



MALAWI LAW COMMISSION

DISCUSSION PAPER NO.4:

**THE CONSTITUTION AND THE
EXECUTIVE BRANCH OF GOVERNMENT**

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1.0 INTRODUCTION

This Discussion Paper is prepared to serve as a working document for the Constitutional Review process undertaken by the Malawi Law commission through its special Law Commission for the Review of the Constitution for the Republic of Malawi.

This Paper focuses on the executive branch of governance as stipulated in the Constitution. The roles and functions of the office of President and the exercise of executive authority through various offices are scrutinized in light of the submissions made by stakeholders and set out in the “Consultation Paper” and the “Issues Paper” as well as from submissions made during the National Constitutional Conference¹. The paper therefore attempts to explore the issues within the confines of the limits placed under the Constitution and where these are perceived to be inadequate by the various submissions, comparative analyses with other jurisdictions is made to offer options to guide the Constitutional Reform process.

1.1 The Executive Branch of Government

Executive authority, in the executive branch of government is vested in the President who is also head of state. The President is assisted in the exercise of his or her duties by a cabinet made up of several members, for which no constitutional size limit exists. Cabinet members advise the President on areas within their respective portfolios. They are appointed by the President. Under Malawi’s hybrid application of the doctrine of the separation of powers, some members of cabinet are appointed from among sitting members of the legislature.

Other members executive officers specifically provided for in the Executive Chapter of the Constitution include the Attorney General and the Director of Public Prosecutions, both of whom are appointed by the President². The office of the Attorney General is unique in that it may either be the office of a Minister or a public office, whereas the office of the director of Public Prosecutions is a public office.

Cabinet members are vested with significant authority and power as heads of their respective Ministries and all civil servants and other employees in the Ministry are answerable to them.

¹ Held between 28th and 31st March 2006.

² Chapter VIII see sections 98 and 99 respectively.

1.2 The Presidency

The very nature of the office of the President as the Chief Executive Officer of the land comes with a breadth of powers and duties limited only by the checks and balances provided under the Constitution. Traditionally, the President's main role is to personify the continuity and legitimacy of the State and to exercise the political powers, functions and duties granted under the Constitution for the administration of the State.

Under the Malawi Constitution, the President is elected jointly with a first Vice President but the President may appoint a second Vice President if he or she considers it desirable in the national interest to do so. The Second Vice President cannot be appointed from the party of the President.³

Generally, within the liberal democratic model, governments with Vice Presidents only have one person holding this role. In many political systems, this Vice President does not yield much day-to-day political power, but is still considered an important part of cabinet. In fact some commentators have even gone as far as to state that, "in politics, a Vice President is a politician whose primary function is to replace the President in the event of his death or resignation".⁴

³ Section 80

⁴ Vice Presidents in Government
wikipedia encyclopedia, http://en.wikipedia.org/wiki/Vice_President

2. THE PRESIDENT

2.1 Eligibility Requirements

The President is chosen through universal direct suffrage by a majority of the electorate. Only a person who is a citizen of Malawi by birth or by descent and has attained the age of thirty-five years is eligible for nomination as President.⁵

Further, the person eligible to be President should not be –

- (a) of unsound mind;
- (b) a bankrupt;
- (c) a person who has within the last seven years been convicted of a crime involving dishonesty or moral turpitude;
- (d) a person who owes allegiance to a foreign country;
- (e) a holder of a public office; or a member of Parliament, unless he or she first resigns;
- (f) a serving member of the Defence Force or Police Service.⁶

These are the only eligibility requirements raised in the Constitution.

The President as head of the executive has several roles to play and various duties to discharge. The powers that are vested in the executive authority in the administration of government, with the President at the helm can generally be summarized as follows: –

- powers to enforce laws (to achieve this, the executive administers the police force, prisons and prosecutes criminals in the name of the state);
- conduct foreign relations of the state;

⁵ Section 80 (2).

⁶ Section 80 (7) (a) – (f).

- command the armed forces;
- administer government ministries and departments;
- appoint senior public officers (sometimes subject to confirmation by the legislature and sometimes on recommendations of subsidiary bodies);
- issue executive orders (or secondary legislation).

In order to fulfil these roles and discharge these duties, certain additional qualifications might be called for.

Several submissions within the Issues Paper voiced the view that the Constitution should stipulate a minimum academic qualification whilst others were of the view that such a provision is unnecessary in light of the fact that the President is assisted, in the execution of his duties, by technocrats.

As regards the minimum age requirement of thirty-five years set out in the Constitution, views in the *Issues Paper* suggest that there should be an upper age limit to supplement the minimum age requirement. There was no consensus reached as to what this upper age limit should be. The *Consultation Paper* on the other hand suggests that the minimum age requirement should be raised so as to guarantee a deeper measure of wisdom in a Presidential aspirant.

Additional views from the National Constitutional Conference, however, suggest that in view of the low life expectancy rate in Malawi, the minimum age requirement ought to be adjusted downwards to enable the youth to also govern.

The *Consultation Paper* also raises issues pertaining to the character of the Presidential aspirant. It was suggested that the nature of the high office of President demands a person who is beyond reproach and thus section 80 (7) which allows an aspirant to stand for office after the expiry of

seven years following a criminal conviction involving dishonesty or moral turpitude should be amended so that any aspirant with any criminal conviction should be ineligible.

No issues were raised as regards the requirements of nationality,⁷ sanity,⁸ liquidity,⁹ allegiance to Malawi,¹⁰ and that the aspirants must not hold any other public office including being a Member of Parliament.¹¹ Whilst most of these are generally non-contentious, debate elsewhere has shown that more may need to be said regarding what constitutes a “citizen of Malawi by birth or by descent” when considering naturalized citizens¹².

The submissions raised in both the *Issues Paper* and the *Consultation Paper* will be discussed against the backdrop of the Presidential roles and the nature of the functions that the high office demands. These roles are derived both from the Constitution, other laws and practice from other democracies following a Presidential model on the issues from provisions from randomly selected Constitutions.

2.2 Roles Of A Head Of State In Perspective

2.2.1 Commander-In-Chief

The Constitution confers on the President the authority of Commander-in-Chief of the Armed Forces.¹³ The historical context of this provision, which is used world-wide in liberal democracies, dates back to the United States Philadelphia Constitutional Conference in 1787. The main reason for granting the President this power was to ensure “civilian control of the military”. The doctrine of “civilian control of the military” places ultimate responsibility for a country’s strategic decision making in the hands of civilian political leadership, rather than professional military officers. Civilian control is often seen as a prerequisite feature of a stable liberal democracy.¹⁴ This is essentially the ultimate responsibility in the security of the nation state. This is a role that must be

⁷ Section 80 (6).

⁸ Section 80 (7) (a).

⁹ Section 80 (7) (b).

¹⁰ Section 80 (7) (d).

¹¹ Section 80 (7) (e).

¹² A naturalized citizen is a citizen who

¹³ Section 78.

¹⁴ Wikipedia, the free encyclopedia, http://en.wikipedia.org/wiki/Civilian_control_of_the_military

exercised with extreme caution as the power to declare war and to make all strategic decisions involved in warfare is reposed in a single person

In practice the role of Commander in Chief is executed with the advice of professional military advisers as well as other advisers. The question may be asked whether it is necessary that the President possess any specific attributes in order to execute his role as Commander-in-Chief, or whether it is sufficient that he acts on advice. Nonetheless President ultimately has to exercise his own judgment in deciding what advice to take or whether to take any advice at all.

ISSUE

Are there any specific competency or eligibility requirements that would equip a Presidential aspirant to dispose the functions of a Commander – in – Chief in a fair, objective and efficient manner?

2.2.2 Chief Executive Officer

The Constitution¹⁵ vests in the President as Head of State, responsibility for the observance of the Constitution and a duty to uphold the Constitution as supreme law of the land. The President is vested with executive authority in the executive leadership within the interests of national unity.

It is this role of the President that provides the face of politics with which the general public are most familiar,¹⁶ as it is the one which reposes the President with the powers that visibly affects people's daily lives. In executing this role, the President is vested in a range of high powers as follows:

- convenor and chair of cabinet meetings¹⁷;
- chief diplomatic officer – in accrediting ambassadors¹⁸

¹⁵ Section 88

¹⁶ Dulani B; Chapter VIII of the Malawi Constitution Reconsidered. A comparative study of the Constitutional chapter on the Executive in Malawi with five other Constitutions. Draft copy of Paper presented at the National Constitutional Review Conference, March 28-31, 2006.

¹⁷ (section 89 (1) (b))

¹⁸ (section 89 (1) (e) and (f));

- chief public appointments officer – in appointing all key officials including cabinet¹⁹, the second Vice President²⁰, judicial officers²¹ and other major senior public officers²²;
- the authority conferring honors²³ ;
- officer charged with negotiation, signing, entering into and acceding to international agreements²⁴;
- officer in charge of appointing commissions of inquiry²⁵;
- officer charged with referenda and plebiscites;²⁶
- officer charged with the pardoning of convicted offenders, the grant of stays of execution of sentence, and the reduction or remission of sentences²⁷.

The peculiarities of the range of these roles requires the person exercising them exercise them in the interests of national unity and in the strict observance of the Constitution at all times. Such a person must be well seasoned not only in terms of age or education, but also calls for a strong executive administration to support the President in his role. As Professor Woodrow Wilson noted, the expressions by which the powers of the executive branch are denominated place the President in a position which “has the right²⁸ in law and conscience, to be as big a man as he can” and in which “only his capacity²⁹ will set the limit”. Capacity in Wilson’s formulation of the exercise of presidential power appears largely subjective, however, there are several objective criteria that set as a minimum, would ensure that any President has the right capacity to execute each of these roles effectively. A brief discussion of the more pertinent of the capacity required is set out in the Constitution follows.

¹⁹ section 89 (1) (d), section 94

²⁰ (section 80 (5)

²¹ (section 111 (1) and (2)

²² (sections 98, 99, 154 (2), 161 (2)

²³ section 89 (1) (c)

²⁴ section 89 (1) (f)

²⁵ section 89 (1) (g)

²⁶ section 89 (1) (i))

²⁷ section 89(2)

²⁸ Wilson, W.; Constitutional government in the United States New York, 1908, pp. 202, 205

²⁹ emphasis supplied

2.3 Age

The issue of age limits viewed in light of the range of high powers referred to above, presents the question whether a minimum age of thirty-five or forty years and under a certain age grants a person sufficient maturity, wisdom, sobriety or any of the qualifications necessary to execute the roles outlined above.

It is generally accepted amongst liberal democracies that the presidency as an office requires a higher age than all other statutory or prescribed age limits.³⁰ The higher age restriction is entirely in keeping with the approach to the presidency as a whole which as an office vested with a range of high powers and duties, tends to require more from those who aspire to the office.³¹

2.4 Education

As “more” is required of persons aspiring to the Presidency, it is only logical that their educational qualifications should also be above average. As first citizen a President is ambassador and performs a representative role of all Malawians to the outside world. His or her credentials should also be exemplary. Whilst it is accepted that experience and worldly wisdom obtained outside university corridors is an important accrediting feature, we cannot escape the realities of the present day and age that judge people on academic certification. As such especially in terms of Malawi where literacy is not so high, a minimum educational requirement may be desirable. The question “what minimum educational qualifications the presidency should require” ought in its response to take into account the demands and the exigencies of the office.

It is surprisingly not common for Constitutions to stipulate minimum academic qualifications for presidential aspirants. In Dulani’s ³² comparative study of five constitutions³³ only the Constitution of Nigeria³⁴ makes provision for minimum academic qualification. A person is eligible for election as President if *inter alia*, he has been educated up to at least school certificate level or its

³⁰ Such as age for voting, drinking, marriage, driving, etc.

³¹ International Debate Education Association *Foreign Born President*, http://www.idebate.org/debatabase/topic_details.php.topicID=361

³² Dulani, B., *op.cit supra* foot note 16, p. 4.

³³ i.e. The Constitutions of the United States, South Africa, Zambia, Nigeria and Kenya

³⁴ Section 131(d)

equivalent. Any presidential aspirant who presents forged certificates to the electoral body in Nigeria is disqualified from contesting for the presidency.

ISSUES:

- Are leadership credentials and qualities capable of certification?
- What is the bare minimum of academic requirements that would ensure adequate capacity for a President to ably discharge all functions of office?

2.5 Nationality

Issues of descent affecting the fundamental rights of naturalized Malawians were raised at the National constitutional conference. Under the Constitution, a person cannot contest for the presidency if he or she is a “citizen of Malawi by birth or descent”³⁵ and “owes allegiance to a foreign country”³⁶. Most liberal Constitutions explicitly exclude foreign nationals from running for the office of President. The Nigerian Constitution, for example, makes any person who is not a citizen of Nigeria by birth, ineligible for contesting the presidency.³⁷ Any person can owe allegiance to a foreign country, even a Malawian by descent. The argument usually given for restricting eligibility criteria to a citizen by birth or descent and to persons who do not owe allegiance to a foreign country in respect of the role of a President is usually that matters of national security especially in terms of strategic command, intelligence and relationships with other countries should not be in the hands of a person with insufficient links and ties to the national interests of the State. In fact proponents of such provisions have often argued that without this citizenship cap on eligibility criteria, control of the Defence Force would be vested in a person whose loyalties are questionable. Presidents born as nationals of a different country who later attain another citizenship may, in dealing with their original country be influenced by their nativity, whether in the form of hostility or favoritism. Even if a Presidential aspirant was able to prove that he or she can

³⁵ Section 80(6)(a)

³⁶ Section 80(7)(d)

³⁷ Section 131(a)

rise above prejudices and deal with the old country objectively, he or she would still widely be regarded as prejudiced and the media would fan such suspicions. "As Commander-in-Chief, it is not enough to be above reproach, one must be above suspicion of reproach".³⁸

The Constitution of the United States³⁹, for example, provides in addition to the requirement of "natural born" subjects, a requirement that such person should have lived in the United States for fourteen years.⁴⁰

The question of the loyalty of presidential aspirants born abroad only arises where the aspirant is not tied to the country he or he wishes to rule, by descent. A child born abroad of a Malawian parent or parents living abroad, is automatically eligible for Malawian citizenship. This child is therefore a natural born subject, rather than one who is naturalized either through marriage or any other qualifying requirement. In fact most countries will not confer their citizenship on a child born in their country whose parents have other nationalities, requiring the child to take the citizenship of his or her parents. The United States requirement that such a person should also have lived in the country for fourteen of years ensures that the person who is becomes president is not one who is out of touch with the values and beliefs of the country as a whole. The first President of Malawi lived abroad for a number of years before returning to Malawi to rule. A fourteen year residency requirement would have made him ineligible to run for presidency immediately upon his return and this is a factor to consider in deciding whether or not to adopt a similar provision in the Malawi Constitution.⁴¹

³⁸ Yinger John; Myths involved to Defend Second-Class Citizenship for Naturalized Citizens Revised August 24, 2000. <http://faculty.maxwell.syr.edu/jyinger/Citizenship/myths.htm>.

³⁹ Article II, Section 1, Clause 5

⁴⁰ The Constitution of Trinidad and Tobago. Section 23 provides for a 10 year residency period, Sudan, section 37 merely provides for a "Sudanese National" with no residency requirement, Vanuatu, section 35, provides for an "indigenous citizen" and Greece, Article 31, provides for a Greek citizen for at least five years, of Greek descendance from father's line.

⁴¹ There have been debates in The United States aimed at passing a resolution to amend Article II, Section 1, Clause 5 "to make naturalized citizens eligible to be President once they have been citizens for 20 years and reached the minimum age requirements already specified in the Constitution" ((H.J. Res. 88) see Yinger, op. cit. supra foot note 14). This debate has gained momentum with the election of Arnold Schwazenegger as Governor of Carlifornia. It will be interesting to follow the debates and whether the Constitution can ever be so amended as two hearings on the same amendment have failed.

ISSUES:

There appears no doubt that a citizenship bar as provided for in the Constitution is desirable. However, an issue which arises for consideration in this respect is whether it is sufficient to limit the Presidency to citizens by birth or descent without imposing a residence requirement? If a residence requirement is adopted, the consideration must be made of an ideal minimum or maximum continuous period of residency immediately prior to the elections .

2.6 Level of Majority for Electing President

Section 80 (2) of the Constitution provides that the President shall be elected by a majority of the electorate through direct and equal suffrage. As noted in the Issues Paper, this provision has created confusion in that it has not elaborated on what constitutes the requisite “majority”. The Courts have given some guidance by defining electorate to mean the total number of voters and majority to mean the highest number of votes scored by any candidate when compared to the votes scored by other candidates.⁴²

The issue of the level of majority as it relates to the election of a President is very important as the legitimate exercise of power by that President is dependant on it.

The *Issues Paper* records several submissions on the undefined issue of “majority”. Some suggestions have set the majority at 50% + 1 of the total votes cast. Under this proposition, if no candidate scores 50% + 1 votes at the first ballot, there should be a run-off ballot between the top two candidates. Any counter-argument on the expense of such a procedure is neutralised by the importance of ensuring that the President has legitimacy and is accepted through being elected by a majority of Malawians. Another position put forward in the *Issues Paper* is that

⁴² *Gwanda Chakuamba and others v Attorney General and others* cc No. 113 of 1999. For detail of the implications of this decision, see *Issues Paper*, page 30.

there is no need to entrench an absolute majority as failure to achieve it would invariably lead to expensive re-runs at every election.

It was also suggested that the political party with the highest number of seats should proffer a candidate. This would ensure that the most recognised party nationally leads government.

The last proposition put forward was even more stringent. On top of scoring the highest number of votes, a winning Presidential candidate must reflect the national appeal by winning 25% of the votes in all three regions.

The importance of having an election system that has national appeal and acceptance cannot be over emphasized in the democratic process. The President as head of state and government is the symbolic representation of the State and government and should be regarded by the public as a Chief Public representative that personifies the continuity and legitimacy of the state. As such, the way in which the President comes into power should be clear and beyond reproach so that he or she is acceptable nationwide and commands enough respect to unify the nation that may, as in the case of Malawi, be split on regional lines.

The Constitutions in reviewed this Paper were not all clear about the level of majority necessary to confer legitimacy on the office of the Presidency and some have gone to considerable lengths to provide for eventualities in the event of the level of majority prescribed not being met. The Constitution of the United States which has a different Presidential election system⁴³ to most countries, simply states that the “person having the greatest number of votes shall be President, if such number be a majority of the whole number of electors appointed”.⁴⁴ The Constitution of the United States goes further to make provision for eventualities such as a tie or situations where no person has a majority. It is interesting to note that in the case of the United States, there is no prescribed majority.

The Constitution of France⁴⁵ on the other hand requires that the President be elected on an “absolute majority of the votes cast”. Failing which a second ballot is to take place on the second

⁴³ The President of the United States is ultimately elected by an electoral college.

⁴⁴ Article II Section 1.

⁴⁵ Article 7.

Sunday following with only the two top candidates competing. In contrast the Constitution of the Russian Federation is completely silent on the level of majority, necessary to elect a President, leaving this for an “organic law”.⁴⁶ The Constitution of Trinidad and Tobago is equally vague on the issue of majority, requiring only that “the candidate who is unopposed or who obtains the greatest number of the votes cast shall be declared elected”.⁴⁷ In Greece, the President is elected by the Parliament through vote by roll call in a special vote called for this purpose by the Speaker.⁴⁸

The general trend amongst the Constitutions reviewed suggests that the issue of the type of majority requisite for legitimising the office of the President has either been left vague or elaborated in statutes. As past experience⁴⁹ has shown that the issue of a majority is problematic, it is submitted that this issue should be elaborated and greater detail should be provided for in terms of processes to be followed if the majority required is not reached.

ISSUES

- What kind of provision is necessary to clear the ambiguity raised by the status quo in the Constitution?
- Would it be better as with the other Constitutions sampled that instead of entrenching these issues in the Constitution in the interests of flexibility, that they would best be left to the review and amendment of the Parliamentary and Presidential Amendment Act?

The specifics of the election process ranging from the level of majority and the attainment of a minimum of 25% of the votes from all regions are all important. There is no doubt that the nation is split on regional lines and a lot has to be done to ensure that the President is legitimised not just by a 50% + 1 majority, but also backed by a certain percentage of the electorate in all the three regions of the country. Great care, though, has to be exercised in prescribing any numbers to prevent the exercise to become an arbitrary choice of numbers.

⁴⁶ Article 81 (3).

⁴⁷ Section 31 (1). Trinidad and Tobago also uses the Electoral College system of election.

⁴⁸ Article 32 (1) of the Constitution of Greece.

⁴⁹ *Chakuamba et al v The Attorney General*. op. cit. supra.

2.7 Tenure of the Office of President

Constitutionalism by its very nature denotes the placing of limits on all legitimate exercise of power. As such a President and his Vice Presidents should ideally only hold office for a limited number of years. The Constitution provides for a five year tenure dating from the date the President is sworn in to the date his or her successor is sworn in.⁵⁰

The First and Second Vice Presidents may hold office from the date they are sworn in until the end of the President's term of office unless their office comes to an end sooner. All three can only serve a maximum of two "consecutive" terms.⁵¹

The use of the word "consecutive" has exercised the mind of civil society with the fear that it may enable an ex-President to find his way back to power after the expiry of two consecutive terms. As this would be contrary to the spirit of the Constitution, some have suggested that greater clarity should be made by removing the word "consecutive".

Whilst the removal of the word "consecutive" might solve the immediate problem, it does not cater for a President who having served one term, loses an election and then *bounces back* after a number of years. The issue in this respect is the use of the word "may" in section 83 in referring to the maximum number of terms that a President can serve. If the word "may" is construed as an eligibility requirement, the issue of a President *bouncing back* does not arise. If however the use of the word "may" is construed as conferring a discretion, the flood gates open and any person who has served as President for a full term before can run for the presidency again. Whilst it may appear harmless for Presidents to *bounce back*, the philosophy of generational politics and contemporary rule is frustrated. World leaders need to be contemporaneous with each other to enable vibrant dialogue and peer pressure where necessary. The examples of Fidel Castro and Robert Mugabe as elderly States Men for whom dialogue with younger States men has proved to be ineffective illustrates the point. Lastly as Malawi matures as a democracy, the next logical step of progression is to build up a pool of retired public officials, including States Men who may be engaged in other areas of nation building.

⁵⁰ Section 83.

⁵¹ Section 83 (3).

ISSUE:

Should the Constitution make it clear that after a person has served one term as President, that Person is ineligible to return to the presidency for a further term.

2.8 Succession to the Office of the President

Vacancies in the office of the President or either of his deputies may occur for any of the following reasons: —

- the tenure of the office expires;⁵²
- the President or Vice President are removed after indictment and conviction by impeachment;⁵³
- the President or Vice President dies;⁵⁴
- the Vice President resigns;⁵⁵
- incapacity;⁵⁶
- simultaneous vacancy of President and Vice President for any reason.⁵⁷

The issue of succession to the office of the President or Vice President depends upon the manner in which the act giving rise to the vacancy occurred.

The various circumstances in which a vacancy arises in the Presidency and the way such vacancy is filled can be categorized in three main groupings. The first type is logical consequence of the end of the stated tenure and this raises no problems as the Constitution stipulates the holding of elections are stipulated at the end of the period of tenure. The second type of vacancy arises upon the death, resignation or removal by impeachment of either of the President or Vice President or both simultaneously. These are unpredictable events and they call for both emergency and long-term measures as it can happen at any time within the period of tenure. The third type of vacancy arises as a result of a temporary absence of the President either due to incapacity or due to a short

⁵² Section 83 (1).

⁵³ Section 86 (1).

⁵⁴ Section 84.

⁵⁵ Section 84.

⁵⁶ Section 87.

⁵⁷ Section 83.

period of time taken away from office either on official duty abroad or otherwise. This third type of vacancy has not been provided for in the Constitution.

2.9 Death, Resignation or Removal

The *Issues Paper* highlights two areas of permanent succession as problematic as the consequences are such that an unelected person succeeds to the Presidency.

In the first instance, section 83 (4) provides that where there is a vacancy in the Presidency, the First Vice President may assume that office for the remainder of the term and appoint a Vice President for the remainder of the term. The issue raised in this respect is that if the President who assumes office also dies then the appointed Vice-President may become President, making an unelected person President.

Secondly, in the case of a simultaneous vacancy in the office of both the President and the Vice President, cabinet may elect an Acting President and Acting Vice President from among its ranks. Both acting appointees may only hold office for 60 days if there is more than one year unexpired on the term of office or for the remainder of the term if four years have expired.⁵⁸ Once again, a situation arises in which unelected persons would rule the nation for a substantial period of time.

The issue of a permanent as opposed to a temporary filling of a vacancy in the office of the President is problematic worldwide. In fact, it took the United States 150 years to evolve a system of law dealing with the issue of permanent succession and even then unresolved issues remain.⁵⁹

The first issue of contention highlighted in the *Issues Paper* is largely problematic because it allows the President to appoint an undemocratically elected Vice Presidency who could potentially replace him or her. The position in the United States prior to the 25th Amendment in 1967, was that if a permanent vacancy of this nature arises, the Vice President succeeded as a President with full powers for the remainder of the term. The new President was not empowered to appoint a Vice President throughout the duration of his or her tenure. This way an undemocratically elected person never got the chance to rule and any emergent second vacancy necessitated the holding of

⁵⁸ Section 83 (4).

⁵⁹ “*Succession to the Presidency – A Chronology*” www.doctorzebra.com/prez/a_succession.htm.

elections. This position was reversed by the 25th Amendment allowing the President to nominate a Vice President who is subject to confirmation by Congress.

ISSUE:

- Should Malawi consider adopting the pre-1967 position if the concern raised in the *Issues Paper* is to be addressed?

The next contentious issue arises out of the occurrence of a simultaneous vacancy in both top offices. Whether a person takes over as President or Acting President seems to depend on his or her position prior to ascending to the top office. Comparative study shows that a Vice President succeeding to the presidency becomes full President whereas any other official such as other cabinet members, become “Acting” President. The theory surrounding the role of an “acting” President is therefore that such a person will only “act” within a specified limit (of six months or less) and in the event of a vacancy during the term in “acting”, the question of an unelected official filling the office of President should not arise and the Constitution should automatically call for fresh elections. The Malawi Constitution avoids such election if the remaining period of the term is a year or less.

2.10 Continuity of Government

The issues raised also highlight one important aspect of governance. There must always be a visible continuity of governance in order to avoid anarchy when the top office falls vacant mid-term. The United States has solved this problem by amending the Constitution. The 25th Amendment speaks as to how the President is succeeded in office and not who succeeds him. It also establishes procedures by which the Vice President and the cabinet can remove the President when they judge him or her to be incapacitated. This Amendment is supplemented by the Presidential Succession Act⁶⁰ which lists cabinet officers in line for Presidential succession. Whenever the structure of cabinet is changed, this law has to be amended to reflect the changes. The current line of succession in the United States ranks cabinet departments by the year in which

⁶⁰ The most recent is Presidential Succession Act of 1947.

they were founded.⁶¹ This ordering of succession provides certainty and could be adopted so long as the length of time in which any unelected official serves as President is limited to a short period whilst awaiting the holding of general elections.

ISSUE:

Since elections are always expensive would it be prudent in this regard to entrench a provision that stipulates an emergency reserve fund to be applied to holding emergency election so as to ensure that a democratically elected person is always at the helm?

2.11 Removal of the President: Impeachment

The greatest concern as regards impeachment is that section 86 of the Constitution providing for it, leaves the procedures for impeachment to Standing Orders of Parliament.⁶² The only requirement is that the procedures accord with the principles of natural justice and the grounds for impeachment are limited to serious violations of the Constitution or serious breach of any written law. The concern was that these procedures should be entrenched in the Constitution or provided for in our Act of Parliament since there is potential for abuse otherwise. A referendum to vote out the holder of office was also preferred to ensure that the procedures are not invoked arbitrarily.

The United States system provides tried and tested procedures for impeachment that might once again offer guidance. First and foremost it must be appreciated that impeachment is an extraordinary process that should not be allowed or should naturally not occur on a regular basis. The United States has only considered the issue of impeachment seriously on four occasions and the result has either been that the President was acquitted, has resigned voluntarily, or the resolution to impeach has failed.

The mechanism of impeachment is self-limiting and cannot be allowed to indulge vexatious claims. First and foremost, Article II, section 4 of the Constitution provides that the grounds shall only be

⁶¹ The line of succession is currently: 1. Vice President, 2. Speaker of the House, 3. President Pro tempore of the Senate, 4. Secretary of State, 5. Secretary for Treasury, 6. Secretary for Defense, 7. Attorney General, etc.

⁶² See Consultation Paper page 45.

“treason, bribery or other high errors or misdemeanors” “High crimes and Misdemeanors” were defined in the Federalist Papers⁶³ as:

- “(1) real criminality –breaking the law;
- (2) abuses of power;
- (3) violation of public trust.”

It is still not easy to pinpoint the exact nature of the offences as Representative Gerald Ford noted in 1970 defined impeachable offences as “whatever a majority of the House of Representatives considers it to be at a given moment in time.”⁶⁴

It seems to be generally acceptable in the United States that the level of impeachable offences has to be high and there has been no allegation that the process was set off for personal motives. The nature of the serious offences outlined above could be reduced into law for our purposes so as to guide the nation which is still somewhat unclear as to the nature of impeachable offences.

As regards the process, the United States grants the House of Representatives “sole power of impeachment”.⁶⁵ The entire House of Representatives votes for a formal impeachment inquiry needing only a simple majority for approval. Although the Constitution does not elaborate on the impeachment procedures, the established House practice is: —

- (1) to begin with a resolution authorizing the Judiciary Committee to investigate any charge brought against the President or Vice President;
- (2) the House Judiciary Committee then holds hearings and investigates the charges;
- (3) if the Judiciary Committee finds support for the charges it issues an impeachment resolution, which includes Articles of Impeachment;

⁶³ Federalist Papers were a series of 85 articles written and published in New York newspapers under the pseudonym Publius between 1787 and 1788 by Hamilton, Madison and Jay in an attempt to explain the new Constitution to the People of America and gain support for it. <http://usgovinfo.about.com/library/fed/bfedindexhtm>.

⁶⁴ <http://usgovinfo.about.com/fed/befedindexhtm>.

⁶⁵ Article I, section 2 of the United States Constitution.

- (4) if the Committee believes impeachment is warranted, it issues a resolution to the full House. The Resolution then goes to the House floor for consideration;
- (5) if the House adopts anyone of the Articles of Impeachment by a simple majority, the President is considered impeached and the matter goes to the Senate for trial.

The Senate is empowered by Article I, section 2 of the Constitution to try all impeachments. The process in the Senate is as follows: —

- (1) An odd number of “prosecutors” or “managers” are chosen either by the Speaker or by ballot from both parties that voted for impeachment.
- (2) The impeached President’s lawyers will present a defense and the President has the right to testify and to cross-examine witnesses as in any criminal proceeding.
- (3) The full Senate acts as jury.
- (4) The Chief Justice presides over the trial. Senators remain silent and all questions are directed in writing to the Chief Justice.
- (5) At the Conclusion of the trial, each Senator is allowed 15 minutes of debate in a closed discussion to discuss the verdict. The vote to convict must be by a two thirds majority. The Senates verdict is final and there is no right of appeal.

ISSUE:

- Should impeachment procedures be provided for in the Constitution or in legislation specifically enacted for that purpose?
- What measures should be put in place to ensure that the impeachment process is not set off by motives of ill intent ? **Suggestion:** *the process of impeachment may involve at least two branches of government and Parliament ultimately must pass the impeachment motion. A referendum is costly and may not be appropriate.*
- What should constitute impeachable offences? **Suggestion:** *These should be definite, precise and limited and the list should be one to which the nation is largely agreeable.*

2.12 Temporary Absence⁶⁶

(a) Absence from the Country

There is no constitutional provision delegating power to either the Vice President or any other official in the event of the President's temporary absence from the country. Such situation provides a temporary vacuum which could be taken advantage of by opportunists seeking to cause unrest.

A number of Constitutions stipulate the President's temporary absence and make provision accordingly. In the Constitution of Trinidad and Tobago for example, where the President is absent from the country, the President of the Senate acts temporarily as President.⁶⁷

ISSUES:

- Should a provision providing for the temporary absence be entrenched in the Constitution or provided for in a law on Presidential Succession or any other written law?
- **Suggestion:** *At any rate international practice suggests that such a provision should provide for the temporary delegation of power which should be reduced to writing to avoid any doubt and ambiguity as to the extent of the exercise of that power.*

(b) Incapacity

Section 87 is very clear about what constitutes incapacity and provides for procedures for obtaining a declaration of the President's incapacity. Medical certification of the incapacity⁶⁸ is a prerequisite so as to remove any element of malice.

2.13 Retired/Removed Presidents

The question "what happens to ex-Presidents at the end of their term of office" is one that is very significant in Malawi's fledgling democracy. If a President is removed by impeachment, the moral

⁶⁶ Dulani, B.; ("Chapter VIII of the Malawi Constitution Revisited" Paper presented at the National Constitution Review Conference, March 28-31st 2006) discusses this issue more fully.

⁶⁷ Section 27 (1).

⁶⁸ Section 87(2)(a)

affront of such a removal should take away any privileges that the President might have otherwise enjoyed. Impeachment is akin to a dishonorable discharge and it would be antithetical to the nature of offence to afford a person convicted under it any presidential benefits after office. There is no doubt that ex-Presidents who leave the office honourably are entitled to the benefits under the Presidents (Salaries and Benefits) Act.⁶⁹ The only issue becomes whether such Presidents should be constitutionally precluded from engaging in active politics so as to give the new President a chance to rule.⁷⁰

The Constitution accords every person (and this must be taken as including a former President) freedom of association⁷¹ and freedom of political participation.⁷² Precluding a former President from engaging in active politics might be an infringement of this right. In the United States, for example, a former President can run for congress (although such person will not be eligible to run for the presidency if he served both terms). This recognises that former Presidents can still engage in active politics. The question therefore becomes whether allowing ex-Presidents to continue in active politics creates such unrest as to justify an infringement of his or her personal freedoms.

A compromise is reached in proposing a provision that limits the former Presidents terminal benefits and privileges if he or she is still engaged in active politics. In Malawi, this seems to have been achieved under the provisions of the Presidents (Salaries and Other Benefits) Act ⁷³.

2.14 Miscellaneous Issues

(a) Immunity

The Constitution⁷⁴ grants immunity to the person holding the office of President or performing functions of President from civil or criminal liability. Criminal immunity is only applicable for as long as the President or the person holding the office of the president is still holding office.⁷⁵ As regards civil immunity, there is no express reference as to whether the President or person holding

⁶⁹ Cap. 2:02, Laws of Malawi.

⁷⁰ Issues Paper, page 37.

⁷¹ Section 32.

⁷² Section 40.

⁷³ See footnote 43 *supra*

⁷⁴ Section 91

⁷⁵ Section 91(2)

the office of President is to be liable after his or her tenure of office has expired. The language of the section extends this immunity to “any civil proceeding” against the President or the person holding the office of President but the office of the President though is susceptible to court orders concerning rights and duties under the Constitution. It is currently being asserted⁷⁶ that immunity extends to the Vice President.

Whether the Vice President is also immune under the Constitution is debatable. Section 91 is clear that it relates to a person holding the office of President or performing his or her functions. This is a clear restriction. Under this section, the Vice President can only claim immunity when he is exercising functions of the President for whatever reason.

ISSUE:

- Should immunity be extended to the Second Vice President and Third Vice President and or their office?
- If immunity is to be extended, should it be civil or criminal liability?
- Does the Constitution need to clarify that this immunity is only to be exercised during the tenure of the presidency?
- Should specific acts for which immunity is granted be outlined?

Historically, and again the United States provides the best example, the President’s immunity has been applied to purely official acts. These are actions carried under the auspices of the office of the Presidency. This tradition goes back to an 1896 case in which the court held that –

“In exercising the function of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under any apprehension that the motives that control his official conduct may at any time become the subject of any inquiry in a civil suit for damages. It would cripple the proper and effective administration of public affairs

⁷⁶ Case involving the current 1st Vice President Dr. Cassim Chilumpha and the Attorney General, Civil Case No. 315, 2005 (unreported) yet to be decided.

entrusted to the Executive Branch of Government if he were subject to any such restraint".⁷⁷

Some commentators took this further to argue that the successful conduct of the office of President requires immunity from criminal sanctions of official acts.

These are valid and well-established principles that offer guidance on how immunity is to be approached. We may therefore do well to entrench a provision restricting the President's immunity.

An argument that arose in the United States during the Clinton regime is worth considering. There is no doubt that Presidential immunity is intended to apply to official acts, but suing a President or subjecting him or her to criminal prosecution also jeopardizes his or her ability to govern. On 27 May 1997, a unanimous United States Supreme Court held in *Clinton v Jones*⁷⁸ that the Constitution does not protect a sitting President from a law-suit that is predicated on private pre-Presidential conduct. Further, an official's absolute immunity extends only to acts in performance of particular functions of his office. The doctrine of immunity finds no application and cannot be invoked where the public official is being sued in his private capacity or as an ordinary citizen. The language in the Malawi Constitution seems to suitably provide for presidential immunity in line with this doctrine.

Mr. Clinton had sought "modest" and "limited" immunity until he left office on the following grounds: —

- the threat of litigation (albeit of a personal nature) would distract the President from his public duties;
- future Presidents could be deluged with merit-less, partisan inspired legislation designed to humiliate and distract the Chief Executive;

⁷⁷ *Spalding v Vilas* 1896 161 US 483 (1896).

⁷⁸ *Clinton v Jones*

- a decision which could result in leaving the President at the mercy of the Judicial Branch presents a violation of the separation of powers. President Jefferson writing to the US Attorney General in 1807 argued that for the President “to comply with such calls would leave the nation without an Executive Branch, whose agency, nevertheless, to be so constantly necessary that is the sole branch which the Constitution requires always to be in function”.⁷⁹
- the Presidency is a unique office with unique vulnerabilities that must be protected.

Whether any of these issues are to be considered will depend upon the peculiar roles of the Presidency. However any decision that is reached must be made against a backdrop of our nation’s commitment to the rule of law which demands that no person be above the law. Further, separation of powers aside, the Constitutional weight of the interest to be served by requiring the judiciary to act as a check and balance on the executive must be balanced against an appreciation of the dangers of judicial intrusions upon the authority and proper jurisdiction of the executive branch. Lastly, taking into account the practical concerns regarding holding the President accountable for actions in private life, any claim of Presidential privilege cannot be granted without serious investigation into why that privilege is necessary. In a hearing for presidential immunity, the burden should ultimately be placed on the President to demonstrate why his office mandates his immunity.

2.15 President Changing Parties

The current situation in which the President who was elected on sponsorship of a political party subsequently resigning from that party whilst in office has attracted divided views.⁸⁰ Whilst some stakeholders are of the view that the President is a free agent and can do what is best for the nation, others have argued section 65 of the Constitution preventing members of Parliament from crossing the floor should apply equally to the President. Others still are of the view that in principle a President elected on a party ticket may resign from that party to focus on national development rather than party politics.

⁷⁹ Ford P; ed; “*Ten Works of Thomas Jefferson*” 1905, p. 404.

⁸⁰ *Consultation Paper* pp 46-47.

There are no ready answers to this divide. It may be argued that a President is a custodian of the Constitution together with the spirit and principles underlying it. In this case it would be considered an oversight that the Constitution is silent about the issue of the President “crossing the floor” or indeed perhaps there is no “floor” for the President to cross as his or her constituency is the entire country.

It may also be argued that as authority to govern comes from the people, fresh mandate should be sought if the circumstances in which one was elected change. If this view is acceptable, the Constitution will have to reflect these serious implications for posterity. At any rate the President’s freedom to associate will have to be weighed in balance against the interests of the Constitution as a whole.

2.16 Rotation of the Office of the President⁸¹

With Malawi population being rather politically split along regional lines and the majority of the population residing in the South, it seems unlikely that the *status quo* will ever produce a President from the north. Some have suggested that rotating the Presidency among the regions appears to be a solution. Whether this can practically be enforced will depend upon a re-engineering of the way in which elections are conducted.

The plurality voting system employed by Malawi may not be best suited to picking a candidate who is acceptable in all three regions.⁸² Suffice it to say that in order for any electoral system aimed at ensuring representation of all three regions to take effect, a lot of resources will have to be invested in civic education.

⁸¹ See Consultation Paper page 47 and see Dulani, B.; *op. cit.* foot note 55 *supra*.

⁸² Issues on electoral reform may be discussed in Para 3 on Electoral Systems and the Constitution.

3. THE OFFICE OF THE FIRST VICE PRESIDENT

The office of the First Vice President (whose title in the absence of a Second Vice President is simply the Vice President) is provided for in section 79 of the Constitution. The exact nature of roles or functions of the First Vice President are not specifically stated in the Constitution and may be stipulated either by the Constitution itself, any other Act of Parliament or by the President. Neither the Constitution nor any other laws prescribe the roles and duties of a Vice President or indeed a Second Vice President except to provide that the Vice President is to preside over Cabinet in the absence of the President.

3.1 Eligibility requirements

Eligibility requirements for all Presidential aspirants i.e. President, First Vice President and, if any, Second Vice President, are the same as outlined in respect of the President.

3.2 Relevance of Office of the Vice President

It is not surprising that very little mention is made of the office of the Vice President in the Constitution or other legislation. The concept of a Vice President is derived from the Constitution of the United States. The founding fathers of the American Constitution created the office of the Vice President as an after thought at the 1787 Constitutional Convention. The delegates had spent days debating the power of the Presidency and ways to check it. To avoid concentration of power in one person, they even considered a multi-person executive. Ultimately, the delegates settled on the appointment of an extraordinary person, a Vice President, without extensive discussion, primarily to address the problem of succession.⁸³

Outside the issue of succession, there seems very little to recommend the retention of this office.

ISSUES

If the Vice Presidency is to be retained others have suggested that it may be worth considering whether –

⁸³ This Nation.Com – American Govt. and Politics Online; “*Why did the Founding Fathers Create the Vice-Presidency*”, <http://www.thisnation.com/question/039.html>.

- the Vice President should be elected separately from the President so that people have a choice to elect the two individually;
- the First Vice President should be the person who came second in the Presidential elections as such a person would already be acceptable to the majority;
- the party with the majority in parliament should produce the First Vice President;
- the President should appoint his own Vice President after elections to ensure good working relations.⁸⁴

In carrying out any or as many duties as the President assigns to him, the Vice President tends to be relegated to symbolic and less important functions of the President. These include ceremonial functions and events that the President may be too busy to attend.⁸⁵ Arguably, these functions could easily be exercised by a senior member of cabinet. If the role of the Vice President is to ensure a balance of power by not concentrating too much power in one person, then the boundaries of the powers to be exercised by each should be clearly set out in legislation if not the Constitution itself.

Comparatively, neither the Constitutions of Greece nor Vanuatu provide for the office of the Vice President. The President appoints a Prime Minister and when he is unable for any reason to discharge his functions, the President may be temporarily replaced by the Speaker of Parliament, or in his or her absence, by cabinet collectively. Similarly, the Constitution of Trinidad and Tobago does not provide for the office of the Vice President. In the event of temporary absence, the President is replaced by the President of the Senate.

Whilst it may be possible therefore for a state to function without a Vice President, a culture has developed in Malawi that calls for this office and the issues raised in both the *Issues Paper* and the *Consultation Paper* appear to suggest that the people are happy with the existence of office of the Vice President but unhappy with the way in which incumbents to the office enter office.

⁸⁴ See Issues Paper and Consultation Paper.

⁸⁵ Wikipedia Free encyclopedia, op. cit. supra.

The need to define the role of the Vice President is nonetheless still important. The South African Constitution provides an important starting point in this respect. Article 91 (5) of the South African Constitution requires the Deputy President to assist the President in the execution of the functions of Government. It is proposed that Malawi might go a step further and outline which ones of the President's roles and functions are to be exercised by the President alone, and which ones are to be the exclusive remit of the Vice President.

The Constitution of the United States⁸⁶ gives the Vice President powers as the President of the Senate. This means that the Vice President oversees matters and may cast a tie-breaking vote in the Senate. Another duty required of the President of the Senate is to preside over the counting and presentation of the United States Electoral College in the presence of both houses of Congress.

Although the former duty is largely ceremonial and the latter only occurs when there is a Presidential election, they are nonetheless prescribed duties that are tied to the office of the Vice President. It may therefore assist in terms of consistency over the role of the Vice President if such prescription were emulated here.

Regarding the proposals arising from the consultation on the election or appointment of a Vice President, the suggestions made and outlined earlier should be treated with caution. Past experience⁸⁷ has shown that making the first runner-up to the President in the election is impracticable in view of differences in political parties. The founding fathers of the United States Constitution originally had such an arrangement in mind, providing that the Vice President would be the person receiving the second highest number of votes and in the event of a tie for second, then the U.S. Senate would decide.⁸⁸ In the election of 1796, a Federalist won the presidency and a Democrat Republican came second. Similar problems arose thereafter necessitating the XIIth Amendment in 1804.

In sum, experience in Malawi has shown the difficulty of maintaining a cordial relationship between a President and a Vice President even from the same political party despite having been elected together. This situation may not be necessarily circumvented by having two separate ballots for

⁸⁶ Article 1, section 3.

⁸⁷ Wikipedia The free Encyclopedia op. cit. supra.

⁸⁸ Again from the American Constitution.

President and Vice President as was suggested by consultees as there is no guarantee that the two who are ultimately elected will share the same ideologies. Appointing a Vice President from the party that has a majority in Parliament may also give similar results.

The practical way forward might be to continue with the present system where Presidents and Vice Presidents are concurrently elected or to allow the President to nominate a Vice President after he or she assumes office. The recommendation that a Vice President be appointed from Parliament, although desirable in terms of ensuring practical working relations in Parliament, lacks the endorsement of the electorate for the second highest office of the land. As international custom has evolved in such a way that Vice Presidents automatically succeeds to the Presidency, it is crucial that such person be endorsed with some form of mandate by the electorate. If the approach of appointing a Vice President after the election is the preferred way forward, perhaps express provision could be made stipulating that the appointed Vice President will not succeed the President and other democratic arrangements for the filling of the vacancy be provided for.

3.3 Vacancy in the Office of the Vice President

The Constitution provides that the Vice President may cease to hold office for any one of four reasons –

- (a) impeachment;⁸⁹
- (b) death;⁹⁰
- (c) resignation;⁹¹
- (d) incapacity.⁹²

Submissions in the *Issues Paper* suggest that the President should be able to dismiss a Vice President with whom he is unable to work. The original intention in creating the office of the Vice President, as noted earlier, was to prevent the President from having too much power. It may

⁸⁹ Section 86 (1).

⁹⁰ Section 84.

⁹¹ Section 87 (6).

⁹² *Ibid.*

actually be healthy to have a Vice President who may at times disagree with the President. The submission in the *Issues Paper* is not without a background experience in Malawi in light of the present impasse between our President and Vice President, and also towards the end of the last presidential term between the then President and Vice President. The balance should be between a democratically elected Vice President not to be removed in the absence of impeachment machinery and the need for the Constitution to enable a Government not to fail to function on account of poor relations between the President and his subordinate Vice President.

Another way is to consider that if the President is to be vested with powers to dismiss the Vice President, such Vice President should be one appointed by him and specific instances and procedures in which the Vice President can be dismiss his own appointed Vice President should be outlined.

4. THE OFFICE OF THE SECOND VICE PRESIDENT

The Constitution⁹³ establishes the Office the Second Vice President. The President⁹⁴ may appoint a person to the office of the Second Vice President where he or she considers it desirable in the national interest. This provision was inserted into the Constitution for reasons of political expediency.⁹⁵ The Constitution does not define nor set down guidelines for what constitutes the “national interest”. The President is therefore at liberty to exercise discretion in the appointment of a Second Vice President. The only limiting factor in the Constitution is that where the President is elected on political party sponsorship, he or she cannot appoint a Second Vice President from within his or her own party.

Views expressed in the *Consultation Paper* suggest the abolition of this office. The views reject the office on the ground that it has no proper job description rendering it redundant and irrelevant unlike that of the First Vice President which has a succession function. The potential for abuse by the President in the appointment procedure was noted as was the impropriety of having three persons in the Presidency in a country as geographically small and as poor as Malawi.

Experience has shown that voter registration and turn out are very low and the representative nature of the electorate actually voting has to be taken into account. No precedent can provide these answers and whatever approach is taken it will have to be taken with the peculiarities of our voters in mind.

The processes regarding re-runs in the event of an election that does not meet the stipulated requirements, again the economic situation peculiar to Malawi will determine the mode of action to be taken. Caution should be exercised before enacting elaborate re-run processes without considering the reality on the ground. Malawi has enough problems funding general elections without considering run-off elections. Australia has come up with a more practical arrangement known as “second-choice voting”. In essence, the voter casts a ballot saying: “Here’s my first choice, but if my preferred candidate only gets a small percentage of the vote, then there’s who I’d vote for, by marking their first preference with a “1” and their second preference with a “2””. Second choice voting is like an instant run off election.

⁹³ Section 79

⁹⁴ Section 80 (5) of the Constitution

⁹⁵ See Consultation Paper page 44.

The appeal of second choice voting lies in the fact that it does not require the holding of another election and so no additional cost is incurred. It is however not a perfect resolution. The negative aspect is that it is complicated. It requires educating the voters, training election officials and reprogramming ballot cards. It is nonetheless a preferable option to re-runs.

The last suggestion, calling for the party with the largest number of parliamentary seats to field a candidate also presents its problems. In terms of ensuring a proper and effective working relationship between the executive and the legislature, this suggestion holds appeal, but has to be carefully considered in order to become a workable system. If this is the preferred mode of electing a President, guidance can be drawn from systems that have Electoral Colleges. Trinidad and Tobago, for example, has an Electoral College which is a unicameral body consisting of all members of the Senate and all members of the House of Representatives assembled together specifically constituted for election purposes.⁹⁶ This type of body ensures legitimacy and acceptability of election results.

It should also be considered that Malawi practices a Presidential system of government as distinct from a parliamentary system. It may not be easy to import this system into a Presidential system. It is to be noted that the Electoral College was the system for electing a President's candidate under the one party system in Malawi replaced by the present system.

⁹⁶ Section 28 (1) of the Constitution of Trinidad and Tobago.

5. CABINET

5.1 Composition

Cabinet is established under the Constitution⁹⁷. It consists of the President, the First Vice President, the Second Vice President and such Ministers and Deputy Ministers as the President may appoint from time to time.

Cabinet is empowered⁹⁸ to exercise functions and powers assigned to it by the Constitution or an Act of Parliament and is responsible for advising the President on any Government policies and any other matter referred to it by the President.

The President appoints both Ministers and Deputy Ministers and is mandated to fill vacancies in the cabinet.⁹⁹ Cabinet Ministers are appointed to serve at the pleasure of the President in his absolute discretion and can therefore be replaced at any time. The Constitution is silent as to the size of cabinet.

The eligibility requirements for Ministers and Deputy Ministers are that such persons must be citizens, not less than twenty-one years of age, able to speak English and registered as voters in a constituency.¹⁰⁰

A number of issues were noted in both the *Issues Paper* and the *Consultation Paper* regarding the size of cabinet.

Stakeholders generally expressed the view that the number of Ministers should be set down in the Constitution with an upper limit. The commonly preferred upper limit appears to be twenty. Such an arrangement would reduce the practice of bloated cabinets and in the event that the President is minded to add an extra ministry, he or she would have to seek Parliamentary approval. Stakeholders were also skeptical about the role of Deputy Ministers who are considered irrelevant in light of the fact that the Government structure already has the office of Principal Secretaries. These suggestions all attempt to prevent unnecessary public expenditure.

⁹⁷ Section 92 (1)

⁹⁸ Section 92 (2)

⁹⁹ Section 94 (1).

¹⁰⁰ Section 94 (2).

Examples elsewhere show that it is possible to set down a constitutional limit for the size of the cabinet. The Constitution of the Republic of Vanuatu¹⁰¹ provides that “the number of Ministers including the Prime Minister, shall not exceed a quarter of the numbers of Members of Parliament”.

The Constitution of the United States on the other hand is silent on the issue of cabinet. The tradition of the cabinet, though, dates back to the beginnings of the presidency itself. The existence of the cabinet derives itself from Article II, section 2 of the Constitution which gives the President power to perform certain functions “by and with advice of the Senate”. It is interpreted that this advice justifies the existence of cabinet whose principal purpose is to advise the President on any subject he may require relating to the duties of their respective offices. The Cabinet of the United States is traditionally limited to 15 executive departments (now 16 with the recent Homeland Security portfolio) considered crucial to the functioning of the country.¹⁰²

The Constitution of the Republic of South Africa offers an interesting alternative. On top of the same type of provisions as are provided in the Malawi Constitution on the composition of Cabinet and the powers of the President to appoint members of cabinet, there are clear eligibility requirements. The President can only select a Deputy President from members of the National Assembly. He or she may select any number of Ministers from among members of the National Assembly and only a maximum of two members can be selected from outside the National Assembly. There is no limit on the number and one may muse that in, although it should be recognised that organizing a Government is also guided by established practice theory the President can therefore appoint as many Ministers as there are members of the Assembly provided two are from outside.

As for offices of Deputy Ministers, government internationally shows that it is common to have these offices. The language in the Constitution does not compel the President to appoint Deputy Ministers. The President can therefore only use this power as desired.

¹⁰¹ Section 40 (2).

¹⁰² Viz: Agriculture, Commerce, Defence, Education, Energy, Health and Human Services, Homeland Security, Housing and Urban Development, Interior, Labour, State, Transportation, Treasury and Veterans Affairs and the Attorney General. Under President George Bush, Cabinet rank has also been accorded to the Administration, Environmental Protection Agency, Director, Office of Management and Budget, the Director, National Drug Control Policy; and the United State Trade Representative.

5.2 Members of Parliament Doubling as Ministers

As members of the executive, cabinet members are expected to discharge their roles and functions separate from the other two branches of government. Under Malawi's model of the separation of powers doctrine, however, Cabinet members can and do double up as Members of Parliament. The *status quo* owes its legitimacy to a Supreme Court decision¹⁰³ and to section 51 (3) of the Constitution.

The effect of the *status quo* as regards the relationship between the legislature and the executive is that the balance of power is tilted towards the executive. Members of Parliament who are Ministers would almost always support Government in the House.¹⁰⁴

Stakeholders suggest that in terms of Malawi, the doctrine of separation of powers should be carried out more deeply precluding in absolute terms the doubling of Ministers as Members of Parliament.

Prescribed systems of government as practiced in the American model do not allow such doubling up. In Parliamentary systems of government, in the manner of the United Kingdom, Ministers have to be or become Members of Parliament in order to stay in office. Most governments find themselves in either of these two absolute spectra and although the Malawian model is problematic, it may be the most suitable option for Malawi.

There is an inextricable link between the function of the legislature and the efficiency of the executive that requires that the two branches form a vital alliance of some sort. Without the approval of the legislature or legislation imposing taxes, approving expenditure, etc., government cannot function. The vital question is therefore that "if the President were to form a government without Members of Parliament as Ministers is it not likely that his budget would often not be approved?"¹⁰⁵ Experience has already shown just how difficult it is for a President to pass legislation when he does not have a majority in Parliament. Allowing Members of Parliament to double up therefore reduces the instances of deadlock that many otherwise operate to the

¹⁰³ *Fred Nseula v Attorney General and Another* cc 63 of 1996, see *Consultation Paper* page 31 and *Issues Paper* page 10.

¹⁰⁴ See *Issues Paper* page 10.

¹⁰⁵ Forsyth Prof. C., *The Relationship Between the Legislature and the Executive*, A Paper presented to the Constitutional Review Conference, 28th to 31st March, 2006.

detriment of governance. As noted in the Constitution of South Africa, for some countries Cabinet Ministers can be taken from the legislature.

Another important consideration in the issue of doubling up is the level of resources available or the number of people willing to participate in politics in the country. The pool of both technocrats and politicians willing to run for Parliament and to accept a cabinet position is very small. It may prove difficult to find cabinet members outside Parliament if the President were restricted to drawing his cabinet from outside the legislature.

Lastly, whilst Presidents enjoy security of tenure in office, the same cannot be said about members of cabinet who are appointed and dismissed at the Presidents discretion. If Cabinet members were obliged to give up their seats in Parliament upon appointment, they would need to be assured, through some express provision in either the Constitution or any other written law, as to the security of their position in office, otherwise it would not be worth their effort to run for Parliament. Further, requiring Ministers to give up their seats would necessitate parliamentary by-elections which are costly.¹⁰⁶

¹⁰⁶ Parliamentary elections are not really amenable to second choice voting but if a strict separation of powers is ultimately decided on, the electorate could be asked to indicate a second choice in case their first preferred candidate was ever appointed to cabinet.

6. STRUCTURE OF GOVERNMENT

Despite being split along regional lines, Malawi is too small geographically to warrant a federal system of government. It may be more practical to consider budgets that are administered along regional lines. As part of the process consolidating democracy and as a strategy for realizing the country's development goal of poverty reduction, Government has already embarked upon decentralizing political and administrative authority to district level.¹⁰⁷

The National Decentralisation Policy¹⁰⁸ already caters for devolution of extensive development functions and responsibilities to District Assemblies at local level. In addition to the performance of their functions, District Assemblies have also been mandated to form committees and finance committees are included. The mechanisms for ensuring development at regional level are therefore catered for.

Instead of casting the issue of development along regional lines, it should be considered a national issue. The only solution for development in the Northern Region should not be restricted to electing/appointing a President from that region. Other ways of ensuring equal development including legislating upon budgetary quotas to be spent on developing each region should be considered. These are not necessarily issues for the Constitution and may be made in another law. They are however worthy of serious consideration to the extent that they have been raised as matters of major concern related to the country's development strategy.

¹⁰⁷ Government of Malawi; Malawi Decentralisation Policy, 1998 p. 1.

¹⁰⁸ *Ibid.*

7. ACCOUNTABILITY

7.1 Disclosure of Assets

The Constitution¹⁰⁹ requires the President and members of Cabinet to fully disclose their assets within three months from the date of election or appointment, to Parliament. The provision might also be bolstered by the insertion of the issue raised by stakeholders is to require that one should declare one's assets with one's nomination in the case of a President and Vice President and before assuming office in the case of other Cabinet Minister. The Constitution of the United States goes further to provide for a clause preventing the President and Cabinet from increasing or diminishing their salary or emolument for the period for which they are appointed or elected.

7.2 Disclosure of Assets by Senior Public Officers

In addition to the President and members of Cabinet, section 213 of the Constitution requires holders of certain offices to also declare their assets. These offices include the National Assembly and public offices of certain senior grades as specified by the National Assembly. The provision also creates a committee of Parliament charged with the monitoring of the compliance of this section.

To date, the National Assembly has neither compiled a list of senior grade or a list of the corporations, etc., whose senior officers are to declare their assets.

One issue arising in this respect is whether it is proper for unelected public officers to declare their assets to Parliament. Further, inactivity of the National Assembly in listing the required offices seems to suggest that the provision is frivolous especially when it is also considered that even the declaration requirement for Cabinet and the President was observed more in its breach than its compliance.¹¹⁰

One commentator¹¹¹ on the Malawi Constitution notes that the declaration of assets by Presidential aspirants is not an eligibility requirement. In view of the nature of the President's duty, it is suggested that the Constitution should contain provisions specifically requiring Presidential

¹⁰⁹ Section 88 A (1)

¹¹⁰ Such as a pre-condition to Swearing In.

¹¹¹ Dulani B, op cit footnote 14.

aspirants to declare their assets as pre-condition for contesting the elections. The Constitution only provides for asset declaration of successful candidates within three months from the date of election or appointment.¹¹²

The Nigerian¹¹³ and Zambian¹¹⁴ Constitutions require successful Presidential aspirants to declare their assets before assuming office or to declare assets as a pre-condition to standing for election, respectively.

Before any new provisions or any amendments are suggested for declaration, enforcement and compliance mechanisms that are effective must be considered. The rationale for requiring senior public offices to declare assets must also be analysed with a view to considering its continuation.

¹¹² Section 88 A (1).

¹¹³ Section 140 (1).

¹¹⁴ Section 35 (5) (b).

8. OTHER EXECUTIVE OFFICES

8.1 The Office of the Attorney General

Section 98 establishes the office of the Attorney General as Principal Legal Advisor to Government. The office may either be the office of a Minister or a public office. The Attorney General may be removed by the President on grounds of incompetence, incapacity or compromise.

In most common law jurisdictions, the Attorney General is the Principal Legal Advisor to Government. The role of the Attorney General in his advisory capacity needs clarification. As the executive is the most visible face of government and the Attorney General is almost always involved in advice and litigation on behalf of various ministries, he is perceived as legal advisor to the Executive. This is a misconception as the Attorney General is mandated to act even on behalf of the legislature and the Judiciary and does do so in practice.

The responsibilities stemming from his role as principal legal adviser are unlike those of any other Cabinet member. The role has been referred to as "judicial-like" and as the "guardian of the public interest".¹¹⁵ There are various components of the Attorney General's role. The Attorney General has unique responsibilities to the judiciary, the legislature and the executive. While there are different emphases and nuances attached to these there is a general theme throughout all the various aspects of the Attorney General's responsibilities that the office has a constitutional and traditional responsibility beyond that of a political minister.

As Principal Legal Advisor, the Attorney General has a special responsibility to be the guardian of that most important concept - the rule of law. The rule of law is a well-established legal principle, but hard to define in simple terms. It is the rule of law that protects individuals, and society as a whole, from arbitrary measures of Government. It is the rule of law that safeguards personal liberties. The Attorney General has a special role to play in advising Cabinet to ensure the rule of law is maintained and that Cabinet actions are legally and constitutionally valid.

¹¹⁵ Canada *Ministry of the Attorney General Act*.

The office of the Attorney General is an independent one. However, as the President appoints and has powers to remove the Attorney General, this further perpetuates the misconception that the office is biased towards the executive.

Stakeholders at the National Constitutional Review Conference expressed concern with the seeming lack of independence of the office of Attorney General and suggested that the office be reviewed. The legislative branch proposed that it be permitted to seek independent legal counsel without conferring with the Attorney General as it perceived the office to be compromised.

To address these concerns, consideration may be given to requiring the Attorney General to be independent and impartial by not belonging to any political party. The Attorney General may also be required to have a certain level of experience in practice, at least ten years to ensure maturity in office. It may also be worth considering restricting the role of the Attorney General to providing legal advice only to the executive. This is in view not only of the limited human resources of the Attorney General's department, but also due to the imposing workload that providing legal advice and representation to all branches of Government would present. Taking the United States as an example, in the early years, the Attorney General used to act as legal counsel for Congress, issuing legal opinions for intended actions. However, giving legal opinions to Congress, the President, Cabinet and heads of executive departments proved too much for the Attorney General and he now only operates within the mandate of the 1789 Judiciary Act which restricts him to give opinions only to the President and heads of executive departments.

If the office of the Attorney General is maintained in its current form, members of the legislature may be given a choice to seek alternative legal advice in specified situations, at the expense of the Attorney General. The Attorney General may approve the external contract before it is entered into. The criteria for seeking independent legal advice should include cases of a political nature presenting potential for bias by the Attorney General or where the interest of justice would require that independent counsel is sought.

9. CONCLUSION

A Constitution ought to reflect a fundamental conviction that governmental "power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it."¹¹⁶ As the most visible branch of government, the executive is perhaps the most likely to overstep its boundaries in the name of governance. As such the executive requires the tightest control mechanisms to ensure free, responsible, and democratic government. Ultimately, all the three branches of government have to be checked in the exercise of their power by provisions that are clear and unambiguous. The concentration of hazy or unclear limitations on governmental power in the executive should be avoided.

¹¹⁶ *The Federalist* No. 48, at 332 (James Madison) (Jacob E. Cooke ed., 1961), quoted in *Metropolitan Washington Airports Auth. ("MWA") v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 273 (1991).