



**MALAWI LAW COMMISSION**

**DISCUSSION  
PAPER NO. 6  
THE  
CONSTITUTION  
AND THE  
JUDICIARY**

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## **PREFACE**

When the Constitution provisionally came into force for one year in 1994, the reasoning was that consultations would be conducted within the year before the document was adopted into a final document. After, the Constitution finally came into force in 1995, the Law Commission undertook a Technical Review of the Constitution in 1998 in order to rectify technical irregularities in the Constitution.

The Law Commission around 2004 commenced the review of the Constitution by inviting submissions from individuals and various sectors of the Malawian society. One of the issues emerging from both written and oral submissions touched on the Judicature or Judiciary. Issues arising from these consultations included eligibility criteria for judgeship, retirement age for Judges, office of the Deputy Chief Justice, definition of 'judicial office', impeachment of Judges and the status of specialized Courts.

This paper has been developed as a working document for the special Law Commission for the Review of the Constitution on matters pertaining to the Judiciary. As such, it discusses the matters arising and other ancillary matters that touch on the operations and constitution of judicial offices and institutions.

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## 1.0 INTRODUCTION

On 18<sup>th</sup> May, 1994, the Republic of Malawi, through an Act of Parliament enacted on 16<sup>th</sup> May, 1994, adopted the Constitution of the Republic of Malawi as the supreme law of the land. Exactly, a year later, the Constitution came definitely into force.<sup>1</sup> The Constitution is primarily a document about political authority and power and how these are exercised. It is also about administrative arrangements in running the government and as such, it locates, confers, distributes, exercises and limits authority among various organs of the State. It also includes aspects of procedure. The Constitution further includes express guarantees of individual freedoms and liberties and proceeds to outline some ideological principles that the State aspires to achieve in future.

The Constitution creates three main organs of government: the Executive, the Legislature and the Judiciary. The Executive branch is responsible for initiation and implementation of policies and legislation while the Legislature is responsible for enacting laws.<sup>2</sup> The role of the Judiciary in this tri-partite arrangement is to interpret, protect and enforce the Constitution and all laws in accordance with the Constitution in an independent and impartial manner with regard only to legally relevant facts and the prescriptions of law.<sup>3</sup> The visibility of the Judiciary as an institution comes through the Courts and the officers that operate them.

This Discussion Paper is prepared as a working document for the special Law Commission for the Review of the Constitution of the Republic of Malawi. It

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<sup>1</sup> Section 212 of the Constitution

<sup>2</sup> Sections 7 and 8 of the Constitution

<sup>3</sup> Section 9; The marginal note to this provision reads: The separate status, function and duty of the judiciary.

has been prepared while taking into account a background of oral and written consultations made by the Malawi Law Commission prior to the National Constitutional Conference<sup>4</sup> held between 28<sup>th</sup> and 31<sup>st</sup> March, 2006. The Paper also takes into account the views expressed at the Conference.

This Discussion Paper sets out the context within which judicial power is derived and exercised and raises matters for discussion in line with the issues that affect the judiciary especially matters that are relevant for the reform exercise. The matters for reform shall be considered through a comparative analysis with how judicial branches elsewhere operate on the international scene. This comparison shall be made in light of the constitutional order that obtains in and is peculiar to Malawi. As far as possible, the comparison shall involve common law countries within the southern African region due to the common legal heritage inherited from the period of colonial administration.

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<sup>4</sup> The Conference marked the official commencement of the review process.

## 2.0 SEPARATION OF POWERS

### 2.1 THE DOCTRINE

The doctrine of separation of powers entails recognition of three main branches of governmental functions as legislative, executive and judicial and corresponding organs that execute these functions.<sup>5</sup> It further entails that these functions are executed by different individuals.<sup>6</sup> Constitutions of various States have adopted the doctrine of separation of powers in different forms but are in unison over the common fear of concentrating enormous power in the hands of one or few individuals. Many Constitutions have avoided the total segregation of powers and repose a combination of the powers in a few individuals. This approach naturally requires the placement of proper safeguards against abuse and a dilution of the quality of power that is reposed in the hands of one individual.

The Constitution of Malawi is one of those Constitutions that have blended the functions of the separate organs albeit to a limited extent. Under the Constitution, the President who heads the executive arm constitutes Parliament together with the National Assembly.<sup>7</sup> Members of Parliament may be appointed Ministers thereby doubling their role of initiating of policies and legislation (role of the Executive branch) and enacting laws (role of the Legislature).<sup>8</sup> It should be noted however that there has never been an instance

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<sup>5</sup> De Smith and Brazier 1998, page 4

<sup>6</sup> *ibid*

<sup>7</sup> Subsection (1) of section 49; Originally, with the Senate which was abolished in 2002

<sup>8</sup> See *Fred Nseula vs. Attorney General and Malawi Congress Party* MSCA Civil Appeal No. 32 of 1997 (Unreported). The Supreme Court reversed the decision of the lower Court and was of the opinion that MPs can double as Ministers without losing their seats in Parliament

where a member of the Judiciary has doubled up either as a Minister or a Member of Parliament.<sup>9</sup>

Elsewhere, in the United States for instance, the President and his Cabinet cannot be members of Congress although the Vice-President occasionally presides over the Senate.<sup>10</sup> Britain on the other hand has a closer resemblance to the Malawi scenario. For instance, the Law Lords act both as legislators and judges.<sup>11</sup> The Lord Chancellor is both a Minister and the Head of the Judiciary and an active member of the House of Lords in its legislative capacity.<sup>12</sup> Ministers like other non-judicial offices have powers to decide justiciable matters.<sup>13</sup>

*Sub-judice* is a Latin maxim which has also been viewed as part of the doctrine of separation of powers. This maxim literally meaning ‘under judgment’ posits that the case in question is currently under trial or being considered by a judicial officer.<sup>14</sup> In England, Australia and Canada it is generally considered inappropriate to comment on a matter that is *sub-judice* even in Parliament or by the Executive.<sup>15</sup> In the United States where the First Amendment to their Constitution protects freedom of speech, comments on matters that are *sub-judice* are allowable, there are in place protective forms of guarding against circus trials especially of criminal defendants whose judgments have been overturned.<sup>16</sup>

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<sup>9</sup> Under the Kamuzu era, Chief Justice Makuta was appointed Minister of Justice from the Bench but had to retire his position as Chief Justice to take up his ministerial appointment

<sup>10</sup> De Smith and Brazier 1998, page 19

<sup>11</sup> *ibid*

<sup>12</sup> *ibid*

<sup>13</sup> *ibid*

<sup>14</sup> See [http://en.wikipedia.org/wiki/sub\\_judice](http://en.wikipedia.org/wiki/sub_judice)

<sup>15</sup> *ibid*

<sup>16</sup> *ibid*

Although the doctrine of separation of powers is not absolute in many instances, it goes hand in hand with the doctrine of the rule of law. This doctrine implies, among other things, that the exercise of powers and functions must have a legitimate foundation and be based on authority conferred by law.<sup>17</sup>

## 2.2 UNDER THE MALAWI CONSTITUTION

The hallmark of the doctrine of separation of powers in the Constitution falls under three provisions that set out the separate status, functions and duties of the three main branches of government.<sup>18</sup> These provisions largely conform to the doctrine as outlined above in prescribing that separate individuals ought to occupy different branches of government and promote separate and exclusive jurisdiction of the three branches.

Under the Constitution, a person may not qualify for nomination or election as a Member of Parliament if he or she holds a public office or belongs to either the Defence Force or Police Service.<sup>19</sup> No person is eligible for nomination as President if the person holds a public office or is a Member of Parliament, *unless that person first resigns*.<sup>20</sup> Membership to the Defence Force or the Police Service is equally disabling.<sup>21</sup>

While the President has the power to make appointments in accordance with powers conferred on him or her by law, some of the appointments are subject

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<sup>17</sup> De Smith and Brazier 1998, page 17

<sup>18</sup> See sections 7, 8 and 9 of the Constitution

<sup>19</sup> Subsection 2 (e) and (f) of section 51

<sup>20</sup> Emphasis supplied. Subsection 7 (e) of section 80

<sup>21</sup> Subsection 7 (f) of section 80

to Parliamentary approval.<sup>22</sup> The President may be impeached by Parliament<sup>23</sup> and the Courts have powers to determine the constitutionality of legislation<sup>24</sup>.

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<sup>22</sup> See Subsection 1 (d) of section 89. For instance, section 154 (2) gives power to the President to appoint an Inspector-General subject to approval by the National Assembly.

<sup>23</sup> See section 86

<sup>24</sup> See subsection 3 of section 11

### 3.0 INDEPENDENCE OF THE JUDICIARY

Among the three branches of government, the principle of judicial independence sets the Judiciary apart from the other two branches of government whose independence is not equally emphasized. Judicial independence posits that the decisions of the Judiciary should be impartial and not subject to the influence of the other branches of government or from private or political interests.<sup>25</sup> Judicial independence is perceived as a prerequisite to the rule of law and a fundamental guarantee of a fair trial.<sup>26</sup> Judges are expected to uphold and exemplify the principle individually and at institutional level.<sup>27</sup> Impartiality on the other hand becomes essential as a tool for the proper discharge of the judicial office. It applies not only to the making of the decision but also to impartiality in the process by which a decision is made.<sup>28</sup>

The principle has been affirmed in numerous international legal instruments and guidelines.<sup>29</sup> The most notable ones include the African Charter of Human and Peoples' Rights provides that State Parties have a duty *to guarantee the independence of the Courts*.<sup>30</sup> The Universal Declaration of Human Rights provides that everyone is entitled to a fair and public hearing by an *independent and impartial tribunal*.<sup>31</sup> The United Nations' sponsored 'Basic Principles on the

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<sup>25</sup> Vijver 2006, page 3

<sup>26</sup> *ibid*

<sup>27</sup> *ibid*

<sup>28</sup> *ibid*

<sup>29</sup> These documents include the 'Recommendations of the Lusaka Seminar on the Independence of Judges and Lawyers'; 'The Blantyre rule of law/separation of powers communiqué' 2003; International Association of Penal Law, International Commission of Jurists and the Centre for the Independence of Judges and Lawyers, Draft Principles on the Independence of the Judiciary 1981

<sup>30</sup> Article 26

<sup>31</sup> Article 10

Independence of the Judiciary<sup>32</sup> provides that the Principles were developed with a view to assisting member states with securing and promoting the independence of the Judiciary and should be taken into account and respected by members within their national legislation.<sup>33</sup> The Principles mainly focus on the independence of the Judiciary; qualifications, selection and training of Judges; conditions of service and tenure; professional secrecy and immunity; and the disciplining, suspension and removal of judges.

Four years later, the United Nations adopted Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary<sup>34</sup> dealing with matters of publicity, resource mobilization and provision, periodic reporting and technical assistance.<sup>34</sup>

An analysis of the various documents on judicial independence has identified a number of requirements essential for substantive independence of the judiciary in a country. The first is the constitutionalisation of judicial independence where the guarantee for judicial independence forms part and parcel of the supreme law of the land.<sup>35</sup> This is expected to be complemented by other oversight institutions such as human rights institutions, law societies, the academia and the media fraternities.<sup>36</sup>

Secondly, judicial functions must be vested in the Judiciary exclusively to avoid the existence and creation of extra-judicial tribunals. Since judicial offices command respect and trust, ascension to judicial office must be based on merit and certain minimum qualifications for members of the Judiciary must be laid

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<sup>32</sup> Adopted by the Seventh UN Congress on the Prevention of Crime and Treatment of Offenders in September 1985 and endorsed by the UN General Assembly in November 1985

<sup>33</sup> See Preamble

<sup>34</sup> Vijver 2006, page 2

<sup>35</sup> *ibid*

<sup>36</sup> *ibid*

down.<sup>37</sup> The appointment of judicial officers must inspire public confidence through public and transparent processes. This also entails the fair and merit-based processes of Judicial Service Commission (JSC) whose membership should not be determined by the President.<sup>38</sup>

The various documents agree that without security of tenure, judicial officers are vulnerable to pressure from all three organs of government. Most documents advocate for permanency in the appointments of judicial officers. Security of tenure may be achieved by providing for terms of office that run until officers reach a compulsory retirement age or occupy office for a fixed term. The compulsory retirement age approach is most common with retiring ages ranging between sixty and seventy-five years while the fixed term approach, less common, has been applied in South Africa (for a period of fifteen years) and has been proposed in the rejected Kenyan Constitution where Judges would be appointed for a period of ten years.<sup>39</sup>

Remuneration of judges has been cited as an underlying major cause of corrupt practices in the Judiciary.<sup>40</sup> It is not known whether increase in the income of judicial officers curbs corruption. In order to deal with the incidents of corruption, disclosure of assets is considered as an effective deterrent in order to prevent corruption, conflict of interest and abuse of public resources.<sup>41</sup>

The various international instruments on judicial independence further recognise and advance the need to improve capacity and attitudes of judges through continuing legal education. Continuing legal education takes the form

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<sup>37</sup> *ibid*

<sup>38</sup> *ibid*. Apparently, there is no express provision in the Constitution empowering the President to appoint members of the JSC

<sup>39</sup> *ibid*

<sup>40</sup> *ibid*

<sup>41</sup> *ibid*

of training programmes, access to legal materials and participation in forums for judges. The need for proper and transparent procedures for evaluation has been emphasized and the promotion of judicial officers should also be put in place. The criteria have to be as objective as possible and should equally apply to processes of a disciplinary nature. However, it should be noted that it appears inappropriate to admonish judges in public. And as such, judges should be accorded immunity from civil and criminal matters on issues related to the performance of their judicial duties. However, the need for a Code of Ethics for the Judiciary has also been emphasized. The Code has to take into account the local legal framework, the means and mechanisms for enforcement of the Code.

In keeping with this principle, the Constitution has entrenched the doctrine and emphasizes that:

*All courts and all persons presiding over those courts shall exercise their functions, powers and duties independent of the influence and direction of any other person or authority.*<sup>42</sup>

The doctrine of judicial independence usually rests on the tenure of judicial office. In most cases, it is secured by giving judicial officers long and oftentimes lifelong tenure<sup>43</sup> and making it difficult for them to be removed from office. Another observation made and viewed as likely to affect the independence of the judiciary relates to the funding of the judiciary. In the event of the Executive preferring to constrain the Judiciary through limitations on funding, the independence of the Judiciary is likely to be compromised. It has been suggested among the issues for review that perhaps the Constitution should

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<sup>42</sup> Subsection 1 of section 103

<sup>43</sup> A case in point is that of Lord Denning of England who retired at the age of 83 years.

protect the budget and operations of the Judiciary from the discretion of the Executive or that Cabinet should include a judicial officer.<sup>44</sup>

This Discussion Paper shall make reference to other matters that affect independence of the judiciary including the special powers of the President given under the Constitution in relation to judicial officers. The Paper shall also throughout its course, refer to the accountability of the Judiciary since the opinions, activities and operations of this organ of Government cannot depart gravely from sentiments of the public and that its management and the financing of its operations cannot be left unchecked.

### **3.1 REMUNERATION OF JUDICIAL OFFICERS**

While tenure of office is the hallmark of judicial independence, the issue of remuneration of judicial officers is equally important. In Malawi, the Constitution has empowered the National Assembly to determine the salaries, pension, gratuity and allowances for judicial officers.<sup>45</sup> In some countries such as Lesotho and Namibia, remuneration of judicial officers is not provided for in the Constitution but has been dealt with within appropriate statutes.<sup>46</sup>

The Malawi Constitution provides that the salary of a Malawian judicial officer may not be reduced without the consent of the holder of that office<sup>47</sup> and shall be increased from time to time so that it retains its original value.<sup>48</sup> The Legislature's intervention into deciding on remuneration for the Judiciary places the latter at the mercy of the former and to a greater extent may not operate well in the event of antagonism or perceived antagonism between the two

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<sup>44</sup> Consultation Paper, page 51

<sup>45</sup> Section 114 of the Malawi Constitution

<sup>46</sup> For Lesotho, the relevant provision is section 15 of the High Court Act and section 10 (1) of the Supreme Court Act and section 5 of the High Court Act

<sup>47</sup> This is apparently a standard practice equally enshrined in the Constitutions of Botswana (section 122 (3)), Kenya (section 208 (5)), South Africa (section 176 (3))

<sup>48</sup> Subsection 2 of section 114; It is yet to be established whether this is practiced in reality

branches. In the United Kingdom, for instance, the remuneration for Judges is determined by an independent pay review body which makes recommendations after receiving evidence from a variety of sources.<sup>49</sup>

Previously, Canada had taken the path similar to Malawi by preventing the Executive from determining salaries of the judicial officers and vested such powers in the Legislature.<sup>50</sup> In 1997, the Supreme Court of Canada through the Provincial Judicial Reference<sup>51</sup> brought a major shift towards judicial independence, by finding an unwritten constitutional norm guaranteeing judicial independence to all judges, including civil law inferior court judges implied by the preamble to the Constitution Act, 1867.<sup>52</sup> Lamer C.J. with L'Heureux-Dubé, Sopinka, Gonthier, Cory and Iacobucci JJ, allowed the appeals in part, stating that there was constitutional protection of judicial independence and impartiality for all judges.<sup>53</sup>

The preamble to the Constitution Act does not mention judicial independence as such but makes reference to the Constitution of the United Kingdom in the following words:

*Whereas the provinces of Canada, Nova Scotia and New Brunswick have expressed their desire to be federally united into one dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a constitution similar in principle to that of the United Kingdom;*<sup>54</sup>

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<sup>49</sup> See [http://en.wikipedia.org/wiki/judicial\\_independence](http://en.wikipedia.org/wiki/judicial_independence), the free encyclopedia p 1, visited on May 8<sup>th</sup>, 2006

<sup>50</sup> *ibid*

<sup>51</sup> [1997] 3 S.C.R. 3

<sup>52</sup> *ibid*

<sup>53</sup> [1997] 3 S.C.R. 3

<sup>54</sup> Preamble to the Constitution Act 1867,

[http://www.oefre.unibe.ch/law/icl/ca00000\\_.html](http://www.oefre.unibe.ch/law/icl/ca00000_.html)[http://www.oefre.unibe.ch/law/icl/ca00000\\_.html](http://www.oefre.unibe.ch/law/icl/ca00000_.html), visited on 17<sup>th</sup> May, 2006. Emphasis supplied.

Consequently, judicial compensation committees as opposed to the executive or even Parliament now recommend judicial salaries in Canada.<sup>55</sup>

Looking at the similarities in the provision of judges salaries, the sticking issue appears to be the question of who determines the salaries of judicial officers. In Zimbabwe, the President sets the rate of remuneration.<sup>56</sup> It appears that the arrangement where an independent body determines the remuneration including other benefits promotes the doctrine of separation of powers than in scenarios where the power is left in the hands of Parliament or the Executive.

### 3.2 TENURE OF JUDICIAL OFFICERS

Tenure, according to the Black's Law Dictionary, refers to 'a right, term or mode of holding or occupying, and tenure of an office means the manner in which it is held, especially with regard to time'.<sup>57</sup> In common usage though, tenure of office for judicial officers relates to the length of time that judicial officers occupy office.

The Constitution provides for tenure of office for judicial officers. All persons holding the office of Judge shall vacate such office upon attaining the age of sixty-five years.<sup>58</sup> This limit on age is not cast in stone for Judges including Justices of Appeal and the Constitution has made a number of exceptions in this regard. Firstly, the President in consultation with the JSC may allow a Judge to continue in office for a given length of time in order to allow that judge to conclude proceedings that were commenced before him or her before he or she attained the retirement age.<sup>59</sup> Although the Constitution provides for the age of sixty-five years, it further allows that a Judge may vacate his or her

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<sup>55</sup> *ibid*

<sup>56</sup> Sections 3 and 4 of the Judges' Salaries, Allowances and Pensions Act (Cap. 7:08)

<sup>57</sup> Page 1469

<sup>58</sup> Subsection 6 of section 119

<sup>59</sup> Proviso to subsection (1) of section 119

office upon attaining such other age as may be prescribed by Parliament. In the event that such age is prescribed by a statute, the different age shall not apply to a Judge without his approval where the statute comes into force after the appointment of such Judge.<sup>60</sup>

As for Magistrates and persons appointed to other judicial office by the Chief Justice, they shall hold office until the age of seventy years. Clearly, a disparity between the age of vacation of office for Judges and lower judicial officers stands out. When the Law Commission consulted judicial officers, the prevailing view was in favour of synchronizing the age of retirement to seventy years. The officers found no justification in the requirement that Judges should leave office earlier than other and lower judicial officers. At a regional level, the average age for retirement of Judges is seventy years. In Namibia, for instance, all judges are expected to retire at the age of sixty-five years but the President is entitled to extend the retiring age to seventy years.<sup>61</sup>

A dissenting view from the people consulted, however, based its opinion on fear of dwindling performance as judicial officers grow older, and suggested that the retiring age should not be raised.<sup>62</sup> This view was also based on the fact that keeping older judges in the judicial system would not make room for younger professionals to take over. The holders of this view went further to recommend the reduction of the retiring age for Magistrates and other judicial officers to fifty-five or sixty<sup>63</sup> or sixty-five years<sup>64</sup>.

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<sup>60</sup> Proviso to subsection (6) of section 119

<sup>61</sup> Sub-article (4) of Article 82 of the Namibian Constitution; The special Law Commission on the Technical Review of the Constitution recommended the adjustment of the retiring age for Judges to seventy years.

<sup>62</sup> Consultation Paper, page 48

<sup>63</sup> Issues Paper, page 38

<sup>64</sup> Consultation Paper, page 48

While the issue of maximum age for judgeship received considerable attention, the issue of a minimum age was also raised. Presently, judgeship may be attained by any person who is or has been a judge of a Court having unlimited jurisdiction in civil and criminal proceedings and the person is entitled to practise as a legal practitioner in such a court and has been entitled to practise for not less than ten years.<sup>65</sup> Judicial officers preferred the age of forty as a minimum age of judgeship since in their view such an age would ensure adequate experience, competence and maturity. Opposition of this view opined that wisdom and competence are not always products of age.

While a Judge holding his or her office in good order holds it until he or she attains the age of seventy years in the United Kingdom, in the United States of America, all members of the Supreme Court, district courts and appeals courts have lifetime tenure.<sup>66</sup> The Constitution of Canada has introduced a mandatory retirement age of seventy-five years.<sup>67</sup>

In the SADC Region, generally, judges hold office until a mandatory retiring age varying from sixty to seventy-five years.<sup>68</sup> In some jurisdictions, although a prescribed age is provided for, judges are allowed to retire either prior to the age in question or after that age. There are notable distinctions between the retirement ages for High Court and Supreme Court judges in some instances and indeed between ordinary judges including Justices of Appeal or Appellate judges and the Chief Justice. Another common factor within the region is the fact that Presidents have powers to extend the period of service after a Judge reaches retirement age. This is not merely for purposes of letting the judge complete matters commenced before he or she reached retirement age, but also

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<sup>65</sup> Subsection (1) of section 112

<sup>66</sup> See [http://en.wikipedia.org/wiki/judicial\\_independence](http://en.wikipedia.org/wiki/judicial_independence)

<sup>67</sup> *ibid*

<sup>68</sup> Tanzania stands out as an exception where the mandatory retiring age is fifty-five years.

in cases where it pleases the President or King so to do. In a number of jurisdictions this is also achieved by allowing statutes to provide for a higher age for retirement other than that prescribed in the Constitution.

In the region, Botswana, Lesotho, South Africa and Swaziland stand out for providing judgeship for a fixed period of time, basically on contract.<sup>69</sup> The reason Botswana opted for contractual appointments was that there was a shortage of legal practitioners at the time of independence. Although, almost the whole bench of the Supreme Court comprises Botswana citizens, two are presently on contract. In Lesotho, the constitution has provided that appellate judges may be appointed for a fixed period of three years, even if they have attained retirement age.<sup>70</sup> Contractual appointments are the norm in Swaziland where Judges are appointed for as long as seven-year contracts. Section 158 of the Swaziland Constitution, though, merely provides that ‘a judge on contract shall vacate office at the end of the period provided in the contract’.

In South Africa, judges of the Constitutional Court are appointed for a non-renewable term of twelve years or are expected to retire upon sooner reaching the age of seventy years.<sup>71</sup> As for the ordinary courts, the fixed period is reduced to ten years and both the fixed period and the prescribed retiring age can be extended by the President by five years respectively.<sup>72</sup>

Another common feature within the SADC Region relates to the provision that either statute or the Constitution prohibits the abolition of the office of judge while there is a substantive holder of that office. Namibia has no prohibitions on the abolition of a judicial office while there is a substantive holder thereof

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<sup>69</sup> Vijver 2006, pages 20, 64, 130-131 and 170.

<sup>70</sup> Section 125 (8) of the Lesotho Constitution

<sup>71</sup> Subsection (1) of section 176 of the South African Constitution

<sup>72</sup> Subsection (2)(a) of section 3 of the Judges' Remuneration and Conditions of Employment Act

while sections 123 (3) and 119(2) of the Lesotho Constitution prohibits such abolition and so do sections 95(2) and 99(3) of the Botswana Constitution. While there is no corresponding provision in the Malawi Constitution, perhaps, administrative justice, duly provided for in the Constitution, would demand that a Judge be furnished with reasons in writing for such abolition since it is obvious that the rights, interests and legitimate expectations of the judicial officer in question would be affected by the abolition. However, the more ideal situation is to introduce a provision that prohibits the abolition of a judicial office while there is a substantial holder of that office.

During consultations with Judges and other judicial officers in Blantyre, it was further argued that raising the retirement age of Judges to the age of seventy was likely to remove the prospect of retiring Judges seeking to be immediately employed after retirement which had the potential of weakening their judicial independence in matters involving prospective employers.

In order to maintain the traditional respect for those that serve or have served in superior judicial office, there was also need to discourage retired Judges from taking up active practice at the Bar. It was considered that raising the retirement age to seventy would achieve this goal. As a package of these reforms, consideration should be given to providing for Judges to retire with their salaries and other benefits. Within the region, Zambia has introduced a similar scheme.

### **3.2.1 POWERS OF THE PRESIDENT**

The President, beyond being endowed with powers to appoint judicial officers, has powers where he deems it to be in the public interest to do so, to assign a

Judge, with the consent of that Judge, to any other office in the public service.<sup>73</sup> During such assignment, the assignee may cease to perform the duties of his office as Judge although this shall not be construed as removal from the office of judge. In the event that the assignment ceases to have effect, the assignee returns to his or her judicial office without formal re-appointment. In any event, the applicable age of retirement for the Judge remains that prescribed by the Constitution or an Act of Parliament.

It is for this reason that the office of the President has since exercised his powers to appoint the Chairperson of the Electoral Commission, the head of the National Compensation Tribunal and the Law Commissioner from among judges. Judges have also been appointed at various times to head Commissions of Inquiry. Although, there appear to be safeguards in the exercise of this power as detailed above, it is notable that the exercise of such powers may be perceived to be an instrument for removing or suspending judges known to be ‘unfavourable’ to the Executive Branch from the Bench under the guise of such appointments. The case of Justice Mwaungulu when Government almost assigned him to the Faculty of Law at Chancellor College is in point.<sup>74</sup>

### **3.2.2 VACATION FROM OFFICE**

Vacation from office has been discussed above but a special discussion is necessitated by the fact that not in all cases is vacation from office occasioned by operation of time. In this light, a distinction between the modes of departure from office suffices to highlight the operation of the doctrine of judicial independence.

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<sup>73</sup> Subsection (7) of section 119

<sup>74</sup> This incident occurred during the Muluzi administration between 1994 and 2004. It attracted local and international criticism as interference with the independence of the judiciary.

There is no clear provision in the Constitution which provides for voluntary departure from judicial office such as resignation. However, there exists an instance where a judicial officer resigned from the bench.<sup>75</sup> This position is at variance with provisions applicable to holders of public office in the other branches of Government such as the office of Speaker, Member of Parliament, the President and his or her Vice- Presidents and Ministers.

It remains doubtful if vacation from office upon attaining the prescribed age falls under voluntary vacation. In any event, attainment of a particular age is hardly voluntary and may come at a time when the holder of judicial office would perhaps prefer to remain in office. As such, it is classified for purposes of this discussion as involuntary and falls under this part.

The Constitution provides that all persons holding judicial office may be removed for two reasons. One ground is *incompetence* in the performance of duties of his office and the other is *misbehaviour*. The removal may be effected by the appointing authority who is the President, under an instrument under the Public Seal after consulting the JSC.<sup>76</sup>

Whichever is the applicable reason, the Constitution sets out a procedure for removal of a Judge from office. The procedure requires that a Judge may be removed from office in accordance with principles of natural justice after a motion praying for his removal on the stated grounds has been debated in the National Assembly, has been passed by a majority of votes of all the members of the Assembly and submitted to the President as a petition for the removal of the Judge concerned.<sup>77</sup> In the interim period, the President may upon consultation with the JSC suspend the Judge from office where he or she is

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<sup>75</sup> Justice Chizumila is on record as having retired on personal grounds.

<sup>76</sup> Subsection (3) of section 119

<sup>77</sup> *ibid*

convinced that it is in the interest of the public to do so.<sup>78</sup> This suspension may be revoked.

Discontent was expressed by judicial officers to the effect that it is not clear at what stage the rules of natural justice will operate and perhaps re-wording of the provision would highlight the proper invocation of the natural justice rules so that they apply to each and every stage of the removal process.<sup>79</sup>

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<sup>78</sup> Subsection (4) of section 119  
<sup>79</sup> Consultation Paper, page 50

## **4.0 COMPOSITION OF THE JUDICIARY**

### **4.1 THE OFFICERS**

The Courts are presided over by judicial officers and the Constitution recognizes the offices of the Chief Justice, Justice of Appeal, Judge of the High Court, Registrar of the High Court and Supreme Court of Appeal, Magistrate of whatever grade and those presiding over traditional or local courts as judicial offices.<sup>80</sup>

#### **4.1.1 THE CHIEF JUSTICE**

The Chief Justice is appointed by the President subject to confirmation by two-thirds of the National Assembly.<sup>81</sup> As the most senior judicial officer, he or she heads the judicial branch of government. The office of the Chief Justice has no deputy. It has been observed that most constitutional offices do not provide for deputies. For instance, there are no deputies for the Attorney General, the Director of Public Prosecutions, the Law Commissioner and the Ombudsman, among other offices. For purposes of easy succession, performance of duties during temporary absence and continuity, stakeholders recommended the creation of the office of the Deputy Chief Justice in line with other countries in the region like Zambia<sup>82</sup> and South Africa<sup>83</sup>.

The Chief Justice is a Justice of the Supreme Court of Appeal and as such, forms part of the composition of the Supreme Court of Appeal.<sup>84</sup> However, the Constitution also provides that the High Court shall be composed of such number of judges, not less than three, as may be prescribed by an Act of

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<sup>80</sup> See subsection (4) of section 111; see also generally Chapter IX of the Constitution

<sup>81</sup> Subsection (1) of section 111

<sup>82</sup> Sub-article (2) (b) of Article 92 of the Zambian Constitution

<sup>83</sup> Sub-section (1) of section 168 of the South African Constitution

<sup>84</sup> Subsection (1) of section 105

Parliament.<sup>85</sup> Subsection (6) of section 111 further provides that for purposes of Chapter IX of the Constitution, the term ‘judge’ includes a Justice of Appeal, an Acting Justice of Appeal, a Judge of the High Court and an Acting Judge of the High Court. Effectively, the Chief Justice is also a Judge of the High Court.<sup>86</sup>

The Supreme Court of Appeal Act provides further that the term ‘judge’ includes the Chief Justice.<sup>87</sup> The statute further provides that a judge may not sit as a member of the Supreme Court of Appeal in the hearing of an appeal from any judgment given by him or her or given by any court on which he was sitting.<sup>88</sup> In the absence of set down criteria as to which matters the Chief Justice may sit on as a member of the High Court as a member of the High Court, it is likely to be perceived that the Chief Justice may personally shop for matters over which he has to preside.

Another problem from such dual membership of the High Court and the Supreme Court of Appeal may arise where an appeal lies against the decision of the Chief Justice while sitting in the High Court. An aggrieved party may not have confidence in having the decision of the Chief Justice reversed by albeit a Supreme Court Justice who is effectively under the Chief Justice. It remains unclear whether any other Justice of Appeal may double membership in both the High Court and the Supreme Court of Appeal. In sum, this may compromise perceptions of independence of the Judiciary by the general public. Perhaps, this may be remedied by confining the Chief Justice (and if applicable, other Justices of Appeal) to the Supreme Court of Appeal.

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<sup>85</sup> Section 109

<sup>86</sup> See section 5 of the Courts Act. Under section 6 of the Courts Act, the Chief Justice is the Senior Judge of the High Court

<sup>87</sup> Section 2

<sup>88</sup> Section 4

### 4.1.2 THE JUSTICES OF APPEAL

The Justices of Appeal preside over the Supreme Court of Appeal and the Constitution also refers to them as Justices of the Supreme Court of Appeal. The Justices of Appeal are also appointed by the President. The President may appoint Acting Justices of Appeal from among Judges of the High Court.<sup>89</sup> The Constitution does not shed much light on the appointments of Acting Justices of Appeal and who is excluded from being so appointed.

In other jurisdictions, notably Lesotho, the Chief Justice and High Court judges may be appointed in an acting capacity notwithstanding the fact that they have reached the age of retirement.<sup>90</sup> For Malawi, there is need for clarity on whether age would bar a Judge from being appointed as a Justice of Appeal and what the rationale for such barrier would be.

### 4.1.3 THE JUDGES

Although, the Constitution uses the term Judge to include Justices of Appeal<sup>91</sup>, the expression refers to judicial officers of the High Court with the exclusion of the Registrar.<sup>92</sup> The Judges or Acting Judges of the High Court are appointed by the President on recommendation of the Judicial Service Commission.

The Courts Act provides that all proceedings of the High Court and all business arising from those proceedings shall be heard and disposed of by or before a single Judge unless the Act provides otherwise.<sup>93</sup>

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<sup>89</sup> Subsection (1) of section 106

<sup>90</sup> Subsection (4) of section 120 of the Lesotho Constitution

<sup>91</sup> Subsection (6) of section 111

<sup>92</sup> Subsection (2) of section 111. See footnote 86.

<sup>93</sup> Section 9

#### **4.1.4 THE REGISTRARS**

The office of Registrar of the Supreme Court of Appeal or High Court is recognized as a judicial office under the Constitution.<sup>94</sup> The Constitution also recognized as such, the office of a Deputy Registrar.

The Registrar of the High Court also doubles as the Registrar of the Supreme Court of Appeal and the same applies to the Deputy Registrar.<sup>95</sup> The Courts Act further provides for the offices of Assistant Registrars.<sup>96</sup> The Chief Justice may appoint any Deputy Registrar to be the District Registrar for any district registry.<sup>97</sup>

#### **4.1.5 THE MAGISTRATES**

There are two kinds of magistrates. There are professional magistrates and lay magistrates. They preside over courts of a lower jurisdiction than the High Court. They are appointed to take judicial office by the Chief Justice on recommendation of the Judicial Service Commission.<sup>98</sup> However, the Courts Act provides that the Courts of a Resident Magistrate or First, Second or Third Grade shall consist of a fit and proper person appointed by the President to be a Resident Magistrate or First, Second or Third Grade Magistrate as the case may be.<sup>99</sup>

#### **4.1.6 THE CHAIRPERSONS**

Presently, the established office of a Chairperson functioning in a judicial capacity is that of the Chairperson of the Industrial Relations Court. The Industrial Relations Court is the only specialized Court recognised by the

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<sup>94</sup> Subsection (4) of section 111 of the Constitution; subsection (4) of section 7A, Courts Act.

<sup>95</sup> Section 5 of the Supreme Court of Appeal Act

<sup>96</sup> Section 7 of the Courts Act

<sup>97</sup> Subsection (3) of section 7A of the Courts Act

<sup>98</sup> Subsection (3) of section 111

<sup>99</sup> Subsection (1) (a) of section 34 of the Courts Act. Compare with subsection (3) of section 111 of the Constitution

Constitution and functioning. Perhaps this is due to the fact that there is an enabling law to this effect.<sup>100</sup> Although the Labour Relations Act does not also define the office of the Chairperson as a judicial office, a Chairperson and his or her Deputy at the Industrial Relations Court constitute the Court with five other persons nominated by the most representative organization of employees and five other persons nominated by the most representative organizations of employers.<sup>101</sup>

A sitting of the Industrial Relations Court is constituted by the presence of the Chairperson or the Deputy Chairperson and one member from the employers' panel and another member from the employees' panel.<sup>102</sup> The Chairperson or the Deputy Chairperson may sit alone where the dispute before the Court involves only a question of law.<sup>103</sup>

During consultations by the Law Commission, judicial officers conceded that it was irregular for the office of the Chairperson of the Industrial Relations Court not to be included in the definition of 'judicial office' in the Constitution.<sup>104</sup> The officers suggested that the office should be included in the definition of 'judicial office'.<sup>105</sup> There would be need, however, to ensure that the definition of 'judicial office' in the Constitution does not inadvertently extend to Chairpersons of all manner of tribunals established under statute. It would have to be confined to court tribunals.

As to the question of the jurisdiction of the office of the Ombudsman, see Discussion Paper 5.

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<sup>100</sup> See Labour Relations Act (Cap. 54:01)

<sup>101</sup> Section 66 of the Labour Relations Act

<sup>102</sup> Subsection (1) of section 67

<sup>103</sup> Subsection (3) of section 67

<sup>104</sup> Consultation Paper, page 50

<sup>105</sup> *ibid.*

## **4.2 THE COURTS**

The Constitution makes reference to the Supreme Court of Appeal, the High Court, the Industrial Relations Court, Magistrates' Courts and Traditional or Local Courts.<sup>106</sup>

### **4.2.1 THE CONVENTIONAL COURTS**

#### **4.2.1.1 THE SUPREME COURT OF APPEAL**

The Supreme Court of Appeal is the most superior court in Malawi and is also a court of record. The Constitution has exclusively established the Supreme Court of Appeal, along with the High Court, as superior courts and without parallel courts with concurrent jurisdiction. The Supreme Court has jurisdiction only to hear appeals from the High Court and other courts that the law may prescribe. When determining matters of an interlocutory nature, the Supreme Court may be composed of a number less than three Judges but ordinarily the Supreme Court is composed of an uneven number of Justices of Appeal not being less than three.<sup>107</sup>

In exercising its appellate powers in criminal matters, the Supreme Court may entertain appeals from aggrieved persons only on matters of law but all decisions of the lower Court on matters of fact and severity of sentence are final.<sup>108</sup>

The Supreme Court of Appeal may also hear appeals from any judgment of the High Court in a civil cause or matter.<sup>109</sup> Among other things, the Supreme

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<sup>106</sup> Sections 104, 108 and 110 of the Constitution

<sup>107</sup> Subsection (2) of section 105

<sup>108</sup> Subsection (2) of section 11 of the Supreme Court of Appeal Act

<sup>109</sup> Section 21 of the Supreme Court of Appeal Act

Court has powers to confirm, vary, amend, or set aside the judgment under contention or give such judgment as the case may require.<sup>110</sup> Judgments of the Supreme Court of Appeal have full force and effect and are equally enforceable as judgments of the High Court.<sup>111</sup>

#### 4.2.1.2 THE HIGH COURT

Under the Constitution, the High Court has unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law.<sup>112</sup> The High Court also has original jurisdiction to review laws and actions or decisions of government for conformity with the Constitution.<sup>113</sup> However, the Constitution has not expressly conferred appellate jurisdiction on the High Court from subordinate courts. In express words of the Constitution, the provision reads that the High Court shall have such other jurisdiction and powers as may be conferred on it by this Constitution or any other law.<sup>114</sup> The Courts Act provides for the appellate jurisdiction of the High Court. It consists of the hearing of criminal appeals from subordinate courts in accordance with criminal procedure applicable at the time.<sup>115</sup> The High Court also exercises appellate civil jurisdiction consisting of hearing of appeals from subordinate courts.<sup>116</sup> Civil appeals lie to the High Court from all final judgments and all interlocutory judgments and orders made in the course of any civil action or matter before a subordinate court.<sup>117</sup>

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<sup>110</sup> Subsection (1) of section 22 of the Supreme Court of Appeal Act

<sup>111</sup> Section 9 of the Supreme Court of Appeal Act

<sup>112</sup> Subsection (1) of section 108

<sup>113</sup> Subsection (2) of section 108

<sup>114</sup> *ibid*

<sup>115</sup> Section 18 of the Courts Act

<sup>116</sup> Section 19 of the Courts Act

<sup>117</sup> Subsection (1) of section 20 of the Courts Act

The High Court comprises of such number of Judges not being less than three.<sup>118</sup>

#### **4.2.1.3 MAGISTRATE’S COURTS**

Magistrates’ Courts form a lower tier of conventional Courts but are superior to traditional or local courts. These Courts are subordinate to the High Court and are presided over by professional or lay magistrates.<sup>119</sup> The Courts Act establishes courts of Resident Magistrates, First, Second and Third Grade Magistrates.<sup>120</sup> However, for the avoidance of doubt, the law declares that a court of a Resident Magistrate is of a higher grade than a court of a magistrate of the First Grade.<sup>121</sup>

Unless specifically prescribed by the Constitution or by statute, appeals of decisions from magistrates’ courts lie to the High Court.<sup>122</sup>

#### **4.2.2 THE SPECIALISED COURTS**

These are Courts endowed with specialized jurisdiction to deal with specific matters that are prescribed by either the Constitution or statute. Specialized Courts exist at High Court level and subordinate court level. At High Court, there is provision for what is loosely referred to as the Constitutional Court while at subordinate level, there is the Industrial Relations Court.

##### **4.2.2.1 THE CONSTITUTIONAL COURT**

The so-called Constitutional Court was established through an amendment to the Courts Act<sup>123</sup>. The amendment creates an *ad hoc* bench of the High Court to

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<sup>118</sup> Section 109 of the Constitution

<sup>119</sup> Subsection (1) of section 110 of the Constitution

<sup>120</sup> Section 33 of the Courts Act

<sup>121</sup> Subsection (3) of section 34 of the Courts Act

<sup>122</sup> Subsection (4) of section 110 of the Constitution

<sup>123</sup> Act No. 2 of 2004

hear constitutional disputes as and when the need arises. Subsection (2) of section 3 of the Courts (Amendment) Act, 2003 provides that:

*Every proceeding in the High Court and all business arising thereout, if it expressly and substantively relates to, or concerns the interpretation or application of the provisions of the Constitution, shall be heard and disposed of by or before not less than three judges.*

Judicial officers while arguing for the establishment of a more permanent Constitutional Court, acknowledge that the present arrangement of an *ad hoc* Court is working reasonably well.<sup>124</sup> The establishment of a permanent bench is intended to promote consistency and competence in the disposal of constitutional matters.<sup>125</sup> However, this proposal has to be viewed in the light of the constitutional prohibition to establish courts of superior or concurrent jurisdiction with the Supreme Court of Appeal or the High Court.<sup>126</sup> It would therefore appear that the establishment of a permanent Constitutional Court would require the amendment of the Constitution to remove the prohibition.

#### **4.2.2.2 THE INDUSTRIAL RELATIONS COURT**

The Industrial Relations Court is established under the Constitution. It is subordinate to the High Court and has been conferred with original jurisdiction over labour disputes and such other issues relating to employment.<sup>127</sup> Both the Constitution and the Labour Relations Act have not conferred the Industrial Relations Act with appellate jurisdiction in matters that fall under their jurisdiction. Appeals however may lie from the Industrial Relations Court to

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<sup>124</sup> Consultation Paper, page 51

<sup>125</sup> *ibid*

<sup>126</sup> Subsection 3 of section 103 of the Constitution

<sup>127</sup> Subsection (2) of section 110. Cf. section 64 of the Labour Relations Act.

the High Court on points of law or matters of jurisdiction.<sup>128</sup> Any decision of the Industrial Relations Court has the same force and effect as a decision or order of a competent Court and shall be enforceable accordingly.<sup>129</sup>

Apart from the suggestion advanced above that the definition of judicial office should be expanded to include the head(s) of the Industrial Relations Court, another suggestion is that the Court be removed entirely from the Judiciary and should be turned into an independent Tribunal. The justification for this proposal lies in the fact that as a tribunal, appeals from the Court would lie directly to the Supreme Court of Appeal.<sup>130</sup> In a way, this would elevate the Court to being a specialized Bench at High Court level.<sup>131</sup>

#### **4.2.2.3 THE COMMERCIAL COURT**

Although not currently set up, there are plans to set up a tribunal to specially deal with commercial disputes.

#### **4.2.2.4 TRADITIONAL OR LOCAL COURTS**

Traditional or Local Courts were also given constitutional status under the Constitution of 1994. However, there had been in place the Traditional Courts Act which had been operational since August, 1962. Traditional Courts were established by warrant under the hand of the Minister.<sup>132</sup> The Traditional Courts consisted of a Chairman appointed by the Minister and such other members as the Minister may appoint sitting with at least one assessor selected by the Chairman from a panel of assessors also appointed by the Minister.<sup>133</sup>

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<sup>128</sup> Subsection (2) of section 65 of the Labour Relations Act

<sup>129</sup> Section 75 of the Labour Relations Act

<sup>130</sup> Subsection (2) of section 104 of the Constitution

<sup>131</sup> This proposal also has to be viewed in light of the prohibition under section 103(3) of the Constitution

<sup>132</sup> Subsection (1) of section 3 of the Traditional Courts Act

<sup>133</sup> Subsection (1) of section 4 of the Traditional Courts Act

Traditional Courts exercised both civil and criminal jurisdiction. Every Traditional Court could exercise such civil jurisdiction as specified in the warrant of establishment over causes or matters in which all parties were Africans and the defendant was when the cause of action arose within the jurisdiction of the Court.<sup>134</sup> In criminal matters, criminal jurisdiction was also set out in the warrant. This involved hearing, trying and determining of all criminal charges and matters in which the defendant was an African and was accused of having, wholly or in part within the jurisdiction of the court, committed or been an accessory to the commission of an offence.<sup>135</sup> As for the offences which would be tried by Traditional Courts, these included offences under the Witchcraft Act and various parts of the Penal Code<sup>136</sup>. Under G.N. 3 of 1994, Regional Traditional Courts were restricted from having jurisdiction to try a listed number of offences under the Penal Code.<sup>137</sup>

The Traditional Courts Act further conferred upon the Minister, the power to confer on the courts jurisdiction to enforce all or any provisions of any law specified in an order, subject to ministerial restrictions and limitations.<sup>138</sup> In cases of a criminal nature, Traditional Courts were authorized by law to pass such sentences including death, imprisonment, performance of public work, corporal punishment and a fine.<sup>139</sup>

Due to the notoriety of Traditional Courts and the perception that they were constituted for purposes of eliminating political opponents, the Constitution of

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<sup>134</sup> Section 8 of the Traditional Courts Act

<sup>135</sup> Section 9 of the Traditional Courts Act

<sup>136</sup> Chapters VII, IX, X, XV, XIX, XX, XXII, XXVIII and XXIX of the Penal Code. See Regional Traditional Courts (Criminal Jurisdiction) Order

<sup>137</sup> Offences included those under sections 38, 39, 40, 41, 44, 54, 76, 77, 78, 133, 134, 138, 157, 208, 209, 213, 233, 234, 235, 236, 237, 300, 301, 302 and 309

<sup>138</sup> Section 13 of the Traditional Courts Act

<sup>139</sup> Subsection (1) of section 14 of the Traditional Courts Act

1994 came out clear and prohibited the establishment of Courts with superior or concurrent jurisdiction with the Supreme Court of Appeal or High Court.<sup>140</sup>

Without much ado, the Constitution of 1994 maintained Traditional or local courts provided that such Courts were to be presided over by lay persons or chiefs as prescribed by law.<sup>141</sup> However, the Constitution limited the jurisdiction of Traditional or Local Courts exclusively to civil cases at customary law and such minor common law and statutory civil cases as may be prescribed by law.<sup>142</sup> In 1997, the thinking became different and Parliament amended the Constitution in order to extend the jurisdiction of Traditional Courts to exclusively cover civil cases at customary law and such minor common law and statutory law offences as prescribed by statute.<sup>143</sup>

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<sup>140</sup> See footnote 123

<sup>141</sup> Subsection (3) of section 110

<sup>142</sup> Subsection (3) of section 110

<sup>143</sup> Proviso to section 110. The extension of jurisdiction to cover offences was introduced in 1997

## 5.0 THE JUDICIAL SERVICE COMMISSION

The Judicial Service Commission is established under the Constitution with a view to establishing an institution for regulating judicial officers.<sup>144</sup> With the exception of Zambia, most SADC countries have Judicial Service Commissions.

### 5.1 COMPOSITION

Almost universally, the President exercises some influence in the composition of the JSC. In Uganda, Parliament has to approve of appointees to the JSC made by the President.<sup>145</sup> In Malawi, the constitution of the JSC revolves around the office of the President and the Chief Justice. Parliament is not involved. The Constitution has shied away from using the term ‘appointment’ in respect of other members of the JSC not being the Chief Justice. The Constitution provides that the President may ‘designate’ a Justice of Appeal or Judge, a legal practitioner and magistrate to constitute the JSC. This designation is made after consultation with the Chief Justice.

The Commission is headed by the Chief Justice who is its Chairman.<sup>146</sup> Other members include the Chairman of the Civil Service Commission or his alternate, a Justice of Appeal or a Judge, a legal practitioner and a magistrate.<sup>147</sup> Other than the Chief Justice and the Chairman of the Civil Service Commission who are members by reason of their offices, the other members are designated as such by the President.<sup>148</sup>

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<sup>144</sup> Section 116

<sup>145</sup> Vijver 2006, page 209

<sup>146</sup> Section 117 (a)

<sup>147</sup> Section 117

<sup>148</sup> *ibid.*

In the membership of the JSC, three positions are guaranteed to be filled by the Judiciary. The JSC in Botswana has two members from the judiciary and in Kenya, has three judicial officers. This composition has been viewed as being loaded heavily with members of the judiciary. For the JSC, the membership from the Judiciary is three out of five members. Comparatively, the Police Service Commission set under the Constitution has only one member out of five members from the Police Service.<sup>149</sup> Similarly, for the Prisons Service Commission, the Chief Commissioner of Prisons or his alternate represent the Prisons Service and any other person nominated by the Inspectorate of Prisons.<sup>150</sup> These are two members out of five. It appears not mandatory for this nominee to come from the Inspectorate of Prisons. Stakeholders expressed the view to the effect that membership of suitable persons from other backgrounds should be considered in the constitution of the JSC.<sup>151</sup>

In Uganda, membership to the JSC is for a renewable term of four years.<sup>152</sup> Removal from membership may be made on account of incompetence, misbehaviour, misconduct and inability to perform the functions of the office.<sup>153</sup> The Malawi Constitution is silent on these details, perhaps, in light of the reference to an Act of Parliament for the JSC.<sup>154</sup> That notwithstanding, it is imperative that the law should come out clearly on such details as the length of the terms of office of the members of the JSC. The same applies to transparency in appointing members and how they are removed and the grounds for such removal. For instance, in light of the powers exercised by the JSC, issues of integrity are paramount when deciding who would comprise a

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<sup>149</sup> Subsection (1) of section 157. The Inspector General of Police or any other senior officer nominated by the Inspector General represents the Police Service

<sup>150</sup> Subsection (1) of section 168.

<sup>151</sup> Consultation Paper, page 49

<sup>152</sup> Subsection (7)(a) of section 146 of the Ugandan Constitution

<sup>153</sup> Subsection (7)(c) of section 146 of the Ugandan Constitution

<sup>154</sup> See section 116

body that would discipline members of the Judiciary. Other considerations may be taken into account.

## 5.2 POWERS

The specific powers of the JSC under the Constitution include the power to nominate persons for judicial office, exercise disciplinary powers over judicial officers including the power to remove judicial officers from office.<sup>155</sup> There is no denying that these powers are quite profound. These, apparently, are very similar to the powers granted to similar Commissions among Malawi's neighbours within the SADC region.

Any person aggrieved by the decision of the Judicial Service Commission may appeal to the High Court.<sup>156</sup> The JSC also has general powers that it may exercise that are reasonably necessary in the performance of its duties.<sup>157</sup> The Constitution also allows that further powers may be conferred on the JSC by a statute.<sup>158</sup>

In other jurisdictions, the JSC has institutional independence. For instance, in Lesotho, the independence of the JSC is guaranteed and the JSC in the exercise of its functions is not subject to the direction or control of any other person or authority.<sup>159</sup> This position is also similar in Namibia.<sup>160</sup> The desire to have a JSC that is independent in Malawi need not be emphasized especially in light of the lingering fear that public regulatory institutions are usually tainted with political interference. In view of the fears expressed above in relation to security of

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<sup>155</sup> Section 118

<sup>156</sup> Proviso to section 118

<sup>157</sup> Subsection (e) of section 118

<sup>158</sup> Subsection (d) of section 118

<sup>159</sup> Subsection (8) of section 132

<sup>160</sup> Subsection (3) of section 4 of the Judicial Service Commission Act

tenure, it is imperative that the JSC should be free from interference from any other body or person.

## 6.0 CONCLUSION

The Judiciary has in recent times grown in relevance and usefulness to the general populace. With the democratic dispensation and increased awareness of human rights and freedoms, the man on the street is becoming more and more aware of the enforcement of these mechanisms. Such developments demand an increase in the efficiency, independence, impartiality and integrity of this branch of government.

It should be noted with emphasis that legal authority derives from the people in whose interests such authority should be exercised. The Constitution has clarified this point by providing that all persons responsible for the exercise of powers of State do so on trust and that all legal authority derives from the people to be exercised solely to serve and protect their interests.<sup>161</sup>

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<sup>161</sup> Section 12

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