

**POPULAR INVOLVEMENT IN CONSTITUTION-MAKING:  
THE EXPERIENCE OF MALAWI**

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## 1.0 INTRODUCTION

This paper is a reflection on the Constitution-making experience of Malawi in the context of popular involvement. The current Constitution was adopted in 1994. By way of background, the will paper look at the processes of the making of earlier Constitutions, bearing in mind that the 1994 Constitution was drafted against the background of the Country's political and Constitutional history. An attempt will then be made to assess the level of popular involvement in the making of the 1994 Constitution.

## 2.0 AN OVERVIEW OF POPULAR INVOLVEMENT IN CONSTITUTION-MAKING

Constitution-making has assumed greater prominence in the last decade than at any other time before in the quest for democracy. Modern Constitution-making requires the participation of ordinary people beyond the traditional power brokers. This has introduced the concept of ownership by the majority as a fundamental prerequisite to legitimacy. A Constitution must be a reflection of a people's history, fears, concerns, aspirations, vision and the soul of the nation.<sup>1</sup> While a Constitution reflects the will of the majority, it must take into account the fears and concerns of the minorities. It must provide a common framework within which people of diverse or even diametrically opposed views, beliefs and cultures, are enjoined to interact without resorting to the force of arms.<sup>2</sup>

To achieve popular involvement in Constitution-making certain requirements have to be satisfied.

First, the population must be educated about the role they will play in the formulation of the new constitution. Such involvement usually commences with public education, which is often a necessity in countries where democracy is a novel concept. Then, the populace must be informed about how democracy and constitutional supremacy work in general, and more specifically, about the possible considerations available to them in forming the Constitution.<sup>3</sup> It is this involvement of the populace that gives the Constitution-making process legitimacy.

Second, the process of consultation must be inclusive. Consultation must not be limited to the elite or principal power brokers, but all classes of society must be afforded the opportunity to participate. Ordinary people must be empowered to make effective contributions to the debate and

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<sup>1</sup> Hassen Ebrahim, "Constitution Making in Southern Africa – Challenges for the New Millenium" May, 2002 p.16

<sup>2</sup> Hassen Ebrahim, *Ibid* .17

<sup>3</sup> Sam Brooke, "Constitution-making and Immutable Principles" (Spring 2005) p.10

they must be provided with the necessary tools to participate through ongoing public programmes using appropriate media and other methods to involve especially the disadvantaged and the marginalized.<sup>4</sup>

Third, deliberate effort should be made to empower civil society. It has been observed that in Africa political parties have rarely been able exclusively to articulate the aspirations, vision, fears and concerns of ordinary people – civil society, with its shortfalls, has well filled this gap.

Fourth, the process must be open and transparent: the public must be informed and involved at all stages of the process of Constitution-making.<sup>5</sup> The process by which citizens can make contributions must also, be made accessible in terms of physical proximity and language.<sup>6</sup> There must be a continuous review and evaluation of the process to ensure that operating principles and standards are being adhered to. To remain true to the principles of public participation, constitutional bodies must be seen to be accountable. Thus working drafts may have to be made available to those who made submissions. The responsiveness of the consultation body can thereby be assessed.<sup>7</sup>

The role of political parties on the Constitution-making process must be recognised; although they generally pursue partisan interests, they play a role in bringing issues for debate to the people at grassroots level.<sup>8</sup>

The role of experts in the Constitution-making process also has a bearing on popular involvement in the Constitution-making process. To achieve popular involvement, the experts must be treated as advisors only, and they must not be allowed to arrogate to themselves the right to decide what the content of the Constitution should be.<sup>9</sup>

### **3.0 POPULAR INVOLVEMENT IN CONSTITUTION – MAKING: THE EXPERIENCE OF MALAWI**

Malawi is a landlocked country in South East Africa with a land area of 118,484 square Kilometres, of which 24,208 square kilometres are inland waters. Lake Malawi is Africa's third largest lake. Malawi is bordered by Mozambique, Zambia, Zimbabwe and Tanzania.

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<sup>4</sup> Hassen Ebrahim, *Ibid* p.p. 19-20

<sup>5</sup> *Ibid* p.5

<sup>6</sup> *Ibid*

<sup>7</sup> *Ibid* p.25

<sup>8</sup> *Ibid* p.27

<sup>9</sup> *Ibid*

The current Constitution of the Republic of Malawi was adopted on 18<sup>th</sup> May, 1994. The Constitution was drafted against the background of a long political and constitutional history. It will, therefore, be useful to provide a little historical background for us to be able to reflect on the Nation's experience with respect to popular involvement in Constitution-making. Malawi was a British Protectorate from 1891 until she gained independence in 1964. In 1966 Malawi became a republic. The Republic became a one-party government and remained so until 1993 when, in a referendum, Malawians voted in favour of multiparty democracy. On 18<sup>th</sup> May 1994 multiparty elections were held, and, a new Constitution was adopted.

### **3.1 The Colonial Period**

#### **3.1.1 1891 / 1902 Africa Order-in-Council, 1889/British Central Africa Order-in-Council, 1902**

What is now Malawi was proclaimed a British Protectorate by the Colonial Office in London on 14<sup>th</sup> May, 1891. Between that date and 1907 the Country was called British Central Africa. During that time, the Country's constitutional order was based on the Africa Order-in-Council of 1889. However, on 11<sup>th</sup> August, 1902, a new and separate Constitution for British Central Africa came into force. This was the British Central Africa Order-in-Council of 1902, and for all practical purposes, it was the first written constitution for this country.<sup>10</sup> This constitution embodied the essence of the concept of separation of powers. It created, for the first time, an "*administration*" headed by the Commissioner and a "*Court of Record*" or High Court.<sup>11</sup> The High Court has "*full jurisdiction, civil and criminal, over all persons and over all matters in the Protectorate.*"<sup>12</sup> However, the enactment of laws or "*Ordinances*" was left within the powers of the Commissioner. In order to reflect the colonial status of the territory, the Commissioner had, in passing legislation for the Protectorate, to observe any special or general instructions of the Secretary of State for the Colonial in London. There were no provisions in this Constitution relating to human rights and fundamental freedoms. Nevertheless, the Constitution required that in making ordinances, "*the Commissioner shall respect existing laws and customs except so far as the same may be opposed to justice or morality.*"<sup>13</sup>

As will be obvious, the declaration of the protectorate and the assumption of power over it by the colonial authority was not based on some "social contract" among the various peoples in the territory. The new

<sup>10</sup> See. Article 1 of the British Central Africa Order-in-Council

<sup>11</sup> See. Articles 4 and 15 respectively

<sup>12</sup> See Article 15(1) of the British Central Africa Order-in-Council

<sup>13</sup> See Article 12(3) of the British Central Africa Order-in-Council

Constitutional order did not reflect the interests of the vast majority of the population but was predicated on the objectives of the colonial regime. Among these were the development of the process of accumulation through expropriation of African lands to enhance settler and corporate enterprises, the inducement of Africans to wage labour, the marginal commodisation of peasant agriculture through cash crop production, and the creation of public order to facilitate colonial production.<sup>14</sup> Needless to point out, this Constitution order was not created through any form of popular involvement of the people to be governed.

### **3.1.2 1907 Nyasaland Order-in-Council**

The next stage in constitutional development came in 1907 when the Nyasaland Order-in-Council was adopted.<sup>15</sup> Under this Constitution, the name of the protectorate changed from British Central Africa to Nyasaland. The concept of the separation of powers was carried a step further with the creation of a Legislative Council consisting of the Governor and at least two other persons. This body was given power to legislate for the Protectorate. However, in doing so, it had to observe any conditions, provisions and limitations prescribed by any instrument under His Majesty's Sign Manual and Signet. Moreover, the Governor was given the right of veto in the making and passing of such Ordinances. Professor Kadzamira has this comment on these constitutional developments:

*“The introduction of a legislative council did not reduce the authority of the governor. In fact the governor not only had the final word on all governmental matters but he also had complete control over the legislature since its members were practically hand-picked by him. Thus the legislature was subordinate to the governor and enacted legislation only on instructions. In theory, the legislature had “power to make ordinances for the peace, order and good government of all persons in the Protectorate.” In practice, the main function of the legislative council was to consult European opinion especially from planters and traders. To get African opinion on various matters the governor relied officially on his administrative officers (district commissioners) and unofficially on the missionaries.”<sup>16</sup>*

As observed by Professor Kadzamira, this new constitutional order, did not improve the situations in terms of popular involvement of the majority

<sup>14</sup> Fedelis Edge Kanyongolo, “The Limits of Liberal Democratic Constitutionalism in Malawi” in Kings M. Phiri & Kenneth R. Ross, *Democratization in Malawi: A Stocktaking*, Blantyre, Malawi: CLAIM 1998, p.354

<sup>15</sup> The first and main Order was adopted on 6<sup>th</sup> July, 1907. There was another the Nyasaland Order-in-Council (No.2) which was adopted on 21 December, 1907

<sup>16</sup> Z.D. Kadzamira “*Constitutional Changes in Malawi 1991-1965 a Brief Survey*” quoted by Musaiwale Chigawa, “*Fundamental Values of the Constitution of Malawi.*” March, 2006

of people governed in deciding the kind of government they wanted. African opinion was virtually unimportant. The power of the state was not exercised on the basis on any constitutional principles limiting the power of government, or, guaranteeing individual rights and liberties.<sup>17</sup> Of course such principles would have been antithetical to the pursuit of the imperialist goals of colonialism. So power relations developed on the basis of the interests of the dominant class, and not by reference to any neutral constitutional standards.

### **3.1.3 1953 Federation (Constitution) Order-in-Council**

In 1953, the colonial administrations of Nyasaland and the Rhodesias decided to consolidate their dominant positions of power by establishing the Federation of Rhodesia and Nyasaland. This was done with the connivance of the British Government which facilitated the establishment by passing the Federation (Constitution) Order-in-Council which received the royal assent on 1<sup>st</sup> August, 1953.<sup>18</sup> The Federal Constitution provided for the centralisation of state power in an administration whose headquarters were in Southern Rhodesia. This was imposed on the people of Nyasaland and Rhodesia despite their opposition. Opposition to the Federation came from both politicians and traditional rulers, and had been expressed as early as 1939 to the Blodisloe Commission, which the British Government had set up to find out the views of Africans on the establishment of the federation. The Commission had concluded that there was united opposition by Africans to the federation. In 1953 as well, a delegation of native chiefs from Nyasaland travelled to London to make a last ditch attempt to forestall the establishment of the federation by presenting a petition to the British Queen.<sup>19</sup> The major reason for this opposition was that the federation would only serve to entrench the imperialist order, by paving way for the attainment of dominion status by European settlers, thereby indefinitely postponing African independence as had happened in the Union of South Africa.<sup>20</sup>

Clearly, the colonial administrations had no regard whatsoever for any form of popular involvement in the making of this Constitutional Order. The administrations rode roughshod over the wishes of Africans who formed the majority of the people to be governed by the Constitution.

Nevertheless, African opposition to the Federation in Nyasaland did not relent. The opposition was galvanised into a nationalist movement which became more and more militant. The colonial authority yielded to

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<sup>17</sup> Fidelis Edge Kanyongolo, "The Limits of Liberal Democratic Constitutionalism in Malawi" in Kings M. Phiri & Kenneth R. Ross, *OP cit* p.354

<sup>18</sup> *Ibid*

<sup>19</sup> *Ibid*. See footnote No.3

<sup>20</sup> *Ibid*. See footnote No.4

pressure after the agitations of 1959, and in 1961, the Lancaster House Constitutional Conference granted Nyasaland a responsible government. The Malawi Congress Party established itself as the undoubted champion of the nationalist movement when it won a landslide victory in the 1961 multiparty elections held under an interim constitution that came into force in 1960.<sup>21</sup>

#### **4.0 1964 Independence Constitution**

On 6<sup>th</sup> July, 1964 Malawi attained independence and a new constitution came into force. The Constitution retained the three organs of the state, namely; the executive, the legislature and the judiciary. However, the Head of State remained the Queen of England but the executive organ was headed by the Prime Minister.<sup>22</sup> It should be noted that one of the most important features of this Constitution is that it contained a comprehensive Bill of Rights.<sup>23</sup> This guaranteed not only human rights and fundamental freedoms for all the people of Malawi, but also ensured a form of limited exercise of governmental authority on the part of the executive organ.

Like many Constitutions drafted as part of the process of transition from colonial rule to independence, the Constitution was a result of negotiation between the departing colonial administration and the dominant nationalist party of the moment, the Malawi Congress Party (MCP). By reason of its landslide victory in the 1961 elections, the MCP, assumed a monopoly of negotiating on behalf of the nationalist movement at the Constitutional talks.<sup>24</sup> It has been observed that this

*“militated against the inclusion of wider civil society interest groups in the talks and reduced the talks to a bargaining session between two parties with relatively narrow vested interests.”<sup>25</sup> On the one hand, was the departing colonial administration, whose main preoccupation was to ensure that the small settler population it was leaving behind would retain its property and be safe from possible oppression from unbridled African majority rule. On the other hand, was the popular nationalist party keen to translate its almost unanimous public support into monopoly legal control of political, economic and social processes.”<sup>26</sup>*

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<sup>21</sup> Fidelis Edge Kanyongolo, *Ibid* p.356. See also footnote No.7

<sup>22</sup> See S.59 of the Constitution of 1964

<sup>23</sup> See SS 11-27 of the Constitution of 1964

<sup>24</sup> Fidelis Edge Kanyongolo, *OP Cit.* p.354

<sup>25</sup> *Ibid*

<sup>26</sup> *Ibid*

Thus the Constitution resulting from the compromise cannot be said to be based on any broad consensus on specific aspects of democratic governance. There were no broad public discussions aimed at bringing out some kind of consensus on fundamental Constitutional issues such as the nature and the limits of the power of the State over citizens and vice versa, the nature of the relationship between the various constitutive parts of the government, and the nature of the relationship between the state and other states.<sup>27</sup> As later events would show, the leadership of the MCP, did not believe in the values reflected in the Independence Constitution, but it suited them to compromise for the sake of attaining independence.

It also seems probable that even the Party elite in the MCP did not agree among themselves on the fundamental values of the Constitutional order they wanted to create. Three months after independence, a cabinet crisis occurred. Some cabinet ministers challenged Dr Kamuzu Banda's autocratic leadership; ideological differences also surfaced over recognition of Communist China. Banda sacked the ministers. Those who opposed him were forced into exile.<sup>28</sup> This crisis, as will become apparent later, had a direct bearing on the making of the Republican Constitution of 1966.

## **5.0 1966 Republican Constitution**

In July, 1965 the Prime Minister announced that Malawi would become a republic in 1966. He appointed a Constitutional Committee comprising some members of the party elite, with a mandate to research and consult on the Constitutional form which would be most appropriate for local social and social economic realities. The Committee came up with proposals for the Constitution. These Constitutional proposals were based on three primary considerations. The first one was that in African traditional systems, it was not usual to have one leader with purely formal and ceremonial powers and another leader with real executive authority. This meant, in effect, that the new constitution would vest the power of Head of State and Head of Government in Malawi in one person. The second consideration was that an elected executive president would strengthen the democratic and representative nature of the government of Malawi. The third one concerned the need for a strong executive leader who should have such Constitutional powers to ensure unity. The Committee noted that:-

*“There is need in a country comparatively undeveloped and inexperienced in nation-hood for a form of government*

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<sup>27</sup> *Ibid* p.357

<sup>28</sup> Jande Banda, “*The Constitutional Change Debate of 1993-1995*,” in Kings M. Phiri and Kenneth R. Ross (ed) *Democratization in Malawi: A Stocktaking*. Blantyre, Malawi: CLAIM, 1998 P.318

*which will afford the necessary degree of unity, resolution and stability to permit the maximum fulfilment of the country's human and physical resources in the shortest period of time"*  
<sup>29</sup>

The Committee further recommended that the republican Constitution should not contain any Bill of Rights. It was observed that Constitutional provisions on human rights and fundamental freedoms tend to generate conflict and tension between the executive and the judiciary.

The draft proposals were presented to, and unanimously adopted by delegates to the Annual Convention of the MCP in October, 1965, before being subsequently endorsed by the cabinet.<sup>30</sup> They became a framework for a Constitutional order that would remain in force for nearly a generation to come. The passing of the Constitution through the Malawi Congress Party dominated Parliament was a formality.

On 6<sup>th</sup> July, 1966, Malawi became a republic under a new Constitution. The Constitution retained the three organs of the state – the executive, the legislature and the judiciary. However, the main theme that runs throughout this Constitution is that of a strong executive authority that is vested in the president on the one hand and the monopoly of political control by the Malawi Congress Party on the other. The president was “*the Head of State, the supreme executive authority of the Republic and Commander In-chief of the Armed Forces.*”<sup>31</sup> Except as otherwise provided by an Act of Parliament, in the exercise of his functions the President would act on his own discretion and would not be obliged to follow advice tendered by any other person.<sup>32</sup>

The power of the President and the MCP was consolidated by several amendments to the Constitution made subsequent to the coming into force of the Constitution. The MCP was to be the only legally recognised party in the country.<sup>33</sup> Dr Kamuzu Banda was to be Head of State and Government for his life.<sup>34</sup> Subsequent presidents would only be elected from nominees of the MCP hierarchy.<sup>35</sup> The President could nominate any number of Members of Parliament and had power to appoint the Speaker of Parliament as well.<sup>36</sup> The Government and the nation was to operate on

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<sup>29</sup> See, Proposals for the Republican Constitution Malawi (white paper 002, 1966), Zomba, Government Press, 1966), P.3

<sup>30</sup> Fidelis Edge Kanyongolo , OP Cit P. 359

<sup>31</sup> Section 8 (1)

<sup>32</sup> Section 8 (3)

<sup>33</sup> Section 4

<sup>34</sup> Section 9

<sup>35</sup> Sections 10(2) 11(1) and (2)

<sup>36</sup> Sections 20 and 25(1)

the basis of the four “cornerstones” of Unity, Loyalty, Obedience and Discipline.” It is important to note that these cornerstones were transplanted from the constitution of the Malawi Congress Party.

Reflecting on the making of this Constitution, it becomes apparent that the process allowed very little, if any, room for popular participation. The making of the constitution became the dangerous monopoly of a Party elite that had not only acquired power, but sought to consolidate that power so that the power would be exercised without question. The process was also hurried. The Committee took only two months to perform its task and formulate proposals for the principles and rules to be contained in the Constitution.<sup>37</sup> The process of consultation was not significantly inclusive or comprehensive, and, was consequently incapable of drawing out consensus on the proposed Constitution.<sup>38</sup>

As if this was not bad enough, the Constitution could be amended by Parliament without any popular involvement, as the one Party Parliament was effectively a rubberstamp for President Banda’s and the Party’s wishes. It is no wonder that under this Constitution Malawians suffered autocratic rule for nearly thirty years.

President Banda used his unlimited political power under the 1966 Constitution to stifle any criticism of himself or his regime, as well as to eliminate political competitors to his rule.<sup>39</sup> As a direct result of the cabinet crisis of 1964, he introduced Public Security Regulations in 1965, making possible detention without trial or charge.<sup>40</sup> University teachers and journalists, who, consciously or unconsciously, made, ambiguous comments in publications or their own circle of friends, that would be regarded as criticism of the leadership of the state, were sometimes imprisoned for years without trial.<sup>41</sup> Leading politicians were murdered by the state apparatus.<sup>42</sup> Sometimes political opponents or critics were subjected to forfeiture of their assets under the Forfeiture Act.<sup>43</sup> The conditions of detention were appalling - including solitary confinement.<sup>44</sup>

## 6.0 1994 CONSTITUTION

### 6.1 The Political Change

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<sup>37</sup> Fidelis Edge Kanyongolo. OP Cit. p.359

<sup>38</sup> Ibid.

<sup>39</sup> Meinhart, Heiko, Free at Last! Malawi’s. Democratic Transition Malawi. Malawi National Initiative for Civic Education, 2004. p.54

<sup>40</sup> Ibid 55

<sup>41</sup> Ibid

<sup>42</sup> Ibid

<sup>43</sup> Ibid. p.56

<sup>44</sup> Ibid p.57

It is important to note that in spite of his autocratic rule during the years of the cold war, President Banda adopted a definite pro-western and anti-communist orientation; and this was well rewarded by the Western Governments, in total disregard of the catastrophic human rights situation, with generous development aid, and, praise for the political stability of his regime, and constructive role in Southern Africa.<sup>45</sup>

However, the end of the East-West conflict made the Banda regime, appear increasingly anachronistic.<sup>46</sup> Banda's Western Allies, no longer had the cold-war justifications for continuing to support the regime. Western donors began to threaten to tie aid to human rights records and rule of law.<sup>47</sup> In the years leading up to the end of the 1980s, the economic situation continued to deteriorate for the majority of Malawians.<sup>48</sup> The change of attitude of the Western donor governments towards the Banda regime, presented a prospect of receiving international support which had hitherto been limited, and this emboldened some internal critics of the regime to break silence and became more open in criticising the government's disregard of human rights and the rule of law.<sup>49</sup> On 8<sup>th</sup> March, 1992, for the first time, the Catholic Church broke its silence, and a Pastoral Letter, signed by all the Bishops of the Catholic Church in the country, was read in all parishes. The Pastoral Letter was strongly critical of the prevailing system and called for political change.<sup>50</sup> The reading of the Pastoral Letter was an epoch-making event.

The combined effect of these developments was to force the regime to admit that some reforms were needed in order to put in place some principles to limit state power and make government more accountable to the citizenry.<sup>51</sup> Of course, in reality, the regime was principally motivated by the desire to forestall withdrawal of foreign aid,<sup>52</sup> which the Western donors had threatened to implement if the regime did not introduce reforms.<sup>53</sup>

The regime did embark on a programme of legal and policy reforms. The significant reforms included the narrowing of the legal definition of sedition, the introduction of a mechanism for quasi judicial review of cases of detention without trial and forfeiture of property by government, and the reduction of imprisonment terms to be imposed on journalists guilty of

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<sup>45</sup> Ibid pp 57-58

<sup>46</sup> Ibid pp. 76-77

<sup>47</sup> Fidelis Edge Kanyongolo, OP Cit p.362

<sup>48</sup> Ibid

<sup>49</sup> Ibid

<sup>50</sup> "Living Our Faith: Pastoral Letter from the Catholic Bishops 1992" in Kenneth R. Ross (ed) Christianity in Malawi, A Source Book Gweru: Mambo Press, 1996 pp 204 - 215

<sup>51</sup> Fidelis Edge Kanyongolo, OP Cit. P.362

<sup>52</sup> Fidelis Edge Kanyongolo, OP Cit. P..362

<sup>53</sup> Ibid

*“publishing information harmful to the interests of Malawi.”*<sup>54</sup> The total effect of the reforms was to create some political space within which a number of interest groups emerged to pursue various social, economic and political agendas.

The regime having agreed to limited reforms, the pressure upon the regime, both from its internal opponents, and donors, mounted, demanding that the government do call for a referendum to let Malawians decide whether there should be constitutional reform to legalise the operation of other political parties in the country. Such a referendum was eventually held on 14<sup>th</sup> June, 1993. The majority voted for a multiparty system of Government. Necessary amendments were made to the Constitution to allow for the existence of other parties.

## 6.2 The Actual Process of Constitution-making

When some space had been created, many members of the pro-democracy movement, came into the open. On 28<sup>th</sup> August, 1992, initially under the name “National Affairs Committee,” at a meeting attended by 15 members of the Movement, including representatives of the Catholic, Anglican and Presbyterian churches, the Muslim Association as well as the Law Society and the Associated Chamber of Commerce and Industry, the Public Affairs Committee (PAC) was founded.<sup>55</sup> The PAC wrote to the Government demanding dialogue with the regime. After some resistance, the Government agreed. On the regime’s side, in October, 1992, the Presidential Committee on Dialogue (PCD), consisting of MCP executive committee members and cabinet ministers, was set up by the President. Thus began an institutionalised process of negotiations.<sup>56</sup>

Following the defeat of the MCP in the referendum, the opposition demanded greater participation in shaping the process of democratization. This was the basis for the post-referendum agreement between PAC and the PCD to create an institutionalised negotiating council to implement the transition to democracy.<sup>57</sup> They agreed to admit only representatives of political parties registered in Malawi. This excluded such civil society organisations as the churches, which had played a decisive role in the initial phase of democratisation. The National Consultative Council (NCC) consisted of seven representatives of each of the parties that were registered before November 30.<sup>58</sup>

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<sup>54</sup> Meinhart, *OP Cit* P. 183

<sup>55</sup> *Ibid*

<sup>56</sup> *Ibid* p. 297

<sup>57</sup> *Ibid*

<sup>58</sup> National Consultative Act, 1993, received President on 13<sup>th</sup> December, 1993 and gazetted on 31<sup>st</sup> December, 1993, denied to have come into force on 23<sup>rd</sup> August, 1993.

NCC began its work on August 28, 1993 although its legal basis was not established until December of that year.<sup>59</sup> The NCC was established by an Act of Parliament<sup>60</sup> *“to oversee the transition from the one party political system to a multiparty political system in Malawi following a national referendum held on 14<sup>th</sup> June, 1993.”* The function of NCC<sup>61</sup> included participating in formulation of policies, initiation of legislative measures necessary for the transition, drafting new electoral law suitable for a multiparty political system, review law governing registration of political parties, preparing draft of a new Constitution to become effective after the first multiparty elections, and preparing draft Bill of Rights.

The Act also created an Executive Committee of the Council called *“National Executive Committee”*. The functions of the Committee<sup>62</sup> included monitoring implementation of policies governing the transition, consulting with the Cabinet on measures relating to the transition to be taken in the management of the transition, and monitoring implementation by Government of legislation relating to the transition. The Council and the Executive Committee were served by a secretariat of public servants.<sup>63</sup>

### 6.3 Drafting of the Constitution

As noted above, the draft Constitution was produced by the NCC. The drafting was delegated to experts from the various political parties, and, international experts with an advisory function only.<sup>64</sup> The Constitution Committee had in its work oriented itself on the Constitutions of a number of Western countries (USA, the United Kingdom, German) as well as African models (Namibia, South Africa)<sup>65</sup> because time was limited, and, because of a number of organisational problems, the Constitution was drafted in haste. The NCC approved the draft in a hurry, final changes were agreed a bare two weeks before the Constitution was proclaimed.<sup>66</sup> The MCP approved the draft with reservations. The Constitution was then to be passed by Parliament.

International experts were involved in formulating clauses of the Constitution. National Democratic Institute (NDI) of the USA advised NCC on formulating the Constitution, highlighting problems and citing examples and alternatives from other countries.<sup>67</sup> It has been observed that the

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<sup>59</sup> National Consultative Council Act, Number 20 of 1993

<sup>60</sup> Section 5(1) of the National Consultative Council Act

<sup>61</sup> Section 5(2) of the National Consultative Council Act

<sup>62</sup> Section 6 of the National Consultative Council Act

<sup>63</sup> Meinhart, *OP Cit* pp. 304-305

<sup>64</sup> *Ibid*

<sup>65</sup> *Ibid*

<sup>66</sup> *Ibid* p. 278-279

<sup>67</sup> *Ibid* p. 278

external influence in the writing of the Constitution was great, since many members of the NCC had no knowledge of Constitutional Law, and thus no basis for comparison.<sup>68</sup>

#### 6.4 Popular Involvement in the Constitution-Making Process

Reflecting on the process, it becomes apparent that there can be no valid claim to popular involvement in the Constitution-making process. In the first place, none of the members of NCC were such by virtue of any popular elections; they did not have any direct mandate from the people to determine even the most basic framework of the Constitution.<sup>69</sup>

Secondly, the NCC membership was limited to political parties (whose leadership was generally unelected at that time), excluding other members of the PAC who had played a crucial role in the dialogue with Government for change. The excluded members, who included the Faith Community, the Law Society and the Associated Chambers of Commerce and Industry, in Malawi, represented important constituencies, (Civil Society) whose views were important on what the Constitution should be. The process did not thereby satisfy the process of legitimation.

It is noted that NCC did organise a seminar in November, 1993 which initiated the debate on changing the Constitution (the seminar resolved that rather than amending the 1966 Constitution, a new Constitution should be drafted).<sup>70</sup>

In February, 1994 NCC organised another Constitutional Drafting Conference with the guidance of the Legal Resources Centre attended by various social groups.<sup>71</sup> However, a comprehensive, complex document, could not be usefully discussed in four days.

The Constitution-making process further failed to satisfy the requirements of popular participation in that it was taken to the people through a referendum or similar process.

Further, the haste in which the Constitution was drafted did not allow room for popular participation in the Constitution-making process. The Constitution needed to be translated from English into the local languages and made accessible to the people before it could be adopted. The population was at all educated on Constitution-making.

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<sup>68</sup> Fidelis Edge Kanyongolo, OP Cit p. 364

<sup>69</sup> Jande Banda OP Cit p. 321

<sup>70</sup> Ibid

<sup>71</sup> Fidelis Edge Kanyongolo OP Cit p. 365

It is also quite clear that the significant influence of the “international experts” in the drafting process substantially influenced the content of the Constitution. Some of the recommendations of the international experts seem to reflect the Western Donor’s views of the Constitution to be created. It has been observed that the Constitution may arguably be among the world’s most liberal constitutions.<sup>72</sup> But the question remains: Were the foreign experts’ recommendations applicable to the specific circumstances prevailing in Malawi? There was need for Malawians to understand, for instance, the nature of the relationship between indigenous moral values and constitutional principles, indigenous culture and human rights.<sup>73</sup>

### 6.5 The Permanent Adoption of the Constitution

As noted above, the Constitution came into force on the 18<sup>th</sup> of May, 1994 provisionally for one year.<sup>74</sup> Within 14 days of the first sitting of Parliament, Parliament appointed a Constitution Committee of the Speaker as Chairman, and, other ten members appointed by the National Assembly. The functions of the Committee included<sup>75</sup> organising national education on the Constitution; organising a national conference fully representative of Malawian Society; inviting and considering proposals from citizens; receiving written submissions or hearing citizens personally, and laying a report of responses before Parliament.

Depending on the extensiveness of the proposals for amendments to the provisional Constitution, Parliament would either amend or repeal the Constitution.<sup>76</sup>

The Committee conducted hearings on the Constitution in the 24 administrative districts of Malawi, which any citizen could attend and make proposals. However, this attempt to include the rural population (and the Malawi population is largely rural!) was largely ineffective. A number of hearings were not useful because the copies of the Constitution, which had been translated into the most important tribal languages, were not distributed in time, or only on the day of the hearing.<sup>77</sup>

The Committee also did organise a national constitutional conference in February, 1995 which was attended by the 274 delegates from political parties, including those not represented in Parliament, and many Civil Society Organisations, such as the Churches, the Law Society, the Trade

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<sup>72</sup> *Ibid* p. 373

<sup>73</sup> Section 212 (1) of the 1994 Constitution

<sup>74</sup> Section 212 (4)

<sup>75</sup> Section 212 (5)

<sup>76</sup> Meinhardt, OP Cit p. 391

<sup>77</sup> Report of the Constitution Committee to the National Assembly on the National Constitutional Conference on the Provisional Constitution held in Lilongwe, Zomba : Government Press

Unions, the Women's Associations and other NGO's, along with Traditional Authorities, the University, the National Bank, the legal system and the armed forces.<sup>78</sup> The five day conference discussed only contentious provisions of the Constitution.<sup>79</sup> Every subject area was introduced by a brief lecture given by a Malawian expert and subsequently discussed in plenary. If no consensus was reached, a vote, by secret ballot, was taken. On a number of important issues the conference participants voted against the proposals put forward by the United Democratic Front (UDF)/Alliance for Democracy (AFORD) Coalition Government.<sup>80</sup> These included the senate as a second chamber, which delegates voted to retain in the Constitution; the right to re-call members of Parliament; creation of the Office of Second Vice President which delegates rejected; limit size of the cabinet. Out of 63 resolutions, 45 were unanimously voted for.<sup>81</sup>

It is important to note that when the Constitution came before Parliament, the UDF/AFORD majority in Parliament ignored all the decisions of the Conference on which the Conference had voted against their positions, and pushed through their own amendment proposals. Thus Parliament suspended the Senate provision, which eventually was repealed, the recall provision was repealed, and the office of Second vice President was created. On 18<sup>th</sup> May 1995 the Constitution came into force permanently.

It can be clearly seen here that the Conference, where the wider society had the opportunity to express their views on the form the Constitution should take, had virtually no impact on the Constitution-making process. Parliament had to decide what the Constitution should be. And this was a Parliament of members who had just been elected into power. There can be no pretending that the UDF/AFORD majority members of Parliament were motivated by the desire to promote national good. Clearly, there was a desire to consolidate their power, and make the exercise of their power less accountable. Perhaps herein lies the weakness of adopting a new constitution through Parliament without a referendum.

The desire to use or amend the Constitution to consolidate power against the wishes of the people, manifested itself again in 2002 and 2003 when attempts were made by the UDF Government, supported in Parliament, by AFORD and MCP, to amend the Constitution to remove the Presidential term limit of two.<sup>82</sup> The plan was eventually abandoned due to pressure from the churches and civil society and donors. This experience is reminiscent of the making of the 1966 Constitution and its subsequent amendments.

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<sup>78</sup> Meinhardt, *OP Cit* p.392

<sup>79</sup> *Ibid* pp. 392-393

<sup>80</sup> *Ibid* p.393

<sup>81</sup> Meinhardt, *OP Cit*. p. 394; S. 83(3)

## 6.6 Review of the Constitution after Ten (10) Years

Recognising that the Constitution was hurriedly drafted, and considering the volume of Constitutional litigation, especially among political players, prior to August 2004, calls were made upon the Malawi Law Commission to carry out a comprehensive review of the Constitution. The Law Commission proposed to the Government, and the Government agreed. In August, 2004, by a Press Notice, the Commission called for submissions from the general public to highlight problematic areas in the Constitution. The Commission also organised consultative meetings with target groups in all the three regions of the country, including civil society, politicians, chiefs, judicial officers and the youth. By March, 2006 the Commission had produced a 58 page Consultation Paper containing people's views on specific provisions. In March, 2006 the Commission held a three day National Constitutional Conference bringing over 300 delegates together from a cross-section of the population. Issues were raised and views received from the floor. In June, 2006 a special Law Commission for the Review of the Constitution was set up in terms of the Constitution. The Commission has continued the work of countrywide consultations, through field trips, Phone-in Radio programmes, Television programmes, and many other forms of communication.

In April, 2007 the Commission held another three day Conference where the interim report of the Commission was presented with recommendations, and further views from the floor were received.

The Commission will soon resume its deliberations and eventually will lay a Report containing recommendations before Parliament.

The Commission has made commendable efforts within the constraints of the resources to achieve popular participation in the review. It is interesting to note that the same issues that Parliament ignored in 1995 are coming up again.<sup>83</sup> As a matter of fact, some interest groups are calling for a referendum to determine the position on the most important issues for fear that Parliament may behave the same way as it did in 1995.

## 7.0 CONCLUSION

The experience of Malawi shows that popular involvement in Constitution-making, though crucial for Constitutional legitimacy, is illusive in a country such as Malawi. The experience reveals a pattern: that there are always actors in the Constitution-making process, such as politicians or political parties, and even donors, that wield power and seek to exclude popular participation in the Constitution-making process, in order to secure their

own selfish or partisan interests. However, the citizens of the nation must continue to exert pressure on the powerful actors in the Constitution-making process, so that the Constitution may reflect the views, values and aspirations of the people.