



MALAWI LAW COMMISSION

REVIEW OF THE MALAWI CONSTITUTION

DISCUSSION PAPER NO. 3

**ELECTORAL SYSTEMS AND MANAGEMENT OF
ELECTIONS [MALAWI]**

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EXECUTIVE SUMMARY

This Paper is on Electoral Systems and Management of Elections. It has been prepared as a working document for the special Law Commission on the review of the Malawi Constitution.

The paper starts with a brief introduction capturing the problem statement. It goes on to discuss various electoral systems, highlighting the strengths and weaknesses of each electoral system. Management of election and election of Senators has also been discussed. It should be observed that the discussions are in relation to the submissions received by the Malawi Law Commission, as such the author has seen it unnecessary to discuss all electoral systems available on the planet¹. The discussion is only on those systems that might work in Malawi as per the submissions received.

Although the paper highlights some options for discussion, the reader should not regard the options as conclusive. The intention is to open up and not to limit, parameters of the discussions.

The paper was prepared by Mr. Allison Mbang'ombe, Deputy Chief Law Reform Officer, Malawi Law Commission.

¹ Thus systems like Block Voting, etc, have not been discussed.

CHAPTER I

1. INTRODUCTION

Elections are the defining moment in any democracy as they perform a fundamental task of conferring legitimacy to elected governments.

Strictly defined, electoral systems are the mechanisms by which preferences of citizens are translated into seats in representative institutions². As such, their impact on the whole range of elements that make up the political character of a society is quite considerable. The behaviour of political parties, governments, or candidates for elected office will, for example, in large measure be conditioned by the shape of an electoral system.

More importantly, the way in which an electoral system translates votes into seats may influence the degree of public support for the democratic system itself. If, for example, citizens do not perceive that their preferences are adequately reflected in the legislature following an election, their support for the system in general is likely to decline³. Turnout during election will drop, respect for politicians and elected representatives will not be seen as fully legitimate. The subject of electoral systems is, or ought, therefore to be of central interest to anyone concerned with the operation of democratic systems.

It is therefore not surprising that the debate on electoral system has become central during the constitutional review. The submissions received on electoral systems during preliminary consultations with respect to parliamentary elections are two fold.

² Allan Cairns, The electoral system and the party system in Canada, 1921- 1965, Canada Journal of Political Science Vol. 1 March 1968

³ For example P.R. System was used as a conflict resolution strategy in Angola and Mozambique (PANA press Johannesburg 03/09/03)

There is a view that upholds the retention of the current system. The main reason for the position is that the current system is easy and cheap to administer and has worked well for Malawi in the past.⁴

The other school of thought is that Malawi should adopt the proportional representation system⁵. This group argues that this system is the best mainly because as the system is, no votes are wasted as each vote is taken into account in determining the percentage of a national vote scored by each party. It is further argued that this system is more democratic and more representative as it gives small parties and vulnerable groups an opportunity to be represented in Parliament.

On presidential elections, some submissions have suggested that the President should be elected by absolute majority of the total votes cast. Implicitly, the argument suggests a second ballot where this level of majority is not achieved at first ballot or alternative (preferential) voting in order to achieve this absolute majority. It is argued that although this seems expensive, it is a necessary evil as it will ensure that the President was voted for by the majority of Malawians. The other suggestion is that Malawi should move to parliamentary system of government where the party with the highest number of seats in parliament elects a President. In their argument, they go on to say that if a President is elected by the party with the highest number of seats in Parliament, the President would be assured of support in Parliament and he or she would be nationally acceptable in the eyes of Malawians.

There are however some people that hold a middle position. Their submission is that the current position of first past the post for presidential election be maintained. However, to ensure legitimacy, a winning President must

⁴ Malawi uses the system of first past the post. We will have a detailed discussion later in the Paper.

⁵ Again a detailed discussion on this will come later in the Paper

exude national acceptance by winning a certain percentage of votes in all the regions or in a majority or a prescribed number of districts.⁶

Other sectors seem contented with the current position and they do not see why a system that has proved effective in placing a President in office should be changed.

It is in view of these submissions that this paper is written to guide members of the special Law Commission in coming up with recommendations on the type of electoral system Malawi may adopt. The Paper therefore presents an overview of various types of electoral systems; their strengths and weakness; and also posts options for discussion. It also gives a brief discussion of the current system to provide insight into the current law on election. Although not specifically mentioned in the submissions on elections, the Paper also discusses the issue of electing senators, more so because, first, several submissions have been received agitating for the return of the Senate and, second, members of the Senate ought to represent people and as such the system of electing them should be clear and democratic if the Senate is indeed reinstated. Finally, management of elections has also been discussed. This is in relation to the composition of the Malawi Electoral Commission, the holding of presidential and parliamentary elections simultaneously with local government elections and electoral dispute resolution.

⁶ Although not expressly stated on this submission, this also seems to suggest a second ballot where this percentage is not achieved at first ballot.

CHAPTER II

2.0 ELECTORAL SYSTEMS: AN OVERVIEW

Electoral systems currently in use in representative democracies can be divided into two basic kinds:

- (a) Majoritarian systems; and
- (b) Proportional representation systems.⁷

2.1 *Majoritarian Systems*

In majoritarian systems, winning candidates are those having attracted the most votes in a particular election. Majoritarian systems differ according to the kinds of majorities that winners must achieve. Basically, there are two kinds of majorities: absolute and simple.

2.1.1 *Absolute Majority*

The system seeks to ensure that the winning candidate has the support of an absolute majority (50+) of the voters in his or her area. There are essentially two ways of achieving this outcome.

First, through alternative voting, where voters are required to rank their preferences on their ballots. Voters write number 1 beside their first choice candidate, 2 beside the second and so on. If, when the ballots are tallied, no candidate gets an absolute majority after counting the first preferences, the candidate with the least votes is eliminated and his or her ballots are

⁷ Hanna Fenichel Pitkin, *The concept of Representation*, University of California Press, 1967

redistributed according to the second choice. This process continues until a winner emerges with more than half of the total votes.⁸

AN ILLUSTRATION OF ALTERNATIVE VOTING

Assume there are 4 candidates fighting for one seat in Constituency A. And assume a candidate needs 601 votes to achieve absolute majority of 50+1. The voting will then be as follows-

First Count:	Candidate A	-	400 votes
(First preferences only)	Candidate B	-	300 votes
	Candidate C	-	300 votes
	Candidate D	-	200 votes

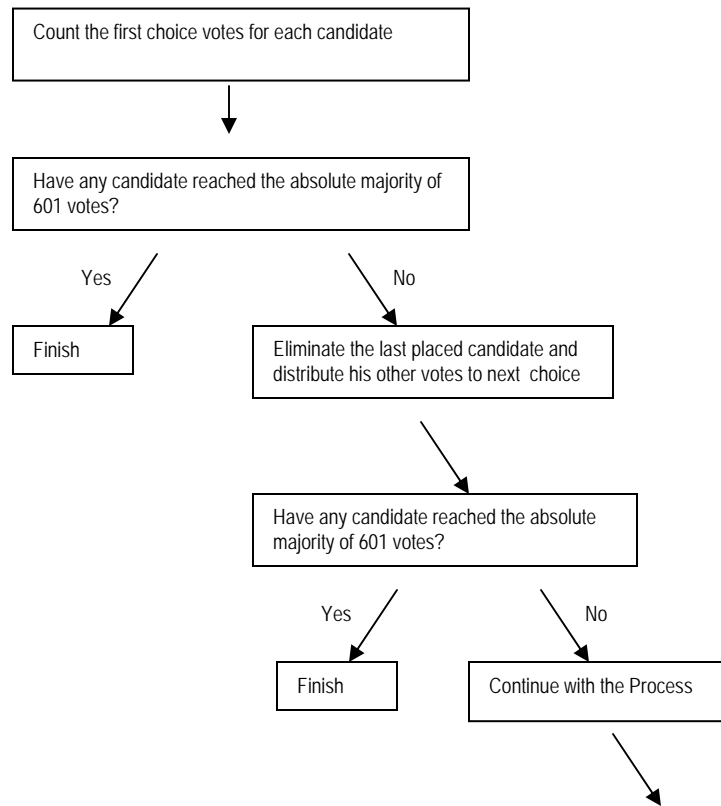
Second Count: Eliminate D from the race. But out of the 200 voters that voted for D as their first choice, 100 voted for A as their second choice, 75 voters voted for C as their second choice and 25 voted for B as their second choice. A then will have 500 votes (400 + 100 from D), B will have 325 votes (300 + 25 from D) and C will have 375 votes (300 + 75 from D).

Third Count: Eliminate B from the race. But out of the 300 voters that voted for B as their first choice, 250 voted for C as their second choice and only 50 voted for A as their second choice. A then will have 550 votes (500 from the second + 50 from B, C will have 625 votes (375 from the second count + 250 from B)

C will therefore be declared a winning candidate after achieving an absolute majority of 625 votes.

⁸Wikipedia encyclopedia www.wikipedia.org. Alternative vote system has been used for elections to the Australian House of Representative since 1918. This kind of voting is sometimes categorized as P.R system because by transferring votes, minority choices are taken care of.

Diagram



Second, absolute majority is achieved through Two-Ballot System. Under this system, balloting may take place in two stages. During the first stage, voters have a choice among several candidates, only one of whom they may vote for. If nobody manages to get an absolute majority from this first round voting, a second ballot is held between the two candidates with the best showing⁹.

2.1.2 Simple Majority

Commonly known as first past the post, simple majority systems are commonly found in countries that have inherited elements of the British parliamentary system. Under the system, a winner need only attract the largest number of votes cast¹⁰.

⁹ In most cases, where more than two candidates appear on the second ballot, a simple plurality determines the winner.

¹⁰ The system is used in Zambia, Zimbabwe and several other African countries

2.2 *Proportional Representation*

The second major category of electoral system is known as Proportional Representation [or PR]. Proportional representation systems are specifically designed to allocate seats in proportion to votes, in the hope that assemblies or governments will accurately reflect the present preferences of the electorate.¹¹

The basic rationale underlying the system is that all voters deserve representation and that majority rule is not necessarily the best.¹² In other words, the right to fair representation entails that all political groups in society deserve to be represented in representative institutions in proportion to their strength in the electorate.¹³

That, in a nutshell, is how a proportional representation system works. But, although proportional representation systems have the same goals of ensuring that all voters receive some representation and that all groups are represented fairly, various systems do have different ways of achieving those objectives. Therefore, it is worthwhile to see how different kinds of proportional representation work in practice.

2.2.1 *Party List Voting*

Party list systems are by far the most common form of proportional representation¹⁴. As the name suggests, each party puts up a list of candidates equal to the number of seats in Parliament¹⁵. On the ballot, voters indicate their

¹¹ PR systems are now the most frequently used electoral system in western democracies – Thomas T. Mackie and Richard Rise, *The International Alliance of Electoral History*. 3rd edition, Macmillan, London, 1991, p. 503

¹² See also Bishop Tengtenga *Towards a Community of Character: Constitutionalism in Malawi*. A paper presented at the National Constitutional Conference 2006, Malawi

¹³ Independent candidates may also run and they are listed separately on the ballot as if they were their own party. However, since it is a percentage of the national vote that counts, it is very unlikely that independent candidates would win since most of them would only be popular in their constituencies.

¹⁴ It is the system used in most European Democracies and in many newly democratized countries including South Africa, Douglas J. Amy, - [How Proportional Representation Elections workes](#).

¹⁵ Independent candidates may also run and they are listed separately on the ballot as if they were their own party. However, since it is a percentage of the national vote that counts, it is very unlikely that an independent candidate would win since most of them would only be popular in their constituency.

preference for a particular party and the parties then receive seats in proportion to their share of the vote.

There are two types of party list systems: Closed and open list. In a closed list, parties submit their lists of candidates in order of priority. Seats are then allocated to each party in order of the submitted list. For instance, if a party wins 40% of the national vote and if this 40% translates to 20 seats, then the first 20 candidates on the party list will be selected. In other words, it is the party that decides who should go to Parliament and voters have no say on it. In an open list however, voters on top of voting for the party, are also given a chance of voting for a candidate from the party list. Voters are presented with an ordered or random lists of candidates chosen in party primaries. In this system voters cannot vote for a party directly, but must cast a vote for an individual candidate. This vote counts for the candidate as well as the party. In this way, the order of the final list of party candidates depends on the number of votes won by each candidate. The most popular candidates rise to the top of the list and have a better chance of being elected.

Noteworthy is that in party list voting, seat allocation is based on a formula a particular jurisdiction would want to adopt. Various formulas do exist but the most common and simplest seat allocation formula is the one called the “largest remainder formula”.¹⁶ The formula works by calculating a quota, which is determined by taking the total number of valid votes and dividing this by the number of seats in a particular representative institution. The quota is then divided into the vote that each party receives and the party wins one seat for each whole number produced.

After this first allocation of seats is complete, then the remainder numbers for the parties are compared and the parties with the largest remainders are

¹⁶ The formula is used in South Africa and most countries that use proportional representation, see the South African Constitution for example.

allocated the remaining seats. Ultimately, all parties end up with the number of seats that as closely as possible approximate their percentage of the vote¹⁷.

ILLUSTRATION OF LARGEST REMAINDER FORMULA

Assume that 200,000 votes were cast in a country of 20 seats. Secondly, assume that three were there parties sharing the votes as follows-

Party A	-	115,000
Party B	-	49,000
Party C	-	36,000

First Step: Calculate the quota - $200,000 \div 20 = 10,000$

Second Step: First seat allocation

Party A	-	$115,000 \div 10,000 =$	11 seats with a remainder of 5,000 votes
Party B	-	$49,000 \div 10,000 =$	4 seats with a remainder of 9,000 votes
Party C	-	$36,000 \div 10,000 =$	3 seats with a remainder of 6,000 votes

Third Step: Second seat allocation

Number of seats occupied	=	18 seats
Number of seats remaining	=	2 seats

¹⁷ Another method of seat allocation is the "highest average system" which divides each party's votes by successive divisors and then allocates seats to the parties in descending order of the quotations. Dick Leonard and Richard Matkiel, World Atlas of Elections: Voting Patterns in 39 Democracies, The Economist Publications, London, 1986. p. 3

Reminder of votes

Party A	-	5,000
Party B	-	9,000
Party C	-	6,000

Party B and C have the largest remainders they will therefore get the two seats.

Total number of seats

Party A	-	11 seats
Party B	-	5 seats
Party C	-	4 seats

2.3 *Mixed-Member proportional representation and parallel voting*

Some jurisdictions have chosen to use a combination of majoritarian and proportional representation systems in order to achieve the benefits of both systems. In such jurisdictions, a particular number, say for instance, half of the members of the legislature are elected using majority voting and the other half by proportional representation.

The system works by asking voters to cast votes on a double ballot. First, on one part of the ballot, they vote for a constituency representative to determine a candidate to represent that particular constituency in the legislature on majority basis. On the other part of the ballot paper, voters indicate their choice of a party and the other half of the seats in the legislature are filled from a list of candidates chosen by their parties¹⁸.

¹⁸This can either be *open party list* or *closed party list* and the votes are counted on a national basis to determine the total portion of seats each party deserves. In Mixed voting, independent candidates will have more chance of making it to Parliament since they can be voted as constituency representatives by majority voting.

Illustration of allocation of seats in mixed member systems

In a Parliament of 100 seats, assume Party A win 30 seats by majority voting. Again assume that Party A got 60% of the national votes and further assume that this 60% translates to 60 seats. Seat allocation will therefore be 30 seats from the majority voting plus 30 seats from the party list. See the Table.

Political Parties	Number of Constituency Seats Won by majority voting	Percentage of the National Vote	Total Number of Seat Deserved by Party	No. of Seats from Party List
Party A	33	60%	60	27
Party B	13	30%	30	17
Party C	4	10%	10	6
	50		100	50

Although some Members are elected by majority voting the total number of seats allocated to a particular party in mixed –member proportional representation, is still largely determined by the percentage of the national vote a particular party gets. In parallel voting however, electors participate in two separate elections using different systems and results of one system do not affect the results of the other system.¹⁹ The most common parallel voting is the supplementary-member system, which combines first past the post with proportional representation. Under the system, a proportion of seats are filled with fast past the post system and the remainder with proportional representation.²⁰ In our illustration for example, party A will get 33 votes from fast past the post voting and 30 votes, which is 60 percent of 50 seats[not 100]. That is why the system is called parallel voting because the results from first past the

¹⁹ See Wikipedia encyclopedia www.wikipedia.org

²⁰ Ibid

post system are independent of the results from the proportional representation system.

CHAPTER III

3.0 STRENGTHS AND WEAKNESSES OF THE SYSTEMS

3.1 *Majoritarian Systems*

Proponents of majoritarian systems base their arguments on several grounds. It is argued that majoritarian systems have the benefit of producing single party majority governments. Indeed research has shown that single party rule is more likely under plurality systems than under proportional representation systems.²¹ This becomes an advantage because in effect, when a voter votes for a party or a candidate, he/she is also choosing a government. It could be argued that governments formed as a result of this system have a freer hand in enacting policies on which they campaigned.²²

A second major advantage of majoritarian systems is their relative simplicity in the eyes of the electorate. No complicated formulas are involved, just the straightforward proposition that the candidate who gets the most votes wins. The simplicity of the system makes the results more acceptable in the eyes of the electorate.

Majoritarian systems are also praised for producing coherent parliamentary opposition. In theory, the flip side of a strong single-party government is that the opposition is also given enough seats to perform its critical checking role, and present itself as a realistic alternative to government of the day.

Proponents of the system further argue that majoritarian systems sometimes would work to exclude extremist parties from parliamentary representation. Unless an extremist minority party's electoral support is

²¹ Andre Blair, The Debate over electoral systems International Political Science Review Vol. 12, No. 3, 1991, P. 240

²² Nevertheless, majoritarian systems are not an absolute guarantee of majoritarian governments especially in presidential systems of governments like in Malawi.

geographically concentrated, it is unlikely that it would get a seat under majoritarian systems. The situation is different from straight²³ proportional representation systems, where a fraction of one percent of the national vote can ensure parliamentary representation.

The other benefit of majoritarian system, perhaps the most advanced argument by proponents of the system in Malawi²⁴, is that it retains the link between constituents and their Members of Parliament thereby fostering true representative accountability. The assumption in this argument is that true representative accountability depends upon voters of one area knowing who their own representative is, and having the ability to re-elect or throw them out at an election time or indeed before an election time in the event of a recall provision.

Majoritarian systems allow voters to choose between people rather than just between parties²⁵. At the same time, voters can assess the performance of individual candidates, rather than just having to accept a list of candidates presented by parties. It is also argued that majoritarian systems offer a chance for popular independent candidates to be elected.²⁶

There are those, however, who refute the alleged benefits of majoritarian systems. The most prevalent argument is that representation is not well served by this kind of electoral system mainly because minority wishes are not reflected in the electoral outcomes. Critics point out that by excluding minorities, the entire political system is discredited. At the least, citizens become uninterested in political involvement, evidenced by voter apathy. At worst, disillusioned citizens may start using passive means to show dissatisfaction, and in that scenario, democracy itself is placed at serious risk.

²³ The word straight should be emphasized because it is also possible under PR systems to have a threshold percentage to avoid this scenario.

²⁴ See the Law Commission Issues Paper on the Review of the Constitution

²⁵ Unless of course if the PR system is open party listing

²⁶ This is particularly important in developing party systems where politics sometimes revolves more around ethnic grounds, family ties or kinship. See Reynold Andrew, Advantages and Disadvantages of First Past the Post 1997

Since the party with the most votes generally wins more seats than its share of the national vote would indicate, other parties are correspondingly disadvantaged by majoritarian electoral systems. One writer had this to say-

*All plurality systems tend to exaggerate the parliamentary representation of the strongest party, to penalize the second party and to devastate third parties whose support is thinly spread across the breadth of a country*²⁷

Majoritarian systems in some situations can encourage the development of regional or ethnic parties. The consequence of this is that parties don't see the need of going outside their political base to campaign. It is also suggested that the party in power at a particular time can try to increase its chances of winning by manipulating constituency boundaries within the party's stronghold²⁸.

In simple majority systems, votes that do not go towards the election of any candidate are often referred to as wasted votes. Because of this scenario minority party supporters begin to feel that they have no realistic hope of ever electing a candidate of their choice, a situation that again encourages voter apathy and anti-government movements. As a result, legitimacy of the elected government becomes questionable.

3.2 *Proportional representation*

The principal argument advanced in favour of proportional representation is its ability to reflect more accurately the preference of voters in terms of seats in Parliament. Because votes are not wasted, voters are said to be more willing to cast votes for smaller parties knowing that their votes will produce tangible

²⁷ William P. Irvine, *Does Canada need a new electoral system?* Institute of intergovernmental Affairs, Queen's University, Kingston, Ontario 1979 p. 11

²⁸ This was particularly the case with Malawi's previous general elections where the South voted for the United Democratic Front, the Centre for the Malawi Congress Party and the North for the Alliance for Democracy. Again there is a general feeling that Constituency boundary manipulation contributed to the UDF's victory in 1999 general elections.

results, and knowing that allocation of seats in Parliament will be on the basis of the share of the national vote.

Therefore, election results are more likely to be acceptable and the elected government is more legitimate in the eyes of voters. Proportional representation systems, so it is argued, offer a better chance for minority and vulnerable groups, like women and the disabled, to be represented in Parliament. Although this is also achievable under majoritarian systems, if parties do adopt quotas for minority candidates, it has nevertheless been a common argument for supporters of proportional representation.

It is also claimed that, because minority views are not marginalized, political discourse and political participation is enriched in proportional representation systems. High levels of voter turnout at elections where proportional representation is employed may confirm this assertion²⁹.

Arguments against proportional representation, however, can be just as compelling as those in its favour. The system is criticized on the basis that it encourages the emergence of extreme views, which, though quite often based on short-lived opinions of the day, are given certain longevity and enhanced legitimacy through access to parliamentary representation³⁰. The argument is best summed up as follows-

“Movements gain representation in Parliament and credibility as contestants in elections. They remain as available and plausible alternatives if regimes run into economic difficulties, and may be able to make difficult the functioning of a democratic regime.”³¹

²⁹ Richard Rose, editor, *Electoral Participation: A Comparative Analysis*, Sage Publications, Beverly Hills 1980.

³⁰ The emergency of Adolf Hitler and his Nazi Party is sometimes blamed on proportional representation system at the time.

³¹ Richard Rose *loc. cit.*

Proportional representation systems are also criticized for the complexity of their balloting process and seat allocation procedures. Empirical evidence suggests that, while voter turnout may indeed be high, ballot spoilage is also high, a possible sign of voter confusion³².

Where closed list system is used, proportional representation is criticized on the basis that parties acquire too much power by determining names that appear at the top of the list. Those elected on the basis of this system owe primary allegiance to their parties rather than to their electorates³³.

³² Andre Blais- Making Representative Democracy work: The views of Canadians Royal Commission on Electoral Reform and Party Financing, Toronto, 1991

³³ Some people however argue that political parties occupy an important place in any representative democracy and that the list system helps to ensure that the role of parties is maintained and strengthened.

CHAPTER IV

4.0 ELECTORAL SYSTEMS IN MALAWI AND SOME COMPARATIVE CASE STUDIES

4.1 *Electoral systems in Malawi*

4.1.1 *Presidential and Parliamentary elections*

Malawi follows an executive type of government. This entails that the candidate who wins presidential elections forms government. The President is therefore elected directly and concurrently with the general elections for members of the National Assembly³⁴. There are therefore two types of elections: presidential elections and parliamentary elections. The system of elections is governed by the Constitution and the Parliamentary and Presidential Elections Act³⁵.

The Constitution makes provision that the President shall be elected by a majority of the electorate through direct, universal and equal suffrage³⁶. The Parliamentary and Presidential Elections Act makes provision for the determination of results for the election of the President and members of the National Assembly. The candidate who obtains majority of the votes at a poll is declared by the Electoral Commission to have been duly elected³⁷.

On the face of it, it seems there is a contradiction between the Constitution and the Parliamentary and Presidential Elections Act in the determination of results for the President. However the matter was resolved by the Malawi Supreme Court of Appeal in *Gwanda Chakuamba and Others vs the Attorney*

³⁴ Section 80 of Malawi Constitution

³⁵ Cap. 2:01, Laws of Malawi.

³⁶ Section 80 (2).

³⁷ Section 96 (5).

*General, the Electoral Commission and the United Democratic Front*³⁸. It is not the intention of the Paper to discuss the case in detail, suffice to say that, primarily, two issues were put before the Court for interpretation: meanings of “electorate” and “majority”, as envisaged by the Constitution and the Parliamentary and Presidential Elections Act. In the opinion of the Court, “electorate”, for the purposes of section 80 of the Constitution,³⁹ (parenthesis my own) means registered voters that have exercised their right to vote⁴⁰

The court went on to say that *“where a majority is required before a particular course of action is taken, the word “majority” should be interpreted as requiring a majority of those voting and not those entitled to vote. A different interpretation would mean that those who have not voted will in effect be treated as voting against the candidate that has the support of the largest number of those who have arisen to vote. It would be against the values of an open democratic society to suggest that the vote of those entitled to vote but have not exercised it should be taken into account on the result of the election. It would amount, in our view, to giving the right to invaluable poll to those people who have chosen not to cast their vote”*⁴¹

“Majority” was defined by the court as *“the greater number or part”*⁴².

Although it focused on presidential elections, the totality of the reasoning in *Gwanda Chakuamba* case is that parliamentary and presidential elections results are determined by simple majority in Malawi. And indeed this has been the case in the previous general elections.

³⁸ MSCA Civil Appeal case No. 20 of 2000.

³⁹ Parenthesis my own

⁴⁰ Otherwise the Oxford Dictionary meaning of the word is - “all the people in the country who have the right to vote.” Normally this is determined before the day of the elections for the purposes of planning the conduct of the elections. In Malawi, the right to vote is qualified by section 77 of the Constitution. Going by the Dictionary meaning as read with section 77 therefore, “electorate” in Malawi would mean “all the people qualified to vote under section 77 of the Constitution and have registered to vote”.

⁴¹ In the absence of compulsory voting, this line of reasoning, in my view, is sensible for the purposes determining election results.

⁴² This seems to auger well with the dictionary meaning of the word. However, Blacks Law Dictionary defines “majority vote” as a “vote by more than half of voters for a candidate”

Further, it would perhaps be strange to treat “majority” under section 80 of the Constitution for presidential election different from “majority” under section 96(5) of the Parliamentary and Presidential Elections Act for parliamentary elections. If they are to mean the same thing and that the meaning were to be absolute majority, then they would be several re-runs in parliamentary elections. This could hardly have been intended. On the other hand, the Act predates the Constitution and was used for the first multiparty presidential and parliamentary election of 1994 before the Constitution came into force. It may well be that the intention of section 80 of the Constitution was to require a high majority for electing someone to the office of President. The language of the Constitution is “majority of the electorate” while the language of the Act is “majority at the poll”. While the courts have presently settled the meaning on the basis of a case where the winning candidate actually scored a majority of more than fifty percent at the poll, there remains a risk that a future court could distinguish a case on its facts where, for example, the leading presidential candidate may score far less than fifty percent at the poll. The country needs to decide what the position should be exactly rather than relying entirely on a judicial interpretation

4.1.2 Local Government Elections

Local Government Elections are governed by the Local Government Act⁴³. Under the Act, a candidate who has obtained majority of the votes at the poll shall be declared by the Electoral Commission to have been duly elected⁴⁴. Simply put, there is no difference in as far as election systems are concerned between general elections and local government elections in Malawi. They both use simple majoritarian system.

⁴³ Cap. 22:02, Laws of Malawi

⁴⁴ Section 80 (5)

4.2 Comparative case studies⁴⁵

4.2.1 South Africa

Presidential Elections

South Africa follows a parliamentary system of government which means that the President is elected by members of parliament after a general election. Their Constitution makes provision that at its first sitting after elections, and whenever necessary to fill a vacancy, the National Assembly must elect a woman or a man from among its members to be the President⁴⁶.

In theory, this means that the President can come from any party represented in Parliament and not necessary from the winning party, so long as he or she has the support of Parliament. The proceedings are presided over by the President of the Constitutional Court or his or her designate Judge⁴⁷. Detailed procedures are stipulated under Schedule 3 to the Constitution. Under that Schedule, a vote must be taken by a secret ballot and the candidate who receives a majority of votes must be declared president of the Republic. If no candidate receives a majority of the votes, the candidate who receives the lowest number of votes must be eliminated and a further vote taken on the remaining candidates. This procedure continues until a candidate is elected.

In short, South Africa's President is elected by absolute majority of Members of Parliament at its first meeting or whenever there is a vacancy. The procedure followed to achieve the absolute majority is the Two Round System.

⁴⁵ The systems of Zambia and Zimbabwe are similar to Malawi. Mozambique and Angola use proportional representation system

⁴⁶ Section 86 (1)

⁴⁷ Section 36 (2)

Parliamentary Elections

South African Parliament consists of two Chambers – the National Assembly and the National Council of Provinces. Members of both chambers are elected by party list proportional representation. Parties submit a rank-ordered list of candidates. Voters then cast their ballots for one party⁴⁸. Seats in the Assembly are allocated based on the percentage of votes each party receives using the “largest remainder” formula .

Local Elections

Similarly, local elections follow the proportional representation system in South Africa. The Constitution makes provision that the election of members to Municipal Council must be in accordance with national legislation which must prescribe a system of –

- (a) proportional representation based on that municipality’s segment of the national common voters roll and which provides for the election of members from lists of party candidates drawn up in a party’s order of preference; or
- (b) proportional representation as described in paragraph (a) combined with a system of ward representation based on that municipality’s segment of the national common voters roll.⁴⁹

The provision means that names of candidates to represent a particular party in Municipal Council will either come from party lists only or from ⁵⁰ a combination of party lists and ward representation determined by direct voting.

⁴⁸ Section 46 (1) of the South African Constitution

⁴⁹ Section 157

⁵⁰ It should be recalled that in proportional representation systems it is usually the case that party representatives have no area attachment. The provision is therefore saying that as far as Local Elections are concerned in South Africa, an Act of Parliament might be combined with a system of Proportional Representation using party lists i.e no area

4.2.2 Namibia

Presidential Elections

The majoritarian system is applied, whereby the candidate who receives more than fifty percent of the votes is elected. If fifty percent majority is not obtained in the first round, the election will be re-run until there is a clear fifty percent majority for one of the candidates. Unlike in South Africa where the President is elected by Parliament, the President in Namibia is elected by popular vote. Thus the President is elected directly by the electorate and the majority is obtained through Two-ballot system if necessary.

Parliamentary Elections

Members of the National Assembly in Namibia are elected through party list proportional representation⁵¹. Again, Namibia uses the “largest remainder” formula when allocating seats to parties⁵². Once seats have been allocated, parties use their discretion in nominating persons as Members of Parliament. In other words, the party list is a closed one.⁵³

Local Elections

The 1992 Namibia Local Authority Act provides that local elections are to be held according to the proportional representation system, with a party list in which parties are compelled to alternate men and women as candidates. The Act further stipulated the introduction of a ward-based electoral framework for the 2004 local election whereby political parties would be required to field individual candidates in the various local electoral wards. This provision was however amended by parliament and the amendment is to the effect that proportional

⁵¹ Although a certain number is nominated by the President on account of their special expertise status or skill but such members have no voting rights and are not taken into account for the purpose of determining any specific majorities required under the Constitution, sections 46 and 49 of the Namibia Constitution.

⁵² Schedule 4 of the Constitution.

⁵³ Ibid

representation electoral system will continue to be used in all future local authority elections in Namibia.⁵⁴

⁵⁴ Kemi Ogunsanya, Namibia elections and conflict Management, 2004

CHAPTER V

5.0 OPTIONS FOR CONSIDERATION [Electoral systems]

Having analyzed the various electoral systems, we will move on to look at options available for Malawi to adopt. The options are based on the submissions received during the preliminary consultations. It is noteworthy however, that the adoption of a particular type of an electoral system must to a larger extent depend on the following, among other things-

- historical background of the country;
- social and ethnic structures;
- economic development; and
- literacy levels.⁵⁵

5.1 *Presidential Elections*

Option I: *Amend the Constitution to allow Malawi move to Parliamentary system of Government*

As noted earlier, Malawi follows a presidential type of government. This is a system of government where the President is elected by popular vote and forms the government. This is in contrast with parliamentary types of government, whereby the head of government is elected by Parliament. Supporters of presidential systems generally claim four basic advantages of the system.

⁵⁵ Robert A. Paul, Wikipedia encyclopedia, www.wikipedia.org. For example proportional representation system is recommended for countries that have diverse ethnic structure or that have a history of civil conflict

First, it is said that the President under the system enjoys direct mandate of the people since he or she is generally elected directly by the people, This makes the President's exercise of authority more legitimate than of a leader elected indirectly⁵⁶.

Second, is the issue of separation of powers. A presidential system establishes the presidency and the legislature as two parallel structures. Supporters of the system claim that this arrangement allows each structure to supervise the other, preventing abuses.

Some sectors claim that in presidential systems, a President can enact changes or reforms quickly. However, others argue that this is not necessarily true because the separation of powers sometimes work to slow down things. It is also argued that in a presidential system, a President, by virtue of having a fixed term, may provide more stability than a Prime Minister who can be made to leave office at any time. However, it must be noted that in some countries Heads of State do have a fixed term although elected by Parliament. A good example is the South African President.

On the other hand, the system is criticized from several angles. Some political scientists say that the system of presidentialism is not constitutionally stable. According to them, the system has fallen into some sort of authoritarianism in most countries it has been tried with the notable exception of the United States of America⁵⁷.

A presidential system, by establishing the presidency and the legislature as two parallel structures, creates undesirable bottlenecks, and reduces accountability by allowing the president and the legislature to keep on shifting blame to each other. It is also argued that the difficulty in removing an unsuitable

⁵⁶ Presidential System, Wikipedia encyclopedia, Ibid.

⁵⁷ Ibid

President from office before his or her term expires presents a significant problem.⁵⁸

Parliamentary systems too have their own strengths and weaknesses. Some believe that it is easier to pass legislation within a parliamentary system because the executive branch can count upon direct support of the legislative branch. In addition, parliamentarianism has attractive features for nations that are ethnically, racially or geographically divided because power is not concentrated in the President. It is hailed for allowing change in power without election. Further, it is contended that parliamentarism is less prone to authoritarianism.⁵⁹

The main criticism against parliamentarism is that the head of government is not directly voted into power by the people. As such, the head of government does not have the direct mandate of the people. Occasionally, an electorate is surprised just by who is elevated to be the head of government or head of state.⁶⁰ Parliamentary systems can also produce unstable governments with constant threats of vote of no confidence for the head of government.

Option II: *Amend the Constitution so that, while maintaining the presidential system of government, the President should be elected by absolute majority of the votes cast.*

This proposal suggests that since in a presidential system of government executive power is concentrated in the President, it is imperative that the President should enjoy the support of the absolute majority of votes cast to provide the required legitimacy. Absolute majority can be obtained through “Two Ballot System” or through “Alternative (or Preferential) Voting”. Two Ballot System would prove to be expensive but simple in its application. Preferential voting would be relatively cheap but complicated in its application.

⁵⁸ Ibid

⁵⁹ Ibid

⁶⁰ Indians were surprised in 2004 when Manmohan Singh was named Prime Minister and not Sonia Gandhi.

Option III: *Maintain the current system of simple majority, but to give legitimacy a candidate should exude a certain level of nationalism by scooping a given percentage threshold of votes in each district or region.*

This proposal suggests a second round of voting if the reserved percentage is not achieved at first ballot. It should also be observed that it is possible to have a candidate who has managed to achieve absolute majority of the national vote but who fails to achieve the required district or regional percentage. What would happen in such situations?

Second, it must also be observed that theoretically, it would sometimes not be possible to achieve the required district or regional percentage after second, third etc. ballots. What would happen in such situations?

Option IV: *Maintain the current system of simple majority for electing the president*

This proposal should be discussed with due regard to all the criticisms leveled against the system as well as the advantages.

5.2 *Parliamentary Elections*

Option I: *The Constitution should be amended so that members of Parliament are elected through a system of proportional representation.*

If the proposal is taken on board, then Commissioners should consider what type of proportional representation should be adopted. If it is a closed party list proportional representation, then,

- (a) Voters will have no say on the persons to be nominated as Members of Parliament;
- (b) Members of Parliament will not have direct linkage with constituencies. In most cases Members of Parliament are primarily regarded as national legislators;
- (c) It will be almost impossible for independent candidates to make it to the National Assembly;
- (d) It will be easy for women and other minority groups to make it to the National Assembly;
- (e) Recall and crossing the floor provisions become irrelevant
- (f) There shall be no need for by-elections;
- (g) Representation is relatively fair;
- (h) It will mark the end of regionally based parties.

If it is open party list proportional representation then-

- (a) Voters will have a say on the persons to be nominated as Members of Parliament. Conversely, women and other minority groups will find it difficult to make it to Parliament;
- (b) Perhaps Members of Parliament would have some sort of constituency attachment, but it is debatable if the recall provision would be relevant in such situation.
- (c) It would be difficult for independent candidates to make it to the National Assembly.
- (d) Crossing the floor provision becomes irrelevant;
- (e) There shall be no need for by-elections;
- (f) Representation is generally fair;
- (g) It will mark the end of regional based parties

The Commission will have to make its decision after taking into account all the advantages and the disadvantages of the system.

Option II: *Amend the Constitution to allow Mixed - Member proportional representation or parallel voting.*

This proposal entails a certain number of Members of Parliament to be elected directly by their constituencies and others through party lists. In this system, independent candidates will have a better chance of making to Parliament through the direct vote. It may require re-demarcation of constituency boundaries. This is a compromise between majoritarian systems and proportional representation.

Option III: *The current system should be maintained but parties should adopt a quota system for minority groups when fielding candidates.*

This proposal would require the review of electoral legislation or political party legislation to effect this rather than the Constitution and shall ensure that women and other minority groups are fairly represented in Parliament. But it will not solve the problem of fair representation generally.

Option IV: *The current system should be maintained.*

This proposal should be discussed with due consideration to all the criticisms leveled against the system as well as the advantages. Generally, the biggest advantage for this system is that Members of Parliament are accountable to the electorate and not to parties. The biggest disadvantage is that minority groups are usually sidelined in the political arena.

Note: The discussion under parliamentary elections is also applicable to local government elections.

CHAPTER VI

6.0 MANAGEMENT OF ELECTIONS

6.1 Composition and Functions of the Malawi Electoral Commission

Management of elections or management of the electoral process is under the purview of the Malawi Electoral Commission in Malawi which is established under the Constitution. In addition to management of elections, the Commission has the following functions and responsibilities-

- determination of constituency boundaries subject to confirmation by the National Assembly;
- determination of electoral petitions and complaints related to the conduct of any elections; and
- such other functions as may be prescribed by the Constitution and Act of Parliament⁶¹

The Electoral Commission Act⁶² provides in a more detailed manner, some more functions of the Commission⁶³.

Under the Constitution, the Chairperson of the Commission is a Judge and other members are appointed as prescribed by the Electoral Commission Act⁶⁴.

Submissions received during preliminary consultations largely suggest that most people are not contented with the way elections are managed in the country. They put the blame squarely on the Electoral Commission. It is argued that the Commission is, in large measure, inherently not capable of managing the

⁶¹ Section 75 and 76 of the Malawi Constitution

⁶² Cap. 2:03, Laws of Malawi

⁶³ Section 8

⁶⁴ Section 75 of the Constitution

electoral process competently because of the constitutional provisions. Submissions have questioned the wisdom of the criteria for the appointment of the Chairperson, the composition of the Commission and functions of the Commission.

On the issue of the Chairperson, the Constitution provides that the chairperson of the Electoral Commission shall be a Judge nominated by the Judicial Service Commission. Some people think that this position should not have been the preserve of Judges. The post should be open to all professions. If a person has the relevant management skills, he or she should be considered for the post.

It is further suggested that the composition of the Electoral Commission as provided by the Electoral Commission Act is erroneous in the sense that membership tend to come from political parties only.⁶⁵

It is suggested that membership of the Commission should be based on qualifications and be broad based to include civil society to enhance the objectivity of the Commission.

Some submissions have attacked the role of the Commission in determining constituency and ward boundaries on the basis that it lacks the required competencies in that field. It is therefore suggested that a separate body should be given the task of determining such boundaries. In a way, this argument is remotely related to the issue of composition of the Commission. As long as the Commission is composed of political representatives and as long as Malawi continues to use majoritarian electoral system, the feeling among critics is that the Commission would be tempted to use constituency boundaries to improve chances of winning for a particular political party.

⁶⁵ Section 4 of the Act

6.1.2 Comparative study

South Africa

The Electoral Commission in South Africa is established by the Constitution under Chapter 9. The Electoral Commission Act⁶⁶ makes provision for the composition of the Commission and its functions. The Commission consists of five members, one of whom is a Judge, appointed by the President⁶⁷. No person is appointed as a member of the Commission unless he or she –

- does not at that stage have a high party political profile;
- has been recommended by the National Assembly by a resolution adopted by a majority of the members; and
- has been nominated by a Committee of the National Assembly, proportionally composed of members of all parties represented in that Assembly, from a list of recommended candidates submitted to the Committee by a special panel⁶⁸.

Unlike in Malawi, Commission members in South Africa are not nominated by political parties but by a panel established for that purpose. Further, Commissioners once appointed must demonstrate their total independence from any political party⁶⁹.

The chairperson of the Commission can come from any profession. The Act only states that the President shall designate a Chairperson and Vice Chairperson from among members.⁷⁰

⁶⁶ Act 51 of 1996

⁶⁷ Section 6

⁶⁸ The panel consists of the President of the Constitutional Court; a representative of the Human Rights Commission; a representative of the Commission on Gender Equality and the Public Prosecutor.

⁶⁹ Section 8 provides that "No member of the Commission may, whether directly or in directly, in any manner give support to any political party or candidate.

⁷⁰ Section 8

The Commission's primary function is the management of elections. Thus, the Commission is not involved in constituency demarcations. Even though the Commission is not involved in constituency demarcations, it is within its functions to demarcate wards for local elections.⁷¹

Uganda

The Electoral Commission in Uganda is established under Chapter V of the Uganda Constitution⁷². It makes provision for the appointment of Commissioners and functions of the Commission. The Commission consists of a chairperson, a deputy chairperson and five other members appointed by the President, with the approval of Parliament. The Constitution does not specify qualifications for the chairperson. It only stipulates that a person appointed as a chairperson should be of high moral character, proven integrity and should possess considerable experience and should also demonstrate competence in the conduct of public affairs⁷³.

Members of the Commission are not nominated by political parties. They are appointed by the President with the approval of Parliament. Therefore, unlike in Malawi, there is no party representation on the Commission in Uganda. The appointment is supposed to be purely on merit.

Like in Malawi, the Commission in Uganda is also empowered to demarcate constituency and ward boundaries⁷⁴. However, a decision by the Commission on the constituency boundaries is appealable under the Electoral Commission Act.⁷⁵ It could be argued that the provision to appeal on the Electoral Commission's decision on constituency boundary was put with the realization that this function can be abused. There is another safeguard under the Constitution. When demarcating constituency boundaries, the Commission

⁷¹ Section 5

⁷² Section 60

⁷³ Section 60 of the Constitution

⁷⁴ Section 61 of Uganda Constitution

⁷⁵ Section 36 of Uganda Electoral Commission Act.

must ensure that the number of inhabitants in the constituency is, as nearly as possible, equal to the population quota. And the population quota is described as a number obtained by dividing the number of inhabitants of Uganda by the number of constituencies into which Uganda is to be divided⁷⁶. In Malawi, however, constituency boundaries are based on several factors, such as population density, ease of communication and geographical features, including existing administrative areas⁷⁷. This formula is used in Uganda for demarcation of ward boundaries only⁷⁸. By using several factors when demarcating constituency boundaries, chances of boundary manipulation are high in Malawi than in Uganda.

Zambia

In Zambia the Electoral Commission is established under Part V of the Zambia Constitution⁷⁹. Its functions are almost similar to the Malawi Electoral Commission including demarcation of constituency boundaries. Boundary demarcation is also based on several factors such as ease of communication, geographical features and, like in Uganda, population quota.

Composition of the Electoral Commission is provided under the Electoral Commission Act. The Commission consists of a chairperson and not more than four other members, appointed by the President, subject to ratification by the National Assembly.⁸⁰ The chairperson can either be a person qualified to hold high judicial office or any other suitably qualified person.⁸¹

⁷⁶ Section 63

⁷⁷ Section 76 of the Malawi Constitution

⁷⁸ Section 181 of Uganda Constitution

⁷⁹ Section 76

⁸⁰ Section 4

⁸¹ Ibid

6.1.3 Options for Consideration

Office of the chairperson

Option I: *Amend the Constitution so that the office of chairperson of the Malawi Electoral Commission is open to all professions or disciplines.*

The proposal would be in line with South Africa, Uganda and Zambia⁸². The argument for this proposal is that Judges may not always be suited to hold the position.

Option II: *Maintain the current position*

The position requires a person qualified to be a Judge because most of the Commission's functions require the interpretation of electoral laws. Further, a Judge as chairperson is likely to guarantee the element of independence since he or she already has security of tenure in the judiciary

Composition of the Commission

Option I: *The law, whether the Constitution or the Electoral Commission Act should make sure that there is no political party representation on the Commission.*

The Electoral Commission Act does not provide for party representation on the Commission. However, because the President is required to consult leaders of political parties represented in Parliament, the perception and indeed the practice is that apart from the Judge, members of the Commission is based on political party representation. This is where the law must be clarified either by

⁸² And other African countries

clearly providing that commission members shall not be active politicians⁸³. Without this clarification, the independence of the Commission is compromised.

Option II: *The law, whether the Constitution of the Electoral Commission Act, should make sure that political party representation at the Commission is maintained by having a lucid provision.*

Political party representation on the Commission is necessary because the Commission's primary function is to manage elections and political parties are major stakeholders in any electoral process. However, provisions should be put in place to guarantee integrity of the persons nominated by political parties and also to guarantee the independence of the Electoral Commission

Functions of the Commission

Option I: *Amend the Constitution so that functions of the Electoral Commission should not include constituency boundary demarcations.*

The Electoral Commission lacks the necessary competence for this sort of function. This function should be given to a different body with the necessary expertise. However, composition of the Electoral Commission if improved may address the issue of incompetence since people with relevant skills might become members of the Commission

Option II: *Maintain the current practice.*

The current practice should be maintained but the Constitution should put in place proper safeguards to allay the concerns of boundary manipulation by putting rigid criteria to ensure consistency and to prevent abuse.

⁸³ See the South African model

It should also be observed that if proportional representation is adopted as an electoral system, the discussion of boundary manipulation, to some extent, becomes irrelevant.

6.2 Holding of Elections

6.2.1 Malawi scenario

Malawi does not hold its presidential and parliamentary elections simultaneously with its local government elections. This is the case primarily because the tenure of office for parliamentarians and presidents is five years while the tenure of office for councilors is three years.⁸⁴

Submissions during preliminary consultations observed that it would be better if local government elections were held concurrently with parliamentary and presidential elections, impliedly suggesting that the tenure of office for councilors should be the same with that of the president and parliamentarians. Two reasons were put forward. First, in view of Malawi's limited resources, this would be a cost saving measure. Second, three years is a short period for councilors to meaningfully implement development programmes.⁸⁵

6.2.2 Comparative study

Uganda

Uganda holds its presidential, parliamentary and local elections concurrently. The Constitution provides that "*except where it is impracticable to do so, the Electoral Commission shall hold presidential, general parliamentary and local government council elections on the same day*".⁸⁶

⁸⁴ See section 23 of the Local Government Elections Act, and section 83 of the Constitution and section 32(4) of the Parliamentary and Presidential Elections Act, which provides that the polls for election of members of the National Assembly may be taken simultaneously with the polls for election to the office of the President.

⁸⁵ See the Law Commission Report on the Constitutional Conference

⁸⁶ Section 61(3)

Zambia

Zambia's presidential and parliamentary elections have not been held concurrently since their "first multiparty" elections. This position was changed in 2004 when Parliament amended the Local Government Elections Act, which allowed future local government elections in Zambia to be held simultaneously with parliamentary and presidential elections. The amendment also extended the tenure of office for councilors to five years from three years.⁸⁷

6.2.3 Options for consideration

Option I *Amend the law so that presidential, parliamentary and local government elections are held simultaneously*

In view of Malawi's limited resources, this will act as a cost saving measure. If the proposal is adopted, the tenure of office for councilors and Mayors will have to be extended to Five years. This would allow councilors to initiate and implement projects in their communities. It is noteworthy that the Constitution only provides for the President on tenure of office. Commissioners will have to decide on whether tenure of office for Parliamentarians and Councilors should be stipulated in the Constitution or in the relevant Acts of Parliament. In Uganda, this is stipulated in the Constitution.

Option II *Maintain the current practice*

Tripartite elections can be complicated resulting into voter spoilage. Again the nature of governance at local level requires short tenure of office unlike at national level. Communities should be able to remove non-performing leaders at local level more easily than at national level.

⁸⁷ See www.nimd.org

6.3 Electoral Dispute Resolution

6.3.1 Malawi scenario

The second and third multiparty elections in Malawi were characterized by numerous disputes over the registration process and the voting process. There were also numerous post-election disputes that culminated into some high profiled court cases. In view of this, submissions were received questioning the electoral dispute resolution mechanism that is currently in place. It has been argued that electoral cases stifle the proper functioning of courts because other cases are generally sidelined in favour of electoral cases. Others have suggested the need of establishing a special court for electoral cases.

Electoral dispute resolution is one of the functions of the Malawi Electoral Commission. It is mandated to determine electoral petitions and complaints relating to the conduct of any elections.⁸⁸ Complaints can also be heard before the High Court by way of appeal or by way of judicial review against the determination of the Electoral Commission.⁸⁹ One would therefore be compelled to argue that the current dispute resolution mechanism is proper since the right to appeal to the High Court against the Electoral Commission determinations or the High Court judicial review over decisions of the Electoral Commission is enough safeguard against abuse of power by the Electoral Commission. But going by the submissions that were received by the Law Commission, perhaps that argument would be out of place. The submission was that a special court or a special tribunal for electoral disputes be established to handle appeals from the Electoral Commission so that matters are expedited without stifling functions of the High Court.

⁸⁸ Section 76(2)(c) of the Constitution

⁸⁹ Section 3 and 4 of the Constitution

6.3.2 Comparative Study

South Africa

In South Africa, a specially established court called an “Electoral Court” handles electoral disputes⁹⁰. It is composed of a Chairperson, who is a judge of the Appellate Division of the Supreme Court, and two other judges of the Supreme Court and two other members.⁹¹

The court has the status of the Supreme Court.⁹² It is empowered to review any decision of the Electoral Commission relating to an electoral matter. It can also hear and determine appeals against any decision of the Electoral Commission, but only so far as such decision relates to the interpretation of any law or any other matter for which an appeal is provided by law.⁹³

Namibia

In Namibia, the Electoral Commission’s functions do not include dispute resolution of electoral matters. Complaints are handed over to the Electoral Commission and thereafter submitted to the High Court.⁹⁴

6.3.3 Option for consideration

Option I *A special court should be established that will be responsible for hearing and determination of electoral disputes by way of appeal or by way of judicial review.*

This proposal suggests that the Electoral Commission should have (maintain) its original jurisdiction in hearing and determining electoral matters.

⁹⁰ Section 18 of the Electoral Commission Act [south Africa]

⁹¹ Section 19 *ibid*

⁹² Equivalent to our High Court, section 18, *ibid*

⁹³ Section 20 *ibid*. Compare this with section 76(3) of the Malawi Constitution, which is wider in its application because the appeal is not restricted to matters relating to interpretation of the law

⁹⁴ Section 109 – 110 of the Namibia Electoral Act

However, instead of the High Court, a special court should be established to hear appeals or to review decisions from the Commission. This would improve the disposal of electoral cases without necessarily stifling functions of the High Court. This would also enable presiding officers to develop some form of expertise in electoral disputes resolution. The court can be established under the Constitution or an Act of Parliament. But the status of the court should be carefully discussed. For example if it is subordinate to the High Court, electoral matters will still go to the High Court by way of appeal or judicial review. Thus the need to expedite electoral disputes is defeated.

Option II *The Electoral Commission should not be involved in electoral dispute resolution even in the first instance*

It should be observed that the Electoral Commission is directly or indirectly connected with most of the electoral disputes since management of elections is its primary function. Therefore, in the best interest of justice, the Electoral Commission should not be involved in electoral dispute resolution because to do so is to make the Electoral Commission a judge over its own matters. Therefore all electoral disputes should be resolved by a court or tribunal different from the Electoral Commission.

CHAPTER VII

7.0 THE SENATE

7.1 Composition and election of the senate as provided by the 1994 Malawi Constitution

The 1994 Malawi Constitution made provision for a second chamber of Parliament called the Senate⁹⁵. Its operation was suspended to 1999. In 2001 the National Assembly abolished the Senate citing lack of resources as the reason for the decision⁹⁶. However, submissions have been put forward during preliminary consultations agitating for the return of the Senate. The main argument, is that the Senate will act as a check over the National Assembly's conduct of business. It would also allow a broader section of society to be involved in matters of national importance⁹⁷.

The proposal, if adopted, requires a discussion of the method of electing Senators as provided under the 1994 Constitution and a comparative study with countries that have a similar parliamentary arrangement. The 1994 Constitution provided as follows⁹⁸-

- (1) The Senate shall consist of eight members as follows-
 - (a) one Senator from each District, registered as a voter in that District and elected by the District Council of that District in secret ballot within thirty days of each local government election;
 - (b) one Senator from each District, being a Chief registered as a voter in that District and elected by a caucus of all the

⁹⁵ Section 68 - 72

⁹⁶ Act No. 4 of 2001

⁹⁷ See the Law Commission Issues Paper on page 22

⁹⁸ Section 68

Chiefs of that District in secret ballot within thirty days of each local government election;

- (c) thirty-two other Senators who shall be elected by a two-thirds majority of sitting members of the Senate on the basis of nominations by the Nominations Committee provided for in subsection (2) from all of the following sectors-
 - (i) interest groups, who shall include representatives from women's organizations, the disabled and from health, education, farming and business sectors, and from trade unions;
 - (ii) society, who shall be such persons as are generally recognized for their outstanding service to the public or contribution to the social, cultural, or technological development of the nation; and
 - (iii) religious, who shall include representatives of the major religious faiths in Malawi.

(2) There shall be a Nominations Committee of the Senate which shall be formed within forty-five days of each local government election for the purpose of nominating the representatives referred to in subsection (1) (c) and which shall consist of the Speaker of National Assembly, the Ombudsman, and seven members, being Senators elected under subsections (1) (a) or (b), appointed by the National Assembly on a motion by the Speaker of the National Assembly.

(3) A Senator may be elected or nominated for an indefinite number of subsequent terms, unless otherwise disqualified or removed.

(4) The Nominations Committee shall endeavour to ensure, when considering nominations, that the Senate is proportionally representative of the various groups in Malawian society and therefore shall seek to ensure, so far as it is possible, that one-half of the members of the Senate are women.

From this provision, Senators would have been elected by District Councils to represent all Districts in Malawi; a caucus of district chiefs to represent chiefs in that particular District; two-thirds majority of sitting members of the National Assembly on the basis of nominations by a nominations committee. The Senate would only have been put in place after local government elections, meaning that Parliament would at a certain point, operate without its second chamber unless local elections and parliamentary elections are conducted simultaneously.

7.2 Comparative case study

Bicameral legislatures⁹⁹ are in use in about a third of the world's nations.¹⁰⁰ One of the most notorious bicameral legislatures is said to be the United States of America's Congress, which is composed of the Senate and the House of Representatives. Originally, members of the House of Representatives and Senators were elected based on different schemes of elections - members of the House of Representatives were directly elected by the people while Senators were elected by the larger (i.e more popular) of each State's legislative chambers.¹⁰¹

⁹⁹ Legislative bodies with two deliberative chambers.

¹⁰⁰ Connie A. Veillette and Christopher J. Deering Evolution of the American Parliament 2003

¹⁰¹ In each America, each state has its own legislative body. Senators to represent particular state were there elected by the state's legislative body.

The situation was changed with the Seventeenth Amendment to the American Constitution which allowed Senators to be elected directly by citizens. The ratification of this amendment was the outcome of increasing popular dissatisfaction with the operation of the originally established method of electing Senators, more especially with the realization that the Senate was equally powerful as the House of Representatives. In short, Senators in America are directly elected by the people in each federal state.

The equivalent of the Senate in United Kingdom is the House of Lords. Members of the House of Lords are however not elected directly by the people. There are several routes to becoming a member of the House of Lords. Some members are nominated by the Appointments Commission. This is a non-statutory, non-departmental advisory public body set up to make recommendations to the Crown for the appointment of non-political members¹⁰². Others become members at dissolution of Parliament where membership may be given to some Members of Parliament who are leaving the House of Commons¹⁰³. A person may also become a member upon the recommendation of a Prime Minister on the Prime Minister's resignation. When a Prime Minister resigns he or she may recommend membership for politicians, the political advisers and others who have supported the Prime Minister. Others come from political party lists to boost the party's strength in the house. The Anglican Archbishops of Canterbury and York; the Bishops of Durham; London and Winchester and the twenty-one senior diocesan Bishops of the Anglican Church have seats in the House. This is because the Anglican Church is the established church of England¹⁰⁴. Traditionally, former Speakers of the House of Commons have been awarded membership of the House at the request of the House of Commons. Finally, Law Lords are permanent members of the House of Lords.¹⁰⁵

¹⁰² www.parliament.uk

¹⁰³ *Ibid*

¹⁰⁴ *Ibid*

¹⁰⁵ *Ibid*

Uganda's Parliament takes a middle position. Instead of having two chambers, the Constitution allows representatives of various groups to be part of the Parliament¹⁰⁶. They include women representatives for every district, representatives of the army, Youth, workers, persons with disabilities and other groups as Parliament may determine¹⁰⁷. Women representatives are elected directly by the people in that particular district.¹⁰⁸ Representatives of the Army, the youths and workers are elected in accordance with regulations prescribed by the Minister responsible.¹⁰⁹ On the other hand, representatives of persons with disabilities are elected by an electoral college of representatives of such persons from each district.¹¹⁰

7.3 Options for Consideration

Option I: *If the Senate is brought back, district representatives should be elected directly by the people.*

This proposal means all district representatives, whether chiefs, women or other sector representatives will have to be elected directly by the people in that particular district. This would ensure legitimacy. The disadvantage of this proposal is that it would be expensive to implement unless perhaps if it is done alongside elections for Members of Parliament.

Option II: *Maintain the original provision. However, room should be created for other prominent Malawians like former speakers of Parliament, former Judges etc.*

This proposal is in line with the British system where prominent people like former Speakers of Parliament, are given the honor of being members of the

¹⁰⁶ Section 78

¹⁰⁷ Ibid

¹⁰⁸ Section 8, Parliamentary elections Act

¹⁰⁹ Ibid

¹¹⁰ Ibid

House of Lords. This will enable the nation to benefit from their experience and expertise.

Option III: *The Senate should not come back. However, representatives of various groups should be allowed to sit and deliberate in the National Assembly.*

This is in line with the Uganda scenario. It can be cheap or expensive depending on how they are going to be elected. It is however cheaper compared to having two separate chambers. It is debatable if they will be able to play their role of checking their constituency representatives.

8.0 CONCLUSION

While electoral systems are a vital component of any representative democracy, one should not overstate their importance. Even the best electoral system will fail if other conditions are not met. For example, proportional representation system without proper civic education will fail in addressing the wrongs associated with majoritarian systems and vice-versa.

It must also be noted that the discussion in this paper has included matters that are not necessarily of constitutional domain. Some issues can be covered under Acts or an Act of Parliament. The inclusion of these issues is purely for purposes of clarity of presentation of some points of view.

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