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**THE BILL OF RIGHTS: HUMAN RIGHTS
UNDER THE MALAWI CONSTITUTION**

BY

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Introduction: Why this Exercise?

Section 132 of the Constitution of Malawi provides the Law Commission with a mandate “to review and make recommendations regarding any matter pertaining to this Constitution.” We are gathered here because of the work of the Law Commission and because of experiences made since the adoption of the Constitution. Legitimate concerns about the implementation of certain provisions in the Constitution, lack of clarity or lacunae have to be addressed and there is a procedure for doing so. However, at the same time the process of constitutional change or amendment should be undertaken with due care.

The Constitution is no ordinary Act of Parliament and its status as the highest law of the land should not be diluted by frequent change. The Constitution is a contract that a nation concludes on how it wants to be governed and how political power should be exercised. This contract must be clear and must guarantee democratic and effective rule.

It has to be respected by rulers and the ruled. Experience and history teach us that constitutions are vulnerable. It is up to a nation to protect the fundamental principles and institutions in terms of which it wants to be governed. This requires care and a sober and honest assessment of all facets of political life. It also brings special responsibilities for all branches of government and those institutions tasked with the duty to implement specific rules against abuse of power. There are only too many examples of the dire consequences for states and nations when the rule of law is not respected.

Constitutions are to be taken seriously. They have to be robust and be protected; but that can only happen if they are respected and equipped with means and mechanisms that will allow and ensure effective implementation. The review process undertaken by the Law Commission can enhance and contribute directly to these qualities in the Malawi Constitution. That is why the present exercise is a very important one and merits dedicated effort and honest engagement with the issues giving rise to legitimate concerns. The outcome of this gathering is about better and more legitimate rule for Malawi.

Conceptual and Practical Underpinnings of the Bill of Rights

The Constitution of Malawi is structured in a rather unique manner as far as it deals with human rights. Chapters II to IV deal respectively with “Application and Interpretation”, “Fundamental Principles” and “Human Rights”. Chapter III (Fundamental Principles) contains a combination of the classical liberal, democratic emphasis on popular sovereignty¹ and human dignity.² With respect to the latter there is a “horizontal” dimension where it is required that not only the State, but “all persons shall recognize and protect fundamental human rights...”

¹ Section 12(1).

² Section 12 12(iv).

African scholars often write about the unique approach to human rights in Africa and that a different classification is and should be adopted here. One such writer lists in his “African typology” social and survival rights; economic, development and environmental rights; and cultural and spiritual rights.³ This debate has been going on for some time, although it seems to be subsiding now, with a greater insight into the need to get the basics right and to start with democracy and the rule of law in Africa. The problems of implementation and enforceability of the different categories of rights are well-known and too much emphasis on a wide range of different rights may result in a lack of focus.

The Constitution of Malawi recognizes the classical individual rights in Chapter IV and lists several “Principles of National Policy” in Article 13. The latter are very important principles and not without the potential to be scrutinized by the Courts.⁴ They are, however, not as directly enforceable as the Chapter IV rights. It has to be noted, however, that a **right** to basic education, and not only an entitlement as provided for in Section 25, is now mentioned and came up in the course of this review. This will require a thorough debate and implementation strategy, but is not a controversial ideological issue. If at all feasible this is an area where a basic right is to be recognized. The same considerations apply to other related areas such as gender issues.

Reform in these areas can also happen by adopting appropriate legislation in order to give effect to the principles already in the Constitution. Whether constitutional amendments will lead to more effective results in areas where lack of financial resources is the main constraint, is not entirely clear. We should distinguish between those serious flaws that can only be addressed by constitutional amendments and the instances where appropriate new legislation will suffice.

In modern and democratic constitutions such as Malawi has, the Bill of Rights has several dimensions which have to be stated again at the outset. These different features provide criteria for evaluating the record on its implementation.

- The Bill of Rights is about those essential conditions in the state affecting human beings. It is, therefore, based on fundamental values such as human dignity and protection against abuse of power.
- It is a means to promote democracy.
- It is part of a supreme and justiciable Constitution.
- The Courts ultimately interpret the provisions in the Bill of Rights and the constitution generally. That is the final stage in the process of giving effect to human rights. However, the Courts cannot do it alone. All branches of government are bound by the Constitution. When the judicial process is invoked it mostly means that somewhere a human right has been violated.

³ John C. Mubangizi “*Towards a new Approach to the Classification of Human rights with specific Reference to the African Context*” 2004 AHRLJ 93.

⁴ Several South African cases deal with matters such as housing and the right to health. Socio-economic grants are often the substance of court applications.

- The Bill of Rights is frequently a source of constitutional litigation.
- Human rights are, as a rule, not absolute. This means that the limitation clause is an important element in the development of constitutional jurisprudence. This poses the particular challenge to the Courts to balance competing values and the public interest. Difficult issues and “political” questions often arise.
- Courts with constitutional jurisdiction frequently face difficult choices regarding separation of powers issues and checks and balances, other important constitutional and democratic values. As a result they develop doctrines and rules on judicial restraint. They are called upon, when ruling on the validity acts of the executive or of laws, to “apply such interpretation of that act or law as is consistent with this Constitution”.⁵
- Constitutional interpretation is to some extent teleological, unique and dynamic.⁶ It wants to promote, protect and improve fundamental values.
- There is a valuable source of constitutional jurisprudence out there and the experiences of other nations are often useful sources to consult; without ignoring the unique features of the national context. Many international human rights instruments are available and may be consulted.⁷
- New constitutions with a bill of Rights often have a “history”. There are good reasons to be extra vigilant and to guard against specific evils of the past. The constitution then also becomes the embodiment and outcome of a struggle against abuse or a milestone in the emancipation of a nation.⁸
- The implementation of several human rights often requires technical capacity and financial resources. That is particularly true of socio-economic rights. It is in general true of access to justice in order to make fundamental rights real and effective.

What is the verdict for Malawi if we use these considerations as criteria for measuring the experience of the last ten years? The present paper is not an analysis of the court cases of the previous decade. The objective is to discuss those matters pertaining to the Bill of Rights that have been highlighted in the Issues Paper and in the Consultation Paper. The relationship between the Bill of Rights and other constitutional spheres will be mentioned and the special role of the Judiciary merits some discussion.

⁵ Section 11(3), Constitution of Malawi.

⁶ See Section 11(1), Constitution of Malawi.

⁷ Section 11(2)(c) of the Constitution of Malawi is quite clear: “In interpreting the provisions of this Constitution a court of law shall where applicable, have regard to current norms of public international law and comparable foreign case law.”

⁸ South Africa, Namibia and Malawi are obvious examples of this kind in Southern Africa. However, let us not forget important other examples such as the rather dramatic example of the Federal Republic of Germany.

Bill of Rights Issues identified by the Present Review

On the basis of what is contained in the Issues Paper the Bill of Rights of Malawi is not really an area of high controversy. Certain aspects have surfaced and will be discussed here.

It has been asked whether the Bill of Rights puts too much emphasis on rights and neglects duties. There are certain things that a constitution cannot do. It cannot make us all good, caring people. Although the legitimacy of such concerns must be recognized, and in particular the dire need in e.g. South Africa for more effective law enforcement, the Constitution is in this regard only an enabling framework. It creates effective means of protection vis-à-vis the state and its organs, with remedies that can be invoked, but civil society, the family and the churches remain those other building blocks which have to ensure civilized behaviour and respect for the rights of others, including civic duties.

Who “interprets” and applies the Constitution and the Bill of Rights? There is no exclusive domain here. All organs of state and all officials have to respect the Constitution. That is a consequence of its supreme status. As far as technical interpretation is concerned, it is ultimately a judicial function. That the Constitution will be invoked in political and other debates is inevitable and a good thing, but in the final analysis it is the Courts that rule on constitutional disputes.

A number of socio-economic issues have been raised and that debate should continue. It is an area where resources have to be available and new legislation may be part of the answer, as could be the case in the field of education, children, health, labour relations and the disabled. If carefully drafted, such rights can be justiciable and often entails an element of procedural and administrative justice. The equality clause can be of direct assistance regarding gender issues and social grants.

With regard to sexual orientation, status of marriages, age to marry and citizenship specific cultural and political sensitivities apply. These debates should and local choices are to be made. The very choice as to whether to include such matters in the bill of Rights or in legislation is part of the discourse.

In the case of the death penalty there is a concern. It has been ruled elsewhere that keeping offenders for long periods on death row constitutes cruel and inhuman treatment. It has been noted that capital punishment is still imposed by the courts but not implemented.

One gets the impression that the courts are actively engaged in the process of developing a corpus of constitutional jurisprudence for Malawi, which is a healthy development and will result in contested outcomes from time to time. The development of the meaning of the equality clause and what constitutes fair differentiation is an example. There does not seem any need for amendment of the Constitution itself in this field, but the debate about what constitutes constitutional issues and whether there is need for a Constitutional Court is a separate matter. The effect of a matter being classified as a constitutional issue can result in staying of proceedings and seeking clarification first. This has resulted in countries such as South Africa, which has opted for a Constitutional Court, in detailed procedural

changes. One gets the impression that this is an area still needs to be developed. The need to give uniform and consistent effect to the Constitution throughout the land is obvious. However, this does not necessarily result in the need for a separate Constitutional Court. It may be another area for legislative reform and more work for the Law Commission!

Other Areas of Concern

- Limitations and derogations
- Political parties, floor crossing
- Beware of popular disenchantment

The Bill of Rights and Judicial Review

- Special role of the courts
- Judicial self restraint and separation of powers
- Chapter II.
- Weimar example.

Experiences Elsewhere in the region

- When do constitutions fail? When do they succeed? In our part of the world? Do not let the state fail.
- Importance of institutions -- of which the Constitution is an important one.
- The special needs of women and children
- Role of a free press

The International Dimension

- Rules-based dispensations
- WTO
- Regional integration
- Incorporation of int. instruments.
- Separation of powers concerns here – int. instruments now frequently of a law making nature. (E.g. SADC Protocols.)

Conclusions

- The process of review and stocktaking is a healthy one. The open manner in which it is done is encouraging and should improve the general legitimacy of the Constitution of Malawi. However, this requires a caveat. The outcome of these deliberations should be taken seriously and be acted upon. The latter will need careful planning and a clear programme of action.
- The Law Commission of Malawi plays a unique role
- Formal education – even of judges – see SA.

- Dissemination of information about the constitution
- Special attention in sensitive areas such as police, immigration.
- But it is still there!
- The most pressing issues discussed here have not dealt with major human rights problems. There are more serious concerns of a political nature.
- The special needs of the judiciary.
- Do not forget your regional and international role in advancing a regional rules-based dispensation.

Gerhard Erasmus.