



The Malawi Law Commission

**CONSTITUTIONAL REVIEW PROGRAMME:
DISCUSSION PAPER NO. 7**

**AMENDMENTS TO THE CONSTITUTION & PRESERVATION OF ITS
SANCTITY**

"No work of man is perfect. It is inevitable that in the course of time, the imperfections of a written constitution will become apparent. Moreover, the passage of time will bring changes in society, which a constitution must accommodate if it is to remain suitable for the nation. It was imperative, therefore, that a practicable means of amending the constitution be provided."

Thomas Jefferson

June, 2006

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1. Introduction

Malawi's current Constitution was adopted provisionally on May 18 1994. It came into force a year thereafter on May 18 1995. Between 1994 and 2005, Parliament passed nine Constitution Amendment Acts amending well over 90 sections.¹ Two of these Acts, which amended 24 sections, were passed within the one-year period the Constitution was in force provisionally. Two Amendment Bills failed to pass² and two more were withdrawn.³ In either instance the government succumbed to public pressure following massive civil society lobbying against the proposed amendments. There are two outstanding Constitution Amendment Bills that, if passed, will amend, at a minimum, a further 18 sections.⁴

Some of the amendments passed during the last 10 years were passed to improve the text of the constitution, correct textual errors and clear ambiguities identified during its provisional application.⁵ However, it became undeniably clear during the 1st National Conference on the Review of the Constitution that a significant number, if not all the non-technical amendments

¹ Anthony Kamanga "Amendments to the Constitution Since 18th May 1994," Paper presented to the 1st National Constitutional Review Conference, Capital Hotel, Lilongwe, March 28-31, 2006.

² Constitution (Amendment) Bill 2002, the Open Terms Bill, and the Constitution (Amendment) Bill 2005, on s.65, both were introduced as Private Members Bills, cf Kamanga, pp 25-26.

³ Constitution (Amendment) Bill 2002, the "Third Term" Bill and Constitution (Amendment) Bill 2004 on the extension of the lifespan of the National Compensation Tribunal, and see Kamanga p 27.

⁴ Anthony Kamanga "Amendments to the Constitution Since 18th May 1994," Paper presented to the 1st National Constitutional Review Conference, Capital Hotel, Lilongwe, March 28-31, 2006, P. 2

⁵ Ibid.

passed or proposed to address “political realities” and “fill perceived gaps”, were in fact passed solely to serve political expedience and to achieve self-seeking interests of the leaders of the ruling United Democratic Front [UDF].⁶

Of the 13 Constitution Amendment Bills presented in Parliament, at least two were introduced as private members’ Bills. In retrospect, coupled with a little hindsight, it is evident that the ‘Open Terms’ Bill, introduced by Khwauli Msiska, MP, was craftily designed to extend Dr. Muluzi’s hold on the presidency. It was generally believed that the approach of a Private Member’s Bill was one way to veil the diabolical intent behind the proposed amendment. Of the remaining two, both presented during the current term of Parliament under the presidency of Dr. Bingu wa Mutharika, one was intended to extend the application of s.65 to target Members of Parliament that joined the Government side after President Mutharika resigned from the UDF.⁷ The other was intended to provide for a “National Governing Council” in anticipation of his impeachment; a further demonstration of the ill intent of most amendments so far enacted or proposed, at serving selfish political goals.

It is against this background that this discussion paper is prepared as part of the resource materials to the Special Law Commission on the review of the Constitution. The paper’s primary objective is to present in its appropriate perspective, the sanctity of the Constitution juxtaposed with a sobering examination of the numerous and oft-unjustified amendments to the

⁶ Ibid.

⁷ Dr. Bingu wa Mutharika became president as a UDF candidate. He subsequently resigned from the UDF and established his own political party, the Democratic Progressive Party.

constitution in the first ten years of its operation. It is hoped that in highlighting the sanctity of the Constitution as the supreme law of the land, the paper will serve to guide Commissioners towards the greater need to fully preserve that sanctity and prevent self-seeking individuals from abusing the mechanism of constitutional amendment during their stay in office. This, it is hoped, will be achieved in part through a presentation of the values and principles that ought to prevail and remain paramount when debating mechanisms and processes for effecting constitutional amendments. These mechanisms, as will be illustrated, must necessarily guarantee that amendments to the constitution only serve to advance national interests rather than political expedience. To that end, the paper will examine, on a comparative basis, the mechanisms and processes in selected jurisdictions and those in the Malawi Constitution. In conclusion, the paper seeks to exhort the Commission to consider practical, yet more restrictive, mechanisms and procedures for amending the Constitution in order to safeguard its entrenched sanctity and preserve its integrity.

2. The Sanctity Of The Constitution

2.1 Constitutions defined

The Oxford English Dictionary defines a constitution as "a body of fundamental principles or established precedents according to which a state or organisation is governed".

The Collins Dictionary says a constitution consists of "the fundamental principles on which a state is governed, especially when considered as embodying the rights of subjects".

Black's Law Dictionary defines a constitution as the "organic and fundamental law of a nation or state, which may be written or unwritten, establishing the character and conception of its government, laying the basic principles to which its internal life is to be conformed, organizing the government, and regulating, distributing, and limiting the functions of its different departments, and prescribing the extent and manner of the exercise of sovereign powers."

Black's Law Dictionary goes further to suggest that a constitution may be regarded as a charter of government deriving its whole authority from the governed. In this sense a constitution is presented as the written instrument agreed upon by the people of a country, or federation, as the "absolute rule of action and decision for all branches, departments and officers of the government, which can only be changed by the authority which established it

by amendment; and in opposition to which any act or ordinance of any such department or officer is null and void".⁸

None of these definitions expressly highlight the character a constitution should necessarily assume; whether written or unwritten. In the latter part of Black's definition, however, there is an implicit introduction of the notion of the existence of some form of document. "Constitution" in this sense means a document having a special legal sanctity, which sets out the framework and principal functions and operations of the different branches of government and their interrelation with one another and individual citizens.⁹ This is true of nations like Malawi, India, South Africa and the United States. Some theorists suggest that to view a Constitution as a document is to construe the term narrowly.¹⁰ The United Kingdom would possess no Constitution. When construed broadly, the "constitution" represents more than just a document. It represents the collection of rules defining the composition, functions and interrelationship of the institutions of government and delineating the rights and duties of the governed.¹¹ In this broad sense, the United Kingdom does possess a Constitution and a body of constitutional law.

At the core of either concept is the undeniable representation of an intangible but very real contract between those exercising the power of government and the governed. This collection or body of principles, traditions and canons

⁸ *Black's Law Dictionary*, Sixth Edition (St. Paul Minn.: West Publishing Co. 1990) p 311 "constitution"

⁹ A. W. Bradley and K. D. Ewing, *Constitutional and Administrative Law*, 12th Ed, (London, Longman) p. 4.

¹⁰ Stanley De Smith & Another, *Constitutional and Administrative Law*, (Suffolk, Penguin Books, 1998) pp 3-13, *passim*. See also A. W. Bradley, *op cit*, pp 4-5.

¹¹ *Ibid*-p. 6.

ranks paramount over any act or conduct of the government. They cannot be changed or altered except in accordance with the authority that established the Constitution.¹²

2.2 Constitutions and Ordinary Legislation Contrasted

Constitutions differ from regular legislation in a number of significant ways. They usually have peculiar origins, are often adopted or enacted by special bodies and are drafted in a unique language and will most likely contain a Bill of rights. Constitutions also differ from regular legislation in the way they are interpreted and the relatively high pedestal they possess in the hierarchy of laws.

Constitutions, unlike ordinary legislation, have a unique and distinct origin and background. All too often, constitutions have emerged out of conflict or revolution, either by a nation seeking self-determination from colonial dominance or a subsequent generation rising against an earlier oppressive government. The United States Constitution was conceived in the wake of the new American nation seeking independence from the British to ensure that its people would not suffer the despotic absolute rule of the British and European monarchs; and to secure liberty and security both for the union and individual citizens.¹³ Malawi's current constitution was forged against a background of a thirty year one party dictatorship that left many oppressed, exiled or dead

¹² Ibid-p. 10.

¹³ S.E. Finer, *et al*, *op cit* p7

during the first 30 years of independence. Of course, there was a Constitution during this period but it hardly ever protected the people or their rights. The government ranked supreme and could carry out any act or conduct without regard to the provisions of the constitution.¹⁴ In 1993, the people of Malawi rejected that Constitution and form of government. They adopted a more robust Constitution, which recognised basic human rights and a form of government that would be accountable to the people.¹⁵ Similarly, a rejection of the apartheid system with all its repressive elements led to the birth of the new South African Constitution in 1994 and which was confirmed in 1996.

Constitutions, unlike regular legislation are rarely passed by regular parliaments. They are often adopted by special conventions. The US Constitution was adopted by a convention of the States on September 17, 1787.¹⁶ The US Congress only began to sit in December 1789.¹⁷ In Germany a special Parliamentary Council adopted the German Basic Law on May 8, 1949.¹⁸ Similarly in Malawi it was a specially created National Consultative Council¹⁹ that supervised the formation of and adopted the current Constitution, which was then enacted by a specially convened parliament on 16th May 1994.

¹⁴ Msaiwale Chigawa, "The Fundamental Values of the Republic of Malawi Constitution of 1994" Paper presented to the 1st National Constitutional Review Conference, Capital Hotel, Lilongwe, March 28-31, 2006

¹⁵ Section 12

¹⁶ Ibid p.115

¹⁷ Robert J. Steamer & Richard J. Maiman *American Constitutional Law, Introduction and Case Studies* (New York; McGraw-Hill, inc 1992) p12

¹⁸ Ibid, p127

¹⁹ A body of several registered political parties, established by an Act of Parliament in 1993.

Written constitutions usually reflect the beliefs and political aspirations of those who framed it.²⁰ Drafted in lofty and emotional language they almost always mirror the mindset of a nation at that crucial period when they were adopted. Emotional words, inspirational preambles and broad sweeping provisions make up the contents of constitutions. Regular legislation, on the contrary, is more technical in form and language and tends to address specific areas of the law.

The South African Constitution begins with the words, *"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."*

The preamble to the US Constitution establishes the reason for the Constitution, reflecting the desires of the framers to improve on the government they currently had, to ensure that the government would be just, and would protect its citizens from internal strife and from attack from the outside. It would be of benefit to the people, rather than to their detriment. And, perhaps as importantly, it intended to do the same for the future generations of Americans."²¹

²⁰ A. W. Bradley, op cit p. 6

²¹ <http://www.usconstitution.net> (Visited on May 30, 2006)

Malawi's preamble to the Constitution is also telling. "*The people of Malawi, recognizing the sanctity of human life and the unity of all mankind, guided by their private conscience 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..adopt this Constitution.*"

Constitutions and constitutionalism go hand-in-hand with human rights, which are often entrenched in a Bill of rights.²² The first 10 amendments in the US Constitution comprise the Bill of rights; chapter 2 of South Africa's 1996 Constitution contains its Bill of rights. Malawi's Bill of rights is contained in chapter 4. These rights include rights to equality, human dignity, life and privacy, among others, as well as the freedoms of religion and expression.

Constitutions are interpreted differently from ordinary legislation. In construing regular legislation, many approaches exist, but the dominant rule is to assign words their plain and ordinary meaning. Constitutions are interpreted broadly to reflect the intent of their framers. This was emphasised by Banda CJ, in *Gwanda Chakuamba, Kamlepo Kalua, Bishop Kamfosi Mnkumbwe vs The Attorney General, The Malawi Electoral Commission and the United Democratic Front*²³: -

²² <http://www.constitutionalcourt.org.za> (Visited on May 30, 2006)

²³ MSCA Civil Appeal No. 20 of 2000 (unreported).

“It is clear [...] that it is to the whole Constitution that we must look for guidance to discover how the framers of the Constitution intended to effectuate the general purpose of the Constitution.”²⁴

The Constitution itself expressly entrusts powers to develop principles to be applied in interpreting the Constitution to the judiciary.²⁵ These principles must promote the values that underlie an open and democratic society.²⁶ The Judiciary is enjoined to take full account of the provisions of the fundamental principles and the provision on human rights.²⁷ The judiciary is further encouraged where applicable, to have regard to current norms of public international law and comparable foreign case law.²⁸

In *Fred Nseula vs Attorney General and Malawi Congress Party*²⁹ Banda CJ, again reiterated the significance of employing special principles in the interpretation of the Constitution: -

“Constitutions are drafted in broad and general terms which lay down broad principles and they call, therefore, for a generous interpretation avoiding strict legalistic interpretation. The language of a Constitution must be construed not in [a] narrow legalistic and pedantic way but broadly and purposively. The interpretation should be aimed at fulfilling the intention of Parliament [...] all the provisions bearing

²⁴ At pp 5-6.

²⁵ Section 11

²⁶ Section 11 (2) (b)

²⁷ See Chapters III and Chapter IV of the Constitution

²⁸ Section 11 (c)

²⁹ MSCA Civil Appeal No. 32 of 1997 (Unrep).

upon a particular subject must be brought to bear and to be so interpreted as to effectuate the great purpose of the Constitution.”³⁰

In the United States the interpretation of the constitution has been fundamental to its legal, political and social development. The interpretation has been dynamic and fluid. The words of the constitution have been accorded different meanings at different times depending on the social and political needs of a particular generation.³¹

2.3 Preserving the Sanctity of the Constitution

It has been suggested that constitutional law concerns the relationship between the individual and the state from a particular viewpoint; the notion of law. And that law does not exist in a social or political vacuum.³² The rules of constitutional law that govern political relations will within a given society reflect a particular distribution of political power. Constitutional law expresses what may be a very high degree of consensus about the organs and procedures by which political decisions are taken. In a stable democracy, constitutional law reflects the value that people attach to orderly human relations, to individual freedoms under law and to institutions such as parliament, political parties, free elections and a free press.³³

³⁰ At p 9.

³¹ <http://www.usconstitution.net/> (visited on May 9, 2006 and see page 20 below on amending the American Constitution.)

³² A. W. Bradley, *op cit* p. 3

³³ A. W. Bradley, *op cit* p. 3

“Constitutional law is one branch of human learning and experience that helps to make life in today’s world tolerable and less brutish than it might otherwise be.”³⁴

By their very nature therefore, constitutions possess a significance and sanctity often ignored and taken for granted. Because nations pin their hopes, ideals and aspirations on the successes of their constitutions, it becomes imperative that constitutions be accorded the sanctity and respect reflecting such solemnity.

The Malawi Constitution asserts its supremacy over all branches of government.³⁵ It binds the acts and conduct of the executive, the laws passed by the legislature, and the decisions passed by the Judiciary,³⁶ while ensuring equal protection to all peoples.³⁷ In the resolution of all political disputes and application of all laws, the constitution is the supreme arbiter and ultimate source of authority.³⁸ Any act or law inconsistent with the constitution is invalid.³⁹

It is easy to speak of the sanctity of the Constitution. The preservation in reality of such inviolability and whether it retains any significance and reverence in law and political association entirely depends on how each state venerates its own constitution.

³⁴ Ibid P. 4

³⁵ Section 10

³⁶ Section 4

³⁷ Section 4

³⁸ Section 10 (1)

³⁹ Section 5

The US Constitution is one of the shortest constitutions ever drafted. It has been hailed as an example of brevity and clarity.⁴⁰ Much of this stems from the fact that it enumerates merely the principal features of the federal government and refrains from regulating state government machinery. Another feature of the US Constitution that has ensured its success is its malleable flexibility coupled with the enormous resourcefulness of the judicial branch in interpreting the words of the constitution to reflect the national interests and needs of each passing generation.⁴¹ The balance is carefully achieved in giving such awesome power to the judicial branch by reserving for the Congress power to correct judicial miss-interpretation of the constitution.⁴²

In contrast, the India Constitution is one of the most detailed, elaborate and longest constitutions, with 444 articles, 12 schedules and 117, 369 words in the English version.⁴³ While the Constitution of India draws extensively from Western legal traditions in its enunciation of the principles of liberal democracy, it is distinguished from many Western constitutions in its elaboration of principles reflecting aspirations to end the inequities of traditional social relations and enhance the social welfare of the population.⁴⁴

Granville Austin has said that probably no other nation's constitution "*has*

⁴⁰ S.E. Finer, *op cit* p7

⁴¹ *Ibid*, p15. See also <http://etext.virginia.edu/jefferson/quotations/jeff1000.htm> visited on May 4 2006.

⁴² Consider the 11th Amendment which limited the original jurisdiction of the US Supreme Court after its ruling in *Chisholm –v- State of Georgia* 2 US 419 (1793)

⁴³ http://en.wikipedia.org/wiki/Constitution_of_India, the free encyclopaedia p 1, visited on May 4 2006.

⁴⁴ *Ibid* p 3.

*provided so much impetus toward changing and rebuilding society for the common good” as the Indian constitution.*⁴⁵

On the other hand the most graphic disdain and disregard towards a constitution is perhaps displayed best by the Russian Communist Government prior to the fall of the Soviet Union.⁴⁶

Whether a Constitution is accorded any reverence reflects an individual state’s regard or disregard towards a desire to conform to the norms, canons and principles it has chosen to abide by. No amount of restrictions in the constitution on powers of amendment or government will of itself, serve to uphold its sanctity without the political will of the government and those in the legislative branch to respect its provisions and the pronouncements of the judicial branch exercised with wisdom and sobriety.

⁴⁵ Ibid p 3.

⁴⁶ The [Russian] regime’s attitude to law and the constitution displayed a striking contrast between its words and its deeds. Mikhail Gorbachev, USSR leader, successfully upgraded the electoral process and the role of the legislature at the expense of the Party, and the years of *perestroika* (1987-1991) resounded with sermons extolling and slogans proclaiming the rule of law. But laws soon became weapons in the struggle to save the Union and in the battle between the Russian Parliament and the President. The heads of state of three of its members, (Russia, Ukraine, Belorussia) announced its end at the Minsk Agreement of December 8 1991, and four days later the Russian Supreme Soviet ratified the agreement and denounced the 1922 Union Treaty. On December 25, 1991, Mikhail Gorbachev resigned as USSR President and on the following day an inquorate Union Parliament wound up the legislative, executive and judicial branches. During the following two years, the same disdain, and contempt, was displayed by both the Russian Congress and the President. Constitutional Amendments, requiring a two-thirds majority of the Congress, were constantly being introduced and immediately adopted. At the same time President Boris Yeltsin was issuing a stream of Presidential edicts of all kinds. Throughout the following eighteen months competing drafts of a new constitution were produced and debated. On September 22 1993, on the ground that ‘the security of Russia is a higher value than formal conformity to contradictory norms created by the legislative branch of government’, the president dissolved the legislature. He had no legal power to do so, as the constitutional Court promptly pointed out, so on October 7 he suspended that body. The physical challenge of removing members of parliament was overcome by arms: the House of Parliament ... was fired on, killing scores of occupants; it was then taken by force. The speaker and others were detained and imprisoned. See S.E Finer, *op cit* pp 11-12 for a fuller treatment of the subject.

In *The Registered Trustees Of The Public Affairs Committee –v- The Attorney General and The Speaker Of The National Assembly and The Malawi Human Rights Commission* (amicus curiae)⁴⁷ Justice Chipeta offers an apt summation: -

*“Our ... Constitution ... is the document that contains the wishes and aspirations of our people. The more genuinely we give it attention and the more sincerely we evaluate its enabling provisions without rushing to disable them by trying to force them to fit in some ancient and expiring doctrinaire concepts, the nearer we will get to the justice regime the framers of the Constitution contemplated for the people of Malawi.”*⁴⁸

This is a clear recognition and an incontrovertible emphasis of the import the framers of the Constitution placed on it as a means through which national goals and justice for the people of Malawi can be attained. It is only prudent therefore that those in leadership positions and who retain the power to guide the direction of our constitutional development should constantly bear in mind the momentous responsibility they assume. They owe it to every Malawian to desist from undertaking initiatives that destabilize the inviolability of the constitution and these principles we have set for our nation. The past 10 years have shown with glaring lucidity that those so far entrusted with our constitutional future had little regard for the sanctity of the constitution. This review consequently offers a unique opportunity for self censure for the

47 Civil Cause Number 1861 Of 2003 (HC) (Unrep)

48 At page 2.

Malawi nation to decide how the sanctity of the constitution can be fortified and the destiny of all Malawians be guaranteed in the protection afforded by the constitution. Clearly this calls for a sober and frank confrontation with our dark temperaments that compel us as leaders to place our individual interests above those of the many deserving but unrepresented peoples of Malawi.

3. Comparative Constitutional Amendment Procedures

The provisions on the means by which a constitution may be amended are of both juridical and political importance: they are themselves an exercise of the constituent power in spelling out how its own creation may be changed; they divide the amending power among people, legislature, and executive, or between a federation and its components; and they may express basic values.⁴⁹

Thomas Jefferson, a founding father of the United States, wrote extensively on politics and government. His avid observations on constitutional amendments are instructive and present some level of sobriety in balancing the need to amend the constitution in response to each generation's needs against the overriding desire to preserve the sanctity of the constitution. He argues that whatever form a constitution takes, great care must be taken to provide a mode of amendment when experience or change of circumstances shall have manifested that any part of it is unadapted to the good of the nation.⁵⁰

He further asserts that a greater facility of amendment is certainly requisite to maintain it in a course of action accommodated to the times and changes through which any nation is ever passing. He points out that time and

⁴⁹ S.E. Finer, et al, *Comparing Constitutions*, (Oxford: Clarendon Press, 1995) p13

⁵⁰ Thomas Jefferson to A. Coray, 1823. See T. J. On the Constitution.

changes in the condition and constitution of society may require occasional and corresponding modifications to its constitution.⁵¹

While he acknowledged the error of looking at constitutions with sanctimonious reverence to the point of deeming them the ark of the covenant, too sacred to be touched, he admitted that recurrent and untested alterations of laws and constitutions was equally unjustifiable and imprudent. He acquiesced that moderate imperfections are better tolerated since once known, they can be accommodated and practical means of correcting their ill effects be devised.⁵²

"But I know also that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed and manners and opinions change with the change of circumstances, institutions must advance also and keep pace with the times."

"Those who [advocate] reformation of institutions *pari passu* with the progress of science [maintain] that no definite limits [can] be assigned to that progress. The enemies of reform, on the other hand, [deny] improvement and [advocate] steady adherence to the principles, practices and institutions of our fathers, which they [represent] as the

⁵¹ Thomas Jefferson to Edward Livingston, 1825.

⁵² Thomas Jefferson to Samuel Kercheval in 1816.

consummation of wisdom and acme of excellence, beyond which the human mind could never advance." ⁵³

To this end, Jefferson advocated episodic reviews of the constitution to gauge whether there be necessity to adjust it to the ever dynamic progress of the state. He maintained that this, however, ought to be done after the passage of a generation.⁵⁴

"Let us provide in our constitution for its revision at stated periods. What these periods should be nature herself indicates. By the European tables of mortality, of the adults living at any one moment of time, a majority will be dead in about nineteen years. At the end of that period, then, a new majority is come into place; or, in other words, a new generation. Each generation is as independent as the one preceding, as that was of all, which had gone before. It has then, like them, a right to choose for itself the form of government it believes most promotive of its own happiness; consequently, to accommodate to the circumstances in which it finds itself that received from its predecessors; and it is for the peace and good of mankind that a solemn opportunity of doing this every nineteen or twenty years should be provided by the constitution, so that it may be handed on with periodical repairs from generation to generation to the end of time, if anything human can so long endure."⁵⁵

⁵³ Thomas Jefferson to John Adams, 1813.

⁵⁴ Thomas Jefferson believed 19 years to be an appropriate period carry out periodic reviews of the constitution.

⁵⁵ Thomas Jefferson to Samuel Kercheval, 1816.

3.1 The American Constitution

Amending the United States Constitution is not easy.⁵⁶ The US Constitution spells out two ways for how it can be amended one of which has never been used before. The first method is for a Bill to pass both halves of the legislature, by a two-thirds majority in each. Once the Bill has passed both houses, it goes on to the state legislatures for ratification. Sometimes a period will be prescribed within which an amendment must be ratified by the states or it automatically lapses.⁵⁷ The last amendment to be ratified was the member's salary amendment and was adopted in 1992 while the "equal rights" amendments failed ratification and was never adopted, as were several others.⁵⁸

The second method prescribed is for a Constitutional Convention to be called by two-thirds of the legislatures of the States, and for that Convention to propose one or more amendments. These amendments are then sent to the states to be approved by three-fourths of the legislatures or conventions. This route has never been taken, and there is discussion in political science circles about just how such a convention would be convened, and what kind of changes it would bring about.⁵⁹

⁵⁶ <http://www.usconstitution.net/constam.html> visited on April 26 2006.

⁵⁷ Compare the 27th Amendment. Congress will normally put a time limit (typically seven years) for the Bill to be approved as an amendment for example, see the 21st and 22nd dealt with at <http://www.usconstitution.net/constam.html> visited on April 26 2006.

⁵⁸ Ibid.

⁵⁹ Ibid.

Regardless of which of the two proposal routes is taken, the amendment must be approved by three-fourths of states. The amendment as passed may specify whether the Bill must be passed by the state legislatures or by a state convention. Amendments are sent to the legislatures of the states by default and passage by the legislature or convention is by simple majority.⁶⁰

The US President usually has no role in the formal amendment process, although he sometimes makes his opinion known. He cannot veto an amendment proposal, nor a ratification.⁶¹

“The negative of the President applies only to the ordinary cases of legislation: He has nothing to do with the proposition, or adoption, of amendments to the Constitution.”⁶²

Another way the Constitution's meaning is changed is often referred to as "informal amendment" which is when the interpretation of the Constitution can change over time.

There are two main ways that the interpretation of the Constitution changes, and hence its meaning. The first is simply that circumstances can change. One prime example is the extension of the vote. In the times of the Constitutional Convention, the vote was often granted only to monied land holders. Over time, this changed and the vote was extended to more and

⁶⁰ Ibid

⁶¹ Article 5, see also the Supreme Court decision in *Hollingsworth v Virginia* 3 USC 378 [1798].

⁶² <http://www.usconstitution.net/constam.html>, *op cit*.

more groups. Finally, the vote was extended to all males, then all persons 21 and older, and then to all persons 18 and older. The informal status quo became law, a part of the Constitution, because that was the direction the culture was headed. Another example is the political process that has evolved in the United States: political parties, and their trappings (such as primaries and conventions) are not mentioned or contemplated in the Constitution.⁶³

The second major way the meaning of the Constitution changes is through the judiciary. As the ultimate arbiter of how the Constitution is interpreted, the judiciary wields more actual power than the Constitution alludes to. For example, before the Privacy Cases,⁶⁴ it was perfectly constitutional for a state to forbid married couples from using contraception; for a state to forbid blacks and whites to marry; to abolish abortion.⁶⁵ Because of judicial changes in the interpretation of the Constitution, the nation's outlook on these issues changed. These changes in meaning are significant because they can happen by a simple judge's ruling and they are not a part of the Constitution and so they can be changed later.

One other way of amendment is also not mentioned in the Constitution and has never been used referred to as "popular amendment".⁶⁶

⁶³ Ibid.

⁶⁴ The Privacy Cases, which included... determined that ..., see for example...

⁶⁵ Ibid.

⁶⁶ Endorsed by Framers James Wilson. The topic is examined in some length in Akhil Reed Amar's book, The Constitution: A Biography, for which visit <http://www.usconstitution.net/constam.html>

The notion of popular amendment comes from the conceptual framework of the Constitution. Its power derives from the people; it was adopted by the people; it functions at the behest of and for the benefit of the people. Given all this, if the people, as a whole, somehow demanded a change to the Constitution, should not the people be allowed to make such a change? As Wilson noted in 1787, "... the people may change the constitutions whenever and however they please. This is a right of which no positive institution can ever deprive them."⁶⁷

"It makes sense if the people demand a change, it should be made. The change may not be the will of the Congress, nor of the states, so the two enumerated methods of amendment might not be practical, for they rely on these institutions. The real issue is not in the conceptual. It is a reality that if the people do not support the Constitution in its present form, it cannot survive."⁶⁸

Lastly it is worthwhile to note that the US Constitution clearly enumerates which articles comprised the original constitution and which ones were added as amendments. This is significant in that anybody clearly understands which provisions are a correct statement of the constitutions and which ones were amended or repealed.

⁶⁷ Ibid

⁶⁸ Ibid, but cf Akhil Reed Amar's book, The Constitution: A Biography, at <http://www.usconstitution.net/constam.html>

In contrast, the Malawi Constitution amendments are not clearly spelt out.⁶⁹ When one peruses through either the 1994 or the 2001 Constitutions, one hardly determines which provisions are operational and which ones are not. This casts a high and worrisome level of uncertainty over the Constitution's textual accuracy. It is not too difficult to imagine one most easily mistakenly reading and considering a provision of the of the Constitution as the correct statement of the law without knowledge that it has since been amended.

There clearly is a need to articulate, in a simple and systematic manner, which provisions have been amended; which ones have been repealed and which ones comprise the original Constitution. Anything less will only compound the problem of deciphering which is the correct version of the Constitution.

3.2 The Indian Constitution

An amendment to the Indian Constitution is understood to be an extremely difficult affair although during the period of its existence it is one of the most frequently amended constitutions in the world.⁷⁰ It normally needs at least

⁶⁹ In the absence of Anthony Kamanga's paper (See note 1 above), it would not have been easy to determine how many amendments have been effected to the Constitution since 1994, let alone determine which edition of the Constitution represents the most up to date version of the text of the Constitution.

⁷⁰ Contrast with the South African Constitution, which is also considerably difficult to change. Section 74(2) states that Bills amending the Constitution require a two-thirds majority in the National Assembly and a supporting vote of six of the nine provinces represented in the National Council of Provinces. Some parts are even more firmly entrenched, e.g. a Bill amending Section 1, which sets out the founding values, requires a 75 percent majority.

two-thirds of the *Lok Sabha* and *Rajya Sabha* to pass it.⁷¹ The first amendment came only a year after its adoption and instituted numerous minor changes. Many more amendments followed, at a rate of almost two amendments per year since 1950. Many matters that would be dealt with by ordinary statutes in most democracies must be dealt with by constitutional amendment in India due to the document's extraordinary detail. Most of the Constitution can be amended after a quorum of more than half of the members of each house in Parliament passes an amendment with a two-thirds majority vote. Articles pertaining to the distribution of legislative authority between Union and State governments must also be approved by 50 percent of State legislatures.

By simple majority of the Parliament: Amendments in this category can be made by a simple majority of members present and voting, before sending them for the President's assent.

By special majority of the Parliament: Amendments can be made in this category by a two - third majority of the total number of members present and voting, which should not be less than half of the total membership of the house. By special majority of the Parliament and ratification of at least half of the state legislatures by special majority. After this, it is sent to the President for his assent.⁷²

⁷¹ The two houses of Parliament in India. See generally, http://en.wikipedia.org/wiki/Constitution_of_India for a fuller treatment of the subject. (Visited on May 4 2006)

⁷² Indian Constitutional development has given rise to the "Basic Structure" doctrine, developed by the Indian Courts during the 70's amidst a fierce battle for supremacy between it and the legislature. Under the doctrine, parliament cannot effect an amendment to the

4. Amending The Malawi Constitution

Chapter XXI provides for amendments to the Constitution. Parliament has power to amend the constitution provided certain conditions are satisfied.⁷³ Parts of the Constitution listed in the Schedule, including Chapter XXI can only be amended when two conditions are met; first, the proposed amendment must be put to a referendum and a majority of those voting should favour the amendment and second the electoral commission should certify to the speaker that it was so put. Parliament can then amend the Constitution by a simple majority.

Parliament can amend those parts of the schedule, including Chapter XXI, without a referendum if the amendment does not affect the substance of the constitution provided the speaker certifies that it does not and a two-thirds majority support the amendment.

It is noted that no proposal to amend parts of the Constitution listed in the Schedule has been presented since the Constitution's adoption in 1994 except the attempt to amend the schedule itself under the failed amendment to s.83 on the third term.⁷⁴ It is not clear therefore how such amendment

Constitution, which purports to offend its basic structure. The topic is dealt with more fully in Discussion paper 2 and was touched *obiter* by Justice Chipeta in his judgment in *The Registered Trustees Of The Public Affairs Committee –v- The Attorney General and The Speaker Of The National Assembly and The Malawi Human Rights Commission* (supra). Suffice to say however; that others argue, including this author that the doctrine exceeds precepts of judicial activism and descends into the schism of legislative usurpation by the Judiciary.

⁷³ Section 196

⁷⁴ The purport was to include the amended s.83 into the schedule so that subsequent attempts to amend it should only be effected through a referendum. To date maybe the worst example and form of abuse of the amendment process in attempting to effect an amendment

would in practice be carried out. It is worth observing, however, that the so called entrenchment provision suggests a possible means of amending the parts of the Constitution listed in the schedule on the satisfaction of two conditions and Parliament would proceed to amend such provisions in the same manner all other amendments have been effected. It only requires the Speaker to certify that a proposed amendment to any part of the Constitution listed in the Schedule does not affect the substance of the Constitution for Parliament to amend it ordinarily. There is no provision whether such amendment would be subject to Judicial Review. Giving the Speaker jurisdiction to determine whether an amendment of parts of the Constitution listed in the schedule does not affect the substance or effect the Constitution under s.196 (2) clearly breaches the principal of separation of powers. By its very nature it is argued that the act or process of certifying whether a particular amendment proposal affects the substance or effect of the constitution suggests the bearer of such responsibility will exercise judgment on the interpretation to be placed on such proposed amendment and its effect on the constitution. Clearly, this is the purview of the judiciary under s. 9 of the Constitution. If any institution be vested with such power it ought rightly be the Judiciary, perhaps the Chief Justice as head of the judiciary.⁷⁵

of an entrenched provision by a sitting Government. Some called the attempt “backdoor” amendment of the schedule.

⁷⁵ Others argue that the Speaker’s decision to certify an amendment in this manner would be an administrative rather than a quasi-judicial act subject to Judicial Review and therefore there is no need to remove this power from his office. On the other hand, if the Chief Justice were vested with power to determine the question controversy would arise whether his decision would also be subject to judicial review.

Parliament can amend Parts of the Constitution not listed in the Schedule by a two-thirds majority.⁷⁶ All past amendments to the Constitution, whether passed, failed or withdrawn related to parts not listed in the schedule.⁷⁷

4.1 Bills to Amend the Constitution

As noted earlier, several of the Bills presented to amend the Constitution during the past decade were Private Member's Bills.⁷⁸ A number of papers presented at the 1st Constitutional Review Conference centred on the question whether or not Members of Parliament should be allowed to introduce proposals to amend the Constitution through Private Member's Bills.⁷⁹ There was much controversy around this question during plenary and debate.⁸⁰

Neither the Constitution nor the House Standing Orders provide specific procedures on introduction of different types of Bills to amend the constitution. Both the Constitution and the Standing Orders only provide general procedures for introduction of Bills. In determining the question at hand, it is imperative to elucidate how ordinary Bills are dealt with in the Standing Orders.

⁷⁶ Section 197

⁷⁷ But see note 64 above.

⁷⁸ The "Presidential Open Terms" Bill by Khwauli Msiska MP (2002), the "Section 65" Bill by John Tembo MP (2005) and the "National Governing Council" Bill by I. I. Matola MP (2005).

⁷⁹ Malawi Law Commission, *Summary Of The Proceedings Of The First National Conference On The Review Of The Constitution*, (Malawi Law Commission, April 2006) (Unpublished) p7 and 32 *et seq.*

⁸⁰ *ibid*

The Constitution introduces three types of Bills; Private Bills, Government Bills, and Private Member's Bills. Although the Constitution does not speak of Public Bills, the Standing Orders group Government Bills and Private Member's Bills as Public Bills and distinguishes them from Private Bills. A Private Bill is said to be one promulgated by an agency that is not part of the government and introduced in Parliament on behalf of the agency where such agency is mandated by an Act of Parliament to do so.⁸¹ It is difficult to imagine an agency under Malawi law empowered as such. There does not seem to be any agencies of this nature in existence; but for illustration's sake, an example, I surmise, would be where an agency such as the Anti Corruption Bureau is empowered to promulgate a Bill that affects the substantive provisions of its enabling Act.⁸² That Bill, if introduced in Parliament on behalf of the ACB, would be a Private Bill.⁸³

On the other hand, a Public Bill is any Bill, which is not a Private Bill.⁸⁴ It follows then that all Bills introduced in Parliament whether by Government or private members are Public Bills.

The Standing Orders distinguish between Government Bills and Private Member's Bills. A Government Bill is a Public Bill promulgated by the government and introduced in the Assembly by or on behalf of government.⁸⁵

A Private Member's Bill is a Public Bill promulgated by a member and

⁸¹ SO 113. See also s.66 (2) (b) (i) & (ii) of the Constitution.

⁸² The Corrupt Practices Act; the proposal to exempt the ACB seeking consent from the DPP, for instance.

⁸³ Even if presented by a Minister.

⁸⁴ SO 108

⁸⁵ SO 109

introduced by that member.⁸⁶ Any member of parliament can introduce a Private Member's Bill.⁸⁷

In the United Kingdom, the distinction between a Government Bill and a Private Member's Bill are not so dissimilar from what we have. However, the distinction between a Private Bill and a Public Bill are starkly different. Under English law, a Public Bill is one that is introduced to alter the general law or deal with public revenue, the general administration of justice, the constitution, the election of local authorities or other public bodies.⁸⁸ A Private Bill is a Bill introduced to confer powers or benefits on an individual or corporate body.⁸⁹

This is in stark contrast to the distinction obtaining under Malawi law between Private and Public Bills both as envisioned in the Constitution and as expanded in the Standing Orders. Research into whether there is a peculiar history behind the couching of the distinction under Malawi law did not draw any pragmatic result.

Either way, it would seem that Members of Parliament are allowed to introduce Private Member's Bills that affect the substantive law both in Malawi and the United Kingdom.⁹⁰ Strictly speaking, the Bills would be Public Bills in either case and in both jurisdictions. Only a single Bill was found since 1994 published for introduction in Parliament as a Private Member's Bill purporting

⁸⁶ SO 110

⁸⁷ SO 111 (1)

⁸⁸ *Halbury's Laws of England*, 4th Ed, (London; Butterworths, 1997) p 441.

⁸⁹ *Ibid.*

⁹⁰ That is, England and Wales, see note 83 above.

to alter or amend a substantive Act.⁹¹ The Bill, published under the hand of O. I. Mkandawire, MP, sought to amend the Reserve Bank of Malawi Act.⁹²

Thereafter, no Private Member's Bill was introduced until 2002 when Khwauli Msiska, MP introduced the "Open Terms" Bill, not just to alter or amend any substantive law, but to amend the Constitution itself.⁹³ It was only defeated after full debate in Parliament. There have been two more attempts to amend the Constitution through Private Member Bills since then.⁹⁴

In the absence of any peculiar history in our constitutional development to justify, or indeed explain the distinction between Private and Public Bills in the Malawi constitution, it is compellingly evident there was an intention by the framers to mirror the distinction obtaining at common law in England between Private and Public Bills. The actual couching of the clause in the Malawi Constitution and Standing Orders may have turned out to be something of a misnomer, perhaps. This would be true as some argue; that Private Member Bills are a necessary safeguard to allow Members of Parliament initiate legislation in the unlikely event the executive, for one reason or another, did not, was unable or indeed was reluctant to initiate legislation by itself. Although of doubtful practical significance, this can only be sustained, if at all, only with reference to regular legislation but not proposals to amend the

⁹¹ The Reserve Bank of Malawi (Amendment) Bill 1996.

⁹² Act No. 8 of 1989 to ensure only the use of politically neutral features on Malawi's currency. The Bill was neither introduced nor debated, the controversy having been resolved differently somehow.

⁹³ Constitution (Amendment) Bill, 2002, Malawi Gazette Supplement, May 24 2002

⁹⁴ The first, introduced by John Tembo, MP, Constitution (Amendment) Bill 2005, published in the Extraordinary Gazette, June 17 2005 which was defeated and the second, by I. I. Matola MP, Constitution (Amendment) Bill 2005, published in the Malawi Supplement Gazette, October 7 2005, which has not yet been tabled and may never be.

Constitution. The position in our Constitution and Standing Orders was most likely copied from England, where there is no written constitution. Again Private Members' Bills can only be justified if restricted to regular legislation. Obviously in England this does not raise much controversy because of the absence of a written Constitution. Where there exists a written Constitution, as in Malawi, it makes no political nor legal sense, to say the least, to extend to Members of Parliament the right to introduce Private Members' Bills to amend the Constitution. Checking Members of Parliament from introducing Private Members' Bills to amend the Constitution is not only logical but also decidedly crucial, especially in a fledgling and embryonic democracy as Malawi's. The amendment of the Constitution should be a universally acceptable process; one not to be entrusted to the wisdom of individual Members of Parliament, however intelligent they may profess to be or are perceived to be by their peers. Furthermore, there is need to always bear in mind the separate functions of the three branches of government especially in relation to which branch is empowered by the Constitution with responsibility of initiating legislation.⁹⁵

Finally, the doctrine of separation of powers⁹⁶ compels us to acquiesce that the constitution grants different functions to different branches of government and that this ought to rank paramount when determining which branch of Government was granted the responsibility of initiating legislation and policy.⁹⁷ The framers of the constitution would not have intended to duplicate the

⁹⁵ S. 7 of the Constitution

⁹⁶ For a comprehensive discussion of the separation of powers, see discussion papers 1, 2, 3 and 6.

⁹⁷ S. 7 of the Constitution

functions of government by granting the same duties to two different branches of government. On this premise, the only logical way to interpret section 7 is to read it in its strict and plain sense: -

The executive shall be responsible for the initiation of policies and legislation and for the implementation of all laws which embody the express wishes of the people of Malawi and which promote the principles of this Constitution.

This argument allows for only one way to effectively preserve the sanctity of the Constitution. Any and all amendments to the Constitution should only be effected through the executive on consultation and participation of all Malawians. The Malawi Law Commission is well suited by virtue of its Constitutional mandate to undertake periodic reviews of the Constitution and advise whether circumstances obtain at any point in time to warrant amendments to the Constitution. It is also in accord with this observation that the further observation is made that all of the amendments effected within the last decade have all been effected to achieve private interests of particular individuals. What this means is that in large part, the Constitution has served Malawi well in these last ten years and has needed no major amendment in its substantive provisions. Viewed from such perspective, it makes good sense to revise the processes of amending the constitution in order to reflect this philosophy.

5. Conclusion

The Malawi constitution has been amended scores of times in the 10 years it has been in force. Some were intended to right textual inaccuracies and evident ambiguities acknowledged during the interim application. Almost all the amendments that affected the Constitution in a substantial way seem to have been effected for political expedience not in the national interest.

The Constitution is a special law that should be respected and held in high esteem by all branches of government. It is the supreme law of the land and should not be abused to achieve political gains by select individuals.

It is inevitable that amendments to the Constitution will become necessary as time goes by. We must at the same time provide for a means of amending the Constitution while at the same time protecting it from abuse by politicians bent on bending it to achieve self-serving goals.

The Constitution is very explicit in its distribution of power and it has placed the responsibility of initiating legislation and formulation of policy in the executive. However, when considering amendments to the Constitution, regard should be had to the higher need for national interest rather than power to the government of the day.

Maybe the time has come to reinforce the procedures for amending the constitution to ensure that its sanctity is preserved and amendments are only effected in the national interest.

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