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*REVIEW OF THE CONSTITUTION:
Some Selective Comments*

BY

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1. Introduction

I am not an expert on Constitutional Affairs. Although I have made Malawi my home for forty years, I offer a few contributions to the current Constitutional Review process with a degree of temerity, not having been born or brought up in the traditions of our society, which body alone can have sovereignty over the provisions of our Constitution. However, I have always taken a keen interest in reported Constitutional issues from the transformation into a republic in 1966 onwards and therefore express hope that the comments that follow in due humility to my position in society may assist in some small way in the review process. It has always been my wish to see the dynamic growth and development of the early years of Independence replicated, and it is in that spirit that these comments are offered. They are not referenced to Clauses in the Constitution, and relate only to issues that I personally see as of especial importance. Others will certainly have other views both on the selection and the suggestions offered.

2. Head of State/Head of Government : Limitations on Power

Our 1994 Constitution as amended (too much amended) remains a hybrid between the US model and the Westminster model and probably fails to incorporate enough of our domestic social (and hence governance) realities. The US model works pretty well in the complex federal situation of the US. The Westminster model works pretty well in the peculiar circumstances of the UK, allowing some limited devolution of power in some specific regions, but much less within the central core of England itself. There are some substantive differences between the Westminster model as applied within the UK and as adapted for use elsewhere, not least in the omission of substantive and entrenched

decentralisation clauses that do not appear in the international version of it in most instances.

The resultant hybrid assumes a Presidency that is almost supreme and has resulted in a Parliament that is unsure of itself and which contributes little of a positive nature to national governance and has only occasionally dared to challenge the Presidency's express wishes, yet to have attempted to impeach the current incumbent on what were hardly "high crimes or misdemeanours". Many of its members are reputed to have succumbed on several, critical, occasions to having their votes bought by representatives of a Presidency. That is not thought to have happened (directly, at least) in the US or the UK for a long time, although it certainly did happen historically in both countries, perhaps most notably in buying the "permanent" dissolution of the Scottish parliament in order to secure England's desires as regards succession by only the 43rd in line to the already united UK throne. That shameful affair has only very recently been (partly) rescinded.

Modern governance is all about checks and balances on the exercise of unbridled power by any of a head of state, a head of government or a parliament, by whatever terms described, supported by further separation by the creation of an independent-minded system of local government (again by whatever name and in varying levels of tiers).

It seems to me that we have not got this right yet, and perhaps we should look at the French model (admittedly its fifth in 200 years), or alternatively the model in more general use in continental Europe.

In France, the Presidency is strong, but must tolerate a Prime Minister backed by a majority in parliament for money bills and human rights issues in particular. If a rejected

Bill is re-presented to the President for a second time with strong support from Parliament he must sign it, resign, or in some instances call a referendum. In most of the rest of Europe, the Head of State (often a hereditary monarch, but equally often a (usually indirectly) elected President) fulfils a primarily symbolic role, and is much less likely than here to have a confrontation with Parliament (though his word can carry a lot of influence), but does hold the critical power to dissolve Parliament, or at least its lower house, and order fresh elections likely to result in change at any time if he feels that step essential in the national interest. Outside the monarchies, where that power has always been there, this is a Post World War 2 concept to prevent absolute power being seized by a duly elected Prime Minister like Hitler again; also to replace ineffective leadership or economically disastrous leadership. The President plays no role in the parliamentary election process and appoints as PM the individual with the greatest support in parliament.

It is to be noted that even the US President with his strong executive powers is not directly elected by the people as is commonly thought. He is elected by an Electoral College, the representatives to which have come only by convention to cast their votes in line with the results of the polls in each of the 50 unequally sized constituent states. Until a two-party system became entrenched in the US, this was not the case, and representatives in the Electoral College voted as they thought fit. That could happen again. It regularly results in the Presidency going to the runner-up in terms of the popular vote.

So what are the answers for Malawi? Clearly a strong executive is required, but need it be in the hands of a President elected for a fixed term regardless of the (changing) composition of the National Assembly? Could it not be in the hands of a Prime Minister able to command a majority in the Assembly, and who can be fired at any time if he loses

a vote of confidence, or by the President if the PM is carrying along parliament towards a position akin to dictatorship in the teeth of public dissatisfaction? The PM route would avoid much duplicated cost, should permit restoration of independence in the public service and greatly reduce the possibility of impeachment of the President diverting attention from the running of the state. Under these circumstances, it would matter much less to me whether the President is directly elected or not, since it would not matter much whether he was an adherent to the same political party as the PM (or indeed to any party).

3. The Status of the (First) Vice – Presidency

As our Constitution Stands, it is difficult to determine the status of the Vice-President. He is not selected primarily to be a “president-in-waiting” should misfortune or impeachment befall the President. In the election process his role and personality are hardly issues in consequence, and his selection is likely to be the result of a consensus – building decision by the successful presidential candidate rather than with an eye to automatic succession during the presidential term. As a result, it is not too clear that the Vice President necessarily ranks as second in the hierarchy. There is also danger of instability during the process required should a presidential vacancy occur (which is rather likely to be a time of tension enough anyhow).

In a head of government situation, where parliament plays the critical role in the executive succession, that is not a matter of undue concern. However, where the head of state is automatically also head of government, the situation is very different. It seems logical that the Vice-President should take over and complete the term of office unless, perhaps, a two-thirds majority in parliament resolves that an election must be held – in

which event the logical interim leader during the election period becomes either the Speaker or the Chief Justice, not the so-called first vice-president.

4. Election Outcomes

The “First-Past-The-Post” system applicable in elections in Malawi is strongly supported at the constituency level as vastly superior to any system based on proportional representation, which results in MP’s not necessarily having empathy with their constituents, disruptively high representation for a party commanding very high levels of support in a restricted area of the country, and representation in parliament of “lunatic fringe” views that could not win any individual seat. It also results in shaky coalitions and policy uncertainties.

However, the case of an executive president, elected via a unified national franchise, is seen as different from constituency or ward elections. The fact that our current State President won only 34 percent of valid votes cast, and out of a relatively low poll, could easily lead to a real problem at some stage during his current term of office, for instance. It is strongly suggested that, as in a large number of countries with executive presidencies, there be provision for a “Run-Off” in such circumstances between the two top-ranking candidates. If held very promptly (e.g. a week after the initial election – which should not be administratively impossible under a reformed Electoral Commission), the personnel and structures required could be kept at place at quite low incremental cost for that length of time, i.e. one week.

5. Avoidance of Challenge to the Vote-Count

The concept of counting votes at individual voting unit level adopted in 2004 was an excellent one. It should be entrenched, with the further requirements that public announcement of results is also made – immediately – at the unit level and that the trail from these to overall results be published also. This would complete the transparency of the actual voting process. It needs not rule out protests, re-counts or nullifications further up the line, but the trail of amendment would be clear, and should require explanation to the satisfaction of accredited Election Observers. There is no obvious reason why such protests should not be swift and precede swearing-in at any level.

6. Powers of Patronage

Whatever new system is considered at the top, the wide-ranging powers of patronage endowed upon the Head of Government must go. Under two successive Presidents, they held back development very seriously. While HOG or HOS selection or consent may be retained for some high-profile positions of serious national importance, it should be based on a small, or very small, list of names presented by an appropriate nominating body – which need not be a parliamentary committee for certain positions such as judges and the army commander or for lower-tier posts, such as positions in parastatals, where the now defined normal rules of corporate governance should prevail, i.e. by the existing board, which government as controlling shareholder or stakeholder can fire in toto, but has to justify such action in the Assembly and to the public. Naturally, the HOG must have power to fill an important casual vacancy with an acting appointee, but only for a strictly limited time period, such as a month, pending completion of the selection process.

7. The Second Chamber

A second Chamber in a parliament, usually devoid of open politics, is an important component of most successful governments. It provides a calm atmosphere in which deficiencies in legislation can be rectified and in which legislation which the first chamber is not progressing can be introduced. However, the question does arise as to the method of selection likely to produce best results at affordable cost. An Upper Chamber must be respected by the lower chamber, and will not achieve anything positive if it adopts a confrontational attitude that would be bound to result in loss of that respect. Perhaps some combination of Traditional Authorities, former senior public officers and the larger faith groups and civic society organisations, nominated partly ex officio and partly by a committee of the Lower Chamber and ratified by the President could be the answer.

8. The Recall Provision

The Recall Provision as regards MP's has been one of the most controversial issues of the 1995 modifications to the 1994 Constitution. The logic behind Recall is clear: if an MP loses the support of a substantial number of his constituents, the matter should be put to the test. However, there is the danger of frivolous or politically motivated Recalls, and of money-inspired ones, as well as of high cost being involved. In most of the longer established democracies an MP is entitled to act and to vote as he considers fit within the bounds of the law (e.g. no purchased voting) and the bounds of the Speaker's independently exercised tolerance. An expulsion or lengthy suspension of a member by the Speaker should result automatically in a by-election if ratified by a vote of the Assembly.

9. MP's as Ministers

The point has been raised specifically as to whether MP's should be entitled to act as ministers of government. In my view, the answer is an emphatic "YES", and to the extent that an individual other than an MP who is appointed a minister due to his exceptional capabilities must be simultaneously nominated to the Upper Chamber, but that such appointments cannot exceed, say, one-third of the total (ministers). The reason for such strongly-held views is the critical issue of accountability. Our parliament has not proven good at grilling minister non-members or getting them to answer parliamentary questions comprehensively. Authority and responsibility must never be separated. Should the Presidency remain an executive post, the incumbent must also submit himself to parliamentary questions at regular intervals, including follow-up questions.

10. President v. Party : the Supremacy issue

The President must not be an office bearer in a political party or pressure group. He must certainly be permitted to address conventions of his (or, if invited, any other) party, and even to answer questions then put to him. Beyond that, however, the supremacy of the office of President sits uneasily with an active role in party politics, and in any event he must not be diverted from national issues to party issues. While an executive president can be expected to implement policies propounded by his party (if he is a member of one) there will be occasions when the national interest dictates otherwise. The current (Executive) President of Russia had no party in his first term, yet managed to get parliamentary support to manage the country effectively.

Party supremacy, like absolute monarchy and dictatorship has been tried extensively worldwide. It always fails in the end, and frequently through bloody revolution in the absence of a safety valve in the form of elections.

11. Crossing-the-Floor

Crossing-the-Floor is another issue that has proven highly controversial, not least because of biased or inconsistent interpretations by successive Speakers. It has to be recognised that there are ways of crossing the floor in voting without changing parties or going beyond declaring oneself an independent, and these are just as likely as a formal floor-crossing to attract pecuniary rewards. Further, creation of a new party during the life of a parliament has “saved” the fortunes of several countries. The provision should be scrapped, although resignation to force a by-election should be encouraged where an individual claims to have seen the light on the road to Damascus and to have changed his political allegiance as a result. If a majority of the constituents who choose to vote (usually low and activist by nature in a by-election) agree, he will be re-elected. In other words, this is in essence a specific example of grounds for Recall.

12. The Speaker

The dignity of the “August House” has fallen badly over recent years in particular. Nobody other than the electorate within a constituency can control who is elected an MP (as the recent elections showed fairly dramatically) and diversity amongst MP’s must not be constrained, but surely a non-partisan view can be taken on the election of a Speaker (e.g. at least a full previous term in the House and the support of two-thirds of re-elected MP’s?) If the answer is not a convincing “YES”, then it would seem that, however unconventional, the Speaker must come from outside Parliament and remain in office

until he resigns, dies or loses a vote of confidence on his continuation in office. The method of nomination of an outsider would require careful consideration, on which no strong views are held. The historical origins of the function of a Speaker in a Lower House remain relevant. They are *to replace* the head of state as chair of the lower house in order to ensure unfettered debate and voting, and to present the outcomes to a head of state no matter how unpalatable they may be to either of them. He is emphatically *not* a member of government or a presidential or political party spokesman. An Upper House in another matter. There, the chair is frequently appointed by, and openly represents the Head of State and takes back the views expressed to his boss. He does not participate in the voting process.

Worldwide, lower chambers tend to include a high proportion of dominant personalities, unaccustomed to being silenced, and can be rowdy places requiring tough discipline, but also much tolerance, from a universally respected chair. A Speaker must be independent of party bias, and is not a decisionmaker on policy. Only when there is a tied vote does he vote, and it must be to maintain the status quo, not to force through change. This may call for a by-election so his constituency remains represented. Meantime, not all incumbents have been accepted as unbiased and the position warrants explicit definition in the Constitution (three slides amplify on this).

The positions of Leader of the House and of his opposite number from across the Chamber also need further consideration. They, too, have major influence on how the House conducts itself. It may be impossible to legislate for this, however, beyond perhaps completion of one full previous parliamentary term in order to be eligible.

13. The Electoral Process

The Electoral Commission and the election process clearly require reconsideration. The problems may have arisen simply by selection of some wrong individuals as chair, given that the first (and recently restored) incumbent performed brilliantly (until forced out of office, possibly unconstitutionally). Politics in South Africa can be volatile (vide 1994), but the election process is carried out well. We should look at their notably successful model for inspiration.

14. Declaration of Assets

The Declaration of Assets provisions at present are woefully inadequate and not a precondition to swearing-in, as they should be, yet probably extend too far down the line. Probably SOCAM (The Society of Accountants in Malawi), assisted by MRA and ACB is the only institution capable of administering this exercise (to a vastly changed brief) properly. At the Head of State/Government level, all assets must surely go into a blind trust administered by totally independent trustees selected by non-political institutions.

15. Politics in Local Government

Originally open political party participation in local government elections was to be prohibited and mayors or chairs and CEO's appointed by Councillors, not a Ministry. However, this was reversed, with all-too-predictable results. It requires reinstatement. The Act also clearly needs a Constitutionally-backed amendment so that retiring Councillors remain in post until successors are elected and sworn-in.

Further, a degree of financial autonomy is essential to permit primary health care, education, policing and road maintenance to be devolved fully. Perhaps the most obvious

solution is to devolve full powers to impose and collect land tax and land rents. One result would be a dramatic reduction in the size of the civil service, and its concentration on political and national interest issues rather than administering social services (badly).

16. The Consolidated Fund

The parameters of the Consolidated Fund require reconsideration. It is wrong in principle that user fees should be swallowed up in the Consolidated Fund and not made available for the purpose for which users paid them in the first place.

17. Debasement of the Currency

The limits on governmental borrowing from the Reserve Bank are far too wide and translate directly into debasement of the currency. They must be greatly tightened and entrenched, with blame and punishment attached to their breach. A formalised peg to a larger currency is probably the only way to achieve this, entrenched as a “referendum clause” in the Constitution. It now requires some K600 to buy what K1 bought in 1964. During the preceding 50 years, which encompassed two world wars, the multiplier was just 8 in total and prior to that almost zero over hundreds of years, including the period of the Industrial Revolution. The losers have been low wage earners, productive investors, including smallholders, and investment into these sectors, which are the generators of sustainable economic growth and poverty reduction. Meantime, real per capita incomes are stuck at their levels of 1973 (30 plus years ago).

18. Land Tenure

Under the current Constitution land not already appropriated as public land or transformed from that latter status to private land vests in the State President for the time

being, presumably as representative of the people. In practice, however, the residual Customary Land area (by far the greatest part of the total land area of the country) effectively vests in the nation's Traditional Authorities, who allocate it to their respective subjects, or to incomers such as businesses, generally in return for modest payment, which the TA's retain. The terms of the Tenure are imprecise. Even where land is purportedly "sold" to the occupier, such sale is not absolute, carries no officially recognised certificate of title and cannot be used as security for borrowing from a financial institution. On death of the holder, or if he or she should be expelled from a community, it is open to reallocation, generally within the family unit (possibly involving subdivision), but not invariably so. The system is the primary source of chiefly authority (a stabilising factor usually) but is incompatible with environmental protection, land improvement or concentration of land holdings into commercially viable units. All of these things are incompatible with economic development and in some respects with social development also. No country has progressed to emergent economy status until a system of absolute, certified and transferable land title has been introduced. Malawi must surely take that step, albeit without forcing individual smallholders to move to the new system until and unless they choose to. The registration authority need not be central government. It could probably best be local authorities, giving them a secure tax base. The erosion of chiefly authority and social cohesion resulting will not be absolute provided their powers of jurisdiction over family matters and petty crime are retained. Tanzania has been through (the transition, seemingly successfully).

The type of tenure to be given is an important issue. Since Independence, substantially all new private land created has been on the basis of leasehold tenure for periods generally ranging between 21 and 99 years, and with ground rents (sometimes substantial) payable.

99 years sounds like a long enough time to encourage investment in sound land management, forestry or long term crops, never mind in buildings. However, the period slowly but surely erodes. A 99 year lease granted in 1964 now has 57 years to run: only just enough to warrant building a quality house or hotel, and not enough to justify the huge cost of a major irrigation scheme. It is suggested that *absolute* title is the only logical answer and with land tax replacing ground rents but extending to *all* land in excess of rural smallholdings less than a hectare in size. This would be a pro-poor and empowerment policy, and practically irreversible.

Access to land is a major issue while population continues to increase. There is no complete solution to this problem short of mass urbanisation. However, there is a partial solution that is readily achievable by the repossession of large areas of leasehold land on which development covenants have not been complied with or ground rent is in massive arrears. There is probably little undeveloped freehold land that is not required to protect watercourses but there is no reason obvious to me why, after due warning and time to comply, what there is should not also be subject to compulsory acquisition at nominal valuation for re-sale to those who may wish to buy and develop it.

19. Changes to the Constitution

The Constitution has proven far too easy to change where a referendum is not a prerequisite. A second Chamber could help reduce this problem, and a Constitutional Court *might* also be helpful by certifying compliance with the rest of the Constitution. Naturally, emergency legislation of very limited duration should be allowed for to meet situations of extraordinary, but temporary, impact.

I trust these few comments prove of some assistance. To me, point 2 (limits on power) is the key issue, involving inability to debase the currency and limits on the taxing powers of central government. The key message is

“TRUST THE PEOPLE, AND THEY WILL RESPECT THEIR LEADERS ”.

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