



MALAWI LAW COMMISSION

CONSTITUTIONAL REVIEW PROGRAMME

ISSUES PAPER

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Issues Paper

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Preface

The Constitution of the Republic of Malawi came into force on 18th May 1994. It was allowed to apply provisionally for a period of one year until May 1995. This was done to ensure further and wider consultations before the Constitution could be adopted as a final document. Thus Parliament confirmed the Constitution in May 1995. In 1998, the Malawi Law Commission undertook a Technical Review of the Constitution, a report of which was published in the Malawi Government Gazette of 16th November 1998. This task was executed primarily to rectify technical irregularities in the Constitution.

However even with these well intentioned exercises to ensure that the Constitution is rendered as user friendly as possible, there have, over the years, arisen several instances where the credibility/ efficacy of the Constitution has been questioned. The problem in part has also been due to the fact that some recommendations contained in the Technical Review Report were not implemented.¹ In some instances, matters of conflict have ended up in court;² in others there have just been debates in which parties have espoused diametrically opposed views on the same provision of the Constitution.³ In yet another category there have been neither court cases nor debates and still interest groups and the general citizenry have expressed dissatisfaction with the Constitution.⁴

It is these matters of concern that the public has on the Constitution that have prompted the Malawi Law Commission to initiate a review of the Constitution pursuant to its mandate under section 35(b) of the Constitution. The Malawi Law Commission has thus invited submissions from the general public on any matter pertaining to the Constitution on which members of the public feel review is required. The Commission has received and continues to receive submissions in this regard.

The Commission will also hold a National Conference on the Review of the Constitution where a selected number of presenters will deliver papers on various areas of their choice on what they perceive to be problem areas in the Constitution as evidenced by its operation in the period since it was adopted. It is planned that the common areas of concern extracted from the public submissions that will emerge from the National Conference will then be laid before a special Law Commission yet to be empanelled which will conduct or spearhead the review and come up with an appropriate Report.

This Issues Paper has been developed from the written submissions Law Commission received between the period October 2004 – December 2005.

¹ The Law Commission has recommended replacing “electorate” with the phrase “those voting under S.80(2)

² See *Chakuamba vs Attorney General and others*

³ For example what constitutes serious violation of the Constitution under section 86 has been a hot debate topic.

⁴For example, other submissions received by the Commission have questioned the need to have the Reserve Bank established under the Constitution and the relevance of the office of the Second Vice President.

The written submissions came from individuals, Government Departments, organizations and representatives of vulnerable groups. It is the expectation of the Law Commission that such an exercise would invigorate debate on these issues and therefore enrich the process of review by allowing wider public participation in the process. This Paper is also intended to serve as part of the record of this Constitutional Review process.

This Paper has been developed by Peter T. Chiniko, Assistant Chief Law Reform Officer who is also the Principal Programme Officer for the Constitutional Review Project.

1.0 INTRODUCTION

The Malawi Law Commission is a constitutional institution established under section 132 of the Constitution. It has the mandate to review all statutory and customary laws of Malawi for purposes of their systematic development in order to ensure that they conform with both the Constitution and relevant international law. In as far as the Constitution is concerned, the Law Commission has the mandate to review and make recommendations regarding any matter pertaining to the Constitution.⁵ The Commission is also mandated to receive submissions from any person with regard to the Laws of Malawi or the Constitution. The findings and recommendations of the Commission are then compiled into reports and, where necessary, the reports include draft legislation and are submitted simultaneously to Cabinet and to Parliament through the Minister of Justice.

1.1 METHODOLOGY OF THE MALAWI LAW COMMISSION

The Malawi Law Commission is headed by a Law Commissioner who is appointed by the State President on the recommendation of the Judicial Service Commission.⁶ In the execution of a particular programme, the Law Commission in consultation with the Judicial Service Commission, empanel a special Law Commission. Individuals are then appointed to serve as Commissioners on the basis of their expert knowledge of the subject matter under review.⁷

A special Law Commission is serviced by programme officers, who are law reform officers, who provide professional legal research input into the activities of the Commission and also act as coordinators for the special Law Commission.

To implement its mandate, the Malawi Law Commission is empowered to carry out public consultations regarding any law under review. The Law Commission can also conduct research and consult with any person⁸ and may even engage consultants for the purpose of furthering its mandate⁹.

1.2 CALL FOR SUBMISSIONS ON THE REVIEW OF THE CONSTITUTION

The Law Commission through the media, issued a call for submissions on the review of the Constitution in August 2004. Since then, the Law Commission has received a substantial number of submissions. The submissions have been made by a cross section of Malawian society notably academics, ordinary folk, politicians, including the former Vice president, the former Speaker of Parliament, political parties, ex-parliamentarians, and various special interest groups. Most of the submissions have been on Chapters I to IX of the Constitution.

⁵ S.135 (h) of the Constitution

⁶ S.133 (a) of the Constitution

⁷ S.133 (b) of the Constitution

⁸ S.7 (e) of the Law Commission Act, Cap 3:09

⁹ S.8 (e) of the Law Commission Act, Cap 3:09

This paper seeks to highlight the areas of concern that the general public have submitted upon with a view to allowing the reader an opportunity to comment on those submissions. This is especially important in respect of those submissions received from representative groups who have made the submissions on behalf of their respective constituencies.

1.3 THE ISSUES AND QUESTIONS

The issues and questions which are presented in the order of the structure of the Constitution, are discussed below.

CHAPTER I

1. NATIONAL LANGUAGE

It has been submitted that the Constitution is silent on what the national language of Malawi is. The submission argues that it is vital to have the Constitution state the national language as it is one of the values of Malawian society and merits constitutional significance. A proposal has therefore been made that the national language of Malawi may be captured in section 2 of the Constitution which deals with other matters of national identity of the Malawi state such as the national flag.

Issues

- Is it necessary that the Malawi Constitution should stipulate a national language?
- If it is found to be necessary to do so, what should be the national language for Malawi?
- Should the national language be an official language as well?
- How should other languages which command regional popularity be treated in the Constitution?

CHAPTER II

2. SEPARATION OF POWERS

Sections, 7, 8 and 9 of the Constitution provide for the separate status, function and duty of the Executive, the Legislature and the Judiciary respectively. These are the three arms of a democratic government which Malawi is. The executive has the mandate to initiate policies and legislation of public or national interest and which advance or promote the principles of the Constitution and to implement such policies and legislation. The legislature's primary mandate is to enact laws as may be initiated by the executive. The judiciary's primary mandate is to interpret, protect and enforce the Constitution and all other laws. In this way, the three arms of government check each other in the manner they execute their mandates and consequently none of the three arms has absolute power to act as it pleases.

This arrangement raises the question whether members of one arm of government may at the same time serve in another arm of government. The common problem area has been the appointment of serving Members of Parliament (Legislature) as Ministers (Executive). This issue is properly exposed in the *Fred Nseula* case¹⁰. In this case Mr Nseula had been elected a Member of Parliament as a member of UDF and while so serving was appointed a Deputy Minister. He then was alleged to have moved to the Malawi Congress Party. Efforts were instituted to have him expelled from Parliament under section 65 of the Constitution for having crossed the floor. When the matter came before Justice Mwaungulu in the High Court, he held that the question of Mr Nseula crossing the floor did not at all arise as he had lost his seat upon appointment as a Deputy Minister. The Judge based his judgment on section 51 (2) (e) which bars people who hold public office from being Members of Parliament. It was thus the Judge's opinion that the office of Deputy Minister was a public office and Mr Nseula could not hold both offices of Deputy Minister and Member of Parliament as this would be in conflict with the separation of powers which the section sought to preserve.

On appeal the Supreme Court found that the office of Deputy Minister (or Minister for that matter) was not a public office and that it was therefore acceptable for a Member of Parliament to serve as a Minister or Deputy Minister at the same time. To date, therefore, Members of Parliament continue to be appointed Ministers and to serve in both the executive and the legislature. The Constitution has further regularized this position by providing that an appointment as a Minister or Deputy Minister shall not be constituted to be an appointment to a public office or to be a public appointment.¹¹

The effect of this amendment is that the doctrine of separation of powers does not apply as regards the legislature and the executive. This would in turn tilt the balance of power towards the executive and would negatively affect the oversight functions of the legislature *viz a viz* the executive as Members of Parliament who are Ministers would almost always support government in the House. This appears to run counter to the spirit of the Constitution which has enshrined the doctrine of separation of powers.

¹⁰ *Fred Nseula vs Attorney General and another*, cc 63 of 1996

¹¹ Section 51 (3)

Issues

- Should Members of Parliament be eligible for appointment as Ministers and still remain Members of Parliament?
- Should non-MP Ministers become MPs? If so, by what mechanism?
- Should Ministers be appointed from outside Parliament only?
- If Members of Parliament were to vacate their seats if appointed to Cabinet, would this not raise the issue of frequent, and perhaps altogether undesirable, bye-elections?
- What would be the safeguards for the individual's security of tenure as a member of Cabinet in his or her service to the nation if he or she were to vacate the seat in Parliament?

CHAPTER III

3. HUMAN RIGHTS

3.1 *The Death Penalty*

Section 16 of the Constitution enshrines the right to life as a non-derogable right. It however, by way of proviso, allows the State to impose by law a sentence of death for certain offences. Thus, the death penalty has been saved in Malawi. On the other hand, section 19(3) of the Constitution provides that “No person shall be subject to torture of any kind or to cruel, inhuman or degrading treatment or punishment”.

Further section 44 provides that there shall be no derogation, restrictions or limitations with regard to among other rights, the right to life. In fact the protection of the right to life is under paragraph (a) of section 44 (1) and therefore is ranked highly. There is therefore a clear contradiction between section 16 and section 44 as far as the protection of the right to life is concerned.

It should be noted that the 1994 constitutional conference was divided on whether to retain the death penalty or not. In the main, chiefs wanted the death penalty retained whilst others wanted it abolished. Section 16 and the proviso thereto was therefore a co-proviso to accommodate these opposing positions.

Since the Constitution came into force in 1994, the successive Presidents have not signed death warrants. However, the courts have continued to hand down death penalties for offences where such sentence is prescribed.

Issues

- Should the death penalty be retained or should it be abolished?
- Whether or not the execution of the death penalty amounts to torture or inhuman or degrading treatment or punishment.

3.2 *Marriage by Repute or Permanent Cohabitation*

Under section 22 the Constitution has provided for the rights to marry and found a family.

In terms of section 22, the family is regarded as the natural and fundamental group unit of society which is entitled to protection by both society and the State.¹² This section further gives all men and women the right to marry and found a family¹³. As far as marriage goes, the Constitution recognizes three types – marriages at law, marriages at custom and marriages by repute or by permanent cohabitation.¹⁴ Marriage at law would be those celebrated under statute such as the

¹² Section 22(1)

¹³ Section 22(3)

¹⁴ Section 22(5)

Marriage Act¹⁵. Marriages at custom are self explanatory as are marriages by repute or by permanent cohabitation. Of course in the last case, practical problems do arise as to what constitutes sufficient repute and length of cohabitation that may qualify such cohabitation as permanent. For instance, the case of *Magombo v Nelson*¹⁶ held that a period of 17 years of cohabitation was sufficient to constitute permanent cohabitation whilst in the case of *Maliro vs Maliro*¹⁷ a period of 13 years of cohabitation was held not to be sufficient.

It is worthwhile noting that in the case of marriage by repute or by permanent cohabitation, the question of whether there was a marriage or not is normally determined upon dissolution of the relationship from whatever cause. This is because, unlike marriages at law and marriages at custom, there are no formalities observed before “entry” into a marriage by repute or by permanent cohabitation. It is rather the repute or permanence of cohabitation that establishes the marriage itself. Thus, couples in such marriages need only hold themselves out as married or only cohabit for such length of time as may constitute permanent cohabitation.

Submissions

It has been submitted that marriage by repute or by permanent cohabitation are alien to Malawian culture and should not be recognized by the Constitution. It is argued that these are western types of marriages and they are bad for Malawian society as they do not encourage social cohesion as do marriages at law or at custom.

Issues

- Should marriages by repute or by permanent cohabitation continue to be recognized by the Constitution?
- Should the Constitution stipulate the types of marriage the people of Malawi may be able to contract?

3.3 Right to Education

Section 25 of the Constitution provides that “all persons are entitled to education. It goes on to state that primary education shall consist of at least five years. In section 13, which deals with principles of national policy, it is stated under paragraph (f) that the State shall provide adequate resources and devise programmes in order to “make primary education compulsory and free to all citizens of Malawi.¹⁸

Currently, Government offers free primary school education. However, primary education is not compulsory. It should be noted that the principles of national policy are only directory in nature and also that they may be implemented on a progressive basis¹⁹.

¹⁵ Cap. 25:01

¹⁶ (1964-66) 3 ALR (mal) 134

¹⁷ (1993) 16 (1) MLR 282

¹⁸ Section 13 (f) (ii)

¹⁹ Sections 14 and 13

Submissions

It has been submitted that primary education should be made compulsory under the Constitution. It is argued that this is the only way high literacy levels, and consequently development may be achieved. It is further proposed that this should be provided under section 25 which provides for the right to education as opposed to the inclusion of this requirement under the national policy provisions which are only directory in nature and may or may not be effectuated depending on the circumstances and resources.

Issue

- Is it realistic for the constitution to require that primary education should be compulsory?
- What should be the number of years that a child must be under obligation to attend compulsory primary education?
- Should there be an age limit beyond which a child should not be obligated to attend compulsory primary education? If so what should the age be?
- What resources should the Constitution require the government to provide to ensure proper implementation of compulsory education?
- Would such a provision of compulsory education be supported by the economic resource currently available to Malawi?

3.4 *Political Right*

Section 40 of the Constitution provides for political rights. In subsection 2, it provides that the State shall provide sufficient funds to any political party which has more than one tenth of the national vote in elections to Parliament so that it is able to continue to represent its constituency.

Submissions

It has been submitted that State funding for political parties should be regardless of representation in Parliament. Another submission is to the effect that the section should be clearer on the level of funding that political parties may get. It is argued that the term “sufficient” engenders too much discretion which may translate to arbitrariness.

Issues

- What constitutes the national vote?
- What should be the criteria for determining which political parties get state funding?
- How should the level of funding for a political party be determined?
- What accounting mechanisms may be put in place to ensure that funding is used for intended purposes?
- Should political parties in Parliament receive funding regardless of the size of the national vote?
- Should political parties outside Parliament receive state funding?

- Should political parties be funded by the State in elections campaign?
- Should political parties declare their sources of funding?
- Should there be restrictions as regards sources of funding for political parties?

3.5 *Arrest, Detention and Fair Trial*

Section 42 (1) of the Constitution generally provides for the rights of detained persons. This includes sentenced prisoners. Section 42 (2) provides for further rights to a person arrested for or accused of commission of an offence. One of these rights is the right “to be brought before an independent and impartial court of law and to be charged or to be informed of the reason for his or her further detention, not later than 48 hours after arrest failing which he or she shall be released”²⁰. The paragraph provides that where the 48 hours period expires outside a court day, the person should be taken to court on the first court day after such expiry.

Submissions

Two submissions have been received on this provision. Firstly, it has been submitted that given the constraint of resources available to the investigating and prosecuting authorities, 48 hours is too short a period to be complied with. It is therefore proposed that the period should be extended to at least 7 days. On the other hand, there has been a counter submission that the 48 hours rule should be maintained and that the investigating and prosecuting agencies merely need to ensure that they work in compliance with the rule. In support of this counter submission, it has been suggested that an arrest should not be effected unless the State is ready to prosecute the matter, i.e, that enough evidence has already been established. It is submitted that the Constitution or the law should provide for an unambiguous enforcement mechanism for this rule as the investigating and prosecuting agencies have tended not to comply with it.

Issues

- Should the period for detaining an accused person without charge or explanation as to why such person should continue to be held without charge be extended? If yes, what should the period be?
- What other mechanisms can be suggested to ensure that the State complies with the current 48 hour rule?
- Should the 48 hour rule apply to certain offences and not others?
- What could be the criteria for such distinction?

²⁰ section 42 (2) (b)

CHAPTER IV

4. CITIZENSHIP

Section 47 of the Constitution provides for who is a citizen and how citizenship may be acquired or lost. The Constitution has however left it to an Act of Parliament to make provision on how citizenship may be acquired or lost. The relevant Act in existence is the Malawi Citizenship Act (Cap. 15:01). However the Constitution has defined the expression “acquisition of citizenship” to include acquisition by, *inter alia*, “marriage”.²¹ The Malawi Citizenship Act does not list marriage as a universal ground for acquiring citizenship. The Act, however, provides that the wife of a Malawian male may be registered as a citizen of Malawi upon application to the Minister²² and on satisfying certain conditions as set out in section 13 of the Act. Among these conditions is that she should be ordinarily resident in Malawi and should have been so resident for a period of five years. It appears therefore that whilst the Constitution lists marriage as a ground for acquiring citizenship, the Malawi Citizenship Act limits this ground only to foreign wives of Malawian males; but even so, it recognizes that marriage is merely a consideration in that process of registration. Further, the Constitution appears to apply to both males and females as being eligible to acquire citizenship by marriage whereas the Malawi Citizenship Act only allows women of Malawian husbands opportunity to apply for citizenship by registration.

Submissions

It has been submitted that due to the apparent inconsistency between the Constitution and the Malawi Citizenship Act as regards qualification for citizenship on grounds of marriage, it is necessary that the Constitution be reviewed in this regard. It is argued that it would be better if the Constitution dropped “marriage” as a ground for acquisition of citizenship and that spouses of Malawians should only acquire citizenship through registration and that marriage should only be one of the considerations. It has been argued that the current position under the Constitution has given rise to sham marriages especially where foreign males have contrived to marry Malawian females solely for purposes of acquiring Malawian citizenship in terms of the Constitution. The Immigration Department has reported that as an enforcement agent it has found difficulties deporting such foreign males as they have claimed citizenship by marriage as the Constitution allows.

Issues

- Should foreigners continue to acquire citizenship by marriage?
- What should be the conditions to be satisfied for one to acquire citizenship by marriage?
- What mechanisms should be put in place to screen marriages of convenience?
- Should both male and female foreigners be allowed to acquire citizenship by marriage?

²¹ Section 47 (3) (a),

²² Section 16 of the Malawi Citizenship Act

CHAPTER V

5. THE LEGISLATURE

5.1 Qualification of Members of Parliament

5.1.1 *Education Qualifications*

Section 51 of the Constitution stipulates both the qualifications and disqualifications for anyone aspiring to become a Member of Parliament. The qualifications are listed in subsection 1 whilst the disqualifications are in subsection 2. There are four qualifications and these are that a person must be a citizen of the Republic, must have attained the age of twenty-one years, must be able to read and write the English language and must be a registered voter in a constituency.

In terms of qualifications therefore, the Constitution has not stipulated any specific educational qualification in as far as MPs are concerned although it may be implied that in a country like Malawi, ability to read and write the English language must infer some modicum of education. However, it is possible for one to be able to read and write the English language without necessarily obtaining an educational qualification. An example would be where one does attend school but fails to pass examinations.

Submissions

It has been submitted that in this age and for the future it is necessary that Members of Parliament must be in possession of some minimum educational qualification and the suggestion is that an MP should possess an M.S.C.E Certificate or its equivalent. Others even suggested a University diploma as a minimum qualification. It is argued that such educational qualification would allow Members of Parliament better capacity for understanding bills and issues generally.

On the other hand, it has been submitted that the current provision should remain as it is. The basic argument is that Parliamentarians do not necessarily perform better because of academic qualifications; rather that performance is driven primarily by the individual's commitment to serve his or her constituents.

Issues

- Should there be set a minimum educational qualification for Members of Parliament, and if so, what should be the minimum educational qualification?
- What should happen if a constituency does not have a candidate who has the minimum education qualification?

5.2 *Disqualification Of Members of Parliament*

5.2.1 *Upper Age Limit*

There is no upper limit as to the age of candidates for membership of Parliament.

Submissions

It has been submitted that there is need to set an upper age limit for Members of Parliament. One reason advanced is that it would allow for younger people to take up such seats as older people retire and that way allow contemporary generation to govern. Secondly, it is argued that it is common place that when people get older they experience reduced capacity to be active in their performance.

On the other hand, it has been submitted that there should be no upper age limit. It is argued that so long as an individual shows capacity to perform to the satisfaction of the constituents, age should not be an issue.

Issues

- Should there be an upper age limit for Members of Parliament?
- What should such upper age limit be?

5.3 Language in Parliament

Section 56 generally accords the National Assembly the right to regulate its own procedure. In that spirit, section 56 (5) provides for the language to be used in Parliamentary proceedings. The subsection provides that proceedings shall be conducted in the English language and such other languages as the National Assembly may prescribe. The Constitution has therefore provided that languages other than English may be used in the National Assembly. The Constitution has however left the decision as to which other languages may be used in the National Assembly to the wisdom of the National Assembly itself. It is therefore possible for the National Assembly to provide for use of vernacular languages in the National Assembly.

Submissions

It has been submitted that some ethnic languages, such as Chewa, be allowed to be used in the National Assembly. It is argued that this would improve the quality of contribution from Members of the National Assembly as some are constrained from participating fully for being handicapped in the use of the English language. It has been argued that as the major local language is Chewa, the National Assembly should deliberate in that language so as to show the country's pride in a major vernacular language and to show nationhood.

On the other hand, it has been submitted that Parliamentary proceedings be conducted in the English language as is currently the case. One of the arguments for this position is that our laws are in English and it would not make sense to have debates in Chewa when the final product would be in English. It has also been argued that translation of debates from Chewa into English would be too costly for the country and may not be achievable in terms of resources. Some have argued that this approach would in part defeat the need for attainment of education to participate in public life.

Issues

- Should the Constitution stipulate what other languages may be used in Parliamentary proceedings?
- What should these other languages be?
- What should be the criteria for choosing such languages?

5.4 *The Speaker*

5.4.1 *Experience of the Speaker*

Section 53 of the Constitution contains provisions relating to the offices of Speaker and Deputy Speaker(s) of the National Assembly. Section 53 (1) provides for the election of the Speaker and section 53(3) provides for the events which may lead to the Speaker's or Deputy Speaker(s) office falling vacant. In total the section has seven subsections. There is however no subsection that provides for the qualifications of a Speaker. In the circumstances the qualifications for Speaker are the ones that obtain for all Members of Parliament under section 51 (1).

Submissions

It has been submitted that the position of Speaker of the National Assembly being a very demanding one and senior, requires that the office holder be possessed with requisite skills in Parliamentary procedure. To this end, it has been proposed that an MP should only qualify to be elected Speaker if they have served at least one prior full Parliamentary term of 5 years. It is argued that electing someone who has not had Parliamentary experience may lead to problems in their handling of the proceedings and business of the House. However, it may be observed that theoretically it is possible that only new members may be returned from a Parliamentary election or that there may be no suitable person for the Speaker's office among those re-elected.

Issues

- Is it necessary that candidates for election to office of Speaker be only those that have served in the House previously?
- What should be the length of experience?
- Should they have occupied other positions of authority in the House, such as Chairmanship of a committee?
- Should individuals with relevant qualifications but who are not Members of Parliament e.g past Members of Parliament be considered for office of Speaker?

5.4.2 *Tenure of office of Speaker*

Section 53(1) provides for the election of a Speaker. This is done at the first sitting after every dissolution of Parliament. The Speaker therefore holds office for the duration of the life of Parliament which is 5 years, unless removed in accordance with the Constitution. In the fifth year, Parliament is supposed to stand dissolved on 20th March in readiness for elections to be held in

May of the same year.²³ This means that between 20th March and the date on which a new Speaker is elected, the office of Speaker is vacant. However, for purposes of remuneration, Members of Parliament are entitled to receive their pay up to the last day preceding the general election.²⁴ Further the President may during the period of dissolution reconvene the National Assembly to discuss issues of a constitutional crisis or emergency nature.²⁵ The Speaker would preside over such a meeting. It would appear therefore that the office of Speaker is in practice not rendered vacant by the dissolution of the National Assembly.

It appears from the above discussion that the Constitution is not clear on the effect of a dissolution of the National Assembly on the office of Speaker.

Submissions

It has been submitted that for purposes of ensuring that separation of powers is observed at all times, it would be better if the Constitution clearly provided that the Speaker continues to hold office until a new Speaker is elected. It is argued that this would ensure that matters to be handled by the Speaker's office are actually handled by the Speaker and not by any other functionary who may actually be from the executive.

Issues

- Should an incumbent Speaker remain in office when the National Assembly is dissolved pending a general election?
- Should an incumbent remain in office until a new Speaker is sworn as is the case with the Presidency?

5.5 *Terms of Office for Members of Parliament*

The provisions for election of Members of Parliament are contained in the Constitution and the Parliamentary and Presidential Election Act (Cap. 2:01). Neither the Constitution nor the Parliamentary and Presidential Election Act has provided a limit of how many terms a Member of Parliament may serve. Thus Members of Parliament can serve as many terms as their constituents do give them through the vote.

Submission

It has been submitted that Members of Parliament should serve only a limited number of terms. The proponents of this position argue that this would allow easy transfer of power between generations. They further argue that there appears to be no justification to allow MPs to serve as many terms as they can when the President is restricted to a maximum of two consecutive terms only. On the other hand there are those whose opinion is that an MP should serve as many terms as possible so long as his or her constituents are satisfied with his or her delivery.

²³ section 67 (1) of the Constitution

²⁴ section 67 (5) of the Constitution

²⁵ section 65 (4) of the Constitution

There has also been a submission to limit the number of times a person may stand for election as a Member of Parliament, even if not actually elected.

Issues

- Should there be a prescribed number of terms that an MP may serve?
- What should be the number of terms that an MP may serve?
- Should MPs continue to serve as long as they are elected by their constituents?
- Should there be a limit as to how many times one may stand for election as an MP even if not actually elected?

5.6 *Recall of Members of Parliament*

The Law Commission has received numerous submissions calling for the reinstatement of the repealed section 64 of the Constitution which provided for the recall of Members of Parliament by their constituencies before expiry of the term of office. The main argument for this proposal is that it would allow the electorate to hold their MPs to account.

There has also been a couple of submissions opposing the coming back of the recall provision. In this regard the argument is that the provision may easily be abused by politicians and it would lead to numerous by elections which may prove expensive for Malawi.

Issues

- Should the recall provision be brought back?
- If so, what would the safeguards against the likelihood of abuse of this provision?

5.7 *Crossing the Floor*

Section 65 of the Constitution provides for circumstances in which change of political affiliation by a member of the National Assembly may lead to the seat of such a member being declared vacant. The first situation is where a Member of the National Assembly, who was at the time of his or her election a member of a political party represented in the National Assembly other than by that member alone but who voluntarily ceases to be a member of that party. The second situation is where a member has joined another political party represented in the National Assembly.

It should be noted that the list of organisations, that could be joined at pain of losing one's seat was, in 2001, extended to "any other political party or association or organisation whose objectives or activities are political in nature"²⁶. However, the High Court, in the case of the Registered Trustees of Public Affairs Committee v The Attorney General and others,²⁷ held the extension to be unconstitutional and invalid.

²⁶ Constitutional (Amendment) Act No. 8 of 2001.

²⁷ Civil Cause No. 1861 of 2003.

Submissions

There are two schools of thought. The first school submits that the current provision should remain but should be extended to restrict Members of the National Assembly who get elected as independent candidates from joining any political party represented in the National Assembly. They argue that such moves betray the trust of the electorate and such members must lose their seats so that they get fresh mandate from the electorate through by elections.

The other school of thought submits that the provision prohibits Members of the National Assembly from freely exercising their political rights by restricting their movement from one political party to another. It is argued that the section should be repealed so that members of the National Assembly should be free to move from one political party to another and from a political party member to an independent member and vice versa.

Issues

- Should section 65 continue to restrict the movement of Members of the National Assembly?
- If yes, in what other circumstances should movement of Members of National Assembly be restricted?
- Should section 65 be repealed? What would be the reasons for such repeal?

5.8 *The Senate*

The Constitution under sections 68 -72 made provision for a second chamber of Parliament called the Senate. However the National Assembly in 1995 resolved to suspend the operation of the Senate to 1999. Then in 1999, the National Assembly abolished the Senate.

Submissions

On the one hand, it has been submitted that the Senate should be brought back. The main argument for this position is that the Senate acts as a check on the way the National Assembly conducts its business. It is further argued that the Senate, in the spirit of the original scheme which included Chiefs, women, the disabled, etc, would allow a broader section of the society to be involved in the legislative process.

On the other hand, it has been submitted that the Senate should not be brought back as it is simply a chain on scarce resources. It is argued that the Senate would not bring any meaningful contribution to the legislative process.

Issues

- Should the Senate be brought back?
- If yes, what should be its composition?
- What should be its functions?
- What should be the size of the Senate?
- Should the size of the National Assembly be changed if the Senate is brought back?

- If yes, what should be the size of the National Assembly?
- How should members of the Senate be determined?

5.9 *System of Electing Members of Parliament*

Malawi elects its Members of Parliament through what is commonly known as the first past the post system. This means that the candidate who scores more votes than any other candidate is declared the winner. There is no minimum threshold of votes that must be scored for one to be declared winner. The Parliamentary and Presidential Elections Act²⁸ has simply said that the candidate who has obtained the majority of the votes at the poll is the winner.

Submissions

The submissions received under this head are mainly two : The first view is that the current system should be maintained. The main reason for this position is that it is an easy and cheap system to administer and it has worked well for Malawi in the past.

The second view is that Malawi should adopt the proportional representative system. It is argued that this system where voters are elected through party lists and seats are allocated on the basis of the percentage of national vote scored by a party, is better for several reasons. The first reason is that there are normally no wasted votes as each vote is taken into account in determining the percentage of national vote scored by each party. This means that more people would be encouraged to participate in elections as they know that their votes counts. Secondly, it gives small parties an opportunity to gain seats in Parliament so long as they amass the requisite threshold of the national vote. Thirdly, it is argued , minority or vulnerable groups such as women can easily be integrated in the membership of parliament so long as the party structure puts them on the party list. Fourthly, it is posted, it obviates the need for costly by-elections as any vacancies would be filled by the party that held the vacant seat.

It has also been submitted that the proportional representation system may be adopted for Local Government Elections.

Issues

- Should the system for electing MPs or Councillors be changed?
- If yes, should Malawi adopt the proportional representation system?
- What other system of electing MPs or Councillors would you suggest?
- Should the Constitution stipulate of the level of majority required to elect an MP or Councillor?
- If yes, what should be the level of majority?

²⁸ Section 96 (5)

5.11 *Vacancy in the office of Speaker / Deputy Speaker(s)*

Section 53 of the Constitution contains provisions that create the office of Speaker and Deputy Speaker(s), how such offices may be filled and the general conduct of such officers. In particular, section 53(1) stipulates that a Speaker shall be elected by a majority of votes of the members of the National Assembly *at the first sitting after every dissolution of the National Assembly*. The election of Deputy Speaker(s) is provided for in section 53(2) whilst section 53(3) provides for situations which may lead to vacancies in the offices of Speaker or Deputy Speaker(s).

Observation

It has been observed that although section 53 creates vacancies in the offices of Speaker or Deputy Speaker(s), there is no provision within the section, nor anywhere else in the Constitution, for filling such vacancies. The only provision that comes close is the proviso to subsection (4) which deals with absences of both the Speaker and Deputy Speaker(s) in which case a member may be elected to act as Speaker for as long as there is no Speaker or Deputy Speaker. As can be noted, this provision would apply to temporary absences of the Speaker and Deputy Speaker and in any case only an acting Speaker may be elected under this proviso and not an acting Deputy Speaker. It is therefore submitted that currently there is no provision for the filling of a vacancy in the office of Speaker or Deputy Speaker, given that the Constitution categorically specifies that election of these officers shall be at the first sitting after a general election. Before the amendment of 1999, the Constitution at least provided for the election of a Deputy Speaker to fill a vacancy in that office, but even then this requirement did not extend to filling a vacancy in the Speaker's office.

Issues

- How should a vacancy in the office of the Speaker be filled?
- How should a vacancy in the office of the Deputy Speaker be filled?

CHAPTER VI

6. ELECTIONS

6.1 *Qualification of Chairperson of the Electoral Commission*

Section 75 (1) of the Constitution provides that the Chairperson of the Malawi Electoral Commission shall be a Judge who may be nominated by the Judicial Service Commission. Thus, the office of Chairperson of the Malawi Electoral Commission is the preserve of lawyers who have made it to being a Judge to the exclusion of all other professionals.

Submission

It has been submitted that the office of Chairperson of Malawi Electoral Commission should be open to all professions / disciplines. It is argued that not all lawyers, let alone Judges, make good administrators and since the work of the Malawi Electoral Commission is primarily the administration or management of elections, a judge may not always be best suited to be Chairperson of the Malawi Electoral Commission. It is considered that what could be done is to let the Chairperson be from any discipline so long as they have among other qualities administrative skills and integrity. However, the Constitution could provide that there shall always be a lawyer on the membership of the Commission. This, it is argued, would ensure that issues requiring legal knowledge would be dealt with appropriately.

Issues

- Should the qualification of the Chairperson of Malawi Electoral Commission change?
- Apart from Judges, who else may be appointed Chairperson of Malawi Electoral Commission?
- Should Judges be at all eligible given their duties of adjudication when matters go before the courts or should they not be assigned to the Commission on full time service for a period during which they should take leave of their judicial functions?
- Which authority should make the appointment of the Chairperson?

6.2 *Composition of the Malawi Electoral Commission*

The Electoral Commission is supposed to have other members being not less than six in number in addition to the Chairperson.²⁹ These other members are to be appointed in accordance with the Electoral Commission Act.³⁰ Section 4(1) of the Act provides that such members shall be appointed by the President in consultation with leaders of political parties represented in Parliament. The section requires the President to appoint suitably qualified persons.

²⁹ Section 75(1) of the Constitution

³⁰ Chapter 2:03 of the Laws of Malawi

In practice, members of the Electoral Commission have always been appointed on nomination of three parties which have dominated Parliament over the past decade, namely, United Democratic Front, Malawi Congress Party and Alliance for Democracy although for one of them, Alliance for Democracy, this is no longer the case. Even today, with eight parties being represented in Parliament, membership of the Electoral Commission remains consisting of UDF, MCP and Aford largely because the current term of office for the Commissioners continues from the period prior to the last general election.

Submissions

From the submissions received, there are two schools of thought on the question of composition of membership of the Electoral Commission.

The one school of thought submits that membership of the Commission should not be based on party nomination. This camp argues that members should be appointed based on their qualification, as stipulated in the Act, and their appointments should not be based on them being political party activists. It is suggested that appointments should be based on interviews and all Malawians should be free to apply for appointment. It is further argued that it is not appropriate to have political parties, which have material interest in the way the Electoral Commission conducts elections, have control of the Commission as this compromises the independence of the Electoral Commission.

The other school of thought submits that it is ideal to have party representatives in the Electoral Commission because the Commission is there to administer elections which is primarily why political parties exist. They further argue that the presence of political parties in the Commission does render some decisions of the Commission readily acceptable as political parties are seen to have been part of the decision making process.

Issues

- Should membership of the Electoral Commission include political party representatives?
- If yes to the above question, how should political parties which may have representation on the Commission be determined?
- Should membership of the Electoral Commission exclude political party representatives?
- What should be the composition of the membership of the Electoral Commission and how should members be appointed?

6.3 Determination of Constituency Boundaries

The Constitution provides that the functions of the Electoral Commission shall be as conferred on it by the Constitution or by the Electoral Commission Act.³¹ In section 76 (2) the Constitution has given the Electoral Commission the functions of determining constituency boundaries impartially³² and reviewing existing constituency boundaries at specified intervals.³³

³¹ Section 76 (1) of the Constitution

³² section 76(2) (a)

³³ section 76 (2) (b)

The Electoral Commission is therefore also charged with the responsibility of determining constituency boundaries. The Constitution has provided factors that the Electoral Commission must consider when determining constituency boundaries.³⁴

Submissions

It has been submitted that the Electoral Commission should not be charged with the duty of determining constituency boundaries. It is argued that the Electoral Commission should only deal with matters of administration of elections. It is argued that since the Electoral Commission has political party representation, it could easily be persuaded to determine boundaries to satisfy the political needs or desires of a particular party i.e. gerrymandering. It is proposed that there should be established a separate body to handle matters of constituency boundaries. It is also argued that such a separate body would easily possess the necessary competence to allow it carry out its mandate in accordance with the considerations stipulated in the Constitution whereas the Electoral Commission may not.

Issues

- Should there be a different body to deal with constituency demarcations?
- Should such a body be established under the Constitution?
- What should be the composition of such a body?

6.4 Number of Constituencies

In section 76 the Constitution has given the Electoral Commission the function of determining constituency boundaries. By virtue of this function therefore, the Electoral Commission has power to determine the number of constituencies and of necessity the number of seats in the National Assembly. The size of the National Assembly and the number of representatives Malawians should have, are effectively determined by the Electoral Commission.

In determining constituency boundaries, the Electoral Commission is supposed to ensure that constituencies contain approximately equal number of voters eligible to register ³⁵ considering the factors of population density, ease of communication and geographical features and existing administrative areas.

The Electoral Commission has since 1994 created 73 new constituencies so that the size of the National Assembly has grown to 193 seats (currently). Some of the notable new constituencies are Likoma Island (which is a district on its own) Neno (again a district on its own); Ndirande Malabada, Ndirande (previously it was one constituency – Ndirande.)

Submissions

It has been submitted that it might not be safe to let the Electoral Commission determine the size of the National Assembly by giving it the function of determining constituency boundaries.

³⁴ section 76 (2) (a)

³⁵ section 76(2) (a)

It is argued that it would be better that the size of the National Assembly or the number of constituencies be prescribed in the Constitution and then determine the constituency boundaries. It is further proposed that should the need arise to increase the number of seats in the National Assembly by creating new constituencies, then Parliament must endorse such a move. It is argued that the increase in the number of seats in the National Assembly has increased expenditure without generating corresponding benefit to Malawi.

It is also argued that prescribing the size of the National Assembly in the Constitution will stamp out the tendency by political parties to influence the creation of new constituencies simply to ensure that such parties have the numbers in the National Assembly.

Issues

- Should the Constitution set the number of seats in the National Assembly?
- What should that number be?
- What should be the procedure for creating a new constituency in the event that the number of seats in the National Assembly is fixed in the Constitution?
- Should the current system whereby the Electoral Commission determines constituency boundaries continue?

CHAPTER VII

7. THE EXECUTIVE

7.1 *The Office of Second Vice President*

Section 79 of the Constitution establishes, *inter alia*, the office of Second Vice President. The office may however only be filled by appointment by the President under section 80 (5). It is not an elected office. Further, if the President was elected on political party sponsorship then he or she shall not appoint a Second Vice President from that political party. This provision has been interpreted by certain circles to provide for coalition governments. The President is also required under section 80 (5) to appoint a Second Vice President only if he or she considers it in the national interest so to do. The Constitution has however left it to the President, to determine in the circumstances what constitutes national interest. So far Malawi has had two appointments of a Second Vice Presidents though it has been the same individual who has been appointed to this office in the first two successive terms under the current Constitution.

The primary function of the office of Second Vice President is to assist the President. The Constitution has however stipulated that the Second Vice President may exercise powers and functions as are conferred by the Constitution or an Act of Parliament. One such function is to preside over Cabinet meetings in the temporary absence of both the President and First Vice President.³⁶ The Second Vice President is also a member of the Cabinet. There is no single Act of Parliament that stipulates any other functions and powers of the Second Vice President.

The Second Vice President is entitled to remuneration by way of salary, allowance or pension as stipulated in section 82. The details of this package are stipulated in the Presidents (Salaries and Benefits) Act.³⁷

Submissions

There are basically two counter submissions on this matter: one for abolition and the other for retention of the office.

The camp that has submitted that the office of the Second Vice President be abolished argues that the office is simply a drain on economic resources as it does not carry out any special functions that may not be ably executed by the Vice President. It is argued further that the appointments of Second Vice President have tended to reflect political party need to secure majority in the National Assembly rather than national interest.

On the other hand, the proponents for retention argue that the office is necessary because Malawi is a country that is politically divided on regional lines. They thus argue that the Second Vice Presidency would be used to ensure that all the three regions of the country have a representative in the Presidency, thereby enhancing national unity.

Issues.

³⁶ section 92 (3) (c) of the Constitution

³⁷ Cap. 2:02 of the Laws of Malawi

- Should Malawi maintain the Second Vice Presidency?
- How can Malawi make provision for coalition governments?
- If the Second Vice Presidency is retained, what should be the powers and functions of such office?
- Is it necessary to stipulate in the Constitution what should constitute “national interest”?
- What considerations would merit being “national interest” considerations?

7.2 *Level of Majority for Electing President*

The Constitution provides that the President shall be elected by a majority of the electorate through direct, universal and equal suffrage.³⁸ The provision has proved problematic as to what constitutes the electorate and what constitutes the majority. Thus, after the 1999 presidential elections, one of the Presidential candidates argued that the winning candidate had not been regularly elected as he had not achieved the required majority of the electorate in accordance with the Constitution and took the matter to court.³⁹

The court held that the electorate meant the total of all voters who had actually cast their votes. The court further held that majority of the electorate should be understood to mean the highest number of votes scored by any candidate when compared to the votes scored by the other candidates.

By judicial interpretation therefore, Malawi chooses its President on relative majority basis. As a result, in the 2004 Presidential elections, the President was elected with a 34% of the total votes cast. It is therefore imaginable, at least in theory, that there could be a President elected with only as low as 5% of the total votes cast.

It should be noted, though, that in this particular case of the 1999 presidential election, the candidate whose election was being challenged had actually been declared to have obtained over 50% of the votes cast. It is possible therefore that this case may not provide authority in future cases where a leading candidate may obtain less than 50% of the votes as a court of equal competence could distinguish the two cases on their facts.

Submissions

Several submissions have been received on this provision. The first is that the President should be elected on a majority of 50%+ 1 of the total votes cast. It is proposed under this submission that if no candidate scores 50%+1 votes at first ballot, there should be a run-off ballot between the top two candidates so that as much as this arrangement may be expensive it would ensure that the President was voted for by a majority of Malawians. This would make such a Presidency both legitimate and acceptable in the eyes of the majority of Malawians.

³⁸ section 80 (2) of the Malawi Constitution

³⁹ Gwanda Chakuamba and others vs Attorney General and others CC No. 1B of 1999

The second submission is that there is no need to set an absolute majority level for electing a President. This submission supports the court decision in the *Chakuamba* case that whoever scores higher amongst the contesting candidates should be declared winner. It is argued that setting an absolute majority would be expensive for Malawi as there would almost invariably be reruns at every Presidential election in view of the number of parties in existence.

The third submission is that the political party with the highest number of seats in Parliament should proffer a President. It is argued that in such a way a President would be assured of support in Parliament. It is also argued that the high number of seats secured by a political party in Parliament is a sign that the party is nationally or more widely acceptable and its leader should therefore be President. In effect this submission proposes a major change in the system of electing a President.

The fourth submission is that on top of scoring the highest, a winning Presidential candidate must reflect national appeal by winning votes in all the regions or districts by not less than a certain percentage-say 25%. It is proposed that this would ensure that a winning candidate is acceptable nationally so as to avoid Presidents who may win because they are popular in only one region which is more populated than the others.

Issues.

- What should constitute majority?
- If majority is not achieved at a general election what should happen?
- If there are to be run off elections within what period should such elections be held?
- Should the President be the one whose party has the majority of seats in Parliament?
- Should there be a minimum number of votes that must be cast for a Presidential candidate for an election to be valid? If yes, what should that threshold be?
- Should a candidate require to obtain a prescribed minimum votes in every region or district to have been elected President?
- Should there be a minimum number of votes that Presidential candidate must score in each district or region in order for the them to be declared the winner?

7.3 Age and Academic Qualifications of Presidential Candidates

Section 80(6) of the Constitution stipulates the qualifications for nomination or election of the President. There are only two qualifications. The first is that he or she must be a citizen of Malawi by birth or descent⁴⁰ and the second is that he or she must have attained the age of thirty-five years.⁴¹ There is no upper age limit for a person to contest for the presidency nor the requirement of ability to read and write English. Educational qualification is not stated to be a pre-requisite for the Presidency. This appears strange when one considers that for the office of Minister of Member of Parliament,⁴² candidates are required to at least be able to read and write the English language.

⁴⁰ section 80(6) (a)

⁴¹ section 80(6) (b)

⁴² section 94 (2) (b)

The disqualifications are contained in section 80 (7). Only persons below the age of 35 years are disqualified but anyone who is 35 years of age and older is eligible.

Submissions

Several submissions have been received on the issue of educational qualifications of presidential candidates. Most of the submissions are to the effect that there should be some educational qualifications that Presidential candidates must possess. The range of qualifications that has been is between Malawi School Certificate of Education and a first degree. It is argued that for someone to ably execute the duties and functions of the high office of President they need a certain level of formal education to be able to appreciate issues and represent the country well at international fora.

On the other hand, some submissions received have argued that although education may be necessary it is not a critical qualification. They argue that the President does not work alone; he or she works with others who would have the appropriate expertise to advise him or her accordingly. This camp therefore argues that the Constitution may remain as it is.

On the matter of upper age limit, quite a number of submissions have been received to the effect that an upper age limit for Presidential candidates needs to be set in the Constitution. It is argued that it is common sense that mental knowledge faculties tend to fail with age. An example is given that in both private and public employment there are prescribed retirement ages and there is no reason why this should not apply to the Presidency.

As regards what the actual age limit should be the submissions are far from agreed. The range is from 60 years to 80 years.

On the other hand, there is a submission to the effect that old age should not be an issue. What should matter is whether a person who offers himself or herself for election is acceptable by the people. In effect this submission is for the maintenance of the status quo.

Issues

- Should the Constitution stipulate educational qualifications for Presidential candidates?
- If yes, what should such qualifications be? – MSCE, DIPLOMA, FIRST DEGREE, MASTERS DEGREE or PHD?
- Should there be an upper age limit for Presidential candidates?
- If yes what should the age be? – 60, 65, 70, 75, 80?

7.4 *Swearing in of The President*

Section 81 (3) provides that the President shall be sworn into office within thirty days of being elected to such office. Thus, under this provision, it is possible for the President to be sworn in on the same day that results are released or on the thirtieth day after election. However, for as long as the President elect has not been sworn in, the outgoing President would remain in office. This ensures that there is no power vacuum at any given point during this period of transition.

Submissions

In the main, there have been received two submissions under this provision. The first is that there should be a minimum period before which a President elect may not be sworn in and a maximum period before the expiry of which he or she must be sworn in. It is argued that such an arrangement would facilitate proper transition of power from the outgoing President to the incoming one. It is further argued that this period would allow the President to pick his or her Cabinet. It would also allow for contesting election result issues that are to be settled by the courts before the President is sworn in. Several time limits have been proposed. One is that the President should be sworn in not earlier than 30 days nor later than 60 days after election. Another is that the period should be not earlier than 30 days not more than 45 days after election.

A second submission is that to avoid an outgoing President holding on to power beyond his mandated five year period, it would be better to hold Presidential elections say two months before the expiry of the Presidential term. This would then allow the incoming President to be sworn in within sixty days as proposed but also at the actual beginning of a new Presidential term.

Issues

- Within what period should a President elect be sworn in?
- If the President elect cannot be sworn in within the stipulated period, who should run the country?
- Should the Presidential elections date change? What should the date be?
- What should happen if the President elect dies before being sworn into office?

7.5 *Size of Cabinet*

Section 92(1) establishes the Cabinet whose function among others,⁴³ is to advise the President with respect to policies of Government. The Cabinet consists of the President, the First Vice President, the Second Vice President and such Ministers and Deputy Ministers as the President may from time to time appoint.

The power to appoint Ministers and Deputy Ministers is provided for under section 94 (1). The same provision gives the President power to fill vacancies in the Cabinet. Both sections 92 (1) and section 94(1) do not restrict the President as to how many Ministers and Deputy Ministers may be appointed or may be appointed to Cabinet. This is left to the wise discretion of the President. In essence the size of the Cabinet is entirely in the hands of the President. The number of Ministers and Deputy Ministers is also a matter left entirely to be determined by the President. As a result Malawi has ever had 47 Ministers and Deputy Ministers at one point which was generally considered to be too bloated for a country of Malawi's resources.

⁴³ section 96 (1) enumerates the functions of Cabinet

Submissions

The submissions that have been received on this matter mainly propose that the number of government ministries needs to be set by the Constitution. It is argued that Malawi is a poor country which cannot afford to have so many government ministries whose functions often times are duplicated. It is also argued that sometimes the Presidency has created new ministries purely for political expediency and not on the basis of proper government administration. It is therefore proposed that the Constitution should simply fix the number of government ministries at a certain level, and the popular number appears to be not more than 20 and that if the Presidency has a justifiable need for the creation of an additional ministry, then Parliament must approve such an addition. In this way, it is argued that the size of Cabinet shall be controlled and resources will not be unduly drained.

It has also been submitted that there is no need for offices of Deputy Ministers as most of their work could easily be done by Principal Secretaries.

Issues

- Should the Constitution fix the size of the Cabinet?
- If yes, what should be the size of the Cabinet?
- Should the Constitution fix the number of government ministries?
- How many ministries should there be and what description of portfolios would constitute Ministries?
- What should be the criteria for creating a new ministry?
- Should there continue to be Deputy Ministers?
- If some Ministers / Deputy Ministers should be Cabinet Ministers, which Ministers/ Deputy Ministers should be in Cabinet?
- Should the President retain power to appoint Ministers/Deputy Ministers as he or she sees fit?

7.6 Succession to Office of President

The Constitution provides for instances when a vacancy may occur in the office of President, and what is to be the succession. There are two situations.

The first is where there is a vacancy only in the office of President. In this case section 83 (4) provides that the Vice President shall assume office of President for the remainder of the term and appoint another person to serve as Vice President, also for the remainder of the term. In this scenario, there are two matters that appear in need of clarity. Firstly, it is not clear whether the Vice President who assumes the Presidency needs to appoint the Vice President from the party on which he or she was elected with the President that has vacated office or may appoint the Vice President from anywhere else. Secondly, whether an appointee to the office of Vice President can himself or herself become President in the event that the President who appointed him vacates office before completion of term. Thus, an un elected person could easily lead Malawi. This appears to be against the spirit of the Constitution as contained in sections 6, 12 and 80.

The second situation is where there is simultaneous vacancy in both the office of the President and the First Vice President⁴⁴. In this case, section 85 provides that the Cabinet shall elect from among its members an Acting President and an Acting First Vice President. Such persons may hold office for not more than 60 days if there is more than one year unexpired on the Presidential term or for the remainder of the term if four years of the Presidential term have expired.

It appears clear that it is possible for non-elected members of Cabinet to assume the Presidency and Vice Presidency. Again, this seems to be against the spirit of the Constitution which seems to emphasize the democratic principle that leadership at the level of the Presidency must be assumed through an election.

The Constitution also lacks procedure for convening the Cabinet to elect an Acting President and an Acting Vice President in the event that a Second Vice President is not in office since only the President, the First Vice President and the Second Vice President can convene Cabinet as the Constitution presently provides.

Submissions

It has been submitted that it would not be proper or democratic to have non-elected members of Cabinet or those that are appointed by the President as Vice President under section 84 become Acting President or President. It is proposed that in such cases there should be a general election to elect a new President.

Issues

- Should the First Vice President automatically take over as President or should there be fresh elections for President?
- In what circumstances should the Vice President automatically take over the Presidency in case of a vacancy?
- How should the office of President and Vice President be filled in the case of the simultaneous vacancies in these offices?
- Should non-elected Cabinet members be allowed to become Acting President or Acting Vice President in the event of simultaneous vacancy in the offices of the President and Vice President?
- What should be the procedure to convene Cabinet to elect such an Acting President and an Acting Vice President in the event of simultaneous vacancies?
- Should there be a fresh presidential election in the event of those elected as President and Vice President not being in office even when the vacancies do not occur simultaneously?

7.6. Election of First Vice President

The First Vice President is elected concurrently with the President.⁴⁵ In fact the name of the nominee for First Vice President appears on the same ballot paper with that of the Presidential

⁴⁴ Section 83 (4)

⁴⁵ Section 80 (4)

candidate who nominates him or her. Thus, once a presidential candidate wins an election, his or her nominated First Vice President is elected as well.

Submissions

In the main, four submissions have been received on this matter. The first is that the First Vice President should be elected separately from the President. It is argued that this would allow the electorate to decide who is to be the First Vice President as opposed to the current system where people may elect a First Vice President they do not want by default because they really wanted to elect the President.

The second submission is that the First Vice President should be the Presidential candidate who came second in the presidential elections. It is argued that such a person may already have shown national appeal by coming second in the polls and therefore should be First Vice President. This would also help, it is argued, in the succession to the presidency in the event of a vacancy as such First Vice President would already have been acceptable by the nation.

The third submission is that the party with the majority in Parliament should produce the First Vice President. It is argued that this would cater for situations where the President's party is not in majority in Parliament as it would make it easier for the President to have support in the House if the leader of the party in majority in the House were part of the Presidency.

The fourth submission is that the President, after election, should appoint his own First Vice President. In this submission it is argued that this arrangement would allow the President to appoint someone he or she knows he or she can work with well. It is further argued that the current set up allows the President to end up with a First Vice President whom he or she cannot work with because the pairing may have been made only for purposes of winning the election. It is further argued that in any event the President is already empowered to fill a vacancy of Second Vice President by appointment.

Issues

- Should the manner of electing a First Vice President be changed?
- What should be the manner of electing a First Vice President?
- Should the President be given power to appoint the First Vice President only after the election?

7.8 Removal of the First Vice President

The First Vice President may cease to hold office in only four ways – by reason of impeachment,⁴⁶ by reason of death⁴⁷, by reason of resignation and by reason of incapacity.⁴⁸ In the case of impeachment, it would be Parliament removing the First Vice President upon conviction on the grounds that the First Vice President committed serious violations of the Constitution or

⁴⁶ section 86 (1)

⁴⁷ section 84, *Ibid*

⁴⁸ section 87(6)

serious breach of a written law. In the case of incapacity, the President would have to sign a declaration, certified by a board of independent medical practitioners to the effect that the First Vice President is incapacitated.

Submissions

It has been submitted that the President should have power to remove the First Vice President just like he is able to remove Ministers or the Second Vice President. It is argued that this would allow the President to remove a non performing First Vice President or one who does not agree with the policies of the President . It is also argued that it is not fair that the President should be saddled with a First Vice President with whom he or she cannot work with.

Issues

- Should the President have power to remove the First Vice President?
- In what other instances may the First Vice President be removed from office?

7.9 Presidential Term Limit

Submissions have been received for the Constitution to make it absolutely clear that a President or Vice President who vacates office is not eligible to stand again or be elected again for the same office. A person can serve in that office only on a continuing basis for a maximum of two consecutive terms.

Issues

- What is the problem with current wording of the Constitution?
- How can the current wording be improved?

7.10 Former Presidents to Retire From Active Politics

Several submissions have been received calling for a provision requiring former Presidents not continue to engage in active politics or hold active political office. Instead they need to preserve their status of statesmanship and to allow political transition to others so that among other things the country could look up to them for peace efforts in time of internal conflicts.

CHAPTER VIII

8. THE JUDICATURE

8.1 *Retirement Age of Judges*

The Constitution provides that judges shall retire at the age of 65 years or such other age as may be prescribed by Parliament.⁴⁹ Thus, Parliament may raise or reduce the retirement age of judges but such alteration will only affect a judge in office with his or her consent.

The Constitution has not provided for a minimum age at which one may be appointed to the office of judge. However section 112 stipulates that for one who has not been a judge before, they need to have practised or been entitled to practise before a court of unlimited jurisdiction in criminal or civil proceedings for a period of not less than ten years. In the Malawi context, one would therefore conclude that in practical terms one may be appointed judge at as low as 32 years of age given that some individuals graduate from the Law School and begin to practise at the age of 22 years. This would mean that they would hold office for up to 33 years to the retiring age of 65 years. The Constitution has also provided for the retirement age of Magistrates⁵⁰ and other persons appointed to judicial offices such as Registrars and put such retirement age at 70 years. The Constitution has therefore set two different retirement ages for judicial officers. Those that hold the higher offices of judge retire earlier than those that hold lower offices of say Magistrates or Registrars.

Submission

In substance, two submissions have been received. The first is that the Constitution should set the retirement age of judges at 70 years just like for Magistrates and other junior judicial officers. It is argued that it does not seem to stand to reason that judges should retire at an earlier age than Magistrates when judges would need to accumulate some practical experience (not less than 10 years) before they can make it to be a judge. It is further argued that the practice in most Commonwealth jurisdictions and within the region is that Judges retire at 70 years.

On the other hand, there is a submission to the effect that there is no reason why judges should retire at 65 years or older when other civil servants retire at 55 years. It is argued that it is common knowledge that mental performance declines with age and therefore having old judges in office would be detrimental to the quality of judicial work. It is therefore proposed that the retirement age of judges be reduced to 60 years or 55 years.

Issues

- Should the retirement age of Judges be revised?
- What should be the retirement age?
- Should Parliament have power to change judges retirement age?
- Should there be a uniform retirement age for all judicial officers?
- If yes, what should the retirement age be?

⁴⁹ section 119 (6)

⁵⁰ section 111 (3)

8.2 *Establishment of a Constitutional Court*

The judiciary in Malawi basically consists of the Supreme Court,⁵¹ the High Court,⁵² and Subordinate courts.⁵³ Appeals from subordinate courts lie to the High Court and appeals from the High Court lie to the Supreme Court.⁵⁴ The Supreme Court can however also hear appeals from such tribunals as an Act of Parliament may prescribe.⁵⁵ The judiciary has been given the power to determine whether a dispute is within its jurisdiction to try or not.

Under section 9 of the Constitution, the judiciary has also been given the responsibility to interpret, protect and enforce the Constitution and all laws in accordance with the Constitution. The Constitution goes on to require organs of State to have due regard to the principles and provisions of the Constitution in the application and formulation of any Act of Parliament.⁵⁶ As such if any Act of Parliament is applied or formulated contrary to the principles and provisions of the Constitution, the courts have power to declare such legislation invalid. It has been argued that this power of the court would only be exercised after the Act had already been passed and, in some unfortunate cases where it was not quickly challenged, after some citizens may have already suffered from its provisions.

However, since under section 5 of the Constitution any act of the Government that is inconsistent with the Constitution can be declared by a court to be not valid, this means that a Bill published by the Government to introduce legislation that is inconsistent with the Constitution could be declared to be invalid.

The Constitution has further specifically given the President power to refer disputes of a constitutional nature to the High Court⁵⁷ for determination. However, in practice, this mechanism has rarely been used but there have been cases where aggrieved citizens or interest groups have challenged the constitutionality of certain legislation in the courts.⁵⁸

In a bid to ensure that constitutional issues are given appropriate attention by the courts, the Courts Act was amended in 2004 to establish what has been loosely styled as a constitutional court⁵⁹ but which in essence is a special panel of High Court judges exercising the jurisdiction of the High Court except by more than a single judge. In a new subsection (2) of section 9 of the Courts Act, it is stipulated that proceedings in the High Court that expressly and substantively relate to or concern the interpretation of the provisions of the Constitution shall be disposed of by or before not less than three judges. Further, in subsection (3) of section 9 of the amended Courts Act, it is provided that a certificate of the Chief Justice that a proceeding is one which falls within

⁵¹ section 140

⁵² section 108

⁵³ section 110

⁵⁴ section 110 (4)

⁵⁵ section 104 (2)

⁵⁶ *ibid*

⁵⁷ section 89 (i) (h)

⁵⁸ *The Registered Trustee of the Public affairs Committee vs the Attorney General and another*, cc No. 1861 of 2003, where PAC challenged the constitutionality of an amendment to section 65 of the Constitution.

⁵⁹ Courts (Amendment) Act No 2 of 2004

the purview of subsection (2) is conclusive evidence of that fact. Thus, it is expressly and substantively the power of a constitutional court to give the interpretation of the Constitution. There are no rules or guidelines on the matter.

It appears therefore that even with a Constitutional Court, the constitutionality of legislation may only be questioned in the course of proceedings. In any case this court is constituted as and when need arises and the composition always changes so long as there are three judges sitting.

Submissions

A number of submissions have been received to the effect that Malawi needs a specialized Constitutional Court. They argue that there is need to have in place a full time Constitutional Court to deal with all matters pertaining to the Constitution. It is further proposed that the Constitutional Court should have power to determine the constitutionality of legislation before it becomes law where such issue has been raised. Further, any amendment to the Constitution itself would have to be endorsed by such a court before coming into force so that its constitutionality should not be challenged after enactment.

Issues

- Is a specialized Constitutional Court necessary?
- Where, in the hierarchy of the courts should such a court be fitted?
- What should be the composition of such a court?
- Should appeals lie from this court to any other court i.e the Supreme Court?
- If there will be no appeals from this Constitutional Court, should the court have powers to reverse its own decision?
- What should be the procedure for handling constitutional matters that only become apparent in the course of proceedings in any other court?

CHAPTER IX

9. LOCAL GOVERNMENT

9.1 *National Local Government Finance Committee*

The National Local Government Finance Committee is established under section 149 of the Constitution. Its primary mandate is to consider submissions from local government authorities in respect of estimates of expenditure and requests for special disbursements. The Committee has powers and functions conferred on it by the Constitution or an Act of Parliament which currently is the Local Government Act.⁶⁰ The Constitution has provided for five powers namely, receipt of estimates of revenue and projected budgets⁶¹, examination and supervision of accounts,⁶² recommendation of distribution of funds and variation of amounts payable where need be,⁶³ preparation of a consolidated budget for all local government authorities which should be presented to the National Assembly by the Ministries⁶⁴, and making application to the Minister for supplementary funds.⁶⁵

The Committee consists of the following six members – a nominee of the local government authorities, the Principal Secretary for Local Government,⁶⁶ the Chairperson of the Civil Service Commission or his or her nominee, a professionally qualified and practising accountant appointed by the Public Appointments Committee⁶⁷, a nominee of the Electoral Commission⁶⁸ and the Principal Secretary responsible for finance or his or her senior representative.⁶⁹

As indicated above, the primary mandate of the National Local Government Finance Committee is to regulate the finances and financing of local government authorities.

Submissions

A sector specific submission has been received to the effect that the provisions for the National Local Government Finance Committee needed to be reviewed. The first proposal is that the name itself should change from National Local Government Finance Committee to National Local Government Finance Commission. It is argued that the use of the word “Committee” does not portray the correct status of the institution as it implies that it is simply part of some bigger entity which is not the case.

The second proposal is that the National Local Government Finance Committee should have its own separate Chapter in the Constitution. It is argued that this would ensure

⁶⁰ Cap 22:01

⁶¹ Section 149 (2) (a)

⁶² Section 149 (2) (b)

⁶³ Section 149 (2) (c)

⁶⁴ Section 149 (2) (d)

⁶⁵ Section 149 (2) (e)

⁶⁶ Section 151 (a) – (b)

⁶⁷ Section 151 (c)

⁶⁸ Section 151 (e)

⁶⁹ Section 151 (f)

independence of the institution just like other constitutional bodies like the Office of the Ombudsman or Law Commission. It is further argued that for the proper functioning of the Committee it needs such independence so that it is seen not to be within the Local Government machinery itself. This would entail changing its reporting structure to, say, a Parliamentary Committee.

The third proposal is that the composition of membership of the Committee should be reviewed so that it consists of more relevant members who can make meaningful contribution to the operations of the Committee. It is suggested that some ex-officio members may not bring much value to the operations of the Committee.

Finally, it has been proposed that the level of funds that Government is to transfer to local authorities should be spelt out in the Constitution to ensure that this is adhered to at all times so that adequate service delivery by local authorities may be achieved.

Issues

- Should the National Local Government Committee be an independent constitutional body?
- Should its name change to National Local Government Commission or similar description such as Council or Board?
- What should be the composition of membership of this Committee?
- How should such members be appointed?
- Who or what authority should have powers of appointment?
- To what authority should such a body report?
- Should the Constitution fix the level of funds (say, by way of a percentage of the national budget) that central government should transfer to local government authorities?

CHAPTER X

10. AUDITOR GENERAL

Section 184 provides for the establishment of the Office of the Auditor General whose main functions are to audit and report on the public accounts of Malawi. The Auditor General is required to submit reports to the National assembly through the Minister of Finance.⁷⁰ The Auditor General may be removed by the President,⁷¹ for specified reasons, but in the exercise of the duties and powers of office, the Auditor General is not subject to the direction or control of any other person or authority.⁷² Further the Auditor General may not be inhibited by any person or authority in the conduct of his or her functions and duties⁷³. It can be seen that the provision intends to engender independence in the office of the Auditor General.

It should however be noted that section 184 falls under a Chapter that deals with finances generally.

Submission

It has been submitted by the Auditor General that in order to ensure independence of the office of the Auditor General, it is necessary that the Constitution contains a separate Chapter to provide for the office of Auditor General. This would be in line with what the Constitution has done in respect of other institutions of good governance such as the office of the Ombudsman.

Secondly, it has been submitted that there is an inconsistency between the Constitution and the Public Audit Act⁷⁴ as regards the reporting mandate of the Auditor General. The Public Audit Act requires the Auditor General to submit his or her annual Report to the President and the Speaker of the National Assembly through the Minister of Finance.

The third and final submission is that the Constitution is silent on the retirement of the Auditor General whilst the Public Audit Act has set the same at 65 years. It is therefore proposed that the Constitution should also stipulate the retirement age of the Auditor General.

Issues

- Is it necessary that the Constitution should have a separate chapter on the office of Auditor General?
- Should the independence of the office of Auditor General mean that the office should be an autonomous constitutional body falling outside the mainstream finance ministry of government?
- Should the Constitution stipulate the retirement age of the Auditor General in order to better secure the tenure of the office?

⁷⁰ Section 184(2)

⁷¹ Section 184(3)

⁷² Section 184 (6)

⁷³ Section 184(7)

⁷⁴ Section 184(8)

- To what authority should the Auditor General report?
- Should the President have sole power to remove the Auditor General whose appointment is subject to confirmation by the National Assembly?

CHAPTER XI

11. RESERVE BANK OF MALAWI

Section 185 makes provision for the establishment, by an Act of Parliament, of a central bank, its primary functions and the structure of governance. The relevant Act of Parliament is the Reserve Bank Act, Chapter 44:02.

Submission

It has been submitted that there is no need to have the establishment of the central bank stipulated in the Constitution as this can adequately be catered for under an Act of Parliament. It is argued that there is no difference between the Reserve Bank and say Malawi Development Corporation which is not in the Constitution.

Issue

Is it necessary to give constitutional status to the Central Bank?

CHAPTER XII

12. CIVIL SERVICE

The Constitution under section 194 prohibits the appointment, election or designation of one person as chairperson of more than one Board, Commission, Council, Committee or similar body that is established by an Act of Parliament. Thus, any person may only be chairperson of one board, commission, council, committee or similar body.

Observation

It has been observed that this prohibition may disentitle Malawi from benefiting from the skills of certain individuals who may competently serve on more than one board due to their expanse and depth of their expertise.

Issues

- Should the prohibition be maintained?
- Should any one person be allowed to chair more than one board, commission etc?
- If any one person may chair more than one board, commission, etc. how many boards, commissions etc may such person chair?

CHAPTER XIII

13. MISCELLANEOUS

13.1 *Declaration of Assets*

The Constitution requires the President and members of the Cabinet to disclose their assets, liabilities and business interests within three months of their election or appointment as the case may be.⁷⁵ However no repercussions have been stipulated for non-compliance. Section 213 has extended this requirement to Members of Parliament⁷⁶ and other senior public officers⁷⁷ and senior officers of parastatals⁷⁸ as the National Assembly may specify. Reference to senior officers to whom the requirement applies extend to those that work in bodies established under or by an Act of Parliament or bodies whose statutory procedures for financial control and accountability are similar to those of bodies established by or under an Act of Parliament. Parliament is yet to define the grades or categories of such public servants required to declare assets, liabilities and business interests.

The disclosures are supposed to be made in writing and delivered to the Speaker of the National Assembly. The Speaker is then required to deposit such documents with such public office as may be specified in Standing Orders of Parliament. However, Parliament has been given power to prescribe by an Act on how the disclosures are to be dealt with. Such an Act has not yet been enacted and therefore disclosures continue to be handled by the Speaker as stipulated in section 88 (A) (1) and section 213 (1) respectively and subsequently there is no mechanism for ensuring compliance.

The Constitution has, as above indicated, stipulated that disclosures must be done within three months from the date of election, nomination or appointment. The Constitution has however not stipulated what should happen in the event of non-compliance. There is also no Act of Parliament that has legislated for non-compliance. In the circumstances there is no mechanism for ensuring compliance.

Submissions

Several submissions have been received on this matter. In the main, all the submissions argue for ensuring that the office holders who are required to disclose their assets, liabilities and business interests do actually disclose such information. They further appear to agree that the only way to ensure compliance is by putting in place punitive measures against those who do not comply. Several proposals have been made to this effect.

It is proposed that for Members of Parliament, the President and the Vice President, disclosure should be done at the nomination stage. It is argued that it would be better to know the financial position of such office holders before they get elected rather than after election because if

⁷⁵ Section 88 (A) (1)

⁷⁶ Section 213 (1) (a)

⁷⁷ Section 213 (1) (b)

⁷⁸ Section 213 (1) (c)

they do not comply after election it may be difficult to get them out of office. For example, it might be difficult to remove the President and Vice President on account that a fresh election might be costly. As for appointed Ministers, Deputy Ministers and the Second Vice President, it is proposed that they must declare their assets, liabilities and business interests once they have been appointed but before they are sworn in. In other words, they should not be sworn in unless they have made disclosure, otherwise they should not take up office at all.

Another proposal is that the provision may remain as it is but that there should be a clear penalty for non compliance. The proposed penalty is simply that whoever does not comply should lose their office after the stipulated period for disclosure has expired.

A further proposal is that on top of such disclosures being made at the point of assumption of office, this should also be done when one leaves office. It is argued that this would allow for a proper check on what wealth one may have accumulated whilst in office. This would in turn allow for proper verification of whether such a person earned wealth whilst in office legitimately or not. It would therefore be easy to hold them to account for the wealth gained whilst in office.

Issues

- Should the time at which the President and First Vice President, Ministers and MPs declare their assets, liabilities and business interests change?
- At what stage should MPs, President and First Vice President declare their assets, liabilities and business interests?
- Should the stage at which an appointed Vice President, Ministers and Deputy Ministers and other appointed senior public officers declare their assets, liabilities and business interests change?
- At what stage should an appointed Vice President, Ministers and Deputy Ministers and other senior public officers declare their assets, liabilities and business interests?
- What should happen in the event that both the President and Vice President have failed to disclose their assets, liabilities and business interests?
- Should there be disclosure of assets, liabilities and business interests at the end of term of office?