Constitutional Interpretation: Judicial Activism or Restraint

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A. Introduction

It is best to start by agreeing with David Pollard's statement[1] as it illustrates the need for countries to draw up constitutions: as constitutions bring effect to some aspirations and, most importantly, regulates the conduct of the citizenry. Constitutions have always been the epitome of a democratic country especially if it reflects the will of the people.

It is generally argued that in an ideal world, legislation would be clear without any doubts as to what it intends to achieve, whom it governs and to what extent it should be applied. If this were possible, courts would not have such a difficulty in construing statutes. The courts[2] would not have developed rules of interpretation

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1 D. Pollard, N. Parpworth & D Hughes, Constitutional and Administrative Law (1997)

> Law is not a value-free system of rules, nor the equivalent of justice or morality. Law is a phenomenon within society, acting upon, and being acted upon, by society. Law may be, as some argue, an expression of the desire of humankind to live in a civilized and ordered way, but individual laws and legal systems are the result of political processes within society whereby values and interests of [**or?**] particular values and interests are promoted and given protection. Individual laws may promote the interests of particular sections within society or seek to redress imbalances, or advance the claims of those who have suffered historic disadvantages. Law may enshrine economic and social ideologies within a state, or be used to promote and protect values, sometimes because there is a broad, law, because, inter alia, they provide the legal framework for the law-making process – a process within which political and social forces in society compete to secure dominance.

2 Introduction to Statutory Interpretation 538

> So while draftsmen aim to address clearly all the principal cases actually in the contemplation of the legislature when the legislation is enacted or made – and they frequently attract criticism for the perceived prolixity that the attempt inevitably produces – the courts will still be faced with matters arising which were either too subsidiary or apparently obvious to be worth addressing expressly or which for some reason or another were not actually within the contemplation of the legislature. In those cases the courts have to apply rules of construction to determine the meaning of the legislation.

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to assist in the explanation of statutes, with the sole purpose of making it understandable to the user: the public.[3]

The concept of statutory interpretation gets more complicated if the courts are asked to interpret constitutional provisions. This is due to the fact that to some degree normal statutory rules cannot apply, as the constitution has a higher value than a normal statute, and is usually the highest law of the land. To further support this point, could a constitutional provision on being interpreted be questioned on the ground of legality or constitutionality?

This article deals with statutory interpretation of the constitution. It looks at the issue of construction of rules as related to or utilized in constitutional interpretation, and explores whether special rules should apply, different from those used to interpret a normal statute. I will also consider the issue if the concept of constitutional interpretation can be considered statutory interpretation in the strictest sense. Furthermore, this article will also address the question whether applying a liberal approach or a restricted approach does not tamper with the original framer's intent.

The practice of Malawian courts will be used as a case study to see what kind of stance has been taken in constitutional interpretation, with particular emphasis to ascertain whether they apply judicial activism or judicial restraint. This article compares the judicial practice in Malawi and the US on how the courts interpret the constitution. Both legal systems are modelled on common law and consequently have written constitutions. This makes it easier to compare how courts have construed certain constitutional provisions, such as the role of the High Court and Supreme Court in Malawi and the Supreme Court in the US. The two countries are significantly different in their mode of governance: Malawi follows the unitary system of government whilst the United States is a federal state, but the fact remains that in both systems, the constitution is the supreme law of the land.

B. Constitutional Interpretation: A Comparison of Malawi and the United States of America

I. Features of Constitutional Interpretation

A constitution in its basic form is a general description about the political authority and power, including the location, conformity, distribution, exercise

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[3] *Scott v Legg* (1876) Ex.D 39, at 42 *per curiam*; *see also*

> My Lords, let me make clear at the outset that this Question is not an implied criticism of the Government, indeed, much of their legislation is drafted with clarity and certainty of legal effect; but, as with previous governments, some of it is a mass of detail from which the underlying intention of Parliament has to be inferred. The detail can be incomplete and is sometimes uncertain in its legal effect or ambiguous on its meaning [...]

(HL Deb., 21 January 1998 c.1583, Lord Renton).

and limitation of authority and power among the organs of the State. However, in the last century, constitutions have evolved and are an articulation of fundamental rights as well.

Firstly, it must be observed that the Malawian constitution shows this particular development starting in 1994 whilst fundamental rights have been the premise on which the US constitution has been founded and this has remained so since its adoption.

Secondly, the concept of statutory interpretation when examined, deals with looking at the nature of a statute or an Act of Parliament, and according to Dworkin, this is a construction that is used by English lawyers and applied to a document in all events. It includes two things, firstly, the meaning of the words; and secondly, their legal effect, or the effect which is to be given to them by courts.[4]

Therefore this paper will consider the constitution as a statute, although it has special qualities, which make it a higher statute and it will look at which rules a court can apply to ascertain the intention of its framers.[5]

II. Constitutional Interpretation in Malawi

Malawian constitutional law has undergone major reform since 1992, mostly due to the changing political climate.[6] The adoption of the 'democratic' constitution in 1994 developed the jurisprudence on constitutional interpretation significantly. The rapid increase in constitutional cases is due to the fact that Malawi has just recently come out of an authoritarian state, which ruled for over thirty years.[7] The judiciary prior to 1994 was markedly a restrained one. The *Chihana case* marks the move for Malawian courts to interpret a constitutional provision more liberally. The court's new image and approach spurred on litigants to test the waters by bringing more constitutional cases.

Most of Malawian common law has been codified into legislation. Consequently, if an issue comes up for statutory interpretation, courts will have recourse to the Interpretation Act and court decisions on the same issue. This suggest that courts are not at liberty to go beyond the set rules of interpretation unless the matter has never come up for interpretation[8] before or there has been an amendment in the

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[4] G. Dworkin, The Nature of a Statute 233 (1967); *see also Chatenay v Brazillian Submarine Telegraph Co.*, (1891) 1 QB 79, at 85 per Lindley J.

[5] *Edinburgh Street Tramway v Torbain*, (1877) 3 Spp. Cas 58, at 68, Blackburn L.

[6] This was the time when Malawi was trying to become a multiparty democracy; *see also Chihana v The Republic*, Criminal Appeal No 9 of 1992 (MSCA) (Unreported); the Supreme Court imputed that despite the Constitution not having the Bill of Rights, the Universal Declaration of Human Rights formed part of the law and as such the court could enforce the rights and freedoms enunciated in it. This was the first time the court gave an unrestricted interpretation.

[7] During Dr Banda's regime, the 1966 Republic Constitution did not contain a Bill of Rights; however, due to the oppressive regime that existed, the court's constitutional interpretations were also very limited so as to reflect the times.

[8] Compare with the United Kingdom, due to the non-codification of some of its common law, including the constitution, courts are allowed to take a wider mandate in interpretation. *See also Pepper v Hart* [1993] AC 593, HL.

pre-existing law, which has changed its scope. It can further be stated that since 1994, the element of checking a statute's constitutionality has become evident in most cases before the courts.

In looking at all these issues, one is tempted to question the scope of constitutional interpretation in Malawi *vis-á-vis* judicial activism compared with judicial minimalism. Some of the Malawian cases show that the Malawian courts have not taken a set stance either to practice liberalism or restraint when faced with a constitutional challenge. For instance in *Malawi Congress Party v Attorney General*,[9] Justice Mwaungulu's decision raised a few eyebrows, but it can be stated that his interpretation of the constitution was done systematically and based on principles of the constitution itself. This is the right approach to take if one is construing a constitutional provision. The principles in Section 11[10] of the constitution must at all times be adhered to by the courts especially since they are the final arbiter[11] as to what is meant by a constitutional provision. However, the above case on appeal[12] brought another surprise to Malawi's constitutional law as the above decision was reversed. The court agreed and appreciated the constitutional rights that were being protected in the lower court, but it took a narrow approach in interpreting Section 44 as to the limitation of Section 28 so as to make such transfer permissible in law.

The two cases have definitely influenced the appreciation of constitutional law in Malawi, despite the fact that the first ruling offers a liberal view whilst the latter offers a reserved view. From 1992 onwards, it has been observed as a trend that where the lower court takes a liberal stand,[13] the Supreme Court, which is the final court in the land, takes a restrictive approach. It should be stressed that this position does not help the country' jurisprudence especially as the country is still developing its new democracy. It is important to ask if one view offers more in terms of statutory interpretation, David Pollard[14] believes that the liberal view is a much better position for any country to take.

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[9] Also known as the *Press Trust* case, Civil Cause No. 2074 of 1995 (HC) (Unreported). The court declared that the Press Trust (Reconstruction) Act of 1995 was null and void as it went against the principles in Section 28 (a section dealing with the right to economic activity). It was noted in the case that the judge understood that the right which he was protecting was not an absolute one, but based on the circumstances, a wider interpretation was needed to protect people's interests.

[10] Section 11 deals with principles which should be used in a case requiring constitutional interpretation.

[11] Section 9 of Republic of Malawi Constitution, Act 24 of 1994 – Court's powers to interpret the Constitution.

[12] *Attorney General v Malawi Congress Party et al.*, Civil Appeal No. 22 of 1996 (MSCA) (Unreported)

[13] *See also Public Accounts Committee v Attorney General and Speaker of National Assembly, Amicus curia Malawi Human Rights Commission*, Civil Cause No. of 2005 (HC) (Unreported), Justice Chipeta ruled that a constitutional amendment of section 65 was unconstitutional as such declared it null and void. See also

[14] Pollard, *supra* note 1, at 5:

> Individual rules of law are predicated on a basic understanding that like situations should be treated alike and this represents a legal application of generally accepted moral notions of the desirability of fair, equal, and consistent dealing between

Whether one agrees or disagrees with Pollard, one needs to bear in mind that the argument comes back to the same point: if a statute is to be interpreted in Malawi, should courts look at the intention of the drafters or should the court's decision be based on individual circumstances, the case or the judge's views? As already stated the constitution is the supreme law[15] of the land and courts are the final and authoritative power for interpretation of statutes. The court should therefore adhere to the tenets of the constitution but also remember its unique nature.

III. Constitutional Interpretation in the US

The US Constitution is one of the oldest constitutions in the world. It is said to be the best drafted constitution due to its simplicity and clarity. Due to its historical background, it is right to point out that it offers a wide range of case precedents for constitutional interpretation.[16] The US Constitution under Article III designates the Supreme Court of the United States of America as the protector of its principles and final arbiter of its intention. As was seen in the Malawian experience, the court has either taken a liberal or restrictive stance when it comes to constitutional interpretation.

Renowned academics have criticized the way the courts have interpreted the constitution.[17] There is controversy as to whether there exists judicial supremacy

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> persons, be they natural or legal creatures ... Principles can also exist in a large number of guises from inspirational statements of high moral principle through to very much more concrete expressions which may appear to be much more akin to rules in their form and content.

[15] *Attorney – General v. Lunguzi et al.*, Civil Appeal No.23 of 1994 (MSCA) (Unreported). The Supreme Court of Appeal held that the State President had violated the provisions of the Constitution (especially s. 43 thereof) by removing the respondent from his post as Inspector General of Police without giving him reasons in writing for such removal. *See also Director of Public Prosecutions v. Dr. Banda et al.*, Criminal Appeal No.21 of 1995 (MSCA) (Unreported): the Supreme Court of Appeal declared ss. 313 and 314 of the Criminal Procedure and Evidence Code null and void because they were inconsistent with s. 42 of the Constitution. It can be noted from all these decisions that executive decisions and actions must conform to the terms and requirements of the constitution. Conversely the legislature must ensure that legislative procedures and enactments are not contrary to the Constitution. However, more emphasis should be placed on the courts so that they adhere to such principles as they are vested with the power of being its protector. They must ensure that their interpretation of the constitution does not go against its grain and sanctity.

[16] 1976, Justice William Rehnquist said:

> The framers of the Constitution wisely spoke in general language and left to succeeding generations the task of applying that would live ... Where the framers ... used general language, they [gave] latitude to those who would later interpret the instrument to make that language applicable to cases that the framers might not have foreseen.

See also Justice White in *Thornburgh v American College of Obstetricians*, 106 S. Ct. 2169 , at 2193 (1986) and also *Missouri v Holland*, 252 US 416, at 433-435 (1920), Justice Oliver Wendell Holmes (on reading the constitution).

[17] L. H. Tribe & M. C. Dorf, On Reading the Constitution 1 (1991), quoting Michael Kammen:

or constitutional supremacy. This is being argued in line with the fact that the cases before the Supreme Court usually involve legislation from the 50 states as opposed to an interpretation of a constitutional provision, a perusal of the writings of Laurence Tribe and Michael Dorf have alluded to this problem in their writings about the American Constitution.[18]

A classic example of the court offering a liberal view was *Brown v Board of Education*[19] in which the court held school segregation to be unconstitutional.[20] One can question if this was a constitutional interpretation or whether it concerned evaluating if a piece of legislation was constitutionally applicable. However, due to the nature of the US system, this is a very good example of a liberal approach to constitutional interpretation.

A restrictive view was noted in *Sugarman v Dougall*[21] where Justice Rehnquist in a dissenting opinion stated that the 14th Amendment was meant only to prohibit state racial discrimination, and not protect those in other 'suspect' classifications. This in itself is very unclear as the very nature of human rights call for a liberal approach.

There are two schools of thoughts about the Supreme Court being the final arbiter in the interpretation of the constitution. Several academics, like professors Larry Alexander and Fredrick Schauer, have argued that the rule of law states that people should refrain from making independent judgments about what the Constitution requires, and should accept without examination the interpretations provided by a "singular authoritative decision maker." Otherwise there will be an "interpretative anarchy" and people will not be able to coordinate their actions on matters on which they disagree. They suggest that the courts, especially the Supreme Court, should stick to the "settlement function" of law, and this should be done by the single authoritative interpreter to which others must defer.[22]

The debate on the issue of separation of powers also exists in the US, because like Malawi, the US Constitution allows for Congress to amend the constitution if there is a two-thirds majority. Jeremy Waldron[23] raised the question about the reason we could have to think that a rule requiring deference to the judgments of five people, who are replaced at random intervals, produces more stability than a rule requiring deference to the judgments of a majority of the House of

"although the Framers of the Constitution intended that 'it be accessible to the people, throughout most of our nation's history the Constitution has been revered more as a sacred object to be worshipped than a text to be read and interpreted.'"

[18] *Id.*, at 7: "How then ought we to go about the task of finding concrete commandments in the Constitution's majestically vague admonitions? If there is genuine controversy over how the Constitution ..."

[19] 347 US 483.

[20] Compare with *Cooper v Aaron*, the Supreme Court reinforced the principal of judicial supremacy as opposed to constitutional supremacy, as it said it followed the principles of Brown as supreme law of the land as they are an interpretation of the Constitution.

[21] 413 US 634, at 649-650 (1973).

[22] M. Tushnet, Taking the Constitution Away from the Courts 27 (1999); *See also Marbury v Madison*, Justice Marshall's statement, "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution."

[23] Tushnet, *supra* note 22, at 29.

Representatives and the Senate, ordinarily concurred in by the President? Or, if one is bothered by the unrealistic prospect of dramatic short-term shifts in purely majoritarian systems in which power is divided among several institutions whose members are elected by majorities or, sometimes, pluralities, and serve varying terms of office, consider the following rule of institutional design. Can one consider this an anomaly, especially if one is considering the issue of democracy? The fact remains that the Supreme Court has developed a number of precedents which have evolved the constitutional law of the US considerably, and more so in the area of human rights,[24] thereby achieving to some degree the framer's intention of treating everyone equal.

C. The Finer Points of the Debate

Should there be a particular or special way for judges to interpret the constitutions in the US and Malawi, so as to ensure that the framer's intentions are embodied in the text of the case? As seen from the above discussion, different readers of any Constitution will reach varying conclusions about what that text is saying or intending to say. Therefore it raises the question what separates judges from normal people? And what does it mean to read the constitution, or further still, to interpret it? It has been noted for instance in the US Supreme Court, a judgment can be predicted based on the judges that are sitting on the bench, that is to say, whether they are liberal or conservative, however their interpretation of the constitution is considered the law and correct.[25]

The above finer points are what seem to be emerging from this article. Although the Malawian and US Constitutions are dramatically different in every sense of the word, when it comes to their interpretation, the constitutions have clearly enunciated who shall have the ultimate power to interpret its context. Moreover, both systems set boundaries, as to who can make amendments to the constitution. Therefore, could the issue of reading or interpreting the constitution be demystified, made easier or deconstructed so as to understand why such decisions are being made about the meaning of constitutions that are clearly drafted like the US and Malawian ones?

Arguably the courts could simply impute that it is because the constitution is vague and as such there is a need for clarification from the court as custodian of constitutional interpretation that such decisions are made. It can be stated that in imputing vagueness to the constitution, the courts are inevitably reducing the intention of the framers and Parliament as the voice of the people. Can it be argued that the courts are going against the doctrine of separation of powers as they are now attributing to the constitution, a framework or meaning that was not intended by the framers? The simple response is yes, but courts have justified this by saying it is a necessary evil, due to the fact that law must be exercised not in a vacuum but in the circumstances and social environment that it exists in.

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[24] *Roe v Wade, Hawaii Housing Authority v Midkiff* 467 US 229 (1984).

[25] The challenge to *Roe v Wade* in mid 2000 when the full bench of the Supreme Court was basically made up of conservative judges.

The history of the US constitution in this area is very useful because it claims that, due to advances in life and the world, it is understandable that there is a need to apply a contemporary interpretation. But in doing so, does the initial intention of the constitution change or does it evolve to accommodate the current circumstances? I believe that the intention of the drafter or framer is looked at, but not always considered. It is often disputed, especially in modern times, as the perception by the courts is that law is dynamic and should change according to the circumstances.[26] This concept, however, goes against the very essence of what a constitution is supposed to be, rigid and always true to its original intent.

The above argument of the literal or purposive interpretation is of particular importance with regard to constitutions, although most judges state that this is a purely academic debate. This paper states the opposite and argues that is not an academic debate, since it has a significant bearing on the legal system. For instance, the current position in the United Kingdom, which to some degree Malawi has adopted, is in favour of the latter interpretation, however, there still exists dissenting views[27] especially about the former interpretation.[28]

On reading the above passage, the argument that constitutional interpretation is different therefore stands, as this is not an ordinary statute construction, especially if one examines the political, historical and social context from which the constitution stems. Thus one could argue that an interpretation by the courts, which is in effect judge-made law, reduces its status, especially if a judge rules that a constitutional provision is contrary to the same constitution.[29]

It is argued that an interpretation by the courts of the constitution, could be considered as rewriting the constitution. The concept of changing or amending the constitution through judge-made law is not proper as it goes against the spirit of the constitution.[30] This in essence is almost a violation of the constitutional

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[26] *Supra* note 2, at 539

> While the purpose of construction is said to be the search for the intention of the legislature, it is important to remember that this it to some extent an artificial concept, and is certainly to be kept distinct from the search from the motive or aims of individual players, however important, in the legislative process.

See also R v Secretary of State for the Environment, Transport and the Regions and another, Ex.p Spath Holme Ltd., [2001] 2 A.C 349, 395 (HL), per Lord Nicholls of Birkenhead; 1, *Salomon v A Salomon & Co. Ltd,*(1897) A.C 22, 38 (HL), per Lord Watson.

[27] *Id.*, at 555

> Discussions of statutory construction focus on whether a court should look strictly and exclusively at the words employed by the legislature or whether they should be prepared to apply a construction which, without doing actual violence to the clear meaning of any words used, will reflect the underlying political and social purposes of the legislation in its application to new cases, by elucidating what the words are intended to mean, by supplying technical deficiencies or by resolving ambiguities.

See also Annex 1, at 556.

[28] For instance in the House of Lords' decision in *R (Quintaville) v Secretary of State for Health* [2003] 2 W.L.R 692, (HL), Lord Bingham of Cornhill.

[29] *Section* 65 case, *op.cit.*

[30] For instance the Malawian Constitution requires that an amendment which changes the spirit of the Constitution must be done through a referendum, so as to ensure that it is democratically sound.

principle of the separation of powers.[31] Therefore, courts should be reminded of this rule when interpreting or reading the constitution so as to ensure that they do not usurp the powers of the legislature who in the in strictest sense are vested with the making of the law. It can be further argued that both the US and Malawian constitutions lack certain procedures for identifying whether a branch of government is violating a constitutional provision.

Thus in relation to Malawi and the US, the issue of statutory interpretation of the constitution cannot only be based strictly and exclusively on the words used. The court should avoid violating the principles on which the constitution is set by carefully looking at the framer's intention[32] and purpose and then applying it to the existing circumstances, including the current underlying political, economic and social climate.[33] The courts can also look at the scope of the law as a whole, which is not easy in case of a constitutional provision. However, it must be accepted as a fact that the constitution does not exist in a vacuum, as it coexists with other provisions or policy. Therefore if the courts are to apply a liberal or restrictive view, then all these issues must be considered.

D. Conclusion

The question of whether constitutional interpretation is statutory interpretation in the ordinary sense of the word, can only be answered by looking at the applicability and non-applicability of constitutional principles on how courts should treat constitutional challenges. Whether the court is checking constitutionality or legality of a constitutional provision or its amendment, reference can only be made to tenets of democracy, good governance and adherence to the rule of law, which in this case is the constitution itself. This can either be done through specialized constitutional courts or by developing legislation which addresses the issue of constitutional interpretation. But it remains that the construction of the constitution with regard to its purpose and meaning must be done to offer the reader a sense of its application.[34]

In their interpretation, courts should always give effect to the drafter's intention as it embodies the country's purpose and if it cannot be plausible to do so, then

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See the judgment of Justice Chipeta in the *Press Trust* case: it can be argued that this was not a purposive interpretation but was a basic violation of the constitution as it was in fact an amendment of the Constitution. This begs the question whether a constitutional provision can be declared to be unconstitutional. It is propagated that since the constitution is the highest law especially in Malawi, as well as abiding by the principle that courts are mandated to declare laws as inconsistent with the constitution, the above incidence in Malawi can be said to be an anomaly.

[31] *Sussex Peerage Case* (1844) 11 Cl & Fin 85, at 143, per Tindall CJ.

[32] W. Twinning & D. Miers, How to do things Rules: A Primer of Interpretation (1999) argues that statutory words must always take priority in the event of a dispute. *See also Duport Steels Ltd v Sirs* [1980] 1 W L R 142, at 168, per Lord Scarman.

[33] *See Fothergill v Monarch Airlines* [1981] AC 251, 271 (HL) for the literal approach to statutory interpretation.

[34] *Riverwear Commissioner v Adamson* (1876-77) App. Cas743, at 763; *see also Black-Clawson International Ltd. V Papierwerke Waldhof-Ashaffenburg* [1975] AC 591, at 613-614, Lord Reid.

at the very least do so with restraint. A judge sitting in the US or Malawi must as opined here not look at constitutional interpretation and consider a restrictive or liberal approach; rather the judge should bear in mind the principles for statutory interpretation as well as understand that a statute usually is legal and factual but a constitutional challenge is mostly legal.

A written constitution is fundamentally a higher law in the land, which is the case in Malawi and the US. Thus, the natural meaning of the words which have been used still maintain this status, and to interpret differently is a violation of the constitution. Malawi has witnessed many changes in its constitutional order since 1994, especially fundamental values of constitutional law that are associated with the rule of law. The US, on the other hand, has not witnessed such constitutional changed for decades and that is why the Supreme Court is able to have such a balance between liberal and conservative views in relation to its constitutional interpretation.

In conclusion, constitutional interpretation as it stands needs a special focus in the area of statutory interpretation, as it deserves a more concentrated effort by the courts due to its context. There may be a need to develop special rules especially in Malawi so as maintain the integrity of the constitution. A court has to be careful not to unravel the tenets that underlie a constitutional provision as it has a major impact on democracy, good governance and rule of law. Lastly, this article was premised on the question whether judicial activism or restraint should be followed when it comes to constitutional interpretation. The answer remains that as long as the sanctity of the constitution is maintained, and the court's decision is sound and clear, the public will not have problems applying such an interpretation.