibid 45.

General & Ors[284]*,* in which Banda CJ urged courts to interpret the Constitution in a principled and contextually appropriate manner through the lens of sections 11 to 14 of the Constitution:

> The principles that we develop must promote the values which underlie an open and democratic society; we must take full account of the provisions of the fundamental constitutional principles and the provisions on human rights. … We are aware that the principles of interpretation that we develop must be appropriate to the unique and supreme character of the Constitution.[285]

V. Executive response to judicial oversight

The decisions against the President and the high executive have often brought the courts to the forefront of public scrutiny, attracting significant negative attention for the individual judges involved.[286] There has also been political retaliation against the judiciary, including attempts to remove individual judges on at least two occasions. The first was during Muluzi's presidency in 2001, when three judges were threatened with impeachment by the NA in response to several decisions that went against the state. In the impeachment motion, the UDF MPs accused the judges of 'passing judgments that had not been in favour to the United Democratic Front government' and being 'tools for the opposition.'[287] Additionally, Mwaungulu J was targeted for 'questioning the presidency while analysing the 1999 general elections'.[288] The impeachment process was halted by the President 'pardoning' the judges, following significant local and international pushback, including the withdrawal of aid to Malawi by international donors.[289]

The second significant event occurred following the invalidation of the 2019 election results by the High Court and upheld by the Supreme Court of Appeal.[290] In 2019, the presidential election was declared in favour of Peter Mutharika, however, the election was annulled following the discovery of election irregularities, including the use of white correction fluid on polling sheets; thus, it became known as the 'Tippex election'.[291] During both the HC case and the MSCA case, the judges of both courts came under unwarranted political criticism and exhibited significant courage in overturning the election results.

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[284] *Chakuamba & Ors. v Attorney General & Ors* [2000] MWSC 5.
[285] Ibid 5-6.
[286] See eg *Malawi Law Society, et al. v The State and The President of Malawi* High Court Miscellaneous Civil Cause No 78 of 2002 (unreported), *Mutharika v Chilima* supra note 5.
[287] Khembo op cit note 121, 92.
[288] Ibid.
[289] Peter VonDoepp 'The problem of judicial control in Africa's neopatrimonial democracies: Malawi and Zambia' (2005) 120 (2) *Political Science Quarterly* 275, 288-289 and Ellett op cit note 161.
[290] *Mutharika v Chilima* supra note 5.
[291] Ibid.

After the invalidation of the election, and pending the rerun, President Mutharika attempted to force Chief Justice Nyirenda and Justice Twea to go on leave pending retirement. The matter was resolved through a HC case brought by civil society, in which Mkandawire J held, unequivocally, that the President had acted unconstitutionally and in breach of the doctrine of the separation of powers and that he had no constitutional or legal basis on which to compel the judges into leave pending retirement.[292] This case is important, having been successfully vindicated by civil society organisations, and because the finding of the Court was founded on the doctrine of the separation of powers, as evidenced in the Constitution and not on any particular specific provision of the Constitution.

There is evidence to suggest that politicians have attempted to influence and interfere with the judiciary on other occasions and despite this, the judiciary has found against the government in significant political disputes.[293] However, VonDoepp's 2005 quantitative study results showed that despite the judiciary's 'independent and assertive role' in many cases, the jurisprudence suggested that the higher the government interest in a case, the more likely the judiciary would observe a high level of deference to the government.[294] It would be interesting to see whether those findings would be any different after the 2019 election petitions.

VI. Conclusion: The courts as an accountability mechanism on high executive power in Malawi

This short survey of cases in Malawi reveals that after three decades of jurisprudence, ranging widely across the spectrum of cases involving the high executive, the courts have established themselves as a vital accountability mechanism for high executive power. However, the jurisprudence is far from integrated and remains characterised by inconsistency and shallow engagement with deeper constitutional principles. An analysis of the judicial-executive relationship reveals institutional courage coupled with jurisprudential confusion, where courts have demonstrated willingness to address executive overreach, but have struggled to develop coherent constitutional principles to guide their interventions.

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[292] *State (obo Human Rights Defenders Coalition & Ors.) v President of the Republic of Malawi & Ors*. [2020] MWHC 26 [74-5].
[293] VonDoepp op cit note 289, 282, 284-293.
[294] Ibid 282.

Turning to consider the coherence of Malawian jurisprudence through the four questions identified in part III(b) of Chapter 1, the institutional performance and doctrinal development may be evaluated as follows.

(a) Institutional access and incidence

With regard to institutional access and incidence, it is clear that Malawian courts are regularly called on to scrutinise high executive conduct. The survey of the jurisprudence illustrates that the courts are active in their role which is consistent with research findings of public trust in the judiciary. Trust in courts remains relatively good at 68 per cent expressing trust in the courts.[295] The judiciary has thus been called the 'democratic stronghold' for Malawi, even in an environment where the quality of the political institutions has weakened.[296]

The 2017 changes to the Court Rules have maintained procedural requirements, including leave to review, reviewability, standing requirements and time limits, which may restrict the ability of litigants to access a remedy and protect the Constitution. During the discussion about standing between the HC and the MSCA, which culminated in *CILIC,* the courts made arguments about the suitability of these procedural requirements in the Malawian context, however, as was discussed above, the arguments of the MSCA were not compelling.

These preliminary procedural requirements, which were developed for good reason in English law, offer a leeway to Malawian judges who might seek to avoid considering tough political topics through reliance on technicalities to dismiss unpalatable cases.[297] Ng'ong'ola argued that 'narrow technical issues' can be relied on as 'acceptable legal solutions' to 'avoid philosophising about the new political and constitutional order.'[298]

The dismissal of a case at leave to review stage deprives individual litigants of opportunities to have their cases heard against the more powerful executive and adds an unnecessary and expensive additional step in the litigation process. Malawian courts rely on English law in holding that 'it is only when there is undoubtedly an arguable case that leave should be

[295] Afrobarometer 'Malawi SDG Scorecard 2021' 19 May 2021 available at https://www.afrobarometer.org/wp-content/uploads/2022/02/malawi_sdg_scorecard_2021-afrobarometer-19may21_1.pdf accessed on 17 March 2023, 4.
[296] Siri Gloppen & Fidelis Edge Kanyongolo, 'Judicial Independence and Judicialization of Electoral Politics in Malawi and Uganda' in Danwood Chirwa & Lia Nijzink (eds) *Accountable Government in Africa* (2012), 2.
[297] See eg *Kachere* supra note 190, *Press Trust I* supra note 197, *S (On application of Dr. Justice Michael Mtambo) v Judicial Service Commission and the President of the Republic of Malawi* [2022] MWHC 92.
[298] Ng'ong'ola (2002) op cit note 74, 85-6. See also, Kachale op cit note 49, 220.

granted.'[299] Whether this standard is compatible with the new constitutional order in Malawi has not been established. Whilst leave to appeal may be a useful way of restricting the filing of frivolous appeals, it may not stand on cogent policy grounds in the Malawian context because it arguably contradicts provisions of the Constitution requiring that all cases are heard.[300] A 'flood gates' argument can be defeated by noting that once a matter is heard and determined and precedent is set, future litigants can be guided by that precedent and know to avoid the re-litigation of a futile topic.

Restrictive time limits for bringing review applications may similarly require justification for their continued applicability, however, the effects of these are assuaged by the courts' discretion to condone late filing.

However, the courts' active engagement with high executive review cases indicates that whilst procedural requirements including leave to review, reviewability, standing requirements and time limits have been strategically invoked to restrict the ability of certain litigants to access review, these barriers have not prevented significant constitutional challenges from reaching judicial consideration.

(b) Institutional effectiveness

Considering institutional effectiveness, the courts have on many occasions held the high executive to account for their use of power and have not appeared timid to overturn executive conduct, including in highly sensitive matters such as the interference with the judiciary. The judiciary did not behave as the 'government lapdogs' that might have been predicted as the institution emerged from Malawi's authoritarian past.[301] Notably, the Constitutional Court's annulment of the 2019 presidential election results exemplifies the courts' willingness to exercise their powers when constitutional violations are established, even in highly politicised cases.

However, the Malawian courts have appeared hesitant in making decisions regarding certain presidential powers, including the appointment of ministers and commissioners of

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[299] *Chaponda* supra note 193, 28.

[300] See eg, s41(2-3) which provides:

> '(2) Every person shall have access to any court of law or any other tribunal with jurisdiction for final settlement of legal issues.
> (3) Every person shall have the right to an effective remedy by a court of law or tribunal for acts violating the rights and freedoms granted to him by this Constitution or any other law.'

[301] VonDoepp op cit note 289, 276.

inquiry. This approach suggests that while the judiciary has embraced its constitutional role as a check on executive power, there remains uncertainty about the appropriate boundaries of that role in relation to the democratic mandate of the executive branch.

Thirty years is not a long time in the life of a country, and it is natural that the memory of the brutal previous regime still stains the image of the high executive in Malawi, particularly as the President in Malawi still yields extensive power in governance. Individual politicians also still exhibit a desire to expand and preserve their own power.[302] The separation of powers between the executive and the legislature and the entrenchment of horizontal accountability has not yet developed enough to curb the executive's powers.[303] In this context, the judiciary plays an important role as the safeguard of the constitutional system, which has brought it directly into conflict with the executive on numerous occasions.[304] The courts' effectiveness is demonstrated by their willingness to step into their greater role in spite of continuing imperial presidentialism and potential political backlash.

(c) Normative foundations

With regard to the normative foundations for the jurisprudence, the courts are guided by a hybrid of homegrown and English common law principles for holding the executive accountable. Since the adoption of the new Court Rules in 2017, the courts have adopted the standard of legality review, rather than the broader common law grounds, for determining the constitutionality of acts of the high executive. However, the courts have not yet engaged deeply with the 2017 Rules and whether they shift away from the common law grounds or whether high executive conduct can still be reviewed under the (b) leg of rule 20. There has also not been clarity on how the standards of review under (a) and (b) interact. Legality and reasonableness are not conceptually distinct concepts in practice since conceptions of rationality, reasonableness and procedural propriety certainly inform legality.

The courts often rely heavily and unquestioningly on English precedent regarding executive conduct to inform their decisions, which may not always be appropriate and can result in

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[302] Nkhata (2010) op cit note 11, 239. Ingo Scholz 'Introduction: Malawi's development course on a knife's edge: Do the politicians care?' in *Towards the consolidation of Malawi's democracy: Essays in honour of the work of Albert Gisy German Ambassador in Malawi* (2008), 2.
[303] VonDoepp op cit note 289, 299.
[304] Marshal Chilenga 'Dikastocracy: Is it undermining democracy in Malawi?' in *Towards the Consolidation of Malawi's Democracy: Essays in Honour of the Work of Albert Gisy German Ambassador in Malawi* (2008), 52, Ellett op cit note 161, 20.

inconsistent jurisprudence.[305] Reliance on English precedent also may not be *in*appropriate. The UK has 400 years of jurisprudence that explains the law of judicial review that was introduced into Malawi. This jurisprudence can enrich Malawian reasoning and explain the underlying principles of the cases and help judges to develop coherence in the law through alignment with these principles.

However, courts seldom address the difference between parliamentary supremacy and presidentialism, the differing culture of political accountability in England and the recent developments of English judicial review. An awareness of these factors and of the nature and goals of the Malawian Constitution could deepen Malawian jurisprudence. Courts should also remain willing to reject English law concepts that undermine the promotion of the principles of the Constitution. In fact, legal borrowing often appears to be perfunctory without critical consideration of whether the imported doctrines serve Malawi's jurisprudential and constitutional framework.

Legality review is an important way of safeguarding the Constitution. However, it is also important to guard against opening the executive and the President up to such a broad array of challenges that they are unable to exercise their legitimate and democratically granted powers for fear of review. In cases like *Mkhandawire*, *Phiri* and *Chaponda,* the courts can engage in drawing boundaries for appropriate interference with executive powers in a principled and contextualised manner.

(d) Coherence of reasoning

On the final question which evaluates coherence as consistency plus principled and reasoned engagement with the underlying principles and precedents of the area of law (jurisprudential coherence) and the constitutional framework as a whole (constitutional coherence), the Malawian courts are not yet showing signs of developing coherence.

This incoherence manifests in several ways. Similar cases involving the high executive may come to differing outcomes in procedural and substantive areas of law. For example, the courts had different findings relating to the standing of CILIC, the Malawian Law Society and the Registered Trustees of the Public Affairs Committee.[306] Another example is regarding the

[305] Kachale op cit note 49, 220.
[306] See *Civil Liberties Committee v Ministry of Justice & Anor* supra note 193 and in *S v Lilongwe Water Board & Ors; Ex Parte: Malawi Law Society* supra note 236, *Registered Trustees of the Public Affairs Committee* supra note 222.

approach to discretionary presidential conduct in *Lunguzi* and *Chilumpha*, *Mkandawire* and *Phiri*.[307] Admittedly, these cases were not identically brought, but the courts' general approaches were also not consistent. Additionally, the judicial reasoning often fails to engage with existing norms and deeper principles of Malawian constitutional law.

Some judges, particularly on the MSCA, avoid challenges to the executive through the strict application of procedural rules, while others avoid engaging with the development of Malawian jurisprudence through overreliance on foreign jurisprudence, rather than reasoned and principled discussions of the law under the Constitution.

More promisingly, some judges are evidently committed to implementing the principles of the Constitution, specifically the protection of fundamental rights, the limitation of government and the rule of law, through their legal reasoning. Judges have begun articulating a 'principled approach' to constitutional interpretation which may help to develop coherence, particularly constitutional coherence. Malawi's particular historical context is reflected in the values and principles embedded in the constitutional text itself and could guide the courts in their goal to read all provisions of the Constitution as aiming to 'effectuate the greater purpose of the Constitution.'[308]

As early as 2001, Mwaungulu J described what is meant by a 'principled approach':

> A country's Constitution must be understood in the wider context of the country's aspirations. Courts must interpret the Malawi Constitution from the democratic ideal and its astute protection of fundamental human rights. It is characteristic that our Constitution, anticipating the problems it intended to forestall and our aspirations for promoting democracy and fundamental human rights, provides notions unheard of or unthought of in modern constitutional and political theory, conceptualisation and thought. This goes to its uniqueness.[309]

In creating standards for executive conduct, the courts could look to the principles and values in the preamble of the Constitution, which include the sanctity of human life, the goal of national unity and harmony, the guarantee of welfare and development, the promotion of peaceful international relations and the creation of a constitutional order that includes open, democratic and accountable governance.

Moreover, specifically against the high executive, the judges can rely on the fact that the authority to govern derives directly from the people of Malawi and that the executives are

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[307] *Lunguzi* supra note 187, *Chilumpha* supra note 218, *Mkandawire* supra note 213, *Phiri* supra note 213.
[308] *Nseula* supra note 185.
[309] *Okeke* supra note 192 (no page numbers available on Malawilii).

required to implement policy and laws that 'express the wishes of the people of Malawi' and 'promote the principles of the Constitution'.[310] Section 12 specifically sets out principles for governance and section 13 states the principles that should underlie national policy. A strict and narrow 'legality' standard of review on its own is not consistent with these principles, which also require that the executive act openly and transparently and in the interests of the people in Malawi.

All in, Malawian jurisprudence regarding the high executive still has low coherence and is marked with pluralism and jurisprudential confusion leading to differing outcomes in cases and the inconsistent application of principles.

(e) The development of coherent constitutional jurisprudence

The attainment of constitutionalism in Malawi is a continuous process, and its democratisation project has been described as 'fragile and incomplete'.[311] This is no doubt exacerbated by the fact that Malawi remains a low-income country with widespread 'lived poverty'.[312] However, in the three decades that have followed the adoption of the 1994 Constitution, Malawi's democratic system has begun to prove itself. The people of Malawi have appointed six different presidents and held seven general elections. Six of these were in the ordinary course, and the most recent elections (held in 2020) were held extraordinarily, after the Constitutional Court annulled the 2019 presidential election results for evidence of irregularities in the election.[313]

Despite this democratic development, results from a recent Afrobarometer survey suggests that while the general population has a good understanding of and desire for democratic governance, they are cautious about the President and Parliament, and believe that it is more important for the citizens to hold the government accountable than to promote government efficiency in decision-making.[314] Results show a deep distrust of the politicians in the executive and in the NA, as well as a sense that political accountability lies with the voters in ensuring

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[310] 1994 Constitution ss 6-7.

[311] Blessings Chinsinga 'Malawi's Democracy project at a crossroads' in *Towards the Consolidation of Malawi's Democracy: Essays in Honour of the Work of Albert Gisy German Ambassador in Malawi* (2008), 7.

[312] Ibid. Statistic is from Afrobarometer 'Malawi SDG Scorecard 2021' op cit note 295, 2. In this survey, 72% of those surveyed in 2019 experienced moderate to high 'lived poverty', up from 55% in 2008. Moreover, 40% stated that they went without enough food "many times / always" and increase from 19% in 2008.

[313] *Chilima* (MWHC) supra note 5, *Mutharika v Chilima* supra note 5.

[314] Centre for Social Research, University of Malawi 'Summary of results – Afrobarometer Round 9 survey in Malawi, 2022' Afrobarometer 29 August 2022 available at https://www.afrobarometer.org/wp-content/uploads/2022/08/MLW_R9_Summary-of-results_Afrobarometer-29Aug22-.pdf, accessed on 30 January 2025, 27.

that the elected government officials do their jobs right.[315] The election results suggest a voting population that is not afraid to exercise their vote to express their opinion of the elected government and recourse to the courts suggests trust in the courts to hold the executive to account. This political assertiveness may be an explanation for the high incidence of constitutional cases challenging high executive conduct.

Despite the imperfect development of the jurisprudence, critiques should not overshadow the fact that the judiciary has stepped into a greater role in the past 30 years, only a small part of which is reflected in this brief overview. The judiciary has become the institution on which the political system relies to resolve political disputes, and this has been done using innovative approaches to judicial review.[316]

The development of a principled approach to the interpretation and application of the Constitution may help provide parameters for correct executive conduct and guide future executives. A principled approach to constitutional interpretation is one of the ways that the courts could employ an 'innovative and expansive approach to adjudication' and 'actualise the transformative potential' of the Constitution, while giving due respect to the democratic mandate of the democratic branches of government and simultaneously protecting and promoting the rule of law and fundamental rights.[317]

A more principled approach to judicial interpretation can also aid in developing a coherent constitutional jurisprudence that is best suited to the development of the autochthonous voice of the Malawian courts. As this chapter has illustrated, the courts have begun to prove themselves and are developing a distinctive constitutional review, however, the failure to engage in deeper doctrinal issues in case law means that the jurisprudence is still not well integrated.

The courts' role as an accountability mechanism for high executive power in Malawi is thus characterised by institutional effectiveness but jurisprudential weakness. While the judiciary has demonstrated its willingness and ability to hold the executive accountable, the development of a coherent, principled framework for such accountability remains a work in progress that will be crucial for the long-term success of Malawi's constitutional democracy.

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[315] Ibid 28.
[316] For a discussion of the breadth of cases that the courts have handled, see Kachale op cit note 49, 125 onwards.
[317] Nkhata (2010) op cit note 11, 237-8.

CHAPTER FOUR
THE COURTS AND THE EXECUTIVE IN NAMIBIA

I. Introduction

We turn now to consider the second jurisdiction, Namibia. An outlier in many respects, Namibia was the first of the three countries in this comparative study to adopt a modern constitution and its history and public law origins are significantly different from the others. Therefore, it offers a different perspective on the executive-judicial relationship.

In 1990, Namibia, newly-independent from South African rule, adopted a new Constitution replacing the sovereign Parliament with constitutional supremacy and providing the judiciary with 'leverage to promote the principles of the rule of law and constitutionalism and protect and advance the fundamental rights of the individual.'[1] Article 5 of this new

[1] Sam Amoo 'The relevance of comparative jurisprudence in the Namibian legal system in *Beyond a Quarter Century of Constitutional Democracy: Process and Progress in Namibia* Nico Horn & Manfred O Hinz (ed) (2017), 199.

Constitution 'imposes a collective responsibility on all the organs of State' to uphold the Constitution and requires the judiciary to enforce this responsibility. This judiciary needed to be 'both willing and able to maintain its integrity and independence against the onslaught of executive intimidation, interference and political patronage'.[2] The Namibian judiciary demonstrates an increasingly coherent jurisprudence of holding the executive accountable for its use of power. While the courts are cautious in cases involving the President, they still require a standard of legality in the exercise of this highest public power.

This chapter begins with a discussion of the history of Namibia, its emergence from colonisation and apartheid under South Africa and the establishment of a trendsetting, rights-based democratic Constitution. The relevant infrastructure of that Constitution will be explained before considering the courts' role since 1990 and how they have ensured that the executive acts within the limits of the powers granted to it under the Constitution. The end of the chapter will consider the coherence of Namibia's emerging jurisprudence.

II. Historical overview

Before European settlers arrived in Namibia, it was inhabited by 'small and highly mobile groups of people who lived from herding cattle, sheep and goats, foraging for a wide range of food from the bush (*veldkos)*, hunting and trapping game, and possibly some small-scale agriculture; they also ran both short- and long-distance trade networks.'[3]

In 1878, the British government annexed an area of 374 square miles around Walvis Bay, a deep-water port on the south-west African coastline, as part of the Cape Colony.[4] After the Berlin Conference in 1884, Germany annexed the surrounding territory and called it 'German South West Africa'. Under German colonisation, the native populations were cruelly dominated and suffered severe retaliation to any resistance.[5] When the Herero and Nama groups rebelled, the German administration killed approximately 65,000 people from 1904-1906 in what is widely considered a genocide.[6] The memory of this first colonisation would

[2] Ibid 209.
[3] Marion Wallace *A History of Namibia: From the Beginning to 1990* (2011) 47.
[4] Ronald B Ballinger 'The territory of South West Africa' (1963) 45(268) *Current History* 361, 362.
[5] Fabian Krautwald 'Genocide and the politics of memory in the decolonisation of Namibia' (2022) 48 (5) *Journal of Southern African Studies* 805-823.
[6] George Steinmetz 'The First Genocide of the 20th century and its postcolonial afterlives: Germany and the Namibian Ovaherero' (2005) 12 (2) *Journal of the International Institute*.

remain a fundamental part of the rhetoric of political leaders in the resistance against South Africa's later occupation of Namibia.[7]

(a) South African colonisation and law

During the First World War, the Union of South Africa, then a self-governing dominion of the British Empire,[8] successfully invaded German South West Africa and was later granted a mandate by the League of Nations to administer the area under South African laws. South Africa renamed it South West Africa (SWA) and treated it as a fifth province.[9] Over time, this would include the introduction of increasingly oppressive and racist laws designed to implement apartheid in the region.[10]

South African law had its origins in Roman-Dutch law supplemented by borrowings from British public and procedural law. Roman-Dutch Law did not make provision for judicial review of executive or administrative acts, and the courts looked to British public law as they developed a uniquely South African body of administrative law called 'common law review' that was based on the concept of legality rather than prerogative writs.[11] Common law review powers stemmed from the courts' inherent role to 'decid[e] on the rights and duties of all persons who are within the protection of the courts'.[12]

Administrative law, as a discreet field of South African law, only developed in the 1960s, but, 'the seeds of judicial review of the proceedings of public authorities were sown and incrementally propagated by the courts long before jurists had any conscious conception of principles — let alone a system — of administrative law.'[13] Thus, during South African occupation of SWA, the courts had jurisdiction to sit in a supervisory relationship over the

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[7] Krautwald op cit note 5, 815-817. Peter H Katjavivi *A History of Resistance in Namibia* (1988), 26.
[8] Union of South Africa Act 1909 (UK).
[9] Chris Saunders 'South Africa and Namibia: Aspects of a relationship, historical and contemporary' (2016) 23(3) *South African Journal of International Affairs* 347, 350. Administration of Justice Proclamation 21 of 1919 (SWA) applied the laws of the Cape Colony across the territory.
[10] Krautwald op cit note 5, 815. These laws included the Native Affairs Act 23 of 1920, Native Administration Act 38 of 1927, Natives (Urban Areas) Act No 21 of 1923, Industrial Conciliation Act 11 of 1924, The Native Trust and Land Act 18 of 1936, The Prohibition of Mixed Marriages Act 55 of 1949.
[11] Jerold Taitz 'Administrative law in South Africa: The theories do not always match the facts' (1987) 12(1) *Journal for Juridical Science* 31, 32-35.
[12] *Union Government v Fakir* 1923 AD 466, 469-471
[13] DM Pretorius '"What's Past Is Prologue": An Historical Overview of Judicial Review in South Africa – Part 2' (2020) 26(2) *Fundamina* 424, 425.

legality of the actions of state agencies, including military authorities, and could set aside the proceedings of these agencies where they exceeded their powers.[14]

The South African National Party's oppressive regime was meticulously designed to implement 'apartheid' or 'separate development' from 1948 and to protect the white ruling class.[15] Even ostensibly racially neutral laws allowed the government to control any behaviour that threatened their interests.[16]

SWA governance under South African rule was characterised by human rights abuses, including arbitrary arrests, detentions and torture of any persons who were thought to be resisting the regime or aiding those who were.[17] The administrative agents of the state were part of 'the machinery designed to implement and maintain the apartheid system', and laws authorised their actions.[18]

Within this system, and despite their inherent powers of review, the courts were, for the most part, positivist and deferential to the dominant executive under South Africa's system of parliamentary sovereignty.[19]

(b) International involvement and the United Nations

As a mandated territory under the League of Nations, SWA had a peculiar relationship with the international realm that would be instrumental in achieving Namibian independence. In 1946, the General Assembly of the United Nations (UN) denied a request by South Africa to incorporate SWA into its territory.[20] South Africa responded by denying the UN's authority as a successor of the League of Nations.[21] Thus began a long dispute between the UN and the South African government regarding the 'Question of South West Africa.'

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[14] Ibid 435.
[15] David R Penna 'Apartheid, the law and reform in South Africa' 1990 (2) *Africa Today* 5, 5.
[16] For an accessible summary of the types of apartheid laws applied in South West Africa see 'The South West Africa Cases' 1967 *Washington University Law Quarterly* 159 (1967), available,: https://openscholarship.wustl.edu/law_lawreview/vol1967/iss2/3 appendix pp203-205.
[17] George Coleman & Esi Schimming-Chase 'Constitutional jurisprudence in Namibia since Independence' in Anton Bösl, Nico Horn & André du Pisani (eds) *Constitutional Democracy in Namibia – A Critical Analysis After Two Decades* (2010), 203.
[18] Ibid 206.
[19] Raymond Wacks 'Judges and injustices' (1984) 101 *SALJ* 266, Cora Hoexter 'Judicial policy in South Africa' (1986) 103 *SALJ* 436, 436-37.
[20] Resolution of the United Nations, General Assembly 'Future Status of South West Africa' A/RES/65(I) 1 December 1946.
[21] United Nations General Assembly 'Communication from the Union of South Africa on the Future Status of South West Africa dated 23 July 1947' A/334, 1 August 1947.

The UN declared South Africa's occupation of SWA to be illegal and called on all member states to impose economic sanctions on South Africa, and the International Court of Justice found that South Africa was in breach of international law and was obliged to withdraw from SWA. However, South Africa refused to comply.[22]

Where the UN's mechanisms failed, a joint diplomatic entity made up of the United States, France, United Kingdom, Canada and West Germany, known as the Western Contact Group, stepped in to assist with resolving the South African/ Namibian impasse.[23] Over the years, they were key in securing negotiated agreements between the South African government and Namibian political parties.[24]

In 1982, the Western Contact Group facilitated negotiations for a set of 'constitutional principles' to guide Namibia's future constitution.[25] These principles included democracy with universal adult suffrage, the separation of powers and a strong, independent judiciary protecting constitutional provisions and enforcing a justiciable Bill of Rights. These principles were important in the creation of the 1990 Constitution. Thus, the international community influenced both the decolonisation process and the nature of Namibia's post-apartheid constitutionalism.

(c) SWAPO and Namibian resistance and the war

Meanwhile, nationalist political organisations were increasingly mobilising in Namibia and among the exiled activists.[26] In 1960, the South West African People's Organisation (SWAPO) emerged which would become a key organisation in the liberation of Namibia. It had a 'nationalistic approach … complemented by a socialist ethos.'[27] With weapons and funding

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[22] United Nations, Security Council resolution 277 (1970) of 30 January 1970; International Court of Justice Advisory Opinion 'Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)' General List 53, 21 June 1971.

[23] Marinus Wiechers 'Namibia's long walk to freedom: the role of constitution making in the creation of an independent Namibia' in Laurel E Miller & Louis Aucoin *Framing The State in Times of Transition: Case Studies in Constitution Making* (2010), 84. See also, George W Sheperd Jr, Edward A Hawley & Tilden J Le Melle 'The Turnhalle Plan for Namibia's future: Dead or in cold storage?' (1977) 24(3) *Africa Today, African Unity: Obstacles and Advances* 7, 9.

[24] Eg, United Nations Security Council Resolution 435 (1978) of 29 September 1978 S/RES/435(1978) It should be noted that from 1975 the United Nations treated SWAPO as 'the authentic representative of the Namibian people,' General Assembly Resolution 3399.26 November 1975. See also Sheperd, Hawley & Le Melle op cit note 23, 8.

[25] United Nations Security Council 'Letter dated 12 July 1982 from the Representatives of Canada, France, Germany, Federal Republic of, the United Kingdom of Great Britain and Northern Ireland and the United States of America addressed to the Secretary-General. S/15287, 12 July 1982.

[26] Katjavivi op cit note 7, chap 7.

[27] Rialize Ferreira & Ian Liebenberg 'The impact of war on Angola and South Africa: two southern African case studies' (2006) 31(3) *Journal for Contemporary History* 42, 44.

from the Soviet Union, Scandinavian and European countries, SWAPO became a 'radical revolutionary organisation' and established its military wing, the People's Liberation Army of Namibia.[28]

In February 1966, the 'Namibian liberation war', known in South Africa as the 'Border War', began. The conflict was a complicated one as it was also intrinsically linked to South Africa's own liberation struggle.[29] Most of the conflict constituted a brutal but 'low-intensity war' that involved SWAPO insurgency in the border region of Namibia and Angola.[30] From 1977, SWAPO infiltrated the north of SWA and regularly clashed with the SADF units stationed there.[31] The ongoing war added another factor leading to Namibia's ultimate independence.

(d) Governance restructuring, compromise and negotiation

Between 1968 and 1989, the South African government introduced a number of compromises to give SWA some autonomy whilst keeping it as a part of South Africa and under its ultimate rule. In 1968, the South African government created a Constitution for SWA, appointing an executive committee and a legislative assembly for the territory, thereby granting it some autonomy.[32] The Administrator would be hand-picked by the President of South Africa, and would exercise powers subject to the control and direction of the President.[33]

In 1977, the South African government amended the 1968 Constitution to give the State President powers to legislate by proclamation over the territory of South West Africa.[34] The State President created the new post of Administrator General (AdminG) to represent the government of South Africa and delegated to the AdminG wide powers to make laws for the territory, including repealing and amending acts applicable in the territory.[35] The AdminG, with his power to rule by proclamation, remained an important part of the governance structure until Namibian independence.

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[28] Ibid 44.
[29] Gary Baines *South Africa's 'Border War': Contested Narratives and Conflicting Memories* (2014), 3. Willem Steenkamp 'The citizen soldier in the border war' (2006) 31(3) *Journal for Contemporary History* 1, 1.
[30] Wiechers op cit note 23, 83.
[31] Ferreira & Liebenberg op cit note 27, 47. The South African Defence Amendment Act 85 of 1967 introduced conscription in South Africa to bolster the strength of the defence forces and mandatory service durations were increased over the years to meet the demands of the conflict.
[32] South-West Africa Constitution Act 39 of 1968.
[33] Ibid ss 2-3.
[34] South-West Africa Constitution Amendment Act 95 of 1977.
[35] Proclamation no181 of 1977, *Government Gazette* vol 146, no5719. 19 August 1977.

On 17 June 1985, the South African government created the Transitional Government of National Unity in Namibia and gave the entity the job to work towards Namibian independence. While South Africa acted as though it was relinquishing control over SWA, it retained real power to intervene in the territory when its interests were suited or threatened. There were marked instances of state interference with the implementation of justice. For example, in 1986, following the murder of Immanual Shifidi at a SWAPO rally, the AdminG, authorised by the State President, intervened to prevent the Attorney-General for South West Africa from prosecuting the five responsible members of the SADF.[36] This is just one example of the extensive discretion that the State President could lawfully and unilaterally exercise through the AdminG, without the oversight by the Parliament, under the broad powers of the 1977 amendment.

(e) Constitution drafting

In December 1988, after 23 years of conflict, international pressure and domestic resistance, a tripartite agreement was made between Angola, the Republic of Cuba and the Republic of South Africa, which saw the Cuban withdrawal from Angola, the South African withdrawal from Namibia and the promise of independence for SWA.[37] In the process, South Africa agreed to finally implement the Security Council's Resolution 435 of 1978, which required the withdrawal of South African troops, free and fair elections under UN supervision and the transfer of power to Namibians.

In November 1989, an election was held for a 72-member Constituent Assembly. These first elections had a 97 per cent voter turnout, and determined the party that would govern upon the adoption of the Constitution.[38] At the first meetings of the Constituent Assembly, each party was invited to present proposals for a constitution.[39] The Constituent Assembly appointed a panel of three legal experts to turn the proposals into a constitutional draft that would meet the requirements of the UN to implement the Constitutional Principles negotiated by the

[36] Nico Horn 'An overview of the diverse approaches to judicial and executive relations – a Namibian study of four cases' in Charles M Fombad (ed) *Separation of Powers in African Constitutionalism* (2016) 300, 304-5.
[37] Ferreira & Liebenberg op cit note 27, 47.
[38] Wiechers op cit note 23, 86.
[39] Ibid 87.

Western Contact Group.[40] Therefore, whilst the 1990 Constitution was '[m]idwifed by the international community', its text was the result of multiple levels of input.[41]

On 21 March 1990, Namibia became an independent country under its supreme Constitution. SWAPO's Sam Nujoma emerged as Namibia's liberator soldier and became the first President with control over 62 per cent of the NA. [42]

III. The 1990 Constitution

The new Namibian Constitution rejected parliamentary sovereignty, preferring republican constitutional supremacy with a separation of powers and a justiciable Bill of Rights. It also introduced strict presidential term limits to avoid the problems faced by Namibia's neighbouring countries at the time.[43] The Constitution's commitment to rights-based democratic values reflects the fact that independence came at the same time as the fall of the Berlin Wall, the end of the Cold War 'and the triumph of neo-liberalism'.[44]

The 1990 Constitution was built on values such as equality, freedom and non-racialism, in sharp contradiction to the principles of apartheid.[45] The Constitution has received international acclaim as a 'progressive document' and was the first of the southern African countries to adopt a rights-based modern Constitution, which became a prototype for many of its neighbouring countries.[46] It has also received criticism for being 'a product of compromise' and meddling by the international community.[47]

Unlike the experiences in Malawi and Seychelles, where unchecked autocratic leadership prompted constitutional reform, Namibia's push for constitutional change was a direct response to its struggle against the apartheid system's inequality. Consequently, it is not surprising that Namibia's resulting constitutional text emphasises limiting executive power less than those of its contemporaries.

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[40] These were Arthur Chaskalson, Gerard Erasmus and Marinus Weichers.
[41] Kennedy Kariseb & Thomas Kasita 'Populism, electoral democracy and the 2019 presidential election in Namibia' (2021) 36(1) *SAPL* 1, 9.
[42] Wiechers op cit note 23, 91.
[43] However, the Namibian Constitution First Amendment Act 34 of 1998 specifically enabled the first President Sam Nujoma to run for a third term.
[44] Saunders op cit note 9 350.
[45] Kenneth Ferdie Mundia 'A constructive interpretation of the Namibian constitution: Transposing Dworkin to Namibia's constitutional jurisprudence' (2016) 31(1) *SAPL* 73, 75.
[46] Kariseb & Kasita op cit note 41, 9.
[47] Ibid 8. Hage G Geingob, 'Drafting of Namibia's Constitution' in Anton Bosl, Nico Horn & Andre du Pisani (eds) *Constitutional Democracy in Namibia – A Critical Analysis after Two Decades* (2010), 85.

The Constitution establishes Namibia as a 'sovereign, secular, democratic and unitary state founded upon the principles of democracy, the rule of law and justice for all.'[48] The organs of state are identified as the executive, the legislature and the judiciary and the Constitution is the supreme law.[49]

(a) Entrenchment of justiciable human rights

Chapter 3 of the Constitution contains a broad list of justiciable Fundamental Human Rights and Freedoms which are to be 'respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government' and which shall be enforceable by the courts.[50] The list of rights includes the article 18 right to fair and reasonable administrative justice.

Article 25 states that no law or executive act may abolish or limit fundamental rights and freedoms except as allowed by the Constitution. Any law or action that violates these rights is invalid.[51] Individuals whose rights are infringed may approach a competent court for enforcement or protection, and the courts have broad remedial powers, including the ability to award monetary compensation.[52]

(b) The executive – the President

An important point in the constitutional discussions was how the relationship between the executive and the legislature would be arranged.[53] The discussion revolved around how to create an executive presidency with sufficient power but also appropriate checks and balances.[54] The outcome is that the President is directly elected and exercises executive power in consultation with the Cabinet, subject to the constitutional oversight of the courts.[55] The powers of the President are also subject to NA oversight, which includes the power to remove a President under article 31, and the more politically tactful power of the NA in article 32(9)

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[48] Namibian Constitution art 1(1). The preamble mirrors this description adding the goal of securing 'liberty, equality and fraternity' for all.
[49] Ibid arts 1(3), 1(6).
[50] Ibid art 5. Socio-economic rights are not included, see Yvonne Dausab & Kelvin Vries 'Transformative constitutionalism in the apex court of Namibia: A reflection of 30 years of jurisprudence' in Tapiwa Victor Warikandwa & John Baloro (eds) *Namibia's Supreme Court at 30 years: A review of the Superior Court's role in the development of Namibia's jurisprudence in the post-independence era* (2022).
[51] Namibian Constitution, art 25(1).
[52] Ibid art 25(2), (4).
[53] See the accounts of the drafting process described by Mudge and Geingob in their chapters, Geingob op cit note 47 and Dirk Mudge 'The art of compromise: Constitution-making in Namibia' in Anton Bösl, Nico Horn & André du Pisani (eds) *Constitutional Democracy in Namibia – A Critical Analysis After Two Decades* (2010), 93 and 135, respectively.
[54] Geingob op cit note 47, 92-3.
[55] Namibian Constitution, art 27.

to 'review, reverse or correct' any action taken by the President. However, the dominance of the President's political party in the NA can easily frustrate the utility of the powers under article 31 or 32 and impeachment is a 'cumbrous political process'.[56]

Namibia has a President and a Prime Minister. The former is the head of State and of the Government and the Commander-in-Chief of the Defence Force[57] and is directly elected by receiving 50 per cent of the valid votes cast in a popular vote.[58] The latter is appointed by the President[59] and is a member of the Cabinet.[60] The Prime Minister is also the leader of government business in the NA, and must 'co-ordinate the work of the Cabinet as head of administration, and … perform other functions as may be assigned by the President or Vice-president.'[61] The role of Prime Minister is, therefore, the bridge between the executive and the legislature.

Executive power is vested in the President and the Cabinet, and the President is 'obliged to act in consultation' with the Cabinet, although the parameters of this obligation have not been discussed in case law.[62] The President has wide power to perform 'all acts necessary, expedient, reasonable and incidental to the discharge of the executive functions of the Government, subject to the overriding terms of this Constitution and the laws of Namibia.'[63]

Article 26 grants the President powers to declare a State of Emergency (SOE), make regulations and suspend laws during such periods. The Constitution outlines guidelines for their use in emergencies, national defence and martial law. The President may also make necessary regulations for national security and public safety.[64] The NA has oversight powers to approve or revoke the President's actions during these times, as a safeguard against executive abuse.[65]

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[56] See Dianne Hubbard et al '*Namibia's Perplexing Presidential Immunity'*, Legal Assistance Centre, 2018 available at https://www.lac.org.na/projects/grap/Pdf/presidential_immunity.pdf accessed on 15 March 2024, 7-8, Charles Manga Fombad 'Constitutional reforms and constitutionalism in Africa: Reflections on some current challenges and future prospects' (2011) 59 *Buffalo LR* 1007, 1057.
[57] Namibian Constitution arts 27, 115.
[58] Ibid art 28(2). This was amended by the Namibian Constitution Third Amendment Act 8 of 2014. This Act introduced a run-off election.
[59] Ibid art 32(3)(i)(bb).
[60] Ibid art 35(1).
[61] Ibid art 36.
[62] Ibid art 27(2), (3). Little emphasis is placed on these requirements in case law, see for example *Matengu v Minister of Safety and Security and Others* 2017 (2) NR 569 (HC), [11] and *President of the Republic of Namibia and others v Namibian Employers' Federation and Other*s 2022 (3) NR 825 (SC), [86-87].
[63] Ibid art 32.
[64] Ibid art 26(5)(a).
[65] Ibid art 26.

Moreover, the President has a role in legislating, with the power to assent to Bills,[66] the power to call special sessions of the NA, prorogue it, dissolve it and summon it for the conduct of business following dissolution.[67] With regard to international relations, the President may 'accredit, receive and recognise ambassadors' and other diplomatic persons, negotiate and sign international agreements, and domestically, may 'pardon or reprieve offenders' and declare martial law.[68] The President, as the head of the executive may 'establish and dissolve such government departments and ministries' and may confer state honours on deserving individuals.[69]

Furthermore, the President has broad appointment powers including to appoint certain persons without restriction,[70] and other persons on the recommendation of the Judicial Service Commission, the Public Service Commission and the Security Commission, respectively.[71] The President may also appoint up to eight persons to the NA 'by virtue of their special expertise, status, skill, or experience' however, these members do not have a vote in the Assembly.[72] Additionally, some appointments, including the appointment of the Electoral Commission, are made by the President with the approval of the NA.[73]

The President also has extensive immunity from prosecution in civil and criminal proceedings.[74] Former Namibian Presidents who have not been impeached enjoy full criminal immunity from all actions taken during their presidency, whether within their personal or official capacities.[75]

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[66] Ibid art 56.
[67] Ibid art 32(3)(a) and (b) and 58(b).
[68] Ibid art 32(3)(c), (d), (e), (f).
[69] Ibid art 32(3)(g) and (h).
[70] Ibid art 32(3)(i) empowers the President to appoint the Vice-President, the Prime Minister, the Deputy-Prime Minister, Ministers and Deputy-Ministers, the Attorney-General, the Director-General of Planning, the Head of the Intelligence Service, and 'any other person or persons who are required by any other provision of this Constitution or any other law.'
[71] Ibid. Under art 32(4) the President can appoint the Chief Justice and judges of the Supreme Court and High Court, the Ombudsman and the Prosecutor-General on recommendation of the Judicial Service Commission, the Auditor-General and the Governor and Deputy-Governor of the Central Bank on the recommendation of the Public Service Commission, and the Chief of the Defence Force, the Inspector General of Police and the Commissioner General of Correctional Service are appointed on the recommendation of the Security Commission. The members of the commissions are, theoretically, removed from executive interference.
[72] Ibid art 46(1)(b).
[73] Ibid art 94A, arts 94B and 104 (Director-General and Deputy of the Anti-Corruption Commission and Boundaries Delimitation and Demarcation Commission). These provisions were introduced by the Namibian Constitution Third Amendment Act 8 of 2014.
[74] Ibid art 31. See Hubbard et al op cit note 56.
[75] Hubbard et al op cit note 56, 8.

(c) The executive – the Cabinet

The Prime Minister and other ministers appointed to the Cabinet are appointed by the President from members of the NA or alternatively nominated by the President to the NA under article 46(1)(b).[76] It is unclear whether the President may remove Cabinet members at will, although the President is obliged to remove a Cabinet member if the NA passes a resolution of no confidence in that member.[77] Ministers owe collective responsibility to the President and to the NA, however, the nuances of what 'collective responsibility' means in Namibian constitutionalism is not clear.[78]

Cabinet members have a wide range of duties and functions, including directing government ministries and departments, initiating Bills, formulating the budget and reporting on the government's 'economic development plans' to the NA.[79] One aspect of the role of the Cabinet that has generated some case law is its function to 'direct, co-ordinate and supervise' parastatal enterprises and whether this amounts to reviewable administrative action.[80]

Cabinet members attend the meetings of the NA and must be 'available for the purposes of any queries and debates pertaining to the legitimacy, wisdom, effectiveness and direction of Government policies'.[81] The Cabinet also has express duties to assist the President and advise the President on matters relating to foreign policy and national defence.[82]

Since the adoption of the Constitution, the political landscape in Namibia has been described as stable, but also as 'stagnant'.[83] The SWAPO government has enjoyed political dominance, leveraging its liberator status three decades later.[84] It has been criticised for 'showing little commitment to upholding human rights and exhibiting strong authoritarian and anti-western ideological tendencies.'[85] Namibia, under the SWAPO leadership, has also been

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[76] Namibian Constitution, art 35.
[77] Ibid art 39.
[78] Ibid art 41. Jill Cottrell 'The Namibian Constitution: An Overview' (1991) 35 (1/2) *Journal of African Law* 56, 67.
[79] Ibid art 40(a- c).
[80] Ibid art 40. See in this regard section IV below and the cases discussed therein.
[81] Namibian Constitution, art 40(e).
[82] Ibid art 40(i), (j).
[83] Sam K Amoo & Isabella Skeffers 'The rule of law in Namibia' in Nico Horn & Anton Bösl (eds) *Human Rights and the Rule of Law in Namibia* (2008) 17 at 36.
[84] Maximilian Weylandt 'The 2014 National Assembly and presidential elections in Namibia' (2015) 38 *Electoral Studies* 126, 128.
[85] Saunders op cit note 9, 354, Henning Melber 'Why we need a constitution – and those bringing constitutional democracy to life' in Nico Horn & Manfred O Hinz (eds) *Beyond a Quarter Century of Constitutional Democracy: Process and Progress in Namibia* (2017), 22

described as a 'de-facto one party State' with 'increasingly autocratic rule.'[86] However, popular trust in the executive and President has historically remained higher that other institutions.[87]

Post-independence Presidents in Namibia have enjoyed wider and wider powers. In 2010, before becoming President himself, Geingob commented on the trend towards the concentration of powers in the President's hands, describing increasing micromanagement by the President, and the increased 'desire to take all decisions at the head of state level.'[88] He cautioned that with SWAPO's control over the NA, 'the integrity of the Constitution depends on SWAPO's commitment to it.'[89]

(d) The legislature

Legislative power is vested in the NA, which consists of 96 members and up to eight persons appointed by the President under article 32.[90] The elected members of the NA are elected for a five-year term based on party lists and proportional representation.[91] While Cabinet members may introduce Bills to the NA without restriction, private members may only introduce Bills if 'supported by one-third of all the members of the National Assembly.'[92]

The Constitution also establishes a National Council made up of three members elected from each region.[93] This body is advisory and is empowered to 'consider', and 'report' on Bills to the NA.[94] It may also recommend legislation on 'matters of regional concern' and 'investigate and report to the National Assembly' on 'subordinate legislation, reports, and documents' referred to it by the NA, and to perform other functions assigned to it by the NA.[95]

The President's ability to appoint ministers from the members of the NA and to nominate members to the NA has enabled the executive to dominate the legislature, forcing executive-led decision-making and minimising the legislature's ability to exercise its democratic

[86] Henning Melber *Understanding Namibia: The Trials of Independence* (2014), 37. For a detailed discussion of SWAPO dominance, see 37-56. Weylandt op cit note 84, 127.
[87] Afrobarometer 'Trust in political institutions is on the decline in Namibia, Afrobarometer survey shows' 23 March 2020 available at https://www.afrobarometer.org/articles/trust-political-institutions-decline-namibia-afrobarometer-survey-shows/ accessed on 30 January 2025.
[88] Geingob op cit note 47, 105.
[89] Ibid 106-7.
[90] Namibian Constitution art 44, 46.
[91] Ibid arts 49, 50.
[92] Ibid art 60(2).
[93] Ibid arts 68. Members of the Council are elected by the members of the Regional Councils under art 108.
[94] Ibid arts 74, 75.
[95] Ibid art 74.

oversight function.[96] One Parliamentarian observed that 'Parliament is effectively rendered a rubber-stamp legislature'.[97] Whilst the President exercises executive power alongside the Cabinet, the real power vests in the President, who holds the power to dismiss ministers at will and to hold ministers individually and collectively responsible.[98] This firmly subordinates the Cabinet to the President.[99]

(e) Independent constitutional institutions

The 1990 Constitution also introduced independent constitutional institutions to support and develop constitutional democracy. The Ombudsman, Anti-Corruption Commission, Electoral Commission, Public Service Commission and Auditor-General are all responsible for different aspects of rights protection and exist to defend the rule of law.[100] The persons appointed into these positions enjoy security of tenure for fixed periods and can only be removed therefrom in terms of the Constitution or an Act of the National Assembly.[101] These institutions are required to act independently and impartially and are established to reinforce the constitutional structure through improving accountability and transparency of the government.

Their effectiveness has varied, influenced by shifts in political dominance, resource constraints, lacking enforcement mandates and the complex interplay between branches of government.[102] Moreover, the President retains an extensive role in the appointment process for each institution which can affect its independence, particularly as SWAPO's political dominance has influenced the context in which they operate. Major corruption scandals, such as the 'Fishrot scandal' which involved high level officials and businessmen accused of embezzling millions from the fishing industry, have reportedly led to a decline in the public

[96] Motion by the Honourable Elma Jane Dienda for the House to debate the impact of the Executive on Separation of Powers, 16 February 2022 available at https://www.parliament.na/motion-by-hon-elma-jane-dienda-16-february-2022-on-the-impact-of-executive-on-separation-of-powers/ accessed on 30 January 2024, 10-11.
[97] Ibid 12.
[98] Arts 41 and 32(6).
[99] Cottrell op cit note 78, 61.
[100] Namibian Constitution, arts 89-94, art 94A introduced by the Namibian Constitution Second Amendment Act 7 of 2010, art 94B introduced by the Namibian Constitution Third Amendment Act 8 of 2014, arts 112-113, art 127. The Security Commission has been omitted as it is not required to act independently by the constitutional provisions.
[101] See eg arts 94, 112(4), 127(4).
[102] Roswitha Ndumbu 'Role and Responsibilities of the Ombudsman' published on *IPPR Blog* 6 August 2021 citing interview with Ombudsman John Walters available at https://ippr.org.na/blog/role-and-responsibilities-of-the-ombudsman/ accessed on 24 July 2025. United States Department of State *Namibia 2022 Human Rights Report* Country Reports on Human Rights Practices for 2022, 9, Hans-Erik Staby 'Namibia's Efforts To Tackle Corruption – 1990 to 2006' in Graham Hopwood ed *Tackling Corruption: Opinions on the way forward in Namibia* (2007), 14.

trust in the Anti-Corruption Commission and the Ombudsman.[103] Continuous reform efforts, greater operational independence and resourcing, and civil society engagement are still required for strengthening the efficacy of these integrity institutions in Namibia's democracy.[104]

The discussion of the courts since 1990 exists against this background of an executive branch with increasing levels of presidentialism, a legislature dominated by one party and partially effective democracy protecting institutions.

(f) The judiciary

Article 78 vests judicial power in the judiciary, which consists of the Supreme Court of Namibia (NSC), the High Court (HC) and the Lower Courts. These courts are to be independent, free from interference by the other branches. The Chief Justice and Deputy Chief Justice oversee the judiciary. The NSC hears appeals from the HC and has inherent jurisdiction and constitutional jurisdiction.[105] The HC has appellate jurisdiction from the Lower Courts, and original jurisdiction in civil and criminal matters.[106] Both the HC and the NSC have constitutional jurisdiction to determine 'cases which involve the interpretation, implementation and upholding of this Constitution and the fundamental rights and freedoms guaranteed thereunder.'[107] Decisions of the NSC are binding on all other courts unless reversed by the NSC itself or overturned by an Act of the NA.[108] The Constitution preserved Namibia's existing common law at the time of independence, as well as all laws in force immediately prior to the Constitution's commencement.[109]

The 2014 Amendment to the Constitution introduced provisions to grant the Chief Justice greater powers to supervise the judiciary, guaranteeing greater financial autonomy for the judiciary and requiring that 'financial and other administrative matters' of the courts 'shall be performed in such a manner that the independence of the judiciary can be effectively and

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[103] Job Shipululo Amupanda 'The fight against corruption in Namibia: An appraisal of institutional environment and a consideration of a model for civil society participation' (2019) *Namibian Law Journal* 187, 195-196.
[104] Katharina G Ruppel-Schlichting 'The independence of the Ombudsman in Namibia in Nico Horn & Anton Bösl (eds) *The Independence of the Judiciary in Namibia* (2008) 286-9, Lesley Blaauw *Promoting the effectiveness of democracy protection institutions in Southern Africa: The Case of the Office of the Ombudsman in Namibia* EISA Research Report No 42 (EISA, Johannesburg 2009) 27-9.
[105] Namibian Constitution, arts 78(5), 79 (2).
[106] Ibid art 80(2).
[107] Ibid art 79.
[108] Ibid art 81.
[109] Ibid arts 66 and 140, respectively.

practically promoted and guaranteed by means of appropriate legislative and administrative measures.'[110]

Judges are appointed by the President on the recommendation of the Judicial Services Commission (JSC) and protected from arbitrary removal, except after an investigation into the judge that may only be initiated by the JSC.[111] Removal of judges is by the President on the recommendation of the JSC, on grounds of mental incapacity or gross misconduct and following investigation by a tribunal that is set up by the JSC.[112]

The courts' jurisdiction to hear and determine constitutional cases arises from several articles in the Constitution. Articles 25 and 5 allow individuals to approach a court where they claim that a fundamental right or freedom has been infringed or threatened (fundamental rights litigation). There are no specific provisions in the Constitution to enable individuals to challenge the constitutionality of legislation or actions of the executive outside of the context of fundamental rights. However, courts are given constitutional jurisdiction over 'the interpretation, implementation and upholding of this Constitution and the fundamental rights and freedoms guaranteed thereunder' under article 80. Courts may also hear matters referred by the Attorney-General and consider the constitutionality of a proposed Bill.[113]

Thus, executive actions and legislative acts are subjected to the rule of law through the courts under articles 25, 5 and 80. To protect the courts, article 78(3) safeguards the 'independence, dignity and effectiveness' of the judiciary by prohibiting interference with the function of the judiciary. The constitutional framework, therefore, aims at the 'judicialisation of politics rather than the politicisation of the judiciary'.[114]

Article 146 provides that '[u]nless the context otherwise indicates, any word or expression in this Constitution shall bear the meaning given to such word or expression in any law which deals with the interpretation of statutes, and which was in operation within the territory of Namibia prior to the date of Independence.' The Constitution does not specifically grant the courts power to develop the common law in line with it and there is disagreement over whether

[110] Ibid subarts (5-7) introduced by the Namibian Constitution Third Amendment Act 8 of 2014.
[111] Ibid arts 32(4), 84.
[112] Ibid art 84.
[113] Ibid art 64.
[114] Oliver C Ruppel & Lotta N Ambunda *The Justice Sector and the Rule of Law in Namibia: Framework, Selected Legal Aspects and Cases* (2010), 30.

this is part of the courts' powers.[115] Some judges view themselves as unable to develop the common law.[116]

To aid interpretation, the courts may look to the preamble, which begins with a recognition of the 'inherent dignity and equal and inalienable rights' of all members of humanity. It commits Namibia to being a 'democratic society where the government is responsible to the elected representatives of the people.'

The Constitution also contains 'Principles of State Policy' in Chapter 11, which list principles to guide the executive in its policy development.[117] This 'somewhat disparate' group of goals seeks to guide social, economic and political philosophy.[118] While these provisions are not binding on the state, the courts are entitled to regard the principles in interpreting any laws based on them.[119] All three judges of appeal in the *Caprivi Treason Trial* held that these principles express 'no more than the intention' of the state to promote the ends sought in the article, and any attempt by a court to require the government to implement these principles would be an impermissible 'intrusion into the exclusive domain of the Government as to its expenditure and allocation of state funds'.[120] In his opinion, however, Chomba AJA encourages the use of a contextual interpretation of these provisions to ensure that they do not become 'dead wood in the Constitution.'[121]

The Constitution has been amended three times since independence, with amendments passed by a NA with a two-thirds majority held by SWAPO. This was done without wide public consultation and attracting 'controversy and backlash'.[122]

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[115] Dianne Hubbard 'Infusions of the Constitution into the Common Law' in Nico Horn & Manfred O Hinz (eds) *Beyond a Quarter Century of Constitutional Democracy: Process and Progress in Namibia* (2017), 212.
[116] For example, *Chairperson of the Immigration Selection Board v Frank & Another* 2001 NR 107 (SC) per O'Linn AJA (Teek AJA concurring), *Digashu and Others v Government of the Republic of Namibia and Others; Seiler-Lilles v Government of the Republic of Namibia and Others* [2022] NAHCMD 11.
[117] Namibian Constitution, art 95-100.
[118] Cottrell op cit note 78, 72.
[119] Namibian Constitution, art101.
[120] *Government of the Republic of Namibia and Others v Mwilima and all other Accused in the Caprivi Treason Trial* 2002 NR 235 (SC), 251E-I.
[121] Ibid 280I.
[122] Kariseb & Kasita op cit note 41, 4, Weylandt op cit note 84, 127, Dennis U Zaire 'Constitutional democracy in Namibia: 25 years on' in Nico Horn and Manfred O Hinz (eds) *Beyond a Quarter Century of Constitutional Democracy: Process and Progress in Namibia* (2017) 73, 77.

IV. The courts as an accountability check on executive power since 1990

The following section considers the relationship between the courts and the high executive in Namibia since 1990, and particularly, whether the courts have developed a coherent jurisprudence to guide their accountability role under the Constitution. As with Malawi and Seychelles, the discussion begins shortly prior to the adoption of the new Constitution.

(a) The pre-1990 judicial role

Prior to 1980, with some noticeable instances of judicial bravery aside,[123] judges displayed 'meek acquiescence in the face of an increasingly draconian body of apartheid and security legislation.'[124] With no power to strike down Acts of Parliament, the courts were limited to implementing the intention of Parliament.[125] Baxter described the situation as such:

> Faced by a sovereign, executive-controlled parliament, no bill of rights, powers delegated to officials and the police in far-reaching terms and protected by a web of unreviewability clauses, what could the judges really do to protect individual rights and political expression, even if they wanted to?[126]

During this time, the courts displayed a jurisprudence of 'analytical positivism' in the face of South African parliamentary sovereignty.[127] Horn describes this as 'a self-imposed blindness' to the cruelties of apartheid.[128] He describes the approach as 'the judicial expression of conservative politics' and quotes Dugard's description of the positivism of the South African courts as a 'jurisprudential cloak of concealment' paraded as analytical jurisprudence.[129]

However, towards the end of the apartheid era, there was a rise of administrative law in South Africa. During this period, many judges began to rely on common law judicial review

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[123] *In re Willem Kok and Nathaniel Balie* (1879) 9 Buch 45, *Sigcau v The Queen* (1895) 12 SC 256, *Minister of the Interior v Harris* 1952 (4) SA 769 (AD). From the late 1970s some courts handed down rulings which were 'surprisingly adverse' to state policy and led to a 'trickle of judicial resistance' that 'became a flow' as judges were emboldened to decide against the regime, Lawrence G Baxter 'Apartheid and the South African Judiciary' (1987) 5(2) *Duke Law Magazine* 9, 11-12.

[124] Baxter op cit note 123, 10.

[125] Ibid 9-10.

[126] Ibid 11.

[127] Amoo & Skeffers op cit note 83, 37; Stefan Shulz 'In dubio pro liberate: The general freedom right and the Namibian Constitution' in Anton Bösl, Nico Horn & André du Pisani (eds) *Constitutional Democracy in Namibia: A Critical Analysis After Two Decades* (2010), 174.

[128] Nico Horn 'Transformative constitutionalism: A post-modern approach to constitutional adjudication in Namibia' in Nico Horn and Manfred O Hinz (eds) *Beyond a Quarter Century of Constitutional Democracy: Process and Progress in Namibia* (2017), 214.

[129] Ibid.

'to serve as buttresses between the Executive and the subjects.'[130] This development influenced the lawyers and courts in SWA, too.

In 1985, the South West Africa Legislative and Executive Authority Establishment Proclamation R101 was enacted. This included a justiciable Bill of Fundamental Rights and permitted judicial review of laws applicable in SWA against the provisions of that Bill of Rights.[131] This legislative enactment created a new form of constitutional review, enabling the courts in SWA to grant remedies that protected individuals against violations of human rights committed by the government.

The Supreme Court of South West Africa Court (SCSWA) took a broad and purposive approach to the interpretation of the rights, whereas, on appeal, the South African Appellate Division of the Supreme Court (AD) maintained its rigid approach to upholding parliamentary sovereignty and legislative intent.[132] As a result, the AD overturned many of the Namibian cases that came to it. There ensued a tension between the SCSWA and the South African administration enforced by the AD.[133]

For example, the Administrator-General Proclamation, 1978 severely restricted the rights of people detained without trial or access to a court of law.[134] In *Katofa v Administrator General, South West Africa, and Another*,[135] which was brought as a habeas corpus application, Levy J granted an order that Katofa have access to his attorney and that the state show cause as to why he should not be released from detention. Relying on fundamental rights language, Levy J stated that habeas corpus writs protect the liberty of the state's subjects and held that every individual 'is entitled to ask the Court for his release, and the Court is bound to grant it, unless there is some legal cause for his detention.'[136] On appeal, overturning the decision, the

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[130] *R v Pretoria Timber Co (Pty) Ltd* 1950 (3) SA 163 (A), 181H-182A. A sample of these cases include *In re Dube* 1979 (3) SA 820 (N); *Komani N.O. v Bantu Affairs Administration Board, Peninsula Area* 1980 (4) SA 448 (AD); *Sigcaba v Minister of Police* 1980 (3) SA 535, 542 (Transkei Sup. Ct.); *Honey v Minister of Police* 1980 (3) SA 800 (Transkei Sup. Ct.); *Government of the Republic of South Africa v Government of KwaZulu* 1983 (1) SA 164 (AD*); In re Duma* 1983 (4) SA 469 (N); *Oos-Randse Administrasieraad v Rikhoto* 1983 (3) SA 595 (AD); *Black Affairs Administration Board, Western Cape v Mthiya* 1985 (4) SA 754 (AD); *More v Minister of Co-operation and Development* 1986 (1) SA 102 (AD); *More v Minister of Co-operation and Development* 1986 (1) SA 102 (AD); *Mahlaela v De Beer N.O.,* 1986 (4) SA 782 (T); *State v. Govender* 1986 (3) S.A. 969 (T).
[131] South West Africa Legislative and Executive Authority Establishment Proclamation R101/1985 17 June 1985 Government Gazette, vol 240 no 9790.
[132] Horn 'An overview' op cit note 36, 302.
[133] Ibid 300.
[134] Administrator-General Proclamation, AG 26 of 1978.
[135] *Katofa v Administrator General, South West Africa and Another* 1985 (4) SA 211 (SWA).
[136] Ibid, 221B.

AD held that existing legislation in force, whether or not it was contrary to the Bill of Rights in Proclamation R101, remained effective until properly amended or repealed.[137]

In *S v Heita,*[138] the SCSWA held that parts of section 2 of the Terrorism Act conflicted with the rights in Proclamation R101, however, the AD effectively overruled this precedent shortly thereafter.[139] Undeterred, in *Ex parte Cabinet for the Interim Government of South West Africa: In re Advisory Opinion in terms of s 19(2) of Proc R101 of 1985*, *(RSA),*[140] the SCSWA declared that the AG's proclamation establishing ethnically differentiated authorities contravened the rights in Proclamation 101.[141] This matter was not appealed. Thereafter, in *Cabinet for the Territory of South West Africa v Chikane,*[142] the AD ruled that SWA courts could not assess administrative action against the Bill of Rights.

The decisions of the SCSWA often restricted the use of executive power. For example, in the case of *Shifidi v Administrator-General for South West Africa*,[143] the AG, authorised by the South African President, intervened to stop a prosecution of SADF members for the killing of an individual at a political rally. The AG issued a certificate under the Defence Act declaring Windhoek a military 'operational area', which would enable the President to prevent any prosecution for acts committed in the operational area. A full bench of the SCSWA held that the AG's certificate was not justified on the facts. The Court set aside the certificate and the decision of the AG not to proceed with the prosecution.

Despite the tension with the AD, the years of 1985-1990 marked a turning point in the judicial-executive relationship as the SCSWA attempted 'to impose the rule of law under an anti-democratic government'.[144] The SCSWA broke from its earlier jurisprudence and created new human rights solutions in a space free from restrictive precedent.[145] The judges of the SCSWA were willing to enforce the Bill of Fundamental Rights, paving the way for enforcing constitutional rights and creating novel constitutional jurisprudence after 1990.[146]

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[137] *Kabinet van die Tussentydse Regering vir Suidwes-Afrika en 'n Ander v Katofa* 1987 (1) SA 695 (A).
[138] *S v Heita and Others* 1987 (1) SA 311 (SWA).
[139] In *Katofa* supra note 135 the approach of Levy J was specifically disapproved.
[140] *Ex parte Cabinet for the Interim Government of South West Africa: In re Advisory Opinion in terms of s 19(2) of Proc R101 of 1985*, *(RSA)*1988 (2) SA 832 (SWA).
[141] The Representative Authorities Proclamation AG 8 of 1980 (SWA).
[142] *Cabinet for the Territory of South West Africa v Chikane & Another* 1989 (1) SA 349 (A).
[143] *Shifidi v Administrator-General for South West Africa and Others* 1989 (4) SA 631 (SWA).
[144] Horn 'An overview' op cit note 36, 306.
[145] Benethelin Zaaruka, *Institutional Dynamics and Impact on Capital Formation: Evidence from Namibia and Tanzania* (PhD thesis, University of the Witwatersrand, 2012), 46.
[146] Coleman & Schimming-Chase op cit note 17, 202, Horn 'An Overview' op cit note 36, 302-6.

(b) The post-1990 courts

In 1990, the five Namibian judges, trained as they were in the South African legal culture of legalism and fidelity to the intention of Parliament, had to shift their jurisprudential approach to one suited to a liberal democratic constitutional supremacy. Commentators have described the post-1990 courts as showing 'a moderately courageous approach' to the new constitutional order, 'greet[ing] the new order positively, although their implementation of it varied.'[147]

The courts have developed a purposive approach to the interpretation of the constitutional provisions with emphasis on societal values.[148] Mahomed CJ described constitutional interpretation as playing 'a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its Government.'[149]

Following on their own pre-1990 jurisprudence under Proclamation 101, the Namibian courts had no difficulty in taking up the role of judicial review of the constitutionality of legislative provisions and striking down unconstitutional provisions for breaching fundamental rights.[150] The remainder of this chapter will evaluate the approach of the courts in upholding the Constitution against the high executive, and specifically in the face of increasing presidentialism.

(c) Sources of judicial review post-1990

There are several sources of law from which the Namibian courts draw their authority to review decisions of the executive. The first is the common law judicial review inherited from the South African occupation that forms a part of Namibian law after 1990.[151] Courts could review a decision of a public body acting under a duty imposed upon it by statute on the grounds of 'disregarding important provisions of the statute', 'gross irregularity' or 'clear illegality in the performance of its duty.'[152] These grounds included the common law principles of natural

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[147] Shulz op cit note 127, 174.
[148] *Ex Parte Attorney-General, Namibia: In re: Corporal Punishment* 1991 (3) SA 76 (NmSC), 188.
[149] *Government of the Republic of Namibia v Cultura 2000* 1993 NR 328 (SC), 340A-H.
[150] See, for example, *S v Van den Berg* 1995 NR 23 (HC); *Kauesa v Minister of Home Affairs & Others* 1996 (4) SA 965 (NmS), *S v Smith* 1996 (2) SACR 675 (Nm*); Freiremar SA v The Prosecutor-General of Namibia & Another* 1996 NR 18 (HC*); Fantasy Enterprises CC t/a Hustler The Shop v Minister of Home Affairs & Another; Nasilowski & Others v Minister of Justice & Others* 1998 NR 96 (HC); *S v Vries* 1998 NR 244 (HC*); Mostert v The Minister of Justice* 2003 NR 11 (SC); *Hendricks & Others v Attorney General, Namibia, & Others* 2002 NR 353 (HC*); Detmold & Another v Minister of Health and Social Services & Others* 2004 NR 1.
[151] Arts 138 and 140 saved the substantive and procedural laws in force immediately prior to the date of independence, including pre-1990 statutes and jurisprudence.
[152] *Johannesburg Consolidated Investment Company Ltd v Johannesburg Town Council* 1903 TS 111, 115.

justice, such as the *audi alteram partem* rule. The court recognised this form of review as inherently 'within the ordinary jurisdiction of the Court' where a person is injured or aggrieved by the 'non-performance or wrong performance of a statutory duty'.[153]

This common law review jurisprudence is supplemented by article 18 of the Constitution, which encapsulates a broader review than common law review.[154] Article 18 introduced a constitutional right to fair and reasonable administrative action. It provides that:

> Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.

In *Kaulinge v Minister of Health and Social Services,* the court held that article 18—

> goes beyond the principles of natural justice … and should be seen against the background of a long history of abuse of governmental power in Namibia by the apartheid South Africa. The temper of art 18 is to repudiate anything that might be unfair and unreasonable from any administrative body or official.[155]

Therefore, scrutiny of administrative bodies has become more intense than it was under the common law, as courts require more justification for conduct rather than mere expression of authority.[156] Both forms of review (common law and review under article 18) derive their authority from the Constitution.[157]

Article 18 applies specifically to 'administrative bodies and administrative officials.' Any executive conduct that is not performed as part of an administrative function, is viewed as not amenable to judicial review under article 18.[158] However, the boundaries of the term 'administrative' are notoriously difficult to determine and challenges brought under article 18 often implicate decisions taken by Cabinet ministers that involve policy determinations. Courts have been cautious to ensure that 'administrative' is not interpreted narrowly, that this

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[153] Ibid.
[154] See *Mokwena v Shinguadja and Another* [2013] NALCMD 10, [2] and *New Era Investment v Roads Authority and Others* 2014 (2) NR 596 (HC), [14]. *Kessl v Ministry of Lands resettlement and Others and two similar cases* 2008 (1) NR 167 (HC) [112].
[155] *Kaulinge v Minister of Health and Social Services* 2006 (1) NR 377 (HC) 383D-F.
[156] Ibid 385J, *Sikunda v Government of the Republic of Namibia* (3) 2001 NR 181 (HC), 191J-192B, *Hikumwah and Others v Nelumbu and Others* 2015 (4) NR 955 (HC) [152].
[157] *Medical Association of Namibia Ltd and Another v Minister of Health and Social Services and others* 2010 (2) NR 660 (HC) [114].
[158] Collins Parker *Administrative Law: Cases and Materials* (2019) 26.

determination is made on a case-by-case basis and there is a focus on the function performed, not the functionary.[159]

Some judges have held that decisions involving implementing policy decisions or performing functions that derive their authority from the Constitution and not statute, would be amenable to another form of review, either under the common law or under article 80. However, the courts have taken a relatively generous approach to what constitutes reviewable conduct under article 18. In *Chairperson of the Immigration Selection Board v Frank & Another*,[160] the Supreme Court held that the implementation of a policy decision to deny a permanent residence to a partner in a same-sex relationship by a minister was administrative for the purposes of article 18, but held that even if it was not, the decision would have been amenable to common law review on grounds of denying natural justice.[161]

The third source of judicial review jurisdiction flows from article 80 of the Constitution, which grants the High Court 'original jurisdiction to hear and adjudicate … cases which involve the interpretation, implementation and upholding of this Constitution and the fundamental rights and freedoms guaranteed thereunder.' Therefore, the jurisdiction under article 80 creates a form of constitutional review that covers challenges arising out of a breach of a human right or a breach of a general provision of the Constitution.

The courts' fundamental rights jurisdiction, first exercised under Proclamation 101, has been subsumed by Articles 5 and 25 of the Constitution.[162] Article 5 provides that:

> The fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the Courts in the manner hereinafter prescribed.

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[159] See *Mbanderu traditional authority and another v Kahuure and others* 2008 (1) NR 55 (SC) [38] and *Permanent Secretary of the Ministry of Finance v Ward* 2009 (1) NR 314 (SC) Strydom AJA (Shivute CJ and Chomba AJA concurring) [30-31]: 'To distinguish between policy matters and implementation of legislation regard should be had to the source of the power, the subject matter thereof and whether it involves the exercise of a public duty'. However, the court also acknowledged that this distinction is not easy to make. See also *Aonin Fishing v Minister of Fisheries and Marine Resources* 1998 NR 147 (HC), *Minister of Mines and Energy and Others v Petroneft International Ltd and others* 2012 (2) NR 781 (SC), *Chaune v Ditshabue* [2013] NAHCMD 111, *Makando v Disciplinary Committee for Legal Practitioners and Others* [2016] NASC 2, [50-52].

[160] See *Digashu* (HC) supra note 116 [113-136].

[161] *Frank* supra note 116, [109].

[162] Parker op cit note 158, 18.

Furthermore, Article 25 enables persons whose rights or freedoms have been infringed or threatened by a law or executive act to approach a competent court or protect their right or freedom.

Reviews of the breach of a constitutional provision that do not involve the breach of a human right are not as frequently brought and most challenges to executive acts are brought under article 18 and couched as the performance of a duty under an Act. However, some cases are brought which directly challenge the exercise of powers emanating from the Constitution.[163]

(d) Discussion of cases involving the executive

While determining cases brought under these various provisions, the courts have been required to make tough decisions, with political ramifications, that have concerned the interests of the high executive and its implementation of policy in Namibia. The courts have been willing to review and have shown courage in overturning decisions of the high executive and the jurisprudence shows a growing body of norms and principles governing the constitutional conduct of the executive. What follows is a somewhat chronological study of the cases that have shaped the jurisprudence of the Namibian High Court and Supreme Court (NSC), categorised into broad topics of development.

i. Coherent, broad, liberal and purposive interpretation

In the early years following Namibia's independence, constitutional jurisprudence emphasised the development of principles for interpreting the Constitution within its contextual framework. Mahomed CJ highlighted the necessity of judicial interpretation reflecting 'the spirit and tenor of the constitution,' which should be understood through a humanistic philosophy woven into its structure.[164] This approach advocates for a generous interpretation of constitutional provisions to facilitate the progressive realisation of its aspirations, as noted in *Cultura 2000*, where it was asserted that the Constitution should be interpreted broadly and purposively to avoid rigid legalism and to foster a dynamic role in expressing national ideals and values.[165]

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[163] See eg *Namibian Employers' Federation and Others v President of Republic of Namibia and Others* [2020] NAHCMD 248 and *President of the Republic of Namibia and Others v Namibian Employers' Federation and others* 2022 (3) NR 825 (SC).
[164] *S v Acheson* 1991 NR 1 (HC), 1991 (2) SA 805 (Nm), 814, *Ex Parte Attorney-General: In Re Corporal Punishment by Organs of State* 1991 NR 178 (SC), 179G.
[165] *Cultura 2000* supra note 149. See also, *Mwandingi v Minister of Defence* 1992 (2) SA 355 NmSC, 362.

The courts' interpretations of their role and that of the executive stem from this holistic, broad approach to constitutional provisions, including the right to fair administrative action.

ii. 'Executive must act within the law'

One of the foundational principles of the Constitution is its commitment to the rule of law, and it was established in the earliest cases that review of executive conduct would be built on the principle that the executive must act within the law. *S v Carracelas and Others,*[166] concerned criminal charges of unlawful fishing within the Exclusive Economic Zone of Namibia (EEZ) under the Sea Fisheries Act[167] read with the Territorial Sea and Exclusive Economic Zone of Namibia Act.[168] The accused challenged the legality of the Cabinet setting the northern border of the EEZ. The state argued that the Cabinet's executive powers found in articles 7, 27(2), 35 and 40(k) of the Constitution provide legal authority for the Cabinet's action. Frank J held that relying on general executive authority was not sufficient—

> the Cabinet must still act within the law and cannot under the guise of the executive authority, for example, make legislative decrees. The fact that the executive may have certain prerogatives in the field of foreign policy… cannot assist them in the matter under consideration.[169]

Frank J held that notices must be 'issued pursuant to the law and cannot, in the absence of a law permitting them, be of any force or effect.'[170] The Court held that the line determined by the Cabinet could not be relied upon as the border of the EEZ in the state's prosecution of the accused.

Furthermore, in *Ex Parte Attorney General, Namibia: In re: Constitutional Relationship between the Attorney-General and Prosecutor General,*[171] Leon AJ described governmental powers as constrained by the Constitution, to be used 'only according to its terms, subject to its limitations and only for agreed powers and agreed purposes.'[172] In this case, the NSC held that the AG could not interfere with the Prosecutor General's powers. The NSC held that the function of the AG is executive and the role of the Prosecutor General is quasi-judicial. The NSC stated that the constitutional provisions regarding the latter should be interpreted in 'the most beneficial way' ensuring that the Prosecutor General is truly independent and subject only

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[166] *S v Carracelas and Others* (1) 1992 NR 322 (HC).
[167] Sea Fisheries Act 58 of 1973.
[168] Territorial Sea and Exclusive Economic Zone of Namibia Act 3 of 1990.
[169] *Carracelas* supra note 166, 327A-B.
[170] Ibid 327C.
[171] *Ex Parte Attorney General, Namibia: In re: Constitutional Relationship between the Attorney-General and Prosecutor General* 1995 (8) BCLR 1070 (NmSC).
[172] Ibid 1078.

to the duty to keep the AG informed, so that the AG can exercise his ultimate responsibility for the office.[173]

This notion that 'the principle of legality reigns supreme' underpins the subsequent jurisprudence of the courts as a way of constraining the exercise of public powers.[174] It is seen as a corollary of the rule of law, which itself is one of the 'foundational triad of principles on which our state is constitutionally grounded' along with the principles of democracy and justice for all.[175] Public power holders, including the high executive, may act 'only in accordance with the powers conferred on them by law' regardless of whether the law is legislation, common law or the Constitution itself.[176]

Moreover, courts have held that legality invokes requirements of acting 'in good faith, fairly and for the purpose for which the powers were conferred without exceeding the limits of such powers.'[177] Where a court finds that a public functionary has exceeded its powers, the court will remit the decision to the original decision-maker, except in exceptional circumstances, including when time is of the essence, and where the tribunal or functionary has exhibited bias or incompetence 'to such a degree that it would be unfair' to remit the matter.[178] In determining what constitutes exceptional circumstances, the courts will be guided by the Constitution, an appreciation of the separation of powers and appropriate deference to the skills and expertise of the decision-maker.[179]

iii. Article 18 – Common law principles to inform 'reasonable and fair decisions'

The majority of cases against the high executive have been brought under the article 18 right to fair and reasonable administrative action. These cases depict a steadily developing body of administrative law built on the principle of legality.

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[173] Ibid 1089.
[174] *Tjirovi v Minister for Lands and Resettlement and Others* 2018 (2) NR 358 (HC), 367 [29], *Rally For Democracy and Progress and Others v Electoral Commission of Namibia and Others* 2010 (2) NR 487 (SC), [23].
[175] *Rally for Democracy and Progress and Others v Electoral Commission for Namibia and Others* 2013 (3) NR 664 (SC) [3].
[176] *Tjirovi* supra note 174 [29], *Medical Association of Namibia Ltd and Another v Minister of Health and Social Services and others* 2010 (2) NR 660 (HC), [109].
[177] *Ngavetene and Others v Minister of Agriculture, Water and Forestry and Others* 2019 (1) NR 129 (HC), [52].
[178] *Waterberg Big Game Hunting Lodge Otjahewita (Pty) Ltd v Minister of Environment and Tourism* [2005] NASC 9, 2010 (1) NR 1 (SC) 31-2, *Tjirovi* supra note 174, 371E-H the court here relied on South African jurisprudence.
[179] *Tjirovi* supra note 174, 372A-G. *President of the Republic of Namibia v Anhui Foreign Economic Construction Group Corporation Ltd and Another* 2017 (2) NR 340 (SC), [61].

The early cases established that article 18 requires administrative bodies to make reasonable and fair decisions but also requires transparency in decision-making.[180] The case of *Chairperson of the Immigration Selection Board v Frank & Another* (the *Frank* case)[181] concerned the Minister of Immigration's denial of an application for permanent residence by a foreign national in a lesbian relationship with a Namibian citizen. The decision is controversial for the statements made by the Supreme Court regarding recognition of same-sex relationships.[182] For our purposes, the NSC's handling of article 18 is relevant. Strydom JA's interpretation of article 18 enabled a broader application of article 18 by rejecting a call to distinguish between quasi-judicial and administrative acts of an administrative body for the purposes of determining reviewability. Strydom JA held that article 18 requires transparent procedures as well as 'reasonable and fair decisions based on reasonable grounds'.[183] In this case, the Minister was clearly making a policy choice to refuse to recognise same-sex relationships for immigration purposes. O'Linn JA (with Teek AJA concurring) agreed that the Immigration Board had failed to disclose facts, principles and policies that influenced the decision, and that it ought to have given the applicants the opportunity to respond according to the *audi alteram partem* common law rule required by article 18.[184] Thus, not only did the NSC allow the review under article 18 of what was clearly a policy-based decision, but it also required the decision to meet the standards of fairness and reasonableness.

This case shows the blending of common law principles relating to judicial review (such as the reliance on the *audi alteram partam* principle) within constitutional litigation, specifically fundamental rights litigation. This permeance between common law principles and constitutional interpretation is also seen in *Federal Convention of Namibia v Speaker, National Assembly of Namibia*[185] in which the court reviewed the decision of the Speaker of the National Assembly not to exercise his function under article 48 of the Constitution to remove a person as a member of the NA. The Speaker had refused to remove the individual based on incorrect information that there was ongoing litigation regarding the individual. The High Court held that the Speaker of the NA was a public officer for the purposes of Rule 53 of the Rules of

[180] *Aonin Fishing* supra note 159, 150 H.
[181] *Frank* supra note 116.
[182] See the criticism of the *Frank* judgment by the High Court in *Digashu* (HC) supra note 116 [107-130], and by the Supreme Court in *Digashu and Another v GRN and Others; Seiler-Lilles and Another v GRN and Others* [2023] NASC 14, (2) NR 358 (SC), [108, 117, 131]. See also Mundia op cit note 45, 82-3, Dausab & Vries op cit note 50, 39-44.
[183] Relying on *Aonin* supra note 159, 150H.
[184] *Frank* supra note 116, 120-121.
[185] *Federal Convention of Namibia v Speaker, National Assembly of Namibia & Others* 1991 NR 69 (HC).

Court and therefore his decisions were amenable to review.[186] The Court relied on its inherent powers of review as enunciated in the South African case of *Johannesburg Consolidated Investment Co v Johannesburg Town Council*,[187] the *locus classicus* on common law review, to direct the Speaker to remove the individual.[188] Thus, the Court's approach was to apply common law substantive law to constitutional duties, even where the public officer was the Speaker of the NA, and therefore the leader of the legislative branch of state.

In the year 2000, the judiciary came under considerable attack for making decisions that went against the government. The conflict began in two cases both involving the Minister for Home Affairs, Jerry Ekandjo. The first case involved the arrest and detention of a musician who was an asylum-seeker residing lawfully in the Osire refugee camp. His band, the Osire Stars, performed at an opposition political party's celebration; thereafter, they were detained by the police and threatened with deportation. Silungwe J, a foreign judge on the Namibian bench, issued an interdict against the Minister of Home Affairs preventing the arrest and deportation of the asylum seekers.[189] As a result of this order, Ekandjo and several other members from SWAPO made threatening statements against the courts, and foreign judges in particular, threatening to withdraw their work permits.[190] It was also reported that Ekandjo was openly encouraging the youth league to threaten and intimidate members of the judiciary.[191]

The second case concerned the arrest and detention without trial of José Domingo Sikunda on the grounds of being a suspected supporter of the Angolan resistance movement, UNITA. The Minister had forwarded Sikunda's name to the Security Commission to declare him a prohibited immigrant without affording him any hearing or opportunity to offer representations. The High Court held that the matter concerned article 18 and the article 12 right to a fair hearing, stating that that the right to be heard is a common law principle of natural justice and a fundamental right.

Mainga J emphasised that article 18 enables the courts to make a closer examination of the use of discretionary power to determine whether it complies with the requirements of fairness

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[186] Ibid 84B.
[187] *Johannesburg Consolidated Investment Co* supra note 152, 115.
[188] *Federal Convention* supra note 185, 89A-B.
[189] *Ngoma v the Minister of Home Affairs* Case no A 206/2000 HC (unreported) described by Horn 'An overview' op cit note 36, 308.
[190] 'Judiciary unbowed by ruling party offensive' *The Namibian* 2 August 2000.
[191] 'Namibia refuse to release ailing Angolan' *News24.com* 30 November 2000 available at https://www.news24.com/news24/namibia-refuse-to-release-ailing-angolan-20001129 accessed on 30 January 2025.

and reasonableness.[192] The Court set aside the Minister's decision to remove Sikunda, and ordered that the Minister of Home Affairs and his officials be 'restrained from unlawfully detaining and harassing' Sikunda, as well as a costs order against the Ministry on an attorney-and-own client scale.

On appeal, the NSC upheld the High Court's decision.[193] The NSC held that the Security Commission had breached article 18 by denying Sikunda the opportunity to be heard and failing to give reasons for its decision. O'Linn AJA held that even where the state is relying on 'state security' as a ground for failing to provide reasons for its decision, it is required to provide 'explicit reasons' for its refusal to give reasons, which enables the court to assess the reasonableness of the refusal.[194]

This decision led to intensified criticism of the judiciary by Ekandjo, who refused to release Sikunda from detention. Eventually, Ekandjo was convicted of contempt of court for disobeying the court ruling that ordered Sikunda's immediate release from detention.[195] The day before the contempt judgment was delivered, a mob of 300 members of the SWAPO youth league marched to the High Court and handed over a warning to the judges not to rule against the Minister.[196]

These cases illustrate the potential of article 18 to enable the courts to examine ministerial powers even when they concerned sensitive political decisions. They also illustrate the willingness of the courts to apply the law against the high executive notwithstanding significant political pushback.

In 2006, VonDoepp published a quantitative study of 250 High Court and NSC judicial decisions between 1990 and 2005 and found that Namibian courts had overall illustrated low levels of deference to the executive over the fifteen years surveyed.[197] However, the research found that after the attacks on the judiciary in 2000, foreign judges became more cautious in

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[192] *Sikunda* (HC) supra note 156, 192.
[193] *Government of the Republic of Namibia v Sikunda* 2002 NR 203 (SC).
[194] Ibid 228D.
[195] 'Landmark judgment in Namibian High Court' IOL.co.za 9 February 2001 available at https://www.iol.co.za/news/africa/landmark-judgment-in-namibian-high-court-60629, 'Ekandjo in hot water with High Court' *The Namibian* 28 September 2004.
[196] 'Landmark judgment in Namibian High Court' 9 Feb 2001 op cit 195.
[197] Peter VonDoepp *Politics and Judicial decision making in Namibia: Separate or connected realms?* Institute for Public Policy Research Briefing Paper 39, Oct 2006. Available https://ippr.org.na/wp-content/uploads/2010/06/BP39.pdf, 1.

handling political matters and displayed a tendency to side with government in politically sensitive matters.[198]

VonDoepp's theory could explain the dissent over the outcome of the case *S v Mushwena & Others*.[199] This case concerned illegality in the process of returning 13 persons to Namibia from Zambia and Botswana for trial. These persons had fled Namibia after the 1999 Caprivi uprising and were charged with various crimes related to that uprising, including treason and murder. They alleged that the Namibian government had colluded with Zambian and Botswanan authorities to abduct these individuals and return them to Namibia to face trial. During the trial, the accused raised the plea that the Court did not have jurisdiction to try them as they had been brought to Namibia unlawfully. The NSC was split three judges to two, with the three foreign judges in the matter holding that the Namibian government was not responsible for any illegality, whereas the two Namibian judges held that there was ample evidence of wrongdoing with regard to 12 of the 13 persons.[200] Ignoring the court a quo's findings that the respective governments had colluded to circumvent the safeguards of a formal legal process, the NSC majority held that 'the Zambian or Botswana authorities did not have an obligation to wait for Namibia, or to urge Namibia, to initiate extradition proceedings to get rid of undesirable foreigners from their territory' and that 'Namibian [authorities] did not have to refuse to receive the returned fugitives, let alone instruct Zambia or Botswana how they should get rid of their unwanted visitors.'[201]

The majority also held that the public interest in bringing fugitives to justice is a 'very weighty counter' in the balance of the rights of the accused against those of the victims of the alleged crimes. The judges appeared quite willing to overlook the findings of human rights abuses that the court a quo had made. Ultimately, the case illustrates that the courts are able to scrutinise the high executive's coercive power in the area of policing and extradition against the standards of legality. However, the majority's findings, which swing in favour of the government, are narrow and formalistic without a full weighing of the rights of the accused persons involved.

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[198] Ibid 12.
[199] *S v Mushwena & Others* [2004] NR 274 (SC).
[200] Mundia describes the Supreme Court decision as 'one of the most impoverished judgments in reasoned exegesis in as far as Namibia's foundational principles and values are concerned.' Mundia op cit note 45, 83.
[201] *Mushwena* (SC) supra note 199, 419E-I.

The pushback from the government against the courts did not prevent all judges, or even all foreign judges, from taking decisions that scrutinised and quashed the exercise of ministers' powers.[202]

iv. Ministers' duties and appropriate deference

Waterberg Big Game Hunting v Minister of Environment and Tourism[203] is important for the breadth of its discussion of article 18, as well as the judges' discussion about judicial deference and whether it was appropriate for the Court to substitute its own decision for an impugned decision. In this matter, the Minister had failed to consider and decide applications for the importation of game animals. An official within the Ministry had been making the decisions for ten years. However, the empowering provision of the Act in question unequivocally appointed the Minister the duty to decide applications for permits. The Court was uniform in its determination that the official, therefore, did not have the power to grant or refuse the permits and the exercise of the discretionary powers by the official in the absence of a lawful delegation was null and void. There was no doubt that the taking of a decision in the absence of empowering provisions amounted to a violation of article 18. O'Linn JA held that the Minister had also breached his duties as a member of Cabinet under articles 40 (duties of members of Cabinet) and 41 (ministerial accountability) by not taking the decisions as required by law.[204]

The Court was, however, split on remedy, and discussed when it is appropriate for the Court to take the decision itself. O'Linn JA would have the licences granted by the Court, whereas Shivute CJ and Chomba AJA disagreed and remitted the decision to the Minister. O'Linn JA believed that the courts were constitutionally mandated to interfere where the actions of the executive or the legislature breach the provisions of the Constitution.[205] He believed that this was a situation where it would be permissible for the Court to hasten the outcome of the dispute by granting the permits. In response, Shivute CJ argued persuasively that deference is appropriate when the subject matter is very technical or of a kind in which a Court has no

[202] *Viljoen & Another v Inspector-General of the Namibian Police* 2004 NR 225 (HC).
[203] *Waterberg Big Game* supra note 178.
[204] Ibid 19.
[205] Ibid 22G-H.

particular proficiency.[206] He quoted the South African constitutional court in *Phambili Fisheries* where the court held that:

> Judicial deference does not imply judicial timidity or an unreadiness to perform the judicial function. It simply manifests the recognition that the law itself places certain administrative actions in the hands of the Executive, not the Judiciary.[207]

v. Discretion within the rules of reason and the Constitution as a whole

Soon thereafter, in *Lisse*, the NSC held that in order to comply with the article 18 requirement of 'reasonable' administrative action, discretionary powers must be exercised rationally, based on facts and in line with the constitutional rights of the affected person.[208] In support of its decision, the Court quotes from the 1891 UK case of *Sharp v Wakefield,* in which it was held that discretion must be exercised within the 'rules of reason and justice and not according to private opinion'.[209] Decision-making must be 'according to law and not humour,' and it must not be 'arbitrary, vague or fanciful, but legal and regular.' [210]

The *Lisse* case concerned the denial of a medical practitioner's authorisation to use the facilities at Windhoek State Hospital. The NSC held that the decision of the Minister and her advisers was 'a travesty of justice – biased, arbitrary and a failure to apply their minds; a failure to apply the most elementary rules of reason and justice such as *audi alterem partem* and in total conflict with article 18 of the Namibian Constitution'.[211] The court drew on Lisse's article 10 right to be treated equally before the law and article 8 right to dignity, finding that it appeared that this medical practitioner had been unconstitutionally singled out by the Minister.[212] As to relief, the NSC did not simply quash and remit the decision, but ordered that the permission be granted. In these circumstances, the Court held that the prejudice and bias against Lisse motivated the intervention of the court. The NSC did not discuss the principles established in *Waterberg*, even though the Court would certainly not have the expertise to determine which doctors are suitable to practice in a state hospital. The Court relied on the extent of bad faith in the decision-making, the prejudice suffered by Lisse that affected his

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[206] Ibid 33 relying on *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA) ([2003] 2 All SA 616), 432 para 53.
[207] *Phambili Fisheries* supra note 206, [50].
[208] *Minister of Health and Social Services v Lisse* 2006 (2) NR 739 (SC), 757-758.
[209] Ibid [20] quoting *Sharpe v Wakefield* [1891] AC 173 (HL), 179.
[210] Ibid.
[211] Ibid 775 [31].
[212] Ibid 757H-758A.

other constitutional rights and the potential of undue delay that would result if the matter was remitted to the Minister.

In the similar case of *Kaulinge,* the High Court held that the requirements of article 18 must be viewed against Namibia's 'long history of abuse of governmental power'.[213] Therefore, when the use of discretionary executive powers impinges on fundamental rights, reviewing judges have greater flexibility to consider the justification provided by the administrative authority.[214] The courts will interpret empowering provisions that have the potential to impact on human rights more restrictively to reduce the potential burden of the imposition of those powers.[215]

This was well illustrated in the case of *Ayoub v Minister of Justice,* which concerned the Minister of Justice's decision to grant authority to arrest and proceed with an extradition.[216] The NSC focused on the execution of an arrest warrant as a severe inroad on the liberty of an individual that requires strict constitutional compliance.[217] It held that Courts will 'jealously guard' their power to review acts of the administrative bodies even when the matter falls within a minister's discretion.[218] The Courts required that the Minister 'place before the court evidence as to the factors that had influenced the exercise of her discretion' in order to determine whether the Minister was entitled to make the decision.[219] In this case, having assessed the information provided, the NSC held that the Minister had made a reasonable decision to proceed with the extradition and that the infringement on the appellant's right to liberty was substantially and procedurally lawful.[220]

The NSC's approach in this case appropriately protects individuals' fundamental rights, while still enabling the executive to provide justification for their actions, which will be accepted if reasonable within the context.

vi. The beginning of a gradual erosion or the beginning of definition?

The cases discussed thus far primarily concern the high executive acting under empowering statutory provisions. These cases illustrate the wide approach that the courts took when

[213] *Kaulinge* supra note 155, 383D-F.
[214] Ibid 385I and 386D.
[215] *Kessl v Ministry of Lands resettlement and Others and two similar cases* 2008 (1) NR 167 (HC).
[216] *Ayoub v Minister of Justice and Others* 2013 (2) NR 301 (SC).
[217] Ibid 319E-I.
[218] Ibid 320 [42].
[219] Ibid 321A-C.
[220] Ibid 325.

interpreting an 'administrative' body for the purposes of article 18. The case of *Permanent Secretary of the Ministry of Finance v Ward,* which concerned the cancellation of a doctor's licence to practice under a government medical aid scheme, turned on whether the termination was 'administrative' and therefore, fell within the scope of article 18.[221] The NSC held that it was not administrative action, but that the contract was purely commercial and therefore, the cancellation was not reviewable. Coleman and Schimming-Chase identify this case of as 'the beginning of a gradual erosion of the right to enforce administrative justice.'[222]

This case is not necessarily the beginning of erosion, but rather the beginning of courts' inclination to place boundaries on the applicability of article 18. In the nearly 20 years of constitutionalism prior to this case, the courts had taken a very broad approach to what constituted administrative action, however, in this matter, the court began to clarify the boundaries of article 18. It held that whether the functionary's actions amount to administrative action is 'not always easy' to determine, and that 'each case must be judged on its own facts and circumstances.'[223] The NSC cautioned that 'in the Namibian context the Constitution distinguishes between the introduc[tion] of statutes, the implementation thereof, policy matters, and executive action which is a clear indication that art 18 therefore deals with decisions taken by officials or administrative bodies exercising administrative action.'[224] To make these distinctions between executive policy matters and the administrative implementation of legislation, the NSC encourages that the 'source of the power, the subject matter thereof and whether it involves the exercise of a public duty' be taken into account.[225] The Court cautioned that it is important to allow 'sufficient space' for the state to generally be governed by the ordinary rules of contract and private law.[226]

In future cases, the courts would build on this discussion, creating a more coherent jurisprudence relating to the boundaries of article 18. In *Trustco,* the Court addressed the approach to determining what constitutes 'reasonable administrative conduct'.[227] The NSC held that:

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[221] *Ward* supra note 159.
[222] Coleman & Schimming-Chase op cit note 17, 209.
[223] *Ward* supra note 159, 320.
[224] Ibid 321E, [26]
[225] Ibid 322B, the court relied solely on South African case law with little regard to the previous approach of the Namibian court.
[226] Ibid [114].
[227] *Trustco Ltd t/a Shield Namibia and Another v Deeds Registries Regulation Board and Others* 2011 (2) NR 726 (SC) per O'Regan AJA with Shivute CJ and Langa AJA concurring.

> What will constitute reasonable administrative conduct for the purposes of Article 18 will always be a contextual enquiry and will depend on the circumstances of each case. A court will need to consider a range of issues including the nature of the administrative conduct, the identity of the decision-maker, the range of factors relevant to the decision and the nature of any competing interests involved, as well as the impact of the relevant conduct on those affected. At the end of the day, the question will be whether in the light of a careful analysis of the context of the conduct, it is the conduct of a reasonable decision-maker. The concept of reasonableness has at its core, the idea that where many considerations are at play, there will often be more than one course of conduct that is acceptable. It is not for judges to impose the course of conduct they would have chosen. It is for judges to decide whether the course of conduct selected by the decision-maker is one of the courses of conduct within the range of reasonable courses of conduct available.[228]

Thus, the Court held that where matters are significantly policy-laden, the court will confine itself to a rationality inquiry.[229]

In *Makando v Disciplinary Committee for Legal Practitioners,* the NSC reiterated the importance of considering the purpose of article 18, which is to 'impose[] a duty on those it binds to act fairly, reasonably and in accordance with common law and legislative requirements' and to provide access to court for those aggrieved by administrative acts.[230]

In determining who is bound by article 18, the Court held that this is clearly, 'bodies and officials engaged in "administration"', however, that this could include non-governmental officials and bodies.[231] The Court urged that the starting point is to consider the nature of the function performed by that body or agency on a case-by-case basis. To assist with this determination, the Court listed some characteristics to be considered when determining whether the task concerned is administrative:

> First, the *source of the power* to perform the task will be an important pointer. For administration is primarily concerned with the implementation of legislation and the tasks and functions of administrative bodies and officials are in most cases provided in statutes. Accordingly, where the source of a task is statutory, it is more likely that the task will be administrative in nature. Secondly, *the nature of the task* will be important. If the task is one performed in the interest of the public or a section of the public, as opposed to a private interest, it again is more likely that the task will be administrative in character. Some public tasks are not administrative in character. For example, adjudicative tasks carried out by judicial officers in their capacity as such, cannot be administrative tasks, although there may be occasions when judicial officers are empowered to carry out administrative tasks. Furthermore, if in performing the task, the relevant agency or body may coerce or compel compliance with its rules by members of the public, then again, the task may be administrative if it is not judicial). A further

[228] Ibid [31].
[229] Ibid 736.
[230] *Makando* supra note 159, [50].
[231] Ibid [51].

> consideration will be *whether the body or agency is funded by public funds to perform the relevant task*.[232] (Own emphasis.)

Although providing some assistance with identifying reviewable conduct, these cases did not clearly exclude 'purely executive' conduct, such as policy making and the performance of constitutional duties, from the scope of article 18. As such, ministerial conduct continued to be challenged under article 18 even when the conduct was more executive in nature and less administrative.

vii. Ministers' ability to direct parastatals

The Cabinet's ability to make decisions in relation to the affairs of parastatals under article 40 lead to an important line of case law concerning the powers of the executive. Article 40 provides that:

> The members of the Cabinet shall have the following functions:
>
> (a) to direct, co-ordinate and supervise the activities of Ministries and Government departments including para-statal enterprises, and to review and advise the President and the National Assembly on the desirability and wisdom of any prevailing subordinate legislation, regulations or orders pertaining to such para-statal enterprises, regard being had to the public interest.

In *Road Fund Administration v Government of the Republic of Namibia,* the High Court held that the Cabinet's power to 'direct, supervise and control' does not include interference through executive decisions where legislation had established an independent Board.[233] In this instance, the Minister had assumed the functions of the Board and exercised the executive powers of the parastatal, usurping the role of the appointed Board.[234] The decisions that were taken by the Board under the Minister's direction were nullified by the High Court.[235]

By contrast, *Minister of Mines and Energy and Others v Petroneft International Ltd* illustrated an example of when it would be appropriate for the executive to intervene with a parastatal. The case, brought under article 18, concerned the interference of the Cabinet in the running of the parastatal, NAMCOR, by revoking its mandate to import petroleum products.[236] The Court accepted evidence that the Cabinet intervened because NAMCOR was facing insolvency, which would have had wide-ranging implications. The Court held that this

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[232] Ibid [53].
[233] *Road Fund Administration v Government of the Republic of Namibia and others* 2012 (1) NR 28 (HC), [31].
[234] The Board had resolved to suspend the 6th, 7th and 8th Respondents and institute disciplinary proceedings against those Respondents following an independent investigation into irregularities committed by those Respondents. The Government, Cabinet and Minister of Finance had interfered to reverse the suspension and to call for an audit by the Auditor General rather than an independent entity.
[235] *Road Fund Administration* supra note 233, [32].
[236] *Petroneft* supra note 159.

interference was synonymous with the mandate of the Cabinet to 'direct, co-ordinate and supervise' parastatals.[237] The NSC held that this 'was consonant with Cabinet's general powers to direct policy on these matters and its responsibility to ensure that NAMCOR functions effectively.'[238]

The Court also held that whether or not this act amounted to administrative action for the purposes of article 18 was not necessary to decide, and proceeded on the assumption that it did.[239] In reaching this finding, the NSC made an important statement about when actions of the Cabinet will be required to conform with the requirements of article 18. It distinguished between when the Cabinet exercises its 'primary constitutional tasks [which] include the initiation of Bills for consideration by the National Assembly and the direction, co-ordination and supervision of ministries and parastatals', which would ordinarily not invoke article 18, and when the Cabinet is implementing legislation, in which case its actions will usually implicate article 18.[240] It noted further that when the Cabinet ministers are performing roles with regard to their specific ministries, they will frequently be performing tasks that fall within article 18.[241]

In the similar matter of *Pamo Trading Enterprises CC*, the NSC held that the Prime Minister and the Minister had interfered with the discretion of the Tender Board in influencing them to cancel a tender.[242] The NSC held that the cancellation of the tender was irrational and unlawful.[243] This matter was brought under article 18 against the Tender Board, and the interference of the executive was ancillary to the main cause of action.

This line of cases clarified that ministerial interference with parastatals is only permissible when the grounds to do so relate to the implementation of government policy and efficient governance and even then, must be justified.

viii. Ministerial discretion must not be directed

Another important line of cases concerns the ability of the Cabinet or the President to instruct a minister in the performance of his or her discretionary powers. In the case of *Matador*

[237] Ibid [31].
[238] Ibid.
[239] Ibid [35].
[240] Ibid [34].
[241] Ibid [34].
[242] *Pamo Trading Enterprises Cc and Another v Chairperson of the Tender Board of Namibia and Others* 2019 (3) NR 834 (SC).
[243] Ibid [55].

Enterprises (Pty) Ltd v Minister of Trade and Industry, it was found that the Minister of Trade was simply following Cabinet instructions when imposing dairy import restrictions.[244] The HC ruled that while consulting with the Cabinet on policy is acceptable, the Minister must independently apply their mind to decisions as required by law. [245] The Minister's claim that the restrictions were non-reviewable because they pertained to policy formulation was dismissed by the Court, which clarified that it was about implementing policy rather than creating it. [246]

In *Anhui Foreign Economic Construction (Group) Corp Ltd v Minister of Works and Transport,* the Minister set aside an airport upgrade contract after the President issued a statement that he would 'instruct the Minister' to cancel the contract.[247] Following this, the Permanent Secretary of the Ministry informed the contracted party that 'the project no longer exists'.[248] The Minister argued that this decision was non-reviewable as it concerned his powers to 'direct, coordinate and supervise the activities' of the Namibian Airports Company, a parastatal. The HC held that the Minister's powers to supervise parastatals must be exercised subject to the Constitution and any other law as all state institutions and public officials must act in accordance with the powers conferred on them .[249] This principle of legality requires that 'the exercise of public power is only legitimate where lawful' and stems from the rule of law, one of the 'foundational principles of our State'.[250] Therefore, the HC held that the Minister had been misguided and had failed to exercise the discretion given to him under the law, which was a contravention of the principle of legality.[251]

The HC decision was upheld on appeal.[252] The NSC reiterated that 'the starting point in any enquiry relating to the exercise of public power is the rule of law and the principle of legality' and that articles 40 and 32 of the Constitution, which grant the Cabinet and the President powers to 'supervise and direct' parastatals would need to be exercised subject to the

[244] *Matador Enterprises (Pty) Ltd v Minister of Trade and Industry and others* 2015 (2) NR 477 (HC).
[245] Ibid 503E-F, 505.
[246] Ibid 505.
[247] *Anhui Foreign Economic Construction (Group) Corp Ltd v Minister of Works and Transport and others* 2016 (4) NR 1087 (HC).
[248] Ibid [17].
[249] Ibid [34-42].
[250] Ibid [23].
[251] Ibid [51].
[252] *Anhui* SC supra note 179.

terms of the Constitution and the law.' [253] This meant that section 9 of the Act in question, which gave discretionary power specifically to the Minister, had been breached.

The precedent that emerges from this line of cases is that the President and the Cabinet members, entrusted as they are with wide powers to govern, do not begin to meddle with areas that the legislature has assigned to specific decision-makers. This is especially important in two contexts: the first is found in smaller countries where societal proximity makes it easy for the President to intervene in decisions at all levels of the Ministry or parastatal decision-making.[254] The second is found in countries that are emerging from histories of executive dominance where it may have become part of the legal culture for the executive to be involved in decisions, even where the legislation entrusts that decision to another decision-maker.[255] The Namibian jurisprudence requires the designated decision-maker to apply their mind and be able to justify their decisions, which enables affected parties to scrutinise the decision-making process for its legality. In turn, the courts will only intervene with the illegal exercise of public powers or a breach of the principles of article 18.[256]

ix. Curial scrutiny in cases of secrecy and national security

The *Haufiku* matter concerned the reviewability of the 'national security' shield that executives often misuse for protection. In *Haufiku,* the HC refused to grant the government an interdict against a newspaper outlet that threatened to publish information supporting accusations of misuse of state resources by the National Central Intelligence Agency (NCIS).[257] The government averred that the publication of the information would 'compromise the secrecy of the NCIS's operations and be prejudicial to Namibia's national security.'[258] The government argued that the HC was bound to grant the interdict once it had proven the threatened publication and raised the national security concerns. The respondents argued that the interdict undermined the constitutional protection of freedom of speech, that the information was not sensitive and did not compromise national security. The HC held that it was not satisfied that

[253] Ibid [49-50].
[254] Wouter P Veenendaal 'Democracy in microstates: why smallness does not produce a democratic political system' (2015) 22(1) *Democratization* 92, 99.
[255] Berihun Adugna Gebeye *A Theory of African Constitutionalism* (2021), 151.
[256] *Matengu v Minister of Safety and Security and Others* 2017 (2) NR 569 (HC), 573-4, [15-16].
[257] *Director General of the Namibian Central Intelligence Service and Another v Haufiku and Others* 2019 (2) NR 556 (SC). The information was that the NCIS had purchased expensive properties that were being used to house former employees of the NCIS. The NCIS had refused to comment on the allegations, and in turn, had instituted the proceedings for an interdiction.
[258] Ibid.

the government had provided sufficient evidence to show that the publication of the information would harm national security.

On appeal, the NSC held that the NCIS's arguments were contrary to the rule of law.[259] It held that the NCIS bore a duty to satisfy the court that the publication would harm national security, and that they had placed 'not a scintilla of evidence' to support the interdict.[260]

Thus, the executive's invocation of 'secrecy and national security' does not put a matter beyond 'curial scrutiny', however, where a proper case is made for protection of government information, which could occur *in camera,* the courts would suppress the publication.[261] It held that '[t]he notion that the court must simply interdict because the state assigns something the label of national security is not consonant with the values of an open and democratic society' based on the rule of law and legality.[262]

Kariseb criticised the judgment for not conducting a proper analysis of how to balance the interests involved in the case.[263] He argues that:

> Currently, it remains unclear how the state's security agencies should go about balancing competing rights and interests in performing their mandate. This is because the Court made its findings in a positivist manner – holding that the NCIS did not fulfil the requirements of an interdict – as opposed to a substantive constitutional rights limitations' analysis. In failing to provide clear guidance on how the NCIS should balance competing interests, the Court leaves open the possibility that the NCIS could use 'national security' in suppressing fundamental human rights and freedoms in future.[264]

However, the courts are well equipped to balance fundamental rights and the state's concerns of secrecy and national security, and so the failure to deal more comprehensively with the right to freedom of expression and the press in this case could be remedied by a more balanced discussion in future matters.

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[259] *Haufiku* supra note 257, [85-6].
[260] Ibid [77].
[261] Ibid [86].
[262] Ibid [74].
[263] Kennedy Kariseb 'On the use and influence of comparative foreign case law in Namibia: Patterns, trends and practices of the Supreme Court' in Tapiwa Victor Warikandwa & John Baloro (eds) *Namibia's Supreme Court at 30 Years: A Review of the Superior Court's Role in the Development of Namibia's Jurisprudence in the Post-Independence Era* (2022), 93-4.
[264] Ibid 94.

x. Ministerial discretion to bring legislation into effect to be exercised rationally according to legislative intention

The recent case of *Itula v Minister of Urban and Rural Development* orientated around the conduct of the Minister in bringing the Electoral Act into effect.[265] This is a purely executive policy determination and the review was brought as part of a challenge to the validity of an election.

In *Itula,* the Minister had brought into effect some, but not all, of the provisions of section 97 of the Electoral Act. The omitted parts of section 97 created a safeguard for the use of electronic voting machines: a simultaneous, verifiable paper trail that would be accepted as authoritative in the election if the paper trail and the results from the voting machines did not tally. The applicants were presidential candidates in the 2019 National Assembly and Presidential elections. They approached the Court to invalidate the decision of the Minister to put only part of section 97 into force, and thereafter, to invalidate the outcome of the 2019 elections. The NSC held that the Minister's determination to bring in part of section 97 was illegal and therefore invalid and unconstitutional, because the legislature intended the provisions to be affected together. However, the NSC also held that there was no proof of irregularities in the election that affected its outcome and refused to annul the election. The Court's order protects the separation of powers and shows a willingness to interfere with discretionary conduct of the Minister to protect the integrity of the legislative scheme.

In *Kruger v Minister of Finance of the Republic of Namibia,* the Court also relied on the doctrine of the separation of powers to inform its review of ministerial conduct. The provisions of an act permitted the Minister of Finance to constitute tax courts, including the appointment and removal of judges of the tax court. The High Court held that this would violate the separation of powers and be 'constitutionally inappropriate'.[266] The provisions of the Act were invalidated.

xi. Prerogative powers also subject to legality

The courts have held that the exercise of prerogative power also falls within the principle of legality. In *Newpoint Electronic Solutions (Pty) Ltd v Permanent Secretary, Office of the Prime Minister and Another,* the HC had found that the Prime Minister had exceeded his powers in

[265] *Itula v Minister of Urban and Rural Development* 2020 NASC 6.
[266] *Kruger v Minister of Finance of the Republic of Namibia and others* 2020 (4) HR 913 (HC), [134].

awarding a tender contract, as this power was not given to him under the relevant law.[267] When the Prime Minister attempted to invoke his prerogative powers under the Constitution, the NSC held that the principle of legality requires compliance with the applicable Act, and the Minister could not rely on any prerogative powers to circumvent the Act's provisions.[268]

xii. The courts' assertive role in protecting fundamental rights against unconstitutional executive policy

The 2023 case of *Digashu* involved a clash between government policy and the fundamental rights of individuals in Namibia. This case concerned two applicants: Mr. Digashu and Ms. Seiler-Lilles. Both cases were brought together after the Minister for Home Affairs refused to recognise their respective same-sex marriages concluded outside of Namibia, for the purpose of granting them immigration status.[269] The applicants both sought constitutional relief in the form of a declaration that the definition of a 'spouse' under the Immigration Control Act be read to include Mr. Digashu and Ms. Seiler-Lilles.[270] In the alternative, the applicants applied for review of the Minister's decisions against them. For Mr. Digashu, this was a denied work permit and for Ms. Seiler Lilles, it was a denied permanent residence permit.

The applicants argued that the Ministry of Home Affairs had informed them that 'same-sex marriages were not recognised in Namibia' and they argued that the Ministry was therefore unconstitutionally discriminating against them on the grounds of their sexual orientation.[271] The HC held that the refusal to recognise a spouse in a valid same-sex marriage concluded abroad was unconstitutional. However, the Court held that it was compelled to follow the previous SC *Frank* case, in which it was stated by the NSC that same-sex marriages are not recognised in Namibia.[272] The HC levelled strong criticism against the approach in the *Frank* case, but also held that it was bound by the precedent until it was overruled by legislation or another decision of the SC.[273] Having found that it was unable to grant the constitutional relief,

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[267] *Newpoint Electronic Solutions (Pty) Ltd v Permanent Secretary, Office of the Prime Minister and Another* 2022 (4) NR 1050 (SC).
[268] Ibid [42].
[269] *Digashu* (HC) supra note 116.
[270] Immigration Control Act 7 of 1993.
[271] *Digashu* HC supra note 116, [38].
[272] See *Frank* supra note 116.
[273] This is consistent with an interpretation of article 81 which requires subordinate courts to follow a decision of a superior court.

the Court turned to the review applications. The Court granted Mr. Digashu's review application but refused Ms. Seiler-Lilles for reasons that are not pertinent to this discussion.[274]

On appeal, the NSC dealt with the constitutional matter only. It held that the facts of the present case could be distinguished from *Frank,* and therefore, the HC need not have felt bound by that case.[275] In balancing the government's policy decision against the appellants' rights, the NSC held that the Ministry had not raised any public policy reasons for not recognising the appellants' marriages, and no reason why the valid foreign marriages ought not to be recognised.[276] The NSC held that there was no rational connection to a legitimate statutory objective that could justify the decision that discriminated unfairly against the appellants and infringed their rights to dignity.[277] Therefore, the Court held that the word 'spouse' in the relevant provision is to be read to include same-sex spouses lawfully married in another country. The NSC granted the appeal, directed the Ministry to recognise the foreign marriages and to recognise the appellants as spouses under the Act. Having granted that relief, the NSC stated that the reviews were unnecessary to be addressed further.

This case illustrates the development of the jurisprudence in Namibia over the past 30 years in several ways. First, the NSC showed a willingness to prefer a human-rights centred approach over a legalistic approach to solve the case before it. Secondly, the Court enabled the Minister to justify its policy, which if provided, would have been weighed against the infringements caused to the applicants. Thirdly, this case illustrates a Court that is not shy to directly overrule a clear government policy that infringes on fundamental rights. This is testament to the independence of the Court as well as its commitment to Namibian constitutionalism.

This case was brought on human rights grounds but illustrated assertiveness on the part of the courts when government policy breaches a human right, and a willingness to find against the executive policy on a sensitive political matter.

xiii. Courts timid in challenges to presidential action

The above cases have involved ministers and members of the Cabinet. Challenges to the actions of the President are rare, and when the President has been in some way implicated in a case,

[274] *Digashu* (HC) supra note 116, [150].
[275] *Digashu* (SC) supra note 182, [81].
[276] Ibid [84].
[277] Ibid [125].

the courts are often hesitant to make any negative findings about the head of state's conduct, even when there is blatant interference with a minister's role.

For example, in *Anhui,* where it was clear that the President had interfered with the Minister's exercise of his discretion, the Court was careful to avoid making any statement about the President's interference, yet it described the Minister's acquiescence to the views of the President to be a clear failure to exercise his discretion in breach of the principles of legality.[278]

Moreover, in *Government of the Republic of Namibia and Another v Affirmative Repositioning Movement*, the President invited the respondent to a meeting that he chaired himself, where he presented his 'brainchild,' a 'massive urban land servicing project.'[279] At this meeting, the President agreed 'to immediately provide services to 200,000 plots' of land if the respondents agreed to stop a 'campaign to illegally occupy urban land'.[280] When the respondent attempted to enforce this agreement, the NSC held that the resolutions of the President were not binding, and that 'no *animus contrahendi* in the sense required to found a legally enforceable contract was established.'[281] Moreover, that 'at most, they are binding in honour only – the President could walk away from that statement given other pressing issues of the Republic, for example drought, a health pandemic, etc.'[282] One wonders whether the NSC would have been so lenient on a minister who promised specific service provision to citizens?

However, in a challenge to the President's proclamations under a State of Emergency during the COVID-19 pandemic, the High Court and the SC displayed a willingness to scrutinise the President's proclamations according to a standard of legality.[283] The HC and NSC required justification from the President for the choice of measures imposed and weighed these reasons against the impact on the rights of the individuals affected. The Courts overturned the President's proclamations, showing that they are willing to scrutinise and overturn even the highest executive function in times of a national emergency. This case will be discussed in detail in Chapter Six.

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[278] *Anhui* (SC) supra note 179, [43] and [51].
[279] *Government of the Republic of Namibia and Another v Affirmative Repositioning Movement* 2023 (3) NR 713 (SC), [28].
[280] Ibid.
[281] Ibid.
[282] Ibid.
[283] *NEF v President* (HC) supra note 163, and *President v NEF* (SC) supra note 163.

Considering the breadth of the power that the President is given under the Constitution, it is remarkable that these powers have not generated more litigation.

(e) Approaching the Namibian courts

An important matter that sets Namibia apart from the other two countries in this comparative study is its relatively unrestrictive procedural rules on approaching the courts under any of the above grounds. Aggrieved persons are able to approach the courts directly with an application for review of the decision or proceedings of 'an inferior court, tribunal, administrative body or administrative official.' These are now brought by way of application through the procedure laid out in rules 76-77 of the Rules of the High Court, 2014. There is no requirement to first obtain leave to review as is common in systems with judicial review adapted from the United Kingdom. Applications to challenge provisions of the Constitution or acts of the executive in breach of the Constitution are brought directly as applications to court.

With regard to standing, articles 18 and 25 are the only provisions in the Constitution to mention a standard for determining standing. These state that 'aggrieved persons' may approach the courts to vindicate their constitutional rights. However, 'aggrieved' is not defined.

The courts have held that litigants bringing cases under articles 18 and 25 (reviews involving breaches of human rights) must be able to show that they have a 'direct and substantial interest' in the case that is 'current' and 'actual'.[284] This has also been applied to cases involving challenges under the courts' article 80 jurisdiction.[285] The threat of a breach of a right is sufficient to found standing.[286] In *Uffindell v Government of Namibia,*[287] the HC clarified that the rule on standing on constitutional issues has shifted from the stricter common law approach to a more purposive approach to standing to ensure the full benefit of constitutional rights to individuals and classes of individuals.[288]

A full bench of the NSC also stated that citizens in a constitutional democracy should not ordinarily be inhibited from exercising their right to approach courts for the determination of

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[284] *Trustco* (SC) supra note 227 [16]. See also *Mweb Namibia (Pty) Ltd v. Telecom Namibia Ltd and Others* 2012 (1) NR 331 (HC), [11]; *Clear Channel Independent Advertising v Transnamib Holdings* 2006 (1) NR 121 (HC), [45], *quoting Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O), 166A. *Uffindell t/a Aloe Hunting Safaris v Government of Namibia and Others* 2009 (2) NR 670 (HC), [12].
[285] Ibid [106-8].
[286] See discussions in *NEF v President (HC)* supra note 163, [58-62].
[287] *Uffindell* supra note 284.
[288] See also *Lameck and Another v President of Republic of Namibia and Others* 2012 (1) NR 255 (HC), [11]; *Jack's Trading CC v The Minister of Finance* 2013 (2) NR 491 (HC); *Petroneft International Glencor Energy UK Ltd and Another v Minister of Mines and Energy and Others* [2011] NAHC 125.

their legal disputes.[289] Rather, alleging the violation of constitutional rights should be given 'the widest scope' and the courts should be 'cautious in denying standing.'[290]

Under the common law, an applicant can only vindicate their own interests and not on behalf of other persons or in the public interest and may not only seek a declaratory relief.[291] This is not clarified with regard to cases emanating from the Constitution. In 2014, the Law Reform and Development Commission recommended the broadening of the rules on standing, in general, in order to make access to justice more achievable. It stated that citizens, individually and collectively, should be able 'to access the courts to ensure the government is meeting its constitutional obligations.'[292] This has not yet been implemented.

V. Conclusion

In 2010, Coleman and Schimming-Chase wrote that '[t]he scope of what constitutes administrative action is gradually being narrowed.'[293] However, the recent cases of the High Court and Supreme Court do not suggest that this is the case fourteen years later. The courts do not appear to be interpreting 'administrative action' narrowly, but rather were seeking to clarify its scope. The review of executive action on non-article 18 grounds is still frequent. Rather, the jurisprudence shows a developing body of principles relating to executive conduct built on the principle of legality and article 18 requirements of fair and reasonable conduct. If anything, the courts appear increasingly emboldened to exercise judicial review powers. The Namibian courts have developed a sophisticated understanding of their constitutional role as guardians of legality, though gaps remain in the frequency of cases scrutinising the highest levels of executive power.

Turning to consider the coherence of Namibian jurisprudence through the four questions identified in Chapter One, the institutional performance and doctrinal development may be evaluated as follows.

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[289] *Trustco* supra note 227, [18].
[290] *Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia and Others* [2009] NASC 17, [30-44].
[291] *Uffindell* supra note 284, [13]. In rare circumstances, individuals may sue on behalf of other persons who may be unable to vindicate their rights. See Law Reform and Development Commission, *Locus Standi Discussion Paper* LRDC27, (2014, Windhoek, Namibia), 10-11.
[292] Law Reform and Development Commission op cit note 291, 17.
[293] Coleman & Schimming-Chase op cit note 17, 208.

(a) Institutional access and incidence

With regard to institutional access and incidence, the case study shows a judicialisation of politics over the years with the courts increasingly called upon to determine the legality of executive action. Despite Namibia's small size, the law reports reveal a significant number of cases brought to challenge the actions of the high executive under article 18 and other constitutional grounds. This consistent incidence of cases suggests that the small population size is not affecting the number of cases brought nor is social proximity in a SWAPO dominated society deterring litigants. However, there are very few cases involving the President, which suggests that strategic choices are made by litigants to challenge ministerial conduct rather than that of the powerful President.

The 2024 Afrobarometer surveys suggest that the population has relatively high trust in the courts with 52 per cent of those surveyed stating that they trusted the courts 'somewhat' or 'a lot', as opposed to the National Assembly (36 per cent) or the President (32 per cent).[294] The relatively high trust in the courts is consistent with the regular incidence of cases.

Access to the courts is unencumbered by restrictive procedural rules, and the courts have taken a broad approach to standing as described in *Uffindell*.[295] Moreover, the courts have interpreted 'administrative action' broadly for the purposes of article 18 litigation. The courts' approach therefore is to reduce barriers to accessing judicial review, which has enabled significant constitutional challenges to reach the courts.

(b) Institutional effectiveness

Considering institutional effectiveness, the Namibian judges have demonstrated their commitment to holding the executive accountable through their approach to engaging with the review cases that are brought before them and requiring the high executive officials to provide detailed reasons for decisions, even when exercising a discretionary power.[296] Thus, the Namibian courts have developed a robust understanding of constitutionalism and legality as justiciable principles and have not shied from holding conduct to be inconsistent with the Constitution.

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[294] Afrobarometer 'Summary of results: Afrobarometer Round 10 survey in Namibia, 2024' available at https://www.afrobarometer.org/wp-content/uploads/2024/08/NAM_R10.Summary-of-results-Afrobarometer-13aug24.pdf accessed 25 July 2025.
[295] *Uffindell* supra note 284.
[296] See eg *Kaulinge* supra note 155, *Ayoub* SC supra note 216 and *Haufiku* supra note 257.

The courts view their review powers as 'an integral part of the rule of law' that should be 'jealously guarded.'[297] In *Medical Association of Namibia Ltd v Minister of Health and Social Services,*[298] the Court adopted the dicta of Chaskalson P in *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others,* in which the South African court held that:

> Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution which defines the role of the courts, their powers in relation to other arms of government, and the constraints subject to which public power has to be exercised. [299]

Namibian courts have moved beyond merely claiming space as the enforcer of the constitution, to developing the normative principles of review as a means of clarifying the constitutional boundaries of the use of high executive power. The breadth of the courts' influence is reflected in the thematic discussion above.

(c) Normative foundations

With regard to the normative foundations for the courts' decisions, the Namibian courts have developed their common law principles of review grafted on to constitutional principles of legality, constitutionalism and the rule of law.

The principle of legality has been developed with explicit reliance on constitutional principles with the NSC emphasising that:

> Constitutionalism, legality and the rule of law are justiciable principles of the Constitution in that any law or conduct inconsistent with them may be declared invalid. Those tenets dictate that the inhabitants of Namibia and those who find themselves within the boundaries of the Republic shall be subject to the ordinary law of the land both in the burdens it imposes and the benefits it bestows.[300]

The jurisprudence is built on the article 18 requirements of lawful, fair and reasonable conduct, and the article 80 requirement of constitutionality. These standards have been applied to high executive conduct through detailed legal reasoning throughout the case law. The jurisprudence also shows judges carefully considering the limitations of their own function alongside their duty to prevent violations of the Constitution.[301] Through this the courts

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[297] *Ayoub (SC)* supra note 216, [42].
[298] *Medical Association of Namibia Ltd and Another v Minister of Health and Social Services and others* 2010 (2) NR 660 (HC) [112].
[299] *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241, [45].
[300] *President v NEF (SC)* supra note 163, [107].
[301] *Matengu v Minister of Safety and Security and Others* 2017 (2) NR 569 (HC), [10-15].

exercise their role to 'promote decision-making based on rational and objective criteria' whilst retaining the standpoint that the courts are 'apolitical'.[302]

While the Namibian cases do draw from comparative jurisprudence from foreign countries as well as international law and conventions, reliance on foreign jurisprudence tends to be well-justified and the application of it to the Namibian context is usually explained.[303] This principled approach to legal borrowing is ensured by the 2014 Rules of Court that introduced a requirement that legal practitioners justify reliance on foreign precedent in their heads of argument, providing an explanation that they are 'unable after diligent search to find Namibian authority on the proposition of law under consideration'; and that the precedent is acceptable for reliance by the court.[304] This forces discussion of, and reliance on, local precedent before foreign precedent and detailed explanations for any legal borrowings that occur. Both of these have the benefit of increasing jurisprudential coherence.

The frequent choice of South African jurisprudence is unsurprising due to the legal history and to the ongoing similarity between the Namibian and South African Constitutions that allows Namibia to benefit from the increased number of cases brought in South Africa because of its larger population size.

(d) Coherence of reasoning

Namibian jurisprudence will inevitably have some inconsistencies, however, the normative foundation of review of the high executive appears more coherent than in many jurisdictions. The Namibian courts are committed to detailed legal reasoning and engage in jurisprudential and constitutional anchoring when discussing judicial review powers. This benefits the courts through full explanations of the adoption of standards and policies that are applied to executive conduct. This detailed reasoning increases jurisprudential coherence and also ensures constitutional coherence.

The case survey indicates a jurisprudence that takes a human-rights centred interpretive approach, requires high executive justification for policy choices, and empowers judges to

[302] Peter Brett *Human rights and the Judicialisation of African Politics* (2018), 2.
[303] Amoo op cit note 1, 196.
[304] Rules of the High Court of Namibia, 2014, r 130.

overturn unconstitutional conduct.[305] The case law suggests the development of a unified normative framework for reviewing executive action with few normative contradictions.

(e) The development of constitutional jurisprudence

The Namibian courts have developed a confident and theoretically grounded approach to judicial review of high executive action. The explicit constitutional foundation for their powers, combined with detailed reasoning and principled borrowing from comparative jurisprudence, suggests a maturing constitutional system where courts understand their role within the separation of powers.

However, the apparent reluctance to challenge the highest levels of executive power, particularly presidential conduct, and the rarity of challenges to ministerial action outside article 18 grounds, does leave potential jurisprudential gaps and may reflect strategic litigation choices or the practical effects of single-party dominance.

The courts' role as an accountability mechanism for executive power in Namibia appears to be characterised by coherent and unified normative foundations and increasingly confident institutional performance. The development of coherent jurisprudential principles suggests a constitutional system that is maturing in its understanding of judicial review, though the practical impact of this development may be limited by political realities.

[305] See eg the approach of the NSC in *Digashu* supra note 116.

CHAPTER FIVE
THE COURTS' ROLE IN REVIEWING HIGH EXECUTIVE POWERS IN SEYCHELLES

I. Introduction

This chapter considers the smallest of the jurisdictions in this study, the Republic of Seychelles, an archipelago in the Indian Ocean consisting of 115 islands and 0.001 per cent of the world's population. The study of Seychelles will show that the constitutional design of the 1993 Seychellois Constitution presupposes a strong and independent judiciary that is able to hold the executive accountable through its constitutional jurisdiction over potential infringements of the Constitution.[1]

However, the practical discussion reveals that the courts' willingness to step into any enhanced role vis-à-vis the potential abuse of power by the high executive has been slow with an historical reluctance to review acts of the executive branch and politically sensitive cases. An unwillingness to engage meaningfully with the underlying constitutional principles has undermined a successful implementation of its new constitutional jurisdiction found in article 125(1)(a) of the Constitution. Despite adopting the judicial review toolset as a mechanism for addressing the review of high executive acts, the courts are not consistent in their approach, which increases uncertainty in the law and decreases the efficacy of their role as an accountability mechanism on executive power. Both the Constitutional Court of Seychelles (CC) and the Seychelles Court of Appeal (SCoA) have demonstrated a jurisprudence of avoidance in recent years, which has negatively impacted the number of constitutional review cases brought to the Courts.

II. Colonial powers in Seychelles

Seychelles was first settled by the French Governor for Mauritius in 1770 before it was ceded to Britain by the Treaty of Paris in 1814 and was administered from Mauritius until 1903. British law was introduced while retaining elements of French law, particularly the French Civil Code, which governed much of the private law.[2] British public law (penal, procedural,

[1] Constitution of the Republic of Seychelles, 1993 ('1993 Constitution'), arts 46, 125(1)(a), 130.
[2] See Mathilda Twomey *Legal Métissage in a Micro-Jurisdiction: The Mixing of Common Law and Civil Law in Seychelles* (2017).

administrative and constitutional law) was introduced, and along with it, the Supreme Court of Seychelles (SCS) was established in 1903.[3]

When the British formally began to govern Seychelles in 1810, Seychelles had a population of 3,486 persons, of whom 3,015 were slaves.[4] Executive power was imposed in the form a British Civil Agent who was sent to administer the obscure colony with a land-owning population that had already forged its identity as being difficult to govern, despite its apparent obsequiousness.[5] The country itself was burdened by its 'remoteness and isolation and its poverty of natural resources', which rendered development and advancement particularly difficult.[6]

As a colony, Seychelles was subject to the oversight of the Colonial Office in Whitehall and obtained its funding via the administration in Mauritius.[7] Prior to independence, important executive decisions were taken at several levels: in the Colonial Office in Whitehall, in the colonial headquarters in Mauritius and in Victoria, where the day-to-day decisions were made by the Governor. The small legislative council that existed was chaired by the Governor, who also controlled its agenda.

In 1948, the Legislative Council of Seychelles was constituted and approximately 2,000 citizens were eligible to vote, as determined by 'a simple literacy test' and other means of qualification.[8] This was the first form of representative government and it consisted of six official members: four elected and two nominated unofficial members.[9] The courts consisted of a Supreme Court in Victoria and Magistrates' Courts on Praslin and in Victoria, which were staffed with foreign judicial officers until the 1990s.[10]

Historically, the legal system was reputed to be slow, parochial, ill-equipped, openly corrupt and staffed by incompetent judges given to their own vices. According to one English

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[3] Seychelles Judicature Order in Council 1903.
[4] Deryck Scarr *Seychelles since 1770: History of a Slave and Post-Slavery Society* (2000) ("*Seychelles since 1770")* 20-37. Throughout the previous 30 years, Seychelles had capitulated to whichever nation appeared a more immediate threat, despite Britain having the formal sovereignty over the small state for the bulk of the period between 1793 and 1810 during the Franco-British Revolutionary wars.
[5] Ibid 39.
[6] House of Commons, Parliamentary debate, *Hansard* Vol 740, 31 January 1967, item 83.
[7] Scarr op cit note 4, 59.
[8] International Foundation for Electoral Systems, '*Pre-election Assessment: Seychelles*' 30 June 1992 https://www.ifes.org/sites/default/files/r01814.pdf accessed 2 March 2021, 21.
[9] Colin Allan 'The Transfer of Power: Ministerialization in Island Countries' (1983) 49(1) *International Review of Administrative Sciences* 49, 49.
[10] Mathilda Twomey 'Impartial adjudicators? The role of foreign judges in Seychelles' in Anna Dziedzic and Simon NM Young (eds) *The Cambridge Handbook of Foreign Judges on Domestic Courts* (2023), 198.

Parliamentarian, the difficulties of finding a 'first-class man' to fill the Chief Justice role were due to the 'pay and prospects offered'.[11] One commentator described an early judge as 'the least qualified of any man to be *juge de paix.* '[12] Another judge was depicted as 'aged, half blind and half deaf and of little use on the bench, except to lose unwelcome depositions on the manslaughter of former slaves.'[13] Appeal to the higher court in Mauritius was prohibitively expensive and thus impossible for anyone but a proprietor with access to credit.[14] While many of the judicial officers of Seychelles during that time were not deemed fit for office, the professionalism and respectability of the judiciary was brought up by the appointment of the eminent jurist, Judge Sauzier, in the 1960s.

In 1970, a fifteen-member legislative assembly was established (which would become the National Assembly) and general elections were held. The Seychelles Democratic Party, led by James Mancham, took a narrow majority and he became the Chief Minister. The Seychelles Democratic Party intended to retain close ties with the UK, whereas the main opposition party, France Albert René's Seychelles People's United Party (SPUP), sought autonomy from Seychelles' coloniser and favoured the introduction of socialist values.[15] In the 1974 election, Mancham again won a narrow majority. In 1976, Seychelles became an independent Commonwealth Republic following the finalisation of a new Constitution drafted in Westminster for Seychelles.[16] The independence Constitution imposed a system with an executive President and a Prime Minister collaborating on state matters. They would be the leaders of the two leading political parties in the election. Mancham became the first President and René was appointed as Prime Minister.

III. The René regime -1977 to 1993

In 1977, merely a year after Seychelles had received its independence, René staged an armed coup d'état, seized power and deposed the democratically elected Mancham.[17]

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[11] House of Commons, Oral answers to questions, *Hansard* Vol 450, 28 April 1948, item 34. See also House of Commons, *Hansard* volume 557 of 25 July 1956, 51.
[12] Scarr op cit note 4, 47.
[13] Ibid 60.
[14] Ibid.
[15] Twomey (2017) op cit note 2, 26. SPUP would become SPPF (Seychelles People's Progressive Front) in 1979 and then Parti Lepep in 2009 and United Seychelles in 2018.
[16] Seychelles Independence Order 1976 SI 1976/894 (UK).
[17] Twomey (2017) op cit note 2, 27, John Hatchard 'Re-establishing a multi-party state: Some constitutional lessons from the Seychelles' (1993) 31 (4) *Journal of Modern African Studies* 601, 601.

Following the coup d'état, René reconstituted Seychelles as a 'Sovereign Socialist Republic' under a new Constitution that was adopted by decree and came into effect on 5 June 1979.[18] The constitutional text banned all political parties and activity other than that of Rene's SPPF.[19] Appointment of all Cabinet members and constitutional appointees were made by the President.[20]

For fifteen years, René governed Seychelles without opposition. He was the primary repository of state power supported by the police, military and an unquestioning People's Assembly.[21] René had a reputation for retaliation against any opposition to the regime in the form of forced disappearances, unexplained deaths, land expropriation and legal sanctions (such as refused licences or planning permission).[22] With the members of the People's Assembly also drawn from the SPPF, there was no effective separation of powers between the legislature and the executive.[23] Moreover, the judiciary became closely intertwined with the other branches of state, all under the extensive powers of the President.[24] The ensuing period was characterised by 'overreach of executive power, resulting in state oppression and numerous human rights abuses.'[25]

The courts were staffed by the handful of judges appointed by the President himself, and cases were brought by another handful of lawyers who operated under government-controlled licences in law centres or in the Chambers of the Attorney General. Despite any provisions guaranteeing some form of judicial independence, these individuals were not immune from sanctions for disloyalty to the state.

Human rights under the 1979 Constitution were unenforceable aspirations contained in the preamble and the courts did not have the power of judicial review of legislation or executive

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[18] Constitution of the Republic of Seychelles Decree, 1979 ('Constitutional Decree, 1979') to which the 1979 Constitution was attached in a schedule, s 1.
[19] 1979 Constitution, s 5. In terms of s 19, the electorate was provided with one candidate nominated by the Party for election as President and would be entitled to vote either for or against that person.
[20] Ibid s 26.
[21] The People's Assembly did have the power to quash a statutory instrument laid before it by the President, a Minister or the Chief Justice within a 3-month period of it being passed in terms of s 64 of the Interpretation and General Provisions Act, 1976 (Cap 103). Unsurprisingly, it was not a check that was invoked during the period.
[22] Seychelles Truth, Reconciliation and National Unity Commission 'Volume II: Historical context and overview of main evidence' and 'Volume III Legal framework and case determinations' in *Report of The Truth, Reconciliation and National Unity Commission* (9 August 2022). See also, IFES Report op cit note 8.
[23] 1979 Constitution, s 37(b).
[24] TRNUC Report Vol 2 op cit note 22, 69.
[25] Ibid.

acts.[26] The only mechanism available for challenging the unlawful use of public power was under the provisions of the pre-independence Courts Act, which had been maintained under the savings clause of the 1979 Constitution.[27] Section 4 of the Courts Act granted the superior courts the same powers as the British courts, including the common law power of judicial review. However, there were very few cases brought during the René regime: the law reports for the SCS and the SCoA report a mere fourteen cases raising judicial review or other public law challenges to the government's use of power during this fifteen-year period of executive rule. Very few cases were brought, even fewer were successful.[28]

Certainly, the judges were more circumspect when deciding matters involving challenges to the high executive, particularly during the one-party years. In several cases, the courts avoided reviewing the acts of the executive based on technicalities. For example, the government was not held subject to an Act, even when it willingly invoked the dispute resolution procedure under that Act.[29] When the President determined to pay compensation for land compulsorily acquired over a twenty-year period rather than immediately, the Chief Justice held that this was not a matter of interpretation of the protections against compulsory acquisition, but a matter for the President, in consultation with the responsible minister, and fell outside of the jurisdiction of the Court.[30]

It is difficult to assess the extent to which this deference or avoidance of taking matters against the high executive can be attributed to the autocratic rule of René and the 'culture of fear that had marked the society of Seychelles' as a result of the coup d'etat.[31] However, it is feasible, since the President ruled at will, legislated by ordinance and had the power to remove judges, even if the judiciary did have the trappings of independence.[32] Ultimately, these formal guarantees of independence were unable to protect the judiciary from interference by the all-powerful executive in such a small society.

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[26] Twomey (2017) op cit note 2, 27 citing Philip Telford-Georges 'Charting Our Course: Report of the Constitutional Commission to President FA Rene and Draft Instructions' (Government Press, 1978) 4-5.
[27] Act 21 of 1964 ('Courts Act, 1964').
[28] *Shell Co. v Government of Seychelles* CS 221/86 (unreported) upheld on appeal in *Government of Seychelles v Shell Company of the Islands* (1988-1993) SCAR 99; *Chetty v Government of Seychelles and Hoareau v Government of Seychelles* (1989) SLR 108; *Valabhji v Controller of Taxes* 1978-1982 SCAR 397.
[29] *R v Rent Board* 1973 SLR 353.
[30] *Shell Co. (SCA)* supra note 28.
[31] Truth Reconciliation and National Unity Commission Report *Volume I Introduction and Background* 9 August 2022, 3.
[32] See 1979 Constitution ss 76, 78-80. The President had the power of appointing and removing judges, and his training as a lawyer meant that he was skilled at skirting the line between official legal conduct and private intimidation. See in this regard the findings in the TRNUC Vol 2 report op cit note 22.

Moreover, in judicial review cases prior to 1993, the references in judgments to the cases relied on for precedent (and reasoning that developed the law in those cases) were few. The judges were almost all from foreign countries, and all had trained abroad, which meant that they brought differing jurisprudential viewpoints to the bench. Once in Seychelles, they found themselves using an underdeveloped Supreme Court library, which lacked comprehensive and regular law reporting. In many of these instances, the judgments do not show a familiarity with the citations or engage with the specific cases.[33]

By 1991, René faced financial difficulties and pressure to return to a multiparty democracy amidst increasing external and internal political opposition, an international groundswell in the human rights movement and the fall of the Berlin Wall.[34] On 4 December 1991, René agreed to initiate a move to a 'pluralist democratic system.'[35] In July 1992, a special election was held to elect representatives to the Constitutional Commission, which would prepare the draft of a new Constitution to put to the people of Seychelles within a year.[36] Even though eight political parties ran for election, only the parties of René and his deposed rival, Mancham, achieved enough votes for seats at the table.[37] The election was 'won' by SPPF, entitling it to fourteen members on the Constitutional Commission, and Mancham's Democratic Party filled the remaining eight seats.

The first text of the constitutional document, failed to achieve the 60 per cent threshold in a referendum for adoption.[38] The Constitutional Commission was reconstituted and its daily deliberations aired on national media with a hotly debated, but hastily completed, constitutional text placed before the people of Seychelles in June 1993. It was adopted by a 70 per cent 'yes' vote in a referendum held on 15-18 June 1993.[39]

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[33] In *R v Ex Parte Foskett, Ex Parte Bouchereau* (1936-1955) SLR 193 the judge stated that in the court library he was unable to access the cases cited in the copy of *Halsbury* on which he was relying.

[34] In an interview René cited a global movement towards full democracy, the growth of internal opposition and the political maturity of the Seychellois population as reasons for the changes. IFES also read-in René's financial motivation that '[f]oreign assistance and tourism will continue to flow only toward a democratic and stable Seychelles.' IFES Report op cit note 8, 10.

[35] Report of the Commonwealth Observer Group *Referendum on the Draft Constitution in Seychelles 12-15 November 1992* (1992) Commonwealth Secretariat ('Commonwealth Report 1992') available at https://dx.doi.org/10.14217/9781848595415-en accessed 30 January 2025, 6.

[36] Ibid 6.

[37] IFES Report op cit note 8, 15.

[38] Commonwealth report op cit note 35, 4-6, 18. The opposition parties rejected the first draft because of 'the undemocratic manner in which the draft was adopted' and stating that 'it was a constitution produced in haste by a small group in order to entrench the power structure of the SPPF.'

[39] The Constitutional Commission was reconvened in January 1993; by 7 May, the new draft was adopted unanimously by the Commission and a referendum was held on 15-18 June. Hatchard op cit note 17, 606,

IV. The Third Constitution of the Republic of Seychelles

This third Constitution of the Republic of Seychelles, adopted by 'We, the People of Seychelles,'[40] expresses its absolute founding principles in its first article, committing it to being 'a sovereign and democratic Republic.'[41] The one-party state, with its democratic trappings and human rights abuses, had damaged public confidence in all the branches of the government, including the judiciary. The re-imposition of a meaningful democracy would require more than the establishment of free and fair multiparty elections in order to achieve the democratic society described as 'a pluralistic society in which there is tolerance, proper regard for the fundamental human rights and freedoms and the rule of law and where there is a balance of power among the Executive, Legislature and Judiciary'.[42] As the International Foundation for Electoral Systems (IFES), noted:

> The transition that the President has himself initiated, however, requires that he, and the government generally, shed the undemocratic practices and institutions upon which they have relied in the past. The difficulties of accomplishing this during the brief transition period are obvious, and are both psychological and institutional. Radical changes in both the institutions and psychology of governance in Seychelles will only come with time. The best that can be expected in the short term are changes that are relatively minor and mostly symbolic.[43]

The new Constitution attempted to incorporate symbolic change (a new flag, a new anthem, new democracy) alongside fundamental institutional changes to secure the long-term goal of establishing and reinforcing multiparty democracy. The 1993 Constitution was drafted by the representatives of two rival political parties. While both men anticipated that they would win the elections under this new Constitution, but they also knew it was plausible that they would not. It cannot be doubted, therefore, that the powers granted to the President and the executive were topics of serious consideration in the minds of the draftsmen.

The text of the 1993 Constitution sought to prevent the recurrence of the undemocratic practices and institutions that René's party had relied on in the past to entrench its hegemonic position. Thus, the constitutional provisions entrenched the doctrine of the separation of powers, placed constitutional restrictions on the powers of the executive, created independent

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Commonwealth Observer Group 1993 'The Presidential and National Assembly Elections in the Seychelles 20-23 July 1993: Report' Commonwealth Secretariat 1993 https://doi.org/10.14217/23101512 accessed 2 March 2021, 5.

[40] 1993 Constitution, preamble.

[41] Ibid art 1.

[42] Ibid art 49.

[43] Keith Klein & Charles Lasham *Pre-Election Assessment: Seychelles* International Foundation for Electoral Systems July 1992 available at https://www.ifes.org/publications/pre-election-assessment-seychelles accessed 2 March 2021, 40.

bodies such as the Ombudsman and gave new powers to the courts to oversee a justiciable Charter of Rights and the guard structure of the system.[44]

(a) The separation of powers under the 1993 Constitution

The introduction of a meaningful separation of powers is intrinsic to the structure of the 1993 Constitution; essentially, it is the 'hallmark of this democratic republic'.[45] Executive power vests with a directly-elected President as head of state and head of government.[46] Legislative powers are vested in the separately-elected National Assembly (NA)[47] and there is an independent judicial branch.[48] The Constitution does not create a hierarchy between the two elected branches, but it does create a balance of interdependence and interaction amongst the three arms of government.[49]

The NA and the executive are required to work together in many aspects, such as in the legislative process, with the Cabinet members introducing Bills and the President assenting to them once passed by the NA. The NA also approves the President's appointment of certain appointees including ministers, diplomatic and international roles.[50] Moreover, the NA can set up committees to enquire into matters and may question ministers on the performance of their departments.[51] The President may attend and address the NA at any time and may write a letter to the NA, which must be read into their proceedings.[52] The judiciary also exercises an accountability role by ensuring that both the other branches exercise their powers subject to the Constitution and may declare any provision of an Act or act of the executive to be unconstitutional and invalid.[53]

In addition to the traditional branches of government, the 1993 Constitution introduced several entities designed to protect the structure of its constitutionalism, each deriving original constitutional powers and subject to constitutional review.[54] These include the Ombudsman,

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[44] See Roger de Backer 'Seychelles: Recognising the writing on the wall' 1992 (134) *The Courier* 31-45.
[45] *Ponoo v Attorney-General* [2010] SCCC 4; (2010) SLR 361, per Dodin J. See *also Herminie & Ano v Pillay & Ors* [2018] SCCC 6 and *Faure v Prea & Ano* [2019] SCCC 11, [136].
[46] 1993 Constitution, art 50 read with 66.
[47] Ibid art 85. The unicameral National Assembly comprises 35 members, 26 of whom are directly elected by constituencies, and 9 members appointed by political parties according to proportional representation.
[48] Ibid art 120.
[49] *Ponoo (SCCC)* supra note 45.
[50] See eg 1993 Constitution arts 86, 93(1), 94, 69.
[51] Ibid arts 93(1) and 104.
[52] Ibid art 92.
[53] Ibid arts 5, 46, 125(1)(a), 130.
[54] Ibid art 125(1)(a).

the Electoral Commission, the Auditor General and the Constitutional Appointments Authority (CAA).[55] There is also a Public Service Appeals Board that hears complaints about the treatment of employees within the public service and an independently-appointed Police Commissioner.[56] These entities each play a distinctive role in protecting the constitutional order by performing important functions and holding the government accountable. They are structurally independent and theoretically not subject to control by any branch of government.[57]

The system of checks and balances created by the constitutional provisions is designed to prevent 'an overconcentration of power' in any branch whilst 'engender[ing] interaction, … in a way which avoids diffusing power so completely that government is unable to take timely measures in the public interest.'[58]

(b) Constitutionally restricted executive power

The 1993 Constitution does away with the autocratic President-for-Life of the previous regime and does not enable the executive to exercise the same unrestricted power, however, it does still enable the executive to exercise vast governmental powers. The Constitution vests executive power in the hands of the President, who is directly elected by secret ballot.[59] The President is the Head of State, the Head of Government and the Commander-in-Chief of the Defence Forces of Seychelles.[60]

The President is assisted by a Cabinet consisting of the Vice-President and seven to fourteen ministers,[61] who are responsible for advising the President regarding government policy and any other matter referred to it by the President.[62] The President is responsible for the conduct of the executive, and the ministers are bound to respect the doctrine of collective responsibility.[63] However, it is unclear how the notion of collective responsibility would find applicability in Seychellois constitutional law. It has never been discussed politically,

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[55] Ibid arts 143,144 read with Schedule 5 (Ombudsman), arts 115-116 (Electoral Commission), art 158 (Auditor General), arts 139-142 (Constitutional Appointments Authority) of the 1994 Constitution.
[56] Ibid arts 145-150 and 161.
[57] See also *Seychelles National Party v Government of Seychelles & Anor; Dhanjee v Michel & Anor* [2015] SCCC 2, [38-9]. However, see also, Mathilda Twomey 'Judicial Appointment in Seychelles – a study in what not to do' Address at the South African Chief Justices Forum Annual Meeting, Seychelles, October 2019 available at www.judiciary.sc/wp-content/uploads/2020/09/sacjf-judicial-appointments-in-seychelles-october-2019.pdf, accessed 16 October 2024.
[58] *Simeon v Attorney-General* [2010] SCCC 3; (2010) SLR 280 per Gaswaga J.
[59] 1993 Constitution sch 3, para 1.
[60] Ibid art 50.
[61] Ibid arts 67 and 69.
[62] Ibid art 68.
[63] Ibid art 71.

academically or judicially.[64] The executive, which consists of the President, the Cabinet ministers and the Attorney General, must all exercise their powers in accordance with the Constitution and the laws of Seychelles.[65]

Ministers act as the heads of departments of government and are responsible for executing the Cabinet's policy decisions and implementing the NA's enactments. Due to the small size of Seychellois society, ministers are often required to perform day-to-day administrative oversight tasks that would not ordinarily be performed by the minister in a larger country.[66] Therefore, attempting to draw a distinct line between what is executive or administrative in nature is difficult. Ministers often make high-level policy determinations; for example, the Minister for Immigration determines which groups of individuals are deemed inimical to the public interest, and simultaneously, applies that policy to determine whether an individual's presence is inimical to the public interest.[67]

The Constitution introduces restrictions on the President's decision-making powers through the introduction of mechanisms of shared responsibility. For example, the appointment of ministers by the President is subject to the approval of a majority of the members of the NA.[68] Since 2016, the NA has refused the appointment of ministers on two occasions, and in each instance, no reasons were given publicly and there was no challenge to the decision.[69] Furthermore, the President's power to pardon is exercised on the advice of a newly-introduced constitutional advisory committee.[70] The President's power to establish and appoint persons to offices for the Republic and appoint representatives of Seychelles to represent Seychelles abroad is also exercised with the approval of a majority of the NA.[71] When an international instrument or treaty is executed by the President, the NA must expressly ratify it by passing a resolution or an Act before the legislation has binding domestic effect.[72]

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[64] In *Ina Laporte & Ors v The Ministry of Land Use and Housing* [2019] SCCA 29, [14] it was held that suing the government can be used to challenge a decision of an individual minister because of collective responsibility.
[65] 1993 Constitution, art 66.
[66] Such as the Minister for Employment's role as an appellate forum for decisions made by the competent officers in the ministry, s 65 of the Employment Act, 1995.
[67] Section 19(h)(i) of the Immigration Decree, 1981.
[68] 1993 Constitution art 69.
[69] 'LDS blocks nomination of three new ministers' *Seychelles Nation* 12 April 2018.
[70] 1993 Constitution arts 60-1.
[71] Ibid arts 62 and 64(1).
[72] Ibid art 64(4). *Vijay Construction (Proprietary) Ltd v Eastern European Engineering Ltd* [2017] SCCA 41 (13 December 2017) the SCoA held that it could not compel the NA to domesticate a treaty that the President had signed,[103-4].

Moreover, the Constitution introduced a two-term restriction for the office of President[73] and it specifically introduced provisions for challenges to be brought against the actions of the executive that have breached any of the rights in the Charter of Rights (fundamental rights litigation) or any provisions of the Constitution (constitutional review).[74] Additionally, executive conduct may be challenged by judicial review under article 125(1)(c) and under the Courts Act, 1964.[75] Therefore, the executive does not enjoy the impunity that it had under the 1977 Constitution, but rather it is accountable to the NA, independent bodies and the judiciary for the exercise of its powers.

However, even after the introduction of the Constitution, the presidency retains its political dominance – both in law and in public perception.[76] The President is vested with executive authority as an individual and exercises almost unrestricted power over the members of Cabinet, who perform their duties under the President's 'direction'.[77] The President may arrange government offices and departments without restriction and establish and/or abolish roles and functions at will.[78] Since René, the President has regularly held the ministerial portfolios for Defence, Legal Affairs and Public Administration, giving the incumbent control over the military, the large public sector, the Attorney General's chambers and the administration (including budget) of the judiciary. Moreover, the Human Rights Commission and the Anti-Corruption Commission report directly to the President, who has oversight of their budget under their respective Acts.[79] These ministerial powers of the President are not subject to the same level of NA oversight as other ministries, because the NA is unable to question the President directly on their portfolios.[80] Furthermore, the President determines the order of presentation of Bills in the NA, and is required to recommend all Bills relating to taxation and budget for presentation in the NA.[81] The President also has the power to summon and prorogue the NA, despite the NA's independent democratic mandate by virtue of its direct election.[82]

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[73] Ibid art 52. The number of terms was reduced from three terms to two terms in the Constitution of the Republic of Seychelles (Seventh Amendment) Act 2016.
[74] Ibid arts 46 and 130.
[75] Courts Act, 1964 s 4.
[76] See Joelle Barnes 'Not the usual suspects: Executive dominance in Seychelles and the developing institutions that could counter it' in Maartje de Visser, Rosalind Dixon and Elizabeth Perham (eds) *Small States Constitutionalism* (forthcoming 2025) accepted transcript, 5.
[77] 1993 Constitution arts 66, 70-1.
[78] Ibid arts 62, 71.
[79] Anti-Corruption Act 2 of 2016, ss 2, 80(4), 81 and 85; and Human Rights Commission Act, 7 of 2018 ss 2, 21, 22, 24, and 27(1).
[80] 1993 Constitution art 93(2).
[81] Ibid arts 90, 94(3).
[82] Ibid arts 107-110.

The smallness of the Seychellois bureaucracy and society enables the President to personally interact with the body politic and to regularly influence all aspects of governance. It is not uncommon for the President to personally address complaints received by the Office of the President, even when they address matters relating to other ministries and branches of government.[83]

Furthermore, the brutal executive dominance of the René regime, which extended into the post-1993 years, stunted the development of a constitutional culture and has had a long-term chilling effect on challenges to executive, and particularly presidential, conduct.[84] This has hampered the development and practice of a meaningful separation of powers in Seychelles, resulting in continued executive dominance in Seychelles' political system.[85]

(c) Justiciable human rights and the establishment of the Constitutional Court

The preamble to the 1993 Constitution recognises the need to protect human rights 'as the foundation for freedom, justice, welfare, fraternity, peace and unity' and requires the protection of human rights through 'a democratic society where all powers of government spring from the will of the people'. It also declares its intention to 'uphold the rule of law' and 'develop a democratic system which will ensure the creation of an adequate and progressive social order'.[86] Chapter III of the Constitution contains a Charter of Fundamental Rights with a broad list of justiciable rights, including civil, political, socio-economic and some third-generation rights.[87]

The judicial powers of Seychelles are vested in an independent judiciary that is subject to the Constitution and the laws of Seychelles only and consists of the Court of Appeal (SCoA), the SCS and the subordinate courts or tribunals established by an Act.[88] Article 5 subordinates any other law to the supreme Constitution and specifies that 'any other law found to be inconsistent with this constitution is, to the extent of the inconsistency, void.' Moreover, the

[83] *The Ombudsman – Righting Wrongs* (Annual Report of the Ombudsman, 2022) available at www.nationalassembly.sc/publications/reports/annual-report-ombudsman-2022-ombudsman-righting-wrongs accessed 16 October 2024 (Ombudsman Report 2022) 3. See also Barnes op cit note 76, 6.
[84] Barnes op cit note 76, 5.
[85] Ibid 4.
[86] Ibid preamble.
[87] Including the right to the protection of the environment (art 38), and the right to cultural life and values (art 39).
[88] 1993 Constitution art 119. The SCoA sits as the apex court hearing appeals from the SC. For a discussion of the historical reasoning for the hierarchy of the courts see Twomey (2017) op cit note 2, 39.

executive and the legislature and all other holders of power are subject to act in accordance with the Constitution and the laws of the land.[89]

The Constitution added new dimensions to the role of the courts in the democracy, by creating fundamental rights review under article 46 and constitutional review under article 130.[90] Under article 46, citizens must aver that one of their rights enumerated in the Charter of Fundamental Human Rights and Freedoms has been or is likely to be contravened by any law, act or omission.[91] Under article 130 citizens can challenge violations of any other provisions of the Constitution (non-fundamental rights) where a person's interest is being or is likely to be affected by the contravention.[92] These constitutional powers to are exercised by two or more SCS judges sitting together to form a Constitutional Court (CC) bench.[93]

The CC, on hearing a matter brought under article 46 or article 130, has broad remedial powers. It may declare acts or omissions to be breaches of the Constitution[94] and may declare any laws to be unconstitutional and void.[95] Furthermore, the Court may grant any remedy available to the Supreme Court to remedy the breach of the constitutional provision, including ordering the payment of damages.[96] Article 87 also provides the CC with the power to hear and determine a referral by the President on the constitutionality of a Bill passed by the NA. Additionally, under article 51(2) and article 82(1), the CC is granted jurisdiction to hear election-related petitions (constitutional process review).

The CC was also granted the new responsibility to investigate claims that the President has committed a violation of the Constitution or a gross misconduct as grounds for removal of the President from office.[97] The Court will only invoke this jurisdiction when requested by a super-

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[89] Ibid arts 66(1) (president and executive), 85 (National Assembly), 119(2) (judges), 139 (Constitutional Appointments Authority), 143(3) (Ombudsman), 145 (Public Service Appeal Board), 159 (Police force), Schedule 2 para 7(5). Additionally, most office holders are required to swear an oath or take an affirmation to uphold the Constitution for example, art 69(4) (Ministers), art 83(8) (speaker and deputy speaker), art 99 (members of National Assembly.

[90] Mathilda Twomey and Joelle Barnes 'Through a glass darkly: Reflections on 25 years of constitutional litigation in Seychelles' in Jacques Colom, Stephanie Rohlfing-Dijoux and Götz Schulze (eds), *The 50th Anniversary of Mauritius: Constitutional Development* (2019) 265-84.

[91] 1993 Constitution art 46(1).

[92] Ibid art 130(1).

[93] Article 129 The Chief Justice ordinarily allocates three judges to form the CC on a case-by-case basis. The SCoA has appellate jurisdiction from decisions of the CC and ordinarily sit as a bench of five judges for this purpose, as allocated by the President of the SCoA. Constitutional cases proceed in terms of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules, SI 33 of 1994.

[94] Ibid arts 46(5)(a) and 130(4)(a).

[95] Ibid arts 46(5)(b) and 130(4)(b).

[96] Ibid arts 46(5)(c-d) and 130(4)(c).

[97] Ibid art 54.

majority of the NA; the Court would then report to the NA, which would thereafter consider the report and vote on whether or not to remove the President.

Against the backdrop of the René regime, it is significant that the 1993 Constitution introduced additional powers to challenge *actions or omissions* as unconstitutional. Members of the executive – the President, the ministers and the Attorney General[98] – are not creatures of statute. They derive their executive authority directly from the Constitution. They also derive specific powers from legislative Acts. When they act, under their specific legislative powers or inherent powers as the head of a Ministry, they are subject to the fundamental principles of the Constitution, the rule of law, the separation of powers and the commitment to democracy. Articles 46 and 130 focus on the effect of the unconstitutional act rather than the source of the power under which the act was performed. The CC's jurisdiction is invoked, therefore, wherever a law, act or omission might result in a breach of the Constitution, regardless of whether the power holder is exercising constitutional powers or powers granted under an Act.

(d) Constitutional review – Article 125(1)(a)

To accommodate the role for the courts anticipated by articles 46 and 130, the jurisdiction of the courts needed to be enlarged. This was done in article 125 which specifies the powers of the SCS. In addition to civil and criminal jurisdiction and original, appellate and other jurisdiction as conferred under legislation,[99] article 125(1)(a) grants original jurisdiction to the SCS to hear all matters relating to the 'application, contravention, enforcement or interpretation' of the Constitution. Thus, article 125(1)(a), read with articles 46 and 130 enables fundamental rights litigation, constitutional review of legislation and executive actions as well as constitutional process review. Common law judicial review jurisdiction is granted to the Supreme Court under article 125(1)(c) of the 1993 Constitution.

A single judge of the Supreme Court, a magistrate or a judicial officer in a subordinate court has no power to entertain a constitutional question. This is reinforced by articles 46(7) and 130(6), which require that if a constitutional question arises in a matter before these courts, they must immediately pause proceedings and refer the matter to the CC.

[98] The Attorney General is included in the chapter governing the executive and is treated as an executive position in the case law.
[99] 1993 Constitution article 125(1)(b) and (d).

(e) Supervisory jurisdiction and common law judicial review

Prior to the new constitutional order, the SCS derived its powers of judicial review from the court's inherent common law powers.[100] The Courts Act, introduced in 1964 ahead of Seychelles' independence, anticipated that self-governing Seychelles would retain close ties to Britain and the sections on jurisdiction of the courts granted the SCS the 'powers, authorities and jurisdiction possessed and exercised by the High Court of Justice in England', which would include the supervisory powers of the Queen's Bench,[101] and where the laws and rules of procedure were silent, the 'procedure, rules and, practice of the High Court of Justice of England' were to be followed.[102] In *Finesse v Banane,* Sauzier J held that the laws relating to the courts' statutory and inherent powers derived from English law are those that were in force in June 1976 when Seychelles obtained its independence.[103] Thus, common law judicial review in Seychelles was governed by the rules and procedures of English judicial review as of 1976.

Article 125(1)(c) of the 1993 Constitution codifies the common law powers of judicial review and the Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Authorities) Rules regulate the procedure for bringing such cases.[104] The Rules retain the English law requirements of making application for review within three months of the decision and obtaining leave to review which includes the requirements to show 'sufficient interest' (standing) and that the petition is being made 'in good faith'.[105]

Article 125(1)(c) states that the SCS shall have—

> supervisory jurisdiction over subordinate courts, tribunals and adjudicating authorit[ies] and, in this connection, shall have power to issue injunctions, directions, orders or writs including writs or orders in the nature of *habeas corpus, certiorari, mandamus, prohibition* and *quo warranto* as may be appropriate for the purpose of enforcing or securing the enforcement of its supervisory jurisdiction.

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[100] *R v Superintendent of Excise and Anor, ex parte Confait* [1935-1955] SLR 154 which held that a writ of certiorari is available when an administrative official or body exercises 'a judicial or quasi-judicial discretion to do or not to do something which affects the rights of the subject'. In *Chenard & Co. v Crown Prosecutor* 1936-1955 SLR 142, the SCS had specified that its power to grant declaratory orders and injunctions stemmed from powers and jurisdiction of the High Court of England under the Judicature Acts of 1873 and 1884 and transferred to the courts in Seychelles under section 6 of the Seychelles Judicature Order in Council of 1903.
[101] See in particular Courts Act, 1964 ss 4 -10, 12.
[102] Courts Act, 1964, s 17.
[103] *Finesse v Banane* [1981] SLR 103.
[104] Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Authorities) Rules SI 40 of 1995.
[105] Ibid rules 4-6.

Article 125(1)(c) thus extends to decisions taken by 'adjudicating authorities,' including but not limited to subordinate courts and tribunals. Sub-article (7) of article 125 specifies that 'an "adjudicating authority" includes a body or authority established by law which performs a judicial or quasi-judicial function.'[106] This includes constitutional and legislative bodies that have an adjudicative role, such as the Public Service Appeal Board and the Truth, Reconciliation and National Unity Commission.[107]

The terminology 'judicial or quasi-judicial function' had first been used in Seychellois case law in the 1947 case of *R v Superintendent of Excise and Anor, ex parte Confait* to limit the scope of judicial review to exclude most administrative and executive conduct from the courts' jurisdiction.[108] However, between 1970 and 1993, the few Seychellois cases had slowly tracked the British courts' expansion of judicial review beyond the exercise of purely 'judicial or quasi-judicial functions'.[109]

For example, in the 1975 case of *Leperre v Coopoosamy*,[110] Sauzier J had cited the UK 1969 case of *Anisminic v Foreign Compensation Commission*[111] as authority for relying on the court's 'inherent jurisdiction to supervise and control all inferior tribunals' without restriction to judicial or quasi-judicial functions.[112] In *Seycat (Pty) Ltd v Government of Seychelles*, the SCS held that a minister levying a 15 per cent tax on fish caught during fishing operations was a reviewable exercise of discretion, even though the act itself did not include a judicial or quasi-judicial act on the part of the minister.[113] In *Compagnie de Iles v Controller of Taxes*, Seaton CJ invalidated the imposition of a tax by the Controller of Taxes (which is not a clearly judicial or quasi-judicial function) as a decision that 'a repository of the power would not reasonably make'.[114] In doing so, the judge applied the reasonableness test adopted in the British courts in the *Wednesbury* case.[115] Seaton CJ went on to recite the developments in the law on judicial

[106] 1993 Constitution art 125(1)(7).
[107] *Government of Seychelles v Public Service Appeal Board & Anor* [2019] SCSC 1252 and *Seychelles People's Defence Forces v The Truth, Reconciliation and National Unity Commission* [2020] SCSC 576.
[108] *Confait* supra note 100.
[109] See eg *R v Passport Officer, ex parte Kathleen Pillay* (1990) SLR 250, 259 -265. For a discussion of the development of UK jurisprudence see Ch 2 part IV(b)(iv).
[110] *Leperre v Coopoosamy* (1975) SLR 156.
[111] *Anisminic v Foreign Compensation Commission* (1969) 2 AC 147.
[112] *Leperre* supra note 110, 159.
[113] *Seycat (Pty) Ltd v Government of Seychelles* (1977) SLR 175.
[114] *Compagnie de Iles v Controller of Taxes* (1988) SLR 154.
[115] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

review with a paraphrasing of the fourth edition of *Halsbury's* Laws of England and accepting it as —

> a well established principle of administrative law that if the repository of a power exceeds its authority, a purported exercise of the power may be pronounced invalid. Similarly, if a power is exercised without lawful authority. *All statutory powers* must be exercised in good faith; the repository of a power must have regard to relevant considerations and not allow himself to be influenced by irrelevant considerations. He must act fairly and not unreasonably. If it is asserted that there was a breach of principle, the courts will consider the validity of the exercise of the power.[116] (Own emphasis).

Seychellois judges also adopted British judicial review principles from cases that occurred after 1976, most specifically, the case of *Council of Civil Service Unions v Minister for the Civil Service*[117] (the *GCHQ* case), which is cited regularly throughout Seychellois jurisprudence.[118] Thus, by the time of the adoption of the 1993 Constitution, common law judicial review had shifted from focusing on the nature of the power (judicial or quasi-judicial) to the nature of the exercise of the power (lawfully, reasonably and with procedural propriety).

However, the terminology in article 125(7) of the Constitution harkened back to *Confait,* and the courts viewed this terminology choice as a conscious limiting of the scope of judicial review to 'judicial and quasi-judicial' acts only. This was discussed in *Bresson v Minister of Administration and Man Power*:

> Article 125(7) of the Constitution had retained the phrase 'quasi-judicial function' notwithstanding that since the decision of the House of Lords in *Ridge v Baldwin* [1964] AC 40 the distinction between authorities exercising judicial and those exercising administrative powers had been discarded for the purpose of the exercise of the supervisory jurisdiction of the courts…. With the accepted and established distinction between quasi-judicial and administrative functions it cannot be presumed that when the Constitution defined 'adjudicating authority' in terms of exercise of judicial and quasi-judicial functions, it was intended that the definition should be extended to include body or authority performing only administrative function.[119]

Thus, 'substantially administrative decisions' were initially held to be 'purely executive' and not capable of invoking the jurisdiction of the Supreme Court.[120] Furthermore, in *Platte Island v Sinon,* the SCS held that 'Article 125 appears tailored to cover only adjudicatory agencies, … and the impugned decision must be a judicial or quasi-judicial decision in nature.'[121] That case concerned a challenge to the cancellation of a tourism development project

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[116] *Compagnie de Iles* supra note 114, 163.
[117] *Council of Civil Service Unions v Minister for the Civil Service* (1984) 3 All ER 935 ('*GCHQ'*).
[118] See eg, *Pillay* supra note 109, 260-261.
[119] *Bresson v Minister of Administration & Man Power* [1998] SCCA 13, 3-4.
[120] Ibid 4.
[121] *Platte Island v Sinon & Ors* [2011] SCSC 111 (no page numbers on Seylii.org).

by a minister as being unreasonable, irrational and legally erroneous. The petition was denied leave to review on this ground and was defeated without hearing. This was confirmed on appeal.[122]

The reintroduction in article 125(7) of the requirement that the decision be made by an adjudicating authority narrowed the scope of judicial review and signified a 46-year regression in the development of judicial review in Seychelles. Whether this was intentional on the part of the draftsmen is not clear.[123] Courts subsequently relied on 'judicial or quasi-judicial' as narrowing the scope of judicial review under article 125(1)(c) of the Constitution.[124] However, the courts were not always consistent in reading their jurisdiction narrowly and sometimes permitted review of non-adjudicative decisions without engaging article 125(7).[125] It would be some time before the strict interpretation of 'quasi-judicial function' would be expanded to include instances where an executive or administrative body has a general duty to act judicially.[126]

Common law judicial review jurisprudence under section 4 of the Courts Act, 1964 continues to be applicable law as it is saved by Schedule 7, Part I clause 2 of the 1993 Constitution.[127] In *Seychelles International Business Authority v Jouaneau,* the SCoA held that there may be at least three sources of the Supreme Court's power of judicial review: arising out of article 125(1)(c) of the Constitution, common law judicial review, and judicial review created by a specific legislative mechanism.[128]

Therefore, under the 1993 Constitution, the role of the court and its jurisdiction had been expanded in article 125 to enable the courts to review breaches of the constitutional provisions under article 125(1)(a), read with articles 46 (fundamental rights litigation) and 130 (constitutional review and constitutional process review). It also introduced constitutional

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[122] *Platte Island Resort and Villas Ltd v Sinon No & Ors* [2014] SCCA 15.
[123] The Constitutional Commission discussions were held in Creole and tended to focus on resolving policy matters rather than drafting technicalities.
[124] See *Bresson* supra note 119, *Platte Island Resort* (SCA) supra note 122 and *Cable & Wireless (Seychelles) LTS v Ministry of Finance and Communications & Anor* (CS 377/1997) (unreported) in which the SCS held that a Minister is not an authority established by law to perform a judicial or quasi-judicial function
[125] *Javotte & Or v Minister of Social Affairs and Employment* [2005] SLR 24, *Vijay Construction (Pty) Ltd v Ministry of Economic Planning and Employment* [2010] SLR 77. In both cases the court engaged with English precedent and the developments after *Ridge v Baldwin* but not with the Seychellois precedent or the constitutional restrictions to their jurisdiction.
[126] *Trajter v Morgan* (2013) SLR 329, *Cable & Wireless Seychelles Ltd v Ministry of Broadcasting and Telecommunication & Anor* [2018] SCSC 8143 [36-9], *Rohoboth Builders vs Licensing Authority* [2014] SCSC 230, [19-26].
[127] *Seychelles International Business Authority v Jouaneau and ano* [2014] SCCA 28.
[128] Ibid [7-11].

provisions to entrench the courts' supervisory jurisdiction in article 125(1)(c). This additional scope for the judiciary was introduced to enable the Constitution to enforce its new constitutional infrastructure, and more importantly, to hold the high executive to account.

V. Courts' role in holding the high executive accountable

(a) The courts' role prior to 1993

After years of the courts playing almost no role in holding the high executive accountable for its use of power, in the three years prior to the adoption of the new Constitution, the SCS became more willing to grant judicial review against decisions of the high executive, including ministerial policy decisions. In *Albest v Stravens,*[129] Abban CJ held that executive discretion must be exercised in compliance with the conditions in the statute and 'judicially', which Georges J later clarified to mean 'fairly towards all concerned' and 'not arbitrarily, capriciously or in a biased manner.'[130]

In the case of *R v Passport Officer – Ex parte Pillay* Georges J, recently appointed from the Commonwealth of Dominica, considered a judicial review brought regarding the denial of a passport renewal application for a Seychelloise living in the United Kingdom by the Seychelles High Commissioner to the United Kingdom.[131] Without giving any reasons for the decision, the High Commissioner had informed the applicant that her passport application was not approved and cancelled her existing Seychellois passport. The Government had argued that the Court did not have jurisdiction to consider the matter because the nature of the discretion was broad and had been properly exercised. Relying on *Ex Parte Confait*, therefore, it was argued that the decision should not be reviewable. However, Georges J held that judicial review had 'witnessed considerable growth … since the cases of *Confait* and *Voss* were decided … particularly within the past seven years.'[132] Georges J held, therefore that the SCS had the jurisdiction to hear and determine the judicial review in terms of the inherent powers of the Court granted under section 3 of the Courts Act. The Court discussed the broad principles of judicial review as developed in British jurisprudence and held that judicial review is available where a decision-making authority exceeds its powers, commits an error of law, commits a

[129] *Albest v Stravens* (1990) SLR 214, 219.
[130] *Michael and Co (Pty) Ltd v Rassool* (1990) SLR 243, 247-284.
[131] *Pillay* supra note 109.
[132] Ibid 259-265.

breach of natural justice, reaches a decision which no responsible tribunal could have reached or abuses its powers.[133]

Georges J also discussed powers that would not be susceptible to review. He relied on Lord Roskill's opinion in *GCHQ* that various powers founded on the prerogative are not reviewable 'because their nature and subject matter is such as not to be amenable to the judicial process' these include matters relating to national security and the making of treaties, policy decisions on foreign affairs and so on.[134] He held however, that:

> The issue of a passport falls into a different category. That is common sense. It is a familiar document to all citizens who travel in the world and it seems obvious that the exercise of the prerogative in the discretion of the Secretary of State or of the executive for that matter is an area where common sense tells one that if for some reason a passport is wrongly refused for a bad reason, the Court should be able to inquire into it.[135]

Georges J held that while the Passport Officer was not obligated to afford the applicant a hearing before arriving at the decision, he was under a duty to provide his reason or reasons for refusal '[o]therwise, there clearly would be no safeguard against arbitrary absolutism.… For the citizen to be ignorant of the reasons for decisions affecting him/her, and how they are arrived at in a primary area of liberty, is clearly insupportable.'[136] Therefore, the Court held that the decision of the Passport Officer was illegal, wrong in principle and therefore null and void.[137]

These cases from the late 1990s show a shift in the courts' understanding of their role and their willingness to make decisions that went against the one-party government. Therefore, on the eve of democratic constitutionalism, the courts had developing jurisprudence regarding the limitation of executive powers that had been developed from the English law principles.

(b) The role of the courts from 1993 – 2007: Years of inertia and corruption

Despite the legal watershed of the adoption of the 1993 Constitution, Seychelles eased into multiparty democratic constitutionalism slowly. After the adoption of the Constitution, René was re-elected as President in the multiparty elections held in July 1993. He held that position for the better part of three presidential terms before retiring during his third term in 2004. He handed over presidency to his Vice-President, James Alix Michel, in a political manoeuvre that

[133] Ibid 259 citing *GCHQ* supra note 117, 950 and *Preston v IRC* (1985) 2 All ER 327, 337.
[134] Ibid 260-261.
[135] Ibid 261.
[136] Ibid 265.
[137] Ibid 263.

is known as '*pas baton'* in Creole,[138] effectively the passing of the presidency from one elected President to his Vice-President during the term. Having already held the position for two years, President Michel was elected President in 2006 and re-elected in May 2011 and in December 2015. In the latter election, there was a run-off election between Michel and Wavel Ramkalawan, the leader of a coalition of opposition parties, to determine which candidate controlled 51 per cent of the vote to win the election. Michel took the election by a narrow margin, and Michel's Vice-President, Danny Faure, became President through the same *pas baton* manoeuvre in October 2016. Faure was defeated in the 2020 election when Ramkalawan won in an historic presidential election as the first opposition political party to come to power since 1977. Thus, René's SPPF held presidential and executive power in Seychelles for a period of over 40 years.

In the legislative branch, SPPF dominated the NA elections until 2016, when Ramkalawan's coalition, the LDS ('Linyon Demokratic Sesel'), won 15 of the 25 constituency seats in the NA. Coupled with the proportional representation seats, LDS assumed control of the majority in the NA and, for the first time, the legislature was controlled by a different political party than the executive.

Thus, despite the constitutional watershed of 1993, the political landscape remained largely unchanged from 1993 to 2016 with SPPF members appointed into important positions in the newly designed constitutional bodies.[139] René continued to exercise largely unrestricted power between 1993 and 2004 and his party 'showed little inclination to allow other voices to be heard or the new constitutional freedoms to be expressed'.[140] While the most egregious human rights abuses of the pre-1993 regime appeared to have ended, the President and his associates apparently lived above the remit of the rule of law.[141]

The provisions of the 1993 Constitution anticipated an independent judiciary that would be empowered to protect against misuse by public power holders. In 1993, this judiciary consisted of a handful of magistrates, three Supreme Court Judges and three non-resident SCoA Judges.

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[138] The vernacular language in Seychelles.

[139] For example, France Bonte, a close friend of René, who was also a lawyer and politician, assumed the position as Chairperson of the Constitutional Appointments Authority (CAA) in 1993 and held the position until 2007. The CAA nominated persons for all non-elected constitutional appointments, including the Attorney General, Auditor General, Judges, Ombudsman and Electoral Commissioner.

[140] Bruce Baker 'Seychelles: Democratising in the shadows of the past' (2008) 26(3) *Journal of Contemporary African Studies* 279, 280.

[141] Ibid 281-2. The 2022 Truth, Reconciliation and National Unity Commission report systematically documents proved incidents of executive domination, violence and discrimination against political opposition supporters and abuses of power by the security forces. TRNUC Report Vol II op cit note 22 ch 7.

All these judicial officers were foreign and had trained in French, British or Mauritian law, none of which jurisdictions shared a constitutional regime like that introduced by the 1993 Constitution. All had been appointed by René and had, until this point in time, served at his pleasure.

This corresponds to a time when there were deep concerns about the independence of the judiciary. In 1996, the Deputy Speaker was reported as saying that the judges were 'government men in robes'.[142] When interviewed in 2006, the members of the Bar were 'virtually unanimous' in their view of the abuse of process by judges.[143] In 2007, Baker reported that there was 'overwhelming evidence of corruption, disregard for procedures and plain incompetence' within the judiciary such that '[j]udicial abuse now arguably constitutes the single most serious governance issue requiring reform.'[144] Baker concluded that the judiciary 'does not give the appearance that a supporter of the opposition could win a case.'[145]

For the first fifteen years of democratic constitutionalism, there was little substantive development of the courts' new constitutional role in protecting and upholding the Constitution, despite statements suggesting that the courts would step up to the new responsibilities posed in the Constitution.[146] For example, the first successful constitutional challenge to legislation was brought in 2015, a full 22 years after the adoption of the Constitution that enabled the courts to quash legislative provisions.[147]

When cases were brought, the reasoning applied by the courts did little to engage with the courts' new role. For example, *Lucas v Public Service Appeal Board,* brought under article 125(1)(c), concerned whether the Public Service Appeal Board (PSAB) was obliged to give an applicant an opportunity to be heard regarding their challenge to their dismissal from the public service.[148] The SCS cited only foreign precedent, overlooked Seychellois precedent, and ignored any developments that were warranted by the new Constitution. The SCS held that in determining whether an individual has a right to be heard when bringing a challenge to their

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[142] Baker op cit note 140, 282 citing a Transparency International report on the situation in Seychelles.
[143] Ibid.
[144] Ibid.
[145] Ibid 283.
[146] In *Bar Association v President of the Republic* SCC 1/204, 20 Feb 2004 (unreported) the court strongly stated that 'conduct which is inconsistent with the Constitution is void.' Moreover, in *Morin v Minister of Land Use and Habitat* (2004-2005) SCAR 301 Ramodebedi P stated, 'such is the importance which the Constitution attaches to the right of access to the Constitutional Court on constitutional matters that an aggrieved party has merely to allege a contravention of the Constitution to establish a prima facie case.'
[147] *SNP v Dhanjee* (SCCC) supra note 57.
[148] *Lucas v Public Service Appeal Board* (1997) SLR 111.

dismissal, 'the requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules [of the tribunal]… and the subject-matter.'[149] It held that having heard evidence regarding the dismissal of the applicant from the employer, the Board does *not* have an obligation to question the applicant or his lawyer to see if they wish to testify or call witnesses in their defence.[150]

The case law evidences the judges' unwillingness to engage with politically charged cases involving executive conduct. For example, in *Seychelles National Party v Government of Seychelles,* the Court held that the President's appointment of members of the independent state-owned broadcasting media 'may appear biased, but there is a breach of article 168 only if there is actual bias.'[151] In the case, the President had appointed seven public servants and his own wife to the Board of the Seychelles Broadcasting Corporation. The challenge to the appointments was brought on the ground that the appointments undermined the constitutionally required independence of the state-owned public broadcasting media. The CC granted the petitioner (a registered political party) standing to bring the case, however, it held that the allegation that the public servants would be influenced by the state was 'only a speculative possibility which is inadequate to ground a complaint under article 130'.[152]

The CC also refused to scrutinise the decision of the President to exclude the public from proceedings in a court martial.[153] The Court held that that the exclusion of the public from the proceedings was permissible under the Constitution, and even that the failure to announce the decision in public, although required by the Constitution, was not a breach of the petitioner's right to a fair hearing.[154]

With regard to decisions of the other high executive members, the courts were willing to review decisions of the Minister for Employment acting in disputes between private individuals and companies under the Employment Act,[155] and cases involving decisions of the Public

[149] Ibid 114.
[150] Ibid 114-115.
[151] *Seychelles National Party v Government of Seychelles* (2001) 2 LRC 178.
[152] Ibid 183.
[153] *Larue v Court Martial and ano* SCC 01/1996, 17 September 1996 (unreported).
[154] Ibid.
[155] *Ex Parte Jeremie* (1995) SLR 78 and *Gardner v Minister of Employment and Social Services* (1994) LSC 84, however, in *Ex parte Chetty* (1995) SLR 67 (a petition requesting reasons for the non-renewal of an employment contract by the Public Sector Commission) the court held that matters concerning employment within the ministry were not public in nature and therefore not reviewable. *Bresson* supra note 119 held that the Minister's exercise of managerial discretion was purely administrative and not judicial or quasi-judicial and therefore not amenable to review.

Service Appeal Board.[156] Moreover, courts were willing to address the failure to give a hearing to a company prior to suspending its trading licence by the Licencing Authority.[157]

All of these cases involve ministers and their departments exercising day-to-day administrative powers. In the area of immigration, the courts were unwilling to interfere with ministerial discretion either under article 125(1)(a) as a matter of human rights, or under article 125(1)(c) as a matter of review. The cases show unquestioning deference to the decision of the Minister of Immigration and an assumption of good faith even when this was unfounded.[158] In *Scheele,* the SCS held that the Ministry was not required to give reasons or an opportunity to be heard even where individuals had their lawful immigration status revoked and were declared 'inimical to the public interest'.[159] In *Benker v Government of Seychelles & Or,*[160] a Yugoslav national overstayed her entry visa after receiving several extensions and having married a Seychellois national. Her application for a dependent's visa (a requirement for spouses of Seychellois to remain in the country) was turned down without giving reasons or showing consideration for the effect on the petitioner's family life. Despite a detailed discussion about the development of judicial review, and even citing *Wednesbury*[161] and *GCHQ*,[162] the Court held that in denying the permit, the Minister has an administrative discretion and not a quasi-judicial discretion. The Court held 'any decision of the executive based on his administrative discretion is simply an administrative decision. They are not judicial or quasi-judicial decisions. In that case, the executive is under no obligation to act judicially.'[163] Here we see the Court invoking the earlier language of the Court in *ex parte Confait* and not referencing the development in the Seychellois law prior to1993.

In *Timonina v Government of Seychelles,*[164] which concerned the revocation of a Gainful Occupation Permit prior to its expiry and without reasons, the Court held that 'in immigration matters involving national security or national interest, failure to give particulars of the reason does not render the decision irrational or unreasonable.'[165] This case was initially brought under

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[156] See eg, *Government of Seychelles v Public Service Appeal Board* SCC 2/1995, 21 November 1995 (unreported), *Lucas* supra note 148.
[157] *Austral Car Rental v Seychelles Licencing Authority* (1996-1997) SCAR 51.
[158] See eg *Omaghomi Believe v Government of Seychelles* (2003) SLR 140.
[159] *Ex Parte Michael Scheele* CS 73/1992 (unreported).
[160] *Benker v Government of Seychelles & ano* (1999) SLR 48.
[161] *Wednesbury* supra note 115.
[162] *GCHQ* supra note 117.
[163] *Benker* supra note 160, 58.
[164] *Timonina v Government of Seychelles* [2007] SCSC 135.
[165] Ibid no page numbers available on Seylii.org.

article 125(1)(a) as a claim for a violation of the petitioner's article 25 right to freedom of movement, which clearly specifies at article 25(5) that a 'law providing for the lawful removal from Seychelles of persons lawfully present in Seychelles shall provide for the submission, prior to removal, of the reasons for the removal and for review by a competent authority of the order of removal.' Despite receiving neither of these constitutional safeguards, the CC declined constitutional jurisdiction and referred the decision to a single judge of the Supreme Court for review. The judge reasoned that the Minister was exercising an executive discretion 'which is a matter of state policy, exercisable only by the executive power of the Minister.'[166] This case illustrates the unwillingness of the Courts to second guess the exercise of a minister's discretion, as well as their reluctance to deal with immigration matters as human rights issues.

Regarding the review of presidential conduct, very few cases were filed challenging presidential conduct directly, and none successfully. *Seychelles National Party* was early precedent to indicate that constitutional review under article 130 would be available against the President, however, the parties were not successful in overturning the President's decision.[167]

The case of *Bar Association of Seychelles v President of Republic* is a jurisprudential outlier given the depth of its discussion of the Courts' role.[168] The Bar Association of Seychelles (BAS) had brought a constitutional petition challenging the President's appointment of three foreign judges, specifically the President of the Court of Appeal, a Justice of Appeal and a judge of the SCS. The CC had dismissed the petition on preliminary objections. Three foreign judges were appointed to hear the appeal. The case is important for its discussions of several aspects of constitutional review under article 130. First, the SCoA held that the BAS had standing to bring the case, applying a 'wide' and 'liberal' approach to questions of standing in accordance with the practice of other Commonwealth countries.[169] Secondly, the Attorney General had argued that neither the President nor the CAA were adjudicating authorities and therefore, not amenable to review. The Court noted the 'unpalatable result of this argument', which would prevent the remedy of unconstitutional conduct of the CAA or the President and held that the question of the appointment was amenable to review.[170] The SCoA held that:

> The President of the Republic does not derive the power to make judicial appointments from his prerogative as the Head of State, but from the Constitution; and in a country such as

[166] Ibid no page numbers available on Seylii.org.
[167] *Seychelles National Party v the Government of Seychelles* (2001) supra note 151.
[168] *Bar Association of Seychelles & Ano v President of Republic & Ors* [2004] SCCA 2, (2004-2005) SCAR 1.
[169] Ibid 15-17.
[170] Ibid 28-29.

> Seychelles, it is the Constitution which is supreme. … Conduct inconsistent with the Constitution would obviously also be void, and a violation of the Constitution is a matter to be remedied by the judiciary.[171]

However, the SCoA warned that the Court would not usurp the function of the CAA by substituting its own decision, but had limited remedies available to it on limited established grounds.[172] The grounds for review mentioned by the Courts would include '*Wednesbury* reasonableness and the grounds of illegality, irrationality and procedural impropriety' cited in *GCHQ*.[173] The SCoA partially upheld the appeal – with regard to the appointment of the Judge of Appeal and the judge of the SCS – the CC's dismissal of the petition was set aside and the matter was reverted to the CC to determine the lawfulness of the appointment. The appeal was unsuccessful regarding the appointment of the President of the Court of Appeal – the appellants had merely argued that the decision of the CAA to appoint the PCA was wrong, but did not raise valid judicial review grounds, therefore, the CC was correct to dismiss this part of the petition.

Apart from the *Bar Association* case, the jurisprudence from 1993 to 2007 reflected judges that dismissed petitions without considering the claims of the petitioners in any depth, and did not include a discussion of the developments prior to 1993 in Seychelles judicial review law or the impact of the new Constitution on their role. They simply turned a blind eye to blatant human rights matters even when they were directly raised in the proceedings.

(c) 2007 – 2017: A slow shift toward accountability

Something shifted around 2007 that affected the legal profession and the courts. Potentially, this involved the fact that René was no longer President, or the retirement of the Chief Justice who had been in office since 1994 and the subject of unofficial scandals and intrigue for his support of the government.[174] It probably also had to do with the appointment of new judges to the SCoA bench including Seychellois judge, Jacques Hodoul (appointed 2005), and Mauritian academic and judge, Dr. Satyabhooshun Gupt Domah (appointed 2006).[175] While the CC remained conservative, the SCoA began to lead a slow shift towards a greater role for the Court

[171] Ibid 30-31.
[172] Ibid 40-41.
[173] Ibid 38.
[174] Baker op cit note 140, 282.
[175] Other notable appointments include Frederick Egonde Ntende (Ugandan) as Chief Justice of the SCS in 2009, and the first female Seychelloise Judge of Appeal, Mathilda Twomey in 2011.

in holding the high executive accountable.[176] Domah JA heralded this change in a judgment in the case of *Chow v Gappy*:[177]

> The Constitutional Court sits between the power of the people and the authority of the organized government to ensure that public affairs are conducted within the frame-work tacitly agreed upon and enshrined in the Charter. It is the temple and the throne to which the citizen pecunious or impecunious rushes to with a view to ensuring that the people power delegated to authority are properly used and not abused. Its prime purpose is to make the Constitution work.[178]

i. Chow v Gappy and Chow v Michel – reviewability under article 130, procedure vs fairness, and issues of standing

In early 2007, President Michel had dissolved the NA and called for fresh elections pursuant to which the Electoral Commissioner had announced new dates for the elections. The leader of an opposition political party brought two important challenges to the CC under article 130 that led to important jurisprudence. In the first case, *Chow v Gappy,* the petitioner challenged the Electoral Commissioner's announcement of the dates for NA elections as a contravention of articles 79 and 81 of the Constitution.[179] The respondent raised preliminary objections to 'material errors' in the petition and its affidavit, as well as the standing of the petitioner under article 130(1) of the Constitution. The CC upheld the preliminary objections and dismissed the petition, arguing that 'the mere averment… of the Petitioner that as Leader and President of the Seychelles Democratic Party he has an interest in the subject matter of the Petition is insufficient for the purposes of rule 5 [of the Constitutional Court rules].'[180] The Court also went on to dismiss the merits of the petition, finding that the Electoral Commissioner did not contravene Articles 79 and 81 of the Constitution.

On appeal, per Bwana, Hodoul and Domah JJA, the SCoA upheld the decision with regard to the validity of the Electoral Commissioner's conduct, however, it overturned the decisions on the preliminary issues.[181] With regard to standing, the SCoA held that it is 'one of the most amorphous concepts in the entire domain of public law' and that 'if it is being used to restrict or disable the provisions, it is being improperly used.'[182] It warned against the 'judicial castration of article 130(1)' by requiring an 'injury to the applicant's interest', as opposed to

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[176] Contrast the different approaches between the CC and the SCoA in *Chow v Gappy & Ors* [2007] SCCC 1 and *Chow v Gappy & Ors* [2007] SCCA 9, (2006-2007) SCAR 93.
[177] *Chow v Gappy* (SCCA) supra note 176
[178] Ibid no page numbers available on Seylii.org.
[179] *Chow v Gappy (*SCCC) supra note 176.
[180] Ibid 7
[181] *Chow v Gappy* (SCCA) supra note 176.
[182] Ibid [20-21].

the simple existence of an interest, by an applicant.[183] The Court warned that while it should be cautious that it is not being abused by 'frivolous and vexatious applications', it should also take the 'responsible' approach to litigation, allowing persons to bring their case to see whether there is a point, even if the case appears to be frivolous and vexatious at first glance.[184] Therefore, the SCoA granted the petitioner standing.

Regarding the second preliminary objection (the failure to meet the requirements of the Constitutional Court rules) the SCoA cautioned against the approach of the CC. It held that in constitutional matters, the rules of Court should not be interpreted as mandatory provisions, 'which will have the effect of the tail wagging the dog, that is procedure swallowing substance.'[185] It held that the procedural requirements should not be elevated to constitutional requirements and thus used to deny access to the Court by citizens.[186]

In the second petition, *Chow v Michel*, the same petitioner challenged the President's dissolution of the NA (and calling for new elections) under article 110(2) on the ground that the reasons given by the President did not amount to being 'in the national interest'.[187] Under article 110, the President may 'for any reason which the President considers it to be in the national interest so to do… dissolve the National Assembly…'. The President's reason for dissolving the NA stemmed from the eleven members of the opposition party in the NA absenting themselves from the NA from 4 October to 19 March. He stated that 'The Opposition is not consistent. The Opposition does not show respect for the people who have elected them as well as the institution of the NA. The Opposition preaches democracy but practices anarchy.'[188] The central question of the case was whether these were valid reasons informing 'the national interest.'

The CC, constituting the same three judges as in *Chow v Gappy,* used this opportunity to reply to the SCoA regarding standing and the conformity of pleadings with the rules of Court. With regard to the latter, the Court held that 'Rules made by the Chief Justice for the Constitutional Court have constitutional validity and can only be defeated if challenged.'[189] With regard to standing, in the pleadings the petitioner had pleaded that there was a 'real risk'

[183] Ibid [16].
[184] Ibid [18-22].
[185] Ibid [26].
[186] Ibid [27].
[187] *Chow & Anor v Michel & Anor* [2007] SCCC 2.
[188] Ibid 2.
[189] Ibid 4.

that the NA election that would be held would be unconstitutional as a result of the unconstitutional dissolution of the Assembly.' The Court held that the pleadings of the petitioner amounted to a 'speculative possibility' that they may be participating in an unconstitutional election.[190] The Court quoted from *Port Glaud Development Company v Attorney General*:

> A threatened contravention is a ground for invoking the jurisdiction of the Constitutional Court under article 46(1) while under article 130(1) there must have been an actual contravention. Where the petition of an Applicant discloses not an actual but only a threatened contravention of the provisions of the Constitution, on a plain reading of Article 130(1), the venue for seeking redress is not the Constitutional Court.[191]

Additionally, the Court held that a voter cannot ground his interest in the case based on his own fundamental right to conduct public affairs through his freely chosen representative, as there are no averments that he is going to vote or that his party would run in the election. Therefore, there were no 'positive and definitive averments' about how his interest is being or is likely to be affected by the contravention.[192] The Court explicitly departed from the SCoA's dicta in *Chow v Gappy* on this matter and claimed that it was not its function 'to make the Petitioner's position effective.'[193] Ultimately, it held that the petition failed to satisfy the 'basic elements' of article 130 and the petitioner lacked standing.[194]

Nevertheless, the CC considered the merits of the case by considering the grounds of the President in dissolving the NA. It held that the President's conduct was reviewable and that his reasons for believing the dissolution was in the 'national interest' were justiciable.[195] The Court referred to the South African *SARFU* case, which distinguishes Head of State and Head of Executive powers of the President.[196] The Court summarised the principle in *SARFU* that 'those powers which historically originated from Royal prerogative, were now enjoyed by the Head of State, but that some of them were strictly controlled by the express provisions of the Constitution.'[197] The Court held that its jurisdiction to review the action of the President 'is not ousted and "judicial review" in the sense of a "Constitutional review" is available for the purpose of enforcement of the Constitution'.[198] Therefore, the Court considered the three

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[190] Ibid 11.
[191] *Port Glaud Development Company v Attorney General* SCA 20 of 1994 (unreported).
[192] *Chow v Michel* supra note 187, 12.
[193] Ibid 12-13.
[194] Ibid.
[195] Ibid 14-16.
[196] *President of the Republic of South Africa v South African Rugby Football Union* (2001) 1 SA 1 CC.
[197] *Chow v Michel* supra note 187, 17.
[198] Ibid 19.

reasons given by the President and held that it was not unreasonable in the circumstances to dissolve the NA and allow the electorate to be consulted through a general election. The court also considered that the decision was not illegal ('cannot be said to constitute an incorrect interpretation of … art 110(2)') and there was no procedural impropriety. Thus, the President's reasons were not unconstitutional.[199] There was no appeal from this case.

The *Chow* cases are important for two reasons: first, they illustrate the CC's willingness to review presidential conduct under article 130 on grounds of illegality, irrationality and procedural impropriety. Secondly, they illustrate the CC's strict and narrow approach to procedural requirements to proceed with review and, thirdly, they illustrate the tension between the SCoA and the CC, a tension that continued for a decade.

ii. Further expansion – Judicial review principles applied under articles 125(1)(c) and 125(1)(a) and providing limits of the judicial role

The SCoA continued to step into its new constitutional role through progressive jurisprudence, which acknowledged the importance of a strong and independent judiciary and the need for 'mutual deference among the three arms of the state …. where all the three arms mutually recognize, respect and pay due homage to their respective scope as well as limitation.' [200]

In 2010, the case of *Raihl v Ministry of National Development*[201] concerned the judicial review of the revocation of planning permission by the Minister of Land Use and Habitat. The SCoA showed a new approach to judicial review by discussing human rights issues within the judicial review reasoning. Citing British law and Mauritian case law, the SCoA held that 'the golden rule jealously guarded in administrative law by the courts is that no executive decision adversely affecting the rights of the citizen, more particularly his property rights, may be taken behind his or her back without affording him or her an opportunity to be heard.'[202] The Court was also willing to look at the tension between the courts and the executive and stated that —

> [a]dministrative law is not about judicial control of executive power. It is not about government by judges. It is simply about judges controlling the manner in which the executive chooses to

[199] Ibid 20-21.
[200] In *Poonoo v Attorney-General* [2011] SCCA 30; (2011) SLR 424.
[201] *Raihl v Ministry of National Development* (2010) SLR 66.
[202] Ibid 69. See also *Seychelles Ports Authority v Desaubin* [2015] SCCA 13 where the SCoA held that an unlawful eviction of a lessee by the Seychelles Ports Authority was 'exactly the sort of State activity that has been sought to be prevented when the Constitution speaks of democracy and the rule of law. The objective was to replace mini-despots exercising justice privée by democratic people at the head of agencies under the rule of law account taken of the Separation of Powers.'

> exercise the power which Parliament has vested in them. It is about exercise of executive power within the parameters of the law and the Constitution.[203]

Thus, judicial intervention in the decisions of the elected branches was justified on rule of law grounds. In *Trajter v Morgan,*[204] a case concerning the Minister for Immigration revoking a passport granted to an individual who fraudulently misled the Ministry during the passport application, the SCoA clarified that judicial review principles under article 125(1)(c) look at the legality, as distinct from the substantive merits, of a decision of a minister. Twomey JA was conscious to 'exercise judicial restraint so as not to usurp the role of the executive in exercising its proper discretion'.[205] However, in this case, the SCoA also relied on English law jurisprudence to apply a proportionality standard of judicial review to the decision of the Minister to revoke the citizenship because the case involved fundamental rights issues. A proportionality approach requires a closer assessment of the balance struck by the decision-maker between policy decisions.[206] The Court relied on the British law case of *R v Ministry of Defence, ex parte Smith,*[207] stating that 'the more substantial the interference with human rights, the more the court will require justification before it is satisfied that the decision is reasonable.'[208] However, in the circumstances, the appellant's own fraudulent conduct weighed against him, and the SCoA held that the Minister's decision was not unreasonable or disproportionate.[209]

In *Talma v Minister for Land Use and Housing,*[210] the SCoA judicially reviewed a decision of the Minister to restrict the development of the petitioner's land and found that the Minister's actions and those of the Ministry were unlawful and, in fact, were additionally egregious because of the effect that this decision had on the Petitioner over many years.[211] The SCoA quashed the restriction on the land and granted exemplary damages against the Ministry.[212]

Michel v Dhanjee concerned a constitutional review challenge brought under article 130 to the constitutionality of the President's reappointment of a foreign judge to the SCoA for a second term of office, on the recommendation of the Constitutional Appointments Authority

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[203] *Raihl* supra note 201, 69.
[204] *Trajter* supra note 126.
[205] Ibid [24].
[206] See eg *R* (*Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532.
[207] *R v Ministry of Defence, ex parte Smith* [1996] QB 517.
[208] *Trajter* supra note 126, [19]. See also the discussion on proportionality in *Jouaneau* SCCA supra note 127.
[209] Ibid [30-33].
[210] *Talma v Minister for Land Use and Housing* [2015] SCSC 733.
[211] Ibid [42].
[212] Ibid.

(CAA). The CC had held that the recommendation of the CAA was inconsistent with article 131(3) and (4) of the Constitution, and therefore unconstitutional and void.[213]

On appeal, the SCoA stated that constitutional review cases brought under article 130 are judicial review of the decision-making process by which the Court can 'only review how the decision was made, declare on its fairness and ultimately on its constitutionality.'[214] Therefore, the Court had to consider 'whether relevant considerations were taken into account, whether there was any evidence of deception or bad faith, and whether the body or person making the decision had the legal or constitutional power to make the decision it did.'[215] The SCoA adopted a review standard in article 130 cases that includes a broad form of legality, including inquiries into fairness, rationality and bad faith.

The SCoA discussed the 'inherent tension' in democratic governance, exacerbated in judicial review cases, where unelected judges safeguard constitutionalism through holding the elected branches of government accountable for their use of legislative and executive power.[216] The SCoA held that the law has developed safeguards to control the boundaries of judicial authority to which the courts must strictly adhere.[217]

Dhanjee was also important for its discussion of standing. The SCoA held that to prove standing when bringing an action under article 130, the petitioner had to demonstrate that his interest was likely to be affected in some way. The Court followed the terminology in article 130 to determine a test for bringing an application:

> (a) there was a contravention or was likely to be a contravention of the Constitution,
>
> (b) the person has a personal interest that is being or likely to be affected by the contravention (in other words he has *locus standi in judicio* to seek redress),
>
> (c) the person whose interest was likely to be affected by the contravention could not obtain redress for the contravention under any other law,
>
> (d) the question raised by the petitioner is not frivolous or vexatious.[218]

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[213] *Dhanjee v Michel* (2012) SLR 1.
[214] *Michel and ors v Dhanjee and ors* (2012) SLR 258.
[215] Ibid 264.
[216] Ibid 264. Citing this case, Twomey CJ, later stated that it is 'an undesirable task for the courts to consider whether to interfere or not to interfere' with exercises of discretionary power by the executive, yet 'it is necessary to have procedural and substantive safeguards in place to control the boundaries of judicial authority so as to avoid "the direct withering fire on the executive by the judiciary".' *Cable & Wireless* supra note 126 [26] – [27].
[217] Ibid.
[218] Ibid 266.

The SCoA warned against allowing 'outdated technical rules of locus standi' to 'prevent a person bringing executive illegality to the attention of the courts.'[219] As such, 'locus standi should, therefore, not be used to prevent a litigant from arguing the substance of his or her case.'[220] Thus, the SCoA adopted a liberal and generous approach to the question of standing and accepted that a 'genuinely concerned citizen' should not be prevented from bringing cases to protect the democracy.[221] Fernando JA dissented on the merits but concurred with regard to standing, and held that the petitioner, as a citizen of Seychelles, had a fundamental duty to uphold and defend the Constitution.[222] He argued that 'the Preamble …provides that "all powers of Government spring from the will of the people". This in my view gives a right to any citizen to challenge a constitutional appointment under article 130(1) of the Constitution which he or she believes contravenes the Constitution.'[223]

Shortly thereafter, in *Brioche v Attorney General* the CC bench considered its approach when exercising its powers under article 125(1)(a) to protect and uphold fundamental rights infringed by an act by a member of the executive exercising power that originates directly under the Constitution.[224] The Court held that the grounds of common law judicial review (illegality, irrationality and procedural impropriety) apply to the review of the exercise of constitutionally originating power.[225] The case concerned a fundamental rights challenge to the AG's discretion to prosecute, while it was held to be reviewable, the court dismissed the application on the merits.

In the process of the judgment the court addressed concerns about whether the AG's powers were reviewable on democratic grounds. Relying on a Fijian Supreme Court Case, *Matalulu v Director of Public Prosecutions,*[226] the Court cites with approval several grounds for setting aside a decision of the executive exercising constitutional powers, including where the decision is in excess of the constitutional or statutory grant of power; where the decision was taken under the direction or control of another person or contrary to the requirement of independence under the Constitution; where the decision was taken in bad faith or as an abuse of process;

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[219] Ibid 267 quoting *R v Inland Revenue Commissioners ex parte National Federation Of Self-Employed And Small Businesses* [1982] AC 617.
[220] Ibid.
[221] Ibid.
[222] Ibid 286.
[223] Ibid.
[224] *Brioche v Attorney General* (2013) SLR 425.
[225] In so determining, the CC adopted the approach advocated by the SCoA in *Bar Association of Seychelles* supra note 168, [29].
[226] *Matalulu v Director of Public Prosecutions* [2003] 4 LRC 712.

where the discretion has been fettered to a rigid policy. These mirror the common law grounds for judicial review of the use of discretion.[227] In a concurring opinion Egonda-Ntende CJ stated that 'it is…one thing to conclude that the courts must be very sparing in their grant of relief… and quite another to hold that such decisions are immune from any review at all.'[228] *Brioche* has not been widely referred to following the case, possibly because the petitioner's claim was dismissed.

iii. Difficulties with forum

Litigants and judges alike have had difficulty in determining the correct forum and procedure for cases challenging high executive conduct and whether to petition the SCS under article 125(1)(c) or the CC under article 125(1)(a) on the basis of articles 130 and 46. The case of *Morin v Ministry of Land Use and Housing*[229] related to the compulsory acquisition of land from a private individual by the Minister. The parties challenged the decision under article 125(1)(a) read with article 46 to the CC, asserting that the land acquisition was unconstitutional. The CC upheld a preliminary legal point and dismissed the petition on the ground that the matter was time-barred and should have been brought properly under article 125(1)(c) as a judicial review.

On appeal, the SCoA held that it was properly brought to the CC and quashed the dismissal, sending it back to the CC for a determination on the merits. Having heard the merits, the CC dismissed the petition, finding that the acquisition for the purposes stated was in the public interest and that the land acquired was at an appropriate location that would allow the Ministry to achieve its objectives in terms of the existing market. It was, therefore, not a constitutional violation. On the second appeal, the SCoA held that there is a clear distinction between a petition being brought to challenge the constitutionality of an intended acquisition and one being brought to challenge the legality of the acquisition, and it was satisfied that the merits argued by the parties were clearly grounded on challenges to the Minister's decision-making and not on violations to the right to property. Ultimately, the SCoA found that as no real constitutional issues were raised in the case, the petition should not have been filed in the CC and the appeal was dismissed in its entirety.[230] This case illustrates the difficulty of framing a

[227] *Brioche* supra note 224 per Egonda-Ntende CJ [10]. These grounds were also adopted by the SCoA in *Jouaneau* SCCA supra note 127, [12-18]. They had first been introduced to Seychelles' jurisprudence in *Pillay* supra note 109 but had not been referred to in two decades since.
[228] Ibid.
[229] *Morin & ano v Ministry of Land Use and Housing and ano* [2014] SCCA 32.
[230] Ibid [34-5].

petition grounded on judicial review principles that is appropriate for both article 125(1)(a) constitutional review, and the article 125(1)(c) supervisory jurisdiction review.

Courts have also tended to rely on English principles for the development of their supervisory jurisdiction under article 125(1)(c), as well as the grounds for review under article 130 read with article 125(1)(a). In some instances, the uncritical reliance on English law principles has inadvertently created incorrect precedent. For example, in *University of Seychelles American Institute of Medicine v Attorney General*,[231] the Court relied on English law relating to the granting of a 'royal Charter' as a way of recognizing the granting of legal personality to an unregistered commercial entity which occurred after 1993. The SCoA held that —

> the grant of a royal Charter to any organisation is an act of grace entirely within the royal prerogative, and no person other than the Sovereign has the right to create a corporation by grant: That would also mean that it is the Prerogative of the President of the Republic if he thought it fit to grant a Charter to any worthy group of individuals…. It is a prestigious means of incorporation and a royal Charter prescribes the objects, powers and constitution of the organisation to which it is granted.[232]

This judgment relied solely on English law and failed entirely to engage with whether the post-1993 President in Seychelles had an inherent power to grant a Charter under the limited powers in the Constitution. In holding that 'Seychelles is governed by English public law', the SCoA overlooked the interruption to English public law by the adoption of a written, republican, rights-based Constitution which prioritises limited powers.[233]

To round off the discussion of the decade since *Chow* in 2007, in *Dubois & Ors v Michel & Ors,*[234] a challenge was brought to the President's reappointment of Judge Burhan, who had been granted citizenship and was eligible to be reappointed permanently. The standing of the petitioners was again challenged, however, the majority of the Court did not determine the matter, but rather dismissed the case on a preliminary point as disclosing no cause of action.[235] This case shows that even nine years after the SCoA's caution in *Chow* against elevating court rules to mandatory provisions and restricting the ability of citizens to bring cases to court, the CC continued to dismiss cases against the high executive on the same technical grounds at a preliminary stage.

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[231] *University of Seychelles American Institute of Medicine v Attorney General* [2015] SCCA 16.
[232] Ibid [21] references omitted.
[233] Ibid [20].
[234] *Dubois & Ors v Michel & Ors* [2016] SCCC 23.
[235] Ibid [48-57].

Thus, during the 2007-2017 period, the SCoA's jurisprudence certainly progressed, and important standards were set for the adjudication of cases involving the high executive and the President, however, the CC remained wedded to its formalistic approach and most challenges to executive conduct in the CC were dismissed without engaging with the substantive merits of the case. Many of these did not go on appeal. Moreover, as the Court adopted progressive English judicial review principles for holding the executive accountable under the Constitution, the Courts from time to time still unconsciously applied English law without considering its applicability under the new constitutional regime. It will also be noted, that in these cases the decisions of the high executive were not overturned.

(d) 2017 – present: Political interference and judicial backsliding

From 2015, a series of political controversies rocked the judiciary, heralding extensive political interference in the judiciary and judicial backsliding. The presidential election, held in December 2015, was won by a margin of 198 votes and resulted in a hotly contested election petition.[236] Two foreign judges and Twomey CJ formed the CC bench that heard the case. They upheld the result of the election despite findings of failures by the Electoral Commission in the handling of the election. The Court held that the procedural failures on the part of the Electoral Commission did not affect the outcome of the election and further could not be imputed to the incumbent President, Michel, as election offences. It did, however, find as proved that the petitioner, the losing presidential candidate, Ramkalawan, had himself committed an election offence after he admitted to one in open court. The Court reported him to the Electoral Commission for sanction as required by law. LDS, Ramkalawan's political party, retaliated against Twomey CJ specifically, chanting hate speech against her at an election rally and inciting crowds to confront her and even go to her residence. Twomey was forced to flee her official residence and was the victim of hate attacks for a long period thereafter.[237]

On appeal, the SCoA upheld the CC's findings, including the finding of the commission of an election offence by Ramkalawan.[238] The SCoA, however, reversed the order that Ramkalawan be reported to the Electoral Commission and struck from the voters' register. It

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[236] *Ramkalawan v Electoral Commission & Ors (Election Non-compliance and Illegal Practices)* [2016] SCCC 11.

[237] Rassin Vannier and Sharon Uranie 'Seychelles Chief Justice leaves official residence after "hatred and violence"' *Seychelles News Agency* 5 June 2016. I have worked closely with Justice Twomey and received her insight into parts of this thesis. In writing this part of the thesis I have sought to maintain objectivity and base my analysis on independent evidence throughout this discussion, however my ongoing collaboration with Justice Twomey may represent a potential source of bias.

[238] *Ramkalawan v Electoral Commission & Ors* [2016] SCCA 17.

found that Ramkalawan had not had a fair opportunity to be heard on the allegations against him prior to the CC's finding. Rather than remitting the matter to the CC for determination, as would be the ordinary procedure, the SCoA, during the session for handing down its judgement, allowed Ramkalawan an opportunity to provide reasons for his misconduct, there and then, in open court. The SCoA then adjourned for a short period and returned to overturn the decision of the CC and replace the decision with its own, exonerating Ramkalawan of all wrongdoing.[239] This incredible conduct on behalf of the SCoA evidences a court considering politics over the law and lawful procedures.

Further evidence of political interference in the judiciary could be seen in the instance of a judge of the SCS, Karunakaran J, taking a case brought by LDS to strike another registered party from the list for the 2016 NA elections. The case was taken in chambers, determined *ex parte* in favour of LDS and delivered on the same day in what the SCoA would later describe: as the 'judge had assumed the powers of the EC [Electoral Commission]' and 'parties have used the process of court to score political points.'[240] That judge was later suspended and found guilty on other grounds of gross misconduct by a Tribunal of Inquiry established by the CAA.[241] At the hearing, he was represented by a lawyer who was the leader of a political party that formed part of the LDS coalition.

The political nature of these cases had a chilling effect on the willingness of judges to hear political cases. In *Karunakaran v Constitutional Appointments Authority,*[242] the CC held that decisions of the CAA do not fall in the class of bodies amenable to judicial review, as it is an independent body established by the Constitution. Therefore, it was not willing to review the decision of the CAA to set up the Tribunal against Karunakaran. This is despite SCoA precedent, which held that CAA decisions were reviewable.[243]

In April 2017, new members were appointed to the CAA. Two of the four appointees were senior ranking officials from the LDS party – the Secretary of the LDS, and Ramkalawan's long-term running mate in the presidential elections. The challenge to their appointment was unsuccessful despite the obvious discrepancy between the constitutional requirements for appointment to the CAA and the constitutional guarantee that the CAA is independent.[244] In

[239] Ibid.
[240] *Linyon Sanzman & Anor v Linyon Demokratic Seselwa & Another* [2016] SCCA 25, [66]-[76].
[241] 'Judge Karunakaran should be removed from office – report' *Seychelles Nation* 12 September 2017.
[242] *Karunakaran v Constitutional Appointments Authority* (2016) SLR 623.
[243] *Bar Association of Seychelles* [2004] supra note 168, 34.
[244] *Volcere v Felix & ors* [2018] SCCC 4. See 1993 Constitution arts 139, 140.

Volcere v Felix,[245] the CC relied on a technicality to deny standing to the litigant challenging the composition of the CAA. This enabled the matter to be dismissed without discussion of the merits.

This case flew in the face of the previous jurisprudence about standing, including the approach enunciated in *Ministry of Land Use and Housing v Stravens,* which warned about keeping the test for standing wide to enable 'genuinely concerned citizens' to bring breaches of democratic rights to court'.[246] The finding of the CC in *Volcere* was upheld by the SCoA which, despite numerous cases to the contrary, held that litigating in the public interest was alien in Seychellois jurisprudence and denied the petitioner standing, refusing to engage in the merits of the appeal that were before it.[247] This is an example of a situation where the court avoided engaging with a case concerning a highly politically sensitive matter, involving judges, appointment bodies and the President. However, it does remind one of the dicta in *Stravens* where the SCoA warns about courts relying on standing arguments as a distraction to 'camouflage[] judicial distaste of the merits'[248] and the caution in *Chow v Gappy* of 'the 'judicial castration of article 130(1)' by requiring an 'injury to the applicants' interest', as opposed to the simple existence of an interest, by an applicant.'[249]

In 2017, the new CAA members instituted a Tribunal of Inquiry into the judicial conduct of Twomey CJ following a complaint from disgraced judge, Karunakaran, which resulted in a long public hearing. The allegations were ultimately found to be completely unfounded.[250] After this, an independent fact-finding mission from the Southern African Chief Justices' Forum interviewed stakeholders across the legal and political landscape in Seychelles about judicial independence in Seychelles and found that the 'majority of stakeholders' believed that —

> when judges deliver judgments that are not received well by certain politicians, such judges are threatened with victimisation. It was submitted that the most common forms of victimisation include being subjected to public criticism, being reported to the CAA for possible removal, and in worst cases, threat of physical violence. It was also reported that at times the judiciary is

[245] Ibid.
[246] *Ministry of Land Use and Housing v Stravens* [2017] SCCA 13. In *Stravens*, the SCoA continued to advocate a 'very generous approach to locus standing' and 'as wide as possible method to standing for petitioners' , [22-23].
[247] *Volcere v Georges & Ors* [2018] SCCA 43.
[248] *MLUH v Stravens* supra note 246, [22] citing B. Hough 'A re-examination of the case for a locus standi rule in public law' (1997) 28 *Cambrian LR* 83-104.
[249] *Chow v Gappy* SCCA supra note 176, [16].
[250] Carmel Rickard 'Seychelles CJ Mathilda Twomey cleared of all charges by top tribunal' *Africanlii.org* 22 February 2019 available at https://africanlii.org/articles/2019-02-22/carmel-rickard/seychelles-cj-mathilda-twomey-cleared-of-all-charges-by-top-tribunal accessed on 30 January 2025.

> punished by some politicians in the National Assembly by being provided with inadequate funding.[251]

It is not surprising that the Seychellois jurisprudence from 2017 onwards reveals a judicial timidity when faced with politically sensitive matters. Whereas the SCoA had previously developed progressive and protective jurisprudence, the post-2017 SCoA is reticent to make any statements against the high executive.

This state of judicial timidity affected the overall jurisprudence. In 2019, for example, a single SCS judge was faced with a judicial review of the NA's annulment of a statutory instrument passed by the President under the Public Service Salary Act (PSSA). The judge held that at 'the heart of this case is the question of whether an action taken by the National Assembly… is amenable to some form of judicial review, and particularly review by a single judge of the Supreme Court'.[252] He, therefore, referred the case to the CC under article 130(6) to determine whether he had the power as a SCS judge to hear the judicial review before the court.[253]

The CC held that the NA's action was amenable to review, however, it was not appropriate for a single judge of the SCS to determine the lawfulness of the NA's action. When the matter was re-instituted in the CC under article 130, the Court engaged in a formalistic interpretative analysis and avoided applying the established judicial review principles to the actions of the NA, but rather stated that the review of the NA's exercise of its legislative powers is 'limited to a determination of whether the NA acted within or outside that power,' thus, a pure legality review.[254] The Court held that the delegation of power by the NA to the President to set the salary table under the Public Service Salary Act does not stop the NA from exercising its constitutionally mandated oversight function of all laws, including delegated legislation made under Article 89. Therefore, the Court held that the NA did not act unconstitutionally in invalidating the President's delegated law-making. While the Court noted that the NA as a 'creature of the Constitution' was still required to act lawfully, yet it was unwilling to set standards to assess the constitutionality of the conduct of the NA.[255] In doing so, the Court avoided playing its constitutionally mandated role. The Court also overlooked the availability

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[251] *Report of the Southern African Chief Justices' Forum on the fact-finding Mission to the Republic of Seychelles* 3-8 June 2018. https://www.statehouse.gov.sc/uploads/downloads/filepath_110.pdf., [27].
[252] *Minister Responsible for Public Administration (Faure) v Speaker of The National Assembly (Prea)* [2019] SCSC 374 [32].
[253] Ibid [32-34].
[254] *Faure v Prea* (SCCC) supra note 45 [120].
[255] Ibid [93].

of the standards of judicial review that had been developed for just this purpose.[256] The Court held that:

> [T]he accountable exercise of delegated powers, and oversight, are essential to good and effective governance and are a constitutional imperative. However, in the absence of constitutionally acceptable parameters, the exercise of these powers is unlikely to prevent conflicts of this nature from occurring in the future. This is a matter best left to the National Assembly and Executive.[257]

Thus, judicial timidity is masked behind formalistic reasoning and strict adherence to the Constitutional Court rules.

Recently, the CC dismissed an application by a political party alleging that the policy and editorial guidelines of the government-owned Seychelles Broadcasting Corporation (SBC) violated the right to freedom of expression under article 22 of the Constitution.[258] The United Seychelles party's live broadcast had been censured by the SBC under its guidelines. These guidelines stated that in political press conferences, parties are required to 'speak the truth, to avoid hate speech, not to incite hatred and discord, and not to cause undue offence or harm to others.'[259] Where the SBC deems a party to have breached the principles, the SBC will not approve further live broadcasts and would remove the offending materials from delated broadcasts. The petitioner's broadcast had been sanctioned and they were challenging the constitutionality of the policy. However, the petition had initially been brought incorrectly, then withdrawn and refiled without an application to file out of time. The petition was dismissed for being out of time because no application for the court to grant leave to file had been sought by the petitioners. The Court held that it had no discretion to extend the period of time for filing where no leave was sought by the parties. Although technically correct, the CC's approach is formalistic, rigid and defeated an important case from being brought.

The judicial timidity has also affected the number of cases brought to the CC. Matters which could have given rise to constitutional cases are not brought to court but are resolved through alternative mechanisms. For example, in 2016, when the President's SPPF was not the majority party in the NA, the NA refused to approve the President's appointment of ministers and the Leader of the Opposition stated that this was 'for the simple reason that LDS is

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[256] Ibid [134].
[257] Ibid [134].
[258] *United Seychelles v Republic of Seychelles & Ors* [2023] SCCC 11.
[259] Ibid the policy is quoted [14].

demanding … fresh presidential and even parliamentary elections'.[260] This action could have been reviewed in Court, but was not.

In 2018, the government purported to lease an island, Assomption Island, to the Indian government for the development of Indian Defence Facilities. Assomption borders on the UNESCO Heritage site, Aldabra Atoll, and the lease agreement led to widespread protest.[261] The legality of such a decision could have been litigated, particularly given the Article 38 constitutional duty on the state to protect, preserve and improve the environment. Following the protests the agreement was annulled, however, the land has now been leased to a Qatari property development company to develop a luxury resort threatening the biodiversity of Seychelles.[262] Again, despite protests, this decision has not been challenged.

Furthermore, during the COVID-19 pandemic of 2020-2021, the President and the Health Commissioner took many measures that affected the fundamental rights of Seychellois citizens; however, no challenges were brought to the legality of these measures. This is discussed in more detail in Chapter Six.

VI. Conclusion: The courts as an accountability mechanism on executive power in Seychelles

The review of cases in Seychelles reveals that there is an acknowledgment of the courts as the correct place to challenge the *ultra vires* use of public power in order to strengthen accountable democracy, yet review of the high executive conduct is available in principle but seldom in practice.[263] The case law on judicial review of executive acts shows that the courts have laid down the principles to approach judicial review of high executive acts, regardless of the source of the authority. However, the courts' powers under article 125 to apply, enforce, interpret and protect the Constitution are often underutilised. Rather, cases are dismissed on technicalities and decisions of the high executive are routinely found to be justified by the Court.

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[260] 'LDS Blocks Nomination of Three New Ministers' *Seychelles Nation* (12 April 2018) <www.nation.sc/archive/258440/lds-blocks-nomination-of-three-new-ministers> accessed 16 October 2024. Two years later, Ramkalawan would later appoint one of those same persons, Mr Billy Rangasamy, as a minister in his cabinet.

[261] Sharon Ernesta 'Overwhelming opposition to proposed Indian base in Seychelles at public meeting' *Seychelles New Agency* 26 February 2018; 'Protest on Saturday to oppose Assomption Island deal' *Seychelles Nation* 01 February 2018.

[262] Jonathan Watts 'Giant tortoises in Seychelles face threat from luxury hotel development' *The Guardian* 11 September 2024.

[263] *Faure v Prea* (SCCC) supra note 45, [120].

The Seychellois jurisprudence is an exemplar of a system that has grappled with jurisprudential and constitutional coherence but lacks both despite promising years of jurisprudential building from 2007 to 2017. Seychelles litigation still finds itself in a 'wilderness of single instances'[264] and administrative and constitutional review in Seychelles lack clarity on how to apply the constitutional principles in practice.

Turning to consider the coherence of Seychellois jurisprudence through the four questions identified, the institutional performance and doctrinal development may be evaluated as follows.

(a) Institutional access and incidence

With regard to institutional access and incidence, the laws exist which enable individuals to bring cases to the courts to challenge high executive conduct. Over the 30 years many cases have been brought, demonstrating that institutional frameworks for accessing judicial review are theoretically available. The availability of remedy is discussed in *Cable & Wireless Seychelles Ltd v Ministry of Broadcasting and telecommunication,* [265] where it was held that—

> a court may issue a writ of certiorari to review all acts by those making determinations affecting the rights of citizens' and that the question is not about whether the individual was acting as an administrator or in a judicial capacity, but rather 'whether the decision taken was judicious and not arbitrary, capricious, in bad faith, abusive or by the consideration of extraneous matters.[266]

However, restrictive approaches to procedural rules have often limited cases from proceeding past preliminary stages. The procedural requirements of the Constitutional Court rules and the judicial review rules may not be in line with constitutional principles of access to justice and the promotion of the rule of law and require reconsideration.

There is still an unusually non-litigious culture when it comes to challenging the use of certain types of high executive power in Seychelles. Furthermore, there has been a decrease in the number of cases, which is likely the result of the chilling effect of political interference from 2015 onward. In many cases, challenges are resolved informally or in the political sphere rather than the legal sphere, as was the case with the President's failure to remove Karunakaran

[264] An oft cited line from Alfred Lord Tennyson's 1853 poem 'Aylmer's Field'.
[265] *Cable & Wireless* supra note 126.
[266] Ibid [36-38].

J following the finding of gross misconduct against him[267] and the resolution of the scandal related to the granting of the Assomption lease to the Indian government.

Other reasons for the low number of cases brought could be attributed to several intertwined factors. These include a lack of educated familiarity with the developed judicial review that is at the public's disposal and residual distrust of the legal institutions or government. Following the decision in *Volcere,* it is more difficult for persons who are not directly affected by decisions to bring their cases. Moreover, lawyers may be reticent to bring politically sensitive cases in a country where the population size means that the fifteen judges and 50 practicing lawyers, as well as the small, elite political class, are rubbing shoulders in social settings, and where career advancement may be more easily scuppered by personal slights against the wrong person.

(b) Institutional effectiveness

Considering institutional effectiveness, the courts have often dismissed cases on procedural grounds prior to hearing the merits of the case. When matters have managed to proceed to the merits, the courts have very seldom overturned executive conduct and then only in less political cases. The courts tend to not require deep explanations from the executive or interrogate the explanations provided, performing a very shallow review, if any. This may be a cause of the reduction in cases relating to the high executive.

With the exception of the years 2007-2017, the case law shows judges deferring to the President or finding technical reasons to avoid determining politically sensitive matters (such as dismissals on the grounds of standing or at leave to review stages).[268] Some of these cases may even amount to what Landau and Dixon term 'weak form abusive judicial review'.[269] Examples of this are found in the judicial abdication in *Faure v Prea,* where the court refused to apply judicial review standards to the NA's actions, and *Volcere v Felix,* where the CC

[267] Despite receiving a report from the Tribunal of Inquiry which found him guilty of gross misconduct and recommended his removal, the President failed to remove him from office as required under article 134 of the Constitution. The Judge remained suspended until he retired in 2020 upon reaching his pensionable age.

[268] See eg, *Karunakaran v Constitutional Appointment Authority* [2017] SCCA 9 (refusal to grant leave to review the decision to suspend a judge pending disciplinary matters against him because matter not ripe); *Assemblies of God v Attorney General* [2020] SCCC 975 (CC dismissed constitutional petition regarding petitioner's right to property stating that petitioner could have sought alternative relief by means of judicial review and not constitutional review).

[269] The authors define weak abusive judicial review as 'when courts uphold legislation or executive action that significantly undermines the democratic minimum core, thus legitimating damaging moves undertaken by political actors.' David Landau & Rosalind Dixon 'Abusive judicial review: Courts against democracy' (2020) 53 *UC Davis LR* 1313, 1345.

overturned existing jurisprudence on standing to avoid determining the constitutionality of the President's appointment of members of the CAA. [270]

In extreme cases, the courts have even applied the wrong law by referring to royal prerogatives rather than constitutional sources of power,[271] permitted judicial fancy-footwork to resolve a difficult political situation[272] and even decided a case without any reference to legal principles at all other than a sole reliance on the principles of natural justice.[273] This demonstrates a concerning pattern where the courts of Seychelles have almost 'fallen into the service of the executive,'[274] by refusing jurisdiction in an attempt to avoid making a politically sensitive decision.[275]

(c) Normative foundations

With regard to the normative foundations for the courts' decisions, the normative foundations have been laid in progressive cases, embracing common law judicial review grounds as the grounds for the constitutional review of high executive conduct. The judicial review tools that the courts have adopted for review of executive conduct are robust with principles established to approach judicial review of executive acts regardless of the source of authority.

Judges have grappled with the parameters of their role and in practice the courts have still been uncertain in their application of the doctrinal principles. It is of concern that the courts persist in mainly citing British cases, even though local jurisprudence exists.[276] There is a jurisprudential difficulty in the direct application of British law where Seychellois law and precedent exists. Judges and lawyers seldom justify the adoption of foreign jurisprudence prior to incorporating it into Seychellois law and uncritical borrowing from a variety of jurisprudence interrupts the stability of the normative framework.

It is also problematic to adopt law from a fundamentally different constitutional setting without critiquing whether it is appropriate in a modern democracy (which it may be). The Seychellois courts also seldom look to other jurisdictions with similar constitutional backgrounds for comparative approaches. The majority of practising attorneys in Seychelles

[270] *Volcere v Felix* (SCCC) supra note 244.
[271] *University of Sey* supra note 231.
[272] For example, the SCoA's manoeuvre in *Ramkalawan* SCCA supra note 238.
[273] *Tornado Trading v PUC& Anor* [2018] SCCA 45.
[274] Alexander M Bickel *The Least Dangerous Branch* (1989), 29.
[275] Such as in the immigration cases, *Believe* supra note 158 and *Timonina* supra note 164.
[276] *Wells v Mondon and Ano* [2010] SCSC 7, *Jivan v Seychelles International Business Authority* [2016] SCSC 108, *Vijay Construction (Pty) Ltd v Andre* [2016] SCSC 21.

have had no formal training in public law under a modern style constitutional supremacy with a balance between the branches of government. As there are no Seychellois secondary resources dealing with judicial review and Seychelles constitutional law, the practicing attorneys fall back on their foreign training.

(d) Coherence of reasoning

On the final question which evaluates the development of coherence, the Seychellois jurisprudence demonstrates fragmented and contradictory approaches to judicial review, which have led to confusion in the application of constitutional principles in practice. The system lacks both jurisprudential and constitutional coherence despite some promising years of jurisprudential building between 2007-2017. The case law does not show consistency, the first and fundamental requirement for coherence.[277] Moreover, judgments do not build on a developing body of jurisprudential principles, which undermines the creation of jurisprudential coherence. Similarly, constitutional principles are haphazardly applied and are not used as a theoretical underpinning for the development of the law.

The case law suggests that the majority of Seychellois judges are not yet able to strike a comfortable balance between their role as a constitutional check and their credentials as unelected power holders, and this is proven by the inconsistency in the jurisprudence. The rotating sittings of the CC bench result in each judge taking very few cases per year, and in the absence of clear resources and training in judicial review of constitutional and supervisory matters, judges are unlikely to be up-to-date with the developments in this field.

Furthermore, the courts rely on the cases being brought (and being brought properly) and this remains a difficulty for the Seychellois judiciary. More cases are brought as SCS judicial review cases under article 125(1)(c) than constitutional cases. This reduces the likelihood of the development of robust judicial review of executive acts under article 125(1)(a), and undermines a key mechanism created in the Constitution: judicial review of constitutional matters.[278]

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[277] Aldo Schiavello 'On "Coherence" and "Law": An analysis of different models' (2001) 14 *Ratio Juris* 236, 236.
[278] See Twomey and Barnes op cit note 90.

(e) The challenges of constitutional development

Gloppen discusses the 'un-political' judge who 'merely interprets the law' as the dominant professional norm in Africa which mitigates against a strong accountability function for the courts.[279] It is not contested that judges in Seychelles should remain un-political, however the failure to consider the application of constitutional principles in interpreting the law regarding executive conduct is a particular failure in Seychelles. The majority of judges appear to not recognise the need to develop the law in a way that is consistent with the new constitutional order of executive accountability.

Prempeh and Gloppen both point to the failure of the new-style constitutions to dilute executive power and authority within the democratised state, which has resulted in 'winner-takes-all' politics as a real possibility for the executive.[280] Executive dominance is still prevalent in Seychelles and this political reality is not tempered by the judiciary stepping into its accountability role.

However, despite the court's slow progress, the judicial review toolset that has been adopted is robust enough to ensure that illegal, irrational, procedurally unfair and disproportionate decisions are held in abeyance by a court, however, the judges need to adopt a determined willingness to develop this role. The challenge lies in developing the institutional courage and technical competence necessary to apply these tools effectively.

The courts rely on the cases being brought (and being brought properly) and this remains a difficulty for the Seychellois judiciary, requiring both cultural and institutional changes to encourage appropriate litigation of executive conduct. The courts should look to develop training for judges and lawyers in Seychellois, regional and comparative judicial review to ensure more consistency and greater depth to their decisions.

The courts' role as an accountability mechanism for executive power in Seychelles is thus characterised by theoretical robustness but practical weakness. While the legal framework exists for meaningful judicial review, the combination of procedural barriers, institutional timidity, inadequate training, and political pressure has resulted in a system where the courts have the tools but lack the determination to use them effectively. The judges need to adopt a

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[279] Siri Gloppen 'The accountability function of the courts in Tanzania and Zambia' (2003) 10 *Democratization* 112, 132.

[280] Gloppen, op cit note 279, 119, H Kwasi Prempeh 'Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa' (2006) 80 *Tulane LR* 1239, 1246.

determined willingness to develop this role if the constitutional promise of judicial accountability is to be realised.

CHAPTER SIX
COMPARING COVID CASES: A COMPARATIVE LOOK AT THE EXECUTIVE-JUDICIAL RELATIONSHIP IN A PANDEMIC

I. Three countries in similar emergency circumstances

In this penultimate chapter, we consider the judicial approach to high executive review in each of our three countries across a similar set of circumstances by comparing how the courts in Malawi, Namibia and Seychelles responded to legal challenges brought against the measures taken by their respective Presidents and Cabinets during the COVID-19 pandemic in 2020.

In early 2020, Malawi, Namibia and Seychelles were faced with the same global emergency: a new, highly infectious, airborne virus that the World Health Organisation identified as a 'Public Health Emergency of International Concern' and a global pandemic.[1] It would result in a global excess mortality of 14,91 million people in the 24 months following January 2020.[2] The World Health Organisation guidelines ensured that similar national

[1] World Health Organisation 'Coronavirus disease (COVID-19) pandemic' available at https://www.who.int/europe/emergencies/situations/covid-19 accessed 30 January 2025.
[2] World Health Organisation 'Global excess deaths associated with COVID-19, January 2020 – December 2021' May 2022, available at https://www.who.int/data/stories/global-excess-deaths-associated-with-covid-19-january-2020-december-2021 accessed 30 January 2025.

responses were taken globally, which included, at different times and to different extents: closing courts, schools, churches and public gatherings; implementing 'stay at home' restrictions or curfews; enforcing the wearing of face masks; 'social distancing'; and disallowing international travel.

This was a time when national leaders were required to take strong executive measures to reduce the spread of the virus, to protect the safety of the population and bolster essential medical services, whilst also balancing the impact that the measures would inevitably have on their citizens' fundamental rights and countries' economies. To make matters more difficult, the pandemic constantly evolved, requiring new responses with each new strain of virus and wave of infections. Whether or not it was described as such, it was a time where each country was factually in a State of Emergency.

In 1983, Niall MacDermot, Secretary-General of the International Commission of Jurists wrote:

> There is a frequent and perhaps understandable link between states of emergency and situations of grave violations of human rights. The most serious violations tend to occur in situations of tension when those in power are, or think they are, threatened by forces which challenge their authority if not the established order of society.[3]

However, when a nation is most threatened is also when the executive needs to be empowered to take decisive and necessary action to combat the threat. Aware of this tension, constitutional documents often contain provisions that regulate executive conduct during States of Emergency (SOE) in advance. These constitutional provisions delegate powers to the President (or another authority) to manage the SOE. These include issuing decrees, engaging military and police support and suspending the operation of ordinary legislation, processes and rights.[4] They also provide safeguards against the prolonged abuse of these extraordinary powers through the implementation of time limits, reporting mechanisms to the legislature (which has a veto power), the inclusion of a list of rights that cannot be derogated and judicial oversight of the use of the powers.

The Constitutions of Malawi, Namibia and Seychelles also make provision for dealing with executive conduct under an SOE. The COVID-19 pandemic provides an unusual opportunity to compare the implementation of those safeguards.

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[3] International Commission of Jurists *States of Emergency: Their Impact on Human Rights* (1983), 1.
[4] John Frerejohn & Pasquale Pasquino 'The law of the exception: A typology of emergency powers' (2004) 2(2) *ICON* 210, 210.

(a) Provisions relating to declarations of States of Emergency

The three legal frameworks in each country are quite similar. Each is a constitutional democracy with a separation of powers, a commitment to the rule of law and a justiciable Bill of Rights. Each country also has specific constitutional provisions empowering the President to declare a SOE for a limited period of time and to take actions, including actions which would derogate from the rights of citizens, subject to certain safeguards.

In Malawi, section 45 of the Constitution provides in relevant part that:

> (1.) No derogation from rights contained in this Chapter shall be permissible save to the extent provided for by this section and no such derogation shall be made unless there has been a declaration of a state of emergency within the meaning of this section.
>
> (2.) The President may declare a state of emergency —
> a. only to the extent that it is provided for in this section;
> b. only with the approval of the Defence and Security Committee of the National Assembly;
> c. only in times of war, threat of war, civil war or widespread natural disaster;
> d. only with regard to the specific location where that emergency exists, and that any declaration of a state of emergency shall be publicly announced; and
> e. only after the state of emergency has been publicly announced.
>
> (3.) Derogation shall only be permissible during a state of emergency —
> a. With respect to freedom of expression, freedom of information, freedom of movement, freedom of assembly and rights under section 19 (6) (a) and section 42 (2) (b);
> b. to the extent that such derogation is not inconsistent with the obligations of Malawi under International Law; and
> c. to the extent that -
> i. in the case of war or threat of war, it is strictly required to prevent the lives of defensive combatants and legitimate military objectives from being placed in direct jeopardy; or
> ii. in the case of a widespread natural disaster, it is strictly required for the protection and relief of those people in the disaster area.

The section also provides safeguards. For example, the declaration of the SOE may only continue for 21 days unless it is extended by a super-majority of the National Assembly, and challenges to the validity of the SOE or any action taken thereunder can be brought to court.[5]

In Namibia, the provisions relating to an SOE are found in article 26, which provides in relevant part:

> (1) At a time of national disaster or during a state of national defence or public emergency threatening the life of the nation or the constitutional order, the President may by

[5] Malawian Constitution, s 45(4-5).

> Proclamation in the Gazette declare that a state of emergency exists in Namibia or any part thereof.
>
> (2) ….
>
> (3) ….
>
> (4) The National Assembly may by resolution at any time revoke a declaration approved by it in terms of this Article.
>
> (5) (a) During a state of emergency in terms of this Article or when a state of national defence prevails, the President shall have the power by Proclamation to make such regulations as in his or her opinion are necessary for the protection of national security, public safety and the maintenance of law and order.
>
> (b) The powers of the President to make such regulations shall include the power to suspend the operation of any rule of the common law or statute or any fundamental right or freedom protected by this Constitution, for such period and subject to such conditions as are reasonably justifiable for the purpose of dealing with the situation which has given rise to the emergency: provided that nothing in this Sub-Article shall enable the President to act contrary to the provisions of Article 24 hereof.

Article 24 provides a list of non-derogable rights and safeguards against prolonged derogation of rights.[6]

In Seychelles, article 41(1) of the Constitution permits the President to declare a SOE where the President has reason to believe that:

> (a) a grave threat to national security or public order has arisen or is imminent; or
>
> (b) a grave civil emergency has arisen or is imminent, in Seychelles or in any part of Seychelles, by a Proclamation published in the Gazette, declare that a state of emergency exists in Seychelles or that part of Seychelles, as the case may be.

Article 43 permits certain restrictions of rights and freedoms during a SOE, however, '[a] law may provide for the taking during a period of public emergency of such measures as are strictly required to meet the exigencies of the situation' and that law 'shall not provide for the taking of measures that are inconsistent with articles 15, 16, 17, 18(3), 19(2) to (6) and (11), 21 and 27 [of the Constitution].'[7]

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[6] Namibian Constitution, Article 24(3) provides that 'Nothing contained in this Article shall permit a derogation from or suspension of the fundamental rights or freedoms referred to in Articles 5, 6 [life], 8 [dignity], 9 [freedom from slavery and forced labour], 10 [equality and non-discrimination], 12 [fair trial], 14 [family], 15 [children's rights], 18 [administrative justice], 19 [culture] and 21(1)(a), (b), (c) and (e) [fundamental freedoms] hereof, or the denial of access by any persons to legal practitioners or a Court of law.'

[7] Seychelles Constitution, art 43. These are the rights to life, dignity, freedom from slavery, forced or compulsory labour, liberty, fair trial rights, freedom of conscience and equal protection of the law.

(b) Judicial jurisdiction over the executive

The courts in Malawi, Namibia and Seychelles have similar constitutional jurisdiction to oversee the implementation of the Constitution and to judicially review administrative conduct, including during SOEs.

In Namibia, the courts are empowered to hear and determine all 'cases which involve the interpretation, implementation and upholding of this Constitution and the fundamental rights and freedoms guaranteed thereunder'.[8] Article 18 also provides for a right to reasonable and fair conduct from administrative bodies and administrative officials. Common law review that preceded the advent of the Constitution is saved as long as it does not conflict with the Constitution or any statute.[9]

Meanwhile, section 103 of the Malawian Constitution grants the courts the power to hear 'all issues of judicial nature' and the responsibility of 'interpreting, protecting and enforcing this Constitution and all laws.'[10] There is also a right to just administrative justice under section 43, and pre-existing common law powers of review are also saved under section 200 '[e]xcept in so far as they are inconsistent with this Constitution'.

In Seychelles, article 125(1)(a) grants original jurisdiction to the Supreme Court to hear all matters relating to the 'application, contravention, enforcement or interpretation' of the constitution. The Supreme Court of Seychelles also has the power to review the conduct of subordinate courts, tribunals and adjudicating authorities performing judicial or quasi-judicial functions, and common law judicial review powers that had been recognised at the time of the adoption of the 1993 Constitution.[11]

With this largely comparable legal framework in mind, the next section considers the legal challenges that were brought (or not brought, in Seychelles' case) and how the courts resolved them. This provides insights into how the courts and the executives in each country interacted in times when the power to govern efficiently and effectively was most needed, and when the fundamental rights of the population were also at stake.

[8] Namibian Constitution, art 80(2).
[9] Ibid art 66(1).
[10] Malawian Constitution, s 9.
[11] Seychelles Constitution, arts 125(1)(c) read with 125(7) and Schedule 7, Part I clause 2 of the Seychelles Constitution.

II. Challenges to COVID-19 measures: Malawi

(a) State v The President of Malawi ex parte Mponda, Soko

In Malawi, despite the existence of the constitutional provisions specifically introduced to enable the derogation of fundamental rights during times of national emergency, the President's measures were not made under the provisions of the Constitution regulating States of Emergency.[12] Instead, the President issued a declaration of a State of Disaster and issued directives to the government, which included the shutting of schools and the implementation of a national lockdown. This had purportedly been done under the pre-constitutional Disaster Preparedness and Relief Act (DPRA).[13]

Perhaps the choice to declare a State of Disaster and not an SOE had to do with a narrow reading of the constitutional provision itself, which provides for a declaration of an SOE only 'in times of war, threat of war, civil war or widespread natural disaster'. However, a convincing argument could be made that a global pandemic is a 'widespread natural disaster', and certainly, that the executive responses required during the pandemic ought to find their fit in the only provisions of the Constitution that enable the derogations of rights. However, the provisions of the DPRA grant the President a wider discretion with regard to the duration of the declaration and require less oversight from the National Assembly.[14]

Additionally, in April 2020, the Minister of Health issued Public Health (Corona Virus Prevention, Containment and Management) Rules, 2020 (the COVID-19 Rules) under the Public Health Act, which enabled the Minister to pass regulations imposing mandatory measures, including mandatory testing, restrictions on meetings and a national lockdown. [15]

In *State v The President of Malawi ex parte Mponda, Soko*, *and Ors,* students challenged the closure of educational institutes by the President during the pandemic.[16] The President's directives were challenged on the grounds that they were unconstitutional and went beyond the prescripts of section 32 of the DPRA and had the effect of limiting the students' fundamental right to education. The applicants argued that the declaration ought to have been issued as a State of Emergency under section 45 of the Constitution, which imposed strict restrictions on

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[12] Malawi Constitution, s 45.
[13] Disaster Preparedness and Relief Act, Cap 33:05 (1992).
[14] Ibid s 33 provides that 'Where a state of disaster has been declared under section 32 the Minister shall communicate such declaration to the National Assembly during the meeting next occurring after the declaration.'
[15] Public Health Act Cap 34:01 (1948).
[16] *State v The President of Malawi & Ors ex parte Mponda, Soko & Ors* [2020] MWHC 6.

the power of the government to affect rights during periods of national emergency. This was clearly an important question and concerned the constitutionality of a pre-1994 enactment. However, the Court refused leave to review the decision of the President, and as such, the matter was not decided on the merits.

The Court identified the case as one of constitutional judicial review and not ordinary judicial review and acknowledged that it was essential to take a 'principled approach' to constitutional interpretation, bearing in mind the supremacy of the Constitution, its enshrined principles and the history of Malawi.[17] However, the Court held that the pandemic was an 'epidemic' in terms of section 32 of the Disaster Preparedness and Relief Act (DPRA), and not a 'State of Emergency' under section 45(3) of the Constitution, therefore, the executive was not bound by the provisions of the Constitution.[18] It held that the constitutional provisions did not intend to cover instances of epidemic, but only war or natural disasters.[19] Moreover, the Court held that the issuing of the declaration of the State of Disaster was prescribed by law, and not unreasonable in the context of a global pandemic. It held that similar approaches had been adopted by neighbouring countries Zambia, Mozambique and Tanzania, and so it accepted that this was proof that these directives were consistent with international human rights standards. The Court held, therefore, that the limitation on the right to education was necessary in a democratic and open society.[20]

The Court did accept that the President's issued directives were not law as they went beyond the prescripts of section 32 and instead of finding the directives illegal or *ultra vires*, the Court created a fiction that the directives were merely 'instructions or recommendations to relevant institutions to either be implemented or not implemented.'[21] Therefore, the Court denied leave to review the directives and the decisions.

In the *Mponda* case, by interpreting the SOE provisions of the Constitution narrowly and excluding the COVID-19 circumstances from the category of a 'widespread natural disaster,' the Court failed to recognise that the constitutional scheme intentionally sought to limit the circumstances where the President would have widespread powers to derogate from fundamental rights. Having found the conduct to be justified by the legislation and not bound

[17] Ibid [3.7].
[18] Ibid 11, [3.15].
[19] Ibid [3.19].
[20] Ibid [3.22].
[21] Ibid [3.25].

by the constitutional safeguards, the Court's analysis was concerned with the lawfulness and reasonableness under the DPRA and deferred to the executive in its interpretation. This was at the expense of the applicants' fundamental rights, including their right to access the courts to bring a case.

However, the Court did not hold the President's actions up to the standard of legality, despite skirting around the issue of the *ultra vires* nature of the directives. While the Court stated that it was considering the principles underlying the Malawian Constitution and its historical context, there was no real evidence of this in its reasoning. Particularly, the Court did not consider that during the Banda regime, there was a history of executive abuse of power justified by overly discretionary provisions given to the President, just like those found in the DPRA.

Moreover, the comparative discussion of the judge was misdirected. The fact that other countries had imposed similar provisions could not be relied on as a justification for the constitutionality of the President's conduct. Not only could those measures also be challenged (and many were), but they exist within a different constitutional context. At best, the existence of similar measures in other countries could be helpful comparators for illustrating the range of options available to the President.

(b) Xiaoxiao v The Director General – Immigration and Citizenship Services

The second Malawian case was also brought by way of judicial review of administrative acts. The matter of *Xiaoxiao* arose as an application for the continuation of an injunction granted in anticipation of a judicial review.[22] Despite being a judgment concerning interim relief, the case touched on several important constitutional aspects.

The applicants were Chinese nationals who had been granted visitors' visas to Malawi, however, upon arrival they were refused entry, arrested and were in the process of being deported from the country when the case was brought. The High Court was required to review the decision of the Director-General of Immigration, acting under the Immigration Act, refusing the claimants entry into the country, confiscating the letters of approval and passports of the claimants upon arrival, and then attempting to forcibly remove the claimants from the country. The claimants sought relief in the form an injunction preventing the claimants'

[22] *State (oao Lin Xiaoxiao & Ors) v The Director General – Immigration and Citizenship Services & Anor* [2020] MWHC 5.

removal, and a declaration that the 1st defendant's conduct was unlawful and in violation of the claimant's section 43 right to lawful and fair administrative action. Only the first part was before the Court; the latter part was to be determined at trial. The respondent had based his justification for his conduct towards the claimants on the existence of the President's declaration of the State of Disaster.

During the judgment, the Court emphasised the rule of law requirements on the executive to only act based on the law and not 'on their whims or arbitrary discretion'.[23] The Court held that the executive does not have any power to make laws other than subsidiary legislation, duly delegated by the legislature under section 58 of the Constitution.[24] When taking emergency measures, these need to be strictly within the law and should be subject to testing by the courts, because the courts have the role to 'safeguard the purity of the law and legally sanction any evasions or violations of the law.'[25] The Court held that the President was not given the powers to impose or introduce measures to deal with a State of Disaster under the DPRA, but rather that the Act provides for the Minister, but not the President or Cabinet, to exercise emergency power through making regulations under the Act.[26] The judge argued that the Minister of Immigration could not ignore the law, and moreover, that the President did not have the power to pass 'extraordinary measures' through his directives simply because the DPRA did not prevent him from doing so.[27] The President, like all other public officers, can only exercise powers that are granted by law.[28] The Court then extensively listed the powers of the President under the Constitution and held that:

> I am not persuaded that the framers of our Constitution could even for a moment have intended that the President should rely on 'implied or incidental powers', on a weighty matter of what measures to take or impose during a state of emergency or a state of disaster, a matter likely to adversely affect an individual's enjoyment of his or her rights, freedoms and personal liberties.[29]

Discussing the role of the court vis-à-vis the executive, the judge held that it should never 'shirk the duty imposed upon it…to determine issues of judicial nature, whether or not such issues touch upon war, threats or war, public disasters, etc.'[30] Therefore, to enable access to justice, 'the threshold for showing that a matter is not amenable to judicial review has to be

[23] Ibid [8.12].
[24] Ibid [8.7].
[25] Ibid [8.21-8.22].
[26] Ibid [9.1.16].
[27] Ibid [8.25], [8.28].
[28] Ibid [8.29].
[29] Ibid [8.63].
[30] Ibid [8.73].

high'.[31] The judge also criticised the Immigration Act as being archaic and discussed how the law previously granted wide discretionary powers to the executive, which allowed them to take decisions against individuals that were justified only after the action was taken.[32] Furthermore, the Court discussed the fact that the previous regime had 'entrenched presidential dictatorship, with no checks and balances.'[33] Ultimately, the Court stated that it was not 'questioning the necessity or otherwise for introducing the measures', however, the manner in which the measures were introduced 'raises weighty legal issues which have to be interrogated at the hearing of the substantive judicial review'.[34]

Therefore, the Court held that there were serious issues to be determined in the case, allowed the case for judicial review and issued an injunction against the removal of the claimants from Malawi pending the final determination of the case.

The bulk of Kenyatta Nyirenda J's findings are *obiter dicta,* however, they reveal a judge interpreting the text of empowering and constitutional provisions through the lens of the principles underlying the Constitution and its history. As a result of this analysis, the judge comes to a different outcome than in the previous case of *Mponda*.

(c) S (oao Kathumba) v President

In the final Malawian case for discussion, two applications were brought to judicially review the decision to declare a lockdown without a declaration of an SOE. The claimants argued that the lockdown amounted to a 'substantial derogation from the fundamental rights under Chapter IV of the Constitution', which would only be permissible during an SOE.[35] The matters were consolidated. The court a quo granted an injunction preventing the government from enforcing the lockdown until the matter could be heard and resolved and granted leave to judicially review the decision.[36] The Court also held that serious questions in the case were required to be tried and that these concerned the interpretation or application of the Constitution. Therefore, the case required certification of the Chief Justice to refer the case to a full bench of High Court judges for that purpose.[37]

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[31] Ibid [8.83].
[32] Ibid [9.2.5].
[33] Ibid [12.1].
[34] Ibid [11.5].
[35] *R (oao Kathumba & Ors) v President & Ors* [2020] MWHC 8.
[36] Ibid 19.
[37] Ibid 26. Cases concerning the Constitution are heard by a panel of at least two High Court judges sitting together.

The matter was then heard by a three-judge constitutional panel to review the legality and constitutionality of the declaration of the lockdown and the promulgation and implementation of the COVID-19 Rules. The President's actions were impugned on four grounds:[38]

1. The decision to declare a lockdown which would impact on the applicants' fundamental rights without the attendant declaration of a State of Emergency.

2. The decision to declare a lockdown without providing social security to vulnerable and marginalised groups in society.

3. The promulgation and implementation of the COVID-19 Rules which would suspend fundamental constitutional rights without the parliamentary oversight of section 58 of the Constitution.

4. The promulgation and implementation of the COVID-19 Rules under section 31 of the Public Health Act, where the Rules expressly state that they authorize the taking of measures that are outside the scope of the parent statutory provisions and are otherwise *ultra vires*.

The Attorney General had conceded that parts of the Rules were unconstitutional. The COVID-19 Rules were repealed and replaced before the matter was decided. The new Rules did not contain the challenged provisions. However, the Court refused to allow this to extinguish the case, as this would make the government action 'capable of repetition, yet evading review'.[39]

The Court first considered whether the COVID-19 Rules were *ultra vires* section 31 of the Public Health Act. The section enabled the Minister to make subsidiary legislation for the purposes of managing threats of infections or widespread infections, however, it did not permit several of the measures imposed by the Minister, including the imposition of a lockdown enforced by the military and the police. The Court went through each challenged provision and held that the COVID-19 Rules were not lawfully made because the Minister was not empowered by the parent Act to make them.[40] The Court reiterated the fact that subsidiary

[38] *R (oao Kathumba & Ors) v President of Malawi & Ors* [2020] MWHC 29.
[39] Ibid [3.4-3.10] with reference to the precedent in *S (on the application of the Human Rights Defenders Coalition and 2 others) v the President of the Republic of Malawi and Another* [2020] MWHC 130.
[40] Ibid [5].

legislation can only be made within the specifications of the empowering Act and to achieve the purposes of the Act.[41]

The Court additionally held that the parts of the impugned provisions, which regulated judicial proceedings and the National Assembly during the State of Disaster, were an encroachment on the doctrine of the separation of powers, an interference with the Chief Justice's rule-making powers and the National Assembly's powers to regulate its own procedure under the Constitution.[42]

The Court also found the Minister was unable to lawfully implement the COVID-19 Rules that enforced the nationwide lockdown without first having the Rules laid before Parliament for scrutiny because of their impact on human rights.[43] To do so was in contravention of section 58 of the Constitution. To the extent that section 17 of the General Interpretation Act could be relied on to circumvent the requirement of National Assembly scrutiny under section 58, those provisions were 'rendered obsolete'.[44] The Court then endorsed the *obiter* findings of the single judge in the *Xiaoxiao* case.[45]

The Constitutional Court held that the lockdown would substantially affect the rights and freedoms of the claimants. The claimants argued that this would only be constitutionally permissible if an SOE, in terms of the Constitution, was declared, and not a State of Disaster. The Attorney General argued in response that the lockdown was a reasonably justifiable limitation of rights under section 44 of the Constitution. The Court held that:

> [W]hile the Executive was well within its powers to prescribe mitigation and control measures in response to the COVID-19 pandemic … the measures imposed by the Rules went beyond limiting the rights in the Bill of Rights… as the impact of the restrictions was to actually negate the essential content of these rights.[46]

The Court held that the Minister acted unconstitutionally in 'using subsidiary legislation to declare measures which could only be imposed by the President' following a declaration by the President of an SOE.[47] The Minister's actions 'visited violence upon this country's constitutional scheme.'[48]

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[41] Ibid [6.4].
[42] Ibid [5.9-5.10]
[43] Ibid [6].
[44] Ibid [10.1.3].
[45] Ibid [6.6] endorsing *Xiaoxiao* supra note 22.
[46] Ibid [7.8].
[47] Ibid [7.9]
[48] Ibid.

In addition to its findings of illegality and unconstitutionality of the Rules, the Court made additional recommendations to the government, including law reform and what factors to consider in legislation for the pandemic in light of the evidence brought to the Court.

The Malawian cases show the wide range of ways that cases concerning executive conduct are handled. The *Kathumba* case is significant not only because it declared the State of Disaster declaration invalid and it invalidated the COVID-19 Rules, but also for the way that the Court engaged in dialogue regarding the acceptable measures that the state could take to remedy the unconstitutionality. The case directly overturns the use of executive power. In *Mponda and Kathumba,* the Minister and the President were not acting in an administrative manner, but they were exercising executive policy powers. In *Xiaoxiao,* the Director General of Immigration was implementing the Immigration Act, thus exercising administrative power. However, both cases were brought in similar ways and there was no distinctive difference in the form of scrutiny applied by the courts.

In *Kathumba* and *Xiaoxiao,* the Courts' reasoning is grounded in the principle of the rule of law under the Constitution, requiring that the Minister and the President act in accordance with the law. The Courts' approaches were textual, contextual and principled – starting with the empowering provisions, and contextualising these within the new constitutional era, which ensures limited government. The *Kathumba* case, specifically, reveals judges that are willing to uphold rule of law standards of legality, even in difficult contexts. However, none of the cases engaged with the appropriate levels of deference to the executive that would be appropriate in SOE situations, where a government is required to take decisive and immediate steps.

The three Malawian cases reinforce several trends about the judicial-executive relationship in Malawi. The first is that there is a healthy culture of bringing legal challenges against the use of executive power in Malawi. In these cases, the President, the Minister of Health and the Director-General of Immigration were all challenged through judicial review cases that raised constitutional matters. However, the judge in *Mponda* applied the lightest scrutiny to the presidential power and the judgment shows the least depth of analysis of the constitutional SOE safeguards and their importance. Moreover, in *Mponda,* the judge was quick to deny access to the litigants to the courts by refusing leave to review the decision. While the students averring interruption of their right to education, perhaps, had the weakest claim of the cases brought in Malawi, the basis of their claim had merit: the argument that the President's declaration of a

state of disaster and directives were *ultra vires* the DPRA and unconstitutional in the light of the SOE provisions of the Constitution. As was seen in *Kathumba,* this argument would, most likely, have been successful before the other Malawian courts. This point leads to the second and third dynamics at play in the Malawian judicial-executive relationship. The second is that the 'leave to review' stage of proceeding granted the judge an opportunity to avoid determining this underlying aspect of the case. The fact that the case was squarely levelled against presidential power may have influenced the judge's unwillingness to grant leave to review, however, that is difficult to assess. Thirdly, although there was some alignment between *Xiaoxiao* and *Kathumba,* the cases reveal inconsistencies between the approach that Malawian courts take to reviewing high executive power.

III. Challenges to COVID-19 measures: Namibia

In Namibia, the *Namibian Employers' Federation* case is one of the rare instances where the President's constitutional powers have been directly challenged in court. The approaches of the High Court and Supreme Court illustrate that the courts will hold the President's conduct to the standard of legality when directly challenged on the exercise of powers emanating directly from the Constitution.

Early in the COVID-19 pandemic, the President of Namibia declared an SOE under the Constitution and issued certain proclamations that were aimed at addressing the pandemic, which included closing businesses, schools and other public gatherings and enforcing the closures with sanctions. The Namibian Employers' Federation challenged the constitutionality of these proclamations on two grounds. The first was that the proclamations were *ultra vires* the powers granted to the President under the Constitution, in that the proclamations sought to regulate areas of employment law, including imposing criminal sanctions for non-compliance. The second challenge was levelled against the delegation of powers to members of the Cabinet during the State of Emergency.

In the High Court, a bench of three judges struck down parts of the impugned regulations finding unconstitutionality under both grounds of challenge.[49] Regarding the first challenge, the Court held that the President's regulations were not specifically with the purpose of dealing with the COVID-19 situation that had given rise to the emergency, and therefore, they were not authorized by the provisions of the Constitution dealing with presidential powers during a

[49] *Namibian Employers' Federation and Others v President of Republic of Namibia and Others* [2020] NAHCMD 248.

State of Emergency. They failed the test of legality.[50] With regard to the question of lawful delegation of the President's powers, the Court held that the powers had been granted to the President alone, and several of the delegations amounted to a total abdication of his presidential responsibilities.[51]

In the carefully balanced judgment, the High Court's approach was respectful of the President's position and considered the need to be practically minded when addressing matters during an SOE. However, the High Court was also strict in upholding the provisions of the Constitution and did not permit the President to be placed above the law, even refusing to accept an affidavit attested to by the Attorney-General that sought to describe the President's decision-making process. The Court held that this was hearsay in the absence of an affidavit of the President himself. In making such a finding, the Court stated that:

> Whatever sensibilities may be evoked by the need to have the President depose to an affidavit, the matter must, in our view, be considered from another perspective, namely, the gravity and invasiveness of the powers the Constitution imbues on the President in Article 26. The powers are enormous and may serve, where appropriate, to suspend the exercise and enjoyment of some fundamental rights prescribed by the Constitution. For this reason, there would be no person better placed to account for how the powers were exercised and why, than the repository of the power, the President himself.[52]

On appeal, the Supreme Court (NSC) also stated that it was applying the test of legality to test the constitutionality of the President's regulations, stating that 'the President can only suspend the operation of laws for the purpose stated in the article.'[53] The NSC stated that 'it is a right guaranteed by the Constitution to live under, to be governed by and to exercise rights granted by the ordinary laws of the land. Legality and the rule of law which are the cornerstones of the Constitution demand no less.'[54]

The NSC focused the analysis on whether the regulations were 'reasonably justified,' a standard embedded in the empowering provision, article 25(6)(b), itself. In determining what would be 'reasonably justified', the Court considered whether the regulations were reasonable and rational. The Court looked at reasonableness and rationality separately. Looking to the UK and South Africa for guidance on what constituted a reasonable decision, the NSC held that the conduct or decision 'will not be reasonable if no functionary invested with the power to make

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[50] Ibid [83].
[51] Ibid at [90].
[52] Ibid [33].
[53] *President of the Republic of Namibia and Others v Namibian Employers' Federation and others* 2022 (3) NR 825 (SC), [105].
[54] Ibid [105].

it and possessed of all the facts which include its potential harmful consequences, would have taken the impugned decision.'[55]

With regard to rationality, the Court adopted the reasoning of Chaskalson CJ in *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others*[56] that decisions must be objectively and rationally related to the purpose for which the power was given, regardless of whether the decision-maker mistakenly believed the decision to be rational.[57]

The NSC then laid down considerations for determining whether a decision is reasonably justifiable in a State of Emergency:

> (a) Is its stated objective (mischief) legally permissible?
>
> (b) What are its consequences on those affected?
>
> (c) The extent of the harm or intrusion cannot be immaterial, and therefore;
>
> (d) it is an important consideration whether the stated objective or mischief had the potential to cause disproportionate harm to one person or group of persons compared to another. In that inquiry, the test is not what the court considers would have been a better solution to the problem that faced the President but rather whether the measures he adopted to address the problem fall within a range of reasonable solutions to address the problem;
>
> (e) the farther removed the measure implemented by the President from dealing with the situation that has given rise to the state of emergency (in this case the pandemic), the higher the burden of justification;
>
> (f) the more harmful the measure on existing rights, the less reasonably justifiable it becomes;
>
> (g) at all events, the President bears the onus of justification, once a measure has been challenged and sufficient material placed before court on affidavit by aggrieved persons that rights have been infringed.[58]

When the regulations of the President were weighed against these factors, the NSC held that the regulations 'failed to strike a balance fairly and reasonably between the competing interests of employers and employees' and that the 'disproportionate harm occasioned to employers' meant that the regulations fell outside of the 'range of reasonable courses open to the President' and were therefore irrational and unconstitutional.[59]

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[55] Ibid at [116].
[56] *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241.
[57] Ibid [85-86].
[58] *President v NEF (SC)* supra note 53, [118].
[59] Ibid [141-2].

On the second ground of appeal that related to the delegation of the President's powers, the NSC read in implied powers to delegate the President's legislative powers, and stated that without implied powers in article 26, tackling an SOE would be impossible, and that where the repository of a power 'places limits on the delegated legislative power and makes it subject to his or her prior approval, such a delegation would not be *ultra vires*.'[60] Giving the President the benefit of the doubt that he would ensure that such safeguards were in place, the NSC held that the challenge to the impugned regulations was premature and overturned the High Court's decision on this ground.[61]

These *NEF* cases show a sophistication in the Courts' handling of the matters. The Courts did not shy away from scrutinising the President's conduct for its legality. The NSC looked to the text of the empowering provisions of the article in the Constitution and sought to provide a test, or at least guidelines, for determining whether the President's measures were 'reasonably justified.' This approach to judgment writing enables future courts to build on the principles laid down in this judgment and contributes towards the development of a coherent jurisprudence.

In determining reasonable justification, the NSC's standard for what constitutes 'reasonableness' encompasses a range of acceptable options that may be available to an informed decision-maker considering the impact of the measures. Here, the Court implicitly accepts that the determination of what measures to put in place was a discretion belonging solely to the President. The Courts were willing to scrutinise the measures only to determine their reasonableness and whether they were 'objectively rationally related' to the purpose of the power. The Court does not seek to usurp that function.

The Courts' approach to the interpretation of the human rights issues in the case shows a rights-centred approach in balancing the regulations against the impact of those regulations on the rights involved. Thus, the test for legality is not merely a textual exercise, but it also places the legality of the President's measures within the context of the Constitution's human rights agenda as a whole.

This case is one of very few in which presidential conduct is directly challenged, and so it provided an important opportunity for the NSC to clarify its approach to determining the legality of high executive conduct, an opportunity from which the NSC did not shy. The

[60] Ibid [93].
[61] Ibid [92-4].

guidelines that the Court laid down for determining reasonableness and rationality of presidential powers can help guide future Presidents in predicting the standards expected of their conduct and assist the Courts in determining the legality thereof.

IV. Challenges to COVID-19 measures: Seychelles

In Seychelles, not a single case was brought to challenge the actions taken by the President and the Cabinet during the COVID-19 pandemic. Rather than acting under the SOE provisions in the Constitution, the President assumed the position as the Minister responsible for Health. Using this power, he amended existing infectious disease regulations, enabling certain measures to be taken during a Public Health Emergency (PHE). These regulations already permitted wide-ranging restrictions of rights during a PHE, and the President's amendment included the addition of the powers to restrict entry and exit from Seychelles, to enforce compulsory medical examinations, to amend the offences and sentences imposable for breach of the regulations (including the offence of absconding from quarantine) and to enable the prohibition or restriction of movement of persons outdoors.[62]

The President appointed a 'Public Health Commissioner', who was tasked with directing the national response under the Public Health Act and would exercise the powers under the Infectious Disease Regulations. The Public Health Commissioner then declared a Public Health Emergency in Seychelles under section 25(5) of the Public Health Act, 2015 and the Commissioner and the President went on television that evening to announce the introduction of measures under the PHE regulations.[63] These measures included a ban on foreign travel and the immediate prohibition of the return of any foreign workers who were outside of the country on that day, regardless of whether they had a valid work permit or interests in Seychelles.[64] The measures also closed schools and called up the military forces, including those who had left the Defence Forces in the previous three years to assist with enforcing the restrictions.[65] In the weeks that followed, curfews would be imposed, businesses would be shut and individuals would be prohibited from travelling between districts. The military would patrol the streets

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[62] Public Health (Infectious Disease) (Amendment) Regulations, 2020 SI 42 of 2020, 23 March 2020.
[63] Public Health Emergency Notice, 2020 SI 31 of 2020.
[64] Daniel Laurence 'Work permits revoked for expats outside Seychelles; gov't eyes rising unemployment' *Seychelles News Agency* 3 August 2020. Seychelles has approximately 20,000 foreign workers on two-year renewable contracts, many of whom have lived in the country for more than ten years. Any foreign worker outside of the country on 31 July 2020 had their work permit cancelled without taking into account the personal circumstances of any of the individuals affected.
[65] 'Address by President Danny Faure on measures to address the COVID-19 situation' State House, 20 March 2020 available at https://www.statehouse.gov.sc/www/news/4777/address-by-president-danny-faure-on-measures-to-address-the-covid-19-situation.

enforcing compliance. This was done without invoking the constitutional SOE provisions, which are the only constitutional provisions permitting derogation of rights and the deployment of the military domestically.[66]

Many decisions and acts by the executive during this period could have been reviewed or challenged on the grounds of constitutionality, including the limitation of rights without a declaration of an SOE, the imposition of stay-at-home orders and curfews, the military intervention and the immediate cancellation of the work permits of all foreign employees (including long-term residents and business owners) outside of the country on 31 July 2020 with no consultation, notice or reasons given. However, no challenges were brought.

This raises an interesting question of why no cases were brought in Seychelles under the Public Health Act or the Constitution, despite the availability of enabling constitutional provisions and laws. Perhaps this is because of Seychelles' smallness – there are fewer potential litigants in the country. Or, perhaps, the smallness enables affected individuals to approach the executive directly?[67] Another possibility is that this shows a lack of trust in courts or a fear of executive reprisal. It is, furthermore, possible that the legal profession advised against approaching the courts because of the high likelihood of a petition being dismissed on a technicality at a preliminary stage, as is often the case with cases involving the President and the conduct of the high executive.[68] These are all plausible explanations that are likely to have contributed to the dearth of litigation during the pandemic.

V. Conclusion – Courts and the executive in crisis times

This brief overview of cases relating to the COVID-19 pandemic illuminates the roles that the courts in Malawi, Namibia and Seychelles play in holding their high executive accountable for the use of power during times of national emergency, and it illustrates some of the characteristics of the review of executive conduct by the judiciary found in these countries. The pandemic created an ideal natural experiment for comparing judicial responses to executive power assertions across the three countries. All faced similar challenges simultaneously: emergency executive powers, constitutional rights restrictions, and democratic governance

[66] Chapter III Part III of the Constitution.
[67] In a 2022 Annual Report, the Ombudsman lists direct access to the Office of the President as a form of dispute resolution in Seychelles. '*Annual Report of the Ombudsman, 2022: The Ombudsman- Righting Wrongs'* 31 January 2023 available at https://www.nationalassembly.sc/publications/reports/annual-report-ombudsman-2022-ombudsman-righting-wrongs, 3.
[68] See the discussion in Chap Five.

under crisis conditions. Yet, the recourse to the courts and the judicial responses reveal strikingly different patterns of assertiveness and effectiveness.

While there are more cases filed challenging executive conduct in Malawi, the courts' approaches are still not fully aligned. The incidence of cases brought demonstrates confidence in the judicial role during a crisis, and the judgments show judicial assertiveness within that role as the majority of the three courts were willing to constrain the use of executive power, even in emergency circumstances. The pluralistic outcomes suggest that the jurisprudence is still lacking in jurisprudential coherence. The inconsistency between the cases reveals a lack of coherence in approach. However, the reasoning in *Kathumba* and *Xiaoxiao* shows a developing principled approach to determining the constitutionality of executive conduct using constitutional review, this sort of detailed reasoning connects developing constitutional jurisprudence to underlying constitutional principle, strengthening the constitutional coherence in the system. Therefore, while the Malawian jurisprudence could be identified as active but pluralistic, it is showing positive signs of development.

The Namibian High Court and Supreme Court took similar approaches that were both grounded in the rule of law and that applied the principle of legality. The NSC's approach considered both 'rationality' and 'reasonableness' within its assessment of 'reasonably justifiable' presidential action. The NSC reasoning shows careful balancing of the needs of the government to respond appropriately to the pandemic and the requirement to act under the Constitution. While there were fewer cases in Namibia, the courts' intervention was decisive and jurisprudentially consistent even when reviewing the actions of the President. This consistency was firmly based in the jurisprudential and constitutional principles which illustrates a development towards coherence. The judicial response is indicative of institutional courage based on coherent legal principle.

The courts in both Namibia and Malawi can be seen to be engaging in a dialogue with the executive about what would be deemed appropriate executive conduct in times of national crisis under the current constitutional regimes. In *Kathumba,* the Court even pointed towards areas of law reform that may be appropriate.

It is of interest that in each of the countries the approach of the courts to the judicial-executive relationship is not much different in times of crisis from how it is during times of ordinary governance. In Malawi and Namibia, this reflects an affirmation of the rule of law, that the government is subject to the law and judicial scrutiny during crises. This consistency

would suggest the courts in those countries refuse to relax their legal standards or deference simply due to crisis conditions. By not bending their legal standards these courts reinforce their own legitimacy and independence.

Times of crisis can prompt governments to claim broader powers and less oversight, to prioritise security or expediency over liberty and human rights. By not altering their approach, courts act as a meaningful check against potential overreach helping to preserve individual rights during such times when constitutional rights are most vulnerable. A consistent judicial approach signals that legal principles are not optional or flexible based on context. It preserves the separation of powers, reinforces civil liberties, and upholds democratic values even under extraordinary pressure.

However, this survey also illustrates how the Seychellois courts are missing from the dialogue with the executive, and their dormancy potentially enables abusive executive conduct to go unchecked. The lack of cases brought could indicate distrust in the courts, the availability of alternative means to obtain relief or other political reasons that stifle turning to the courts. However, this finding, too is consistent with the reduction of cases that have been brought since 2017, and this dormancy undermines the mechanisms for judicial review in the constitution.

CHAPTER SEVEN
FINDINGS, RECOMMENDATIONS AND CONCLUSIONS

> *If judges consciously acknowledge that they are 'social engineers', and if they exercise their review powers in a purposive and progressive manner, 'classification' need not necessarily yield narrow or inhibiting results*.[1]

I. Introduction

The judicial-executive relationship in Africa is still often described as 'an executive that is too strong and a judiciary that should be stronger.'[2] The new constitutions introduced in Malawi, Namibia and Seychelles in the 1990s sought to constrain executive power primarily by introducing a greater role for the courts in holding the President and high executive accountable for their use of power.

Calabresi argues compellingly that long-term success of constitutional systems is determined by their ability to implement the presence of an independent court system that follows the rule of law, has the power of judicial review over national legislative and executive acts and has the existence of a meaningful system of checks and balances.[3] If the judiciary's separation of powers role remains underdeveloped (nascent) or inauthentic (lacking appropriate localisation of the terms and principles), this may threaten the success of the constitutional order as a whole.[4]

The judicial check on the exercise of high executive power is not only beneficial for constitutional democracy, but it is a constitutional imperative. The courts play an interpretative role in determining the meaning of constitutional provisions, and they can develop 'a system of separation of powers [which] can allow the citizenry to monitor and constrain its inevitably imperfect agents … [through] proliferat[ing] the points of access to government.'[5] Furthermore, courts can engage the dialogical potential of judicial review to ensure that every exercise of power is justified by law and that governments 'rest[] on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command.'[6]

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[1] DM Pretorius '"What's past is prologue": An historical overview of judicial review in South Africa – Part 2' (2020) 26(2) *Fundamina* 424, 449, fn65,.
[2] James Fowkes 'Relationships with power: Re-imaging judicial roles in Africa' in Charles M Fombad (ed) *Separation of Powers in African Constitutionalism* (2016) 205-206.
[3] Steven G Calabresi 'The global rise of judicial review since 1945' (2020) 69 (3) *Catholic University LR* 401, 32.
[4] Ibid.
[5] Cass R Sunstein *Designing Democracy: What Constitutions Do* (2001), 99.
[6] Etienne Mureinik 'A Bridge to Where?: Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31, 32.

The new constitutional role for the courts in Malawi, Namibia and Seychelles left judges to redefine their relationship to the other branches of government. As cases were brought to the courts, they had to fashion new standards for reviewing the constitutionality of legislation and determine the extent of their constitutional authority to review executive conduct.

As important as test cases are for establishing the availability of judicial intervention, developing and maintaining a steady and coherent jurisprudence is important in creating predictability in court decisions and in establishing appropriate standards for executive conduct within the constitutional framework. Having a clearer view of the jurisprudence that is developing in each country can lead to the standardisation of the approach to judicial review of executive power, regardless of which form is chosen. This, in turn, promotes the rule of law, reinforces the legitimacy of the judiciary, curbs inappropriate judicial intrusion into the executive's discretionary space, assists the executive with exercising its power and encourages dialogical exchange with the legislature and the executive.

Predictability requires a detailed and systematic engagement with the principles underlying the jurisprudence as well as an attempt to enunciate guidelines to assist future judges as they are faced with similar cases.

Establishing appropriate standards requires engaging with the constitutional provisions, the existing law and the principles underlying the Constitution, as well as the contextual history that led to the adoption of this constitutional arrangement. This can also enable the executive to adjust its conduct appropriately to such standards.

In all three countries in this study, the authoritarian rule prior to constitutional renewal involved harsh backlash against challenges to the government. This may still affect the willingness of litigants to bring cases and overly deferential precedent may still influence the approach taken by a judge in a particular case. Moving past these factors will take time. Coherence and clarity in the approach of the courts can create certainty, encourage litigants to bring cases and motivate judges to determine them without fear of reprisal.

This thesis has explored the evolving relationship between the high executive and the judiciary in Malawi, Namibia and Seychelles in the three decades since they adopted rights-based democratic Constitutions, to assess whether the judiciaries have developed a clear set of principles by which to hold the high executive accountable to constitutional standards. These standards are needed to create grounds for review, procedures for bringing cases and remedies

for unlawful or unconstitutional conduct. Chapters Three to Five surveyed the histories, the constitutional infrastructure and the jurisprudence of the courts in Malawi, Namibia and Seychelles to consider how the courts have developed their new constitutional review power and how they have identified the developing, problematic or lacking areas of jurisprudence.

A study of the cases brought during the COVID-19 pandemic enabled a high-level comparison of the approaches of the courts in the three countries to executive, and particularly presidential, conduct during a time of national crisis.

This thesis is the first detailed systematic engagement in this area of law for these jurisdictions and serves as a point of reference for future judicial decisions and a starting point for future studies. It also seeks to encourage judges to focus on developing coherence in their jurisprudence. This coherence requires that judgments are as consistent as possible with previous jurisprudence while reinforcing the principles that underly the constitutional text itself.

The findings, results and recommendations are outlined and discussed below.

II. Findings

(a) *Country-specific findings*

The courts in Malawi, Namibia and Seychelles have established appropriate standards for reviewing high executive conduct, however, there are different levels of predictability and clarity in the jurisprudence. Moreover, in Malawi and Namibia these standards have been effectively utilised to hold the high executive accountable as their Constitutions require. In Seychelles, despite a promising decade of development from 2007-2017, the jurisprudence is still underdeveloped as a result of courts avoiding determining the merits of cases involving the high executive.

i. *Malawi – institutional courage with jurisprudential confusion*

The high executive in Malawi still yields extensive power, despite the introduction of more accountability to the National Assembly (NA) and guarantor institutions. The Malawian judiciary is frequently relied on to hold the executive accountable, particularly in political matters. The resultant jurisprudence reveals a system striving to gain its own voice in holding the executive accountable. This is undermined, however, by judgments that often lack detailed and principled reasoning with justification for the adoption of borrowed principles. Some

judges, particularly on the MSCA, avoid challenges to the executive through the strict application of procedural rules and by avoiding engaging with existing Malawian jurisprudence through overreliance on foreign jurisprudence. However, cases such as the 2019 election cases[7] and *Kathumba*[8] reveal a developing jurisprudence that is robust, well-reasoned and unafraid of confronting the President.

The Malawian cases from 1990 to 2017 blended common law judicial review grounds (illegality, irrationality, procedural impropriety) with constitutional grounds for review (breach of fundamental rights and constitutional compliance grounds), creating a uniquely Malawian approach to constitutional review. The introduction of new civil procedure rules in 2017 introduced a new type of constitutional review, separating it from administrative review, and thus, separating the previously blended judicial-constitutional review approach.[9] The rules appear to introduce a legality standard in place of the common law grounds for review. There is still uncertainty as to what this entails, which will resolve over time with careful judicial interpretation. The rules retained some procedural requirements that may act as barriers to access the courts.

The lack of constitutional jurisdiction of a single judge of the HC adds the complicated procedure of requiring certification by the Chief Justice and the empanelling of a three-judge bench. This procedure may deter litigants, delay the resolution of cases and cause confusion where the pleadings were drafted for the HC and may not be fit for determining the constitutional question without supplementing or amending the pleadings.

Many Malawian cases illustrate judges interpreting the role of the high executive through the lens of the principles underlying the Constitution, including, primarily, the rule of law. However, there is still no standardised approach to constitutional analysis of executive conduct and as the COVID-19 cases illustrate, the outcome of similar cases involving the executive can be vastly different. Thus, while having developed appropriate standards, the Malawian courts lack jurisprudential predictability and coherence. However, there is sometimes deep constitutional engagement that indicates that constitutional coherence is developing.

[7] *Mutharika & Anor v Chilima & Anor* [2020] MWSC 1.
[8] *R (oao Kathumba & Ors) v President & Ors* [2020] MWHC 8.
[9] Courts (High Court) (Civil Procedure) Rules, 2017.

ii. *Namibia – maturing constitutional confidence*

Namibian jurisprudence is the most coherent of the three jurisdictions and the development of the standard of legality has proven able to cover a wide range of executive conduct – from article 18 administrative review and fundamental rights litigation to broader forms of constitutional review. For non-administrative executive conduct, the courts apply a standard of legality, but higher levels of scrutiny are required where article 18 is invoked, which requires reasonableness, fairness and transparency in addition to legality, and where fundamental rights are involved.

The Namibian jurisprudence illustrates a nuanced, case-by-case development of standards and principles for reviewing the conduct of the high executive. A general approach to constitutional review has developed that includes a baseline inquiry of legality, which requires the courts to look at the guiding provisions in the context of the Constitution as a whole and interpret them through the lens of the Constitution. Even where the matter touches on national security or highly discretionary areas, the Namibian courts have required rational justification from the executive.

Legal practitioners in Namibia show a preference for bringing challenges to executive conduct through the article 18 right to administrative action, and the courts have, at times, applied a wide definition to the terms 'administrative action' and 'administrative official' to facilitate the hearing of the merits of such cases.

The cases also reveal a reticence to challenge presidential conduct, and the increasing dominance of SWAPO over the past 30 years has potentially affected the willingness of litigants to directly challenge the use of high executive powers. However, the courts have established that even presidential conduct must meet the standards of legality.[10]

The 2014 Court rules[11] enforce reliance on Namibian case law and justification for invoking foreign precedent. This requires the courts to grapple with previous and borrowed precedent and work towards developing more coherent jurisprudence.

The wide principles of standing and the absence of a requirement of an application for leave to review enhances access to the courts and reinforces the Constitution's emphasis on access

[10] *President of the Republic of Namibia and Others v Namibian Employers' Federation and others* 2022 (3) NR 825 (SC).
[11] Rules of the High Court of Namibia, 2014, r 130.

to justice. It also ensures that cases involving the determination of the legality of executive conduct are not prematurely extinguished on procedural grounds.

Namibia, with its better law reporting, active civil society and history of academic engagement, shows a more sophisticated jurisprudence regarding the judicial-executive relationship than the other two countries in the study. The judges of the Namibian Supreme Court, in particular, tend to express the underlying principles of their reasoning and lay out tests, guidelines and approaches to assist with developing the jurisprudence. However, the guidelines would still benefit from academic or further judicial systematisation building on the start made by this thesis. Overall, the Namibian jurisprudence has the most promising coherence, it shows emerging standards and largely predictable outcomes.

iii. *Seychelles – theoretical robustness, practical dormancy*

Seychelles is the smallest country in the study with the smallest legal and political elite. These factors, the history of executive dominance and a history of judicial capture have undoubtedly affected both the willingness of parties to come to court to challenge the executive and the quality of the resultant jurisprudence.

The developments in the jurisprudence from 2007 to 2017 laid foundations for judicial review of executive conduct, however, the standards to be applied, which are based on English common law judicial review standards, remain underdeveloped. Many judicial review cases and Constitutional Court cases end in dismissal for procedural irregularities, including lack of standing and insufficient pleadings. There have been few cases to successfully reach the merits of the case since the *Volcere* judgment.[12] The predictability of case dismissal before reaching substantive merits of cases indicates systemic issues within the judicial process – either abdication of the judicial role or a system-wide failure in procedural compliance, specifically, the drafting of pleadings.

Moreover, there is an ongoing confusion about procedures for bringing cases: which court to approach, and which provisions of the Constitution to use – whether article 125(1)(a), article 125(1)(c), article 130, or article 46. The court rules that govern judicial review and

[12] *Volcere v Felix & ors* [2018] SCCC 4, *Volcere v Georges & Ors* [2018] SCCA 43.

Constitutional Court cases have not been revised since 1995 and noticeably hinder access to the courts.[13]

Of those cases against the executive that have managed to pass the threshold procedural questions, very few have overturned executive conduct and none have overturned presidential conduct. The reliance on foreign precedents without adequate engagement with local jurisprudence or constitutional principles contributes to a lack of coherence in the case law. Seychellois jurisprudence is also stunted by under-resourcing, lack of law reporting and inadequate training in Seychellois constitutional law. As a result, the jurisprudence in Seychelles remains underdeveloped and inconsistent.

However, the jurisprudence that emerged in the final days of the authoritarian state (1990-1993) and the Court of Appeal jurisprudence from 2007 to approximately 2017 adopted the developed English grounds for judicial review and established principles for holding the high executive to account for its use of power. These are similar standards to those that have been effectively applied in Malawi and modern English law. They could be developed in Seychelles to achieve the intentions of the Seychelles Constitution to subordinate all executive conduct to the Constitution.

(b) Comparative assessment of findings

The central question of whether courts in post-independence African democracies have developed meaningful 'bite' in holding the executive accountable reveals a complex picture when examined across the experiences of Malawi, Namibia and Seychelles. Thirty years after the constitutional transitions of the 1990s, these three jurisdictions demonstrate markedly different trajectories in judicial-executive relations, offering important insights into the conditions under which courts can effectively serve as accountability mechanisms in presidential systems.

The survey of cases across these three countries reveals that the development of judicial effectiveness is neither uniform nor predictable but rather depends on a complex interplay of institutional design, political context, jurisprudential engagement and development and judicial courage. The table below summarises the findings across the four analytical questions for each

[13] Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules, SI 33 of 1994; Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Authorities) Rules, SI 40 of 1995.

jurisdiction relating to institutional access and incidence, effectiveness, normative foundations, and jurisprudential and constitutional coherence.

Table: Overview of country findings

Dimension	Malawi	Namibia	Seychelles
Year of constitution	1994	1990	1993
Estimated Population	21 million	3 million	100,000
Peaceful political change since adoption of constitution	Yes	No, but peaceful contested elections	Yes
Institutional Access & Incidence	**Active:** Courts regularly called upon; high public trust; active judicial engagement despite procedural barriers	**Partially active**: Courts increasingly emboldened; scope of review broadly interpreted, low incidence of presidential challenge	**Dormant**: Legal frameworks exist but restrictive procedural rules limit access; declining cases post-2015; non-litigious culture with high executive
Institutional Effectiveness	**Somewhat effective**: Courts overturn executive conduct in sensitive matters; willing to challenge judicial interference; varying judicial timidity	**Effective**: Detailed reasoning and principled application; constitutional control recognised; limited challenges to highest executive levels	**Ineffective:** Routine dismissal on technicalities; shallow review when merits reached; deference except 2007-2017 period
Normative Foundations	**Mixed:** Hybrid - UK common law with Malawian constitutional approach to constitutional review, some unreflective English borrowing; emerging 'principled approach'	**Strong:** Hybrid, inherited South African law with constitutional principles of legality and rule of law; principled borrowing with justification requirements; coherent article 18 framework	**Weak:** Inherited UK common law principles but uncritical borrowing; fragmented approaches; inadequate training undermines application
Coherence Jurisprudential coherence	**Weak:** Shallow reasoning; inconsistent outcomes in similar cases; pluralism and jurisprudential confusion	**Strong:** Detailed legal reasoning; principled foreign law application	**Very Weak:** inconsistent outcomes, contradictory approaches
Constitutional coherence	**Medium:** lack of doctrinal integration but gradual development, prioritises English law procedure over constitutional justifications	**Strong:** principled constitutional engagement, few instances of presidential review	**Weak:** inconsistent engagement with constitutional developments and norms, especially since 2017

i. *Testing the judicial role*

The courts in Malawi, Namibia, and Seychelles have undergone significant evolution in their roles in holding the high executive accountable for its use of power with the adoption of rights-based democratic constitutions. A watershed such as constitutional renewal has a disruptive effect on the existing jurisprudence, and with the introduction of a new role for the courts in the 1990s constitutions in all three countries, some confusion in the jurisprudence is expected, as is some striving to redetermine the relationship with the executive and to test the parameters of the new role.

Since the introduction of their constitutions, all three countries have seen a 'testing' of the courts' roles and the limitation of executive power. Cases include challenges to Presidential conduct during the COVID-19 pandemic, election petitions and disputes regarding the appointment of judges and ministers. Thus, the courts have been expected by the public to play a 'representation-reinforcing' role in providing a forum for addressing malfunctions in the democratic process in each of the countries.[14] In Namibia and Malawi, the courts have played that role and, on many occasions, have found conduct of the high executive to be unconstitutional and illegal. In Seychelles, however, only administrative executive conduct has been found unconstitutional.[15] However, in all three jurisdictions there are also instances where the judges have avoided taking tough political decisions, deferred to the executive and failed to prevent executive overreach.

In all of the jurisdictions, cases that challenge high executive conduct have been brought using all five of the various forms of review identified in Chapter Two – common law judicial review, fundamental rights litigation, litigation under the right to fair and reasonable administrative action, constitutional review and constitutional process review. Some forms of litigation were more dominant in one country and less pronounced in another. For example, article 18 litigation in Namibia is frequent, whereas the Malawian counterpart under section 43, is seldom invoked to challenge high executive conduct. In Seychelles, common law judicial review under article 125(1)(c) remains favoured over constitutional routes.

[14] John Hart Ely *Democracy and Distrust: a Theory of Judicial Review* (1980), 103. See also, Rosalind Dixon *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age* (2023) chap 1.
[15] In *Michel & Ors v Dhanjee & Ors* [2012] SCCA 10 the Constitutional Court had overturned the reappointment of a judge, but the Court of Appeal overturned that finding.

In all three countries, there are instances of judges holding the high executive accountable in the face of executive pushback and direct attacks on the judiciary. This was seen in Malawi after the 2019 elections, in Namibia in the early 2000s and in Seychelles after the 2015 elections. The ability of judges to stand firm in the face of executive intimidation is an indicator of judicial independence and sign of health in the democracy.

Thirty years after constitutional transition, all three countries remain works in progress in developing effective judicial-executive balance. This reinforces the intuitive conclusion that meaningful judicial empowerment requires generational change and sustained institutional development rather than immediate post-transition transformation.

ii. *Continuing presidential exceptionalism*

Consistent with studies of other African jurisdictions, the research illustrates that in the three countries, presidential dominance persists by virtue of the wide powers given to the office under the Constitution and the societal pre-eminence ascribed by practice.[16] The other branches of state, the legislature and the judiciary, remain subordinate to the executive both by practice and by the practicalities of the constitutional provisions.[17]

In all three countries, the executive has controlled and dominated the legislature, disabling the supervisory power of the legislative branch. In Seychelles, there was a period from 2015 to 2020 when the presidency and National Assembly were held by different parties. This caused a political impasse with increased scrutiny of the executive. However, this was an anomaly. The norm for Seychelles, and the other countries, is that the President's party controls the National Assembly.

This leaves the judiciary primarily responsible for holding the executive to account and sets up the judiciary in direct opposition with the executive. As a result, the courts have emerged as the primary space in which executive power is challenged to protect the populace from breaches of human rights and abuse of power.

All three constitutions facilitate presidential dominance by enabling the President to exercise wide-ranging powers. In the political and legal settings, there is still pervasive

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[16] Charles M Fombad 'An Overview' in Fombad (ed) *Separation of Powers in African Constitutionalism* (2016), 70. Muna Ndulo 'Presidentialism in Southern African states and constitutional restraint on presidential power' (2002) 26 *Vermont LR* 769, 771.

[17] H Kwasi Prempeh 'Presidential power in comparative perspective: The puzzling persistence of imperial presidency in post-authoritarian Africa' (2007) 35 *Hastings Constitutional Law Quarterly* 761, 763.

presidential exceptionalism and some reticence to challenge presidential conduct directly in court. Moreover, Presidents are seldom called physically before the National Assembly to account for their actions. Presidents are protected by immunity provisions and residual common law deference yet, they hold the most power, including the powers of pardons, appointments, initiating laws and developing policies. Holding the President accountable for their use of power is complicated by several factors.

First, the historical power of the incumbent may complicate presidential accountability. For example, the SWAPO dominance over the full 30 years in Namibia may have affected the number of cases brought against the President in Namibia because of a reticence to challenge the party credited with leading the national liberation. Furthermore, René's re-election in Seychelles after the adoption of the 1993 Constitution and his long history of brutal retaliation may explain why there were so few cases against the President brought while he was still in office and the ongoing weak legal culture of constitutional challenge of high executive conduct.

Secondly, presidential accountability is complicated by pre-constitutional precedent that held that the exercise of prerogative powers was non-justiciable. Pre-1970s English jurisprudence still finds its way into judgments, often without a discussion about its appropriateness in a modern democratic constitutionalism.

Thirdly, presidential accountability is complicated where a country has a small population with entwined elites, where litigants or judges could face repercussions for findings against the President – particularly for judges who would still seek promotion to higher courts.

The comparative study in this thesis reveals the significant impact of political competition on judicial effectiveness. Malawi's more competitive political environment, evidenced by six different presidents across seven elections, appears to have created space for more robust judicial intervention, particularly when challenges are brought to presidential conduct. In contrast, the continued dominance of liberation movements in Namibia and Seychelles (until 2020) may have constrained judicial assertiveness through both political pressure and reduced incentives for opposition litigation.

iii. *Empowering and implementation are equally important*

Therefore, the findings from the three countries illustrate that equipping courts with the power to hold the high executive to constitutional standards through constitutional provisions is necessary, but not sufficient, to constrain executive power in modern African democracies.

These powers require careful contextual development of jurisprudence that is integrated into the broader constitutional system, thus taking into account the challenges of institutional design and legal and political culture. This development depends on factors such as the independence of the courts, procedural provisions enabling cases to be brought, public faith in the judicial system and a judicial willingness to engage with the constitutional mandate by developing the norms required to review executive power.

Moreover, all three countries demonstrate the double-edged nature of procedural requirements for judicial review. While such requirements serve legitimate purposes in preventing frivolous litigation, they also provide convenient escape routes for judges seeking to avoid politically sensitive decisions. The Malawian experience shows that restrictive leave requirements and standing rules can be overcome, however that they can also be utilised to deny leave to review. The Seychelles experience demonstrates how such procedures can effectively neuter constitutional judicial review. Namibia's more expansive approach to standing and lack of procedural gatekeeping in constitutional review cases certainly increases accessibility to the courts and forces engagement with the merits of the case.

iv. *Significance of legal origin and legal reasoning*

Despite having similar empowering constitutional provisions, each country has experienced different developments in their jurisprudence. The Constitutions were drafted at the same time, they reflect the prevailing international political and legal theory of the early 1990s and they emerged from similar authoritarian governance. However, the implementation of the constitutional provisions relating to the judiciary and the executive is dependent on many contextual factors.

The legal origin of the public law in each country is a significant factor in the approach that the courts take to implementing the constitutional provisions. The absence of existing jurisprudential tools and in-depth academic discussion on constitutional judicial review in the 1990s led courts to borrow from their public law to inform their constitutional jurisprudence. The courts primarily turned to either the English principles on judicial review (Malawi and Seychelles) or the South African Constitutional Court's post-1993 constitutional review (Namibia).

English judicial review underwent a significant change during the second half of the 20th century and precedents from before that period include outdated concepts often ill-suited to the

specific realities faced by modern African courts. In Malawi and Seychelles, particularly, there are examples of judges referring to common law principles of English judicial review without considering whether this is still good law, constitutionally appropriate or relevant. In both countries, the reliance on outdated principles of judicial review has been used to justify a narrow or overly deferential approach to the role of the court.[18] Odinkalu warns of such an approach, stating that the first generation of constitutionalism, immediately post-independence was destroyed —

> not so much by the intolerance of the executive as by the enthusiastic abdication of judicial responsibilities by the persons and institutions mandated under those Constitutions to perform them, coupled with a readiness to share across national borders the wrong models and bad precedents.[19]

Namibia has not encountered the same problem with reliance on outdated concepts due to the fact that its borrowing has primarily been from post-1993 South African jurisprudence and the Namibian courts do tend to critically apply precedent when relying on it.

The quality of legal reasoning emerges as a crucial factor in embedding norms and building coherence. This distinguishes effective from ineffective judicial review. Namibia's emphasis on justified foreign borrowing and detailed constitutional reasoning promotes coherent development of norms and contrasts sharply with the shallower approaches seen in Malawi and Seychelles.

v. *Jurisdiction size does make a difference, but less than expected*

The study reveals that courts in micro-, small, and medium-sized commonwealth countries with populations of less than 25 million people face similar difficulties in exercising an effective horizontal accountability on the high executive despite their differing sizes.

Seychelles is indeed affected by its smallness. There are fewer cases that arise, the members of the bench are generally trained in foreign countries because of a lack of legal training in Seychellois law, there is sporadic law reporting and a lack of resourcing that affects access to research materials and there is a low number of legal practitioners. Moreover, the closeness of a small society means that judges might be less likely to take unpopular decisions against the executive, which may affect their prospects of promotion or result in victimisation. However,

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[18] DM Chirwa 'Liberating Malawi's Administrative Justice Jurisprudence from its Common Law Shackles' (2011) 55(l) *Journal of African Law* 105, 106.

[19] Chidi Anselm Odinkalu 'The judiciary and the legal protection of human rights in common law Africa: allocating responsibility for the failure of post-independence Bills of Rights' (1996) 8 *Annual Conference of African Society of International and Comparative Law* 124, 136-137.

these factors are not unique to Seychelles; social proximity, under-resourcing and insufficient numbers of legal practitioners affect larger developing countries, too.

However, Namibia's cases illustrate a sophistication that has not been developed from a long line of case law, but rather from judges who take the time to carefully consider the preceding cases and who exercise thoughtful and comprehensive judgment-writing skills to seek to develop the jurisprudence at every opportunity. This illustrates that intentional judicial reasoning can outweigh the impacts of smallness.

vi. *The importance and changing nature of legal culture*

The study reveals the importance of judicial culture in determining accountability effectiveness. The emergence of judges willing to embrace their constitutional role as executive watchdogs, rather than mere legal technicians, appears crucial for developing genuinely effective jurisprudence. The study highlights judicial willingness as a crucial but under-theorised element in constitutional effectiveness. While institutional design can create opportunities for judicial interventions, the actualisation of constitutional potential depends significantly on individual and collective judicial willingness to embrace difficult questions and resolve them through logical legal reasoning based on a principled constitutional approach. This personal dimension of constitutional development deserves greater attention in comparative constitutional scholarship.

The study also illustrates how legal culture is not static. All three countries experienced a distinct development of judicial review in the years immediately prior to the adoption of their new Constitutions. Judicial review was invoked in novel ways to protect against executive excesses and protect human rights, and judges were willing to accept these arguments, even in the face of authoritarian regimes. In Seychelles, there were no legislative amendments that led to that change; it happened simply through common law jurisprudential extensions. In Malawi, the United National Declaration of Human Rights was held to be directly applicable and justiciable, and courts relied on it to make constitutional findings. In Namibia, the adoption of Proclamation 101, a quasi-constitutional document that contained human rights, was significant for the same reasons. Similarly, in the UK, the legal culture in the 1960s changed rapidly to enable a greater scope for judicial review. Likewise, in Seychelles, constitutional review expanded rapidly in 2007, and contracted as quickly, in about 2017. This phenomenon could be the focus of future research.

vii. *Executive efficiency and democratic credentials arguments are less important to the courts than expected*

The courts in all three African democratic countries appear less concerned about their own democratic credentials, or promoting efficient executive decision-making, than would have been expected. In all three jurisdictions, the judges tend to focus on textual analysis of the legality of the conduct of the executive, with little ink spent on explaining the importance of ensuring that the governments are able to govern efficiently and effectively. In some cases, judges point to the democratic credentials of the executive, particularly to justify deference to the executive. However, the courts appear confident in their role and not concerned about the counter-majoritarian dilemma or their democratic credentials to hold the executive accountable.

Courts should not lose sight of their role in enabling the executive to govern effectively. This is underemphasised in the jurisprudence. We see dialogic exchange in the Malawian case of *Kathumba* between the courts and the executive in which the courts identify areas of reform that could assist with ensuring constitutional conduct in the future. This sort of interaction is helpful for promoting better government.

(c) Factors that inhibit the development of coherence

The findings challenge simplistic approaches to constitutional transplantation that assume similar institutional designs will produce similar outcomes across different contexts. The contrast between Namibia's sophisticated theoretical development and Seychelles' practical dormancy, despite comparable constitutional frameworks, demonstrates the complex mediating role of local factors in constitutional implementation.

There are multiple factors that are seen to inhibit the development of coherent review of high executive conduct. The individual country chapters have outlined some of the potential gaps or problems that the countries face. Some are identified below:

- In Malawi and Seychelles, the requirement to constitute a quorum bench to hear a constitutional matter, because a single first-instance judge does not have constitutional jurisdiction, creates confusion and time-wasting procedures.
- Difficulties with accessing primary legal materials, up-to-date case law and legislation can inhibit the development of jurisprudence. Seychelles and Malawi have sporadic publication of physical law reports and in Namibia, online

subscriptions to the law reports are not available to all judicial officers and individual offices or libraries are not all well-stocked. The online publication of legal sources available on free legal information institutes is rapidly improving but is still far from comprehensive.

- In all three countries, there is a lack of legal textbooks that review and systematise the jurisprudence, enabling judges and legal practitioners to critically engage with domestic precedent.
- A lack of continued legal education for judges and lawyers in current constitutional law affects the development of jurisprudence. It particularly affects Seychelles, which has little training in Seychellois constitutional law and to a lesser extent, this also affects Malawi and Namibia.
- In Seychelles and Malawi, there are more procedural steps in bringing cases, including leave to review requirements and strict standards for proving standing. The procedural uncertainty leads to cases being dismissed without determining the merits. Rethinking the procedures, clarifying the approach of the court to the procedures and enhancing access to courts through more constitutionally principled procedural rules may help to overcome this.
- In the case law from Malawi and Seychelles, we see instances of indiscriminate borrowing with little explanation as to the relevance of that case or its appropriateness for use. This affects the consistency and coherence of the jurisprudence when inappropriate precedent is adopted without sufficient localisation.

The solutions that are needed to address these gaps are highly contextual and nuanced and could be addressed in future work.

(d) *An approach to systematic, principled engagement by judges*

Throughout this thesis, examples have been provided of how courts have acted as effective safeguards against the abuse of high executive power. There are also many examples when the courts have failed to do just this. The development of a coherent and principled approach to reviewing high executive conduct requires systematic engagement with constitutional principles and existing precedent at every opportunity. A thorough reflection of that meaningful engagement in the texts of judgments is mandatory for coherence. This process requires an investigation by the court of:

- The plain language of the empowering provision and whether any standards of conduct can be imputed to that provision;
- Constitutional principles found in the preamble and provisions of the Constitution that have a bearing on how that power ought to be performed;
- The effect of the decision-maker's decision on individual rights, democratic institutions or the structural integrity of the constitutionalism;
- The executive decision-maker's justification and whether the court is bound to accept the justification for any prudential (such as polycentric policy decisions or state security) or democratic reasons (the exercise of a political discretion);
- Existing domestic jurisprudence related to this decision and executive conduct as a whole, and whether it is binding;
- The constitutional applicability and persuasiveness of foreign jurisprudence that might give guidance on evaluating the conduct.

Legal practitioners have a duty to provide arguments and information to judges during the litigation processes to enable the judges to engage with the arguments during their judgment writing. Judges should be empowered to ask to be addressed on these matters.

III. Recommendations

This thesis is merely the the beginning of the research that delves into the relationship between the courts and the high executive in Malawi, Namibia and Seychelles. Ideally, it will contribute to an ongoing discussion about how to strengthen and empower the judges of these courts to perform their legally-mandated constitutional role. The research findings give rise to several further topics for future academic exploration.

(a) *Further systematisation and academic engagement with the judicial-high executive relationship*

While standards are beginning to develop in the courts' exercise of their constitutional role, systematisation of the law would assist with consolidating it. This requires engagement from the bar, the bench and academia. All three countries would benefit from further academic research into the substantive and procedural norms that emerge from these cases. In addition, more in-depth discussions of the principles that are developing in the jurisprudence would also be advantageous. None of the three countries in this study have extensive, systematic academic

study into this topic to benefit judges, practitioners and students. Seychelles, in particular, has almost no secondary academic resources, and would benefit from such resources.

Future studies could also engage more closely with some of the themes that emerged in the background of this study, such as: How the judiciaries have balanced or resolved the tension between upholding the rule of law and democracy as competing constitutional imperatives? How to resolve the ambiguity that arises in judicial review terminology such as 'reasonableness' and 'rationality' to create greater coherence, and how the courts might approach the integration of pre-constitutional jurisprudence with developing new constitutional norms? Discussions could be had about whether a more significant normative separation is justified from the inherited colonial jurisprudence and how such a decolonising process may look. Moreover, whether greater emancipation from UK common law principles is recommended for normative development.

(b) Research into constitutionally appropriate procedural rules

Research that considers the continued suitability and constitutional appropriateness of court procedures that govern the bringing of constitutional review cases is required, especially in Malawi and Seychelles.

In the commonly cited case of *R (ex parte National Federation of the Self Employed and Small Businesses) v Inland Revenue Commissioner,*[20] the UK House of Lords stated that the right to refuse leave to judicial review is an important safeguard against courts being flooded and public bodies being harassed by irresponsible applicants for judicial review, and it safeguards the administration from being paralysed by legal challenges. This is not relevant in Malawi or Seychelles, where other barriers to accessing courts, such as high legal costs, lack of available lawyers, complicated procedures and potential executive retaliation prevent litigants from coming forward. Moreover, a commitment to promoting access to courts and fair civil procedures should not prevent litigants from raising matters. Particularly if the matters raised concern the constitutional governance of the country. This is not to argue for the complete removal of procedural requirements and correct court procedure, but rather to indicate how these procedural requirements can undermine the likelihood of legitimate matters reaching the substantive merits stage of proceedings.

[20] *R (ex parte National Federation of the Self Employed and Small Businesses) v Inland Revenue Commissioner* [1982] AC 617.

Work towards evaluating existing procedures and recommending 'best practices' would greatly assist Chief Justices and senior judges tasked with developing rules of procedure. Research is required to assess the procedural needs of the courts and test the suitability of processes that inhibit access to court.

(c) *Research into structural constraints on executive power*

More generally, research that focuses on mechanisms for lessening the strength of the executive president in Africa remains an important topic for further study. The role to be played by the courts must be considered without placing too great an expectation on the judiciaries; they are only one branch of state. The strengthening of the accountability function of the legislature and ways to support guarantor institutions also deserve careful consideration and reform.

In 2006, Prempeh stated that—

> the constitutional model that relies on the judiciary to uphold and protect constitutionalism (juridical constitutionalism) places too much faith in judicial review and emphasis on the courts' role and not enough on diffusing executive hegemony through horizontal and vertical power dispersion (structural constitutionalism).[21]

The reflection is at least partially correct, as modern constitutions do not effectively diffuse the power that the high executive has accumulated. However, it is not true that too much faith is placed in the role that the judiciary can play. Prempeh's statement implies that the analysis is a zero-sum equation. It could be differently conceptualised as a continuing progression of constitutionalism and simply part of what Rosenfeld describes as the dialectic development of constitutionalism.[22] The current focus of constitutionalism has been on strengthening the courts' role and 'diffusing' power through constitutional mechanisms, such as the introduction of guarantor institutions and greater checks and balances by the National Assembly. The next development could be a focus on the structural lessening of presidential power that Prempeh suggests.

(d) *Judicial resourcing*

The digital publication of free legal information, appropriate cross-jurisdictional forums for experience sharing and ongoing judicial education have the potential to bolster and support the individual judges as they develop their jurisprudence. The development of these resources

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[21] H Kwasi Prempeh 'Marbury in Africa: Judicial review and the challenge of constitutionalism in contemporary Africa' (2006) 80 *Tulane LR* 1239, 1244.
[22] Michel Rosenfeld 'Constitutional Identity' in Michel Rosenfeld and András Sajó (eds), The Oxford Handbook of Comparative Constitutional Law (2012), 766.

needs to also consider the sustainability of these projects to ensure that the judiciaries are not affected by project-funding limitations.

IV. Conclusion

As a final consideration, this study takes place more than 30 years after the courts were granted their new role. In legal terms, this is a short period of time. Judge-made law is developed through a slow and iterative process of analogical judicial reasoning. Legal principles can wax and wane over time. Moreover, it is a feature of the common law that principles, values and doctrines do not emerge fully-formed, but are 'fashioned, refashioned, developed, altered and changed over time.'[23] Over time, categories are fashioned and doctrine emerges based on the values that prevail in that legal sphere, and one can draw out what is considered as 'fundamental' in the body of law.[24] Over more time, it will develop into an established area of law with an 'admixture of normative and practical considerations'.[25] Even fully-formed, the values that underpin the body of the law may change, either from within the common law or from legislative intervention.[26]

Ultimately, the study of the three countries shows the efforts made by the courts in all three jurisdictions to establish the parameters of their role in holding the executive to account for use of power. The law in each country is at different stages of the long developmental process from a single instance judicial reasoning to a fully formed corpus of law.

In Africa, law was originally used to introduce and justify authoritarianism and this legacy has persisted through regimes and generations. The systems of autocracy created by colonial law and one-party authoritarianism can only be undone by the repeal of their provisions, the introduction of carefully crafted laws that restrict unlimited governing powers and the conscious application of those new laws in a way that reimagines governance. Modern African constitutions have sought to replace the previous enabling laws with ones that instil democracy and constrain executive power. In doing so, those constitutions have placed the courts at the centre of this process. This thesis has studied the emergent norms in each country and the developing levels of coherence within the jurisprudence which indicates the maturity of the courts' role and the ability to withstand constitutional retreat.

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[23] Paul Craig *UK, EU and Global Administrative Law: Foundations and Challenges* (2015), 16-17.
[24] Ibid 15-16.
[25] Ibid 17.
[26] Ibid 17.

The jurisdictions in this study are at risk of what Issacharoff terms the 'peril of constitutional retreat.'[27] As we look to the future, the courts will continue to bear the critical responsibility of ensuring that executive actions align with constitutional mandates. It is my hope that the insights gleaned from this thesis will not only aid judges in Namibia, Malawi, and Seychelles in their review of executive conduct, but that it will also inspire further academic exploration into these important themes.

[27] Samuel Issacharoff *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (2015), 424 referring to South Africa.

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