

## Court fees and access to justice: towards a policy-oriented approach in Malawi

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## INTRODUCTION

Levying of court fees at common law has a very long and complex history dating back to as early as 13<sup>th</sup> Century.<sup>1</sup> Fees have always been charged to users of Courts.<sup>2</sup> Malawi's justice system was erected upon this English system allowing for levying of fees in judicial institutions. In Malawi, the Courts Act<sup>3</sup> governs the levying of court fees. This is a piece of legislation enacted immediately after receiving independence from Britain in 1964.<sup>4</sup> Court fees are set out in a schedule to section 32 of the Courts Act. The Courts Act gives the power to the Chief Justice from time to time by notice published in Gazette to revoke, replace or amend the schedule.<sup>5</sup> Since its enactment, this schedule has been amended, revoked and replaced five times.<sup>6</sup> For a long time, such levying of court fees was kept relatively low so as to facilitate access to justice.<sup>7</sup> During the 2004 court fees revision, Malawians living in one of the least developed countries and predominantly agricultural based,<sup>8</sup> were paying court fees within the equivalent of 0.48 USD.<sup>9</sup> This is against a background of ~~approximately inflation of around 5-6 percent as of 2012<sup>10</sup> and~~ 50.7 % of the 15.91 million people living below the poverty line.<sup>11</sup> That notwithstanding, high level of attendant cost for processing applications coupled with prohibitive costs of legal services

<sup>1</sup> P. Polden, *A History of the County Court 1846-1971*, (Cambridge: Cambridge University Press, 1999), 153

<sup>2</sup> P. Karsten, Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, *A History to 1940, (1997-1998) 47 DePaul Law Review*, 232

<sup>3</sup> Cap. 3:02 of the Laws of Malawi

<sup>4</sup> B.P. Wanda, Legal Aid Services in Malawi, (1975) 1 *Washington University Law Review*, 113 - 116

<sup>5</sup> Section 32(2) of the Courts Act

<sup>6</sup> General Notice Number 152 of 1977, General Notice Number 63 of 1997, General Notice Number 31 of 1998, General Notice Number 41 of 2004 and General Notice Number 35 of 2011

<sup>7</sup> F. Kanyongolo, *Malawi Justice Sector and Rule of Law: A review by AFRIMAP and Open Society Initiative for Southern Africa*, Open Society Initiative for Southern Africa (Open Society Foundation, 2006), 134

<sup>8</sup> K. Pauw, *et. al.*, *Exchange Rate Policy and Devaluation in Malawi*, (Washington, DC: International Food Policy Research Institute, 2013), 1-3, <http://www.ifpri.org/sites/default/files/publications/ifpridp01253.pdf> (last accessed on 5 May 2014)

<sup>9</sup> According to the General Notice Number 41 of 2004, Malawians were supposed to pay K60 (equivalent of 0.48 USD) as fees payable for court proceedings.

<sup>10</sup> ~~Pauw, *Op. Cit.*, p. 2~~

<sup>11</sup> <http://data.worldbank.org/country/malawi> (last accessed on 6 May 2014)

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heavily contributed towards an upward revision of court fees.<sup>12</sup> The Chief Justice executed the powers vested in his office and with the approval of the Minister of Justice under section 32 of the Courts Act by replacing the schedule in General Notice Number 35 of 2011. This led to a one thousand two hundred and forty nine percent (1, 249%) increase in court or filing fees.<sup>13</sup> Malawians now had to pay an equivalent of 50 USD as court fees with an inflation rate of 24%.<sup>14</sup> This increase prompted an outcry from the media and the public<sup>15</sup> and later resulted in litigation. The Chief Justice and Minister of Justice were sued by private citizens under judicial review proceedings in the case of *The State and The Honourable The Chief Justice and The Minister of Justice and Constitutional Affairs Ex-parte: Ralph Kasambara, Malawi Law Society and Hophmally Makande*.<sup>16</sup> It was argued that both the Chief Justice and the Minister of Justice had exercised their powers unreasonably and not in line with their authority by revising the court fees. Further that the fees in essence were contrary to the right to access justice as many Malawians could not afford 50 USD as court fees.<sup>17</sup> An interim injunction was granted freezing the new court fees and pending judicial review hearing. Three years later the matter was withdrawn and settled out of court paving way for a full enforcement of Courts (Schedule) (Replacement) Notice, 2011.

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<sup>12</sup> Government Notice Number 35, issued on 26 August, 2011 also known as Courts (Schedule) (Replacement) Notice, 2011

<sup>13</sup> According to Government Notice Number 35, Court Fees were reviewed upwards from K60 to K25, 000 for an Ex-parte application for an injunction.

<sup>14</sup> <http://www.nsomalawi.mw/index.php/latest-publications/consumer-price-indices.html> (last accessed on 5 May 2014)

<sup>15</sup> <http://www.malawidemocrat.com/politics/malawi-%E2%80%98selling%E2%80%99-justice-up-fees-for-court-injunctions/> (accessed on 1 March 2014)

<sup>16</sup> *The State and The Honourable The Chief Justice and The Minister of Justice and Constitutional Affairs Ex-parte: Ralph Kasambara, Malawi Law Society and Hophmally Makande*, Judicial Review Cause No. 41 of 2011 (Unreported)

<sup>17</sup> *Ibid*

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This article explores court fees legislation in Malawi and how the same affects the right to access justice.<sup>18</sup> The discussion considers arguments for and against the upward revision of court fees including discriminatory or limitational tendencies ~~based on poverty, bordering on poverty~~. In conclusion, this article suggests a policy-oriented approach<sup>19</sup> to reviews, consultations and the enactment of court fees legislation. There is need to clarify and implement common interests of various stakeholders<sup>20</sup> in accordance with their expectations<sup>21</sup> and public trust so as to fulfill their fiduciary duty.<sup>22</sup> The article further suggests that in the process of analyzing data, policy formulation and enactment, decision-makers should bear in mind the prescriptive purposes of the law that demand a focus on the realities of authority and control. In order to facilitate actual decision making, policy oriented approach proposes that there should be consideration of the goal formulation,<sup>23</sup> trend description,<sup>24</sup> factor analysis,<sup>25</sup> projection of future decisions<sup>26</sup> and invention<sup>27</sup> of alternatives.<sup>28</sup> Human dignity or human good is the

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<sup>18</sup> For purposes of this article the concept of access to justice focuses on two basic objectives of the Malawi legal system being (a) that it is accessible to people from all levels of society and (b) that it is able to provide fair decisions and rules for people from all levels of society, either individually or collectively. The fundamental idea to be mainstreamed in this concept is the achievement of social justice for all citizens.

<sup>19</sup> Sometimes known as the ‘New Haven Approach’ or ‘Law, Science and Policy.’ It is a jurisprudence that considers law as a decision making process that includes both policy and statute or treaty.

<sup>20</sup> Chief Justice, Minister of Justice, Malawi Law Society, General Public

<sup>21</sup> S. Wiessner ‘Law as a Means to Public Order of Human Dignity: The Jurisprudence of Michael Reisman’ (2009) 34 *Yale Journal of International Law*, 526

<sup>22</sup> Section 12 (i) to (iii) of the Constitution of Malawi sets out fundamental Principles as follows: (i.) *All legal and political authority of the State derives from the people* of Malawi and shall be exercised in accordance with this Constitution solely to serve and protect their interests; (ii) All persons responsible for *the exercise of powers of State do so on trust* and shall only exercise such power to the extent of their lawful authority and in accordance with their responsibilities to the people of Malawi; (iii) The authority to *exercise power of State is conditional upon the sustained trust of the people of Malawi* and that trust can only be maintained through open, accountable and transparent Government and informed democratic choice.

<sup>23</sup> Consideration of the aims or objectives of the legislation

<sup>24</sup> The practice in the past in terms of decision making relating to court fees

<sup>25</sup> The current circumstances within which the decision or legislation will operate

<sup>26</sup> The likely impact or effect of the decision or legislation

<sup>27</sup> Any suggestions that can help to cushion the impact of the decision or legislation

<sup>28</sup> M. Reisman, et. al. ‘The New Haven Scholarship: A Brief Introduction’, (2007) 32 *Yale Journal of International Law*, 576

core value for formulating legal principles.<sup>29</sup> It is what all human beings value.<sup>30</sup> In order to achieve this human good or value, it is proposed that there should be a balance between the cost of court system and access to justice. Attention should therefore go to the decision-makers as “participants” who are endowed with power of decision-making. Further, attention should be placed to their “perspectives” or subjective dimensions that animate their decision-making process. Lastly, for the balance to be achieved, there should be an analysis of their “bases of power” or resources upon which they draw their power and the “strategies” or ways they manipulate those resources.<sup>31</sup>

## **I. THE CASES FOR AND AGAINST INCREASE IN COURT FEES A CASE FOR COURT FEES**

Since the Chief Justice in conjunction with the Minister of Justice and Constitutional Affairs amended the Courts Act adjusting court fees upwards under Government Notice Number 35 of 26 August, 2011, heated debate arose as to the legality and reasonableness of the new court fees. Proponents of an upward revision of court fees have argued that revised court fees are reasonable when set against a policy of full cost recovery for services provided by the Courts.<sup>32</sup> Attendant costs for processing such applications are expensive resulting in Courts incurring costs. Obtaining an *ex-parte* application is even higher as the court is moved at odd hours.<sup>33</sup> The Court

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<sup>29</sup> M. McDougal, H. Lasswell (1996) ‘The New Haven School’ in R. Beck, et. al. (eds.) *International Rules: Approaches from International Law and International Relations*, (Oxford: Oxford University Press, 1996) 109, 111

<sup>30</sup> *Ibid*

<sup>31</sup> Reisman, *Op. Cit.*, 578

<sup>32</sup> *The State and The Honourable The Chief Justice and The Minister of Justice and Constitutional Affairs Ex-parte: Ralph Kasambara, Malawi Law Society and Hophmally Makande*, Judicial Review Cause No. 41 of 2011 (Unreported), Submissions by Honourable The Attorney General Representing The Chief Justice and The Minister of Justice and Constitutional Affairs

<sup>33</sup> It would require fuel, subsistence/ meal allowances, stationary, communication for the Honourable Judge, Registrar and members of the judiciary

fees levied contribute towards judiciary funds that are paid out in accordance with law.<sup>34</sup> Therefore, section 32 of the Courts Act,<sup>35</sup> grants power to High Court to levy fees as set out in a schedule. This is in respect of proceedings and matters before court.<sup>36</sup> It further provides that the Chief Justice may, with the approval of the Minister of Justice, from time to time, by notice published in the Gazette, revoke, replace or amend the schedule.<sup>37</sup> ~~That notwithstanding, the High Court may in any cause or matter, if it thinks fit, dispense in whole or in part with the payment of any fee chargeable under the schedule on the grounds of the poverty of any party or other person or for any other reason.~~<sup>38</sup> Proponents of court fees have also argued that court fees provide for increased funding for the courts to deliver justice.<sup>39</sup> Further, reviewing court fees improves court efficiency as courts effectively recover full cost that enable them competently discharge their duties.<sup>40</sup> Increased court fees can help curb wasteful litigation such as abuse of court process which mostly results in public resources being spent inefficiently.<sup>41</sup> Courts can be clogged with interim injunction relief and the main action is never pursued.<sup>42</sup> Therefore, court fees ensure that the Plaintiff has something at stake which is of palpable or tangible value as opposed to being merely abstract or theoretical.<sup>43</sup> Some cases do not warrant to go through court process as they can be easily settled out of court.<sup>44</sup> ~~It has further been argued that increased court fees can help improve access to justice curtailing the abuse of the court process which mostly~~

<sup>34</sup> Section 4(3) of the Judicature Administration Act Chapter 3:10 of the Laws of Malawi

<sup>35</sup> Chapter 03:02 of the Laws of Malawi

<sup>36</sup> Section 32(1) of the Courts Act

<sup>37</sup> Section 32(2) of the Courts Act

<sup>38</sup> ~~Section 32(3) of the Courts Act~~

<sup>39</sup> F. Michelman, 'The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights – Part H' (1974) 3 *Duke Law Journal*, 527

<sup>40</sup> P. Spector, 'Financing the Courts through Fees: Incentives and Equity in Civil Litigation' (1974-1975) 58 *Judicature*, 330

<sup>41</sup> Spector, *Op. Cit.*, p. 330

<sup>42</sup> T. Tembo, 'Review of Filing Fees', *Case Flow and Record Management Workshop of The International Senior Lawyers Project Support to Malawi Judiciary*, 13 to 17 December, 2010, (Blantyre: Mount Soche, 2010) (unpublished paper).

<sup>43</sup> Spector, *Op. Cit.*, p.332

<sup>44</sup> Tembo, *Op. Cit.*, p.2

~~results in public resources being spent inefficiently.<sup>45</sup> Courts can be clogged with interim injunction relief and the main action is never pursued.<sup>46</sup> Court fees ensure that the Plaintiff has something at stake which is of palpable or tangible value as opposed to being merely abstract or theoretical.<sup>47</sup> Some cases do not warrant to go through court process as they can be easily settled out of court.<sup>48</sup> It is ~~suggested~~ ~~arguable~~ that the Chief Justice is vested with powers to revise court fees. In doing so, the Chief Justice takes cognizance of economic realities attendant to court users.<sup>49</sup> Therefore, such a revision by the Chief Justice will not be a bar to access to justice.<sup>50</sup> ~~Instead of negatively affecting the right to access justice, a review of court fees improves access to justice as courts effectively recover full cost and are able to discharge their duties and obligations competently.<sup>51</sup> The more the resources that the treasury has, the better the delivery of access to justice by the courts.<sup>52</sup> Further, the High Court may in any cause or matter, if it thinks fit, dispense in whole or in part with the payment of any fee chargeable under the schedule on the grounds of the poverty of any party or other person or for any other reason.<sup>53</sup> Therefore, this discretion to waive fees provides access to justice. Legal Aid availability is another tool that enables access to justice. It has been argued that~~~~

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<sup>45</sup> ~~Spector, *Op. Cit.*, p. 330~~

<sup>46</sup> ~~T. Tembo, 'Review of Filing Fees', *Case Flow and Record Management Workshop of The International Senior Lawyers Project Support to Malawi Judiciary, 13 to 17 December, 2010*, (Blantyre: Mount Soche, 2010) (unpublished paper);~~

<sup>47</sup> ~~Spector, *Op. Cit.*, p.332~~

<sup>48</sup> ~~Tembo, *Op. Cit.*, p.2~~

<sup>49</sup> ~~*The State and The Honourable The Chief Justice and The Minister of Justice and Constitutional Affairs Ex-parte: Ralph Kasambara, Malawi Law Society and Hophmally Makande Case*, Submissions by Honourable The Attorney General~~

<sup>50</sup> ~~*Jumbe & Mvula -v- Attorney General* Constitutional Case Number 1 & 2 of 2005 (Unreported), it was held that in order to prove a limitation, the State must produce evidence to justify imposition of limitation to a relevant right.~~

<sup>51</sup> ~~P. Spector, 'Financing the Courts through Fees: Incentives and Equity in Civil Litigation' (1974-1975) 58 *Judicature*, 330~~

<sup>52</sup> ~~F. Michelman, 'The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights— Part II' (1974) 3 *Duke Law Journal*, 527~~

<sup>53</sup> ~~Section 32(3) of the Courts Act~~

~~It has further been argued that increased court fees can help improve access to justice curtailing the abuse of the court process which mostly results in public resources being spent inefficiently.<sup>54</sup> Courts can be clogged with interim injunction relief and the main action is never pursued.<sup>55</sup> Court fees ensure that the Plaintiff has something at stake which is of palpable or tangible value as opposed to being merely abstract or theoretical.<sup>56</sup> Some cases do not warrant to go through court process as they can be easily settled out of court.<sup>57</sup> It has further been argued that those people that cannot afford revised court fees will always be protected by the Legal Aid Act<sup>58</sup> provided that there is an assessment and proof as to insufficient means of such persons.<sup>59</sup> Any costs can upon an order or agreement be chargeable on any property, damages or other amount made in favour of any legally aided person.<sup>60</sup> Proponents of court fees have argued that an assessment as to means and contribution at Legal Aid is a built-in guarantee that people may question whether or not it is wise to bring an action.<sup>61</sup> Notwithstanding arguments for an upward review of court fees, such acts reduce access to justice.~~

Opponents of court fees revision have argued that Courts (Schedule) (Replacement) Notice, 2011 is an unusually, unjustifiable and excessive review.<sup>62</sup> It does not ~~that does not~~ recognize the

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<sup>54</sup> Spector, *Op. Cit.*, p. 330

<sup>55</sup> T. Tembo, 'Review of Filing Fees', *Case Flow and Record Management Workshop of The International Senior Lawyers Project Support to Malawi Judiciary, 13 to 17 December, 2010, (Blantyre: Mount Soche, 2010)* (unpublished paper).

<sup>56</sup> Spector, *Op. Cit.*, p.332

<sup>57</sup> Tembo, *Op. Cit.*, p.2

<sup>58</sup> Chapter 4:01 of the Laws of Malawi

<sup>59</sup> Sections 18(1)(b) and 20(b) of Legal Aid Act Number 7 of 2011, Chapter 4:01 of the Laws of Malawi

<sup>60</sup> Section 22 of the Legal Aid Act Number 7 of 2011

<sup>61</sup> A.W, Jongbloed., 'Access to Justice, Costs and Legal Aid' (2007) 11(1) *Electronic Journal of Comparative Law* 7

<sup>62</sup> *The State and The Honourable The Chief Justice and The Minister of Justice and Constitutional Affairs Ex-parte: Ralph Kasambara, Malawi Law Society and Hophmally Makande Case*, Submissions by The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants



economic realities confronting average Malawians who live below the poverty line.<sup>63</sup> Therefore, such a 1,249% fee rise has an ultimate result of reducing access to justice. The Constitution of Malawi grants equal protection to everyone.<sup>64</sup> It is suggested that the court fee rise takes away that protection. Poor people are less likely to afford the new fees. It is further suggested that this is contrary to rule of law and public policy. Under section 32 of the Courts Act, the Chief Justice *may* revoke, revise or replace the schedule providing for court fees.<sup>65</sup> It is argued this is not mandatory but discretionary on the Chief Justice. Further to this, it is also discretionary on the High Court to dispense in whole or in part with the payment of any fee chargeable under the schedule on the grounds of the poverty of any party or for any other reason.<sup>66</sup> It is arguable that in practice there is minimal or no evidence of Courts following this provision.<sup>67</sup> All cases have had a filing or court fee levied on them or else the court cannot process them.<sup>68</sup> Courts have heavily relied on the Legal Aid Act<sup>69</sup> that those people that cannot afford court fees will always be protected provided that there is an assessment and proof as to insufficient means of such persons.<sup>70</sup> Any costs can upon an order or agreement be chargeable on any property, damages or other amount made in favour of any legally aided person.<sup>71</sup> From these statutes, it is submitted that no guidance can be obtained from the Courts Act, Legal Aid Act or case law about what constitutes “the grounds of poverty of any party” or “an assessment and proof as to insufficient

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<sup>63</sup> Eggen, O., ‘Making and Shaping Poor Malawians: Citizenship Below the Poverty Line’, 31(6) *Development Policy Review*, 697, 699

<sup>64</sup> Section 4 of the Malawi Constitution provides that: This Constitution shall bind all executives, legislative and judicial organs of the State at all levels of Government and all the peoples of Malawi are entitled to the equal protection of this Constitution, and laws made under it.

<sup>65</sup> Section 32(2) of the Courts Act

<sup>66</sup> Section 32(3) of the Courts Act

<sup>67</sup> *The State and The Honourable The Chief Justice and The Minister of Justice and Constitutional Affairs Ex-parte: Ralph Kasambara, Malawi Law Society and Hophmally Makande Case*, Submissions by The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants

<sup>68</sup> *Ibid*

<sup>69</sup> Chapter 4:01 of the Laws of Malawi

<sup>70</sup> Sections 18(1)(b) and 20(b) of Legal Aid Act Number 7 of 2011, Chapter 4:01 of the Laws of Malawi

<sup>71</sup> Section 22 of the Legal Aid Act Number 7 of 2011

means.”<sup>72</sup> ~~It is arguable that the grounds of poverty and proof as to insufficient means is joblessness, the wage or net pay of an employee in a month, if a business person or farmer the amount of money or profit he or she makes in a month or at the end of a farming season. From this premise, it is therefore~~ is submitted that the court should be able to reflect or mirror policy<sup>73</sup> that enables a penniless litigant to access justice. The indigent or penniless litigant and the wealthy should all have equal access to justice. ~~Court fees should not be used as a tool for the wealthy against the indigent.~~<sup>74</sup> The Constitution of Malawi guarantees observance of the rule of law by all institutions and persons<sup>75</sup>, recognition and protection of fundamental rights<sup>76</sup> such as access to justice. The State has a duty to actively promote the welfare and development of the people of Malawi in accordance with principles of national policy<sup>77</sup> by progressively adopting, interpreting<sup>78</sup> and implementing policies and legislation aimed at achieving, *inter alia*, the promotion of law, order and respect for society, honest practices in government, adequate resourcing, and the humane application and enforcement of laws and policing standards.

### III. ACCESS TO JUSTICE FOR THE POOR LIMITATIONS

It is argued that section 32 of the Court’s Act has been interpreted in such a way that has heavily impacted on the poor. It has hampered the poor person’s constitutional right to recognition before the law. ~~It is suggested that section 32 of the Courts Act should be construed in light of~~

<sup>72</sup> ~~It is suggested that grounds of poverty and proof as to insufficient means is joblessness, the wage or net pay of an employee in a month. For a business person or a farmer. the amount of money or profit he or she makes in a month or at the end of a farming season.~~

<sup>73</sup> Wiessner, *Op. Cit.*, p. 526

<sup>74</sup> M.R, Anderson, *Access to Justice and legal Process: Making Legal Institutions Responsive to Poor People in LDCs*, (London: Institute of Development Studies, 2003), 21 <http://www.ids.ac.uk/files/dmfile/Wp178.pdf> (accessed on April, 2014)

<sup>75</sup> Section 12 (1) of the Malawi Constitution; see also *State and Malawi Regulatory Authority (MERA) Ex-parte: Chilivumbo* Miscellaneous Civil Cause No. 176 of 2011 (H.C. Lilongwe District Registry) (unreported), per *Justice Kachale*

<sup>76</sup> Section 12(iv) of the Constitution of Malawi

<sup>77</sup> Section 13(m) of the Constitution of Malawi

<sup>78</sup> Section 14 of the Constitution of Malawi

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section 41 of the Constitution that provides for every person's right to recognition before the law.<sup>79</sup> Further, such limited understanding of section 32 has hindered access to any court of law or any other tribunal with jurisdiction for final settlement of legal issues.<sup>80</sup> In the end, there is no right to and right to an effective remedy by a court of law or tribunal for such poor people, acts violating the rights and freedoms granted by the constitution or any other law.<sup>81</sup> Access to justice justice has been held to represents the hallmark of a civilized society.<sup>82</sup> The Malawi Constitution fully embraces this aspiration<sup>83</sup> and it should not be departed from. Therefore, its interpretation of access to justice must reflect the unique character<sup>84</sup> and nature of what parliament intended. It must not be construed in a narrow legalistic and pedantic<sup>85</sup> way but broadly and purposively<sup>86</sup> so as to bring to bear the great purpose of the Constitution, namely protection of the poor. Such access to justice facilitates access and protection of other rights.<sup>87</sup> Thus fee waiver cannot be justified as an option for the courts to poor people. This is so because it is a mechanism that is rarely pursued by the courts as to some extent relies on the same fees for its operations.<sup>88</sup> Practically, the Malawi judiciary is heavily underfunded and its annual budget needs are rarely met.<sup>89</sup> Therefore, it is unrealistic to expect the courts to waive costs that will go towards its own operational costs unless government improves its funding. In the same line, it is argued that

<sup>79</sup> Section 41(1) of the Constitution of Malawi

<sup>80</sup> Section 41(2) of the Constitution of Malawi

<sup>81</sup> Section 41(3) of the Constitution of Malawi

<sup>82</sup> *Baromoto-v- Minister of Home Affairs* 1998 (5) BCLR 562 (W)

<sup>83</sup> Section 41 of the Constitution on access to justice.

<sup>84</sup> Section 11(1) of the Malawi Constitution

<sup>85</sup> S. Kayuni, 'The Narrow, Legalistic and Pedantic Version of Locus Standi: CILIC Case, A Death knell to *Actio Popularis* in Malawi' (2008) 8(1) *Unima Students Law Journal*, 41

<sup>86</sup> *Fred Nseula -v- Attorney General and Malawi Congress Party* MSCA Civil Appeal Number 32 of 1997 (MSCA) (unreported); See also *The State and Malawi Electoral Commission – Ex-parte Rigtone Mzima*, MSCA Civil Appeal No 17 of 2004 (unreported), per *Tembo JA*, 5 and 6

<sup>87</sup> D. Kaersvang, 'Equality Courts in South Africa: Legal Access for the Poor' (2008) 15(2) *The Journal of International Institute*, 4.

<sup>88</sup> L. Silverstein, 'Waiver of Court Costs and Appointment of Counsel for Poor Persons in Civil Cases' (1967-1968) *2 Valparaiso University Law Review*, 21.

<sup>89</sup> R. Ellett, *Pathway to Judicial Power in Transitional States: Perspectives from African Courts*, (Oxon, Routledge, 2013), 103

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though in theory legal aid can help resolve access to justice,<sup>90</sup> the mechanism does not adequately work as the Legal Aid Bureau is poorly funded,<sup>91</sup> leading to low staffing levels.<sup>92</sup>

Unlike most other Constitutions, the Constitution of Malawi elevates some rights above others. Section 44 of the Constitution prescribes certain rights and prohibitions as non-derogable. Included in the non-derogable rights are two which are stipulated in section 44(1)(g) *i.e.* ‘the right to equality’ and the right to ‘recognition before the law’. These are therefore two distinct rights which are elevated above all others except for those non-derogable rights listed in section 44(1).<sup>93</sup> That notwithstanding, it is important to distinguish between sections 41(1) and 20(1) of the Constitution. The later enshrines the right to equality by proscribing all forms of discrimination. However, the prohibition against discrimination and the recognition of a person before the law are conflated<sup>94</sup> into the same concept of equality. It is therefore posited that underlying Malawi’s constitutional order is the idea of the rule of law which entails formal equality and equal treatment before the law and the outlaw of discrimination. The prohibition against discrimination and the recognition of a person before the law relate to the same concept of equality. It is suggested that in order to determine whether or not section 32 of the Courts Act as read with Courts (Schedule) (Replacement) Notice, 2011 conforms to the overriding principle

<sup>90</sup> D. Rhodes, ‘Access to Justice’, (2000-2001) 69(5) *Fordham Law Review*, 1785-1811.

<sup>91</sup> G. Siri & F.E. Kanyongolo, ‘Courts and the poor in Malawi: Economic Marginalization, Vulnerability, and the Law.’ (2007) 5(2) *International Journal of Constitutional Law*, 258-293.

<sup>92</sup> C. McKen, ‘Legal Education in Malawi’. (1997) 23 *The John Marshall Law Review*, 55.

<sup>93</sup> The only rights which are non-derogable are: the right to life, right to equality and recognition before the law; and the right to freedom of conscience, religion, belief and thought and the right to academic freedom. Further to this, it should be noted that the singular term ‘right’ seems to be used in the Constitution even when more than one right is involved. It should be no wonder that it is used in section 44(1)(g) to refer to two distinct rights; the right to equality and the right to recognition before the law.

<sup>94</sup> D. Chirwa ‘Upholding the sanctity of Rights: A Principled Approach to Limitations and Derogations under the Malawian Constitution’ (2007) 1(1) *Malawi Law Journal*, 5

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of access to justice, it must pass the test in section 44 of the Constitution. Section 44 (so far as relevant) provides as follows:

**Limitations on rights**

1. **There shall be no derogation, restrictions or limitation with regard to -  
(g) the right to equality and recognition before the law;**
2. **Without prejudice to subsection (1), no restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law, which are reasonable, recognized by international human rights standards and necessary in an open and democratic society.**
3. **Laws prescribing restrictions or limitations shall not negate the essential content of the right or freedom in question shall be of general application.**

It is conceded from the above provision that constitutional rights to access justice and effective remedies can be limited, derogated from or restricted. The only requirement is that such restriction or limitation must satisfy the test in section 44(2) and (3) of the Constitution that such limitation must be prescribed by law, be reasonable, be recognized by international human rights standards, be necessary in an open and democratic society, not negate the essential content of the right or freedom in question and be of general application.<sup>95</sup> It is suggested that in considering limitations of the enjoyment of access to justice, regard must be had to the effect of such limitation and not its purpose. Court fees being part and parcel of an entire process put in place for the administration of justice are intended to facilitate the process than to obstruct or limit it. Procedure is the machinery of law, the channel and means whereby law is administered and justice is reached. Court fees departs from its office where instead of facilitating the said administration of justice, it is permitted to obstruct or even extinguish legal rights. It is thus made to govern where it ought to sub-serve.<sup>96</sup> The majority of Malawians are poor and live below the poverty line.<sup>97</sup> It is posited that the social status of being indigent is protected under section 20(1)

<sup>95</sup> *Nelson Jasi-v- Republic* Criminal Appeal Number 64 of 1997 (HC, Principal Registry) (unreported)

<sup>96</sup> *Henry JB Kendal & others -v- Peter Hamilton* [1887] 4 AC 504, per *Lord Penzance*

<sup>97</sup> <http://data.worldbank.org/country/malawi> (accessed on 2April 2014)

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of the Constitution. What is prohibited is discrimination of persons in any form.<sup>98</sup> The fact that poverty is not specifically mentioned does not require that it be treated differently from alleged discrimination based on grounds specifically mentioned in the relevant provision. Notably, the provision guarantees equal and effective protection against discrimination on grounds which extend, beyond those specifically listed, to any ‘other status.’ Poverty is a characteristic bearing similarly to that of property, which is specifically mentioned. It therefore follows that any excessive upward revision of court fees is an unjustifiable limitation to the right to equality and cannot stand in an open and democratic society.

#### IV. SETTING FEES - A POLICY-ORIENTED ~~TEDED~~ APPROACH

As demonstrated in the foregoing, the fee increases effected by the Chief Justice and Minister of Justice and Constitutional Affairs were too substantial. Further to this, they were preceded by insufficient consultation. Inadequate provision was made to ensure access to justice for those who could not afford the new fees. This is contrary to Section 41 of the Republican Constitution upholds the right to access justice and legal remedies. It thus follows that the State shall not obstruct persons who turn to the courts to have their rights determined or protected. Any domestic law or measure that imposes costs or obstructs access to courts must be regarded as offending the tenets of the Constitution. The executive cannot in law abrogate the right to access justice as:

**‘.....the infringement of such a right [the right of access to a court] must be either expressly authorized by a provision in an Act of Parliament or arise by necessary implication. Even where it can be said that the making of a rule under powers to make rules by subordinate legislation arise by necessary implication, it will still be in question whether the rule formulated is reasonable. Even where the need for such a rule does arise by necessary implication either because the purpose of Parliament cannot be achieved without it or the function of Parliament has laid on a person or**

<sup>98</sup> *In the Matter of the Admission of David McRester Nyamirandu and In the Matter of the Legal Education and Legal Practitioners Act (Cap. 3:03 of the Laws of Malawi)* Constitutional Case Number 3 of 2008 (HC, Principal Registry)(Unreported)

cannot be discharged without it, the rule will be *ultra vires* the rule making power if the rule as framed is unreasonable; if it is wider than is necessary, if it infringes the fundamental right to a greater extent than is required.<sup>99</sup>

When the Chief Justice pursuant to powers vested in his or her office under section 32 of the Courts Act sets reasonable court fees, such an act does not constitute interference with an individual's right of access to justice. Whether court fees are set at a reasonable level is a separate question from whether it is appropriate for a particular individual having regard to his means. The section gives discretion to the Chief Justice with the approval of the minister by notice in the gazette to revoke, replace or amend the schedule. It is suggested that in an open and democratic society, it is important for the two offices as participants in the decision making process to make public consultations in order to clarify and implement their common interests.<sup>100</sup> This should be done in accordance with the participants' expectations in controlling<sup>101</sup> litigation. The two offices should forecast to the extent possible, alternative future decisions and their consequences that would provide tools for proper decision-making.<sup>102</sup> Justice Potani in adopting the *dictum* of Morris, J in *Fletcher –v- Minister of Town and Country Planning*<sup>103</sup> has ably explained what constitutes consultation:

**“...the word consultation is one that is in general use and that is well understood. No useful purpose would, in my view be served by formulating words of determination. Nor would it be appropriate to seek to lay down the manner in which consultations must take place. The Act does not prescribe any particular form of consultation. If a complaint is made of failure to consult, it will be for the court to**

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<sup>99</sup> *R. v. Secretary of State for the Home Department and others, ex p Saleem*, [2000] All E.R. 814 (Court of Appeal). In granting judicial review of the Immigration Appeal Tribunal's refusal to entertain an application for leave to appeal, the Court struck down r.42(1)(a) of the Asylum Appeals (Procedure) Rules 1996. That rule provided that notice of a special adjudicator's determination was deemed to have been received two days after posting, regardless of whether or when actually received. The Court held the rule to be *ultra vires* the enabling Act since it went beyond regulating rights of appeal and was destruction of such right (which were fundamental rights akin to access to courts of law).

<sup>100</sup> In this article social sciences is viewed as a mode of organizing data about various social processes, modality of phase analysis and analytical break-down of the actual components of a decision

<sup>101</sup> S. Ratner & A. Slaughter, 'Appraising the Methods of International Law: A Prospectus for Readers', (1999) 93 *American Journal of International Law*, p.294

<sup>102</sup> M. Reisman, et. al. 'The New Haven Scholarship: A Brief Introduction', (2007) 32 *Yale Journal of International Law*, 576

<sup>103</sup> [1947] 2 All ER 496, 500

examine the facts and circumstances of the case and to decide whether consultation was, in fact, held...”<sup>104</sup>

From the above premise, it can be argued that the facts and circumstances will guide the courts’ determination on whether the conduct of the Chief Justice and Minister of Justice amounted to consultation. It is suggested that various meetings and public views solicitation would be ideal in making sure that considerations of the indigent Malawians to attain access to justice.

Another issue that seriously needs attention is the *forma pauperis*<sup>105</sup> principle mirrored in section 32(3) of the Courts Act. It provides that the High Court may in any cause or matter, if it thinks fit, dispense in whole or in part with the payment of any fee chargeable under the Schedule on the grounds of poverty of any party or other person or for any other reason. *Forma pauperis* is a statutory provision that first appeared in 11 Henry 7, c.12 of 1494. By that statute there was a waiver of fees payable to the Crown, the appointment of clerks and, among other things, the appointment of an attorney. All this was meant to assist a poor person who had a case which would not be heard without such assistance.<sup>106</sup> As the practice developed, it became a requirement in the mid 1700’s that the pauper provide affidavit evidence that he was not worth 5 pounds and that the application be accompanied by counsel’s opinion. The standard of impecuniosity later became more generous providing that proof was required that the person seeking to sue as a pauper not only must provide proof that he was not worth 5 pounds but that he must also have an opinion from counsel that he had reasonable grounds for the proceeding.<sup>107</sup>

<sup>104</sup> *State and The President of the Republic of Malawi Ex-parte Dr. Bakili Muluji and John Z.U Tembo* Miscellaneous Civil Cause Number 99 of 2007 (HC) (unreported), per Justice Potani

<sup>105</sup> *Black’s Law Dictionary*, 9<sup>th</sup> Edition explains this term as an indigent person seeking public assistance, waiver of court fees, free public service or appointment of counsel.

<sup>106</sup> *Clifton –v- Dexter & Crozier Ltd*, [1923] NZLR 1042 (CA); see also *Yeatts –v- Raupekapeka Sawmill Co. Ltd*, [1958] NZLR 739 (CA), 743.

<sup>107</sup> *Cook v. Imperial Tobacco Co.*, [1922] 2 K.B. 158,163, per Lord Justice Banks

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Efficient Legal Aid mechanism has eventually replaced this common law of *forma pauperis*.<sup>108</sup>

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Notwithstanding this, it is ~~It is therefore~~ suggested that lack of due consideration to *forma pauperis* in Malawi where legal aid is so patchy and there exists extreme poverty, is in itself a breach of a fixed feature of common law that was codified by section 32(3) of the Courts Act. This is a piece of legislation that should always be contemplated by all participants whose aim is achieving a common purpose<sup>109</sup> namely the attainment of human good. Frequent use of the provision among judicial officers can be a tipping point for all to emulate.<sup>110</sup> It is aimed at helping out the poor and it does not foresee an affluent litigant or a person of some social prominence but contemplates the financially poor. It is further suggested that financial difficulties do not necessarily equal an indigent status. A person of scant means does not necessarily constitute a pauper but a person without any means.<sup>111</sup> The failure of the High Court to seriously take into account the underlying differences between individuals in society on the basis of poverty *notwithstanding* the statutory provision granting discretion to waive fees, amounts to a denial of equal benefit of the law. The right to access the courts is under the Constitution one of the foundational pillars strengthening the rights and freedoms of Malawians. Its protection should therefore be guaranteed at all cost.

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<sup>108</sup> Nicholas Paul Alfred Reekie and Attorney General and District Court at Waitakere & Nicholas Paul Alfred Reekie and Department of Corrections and Visiting Justice To Spring Hill Correctional Facility, SC 47 /2013 [2014] NZSC 63, Judgment of 29<sup>th</sup> May, 2014, para 9

<sup>109</sup> G. Kelling & C. Coles, *Fixing Broken Windows*, (New York, Simon & Schuster, 1997) 241

<sup>110</sup> M. Gladwell *The Tipping Point*, (New York, Back Bay Books, 2002), 9

<sup>111</sup> *Ibid*

benefit from such guarantees, thus, access to court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.<sup>112</sup> Of what value are the rights and freedoms guaranteed by the Constitution if a person is denied access to a court of competent jurisdiction in order to vindicate them? How can the courts independently maintain the rule of law, and effectively discharge the duties imposed on them by the Constitution ~~if access~~ if access to them is hindered, impeded or denied? Already, courts are sparsely located with limited number of judicial officers available. Government Notice No. 35 of 2011 cripples the already hindered access to justice in Malawi.

In order for the participants to the revocation, amendment or replacement of the schedule under section 32(2) of the Courts Act to achieve human good and constitutional order, they need to consider eight suggested human values.<sup>113</sup> These are power<sup>114</sup>, wealth<sup>115</sup>, enlightenment<sup>116</sup>, skill<sup>117</sup>, well-being<sup>118</sup>, affection<sup>119</sup>, respect<sup>120</sup> and rectitude.<sup>121</sup> Human dignity is assumed or

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<sup>112</sup> *Golder v. United Kingdom* (1975), 1 E.H.R.R. 524, 536

<sup>113</sup> McDougal, *Op. Cit.*, pp. 122 – 124; policy-oriented jurisprudence advocates for these values as goals that every community wishes to attain in order to achieve human dignity

<sup>114</sup> To what extent is power widely or narrowly held by those involved in the decision-making process such as the Chief Justice and Minister of Justice? It also considers how many other people or members of the community in which the decision is to be implemented are involved (be it direct or indirect) in enacting prescriptions, recommendations or invocations? To what extent are the processes of adjustment coercive or persuasive? E.g. how intense is the expectation of opposition to proposals for revision? How intense is the expectation of coming to a consensus without risking litigation or injunction?

<sup>115</sup> To what extent is the economy focused on savings and investments? For instance, what are the fiscal measures that influence a revision of the court fees? Further, whether during implementation will the community afford or withstand the impact the revision will bring. Are there minimum income guarantees on the part of the community?

<sup>116</sup> To what extent does the community protect the gathering, transmission and dissemination of information? For instance, to what extent has there been dissemination of information related to the increase so as to not only have public participation but also prepare them for the effects of such a rise in filing fees.

<sup>117</sup> To what degree is the body politics committed to the opportunity for discovery and cultivation of socially acceptable skills on the part of everyone? For instance, is there universal and equal access to educational facilities where negotiating skills can be attained? Are new skills recognized and assisted readily? Are there skills that would enable the community appreciate the implications of settling a matter out of court than taking it to court where there is likelihood of paying a high filing fee?

<sup>118</sup> To what extent is continued increase of numbers encouraged even at the expense of immediate improvement of the values available to individuals. To what extent is the population sought to be protected from mental and

postulated deliberately in order to leave everyone free to justify it in terms of his or her preferred theological or philosophical tradition.<sup>122</sup> Therefore, the policy oriented approach will enable participants develop tools to bring about changes that will attain human good.<sup>123</sup> When decision-makers consider revoking, removing or replacing the schedule under section 32 of the Courts Act, they have to bear in mind that there is also a constitutional duty to guarantee access to justice. Therefore, in interpreting what constitutes an indigent person, it is suggested that decision-makers should focus on restoring faith in the soundness of the legal system. Such interpretive skills will further make policymakers realize that prescriptive purposes of the law demand a focus on realities of authority and control.<sup>124</sup> Alternative future decisions on section 32 of the Courts Act and their consequences should provide conceptual tools that can propagate or lead to alternative decisions<sup>125</sup> when it comes to access to justice. It is suggested that reliance on Legal Aid Bureau as a vehicle for achieving access to justice for the indigent is wrong. Decision-makers' satisfaction should not be drawn from the existence of Legal Aid Bureau as this office is not only understaffed<sup>126</sup>, underfunded<sup>127</sup> but also not available all over Malawi.<sup>128</sup> It is therefore imperative that Malawi should aim at adopting and

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physical deprivation? To what extent is the degree of development, health, comfort, social security of population? How well psychologically prepared is the community not to lose trust and confidence in the State for hiking the court fees?

<sup>119</sup> What is the protection given to the indigent family and other institutions of congeniality?

<sup>120</sup> What is the commitment to caste or to mobile class forms of society? To what extent is minimum respect accorded to everyone on the basis of mere membership of the human race? Is there equality and respect for all?

<sup>121</sup> To what degree does the body politic protect freedom of worship and of religious propaganda? E.g. Moral and religious teachings about helping the poor and the weak in society.

<sup>122</sup> McDougal, *Op. Cit.*, p. 122

<sup>123</sup> Human dignity is postulated deliberately in order to leave everyone free to justify it in terms of his or her preferred theological or philosophical tradition; see generally McDougal, *Op. Cit.*

<sup>124</sup> S. Wiessner above note number 11, 526

<sup>125</sup> M. Reisman, above note number 13, 576

<sup>126</sup> H. Anderson, 'Justice Delayed in Malawi's Criminal Justice System Paralegals vs. Lawyers' (2006) 1(1) *International Journal of Criminal Justice Sciences*, 2

<sup>127</sup> D. McQuid-Mason, *Assessment of Legal Aid in the Criminal Justice System in Malawi*, Kwazulu Natal, University of Kwazulu Natal, 2006), 53, Legal Aid Bureau receives only about 1.5 US cents per capita

<sup>128</sup> <http://ruleoflawmalawi.blogspot.co.uk/2011/10/legal-aid-act-2010.html> (last accessed on 6 May 2014)

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implementing strategies that will guarantee a flourishing pro-access to justice constitutional order bearing in mind economic realities of Malawians. It should further be presided over by an inventive and activist judiciary that is aided by a proficient bar, supported by the state and cherished by the public. Such reflection of economic realities must widen the concept of poverty to include not only those who are below the poverty line, but also persons living above the poverty line who nevertheless experience financial difficulties in obtaining access to justice.<sup>129</sup> A sufficient flexibility for an objective interpretation of section 32 of the Courts Act will reinforce constitutional order in Malawi as opposed to revocations, amendments or replacements of the schedule. The executive as part of a broader network of mechanisms for public order should be a catalyst for encouraging access to justice in the courts so as to enhance the rule of law in Malawi. The judiciary should exercise discretion while weighing the economic realities obtaining in the country with those of the litigation cost incurred by the Courts.

Access to justice is the decisive basis of the entire justice system in Malawi. Its character demonstrates that even twenty years after the adoption of a human rights regime in the country, it is still operating on virgin grounds with no case law to tap from.<sup>130</sup> The State needs to encourage and adopt processes that do not cost the credibility of the courts. It is submitted that review, revocation or replacement of the schedule is ultimately a political goal rather than a legal one. It is further submitted that the promise or nascent of access to

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<sup>129</sup> G. Chan, 'The Rights of Access to Justice: Judicial Discourse in Singapore and Malaysia' (2007) 2(1) *Asian Journal of Comparative Law*, 2

<sup>130</sup> *The State and The Honourable The Chief Justice and The Minister of Justice and Constitutional Affairs Ex-parte: Ralph Kasambara, Malawi Law Society and Hophmally Makande Case* which had given hope to Access to justice and Court fees litigation ended up being withdrawn from Court and a consent judgment paving way for full implementation of the Courts (Schedule) (Replacement) Notice, 2011.

justice in Malawi is a phenomenon anchored in power, yet simultaneously capable of transcending it.

Court fees should be viewed as a process rather than just an implementation of a rule. It must be done systematically and openly<sup>131</sup> based on common expectations<sup>132</sup> of Malawians. Power should not just be about impositions of unilaterally made decisions that offend constitutionalism. It must at all times in as far as constitutionalism is concerned enhance both law and order.<sup>133</sup> Norms and normative outlooks should matter in formations of order<sup>134</sup> as far as they attain stable models that are beneficial.<sup>135</sup> It is submitted that even though review, revocation or replacement of schedule under section 32 of the Courts Act remains at the heart of legal debate in the Malawi, its mystical moss<sup>136</sup> should be understood as essentially a decision making process that considers then indigent and guarantees access to justice.

It is suggested that strategies employed by the participants should include prescription of court fees in such a way as not to deprive a citizen of his or her constitutional right to access the courts.<sup>137</sup> Therefore, dialogue among participants should include proposals for increased court

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<sup>131</sup> H. Koh, 'Is there a 'New' New Haven School of International Law?', (2007) 32 *Yale Journal of International Law*, 563

<sup>132</sup> O. Hathaway, 'The Continuing influence of the New Haven School', (2007) 32 *Yale Journal of International Law*, 558

<sup>133</sup> *Ibid*

<sup>134</sup> C. Borgen, 'Whose Public, Whose Order? Imperium Region and Normative Fiction', (2007) 32 *Yale Journal of International Law*, 331

<sup>135</sup> M. McDougal, et. al 'The World Constitutive Process of Administrative Decision' (1966-67) 19(3) *Journal of Legal Education*, 254

<sup>136</sup> M. Reisman, 'Why Regime Change Is (Almost Always ) A Bad Idea', (2004) 98 *American Journal of International Law*, 504

<sup>137</sup> *Regina v Lord Chancellor, ex parte Witham* [1997] 2 All ER 779

funding that can result in increased court access for the poor.<sup>138</sup> Malawians should not feel short-changed<sup>139</sup> and lose trust in the courts that are a core foundation to democracy. Administration of justice may be fair and just. If it cannot be effectively accessed, people are not protected. Right to access justice enshrined in the constitution plainly represents an expression of the peoples' aspirations.<sup>140</sup> It must at all cost be protected.

The principal features to access justice are the people (with all their cultural, economic and social peculiarities) and the institutions. Further features are the processes that represent the elements from which law originates, lives and evolves.<sup>141</sup> The justice system within which these features operate must be an inseparable and integrative part of the more complex communal system that cannot be artificially isolated from economics, ethics and politics.<sup>142</sup> Enhancing access to justice is for the benefit of the poor and especially the vulnerable. It further contributes towards the struggle to change the social and economic conditions that underpin Malawi's legal order and seriously overlooked by policy makers.<sup>143</sup>

## V. CONCLUSION

Insufficient consultations and lack of regard for access to justice for poor people led to a substantial increase in court fees in Malawi. This article attempted to examine contextual factors and legal criteria of the present state of access to justice ~~in Malawi~~ and the

<sup>138</sup> See generally C. Sumner, *Providing Justice to the Justice Seeker: A Report on the Access and Equity Study in the Indonesian General and Religious Courts 2007-2009*, (Mahkamah, Agung, 2010)

<sup>139</sup> C. Ceyes, & R. Pirozolo, 'Access to Justice in Lower Value Clinical Negligence Claims', (2009) 15(6) *The AvMA Medical & Legal Journal*, 256

<sup>140</sup> *Public Affairs Committee –vs- Attorney General* Civil Cause Number 1875 of 2003(HC) (unreported) [2003] MWHC 71

<sup>141</sup> M. Cappelletti, 'Access to Justice as a Theoretical Approach to Law and Practical Program for Reform', (1992) 109 *South African Law Journal*, 22

<sup>142</sup> *Ibid*

<sup>143</sup> Chan, *Op. Cit*, p. 2

opportunities from the theoretical framework of policy-oriented jurisprudence that views law as derived from elements of authority and control in determining reviews, amendment or replacement of schedule under section 32 of the Courts Act. This has been through an analysis from the debates in Malawi arising from the recently published *Courts (schedule) (Replacement) Notice Number 35, 2011* under section 32 of the Courts Act gazetted on 26<sup>th</sup> August, 2011, rule development and its limitational elements. Human dignity in the context of this article has been described as an advocacy for non-discriminatory policies on the basis of social status such as means or poverty when considering and consulting on review of court fees that heavily affect the right to access justice under the Republican Constitution. In order to achieve human good, the Chief Justice and Minister of Justice must make public consultations in order to effect section 32 of the Courts Act. The fact that these human goods, in some cases described as political calculus<sup>144</sup> do not come out clearly under section 32 of the Courts Act gives room for broader interpretation that the framers of that piece of legislation might have intended to leave to the participants to determine. No one should be subjected to discrimination on the basis of his or her social status. It is posited that in the execution of powers vested under section 32 of the Court's Act, the Chief Justice and Minister of Justice on the one hand and all relevant stakeholders on the other must mirror the *animus* of the framers of that section, reading it with sections 20 and 41 of the Constitution and the genesis of common law allowing for filing of *forma pauperis*.

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<sup>144</sup> See generally N. Machiavelli, & A. Parel, *The Political Calculus: Essays on Machiavelli's Philosophy*, (Toronto, University of Toronto Press,

The 1249% increase in court fees as reflected in the notice obstructs access to justice. Notwithstanding justifiable derogations from human rights<sup>145</sup>, the notice amounts to discrimination based on poverty affecting poor peoples' right to equality and recognition before the law. It does not conform to fundamental principles governing non-discrimination.<sup>146</sup> It draws a formal distinction between the litigant and others on the basis of their means. It further fails to take into account the litigant's already disadvantaged position within the Malawian society resulting in substantively differential treatment based on enumerated and analogous grounds. It withholds a benefit from the litigant in a manner which reflects the stereotypical application of a presumed group. This perpetuates a view that an individual is less worthy of recognition or value as a member of Malawian polity, equally deserving of concern, respect, and consideration. It is suggested that the Notice was therefore designed to preclude those with limited means ending up with typecast or pigeonhole assumptions about the poor. Access to justice as a right must be given the greatest measure of protection.<sup>147</sup> It is salutary to remember that the poor need the law more than the rich. If access to justice is limited to the rich, the poor are likely to resort to vigilantism. The consequences of it are bound to have a disastrous effect on the maintenance of law and order. If the poor Malawians see the legal and judicial system in existence as mainly serving the interest of the rich and the powerful it is likely to result in a death-knell of the rule of law and democracy.<sup>148</sup>

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<sup>145</sup> JF Hartman, 'Derogation from human rights treaties in public emergencies: A critique of implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations' (1972) 22(1) *Harvard International Law Journal*, 2.

<sup>146</sup> Section 20 of the Malawi Constitution

<sup>147</sup> DM Chirwa, *Human Rights under the Malawian Constitution* (Cape Town, Juta, 2011), 55

<sup>148</sup> BA Samatt, 'The Right to Legal Aid' in H. Othman & CM Peter (Eds.) *Perspectives on Legal Aid and Access to Justice in Zanzibar*, (Zanzibar: Zanzibar Legal Services Centre, 2003), 2



