

Voice, Active Citizenship and Law Reform: Insights into the Making of Malawi's Constitution of 1994 and Beyond

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Abstract

Andrew Arato has poignantly observed that constitution-making is underpinned by serious political actors operating behind the scenes. These actors – who hold *le pouvoir constituant*, that is, constituent power, or act in its name – are the ones who in turn hire the lawyers to draft a constitution's text. This observation raises a number of questions: To what extent is constitution as text the expression of a people in a polity? To what extent is a constitution as text a mere reflection of the positions of experts? How important is voice and active citizenship in constitution-making? Can law reform enhance or undermine voice and active citizenship in constitution-making? This paper looks at the making of the Malawi's Constitution of 1994 and analyzes the extent to which voice and active citizenship has influenced the Constitution's text. In doing so, the paper looks at the evolution of the nature of the 'Presidency'. I conclude that the sole focus on the constitution as text is misplaced. The focus must equally be on the constitution as a way of life.

Introduction

The making of a new constitution is deliberate process. It may proceed on the back of empirical analysis or evidence but it is not a state of nature. Indeed, the orthodox view is that the making of a constitution succeeds an 'order in ruins' following a 'revolution', 'a lost war' or 'similar catastrophe'.¹ In the last couple of decades, however, the thinking has moved on. The modern constitution is no longer 'a gradual, historical process', it is 'the active making of a new order'.²

The natural law position on constitution-making has been to interpret the process as an enterprise involving 'equal, free men'.³ However, scholars such as Andrew Arato note that there are important political actors behind any process of constitution making. In Arato's case, he has poignantly observed that constitution-making is underpinned by serious political actors operating behind the scenes. These actors – who hold *le pouvoir constituant*, that is, constituent power, or act in its name – are the ones who in turn hire the lawyers to draft the constitution's text.⁴ Indeed, HWO Okoth-Ogendo states that constitutions should be understood in the context of the process of constitution-making. The process is an 'eminently political act' involved with the 'creation of distribution, exercise, legitimational effects and reproduction of *power*'.⁵ Finally, Edmund Burke has said on the point:

[Constitutions are] made by the peculiar circumstances, occasions, tempers, dispositions, and moral, civil, and social habitudes of the people, which disclose themselves only in a long space of time.⁶

How then were constitutions such as Malawi's Constitution made? The reassessment of constitutions such as Malawi's Constitution is pertinent given their gestation. The second

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¹U Preuss 'Constitutional Power Making for the New Polity: Some Deliberations on the Relations Between Constituent Power and the Constitution' (1992–1993) 14 *Cardozo Law Review* 639, 639.

² Preuss, above, 639.

³ Preuss, above.

⁴ A Arato 'Forms of Constitution Making and Theories of Democracy' (1995) 17 *Cardozo Law Review* 191.

⁵ HWO Okoth-Ogendo, 1991

⁶ E Burke in Preuss, n 1, 639.

wind of change at the turn of the 1990s led to the (routine) adoption of largely liberal, democratic constitutions in most of sub-Saharan Africa. A number of factors account for this status quo. The demise of the Cold War redirected the focus of international geopolitics to legal liberalism.⁷ Yash Ghai further attributes the agitation for liberal democratic constitutions to the failure of authoritarian and undemocratic regimes in Africa in fostering economic growth epitomised by the ‘collapse of African economies’.⁸ Liberal democratic constitutions were also being propounded as a panacea for economic and political stability.⁹

This raises a number of queries: If the power dynamics in a polity underlie a constitution, to what extent is constitution as text the expression of a people in a polity? To what extent is a constitution as text a mere reflection of the positions of experts? How important is voice and active citizenship in constitution-making? Can law reform enhance or undermine voice and active citizenship in constitution-making?

In this paper, I locate these questions in the process of the making of Malawi’s Constitution of 1994. I focus on the ‘idea’ of ‘accountable government’ and analyze the evolution of the nature of the ‘Presidency’ as a way of tackling the queries that I raise here. Beyond the queries and analyses, I conclude that the sole focus on the constitution as text is misplaced. The focus must equally be on the constitution as a way of life.

Foundation of a Constitution: The Conception of Constituent Power

In constitutional theory, commentators have argued that political authority derives from the people who are the repository of constituent power. Antonio Negri has been a major proponent here. He contends that constituent power is an expression of the popular will; it is the power of the ‘multitude’. Hence, democracy is appurtenant to the concept and practice of constituent power. He contends that constituent power is in constant conflict with constituted power, which is the fixed power of formal constitutions. Constituent power, in Negri’s thesis, would lie neither with the legislature nor the judiciary as, according to him; the propensity ‘to revolt’ lies with the people themselves.¹⁰

It has been suggested that those whose authority is necessary for constitution-making – the ‘governed’ as the repository of constituent power – cannot do so without surrendering that authority to ‘institutional’ sites – the ‘governors’ as the holders of constituted power. This apparently epitomizes the paradox of constitutionalism.¹¹ The paradox resonates with the point Antonio Gramsci makes on the deference of the ‘governed’ in the context of ‘spontaneous’ consent.¹²

In the case of Malawi’s Constitution, let us look at the section 12 which provides for the social trust and the public trust. Section 12 of the Constitution reads:

⁷ D Venter, 1995:157-160; J Van Donge, 1995:197-202; j Hatchard *et al*, 2004:22

⁸ Y Ghai, 1993: 52

⁹ I Shivji, 1991:27

¹⁰ A Negri, 1991

¹¹ M Loughlin & N Walker (eds.) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, Oxford: Oxford University Press, 2007

¹² A Gramsci, 1971

This Constitution is founded upon the following underlying principles–

- (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.
- (iv) The inherent dignity and worth of each human being requires that the State and all persons shall recognize and protect fundamental human rights and afford the fullest protection to the rights and views of all individuals, groups and minorities whether or not they are entitled to vote.
- (v) As all persons have equal status before the law, the only justifiable limitations to lawful rights are those necessary to ensure peaceful human interaction in an open and democratic society.
- (vi) All institutions and persons shall observe and uphold the Constitution and the rule of law and no institution or person shall stand above the law.

Section 12 emphasizes some nine principles on exercise of State authority. These principles are: The people are the root of legal and political authority of the State; second, the exercise of the legal and political authority of the State is delineated by the Constitution itself; third, the exercise of the legal and political authority of the State shall be for protection of the interests of the people; fourth, persons exercising the powers of the State do so on trust; fifth, persons exercising powers of the State do so as fiduciaries since they are under a duty to do so lawfully and in line with their responsibilities to the people; sixth, the maintenance of the trust for the exercise of the powers of the State depends on an open, accountable and transparent Government, and informed democratic choice; seventh, the recognition and protection of human rights of persons in the country is derived from the inherent dignity and worth of every person; eighth, all persons are equal before the law; and finally, the Constitution has universal application to all persons and institutions and every person and institution shall comply with it.

The premise of the public trust and the social trust respectively needs elaborating. First, it is necessary to clarify the notion of ‘trust’ itself: It has been argued that trust, together with reciprocity, solidarity and cooperation are the ‘habits of the heart’ of social behaviour.¹³ While it has been difficult to underpin the notion of ‘trust’ in definitive terms, ‘trust’ has been described as an ‘encapsulated interest’. Kenneth Newton states:

Trust involves risk, it is true [...] but it also helps to convert the Hobbesian state of nature from something that is nasty, brutish, and short, into something that is more pleasant, more efficient, and altogether more peaceful. Social life without trust would be more intolerable and, most likely, quite impossible.¹⁴

Turning to the public trust and the social trust: The public trust in public law has constituted a ‘mixture of ideas’ which have ‘floated freely’ in constitutional theory. However, central to the notion of the public trust is the idea that the ‘right to govern’ must be exercised for the

¹³ K Newton ‘Social Trust, Social Capital, Civil Society and Democracy’ (2001) 22(2) *International Political Science Review* 201, 202 [internal citations omitted].

¹⁴ K Newton, above, 202 [internal citations omitted].

benefit of the civic public.¹⁵ Hence, as a practical matter, the choices of the ‘governors’ must conform to the wishes of the ‘governed’.¹⁶ The social trust, on the other hand, is rooted in social capital theory. It forms the basis of an individual’s participation in a social system.¹⁷ While scholars such as Newton make a distinction between social trust and political trust on the basis of social capital and political capital respectively,¹⁸ in the context of constitutional theory, I suggest that the distinction is blurred since the exercise of the State, ‘juridical’ power has, one way or the other, implications for the relations of the civic public in a social system.

In respect of the public trust under the section 12 of the Constitution, its nature lies in at least two attributes: the existence of the trust is publicly constituted under the Constitution itself; and the sustenance of the trust is dependent on an open, accountable and transparent Government. The nature of the social trust, on the other hand, lies in the fact that the exercise of the fiduciary duty that the Constitution has reposed in persons exercising the powers of the State shall be in accordance with the responsibilities of those fiduciaries towards the people as specified by the Constitution itself. Indeed, Kamchedzera and Banda have argued that the nature of the social trust also lies in the use of terms such as ‘trust’, ‘open’, ‘accountable’, ‘transparent’; and I would add ‘informed, democratic choice’. All these descriptors point to the nature of governing in the country.¹⁹

The public trust and the social trust mark a conceptual shift from social contract to a constitution–based fiduciary relationship between the ‘governed’ and the ‘governors’. Under social contract, the emphasis is on the conduct of ‘citizens’ – the ‘governed’ – while under a constitution–based fiduciary relationship, the focus is on the conduct of the ‘rulers’ – the ‘governors’. The constitution–based fiduciary relationship is underpinned by the Lockean ‘right to revolution’ where a ‘sovereign’ that betrays the trust of ‘men’ must be ‘overthrown’.²⁰ In this respect, under the public trust and the social trust under the Constitution, the consent of the people as the ‘governed’ is not deferred. In this way, the exercise of the State authority is always subject to the terms of governing set by the people.²¹

However, it is contended here that in light of the nature of the public trust and the social trust under the Constitution neither the deference nor the paradox has a basis in Malawi’s constitutional order at least at the normative level. It is clear under the Constitution that the public trust and the social trust maintains a constitution–based fiduciary relationship between the ‘governed’ and the ‘governors’ such that, at the normative level, the terms of governing will have been set down by the ‘governed’ as the repository of constituent power.

¹⁵ See generally JL Sax ‘The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention’ (1969–70) 68 *Michigan Law Review* 471. For a discussion of the conception of the ‘civic public’: See PP Ekeh, Chapter 4, note 55

¹⁶ JL Sax, above, 483

¹⁷ K Newton, note 13

¹⁸ K Newton, above

¹⁹ G Kamchedzera & CU Banda, ‘The right to development, the quality of rural life, and the performance of legislative duties during Malawi’s first five years of multiparty politics’, 2009, 5

²⁰ See J Locke *Two Treatises on Government*, 1689

²¹ See A Gramsci, n 12, 12 on ‘spontaneous’ consent; and AA Mazrui ‘The Tensions of Crossing the Floor in East Africa’ in AA Mazrui (ed.) *Violence and Thought: Essays on Social Tensions in Africa*, London: Longman, 1969, 122–XXX on ‘composite’ consent

Voice and Active Citizenship Defined

Voice as the audiolization of speech must first engage with the question: *Who (can) speak?* The question raises the issue of rules of ‘entry’. In the context of discourse, Manthia Diawara has reconciled VY Mudimbe and Michel Foucault²² and has argued that Foucault’s ‘archaeological approach’ is ‘doubly enabling’ because it has made it possible to ‘think against the grain’ and it has made ‘proposals of alternative discursive formations.’²³ In relation to Mudimbe, Diawara further observes:

Mudimbe uses Foucault’s method to unmask and unmake the Western *ratio* that dominates the human sciences and, under the guise of universalism, duplicates Western man in Africa. On the other hand, Mudimbe creates a postcolonial and postimperialist discourse that posits a new regime of truth and a new social appropriation of speech, thereby raising the question of individual subjugation in postcolonial discourse.²⁴

Diawara goes on to argue that both Foucault and Mudimbe de–bunk discourse by recognizing its three key ‘rules’. First, it sets external rules. Diawara states:

These [rules] include the construction of forbidden speech that bans certain words from certain statements; the designation of madness that opposes reason to insanity; and a regime of truth that determines the desire to know and practices a principle of discrimination[.]²⁵

Second, discourse creates an ‘internal system’. Here Diawara argues:

This internal system is aimed at classifying, ordering, and distributing discursive materials so as to prevent the emergence of the contingent, of the Other in all its nakedness. This internal system of discursive subjugation involves the concept of authorship, which serves to rarify the quantity of statements that can be made; the construction of the organization of disciplines as a delimiting force; and a notion of commentary that organizes discursive statements according to temporal and spatial hierarchies.²⁶

Finally, discourse, according to Foucault and Mudimbe, ‘gridlocks’ the rules of ‘entry’. Again, Diawara states:

[I]t posit[s] the conditions of possibility for putting discourse into play through the subjugation to rules of the individuals involved in discursive deployment. The object, however, is neither to neutralize the return of that which was repressed nor to conjure out the risk of it appearing in discursive practices, but to make sure that ‘no one will enter the discursive space unless certain prerequisites are satisfied and one is qualified to do so.’²⁷

These observations may be transposed to a governmentality context in so far as ‘conduct’ or ‘rule–making’ under discourse is concerned with the ‘irruption’ of ‘discontinuity’ or ‘disorder’.²⁸ Indeed, in the context of Foucauldian counter–conduct, Graham Burchell has noted that it may be ‘ascetic’; that is, the self rejects prescription on the self; it may be ‘collective’ or ‘communal’, where it involves a communal opposition to ‘doctrine; or it may be ‘mystic’, where it points to possibility of a different ‘truth’ system.²⁹ Foucauldian counter – conduct itself is not simply resistance. It is not a quest for an alternative mirror of ‘power’.

²²M Diawara ‘Reading Africa Through Foucault: V. Y. Mudimbe’s Reaffirmation of the Subject’ (1990) 55 *October* 79

²³M Diawara, above, 80

²⁴M Diawara, above

²⁵M Diawara, n 22, 80

²⁶M Diawara, above

²⁷M Diawara, n 22, 80 [internal citation omitted]

²⁸M Diawara, n 22, 81

²⁹G Burchell, 1991

In this sense, it would merely be dissidence. Rather, counter–conduct entails a struggle against the implementation of a norm; against ‘conducting’.³⁰

In the context, of constitution–making, the seminal article by Gayatri Spivak – ‘Can the subaltern speak?’³¹ – is significant. At the risk of essentialising a highly nuanced thesis, Spivak’s central point is that the ‘subaltern’ is not every ‘discriminated–against’ or every ‘voiceless’. The subaltern is that person who is marginalized, voiceless and denied ‘space’ within cultural imperialism. She states:

In postcolonial terms, everything that has limited or no access to the cultural imperialism is subaltern— a space of difference. Now who would say that’s just the oppressed? The working class is oppressed. It’s not subaltern.... Many people want to claim subalternity. They are the least interesting and the most dangerous. I mean, just by being a discriminated-against minority on the university campus, they don’t need the word ‘subaltern’... They should see what the mechanics of the discrimination are. They’re within the hegemonic discourse wanting a piece of the pie and not being allowed, so let them speak, use the hegemonic discourse. They should not call themselves subaltern.³²

The rules of ‘entry’ of a speaker and non–speaker under a liberal, democratic constitutional *ethos* presuppose a certain ‘knowledge–construct’: the superiority of the individual, accountable and transparent government, periodic elections, adherence to human rights, separation of powers and independence of the judiciary. The categories are closed.

Is it all doom and gloom then? Possibility emerges from connecting voice to *gnosis*. The understanding of *gnosis* here is Mudimbean. Mudimbe develops his idea of *gnosis* in *The Invention of Africa*.³³ I will not rigorously engage with Mudimbe’s thesis here except to note as follows: In *The Invention of Africa*, Mudimbe adopts *gnosis* from the Greek word ‘*gnosko*’ meaning ‘to know’ in developing his thesis on African knowledge; particularly ‘the notion of philosophy to African traditional systems of thought’.³⁴ He states:

Specifically, *gnosis* means seeking to know, inquiry, methods of knowing, investigation, and even acquaintance with someone [...] *Gnosis* is different from *doxa* or opinion, and, on the other hand, cannot be confused with *episteme*, understood as both science and general intellectual configuration.³⁵

In this context, Mudimbe has argued that *gnosis* has a ‘sociohistorical origin’ and an ‘epistemological context’ that allows ‘the notion of conditions of possibility’ to flourish.³⁶ In this sense, *gnosis* is the cognitive make up of counter–conduct. It need not be institutionally located. It is innate to the human as a social being. Second, the suggestion here is that as a repository of constituent power, the people as a sovereign are the primordial arbiter of ‘knowing’; who can govern, what is to govern, or what or who is governed; and the methods of the knowing to govern.³⁷

³⁰ M Foucault, *Security, Territory, Population: Lectures at the Collège de France*, New York: Picador, 2009

³¹ GC Spivak ‘Can the subaltern speak?’ in Cary Nelson and Lawrence Grossberg (eds.) *Marxism and the Interpretation of Culture*, London: Macmillan, 1988

³² L de Kock ‘Interview With Gayatri Chakravorty Spivak’, New Nation Writers Conference, South Africa, *ARIEL: A Review of International English Literature*, Volume 23, Issue 3, 1992, 29–47, at <http://ariel.synergiesprairies.ca/ariel/index.php/ariel/article/viewFile/2505/2458> (visited on 30 October, 2011)

³³ VY Mudimbe *The Invention of Africa* James Currey & Co, 1984

³⁴ VY Mudimbe, above, ix

³⁵ VY Mudimbe, n 33

³⁶ VY Mudimbe, n 35, ix–xii

³⁷ C Gordon, 1991; A Negri, n 12; and VY Mudimbe, n 33. The suggestion compares with Gramsci’s idea of organic intellectual. The only difference is that Gramsci’s intellectual is located in a party politics structure. Under a Gramscian interpretation of the organic intellectual, the intellectual is the ‘thinker’ and ‘organizer’

The reference to the public trust and the social trust under the Constitution does not mean deference to a formal, legal ‘ordering’ as the basis for the knowing to govern. The invocation of Mudimbe’s *gnosis* is to argue for ‘possibility’; for a change of mindset. The public trust and the social trust under the Constitution is an expression of the terms of ‘governing’ between the citizen as the ‘governed’ and those entrusted with the exercise of State authority – the ‘governors’.³⁸

In effect, the constitution as text when taken on face value may be configured as the voice of the governed. However, the caution from scholars such as Arato should raise the awareness that the text is in fact a mirror of nuanced political processes involving serious political actors. Further, if voice must be linked to *gnosis* and its necessary sociohistorical origin, what then should we make of a constitution(al) text based on a liberal democratic *ethos* in a society such as Malawi? How autochthonous is voice mirrored in the text of Malawi’s Constitution? I will return to the points in due course.

Let me now turn to ‘active citizenship: The general understanding of active citizenship is in terms of rights and responsibilities of citizens. Rights are enunciated under rights-based liberalism. Hence, a constitution outlines the rights accruing to citizens. Responsibilities are not such a straightforward matter.

In the context of constitution-making, I propose that active citizenship may be construed in the context of Foucauldian counter-conduct. Faranak Miraftab and Shana Wills illustrate, in my view, active citizenship as counter-conduct most graphically. They talk of ‘drama of citizenship’. The drama of citizenship is ‘active’, ‘engaged’ and ‘grounded in civil society’.³⁹ It is concerned with a gamut of issues about civil, political, social and economic rights.⁴⁰ It is also decidedly ‘non-formalized’ and permeates ‘the high courts of justice’, ‘the ministerial corridors of government institutions’, ‘the streets of the city’, ‘the squatter camps of hope and despair’, and ‘the everyday life spaces of [the] [excluded]’.⁴¹ The drama of citizenship is the opposite of ‘statist citizenship’ where the citizen defers the legitimacy of State and ‘juridical’ government to the ‘governors’.⁴²

In the end, voice and active citizenship coalesce under a robust citizenry. Robust citizenry however presupposes immunity from ‘elite capture’ in terms of (public) opinion and effectiveness of the ‘governors’. The reality in sub-Saharan Africa is rather grim. Achille Mbembe captures the state of affairs better. He states:

The concern for rank, the quest for distinction, and the insistence of the [Cabinet] Minister on due pomp are expressed through such rhetorical devices as repetition and lists, contrasts between words and

whose basic function is to ‘direct’ the ‘ideas’ and ‘aspirations’ of his or her social class in a society: See A Gramsci, n 12. Walter Adamson observes that according to Gramsci, the organic intellectual has a critical role, whose ‘social function is to serve as a transmitter of ideas within civil society and between government and civil society’: See W Adamson *Hegemony and Revolution: A Study of Antonio Gramsci’s Political and Social Theory*, Berkeley: University of California Press, 1980, 143. The organic intellectual is one of a kind ‘specialized in the conceptual and philosophical elaboration of ideas’: See W Adamson, in this note, 145. The organic intellectual ‘acts only to enter into a dialectic with the democratic organization of the masses [. . .] founded on political and intellectual self-activity,’ rather than any ‘external formula’: See W Adamson, in this note, 41

³⁸VY Mudimbe, n 33

³⁹F Miraftab & S Wills, 2005, 201

⁴⁰F Miraftab & S Wills, above

⁴¹F Miraftab & S Wills, n 39, 201–202

⁴²F Miraftab & S Wills, n 39

things, frequent antitheses, a tendency to exaggerate and indulge systematically in superlatives, a common use of hyperbole and expressions that go beyond reality, and preference for imprecise propositions and vague generalizations, complete with constant references to the future. To be effective, this verbal trance state must reach a point where all that matters is the harmony of the sound produced – because, by and large, it is the particular arrangement of sound that brings on a state of “possession” and triggers the mind’s voyaging; the space it creates through violence, though, is, in the postcolony, totally colonized by the *commandement*.⁴³

Hence, the space where voice and active citizenship must traverse is a litany of ‘interest’. There is patriarchy, manipulation, path dependence and outright ‘Othering’. I now will look at the nature of the ‘Presidency’ under Malawi’s Constitution in order to offer some thoughts on the queries I have highlighted in the Introduction.

The Constitution of 1994

The constitution(al) text was drafted by the constitutional sub–committee of the National Consultative Committee between January and May, 1994. Some parts of the Constitution were amended in plenary sessions of a full sitting of the National Consultative Committee.⁴⁴ The constitutional sub–committee comprised 5 Malawian lawyers and their secretary was a British consultant commissioned by the British Government through the British Council.⁴⁵

Three constitutional conferences took place between 1993 and 1995 where various themes on the constitution(al) text were discussed. The conferences of 1993 and 1994 were very much civil society–driven.⁴⁶ More importantly, the State also provided space for a constitutional conference. The National Constitutional Conference on the Provisional Constitution held at the New State House in Lilongwe, Malawi from 20–23 February, 1995⁴⁷ settled the ‘norms’ of the Republican Constitution as we know it today.⁴⁸ The list of participants to the Conference shows that the participants were predominantly urban–based professionals from the public and private sectors respectively; members of urban–based, non–governmental organizations; chiefs (as representatives of the rural folk); politicians; local and international academics; ‘observers’ from international organizations; and members of the diplomatic corps. In total, 273 delegates and some 78 local and international observers attended the Conference. Hence, 273 individuals were the voice of some 11 million Malawians. All diplomatic missions resident in Malawi also had observer status at the Conference and they had a presence at the Conference.

The constitution–making process has been indicted of external interference. Richard Carver has observed that prior to the multiparty general elections of 17 May, 1994, ‘the World Bank ran a series of seminars for political parties on economic and financial management.’ The apparent aim of the seminar series was to ensure that the political parties’ agenda reflected World Bank thinking. During the parliamentary debate on the certification of the Constitution, a member of the Opposition lamented at the supposedly external interference

⁴³ A Mbembe, *On the Postcolony*, Berkeley and Los Angeles, California: California University Press, 2001, 118

⁴⁴ The National Consultative Committee was a multiparty forum for the development of a new Constitution for Malawi following the national referendum: see the National Consultative Act, Number 20 of 1993

⁴⁵ The five Malawian lawyers were: Zangaphee Chizeze, Khoti Kamanga, MacLaws Makwiti, Modechai Msisha and Matembo Nzunda. Kevin Bampton served as the committee’s secretary. The then Solicitor General and Secretary for Justice, Elton M. Singini, served the secretary to the National Consultative Committee

⁴⁶ E Kanyongolo, 1998

⁴⁷ E Dokali (ed.) *Building Blocks of the Constitution of Malawi, 1995* (1995) [on file with the author]

⁴⁸ E Dokali, above

when he alleged that ‘certain provisions’ of the Constitution had to be approved by the International Monetary Fund.⁴⁹

There have been analyses on the nature of participation at these conferences and the implications for legitimacy. Let us now look at the nature of the ‘Presidency’:

Memory

The nature of the Presidency under the Constitution is in part a result of Malawi’s recent past in so far one looks at the powers conferred on the Presidency and the inclusion of presidential term limits under the Constitution. A quick caveat: I will not delve on the rich scholarship on collective memory or counter memory here.⁵⁰ Rather, I situate my take of memory in a more practical or pragmatic tense as a lived remembering of (an often tortured) past.

On powers

Under Malawi’s Republican Constitution of 1966, the Presidency was the constitution unto itself. Section 9 of the 1966 Constitution provided that ‘Dr. Hastings Kamuzu Banda shall be the Life President of the Republic of Malawi’. Life President Banda had extensive under the body of laws in the country: the power to hire and fire; emergency constitutional powers; so-called public security powers; and even the power to declare citizens of the country *persona non grata*.⁵¹ Hence, for three decades, between 1964 and 1994, Malawi under Banda was a nation under siege.⁵²

The image through the remembering at the three constitutional conferences ought to have been that of a very powerful, omniscient Presidency. What was the analysis of the status quo? The 1994 Constitution has retained a largely powerful Presidency.⁵³ The President has extensive powers on appointment and removal of Cabinet Ministers and deputy Ministers, and appointment of ambassadors and other diplomatic representatives.

The President can also appoint of the Attorney General, Director of Public Prosecutions, the Auditor General, Inspector General of Police and the Chief Commissioner of Prisons. However, the President’s power to remove these officers can only be based on incapacity, age, incompetence, or partiality.

The President also has power to convene and preside over meetings of the Cabinet; confer honours; make appointments; negotiate, sign and enter into and accede to treaties; appoint commissions of inquiry; refer constitutional disputes to the High Court and proclaim referenda and plebiscites as required by the Constitution or an Act of Parliament.

There is an odd similarity between section 8 and Chapter V of 1966 Constitution and section 89 of the Constitution. How may we understudy this oddity? In fact none of the three conferences took issue with the extensive powers in the presidency. The concern seems to be

⁴⁹ See the contribution of Dr. Hetherwick Ntaba, member of Parliament for Lilongwe South East (Malawi Congress Party) in Government of Malawi *Proceeding of Parliament, 30th Session, 3rd Meeting*, Zomba: Government Printer, 1995, 1537

⁵⁰ See for example Zygmunt Bauman, *Memories of Class*, Abingdon, Oxon: Routledge, 1982 on collective memory and Michel Foucault, *Language, Counter-memory and Practice*, Ithaca, New York: Cornell University Press, 1977

⁵¹ See for example the General Interpretation Act (Cap. 1:01, Laws of Malawi); the 1966 Constitution; Preservation of Public Security Act (Cap. 14:02, Laws of Malawi)

⁵² See P Short, *Banda*, London: Routledge & Kegan, 1974

⁵³ See generally section 89 of the 1994 Constitution

with the notion of a life president. The belief in a strong presidency is not peculiar to Malawi. H. Kwasi Prempeh has observed as follows:

Tolerance for presidential misrule and indefinite presidential tenure may have worn thin in Africa's democratizing polities, but with voters still caring most about beating the twin scourges of underdevelopment and economic marginalization, belief in the beneficent uses of preponderant executive power continues to run strong. African polities must move beyond the fixation with "strong" leadership and focus instead on building credible and effective institutions at both the national and local levels. If anything, an imperial presidency magnifies the costs of having an incompetent or bad leader at the helm.⁵⁴

On term limits

Section 83 of the 1994 Constitution provides for presidential term limits. The presidency in Malawi is restricted to two five year terms; no more, no less. This is a direct response to section 9 of the 1966 Constitution where Life President Banda is ever-lasting. The constitutional conferences of 1993 through to 1995 were quiet clear that Malawi had to introduce presidential term limits. In a liberal democratic constitutional order, Gideon Maltz provides the justification of presidential term limits as follows:

Presidential term limits have spread very widely, but the challenge today is that of enforcement. Term limits are an important instrument of democratization in electoral-authoritarian countries: this is not just because they constrain the power of individual leaders, but also because they tend to promote political party alternation [...] which in turn fosters democratization. The international community can promote presidential term limits compliance through deepening the norm of term limits, using aid conditionality, addressing the incentives of incumbent leaders, and encouraging the entrenchment of term limits in constitutions.⁵⁵

Hence, presidential term limits are not only a matter of constitutional liberalism, they are also intertwined with the intricacies of global geopolitics.

Constitution as a Liability

I construe the constitution as a liability as the case where a person reposed with reposed with (constitutional) State authority finds the constitution – the text – as a hindrance. The point may be illustrated through a narration of the attempts to amend section 83 of the 1994 Constitution in 2002. Sean Morrow provides the context thus:

The idea of the third term, and indeed a life presidency, was raised in the immediate aftermath of the 1999 election, ironically by the Attorney-General, Peter Fachi, the very office-holder who might be expected to be the most punctilious about constitutionality. In the context of the wrangling over the legitimacy of the election, he said that 'Muluzi may even become life president regardless of what the courts rule'. Subsequently, Dumbo Lemani, a prominent UDF official, was quoted as saying that 'the Constitution will be amended to pave way for a third term'. This did not come out of nowhere. The campaign leading to the 1999 election was characterised by a blurring of the line between politics and government and the use of government resources for essentially political ends. Constitutionalism was most certainly under attack.⁵⁶

⁵⁴ HK Prempeh, 'Presidents Untamed', *Journal of Democracy*, Volume 19, Number 2, April 2008, 109–123, 109

⁵⁵ G Maltz, 'The Case for Presidential Term Limits' *Journal of Democracy*, Volume 18, Number 1, January 2007, 128–142

⁵⁶ S Morrow, 'Toxic mushrooms? The presidential third term debate in Malawi' in Southall & Henning Melber (eds.) *Legacies of Power: Leadership Change and Former Presidents in African Politics*, HSRC Press, 2006, 151–174

On 4 July, 2002, the Muluzi Administration introduced a constitutional amendment bill which sought to change the two term limit to an open term. The bill failed to attain a super-majority in Parliament. The Administration sought to introduce a constitutional amendment which now sought to change the two term limit to a third term limit. This bill was withdrawn in January, 2003.

The two bills met fierce popular resentment. There were protest meetings and protest Sunday sermons. The executive invoked intimidatory tactics including the banning of demonstrations against (particularly) the amendments. The courts revoked the purported order.⁵⁷

The proposed amendments are ironic. The President, by oath of office, is under a duty to ‘preserve’ and ‘defend’ the Constitution ‘without fear or favour’.⁵⁸ Can we rationalize the clear contradiction between the removal of a term limit and the duty to preserve and defend the status quo? Daniel Vencovsky makes an attempt:

Presidents may be motivated by more selfish considerations, such as vanity and hunger for power, fear of prosecution for corruption or human rights abuses and the lack of opportunities for retired presidents. It has also been suggested that tenure extensions may be spurred by the anxiety of the neopatrimonial network³ that fears the loss of connections and privileges.⁵⁹

Beyond the populist basis of the extension of the term limit, the Law Commission has been presented with a technical argument based on the wording of section 83 of the Constitution. The Law Commission notes:

Stakeholders have expressed very strong views about the wording of section 83 (3) of the Constitution. The concern is that unless the section is improved, an ex-President who has served his or her two terms can bounce back after serving two ‘consecutive terms’. In its deliberation on this matter, the Commission unanimously refused to subscribe to the view that, having regard to the current wording of section 83 (3) and the mischief of that provision, a President, First Vice President or Second Vice President who has served in his or her position as such for two consecutive terms would be eligible to ‘bounce back’ and serve a further term. It was the unanimous view of the Commission that such a reading of the provision would defeat the whole purpose of the provision, namely, that a President, First Vice President or Second Vice President should serve in his or her position as such for only two terms. The Commission, nevertheless, noted that the wording of section 83 (3) is liable to misinterpretation, particularly where a President, First Vice President or Second Vice President does not serve two consecutive terms but one term of five years, and is subsequently elected or appointed, as the case may be, to the office of President, First Vice President or Second Vice President.

In order to avoid any possible misinterpretation in relation to a President, Vice President or Second Vice President who serves only one term of five years, the Commission recommends two solutions. First, the Commission recommends the deletion of the word ‘consecutive’ in section 83 (3). This shall make it clear that a person can only be President of Malawi for a maximum of two terms whether consecutive or not.⁶⁰

Indeed, the matter came before the courts in run up to the 2009 general elections.⁶¹ The applicants in *ex parte Muluzi (section 83)* case argued that the language of section 83 of the Constitution allowed a president who had served two terms to contest in presidential elections if he or she had taken a break in between his or her attaining two terms and the renewed wish

⁵⁷ See Morrow, above

⁵⁸ Section 81 of the Constitution

⁵⁹ D Vencovsky ‘Presidential Term Limits in Africa’, *Conflict Trends*, Issue 2, 2007, 15, 15–16

⁶⁰ Law Commission Report on the Review of the Constitution, 2007

⁶¹ *The State v. Malawi Electoral Commission ex p. Bakili Muluzi and Another*, Constitutional Case No. 2 of 2009 (unreported) (‘*ex parte Muluzi (section 83)* case’)

to contest. The High Court dismissed the argument on the basis of the purposive principle of interpretation.

The re-emergence of the ‘debate’ on the presidential term limits in 2009 was highly charged and polarized since it pitted followers of different political affiliation against each other. In my view, the ‘debate’ in 2009 was primarily a political patronage matter than it was a constitutional one.

Constitution as a Way of Life

If the understanding is that law reform transcends the institutional setting of law reform agency, and that constitution as text is limited, then I suggest that we must understand ‘constitution’ in governing as a way of life.

First, I suggest that the basic challenge to voice, active citizenship and law reform in the general context of a constitution as a text or ism is the nature of ‘knowledge’ itself. There is an uncanny linkage between ‘knowledge–production’ and the ethos of modernity. Indeed, if the age-old understanding of governing is that it is based on social contract, then the focus must at once be on the governed. Indeed, in this ‘social ordering’, a multiform of tactics engenders modes of control and manifestations of knowledge primarily for the defense of capital.⁶² Indeed, the ‘psyche’ is to portray of a ‘culture’ of masters (read the governors) and servants (read the governed).

Second, and building on the first point, it is a misnomer, in my view, to consider the principles or norms in a constitution(al) text as ‘*conferments*’. I suggest that the principles or norms in a constitution(al) text are ‘*confirmations*’. ‘Confirmations’ is based on the innateness of the given phenomenon. This must accrue on the back of human dignity – that human rights are central to dignified living. I construe human dignity in a similar manner to Costas Douzinas. Human dignity entails that as a *self*, the human being has ‘free will’, ‘moral autonomy’, ‘responsibility’⁶³ and, I add, self-worth. Further, as the *social being*, the human being has a mutual obligation for the respect of the other human being.⁶⁴ The adherence to the principles or norms under constitution(al) text has to be in pursuit of dignified living.

The sum of the two propositions is constitution as a way of life.

Conclusion

Let me end by a beginning. What follows is pretty embryonic. Nonetheless, this is a beginning of further engagement on the following:

‘Appropriated’ voice

To ‘appropriate’ here is ‘to seize or take without permission for oneself’. I conceive of “‘appropriated’ voice’ as a situation where one constituency purports to speak for another. This how I suggest we must understand the constitution–making process of 1993 through to 1995. The problematic arises from the sample (or the numbers) and the problems of legitimacy that come with it.

⁶² See M Foucault, ‘Governmentality’ G Burchell *et al.* (eds.) *The Foucault Effect: Studies in Governmentality*, Hemel Hempstead: Harvester Wheatsheaf, 1991, 87–104

⁶³ C Douzinas *Human Rights and Empire: The Political Philosophy of Cosmopolitanism*, 2007

⁶⁴ Cf. Douzinas, above

During the legislative debates on the confirmation of the 1994 Constitution, the members often rose as the ‘voices of the people’.⁶⁵ Scholars such as Spivak have seriously called in question the ‘appropriated’ voice.⁶⁶

‘Pasargadan’⁶⁷ voice

In the context of constitution–making, how may we construe the July 20 protests in Malawi? In the petition that underpinned the protests, the ‘invincible’ author declares the call for an audit of the socio–political and economic situation of the country was being pursued under the rights and freedoms enshrined under the Constitution.⁶⁸ The President is not being held accountable within a formal State setting of, for example, the national assembly. The call is being from a ubiquitous space of the ‘people’. Again, a caveat: Since there was identifiable civil society leaders associated with the protests, were these truly representative of the Malawi subaltern?

Kelmanian compliance as active citizenship

A word on Kelmanian compliance: In the context of social psychology, Herbert Kelman has proposed three types of social attitudes; compliance, identification and internalization. Kelmanian compliance refers to a public conformity while retaining one’s personal beliefs [regarding phenomena].⁶⁹ In our context, to what extent is their purported internalization of a liberal, democratic ethos when, in fact, none exists? If we are to construe Kelmanian compliance as active citizenship then it is not obvious and often subtle.

...

By way of responses to the queries raised in the Introduction: Whether a constitution as text is the expression of a people or a reflection of expert–speak turns on the conclusion one makes from the relationship between ‘knowledge–production’ and modernity. Second, voice and active citizenship are important to law reform in enhancing constitutionalism, rule of law and democratic governance but only when conceptualized as ‘Pasargadan’ voice, and Kelman compliance as active citizenship.

⁶⁵ See E Dokali, n 47

⁶⁶ See Spivak, n 31

⁶⁷ The term derives ‘pasargada’, a fictitious community where ‘alternative’ legality flourishes: see Boa de Sousa Santos, 1977

⁶⁸ July 20, 2011 Petition to the State President of Malawi [on file with the author]

⁶⁹ HC Kelman ‘Compliance, Identification and Internalization: Three Processes of Attitude Change’ (1958) 2(1) *Conflict Resolution* 51.