



MALAWI LAW COMMISSION

**SUMMARY OF THE PROCEEDINGS OF THE
FIRST NATIONAL CONFERENCE ON THE
REVIEW OF THE CONSTITUTION**

April, 2006

ACKNOWLEDGEMENTS

This Summary of the Proceedings of the First National Conference on the Review of the Constitution has been compiled through the concerted efforts of a team of rapporteurs which was led by the Honourable Justice Andrew Nyirenda. The rest of the members of the team were: Honourable Justice Anaclet Chipeta, Dr. Blessings Chinsinga, Dr. Mustafa Hussein, Dr. Fidelis Edge Kanyongolo, Dr. Augustine Magolowondo and Mrs. Linda Ziyendammanja.

The team of rapporteurs was ably assisted by the professional officers at the Malawi Law Commission. This Summary was edited by Chikosa M. Silungwe, Assistant Chief Law Reform Officer at the Malawi Law Commission.

INTRODUCTION

The Malawi Law Commission is established by section 132 of the Constitution. The broad mandate of the Law Commission is to review all statutory and customary laws of Malawi for their conformity with the Constitution and applicable international law. The Law Commission has a further mandate to review and make recommendations regarding any matter pertaining to the Constitution itself.¹ In this vein, the Commission, in 1998, embarked and finalised the technical review of the Constitution. The task was undertaken to correct irregularities and textual errors in the Constitution as adopted on 18th May, 1995.²

The Law Commission embarked on the current programme to review the Constitution in August, 2004. The Law Commission has had written submissions and consultative meetings in relation to the review with various interest groups; namely, traditional leaders; professional associations such as the Malawi Law Society; civil society; the academia; the youth; women's groups; political parties represented in, and those not represented in, Parliament; the Judiciary; the civil service; and constitutional bodies including the Reserve Bank of Malawi, the Malawi Police Service and the Malawi Defence Force.

The Law Commission held the first National Conference on the Review of the Constitution from 28th to 31st March, 2006 at Capital Hotel, Lilongwe, Malawi. This first National Conference was officially opened by His Excellency the State President Dr. Bingu wa Mutharika on Tuesday, 28th March, 2006. The Conference received diverse presentations from local and international experts, the Malawi Law Commission and interest groups such as the Civil Society Political Platform, the Parliamentary Women Caucus, persons with disabilities and the youth. The Conference was officially closed by the Honourable the Chief Justice, Justice Leonard Unyolo, SC on Friday, 31st March, 2006.

The core agenda of the Conference was to present to the participants and delegates the issues for the review of the Constitution as submitted to the Law Commission by various interest groups and members of the general public and to hear the views of the participants on those issues and to allow the participants the opportunity to raise other issues for the review of the Constitution.³

This Summary is not a verbatim report of the proceedings of the Conference. This Summary will be part of the working documents that will be used by the special Law Commission on the Review of the Constitution which is to be empanelled under section 133 of the Constitution.

There is an appendix to this Summary which, among other things, has summaries of the proceedings of each day of the National Conference. The summaries of the papers are *mere* summaries. The full versions of the papers are available on the Law Commission website.

¹ See section 135 (b) of the Constitution.

² See Malawi Law Commission (1998) *Report on the Technical Review of the Constitution*. Malawi Government Gazette Extraordinary.

³ See Malawi Law Commission (2006) *Constitutional Review Programme: Consultation Paper*. Lilongwe: Capital Printers, p. 13 (hereafter the "*Consultation Paper*").

The appendix also contains a list of participants that attended the National Conference. It is possible that names of some participants are missing from the list where those participants did not register with the Conference Secretariat.

The Law Commission wishes to acknowledge the funding it has received from the Government of Malawi, the European Union, the United Nations Development Programme (UNDP) and the Government of the Kingdom of Norway through the Norwegian Agency for Development (NORAD) in respect of the entire programme on the review of the Constitution.

SUMMARY OF PROCEEDINGS

1. the Preamble

The Preamble to the Constitution presently states, in part, that “THE PEOPLE OF MALAWI, *recognizing* the sanctity of human life...HEREBY adopt the following as the Constitution of the Republic of Malawi.” The point was made that the phrase

“WE THE PEOPLE OF MALAWI” adds a sense of ownership of their Constitution on the part of the people of Malawi as opposed to the present wording which is couched in the third person.⁴

2. the Quest for a National Language

The point was made that in order to enhance unity and national identity, section 2 of the Constitution which provides for a National Flag, a National Coat of Arms, a National Anthem and a Public Seal must also make provision for a National Language.⁵

A consensus emerged at the Conference that if the Constitution were to provide for a National Language, that language may have to be Chichewa on the basis that it is widely spoken and understood throughout Malawi.

3. the Doctrine of Separation of Powers

The doctrine of separation of powers can be primarily located in sections 7, 8 and 9 of the Constitution. The Conference received several presentations that addressed the doctrine.⁶ The presentations underscored that no Constitution is perfect.⁷ A Constitution needs to be clear, concise and flexible and based on objective and neutral underlying principles.⁸ It was acknowledged that the Constitution provides for a hybrid system of governance; that is, the Malawi constitutional model is neither purely presidential nor is it purely parliamentary.⁹ In this vein, a number of concerns were raised regarding the application of the doctrine under the Malawi constitutional model. The major areas of concern were as follows–

(a) Whether it is appropriate for the President to appoint members of Cabinet from among Members of Parliament.

(i) In light of separation of powers, the concern was whether this is an appropriate arrangement since a person who serves as both a Cabinet Minister and a Member of Parliament has both legislative and executive functions. Conversely, it was pointed out that Cabinet Ministers who are entirely not part of the Legislature may affect accountability and transparency as there would be no proper flow of information between the Executive and the Legislature.

(ii) Conversely, it was pointed out that if Members of Parliament who are appointed Cabinet Ministers were to relinquish their legislative seats it would result in numerous by-elections and loss of security of tenure by the (hitherto) Members of Parliament.

⁴ See Rafiq Hajat (2006) “A Constitutional Fortress: Mirage or Miraculously Possible?”. Mimeo.

⁵ Cf. Malawi Law Commission (2006) *Constitutional Review Programme: Issues Paper*. Lilongwe: Capital Printers, p. 9 (hereafter the “*Issues Paper*”).

⁶ See Christopher Forsyth (2006) “Relationship between the Legislature and the Executive: Building a Relationship suitable for the circumstances of Malawi”, mimeo.; Msaiwale Chigawa (2006) “Fundamental Values of the Constitution of the Republic of Malawi” mimeo.; A. Peter Mutharika (2006) “Towards a More Manageable Constitution” mimeo.; and the *Issues Paper*, pp. 10–12.

⁷ Cf. Christopher Forsyth (2006).

⁸ Cf. Mutharika (2006).

⁹ See Christopher Forsyth (2006), Mutharika (2006) and Robert Martin (2006) “Review of the Constitution: Some Selective Comments”. Mimeo.

- (b) In relation to the core mandates of the three branches of government as provided for under the Constitution, one of the major concerns in this respect is that while the Executive has the mandate to initiate legislation there have been instances where the Legislature, through Private Member's Bills, has initiated legislation especially aimed at amending the Constitution. The worry is that this amounts to a breach of the separation of powers. Another school of thought argued that Private Member's Bills are an acceptable mechanism for initiation of legislation in appropriate cases.
- (c) With regard to the Judiciary, the Conference was informed that the various court orders that are issued against the Executive and Legislature are deemed as an interference with the other branches of Government. This, in turn, is considered as a breach of the doctrine of the separation of powers.¹⁰ It was also observed that the Judiciary issues its orders upon the motion of an aggrieved party. Court orders are issued on the merits of the case before the courts. It was also pointed that there is always a right of appeal against a court order.
- (d) Whether the requirement that certain public appointments that are made by the President must be confirmed by the Legislature must be retained in the Constitution.¹¹ Presently, the appointment of the Inspector General of Police;¹² the Director of Public Prosecutions;¹³ the Chief Justice;¹⁴ and Ambassadors, High Commissioners and principal diplomatic staff¹⁵ are appointed by the President subject to confirmation by the Legislature.
- (e) In section 89 of the Constitution, the power to ratify international instruments lies with the Executive and yet power to domesticate under section 211 of the Constitution lies with the Legislature.¹⁶ It was suggested that the power of ratification must lie with the Legislature.

¹⁰ Mutharika (2006) argues in his paper for the need to consider judicial restraint through the 'political question' doctrine.

¹¹ *See*, for example, the requirement under subsection (2) of section 154 of the Constitution where the President's appointment of an Inspector General has to be confirmed by a simple majority of the National Assembly. Following the acrimony that ensued the confirmation of Mrs. Mary Nangwale to the position of Inspector General, the Conference received a submission from the Malawi Police Service to the effect that the requirement to have an appointee Inspector General confirmed by the National Assembly must be removed from the Constitution as it only serves to heighten instability in the Malawi Police Service.

¹² *See* section 154(2) of the Constitution.

¹³ *See* section 101(1) of the Constitution.

¹⁴ *See* section 111(1) of the Constitution.

¹⁵ *See* section 190 of the Constitution.

¹⁶ The point was emphasized in the presentation of the Ministry of Gender, Child Welfare and Community Services (Malawi Government (2006) "Realization of Women's Human Rights and Gender Justice". mimeo) and the Parliamentary Women Caucus in making the case for the domestication of international legal instruments on the rights of women and gender equality generally.

4. Human Rights

A number of issues emerged in relation to Chapter IV of the Constitution which provides for a Bill of Rights. The notable issues here relate to the following-

(a) The right to life

The right to life is provided for under section 16 of the Constitution. The provision states:

“16. Every person has the right to life and no person shall be arbitrarily deprived of his or her life:

Provided that the execution of the death sentence imposed by a competent court on a person in respect of a criminal offence under the laws of Malawi of which he or she has been convicted shall not be regarded as arbitrary deprivation of his or her right to life.”

The Conference received some emotive submissions for the repeal of the death sentence as allowed under section 16 of the Constitution.¹⁷ There was no clear indication at the Conference as to whether the participants consider that Malawi must retain the death sentence or abolish it.

(b) Marriages by repute and permanent cohabitation

The Constitution recognizes marriages at law, custom and marriages by repute or permanent cohabitation.¹⁸ The Conference received presentations which advocate the abolition of marriages by repute or permanent cohabitation on the basis that these types of marriage are against ‘custom’ or ‘tradition’ that obtains amongst the various ethnic groups in Malawi.¹⁹ A clarification on the matter was proffered in plenary that marriages by repute or permanent cohabitation were in fact a legal innovation by the courts for the protection of the rights of women and children.

(c) Political Rights

Section 40 of the Constitution provides for political rights. A number of concerns were raised in relation to funding of political parties as provided for under section 40(2) of the Constitution. The concerns were-

- (i) whether the funding must be extended to ‘smaller’ parties;
- (ii) whether the funding must be paid directly to the constituencies;

¹⁷ A notable presentation on the matter was made by Dr. Vera Chirwa, the Special Rapporteur on Prisons and Conditions of Detention in Africa (under the African Commission on Human and Peoples’ Rights), who emphasised that death sentence is inhuman and degrading punishment and Malawi must seriously consider abolishing it. *See also* the *Issues Paper*, p. 12. The Director of Public Prosecutions, Mr. Ishmael Wadi, also made a submission for the abolition of the death sentence.

¹⁸ *See* subsection (5) of section 22 of the Constitution.

¹⁹ *See* the presentation by the Ministry of Gender; *see also* the *Issues Paper*, pp. 12–13.

- (iii) what mechanisms must be put in place to ensure accountability on the use of party funding;
 - (iv) whether the requirement of one-tenth representation in Parliament as a condition precedent before funding to a political party may be disbursed is necessary.
 - (v) whether the Constitution must provide for affirmative action to ensure the participation of women in politics and public life generally.
- (d) Rights of children

Section 23 of the Constitution provides for matters affecting children generally. The Conference was informed that the Constitution defines 'child' differently for various purposes such as marriage or participation in politics whether as a voter or an election candidate. It was argued that there is need to harmonise the criterion for the determination of 'child' under the Constitution.²⁰ It was proposed that 'child' must mean a person who is below the age of eighteen years for all purposes in line with international legal instruments especially the Convention on the Rights of the Child.

(e) Citizenship

Section 47 of the Constitution provides for acquisition and loss of Malawi citizenship. The enabling law on Malawi citizenship is the Malawi Citizenship Act.²¹ Malawi citizenship may be acquired through, among other criteria, marriage.²² A number of concerns were raised in respect of the provision. First, whether marriage must remain a ground for acquiring citizenship in light of the possibility of 'marriages of convenience'. Second, to the extent that under the Malawi Citizenship Act only a foreign wife of a Malawian man may acquire Malawi citizenship but not vice-versa, the Act is discriminatory and unconstitutional.

(f) Freedom of expression and the media

While there was no real problem that was noted with the constitutional provisions, the Conference received a presentation which highlighted the flaws that still exist in the Laws of Malawi that limit the freedom of expression in relation to the media. It was emphasized that there is an urgent need to review the statutory laws in Malawi to ensure their constitutionality.²³

5. the Legislature

²⁰ The Conference received a presentation from the Youth to this effect.

²¹ Cap. 15:01.

²² See subsection 3(a) of section 47 of the Constitution.

²³ See Charles Simango (2006) "Undue Restrictions: Media Perspectives of the Constitution of Malawi." Mimeo.

Chapter VI of the Constitution provides for the Legislature generally. A number of issues were raised regarding the Legislature both in the presentations and plenary. The issues were as follows-

(a) Qualifications of Members of Parliament

(i) Whether the Constitution must provide for a minimum educational qualification for Members of Parliament.²⁴ The Conference suggested a minimum of the Malawi School Certificate of Education or its equivalent.

(ii) Whether the Constitution must provide for an upper age limit.

(b) Tenure of Members of Parliament

Whether the Constitution must provide for limited number of terms within which a person may serve as a Member of Parliament.²⁵

(c) The Speaker

(i) Whether the Speaker must have autonomy under the Constitution to convene Parliament. Currently, Parliament convenes following consultation between the Speaker and the President.²⁶

(ii) Whether Parliament must control its own budget, independent of the Treasury, so as to allow it to properly run its calendar.

(iii) Whether the Speaker must remain in office after dissolution of Parliament just like the President does.²⁷

(iv) Whether once elected, the Speaker must cease to be a member of a political party; if he or she was elected to Parliament as a member of a political party.

(v) Whether a person must not qualify for election as Speaker of the National Assembly unless he or she has served one full term as a Member of Parliament prior to his or her nomination for the office of Speaker.²⁸

(d) the 'Recall Provision'

The provisional Constitution of 1994 provided, in section 64, for the recall of Members of Parliament upon proper cause and certification by the Electoral

²⁴ See the *Issues Paper*, p. 17.

²⁵ See Mutharika (2006) who draws parallels with the system of term limits for, among others, members of parliament in Mexico.

²⁶ See section 59 of the Constitution.

²⁷ See the *Issues Paper*, pp. 19–20.

²⁸ See the *Issues Paper*, p. 19.

Commission. Section 64 was repealed in 1995.²⁹ The main issue here was whether or not the ‘recall provision’ must be re-introduced in the Constitution. The main argument in favour of the ‘recall provision’ was that it would make Members of Parliament more accountable to their constituents.³⁰ The main argument against the re-introduction of the ‘recall provision’ was the danger of it being abused by ‘busybodies’.

(e) ‘Crossing the Floor’

Section 65 of the Constitution deals with the issue of ‘crossing the floor’. The provision has, over time, gained both notoriety and controversy. The provision, as originally couched, stated as follows–

“65.–(1) The Speaker shall declare vacant the seat of any member of the National Assembly who was, at the time of his or her election, a member of one political party represented in the National Assembly, other than by that member alone but who has voluntarily ceased to be a member of that party and³¹ has joined another political party represented in the National Assembly.

(2) Notwithstanding subsection (1), all members of all parties shall have the absolute right to exercise the free vote in any and all proceedings of the National Assembly, and a member shall not have his or her seat declared vacant solely on account of his or her voting in contradiction to the recommendations of a political party, represented in the National Assembly, of which he or she is a member.”

The Conference was informed that the provision was amended in 2001 to extend its application to Members of Parliament who “join any other political party (not represented in the National Assembly) or association or organization whose objectives are political in nature.”³² The High Court subsequently ruled that the amendment is unconstitutional.³³

The main issues raised about section 65 of the Constitution were as follows–

- (i) Whether or not the provision is in conflict with section 32 of the Constitution (on freedom of association).

²⁹ See the Constitution (Amendment) Act, Act No. 6 of 1995.

³⁰ See the *Issues Paper*, p. 21; cf. Christopher Forsyth (2006), Martin (2006), Mutharika (2006) and James Tengtenga (2006) “A Community of Character: Constitutionalism in Malawi”. Mimeo. Mutharika (2006), for example, argues that a well-defined system of term limits for members of parliament is a better way of facilitating accountability of members of parliament than a ‘recall provision’. Tengtenga (2006), on the other hand, argues that to reject a ‘recall provision’ for fear of ‘abuse’ “begs the question whether legislation is not passed simply because it has the potential of being abused.” He goes on to ask “[...] what legislation carries no such risk?”

³¹ The Law Commission recommended the repeal of the conjunction “and” here and the replacement of that conjunction with “or”: see Malawi Law Commission (1998) *Report on the Technical Review of the Constitution*. Malawi Government Gazette Extraordinary, p. 268.

³² See the Constitution (Amendment) (No.2) Act, 2001, Act No. 8 of 2001; see also Anthony Kamanga (2006) “Amendments to the Constitution since 18th May, 1994”. Mimeo.

³³ See the decision of Justice Anaclet Chipeta in *Registered Trustees of the Public Affairs Committee v the Attorney General* Civil Cause No. 1861 of 2003 (High Court, Principal Registry (Unreported)).

- (ii) Whether or not the provision has been abused to suit political expedience.
- (iii) Whether the provision is required to enforce party discipline and prevent the weakening of political parties and the re-emergence of a one party State.
- (iv) Whether the provision is necessary to ensure that Members of Parliament remain accountable to the electorate.

(f) The Senate

The Constitution of 1994 provided for a Senate (substantively under sections 68 to 72 of the Constitution). The Senate was abolished in 2001.³⁴ A number of issues were raised in relation to the Senate, namely-

- (i) Whether the Senate must be re-introduced in the Constitution.³⁵
- (ii) If the Senate were to be re-introduced in the Constitution, what ought to be done to ensure that the expenditure on the Legislature is within manageable levels.
- (iii) What would be the role and mandate of the Senate in relation to the chamber of Members of Parliament.

6. Elections and Electoral Systems

The Conference received an extensive presentation on elections and electoral systems.³⁶ A number of other presentations tangentially addressed the issue.³⁷

(a) Composition of the Electoral Commission

The following issues were raised in respect of the composition of the Electoral Commission-

- (i) Whether qualification for the Chairperson of the Commission must go beyond judges to include persons in other professions who would equally be suitable to discharge the functions of the Chairperson of the Commission.³⁸
- (ii) Whether the composition of the Commission must extend generally to eminent persons and its membership must extend to other institutions beyond the present restriction to members of political parties.³⁹

³⁴ See the Constitutional (Amendment) Act, 2001, Act No. 4 of 2001; see also Kamanga (2006).

³⁵ See the *Issues Paper*, p.22; see also Hajat (2006) and Martin (2006).

³⁶ See Denis Venter (2006) "Elections and Electoral Systems in Emerging Democracies: A Case for Electoral System Re-Design in Malawi". Mimeo.

³⁷ See Chigawa (2006) and Martin (2006).

³⁸ See the *Issues Paper*, p. 25.

³⁹ See footnote 30.

(b) The mandate of the Electoral Commission

The issue was whether or not the duty to conduct free and fair elections should not be clearly spelt out in the Constitution. Section 76 of the Constitution (on powers and functions of the Electoral Commission) does not stipulate that the Commission shall ensure free and fair elections.⁴⁰

(c) Electoral Systems⁴¹

The Conference was made aware of the various electoral systems that may be available to Malawi. These systems include the Plurality-Majority Electoral Systems (and these are: the First-Past-the-Post [FPTP] system, the Block Vote [BV], the Alternative Vote [AV] and the Two Round System [TRS]); the Semi-Proportional Electoral Systems (and these are: the Single Non-Transferable Vote [SNTV] and the Parallel Voting System [PVS]) and the Proportional Representation [PR] Electoral Systems (and these are: the List PR System, the Mixed Member Proportional [MMP] System and the Single Transferable Vote System).⁴² The choice of a particular electoral system however will depend on the political realities esoteric to Malawi.

- (i) There was concern as to whether the FPTP system, as has been applied in Malawi, best serves the national interest.⁴³
- (ii) There was also concern about the management of elections in Malawi; especially issues in respect of vote-rigging and resolution of irregularities.
- (iii) In light of limited resources, whether it is not prudent to hold local government elections concurrently with parliamentary and presidential elections.

7. The Executive

Chapter VIII of the Constitution provides for the Executive generally. The main issues that were raised at the Conference in respect of the Executive were as follows-

(a) Qualifications of the Presidency

- (i) Whether the Constitution must provide for an upper age limit in respect of candidates for the Presidency. Currently, the Constitution, in section 80(6) (b), only provides for a minimum age limit of thirty-five years.⁴⁴

⁴⁰ The point was emphasized in the presentation of Temwa Nyirenda, SC.

⁴¹ See generally Venter (2006).

⁴² See Venter (2006).

⁴³ See the *Issues Paper*, p. 30.

⁴⁴ See the *Issues Paper*, p.31. See also Boniface Dulani (2006) "Chapter VIII of the Malawi Constitution Re-Considered: A Comparative Study of the Constitutional Chapter on the Executive in Malawi with five other Constitutions". Mimeo.

- (ii) Whether the Constitution must provide for a minimum educational qualification in respect of candidates for the Presidency.⁴⁵ It was suggested that the Constitution must provide for a minimum educational qualification of a Bachelor's degree in respect of all presidential aspirants.

(b) Disclosure of Assets

Section 213 of the Constitution provides for the requirement of disclosure of assets by the Presidency, members of Cabinet, Members of Parliament and senior public officers of specified grades. The point is whether this requirement must be satisfied, in respect of the elective offices, before the submission of nomination papers, or before taking oath of office or soon thereafter, and, if so, how soon.⁴⁶

(c) Political Party Allegiance

Where a President is elected as a candidate of a particular political party-

- (i) Whether that President can leave the party that sponsored him or her into office.⁴⁷
- (ii) In cases where the President remains a member of the party that sponsored him or her into office, whether he or she can hold any positions in that party.

(d) Rotational Presidency

Whether the Presidency must be made rotational on the basis of the three regions of Malawi.⁴⁸

(e) Tenure of the Presidency

Section 83(3) of the Constitution provides that the Presidency may serve in office a maximum of two consecutive terms. A number of issues were raised in respect of the provision. First, it was pointed out that in view of the possibility of an incumbent seeking to extend his tenure, the provision on tenure for the President must be an entrenched provision. Second, it was suggested that the wording of the provision must be further improved to make it clear that an incumbent can only serve in office for two terms only.

(f) Election and Removal of the First Vice-President

The other issue raised on the question of Presidency was whether the First Vice-President must be elected together with the President or he or she must be appointed by the President.⁴⁹

⁴⁵ See the *Issues Paper*, pp. 31–32.

⁴⁶ See the *Issues Paper*, p. 47. See also Dulani (2006).

⁴⁷ See Dulani (2006).

⁴⁸ See Dulani (2006) and the *Consultation Paper*, p. 47. Mutharika (2006) has suggested the scrapping of the three regions of Malawi altogether as there is no geographical or other logical basis for their present demarcation.

Conversely, the issue that then arose was whether a President must have power to remove a First Vice-President. The issue arose in light of the nature of the relationship that may emerge between an incumbent President and his or her Vice. Under the Constitution, an incumbent President cannot remove a First Vice-President.⁵⁰ An incumbent President has power to remove a Second Vice-President.⁵¹

(g) Impeachment of the Presidency

Impeachment of the Presidency is governed by section 86 of the Constitution. The issue that arose was whether impeachment procedures must be spelt out in the Constitution or in an Act of Parliament rather than in Standing Orders of Parliament which are subsidiary legislation.⁵²

(h) the Office of the Second Vice President

The issue that arose here is whether the office of the Second Vice President, as provided for under section 79 of the Constitution, must be retained in the Constitution or abolished.⁵³

(i) Size of Cabinet

The point was made that the size of Cabinet must be stipulated in the Constitution.⁵⁴

(j) The Office of the Attorney General

A number of concerns were raised in relation to the professionalism and independence of the Office of the Attorney General. It was pointed out that where an incumbent Attorney General aligns himself or herself with a particular political party his or her professionalism and independence is compromised and the Office tends to serve parochial political interests.

It was suggested that the Constitution must entrench the professionalism and independence of the Office of the Attorney General.⁵⁵

8. the Judiciary

⁴⁹ See the *Issues Paper*, pp. 35–36. See also Dulani (2006).

⁵⁰ See section 86(1) of the Constitution.

⁵¹ See section 86(3) of the Constitution.

⁵² See the *Consultation Paper*, pp. 45–46.

⁵³ See the *Issues Paper*, p. 29.

⁵⁴ See the *Issues Paper*, p. 34.

⁵⁵ Cf. section 98 of the Constitution.

Chapter IX of the Constitution provides for the Judiciary (or Judicature). The Conference was informed that the Judiciary has the role of safeguarding the fundamental values of the Constitution.⁵⁶ Hence, the Judiciary has the mandate to hear “all matters of a judicial nature.”⁵⁷

In respect of the Judiciary, the following issues arose–

(a) Tenure of Judges

Whether the retirement age of Judges must remain at the age of 65 years or it must be increased or indeed lowered.

Presently, there is disparity between the retirement age for Judges and that of magistrates; with the retirement age of the latter set at the age of 70 years.

(b) Office of the Deputy Chief Justice

Whether the Constitution must create the office of the Deputy Chief Justice.⁵⁸

(c) Composition of the Judicial Service Commission

Section 117 of the Constitution provides for the composition of the Judicial Service Commission. The present composition of the Commission has been deemed ‘Judiciary heavy’.⁵⁹ The issue raised was whether the composition of the Judicial Service Commission must be expanded to include persons from other disciplines other than law to ensure that the process of appointing judicial officers is more transparent.

(d) Establishment of a Constitutional Court

A number of submissions were made at the Conference calling for the establishment of a permanent Constitutional Court.⁶⁰ Presently, the High Court sits as an ad hoc ‘constitutional court’.⁶¹ It was pointed out however that the establishment of a Constitutional Court will require the amendment of section 103(3) of the Constitution which forbids the establishment of courts of superior or concurrent jurisdiction with the Supreme Court or the High Court.⁶²

(e) The Status of the Industrial Relations Court

It was pointed out that the Industrial Relations Court must be elevated to the status of a division of the High Court. The present status of the Industrial

⁵⁶ See Jane Ansah (2006) “The 1994 Malawi Constitution and the Role of the Judiciary”. Mimeo. See also Chigawa (2006). Mutharika (2006) has however cautioned against a “powerful” Judiciary.

⁵⁷ See subsection (2) of section 103 of the Constitution.

⁵⁸ See the *Consultation Paper*, p. 51.

⁵⁹ See the *Consultation Paper*, p. 49.

⁶⁰ See Hajat (2006), Martin (2006) and Tengtenga (2006). The Presentation from the Civil Society Political Platform also made the case for a Constitutional Court. Similar sentiments were made in plenary.

⁶¹ This follows the Courts (Amendment) Act, 2004, Act No. 2 of 2004, which allows a panel of three High Court Judges to preside over a matter requiring the interpretation or application of the Constitution.

⁶² Section 103 of the Constitution is an entrenched provision and can only be amended by referendum.

Relations Court, as a court subordinate to the High Court, was noted to be undesirable.

8. the National Compensation Tribunal

The issue raised in this respect was that the Tribunal has not completed the bigger part of the task for which it was established and that there is need to have its life time extended.

9. Conclusion

It was generally acknowledged that it was not possible for the Conference to tackle all the issues which were raised in the *Issues Paper* and the *Consultation Paper* respectively. A number of other pertinent observations also emerged from the Conference that were not envisaged or did not arise during the development of the *Issues Paper* and the *Consultation Paper*.

It was also acknowledged generally during plenary that the Constitution is the supreme law of the land. The Conference acknowledged further that events of the recent past do not augur well for the entrenchment of a democratic culture in light of the multiplicity and frequency of amendments to the Constitution.

In the end, the outcome of this first National Conference vindicates the concerns of the public at large because the concerns that were raised in the *Issues Paper* and the *Consultation Paper* largely turned out to be the concerns voiced by the participants and delegates at the Conference.

APPENDIX

SUMMARY OF THE PROCEEDINGS OF THE DAY (28th MARCH, 2006)

A. Presentation of the *Issues Paper* and the *Consultation Paper*

Janet L. Banda

The Presentation covered the issues arising out of the written submissions received by the Commission and through the consultation process undertaken by the

Commission. The presenter stated that the National Conference forms the second phase of the constitutional review process designed by the Commission. The next phase of the programme will entail the empanelment of a special Law Commission under section 133 of the Constitution. The basis of the appointment to serve as a Commissioner on the special Law Commission will be guided by the subject matter under review itself; in this case, the review of the Constitution. There shall be a second National Constitutional Conference later in the year where the tentative recommendations of the special Law Commission shall be presented for further feedback.

The presenter highlighted the issues captured in the *Consultation Paper* and the *Issues Paper*. The consultations have revealed the need for the procedure of the certification of the recommendations of the law reform process to ensure that parochial interests do not overwhelm the final text of the Constitution.

During plenary, the following emerged:

- Whether party funding must go directly to the constituency for maximum benefit by the constituents (*see the Consultation Paper at page 17*).
- Section 65 of the Constitution must remain in the Constitution to curb ‘fraud’ and bribes, prevent weakening of political parties and to prevent the re-emergence of the one party system.
- Whether the institution of the Law Commission will not form part of the review process considering that it is established under the Constitution.
- The doctrine of separation of powers ought to be clarified in the context of the procedure for Private Member’s Bills (*cf. sections 7 and 66 of the Constitution; pending the presentation by Professor Forsyth*).
- The need for clarity in relation to the right of privacy in the context of enforcement of anti-child labour laws and other related laws.
- The need to re-consider the capacity to marry on the basis of age in view of the (apparent) contradictions under the current constitutional set up.
- The need to re-visit the definition of ‘child’ to comply with international law.
- The need to critically examine the basis of national unity on national language.
- The need to examine the need for a national language in the light of freedom of culture under the Constitution.
- The need for the Speaker of the National Assembly to (independently) convene the Assembly.

B. Fundamental Values of the Constitution of Malawi

Dr. Msaiwale Chigawa

Dr. Chigawa identified six fundamental values which he locates, primarily, in section 12 of the Constitution. The six fundamental values are: (a) supremacy of the Constitution; (b) rule of law (or limited government); (c) respect for human rights; (d) democracy, election and responsible government; (e) transparency and accountability; and (f) respect for international law. The author emphasized the need to locate the fundamental values in the context of the political history of Malawi.

During plenary, the following emerged:

- It was pointed out that while the six fundamental values are critical for the constitutional development of Malawi, the core constitutional value ought to be the 'welfare of the people of Malawi'.

C. Towards a Community of Character: Constitutionalism in Malawi

Dr. James Tengtenga

The presenter looked at the Constitution from a moral (religious) perspective. He argued that in Malawi as a religious nation, be it Christian, Moslem or other, we have an imperative for 'goodness' that leads to peace, justice, prosperity and well-being for our nation.

The thrust of the constitutional process ought to be the pursuit of the 'good'. However, the presenter points out that the imperative for 'goodness' has been affected by 'sin' and consequently the proclivity to 'sin'.

Democracy, or indeed constitutionalism, ought to aim at achieving a community of justice and peace; what might be called *shalom*. Constitutionalism is a dynamic process towards the realization of the 'being'.

Constitution-making and the Constitution (as the text) must reflect the character of a community and its vision. It must set out the hope and obligations of a 'people' or a 'nation'. It must also help to build a community. Constitution-making ought to hinge on consultation as a tenet of transparency and accountability.

The 'political' must respect the consensus of the 'people' and must not serve self interests. The author also cited a number of examples of amendments to the Constitution that were 'selfish'. The author suggested enhancing the role of the Judiciary in safeguarding the Constitution through, for example, a Constitutional Court. Further, the author suggested that we need a community that is itself altruistic.

During plenary, the following emerged:

- Whether majoritarianism serves our democracy (constitutionalism) adequately.
- To the extent that a constitution is an instrument of choice and must reflect the values of the people of Malawi, how far can we make the Constitution truly Malawian?
- The need to examine the procedure on the certification of the recommendations of the Constitution to inculcate the culture of consultation.

In the absence of a well laid certification procedure, consultation may not reflect a 'culture' but rather 'window dressing'.

- Whether impeachment procedures should or should not be provided for under the Constitution. (*Quare* whether the enabling provisions on the Senate ought to be re-visited in light of, *inter alia*, impeachment procedures).
- Whether removal of the Presidency must be through referendum.
- Whether the 'recall provision' (*previously* section 64 of the Constitution) should or should not be re-introduced in the Constitution. (*Quare* the need for extensive provisions on the recall procedure.)

SUMMARY OF THE PROCEEDINGS OF THE DAY (29th MARCH, 2006)

A. Relationship Between the Legislature and the Executive: Building a Relationship Suitable for the Circumstances of Malawi

Professor Christopher Forsyth

Professor Forsyth pointed out that a fundamental question for the Conference is to determine the nature of Malawi's democracy; do Malawians elect a person as their representative or a political party? Hence, according to Professor Forsyth: (a) If the Malawi electorate favour persons, they will favour the 'recall provision' to be re-introduced in the Constitution to remove a non-performing representative; (b) If the Malawi electorate elect persons and not political parties, they will not be concerned about 'crossing the floor'; and (c) Likewise, if the president is elected in his or her personal capacity, party affiliation prior to his or her election will not matter.

The presenter then outlined the history of the doctrine of separation of powers. He emphasised that despite the historical appeal in the separate status, functions and duties of each of the three branches of government in instilling democratic governance, no constitution in the world would operate if the doctrine were applied absolutely.

Sections 7, 8 and 9 of the Constitution enshrine the separate functions of the Executive, Legislature and the Judiciary. In comparison, in England and Wales, until recently, the Lord Chancellor (who heads the Judiciary) was not only a Judge but also a member of the House of Lords (sitting as the Legislature) and a Cabinet Minister. The concept of responsible government currently practiced in the UK requires that the Executive must be responsible to the Legislature so as to account to the Legislature for its conduct of the nation's affairs. Hence, Cabinet Ministers have to be or become Members of Parliament. If the Executive loses the confidence of the House of Commons, it must resign.

In the United States of America, on the other hand, the doctrine is practised more deeply. The president cannot be impeached even if he loses the confidence of the legislature (unless he commits a very serious crime). The president and his or her Cabinet cannot double as members of Congress. The president may veto legislation but he or she may be overridden by two-thirds of each house of Congress.

The (Malawian) Constitution seems to suggest an American model but the practice as guided by the courts has favoured an application of the doctrine as practised in England to allow Cabinet Ministers to also serve as Members of Parliament. In Malawi, Ministers are accountable not to Parliament but to the President. There is therefore a substantial Executive presence in Parliament.

Ultimately, Malawi is a hybrid system with elements of the British, American and South African systems.

The presenter gave an overview of the French model, the American model and the British model. He however left the question of choice of the nature of the doctrine of separation of powers as applicable to Malawi for the Conference. The system that works well for Malawi depends on what degree of separation of powers is workable or desirable for Malawi.

During plenary, the following emerged:

- The need for the Constitution to be clear on the basis of the political system in Malawi; whether the system is primarily based on political parties or the emphasis is on individual persons.
- How does section 65 of the Constitution complement the political system in Malawi? Is the political system based on political parties or individual persons.
- Whether section 65 of the Constitution ensures political party allegiance and loyalty.
- Whether sections 62 and 65 of the Constitution complement each other.
- Whether section 65 of the Constitution is in conflict with section 32 of the Constitution (on freedom of association).
- Whether a 'recall provision' in the Constitution will ensure that Members of Parliament are accountable to the electorate.
- Whether a president elected into office on a political party ticket must relinquish all party portfolios he or she may have in the political party upon assuming the presidency.
- Whether only those Members of Parliament that get appointed to Cabinet posts must be the only ones to initiate amendments to the Constitution.
- Whether the Speaker must convene the Legislature independent of the President.

B. Chapter VIII of the Malawi Constitution Reconsidered: A Comparative Study of the Constitutional Chapter on the Executive in Malawi with five other Constitutions

Boniface Dulani

Mr. Dulani discussed Chapter VIII of the Constitution (on the Executive) and compared it to the relevant provisions under the Constitutions of Kenya, Nigeria, South Africa, Zambia and the United States of America respectively.

Mr. Dulani dealt with three specific areas in his comparative analysis; namely: (a) qualifications for presidential candidates; (b) election of the presidency; and (c) post-election matters.

Mr. Dulani stated that he focused on Chapter VIII of the Constitution because the Executive is the most well known branch of government.

(a) Qualifications of the Presidency

The presenter emphasised that the presidency is the highest office of the land. He is the first citizen and an ambassador for the Malawi nation and he or she should not embarrass Malawi when he or she represents Malawi at international or other fora.

The presenter observed that only the Constitution of Nigeria spells out minimum qualifications for presidential aspirants; a School Leaving Certificate Level or its equivalent. He pointed out that while it is important to consider education qualifications, we should bear in mind that some of the most ruthless leaders and worst dictators had been very well educated and therefore (administrative) experience is just as important.

In respect of age, the presenter observed that it is important to have a mature president and maturity comes with age. While most, if not all the constitutions looked at stipulate a minimum age requirement, none of them specify a maximum age. He further commented that in Malawi politics is dominated by what he calls a 'gerontocracy'; whereby old folk continue to dominate national politics and seem not ready to give up the reigns of power to a younger generation of politicians.

While all five constitutions under consideration stipulate a minimum age for the presidency (the Constitution of Nigeria sets the minimum age at the age of forty years while the other four sets it at thirty-five), the presenter argued that the determination of the minimum age is arbitrary and limiting. He questioned the justification for allowing persons to vote at the age of eighteen but refuse them to stand for presidency until they attain the age of thirty-five years. He felt that allowing persons to vote at the age of eighteen years suggests that society trusts them to be old enough to decide the future of their country.

The presenter also tackled the issue of disclosure of assets. In Malawi, the Constitution stipulates that the presidency must make a disclosure of their assets within three months of assuming office. In Nigeria, the Constitution requires a

president elect to disclose their assets before he or she assumes office. In Zambia, all presidential candidates are required to disclose their assets before contesting in presidential elections.

(b) Election of a President

The presenter observed that unlike Kenya, South Africa and Zambia, it is not clear under the Malawian Constitution what ought to happen if only one out of a number of presidential candidates qualifies to run for the presidency. The presenter asserts that there seems to be an ambiguity between section 80(1) and (2) of the Constitution and section 55 of the Parliamentary and Presidential Elections Act (Cap. 2:01). In Kenya, South Africa and Zambia, there is no need for an election. The candidate assumes office without contest.

In Nigeria, the candidate is required to obtain a minimum electoral vote.

The presenter also contended that there is need to heighten the 'majority provision' in respect of a winner of a presidential election. The presenter noted that all five Constitutions (seem to provide for) a simple majority. Under the Constitutions of South Africa and the United States there are elaborate procedures for the determination of a winner where there is a tie.

(c) Rotational Presidency

The presenter argued that the question of a rotational presidency in Malawi is pertinent because with the patronage nature of politics, we tend to give leadership on nepotistic and regional lines and others may never get the chance to become president. He pointed out however that none of the five constitutions make provision for a rotational presidency but there are in-built mechanisms requiring leaders to adopt national agenda. In Kenya and Nigeria, there is need for a minimum vote that presidential aspirants must attain in areas beyond their own region or province.

(d) Post-Election Matters

The presenter outlined what he perceives as gaps in the Constitution in respect of post-election matters. He stated that the Constitution is not clear as to what happens if a president-elect dies before assuming office. In Nigeria, the Constitution states that the vice president-elect assumes the presidency because he or she is elected together with the president. In Kenya, the Constitution provides that there must be a re-run of the elections because the vice president is appointed by the president rather than elected together with the president.

There is a lack of clarity in the Constitution in what determines the party that forms government. The other four Constitutions are also silent on this issue. (*Quare* which party would have formed government had Justin Chimera Malewezi, an independent presidential candidate, won the presidential elections of 2004). The presenter suggested a review of the terminology in Parliament.

The presenter also noted that the Constitution is silent as to what must when a president, who was elected on a political party ticket, resigns from the party that sponsored him or her.

In relation to the need for an acting President where the President is outside the Malawi, the presenter noted that in South Africa, the matter has been dealt with as a matter of routine. There is a clear list of who acts as president. In Zambia, the delegation must be in writing to be valid.

The presenter also noted that the question as to whether a president can or cannot fire his or her vice depends on mode of assuming the vice presidency. It is consequential to fire an appointed vice president than an elected one.

Finally, the presenter observed that the wording of section 83(3) of the Constitution (on tenure of the presidency) creates an ambiguity and needs to be further improved.

During plenary, the following emerged:

- Whether once elected, a President must resign from his or her political party (where he or she was elected on a political party ticket).
- Whether the Constitution must stipulate minimum educational qualifications bearing in mind that a person may be a suitable candidate for the presidency while only possessing informal educational qualifications.
- Whether the doctrine of separation of powers entails that the three branches of government are separate and equal or separate but not equal.
- The need for the Constitution to clarify what a 'public office' means.
- The need to re-visit the terminology used in our political system. The term 'ruling party' is a one-party system throw back.
- The Conference agreed that the Constitution must not stipulate a maximum age limit in respect to the presidency.
- Whether a rotational presidency may inculcate regionalism in Malawi.
- How must the Executive, Legislature and the Judiciary relate to each other?
- What ought to be the scope of private member's Bills?
- Whether in the Malawian context it is impossible to institutionalise the educational qualifications of presidential candidates.
- Whether the Constitution must compel political parties to be 'democratic' in the process of nominating or electing their presidential or parliamentary candidates.

C. The 1994 Malawi Constitution and the Role of the Judiciary

Honourable Justice Jane Ansah

Honourable Justice Ansah emphasized the role of the judiciary in safeguarding the fundamental values of the Constitution.

She asserted that the Constitution is the supreme law which needed to be safeguarded by an independent Judiciary.

She highlighted the different roles of the Executive, the Legislature and the Judiciary under the Constitution. The Constitution underpins the primacy of the jurisdiction of the courts on all matters of a judicial nature.

She lauded the judicial review procedure which the Judiciary has used in the determination of the constitutionality of legislation or amendments to the Constitution itself.

During plenary, the following emerged:

- Whether in light of section 60 of the Constitution, a warrant of arrest, an order of injunction or any other court order can be issued against a Member of Parliament or the office of the Speaker.
- Whether by virtue of section 91 of the Constitution (on immunity of the presidency), the Presidency in Malawi is above the Constitution and therefore creating a contradiction with section 5 of the Constitution (on supremacy of the Constitution).
- The need to re-visit the procedure on appointment of Judges.
- The need to re-visit the composition of the Judicial Service Commission.

D. Amendments to the Constitution since May 18th 1994

Anthony Kamanga, SC

The presenter stated that there have been nine Constitution (Amendment) Acts since 18 May 1994 which have affected some ninety sections of the Constitution. The amendments dealt with “correction of textual errors and ambiguities”; “improvement of the text”; “introduction of new substantive provisions to fill perceived gaps”; and “amendment of substantive provisions for political expedience or to address political realities”. The Amendment Acts are as follows: the Constitution (Amendment) Act, 1994 (Act No. 31 of 1994) (which, among others, created the office of the Second Vice President); the Constitution (Amendment) Act, 1995 (Act No. 6 of 1995) (which incorporated the recommendations of the Constitutional Committee); the Constitution (Amendment) Act (No. 2), 1995 (Act No. 1 of 1997) (which subjected the Director of Public Prosecutions to the general or special directions of the Attorney General and also introduced section 213 of the Constitution on disclosure of assets); the Constitution (Amendment) Act, 1998 (Act No. 38 of 1998) (which synchronized terms of office of the Presidency and Members of Parliament respectively); the Constitution (Amendment) Act, 1999 (Act No. 11 of 1999) (on the date of parliamentary and presidential elections); the Constitution (Amendment) Act, 2001 (Act No. 4 of 2001) (on abolition of Senate); the Constitution (Amendment) (No.2) Act, 2001 (Act No. 8 of 2001) (which amended section 65); the Constitution (Amendment) (No. 3) Act, 2001 (Act No. 13 of 2001) (which effected some of the recommendations of the Law Commission); and the Constitution (Amendment) (No.2) Act, 2003 (Act No. 4 of 2004) (which corrected a textual error by providing for “Defence Force of Malawi” instead of “Defence Forces of Malawi”).

The presenter also stated that there are two outstanding amendment Bills. First, the Constitution (Amendment) Bill, 2005 (Bill No. 1 of 2005) which seeks to effect amendments to entrenched provisions of the Constitution that do not “affect the substance or effect” of the Constitution. This Bill will, among other things, introduce a ‘Bill of Duties’ as a new subsection (2) to section 12 of the Constitution. The second Bill is the Constitution (Amendment) Bill, 2005 (Private Member Bill No. 2 of 2005) which seeks to amend section 83 of the Constitution in order to introduce a National Governing Council.

The presenter further stated that the Constitution (Amendment) Bill, 2002 (Bill No. 1 of 2002) which sought to amend section 83(3) of the Constitution to allow open terms for the Presidency was defeated in the National Assembly.

The Constitution (Amendment) Bill, 2002 (Bill No. 14 of 2004) which sought to amend section 83(3) of the Constitution to allow an incumbent President to serve in office for three consecutive terms was withdrawn by the Executive.

Finally, the Constitution (Amendment) (No. 2) Bill, 2004 (Bill No. 20 of 2004) which sought to extend the life of the National Compensation Tribunal was cancelled by the Executive.

During plenary, the following emerged:

- Whether the Constitution must be amended by Private Member’s Bills.
 - The presenter’s personal view is that the Constitution must not be amended by Private Member’s Bills. Constitutional amendments must be initiated by the Executive because amending the Constitution does not affect only a section of the population in Malawi.
- The need to make Bills proposing amendments to the Constitution public (*Quare* whether gazetting of bills is not serving this requirement).
- Whether the office of a Cabinet Minister must be regarded as a public office. [The dichotomisation of public office and political office is partly historical: *see* definition of “Minister” under the Constitution of 1966. The Supreme Court of Appeal in *Nseula*⁶³ merely endorsed this position. Under the Constitution of 1966, the President, Cabinet Ministers, Deputy Ministers and senior officers of parastatals were excluded from definition of “public officer”.]

E. Lessons from the Perspective of Court Litigation

Temwa Nyirenda, SC

The presenter dwelt on four sections of the Constitution as follows-

Section 40(2) of the Constitution

⁶³ The decision was made in the case of *Fred Nseula et al v the Attorney General* MSCA Civil Appeal No. 32 of 1997 (Malawi Supreme Court of Appeal (Unreported)).

The presenter observed that the requirement under the provision to fund political parties contradicts the view that a constituency is represented by an individual. The position under the provision also raises the question whether a Member of Parliament is accountable to the electorate or his or her political party.

Section 65 of the Constitution

The presenter observed that section 65 of the Constitution has a bearing on section 40(2) of the Constitution. The Malawi political system must be clear as to whether we entrench a political system based on political parties or individuals.

Section 76 of the Constitution

The presenter pointed out that the provision omits the management of free and fair elections as a key function of the Electoral Commission.

Section 83(3) of the Constitution

The presenter suggested that the provision on tenure of the Presidency must be one of the entrenched provisions of the Constitution in light of a history of attempted amendments to this provision.

During plenary, the following emerged:

- Section 8(1) of the Electoral Commission Act (Cap. 2:03) mandates the Electoral Commission to conduct free and fair elections.
- Whether party funding need not depend on the one-tenth requirement under section 40(2) of the Constitution.
- Whether section 40(2) of the Constitution is intended to inculcate a political party system for Malawi.

F. Elections and Electoral Systems in Emerging Democracies: A Case for Electoral System Re-Design in Malawi

Dr. Denis Venter

Dr. Venter first described the concept of constitutional liberalism; being the rule of law, separation of powers and protection of basic civil liberties of the individual. The presenter observed that the challenge for emerging democracies in Africa is the rise of illiberal democracies which take a rather mechanistic view of democracy as the periodic conduct of multiparty elections where the individual exercises his or her political freedom of choice.

The presenter outlined the need of governance in a polity. This entails reciprocity, trust and accountability as a prerequisite of governance. He went on to state that an election is a process and not an event. Elections are an important but not sufficient tenet of democratic governance.

The purpose of elections may be described as: legitimation (of a polity); alteration of the conditions of governance; confidence-building; provision of (political) stability; and public education.

The outcome of an election and the quality of election management generally will depend on the players involved such as an independent electoral commission and the political parties.

Dr. Venter identified nine main electoral systems which can be categorized in three broader categories: plurality-majority electoral systems; semi-proportional electoral systems; and proportional representation electoral systems. He emphasized that an electoral system re-design must meet the following criteria: representativeness; accountability; inclusiveness and accessibility; stability of government; development of a party system; and the ability to engender reconciliation. Any electoral system that is adopted must create a vibrant opposition that would assist the government. The First-Past-The-Post (FPTP) electoral system cannot be relied upon in Africa in the distribution of constituencies.

Dr. Venter then laid out the case for electoral system re-design in Malawi; stating that there is a general disenchantment and growing dissatisfaction and disquiet about the conduct of politicians and the conduct of elections generally. He suggested that Malawi may consider adopting the Two Round (or Run-Off) electoral system (TRS) or the Mixed-Member Proportional electoral system (MMP).

During plenary, the following emerged:

- Whether the MMP has curtailed vote rigging where it has been adopted.
- The need for the Electoral Commission to ensure that election management is handled unscrupulously. Hence, voter registration must be a continuous process and need not only be done just close to an election as a lot of electoral fraud is committed during such sporadic registrations.
- The Malawi Electoral Commission indicated that preliminary findings of its independent consultation also suggest that the MMP may be appropriate for Malawi.
- The Centre for Multiparty Democracy indicated that in their consultations, no electoral system was arrived at. However, political parties were asked which system would suit them. The unanimous conclusion was that the TRS (50+1) was appropriate for the presidency; PR system for parliamentary elections; and FPTP system for local government elections.
- Whether the MMP would work in Malawi in light of Malawi's high illiteracy levels.

**SUMMARY OF PROCEEDINGS
(30th MARCH, 2006)**

A. **The Bill of Rights: Human Rights under the Malawi Constitution**

Professor Gerhard Erasmus

The presenter pointed out that the Constitution is no ordinary law as it is the supreme law of the land. In this respect, a constitution must be drafted with an eye to the future; it has to be respected by the rulers and the ruled; it needs to be protected from numerous amendments through in-built mechanism. As much as possible, a polity must utilise statutes to address emerging realities rather than amending a constitution. The Judiciary can act as the guardian of a constitution. The quality of a constitution will determine the quality of governance in a polity.

The Bill of Rights in the Constitution is based on fundamental values such as human dignity and protection from abuse of power. A Bill of Rights is a means of promoting democracy.

The presenter also pointed out that the procedure for amending the Constitution must take into account the nature of the document and the consequences those amendments may bring if they were effected. Amendments must not dilute the effect of the Constitution. The presenter observed that sometimes solutions do not lie in amending the Constitution. It is also important to consider legislation as viable options to address particular issues.

The presenter further noted that while all public and private individuals and institutions interpret the Constitution all the time, the technical and binding interpretation of the Constitution is the exclusive jurisdiction of the Judiciary. Over time, the courts develop rules that are peculiar to constitutional interpretation.

During plenary, the following emerged:

- Whether there is need for a Bill of Duties in the Constitution.
 - The presenter pointed out all laws creating rights have a corresponding requirement for duties on the rights bearers themselves.
- Whether in the context of the right to economic activity, the State can impose bans on the sale of certain commodities [*Cf.* the tendency by local government authorities to impose bans on the sale of green maize during certain times of the year.]
- Whether section 65 of the Constitution contradicts section 33 of the Constitution (on freedom of conscience) to the extent that allegiance to a political party seems to supersede the freedom to exercise one's conscience.
- Whether nationality must be maintained for anti-discrimination under section 20 of the Constitution.

- The need to re-visit the provision on the right to property in light of heavy encroachment on public land and zoned areas.
- Whether anti-discrimination based on sex and race under section 20 of the Constitution reflects the reality in Malawi.

**B. Realization of Women’s Human Rights and Gender Justice:
Recommendations for a More Equitable Constitution**

Andrina Mchiela

The presenter delivered the paper on behalf of the Ministry of Gender, Child Welfare and Community Services. She observed that the ‘social construct’ of men and women in Malawi society is that the former are self reliable while the latter are submissive and timorous. She pointed out that these are the lived realities (through socialization and cultural practices) which have implications for women in terms of dependency on men; poor health (through malnutrition and sexually transmitted infections); domestic violence; poor education; discrimination in the workplace and society in general.

She noted that there is a commitment at state level to promote, protect and respect gender equality. In the Constitution, gender equality is the first principle of national policy (under the part on Principles of National Policy).

The presenter further observed that Malawi has demonstrated a commitment to international human rights instruments and has especially conventions, declarations and protocols on the promotion of women’s rights and welfare. Other subsidiary efforts have included the domestication at policy level of international obligations.

The presenter raised a number of issues and made a number of recommendations related to the rights of women and girls; namely, the need to re-visit concept of marriage by repute and permanent cohabitation; registration of marriage; the definition of ‘child’; negative cultural rights; freedom of religion in the context of the rights of women; participation of women in public life and decision making through the provision of quotas; affirmative action; witchcraft as a human rights issue; the need to provide for an elaborate right to health including sexual and reproductive health; and criminalization of sexual harassment.

During plenary, the following emerged:

- Whether the term ‘religion’ can be replaced with ‘faith’.
- Whether the minimum quota of thirty per cent for women for positions in the public sector is on the lower side.
- The need to accept women’s rights as human rights.
- Whether gender equality ought to be placed in the context of Malawi to take into account the sensitivities of Malawi society.

- The concept of marriage by repute and permanent cohabitation was clarified and it was pointed out that the concept is legal innovation by the courts meant to protect the rights of women and children.
- The need to re-examine ascendancy to traditional leadership to allow for participation of women in that sector.

C. **Review of the Constitution: Some Selective Thoughts**

Robert Martin

The presenter observed that a number of issues contained in his paper were already addressed by other presentations. He nonetheless made a number of observations relating to the Constitution.

He echoed the view that the Malawi constitutional model is hybrid in nature. In this respect, the doctrine of separation of powers has been problematic in Malawi perhaps because the model has not reflected the esoteric reality of Malawi society.

He noted that the Constitution assumes a presidency that is almost supreme. Modern governance is largely the product of checks and balances on the exercise of unbridled power by any person.

The presenter advocates for a strong executive which may be counter balanced by a strong office of a Prime Minister. [In this respect, the presenter drew parallels with the French Model].

The presenter pointed out the difficulties with the office of the First Vice Presidency. He observed that a First Vice President is not a 'President-in-Waiting'. The fact is that his role and personality are hardly issues in the election process. The fact that the office of the First Vice President is entrenched under the Constitution poses challenges where there is a vacancy in the office of the President and where there is an urge to remove an incumbent President. The presenter argued that the status quo may result in instability following a vacancy or removal of a First Vice President.

The presenter also pointed out that the issue of land tenure ought to be critically examined. He stressed that the nature of land tenure has implications for investment and ultimately the growth of an economy.

During plenary, the following emerged:

- Whether land tenure reform for purposes of economic growth is a form of 'land grabbing'.
- Whether Malawi must introduce provincial governance and administration.
- The need to prioritise environmental management issues.

- Whether meaningful environmental management hinges upon absolute ownership of land.
- Whether it is necessary to provide ethnic identity to the State.

D. Constitutional Fortress: Mirage or Miraculously Possible?

Rafiq Hajat

The presenter stated that constitution making must reflect realities and aspirations of people. He highlighted the basic structure of a constitution as being sovereignty; supremacy; the form of government; and separation of powers. Hence, constitutionalism entails a strict adherence to the principles of the Constitution. The review of a constitution is deliberate stocktaking and analysis of causes underlying the success or the failure to adhere to the Constitution.

The presenter made a comparison of the preambles to the Constitutions of Malawi and South Africa and observed that the omission of 'We' in the Preamble to the Constitution of Malawi takes away the ownership of the supreme law. He further observed that Preamble also makes no reference to social justice.

The presenter noted that the supremacy of the Constitution is not respected. Laws have not been reviewed for compliance with the Constitution. He attributed the lack of review of the laws to lack of human and financial resources and also to the technical requirement of standing for the enforcement of rights.

He suggested that there is need for a fast track Judiciary since current arrangement lacks mechanism for speedy disposal of constitutional matters.

He also pointed out that flexibility of the amendment procedure has led to abuse. Civil society has played a crucial role in constitutional law development and achievement of checks and balances.

The presenter also advocates for the re-introduction of the Senate as a further mechanism for checks and balances in Malawi constitutionalism.

During plenary, the following emerged:

- The need for non-discrimination in the appointments made by the President.
- The need to guarantee the independence of accountability in the Constitution.
- Whether Parliament may reserve seats for workers' representatives.
- Whether the Constitution must provide for a maximum age for presidency

- Whether ex-presidents must retire from active politics.
- Whether the National Anthem must be re-visited; especially the three vices: hunger, disease and envy.
- Whether the introduction of 'We' in the Preamble to the Constitution will merely reflect adoration of the South African model.

E. Undue Restrictions: Media Perspectives of the Constitution of Malawi

Charles Simango

The presenter focused on protection of freedom of expression and speech of the 'Fourth Estate'. The presenter noted that there are several international treaties on the protection of the 'Fourth Estate' including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the African Charter on People's and Human Rights, the American Convention on Human Rights and the European Convention of Human Rights.

The presenter observed that international treaties need to be domesticated for them to have a force law. He also noted that a number of statutes do not conform to the Constitution and have negative implications for the enjoyment of the right to freedom of expression.

While the Constitution provides for freedom of expression, it is not clear to what extent the freedom may be limited under the law.

During plenary, the following emerged:

- The need for a systematic law revision exercise to ensure that all laws conform to the Constitution. [The Protected Flag, Emblems and Names Act (Cap. 18:03) was cited as a notorious relic of one partyism.]
- The need for balanced coverage by the public media.
- Whether there is restraint on access to information through restraint on private radios.
- The need to entrench democracy through the media.

SUMMARY OF THE DAY
(31st MARCH, 2006)

A. Towards a More Manageable Constitution

Professor A. Peter Mutharika

The presenter underscored the fact that a constitution must be clear, concise and flexible. It must be based on neutral, objective principles. A constitution must not aim at punishing or rewarding individuals or groups. It must reflect the wishes of the people.

The presenter observed that a better understanding of the doctrine of separation of powers is to recognise that it requires a 'division of responsibilities' on the part of the key players in a polity; namely, the Executive, the Legislature and the Judiciary. There is need for consultation and transparency before decisions are made especially where such decisions require the interface of the Executive and the Legislature

The presenter also pointed out that there must be a balance between the independence of the Judiciary and the principle of accountability. This entails that the Judiciary must exercise restraint by invoking the 'political question' doctrine. The converse may lead to the emergence of an enormously powerful Judiciary.

The presenter also asserted that term limitations are a better mechanism to facilitate the accountability of members of Parliament rather than a 'recall provision'. [The presenter drew parallels with the system of term limitations in Mexico.]

The presenter also stated that for purposes of fostering national unity in Malawi, regional demarcations are not necessary in Malawi because there is no geographical or other logical justification for their existence.

Finally, in order to inculcate a democratic culture in Malawi, the law may regulate intra-party democracy. The political parties may therefore be compelled to be democratic through mechanisms of party funding or registration.

During plenary, the following emerged:

- Whether the detail in the Constitution reflects a lack of confidence and trust of political leaders.
- The need to develop a constitution based on neutral, objective principles and not necessarily based on personalities.
- The need to recognise NGOs as part of the democratic process (*Quare* whether the Non-Governmental Organisations Act, Act No. 6 of 2000, affects the spirit of a democratic culture.)
- Whether a constitutional court is necessary for Malawi.

- Whether the recall provision must be re-drafted if it is to be re-introduced in the Constitution to guard against abuse.
- The Judiciary has a mandate to interpret the Constitution especially in the use of public funds for political parties.
- Whether the courts ought not to move on their own motion in relation to constitutional matters.
- Whether integrity is as much important as educational qualifications in relation to qualification for presidency.
- Whether traditional leadership must be recognised under the Constitution.

B. Presentations from the Floor

The Youth

In their presentation, the youth made the following observations:

- The 'Youth' must be recognised under the Constitution as a vulnerable group.
- 'Youth' must be defined as all persons between the age of eighteen and twenty five years.
- The age of capacity for marriage must be synchronised to be the age of eighteen years.
- The need for tertiary education to be a right and not a policy matter.
- The need to lower the minimum age for qualification for presidency to cater for the participation of the 'Youth' in politics.

FEDOMA

In the presentation on behalf of persons with disabilities, FEDOMA made the following observations:

- People with disabilities must be involved in decision making process.
- The need to introduce quota system for people with disabilities for the purposes of parliamentary elections and local government elections. [Examples of countries that have quota systems include South Africa, Lesotho and Zimbabwe.]
- The need for a special provision in the Constitution for the protection of persons with disabilities.

- The need for entrenchment of the rights of persons with disabilities in the Constitution in the same way that the rights of women and children are specially entrenched.
- The need for Government to affirm its commitment to international legal instruments relating to persons with disabilities.
- The need to take into account the concerns of persons with disabilities in national policies.
- Whether 'incapacity' under section 87 of the Constitution may affect persons with disabilities.
- Whether sign language must be used in Parliament to allow the full participation of persons with disabilities in politics. [It was argued that this is not in conformity with section 13(g) of the Constitution. Hence, a person with hearing disability who qualifies to be elected as a member of the National Assembly will not be able to take an active part in the proceedings of Parliament.

Parliamentary Women Caucus

The presentation of the Caucus made the following observations:

- The need to put in place mechanisms in the Constitution to ensure gender equity and gender equality.
- The need to provide for quota systems for the participation of women in politics. [The Caucus proposed a minimum of 50 per cent quota for women as proposed by the African Union.]
- Whether the law must regulate intra party democracy to foster the participation of women in politics.

Reserve Bank of Malawi

The presentation from the Central Bank made the following observations:

- The Central Bank must have operational independence. The Bank would professionally advise Government on matters of fiscal policy.
- The Bank must have a reporting requirement to a relevant committee of Parliament.
- The independence of the Bank must also entail security of the tenure of the Governor.

[The observations are in line with the SADC Model Law on the independence of central banks.]

Civil Society

The grouping made the following observations:

- Whether the President must be able to resign voluntarily.
- Whether there must be a provision to enable the creation of a government of national unity.
- Whether Cabinet Ministers must be allowed to double as Members of Parliament.
- Whether Cabinet Ministers and Members of Parliament must disclose their assets before they are sworn into office.
- Whether the minimum age for the presidency must be reduced to the age of thirty years.
- Whether the Speaker may be eligible for appointment as a Cabinet Minister.
- The Constitution must provide for a minimum educational qualification for Members of Parliament which must be a diploma.
- Whether the number of constituencies in Malawi must be reduced.
- The need to retain section 65 of the Constitution.
- The need to provide for the office of a deputy Chief Justice.
- Whether the retirement age for members of the Judiciary must be the age of eighty years.
- Whether there must be established a Constitutional Court.
- Whether the Industrial Relations Court must be elevated to the status of the High Court.
- Whether the electoral system must be changed to the proportional representation.
- The need to base the composition of the Electoral Commission on professionalism.
- Whether the Chairperson of the Electoral Commission need not be a Judge.
 - Whether the Electoral Commission must report to Parliament.
 - Whether there must be tripartite elections for the President, Parliament and Local Government.

- Whether political party funding under section 40 of the Constitution must be made to all political parties represented in Parliament.
- Whether political parties must disclose sources of their funding.
- Whether the Electoral Commission must preside over primaries of political parties.
- Whether the Constitution must provide for an economic policy. [The Constitution, in section 13(n), provides for a market economy.]
- Whether the appointment of the Commander of the Malawi Defence Force and the Inspector General of Police must follow the same procedure.
- The need to re-visit the mandate of the Ombudsman and the Malawi Human Rights Commission.
- Whether the Anti-Corruption Bureau must be established by the Constitution rather than an Act of Parliament.
- The need to recognise the role of traditional authorities.
- Whether the powers of the Law Commission must be enhanced.
- Whether the certification of the review of the Constitution must be put to a referendum and not through Parliament.
- Whether section 207 of the Constitution must be re-examined *vis-à-vis* categories of land.
- Whether the appointment of the Inspector General of Police must not be confirmed by the National Assembly to avoid politicisation of the process.
- Whether the Constitution must provide for educational qualification for the Commander of the Malawi Defence Force and the Inspector General of Police.
- Whether the National Assembly must have power to scrutinize the appointment and removal of Senior Officers of the Malawi Defence Force.

Gender Coordination Network

The Network made the following observations:

- The need for section 20 of the Constitution to include HIV and AIDS as status on which discrimination is prohibited.
- The concept of marriage by repute or permanent cohabitation must provide for a minimum length of cohabitation or reputation necessary for a marriage of this nature of at least three years.

- The need to amend the Malawi Citizenship Act to allow foreign husbands of Malawian women to attain Malawi citizenship if they so wish.

Presentation by Traditional Authorities

The presentation by Traditional Authorities was made by Paramount Chief Lundu, Inkosi ya Makosi Gomani and Inkosi Kapingo Sibande. The Traditional Authorities made the following observations:

- The need for the Constitution to recognize the institution of chieftaincy.
- Whether the Senate must be re-introduced in the Constitution.
- The need to introduce Chichewa as a National Language.
- Whether the law must recognise witchcraft in Malawi and address the same accordingly.
- The need to maintain the death sentence under Malawi law.
- The law must not provide for a maximum age limit for the presidency. [The minimum age for presidency must be maintained at the age of thirty five years.]
- Whether the Speaker must not have absolute powers to declare a seat vacant.
- The need for customary land to be recognized and protected by the Constitution.
- The need to re-introduce the 'recall provision'.
- The need to provide for procedures of the impeachment of the presidency in the Constitution.
- Whether the National Assembly can only debate the impeachment of the presidency after a referendum has been conducted.

Faith Groups

The Constitution must make reference to 'God' or 'the Almighty'.

Association for Dialogue and Reconciliation

The Association made the following observation:

- The need for the introduction of the Unity and Reconciliation Act to act as a permanent collective bargaining structure responsible for: (a) healing

wounds of the past; (b) observing the present administrative strategies; and (c) addressing issues of reconciliation of all Malawians.

Malawi Law Society

The Society made the following observations:

- There is a danger of abuse if the period before an accused is brought before a court to satisfy the requirement of section 42 of the Constitution is enlarged.
- Section 65 of the Constitution is not in conflict with section 32 of the Constitution. The philosophy behind the provision is to avoid the re-emergence of the one party State.
- The present structures of the office of the Attorney General allows for the smooth operation of the office. There is a danger in reducing the powers of the Attorney General. Lawyers can, from time to time, be assigned to the office of the Speaker.
- There is need to discuss the 'recall provision' in the context of section 12 of the Constitution.

LIST OF PRESENTERS

LIST OF PRESENTERS

1. Honourable Justice Jane ANSAH

The Honourable Justice Jane Mayemu Ansah holds a Ph.D. degree from University of Nottingham which she obtained in 2002; a Master of Laws degree (in International Human Rights Law) from the School of Oriental and African Studies of the University of London which she obtained in 1996; and a Bachelor of Laws degree from the University of Malawi which she obtained in 1978.

She was appointed a Judge of the High Court in October, 1997. She is the Chairperson of the National Compensation Tribunal (from 2003 to date).

She has written articles and conference papers on human rights, women's rights and customary law in Malawi.

2. Mrs. Janet BANDA

Mrs. Janet Laura Banda is the Chief Law Reform Officer at the Malawi Law Commission. She holds a Master of Laws degree from Georgia State University and a Bachelor of Laws with Honours degree from the University of Malawi.

3. Dr. Msaiwale CHIGAWA

Dr. Msaiwale Chigawa is a Lecturer in Law at the School of Law, University of Malawi, Chancellor College. He holds a Ph.D. degree from the University of Oxford; a Master of Laws degree from the University of Cambridge; and a Bachelor of Laws with Honours degree from the University of Malawi.

He has written a number of articles and conference papers on human rights, public international law and constitutional law.

4. Mr. Boniface DULANI

Mr. Boniface Dulani is a Lecturer in the Department of Political and Administrative Studies at the University of Malawi, Chancellor College. He holds a Bachelor of Arts

with Honours degree (in Politics) from the University of York which he obtained in 1999 and a Master of Philosophy degree (in Development Studies) from the University of Sussex which he obtained in 2002.

He is the current Head of the Department of Political and Administrative Studies (from March, 2005 to date). He has also served as the acting Dean of the Faculty of Social Sciences (from October, 2005 to March, 2006).

Mr. Dulani has written a number of conference papers and journal articles on democracy, elections and politics in Malawi including a monograph on the parliamentary and presidential elections of 2004 in Malawi. He has also been engaged as a consultant on divers programmes.

Outside the academia, Mr. Dulani is a Trustee and Chairperson of the Appointments and Disciplinary Committee of the Malawi Blood Transfusion Trust Services (from March, 2003 to date); a Board Member of the Consumers Association of Malawi (from August, 2001 to date); and a Committee Member of the Civil and Political Rights Thematic Committee of the Malawi Human Rights Commission (from March, 2006 to date). He has also been a Member of the Taskforce overseeing the implementation of the proposed Multi-Sector Regulatory Framework for the energy, transport, communications and water sectors in Malawi (from November, 2002 to July, 2004).

He is interested in good governance, democracy, the political economy of development, rural development, international relations, property rights, community participation, social funds, education and development, decentralization, democracy and development and non-state actors in development.

5. Prof. Gerhard ERASMUS

Professor Gerhard Erasmus holds a Doctor of Laws degree from the University of Leiden which he obtained in 1979; a Master of Arts degree from the Fletcher School of Law and Diplomacy in association with the Harvard School of Law which he obtained in 1979; a Doctorandus Iuris from the University of Leiden which he obtained in 1976; a Bachelor of Laws degree from the University of Orange Free State which he obtained in 1973; and a B.Iuris degree from the University of Orange Free State which he obtained in 1971.

Professor Erasmus is an Advocate of the Supreme Court of South Africa. He has lectured at the University of Stellenbosch from 1979 to 2005 where he made Professor in 1984. He has published widely in the fields of human rights, international trade law, international environmental law, public international law and human rights.

Professor Erasmus was an Advisor (on the drafting of the Namibian Constitution) to the Namibian Constitutional Assembly in 1990; a member of the Panel of Constitutional Experts (on the drafting of the South African Constitution) to the South African Constitutional Assembly in 1994 and 1995; and an Advisor (on the revision of the Malawi Constitution) to the Malawi Government through the institution of the Malawi Law Commission.

Since 2006, Professor Erasmus is the Senior Research Fellow at the Trade Law Centre for Southern Africa; where he is a founding member.

6. Prof. Christopher FORSYTH

Professor Christopher Forbes Forsyth holds a Ph.D. degree from the University of Cambridge which he obtained in 1984; a Bachelor of Laws degree from the University of Cambridge which he obtained in 1977; a Bachelor of Laws degree from the University of Natal which he obtained in 1975; and a Bachelor of Science degree in Mathematics and Mathematical Statistics from the University of Natal which he obtained in 1972.

Prof. Forsyth is a Barrister-at-Law, a member of the Inner Temple and an Advocate of the Supreme Court of South Africa. He was elected an Academic Bencher of the Inner Temple in 2003. In 2004, he was appointed a Recorder on the South Eastern Circuit in the England and Wales legal system.

He has lectured at the Universities of Natal, Canterbury, Cape Town and Stellenbosch. He made Professor of Public Law and Private International Law at the University of Cambridge in 2005. He is currently the Director of the Centre of Public Law at the University of Cambridge. He is also an Extraordinary Professor in Public Law at the University of Stellenbosch (from 2002 to date).

Professor Forsyth has published extensively in the area of public law and private international law. He is the co-author of the seminal book, *Administrative Law* (with Professor William Wade). The book is published by the Oxford University Press and it is in its ninth edition.

He has been engaged as Advisor to, among others, the Governments of the United Kingdom, Hong Kong, South Africa and Malawi on questions of constitutional and administrative law.

7. Mr. Rafiq HAJAT

Mr. Mohamed Rafiq Mussa Hajat was born on 14th September, 1955 at Queen Elizabeth Central Hospital in Blantyre, Malawi.

Mr. Hajat completed the Inter. B.A. in political science at Saint Xavier's College, Bombay, India in 1975; and the GCE "A" Levels in Political Science and Economics at Openshaw, Manchester, United Kingdom in 1978.

He has served in various capacities in the Malawi Chamber of Commerce and Industry; and has served on the Boards of Small Enterprise Development Organisation of Malawi and the Development of Malawi Traders Trust.

Mr. Hajat is the Founder of the Institute of Policy Interaction, where he has been the Executive Director since 2001.

8. Mr. Anthony KAMANGA, SC

Mr. Anthony D. Kamanga, SC, holds a Master of Laws degree from the University of Toronto, Ontario, Canada (class of 1982) with a strong bias of international financing; a Bachelor of Laws degree from the University of Malawi (class of 1978); and a Post-Graduate Diploma in Legislative Drafting obtained from Ottawa, Canada (class of

1993). He has acted, for more than twenty years, as legal counsel to the Malawi Government in, among other things, international financial transactions with the World Bank Group, the African Development Bank and other multilateral financial institutions.

Mr. Kamanga is currently employed as the Chief Parliamentary Draftsman in the Ministry of Justice and Constitutional Affairs of the Government of Malawi where he heads the Legislative Drafting Section.

Mr. Kamanga was appointed Senior Counsel by the State President of the Republic of Malawi in 2004.

9. Mr. Robert MARTIN

Mr. Bob Martin is a Chartered Accountant and a Consultant Economist. He works for Economic Resources Limited. He holds a Diploma in Mercantile Law and a Diploma in Economics from St. Andrews University, Scotland.

He is a professional Member of Chartered Accountants (Scotland), Chartered Public Accountants (Malawi) and the Chartered Institute of Taxation.

Mr. Martin has vast experience in corporate restructuring, privatization and the agricultural and manufacturing sector.

He has served on the boards of various public sector and charitable organisations. He is currently a Member of the Board of Directors of Nedbank.

10. Mrs. Andrina MCHIELA

Mrs. Andrina Mchiela is the Principal Secretary in the Ministry of Gender, Child Welfare and Community Services.

Mrs. Mchiela made a presentation to the Conference on behalf of the Ministry of Gender, Child Welfare and Community Services in her capacity as the Principal Secretary of that Ministry.

11. Prof. A. Peter MUTHARIKA

Professor Mutharika is a Professor of Law at Washington University School of Law where he also chairs the doctoral degree programme. He has taught the Law of Contracts, Administrative Law, Agency and Partnerships, Legal Writing, International Law, International Organizations Law, International Trade Law, International Investment Law, International Development Law and International Diplomatic Law.

He has also taught at Universities in Tanzania, Uganda and Ethiopia, and at Rutgers University, Newark, New Jersey in the United States of America. He has also been a Visiting Professor at the London School of Economics.

Professor Mutharika has served on various International Boards and Committees as well as Editorial Boards and Committees of International Journals. Amongst these has been his services on the International Advisory Board of New Community Corporation (the world's largest community development corporation) of Newark, New Jersey.

Professor Mutharika attended the Conference in his personal capacity.

12. Mr. Temwa NYIRENDA, SC

Mr. Temwa Chanaichi Nyirenda, SC, holds a Bachelor of Laws degree from the University of Malawi which he obtained in 1975. He briefly worked as a State Advocate in the Ministry of Justice of the Government of Malawi before joining the private practice in 1976. He is a partner in Nyirenda & Msisha (Law Firm).

Mr. Nyirenda has served the Malawi Law Society in various capacities including as its Chairman for the term 1993/1994.

He was a member of the Public Affairs Committee in 1992 and 1993, and a member of the National Consultative Committee in 1993 which, among other things, oversaw the drafting of the Constitution of 1994.

He was appointed Senior Counsel by the State President of the Republic of Malawi in 2004.

13. Mr. Charles SIMANGO

Mr. Charles Simango was born on 15th May, 1968 in Mchinji district in central Malawi; an eleventh born child in a catholic family of fourteen siblings.

He graduated from the University of Malawi, Chancellor College in 1993 with a Bachelor of Arts degree majoring in Philosophy. He has served as Editor-in-Chief of the award-winning 'The Democrat' newspaper and Blantyre Newspapers Limited, publishers of the 'Daily Times', 'Malawi News' and 'Sunday Times' newspapers respectively. He now serves as the National Director of the National Media Institute of Malawi (NAMISA).

Mr. Simango owns a print media production house, the Mass Media Centre, where he designs and implements print communication solutions for key development and corporate organisations.

He is currently studying for a Masters degree in Communication for Development at the University of Malawi, Chancellor College.

14. Bishop James TENGATENGA

The Right Reverend James Togatenga is the Bishop of the Anglican Diocese of Southern Malawi. He holds a Master of Divinity degree and a Doctor of Divinity (Honoris Causa) degree from the Episcopal Theological Seminary of the Southwest; and a Ph.D. degree from the University of Malawi where his thesis focused on the relationship between church, state and society through an analysis of Anglican

ecclesiology in Malawi. He also holds a Post-Graduate Diploma in Community Work from the University of Birmingham.

The Bishop has been a Lecturer at the Zomba Theological College, the University of Malawi and Clare College, Cambridge; and a Visiting Professor at the Episcopal Theological Seminary of the Southwest. He has also been a Commissioner of the National AIDS Commission.

15. Dr. Denis VENTER

Dr. Denis Venter obtained a Bachelor of Arts with Honours degree and a Master of Arts degree, both in political science, from the University of Pretoria. He also obtained a D.Litt. et Phil. Degree in political science from the University of South Africa, Pretoria.

He served as the Executive Director of the Africa Institute of South Africa until June, 1999. Since then, he is the Managing Director of Africa Consultancy and Research based in Pretoria, South Africa.

In 1981, he founded the Journal of Contemporary African Studies where he was its first editor and later consultant editor. In 1993, he became the first President of the African Studies Association of South Africa (ASASA), and from 1995 to 2005, he served as the Vice-Chairman of the International African Institute (IAI), based in London, England.

Dr. Venter has also served as the Assistant Director of the South African Institute of International Affairs (SAIIA) where he served on its National Executive Council from 1971 to 1995. He was a member of the Council of South African Political Studies Association (SAPSA) from 1983 to 1989. He is a member of the African Studies Association of the United Kingdom (ASAUK); of the Royal African Society, London; and of the African Association of Political Science (AAPS).

He has also worked as a Lecturer in the Department of Political Science and International Politics, University of Pretoria and Chief Researcher in Politics and International Relations and Head of Academic Programmes at the Africa Institute of South Africa, Pretoria.

Dr. Venter was also a Visiting Professor at the *Institut d'Etudes Politiques de Bordeaux*, France in 1991, and again in 1994; a Visiting Research Fellow at the Afrika-Studiecentrum, Leiden, The Netherlands in 1996; and a Visiting Professor and Research Fellow at the Centre for African Studies, University of Mumbai, India in 1998.

LIST OF MODERATORS

1. Mr. Yusuf ALIDE

Mr. Yusuf Alide joined the Ministry of Education as a teacher in 1986. In 1987, he joined the University of Malawi as a Staff Associate and Tutor in the Technical Education Department at the Polytechnic. He rose through the ranks of the college structure to the position of Vice Principal in 2001. He is currently Acting Principal of the Polytechnic, a position he has held since 2005.

Mr. Alide holds Master of Education degree from Brunel University, United Kingdom.

2. Honourable Justice Richard BANDA, SC

Honourable Justice Richard Allen Banda, SC, (retired) is the immediate former Chief Justice of the Malawi Supreme Court of Appeal and the High Court of Malawi. He is a Barrister-At-Law and a member of the Gray's Inn, London.

He has served the Government of Malawi in different capacities including service as the Director of Public Prosecutions, the Solicitor General, the Minister of Justice and Attorney General and the Minister of Local Government. He has also served as the President of Commonwealth Association of Magistrates and Judges. He was a Member of the Committee of Eminent Lawyers who reviewed the draft statute which constituted the African Court of Justice.

Justice Banda is an Honorary Fellow of the Society of Advanced Legal Studies at the University of London; an Honorary Bencher of Gray's Inn, London; and President of the Commonwealth Secretariat Arbitral Tribunal.

3. Prof. Zimani KADZAMIRA

Mr. Zimani David Kadzamira, born in 1941, is a Professor of Government and is currently the Vice Chancellor of the University of Malawi (since August 2005). He graduated from Princeton University in 1966 with a Bachelor of Arts degree in Politics and attained his Ph.D. degree in the same field from the University of Manchester in 1974. Since joining the University of Malawi in 1966 as an Assistant Lecturer, he has risen through the academic ranks and has held various positions including those of Head of Department, Dean, Vice Principal and Principal of Chancellor College (from 1981 to 1990) as well as Bunda College of Agriculture (from 1990 to 1992).

Between 1992 and 1994, he was seconded to the Foreign Service and had the honour of serving as the first Malawi Ambassador to Japan and, on a non-residential basis, the Republics of China and South Korea, before returning to the University of Malawi.

Over the years, he has also served on national committees and boards including the Malawi Broadcasting Corporation, the National Research Council, the Tobacco Control Commission and Kamuzu Academy. At regional and international levels, he was the Secretary General of the Supreme Council of Sport in Africa (Zone 6) (from 1987 to 1992) and a Trustee of the World Fish Centre (from 1990 to 1995).

His research interests have ranged from the local politics and the management of agricultural development programmes to issues related to elections, political parties, governance and consolidation of democracy. He has also facilitated and coordinated

various studies, workshops, courses and conferences on human rights, training of young politicians, political parties and the parliamentary training programmes.

4. Mr. Tony KANDIERO

Mr. Kandiero has served Malawi in various capacities, which include twenty-three years as a broadcaster with the Malawi Broadcasting Corporation, an organisation he led as its General Manager between 1980 and 1988.

In 1988, he was appointed High Commissioner to Zimbabwe and Botswana. In 1990, he was appointed High Commissioner to the Court of St. James, London, United Kingdom. On a non-residential basis, he was also Ambassador to Finland, Norway, Portugal, Sweden and Spain. In 1993, he returned to Malawi's Home Service where he was assigned to head the Ministry of Foreign Affairs. He was later appointed General Manager of Malawi Portland Cement Company pending retirement.

Although he officially retired from public service in 1995, he nevertheless continued to be honoured with various appointments, which include, serving as Special Assistant to the then President of the Republic of Malawi, Dr. Bakili Muluzi. In 2000, Mr. Kandiero returned to the Foreign Service as Ambassador to the United States of America. On a non-residential basis, he was also Ambassador to Argentina, Colombia and Mexico.

Mr. Kandiero has served on several Boards at home and abroad. Currently, he is a life Honorary Member of the International Eye Foundation, which is based in Washington, D.C., and in Malawi, he is, among other things, a Trustee of Press Trust.

He holds a Master of Philosophy degree (in Management Studies) obtained at Henley, United Kingdom.

5. Rev. Dr. Winston KAWALE

Dr Winston Kawale joined the Malawi Civil Service in 1968 and worked as a Teacher / Head Teacher up to 1976.

He was then called to pastoral work and worked as a Parish Minister under CCAP Nkhoma Synod between 1981 and 1984. Between 1988 and 1992 and 1992 to 2000, he served as the Education Secretary for CCAP Nkhoma Synod.

Dr. Kawale briefly worked with Bible Society of Malawi as National Coordinator on the Chichewa Bible Project between 2000 and 2001.

He went back to CCAP Nkhoma Synod in 2001 as General Secretary, a position he holds to this day. He is also current Vice President of Reformed Ecumenical Council which is headquartered in Grand Rapids, Michigan, United States of America. He is a member of the Council of the University of Malawi.

Dr Kawale is a distinguished scholar in theology as exemplified by the fact that he holds Doctorate of Theology, obtained from the renowned University of Stellenbosch in South Africa.

6. Dr. Edrinnie KAYAMBAZINTHU

Dr. Edrinnie Elizabeth Lora Kayambazinthu is an Associate Professor in English specialised in language planning issues. She holds a Ph.D. degree in Linguistics from La Trobe University, Melbourne, Australia. She has been employed with the University of Malawi as a Lecturer in the English Department at Chancellor College since 1981.

Apart from teaching and research, Dr. Kayambazinthu has held a number of administrative positions both at Chancellor College, where she teaches, and the University of Malawi as a whole. She is the current Dean of the Faculty of Humanities (from 2002 to date) after working as head of the English Department for five years (from 1997 to 2002). She has served as a Senate Representative on the Council of the University of Malawi under two separate terms; first from 1999 to 2001 and from 2003 to date.

She has also served as a board member of some local and international human rights organizations such as the Open Society Initiative of Southern Africa (OSISA). She has published both journal articles and a monograph on the language situation in Malawi. Her consultancy and research work have been in areas of language use; translation; governance and human rights; information, education and communication (IEC); gender; political communication (to both members of parliament and young politicians) and development communication.

7. Mr. Kapote MWAKASUNGULA

Mr. Kapote Mwakasungula holds Bachelor of Arts with Honours degree and a Master of Arts degree (both in Political Science and Public Administration) from the University of Dar-es-Salaam.

He worked for the Government of Tanzania from 1970 to 1978 when he quit Government and joined the University of Dar-es-Salaam as a Lecturer in Public Administration and Management to undergraduate and graduate students. He rose to the position of Senior Lecturer.

From July, 1993 to May, 1994, he was part of the National Consultative Council (NCC) and the National Executive Committee (NEC) which, among other things, drafted the Constitution of 1994.

He has served as Malawi's High Commissioner to Zimbabwe and Botswana.

Mr. Mwakasungula is the author of *The Rural Economy of Tanzania: A Critical Analysis* (Christian Michelsen Institute, Bergen: 1994) and a monograph on *Government and Administration in Tanzania: from German Times to Nyerere* (Christian Michelsen Institute, Bergen: 1989).

8. Prof. Peter MWANZA

Professor Peter Mwanza is currently the Vice Chancellor of Mzuzu University.

He obtained his Bachelors and Masters, and Doctorate degrees from the Universities of London and Ohio State respectively. He was the first Malawian Academic to teach in the University of Malawi where he rose in the ranks and became the first Malawian Principal of Chancellor College; way back in the early seventies.

While at Chancellor College, he participated in national activities especially the promotion of the role of science and technology in development. He was also instrumental in the establishment of the National Research Council of Malawi.

Professor Mwanza took a sabbatical and went to work with the United Nations where he was Director for Natural Resources, Environment and Science and Technology Programmes for Africa.

He returned home after fourteen years and joined colleagues in the establishment of the Mzuzu University.

9. The Very Rev. Dr. Silas NCOZANA

The Very Rev. Dr. Silas Ncozana was educated in Malawi, United States of America, Canada and the United Kingdom coming out with Ph.D. degree from Aberdeen University.

He has worked as an ordained Minister of Religion from 1968 within the CCAP Synod of Blantyre and as its General Secretary from 1985 to 1995. He is also a former Moderator of the General Assembly of the CCAP.

Rev. Dr. Ncozana is a Visiting Fellow at Princeton Seminary and Pittsburgh Seminary in the United States of America, and a Lecturer in Church History at the University of Fort Hare in South Africa.

In 1998, he was appointed Malawi's High Commissioner to Tanzania and in 1999 Ambassador to Germany with non-resident accreditation as Ambassador to Austria, Denmark, Switzerland, and the Vatican (Holy See).

He is currently the Principal at the Parallel Theological Training Program in Zomba, southern Malawi.

Rev. Dr. Ncozana was instrumental in the founding of the Public Affairs Committee and is a veteran member in the political transformation of Malawi in the period from 1992 to 1994.

10. Mr. Ron NKOMBA

Mr. Ronald Norman Levi Nkomba joined the Malawi Civil Service in August, 1969 and, after working in the Office of the President and Cabinet and the Ministry of Foreign Affairs (then Ministry of External Affairs), was in 1978 appointed as the Malawi High Commissioner to Kenya.

He returned from Kenya in August, 1981 and served as Permanent Secretary for the Ministries of Local Government, of Transport and Communications, and of Health. In August 1985, Mr. Nkomba was appointed as Secretary for External Affairs until he opted for early retirement in February, 1990.

In December, 1991, Mr. Nkomba was appointed as the Malawi Ambassador to the Federal Republic of Germany with non-resident accreditation as Ambassador to Austria, Denmark, Switzerland, and the Vatican (Holy See). Before the appointment, Mr. Nkomba had worked as Chairman of the National Coffee

Authority and as a National Expert in the UNDP-Funded Consultancy on the Malawi Civil Service Home Ownership Scheme.

Mr. Nkomba returned from Germany in March, 1995 and in September of the same year was appointed Chairman of the Working Committee on the Establishment of Mzuzu University. Currently, he is the Executive Director of the Lilongwe-based Mzuzu University Trust Fund.

Mr. Nkomba has worked closely with the Law Commission and the Malawi Human Rights Commission on many interview panels and was a Commissioner on the special Law Commission on the Technical Review of the Constitution in 1998.

11. Mrs. Mary NKOSI

Mrs. Mary Catherine Nkosi was born a number of years ago; on 10th November, 1950.

Mrs. Nkosi is a banker and is currently the Deputy Governor of the Reserve Bank of Malawi. She is the first woman ever to serve in that capacity.

She holds a Bachelor of Science degree from the University of Malawi which she obtained in 1973. She also holds a Post-Graduate Diploma in Management Studies from the Polytechnic of Central London which she obtained in 1981.

Mrs. Nkosi worked with National Bank of Malawi for twenty-two years (from 1973 to 1995) where she was the first graduate to be employed by the Bank and the first woman to be appointed Bank Manager.

From May, 1995 until 2000, she was the Chief Executive Officer of FINCOM. Upon the acquisition of majority shareholding in FINCOM by NedBank, she became the Executive Director of NedBank until April, 2003 when she assumed the office of Deputy Governor.

Mrs. Nkosi was also the first woman to serve as the President of the Bankers' Association of Malawi for two terms. She served as an executive director of the COMESA Bankers' Association for six years until April, 2003. She has served on several boards of directors of various companies and legal entities in Malawi, including the Privatisation Commission, Air Malawi Limited, Press Agriculture Limited, Women's World Banking, MEDI Trust, Alexander Forbes and Vanguard Assurance Company Limited.

In a nobler task - by her own rating - Mrs. Nkosi serves in the Kingdom of God as the Assistant Pastor responsible for Administration and Finance at Living Waters Church, Lilongwe Branch.

12. Mrs. Dorothy NYASULU

Mrs. Dorothy Grace Nyasulu is the incumbent Chairperson of the Malawi Human Rights Commission.

She holds a Masters degree in Women's Law from the University of Zimbabwe which she obtained in 2006. She also holds a Bachelor of Science degree in Nursing from the University of Malawi which she obtained in 1994.

Mrs. Nyasulu has worked as a Nurse and Nurse Manager in the public and private sectors, and a Lecturer in nursing at the Nkhoma School of Nursing. She has also worked as the Gender Project Director for CIDA and before joining CIDA, as a Trainer in Action AID and National Family Planning Council of Malawi respectively.

She has a passion for constitutionalism and the protection and promotion of the rights of vulnerable groups.

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1. Honourable Justice Andrew NYIRENDA

The Honourable Justice Andrew Nyirenda holds a Master of Laws degree (in Public International Law) from the University of Hull, England which he obtained in 1985 and a Bachelor of Laws with Honours degree from University of Malawi which he obtained in 1980.

He was appointed a Judge of the High Court of Malawi in June, 1994. He is currently the Judge President for the Lilongwe District Registry of the High Court and the Supervising Editor of the Malawi Law Reports (from 2003 to date).

Justice Nyirenda also served as the Director of Public Prosecutions in the Attorney General's Chambers in the Ministry of Justice of the Government of Malawi from 1992 to 1994.

He has written extensively on human rights, criminal justice and criminal law. In 2002 and 2003, he was a Hubert Humphrey Fellow at the Washington College of Law, American University, Washington, D.C.

Justice Nyirenda served as the deputy Chairperson of the special Law Commission on Criminal Justice Reforms as that Commission reviewed the Traditional Courts Act (Cap. 3:03).

2. Honourable Justice Anaclet CHIPETA

The Honourable Justice Anaclet Chipeta holds a Master of Laws degree (in Civil Liberties and Human Rights) from the University of Leicester which he obtained in 1996 and a Bachelor of Laws with Honours degree from the University of Malawi which he obtained in 1980.

He was appointed a Judge of the High Court of Malawi in 2000.

Justice Chipeta has also served as the Chief State Advocate and Chief Legal Aid Advocate in the Ministry of Justice of the Government of Malawi.

He was adjunct Lecturer in Criminal Law, and Evidence, Advocacy and Ethics in the School of Law, University of Malawi, Chancellor College.

Most recently, Justice Chipeta served as the Chairperson of the special Law Commission on the Review of the Legal Aid Act (Cap. 4:01).

3. Dr. Blessings CHINSINGA

Dr. Blessings Darlo Blondie Chinsinga holds a Ph.D. degree (in Development Studies) from the University of Mainz which he obtained in 2005; a Master of Philosophy degree (in Development Studies) from the University of Cambridge which he obtained in 1998; and a Bachelor of Arts degree (in Public Administration) from the University of Malawi which he obtained in 1995.

Dr. Chinsinga is a Senior Lecturer in the Department of Political and Administrative Studies at the University of Malawi, Chancellor College.

His areas of core competence and research interests include: decentralisation and poverty reduction, governance and institutional analysis, globalization and regional integration, local level politics particularly the interface between modern and traditional political processes and constitutions, targeting development interventions, rural livelihoods and development.

4. Dr. Mustafa HUSSEIN

Dr. Mustafa Kennedy Hussein holds a D. Litt. et Phil. degree from the University of Johannesburg which he obtained in 2006; a Master of Arts degree (in Public Administration) which he obtained from the Rand Afrikaans University in 2000; and a Bachelor of Commerce degree (in Business Administration) (which he obtained in 1994), a Post-Graduate Diploma in Management Studies (which he obtained in 1992) and a Diploma in Public Administration (which he obtained in 1983), all from the University of Malawi.

He is a Senior Lecturer in the Department of Political and Administrative Studies of the University of Malawi, Chancellor College where he teaches Human Resource Management, Industrial Relations and Research Methods.

His research interests are in governance, industrial relations, human resource management and development administration.

5. Dr. Edge KANYONGOLO

Dr. Fidelis Edge Kanyongolo holds a Ph.D. degree from the University of East Anglia which he obtained in 2000; a Master of Laws degree from the University of Cambridge which he obtained in 1990; and a Bachelor of Laws with Honours degree from the University of Malawi which he obtained in 1986.

Dr. Kanyongolo is a Senior Lecturer in Law in the School of Law, University of Malawi, Chancellor College where he teaches Constitutional and Administrative Law and Jurisprudence. He was the Head of Department (from 1994 to 1996) and Acting Dean (from 1994 to 1995) in the School.

He has written articles, book chapters and conference papers on, and has been engaged as a consultant in, human rights, governance, media law, constitutional law and theory, and agrarian reform.

In 2003, Dr. Kanyongolo (together with T. Maliyamkomo) edited a book entitled *When Political Parties Clash* (Dar-es-Salaam: Tema Publishers).

6. Dr. Augustine MAGOLOWONDO

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He is the Programme Officer for GTZ Forum for Dialogue and Peace in Malawi.

He has practical experience in good governance, democracy, decentralization, human rights and conflict management.

7. Mrs. Linda ZIYENDAMMANJA

Mrs. Linda Ziyendammanja holds a Bachelor of Laws with Honours degree from the University of Malawi which she obtained in 1996.

She is a partner in Lawson & Co. (Law Firm).

She has served as the Secretary of the Malawi Law Society (for the term 2005/2006) and the President of the Women Lawyers' Association (for the term 2005/2006).

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