



# **MALAWI LAW COMMISSION**

**CONSTITUTION REVIEW PROGRAMME**

**CONSULTATION PAPER**

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## Preface

This Consultation Paper builds on the Issues Paper which the Commission developed from written submissions that it received from various sectors of the Malawian society from October 2004 to May 2005. It also culminates from the views and suggestions of the various target groups that the Commission consulted following a Cabinet directive requiring the Law Commission to consult widely and to take on board views of those Malawians who do not have an opportunity to write to the Commission to ensure that the consultation process is as inclusive as possible.

To that end, the Commission met with representatives of political parties both in Parliament and outside Parliament, Chiefs from all the three regions of Malawi, civil society organisations, the youths and children, academics, professional bodies, the Parliamentary Women Caucus, Principal Secretaries and Chief Executives in Government, Judges and Magistrates and Cabinet Ministers.

This Consultation Paper therefore is a consolidation of the views of these target groups regarding the issues raised in the Issues Paper. The Paper also highlights new issues raised at the consultative meetings. It is hoped that the discussion in this paper shall continue to stimulate debate on the issues to be discussed at the National Constitutional Conference.

The Consultation Paper is structured in two parts. The first part presents views of stakeholders on the design of the review programme. The second part presents views of stakeholders on the substantive provisions of the Constitution.

The Paper has been prepared by Janet Laura Banda (Mrs) currently holding the post of Chief Law Reform Officer in the Malawi Law Commission.

## PART 1

### 1. INTRODUCTION

#### 1.1 *Constitutional Mandate*

The Law Commission is established under Chapter XII of the Constitution of the Republic of Malawi and is mandated to review laws of Malawi for conformity with the Constitution and applicable international law. It is also mandated to review and make recommendations regarding any matter pertaining to the Constitution<sup>1</sup>. The Law Commission is empowered to receive submissions from any person or body regarding the laws of Malawi and is required to report its findings and recommendations to the Minister of Justice who is in turn to publish any such Report and lay it in Parliament.

The Law Commission is headed by a Law Commissioner appointed by the President on the recommendation of the Judicial Service Commission<sup>2</sup>.

The Law Commissioner in fulfilling the mandate of the Law Commission is assisted by “experts” appointed by the Law Commissioner in consultation with the Judicial Service Commission. These are appointed from time to time and for such time as they are required on account of their expert knowledge of a matter of law under review or on account of their expert knowledge of other matters relating to a legal issue under review.<sup>3</sup>

#### 1.2 *Independence of the Law Commission*

The Law Commission has been established as an independent national institution to perform its functions and exercise its powers free of the direction or interference of any other person or authority. The independence is guaranteed by section 136 of the Constitution in the following terms-

Independence 136. The Law Commission shall exercise its functions of the Law independent of the direction or interference of any other Commission person or authority.

#### 1.3 *Reports of the Law Commission*

The Law Commission has so far produced thirteen Reports since becoming functional in 1996. These include the following-

- Report on the Review of Certain Laws on Defilement, Marriage, Affiliation and Citizenship, 1996
- Report on the Technical Review of the Constitution, 1998

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<sup>1</sup> See section 135 of the Constitution

<sup>2</sup> Section 133 (a) of the Constitution

<sup>3</sup> See section 133 (b) of the Constitution

- Report on Bail Guidelines, 2000
- Report on the Review of the Penal Code, 2000
- Report on the Review of the Army Act, 2001
- Report on the Review of Censorship and Control of Entertainment Act, 2001
- Report on the Review of the Legal Education and Legal Practitioners Act, 2002
- Report on the Review of the Corrupt Practices Act, 2002
- Report on the Review of the Police Act, 2002
- Report of the Review of the Criminal Procedure and Evidence Code, 2004
- Report on Conversion of Fines, 2004
- Report on the Review of the Wills and Inheritance Act, 2004
- Report on the Review of the Legal Aid Act, 2005

All these Reports include Bills some of which have been enacted. Presently, the Commission is in the process of finalizing, printing and publishing four more Reports, namely, the Report on the Review of Child Rights Related Legislation, the Report on the Review of the Traditional Courts Act, the Report on the Review of Marriage and Divorce Laws and the Report on the Review of Land Related Law Reforms.

## 2. PROGRAM DESIGN

The original review process and methodology anticipated by the Law Commission on this programme in 2004 envisaged the identification of problematic areas in the Constitution by the Law Commission, the receipt of oral and written submissions on those areas, the holding of a National Constitutional Conference and subsequently carrying out of the usual law reform process by a special Law Commission constituting of experts and stakeholders.

However, pursuant to a Cabinet directive, the Law Commission redesigned the review process, especially the anticipated methodology, so as to render it more widely inclusive of the Malawian society. The redesigned process has been demarcated in three phases as follows –

- (a) Preliminary consultations with target groups (written and oral submissions)
- (b) First National Constitutional Conference
- (c) Law Reform Process and Second National Constitutional Conference

### 2.1 *Preliminary Consultations*

The purpose of this first phase was to give an opportunity to Malawians to highlight those areas in the Constitution that they perceive to be problematic in terms of implementation without necessarily restricting debate to issues highlighted by the Law Commission in previous fora. The first phase was also intended as a confidence building measure, particularly among the major political players and stakeholder interest groups. To that end, the Law Commission sought to instill a sense of ownership of the process to all Malawians to ensure legitimacy and credibility of the process.

The first phase thus saw the Law Commission conducting preliminary consultations separately with political parties in Parliament, in particular, MCP, UDF, PPM, AFORD, MGODE, RP and DPP. The preliminary consultations have also been held separately with various civil society bodies, extending to Chiefs from all the three regions, professional associations, academics from the two State Universities, civil liberties groups, faith groups, children and youth groups and the media.

The Commission has also consulted Women Parliamentary Caucus, Principal Secretaries and Heads of Public Service institutions, the Judiciary and a group of Cabinet Ministers as representing the Executive.

In terms of the actual consultations on the design of the programme, various views were suggested. Great emphasis was placed by political parties on the need to consult Chiefs to ensure social input, credibility and acceptability<sup>4</sup> of the process.

Other political parties also cautioned against relying on Members of Parliament as representing views of the people.<sup>5</sup> It was mentioned that in the recent

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<sup>4</sup> Meeting with UDF MPs held on 5<sup>th</sup> October, 2005.

<sup>5</sup> MGODE, Republican Party and AFORD

past some constituents have complained that their Members of Parliament claim to have consulted them on crucial issues of governance when in fact they were not consulted.

It was therefore suggested that leaders of political parties at the grassroots level are a better option to be consulted as opposed to Members of Parliament who are guided by the political party leadership. Further, it was suggested that the consultation meetings should be at constituency level and a Member of Parliament would be invited to attend. It was felt that this would ensure support for members of Parliament on any proposed amendments to the Constitution that may ensue. The Law Commission was also advised to take specific issues to the people in the consultation process.

On their part, the Chiefs suggested that once the law reform process commences, consultations should start at the level of Traditional Authority (TA) through Area Development Committees (ADCs). It was felt that this would ensure adequate representation of people at the grassroots since ADCs comprise Members of Parliament, Councillors, Civil Society bodies, public officers, Group Village Headmen and political parties. Further, the Chiefs advised that ADCs exist in each and every jurisdiction of a T/A. The Chiefs also cautioned against heavy reliance on non governmental organizations (NGOs) since there are some NGO's who are perceived to advance agendas of either political parties or donors.

The Chiefs also suggested a meeting of all the Chiefs in Malawi to provide an opportunity for them to give their own views regarding the Constitution<sup>6</sup>. It was however suggested that if this is not possible due to lack of resources and time, then the Law Commission should organize meetings at the district level to be attended by representatives from each and every TA in each district. It was further suggested that at the District meetings, each TA should send 10 delegates which should include representation from NGO's, faith community, and "real" villagers. Gender considerations should also be taken into account to ensure adequate representation of women.

The Chiefs also emphasized the importance of alerting Chiefs in advance on the issues to be discussed at the District Conferences. To that effect, the chiefs suggested the preparation of a questionnaire by the Law Commission<sup>7</sup>.

The Malawi Law Society and the University of Malawi<sup>8</sup> in responding to the issue of who to consult however suggested that the consultations should target three categories of people, namely, politicians as a special constituent; the general public including civil society, ordinary-persons and faith based organizations as a target group; and professionals as another special constituent. It was further suggested that the consultations should be combined with civic education to ensure maximum and constructive contribution to the process.

The Law Commission was also urged to consider setting up the special Law Commission immediately to start working prior to the National Constitutional Conference to ensure that the members of the special Commission benefit from the

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<sup>6</sup> This suggestion was made by Chiefs from the Central Region

<sup>7</sup> This demand was made by Chiefs from the Southern Region and the Northern Region.

<sup>8</sup> At a meeting held at Shire Highlands Hotel in Blantyre on 19<sup>th</sup> October, 2005.

preliminary consultations. The Law Commission was further cautioned to strategize properly on the timing for the presentation of its Report to take into account the political climate.

The children and youth groups suggested that consultations with their category should be co-ordinated by the Ministry of Youth, Sports and Culture and the Ministry of Gender, Youth and Community Services and that this should be co-ordinated from two angles: children aged 11-17 as a separate target group and youths aged 18-25 as another separate target group. It was also emphasized that consultations at district level should include these categories.

At all the consultative meetings with stakeholders general disappointment was expressed at the way politicians have destroyed the spirit of the Constitution with the numerous amendments since 1994. Other stakeholders even questioned the necessity of involving the rural masses<sup>9</sup> and the general public in the constitutional review process when at the end of the day Parliamentarians, who normally pursue their own agenda, are to decide whether the recommendations of the people are to be enacted or not<sup>10</sup>.

## *2.2 First National Constitutional Conference*

The purpose of this second phase is threefold. The first purpose is to launch the constitutional review process since it is a programme of significant national interest. The second purpose of the Conference is to build some consensus on the issues in need of review. The third purpose is to suggest the way forward especially in relation to the issues affecting provisions that are protected in the Schedule to the Constitution, if any.

All the consultative meetings endorsed the importance of the National Constitutional Conference. Some stakeholders considered it as an important measure in nation building in view of the current climate of apparent political tension in the country. Others considered that the holding of the Conference would indicate the level of support and commitment by Government since it shall be officiated by the Head of State<sup>11</sup>.

Other reasons in support of the Conference include the need to provide a forum to consolidate the views from all the three regions and also the bringing together of different classes of people to contribute to the constitution making process regardless of class. It was also seen as an opportunity to allow people to vent their frustrations regarding implementation of the Constitution<sup>12</sup>.

Most stakeholders however considered that the targeted number of invitees, a figure of 150 people was too low. It was however conceded that the quality of debate, not necessarily the quantity of participants, is what mattered. The Law

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<sup>9</sup> Meeting with villagers of Gumulira Village, TA Mulonyeni, Mchinji held on 15<sup>th</sup> February, 2005.

<sup>10</sup> Same sentiments were expressed by civil society bodies from both the Southern and Northern Region.

<sup>11</sup> Sentiments expressed at meetings with civil society, Law Society, political activists, academia and faith groups.

<sup>12</sup> These reasons featured highly in the meetings held in the North.

Commission was however encouraged to develop a website to enable interaction with Malawians both within and outside the country.<sup>13</sup>

The Law Commission was also urged to prepare properly for the Conference to ensure representative views as opposed to individualistic views. Further, the Law Commission was advised to ensure that the Conference is not dominated by political parties<sup>14</sup>. To that end a suggestion was made that in terms of political parties, only those parties on the register and with established structures should be invited. It was also urged that university students as a special constituent should not be left out.<sup>15</sup>

### *2.3 Law Reform Process and Second national Constitutional Conference*

The law reform process shall be characterized by the usual methodology adopted by the Law Commission for all law reform programmes. It shall therefore start with the empanelling of experts as Commissioners to work part time for the Law Commission and meet regularly on a monthly basis to deliberate on issues. These meetings shall culminate in the development of a Law Commission Report, a draft of which shall be presented at a second National Conference for input by stakeholders before finalisation and submission to Cabinet and Parliament.

The work of the special Law Commission shall also be characterized with further consultations at district level as recommended by stakeholders during the consultation process.

Stakeholders emphasized the need to appoint suitable people to the special Law Commission based on their recognized expertise, and experience in their chosen field.

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<sup>13</sup> This suggestion was made at a meeting with the DPP Cabinet Ministers.

<sup>14</sup> A submission from PPM suggests that Parties in Parliament should each have five representatives at the Conference regardless of party size.

<sup>15</sup> Suggestions made by DPP

## PART 11

### CHAPTER I

#### 1 THE REPUBLIC

##### 1.1 *National Language*

The Constitution of Malawi is silent on the issue of a national language. Consultations have revealed that “Chichewa” is recognized as the national language though this recognition is not official. It has therefore been suggested that, for the avoidance of doubt, the Constitution should recognize “Chichewa” as the national language in section 2. It was argued that this initiative shall promote national unity.<sup>16</sup>

##### 1.2 *Separation of powers*

Sections, 7, 8 and 9 of the Constitution provide for the separate status, function and duty of the Executive, the Legislature and the Judiciary respectively. These are the three arms of a democratic government which Malawi is. The executive has the mandate to initiate policies and legislation of public or national interest and which advance or promote the principles of the Constitution and to implement such policies and legislation. The legislature’s primary mandate is to enact laws as may be initiated by the executive. The judiciary’s primary mandate is to interpret, protect and enforce the Constitution and all other laws. In this way, the three arms of government check each other in the manner they execute their mandates.

Consultations have urged the Law Commission to look closely at the wording creating the separate functions of the three arms of Government to ensure that there is no encroachment. An example was cited of the powers of the Executive arm of government to initiate policy and legislation which sometimes is high jacked by the legislature under the guise of private members bills. It was emphasized that the Constitution should clearly exclude itself from the purview of a private members bill since, firstly, there is nothing private about the Constitution itself and secondly, it is a policy document hence falling squarely on the Executive as one of its responsibilities.

##### 1.3 *Fundamental principles*

Section 13 of the Constitution lists down the principles of national policy starting from gender equality all the way to good governance. The consultations have revealed that people are in favour of introducing food security as one of the fundamental principles. It has also been suggested that food security should be at the top of the ranking since in Malawi it is a priority and all other principles are secondary to it.

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<sup>16</sup> DPP as a party was also in support of this suggestion

## CHAPTER II

### 2. HUMAN RIGHTS

#### 2.1 *Death Penalty*

Section 16 provides that “every person has a right to life and no person shall be arbitrarily deprived of his or her life”. There is however an exception to this rule. The proviso to the section exempts the execution of the death sentence imposed by a competent court on a person in respect of a criminal offence under the laws of Malawi where a conviction has been secured.

However, section 44 (1) (a) embraces the “right to life” as one of those rights that are non-derogable. There is therefore a clear contradiction between section 16 and section 44 which needs ironing out.

In discussing the issue of death penalty, Judicial officers considered that this penalty should not be mandatory but rather that the circumstances of each particular case should determine whether this penalty should be imposed or not. The Chiefs from the Central Region have even gone further to suggest that this penalty should be removed on grounds that it is barbaric and does not achieve any purpose. It was also generally observed that trends in the region<sup>17</sup> are moving towards abolishing this penalty. Civil society is also in favour of removing this penalty.

#### 2.2 *Marriage by Repute or Permanent Cohabitation*

Section 22 recognizes the institution of marriage and seeks to protect it as the fundamental group unit in society. In that regard, the Constitution recognizes three types of marriages. These are statutory marriages, marriages at custom and marriages by repute or permanent cohabitation.

In the cases of marriages by repute or permanent cohabitation, validity is usually determined on the termination of the marriage whether by death or otherwise and is usually influenced by the length of period of cohabitation<sup>18</sup>. Chiefs strongly argued that marriages by repute or permanent cohabitation encourages immorality in our society. It was further argued that these marriages are against Malawian traditions and customs which look to a marriage as a joining of two families and a social unit to bring about social cohesion.

On their part, children and the youth have condemned marriages by repute and suggested that these should not be recognized by the Constitution on the basis that such marriages encourages immorality among the youths and also expose the youth to undesirable relationships<sup>19</sup>.

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<sup>17</sup> South Africa, Mozambique and Namibia countries which have also adopted democratic constitutions in the 90s have done away with this penalty.

<sup>18</sup> See *Magombo vs Nelson*, (1964 – 66) 3ALR (Mal) at page 134 and *Maliro vs Maliro* (1993) 16 (1) MLR 282.

<sup>19</sup> Views expressed by the Children and the Youth at a meeting held at Capital City Motel in Lilongwe

Judicial officers however proffered a different view. They looked at this type of marriage as a mechanism to protect women from men who pretends to be married to women. In Their view marriage by repute does not weaken the institution of marriage if taken from that angle of women protection.

### *2.3 Political Rights*

Section 40 (2) requires the state to provide funds to any political party which has secured more than one-tenth of the national vote in elections to Parliament to ensure that during the life of any parliament such party has sufficient funds to represent its constituency. The statute which was enacted to ensure the proper implementation of this provision, the Political Parties (Registration and Regulation) Act<sup>20</sup> is silent on party funding.

Stakeholders suggested that there is need for guidelines on this provision to suggest a formula for determining levels of funding to qualifying parties. For example, judicial officers suggested that the level of funding should be based on the number of seats held by a party. It was also suggested that the approach of constituency office funding rather than party funding should be explored.

Judicial officers however opposed the suggestion that party funding should be regardless of representation in Parliament<sup>21</sup>. It was feared that people might register bogus parties to siphon state funds. It was also argued that Government resources are limited and hence the need to regulate party funding. Other stakeholders have submitted that the provision should be flexible to allow adjustment of political party funding during the life of Parliament depending on actual representation. This view argued that allowing party funding to remain static during the life of Parliament may lead to inequalities since party representation is influenced by defections or losses in by-elections.<sup>22</sup>

The last point on this issue that was emphasized was the need to ensure proper use of funds allocated pursuant to this provision. It was therefore suggested that mechanisms should be incorporated either under the Constitution or in the Political Parties (Registration and Regulations) Act to ensure transparency and accountability in dealings with such funds through audit by the Auditor General.

### *2.4 Citizenship*

In Malawi, citizenship may be acquired by birth, descent, marriage, registration or naturalization. This is provided for under section 47 of the Constitution.

Citizenship by marriage has been the bone of contention. The Malawi Citizenship act<sup>23</sup> does not recognize this mode of acquiring citizenship outright. Marriage is in fact a factor in the acquisition of citizenship by registration. Secondly, citizenship through marriage is available only to wives of Malawian male citizens on

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<sup>20</sup> Cap 2:07

<sup>21</sup> As suggested by other political parties.

<sup>22</sup> View expressed by the DPP

<sup>23</sup> Cap. 15:01 of the Laws of Malawi

satisfying the conditions set out under section 13 (1) of the Act. Among these conditions include the requirement continuous residence for a period of five years, adequate knowledge of a prescribed vernacular language or English, good character and suitability.

There is a clear contradiction between the Constitution and the Malawi Citizenship Act. Firstly, marriage per se is a ground for acquisition of citizenship under the Constitution while as under the Act it is a factor to be taken into consideration in the process of acquiring citizenship by registration. Secondly, citizenship by registration through marriage is only available to wives of male citizens of Malawi while the Constitution does not distinguish between male or female citizens.

In 1996, the Parliamentary Women Caucus submitted proposals to the Law Commission for the review of the Act, so as to remove those aspects which discriminate against women. In particular, it was submitted that section 16 of the Act should be opened up to confer similar treatment to foreign husbands of Malawian female citizens. This submission was premised on the fact that the Constitution prohibits any form of discrimination under section 20 and guarantees equal treatment of men and women. Cabinet in its wisdom rejected the proposal to amend the Malawi Citizenship Act in this regard principally on fear of opening up the country to undesirable characters who may use Malawian women to obtain citizenship.

Ten years down the line, the Parliamentary Women Caucus has had a change of heart on this issue. The caucus has suggested the tightening up of our citizenship law to make it difficult for one to obtain citizenship by marriage whether female or male due to the current spate of foreigners marrying Malawian women as a way of obtaining citizenship<sup>24</sup>. It has therefore been suggested that the current position on the law regarding foreign husbands should also apply to foreign wives so that they are only granted residency.

Cabinet Ministers and Judicial officers supported this position and emphasized the need to strictly regulate the conferring of citizenship through marriage across the board and suggested that it should be merely one of the considerations.

## *2.5 Women Participation in Parliament*

This was an issue of concern during most of the stakeholder meetings. At present Parliament consists of 193 members out of which 27 are women. This represents a 12% representation of women which is far below the minimum of thirty percent as required by the SADC Protocol and other international instruments. This figure also does not correspond to the population of women in Malawi which is over 50% of the total population.

Civil society bodies have proposed a solution to address this anomaly. The suggestion is that Malawi should consider introducing the system of proportional representation since it has the advantage of empowering political parties to determine their representatives in Parliament. Under such a system, it was argued,

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<sup>24</sup> In particular, Nigerians

it would be easy to achieve the thirty percent minimum and thereby enable Malawi to comply with its regional and international commitments.

The Parliamentary Women Caucus supports this proposal and concedes that with the current electoral system it is difficult to achieve the thirty percent minimum quota for women. A number of reasons for this state of affairs were suggested. For example, it was mentioned that women do not come forward either out of timidity or due to the unfavourable political climate.

The Caucus suggested other alternatives such as introduction of a quota system so that a certain percentage of seats should be reserved for women. The other alternative is to introduce the approach of having separate constituencies for women only. For these alternatives, the countries of Uganda, Tanzania and Rwanda were cited as examples where such systems are working.

## *2.6 Sexual Orientation*

Section 20 of the Constitution prohibits discrimination on the basis of factors such as race, colour, sex, language, political or other opinion or other status. On the basis of this provision, a submission has been received to amend the Penal Code<sup>25</sup>(in the context of the Constitution Review) to remove discrimination on the basis of sexual orientation. Section 153 of the Penal Code prohibits what are termed “unnatural offences”. These include the having of “carnal knowledge of any person against the order of nature” or “permitting a male person to have carnal knowledge of [a male or female person] against the order of nature.” This offence attracts a maximum of fourteen years imprisonment.

The Penal Code also criminalizes indecent practices between males under section 156. Thus a male person is prohibited from committing acts of gross indecency with another male person in public or private. The maximum penalty for this offence is five years.

The meeting with civil society in Blantyre rejected the idea of legalizing homosexuality or lesbianism. The Parliamentary Women caucus, DPP and villagers of Gumulira Village, T/A Mlonyeni also rejected gay marriages and the gay rights. The same sentiments were expressed by the Chiefs in all regions. It was argued that such relationships undermine the institution of marriage. The Chiefs thus cautioned the Law Commission against importing and copying practices and tendencies that are immoral from both the religious and social perspective.

## *2.7 Arrest, Detention and Fair Trial*

Section 42 of the Constitution generally regulates the issue of arrests, detentions and fair trials and requires that every person arrested should be brought before an independent and impartial court of law either to be charged or to be informed of the reason for his or her further detention. This is to be done within forty eight hours of the arrest. If the period of forty eight hours expires outside a court day, on the first court day after such expiry.

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<sup>25</sup> Cap. 7:01 of the Laws of Malawi

This provision has always been a bone of contention in the multiparty Malawi. On the side of Government, it has always been felt that the period of forty eight hours is too short in view of resource constraints hence the suggestion to extend to seven days<sup>26</sup>. It has also been generally felt that the police have not implemented this provision satisfactorily.<sup>27</sup>

A counter argument is that the period of forty eight hours is adequate to enable the Police charge and take a suspect to court. It was suggested that a democratic police service should only effect an arrest where it is ready to prosecute the matter. This provision therefore ensures that individual liberties are not necessarily curtailed.

During the consultations, this matter only came up at two meetings, the one with judicial officers and the other one with villagers at Gumulira Village, T/A Mlonyeni in Mchinji. At the meeting with judicial officers, it was emphasized that the forty-eight hour period is an important safeguard to protect detained persons. To that end, the meeting suggested that temporary remand warrants should not be unnecessarily extended to avoid abuse of the process. It was however suggested that complex cases such as those involving terrorism, should be treated differently. The meeting also suggested that the procedural law on this aspect which is the Criminal Procedure and Evidence Code <sup>28</sup>should be strengthened to require police officers to give reasons at the time of arrests and to inform the suspect of his or her rights as such person.

On the other hand, the villagers of Gumulira Village supported the position of Government officials and suggested that the period of detention without charge or being brought before court should be extended to a maximum of ten days. This would prevent police from granting bail willy nilly and also address the issue of arrogance on the part of habitual criminals who terrorize villagers with the knowledge that, once arrested, they will be released on bail immediately.

## 2.8 *Right to Education*

Section 25 of the Constitution provides that all persons are entitled to education and states that primary education shall consist of a least five years of education. Section 13 of the Constitution which enumerates principles of National Policy requires the State to provide adequate resources to the education sector and devise programmes in order to make primary education compulsory and free to all citizens of Malawi, among other things.

Stakeholders raised a number of issues regarding the enjoyment of the right to education in Malawi. At the meeting with children and youth groups in Lilongwe, it was suggested that Government should implement the constitutional provision on compulsory education to ensure that children and the youth go to school. In discussing the same issue, judicial officers however were not convinced that Government was ready to implement this constitutional policy. The issue of lack of enforcement mechanisms featured highly during the discussion.

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<sup>26</sup> Submission received from the Director of Public Prosecutions

<sup>27</sup> This prompted Government to enact the Bail (Guidelines) Act in 2000 to regulate the granting of bail by the Police

<sup>28</sup> Cap. 8:01 of the Laws of Malawi

On the issue of free education, the meeting with children and young persons expressed dissatisfaction at the way this is implemented in practice. It was argued that primary education is not free in the real sense due to the numerous financial contributions required of pupils. This prevents children in rural areas from going to school. The children and young persons therefore urged Government to look into this issue as a matter of urgency to ensure that primary education is indeed free.

The meeting with the children and the young persons also suggested that the minimum of five years for primary education is too low and should be raised to a minimum of seven years. At the same meeting, the syllabus for both primary and secondary school was discussed. It was suggested that Government should revisit these syllabuses to ensure relevance and also to avoid regular changes which at best confuse pupils and students. Government was also urged to look at the school calendar year and consider changing it. Judicial officers also suggested that the State should consider putting up measures to help children with special needs.

### *2.9 Rights of the Youth*

The Constitution protects children, women and people with disabilities as being vulnerable groups. At the meeting with the children and the youth, it was pointed out that there is a glaring omission in the Constitution regarding the “youth” as a vulnerable group. It was therefore suggested that a provision should be introduced in the Constitution to confer special rights on the youth and protect them as a vulnerable group.

### *2.10 Age of Marriage*

Section 22 (6), (7) and (8) of the Constitution regulates the age for entering a marriage. Subsection (6) provides that “No person over the age of eighteen years shall be prevented from entering into a marriage” Subsection (7) requires that persons aged between fifteen and eighteen should seek parental consent whereas subsection (8) discourages marriages between persons where either of them is under the age of fifteen years.

At the meeting with children and the youth, it was considered that the provision encourages early marriages by allowing children aged fifteen to get married with parental consent. It was argued that this has contributed to the practice of forcing children into early marriages by parents as a source of income. The meeting concluded that this violates the right of the child to education and suggests that marriages below eighteen should not be allowed in Malawi. It was further suggested that before entering into a marriage any person who is between eighteen and twenty one should seek parental consent while as those twenty -one and above should not be prevented from entering into a marriage.

### *2.11 Rights of Children*

Section 23 recognizes children as those persons under sixteen years of age. The section thus confers specific rights on children and seeks to protect them from economic exploitation or any unacceptable treatment, work or punishment.

The meeting with the children and the youth considered the age of sixteen as too low for the purposes of the section and strongly suggested that it should be raised to eighteen. The Democratic Progressive Party and senior public officers were also in support of this view and suggested the alignment of this age to that under the Convention on the Rights of a Child. There was a further suggestion by the senior public officers that section 23 should incorporate a requirement for the compulsory registration of birth of children.

## 2.12 *The Non-Discrimination Provision*

Section 20 of the Constitution prohibits discrimination in any form and requires the State to pass legislation to address inequalities in society. It has been argued that the present wording of section 20 implies that prohibition of discrimination is absolute. However, the Supreme Court in the case of *Attorney General vs Malawi Congress Party and Others*<sup>29</sup> held that “human rights jurisprudence prohibits discrimination in the literal sense of differential treatment only if it is not reasonably justifiable”<sup>30</sup> The United Nations Committee under the International Covenant on Civil and Political Rights (ICCPR) has also taken a similar position regarding the issue of discrimination and has stated that “The right to equal protection of the law without any discrimination does not make all difference in treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26”.<sup>31</sup>

To accommodate some forms of discrimination perceived to be reasonable and justifiable, stakeholders suggests that section 20 should be amended by qualifying the word “discrimination” by preceding it with the adjectives “unlawful” or “unfair”. This suggestion was made by the Body of Case Handling Institutions and by Parliamentary Women Caucus to embrace the principle of positive discrimination. It was argued that this is the position in constitutions of other countries in the region such as South Africa, Zambia and Zimbabwe.

Two other matters were raised on this provision. The first one concerned the prohibition of discrimination on the basis of “nationality”. Suggestions were made to remove this aspect from the provision pursuant to the recommendation of the Law Commission in its Report on the Technical Review of the Constitution where it was suggested that “nationality” should be replaced by “national origin” which different and is the expression used in Article 2 of the Universal Declaration of Human Rights.<sup>32</sup> It was argued that the State should be in a position to differentiate on the ground of nationality in appropriate cases for the benefit or protection of its citizens.<sup>33</sup>

The second matter raised regarding this provision is the issue of HIV/AIDS as a global issue and hence requiring constitutional recognition. There is therefore a strong suggestion that discrimination on the basis of HIV/AIDS should be specifically mentioned in the provision<sup>34</sup>. It has been argued that the “other status” in the

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<sup>29</sup> Criminal Appeal No. 22 of 1996

<sup>30</sup> Case quoted in the submission of the Body of Case Handling Institutions

<sup>31</sup> Comm. No. 172/1984, para. 13

<sup>32</sup> Malawi Government Gazette dated 16<sup>th</sup> November, 1998 at page 259

<sup>33</sup> Views expressed at a meeting with Cabinet Ministers

<sup>34</sup> Views expressed by Malawi Law Society, Senior public officers and Children and the Youth

provision is not adequate to highlight the significance on need to stamp out discrimination on the basis of HIV/AIDS.

### *2.13 Labour Rights*

The Constitution under section 31 (1) guarantees the right to fair and safe labour practices and fair remuneration. Subsection (3) emphasizes the right to fair wages and equal remuneration for work of equal value without distinction or discrimination of any kind in particular on basis of gender, disability or race.

Stakeholders have suggested redrafting of the section to group similar matters together to avoid confusion. Thus, issues of fair remuneration and wages should be dealt with in one subsection while the issue of fair and safe labour practices should be in another subsection.

### *2.14 Administrative Justice*

Section 43 of the Constitution guarantees the right to lawful and procedurally fair administrative action. It also requires any person affected by any administrative action to be furnished with reasons in writing for such actions.

The Law Commission in its Report on the Technical Review of the Constitution observed that there is an obvious omission in paragraph (b) and recommended insertion of the words “are affected”.

The Body of Case Handling Institutions has also submitted on this aspect and reiterated the need to address the omission.

## CHAPTER III

### 3. THE LEGISLATURE

#### 3.1 Senate

The original section 49 of the Constitution defined Parliament to consist of the National Assembly, the Senate and the President as Head of State. Section 68 provided for the composition of the Senate to include one Senator from each District being a registered voter in that District and elected by secret ballot, one Chief from each District elected by a caucus of all the Chiefs in that District and thirty-two other Senators elected by a two-thirds majority of sitting members of the Senate from interest groups, the society,<sup>35</sup> and faith groups. The Senate was to be assisted by a Nominations Committee of the Senate in identifying persons qualifying under the last category. All in all the Senate was to consist of a total of eighty Senators.

Parliament repealed all provisions relating to the Senate through Act No I of 2001 on the basis that a Senate would not be accommodated under the meager financial resources of the country. The then Attorney General and Minister of Justice, Honourable Peter Fachi, argued that “the costs of the operations of the Senate are well beyond reach given Malawi’s limited financial resources<sup>36</sup>. The decision to abolish the Senate was thus influenced by the then recent revision of the Terms and Conditions of Service for Members of Parliament and the devaluation of the Kwacha which put the revised estimate of Parliament at K500 million if the Senate was to be accommodated. At no point in the course of the debate did any Parliamentarian bring up section 45 (8) which states that –

*“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.”*

Arguably, Parliament’s action amounted to the dissolution of an organ of State contrary to the Constitution.

The sentiments at several of the consultative meetings were in favour of bringing back the Senate. It was felt that the Senate would provide appropriate checks and balances in the legislature to promote compliance with section 8 of the Constitution by that organ. Section 8 provides as follows –

*“The Legislature when enacting laws shall reflect in its deliberations the interests of all the people of Malawi and shall further the values and duty explicit or implicit in the Constitution”.*

It was generally felt by Chiefs and Civil Society that the legislature does not live up to this standard because there are no checks and balances within the legislature. The Chiefs also considered that the existence of the Senate might

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<sup>35</sup> Nominations from the Society was to be based on outstanding service to the public or contribution to the development of the country.

<sup>36</sup> Hansard, sixth Meeting thirty fourth session, Thursday, 11<sup>th</sup> January 2001 page 14-15.



*Assembly who shall, on such notification, declare the seat vacant and a by-election shall be announce.*

Parliament repealed this provision through Act No 6 of 1995. Parliament argued that this provision may encourage witch hunting and is liable to abuse by constituents.

The majority view from the stakeholders meetings was in favour of re-introducing the recall provision to provide a mechanism to make Members of Parliament accountable. It was argued that the provision was agreed upon by Malawians as a nation yet Members of Parliament who are merely employees of Malawians and are a minority group removed it. This in itself was inappropriate and supports the call to bring the provision back in the Constitution.

At the meeting with children and the youth in Lilongwe, which favoured bringing back the provision, it was urged that if reintroduced the recall provision should be protected in the Schedule to avoid a repetition of what happened in 1995. Civil Society emphasized that the provision should be seen as conferring a right on the electorate to demand transparency and accountability on the part of their representatives since the exercise of power of state is conditional upon sustained trust of the people of Malawi<sup>38</sup>. Others premised their argument on the fact that a President or a judge may be impeached in stated circumstances and hence the need for similar treatment for Members of Parliament<sup>39</sup>. It was further argued that a person with power to appoint should similarly have power to dismiss in the event of dissatisfaction with performance of an employee. It was also argued that the provision might act as a check on the behaviour of Members of Parliament in Parliament which is at best confusing to the ordinary people who vote them into Parliament.

Other stakeholders felt that reintroduction of the provision shall control the current practice where Members of Parliament disappear from their constituencies till next elections. Furthermore, it was generally agreed that the provision shall encourage Members of Parliament to serve constituents rather than political parties<sup>40</sup>.

It was however strongly suggested by the Malawi Law Society that in the event that the provision is brought back, it should incorporate set procedures to regulate the recall process which should include rules of natural justice. This position was also supported by the Women Parliamentary Caucus which emphasized the need for adequate safeguards to protect Members of Parliament. Some political parties in supporting this position suggested that the job description of a Member of Parliament should be spelt out so that grounds for removal would be easier to establish to avoid abuse of the provision<sup>41</sup>. The Chiefs from the Southern Region insisted that the grounds for recall should be spelt out in the Constitution to prevent disgruntled people from abusing the provision. Thus, failure of one to permanently reside in ones constituency was cited as an example of a ground to be considered for inclusion.

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<sup>38</sup> See section 12 (ii) and (iii) of the Constitution.

<sup>39</sup> Meeting with Chiefs from the Northern Region.

<sup>40</sup> Views expressed at the meeting with Chiefs from the Southern Region.

<sup>41</sup> RP, MCODE, AFORD.

The University of Malawi however cautioned the Law Commission to consider the consequence of writing in the Constitution a provision that will encourage constant conflict. It was feared that the result may affect not only the recalled Members of Parliament but rather constituents and at the end of the day, the Malawi nation itself since this shall require frequent by-elections which would impact negatively on a poor nation such as Malawi. Although, this minority view conceded the rampant existence of fraud and bribes during elections, a recall was not considered to be the best solution in light of extreme poverty.<sup>42</sup>

### 3.3 *Crossing the floor*

Section 65 (1) of the Constitution empowers the Speaker to declare vacant the seat of any member of the National Assembly elected as a member of one party who voluntarily leaves his party and joins another political party represented in the National Assembly. The provision is silent on independent members.

During the technical review of the Constitution which culminated in the Law Commission Report on the Technical Review of the Constitution<sup>43</sup>, the Commission received submissions indicating that the loose language of this provision is the “purported constitutional justification for the present spate of [self declared] independent Members of Parliament”. It was also submitted that such members were not genuine independents but rather were scared of the wrath of the section if they revealed that they had joined other political parties in Parliament.

In attempting to address this problem the Law Commission recommended a number of solutions. The first one was that the provision should catch a Member of Parliament elected on a party ticket but who voluntarily leaves his party whether he joins another party in Parliament or not. The second scenario was that of a Member of Parliament who leaves his or her political party and joins another party in Parliament. Thirdly, in order to ensure that those members of Parliament who are expelled from their parties are not unnecessarily victimized by party leaders, the Commission recommended that the seat of such an MP should not be declared vacant unless the High Court declares that the expulsion was for a good and sufficient reason.

The objective of the proposals was to ensure that a person should only claim to be independent where he was elected as such in accordance with the Parliamentary and Presidential Elections Act<sup>44</sup> or where it was not out of his own volition. This was in recognition of the major role that party allegiance plays in influencing an individual’s vote in Malawi. Thus, any member of Parliament elected under a particular party banner who subsequently resigns should be required to seek a fresh mandate from his constituency.

In seeking to implement the recommendations from the Law Commission Report, Parliament amended section 65 through Act No. 8 of 2001 and extended the provision to prohibit the joining by Members of Parliament of any other political

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<sup>42</sup> This view was expressed by the DPP

<sup>43</sup> Malawi Government Gazette dated 16<sup>th</sup> November, 1998, section 65 was a subject of concern and debate.

<sup>44</sup> See section 32 (3)

party [not necessarily a party in Parliament] or association or organization whose objectives are political in nature"<sup>45</sup>. Parliament based its decision to extend the ambit of the provision for a number of reasons. The first was to protect the political power base of each political party in the House thereby protecting the political interest of voters. This would in turn prevent the giving of undue practical advantage to one party over others<sup>46</sup>. The second was to prevent politics of camouflage and encourage transparency in politics.<sup>47</sup>

The amendment was however challenged in the case of the *Registered Trustees of Public Affairs Committee V The Attorney General and others*<sup>48</sup> where the court found the extension of the principle of "crossing the floor" to organizations outside Parliament unconstitutional since it defeated the whole philosophy of the principle. The court considered the amendment so radical and revolutionary so as to place Malawi "on a lonely island [by] conceiving [such] strange and ingenious kind of crossing the floor". The court found the phrase "objectives or activities that are political in nature" to be so wide and all-catching so as to scare away Members of Parliament even from organizations and associations that are "pure" by any standards.

In terms of submissions on this provision, there were two views, one for retention, the other for repeal. Those who were in favour of retention, in particular Chiefs from all the three regions argued that party affiliation influence choice of candidates in Malawi. It was thus considered that crossing the floor is the greatest betrayal to constituents. The Chiefs insisted that the seat of a Member of Parliament who crosses the floor from one party to the other should be declared vacant and he or she should be required to refund the Party that sponsored him. Where the Member of Parliament was elected as an "independent" he should equally lose his seat on joining a party in Parliament. The Parliamentary Women Caucus also emphasized this position.

In support of retention, the Malawi Congress Party actually argued that section 65 of the Constitution should not even be a subject of debate since section 62 (2) of the Constitution is very clear about the mode of representing a constituency and requires a Member of Parliament to represent his or her constituency in such manner as he or she was elected as is prescribed by the Constitution or an Act of Parliament. The Parliamentary and Presidential Elections Act<sup>49</sup> recognizes that a person can only be elected as an independent or on a party sponsorship and represent his constituency as such.

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<sup>45</sup> Honourable Khwauli Msiska during the debate of the Bill argued that "for us to say that 'if you join an association that should also warrant one losing his seat is over stretching [the] imagination of "crossing the floor" "He cautioned Parliament to be clear of what type of floor was talked about and avoid situations that would make the National Assembly vulnerable to other groups in the streets because that was not what was originally intended. Hansard: Seventh Meeting – Thirty Fourth Session, Tuesday 19<sup>th</sup> June, 2001 at page 50.

<sup>46</sup> Hon. Khwauli Msiska (AFORD) Hansard, National Assembly Debates, Seventh Meeting – Thirty – Fourth Session Tuesday, 19<sup>th</sup> June 2001 at page 49.

<sup>47</sup> Ibid Hon J.Z.U. Tembo (Leader of opposition).

<sup>48</sup> Civil cause No. 1861 of 2003.

<sup>49</sup> Cap. 2:01 of the Laws of Malawi

Civil society also supported this position and emphasized the need to require such a Member of Parliament to seek fresh mandate from his constituents<sup>50</sup>. It was argued that the framers of the Constitution intended to promote morality among politicians by including these two provisions in the Constitution<sup>51</sup>. To that end, civil society cautioned that the exercise of freedom of association should be balanced with the constitutional requirement of governing based on sustained trust of the voters<sup>52</sup>. It was also pointed out that freedom of association or expression can be limited as long as this is done within the ambit of section 44(2) of the Constitution<sup>53</sup>.

The proponents against retention of the provision argued that section 65 promotes party politics by giving too much power to political parties in Parliament to control their Members of Parliament. It is therefore argued that the consequent result has been the lack of exercise of independent minds by the Members of Parliament for fear of repercussions<sup>54</sup>. It was further argued that the provision curtails the exercise of freedom of association under section 32 of the Constitution by threatening the loss of a seat in Parliament.<sup>55</sup> It was also argued that it curtails the exercise of political rights as guaranteed under section 40. This school of thought therefore cautioned against legislating for human characteristics. It was emphasized that the primary objective of democracy which should be kept in mind is to see that a member of Parliament is serving the interests of the constituents.

### 3.4 *Tenure of Members of Parliament*

The Constitution and the Parliamentary and Presidential Elections Act<sup>56</sup> provide for eligibility requirements for one to qualify as a Member of Parliament, the nomination process and the election process. However, no attempt to regulate the length of time that a person serves as a Member of Parliament is made in both. Thus, the ballot is the only mode of determining the length of service of a Member of Parliament.

Various sentiments were expressed regarding the issue of tenure of Members of Parliament. It was generally accepted that the ballot cannot provide adequate mechanism to weed out Members of Parliament who are unpopular since poverty and voter apathy are other factors to be taken into account<sup>57</sup>. It was therefore suggested that a Member of Parliament should serve a maximum of two terms to accommodate new blood and new ideas<sup>58</sup>. It was argued that this would allow other people to participate in the legislative process. On their part, children and the youth argued that a term limit for members of Parliament would give an opportunity to the

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<sup>50</sup> These sentiments were also expressed by villagers from Gumulira Village, TA Mlonyeni, Mchinji.

<sup>51</sup> Meeting with civil society bodies in Blantyre.

<sup>52</sup> Similar sentiments were expressed at a meeting with civil society, legal fraternity, political activists, academia and faith groups held in Mzuzu on 15<sup>th</sup> December, 2005.

<sup>53</sup> This provision requires that restrictions or limitations on rights and freedoms should be those prescribed by law, which are reasonable, recognized by international human rights standards and necessary in an open and democratic society.

<sup>54</sup> These views were expressed at a meeting with the Malawi Law Society and the University of Malawi.

<sup>55</sup> This view was also expressed by the DPP

<sup>56</sup> Cap. 2:01 of the Laws of Malawi

<sup>57</sup> These are sentiments from civil society.

<sup>58</sup> It was generally pointed out that the oldest serving Members of Parliament have shown the tendency to contaminate the minds of new Members of Parliament.

youth to embrace responsibilities of national importance. This proposal is also supported by research carried out by an NGO, Centre for Human Rights and Rehabilitation, which found that people are in support of imposing term limits for Members of Parliament as is the position with the Presidency, an equally elected public office<sup>59</sup>.

Professional bodies however proffered a different view and recommended no term limit for Members of Parliament. To them, the ballot provides an adequate mechanism for dismissing a non-performing Member of Parliament. It was felt that rather than imposing a term limit for Members of Parliament, the reforms should consider suggesting a maximum age for eligibility as a Member of Parliament. The other argument in support of this position was that there is no comparison between the office of a Member of Parliament and that of the President because the potential for abuse of power for a Member of Parliament is much lower.

### 3.5 *Qualification of Members of Parliament*

Section 51 of the Constitution provides for the pre-requisites for one to be eligible for nomination as a member of Parliament. Among the pre-requisites is that one should be able to speak and read the English language well enough to take an active part in the proceedings of Parliament<sup>60</sup>. This means that there is no formal education qualification required for one to qualify. The Electoral Commission has implemented this provision by requiring those without educational certificates to take proficiency tests.

From the oral submissions received from various stakeholders, this is an area of obvious concern to most Malawians. For example, the Chiefs from the Central Region suggested that a minimum of a University Diploma should be imposed to ensure high caliber of people in Parliament to facilitate constructive debate on issues of national interest<sup>61</sup>. This view was supported by the Malawi Law Society and the University of Malawi. It was also felt that this shall encourage the youth to work hard in school if the standards are raised. Others suggested a minimum of Malawi School Certificate of Education (MSCE) or its equivalent.

Civil Society however cautioned that a formal educational qualification does not guarantee diligence on the part of Members of Parliament as observed of some well educated Members of Parliament in recent debates and conduct in Parliament. In terms of the proposed minimum education request, other stakeholders were skeptical about the competences of holders of a certificate such as an MSCE of these days who, it was alleged, cannot speak proper English.

Some groups strongly objected to the introduction of the use of vernacular languages in Parliament.

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<sup>59</sup> Chiefs from the North also supported this proposal to prevent situations where others treat a Member of Parliament as a Chief.

<sup>60</sup> Section 51 (1) (b).

<sup>61</sup> i.e. Malawi Law Society, University of Malawi,

### 3.6 Members of Parliament Doubling as Ministers

This was an area of controversy prior to 1997.<sup>62</sup> Section 51 (2) (e) of the Constitution provides that “no person shall be qualified to be nominated or elected as a member of Parliament who .... (e) holds or acts, in any public office or appointment ...” This provision reflects an important principle of the British Constitutional law established centuries ago which sought to ensure that Parliament was free from control by the king<sup>63</sup>. Of course in the UK today Members of Parliament serve as Ministers.

This same principle is emphasized in jurisdictions that practice the presidential system of government such as America where a member of Congress cannot at the same time serve in Cabinet.

In the case of *Nseula and others vs Attorney General and the Malawi Congress Party*<sup>64</sup> Mwaungulu J held that when a member of Parliament was appointed a Minister, his Parliamentary seat automatically became vacant because it was found that this created a situation which was caught by section 63 (1) of the Constitution. That section provides that a seat held by a particular person is vacated if circumstances were to arise that, were the person not already a member, he or she would be disqualified from membership. As has been mentioned, section 51 (2) (e) prohibits the nomination or election of persons holding any public office to be Members of Parliament. The judgement proceeded on the assumption that a ministerial post is a public office.

The Supreme Court overturned the High Court decision and held that a Ministerial post is not a public office but rather a political office. The Supreme Court based its findings on section 75 (2)<sup>65</sup> and section 98 (5)<sup>66</sup> which distinguishes the two offices. The Court also relied on the case of *Attorney General vs Chipeta*<sup>67</sup> where it was categorically found that the Constitution gives the President power to appoint Ministers from both outside or among Members of Parliament. The case of *President of Malawi and the Speaker vs R.B. Kachere*<sup>68</sup> was also cited as authority in this regard where it was held that the office of the President and that of the Speaker was a political office and not a public office.

The decision of the Supreme Court in the Nseula Case endorsed the appointment of Members of Parliament as Cabinet Ministers suggesting that the Malawian constitutional model is a fused one such that it combines the British Model as well as the American model.

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<sup>62</sup> Before the Supreme Court decision in the case of *Nseula and others vs Attorney General* MSCA Civil Appeal 32 of 1997).

<sup>63</sup> See Erasmus, <file:///F:\erasmus.htm>

<sup>64</sup> for Civil Cause No. 63 of 1996

<sup>65</sup> Section 75 provides as follows – “A person shall not be qualified to hold the office of a member of the Electoral Commission if that person is a Minister, Deputy Minister, a Member of Parliament or a person holding public office.”

<sup>66</sup> Section 98 (5) provides as follows - “The office of the Attorney General may either be the office of a Minister or may be a public office.”

<sup>67</sup> MSCA Civil Appeal No. 33 of 94

<sup>68</sup> MSCA Criminal Appeal No. 20 of 95

In discussing this issue with the target groups at the consultative meetings, a majority view indicated that past experience has shown that this is not the best model. It was therefore suggested that Members of Parliament should not hold Ministerial positions since being a member of Parliament was considered a full time job. A ministerial post only distracts such members from serving their constituents.<sup>69</sup> It was further observed that the combination of the two offices dilutes a major principle of our Constitution, namely, the doctrine of separation of powers which seeks to promote transparency and accountability through the provision of checks and balances among the three branches of government.

### 3.7 *The Speaker*

Section 53 (1) provides for the office of the Speaker of the National Assembly and requires that such Speaker should be elected by majority vote of the House. This is usually done at the first sitting of Parliament after general elections. The section is silent on experience or qualification of a person to be elected Speaker. It therefore logically follows that the requirements applicable to someone aspiring to be a Member of Parliament should equally apply to aspirants to the office of Speaker.

Stakeholders recognized the importance and status of the office of Speaker and emphasized the need for independence for holders of such office. To that end, civil society bodies<sup>70</sup> suggested that the Constitution should bar the President from removing the holder of the office of Speaker from office as this subjects the office to manipulation and erodes independence of the office. The Speaker should therefore be at par with the Chief Justice and the Vice-President.

It was further suggested that for a Member of Parliament to qualify to be elected Speaker such member should have served a prior term of 5 years to ensure adequate experience to ably lead and guide the House.

A further suggestion from the meeting with the Malawi Law Society emphasized the need to include a provision in the Constitution to guarantee the existence of the office of Speaker in the event of dissolution of Parliament to ensure continuity in the functions of the office till a new Speaker is elected. Such a provision should require any member of Parliament elected to that office to resign from his political party to enable him exercise his functions independently<sup>71</sup>. It was argued that this arrangement would also promote observance of the doctrine of separation of powers, a concept that runs through the Constitution. This would in turn ensure that the Speaker is not amenable to removal and appointment to Cabinet as happened in the previous Government<sup>72</sup>.

The meetings also suggested that if these proposals were to be adopted, the Constitution should spell out the circumstances which may warrant the removal of a Speaker by a two-thirds majority to prevent abuse of the process of removal by the House.

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<sup>69</sup> Civil Society and Faith Groups Sentiments.

<sup>70</sup> At a meeting in Blantyre.

<sup>71</sup> It was however conceded that resignation may not always remove bias and in any case section 53 (6) of the Constitutional ready seeks to achieve the same objective.

<sup>72</sup> Sentiments expressed by civil society from the North

### 3.8 *Other Issues*

#### 3.8.1 *Court Injunctions by Members of Parliament*

At the meeting with the Parliamentary Women Caucus it was mentioned that the practice that has developed of members of Parliament rushing to court to seek court injunctions on decisions that they have participated in impacts negatively on the effective functioning of Parliament. It was therefore suggested that Parliament should take collective responsibility over its decisions and no member should be allowed to challenge any such decision outside Parliament.

#### 3.8.2 *Convening of Parliament*

The powers of the Speaker was raised at the meeting with the Parliamentary Women Caucus. Dissatisfaction was expressed regarding section 59 which requires the Speaker to convene Parliament in consultation with the President in recognition of the fact that the president is part of Parliament<sup>73</sup>. It was argued that this provision cripples the work of Parliament as the President may not readily give consent each time Parliament wishes to conduct its business. It was further argued that this compromises the independence of the institution of Parliament. It was therefore suggested that the aspect that require the Speaker to consult the President should be removed.

A contrary view was however proffered by the Executive arm of Government which maintained that the present position should remain. The Executives also maintained that the power to initiate the state budget remains with the Executive.

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<sup>73</sup> See section 49

## CHAPTER IV

### 4. ELECTIONS

#### 4.1 ELECTORAL COMMISSION

##### 4.1.1 Chairperson

Section 75 (1) provides that the Chairperson of the Malawi Electoral Commission shall be a judge who may be appointed by the President on recommendation from the Judicial Service Commission. Thus, the Chairmanship of the Commission is strictly the purview of judges<sup>74</sup>.

Most of the consultative meetings indicated dissatisfaction with the current position of requiring only those persons holding the office of judge to be appointed to the Chairmanship of the Commission. Firstly, it was considered that the reasons for preferring a judge as indicated by the legislative history have proved to the contrary where time and again the general public has questioned the independence and integrity of the Chairperson (a Judge) of the Commission<sup>75</sup>. Secondly, there was a general perception of the creation of conflict of interest among judges regarding matters emanating from the Electoral Commission since they are perceived to be duty bound to protect the reputation of a fellow judge. Thirdly, stakeholders generally observed that lawyers are not the best managers and since the primary function of the Commission is to manage elections, lawyers were considered to be ill equipped for the task<sup>76</sup>. It was thus suggested that the guiding principles in an appointment of this nature should be the integrity and competency of an individual supported by a minimum of a degree qualification.<sup>77</sup>

Other views suggested that the status quo should be maintained since it is easy to assess the integrity of a judge by virtue of his office. Alternatively, a lawyer not necessarily a judge, should be appointed to ensure smooth handling of electoral disputes.

##### 4.1.2 Composition

In terms of composition of the Malawi Electoral Commission, section 75 (1) provides that it should consist of a Chairman and such other members, not being less than six, appointed in accordance with an Act of Parliament. In this regard, the relevant Act of Parliament is the Electoral Commission Act<sup>78</sup> and it requires the President to appoint suitable persons to the Commission in consultation with the leaders of political parties represented in the National Assembly<sup>79</sup>. In practice, this

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<sup>74</sup> The Constitution uses the term "judge" in relation to judicial officers in the High Court only i.e. section 109. Judicial officers in the Supreme Court of Appeal are referred to as justices ie sections 105 and 106. Interestingly, since its establishment, the Electoral Commission has been chaired by Justices of Appeal.

<sup>75</sup> Views expressed at the meeting with civil society in Blantyre

<sup>76</sup> Meeting with Chiefs from the Southern Region; meeting with Malawi Law Society and University of Malawi; meeting with Civil Society from the Southern Region

<sup>77</sup> Similar sentiments were expressed by PPM

<sup>78</sup> Cap. 2:03.

<sup>79</sup> See section 4

has strictly translated into the appointment of members of the respective parties to the Commission.

Since 1994 membership of the Commission has thus emanated from UDF, MCP and AFORD. Even today with the change of membership in Parliament 8 political parties, composition of the Commission remains unchanged.

It is important to observe that, a simple reading of the provision indicates that it was never intended that the Commission should be a preserve of political parties in Parliament. Rather, the intention was to encourage proper consultation with parties in Parliament to ensure that acceptable and suitable persons are appointed to the Commission. However, practice has shown the contrary and this has led to dissatisfaction with the caliber of persons appointed to the Commission. For example, chiefs have strongly criticized the idea of having only politicians on the Commission and suggested inclusion of civil society organizations to promote independence<sup>80</sup>. The heavy reliance on politicians in such a body was also criticized for the simple reason that they lack the requisite technical competences to guide the institution<sup>81</sup>.

The meeting with civil society organizations held in Blantyre suggested that membership of the Commission should exclude politicians but rather that it should comprise of professionals. However, in other fora, this was criticized on the understanding that the involvement of politicians cannot be dispensed with outright in matters involving elections in order to promote acceptability of results since the politicians are the key players. Other views simply urge a review of the composition without proffering suggestions.<sup>82</sup>

#### 4.1.3 Functions

Among the functions of the Commission as conferred by the Constitution<sup>83</sup> and the Electoral Commission Act<sup>84</sup> include the determination of the number of constituencies for purposes of an election and the determination of constituency boundaries.

A number of stakeholders expressed dissatisfaction at the manner the Commission has conducted itself regarding the issue of demarcation of constituencies. In particular, the Chiefs complained of lack of consultation before boundaries are demarcated.

Civil society has suggested that Government should consider introducing a separate body to carry out this function and that such a body should be required to consult before effecting any demarcation. It was argued that such an arrangement would prevent manipulation by politicians to consolidate their power base. It was further suggested that the Constitution should stipulate the number of constituencies

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<sup>80</sup> There were also suggestions in the Southern Region that Chiefs should be included though some contrary-views expressed concern on the impact of such inclusion which it was feared may dilute the importance and value attached to the status of a chief.

<sup>81</sup> Meeting with Law Society and University of Malawi.

<sup>82</sup> Such as the PPM

<sup>83</sup> Section 76

<sup>84</sup> Section 8.

in Malawi to ensure that the number is not unnecessarily bloated for political gain. This arrangement would also have the advantage of reducing the workload of the Commission and would afford it a chance to concentrate on voters civic education among other functions.

The meeting with Malawi Law Society and University of Malawi however suggested a slightly different approach. It was considered at that meeting that if an independent Electoral Commission is achieved through the inclusion of other stakeholders, there would be no need to establish another body with the specialized function of demarcating boundaries.

## 4.2 ELECTORAL SYSTEM

### 4.2.1 Level of majority for electing a President

Section 80 (2) provides that the President shall be elected by a majority of the electorate through direct, universal and equal suffrage. The standard of “majority of the electorate” has proved problematic for Malawi. Firstly, the word “majority” itself is a problem. Does this mean 50+1 or simply the candidate with more votes<sup>85</sup>.

Secondly, what constitutes “electorate” in the context of the Constitution is another problematic area. The normal meaning attached to this word is “the body of all qualified voters”. Thus, a strict interpretation of “majority of the electorate” may mean the greater number of those qualified to vote whether they actually vote or not.

In the case of *Gwanda Chakuamba and Others Vs Attorney General and Others*<sup>86</sup> the plaintiff challenged the results of the 1999 Presidential Elections arguing that the winning candidate had not achieved the required majority as provided in section 80(2) of the Constitution. It was their argument that the candidate needed to achieve fifty percent plus one of the electorate. The plaintiff further contended that section 96(5) of the Parliamentary and Presidential Elections Act<sup>87</sup> is unconstitutional in as far as it does not comply with section 80(2) of the Constitution. This argument was based on the purport of section 5 of the Constitution<sup>88</sup>.

The court found that the word “majority” in the section is used to portray its common and literal meaning, namely “a number of votes greater than the number secured by any other candidate”. The court arrived at this conclusion by looking at other provisions in the Constitution dealing with election of officers such as sections 49(2), 53(1) and 73(3)<sup>89</sup>.

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<sup>85</sup> According to Collins Concise Dictionary “majority” means “the greatest number or part of something” and in an election it means “the number of votes or seats by which the strongest party or candidate beats the combined opposition or the runner up”.

<sup>86</sup> Civil Cause No. 1B of 1999.

<sup>87</sup> Cap. 2:01

<sup>88</sup> Section 5 provides as follows – “Any act of Government or any law that is inconsistent with the provisions of this Constitution shall, to the extent of such inconsistency, be invalid”

<sup>89</sup> The Court was also influenced by the interpretations in the Oxford Advanced Learners Dictionary and the Collins English Dictionary.

The Court also found that the word “electorate”, though meaning people entitled to vote, in the context of the Constitution means those who actually vote. It was considered that a different interpretation would be absurd for a number of reasons. Firstly, voting is not compulsory in Malawi, hence a majority of the electorate can never be achieved. Secondly, there is no provision in the Constitution giving guidance as to what should happen in the event that no candidate achieves the ideal number of votes. Thus, issues such as when should a re-run take place; who should be the contenders or should the nomination process be re-opened need to be addressed?<sup>90</sup>.

The Court also stated that –

*“Constitutions are drafted in broad and general terms which lay down broad principles and they call, therefore, for a generous interpretation avoiding strict legalistic interpretation. The language of a Constitution must be constructed not in narrow legalistic and pedantic way but broadly and purposively. The interpretation should be aimed at fulfilling the intention of Parliament.*

This judicial interpretation of the Constitution therefore means that Malawi chooses its Presidents on a relative majority basis. As a result, in the 2004 Presidential Elections, the President was elected with 34% of the total votes cast.

A number of views have been expressed regarding this provision. The first is that the President should be elected on a majority of fifty percent plus one of those voting simply to demonstrate that the person has authority to rule or govern. In other words the argument is that “legitimacy” is achieved by “the popular acceptance of a governing regime”. The meeting with Malawi Law Society and University of Malawi insisted that this level would reflect the confidence of the electorate since the person has the whole country as his constituency. Civil society, faith groups and political activists also supported this position and suggested that if at an election, no candidate achieves this level, the two top contestants should compete against each other<sup>91</sup>.

The second view is that the first past the post as enunciated in the Chakuamba Case should be maintained. This view was largely expressed by the Chiefs from all the three Regions. The Parliamentary Women Caucus also favoured this position. It was argued that insisting otherwise would be counter-productive for Malawi which is a poor nation and relies on donor support to conduct elections. Factors such as voter apathy and fragmentation of parties in Malawi were cited as examples that would contribute to re-runs for every Presidential election.

The third view proposed that Malawi should move to Parliamentary type of Government where a political party with the highest number of seats in Parliament

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<sup>90</sup> It should be noted, though, that in this particular case of the 1999 Presidential election, the candidate whose election was being challenged had actually been declared to have obtained over 50% of the votes cast. It is possible therefore that this case may not provide authority in future cases where a leading candidate may obtain less than 50% of the votes as a court of equal competence could distinguish the two cases on their facts.

<sup>91</sup> A similar position obtains in Liberia and it was used recently.

should produce a President. This would ensure support for a President in Parliament and relative national acceptance.

The meeting with civil society faith groups, academia and professionals in the North suggested a fourth dimension to the election of the President. It was suggested at that meeting that in addition to scoring the most votes, a Presidential candidate must reflect national appeal by winning votes in all the regions or districts by not less than a certain agreed percentage. This would prevent the ushering in of Presidents into office on the basis of popularity in one region influenced by demography.

#### *4.2.2 System of electing members of Parliament*

Some stakeholders suggested that the system of electing members of Parliament should shift to proportional representation where parliamentary seats are allocated to parties on the strength of the percentage of votes obtained by a party at an election. It was argued that such a system may ensure adequate representation of minority and vulnerable groups in Parliament such as women and people with disabilities since the party chooses its representatives in Parliament after winning the election. It was further argued that this system if adopted shall address the issue of dealing with expensive by-elections each time there is a vacancy.

A counter argument against the system which was emphasized by other stakeholders is that this system is complicated for Malawi and it would only perpetuate dictatorship by party leaders.

While on the same issue of electing members of Parliament, other participants raised the importance of ensuring that women are adequately represented in Parliament and suggested a quota system for women to achieve the 30% representation of women in Parliament.<sup>92</sup>

#### *4.2.3 General Elections*

Section 67 provides that the polling day for any general elections shall be a Tuesday in the third week of May every five years. If this is not practicable, the polling shall be held on a day within seven days from that Tuesday appointed by the Electoral Commission. Section 80 (1) provides that the ballot in a Presidential Election shall take place concurrently with the General Election for members of the National Assembly.

A number of issues have been raised regarding the conduct of elections. Firstly, it has been suggested that the dates for holding general elections ought to be reviewed as the campaign period preceding the general elections is adversely affected by the rainy and farming season<sup>93</sup>. It was also observed that the holding of elections in May means holding general elections during the end of a financial year which may have budgetary implications. Other stakeholders have suggested that the fixing of the date of general elections in the Constitution is a minute detail not

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<sup>92</sup> Senior public officers and Parliamentary Women Caucus

<sup>93</sup> Views expressed by PPM and DPP

deserving Constitution status. It has therefore been suggested that the Constitution should simply state the quarter of the year within which general elections should be held.<sup>94</sup>

Secondly, it was suggested that tripartite elections should be held in order to reduce costs and for conveniency. Thus, the Presidential, Parliamentary and local government elections should be held at one poll.<sup>95</sup>

Thirdly, it has been suggested that after General Elections any form of campaign should be prohibited to avoid perpetual campaign by ruling parties which compromises national development<sup>96</sup>.

Fourthly, the current electoral system has been criticized in that it favours a ruling party since such party has all the resources at its disposal. It has been argued that the system is feasible for western or other countries where political parties are adequately resourced.<sup>97</sup> It has further been argued that in Africa, it is very rare to change a government through the ballot because of the unique advantage of access to public resources by the ruling party often with abuse and impunity. These factors distort the playing fields and deprive the electorate of a genuine opportunity to elect a government of their own choice.

It has therefore been suggested that, to level the playing field, there should be no party in power during elections. Consequently, the running of government affairs should vest in a Presidential Council comprising of all leaders of political parties in Parliament headed by a Chairperson. The Chair should rotate on a monthly basis and the decisions of the Council should be made collectively by all members<sup>98</sup>.

#### *4.2.4 Period of Announcing Election Results*

This matter is regulated by the Parliamentary and Presidential Elections Act. Thus, section 99 requires the Commission to publish in the *Gazette* and by radio broadcast and in at least one issue of a newspaper in general circulation in Malawi the national result of an election within eight days from the last polling day and not later than forty-eight hours from the conclusion of the determination thereof.

At the meeting with civil society in Blantyre, some participants suggested that a minimum of seven days before announcement of results should be imposed to allow for all polling centers to submit their findings to the returning officer. There was some concession that anything beyond the seven days may leave room for manipulation of the election result.

#### *4.2.5 Eligibility to Vote*

Section 77 provides that all persons shall be eligible to vote in any general elections, by-election, presidential election, local government election or referendum

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<sup>94</sup> These views were expressed by the DPP

<sup>95</sup> Views suggested by senior government officers and the DPP

<sup>96</sup> Views expressed by PPM

<sup>97</sup> Views expressed by PPM

<sup>98</sup> A senior members of PPM has argued that in Africa governments can only change in revolutionary elections or military take over

subject to fulfilling certain requirements. One such requirement is that the person should have attained the age of eighteen years at the date of the application for registration.

Views have been expressed suggesting that the age of voting should be determined at the date of voting not registration. It was considered unfair to bar someone from voting who is eighteen on polling day on the basis that he or she was not yet eighteen on registration day.

#### *4.2.6 By elections*

Section 44 of the Parliamentary and Presidential Elections Act <sup>99</sup> provides for instances when by-elections shall be conducted. This may happen on withdrawal of candidature or death of a candidate.

It has been suggested that the issue of by-elections should be provided for in the Constitution. It has further been suggested that only those parties which participated in the General elections should be allowed to participate in by-elections since a by-election is a continuation of a General Election.<sup>100</sup>

#### *4.3 Other Issues*

##### *4.3.1 Review of Electoral Laws*

Stakeholders have generally suggested the comprehensive review of electoral laws to allow for the leveling of the electoral playing field to prevent the ruling party from monopolizing state resources to the detriment of small and opposition parties<sup>101</sup>.

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<sup>99</sup> Cap. 2:01 of the Laws of Malawi

<sup>100</sup> Views expressed by Parliamentary Women Caucus.

<sup>101</sup> Civil Society, MCP, PPM

## CHAPTER V

### 5. THE EXECUTIVE

#### 5.1 *Swearing of President / Vice President*

Section 81 (3) of the Constitution requires that any person elected as President should be sworn into office within thirty days of being elected. No minimum number of days to be observed before such person takes office are provided. Meanwhile the outgoing President is expected to serve till the newly elected President is sworn into office.<sup>102</sup>

In most of the meetings with the target groups, dissatisfaction with this arrangement of having no minimum number of days stipulated before swearing in a president was expressed especially in view of what transpired in the 2004 presidential elections<sup>103</sup>. However, stakeholders were against a prolonged waiting period. For example, Chiefs from the North felt that a prolonged period may open up the process to undesirable practices under the guise of investigation of complaints and verification of results. It was also feared that if the period were prolonged, it may breed violence since tempers are usually volatile during time of elections.

Participants thus generally suggested that the minimum period should range from 14<sup>104</sup> to 30 days<sup>105</sup>. This would allow for proper handover and transition. Further it would allow for audit of the outgoing government to minimize loss of government resources.<sup>106</sup> Another reason suggested was that the period would allow for the Electoral Commission and the courts to sort out electoral disputes. It was therefore proposed that courts dealing with electoral disputes should be required to deal with such matters expeditiously by imposing a time frame in the law.<sup>107</sup>

In terms of the maximum period, 60 days was suggested.<sup>108</sup> It was however further suggested that mechanisms should be put in place to check an outgoing President from unacceptable behaviour to promote smooth transition. Others even went further to suggest that the date of swearing in of the President should be spelt out specifically in the Constitution in the same way the date for General Elections is spelt out.<sup>109</sup>

In discussing the issue of the appropriate minimum period for swearing a president into office, another contentious issue was raised. Thus, whether the minimum period should be before or after the expiry of the term of the incumbent. It was argued that if the suggested period of between 30 to 60 days is after the incumbent's term, it would be unlawful since it would mean the incumbent extending

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<sup>102</sup> See Section 81 (4)

<sup>103</sup> A presidential elect was sworn in within 3 days of the results

<sup>104</sup> Proposal by Chiefs from the North

<sup>105</sup> This was suggested by the Chiefs from the South, Malawi Law Society, University of Malawi, Parliamentary Women Caucus and Civil Society

<sup>106</sup> Chiefs from the South

<sup>107</sup> Sentiments expressed at a meeting with the Malawi Law Society and University of Malawi. A similar suggestion was made at a meeting with Civil Society in Blantyre

<sup>108</sup> i.e by Civil Society and Parliamentary Women Caucus

<sup>109</sup> Civil society

his term beyond the constitutional dictates. It was therefore suggested that 30 days minimum period should be before, consequently requiring elections to be held before the expiry of the term of office of the incumbent.<sup>110</sup>

## 5.2 *Eligibility Criteria for the Office of the President and Vice President*

Eligibility criteria for the office of President or Vice President is stipulated in section 80 (6) of the Constitution. That provision states that a person shall be eligible for these two high offices if that person is a citizen of Malawi by birth or descent and has attained the age of thirty five years.

Diverse views were expressed on this matter. For example in terms of age, some stakeholders suggested the age bracket of thirty as the minimum and seventy as the maximum age to contest<sup>111</sup>. This proposal implicitly suggests the reduction of the minimum age from thirty five. Others suggested adoption of the maximum age limit of seventy to ensure agility of the aspirants since the office is demanding<sup>112</sup>. The Chiefs from the Central Region suggested raising the minimum age to forty and leaving the maximum age out. The reason suggested was that age breeds wisdom. It was thus felt that there is guarantee of worldly experience in a person who is over forty so as to be adequately equipped for the office of President.

The issue of educational qualification also attracted considerable debate. Most meetings with stakeholders agreed that a university degree as a minimum should be a prerequisite. It was argued that this would ensure that aspirants are fully equipped to contribute meaningfully and constructively to national development and to global issues. It was also argued that such a qualification would enable the person handle issues of governance competently. It would also encourage children to go to school to attain the University degree and aspire for this high office of State.

Other views suggested that a Presidential candidate should possess a doctorate degree to avoid the practice of lobbying and hunting for honorary degrees in order to fit in and compare with previous presidents.<sup>113</sup>

Stakeholders also raised issues pertaining to the character of the aspirants and suggested that persons aspiring to these high offices should be beyond reproach. Thus, a candidate should not have any criminal record involving moral turpitude. The issue of such a conviction becoming spent should not arise<sup>114</sup>. Other stakeholders suggested an outright bar for aspirants with any criminal record without necessarily confining such to those crimes involving moral turpitude<sup>115</sup>. It was argued that the office of the President is the highest in the land and that of the Vice President, the second highest and thus should attract a very rigorous criteria. It was thus suggested that section 80 (7) should be amended in that regard.

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<sup>110</sup> views of Malawi Law Society and University of Malawi

<sup>111</sup> Views of the Chiefs from the South

<sup>112</sup> Views expressed by Civil Society, Chiefs from the North, Malawi Law Society and University of Malawi

<sup>113</sup> Views expressed at a Meeting with Civil Society, Faith groups, professionals and academia from the North

<sup>114</sup> This was an issue that was unanimously agreed upon by stakeholders

<sup>115</sup> Views of Civil society.

Another view that emerged concerned the financial probity of candidates. Chiefs from the South suggested that the financial status of a candidate should also be one of the criteria for eligibility. To that end, certain minimum financial status should be incorporated in the Constitution. This would address the current problem of using political office for personal enrichment by most holders. It was therefore, suggested that all contestants should declare assets before contesting.

### 5.3 *Office of the First Vice-President*

Section 80 (4) requires the first Vice President to be elected concurrently with the President. Thus, the name of a candidate for the First Vice President appears on the same ballot paper as the name of the Presidential candidate who nominated him.

The debate at all the stakeholders meetings was whether it is ideal and appropriate that the President should be elected together with his Vice. Three views were expressed on this matter.<sup>116</sup>

The first view supported the retention of the status quo. The proponents of this view argued that since the Vice –President’s job description is not very different from that of the President in his capacity as the deputy, he ought to acquire mandate from the people in compliance with section 12 of the Constitution. It was further argued that the First Vice-President is empowered to act as a President whenever the President is incapacitated.<sup>117</sup> It therefore logically follows that the nation would not want an un elected Vice-President to rule the country in such a situation since anybody exercising the functions of the Office of the President requires election through direct, universal and equal suffrage.<sup>118</sup> This ensures legitimacy of the authority to govern.

It was further advanced by the proponents of this view that, in debating this issue, people should not be influenced by the current political climate which was considered temporary but should focus on the philosophy of the Constitution in relation to governance issues. It was argued that the solution for the crisis is for parties to desist from imposing candidates and running mates but rather to leave the choice of running mate to a presidential candidate in compliance with section 80 (3) which require every presidential candidate to declare his or her running mate at the time of his or her nomination.

The second view suggested that the current system of electing a First Vice-President should change. It was suggested that the President, once he ascends to office should be empowered to appoint his vice. This would address problems of saddling a President with a Vice who, it may happen, doesn’t see eye to eye with the President. It was further suggested that a mechanism requiring Cabinet including the appointed Vice-President to oversee the country while awaiting elections should be provided to address the concern of having an un elected person ruling the country.

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<sup>116</sup> Even Civil Society were divided on this

<sup>117</sup> See section 87 (1) of the Constitution

<sup>118</sup> Section 80 (2) of the Constitution

The third view suggested that a presidential candidate who comes second in an election should become the Vice-President. It was argued that such person has proof of popularity and hence some legitimacy to rule.

#### 5.4 *Office of Second Vice-President*

Section 80(5) of the Constitution empowers the President to appoint a person to the Office of Second Vice President where he considers it desirable in the national interest. This provision was inserted by Parliament through Act No. 6 of 1995 and the major reason was to ensure that the then ruling United Democratic Front (UDF) attains a two-thirds majority in Parliament by working with the Alliance for Democracy (AFORD). Another reason was to ensure inclusion of all the three regions in the government structure. So far the position has been filled twice by the same person, Mr Chakufwa Thom Chihana, President of AFORD.

All the stakeholder meetings rejected the retention of this office. It was argued that the office does not have a proper job description rendering the office redundant and irrelevant. Secondly, it was feared that the powers of appointment in this regard may be easily abused by a sitting President<sup>119</sup>. Thirdly, stakeholders considered Malawi to be too small geographically to require three, persons in the presidency. Even in terms of population, it was felt that having three such positions was absurd.<sup>120</sup> In addition, most stakeholders considered Malawi to be too poor to accommodate all the three Presidents. It was argued that if this was done in the past, it was to the detriment of the majority poor living in the rural areas and it was as a result of politics of appeasement and self aggrandizement.<sup>121</sup>

Other stakeholders observed that the current arrangement encourages regionalism and politics of patronage as the pattern is that the President shall always come from the South, the first Vice-President from the Centre and the Second Vice-President from the North since the North is the least populated region<sup>122</sup>.

The meeting with civil society in Blantyre strongly recommended abolition of this office for irrelevance and considered this review to be an opportunity for Malawi to clean up the dirty politics that characterized the county between 1994 - 2004 since the creation of the office which it was argued, has been used for wrong reasons.

#### 5.5 *Size of the Cabinet*

Section 92 (1) establishes a Cabinet and provides that it shall consist of the President, the First Vice-President, the Second Vice-President and such Ministers and Deputy Ministers as the President may appoint from time to time. Cabinet is empowered to exercise powers and functions assigned to it by the Constitution or an Act of Parliament and is responsible for advising the President with respect to Government policies and any other matter referred to it by the President.<sup>123</sup>

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<sup>119</sup> Civil Society, faith groups and academia

<sup>120</sup> Views expressed by Chiefs from the South

<sup>121</sup> Views of Law Society and University of Malawi

<sup>122</sup> Other stakeholders considered that the solution lies in the introduction of Regional Parliaments to facilitate regional developments

<sup>123</sup> See section 90 (2)

Section 94 (1) empowers the President to appoint Ministers and Deputy Ministers and to fill vacancies in the Cabinet. This power is in the absolute discretion of the President leaving the determination of the size of the Cabinet entirely to the President.

Prior to 1994, the size of Cabinet was 14 ministers. After 1994, Cabinet bloated to 47 at a certain point in time.<sup>124</sup> At the moment, the size of Cabinet is about 30 Ministers and Deputy Ministers.

Stakeholders have argued that the size of Cabinet should take into account the meager resources of the country. Experience has shown that in the previous government this factor was least considered. It is therefore suggested that the size of Cabinet should be regulated by the Constitution. Stakeholders could however not agree on the appropriate maximum number. Others suggested fourteen, others fifteen and yet others suggested twenty including deputies. Stakeholders also insisted that the practice of Ministers combining responsibilities should be encouraged as was the case prior to 1994. It was also pointed out that the actual portfolios should be spelt out in the Constitution as is the case in other jurisdictions such as Switzerland. Any extension of portfolios should be subject to the approval of Parliament.

The chiefs from the North could not see the relevance of the offices of Deputy Ministers. It was argued that it was high time government started recognizing the role of Principal Secretaries and recommended abolition of the office of Deputy Ministers.

## 5.6 *Other Issues*

### 5.6.1 *Tenure of the President or Vice-President*

Section 80 (3) provides that the “President, the First Vice-President and the Second Vice-President may serve in their respective capacities a maximum of two consecutive terms.”

Civil society has strongly recommended that the wording of section 83 (3) should be improved to ensure that an ex-president does not bounce back after serving the two terms. The Malawi Congress Party was also very strong on this issue.

It was further suggested that the Constitution should bar an ex-President and Vice-president from engaging in active politics since both are father figures to the nation and should therefore not be seen as favouring a small group of people<sup>125</sup>.

### 5.6.2 *Impeachment Procedures*

Section 86 provides for the removal of the President or first Vice President by way of impeachment. The provision requires that the procedure for impeachment shall be as laid down by the Standing Orders of Parliament provided that they are in

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<sup>124</sup> People argued that this was due to politics of appeasement during the Bakili Muluzi era

<sup>125</sup> These sentiments were also expressed by the villagers of Gumulira Village, T/A Mlonyeni

full accord with the principles of natural justice. The grounds for impeachment are serious violations of the Constitution or serious breach of the written laws of the Republic.

General dissatisfaction was expressed on this provision. Firstly, it was considered that relegating procedures of such national significance to Standing Orders of Parliament which are subsidiary legislation was inappropriate. A suggestion was therefore made by Civil Society that these procedures should either be incorporated in the Constitution or in a statute. The other view was that the procedures should be developed by the Senate as the upper house of Parliament<sup>126</sup>.

It was also suggested that the impeachment procedures should only be invoked after a referendum to ensure that such a move has the support of the nation. This would avoid abuse of the process influenced by selfish reasons<sup>127</sup>.

### *5.6.3 Treatment of Impeached Presidents / Vice Presidents*

Section 86 (1) provides that persons holding the two high offices of president and Vice – President respectively may be removed from office on indictment and conviction by impeachment. Subsection (2) provides that the procedure to be followed on impeachment shall be as laid down by the Standing Orders of Parliament.

Several issues were raised on this provision though no solutions were proffered. In particular stakeholders posed the following question: how should an impeached President or Vice President be treated? Should he be entitled to receive presidential benefits like a retired President? In view of the fact that section 91 provides for the immunity of the President alone in terms of civil suits and criminal prosecutions, what is the status of the Vice President regarding the issue of immunity. Should a criminal record be a ground of impeachment, should a Vice President really be subjected to criminal prosecution?

### *5.6.4 President Changing Parties*

Section 80 (1) of the Constitution provides that the President shall be elected in accordance with the Constitution in such manner as may be prescribed by an Act of Parliament. Section 32 (3) of the Parliamentary and Presidential Elections Act<sup>128</sup> gives guidance on how a person may be elected to the office of President. It provides that this may be either through the sponsorship of a political party or as an independent candidate.

Several views were expressed on the issue of the President resigning or changing his party while in office. The first view was that the President is a free agent and he should do what he considers to be best for the nation. It was argued that if he is saddled with party politics, issues of national interest shall be compromised<sup>129</sup>.

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<sup>126</sup> Views expressed by the Children and the Youth in Lilongwe

<sup>127</sup> views expressed by children and the youth in Lilongwe

<sup>128</sup> Cap. 2:01 of the Laws of Malawi

<sup>129</sup> Chiefs were divided on this issue, civil society was equally divided

The second view suggested that the standard applicable to Members of Parliament under section 65 of the Constitution should also apply to the President since both are elected offices. This view essentially recommends introduction of a provision in the Constitution to bar the President from changing parties. The reasoning is that the logical consequence of section 32 (3) of the Parliamentary and Presidential Elections Act is that a person may only rule either as an independent or a member of a political party if he or she was elected as such. This therefore leaves no room for maneuvering and any change should require fresh mandate<sup>130</sup>. The proponents of the second view however conceded that there might be instances that a President may be forced to leave his or her party, and that in such circumstances he should be allowed to rule as an independent<sup>131</sup>.

The third view is so radical and seeks to proffer a solution to the problem of party politics and its negative impact on national development in Malawi. This view suggests that once a President ascends to office on a party ticket, he or she should immediately resign from that party and focus on issues of national development as opposed to party politics.<sup>132</sup> The fate of such President in the next general elections was however not discussed.

#### *5.6.5 Rotation of the Office of President*

In the meetings in the North, it was strongly suggested that a system of rotating the presidency through the three regions of the country should be introduced in the Constitution. It was argued that the North is sparsely populated and, with the present arrangements, can never produce a President. This was seen as a disadvantage and a major contribution to the unequal distribution of national resources which has seen the North lagging behind. Hence, rotating Presidents along regional lines was seen as the best solution.

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<sup>130</sup> This view was expressed by Chiefs and the Parliamentary Women Caucus

<sup>131</sup> Views expressed by Malawi Law Society and University of Malawi

<sup>132</sup> Views expressed by Chiefs from the South

## CHAPTER VI

### 6. THE JUDICIARY

#### 6.1 *Retirement Age of Judges*

Section 119 (1) (b) provides that a person holding the office of judge shall vacate that office on attaining the age of sixty five. On the other hand, section 113 (3) of the Constitution dealing with magistrates and other persons appointed to judicial office provides that such persons shall retire on attainment of the age of seventy.

The majority view at a meeting with Judicial Officers was in favour of raising the retirement age of judges to seventy for consistency with the age of retirement for other judicial officers. It was argued that it is indeed illogical to require judges to retire at a younger age than the other judicial officers. It was considered that this would maintain the traditional respect for those that serve or have served in superior judicial office and hence discourage retired judges from taking up active practice at the Bar.

Moreover, the Report of the Law Commission on the Technical Review of the Constitution<sup>133</sup> suggested the raising of the retirement age of judges to seventy on the basis, of among other things, the fact that it is the standard retirement age for Judges in the region. That Report however recommended that should be achieved through an Act of Parliament.

There was however a minority view which suggested that the retirement age should not be raised. This view was similar to the view expressed by civil society. The concern was that normally performance declines as one grows older. It was also argued that a lower retirement age, such as sixty five, would create room for younger generations to take up challenging positions. This view therefore suggested that the solution is to reduce the retirement age of magistrates to sixty five. This would similarly address the issue of consistency.

#### 6.2 *Minimum Eligibility Age for Judgeship*

Section 112 provides that a person qualifies for appointment as a judge in two situations. Firstly if that person is or has been a judge of a court having unlimited jurisdiction in criminal or civil proceedings. Secondly, if that person is entitled to practise as a legal practitioner or an advocate or a solicitor in such a court and has been entitled so to practise for not less than ten years.

There is no minimum age prescribed. At the meeting with judicial officers two views were proffered on this issue. The first view was that a minimum age should be prescribed and the age of forty was suggested. It was argued that such an age would ensure adequate practising experience, competence and manority. It was further argued that in the past, a person could not be appointed a judge until the age of forty.

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<sup>133</sup> Malawi Government Gazette, 16<sup>th</sup> November 1998 at page 280.

The second view supported retention of the status quo and argued that prescribing the minimum age might be counter productive since its not always that age breeds wisdom and competence.

### *6.3 Deputy Chief Justice*

The Constitution does not provide for this office. In other jurisdictions such as South Africa<sup>134</sup> this office has been provided for in the Constitution.

Stakeholders generally felt that there is need to provide for such office to facilitate easy succession or performance of duties during temporary absence<sup>135</sup>. The practice (as presently stipulated in the Constitution) of respecting the order of seniority was found to be both inadequate and not reliable. It was also argued that in both the other two branches of Government, namely, the Executive and the Legislature, offices of deputies are provided for in the Constitution. This, it was argued, strengthens the case for the creation of the office of "Deputy Chief Justice".

### *6.4 Definition of Judicial Office*

Section 111 (4) defines "judicial office" the term as to mean "the office of a Justice of Appeal or Acting Justice of Appeal, a Judge of the High Court or Acting Judge of the High Court, the Registrar or Deputy Registrar of the Supreme Court of Appeal and of the High Court, a magistrate of whatever grade and a person presiding over a traditional or local court.

The definition excludes the office of a person serving as a Chairperson or Deputy Chairperson of the Industrial Relations Court, a subordinate court established under section 110(2) of the Constitution. It was conceded at the meeting with judicial officers that this was an inadvertent omission which needs to be rectified. The meeting thus suggested that the office of a Chairperson of the Industrial Relations Court or his deputy should be included in the definition of the term "judicial office".

### *6.5 Judicial Service Commission*

Section 117 provides for the composition of the Judicial Service Commission. The composition consists of the Chief Justice as Chairperson, the chairman of the Civil Service Commission or his nominee, a justice of Appeal or a Judge, a legal practitioner and a magistrate as may be designated in that behalf by the President after consultation with the Chief Justice. Membership therefore consists of three judicial officers, a legal practitioner and a civil servant.

At the meeting with judicial officers, dissatisfaction with this composition was expressed. It was argued that the membership is judiciary heavy and thus nominations may not be made transparently. It was therefore suggested that membership should include an appropriate number of other suitable persons.

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<sup>134</sup> i.e see section 168 (1) of the South African Constitution.

<sup>135</sup> This view emerged at the meeting with judicial officers and also at a meeting with civil society in the North

It is also worthwhile to point out that the Law Commission has received a submission from the Judicial Service Commission urging the enactment of an Act of Parliament to facilitate the independence and proper functioning of the Commission. This is being handled separately as a full law reform programme.

#### *6.6 Appointment of Judges*

The Constitution, under section 111 (2) requires that judges should be appointed by the President on the recommendation of the Judicial Service Commission.

Judicial officers observed that this provision is not observed in practice and in most cases judges are appointed without consulting the Judicial Service Commission. Consequently, a general appeal was made urging that section 111 (2) should be adhered to by the responsible authority.

#### *6.7 Impeachment of Judges*

Section 119 (3) empowers the President by an instrument under the Public seal and in consultation with the Judicial Service Commission to remove a judge from office. This power may be exercised following debate and passing of a motion in Parliament praying for such removal. The grounds for removal are incompetence and misbehaviour. A proviso to subsection (3) requires that the procedure for removal shall be in accordance with principles of natural justice.

Judicial officers considered this provision to be unsatisfactory principally because it does not state at what point the procedures of impeachment must comply with rules of natural justice to prevent abuse of the process. It was suggested that the provision should be reworded to require compliance with rules of natural justice at each stage to secure the tenure of judges.

#### *6.8 The Industrial Relations Court*

The Industrial Relations Court is established under section 110 (2) of the Constitution as a subordinate court to the High Court. A special submission was made from the Court itself at the meeting with judicial officers. This submission urged the removal of the Industrial Relations Court from the Judiciary and turning it into a tribunal. It was argued that this arrangement shall have the advantage of having appeals lie directly to the Supreme Court.

The alternative suggestion was to recognize the court as a specialized subordinate court and include the office of the Chairperson and Deputy Chairperson in the definition of "judicial officer".

#### *6.9 Constitutional Court*

The Constitution recognizes two types of superior courts in Malawi, the Supreme Court of Appeal and the High Court. It essentially prohibits the

establishment of courts with superior or concurrent jurisdiction with the Supreme Court of Appeal or the High Court<sup>136</sup>.

Parliament however amended the Courts Act through Act No ... of 19... to facilitate the constitution of a special Constitutional Court where a constitutional dispute arises. This operates on the need basis. Judicial officers conceded that this arrangement is working perfectly though it was felt that there is a need to enhance performance of such an ad hoc court by establishing a permanent and fully fledged Constitutional Court. At the meeting with People's Progressive Party, this suggestion was also made. It was argued that this would improve competence and encourage consistency in court judgements. Civil society, academia and political activists from the North also expressed the same sentiments.

Despite making this recommendation, judicial officers were aware that implementing the proposal will be difficult in view of the prohibition in section 103 (3) of the Constitution to establish courts of superior or concurrent jurisdiction with the Supreme Court or the High Court.

## *6.10 Other Issues*

### *6.10.1 Remuneration for the Chief Justice*

Judicial officers generally observed that remuneration to the office of the Chief Justice is not sufficient. In keeping with the status of the office as the head of a branch of Government, it was suggested that the remuneration of this office should be similar to that of the Vice President.

### *6.10.2 Funding to the Judiciary*

Judicial officers raised the issue of problems experienced by the Judiciary due to inadequate funding and suggested two alternative solutions. The first solution was that the composition of Cabinet should include a judicial officer to carry views of the Judiciary to that state institution. It was argued that after all, members of Parliament are eligible to be members of Cabinet.

The second solution proffered was to tighten up the Constitution in section 183 to ensure that it protects the budget and operations of the Judiciary.

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<sup>136</sup> See section 103 (3)

## CHAPTER VII

### 7. CONSTITUTIONAL BODIES

#### 7.1 *Human Rights Commission*

Section 129 establishes the Human Rights Commission with the primary mandate of protecting human rights and investigating violations of the rights accorded by the Constitution. It consists of the Law Commissioner, the Ombudsman and other persons from reputable organizations nominated by the Law Commissioner and the Ombudsman.

A number of issues have been raised regarding this institution. Firstly, dissatisfaction has been expressed with the mode of appointing the other Commissioners. It has been argued that leaving the power of nomination to the Law Commissioner and Ombudsman gives the impression that the institution is subordinate to the other two institutions. The direct participation of the two heads of other constitutional bodies in this institution was also criticized as unsuitable and a strain on the budget of the institution.<sup>137</sup> It has therefore been suggested that the appointing procedure should be revisited. Further, the tenure of Commissioners should be secured in the Constitution itself to guarantee independence of the institution.

The second issue relates to the mandate of the institution. It has been argued that the mandate conferred by section 129 and 130 is too broad since it empowers the Commission to protect and investigate violations of “rights accorded by this Constitution or any other law”. This scenario, it is felt, increases the probability of jurisdictional conflicts between the Commission and other institutions or bodies which deal with rights more generally<sup>138</sup>. It has therefore been suggested that section 129 should be amended to restrict the mandate of the Commission to rights accorded by Chapter IV of the Constitution or applicable international human rights instruments. Subsequently, section 30 should also be amended to reflect this restrictive scope.

#### 7.2 *Office of the Ombudsman*

The Office of the Ombudsman is established under section 120 of the Constitution and has the mandate to investigate cases of injustice where it appears that there is no remedy reasonably available by way of court proceedings<sup>139</sup>. Section 5 of the Ombudsman Act<sup>140</sup> however seems to limit the broad jurisdiction conferred by the Constitution to cases of injustice occasioned by public officers. This position is supported by a number of court decisions and it also represents common international practice<sup>141</sup>. At the meeting with senior public officers, it was suggested that there should be clarity on the jurisdiction of the Ombudsman. To that end, either

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<sup>137</sup> Meeting with Principal Secretaries, Heads of Constitutional Bodies and Senior Civil Servants.

<sup>138</sup> Submission from Body of Case Handling Institutions.

<sup>139</sup> Section 123 of the Constitution

<sup>140</sup> Cap. 3:07 of the Laws of Malawi

<sup>141</sup>

the Constitution should be amended to restrict the jurisdiction of the Ombudsman Act should be broadened in terms of jurisdiction to avoid confusion.

Secondly, it was observed that the mode of determining whether a matter should come before a court or the Ombudsman is ambiguous. It is not clear whether this should be done subjectively or objectively. It has therefore been suggested that the provision should make it clear that such determination should be made by the Ombudsman who is seized of the jurisdictional question in the first place.<sup>142</sup> This would reduce the frequent judicial challenges to the scope and limits of jurisdiction of the Ombudsman. To that end, a simple insertion of the words “to the Ombudsman” immediately after the word “appear” in the third line would suffice to address the problem.

Thirdly, it was suggested that the types of relief that may be awarded by the Ombudsman should be clearly provided for in the Act. As an example, it was mentioned that it is doubtful as to whether the Ombudsman can award monetary compensation.

Similarly, procedures to be followed in awarding remedies should be spelt out under the law.

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<sup>142</sup> Views expressed by the Body of Case Handling Institutions

## CHAPTER VIII

### 8. OTHER INSTITUTIONS

#### 8.1 *Defence and Security Committee*

This is a Committee of the National Assembly and it is established under section 162 of the Constitution. Representation of the Committee is proportional to the seats that a political party has in Parliament and members are appointed for one year only. The functions and powers of the Committee are as may be conferred by the Constitution and an Act of Parliament.

Firstly, it was observed that the specific role of this Committee is not specified. It has therefore been suggested that this should be spelt out.

Secondly, stakeholders considered a maximum term of one year to be grossly inadequate and suggests that the members term should be five years to coincide with the life of Parliament.<sup>143</sup>

Representatives of the Defence Force at this meeting also questioned the appropriateness of the provisions of section 161 (3) in extending oversight or supervisory powers of this Committee over appointments in the Defence as provided for in subsection (2) (b) of section 161.

#### 8.2 *Immigration Department*

This is a Department in the Ministry of Home Affairs and Internal Security. However, previously it was part of the Police Service and hence was a security organization.

It has been observed that presently the status of this institution is not known as to whether it is still a security organization or a civilian organization. Due to the importance of this institution in matters of internal security, it has been suggested that it should be accorded its own Chapter in the Constitution to spell out its mandate. The Chapter should also guarantee the independence and professionalism of the Department.<sup>144</sup>

#### 8.3 *Anti-Corruption Bureau*

This institution is established under the Corrupt Practices Act with the broad mandate to prevent corruption in public bodies and private bodies.

Stakeholders emphasized the need to upgrade this institution to a constitutional status in view of the central role that it plays as a state institution in curbing corruption in society. In making this suggestion, stakeholders were mindful of one of the principles of national policy under section 13 (o) which requires the

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<sup>143</sup> Views of Senior Public Officers

<sup>144</sup> Views expressed at a meeting with senior public officers

State to introduce measures which will guarantee accountability, transparency, personal integrity and financial probity to strengthen public trust and good governance.

#### *8.4 The Reserve Bank of Malawi*

Section 185 establishes the Reserve Bank of Malawi as a Central Bank of the Republic of Malawi. The Bank serves as the State's principle instrument for the control of money supply, currency and the institutions of finance.

It has been suggested that the independence of the Bank should be guaranteed by the Constitution. Furthermore, the provision establishing the Bank should be protected in the Schedule in view of past experience where an organ of State (Senate) has been abolished wantonly which are all public institutions.

#### *8.5 Public Service Commission*

Presently, the Constitution establishes the Civil Service Commission under section 186 with the primary mandate to regulate and confirm appointments in the civil service. There is no central body to regulate the new institutions that have come about since 1994 such as the Law Commission, the Ombudsman, the Anti Corruption Bureau and the Malawi Electoral Commission.

It has been suggested that the Constitution should establish a Public Service Commission with similar functions as currently exercised by the Civil Service Commission with a focus on all public institutions. All the other Service Commissions including the Civil Service Commission should be structurally subordinate to it and should be provided for in the Public Service Act<sup>145</sup> and other statutes dealing with specific services.

Secondly, the Public Service Commission should be guaranteed independence to ensure the proper and effective functioning of the institution.

#### *8.6 Police Service*

The Constitution under section 154 creates the office of the Inspector General of Police as head of Malawi Police Service. Appointment to this office is by the President on confirmation by the National Assembly by a majority of the members present and voting.

It has been suggested that the appointment of Inspector General should not be subject to Parliamentary approval. It was argued that appointment of the Commander of the Defence Force is not subject to this process and hence the need for consistency in appointments to jobs that deals with matters of security whether internal or external.

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<sup>145</sup> Cap 1:03 of the Laws of Malawi

## 8.7 *Institution of Chieftaincy*

In the 1966 Republican Constitution the institution of chieftaincy was specifically recognized under section 6 which provided as follows-

*“The institution of Chieftaincy shall be recognized and preserved in the Republic, so that the chiefs may make the fullest contribution to the welfare and development of the country in their traditional fields.”*

This provision appeared in Chapter I of that Constitution which was on the Republic. Research carried out by the Law Commission indicates that most post independence African countries incorporated similar provisions in their Constitutions. In countries such as Tanzania, where the chieftaincy has been abolished, the provision on Chieftaincy has been repealed.

In Malawi, though the Constitution does not specifically recognize the institution of Chieftaincy provision was made to allow for the participation of Chiefs in matters of national development. Under the repealed section 68, subsection (1) (b) provided for the inclusion of a Chief from each District in the membership of the Senate.

Similarly, section 146 (4) requires Parliament to ensure that “the composition of local government authorities includes a prescribed number of persons serving as Chiefs in the area of jurisdiction of such authorities”.

It has been argued that this clearly shows that it was never intended to abolish the institution of Chieftaincy but rather that it was an oversight. The meetings with Chiefs throughout the country have suggested that the Constitution should be amended to recognize the institution of Chieftaincy as was the position prior to 1994. This view is also supported by civil society, faith groups, academia and political activists from the Northern Region.

## CHAPTER IX

### 9. MISCELLANEOUS

#### 9.1 *Ratification of International Instruments*

Section 89 (1) (f) empowers the President to negotiate, sign, enter into and accede to international agreements or to delegate such power to Ministers, Ambassadors and High Commissioners.

At the meeting with Parliamentary Women Caucus it was suggested that this power should vest with Parliament to accord with international practice. It was further argued that a decision to subject citizens to international obligations should vest in an elected body such as Parliament.

#### 9.2 *Office of the Attorney General*

Section 98 (1) of the Constitution established the office of the Attorney General as the principle legal advisor to the Government. Subsection (2) of section 98 states that the office of the Attorney General may either be the office of a Minister or may be a public office.

General dissatisfaction was expressed on the conduct of holders of this office since adoption of the 1994 Constitution. It has been suggested that the office of the Attorney General should not be the office of the Minister to enable the proper functioning of that office and ensure independence and that it serves all the three branches of Government. This suggestion essentially demands that an Attorney General should strictly be a public officer to avoid subjecting such an important office to partisan politics.<sup>146</sup>

#### 9.3 *Disclosure of Assets*

Section 88 A (1) of the Constitution requires the President and members of Cabinet to disclose their assets, liabilities and business interests within three months of their election or appointment as the case may be. Section 213 has extended this requirement to Members of Parliament, senior public officers and senior officers of parastatals. The Constitution further gives Parliament the assignment to determine the grades and positions of officers required to disclose assets.<sup>147</sup> Parliament is yet to do this.

The disclosure of assets is required to be made in a written document delivered to the Speaker of the National Assembly who is required to deposit such document with such public office as may be specified in the Standing Orders of Parliament.

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<sup>146</sup> Views expressed by Parliamentary Women Caucus and Civil Society from the North.

<sup>147</sup> See section 213

Stakeholders accepted that there is a general lack of enforcement of this provision either due to lack of an enabling statute or political will. It was therefore suggested that politicians should be required to disclose their assets before taking oath of office. This would mitigate instances of arrogance and impunity<sup>148</sup>.

Secondly, the requirement to disclose assets to the Speaker was generally found to be unsatisfactory and contributing to the lack of implementation of the law. It was suggested that disclosure should be made to a public office such as the Auditor General as is the practice in other jurisdictions.

Thirdly, stakeholders urged Government to speed up the process of developing a statute in this crucial area of governance to facilitate the proper and effective implementation of the law.

#### *9.4 Relevance of the Constitutional Review Process*

Most stakeholders applauded the Law Commission for taking the initiative to clean the Constitution in accordance with its mandate. However, at all the consultative meetings, participants questioned the commitment of Parliament to advance the wishes of the people since most of the times Parliament is seen as advancing its own agenda.

To that end, stakeholders doubted the relevance of the whole review process if at the end of the day it will be left to Parliament to determine whether the recommendations of the people are to be enacted or not<sup>149</sup>. The meeting with senior public officers specially expressed worry on the suggestion to re-introduce recall provision since it directly affects the Members of Parliament themselves.

#### *9.5 Market Economy*

One of the principles of national policy under section 13 of the Constitution requires the State to achieve a sensible balance between the creation and distribution of wealth through the nurturing of a market economy.

Some stakeholders were not convinced that the issue of market economy should be dictated by the Constitution considering that a government in power might decide to follow different economic policies since that is its prerogative.<sup>150</sup>

#### *9.6 Children Parliament*

The meeting with children and young persons suggested that Government should consider introducing a Children Parliament in the Constitution to mould future leaders.

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<sup>148</sup> Views expressed by Civil Society

<sup>149</sup> Views expressed by the villagers of Gumulira Village, T/A Mlonyeni and Civil Society

<sup>150</sup> Views expressed at a meeting with senior public officers