

GAZETTE EXTRAORDINARY

**The Malawi Gazette Supplement, dated 21st September, 2007, containing
Report of the Law Commission (No. 6D)**

LAW COMMISSION REPORT NO. 18

CONSTITUTION OF MALAWI

REPORT OF THE LAW COMMISSION ON THE REVIEW OF THE
CONSTITUTION

The Report of the Law Commission on the Review of the Constitution is hereby published and shall be laid in Parliament pursuant to section 135 (*d*) of the Constitution.

Dated this 7th day of September, 2007.

(FILE NO. LC/01/16)

H. D. PHOYA
Minister of Justice

REPORT OF THE LAW COMMISSION ON THE REVIEW OF THE
CONSTITUTION

TO: THE HONOURABLE MINISTER OF JUSTICE

This is the Report on the Review of the Constitution by the special Law Commission appointed under section 133 of the Constitution.

We, the members of the Commission, submit this Report pursuant to section 135 of the Constitution and commend the Report and its recommendations to the Government, Parliament and the people of Malawi.

MEMBERS

PROF. ZIMANI D. KADZAMIRA

Chairperson of the Commission
University of Malawi



.....

MARY NKOSI (MRS.)

Deputy Chairperson of the Commission
Reserve Bank of Malawi



.....

JANET LAURA BANDA (MRS.)

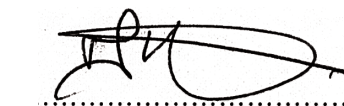
"Acting" Law Commissioner
Malawi Law Commission



.....

MR. THUOSE R. O'DALA


Commissioner
Office of the President and
Cabinet



.....

JUSTICE HARRIS MICHAEL MTEGHA, SC -

*Commissioner
Judiciary*



.....

JUSTICE FRANK EDGAR KAPANDA

*Commissioner
Judiciary*



.....

JUSTICE LOVERMORE PAULO CHIKOPA

*Commissioner
Judiciary*



.....

ANTHONY KAMANGA, SC


*Commissioner
Ministry of Justice and
Constitutional Affairs*



.....

SOPHIE M. KALIMBA (MRS.)

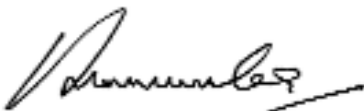
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Blantyre City Assembly*



.....

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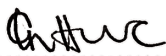
*Commissioner
Mzuzu University Trust Fund*



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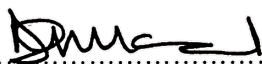
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Ministry of Justice



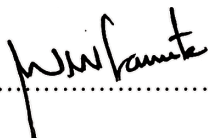
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Commissioner,
Malawi Human Rights Commission



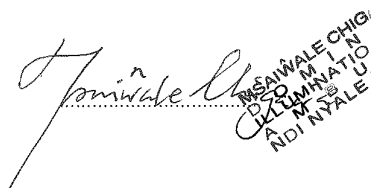
MR. WILLIE SAMUTE

Commissioner
Public Sector Reform
Office of the President and Cabinet




DR. MSAIWALE CHIGAWA

Commissioner
University of Malawi



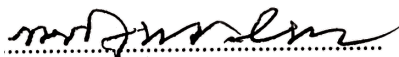
MR. MABVUTO H. HARA

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Malawi Law Society



DR. MUSTAFA HUSSEIN

Commissioner
University of Malawi



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Commissioner
Synod of Nkhoma



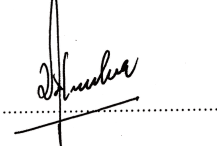
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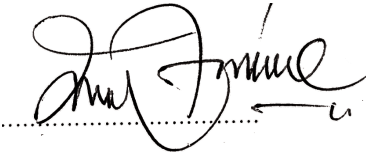
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Commissioner
Malawi Law Society



MR. MOSES WASHINGTON KAJAWA
MKANDAWIRE

Commissioner
Church and Society, Synod
of Livingstonia



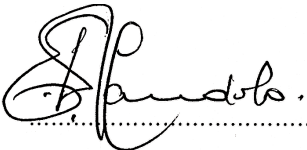
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Commissioner
Retired Civil Servant



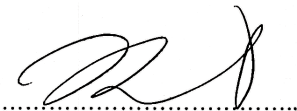
MR. EMMANUEL TED NANDOLO

Commissioner
Council for Non-Governmental
Organizations in Malawi



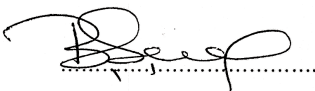
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Commissioner
Umunthu Foundation



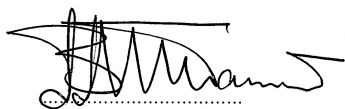
BERTHA L. SEFU (MRS.)

Commissioner
Malawi Council for Churches



REV. FATHER DR. BONIFACE TAMANI

Commissioner
Public Affairs Committee

A handwritten signature in black ink, appearing to read 'Boniface Tamani', written over a horizontal dotted line.

Date: 31st August, 2007

Programme Officers

The Commission was professionally serviced by a team of eight lawyers in the Malawi Law Commission namely Mrs. Janet L. Banda as Principal Programme Officer, Mr. Allison Mbang'ombe, Mr. Chikosa Silungwe, Mr. Peter Chiniko, Mr. William Msiska, Mrs. Fiona Mwale, Mr. Chizaso Nyirongo, Mr. Austin Msowoya. Mrs. Banda was responsible for the coordination of all aspects of the programme whilst the rest of the team contributed to the development of the Report.

Changes in the Composition of the Commission

At the commencement of the programme in 2005, Justice Elton Singini, SC., was Law Commissioner. He however completed his assignment at the Law Commission during the course of the programme. Justice Singini spearheaded the first phase of the programme. This phase involved in-depth research and extensive consultations with targeted stakeholders. The first phase also involved the identification and appointment of Commissioners to serve on the special Law Commission and the development of Terms of Reference for the special Law Commission. This phase culminated into the successful holding of the First National Constitution Conference in March 2006.

Justice Singini was replaced by Mr. Anthony Kamanga, SC., as Law Commissioner in August, 2006. Mr. Kamanga embraced the programme in its second phase. This phase involved the actual review work, the development of information, education and communication (IEC) materials, further local and regional consultations and the development of a Draft Report. The phase culminated into the successful holding of the Second National Constitution Conference in April 2007 where the Draft Report was presented to stakeholders for in-put before finalization.

Mr. Anthony Kamanga was appointed Solicitor General and Secretary for Justice in July 2007. Due to the gap created by the appointment of Mr. Kamanga in that capacity, Mrs. Janet Laura Banda, Chief Law Reform Officer, took charge of the programme in its final phase as the deputy to the Law Commissioner. She assumed the role of Law Commissioner in the review programme and saw it to its completion. The final phase involved the finalization of the Report including the drafting of the two Constitution Amendment Bills and other amendment Bills to ancillary legislation. She has therefore appended her signature to this Report in her capacity as "Acting" Law Commissioner.

Further, in a sad development, Commissioner Alex Maluza who was then serving as Solicitor General passed away in March, 2007. Commissioner Maluza was a resourceful person who made valuable contribution to the work of the Commission.

Acknowledgements

Funding for this programme was in two components. One component was funded by Government and this covered the actual law reform work including special Law Commission meetings, study visits to Namibia and South Africa and the Second National Constitution Conference. The second component consisted of funding provided by the Government of the Kingdom of Norway, European Union (EU) and United Nations Development Programme (UNDP). This funding was administered by UNDP and it covered research, the First National Constitution Conference, study visits to Zambia and Uganda, and the development, distribution and dissemination of IEC materials. It also covered part of the cost of the Second National Constitution Conference.

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INTRODUCTION

Background

The Malawi Constitution was adopted in 1994 to operate provisionally for one year and was enacted into definitive force in 1995. The adoption of the Constitution followed the results of a referendum held in 1993 which were in favour of a multi-party system of Government.

During the period of its provisional application several amendments were made to the Constitution. These were to section 51 (2) (g) in relation to disqualification factors for members of Parliament; section 56 (7) (c) in relation to the authority to confer functions on committees of the National Assembly; section 63 (2), in paragraph (b) of the proviso, in relation to the period for holding by-elections in case of vacancies in the National Assembly; section 64 to repeal the provision on the recall of members of the National Assembly by constituents; sections 68 to 72 to repeal the provisions on senate and sections 79 and 80 (5) to introduce the office of the Second Vice-President. Thereafter numerous amendments have been effected largely for political expediency as opposed to inadequacy of the substance of the Constitution.

The Law Commission, on its part, carried out what was termed to be a Technical Review of the Constitution in 1998 with a view to settling the text of the Constitution by correcting apparent textual errors and textual inconsistencies within it. This culminated into Government adopting two Constitution Amendment Bills. One translated into Constitution (Amendment) Act No. 13 of 2001 and the other is still pending before Parliament as Bill No. 13 of 2006.

The current review exercise was necessitated by three factors. First, the hurried manner in which the Constitution was drafted left a number of crucial gaps within the Constitution. This has been evident especially in relation to the functioning of the offices of the President and Vice-President in case of vacancies including simultaneous vacancies. Second, the numerous amendments to the Constitution have not been made in a systematic way and have brought about some discord among some provisions. Third, the frequent court litigation especially among political players has given the perception that the Constitution is inadequate to address a number of governance issues. This image of the Constitution has compelled individuals and institutions to urge for the review of the Constitution.

With this background, the Law Commission proposed to the Government that there was need to carry out some review of the Constitution pursuant to the Commission's mandate under section 135 (b) of the Constitution. After the Government gave approval, the Law Commission, in a public notice issued in the press in August, 2004, called for submissions from the general public to highlight problematic areas in the Constitution. Further, the Commission organized consultative meetings with target groups in all the three regions, including civil society organizations, politicians, chiefs, judicial officers, senior public officers and the youth.

First National Constitution Conference

The consultations culminated into the First National Constitution Conference which was held at the Capital Hotel in Lilongwe from 28th to 31st March, 2006. The purpose of the Conference was three fold. First, it was to launch the Constitution review process due to its national significance. Second, it was intended to present to the participants matters pertaining to the Constitution that had been raised by members of the public and by stakeholder groups in their submissions and during the consultations conducted by the Law Commission. The matters raised were compiled in an Issues Paper and in a Consultation Paper. The third purpose of the Conference was for the Law Commission to receive from the Conference participants further issues pertaining to the Constitution. The Conference was attended by close to 300 participants from a wide cross section of the Malawian society. It was facilitated by expert presentations by a number of local and foreign experts.

Special Law Commission on the Review of the Constitution

Following the holding of the First National Constitution Conference, a specially constituted Law Commission was appointed under section 133 of the Constitution to carry out the review of the Constitution. Its membership included representation from the judiciary, the public service, civil society, gender interest groups, law society, faith groups, academia and other eminent citizens.

Terms of Reference

The Terms of Reference for the special Law Commission on the Review of the Constitution were——

1. To carry out a review of the Constitution to address——
 - (a) matters pertaining to the Constitution raised in the Issues Paper, the Consultation Paper and during the First National Constitution Conference;
 - (b) short-comings within the Constitution which affect the good conduct of the government of the country;
 - (c) any other matters that might arise during the review process pertaining to the Constitution.
2. To assume ownership of the review process and adopt a methodology that guarantees wide consultation and transparency in carrying out its work.
3. To make preliminary recommendations addressing its findings and present those findings and recommendations to a Second National Constitution Conference.
4. Finally, to produce a Report containing findings and recommendations, accompanied by draft legislation based on the recommendations, to be submitted to the Minister of Justice for presentation to Cabinet and laying in Parliament.

Work Methodology

The Commission adopted the following methodology in reviewing the Constitution—

- the Commission invited submissions from members of the general public through notices in the local papers and in the *Gazette*, and several written submissions were received and an Issues Paper was developed out of the submissions;
- the Commission organized workshops and meetings in all the three regions of the country and targeted specific stakeholders such as chiefs, politicians, faith based organizations, civil society, academia, women, youth groups, Members of Parliament, senior government officials, judicial officers and Members of Cabinet. A Consultation Paper was developed capturing views of these stakeholders;
- the Commission organized the First National Constitution Conference in March, 2006. The Conference was officially opened by His Excellency the President, Dr. Bingu wa Mutharika;
- the Commission met for three days once or twice a month for a total period of eight months. During these meetings the Commission discussed and analyzed submissions in the Issues Paper and the Consultation Paper and examined several comparable Constitutions from selected countries within the region and from other common law jurisdictions;
- the Commission arranged study visits to Namibia, South Africa, Zambia and Uganda where some Commissioners and programme officers had occasion to observe practical implementation of comparable provisions of the Constitution;
- the Commission arranged various consultative meetings with stakeholders and engaged graduate research assistants to carry out research with a view to consult further on specific issues where broad consensus proved elusive;
- the Commission engaged the services of consultants to design and develop information, education and communication (IEC) materials in the form of television and radio programmes, banners, brochures and posters, and widely disseminated the information and materials with a view to ensure maximum participation in the review process by all sectors of society;
- the Commission organized a Second National Constitution Conference to consult stakeholders on the tentative findings and recommendations made by the Commission;
- the Commission then proceeded to produce this Report.

All submissions, comments and criticisms that were received by the Commission were considered and debated and have been used in developing the final recommendations contained in this Report.

SPECIFIC FINDINGS AND RECOMMENDATIONS

1 PREMIMINARY ISSUES

(a) *Preamble*

At the First National Constitution Conference, delegates observed that the wording of the Preamble does not indicate ownership of the Constitution by the people of Malawi. It was therefore suggested that this omission should be rectified.

The Commission conceded the point raised by delegates and recommends insertion of the word “**WE**” at the very beginning of the Preamble and the word “**DO**” immediately before the word “**HEREBY**”.

In discussing the Preamble further, the Commission observed that it is lacking in certain respects and recommends improvement by inserting the following new aspirations at the very beginning—

determined

to defend and safeguard the territorial integrity and political independence of our country;

convinced

that unity and freedom as well as peaceful co-existence between all the people of Malawi are the real foundations of our nationhood and survival;

The Commission further recommends insertion of the following aspiration immediately after the last aspiration—

determined

to uphold, at all times and at all levels of society, the values that underlie our democratic society:

The Commission also considered that Malawi has always proclaimed to be a God fearing nation. The Commission therefore considered the absence of this proclamation in the Preamble to the Constitution a glaring omission and recommends the adoption of the following sentence at the end of the Preamble—

May the Almighty God Bless Our Nation.

(b) *National Language*

The Law Commission received a number of written and oral submissions urging the introduction of Chichewa as a national language in the Constitution¹. At the First National Constitution Conference the matter was also discussed.²

The Commission was aware that “Chichewa” was declared a national language in 1978. The issue before the Commission was therefore to decide whether this position should be reflected in the Constitution. In debating this issue, the Commission considered the advantages and disadvantages of having a national language stipulated in the Constitution. In terms of advantages, the Commission observed that a national language is an important aspect of national

¹ See Issues Paper

² See Summary of the Proceedings of the First National Constitution Conference on the Review of the Constitution p.6

identity. Second, the Commission observed that a national language may be a useful tool for dissemination of development policies of government. Third, a national language provides a mechanism for enhancing national unity and is a vehicle for ease of communication for a nation.

However, the Commission was also aware that elevating a national language to a constitutional status may not reflect the reality of the nation of Malawi, which is a collection of various tribes with their own languages. The Commission observed that such elevation may lead to the other languages being regarded as inferior. Hence, by extension, ethnic groups related to the languages may be regarded as either superior or inferior to others.³ In order to avoid this perception an argument was put forward that instead of recognizing a national language, the Constitution should recognize an official language.

In view of this, the Commission sought some expert guidance on the distinction between a national and an official language. In this vein, the Commission learnt that a national language is a “language for interethnic and wider communication within a country for national identity, unity and dissemination of information for development purposes” whilst an official language is a “language of communication for government administration, legislature, judiciary, education, trade and international relations”.

The Commission further heard that as per the 1966 Malawi Census Report, there are four major languages/ethnic groups in Malawi which are: Chewa (50.2%), Lomwe (14%), Yao (13%) and Tumbuka (9%). The 1998 Malawi Census Report shows that 75% of Malawi population can speak and understand Chichewa. The Commission also learnt that historically, Chinyanja was the national language from 1912 to 1967 and that Chichewa was the national language as well as a medium of instruction (std 1 - 4) and an examination subject from primary to tertiary level of education between 1968 to 1994. In the period from 1994, the position has remained the same but the approach has been rights based and more vernacular languages are used in radio broadcasting. It was also explained that there are designs to have some vernacular languages used as medium of instruction in the early years of education. However, even with this exposition the Commission could not reach a consensus on the issue of the national language.

The Commission therefore carried out a survey in a number of selected districts throughout the country to determine the sentiments of the general public on this issue. The result of that survey indicated that 88.7% as opposed to 7.5% were in favour of the submission to recognize Chichewa as a national language.

In debating the issue further, the Commission considered that the advantage of Chichewa is that it is widely spoken and understood by the majority (75%) of Malawians throughout the country and that it is already a medium of instruction in primary schools as well as an examination subject up to tertiary level. The Commission further considered that the term Chichewa has no negative connotations as submitted by other stakeholders nor does the Chewa people have

³ This was the major concern of those who opposed introduction of Chichewa as a national language.

negative history as such but rather that it was a system of government that existed after independence which was problematic. It would therefore be wrong to associate the Chichewa language with the negative aspects of a system of government.

The Commission also looked at the Constitutions of South Africa, Mozambique, Namibia, Zambia and Rwanda for guidance. With regard to South Africa, the Commission noted that the Constitution recognizes only official languages and these are stated in the Constitution.⁴ There are 11 official languages amongst which are English and Africans. However the Commission learnt that although the South African Constitution recognizes eleven official languages, Afrikaans and English are predominant mainly due to the attendant high cost of translating all materials into all the official languages. The Commission also learnt that the recognition of the eleven official languages was a result of the oppressive political history of the country whereby ethnic groups were segregated into “Bantu status” based on their specific Bantu languages.

The Namibia Constitution recognizes only an official language⁵ which is English. However Article 3 (2) provides that other languages may be used as a medium of instruction in schools and for legislative, administration and judicial purposes in regions and areas where such other language or languages are spoken by a substantial component of the population. The Commission however learnt that in practice English is the language used for all official purposes. The Commission noted that the Constitution of Mozambique specifically recognizes Portuguese as the official language.⁶ As regards national language, the Constitution recognizes various national languages by providing in Article 5 (2) that “the State recognizes the value of national languages and shall promote their development and increased roles as languages in the education of citizens”.

In Zambia, the Commission learnt that the Constitution only recognizes English as the official language but does not recognize any indigenous languages as a national language. The Commission also learnt that even the recent Constitution review in Zambia did not discuss the issue of national language. The Commission learnt however that seven local languages are used on radio and television as tools for information dissemination but that this is merely a matter of government policy and not through legislation. The only instance where legislation has provided for local languages, the Commission learnt, is in citizenship law whereby applicants for citizenship by naturalization are required to have knowledge of at least one of the seven local languages which are Lozi, Bemba, Tonga, Nyanja, Kaombe, Lunda and Luvale. These languages are also optionally examinable in the areas of their prevalence.

Finally, the Commission considered the Constitution of Rwanda and noted that it recognizes both national language, which is Kinyarwanda and official languages which are Kinyarwanda, French and English.⁷

⁴ Section 6

⁵ Article 3 (2)

⁶ Article 5

⁷ Article 5

Initially, the Commission took the tentative position that there was no need for the Constitution to recognize a national language. The Commission considered that the current position has not created any problems that need to be cured by the introduction of a national language in the Constitution. The Commission further considered that giving constitutional recognition to Chichewa as the national language might only result in creating unnecessary tensions in the country.

The majority of the delegates to the Second National Constitution Conference strongly disagreed with the position taken by the Commission on this issue and considered that the position taken was contrary to all the findings and indications of the survey and research carried by the Commission. The delegates considered that Chichewa has served the nation well as a language for ease of communication and hence deserves to be recognized as a national language by the Constitution. The delegates thus considered that other languages may serve as regional languages. The Commission was therefore urged to reconsider its position on this issue.

In debating the issue further, the Commission benefited from further submissions on the issue of Chichewa as national language. Most of the submissions received after the Conference which were against recognizing Chichewa as a national language re-iterated the fear that such a development may obliterate the other local languages and might run counter to section 26 of the Constitution which guarantees the right of every person “to use the language and to participate in the cultural life of his or her choice”.

In terms of further submissions in favour of recognizing Chichewa as a national language, reliance was placed on linguistic, political and historical factors.⁸ For example, it has been argued that the 1966 and 1998 population census data indicated that Chichewa is the language spoken by the majority of Malawians.⁹

Further, a socio-linguistic survey conducted by the Centre for Languages on other languages such as Tumbuka, Yawo, Sena and Lomwe on the educational issue of whether parents, pupils and teachers would support the introduction of those languages as media of instruction in the first four years of primary school education revealed that an overwhelming majority of the respondents supported the idea that Chichewa remains an examinable subject because it is a language of wider communication. It was therefore considered that “any move to remove it from the school system would be seen as disadvantaging the children who do not come from Chichewa-speaking areas”. It is important to note that this study was conducted in the areas where those other languages are predominantly spoken.

The result of the above study was independently corroborated by another survey done in the Northern Region in 2000.¹⁰

It has therefore been submitted that the studies above and the results of the census indicate that there is general acceptance in Malawi that Chichewa is a *lingua franca* in the country.

⁸ Submission received from Centre for Language studies.

⁹ Approximately 75% of Malawians speak and understand Chichewa.

¹⁰ This study was conducted by Mchazime.

On the issue of political factors, it has been submitted and conceded that there is nothing intrinsically uniting about language since unity is influenced by a number of factors such as degree of political, economic and social equality and justice as perceived by the people. However, it has been argued that the importance of a common language as a necessary pre-requisite for peace and national unity and a potential unifying factor in a country where the other factors mentioned above are observed cannot be denied.¹¹

Consequently, the tentative position taken by the Commission that the “elevation of one language to the status of a national language is detrimental to smaller languages” was found to be unjustified since, arguably, it depends on the kind of language policy which a government may adopt. It has been pointed out that if sufficient constitutional guarantees are put in place for the respect, support, development and promotion of all other languages, the problem of marginalization of smaller languages cannot exist. The Commission observed that such guarantees are available in our Constitution for example section 26.

Stakeholders also submitted that historical factors favour the recognition of Chichewa as a national language. Examples cited include the fact that the language has been the focus of academic studies since early 1920’s when it was being taught at the School of Oriental and African Studies in the United Kingdom.

In the final analysis, the Commission concluded that consideration of all the pros and cons weighs in favour of recognizing Chichewa as a national language. The Commission thus recommends that a provision should be incorporated in the Constitution to that effect. Further, the Commission recommends that in addition to the existing right on use of one’s own language found in section 26, the Constitution should guarantee the protection of all languages in the country, regardless of their location, size or origin. Furthermore, the Commission recommends that the Constitution should recognize English as the official language for the avoidance of doubt.

The Commission therefore recommends adoption of the following section 2A—

“Languages

(1) The official language of the Republic of Malawi is English.

(2) The national language of the Republic of Malawi is Chichewa.

(3) The State shall take practical and positive measures to protect all local languages in Malawi to ensure that there is no diminished use or status of such languages.”

(c) Provisions on separation of powers

The Law Commission received quite a number of written submissions on this issue especially with regard to the doubling of Members of Parliament as Ministers¹². During the consultative meetings a second issue came up with regard to what is the proper authority to initiate legislation and whether the legislature should be able to initiate amendments to the Constitution through private members Bills¹³.

¹¹ See Mtenje "On the Choice of Chichewa as National Language"

¹² See Constitution Review Issues Paper p.10

¹³ See Constitution Review Consultation Paper p. 15

The Commission considered the doctrine of separation of powers as contained in sections 7, 8 and 9 of the Constitution. First, the Commission debated whether it was appropriate for the Members of Parliament, who are under the legislature, to be appointed as Ministers, under the Executive, without the Members of Parliament losing their seats. The Commission observed that strict application of the doctrine of separation of powers bars any individual to serve under two separate arms of government. This is meant to enhance checks and balances. The Commission however observed that since 1994 the party to which the President belongs has over the years tended to appoint Members of Parliament from other parties as Ministers in a bid to increase its own numbers in Parliament.

The Commission conceded that this practice undermines the strength of opposition parties and poses a danger to the enhancement of multiparty democracy.

The Commission noted that indeed for proper separation of powers it would be appropriate that Members of Parliament did not at the same time belong to the Executive as Ministers. The Commission however observed that Malawi's system of government was hybrid such that it combines the Parliamentary and Presidential systems of government. In that light, it was the view of the Commission that doubling of Members of Parliament as Ministers may be beneficial in achieving smooth running of government operations since this arrangement promotes interaction between Legislature and Cabinet.¹⁴

On the issue of the growing practice of appointing a member of Parliament from another political party as a Minister, the Commission was of the view that the appointing authority should obtain the consent of the concerned political party so that the practice should be properly regulated so as not to pose a danger to the enhancement of multiparty democracy. The Commission considered that if a member of a political party accepts a ministerial appointment without the blessing of his political party, then such member should be deemed to have crossed the floor.

The Commission therefore recommends amendment of the Constitution in section 94 (1) by adding the following proviso—

“Provided that where the President is desirous of appointing Minister a Member of Parliament from another political party, he or she shall first obtain consent from such other party before appointing such Member of Parliament as Minister”.

In making this recommendation, the Commission considered that on the issue of Members of Parliament who are independents, it would be a question of fact based on the conduct of the concerned Member of Parliament which would determine whether the Member has joined Government or not.

In deliberating on the appropriateness of the practice which has developed of Members of Parliament seeking to initiate amendments to the Constitution through Private Members Bills, the Commission considered that the current

¹⁴ Delegates to the Second National Constitution Conference supported this position and observed that it would be unfair to request an MP to give up his seat on account of such appointment.

scheme of the Constitution does not envisage this practice. The Commission observed that section 7 of the Constitution specifically entrusts the responsibility of initiation of policies and legislation which embody the express wishes of the people of Malawi and which promote the principles of the Constitution on the Executive arm of Government. The Commission further observed that the Constitution has under Chapter XII institutionalized law reform, including the review of the Constitution, by establishing the Law Commission as a State institution with such mandate. The Commission, therefore, concluded that a Private Members Bill by its very nature is not appropriate for the initiation of an amendment to the Constitution.

(d) Principles of National Policy

Section 13 of the Constitution lists the principles of national policy starting from gender equality all the way to good governance. During the consultative meetings with stakeholders the issue of food security came up as a matter that should be included in the Constitution under fundamental principles of National Policy to serve as a reminder to the government of the day that this is a priority area for Malawi and all other principles are secondary to it. It was further suggested that food security should be at the top in terms of ranking to signify its importance.¹⁵

The other issue raised by stakeholders was on paragraph (n) providing for “Economic Management”. It was generally observed that the prescription of “market economy” as the preferred model is restrictive since a Government might adopt different economic policies. It was therefore suggested that the reference to market economy should be deleted.

In debating these issues, the Commission considered whether it was necessary to have food security included under section 13. After some debate the Commission agreed that indeed food security was a matter of national importance and was one of the critical factors to national development. The Commission therefore resolved that food security should be included under section 13 of the Constitution.

The Commission also considered whether it was necessary to signify the importance of food security by ranking it first on the list of principles of National Policy. The Commission observed that the current scheme of section 13 of the Constitution did not appear to indicate that there was any deliberate ranking of the principles and therefore it would not be necessary to strive to make food security as the top ranking principle of National Policy. The Commission however recommends that for the purposes of consistency and order, it would be proper to have food security appearing near to nutrition which is under section 13 (b). The Commission therefore recommends that paragraph (b) should be amended to read as follows—

(b) Food Security and Nutrition

To achieve food security and adequate nutrition for all in order to promote good health and self-sufficiency.

¹⁵ See Summary of the Proceedings of the First National Constitution Conference p. 6.

In discussing paragraph (n), the Commission conceded that the prescription of market economy as a preferred model is unjustified and considered that this might be perceived as a curtailment of the exercise of freedom of choice for citizens in as far as the enjoyment of political rights under section 40 is concerned since some citizens may prefer a Government that propagates adoption of a different model. The Commission thus recommends deletion of the words “through the nurturing of a market economy” from the paragraph so that the paragraph now reads as follows—

(n) *Economic Management*

To achieve a sensible balance between the creation and distribution of wealth through the nurturing of an appropriate economy and long-term investment in health, education, economic and social development programmes.

The Commission also considered the submission of the Ministry of Women and Child Development with regard to the need for the Constitution to provide for early child development, compulsory primary education for children, promotion of equity and equality between boys and girls and provision of amenities for children with special needs. On early child development the Commission was of the view that this did not merit constitutional recognition and could be dealt with under statute. The Commission recommends therefore that promoting early child development should not be introduced into the Constitution.

The Commission however agreed with the submission to make primary education compulsory for children. The Commission was of the view that a compulsory primary education scheme may be practically achieved if it were to target children.

The Commission therefore recommends that section 13 (f) (ii) be amended by inserting the expression “**for children**” after the words “compulsory” so that the provision now reads as follows—

“(ii) make primary education compulsory for children and free to all citizens;”.

The Commission then considered the proposal to introduce promotion of equity and equality between boys and girls. The Commission considered whether this was not an issue falling under the broader provisions on gender under section 13 (a) even though the proposal was made in the context of education. The Commission formed the opinion that indeed this was a cross cutting gender issue that may not be specifically applicable to boys and girls in or at school only. The Commission therefore concluded that it would be inappropriate to introduce issues of equity and equality between boys and girls under section 13 (f) as the provision focuses on education only.

The last issue that the Commission considered was the proposal to provide for the provision of amenities for children with special needs in schools and institutions. The Commission saw merit in this proposal as it was of the view that such a policy would indeed direct government to ensure that children with special needs have appropriate amenities in schools and institutions conducive to their learning needs. The Commission therefore recommends introduction of a new subparagraph (iv) under section 13 (f) to read as follows—

“(iv) ensure that special amenities for children with special needs are provided in schools and learning institutions;”.

The existing subparagraph (iv) should therefore be renumbered as subparagraph (v).

2 HUMAN RIGHTS

(a) Right to life

Section 16 guarantees the right to life and prohibits any arbitrary deprivation of life. However, the proviso to the section allows for the execution of the death sentence imposed by a court of law. The Law Commission received quite a number of written submissions praying for the abolition of the death penalty on the understanding that it does not serve any meaningful purpose.¹⁶ It was further argued that the proviso to section 16 which allows for the execution of the death sentence imposed by a competent court is inconsistent with section 44 (1) (a) of the Constitution which recognizes the right to life as a non-derogable right. During both the stakeholders meetings¹⁷ and the First National Constitution Review Conference¹⁸ delegates raised and debated this issue comprehensively. Generally the debate was simply whether or not the death sentence should remain in our statute books.

In discussing the appropriateness of the death sentence, the Commission considered whether it was a meaningful deterrent punishment. The Commission heard views that the death sentence has not served this country as a deterrent punishment. It was further argued that an individual can not be reformed through the death sentence since the purpose of punishment should be reformation rather than retribution. The Commission however considered that there are certain offences which require retribution for offenders to protect society.

In view of the delicate nature of this issue in Malawi, the Commission sought further views of stakeholders through district consultations, national television, radios, newspapers, brochures, banners and posters and the majority of the responses indicated that people are in favour of retaining the death sentence.

The Commission also considered similar provisions in constitutions of other countries such as Botswana, Namibia, Mozambique and South Africa. The Commission found that section 4 of the Botswana Constitution is similar to that of Malawi as it allows death sentences passed by a court of law although the right to life is protected in the same provision. However, in Namibia, Article 6 of the Constitution of Namibia protects and respects the right to life and it also prescribes against death as a competent sentence. The Commission observed that the article clearly prohibits executions in Namibia thereby abolishing the death sentence.

Similarly, the Constitution of Mozambique under Article 40 (2) abolishes the death penalty while as the Constitution of South Africa simply guarantees the

¹⁶ See Issues Paper p. 12

¹⁷ See Consultation Paper p. 16

¹⁸ See Summary of the Proceedings of the First National Conference on the Review of the Constitution p.9.

right to life with no exception whatsoever under section 11. This Article in effect abolishes the death sentence in South Africa. The Commission learnt that the abolition of the death sentence in Namibia and South Africa was influenced by the two countries political history whereby death sentence was almost invariably unfairly applied to deal with black political dissidents during the fight for independence. The Commission however learnt that in Namibia, there is a ground swell of opinion for re-introduction of the death sentence mainly for heinous offences for which the sentence would be a fitting retributive punishment. The Commission further learnt that implementation of life sentence in Namibia has met with some practical problems due to the parole system where a capital offender may be released earlier than one who committed a lesser offence.

In Zambia, the Commission learnt that the death sentence is applicable to the offences of aggravated robbery, murder and treason. However, the presiding judge has discretion to impose the death sentence or life sentence. The Commission also learnt that in the Constitution review process, traditional leaders and the rural masses are in favour of retaining the death sentence. Of the churches, Catholics are for abolition whilst Protestants, Pentecostals and Evangelist are for its retention.

With this background in mind, the Commission considered a number of issues before arriving at a decision. Firstly, the Commission considered that retribution is a necessary aspect of criminal justice. Secondly, the Commission was of the view that the general populace of Malawi was not ready to have the death sentence abolished as this would be taken to mean that murder was being sanctioned by the law. The Commission arrived at this conclusion after considering the overwhelming response from rural areas against the abolition of the death sentence.¹⁹ Additionally, the Commission was of the view that practical realities in Malawi justifies the retention of death sentence notwithstanding current trends on the international scene.

On the issue of the perceived inconsistency between the proviso to section 16 and section 44 (1) (a), the Commission generally observed that there was no inconsistency since the proviso to section 16 only protects the right to life against arbitrary deprivation.

The Commission therefore recommends that section 16 should remain as it is so that death sentence may be imposed where necessary by a court of competent jurisdiction. The Commission however recommends that the Penal Code should be amended to restrict the imposition of the death sentence to cases of murder. The Commission further took note of the recommendation by a sister Commission in its Report on the Review of the Penal Code²⁰ which has proposed that even in the case of murder the court should exercise discretion whether to impose the death sentence or life sentence depending on the surrounding circumstances of each case.

The Constitutional court in the case of Francis Kamtayeni and others vs Attorney General²¹ re-iterated this position on the basis that the mandatory

¹⁹ According to the random survey carried by the Commission with the assistance of NICE in all the Districts of Malawi, out of a total number of 8,048 respondents, 5,609 were in support of retention of the death penalty representing 69.7% and 2,367 were against retention representing 29.4%. Those who indicated no strong view represented 0.9%.

²⁰ P 52.

²¹ Constitutional case No. 12 of 2005.

requirement of the death sentence is in violation of the constitutional guarantees of rights under section 19 (1), (2) and (3) on the protection of the dignity of every human being, the right of an accused to a fair trial under section 42 (2) (f) and the right of access to justice, in particular the right of access to the court for final settlement of legal issues under section 41(2) of the Constitution.

Delegates to the Second National Constitution Conference indicated support for retention of death penalty but did not agree with the recommendation that offences such as defilement, aggravated assaults and aggravated robberies should be excluded from offences where a death sentence may be imposed. The Commission took note of these sentiments but noted that these are matters of penal law, suffice to say that the Constitution should retain the proviso to section 16 which allows death sentence on appropriate cases.

(b) Equality

Section 20 of the Constitution prohibits discrimination of persons in any form but allows the State to adopt legislation to address inequalities in society. There were three submissions regarding this provision.²² The first was that the term “discrimination” in subsection (1) should be qualified with adjectives such as “unlawful” or “unfair” to allow for “positive discrimination”.²³ Thus, discrimination for the purposes of affirmative action should be accommodated in furtherance of the realization of certain aspirations such as the 30% quota for women representation as demanded by the SADC Declaration on Gender and Development of 1997 which stipulated that member States should achieve this threshold by 2005. The second submission was that the term “nationality” should be deleted to allow the State in certain cases to discriminate on the grounds of nationality for the benefit of and protection of its own citizens.

The third and last submission was that the provision should specifically state that discrimination on the basis of HIV and AIDS is prohibited²⁴ to portray the significance of the need to stamp out such discrimination.

On the suggestion to qualify the word “discrimination”, the Commission considered whether the current wording of subsection (2) does not provide for affirmative action. That subsection allows the State to pass legislation to address inequalities in society and to prohibit discriminatory practices and the propagation of such practices.

In order to have informed debate regarding this matter, the Commission looked at similar provisions in the constitutions of six other African countries namely, South Africa, Zimbabwe, Zambia, Tanzania, Ghana and Uganda.

The Commission found that in South Africa the word “discrimination” is qualified by the adjective “unfair”.²⁵ On the other hand, Zimbabwe, Zambia, Ghana and Uganda have sought to achieve the same objective by including provisions akin to subsection (2) of section 20 of the Malawi Constitution.

²² See Summary of the Proceedings of the First National Conference on the Review of the Constitution.

²³ See Consultation Paper p. 22.

²⁴ Ibid pp 22 - 23.

²⁵ See Section 9 (3).

The Commission thus concluded that there was no need to introduce adjectives to qualify the term discrimination as the current wording of the section as a whole achieves the same purpose. The Commission therefore recommends that the word “discrimination” should remain as it is. This position was generally supported by delegates to the Second National Constitution Conference.

In debating the inclusion of the word “nationality” as a basis for prohibiting discrimination, the Commission learnt that this inclusion was a textual error as the words should have been “national origin”. The Commission further took note that a sister Commission on the Technical Review of the Constitution recommended that this textual error should be corrected and that an amendment Bill to that effect is before Parliament. The Commission however, considered that the issues involved relative to the inclusion of the word “nationality” are substantive and go beyond what was termed a “textual error”. The Commission therefore considered comparable provisions in the constitutions of five other countries namely, South Africa²⁶, Zimbabwe²⁷, Zambia²⁸, Ghana²⁹ and Uganda³⁰ to determine regional trends regarding this issue and observed that there is no reference to “nationality” as a prohibited ground of discrimination in the comparable provisions. The Commission therefore concluded that the inclusion of “nationality” as a prohibited ground of discrimination in the Malawi Constitution was an anomaly. The Commission was further aware that international law allows a state to discriminate on the basis of nationality for the benefit and protection of its own citizens and hence inclusion of the word nationality in section 20 may incapacitate the state from taking affirmative action in favour of citizens in appropriate cases. To that end, the Commission recommends deletion of the word “nationality” from section 20.

On the suggestion to expressly mention HIV and AIDS status as a prohibited ground of discrimination, the Commission was satisfied that the words “other status” employed in subsection (1) sufficiently includes people with HIV and AIDS as a category to be protected. The position taken by the Commission is in line with the interpretation of the Committee on Economic, Social and Cultural Rights as well as the Committee on the Rights of the Child in the NOTE on HIV and AIDS and the Protection of Refugees, Internally Displaced Persons and Other Persons of Concern that the expression “or other status” as used in the relevant international human rights instruments includes health status, including HIV and AIDS.³¹

Delegates to the Second National Constitution Conference disagreed with the position taken by the Commission on the basis of the peculiar nature of the epidemic and urged the Commission to reconsider its position. In debating the issue further, the Commission maintained its position and considered that it would be most unusual to legislate for a disease in a Constitution.

²⁶ See section 39 of the Constitution

²⁷ See article 23 of the Constitution

²⁸ See section 23 of the Constitution

²⁹ See article 17 of the Constitution

³⁰ See article 21 of the Constitution

³¹ UN Commission on Human Rights Resolution 1996/44 and also Resolution 1995/21 of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities.

(c) Family and Marriage

Section 22 prescribes the age of fifteen as the minimum age for marriage in Malawi and requires parental consent to be obtained in marriages in which one party is, or both parties are, below the age of eighteen. In the consultative meetings the youth argued that allowing children aged fifteen to get married with parental consent encourages early marriages to the detriment of the child's exercise of the right to education. A suggestion was therefore made that the age of marriage with parental consent should be increased to eighteen years and that only those who are twenty-one and above may enter into marriage without the need for consent.³²

The Commission therefore took time to consider whether the age at which one may marry should be revised upwards. The Commission was aware that the special Law Commission on the Review of the Laws on Marriage and Divorce has proposed abolition of parental consent and that age of marriage should be increased to eighteen years.³³ In arriving at that decision the Commission was influenced by the potential hazard of early marriages to reproductive health of especially young girls. The Commission however heard that there was resistance in certain areas of the country where cultural practices allow young girls of below fifteen years of age to get married. It was contended that in these areas the intention is to protect girls from illicit and harmful liaisons and also to accord with certain religious convictions.

The Commission further looked at the Constitution of Namibia as well as to relevant statutes of South Africa, Botswana and Mozambique as the latter three countries have no similar provisions in their Constitutions. In the case of Namibia, the Commission noted that Article 14 (1) allows only men and women of full age (twenty-one years) to marry. In Mozambique, the law sets the minimum age of marriage for both sexes at eighteen years.³⁴

The situation for Botswana in this regard is similar to Mozambique to some extent where the Married Persons Property Act as amended in 2001 provides that persons who are twenty-one years and above may marry without parental consent whilst those above 18 years but below 21 years need parental consent.³⁵

The Commission also found that South Africa has a peculiar arrangement. Persons under twenty-one years of age require parental consent whilst boys below eighteen years and girls below fifteen years require Ministerial consent. The Commission also noted that the minimum age for marriage is set at twelve years for girls and fourteen years for boys in South Africa.

The Commission further considered four international instruments. The first was the International Covenant on Civil and Political Rights which provides in Article 23 (2) that persons of a "marriageable age have the right to marry and found a family". The second instrument was the African Charter on Human and Peoples Rights which stipulates in Article 18 (3) that "the State shall ensure the

³² See Constitution Review Consultation Paper p. 21.

³³ See Report on the Review of Laws on Marriage & Divorce, June 2006 p. 27.

³⁴ Note that prior to 2003 the age used to be 14 years for girls and 16 years for boys.

³⁵ Prior to 2001, the age of marriage was 14 years for girls and 16 years for boys.

elimination of every discrimination against women and shall also ensure the protection of the rights of the women and the child as stipulated in international declarations and conventions". The third instrument was the Convention on the Rights of the Child which states that "a child means every human being below the age of eighteen unless under the law applicable to the child majority is attained earlier".³⁶

The fourth instrument considered was the Convention on Consent to Marriage, Minimum Age for marriage and Registration of Marriage. The Commission observed that Article 2 of the Convention provides that "State parties shall take legislative action to specify a minimum age for marriage. No marriage shall be legally entered into by any person under this age except where a competent authority has granted a dispensation as to a different age, for serious reason, in the interest of the interested parties."

In the end the Commission concluded that early marriages are to the detriment of children and girls in particular and recommends that the age of marriage with parental or guardian's consent should be sixteen years for both sexes and that persons who are eighteen years old may marry without consent. Delegates to the Second National Constitution Conference pointed out the inconsistencies in the recommendations made by the Law Commission regarding the general protection of children in light of the recommendation to amend section 23 of the Constitution to raise the age of a child from sixteen to eighteen. Delegates considered that allowing children to get married with parental consent below the age of eighteen is not in their best interests.

In any event delegates considered that the recommendation of the Commission on this matter does not tally generally with the trend in the region.³⁷ However, the Commission maintained its position that the age of marriage with consent should be sixteen mainly in view of the recommendation in the Report of the Review of the Penal Code to raise the age of defilement to sixteen.

The Commission thus recommends amendment to section 22 (7) to read as follows—

"(7) For persons between the age of sixteen and eighteen years a marriage shall only be entered into with the consent of their parents or guardians."

In consequence of the amendment to section 22 (7) the Commission recommends deletion of section 22 (8) for irrelevance.

In debating this provision further, the Commission observed that subsection (2) of section 22 provides that each member of the family is protected by law against all forms of neglect, cruelty or exploitation. It has been submitted that the provision should extend protection to cover abuse since this is very prevalent in most families. The Commission considered this submission and agreed that indeed cases of abuse in families is a matter that has been and is always likely to be common. The Commission therefore recommends that section 22 (2) be amended by inserting the word **"abuse"** after the word **"cruelty"**.

³⁶ See Article 1

³⁷ See Botswana, Namibia and Mozambique.

The Commission also considered a submission advocating for the introduction of a new provision stipulating that parties to a marriage should be deemed to be equal in rights. The submission argued that some marriages are subjugative because parties go into such marriages on an unequal basis. It was therefore suggested that a provision requiring equality in marriage would be necessary to curb such subjugative marriages.

The Commission considered that although the proposal appeared plausible it would not be necessary to include it in the Constitution. The Commission was of the view that there are already in place constitutional as well as statutory provisions that adequately address the mischief that the purported provision seeks to address. The Commission therefore resolved that the status quo be maintained.

At the Second National Constitution Conference it was submitted that the Constitution should expressly prohibit same sex marriages. The Commission was aware that similar submissions were made in the regional workshops on the basis that such relationships undermine the institution of marriage.³⁸ In those workshops Chiefs strongly cautioned the Law Commission against importing and copying practices and tendencies that are immoral from both the religious and social perspective.

In debating the issue, the Commission concluded that Malawi as a nation is not ready for same sex relationships and recommends amendment of section 22 (3) to read as follows—

“(3) All men and women have the right to marry and found a family and a marriage shall be celebrated between a man and a woman.”

Another submission made at the Second National Constitution Conference urged for the recognition of religious marriages under section 22 (5). The Commission considered that religious marriages are covered as marriages at law since they are celebrated and recognized under the following two Acts of Parliament; the African Marriage (Christian Rites) Registration Act³⁹ and the Asiatics (Marriage, Divorce and Succession) Act.⁴⁰

(d) Marriage by Repute or Permanent Cohabitation

Section 22(5) recognizes marriage by repute or permanent cohabitation. The Law Commission received a number of written submissions on the matter of marriages by repute or by permanent cohabitation⁴¹. The matter was also a hot topic during the stakeholders meetings⁴² as well as at the First National Constitution Review Conference⁴³. The thrust of the submissions and presentations was that marriages by repute or permanent cohabitation should not be recognized by the Constitution as they are alien to Malawian culture and water down the sanctity of the institution of marriage. It was further submitted that the two main religions in Malawi, Christianity and Islam, abhor any other relationship that may supplant the institution of marriage.

The Commission considered whether the Constitution should continue to recognize marriages by repute or by permanent cohabitation.

³⁸ See Constitution Review Programme, Consultation Paper, March, 2006 p. 19.

³⁹ Cap. 25:02.

⁴⁰ Cap. 25:03.

⁴¹ See Issues Paper pp12-13.

⁴² See Consultation Paper pp 16-17.

⁴³ See Summary of the Proceedings of the First National Conference on the Review of the Constitution.

In favour of maintaining the status quo, the Commission considered that marriages by repute or permanent cohabitation are not marriages *per se* but rather legal fictions that allow the courts to protect the interests of usually the weaker party in such a relationship. The Commission, therefore, felt that the legal fiction of marriage by repute or permanent cohabitation was a necessary evil as otherwise the weaker parties in such relationships would be more disadvantaged in the event of termination of such relationships. The Commission further considered the impact of removing this legal fiction of marriage from the Constitution from the perspective of protection of women's rights and concluded that it would be a retrogressive step.

Furthermore, in view of the fact that there is an initiative by the special Law Commission on Gender-Related Law Reforms to give this kind of marriage statutory recognition under a proposed Bill entitled "Marriage, Divorce and Family Relations"⁴⁴, the Commission concluded that the Constitution should continue to recognize marriages by repute or permanent cohabitation. This conclusion came under heavy criticism at the Second National Constitution Conference as it was viewed as tantamount to sanctioning adulterous unions. The Commission however maintained its position principally on the understanding that marriages by repute or permanent cohabitation are a necessary evil to protect the weaker party in such relationships who, in most cases happens to be a woman. The Commission also considered that from a religious perspective such relationships are not condemned out right but rather that couples are invited to formalize the unions. Thus, the law should be seen to do the same in a different way.

(e) *Rights of Children*

Section 23 provides specific rights for children and defines a child as a person under the age of 16 years for the purposes of that section. The Commission received several submissions on this provision. First, it was submitted that the age of a child should be raised to eighteen years so that it is in line with the provisions of the Convention on the Rights of the Child. It was also considered that children need protection up to that age. Second, it was submitted that the age of a child should be harmonized under the Constitution. Third, was pointed out that the Constitution omitted to provide that in all matters affecting a child, *the best interests of the child* is paramount as advocated by the Convention on the Rights of the Child. Fourth, it was urged that the Constitution should recognize the right of a child to participate in matters that affect the child's well being. It is argued that this right should extend beyond the child being given an "opportunity to be heard in any judicial and administrative proceedings affecting the child" as advocated by the Convention on the Rights of the Child. And finally, it was submitted that the Constitution has not provided for the protection of children in times of conflict. This relates to situations where children may be forcibly drafted into military operations as child soldiers or abused in any other way in armed conflicts.⁴⁵

⁴⁴ See Report of the Law Commission on the Review of Laws on Marriage and Divorce.

⁴⁵ The last two submissions are from the Ministry of Gender and Social Welfare.

In debating the issue of the age of a child, the Commission conceded that children need protection up to the age of eighteen. The Commission also considered the importance of adhering to international obligations especially under the Convention on the Rights of the Child to which Malawi is a party. However, the Commission observed that the Convention allows for the provision of a lower age of majority by State parties.

In terms of comparative study, the Commission considered four constitutions from the region namely those of Namibia, South Africa, Mozambique and Botswana. In considering the constitution of Namibia, the Commission noted that the age of a child is capped at sixteen years, a position similar to that obtaining in Malawi. In the case of South Africa, the Commission noted that under subsection 3 of section 28 of the South African constitution, a “child” means “a person under the age of eighteen and this prescription applies to all rights enumerated under the section”. As for Mozambique and Botswana there are no comparable provisions.

In the final analysis, the Commission considered it ideal to raise the age in this provision to eighteen years. The Commission was fortified in this view since the average Malawian child is normally still in secondary school at the age of eighteen years and would need protection under the Constitution. The Commission hence recommends that the age of the child under section 23 should be raised to eighteen years of age.

On the issue of harmonization of the age of the child, the Commission acknowledged the danger of seeking to harmonize the age of the child under the Constitution for purposes of various laws. The Commission was of the view that various laws seek to achieve different results regarding the age of majority and, as such, it would be inappropriate to impose a uniform age. The Commission, therefore, refrained from recommending a uniform age.

In discussing the principle of “the best interest of the child”, the Commission observed that the special Commission on the Technical Review of the Constitution in its Report⁴⁶ concluded that “it is now a universal principle that the best interest of children should be a primary consideration when decisions on their welfare are taken” and proceeded to recommend an amendment to subsection (1) of section 23 to insert the words “and the best interests and welfare of children shall be a primary consideration in all decisions affecting them” at the end of that subsection. The Commission was aware that a Bill proposing an amendment of subsection (1) of section 23 to that effect is pending before Parliament⁴⁷. The Commission thus indorsed the position taken by that Commission⁴⁸.

In deliberating on the issue whether the Constitution should recognize the right of a child to participate in matters that affect the child’s well being, the Commission took note of the Report of the special Commission on the Review of Child Rights Legislation which has dealt with this matter in such broad terms as

⁴⁶ See Law Commission Report No. 2 (1998), Malawi Government Gazette of 16th November 1998, p. 142.

⁴⁷ Bill No 13 of 2006.

⁴⁸ The special Commission on the Review of Child Rights-Related Laws has also incorporated this principle in the proposed Child (Care, Protection and Justice) Bill.

to encompass the purview of the submission. The Commission therefore concluded that the matter would be appropriately dealt with under the Child (Care, Protection and Justice) Bill as proposed in that Report.

On the issue of prohibiting the involvement of children in armed hostilities and their general protection in times of hostilities, the Commission agreed on the need to protect children in this regard and considered that incorporation of a provision to prohibit such practice would provide a proper safeguard for the protection of children in the country should such hostilities arise.⁴⁹ The Commission therefore recommends insertion of a new paragraph to read as follows—

“Children shall not be used in armed conflict and are entitled to be protected in times of armed conflict.”.

The Commission was aware of a recommendation made by the Special Law Commission on the Technical Review of the Constitution in its Report⁵⁰ urging the introduction of a new subsection (4) and the renumbering of the existing subsections (4) and (5) as subsections (5) and (6) respectively to accommodate the right of children to maintenance from their natural parents without necessarily restricting the enjoyment of such right to dissolution of marriage as is the case now. The proposed new subsection (4) is also to protect vulnerable children such as orphans, children with disabilities and other children in situations of disadvantage.

In view of this earlier recommendation by a sister Commission which is in a Bill pending before Parliament, the Commission recommends that the proposed subsection to prohibit involvement of children in armed hostilities should be numbered (6) and the existing subsection (5) should be renumbered subsection (7).

(f) Rights of the Youth

This is a matter that is not specifically provided for in the Constitution. It was raised during the stakeholders consultative meetings.⁵¹ The submission was that the youth are a constituency of considerable import and unique vulnerabilities and hence in need of special protection by the Constitution.

The Commission considered whether it was necessary that the Constitution should have specific provisions relating to the youth as an interest and vulnerable group. To that end, the Commission carried out a survey of the Constitutions of all fifty-three African countries and observed that out of these only twenty make specific mention of the youth or young persons. However, the Commission observed that where there is such specific mention, it is done under the principles of state or national policy as mere directives.⁵² This is in sharp contrast to the submission to include the rights of the youth in the Bill of Rights as an interest and vulnerable group.

⁴⁹ Delegates to the Second National Constitution Conference supported this position and emphasized that children should not be involved in any manner in any armed conflict whether international or national.

⁵⁰ See Law Commission Report No. 2 (1998), Malawi Government Gazette of 16th November, 1998 p. 260.

⁵¹ See Constitution Review Consultation Paper p. 21.

⁵² Cameron (preamble), Lesotho (sec. 32 of Principles of State Policy), Nigeria (sec. 17(3)(f) of the Fundamental Objectives and Directive Principles of State Policy), Sudan (Art. 14 of the Directive Policies).

The Commission thus considered that it is not necessary to accord special rights to the category of “youth” since once a person attains the age of eighteen he or she shall be deemed to be an adult if the recommendations with respect to section 23 are adopted by Government. Consequently, all the rights accruing to adults shall accrue to youth at that point in time.⁵³

(g) *Right to Education*

Section 25 provides that all persons are entitled to education and requires that primary education should consist of at least five years of education. The Law Commission received a number of written submissions⁵⁴ as well as oral presentations during the stakeholders consultative meetings on the implementation of the right to education.⁵⁵ The main thrust of these submissions was that the Constitution should clearly provide that every child should get basic education and to require government to implement compulsory education faster, rather than relying on section 13 of the Constitution which simply requires government to devise programmes to make primary education free and compulsory.

In discussing this issue, the Commission had recourse to similar provisions in the constitutions of South Africa, Mozambique and Namibia. In the case of South Africa, the Commission noted that section 29 of the Constitution simply provides for the right to basic education including adult basic education but has left the issue of compulsory education and its mechanics to an Act of Parliament⁵⁶. The Commission however observed that in Namibia, the Constitution does provide for compulsory primary education and the State is obliged to provide State schools at which primary education is offered free⁵⁷. Finally, in the case of Mozambique, the Commission observed that the Constitution has not provided for compulsory education but has made education a duty of every citizen.⁵⁸

The Commission considered that the language of section 13 (f) is flexible and allows the State to adopt and implement policies such as compulsory and free primary education progressively in view of resource constraints. The Commission was of the view that this is a better approach to the issue bearing in mind the economic situation of Malawi. Delegates to the Second National Constitution Conference supported the position taken by the Commission and conceded that though education is a critical right, it can only be made compulsory once adequate resources are available at national level.

The Commission further considered that whilst the matter of education being compulsory is crucial to attaining higher literacy levels, it may be best left to an Act of Parliament. To that end, the Commission learnt that a sister Commission

⁵³ Delegates representing the Youth at the Second National Constitution Conference were not satisfied with the position taken by the Commission and urged reconsideration of this position. The Commission however arrived at the same conclusion after considering the submissions at the Conference.

⁵⁴ See Constitution Review Issues Paper pp 13 - 14.

⁵⁵ See Constitution Review Consultation Paper pp 20 - 21.

⁵⁶ See section 21 (1) of the South African Schools Act, 1996.

⁵⁷ See Article 20 (2) of the Namibian Constitution.

⁵⁸ See Article 88 (1) of the Mozambican Constitution.

on the Review of the Education Act was already looking into these issues. The Commission therefore agreed to leave the issue of compulsory education to be dealt by that Commission in an Act of Parliament if necessary.

The Commission also considered whether the number of years of compulsory education in primary education should be changed from “five” to “eight years” in view of the fact that primary education in government schools requires at least eight years. The Commission observed, however, that some private schools, which are allowed under the Constitution, offer primary education up to 6 years only. The Commission was also aware that increasing the minimum number of years of primary education may create a problem in respect of private schools. The Commission was of the view that since the current five years is only a minimum, legislation may stipulate that in respect of government schools, the minimum may be eight years, and this would not create any conflict with the Constitution. The Commission therefore recommends that the current status quo be maintained.

(h) Labour Rights

Section 31 provides for the right of every person to fair and safe labour practices and the right to form and join trade unions. Stakeholders suggested that section 31 (1) be redrafted so that similar matters are grouped together to avoid confusion. This would mean that issues of fair remuneration and wages should be in the same subsection and the issue of fair and safe labour practices in another subsection.

In considering the suggestion, the Commission considered further whether section 31 of the Constitution as it stands did not tilt more in favour of employees than employers. It was observed that the emphasis on the right to fair and safe labour practices and to fair remuneration gives the impression that the Constitution only protects employees whereas in reality even employers would be entitled to fair labour practices. After some deliberation the Commission resolved that the wording of section 31 be revisited and the section redrafted to take into account both matters of rearranging issues and providing for employers. The South African Constitution was used for guidance in this respect. The Commission thus recommends the amended section 31 to read as follows—

“Labour
relations

31.—(1) Every person shall have the right to fair and safe labour practices.

(2) Every person shall be entitled to fair wages and equal remuneration for work of equal value without distinction or discrimination of any kind, in particular on the basis of gender, disability or race.

(3) Every employee shall have the right—

(a) to form and join a trade union;

(b) to participate in the activities and programmes of a trade union; and

(c) to strike.

(4) Every employer shall have the right—

(a) to form and join an employer’s organization; and

(b) to participate in the activities and programmes of an employer’s organization.

(5) Every trade union and every employer’s organization shall have the right—

(a) to determine its own administration, programmes and activities;

(b) to organize; and

(c) to form and join a federation.

(6) Every trade union, employer’s organization and employer shall have the right to engage in collective bargaining.

(i) Political Rights

Section 40 provides for political rights in general and political party funding in particular. This provision featured in the written submissions⁵⁹, the stakeholders’ consultative meetings⁶⁰ and the First National Constitution Review Conference⁶¹. The debate in all these submissions were threefold. The first was whether political parties should continue to enjoy public funding. The second was the issue of criteria to be used to determine which political parties enjoy such public funding. There were contrary suggestions on this matter. One was that funding of a political party should depend on presence in Parliament. The other suggestion was that funding of political parties should extend to parties outside Parliament which secure a certain percentage of the national vote. The third debate centered on what would constitute the permissible levels of funding for political parties and how these should be determined.

Most of the submissions received by the Law Commission were in favour of maintaining the concept of public funding of political parties to sustain multiparty democracy. However, the point of contention was the eligibility criteria. At the meeting with political parties held at Cresta Hotel on 13th October, 2006 it was observed that the formula under section 40(2) of the Constitution is inequitable and it was suggested that a threshold minimum level of funding for all parties in Parliament should be proposed. It was further suggested that distribution of the rest of the money allocated to political parties should depend on party strength in Parliament. To that end, the Commission was informed that the Netherlands Institute of Multiparty Democracy has established a formula which requires the equal distribution among political parties of 50% of the total amount allocated to political parties represented in Parliament and distribution of the balance based on parliamentary seats. It was argued that this approach would strengthen established parties and at the same time nurture the upcoming small parties since the current

⁵⁹ See Issues Paper pp 14-15.

⁶⁰ See Consultation Paper p. 17.

⁶¹ See Summary of the Proceedings on the First National Conference on the Review of the Constitution p. 10.

formula is considered oppressive and discriminatory especially in relation to small parties⁶².

The majority of the parties present further emphasized the need to introduce mechanisms to ensure that parties account for the public funds⁶³. It was suggested that accountability should start at party level to ensure future corrupt free governments. Other parties however pointed out the difficulty of requiring political parties to account for public funds in view of the nature of activities of political parties⁶⁴. These other parties conceded that accountability is important but within reasonable limits to avoid the risk of exposing a party's strategies for accessing resources.

In debating the issue of public funding of political parties, the Commission conceded that it was important that political parties should continue to benefit from public funding. The Commission considered that parties as institutions need to be supported financially so that the concept of multiparty democracy which Malawi embraced through the 1993 referendum is nurtured and sustained.

The Commission further deliberated on the suggestion that funding of political parties should extend to political parties outside Parliament which get one-tenth of the national vote. One strong argument in support of this suggestion is that the national vote should be the basis as this would ensure that political parties were truly national in nature. Further, it was argued that this approach would nurture small parties outside Parliament which may get an agreed percentage of the national vote at a general election. The premise of the argument is that even parties outside Parliament do contribute to the development of a nation by offering diverse opinion on government policies and governance issues.

However, the Commission considered that allowing parties outside Parliament to receive public funding could be problematic as there would be the likelihood that too many parties may secure the 10% of the national vote and, hence, such a scheme may not be sustainable considering the limited resources of the country. The Commission also considered that political parties exist primarily to achieve representative leadership and that this is appropriately reflected in the number of seats that a political party secures in a General Election to the National Assembly. The Commission thus concluded that funding of political parties should be influenced by the presence of a party in Parliament. The Commission, therefore, did not agree with the suggestion that political parties outside Parliament should be funded.

In order to enrich debate on the issue of political party funding the Commission considered provisions in Constitutions of other African countries such as Mozambique, Namibia and South Africa. The Commission observed that in Mozambique, the Constitution does not provide for public funding for political parties. In the case of Namibia, the Commission noted that public funding of political parties is restricted to parties with representation in Parliament, a situation similar to Malawi.

⁶² Views expressed by PETRA, Peoples Progressive Movement.

⁶³ Peoples Progressive Movement, PETRA, MAFUNDE, Democratic Progressive Party.

⁶⁴ Malawi Congress Party, United Democratic Front.

As regards South Africa, the Commission observed that although political rights are contained in section 19 of the Constitution, the issue of public funding of political parties has been dealt with under statute. The Commission further noted that the relevant statute is the Public Funding of Represented Political Parties Act, 1997. That Act provides for *inter alia* the basis of funds allocation, the guiding principles in the formula for allocation and what the funds may be used for. Public funding of political parties is however confined to political parties represented in Parliament.

In the final analysis, the Commission recommends that only parties with representation in Parliament should benefit from public funding in order to ensure sustainability of funding political parties. Further, in order to nurture small parties, the Commission recommends that the decision to fund political parties represented in Parliament should not be determined by the size of the national vote but rather by the mere fact of representation in Parliament.

The Commission also considered whether independent Members of Parliament should enjoy public funding as do political parties. The Commission however realized that this would not be ideal as independent Members of Parliament were not political parties and the rationale behind allowing public funding of political parties is to enable political parties to sustain themselves.

On the issue of the levels of public funding for political parties represented in Parliament, the Commission deliberated on the criteria to be used. The Commission observed that the current position is that only those parties that score one-tenth ($\frac{1}{10}$) of the national vote are eligible for public funding. The Commission further observed that in practice, this has translated in funding of political parties that have at least 10% of the total seats in the National Assembly. The Commission conceded that indeed this formula leaves out small parties and therefore recommends that a formula that entails equal distribution of 50% of the total amount allocated to political parties represented in Parliament and distribution of the balance on the basis of parliamentary seats. The Commission however realized that issues pertaining to levels of funding for political parties involve minute detail suitable to be regulated by statute. To that end, the Commission considered that the Political Parties (Registration and Regulation) Act⁶⁵ would be better suited to incorporate such detail and recommends accordingly.

Consequently, the Commission recommends an amendment to subsection (2) of section 40 to provide that all political parties represented in Parliament shall benefit from public funding, and further that the formula to be used in funding such political parties shall be provided for in an Act of Parliament. The amended subsection (2) is to read as follows—

“(2) The State shall provide funds so as to ensure that, during the life of any Parliament, any political party which has secured any number of seats in elections to that Parliament has sufficient funds to continue to represent its constituency:

Provided that the formula for determining the levels of funding to political parties represented in Parliament shall be prescribed by an Act of Parliament.”.

⁶⁵ Cap. 2:07

Delegates to the Second National Constitutional Conference were in support of the proposals made by the Commission regarding political party funding but added that political parties should be required to disclose supplementary sources of funding whether local or international in the interest of transparency and accountability. The Commission agreed and recommends that this should be appropriately incorporated under the Political Parties (Registration and Regulation) Act.⁶⁶

(j) *Access to justice and legal remedies*

Section 41 provides for certain rights to facilitate access to justice and legal remedies such as the right of every person to recognition as a person before the law, the right of access to any court of law or any other tribunal with jurisdiction for final settlement of legal issues and the right to an effective remedy by a court of law or tribunal for acts violating the rights and freedoms guaranteed by the Constitution. Further section 44 has isolated the right to equality and recognition before the law as non-derogable among the rights under section 41.

The Law Commission received a written submission urging for inclusion under section 44 (1) “the right of access to the courts or any other tribunal for final settlement of legal issues” to make it non-derogable. It is argued that this right is closely associated with the right to equality and recognition before the law to the extent that the two cannot be separated. The Commission concurred with the submission and recommends amendment of section 44 (1) (g) to incorporate “the right of access to any courts of law or any other tribunal with jurisdiction for final settlement of legal issues” as a non-derogable right.

(k) *Arrest, Detention and Fair Trial*

The Commission received both written submissions⁶⁷ and oral presentations⁶⁸ on the period of detention of persons before being taken to court otherwise known as the forty-eight hour rule as provided under section 42 (2) (b). There were two opposing positions that the submissions and oral presentations made. The one view was that there is need to extend the period within which a person may be detained by the police without court sanction from the current forty-eight hours to at least seven days. The argument in favour of this view focused on the perceived inadequacy of resources within the prosecuting agencies of government to ensure compliance with the provision. On the other hand, there was submission to the effect that the current period of forty-eight hours is adequate and that what was needed was to provide for mechanisms that oblige government to comply with the provision.

The Commission considered whether it was necessary to extend the period within which a person may be held without court sanction beyond the current forty-eight hours. In order to enrich debate, the Commission looked at similar provisions of other constitutions in the region such as Namibia,⁷⁰ South Africa

⁶⁶ *ibid*

⁶⁷ See Constitution Review Consultation Paper; see also Summary of Proceedings of the First National Conference on the Review of the Constitution.

⁶⁸ See Constitution Review Issues Paper p. 15.

⁶⁹ Article 11 (3).

⁷⁰ Section 25.

and Mozambique⁷¹ and observed that the position is similar to section 42 (2) (b) of the Malawi Constitution. Thus, detention without the sanction of the court is only permissible for a maximum period of forty-eight hours. Consequently, the Commission was of the view that there was no need for any extension as the period of forty-eight hours can always be extended with court's approval if the state shows that it is in the interests of justice to do so. The Commission was further of the view that the forty eight hour period was not meant to be a period within which an offence should be investigated as ideally, investigations were supposed to be done prior to an arrest. The Commission therefore recommends the retention of section 42 (2) (b).

The Commission also considered whether it was necessary to amend the provision in section 42 (g) (iii) which provides for children to be separated from adults when imprisoned to include detention. The submission was that even where a child is merely detained he or she should be separated from adults. The Commission agreed that imprisonment and detention are two different things and they must each be specifically provided for. The Commission therefore recommends that section 42 (2) (g) (iii) be amended by inserting the words “**or detained**” before the word “imprisoned”.

(I) *Citizenship*

Section 47 of the Constitution provides that an Act of Parliament may make provision for the acquisition or loss of citizenship of Malawi by any person and defines the expression “acquisition of citizenship” to include acquisition by “marriage”. The matter of obtaining citizenship through marriage featured very highly in written submissions,⁷² at stakeholders consultative meetings⁷³ and at the First National Constitution Conference. It was submitted that marriage *per se* should not be a ground for acquisition of Malawian citizenship.

The Commission considered whether marriage should continue to stand as one of the grounds of acquiring citizenship as stipulated in section 47. The Commission learnt that the issue has also been raised by the Immigration Department which has been flooded with claims of citizenship by non Malawian males who have married Malawian females. This is mostly in situations where the foreign males are facing deportation from the country. The Commission observed that marriage *per se* was not meant to be a ground for acquiring citizenship. The Commission considered rather that marriage was merely one of the factors to be taken into account in an application for citizenship by a foreign spouse as is provided under section 16 of the Malawi Citizenship Act.

The Commission observed that although it is the Act that is supposed to be consistent with the Constitution, the position under the Act was acceptable than the one under the Constitution. The Commission therefore resolved that it would be best to amend the Constitution by removing reference to marriage as a ground for acquiring citizenship. The Commission therefore recommends deletion of the reference to the word “marriage” in section 47 (3).

⁷¹ Article 64.

⁷² See Constitution Review Issues Paper p. 17.

⁷³ See Constitution Review Consultation Paper pp 17 - 18.

At the Second National Constitution Conference the women's lobby group also urged for the amendment of section 24 (1) (a) (iv) of the Constitution to empower women to pass on citizenship to husbands and children easily so as to provide guidance on issues of equality even in matters of citizenship.

In debating this matter, the Commission considered that this is a matter proper for the Citizenship Act since it is incumbent upon the Immigration authorities to deal with each application on a case by case basis depending on circumstances of each.

(m) Distribution of property on termination of marriage

Section 24 (1) (b) (i) guarantees women full and equal protection including the right, on the dissolution of marriage, to a fair disposition of property that is held jointly with a husband. The Law Commission received both oral and written submissions from the women's lobby group urging for the amendment of this provision on the basis that it does not recognize a marriage as a joint enterprise of interdependence thereby putting one spouse in a position of inferiority regarding rights over matrimonial property. It has been argued that the emphasis on "fair distribution of property that is held jointly"⁷⁴ with a husband as opposed to property that is held in common within a marriage works to the detriment of women who are often times not bread winners.

In discussing this matter, the Commission observed the courts have interpreted the expression "jointly held" very loosely.⁷⁵ The Commission also considered that the words "fair distribution" impose on the court an obligation to take into account the circumstances of each case and hence facilitate the use of discretion in arriving at a decision.

The Commission further observed that although the special Law Commission on Laws on Marriage, Divorce and Family Relations in its Report decried the inadequacy of this provision, that Commission conceded that the provision attempts to set a minimum standard for the fair distribution of matrimonial property and that it is incumbent upon enabling legislation to expand on this minimum standard.⁷⁶ The Commission therefore recommends retention of the status quo.

(n) Participation of Women

Section 13 (9) of the Constitution requires the State to achieve and promote gender equality by, among other things, adopting policies and passing legislation to ensure full participation of women in all spheres of life.

The Law Commission received submissions indicating that the absence of mechanisms expressly guaranteeing women equal participation in areas of decision making and politics denies women a measurable "fair level" of participation.⁷⁷ The Commission was therefore urged to amend section 24 to safeguard the interests of women by providing a quota system within the range of

⁷⁴ Emphasis added.

⁷⁵ See the case of *Phiri Vs Phiri* Civil Appeal No. 15 of 2006 (Unreported).

⁷⁶ See page 84.

⁷⁷ Oral submissions made by the Women Lobby group at the Second National Constitution Conference.

30% to 50% as advised by the SADC Heads of State to guarantee a fair level of participation of women.

The Commission considered whether it was necessary to provide a quota system in the Constitution in order to enhance participation of women in all spheres of life. The Commission observed that Malawi failed to achieve the 30% target by 2005 and considered that even raising that figure to 50% is not attainable and hence futile. The Commission further considered that it is impracticable to stipulate a quota in the Constitution since the proposed percentage may change all the time. The Commission however concluded that this issue may appropriately be provided for in an Act of Parliament. The Commission therefore took cognizance of the on-going work of the special Law Commission on Gender-Related Law Reforms which is in the process of developing a law on gender equality and is dealing with the specific issue of incorporating a quota system in all spheres of public life to promote participation of women.

(o) *Disability and the Constitution*

The Commission received oral and written submissions relating to a number of concerns regarding protection and promotion of the rights of people with disability.⁷⁸ The submissions urged for the involvement of people with disabilities in the decision making process in areas of policy and legislation, affirmative action, and access to facilities and information.

The Commission conceded that the submissions had merit but considered that matters raised involved details that may appropriately be dealt with under an Act of Parliament. To that end, the Commission was informed that the Ministry of Justice has already been approached to draft a comprehensive law on people with disabilities to replace the Handicapped Persons Act.⁷⁹

3. THE LEGISLATURE

(a) *The Senate*

The Constitution, until 2001, provided for the Senate (in sections 68 to 72 of the Constitution). The functions of the Senate were comprehensive including the power to initiate legislation, to vote motions, to confirm or remit Bills passed by the National Assembly. In this respect, the Senate was accorded substantive “legislative” powers. The Senate was abolished in 2001⁸⁰ on the understanding that Government does not have resources to support a second chamber of Parliament.

The Commission received numerous submissions urging the re-introduction of the Senate. The core basis of these submissions is that re-introduction of the Senate will enhance oversight within the Legislature. It has further been submitted that existence of a Senate will allow for representation of special

⁷⁸ Of particular significance was the submission from Federation of Disability Organizations in Malawi (FEDOMA).

⁷⁹ Cap. 33:02.

⁸⁰ See Constitution (Amendment) Act, 2000, Act Number 11 of 1999.

interest groups and participation of traditional authorities in matters of national interest. In addition, some sectors argued that the abolition of the senate may be in breach of section 45 (8) of the Constitution, an entrenched provision, which provides that “under no circumstances shall it be possible to suspend this Constitution or any part thereof or dissolve any of its organs save as is consistent with the provisions of this Constitution”.

In order to enrich debate on the issue of the Senate, the Commission conducted a comparative analysis of other constitutions within the SADC region and established that only four countries out of the fourteen SADC countries have bicameral Parliaments. These are Botswana, Lesotho, Swaziland and South Africa. The Commission established that bicameralism in these countries seek to achieve different objectives. For example, in Botswana and Lesotho political expedience ranks high on the agenda whereby traditional leaders are incorporated in the governance structure in recognition of their central role in leadership. To that end, Botswana has a House of Chiefs while as Swaziland has a Senate comprising largely of chiefs. Another consideration is the creation of a perception of an all inclusive system of government where special interest groups or provinces are taken on board to participate in governance issues. This is the case for Swaziland where gender considerations take precedence. South Africa on the other hand has sought to embrace all the provinces to ensure a participatory system of governance. The Commission has also established that bicameralism elsewhere has been justified on the basis of existing diversity in polity in terms of ethnicity, language and political history.⁸¹

The Commission considered that the Senate may be a necessary check on the National Assembly as an internal mechanism of accountability within the Legislature. In its debate, the Commission attempted to reconcile (a) the possibility of the existence of other avenues of accountability in respect of the National Assembly; (b) replication of responsibility or inefficiency between the National Assembly and the Senate; and (c) the reality of the possible strains on the financial resources available to the State.

In debating this issue further, the Commission considered that if the Senate were to be brought back, the composition should be revisited and the membership reduced. The Commission further considered that the functions of the Senate should also be revisited to avoid duplication and inefficiency in the operations of Parliament. There were thus suggestions that representation should comprise of two categories of people namely, experts in different fields which are not in the public service and have no political affiliation, and representatives of special interest groups. The Commission further considered that the primary function of the second chamber should be to provide oversight functions over the National Assembly since experience has shown that it is not always that the National Assembly in its deliberations reflects the interest of all the people of Malawi as required by section 8 of the Constitution.

⁸¹ See, for example, Bankole Okuwa (2001) “Retaining a Bicameral Legislature for Nigeria” http://www.nigerdeltacongress.com/articles/retaining_a_bicameral_legislatur.htm (visited on 26th August, 2006).

However, the Commission also considered that the re-introduction of the Senate may be perceived to be duplication in terms of functions and conceded that the National Assembly may be checked through other means such as the recall provision and the ballot. Further, the Commission considered that though this Chamber may provide an avenue to allow special interests and vulnerable categories such as women to access Parliament easily, relegating women to this Chamber as a vulnerable category is not satisfactory since indications are that, the function of the Chamber may be confined to that of an advisory body, if it were to be brought back. The Commission therefore considered that a better approach may be to introduce a quota system in the National Assembly as is the case in other countries such as Uganda and Tanzania and went ahead to discuss the merits and de-merits of such a system. The Commission further discussed the danger of reacting to problems in the National Assembly created by political parties.

After a lengthy debate, the Commission nevertheless resolved that the Senate should be re-introduced as a second chamber of Parliament to be headed by a Leader of the House and recommends accordingly. This shall entail amendments to all appropriate provisions under Chapter VI, and all other provisions of the Constitution which were amended in 2001 as a result of the abolition of the Senate.

The Commission further recommends that the Senate should comprise both elected and nominated members, entailing adopting both the political and representative approach. Elected members are to be elected by the respective local government authorities in every district. Furthermore, in recognition of the indispensable role that Chiefs play in leadership and governance, the Commission recommends that Chiefs should be represented in the Chamber. The Commission also recommends inclusion of two other categories of persons, namely experts and special interest and vulnerable groups. Senators representing the last two categories are to be nominated by the Nominations Committee to be chaired by the Chairperson of the Electoral Commission.

The Commission considered that the size of the Senate should not be distended and recommends a maximum of seventy senators. This figure shall include one senator from each district nominated by local government authorities; ten chiefs; ten senators representing women; people with disabilities; trade unions; nineteen experts from various fields and three senators representing the major religious faiths.

Delegates to the Second National Conference supported the recommendations made by the Commission but suggested that the number of chiefs should be increased. The Commission however maintained its position in recognition of the fact that Chiefs are easily manipulated by the Executive arm of government. Hence, having too many of them may compromise the effective functioning of the second House.

Delegates further expressed concern on the allegedly large number (32) of Presidential appointees to the Senate. The Commission was however satisfied that the involvement of the Nominations Committee shall provide a proper safeguard to prevent abuse of appointing powers.

Delegates also suggested that Senators should be directly elected to ensure legitimacy. The Commission however observed that the procedure of electing Senators which it has suggested is the most preferred in the region. The Commission also considered that it is a cheaper way of doing things and an acceptable form of indirectly electing leaders democratically.

The Commission therefore recommends adoption of the following new section 68—

“Composition
of the Senate

68.—(1) The Senate shall be composed as follows—

(a) one Senator from each District, registered as a voter in that District, and elected by the District Council of that District within thirty days of each Local Government Election;

(b) ten Senators elected by a caucus of Chiefs who shall themselves be chiefs;

(c) thirty-two other Senators appointed by the President on the basis of nominations by the Nominations Committee provided for in subsection (2) as follows—

(i) ten Senators representing interest groups who shall include representatives from women’s organizations, people with disabilities, and from trade unions;

(ii) nineteen Senators from society recognized as experts in their respective fields; and

(iii) three Senators, representing the major religious faiths in Malawi.

(2) There shall be a Nominations Committee of the Senate which shall be appointed thirty days before each general election for the purpose of nominating Senators referred to in subsection (1) (c).

(3) The Nominations Committee shall consist of—

(a) the Chairperson of the Electoral Commission, who shall be the Chairperson of the Committee;

(b) the Chairperson of the Human Rights Commission;

(c) a representative of civil society;

(d) a representative of the academia; and

(e) a legal practitioner nominated by the Malawi Law Society.

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

(5) The Nominations Commission shall invite nominations from the general public and shall endeavor to ensure, when considering nominations, that the Senate is proportionally representative of the various groups in Malawian society and therefore shall seek to ensure, so far as is possible, that one-half of the members of the senate are women.

(6) For the purposes of this section, “Chief” means a paramount chief, a senior chief and Traditional Authority.”.

The Commission further recommends that the primary purpose of the Senate should be deliberative. The Commission was guided by the repealed section 70 of the Constitution and the White Paper on Reforms to the House of Lords presented to the Parliament of England in 2001. It was the view of the Commission that the second chamber should not seek to usurp the role of the National Assembly as the pre-eminent Chamber.

The Commission therefore considered that the functions and powers of the Chamber should be restricted to, among other things, scrutinizing and proposing amendments to Bills originating from the National Assembly. Power to initiate Bills or indeed any private members Bills should be excluded. The Senate should also have powers to vote to confirm or remit Bills passed by the National Assembly. The Commission further considered that the Senate should be empowered to debate any issue on its own motion and vote motions in respect of any matter including motions to indict or convict the President or Vice-President.

It was the view of the Commission that these functions and powers shall provide adequate safeguards to ensure appropriate oversight leverage over the National Assembly. To that end, the Commission recommends adoption of the following new sections 70 and 71 of the Constitution—

**“Functions
and power of
the Senate**

70. The Senate shall be an indirectly elected chamber the primary purpose of which shall be deliberative and which shall have powers, subject to this Constitution, to—

(a) receive, scrutinize and amend Bills from the National Assembly;

(b) vote motions to confirm or remit Bills passed by the National Assembly;

(c) debate any issue on its own motion and vote motions in respect of any matter, including motions to indict or convict the President or Vice-President by impeachment;

(d) exercise such other functions and powers as are conferred on it by this Constitution;

(e) carry out such other functions as may be delegated to it by an Act of Parliament; and

(f) take all actions incidental to and necessary for the proper exercise of its functions.”.

Scrutiny by
Senate

71.—(1) All Bills shall be laid before the Senate except appropriation or money Bills.

(2) Any member of the Senate may, in respect of a Bill laid before the Senate—

(a) within fourteen days of that Bill being laid, raise a motion to debate that Bill in full readings; or

(b) after fourteen days, but before the lapse of forty days, raise a motion to remit the Bill to the National Assembly.

(3) Any Bill laid before the Senate which has not been the subject of a motion to debate within the meaning of this section shall after the lapse of forty days, be presented for assent by the President.

(4) Where a Bill is debated under subsection (2) (a), it shall be passed back to the Speaker of the National Assembly who shall certify that it is—

(a) without amendment, in which case the Speaker shall present it for assent by the President; or

(b) amended, in which case the Bill shall be laid before the National Assembly for fourteen days, provided that if no motion to debate the Bill in full is raised by any member of the National Assembly within that time it shall be presented in amended form for assent by the President.

(5) Where a Bill has been remitted by the Senate by virtue of a majority vote in favour of a motion under subsection (2) (b)—

(a) the Senate shall give written reasons for that remittance; and

(b) the Speaker of the National Assembly shall table the Bill which may be further debated and amended, and if passed by a majority of all the members of the National Assembly, may be presented for assent by the President.”.

On the issue of dissolution of the Senate, the Commission considered that the life of the Senate should coincide with that of the National Assembly and recommends adoption of the following new section 72—

“Dissolution of
the Senate

72. The Senate shall last for five years from the date of its first sitting, being no later than sixty days before the next General Elections.”.

(b) Recall of Members of the National Assembly

The Constitution, until 1995, provided, under section 64, for the recall of members of the National Assembly. The provision was repealed by the Constitution (Amendment) Act, 1995⁸² while the Constitution was provisionally in force. Section 64 provided as follows—

“64.—(1) *Every member of the National Assembly shall be liable to be recalled by his or her constituency in accordance with this section.*

(2) *A member of the National Assembly shall be subject to recall by his or her constituency where a petition has been upheld-*

(a) is a registered voter in the constituency that a member being recalled has been elected to represent;

(b) has proved, on a balance of probabilities, that there is a sufficient proportion of the electorate within that constituency, being not less than half the total of registered voters, who desire that the seat representing that constituency should be contested in a by-election.

(3) *Where there has been a successful petition of recall in accordance with subsection (1), the decision of the Electoral Commission shall be notified to the Speaker of the National Assembly who shall, on such notification, declare the seat vacant and a by-election shall be announced.”*

The Law Commission received numerous submissions for the re-introduction of the recall provision, and that the provision should be entrenched⁸³. The majority view in favour of the re-introduction of this provision considered it an important tool for enforcing accountability of Members of Parliament to their constituents.

At a meeting with political parties convened to consult further on this issue,⁸⁴ the views of the parties were divided. The political parties generally agreed that Members of Parliament needs to be accountable to their constituents. The point of disagreement was on how to ensure that this is achieved. There were several views.

One view was that the recall provision was not necessary but rather that the ballot which comes after every five years is enough mechanism to regulate the behaviour of Members of Parliament since constituents have the opportunity to express their views by maintaining a Member of Parliament or voting him or her out. Proponents of this view criticized the recall provision for lack of express grounds for a recall⁸⁵.

⁸² Act Number 6 of 1995. The repeal was on the understanding that the provision may encourage witch hunting and was considered to be liable to abuse by constituents.

⁸³ See Constitution Review Consultation Paper page 26.

⁸⁴ Parties in attendance were MCP, DPP, Aford, UDF, PETRA, MAFUNDE, PPM and MDP.

⁸⁵ Views expressed by Malawi Congress Party.

The other argument against a recall provision was that many constituents are not aware of the actual job description of a Member of Parliament in view of high illiteracy levels and cautioned that in the absence of express description of the responsibility of a member of Parliament, a member may be recalled for the wrong reasons. It was further argued that the current system of electing Members of Parliament which is first past the post may result in abuse of the recall provision since the aggregate majority of those who did not vote for the member of Parliament may conspire to remove him or her. Furthermore, emphasis was placed on the attendant cost of implementing a recall provision which may necessitate the holding of frequent and untimely by-elections. It was argued that Malawi is too poor a nation to finance frequent by-elections.⁸⁶ Furthermore, the Commission was urged to bear in mind the culture of jealousy common among Malawians in considering the issue of a recall.

The other view was that the recall provision should be re-introduced in the Constitution. However, it was suggested that duties and functions of an MP should be spelt out in the constitution to prevent the use of trivial matters as subject of a recall⁸⁷.

The proponents of a recall provision also emphasized the need to incorporate grounds and appropriate procedures to facilitate a recall process.⁸⁸ It was argued that the existence of a recall provision shall make Members of Parliament more accountable especially in controlling unacceptable electoral campaign promises⁸⁹. It was further considered that the five year period between elections is too long a period to keep a non-productive Member of Parliament in office.

The last view suggested that the Commission should find other ways of making Members of Parliament accountable. It was felt that the ballot does not provide adequate mechanisms to make Members of Parliament accountable and that a recall provision may not benefit Malawi as a country. It was therefore suggested by proponents of this view that the focus should be on the issue of “accountability” rather than “recall”.⁹⁰

In debating this matter, the Commission had recourse to the recall provisions under the constitutions of other African countries such as Nigeria and Uganda for guidance.⁹¹ The Commission established that under the constitutions of Nigeria and Uganda, the recall provisions provide a basis for the recall of the member of the legislature. Under section 69 of the Constitution of Nigeria, a recall is possible if registered constituents have lost confidence in a senator or a member of the House of Representatives. Under section 84 of the Constitution of Uganda, recall is possible in the case of mental or physical incapacity, misconduct, or desertion of the constituency.

In discussing the repealed provision, the Commission observed that it did not provide for grounds for a recall and considered this a major weakness of the

⁸⁶ An example was given of the Governments failure to hold local government elections as at present.

⁸⁷ Views expressed by United Democratic Front Party.

⁸⁸ Views expressed by Malawi Democratic Party.

⁸⁹ Views expressed by MAFUNDE.

⁹⁰ Views expressed by PETRA.

⁹¹ See section 69 of the Constitution of Nigeria and section 84 of the Constitution of Uganda.

provision. The recall was left to the impulses of constituents in any particular constituency.

The Commission agreed with the recommendation to re-introduce the recall provision for Members of the National Assembly for two reasons. First, the Commission considered that the exercise of power of State is conditional upon sustained trust of the people of Malawi as required under section 12 (i) and (iii) of the Constitution. Second, the Commission considered that a president or judge may be impeached on specified grounds in stated circumstances and hence the need for similar treatment for Members of Parliament to promote transparency and accountability in the conduct of their business.

The Commission, therefore, recommends re-instatement of the recall provision in the following modified version—

“Recall of
members of
National
Assembly

64.—(1) Every member of the National Assembly shall be liable to be recalled by his or her constituency in accordance with this section.

(2) A member of the National Assembly may be recalled by his or her constituency on any of the following grounds—

(a) physical incapacity rendering the member incapable of performing the functions of his or her office;

(b) misconduct or misbehaviour of the member, likely to bring hatred, ridicule, contempt or disrepute to the office of the member; or

(c) loss of confidence in the member by his or her constituency.

(3) The recall of a member of the National Assembly shall be initiated by a petition in writing setting out the grounds relied on and signed by at least two-thirds of the registered voters of the constituency of the member; and the petition shall be delivered to the Speaker.

(4) On receipt of a petition, in accordance with subsection (3), the Speaker shall, within fourteen days require the Electoral Commission to conduct a public inquiry into the matters alleged in the petition.

(5) The Electoral Commission shall conduct any inquiry required pursuant to subsection (4) expeditiously and in accordance with rules of natural justice, and immediately after the conclusion of the inquiry shall report its findings to the Speaker.

(6) The Speaker shall—

(a) declare vacant the seat of a member of the National Assembly, if the Electoral Commission notifies the Speaker in writing that it is satisfied from the

inquiry, with the veracity of the allegations set out in the petition;

(b) declare immediately that the petition was unjustified, if the Electoral Commission notifies the Speaker in writing that it is not satisfied with the veracity of the allegations set out in the petition.

(7) Where there has been a successful petition of recall in accordance with this section and a seat of a member of the National Assembly is declared vacant, a by-election shall be held.”.

In discussing the above proposed provision, some delegates to the Second National Constitution Conference expressed fear that the provision may be abused. Nevertheless, the Commission was satisfied that the proposed modified version has no loopholes and that the procedure is elaborate to prevent abuse.

The re-instatement of the recall provision shall necessitate an amendment to section 63 to include a new paragraph (g) in subsection (1) to provide for the automatic vacancy in the seat of a member of the National Assembly who has been successfully recalled by his or her constituents. The new paragraph is to read as follows—

“(g) if there has been a successful petition of recall in accordance with section 64.”.

(c) Crossing the floor

Section 65 (1) of the Constitution in effect empowers the Speaker to declare vacant the seat of any member of the National Assembly elected as a member of one party who voluntarily leaves his party and joins another party represented in Parliament. The section is silent on independent members of Parliament.

The submissions received by the Law Commission urged for the strengthening of this provision and also the removal of any perceived vagueness on the position of independent Members of Parliament.

Further, at a meeting with political parties convened by the Commission to consult further on this provision, the majority view was that this provision should be maintained and that it should be strengthened to include independent Members of Parliament⁹². It was argued that the framers of the Constitution wanted to address the issue of what is termed “political immorality” among politicians⁹³ and protect opposition parties from predatory tendencies by ruling parties⁹⁴. It was suggested that in considering reforms to this provision, the Commission should bear in mind that parties invest a lot in their candidates during elections and on that basis members should not be allowed to cross the floor⁹⁵.

⁹² AFORD, MAFUNDE, MCP, MDP, UDF, PPM. However, PETRA and DPP did not support the view that the provision should cover Independent Members of Parliament.

⁹³ AFORD.

⁹⁴ MAFUNDE.

⁹⁵ MAFUNDE.

Parties further emphasized the usefulness of the provision for a fledgling democracy and considered that it does not curtail freedom of association as provided under section 40 (1) as other quarters have argued since section 44 (2) allows for the placing of restrictions on the exercise of any rights and freedoms so long as such restrictions prescribed by law, are reasonable, are recognized by international human rights standards and are necessary in an open and democratic society⁹⁶. It was therefore suggested that a Member of Parliament who abandons his party should seek fresh mandate⁹⁷.

In discussing this issue, the Commission observed that “crossing the floor” emanates from English parliamentary practice. A person was deemed to have “crossed the floor” if he or she joined another political party in Parliament or voted with another political party in Parliament against his or her own political party. “Crossing the floor” is therefore not peculiar to Malawi and is recognized under the Constitutions of, among others, Ghana, India, Namibia, South Africa, Tanzania, Uganda and Zambia. The gist permeating through all these jurisdictions is that “crossing the floor” is limited to the status of Members of Parliament within the legislature.⁹⁸

The Commission further observed that section 62 of the Constitution determines the composition of the National Assembly. The provision states that the National Assembly shall consist of such number of seats representing every constituency in Malawi as determined by the Electoral Commission.⁹⁹ Further, each constituency shall freely elect any person, subject to the Constitution and the relevant electoral law, to represent that constituency as a member of the National Assembly.¹⁰⁰

The Parliamentary and Presidential Elections Act¹⁰¹ is the principal law on election of persons to the National Assembly in Malawi and provides the procedure on nomination of candidates under section 37. A candidate may stand for or may be sponsored by a political party,¹⁰² or may contest the election (or by-election) as an independent candidate,¹⁰³ and the nomination is required to specify that fact. Hence, every candidate in a parliamentary election is elected as a member of the National Assembly as a candidate of a political party or as an independent candidate. It follows that, in terms of section 62 (2) of the Constitution, a constituency may elect their representative as a candidate of a political party or an independent candidate. This determines the composition of the National Assembly under section 62 (1) of the Constitution not just at the first sitting after the general elections but throughout the term of the National Assembly.

⁹⁶ PETRA.

⁹⁷ Malawi Congress Party. The majority of the parties present also suggested that a similar provision should be introduced to bar a sitting President from changing parties or declaring himself independent since such conduct seriously undermines democracy.

⁹⁸ See <http://www.parliament.uk/glossary.cfm?ref=crossin> 283 (visited on 28th June, 2006).

⁹⁹ See also the obiter dictum of Justice Chipeta in *Registered Trustees of Public Affairs Committee v The Attorney General* Civil Cause Number 1861 of 2003 (High Court, Principal Registry (Unreported)) at p. 57.

¹⁰⁰ See section 62 (1) of the Constitution.

¹⁰¹ See section 62 (2) of the Constitution.

¹⁰² Cap. 2:01.

¹⁰³ See section 37 (2) (d) of the Parliamentary and Presidential Elections Act.

The Commission further observed that the High Court in *Registered Trustees of Public Affairs Committee v The Attorney General* endorsed section 65 (1) of the Constitution as a proper curtailment of rights under sections 32 and 40 of the Constitution as allowable under section 44 (2) of the Constitution.

Consequently, the Commission unanimously agreed that the concept of “crossing the floor” must be retained under the spirit of the constitutional order in Malawi. Further, the Commission noted that section 65, as presently worded, expressly excludes independent members of Parliament. The Commission agreed that the concept of crossing the floor should extend to independent members of Parliament so that once a person is elected as an independent member of Parliament he or she should not change status, but maintain that status throughout the life of the Parliament.

The Commission considered that any change of status amounts to betrayal of constituents since there is a social contract. The Commission also feared that leaving out independents may expose the provision to abuse since powerful political parties may field more candidates under the guise of independents thereby gaining unfair advantage. This may result in defeating the philosophy behind the concept.

The Commission, accordingly, initially resolved that section 65 should be repealed and the concept of “crossing the floor” should be included under section 63 of the Constitution as one of the circumstances that should result in the creation of a vacancy for a seat of a Member of the National Assembly.

Delegates to the Second National Constitution Conference unanimously disagreed with the recommendation to repeal section 65 and include the concept of “crossing the floor” under section 63. Delegates considered that this approach shall result in burying the concept and hence reduce its significance in protecting multi-party democracy in Malawi. The Commission was therefore urged to reconsider its recommendation and retain the concept in section 65. The Commission was further urged to ensure that section 65 should cover independent members of Parliament.

In deliberating this matter further, the Commission conceded that section 63 might not be the most suitable provision under which to incorporate the concept of “crossing the floor” since it provides for vacancies by operation of law. The Commission therefore considered that since issues under section 65, by their very nature, require evidential proof section 63 might not adequately address the nuances of the traditional concept of crossing the floor.

The Commission, therefore, recommends that section 65 should be retained and amended to read as follows—

“Crossing the
floor

65.—(1) The Speaker shall declare vacant the seat of any Member of the National Assembly who, having been elected to the National Assembly as a member of a political party, voluntarily ceases to be a member of that political party, or having been elected to the National Assembly as an independent candidate, ceases to be an independent member.

(2) Notwithstanding subsection (1), all members of all political parties represented in the National Assembly shall have the absolute right to exercise a free vote in any and all proceedings of the National Assembly, and a member shall not have his or her seat declared vacant solely on account of his or her voting in contradiction to the recommendations of a political party, represented in the National Assembly, of which he or she is a member.”.

(d) Tenure of Members of the National Assembly

The Commission received submissions urging for the introduction of limited tenure of office in respect of members of Parliament.¹⁰⁴ The argument in favour of limited tenure of office of members of the National Assembly is that it will serve as a tool for transparency and accountability.¹⁰⁵ The Commission observed that neither the Constitution nor an Act of Parliament provide a limited tenure of office of members of the National Assembly as the Constitution does in respect of the presidency.¹⁰⁶ Section 67 of the Constitution merely states that the tenure of office of members of Parliament shall be five years. There is no maximum limit of the tenure of office of members of the National Assembly.

The Commission was aware that a system of term limits exists in other jurisdictions such as Mexico in respect of, among other political players, members of Parliament.¹⁰⁷ The Commission however considered that limiting tenure of Members of Parliament shall only result in limiting freedom of choice. In any event, the Commission was satisfied that the Constitution has provided a means of weeding out unwanted Members of Parliament through the ballot. The Commission therefore recommends that the Constitution must retain the open tenure of Members of Parliament.¹⁰⁸

(e) Qualification of Members of Parliament

The Law Commission received written submissions requesting the introduction of a minimum formal educational qualification for members of Parliament.¹⁰⁹ This sentiment was also echoed in the consultative meetings conducted in all the three regions by the Law Commission.¹¹⁰

Section 51 of the Constitution provides for qualification of members of the National Assembly. The provision states that a person is not qualified to be nominated or elected as a member of the National Assembly unless he or she is—

- (a) a citizen of Malawi who has attained the age of twenty-one years;¹¹¹*
- (b) able to speak and to read the English language well enough to take*

¹⁰⁴ See Constitution Review Consultation Paper, pp.29-30; Constitution Review Issues Paper, pp. 20-21; and the Summary of the Proceedings of the First National Constitution Conference, p.12.

¹⁰⁵ See Constitution Review Consultation Paper, p.30.

¹⁰⁶ Cf. section 83 (3) of the Constitution.

¹⁰⁷ See A. Peter Mutharika (2006) “Towards a More Manageable Constitution”. Mimeo.

¹⁰⁸ Delegates to the Second National Constitution Conference were in support of this position.

¹⁰⁹ See Constitution Review Issues Paper.

¹¹⁰ See Constitution Review Consultation Paper p. 29.

¹¹¹ See section 51 (1) (a) of the Constitution.

*an active part in the proceedings of Parliament;¹¹² and
(c) registered as a voter in a constituency.¹¹³*

The requirement that a person must be “able to speak and to read the English language well enough to take an active part in the proceedings of Parliament” has come under scrutiny.¹¹⁴ A like requirement was provided under the Constitution of Malawi of 1964¹¹⁵ and the (Republican) Constitution of Malawi of 1966.¹¹⁶ It has been argued that this low education standard made sense during the early years of independence since only a limited number of Malawians had opportunity to go to school. It has been further argued that due to the functions of Parliament which are legislative in nature, the Constitution must make provision for a minimum academic qualification which a person must possess before they qualify for election as a Member of the National Assembly.¹¹⁷

The Commission was of the view that the requirement of a minimum formal education qualification must be considered in the context of the reality in Malawi. A recent study by the World Bank and the Government¹¹⁸ shows that, at present, 84 per cent of all men and 92 per cent of all women have no formal educational qualification. The illiteracy rates for women are particularly high, with the proportion of women who have never attended formal education increasing to 19 per cent, in the age group 20 to 24 years, to 70 per cent for those aged 65 years and older. In comparison, the figures for men are 9 per cent and 38 per cent, respectively.

Further, a population and housing census conducted by the National Statistical Office in 1998 shows that 48.6 per cent of women as compared to 72 per cent of men are literate. 31.4 per cent and 40.2 per cent of women and men respectively have completed primary school education. 11.1 per cent and 19.9 per cent of women and men respectively have completed secondary school education.¹¹⁹

The Commission deliberated at length whether the Constitution must

¹¹² See section 51 (1) (b) of the Constitution. This position must be juxtaposed with section 56 (5) of the Constitution which states that the proceedings of the National Assembly may be in “such other language as the National Assembly may prescribe.” Cf. section 55 of the Constitution of Nigeria which provides that “[t]he business of the National Assembly shall be conducted in English, and in Hausa, Ibo and Yoruba when adequate arrangements have been made therefor.” See also section 64 (c) of the Constitution of Zambia which provides that, among other things, a person must be “literate and conversant with the official language of Zambia” as a prerequisite for membership to the legislature. The official language of Zambia is English.

¹¹³ See section 51 (1) (c) of the Constitution.

¹¹⁴ See Constitution Review Consultation Paper, p. 30; Constitution Review Issues Paper, p. 17; and also Summary of the Proceedings of the First National Constitution Conference, pp. 11-12.

¹¹⁵ Section 34 (on qualifications for election to the National Assembly) provided, in subsection (1) (b), that a person shall be qualified to be elected as a member of the National Assembly if he “is able to speak and, unless incapacitated by blindness or other physical cause, to read the English language well enough to take an active part in the proceedings of the Assembly.”

¹¹⁶ Under section 23 which is a replica of section 51 (1) (b) of the Constitution.

¹¹⁷ See footnote 27. This fortifies Ackerman's second pillar in his 'new Separation of Powers'; namely, professionalism: see Ackerman at p.641ff.

¹¹⁸ World Bank and Government of Malawi (2004) *Malawi Strategic Country Gender Assessment*. Lilongwe: UNDP-Malawi, p. 49.

¹¹⁹ See generally National Statistical Office (2002) *1998 Malawi Population and Housing Census: Analytical Report*. Zomba: National Statistical Office.

provide for a minimum formal educational qualification and looked at both the pros and cons for retaining the status quo. The Commission observed that the statistics indicate that a very low percentage of Malawians possess a basic formal education qualification of Malawi School Certificate of Education and considered that insisting on such qualification may result in excluding the majority of Malawians from competing for parliamentary seats and in the process defeat democracy. The Commission further considered that current problems facing Parliament are largely to do with character and integrity of individual members rather than the possession of inadequate formal qualifications by members. The Commission conceded that the office of a member of the National Assembly is a position of trust and prescribing a minimum formal educational qualification would be perceived to be elitist. The Commission was also aware that most constitutions of African nations do not provide for a basic formal qualification due to the realities on the ground regarding literacy levels.¹²⁰ The Commission was, therefore, aware that the status quo allows people greater latitude in choosing representatives.

In spite of this, the Commission considered that the basic qualification of ability to speak and read the English language is grossly inadequate and quite retrogressive. The Commission considered that the nation should strive to inspire the youth to obtain higher levels of education as future leaders. The Commission also considered that the proficiency test required and administered by the Electoral Commission can be easily manipulated. The Commission, therefore, concluded that a better approach is to administer this test across the board regardless of certificates since possession of a certificate in itself is not a guarantee of ability to read and speak English. Hence, in view of the fact that in practice the Electoral Commission uses the Malawi School Certificate of Education or its equivalent as a minimum, the Commission recommends that this position should be adopted as the law. This Recommendation was a subject of heated debate at the Second National Constitution Conference. Some delegates considered an educational qualification irrelevant since the key issue is one of representation. Others however supported the recommendation and considered that this would ensure quality debate in Parliament and better understanding of issues by Members of Parliament.¹²¹

In debating this issue further, the Commission maintained its position and recommends that section 51 (1) (b) should therefore be amended to read as follows—

“(b) is in possession of a Malawi School Certificate of Education or its equivalent and is able to speak and to read the English language well enough to take part in the proceedings of Parliament;”.

The Commission further resolved that section 51 (2) (c) and (g) be amended by deleting the words “within the last seven years” to prevent persons with previous criminal records assuming responsibility in public office .

¹²⁰ Except for Nigeria and Uganda.

¹²¹ See also qualifications for presidential candidates in Chapter 5 which deals with the Executive Branch of Government.

(f) The Office of Speaker

Section 53 provides for the office of the Speaker of the National Assembly and requires that the Speaker shall be elected by a majority of vote of the National Assembly at the first sitting after any dissolution of the National Assembly. The section is silent on experience or qualification of the Speaker.

The Law Commission received submissions to the effect that the law should require an aspirant for the office of Speaker to possess certain experience to qualify for this office. To that end, it was suggested that such aspirant should have served a prior term of five years. It was further submitted that the office should be strengthened to guarantee independence and impartiality by providing for continuity in the event of dissolution of Parliament. The current practice of calling the Speaker to preside over Parliament where it is convened by the Head of State for an emergency meeting was considered to be unsatisfactory.

In discussing these matters, the Commission did not agree with the proposal to require certain experience or qualification for aspirants to the office of Speaker. The Commission considered that the present position on election of Speaker is adequately flexible so as not to unnecessarily constrain the National Assembly say, for example, where there is no member in the National Assembly who has served a prior term in the House. The Commission further considered that a Speaker is first and foremost a member of the National Assembly, hence the normal qualifications required for Members of Parliament should equally apply to the holder of this office.¹²²

On the issue of continuity for the office of the Speaker, the Commission found the current practice in this regard unsatisfactory and had recourse to Constitutions of other African countries such as Nigeria, Zimbabwe and Zambia for guidance. The Commission established that the Constitutions of these nations specifically provide for continuity of the office of Speaker on dissolution of Parliament.

The Commission therefore recommends that section 53 (3) (b) should provide for continuity of the office of Speaker in the event of dissolution of Parliament.¹²³ The amended paragraph (b) should read as follows—

“(b) if the holder ceases to be a member of the National Assembly otherwise than by reason of dissolution of the National Assembly in accordance with section 67; ...”

Further, the Commission recommends introduction of the following new paragraph (c) and renumbering of paragraphs (c) and (d) as paragraphs (d) and (e) respectively—

“(c) when the National Assembly first sits after any dissolution of the National Assembly; ...”

¹²² Delegates to the Second National Constitution Conference unanimously supported this recommendation.

¹²³ Delegates to the Second National Constitution Conference were in support of this recommendation and considered that the office of Speaker shall be protected as is required of a head of a branch of Government and that it shall also enhance independence of the office.

(g) *Convening of Parliament*

Section 59 of the Constitution provides the procedure for convening of the National Assembly. The National Assembly is convened by the Speaker in consultation with the President. The Commission received submissions to the effect that the Speaker must be mandated at law to convene the National Assembly without consulting the President as Head of State in a bid to facilitate the smooth functioning of that institution.

The Commission deliberated on whether the National Assembly may be convened by the Speaker alone without consultation with the President as Head of State. The Commission however observed that section 49 of the Constitution define “Parliament” as to consists of the National Assembly and the President as Head of State. The Commission considered that this definition in itself makes the position of the President as Head of State and a member of Parliament indispensable in the convening of Parliament. The Commission further observed that in an ideal polity, section 59 of the Constitution is the correct parliamentary practice which is also obtaining in comparable jurisdictions.¹²⁴

The Commission further observed that a number of logistical problems may arise if the Speaker were to convene the National Assembly without prior consultation with the President as Head of State. First, the Executive sets out the agenda for the National Assembly through the preparation and presentation of, among other things, Government Bills. Second, notwithstanding section 183 of the Constitution, the Executive has to be aware of a convening of the National Assembly to ensure the availability of financial resources.

The Commission therefore recommends that the status quo under section 59 should be retained.

4. ELECTIONS

4.1 MANAGEMENT OF ELECTIONS

Management of the electoral process is under the purview of the Malawi Electoral Commission which is established under the Constitution. The functions and responsibilities of the Electoral Commission are stipulated in the Constitution as well as under the Electoral Commission Act¹²⁵. Specifically, the Electoral Commission is responsible for the determination of constituency boundaries subject to confirmation by the National Assembly; determination of electoral petitions and complaints related to the conduct of elections; and such other functions as may be prescribed by the Constitution and an Act of Parliament¹²⁶. Under the Electoral Commission Act, the Electoral Commission is empowered to supervise and direct the general conduct of any election and to take necessary measures for the conduct of free and fair elections¹²⁷.

¹²⁴ See, for example, section 93 of the Constitution of Botswana; section 62 (3) of the Constitution of Namibia; section 51 of the Constitution of South Africa; section 88 of the Constitution of Zambia; and Article 62 of the Constitution of Zimbabwe.

¹²⁵ Cap. 2:03 Laws of Malawi.

¹²⁶ Section 75 and 76 of the Constitution.

¹²⁷ Section 8.

Submissions received by the Law Commission during preliminary consultations suggest that most Malawians are not satisfied with the way elections have been managed in the past. They put the blame squarely on the Electoral Commission. It was submitted that the Electoral Commission is, in large measure, inherently not capable of managing the electoral process competently because of flaws with the law relating to the criteria for the appointment of its headship, its composition and its functions. The special Commission, therefore, took time to discuss a number of issues regarding the management of elections.

(a) *Headship of the Electoral Commission*

The Constitution under section 75 (1) provides that the Chairperson of the Electoral Commission shall be a Judge nominated by the Judicial Service Commission. Submissions received by the Law Commission suggested that the position of the head of the Commission should not be the preserve of Judges. The position should be open to all professions or disciplines so that the Electoral Commission may benefit from the services of other competent Malawians who are not necessarily Judges. An argument was put forward that since the primary function of the Electoral Commission as provided by the Constitution and the Electoral Commission Act is management of Elections, Judges may not always be best suited to head the Electoral Commission¹²⁸.

The matter was discussed by the Commission at length. The Commission observed that the post of Chairperson of the Electoral Commission requires a person who is perceived by the public as independent, impartial and of high integrity. The Commission was aware that the choice of judges, at the time of drafting of the Constitution, was based on these factors and security of tenure. It was further considered at that time that, by virtue of their training and experience, Judges are perceived to be capable of analyzing and isolating facts, and determining complex issues impartially.

Nevertheless, the Commission saw merit in the argument that the post of head of the Electoral Commission should not be the preserve of Judges. First, the Commission observed that the appointment of Judges to head the Electoral Commission contradicts the spirit of section 75 (2) of the Constitution which disqualifies any person holding public office from being a member of the Electoral Commission. The Commission observed that the office of a Judge is, by all description, a public office¹²⁹. Although it can be argued that the intention of the express mentioning of Judges in section 75 (1) was to exclude them from the application of section 75 (2), the Commission, nevertheless, concluded that judges should be disqualified from the membership of the Electoral Commission by virtue of being public officers.

Secondly, the Commission observed that the appointment of a Judge to be Chairperson of the Electoral Commission compromises the very independence that is supposed to be associated with the office of the head of the Electoral Commission since independence, if construed broadly, includes being independent of any branch of Government be it the Executive, the Legislature or

¹²⁸ See Constitution Review Consultation Paper p. 34.

¹²⁹ Section 2 of the General Interpretation Act defines a "public office" as any office the holder of which is invested with or performing duties of public nature.

the Judiciary. This sort of independence is not obtainable if a Judge who is a member of the Judiciary is appointed as Chairperson of the Electoral Commission.

Thirdly, the Commission observed that as long as the Electoral Commission is headed by a judge, it defeats a common man's logic when appeals against decisions of the Electoral Commission go to the very same courts that the judge belongs.

The Commission also looked at regional practice regarding this issue and observed that the post of the Chairperson of electoral bodies in South Africa, Uganda and Zambia is not the preserve of Judges. The Commission therefore could not see the justification for maintaining the status quo to the exclusion of other competent Malawians holding appropriate qualifications in other disciplines.

In view of the reasons as stated, the Commission initially took the position that the headship of the Electoral Commission should be open to all professions but that Judges should be disqualified unless retired. Delegates to the Second National Constitution Conference disagreed with the suggestion that serving judges should be expressly excluded. It was argued that judges come with a package of certain attributes required of this office such as integrity, independence and legal knowledge to ably deal with disputes.

In debating this matter further, the Commission learnt that in all the jurisdictions where the headship is open to all professions serving judges have not been excluded. The Commission therefore reconsidered its earlier position and concluded that serving judges should not be excluded from consideration from appointment.

The Commission further recommends that a well elaborate procedure for the appointment of the head of the Electoral Commission should be put in place under the Electoral Commission Act in order to ensure that the person appointed is competent, impartial, independent and of high integrity. Draft provisions to this effect are incorporated at an appropriate place in the Report.

Delegates to the Second National Constitution Conference also raised the issue of continuity of the operations of the Electoral Commission in the event that the post of Chairperson becomes vacant. It was therefore submitted that the office of the Vice-Chairperson should be created to ensure that there is no leadership vacuum at any time.

In deliberating on this issue, the Commission concluded that a better approach is to empower the remaining members to elect one amongst themselves to act as Chairperson in the interim and that this should be provided for under the Electoral Commission Act. The Commission thus did not agree with the suggestion of the delegates and recommends to that effect.

In its Draft Report to the Second National Conference, the Commission observed that, although the Electoral Commission is an independent institution under the Constitution, the independence is not easily appreciated by a common Malawian since one has to read the relevant constitutional provisions in order to appreciate the independence. The Commission, therefore, considered that this

state of affairs negatively affects the integrity of the Electoral Commission from the perspective of a common man. In order to address this problem, the Commission proposed that the word “independent” should come clearly before the name of the Electoral Commission.

Delegates disagreed with this proposal and considered introduction of the word “independent” in the name of the Commission meaningless as the independence must be in the operations. The Commission therefore reconsidered its position and recommends retention of the status quo.

(b) Composition of the Electoral Commission

Composition of the Electoral Commission as provided by section 75 of the Constitution consists of a Chairman and such other members, not being less than six, appointed in accordance with an Act of Parliament. The Electoral Commission Act is the relevant Act envisaged by the Constitution and it requires the President to appoint members of the Electoral Commission in consultation with the leaders of political parties represented in the National Assembly.¹³⁰

The Law Commission received several submissions on this matter. It was suggested by civil society that the composition of the Electoral Commission should exclude political parties as this compromises the independence of the Commission¹³¹ and that only professionals should be appointed to this body. It was also suggested, in the alternative, that membership should combine politicians and civil society representatives to promote independence. Other submissions embraced the current practice of political party representation in the Electoral Commission primarily because political parties are considered to be key players of the electoral process. Hence, it is considered that the inclusion of political parties in the Electoral Commission promotes acceptance of results of elections since they would have been part of the process as party representatives.

In discussing these submissions, the Commission observed that the law as it is, does not provide for party representation on the Electoral Commission. The practice of appointing political nominees has simply developed because the President is required to consult leaders of political parties represented in Parliament and the parties tend to dictate names on political party lines. Hence, the perception has been that, apart from the Judge, membership of the Electoral Commission is on political party representation.

The Commission deliberated over the issue of composition and the way membership of the Electoral Commission is determined at length and recommends that the current practice be changed for several reasons. First, the Commission observed that the current practice is untenable in the sense that it does not provide an entrance route for new political parties that acquire seats in Parliament midstream through by-elections. An example was given that since 1994 membership of the Electoral Commission has comprised of the parties of UDF, MCP and AFORD despite the fact that party representation in Parliament has increased. Second, the Commission agreed with the view that party representation on the Electoral Commission compromises impartiality and

¹³⁰ Section 4 of the Electoral Commission Act.

¹³¹ Malawi Law Commission Consultation Paper pg 35.

independence of the Electoral Commission, more especially when other political parties are not represented and it is practically impossible to include all parties.¹³² The Commission also observed that the current practice has also resulted in discriminating against independent members of Parliament. And finally, the Commission considered that membership of the Electoral Commission is not supposed to be a representation of stakeholders but rather a composition of experts in various fields that may be capable of executing the functions of the Electoral Commission in a competent and impartial manner. This may not be achieved if political party representation is maintained.

The Commission further considered practice in the region, in particular, in countries such as South Africa, Zambia and Uganda and their findings fortified the position that political parties should not be represented on the Electoral Commission¹³³. The Commission therefore recommends that membership of the Commission should comprise of experts and that appointments should consider factors such as non-partisanship and gender balance.

Delegates to the Second National Constitution Conference were divided on this issue. Those who disagreed with the position taken by the Commission argued that political party representation cannot be dispensed with on the Electoral Commission because this ensures post election stability. It was further advised that members nominated by political parties are not necessarily party members but rather persons considered neutral and impartial.

The Commission however maintained its position but agreed to incorporate a requirement that the nominating body should be required to specifically invite nominations from political parties.

The Commission further deliberated on the size of the Electoral Commission in terms of the number of members. The Commission observed that section 75 does not specify the actual number but instead only provides for a minimum number of six members without providing for the maximum number for membership. The Commission considered that leaving this to the appointing authority is to create room for possible abuse of appointing powers since previous experience has shown that it is possible for the appointing authority to exaggerate the membership for the wrong reasons resulting in compromising the effective functioning of an institution. The Commission therefore resolved that in addition to the minimum number, the Constitution should also make provision for a maximum number of members of the Electoral Commission. To that end, the Commission recommends a minimum of five Commissioners and a maximum of seven Commissioners.

Section 75 should, therefore, be amended to read as follows—

“Electoral
Commission

75. (1) There shall be an Electoral Commission which shall consist of not less than five members and **not more than seven members** as may be appointed in accordance with an Act of Parliament.”. ¹³⁴

¹³² Currently there are more than thirty registered political parties in Malawi.

¹³³ See for example section 8 of the South African Constitution.

¹³⁴ It is proposed that details, including the scheme for appointing Commissioners be provided in the Electoral Commission Act.

“(2) A person shall not be qualified to hold the office of member of the Electoral Commission if that person is a Minister, a Deputy Minister, a member of Parliament or a person holding public office:

Provided that a person shall not be so disqualified on account of his or her being a judge.”.

Another fundamental issue discussed by the Commission was the enhancement of independence and impartiality of the Electoral Commission. Two issues came out of this discussion: the appointment procedure and the appointing authority. The Commission observed that matters of appointment procedure and appointment authority might not necessarily be of constitutional domain but it nevertheless discussed the issues because the principles of impartiality and independence which are sought to be achieved by these processes have been introduced by the Constitution itself.

On appointment procedure, the Commission recommends that a transparent procedure should be put in the Electoral Commission Act that would ensure accountability. In that regard, the Commission looked at the procedure currently in place for the appointment of Commissioners for the Malawi Human Rights Commission¹³⁵. The Commission considered that the procedure stipulated for the appointment of Commissioners for the Malawi Human Rights Commission is indeed transparent and recommends the adoption of that procedure, with necessary changes, for the appointment of Commissioners for the Electoral Commission.

On that score, the Commission observed that under the Human Rights Commission Act, the Law Commissioner and the Ombudsman empanel a panel of experts to assess nominees to the Human Rights Commission and recommends that the Electoral Commission Act should also provide for a similar panel to assess nominees to ensure transparency and accountability. The Commission was aware of the dangers of having a fixed panel of experts in an Act of Parliament in that there is no room for flexibility. Nevertheless, the Commission observed that this is a lesser evil than to risk abuse of power where the appointment is left to the discretion of an appointing authority. To that end, the Commission recommends the following persons to form the panel of experts responsible for the assessment of potential Commissioners of the Electoral Commission: the Law Commissioner; Chairperson of the Malawi Human Rights Commission; a Judge of the High Court; a representative of the University of Malawi to be nominated by the Vice-Chancellor; and a representative of civil society organizations.

The assessment committee shall be responsible for the assessment of potential Commissioners on the basis of integrity, political neutrality, qualifications and gender balance. The selected names shall then be forwarded to the appointing authority for a formal appointment. On that note, the Commission recommends that the President should be retained as the appointing authority since enough safeguards will have been put in place for the independence of the Electoral Commission.

¹³⁵ Section 4 of the Human Rights Commission Act.

In summation, the Commission recommends that the Electoral Commission Act¹³⁶ should be amended accordingly to take into account these recommendations. Consequently, the Commission recommends that the Electoral Commission Act be amended by the insertion of a new definition of “Public Appointments Committee” in section 2, and by repealing section 4 of the Act and replacing it with new provisions on appointment criteria of members of the Electoral Commission, the procedure to be followed, and establishment of a selection panel that will be responsible for the assessment of potential members of the Electoral Commission on the basis of the stipulated criteria, as follows—

NEW DEFINITION

““Public Appointments Committee” means the Public Appointments Committee of Parliament established under section 56 (7) of the Constitution.”.

New sections 4, 4A, 4B, 4C and 4D

“Appointment
of members
of the
Commission

4.—(1) The President shall, subject to section 75 of the Constitution and in accordance with section 4B, appoint suitably qualified persons to be members of the Commission, on such terms and conditions as the Public Appointments Committee shall determine.

(2) In appointing members of the Commission pursuant to subsection (1) the President shall have regard to the need for continuity of service on the Commission so that at least half of the members appointed thereunder shall be re-appointed for the next term of office.

(3) Members of the Commission shall be persons of integrity and who possess qualifications, expertise and experience in any relevant fields including law, economics, elections or public administration.

(4) Members of the Commission shall serve full-time.

(5) The remuneration and any allowance of a member of the Commission may not be reduced during his term of office without his consent, and may be increased at such intervals as the Public Appointments Committee may determine.

(6) A member of the Commission may resign from his office at any time by notice in writing to the President.”.

Establishment
of Selection
Panel

4A.—(1) There is hereby established a selection panel (in this Act otherwise referred to as the “Selection Panel”) which shall, in accordance with section 4B, be responsible for inviting and assessing applications for the office of member of the Commission, and making recommendations to the President, whenever a vacancy occurs in the membership of the Commission.

¹³⁶ Cap 2:03

(2) The Selection Panel shall, when inviting applications for the office of member of the Commission, specifically invite nominations from political parties.

(3) The Selection Panel shall consist of—

- (a) Law Commissioner;
- (b) the Chairperson of the Human Rights Commission;
- (c) a Judge of the High Court nominated in that behalf by the Judicial Service Commission; and
- (d) two representatives of civil society organizations nominated by the council of non-governmental organizations in Malawi.

(4) The names of the members of the Selection Panel shall be published in the *Gazette*.

(5) Members of the Selection Panel shall elect a Chairperson from amongst their number, and the Selection Panel shall determine its own procedure.

Procedure for
Appointment
of members
of the
Commission

4B.—(1) The procedure for appointing members of the Commission shall involve first the issuing of a public advertisement inviting applications for the office of member of the Commission, and shall be signed by the chairperson of the Selection Panel.

(2) The advertisement under subsection (1) shall invite applications in writing within thirty days of the date of the advertisement, and the advertisement shall require applicants to submit a curriculum vitae.

(3) The Selection Panel shall—

(a) assess the applications received pursuant to subsection (2), including the reputation of each applicant, and

(i) may seek other or further information pertaining to the applicant from the applicant or any other person or source; and

(ii) shall interview each applicant,

before recommending to the President who among the applicants shall be appointed by the President as members of the Commission; and

(b) according to its assessment under paragraph (a), keep a list of reserved names of applicants to be appointed to fill any vacancy for the remainder of the

term of any member of the Commission who vacates office before the expiry of the term prescribed in section 75 (3) of the Constitution.

(4) A list of the names of applicants recommended by the Selection Panel and the names of the persons appointed by the President and the resultant membership of the Commission shall be published in the *Gazette*.

**Appointment
of Chairperson
of the
Commission**

4C. The President shall appoint the Chairperson of the Commission.”.

**Acting
Chairperson
of the
Commission**

4D. Where the office of the Chairperson of the Commission becomes vacant by virtue of section 75 of the Constitution, the members shall elect one amongst themselves to act as Chairperson in the interim while awaiting the President to appoint a Chairperson in accordance with section 4C.

The Electoral Commission Act should further be amended by deleting the word “President” in the proviso to section 6 (1) and substituting therefor the word “Parliament” for the purposes of entrenching its independence so that although the members of the Commission are appointed by the President, the Commission should be accountable to Parliament.

(c) Functions of the Electoral Commission

Functions of the Electoral Commission are stipulated in the Constitution as well as in the Malawi Electoral Commission Act.¹³⁷ Submissions received by the Law Commission have shown that most people are not satisfied with the way the Electoral Commission executes some of its functions.

First, some submissions attacked the role of the Electoral Commission in determining constituency and ward boundaries for purposes of elections on the basis that the Commission lacks the required competencies in that field. The argument goes on to say that as long as the Electoral Commission is composed of political party representatives and as long as Malawi continues to use majoritarian type of electoral system, the Commission would always be at the mercy of the ruling party and liable to manipulate the number of constituencies in favour of a ruling political party’s stronghold. It was therefore suggested that the function of constituency and ward boundary demarcation should be given to a different independent body that has the relevant expertise.¹³⁸

In debating this matter, the Commission considered the appropriateness of giving constituency and ward boundary demarcation powers to the Electoral Commission as opposed to Parliament, which is composed of elected people. The Commission observed that perhaps it could have been appropriate if Parliament was given powers to determine the boundaries upon considering

¹³⁷ Section 76 of the Constitution and s. 8 of the Electoral Commission Act.

¹³⁸ Constitution Review Issues Paper p. 35.

recommendations from the Electoral Commission so that the power to demarcate constituency and ward boundaries is in the realm of the people through their representatives. The Commission noted that the current situation relegates Parliament to a position of compulsory confirmation of the recommendations of the Electoral Commission as required under section 76 of the Constitution.

The Commission agonized over these issues at length and concurred with the observation that as long as the Electoral Commission is composed of political party representatives, it shall indeed always lack the required competencies of constituency and ward boundary demarcation and the temptation of boundary manipulation shall always be there. The Commission however took solace in the proposal to change the procedure for the appointment of members of the Electoral Commission. With the proposed procedure, if adopted, members of the Electoral Commission will be appointed on the basis of some relevant expertise. The Commission further observed that it is always possible for the Electoral Commission to co-opt or consult experts for the necessary expertise.

On the appropriateness of giving constituency and ward boundary demarcation powers to the Electoral Commission as opposed to Parliament as an elected body, the Commission resolved that much as this might be a valid observation, to do so would mean giving the power to politicians because Members of Parliament, apart from representing the people, do also represent their political parties. Therefore, the number of constituencies and wards can be manipulated on political party lines.

In view of these observations, the Commission recommends that the current practice on demarcation of constituency and ward boundaries should be maintained.

The Electoral Commission is also mandated to handle all electoral disputes in the first instance. Thereafter, matters go to the High Court by way of judicial review or appeal. Preliminary consultations with stakeholders revealed discontent over the electoral dispute resolution mechanism currently in place in Malawi. The process was among other things, criticized for its attendant delays. It was therefore suggested that a special court or tribunal should be established so that appeals or judicial reviews from the determinations of the Electoral Commission should go to this special court or tribunal and not the High Court. It is argued that in such a way, electoral disputes will be expedited and at the same time, presiding officers will acquire some form of expertise on electoral matters with time. This is the position in other countries such as South Africa and Namibia.¹³⁹

The other suggestion is that since the Electoral Commission is, in most cases, directly or indirectly involved in most of the electoral disputes, it should not be allowed to handle electoral disputes even in the first instance because to do so, is to make the Electoral Commission judge over its own matters. This argument therefore supports the establishment of a special court or tribunal to handle electoral disputes, and goes further to suggest that the Electoral Commission should not at anytime be involved in electoral disputes except for the purposes of facilitating procedural requirements. It was therefore suggested that appeals from this proposed special court should go to the High Court.

¹³⁹ See section 18 of South Africa's Electoral Commission Act and section 109-110 of the Namibia Electoral Commission Act.

The Commission discussed the two suggestions at length. First, on the suggestion that a special court or tribunal be established to handle appeals or judicial reviews of matters emanating from determination of the Electoral Commission, the Commission considered that the suggestion is contrary to section 103 of the Constitution. The section restricts the creation of new courts that would, in effect oust the jurisdiction of the High Court. Further, section 103 is an entrenched provision which would require a referendum if it were to be amended.¹⁴⁰ Second, the Commission considered that to sideline the Electoral Commission in all matters of electoral disputes, would create problems. The Commission observed that electoral disputes are of varying nature and scope and that not all electoral disputes can or should be handled by courts. The Commission noted that some electoral disputes are best handled by players on the ground and the Electoral Commission is best suited for that role.

The Commission further considered that creating a special court for electoral disputes would not be a prudent way of utilizing Malawi's scarce resources considering that electoral disputes are essentially periodic.

Consequently, the Commission recommends that the Electoral Commission should maintain its mandate of determining electoral petitions and complaints related to the conduct of elections under section 76 of the Constitution. The Commission further recommends that the Judiciary should however be prevailed upon to create a division in the High Court to deal with cases emanating from electoral disputes. This would enable the High Court to develop some expertise and deal with such matters expeditiously. The Commission was also confident that such an approach would enable the High Court build institutional memory on electoral cases.

Furthermore, the Commission conceded the need to create other channels of dispute resolution so that the Electoral Commission concentrates on its primary function of management of elections. The Commission observed that if the Electoral Commission is pre-occupied with matters of electoral disputes, it might not be able to execute its primary function effectively. To that end, the Commission saw the importance of creating alternative dispute resolution mechanisms and recommends the establishment of tribunals in constituencies to be responsible for solving electoral disputes at source.

However, delegates to the Second National Constitution Conference disagreed with this recommendation on the basis that there is no guarantee that the decisions of the tribunals at constituency level would be consistent. The Commission thus conceded this point and reconsidered its position on this matter.

In debating further on the functions of the Electoral Commission, the Commission observed that the primary function of the Electoral Commission is to ensure free and fair elections at all times in the country. This primary function does not appear anywhere in the Constitution. The Commission therefore recommends the amendment of section 76 of the Constitution to reflect that the primary function of the Electoral Commission is to ensure free and fair elections.

¹⁴⁰ See Section 196 of the Constitution.

Although this function is already captured under the Electoral Commission Act, the Commission nevertheless considered that the prominence of this function can only be appreciated if it is also captured under the Constitution.

The Commission therefore recommends amendment of section 76 of the Constitution in subsection (1) by inserting the words, **“in order to ensure free and fair elections,”** after the word “shall” in the first line.

(d) Holding of Elections

Malawi does not hold its presidential and parliamentary elections simultaneously with local government elections. Submissions during preliminary consultations suggested that it would be better if local government elections were held concurrently with parliamentary and presidential elections in view of Malawi’s limited resources since it would entail using the same officers, the same materials and the same logistical support for the three elections.

The Commission conceded that the suggestion is justifiable for several reasons. First, the Commission considered that holding tripartite elections would save Malawi’s meager resources. The Commission observed that the country has operated without local representatives for a substantial period due to lack of resources and thereby denying the citizenry their right to participate in local governance.

The Commission is also aware that in other countries such as Uganda, presidential, parliamentary and local elections are held simultaneously¹⁴¹. In Zambia, the Local Government Elections Act has just been amended paving way for future local government elections to be held simultaneously with parliamentary and presidential elections.¹⁴²

In view of the reasons mentioned, the Commission recommends the adoption of tripartite elections in Malawi.¹⁴³ The Commission however observed that the adoption of tripartite elections will bring its own challenges. For instance, if the suggestion is adopted, it will mean either deferring local government elections to 2009, or, holding the elections before 2009 but then curtailing the tenure of office of councillors to pave way for tripartite elections in 2009. The further alternative is to hold the local government elections before 2009 and extend the tenure of office for councillors to the next general election after the 2009 general elections.

In view of the public outcry urging for the holding of local government elections as soon as possible, the Commission observed that the first option is not the best to implement without further consultations. The Commission was of the view that the best option is to hold local government elections before the 2009 general elections and curtail the tenure of office of councilors to pave way for tripartite elections in 2009. The only hiccup on this suggestion is that the relevant law is yet to be amended.

In view of the recommendation to adopt tripartite elections, the Commission recommends amendment of section 147 (5) as follows—

¹⁴¹ Section 61(3) of the Uganda Constitution.

¹⁴² See www.nimd.org.

¹⁴³ This recommendation was supported by delegates to the Second National Constitution Conference.

“(5) Local Government elections shall take place concurrently with general elections for members of the National Assembly as prescribed under section 67 (1), and Local Government authorities shall stand dissolved on the 20th of March in the fifth year after their election.”.

4.2 ELECTORAL SYSTEM

(a) *System of Electing a President*

Malawi follows an executive type of government. This entails that the candidate who wins presidential elections forms government. The President is therefore elected directly by the people¹⁴⁴. The Constitution makes provision that the President shall be elected by a majority of the electorate¹⁴⁵. The Parliamentary and Presidential Elections Act makes provision for the determination of results for the election of the President. The candidate who obtains majority of the votes at a poll is declared by the Electoral Commission to have been duly elected. The word “majority” in the Constitution and the Parliamentary and Presidential Election Act has been interpreted to mean “simple majority” by the courts¹⁴⁶. By judicial interpretation therefore, Malawi elects its President on simple majority of the votes cast.

The first submission received in respect of the election of a President is that the President should be elected on a majority of over 50% of the total votes cast since in a presidential system of government, executive power is concentrated in the presidency. It is therefore argued that the President should enjoy the support of absolute majority of votes cast to achieve the required legitimacy.¹⁴⁷ The other suggestion is that Malawi should move to parliamentary system of government where the political party with the highest number of seats in parliament elects a President. The proposal argues that if a President is elected by the political party with the highest number of seats in Parliament, he or she would be assured of support in Parliament and would naturally be acceptable in the eyes of Malawians.¹⁴⁸ Some submissions have suggested that the current position of first past the post for presidential elections be maintained. However, to ensure legitimacy, a winning President must exude national acceptance by winning a certain percentage of votes in all the regions or in a majority or prescribed number of districts¹⁴⁹.

The Commission discussed all the options available for the election of a President as per the submissions. The Commission rejected a parliamentary system of government on the basis that it does not avail to the electorate the opportunity of electing a President of their choice. Although a parliamentary government has its own advantages, the Commission nevertheless considered that the system of electing a President directly by the electorate makes the elected President accountable to the electorate unlike in parliamentary systems where the President is primarily accountable to the Parliament that elected him.

¹⁴⁴ Section 80 of the Constitution.

¹⁴⁵ *ibid.*

¹⁴⁶ *Gwanda Chakuamba et al vs Attorney General et al* cc no. IB of 1999.

¹⁴⁷ Malawi Law Commission, Constitution Review Issues Paper p. 30.

¹⁴⁸ *Ibid* p. 31.

¹⁴⁹ Although not expressly stated in this submission, this also seems to suggest a second ballot where this percentage is not achieved at first ballot.

Similarly, the Commission rejected the proposal that a winning president must win a certain percentage of votes in all the regions or in a majority or prescribed number of districts. The Commission observed that, theoretically, it would be possible for the country to fail to achieve this threshold percentage after second or third ballot.

The Commission was therefore left with two options: to continue electing a President using simple majority of the votes cast or to start electing a President using absolute majority of votes cast¹⁵⁰.

It was the view of the Commission that the system of electing a President on the basis of absolute majority of the votes cast indeed accords legitimacy to the elected President. The Commission observed that legitimacy to rule is a prerequisite to a sustainable democracy. With the system of first past the post, it is possible to have a President elected with only less than 20% of the votes cast especially in view of the current escalation of candidates participating in presidential elections. The Commission observed that in 1999, the President was elected by more than 50 % of the votes cast but in 2004 the President was elected by 34% of the votes casts. This confirmed the fear that in future there could be a President elected with less than 20% of the votes cast. The Commission further considered that if the President were elected by absolute majority of the votes cast, it would promote the culture of legitimate pre-election political alliances. The Commission also observed that the special Law Commission on the Technical Review of the Constitution made the same recommendation in 1998 when it said that “it would be inconsistent with the President’s duty under section 88 (2) to provide “executive leadership in the interest of national unity” for him or her to be elected on a minority vote”.¹⁵¹

The Commission also had occasion to look at relevant provisions of Constitutions of other countries. The Commission observed that in Namibia, the President is elected by an absolute majority of the votes and if absolute majority is not obtained in the first round, the election is re-conducted until there is a clear absolute majority of the votes¹⁵². Similarly, Uganda elects its President by an absolute majority of the votes and a re-run is conducted where this is not obtained in the first round¹⁵³.

During the discussion, the Commission did not lose sight of the fact that electing a President using the system of 50 + 1%, which essentially means a second ballot where this is not achieved at first ballot, is expensive and could prove unsustainable having regard to Malawi’s meager resources. It was further observed that this might be one of the reasons why the 1998 recommendation by the special Law Commission on the Technical Review of the Constitution was not implemented. In addition to that, it was observed that re-runs of Presidential elections is potentially a recipe for civil conflicts. The Commission draw lessons

¹⁵⁰ Note that the Commission restricted itself to “a majority of votes cast” and not majority of registered people because the case of Gwanda Chakuamba et al defined the word “majority of electorate” “to mean “majority of the votes cast”.

¹⁵¹ However this recommendation was made before the Gwanda Chakuamba case and in the opinion of the special Law Commission, “majority” was construed as 50+1%.

¹⁵² Section 28 of the Namibia constitution.

¹⁵³ Section 103 of Uganda constitution.

from situations in Liberia and Democratic Republic of Congo, where re-runs on presidential elections were associated with civil conflicts. It was also noted that re-runs of presidential elections could, in some cases, lead to voter apathy. In the absence of compulsory voting, some voters would not have the incentive of participating in the second ballot where their favorite candidate is not participating. In that sense it would still be difficult to achieve the required legitimacy where a considerable number of voters that participated in the first ballot fail to participate in the second ballot.

The Commission had a lengthy debate on these issues and in the end, nevertheless, resolved that a President should be elected by absolute majority of the votes cast to ensure legitimacy.¹⁵⁴ In view of this, the Commission recommends that section 80 (2) of the Constitution should be amended to read as follows—

“(2) The President shall be elected by a majority of more than fifty percent of the valid votes cast through direct, universal and equal suffrage and, where such majority is not obtained in the first ballot, the necessary number of ballots between the presidential candidate who obtained the greatest number of votes and the runner up, together with their respective Vice-Presidential Candidates shall be conducted until such result is reached.”.

Following this proposed constitutional amendment, the Parliamentary and Presidential Elections Act should consequently be amended by redrafting section 96 (5) to read as follows—

“(5) Subject to this Act, in any election—

(a) the Parliamentary candidate who obtains the greatest number of votes at the poll; and

(b) the Presidential candidate who obtains the majority of more than fifty per cent of the valid votes cast at the poll, shall be declared by the Commission to have been duly elected.”.

(b) System of Electing Members of Parliament

The system of electing Members of Parliament is provided by the Constitution and the Parliamentary and Presidential Elections Act. Section 62 (2) of the Constitution provides that each constituency shall freely elect any person, subject to the Constitution and an Act of Parliament, to represent it as a member of the National Assembly in such manner as may be prescribed by the Constitution or an Act of Parliament. The Constitution does not prescribe the “manner” and left this to be prescribed by an Act of Parliament, in this case the Parliamentary and Presidential Elections Act.¹⁵⁵ provides that a candidate who obtains the majority of the votes at the poll is the winner. Hence, on the basis of the case of the *Gwanda Chakuamba, et al*, Malawi elects its Members of Parliament through the first past the post system. Thus the candidate who scores most votes than other candidates is declared a winner.

¹⁵⁴ The majority of the delegates at the Second National Conference were in support of the position taken by the Commission on this matter. There was however a minority view which considered the expense associated with the second ballot unwarranted.

¹⁵⁵ Cap 2:01.

Submissions and consultations revealed that some stakeholders would like Malawi to adopt the system of proportional representation, where parliamentary seats are allocated to parties on the strength of the percentage of votes obtained by a party at an election.¹⁵⁶ Several reasons have been put forward in support of this suggestion. First, it is argued that because all votes are taken into account when calculating the national percentage scored by each party, there are no wasted votes in the proportional representation system. Implicitly, more people would be encouraged to participate in elections knowing very well that their votes will always play a role in the results of an election. Second, proportional representation system solves the problem of by-elections, which is considered expensive and unsustainable by most Malawians. Third, it is also argued that since most candidates who stand for elections as Members of Parliament are nominated by parties, the likelihood of vulnerable groups like women and people with disabilities making it to the National Assembly is high compared with first past the post system. Fourth, it has been argued that because votes are not wasted, proportional representation generally reflects wishes of the electorate in a fairer manner unlike in first past the post system.¹⁵⁷ Finally, it has been argued that the system of proportional representation provides a more realistic opportunity for smaller parties to find their way into Parliament on the basis of their national vote.

In discussing this matter, the Commission observed that changing an electoral system is a serious issue which must be considered with sobriety. While the Commission did not disagree with the observation made in support of proportional representation the Commission noted that it is possible to address some of the issues raised while maintaining the current system of first past the post. For instance, representation of women and people with disabilities may be addressed if parties are compelled, through legislation, to adopt a quota system within their structures. The Political Parties (Registration and Regulation) Act could be utilized for this purpose. The Commission further observed that most Malawians have demonstrated through their submissions that they want Members of Parliament to be accountable to their constituents and not to their political parties. The Commission noted that in large measure, if proportional representation is adopted, Members of Parliament shall represent political parties and not constituents. This in turn would give too much power to party leaders at the expense of Members of Parliament being accountable to the people. The Commission noted that there are indeed some countries within the region that have adopted the system of proportional representation,¹⁵⁸ but nevertheless took the view that the current first past the post system should be maintained for Malawi since there is no serious issue that would necessitate change of the current electoral system.¹⁵⁹

¹⁵⁶ This means that if Party "A" gets 60% of the National Votes it will be allocated 60% of the number of seats in the National Assembly using an agreed formula.

¹⁵⁷ See Constitution Review Issues Paper p. 23 and Constitution Review Consultation Paper p. 38.

¹⁵⁸ Countries such as South Africa, Namibia, Mozambique, Angola, all use the system of proportional representation. Lesotho uses a mixture of proportional representation and first past the post.

¹⁵⁹ This position was supported by the majority of the delegates to the Second National Constitution Conference. The minority view however considered that proportional representation would guarantee great participation of women and eliminate regionalism.

(c) *Eligibility to vote*

Under section 77 of the Constitution, all persons are eligible to vote in any general election, by-election, presidential election, local government election or in a referendum as long as certain requirements are fulfilled. Among other requirements, the persons must have attained the age of eighteen years at the date of the application for registration. Thus, a person can be denied the right to vote even if he or she is eighteen at the date of voting because the right to vote accrues at the time of registration and not on the voting date.

Views were expressed suggesting that the right to vote should accrue at the date of voting.¹⁶⁰ In other words, if a person can demonstrate that he or she will be eighteen years at the date of voting, he or she should be allowed to register for elections even though he or she is not eighteen years old at the date of registration. It was argued that to bar a person who is eighteen on a polling day from voting on the basis that he or she was not yet eighteen on registration day is grossly unfair. This suggestion is in line with section 15 of the Parliamentary and Presidential Elections Act.¹⁶¹ Under that section, a person can register for elections if on or before the polling day he or she shall have attained the required age of eighteen years. The Commission, therefore concluded that there is a contradiction between the Act and the Constitution.

The Commission observed that allowing persons who have not attained the age of eighteen years on account that they will have attained the required age at the date of voting is not appropriate since it would create loopholes for rigging in the system. Secondly, the Commission considered it important to determine the electorate at the time of registration for the purposes of planning. The Commission therefore recommends retention of section 77 (2). Consequently section 15 of the Parliamentary and Presidential Elections Act should be amended by deleting the phrase “polling day” and substituting therefor with the phrase “**registration day**” so that the section is consistent with the Constitution.

Delegates to the Second National Constitution Conference were generally dissatisfied with the position taken by the Commission on this matter and considered it unfair to bar a person who is eighteen on polling day on account of the fact that she was not eighteen on registration day.

The Commission nevertheless maintained its position in view of the reasons indicated earlier and also considered that the right to vote accrues on the date of registration.

(d) *By-elections*

The Law Commission received a submission that instances when by-elections shall be conducted should be provided for in the Constitution. It was further suggested that only those parties that participated in the general elections should be allowed to participate in by-elections since, so it was argued, a by-election is a continuation of a general election.¹⁶²

¹⁶⁰ Malawi Law Commission; Consultation Paper pg 40.

¹⁶¹ Section 15.

¹⁶² Constitution Review Consultation Paper p. 40.

The Commission observed that matters of by-elections are already covered in the Constitution. The Commission also did not see merit in the suggestion that only parties that participated in the general elections should be allowed to participate in a by-election. The Commission therefore recommends retention of the current practice.

(e) *Period of Holding General Elections*

The Constitution provides that the polling day for any general election shall be a Tuesday in the third week of May every five years. If this is not practicable, the polling shall be held on a day within seven days from that Tuesday appointed by the Electoral Commission.¹⁶³

Preliminary consultations revealed that some people are not satisfied with the stipulated period of holding general elections as provided by the Constitution. It was argued that the campaign period preceding the general elections is adversely affected by the rainy and farming season and therefore not appropriate for campaigns.¹⁶⁴ It was also observed that the holding of elections in May means holding general elections during the end of a financial year and that this may have budgetary implications.¹⁶⁵ Other stakeholders questioned the wisdom of having details such as dates of general elections¹⁶⁶ in a Constitution.

The Commission considered the submissions and observed that the alleged difficulties associated with campaigning during the rainy and farming season is not adequate reason to justify a Constitution amendment to change the dates for the General Elections as provided by the Constitution. The Commission further noted that even though the month of May is towards the end of a financial year, that in itself is not a hindrance to financial planning as Treasury would have known about the general elections at the start of the financial year and therefore would have included that in the budget. The Commission noted that fixing dates of general elections in the Constitution is perhaps a matter of detail but nevertheless concluded that this is a necessary detail which provides certainty in terms of tenure of office for elected officers. The Commission, therefore, recommends retention of the current status.

(f) *Period of Announcing Election Results*

Under the Parliamentary and Presidential Elections Act¹⁶⁷ the Electoral Commission is required to publish in the *Gazette* and by radio broadcast and in at least one issue of a news paper, the results of an election within eight days from the last polling day and not *later*¹⁶⁸ than forty-eight hours from the conclusion of the determination thereof.

It has been suggested by some stakeholders that the law should provide for a minimum of seven days before announcement of results to allow ample time for all polling centers to submit their findings to returning officers.¹⁶⁹

¹⁶³ Section 67.

¹⁶⁴ Constitution Review Consultation Paper p. 38.

¹⁶⁵ Ibid

¹⁶⁶ Ibid

¹⁶⁷ Section 99

¹⁶⁸ Probably the Act should have said not "earlier".

¹⁶⁹ Constitution Review Consultation Paper p. 39.

The Commission considered this suggestion and resolved that since the issue is a statutory matter it will be dealt with when the Parliamentary and Presidential Elections Act is being reviewed.

5. THE EXECUTIVE

5.1 The PRESIDENT AND THE FIRST VICE-PRESIDENT

Executive authority in the Republic of Malawi is vested in the President who is also Head of State and Government.¹⁷⁰ The President is assisted in the exercise of his or her duties by the First and Second Vice-Presidents and a Cabinet.¹⁷¹ The First Vice-President is elected concurrently with the President¹⁷² but the Second Vice-President is appointed by the President in the exercise of his or her discretion should it be in the national interest to do so.¹⁷³ The Cabinet, consisting of Ministers and Deputy Ministers is also appointed by the President. The President appoints members of the Cabinet in his or her discretion both in terms of the person's appointed and the number of persons appointed.

Submissions received by the Law Commission during the preliminary consultations suggest that most Malawians are dissatisfied with a number of issues regarding these high offices.¹⁷⁴ The consultations also reveal dissatisfaction with certain constitutional provisions relating to the Presidency which are perceived as being either too vague or inappropriate. The Commission, therefore, looked at each of these issues in turn, for the purpose of coming up with specific findings and recommendations as follows—

(a) *Tenure*

The Constitution under section 83 (1), provides that the “President shall hold office for five years from the date his or her oath is administered, but shall continue in office until his or her successor has been sworn in.” Under section 83 (2) both the First Vice-President and Second Vice-President shall hold office from the date they are sworn-into office until the end of the President’s term of office unless the Constitution provides for their earlier release from discharging the duties of their office. The First Vice-President and Second Vice-President have a similar tenure as the President, the only difference being that their term may come to an end sooner than five years in accordance with the Constitution.¹⁷⁵ The President, First Vice-President and Second Vice-President are constitutionally restricted to serve in their respective capacities for a maximum of two consecutive terms.¹⁷⁶ It is important to note that any appointment or election to fill a vacancy in the office of the President or First Vice-President is not regarded as a term for the purposes of computing tenure.¹⁷⁷

¹⁷⁰ Section 78 of the Constitution.

¹⁷¹ Section 79, 80 (5) of the Constitution.

¹⁷² Section 80 (4) of the Constitution.

¹⁷³ Section 80 (5) of the Constitution.

¹⁷⁴ Constitution Review Consultation Paper pp. 41-47, Constitution Review Issues Paper pp. 29-37.

¹⁷⁵ Section 83 (2).

¹⁷⁶ Section 83 (3).

¹⁷⁷ *ibid.*

Stakeholders have expressed very strong views about the wording of section 83 (3) of the Constitution.¹⁷⁸ The concern is that unless the section is improved, an ex-President who has served his or her two terms can bounce back after serving two “consecutive terms”. In its deliberation on this matter, the Commission unanimously refused to subscribe to the view that, having regard to the current wording of section 83 (3) and the mischief of that provision, a President, First Vice-President or Second Vice-President who has served in his or her position as such for two consecutive terms would be eligible to “bounce back” and serve a further term. It was the unanimous view of the Commission that such a reading of the provision would defeat the whole purpose of the provision, namely, that a President, First Vice-President or Second Vice-President should serve in his or her position as such for only two terms.¹⁷⁹ The Commission, nevertheless, noted that the wording of section 83 (3) is liable to misinterpretation, particularly where a President, First Vice-President or Second Vice-President does not serve two consecutive terms but one term of five years, and is subsequently elected or appointed, as the case may be, to the office of President, First Vice-President or Second Vice-President.

In order to avoid any possible misinterpretation in relation to a President, First Vice-President or Second Vice-President who serves only one term of five years, the Commission recommends two solutions. First, the Commission recommends the deletion of the word “consecutive” in section 83 (3). This shall make it clear that a person can only be President of Malawi for a maximum of two terms whether consecutive or not.

Consequently, the amended section 83(3) is to read as follows—

“83.—(3) The President and the Vice-President may serve in their respective capacities a maximum of two terms, but when a person is elected or appointed to fill a vacancy in the office of President or Vice-President, the period between the election or appointment and the next election of a president shall not be regarded as a term.”.¹⁸⁰

In order to further remove any possibility of doubt on the recommendation of the Commission that a President can only serve in that office for two terms, the Commission also recommends an amendment to section 80 subsection (7) which sets out the eligibility requirements for nomination as a candidate for election as President or Vice President. Thus, the Commission recommends the addition of a new eligibility requirement to constitute a new paragraph (*h*) to section 80 subsection (7) as follows—

(h) has served in the office of President or Vice-President, as the case may be, for two terms.

The Commission also recommends that the Parliamentary and Presidential Elections Act¹⁸¹ be amended to include an eligibility provision barring any presidential candidate who has served for two terms from standing for and being

¹⁷⁸ Constitution Review Consultation Paper p. 45 and Constitution Review Issues Paper p. 37.

¹⁷⁹ Delegates to the Second National Constitution Conference generally were in support of this interpretation by the Commission and cautioned that its final recommendation should not be perceived as targeting individuals.

¹⁸⁰ Also note that the Commission has recommended the abolition of the Office of the Second Vice-President at an appropriate stage.

¹⁸¹ Cap. 2:01 of the Laws of Malawi.

elected to the office of President. Section 49 (1) (e) of the Act should therefore be amended to include an insertion of an additional requirement that the candidate should also make a statutory declaration to the effect that he or she has not stood for election to the office of President and won elections on more than two previous occasions. The amended section 49 (1) (e) of the Parliamentary and Presidential Elections Act is to read as follows—

(e) shall be accompanied with evidence or a statutory declaration by the candidate made before a magistrate or a Commissioner for Oaths that the candidate—

(i) is a citizen of Malawi;

(ii) has attained the minimum age required by the Constitution for the election to the office of President; and

(iii) has not served in the Office of President or Vice-President for two terms.

(b) Concurrent Election

Section 80 (4) of the Constitution provides for the concurrent election of the President and the First Vice-President whose names appear on the same ballot paper. Consultations on the issue expressed three different views.¹⁸² The first view supports the retention of the *status quo* bearing in mind the similarities of the job descriptions of the President and his Vice-President. It was also noted that as the Vice-President automatically succeeds the President in the case of death, resignation or impeachment, he or she needs the mandate of the electorate, attained through a concurrent election, to gain legitimacy for the office. The second view on the other hand suggests that the President should be empowered to appoint his Vice-President after ascending to office. This scenario, it is argued, would ensure a proper working relationship between the two. The final view was more radical in requiring the Presidential candidate who came second in the elections to become Vice-President. The argument in support of this view is that this person would attain legitimacy by the very fact of being the people's second choice.

The Commission observed that section 80 (3) of the Constitution requires every presidential candidate to declare his or her first Vice-President at the time of his or her nomination. It was the Commission's considered view that this provision underscores the fact that the election and prior nomination of a presidential candidate is part of a political process as distinct from a legal issue and should therefore not be the subject of law reform. Running-mates are determined during political party conventions for reasons of political expediency which the legal machinery is ill-suited to prescribe. The Commission was therefore satisfied that the office of the President and the Vice-President must be understood as a joint "package" which cannot be separated.

¹⁸² Constitution Review Consultation Paper p. 43.

The Commission further considered the practical problems that may arise if the Presidential candidate who came second were to be made Vice-President. First, such an arrangement would force on Government a Vice-President from the opposition whose agenda may be different. This may result in tensions between the two. Second, in the event that a vacancy occurs in the office of the President, the opposition may take over and this might raise serious concerns on the mandate of such government.

The Commission thus resolved to maintain the *status quo*.

(c) *Eligibility Criteria*

According to section 80 (6) of the Constitution, a person is only eligible for election to the office of either President or Vice-President if he is a citizen of Malawi by birth or descent and has attained the age of thirty five years.

Submissions on the eligibility criteria were threefold. The first submission was on age. There were proposals to lower the minimum age,¹⁸³ whilst others proposed introducing a maximum age limit of seventy to ensure that holders of this high office are able to keep up with the demands of the office. Another proposal in this regard was to raise the minimum age limit to forty to ensure wisdom and maturity for the office.

The Commission was aware that it is generally acceptable amongst liberal democracies that the office of President requires a higher minimum age than all other statutory offices.¹⁸⁴ The presidency is vested with such a wide range of high powers and duties and, therefore, requires more from those who aspire to the office. In this regard, the Commission nevertheless considered the age of thirty-five adequate and appropriate to give young persons a chance to govern and at the same time allow for a substantial level of maturity to meet the challenges presented by the high office.

During the Second National Constitution Conference, there was a general dissatisfaction with this position from the constituency representing the youth. The example of the President of the Democratic Republic of Congo, Joseph Kabila was cited as an example of a person who ascended to the high office at a younger age. The Commission in debating the issue further considered that the example cited is not the most appropriate since the succession in that country was done in a most unusual manner. The Commission thus maintains its position and recommends retention of the *status quo*.

In terms of the upper age limit, the Commission considered that this is a political issue best left to the political process. Political parties should be given enough leverage to field a candidate who is acceptable to the electorate and if this candidate fails to convince the electorate of his or her youthful exuberance, such candidate will be naturally removed by the process. The Commission, therefore, resolved not to make any prescriptions regarding a maximum age limit.¹⁸⁵

¹⁸³ Constitution Review Consultation Paper p. 42.

¹⁸⁴ Constitution Review Discussion Paper No.4

¹⁸⁵ Delegates to the Second National Constitution Conference supported this position.

The third submission was on educational eligibility criteria. The Constitution is silent on this matter. However, stakeholders considered that the functions that the President executes as Head of State and Government calls for some minimum qualifications before a presidential candidate can present himself or herself for election.

The Commission considered a number of issues in debating this matter.

First, it was argued that imposing some minimum academic qualification might be perceived to be discriminatory. The Commission however considered that though such a requirement may seem *prima facie* to be discriminatory against the majority of Malawians without any academic qualification, matters of leadership are by their very nature discriminatory since only a few can rule and those that do must be subjected to rigorous tests of which an academic qualification is one. Second, it was the view of the Commission that a minimum academic requirement would inspire many Malawians to aspire towards attaining high academic qualifications. Third, the Commission considered that the President is the ultimate authority and that though he or she relies on advisors, his or her decisions should be grounded on a firm academic base.

In debating this issue further, the Commission also had recourse to Constitutions of other countries in the region and observed that the Constitution of Nigeria requires Presidential candidates to at least be educated up to school certificate level or its equivalent.¹⁸⁶ The same position obtains in Ghana.

The Commission however settled for a minimum academic qualification of a first university degree from a recognizable institution for all aspirants to this highest office for the reasons stated earlier. Delegates to the Second National Constitution Conference were divided on this issue. Those who disagreed with the position taken by the Commission considered the requirement of a degree too high and argued that in any event possession of a degree does not guarantee wisdom and competence in handling matters of State. It was further feared that such a requirement may adversely affect people from those districts that historically have produced fewer graduates.

The Commission however, maintained its position on the understanding that a President is the Chief Executive of a nation and, as such, he should be in a position to understand global issues and appreciate technical advice given by advisors.

The Commission therefore recommends that section 80 (6) of the Constitution should be amended to read as follows—

“(c) has attained a minimum of a first degree from a recognized institution.”.

The third submission related to criminal records of the aspirants to the Presidency. Section 80 (7) (c) of the Constitution makes ineligible or disqualifies any person who has within the seven years preceding the election been convicted of a crime involving dishonesty or moral turpitude. Section 80 (7) (g) further makes ineligible any person who has within the seven years preceding the election, been convicted of any violation of any law relating to election of the President or Members of Parliament.

¹⁸⁶ See section 131 (d) of the Nigerian Constitution.

Delegates to the First National Constitution Conference were of the view that the seven year rule should be abolished and all candidates for election to the Presidency should have no criminal record. The Commission endorsed this view after a lengthy deliberation. The Commission was of the view that the dignity of the office of President requires that it be occupied by a person of unquestionable character. The Commission however recommends that the restriction is to apply only to crimes involving dishonesty and moral turpitude. Hence, offences such as road traffic offences would not be a bar for standing for election to the presidency.

This position was supported by delegates to the Second National Constitution Conference. It was however suggested that a definition of moral turpitude should be included in the provision or, alternatively that offences that fall in this category should be outlined. In considering this submission, the Commission observed that interpretation of the expression “moral turpitude” is better left to the courts.¹⁸⁷

The Commission therefore recommends the deletion of the words “within the last seven years”, from sections 80 (7) (c) and (g). The amended section 80 (7) (c) and (g) is to read as follows—

(c) has been convicted by a competent court of a crime involving dishonesty or moral turpitude; and

...

(g) has been convicted by competent court of any violation of any law relating to election of the President or election of Members of Parliament.

The Commission also considered section 94 of the Constitution which makes provision for the appointment of Ministers and Deputy Ministers. The Commission observed that a similar disqualification to appointment as a Minister or Deputy Minister on the grounds of a past conviction for a crime involving dishonesty or moral turpitude within the last seven years is provided for in section 94 (3) (c). The Commission took the view that Ministers effectively administer the executive authority of the President. The Commission, therefore, recommends the abolition of the seven year exemption rule in this regard.

The Commission further noted that similar disqualifications apply to Members of Parliament under section 51 (2) (c) and (g) of the Constitution. As Members of Parliament are also supposed to be of exemplary character and can easily ascend to ministerial posts, the Commission recommends that the same rule should apply to them. This shall necessitate amendments to section 51 (2) (c) and (g) to that effect.

(d) Swearing In

The persons elected to the Office of President and First Vice-President or appointed to the office of Second Vice-President are required to be sworn into office within thirty days of election or appointment in accordance with section 81 (3) of the Constitution. The outgoing President is obliged to serve until the newly elected President is sworn into office.¹⁸⁸ Stakeholders raised various concerns on

¹⁸⁷ See Tembo (JZU) and Another Vs AG Civil Appeal no. 50 of 2003

¹⁸⁸ Section 81 (4).

these provisions. Firstly, it was pointed out that there is no provision on a minimum period before the swearing in of a President so as to allow for any contests to the elections to be investigated and adjudicated through the courts. Secondly, it was suggested that there ought to be a maximum period after the election following which the President must be sworn into office to ensure a proper transition of power. Lastly, concerns were raised that the maximum post-election period before swearing in should not be too long as it would encroach upon the newly elected Presidents tenure and unnecessarily elongate the tenure of the outgoing President. Time limits for swearing in raised in the various submissions ranged from no earlier than 30 days and not later than 45 to 60 days after the election.¹⁸⁹

The Commission observed that it is common parlance in the aftermath of African elections for judicial contest of election results. Early or immediate swearing into office always raises suspicion of an attempt to cover up any irregularity in the conduct and administration of the elections. The Commission considered that this problem relates to the management of the Electoral Commission itself rather than with the electoral process. As such, the Commission considered that this is a problem that can only be solved by ensuring the independence and competence of the Electoral Commission, and not by an amendment to the Constitution.

In addition, the Commission noted that the need to allow for investigations and final settlement of electoral disputes cannot be a reason to dictate the minimum period before which a Presidential candidate can be sworn in. The Commission was aware that all electoral irregularities fall under the ambit of the Electoral Commission. Under the Parliamentary and Presidential Elections Act,¹⁹⁰ the Electoral Commission is competent to receive written complaints alleging irregularity at any stage¹⁹¹ and that the Commission is mandated to take necessary action to correct the irregularity and its effects. Complaints relating to the election of President are however always complex and are usually not resolved to the satisfaction of both parties by the Commission and so an appeal may be filed to the High Court. It is however not easy to put a time limit to the processes outlined above.

Comparative study on other Constitutions within the region and beyond revealed that those jurisdictions that have a minimum time limit have done so without reference to any dispute resolution mechanism. Under the Constitutions of Greece and Sierra Leone for example, a President elect assumes office either on the day following the expiration of the term of the outgoing President or a day after his or her election.¹⁹²

Under the South African Constitution,¹⁹³ a President must assume office within five days of election by Parliament. The Kenyan Constitution requires that a person elected as President shall assume office as soon as he or she is declared to be elected.

189 Constitution Review Issues Paper pp. 32-33 and Constitution Review Discussion Paper No. 4 p.10

190 Cap 2:01 of Laws of Malawi.

191 Sections 113 and 114.

192 Articles 33 and 42 (3) respectively.

193 Section 87.

In view of the comparative analysis, the Commission resolved on a minimum period of seven days before which a President and Vice-President cannot be sworn into office. In terms of the maximum period within which a Presidential elect should be sworn in, the Commission retained the period of 30 days. This would ensure that the outgoing President does not hold office too long beyond their period of tenure, whilst giving some time, albeit limited, to deal with disputes.

The Commission therefore recommends that section 81 (3) of the Constitution should be amended to read as follows—

“(3) A person elected to be President or Vice-President shall be sworn into office, in accordance with subsection (1), after seven days but no later than thirty days of being elected.”.

The Commission also recommends that a new provision should be inserted in the Parliamentary and Presidential Elections Act providing for the speedy resolution of disputes. The Commission therefore recommends that section 113 be renumbered section **113 (1)** and a new subsection **(2)** be inserted as follows—

“(2) Where the complaint alleges an irregularity that would nullify the results of an election, the lower level authority or the Commission in deciding on the matter shall do so before the expiration of seven days from the date the election results are announced.”.

Similarly, the Commission recommends the amendment of section 114 of the Parliamentary and Presidential Elections Act adding a paragraph **(c)** to subsection **(2)** as follows—

“(c) shall expeditiously decide the matter so as to ensure that President elect is sworn into office within the period specified by the Constitution.”.

(e) Simultaneous Vacancies

Section 85 of the Constitution empowers Cabinet to elect an Acting President and Acting First Vice-President from amongst its members should both the offices of President and First Vice-President fall vacant simultaneously. The persons elected in this regard may hold office for not more than sixty days if there is more than one year unexpired on the Presidential term or may serve for the remainder of the term if four years of the Presidential term has expired.

Concerns were raised from some quarters on the undesirability of non-elected persons succeeding to the office of Acting President and Acting Vice-President.

This issue greatly exercised the minds of the Commission which considered various alternatives to the *status quo*. The Commission was concerned not only with the issue of undemocratically elected persons succeeding to high office but also with the potentially uncertain process of awaiting cabinet to meet and fill in the simultaneous vacancies. In the interim, whilst awaiting cabinet to meet, a power vacuum is created. Issues raised in this regard also brought out the problem of which member of cabinet would convene a meeting to elect the acting President and First Vice-President in the absence of a Second Vice-President.

At one stage the Commission considered the possibility of reverting power to the people by providing for the democratically elected Speaker of the National Assembly to be the Acting President pending elections. However, the Commission was aware that countries with this practice usually use the Parliamentary system of Government and a President is elected by Parliament. Further, the Commission was aware that a Speaker of the National Assembly may be elected from the opposition. Such a person may frustrate the strategies and policies of the ruling party, thus creating confusion during his or her interim tenure.

The Commission finally resolved to maintain the *status quo* which works within a structured system for ensuring that the office of the Presidency is kept running even in the event of simultaneous vacancies in the offices of the President and Vice-President. The State machinery in the office of the President and Cabinet is supported by civil servants such as the Chief Secretary and other staff members who are responsible for convening Cabinet in situations of simultaneous vacancies in the Presidency and the Vice-Presidency. With this strong administrative support system in place, the issue of which member of Cabinet would be responsible for convening Cabinet does not arise. The Commission was also aware that constitutions of other countries in the region such as Zambia have made similar provision. The Commission thus recommends retention of the *status quo*.

(f) *Temporary Vacancy*

Section 87 of the Constitution provides for the filling of the office of the President in the case of a temporary vacancy due to incapacitation.

The issue of temporary absence of the President has not been addressed. Consultations undertaken by the Law Commission prior to the First National Constitution Conference expressed general dissatisfaction with the present arrangements regarding the issue of temporary absence by the President from the country. The Commission resolved that continuity of governance at all times is essential and the Commission had recourse to Constitutions of other countries to determine how this issue has been dealt with.

Comparative study from other jurisdictions produced varied results. The Constitution of Nigeria provides that wherever the President is proceeding on vacation and submits a written declaration to that effect to the President of the Senate and the House of Representatives, the functions of his office are discharged by the Vice-President as Acting President unless the President's declaration states otherwise.¹⁹⁴ The Commission observed that the Nigerian provision has the advantage of flexibility and caters for situations where both the President and Vice-President may be temporarily absent simultaneously. In that case, the President may declare who should act as President. The Namibian Constitution on the other hand addresses the problem by providing for a specific line of succession made up of the Prime Minister, the Deputy Prime Minister and a person appointed by cabinet, in that order.¹⁹⁵ These persons may act in the office of the President where necessary or expedient due to a temporary absence from the country or because of pressure of work.

¹⁹⁴ See section 145 of the Nigerian Constitution.

¹⁹⁵ Article 34.

The Ghana Constitution simply requires the Vice President to act as President where there is a temporary absence of the President. The Constitution of Zambia requires the Vice President to act as President and if the Vice President is also unable to perform the functions of the office due to physical or mental infirmity or absence from Zambia, then Cabinet is empowered to elect one among themselves to act. This only applies where the President is unable to authorize other person in writing to act on his behalf.

After lengthy deliberations, the Commission decided to opt for a provision on succession, making specific office holders eligible to assume the duties of the office of President in cases of temporary absence of the President. The Commission further recommends that authority for temporary exercise of the functions of President be provided for in writing to avoid any doubt.

The Commission, therefore, recommends the insertion of a new section **85 A** in the Constitution, on succession, as follows—

“Temporary
vacancy

85A.—(1) Subject to subsection (2), where a temporary vacancy is created due to an absence from the country by the President on vacation or otherwise; or due to illness or other incapacity making the President temporarily unable to exercise the functions of the office, the following persons shall in the order provided for in this subsection act as President until the President is able to resume office—

(a) the Vice-President;

(b) a Cabinet Minister signified by the President.

(2) Where the person to fill the temporary vacancy is a Cabinet Minister, the President shall submit to the Speaker of the National Assembly a written declaration authorizing the temporary transmission of power.”

(g) *President Changing Parties*

Section 80 (1) of the Constitution provides that the President shall be elected in accordance with the Constitution in such manner as may be prescribed by an Act of Parliament. Section 32 (2) of the Parliamentary and Presidential Elections Act¹⁹⁶ gives guidance on how a person may be elected to the office of President and provides that this may be either through the sponsorship of a political party or as an independent candidate.

Stakeholders raised concern at the lack of a provision holding the President and Vice-Presidents to the parties that brought them into office throughout their tenure along similar lines as section 65 of the Constitution which applies to Members of Parliament. Views on this matter were divided. Some stakeholders considered that the changing of parties by the President while in office is immoral and undemocratic as the President ushers a party in Government through the back door.¹⁹⁷ On the other hand, other stakeholders submitted that the President is a free agent and should be able to do what he considers to be best for the nation. It

¹⁹⁶ Cap 2:01 of the Laws of Malawi.

¹⁹⁷ Constitution Review Consultation Paper pp 46-47.

was argued that if a President is saddled with party politics, issues of national interest shall be compromised.¹⁹⁸

In debating this issue, the Commission considered that this is not an issue to warrant impeachment. The Commission concluded that the President's constituency is the whole nation and cannot be treated as a constituency seat where Members of Parliament are held or bound to the political party that sponsored their ascendancy to office. The Commission further considered that the Presidency is a different office and the highest office of the land and should be associated with security of tenure. The Commission, therefore, recommends the retention of the *status quo*.

5.2 THE OFFICE OF THE SECOND VICE-PRESIDENT

Section 80 (5) of the Constitution makes provision for the discretionary appointment of a Second Vice-President, by the President, should it be desirable in the national interest. The only condition on the appointment is that the President and the Second Vice-President must not be from the same party. The majority of stakeholders consulted called for an abolition of the office. The office was viewed as unnecessary for a poor and small country such as Malawi and considered that it is a provision that is liable to abuse as there is no definition of "national interest". Others considered the lack of a job description for the office as evidence of redundancy and considered that it encourages regionalism and politics of patronage.¹⁹⁹ There was some minority view however which suggested the provision is necessary to foster regional integration and ensure a working Government.

The Commission considered the arguments in favour of retention which basically focused on the importance of the office in preventing paralysis in governance. The Commission noted that since 1994, there has never been a majority government and the provision has helped to make up government numbers more especially with the existence of section 65 which prevents crossing the floor.

The Commission, however, observed that compensatory politics is not in conformity with democratic principles. The Commission considered that section 80 (5) encourages the putting of unelected parties into power through the back door. The Commission was aware that the issue of amassing adequate numbers in Parliament may be addressed by encouraging political parties to forge political alliances prior to elections to gain the required majority during elections.

The Commission, therefore, agreed with the view that the provision creating the office of the Second Vice-President is unnecessary for a geographically and demographically small country such as Malawi. The Commission further agreed that Malawi is too poor to support three institutions under the Presidency and found the argument on regional integration to be invalid since Malawi boasts of politics of patronage as ever at the moment despite having the provision. The Commission, therefore, recommends the deletion of section 80 (5) with incidental

¹⁹⁸ *ibid* pp. 46-47.

¹⁹⁹ Constitution Review Consultation Paper p. 44.

amendments wherever references to the office of Second Vice-President appear.²⁰⁰

5.3 IMPEACHMENT

Section 86 provides for the removal of the President and First Vice-President by impeachment. The section stipulates that the procedures for impeachment shall be as laid down by Standing Orders of Parliament. Stakeholders submitted that Standing Orders are not weighty enough to provide for a matter of such magnitude as the impeachment of a President. Stakeholders were also of the view that in order to avoid abuse, the process of impeachment should be set off by a referendum.

In addition to this concern, the Commission noted a further fundamental issue. Section 86 (2) (a) requires that indictment and conviction by impeachment shall be on serious violation of the Constitution or serious breach of written laws of the Republic. The Commission considered that the requirements under subsection (2) call for interpretation of the law and was not convinced that Members of Parliament do have the competence to determine that a serious violation of the Constitution or a serious breach of a written law has occurred, this being a function of the Judiciary.

The Commission noted that there are two possible ways of dealing with the issue. The procedures for impeachment can either be provided for in the Constitution or these can be provided in another written law. Comparatively, the Zambian Constitution sets out the procedures within the Constitution.²⁰¹ The Commission however was of the view that impeachment procedures require detail that are appropriate for an Act of Parliament. The Commission therefore recommends adoption of a new Act of Parliament to incorporate the procedures. The Bill for the proposed Act has been attached to this Report.

The Commission also observed that section 87 of the Constitution provides for the removal of the President and Vice-President on grounds of incapacity, that is, for infirmity of body or mind. The procedure for this process has been almost fully prescribed under section 87. However, subsection (7) leaves the appointment of an independent board of medical practitioners for certifying the condition of incapacity to be regulated under Standing Orders of Parliament. The Commission observed that Parliament is yet to introduce such procedures in the Standing Orders. The Commission therefore recommends that Parliament should introduce these procedures so as to fill procedural gaps as a matter of urgency.

5.4 SIZE OF CABINET

Section 92 (1) of the Constitution provides for the establishment of Cabinet which consists of the President, the First Vice-President, the Second Vice-President and such Ministers as the President may appoint from time to time. This provision is supplemented by section 94 (1) which empowers the President to

²⁰⁰ The majority of the delegates to the Second National Constitution Conference were in support of this position. There was however a minority view which emphasized the importance of the office in accommodating the interests of minority groups.

²⁰¹ Section 37.

appoint Ministers and Deputy Ministers to fill vacancies in Cabinet. Section 90 (2) provides that Cabinet is the body empowered to exercise certain functions under the Constitution and responsible for advising the President. The Constitution is, however, silent as to the size of the Cabinet leaving it to the absolute discretion of the President. Stakeholders suggested that the size of Cabinet should take into account the meagre resources of the country, and hence ministerial portfolios should be subject to the approval of Parliament. Others went as far as to suggest the abolition of the office of Deputy Ministers so that offices of Principal Secretaries are utilized fully.²⁰²

Comparative analysis with Constitutions from other jurisdictions indicates that there is no hard and fast rule on the approach to be adopted. For example, the constitution of the outer Republic of Vanuatu has attempted to set down a constitutional limit for the size of cabinet. The Commission however found the approach adopted unsatisfactory. In that jurisdiction the Constitution²⁰³ provides that “the number of Ministers, including the Prime Minister, shall not exceed a quarter of the number of Members of Parliament”.²⁰⁴ The Constitution of the Republic of South Africa offers an interesting alternative. The President may select any number of Ministers from among members of the National Assembly and only a maximum of two can be selected from outside the National Assembly. It should however be noted that there is no limit for those selected from among members of the National Assembly. However, the Commission observed that in Zambia the Constitution requires that any Ministry created should be subject to the approval of Parliament. This is more in line with the submission received by the Commission.

In deliberating the matter, the Commission considered that introduction of a provision to require the President to get the approval of Parliament for the creation of ministerial portfolios would be impracticable and would militate against political expediency. The Commission, therefore, resolved that the President should be left with the discretion to decide on the size of his or her cabinet.

Delegates to the Second National Constitution Conference were dissatisfied with the position taken by the Commission in view of the practice that has developed where ministerial posts are used to woo members of the opposition and in the process bloating the size of Cabinet. Delegates also observed that this practice tends to weaken opposition parties and is a threat to the consolidation and sustenance of multiparty democracy.

In deliberating on this issue further, the Commission observed that the Constitution has adequate checks and balances militating against abuse of power by the Head of State in Ministerial appointments such as section 65. The Commission further took the view that its recommendation to amend section 94 of the Constitution to require the President to obtain consent in relation to appointment of Members of Parliament from other political parties should suffice to provide an immediate remedy.²⁰⁵

²⁰² Constitution Review Consultation Paper pp 44-45 and Constitution Review Issues Paper p. 33-35.

²⁰³ Section 40 (2).

²⁰⁴ See Constitution Review Discussion Paper No. 4 p. 35.

²⁰⁵ See page 21

5.5 ROTATION OF THE PRESIDENCY

Consultations in the Northern Region strongly advocated a system that will see the rotation of the Presidency through the three regions of the country entrenched in the Constitution.²⁰⁶ This argument was raised in view of the fact that the Northern Region is the most sparsely populated and hence under current arrangements requiring a majority vote, can never produce a President. Such a state of affairs was seen as a discriminatory advantage to the Southern Region which has resulted in the low rate of development in the Northern Region.

The Commission, however, observed that rotation enhances division rather than unity. It highlights differences and therefore runs contrary to the principles of democracy by negating the freedom of choice. The Commission further noted that the current problem is not one of rotation but of poor management of political parties which is a socio-political issue. The Commission, therefore, concluded that this issue is not a subject for constitutional reform.²⁰⁷

5.6 CREATION OF THE OFFICE OF PRIME MINISTER

Stakeholders at the First National Constitution Conference proposed the creation of the Office of the Prime Minister to cater for situations where the President occupies himself or herself almost entirely to issues pertaining to party politics at the expense of State or Government matters. It was suggested that the party which produces more Members of Parliament should be accorded the privilege of producing a Prime Minister²⁰⁸. The post of Prime Minister is the most senior Cabinet Minister in Government. This post may be encountered both in the parliamentary and presidential or semi-presidential systems of Government.²⁰⁹

The Commission was aware that the post of Prime Minister usually features more in parliamentary rather than Presidential systems of Government and as such considered it ill-suited to the Malawi constitutional order. The Commission further observed that the creation of the office of the Prime Minister may result in the shedding of some of the powers of the President leaving him or her as a largely ceremonial figure as is the case with the current post of the Second Vice-President. Lastly, the Commission was also of the view that constitutional reform should not be premised on a political situation in which the President is perceived as paying too much attention to party issues so that an additional office is created. The Commission concluded that the President is already the Head of State and Government and therefore no reforms are necessary in this regard.

5.7 OTHER OFFICES

(a) *Office of the Attorney General*

Section 98 of the Constitution provides for the Office of the Attorney General who shall be the principal legal adviser to Government. Subsection (5) of

²⁰⁶ Constitution Review Consultation Paper p. 47.

²⁰⁷ Delegates to the Second National Constitution Conference generally were in support of the position taken by the Commission. There was however minority views which urged the Commission to acknowledge minority rights, in accordance with global trends, by enabling representatives of regional minorities to assume the highest office.

²⁰⁸ See Issues Paper.

²⁰⁹ Wikipedia, the Free Encyclopedia http://en.wikipedia.org/wiki/Prime_Minister.

section 98 however makes this office either the office of a Minister or public officer. The 1966 Constitution had an identical provision,²¹⁰ save that traditionally, at least up to 1992, the Office of the Attorney General had always been occupied by a public officer.

The Office of the Attorney General is presumably an independent one. However, general dissatisfaction has been expressed by the general public on the conduct of office holders since the adoption of multi-party politics who are perceived to be biased towards the Executive arm of Government.²¹¹

Further, stakeholders at the First National Constitution Conference expressed concern with what they perceived to be lack of independence of the office of the Attorney General and suggested that the office be reviewed so as to make it purely a public office. Parliament went further to propose that there is need to empower Parliament to seek independent legal counsel without conferring with the Attorney General as it perceived the ability of the Attorney General to be its legal representative seriously compromised by strong allegiance to the Executive.

The Commission appreciated and shared the concern raised by stakeholders with regard to the office of the Attorney General. The Commission was aware that during the one party era, the office of the Attorney General worked well, providing legal advice to all three organs of Government. In the current multiparty dispensation, the Attorney General has at times been, or perceived to be, a functionary of the ruling party and as such his or her ability to give independent advice has been compromised. In addition, the Commission observed that where the Attorney General is the holder of political office, upon dismissal it is not clear as to whether the Attorney General is dismissed under section 98 or under section 95 (2) under which the President is empowered to remove Ministers.

The Commission also noted that the seeming current practice of appointing a Judge who has not retired or resigned from the judiciary to the office of Attorney General is also an anomaly compromising his or her independence. The Commission thus recommends that a serving judge should be barred from being appointed as Attorney General.

Delegates to the Second National Constitution Conference disagreed with the position taken by the Commission on this issue and considered that this is an established practice in Malawi which dates back to the pre-1994 years. Delegates also argued that the Constitution appears to support such appointments under section 119 (7).

In deliberating this issue further, the Commission considered that section 119 (7) compromises the independence of the judiciary as judges on assignment are exposed to political influences. The Commission also emphasized the importance of ensuring that people do not develop certain perceptions about judges on account of their previous assignments. The Commission thus recommends deletion of subsection (7) of section 119 on that basis.

²¹⁰ See section 56 of the repealed Constitution.

²¹¹ Constitution Review Discussion Paper No. 4 p. 52.

The Commission further recommends that the office of the Attorney General should be strictly a public office. This shall necessitate amendments to subsections (4) and (5) of section 98.

Delegates to the Second National Constitution Conference unanimously supported this position. However, it was urged that the Commission should consider proposing legislation that specifies situations where the Attorney General may or may not act for the other branches of Government. In such a situation a branch of government should be in a position to engage a legal practitioner without seeking consent of the Attorney General.

In deliberating this issue, the Commission was of the view that the concerns raised regarding the independence and impartiality of the office are more to do with personalities rather than constitutional reforms. The Commission was therefore satisfied that the recommendation to make the office purely a public office shall go along way in insulating the office and guaranteeing the much needed independence and impartiality in the conduct of office holders. Therefore the Commission maintains its recommendation on this aspect.

The Commission further considered whether it would be appropriate to subject the appointment of the Attorney General to the confirmation of the Public Appointments Committee to ensure impartiality. After careful consideration, the Commission noted that it would be most unusual to go that way since the norm in the Commonwealth is to give discretion to the Head of State for such an appointment. The Commission further found that instances that require the President's appointment of a functionary to be confirmed by Parliament involve offices where the exercise of power by the functionary is prone to abuse to the detriment of citizens' civil liberties. These include offices such as that of the Director of Public Prosecutions, the Director of Anti-Corruption Bureau and the Inspector General of Police. These offices are different from that of the Attorney General who is a legal advisor to Government in the broad sense. The Commission, therefore, recommends that the appointment of the Attorney General should not be required to be confirmed by the Public Appointments Committee.²¹²

On relationship between the Attorney General and the Director of Public Prosecutions, who under section 101 (2) albeit being independent, is subject to the general or specific directions of the Attorney General, the Commission understood the provision to mean that the Director of Public Prosecutions is subject to the general administrative supervision of the Attorney General. The Commission did not find any problems with the provision since where an Attorney General has attempted to abuse this relationship, the courts have been quick to come to the rescue. The Commission therefore recommends retention of section 101 (2).

(b) The Office of the Inspector General.

Under section 154 (2) of the Constitution, the Inspector General of Police is appointed by the President and confirmed by the National Assembly. The Public

²¹² Delegates to the Second National Constitution Conference were generally in support of this position. There was however a minority view that considered that subjecting the appointment of the Attorney General to the confirmation of Parliament shall ensure transparency and accountability.

Appointments Committee is also empowered to inquire upon the competence of such a person to carry out the duties of that office. Stakeholders questioned the differential treatment between the Inspector General of Police and the Commander of the Defence Force who is appointed by the President without reference to scrutiny by Parliament under section 161 (2) since both offices deal with matters of security²¹³.

The Commission did not find this concern justifiable as there are fundamental differences between the two offices. The Commission noted that the Police Service is responsible for internal security and by extension the office of Inspector General deals with individual liberties on a day to day basis. This in itself requires enough safeguards to ensure that the holder of the office is suitable and appropriate. On the contrary, the Defence Force is responsible for external security. The Commission took the view that the President as Commander-in-Chief of the Defence Force must be allowed the discretion to pick a Commander he can work with within his period of tenure if security and stability of Government are to be achieved.

The Commission therefore resolved that the current *status quo* should be retained.

The Commission however recommends the deletion of the words “**and confirmed by**” to be replaced with the words “**subject to confirmation by**” in section 154 (2) to make it clear that the Inspector General does not take office before he or she is confirmed. Delegates to the Second National Constitution Conference urged that the process of confirmation should be expedited to ensure that there is no vacuum in the command structure for long periods of time.

The Commission also noted that there is an inconsistency in the use of the words “appointed” in section 154 (2) and “nominated” in section 154 (3) in reference to the appointment of the Inspector General. The Commission recommends that this inconsistency should be rectified by deleting the word “**nominated**” in subsection (3) and replacing it with the word “**appointed**”.

Delegates, however, noted that “although Malawi has the most stringent procedure for appointment of Inspector General in the SADC region, the holder of this office lacks security of tenure.” The Commission was therefore urged to incorporate measures in the Constitution that should safeguard tenure of office of the Inspector General.

In order to address this problem, the Commission recommends that removal of an Inspector General should be subject to confirmation by Parliament. It is the view of the Commission that since Parliament is involved in the appointment of an Inspector General, logically it should also have a say on the unsuitability or incompetence of an incumbent.

The Commission therefore recommends adoption of the following new subsection (5)—

(5) Where removal of a person holding the office of Inspector General by the President is pursuant to paragraphs (a), (b) or (c) of subsection (4), the removal shall be subject to confirmation by the National Assembly.

²¹³ Constitution Review Discussion Paper No. 5 pg. 27.

(c) *Office of the Director of Public Prosecutions*

The Constitution provides for the Office of the Director of Public Prosecutions under section 99 (1) and requires that this office shall be a public office. The section is silent on experience and qualification of the Director of Public Prosecutions.

Submissions received by the Law Commission pertaining to this office were three-fold. First, it was submitted that an eligibility criteria should be incorporated. To that end, it was suggested only a person or legal practitioner who qualifies to be a judge should be eligible for appointment to this office. Second, it was submitted that the office of Deputy Director of Public Prosecutions should be created in view of the workload and to ensure that no gap is created in the functioning of the office in case of incapacitation or vacancy. Third, it was submitted that removal of an incumbent should be confirmed by Parliament to promote independence and protect tenure of office.

In discussing these matters, the Commission did not agree with the proposal to require certain experience for aspirants to the office of Director of Public Prosecutions. It was of the view that for this post, the system is better placed to sieve candidates. The Commission further observed that the office of the Ombudsman is in a similar position.²¹⁴

On the issue of creating the office of Deputy Director of Public Prosecutions, the Commission considered that this may not be necessary since the current set up in the Ministry of Justice and Constitutional affairs is self regulatory in that the Chief State Advocate deputizes and assumes the functions of the office in the event of incapacitation or a vacancy.

The Commission also observed that the only instances where the Constitution has created offices of Deputies is in relation to Ministers as comprising part of the leadership of the Executive; and also that of Speakers as comprising part of the leadership of the legislature. The Commission was satisfied of the appropriateness of these arrangements for the two branches of Government, hence its recommendation to create the office of the Deputy Chief Justice.²¹⁵

On the issue of tenure and independence of the holder of the office, the Commission conceded the importance of security of tenure in promoting independence for the proper and effective functioning of the office.

The Commission therefore recommends adoption of a new subsection (3)—

(3) Where removal of a person holding the office of the Director of Public Prosecutions by the President is pursuant to paragraphs (a), (b) or (c) of subsection (2), the removal shall be subject to confirmation by the Public Appointments Committee.

²¹⁴ See section 120 of the Constitution.

²¹⁵ See page 101

6. THE JUDICIARY

(a) *The Chief Justice*

The Constitution in sub-section (1) of section 111 provides that the Chief Justice shall be appointed by the President and has to be confirmed by a majority of two-thirds of the members of the National Assembly present and voting.

The Commission had a lengthy debate on the involvement of the National Assembly in the confirmation of the Chief Justice. The Commission first considered the implication of the words 'present and voting' in relation to the two-thirds majority needed to confirm the Chief Justice. It was observed that out of 193 members in the National Assembly, the quorum is formed when there is a minimum number of 97 members. As such, two-thirds of 97 members is approximately 64 members. The Commission had a lengthy debate on whether the intention of the framers of the Constitution was that the holder of the Office of the Chief Justice may be confirmed by a majority of 64 members of Parliament. The Commission observed that it may be more appropriate if the Chief Justice was confirmed by two-thirds of the total membership of the National Assembly since he or she heads an organ of Government.

The Commission also considered the process followed in other countries within the region in appointing and confirming the Chief Justice. In South Africa, the appointment of the Chief Justice is made by the President after consulting the Judicial Service Commission.²¹⁶ The National Assembly is not involved in the process. However, the National Assembly is involved when the President appoints the President and Deputy President of the Constitutional Court who he or she appoints after consultation with the Judicial Service Commission and the leaders of political parties represented in Parliament.²¹⁷

The Commission also observed that the involvement of the National Assembly in the appointment process of public officers tends to politicize the appointment process although it may provide a forum for checking the credibility of officers appointed by the President. The Commission was aware that a major weakness in the present arrangement is that Parliament does not give reasons for rejection of a particular appointee and as such, the reasons behind confirmation or rejection could be arbitrary.

However, the Commission observed that the involvement of Parliament is intended to promote the system of checks and balances between different organs of Government. The Commission conceded that the absence of members in Parliament should not hold the country at ransom and prevent the confirmation of a Chief Justice when in fact, the number of members present in Parliament meets the quorum as prescribed in section 50 (1) of the Constitution²¹⁸ and is sufficient for transacting business in the Chamber.

Notwithstanding the problems related to the National Assembly, the Commission resolved that it would be important to maintain the involvement of Parliament in the broader sense and recommends retention of subsection (1) of section 111.

²¹⁶ Section 174 (3) of the South African Constitution.

²¹⁷ Take note that these two offices are higher than the office of the Chief Justice since the Constitutional Court is the highest court in South Africa.

²¹⁸ This section provides that the quorum is formed by the presence of at least one-half plus one on the members of the Chamber entitled to vote.

In terms of eligibility to the office of Chief Justice, the Commission considered whether the Constitution should set out minimum qualifications for the position of Chief Justice in order to positively guide debate in the National Assembly when it sits to confirm a Chief Justice. The Commission further considered whether criteria for eligibility should be clearly spelt out in order to ensure that those appointed to head the Judiciary are familiar with and understand the operations of the Judiciary. The Commission looked at comparative provisions in the Constitutions of Uganda, Zambia, Zimbabwe and Namibia and noted that qualifications have been set down for the position of Chief Justice. The Commission nevertheless recommends retention of the present status, mainly because the Constitution already stipulates qualifications for Judges.

The Commission also considered whether there should be a peer review mechanism of candidates by fellow judges who are in a better position to vouch for the candidate's eligibility. The Commission however observed that though Judges have a direct interest in the person who is appointed Chief Justice, the peer review mechanism is prone to promoting personal vendettas among Judges.

(b) Deputy Chief Justice

The Commission learnt that the absence of the Chief Justice causes administrative and operational problems in the Judiciary. It was observed that in the absence of the Chief Justice, all duties and functions slow down considerably and have to wait for the Chief Justice to return from temporary absence. For instance, no lawyer may be admitted to practice in Malawi in the temporary absence of the Chief Justice since the hearing of petitions for admission have to wait until such time as the Chief Justice is available again. The Commission also learnt that in cases of temporary absence of the Chief Justice, it is not clear who has to take over the leadership role since judges have no command structure.

Submissions received by the Law Commission during preliminary consultations suggested that stakeholders felt the need to provide for the office of Deputy Chief Justice to facilitate easy succession or performance of the duties of the Chief Justice in cases of temporary absence. The Commission saw merit in this proposal and recommends that the Constitution should establish the office of Deputy Chief Justice. The Commission further recommends that the duties and functions of the Deputy Chief Justice should be clearly outlined.

The Commission therefore recommends that section 105 (1) (b) of the Constitution should be amended to read as follows—

“(b) the Deputy Chief Justice and such other number of Justices of Appeals not being less than three, as may be prescribed by an Act of Parliament;”.

The Commission also recommends that section 111 (2) of the Constitution be amended by adding the following provision—

“(2) The Deputy Chief Justice and all other Judges shall be appointed by the President on the recommendation of the Judicial Service Commission.”.

In light of the introduction of the office of the Deputy Chief Justice, the provision on vacancy in the office of the Chief Justice had to be re-examined. In

the current provision, if there is a vacancy in the office of the Chief Justice, the most senior Judge in the Supreme Court takes over temporarily. The Commission recommends that in light of the introduction of the new office, section 113 (1) should be amended by inserting the words **“the Deputy Chief Justice, and if the office of the Deputy Chief Justice is vacant, or if the Deputy Chief Justice is for any reason unable to perform the functions of his or her office, those functions shall be performed by”** between the words “shall be performed by,” and “the most senior judge” in the said provision.

(c) *Justices of Appeal*

The Commission observed that there is no differentiation in the eligibility criteria for appointment of Justices of Appeal and Judges of the High Court. The Commission was dissatisfied with this position and considered that it would be desirable for persons appointed to the Supreme Court of Appeal to have served on the High Court for a stipulated minimum number of years since it is the highest court of the land. The Commission was aware that in other jurisdiction such as South Africa only those persons who have served in the Supreme Court or High Court for a prescribed number of years are eligible for appointment to the Constitutional Court which is the highest court in South Africa. The Commission considered this a better and safer approach and recommends that the same should be adopted for Malawi. To that end, the Commission was of the view that a minimum period of ten years as a High Court judge should be the benchmark. The Commission therefore recommends amendment of section 112 of the Constitution by renumbering the existing subsection (2) as (3) and adoption of the following new subsection (2)—

“(2) Notwithstanding subsection (1), a person shall not be qualified to be appointed as a Justice of Appeal unless that person is, or has been a judge of the High Court for not less than ten years.”.

(d) *Head of the High Court*

The Commission observed that while the Chief Justice is by law the most senior judge of the High Court,²¹⁹ the law does not designate any Judge as Head of the High Court. The Commission learnt that the absence of a Judge specially designated as Head of the High Court presents administrative and operational problems. The Commission noted that beyond the administrative needs, the dual membership of the Chief Justice as Supreme Court Judge and Senior Judge of the High Court does not resolve the leadership problem in the High Court. Further, the Commission was dissatisfied with this arrangement and considered the designation of the Chief Justice as the most Senior Judge of the High Court a contradiction to the position in the Constitution where the Chief Justice is specially designated as a Justice of Appeal.

²¹⁹ See section 6 of Courts Act Cap. 3:02 of the Laws of Malawi

In summation, the Commission recommends that the position of Head of the High Court be established but further recommends that all details pertaining to this establishment be dealt with under the Courts Act.²²⁰ The Commission therefore recommends that section 5 of the Courts Act be amended by inserting the words “**Judge President**” between the words “**Chief Justice**” and “and such number...”. The Commission further recommends that Section 6 of the Courts Act be replaced with the following new section—

“Head of the
High Court

6. The Judge President shall be the Head of the High Court, and the other Judges shall take precedence after him according to the priority of their respective appointments as such.”.

The Commission also recommends that the Courts Act should be amended to provide for the powers, duties and functions of the Judge President.

(e) *Minimum Age for Judgeship*

A person may qualify for appointment as Judge if he or she is, or has been, a Judge of a court having unlimited jurisdiction in criminal or civil proceedings or a person who is entitled to practice as a legal practitioner, an advocate or a solicitor in such a court and has been entitled so to practice for a period of ten years prior to the appointment.²²¹ The Commission deliberated on whether to maintain the *status quo* on minimum qualifications for judgeship or introduce and prescribe a minimum age at which a person would qualify for appointment as judge. Arguments in favour of introducing a minimum age limit referred to the fact that at a particular age, an individual is perceived to have attained the necessary level of maturity and integrity commensurate with the demands of the office of judge. The age of 40 years was proposed as appropriate for a person to attain judgeship. Zimbabwe was cited as an example of a country where a minimum age of 40 years has been placed as a threshold age for attaining judgeship. Contrary views expressed considered the age of 40 years too high in view of the fact that eligibility for the highest office in the land, the Presidency, is attainable at only 35 years.

The Commission further considered comparative provisions in Constitutions of Botswana, Kenya, Lesotho, Namibia and Swaziland and noted that there is no established trend in the region towards prescribing a minimum age of eligibility. Instead of prescribing a minimum age, most jurisdictions in the region have set down years of experience either as an advocate or a judge prior to appointment as judge as the necessary pre-requisite. This length of time generally ranges between 5 and 10 years.

In conclusion, the Commission agreed to maintain the position in section 112 of the Constitution.²²²

The Commission, however, proposed to introduce new criteria for prospective appointees for judgeship. This position was taken following the South

²²⁰ Delegates to the Second National Constitution Conference were unanimously in support of this recommendation.

²²¹ Section 112 of the Constitution

²²² Delegates to the Second National Constitution Conference were in support of this position.

African example where it is required that the appointee for the office of Judge should be “fit and proper” person to take up that office. Other conditions that were recommended by the Commission include competence and integrity. The Commission further recommended that, in order to preserve the integrity of judgeship, no individual shall be appointed judge if he or she has been convicted of a crime involving dishonesty or moral turpitude prior to their appointment.

The Commission therefore recommends that section 112 (1) of the Constitution be amended by adding the following provisions—

(c) is fit and proper to exercise the functions of the office of Judge;

(d) has not been convicted by a competent court of a crime involving dishonesty or moral turpitude.

(f) Retirement Age of Judges

Section 119 provides that a person holding the office of Judge shall vacate that office on attaining the age of sixty five years or such other age as may be prescribed by Parliament. On the other hand, the retirement age of magistrates is seventy years.²²³ The Commission learnt that the disparity in retirement age between judges and magistrates may have been a result of an editorial omission at the time of editing the provisional Constitution of 1994. The Commission observed that the role of Parliament in changing the age of retirement for judges should be restricted. The Commission felt that Parliament could change the age of retirement for judges anyhow in order to target specific judges that are perceived to be unfriendly to Parliament. In its deliberations, the Commission observed that at the age of sixty five years, most judges are still very resourceful and their services are still needed at the bench. The Commission resolved that the retirement age for judges in the Constitution should be raised to seventy years.²²⁴

The Commission also considered whether the law should make provision for judges that are engaged to work as such for an agreed period of time. The Commission observed that there are several reasons in favour of this proposal. For example there are numerous instances when there is need to expeditiously dispose of matters before the Courts. These cases may be single cases or group of cases. There may still be cases where such appointments maybe necessitated by reason of special reason of a special knowledge or expertise in the area under trial. In such cases, judges may be appointed and assigned to judicial functions on an *ad-hoc* basis in order to dispose of cases such as murder cases.

The Commission was made aware that in jurisdictions that have engaged judges on contract or “contract judges”, many legal practitioners have been persuaded to join the Judiciary after participating as judges on contract. However, the Commission conceded that the difference in tenure with the ‘permanent judges’ may compromise the quality of service delivered by such judges. The Commission observed that employing judges on contract may affect their performance since their tenure of office is uncertain. After thorough consideration, the Commission observed that since the tenure of office would be

²²³ Section 111 (3) of the Constitution.

²²⁴ Delegates to the Second National Constitution Conference were in support of this position.

governed by a contract, which would be signed by the parties prior to the Judge assuming office. The tenure of “contract judges” would be secure in that basis.

The Commission concluded that the concept of “judges on contract” is important for Malawi in order to provide cover when there is shortage of staff and when the need for specialized and relevant expertise when disposing of matters arises. The Commission also observed that the judges appointed on contract may include those who have already served as such and have since retired. The Commission, therefore, recommends the introduction of the following provision at the end of sub-section (2) of section 111-

“(2) ...; and the President may, on the recommendation of the Judicial Service Commission, appoint judges on contract for a specified period to sit in cases or a class of cases, or to fill casual vacancies in the Court, or to enable the Court to deal with its work expeditiously.”.

Consequently, the Commission recommends the amendment of section 119 (1) of the Constitution by adding the words **“except a Judge appointed on contract”** between the words “Judge” and the word “shall”.

(g) Removal of Judges from Office

The Commission observed that in terms of section 119 (2) of the Constitution, judges may be removed from office on two grounds: *incompetence* and *misbehaviour*. The Commission considered the appropriateness of the word *misbehaviour* as a ground for removing a judge from office and considered it to be subjective. The Commission felt that what would constitute *misbehaviour* by a judicial officer was not easy to define and concluded that such a ground may be liable to abuse. The Commission was of the view that the term *misconduct* is more appropriate and appears to be more objective in nature. The Commission thus recommends deletion of the word “misbehaviour” and replacement of that word with **“misconduct”**.

The Commission also considered whether, in line with the practice in the region, incapacity should be introduced as a ground for removal of a judge. Firstly, the Commission observed that this ground becomes critical especially in cases where the incapacity is not acknowledged by the judge who is affected by it (especially in cases of mental incapacity). Secondly, the Commission also considered that there may be cases where the incapacity is self-induced, for instance, through consumption of mind altering substances. The Commission recommends the introduction of incapacity as the third ground on which a judge may be removed from office by inserting into subsection (2) of section 119, the words **“or for inability to perform the functions of the office, whether arising from infirmity of body or mind”** after the words “misbehaviour”.

In light of the proposal to introduce incapacity as a ground on which a judge may be removed from office, the Commission observed that the process of removing a judge from office entrenched in the Constitution is not appropriate. The Commission considered a scenario where a judge has, for instance, suffered a severe stroke and his or her removal has to be debated before the National

Assembly for purposes of removal from office. The Commission expressed concern that this could be dehumanizing for the judge in question and his family, relatives and friends. The Commission thus recommends that special procedure should be developed in relation to the ground of incapacity.²²⁵

The Commission also deliberated over involvement of Parliament in the process of removal of judges. The Commission observed that under the current provisions (section 119 (3) to (5)), the involvement of Parliament is inappropriate for several reasons. Firstly, it politicizes the process of removal and also causes irreversible psychological and social damage to the Judge under debate since the debate in Parliament is public. The Commission noted that in cases where the incompetence or misconduct of a judge is not proven, the damage caused in the eyes of the public is beyond repair and would compromise the reputation of the Judge in question.

Secondly, the Commission also doubted whether Parliament could carry out dispassionate investigations against an allegation of incompetence or misconduct made against a judge. The Commission felt that only a competent and objective institution vested with investigative powers would be better placed to conduct such thorough investigations. Thirdly, the Commission doubted whether Parliament could provide an accused judge a hearing that respects the rules of natural justice as required by the Constitution. The Commission observed that under the current scheme, the National Assembly would be accuser and judge in its own or in the same cause. The majority of the delegates to the Second National Constitution Conference were in support of these sentiments and observed that a majority Government can easily abuse the process and victimize judges perceived to be sympathetic to the opposition.

The Commission considered the establishment of an independent tribunal endowed with powers to conduct independent and thorough investigations on any allegations brought against any judicial officer. The Commission learnt that a number of countries within the region have introduced such a tribunal in order to deal with issues of removal of judges from office. The Commission learnt that Malawi and a few neighbours stand in isolation by involving Parliament or relying on the Judicial Service Commission for this task.

The Commission learnt that in Kenya, the Constitution provides for the appointment of a tribunal in the event that the Chief Justice or a Judge has to be investigated over alleged inability to perform the functions of his or her office or misconduct.²²⁶ During the period of investigation, the Judge in question is not allowed to perform the functions of his or her office and may be suspended. When the tribunal has completed the investigations, it makes its recommendations to the President who must act in accordance with those recommendations.²²⁷

Section 121 (5) of the Lesotho Constitution provides for the appointment of a tribunal in the event that removal of a judge requires investigation. Members of the tribunal are selected by the Prime Minister if the investigation involves the

²²⁵ See procedure suggested below on removal of judges.

²²⁶ Section 62 (7) of the Draft Constitution.

²²⁷ Section 220 (5) of the Draft Constitution.

Chief Justice and by the Chief Justice if the investigation involves an ordinary judge.²²⁸ All appointments are however made by the King. During this period, the judge under investigation may be suspended.

In South Africa, the Commission learnt that the Judicial Service Commission is the oversight institution over the removal of judges and, there have been proposals for amendments to the Judicial Service Commission Act, 1995 and the introduction of the Judicial Conduct Tribunals Bill to establish a mechanism for dealing with complaints against judges and magistrates and a special tribunal to consider allegations of serious, impeachable misconduct against judges. The proposed Judicial Conduct Tribunals Bill is intended to specifically provide for the appointment of a tribunal for cases of alleged incapacity, gross misconduct or gross incompetence.

In Tanzania, where judges may be removed from office only for inability to perform functions of the office or misbehaviour, when such a case arises, the President must appoint an independent tribunal to investigate and report the possible removal of a judge.²²⁹ The President is obliged to follow the recommendations of the tribunal if the tribunal recommends removal of a judge.²³⁰ A similar position obtains in Uganda where only once has a tribunal been appointed and it led to the removal of a judge.

Zambia and Zimbabwe have also provided for the appointment of a tribunal for the investigation and recommendation of removal of a judge in cases of inability to perform functions of the office, incompetence and misconduct.²³¹ Powers of appointment vest in the President who is obliged to follow the recommendations of the tribunal.

In the case of Malawi, the Commission observed that the proposed tribunal would be required to treat the whole investigative process with the strictest sense of confidentiality in order to protect the integrity of the judiciary. The Commission further proposed that upon completing its findings, this independent tribunal should be vested with the power to “try” the judicial officer and upon finding the judicial officer responsible or liable on any of the section 119 grounds, the tribunal would convict the judge accordingly. The Commission observed that if the matter were brought into the public realm at this stage, the integrity of the Judiciary would still be preserved. Further the Commission considered that it would be easier to observe the principles of natural justice if the tribunal was involved rather than Parliament.

The Commission also observed that the tribunals can either be permanent or *ad-hoc*. Almost in all cases, the appointing authority of judicial officers is obliged to follow the recommendation and advice of these tribunals. The tribunals also provide an opportunity for a thorough and competent investigation into various allegations levelled against judicial officers without creating the “public circus” trial usually characteristic of Parliament proceedings thereby protecting the integrity of the judiciary prior to removal of a judge.

²²⁸ Section 121 (6).

²²⁹ Section 110 (6) of the Constitution.

²³⁰ Section 110 (7) of the Constitution.

²³¹ Article 98 (3) of the Zambian Constitution and section 87 of the Zimbabwe Constitution.

In conclusion, the Commission recommends that an independent tribunal be established for the purpose of investigating and trying judicial officers.²³² The Commission observed that the power to appoint and remove a judge, however, shall remain vested in the President. The Commission, therefore, recommends that sub-sections (6) and (7) of section 119 be renumbered to subsections (7) and (8) and that subsections (3) to (5) be replaced entirely with new subsections (3) to (6) as follows—

“(3) Where the question of removing a judge from office arises, under subsection (2), the President shall in consultation with the Judicial Service Commission, appoint a Tribunal consisting of a Chairperson and not less than two other members, who hold or have held high judicial office, and the Tribunal shall—

(a) inquire into the matter and report on the facts thereof to the President:

Provided that the procedure adopted by the Tribunal in the inquiry shall be in accordance with principles of natural justice; and

(b) advise the President whether the judge ought to be removed from office under this provision.

(4) The President may, by an instrument under the Public Seal and in consultation with the Judicial Service Commission, remove from office any judge where the Tribunal appointed under subsection (3) recommends to the President that the Judge should be removed from office in accordance with this section.

(5) Where the question of removing a judge from office has been referred to a Tribunal appointed under this subsection (3), the President may, after consultation with the Judicial Service Commission, suspend the judge from performing the duties of his or her office, if he is satisfied that it is in the public interest so to do.

(6) The suspension of a judge under subsection (5) may at any time be revoked by the President, after consultation with the Judicial Service Commission, and shall in any case cease to have effect where the question for removing a judge is withdrawn from the Tribunal or, if the Tribunal finds in favour of the judge under investigation, or if the Tribunal advises the President that the judge ought to be removed from office.”.

In light of the renumbering of the provisions listed above, the Commission also observed that the reference in subsection (1) of section 119 to subsection (6) be changed and that subsection (1) be amended accordingly to read subsection (7).

²³² Delegates to the Second National Constitution Conference generally were in support of this recommendation and considered that it is a safer approach and in tandem with the trend in the region. There was however a minority view that considered the involvement of Parliament as a safer option.

(h) Judicial Service Commission

The Judicial Service Commission is established under section 116 of the Constitution. A number of issues were raised regarding this institution.

The first issue focused on representation. It was observed that the Judiciary is over-represented on the Judicial Service Commission with three out of five members. This was viewed as unrepresentative of all parties that have an interest in the proceedings of the Judicial Service Commission. The Commission felt that the mandate of the Judicial Service Commission under section 118 makes it prone to the satisfaction of the collective interest of the Judiciary above any other interest. The Commission also observed that the current membership of the Judicial Service Commission creates a lingering perception that judicial self-interest is likely to take centre stage at the Commission.

The Commission, however, felt that the presence of judicial officers representing the subordinate courts, the High Court and the Supreme Court of Appeal is indispensable. The Commission also observed that while their presence makes that institution judiciary-heavy, it is necessary that all three levels at the Judiciary should be represented in order to sufficiently cater for their diverse interests. In order to address issue of the heavy presence of the Judiciary, the Commission recommends that the membership of the Judicial Service Commission be raised from five to six. The Commission thus recommends the nomination of a non-lawyer member who shall be designated as such by the President in consultation with the Chief Justice. Delegates to the Second National Constitution Conference disagreed with the recommendation to include a non-lawyer. It was feared that opening up the Judicial Service Commission to non-lawyers may lead to abuse and undue influence being brought to bear on the Commission and ultimately the Judiciary.

The Commission however considered that it is important to include a non-lawyer to promote transparency and to reduce the perception that membership of the Judicial Service Commission is Judiciary-heavy. The Commission therefore maintained its position and recommends the addition of subsection (e) to section 117 to read as follows—

“(e) such other member, other than a legal practitioner or judicial officer, designated by the President acting after consultation with the Chief Justice.”.

The second issue was the role of the Chief Justice in the Judicial Service Commission. The Commission considered that under the current membership, there may be a perception that other members, on account of seniority within the judicial ranks, may find it difficult to disagree with the Chief Justice who is also the Chairperson. The Commission observed that, for the same reason, the legal practitioner may be reluctant to antagonize the Chief Justice.

The Commission considered several options regarding the leadership of the Judicial Service Commission. The first option was to give the leadership role to a retired judge for the simple reason that the other members may participate more

freely than when the Chairperson is a sitting Chief Justice. The second option was to give the leadership role to the Chairperson of the Public Service Commission. The argument was that the Chairperson of the Public Service Commission is the least likely of the members to be affected by the perceived undue authority of the Chief Justice.

The Commission however observed that the Judicial Service Commission is mainly concerned with matters involving judicial officers with respect to appointment, discipline and removal from office, among other things. Having deliberated on the matters of composition and leadership of the Judicial Service Commission, the Commission concluded that due to the nature and powers of this particular institution, it is proper that the highest ranking judicial officer, the Chief Justice, should remain the Chairperson.²³³

The third issue related to the lack of tenure of office for members of the Judicial Service Commission. The Commission observed that in light of the mandate of the Judicial Service Commission, it is important that the members should have security of tenure and clear grounds and procedures for removal from office. The Commission had recourse to provisions of Constitutions from other jurisdictions on this matter and learnt that in Uganda, for instance, members of the Judicial Service Commission serve for a period of four years.²³⁴ The Commission thus recommends that membership of the Judicial Service Commission should be for four years and therefore recommends that section 117 should be amended by renumbering the current provision as subsection (1) and adding a new subsection (2) to read as follows—

“(2) Subject to this section, the office of a member of the Judicial Service Commission shall become vacant—

(a) at the expiry of four years from the date of that person’s appointment, unless reappointed to a new four year term:

Provided that this paragraph shall not apply where the member in question still holds the office of Chief Justice, or other office in which behalf that person was appointed to the Judicial Service Commission; or

(b) if any circumstances arise that, if that person were not a member of the Judicial Service Commission, would cause that person to be disqualified from appointment as such; or

(c) on removal by the President on the recommendation of the Chief Justice, but no member shall be recommended for removal under this paragraph unless the Chief Justice is satisfied that he or she is—

(i) not competent to exercise the duties of that office;

(ii) compromised to the extent that his or her financial probity is in serious question; or

(iii) otherwise incapacitated.”.

²³³ Delegates to the Second National Constitution Conference were in support of this position.

²³⁴ Section 146 (7) (a) of the Uganda Constitution.

The Commission further noted that tenure of office for the membership of the Judicial Service Commission is directly linked to the independence in the performance of the duties of the Judicial Service Commission. The Commission, however, lamented the absence of a clause that would emphasize this independence. The Commission observed that since the Executive exercise a constitutive role in the Judicial Service Commission, it would be in the interest of the institution that its independence should be clearly emphasized. The Commission, therefore, recommends the introduction of a clause stipulating clearly the independence of this body.

To that end, the Commission recommends the renumbering of section 116 as section 116 (1) and the introduction of a new subsection (2) to read as follows—

(2) In the exercise of its powers, functions and duties, the Judicial Service Commission shall be completely independent of the interference or direction of any other person or authority.

(i) Definition of Judicial Office

The Commission noted that, in terms of jurisdiction, the Industrial Relations Court is the only specialized Court created in the Constitution.²³⁵ The Commission further observed that the officers who settle labour disputes at this Court are not recognized as judicial officers by the Constitution.

The Commission, however, established that as a matter of practice, all individuals that have ever been appointed Chairperson of the Court have been drawn from the Judiciary and are equivalent in rank to the Senior Deputy Registrar of the High Court. The Chairperson of the Industrial Relations Court is appointed in exactly the same manner as Magistrates. Additionally section 111 (3) of the Constitution provides that “Magistrates and persons appointed to *other judicial offices* shall be appointed by the Chief Justice on the recommendation of the Judicial Service Commission...”²³⁶

The Commission observed that although the Industrial Relations Court has relaxed rules of procedure that make it more user-friendly, unlike the High Court and the Magistrates’ Courts, it is a court of law. The Court is endowed with original jurisdiction to hear and determine all labour disputes under that law or any other written law.²³⁷ In view of the foregoing, the Commission recommends that the Chairperson and Deputy Chairperson of the Industrial Relations Court should be recognized as judicial officers by inserting a new paragraph under section 111 (4) as follows—

“(f) the Chairperson or Deputy Chairperson of the Industrial Relations Court.”.

(j) The Status of the Industrial Relations Court

The Commission deliberated on the status of the Industrial Relations Court which is subordinate to the High Court. Under the current arrangement, appeals

²³⁵ Section 110 (2) of the Constitution.

²³⁶ Emphasis supplied.

²³⁷ Section 64 of the Labour Relations Act; Section 110 (2) of the Constitution.

from this Court lie to the High Court. The Commission learnt that the Court had made a submission requesting the Commission to consider elevating the Court to the High Court level or in the alternative, converting it into a Tribunal. The perceived advantage of the latter proposal is that appeals from its decisions would lie straight to the Supreme Court of Appeal. This proposal was based on section 104 (2) which provides that appeals lie to the Supreme Court of Appeal “from the High Court and such other courts and tribunals as an Act of Parliament may prescribe”.

The Commission, however, considered that it is not necessary to convert the Court into a Tribunal since the Constitution stipulates under section 104 (2) that appeals may lie to the Supreme Court from “the High Court and such other courts” which may include the Industrial Relations Court if the act were to be amended to that effect. The Commission further concluded that the conversion of the Industrial Relations Court into a Tribunal may deprive the court user of a tier in the justice system to which he or she would have appealed. Delegates disagreed with this position and considered that the Industrial Relations Court has more attributes of a tribunal than a court due to the relaxed procedures and its membership which consists of the Chairperson as a presiding officer and representatives of employees and workers. Nevertheless, the Commission maintained its position on these issues.

The Commission further observed that under section 103 (3), the establishment of courts of superior or concurrent jurisdiction with the Supreme Court of Appeal or the High Court is prohibited. For this reason, the elevation of this Court into a court with concurrent jurisdiction as the High Court would be unconstitutional. The Commission concluded a solution may lie in the creation of a division of the High Court specializing in labour matters.

However, the Commission was of the view that this path may not be consonant with the procedures and processes of the Industrial Relations Court in its current form. As observed earlier, the Industrial Relations Court which is a subordinate Court, has relaxed rules on procedure, evidence and legal representation. The Commission considered that it would be unfair for the court user who did not have to strictly observe rules of procedure to lose this opportunity and face his or her opponent in a more legalistic environment of a Labour Court established at High Court level.

The Commission therefore recommends the retention of the *status quo*.

(k) *Constitutional Court*

The Commission received submissions requesting for the setting up of a permanent constitutional court. The Commission considered the difficulty of implementing this proposal in light of section 103 of the Constitution. Section 103 prohibits the setting up of courts of superior or concurrent jurisdictions with the Supreme Court of Appeal or High Court. The Commission was aware that section 9 (2) of the Courts Act and section 3 (3) of the Supreme Court of Appeal Act empower the Chief Justice to appoint three Judges to sit as a Constitutional Court whenever there is a dispute that expressly and substantially relates to or

concerns the interpretation of the provisions of the Constitution and as a Constitutional Court of five judges in order to hear an appeal where the question involves the interpretation or application of the Constitution.

The Commission considered comparable provisions in Constitutions from other jurisdictions notably South Africa where the Constitutional Court setup is elaborate. The Commission observed that in South Africa, the Constitutional Court is set up under the Constitution and is ranked highest Court in South Africa. In the provision that details the courts of the judicial system of South Africa, the Constitutional Court has jurisdiction to hear only constitutional matters.²³⁸

In most other jurisdictions, the power to hear constitutional matters is vested in the ordinary courts. For instance, in Uganda, the Court of Appeal sits as a Constitutional Court. In Zimbabwe, the Supreme Court has jurisdiction to determine constitutional matters while in Namibia, both the High Court and the Supreme Court have jurisdiction to hear constitutional matters.

The Commission considered the various approaches in setting up of a Constitutional Court and recommends retention of the current arrangement of an *ad-hoc* bench set up under the Courts Act and the Supreme Court of Appeal Act. The Commission was fortified in this view considering that the current *ad-hoc* arrangement is working perfectly. The Commission therefore saw no need for setting up a separate bench of the High Court to specialize in constitutional matters.

Most delegates to the Second National Constitution Conference disagreed with the position taken by the Commission. It was argued that the setting up of a Constitutional Court would ensure expediency and expertise in the handling of constitutional matters. The Commission was urged to reconsider this matter.

In deliberating this matter further, the Commission considered that, in addition to the other reasons given earlier, practice and experience indicates that there would not be enough cases in a year to keep such a court busy. The Commission therefore concluded that the creation of such special court would not be justifiable. The Commission hence maintained its position.

7.0 CONSTITUTIONAL AND OTHER BODIES

7.1 CONSTITUTIONAL BODIES

(a) *Ombudsman*

The Constitution under section 120 provides for the creation of the office of the Ombudsman with such powers, functions and responsibilities as are provided for by the Constitution and an Act of Parliament. Basically, the Constitution mandates the Ombudsman to investigate any and all cases where it is alleged that a person has suffered injustice, and it does not appear that there is any remedy reasonably available by way of proceedings in a court or by way of appeal from a court; or where there is no other practicable remedy.²³⁹

²³⁸ See section 166 and Section 168 (3) of the South African Constitution.

²³⁹ Section 123 of the Constitution.

Under the Ombudsman Act,²⁴⁰ the Ombudsman is empowered to inquire into or investigate any matter concerning any alleged instance of abuse of power or unfair treatment of any person by an official in the employ of any organ of Government, or manifest injustice or conduct by such official which would properly be regarded as oppressive and unfair in an open and democratic society.²⁴¹ Organ of Government is defined as including the State, and any local authority, board, commission, committee, corporation, body or institution established or instituted under any written law.²⁴²

Submissions received by the Law Commission during the initial consultations indicate that the Act limits the jurisdiction of the Ombudsman as provided for in the Constitution. Secondly, the mode of determining whether a matter falls within the jurisdiction of the court or Ombudsman is ambiguous as it is not clear whether it is subjective or objective. Thirdly, the types of relief to be awarded by the Ombudsman should be spelt out in the Act, as it is doubtful whether the Ombudsman can award monetary compensation. Similarly, procedures for awarding remedies should be spelt out under the law. The Commission therefore took time to discuss these issues in turn.²⁴³

On the issue of general jurisdiction, the Commission observed that there is indeed a conflict between the Constitution and the Ombudsman Act. The Commission considered that the scope under the Constitution is very wide to include even matters involving private persons, the Commission found this position to be unsatisfactory. The Commission was aware that section 5 of the Act embraces the traditional role of the Ombudsman in dealing with matters of maladministration occasioned by public bodies or officers in the employ of such bodies. Further, the Commission observed that the Supreme Court of Appeal in *Air Malawi Ltd v Office of the Ombudsman* emphasized the traditional role of the Ombudsman and concluded that the Act aptly defines the jurisdiction of the Ombudsman.²⁴⁴

Delegates to the Second National Constitution Conference observed that the office of the Ombudsman is perceived to be a very effective State institution in dealing with matters of maladministration generally. It was therefore argued that confining the mandate of this office only to cases of maladministration involving public bodies or public officers would result in perpetuating injustices in the private sector. Delegates also considered that the situation in Malawi of having only one Ombudsman shall work to the disadvantage of those individuals affected by maladministration in the private sector if the traditional role as propagated by the Act is to be insisted on. Delegates therefore urged the Commission to embrace the direction given by the Constitution.

In deliberating this issue further, the Commission conceded the points made by the delegates and reconsidered its earlier position. The Commission therefore recommends retention of the *status quo* in section 123 of the Constitution and amendment of the Ombudsman Act for compliance.

²⁴⁰ Cap 3:07

²⁴¹ Section 5

²⁴² Section 2

²⁴³ Constitution Review Consultation paper pgs 52-53

²⁴⁴ MSCA Civil Appeal No. 1 of 2000

The manner of determining jurisdiction of the Ombudsman in a particular matter was a topic for a lengthy debate. The Commission was of the view that there is need to clarify the scope of the jurisdiction of the Ombudsman to reduce frequent judicial challenges. In that regard, the Commission recommends amendment of subsection (1) of section 123 by inserting the words “**to the Ombudsman**” after the word “appear”.

On the issue of the types of reliefs and procedure for awarding remedies, the Commission noted that the Constitution makes provision for the remedies which fall under the realm of the Ombudsman. These are: to direct that appropriate administrative action be taken to redress the grievance; to cause the appropriate authority to ensure that there are, in future, reasonably practicable remedies to redress a grievance; and to refer a case to the Director of Public Prosecutions with a recommendation for prosecution, and, in the event of refusal by the Director of Public Prosecutions to proceed with the case, the Ombudsman shall have the power to require reasons for the refusal.²⁴⁵

The Commission further noted that the remedies the Ombudsman can award does not include monetary compensation. The Commission was aware that the courts have also made pronouncements to that effect. For example in *Trustees of Malawi against Physical Disability vs Ombudsman*²⁴⁶ the court concluded that there is no power in the Constitution for the Ombudsman to award compensation of any form. The Court in that case relied heavily on section 46 of the Constitution which expressly leaves the power to make orders including compensation to the courts. The Commission, therefore, concluded that the remedies the Ombudsman can give are limited to what is contained in section 126 of the Constitution and in section 8 of the Ombudsman Act.

The Commission had recourse to comparative provisions in the Constitutions of Namibia and Lesotho and observed that in Namibia the Ombudsman has very wide powers to investigate complaints against government, persons, enterprises and private institutions. The justification for the position in Namibia is the non-existence of the Human Rights Commission. However, the power to award monetary compensation is left to the courts. In the main, the powers are only limited to providing legal assistance or advice. In Lesotho, the Ombudsman makes a recommendation of a remedial action including payment of compensation. The Commission observed that recommending an award is different from actual awarding of compensation.

The Commission further observed that the Ombudsman Act²⁴⁷ provides for an elaborate and clear procedure on how the Ombudsman should award remedies.

Initially, the Commission recommended that the *status quo* should be maintained so that the Ombudsman’s remedies should not include monetary compensation or any remedy which falls within the jurisdiction of the courts. However, delegates to the Second National Constitution Conference disagreed with the position taken by the Commission and urged that the institution should be empowered to award compensation for the effective functioning of the institution.

²⁴⁵ Section 126

²⁴⁶ MSCA Cause No. 22 of 2001

²⁴⁷ Section 8

In deliberating this issue further, the Commission conceded that the office of the Ombudsman is very popular with the common man and hence empowering this institution to award monetary remedies would go along way to enhance public confidence in the administrative justice system. Moreover, in other countries in the region, such as Lesotho, the Ombudsman is given this power. The Commission thus indorsed the recommendation of the Conference and recommends that the office of the Ombudsman should be empowered to award monetary remedies. Section 126 of the Constitution should thus be amended to incorporate this aspect by adopting the following new paragraph (a)—

“(a) award monetary compensation;”.

Existing paragraphs (a), (b) and (c) should be renumbered paragraphs (b), (c) and (d) respectively.

Another matter that the Commission considered regarding the Office of the Ombudsman was the retirement age of the holder of that office. The Commission recommends that the retirement age of the Ombudsman should be raised from 65 to 70 following its recommendation to raise the retirement age of a judge since the Ombudsman performs quasi-judicial functions. Section 128 (2) should thus be amended in paragraph (c) by deleting “sixty-five” and replacing it with “seventy”.

(b) Malawi Human Rights Commission

The Malawi Human Rights Commission is established under section 129 of the Constitution with the primary mandate of protecting human rights and investigating violations of rights accorded by the Constitution. The composition of the Commission includes the Law Commissioner, the Ombudsman and such other persons as shall be nominated from time to time in that behalf by those organizations considered in the absolute discretion of both the Law Commissioner and the Ombudsman to be reputable organizations that are wholly or largely concerned with the promotion of rights and freedoms guaranteed by the Constitution or any other written law.²⁴⁸ The Law Commissioner and the Ombudsman are required jointly to refer the names of the persons nominated to the President for formal appointment of such persons as members of the Human Rights Commission.²⁵⁹ Section 4 of the Human Rights Commission Act elaborates on the procedure of appointment in detail. Tenure of office of the members is three years and a member is eligible for re-appointment.²⁵⁰

Submissions received by the Law Commission indicated dissatisfaction with the involvement of the Law Commissioner and Ombudsman in the nomination procedure of Human Rights Commissioners and also generally with the two officers involvement in the work of the Commission. It was submitted that the involvement of these two officers creates the perception that the Human Rights Commission is subordinate to the Law Commission and the Ombudsman.

It was also submitted that the Constitution should clearly stipulate that in carrying out its functions the Commission should demonstrate independence.

²⁴⁸ Section 131 of the Constitution

²⁴⁹ *ibid*

²⁵⁰ Section 5 of Human Rights Commission (Cap 3:08)

It has also been submitted that tenure of Human Rights Commissioners be secured in the Constitution. Presently, the Constitution recognizes the Human Rights Commissioners as part time officers though practice sanctioned by Presidential endorsement allows three Commissioners to operate fulltime. The consultations have also revealed that the mandate as provided for in sections 129 and 130 of the Constitution is too broad, since the rights to be protected include those accorded by any other law.²⁵¹ The Commission, therefore, looked at each of these issues in turn coming up with specific findings and recommendations.

On the issue of the involvement of the Law Commissioner and Ombudsman in the Human Rights Commission, the Commission considered that this gives transparency to the appointment procedure and also strengthens expertise in the institution. The Commission however conceded that there is a need to strengthen the composition of nominating officers by including the Judicial Service Commission and the Civil Service Commission and recommends accordingly.

The Commission also considered trends obtaining in other countries in the region by looking at the Constitutions of Zambia, Uganda and Tanzania. The Commission observed that in Zambia and Uganda the appointment of Commissioners is done by the President subject to ratification by the National Assembly. In Tanzania, the position is similar to that of Malawi. Different institutions are involved in short-listing of qualified persons whose names are forwarded to the appointing Committee comprising of the Chief Justice, Speaker of the National Assembly, Chief Justice of Zanzibar, Speaker of House of Representatives of Zanzibar and the Deputy Attorney General. The chosen list of names is sent to the President who appoints the Commissioners.

In the final analysis, the Commission resolved that the current appointment procedure be retained.

On the issue of independence of the Commission, the Commission observed that there is merit in the suggestion in the light of other constitutional bodies where such provisions are in the Constitution. The Commission recommends that for consistency, the Constitution be amended to provide for the independence of the Commission in a new section 131A.

The Commission, accordingly, recommends the introduction of a new 131A as follows—

**Independence
of the
Commission**

131A. The Commission shall exercise its functions and powers independent of the direction or interference of any other person or authority.

In relation to the issue of tenure of Commissioners, the Commission recommends that the term of office for Commissioners should be increased to four years and that subsection (3) of section 131 should be repealed and replaced with the following new subsections (3) and (4)—

(3) A member of the Human Rights Commission, other than a member by virtue of paragraph (a) and (b) of subsection (1), shall serve

²⁵¹ Constitution Review Consultation Paper p. 52.

a term of not more than four years but he or she shall be eligible for re-appointment for a further term of not more than three years.

(4) The President may remove a member of the Human Rights Commission, other than a member by virtue of paragraph (a) and (b) of subsection (1) from office on the grounds of—

(a) incompetence;

(b) incapacity;

(c) in circumstances where the member is compromised to the extent that his or her ability to impartiality exercise the duties of his or her office is seriously in question.

On the issue of the broadness of the mandate of the Human Rights Commission and the potential for jurisdictional conflict with other institutions, the Commission was of the view that issues of human rights are too broad. They are not only limited to those contained in Chapter IV of the Constitution but rather extend to rights accorded by other written laws as well. In that regard, the Commission recommends retention of sections 129 and 130 in their entirety.

(c) Defence and Security Committee of the National Assembly

The Committee is established under section 162 of the Constitution. The Committee's composition is represented proportionally by the political parties having seats in the National Assembly. It exercises powers and function conferred by the Constitution and an Act of Parliament. One such function is to scrutinize the exercise of all powers conferred on the Defence Council.²⁵² The tenure of office of this Committee is one year.

The consultations carried out by the Law Commission revealed that the specific role of the Committee is not specified and that the period of tenure of one year is grossly inadequate.²⁵³ Further, the representatives of the Defence Force questioned the appropriateness of the oversight or supervisory powers of the Committee over appointments in the Force.²⁵⁴

In its deliberations on the three issues, the Commission admitted that the Committee is a new feature in our constitutional order and that it has a background from Malawi's historical past. Thus, on matters of defence and security the National Assembly should have an oversight direction, since it is viewed as a linchpin of all democratic developments of emerging democracies. Government actions must be seen to be both lawful and legitimate. Consequently, supervision is a tool intended to ensure political accountability and transparency in the defence and security sector.

On the issue of the specific role of the Committee to be spelt out in the Constitution, the Commission observed that other Parliamentary Committees such as the Public Appointments Committee, Budget Committee and Legal

²⁵² Section 161(5) of the Constitution

²⁵³ Constitution Review Consultation paper p. 54

²⁵⁴ *ibid*

Affairs Committee are created under section 56 (7) and perform their functions as conferred by the Constitution or by an Act of Parliament or resolution or by the Standing Orders of Parliament. No specific functions for these Committees have been specifically provided for in the Constitution. The Commission therefore concluded that there is no need to treat the Defence and Security Committee differently.²⁵⁵

The Commission further considered the issue of tenure in the light of the provision of section 56 (7) (b). The Commission resolved that the period of one year suffices and is consistent with parliamentary practice. The other reason is that the Committee deals with matters of security and therefore a period of one year is justified.

In conclusion, the Commission recommends retention of the *status quo*.

(d) *Reserve Bank of Malawi*

The requirement for the establishment of the Reserve Bank of Malawi is acknowledged under Chapter XIX of the Constitution²⁵⁶ but the Bank is established under the Reserve Bank of Malawi Act²⁵⁷ to serve as the State's principal instrument for the control of money supply, currency and institutions of finance and generally serve in accordance with the normal functions of a central bank. In terms of section 4 of that Act the principal objectives of the Bank are to act as banker and adviser to the Government and several other objectives with a bearing on the national economy and Government economic policies. The Bank has powers and functions which are performed largely on behalf of the Government which includes international transactions.²⁵⁸

With reference to this institution, it has been submitted that section 185 of the Constitution should be entrenched to ensure that the Bank is not abolished at the whim of a government. It has further been suggested that the Bank should have a reporting requirement to a relevant Committee of the National Assembly. Furthermore, it has been submitted that the independence of the Bank must also entail security of tenure of the Governor and Deputy Governor.

In relation to the issue of entrenchment of section 185, the Commission considered that this would not protect the Bank since the Bank is established under statute. The Commission was further informed that currently there is an initiative to reform the Reserve Bank of Malawi Act in a bid to provide solutions to most of the concerns raised. A good example is that there is a proposal that the appointment of the Governor and Deputy Governor be subjected to parliamentary approval.

In conclusion, the Commission recommends retention of the constitutional provisions but that most of the issues raised should be covered under the Act.

²⁵⁵ Section 162 (1) of the Constitution

²⁵⁶ Section 185 of the Constitution

²⁵⁷ Cap 44:02 of the Laws of Malawi

²⁵⁸ Section 28 of Reserve Bank of Malawi Act, Cap. 44:02

(e) National Local Government Finance Committee

The Constitution establishes the National Local Government Finance Committee under Chapter XIV of the Constitution dealing with Local Government.²⁵⁹ The functions and powers of this body include the receipt of revenue and projected budgets, examination and supervision of accounts, recommendation of distribution of funds and variation of amounts payable where need arises, preparation of a consolidated budget for all local government authorities and making application to the Minister for supplementary funds. The primary mandate of the Committee is to oversee the finances of the Assemblies.

The composition of the Committee is provided for under section 151 and includes: one person nominated from time to time by a caucus of local government authorities; the Principal Secretary of Local Government; one person who is a professionally qualified and practising accountant appointed by the Public Appointments Committee on the recommendation of the Committee; the Chairperson of the Civil Service Commission or a member of that Commission nominated by the Chairperson from time to time; one person nominated by the Electoral Commission from time to time; and the Principal Secretary responsible for Finance or his or her senior representative.

Tenure of office for members of the Committee is three years and removal of members is by the President on the recommendation of the Public Appointments Committee, but no member shall be recommended for removal unless the Public Appointments Committee is satisfied that the member is incompetent, compromised to the extent that the members financial probity is in serious question, or is otherwise incapacitated.²⁶⁰

Under Part VI of the Local Government Act²⁶¹ the Committee is mandated to perform a lot of financial duties which include approving estimates both annual and supplementary in respect of an Assembly.

From the consultations and submissions made to the Law Commission several issues emerged. It has been argued that the name should change from Committee to Commission as the term Committee implies that it is a component of a bigger entity. Further, it has been submitted that this institution should have its own Chapter in the Constitution. Furthermore, it has been submitted that the composition of the Committee be reviewed to enhance competence. Lastly, it has been submitted that the amounts of funds transferred from central government to local government be spelt out in the Constitution in form of a percentage of the national budget.²⁶²

The Commission found merit in the submission that the name should change from Committee to Commission. The Commission unanimously agreed that the term Committee presupposes that it is a part of a bigger entity and recommends that “Committee” should be replaced with “**Commission**”.

²⁵⁹ Section 149

²⁶⁰ Section 151(2)

²⁶¹ Cap 22:01 of Law of Malawi

²⁶² Constitution Review Issues Paper pp 41 - 42

In terms of creating a separate Chapter for the Committee, the Commission was of the view that the provisions regulating the institution are appropriately placed in a Chapter on local government administration. The Commission therefore recommends that the *status quo* be retained.

On the issue of composition, the Commission agreed that there is need for review as the current composition does not tally with the functions and powers of the Committee. The Commission observed that the composition of the Committee should reflect competencies that should satisfy the mandate of the Committee. The Commission further observed that the section does not specify the appointing authority in relation to members nominated to sit on the Committee. The Commission thus recommends that all persons nominated to sit on the Committee should be appointed by the President. Section 151 is, therefore, to be repealed and replaced as follows—

“Composition
of the National
Local
Government
Finance
Commission

151.—(1) The members of the National Local Government Finance Commission shall be—

(a) two persons who shall be nominated from time to time in that behalf by a caucus of local government authorities and appointed by the President;

(b) one person who is a qualified and practising accountant nominated in that behalf by a body regulating the profession of accountants in Malawi and appointed by the President;

(c) one person who is a qualified and practising economist nominated in that behalf by a body regulating the profession of economists in Malawi and appointed by the President;

(d) the Chairman of the Local Government Service Commission, or such other member as may for the time being be designated in that behalf by the Chairman of the Local Government Service Commission;

(e) two persons nominated in that behalf by a caucus of civil society organizations and appointed by the President; and

(f) the following *ex-officio* members—

(i) Principal Secretary responsible for Local Government;

(ii) Principal Secretary responsible for Finance;

(iii) Principal Secretary responsible for Economic Planning and Development.

(2) The Commission shall elect a Chairman of the Commission from among the appointed members at the first meeting of the Commission.

(3) Except for *ex-officio* members, the term of office of a member of the Commission shall expire—

(a) three years after the date that member was first appointed; or

(b) on removal by the President on the recommendation of the Public Appointments Committee, but no member shall be recommended for removal under this paragraph unless the Public Appointments Committee is satisfied that he or she is—

(i) not competent to exercise the duties of that office;

(ii) compromised to the extent that his or her financial probity is in serious question; or

(iii) otherwise incapacitated.

(4) For the purposes of subsection (1) (a), the Minister responsible for Local Government shall convene a caucus of local government authorities within thirty days of the election of those authorities.”

Lastly, on the issue of spelling out in the Constitution the amount of funds transferred from Central Government to local government authorities, the Commission unanimously resolved that issues of budget cannot be included in the Constitution as this will be recipe for confrontation. The Commission was also aware that there is an agreed formula which takes into account several factors in computing how much funds should be transferred to respective Assemblies. The Commission therefore recommends that the *status quo* be retained.

(f) Civil Service Commission

The Constitution currently makes provision for the establishment of a Civil Service Commission under section 186. The Commission is composed of a Chairperson, Deputy Chairperson and not less than six nor more than ten other members. The powers and functions of the Commission are to appoint persons to hold or act in offices in the service, including the power to confirm appointments and to remove such persons from office. It also has powers to exercise disciplinary control.²⁶³

However, section 189 excepts the application of Chapter XX to appointments regulated by the Judicial Service Commission, the Police Service Commission, the Prison Service Commission among others.

The other institutions and bodies that have emerged since 1994 pursuant to the new Constitution order are outside the mandate of the Civil Service Commission. These include the Law Commission, the Human Rights Commission, the Electoral Commission, the Office of the Ombudsman and the

²⁶³ Section 187

Anti-Corruption Bureau. Stakeholders have submitted that the Constitution should establish a Public Service Commission as an umbrella body for all public institutions with similar functions as currently exercised by the Civil Service Commission. Consequently, it has been suggested that all commissions should be subordinate to the Public Service Commission.²⁶⁴

Comparative studies carried out by the Commission revealed that in most SADC countries constitutions provide for a Public Service Commission with similar functions as those exercised by the Civil Service Commission. For example, the Commission learnt that in South Africa, the Public Service Commission has broad mandate over the public service which includes monitoring and evaluating the organization, administration and personnel practices of the public service. There are no other service commissions recognized by the Constitution. In Namibia the position is the same as in South Africa and in that jurisdiction the Commission works through committees chaired by members of the Public Service Commission established in all pertinent sectors such as health and education. The Commission learnt that this approach is preferred to avoid the cost and expense associated with the creation of separate and permanent service commissions.

On the other hand, though Uganda has a Public Service Commission mandated to review the terms and conditions of service and qualifications of public officers, its mandate does not extend to specialized staff such as health workers, the police and judicial officers. Specialized commissions regulate appointments of such staff. The Public Service Commission is merely consulted when the other commissions effect appointments and review terms and conditions of service of their respective staff. The Commission learnt that this approach has the advantage of ensuring that sector issues are handled professionally without unnecessary delays.

In debating this issue further, the Commission learnt that there is an initiative by Government to create an umbrella body for the public service with a broad mandate as the ultimate oversight body. The Commission recognized the need to harmonize the terms and conditions of service in the public service, in particular those for the new institutions created by the 1994 Constitution. The Commission however observed that this development is liable to meet a number of challenges.

First, the Commission was of the view that the creation of such a body might result in increasing the red tape in handling of matters affecting the public service. Second, the Commission was aware that for the proper and effective functioning of institutions such as the Ombudsman, Anti-Corruption Bureau, the Law Commission, the Electoral Commission and the Human Rights Commission, a certain level of autonomy is required. The Commission however, observed that this cannot be achieved if the institutions were to come under the direct supervision of the proposed Public Service Commission. Thirdly, the Commission was not satisfied that the proposed Public Service Commission would have adequate capacity and competence to provide effective oversight functions over all public institutions and at the same time supervise and monitor

the other service commissions effectively. Lastly, the Commission observed that there are a number of service commissions created by the Constitution such as the Police Service Commission and the Prison Service Commission which would necessitate further amendments to the Constitution to make such Commissions subject to the proposed Public Service Commission.

In view of the above challenges, the Commission recommends retention of the *status quo*.

7.2 OTHER BODIES

(a) *Immigration Department*

This is one of the departments in the Ministry of Home Affairs and Internal Security along side the Police and the Prison Service. Matters of immigration are provided for under the Immigration Act. The Citizenship Act is another Act implemented by the Department.

The Law Commission received a submission from the Immigration Department suggesting that the status of the Department is not clear as to whether it is a security organization or a civilian one. It was argued that the Constitution provides, for Police Service and the Prison Service under separate Chapters but is silent on the Immigration Department. It was therefore submitted that the Immigration Department be accorded its own Chapter under the Constitution to spell out its mandate. The Chapter should also guarantee the independence and professionalism of the Department.

In debating this matter, the Commission was not persuaded by the suggestion that the Department should be accorded its own Chapter. The Commission noted that matters of immigration are as good as matters of internal security. Hence, the Commission considered the placement of the Department under the Ministry of Home Affairs and Internal Security appropriate.

The Commission also considered trends in other jurisdictions such as Botswana and Tanzania and found that the position is similar to the one in Malawi, in that the administration of the Department is reposed in the Chief Immigration Officer.²⁶⁵ Further, research has also revealed that no Constitution in the jurisdictions considered has specifically provided for immigration matters. On the issue of independence of the Department, the Commission observed that most legislation show that the officers in the Department, perform their duties on specific or general directions from the relevant authorities.

In the light of the foregoing, the Commission recommends that the *status quo* be retained.

(b) *Anti-Corruption Bureau*

The Anti-Corruption Bureau is established under the Corrupt Practices Act,²⁶⁶ with the broad mandate to investigate, prevent and prosecute acts of corruption. Its genesis may be found in one of the principles of national policy

²⁶⁵ See s. 3 Immigration Act of Botswana, s.4 Immigration Act of Tanzania

²⁶⁶ Cap. 7:04 Laws of Malawi

under section 13(o) of the Constitution which requires the State to introduce measures which guarantee accountability, transparency, personal integrity and financial probity in order to strengthen public trust and good governance.

Stakeholders emphasized the need to upgrade this institution to a constitutional body in view of its importance and sovereign role in the conduct of matters of criminal justice. It has been submitted that the institution is vulnerable if left to exist under an Act of Parliament.

In debating this matter, the Commission observed that the Constitution establishes the office of the Director of Public Prosecutions with power in all criminal matters to institute and undertake criminal proceedings against any person before any court.²⁶⁷ The Anti-Corruption Bureau is subject to the authority of the Director of Public Prosecutions. With this arrangement, the Commission observed that there is no need to change the status of the Anti-Corruption Bureau.

Further, a comparative analysis of the Constitutions of Tanzania, Zambia, Zimbabwe, Lesotho and Botswana also reveals that bodies dealing with issues of corruption are established by Acts of Parliament and not Constitutions.

The Commission therefore concluded that by legislating for the Bureau, Malawi as a State has fulfilled its obligation under the principles of national policy as contained in section 13(o) of the Constitution. The Commission therefore recommends that the *status quo* be retained.

(c) *Institution of Chieftaincy*

The 1966 Constitution specifically recognized the institution of chieftaincy under section 6. The 1994 Constitution on the other hand only gives power to chiefs to preside over local courts²⁶⁸ and also to be members of the local government authorities.²⁶⁹

Consultation with chiefs and civil society suggests that the Constitution should be amended to recognize the institution of Chieftaincy as was the position prior to 1994 in view of the important role that chiefs play in governance issues.

The Commission noted that it is a general trend in most of the Constitutions of African countries to recognize the institution of Chieftaincy. For example, Zambia, Zimbabwe, South Africa, Botswana, Lesotho, Uganda, Kenya, Ghana and Sierra Leone all have provisions governing the institution of Chieftaincy.

In its deliberations, the Commission unanimously agreed that it was never intended to abolish the institution of Chieftaincy but rather it was an oversight. The Commission thus recommends that the institution of Chieftaincy should be re-introduced in the Constitution under Chapter III on principles of national policy. Delegates to the Second National Constitution Conference were in support of this recommendation and urged the Commission to incorporate safeguards to ensure that Chiefs are not manipulated by the Government of the day.

²⁶⁷ Section 99

²⁶⁸ Section 110(3)

²⁶⁹ Section 146(4)

The Commission therefore recommends that section 13 of the Constitution be amended by introducing a new paragraph (p) to read as follows—

“(p) Chiefs

To recognize and preserve the institution of Chieftaincy so that Chiefs may make the fullest contribution to the welfare and development of the country in their traditional field.”.

(d) Auditor General

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

It has been submitted that in order to ensure independence of the office, it would be better if the Constitution contained a separate Chapter to provide for the office. It is argued that this would be in line with the scheme of the Constitution in respect of other institutions of good governance. Secondly, it has been submitted that there is an inconsistency between the Constitution and the Public Audit Act as regards the reporting procedure. The Public Audit Act requires the Auditor General to submit his or her report to the President and Speaker of the National Assembly while the Constitution requires the Auditor General to submit the report to the National Assembly through the Minister of Finance.²⁷⁰ Thirdly, it is submitted that the Constitution should stipulate the retirement age of the Auditor General.

In debating on the issues raised, the Commission was satisfied that the office of the Auditor General is appropriately placed under a Chapter dealing with finances generally. The Commission thus saw no merit in the submission to change this position and hence recommends retention.

On the issue of reporting procedure, the Commission considered that the Constitution reflects acceptable practice since the Minister of Finance is best suited to lay the Report of the Auditor General before Parliament. The Commission was further aware that this arrangement is a mere formality and that the Minister does not tamper with the contents of the Report. The Commission also considered that the arrangement under the Act requiring the Auditor General to submit his report to the President and Speaker is a necessary safeguard to ensure transparency and accountability. The Commission thus recommends retention of the *status quo*.

²⁷⁰ Constitution Review Issues Paper p 43

8.0 MISCELLANEOUS

(a) *Ratification of International Instruments*

Section 89 (1) (f) of the Constitution empowers the President to negotiate, sign, enter into and accede to international agreements or to delegate such power to Ministers, Ambassadors and High Commissioners.

Submissions suggested that this power should be vested in Parliament. It has been argued that a decision to subject citizens to international obligations should vest in an elected body such as Parliament.

The Commission was informed that internationally, the practice is that the Head of State has the authority to enter into international agreements, save for financial agreements which are entered into by the Minister of Finance. The position has been the same under the 1966 Constitution. The Commission considered that signing of agreements involves negotiation and Parliament would not be in a position to perform such a task. Secondly, the Commission considered that the discretion to determine appropriate agreements and treaties falls within the purview of the Executive. The Commission therefore considered that it would be inappropriate to remove the power to sign, ratify and negotiate international agreements from the executive.

The Commission further observed that in carrying out this function, the President is assisted by Cabinet which is obliged to do so under section 96 (1) (f) and also to inform Parliament on international agreements that are to be concluded or acceded to. Parliament, on its part, is mandated under section 66 (1) (c) to debate and vote motions in relation to any matter.

The Commission therefore concluded that the various constitutional provisions read together provide adequate safeguards and flexibility in dealing with such matters. The Commission recommends retention of *status quo*.

(b) *Disclosure of Assets*

Section 88A (1) of the Constitution requires the President and members of Cabinet to disclose their assets, liabilities and business interest including those of spouses within three months of their election or appointment as the case may be. Section 213 has extended this requirement to Members of Parliament, senior public officers and senior officers of statutory corporations. The Constitution further gives Parliament the assignment to determine the grades and positions of officers required to disclose assets.²⁷¹

The disclosure of assets is required to be made in a written document to the Speaker of the National Assembly who is required to deposit such documents with such public office as may specified in the Standing Orders of Parliament.

The Law Commission received a number of submissions. First, stakeholders considered that the period of three months within which to disclose assets by politicians was too long a period and feared that such a lengthy period may provide a window of opportunity for such persons to dubiously amass personal

²⁷¹ *ibid*

wealth. Second, stakeholders observed that there is a general lack of enforcement of this provision either due to lack of an enabling statute or political will.

In debating the issue of non-compliance, the Commission was aware that the current state of affairs is as a result of the country’s political history and culture where politicians and senior public officers are held in reverence. The Commission observed that in the present context a request to persons holding political office to declare assets once they ascend to such office is futile. The Commission was of the view that there is need to propose a scheme that is effective and best suited for Malawi.²⁷²

First, the Commission considered that in order to promote effectiveness of the scheme of disclosure of assets and liabilities on the part of the leadership in Government, section 88 of the Constitution should be amended to include members of Cabinet and prohibit the performance of remunerative work outside official duties and the use of the office of the President or Cabinet Minister for gain. The Commission therefore recommends adoption of the following two new subsections as subsections (3) and (4)—

Responsibility of the President and members of Cabinet	88.—(1) ...
	(2) ...
	(3) The President and members of Cabinet shall not perform remunerative work outside the duties of their office.
	(4) The President and Members of Cabinet shall not use their respective offices for personal gain or place themselves in a situation where their material interests conflict with the responsibilities and duties of their office.

Initially, the Commission considered that the best approach is to adopt different schemes for elected officials and appointed officials. Thus, for appointed officials, the Commission recommended retention of the *status quo* in terms of the period within which to declare assets. The Commission considered that in order to facilitate effective compliance of these provisions on the part of persons holding political office such as the President, Vice-President, Ministers and Members of Parliament, such persons should be required to disclose assets before taking office or before swearing in. Further, in the event that the Senate is re-introduced, the Commission considered that Senators should also be included under this category.

In terms of public officials, the Commission recommended that the current scheme of requiring disclosure of assets within three months of appointment should be maintained.

Delegates to the Second National Constitution Conference were dissatisfied with the position taken by the Commission on this matter. The differential treatment was considered unjustified. In response to this observation, the

²⁷² Delegates to the Second National Constitution Conference conceded that the principle of disclosure of assets and liabilities is very important. However, delegates could not agree on the period within which disclosure of assets should be done.

Commission conceded the error and recommends that both should be required to declare assets and liabilities before assuming or taking up office. The Commission however had a lengthy debate on whether, for politicians, this should translate into the requirement to submit a declaration form duly filled as one of the supporting documents when presenting nomination papers. The Commission observed that in all jurisdictions where this is a requirement, it has been provided for under an Act of Parliament. Hence, if Malawi has to go that way, it shall necessitate an amendment to section 38 of the Parliamentary and Presidential Elections Act to include a Declaration Form as one of the required supporting documents. The Commission was aware that the challenge with this route is that there is no Act of Parliament at the moment incorporating details for the proper implementation of constitutional provisions on disclosure of assets and liabilities to which the Parliamentary and Presidential Elections Act may refer. The Commission therefore took the position that once a law on declaration of assets and liabilities is adopted, section 38 of the Parliamentary and Presidential Elections Act should be amended to include this requirement.

The Commission also observed that it is important to require periodic disclosure of assets and liabilities for persons holding public or political office as a monitoring tool to curb corrupt practices. The Commission was however aware that this detail is appropriate for an Act of Parliament and hence recommends that this should be incorporated under the new law currently being developed by the special Law Commission on the Development of Legislation on Assets and Declarations.

In summation, the Commission therefore recommends replacement of section 88A with the following new section 88A—

“Disclosure of
assets by the
President and
Members of
Cabinet

88A.—(1) A person elected to be President or Vice-President or a person appointed to be Minister or Deputy Minister, as the case may be, shall before he or she assumes office, fully disclose all of his or her assets, liabilities and business interests and those of their spouses, held by them or on their behalf as at that date.

(2) Disclosure of assets pursuant to subsection (1), and unless Parliament otherwise prescribes by an Act of Parliament, shall be made in a written document delivered to the Speaker of the National Assembly who shall immediately upon receipt deposit the document with such public office as may be specified in the Standing Orders of Parliament.

(3) Any business interests held by the President and members of the Cabinet shall be held on their behalf in a beneficial trust which shall be managed in such manner as to ensure conformity with the responsibilities and duties of their office.”

In discussing section 213, the Commission found the requirement that only “senior” public officers and senior officers in Corporations and similar bodies should disclose assets unsatisfactory. The Commission observed that over and above seniority, the nature of the functions of the job for each grade should be the determining factor since it is the functions of a particular job which may expose an officer to corrupt practices. An example of a crucial function cited was that of procurement which normally is exercised by fairly junior officers in the public service.

The Commission therefore recommends deletion of the word “senior” in both paragraphs (b) and (c) of subsection (1). The Commission further considered that rather than Parliament determining the grades by resolution under subsection (2), these grades and positions should be provided for in an Act of Parliament. To that end, the Commission was informed that the Law Commission through a special Law Commission on the Development of Legislation on Assets and Declarations is already looking into this matter.

The amended section 213 shall read as follows—

“Disclosure of assets of certain office **213.—(1) In addition to the President and members of the Cabinet as provided by section 88A, the holders of the following offices, that is to say—**

(a) a member of the National Assembly;

(b) a member of the Senate;

(c) a public officer of such grade or position as shall be specified under subsection (2);

(d) an officer of such grade or position as shall be specified under subsection (2), of—

(i) a corporation, board, commission, council or similar body established by or under an Act of Parliament;

(ii) any other body, corporate or unincorporate which in accordance with any Act of Parliament is subject to the same statutory procedures for financial control and accountability as apply in common to a body referred to in subparagraph (i),

shall, before assuming office, or taking up an appointment or his or her seat, as the case may be, fully disclose all his or her assets, liabilities and business interests and those of his or her spouse ...

(2) For the purpose of paragraphs (c) and (d) of subsection (1), disclosure of assets shall be required for officers of such grades and positions as prescribed by an Act of Parliament.”.

Delegates to the Second National Constitution Conference also urged that politicians, relevant public officials and other officials should be required to disclose assets at the point of exit from office to ensure an effective anti- corruption and monitoring mechanism. The Commission conceded this point and recommends that this detail should be incorporated under the new law currently being developed by the special Law Commission on the Development of Legislation on Assets and Declarations.

APPENDIX A

CONSTITUTION (AMENDMENT) BILL, 2007

CONSTITUTION (AMENDMENT) BILL, 2007

[NOTE: This BILL contains all the amendments recommended by the Commission to non-scheduled sections]

ARRANGEMENT OF SECTIONS

1. Short title
2. Replacement of the Preamble
3. Amendment of s. 48 (3) of the Constitution
4. Amendment of s. 49 of the Constitution
5. Amendment of s. 50 of the Constitution
6. Amendment of s. 51 of the Constitution
7. Amendment of s. 52 of the Constitution
8. Amendment of s. 53 of the Constitution
9. Amendment of s. 54 (1) of the Constitution
10. Replacement of s. 55 of the Constitution
11. Amendment of s. 56 of the Constitution
12. Amendment of s. 57 of the Constitution
13. Replacement of s. 59 of the Constitution
14. Amendment of s. 60 of the Constitution
15. Amendment of s. 61 of the Constitution
16. Amendment of s. 63 (1) of the Constitution
17. Insertion of new s. 64 of the Constitution
18. Amendment of s. 65 of the Constitution
19. Insertion of a new s. 68 in the Constitution
20. Insertion of a new s. 69 in the Constitution
21. Insertion of a new s. 70 in the Constitution
22. Insertion of a new s. 71 in the Constitution
23. Insertion of a new s. 72 in the Constitution
24. Amendment of s. 75 of the Constitution
25. Amendment of s. 76 (1) of the Constitution
26. Amendment of s. 80 of the Constitution
27. Amendment of s. 81 of the Constitution
28. Amendment of s. 82 of the Constitution
29. Amendment of s. 83 (3) of the Constitution
30. Insertion of a new s. 85A in the Constitution
31. Amendment of s. 86 of the Constitution
32. Amendment of s. 88 of the Constitution
33. Replacement of s. 88 A of the Constitution
34. Amendment of s. 89 (4) of the Constitution
35. Amendment of s. 94 of the Constitution
36. Amendment of s. 98 of the Constitution

37. Amendment of s. 102 of the Constitution
38. Amendment of s. 105 (1) of the Constitution
39. Amendment of s. 112 of the Constitution
40. Amendment of s. 113 (1) of the Constitution
41. Amendment of s. 116 of the Constitution
42. Amendment of s. 117 of the Constitution
43. Amendment of s. 123 (1) of the Constitution
44. Amendment of s. 126 of the Constitution
45. Amendment of s. 128 (2) of the Constitution
46. Amendment of s. 131 of the Constitution
47. Insertion of new s. 131 A of the Constitution
48. Amendment of s. 147 of the Constitution
49. Replacement of s. 149 of the Constitution
50. Amendment of s. 150 of the Constitution
51. Amendment of s. 151 of the Constitution
52. Amendment of s. 154 of the Constitution
53. Amendment of s. 213 of the Constitution

A BILL

entitled

An Act to amend the Constitution

ENACTED by the Parliament of Malawi as follows—

- | | |
|-----------------------------------|---|
| Short title | 1. This Act may be cited as the Constitution (Amendment) Act, 2007. |
| Replacement
of the
Preamble | <p>2. The Preamble is repealed and replaced as follows—</p> <p>“WE THE PEOPLE OF MALAWI—</p> <p><i>determined</i></p> <p>to defend and safeguard the territorial integrity and political independence of our country;</p> <p><i>convinced</i></p> <p>that unity and freedom as well as peaceful co-existence between all the people of Malawi are the real foundations of our nationhood and survival;</p> <p><i>recognizing</i></p> <p>the sanctity of human life and the unity of all mankind;</p> <p><i>guided</i></p> <p>by their private consciences and collective wisdom;</p> <p><i>seeking</i></p> <p>to guarantee the welfare and development of all the people of Malawi, national harmony and peaceful international relations;</p> |

desirous

of creating a constitutional order in the Republic of Malawi based on the need for an open, democratic and accountable government;

determined

to uphold, at all times and at all levels of society the values that underlie our democratic society

DO HEREBY adopt the following as the Constitution of the Republic of Malawi.

May the Almighty God Bless Our Nation

3. Section 48 (3) of the Constitution is amended by inserting the words “or by the Senate” immediately after the words “National Assembly” in the second line.

Amendment
of s. 48 (3) of
the
Constitution

4. Section 49 of the Constitution is amended—

(a) in subsection (1), by inserting the words, “the Senate” immediately after the words “National Assembly”;

Amendment
of s. 49 of the
Constitution

(b) in subsection (2), by deleting subparagraphs (a) and (b) and substituting therefor the following new subparagraphs as subparagraphs (a) and (b)—

“(a) been laid before and passed in the National Assembly by a simple majority or such other majority as is otherwise required by this Constitution in respect of any particular Bill;

(b) been laid before and passed in the Senate by a simple majority or such other majority as is otherwise required by this Constitution in respect of any particular Bill;”;

(c) by deleting subsection (3) and substituting therefor the following new subsection (3)—

“(3) “Chamber” means either the Chamber of the National Assembly or of the Senate.”.

5. Section 50 of the Constitution is amended—

(a) in subsection (1), by deleting the words “the National Assembly” appearing in the first line and substituting therefor the words “each Chamber”;

Amendment
of s. 50 of the
Constitution

(b) by deleting subsection (2) and substituting therefor the following new subsection (2)—

“(2) If it is brought to the attention of the Speaker of the National Assembly or a person acting as Speaker, or to the Leader of the House of Senate or any person acting as Leader of the House of Senate by any member of the Chamber over which he or she is presiding that there are less than the number of members prescribed by the Standing Orders of that Chamber, present and after such interval as may be prescribed by the Standing Orders of the Chamber, the Speaker or the Leader of the House ascertains that the number of members present is still less than that prescribed by the Standing Orders of that Chamber, he or she shall adjourn the Chamber.”.

Amendment of
s. 51 of the
Constitution

6. Section 51 of the Constitution is amended in—

(a) in subsection (1)—

(i) by deleting paragraph (a) and substituting therefor the following new paragraph as paragraph (a)—

“(a) is a citizen of the Republic who at the time of nomination has attained—

(i) the age of twenty-one years, in the case of the National Assembly; and

(ii) the age of thirty-five years, in the case of the Senate.”;

(iii) by inserting in paragraph (b) at the very beginning the following words—

“is in possession of a Malawi School Certificate of Education or its equivalent and”;

(b) in subsection (2)—

(i) in paragraph (c), by deleting the words, “within the last seven years,”;

(ii) in paragraph (g), by deleting the words, “within the last seven years,”.

Amendment
of s. 52 of the
Constitution

7. Section 52 of the Constitution is amended by deleting the words “National Assembly” in the fourth line and substituting therefor the words “Chamber in which he or she shall sit”.

Amendment
of s. 53 of the
Constitution

8. Section 53 of the Constitution is amended—

(a) by inserting in the marginal note the words “and the Leader of the House and Deputy Leader of the House” immediately after the words “Deputy Speaker”;

(b) by deleting subsection (1) and substituting therefor the following new subsection (1)—

“(1) There shall be a Speaker of the National Assembly and a Leader of the House of Senate who shall be elected by majority vote of the Chamber in which he or she sits at the first sitting after any dissolution of that Chamber.”;

(c) by deleting subsection (2) and substituting therefor the following new subsection (2)—

“(2) The members of each Chamber shall elect one or more persons to be—

(a) Deputy Speaker or Deputy Speakers in the case of the National Assembly; or

(b) Deputy Leader of the House or Deputy Leaders of the House in the case of the Senate,

at the first sitting after a general election or after any event which results in a vacancy in those offices.”;

(d) in subsection (3)—

(i) by deleting all the words preceding paragraph (a) thereof and substituting therefore the following—

“(3) The office of the Speaker, Deputy Speaker, Leader of the House or Deputy Leader of the House shall become vacant—”;

(ii) in subparagraph (b) by adding at the end thereto the following words “or Senate otherwise than by reason of dissolution of the National Assembly or Senate in accordance with section 67 and section 72 respectively.”;

(iii) by renumbering the existing paragraph (c) and (d) as paragraphs (d) and (e) respectively;

(iv) by inserting the following new paragraph as paragraph (c)—

“(c) when the National Assembly and Senate first sits after any dissolution of the National Assembly or Senate.”;

(v) in the existing paragraph (d)—

(a) by inserting the words “or Senate” immediately after the words “National Assembly” in the first line;

(b) by deleting the words “National Assembly” in the third line and substituting therefore the word “Chamber”; and

(c) in the proviso, by deleting the words “Speaker and Deputy Speaker” and substituting therefor the word “holder”;

(e) by deleting subsection (4) and substituting therefor the following new subsection (4)—

“(4) The Speaker or Leader of the House or in the absence of the Speaker or Leader of the House, such Deputy Speaker or Deputy Leader of the House as the Speaker or Leader of the House has nominated, shall preside at every sitting of that Chamber:

Provided that in the absence of the Speaker, every Deputy Speaker or in the absence of the Leader of the House or every Deputy Leader of the House, the Chamber may elect one among its members to act as Speaker or Leader of the House, as the case may be, for that session or that sitting.”;

(f) in subsection (5)—

(i) by inserting the words, “Leader of the House, Deputy Leader of the House” immediately after the word “Deputy Speaker” in the first line;

(ii) by deleting the words “National Assembly” in the last line and substituting therefor the words “Chamber in which he or she sits”;

(g) in subsection (6)—

(i) by inserting the words, “Leader of the House or Deputy Leader of the House” immediately after the word “Deputy Speaker” in the first line;

(ii) by deleting the words “National Assembly” in the third line and substituting therefor the word “Chamber”.

Amendment
of s. 54 (1)
of the
Constitution

9. Section 54 (1) of the Constitution is amended by inserting the words “or Leader of the House” immediately after the word “Speaker”.

Replacement
of s. 55 of the
Constitution

10. Section 55 of the Constitution is repealed and replaced as follows—

“The Clerk

55. There shall be a clerk to the National Assembly and a Clerk to the Senate who shall be public officers and shall assist the Speaker or Leader of the House of the Chamber to which that Clerk is appointed and perform such functions and duties as the Speaker or Leader of the House may direct.”.

Amendment
of s. 56 of the
Constitution

11. Section 56 of the Constitution is amended—

(a) in subsection (1), by inserting the words, “or the Senate” immediately after the words “National Assembly”;

(b) in subsection (2), by inserting the words “and the Senate” immediately after the words “National Assembly”;

(c) in subsection (3), by deleting the words “National Assembly” and substituting therefor the words “each Chamber”;

(d) in subsection (5), by deleting the words “the National Assembly” and substituting therefor the words “each Chamber”.

Amendment
of s. 57 of the
Constitution

12. Section 57 of the Constitution is amended—

(a) by renumbering the existing provision as subsection (1);

(b) by inserting the following new subsection as subsection (2)—

“(2) The Senate shall not have the power to debate or vote upon any motion or receive any Bill to which this section applies.”.

Replacement
of s. 59 of the
Constitution

13. Section 59 of the Constitution is repealed and replaced as follows—

“Session and
sitting

59.—(1) Every meeting of the National Assembly and of the Senate shall be held at such place within Malawi and shall commence at such time as the Speaker or the Leader of the House, in consultation with the President, may appoint with respect to the Chamber in which he or she presides and the sittings

of each Chamber after the commencement of that meeting shall be held at such times and on such days as that Chamber shall appoint:

Provided that—

(a) the President in consultation with the Speaker and the Leader of the House, may summon on extra ordinary occasions, a meeting of the National Assembly or the Senate; and

(b) the President may, in consultation with the Speaker and the Leader of the House, prorogue the National Assembly or the Senate.

(2) There shall be at least two meetings of the National Assembly and of the Senate in each session.

(3) A session of the National Assembly or the Senate shall be opened by the President on such date as the President, in consultation with the Speaker or the Leader of the House, shall determine.

(4) A session shall be of such duration as the President, in consultation with the Speaker or Leader of the House, shall determine.”.

14. Section 60 of the Constitution is amended—

Amendment of
s. 60 of the
Constitution

(a) in subsection (1)—

(i) by inserting the words “and the Leader of the House, every Deputy Leader of the House and every member of the Senate” immediately after the words “National Assembly” in the second line;

(ii) by inserting the words “or the Senate,” immediately after the words “National Assembly” in the fourth line;

(iii) by inserting the words “or the Senate” immediately after the words “National Assembly” in the seventh line;

(b) in subsection (3)—

(i) by inserting the words “and the Senate and any Committee of the Senate” immediately after the words “National Assembly” in the second line;

(ii) by deleting the words “National Assembly” in the sixth line and substituting therefor the words “respective functions of each chamber”;

(iii) by deleting the word “National Assembly” in the last line and substituting therefor the word “Chamber”;

(c) in subsection (4)—

(i) by deleting the words “The National Assembly” at the very beginning and substituting therefor the words “Each Chamber”;

(ii) by deleting the words “National Assembly” in the second line and substituting therefore the words “that Chamber”;

(iii) by deleting the words “National Assembly” in the fourth line and substituting therefor the word “Chamber”.

Amendment
of s. 61 of the
Constitution

15. Section 61 of the Constitution is amended—

(a) in subsection (1)—

(i) by deleting the words “National Assembly” in the third line and substituting therefore the words “Chamber of which he or she is a member”;

(ii) in paragraph (a), by deleting the words “the National Assembly” and substituting therefore the words “that Chamber”;

(iii) in paragraph (b), by deleting the words “the National Assembly” and substituting therefor the words “that Chamber”;

(b) in subsection (2), by deleting the words “National Assembly” and substituting therefor the words “Chamber of which he or she is a member”.

Amendment
of s. 63 (1) of
the
Constitution

16. Section 63 (1) of the Constitution is amended—

(a) in paragraph (d) by adding at the end thereto the words, “or becomes a member of the Senate;”;

(b) by inserting the following new paragraph as paragraph (g)—

“(g) if there has been a successful petition of recall in accordance with section 64.”.

Insertion of
new s. 64 of
the
Constitution

17. The Constitution is amended by inserting the following new section 64—

“Recall of
Members of
National
Assembly

64.—(1) Every member of the National Assembly shall be liable to be recalled by his or her constituency in accordance with this section.

(2) A member of the National Assembly may be recalled by his or her constituency on any of the following grounds—

(a) physical incapacity rendering the member incapable of performing the functions of his or her office;

(b) misconduct or misbehaviour of the member likely to bring hatred, ridicule contempt or disrepute to the office of the member; or

(c) loss of confidence in the member by his or her constituency.

(3) The recall of a member of the National Assembly shall be initiated by a petition in writing setting out the grounds relied on and signed by at least two-thirds of the registered voters of the constituency of the member; and the petition shall be delivered to the Speaker.

(4) On receipt of a petition, in accordance with subsection (3), the Speaker shall, within fourteen days require the Electoral Commission to conduct a public inquiry into the matters alleged in the petition.

(5) The Electoral Commission shall conduct any inquiry required pursuant to subsection (4) expeditiously and in accordance with rules of natural justice, and immediately after the conclusion of the inquiry shall report its findings to the Speaker.

(6) The Speaker shall—

(a) declare vacant the seat of a member of the National Assembly, if the Electoral Commission notifies the Speaker in writing that it is satisfied from the inquiry, with the veracity of the allegations set out in the petition;

(b) declare immediately that the petition was unjustified, if the Electoral Commission notifies the Speaker in writing that it is not satisfied with the veracity of the allegations set out in the petition.

(7) Where there has been a successful petition of recall in accordance with this section and a seat of a member of the National Assembly is declared vacant, a by-election shall be held.”.

18. Section 65 of the Constitution is amended by deleting subsection (1) and substituting therefor the following new subsection (1)—

Amendment
of s. 65 of the
Constitution

“(1) The Speaker shall declare vacant the seat of any Member of the National Assembly who, having been elected to the National Assembly as a member of a political party, ceases to be a member of that political party, or having been elected to the National Assembly as an independent candidate, ceases to be an independent member.”.

19. The Constitution is amended by inserting the following new section as new section 68—

Insertion of a
new s. 68 in
the
Constitution

“Composition
of the Senate

68.—(1) The Senate shall be composed as follows—

(a) one Senator from each District, registered as a voter in that District, and elected by the District Council of that District within thirty days of each Local Government Election;

(b) ten Senators elected by a caucus of Chiefs who shall themselves be chiefs;

(c) thirty-two other Senators appointed by the President on the basis of nominations by the Nominations Committee provided for in subsection (2) as follows—

(i) ten Senators representing interest groups who shall include representatives from women's organizations, people with disabilities, and from trade unions;

(ii) nineteen Senators from society recognized as experts in their respective fields; and

(iii) three Senators, representing the major religious faiths in Malawi.

(2) There shall be a Nominations Committee of the Senate which shall be [appointed] thirty days before each general election for the purpose of nominating Senators referred to in subsection (1) (c).

(3) The Nominations Committee shall consist of—

(a) the Chairperson of the Electoral Commission, who shall be the Chairperson of the Committee;

(b) the Chairperson of the Human Rights Commission;

(c) a representative of civil society;

(d) a representative of the academia; and

(e) a legal practitioner nominated by the Malawi Law Society.

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

(5) The Nominations Commission shall invite nominations from the general public and shall endeavor to ensure, when considering nominations, that the Senate is proportionally representative of the various groups in Malawian society and therefore shall seek to ensure, so far as is possible, that one-half of the members of the senate are women.

(6) For the purposes of this section, “Chief” means a paramount chief, a senior chief and Traditional Authority.”.

20. The Constitution is amended by inserting the following new section 69—

Insertion of
a new s. 69
in the
Constitution

“Vacancies in
the Senate

69.—(1) The seat of a member of the Senate shall become vacant—

- (a) if the Senate has been dissolved;
- (b) if a member dies or resigns his or her seat;
- (c) if a member ceases to be a citizen of the Republic;
- (d) if a member assumes the office of President or Vice President, Minister or Deputy Minister or becomes a member of the National Assembly;
- (e) if any circumstances arise that, if he or she were not a member of the Senate, would cause that member to be disqualified for nomination or election under this Constitution or an Act of Parliament; or
- (f) if the Senate declares a member’s seat vacant in accordance with such rules and Standing Orders as may permit or provide for the removal of a member for good and sufficient reason provided that they accord with the principles of natural justice.

(2) The Leader of the House shall give notice to the Electoral Commission and in the Gazette in the event that the seat of any member of the Senate becomes vacant under this section.

(3) Where the seat of a member of the Senate is declared vacant by virtue of this section—

- (a) if that member was elected by a District Council, then the Electoral Commission shall notify the Council of that District which elected that member to declare an election within thirty days of the seat becoming vacant;
- (b) if that member was elected by Chiefs, then the Leader of the House shall notify the Chiefs of the District from where that member was elected so as to convene the relevant caucus of Chiefs for the election of another member;
- (c) if that member is a sector representative, then the Leader of the House shall convene the Nominations Committee of the Senate which shall put forward nominations for appointment to the Senate.

Insertion of a
new s. 70 in
the Constitution

21. The Constitution is amended by inserting the following new section as section 70—

“Functions and
powers of the
Senate

70. The Senate shall be an indirectly elected chamber the primary purpose of which shall be deliberative and which shall have powers, subject to this Constitution, to—

(a) receive, scrutinize and amend Bills from the National Assembly;

(b) vote motions to confirm or remit Bills passed by the National Assembly;

(c) debate any issue on its own motion and vote motions in respect of any matter, including motions to indict or convict the President or Vice President by impeachment;

(d) exercise such other functions and powers as are conferred on it by this Constitution;

(e) carry out such other functions as may be delegated to it by an Act of Parliament; and

(f) take all actions incidental to and necessary for the proper exercise of its functions.”.

Insertion of
a new s. 71
in the
Constitution

22. The Constitution is amended by inserting the following new section as section 71—

“Scrutiny by
Senate

71.—(1) All Bills shall be laid before the Senate except appropriation or money Bills.

(2) Any member of the Senate may, in respect of a Bill laid before the Senate—

(a) within fourteen days of that Bill being laid, raise a motion to debate that Bill in full readings; or

(b) after fourteen days, but before the lapse of forty days, raise a motion to remit the Bill to the National Assembly.

(3) Any Bill laid before the Senate which has not been the subject of a motion to debate within the meaning of this section shall after the lapse of forty days, be presented for assent by the President.

(4) Where a Bill is debated under subsection (2) (a), it shall be passed back to the Speaker of the National Assembly who shall certify that it is—

(a) without amendment, in which case the Speaker shall present it for assent by the President; or

(b) amended, in which case the Bill shall be laid before the National Assembly for fourteen days, provided that if

no motion to debate the Bill in full is raised by any member of the National Assembly within that time it shall be presented in amended form for assent by the President.

(5) Where a Bill has been remitted by the Senate by virtue of a majority vote in favour of a motion under subsection (2) (b)—

(a) the Senate shall give written reasons for that remittance; and

(b) the Speaker of the National Assembly shall table the Bill which may be further debated and amended, and if passed by a majority of all the members of the National Assembly, may be presented for assent by the President.”.

23. The Constitution is amended by inserting the following new section as section 72—

Insertion of
a new s. 72
in the
Constitution

“Dissolution of
the Senate

72. The Senate shall last for five years from the date of its first sitting, being no later than sixty days before the next general elections.”.

24. Section 75 of the Constitution is amended—

Amendment
of s. 75 of the
Constitution

(a) by deleting subsection (1) and substituting therefor the following new subsection (1)—

“(1) There shall be an electoral Commission which shall consist of not less than five members and not more than seven members as may be appointed in accordance with an Act of Parliament.”;

(b) in subsection (2), by adding thereto the following new proviso—

“Provided that a judge shall not be so disqualified on account of being a judge.”.

25. Section 76 (1) of the Constitution is amended by inserting immediately after the word “shall” the following words, “in order to ensure free and fair elections.”.

Amendment
of s. 76 (1) of
the
Constitution

26. Section 80 of the Constitution is amended—

Amendment
of s. 80 of the
Constitution

(a) by deleting subsection (2) and substituting therefor the following new subsection (2)—

“(2) The President shall be elected by a majority of more than fifty percent of the valid votes cast through direct, universal and equal suffrage and, where such

majority is not obtained in the first ballot, the necessary number of ballots between the Presidential candidate who obtained the greatest number of votes and the runner up, together with their respective declared first vice Presidential candidates, shall be conducted until such result is reached.”;

(b) by deleting subsection (5);

(c) by renumbering subsections (6) and (7) as subsections (5) and (6) respectively;

(d) in the existing subsection (6), by inserting the following new paragraph as paragraph (c)—

“(c) has attained a minimum of a first degree from a recognized institution.”;

(e) in the existing subsection (7)—

(i) by deleting the words “Second Vice President”;

(ii) in paragraph (c), by deleting the words, “within the last seven years,”;

(iii) in paragraph (g), by deleting the words, “within the last seven years,”;

(iv) by inserting the following new paragraph as paragraph (h)—

“(h) has served in the office of President or Vice-President, as the case may be, for two terms.”.

Amendment
of s. 81 of
the
Constitution

27. Section 81 (1) of the Constitution is amended—

(a) in subsection (1), by deleting the words “or Second Vice President”;

(b) by deleting subsection (3) and substituting therefor the following new subsection (3)—

“(3) A person elected to be President or Vice President shall be sworn into office, in accordance with subsection (1), after seven days but no longer than thirty days of being elected.”.

Amendment
of s. 82 of the
Constitution

28. Section 82 of the Constitution is amended by deleting the words “Second Vice President”.

Amendment
of s. 83 (3) of
the
Constitution

29. Section 83 (3) of the Constitution is amended—

(a) by deleting the “,” after the word “President” in the first line and substituting therefor the word “and”;

(b) by deleting the words “and the Second Vice-President”;

(c) by deleting the word “consecutive” appearing immediately before the word “terms” in the third line.

30. The Constitution is amended by inserting the following new section as section 85A—

Insertion of a new s. 85A in the Constitution

“Temporary vacancy

85A.—(1) Subject to subsection (2), where a temporary vacancy is created due to an absence from the country by the President on vacation or otherwise; or due to illness or other incapacity making the President temporarily unable to exercise the functions of the office, the following persons shall in the order provided for in this subsection act as President until the President is able to resume office—

(a) the Vice President;

(b) a Cabinet Minister signified by the President.

(2) Where the person to fill the temporary vacancy is a Cabinet Minister, the President shall submit to the Speaker of the National Assembly a written declaration authorizing the temporary transmission of power.”.

31. Section 86 of the Constitution is amended—

Amendment of s. 86 of the Constitution

(a) in subsection (2) (c), by deleting the words “members of the National Assembly” and substituting therefore the words “members of both Chambers”;

(c) by deleting subsection (3).

32. Section 88 of the Constitution is amended—

Amendment of s. 88 of the Constitution

(a) in the marginal note, by inserting the words “and members of Cabinet” immediately after the word “President”;

(b) by inserting the following new subsections as subsections (3) and (4)—

“(3) The President and members of Cabinet shall not perform remunerative work outside the duties of their office.

(4) The President and Members of Cabinet shall not use their respective officers of personal gain or place themselves in a situation where their material interests conflict with the responsibilities and duties of their office.”.

33. Section 88A of the Constitution is hereby repealed and replaced as follows—

Replacement of s. 88A of the Constitution

“Disclosure of assets by the President and members of Cabinet

88A.—(1) A person elected to be President or Vice President or a person appointed to Minister or Deputy Minister, as the case may be, shall before he or she assumes office, fully disclose all of his or her assets, liabilities and business interests and those of their spouses, held by them or on their behalf as at that date.

(2) Disclosure of assets pursuant to subsection (1), and unless Parliament otherwise prescribes by an Act of Parliament, shall be made in a written document delivered to the Speaker of the National Assembly who shall immediately upon receipt deposit the document with such public office as may be specified in the Standing Orders of Parliament.

(3) Any business interests held by the President and members of the Cabinet shall be held on their behalf in a beneficial trust which shall be managed in such manner as to ensure conformity with the responsibilities and duties of their office.

Amendment of s. 89 (4) of the Constitution

34. Section 89 (4) of the Constitution is amended by adding at the end thereto the words “or Senate”.

Amendment of s. 94 of the Constitution

35. Section 94 of the Constitution is amended—

(a) in subsection (1) by inserting the following new proviso—

“Provided that where the President is desirous of appointing Minister a member of Parliament from another political party, he or she shall first obtain consent from such other party before appointing such Member of Parliament as Minister.”;

(b) in subsection (3), in paragraph (c) by deleting the words “, within the last seven years,”.

Amendment of s. 98 of the Constitution

36. Section 98 of the Constitution is amended—

(a) by deleting subsection (4) and substituting therefore the following new subsection (4)—

“(4) The office of Attorney General shall become vacant after the person holding that office”

(a) has served a term of five years:

Provided that he or she may be appointed for such further term or terms not exceeding five years; or

(b) has resigned or retired;

(c) by deleting subsection (5) and substituting therefor the following new subsection (5)—

“(5) The office of Attorney General shall be a public office.”.

37. Section 102 of the Constitution is amended by inserting the following new subsection as subsection (3)—

Amendment
of s. 102 of
the
Constitution

“(3) Where the removal of a person holding the office of Director of Public Prosecutions by the President is pursuant to paragraphs (a), (b) or (c) of subsection (2), the removal shall be subject to confirmation by the Public Appointments Committee.”.

38. Section 105 (1) of the Constitution is amended in paragraph (b) by inserting the words “the Deputy Chief Justice and” at the beginning.

Amendment
of s. 105 (1)
of the
Constitution

39. Section 112 (1) of the Constitution is amended by—

Amendment
of s. 112 of
the
Constitution

(a) adding thereto the following two new paragraphs as paragraphs (c) and (d)—

“(c) is fit and proper to exercise the functions of the office of judge;

(d) has not been convicted by a competent court of a crime involving dishonesty or moral turpitude.”;

(b) by renumbering the existing subsection (2) as subsection (3).

(c) by inserting the following new subsection (2)—

“(2) Notwithstanding subsection (1), a person shall not be qualified to be appointed as a Justice of Appeal unless that person is, or has been a judge of the High Court for not less than ten years.”.

40. Section 113 (1) of the Constitution is amended by inserting the following words immediately before the words “most senior judge” in the seventh line—

Amendment
of s. 113 (1)
of the
Constitution

“the Deputy Chief Justice, and if the office of the Deputy Chief Justice is vacant, or if the Deputy Chief Justice is for any reason unable to perform the functions of his or her office, those functions shall be performed by.”.

41. Section 116 of the Constitution is amended by numbering the existing provision as subsection (1) thereof and inserting the following new subsection as subsection (2)—

Amendment
of s. 116 of
the
Constitution

“(2) In the exercise of its powers, functions and duties, the Judicial Service Commission shall be completely independent of the interference or direction of any other person or authority.”.

42. Section 117 of the Constitution is amended—

Amendment
of s. 117 of
the
Constitution

(a) by numbering the existing section as subsection (1) thereof and adding thereto the following new paragraph as paragraph (e)—

“(e) such other member, other than a legal practitioner or judicial officer, designated by the President acting after consultation with the Chief Justice.”;

(b) by adding thereto the following new subsection as subsection (2)—

“(2) Subject to this section, the office of a member of the Judicial Service Commission shall become vacant—

(a) at the expiry of four years from the date of that person's appointment, unless reappointed to a new four year term;

Provided that this paragraph shall not apply where the member in question still holds the office of Chief Justice, or other office in which behalf that person was appointed to the Judicial Service Commission; or

(b) if any circumstances arise that, if that person were not a member of the Judicial Service Commission, would cause that person to be disqualified from appointment as such; or

(c) on removal by the President on the recommendation of the Chief Justice, but no member shall be recommended for removal under this paragraph unless the Chief Justice is satisfied that he or she is—

(i) not competent to exercise the duties of that office;

(ii) compromised to the extent that his or her financial probity is in serious question; or

(iii) otherwise incapacitated.

Amendment
of s. 123 (1)
of the
Constitution

43. Section 123 (1) of the Constitution is amended by inserting the words “to the Ombudsman” immediately before the word “appear” in the third line.

Amendment
of s. 126 of
the
Constitution

44. Section 126 of the Constitution is amended—

(a) by deleting the word “shall” in the paragraph preceding paragraph (a) and substituting therefor the word “may”;

(b) by renumbering the existing paragraphs (a), (b) and (c) as paragraphs (b) (c) and (d);

(c) by inserting the following new paragraph as paragraph (a)—
“(a) award monetary compensation;”

Amendment
of s. 128 (2)
of the
Constitution

45. Section 128 (2) is amended in paragraph (c) by deleting the words “sixty-five” and substituting therefor the word “seventy”.

46. Section 131 of the Constitution is amended by deleting subsection (3) and substituting therefor the following new subsections (3) and (4)—

Amendment
of s. 131 of
the
Constitution

“(3) A member of the Human Rights Commission, other than a member by virtue of paragraph (a) and (b) of subsection (1), shall serve a term of not more than four years but he or she shall be eligible for re-appointment for a further term of not more than three years.

(4) The President may remove a member of the Human Rights Commission, other than a member by virtue of paragraph (a) and (b) of subsection (1) from office on the grounds of—

(a) incompetence;

(b) incapacity;

(d) in circumstances where the member is compromised to the extent that his or her ability to impartially exercise the duties of his or her office is seriously in question.”.

Insertion of
new s. 131A
of the
Constitution

47. The Constitution is amended by inserting of the following new section as section 131A—

Independence
of the
Commission

131A. The Commission shall exercise its functions and powers independent of the direction or interference of any other person or authority.”.

48. Section 147 of the Constitution is amended by deleting subsection (5) and substituting therefor the following new subsection (5)—

Amendment
of s. 147 of
the
Constitution

“(5) Local Government elections shall take place concurrently with general elections for members of the National Assembly as prescribed under section 67 (1), and Local Government authorities shall stand dissolved on the 20th of March in the fifth year after their election.”.

49. Section 149 of the Constitution is amended—

Amendment
of s. 149 of
the
Constitution

(a) in subsection (1), by deleting the word “Committee” in the second line and substituting therefor the word Commission”;

(b) in subsection (3), by deleting the word “Committee” in the last line and substituting therefor “Commission”.

50. Section 150 of the Constitution is amended by deleting the word “Committee” in the seventh line and substituting therefor the word “Commission”.

Amendment
of s. 150 of
the
Constitution

51. Section 151 of the Constitution is repealed and replaced as follows—

Replacement
of s. 151 of
the
Constitution

“Composition
of the National
Local
Government
Finance
Commission

151.—(1) The members of the National Local Government Finance Commission shall be—

(a) two persons who shall be nominated from time to time in that behalf by a caucus of local government authorities and appointed by the President;

(b) one person who is a qualified and practising accountant nominated in that behalf by a body regulating the profession of accountants in Malawi and appointed by the President;

(c) one person who is a qualified and practising economist nominated in that behalf by a body regulating the profession of economists in Malawi and appointed by the President;

(d) the Chairman of the Local Government Service Commission, or such other member as may for the time being be designated in that behalf by the Chairman of the Local Government Service Commission;

(e) two persons nominated in that behalf by a caucus of civil society organizations and appointed by the President; and

(f) the following *ex-officio* members—

(i) Principal Secretary responsible for Local Government;

(ii) Principal Secretary responsible for Finance;

(iii) Principal Secretary responsible for Economic Planning and Development.

(2) The Commission shall elect a Chairman of the Commission from among the appointed members at the first meeting of the Commission.

(3) Except for *ex-officio* members, the term of office of a member of the Commission shall expire—

(a) three years after the date that member was first appointed; or

(a) on removal by the President on the recommendation of the Public Appointments Committee, but no member shall be recommended for removal under this paragraph unless the Public Appointments Committee is satisfied that he or she is—

- (i) not competent to exercise the duties of that office;
- (ii) compromised to the extent that his or her financial probity is in serious question; or
- (iii) otherwise incapacitated.

(4) For the purposes of subsection (1) (a), the Minister responsible for Local Government shall convene a caucus of local government authorities within thirty days of the election of those authorities.”.

52. Section 154 of the Constitution is amended—

(a) in subsection (2), by deleting the words “and confirmed by” and substituting therefor the words “and the appointment shall be subject to confirmation by”;

Amendment of
s. 154 of the
Constitution

(b) in subsection (3), by deleting the word “nominated” appearing in the fourth line and substituting therefor the word “appointed”;

(c) by renumbering the existing subsection (5) (6) and (7) as subsections (6) (7) and (8) respectively;

(d) by inserting the following new subsection as subsection (5)—

“(5) Where the removal of a person holding the office of the Inspector General by the President is pursuant to paragraphs (a), (b) or (c) of subsection (4), the removal shall be subject to confirmation by the National Assembly.”.

53. Section 213 of the Constitution is amended—

(a) in subsection (1)—

Amendment of
s. 213 of the
Constitution

(i) by renumbering the existing paragraphs (b) and (c) as paragraphs (c) and (d) respectively;

(ii) by inserting the following new paragraph as paragraph (b)—

“(b) a member of the Senate,”;

(iii) in the existing paragraph (b), by deleting the word “senior” immediately before the word “grade”;

(iv) in the existing paragraph (c) by deleting the word “senior” immediately before the word “grade”;

(v) in the paragraph succeeding the existing paragraph (c) (ii), by deleting the words “within three months from the date of his or her election, nomination or appointment” and substituting therefor the words “before assuming office, or taking up an appointment or his or her seat”;

(*b*) by deleting subsection (2) and substituting therefor the following new subsection (2)—

“(2) For the purpose of paragraphs (*c*) and (*d*) of subsection (1), disclosure of assets shall be required for officers of such grades and positions as prescribed by an Act of Parliament.”.

APPENDIX B

CONSTITUTION AMENDMENT (No. 2) BILL, 2007

CONSTITUTION AMENDMENT (No. 2) BILL, 2007

[Note: This Bill contains all the amendments recommended by the Commission to the sections listed in the Schedule to the Constitution and hence the Bill requires adherence to section 196 of the Constitution]

ARRANGEMENT OF SECTIONS

- 1. Short title
- 2. Insertion of new s. 2A
- 3. Amendment of s. 13 of the Constitution
- 4. Amendment of s. 20 (1) of the Constitution
- 5. Amendment of s. 22 (7) of the Constitution
- 6. Amendment of s. 23 of the Constitution
- 7. Replacement of s. 31 of the Constitution
- 8. Amendment of s. 40 (2) of the Constitution
- 9. Amendment of s. 42 (2) of the Constitution
- 10. Amendment of s. 44 (1) of the Constitution
- 11. Amendment of s. 47 (3) of the Constitution
- 12. Replacement of s. 111 (2) of the Constitution
- 13. Amendment of s. 119 of the Constitution

A BILL

entitled

An Act to amend the Constitution

ENACTED by the Parliament of Malawi as follows—

1. This Act may be cited as the Constitution (Amendment) (No. 2) Act, 2007. Short title

2. The Constitution is amended by inserting after section 2 the following new section as section 2A.— Insertion of new s. 2A

“Languages 2A.—(1) The official language of the Republic of Malawi is English.

 (2) The national language of the Republic of Malawi is Chichewa.

 (3) The State shall take practical and positive measures to protect all local languages in Malawi to ensure that there is no diminished use or status of such languages.”.

3. Section 13 of the Constitution is amended— Amendment of s. 13 of the Constitution

(a) by deleting paragraph (b) and substituting therefor the following new paragraph (b)—

“(b) *food security and nutrition*

To achieve food security and adequate nutrition for all in order to promote good health and self-sufficiency”;

(b) in paragraph (f)—

(i) in subparagraph (ii), by inserting the words “for children” immediately after the word “compulsory”;

(ii) by renumbering subparagraph (iv) as subparagraph (v).

(iii) by inserting the following new paragraph as paragraph (iv)—

“(iv) ensure that special amenities for children with special needs are provided in schools and learning institutions.”;

(c) in paragraph (n), by deleting the words “market” and substituting therefor the word “appropriate” immediately before the word “economy”.

(d) by adding the following new paragraph as paragraph (p)—

“(p) Chiefs

To recognize and preserve the institution of chieftaincy so that chiefs may make the fullest contribution to the welfare and development of the country in their traditional field.”.

Amendment of
s. 20 (1) of the
Constitution

4. Section 20 (1) of the Constitution is amended by deleting the word “nationality”.

Amendment of
s. 22 (7) of the
Constitution

5. Section 22 of the Constitution is amended—

(a) in subsection (2), by inserting the word, “abuse” immediately after the word “cruelty”;

(b) in subsection (3), by adding at the end thereto the following words—

“and a marriage shall be celebrated between a man and a woman”;

(c) in subsection (7), by deleting the word “fifteen” and substituting therefor the word “sixteen”;

(d) by deleting subsection (8).

Amendment of
s. 23 of the
Constitution

6. Section 23 of the Constitution is amended—

(a) by renumbering subsection (5) as subsection (7);

(b) by inserting the following new subsection as subsection (6)—

“(6) Children shall not be used in armed conflict and are entitled to be protected in times of armed conflict.”;

(c) in the renumbered subsection (7), by deleting the word “sixteen” and substituting therefor the word “eighteen”.

Replacement of
s. 31 of the
Constitution

7. Section 31 of the Constitution is repealed and replaced as follows—

“Labour

31.—(1) Every person shall have the right relations to fair and safe labour practices.

(2) Every person shall be entitled to fair wages and equal remuneration for work of equal value without distinction or discrimination of any kind, in particular on the basis of gender, disability or race.

(3) Every employee shall have the right—

(a) to form and join a trade union;

(b) to participate in the activities and programmes of a trade union; and

(c) to strike.

(4) Every employer shall have the right—

(c) to form and join an employer's organization; and

(d) to participate in the activities and programmes of an employer's organization.

(5) Every trade union and every employer's organization shall have the right—

(a) to determine its own administration, programmes and activities;

(b) to organize; and

(c) to form and join a federation.

(7) Every trade union, employer's organization and employer shall have the right to engage in collective bargaining.”.

8. Section 40 (2) of the Constitution is amended—

(a) by deleting the words “more than one-tenth of the national vote” and substituting therefor the words “any number of seats”;

Amendment
of s. 40 (2)
of the
Constitution

(b) by adding thereto the following proviso—

“Provided that the formula for determining the levels of funding to political parties represented in Parliament shall be prescribed by an Act of Parliament.”.

9. Section 42 (2) of the Constitution is amended in paragraph (g) subparagraph (iii) by inserting the words “detained” immediately before the word “imprisoned” in the first line.

Amendment
of s. 42 (2)
of the
Constitution

10. Section 44 (1) of the Constitution is amended—

(a) in paragraph (h), by deleting the word “or”;

Amendment
of s. 44 (1)
of the
Constitution

(b) by inserting the following new paragraph as paragraph (j)—

“(j) the right of access to any courts of law or any other tribunal with jurisdiction for final settlement of legal issues.”.

Amendment of
s. 47 (3) of the
Constitution

11. Section 47 (3) of the Constitution is amended in paragraph (a) by deleting the word “marriage”.

Replacement of
s. 111 (2) of the
Constitution

12. Section 111 (2) of the Constitution is repealed and replaced as follows—

“(2) The Deputy Chief Justice and all judges shall be appointed by the President on the recommendation of the Judicial Service Commission; and the President may, on the recommendation of the Judicial Service Commission, appoint judges on contract, for a specified period, to sit in a case or class of cases, or to fill casual vacancies in the court, or to enable the court to deal with its work expeditiously.”.

Amendment of
s. 119 of the
Constitution

13. Section 119 of the Constitution is amended—

(a) in subsection (1), by deleting “(6)” and substituting therefor “(7)” and by inserting the phrase “except a judge appointed on contract” immediately after the word “judge”;

(b) in subsection (2), by deleting the word “misbehaviour” and substituting therefor the words “misconduct, or for inability to perform the functions of the office, whether arising from infirmity of body or mind”;

(c) by deleting subsections (3), (4) and (5) and substituting therefor the following new subsections (3), (4) and (5)—

“(3) Where the question of removing a judge from office arises, under subsection (2), the President shall in consultation with the Judicial Service Commission, appoint a Tribunal consisting of a Chairperson and not less than two other members, who hold or have held high judicial office, and the Tribunal shall:

(a) inquire into the matter and report on the facts thereof to the President:

Provided that the procedure adopted by the Tribunal in the inquiry shall be in accordance with principles of natural justice; and

(b) advise the President whether the judge ought to be removed from office under this provision.

(4) The President may, by an instrument under the Public Seal and in consultation with the Judicial Service Commission, remove from office any judge where the Tribunal appointed under subsection (3) recommends to the President that the Judge should be removed from office in accordance with this section.

(5) Where the question of removing a judge from office has been referred to a Tribunal appointed under subsection (3), the President may, after consultation with the Judicial Service Commission, suspend the judge from performing the duties of his or her office, if he is satisfied that it is in the public interest so to do.

(d) by inserting the following new subsection as subsection (6)—

“(6) The suspension of a judge under subsection (5) may at any time be revoked by the President, after consultation with the Judicial Service Commission, and shall in any case cease to have effect where the question for removing a judge is withdrawn from the Tribunal or, if the Tribunal finds in favour of the judge under investigation, or if the Tribunal advises the President that the judge ought to be removed from office.”.

(e) by renumbering subsections (6) and (7) as subsections (7) and (8).

APPENDIX C

IMPEACHMENT OF PRESIDENT BILL 2007

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IMPEACHMENT OF PRESIDENTS BILL
ARRANGEMENT OF SECTIONS

PART I—PRELIMINARY

- 1. Short title
- 2. Interpretation

PART II—PROCEDURE ON IMPEACHMENT OF A PRESIDENT

- 3. Grounds for removal
- 4. Notice of removal
- 5. Procedure on receipt of notice of impeachment
- 6. Passing of motion to constitute a Tribunal
- 7. Chief Justice to appoint Tribunal
- 8. Tribunal to sit in Camera
- 9. President to be heard
- 10. Procedure for Tribunal
- 11. Procedure on receipt of report by Speaker

PART III—MISCELLANEOUS

- 12. Removed President may apply for Judicial review
- 13. High Court to sit as Constitutional Court on Judicial review
- 14. Removed President to lose benefits
- 15. Removed President not eligible to stand in elections

A B I L L

entitled

An Act to make provision for procedures to be followed on impeachment of a President, for the appointment of a tribunal responsible for investigating allegations against a President and for matters incidental thereto or connected therewith.

PART I—PRELIMINARY

- | | |
|----------------|---|
| Short title | 1. This Act may be cited as the Impeachment of Presidents Act. |
| Interpretation | 2. In this Act unless the context otherwise requires—
“Tribunal” means a Tribunal appointed under section 6;
“President” includes Vice President. |

PART II—PROCEDURE ON IMPEACHMENT OF A PRESIDENT

- | | |
|--|--|
| Grounds for removal of President from office | 3. A President may be removed from office in accordance with section 86 of the Constitution on any of the following grounds— |
|--|--|

(a) serious violation of the Constitution including abuse of office or willful violation of the oath of allegiance and the oath of office;

(b) serious breach of the written laws of the Republic including bribery, perjury, and any other serious offence;

(c) gross misconduct or misbehaviour in that he or she has—

(i) conducted himself or herself in a manner which brings or is likely to bring the high office of the President into hatred, disrepute, ridicule or contempt; or

(ii) dishonestly done any act or omission which is prejudicial or inimical to the economy or the security of the State.

4.—(1) The National Assembly shall not pass a motion to impeach the President save only if a written notice signed by less than one third of all the members of Parliament is submitted to the Speaker thirty days prior to the sitting at which such motion is intended to be moved in the National Assembly.

Notice of removal

(2) The notice submitted to the Speaker under subsection (1) shall—

(a) state the intention to move a motion for a resolution in Parliament for the removal of the President;

(b) specify the wrong or wrongs committed by the President; and

(c) propose that a Tribunal be constituted to inquire into the charges brought against the President.

5.—(1) Where the Speaker is satisfied that the provisions of the Constitution and this Act for the moving of a motion to remove the President have been complied with, he or she shall, within seven days of the receipt of the notice, cause a copy thereof to be served on the President and on each Member of Parliament.

Procedure on receipt of notice of impeachment by Speaker

(2) The Speaker shall also cause any statement made in reply to the allegation by the President to be served on each Member of Parliament.

6.—(1) A motion of the National Assembly that a Tribunal be constituted shall not be declared as having passed, unless it is affirmed by the votes of not less than two-thirds of the members of the National Assembly in a Committee of the whole house.

Passing of motion to constitute a Tribunal

(2) In the event that the National Assembly passes the motion to constitute a Tribunal, the President shall be deemed to be out of office, and the duties and functions of the office of President shall be discharged in accordance with section 87 (1) of the Constitution until the Speaker shall inform the President about the resolution of the National Assembly in connection with the charges brought against him.

Chief Justice
to appoint
Tribunal

7.—(1) Within seven days of the passing of a motion under section 6, the Speaker shall request the Chief Justice to appoint a Tribunal to investigate the allegations as provided under section 4 (2) (b).

(2) Pursuant to subsection (1), the Chief Justice shall appoint a panel of five persons to constitute the Tribunal who in his opinion are of unquestionable integrity, not being members of any public service, Parliament or a political party.

Tribunal to sit
in Camera

8. The Tribunal shall, in carrying out its mandate, sit in Camera.

President to be
heard

9. The Tribunal shall afford the President the opportunity to be heard in his defence in person and to be represented by a legal practitioner or legal practitioners of his or her own choice.

Procedure for
Tribunal

10.—(1) The Tribunal shall adopt its own procedure and shall, within three months of its appointment, report its findings to the Chief Justice.

(2) The Chief Justice shall, on receipt of the report from the Tribunal, immediately submit the same to the Speaker of the National Assembly who shall make available a copy of the report to the President.

Procedure on
receipt of report
by Speaker

11.—(1) Where the findings of the Tribunal indicate that the allegation against the President has not been proved, no further proceedings shall be taken in respect of the matter.

(2) Where the findings of the Tribunal indicate that the allegation against the President has been proved, then within fourteen days of the receipt of the report by the Speaker, the National Assembly shall convene and discuss the report and shall afford the President the opportunity to be heard.

(3) Pursuant to subsection (2), the National Assembly, may by the votes of not less than two-thirds majority of all the Members, pass a resolution that the charges against the President have been proved and that he or she is unworthy of continuing to hold the office of President.

(4) In the event that the National Assembly passes a resolution that the charges against the President have been proved and that he is unworthy of continuing to hold the office of President, the Speaker shall inform the President and the Chairman of the Electoral Commission about such resolution of the National Assembly, where upon the President shall be obliged to vacate office before the expiry of three days from the day the National Assembly passed the resolution.

PART III—MISCELLANEOUS

Removed
President
may apply
for Judicial
review

12.—(1) Any President who ceases to hold office by reason of the allegations against him under the Constitution or this Act being proved may apply to the High Court for judicial review of the decision made by the National Assembly within thirty days.

(2) Where a President applies for judicial review under subsection (1)—

(a) the decision to remove such President shall be suspended pending the outcome of the High Court proceedings;

(b) the President shall be deemed out of office and the duties and functions of the office of President shall be discharged in accordance with section 87 of the Constitution until the outcome of the judicial review.

13. In hearing an application for judicial review under this Act, the High Court shall sit as a Constitutional Court constituted under the Courts Act and shall hear the matter expeditiously.

High Court
to sit as
Constitutional
Court on
Judicial
review

14. A President who ceases to hold office by reason of the charges against allegations against him under the Constitution or this Act being proved shall not be entitled to receive any payment by way of pension or to receive any benefits or other privileges which he has under the Constitution or any other written law.

Removed
President to
lose benefits

15. A President who ceases to hold office by reason of the allegations against him under the Constitution and this Act being proved shall not be eligible for nomination as a candidate for election as President, Vice President or Member of Parliament or for appointment as Minister or to any public office.

Removed
President not
eligible to
stand in
elections

APPENDIX D

POLITICAL PARTIES (REGISTRATION AND REGULATION) (AMENDMENT) BILL 2007

A BILL

entitled

An Act to amend the Political Parties (Registration and Regulation) Act.

ENACTED by the Parliament of Malawi as follows—

Short title **1.** This Act may be cited as the Political Parties (Registration and Regulation) (Amendment) Act, 2007.

Amendment of the Short title of the principal Act **2.** The short title of the Political Parties (Registration and Regulation) Act (hereinafter referred to as the “principal Act”) is amended by deleting the bracketed words.

Replacement of the Long title of the principal Act **3.** The long title of the principal Act is repealed and replaced as follows—
“An Act to make provision for regulating the registration, financing and functioning of political parties”

Insertion of New Part IIIA into the principal Act **4.** The principal Act is amended by inserting, after Part III, a new Part III A as follows—

“PART III A—PUBLIC FUNDING OF POLITICAL PARTIES REPRESENTED IN PARLIAMENT

Interpretation **15A.** In this Part, “Minister” means the Minister responsible for finance.

Allocation of public funds by the State **15B.—**(1) The State shall fund every political party represented in Parliament so as to ensure that during the life of any Parliament, such political party has sufficient funds to continue to represent its constituency.

(2) The allocation of funds under subsection (1) shall be done in accordance with the following formula—

(a) fifty per cent to be allocated, on the basis of the principle of equity, in equal shares among the parties represented in Parliament; and

(b) fifty per cent to be allocated, on the basis of the principle of proportionality, in the ratio that the number of seats that a party has in Parliament bears to the total number of seats in Parliament.

(3) The information and particulars necessary for applying the prescribed formula to any party shall be ascertained from the relevant facts and circumstances obtaining at the time when the

allocation is to be made.

(4) The allocation of funds shall be made at such times or intervals and in such instalments as may be prescribed.

15C.—(1) The funds allocated to a political party may be used for any purposes compatible with its functioning as a political party in an open and democratic society. Use of public funds

(2) A political party shall not use funds received from the State for the following purposes—

(a) directly or indirectly paying any salary, allowance or other benefit to any person who represents the party in Parliament, is a Minister, Deputy Minister or holds a public office;

(b) financing or contributing to any matter, cause, event or occasion, whether directly or indirectly, in contravention of any code of ethics binding on the Members of Parliament;

(c) directly or indirectly establishing any business or acquiring or maintaining any right or financial interest whatsoever in any business or in any immovable property:

Provided that this paragraph shall not apply where the right or interest in the immovable property is to be used solely for ordinary party political purposes; or

(d) the carrying out of any activity that is incompatible with a political party's functioning in an open and democratic society.

15D. Every political party to which public funds are allocated shall— Political parties to account for funds

(a) keep with a bank in Malawi, a separate bank account into which the funds allocated to the party shall be deposited;

(b) keep proper books of account and other records in relation thereto and shall balance its accounts for that year and produce statements of final accounts within six months from the end of each financial year; and

(c) submit the final accounts to the Registrar who shall forward a copy to the Auditor General and the Speaker of the National Assembly.

15E.—(1) The accounts of a political party which is allocated public funds shall be audited by the Auditor General or an auditor appointed by the Auditor General. Auditing

(2) The Auditor General may carry out surprise audit, investigation or any other audit considered necessary.

(3) The Auditor General shall give his report of the audited

accounts to—

- (a) the Registrar;
- (b) the political party concerned; and
- (c) the Speaker of the National Assembly.

Disallowance
of certain
expenditure

15F.—(1) After considering the report of the Auditor General, the Registrar may recommend to the Minister to disallow any item of expenditure which is contrary to this Act.

(2) The Minister shall have power to—

(a) surcharge the amount of any expenditure disallowed on the party;

(b) surcharge any sum which has not been duly brought into account on the party;

(c) surcharge the amount of any loss or deficiency occasioned by the negligence or misconduct of any person on the party; or

(d) set off the amount irregularly spent against any allocation that may be or may become payable to the party.

(3) Any person aggrieved by a decision of the Minister may apply to the High Court for judicial review.

(4) Any sum surcharged on a party shall be payable to the Registrar within one month of the written notification of the surcharge to such party or, in the case of an application under subsection (3), within one month of the decision of the High Court if such decision confirms the surcharge and shall be recoverable as a debt to the Government.

Suspension of
funding

15G.—(1) The Minister, on the recommendation of the Registrar, may order that allocation of funds to a political party be suspended if satisfied on reasonable grounds that the party has failed to comply with any requirement in this Part.

(2) Where the Minister intends to order the suspension of allocation of funds to a political party, he shall—

(a) by written notice inform the party of the intended suspension and the reasons therefor; and

(b) as the party to furnish reasons in writing within the period specified in the notice why its allocation should not be suspended.

Cessation of
public funding

15H. Where a political party ceases to qualify for allocation of public funds by the State, it shall, within 21 days after such cessation, repay to the State any unspent balances, as at that date, of the funds that had been allocated to the party.

15I. If Parliament is dissolved, a political party represented in Parliament shall—

Dissolution of Parliament

(a) close its books and records of account kept in terms of Section 15D not later than 21 days before the date set for general elections and shall within 14 days thereafter submit an audited statement in respect of those books and records of account to the Registrar; and

(b) not later than the day immediately before the date set for the general elections, repay to the Registrar the unspent balances, as at the date when the books and records of account were closed, of all the funds that had been allocated to the party.

15J. The Minister may issue written instructions not inconsistent with the provisions of this Act for the better control and efficient management of funds allocated to political parties represented in Parliament.”

Power of Minister to give financial instructions

5. The principal Act is amended by inserting after section 16 the following new section as Section 16 A—

Insertion of new section 16A

“Declaration of sources of funds

16A. Every political party shall annually submit to the Registrar a declaration stating the amounts and sources of the funds of such political party in the prescribed manner.”

APPENDIX E

ELECTORAL COMMISSION (AMENDMENT) BILL, 2007

A B I L L*entitled***An Act to amend the Electoral Commission Act**

ENACTED by the Parliament of Malawi as follows—

Short title **1.** This Act may be cited as the Electoral Commission (Amendment) Act, 2007 hereinafter referred to as the “Act”.

Amendments of s. 2 of the Act. **2.** The Electoral Commission Act (hereinafter referred to as the “principal Act”) is amended in section 2 of the Act by inserting the following new definition of “Public Appointments Committee” immediately after the definition of “Chief Elections Officer”—

“Public Appointments Committee” means the Public Appointments Committee of Parliament established under section 56 (7) of the Constitution.

Replacement of s. 4 of the Act **3.** Section 4 of the principal Act is hereby repealed and replaced with the following new sections as section 4, 4A, 4B and 4C—

“Appointment of members of the Commission **4—**(1) The President shall, subject to section 75 of the Constitution and in accordance with section 4B, appoint suitably qualified persons to be members of the Commission, on such terms and conditions as the Public Appointments Committee shall determine.

(2) In appointing members of the Commission pursuant to subsection (1) the President shall have regard to the need for continuity of service on the Commission so that at least half of the members appointed thereunder shall be re-appointed for the next term of office.

(3) Members of the Commission shall be persons of integrity and who possess qualifications, expertise and experience in any relevant fields including law, economics, elections or public administration.

(4) Members of the Commission shall serve full-time.

(5) The remuneration and any allowance of a member of the Commission may not be reduced during his term of office without his consent, and may be increased at such intervals as the Public Appointments Committee may determine.

(6) A member of the Commission may resign from his office at any time by notice in writing to the President.”.

Establishment
of Selection
Panel

4A.—(1) There is hereby established a selection panel (in this Act otherwise referred to as the “Selection Panel”) which shall, in accordance with section 4B, be responsible for inviting and assessing applications for the office of member of the Commission, and making recommendations to the President, whenever a vacancy occurs in the membership of the Commission.

(2) The Selection Panel shall, when inviting applications for the office of member of the Commission, specifically invite nominations from political parties.

(3) The Selection Panel shall consist of—

(a) the Law Commissioner;

(b) the Chairperson of the Human Rights Commission;

(c) a Judge of the High Court nominated in that behalf by the Judicial Service Commission; and

(d) two representatives of civil society organizations nominated by the council of non-governmental organizations in Malawi.

(4) The names of the members of the Selection Panel shall be published in the Gazette.

(5) Members of the Selection Panel shall elect a Chairman from amongst their number, and the Selection Panel shall determine its own procedure.

Procedure for
Appointment of
members of the
Commission

4B.—(1) The procedure for appointing members of the Commission shall involve first the issuing of a public advertisement inviting applications for the office of member of the Commission, and shall be signed by the chairman of the Selection Panel.

(2) The advertisement under subsection (1) shall invite applications in writing within thirty days of the date of the advertisement, and the advertisement shall require applicants to submit a curriculum vitae.

(3) The Selection Panel shall—

(a) assess the applications received pursuant to subsection (2), including the reputation of each applicant, and

(i) may seek other or further information pertaining to the applicant from the applicant or any other person or source; and

(ii) shall interview each applicant, before recommending to the President who among the applicants shall be appointed by the President as members of the Commission; and

(b) according to its assessment under paragraph (a), keep a list of reserved names of applicants to be appointed to fill any vacancy for the remainder of the term of any member of the Commission who vacates office before the expiry of the term prescribed in section 75 (3) of the Constitution.

(4) A list of the names of applicants recommended by the Selection Panel and the names of the persons appointed by the President and the resultant membership of the Commission shall be published in the *Gazette*.

Appointment of Chairman of the Commission 4C. The President shall appoint the Chairman of the Commission.

Acting Chairman of the Commission 4D. Where the office of the Chairman of the Commission becomes vacant by virtue of section 75 of the Constitution, the members shall elect one amongst themselves to act as Chairman in the interim while awaiting the President to appoint a Chairman in accordance with section 4C.”.

Amendment of s. 6 (1) of the Act

4. Section 6 (1) of the principal Act is amended in the proviso by deleting the word “President” and substituting therefor the word “Parliament”.

APPENDIX F

PARLIAMENTARY AND PRESIDENTIAL ELECTIONS (AMENDMENT) BILL, 2007

A B I L L
entitled

An Act to amend the Parliamentary and Presidential Elections Act

ENACTED by the Parliament of Malawi as follows—

1. This Act may be cited as the Parliamentary and Presidential Elections (Amendment) Act, 2007. Short title

2. The Parliamentary and Presidential Elections Act (hereinafter referred to as the “principal Act”) is amended in section 49 (1) (e) by inserting the following new subparagraph (iii)— Amendment of s. 49 of the Act

“(iii) has not served in the Office of President or Vice-President for two terms.”.

3. Section 96 (5) of the principal Act is amended by deleting subsection (5) and substituting therefor the following new subsection (5)— Amendment of s. 96 of the Act

“(5) Subject to this Act, in any election—

(a) a candidate who obtains the greatest number of votes at the poll in a Parliamentary election; and

(b) a candidate who obtains the majority of more than fifty per cent of the valid votes cast at the poll in a Presidential election, shall be declared by the Commission to have been duly elected.

4. Section 113 of the principal Act is amended— Amendment of s. 113 of the Act

(a) by renumbering the section as subsection (1);

(b) by inserting the following new subsection as subsection (2)—

“(2) Where the complaint alleges an irregularity that would nullify the results of an election, the Commission in deciding on the matter shall do so before the expiration of seven days from the date the election results are announced.”.

5. Section 114 (2) of the principal Act is amended by inserting the following new paragraph as paragraph (c)— Amendment of s. 114 of the Act

“(c) shall expeditiously decide the matter so as to ensure that the President elect is sworn into office within the period specified by the Constitution.”.

APPENDIX G

COURTS ACT (AMENDMENT) BILL, 2007

A BILL

entitled

An Act to amend the Courts Act

ENACTED by the Parliament of Malawi as follows—

1. This Act may be cited as the Courts (Amendment) Act, 2007. Short title

2. The Courts Act (hereinafter referred to as the “principal Act”) is amended in section 5 by inserting the words “judge President” immediately after the words “Chief Justice”. Amendment of s. 5 of the Act

4. Section 6 of the principal Act is repealed and replaced by the following new section as section 6. Replacement of s. 6 of the Act

Head of the High Court

6.—(1) The Judge President shall be the Head of the High Court, and the other Judges shall take precedence after him according to the priority of their respective appointments as such.

(2) Notwithstanding subsection (1), the Chief Justice shall be the most Senior Judge of the High Court and the Judge President and the other Judges shall take precedence after him according to the priority of their respective appointments as such.

5. The principal Act is amended by insertion of the following new section 6A— Insertion of the new s. 6A of the Act

Powers, functions and duties of Judge President

6A. The Judge President shall be responsible for—
(a) assigning cases to other judges of the High Court;
(b) day to day management of the Registries of the High Court;
(c) giving consent to other judges to sue where appropriate.

APPENDIX H

OMBUDSMAN (AMENDMENT) BILL, 2007

A BILL

entitled

An Act to amend the Ombudsman Act

ENACTED by the Parliament of Malawi as follows—

1. This Act may be cited as the Ombudsman (Amendment) Act, 2007. Short title

2. The Ombudsman Act (hereinafter referred to as the “principal Act”) is amended in section 5— Amendment
of s. 5 of
the Act

(a) in subsection (1)—

(i) by deleting the words “by an official in the employment of any organ of Government”;

(ii) by deleting the words “by such official”;

(b) in subsection (2)—

(i) in paragraph (a), by inserting the words “or any other authority or institution” immediately after the word “Government”;

(ii) in paragraph (b), by inserting the words “or any other authority or institution” immediately after the word “Government”.

APPENDIX C

IMPEACHMENT OF PRESIDENT BILL

APPENDIX D

POLITICAL PARTIES (REGISTRATION AND REGULATION) (AMENDMENT) BILL)2007

APPENDIX E

ELECTORAL COMMISSION (AMENDMENT) BILL, 2007

APPENDIX F

PARLIAMENTARY AND PRESIDENTIAL ELECTIONS (AMENDMENT) BILL, 2007

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MALAWI LAW COMMISSION

REPORT OF THE LAW COMMISSION ON THE REVIEW OF THE CONSTITUTION

September 2007

ISBN: 978-99908-85-02-6

