

CONSTITUTION

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Date Enacted: January 01, 1970 | Date of Commencement: January 01, 0001

CHAPTER IV

HUMAN RIGHTS

Section 45 - Derogation and public emergency 11 of 2010

45.—(1) No derogation from rights contained in this Chapter shall be permissible save to the extent provided for by this section and no such derogation shall be made unless there has been a declaration of a state of emergency within the meaning of this section.

(2) There shall be no derogation with regard to—

- (a)** the right to life;
- (b)** the prohibition of torture and cruel, inhuman or degrading treatment or punishment;
- (c)** the prohibition of genocide;
- (d)** the prohibition of slavery, the slave trade and slave-like practices;
- (e)** the prohibition of imprisonment for failure to meet contractual obligations;
- (f)** the prohibition on retrospective criminalization and the retrospective imposition of greater penalties for criminal acts;
- (g)** the right to equality and recognition before the law;
- (h)** the right to freedom of conscience, belief, thought and religion and to academic freedom; or
- (i)** the right to habeas corpus.

(3) The President may declare a state of emergency—

- (a)** only to the extent that it is provided for in this section;
- (b)** only with the approval of the Defence and Security Committee of the National Assembly;
- (c)** only in times of war, threat of war, civil war or widespread natural disaster;
- (d)** only with regard to the specific location where that emergency exists, and that any declaration of a state of emergency shall be publicly announced; and
- (e)** only after the state of emergency has been publicly announced.

(4) Derogation from the rights contained in this Chapter, other than the rights listed in subsection (2), shall be permissible during a state of emergency within the meaning of this section and to the extent that—

- (a)** such derogation is consistent with the obligations of Malawi under international law; and
- (b)** in the case of—
 - (i)** war or threat of war, it is strictly required to prevent the lives of defensive combatants and civilians as well as legitimate military objectives from being placed in direct jeopardy; or
 - (ii)** a widespread natural disaster, it is strictly required for the protection and relief of those people and facilities whether in or outside the disaster area.

(5) The declaration of a state of emergency and any action taken in consequence thereof shall be in force for a period of not more than twenty-one days, unless it is extended for a period of not longer than three months, or consecutive periods of not longer than three months at a time, by resolution of the National Assembly adopted by a majority of at least two-thirds of all its members.

(6) The High Court shall be competent to hear applications challenging the validity of a declaration of a state of emergency, any extension thereof, and any action taken, including any regulation enacted, under such declaration.

(7) Where a person is detained under a state of emergency such detention shall be subject to the following conditions—

(a) an adult family member or friend of the detainee shall be notified of the detention as soon as is reasonably possible and in any case not later than forty-eight hours of detention;

(b) the name of every detainee and a reference to the measures in terms of which he or she is being detained shall be published in the Gazette within five days of his or her detention;

(c) when rights entrenched in section 19 (6) (a) or section 42 (2)(b) have been suspended—

(i) the detention of a person shall, as soon as it is reasonably possible but not later than ten days after his or her detention, be reviewed by a court, and the court shall order the release of the detainee if it is satisfied that the detention is not necessary to restore peace or order;(ii) a detainee shall at any stage after the expiry of a period of five days after a review under subparagraph (i) be entitled to apply to a court of law for a further review of his or her detention, and the court shall order the release of the detainee if it is satisfied that the detention is no longer necessary to restore peace or order;

(d) the State shall for the purpose of a review referred to in paragraph (c) submit written reasons to justify the detention or further detention of the detainee to the court, and shall furnish the detainee with such reasons not later than two days before the review.

(8) If a court finds the grounds for the detention of a person to be unjustified or illegal it shall order his or her release and that person shall not be detained again on the same grounds unless the State shows good cause to a court prior to such re-detention.

(9) Under no circumstance shall it be possible to suspend this Constitution or any part thereof or dissolve any of its organs, save as is consistent with the provisions of this Constitution.