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**THE CHARACTER OF THE LEGISLATURE UNDER THE
CONSTITUTION OF THE REPUBLIC OF MALAWI, 1994**

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THE CHARACTER OF THE LEGISLATURE UNDER THE CONSTITUTION OF THE REPUBLIC OF MALAWI, 1994

1. Introduction

Prior to 1994, the constitutional order in Malawi was premised upon parliamentary supremacy.¹ In 1994, an epochal paradigm shift occurred with the coming into force of a new Constitution.² The Constitution is the supreme law of the land.³ The Constitution also provides for a Bill of Rights under Chapter IV. The Constitution further states that the authority to govern is derived from the people of Malawi as expressed through equal and universal suffrage in an election.⁴

Further still, the Constitution also proceeds on a very fundamental principle and states that all legal and political authority of the State derives from the people of Malawi and shall be exercised in accordance with the principles of the Constitution.⁵

And finally, the Constitution creates a public trust where all persons exercising powers of State shall do so to the extent of their lawful authority and in accordance with their duties and responsibilities to the people of Malawi.⁶

¹ See the Constitution of the Republic of Malawi, 1966.

² See the Constitution of the Republic of Malawi enacted by the Republic of Malawi (Constitution) Act, 1994, Act Number. 20 of 1994, (the “Constitution”). The Constitution came *provisionally* into force on 18th May, 1994 (by virtue of section 212 of the Constitution) and *definitely* came into force on 18th May, 1995 (by virtue of section 2 of the Republic of Malawi (Constitution) Act, 1995, Act Number 7 of 1995). See also Anthony Kamanga (2006) “Amendments to the Constitution since 18th May, 1994”. Mimeo.

³ See section 5 of the Constitution.

⁴ See section 6 of the Constitution.

⁵ See section 12(i) of the Constitution.

⁶ See section 12 (ii) of the Constitution.

2. Separation of Powers under the Constitution

The doctrine of separation of powers⁷ may be located in sections 7, 8 and 9 of the Constitution. The three branches of government are nobly tasked to advance the agenda of the Constitution. The Executive is charged with the responsibility of initiating policies and legislation and for implementation of laws that “embody the express wishes of the people of Malawi and which promote the principles of the Constitution.”⁸ The Legislature is required to enact laws that reflect the deliberate interests of the people of Malawi and that further the values of the Constitution.⁹ Finally, the Judiciary is responsible for interpreting, protecting and enforcing the Constitution and all laws in accordance with the Constitution in an independent and impartial manner.¹⁰

The doctrine of separation of powers has become increasingly contested. While a Diceyan analysis of the doctrine may have suggested a mechanistic interpretation of “separateness” of the powers of the three branches of government, no polity has applied the doctrine in an absolute manner.¹¹

In the context of the constitutional order in Malawi, the doctrine of separation of powers must be understood subject to the public trust and the parameters of legality set by the Constitution itself in respect of any organ of State; let alone the three branches of government.¹²

⁷ See, for example, A.W. Bradley (1985) *Wade and Bradley on Constitutional and Administrative Law*. London and New York: Longman, p. 47ff. for a detailed analysis of the doctrine.

⁸ See section 7 of the Constitution.

⁹ See section 8 of the Constitution.

¹⁰ See section 9 of the Constitution.

¹¹ See Bradley (1985:49).

¹² See sections 4 and 5 of the Constitution.

Bruce Ackerman has developed an interesting thesis on what he calls a ‘new Separation of Powers’. Ackerman asserts that the ‘exportation’ of the American model and the Westminster model of separation of powers is no longer justified.¹³ His thesis of a ‘new Separation of Powers’ is based upon the characterization of the doctrine under what has been termed ‘south Constitutions’.¹⁴ The thesis of a ‘new Separation of Powers’ is based on three pillars: democracy, professionalism and protection of human rights.¹⁵ The pillar on democracy is premised on ‘constrained parliamentarism’ whereby the law-making power of parliament is restricted by other institutions of democratic self-government as provided under a constitution.¹⁶ The second pillar on professionalism lauds the potential contribution of professionalism in the judiciary and the executive. In an analysis of the American model, Ackerman asserts that professionalism has worked well in the judiciary and not so much in the executive.¹⁷ The challenge under ‘south’ constitutional orders is the inculcation of professionalism even in the legislature.¹⁸ In respect of the third pillar, Ackerman advocates the protection of human rights using specialized state agencies beyond the courts.¹⁹ The ‘new Separation of Powers’ seeks to avert the ‘impasse’ that may emerge from “(unnecessary) crises of governability”;

¹³ See Bruce Ackerman (2000) “A New Separation of Powers” 113 *Harvard Law Review* 633–729 (hereafter “Ackerman”).

¹⁴ ‘South’ constitutionalism refers to the non-Western constitutional jurisprudence in jurisdictions such as India and South Africa: see for example Upendra Baxi (2003) “Alternate Constitutionalism under the Signature of Globalization”. Mimeo.; David Schneiderman (2001) “Constitutional Approaches to Privatization: An Inquiry into the Magnitude of Neo-Liberal Constitutionalism”. Mimeo. (also available at <http://www.law.duke.edu/journals/63LCPSchneiderman>)

¹⁵ See Ackerman at p.640.

¹⁶ See for example the powers and functions of the Human Rights Commission and the Office of the Ombudsman under the Constitution.

¹⁷ See Ackerman at p.641.

¹⁸ Cf. the powers and functions of the Legislature under the Constitution. The Constitution presupposes a high level of professional sobriety by legislators in the discharge of their powers and functions under the Constitution.

¹⁹ See Ackerman at p.641.

perilous “exercise of full authority”; and the problems of the “cult of personality”.²⁰ In the final analysis, it is a running challenge of government that in the conceptualization of separation of powers “constitutional engineering must be combined with cultural sensitivity and economic realism.”²¹

3. Composition of the Legislature

3.1 The Presidency and the Legislature

Section 49(1) of the Constitution provides that Parliament consists of the National Assembly and the President as Head of State. The relationship is pertinent as a Bill becomes law after the assent of the President.²² The President has a consultative role in the convening,²³ proroguing²⁴ and the dissolution of the National Assembly.²⁵ The President, in terms of section 67 (4) of the Constitution, can (in his or her own right) reconvene the National Assembly.²⁶

3.2 Composition of the Legislature

Section 49 of the Constitution states that the Legislature consists of the National Assembly and the President as Head of State. Under the provisional Constitution of 1994,²⁷ the Legislature consisted of the National Assembly, the Senate and the President

²⁰ *ibid.*, *passim*.

²¹ See Ackerman at p.728.

²² See sections 49 (2) (c) and 73 of the Constitution.

²³ See section 59 (1) of the Constitution.

²⁴ See section 59 (1) (c) of the Constitution.

²⁵ See section 67 of the Constitution.

²⁶ The point is discussed under Parts 4.2 and 4.3 of this Paper.

²⁷ This reference is to the Constitution of the Republic of Malawi enacted by the Republic of Malawi (Constitution) Act, 1994, Act Number 20 of 1994 (erstwhile referred to as the “Constitution”). The use of ‘provisional Constitution’ is to emphasize the status of the law when the Constitution was *provisionally* in force as opposed to the post–18th May, 1995 period when the Constitution *definitely* came into force. See also section 212 of the Constitution.

as Head of State.²⁸ In light of the role of the President in convening, proroguing and dissolution of the National Assembly, the composition is pertinent.

3.2.1 Composition of the National Assembly

The composition of the National Assembly is provided under section 62 of the Constitution. The provision states that the National Assembly shall consist of such number of seats representing every constituency in Malawi as determined by the Electoral Commission.²⁹ Further, each constituency shall freely elect any person, subject to the Constitution and the relevant electoral law, to represent that constituency as a member of the National Assembly.³⁰

The election of a person to the National Assembly is subject to the Parliamentary and Presidential Elections Act³¹ and the Constitution in relation to their qualification and eligibility.³²

3.2.1.1 Qualifications of Members of Parliament

This is governed by section 51 of the Constitution. A person is not qualified to be nominated or elected as a member of Parliament unless he or she is–

- (a) a citizen of Malawi who has attained the age of twenty–one years;³³
- (b) “able to speak and to read the English language well enough to take an active part in the proceedings of Parliament”;³⁴ and

²⁸ See section 49 of the provisional Constitution.

²⁹ See section 62 (1) of the Constitution. The present National Assembly has 193 seats.

³⁰ See section 62 (2) of the Constitution.

³¹ Cap. 2:01.

³² See Parts 3.2.1.1 and 3.2.1.2 of this Paper.

³³ See section 51 (1) (a) of the Constitution.

³⁴ See section 51 (1) (b) of the Constitution. This position must be juxtaposed with section 56 (5) of the Constitution which states that the proceedings of the National Assembly may be in “such other language as the National Assembly may prescribe.” Cf. section 55 of the Constitution of Nigeria which provides that “[t]he business of the National Assembly shall be conducted in English, and in Hausa, Ibo and Yoruba when adequate arrangements have been made therefor.” See also section 64(c) of the Constitution of

- (c) “registered as a voter in a constituency”.³⁵ The Constitution is not clear as to whether a person must be a registered voter in the constituency where he or she intends to contest an election or whether registration in any constituency satisfies this requirement.

The Law Commission³⁶ has concluded that “for reasons of principle and pragmatism” a candidate need not be registered as a voter in the constituency he or she intends to contest in an election.

The requirement that a person must be “able to speak and to read the English language well enough to take an active part in the proceedings of Parliament” has come under scrutiny.³⁷ A like requirement was provided under the Constitution of Malawi of 1964³⁸ and the (Republican) Constitution of Malawi of 1966.³⁹ It has been argued that due to the nature of legislative functions as envisaged under the Constitution, the Constitution must make provision for a minimum academic qualification which a person must possess before they qualify for election as a Member of the National Assembly.⁴⁰ In comparison, section 47 of the Constitution of South Africa is similar to section 51 of the

Zambia which provides that, among other things, a person must be “literate and conversant with the official language of Zambia” as a prerequisite for membership to the legislature. The official language of Zambia is English.

³⁵ See section 51 (1) (c) of the Constitution.

³⁶ See Malawi Law Commission (1998) *Report on the Technical Review of the Constitution*. Malawi Government Gazette Extraordinary, p. 265.

³⁷ See Malawi Law Commission (2006) *Constitutional Review Programme: Consultation Paper*. Lilongwe: Capital Printers, p. 30 (hereafter the “*Consultation Paper*”); Malawi Law Commission (2006) *Constitutional Review Programme: Issues Paper*. Lilongwe: Capital Printers, p. 17 (hereafter the “*Issues Paper*”); and also the *Summary of the Proceedings of the First National Conference of the Review of the Constitution*. Mimeo., pp. 11–12 (hereafter the “*Constitutional Conference Summary*”).

³⁸ Section 34 (on qualifications for election to the National Assembly) provided, in subsection (1) (b), that a person shall be qualified to be elected as a member of the National Assembly if he “is able to speak and, unless incapacitated by blindness or other physical cause, to read the English language well enough to take an active part in the proceedings of the Assembly.”

³⁹ Under section 23 which is a replica of section 51 (1) (b) of the Constitution.

⁴⁰ See footnote 37. This fortifies Ackerman’s second pillar in his ‘new Separation of Powers’; namely, professionalism: see Ackerman at p.641ff.

Constitution. On the other hand, section 65(2)(a) of the Constitution of Nigeria expressly provides, among other things, that a person does not qualify to contest in an election for membership to the legislature unless he or she “has been educated up to at least School Certificate level or its equivalent.” Section 80(1) (c) of the Constitution of Uganda has a similar provision to section 65 of the Constitution of Nigeria. The Ugandan provision provides that a person is qualified to be a member of parliament if he or she “has completed a minimum formal education of Advanced Level or its equivalent.” The requirement for minimum formal education must be considered in the context of the reality in Malawi. A recent study by the World Bank and the Government⁴¹ shows that, at present, 84 per cent of all men and 92 per cent of all women have no formal educational qualification. The illiteracy rates for women are particularly high, with the proportion of women who have never attended formal education increasing from 19 per cent, in the age group 20 to 24 years, to 70 per cent for those aged 65 years and older. In comparison, the figures for men are 9 per cent and 38 per cent respectively.

Further, a population and housing census conducted by the National Statistical Office in 1998 shows that 48.6 per cent of women as compared to 72 per cent of men are literate. 31.4 per cent and 40.2 per cent of women and men respectively have completed primary school education. 11.1 per cent and 19.9 per cent of women and men respectively have completed secondary school education.⁴²

⁴¹ World Bank and Government of Malawi (2004) *Malawi Strategic Country Gender Assessment*. Lilongwe: UNDP–Malawi, p. 49.

⁴² See generally National Statistical Office (2002) *1998 Malawi Population and Housing Census: Analytical Report*. Zomba: National Statistical Office.

Finally, the Integrated Household Survey by the National Statistical Office conducted from 2004⁴³ reveals that 28 per cent of all household heads in Malawi have no formal certificate of education. 21 per cent of all male household heads have no formal certificate of education while 52 per cent of all female household heads have no formal certificate of education. 54 per cent of all household heads in Malawi have primary school education. 59 per cent of all male household heads have primary school education. 40.6 per cent of female household heads have primary school education. 17 per cent of all household heads in Malawi have attained secondary school education and above. 19.9 per cent of all male household heads have attained secondary school education and above. 7.2 per cent of all female household heads have attained secondary school education and above.

The Survey reveals the following statistics when desegregated according to the three regions of the country: 11.5 per cent of the population in Northern Malawi have no formal education; 65.3 per cent have primary school education and 23.2 per cent have secondary school education and above. 28.4 per cent of the population in Central Malawi have no formal education; 55.6 per cent have primary school education and 16 per cent have secondary school education and above. Finally, 31.7 per cent of the population in Southern Malawi have no formal education; 51.8 per cent have primary school education and 16.5 per cent have secondary school education and above.

3.2.1.2 The Parliamentary and the Presidential Elections Act

The Act is the principal law on the election of persons to the National Assembly. The nomination of persons as members of the National Assembly is governed by Part IV,

⁴³ National Statistical Office (2006) *Malawi Integrated Household Survey 2004 to 2005*. Zomba: National Statistical Office.

Division 2 of the Act. Section 37 of the Parliamentary and Presidential Elections Act provides the procedure on nomination of candidates. A returning officer⁴⁴ attends in the open court at an appointed place to receive nomination papers that comply with the Act.⁴⁵ The nomination of a candidate is made in the prescribed form, supported by the registered voters in the constituency in which the candidate intends to be a candidate,⁴⁶ and the nominee consents to the nomination.⁴⁷

In the case where a candidate will stand for or will be sponsored by a political party,⁴⁸ or will contest the election (or by-election) as an independent candidate,⁴⁹ the nomination will specify that fact. Every nominated candidate is required to identify themselves to the satisfaction of a returning officer.⁵⁰

Hence, every candidate in a parliamentary election is elected as a member of the National Assembly as a candidate of a political party or as an independent candidate. It follows that, in terms of section 62(2) of the Constitution, a constituency may elect a candidate of a political party or an independent candidate. This determines the composition of the National Assembly under section 62 (1) of the Constitution not just at the first sitting after the general elections but throughout the term of the National Assembly.

⁴⁴ See section 34 of Parliamentary and Presidential Elections Act whereby a District Commissioner may be designated a returning officer.

⁴⁵ See section 37 (1) of the Parliamentary and Presidential Elections Act.

⁴⁶ See section 37 (2) (b) of the Parliamentary and Presidential Elections Act. Since section 51 of the Constitution is not specific about the constituency where a person is registered as a voter, *quare* whether section 37 (2) (b) of the Parliamentary and Presidential Elections Act is unconstitutional.

⁴⁷ See section 37 (2) (c) of the Parliamentary and Presidential Elections Act.

⁴⁸ See section 37 (2) (d) of the Parliamentary and Presidential Elections Act.

⁴⁹ See Section 37 (2) (e) of the Parliamentary and Presidential Elections Act.

⁵⁰ See section 37 (3) of the Parliamentary and Presidential Elections Act.

3.2.1.3 Recall of Members of Parliament

The provisional Constitution of 1994 provided, under section 64, for the recall of members of the National Assembly. The provision was repealed by the Constitution (Amendment) Act, 1995⁵¹ while the Constitution was provisionally in force. Section 64 provided as follows–

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

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

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

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

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

Section 69 of the Constitution of Nigeria provides for the recall of a member of the Senate or House of Representatives. The provision states that more than one-half of the registered voters in the constituency of the senator or representative must have signed a petition presented to the chairperson of the independent electoral commission alleging their loss of confidence in the senator or representative and the petition is confirmed in a referendum. Similarly, section 84 of the Constitution of Uganda provides as follows–

⁵¹ Act Number 6 of 1995.

“84. - (1) Subject to the provisions of this article, the electorate of any constituency and of any interest group referred to in article 78 of this Constitution have the right to recall their Member of Parliament before the expiry of the term of Parliament.

(2) A member of Parliament may be recalled from that office on any of the following grounds–

(a) physical or mental incapacity rendering that member incapable of performing the functions of the office; or

(b) misconduct or misbehaviour likely to bring hatred, ridicule, contempt or disrepute to the office; or

(c) persistent deserting of the electorate without reasonable cause.

(3) The recall of a member of Parliament shall be initiated by a petition in writing setting out the grounds relied on and signed by at least two–thirds of the registered voters of the constituency or of the interest group referred to in clause (1) of this article, and shall be delivered to the Speaker.

(4) On receipt of the petition referred to in clause (3) of this article, the Speaker shall, within seven days require the Electoral Commission to conduct a public inquiry into the matters alleged in the petition and the Electoral Commission shall expeditiously conduct the necessary inquiry and report its findings to the Speaker.

(5) The Speaker shall–

(a) declare the seat vacant, if the Electoral Commission reports that it is satisfied from the inquiry, with the genuineness of the petition; or

(b) declare immediately that the petition was unjustified, if the Commission reports that it is not satisfied with the genuineness of the petition.

(6) Subject to the provisions of clause (2), (3), (4) and (5) of this article, Parliament shall, by law prescribe the procedure to be followed for the recall of a Member of Parliament.”

It is noteworthy that the recall provisions under the constitutions of Nigeria and Uganda give a basis for the recall. In the Nigerian case, a recall may be based on loss of confidence in the senator or representative by the electorate. In Uganda, the recall may be based on physical or mental incapacity, misconduct or misbehaviour, or persistent desertion of the electorate.

A number of observations may be made in respect of section 64 of the provisional Constitution. Neither the Constitution nor the Electoral Commission Act⁵² adequately provided for a forum of arbitration in respect of recall. There was no provision for procedure beyond the standard of proof provided under section 64 (2) (b). Unlike the recall provisions in Nigeria and Uganda, there was no clear basis for the recall under the provisional Constitution. However, those in favour of the re-introduction of a recall provision argue that such a provision will ensure accountability on the part of members of Parliament. In any event, the Constitution provides for the removal of the presidency or judges through, among other considerations, impeachment.⁵³ The opposing view is that a recall provision may be subjected to abuse.

A case may be made for further provision for procedure if a recall provision were to be introduced.⁵⁴ It is a moot point whether the provision could not be subject to abuse where the 'wasted vote' is greater than the total number of registered voters; that is, where the aggregated votes of a winning candidate are less than the aggregated votes of all losing candidates in an election or by-election.

⁵² Cap. 2:03.

⁵³ See the *Consultation Paper*, p. 26; the *Issues Paper*, p. 21.

⁵⁴ See the *Consultation Paper*, p. 26.

3.2.1.4 Crossing the Floor

The phenomenon referred to as ‘crossing the floor’ is provided under section 65 of the Constitution. The section provides as follows–

“65. – (1) The Speaker shall declare vacant the seat if any member of the National Assembly who was, at the time of his or her election, a member of one political party represented in the National Assembly, other than by that member alone but who has voluntarily ceased to be a member of that party and has joined another political party represented in the National Assembly.

(2) Notwithstanding subsection (1), all members of all parties shall have the absolute right to exercise a free vote in any and all proceedings of the National Assembly, and a member shall not have his or her seat declared vacant solely on account of his or her voting in contradiction to the recommendations of a political party, represented in the National Assembly, of which he or she is a member.”

‘Crossing the floor’ emanates from English parliamentary practice.⁵⁵ A person was deemed to have ‘crossed the floor’ if he or she joined another political party in Parliament or voted with another political party in Parliament against his or her own political party. ‘Crossing the floor’ is not peculiar to Malawi and is recognized under the Constitutions of, among others, Ghana, India, Namibia, South Africa, Tanzania, Uganda and Zambia. The gist permeating through all these jurisdictions is that ‘crossing the floor’ is limited to the status of members of parliament within the legislature.⁵⁶

South Africa has a radically esoteric conceptualization of ‘crossing the floor’. Schedules 6A and 6B of the Constitution of South Africa provide for a regime of ‘crossing the floor’ in the national assembly or provincial legislature. The legal

⁵⁵ See http://www.parliament.uk/glossary.cfm?ref=crossin_283 (visited on 28th June, 2006).

⁵⁶ See also the *obiter dictum* of Justice Chipeta in *Registered Trustees of Public Affairs Committee v The Attorney General* Civil Cause Number 1861 of 2003 (High Court, Principal Registry (Unreported)) at p. 57.

framework has been augmented by four legislative amendments.⁵⁷ The framework states: the defector must be a member of the national or provincial or local government; the defection must represent not less than ten per cent of the total number of seats held by the political party the defector is leaving; the defection must take place within the first fifteen days in the second year following the date of an election of the legislature; and the seat held by the defector is considered that of the political party to which the member is defecting. Schedules 6A and 6B of the Constitution of South Africa also state that during the duration of the period of crossing the floor, a member of a political party represented in the national or provincial legislature may be suspended without his or her written consent.⁵⁸ The political context of the amendments is that they were meant to allow an African National Congress/New National Party ‘coalition’ to exist at all levels of government.⁵⁹

The legal framework on ‘crossing the floor’ in South Africa has been considered in *United Democratic Movement v The President of the Republic of South Africa et al.*⁶⁰ The applicant and *amicus curiae* in the case argued, among other points, that allowing ‘crossing the floor’ would undermine the representation of voters’ interests as prescribed by the proportional representation system under South African electoral law. The Constitutional Court did not decide “the matter one way or the other”.⁶¹ The Court stated that it was for Parliament to determine the validity of the legislation. What fell for the

⁵⁷ These are the Constitution of the Republic of South Africa (Amendment) Act, Act Number 18 of 2002; the Local Government (Municipal Structures) (Amendment) Act, Act Number 20 of 2002; the Constitution of the Republic of South Africa (Amendment) (No. 2) Act, Act Number 21 of 2002; and the Loss of Membership of the National Assembly and Provincial Legislatures Act, Act Number 22 of 2002.

⁵⁸ See the discussion by Jonathan Faull (undated) “Floor Crossing Briefing: Legislative and Political Background, and the Procedural Framework” at www.idasact.org.za (visited on 16th June, 2006).

⁵⁹ *ibid.*

⁶⁰ Constitutional Court Case Number 23 of 2002.

⁶¹ See John Faull, *supra*, footnote 58.

determination of the Court was not “whether the amendments are appropriate or inappropriate [but whether] [they are] constitutional or unconstitutional.”⁶² The Court analyzed a number of electoral systems in the context of ‘crossing the floor’ and asked itself whether ‘crossing the floor’ undermines or enhances democracy. The Court held the view that ‘crossing the floor’ does not undermine democracy. The Court nonetheless noted a number of “technical deficiencies”⁶³ related to ‘crossing the floor’ at the national and provincial levels respectively. In effect, Parliament had to re-draft the legislation.⁶⁴ The question of ‘crossing the floor’ continues to engage the South African national assembly.⁶⁵ President Thabo Mbeki has acknowledged that the question of ‘crossing the floor’ is “an eminently political matter”.⁶⁶

There is an apparent disharmony between subsections (1) and (2) of section 65 of the Constitution. Subsection (2) of section 65 of the Constitution seems to have been a response to the Tenth Schedule of the Constitution of India. India has a “harsh”⁶⁷ conceptualization of ‘crossing the floor’. Under the Tenth Schedule of the Constitution of India⁶⁸, a person crosses the floor if–

- “(a) he has voluntarily given up his membership of [a] political party; or
- (b) he votes or abstains from voting [in parliament] contrary to any direction issued by the political party to which he belongs or by any person or authority authorised by it in this behalf, without obtaining, in either case, the prior permission of such political party, person or authority and such voting or abstention has not been condoned by such political

⁶² See at p.7 of the Judgment.

⁶³ The Court found the use of the transitional mechanism under Item 23A of Schedule 6A to the Constitution unconstitutional: see at pp. 44–55 of the Judgment.

⁶⁴ See John Faull, *supra*, footnote 58.

⁶⁵ See “Proceedings of the National Assembly, Thursday, 18th May, 2006” at www.dfa.gov.za (visited on 16th June, 2006).

⁶⁶ *ibid.*

⁶⁷ See the *obiter dictum* of Justice Chipeta in *Registered Trustees of Public Affairs Committee v The Attorney General* at p.57.

⁶⁸ Paragraph 2 (1) of the Tenth Schedule of the Constitution of India.

party, person or authority within fifteen days from the date of such voting or abstention.”⁶⁹

Hence, by virtue of section 65 (2) of the Constitution, the manner of voting by a member of the Malawi Parliament, shall not have implications for, and does not amount to, ‘crossing the floor’.

Nonetheless, section 65(1) of the Constitution has gained controversy and notoriety, over the years⁷⁰ and has been the subject of numerous litigation.⁷¹ The Law Commission noted in 1998 that the provision had become “the purported constitutional justification for [...] the spate of ‘independent’ members of Parliament.”⁷² The Law Commission observed that the ‘independent’ members of Parliament constituted “those members who had voluntarily left one (political) party (represented in Parliament) but who had not joined another (political party represented in Parliament).”⁷³ In those cases, the Speaker was unable to declare the seats of those members vacant.⁷⁴ Hence, the Law Commission recommended the replacement of the words “that party and has” in line four of section 65(1) of the Constitution with “that party or has”.⁷⁵

⁶⁹ In fact in *Kihota Hollohon v Zachilhu et al* (1993) AIR SC 412, the Indian Supreme Court held that the Tenth Schedule (apart from paragraph 7 which ousted the jurisdiction of the courts) is constitutional. Perhaps the conceptualization of ‘crossing the floor’ under the Tenth Schedule of the Constitution of India serves a useful purpose in Indian politics. In Malawi, section 65 (2) of the Constitution has adopted an opposite position. See also Ruth Gordon (1999) “Growing Constitutions” 1 *University of Pennsylvania Journal of Constitutional Law* 528–582. Cf. Article 63A of the Constitution of Pakistan; *Wukala Mahaz Barai Tafahaz Dastoor v Federation of Pakistan* PLD 1998 Supreme Court 1263; and *United Democratic Movement v The President of the Republic of South Africa*.

⁷⁰ See the *Consultation Paper*, pp. 27–29; and also the *Issues Paper*, pp. 21–22.

⁷¹ See, for example, *Fred Nseula v The Attorney General and Malawi Congress Party* Civil Cause Number 63 of 1998 (High Court, Principal Registry (Unreported)) (hereafter “*Fred Nseula (1998)*”); *The Attorney General v S.G. Masauli* MSCA Civil Appeal Number 28 of 1998 (Malawi Supreme Court of Appeal (Unreported)); *B.J. Mpinganjira et al. v The Speaker of the National Assembly and the Attorney General* Civil Cause Number 3140 of 2001 (High Court, Principal Registry (Unreported)).

⁷² Malawi Law Commission (1998) *Report on the Technical Review of the Constitution*, p.268.

⁷³ *ibid.*

⁷⁴ *ibid.*

⁷⁵ *ibid.*

The Executive in 2001 amended section 65(1) of the Constitution,⁷⁶ “to in effect extend the application of that provision to members of Parliament who join any other political party (not represented in the National Assembly) or association or organization whose objectives or activities are political in nature.”⁷⁷ This amendment to section 65 of the Constitution was the subject of litigation and has since been declared unconstitutional.⁷⁸ The Court said at p. 63–

“On authority of sections 5 and 11 (3) of the Constitution [...] the amendment capturing the voluntary resignation by a Member of Parliament from a party represented in the National Assembly [or] the joining of a political party represented in the National Assembly by a Member of Parliament who belonged to another political party also so represented in the said Assembly at the time of his election must be saved and it will [...] survive. Accordingly [...], having in terms of jurisdiction of this Court under section 108 (2) of the Constitution reviewed and found the amendment to section 65 (1) of the Constitution [...] being unconstitutional in terms of [section] 5 of the Constitution inconsistent with the Constitution, only to the extent where it deems the joining of any other political party, or the joining of any association or organization whose objectives or activities are political in nature to amount to crossing the floor, I now duly declare the same unconstitutional and invalid, as prayed.”

The interpretation by the Court of section 65(1) of the Constitution in *Registered Trustees of Public Affairs Committee v The Attorney General* in effect means that the recommendation of the Law Commission in respect of the provision has been upheld.⁷⁹

⁷⁶ See Constitution (Amendment) (No.2) Act, 2001, Act Number 8 of 2001.

⁷⁷ See Kamanga (2006).

⁷⁸ See the decision of Justice Chipeta in *Registered Trustees of Public Affairs Committee v The Attorney General*. The provision is now the subject of a Presidential Reference: see *In the Matter of a Presidential Reference of a Dispute of a Constitutional Nature under section 89 (1) (h) of the Constitution and In the Matter of section 65 of the Constitution* (Constitutional Cause Number 15 of 2005). The High Court has not yet decided the case.

⁷⁹ The notion of judicial review also raises the question as to when is a court merely “interpreting” the constitution and is not itself “amending” the constitution: see Upendra Baxi (1999) “The Perils and Politics of the Amending Power” in Upendra Baxi, *et al.* (eds.), *Reconstructing the Republic*. Delhi: Har–Anand Publications.

The Malawi Supreme Court of Appeal in *Gwanda Chakuamba et al. v The Attorney General et al.*⁸⁰ and *Fred Nseula v The Attorney General and the Malawi Congress Party*⁸¹ has urged a liberal approach to constitutional interpretation which must look at the whole Constitution “for guidance to discover how the framers of the Constitution intended to effectuate the general purpose of the Constitution.”⁸² The Supreme Court has further urged that “[t]he language of a Constitution must be construed not in a narrow pedantic way but broadly and purposively.”⁸³ In this vein, it is important not to look at section 65 of the Constitution narrowly but more broadly as an aspect of the composition of the National Assembly.

The analysis of section 62 of the Constitution (on composition of the National Assembly) shows that the framers of the Constitution were, to a certain extent, mistaken in the way section 65 of the Constitution is couched and little wonder that the application of the provision has been problematic. The basic principle of section 65 of the Constitution must be the entrenchment of the mandate that a member of the National Assembly received at the poll and which he or she enjoys as he or she enters the National Assembly. Section 62 of the Constitution talks of a member of the National Assembly representing his or her constituency in the manner he or she was elected as prescribed by the Constitution or by an Act of Parliament. The Constitution does not so much prescribe the manner of representation but an Act of Parliament does and this is provided under section 32(3) of the Parliamentary and Presidential Elections Act. Hence, section 65 of

⁸⁰ MSCA Civil Appeal Number 20 of 2000 (Malawi Supreme Court of Appeal (Unreported)) (hereafter the “*Presidential Elections case*”).

⁸¹ MSCA Civil Appeal Number 32 of 1997 (Malawi Supreme Court of Appeal (Unreported)) (hereafter “*Fred Nseula (1997)*”).

⁸² See the *Presidential Elections case* at pp. 5–6 of the Judgment.

⁸³ See *Fred Nseula (1997)* at p.9 of the Judgment.

the Constitution must complement section 62 of the Constitution. In this respect, a member of the National Assembly must be deemed to have ‘crossed the floor’ if he or she attains a new ‘status’ other than the one that contributed to the settlement of the composition of the National Assembly under section 62 of the Constitution. Such change in ‘status’ must enable the Speaker to declare the seat of that member vacant.

It follows that the present section 65 of the Constitution must be deleted as it places undue emphasis on membership to a political party represented in the National Assembly. The provision must place emphasis on the ‘status’ of members of the National Assembly as an aspect of the composition of the National Assembly. In fact, it may be argued that the present section 65 of the Constitution is superfluous with the existence of section 62 of the Constitution. However, to make it clear that section 65 of the Constitution is principally intended to complement section 62 of the Constitution; the special Law Commission may consider the following provision as the new section 65–

“65. – (1) The Speaker shall declare vacant the seat of any member of the National Assembly who was, at the time of his or her election, an independent or a member of a political party but has voluntarily ceased to be an independent or a member of the political party.

(2) Notwithstanding subsection (1), a member of a political party shall have the absolute right to exercise a free vote in any and all proceedings of the National Assembly, and a member shall not have his or her seat declared vacant solely on account of his or her voting in contradiction to the recommendations of the political party of which he or she is a member.”

Since section 62 of the Constitution recognizes that members of the National Assembly may include independents or those representing political parties, any change in

the ‘status’ of a member of the National Assembly must require a fresh mandate from the electorate through a by–election.⁸⁴

Another dimension surrounding section 65 of the Constitution is whether the provision infringes section 32 of the Constitution. If an infringement exists, the related consideration is whether section 65 of the Constitution is unconstitutional. Section 32 of the Constitution provides as follows–

“(1) Every person shall have the right to freedom of association, which shall include the freedom to form associations.

(2) No person may be compelled to belong to an association.”

The consideration of section 65 of the Constitution in light of section 32 of the Constitution has generated considerable debate.⁸⁵ Two schools of thought emerge in the debate; with one school asserting that section 65 of the Constitution infringes section 32 of the Constitution and the other school arguing the opposite position.

It must be pointed out that section 44 (2) of the Constitution allows restrictions or limitations on the exercise of the rights enshrined under the Constitution in four instances. The restrictions or limitations must be prescribed by law; reasonable; recognized by international human rights standards; and necessary in an open and democratic society.⁸⁶ Section 44 (3) of the Constitution further states that “[l]aws prescribing restrictions or limitations shall not negate the essential content of the right or freedom in question, shall be of general application.”

⁸⁴ See section 32 of the Parliamentary and Presidential Elections Act on the procedure on by–elections.

⁸⁵ See the *Consultation Paper*, p. 29; *The Issues Paper*, p.22; and the *Constitutional Conference Summary*, p.14.

⁸⁶ The position has been endorsed in *Hon. J.Z.U. Tembo and Hon. Kate Kainja v The Attorney General* Civil Cause Number 50 of 2003 (High Court, Mzuzu District Registry (Unreported)) and *Republic v Maggie Kaunda* Criminal Appeal Number 89 of 2001 (High Court, Mzuzu District Registry (Unreported)).

The relationship between sections 32 and 65 of the Constitution engaged the Court in *Registered Trustees of Public Affairs Committee v The Attorney General*. In the case, counsel for the plaintiff argued, among other points, that section 65 of the Constitution, as amended by Act. Number 8 of 2001, curtailed the freedom of association as provided under section 32 of the Constitution and political rights under section 40 of the Constitution and was therefore unconstitutional and invalid. The Court made two pertinent observations *obiter*. First, the Court reiterated the position in *Fred Nseula (1998)* that one constitutional provision cannot be used to destroy the validity of another constitutional provision.⁸⁷ Hence, section 32 of the Constitution cannot be used to destroy the validity of (the original) section 65 (1) of the Constitution. Any amendment to section 65 (1) of the Constitution, let alone an amendment to any provision of the Constitution, can be challenged, on its own merits, for its constitutionality. Second, the Court agreed that the enjoyment of the freedom of association under section 32 of the Constitution by a member of the National Assembly was subject to section 65 (1) of the Constitution.⁸⁸ Any change in the ‘status’ of the member would require him or her to seek a fresh mandate with the electorate. While the Court did not elaborate on the basis of seeking a fresh mandate, it is recognised in constitutional theory that political authority derives from the people as the repository of ‘constituent power’. Hence, the legitimation of political authority is through a poll in which the electorate participates.⁸⁹ In this

⁸⁷ See at pp. 34 and 42 of the Judgment.

⁸⁸ See at p. 53 of the Judgment.

⁸⁹ See Antonio Negri (1999) *Insurgencies: Constituent Power and the Modern State*. Minneapolis, London: University of Minnesota. Negri contends that ‘constituent power’ is an expression of the popular will; it is the power of the multitude. Hence, democracy is appurtenant to the concept and practice of ‘constituent power’. He contends that ‘constituent power’ is in constant conflict with ‘constituted power’; which is the fixed power of formal constitutions. ‘Constituent power’, in Negri’s thesis, would lie neither with the legislature nor the judiciary as, according to him, the propensity ‘to revolt’ lies with the people themselves.

respect, the Court in *Registered Trustees of Public Affairs Committee v The Attorney General* endorsed section 65 of the Constitution as a valid curtailment of freedom of association of a member of the National Assembly (and his or her constituency) as prescribed by section 32 of the Constitution, in terms of section 44 (2) of the Constitution.

Finally, a provision on ‘crossing the floor’ may be premised on what Professor Ali Mazrui (writing in 1967) has termed the “concept of *composite consent*”.⁹⁰ Professor Mazrui asserts (in the context of political parties) that “[w]hat is consented to after a free inter-party election is not simply which party should rule. The effect of the voting is not merely in determining which party is in a majority in the legislature but also which is in a minority and by what margins of strength the different parties are separated. The balance of forces which emerges after a free election is what enjoys the *composite consent* of the electorate as a whole.” Hence, a provision on ‘crossing the floor’ (like section 65 of the Constitution) guarantees that the *composite consent* of the electorate is respected in the intervening period before the next general elections.

3.2.1.5 Tenure of Office of Members of Parliament

Neither the Constitution nor an Act of Parliament provide a limited term of office of members of Parliament as the Constitution does in respect of the presidency.⁹¹ Members of Parliament have an open term of office. Section 67 of the Constitution merely states that the term of office of members of Parliament shall be five years. The

See also Bruce Ackerman (1991) *We the People: Foundations*. Cambridge, Mass.; London: Harvard University Press; and section 12 (i) of the Constitution.

⁹⁰ Ali Al’Amin Mazrui (1969) “The Tensions of Crossing the Floor in East Africa” in Ali Al’Amin Mazrui, *Violence and Thought: Essays on Social Tensions in Africa*. London: Longman, pp. 122–146, at p.141. The article was originally presented at the Seventh World Congress of the International Political Science Association, Brussels, Belgium, in September, 1967.

⁹¹ Cf. section 83(3) of the Constitution.

provision does not provide a maximum limit of the term of office of members of Parliament. There has been a call for a limited term of office even in respect of members of Parliament.⁹² A system of term limits exists in Mexico in respect of, among other political players, members of Parliament.⁹³ The crux of the argument for limited term of office of members of Parliament is that it will serve as a tool for transparency and accountability.⁹⁴

4. Procedure of the Legislature

4.1 Standing Orders

The National Assembly may generally regulate its own procedure in accordance with its Standing Orders subject to the Constitution.⁹⁵ In fact, the constitutionality of the procedure of the National Assembly may be the subject of judicial review.⁹⁶ The quorum of the National Assembly is formed at the beginning of a sitting by the presence of at least one-half plus one of the members of that Chamber entitled to vote, not including the Speaker or a presiding member.⁹⁷ The issue of ‘quorum’ in the National Assembly has been decided upon in the case of *The Malawi Congress Party, L.J. Chimango and Dr.*

⁹² See the *Consultation Paper*, pp.29–30; the *Issues Paper*, pp. 20–21; and the *Constitutional Conference Summary*, p.12.

⁹³ See A. Peter Mutharika (2006) “Towards a More Manageable Constitution”. Mimeo.

⁹⁴ See the *Consultation Paper*, p.30.

⁹⁵ See section 56 (1) of the Constitution.

⁹⁶ See *The Attorney General v Dr. Mapopa Chipeta* MSCA Civil Appeal Number 33 of 1994 (Malawi Supreme Court of Appeal (Unreported)) and *The Attorney General v Fred Nseula and the Malawi Congress Party* MSCA Civil Appeal Number 18 of 1996 (Malawi Supreme Court of Appeal (Unreported)). The point has been made that, in appropriate cases, the courts must invoke the ‘political question’ doctrine: see *Nixon v United States* 506 U.S. 224 (1993). However, section 10 (1) of the Constitution states that the Constitution itself shall be the “supreme arbiter and ultimate source of authority” in the interpretation of all laws and in the resolution of political disputes. See also Discussion Paper No. 6 which elaborates the role and nature of the Judiciary under the Constitution.

⁹⁷ See the Constitution (Amendment) (No.3) Act, 2001, Act Number 13 of 2001, which reduced the requirement for quorum from “two-thirds” to “one-half plus one”. See also Kamanga (2006) who states that the amendment is intended “to promote good government of Malawi by enabling Parliament to commence its business with a quorum which can be easily formed without compromising its deliberations and decisions.”

H.M. Ntaba v The Attorney General and The Speaker of the National Assembly (otherwise the “*Press Trust*” case).⁹⁸ At the time of the *Press Trust* case, section 50 (1) of the Constitution stated that “[t]he quorum of the National Assembly shall be formed by the presence at the beginning of any sitting of at least two thirds of the members of the National Assembly entitled to vote, not including the Speaker or a presiding officer.”

Standing Orders 26 and 27 provide as follows–

“26. A quorum of the National Assembly or of a Committee of a whole House shall consist of two-thirds of all the members of the Assembly besides the person presiding.

27.- (1) If at any time the business of the Assembly has commenced, or when the Assembly is in Committee and a vote is required to be taken, the attention of Mr. Speaker or the Chairman is called to the absence of a quorum, Mr. Speaker or the Chairman shall count the Assembly or the Committee, as the case may be [...].”

The Supreme Court of Appeal in the *Press Trust* case held that quorum is formed *at the beginning of a sitting*.⁹⁹ The correctness of the interpretation of the Supreme Court relative to the wording of the provision may be queried. However, until the decision in the *Press Trust* case is reversed by a future decision of the Supreme Court, the decision remains the settled interpretation of the provision.

4.2 Convening the National Assembly

The National Assembly is convened by the Speaker in consultation with the President in terms of section 59 of the Constitution. Every meeting of the National

⁹⁸ Civil Cause Number 2074 of 1995 (High Court, Principal Registry (Unreported)); *and also The Attorney General v Malawi Congress Party, L.J. Chimango and Dr H.M. Ntaba* MSCA Civil Appeal Number 22 of 1996 (Malawi Supreme Court of Appeal (Unreported)).

⁹⁹ Justice Mwaungulu, delivering the judgment of the High Court in the *Press Trust* case, held that the requirement of quorum persists throughout a sitting on an interpretation of subsections (1) and (2) of section 50 of the Constitution.

Assembly shall be held at a place in Malawi.¹⁰⁰ The President in consultation with the Speaker may summon, on extraordinary occasions, a meeting of the National Assembly.¹⁰¹ The National Assembly shall hold at least two meetings in a session.¹⁰²

However, section 67(4) of the Constitution allows the President (in his or her own right) to reconvene the National Assembly after its dissolution but before a general election where he or she is “of the opinion that a constitutional crisis or emergency has arisen which requires urgent legislation or consideration by the National Assembly.” The provision states that the reconvention “of the National Assembly is for that purpose alone.” The reconvened National Assembly stands dissolved on the date of the general election.¹⁰³ The Constitution is not clear whether the reconvening of the National Assembly constitutes a sitting (and by extension a meeting and session) as envisaged under section 59 of the Constitution.

In this regard, the Law Commission¹⁰⁴ recommended that in section 59 (1) of the Constitution, the word “meeting” must replace the word “session” wherever, it appears. The recommendation of the Law Commission was passed into law in 2001.¹⁰⁵

4.3 Election, Vacancy and Qualification of the Speaker

The Speaker is elected by a simple majority of the members of the National Assembly at the first sitting of the National Assembly *after every dissolution of the National Assembly*.¹⁰⁶ The members of the National Assembly may elect a deputy Speaker or deputy Speakers at the first sitting of the National Assembly *after a general*

¹⁰⁰ See section 59 (1) of the Constitution.

¹⁰¹ See section 59 (1) (a) of the Constitution.

¹⁰² See section 59 (2) of the Constitution.

¹⁰³ See section 67 (4) of the Constitution.

¹⁰⁴ Malawi Law Commission (1998) *Report on the Technical Review of the Constitution*, p. 267.

¹⁰⁵ See Constitution (Amendment) (No.3) Act, Act Number 13 of 2001; *see also* Kamanga (2006).

¹⁰⁶ See section 53 (1) of the Constitution.

*election.*¹⁰⁷ In light of section 67 (4) of the Constitution, the National Assembly may have to elect a Speaker following its reconvention. The National Assembly may not necessarily elect a deputy Speaker or deputy Speakers.

The election of a Speaker is pertinent as the re-convened National Assembly meets at its first sitting following its dissolution. To the extent that a general election will not have taken place, the election of a deputy Speaker or deputy Speakers does not arise. The moot point however is whether a National Assembly that reconvenes under section 67 (4) of the Constitution reconvenes at a ‘sitting’ of a meeting within a session as provided under section 59 of the Constitution. The meeting of the National Assembly envisaged under section 67 (4) of the Constitution will have been convened by the President without consultation with the Speaker as is ordinarily required under section 59 of the Constitution. This may necessarily be the case as the premise is the existence or occurrence of an emergency the determination of which ought not to be a matter for consultation. Determination of an emergency ought to be an executive function.¹⁰⁸

While section 53(1) of the Constitution specifically provides the mode of the election of the Speaker, section 53(3) of the Constitution (on vacancy in the office of the Speaker) does not provide the mode of filling the vacancy. The proviso to section 53(4) of the Constitution provides the mode of electing an Acting Speaker in the absence of a Speaker or Deputy Speaker. It is pertinent that the Constitution provides the mode of filling a vacancy in the office of the Speaker. Section 52(1) of the Constitution of South Africa, for example, provides that “[a]t the first sitting after its election, *or when*

¹⁰⁷ See section 53(2) of the Constitution.

¹⁰⁸ Cf. section 84(2) of the Constitution of South Africa (on the power of the President “to summon the National Assembly to an extraordinary sitting to conduct special business”).

necessary to fill a vacancy, the National Assembly must elect a Speaker and a Deputy Speaker from among its members.”

The point may be made that election of Speaker is provided under Standing Order 33 of the Standing Orders of the National Assembly. At any rate, the language under section 53 of the Constitution and Standing Order 33 must be aligned as Standing Order 33 states that “[w]henever it is necessary for the Assembly to elect a Speaker, whether after a general election or when a vacancy in the office of the Speaker has occurred in any other way, the procedure for election shall be s provided in this Standing Order.”

In relation to qualification for election to the office of Speaker, it has been proposed that a person ought not to qualify for the office of Speaker of the National Assembly unless that person has served as a member of the National Assembly for at least one term of five years.¹⁰⁹ This is to ensure professionalism and maturity on the part of those aspiring for the office of Speaker.¹¹⁰ While the concerns may be valid, the present position on the election of Speaker is adequately flexible as such the National Assembly need not be constrained in the election of the Speaker say, for example, where there is no member in the National Assembly who has served a prior term in the House.

4.4 Parliamentary Committees

The Constitution provides, in section 56(6), that the National Assembly may establish such committees or joint committees for “scrutiny of legislation and performance of other functions.”

Further, under section 56(7), the Constitution establishes the following committees of the National Assembly: Public Appointments Committee, Budget

¹⁰⁹ See the *Issues Paper*, p.19; and the *Constitutional Conference Summary*, p. 12.

¹¹⁰ Cf. Ackerman’s second pillar on professionalism under his ‘new Separation of Powers’ at p.641ff.

Committee and Legal Affairs Committee. These committees perform functions conferred by the Constitution, an Act of Parliament, resolution or Standing Orders. For example, the Public Appointments Committee is required under the Constitution to confirm the appointment of the Director of Public Prosecutions,¹¹¹ Ambassadors, High Commissioners and other principal diplomatic staff,¹¹² members of the Civil Service Commission;¹¹³ and to appoint an Ombudsman.¹¹⁴

There has been concerted clamour by members of the National Assembly in Malawi for more legislative oversight over the Executive.¹¹⁵ In the context of section 7 (on the separate status, function and duty of the [E]xecutive) and Chapter VIII of the Constitution respectively, the oversight function of the Legislature ought to be ensuring that the policies and legislation initiated by the Executive “embody the wishes of people of Malawi and [...] promote the principles of the Constitution.”¹¹⁶ The oversight function ought to be exercised by the Legislature as a whole Chamber generally unless specifically provided under the Constitution. Nonetheless, committees are necessary for the detailed consideration of Bills after the first ‘reading’ or consideration of public comments or submissions on Bills or other legislative matter.¹¹⁷

4.5 Dissolution of the National Assembly

Section 67(1) of the Constitution provides for the dissolution of the National Assembly. As discussed elsewhere,¹¹⁸ the office of the Speaker (and by extension the

¹¹¹ See section 101(1) of the Constitution.

¹¹² See section 190 of the Constitution.

¹¹³ See section 191(1) of the Constitution.

¹¹⁴ See section 122(1) of the Constitution.

¹¹⁵ See, for example, “Mardef Loans Still on Hold,” *The Nation*, 3rd November, 2005.

¹¹⁶ See section 7 of the Constitution.

¹¹⁷ Cf. M. Chaskalson *et al.* (1996) *Constitutional Law of South Africa*. Kenwyn: Juta Press, p. 3–13.

¹¹⁸ See the discussion under Part 4.4.

Deputy Speakers) is not rendered vacant where there has been a dissolution of the National Assembly.

5. Legislation¹¹⁹

Section 48 (1) of the Constitution provides that “[a]ll legislative powers of the Republic shall be vested in Parliament which shall have powers and responsibilities set out in this Constitution.” Subject to the Constitution, the National Assembly has power to “receive, amend, accept or reject Government Bills and Private Bills”¹²⁰ and to initiate Private Member’s Bills.¹²¹ The Constitution, in section 195, allows Parliament to amend the Constitution. Sections 196 and 197 of the Constitution provide restrictions on amendments to the Constitution.¹²²

Section 8 of the Constitution provides that the Legislature when enacting laws shall reflect in its deliberations the interests of all the people of Malawi and shall further the values [of] the Constitution. The values of the Constitution may be located in section 12 and include supremacy of the Constitution; rule of law; respect of human rights; responsible government through participatory democracy and democratic government; transparency and accountability through periodic elections based on universal and equal suffrage; and respect for international law.¹²³

Section 7 of the Constitution mandates the Executive with the initiation of, among other things, legislation. There are two exceptions to section 7 of the Constitution. First, section 66(1) (a) of the Constitution allows the Legislature to ‘consider’ a Private Bill

¹¹⁹ Discussion Paper No. 7 gives a detailed discussion of types of bills, the nature of constitutions and the scope and procedure of amendments to constitutions.

¹²⁰ See section 66 (1) (a) of the Constitution.

¹²¹ See section 66 (1) (b) of the Constitution.

¹²² See Discussion Paper No. 7.

¹²³ See Msaiwale Chigawa (2006) “Fundamental Values of the Constitution of Malawi”. Mimeo.

brought, by definition, by “an agency not part of Government” but mandated to bring the Bill by an Act of Parliament. Second, section 66(1) (b) of the Constitution allows the Legislature to initiate a Private Member’s Bill. The point may be made that the scheme under the Constitution allows the Legislature to discharge its oversight function over the Executive in terms of section 8 of the Constitution. Further, in light of section 7 and section 66 of the Constitution respectively, it is a moot point whether the exceptions under section 66 of the Constitution can propose legislation of a ‘truly public nature’. Section 7 of the Constitution has delineated that public function to the Executive. The exceptions under section 66 of the Constitution must cater for ‘private matters’ in the narrowest sense of the word possible.¹²⁴

Under the Constitution of South Africa, the national assembly, under section 55(1), has the power “to initiate or pass legislation except money bills.” The Constitution of South Africa envisages three legislative processes designed to deal with constitutional amendments, Bills affecting the (South African) provinces, and other Bills. For instance, the procedure on constitutional amendments requires public comment on the amendment Bill and a supermajority of the national assembly and at least six provincial assemblies to effect the amendment.¹²⁵

In Malawi, the Constitution envisages at least two legislative processes. First, the process provided under section 48(1) as read with section 66 of the Constitution. Second, the process provided under sections 196 and 197 of the Constitution (which predominantly deal with constitutional amendments). Hence, while section 48(1) of the Constitution suggests expansive legislative powers conferred on the Legislature, there are

¹²⁴ See the discussion in Discussion Paper Number 7.

¹²⁵ See generally the discussion in Chaskalson (1996: 3–15 to 3–16); see also sections 73, 74, 75, 76 and 77 of the Constitution of South Africa.

a number of limitations on those powers prescribed by the Constitution itself that shape the character of the Legislature. These limitations may be described as the ‘basic structure’ doctrine limitations, the fundamental rights limitations, limitations of extraterritorial competence, limitations based on separation of powers, and delegation limitations.¹²⁶

5.1 ‘Basic Structure’ doctrine limitations

The Constitution, in sections 195, 196 and 197, deals with the legislative power and mode of amendments to the Constitution. Section 196(1) of the Constitution provides that Parliament can amend the provisions in the Schedule to the Constitution by referendum only. Section 196(2) of the Constitution provides that the requirement for a referendum may be waived where the amendment the Speaker certifies that the proposed amendment does not “affect the substance or effect” of the Constitution and the amendment Bill is supported by a supermajority. Section 197 of the Constitution provides that amendment of provisions that are not contained in the Schedule to the Constitution must be supported by a supermajority. In this respect, sections 196 and 197 of the Constitution raise the question whether the Constitution entrenches the ‘basic structure’ doctrine.

The ‘basic structure’ doctrine originates from India. The Supreme Court of India has held that there are certain implied substantive limitations on the power of parliament to amend the constitution. Article 368 of the Constitution of India provides for the general power of amendment conferred on the Parliament of India. The Supreme Court

¹²⁶ Cf. Chaskalson (1996) who uses this classification on the limitation on legislative powers.

of India “has read an implied limitation on the power of amendment”.¹²⁷ *Kesavananda Bharati v State of Kerala*¹²⁸ is authority under Indian constitutional law that the legislative power of amendment does not extend to any amendment which alters the basic structure of the Constitution.¹²⁹ The Court held that the legislature could not amend “the constitution’s basic or essential structure, even through a formal constitutional amendment process, because this would amount not just to its amendment but to its replacement with a new document.”

The delineation of the ‘basic structure’ has not been a futile exercise but has definitely been a daunting one. Baxi has stated (in the context of *Kesavananda Bharati*) that the doctrine encompasses limitations on the repeal of the Constitution itself; expansion of the amending power; attempts to prohibit judicial review; adjudication of disputes by the legislature; fundamental rights; and the “democratic nature” of a constitution.¹³⁰ In fact, the Court in *Kesavananda Bharati* held that the ‘basic structure’ is to be defined by the Court itself.¹³¹ In this respect, the character of the ‘basic structure’ can be problematic in the face of a ‘runaway court’.¹³² The doctrine has been applied sparingly and has tended to affect the rule of law and the separation of powers between

¹²⁷ See the discussion in Chaskalson (1996:3–23). The German Basic Law, under Article 79(3), specifically refers to the ‘basic structure’ doctrine. The doctrine has been rejected in Sri Lanka and Singapore: see *In re Thirteenth Amendment to the Constitution and Provincial Council Bill* [1990] LRC (Const.) 1 at p.13g–14g and *Teo Soh Lung v Ministry of Home Affairs et al* [1990] LRC (Const.) 490 respectively (cited in Chaskalson (1996: 3–24)).

¹²⁸ AIR 1973 S.C. 1461. The Court also used the terms ‘basic features’; ‘fundamental features’; ‘essential features, basic elements and fundamental principles’: see the discussion in David Morgan (1981) “The Indian ‘Essential Features’ Case” 30 *International and Comparative Law Quarterly* 307–337, p.308.

¹²⁹ See also *Golak Nath v State of Punjab* AIR 1967 S.C. 1643; *Indira Gandhi v Raj Narain* AIR 1975 S.C. 2299; *Minerva Mills v Union of India* 1980 SC 1789; and *S.P. Gupta v President of India* AIR 1982 S.C. 149.

¹³⁰ Baxi (1999:192).

¹³¹ See also the discussion in John Hatchard *et al* (2004) *Comparative Constitutionalism and Good Governance in the Commonwealth*. Cambridge: Cambridge University Press, p.57.

¹³² See Baxi (1999); and also Chikosa Silungwe (2005) “Stuck in a constitutional moment?: A discussion of the proposed amendment of the constitutional provision on tenure of the presidency in Malawi and Zambia”. Mimeo.

the legislature and the judiciary.¹³³ Baxi has concluded that “in effect [the ‘basic structure’ principle] means not that Parliament may not amend each and every provision of the Constitution but only that amendments require judicial endorsement.”¹³⁴ In the final analysis, “[t]he scope of the basic structure limitations on the amending power and beyond ...remains indeterminate. Its discursive expansion to deployment of executive power under the Constitution will remain open to informed contention.”¹³⁵

In Malawi, the ‘basic structure’ doctrine has not been actively developed by the courts in the twelve years or so of liberal democratic constitutionalism. This is the case as there have not been many challenges of amendments to the Constitution before the courts. The notable challenge of an amendment to the Constitution that has come before the courts remains the case of *Registered Trustees of Public Affairs Committee v The Attorney General*. Hence, to the extent that the Court held that the amendment to section 65 (1) of the Constitution curtailed the enjoyment of fundamental rights under sections 32 and 40 of the Constitution, the Court unwittingly upheld the ‘basic structure’ doctrine.

On a close reading of sections 196 and 197 of the Constitution, the Constitution itself incipiently inculcates the ‘basic structure’ doctrine. The problem with section 196(2) of the Constitution is that Parliament itself shall determine whether an amendment affects the “substance or the effect of the Constitution”. In the absence of the concept of abstract judicial review,¹³⁶ the status quo may be self-serving and degenerate into abuse. However, the overriding power of judicial review by the Judiciary may militate against abuse.

¹³³ Chaskalson (1996: 3–24).

¹³⁴ Baxi (1999: 175).

¹³⁵ Baxi (1999:192).

¹³⁶ The concept allows judicial review of Bills by the courts for their constitutionality: *see*, for example, sections 79 and 84 of the Constitution of South Africa.

5.2 The Fundamental Rights limitations

Parliament's legislative authority does not extend to limitations of fundamental rights except as allowed by section 44 of the Constitution. Parliament is under a duty to abstain from violating fundamental rights enshrined under the Constitution.¹³⁷ The emerging trend in comparable foreign constitutional orders is that Parliament is also obliged to fulfil certain rights by positive action.¹³⁸ The Courts in Malawi have also recognized this obligation on the part of Parliament. Justice Chipeta said, in *Registered Trustees of Public Affairs Committee v The Attorney General*, that Parliament is “duty-bound to avoid either abrogating or abridging [...] fundamental rights and freedoms as conferred by Chapter IV of the Constitution.”¹³⁹

5.3 Limitations of Extraterritorial Competence

Guido Rossi points out that “[t]he principle of strict territoriality, which underlies classical international law and has develop[ed] on two distinct planes – the *jurisdiction to prescribe* and the *jurisdiction to enforce*”– entails that the general rule has been that a State cannot legislate beyond its territory. However, Rossi further points out that “even in classical international law, the principle of a possible legitimization of the exercise of the power of jurisdiction beyond the State's frontiers was embraced by the important judgment of 7th September, 1927 of the Permanent Court of Justice, in the famous *Lotus* case (between France and Turkey).”¹⁴⁰

The position today is that, in appropriate cases, especially criminal and attendant laws, Parliament may legislate beyond the territory. Clear instances where Parliament has

¹³⁷ See the discussion in Chaskalson (1996: 3–2).

¹³⁸ See C Scott and P Macklem (1992) “*Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution*” 141 *University of Pennsylvania Law Review* 1, 73–77. See also sections 8 and 10 (2) of the Constitution.

¹³⁹ See at p. 61 of the Judgment.

¹⁴⁰ See Guido Rossi (undated) “How Much Longer Can We Do Without a Supranational Authority for Financial Transactions?” at www.undoc.org/palermo/rossi/rtf (visited on 26th June, 2006).

legislated beyond the territory include sections 5 and 6 of the Penal Code¹⁴¹ and section 53 of the Corrupt Practices Act¹⁴² where the law applies in relation to offences committed outside Malawi.

5.3 Separation of powers limitations

The debate around the initiation of Bills discussed above invokes the limitation of legislative authority by virtue of the doctrine of separation of powers. The related point is the quest for greater oversight powers on the part of parliamentary committees as discussed under Part 4.4.

5.4 Delegations limitations

Section 58(1) of the Constitution authorizes Parliament to delegate to the Executive or Judiciary “the power to make subsidiary legislation within the specification and for purposes laid out in that Act.” Section 58(2) of the Constitution prohibits Parliament to delegate legislative powers that “would substantially and significantly affect the fundamental rights and freedoms recognized by the Constitution.”

Even though the Executive or Judiciary can make subsidiary legislation by authority of section 58(1) of the Constitution, further delegation of the power is prohibited by section 36 of the General Interpretation Act.¹⁴³ The principle here is that law-making must not be overly delegated to the executive or indeed the judiciary.¹⁴⁴

¹⁴¹ Cap. 7:01.

¹⁴² Cap. 7:04.

¹⁴³ Cap. 1:01.

¹⁴⁴ Chaskalson (1996:3–4) observes that the doctrine developed in the United States of America where it was used to frustrate the New Deal. See also *Panama Refining Co v Ryan* 293 U.S. 388; *Schechter Poultry Corp v United States* 295 U.S. 495; and *Lichter v United States* 334 U.S. 742.

6. The Legislature as an ‘Arbiter’

6.1 Impeachment of the Presidency

Section 86 of the Constitution provides for the removal of the presidency through impeachment. The provision states that–

- (a) the President or Vice President shall be removed from office through indictment and conviction by impeachment;¹⁴⁵
- (b) the procedure for impeachment shall be laid down by Standing Orders of Parliament in full accord with principles of natural justice;¹⁴⁶
- (c) the indictment and conviction by impeachment shall *only* be on grounds¹⁴⁷ of–
 - (i) serious violation of the Constitution, or
 - (ii) serious breach of the laws of the Republic;
- (d) the serious violation or serious breach must occur or come to light during the term of office of the presidency;¹⁴⁸
- (e) an indictment and conviction shall require an affirmation of a super majority of the National Assembly;¹⁴⁹
- (f) a conviction by impeachment disqualifies the convicted President from future office.¹⁵⁰

¹⁴⁵ See section 86 (1) of the Constitution.

¹⁴⁶ See section 86 (2) of the Constitution. The Law Commission has observed that “[t]he requirement for compliance with rules of natural justice appears in several other parts of the Constitution, but in all those other parts, the requirement does not carry the element of being in *full* accord as in the case of Standing Orders for impeachment.”: Malawi Law Commission (2005) *Standing Orders of Parliament on Impeachment of the President and Vice President: Preliminary Findings*. Mimeo., p.2.

¹⁴⁷ See section 86 (2) (a) of the Constitution.

¹⁴⁸ See section 86 (2) (a) of the Constitution.

¹⁴⁹ See section 86 (2) (b) and (c) of the Constitution.

¹⁵⁰ See section 86 (2) (d) of the Constitution. The moot point here is whether indictment and conviction by impeachment is outside the concept of spent convictions which is incipiently allowed under section 51(2)

Under the section 86 (2) (c) of the provisional Constitution; the Speaker was to preside over an indictment by impeachment and the Chief Justice over the trial on impeachment. The provisional Constitution addressed the concerns that may arise under the principles of natural justice whereby different persons were the “prosecutor”, the “judge” and the “jury”.¹⁵¹

It is noteworthy that the provision on impeachment of the presidency stipulates that the impeachment shall follow the *Standing Orders of Parliament*.¹⁵² Under sections 50 and 56 of the provisional Constitution, there was reference to *Standing Orders of the respective chambers* of Parliament. Hence, section 86 of the Constitution, by reference to Standing Orders of Parliament, implies that the Senate was to participate in the impeachment of the presidency as may have been appropriately provided for under the Standing Orders of *Parliament*. In fact, section 86 (2) (d) of the provisional Constitution provided that the conviction of the presidency by impeachment required the affirmative vote of two-thirds of the members of *both Chambers*. Neither Parliament nor the National Assembly had developed Standing Orders on the procedure for the impeachment of the President until 2005 when the National Assembly adopted the procedure for the impeachment of the presidency under Standing Order 84 on 20th October, 2005.¹⁵³

(c) of the Constitution (as one of the disqualifiers of persons contesting elections for members of the National Assembly) and section 80(2) (c) of the Constitution (as one of the disqualifiers of persons contesting elections for the presidency).

¹⁵¹ See Malawi Law Commission (2005) *Standing Orders of Parliament on Impeachment of the President and Vice President: Preliminary Findings*, p.2.

¹⁵² See section 86 (2) of the Constitution.

¹⁵³ The adoption is now the subject of litigation: see *In the matter of a Presidential Reference of a Dispute of a Constitutional Nature under section 89 (1) (h) of the Constitution and In the Matter of Section 86 (1) of the Constitution and In the Matter of Impeachment Procedures under Standing Order 84 adopted by the National Assembly on 20th October, 2005* (Constitutional Cause Number 13 of 2005, High Court, Principal

Notwithstanding the *Presidential Referral on Impeachment Procedures* matter, the question whether procedure on impeachment of the presidency must be contained in the Constitution or under the Standing Orders of Parliament continues to generate public attention and opinion.¹⁵⁴ The Law Commission has also made preliminary findings of the matter.¹⁵⁵ This discussion on the procedure on impeachment of the presidency draws heavily on those findings.

The Constitution, in section 86 (2), states that the procedure for impeachment shall be laid down by Standing Orders of Parliament so long as those Orders “are in full accord with principles of natural justice”. An analysis of section 86 of the Constitution has revealed the inherent problems of natural justice that emerge in the absence of the Senate in contrast to the position obtaining under the provisional Constitution. In this respect, the Law Commission has concluded that procedure on impeachment needs to be prescribed in the Constitution itself.¹⁵⁶ It has been asserted that “[t]his is desirable and is recommended for the reason that it avoids the risk of such important procedures in constitutional governance being subjected to amendments or revisions without the higher consensus in Parliament required for provisions of constitutional significance. It would also avoid the risks of court challenges that substantive matters affecting the Constitution are being legislated for under subsidiary orders, since some of the matters requiring to be provided for may go beyond procedure.”¹⁵⁷

Registry) (hereafter the “*Presidential Referral an Impeachment Procedures*” matter). The case is yet to be decided by the High Court.

¹⁵⁴ See the *Consultation Paper*, pp. 45–46; the *Constitutional Conference Summary*, p. 19.

¹⁵⁵ See Malawi Law Commission (2005) *Standing Orders of Parliament on Impeachment of the President and Vice President: Preliminary Findings*.

¹⁵⁶ *ibid.*, p.4.

¹⁵⁷ *ibid.*

The Law Commission arrived at its conclusion¹⁵⁸ having looked at precedents from England and Wales,¹⁵⁹ Ghana,¹⁶⁰ Republic of Ireland,¹⁶¹ Nigeria,¹⁶² Tanzania,¹⁶³ Uganda,¹⁶⁴ United States of America¹⁶⁵ and Zambia.¹⁶⁶ A common thread in all the precedents that were examined is that procedure on impeachment is prescribed in the Constitution or principal Act of Parliament; impeachable violations of the Constitution are prescribed; and the rules of nature justice are fully observed and respected.¹⁶⁷

6.2 The Senate

The provisional Constitution of 1994 provided for the Senate (in sections 68 to 72). The Senate had a ‘legislative’ role.¹⁶⁸ The functions of the Senate were comprehensive including the power to initiate legislation, to vote motions, to confirm or remit Bills passed by the National Assembly. In this respect, Senate had substantive ‘legislative’ powers. The Senate was abolished in 2001.¹⁶⁹ The abolition of the Senate was in breach of section 45 (8) of the Constitution which provides that “[u]nder no circumstances 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.” The abolition of the Senate was necessitated by purported ‘financial prudence’.¹⁷⁰

¹⁵⁸ *ibid.*, p.3.

¹⁵⁹ See Malawi Law Commission (2005:23–24).

¹⁶⁰ See Article 69 of the Constitution of Ghana.

¹⁶¹ See Article 12(10) of the Constitution of Ireland.

¹⁶² See section 143 of the Federal Constitution of Nigeria.

¹⁶³ See Article 46A of the Constitution of Tanzania.

¹⁶⁴ See Article 107 of the Constitution of Uganda.

¹⁶⁵ See Malawi Law Commission (2005:18–22).

¹⁶⁶ See Article 37 of the Constitution of Zambia.

¹⁶⁷ See Malawi Law Commission (2005:4–5).

¹⁶⁸ See section 70 of the provisional Constitution (repealed).

¹⁶⁹ See Constitution (Amendment) Act, 2000, Act Number 11 of 1999.

¹⁷⁰ See the Statement of Honourable Peter Hapana Fachi, Minister of Justice and Attorney General, *Hansard*, Sixth Meeting, Thirty Fourth Session, Thursday, 11th January, 2001, pp.14–15 (*cited in the Consultation Paper*, p.24). The matter remains open for challenge before the courts.

Suffice it to say that the Constitution has made no provision on mode of the dissolution of any of its organs.

The composition of the Senate¹⁷¹ was as follows–

- (a) a Senator elected by a District Council;
- (b) a Senator being a Chief, elected by a caucus of Chiefs in the District;
- (c) thirty–two Senators elected by two-thirds of sitting members of the Senate on the basis of nominations by a Nomination Committee and representing the following sectors–
 - (i) women’s interests;
 - (ii) the disabled;
 - (iii) health;
 - (iv) education;
 - (v) farming and business;
 - (vi) trade unions;
 - (vii) persons who have made outstanding contribution service to the public or to the social, cultural or technological development of Malawi; and
 - (viii) religion.

The Nomination Committee comprised the Speaker of the National Assembly, the Ombudsman and Senators. The term of office of the members of the Senate was three

¹⁷¹ See section 68(1) of the provisional Constitution (repealed).

years¹⁷². There is a strong voice for the re-introduction of the Senate to promote accountability, transparency and diversity in the legislative process.¹⁷³

The existence of a Senate and its composition is a political rather than a legal exercise.¹⁷⁴ A comparative analysis of polities that embody bicameralism through constitutions may not immediately reveal the underlying political considerations that justify a bicameral legislature. Having stated thus, a fleeting analysis of other jurisdictions within the SADC region reveals the following: First, the parliament of South Africa has two Houses; namely, the National Assembly and the National Council of Provinces. While the National Council of Provinces has a legislative role, its main purpose is to “provide a national forum for consideration of issues affecting the provinces.”¹⁷⁵ Further, the National Council of Provinces is not “an organ of responsible government” as the national executive is accountable only to the National Assembly.¹⁷⁶ Finally, the National Council of Provinces “comprises nine provincial delegations of ten members” each who are selected by the (South African) “provincial legislatures on the basis of party political proportional representation.”¹⁷⁷ In the legislative process, the National Council of Provinces has a veto power in respect of constitutional amendments that affect the founding provisions, the bill of rights, the Council itself, and other

¹⁷² See section 72 of the provisional Constitution (repealed). The tenure of the National Assembly is five years as provided under section 67 (1) of the Constitution.

¹⁷³ See the *Consultation Paper*, pp. 24–25.

¹⁷⁴ The distinction of the ‘political’ from the ‘legal’ can be justified under a positivist approach to ‘law’. Critical legal theorists have consistently ‘trashed’ the distinction of politics from ‘law’ (or ‘law’ from politics) as a myth: See, for example, Grigg–Spall, Ian and Paddy Ireland (eds.) (1992) *Critical Lawyers’ Handbook: Volume 1*. London: Pluto.

¹⁷⁵ See section 42(4) of the Constitution of South Africa. See also Chaskalson (1996:3–13).

¹⁷⁶ See section 55(2) of the Constitution of South Africa. See also Chaskalson (1996: 3–13).

¹⁷⁷ See sections 60(1), 61(1) as read with Part B of Schedule 3 of the Constitution of South Africa. See also Chaskalson (1996: 3–13 to 3–14).

provincial matters. Such amendments must be passed with the support of six out of the nine provinces.¹⁷⁸

The Constitution of Botswana provides for a House of Chiefs.¹⁷⁹ Section 85(5) of the Constitution of Botswana provides that “[t]he House of Chiefs shall be entitled to discuss any matter within the executive or legislative authority of Botswana of which it considers it is desirable to take cognizance in the interests of the tribes and tribal organizations it represents and to make representations thereon to the President, or to send messages thereon to the National Assembly.” The House is composed of eight ex-officio members; four elected members; and three specially elected members.¹⁸⁰ The ex-officio members are persons holding the office of chief among the eight tribes of the people of Botswana.¹⁸¹ The elected members are “persons for the time being performing the functions of the office of Sub-Chief in the Chobe, North East, Ghanzi and Kgalagadi districts, respectively.”¹⁸² The specially elected members are elected by the eight ex-officio and four elected members as long as the persons that are specially elected were not actively involved in politics in the five year period prior to their election.¹⁸³ The House plays a critical legislative role in relation to constitutional amendments and other general statutory amendments¹⁸⁴ that affect “the designation, recognition, removal of powers of Chiefs, Sub-Chiefs or Headmen; the organization, powers or administration of

¹⁷⁸ See section 74 of the Constitution of South Africa.

¹⁷⁹ See Part III of the Constitution of Botswana.

¹⁸⁰ See section 77(2) of the Constitution of Botswana.

¹⁸¹ See section 78 of the Constitution of Botswana.

¹⁸² See section 79(1) of the Constitution of the Constitution of Botswana.

¹⁸³ See section 79(2) of the Constitution of Botswana.

¹⁸⁴ See generally section 88 of the Constitution of Botswana.

customary courts; customary law, or the ascertainment or recording of customary law; or tribal organization or tribal property.”¹⁸⁵

The Constitution of Lesotho provides that Parliament shall consist of the King, a Senate and a National Assembly.¹⁸⁶ The Senate consists of “the twenty-two Principal Chiefs and eleven other Senators nominated in that behalf by the King acting in accordance with the advice of the Council of State [...]”¹⁸⁷ The Senate has a ‘legislative’ role and in this respect has the power to consider bills before they are enacted into law.¹⁸⁸

The Constitution of Swaziland provides, in section 95, for a Senate comprising thirty-one senators. Ten senators are elected by the House of Assembly at their first meeting. The Constitution further provides that half of those ten senators must be women.¹⁸⁹ Twenty senators are appointed by the King, eight of whom must be women.¹⁹⁰ The Senate has general legislative powers in respect of ‘ordinary’ bills including appropriation or money bills or what has been termed as urgent bills.¹⁹¹

The Constitutions of Zambia, Namibia and Zimbabwe do not provide for a bicameral legislature as such but allow ‘nominated’ membership to the respective parliaments. Section 63(1) of the Constitution of Zambia provides that there shall be eight nominated members of parliament. Under section 68 of the Constitution of Zambia, the President has power to nominate a person as a member of parliament to enhance the

¹⁸⁵ See section 88(2) of the Constitution of Botswana.

¹⁸⁶ See section 54 of the Constitution of Lesotho.

¹⁸⁷ See section 55 of the Constitution of Lesotho.

¹⁸⁸ See section 78 of the Constitution of Lesotho.

¹⁸⁹ See section 95(2) of the Constitution of Swaziland.

¹⁹⁰ See section 95(3) of the Constitution of Swaziland.

¹⁹¹ See sections 108, 111, 113, 114 and 115 of the Constitution of Swaziland.

representation of “special interests or skills”¹⁹² as long as the nominated person did not stand in the immediate preceding election or by-election.¹⁹³ The Constitution of Namibia contains a similar provision. Section 46(1) (b) of the Constitution of Namibia provides that the President may “appoint not more than six (6) persons [...] by virtue of their special expertise, status, skill or experience: provided that such members shall have no [sic] [vote] in the National Assembly, and shall not be taken into account for the purpose of determining any specific majorities that are required under th[e] Constitution or any other law.”

Section 38 of the Constitution of Zimbabwe provides that the composition of parliament shall be “one hundred and fifty members qualified in accordance with Schedule 3 for election or appointment to Parliament, of whom (a) one hundred and twenty shall be elected by voters registered on the common roll for one hundred and twenty common roll constituencies; (b) eight shall be Provincial Governors, appointed by the President as members of Parliament ex-officio; (c) ten shall be chiefs elected in accordance with the Electoral Law; and (d) twelve shall be appointed by the President.”

In the final analysis, while the existence (or non-existence) of a senate is a political exercise, there is need to carefully weigh the following considerations: availability of financial resources in a national economy to absorb the cost; mechanisms to curb duplication and hence promote efficiency; and the need for greater oversight

¹⁹² See section 68(1) of the Constitution of Zambia.

¹⁹³ See section 68(3) of the Constitution of Zambia.

within a legislature.¹⁹⁴ Okuwa justifies bicameralism on the basis of diversity in a polity in terms of ethnicity and political history.¹⁹⁵

7. Conclusion

The history of Malawi has tempered the character of the Legislature under the Constitution. While the constitutional order before 1994 was based on parliamentary (if not executive) supremacy, the caprice and whim under that order meant that the legitimation of the new polity was to be reposed in the Constitution itself under the concept of constitutional supremacy. Hence, in light of that history, the Legislature is no longer sovereign. The character, authority and legality of the Legislature are derived from the Constitution itself.

Second, Okoth–Ogendo rightly asserts that constitutions should be understood in the context of the process of constitution–making. The process is an “eminently political act” involved with the “creation of distribution, exercise, legitimational effects and reproduction of *power*.”¹⁹⁶ Gordon¹⁹⁷ also emphasizes the need for constitutions to be ‘home–grown’ for their viability and endurance. Hence, the safeguards against parliamentary dictatorships must be equally applied against the emergence of a ‘bulldog’ executive. A constitution–making process must guard against the re–emergence of ‘patrimonialism’ or ‘neopatrimonialism’, where upon independence, in most African states, “despite formal political structures, personalized power was exercised as an

¹⁹⁴ See, for example, Bankole Okuwa (2001) “Retaining a Bicameral Legislature for Nigeria” http://www.nigerdeltacongress.com/rarticles/retaining_a_bicameral_legislatur.htm (visited on 26th August, 2006). See also Ackerman at footnote 21.

¹⁹⁵ *ibid.*

¹⁹⁶ H.W.O. Okoth–Ogendo (1991) “Constitutions without Constitutionalism: Reflections on an African Political Paradox” in Issa Shivji (ed.), *State and Constitutionalism in Africa: An African Debate on Democracy*. Harare: SAPER, p.5.

¹⁹⁷ Ruth Gordon (1999:533).

informal system of patronage” and to which the legal order was subordinate.¹⁹⁸ The folly of dictatorship in postcolonial Africa lay in the fact that the executive set out the parameters of the *ethos* instead of the *ethos* setting out the parameters of the exercise of executive power.¹⁹⁹

Finally, the challenge for a ‘south’ constitutional order like Malawi lies in the trade-offs of power among the executive, legislature and judiciary under a concept of separation of powers such as Ackerman’s ‘new Separation of Powers’.

¹⁹⁸ See John Hatchard, *supra*, pp.310–311.

¹⁹⁹ See Chikosa Silungwe (2005) “*Chavismo* and the Constitution of Venezuela of 1999”.Mimeo.

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