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**CHAPTER VIII OF THE MALAWI CONSTITUTION
RECONSIDERED:**

**A Comparative Study of the Constitutional Chapter
on the Executive in Malawi with five
other Constitutions**

BY

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RECONSIDERED:

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*By Boniface Dulani*²

1.0 INTRODUCTION

The executive branch of government arguably provides the face of politics with which the general public are most familiar. Such is the extent of the familiarity and popular visibility of the Executive branch of government that most people often refer to it as *the* government.

Recent political experience and developments have however highlighted a number of problems and loopholes in the Chapter of the constitution that details the functions and responsibilities of the Executive in Malawi. Several of these will no doubt be discussed at length in this Conference, having been identified in the numerous consultations conducted by various stakeholders. As a way of contributing to the debate, this paper introduces a number of questions and observations on Chapter VIII in the Malawi constitution on the Executive. The paper adopts a comparative approach in that it discusses the provisions in Chapter VIII of the Malawi Constitution and identifies a number of weaknesses that might require redress by comparing to other constitutions.

Specifically, the paper looks at three themes under the Executive provisions in the constitution, namely: qualifications for presidential aspirants; the actual election process, and post-election matters. These are discussed by comparing Chapter VIII of the Malawi constitution to the constitutional provisions on the Executive of a number

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of countries, namely: the United States (Article 2 of the US Constitution); the Federal Republic of Nigeria (Chapter VI of the Constitution of the Federal Republic of Nigeria); South Africa (Chapter 5); the Zambia (Part IV); and the Republic of Kenya (Chapter II). The paper also draws from the Malawi Parliamentary and Presidential Elections Act (being Chapter 2:01 of the Laws of Malawi).

The choice of the five constitutions is purely on personal preference and accessibility to the author. There is therefore no reason to expect that there are no other constitutions that might provide equally more useful lessons for Malawi. It has also to be pointed out that the paper does not seek to adopt any particular position on any of the questions that it raises. Instead of being prescriptive, the approach and mode of presentation is aimed at providing a comparative context to the deliberations that are taking place in this Conference.

2.0 THE EXECUTIVE IN THE MALAWI CONSTITUTION

Constitutions aim to lay down a framework in which government and political activities are conducted. They therefore provide sets of rules that seek to establish the duties, powers and functions of the various institutions of government, thus setting up the basis for government (Heywood, 1997).

The formal provisions of the Constitution regarding the Executive branch of government are discussed in Chapter VIII of the Constitution. This chapter sets out the principles of election of the President, his deputies (i.e., the First and Second Vice Presidents), and their removals. The Chapter also details out the procedures for appointments of Cabinet Ministers, their duties and functions and also the appointments of other key officers that work with the executive in the execution of state business, such as the Attorney General and the Director of Public Prosecutions.

There are a total of 24 sections in Chapter VIII of the Malawi constitution. This makes it one of the longest chapters among the six constitutions that were reviewed in this

study. Only the Zambian and Kenyan constitutions, with a total of 28 and 25 sections respectively, have longer Executive chapters from the six constitutions that were compared. The United States on the other hand, has shortest, with only four sections.

Table 1: Number of Sections in the Executive Chapters

| | | | | | |
|--------------------------|------------------------------|-----------------------------|-------------------------|-------------------------|-----------------------|
| Malawi (Chapter VIII) | United States (Article 2) | South Africa (Chapter 5) | Zambia (Chapter VII) | Nigeria (Chapter VI) | Kenya (Chapter II) |
| 24 | 4 | 19 | 28 | 22 | 25 |

In addition to being one of the longest chapters on the Executive, the Malawi constitution has undergone several amendments to its Executive Chapter since its adoption in 1994. I am aware that there will be a presentation at this conference on amendments in the Constitution. However, it is worthy pointing out that the United States Constitution, which is the oldest of the six Constitutions under review, has only been amended 26 times since its adoption in 1787. Of these 26 amendments, only four have been on the Executive, namely:

- 12th Amendment, (ratified on 27th July 1804) - provides additional information on the procedures for election of the president and Vice President,
- Amendment 22 (ratified on 27th February 1951)- provides guidance on limitations of presidential terms)
- Amendment 29 (ratified on 29th March 1961) - presidential elections for the District of Columbia
- Amendment 25 - Presidential disability and Vice Presidential vacancies

While it is often said that a constitution ought to be a living document, and should therefore be changed and amended to respond to emerging issues and challenges, it also needs to be appreciated that a stable constitution that is not regularly changed has the potential to generate greater public confidence in the constitutional set-up. As

the local saying goes, *mwala ogubuduzika sumera ndele*- frequent amendments might only serve to undermine the strength and relevance of the constitution.

3.0 QUESTIONS ON QUALIFICATIONS FOR PRESIDENTIAL ASPIRANTS

What qualifications should individuals contesting for the presidency have? This has been one of the lingering questions in the run-up to this Constitutional debate. All the six constitutions sampled provide guidance on the qualifications of a Presidential candidate. However, there are a number of differences in the specific qualification criteria for candidates contesting for the presidency. A number of questions and gaps emerge from these qualifications, some of which are discussed below.

a) Should there be education qualifications for a President?

One question that has been raised in the debates leading to this Conference has been on whether the Constitution should spell out minimum education qualifications for candidates vying to contest for the presidency. Being the highest office of government and state, the functions of the president require individuals who are capable of grasping and analysing issues that can determine the destiny of millions of people. As head of state, the President is the country's first Ambassador and portrays the image of the nation. By setting minimum education qualifications, the country would therefore be saving itself the embarrassment of being led by individuals who might not have the skills and capacity to lead it.

Very few constitutions, however, spell out the minimum education requirements for one to vie for the presidency. Among the six constitutions that were sampled in this study, only the Nigerian Constitution provides specific education qualification requirements for Presidential candidates. Section 131(d) of the Nigerian Constitution states that a person shall be qualified for the election to the office of the President if:

He has been educated up to at least School certificate level or its equivalent.

The Nigerian constitution goes further to point out that candidates who present forged certificates to the Independent National Electoral Commission would be disqualified from contesting for the presidency.

It has to be acknowledged, however, that there is a danger that in setting minimum education qualifications for presidential aspirants, the country would risk denying itself the services of individuals who have a natural born intellect to lead and yet might not have high academic qualifications. Indeed, it might be a fallacy to equate academic qualifications with the ability to lead. History has taught us that some of the most ruthless and inept leaders over time have been some of the most brilliant academic minds of their times. There is need therefore to tread carefully on this particular aspect of the debate.

b) Should there be minimum and maximum presidential age limits?

One question that has risen a number of times leading to this Constitutional review conference has been on age limits for presidential candidates. Currently, the Malawi constitution only provides a minimum age limit of thirty five years for eligibility to contest for the presidency (see section 80(6)(b). being the highest office of state, the minimum age limit ensures that holders of presidential office are mature enough and have the capacity to lead the country's peoples.

However, apart from providing for the minimum age limit, there is no maximum age limit provided. This has caused many to advocate for the introduction of a maximum age limit - with the most frequent suggestions being that the maximum age limit should be 75 (see Sunday Times, 19 March 2006, 'Setting Age Limit for presidential aspirants). Meanwhile, there is also a campaign that is calling for the review of even the minimum age limit.

The Malawian political arena has for a long time been, and continues to be, dominated by names that have been around for a long time and are quite old, giving it a *gerontocratic* face. Introducing a maximum age limit would therefore open up

opportunities for a new and younger leadership that would have the potential to build on the foundations already laid down and also introduce nouvelle ways of governance. In a world that has seen dramatic changes in a variety of ways, it is argued that age limitations are necessary to tackle the complex and sophisticated nature of modern public policy, reduce personalised rule and in the final analysis, enhance the consolidation of democracy (ibid).

By contrast, others argue that introducing a maximum age limit cannot be justified on the basis of historical experience. Instead, it would simply deprive the country of the services of capable and brilliant minds who might still have much to offer despite their advanced age.

None of the five other constitutions that were analysed for this study provide for a maximum age limit for presidential aspirants. Malawi would therefore become unique among the six countries under review if it were to introduce a maximum age limit for presidential aspirants.

With regard to the debate on reviewing the minimum age limit downwards, several arguments have also been made. First is the argument that since the constitution does give all Malawians above the age of 18 the right to vote, it is rather arbitrary to set the minimum age for presidential aspirants at 35. By giving all citizens the right to vote from the age of 18, the constitution does implicitly recognise that one's mental faculties are mature enough at this age to make decisions that affect the whole country. Putting a minimum age limit of 35 therefore sends a contradictory signal in that despite recognising that an individual is mature enough to make serious national decisions, such persons are at the same time considered not mature enough to assume the highest office of state.

Throughout history, there have been leaders that have risen to become great national heroes who started off from an early age. In Japan, for example, the Meiji Restoration

of the 18th century that transformed the country from being a backward and poor state to the modern economic power that it is today, was led by young samurai and not necessarily old minds. In the United States, Franklin Roosevelt was elected Senator at the tender age of 28 and eventually rose to become US president. Closer to home, King Mswati of Swaziland, President Joseph Kabila, all rose to the highest offices of their countries from very young ages. Within our own local politics, people such as Aleke Banda, John Tembo and others entered into the political arena from a very young age but were able to take part in matters of state without age being reported to have been a hindrance to their performance. In an era when the country's life expectancy stands at a lowly 37 (World Bank), the minimum age limit of presidential aspirants of 35 is arguably a touch on the higher side.

When considering the merits and demerits of the minimum age limit of 35 years, however, it has to be borne in mind that Malawi is yet again not unique in setting a minimum age limit for presidential aspirants. The United States, Zambia and Kenya have similar provisions which provide for a minimum age limit of 35. Nigeria on the other hand has a slightly higher minimum age limit of 40 years. Table 2 below provides a summary of the minimum age limits for presidential aspirants in the six countries under comparison:

Table 2: Minimum presidential age limits

| Malawi | Zambia | South Africa | Kenya | Nigeria | United States |
|--------|--------|--------------|-------|---------|---------------|
| 35 | 35 | N/A | 35 | 40 | 35 |

c) Should presidential aspirants declare their assets as a condition for contesting?

One major challenge that has a bearing on the entrenchment of democracy and democratic values in the country has been the failure, often deliberate, by political office holders in the executive and the legislature to declare their assets once they

have ascended to high offices of state. The Malawi constitution does not currently make any specific provisions requiring Presidential aspirants to declare their assets as a qualification for contesting the elections.

Although the victorious candidates are by law required to declare their assets within three months from the date of election or appointment (see section 88 A, 1), in practice even this has proven to be difficult. Indeed, the three months grace period can itself be used an opportunity for the president or his deputy to use their office to accumulate resources. Malawi could perhaps learn in this respect from the provisions of the Nigerian and Zambian constitutions as a way of promoting greater transparency and accountability among senior government personnel.

In the Nigerian case, victorious presidential candidates are required to declare their assets first before they can assume the presidency. Specifically, section 140(1) provides that:

Any person elected to the office of President shall not begin to perform the functions of that office until he [or she] has declared his [or her] assets

Zambia is even stricter than Nigeria in that under Section 34(5)(b) of the country's Constitution, all presidential aspirants are required to declare their assets and liabilities, otherwise they would not be eligible to stand.

4.0 QUESTIONS ON ELECTING A PRESIDENT

A Constitution is supposed to be a document that provides stability and guidance on issues of governance. However, a thorough assessment of the executive Chapter in the Malawi Constitution reveals a number of grey areas in with regard to the actual process of electing and swearing in a new president. This Section now turns to look specifically at this topic.

a) What if there is only one eligible candidate for the elections?

The Malawi Constitution, together with the Parliamentary and Presidential Elections Act, are both framed on the assumption that there will be multiple presidential candidates in any election. Thus section 80(1 and 2) of the Constitution and Section 55 of the Parliamentary and Presidential Elections Act, both presuppose that there will be multiple candidates in any given presidential election. Given the multi-party nature of our politics, this might on the surface appear a fair assumption to make. However, what these provisions ignore is the probability, admittedly very remote, that there might be an occasion when there could be only one qualified candidate vying for the state presidency. Under such a scenario, the current provisions in both the Constitution and in the corresponding Parliamentary and Presidential elections Act would not apply. In particular, there is some ambiguity in Section 55 of the Parliamentary and Presidential Elections Act which states simply that:

If two or more persons have been duly nominated as candidates for election to the office of President, the Commission shall, as soon as practicable, after the close of the period for nomination give public notice that a poll is to be taken...

The above provision however fails to clearly stipulate what should to happen if there is only one candidate nominated for the presidency. It would thus remain up to the discretion of the Electoral Commission on whether to re-open the nomination process, hold a referendum-like election or simply declare the single candidate duly elected without any polls.

In the other countries where there are direct presidential elections, constitutions make specific provisions for instances when there is only a single candidate vying for the Presidency. The Kenyan, South African and Zambian constitutions all provide for automatic ascendancy to the presidency if there is only one candidate in the elections (see section 5 of Schedule 3 of the South African Constitution; section 5 (3)(C) of the Zambian Constitution; and, section 34 (7) of the Kenyan and constitution. On the other hand, the Nigerian Constitution provides in section 133 for a referendum-kind

of election when there is one eligible candidate. For such an individual to win, he or she has to secure:

- a) a majority of the YES votes cast
- b) Not less than one-quarter of the votes cast in each of at least two-thirds of all the States in the federation and the Federal Capital, Abuja.

While admitting that the probability of having only a single qualified candidate in the presidential elections might appear very remote, it is imperative that the Malawi constitution should make provisions for such scenarios as is the case in the other African constitutions reviewed in this paper. This would prepare the country for any such eventuality before it occurs. Otherwise, there would be no guiding principle in the constitution if such a case were to occur.

b) What constitutes majority to determine victory?

A more contentious issue that has dogged Malawi politics since 1994 has been the question what constitutes a majority for any candidate to be declared victorious in an election. This issue came to a particular head in 2004 when the victorious candidate in the presidential polls, the incumbent President Mutharika, won with only 36% of the valid votes. This outcome not only brought into question the legitimacy of the new President, but it also highlighted a discrepancy between the wishes of the majority of the electorate and the elections' outcome (Dulani 2005). This outcome, coupled with the absence of clear parliamentary majority, contributed a great deal to the political bickering that characterised Mutharika's first year in office.

Although the courts have helped to clarify on the subject of majority by applying the First past the Post principle that the candidate with the most number of votes in the elections wins, the 2004 elections showed that the usage of simple plurality can deliver results that are a distortion of voters' choice and ultimately defeat the

principle of majoritarian rule. The votes of those who vote for losing candidates are effectively wasted, even if they constitute a majority.

As a way of addressing the question of majority, it might help to be very clear in the Constitution what constitutes majority. Such clarity can be done by, besides the need to secure a simple majority, requiring candidates to secure a minimum share of the votes at national level, say fifty percent plus one. This is the case in South Africa, where any presidential nominee has to secure an outright majority support in the National Assembly. In cases where there is no one who secures a majority, then the constitution would provide for a re-run between the top-two candidates so that there is a clear winner. This would in turn ensure that there are no questions raised about the legitimacy of the presidency as any person ascending to this office would have secured the endorsement of at least half of the electorate.

Of the constitutions surveyed, the South African and US constitutions go further on the subject of determining majority and declaring winners by providing guidance on what procedures to follow if there is a tie among the top contenders for the presidency. In case of a tie, the South African constitution provides that the bottom candidate should be eliminated and then the election to be re-run until one candidate secures a majority. It has to be stated though that this is logistically possible in South Africa where the president is elected by the National Assembly and not in a direct ballot. In the US on the other hand, the constitution provides that if there is a tie among the presidential candidates, Congress assumes the power to vote for one of the top two candidates as president (see Article 2, section 1)

c) Should the presidency be rotated?

Another question that has arisen in the build up to this conference has been the calls from various quarters that the presidency be rotated by region. These calls emerge out of frustrations with the current First Past the Post System set-up, which tends to reward candidates coming from the more populous regions – primarily, the southern

region over those from the less populous ones, such as the north. Given the system of political patronage that characterises Malawian politics, giving rewards and development to one's kith and kin, there is a general feeling that the less populous regions will not have a fair share of benefit from the national cake.

Whilst rotation of the presidency is certainly an option, it is revealing that none of the six constitutions under review have promoted such an approach. One possible explanation is that putting in place this kind of requirement would actually entrench the system of patronage and favouritism rather than actually get rid of it. When one ascends to the presidency, they should be head of state for the entire country and serve all people, rather than a particular region, ethnic or tribal group.

As a way of addressing such concerns, it is possible to introduce mechanisms in the constitution that would require any presidential aspirant to adopt and promote a national rather than regional or ethnic agenda. This would involve introducing mechanisms in the constitution that require the winning candidates to win a certain proportion of votes from particular regions or districts. For example, in Kenya, section 5(3)(f) requires that the winning candidate should secure not only a majority of the votes, but should also have secured at least a minimum of twenty-five percent of the valid votes in at least five of the country's eight provinces (section 5(3)(f)). Similarly, in Nigeria, the winning candidate has to, in addition to obtaining a majority share of the votes, secure not less than a quarter of the votes cast in at least two-thirds of all the states in the Federation and in the Federal Capital of Abuja (see Section 134 (1), (2), (3) and (4)).

5. POST ELECTION MATTERS

The third area where a number of questions and constitutional related to the Executive is with regard to events after the elections of members of the executive. This section turns to look at a number of these questions.

a) What happens if a winning presidential candidate dies before being sworn in?

Another gap that emerges in the Malawi Constitution after comparing it to the five other constitutions in this study is the procedure to be followed in the event that a victorious presidential candidate dies before being sworn in. Although again such an event might appear unlikely, it is still possible that a president-elect could die during the period between the declaration of results and the swearing-in ceremony. Technically speaking such an individual would not be president, neither would his or her running mate. It would therefore not be automatic that the running mate would assume the presidency as would be the case if both have been sworn in.

Several of the constitutions that were reviewed for this study do make such provisions to guide the procedures to be followed if the president-elect dies before being sworn in. There are two approaches to addressing such as scenario. The first approach is to allow the running mate of the president-elect to ascend to the presidency. This is the case in Nigeria, where section 136(1) of the Federal Constitution stipulates that if a president-elect dies before taking the oath of office, the person elected with him as Vice President shall be sworn-in as President and that he or she shall in turn nominate a new Vice-President. The second approach is offered by Kenya. Here, the Constitution stipulates that a new election would have to be called if a candidate duly elected dies before being sworn in as president (section 5 (4)(c).

It needs to be pointed out though that in the Nigerian case, as is the case in Malawi, any presidential aspirant has to declare a running mate before the elections whereas in Kenya, a President appoints his or her own deputy after being sworn-in. This might therefore explain the different approaches that are used. It would therefore be worth giving this issue some serious consideration at this conference to make sure that as a country, we are not caught out if such an unlikely event were to happen.

b) What should determine the party of government?

The linkage between the Executive and government assumes greater prominence in Malawi on account of the fact that there are no clear rules governing the procedures for declaring which party can form government after an election. Both the Constitution and the Parliamentary and Presidential Elections Act are silent on the procedure for declaring which party can form government after general elections. In the absence of such rules, the conversational interpretation has been that the party that produces the winning presidential candidate in the elections automatically assumes the status of the government side in parliament. The implicit assumption here being that the party that wins the presidential elections is also one that wins the majority number of seats in government.

However, the 2004 elections highlighted considerable weaknesses in this interpretation. Although the Malawi Congress Party (MCP) won the highest number of seats of all parties in Parliament, the United Democratic front (UDF) became the party of government by virtue of the fact that it had produced the winning president (Dulani, 2005). This situation was further complicated in early 2005 when the victorious candidate in the 2004 elections, Dr. Bingu wa Mutharika, decided to exercise his freedom and left the UDF to form his own party, the Democratic Progressive Party (DPP). By virtue of the fact that DPP was led by the state president, it effectively acquired the status of party of government despite not having contested any general election to have its agenda endorsed by the general population. As recent experience has shown, this can result in constant struggles for power, resulting in what effectively amounts to government gridlock³.

The linking of the party of government in Parliament to the winning president, besides giving high value to the presidential over the parliamentary elections, is further complicated by the fact that the constitution does make provision for

³ A paralysis that arises from institutional rivalry between the legislature and the executive branches of government.

independent candidates to contest for the presidency and parliament. In a scenario where an independent candidate wins the presidency, this would create enormous complications and dilemmas on who would assume the status of the party of government, especially since independent MPs do not constitute a single parliamentary block. This confusion highlights the need to review and clarify the rules that govern the party which forms government in the constitution and the Parliamentary and Presidential Elections Act to take into account the existence of independent presidential and parliamentary candidates. This would then reduce potential instances of paralysis in the operations of government.

None of the five other constitutions under review make such provisions., and hence do not offer any particular lessons for Malawi. However, in the US context, the stricter demarcation of power between Congress and the Executive means that the results of the presidential elections do not have a bearing on the terminology used in Congress over the status of parties. In South Africa too, where the president is elected by the national Assembly, such a scenario is currently existing in Malawi is perhaps not as likely as the victorious presidential candidate usually comes from the largest political party in parliament. Otherwise, the executive chapters in Kenya, Nigeria and Zambia are silent on the relationship between the executive and the legislative branch.

c) Should a president be allowed to resign from the party that sponsored him or her into office?

There have been several questions as to whether the President should be allowed to resign from the party on whose ticket he or she was sponsored to power. None of the five other constitutions analysed for this study spell out whether the President should be allowed to resign from the party that sponsored him or her into power.

However, given the rather unique attachment that exists between the presidency and the party that assumes the status of the parliamentary party of government in

Malawi, as outlined above, there is great need for clarity on this issue. This can be addressed by requiring all presidential aspirants to contest on a particular party's ticket and in that if they resign from that party, there should be fresh elections for them to seek a new electoral mandate. This would safeguard the central tenet of democracy, namely that power should reside in the hands of the governed not those governing.

The requirement for presidential candidates to stand on a political party ticket is provided for in the constitutions of Kenya (section 5(3)(a); Zambia (section 34(3)(d); the Nigeria (section 131)(c) and is built in into the South African Constitution where the President is elected among the National Assembly members and where election into the National Assembly is strictly on a party ticket. If the president opts to resign from his or her party, this serves as an automatic trigger for fresh presidential elections. Such provisions, apart from clarifying the implications of resignations from the original sponsoring party, have the added potential of encouraging intra-party efforts at reconciliation when differences arise.

While introducing party membership as a qualification for any individual to contest for the Presidency would address some of the problems that have been experienced especially after the 2004 elections, it also has potential to reduce voter choice. Given the problematic nature of Malawian parties, where internal party democracy has often been a problematic and contentious issue (see Dulani, 2005), restrictions that require political aspirants to belong to political parties would effectively reduce voters' choice and deny them the choice of voting for independent candidates.

The solution to Malawi's unique political situation might not necessarily lie in introducing a political party requirement for all presidential aspirants. Rather, there might be need to introduce clear guidelines and terminology in the categorisation of parties in Parliament. Instead of the present system that relates the presidency to the

party of government in Parliament, it would help to review the sections on the legislature and introduce the new terminology of majority versus minority parties.

d) Who becomes Acting President when the president is absent?

Recent political events have highlighted the uncertainty over the issue of an Acting President when the President is outside the country. While Chapter VIII of the Malawi Constitution does provide for a Vice President who is elected together with the President in an election (Section 79), there is no provision that gives guidance on the procedures for delegating presidential authority to an Acting President. This has resulted in controversy as the President has either opted not to have an Acting President on the ground when he is outside the country or has opted to by-pass the Vice President and delegate presidential powers to other senior cabinet Ministers.

While conventional wisdom might suggest that the Vice President would be the natural person to act on behalf of the President in his or her absence, the lack of clarity on the procedures for delegation in the Constitution has meant that this has been open to different and subjective interpretations. This, in my view, calls for the need to specify clearly in the Constitution the procedures for delegation to avoid any misconstruing or deliberate manipulation of any such loopholes.

Although Malawi is again not unique in making no specific provisions for the procedures for delegation (The US Constitution too does not make any specific reference to procedures for delegating power to the Vice President), four of the other constitutions sampled in this comparative study make specific provisions on procedures for delegating power to an Acting President. There are two ways of such delegation: either as a matter of normal procedure and routine, as is the case in (South Africa (Section 90) and Nigeria (section 145); or by specific delegation in writing as is the case in Zambia (Section 39) and Kenya (section 11). In the first instance, the constitution can specify the order of delegation to assume the Acting

Presidency. This is clearly the approach in South Africa where section 90 of the Constitution provides that:

“When the President is absent from the republic or otherwise unable to fulfil the duties of the president, or during a vacancy in the office of President, an office bearer in the order below acts as President:

- a. The Deputy President
- b. A Minister delegated by the president.....

The second approach is the one in Zambia and Kenya which require the president to specifically delegate authority in writing to anyone who has to act on his or her behalf when he or she is absent (See Sections 11 and 39(1) of the Kenyan and Zambian constitutions respectively).

Whichever approach is adopted, it is imperative for Malawi to have a clear provision that specifies the order and form of delegation.

e) Should the President then have power to fire the Vice President?

The recent political experience in Malawi, which has been characterised by poor relationship between President Mutharika and vice president Cassim Chilumpha, has brought up questions on whether the president should have power to fire the vice president. The present political scenario is somewhat similar to that which ensued in the first half of 2004 when former first Vice President, Justin Malewezi decided to part ways with the UDF and distance himself from the presidency of Bakili Muluzi.

A review of the six constitutions reveals that it is only in countries where the Vice President is appointed by the elected president that the President has powers to fire the Vice President. This is the case in Kenya (section 15 (1) and (6); in South Africa (section 3); and Zambia (section 45(2). However, in Nigeria and the United States, where, like Malawi, a presidential candidate has to declare his or her running mate

before the polls, the President does not have powers to dismiss his or her deputy. The reasoning being that the Vice President enjoys the same level of direct electoral support that the President enjoys. The Vice president, in other words, can only be removed following the same procedures that apply to the removal of the elected president as he or she is also treated as an official with direct popular mandate.

If the question on whether the president should have power to fire the vice president comes up, this Conference may wish to be guided by the different approaches that are followed elsewhere which are determined by the mode of ascendancy to office of the vice president.

f) What should be the maximum tenure of office?

It has been argued that the provision in the Malawi Constitution governing the presidential tenure limits is not tight enough. This leaves it open to manipulation and subjective interpretation. This section , (83)(3), currently states that:

The President, the First Vice President and the Second Vice President may serve in their respective capacities a maximum of two consecutive terms....

The usage of the word 'consecutive' in the above section does suggest that it would be possible for an individual who has served two terms to come back as president after a break in between the terms. For example, it would be possible for one to serve two terms and return after a break of another one single term. None of the other five constitutions, all of which also provide the maximum tenure of office for presidency, use the word 'consecutive' in their constitutions. All these constitutions instead take the cue from the US and South African constitutions which states that:

“No person may hold office as president for more than two terms”.

Such clarity would mean that no one single individual can serve as a president for more than two five year terms, irrespective of whether the terms are consecutive or not.

6.0 CONCLUSION

This paper has attempted to raise a number of questions with a view to informing the debates at the Constitutional review Conference. By drawing on the comparative cases of five other constitutions, the paper has attempted to provide lessons that can guide the participants at the conference in responding to some of the issues that emerge, particularly on Chapter VIII of the Malawi constitution that discusses the executive.

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