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***TOWARDS A MORE MANAGEABLE
CONSTITUTION***

BY

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Towards A More Manageable Constitution

**Remarks made at the National Constitution Review Conference, Capital Hotel,
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I consider it a great honor and privilege to be invited by the Law Commission to take part in the review of our constitution. It is hard to believe that eleven years have passed since we met at the New State House to review the then Provisional Constitution in February 1995. So much has happened since 1995. Opportunistic diseases continue to challenge our social structure. Forces beyond our control continue to challenge our economic planners as they try to manage our economy under the new rules of a global economy. Perhaps the greatest challenge is how we, as a people, will concretize/institutionalize our twelve year democracy in a manner that will, in the words of America's famous Declaration of Independence, guarantee our people the right to "life, liberty and the pursuit of happiness". The American Declaration of Independence is, of course, not part of the United States Constitution but the imperative articulated in the Declaration is the foundation on which the United States Constitution is based. It is no wonder therefore that the United States Constitution has served the American people well for the past 217 year because it is based on these shared values.¹

The challenge facing us at this conference, therefore, as we debate the various issues that the Law Commission has identified in Issues Paper I is whether we are able to reach common ground on the basis of shared values and within a framework of unity not acrimony. There is therefore a need for us at this conference to agree on certain fundamental principles. First, whatever text emerges after the various stages of the review process are completed, the central

¹The United States Constitution, ratified in 1789, is the oldest written constitution still in effect. See, Robert L. Maddex, *Constitutions of the World* 299 (1995).

purpose of our constitution must be good governance.² Second, we need to agree at the outset that the constitution must consist of neutral and objective principles. What this means is that we cannot structure the constitution in a manner that targets individuals or groups for either reward or punishment. When Constitution-makers forget this cardinal principle and embark on personalization or appeasement of special interests, the consequences have been disastrous. Third, we need to reach a consensus on what are the appropriate areas for inclusion in the constitution and what areas need perhaps to be dealt with by legislation. Indeed some have argued that the constitution is too detailed. As I have argued elsewhere, this was inevitable in light of our post-independence history. However when a constitution is as detailed as ours is, there is a danger that the drafters will be forced to focus on the text thereby missing its essences. This may lead to vagueness and contradictions thereby providing fertile ground for endless constitutional litigations.³

²International lawyers now agree that the right to good governance is now emerging as a human right. See Thomas M. Franck, "The Emerging Right to Democratic Governance" 86 *American Journal of International Law* 46 (1992). See also William D. Jackson, *Democratic Governance and International Law* (2000). The Constitution has attempted to laydown the foundation for good governance by providing for accountability and transparency in section 13(o). This goal must be reflected in various aspects of the Constitution.

³See A. Peter Mutharika, "The 1995 Democratic Constitution of Malawi" 40 *Journal of African Law* 206 (Oxford University Press) 1996. A good illustration of vagueness is section 83(2) which provides that the President, First Vice President and Second Vice President may serve in their respective capacities a maximum of "two consecutive terms". Apparently, a person who

It is of course impossible to draft a constitution that will be absolutely clear. Words do not have an independent meaning and must be interpreted within the context in which they are used. There will therefore always be a tension between text and context. A good draftsman, however, can minimize this tension if he/she is working on the basis of clearly articulated principles. This is really what I mean by a “manageable” constitution. A “manageable” constitution is one that is structured in a manner that is clear enough to those who are charged with administering it and that gives them sufficient flexibility to govern.

When the Law Commissioner asked me a few weeks ago to make a presentation at this conference, he suggested that I could extend my presentation to “the perspective of global and international approaches to constitution making” if I so desired. I certainly appreciate the Law Commissioner’s decision to give the presenters such flexibility. As we try to fit our constitution to our own circumstances, we can still learn from others how they have dealt with some of the issues that we will be debating at this conference. In a way, our task is much easier than it was at the National Constitutional Conference in 1995. Then we the presenters were assigned specific topics and we had no background materials other than the text of the Provisional Constitution. This time we have the benefit of the Consultation Paper and the Issues Paper I. These are well crafted documents. I commend the Law Commission for such a thorough effort. I was particularly interested that the Issues Paper reiterates some of the issues that I raised in my Working Paper in 1995. The Constitutional Conference made recommendations on some of these issue but many were not acted on. I hope that when this review process is completed, the resulting recommendations will

left office after a five-year term could come back after a hiatus and serve two more consecutive five-year terms making it a total of fifteen years since the last two terms would not be consecutive to the first five-year terms. This drafting problem could easily have been cured by changing the phrase to “two five-year terms”. See A. Peter Mutharika, *Malawi: Reflections on the Democratization Process, the Constitution, and the Rule of Law 2* (1994). See also, A. Peter Mutharika, *The Presidency and Vice Presidency, The Structure and Role of Parliament (National Assembly and the Senate) and the Relationship between Branches of Government under the Constitution 5* (1995). Working paper presented at the National Constitutional Conference, New State House, Malawi 19-23 February 2005 (hereafter referred to as Working Paper).

be acted on. The two documents prepared by the Law Commission contain so many issues that I am unable to address within the length of this paper and in the short time I had to prepare these remarks I will therefore only address what I consider major themes. These themes are not necessarily related but I believe they are at the heart of every constitutional structure. I realize also that this is not an academic conference. My approach will therefore be more practical and less theoretical.

Separation of Powers

Issues Paper I has addressed the separation of powers doctrine on pages 11 and 12. The five issues that the law commission raises on page 12 are pertinent and should provide a useful basis for discussion. On the issue whether non-M P ministers should become M Ps, one might add another issue which does not appear to be addressed in the constitution and in the Parliamentary Standing Orders. This pertains to the issue of the immunity of non-M P ministers. Under Section 60 of the Constitution, the Speaker, the Deputy Speaker and members of the National Assembly are, except in cases of treason, privileged from arrest while going to and from the National Assembly, within the precincts of the National Assembly and with respect to utterances made that form part of the proceedings of the National Assembly. Section 96 grants cabinet ministers the right to participate in parliamentary debates but is silent on the immunity issue. There may very well be some piece of legislation or judicial decision on the matter that I have not been able to access that address this issue. In any event, this issue should be spelled out in the Constitution.

The separation of powers issue has become a big issue in Malawi as demonstrated by the Mardef loans program, the budget controversy and rejection by Parliament of some presidential appointees. According to the Consultation Paper (p. 15), “consultations have urged the Law Commission to look closely at the wording creating the separate functions of the three arms of government to ensure that there is no **encroachment**”. No encroachment between the three branches of government? That’s a tough assignment because even the three horses that pull the Russian troika sometime encroach on each other! May be encroachment can be minimized taking into account our own conditions. A brief history might be helpful. Although the concept of separation of powers can be traced back to Ancient Greece and to Aristotle in particular through John Harrington in his treatise **Oceana** (1656); John Locke in his treatise **Civil Government** (1690) and Montesqueu in his **Spirit of the Laws** (1748) it is really the Americans who were able to translate the concept into a workable constitutional structure. Worried about abuse of power by the British colonial government that they had just overthrown, the drafters of the United States federal constitution wanted a government of limited powers “strong enough to fend off enemies foreign and domestic but not so strong as to dominate the thirteen state governments.”⁴ A government that featured three separate branches would therefore be limited because the three branches would check and balance each other. Almost every country today has some form of separation of powers and many have managed to adopt them to their specific situations.

In the hybrid model that characterizes the Malawi Constitution, we have the opportunity to

⁴David Yalof “United States-Federal System” in 4 Legal Systems of the World 1700 (2002).

borrow from both the parliamentary and the presidential systems. Before we do that though, we have to acknowledge two factors that might affect the way we deal with the doctrine. The first factor is historical. The people who governed our country during the 73 years of British rule came from a tradition where only one branch of government - in this case parliament - was preeminent over the other branches. Since the colonial state was by nature non-elective, institutional primacy was in the colonial situation given to the colonial executives. Thus the Chief Secretary (de facto prime minister) exercised executive and legislative powers. At the district level the District Commissioner exercised executive, legislative and judicial functions. The second factor is cultural. Under the Lugard theory of indirect rule, our traditional rulers were pretty much left to administer local affairs.⁵ Again whether it was at the village headman level or the traditional authority level, executive, legislative and judicial function were fused. During the “Big Man” a period of post-colonial rule in Africa, this fusion of power in the executive was essentially a continuation of the colonial setup. That is probably why defusion and separation have become so difficult in the democratization era.

⁵See, A. Peter Mutharika, “Some Thoughts on Rebuilding African State Capacity” 76 Washington University Law Quarterly 282 (1998).

In our constitution, a deliberate attempt has been made to intersect the powers of the executive and the legislative. Thus the National Assembly can override the President after a 21-day cooling-off period if he withholds assent to a bill;⁶ there is established shared responsibility between the Minister of Finance and the National Assembly in the management of the Republic's finances;⁷ shared responsibility between the President and the National Assembly in treaty-making and implementation;⁸ the role of the National Assembly in the appointment of the Chief Justice, some senior administrative personnel and some senior diplomatic staff. What is rather startling with respect to this executive / legislative shared responsibility is the provision that the president can declare a state of emergency only with the "approval" of the Defence and Security Committee of the National Assembly.⁹ Because of the national security implication of such a declaration one would expect that there would be a requirement to "consult" with at least the Chairman and senior members of the Committee but not "approval". May be that is something that can be debated at this conference. Another issue that needs to be debated at this conference is the role of the National Assembly and / or certain committees of the National Assembly in the appointment of certain senior personnel. This shared responsibility is a positive element of the Constitution and I was one of the advocates of this shared responsibility at the National Constitutional Conference in 1995. There have, however, been some difficulties with this practice over the past eleven years. In a number of cases a prospective appointee who appeared otherwise qualified has been rejected. Because the National Assembly is not required to give reasons for the rejection, Presidents have experience difficulties in submitting another candidate without knowledge as to why the first candidate was rejected. Under the United States Constitution, the Senate is not required to give reasons either as to why a nominee for public office has been rejected. In most cases, there are extensive consultations between the White House and the relevant committee chairs and ranking members before the

⁶Section 73. This "legislative veto" has been declared unconstitutional by the Supreme Court of the United States on the ground that it violates the Separation of Powers doctrine. Section 73 would probably not pass constitutional muster if challenged in our courts.

⁷Section 175.

⁸Sections 89(1), 211(1).

⁹Section 45.

nominee's name is even announced in order to assess the nominee's acceptability to Congress. When a person has been formally nominated, and has had a hearing in the relevant committee, the vote in the committee is very transparent and members of the committee will explain why they voted positively or negatively for the candidate. If the nomination is voted out of the committee to the whole Senate, the Senators give a full explanation for their positive or negative vote. In that way, there is complete transparency and the White House has a clear idea why the nominee was rejected and what kind of nominee is likely to get confirmed. My proposal is that the principles of prior consultation and transparency should be discussed at this conference to see what consensus will emerge.

The Role of the Judiciary

Ten years ago, I wrote that constitutionalism will succeed in our country largely if we have a judiciary that understands its role in a democratizing society.¹⁰ Six years later, I wrote, that the legal and judicial system in our country had regained the public trust.¹¹ It is surprising therefore that in both the Consultation Paper and the Issues Paper only pro forma issues e.g. retirement age for judges, appointment of judges, funding for the judiciary etc. and of course the issue of a constitutional court were raised.

Fair compensation of the judiciary and adequate resources are of course important if the judiciary is to properly perform its role. It is surprising, however, that no one apparently raised the fundamental issue of what the role of the judiciary should be in a democratizing society and in a constitutional framework of checks and balances. I will attempt to do so in the next few paragraphs.

What should the role of the judiciary be? I have demonstrated earlier that ours is supposed to be a system of checks and balances. This means that one branch of government should check and be balanced against the other branch so that no single branch becomes either more powerful than the others or is immune from restraint. This issue is very important in the Malawi context because the judiciary is being constantly called on to solve nearly our political disputes. Indeed a cursory survey has shown that during the past eleven years, there has been more litigation over political disputes in Malawi than in any other country in Sub-Saharan Africa! The more society relies on the courts to solve all societal problems, the more the courts become the most powerful branch of the government. This is in fact what has happened in the United States as demonstrated in the 2000 presidential election in which the decision of the Supreme Court determined the outcome of the election.¹²

¹⁰Supra note 3 at 219.

¹¹See, A. Peter Mutharika "Legal System of Malawi" in 3 Legal Systems of the World 954 (2002).

¹²Bush v. Gore, 531 U.S. 98 (2000).

This is not what the framers of the American Constitution had intended during the debate over the Separation of Powers Doctrine. The framers of the American Constitution were worried about giving a lot of power to a branch of the government that was unelected, had lifetime tenure and was not answerable to the people. In the **Federalist Papers**¹³ no. 78. Alexander Hamilton tried to allay this fear by arguing that the judiciary “will always be the **least dangerous** to the political rights of the Constitution; because it will be the least in a capacity to annoy or influence them.”¹⁴

¹³The Federalist Papers were a series of 85 articles written under the pen name of Publius by Alexander Hamilton, James Madison and John Jay. These articles were published in newspapers in New York in 1787-1788, in order to persuade a suspicious public to ratify the U.S. Constitution. The Constitution was ratified in 1789. Madison later on became President of the United States, Jay, Chief Justice and Hamilton, Secretary of the Treasury.

¹⁴The Federalist Papers, University of Oklahoma College of Law: A Chronology of U.S. Historical Documents 1 (2006). See also, Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1986).

What happens in cases where judges have made a mistake or where the dispute is too political? The United States approaches this issue in two ways. Where the Supreme Court of the United States has clearly made a mistake in its interpretation of the law, Congress can enact legislation to overturn the decision. Secondly, the Supreme Court itself is required through practice developed over 200 years to restrain itself if the issue before it is too political. This is done, for example, with respect to foreign affairs under what is known as the “political question” doctrine. This is a very narrow doctrine applied only in those cases where the court feels that the Constitution has committed decision on the subject to another branch of the federal government. A recent leading case is *Goldwater v. Carter*.¹⁵ In this case former Senator Barry Goldwater of Arizona sued over President Carter’s decision to abrogate the mutual defence treaty with Taiwan as a condition for establishing diplomatic relations with the People’s Republic of China. The Supreme Court held that while the issue was justiciable, it was not judicious to adjudicate it. This is indeed a very controversial doctrine. Some have argued that there is little or no basis for this doctrine in the U.S. Constitution and that courts use it to avoid deciding difficult cases. If that doctrine were to be used in our country, it would probably be confined to such cases as allegations of elections irregularities in elections within political parties. That could be done if we were able to democratize and institute dispute resolution mechanisms within our political parties.

Other countries have also struggled with the issue of accountability of the judiciary while at the same time trying to maintain the fundamental principle of judicial independence. Mexico offers an interesting example. Mexico has a tradition of hostility towards lifetime appointments or professional politicians. Thus in Mexico, the president is elected to a single six-year term. Members of the Chamber of Deputies (National Assembly) are elected to a three year term but cannot serve more than one term in succession. Senators are elected to a single six-year term.

Judges in Mexico are therefore term-limited. The Supreme Court of Mexico is made up of eleven justices who are appointed to the Court for a fifteen year term. The eleven justices elect a Chief Justice from within the Court who serves for a four-year term and can not be immediately reelected to the Chief Justice position. The Mexican policy of term-limiting all the three branches of government has made their system more flexible and transparent.

I personally do not advocate term limitation for judges. I believe the mechanism for disciplining judges that is in the Constitution is adequate.¹⁶ Normal judicial practices such as recusal and disclosure of assets would probably enhance public perception of the integrity of the judiciary. As other dispute settlement mechanisms are developed, that might enable the judiciary to refrain from adjudicating some of the patently political disputes as their American counterparts sometimes do.

¹⁵444 U.S. 996 (1979).

¹⁶Section 119.

The issue of a constitutional court is addressed on pages 42-43 of the Issues Paper and pages 50-51 of the Consultation Paper. I am personally not convinced about the need for a constitutional court. Section 108 of the Constitution has already established the High Court as the constitutional court and the Court (Amendment) Act No. 2 of 2004 merely enables the High Court to create from within itself a smaller chamber to deal with constitutional matters. The system seems to have worked well so far. If a separate constitutional court were to be established, Section 103 would not create an obstacle as it would simply be amended. For our courts to have jurisdiction, there must be a dispute of a legal nature before it. Thus the President can refer a dispute of a constitutional nature to the High Court under Section 89 of the Constitution. In some countries, the constitution allows the highest court in the land to issue an advisory opinions on a constitutional issue without an actual dispute in play. Canada offers a good example. In Canada, this “reference” principle has been used to, for example, decide whether the province of Quebec is entitled to self determination. The suggestion that if a constitutional court were to be established in Malawi, it should have the power to determine the constitutionality of legislation before it became law startled me. It is the responsibility of the Attorney General, as the principal legal advisor to the government to advise the legislature on the constitutionality of legislation before it becomes law. Action by another branch of the government to rule on the constitutionality of pending legislation would be a serious encroachment on the legislative process and thus a violation of the separation of powers doctrine.

The Issues paper does not address the question of how such a constitutional court should be manned. Here in Malawi we come from a common law tradition of parliamentary sovereignty where the practice of judicial review is not past of our tradition.¹⁷

If we were to create a constitutional court in Malawi, one jurisdiction we might want to learn from is Germany. In Germany, most constitutional court members are law professors and other distinguished jurists and are not drawn from the regular courts. They usually serve for one or more terms of from eight to twelve years. These courts decide constitutional law cases at the request of high government officials and by private citizens who claim that their rights have been violated. Because they are not part of the regular court system, they are seen as having more independence, less political and generally unbiased.¹⁸

Term Limitation / Recall of Members of Parliament

¹⁷South Africa has a very vibrant constitutional court. South Africa though, does have some civil law tradition through its Roman-Dutch law background.

¹⁸www.usinfo.state.gov/journals/itdir10301/ihde/schwartz.htm

Term limitation and recall are in a way two sides of the same coin. Underlying both is the idea that the people are entitled to representation in parliament that is vibrant and responsive. If you have a well-structured term limitation formula, you do not need recall. In any event, it is difficult to define the grounds for recall. A recall would be used by the unsuccessful candidates to rerun the election and would subvert and destabilizes our electoral system.

Term-limitation, on the other hand, is something that warrants serious consideration. There is a powerful international movement in favor of term limitations. In the United States, for example, many states have adopted and are adopting term limitations for their state legislatures. This has opened up the political system and many younger people are now able to serve. Earlier on in the section on the judiciary, I mentioned how Mexico has finessed the term limitation approach to a point where it has had positive effect on Mexico's economic development. Since the president is limited to a maximum of ten years, I would suggest that no member of Parliament or local legislative body should serve for a period of more than ten years.

National Unity

Chapter 1 of the Constitution enshrines the doctrine of equal protection. Equal protection is a complex constitutional principle. In our context it means that all people are entitled to the protection of equal laws and thus equal opportunity. On page 47 of the Consultation Paper, a view has been expressed that the presidency should rotate between the three regions so as to give each region the opportunity to develop. This idea is not necessarily outlandish. Both Switzerland and Malaysia have rotating presidencies. In the case of Malaysia, though, the presidency is a ceremonial position. A constitutional formula could be found under which an executive presidency would rotate. One has to wonder though whether that would exacerbate regionalism. Our three regions are certainly not a geographical imperative. They were drawn for the convenience of the colonial administrators and to some extent the missionaries. Assuming that the idea of a rotating presidency does not garner sufficient support there are two possible ways of addressing these concerns about regional marginalization. First, we could look at the idea of proportional representation. Proportional representation has worked quite well in Italy, Germany, New Zealand, Russia, Mexico, and Israel. Sweden, Denmark and many other countries have various versions of proportional representation. Closer to home Mauritius, Namibia and South Africa have some form of proportional representation. Another and perhaps more radical response is to simply abolish the three regions and create the district as the basic administrative unit. Nigeria successfully resolved the problems that were created by the existence of the three regions at the time of independence in 1960 into what are now thirty-six states and one federal territory. While the initial decision to abolish the regions led to war, Nigeria is now a much more unified and stable country. Similarly, South Africa's decision to break the original four provinces into nine has created a very stable political environment.

Democratic Culture

It was rather surprising to me that most of the consultation has confined itself to the three

branches of the government. It is clear that these are the areas that are of most concern to the stakeholders - and perhaps appropriately so. However, if our constitution is to work, the structure on which it is built needs to be democratized also.

The Constitution does not directly recognize political parties but does so by reference.¹⁹ The Constitution is thus premised on the existence of political parties as the nominating, the crossing the floor and the second vice president clauses clearly do. To the extent then that the political parties form the structure on which the constitution lies, there must be democratization within the political parties if the constitution is to succeed. This could be effected in several ways. First, we could have a provision in the constitution or legislation that requires all registered political parties to hold periodic and transparent party elections. Second, for the political parties that are represented in parliament and therefore receive public funding, we could condition such funding on internal democracy and transparency within the political parties. The Electoral Commission or some other body could be set up to monitor compliance and in the case of political parties that are represented in parliament, compliance could be monitored by the Speaker's / Clerk's Office or a specially selected parliamentary committee. Another area that might required transparency is civil society. Civil society has become a very indispensable part of our democratization process. Broader democratization in civil society organizations would create another very important structure on which the Constitution lies. The civil service, parastatal organizations, and even the private sector all need to be modernized and transparentized because they all must play an important role in our democratization process.

Conclusion

As I have stated elsewhere in this presentation, the Law Commissioner suggested that I bring in a global and international perspective to constitution-making. I have tried to do so. We obviously can learn from others. In the end though, we must structure a constitution that is based on our own values and history and our own special circumstances here. That is why these extensive consultations that the Law Commission has conducted are so important. Our people need to feel a sense of ownership of the constitution through their participation so far and through their subsequent participation. It is only through this broad participation that the constitution can gain acceptance and respect. I want to congratulate our people for the civil manner in which the constitution review process has so far proceeded. I hope we can continue this spirit of cooperation. A couple of times over the past several years, I have declined to participate in constitution reviews elsewhere that have subsequently imploded and I very much congratulated myself for my foresight. I regret that due to the limited timeframe I had to write this paper, I have not had the opportunity to adequately edit it. Some of the ideas I have stated here many very well be considered unacceptable by others. I hope however that they will contribute to a robust debate at this conference. I want to thank the Law Commission for inviting me to this conference.

¹⁹Sections 65 and 80.