



MALAWI LAW COMMISSION

DISCUSSION PAPER NO. 1

**HUMAN RIGHTS UNDER THE CONSTITUTION OF
THE REPUBLIC OF MALAWI**

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PREFACE

One of the areas of the Constitution which has stirred debate in the ongoing Constitutional Review Programme is the Chapter on Human Rights.

Submissions have been received by the Law Commission on several rights as laid down in the Bill of Rights. Most submissions were written as exposed in the Issues Paper whilst others were in oral form as contained in the Consultative Paper.

At the First National Conference on the Review of the Constitution, participants mostly argued in support of or against the submissions outlined in the Issues Paper and Consultative Paper.

This discussion paper seeks to generate further discussion on those rights that have featured in the constitutional review debate.

The paper discusses each right under debate as a topic, exposes the position at law currently, delves into comparative study of other constitutions and relevant international instruments (where applicable) and finally identifies areas for reform and offers proposals for such reform.

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INTRODUCTION

The Malawi Constitution has provided human rights in two ways: in Chapter Three under Fundamental Principles and in Chapter Four under Human Rights. In fact Chapter Four is the Bill of Rights properly so called.

The principles of national policy under Chapter Four are only directory in nature.¹ This means the State is given some leeway to implement them progressively given the economic resources as most of the rights provided under this chapter are social, economic and cultural rights.

On the other hand, the Bill of Rights contains most basic fundamental rights although other social, economic, and cultural rights are also included. A good example is the right to education which appears under the fundamental principles as well as under the Bill of rights.

Some of the rights guaranteed in the Constitution have raised debate in the ongoing Constitutional review process and it is those that form this discussion paper.

¹ Section 13 of the Constitution.

THE DEATH PENALTY

The Constitution has enshrined the right to life in section 16. It has further provided that “no person shall be arbitrarily deprived of his or her life”. There is however a proviso to the section which states that “the execution of the death sentence imposed by a competent court on a person in respect of a criminal offence under the laws of Malawi of which he or she has been convicted shall not be regarded as arbitrary deprivation of his or her right to life”.

It is therefore clear that although the Constitution recognises the right to life, it allows the state to in fact deprive persons of this right through the judicial process and such deprivation is considered not arbitrary. Currently, under the Penal Code² only five crimes carry the death sentence as the maximum punishment. These are treason³, rape⁴, murder⁵, armed robbery⁶ and housebreaking and burglary⁷.

There is considerable debate, both internal and worldwide, as to whether the death penalty should be retained on statute books as an appropriate punishment.

The Internal Debate

As regards the internal debate, there are two points worth considering. The first, point is rather technical and concerns the provisions of the Constitution itself. Firstly, section 19 which provides for human dignity and personal freedoms

² Cap. 7:01 of Laws of Malawi.

³ Section 38 (1) of the Penal Code

⁴ Section 133 of the Penal Code.

⁵ Section 301 of the Penal Code.

⁶ Section 309 of the Penal Code

⁷ Section 19 (3).

stipulates that “no person shall be subject to torture of any kind or to cruel, inhuman or degrading treatment or punishment.”⁸

It is argued that there can be no greater cruel, inhuman and degrading punishment than death. This appears to be buttressed by the fact that even corporal punishment which at least would ordinarily, leave the convict alive, is prohibited by the Constitution.⁹ Secondly, and perhaps more importantly, section 44 provides that there shall be no derogation, restrictions or limitations to certain rights, the primary one, in ranking order, being the right to life¹⁰. Further, and if the argument that the death penalty is a cruel, inhuman and degrading punishment is accepted, the prohibition of torture, and cruel, inhuman or degrading treatment or punishment is also not to be derogated, restricted or limited.¹¹

In the circumstances it could be argued that the proviso under section 16 is of no effect as it is defeated by section 19 and section 44.

Thirdly, it should be noted that Malawi has since the coming into force of the Constitution in 1994 not executed a single death row inmate. This is in line with the aspirations of the Second Optional Protocol to the International Convention on Civil and Political Rights (ICCPR) adopted by the United Nations General Assembly in 1989 whose goal is the abolition of the death penalty. Malawi is therefore rated as a country that has in practice abolished the death penalty.¹²

It should, on the other hand, be noted that there is argument that no right is absolute. Thus every right may be limited or restricted if the restrictions or limitations are prescribed by law, reasonable, recognised by international human rights

⁸ Section 19 (4).

⁹ Section 44 (1) (a).

¹⁰ Section 44 (1) (b).

¹¹ <http://www.amnesty.org/deathpenalty> visited on 11th May, 2006.

¹² See the case of *Harold Wilson*.

standards and necessary in an open and democratic society.¹³ The 1998 Law Commission Report on the Technical Review of the Constitution recognizes this position.¹⁴ However, the recommendations of the Report are yet to be enacted.

The Wider Debate

At the international level the trend seems to be towards abolition of the death penalty.¹⁵ The main argument for abolition is that the death penalty violates human rights. This is because it deprives the individual of life which is contrary to the Universal Declaration of Human Rights and it is also a cruel and degrading punishment.¹⁶ It is further argued that the death penalty is no longer a deterrent factor in as far as crime is concerned and that innocent individuals may be executed only for exonerating evidence to surface after execution. As death is so final there would be no reprieve for such unfortunate individuals.¹⁷

There are various instruments in place which advocate for the eventual abolition of the death penalty throughout the world. Some of these instruments are the Second Optional Protocol to the International Convention on Civil and Political Rights (ICCPR),¹⁸ the Protocol to the American Convention on Human Rights, adopted by the General Assembly of the Organisation of American States which provides for the total abolition of the death penalty, allowing for its use in wartime only,¹⁹ and a resolution of the United Nations Commission in Human Rights (UNCHR) calling on all states that still maintain the death penalty to progressively

¹³ Section 44 (2) of the Constitution.

¹⁴ p. 262, the Malawi Government *Gazette*, 16th November 1998.

¹⁵ <http://www.amnesty.org/deathpenalty> visited on 11th May, 2006.

¹⁶ *Supra*.

¹⁷ <http://www.amnesty.org/deathpenalty> visited on 11th May, 2006.

¹⁸ *Ibid*.

¹⁹ Lena Baker, who had to be granted pardon post humously because she was deemed to have acted in self defence and a lesser offence should have been preferred.

restrict the number of offences for which it may be imposed with a view to completely abolishing it.

Comparative Study

A study of the Constitutions of Botswana, Namibia, Mozambique and South Africa shows that, save for Botswana, the other three countries have abolished the death penalty.

- Botswana

Section 4 of the Botswana Constitution is couched in similar fashion to section 16 of the Malawi Constitution in that while providing for the protection of the right to life it stipulates that a sentence of death passed by a court of law is valid under the Constitution.

- Namibia

Article 6 of the Namibian Constitution provides that “the right to life shall be respected and protected”. It further provides against prescription of death as a competent sentence. Thus courts and tribunals have clearly been denied power to impose the death penalty. The article also expressly states that “no executions shall take place in Namibia”. Clearly therefore Namibia has abolished the death penalty.

- Mozambique

Mozambique has also unequivocally abolished the death penalty by simply providing under Article 40 (2) of the Constitution that “there shall be no death penalty in the Republic of Mozambique”.

- South Africa

The South African Constitution has simply guaranteed the right to life, under section 4, with no exception whatsoever. South Africa has therefore abolished the death penalty. The Constitutional Court in South Africa has also interpreted the

relevant provision of the Constitution and has held that the death penalty has been abolished under that country's Constitution.

It is worth noting that except for Botswana where the Constitution is older, Mozambique, Namibia and South Africa had new Constitutions adopted in the 1990's²⁰, just like Malawi.

Areas and proposals for reform

It is clear that Malawi has de facto, abolished the death penalty as it has not executed any convict in the past 12 years or so. However, as long as the Constitution retains the proviso to section 16 allowing for the death penalty to be imposed by a competent court, there is no guarantee that a future government would not re-commence executions. In any case, as long as the sentence of death is not commuted to life, such death row inmates always live with the fear that some indefinite day, it may be, executed. Thus uncertainty and anxiety created by not knowing when the penalty may be executed in itself surely amounts to cruel inhuman and torturous treatment. Of course the President has power of pardon under section 89 (2) but this is a power that possibly could be applied arbitrarily.

In the circumstances, and given the international trends regarding the abolition of the death penalty, it would appear that there is a strong case for suggesting that it would be best to clearly stipulate that the death penalty is abolished.

²⁰ Mozambique adopted its Constitution in 1990, Namibia in 1990 and South Africa in 1996.

MARRIAGE BY REPUTE AND PERMANENT COHABITATION

The Constitution has under section 22 provided for the rights of all men and women to marry and found a family. The family is regarded as the natural and fundamental group unit of society which is entitled to protection by both society and the state.²¹ The Constitution recognizes three types of marriages²² –

- (a) statutory marriages or, in the language of the Constitution, marriages at law;
- (b) marriages at custom; and
- (c) marriages by repute or permanent cohabitation.

Statutory marriages or marriages at law are those celebrated in accordance with an Act of Parliament, which is the Marriage Act.²³ Marriages at custom are those celebrated in accordance with rites of the customs of the contracting partners.

Finally, marriages by repute or by permanent cohabitation are relationships that are deemed to be marriages, at the determination of a court, based on the fact of the reputation that the parties were married or that the parties had cohabited on some permanent basis.

The nature of Marriages by repute or by permanent Cohabitation

The first thing to note is that there are no formalities required to be observed before establishing such marriages. Parties need only to hold themselves out as husband and wife or live together for some length of time as such.

²¹ Section 22 (1).

²² Section 22 (5).

²³ Cap. 25:01 of the Laws of Malawi.

However, what constitutes an acceptable length of period to satisfy the permanence of cohabitation test is entirely left to the determination of the courts. Thus, in the case of *Nelson v Magombo*,²⁴ a period of cohabitation of seventeen years was considered long enough to establish marriage whilst in the case of *Khembo v Khembo*²⁵ the court found that no marriage existed although the children of the relationship were allowed maintenance.

Another point to be noted is that the courts do consider marriages by repute or by permanent cohabitation as a legal fiction which provides a fall back position so that women and children from informal relationships are protected against potential neglect and abuse by, normally, the male party to the relationship. They also ensure that children from such marriages as well as the wife or husband, as the case may be, are able to inherit from the deceased spouse's property.

The argument against marriages by repute or by permanent cohabitation has been mainly that it is alien to Malawian culture and waters down the sanctity of the institution of marriage.²⁶ It is posited that acknowledging marriages by repute means allowing young people to live together as married couples without going through the proper formalities of marriage. This, it is argued, breeds immorality and increases the likelihood of single parent households as such relationships do not last long. The cases above cited however seem to defy both the arguments that such marriages do not last long and that they are alien to Malawi culture.

Areas and proposals for reform

It is submitted that marriages by repute or by permanent cohabitation are a necessary fall back position that in reality protects mainly women and children from

²⁴ (1964-1966) ALR Mal 134.

²⁵ Civil Appeal No. 16 of 1969 (Unreported).

²⁶ Issues Paper p. and Consultation paper p. .

hardship in the event of dissolution of such marriage. There appears to be no firm ground for presuming that once such marriages are abolished everyone wishing to have marriage like relationship will go for the formalised marriages being advocated. It would appear therefore that the way forward for Malawi is to allow marriages by repute or by permanent cohabitation to remain recognised by the Constitution as well as by the courts as the position is at present.

AGE OF MARRIAGE

The Constitution stipulates in section 22 the age of marriage. It provides that persons above eighteen years of age cannot be prevented from entering into marriage.²⁷ This simply means that they may get married without requiring the consent of any other person or authority. For those who are between 15 and 18 years of age, the Constitution requires them to obtain parental consent.²⁸

The Constitution further states that the State shall actively discourage marriages of persons where either of them is under 15 years of age. This means that it is possible for a marriage to be contracted between a man of 40 years and a girl of 14 or indeed a woman of forty and a boy of 14. It further appears to imply that there is no minimum age of marriage. Of course it should be noted that the Penal Code currently stipulates that having unlawful sexual relations with a girl of not more than 13 years of age is an offence.²⁹ But the use of the term “unlawful” implies that it is possible to have lawful sexual intercourse with a girl of under 13 years of age.³⁰ It is therefore conceivable that a claim of marriage would be a perfect defence to a charge under section 138. In any case it appears questionable whether section 138 is in fact not unconstitutional as section 22 (8) merely directs the state to actively discourage marriages where either party is under 15 years of age. It may be argued that section 138 of the Penal Code is in fact a state mechanism to actively discourage such marriages. However the fact that the state merely is discouraging, be it actively, such marriages means that such marriages may in fact take place.

²⁷ Section 22 (6).

²⁸ Section 22 (7).

²⁹ Section 22 (8).

³⁰ Malawi Law Commission Report on the Review of the Penal Code. Malawi Government *Gazette* Extraordinary p. 36.

Comparative Study

- Namibia

Article 14 (1) of the Namibian Constitution³¹ simply states that:

“Men and women of full age shall have the right to marry and found a family”

Full age being 21 years in Namibia, this means the right to marry only accrues to men and women who are 21 years of age and above.

- Mozambique

Until 2003 the marriage age was 14 years for girls and 16 years for boys. However, in 2003 this law was amended and the marriage age for both sexes is now 18 years.³²

- Botswana

The Married Persons Property Act³³ which was amended in 2001 provides that persons who are 21 years and above may marry without parental consent while those between 18 years and 21 years need parental consent. Prior to 2001 the age of marriage was 14 years for girls and 16 years for boys, just like Mozambique.

- South Africa

South Africa is a different kettle of fish altogether. The Constitution itself has not made any provision relating to marriage. Statutory law³⁴ however provides that minors under 21 years of age require parental consent whilst boys below eighteen and girls below 15 years require ministerial consent. Further the minimum age of marriage is set at 12 years for girls and 14 years for boys.

³¹ <http://www.oefre.unibe.ch>.

³² <http://www.orfamofamerica.org>.

³³ <http://www.historycentral.com/nationbynation/Botswana/human.html>.

³⁴ <http://www.paralegaladvice.org.za/docs/chap07/02.html>.

International Instruments

There are four instruments that require to be studied. The first is the International Covenant on Civil and Political Rights which provides that persons of “marriageable” age have the right to marry and found a family.³⁵

The second instrument is the African Charter on Human and Peoples Rights.³⁶ This Charter stipulates that –

“the State shall ensure the elimination of every discrimination against women and shall also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions”.

The third instrument is the Convention on the Rights of the Child which stipulates that “a child means every human being below the age of eighteen unless under the law applicable to the child, majority is attained earlier”.

The fourth and final instrument is the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages. In Article 2, the Convention stipulates as follows –

“State parties shall take legislative action to specify a minimum age for marriage. No marriage shall be legally entered into by any person under this age, except where a competent authority has granted a dispensation as to age, for serious reasons, in the interest of the intending parties”.

³⁵ Article 23 (2) of the International Covenant on Civil and Political Rights.

All these instruments make a case for setting a minimum age for marriage, albeit they allow for the provision of some exceptions to the minimum age.

Areas and proposals for reform

There are two areas that beg reform –

- (1) whether it is necessary that the Constitution sets a minimum age for marriage as has been done in Malawi;
- (2) whether the minimum age for marriage as prescribed in the Constitution should be reviewed;
- (3) whether there should be exceptions to this minimum age and if so who should have the power to grant such dispensation – parents/guardians or the State.

(a) **Minimum age**

It appears clear that there is a good case for the Constitution to set a minimum age of marriage in clear terms. The Marriage Act already sets this at eighteen years. The CRC defines a child as every human being below the age of eighteen. Namibia has set the age at 21 years and Botswana and Mozambique at 18 years. Scientific studies have shown that conception, which would ordinarily follow marriage by children in their teens, is dangerous.³⁷

(b) **Exception to minimum age**

The Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages recognises that there might be exceptional circumstances in which it may be in the interest of the intending spouses to allow them to marry even though they may be under the minimum age. The Commission may consider

³⁷ See Malawi Law Commission Report of the Law Commission on the Review of the Laws on Marriage and Divorce, 2005 p. 24 (Unpublished).

situations, that would warrant such exceptions, and also as to whether, beyond parents or guardians, government officials should have authority to grant exemptions.

RIGHTS OF CHILDREN

Section 23 of the Constitution recognises and protects the rights of children.

These are –

- (a) entitlement to equal treatment before the law;³⁸
- (b) the right to given a name and a family name and the right to a nationality;³⁹
- (c) the right to know and to be raised by their parents;⁴⁰ and
- (d) entitlement to be protected from economic exploitation or treatment, work or punishment that is or is likely to⁴¹ –
 - (i) be hazardous;
 - (ii) be harmful to their health, or to their physical, mental or spiritual or social development.

The Section then stipulates that for purposes of the section children shall be persons under sixteen years of age.⁴² This prescription of the age of a child being sixteen has caused debate.⁴³

It should be noted at the outset that the age of 16 years is only applicable in the context of section 23 and not for any other purposes. However one wonders whether the age prescription in subsection (5) of section 23 really should apply to the whole section or only to subsection (4) of section 23. This is because if the age prescription applies to the whole section, then it may be argued, for instance, that any person who is above sixteen may not be entitled to be raised by his parents as

³⁸ Section 23 (1).

³⁹ Section 23 (2).

⁴⁰ Section 23 (3).

⁴¹ Section 23 (4).

⁴² Section 23 (5).

⁴³ See Consultation Paper p. 21-22.

required by subsection (3) of section 23. This would mean parents would be under no legal obligation to provide for such children.

Comparative Study

- Namibia

The Constitution of Namibia has a like provision in Article 15.⁴⁴ The wording of sub article 1 of Article 15 is similar to that of subsection 1 – 3 of our section 23 whilst sub article 2 of Article 15 is similar to subsection 4 of section 23. The distinction to be noted here is that although the age of a child is also set at 16 years under sub article 2 it only applies to that particular sub article and not to the whole Article. Thus the child's right to be cared for by their parents is not restricted to up to the age of sixteen only, as our Constitution seems to suggest.

- South Africa

Section 28 of the South Africa Constitution⁴⁵ provides for and protects the rights of children. In the main the section is similar to our section 23 although the South African one appears to be more elaborate. As regards the issue of age subsection 3 of section 28 of the South Africa Constitution provides that a "child" means "a person under the age of eighteen years and this prescription applies to all rights, enumerated under the section".

- Botswana and Mozambique

The constitutions of these two countries contain no comparable provisions.

Areas and proposals for reform

The issue to be settled is whether the upper age cap for one to be defined as a child should remain at sixteen years or should be raised to eighteen years.

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⁴⁵ <http://www.polity.org.za/html/govdocs/constitution/saconst02.html>.

In view of the consideration noted under the part dealing with Minimum Age of Marriage⁴⁶ and considering the South African constitutional provisions it is suggested that the age be revisited and raised to eighteen years. This suggestion is made also in recognition of the realities of Malawian society where most children do not finish secondary education until they are at least eighteen years. Thus they need parental care and protection from exploitative tendencies up to that age. This would also obviously be in line with the aspiration of the Convention on the Rights of the Child.

It is also observed that if the age were to be raised to eighteen years then the current subsection 5 of section 23 may remain in its current form or it may be amended so it only applies to those aspects of the section that seek to protect the child against unfavourable practices as stipulated in section 23 (4).

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RIGHT TO EDUCATION

The right to education is in section 25 of the Constitution. The section stipulates that primary education shall consist of at least five years⁴⁷ and allows for the establishment of private institutions⁴⁸ which must be registered with the State⁴⁹ and must have standards that are not inferior to state education institutions.⁵⁰

This right is also reflected in the principles of national policy under section 13 (f). In this section the State is directed⁵¹ to, *inter alia*, make primary education compulsory and free to all citizens of Malawi.⁵² However, although the provision is merely directory, the courts are entitled to consider such provision in interpreting and applying the right under section 25.⁵³

The issues of compulsory primary education and the minimum period of primary education have been raised in the Consultation Paper and the Issues Paper.⁵⁴

1. Minimum period of primary education

The Constitution has set the minimum at five years. This appears to be on the lower side given the realities of the Malawi education system. In government primary schools a pupil would have to do eight years to complete primary education. In private primary schools this period is between 6 and 7 years. This is because the pupil normally spends 1 – 2 years in kindergarten. Thus the elementary school

⁴⁷ Section 25 (2).

⁴⁸ Section 25 (3).

⁴⁹ Section 25 (3) (a).

⁵⁰ Section 25 (3) (b).

⁵¹ Section 14 of the Constitution.

⁵² Section 13 (f) (ii).

⁵³ Section 14.

⁵⁴ See Consultation Paper pp 20-21 and Issues Paper p. .

education still requires at least eight years. Of course it is conceded that there might be an element of home schooling envisaged in the provision such that the minimum of five years would suffice. Another point worth considering is that the wording of the section does not envision the obtaining of a certificate upon completion of primary education by the pupil. Primary education is therefore merely meant to open up the pupil's mind and not to equip them with any mental skills that may make them employable.

The Constitution has only provided a minimum period during which one may receive instruction in a primary school. It has not set a minimum age at which one may start school nor has it set a maximum age at which, regardless of whether one has completed primary education or not, one would have to leave primary school.

2. Compulsory primary education

The Constitution has provided for this under the directory principles of national Policy. This allows the State to implement such a policy progressively on the basis of availability of economic resources. Currently there is no legislation in place that may be used to implement such a policy in terms of enforcement mechanisms.

Comparative Study

- **Mozambique**

Article 88⁵⁵ of the Constitution of Mozambique provides for the right to education. In sub article 1 of Article 88, education is both a right and a duty of citizens. Thus the citizen must actively pursue the right to education as it is his or her constitutional duty so to do. The Constitution does not stipulate that education is compulsory nor does it prescribe sanctions for non execution of this duty by citizens.

⁵⁵ Constitution of Mozambique, 1990, at .

It does not prescribe periods of education nor age ranges within which primary education may be obtained.

- Namibia

Article 30 of the Namibia Constitution provides for the right to education. It makes primary education compulsory and the State is obliged to provide State schools at which primary education is offered free of charge.⁵⁶ The provision goes further to stipulate that children must stay in school until they complete primary or they attain the age of 16 years whichever is the sooner. Primary education is therefore only compulsory to children who are not more than sixteen years old.⁵⁷

- South Africa

Section 29 of the South Africa Constitution simply provides for the right to basic education,⁵⁸ including adult basic education. It further provides for the right to receive education in the official language of the pupils choice where such education is reasonably practicable⁵⁹ and for the establishment of private institutions.⁶⁰

The Constitution has not stipulated that the basic education is compulsory nor has it provided for minimum period of primary education or maximum age of attendance. These have been left to an Act of Parliament and this is the South African Schools Act. In this Act it is provided that learners who are at least seven (7) years old shall compulsorily attend primary school until completion of ninth grade or they attain the age of fifteen years whichever is the sooner.⁶¹ The Act also stipulates for punishment for failure to comply with the compulsory provision.

⁵⁶ Article 20 (2) Constitution of Namibia at

⁵⁷ Article 20 (3) of Constitution of Namibia.

⁵⁸ See section 29 (1) of the South Africa Constitution.

⁵⁹ See section 29 (2).

⁶⁰ See section 29 (3).

⁶¹ See section 3 (1) of the South African Schools Act, 1996.

Basic education in South Africa is prescribed for children of not more than 15 years of age. However, because the Constitution recognizes adult basic education, those children who would not complete basic education by reason of age would still access basic education through the basic adult education facility. Unlike Namibia and Malawi, in South Africa compulsory education provisions have been relegated to be covered by statute.

Areas and proposals for reform

There are two areas that may need to be addressed –

- whether compulsory primary education should remain a matter of national policy or it should move into the Bill of Rights proper and be part of section 25;
- whether the minimum period of primary education should be revised upwards and whether there should be an upper age limit for the attainment of primary education.

Compulsory Education

In view of the discussion above, it would be proposed that compulsory primary education remains a matter of national policy and therefore directory only. This is a social economic right that may only be implemented progressively depending on the circumstances and resources of government. It is doubtful that Malawi at the moment may implement this right meaningfully.

Minimum period of education

The Constitution has merely set a minimum period of five years. In practice and through statute this period can be increased. The advantage of having this lower minor minimum is that it may allow meritorious students to stay in primary for

only the shortest possible period. Further, because the Constitution has not set a maximum, it allows those that may not be as astute to remain in school for as long as may be required.

However serious thought should be given to setting a minimum age of enrolment and may be a maximum age as well under statute. This would ensure that the state does not waste valuable resources on pupils who may stay in primary school for inordinately long periods.

ARREST DETENTION AND FAIR TRIAL

One of the most potent powers of state is the power to arrest and detain people who it suspects of having committed offences against the state. This power may be viewed as a restriction of the right to liberty and the right to personal freedom provided for in sections 18 and 19 respectively. However, this power is necessary to ensure the protection of the larger populace and peaceful relations and good social order in the community and among people. The state is expected not to use this power arbitrarily. However, it is recognized that such abuse may in fact take place. The Constitution has therefore provided for ways in which this power may be exercised without unnecessarily impinging the right to liberty and person freedom.⁶²

Section 42 generally provides the manner in which a detained person including those who have been convicted may be dealt with by the state. Subsection (1) of section 42 provides for rights of such detained persons whilst subsection (2) of section 42 provides for the rights of every person arrested for, or accused of, the alleged commission of an offence. Thus, subsection (2) of section 42 specifically relates only to suspects and not to convicts. The rights in subsection (2) are also in addition to the general rights of detained persons under subsection (1).

Amongst the rights under subsection (2) of section 42, the right which stipulates the period within which the state may detain a suspect without court order⁶³ paragraph (b) of that subsection provides that reads as follows –

Every person arrested ... shall have the right –

“ (b) as soon as it is reasonably possible, but not later than 48 hours after arrest, or if the period of 48 hours expires

⁶² S42(2) (b).

⁶³ Section 42 (2) (b).

outside ordinary court hours on a day which is not a court day, the first court day after such expiry to be brought before an independent and impartial court of law and to be charged or to be informed of the reason for his or her further detention, failing which he or she shall be released”.

It has been submitted by the office of the Director of Public Prosecutions that the 48 hour period is too short for the investigating authorities, given their limited resources, to have carried out their work and collect enough evidence for purposes of trial.⁶⁴ On the other hand, it has countered that the Police deliberately fail to comply with this provision by failing to charge the suspect within 48 hours or taking the suspect to court to get a court order for continued detention or releasing him or her.⁶⁵ The issue is whether the period of 48 hours should be maintained or should be increased as submitted by the government through the office of the DPP.

An analysis of this subsection shows that the problem of lack of resources may not hold. The subsection simply requires that the state should –

- (a) be able to hold a suspect for 48 hours without charge or without going to court;
- (b) if the period of 48 hours expires and the state has need to continue holding a suspect, it should go to court and state the reasons why it must continue to hold such a suspect whereupon if the court is satisfied that it is in the interest of justice that the suspect continues to be detained, the court may grant the request;

⁶⁴ see Consultation Paper pp19-20, Issues Paper p ...

⁶⁵ see Simaisi Maulidi Vs the Republic, miscellaneous Criminal Application No. 222 of 1999 (unreported) p5, per Twea J.

- (c) if such court order is not obtained or has been denied then the suspect must be released.

It will be seen therefore that section 42 (2) (b) does not force the state to release suspects within 48 hours. This will only happen where the state has not been able to obtain a court order allowing it to extend the detention of the accused.

The right of the accused to be brought before a court within 48 hours is complemented with the right of the accused under paragraph (e) to be released from detention, with or without bail, unless it can be shown to the court that the interests of justice require the accused's continued detention.

Comparative Study

- Namibia

A comparable provision in the Namibia Constitution⁶⁶ is Article 11 (3) which provides as follows –

“all persons who are arrested and detained in custody shall be brought before the nearest Magistrate or other judicial officer within a period of forty eight (48) hours of their arrest or if this is not reasonable as soon as possible thereafter, and no such person shall be detained in custody beyond such period without the authority of a Magistrate or a Judicial officer”.

This provision is in substance similar to the Malawi provision in that it requires the state to obtain court authority to hold a suspect beyond 48 hours. The only distinction is that the Malawi provision restricts state unilateral extension of the 48 hour period only to situations where such period expires outside the ordinary court hours or on a day which is not a court day whilst the Namibia provision allows for

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extension if it is not reasonable in the circumstances to comply with 48 hours period. The grounds for extension may be the same as those enunciated under the Malawi Constitution or any other so long as they are reasonable and the suspect is brought to court as soon as possible after the expiry of the forty eight hours.

- Mozambique

This complies with Article 64 of the Mozambique Constitution providing for preventive custody of citizens. This can only be done in accordance with legal provisions which must also fix the duration and limits of such imprisonment.⁶ However, sub article 2 of Article 64 requires that within a period fixed by law such a detained person be brought before judicial authorities to decide on the lawfulness and continuation of such imprisonment. Clearly the Mozambique Constitution has left matters of period to ordinary statute.

In fact the statute law in Mozambique also provides that the maximum preventive imprisonment period is 48 hours and during this time the detainee has the right to have his case reviewed by judicial authorities. The detainee may further be held for up to 60 days with authority of judicial authorities. Where the penalty for the offence is 8 years or more they may be held for up to 84 days without formal charge and may, with judicial approval, further be held for two consecutive custody periods. Where the custody period expires without any formed charge being preferred, then the detainee must be released.

- South Africa

The Constitution of South Africa provides for the rights of arrested, detained and accused persons under section 35. In the main, the rights of an arrested person alleged to have committed an offence are similar to those under the Malawi

⁶ Article 64 (1) of the Mozambique Constitution

Constitution for under the South African Constitution it is provided under section 35 (1) (d), as follows –

“(1) Everyone who is arrested for allegedly committing an offence has the right –

- (d) to be brought before a court as soon as reasonably possible but not later than –**
 - (i) 48 hours after the arrest, or**
 - (ii) the end of the first court day after the expiry of the 48 hours expire outside ordinary court hours or a day which is not an ordinary court day.**

The South African Constitution further provides under section 35 (1) (e) for detention beyond 48 hours if reasons for such continued detention have been furnished to the suspect in court and, obviously, if the court has accepted them. Malawi and South Africa therefore share the same model.

It shall not be the general rule that persons awaiting trial shall be detained in custody but release may be subject to guarantees to appear for trial at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

Need for reform

The analysis shows that the state can easily comply with the provisions of S42(2)(b) by simply ensuring that they bring suspects to court whenever there is need to hold such suspects beyond 48 hours. Surely the courts would grant such requests if the grounds are reasonable and they are in the interests of justice.

POLITICAL RIGHTS – PUBLIC FUNDING OF POLITICAL PARTIES

In 1993 the people of Malawi, through a national referendum decided political activity shall be organized on multiparty basis⁶⁷ as opposed to single party basis. The Constitution does not say in so many words that political activity shall be based on multiparty basis but does reflect this position in various provisions. Some of these provisions are section 40 which deals with political rights generally and political party funding in particular; section 56 (7) on proportionate representation of political parties on Committees of Parliament; section 65 which restricts the movement of Members of Parliament elected on political party tickets; section 80 (5) which restricts the appointment of a Second Vice President to be from a political party other than that of the appointing President; and, section 193 on the independence of the Civil Service from political party influence of political parties. There are also various statutes that give effect multipartyism in Malawi.⁶⁸ It is however section 40 (2) which provides for political party funding that is of interest here as it has generated debate in the Constitution review process.

Section 40 (2) reads –

“The State shall provide funds so as to ensure that, during the life of any Parliament, any political party, which has secured more than one-tenth of the national vote in elections to that Parliament has sufficient funds to continue to represent its constituency”.

It is clear from the subsection that the State is obliged to fund political parties that achieve the vote threshold of one-tenth of the national vote. It is also clear that,

⁶⁷ 63% of the voting in the referendum said yes to multipartyism.

⁶⁸ Example, Parliamentary and Presidential Elections Act, Political Parties (Registration) Act.

such one-tenth of the national vote must translate into such parties having actual representation in Parliament.

It is however not clear what constitutes the national vote. In ordinary parlance, one would believe that this must be the sum total of all votes cast in a general parliamentary election. It is possible to interpret this provision to mean that all the votes cast in parliamentary elections in all the 193 constituencies would have to be added to arrive at the national vote. Under this interpretation, it would only be those parties that score one-tenth of such national vote and have actual representation in Parliament that would be entitled to state funding under section 40 (2).

This interpretation creates a problem. Malawi is divided into 193 constituencies and is not a single constituency. These constituencies have different population densities⁶⁹. This means it would be possible for a party to score one-tenth of the national vote without securing actual representation in Parliament. Again, because of the first past the post system that is in use, it is possible for a party to score less than one-tenth of the national vote but still have actual representation in Parliament. This would be where the party secures a number of low density constituencies. It is humbly submitted perhaps the one-tenth formula was misconceived in our case as it would only make sense. Where the electoral system is on proportion representation basis using party lists and the whole country was one constituency and one-tenth is the minimum vote score for allocation of a Parliamentary seat to parties. The provision for independent candidates appears to complicate the matter even more.

⁶⁹ At last general election the lowest populated constituency was ... with ... voters whilst the highest was with ... voters.

In practice, Parliament has interpreted the provision to mean that funding should be given to political parties that have one-tenth of the total number of seats in Parliament.⁷⁰

The Constitution has not provided for accountability mechanisms for such funding. It has also not stipulated any restrictions as to sources of funding or funding limits.

Comparative Study

- Mozambique

The Constitution of Mozambique recognizes parties as the expression of political pluralism and the fundamental instruments for the democratic participation of citizens in the governing of the country.⁷¹ Further, political parties are required to be democratic in their structure and operation.⁷² There are other provisions contained in sections 72, 77 and 78 of the Mozambican Constitution. These relate to principles that bind political parties. Suffice it to say that the Mozambique Constitution does not provide for political party funding.

- Namibia

In Namibia, public funding is confided to parties represented in Parliament.

- South Africa

The South African Constitution⁷³ provides for political rights in section 19 which is within the bill of rights. The section does not however provide for political party funding as does in section 40 of the Malawi Constitution. This aspect has been

⁷⁰ The Business Committee made this decision in and the practice has persisted such as that currently on Malawi Congress Party (60 seats) and UDF () get State funding.

⁷¹ Section 70 of the Mozambique Constitution.

⁷² Section 70 (2) of the Mozambique Constitution.

⁷³ <http://www.polity.org.za>.

provided for under section 236 under General Provisions. Section 236 reads as follows: –

“To enhance multiparty democracy, national legislation must provide for funding of political parties participating in national and provincial legislatures on an equitable and proportional basis”.

This matter has been left to ordinary statute and this is the Public Funding of Represented Political Parties Act, 1997.⁷⁴ Section 5 of this Act provides for the basis of funds allocation, the guiding principles in the formula for allocation and what the funds may be used for. The Act further places the fund under the management of the Electoral Commission.⁷⁵ It should also be noted that funding of parties is based on yearly presentation of the budget estimates to the national and provincial legislatures.⁷⁶

There are two principles for allocation of funding and these are proportionality and equity. Under proportionality what is considered is the ratio that the total number of seats of a party bears to the total number of seats of the legislature. In terms of equity, there is a fixed threshold for a minimum allocation to each party represented in the legislature⁷⁷ and a weighted scale of representation for an allocation to each of the political parties represented.⁷⁸

It is therefore clear that in South Africa all parties represented in Parliament are entitled to public funding although on different rates based on their level of representation. It is also obvious that the allocation is made on the basis of facts

⁷⁴ <http://www.info.gov.za>.

⁷⁵ Section 51 the Public Funding of Represented Political Parties Act, 1997.

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and circumstances obtaining at the time of allocation. Thus funding levels can always fluctuate.

- Botswana

There is no public funding of political parties in Botswana.

Areas and proposals for reform

In view of the Malawi economy, it is clear that multipartyism of National Assembly can only be enhanced through continued public funding. This is because it is inconceivable that parties would be able to generate enough funds for sustaining their organisations through membership contributions. Of course, parties are not barred from getting donations from any source but public funding would be more reliable. In any case these parties perform a public function in providing checks and balances to the ruling party and offering the public a diversification of political ideas. However the formula for allocation of funds appears to be in need of review and clarity. The South African model could provide an example to learn from.

These matters of detail could be properly provided for under an Act of Parliament. Such an Act should also consider the issue of private donations, especially whether there should not be need for disclosure of such private donations and whether there should not be a cap on the level of private funding that a party may receive to ensure a level playing field.

CONCLUSION

The Constitution is meant to be a framework of governance. It cannot contain all the details that may be required to ensure that its provisions are adhered to or implemented. In most cases therefore it would be advised to provide for the implementation details under statutes. This is an advantage in that statutes are or should be easier to amend especially if the Constitution is allowed enough flexibility so that it can easily be adapted to changing circumstances.

The Bill of Rights for example is entrenched and amendment thereto may require referendum. This has economic resource implications and consideration may need to be given to such hidden costs of any amendments.

Above all, Malawi must develop a human rights culture. Regardless of how well and elaborately the provision on human rights may be crafted in the Constitution, implementation is always the key.