



MALAWI LAW COMMISSION

**CONSTITUTION REVIEW CONFERENCE
28TH – 31ST MARCH, 2006
CAPITAL HOTEL, LILONGWE**

***A CONSTITUTIONAL FORTRESS:
MIRAGE OR MIRACULOUSLY POSSIBLE?***

PAPER BY

***Rafiq Hajat
Executive Director – Institute for Policy Interaction (IPI)***

A Constitutional Fortress

Mirage or Miraculously Possible?

By Rafiq Hajat

The Constitutional beginning

- Constitution making must primarily reflect particularly national aspirations and local conditions. Thus, whilst certain principles can be deemed as universal, they must, in the final analysis, correspond with realities prevalent in the local arena. The basic structure of a Constitution was originally mooted by a German Jurist, Dietrich Conrad (1932-2001) and has since been the cause of much debate and deliberation amongst political scientists, constitutional experts, the judiciary and all other stakeholders in the political landscape. A summary of the scope and extent of its influence is largely agreed upon by most experts in Constitutions and constitutionalism:
- Sovereignty, unity and integrity of the Nation;
- Supremacy of the Constitution and the rule of law;
- Limited amending powers;
- Republican and democratic forms of government;
- Free and fair elections;
- Separation of powers between the legislature, executive and judiciary;
- Power of judicial review;
- The character, vision and ideology of the Constitution;
- Inviolable Civil liberties guaranteed to citizens;
- Clearly defined balance between National Policy and Fundamental Rights;

Definitions

- Before we begin to focus on the gist of this paper, it may be helpful to define certain terms that are commonly used in discourses of this nature, thereby ensuring that we are all on the same wavelength.
- **CONSTITUTIONALISM** refers to the strict commitment and adherence to the letter and spirit of the Constitution in every area of governance. It is a deeply rooted conviction to uphold and preserve the principles and values underlying the Constitution above any other considerations.
- **CONSTITUTIONAL GOVERNMENT** relates directly to Section 12 (iii) of the Constitution, which states: "The authority to exercise powers of State is conditional upon the sustained trust of the people of Malawi". It is thus, the manner in which the above-mentioned spirit is translated in practice, i.e. principles of power sharing,

accountability, limited governmental authority. Even where a government has attained legitimacy to govern i.e. through regular elections etc, its constitutionality can be assessed by other criteria, i.e. mechanisms for public scrutiny of governmental actions and channels of direct and indirect communication between the government and the people.

- **CONSTITUTIONAL REVIEW** is a process aiming at the following objectives:
- A deliberate stock taking on the depth of adherence to its Constitution achieved by a nation.
- An analysis of the causes underlying successes and/or lapses in adherence to the Constitution;
- Identification of remedies to rectify any damage that may have been inflicted upon the Constitution – both literally and substantively.

Preambular Comparison

- A perusal of the Preambles of two different Constitutions provides an illuminatory glimpse into the mindset and aspirations of their Framers who sought to capture the aspirations and vision of their peers in framing the Supreme Rulebook of their respective lands:

South Africa

- We, the people of South Africa,
- Recognise the injustices of our past;
- Honour those who suffered for justice and freedom in our land;
- Respect those who have worked to build and develop our country; and
- Believe that South Africa belongs to all who live in it, united in our diversity.
- We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to –
- Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
- Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
- Improve the quality of life of all citizens and free the potential of each person; and
- Build a united and democratic South Africa able to take its rightful place as a sovereign sate in the family of nations.
- May God protect our people.
- Nkosi Sikelel'iAfrica. Morena boloka setjhaba sa heso.
- God seen Suid Africa. God bless South Africa.
- Mudzimu thatusheda Afurika. Hosi katekisa Afrika.

Malawi

- **THE PEOPLE OF MALAWI**

- Recognising the sanctity of human life and the unity of all mankind;
- Guided by their private and collective wisdom;
- Seeking to guarantee the welfare and development of all the people of Malawi, national harmony and peaceful international relations;
- Desirous of creating a constitutional order in the Republic of Malawi based on the need for an open, democratic and accountable government;
- **HEREBY** adopt the following as the Constitution of the Republic of Malawi.

Differences

- The South African Preamble starts with the words “We, the people”, thereby establishing irrefutable ownership of the social contract by using the first person plural, and leaves no doubt that the powers to govern derive directly from the people.
- Our preamble starts by omitting the all important “We” and merely commences with “The people” which almost suggests that the preamble was written by some third party on behalf of the people of Malawi. This fundamental oversight is perhaps symptomatic of the absence of ownership by the people of Malawi and perhaps therein lies the root of the problem.
- Our preamble does not contain any reference to ‘Social Justice’
- Our preamble seems lukewarm and tepid when compared to the power and vision of our South African brethren.

Recommendations

- Though Section 46 of the Constitution deals with enforcement of the supreme law of the land, past experiences have clearly shown the impracticability of actually translating these provisions into action. It is therefore imperative to review this section with regard to infusing the requisite element of utility that is lacking. Here are some thoughts for consideration:
- Section 5 of the Constitution states: “Any act of Government or any law that is inconsistent with the provisions of this Constitution shall, to the extent of such inconsistency, be invalid.” However, to my knowledge, a comprehensive review of extant legislation in order to ascertain constitutionality has not yet been conducted.
- The main impediment appears to be the unavailability of requisite funding allocated for such purposes. This is perhaps in line with the low priority accorded to this vital exercise by our Politicians who appear to be content with the status quo and would not wish to rock their boats by embarking on such a potentially unsettling course of action.
- The Donors, on the other hand, are deterred by the prohibitively high costs that have been requested by the Law Commission for undertaking the review. Indeed, one Donor jocularly remarked that the costs of a comprehensive review as computed by the Law Commission would equal the entire annual GDP for Malawi – i.e. US\$1.8

billion!

Locus Standi:

- The past decade has revealed several anomalies in judicial process that inhibit, impede or even prevent a Citizen of Malawi from attaining justice when his/her constitutional rights have been violated. Indeed, the rules surrounding the lodging of 'Public Interest' cases virtually bar any bona fide supplicant from accessing justice by insisting that the supplicant must establish personal loss before being deemed eligible to lodge such actions. It is therefore necessary for the said rules to be revised in order to provide the flexibility that would enable Citizens to secure representation in the courts and obtain justice – either for themselves, or on behalf of the public at large. Perhaps that may provide cogent answers to the question: Who is the Judiciary accountable to?

Fast Track Judiciary:

- The current structure of the judiciary has proved to lack mechanisms to deal with Constitutional matters in a timeous and comprehensible manner. Though we do already have a Constitutional bench manned by three Supreme Court Judges, the rulings emanating therefrom have often overturned High Court rulings that seemed to be perfectly reasonable, equitable and understandable. It therefore seems necessary to set up a Constitutional Court that would be charged to vet all draft legislation or constitutional amendments for unconstitutional sentiments or impact prior to tabling in Parliament, in addition to providing a 'fast track' route for Constitutional cases from all sections of Malawi society.

Constitutional Amendments:

- the propensity of our political leaders to attempt constitutional amendments to suit narrow vested interests has already been alluded to in the text. It is therefore, vital to strengthen Sections 195-197 that address the procedures pertaining to amendments of our Constitution. This should be done in such a way that no amendments of any sort can ever be steamrolled through Parliament against the wishes of the people. One such way would be to insert a clause that requires all amendments must be vetted by the abovementioned Constitutional Court and subsequently go through a consultation process with Academia, Faith Communities, Traditional Authorities, Professional Bodies, Private Sector, NGOs, CSOs and CBOs for written endorsements before being tabled in Parliament for scrutiny and debate. This may be a very lengthy process, but it would certainly neutralise the tendency to amend the Constitution on an ad hoc basis.

Civil Society Development:

- The Open/Third Term Saga revealed several important facts about the state of democracy in Malawi, the most prominent being the power and influence that could be wielded by a unified and focussed Civil Society. This marked a high point in the evolution of Civil Society as a true 'Fourth Estate' to balance the three arms of Government in a democratic dispensation. Unfortunately, the dynamism that was generated during that heady period, has now dissipated into a somnolent sense of complacency, which is further compounded by an official antipathy towards views forwarded by CS. It is therefore, imperative to implement appropriate measures which would institutionalise CS participation in all policy/decision making/constitutional processes without the suspicion, acrimony and resistance that is prevalent at present.

Reinstatement of the Senate:

- The abolishment of the Senate (Bill No. 4 of 2000) by the National Assembly (NA) was a direct violation of S45 (8) of the Malawi Constitution which states "Under no circumstances shall it be possible to suspend this Constitution or any part thereof, or dissolve any of its organs, save as is consistent with the provisions of the Constitution. It is becoming increasingly obvious that there is need for an upper house to provide the stability which is necessary to counter excessive emotionalism and myopic pursuance of hidden agendas that has been manifest in the NA from time to time. Such reinstatement would also, amongst other things, help to restore waning public confidence in the Legislature, provide a forum for greater inclusivity of underrepresented sectors of Malawi Society such as the T/As and the disabled and present a buffer against legislation or actions that may prove inimical to public/national interests.

Recall Provisions/ Impeachment:

- It is apparent from all the public debate and feedback from every level of Malawian society that mechanisms of vertical accountability for all elected public officials including the Executive (including the Cabinet) and Parliamentarians must be present in the Constitution. They must however be structured in such a way that would deter frivolous or malicious usage by vested interests. I would opine that the following steps must feature in the process:
- Any case pertaining to the above must first be investigated to ascertain validity by a task force comprising independent constitutional bodies such as the Human Rights Commission, the Law Commission etc. Civil Society and Faith Community groups who are involved in governance issues, professional bodies such as the Law Society.
- Once the abovementioned taskforce has established adequate grounds for further action, the matter should be referred to a Disciplinary Committee of the Lower House for deliberation and decision.
- The decision of the Disciplinary Committee can then be referred to the Upper House for vetting, review and finalisation.

- Having followed all the above steps, the case must finally be referred to the Constitutional Court for their ruling before the case is finally closed and commensurate action is taken.

Double Indemnity:

- The issue of M.P.'s doubling as Ministers has become a thorn in the side of constitutional governance. It does not need a rocket scientist to discern the blurring of lines between the Executive and Legislature by virtue of fence straddling by people who hold positions in both. It is high time that this matter is finally put to rest, and I would humbly propose that this august assembly unequivocally recommends that the practice is disallowed forthwith in our Constitution. This will resolve many peripheral issues such as 'Crossing the Floor' and M.P. poaching that has become endemic.

Constitutional Review:

- We live in rapidly changing times that, in turn, generate changing perspectives and aspirations. Our Constitution must therefore, be a living document that reflects changing realities and should not therefore be allowed to stagnate into obsolescence. It is therefore advisable to have an ongoing review process – say every five – ten years, that would freshen the Constitution with inputs from new generations of Malawians who have their own expectations, ambitions and dreams – that may radically differ from our archaic mindsets.
- **The Constitution and constitutionalism** must be introduced as compulsory subjects into school curricula – from Primary School upwards. All school functions must start with our national prayer – The National Anthem. This will help to inculcate a sense of national identity, pride and patriotism that is sorely lacking in our national psyche at present.
- **Adult courses** in the same subjects must be offered free of charge – after hours, in every learning institution. The primary targets would be the Police Service, the Army, T/As, LG Councillors, Religious and community leaders at all levels. This form of 'civic education' could then create a ripple effect if the recipients extended their knowledge through their respective interfaces with the grassroots.
- **The Conference** could perhaps consider amending our National Anthem to say "Bless our people - each and every one" instead of "Bless our Leaders.")

Penalties:

- Last, but not least, it may be appropriate to give 'teeth' to our Constitution by including direct penalties for violations of our Constitution. These could be graded in degrees of severity for the extent of the violation and would be applicable to all Malawians – regardless of class, rank or status. By so doing, we may see a vestige of awe and respect for the supreme law that has been markedly absent until now.