



MALAWI LAW COMMISSION

DISCUSSION PAPER NO. 5:

CONSTITUTIONAL INSTITUTIONS AND OTHER OVERSIGHT BODIES

[May, 2006]

EXECUTIVE SUMMARY

The principal objective of this Discussion Paper is to act as a working document for the Review of the Constitution in the light of the perceived shortfalls identified through consultations, written submissions and from views expressed during the First National Constitutional Conference in respect of Constitutional and other oversight bodies.

This paper discussed the several issues raised pertaining to each Constitutional or oversight body in the light of the relevant provisions of the Constitution and the governing legal framework. Further the paper offers solutions and recommendations on the way forward.

The paper has been prepared by William Yakuwawa Msiska, Assistant Chief Law Reform Officer in the Malawi Law Commission.

TABLE OF CONTENTS

	Page
1. INTRODUCTION.....	1
2. OUTLINE OF THE CONSTITUTIONAL BODIES.....	1
2.1 Office of the Ombudsman.....	1
2.1.2 OTHER JURISDICTIONS.....	5
2.2 Malawi Human Rights Commission.....	6
2.2.1 OTHER JURISDICTIONS.....	8
2.3 DEFENCE AND SECURITY COMMITTEE.....	10
2.4 Reserve Bank of Malawi.....	12
2.4.1 OTHER JURISDICTIONS.....	13
3. NATIONAL LOCAL GOVERNMENT FINANCE COMMITTEE.....	14
4. PUBLIC SERVICE COMMISSION.....	16
5. POLICE SERVICE.....	17
5.1 OTHER JURISDICTIONS.....	19
5.2 INSTITUTION OF CHIEFTANCY.....	19
5.3 OTHER JURISDICTIONS.....	19
6. OTHER OVERSIGHT BODIES.....	20
6.1 AUDITOR GENERAL.....	20
6.2 OTHER JURISDICTIONS.....	21
7. IMMIGRATION DEPARTMENT.....	22
7.1 OTHER JURISDICTIONS.....	22
8. ANTI-CORRUPTION BUREAU.....	22
8.1 OTHER JURISDICTIONS.....	23

1. INTRODUCTION

Malawi's transition from one-party state to plural politics in 1994 came with the expectation of a new political dispensation based on the rule of law, respect for human rights, democracy, good governance and transparency and accountability. As a way of embracing these values, it was appealing to the framers of the Constitution to have some bodies established under the Constitution with various mandates. These institutions are the Malawi Human Rights Commission, Malawi Law Commission, Office of Ombudsman, Malawi Electoral Commission¹, the Judicial Service Commission², Defence and Security Committee, the Reserve Bank of Malawi, Public Service Commission, the Police Service. Some of these institutions such as the Human Rights Commission, the Office of the Ombudsman, Malawi Law Commission, Electoral Commission, National Local Government Finance Committee and Defence and Security Committee were introduced as a new phenomena.

This discussion paper is prepared as a working document on the views expressed during consultations and the National Constitutional Conference on some aspects pertaining to each individual institution. The paper is structured in such a way that issues raised in respect of each institution will be considered followed by an international perspective through comparative analysis. Then questions will be asked on the viability of some of the issues raised.

Lastly, a discussion on other bodies like the Immigration Department, the Anti-Corruption Bureau, and the Auditor General will be considered in the light of submissions made by these institutions and views expressed by the general public.

2. OUTLINE OF CONSTITUTIONAL BODIES, OTHER OVERSIGHT BODIES AND INDIVIDUAL COMPARATIVE ANALYSIS

2.1 OFFICE OF THE OMBUDSMAN

The Ombudsman's concept is a dominant and prevalent issue in political and legal theory nowadays. This cannot be overemphasized.

Ombudsman is a Scandinavian word meaning officer or Commissioner. In its special sense it means a Commissioner who has the duty of investigating and reporting to Parliament on citizens complaints against the government³.

By and large, the Ombudsman's main function came to be the investigation of complaints of maladministration on behalf of aggrieved citizens and the recommendation of corrective action to the governmental official or department involved⁴. It is argued that the Ombudsman office is necessitated by the limitation

¹ Discussion Paper No. 3.

² Discussion Paper No. 6.

³ H.W.R. Wade v C.F. Forsyth Admin Law p.81

⁴ BC Deut Corpon v Fredman (Ombudsman) [1984] 2SCR

of courts which are well known. Thus, litigation can be costly and slow. Only most serious cases of administrative abuse are therefore likely to find their way into courts. More importantly, there is simply no remedy at law available in great many cases. This is the problem and the special role the Ombudsman had come to fill. There is a large residue of grievances which fit into none of the regular legal moulds but are nonetheless real. A humane system of government must provide some way of assuaging them, both for the sake of justice and because accumulating discontent is a serious clog on administrative efficiency in a democratic country.

In Malawi the Office of the Ombudsman is established under section 120 of the Constitution and has the mandate to investigate cases of injustice where it appears there is no remedy reasonably available by way of proceedings in a court or by way of appeal from a court or where there is no other practicable remedy.⁵ During the consultations it was observed that section 5 of the Ombudsman Act⁶ seems to limit the broad jurisdiction conferred by the Constitution to cases of injustice occasioned by organs of government. However the historical perspective, international practice and court decisions⁷ support the position that the injustice occasioned should be by organs of government. This it seems raises an issue of jurisdiction. The Ombudsman's jurisdiction is not an easy question⁸. Many complaints ombudsmen investigate can be framed as causes of action that the law recognizes. In the case of Rv Local Commissioner of Administration ex parte Croydon London Borough Council⁹ Lord Woolf said,

"I do not find it easy to define precisely the limits of the Commissioner's jurisdiction"

In his speech to the House of Commons, the British Ombudsman said,¹⁰

"This is an area in which the courts also have a function and I have not found it easy to define the borderline between their jurisdiction and mine".

It should be conceded however, that that may depend on the special wording of the relevant provision. However difficult, the question of jurisdiction is paramount. It may turn out that under our Constitution and relevant statutes the problem is completely overcome. The Constitution, in section 123, sets out the parameters within which the Ombudsman can operate. These limits of exercise of jurisdiction are threefold. Firstly that a person has suffered injustice. Secondly that it does not appear that there is any remedy reasonably available by way of proceedings in a court or by way of appeal and lastly where there is no other practicable remedy. The Ombudsman must bear these considerations when assuming jurisdiction. The Ombudsman has the general Ombudsman jurisdiction. This refers to powers that

⁵ Section 123 of the Constitution.

⁶ Cap. 3:07 of Laws of Malawi.

⁷ Air Malawi Ltd v Ombudsman MSCA Civil Appeal No. 1 of 2000.

⁸ The Legal Powers of Ombudsman; The Law Society *Gazette* 1984 at 3108.

⁹ [1989] 1 All ER 1033 at 1042.

¹⁰ Annual Report for 1976, House of Commons 116.

only the Ombudsman within the realm and sphere or tenets of the Constitution and law require the office to exercise.

Where there is a complaint the Ombudsman is under a duty to consider carefully the question of jurisdiction. The framers restricted the powers deliberately and intelligently. The word used in section 123 is “appear”. If it does appear that there is a remedy available in a court of law either by proceedings or appeal to a court or there is some other practicable remedy the Ombudsman should not assume jurisdiction. This means the exercise of discretion. It has been judicially pronounced in Rv Personal Investment Authority Ombudsman.

“that the applicants contention is that the predominant purpose test is objective. The Ombudsman, in his provisional view, appears to have taken the view that it is subjective in the sense that the matter must be looked at through the eyes of those participating. However, the correct view in the first instance is a matter for the Ombudsman to determine for the purpose of determining his jurisdiction”.”

This presupposes that the Ombudsman should look at the complaint in the light of the limitation of his powers for him to determine if he has jurisdiction.

The exercise of discretion in determining whether the Ombudsman has jurisdiction can therefore not be said to be subjective. It is objective as the Ombudsman is guided by the Constitutional and statutory parameters. The exercise of discretion is always objective. It is up to the Ombudsman to conclude if he has jurisdiction in the light of the alleged complaint in relation to the Constitutional and statutory parameters set by the law¹¹. Thus there is no jurisdictional overlap between the courts and office of the Ombudsman.

There was also a suggestion that the types of the relief that may be awarded by the Ombudsman should be clearly provided in the Act¹². It is worth to note that the Constitution¹³ provides for remedies which the Ombudsman can award. It does not include monetary compensation¹⁴. The Ombudsman Act in section 8 also provides for the remedies the office can award. Judicial decisions have also confirmed that the award of monetary compensation is within the realm of the courts as the Ombudsman cannot operate parallel to courts.

Lastly, procedures for awarding remedies squarely falls within the provisions of section 8 of the Ombudsman Act.

¹¹ [1997] EWCA civ. 814.

¹² See Consultation Paper p.53

¹³ See *Air Malawi Ltd v Ombudsman MSCA Civil/Appeal No. 1 of 2000* and also *Trustees of Malawi Against Physical Disability v Ombudsman Misc. Civil Cause No. 22 of 2001*.

¹⁴ Constitution of Republic of Namibia.

2.1.2 OTHER JURISDICTIONS

The issues raised during the consultations as discussed above need to be looked at in the light of what obtains in other jurisdiction.

2.1.2.1 Namibia

In Namibia the office of the Ombudsman is created under article 91¹⁵ where among other things it gives the Ombudsman duty to investigate complaints concerning practices and actions by persons, enterprises and other private institutions where such complaints allege that fundamental rights and freedoms have taken place. It is therefore a common fact that in Namibia the jurisdiction of the Ombudsman applies across the board without referring to only organs of government. However, article 25¹⁶ limits the Ombudsman powers to providing legal assistance or advice and gives the powers to award monetary compensation in respect to any damage suffered by the aggrieved persons to the courts only.

It should be noted that the Ombudsman in Namibia has very wide jurisdiction. However, the power to award monetary compensation is reserved for the courts. This is in tandem with the judicial pronouncements in Malawi.

It should be noted that Namibia does not have a separate Human Rights Commission. It could well be that the wide powers to investigate beyond government organs is to cover what would be the competence of a Human Rights Commission as in Malawi. In international practice the Human Rights Commission does not exercise judicial powers such as ordering monetary awards. And in Malawi the Human Rights Commission is expressly denied such power.

2.1.2.2 Lesotho

In the Kingdom of Lesotho the office of the Ombudsman is established under section 134¹⁷ with the functions of investigating any action taken by an officer or authority in the exercise of the administrative functions of that officer or authority in cases where it is alleged that a person has suffered injustice in consequence of that action.

In spite of this general provision, the Constitution also contains limitations on the powers of the Ombudsman. The Ombudsman can only investigate departments of government, local government authorities, statutory corporations and members and persons in the service of those organization. The Ombudsman is also mandated to write a report of every investigation undertaken which includes a statement of action taken by the concerned authority as a consequence of the investigation and may include a recommendation of a remedial action including payment of compensation.

¹⁵ Constitution of Namibia.

¹⁶ Constitution of Namibia.

¹⁷ Constitution of Lesotho.

It would appear that in Lesotho, the Ombudsman is empowered to recommend an award of monetary compensation. This is not the case in Malawi.

When considering the issues raised the Commission should seek to find answers specific to the conditions and goals relevant for Malawi.

MATTERS FOR DISCUSSION

- whether there is a jurisdictional overlap between the Courts and office of Ombudsman?
- whether reliefs awarded by the Ombudsman are already catered for under the Constitution and the Act?
- whether the Constitution and the Act have adequately provided for the procedures in awarding remedies?

2.2 MALAWI HUMAN RIGHTS COMMISSION

The Malawi Human Rights Commission as one of the national human rights institutions is established under section 129 of the Constitution with the primary mandate of protecting human rights and investigating violations of rights accorded by the Constitution. The composition of the Commission includes the Law Commissioner, the Ombudsman and other persons from reputable organizations nominated by the Law Commissioner and the Ombudsman¹⁸.

A number of issues were raised regarding the institution¹⁹. The first is that leaving the power of nominating other Commissioners vested in the Law Commissioner and Ombudsman gives the impression that the institution is subordinate to the other two institutions. The Constitution has not created any of its organs subordinate to each other. While this view may have validity, in reality it is just a perception. The other advantage of having the Law Commissioner and Ombudsman as part of the Commission allows continuity of the operations of this body knowing that there are normally delays in the appointment of Commissioners. A perusal of section 131(i) (c) of the Constitution and section 4 of the Human Rights Commission Act on the procedure for appointment of other Commissioners is in accordance with international standards. The composition and appointment of members, whether by election or otherwise, is established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of civilian society involved in the promotion and protection of human rights particularly by powers which will enable effective cooperation to be established

¹⁸ See page 52 of the Consultation Paper.

¹⁹ Cap. 3:08 of Laws of Malawi.

with, or through the presence of, representatives of NGOs involved in work of human rights, trade unions, professional associations (of lawyers, doctors, journalists, etc.) trends in philosophical or religious thought, universities or as eminent experts²⁰.

Such a procedure is thought to ensure transparency, integrity and accountability independence from political influence. The procedure under the Act starts by issuing of a public advertisement signed jointly by the Law Commissioner and the Ombudsman, directed to reputable organizations representative of Malawian society in the promotion and protection of human rights. The advertisement invites the appropriate organizations to nominate up to two persons who are independent, non-partisan and of high integrity and standing. The names, addresses and curriculum vitae of the nominees are sent to the Commission. In turn the Law Commissioner and the Ombudsman jointly assesses the reputation of the nominating organization and may seek further information from the nominee or any other source before recommending who among the nominated persons is to be formally appointed by the President.

This rigorous process can therefore not be said to peg the Human Rights Commission subordinate to Law Commission and Office of the Ombudsman. The two officers merely recommend the nominated names upon their assessment to the President for formal appointment.

Related to the above issue is the issue that the tenure of Commissioners be secured in the Constitution in order to guarantee independence. Though tenure of office is one of the aspects of ensuring independence of an institution, there is no harm having the provision in an Act of Parliament. Section 5 of the Act²¹ states expressly that a Commissioner shall hold office for three years and is also eligible for re-appointment, whereas impartiality and independence is also well grounded in the Act²². In fact in its life of operation the institution has been very critical in issues of promoting and protecting human rights without interference from any quarters.

It has also been observed as a weakness the fact that there is no express provision in the Constitution stating about the independence of the Human Rights Commission. The language of section 136 on the independence of the Law Commission or section 121 on the independence of the Office of the Ombudsman is omitted in respect of the Human Rights Commission although this is elaborate in the Act.

Lastly, the consultations also raised an issue that the mandate conferred by section 129 and 130 is too broad since it empowers the Commission to protect and investigate violations of "rights accorded by this Constitution or any other law". It should be noted that the term "human rights" is defined in the Act²³ as meaning human rights guaranteed by or under the Constitution or any other law in force in

²⁰ Section 11 and 34 Human Rights Commission Act, Cap 3.08

²¹ section 2 Human Rights Commission Act Cap 3.08

²² Section 130 Human Rights Commission Act Cap 3.08

²³ Cap. 3:08 of the Laws of Malawi.

Malawi, including international law. The view that the wide mandate would increase the probability of jurisdictional conflicts with bodies mandated to deal with rights generally cannot be supported. The Constitution itself has limited the mandate of the Commission, in that it cannot exercise a judicial or legislative function and that it shall not be given powers so to do²⁴. This entails that a violation of a right accorded by any other law will be dealt with by other institutions such as the judiciary. The powers of the Commission are limited to investigation and recommendation for effective promotion of rights. This is also clearly from section 22²⁵ where remedies to be awarded by the Commission are spelt out which among other things it shall seek amicable settlement through conciliation where appropriate on the basis of confidentiality, render assistance or advice as the party that complained or petitioned may reasonably require in terms of ss. 15 (2) and 46 (2) (b) and it may also transmit the complaint, petition or any other matter to any other competent authority as prescribed by the law, or otherwise as it thinks fit. It has in fact assisted complainants through the judicial system as a friend of the court where there is an alleged violation of rights²⁶.

2.2.1 OTHER JURISDICTIONS

2.2.1.1 Zambia

The Human Rights Commission in Zambia is established under both the Constitution²⁷ and its regulatory law²⁸ as an autonomous body with powers and functions similar to the Malawi Human Rights Commission. The appointment of Commissioners is by the President subject to ratification by the National Assembly²⁹. Tenure of office is also put in the Act and it is three years subject to renewal.³⁰

2.2.1.2 Uganda

The Uganda Human Rights Commission is an independent Constitutional body established to promote and protect human rights. It is established under article 51(1) of the Constitution and by the Uganda Human Rights Commission Act³¹. Tenure of office of the members is six years and a member is eligible for re-appointment. The powers and functions are similar to those exercised by the Commission in Malawi. However, there is a salient feature in that in Uganda the Commission has very wide jurisdiction in that upon satisfaction that there is an infringement of fundamental rights the Commission may order release of a detained or restricted person, payment of compensation and any other remedy or redress. A person dissatisfied has the right of appeal to the High Court³².

²⁴

²⁵

²⁶ PAC v Attorney General, Speaker of National Assembly, Human Rights Commission (Amicus curiae).

²⁷ Article 125.

²⁸ Human

²⁹ Section 5 of Human Rights Commission Act

³⁰ Section 7

³¹ Act No. 4 of 1997

³² Section 53 of the Constitution.

Appointment of Commissioners is done by the President with the approval of Parliament³³.

2.2.1.3 Tanzania

The Commission for Human Rights and Good Governance is an independent Constitutional body established under article 131 of the Constitution of Tanzania. It is regulated by an Act of Parliament.³⁴ The mandate is similar to what obtains in Malawi. The appointment of members is done following a procedure laid down through a Government Notice.³⁵ Different institutions are involved in short-listing qualified people and the list is forwarded to the appointing Committee who comprise of the Chief Justice, Speaker of National Assembly, Chief Justice of Zanzibar, Speaker of House of Representatives of Zanzibar and the Deputy-Attorney General. The chosen list is then sent to the President who then appoints the Commissioners.³⁶ This process is thought to dispel political influence and upholds independence of the institution as provided for under section 14.³⁷ Its jurisdiction is greatly restricted in that it cannot investigate certain matters that are pending before courts or judicial tribunal, matters relating to prerogative of mercy and matters on which the President directs otherwise.³⁸

Tenure of office of Commissioners is three years and eligible for re-appointment.

MATTERS OF DISCUSSION

- Whether the appointment procedure should be revisited and if so what is the justification.
- Whether having provisions on the period of tenure in Act of Parliament compromises independence of the Commission.
- Whether indeed provision should be made in the Constitution expressly stating about the independence of the Commission.
- Whether sections 129 and 130 be amended as there is a perceived probability of jurisdictional conflict between the Commission and other bodies which deal with rights more generally.
- Whether the Law Commissioner and the Ombudsman should still be members of the Commission and responsible for nominating persons to be members.

³³ S.3 Uganda Human Rights Commission Act, Act No. 4 of 1997.

³⁴ Commission for Human Rights and Good Governance Act, Act No. 7 of 2001.

³⁵ Government Notice No. 89/2001.

³⁶ Section 7 of the CHRGG.

³⁷ Section 7 of the CHRGG.

³⁸ Section 16 of the CHRGG.

2.3 DEFENCE AND SECURITY COMMITTEE ON NATIONAL ASSEMBLY

The Committee is established under section 162 of the Constitution. The Committee's composition is represented proportionally by the political parties having seats in the National Assembly. It exercises powers and functions conferred by the Constitution and an Act of Parliament. Its tenure of office is one year.

It falls under Chapter XVI of the Constitution which establishes the Defence Forces of Malawi. The powers in terms of subsection (3) of section 161 is to scrutinize the powers conferred on the President and the Defence Council in determining operational use of the Defence Forces of Malawi and the appointment and removal of senior officers and other members of the Defence Forces. It may also recommend delegation of authority of Defence Council to any member of the Defence Forces of Malawi.

The Defence Forces Act,³⁹ however is silent on powers and functions of the Committee. The bodies and forces responsible for ensuring security have a variety of roles and tasks. At domestic level, it is their job to preserve law and order, protect security of the State, persons and property, safeguard democratic institutions and procedures to ensure peaceful co-existence of different sections of the Community. This entails that matters of defence and security are very broad and not only confined to the Defence Forces.

The idea of parliamentary oversight of the security sector is viewed as a linchpin of all democratic developments of emerging democracies. The effectiveness of parliamentary control is all the more vital in so far as it guarantees that new policies will be designed and implemented with all the desired transparency and accountability.⁴⁰

Government must be both lawful and legitimate. Consequently, some form of democratic supervision is required, the essence of which must be carried out by Parliament. Democratic supervision makes use of specific tools intended to ensure political accountability and transparency of the security sector. The instruments may include constitutional principles, legal rules, institutional and logistical provisions, as well as more general activities aimed at fostering good relations between various parts of the defence and security sector on the one hand and political power on the other.⁴¹

It can therefore not be overemphasized that good governance has an important value for the democratic oversight of the security sector. The creation of the Committee under the Constitution was possibly necessitated by the nature of our transition from one party rule to multiparty. The new dispensation had to contend with public distrust then in the defence and security sector.

One aspect of oversight is that it does not start and end with legislation. It is also necessary to exercise influence on organs of government within the

³⁹ Act No. 11 of 2004.

⁴⁰ UNDP Human Development Report 2002 Edn.

⁴¹ European Parliamentary Assembly, Recommendation 1713 of 2005.

Committee's portfolio, as well as in the implementation and impact of legislation and policies passed by Parliament on security matters. The duties and functions therefore involve monitoring, investigating and recommending to the Executive and Parliament on how defence and security matters could be resolved or attended to.⁴²

Internationally the Defence and Security Committee of Parliament is not constituted in the Constitution.⁴³ However, for the sake of Malawi in the light of our historic past it may be proper to have elevated the Committee to constitutional status. And if proper, then it was wrongly placed under the Chapter on Defence Forces. It would rather have been created under the Chapter on Legislature. The justification is that matters of defence and security are more encompassing than being confined to the Defence Forces.

A survey of other jurisdictions reveals that the Defence and Security Committee of Parliament is a standing committee established by the National Assembly to take care of matters of security in general. In our case, it might have been put in the Constitution with the aim of discouraging political interference in matters of security. However, it is reiterated that it would be appropriate if the Committee was established with the mandate on all security matters.

Several issues were raised during the consultations which should be considered in light of the above discussion. It is suggested that the specific role of the Committee should be spelt out. With the sentiments that it should be a Committee established specifically under the Chapter on Legislature then the requirement to spell out its role is justified. On the other hand if the thinking is to do away with the Committee altogether from the Constitution then the standing orders should spell out the role of the Committee.

Indeed the suggestions on tenure of office are pertinent. It should correspond with the life of Parliament i.e. five years. This is assuming it is not removed from the Constitution.

The exercise of supervisory powers on appointments and removal of senior officers is misconceived as the powers are reposed in the Defence Council.⁴⁴ To subject the powers of the Defence Council to scrutiny compromises the importance of the institution. Institutions such as the Police Service Commission and the Prison Service Commission are not subjected to the scrutiny of any organ or authority.

⁴² James Ngculu, Parliamentary and Defence and Security Oversight, African Security Review vol. 10 No1, 2001.

⁴³ See Constitution, Namibia, South Africa, Zambia.

⁴⁴ S. of Defence Forces Act.

MATTERS FOR DISCUSSION

- Whether the Committee should be maintained in the Constitution and what should be its proper place.
- If maintained in the Constitution as a Committee of the National Assembly then its role should be clearly spelt out as is for the Public Accounts Committee and the Legal Affairs Committee.
- Should the tenure of office be upgraded to 5 years which is the lifespan of Parliament.

2.4 RESERVE BANK OF MALAWI

The Reserve Bank of Malawi appears under Chapter XIX of the Constitution⁴⁵ but to be established by an Act of Parliament and to serve as the State's principal instrument for the control of money supply, currency and the institutions of finance and generally serve in accordance with the normal functions of a central bank.⁴⁶

With reference to this institution, it has been submitted that it need not be stipulated in the Constitution as it is adequately catered for in the Act.⁴⁷ On the other hand, it has been suggested that the independence of the Bank should be guaranteed by the Constitution.⁴⁸ It has further been suggested that the Bank should have a reporting requirement to a relevant committee of Parliament and the independence of the Bank must also entail security of tenure for the Governor.⁴⁹

In discussing the first issue recourse should be had to section 185 of the Constitution which gives the Bank the status as the State's principal instrument in monetary matters. In terms of the Reserve Bank of Malawi Act⁵⁰ the principal objectives of the Bank are to act as banker and adviser to the Government and several other objectives with a bearing on the national economy and Government economic policies.

The Bank has powers and functions which are performed largely on behalf of the Government which includes international transactions.⁵¹ With all these government responsibilities it would be wrong not to include the Bank in the Constitution. It is a state institution despite being established under an Act as a body

⁴⁵ S.185 of the Constitution.

⁴⁶ Reserve Bank of Malawi Act Cap. 44:02.

⁴⁷ Issues Paper p.45.

⁴⁸ Consultation Paper p.55

⁴⁹ Summary of National Constitutional Conference.

⁵⁰ Section 4.

⁵¹ Section 28 of Reserve Bank of Malawi Act.

corporate. The Bank should have prominence in the Constitution as a state institution.

On the issue of the independence of the Bank being stipulated in the Constitution it is conceded to be a plausible suggestion noting that even the Act does not make provision for the independence of the Bank in the performance of its functions. It would be proper to have the provision both in the Constitution and in the Act.

On the issue of reporting to a relevant Committee of the National Assembly, there is already a reporting structure that ends in the National Assembly. The Bank is mandated to submit a copy of the annual accounts certified by auditors and a report on its operations of that financial year to the Minister who causes the two copies to be laid before the National Assembly.⁵² Unless the suggestion is direct reporting to the National Assembly without an intermediary, then this process suffices.

As regards tenure of office, the Governor and Deputy Governor are appointed by the President for a period of five years and can be re-appointed.⁵³ The Act does not provide for grounds of removal of the Governor or Deputy Governor, thereby threatening their tenure of office.

OTHER JURISDICTIONS

2.4.1 Uganda

Central Bank of Uganda is established under article 161 of the Constitution. Its authority is vested in the Board consisting of a Governor and Deputy Governor and up to five other members. The President appoints the members of the Board with the approval of Parliament. Such appointed members hold office for a term of five years and are eligible for re-appointment. The Bank performs functions and duties which are supposed to be performed by central banks.

The Governor, Deputy Governor and all other members of the Board may be removed from office by the President on the grounds of inability to perform duties of the office arising from infirmity of body or mind, misbehavior or misconduct and also as a result of incompetence. The Constitution also stipulates that in performing its functions the Bank shall conform to the Constitution but shall not be subject to direction or control of any person or authority.

In terms of reporting the procedure is similar to what obtains in Malawi.⁵⁴

2.4.2 Ghana

⁵² S.52 of the Act.

⁵³ S.12 of the Act.

⁵⁴ S.50 Central Bank of Uganda statute.

In Ghana the Central Bank is established under article 183 of the Constitution. The Governor is appointed by the President acting in consultation with the Council of State for a period of four years. The Governor also chairs the board of the Bank. Removal of the Governor is on the same grounds and manner in which a Justice of the Superior Court of Judicature is removed. The Bank reports to the Minister in terms of returns, annual audited accounts and reports.⁵⁵ The independence of the Bank is guaranteed in the Constitution.

MATTERS FOR DISCUSSION

In view of the Malawi position and what obtain in two jurisdictions, the following are matters for discussion.

- Whether the Bank should not be provided for in the Constitution.
- Whether the independence of the Bank be guaranteed in the Constitution.
- Whether the current reporting procedure is not adequate.
- Whether the Act should make provision for the procedure for appointment or removal of Governor and Deputy Governor to ensure transparency and accountability and also guarantee security of tenure of the two offices.

3. NATIONAL LOCAL GOVERNMENT FINANCE COMMITTEE

As stated elsewhere in this Paper this Committee is a new phenomena in our political and legal theory. It is created under Chapter XIV of the Constitution dealing with Local Government.⁵⁶ The function and powers are provided by the Constitution among which are the receipt of revenue and projected budgets, examination and supervision of accounts, recommendation of distribution of funds and variation of amounts payable where need arises, preparation of a consolidated budget for all local government authorities and making application to the Minister for supplementary funds. The primary mandate of the Committee is to oversee the finances of the Assemblies.

⁵⁵ S.56 Central Bank of Ghana Act.

⁵⁶ S.149 of the Constitution.

The Committee consists of six members. A nominee of the caucus of local government authorities, Secretary for Local Government, Chairperson of Civil Service Commission or his nominee, a professionally qualified and practising accountant appointed by the Public Appointments Committee, a nominee of the Electoral Commission and the Principal Secretary responsible for finance or his representative.⁵⁷

From the consultations and submissions made to the Law Commission several issues emerged. Firstly, it is argued that the name should change from Committee to Commission as the term Committee implies that it is a segment of a bigger entity. Secondly, that it should have its own Chapter in the Constitution to ensure independence of the institution. Thirdly, that the composition of membership be reviewed. Fourthly, that amount of funds transferred from central government to local authorities be spelt out in the Constitution by way of a ratio or proportion of the national budget to foster adherence in order to achieve service delivery by local authorities.⁵⁸

On the issue of changing the name from Committee to Commission, Council or Board, the sentiment expressed is justified. The justification comes from the natural meaning of the word "Committee". The term Committee is defined as "a group of people chosen especially by and from a larger group to do a particular job or for special duties."⁵⁹ If this was the intention of the framers of the Constitution, then a larger group would have been created. As there is no larger group, change to an appropriate term should be considered.

The Constitution has embraced the principle of decentralization under the separate Chapter on local government. There is valid reason therefore to have a special body within the Local Government sector to oversee the finances of the sector.

There is certainly need to review the composition of this body and to make detailed provision for its functioning under an Act of Parliament.

The suggestion that levels of funds transferred from Central Government to local government be spelt out in the Constitution is perhaps untenable.

There is no comparative analysis with other jurisdictions as research has shown that such a body does not exist in the other jurisdictions considered.

⁵⁷ S.151.

⁵⁸ Issues Paper pp 41-42.

⁵⁹ Longman Dictionary of Contemporary English.

MATTERS FOR DISCUSSION

- Whether the name of the Committee should change to Commission or Board or other appropriate term.
- Whether the Committee should have its own Chapter in the Constitution rather than fall under Local Government.
- Whether the composition of membership be reviewed.
- Whether levels of funds transferred from Central Government to local government be spelt out in the Constitution.

4. PUBLIC SERVICE COMMISSION

Currently, the Constitution establishes the Civil Service Commission under section 186 with the primary mandate to regulate and confirm appointments in the Civil Service. However, there is no body to regulate the new institutions that have come about 1994 such as the Law Commission, the Ombudsman and others.

Suggestions coming from the consultations are to the effect that the Constitution should establish a Public Service Commission with similar functions as currently exercised by the Civil Service Commission with a focus on all public service institutions. All other Service Commissions should be subordinate to it and be provided for under the Public Service Act.⁶⁰ The other suggestion is that the Public Service Commission should be guaranteed independence to ensure the proper and effective functioning of the institution.⁶¹

Lastly, it has been observed that section 194 of the Constitution prohibits the appointment, election or designation of one person as chairperson of more than one Board, Commission, Committee, Council or similar body established by an Act of Parliament.⁶² The prohibition may disentitle the nation from benefiting from the skills of individuals who may competently serve on more than one board due to their expanse and depth of their expertise in whatever position including chairpersons of such bodies..

⁶⁰ Consultation Paper p.55.

⁶¹ Ibid.

⁶² Issues Paper p.46.

Section 28 of the Public Service Act⁶³ states that the Civil Service Commission and every other Service Commission established under the Constitution shall in the performance of its functions, be bound by and guided by the Act. This presupposes that Public Service is wider than Civil Service. There are other services of a public nature which fall out of the civil service. It is therefore advisable that all other service commissions including the Civil Service Commission be under the Public Service Commission. This might require amending Chapter XX of the Constitution by replacing “Civil Service” with “**Public Service**” and make consequential amendments.

Surprisingly though, the Constitution only talks of independence of the Civil Service in so far as exercise or participation in political activities does not compromise the independent exercise of functions, power and duties in an impartial manner. It is imperative therefore that the independence of the suggested Public Service be guaranteed in the Constitution.⁶⁴ This should be extended to the entire public service.

A counter argument may be made in support of the prohibition of designating, electing or appointing one person to be a chairperson of several boards, Commissions, Committees, Councils or similar bodies is that there are several citizens with capable qualifications and competencies who can ably transact.

OTHER JURISDICTIONS

4.1 Ghana

In Ghana the Public Services are established under Chapter Fourteen of the Constitution, in particular article 190.⁶⁵ It states that the Public Services of Ghana shall include the Civil Service, Judicial Service, Audit Service, Education Service, Parliamentary Service, Health Service, Statistical Service, National Fire Service, Customs, Excise and Preventive Service, Internal Revenue Service, Police Service, Immigration Service, Legal Service, Public Services established by the Constitution and such other public services as Parliament may by law prescribe.

Section 194⁶⁶ establishes the Public Service Commission of Ghana to which most of the Service Commissions are subordinate. The Public Service Commission is also independent in that it is not subject to the control or direction of any person or authority in the performance of its functions. This it is thought instills impartiality and also prevents abuse.

⁶³ Cap 1:05 of laws of Malawi.

⁶⁴ S.193 of the Constitution.

⁶⁵ Constitution of Ghana 1992.

⁶⁶ Constitution of Ghana 1992.

MATTERS FOR DISCUSSION

- Whether the Constitution should make provision for the establishment of Public Service Commission to which other Service Commissions should be subordinate.
- Whether the Public Service Commission should be guaranteed independence in the performance of its functions.
- Whether the provision on the prohibition of the appointment, election or designation of one person as chairperson of more than one Board etc be removed from the Constitution.

5. THE POLICE SERVICE

The Constitution under section 154 creates the office of Inspector General of Police as head of the Malawi Police Service. Appointment to this office is by the President on confirmation by the National Assembly by a majority of the members present and voting. Suggestions from the consultations are that the appointment of the Inspector General should not be subject to Parliamentary approval just as the appointment of the Commander of the Defence Force is not subject to this process and hence the need for consistency.⁶⁷

The process of subjecting the appointment of Inspector General to Parliamentary approval may be justified as a mechanism to check political interference in matters of appointment to this position in which considerable powers of State are vested, particularly the power of law enforcement including the power of arrest.

While there are no universal formulas, the power to appoint a police chief must at minimum, be prescribed by clear and fair procedures. Where possible, the impact of additional institutions such as Service Commissions or civilian oversight bodies can be integrated, adding transparency and civilian participation to this important process.

⁶⁷ Consultation Paper p.55.

5.1 OTHER JURISDICTIONS

The appointment of Inspector General of Police in Uganda is by the President with the approval of Parliament.⁶⁸ In Zimbabwe the appointment is done by the President after consultation with such person or authority as may be prescribed by or under an Act of Parliament.⁶⁹ In Nigeria the appointment is again done by the President on the advice of the Nigeria Police Council. The appointment should be from serving members of the Police Service.⁷⁰

MATTER FOR DISCUSSION

- The question for consideration is whether the current status should be retained.

5.2 INSTITUTION OF CHIEFTAINCY

In the 1966 Constitution the institution of Chieftaincy was specifically recognized under section 6 which provided as follows –

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

The Constitution in some respects gives power to Chiefs to preside over local courts⁷¹ and also to be members of a local government authority.⁷² This is an indication that the framers of the Constitution were versed with the important role chiefs play in society. As rightly argued it was never intended to abolish the institution of chieftaincy but rather an oversight. If it were so intended then the Chiefs Act⁷³ would have been repealed.

5.3 OTHER JURISDICTION

It is a general trend in most of the Constitutions in African to recognize the institution of chieftaincy under a special part. For example Zambia, Zimbabwe, South Africa, Botswana, Lesotho, Uganda, Kenya, Ghana and Sierra Leone have provisions in their constitutions governing the institution of Chiefs.

⁶⁸ Article 213 Constitution of Uganda.

⁶⁹ Article 93 Constitution of Zimbabwe

⁷⁰ Article 215 Constitution of Nigeria

⁷¹ Section 110 (3) of the Constitution.

⁷² Section 146 (4) of the Constitution.

⁷³ Cap. 22:03 of Laws of Malawi.

MATTERS FOR DISCUSSION

Whether Malawi should follow suit by introducing similar provisions in the Constitution knowing that the Institution of Chieftaincy is a very important component of the social fabric in our society, or a minimum to bring back into the Constitution the text of the 1966 Constitution.

6. OTHER OVERSIGHT BODIES

6.1 AUDITOR GENERAL

Section 184 of the Constitution provides for the establishment of the office of Auditor General. This section falls under the Chapter that deals with finance generally. The main functions of the Auditor-General are to audit and report on the public accounts of the State. The Auditor-General is required to submit reports to the National Assembly through the Minister of Finance. In the exercise of the powers and duties of his office, the Auditor-General is not subject to the direction or control of any other person or authority. Further, he may not be inhibited by any person or authority in the conduct of his functions and duties.

It has been submitted that in order to ensure independence of the office, it would be better if the Constitution contained a separate Chapter to provide for the office. It is argued that this would be in line with what the Constitution has done in respect of other institutions of good governance.⁷⁴ Secondly, there is an inconsistency between the Constitution and the Public Audit Act as regards the reporting mandate. The Public Audit Act requires the Auditor General to submit his report to the President and Speaker of National Assembly while the Constitution requires him to submit the report to the National Assembly through the Minister responsible for finance.⁷⁵ It is also proposed that the Constitution should stipulate the retirement age of the Auditor-General.⁷⁶

It should be noted that the office of Auditor-General is very important in so far as the auditing of the finances of government is concerned. The office deals with accounts of government. This entails that the Chapter on Finance in the Constitution is very broad including matters of audit. If one looks at the Chapter creating the Police Service, it is noted that within that Chapter the Police Service Commission is established. Since the Auditor-General deals with matters of finance, perhaps the office is rightly placed.

⁷⁴ Issues Paper page 43.

⁷⁵ Ibid.

⁷⁶ Ibid.

There is no harm in stipulating the retirement age could be prescribed in the Constitution though it suffices to have it prescribed under the Act that regulates the office of the Auditor-General.

6.2 OTHER JURISDICTIONS

In Tanzania, Uganda, Kenya, Zambia, Zimbabwe and Ghana the provisions regarding the Auditor-General fall under the Chapter on Finance in the respective Constitutions. These jurisdictions have also stipulated in their Constitutions the retirement age as being sixty years. However, reporting structures vary. For example in Zambia⁷⁷ the Auditor-General submits his report to the President who will cause it to be laid in Parliament. If the President makes default in laying the report, the Auditor-General is mandated to submit it to the Speaker, in his absence to the Deputy Speaker who will cause it to be laid before the National Assembly. In Tanzania⁷⁸ the report is submitted to the President who directs persons concerned to lay the report in the National Assembly and if the President defaults the Controller and Auditor-General is mandated to submit the report to the Speaker or Deputy Speaker and if these two offices are vacant, the report is submitted to the National Assembly.

The Kenya scenario is different from these two in that the Controller-Auditor-General is required to submit his report to the Minister of Finance who not later than seven days after each of the National Assembly first meets after receiving the report must lay it before the National Assembly.⁷⁹ This is similar to the provision in the Malawi Constitution.

MATTERS FOR DISCUSSION

- Whether Auditor General be created under a separate Chapter in the Constitution.
- Whether the Constitution should stipulate retirement age of Auditor General
- Whether Malawi should maintain the Constitutional reporting structure and effect or make to the Constitution to align with the Public Audit Act.

⁷⁷ Article 121 (4) of Constitution.

⁷⁸ Article 143 of Constitution.

⁷⁹ Article 128 of Constitution of Kenya.

7. IMMIGRATION DEPARTMENT

This is a department in the Ministry of Home Affairs and Internal Security along with the Police Service and Prison Service.

From the consultations, it has been observed that currently the status of the institution is not known as to whether it is still a security organization or a civilian one. This arises from the fact that there is no specific reference in the Constitution to immigration services as a distinct State portfolio while the Police Service and the Prisons Service have been provided under a separate Chapter for each. It has been suggested that it should be accorded its own Chapter as well in the Constitution to spell out its mandate. The Chapter should also guarantee the independence and professionalism of the Department.

Immigration Service is governed by an Act of Parliament, the Immigration Act and another Act under its responsibility is the Citizenship Act.

7.1 OTHER JURISDICTION

In almost all the jurisdictions considered the trend is as obtains in Malawi. The administration of the department is reposed in the Chief Immigration Officer.⁸⁰ Research reveals that no Constitution has specifically provided for immigration matters. On independence of the department most legislation show that the officers in the department perform their duties on specific or general directions from the relevant authorities.

MATTERS FOR DISCUSSION

- Whether the Immigration Service should be provided for in the Constitution and under its own Chapter.

8. ANTI-CORRUPTION BUREAU

The Anti-Corruption Bureau is established under the Corrupt Practices Act⁸¹ with the broad mandate to investigate, prevent and prosecute acts of corruption. Its genesis may be found in one of the principles of national policy under section 13 (0) of the Constitution which requires the State to introduce measures which will

⁸⁰ S.3 Immigration Act Botswana, S.4 Immigration Act Tanzania.

⁸¹ Cap 7:04 Laws of Malawi.

guarantee accountability, transparency, personal integrity and financial probity in order to strengthen public trust and good governance. Stakeholders emphasized the need to upgrade this institution to a Constitutional status in view of its important and sovereign role in the conduct of matters of criminal justices. It has been submitted that the institution is vulnerable if left to exist only under an Act of Parliament.⁸²

The Bureau, though, is subject to the authority of the Director of Public Prosecutions and therefore its establishment under an Act is fitting unless it is intended to remove that subsidiarity.

8.1 OTHER JURISDICTIONS

Constitutions of Governments of Tanzania, Zambia, Zimbabwe, Lesotho and Botswana do not contain a provision establishing the relevant body that deals with corruption. Bodies dealing with issues of corruption in those comparable jurisdictions are established by an Act of Parliament, and that is the position in Malawi.

MATTERS FOR DISCUSSION

- Whether the Bureau should be upgraded to a constitutional body.

⁸² Consultation Paper page 54.