



## **MALAWI LAW COMMISSION**

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CAPITAL HOTEL, LILONGWE**

***AMENDMENTS TO THE CONSTITUTION  
SINCE 18<sup>TH</sup> MAY, 1994***

***BY***

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AMENDMENTS TO THE CONSTITUTION  
SINCE 18<sup>TH</sup> MAY, 1994

PRESENTATION AT  
THE NATIONAL CONSTITUTION REVIEW  
CONFERENCE

AT

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## 1. INTRODUCTION

The Constitution of the Republic of Malawi (otherwise referred to as the “Constitution”), enacted by the Republic of Malawi (Constitution) Act, 1994<sup>1</sup> came provisionally into force on 18<sup>th</sup> May, 2004,<sup>2</sup> and definitely came into force on 18<sup>th</sup> May, 1995<sup>3</sup>.

The Constitution has, since 18<sup>th</sup> May, 1994, been amended by nine Constitution (Amendment) Acts, and these amendment have affected over ninety sections of the Constitution (as adopted on 18<sup>th</sup> May, 1994).<sup>4</sup> The amendments to the Constitution include correction of textual errors and ambiguities identified after the adoption of the Constitution, as well as improvement of the text of the Constitution, and the introduction of new substantive provisions to fill perceived gaps; but also the amendment of substantive provisions of the Constitution for reasons of political expedience or to address political realities.

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<sup>1</sup> Act No. 20 of 1994

<sup>2</sup> section 212 of the Constitution

<sup>3</sup> section 2 of the Republic of Malawi (Constitution) Act, 1995 (Act No. 7 of 1995)

<sup>4</sup> In addition there are outstanding several proposed amendments to the entrenched provisions of the Constitution proposed in the Report of the Law Commission on the Technical Review of the Constitution published in the *Gazette* on 16<sup>th</sup> November, 1998, which was tabled in Parliament on 4<sup>th</sup> December, 1998. These proposed amendments have been republished as Constitution (Amendment) Bill, 2005, (Bill No. 1 of 2005). There is also outstanding a Private Member’s Bill, Constitution (Amendment) Bill, 2005 (P.M.B. No. 1 of 2005) published on 7<sup>th</sup> October, 2005.

This presentation seeks, to highlight, chronologically, some of the amendments effected to the Constitution since its adoption on 18<sup>th</sup> May, 1994, as well as unsuccessful proposed amendments and outstanding proposed amendments to the Constitution.

## 2. AMENDMENTS TO THE CONSTITUTION

### A. Republic of Malawi (Constitution) (Amendment) Act, 1994<sup>5</sup>

The Republic of Malawi (Constitution) (Amendment) Act, 1994, contains the first set of amendments to the Constitution, and was passed while the Constitution was still provisionally in force.

This Act created the office of Second-Vice President; and sections 79 and 80 were amended, respectively, to establish the office of the Second Vice President and to empower the President, where he considers it desirable in national interest so to do, to appoint a Second Vice President.

In addition, the Act amended section 83 to provide that the term of office of the First Vice President and the Second Vice President shall be five years, or up to the President's five year term of office, whichever is sooner.

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<sup>5</sup> Act No. 31 of 1994.

B. Constitution (Amendment) Act, 1995<sup>6</sup>

The second set of amendments to the Constitution, effected by the Constitution (Amendment) Act, 1995, include amendments relating to recommendations of the Constitution Committee which had been set up under section 212 of the Constitution while the Constitution was provisionally in force.<sup>7</sup>

The Constitution (Amendment) Act, 1995, among other things-

- qualified the State's obligation, under section 40, to provide funds to political parties with more than one-tenth of the national vote in Parliament by, in effect, providing that funding should be made available "where necessary".
- limited the disqualifications of persons to be elected as Members of Parliament under section 51 (c ) and (g) to convictions for crimes involving dishonesty or moral turpitude and convictions relating to the election of the President or Members of Parliament that occurred within seven years.

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<sup>6</sup> Act No. 6 of 1995.

<sup>7</sup> The Constitution (Amendment) Act, 1995 effected amendments to sections 40, 51, 56, 83, 77, 80, 86, 87, 88, 94, 101, 111, 126, 140, 146, 147, 154, 184 and 210, and repealed section 64, of the Constitution.

- repealed the section 64, the “recall of members provision”.

Section 64 of the Constitution provided as follows -

*“Recall of members* 64.- (1) *Every member of the National Assembly shall be liable to be recalled by his or her constituency in accordance with this section.*

(2) *A member of the National Assembly shall be subject to recall by his or her constituency where a petition has been upheld by the Electoral Commission where the petitioner -*

(a) *is a registered voter in the constituency that the member being recalled has been elected to represent;*

(b) *has proved on the balance of probabilities, that there is a sufficient proportion of the electorate within that constituency, being not less than half of the total of registered voters, who desire that the seat representing that constituency should be contested in a by-election.*

(3) *Where there has been a successful petition of recall in accordance with subsection (1), the decision of the Electoral Commission shall be notified to the Speaker of the National Assembly who shall, on such notification, declare the seat vacant and a by-election shall be announced.”.*

- introduced a requirement, in section 73 (1), that the President must, in respect of Bills presented to him for assent, signify assent or withholding of assent within 21 days, and, in section 73 (3), that if any Bill is again passed by the National Assembly within three

months (and not six months) of the President withholding assent, then the Bill shall again be presented to the President for assent.

- limited the disqualifications of persons to be elected as President and Vice President under section 80 (7) (c) and (g) to convictions for crimes involving dishonesty or moral turpitude and convictions relating to elections of the President or Members of Parliament that occurred within seven years.
- amended section 86 (1) to require that the President and the First Vice President, as the case may be, shall be removed from office on indictment and conviction by impeachment; and in section 86 (2), deleted paragraph (c) which provided that “*the Speaker shall preside over proceedings of indictment and the Chief Justice shall preside over trial on impeachment*”.
- amended section 88 (3) to require the President and members of the Cabinet, within three months from the date of election or appointment, as the case may be, to fully disclose all their assets, liabilities and business interests, and those of their spouses, and further that the disclosure be made in a written document to be delivered to the Speaker of the National Assembly, who shall upon

receipt deposit the document with such public office as may be specified in the Standing Orders of Parliament.

- limited the disqualifications of persons to be appointed Ministers under section 94 (3) (c) and (g) to convictions for crimes involving dishonesty and moral turpitude and convictions relating the election of the President or Members of Parliament that occurred within seven years.
- required that the appointment of the Director of Public Prosecutions by the President under section 101 shall be confirmed by the Public Appointments Committee of Parliament.
- established, under section 147, the Local Government Service Commission.
- required that the appointment of the Auditor General by the President, under section 184, be confirmed by a majority of the members of the National Assembly.
- in section 210, extended the establishment of the Senate to after May, 1999.



C. Constitution (Amendment) (No.2) Act, 1995<sup>8</sup>

The Constitution (Amendment) (No.2) Act, 1995, among other things –

- amended section 101 (2) to provide that in exercise of the conferred on him or her by Constitution or any other written, the Director of Public Prosecutions shall be subject to the general or special directions of the Attorney General (but shall otherwise act independently of the direction or control of any other authority or person and in strict accordance with the law).
- introduced new provision as section 213, requiring, in addition to the President and members of Cabinet, that Members of the National Assembly, the Senate, and public officers and senior officers of statutory bodies as shall be specified by the National Assembly, within three months from the date of his or her election, nomination or appointment, as the case may be, to fully disclose all his or her assets liabilities and business interests and those of his or her spouse held by him or her or on his or her behalf.
  - the disclosure to be in a written document delivered to the Speaker of the National Assembly who shall deposit the

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<sup>8</sup> Act No. 1 of 1997. The Bill in respect of this Act was published in 1995 and was passed by Parliament on 20<sup>th</sup> December, 1996; the Act was published on 11<sup>th</sup> February, 1997.

document at a public office specified in the Standing Orders.

- the National Assembly by resolution is required to specify the public officers and grade of senior officers to whom section 213 applies.<sup>9</sup>

D. Constitution (Amendment) Act, 1998<sup>10</sup>

Up to the date of the passing of the Constitution (Amendment) Act, 1998, in November, 1998-

- section 67 provided that the tenure of the National Assembly shall be five years from the date of its swearing in, and that the National Assembly shall thereafter stand dissolved until a new National Assembly is elected.
- section 83 (1) provided the term of office the President shall be five years.

Accordingly, both the National Assembly and the President held office for five years from the date of the swearing in of members of Parliament and the President, respectively.

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<sup>9</sup> The National Assembly is yet to specify the public officers and grade of senior officers to whom section 213 applies.

<sup>10</sup> Act No. 38 of 1998.

The first National Assembly under the new Constitution was sworn in on 29<sup>th</sup> June, 1994 and the first President under the new Constitution was sworn in on 21<sup>st</sup> May, 1994. The tenure of the National Assembly and the tenure of the President consequently, expired on different dates, namely 28<sup>th</sup> June, 1999, and on 20<sup>th</sup> May, 1994, respectively.

The consequences of this was that parliamentary and presidential elections in 1999, and such elections in subsequent years could not be held on the same date or dates as was the case with the general elections in 1994.

In order, among other things, to remedy this practical difficulty and to ensure that the 1999 parliamentary and presidential elections, and subsequent parliamentary and presidential elections, are held simultaneously, and further in order to allow candidates (particularly candidates for parliamentary elections) sufficient time to campaign, the Constitution (Amendment) Act, 1998 -

- replaced section 67 with a new provision –
  - which provided for the dissolution of the National Assembly on 20<sup>th</sup> March in the fifth year after its election, and the holding of parliamentary elections on a Tuesday in the third week of May, (or if it is not practicable for the polling to be held on the Tuesday in the third week of May, the polling shall be held on a day, within

seven days from that Tuesday, appointed by the Electoral Commission).

- enables the President to reconvene the National Assembly between the period of its dissolution and a general election if the President is of the opinion that a constitutional crisis or emergency has arisen which requires urgent legislation or consideration by the National Assembly.
- amended section 80 (1) to expressly provide that presidential elections shall be held concurrently with parliamentary elections.
- replaced section 83 (1) with a new provision which in effect extended the term of the President from five years from the date of administration of the oath of office until his or her successor has been sworn in.
- replaced section 83 (2) with a new provision aligning the term of office of the First Vice President and the Second Vice President to that of the President.

E. Constitution (Amendment) Act, 1999<sup>11</sup>

The Constitution (Amendment) Act, 1999 further amended section 67 (1) in 1999 when it became apparent that, due to logistical problems, the 1999 parliamentary and presidential elections could not be held on the date(s) provided for in the Constitution as amended in (November, 1998), by providing that those elections should be held on a day not later than 15<sup>th</sup> June, 1999, appointed by the Electoral Commission.

F. Constitution (Amendment) Act, 2001<sup>12</sup>

The Constitution (Amendment) Act, 2001 in effect abolished the Senate as a second Chamber of the Malawi Parliament.<sup>13</sup>

G. Constitution (Amendment) (No. 2) Act, 2001<sup>14</sup>

The Constitution (Amendment) (No.2) Act, 2001 amended section 65, which deals with crossing the floor, to in effect extend the application of that provision to members of Parliament who “join any other political party (not represented in

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<sup>11</sup> Act No. 11 of 1999.

<sup>12</sup> Act No. 4 of 2001.

<sup>13</sup> The Act amended sections 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 59, 60, 61, 63, 66, 86, 89, 189, 212 and 213, and repealed sections 68, 69, 70, 71 and 72, of the Constitution to remove from the Constitution all references to the Senate.

<sup>14</sup> Act No. 8 of 2001.

the National Assembly) or association or organization whose objectives or activities are political in nature".<sup>15</sup>

H. Constitution (Amendment) (No. 3) Act, 2001<sup>16</sup>.

The Constitution (Amendment) (No. 3) Act, 2001 amended the Constitution in order to effect some of recommendations of the Law Commission on the Technical Review of the Constitution, appointed pursuant to section 133 of the Constitution contained in the report of the Law Commission published in the *Gazette* on 16<sup>th</sup> November, 1998, which was tabled in Parliament on 4<sup>th</sup> December, 1998.<sup>17</sup>

The Act, among other things-

- amended section 49 (2) in order to clarify the majority required to pass a Bill into an Act of Parliament.

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<sup>15</sup> The extension of the application of section 65 enacted by this amendment was declared unconstitutional by the High Court by Justice Chipeta in Registered Trustees of the Public Affairs Committee v Attorney General, Civil Cause No. 1861 of 2003 (High Court, Principal Registry (Unreported)).

<sup>16</sup> Act No 13 of 2001.

<sup>17</sup> The terms of reference of the Law Commission on the Technical Review of the Constitution were –

- (a) to identify overlaps and repetitions between and within sections and Chapters of the Constitution;
- (b) to check for consistency and accuracy throughout the text of the Constitution; and
- (c) to make textual and editorial suggestions as to how any overlaps and inconsistencies identified might be corrected.

- amended section 50 (1) by reducing the quorum for the National Assembly from “two-thirds” to “one-half plus one”.<sup>18</sup>
- amended section 51 (2) by, among other things, extending disqualification on grounds of fraud to local government elections as well and not only to elections of the President and Members of Parliament.
- amended section 51 by adding thereto a new subsection (3) which makes it clear that appointment as a Minister or Deputy Minister in accordance with section 94 (1) of the Constitution shall not be construed to be an appointment to public office or to be public appointment, and thus, removing any doubt that a Minister or Deputy Minister is not disqualified from holding the office of Member of Parliament.<sup>19</sup> .
- amended section 59 to ensure clarity of the terms “session, meetings and sittings” of Parliament.<sup>20</sup>

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<sup>18</sup> The requirement of a quorum of “two-thirds” is considered to be too high and capable of rendering Parliament unworkable if for whatever reason the quorum of two-thirds is not achieved. This amendment is, therefore, intended to promote the good government of Malawi by enabling Parliament to commence its business with a quorum which can easily be formed without compromising its deliberations and decisions.

<sup>19</sup> This reflects the long standing practice of appointing Ministers and Deputy Ministers from Parliament, without requiring them, to resign first, as Members of Parliament.

<sup>20</sup> In orthodox usage a *meeting* of Parliament is a period of some time during which several *sittings* (often daily) of Parliament take place; a session is a period usually of one year within which several *meetings* take place. Consequently, the word “meetings” in section 59 (1) replaced the word “session” wherever it

- amended section 60 (3), with respect to the power of the National Assembly to conduct investigations and where necessary subpoena any person to appear before it and its committees, to give the National Assembly power to hold a person who has disobeyed a subpoena, in contempt of the National Assembly or committee.
- amended section 87 to eliminate a logical difficulty.<sup>21</sup>
- amended section 88 by creating out of subsections (3), (4) and (5) of that section a new section 88A titled “Prevention of conflict of interest of the President and Cabinet”
- amended section 113 (1) to ensure that where for any reason the Chief Justice will not perform the functions of his or her office there should be no doubt that the most senior judge should perform those functions until the Chief Justice has resumed his or her functions.

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appeared. Furthermore, the marginal note was altered to read “Meetings, sittings and session”. Similarly, in section 59 (2), the word “sittings” was deleted and replaced by the word “meetings” since it could not have been the intention to make reference to “sittings” in view of the explanation in this paragraph. A new subsection (3) was also added to section 59 to require the President, in terms of the usual and long standing practice, to open the sessions of the National Assembly.

<sup>21</sup> It is considered illogical for the Constitution, in section 83 (4), to provide that in the event of the Presidency becoming vacant through death or resignation, the Vice-President shall assume the office of President but when the vacancy is occasioned by incapacity for more than one year a Presidential election is required (as subsection 87 (5) specified). The amendment rectified this logical difficulty by making similar provisions to those of section 83 (4) where a vacancy is occasioned by incapacity for more than one year.



- amended the proviso to section 118 by providing that appeals against decisions of the Judicial Service Commission shall lie to the High Court, and not immediately to the Supreme Court of Appeal<sup>22</sup>
- amended section 121 to make it clear that while the Ombudsman is required to be completely independent of the interference or direction of any other person or authority, he or she is, nevertheless, answerable to Parliament.
- amended section 122 (2) (f) to clarify that a serving Ombudsman may be re-appointed for a further term of office.<sup>23</sup> .
- amended sections 133 and 134, respectively, by providing for a fixed five-year term of office of the Law Commissioner in keeping with the constitutional position of similar offices such as those of the Director of Public Prosecutions,<sup>24</sup> Ombudsman,<sup>25</sup> Inspector General of Police<sup>26</sup> and Chief Commissioner of Prisons<sup>27</sup>.

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<sup>22</sup> This is so because judicial review of administrative decisions made by public institutions is vested in the High Court in the first instance and only thereafter does it lie to the Supreme Court of Appeal on appeal.

<sup>23</sup> That section as it was then worded, appeared to preclude the appointment of a serving Ombudsman for a further term.

<sup>24</sup> section 102 (1) of the Constitution.

<sup>25</sup> section 128 (1) of the Constitution.

<sup>26</sup> section 154 (3) of the Constitution.

- amended section 147
  - ♥ to clarify that the words “local government officers” in subsections (1) and (3) were, in fact, intended to mean “local councillors” since it clearly seems not to have been the intention that local government officers, who form the professional, technical and administrative personnel of local government authorities will be elected to their offices<sup>28</sup>.
  - ♥ to provide for a fixed five-year term for local government authorities.<sup>29</sup>
- amended section 149 by rectifying a possible problem created by subsection (2) (b) of that section as it then read. It was considered that the National Local Government Finance Committee would not have or should not have responsibility for the audit of local government authorities, nor could be expected that the Committee would have within its own establishment the capacity to carry out

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<sup>27</sup> section 166 (2) of the Constitution.

<sup>28</sup> In practice professional, technical and administrative personnel of public institutions are appointed and not elected to their offices.

<sup>29</sup> This is also consistent with the fixed five-year term of the National Assembly with the only difference that, as provided for elsewhere, local government elections shall take place later than elections to the National Assembly.

task in respect of all these many local government authorities. The amendment thus restricted the Committee's power to examine and supervise the accounts of local government authorities and to require the accounts to be audited by an auditor appointed by the local government authority with the approval of the Committee [unless otherwise provided by an Act of Parliament].

- amended section 150 to provide for what is to be done with revenues collected by a local government authority which it is not permitted to retain.<sup>30</sup>
- amended section 151 to empower the Minister responsible for Local Government to convene a meeting of local government authorities (as is required under subsection (1) (a) of that section) within thirty days of the election for local government authorities for purposes of nominating a person to be a member of the National Local Government Finance Committee.<sup>31</sup>

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<sup>30</sup> The section, as it then read, was silent on this point and the amendment required that any surplus of revenue collected by local government authorities shall be paid into the Consolidated Fund [unless otherwise provided by an Act of Parliament.]

<sup>31</sup> As then worded, section 151 did not provide for the manner in which the caucus of the Committee will be convened or held.

The amendment also required that there should be representation of the Ministry of Finance on the National Local Government Finance Committee.<sup>32</sup>

- amended sections 152, 153, 154, 157 and 158, respectively, by deleting the reference therein to the term “Malawi Police Force” wherever it appears and substituting, therefor, the term “Malawi Police Service”.<sup>33</sup>

In addition the Act amended section 157 (1) (c) by inserting in an appropriate place in that subsection the words “save as provided in subsection (1) (c ).” in order that it is not inconsistent with subsection 157 (3) which precludes membership of the Police Service Commission by “a police officer” when the intention under subsection 1 (c) is clearly that the Inspector General or other senior officer shall be a member of that Commission.

- replaced section 159 with a provision which ensures that the Defence Forces of Malawi are constituted by or under the Constitution itself, and by necessary implication, prohibiting the

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<sup>32</sup> This is in line with the requirement in the Government of involving the Ministry of Finance in important financial matters and in response to a recommendation contained in a UNDP Study on Local Government Finance.

<sup>33</sup> The use of the term “Malawi Police Service” is consistent with modern trends and reflects the way the community should perceive the police and the way the police should perceive themselves.

establishment of any other military force than the Defence Forces of Malawi constituted by or under the Constitution.

- amended section 160 (1) to prohibit the employment of any part of the Defence Forces outside Malawi for more than 90 days, except with the authority of the National Assembly.<sup>34</sup>.
- amended section 161 to provide for words clearly establishing the office of the Commander of the Defence Forces and the appointment of the Commander of the Defence Forces by the President.

The Act further made the Commander accountable to the Minister responsible for Defence (in whom is also vested political responsibility for the Defence Forces) in the day-to-day management of the Defence Forces.<sup>35</sup>

The Act also amended section 161 by making new provision to address the absence in the Constitution of a provision for the

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<sup>34</sup> This is to ensure proper accountability for the decision to deploy troops abroad.

<sup>35</sup> The amendment is in line with the provisions of section 154 (1) of the Constitution which make the Inspector General of Police accountable to the Minister responsible for the Police. It is, therefore, only logical to make the Commander of the Defence Forces accountable to the Minister responsible for Defence.

declaration of a state of war to counter an external threat to Malawi or a threat to its allies.<sup>36</sup>

- amended section 163 to provide for words formally establishing the Malawi Prisons Service.<sup>37</sup> .
- amended section to extend, as a matter of logic, the concept of disqualifying police officers from appointment as member of the Police Service Commission to the disqualification of prison officers from serving on the Prisons Service Commission.

#### I. Constitution (Amendment) (No. 2) Act, 2003<sup>38</sup>

This Act amended the Constitution to replace the term “Defence Forces of Malawi” with the term “Defence Force of Malawi” wherever the former term appeared in the Constitution<sup>39</sup>

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<sup>36</sup> The new provisions are contained subsections (6), (7), and (8) to section 161. These provisions take into account a shift in modern times from the use of military forces in combat (to counter foreign aggression) to the increasing use of military forces in peace-keeping, emergencies arising from natural calamities and the promotion of human rights and personal freedoms. An expression which is considered to embrace these matters and gives military forces their modern roles in society is “state of national defence.” It is this concept which the proposed new subsection (6), (7) and (8) to section 161 of the Constitution seek to incorporate in the Constitution. It should be noted that this concept is not the same as the concept of a :state of emergency” provided for under sections 44 and 45 of the Constitution.

<sup>37</sup> No such words were available, presumably through an oversight.

<sup>38</sup> Act No. 4 of 2004.

<sup>39</sup> The Act effected amendments to sections 51,78, 159, 160, 161 and 189 and replaced the heading to Chapter XVI of the Constitution.

### 3. OUTSTANDING CONSTITUTION (AMENDMENT) BILLS

#### A. Constitution (Amendment) Bill, 2005<sup>40</sup>

This Bill proposes to effect amendments to sections listed in the Schedule to the Constitution, to section 196 of the Constitution and to the Schedule to the Constitution (otherwise commonly referred to as the “entrenched provisions”) as recommended by the Law Commission, in its Report on the Technical Review of the Constitution published on 16<sup>th</sup> November, 1998; these amendments do not “affect the substance of the effect” of the Constitution, and so fall within section 196 (3) of the Constitution, enabling this Bill to be passed without a referendum.

The amendments proposed by the Bill are straight forward, and are mostly of textual nature; the following are some of the more important amendments proposed by the Bill.

- Clause 3 of the Bill proposes to replace section 8 to express more precisely and sufficiently the responsibility of the legislature in regard to its primary function, which is the enactment of legislation.
- Clause 4 of the Bill proposes to effect textual corrections to section 12, and to introduce in section 12, as subsection (2), new provision covering duties of individuals towards others and society.<sup>41</sup>
- Clause 6 of the Bill proposes to amend section 15 to correct a textual error in the expression “the executive, legislature and

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<sup>40</sup> Bill No.1 of 2005.

<sup>41</sup> . The proposed new subsection, which is modeled on the provisions of Articles 27 and 28 of the African Charter on Human and Peoples Rights, complements the rights of individuals set out in the Constitution.

judiciary all organs of the Government”; and to incorporate elements of promotion and enforcement of human rights, and to expressly extend the enforcement rights thereunder to natural as well as legal persons.

- Clause 9 of the Bill seeks to amend section 22 (7) and (8) to raise the marriageable age from fifteen to sixteen years, and also to correct a typographical error with respect to word “actually” in subsection (8) which should read “actively”.
- Clause 10 of the Bill seeks to amend section 23 to incorporate, in subsection (1), the universal principle that the interests of children should be the primary consideration when decisions of their welfare are taken. Clause 10 also proposes to introduce, as part of section 23, a new provision guaranteeing the right to safety and security of all children, particularly children with disabilities or in situations of disadvantage.
- Clause 14 of the Bill seeks to amend section 37 by deleting the words “subject to an Act of Parliament” and thus remove an apparent misconception that the right to access information could be restricted or limited by an Act of Parliament without meeting the other tests of such restriction or limitation as required by section 44 (2), namely, that limitation or restriction is “reasonable, recognized by international human rights standards, and necessary in an open and democratic society”.
- Clause 15 of the Bill seeks to amend section 40 (3) to replace the words “public office” with the words “elective office”.



- Clause 17 of the Bill seeks to amend section 42 to effect textual corrections and also to add, under subsection (2), a new special provision with respect to persons with disabilities when held in detention.
- Clause 18 of the Bill proposes to replace section 43 (b) with a new wording, in the interest of clarity.
- Clauses 19 and 20 of the Bill, in addition to effecting textual corrections, propose to amend sections 44 and 45 to clarify the distinction between the concepts of “limitation or restriction of rights” and “derogation from rights”, and in effect propose that the provisions of section 44 (1) be moved to section 45 as a new subsection (4) under section 45 which clearly stipulates the circumstances under which rights under the Constitution may be derogated from.
- Clause 23 of the Bill seeks to amend section 111(3) and (6). Section 111 (3) provides for the removal of magistrates “in accordance with section 119” of the Constitution, but that section only provides for the removal of Judges and not Magistrates. Accordingly, clause 23 proposes to replace of the words “in accordance with section 119” with the phrase “unless sooner removed by the Chief Justice on the recommendation of the Judicial Service Commission”. With respect to section 111 (6), clause 23 proposes to include the Chief Justice in the definition of Judge.
- Clause 24 of the Bill seeks to amend section 114 to protect “other employment benefits” of holders of judicial office, in addition to salaries and allowances as at present provided for in section 114.

- Clause 27 of the Bill seeks to replace the statement appearing immediately after the heading of the Schedule to the Constitution to make clear the intent that the Schedule itself cannot be amended without following the procedure laid down in section 196 (1).

B. Constitution (Amendment) Bill, 2005 <sup>42</sup>

This Private Member's Bill which is sponsored by Hon. I. I. Matola, Member of Parliament (UDF), was published in the *Gazette* on 7<sup>th</sup> October, 2005 seeks to amend section 83 in order to make provision for the constitution of a National Governing Council as an interim governing body in the event that the President is impeached from office until such time a presidential election is held.

3. CONSTITUTION (AMENDMENT) BILLS DEFEATED IN THE NATIONAL ASSEMBLY

A Constitution (Amendment) Bill, 2002 <sup>43</sup>

This Private Member's Bill, commonly referred to as the "Open Term Bill", and sponsored by Hon. Khwauli Msiska, Member of Parliament

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<sup>42</sup> P. M. B. No. 2 of 2005.

<sup>43</sup> Bill No.1 of 2002.

(AFORD) (as he was then) was published in the *Gazette* on 24<sup>th</sup> May, 2002.

The Bill sought to amend section 83 (3) to remove the limitation on the number of terms that President may serve. The Bill was defeated in the National Assembly.

B. Constitution (Amendment) Bill, 2005<sup>44</sup>

This Private Member's Bill which was published in the *Gazette* on 7<sup>th</sup> October, 2005 was introduced in the National Assembly by the Leader of the Opposition in Parliament and sought to amend section 65 in order to empower the Speaker of the National Assembly to declare vacant the seat of any member of Parliament who, "having been elected to the National Assembly as a candidate of a political party, or as an independent candidate, voluntarily, ceases to be a member of that political party, or ceases to be an independent member".

This Bill was defeated in the National Assembly by a narrow majority.

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<sup>44</sup> P. M. B. No.1 of 2005

#### 4 CANCELLED/WITHDRAWN CONSTITUTION (AMENDMENT) BILLS

##### A. Constitution (Amendment) Bill, 2002<sup>45</sup>

This Bill (commonly referred to as the “Third Term Bill”) was published in the *Gazette* on 6<sup>th</sup> September, 2002 and sought to effect two amendments to the Constitution; first, to amend section 83 (3) to allow any President of Malawi to serve a maximum of three consecutive terms; and, second, to entrench section 83 by listing that section in the Schedule to Constitution so that in future any proposed amendment of section 83 would only be done with the approval of the majority vote of Malawi expressed in a referendum.

The Bill was introduced in Parliament but was subsequently withdrawn.

##### B. Constitution (Amendment) (No. 2) Bill, 2004<sup>46</sup>

This Bill which was published on 15<sup>th</sup> September, 2004 proposed to introduce in the Constitution a new provision to extend the life of the National Compensation Tribunal for an additional period of five years from 18<sup>th</sup> May, 2005 or until all claims registered with the Tribunal on or before 18<sup>th</sup> May, 2004 had been determined, whichever is the sooner, and also to extend by an additional five years from 18<sup>th</sup> May, 2004, the period

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<sup>45</sup> Bill No.14 of 2004

<sup>46</sup> Bill No. 20 of 2004

during which the National Compensation Fund may be charged with claims for compensation arising out of abuse of power or office of the Government in power between 6<sup>th</sup> July, 1966 and 18<sup>th</sup> May, 2004. The Bill was subsequently cancelled by notice in the *Gazette*.