THE REPUBLIC OF MALAWI

**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**CIVIL CAUSE NUMBER 2074 OF 1995**

**BETWEEN:**

MALAWI CONGRESS PARTY..... 1st PLAINTIFF
- and -
L. J. CHIMANGO, MP..... 2nd PLAINTIFF
- and -
H. G. NTABA, MP.....3rd PLAINTIFF

-and-

THE ATTORNEY GENERAL..... 1st RESPONDENT
- and -
THE SPEAKER OF THE
NATIONAL ASSEMBLY..... 2nd RESPONDENT

**CORAM:** **MWAUNGULU, J**
For the Plaintiffs: T. C.Nyirenda
For the defendants: Chizumila, A.G., Mhone
Official Interpreter/Recorder: Selemani

**JUDGMENT**

This is an action by three plaintiffs. The first plaintiff, the Malawi Congress Party, is a political party registered in accordance with our laws. Prior to 1994 it was the only party under the Republican Constitution of 1966. After 1994 there have been several political parties. The Malawi Congress Party is the main opposition party in the National Assembly, the lower house under our constitution but the only legislative body till 1999 when a second Chamber, the Senate, may be constituted. The second and third Plaintiffs are members of the National Assembly under the party ticket of the Malawi Congress Party. They hold crucial positions in that party. The first defendant is the Attorney General. He is sued on government actions. The second defendant is the Speaker of the National Assembly.

The action emanates from events which have become characteristic in our legislative house. These events in the house arise because the party in Government, the United Democratic Front, does not command the necessary majority in Parliament. At the time of the events in question it entered into a coalition with the Alliance for Democracy. This created a

numerical advantage pass the simple majority. It did not give a two thirds majority of the house.

On the 6th of November, 1995 a Bill entitled Press Trust Reconstruction Bill was passed to members of the National Assembly. On 7th of November 1995 the Minister of Finance, Mr. Aleke Banda, put a motion to dispense with notice to members of the National Assembly. In spite stem opposition from the Malawi Congress Party, the motion was carried through. The Bill was debated and passed by the National Assembly without the Malawi Congress Party because the Malawi Congress Party had walked out of the house. The Act, the Press Trust Reconstruction Act, was passed when the President assented to the Bill. In spite applications to the High Court for an injunction to stop the President from signing assenting to the Bill, the Press Trust Reconstruction Bill, now law as the Press Trust Reconstruction Act was passed. The plaintiffs want it declared null and avoid for being unconstitutional in substance and for being passed in contravention of the constitution.

The plaintiffs took out this summons on the 15th of November 1995. It was served on the Attorney General on the 17th of November 1995. The summons raised a number of issues which in all fairness cannot be classified categorised or summarised. The best thing to do is to recast them. First, the plaintiffs request this Court for a declaration that the conduct of the business of the national Assembly on the 7th and or 8th of November 1995 when there was no quorum for such meeting of the National Assembly was violation of the constitution. They want a declaration that section 50 (1) and 50(2) of the Constitution requires that there be a quorum in the House for competent business to be commenced and for the continuation of such business. They want a declaration that the Standing Orders of the National Assembly were violated during the presentation of the Press Trust Reconstruction Act. Consequently, they also want a declaration that no quorum in fact existed when the Press Trust Reconstruction Bill was debated, read and passed by the Assembly. They want a declaration that the National Assembly had no constitutional competence to pass the Press Trust Reconstruction Act. The Court should, therefore, declare that the Press Trust Reconstruction Act is unconstitutional and, therefore, null and void or invalid to the extent that it is inconsistent with the Constitution of Malawi. In view of what has been prayed for, they want an order for striking out of the said Act as having been irregularly passed. They want an interim order for the Press Trust Reconstruction Act not to be signed into law or if so signed not to be implemented until after the determination of the question raised in this summons.

There is an omnibus prayer in which this Court is called upon to determine several questions and afford the plaintiffs consequential declaration orders and remedies. The first question for determination is whether Parliament has constitutional competence to conduct business when there is no quorum. The plaintiffs want this Court to declare that the presentation of the Bill as an Executive Branch Bill to the National Assembly and the debating of the Bill by the National Assembly on November 7, 1995 and in passing into law by the National Assembly before the cabinet had complied with article 96 of the constitution was a violation of the Constitution of Malawi. They want a declaration that the Speaker of the National Assembly should not have allowed Parliamentary business and debate to proceed on the Bill nor the

passing of the Bill itself prior to satisfying himself that article 96 of the Constitution had been complied with. They want a declaration that the passing of he Press Trust Reconstruction Act was done in violation of the Standing Orders of the Assembly and the rights of all members of the Assembly to 21 days notice prior to the presentation of a Bill to the National Assembly. The plaintiffs want a declaration that Parliament has no competence to pass a law that expropriates private property arbitrarily. They contend generally that the Attorney General has violated the constitution of Malawi by failing to correctly advise the Executive and Legislative Branches of Government on the substance of the fundamental rights contained in Chapter IV of the Constitution of Malawi and the Constitutional obligations and limitations on the Executive and Legislative Branches. It is further argued that Parliament has no constitutional or legal competence to wind up a limited liability company duly registered under the company Act. The plaintiffs contend that they are entitled to have the Bill properly debated in the National Assembly and to an opportunity to have the views of their constituency, experts and the general public before the Bill is signed into law. Finally they generally contend that the Press Trust Reconstruction Act is a violation of the Constitution of Malawi and therefore invalid.

On the 7th of March 1996, the Attorney General, after intimating to defend, made a reply to the summons. There are many issues coming out from the reply of the Attorney General. Once again a précis is inappropriate. It may be useful to restate the issues. The first point taken by the Attorney General is that when the National Assembly met on the 7th of November 1995 there was a quorum of the National Assembly* in terms of section 50 of the constitution and Order 26 of the National Assembly Standing Orders. Secondly, he contends that the Press Trust Reconstruction Act was passed by Parliament in accordance with section 48 (1) and 6 (1)(e), 73 (1) and (5) and 74 of the Constitution and Standing Orders 114 (1) and (4) and 116 (1). The Standing Orders were made in pursuant of section 56 (1) of the Constitution which empowers the National Assembly to regulate its own procedure. He contends that the Act is valid in terms of the Constitution and the Standing Orders and it is not inconsistent in whole or in part with the Constitution. Consequently, this Court has no power at all to declare the Act unconstitutional or null and void or strike it down.

The Attorney General contends that the Act does not make any provision at all for the expropriation of the Press Trust or the property of any person. The Press Trust, he contends, was incorporated under the Trustees Incorporation Act, and is and has always been a charitable trust. The effect of such incorporation was to confer on the Press Trust a legal personality separate from the trustees. The Press Trust property is owned by the Press Trust not Dr. Banda. Press Trust is not, therefore a private trust.

The Attorney General further contends that the Act merely makes provision for the reconstruction or re-organisation of the Press Trust and its administration with a view to enhancing the opportunity for the beneficiaries of the Press Trust and its administration., regardless of their political affiliation, to derive maximum benefit from the Press Trust Property and also with a view to ensuring that the Press Trust property is not only administered by only one political party, namely Malawi Congress Party, for the benefit only of selected members of that party or of the immediate families of certain prominent personalities of that party. The

Attorney General contends that the Press Trust being a charitable trust for the benefit of the Malawi nation, the National Assembly, being composed of duly elected representatives of the people of Malawi,, has full constitutional and legal competence and power to reconstruct the Press Trust to ensure that the people of Malawi derive maximum benefit from the Press Trust held in trust for them by the trustees of the Press Trust one of whom one of them is the Minister of Finance.

As regards to section 96 (2) of the Constitution, the Attorney General contends that the Cabinet must make legislative proposals available in time to the National Assembly and not to any other person or authority for the simple reason that the National Assembly consists of duly elected representatives of the people of Malawi to whom the cabinet is responsible. It is the members of the National Assembly who must canvass expert and public opinion. The minimum time allowed for canvassing public opinion is provided for in Standing Order 114 (1) which requires the publication of a Bill at least 21 days before the Bill is read a first time in the National Assembly. However, Standing Order 114 (4) allows a Government Minister,, and not a member of the National Assembly, to move a motion, without notice, for the dispensation of the requirement of Standing Order 114 (1), where, in the opinion of the Minister, a Government Bill is so urgent or of such a nature as to permit compliance with Standing Order 114 (1) impossible. The Attorney General further contends that Section 96 (2) of the Constitution relates to the functions of the Cabinet and, therefore, the plaintiffs cannot use the omission by Cabinet for challenging the process of the legislature. He contends that there is nothing in the Act to suggest that is inconsistent with the constitution. The Attorney General further contends that the plaintiffs can only challenge the Act for being unconstitutional. They cannot challenge the process by which it was made.

Then there are further averments touching on Dr. Banda. It is contended that the former head of state was a nominee for the people of Malawi and never owned shares there. His selling of the shares was in breach of trust. Dr. Banda was not the only trustee. So he could not dispose of the property in question. The Attorney General decries that he violated the constitution by not advising the Executive and Legislative Branches of Government. He contends that the National Assembly has got competence to wind up the company by virtue of the deed in the schedule to the Act. The Act he contends, does not violate the Constitution. He further urges that the affidavit of Mr. Ntaba raise fundamental issues of fact which cannot be resolved by affidavit. He pays that the action be dismissed because it is frivolous and vexatious.

The application is buttressed by affidavits of the Minister of Finance and Dr. Ntaba. Mr. Chimango has not filed an affidavit. Dr. Ntaba swears on behalf of the Malawi Congress Party. On behalf of the defendants there are affidavits from the Attorney General and the Minister of Finance. The affidavits of the plaintiffs and defendants highlight the events in Parliament and a bit of background to the formation and ownership of the Press Trust and Press Holdings Limited. The background to these institutions has little bearing really to the questions that have to be determined in this application, questions of the constitutionality of the Press Trust Reconstruction Act.' They offer, however, a perspective and context in which the present application should be understood. It is important to say this because, right at the beginning of

the hearing, in compliance with the procedure when the originating summons is the mode adopted to commence the proceedings, the question of whether the mode was appropriate to enable the parties to proceed by writ of summons was raised by the court. It was also a matter directly raised by the defendants' affidavit in the action. The Court adjourned for that purpose. When the Court resumed, it was agreed that the matter should proceed on affidavits and in the form in which they were. Of course, the Court reserved the right at a later stage to still order the proceedings to proceed as if commenced by writ. As the proceedings went on it was very apparent that the application raised broad constitutional issues which could be resolved on the affidavits as they were. The matters in issue, on which probably there was conflict, did not affect the broad questions raise by the application. It was still possible to answer the broad constitutional question whatever view is taken on the disputed facts. It may be useful, however, to resolve the legal implications of certain facts to resolve the broad constitutional questions raised. To that end the facts contained in the affidavits have to be evaluated but only succinctly. It is not important to lay down the whole scope of the facts raised by the affidavits. Much of the background to the Trust itself and the Press Holding Company is found in the affidavit of the Minister of Finance. It is to that affidavit that we now turn.

The Minister of Finance traces the origin of the Trust to the Malawi Congress Party. In his affidavit it is very clear that whatever financial arrangements or organisations they are at the aegis and interest of the Malawi Congress Party. It is the Malawi Congress Party which gets the funds and authorises all and divers on the funds. The origin of the Press Trust is the Malawi Congress Party:

> *"The origins of the Press Trust date back to 1959 when the Late Orton Ching'oli Chirwa and I, then President and Secretary General of the Malawi Congress Party, respectively, which the former founded while Dr. H. Kamuzu Banda was in detention in Zimbabwe., then Southern Rhodesia., established the Malawi Congress Party (hereinafter called "MCP") which de facto was, then, the sole political party."*

The Malawi Congress Party established the Malawi Press Ltd:

> *"Later in the same year the MCP established the Malawi Press Limited (hereinafter called NTU) to publish and print the Malawi News, a newspaper presently in circulation which hitherto was produced and printed on a duplicating machine."*

The funds are raised by the Malawi Congress Party by contributions to it or by sale of its membership cards:

> *"The initial capital of MPL was raised from funds contributed by members of the public through the MCP and through the sale of MCP membership cards which together realized the sum of £30,000."*

The money is handed over to Dr. Banda as the President of the Malawi Congress Party and the Malawi Congress Party decides to capitalise the Malawi Press Ltd.:

*"The MCP used that money partly to capitalize MPL and partly to buy a printing press which was to be used to publish and print the Malawi News using more modem equipment than the old duplicating machine referred to in paragraph 3."*

When the Minister of Finance is removed from the Malawi Congress Party, he loses directorship of the company formed by the Malawi Congress Party:

*"Accordingly, when I was eventually expelled from the MCP in 1973, 1 was, for that reason, required to transfer, which I did, the single share I held since I was considered as no longer representing the interest of the people of Malawi."*

Even the most important decision of 1970 was made by the Malawi Congress Party:

*"In 1970 a decision was made by the Central Executive Committee of MCP that the original shareholders of MPL, namely, Dr. Banda and myself, be the shareholders of Press Holdings Limited."*

It is important to consider the status of the Malawi Congress Party because much of the confusion in the affidavit of the Minister of Finance emanates from lack of appreciation of what the Malawi Congress Party was all these years and is now. There is no evidence that it was incorporated under an Act as it is now. Political parties are registered and attain a legal status. Up to that time the Malawi Congress Party was a political party. A political party is an association. It is an association of members. The members associate solely to influence and direct policy by voting members in political office. Whether a political party embraces everybody in a country, it is no more than an association of members. Such associations have constitutions. Prior to 1994, the Constitution only allowed one political party to operate in the country. That provision conferred no uniqueness on the Malawi Congress Party. It was still an association of its members governed by its constitution. Unless it registered under the Trustee Incorporation Act, it was an unincorporated body (per Silungwe C.J. in **Secretary General of the United National Independence Party -v- Chipimo 1985, C A.L.R. 1133** . As an unincorporated body, it could acquire property through its members. The fact that it had members all over the country did not make it any better in law than a club in relation to its members. Through its membership and contributions from the public, it could raise funds. It had full charge and control over its funds. It, through its leadership, it so appears from the Minister of Finance, could invest or divest its funds for the benefit of its ideals, operations and members. In law, even if the public contributed to its funds, that is how all political parties and all associations raise money. The funds do not become public funds because they have been raised from the public. Neither do funds become public simply because an association is selling its membership cards to its members however, many and wherever they are from. Equally, a man does not become a member of an association because he has contributed to its causes. Membership of an association confers a lot of rights interests and obligations on members.

As an unincorporated association or incorporated association, a political party is an individual collectively. It is not a public body. It is not Government. A political party by definition is not a

government nor part of it - although such of its members as occupy political office constitute the government of the day. Consequently, the property it owns is not public property or government property. It is property of the association and its members. Of course when there is one political party legalised everybody belongs to that party. This however does not alter the position of the party itself or its members in the eyes of the law. The Minister of Finance has difficulty accepting that the funds and assets that the Malawi Congress Party acquired belonged to the association and through it to its members. He wants to think that the property and funds belonged to the public, and extrapolates the association. That position is untenable in law.

It is more difficult for the Minister of Finance on the story as he relates. The affidavit he has sworn is littered with statements to the effect that it was really the Malawi Congress Party which was pulling the shots on the funds. One such decision relates to creation of a limited company through the funds that the political party as an association had created. This decision was made at an early stage as the Minister of Finance has conceded. That decision was not a government decision. It was a decision of the political party itself. When the Limited company in the name of Press Holdings Ltd was incorporated, it became a legal person in its own right distinct from the Malawi Congress Party itself as an unincorporated association. It could be, and I find no reason why it should not be, that it was understood as the Minister of Finance contends that the shares were in trust for the people of Malawi but, in law the result is clear to see. The membership of the company could not be disassociated from the political party. Afterall, the funds came from the political association. So did the decision to create the holding company. In law, however, the holders of the share certificates were the members. The company, however, was a separate legal entity. It was not a public company. It was a private company limited by shares and its shares were not transferable to the public as the memorandum of association of Press Holding Limited which the Honourable Minister has displayed shows.

The Minister of Finance then refers to a development that occurred later in the history of Press Holdings Ltd. There is nothing to suggest otherwise than the Minister of Finance suggests. Press Holdings Limited was given preferential treatment. It should be accepted that Press Holdings Limited borrowed money from local banks. It should also be accepted that government guaranteed some loans given by international banks to Press Holdings Limited. None of these things alter the status in law of the Press Holdings Limited.

A public company or a statutory corporation only becomes one by incorporation or by statute. However much preferential treatment a limited company can act from the powers that be in government it never changes a private company into a statutory company or a public company. Neither does a public company or statutory corporation become one by repute or association. It is not unoften that government will give preferential treatment to a private company. It has never been understood that in such a case the private company becomes a public company.

Neither does the fact that international banks said to government that they cannot lend money to Press Holdings Limited because it is a private company unless government guarantees

the loan change the status of Press Holdings Limited. In fact, as the Minister of Finance has conceded, government went to guarantee the-loans precisely because Press Holdings was a private company. Such a guarantee was inane where the company was statutory. The lender never alters the status of the borrower. A private company does not turn out to be a public company or statutory body because a lender has decided to lend to an otherwise private company where the lender's rules state that it cannot lend to a private person. The situation between Press Holdings Limited and the international lenders was between lender and borrower. It did not change the status of the lender just as it did not alter the situation of the borrower.

In that lender and borrower situation the government was the guarantor. The guarantor was obligated to pay the lender in case of default by the borrower. The guarantor can be indemnified by the borrower but only by action. It has not been suggested that Press Holdings Limited has not paid the money to the lender. If this has not been done obviously the guarantor has agahts against the borrower. These rights, however, flow from the agreement. Government does not have that right because the funds came from the public. Above all the guarantee cannot change the status of a guarantor borrower or lender. The bottom line is that Press Holdings Limited, in the absence of legislation is not a statutory body. It is a private company registered under the Companies Act.

The next stage in the development of the Press Trust Reconstruction Act is the Press Trust Deed. That deed has not been made available to the Court. There is so much concerning it in the Act itself and the affidavits from both sides. The deed is dated 10th February 1982. Press Trust is incorporated under the Trustees Incorporation Act. It was registered on 5th March 1992. The settlor is Dr. Banda, the former Head of State. He is the "Founder Trustee". There are powers to appoint trustees. These are in the founder Trustee. That is all I know on the power to appoint. This Trust also holds the shares in Press Holdings Limited. Up to the time of this Act, trustees were those appointed by the forti er Head of State. In view of the background I have given, the Founder Trustee, being the President of the Malawi Congress Party, had only appointees from the Malawi Congress Party. More importantly the Press Holding Limited group is a whole conglomerate affecting every web of life of every Malawian. Both these aspects have political implications. Whatever the case though one has to contend with the status of the Press Trust in law.

The plaintiffs contend that the Press Trust is the property, indeed private property of Dr. Banda, the founder. In law that is not the case. By the deed, of 10th February 1982 the settlor ceased to be the owner of the property the subject of the trust. The property vested in the trustees. In law the trustees were the owners of the trust. The founder however made himself a founder trustee. He together with the others became the owners in law of the trust proper the settlor having fully divested himself of the property the subject of the trust. It appears both from the Act and the affidavits of the defendants that the Minister of Finance and others appointed by the settlor constitute the trusteeship. The power to appoint trustees is the only one reserved for the settlor. The deed, as I have said, is not before the Court. It appears however, from the Act itself and the affidavit of the Minister of Finance that the deed, the

instrument which created the trust, provides for a way in which trustees are to be appointed. The trustees of the trust are in the eyes of the law the owners of the trust property.

The trust thus created is a private trust. It is governed by common law and subject to the Trustees Act. The property the subject of the trust at this stage is private property. The property constituting the trust comes from private citizens incorporated or not. It is owned by trustees who are private persons. The trustees have the full rights of ownership subject to the dictates of the trust deed., common law and statutes. The Press Trust subsequently was incorporated under the Trustees Incorporation Act. The Press Trust is, therefore, a charitable trust. Ile consequences of incorporation are to create the trustees as a legal personality. The property the subject of the trust becomes the property of this incorporated body. As such it is private property which can be used by the trustee for the purposes of the trust. The property albeit for the benefit of the public at large remains in law private property. It is not public property. The trust in that sense is governed by common law the Trustee Act and the Trustee Incorporation Act. We will consider the law a lit bit later. The deed is a private instrument created by a private citizen, Dr. Banda. It is not a document of the government. It suffices for now to appreciate the status of the Press Trust prior to the objected Act, the Press Trust Reconstruction Act.

It is now the time to look at the Press Trust Reconstruction Act. It has an exciting yet betraying preamble:

> *"An Act to make provision for the reconstruction of the Press Trust; to clarify the objects and status of the Press Trust and to provide for consequential changes relating to assets forming part of the Press Trust Fund and for matters connected with or incidental to the foregoing."*

It has a precise title:

> *"This Act may be cited as the Press Trust Reconstruction Act."*

It recognises the existence of the Press Trust and its incorporation under the Trustees Incorporation Act:

> *"Original deed" means the Press Trust Deed dated the 10th day of February 1992, and incorporated under the Trustees Incorporation Act on the 5th day of March 1982, at the office of the Registrar General. "Press Trust" means the Trust established under the original deed."*

It purports to vary the Trust Deed:

> *"For the better administration of the Press Trust,, the original deed shall be deemed varied in the terms and for as set out in the Schedule at the expiry of 14 days from the date of publication in the Gazette of a notice to the effect given by the Minister of*

*Finance and the terms and form as set out in the Schedule are hereinafter referred to as the "Deed of Variation."*

The powers to appoint trustee are contained in section 4:

*"(I) Upon the publication of the notice referred to in section 3, the President and the Settlor shall, within twenty days from the date thereof, each appoint, by notice in writing to the Attorney General, one person to hold office as initial trustee provided such person is qualified to be appointed a trustees under the Deed of Variation.*

*(2) In the event that either the President or the Settlor fails for whatever reason within the twenty days to appoint the initial trustee under subsection (1), the Attorney General shall appoint such person as he thinks fit, being a person who is qualified under the Deed of Variation to be appointed a trustee, to be initial trustee and such appointment shall be valid for all purposes as if it had been made by the President or Settlor, as the case may be.*

*(3) Upon the appointment of the second of the initial trustees, the existing trustees other than an initial trustee shall cease to hold office as trustee of Press Trust."*

Section 5 transfers the property in the trust:

*"Upon the appointment of the initial trustees all the assets or rights of the Trust Fund and all liabilities or obligations of the Trust Fund properly incurred by the existing trustees shall be deemed transferred from the existing trustees to the initial trustees."*

The Act recognises the existence of Press (Holdings) Limited:

*"Press (Holdings) Limited" means the company of that name incorporated under the Companies Act on 13th January 1969, under the company registration No. 1210."*

The Press Trust, like other trusts created after 10th November 1967, is governed by the Trustees Act, Cap 5:02 (Section 3(1)). That Act applies to all trusts without exception. Appointment and discharge of trustees is provided for in part IV of the Act. The general provision is in section 46:

*"(1) Where a trustee, either original or substituted, and whether appointed by a court or otherwise, is dead, or remains out of Malawi for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, or is a minor, then, subject to the restrictions imposed by this Act on the number of trustees*

*(a) the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating trust; or*

*(b) if there is no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representative of the last surviving or continuing trustee, may, by writing, appoint one or more other persons (whether or not being the person exercising the power) to be a trustee or trustees in the place of the trustee so deceased, remaining out of Malawi, desiring to be discharged, refusing, or being unfit or being incapable, or being a minor, as aforesaid."*

This section deals with the power of appointment as provided in the instrument creating the trust. Courts are also given general powers to appoint new or additional trustees in part V of the Act. The power is in section 51 of the Act.

*"The Court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult or impracticable so to do without the assistance of the Court, make an order appointing a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee."*

Trustees can be appointed by statutory power. This is clear from section 54:

*"In any of the following cases, namely -*

*(a) where the Court appoints or has appointed a trustee, or where a trustee has been appointed out of Court under any statutory or express power."*

The Act also provides for ways in which variations to the trust may be made. This is in section 7 1:

*"(1) Where property, whether movable or immovable is held on trusts arising, whether before or after the commencement of this section, under any will, settlement or other disposition, the Court may, if it thinks fit by order approve on behalf of -*

*(a) any person having, directly or indirectly, an interest whether vested or contingent, under the trusts who by reason of minority or other incapacity is incapable of assenting; or*

*(b) any person (whether ascertained or not) who may become entitled, directly or indirectly, to an interest under the trusts as being at a future date or on the happening of a future event a person of any specified description or a member of any specified class of persons, so however that this paragraph shall not include any person who would be of that description, or a member of that class, as the case may be, if the said date had fallen or the said event had happened at the date of the application to the Court; or*

*(c) any person unborn; or*

*(d) any person in respect of any discretionary interest of his under protective trust where the interest of the principal beneficiary has not failed or determined, any arrangement (by whomsoever proposed, and whether or not there is any other person beneficially interested who is capable of assenting thereto) varying or revoking all or any of the trusts, or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts:*

*Provided that, except by virtue of paragraph (d), the Court shall not approve an arrangement on behalf of any person unless the carrying out thereof would be for the benefit of that person."*

The Press Trust, like other trusts incorporated under the Act, is governed by the Trustees Incorporation Act (Cap 5:05). The Press Trust, as the Press Trust Reconstruction Act acknowledges, was registered as a charitable trust. The consequences of incorporation are contained in section 3(3) of the Act:

*"Upon the issue of a certificate under subsection (2), the trustees shall thereupon become a body corporate by the name described in the certificate and shall have perpetual succession and a common seal and power to sue and to be sued in such corporate name."*

Incorporation does not affect the legal liability of the trustees:

*"Any property movable or immovable vested in, transferred to, held or acquired by the body corporate shall be held for the purpose of the charity or association and in such and the like manner as it was held by the trustees prior to incorporation, subject to this Act."*

The Act underlines the importance of the constitution of the charitable trust in determining its composition. Section 7(1) provides:

*"Where a certificate of incorporation has been granted to the trustees of a charity or association, vacancies in the number of trustees thereof shall from time to time be filled as required by the constitution of the charity or association or by such legal means as would have been available for the appointment of new trustees thereof is no such certificate of incorporation had been grated; and the appointment of every new trustee shall be certified and registered in the prescribed manner and thereupon the new trustee shall be deemed to be incorporated for the purposes of the Act."*

The Act provides ways in which certain changes can be made to the constitution of the charity. This is in section 9(1) and (3):

*"In case any association, on whose behalf any property is held by a body corporate registered under this act, desires to change its constitution in any manner described in subsection (3), it shall first submit, in the prescribed form, a draft of the proposed*

*amendment for the approval of the Minister, who may, in his discretion, grant or withhold his approval. The amendments which require approval under subsection (1) are those which in any way affect the objects of the association, the appointment, retirement and authority of the trustees or other officers thereof, the authorization by the association of acts of the trustees thereof and the manner in which such authorization may be verified and the use of the common seal."*

The winding up of companies is provided in section 204 of the Companies Act:

*"The winding-up of a company may be either*

*(a) by the Court; or*
*(b) voluntary*

*Unless the context otherwise requires, the provision of this Act with respect to winding-up apply to the winding-up of a company in either of those modes."*

Section 212 provides for the people who may wind up a company:

"A Company (whether or not it is being wound up voluntarily may be wound up under an order of the court on the petition of -

(a) the company;
(b) any creditor, including a contingent or prospective creditor, or the company;
(c) a member or any person who is the personal representative of a deceased member or the trustee in bankruptcy of a bankrupt member;
(d) the Attorney General; or
(e) any liquidator or the company appointed in a voluntary liquidation."

Section 213 provides for circumstances in which a company is wound up:

"The court may order the winding-up of a company if
(a) the company has by special resolution resolved that it be wound up by the court;
(b) the company does not commence its business (if any) within a year from its incorporation or suspends it business for a whole year;
(c) the number of members is reduced below two;
(d) the company is unable to pay its debts;
(e) the period, if nay, fixed for the duration of the company by the memorandum or articles expires or the event, it any, occurs on the occurrence of which the memorandum or articles provide that the company is to be dissolved; or
(f) the court is of opinion that it is just and equitable that the company be wound up."

I have tried to lay down the status of the various entities that are concerned in this action to enable an apt consideration of the broad issues and on the same token the law covering them

has been laid. The Press Trust Reconstruction Act cuts across most statutory provisions. The Attorney General has not explained how these other Acts apply to the Press Trust in view of the Press Trust Reconstruction Act. The Press Trust Reconstruction Act obviously does not repeal the other Acts because it only pertains to a particular trust and a particular company. This aspect comes for consideration later but the comment helps us to develop into the general issues that have arisen in this matter.

Put broadly, the question for determination is whether the Press Trust Reconstruction Act is unconstitutional. If it is, this Court, in spite that the Act has been passed by the National Assembly and assented by the President, can declare the Act unconstitutional. The Constitution of 1994 makes this possible expressly. Most of the provisions touching on the power of this Court to review legislative and government actions and the law for conformity with the Constitution were considered recently in **Nseula -v- Attorney General (Civ. Cause No. 63 of 1996)**. It is not necessary to restate them in this case. The constitutionality of the Act is being challenged or explained on failure to comply with certain procedural provisions of the constitution and certain substantive principles of the constitution. I will start with the procedural queries.

The procedural problems concern two aspects: the questions of adequate notice to the members of the National Assembly and quorum. I will consider the former first. The facts on this are accepted by the plaintiffs and defendants. On 7th November 1995 the Press Trust Bill was circulated to members. On the 8th of November the Minister of Finance put a motion without notice to introduce the Bill. The plaintiffs, the main opposition party, the Malawi Congress Party, and two members of Parliament did not expect this. They were of the view that the Act was very important that they needed more time. The request was shot down and the motion put to the House by the Speaker. The Bill was tabled to the National Assembly. The National Assembly passed the Bill the next day. The President assented to it on 15th November 1995. If the question is whether a different decision should have been passed by the National Assembly by way of allowing more time, then this Court, although it can properly interfere, will as a matter of course give great weight to the decision of the House unless there has been something so gross as to go to the root of the Constitution or this Court has to protect fundamental human rights. And when the National Assembly pleads any of its privileges, particularly in relation to its internal procedures, the Court will uphold the privilege and leave matters of internal procedures to the House.

The plaintiffs do not approach the issue that way. The Minister of Finance relied on Standing Order No. 114:

> *"(1) Except as provided by paragraph (4) every Public Bill shall be published in the Gazette in at least two issues at intervals of not less than seven days and the first publication shall take place not less than 21 days before the Bill is read a first time.*
>
> *(2) With every bill shall be published a full explanatory statement of the objects of and reasons for the Bill, which, in the case of a Government Bill, shall be signed by, or on*

*behalf, of the Attorney General and, in the case of a Private Member's Bill or a Private Bill, by the Member introducing it.*

*(3) The second or subsequent publication of a Bill shall be deemed to have been made by the insertion of a notice in the Gazette, giving the title of the Bill and the number and date of the Gazette in which is was first published.*

*(4) Where, in the opinion of the responsible Minister a Government Bill is so urgent or of such nature as not to permit of compliance with all or any of the provisions of the Standing Order relating to the publication of Bills, the Minister may, before presenting the Bill under Standing Order 116, move without notice a motion that those provisions be dispensed with in respect of that Bill and, upon such a motion being carried,, those provisions shall be suspended, and be deemed always to have been suspended in respect of that Bill."*

There is agreement that what was done here was permitted by the Standing Order. It is contended by the plaintiffs, that that part of the Standing Order which allows the Minister to give no time at all is inconsistent with section 96 (2) of the Constitution and should be declared null and void. Section 96(2) provides as follows:

*"In performing the duties and functions referred in this section -the Cabinet shall make legislative proposals available in time in order to permit sufficient canvassing of expert and public opinion."*

To which the defendants reply that the Standing Order was made under the power under the Constitution for the National Assembly to make rules to govern its own procedure. Section 56 (1) of the Constitution provides:

*"Subject to this Constitution, the National Assembly, or the Senate may by Standing Order or otherwise regulate its own procedure."*

To this the plaintiffs reply that the power to make rules under section 56(l) is expressly stated to be subject to this Constitution. Consequently, the Standing Orders passed by the national Assembly cannot be inconsistent with the Constitution.

A constitutional provision that requires one to give time to enable sufficient canvassing of expert and public opinion is clearly not served by a provision that does not give such time. It could be served by a provision that gives less time but not by one that gives none at all. One would have thought that this is obvious. It may be not. There are bound to be situations and time when it may be unnecessary to give time, take for example where the matter in question is a matter of public notoriety or importance. There are bound to be so many such Bills, money bills for borrowing money could be cited, where it would be unnecessary to give time. Yet there could be instances when it would be necessary to give time. The Hijacking Act, Cap 7:03 is the case in point; it was passed in a day. Some Constitutions specifically provides for both

scenarios. The Irish Constitution is illustrative of the situation. The proviso is a constitutional provision requiring the Houses of Parliament to consider the need of a referendum on the issue before the Executive assents to a Bill. Article 47., is in the following terms:

> *"These provisions shall not apply to money Bills or to such Bills as shall be declared by both houses to be necessary for the immediate preservation of the public peace, health or safety."*

Our constitution does not have such a rider to section 96(2) itself or any constitutional provision. This Court has, therefore, to interpret section 96(2) as it is. When interpreting a Constitution, while there might be similarity in approach with interpreting statutes, it must be remembered at all times that a Constitution is a much broader in its purposes, mandates and scope. What should not happen is to treat constitutional provisions as statutory provisions. In **Minister of Home Affairs -v- Fisher** (1980) A.C. 319, 329, Lord Wilberforce advocated a generous and purposive approach. He called Courts to "treat a constitutional instrument sui generis calling for principles of interpretation of its own, suitable to its character as already described, without necessary acceptance of all the presumptions that are relevant to legislation of private law". Such an approach allows the Court to look at the history and facts before the Constitution as can be evidenced by debates and discussions of the Constitution. **(Harris and others -v- Minister of the Interior and Anothers 1952 (2) A.D. 428; Constitutional Reference by the Morobe Provincial Government 1985 L.R.C. (Const.) 642).**

The framers of our Constitution required all legislative proposals sponsored by Government to be made available in time to allow canvassing of public and expert opinion. They could have gone the Irish way and except other Bills from this rigorous demand. They did not. They were mindful of the history of our beloved country and the prospect of abuse. Our history shows that very onerous and unconscionable legislation had been rushed and passed through the National Assembly with disastrous results to the ethos of our nation and people. They were conscious of the frailty and fickleness of men. What turns out to be an innocuous and reasonable provision could mean disaster in the hands of such men. The framers of our Constitution as far as we know had a lot of constitutional documents to draw from and a turbulent past history to look at. They did not provide for any rider to dispense with such notice in the event of urgency. They insisted for sufficient time. Against this, of course, is the necessity known by urgency of certain matters before the House. In approaching the provision, therefore there is a dilemma of a choice between two evils. In that choice it is better evil to go for an interpretation which requires some time to be given as against that which does not in certain circumstances. If one goes for an interpretation that allows for consideration of circumstances, these circumstances may vary subjectively in nature and extent.

The interpretation that calls for time to be given may at first site appear oblivious to urgency, emergency or necessity. It is not. Such a rule will allow the time allowed to depend on the urgency, emergency or necessity of the legislative proposals. Those proposals right far away on the scale will not require short notice. Urgent legislative proposals will require a prescribed time of a lesser duration. Our Constitution stipulates that when interpreting it the Court should

have regard to principles obtainable in open democratic societies. In the United Kingdom, on a similar procedure, it was permissible to give no notice at all. The time was later extended to two days. It has now been extended to between seven to ten days. In the United Kingdom, however, they do not have a provision like section 96(2) of our Constitution requiring time to be given for legislative proposals.

With this it is very easy to dispose of the argument of the Attorney General that the Standing Order was made under a power conferred by the Constitution. As Mr. Nyirenda has pointed out, the power to make rules is subject to the Constitution. On the particular point the Constitution in section 96(2) requires time to be given. The National Assembly cannot under the guise of this power make orders that arrogate from this provision. One part of the Constitution cannot abrogate another **(New Brunswick Broadcasting Corporation -V- Nova Scotia) (1993), R.C.S. 318**. Neither can a provision made under a particular constitutional provision abrogate the Constitution.

Given our past history, it must have been obvious what the damage was if legislation was rushed in Parliament without allowing Members of Parliament sufficient time to canvass public and expert opinion. If the arguments for urgency had been in their contemplation the framers of our Constitution would have been the most willing to oblige. It appears odd to me that the framers of our Constitution would have reserved the power that the Minister has under this Standing Order to be conferred by Standing Orders. The purpose of Standing Orders or statutes made under section 56(l) of the Constitution is to regulate procedure not to create new powers.

On the face of it, a provision which gives no time to one who is supposed to be given time is inconsistent with a provision that requires time to be given to the other. The history of our country justifies a constitutional provision that required time to be given. In such a case sometime, albeit not a long time, must be given to enable canvassing of public and expert opinion.

Against this, however, is the contention that such time can be given and should be given at the different stages of the passage of the Bill in the National Assembly. The quick answer to that is that the framers of our Constitution thought it important that such time should be afforded before this stage. I need not mention the beneficiency of the policy of sufficient time for availability of legislative proposals to the actual debates as the Bill passes through Parliament. The contribution of sufficiently informed legislators to debates in Parliament is phenomenal. Apart from that there is wide discussion now that there is little public input in legislation. Apart from that issues, the subjects of legislation now are becoming complex and it behoves every legislator to seek opinions of the public and experts. All these considerations are truncated by a provision that removes time for such an opportunity to allow canvassing of public and expert opinion. A Standing Order which provides that the Minister can without notice introduce a Bill in Parliament is inconsistent with the Constitution. To that extent it is invalid. It should be replaced by one that at least gives some time although attenuated time to cater for emergency and urgent legislation. The Constitution may have to be amended. to

enable the National Assembly to declare that the provision will not apply to situations where there is a declaration by the National Assembly. The result is that only the other provisions of Standing Order 114 remain. The Malawi Congress Party, the two members of Parliament should have been given twenty one days notice as they allege.

This leads me to consider the second aspect on the procedural requirements of the Constitution. This touches on the Quorum. The Quorum of the National Assembly is covered by the Constitution in Section 50(l) and 50(2) of the Constitution which provide:

> *"(1) The quorum of each Chamber shall be formed by the presence at the beginning of any sitting of at two thirds of the members of that Chamber entitled to vote,, not including the Speaker or a presiding member.*
>
> *(2) If it is brought to the attention of the Speaker or person acting as Speaker by any member of the Chamber over which he or she is presiding that there are less than the number of members prescribed by the Standing Orders of that Chamber present and after such interval as may be prescribed in rules of procedure of the Chamber, the Speaker or person acting as Speaker ascertains that the number of members present is still less than that prescribed by the Standing Orders Chamber, he or she shall adjourn the Chamber."*

The two subsections should be read together. If they are read together no problem arises. Both Mr. Nyirenda, the plaintiffs counsel, and the Attorney General., Mr. Chizumila concentrated on subsection 1. They concentrated on the meaning of the word "sitting" to yield the results justifying their positions. Neither approach is justified on the reading of the two provisions together.

Mr. Nyirenda submits that the word "sitting" means the different and daily activities. According to this rendition there is a sitting on every day the Parliament is in session. The word "sitting" is not defined by the Constitution. It is used in section 59 of the Constitution:

> *"Every session of the National Assembly and of the Senate shall be held at such place within Malawi and shall commence at such time as each Speaker, in consultation with the President, may appoint with respect to the Chamber in which that Speaker presides at the sitting of each Chamber after the commencement of that session shall be held at such times and on such days as that Chamber shall appoint: ..... There shall be at least two sittings of the National Assembly and of the Senate every year."*

Clearly the word in this section in a sense is contrary to what Mr. Nyirenda is proposing. Mr. Nyirenda wants us to use it in the sense in which it is used in the Standing Orders of the House. This cannot be done. The Standing Orders of the National Assembly cannot be an aid to interpretation of the Constitution.

The Attorney General contends that if we accept the rendition of the word sitting in section 59, there was Quorum of the National Assembly in so far as there was two thirds majority at the beginning of that sitting. It did not matter that at a later stage, namely when the members of the National Assembly of the Malawi Congress Party walked out of the National Assembly, there were less than two thirds in the House. With much sense of urgency he contended that if the quorum was to be retained throughout the opposition can walk out and hold the house in ransom. The Attorney General, therefore, submits that the Constitution requires two thirds of the National Assembly at the beginning and not during the deliberations.

There are problems, however, with this stance. On first reading of section 50(l), the Attorney General's position looks correct. On second reading however, the position becomes shakky. All that the subsection says is that the quorum of the National Assembly shall be two thirds of the members at the beginning of the sitting, assuming of course) the rendition of the word as is engendered in section 59. That is all the subsection says. All that is suggested after that is conjecture.

The Attorney General's position is that what the section means is that after that the number can dwindle to any level provided the quorum was constituted at the beginning. The section only says that the beginning of the sitting the Quorum of the National Assembly shall be two thirds of the House. What the section does not say will help to appreciate what it does say. The section does not say as the Attorney General contends that after the beginning and in the course of the proceedings the Quorum shall not be two thirds of the House. Neither does the subsection say, as Mr. Nyirenda contends that after having two thirds at the beginning after that in the course of the proceedings the Quorum shall be two thirds. Subsection (1) alone, therefore, only helps us to know what the Quorum should be at the beginning of the sitting. It does not say what should happen thereafter. It leaves a gap. I will come to the gap later in the judgement. Let us concentrate more on subsection 1.

There are problems with reading so much in subsection 1. The difficulty is underscored by a comparison of a Scottish and an English case. I have not read the Scottish case of **Henderson -v- James Louttit & Co. Ltd** (1894)21 Rettie 674. The report is not available in our library. The case is however adequately referred to in the English case of **In Re Hartley Baird Ld. (1955) Ch. D. 143**. in a judgement of Winn-Parry, J. In that case the articles of association provided for Quorum in the following manner. Article 52 provided:

> *"No business shall be transacted at any general meeting unless a quorum is present when the meeting proceeds to business. For all purposes the quorum shall be ten members personally present."*

Article 53 provided:

> *"If within half an hour from the time appointed for holding a general meeting a quorum is not present, the meeting, if convened on the requisition of members, shall be dissolved. In any other case it shall stand adjourned to the same day in the next week, at*

*the same time and place, and if at such adjourned meeting a quorum is not present within an hour from the time appointed for holding- the meeting, the members present shall be a quorum."*

The facts were very simple. At the meeting of shareholders a Quorum was formed at the beginning of the meeting. The resolution was made after one member, dissatisfied with the resolution, left and reduced the Quorum in the process. The question was whether a resolution passed without quorum at the end was valid. Winn-parry held that it was valid. He starts by rejecting the decision of the Scottish case. The crux of the Judge's reasoning is in the following statement:

***"Prima facie** those words are apt to apply to the case before me, but as I read the somewhat short report and look at the facts, it appears to me that statement can be properly regarded as obiter dictum. In any event, with all respect to that decision of the Court of Session, I feel compelled primarily to concentrate on the language of the two relevant articles before me. From the force of that language, I have come to the conclusion that I ought not to follow the Scottish case, but that I ought to conclude that the meeting in question of the holders of the "B" ordinary shares was one at which a valid class resolution was passed, because at the beginning of the meeting, that is when the meeting proceeded to business, there was present a quorum as provided by article 46 of the articles of association."*

With respect to Winn-Parry J the conclusion is only justified by the premise that he took on the purport of article 52. That premise is found at page 146 when he says:

*"It provides that no business is to be transacted at a general meeting unless a condition is fulfilled and that condition is a composite one. It requires not only that a quorum is to be present, but qualifies that by saying that the quorum is to be present when the meeting proceeds to business, then a formula is set out for calculating the number who are to form the quorum."*

I agree that article 52 creates a condition precedent for transaction of business but I am not of the view that the condition is a composite one. Winn -Parry, J proceeds on the basis that because the condition is a composite one, the words ‘when the meeting proceeds to business' are a qualification, in other words they are an element of the condition. Accepting that they are qualifying one has also to accept that the words could be descriptive. In the latter sense they are not part of the condition. They only describe when the quorum should be ascertained for purposes of transacting the business. In short all the article says is don't start any business if, when you begin business, there is no quorum. Obviously it does not say that the quorum can dwindle afterwards.

The words just referred to could be descriptive rather than prescriptive. This rendition also accords much with common sense, practice and, as we shall see shortly, the meaning of the word quorum. In practice and common sense the quorum is ascertained at the beginning of

the meeting. It is never the practice that people should go into a meeting, to ascertain the quorum at the beginning and at the end or during the meeting ascertain the quorum to see if they were validly constituted. Winn-Parry J justifies his premise in the following words:

> *"It could only be by implication that that language could be extended to cover the position when the meeting proceeds to the vote because, on the face of it, the condition of the article is fulfilled if the quorum is present when the meeting proceeds to consider the business for which it was convened."*

Clearly what follows after the meeting has started can only be by implication. It cannot be said by just reading article 52 that the provision implies that at the voting stage any less number can make a binding decision. The position, however., is, as we shall see when we look at the meaning of the word quorum, less number than constitutes the quorum cannot bind the quorum Winn-Parry J proceeds to justify his interpretation as follows:

> *"Looking still only at these articles, I think that that interpretation is underlined when one considers and analyses article 53, which is designed to cover the position which would arise if a quorum was not at any time present, and not merely where the numbers present were reduced below the number required for a quorum under article 52, because article 53 says: "If within "half an hour from the time appointed for the holding of a general meeting a quorum is not present," then certain consequences are to follow. Putting aside the case of a meeting convened on the requisition of members, the result would be that there would be an automatic adjournment for one week., and then the members present would form a quorum. That article is clearly designed to save a meeting which has been properly convened, but which cannot proceed to business because no quorum is ever present; but it does not apply in the case of a meeting at which a quorum is present at the beginning when the meeting proceeds to business, but at which a quorum has ceased to be present at the time when the meeting proceeds to vote on any resolution before it."*

With respect to Winn-Parry J. the article does cover a meeting at which a quorum is present at the beginning when the meeting proceeds to business, but at which a quorum has ceased to be present at the time when the meeting proceeds to vote on any resolution put before it. Now the first part of article 53 deals with a situation where the quorum cannot be constituted at the beginning of the general meeting. The article provides that the meeting if convened shall be dissolved. The latter part deals with any other case, for the introductory words are "in any other case". This includes., in my view, the situation where, when the members proceed to vote on a resolution and at that stage the Quorum is not constituted. In any case article 52 provides that for all purposes the quorum shall be ten members. The article itself provides that the quorum shall be constituted at the beginning of the meeting. It also says that for all purposes the quorum shall be ten members. For purposes of voting the number shall be ten. If the members are to vote, for that purpose the quorum shall be ten. It does not matter that at the beginning there are ten. If they are less then, at a voting stage, according to the last bit of article 53, such members as were present at the voting stage constitute a quorum at a

subsequent meeting. It is important to realise that according to article 53, the first part, if at the beginning of the meeting there is no quorum the meeting shall stand dissolved. There is no provision for the re-constitution of the meeting. While as in any other case, and this includes, and must be the only case, the situation where a quorum was properly constituted and there is less than the quorum, the members who remain after the quorum has dwindled can convene and constitute the quorum at the subsequent meeting. It is not correct therefore that article 53 does not save the situation where the quorum has dwindled after a member has left for whatever reason and reduced the quorum in the process.

On this pretext the next statement by Winn-Parry J is unacceptable:

> *"Either then there is a gap in the scheme of the articles, which would be unfortunate, or else there is no gap; but there can be no gap only if the interpretation which I have placed on article 52 is the right one."*

There is no gap in the articles. The articles together require that no business should be transacted unless when business begins the quorum is constituted. They point in no uncertain terms that for all purposes the quorum shall be ten. That should mean that for purposes of commencing a meeting the number should be ten. ' They state that no business should be transacted as long as at the beginning the quorum is not constituted. If it is not so constituted the meeting should be dissolved. In any other case, that is where the quorum has been constituted at the beginning, if there are less than ten, the meeting should be adjourned and if at the next convened meeting the quorum is not constituted the people present will constitute the quorum. In my view there is not gap. The articles saved the situation which counsel for the applicant feared, it would enable a person to wreck a meeting where a quorum was present at the beginning of the meeting by leaving before the business of the meeting was transacted and thereby reducing the meeting to a number below the quorum". If such a member left those left can re-constitute a Quorum at the next meeting and carry the day. Since there is no gap Winn-Parry's interpretation serves and saves nothing.

Winn-Parry J, did not follow the decision in **Henderson -v- James Louttit & Co. Ltd.** In that case the court had to contend with a provision similar to article 52. There was no equivalent of article 53 found in In Re Hartley Baird Ld. In Henderson -vJames Louttit & Co. Ld the Scottish Court decided differently from Winn-Parry J. Winn-Parry J did not follow the Scottish decision for three reasons.

First it is because in **Henderson -v- James Louttit & Co**. there was no provision equivalent to article 53. The corollary to this is that he would have decided differently if article 53 was not there. Therefore, on its facts the Scottish decision is correct. Moreover both article 52 and 53, particularly the latter parts of the articles, clearly show that the quorum had to be present not only at the beginning but thereafter. If, therefore, there was no equivalent of article 53 in **Henderson -v- James Louttit & Co. Ltd**. the decision was correct. The second reason given for not following the Scottish decision is that WinnParry J had to concentrate on the document before him. This implies that on the construction of the documents as before

**Henderson -v- James Louttit** the Scottish Court could be right. The last reason given by Winn-Parry J is that the decision is obiter. On a provision similar to article 52, the Lord President took the view, accepted by other members of the Court, that a Quorum must not only be present at the commencement of the meeting but also at the time when the business is transacted. In the course of the judgment, at page 676 the Lord President commented as follows:

> *"It would be a highly inconvenient, not to "say unnatural meaning to attribute to it, (the article) to hold " that all that is necessary to the validity of the proceedings is, "that at the earliest stage of the meeting a quorum should be "present, but that after the real business of the meeting is "started and under consideration the quorum might go away."*

As I said before,, the Scottish report is not available to me. I want to accept that the statement is obiter In any case the application in In re Baird was unopposect. WinnParry, i., could only accept the one view. it is, however, a good rule. It accords wits common sense and practice. The words when the meeting proceeds to business" are descriptive. They describe the time when the quorum should be ascertained when the business is to be transacted. They do not prescribe a Quorum for the rest of the business. In the normal course of things the quorum is ascertained at the beginning. It is intended that the quorum would be maintained through the proceedings. The criticism that otherwise a member would derail the meeting by his departure if the rule was otherwise is countered by similar criticism that if the rule was as is suggested a meeting could start and people leave the meeting as long as it is properly constituted at the beginning. In that case the functions, of a Quorum would be to create a quorum with the disastrous result that once a quorum has been constituted the deliberations can proceed with a reduced number. Then why create a Quorum? I agree with the Scottish Court that it would be an inconvenient and unnatural meaning to attribute to the article.

The purpose of a Quorum cannot be to constitute a quorum. The function of a quorum is to create a body for deliberations of the business of the organisation or institution and come up with valid decisions that would bind the institution. When interpreting a provision it is most useful to appreciate the meaning of the word Quorum. Understandably our constitution has not defined what a quorum is. The **Oxford Advanced Learners Dictionary of Current English. AY Hornby, Oxford Press, 3rd Edn., 22nd Ump.** defines Quorum as "the number of persons who must, by the rules, be present at a meeting before its proceedings can have authority". The hallmark of a quorum is presence at the meeting, not absence. The ultimate purpose of the number is that with that presence it may validate the proceedings. Proceedings should not be split into processes. The aim is that the whole proceeding or process must be validated. The whole process from beginning to end must be valid. It is not just the beginning which must be valid, the end must be equally valid. I have considerable problems in thinking that the proceeding will be considered valid when members in right members are present at the beginning and are absent at the end of the proceeding.

The purpose of a quorum is stated by the American case of **Benintandi -v- Kenton Hotel, 294 N.Y. 112, 60 N.E. 2d 829, 831**. 1 have not read the report. The case is cited in **Blacks Law Dictionary, M.A. Black 5th Edn., 1979 (St. Paul Minn West Publishing Co.).**

*"The idea of a quorum is that, when that required number of persons goes into a session as a body, such as directors of a corporation, the votes of a majority thereof are sufficient for binding action."*

It is obvious from this holding that the members of that which constitute the quorum must be present at the voting stage not only at the beginning. If this is what a quorum is and entails a provision which ousts this rendition must be clear and unambiguous for the natural meaning of the word 'Quorum' is as I have demonstrated. It presupposes a body which must be present through out the proceedings as to render efficacy and validity to the decisions and actions of that body. Ibis conclusion does not mean that the rules cannot be made in such a way that a quorum cannot be constituted as stated. If the rules do provide differently, it must be in no unambiguous terms. One must go to the rules to ascertain what was intended.

I must now turn to section 50 of our Constitution. The Attorney General thinks that the provision means that the quorum must be on at the beginning of the seating. I do not think that that interpretation is correct on reading section 50(l):

"The quorum of each Chamber shall be formed by the presence at the beginning of any sitting of at least two thirds of the members of that Chamber entitled to vote, not including the Speaker or a presiding member."

On the face of it, the understanding of the Attorney General is correct. On close reading there are more possibilities. The words "at the beginning of any sitting" could be descriptive rather than prescriptive. In the latter they are only indicative of when the quorum should be formed, namely at the beginning of the sitting. We will have more to say on this aspect later. If the words are descriptive,, all that section 50 1) says is that the sitting, in the sense in which I have stated, cannot start unless there are two thirds when the sitting begins. Put differently, all that the section says is, don't start if there are less than two thirds at the- beginning of sitting. In other words, the National Assembly can only start sitting, i.e. when the quorum is formed, when at the beginning of the sitting there are two thirds of the members of the National Assembly.

Taking the reasoning of the Attorney General there would be a gap in the provisions. Suppose that at the beginning of the sitting there is two thirds and the House dwindles to one fifth. On the Attorney Generals reasoning they could bind the nation as long as the quorum was constituted at the beginning. That is very odd. I cannot imagine that the framers of our Constitution had that in mind. In this scenario there is a gap in the Constitution on what should happen if there is less than two thirds at the voting state.

On the other hand, it will sound strange to the whole citizenry that the quorum should only be constituted at the beginning of the sitting and that after that it should disappear. Accepting that the quorum is constituted at the beginning of the sitting, it may be useful to see what section 50(l) does not say to understand what it does say. Accepting that the quorum shall

be constituted at the beginning of the sitting, what section 50(l) does not say is that the quorum should be retained throughout the proceedings. This is Mr. Nyirenda's view. The section does not say that. Neither is this view possible by inference. Neither does section 50(l) say that the number could be reduced. This is the Attorney General's view. Section 50(l), therefore, should re restricted to the interpretation that it determines the quorum that should be in place when the National Assembly is beginning its sitting. It does not deal with what the quorum should be after the sitting has already been commenced. It should not be understood to mean that the quorum of the National Assembly will be constituted when there are two thirds of the members or the National Assembly at the beginning with the unpalatable and unthinkable result that the number of members can plumage to any level and the National Assembly so sparsely constituted capable of binding the This interpretation is consistent with both the Scottish case of **Henderson -v- James Louttit & Co. Ltd** and the English case of **In re Hartley Baird Id**. Winn-Parry J, in the English case, agreed that article 52, which is in similar words with the provision in **Henderson -v- James Louttit & Co. Ltd.** and our section 50(l), standing alone, was incapable of resulting in an interpretation that the quorum could be constituted only at the beginning of the meeting and disappear later. What made the difference was article 53 in **In Re Baird** which was absent in **Henderson -v- James Louttit & Co.** WinnParry J said:

> *"In the course of that case, the court had to consider an article in all material respects similar to article 52, but so far as I can see from a study of the report, the article corresponding to article 53 in the company's articles in this case was not cited to the court."*

Later he says:

> *"In any event, with all respect to that decision of the Court of Session, I feel compelled primarily to concentrate on the language of the two relevant articles before me. From the force of that language, I have come to the conclusion that I ought not to follow the Scottish case, but that I ought to conclude that the meeting in question of the holders of the "B" ordinary shares was one at which a valid class resolution was passed, because at the beginning of the meeting, that is when the meeting proceeded to business, there was present a quorum as provided by article 46 of the articles of association."*

Obviously Winn-Parry, J. did not have a provision like our section 52(2) of the Constitution. I realise that in the case considered the Court were dealing with documents in private law; the approach, however, is of general application and can be transposed for interpreting the Constitution. In this case section 50(l) standing alone is incapable of resulting in an interpretation advocated by the Attorney General. Winn-Parry, J., did not have to consider a provision like section 50(2).

Section 50(l) should be read together with section 50(2). Section 50(2) should be considered in view of the standing orders of each Chamber as to the Quorum of each house.

The two provisions should be read in the scheme of the provision just mentioned. This is the approach advocated by Winn-Parry J, in **In Re Baird Id -**

> *"In any event, with all respect to that decision of the Court Session, I feel compelled primarily to concentrate on the language of the two relevant articles before me. From the force of that language, I have come to the conclusion that I ought not to follow the Scottish case, but that I ought to conclude that the meeting in question of the holders of the "B" ordinary shares was one at which a valid class resolution was passed, because at the beginning of the meeting, that is, when the meeting proceeded to business, there was present a quorum as provided by article 46 of the articles of association."*

What is the scheme of section 50 of our Constitution. By looking at section 50(l) and 50(2) it will be seen that the framers of our Constitution wanted to deal with the question of the quorum of the Chambers in two stages. The first stage is the quorum at the beginning of each sitting. This is dealt with in section 50(l). The second stage is the Quorum after the beginning of the sitting, the quorum during the sitting. The framers of our Constitution provided the quorum for the beginning of the sitting of the house directly. They left the quorum of the house for the course of the proceedings to the two Chambers themselves. This is implicit in section 50(2) of the Constitution. It is in this context that Standing Order 26 is created -

> *"A quorum of the Assembly or of a committed of the whole House shall consist of twothirds of all the Member of the Assembly besides the person presiding."*

You notice immediately that in Standing Order 26 there is no reference to the beginning of the sitting. The Standing Order is conjured in absolute terms that indicate that quorum should be retained throughout. Why is there no reference to the beginning of the sitting? It is precisely for the reason that the quorum that is required at the beginning of the sitting has already been provided for in section 50(l) of the Constitution by framers of our Constitution. It will be seen from the scheme the framers have in section 50 that even if we accept that the quorum of the National Assembly shall be two thirds of its members at the beginning of the sitting the quorum after the beginning of the sitting is to be determined by the House. In this particular instance the National Assembly itself pursuant to section 50(2) of the Constitution has laid two thirds majority of its members for it proceedings.

The same result is arrived at if the two subsections are read together. Now subsection 1 provides that the quorum of the chamber shall be formed by the presence at the beginning of any sitting of at least two thirds of the members of the Chamber entitle to vote not including the Speaker or a presiding member. Then comes the provision in subsection 2 that if it is brought to the attention of the Speaker or person acting as Speaker by any member of the Chamber over which he or she is presiding that there are less than the number of members prescribed by the standing orders of that Chamber etc. Subsection 1 deals with the quorum as at the beginning of the sitting. Subsection 2 presupposes the existence of a different quorum for the Chamber after the sitting has begun and during the proceedings. That prescription is distinct form the one for the beginning of the sitting.

It could be said that section 51(2) does not detract from the requirement of two thirds at the beginning of the sitting because the rule refers to a member of the Chamber bringing to the attention of the Speaker the absence of the Quorum. It could be argued that the section refers to the situation. where the quorum not having been constituted at the beginning of the sitting a member of the Chamber brings the matter to the attention of the Speaker or a person presiding on behalf of the Speaker. That is a possibility. Section 50(2) is however, specific on which quorum is in issue it is the one prescribed by the Standing Orders of the Chamber, not the one under section 50(l). Section 50(2) would have said if the attention of the Honourable Speaker was brought to the Section 50(2) refers to the quorum absence of quorum in subsection 1 prescribed by the Standing Order.

In my judgment on the principles as I have tried to lay down, whatever view is taken, the quorum of the National Assembly is two thirds of its members at the beginning and during the proceedings. Reading section 50(l) alone, it cannot be said that it stands for the proposition that the quorum of the chamber shall be constituted at the beginning of the sitting. When the section is read in the context of section 50(2) it is more apparent that section 50(l) is only providing for the quorum at the begining of the sitting and leaves the quorum for afterwards to be determined by the Chamber. The National Assembly had determine that to be two thirds of members of the Chamber. This number must be maintained throughout the proceedings. If the framers of our Constitution had intended that the quorum should be constituted at the beginning of the sitting, it was superfluous to require another as in section 50(l) in accordance with the Standing Order of each Chamber, in section 50(2). It was unnecessary to presuppose another quorum in accordance with Standing Order if all the framers of our Constitution wanted was a quorum at the beginning of a sitting. It is not correct , therefore, that in the course of the proceedings of the National Assembly it suffices if the two thirds quorum is constituted only at the beginning of the sitting.

It might really be painful when the government, like in this case, is in the minority in the House that the majority will hold Parliament in a ransom. It is equally sad for the country to say that the laws of the land represent the will of the nation when really an insignificant number of the nation's representatives have passed the legislation. That situation, however, is a political statement which is not solved legally. It is solved by politicians, not the law. The courts cannot prescribe to the voter to vote in such a way that the Government has a majority. Statesmanship should leave politicians to enter into coalitions to solve political stalements. The law cannot be that that the number, however small, of the governing party should form a quorum. This is implicit in the submission that government will be held in ransom. The duty of the court is not to create a Constitution. The duty of the court is to interpret it. On the Constitution as it is now the quorum of the National Assembly shall be two thirds at the beginning and two thirds during the proceedings. Any other view requires changing the Constitution. Courts cannot do that. Parliamentarians can with the requisite majority.

Before leaving this issue, it may be useful to consider the effect of section 56(2):

*"Save as otherwise provided in this Constitution, the National Assembly and the Senate may act unless more than two-thirds of all their seats are vacant."*

I have had a bit of difficulty in appreciating how this provision was introduced when the matter before the House was whether the House had a quorum. First the provision is not dealing with the quorum. Secondly it is only stating the point below hich the National Assembly may not act because its seats are vacant - -there is nothing in Mat section to suggest that the National Assembly can act without the necessary quorum. All it is saying is that if the seats of the National Assembly are below a third the National Assembly cannot act. All it means to my mind is that there is no National Assembly when more than two thirds of its seats are vacant, the situation in law called abeyance. If there are more than a third of the seats of the National Assembly the National Assembly can act. In relation to the requirement of a Quorum, the National Assembly can convene on other matters that do no require a quorum, for if it wanted to commence a sitting of the house, it would not do so as long as there is no quorum. That this is the case is confirmed by the word of the subsection itself. It says *"save as otherwise provided in this Constitution".* Consequently, if the Constitution provides for a quorum for a sitting of the National Assembly, section 56(2) is subject to that provision with the result that even if the number of seats is above one third, there can be no sitting of the National Assembly if at the beginning or during its deliberations there are less than two thirds of its members present in the Chambers. If it was otherwise it would be superfluous to put the quorum of the Chamber at two thirds. The thing to do in that case is to put the coram at one third. If the framers of our Constitution intended Section 56(2) to override other provisions, they would have used the often used words "Notwithstanding other provisions of the Constitution."

This leads me to the next aspect of procedure which is the bone of contention in this action. The plaintiffs contended that the Speaker of the National Assembly should not have done what he did when the question of lack of coram was brought to his attention. According to section 50(2), if this fact is brought to the attention of the Speaker or a person acting in his behalf, the Speaker or such person should ascertain the number of members present. If he confirms that the number is less he should adjourn the Chamber. The provision is adumbrated by Standing Order 27:

"(1) If at any time after the business of the Assembly has commenced, or when the Assembly is in Committee and a vote is required to be taken, the attention of Mr. Speaker or the Chairman is called to the absence of a quorum, Mr. Speaker or the Chairman shall count the Assembly or the Committee, as the case may be. If on the first count a quorum does not appear to be present, Mr. Speaker or the Chairman shall cause the division bell to be rung as for a division, and if no quorum be present after the lapse of three minutes he shall announce to the Assembly that there is not a quorum present and shall proceed as follows:

(a) if Mr. Speaker be in the Chair, he shall adjourn the Assembly without question put until the next sitting day;

(b) if the Assembly be in Committee, the Chairman shall leave the Chair and report the fact to Mr. Speaker, who shall adjourn the Assembly without question put until the next sitting day. Provided that if attention is drawn to the absence of a quorum before the commencement of business, Mr. Speaker or the Chairman, as the case may be, shall before taking the action described in paragraphs (a) and (b), suspend the sitting for half an hour.

(2) If, from the number of members taking part in a division it appears that a quorum is not present, the division shall be invalid. The business then under consideration shall stand over until the next sitting and Mr. Speaker shall proceed as if his attention had been drawn to the absence of a quorum. If a quorum is then present, the next business shall be entered upon.

(3) Whenever Mr. Speaker or the Chairman is engaged in counting the Assembly or the Committee the Bar of the Assembly shall remain open."

Reading these provisions together, as soon as the question of absence of quorum is brought to the Speaker or the person presiding in his behalf, the Speaker or the person presiding is duty bound to count the members.

I do sympathise with the Speaker with the course he took. He took the step he took not because he was oblivious to the Constitutional position or the Standing Order. The members of the House interposed, of course with indulgence to respond immediately after the Speaker's attention was brought to the absence of quorum. There is nothing in the Constitution or the Standing Orders of the Chamber to allow for the Speaker or a member of the Chamber to find the reason why a member has brought the question of the absence of quorum to the Speaker of the National Assembly. The question of absence of quorum was so crucial to the framers of our Constitution that the Speaker had to act with urgency and resolution. The Speaker was under a duty to count the members no sooner than the member of the House brought the matter of absence of a quorum to his attention.

Unfortunately the Speaker proceeded as he did to hear debate on the issue. At the end of the debate he decided not to count the members. Much of that debate should have been left to after the members had been counted. This was not going to be acceptable to the government side for that count was going to show that the quorum under the Standing Orders of the House was not constituted after the Malawi Congress Party had walked out of the Chamber. That notwithstanding, the Speaker should still have counted the House. The decision that he took after the debate was based on a wrong interpretation of the Constitution. The Speaker did not follow the Constitution let alone the Standing Orders of the Chamber when the matter of the absence of a quorum was brought to his attention. It is not disputed that after the Malawi Congress Party members of the National Assembly walked out there was not two thirds of the house to constitute a quorum in terms of Standing Order 26. The Speaker should then have adjourned the Chamber in terms of section 50(2) of the Constitution. The situation could

not be saved by section 56(2) because that provision does not relate to quorum and is itself subject to provision relating to quorum.

On the first aspect of the challenge that the Press Trust Reconstruction Act was passed without compliance with the provision of the Constitution I have decided that that was the case. Members of Parliament were required to be given notice. A provision in the Standing Orders of the National Assembly requiring that no notice should be given at all is incongruous with a provision that says time should be given. If there is urgency, some reduced time could be allowed and a provision that gives reduced time which is reasonable as the circumstances of the case demand would be complying with the Constitutional requirements in section 96(2). On the quorum, I have found that section 50(l) read on its own does not stand for the proposition that the quorum of a Chamber has to be determined at the beginning of a sitting and that after that the quorum can dwindle. Section 50(l) does not deal with quorum of a Chamber in the course of proceedings after the sitting has began. Section 50(l) has to be read in relation to section 50(2). If the two are read together, it will be seen that section 50(l) deals with the quorum at the beginning of the sitting. Section 50(2) deals with the quorum after a sitting has began. Under Standing Order 26, made pursuant to section 50(2), the quorum of the National Assembly shall be two thirds of its members throughout the proceedings. When the attention of the Speaker of the National Assembly has been drawn to the absence of a quorum in terms of Standing Orders he has to adjourn the Chamber, in terms of section 50(2) of the Constitution, after ascertaining that the quorum is absent.

These conclusions, however, do not in themselves dispose of the matter of the validity of the Press Trust Reconstruction Act. As noted earlier, the Act is being challenged on two fronts, namely, for not complying with the requirements of the Constitution and offending substantive principles of the question. It may be the best thing to do now, having made conclusions on noncompliance with the procedures laid by the Constitution, to consider whether on this aspect the Press Trust Reconstruction Act can be vitiated. Mr. Nyirenda submits that in so long as there has been failure to comply with the Constitution the Act should be declared null and void. The Attorney General thinks that the Court can only declare an Act of Parliament invalid if it violates principles of the Constitution. These are fundamental questions. Naturally one has to be conscious that the matter is based on the relationship between branches of Government whose independent existence as preserved by the Constitution should be respected. This is important not only because it is what the framers of out Constitution intended in the Constitution which they promulgated but also because at every point in time each branch must avoid at any cost and do whatever it takes to minimise conflict, friction or competition between the branches of Government. Having said that, however, our Constitution enjoins every branch of Government to respect the Constitution. It has left the duty to this Court as an arbiter on matters where constitutionality is in issue **(Nseula -v-. Attorney General**. This is a noble task given to an appropriate and venerable branch of Government which this branch of Government must carry out in order to uphold the Constitution even if in some sense it is perceived to be an intrusion or superiority over other branches of Government. It is a hallmark of our new constitutional law that Courts now can test the validity of an Act of Parliament. In that sense our Courts stand on a more august and enviable situation than English

Courts. For the extent to which Parliament can be impugned for its legislative process in the Courts of that land is muted and shrouded in the pillar aspect of its Constitutional Law, the supremacy of Parliament. It is those consideration which the Attorney General insidiously brings in his argument. There is little doubt that some of these considerations have a bearing in our Constitutional Law. Our 1994 Constitution, however, is **Volte - face.**

No doubt., as the Attorney General contends, it is anathema under English law to question the validity of an Act of Parliament because of lapses in procedures in the way the Act was passed in Parliament. This is a sequel to the wider rule in English Constitutional law that because of the doctrine of supremacy of Parliament, Courts cannot consider the validity of an Act of Parliament, it being the duty of the Courts only to interpret the Act. Ile rule has existed in some form in ancient times but in modem times was expressed albeit obiter by Lord Campbell, in defiance of the views north of England, in **Edinburgh and Dalkeith Railway Co. -v- Wauchope (1842) 8 C I & F. 7109 1 Bell 252, 278-279**

> *"My Lords, I think it right to say a word or two before I sit down, upon the point that has been raised with regard to an Act of Parliament being held inoperative by a court of justice because the forms, in respect of an Act of parliament, have not been complied with. There seems great reason to believe that (sic) notion has prevailed to a considerable extent in Scotland, for we have it here brought forward as a substantive ground upon which the act of the 4th and 5th William the Fourth could not apply: the language being, that the statute of the 4th and 5th William and Fourth being a private Act, and no notice given to the pursuer of the intention to apply for an Act of Parliament, and so on. It would appear that that defence was entered into, and the fact was examined into, and an inquiry, whether notice was given to him personally, or by advertisement in the newspapers, and the Lord Ordinary, in the note which he appends to his interlocutor, gives great weight to this. The Lord Ordinary says 'he is by no means satisfied that due Parliamentary notice was given to the pursuer previous to the introduction of this last Act. Undoubtedly no notice was given to him personally, nor did the public notices announce any intention to take away his existing rights. If, as the Lord Ordinary is disposed to think, these defects imply a failure to intimate the real design in view, he would be strongly inclined to hold in conformity with the principles of Donald, November 27, 1832, that rights previously established could not be taken away by a private Act, of which due notice was not given to the party meant to be inured.' Therefore my Lord Ordinary seems to have been most distinctly of opinion, that if this Act did receive that construction,, it would clearly take away the right to this tonnage from Mr. Wauchope, and would have had that effect if notice had been given to him before the Bill was introduced into the House of Commons; but that notice not having been given, it could have no such effect, and therefore the Act is wholly inoperative. I must express some surprise that such a notion should have prevailed. It seems to me there is no foundation for it whatever; all that a court of justice can look to is the Parliamentary roll; they see that an Act has passed both Houses of Parliament, and that it has received the royal assent, and no court of justice can inquire into the manner in which it was introduced, into Parliament, what was done previously to its being*

*introduced, or what passed in Parliament during the various stages of its progress through both Houses of Parliament. I therefore trust that no such inquiry will hereafter be entered into in Scotland, and that due effect will be given to every Act of Parliament, both private as well as public upon the just construction which appears to arise upon it."*

The dictum was approved as expressing the correct legal position by Lord Justices Reid, Morris of Borth Y Gest, Wilberforce, Simon and Cross in the House of Lords in **British Railways Board -v- Pickin (1974) A. C. 765.** Lord Reid said:

*"No doubt this was obiter but, so far as I am aware, no one since 1842 has doubted that it is a correct statement of the constitutional position."*

The House of Lords declared the immutability of Parliament and its Acts. Lord Reid said:

*"The function of the court is to construe and apply the enactments of Parliament. The court has no concern with the manner in which Parliament or its officer carrying out is Standing Order perform these function. Any attempt to prove that they were misled by fraud or otherwise would necessarily involve an inquiry into the manner in which they had performed their functions in dealing with the Bill which became the British Railways Act 1968."*

Lord Morris said:

*"The conclusion which I have reached results, in my view, not only from a settled and sustained line of authority which I see no reason to question and which I think should be endorsed but also from the view that any other conclusion would be constitutionally undesirable and impracticable. It must surely be for Parliament to lay down the procedures which are to be followed before a Bill can become an Act. It must be for Parliament to decide whether its decreed procedures have in fact been followed. It must be for Parliament to lay down and to construe its Standing Orders and further to decide whether they have been obeyed: it must be for Parliament to decide whether in any particular case to dispense with compliance with such orders. It must be for Parliament to decide whether it is satisfied that an Act should be passed in the form and with the wording set out in the Act. It must be for Parliament to decide what documentary material or testimony it requires and the extent to which Parliamentary privilege should attach. It would impracticable and undesirable for the High Court of Justice of embark upon an inquiry concerning the effect or the effectiveness of the internal procedures in the High Court of Parliament or an inquiry whether in any particular case those procedures were effectively followed."*

**Lord Reid** ably demonstrated the historical and constitutional context in which the rule was understood:

*"The idea that a court is entitled to disregard a provision in an Act of Parliament on any ground must seem strange and starling to anyone with any knowledge of the history and law of our constitution, but a detailed argument has been submitted to your Lordships and I must deal with it.*

*I must make it plain that there has been no attempt to question the general supremacy of Parliament. In earlier times many learned lawyers seem to have believed that an Act of Parliament could be disregarded in so far as it was contrary to the law of God or the law of nature or natural justice, but since the supremacy of Parliament was finally demonstrated by the Revolution of 1688 any such idea has become obsolete."*

The case of **British Railways Board -v- Pickin** is understood to have settled the problem in that country. It has not in fact. There are voices in academic circles. In **Constitutional and Administrative Law New Edn.,**

**Penguin, 1985,** De Smith and Brazier note:

*"This decision clarifies the situation which had been the subject of much academic debate. The courts will apparently now take the view that they lack jurisdiction to pronounce an ostensibly authentic Act of Parliament to be a nullity even though in fact Parliament has not functioned according to existing law. But the point still requires further exploration."*

**British Railway Board -v- Pickin** probably settled the law. The law so expressed however, appears to some to be so prosaic. There are now broader questions asked in English Constitutional law. Some of those are hypothetical but the do show the fallibility of such a broad rule. At page 86 De. Smith and Brazier state:

*"The courts will not encroach upon the exclusive preserves of the two Houses. Article 9 of the Bill of Rights 1689 provides that 'proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.' They fall within the province of Parliamentary privilege. Hence the courts will refuse to inquire into such questions as whether either House was mistaken as to the facts, whether a bill had two, three or thirty-three readings, whether a quorum was present, and so on. Perhaps they would even disclaim jurisdiction to inquire whether a bill was in fact passed in the same form by both Houses. If, however, it were to be asserted that a bill had not obtained a majority at the final reading in the House of Commons, would they, even after Pickin's case, be prepared to go behind the official text of the Act and determine the Journal of the House and the notes of the official shorthand writers, on the grounds that the alleged defect was peculiarly gross and that 'a court must not decline to open its eyes to the truth?"*

This comment, probably puts the matter a bit broadly. Two instances will illustrate the problem. In modem times statutes, not Constitutions have been enacted providing for

procedural and formal requirements to be complied with before a bill is passed into law. Courts have held that such requirements are directory and will be invoked only if the requirements are a condition precedent for passing a statute. The Australian cases of **Clayton -v- Heffron (1961) 105 C.L.R. 214, Cormack -v- Cope (1974) 131 C.L.R. 432** and **Victoria -v- Commonwealth of Australia and Conor (1975) 134 C.L.R. 81** illustrate the point. I agree with the comments of De Smith and Brazier at page 87 -

> *"What if it is alleged that procedural or formal requirements laid down by statute have not been complied with during the passage of a Bill? some modem statues have laid down procedural rules to be observed before a particular class of bill is introduced in Parliament. These rules are probably no more than directory; that is to say, nonmcompliance will not vitiate the end-product. One can arrive at this conclusion by two alternative assertions. The first is that the giving of the royal assent and publication with the appropriate words of enactment cure all prior defects. The second is that the rules in question are not of such fundamental importance to be regarded as conditions precedent to the validity of subsequent legislation. Clearly these are different approaches, the second implying that, compliance with statutory procedural rules of fundamental importance might be regarded as a condition precedent. One is not obliged to assume that fundamental rules of such a character lie within the exclusive cognizance of Parliament itself."*

Moreover to say that Courts cannot question the validity of an Act of Parliament on procedural aspects ignores the fundamental question what is an Act of Parliament. Our Constitution defines an Act of Parliament in section 49(2):

> "Unless otherwise provided in this Constitution, an "Act of Parliament" shall be a Bill which has -
>
> (i) been laid before and passed by a majority of the National Assembly;
> (ii) been laid before and passed by a majority of the Senate; and
>
> (iii) been assented to by the President in accordance with this Chapter."

The comments, again, of De Smith and Brazier are appropriate:

> *"In order to express its sovereign will, Parliament must be constituted as Parliament and must function as Parliament within the meaning of existing common law and statute law. Unless these antecedent conditions of law-making have been fulfilled, the product should not be regarded as an authentic Act of Parliament."*

Our legislature is created by our Constitution. The Constitution provided for the composition and functions of the Legislature. Our Parliament is property constituted to express its legislative will if, according to the Constitution and our law, it has a quorum. As I have stated earlier,

where the procedure has been laid by statute the Court will only interfere with the statute if the procedure laid down can be regarded as contention precedent. The problem arises when that procedure has been laid down by the law behind Parliament, in our case the Constitution. There is very little help one can get from English authorities because there is no written Constitution. There are however, constitutional law cases from other jurisdictions which show that a sovereign Parliament must act in a manner prescribed by the Constitution in order to properly express its legislative will.

The first case is the Irish case of **R. (O'Brien) -V- Military Government, N.D.U. International Camp. (1924 I.L.R. 32**. Article 47 of the Free State Constitution provided as follows:

> *"Any Bill passed or deemed to have been passed by both Houses may be suspended for a period of ninety days on the written demand of two-fifths of the members of **Dail Eireann** of a majority of the members of **Seanad Eireann** present to the President of the Execution Council not later than seven days from the day on which such a Bill shall have been so passed or deemed to have been so passed. Such a Bill shall, in accordance with regulations to be made by the **Oireachtas**, be submitted by referendum to the decision of the people if demanded before the expiration of the ninety days, either by a resolution or **Seanad Eireann**, Assented to by three-fifths of the members of Seanad Eireann, or by a petition signed by not less than one-twentieth of the voters then on the register of voters, and the decision of the people by a majority of the voter recorded on such referendum shall be conclusive. These provisions shall not apply to many Bills as shall be declared by both House to be necessary for the immediate preservation of the public peace, health, or safety."*

The Bill under which the plaintiff was detained was assented to one day after it was passed. The Act was held to be invalid because it did not comply with the procedure in the Constitution. It was contended that because the Act had been consented to and was presented as an Act of Parliament it was unnecessary to consider the effect of article 4T. In rejecting the contention Molong CJ said:

> *"What does that Article mean? A Bill has passed both Houses, but sill the rights of the members of both Houses of the Legislature do not cease to exist. It may be that a number of members of the Legislature thin, notwithstanding that a Bill has in fact passed a majority of both Houses, that the people should have the ultimate decision upon the question. How are they to express their views? The only way by which their views can be expressed under the Article is by a written demand. A written demand requires time. What time is to be given for that written demand? The Article ways seven days. Consequently the scheme of the Article so tar is this: A Bill passes both Houses, but notwithstanding that it passes both Houses two-fifths of the members of the **Dail** or the majority of the **Seanad** may think that there should be a referendum may express their thoughts in a constitutional manner under Article 47 by presenting a petition to the President of the Executive Council.*

*That would be rendered nugatory, of course, if immediately the Bill was passed, and the demand was made, it was open to the President of the Executive Council to disregard the demand and sent is at once to the Governor-General, as has been contended for by Mr. Sullivan. But that is not the meaning of the Article at all. The word "may" there casts a duty upon the President of the Executive Council, if he refuses such a written demand, to submit it to referendum-, and that is made perfectly*

*clear by the words at the second clause, which days that such a Bill was in accordance with the regulations to be made by the Oireachtas to be submitted by referendum to the decision of the people when it is taken in a proper manner."*

The next case is the **South African** case of **Harris and Other -v Minster of the Interior 1952 (4) SA 769.** In that matter section 35(l) of the South Africa's Act provided as follows:

*"Parliament may by law prescribe the qualifications which shall be necessary to entitle persons to vote at the election of members of the House of Assembly, but no such law shall disqualify say person (other than a Native, as defied in sec. 1 of the Representation of Natives Act 1936) in the Province of the Cape of Good Hope who, under the laws existing in the Colony of the Cape of Good Hope at the establishment of the Union, is or may become capable of being registered as a voter from being so registered in the Providence of the Cape of Good Hope by reason of his race of colour only or disqualify any Native, as so defined, who under the said Act would be or might become capable of being registered in the Cape Native voters' roll instituted under that Act from being so registered, or alto the Dumber of the members of the House of Assembly who in terms of the said Act may be elected by the persons registered in the said roll, unless the Bill embodying such disqualification or alteration be passed by both Houses of Parliament sitting together, and at the third reading be agreed to by not less than two thirds of the total number of members of both Houses. A Bill so passed at such joint sitting shall be taken to have been duly passed by both Hoses of Parliament."*

Section 152 provided as follows:

*"Parliament may by law repeal or alter any of the provision of this Act: Provided that no provision thereof, for the operation of which a definite period of time is prescribed, shall during such period be repealed or altered: And provided further that no repeal or alteration of the provisions contained in this section or in secs. 33 and 34 (until the number of members of the House of Assembly has reached the limit therein prescribed, or until a period of ten years has elapse after the establishment of the Union whichever is the longer period), or in secs. 35 and 137, shall be valid unless the Bill embodying such repeal or alteration shall be passed by both Houses of Parliament sitting together, and at the third reading be agreed to by not less than two-third of the total number of members of both Houses. A Bill so passed at such joint sitting shall be taken to have been duly passed by both Houses of Parliament."*

It was common ground that the Representation of Voters Act 1951 which provided for separate representation of Europeans and non-European voters in the province of Cape of Hood Hope was passed by the House of Assembly and the Senate sitting separately and assented to by the Governor-General and that it was not passed in conformity with the provisions of sec. 35(l) and 152 of the South African Act. The Court held that it had power to declare an Act invalid on the ground that it was not passed in conformity with the provision of the sections 35 and 152 of the South Africa Act. Centlivres, C.J. said at page 471:

> *"To say, as long as the entrenched clauses still appear in the South African Act, that the "procedure express or implied in the South Africa Act is so far as Courts of Law are concerned at the mercy of Parliament like everything else" seems to me with great respect to be inconsistent with the decision of this Court in* ***Rex -v- Ndobe,*** *supra at p 497. There this Court said that under sec. 58 of the South Africa Act, each House of Parliament is free to prescribe its own rules with respect to the order and conduct of its business and proceedings and that into the due observance of such rules this Court is not competent to enquire but that this Court is competent to enquire whether, regard being had to the provisions of sec. 35 an Act of Parliament has been validly passed. To hold otherwise would mean that Courts of law would be powerless to protect the rights of individuals which were specially protected in the constitution of this country."*

The most illustrative, however, is the judgment of Lord Pearce when delivering the opinion of the Privy Council in **The Bribery Commissioner -v- Ranasinghe (1965 A.C. 172.** It may be useful to spend more time on this decision for what it is worthy. The constitution of Ceylon in section 29(l) and (4) provided as follows:

> *"Subect to the provisions of this Order Parliament shall have power to make laws for the peace, order and good government of the Island..... In the exercise of its powers under this section, Parliament may amend or repeal any of the provisions of the Order, or of any other Order of Her Majesty in Council in its application to the Island.*
>
> *Provided that no Bill for the amendment or repeal of any of the provisions of this Order shall be presented for the Royal Assent unless it has endorsed on it a certificate under the hand of the Speaker that the number of votes case in favour thereof in the House of Representatives amounted to not less than two-thirds of the whole number of Member of the House (including those not present).*
>
> *Every certificate of the Speaker under this subsection shall be conclusive for all purposes and shall not be questioned in any court of law."*

The Bribery Amendment Act 1958, under which Bribery Commissioners were appointed in violation of the Constitution to try corruption crimes, did not have a certificate and was not passed by the necessary majority. It was contended that when a Court is faced with an official Act of Parliament it cannot enquire into any procedural matter and cannot properly enquire

whether a certificate was endorsed on the Bill. This was rejected. What Lord Pearce said about the duty of the Court when there is threat to violate the tenets of the constitution is illuminating:

> *"Once it is shown that an Act conflicts with a provision in the Constitution, the certificate is an essential part of the legislative process. The court has a duty to see that the Constitution is not infringed and to preserve it inviolate. Unless, therefore, there is some very cogent reason for doing so, the court must not decline to open its eyes to the truth."*

Lord Pearce was astute to criticise the views of English Courts, and justifying the position of those courts. He did prophesy that should matters like that arise probably a different approach would be taken. Said he:

> *"The English authorities have taken a narrow view of the court's power to look behind an authentic copy of the Act. But in the Constitution of the United Kingdom there is no governing instrument which prescribes the law-making powers and the forms which are essential to those powers. There was, therefore, never such a necessity as arises in the present case for the court to take any close cognisance of the process of law-making.*
>
> *In **Edinburgh Railway Co. v Wauchope**, however, Lord Campbell said: "All that a court of justice can do is to look to the Parliamentary roll." There seems no reason to doubt that in early times, if such a point could have arisen as arises in the present case, the court would have taken the sensible step of inspecting the original."*

The *ratio decidendi* of the case is at page 197 and can be stated simply as that if the authority from which the Legislature owes its existence creates a procedure in which the legislature's power can be exercised, the legislature, in its exercise of its powers, cannot ignore those provisions. This rule does not in anyway affect the power of Parliament to make laws. It only requires the legislature to act in compliance with the dictates of the authority from which the legislature owes its existence and mandate:

> *"These passages show clearly that the Board in McCawley's case took the view, which commends itself to the Board in the present case, that a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law. This restriction exists independently of the question - whether the legislature is sovereign, as is the legislature of Ceylon, or whether the Constitution is **"uncontrolled.** As the Board held the Constitution of Queensland to be."*

Lord Pearce rejected any suggestion that that stance raised the question of sovereignty:

> *"No question of sovereignty arises. A Parliament does not cease to be sovereign whenever its component members fail to produce among themselves a requisite majority, e.g., when in the case of ordinary legislation the voting is evenly divided or when in the case of legislation to amend the Constitution there is only a bare majority*

*are entitled under the Constitution of Ceylon to have no amendment of it which is not passed by a two-thirds majority. The limitation thus imposed on some lesser majority of members does not limit the sovereign power of Parliament itself which can always, whenever it chooses, pass the amendment with the requisite majority."*

Of course his prophesy that someday English Courts will reconsider their myopic stance did not come to pass because almost a decade later the House of Lords dished the **British Railwavs Board -v- Pickin** decision. The decision of Lord Pearce in the Privy Council was not even put to the House. For most countries with written Constitutions., however The **Bribely Commissioner -v- RanaSinghe** is the representative view. Jurisdictions emanating from the British Colony and adopting written Constitutions have not been slovenly shackled by the doctrine of supremacy of Parliament **(New Brunswick Broadcasting Corporation -v- Nova Scotia** (1993) 1 R.C.S. 318; **Smith -v- Mutasa** (1989) 3 Z.L.R. 183). In the Indian case of **Special Reference No. 1 of 1964.** (1965) 1 S.C.R. 413 446 **Gajendragakar CJ:**

*"…there is no doubt that the Constitution has entrusted to the Judicature m this country the task of construing the provisions of the Constitution and of safeguarding the fundamental rights of the citizens. When a statute is challenged on the ground that it has been passed by a Legislature without authority, or has otherwise unconstitutionally trespassed on fundamental rights, it is for the courts to determine the dispute and decide whether the law passed by the Legislature is valid or not. Just as the Legislatures are conferred legislative authority and their functions are normally confined to legislative functions, and the functions and authority of the executive lie within the domain of executive authority, so the jurisdiction and authority of the Judicature in this country lie within the domain of adjudication. If the validity of any law is challenged before the courts, it is never suggested that the material question as to whether legislative authority has been exceeded or fundamental rights have been contravened can be decided by the Legislature themselves. Adjudication of such a dispute is entrusted solely and exclusively to the Judicature of this country."*

Even the notion that procedures under standing orders cannot be impugned is no longer sacrosanct. In **Harris and Others -v- Minister of the Interior and Another** (1952) 2 A.D. 428, 476, Cent CT, said:

*"If Act 46 of 1951 had been passed before the Statute of Westminster, it is clear from the reasons given in the decision of this Court in **Rex v Ndobe,** supra, that that Act would not have been a valid Act, as it was not passed in accordance with the procedure prescribed by secs. 35(l) and 152 of the South Africa Act. That decision was not questioned on behalf of the respondents and there is no reason to doubt its soundness. The Court in declaring that such a Statute is invalid is exercising a duty which it owes to persons whose rights are entrenched by Statute; its duty is simply to declare and apply the law and it would be inaccurate to say that the court in discharging that duty is controlling the Legislature. See Bryce's **American Constitution** (3rd ed., Vol. 1 p. 582)."*

Later he says:

> *"To say, as long as the entrenched clauses still appear in the South Africa Act, that the "procedure express or implied in the South Africa Act is so far as Courts of Law are concerned at the mercy of Parliament like everything else" seems to me with great respect to be inconsistent with the decision of this Court in Rex -V- Ndobe, supra at P. 497. There this Court said that under sec. 58 of the South Africa Act, each House of Parliament is free to prescribe its own rules with respect to the order and conduct of its business and proceedings and that into the due observance of such rules this Court is not competent to enquire, but that this Court is competent to enquire whether, regard being had to the provisions of sec. 35, an Act of Parliament has been validly passed. To hold otherwise would mean that Courts of law would be powerless to protect the rights of individuals which were specially protected in the Constitution of this country."*

**Dumbutshena, C.J.,** made similar remarks in the Zimbabwean case of Smith -v- Mutasa at page 194:

> *"Should the House of Assembly disregard its own laws it falls upon the Judiciary to say so and to pronounce the breach."*

Our National Assembly is created by our constitution. It owes its existence from the Constitution. The Constitution prescribes it powers and composition there are certain aspects of legislative process that are directly provided in the Constitution.

What comes from all the authorities that I have considered is that whether Courts will interfere on the procedural aspects or legislation depends on the fundamental law of the land. In a jurisdiction, like in the United Kingdom, where there is no written Constitution, the doctrine of supremacy of Parliament entails that the procedure affecting legislation can only be a product of Parliament itself and alterable by Parliament. The immutability of the doctrine of supremacy of Parliament results in the inability of courts to question the validity of Acts Parliament on any basis including the procedure in which the Act was passed. Where the fundamental law is a written Constitution, however, the Legislature cannot overlook the procedure laid by the Constitution for validity of its legislative actions or exercise of its legislative will. The Constitution normally leaves the power to the Legislature to make provision for its internal procedure. While Courts will not want to interfere with the internal procedure of the Legislature, they are entitled to consider beyond the Standing Orders of the Legislature in order to protect rights of citizens protected by the written constitution. Courts, will also in order to retain the Constitution inviolate, ensure that the procedures for law-making the Constitution has laid are complied with.

The extent to which Courts will go to annul an Act for non-compliance with the procedure whether be it presented by the authority creating it must depend on the nature of the procedural requirement. Far must be the day when the Legislature must be detracted by the Courts from expressing its legislative will for minute infraction or infringement of

constitutional procedure or its own rubrics and derogation from inconsequential requirements of constitutional or its own procedure. In questioning the validity of the Act the Court must consider its duty to ensure that the Constitution remains inviolate and that the rights of the citizen protected under the Constitution are not sacrificed at the alter of the expedience to give artificial efficacy to the Standing Order of the legislature. Against this courts must be wary to avoid confrontation with the legislature and interference or intrusion in the legislative process. The necessary balance is some times difficult to strike but this process is the only way to ensure that the Constitution is not violated while upholding the independence of the legislative process and protection of the citizen.

In this particular case two aspects of the Constitutional requirements are in question the first one is that the plaintiffs were not given adequate time in which to allow them to canvass public and expert opinion. As I have said before, the framers of our Constitution must have been influenced by our history to phantom a provision in the manner of section 96(2). Austere legislation with damaging consequences on the citizen could be rushed through Parliament either by design or by giving inadequate time to members of the Chamber to enable canvass public and expert opinion. As we have seen, however, there are likely to be situations of necessity or urgency when it might not be possible to give adequate time. In any case what time is adequate is a matter of degree. What is adequate time in one case may not be adequate in another. The question of adequacy is so open an issue that can say without hesitation that could not have been in the contemplation of the framers of our Constitution that a statute passed by the National Assembly or Senate should be vitiated because of inadequate time. As far as we know in most legislatures in most democracies Bills will pass through many stages which could be extended to enable evidence, affected groups and public and expert opinion to be interjected. What is actually lost out before the Bill is presented to Parliament may be gained later when the Bill is being debated in various stages. Having said that I am aware of the criticism that in practice very little input can be put in the time when the Bill is being debated. In any event I think it would be a very sad thing to vitiate an Act simply because members of the National Assembly were not given adequate time in which to canvass public or expert opinion. Against this stance it could be said that there is a danger that Parliament could hastily pass a legislation which grossly undermines fundamental rights of the citizen. That could be so. If that is the case, however, the legislature could be impugned directly for violating fundamental rights without raising the question of time.

Different considerations, however, relate to quorum. I am aware that there is a plethora of authority in the United Kingdom and elsewhere that Courts have not been astute to enquire into the quorum in order to vitiate an Act of Parliament. As I have said, in spite the decision of the House of Lords in **British Railways Board -v- Pickin** there are deep voices against the rule so expressed. More importantly, as Lord Pearce suggested in The **British Commissioners -v- Ranasinghe,** the quorum in the United Kingdom is not provided by the authority which creates the Legislature. In Malawi it is the Constitution which creates the quorum of the National Assembly. The Quorum of the National Assembly is no minor matter. It is related to the question when is the National Assembly the National Assembly. Quorum is the number of persons whose presence is required to give validity to the decisions of the Chamber. It follows a

fortiori that the National Assembly is not properly constituted to transact business as far as our Constitution goes until the quorum is constituted. It is only when there is a quorum when the decisions of that house can bind the laegis. It could not have been in the mind of the framers of our Constitution that any number of the membership of the National Assembly should bind the nation. The essence of democracy is the pluralism of ideas and debate. The best of decisions can only come from a wider participation of those who are responsible for decision making. Given as it is that the quorum is prescribed by the Constitution itself any law passed without the necessary quorum should be vitiated more so when the matter of absence of quorum was brought to the attention of the Chamber and the National Assembly was not properly constituted. It is the duty of the Legislature to uphold the Constitution. When a matter of constitutionality is brought before it, it cannot overlook it. The Legislature is duty bound to act in accordance with the Constitution in the course of its proceedings. Even if there was a quorum because, as the Chamber erroneously thought, the quorum was constituted at the beginning of the sitting, Standing Order 26, made pursuant to section 50(2), had set the quorum of the National Assembly for the transaction of the business at two thirds. Section 50(2) is peremptory on the Speaker as to what he should do when his attention has been brought to the absence of quorum in accordance to quorum prescribed by the Standing Order of the Chamber: once he ascertains that the quorum is not so constituted the Speaker must adjourn the Chamber. Reading the unction and importunity of section 50(2) one is left in no doubt that the framers of our Constitution regarded the quorum of the National Assembly to be of paramount importance, and that for a reason. The reason being that the decision that bind the legis must be as representative as possible. In as far as what is at stake is a constitutional provision the matter is no longer a matter of internal procedure. The question whether there has been compliance with the Constitution by the legislature cannot be left with the legislature alone. It being accepted that there were less than two thirds in the Chamber of the National Assembly when the Press Trust Reconstruction Bill was passed, that Bill was passed without the necessary quorum and the national Assembly was incompetent to bind the nation by the Bill. The Act is invalid on this aspect of Constitutional procedure.

Apart from the procedural aspects the Press Trust Reconstruction Bill is being challenged on other fundamental aspects of our Constitution. Mr. Nyirenda in his summons states that Parliament has no legal or constitutional competence to pass a law that expropriate private property arbitrary. To which the Attorney General replies that the Press Reconstruction Act is intended to reconstruct the deed and is not expropriating property. The Attorney General further deposes that looking at the Act as it is there is nowhere does it violate the Constitution. I will deal with the latter aspect a bit later. For now, we have to consider the question of arbitrary appropriation of property.

Our 1994 Constitution has been perceived as hermaphrodite of the American and British systems. Precisely our written Constitution specifically provides for fundamental human rights. Some of these rights are contained in the Bill of Rights in the American Constitution. The contention raised by Mr. Nyirenda is the concept of due process. Mr. Nyirenda, however, thought the word due process refers to compliance with constitutional procedure. Our due process provisions are in section 28 (2) and 44 (4). Section 28 (2) provides:

*"No person shall be arbitrarily deprived of property."*

Section 44 (4) provides:

> *"Expropriation of property shall be permissible only when done for public utility and only when there has been adequate notification and appropriate compensation, provided that there shall always be a right to appeal to a court of law."*

Subsection I of Section 28 of our Constitution preserves the long historical sanctity of private property, a sanctity which in ages past has necessitated under various laws moral or state the protection now enshrined in our Constitution. Various private laws have prescribed violations of property rights between private persons. In that sense government is in the same position as a private person. The laws of trespass and conversion apply to government in the same way they apply to private persons.

It has, however, been the law of civilised nations that in times of war Government can deploy private property for the exigencies of war just like it can conscript human beings for purposes of war. Equally it has been the law of civilised nations for government to acquire property for public utility. It has not been, however in the law of civilised nations for government to take the property of one private citizen and give it to another except in the process of litigation when enforcing 'competing claims. The most that Government can do in the latter case is to regulate private property rights. All these aspects are recognised in our Constitution of 1994.

Article 28 (1) recognises the right of any person to acquire property. Person encompasses divers, from humans to body corporates. A person can acquire property together with others. Article 28(2), once a person has acquired property, protects that persons right to property, proscribes arbitrary deprivation. "Arbitrary" has not been defined on the Constitution. Its scope, however, is in article 44(4) of our constitution, at least in relation to government. Government is permitted to acquire property only for purposes of public utility. Public utility has not been defined. It means for public use, and in constitutional provision restricting the exercise of the right to take private property by virtue of eminent domain,, means a use concerning the whole community as distinguished from particular individuals. If the object is to satisfy a great public want or exigency it suffices the conditions of public utility. As Sanford, J., said in **Rindge co. -v- Los Angeles County** 262 U.S. 700 707 *"It is not essential that the entire community nor even a considerable portion, should directly enjoy or participate in an improvement in order to constitute a public use"*. It is for the Legislature to determine whether the necessity and exigency of a taking and the legislature may delegate to an institution. In **Joslin Manufacturing Co. -v- City Providence Z62 U.S. 668, 67 Sutherland, J.**, said:

*"That the necessity and expediency of taking property for public use is a legislative and not a judicial question is not open to dissension. The question is purely political, does not require a hearing, and is not subject of judicial enquiry."*

Section 44(4) of our Constitution, however, creates condition precedent. The condition precedent has three requirements, notice, compensation and right of enquiry by the Courts of Malawi. Our Constitution, therefore, in relation to expropriation of property brings the concept of due process.

This Constitution binds all branches of government at all levels of Government. Section 4 provides:

*"This Constitution shall bind all executive, legislative and judicial organs of the State at all levels of Government and all the people of Malawi are entitled to the equal protection of this Constitution, and laws made under it."*

Our Legislature, when performing its functions, is to further the values implicit and explicit in the Constitution:

*"The legislature when enacting laws shall reflect in its deliberations the interest of all the people of Malawi and shall further the values explicit or implicit in this Constitution."*

The powers of this Court are contained in Section 108(2) of our Constitution:

*"The High Court shall have original jurisdiction to review any law, and any action or decision of the Government, for conformity with this Constitution, save as otherwise provided by this Constitution and shall have such other jurisdiction and powers as may be conferred on it by this Constitution or any other law."*

The bottomline of all these constitutional provisions is that any action of Government or law which offends the Constitution or its principles can be annulled by the High Court of Malawi. As was said in **Nseula -v- The Attorney General** this is a novation on English law. For there, under the doctrine of supremacy of Parliament, courts are incapacitated from questioning the validity of an Act of Parliament. In spite that there is no equivalent provision in the American Constitution, the Supreme Court in the United States has espoused the power to review legislation from the Constitution itself. In relation to due process, the 14th Amendment to the American Constitution is as follows:

*"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within it jurisdiction the equal protection of the laws."*

In the United Kingdom Courts cannot question legislation; it follows that one has to look elsewhere for judicial pronouncements on the matter under consideration. Fortunately in section 11(2)(1), our Constitution affords us the liberty, when interpreting it, to look at comparable foreign cases. The fourteenth Amendment in the American Constitution, encompassing more aspects than right to property, is in substance the same as our sections 28 and 44 (4). Naturally decisions of the Supreme Court of the United States become handy.

The purpose of our sections 28(2) and 44(4) of our Constitution is for all to see. It is based on the recognition that by its very nature Government or the State wields substantial power over its citizens. It recognises the importance of property rights for its citizens and itself. Due process, the necessity of notifying and giving adequate opportunity for hearing on competing claims of necessity by the state and the rights of a citizen to property, provides a balance which justifies deprivation of property by state. The purpose of due process is to protect the people from the state. The fundamental purpose of due process is to allow the aggrieved party due opportunity to present his case and to have its merits fairly judge. Our sections 28(2) and 44(4) were designed to prevent arbitrary decision making that can infringe the constitutionally protected right to property. On the law of our land any action of Government or law which results in arbitrary deprivation or expropriation of property without compensation, notice and right to appeal to the court or our land will be struck down by our courts for violating the Constitution.

Our Constitution has not defined the word arbitrary. There is slight difference if any between our section 28(2) and the 14th amendment of the American Constitution., the due process concept. Definitely the understanding of the provision by American courts will assist in appreciating our section 28(2) of Mr. Constitution.

Under American Constitutional Law the understanding of due process has depended on the distinction between economic due process under which legislation is passed to regulate economic interests and where legislation is affection fundamental rights. The starting point is the case of **Lochner -v- New York (1905) 198 U.S. 45.** In that case under attack was a New York statute prohibiting employers from employing workers in bakeries more that ten hours per day and sixty hours per week. The decision of the court was not unanimous. The majority view was given by **Peckham, J.** He held that the due process issue was whether that law was "an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty".

In applying the test the Judge considered whether the state could rely on its general police powers of interest of state to pass such legislation. He thought that albeit that the purpose of the statute was to promote the health and welfare of employers its real purpose was to regulate contractual labour relationship. Justice Perkham thought that the ordering of private economic relationships was simply not a matter of general welfare of the state. The majority looked at the purpose of the statute and held that it was not for that purpose. Further the court held that the Act was not necessary or appropriate for safeguarding the health of the public or the employees. The majority were of the view that a statute must have a "more direct

relationship as a means to an end". What the majority thought was that if a statute is passed which does not meet any of its objectives or could be shown to be lacking it must be arbitrary and short of due process requirements.

The detractors were Justice Holmes and Harlam. Justice Harlam found that there was sufficient evidence on which the legislature could reasonably conclude that long working hours threatened the health of workers. For Justice Harlam only if economic enactments were plainly, palpably beyond all questions, inconsistent with due process liberty should the court invalidate a legislative enactment? Justice Holmes criticised the majority for making economic decisions which were really in the realm of politicians and not in the purview of the courts. He was of the view that the majority will as expressed by the legislature, in a statute, must prevail unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the conditions of our people and law." The majority decision has drawn a lot of criticism. First among the criticisms is the will and ease with which court was willing to enquire into the purposes of the legislative in passing the enactments. That clearly is outside judicial competence. Matters of policy are real matters for the legislature. The second criticism was that Justice Peckham closely examined the appropriateness of the legislature means. Again there was no deference to the legislative judgment; there was no respect for the choice among the many options that the legislative chose from.

For the most part since the **Lochner** decision the majority view provided **(Adair -v- United States** 1905; **Luppage -v- Kansas** (1915); **Adkins -v- Children's. Hospital** 1923. This view, however, is not supported any more. In **Nebbia -v- New York** (1954) the Court held that it was not for the Court to probe the purposes of the legislation. It was also held that a state is free to adopt whatever economic power policy may reasonably be deemed to promote public welfare. The court said that if the means selected leave a reasonable relationship to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio."

This might appear like the same test that was promulgated by the majority in **Lochrer** case. It is not. Justice Peckham wanted a direct relationship between the purpose and the means used. In any case this latter view gives due veneration to the legislative purpose. It is not for the court to probe the purposes and appropriateness of legislative action. The procedure employed by the legislature must be demonstrably irrelevant to the permissible state policy for statute to be afforded the due process.

What should not be ignored in reading these two cases, however, is that they deal with economic legislation. The two statements from the judgment clearly show that this rationality approach only applies when dealing with economic due process. They clearly demonstrate that the principles do not apply when the statute affects substantial due process that is to say when the statute clearly offends fundamental human rights. In **Constitutional Law 1991** Barron and Dienes state at page 153:

*"It is important for the student to note that this deferential standard of due process review, or more precisely, judicial abdication, is used primarily for socio-economic laws. It is not applicable when legislation burdens the exercise of fundamental rights. In the absence of a meaningful burden on a fundamental personal right, the student should use the deferential rational basis standard of review in analyzing the constitutionality of laws challenged on due process grounds."*

At page 157 the learned authors say:

*"When federal or state legislation burdens the exercise of fundamental personal rights, the courts forsake the rational basis test in favour of more searching standards or review. when, for example, First Amendment rights are burdened by a law, the courts will not uphold the legislation even it is rationally related to a permissible governmental objective. Rather, the courts will demand that government establish that the law is narrowly tailored to a compelling substantial governmental interest."*

The justification for such an approach as far as our law is concerned is that our Constitution not only requires every action of Government or law to be subservient to the Constitution but its core essence is the protection of fundamental human rights.

Given then that action of Government or law results in deprivation of property of an individual our Constitution requires that Government action should or law should not be arbitrary. To bring the principle in context our constitution will judge every legislation that results in arbitrary deprivation of private property. In the American case of **In re Blumer 66 B.R. 109**, affirmed in **Dunning-Ray Ins. Agency Inco. -v- Credit Alliane Corp., 826 F.Zd 1069,** it was held that a statute must comply with both substantive and procedural due process.

In order to strike a legislation or action of government for violating section 28(2) and 44(4) the Court has to be satisfied of three things: that there is a deprivation that deprivation must be by government action or law and that deprivation must be arbitrary or to, use the American concept, without due process. **(Cospito -v- Heckler 471 U.S. 1131**, and **Windsor Communications Group., Inc -v- Gra 75 B.R. 713**.

The words *"deprived"* in section 28(2) and expropriation in section 44(4) have not been defined in the constitution. **Blacks Law Dictionary 5th Edn. 1979** defines the word *"deprivation of property"* as a due process guarantee which is abridged when Government takes private property without just compensation except under extraordinary circumstances of police power, though for deprivation of property there is not required an actual, physical taking for private or public use". Expropriation by the same dictionary consists in a taking as under eminent domain. From these definitions, it is obvious that Government does have some power to take private property. Ibis power is stated as eminent domain. The definitions also indicate the scope of the power. There are two aspects to that scope. First, that government can only take private property on its general police powers. Secondly, if the government is not relying on its police powers, the taking will be with just compensation. Whatever the case there must be a taking by

government. A reasonable exercise of government power on property does not constitute a taking or deprivation. While property may be regulated to a certain extent, if regulation goes too far it will be recognised as a taking **(Penuslavania Coal Co. -v- Mahon (1922), 260 U.S. 393**. To constitute a taking there must be a substantial change in the qualities of ownership of property.

Secondly, the deprivation must be by government action or law. Any law the result of which is deprivation of private property without compensation will be struck out by the Courts of Malawi unless that deprivation is in exercise of the state police powers. Our Constitution recognises the right of our citizens to acquire property. Our Constitution requires that no citizen should be deprived of that property arbitrary. Our constitution requires that expropriation should be with due notices, adequate compensation and a recourse to the Courts to challenge the expropriation. It follows a fortiori in that any government action, whether be it by Executive action of Legislation, that undermines these constitutional tenets will be struck down by the Courts of Malawi.

Finally it must be shown that the deprivation was arbitrary or without due process. This concept operates at two levels. First, the Court has to consider whether the course taken by government or the legislative satisfies the requirement that property of a citizen should not be deprived arbitrarily, without notice or compensation. This principle is well illustrated by the American case of **United States -v- Lulac, 793 r. Zd. 636**. The Court there held that no right to notice and hearing attends legislative enactments that affect general class of persons. Though an individual is entitled to notice and hearing before state action deprives him of property, life or liberty. It was also held that persons of a class affected by a general enactment receive procedural due process by legislative process and individuals of a class have no right to individual attentions. The corollary of this is that an individual not belonging to a class is entitled to notice and hearing before state action deprives him of property. Short of that there is arbitrary arbitration.

The second level at which arbitrariness or lack of due process operates is whether the individual should have been given a hearing or notice before the Government or legislative action. In deciding whether there is no arbitrariness in government action or legislation Courts look at three aspects: the nature of the private interest that will be affected by the state action; the risk of erroneous deprivation of such interest through the method adopted and the probable value, or any of additional or substituted safeguards and governments interest including function involved and fiscal and administrative burden that additional or substitute procedural requirements would entail **(Spielbery -v- Board of Regents University of Michig 601 F. Supp 994; Bass Plating Co. -V- Town of Windsor, 639 F. Supp. 873; In re Class Action Application for Habeas Corpus on Behalf of All Maternal Witness in Western District of Texas, 612 F. Supp. 940)**

Picking up from the dissenting view of Justice Holmes in **Lochner -v- New York** and the statement of the Court in **Nebbia -v- New Your (291 U.S. 502),** a statute will be upheld if it fulfils a legislative purpose so long as it does not impinge on fundamental rights and is neither

arbitrary nor discriminatory. Holmes, J. said that the majority will, expressed by the legislature, should prevail *"unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."* In **Nebbia -v- New York** the court held that if the means selected by government *"have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court* ***functus officio."*** Both statements show the connection between arbitrariness or lack of due process and the concept of equality before the law. Equality before the law in a fundamental right. Moreover, a law which ruly applies to only a particular person or class of persons may be arbitrary. In **Quiban -v- United States Veterans' Administration 713 F. Supp.** it was held that when persons similarly situated with other are denied benefits pursuant to an arbitrary and irrational classification, they have not received due process regardless of whether their right to benefit is considered a property right, a fundamental right, or not a right or benefit, the key right is not the right to benefits *per se* but the right to be treated on the same basis as others with whom a person is similarly situated.

Equality before the law is a fundamental right. It is provided under our constitution in section 20 (1):

> *"Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed -equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, 'disability, property, birth or other status."*

It is one of the fundamental principles of our constitution. Section 12(v) provides as follows:

> *"As all persons have equal status before the law, the only justifiable limitations to lawful rights are those necessary to ensure peaceful human interaction in an open and democratic society."*

In interpreting of the Constitution, in particular Section 20(l), the Court must, in accordance with section 11(2) (b), take full account of fundamental principles to which section 12(v) is a part.

Equality before the law is a cardinal aspect of our law. Now our Courts will, therefore, shoot down any government action or law which results in unequal treatment before the law. Discrimination of persons in any form is proscribed and all persons should, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth or other status. A law which results in unequal treatment between the citizens of the land will be arbitrary.

Government, the legislature or the Executive branches, has authority and constitutional duty to ascertain whether it is denying its citizens equal protection of the laws, and if that be

the case, to take corrective steps **(Associated General Contractors or California Inc. -v- Citv and Countv of San Francisco. 813 F. Zd. 922.** Government will be in violation of fundamental right to equality before the law even if its action be in form of a statute or any form **McGhue -V-Sipes 334 U.S. 1)**: It follows, therefore, that the power of the state to create and enforce property rights or interest must be such that it does not result in unequal treatment before the law or arbitrariness **(Shelley -v- Kraemer, 334 U.S.1).** Even if there is a valid Government objective, this cannot be achieved by discriminatory imposition of burdens **(Gilliard -v- Kirk 633 F. Supp. 1529; Sklar -v-.Byrne, 727 F. Zd. 633.**

I think it may be useful to restate the scope of equal protection under the law. The purpose of the equality before the law provisions is that those who are similarly placed in society will be dealt with similarly by Government action. This is far from suggesting that in its formulation or application of the laws government cannot classify persons. The equality before the law provisions in our Constitution prohibit impermissible criterion for classification or a classification arbitrarily used to burden a group of individuals **(Hawkins -v-N ational Collegiate Athletic Association, 652 F. Supp. 602).** Consequently, while based on a classification legislation may be justified if it meets a government purpose it will receive the closest scrutiny when it impinges on a fundamental right **(Edelstein -v- Wilents, 812 F. Zd. 1059).** Equal protection essentially requires that all persons similarly situated be treated alike.

It must not have been obvious why it has been necessary to lay down all this plethora of authorities on the subject. As I mentioned earlier, apart from the procedural issues raised under the Constitution, the Act is being challenged on fundamental aspects of the constitution. Mr. Nyirenda submits that Parliament had no power to pass a law whose result is arbitrary expropriation of property. The Attorney General contends that Parliament has such power and good reasons. The reason is that the Press Trust belongs to the people as a charitable trust and its property should be used for the benefit of the people. It is incumbent, therefore, on Parliament to ensure that the trust is not administered by members of the 1st plaintiffs only but other political parties.

Speaking for myself, in view of the law as I have tried to lay, I see no conflict really between Mr. Nvirenda's contention and the Attorney Generals. There is only a difference of emphasis. Moreover, if the arguments of both are distended, they can only refer to one thing. That Government can expropriate property is conceded by Mr. Nyirenda. Section 28(2) seems to imply it. It only proscribes arbitrary deprivation. It, therefore, allows non-arbitrary deprivation. It may be useful to continue with this aspect a bit later to allow me to explain a distinction that the framers of our constitution made. The word used in section 44(4) of our constitution is "expropriation". The word "deprive" has not been used in section. 44(4). Expropriation, as already defined in Blacks Law Dictio , refers to a legitimate taking of private property for public use. The consequence of such taking is that that property becomes public property and the properly in it vests in government of the state. The private owner has no interest in that property whatsoever. For that reason the fundamental law of the land requires that the private owner be given notice, adequately compensated and be given a recourse to the Courts. Expropriation presupposes a legitimate purpose, such as war or construction of a road

etc. Expropriation does not allow government to acquire property for the state or government just for its own sake. Expropriation must be for public utility. There is nothing in section 44(4) of our Constitution that allows government to expropriate property from one individual so that it is given to another. Neither is there anything in the law of civilised nations or open democracies that empowers government to take property from one citizen to another than under governments police powers.

Consequently, apart from expropriation as just defined, government cannot arbitrarily deprive a citizen of his property. In this particular case the Press Trust Reconstruction Act does not purport to vest this property in Government. The Press Trust Reconstruction Act vests the property in trustees. It does 'not vest the property in Government. As I have tried to show the Government would also be acting arbitrarily even if it vested the property in itself unless it showed, and I said how on the facts of this case it could, that the property was for public utility. If it did vest the property in itself, it would have to give notice to the trustees, compensate and allow recourse to the courts. As I have said, however, the effect of the Press Trust Reconstruction Act is to vest the property in trustees, the trustees are not government. Obviously in taking the property of Press Trust from the original trustees of Press Trust to those that the Press Trust Reconstruction Act had created, Parliament was transferring private property from one private person to another. Press Trust, as we shall see shortly and as we mentioned earlier is a charitable trust. Charitable trust property, even thought intended to benefit people at large, is still private property. It is not public property. It is private property. The legal owners of any trust property are the trustees. Even when the trustees register a trust as a charitable trust, in the eyes of the law the legal owners are the trustees. The public or the people who benefit under the trust are only beneficiaries. They have no legal title as against the legal trustees. Their right is only in equity. Section 4 of the Trustees Incorporation Act provides:

> *"Any property movable or immovable vested in, transferred to, held or acquired by the body corporate shall be held for the purposes of the charity or association and in such and the like manner as it was held by the trustees prior to incorporation, subject to this Act."*

Section 5 provides as follows:

> *"After a certificate of incorporation has been granted under this Act, all trustees of the charity or association, notwithstanding their incorporation, shall be chargeable for such property as shall come into their hands and shall be answerable and accountable for their own acts, receipts, neglects and defaults and for the due administration of the property of the charity or association,, in the same manner and to the same extent as if no such incorporation had been effected."*

Consequently, the property of Press Trust, is private property and in law belongs to the trustees created by the Press Trust. Dr. Banda, the settlor divested himself of any interest in the property when *inter vivos* he executed the Press Trust Deed and vested the property in the trustees. The only explanation given by the Attorney General for why Parliament had power to

pass the Press Trust Reconstruction Bill is that since the Press Trust property in accordance with the Press Trust Deed was for the benefit of the people of Malawi, the National Assembly, being representative of the people of Malawi, was the better power to better serve the people's interest by passing the legislation it passed. This deed is a private document. How government thought it could vary the deed, I do not know. Government cannot vary a deed in this manner just as it cannot vary a contract between citizens or a will of testator.

Given that trust property is private property vested in the trustees, the legislature, and government in that sense cannot deprive a citizen of property arbitrarily In so far as the Press Trust was registered under the Trustees Incorporation Act, it became a person sui generis. It is a legal person. It has full rights like any person. The last thing it is is that it is public property because it benefits the public at large. 'fhe Press Trust is governed by private law, common law and statutory. The public served by the charitable trust is a beneficiary. Under the law of trust the only representative who legitimately represents the interest of the public under the trust is the Attorney General who stands in as **amicus curiae** in any case where there is a threat to trust property through inadvertence or fraud by the trustees. There is nothing in the Press Trust Reconstruction Act which suggest a repeal of the common law the Trustees Act or the Trustees Registration Act in so far as the Press Trust is concerned. Parliament cannot, and in the Press Trust Reconstruction Act has not, created itself as **amicus curiae** for the public interest in a charitable trust.

Given, then that this was not expropriation of private property for government utility, the only consideration is whether this did not amount to arbitrary deprivation of property. The essence of our section 28(2) and 44(4) of our constitution is to ensure that there is an opportunity for hearing of the affected party before government action whether that action is expressed in Executive act or Legislative action before private property is deprived. I have said before that the concept of due process or nonarbitrariness comports that in relation to legislation which will affect rights to property there should be an opportunity to be heard. I also stated that in case of legislation that affects a whole class of people arbitrariness is avoided because the class has notice of the legislation through the legislative process. In England this requirement is achieved at the stage of the second reading of the Bill, **Parliamental:y Practice, 9th edn., Butterworths, E. May, 502:**

> *"The second reading is the stage at which counsel have been heard, when the House has been of opinion that a public bill was of so peculiar a character as to justify the hearing of parties whose interest, as distinct from the general interest of the country, were directly affected by it.*
>
> *It is a general principle of legislation that a public bill, being of national interest, should be debated in Parliament upon the grounds of public expediency; and that the arguments on either side should be restricted to Members of the House, while peculiar interests are represented by the petitions of the parties concerned. Questions of public policy can be discussed only by Members; but where protection is sought for the rights and interests of public bodies, or others, the parties have been permitted to represent*

*their claims, either in person or by counsel. Counsel have also been heard at various other stages of bills, as well as on the second reading. In the case of bills of pains and penalties, disabilities, or disfranchisement, it has been usual to order a copy of the bill, and the order for the second reading,, to be served upon the parties affected, and to hear them by counsel. The Attorney General has also been ordered to appoint counsel to manage the evidence, at the bar of the House, in support of the Bill, or to take care that evidence be produced in support of the bill."*

It is very clear, however, that in the formulation of a legislation which will affect a particular individual arbitrariness is avoided by affording an opportunity to the individual affected of an opportunity to be heard. It is arbitrary to require that the individual will be notified through the legislative process for he may actually not notice the Parliamentary proceedings.

In Malawi now there are many trusts that have been registered under the Trustee Incorporation Act. The Press Trust Reconstruction Act only relates to one such trust. It is not a law governing all the trusts under the Trust Incorporation Act. In Malawi now there are many trusts. The Press Trust Construction Act is not touching other trusts. It is only touching the Press Trust. To avoid arbitrariness the legal owners of Press Trust should have been afforded a hearing or notice before the Press Trust Reconstruction Act was passed.

This leads me to consider the parties who should have been heard if the taking here was not to be arbitrary. In this aspect the only affidavit I will accept is the one of Mr. Aleke Banda who deponed on behalf of the Attorney General. If there is one thread of truth which runs in the affidavit of Mr. Aleke Banda it is that the whole Press Trust scenario is the action and creation of the Malawi Congress party. It is accepted that whatever funds went to Dr. Banda went to him because he was the President of Malawi Congress Party. It is conceded that all decisions about Press Holding Ltd. and other decisions affecting the property where under the aegis of the Malawi Congress party. At no point in time is it suggested that Government was involved in any decision affecting the property of the Malawi Congress Party. It is also conceded both in the affidavit of Mr. Aleke Banda and Mr. Chizumila and the arguments before me that apart from Mr. Aleke Banda, all the trustees of Press Trust are from Malawi Congress Party. Its because of this that it is argued that Press Trust being for the benefit of the people should be run by people from all political parties. Once it is accepted that the whole press superstructure is the creation of the Malawi Congress Party it appears illogical that other parties should have a say except for the argument that before 1994 there was only one political party to which we all belonged.

The argument that because all of us once belonged to the Malawi Congress Party before does not itself entitle us as a matter of law to the property of that party. The Malawi Congress Party prior to our 1994 Constitution was a legal person in the light of the law with its independent existence, independent from government. It of course had members. It was an unincorporated association. The property it held was on behalf of its members. The United Democratic Front, the Alliance for Democracy etc, now have property. That is perceived to be the property of its members. It is not perceived to belong to the people of Malawi. In 1994

under our law more political parties were introduced. The Constitution did not abolish the Malawi Congress Party. It allowed other political parties to be formed to which others would join. Those who decided to leave were excluded by their choice to the benefits of the Malawi Congress Party property acquired on its behalf unless it can be, shown that those who left had some entitlement according to the rules of the Malawi Congress Party Constitution. The law as I understand it, and it can be seen from the ecclesiastical law on schism, is that those who leave have no entitlement to what they leave behind. **(Mwase -v- Church of Central Africa (1923-60) 1 A.L.R. (M) 45).** The Malawi Congress Party, therefore, had a right, on the facts as conceded by the Attorney General, to be heard before the legislative action which resulted in the Press Trust Reconstruction Act.

As I have stated before in considering whether due process is necessary the Court has to look at (a) the private interest that will be affected by the official action; (b) the risk of erroneous deprivation of such interest through procedure used; and (c) the probable value, if any of additional or substitute procedure safeguards, and government interest. On the first question, the nature of the property in question is trust property. Trust property in law belongs to the trustees. The public is only a beneficial owner. The full property rights belong to the trustees. The beneficiaries have no property rights. The beneficiaries are the public in this case. It is conceded that the public cannot intervene in case of abuse by trustees. The law, however, allows the Attorney General as **amicus curiae** to intervene on behalf of the beneficiaries. The property rights of the trustees will however, be affected by this legislation. The effect is to create totally different trustees by ministerial action. The powers of trustees are personal. The rights created by a trust are personal. In an ordinary trust, the rights devolve to a personal representative upon death. For a charitable trust replacement is only in accordance with the rules. The nature of property in this case militates against legislative intrusion of whatever forum.

Secondly, the Court has to consider the risk of erroneous deprivation. Going by the affidavit of Mr. Aleke Banda there are so many facts and issues that are assumed which could be erroneous or at least could be challenged. First, it is said that the money forming part of the trust property was from the party funds. This presupposes that Dr. Banda contributed nothing. Dr. Banda has said nothing nor has he been given the opportunity to state so before the Press Trust Reconstruction Bill. Then there is the very question whether what Mr. Aleke Banda says that the Press Holding Ltd shareholding came from party funds. This has to be established. Mir. Aleke Banda's assertion is not conclusive. It would be preposterous for our Parliament to go on a legislation that has got human right implications as to property rights merely on what Mr. Aleke Banda says when the other party is not heard. In any case the documents in Mr. Aleke Banda's affidavit show that the shares belonged to Dr. Banda. Mr. Aleke Banda says no to this. He says Dr. Banda held them on trust for the people. No trust deed is shown to that effect. We should believe Mr. Aleke Banda or the documents lodged with the Registrar General. The risks of error are monumental. There is more. It is suggested that Dr. Banda fraudulently converted the money to his personal ends. If Dr. Banda did that, the Press Trust as created fails because he had no property to dispose of. The result would be that by resulting trust the money goes back to where it came from. Unfortunately that money would not go to Malawi Government

under tile principle of *bona vacantia*; it would go back to the Malawi Congress Party which owned the money on behalf of its members in the first place by resulting trust. I could go on enumerating the problems caused by the affidavit. These are enough to show that there is a whole risk here of erroneous deprivation of property. The property could have belonged to the Malawi Congress Party, Dr. Banda or the people. It was necessary therefore, before passing the legislation to avoid arbitrary deprivation of property, that the protagonists should have been heard. The effect of the Press Trust Reconstruction amounts to a taking or deprivation of property in that it vests trust property belonging to the original trust to the new trustees. The property in Press Trust up until the Act belonged to the original trustees. It is erroneous to regard it as belonging to the beneficiaries. Mr. Aleke Banda's assertion that the money belonged to the people could be erroneous. The government would be acting arbitrarily, depriving property of an individual if, without asserting the correctness of certain assertions as to property rights, the National Assembly passes, a law the reslut which is taking of property form a citizen. Finally, in deciding whether government action of legislation is arbitrary or defies judicial process the Court has to consider the probable value of additional or substitute safeguards. In this particular case Government decided to legislate on Press Trust but, as we have seen, in the face of competing interests as to ownership or property. If there were any problems in the administration of the charitable trust, the Attorney General as **amicus curiae,** could have proceeded under section 5.1 (1) or (2) of the Trustees Act. Section 5 1 (1) provides:

> *"The Court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult or impracticable so to do without the assistance of the Court, making an order appointing a trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee."*

Section 51(2) provides:

> *"In particular and without prejudice to the generality of the foregoing provision, the Court may make an order appointing new trustees in substitution for a trustee who is convicted of felony, or is a lunatic or a defective, or is a bankrupt, or is a corporation which is in liquidation or has been dissolved."*

If there was need to vary the deed again the Attorney General as amicus curiae could have proceeded under section 7 1 (1) of the Trustee Act. I know of no law which allows a government to ex curia vary a private document, power of attorney, will, deed or contract. The advantage of this approach is that it would have put the matter out of the fray of the political overtones which characterise the Press Trust Reconstruction Act. An independent Court would have been better posed to consider the interest of the beneficiaries under the trust. If the validity of the trust was at stake, anyone who would personally have benefitted from Dr. Banda would have sued as well. Government legislation puts the matter beyond reach. What we are left with is a legislation that could very well be in conflict with the Constitution because of its potential to deprive the citizen, the Malawi Congress Party, or the trustees, or those who are entitled directly to Dr Banda's property or private property. Such an Act should be declared unconstitutional.

I do not want to spend a lot of time on the other aspect of the constitution on which the Press Trust Reconstruction Bill should be thrown out. The other aspect emanates from the very principle of arbitrary deprivation although it has its independent existence under the constitution. It is an arbitrary deprivation or property to pass a legislation the effect of which is to treat an individual's property rights in a different manner that is accorded from other similarly placed. This is an extension of the equality before the law principle. Courts will intervene on a statute that is overtly discriminatory. (**Asian American Business Group -v- City of Pomona 716, F. Supp. 1328).** Laws that are passed by Parliament should be intended for the general welfare of the people of Malawi. Under the equality before the law provisions of our Constitution laws that are promulgated by our National Parliament must be directed to all in the class. Short of that they will be attacked for discrimination. Laws which are promulgated against one individual are likely to be disqualified as vindictive and implying unequal treatment under the law and an arbitrary deprivation of property. While enforcement of a law on one individual is not unequal treatment under the law because government wants to set an example **Falls -v-Town of Dyer, Ind. 875 F. Zd. 146)** laws cannot be enacted which single out an individual as a target. Our equal protection provision in our Constitution direct that all persons similarly circumstanced shall be treated alike. This is not achieved by the Press Trust Reconstruction Act. First the Act is only directed at one trust and only one charitable trust. It puts the trustees of Press Trust different from the rest of the trustees. It puts this trust alone to obligations and implications not visited on other trusts or charitable trusts. While other trusts can be varied only by the Court, this trust could not be so varied. While for other trusts additional or new trustees can only be in accordance with the trust deed or by the Court, the effect of the Press Trust Reconstruction Act is to remove all that and subject the Press Trust alone to appointment by the Attorney General, for example. There is no indication that the other Acts have been repealed. The Press Trust Reconstruction Act is overtly discriminatory on the face of it. It singles the Press Trust from the preamble right through to the body of the Act. Under it, Press Holding Limited, again, just a single company is targeted, for winding up regardless of the Companies Act 1984, which applies to all companies. The Act is discriminatory against a single Trust and a single Company. The Rights under the Constitution apply to corporations. **(Metropolitan Life Insurance Co. -v- Ward 470 U.S. 869.** The Press Trust Reconstruction Act results in unequal treatment before the law and is tantamount to arbitrary deprivation of property.

The best spot to end the equality before the law aspect is to look at a case from Cooks Island, **Clarke -v- Karika (1985) C.A.L.R. 732.** This case is interesting and, in view of certain provisions in the Press Trust Reconstruction Act, relevant. As I have said before, one of the provisions in the Press Trust Reconstruction Act, is that the other trustees will be appointed by the Attorney General or the President. This is in derogation to the law as is now that after the initial trustees, new or additional trustees shall be appointed in accordance with the instrument creating the trust or by the Court. In **Clarke -v- Karika.** In 1908 the Cook Island Land Titles Court determined that certain lands belonged to the Karika family but it awarded life interests to rival claimants. There was no right of appeal from this decision in 1908. The Rehearing of The Puna Lands Act 1980 provided for rehearing of claims in respect of the disputed lands. Margaret

Karika, the present respondent, applied for declarations to determine three questions, claiming inter alia, that the Act was invalid in that it infringed fundamental rights protected by the constitution. The respondents argued, among other things, that the Act smacked of unequal treatment before the law because it singled out members of a particular family related by blood. The remarks of **Speight, C.J.,** at page 749-750 are apposite:

> *"What counsel for the respondent did seek to place some reliance on is that the owners affected by the Act are a blood-related group. Insofar as this is a claim of discrimination or unequal treatment because of family origin, the answer is that the family relationship is inherent in the land tenure system. The terms of the 1980 Act indicate that the essential reason why that group of people is affected is that titles to a particular tract of land are in dispute; it is not their relation to one another. The Court cannot impute to Parliament a hidden intention to legislate against a particular family. There is nothing in the Act or the evidence to warrant an inference of that sort.*
>
> *Counsel for the respondent contend that the legislation disturbs a duly adjudicated title. One central feature of the legislation provides part of the answer: the legislation makes no judgment about the merits of the dispute. Rather it confers jurisdiction on an impartial forum which, having allowed those affected full opportunity to be heard, will rule on the merits of the case. Of course that is not a complete answer. The Act does place a duly adjudicated and quite long-standing title in jeopardy, although the persons represented by the appellant evidently claim that their ancestral rights can now be shown to be older. But we know of no principle, nor were counsel able to cite any authority from any jurisdiction, for a proposition that fair rehearing before a competent judicial tribunal of an issue of civil rights is necessarily an infringement of equality before the law or the protection of the law. And, as already stressed, there is nothing before the Courts to establish that in legislating for a rehearing in this instance Parliament discriminated between like case."*

In this particular case the Press Trust Reconstruction Act is aimed at a single trust. As I have said it places burdens on a single trust or company that are not visited on others. It gives power to the President or Attorney General to appoint subsequent trustees. In any case the people it appoints do not have the level of impartiality that is expected of members of the court. This calibre of people is very different from the ones in **Clarke -v-Karika.** The Act is unconstitutional in the sense that it treats the Press Trust and Press Holdings Ltd. in a situation in which the two can say they are not getting equal treatment before the law.

While Parliament has got power to deprive property, it cannot do it in a manner which can be said to be arbitrary deprivation of private property. It is the duty of Parliament to pass laws which do not offend the Constitution. Any law which impinges on fundamental rights will be thrown out by Courts in Malawi. In this particular case it is not correct what the Attorney General says that the Press Trust Reconstruction Act offends no aspect of the Constitution. The Act deprives of the original trustees of Press Trust, the legal owners under the law, of their rights by vesting the property in trustees it creates. Since this was not expropriation, it is

arbitrary deprivation of property in so far those who could be entitled to the property, the original trustees, the Malawi Congress Party, or those inheriting from Dr. Banda, were not given a chance to be heard before the legislation. Since the legislation was directed at only one Trust it was not adequate that the notice should have been given by the legislative process. In fact as far as we know, counsel for the Press Trust or Press Holdings or those who would have been entitled through Dr. Banda were not invited at the second reading of the Bill in Parliament. Moreover the Press Trust Reconstruction Act is arbitrary in its taking of the property of the trust in that it treats the trustees of Press Trust differently from other trusts or charitable trust. It is the duty of our National Parliament to pass laws which do not discriminate or result in unequal treatment under the law. Such laws to the extent that they discriminate would be considered as resulting in arbitrary deprivation of property.

The Press Trust Reconstruction Act is, therefore in contravention of the Constitution both in terms of the way it passed through the National Assembly as well as on the principles which the Constitution stands for. I declare the Press Trust Reconstruction Act null and void. In so doing there is not interference with the sovereignty of Parliament. The Constitution gives power to this Court to do so (section 11 (3)). In any case it is still open to Parliament to pass another law which abides with procedure of the fundamental law and gives credence to the constitutional principles just mentioned. In fact in the united Kingdom,, where an Act of parliament has been criticised severely Courts, instead of invalidating it, because English Courts cannot invalidate an Act, have remitted the Act back to the Legislature to pass it properly. At page 38 of **Craies on Statute Law**, 7th Edn. S.G.G. Edgar says:

> *"If a serious question were raised as to the validity of an Act, it is possible that the judges would adjourn the proceedings in which it arose until Parliament had an opportunity of settling the question by a fresh Act, as was done in **Pylkington Case** in 1450."*

Section 11(3) of the constitution, however, allows me to apply such interpretation of the law as is consistent with the Constitution. I find none in the Press Trust Act that I can interpret. The Press Trust Reconstruction Act is a brief Act. It is intended to deal with the Press Trust. The Press Trust Reconstruction Act is invalid. There is nothing in view of the matters that I have raised that can be applied that remains consistent with the Constitution.

The application succeeds with costs.

**MADE** in open Court this 1st day of July 1996.

**D. F. Mwaungulu**
**JUDGE**