

# CONSTITUTION OF THE REPUBLIC OF MALAWI

## CHAPTER 1

### THE REPUBLIC OF MALAWI

1. The Republic of Malawi is a sovereign State with rights and obligations under the Law of Nations.
2. Malawi shall have a National Flag, a National Coat of Arms, a National Anthem, and a National Seal.
3. The national territory of the Republic of Malawi shall consist of all the territory, including airspace, waters and islands which comprised the territory of Malawi before the coming into effect of this Constitution.
4. All powers exercised by the State are entrusted to it by the people of Malawi and are defined and limited by this Constitution which shall be supreme.
5. The Constitution shall bind all executive, legislative and judicial organs of the State at all levels of government and all the peoples of Malawi are entitled to the equal protection of the Constitution, its agencies and laws made under it.
6. Any act of government, any law or any decision of a Court that is inconsistent with the provisions of this Constitution shall, to the extent of such inconsistency, be invalid.
7. The authority to govern derives from the people of Malawi as expressed through universal and equal suffrage in genuine and regular elections.
8. The executive shall be responsible for the initiation and implementation of policies and legislation which embody the express wishes of the people of Malawi and which promote the principles of this Constitution.
9. The legislature when enacting laws shall reflect in its deliberations and represent in its decisions the interests of all the people of Malawi and shall further the values implicit in this Constitution.
10. The judiciary shall have the responsibility of interpreting, protecting and enforcing this Constitution and all laws in accordance with it in an independent and impartial manner with regard only to questions of fact and the prescriptions of law.

## CHAPTER 2

### FUNDAMENTAL PRINCIPLES

11. Universal Principles

The people of Malawi unite themselves and affirm the importance

of the following values in the life of the nation, the government and the citizen:

Note: submissions have been requested and will be made by the churches and members of the public.

(examples subitted:

- sanctity of life
- importance of the family
- collective wisdom)

## 12. Constitutional Principles

This Constitution is founded upon the following underlying principles:

- (1) All legal and political authority of the State derives from the people of Malawi and shall be exercised in accordance with this Constitution solely to serve and protect their interests.
- (2) All persons responsible for the exercise of State powers do so on trust and shall only exercise power to the extent of their lawful authority and in accordance with their responsibilities to the people of Malawi.
- (3) The authority to exercise State power is conditional upon the sustained trust of the people of Malawi and that trust can only be maintained through open, accountable and transparent government and informed democratic choice.
- (4) The inherent dignity and worth of each human being requires that the State and all persons shall recognise and protect fundamental human rights and afford the fullest protection to the rights and views of all individuals, groups and minorities whether or not they are entitled to vote.
- (5) As all persons have equal status before the law, the only justifiable limitations to lawful rights are those necessary to ensure peaceful human interaction in an open and democratic society.
- (6) All institutions and persons shall observe and uphold the Constitution and the Rule of Law and no institution or person shall stand above the law.

## 13. Principles of National Policy

The State shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the following goals:

- (1) Equality for Women

To obtain equality for women through:

- (a) full participation in all spheres of Malawian society on the basis of equality;
- (b) the implementation of the principles of non-discrimination and such other measures as may be required; and
- (c) the implementation of policies to address social issues such as domestic violence, security of the person, lack of maternity benefits, economic exploitation, and rights to property.

(2) Nutrition

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

(3) Health

To provide adequate health care, commensurate with the health needs of Malawian society and international standards of health care.

(4) The Environment

To manage the environment responsibly in order to:

- (a) prevent the degradation of the environment;
- (b) provide a healthy living and working environment for the people of Malawi;
- (c) accord full recognition to the rights of future generations by means of environmental protection and the sustainable exploitation of natural resources; and
- (d) protect the rich biological diversity of Malawi.

(5) Rural Life

To enhance the quality of life in rural communities and to recognise rural standards of living as a key indicator of the success of government policies.

(6) Education

To provide adequate resources to the education sector and devise programmes in order to:

- (a) eliminate illiteracy in Malawi;
- (b) introduce free primary education;
- (c) offer greater access to higher learning and continuing education; and
- (d) promote national goals such as unity and the elimination

of political, religious, racial and ethnic intolerance.

(7) The Disabled

To support the disabled through:

- (a) greater access to public places;
- (b) fair opportunities in employment; and
- (c) the fullest possible participation in all spheres of Malawian society.

(8) Children

To encourage and promote conditions conducive to the full development of healthy, productive and responsible members of society.

(9) The Family

To recognise and protect the family as a fundamental and vital social unit.

(10) Elderly

To respect and support the elderly through the provision of community services and to encourage participation in the life of the community.

(11) International Relations

To govern in accordance with and actively support the further development of the law of nations and the Rule of Law in regional and international affairs.

(12) Peaceful settlement of disputes

To strive to adopt mechanisms by which differences are settled through negotiation, good offices, mediation, conciliation, and arbitration.

(13) Administration of Justice

To promote law and order and respect for society through civic education, by honest practices in government, adequate resourcing, and the humane application and enforcement of laws and policing standards.

(14) Economic Management

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

(15) Public Trust and Good Governance

To introduce measures which will guarantee accountability, transparency, personal integrity and financial probity and which by virtue of their effectiveness and visibility will strengthen confidence in public institutions.

The next 3 sections are not complete.

#### Application of the Constitution

14. (1) In the interpretation of all laws and the resolution of all political disputes this Constitution and the principles contained herein shall be regarded as the supreme arbiter and ultimate source of authority.
  - (2) The provisions of this Constitution shall be interpreted in accordance with and with full regard to the Principles set out in Chapters 2 and 3 and with full regard to public international law and foreign comparable foreign case law.
  - (3) In the interpretation of any Act of Parliament and the applicability and development of the common law and customary law all Courts shall have due regard to the principles and provisions of this Constitution.
15. The principles contained in this Chapter shall be treated as an integral part of this Constitution to guide its legal interpretation, and to guide the conduct of both private and public affairs.
16. Principles of National Policy
- (1) The principles of national policy shall be directory in nature but Courts shall be entitled to have regard to them in interpreting and applying any laws, including the provisions contained in this Constitution, or in determining the validity of executive decisions.
  - (2) In order to achieve these objectives at all levels of society, appropriate legislation should be considered and adopted, while respecting continuity and minimising disruption where possible.
  - (3) The achievement of these goals entails obligations for Malawian society as well as for the State.

### CHAPTER 3

#### BILL OF HUMAN RIGHTS

17. Protection of Human Rights and Freedoms
- (1) The Human Rights and Freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and where applicable to them, by all natural and

legal persons in Malawi and shall be enforceable in the manner hereinafter prescribed.

- (2) Any person or group of persons with sufficient interest in the protection and enforcement of rights under this Chapter shall be entitled to the assistance of the Courts, the Ombudsman, the Human Rights Commission and other organs of government to ensure the promotion, protection and redress of grievance in respect of those rights.

18. The Right to Life

Every person has the right to life. No one shall be arbitrarily deprived of his or her life.

19. Liberty

Every person has the right of personal liberty.

20. Human Dignity and Personal Freedom

- (1) The dignity of all persons shall be inviolable.
- (2) (a) In any judicial proceedings or in any other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.  
  
(b) No person shall be subject to torture of any kind or to cruel, inhuman or degrading treatment or punishment.  
  
(c) No person shall be subject to corporal punishment in connection with any judicial proceedings or in any other proceedings before any organ of the State.
- (3) Every person shall have the right to freedom and security of person, which shall include the right not to be detained without trial.

21. Equality

- (1) The law shall prohibit any discrimination and shall guarantee to all persons equal and effective protection against discrimination on grounds such as: race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth or other status.
- (2) Legislation may be passed addressing inequalities in society and prohibiting discriminatory practices and the propagation of such practices and may render such practices criminally punishable by the courts.

22. Privacy

Every person shall have the right to personal privacy, which shall include the right not to be subject to searches of his or her person,

home or property, the seizure of private possessions or violation of private communications, including mail and all forms of telecommunications.

23. Family and Marriage

- (1) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
- (2) Each member of the family shall enjoy full and equal respect and shall be protected by law against all forms of neglect, cruelty or exploitation.
- (3) (a) Men and women, without any limitation due to race, colour, ethnic origin, nationality, religion or social or economic status shall have the right to marry and found a family.  
  
(b) No person shall be forced to enter into marriage.  
  
(c) This section shall apply to all marriages at law, marriage by repute or by permanent cohabitation.
- (4) No person over the age of eighteen years shall be prevented from entering into marriage.
- (5) Between the age of fifteen and eighteen years a marriage shall only be entered into with the consent of the parents or guardians.
- (6) The law shall recognise and protect marriages by repute or by permanent cohabitation for the purpose of enforcing duties and rights under the law.

24. Rights of Children

- (1) All children are legitimate, regardless of the circumstances of their birth, and are entitled to equal treatment before the law.
- (2) All children shall have the right to a given name and a family name and the right to a nationality.
- (3) Children have the right to know and be cared for by their parents.
- (4) Children are entitled to be protected from economic exploitation and shall not be employed in or required to perform work that is likely to be hazardous or to interfere with their education or which will be harmful to their health or physical, mental or spiritual or social development.
- (5) For the purposes of this section children shall be persons under sixteen years of age.

25. Education

- (1) All persons are entitled to education.

- (2) Primary education shall be compulsory and free to all to the maximum of the State's available resources with a view to achieving progressively the full realization of this right.
- (3) Primary education shall consist of at least five years of education.
- (4) Private schools and other private institutions of higher learning shall be permissible, provided that:
  - (a) such schools or institutions are registered with a State department in accordance with the law;
  - (b) the standards maintained by such schools or institutions are not inferior to official standards;
  - (c) no restrictions are imposed with respect to the admission of pupils based on grounds other than religion;
  - (d) no restrictions are imposed with respect to the recruitment of staff based on grounds other than religion.

26. Culture and Language

Every person shall have the right to use the language and to participate in the cultural life of his or her choice.

27. Slavery, Servitude and Forced Labour

- (1) No one shall be held in slavery or servitude.
- (2) Slavery and the slave trade shall be prohibited.
- (3) No one shall be subject to forced labour.
- (4) Nobody shall be subject to tied labour that amounts to servitude.

28. Property

- (1) All persons shall, subject to this Constitution, be able to acquire, alone or in association with others, rights in property.
- (2) No one shall be arbitrarily deprived of property.

29. Economic Activity

Every person shall have the right freely to engage in economic activity, to work and to pursue a livelihood anywhere in the national territory.

30. The Right to Development

- (1) All persons and peoples have a right to development and therefore to the enjoyment of economic, social, cultural and

political development. Women in particular shall be given special consideration in the application of this right.

- (2) The State shall undertake all necessary measures for the realisation of the right to development. Such measures shall include, amongst other things, equality of opportunity for all in their access to basic resources, education, health services, food, shelter and employment.
- (3) Measures shall be undertaken to introduce reforms aimed at eradicating social injustices and inequalities.
- (4) The State has a responsibility to respect the right to development and to justify its policies in accordance with this responsibility.
- (5) The State should encourage popular participation in all spheres of society as an important factor in the realisation of the right to development.

#### 31. Labour

- (1) Every person shall have the right to fair and safe labour practices and to fair remuneration.
- (2) All persons shall have the right to form and join trade unions or not to join them.
- (3) Every person shall be entitled to fair wages and equal remuneration for work of equal value without distinction and discrimination of any kind, in particular on the basis of sex.

#### 32. Freedom of Association

- (1) Every person shall have the right to freedom of association, which shall include the freedom to form associations.
- (2) No one may be compelled to belong to an association.

#### 33. Religion, Belief and Opinion

Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, which shall include academic freedom.

#### 34. Freedom of Expression and of the Press

- (1) Every person shall have the right to freedom of speech and expression.
- (2) The press shall have the right to report and publish freely, within Malawi and abroad, and the fullest possible facilities for access to public information.

#### 35. Access to Information

Every person shall have the right of access to all information held

by the State or any of its organs at any level of Government insofar as such information is required for the exercise of his or her rights.

36. Freedom of Assembly

Every person shall have the right to assemble and demonstrate with others peacefully and unarmed.

37. Freedom of Movement and Residence

- (1) Every person has the right to freedom of movement and residence within the borders of the State.
- (2) Every person has the right to leave the country and to return to it.

38. Political Rights

- (1) Subject to this Constitution, every person shall have the right:
  - (a) to form, to join, to participate in the activities of and to recruit members for a political party;
  - (b) to campaign for a political party or cause; and
  - (c) Every person shall have the right to participate in peaceful political activity intended to influence the composition and policies of the Government.
  - (d) freely to make political choices.

Provided that the State must ensure that Parties represented in the National Assembly should have sufficient funds to continue to represent their constituency.

- (2) Every person shall have the right to vote, to do so in secret and to stand for election for public office.

39. Access to Justice and Legal Remedies

- (1) Every person has a right to recognition as a person before the law.
- (2) Every person shall have access to any court of law and to any other tribunal for final settlement of justiciable issues.
- (3) Every person has the right to an effective remedy by a court of law or tribunal for acts violating the rights and freedoms granted to him by this Constitution or any other law.

40. Arrest, Detention and Fair Trial

- (1) Every person who is detained, including every sentenced prisoner, shall have the right-

- (a) to be informed promptly in a language which he or she understands of the reason for his or her detention;
  - (b) to be detained under conditions consonant with human dignity, which shall include at least the provision of adequate nutrition and medical treatment at State expense;
  - (c) to consult confidentially with a legal practitioner of his or her choice, to be informed of this right promptly and, where substantial injustice would otherwise result, to be provided with the services of a legal practitioner by the State;
  - (d) to be given the means and opportunity to communicate with, and to be visited by, his or her spouse or partner, next-of-kin, religious counsellor and a medical practitioner of his or her choice; and
  - (e) to challenge the lawfulness of his or her detention in person before a court of law and to be released if such detention is unlawful.
- (2) Every person arrested for the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right-
- (a) promptly to be informed, in a language which he or she understands, that he or she has the right to remain silent and to be warned of the consequences of making any statement;
  - (b) as soon as it is reasonably possible, but not later than 48 hours after the arrest, or if the said period of 48 hours expires outside ordinary court hours or on a day which is not a court day, the first court day after such expiry, to be brought before an ordinary court of law and to be charged or to be informed of the reason for his or her further detention, failing which he or she shall be entitled to be released;
  - (c) not to be compelled to make a confession or admission which could be used in evidence against him or her; and
  - (d) to be released from detention with or without bail, unless the interests of justice require otherwise.
- (3) Every accused person shall have the right to a fair trial, which shall include the right-
- (a) to public trial before an ordinary court of law within a reasonable time after having been charged;
  - (b) to be informed with sufficient particularity of the charge;
  - (c) to be presumed innocent and to remain silent during a plea proceedings or trial and not to testify during trial;

- (d) to adduce and challenge evidence, and not to be a compellable witness against himself or herself;
- (e) to be represented by a legal practitioner of his or her choice or, where substantial injustice would otherwise result, to be provided with legal representation at State expense, and to be informed of these rights;
- (f) not to be convicted of an offence in respect of any act or omission, and not to be sentenced to a more severe punishment than that which was applicable when the offence was committed;
- (g) not to be tried again for any offence of which he or she has previously been convicted or acquitted;
- (h) to have recourse by way of appeal or review to a higher court than the court of first instance;
- (i) to be tried in a language which he or she understands or, failing this, to have the proceedings interpreted to him or her; and
- (j) to be sentenced within a reasonable time after conviction.

41. Administrative Justice

Every person shall have the right to:

- (a) Lawful administrative action where any of his or her rights or interests are affected or threatened;
- (b) Procedurally fair administrative action where any of his or her rights or legitimate expectations are affected or threatened;
- (c) Be furnished with reasons in writing for administrative action which affects any of his or her rights or interests;
- (d) Administrative action which is justifiable in relation to the reasons given where any of his or her rights are affected or threatened.

42. Asylum, Refugee Status and Statelessness

- (1) A person from another country to whom is denied, in his or her country of origin or habitual residence, the effective exercise of those democratic rights and freedoms guaranteed by the Constitution of Malawi or who has a well founded fear of persecution on the grounds of race, sex, religion, nationality, membership of a particular social or ethnic group, or political opinion, or whose life, liberty or physical integrity is threatened or who is deprived of citizenship, shall have the right to asylum in Malawi.
- (2) No person shall be subjected to measures such as rejection at

the frontier, return or expulsion which will compel him or her to return to or remain in a territory where his or her life or physical integrity will be threatened for the reasons mentioned in subsection (1).

43. Genocide

Acts of genocide are prohibited and shall be prevented and punished.

44. Limitation

- (1) No restrictions or limitations may be placed on the exercise of the rights and freedoms provided for in this Constitution other than those prescribed by law, which are reasonable, recognised by international human rights standards and necessary in an open and democratic society.
- (2) Laws prescribing restrictions or limitations shall not negate the essential content of the right or freedom in question, shall be of general application and shall not be aimed at particular individuals or groups.
- (3) Expropriation of property will be permissible only when done for public utility or social interest and only when there has been adequate notification and just compensation, provided that there shall always be a right to appeal.

45. Derogation and Public Emergency

- (1) No derogation from rights contained in this Chapter shall be permissible except to the extent that it is provided for by this section and no such derogation shall be made unless there has been a declaration of a state of emergency within the meaning of this section.
- (2) The President may declare a state of emergency:
  - (a) only to the extent that it is provided for in this section;
  - (b) only with the approval of both the Army Council and the Defence Committee of the National Assembly;
  - (c) only in times of war or civil war; and
  - (d) only with regard to the specific location where that emergency exists.

Provided that any declaration of a state of emergency shall be publicly announced.

- (3) Derogation shall only be permissible during a state of emergency with respect to freedom of expression, freedom of information, freedom of movement, freedom of assembly and the right not to be detained without trial, and only to the extent that such derogation is required to prevent the lives of defensive combatants and legitimate military objectives from

being placed in direct jeopardy.

- (4) The declaration of the state of emergency and any action taken in consequence thereof shall be in force for a period of not more than twenty-one days, unless it is extended for a period of not longer than three months, or consecutive periods of not longer than three months at a time, by resolution of the National Assembly adopted by a majority of at least two-thirds of all its members.
- (5) The High Court shall be competent to enquire into the validity of a declaration of a state of emergency, any extension thereof, and any action taken, including any regulation enacted, under such declaration.
- (6) Where a person is detained under a state of emergency such detention shall be subject to the following conditions:
  - (a) An adult family member or friend of the detainee shall be notified of the detention as soon as is reasonably possible;
  - (b) The names of all detainees and a reference to the measures in terms of which they are being detained shall be published in the Gazette within five days of their detention.
  - (c) When rights entrenched in subsection (5) (2) or section 25 have been suspended-
    - (i) the detention of a detainee shall, as soon as it is reasonably possible but not later than 10 days after his or her detention, be reviewed by a court of law, and the court shall order the release of the detainee if it is satisfied that the detention is not necessary to restore peace or order;
    - (ii) a detainee shall at any stage after the expiry of a period of 10 days after a review in terms of subparagraph (i) be entitled to apply a court of law for a further review of his or her detention, and the court shall order the release of the detainee if it is satisfied that the detention is no longer necessary to restore peace or order;
    - (iii) a detainee shall be informed of the reasons for his detention.
  - (d) the detainee shall be entitled to appear before the court in person, to be represented by legal counsel, and to make representations against his or her continued detention;
  - (e) the detainee shall be entitled at all reasonable times to have access to a legal representative of his or her choice;
  - (f) the detainee shall be entitled at all times to have access to a medical practitioner of his or her choice; and

- (g) the State shall for the purpose of a review referred to in paragraph (c) (i) or (ii) submit written reasons to justify the detention or further detention of the detainee to the court, and shall furnish the detainee with such reasons not later than two days before the review.
- (7) If a court of law, having found the grounds for a detainee's detention unjustified, orders his or her release, such a person shall not be detained again on the same grounds unless the State shows good cause to a court of law prior to such re-detention.

46. Enforcement

- (1) Save in so far as it may be authorised to do so by this Constitution, the National Assembly or any subordinate legislative authority shall not make any law, and the Executive and the agencies of Government shall not take any action which abolishes or abridges the fundamental rights and freedoms conferred by this Chapter, and any law or action in contravention thereof shall to the extent of the contravention be invalid.

Provided that:

- (a) a competent Court, instead of declaring such law or action to be invalid, shall have the power and the discretion in an appropriate case to allow the National Assembly, any subordinate legislative authority, or the Executive and the agencies of Government, as the case may be, to correct any defect in the impugned law or action within a specified period, subject to such conditions as may be specified by it. In such event and until such correction, or until the expiry of the time limit set by the Court, whichever be the shorter, such impugned law or action shall be deemed to be valid;
  - (b) any law which was in force immediately before the coming into effect of this Constitution shall remain in force until amended, repealed or declared unconstitutional. If a competent Court is of the opinion that such law is unconstitutional, it may either set aside the law, or allow the National Assembly to correct any defect in such law, in which event the provisions of subsection (a) hereof shall apply.
- (2) Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom, and may approach the Ombudsman or the Human Rights Commission to provide them with such legal assistance or advice as they require, and the Ombudsman or the Human rights Commission shall have the discretion in response there to provide such legal or other assistance as he or she may consider expedient.

- (3) Subject to the provisions of this Constitution, the Court referred to in subsection (2) hereof shall have the power to make all such orders as shall be necessary and appropriate to secure such applicants the enjoyment of the rights and freedoms conferred on them under the provisions of this Constitution, should the Court come to the conclusion that such rights or freedoms have been unlawfully denied or violated, or that grounds exist for the protection of such rights or freedoms by injunction.
- (4) The power of the Court shall include the power to award monetary compensation in respect of any damage suffered by the aggrieved persons in consequence of such unlawful denial or violation of their fundamental rights and freedoms, where it considers such an award to be appropriate in the circumstances of particular cases.

47. Interpretation

- (1) New and appropriate principles of interpretation of this Constitution shall be developed and employed by the Courts to reflect the Constitution's unique character and supreme status.
- (2) In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society and shall, where applicable, have regard to public international law applicable to the protection of human rights and freedoms and may have regard to comparable foreign case law.
- (3) In the interpretation of any law and the application and development of the common law and customary law, a court of law shall have due regard to the spirit and values of this Constitution.
- (4) A court of law will also be entitled to have regard to the Principles of the Constitution provided for in Chapter 1.

CHAPTER 4

CITIZENSHIP

- 48.
- (1) Every person who immediately before the appointed day was a citizen of Malawi under any existing law shall continue to be a citizen of the Republic after the appointed day.
  - (2) An Act of Parliament may make provision for the acquisition or loss of citizenship of the Republic by any person after the appointed day.
  - (3) In this section, the expression:
    - (a) "acquisition of citizenship" includes acquisition by birth, descent, marriage, registration, naturalisation or any other means prescribed by an Act of Parliament;

- (b) "loss of citizenship" includes loss by deprivation, renunciation or any other means prescribed by an Act of Parliament.

## CHAPTER 5

### THE LEGISLATURE

#### Parliament

49. (1) All legislative powers of the Republic shall be vested in Parliament which shall have the powers and responsibilities set out in this Constitution.
- (2) An Act of Parliament shall have primacy over other forms of law, but shall be subject to the Constitution.
- (3) Any question proposed for decision by the National Assembly or by the National Council shall be decided by a majority of the votes of the members present and voting, unless this Constitution or the National Assembly provides that a qualified majority shall be required for a decision of a particular question.

#### Definitions

50. (1) For the purposes of this Constitution, unless otherwise stated, "Parliament" shall mean a lower chamber known as the National Assembly and an upper chamber known as the National Council.
- (2) Subject to this Constitution, an "Act of Parliament" shall be a Bill which has been introduced into the National Assembly and passed by a majority of that chamber, which has subsequently been deliberated on by the National Council, and, where applicable, voted on by the majority of the members of that Chamber and has been assented to by the President in accordance with this Chapter.

#### Quorum

51. (1) The quorum of each Chamber shall be formed by the presence of at least one half of the members of that Chamber entitled to vote, not including the Speaker or presiding member.
- (2) If after such interval as may be prescribed in the rules of procedure of the Chamber, the Speaker or person acting as Speaker ascertains that the number of members present is still less than one-half of all the members of the Chamber, he or she shall adjourn the Chamber.

#### Qualifications of members

52. (1) A person shall not be qualified to be nominated or elected as a member of the Parliament unless that person:

- (a) is a citizen of the Republic who upon taking office has attained the age of twenty-one years in the case of the National Assembly and the age of thirty-five years in the case of the National Council;
- (b) is able to speak and to read the English language well enough to take an active part in the proceedings of Parliament; and
- (c) is registered as a voter in a constituency.

Provided that, notwithstanding subsection 1(b), above, Parliament may make provision to allow persons who are literate in any other language of Malawi, but have insufficient command of the English language, to be eligible as a candidate for nomination and election.

(2) Notwithstanding subsection (1) no person shall be qualified to be nominated or elected as a member of the Parliament who:

- (a) is under a declaration of allegiance to a country other than the Republic of Malawi;
- (b) is, under any law in force in Republic, adjudged or otherwise declared to be of unsound mind;
- (c) has been convicted by a competent court of a crime involving dishonesty or moral turpitude within seven years of the date of nomination.
- (d) is an undischarged bankrupt, having been adjudged or otherwise declared bankrupt under any law in force in the Republic.
- (e) holds or acts in any public office or appointment, except where this Constitution explicitly provides that a person shall not be disqualified from standing for election solely on account of holding that office or appointment, or where that person resigns from that office in order to stand;
- (f) belongs to, and is serving in the armed forces or the police force;
- (g) has been convicted by any court in the last seven years of any violation of any law relating to election of the President or election of the members of Parliament under any Act of Parliament.

#### Oath of Allegiance

53. (1) Every officer and member of Parliament, before taking his or her seat, or assuming the duties of his or her office shall take and subscribe before the Chamber in which they shall sit:

- (a) the oath of allegiance in the form prescribed by law; and
  - (b) such other oaths for the due performance of their respective offices as may be prescribed by law.
- (2) The oaths of both Speakers and of all Deputy Speakers shall be rendered by and subscribed before the Chief Justice, and the oaths of all other members of the National Assembly and National Council, the Clerk to the National Assembly and of the Clerk to the National Council shall be tendered by the subscribed before the Speaker or a Deputy Speaker of the Chamber in which the member shall sit.

#### The Speaker

54. (1) There shall be a Speaker of the National Assembly and an Speaker of the National Council who shall be elected by majority vote of the Chamber in which they sit.
- (2) The members of each Chamber shall elect one or more persons to be Deputy Speaker or Deputy Speaker at the first sitting after a General Election in the case of the National Assembly or after a Local Election in the case of the National Council and after any event which results in a vacancy in the office of any Deputy Speaker.
- (3) The office of Speaker shall become vacant:
- (a) on the death or resignation of the Speaker;
  - (b) if the Speaker ceases to be a member of the Chamber in which he or she sits;
  - (c) if the Speaker becomes President, Vice President, a Minister or a Deputy Minister;
  - (d) if the Chamber in which the Speaker presides, by a resolution supported by the votes of not less than two-thirds of all the members thereof, resolves that the Speaker be removed from office.
- (4) The Speaker, or in the absence of the Speaker, such Deputy Speaker as the Speaker has nominated, shall preside at every sitting of each Chamber.
- Provided that in the absence of the Speaker and of every Deputy Speaker, the Chamber may elect one among its members to act a Speaker for that session or that sitting.
- (5) Any person who is elected Speaker, or any person acting as Speaker, shall discharge his functions and duties and exercise such powers as he or she has by virtue of that office independent of the direction or interference of any body or authority, save as accords with the express will and the Standing Orders of the Chamber.

- (6) Notwithstanding that the Speaker or a person acting as Speaker has been elected as a member of a political party, he or she shall not be subject to the control, discipline, authority or direction of that party or any other political party, in the discharge of the functions and duties of that office and in the exercise of the powers of that office.

#### Casting vote

55. (1) The Speaker of a Chamber shall not have a deliberative vote, but if the votes of the Chamber over which that Speaker is presiding are equally divided upon any question, he or she shall exercise the casting vote.
- (2) Any member of the National Assembly or National Council, other than the Speaker, shall when presiding in the Chamber of which he is a member, retain his original deliberative vote as a member and shall also have and exercise a casting vote if the votes of that Chamber are equally divided.

#### The Clerk

56. There shall be a Clerk to the National Assembly and a Clerk to the National Council who shall be public officers and shall assist the Speaker of the Chamber to which the Clerk is appointed and perform such other such functions and duties as that Speaker may direct.

#### The right to regulate procedure

57. (1) Subject to this Constitution, the National Assembly and the National Council may regulate their own procedures.
- (2) The National Assembly and the National Council may act notwithstanding any vacancy in its membership being not more than a half of all its seats.
- (3) The presence or participation of any person not entitled to be present or to participate in the proceedings of each Chamber shall not invalidate those proceedings.
- (4) Each Chamber shall provide access to the press and members of the public except where a motion is passed with reasons prohibiting public access in the national interest.
- (5) The proceedings of Parliament shall be conducted in the English language and such other languages as each Chamber may prescribe in respect of its own proceedings.
- (6) Parliament may establish any Committees of their members and may form Joint Committees for the scrutiny of legislation and performance of their other functions except voting on motions and Bills.

#### Money Bills

58. The National Assembly may, in consultation with the Minister

responsible for Finance:

- (1) proceed upon any Bill or any amendment to a Bill that makes provision for any of the following purposes:
  - (a) for the imposition of tax or the alteration of tax;
  - (b) for the imposition of any charge upon the State Revenue Fund, or the alteration of any such charge;
  - (c) for the payment, issue or withdrawal from the State Revenue Fund of any moneys not charged thereon, or any increase in the amount of such payment, issue or withdrawal; or
  - (d) for the composition or remission of any debt due to the Government.
- (2) proceed upon any motion or any amendment to a motion the effect of which, would be to make provision for any of those purposes in subsection (a) above; or
- (3) receive any petition that, in the opinion of the person presiding, requests that provision be made for any of those purposes.

Provided that the National Council shall have the power to debate or vote upon any motion or receive any Bill to which this section applies but may not amend or reject such a motion or Bill.

#### Delegated legislation

59. (1) The National Assembly may with respect to any particular Act of Parliament delegate to the Executive the power to draw up subsidiary legislation within the specification and for the purposes laid out in that Act.

Provided that no subsidiary legislation shall come into force unless that legislation:

- (a) has been laid before Parliament for no less than thirty days, or such longer period as the enabling Act of the National Assembly may prescribe;
  - (b) has not been rejected by the National Assembly; and
  - (c) has not been remitted by the National Council.
- (2) Notwithstanding subsection (1) the National Assembly shall not have the power to delegate any legislative powers to the executive which would affect the fundamental rights of citizens recognised by this Constitution.

#### Sessions and sittings

60. (1) Every session of the National Assembly and of the National

Council shall be held at such place within Malawi and shall commence at such time as each Speaker, in consultation with the President, may appoint with respect to the Chamber in which that Speaker presides and the sittings of each Chamber after the commencement of that session shall be held at such times and on such days as that Chamber shall appoint.

Provided that:

- (a) the President in consultation with Speaker of the relevant Chamber may summon on extraordinary occasions a meeting of the National Assembly or the National Council; and
  - (b) the President may, in consultation with the Speaker, prorogue the National Assembly or the National Council.
- (2) There shall be at least two sittings of the National Assembly and of the National Council every year.

#### Privileges and Immunities of Members

61.

- (1) The Speaker, every Deputy Speaker, every member of the National Assembly and every member of the National Council shall, except in cases of treason, be privileged from arrest in going to, returning from, or while in the precincts of the National Assembly or the National Council, and shall not, in respect of any utterance that forms part of the proceedings in the National Assembly or the National Council, be amenable to any other action or proceedings in any Court, tribunal or body other than Parliament.
- (2) All official reports and publications of Parliament or of its proceedings or of the proceedings of any Committee of the Parliament shall be privileged and utterances made in the Parliament or of any Committee thereof wherever published shall be protected by absolute privilege.
- (3) The National Assembly and the National Council shall each have the power to conduct investigations and exercise the power to subpoena the attendance of any person or office holder whatsoever, as required in connection with the prudent exercise of the respective functions of each Chamber.

#### Members interests

62.

- (1) A member of the Parliament, where he or she has a direct or indirect material interest in a matter being discussed by the Chamber of which he or she is a member:
  - (a) disclose such interest to that Chamber; and
  - (b) not be entitled to vote on that matter without leave of that Chamber.

- (2) Where a member of the Parliament fails to disclose a material interest in accordance with subsection (1) that member shall be guilty of a contempt of the Chamber of which he or she is a member.

#### Composition of the National Assembly

63. (1) The National Assembly shall be comprised of such number of seats, representing every constituency in Malawi as shall be determined by the Electoral Commission, created under this Constitution.
- (2) Each constituency shall freely elect any person, subject to this Constitution and an Act of Parliament, to represent it as a member of the National Assembly in such manner as may be prescribed by this Constitution or an Act of Parliament.

#### Vacancies in the National Assembly

64. (1) The seat of a member of the National Assembly shall become vacant:
  - (a) if the National Assembly has been dissolved;
  - (b) if a member dies or resigns his seat;
  - (c) if a member ceases to be citizen of the Republic;
  - (d) if a member assumes the office of President or Vice President;
  - (e) if any circumstances arise that, if he or she were not a member of the National Assembly, would cause that member to be disqualified for election under this Constitution or any other Act of Parliament;
  - (f) if the National Assembly declares a member's seat vacant in accordance with such rules and Standing Orders as may permit or prescribe the removal of a member for good and sufficient reason provided that they accord with the principles of Natural Justice; or
  - (g) if a member is subject to recall by his constituency in accordance with an Act of Parliament and the provisions of this Constitution.
- (2) The Speaker of the National Assembly shall give notice in the Gazette in the event that the seat of any member of the Assembly shall become vacant under this section.

Provided that:

- (a) the National Assembly shall make provision for holding by-elections to fill any vacancy that shall occur;
- (b) any by-election to fill any vacancy that shall occur shall be held as expeditiously as possible, and in no event later

that ninety days after the seat of any member of the National Assembly shall become vacant; and

- (c) any member elected at a by-election shall serve until such time as his seat becomes vacant in accordance with subsection (1).
- (3) The Speaker may, upon a motion of the National Assembly, postpone the declaration of a vacant seat for such period as that motion prescribes so as to permit any member to appeal against a decision:
  - (a) that member currently holds the seat that is to be declared vacant;
  - (b) there is a right to appeal against that decision to a court; and
  - (c) the decision being appealed is such that it which would require that member to vacate his seat in accordance with this section.

#### Recall of members

- 65. (1) Every member of the National Assembly shall be liable to be recalled by his or her constituency within the meaning of this section.
- (2) A member of the National Assembly shall be subject to recall by his or her the constituency in order to contest another by-election, if a petition of recall has been upheld by the Electoral Commission, where the petitioner:
  - (a) is a registered voter in the constituency that the 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.

#### Crossing the floor

- 66. (1) The Speaker shall declare vacant the seat of any member of the National Assembly who was, at the time of his election, a member of one political party represented in the National Assembly, other than by that member alone but who has ceased to be a member of that party and has joined another party represented in the National Assembly.

Provided that:

- (a) a member of the National Assembly who was elected as an independent member of the National Assembly and as such was not a member of a party represented in the National Assembly, shall not, solely by reason of joining a party represented in the National Assembly, have his seat declared vacant; and
  - (b) a member of the National Assembly, who was a member of a party represented in the National Assembly at the time of his election, but has ceased to be a member of that party and has thereafter declared himself or herself as not being a member of any party represented in the National Assembly, shall not have his seat declared vacant, under this section, unless he or she subsequently joins another party within the life of that Parliament.
- (2) Notwithstanding subsection (1), all members of all parties shall have the absolute right to exercise a free vote in any and all proceedings of the National Assembly, and shall not have their seat declared vacant solely on account of their voting in contradiction to the recommendations of a party, represented in the National Assembly, of which they are a member.

#### Functions and powers of the National Assembly

67. The National Assembly shall be a directly elected chamber whose primary purpose shall be legislative and which shall have power, subject to this Constitution, to:
- (1) receive, amend, accept or reject Government Bills and Private Bills;
  - (2) initiate Private Members Bills on the motion of any member and amend, accept or reject all Private Members Bills;
  - (3) receive, amend, accept or reject any Bills remitted from the National Council;
  - (4) debate and vote motions in relation to any matter including motions to indict and convict the President or Vice-President by impeachment;
  - (5) exercise such other functions and powers as are conferred on it by this Constitution; and
  - (6) take all actions incidental to and necessary for the proper exercise of its functions.

#### Dissolution of the National Assembly

68. (1) The National Assembly, shall continue for five years from the date of its first sitting after any dissolution and then shall stand dissolved.
- (2) Whenever the National Assembly is dissolved a general

election of members of the National Assembly shall be held within ninety days of the date of the dissolution and the date of a session of the National Assembly shall be appointed by the President to commence within forty five days of the date appointed by the Electoral Commission as the polling day for the election or, if more than one polling day is appointed, within forty five days of the last polling day.

#### Composition of the National Council

69. The National Council shall consist of:

- (1) two Local Delegates from each District being one man and one woman, registered as voters in that District and elected by the Council of that District in secret ballot within thirty days of each local government election;
- (2) twelve seats shall be occupied by Chiefs Delegates;
  - (a) four Chiefs elected in secret ballot by a caucus of Chiefs to be held in Mzuzu within thirty days of any local government election;
  - (b) four Chiefs elected in secret ballot by a caucus of Chiefs to be held in Lilongwe within thirty days of any local government election;
  - (c) four Chiefs elected in secret ballot by a caucus of Chiefs to be held in Blantyre within thirty days of any local government election;
- (3) ten seats being composed of two Sector Representatives from each of the following sectors of society:
  - (i) health;
  - (ii) education;
  - (iii) farming;
  - (iv) business; and
  - (v) trade unions,

who shall be elected by a two thirds majority of members of the National Council on the basis of nominations by the Nominations Committee provided for in subsection (6)

- (4) six persons General Representatives and who shall be such persons as are generally recognised for their outstanding contribution to the social, cultural, or technological development of the nation, who shall be elected by a two thirds majority of members of the National Council on the basis of nominations by the Nominations Committee provided for by subsection (6).
- (5) four Clerical Representatives of the different religious faiths

in Malawi, who shall be elected by a two thirds majority of members of the National Council on the basis of nominations of the Nominations Committee prescribed by subsection (6).

- (6) There shall be a Nominations Committee which shall be formed within thirty days of the each Local Government election for the purpose of nominating the Representatives referred to in this section and which shall be made up of the Speaker of the National Council, the Speaker of the National Assembly, the Ombudsman, and seven members, being Delegates of the National Council.

Provided that any Representative may be nominated for an indefinite number of subsequent terms, unless otherwise disqualified or removed.

#### Vacancies in the National Council

70. (1) The seat of a member of the National Council shall become vacant:
- (a) if the National Council has been dissolved;
  - (b) if a member dies or resigns his seat;
  - (c) if a member ceases to be citizen of the Republic;
  - (d) if a member assumes the office of President or Vice President, Minister or Deputy Minister;
  - (e) if any circumstances arise that, if he or she were not a member of the National Council, would cause that member to be disqualified for nomination or election under this Constitution or any other Act of Parliament; or
  - (f) if the National Council declares a member's seat vacant in accordance with such rules and Standing Orders as may permit or prescribe the removal of a member for good and sufficient reason provided that they accord with the principles of Natural Justice.
- (2) The Speaker of the National Council shall give notice in the Gazette in the event that the seat of any member of the Council shall become vacant under this section.
- (3) Where the seat of a member of the National Council is declared vacant by virtue of this section:
- (i) if that member is a Local Government Delegate, then the Electoral Commission shall notify the District Council by which that Local Government Delegate was elected to declare an election within thirty days of the seat becoming vacant;
  - (ii) if that member is a Chiefs Delegate, then the Speaker of the National Council shall notify the Paramount Chiefs so as to convene the relevant

caucus of Chiefs for the election of another delegate;

(iii) if that member is a Sector Representative, a General Representative or a Clerical Representative, then the Speaker of the National Council shall convene the Nominations Committee of the National Council who shall put forward nominations for appointment to the National Council.

#### Functions and powers of the National Council

71. The National Council shall be an indirectly elected chamber whose primary purpose shall be deliberative and which shall have power, subject to this Constitution, to:
- (a) receive, scrutinize and amend Bills from the National Assembly, not being Money Bills;
  - (b) vote motions to confirm or remit Bills passed by the National Assembly;
  - (c) debate any issue at its own motion, initiate Private Members Bills and vote motions in respect of any matter including motions to convict the President or Vice-President by impeachment;
  - (d) carry out such other functions as may be delegated to it by an Act of Parliament;
  - (e) exercise such other functions and powers as are conferred on it by this Constitution; and
  - (f) take all actions incidental to and necessary for the proper exercise of its functions.

#### Scrutiny by the National Council

72. (1) All Bills shall be laid before the National Council.
- (2) Any member of the National Council may, in respect to a Bill laid before the National Council;
- (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 National Council 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 Presidential Assent.
- (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 Presidential Assent; 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 Presidential Assent.
- (5) Where a Bill has been remitted by the National Council by virtue of a majority vote in favour of a motion under subsection (2) (b):
- (a) the National Council shall give 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 seats of the National Assembly may be presented for Presidential Assent.
- (6) Where a Private Members Bill has been initiated and passed by the National Council it shall be sent to the Speaker of the National Assembly who shall table the Bill which may be further debated and amended, and if passed by a majority of the National Assembly the Bill may be presented for Presidential Assent.

#### Dissolution of the National Council

73. The National Council shall continue from the date of its first sitting, being no later than thirty days after a Local Government election after any dissolution until it stands dissolved which shall take place 90 days before the next Local Government elections.

#### Presidential Assent

74. (1) Where a Bill is presented to the President for assent the President shall either assent or withhold assent.
- (2) Where the President withholds assent to a Bill, the Bill shall be returned to the Speaker of the National Assembly by the President with a notification that the President's assent has been withheld including reasons therefor, and the Bill shall not be again debated by the National Assembly until after the expiry of twenty-one days from the date of the withholding of that notification.
- (3) If the Bill is debated again and passed by a majority of the National Assembly at any time between the date of the expiry of the twenty-one days referred to in subsection (2) and six months from that date, the Bill shall be again presented for Presidential Assent.
- (4) Where a Bill is again presented to the President for assent in accordance with subsection (3), the President shall assent to

the Bill within twenty-one days of its presentation.

- (5) When a Bill that has been duly passed is assented to in accordance with this Constitution the Clerk shall cause it to be published immediately in the Gazette.

The coming into force of laws

75. No law made by Parliament shall come into force until it has been published in the Gazette, but Parliament may prescribe that a law shall not come into force until some later date, after its publication in the Gazette.

## CHAPTER 6

### ELECTIONS

The Electoral Commission

76. (1) There shall be an Electoral Commission which shall consist of a Chairman who shall be a judge nominated in that behalf by the Judicial Service Commission and such other members, not being less than six, as may be appointed in accordance with an Act of Parliament.
- (2) A person shall not be qualified to hold the office of a Member of the Electoral Commission if that person is a Minister, Deputy Minister, a member of Parliament or a public officer.
- (3) Subject to this section, a person shall cease to be a member of the Electoral Commission:
  - (a) at the expiration of four years from the date of his appointment, unless reappointed to a new four-year term; or
  - (b) if any circumstances arise that, if that person were not a member of the Electoral Commission, he or she would be disqualified for appointment as such.
- (4) A member of the Electoral Commission may be removed from office by the President on the recommendation of the Public Appointments Committee of the National Assembly on the grounds of incapacity or incompetence in the performance of the duties of that office.

Powers and Functions

77. (1) The Electoral Commission shall exercise such functions in relation to elections as may be conferred upon it by this Constitution or by an Act of Parliament.
- (2) The duties and functions of the Electoral Commission shall

include:

- (a) to determine constituency boundaries impartially on the basis of ensuring that constituencies contain approximately equal numbers of voters eligible to register, subject only to consideration of:
    - (i) population density;
    - (ii) ease of communication; and
    - (iii) geographical features and existing administrative areas.
  - (b) to review existing constituency boundaries at intervals of not more than five years and alter them in accordance with the principles laid down in subsection (2) (a).
  - (c) to determine electoral petitions and complaints relating to the conduct of any elections to ensure compliance as prescribed under this Constitution and any other Act of Parliament, subject to the right of any petitioner or complainant to appeal to the High Court against determinations of the Electoral Commission, with respect to any electoral petition that the petitioner has laid before the Electoral Commission; and
  - (d) to perform such other functions as may be prescribed by an Act of Parliament.
- (3) The Electoral Commission shall exercise its powers, functions and duties under this section independent of any direction or interference by other person or authority.
- (4) Without prejudice to subsection (3):
- (a) the High Court shall have jurisdiction entertain applications for judicial review of the exercise of powers by the Electoral Commission to ensure that they were duly exercised in accordance with this Constitution or any Act of Parliament; and
  - (b) The National Assembly shall confirm all determinations by the Electoral Commission with regard to the drawing up of constituency boundaries or shall reject such determinations.

Provided that the National Assembly may not of their own motion amend constituency boundaries, save with the written approval and recommendation of the Electoral Commission.

#### The Franchise

78. (1) All persons shall be eligible to vote in any General Election, Presidential Election, local government election or referendum, subject only to this section.

(2) Subject to subsection (3), a person shall be qualified to be registered as a voter in a constituency if, and shall not be so qualified unless, at the date of the application for registration that person:

(a) is a citizen of the Republic;

(b) has attained the age of eighteen years; and

(c) is ordinarily resident in that constituency or was born there or is employed or carries on a business there.

Provided that a person shall be qualified to be registered as a voter in a constituency, even if not a citizen of the Republic, after having been ordinarily resident in the Republic for seven years.

(3) No person shall be qualified for registration as a voter in a constituency if that person:

(a) is under any law in force in the Republic, adjudged or otherwise declared to be of unsound mind;

(b) is under sentence of death imposed by a court having jurisdiction in the Republic, either before or after the appointed day;

(c) is disqualified from registration as a voter on the grounds of his having been convicted of any violation of any law relating to elections passed by Parliament and in force at the time of, or after the commencement of this Constitution, or for infringement of subsection (4).

(4) Where any person is qualified to be registered in more than one constituency as a voter he or she may be so registered only in one constituency.

## CHAPTER 7

### THE EXECUTIVE

#### The President

79. There shall be a President who shall be the Head of State and Government and Head of the Executive and the Commander-in-Chief of the Armed Forces.

#### The Vice-President

80. There shall be a Vice-President who shall assist the President and who shall exercise the powers and functions conferred on him or her by this Constitution and by any Act of the National Assembly.

#### Election

81. (1) The President shall be elected in accordance with the provisions of this Constitution and in such manner as may be prescribed by an Act of the National Assembly.
- (2) The President shall be elected by a majority of the electorate through direct, universal and equal suffrage.
- (3) Every Presidential candidate shall at the time of his nomination declare who shall be his Vice President if he is elected.
- (4) The Vice President shall not be directly elected.
- (5) A person shall only be qualified for nomination for election as President or Vice-President if that person:
- (a) is a citizen of the Republic of Malawi by birth or descent;
  - (b) has attained the age of thirty-five years.
- (6) No person shall be eligible for nomination as candidate for election as President or Vice-President if that person:
- (a) has been adjudged or declared to be of unsound mind;
  - (b) is an undischarged bankrupt having been declared bankrupt under a law of the Republic;
  - (c) has been convicted by a competent court of a crime involving dishonesty or moral turpitude within seven years of the date of nomination.
  - (d) is under a declaration of allegiance to a foreign country.
  - (e) is the holder of a public office or a member of the National Assembly, unless that person first resigns.

#### Oath or Affirmation

82. (1) Before a person elected to be President or appointed to be Vice President takes office that person shall take the following oath which shall be administered in public by the Chief Justice:
- " I ..... do solemnly swear that I will well and truly perform the functions of the high office of President (or Vice-President) of the Republic of Malawi, and that I will preserve and defend the Constitution, and that I will do right to all manner of people according to law without fear or favour, affection or ill-will. So help me God".
- (2) Instead of taking an Oath the President or Vice President, may, if he thinks fit, make an affirmation which shall be in the like form with the substitution of "affirm" for "swear", and the omission of the final sentence.

- (3) A person elected to be President or nominated to be Vice-President shall be sworn into office, in accordance with subsection (1), within thirty days of being elected.
- (4) The President and Vice-President shall hold office until such time as his or her successor is sworn in.

#### Remuneration

83. (1) The President and Vice-President shall receive such salary, allowance or pension as may from time to time be determined by an Act of the National Assembly.
- (2) The salary of the President and Vice-President shall not be reduced without their consent.

#### Term of Office

84. (1) A President and the Vice President shall hold office for five years.
- (2) A President or Vice-President may serve a maximum of two consecutive terms.
- (3) Whenever there is a vacancy in the office of President the Vice President shall assume that office.

Provided that the Vice President shall only hold office as Acting President until the expiry of ninety days or, where four years of a Presidential term have expired, for the rest of that Presidential term, and thereafter a Presidential election shall be held

85. If the Vice-President dies or resigns from office, the vacancy shall be filled for the unexpired period of that term by a person appointed by the President.
86. If at any time both the office of President and Vice President become vacant then the Cabinet shall elect from among its members an Acting President and Acting Vice President who shall hold office for no more than ninety days or, where four years of a Presidential term have expired, for the rest of that Presidential term, and thereafter a Presidential election shall be held.

#### Removal from office

87. (1) The President and Vice President shall be removed from office where the National Assembly has indicted and convicted the President or Vice President by impeachment.
- Provided that any such impeachment proceedings shall be in full accord with the principles of Natural Justice and that:
- (a) indictment and conviction by impeachment shall only be on the grounds of serious violation of the Constitution or serious breach of the written laws of the Republic;

- (b) indictment on impeachment shall require the affirmative vote of two-thirds of the members of the National Assembly in a Committee of the whole house;
- (c) the Speaker shall preside over proceedings for indictment by impeachment and the Chief Justice shall preside over trial on impeachment;
- (d) conviction on impeachment shall require the affirmative vote of two-thirds of the members of both Chambers;
- (e) conviction in cases of impeachment shall cause the removal, and disqualification from future office, of the office holder; and
- (f) Conviction by way of impeachment shall not act as a bar to legal proceedings.

88. (1) Whenever the President is incapacitated so as to be unable to discharge the powers and duties of that office, the Vice President shall act as President, until such time in the Presidential term as the President is able to resume his functions.
- (2) The President shall not be deemed to be incapacitated for the purposes of this section until and unless:
- (a) there is a written declaration, certified by a board of independent medical practitioners, that the President is unable to discharge the duties of the Presidency;
  - (b) the declaration is signed by the Vice President and a majority of the Cabinet, holding office at that time; and
  - (c) the declaration is submitted by the Vice President to the Speaker of the National Assembly.
- (3) Upon submission of a declaration under subsection (2), the Vice President shall immediately assume the powers and duties of the Presidency as Acting President.
- (4) Where a President has been declared to be incapacitated in accordance with subsection (2) the President may at any time thereafter submit to the National Assembly a written declaration stating his fitness to carry on the duties of the Presidency.

Provided that:

- (a) upon receipt of such a declaration from the President, the National Assembly shall have thirty days to determine whether the President is in fact so incapacitated as to be unable to discharge the duties of the presidency; and
- (b) if the National Assembly determines that he remains so incapacitated so as to be unable to discharge the duties of the Presidency, by an affirmative vote of two-thirds of all

of its members, the Vice President shall continue to act as President until the National Assembly determines that the President is again fit to assume the duties and powers of his office; or

- (5) If the National Assembly determines that the President is no longer so incapacitated as to be unable to discharge the duties of the Presidency, by an affirmative vote of two-thirds of the National Assembly, the President shall resume the duties of his office within thirty days of that vote.
- (6) If, on the expiry of twelve months from the date of the Speaker being notified of the incapacity of the President, the National Assembly has not determined that the President is fit to perform his duties in accordance with subsection (4), then a Presidential election shall be held.
- (7) These provisions shall apply mutatis mutandis to the incapacity of the Vice President except that the certificate shall then be signed by the President and be submitted to the Speaker by the President.

#### Responsibilities of the President

89. (1) The President shall be responsible for the observance of the provisions of this Constitution by the executive and shall as head of state defend and uphold the Constitution as the supreme law of the land.
- (2) The President shall provide executive leadership in the interest of national unity in accordance with this Constitution and the law of the Republic.
- (3) The President shall not hold any other public office and shall not perform remunerative work outside the duties of his or her office and shall fully disclose all of his or her assets and business interests upon election.
- (4) The President and members of the Cabinet shall not use their office for personal gain or place themselves in a situation where their material interests conflict with the responsibilities and duties of his or her office.

#### Powers and Functions of the President

90. (1) The President shall have the following powers and duties:
  - (a) to promulgate Bills and assent to Bills duly passed by Parliament;
  - (b) to convene and preside over meetings of the Cabinet;
  - (c) to confer honours;
  - (d) to make such appointments as may be necessary in accordance with powers conferred upon him or her by this Constitution or any Act of the Parliament;

- (e) subject to this Constitution to appoint, accredit, receive and recognise ambassadors, plenipotentiaries, diplomatic representatives and other diplomatic officers, consuls and consular officers;
  - (f) to negotiate, sign, enter into and accede to international agreements or to delegate such power to Ministers, Ambassadors and High Commissioners;
  - (g) to appoint commissions of enquiry;
  - (h) to refer disputes of a constitutional nature to the High Court;
  - (i) to proclaim referenda and plebiscites in accordance with this Constitution or an Act of Parliament;
- (2) The President may pardon convicted offenders, grant stays of execution of sentence, reduce sentences, or remit sentences, provided that:
- (a) decisions under this subsection shall be taken in consultation with an Advisory Committee on the Granting of Pardon, the composition and formation of which shall be determined by an Act of Parliament;
  - (b) judgements in cases of impeachment shall not be liable to pardon by the President.
- (3) The President shall each year immediately before the consideration of the official budget attend Parliament and shall:
- (a) address Parliament on the state of the nation and on the future policies of the Government at that time;
  - (b) report on the policies of the previous year; and
  - (c) respond to questions.
- (4) The President shall exercise all other powers reasonably necessary and incidental to the functions of his office as are prescribed by this Constitution or an Act of Parliament.
- (5) The powers and functions of the President shall be exercised by him or her personally or by a member of the Cabinet or by a government official to whom the President has delegated such power in writing.

#### Confirmation of Presidential Acts

91. (1) Decisions of the President shall be expressed in writing under his or her signature.
- (2) The signature of the President on any instrument shall be confirmed by the Seal of the Republic.

## Immunity

92. (1) No person holding the office of President or performing the functions of President may be sued in any civil proceedings but the office of President shall not be immune to orders of the Courts concerning rights and duties under this Constitution.
- (2) No person holding the office of President shall be charged with any criminal offence in any Court except where he has been charged with an offence for which he has been indicted and convicted on impeachment.
- (3) After a person has vacated the office of President, he or she shall not be personally liable for acts done in an official capacity during his or her term of office.

## Cabinet

93. (1) There shall be a Cabinet consisting of the President, the Vice-President and such Ministers and Deputy Ministers as may from time to time be appointed by the President.
- (2) The Cabinet shall exercise the powers and functions assigned to it by this Constitution or an Act of Parliament and shall be responsible for advising the President with respect to the policies of the Government and with respect to such other matters as may be referred to it by the President.
- (3) Cabinet meetings shall be presided over by the President, or in the temporary absence of the President by the Vice-President.
- (4) There shall be a Secretary to the Cabinet who shall be appointed by the President and who shall:
- (a) have charge of the Cabinet office;
  - (b) be responsible, subject to the directions of the Cabinet, for arranging the business, and keeping the minutes of the Cabinet;
  - (c) convey the decisions of the Cabinet to the appropriate persons or authorities; and
  - (d) have such other functions as the Cabinet may direct.

## Government Departments

94. (1) There shall be Ministers and Deputy Ministers who shall be appointed by the President and who shall exercise such powers and functions, including the running of Government Departments as may be prescribed by the President subject to this Constitution.
- (2) Every Government Department shall be under the supervision

of a Principal Secretary who shall be under the direction of a Minister or Deputy Minister.

#### Appointment of Ministers

95. (1) The President shall have the power to appoint Ministers or Deputy Ministers and to fill vacancies in the Cabinet.
- (2) Every Minister or Deputy Minister must be a citizen of the Republic and must be a person qualified to stand as a candidate for election to the National Assembly in accordance with the Constitution.
96. (1) Upon the motion of the National Assembly the Public Appointments Committee of the National Assembly shall be empowered to summon a person who is nominated for the office of Minister or Deputy Minister, before that person is appointed, in order to question that person as to his or her competence and character.
- (2) Notwithstanding subsection (1), the approval of the National Assembly and the Public Appointments Committee of the National Assembly shall not be required for the appointment of any Minister or Deputy Minister.
- (3) No Minister or Deputy Minister shall assume office unless an oath or solemn affirmation was taken and executed in public in a manner prescribed by an Act of the National Assembly.
- (4) The President shall have the power to remove Ministers or Deputy Ministers from their posts.
- (5) The President shall be obliged to terminate the appointment of any member of the Cabinet if the National Assembly by a majority of two thirds of its members passes a motion of no confidence in that member.

#### Duties and Functions of the Cabinet

97. (1) The members of the Cabinet shall have the following functions:
- (a) advise the President;
- (b) to direct, co-ordinate and supervise the activities of Government Departments, including para-statal enterprises;
- (c) to initiate Bills for submission to the National Assembly;
- (d) to prepare, explain and formulate for the Parliament the budget of the State and its economic programmes;
- (e) to be available to Parliament for the purposes of answering any queries and or participating in any debate pertaining to the content of government policies;

- (f) to assist the President in determining what international agreements are to be concluded or acceded to and to inform Parliament thereon;
  - (g) to take responsibility for the implementation and administration of laws; and
  - (h) to carry out such other functions reasonably necessary for the performance of their duties as prescribed by this Constitution, the President or an Act of Parliament.
- (2) In performing the duties and functions referred in this section the Cabinet shall make legislative proposals available in time in order to permit sufficient canvassing of expert and public opinion.

#### Ministerial Accountability

98. All Ministers shall be accountable to the President for the administration of their own Departments.

### CHAPTER 8

#### THE ADMINISTRATION OF JUSTICE

##### The Independence and Jurisdiction of the courts and the judiciary

99. (1) All courts and all persons presiding over those courts shall exercise their functions, powers and duties independent of the influence and direction of any other person or authority.
- (2) The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue is within its competence.

##### The Supreme Court

100. (1) There shall be a Supreme Court of Appeal for Malawi, which shall be a superior court of record and shall have such jurisdiction and powers as may be conferred on it by this Constitution or by any other law.
- (2) The Supreme Court of Appeal shall be the highest appellate court and shall have jurisdiction to hear appeals from the High Court and such other Courts and Tribunals as an Act of Parliament may prescribe.

##### Composition of the Supreme Court of Appeal

101. (1) The Justices of the Supreme Court of Appeal shall be:
- (a) the Chief Justice;
  - (b) no less than three Justices of Appeal.

- (2) When the Supreme Court of Appeal is determining any matter, other than an interlocutory matter, it shall be composed of an uneven number of Justices, not being less than three.
- (3) A Justice of the Supreme Court of Appeal may only be appointed in accordance with section 107.

#### Acting Justices of the Supreme Court

102. (1) If, by reason of a vacancy or vacancies of office, or by reason of the operation of section 103, there are less than three serving Justices of Appeal, then the Chief Justice may appoint such High Court judges, as may be approved by the Judicial Service Commission, to serve as Acting Justices of Appeal.
- (2) An Acting Justice of Appeal shall hold that office only until such time as he is appointed Justice of Appeal or Chief Justice in accordance with section 107 provided that he shall cease to serve as a Justice of Appeal if:
- (a) there are more than three serving Justices of Appeal, either by reason of a vacancy or vacancies being filled in accordance with section 107 or where such Justices of Appeal or Acting Justices of Appeal as have been excused from serving on the Supreme Court are able to resume their duties in accordance with section 103.
  - (b) he is excused from his duties as a an Acting Justice of Appeal in accordance with section 103.

#### Relief from duties

103. (1) A Justice of Appeal or Acting Justice of Appeal shall be excused from serving on the Supreme Court of Appeal only for such time as is reasonably necessary and only:
- (a) by reason of that Justice or Acting Justice of Appeal having been a party to proceedings in a lower court, the decision of which is being appealed to the Supreme Court of Appeal; or
  - (b) for such other reason that the Chief Justice or Judicial Service Commission considers would prevent him from performing the duties of his office.
- (2) For the purposes of this section "a party to proceedings" shall include any person exercising of a judicial function in those proceedings, or having been retained for the purposes of legally representing a party to the proceedings, or being retained for the purposes of legal advice to a party to the proceedings.

#### The High Court

104. (1) There shall be a High Court for the Republic which shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law.
- (2) The High Court shall have original jurisdiction to review the laws for conformity with this Constitution and the actions of Government for conformity with this Constitution and any law, save as otherwise provided by this Constitution and shall have such other jurisdiction and powers as may be conferred on it by this Constitution and any other law.

#### Composition of the High Court

105. The Judges of the High Court shall be:

- (1) the Chief Justice; and
- (2) such number of judges, not being less than two, as may be prescribed by any written law.

#### Subordinate Courts

106. (1) There shall be such courts, subordinate to the High Court as may be prescribed by an Act of the National Assembly which shall be presided over by professional magistrates and lay magistrates.
- (2) Parliament may make provision for local courts presided over by such lay magistrates or chiefs, provided that the jurisdiction of shall be limited exclusively to civil cases at customary law and certain minor common law and statutory civil cases as prescribed by an Act of Parliament.

#### The Appointment of the Judiciary

107. (1) The Chief Justice shall be appointed by the President and confirmed by the National Assembly by a majority of two thirds of the members present and voting.
- (2) All other judicial officers shall be appointed by the President on the recommendation of the Judicial Service Commission.
- (3) A person holding the office of Chief Justice or any other judicial office shall hold that office until the age of seventy.

Provided that a person may not be removed from a judicial office by the Judicial Service Commission except in accordance with section 115.

- (4) For the purposes of this Chapter "judicial officer" shall mean, Justice of Appeal, Acting Justice of Appeal, Judge or Acting Judge of the High Court, unless otherwise provided.
108. (1) A person shall not be qualified for appointment as a judicial officer unless that person:
- (a) is, or has been, a judge of a court having unlimited

jurisdiction in criminal or civil proceedings; or

- (b) is entitled to practise as an advocate or a solicitor in such a court;
- (2) For the purposes of this section, a person shall be regarded as entitled to practise as a an advocate or solicitor if that person has been called, enroled or otherwise admitted as such and has not been subsequently disbarred or removed from the roll of advocates or solicitors notwithstanding that the person:
- (a) holds or acts in any office the holder of which, by reason of his office, precludes that person from practising in court; or
  - (b) does not hold a practising certificate and has not satisfied any other like condition of his being permitted to practise.

#### Vacancy

109. (1) If the office of Chief Justice is vacant, or if the Chief Justice is for any reason unable to perform the functions of his office, then, until a person has been appointed to and has assumed the functions of that office, or until the person holding that office has resumed those functions, as the case may be, those functions shall be performed by the most senior judge then sitting on the High Court.
- (2) If any judicial office vacant or if any judicial officer is appointed to act as Chief Justice, or is for any reason unable to perform the functions of his office, the President, on the recommendations of the Judicial Service Commission, may appoint a person qualified for appointment as judicial officer under this section to act in that office.

#### Remuneration

110. (1) All judicial officers shall receive a salary for their services, and on retirement such pension, gratuity or other allowance as may from time to time be determined by the National Assembly.
- (2) The salary and allowances of judicial officers shall not without their consent be reduced during their period of office.
- (3) The salary, pension, gratuity or other allowance received by a Judicial officer shall be a charge upon the Consolidated Fund.

#### Judicial Oath

111. A judicial officer shall not enter upon the duties of his or her office unless that officer has taken and subscribed the oath of allegiance and such oath for the due execution of his office in such manner and form as may be prescribed by law.

#### The Judicial Service Commission

112. There shall be a Judicial Service Commission for the regulation of judicial officers and which shall have such jurisdiction and powers as may be conferred on it by this Constitution or by any other law, subject to this Constitution.

113. The Judicial Service Commission shall consist of:

- (1) the Chief Justice who shall be the Chairman; and
- (2) the Chairman of the Civil Service Commission, or such as other member as may for the time being be designated in that behalf by the Chairman of the Civil Service Commission
- (3) such Justice of Appeal or Judge as may for the time being be designated in that behalf by the President acting after consultation with the Chief Justice
- (4) such legal practitioner as may for the time being be designated in that behalf by the Law Society of Malawi; and
- (5) such Resident Magistrate or Magistrate as may for the time being be designated in that behalf by the Malawi Magistrates' Association

Powers of the Judicial Service Commission

114. The Judicial Service Commission shall have the authority to:

- (1) nominate persons for judicial office, subject to section 107;
- (2) exercise such disciplinary powers in relation to persons in judicial office as shall be prescribed by an Act of Parliament, subject to this Constitution
- (3) recommend, subject to section 115, the removal of a person from judicial office
- (4) make such representations to the President as may be prescribed by an Act of Parliament, subject to this Constitution; and
- (5) exercise such other powers as are reasonably necessary for the performance of their duties.

Provided that nothing in this section shall prejudice the right of any person in judicial office who was the subject of any decision by the Judicial Service Commission to appeal to the Supreme Court against that decision.

Powers of removal

115. (1) The Judicial Service Commission shall have exclusive powers of removal of a person in judicial office but no person shall be removed from judicial office except where that person is adjudged by the Judicial Service Commission to be:

- (a) incompetent in the exercise of his judicial office;
- (b) compromised in the exercise of his or her judicial functions to the extent that his or her ability to impartially dispense justice is significantly impaired;
- (c) otherwise incapacitated; or
- (d) over the age of seventy-five

Provided that the removal of a person in judicial office may not be recommended by the Judicial Service Commission, save that at least three of the members of the Commission are of the opinion that one of the criteria in this subsection has been satisfied.

- (2) If the Judicial Service Committee recommends that a person holding judicial office should be removed, the President shall remove that person, subject only to the approval of the Public Appointments Committee
- (3) For the purposes of section 114 and section 115 the meaning of "judicial officer" shall include a person holding the office of:
  - (a) Justice of Appeal or Acting Justice of Appeal;
  - (b) High Court Judge;
  - (c) Registrar or Deputy Registrar of the Supreme Court of Appeal or High Court; or
  - (d) Chief Magistrate, Resident Magistrate or Magistrate

#### The Attorney General

116. (1) There shall be the office of Attorney General, who shall be principal legal adviser to the Government.
- (2) Such powers as are vested in the office of the Attorney General may be exercised by the person appointed to that office or such other persons in the public service, acting as that the subordinates of that person in accordance with his or her general and specific instructions.
  - (3) Appointment to the office of Attorney General shall be made by the President on the recommendation of the Judicial Service Commission.
  - (4) The office of Attorney General shall become vacant after the person holding that office has served for five years, or on the resignation of the President, whichever is sooner, provided that:
    - (a) the person holding that office may be nominated for such further terms, not exceeding five years, as the President deems appropriate, subject to confirmation by the Public

Appointments Committee of the National Assembly.

- (b) a person holding the office of Attorney General may be subject to removal by the President in conjunction with Judicial Service Commission only by reason of that person being:
    - (i) incompetent in the exercise of his or her duties;
    - (ii) compromised in the exercise of his or her duties to the extent that his or her ability to exercise his functions impartially is in serious question;
    - (iii) otherwise incapacitated; or
    - (iv) over the age of seventy five.
  - (c) the removal of a person holding the office of Attorney General shall not be effected by the President, save that at least three of members of the Judicial Service Commission are of the opinion that one of the criteria in this section has been satisfied and without prejudice to the person being removed from the office having the right to appeal to the High Court.
- (5) Any person appointed to the office of Attorney General or exercising powers on behalf of that office shall exercise such powers as are conferred on him or her by this section independent of the direction and control of any authority or person and in accordance with the law, subject to this Constitution.
- (6) The office of Attorney General may either be the office of a Minister or may be a public office.
117. (1) There shall be the office of Director of Public Prosecutions which shall have powers in respect to any criminal case and which shall include the power to:
- (a) instigate and undertake criminal proceedings against any person before any court (other than a court martial) in respect to any offence alleged to have been committed by that person;
  - (b) take over and continue any criminal proceedings that have been instituted or undertaken by any other person or authority; and
  - (c) discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by the office of the Director of Public Prosecutions or any other person or authority.
- Provided that:
- (i) nothing in this section shall prejudice the right of a person with sufficient interest to petition the High

Court for a judicial review of the exercise of powers under this section; and

(ii) in respect of a decision which is the subject of such a petition, or in any case where the power to discontinue a case under subsection 1(c) has been exercised, the Director of Public Prosecutions shall be required to publish reasons for the decision, subject to any order that the High Court may make with respect to the safeguard of the rights of persons under this Constitution.

(2) The powers of the office of the Director of Public Prosecutions or exercised on its behalf under section 118, shall be vested in that office to the exclusion of any other person or authority.

#### Delegation of powers to prosecute

118. (1) Such powers as are vested in the office of the Director of Public Prosecutions may be exercised by the person appointed to that office or such other persons in the public service, acting as his subordinates in accordance with his general and specific instructions in accordance with an Act of Parliament.

(2) Notwithstanding subsection (1):

(a) the person appointed to the office of Director of Public Prosecutions shall be accountable for the exercise of such powers in his own behalf and those powers exercised on his or her behalf by subordinates in accordance with subsection (1); and

(b) an Act of Parliament shall prescribe restrictions relating to the exercise of powers under this section by any member of the Malawi Police.

#### Appointment of the Director of Public Prosecution

119. (1) Appointment to the office of Director of Public Prosecutions shall be made by the Judicial Service Commission, subject to satisfying the Public Appointments Committee as to the competence of the person so appointed to perform the duties of that office and as to capacity of a person so appointed to pursue prosecutions independently.

(2) Any person appointed to the office of Director of Public Prosecutions or exercising powers on behalf of that office shall exercise such powers conferred on them by this section or any other law independent of the direction and control of any authority or person and in strict accordance with the law.

#### Removal of the Director of Public Prosecutions

120. (1) The office of the Director of Public Prosecutions shall become vacant after the person holding that office has served for five years.

Provided that the person holding that office may be nominated for such further terms, not exceeding five years, as the Judicial Service Commission deems appropriate, subject to confirmation by the Public Appointments Committee.

- (2) A person holding the office of the Director of Public Prosecutions may be subject to removal before the expiration of his term of office, if the Judicial Service Commission is satisfied that the person holding that office is:
- (a) incompetent in the exercise of his or her duties;
  - (b) compromised in the exercise of his or her duties to the extent that his or her ability to exercise his functions impartially is in serious question;
  - (c) otherwise incapacitated; or
  - (d) over the age of seventy five.

Provided that the removal of a person holding the office of Director of Public Prosecutions shall not be effected by the Judicial Service Commission, unless at least three of its members are of the opinion that one of the criteria in this section has been satisfied and the exercise of the powers under this section shall be without prejudice to the person being removed from the office from having the right to appeal to the High Court.

## CHAPTER 9

### THE OMBUDSMAN

#### Establishment

121. There shall be a public office known as the Ombudsman which shall have such powers, functions and responsibilities as are conferred upon that office by this Constitution and any other law.

#### Independence of the Ombudsman

122. In the exercise its powers, functions and duties, the office of the Ombudsman shall be completely independent of the interference or direction of any other person or authority

#### Appointment of the Ombudsman

123. (1) Nominations for appointment to the office of Ombudsman shall be received from the public by way of a public advertisement placed by the Clerk to the National Assembly and the successful candidate shall be appointed by the Public Appointments Committee in accordance with the requirements of this section.

- (2) The person appointed to the office of Ombudsman shall:
- (a) have sufficient knowledge of the law
  - (b) be publicly regarded as a person who can make impartial judgements;
  - (c) have sufficient knowledge of the workings of government;
  - (d) not have had any criminal convictions and not have been a bankrupt;
  - (e) be otherwise competent and capable of performing the duties of his office; and
  - (f) not be the President, Vice President, a Minister or Deputy Minister or a serving Civil Servant.

#### Functions and Powers

124. (1) The office of the Ombudsman may 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.
- (2) Notwithstanding subsection (1) the powers of the office of the Ombudsman under this section shall not oust the jurisdiction of the courts and the decisions and exercise of powers by the Ombudsman shall be reviewable by the High Court on the application of any person with sufficient interest in a case he has determined.

#### Powers of investigations

125. The Ombudsman shall have full powers to:
- (1) subpoena the attendance of any person who the Ombudsman reasonably believes to be connected with any investigation being undertaken by that office;
  - (2) require the immediate disclosure of information and documents of any kind, from any public body;
  - (3) question any person who the Ombudsman reasonably believes to be connected with an investigation that is being undertaken by that office; and
  - (4) initiate contempt proceedings against any person or authority in connection with noncompliance with the powers in this section.

#### Privileges and immunities of the Ombudsman

126. A person holding the office of Ombudsman shall:

- (1) be provided with the necessary resources to discharge the functions of that office;
- (2) be entitled to the fullest co-operation of any person or authority of whom he requests assistance in connection with his duties; and
- (3) enjoy with respect to his official functions the same protection and privileges as are enjoyed by members of Parliament.
- (4) be paid a salary to be charged to the Consolidated Fund and which shall not be reduced without the consent of the office holder.

#### Remedies

127. Where the investigations of the Ombudsman reveal sufficient evidence to satisfy him that an injustice has been done, the Ombudsman shall;
- (1) direct that appropriate administrative action be taken to redress the grievance;
  - (2) cause the appropriate authority to ensure that there are, in future, reasonably practicable remedies to redress a grievance;
  - (3) direct a court to adjudicate on an issue or on the quantum of compensation; or
  - (4) refer a case to the Director of Public Prosecutions with a recommendation for prosecution, and in the event of a refusal by the Director of Public Prosecutions to proceed with the case, the Ombudsman shall have the power to require reasons.

#### Reports of the Ombudsman

128. The Ombudsman shall lay, each year, before the National Assembly a report which shall include a record of all complaints and applications to the office of Ombudsman, a record of the exercise of powers with relation to applications, of the remedies afforded to applicants in respect of grievances and shall also include a record of the general recommendations of the Ombudsman in respect of grievances.

#### Removal from office

129. (1) A person appointed to the office of Ombudsman shall serve a term of not more than five years, provided that the Public Appointments Committee may appoint that person for such further terms of five years as it deems fit of unless they sooner terminate that appointment in accordance with this section.
- (2) A person appointed to the office of Ombudsman shall not be

removed by the Public Appointments Committee, save:

- (a) in such circumstances where the person who had that person not been Ombudsman, that person would have been disqualified from being appointed;
- (b) for gross misconduct; or
- (c) on reaching the age of sixty five years.

## CHAPTER 10

### HUMAN RIGHTS COMMISSION

#### Establishment

130. Parliament may provide for a Human Rights Commission for the protection and investigation of violations of the rights accorded by this Constitution or any other law.

#### Powers

131. The Human Rights Commission shall, with respect to the applications of an individual or class of persons, or on its own motion, have such powers of investigation and recommendation as are reasonably necessary for the effective promotion of the rights conferred by or under this Constitution, but shall not exercise a judicial or legislative function and shall not be given powers so to do.

#### Composition

132. The Human Rights Commission shall consist of:

- (1) any person, at that time holding the office of Law Commissioner and any person, at that time holding the position of Ombudsman and such other persons as they may from time to time appoint in that behalf in accordance with this section.

Provided that, save as prescribed by this section, no other member of the Human Rights Commission shall be a person in any public office or the President or Vice President, a Minister or Deputy Minister.

- (2) such persons, nominated from time to time in that behalf from by those organisations that are considered in the absolute discretion of both the Law Commissioner and the Ombudsman to be reputable organisations, and that are largely or wholly concerned with the promotion of the rights and freedoms guaranteed by this Constitution.

Provided that all members of the Human Rights Commission shall continue to be members of the Commission until such time as they are dismissed on the grounds of incompetence,

incapacity, or in such 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.

## CHAPTER 11

### LAW COMMISSION

133. There shall be a Law Commission which shall have the power to review and make recommendations relating to the repeal and amendment of laws and that shall have such powers and functions as shall be conferred on it by this Constitution and any other Act of Parliament.
134. The Law Commission shall consist of:
- (1) a permanent, salaried Law Commissioner who shall be appointed by the President on the recommendation of the Judicial Service Commission and who shall be a judicial officer or legal practitioner; and
  - (2) Such number of persons as the Law Commissioner in consultation with the Judicial Service Commission may appoint from time to time and for such time as they are required on account of their expert knowledge of a matter of law being then under review by the Law Commissioner, or on account of their expert knowledge of other matters relating to a legal issue being then under review.

#### Removal of Law Commission

135. The President may remove the Law Commissioner or a person who is otherwise appointed to the Law Commission on the recommendation of the Public Appointments Committee of the National Assembly if the Public Service Committee is satisfied that the Law Commissioner or such other person appointed to the Law Commission, as the case may be, is not competent or otherwise incapacitated so as to be unable to perform the functions of his office.

#### Powers and functions of the Law Commission

136. The Law Commission have the power:
- (1) to review and make recommendations regarding any matter pertaining to the laws of Malawi and their conformity with the Constitution and applicable International Law;
  - (2) to review and make recommendations regarding any matter pertaining to the Constitution of the Republic of Malawi;
  - (3) receive any submissions from any person or body regarding the laws of Malawi or the Constitution; and

(4) to report its findings and recommendations to the Minister of Justice who shall publish any such report before Parliament.

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

## CHAPTER 12

### NATIONAL COMPENSATION TRIBUNAL

#### The National Compensation Tribunal

138. There shall be a National Compensation Tribunal which shall entertain claims with respect to alleged criminal and civil liability of the Government of Malawi which was in power before the commencement of this Constitution and which shall have such powers and functions as are conferred on it by this Constitution and an Act of Parliament.

#### Exclusive original jurisdiction

139. (1) No person shall institute proceedings against any Government in power after the commencement of this Constitution in respect of any alleged criminal or civil liability of the Government of Malawi in power before the commencement of this Constitution, save by application first to the National Compensation Tribunal, which shall hear cases initiated by persons with sufficient interest.

(2) Notwithstanding subsection (1), the National Compensation Tribunal shall have the power to remit a case for determination by the normal courts of the land where the Chairman of the National Compensation Tribunal is satisfied that the Tribunal does not have jurisdiction, or where the Chairman feels it is in the interest of justice so to do.

#### Composition

140. (1) There shall be a Chairman of the National Compensation Tribunal shall be a judge who shall:

(a) be nominated and appointed in that behalf by the Judicial Service Commission; and

(b) hold the office of Chairman of the National Compensation Tribunal for no more than three months or until such time as that person ceases to be a judge whichever is sooner:

(2) The Chairman of the National Compensation Tribunal shall be assisted by two Assessors, who shall be:

(a) a certified public accountant who shall be nominated and appointed by the Public Appointments Committee to

supervise the accounts of the National Compensation Fund and to shall advise the Tribunal as to the quantum of compensation payable with respect to any claim taking into account the to overall number of claims being put before the Tribunal in that financial year.

- (b) a legal practitioner who shall be nominated from time to time in that behalf by the Law Society of Malawi and appointed by the Public Appointments Committee to act as legal representative for any party claiming compensation from the Tribunal and who is unrepresented by legal counsel.

Provided that both Assessors may be removed by the Public Appointments Committee on the grounds of incapacity or incompetence in the exercise of their duties.

#### Procedure

- 141. (1) The National Assembly shall prescribe such rules of procedure of the National Compensation Tribunal as shall ensure the expeditious disposal of cases, which may include an informal preliminary arbitration procedure.
- (2) Notwithstanding subsection (1), the procedures of the National Compensation Tribunal shall:
  - (a) conform to the standards of evidence required for a normal civil court;
  - (b) conform with the standards of justice set out in this Constitution and the general principles of Natural Justice;

#### Protection of third party rights

- 142. Where any third party disputes a claim or has an interest in moneys or property that is the subject of a claim before the National Compensation Tribunal:
  - (1) that party shall be given adequate notification;
  - (2) that party shall be entitled to legal representation; and
  - (3) if the Chairman of the National Compensation Tribunal is satisfied that the person is of insufficient means to retain legal counsel it may order that the Ministry of Justice shall retain a legal practitioner on that persons behalf.

#### Jurisdiction of the ordinary courts

- 143. (1) The High Court shall not be excluded from hearing applications for judicial review of the decisions of the Tribunal nor shall a determination by the Tribunal be a bar to further criminal or civil proceedings in an appropriate court against a private person for the duration of the existence of the fund.

- (2) A "private person" for the purposes of this section means a person who was before the commencement of this Constitution a member of the Government or one of its agents, who would, under the laws then in force, have been personally liable for an act that is the subject of the criminal or civil proceedings.

#### Power to waive statutory limitations

144. For the purposes of pursuing claims before the National Compensation Tribunal and criminal and civil proceedings against a private person within the meaning of subsection 143(2), any statutory time limitation may be waived by the Tribunal or by a court if it seems equitable to do so.

#### National Compensation Fund

145. (1) There shall be a National Compensation Fund which shall be a trust vested in the Republic.
- (2) The National Compensation Fund shall be used exclusively for the purposes assigned to it by this Constitution and shall:
  - (a) be a trust whose purpose shall be for the exclusive benefit of those applicants to the National Compensation Tribunal who have been granted and award, gratuity, pension or other allowance according to the principles, procedures and rules of the National Compensation Tribunal;
  - (b) be held in a separate account within the Reserve Bank of Malawi; and
  - (c) have all of its reports, financial statements and information relating to its operation published and maintained for public scrutiny.
- (3) The National Compensation Tribunal shall be the only body responsible for disbursements from and charges to the National Compensation Fund, provided that the trustees of the Fund shall make such other disbursements from and charges on the Fund as are necessary and prudent for the efficient operation of the Fund.
- (4) There shall be no fewer than four Trustees of the National Compensation Fund who shall be appointed from time to time by the National Compensation Tribunal on the recommendation of the Ombudsman.
- (5) A Trustee shall hold office for the duration of the Fund unless and only in such circumstances as that trustee is removed by the National Compensation Tribunal on the grounds of:
  - (a) incompetence;
  - (b) incapacity; or

- (c) being compromised in the exercise of his or her functions to the extent that his or her financial probity is in serious question.
- (6) Trustees of the National Compensation Fund shall exercise their functions independent of direction or interference by any body or authority, save as is provided by this section.
- (7) The Auditor General shall make an annual report to be laid before the National Assembly, on the conduct and status of the Fund which shall provide guidance to the National Assembly for voting an Appropriation for the purposes of the National Compensation Fund, which shall be called the National Compensation Fund Appropriation.
- (8) The National Compensation Fund Appropriation shall be laid before the National Assembly by the Minister responsible for Finance before the beginning, and with respect to, every financial year during the life of the Fund.
- (9) With respect of any financial year, the Tribunal shall prescribe a time not being more than six months after the commencement of that financial year, after which the Tribunal shall not receive applications for the redress within that financial year from the National Compensation Fund.

#### Winding up of the National Compensation Tribunal

146. The National Compensation Fund shall expire not later than ten years after the commencement of this Constitution at which time the National Compensation Tribunal shall also dissolve.
- (2) If, in respect to any year within the period prescribed in subsection (1), and after the second year of it coming into existence, less than ten applications are made to the National Compensation Tribunal, then the Chairman of the Tribunal may direct the Minister responsible for Finance to lay before the National Assembly a Bill:
    - (a) to dissolve the National Compensation Tribunal and the National Compensation Fund;
    - (b) to confer on the High Court jurisdiction equivalent to that of the National Compensation Tribunal to determine claims against the Government within the meaning of this section.

Provided that for the remaining duration of the period prescribed in subsection (1) the residue of the Fund will remain a separate Fund within the accounts of the State Revenue Fund which shall be drawn upon by the Ministry of Justice in respect of awards made by the High Court with relation to claims that would otherwise have been determined by the National Compensation Tribunal.

## CHAPTER 13

### LOCAL GOVERNMENT

#### Functions of Local Government Authorities

147. (1) There shall be Local Government Authorities which shall have such powers as are vested in them by this Constitution and any Act of Parliament.
- (2) Local Government Authorities shall be responsible for the representation and welfare of the people over whom they have jurisdiction to the extent that it is prescribed by any Act of Parliament.
- (3) Parliament shall, where possible, provide that issues of local policy and administration be decided on at local levels under the supervision of Local Government Authorities.
- (4) Parliament shall ensure that the composition of Local Government Authorities affords equal representation in respect of each ward within its territorial jurisdiction and that the boundaries of each ward shall be designated by the Electoral Commission in accordance with section 149(2).

#### Composition of Local Government Authorities

148. (1) Local Government Authorities shall be constituted of Local Government officers who shall be elected by free, secret and equal suffrage under the supervision of the Electoral Commission by the registered voters in the area over which that Local Government Authority is to have jurisdiction.
- (2) The offices of local government shall include mayors in municipalities and local councillors in all areas and Local Government Officers shall have such functions, powers and responsibilities as shall be laid down by an Act of Parliament.
- (3) There shall be in respect of each Local Government Authority such administrative personnel, subordinate to Local Government Officers, as shall be required to execute and administer the lawful resolutions and policies of those officers.

#### Jurisdiction of Local Government Authorities

149. (1) Subject to the recommendations of the Electoral Commission, and in accordance with the principles laid down in this Constitution and any other law relating to National Elections, there shall be drawn boundaries for city councils, municipal councils or municipalities, town councils and district councils.
- (2) Any boundaries determining the territorial jurisdiction of any Local Government Authority shall be geographical only, without reference to race, colour, or ethnic origin of the inhabitants of the area.

Powers and Functions of the National Local Government Finance Committee

150. (1) There shall be a National Local Government Finance Committee that shall hear submissions from each and every Local Government Authority in respect of estimates of expenditure and requests for special disbursements and shall have such other powers and functions as may be conferred on it by this Constitution or an Act of Parliament.
- (2) The National Local Government Finance Committee shall have the power to:
- (a) receive all Local Government Authority estimates of revenue and all projected budgets;
  - (b) supervise and audit accounts of Local Government Authorities, in accordance with any Act of the National Assembly, subject to the recommendations of the Auditor General;
  - (c) make recommendations relating to the distribution of funds allocated to Local Government Authorities, and vary the amount payable from time to time and area to area according to, and with sole consideration, of economic, geographic and demographic variables.
  - (d) submit a consolidated budget for all Local Government Authorities and estimates after consultation with the Treasury, which shall be presented to the National Assembly by the Minister responsible for Local Government before the commencement of each financial year, and make application to the Minister for supplementary funds where necessary.
151. The Government shall be under a duty to ensure that there is adequate provision of resources necessary for the proper exercise of Local Government functions and to this effect shall allow a Local Government Authority to keep such proportion of the revenue collected by that Authority as shall be prescribed by the National Local Government Finance Committee.

Composition of the National Local Government Finance Committee

152. (1) The members of the National Local Government Finance Committee shall be:
- (a) one person who shall be nominated from time to time in that behalf by the Local Government Association;
  - (b) the Minister or Deputy Minister responsible for Local Government Authorities or such person as shall be nominated by the Minister from time to time in that behalf;

- (c) one person who shall be nominated from time to time in that behalf by the Public Accountants Board;
  - (d) the Chairman of the Civil Service Commission or such person as shall be nominated by the Chairman from time to time in that behalf;
  - (e) one person who shall be nominated from time to time in that behalf by the Electoral Commission.
- (2) Excepting persons who are or become members of the Committee by virtue of holding office as Minister or Deputy Minister responsible for Local Government Authorities or by virtue of holding office as Chairman of the Civil Service Commission, the term of office of a member of the National Local Government Finance Committee 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.

Providing no member shall be removed save that the Public Appointments Committee is satisfied that he 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.

## CHAPTER 14

### THE POLICE

#### The Malawi Police Force

153. There shall be a Malawi Police Force which shall be constituted by an Act of Parliament that shall specify the various divisions and functions of the Malawi Police Force.

#### Powers and Functions of the Police

154. (1) The Malawi Police Force shall be an independent organ of the executive which shall be there to provide for the protection of public safety and the rights of persons in Malawi according to the prescriptions of this Constitution and any other law.
- (2) The Police Force of Malawi shall enjoy only such powers as are necessary for the protection of rights under this Constitution and the maintenance of public safety and public order in accordance with the prescriptions of this Constitution

and the law.

- (3) In the exercise of their functions, members of the Malawi Police Force shall be subject to the direction of the courts and shall be bound by the orders of such courts.
- (4) Political responsibility for the Malawi Police Force shall vest in a Minister of the Government who shall ensure that the discipline and conduct of the Malawi Police Force accords with the prescriptions of this Constitution and any other law.

The Inspector General of Police

- 155.
- (1) There shall be the office of Inspector General of Police who shall be the Head of the Malawi Police Force.
  - (2) The President shall appoint the Inspector General of Police subject to approval by the Public Appointments Committee who may enquire into to the competence of the person so appointed to carry out the duties of that office and such other questions as may have direct bearing on the performance of the duties of that office.
  - (3) The office of the Inspector General of Police shall become vacant after the person holding that office has served for five years, provided that the person holding that office may be nominated for such further terms, not exceeding five years, as the President may deem appropriate, subject to confirmation by the Public Appointments Committee.
  - (4) A person holding the office of Inspector General of Police shall be subject to removal by the President only by reason of that person being:
    - (a) incompetent in the exercise of his or her duties;
    - (b) compromised in the exercise of his or her duties to the extent that his capacity to exercise his powers impartially is in serious question;
    - (c) otherwise incapacitated; and
    - (d) over the age of sixty five;

Providing that the power conferred on the President under this section shall be exercised without prejudice to the person being removed from the office from having the right to appeal to the High Court.

- (5) Subject to subsection (4) above, in the exercise of the duties and powers vested in the office of the Inspector General of Police by the Constitution or any other law, the person holding that office shall not be subject to the direction or control of any other person or authority, other than as prescribed in this Constitution or an Act of Parliament.
- (6) The Inspector General of Police may delegate such powers as

are conferred on him or her by the National Assembly to such persons or authorities being a part of the Malawi Police Force, in accordance with an Act of Parliament.

Provided that with respect to the powers in this subsection, the Inspector General of Police shall notify the Police Service Commission of any delegation and the Police Service Commission may prescribe any regulations it deems appropriate in relation to the manner and form of reports that the person exercising that power shall make and shall specify such restrictions as may be required to ensure the proper exercise of powers delegated under this section in accordance with the law.

#### The Police Service Commission

156. (1) There shall be a Police Service Commission with such powers and functions as are conferred upon it by this Constitution and an Act of Parliament.
- (2) Subject to this Constitution, power to appoint persons to hold or act in offices in the Police Force of Malawi, other than that of Inspector General of Police, including the power to confirm appointments, and to remove such persons from duty shall vest in the Police Service Commission.
- (3) The Police Service Commission shall, subject to this Constitution and any general directions of an Act of Parliament, exercise disciplinary control over persons holding or acting in any office to which this section applies.

#### Power to delegate

157. (1) The Police Service Commission, may, subject to such conditions as may be laid down by an Act of Parliament, delegate powers conferred by this Constitution or an Act of Parliament by directions in writing to any member of the Commission or to any civil servant or public body.
- (2) Where any person or body may from time to time exercise powers under this section on behalf of the Police Service Commission, in accordance with subsection (1), the Police Service Commission shall:
- (a) require that person or body to furnish reports in such manner or form as they may have specified in the directions which delegated those powers.
- (b) hear such complaints or appeals from persons with sufficient interest relating to the exercise of powers delegated under this section and shall have the authority to:
- (i) quash the decision of a body or person exercising such powers;
- (ii) exercise such disciplinary powers with relation to

such body or person, subject to the conditions laid down by an Act of Parliament; and

(iii) revoke directions delegating powers to any person or body.

Provided that nothing in this section shall prejudice the right of any person who is the subject of a decision made by or on behalf of the Police Service Commission to appeal to the High Court or the right of any person with sufficient interest in such a decision to petition the High Court for judicial review of that decision.

#### Composition of the Police Service Commission

158. (1) The Police Service Commission shall consist of the following members:
- (a) such Justice of Appeal or judge as may for the time being be nominated in that behalf by the Judicial Service Commission;
  - (b) such member of the Civil Service Commission as may for the time being be nominated in that behalf by the Civil Service Commission;
  - (c) such legal practitioner as may for the time being be nominated in that behalf by the Law Society of Malawi;
  - (d) the Inspector-General of Police or such senior officer as he or she may for the time being nominate in that behalf; and
  - (e) the Ombudsman.
- (2) The members of the Police Service Commission shall elect a Chairman from among their number and three members of the Police Service Commission shall form a quorum.
- (3) A person shall not be qualified for appointment as a member of the Police Service Commission if he is President, Vice-President, a Minister or Deputy-Minister, or a Member of Parliament or a serving police officer.
- (4) Subject to this section, the office of a member of the Police Service Commission shall become vacant:
- (a) at the expiration of three years from the date of that person's appointment, unless reappointed to a new three year term; or
  - (b) if any circumstances arise that, if that person were not a member of the Police Service Commission, would cause that person to be disqualified from appointment as such.

Provided that subsection (4) (a) shall not apply where the member in question still holds the office the Inspector

General of Police or the Ombudsman, in which behalf that person was appointed to the Police Service Commission.

Political independence of the Malawi Police Force

159. (1) Members of the Police Force of Malawi shall ensure that they exercise their functions, powers and duties as impartial servants of the general public and the Government of the day.
- (2) No member of the Police Force of Malawi shall be able to directly participate in political activities.

Provided that:

- (a) any member of the Police Force of Malawi shall have the right to resign in order to participate directly in political activities;
- (b) nothing in this section shall be deemed to prejudice any member of the Police Force of Malawi having the absolute right to vote in accordance with this Constitution;
- (c) nothing in this subsection shall prejudice the right of any member of the Police Force of Malawi to hold office in or be a member of any association, group or professional body, the purposes of which are principally to represent their members interests with relation to the terms and conditions of employment or the general carrying on of any profession or trade or the promotion of any interest, not pertaining directly to the promotion of a political party, campaign or philosophy or otherwise inconsistent with the functions of the Police Force of Malawi.
- (3) No government or party shall cause any member of the Police Force of Malawi acting in that behalf to exercise functions, powers or duties for the purposes of promoting or undermining of any political party or individual member of that party, nor shall any member of the Police Force of Malawi acting in that behalf promote or undermine any party or member of a party.
- (4) No government or party shall cause any member of the Police Force of Malawi, acting in that behalf to deploy resources, whether they be financial, material or human resources, for the purposes of promoting or undermining any political party or member of a political party or interest group, nor shall any member of the Police Force of Malawi, acting in that behalf cause such deployment.

Provided that nothing in this section shall be construed as derogating from the duty of the Police to uphold the rights and afford protection to all political parties, persons and organisations equally without fear or favour in accordance with this Constitution and subject to any law.

- (5) Any member of the Police Force of Malawi who contravenes

this section shall be subject to such disciplinary measures as the Police Service Commission considers appropriate, taking into account the gravity and circumstances of the contravention, subject to such regulations as may be prescribed by an Act of Parliament.

- (6) Where the Police Service Commission is satisfied that a government or political party or member of a political party has acted in contravention of subsection (4) or subsection (5), the Police Service Commission may initiate proceedings before the High Court for punitive damages and, in the case of a contravention of subsection (5) for the recovery of such resources or sums equivalent to the benefit of the enjoyment of those resources from the party of government, or political party or member of a political party who has so benefitted, as the case may be.

## CHAPTER 15

### THE ARMED FORCES

#### The Armed Forces of Malawi

160. There shall be no military force constituted in Malawi other than the Armed Forces provided for and regulated by this section.

#### Constitutional position of the Armed Forces

161. The Armed Forces of Malawi shall operate, at all times under the direction of those civil authorities in whom this Constitution vests such power, and shall:
  - (1) uphold the sovereignty and territorial integrity of the Republic of Malawi and guard against threats to the safety of its citizens by force of arms;
  - (2) uphold and protect the Constitutional Order in Malawi and assist the civil authorities in the proper exercise of their functions under this Constitution;
  - (3) provide technical expertise and resources to assist the civilian authorities in the maintenance of essential services in times of emergency; and
  - (4) perform such other duties outside the territory of Malawi as may be required of them by any Treaty entered into by Malawi in accordance with the prescriptions of International Law.

Provided that no person or authority may direct or deploy the army to act in contravention of this Constitution on pain of conviction for treason against the Republic, notwithstanding any immunity granted by this Constitution or by any other law.

## Responsibility for the Armed Forces

162. (1) The ultimate responsibility for the armed forces shall vest in the President as Commander in Chief.
- (2) Any powers conferred on the President by virtue of this Chapter shall only be exercised on the recommendations of an Army Council that shall include the Minister of Defence and the Army High Command and which shall have;
- (a) the power to determine the operational use of the armed forces.
- (b) the power to appoint and remove from office the Army Commander and other members of the armed forces.
- (c) such other powers and duties as may be prescribed by an Act of Parliament.

Provided that these powers shall be exercised subject to the scrutiny of a Defence Committee of the National Assembly, created in this Chapter.

- (3) The Army Council may, by directions in writing and subject to such conditions as may be laid down by an Act of Parliament or are recommended by the Defence Committee and adopted by the National Assembly, delegate to any member of the armed forces any of the powers conferred on it by an Act of Parliament.

## The Defence Committee of the National Assembly

163. (1) The Defence Committee of the National Assembly shall be composed of one member of each of the political parties, nominated from time to time in that behalf for terms of not more than one year, and shall have such powers and functions as may be conferred upon them by this Constitution and an Act of Parliament.
- (2) The Defence Committee may be assembled at any time, notwithstanding that Parliament stands adjourned and, where Parliament stands dissolved, shall continue to be constituted until such time as a new Parliamentary session begins and a new Defence Committee is appointed.

## CHAPTER 16

### PRISONS

#### The Malawi Prison Service

164. The Malawi Prison Service shall consist of all penal institutions, labour camps, special and secure schools and other institutions that are used to house, detain and rehabilitate persons sentenced to imprisonment in whatever form it may take, but shall not include

holdings cells in police stations.

The Chief Commissioner for Prisons

165. (1) There shall be the office of Chief Commissioner for Prisons that shall be responsible for the Prison Service of Malawi and shall be a public office with such powers, functions and duties as may be conferred on it by this Constitution and any Act of Parliament.
- (2) The principal responsibilities of the Chief Commissioner for Prisons shall be to ensure the proper and efficient administration of the penal institutions that comprise the Prison Service of Malawi, subject to and in accordance with:
- (a) the Constitutional protection of rights and other provisions of the Constitution or any other law;
  - (b) the recommendations of the Prison Service Commission and the Inspectorate of Prisons as prescribed by the Minister responsible for Prisons in accordance with the wishes of Parliament; and
  - (c) the directions of the courts with relation to persons convicted by the courts to a sentence of incarceration or penal servitude within a penal institution, or incarcerated by the courts pending execution of the sentence of the courts, or awaiting sentence by the courts or otherwise on remand to the custody of the Prison Service or being held on behalf of the Police Force in connection with any law.
- (3) Subject to this section, in the exercise of the duties and powers vested in the office of the Chief Commissioner for Prisons by the Constitution or any other law, the person holding that office shall not be subject to the direction or control of any other person or authority, other than as prescribed in this Constitution and an Act of Parliament.

Power to delegate

166. (1) The Chief Commissioner for Prisons may delegate such powers as are conferred on him by Parliament to such persons or authorities being a part of the Malawi Prison Service.
- (2) With respect to the delegation of powers in subsection (1):
- (a) the Chief Commissioner for Prisons shall notify the Prison Service Commission and the Inspectorate of Prisons of any such delegation; and
  - (b) the Prison Service Commission and the Inspectorate of Prisons may prescribe any regulations they deem appropriate in relation to the manner and form of reports that the person or authority exercising that power shall make and shall prescribe such restrictions as may be required to ensure the proper exercise of powers

delegated under this section.

#### Appointment of the Chief Commissioner for Prisons

167. (1) The President shall appoint the Chief Commissioner for Prisons subject to approval by the Public Appointments Committee as to the competence of the person so appointed to carry out the duties of that office and as to such other questions as may have direct bearing on the performance of the duties of that office.
- (2) The office of the Chief Commissioner for Prisons shall become vacant after the person holding that office has served for five years, provided that the person holding that office may be nominated for such further terms, not exceeding five years, as the President deems appropriate, subject to confirmation by the Public Appointments Committee.
- (3) A person holding the office of Chief Commissioner for Prisons shall be subject to removal by the President only by reason of that person being:
- (a) incompetent in the exercise of his or her duties;
  - (b) compromised in the exercise of his or her duties to the extent that his or her capacity to impartially exercise the duties of that office is in serious question;
  - (c) otherwise incapacitated;
  - (d) over the age of sixty five;

Providing that the removal of a person holding the office of Chief Commissioner for Prisons by the President shall be without prejudice to the right of that person to appeal to the High Court.

#### The Prison Service Commission

168. (1) There shall be a Prison Service Commission with the powers and functions conferred on it by this Constitution and an Act of Parliament.
- (2) The Prison Service Commission shall have the power to appoint persons to hold or act in offices in the Prison Service of Malawi other than the Chief Commissioner of Prisons, including the power to confirm appointments, and to remove such persons from duty.
- (3) The Prison Service Commission shall, subject to this Constitution and any general directions of an Act of Parliament exercise disciplinary control over persons holding or acting in any office to which this section applies.
- (4) The Prison Service Commission, may, subject to such conditions as may be laid down by an Act of Parliament, delegate powers under this section by directions in writing to

any member of the Commission or to any civil servant or public body, being part of the Prison Service of Malawi.

- (5) Where any person or body may from time to time exercise powers under this section on behalf of the Prison Service Commission, in accordance with subsection (4), the Prison Service Commission shall:
- (a) require that person or body to furnish reports in such manner or form as they have specified in the directions which delegated those powers.
  - (b) hear such complaints or appeals from persons with sufficient interest relating to the exercise of powers under this section and shall have the authority to:
    - (i) quash the decision of a body or person exercising such powers.
    - (ii) exercise such disciplinary powers with relation to such body or person, subject to the conditions laid down by an Act of Parliament.
    - (iii) revoke directions delegating powers to any person or body.

Provided that nothing in this section shall prejudice the right of any person who is the subject of a decision made by or on behalf of the Prison Service Commission to appeal to the High Court or the right of any person with sufficient interest in such a decision to petition the High Court for judicial review of that decision.

#### Composition of the Prison Service Commission

169. (1) The Prison Service Commission shall consist of the following members:
- (a) such Justice of Appeal or judge as may for the time being be nominated in that behalf by the Judicial Service Commission.
  - (b) such member of the Civil Service Commission as may for the time being be nominated in that behalf by the Civil Service Commission.
  - (c) such legal practitioner as may for the time being be nominated in that behalf by the Law Society of Malawi.
  - (d) such person as may be nominated from time to time in that behalf by the Inspectorate of Prisons.
  - (e) the Chief Commissioner for Prisons or a person nominated by the Chief Commissioner of Prisons from time to time in that behalf, being a senior member of the prison service.
- (2) The members of the Prison Service Commission shall elect a

Chairman from among their number and three members of the Prison Service Commission shall form a quorum.

- (3) A person shall not be qualified for appointment as a member of the Prison Service Commission if he is President, Vice-President, a Minister or Deputy-Minister, or a Member of Parliament.
- (4) Subject to this section, the office of a member of the Prison Service Commission shall become vacant:
  - (a) at the expiration of three years from the date of that member's appointment, unless reappointed to a new three year term; or
  - (b) if any circumstances arise that, if that member were not a member of the Prison Service Commission, would cause that member to be disqualified from appointment as such.

Provided that subsection (4) (a) shall not apply where the member in question still holds the office the Chief Commissioner for Prisons, in which behalf that person was appointed to the Prison Service Commission.

#### The Inspectorate of Prisons

- 170.
- (1) There shall be an Inspectorate of Prisons which shall have such powers, functions and duties in relating to the Prison Service of Malawi as shall be conferred on it by the Constitution or any other law.
  - (2) The Inspectorate of Prisons shall exercise its powers functions and duties independent of any direction or interference by any other person or authority.
  - (3) The Inspectorate of Prisons shall:
    - (a) be charged with monitoring the conditions, administration and general functioning of prisons taking due account of applicable international standards;
    - (b) have such powers as shall be required to make investigations;
    - (c) require any person to answer questions relating to such subjects as are relevant to those investigations;
    - (d) have the power to visit any and all institutions within the Malawi Prison Service without notice and without let or hindrance; and
    - (e) exercise such other powers as may be prescribed by an Act of Parliament.
  - (4) The Inspectorate of Prisons shall cause to be laid before the National Assembly such reports as the Inspectorate of Prisons may make at such times that they report and such reports

shall be laid through the Minister responsible for prisons in the form of a motion for acceptance of the recommendations of the Inspectorate of Prisons.

Provided that where the recommendations of the Inspectorate of Prisons require amendment to the law, the Minister shall lay before Parliament those recommendations in the form of a Bill.

- (5) The powers conferred on the Inspectorate for Prisons by this section shall also be exercisable with respect to holding cells in police stations.

#### Composition of the Inspectorate of Prisons

171. The Inspectorate of Prisons shall be comprised of seven members who shall be:
  - (1) such legal practitioner as shall from time to time be nominated in that behalf by the Law Society of Malawi;
  - (2) such Justice of Appeal or Judge as shall from time to time be nominated in that behalf by the Judicial Service Commission;
  - (3) the Chief Commissioner for Prisons or such person as he may nominate in that behalf being a senior member of the prison service;
  - (4) such member of the Prison Service Commission as shall from time to time be nominated in that behalf by that Commission;
  - (5) such Resident Magistrate or Magistrate as shall be from time to time nominated in that behalf by the Malawi Magistrates' Association;
  - (6) such nominee of the Joint International Committee of the Red Cross and the Red Crescent as shall from time to time be nominated in that behalf by the representatives of that Committee in Malawi; and
  - (7) such other representative of an organisation involved in the monitoring of human rights or more generally concerned with the welfare of offenders as may be approved by the rest of the membership of the Inspectorate of Prisons.

### CHAPTER 17

#### THE STATE REVENUE

##### Revenue

172. No tax, rate, duty, levy or imposition shall be raised, levied or imposed by or for the purposes of the Government or any local authority otherwise than by or under the authority of the law.

The State Revenue Fund

173. All revenues or other moneys raised or received for the purposes of the Government shall, subject to this Constitution and any Act of Parliament, be paid into and form one fund, to be known as the State Revenue Fund.

174. (1) No money shall be withdrawn from the State Revenue Fund except:
- (a) to meet expenditure that is charged upon the fund by this Constitution or by any Act of the National Assembly or consistent with this Constitution;
  - (b) where the issue of those moneys has been authorized by an Appropriation Act, a supplementary Appropriation Act or by an Act made in pursuance of subsection (5) or of sections 178, 179, 180, 181 or 182 or by a resolution of the National Assembly made in accordance with section 177.

Provided that this subsection shall not apply to any sums mentioned in subsection 176(3).

- (2) Where any moneys are charged by this Constitution or by any Act of the National Assembly upon the State Revenue Fund, they shall be paid out of that Fund by the Minister responsible for Finance to the person or authority to whom the payment is due.
- (3) No moneys shall be withdrawn from the State Revenue Fund except in the manner prescribed by the National Assembly.
- (4) The investment of moneys forming part of the State Revenue Fund by way of deposit with the National Reserve Bank or such other secure invest as may be approved by the National Assembly shall not be regarded as a withdrawal of those moneys from the State Revenue Fund for the purposes of this Constitution.
- (5) Notwithstanding subsection (1) provisions may be made by or under an Act of the National Assembly authorizing withdrawals to be made from the State Revenue Fund, in such circumstances and to such extent as may be prescribed by or under an act of the National Assembly, for the purpose of making allowances to persons or authorities other than the Government.

Provided that:

- (a) no moneys shall be advanced from the State Revenue Fund under this subsection save on condition that they are repayable by the person or authority to whom or on behalf of whom they are advanced.
- (b) this section shall not apply with respect to;

- (i) the proceeds of Government loans raised for a specific purpose under an Act of the National Assembly;
  - (ii) money or interest received by the Government subject to a trust;
  - (iii) advance drawings and repayments of those drawings, authorised by the National Assembly;
  - (iv) such special funds under this Constitution where it is specified that this section should not apply.
175. (1) There shall be charged on the State Revenue Fund in addition to any grant, remuneration or other moneys so charged by this Constitution or any Act consistent with this Constitution:
- (a) all debt charges for which the Government is liable;
  - (b) all pensions, compensations for loss of office and gratuities for which the Government is liable;
  - (c) any moneys required to satisfy any judgement, decision or award made or given against the Government by any court or tribunal; and
  - (d) all moneys or debt charges charged before the appointment day upon the revenues or public funds of Malawi.
- (2) For the purposes of this section, "debt charges" include interest, sinking fund charges, the repayment or amortization of debt, and all expenditure in connection with the raising of loans on the security of the State Revenue Fund and the service and redemption of debt thereby created.

#### Annual Estimates

176. (1) (a) The Minister responsible for Finance shall lay before the National Assembly a statement of the estimated receipts and the expenditure of the Government in respect of that financial year, other than the sums specified in subsection (3).
- (b) The statement of estimates shall be laid before the National Assembly in respect of every financial year and shall be so laid before the commencement of that financial year.
  - (c) Where the National Assembly does not propose to debate the estimates until after the commencement of the financial year to which they relate, the estimates of the revenue may be laid before the National Assembly at any time before the commencement of such debate.
- (2) The estimates of expenditure shall show separately the total sums respectively required to meet the heads of other

expenditure proposed to be met from the State Revenue fund.

- (3) The sums to be shown in the estimates of receipts and expenditure shall not include:
  - (a) sums representing the proceeds of any loan raised by the Government for specific purposes and appropriated for those purposes by the Act authorizing the raising of the loan;
  - (b) sums representing any money or interest on money received by the Government subject to a trust and to be held or applied in accordance with the terms of that trust;
  - (c) sums representing moneys authorized to be advanced from the State Revenue Fund under an Act of Parliament and repayments thereof;
  - (d) sums representing moneys received for or to be applied from any special fund established and regulated by this Constitution or by an Act of Parliament which provides that subsections (1) and (2) shall not apply to that fund.

#### Appropriation Bills

177. When the estimates of expenditure to be met from the State Revenue fund but not charged thereon have been approved by the National Assembly a Bill, to be known as an Appropriation Bill, shall be introduced in the Assembly providing for the issue from the State Revenue Fund of the sums necessary to meet that expenditure and the appropriation of those sums, under separate votes for the several heads of expenditure approved, to the purposes specified in the Bill.

#### Supplementary Appropriations

178. (1) If in respect of any financial year it is found:
- (a) that the amount appropriated by the Appropriation Act for any purpose is insufficient, or that a need has arisen for expenditure for a purpose for which no amount has been appropriated by the Appropriation Act; or
  - (b) that any moneys have been expended for any purpose in excess of the amount (if any) appropriated for that purpose by the Appropriation Act,

a supplementary estimate showing the sums required or spent shall be laid before the National Assembly and the heads of any such expenditure shall be included in a supplementary Appropriation Bill or in a motion or motions approving such expenditure.

- (2) Where any supplementary expenditure has been approved in a financial year by a resolution of the National Assembly under subsection (1), a supplementary Appropriation Bill shall be introduced in the National Assembly as soon as practicable

after the commencement of the financial year next following, providing for the appropriation of the sums so approved.

#### Advance Drawing Rights

179. The National Assembly may make provision under which, if it appears to the Minister responsible for Finance that the Appropriation Act in respect of any financial year will not come into operation by the beginning of that financial year, he or she may authorize the withdrawal from the State Revenue Fund of moneys for the purpose of meeting expenditure necessary to carry on the services of the Government until the expiration of four months from the beginning of that financial year or the coming into operation of the Appropriation Act, whichever is earlier.

Provided that provision for any moneys so withdrawn shall be included, under the appropriate heads, in the Appropriation Bill.

#### Contingency Fund

180. (1) The National Assembly may make provision for the establishment of a Contingencies Fund and for authorizing the Minister responsible for Finance, if he is satisfied that there has arisen an urgent and unforeseen need for expenditure for which no other provision exists, to make advances from that Fund to meet that need.

(2) Where any advance is made from the Contingencies Fund, a supplementary estimate shall, as soon as practicable, be presented to and voted on the National Assembly and a supplementary Appropriation Bill or motion approving such expenditure in accordance with section 177 shall be introduced for the purpose of replacing the amount so advanced.

#### Government Loans

181. (1) A loan may be raised by the Government under the authority of an Act of the National Assembly and not otherwise.

(2) The National Assembly may, in the Act authorizing the raising of a loan or by any other Act, appropriate the proceeds of the loan for specific purposes and authorize the payment of such proceeds out of the State Revenue Fund for such purposes.

#### Special Funds

182. (1) An Act of the National Assembly may, subject to section 183, make provision for the creation of special funds which shall be accounted within the accounts of the State Revenue Fund and for the regulation or management of the moneys accounted in such special funds.

(2) An Act in accordance with subsection (1) may provide that section 176(1) and 176(2) shall not apply to any particular fund.

- (3) The National Assembly may make provisions regulating the manner in which moneys or investments held by the Government subject to a trust are to be accounted for.

#### The Development Fund

183. (1) There shall be a special fund within the State Revenue Fund to be known as the Development Fund. Receipts and expenditure of the Government relating to the development of the Republic, which have not been included in the annual statement provided for in section 176, shall be accounted in the accounts of the Development Fund. Estimates of such receipts and expenditure shall be submitted by the Minister responsible for Finance to the National Assembly not less than once yearly.
- (2) When the estimates of expenditure to be met from the Development Fund have been approved by the National Assembly, a Bill to be known as Appropriate (Development Fund) Bill shall be introduced in the National Assembly providing for the issue from the Development Fund and appropriation of the sums necessary to meet that expenditure.

#### Auditor General

184. (1) There shall be the office of the Auditor General who shall audit and report on the public accounts of Malawi, and shall exercise such other powers with relation to the public accounts and the accounts of public authorities and bodies as may be prescribed by an Act of Parliament, insofar as they are compatible with the principal duties of that office.
- (2) The Auditor General shall submit reports at least once a year to the National Assembly, through the Minister responsible for Finance, not later than the first meeting of the National Assembly after the completion of the report.
- (3) Appointment to the office of Auditor General shall be made by the Civil Service Commission, subject to satisfying the Public Appointments Committee as to the competence of the person so appointed to perform the duties of that office and as to the financial probity of a person so appointed, so far as it is relevant to the duties of that office.
- (4) (a) The office of the Auditor General shall become vacant after the person holding that office has served for five years, provided that the person holding that office may be nominated for such further term, not exceeding five years, as the Civil Service Commission deems appropriate, subject to confirmation by the Public Appointments Committee.
- (b) A person holding the office of Auditor General shall be subject to removal by the Civil Service Commission only by reason of that person being:

- (i) incompetent in the exercise of his or her duties; or
- (ii) compromised in the exercise of his or her duties to the extent that his financial probity is in serious question; or
- (iii) otherwise incapacitated; or
- (iv) over the age of seventy five.

Providing that the removal of a person holding the office of Auditor General shall not be effected by the Civil Service Commission, save that at least four of its members are of the opinion that one of the criteria in this section has been satisfied and without prejudice to the person being removed from the office from having the right to appeal to the High Court.

- (5) Subject to subsection (4) above, in the exercise of the duties and powers vested in the office of the Auditor General by the Constitution or any other law, the person holding that office shall not be subject to the direction or control of any other person or authority.
- (6) No person or authority may inhibit the Auditor General in the conduct of his functions and duties.

## CHAPTER 18

### THE CONSOLIDATED FUND

185. (1) There shall be a special fund within the accounts of the State Revenue Fund upon which shall be charged certain protected expenditures which shall be known as the "Consolidated Fund".
- (2) The Minister responsible for Finance shall in respect of every financial year cause to be laid before the National Assembly before the commencement of the financial year or within four days of the commencement of the next sitting of Parliament after the commencement of this Constitution, an Annual Appropriation Bill. The Annual Appropriation Bill will be for the purposes of voting sums for expenditure from the Consolidated Fund.
- (3) The National Assembly shall pass the Annual Appropriation Bill without revision, save where it is insufficient to meet the expenditure to be charged on the Consolidated Fund in which case it might revise the Bill so as to accommodate the expenditure to be charged on the Consolidated Fund.
- (4) No money shall be withdrawn from the Consolidated Fund save in respect to the following classes of expenditure:
- (a) the salaries of the President and of the Justices of Appeal

and of the High Court judges;

(b) the expenditure incurred to convene Parliament; and

(c) such other expenditure as may be specified in this Constitution.

- (5) Appropriations for the purposes of the Consolidated Fund shall also be appropriations for the purposes of section 173, section 176, section 177, section 178 and section 179.

## CHAPTER 19

### THE NATIONAL BANK

186. (1) There shall be established by Act of Parliament a Central Bank of the Republic of Malawi which shall serve as the State's principal instrument for the control of money supply, currency and the institutions of finance and shall serve generally in the normal functions of a central bank.
- (2) The bank shall be controlled by a board which shall consist of a Governor and members of the board who shall, subject to this Constitution, be appointed in accordance with that Act of Parliament.

## CHAPTER 20

### CIVIL SERVICE

#### Civil Service Commission

187. There shall be a Civil Service Commission which shall have the powers and functions conferred upon it by this Constitution or any Act of Parliament and which shall consist of a Chairman, Deputy Chairman and not less than six nor more than ten other members.

#### Powers of the Civil Service Commission

188. (1) Subject to this Constitution, power to appoint persons to hold or act in offices in the civil service, including the power to confirm appointments, and to remove such persons from office shall vest in the Civil Service Commission.
- (2) The Civil Service Commission shall, subject to this Constitution and any general directions of an Act of Parliament, exercise disciplinary control over persons holding or acting in any office to which this Chapter applies.
189. (1) The Civil Service Commission, may, subject to such conditions as may be laid down by an Act of Parliament, delegate powers under this section by directions in writing to any member of the Commission or to any civil servant or public body.

- (2) Where any person or body may from time to time exercise powers under this section on behalf of the Civil Service Commission, in accordance with subsection (1), the Civil Service Commission shall:
  - (a) require that person or body to furnish reports in such manner or form as specified in the directions which delegated those powers.
  - (b) hear such complaints or appeals from persons with sufficient interest relating to the exercise of powers under this section and shall have the authority to:
    - (i) quash the decision of a body or person exercising such powers.
    - (ii) exercise such disciplinary powers with relation to such person or body, subject to the conditions laid down by an Act of Parliament.
    - (iii) revoke directions delegating powers to any person or body.

Provided that nothing in this section shall prejudice the right of any person who is the subject of a decision made by or on behalf of the Civil Service Commission to appeal to the High Court or the right of any person with sufficient interest in such a decision to petition the High Court for judicial review of that decision.

190. This Chapter shall not apply where this Constitution has otherwise provided for the appointment or removal of a civil servant or other public appointment, or to appointments that are regulated by the Judicial Service Commission, the Police Service Commission or the Army, nor shall it apply to the following offices:

- (1) the Chief Justice, the Director of Public Prosecutions and the Attorney General;
- (2) such personal staff of the President as an Act of Parliament might allow;
- (3) Ambassadors, High Commissioners and other principal diplomatic staff, within the meaning of section 191(1);
- (4) the Cabinet Secretary; and
- (5) appointments in the Army and Police Services.

191. (1) Ambassadors, High Commissioners and other principal diplomatic staff, as shall be determined by an Act of Parliament shall be appointed by the President, provided the Public Appointments Committee may require persons so appointed to answer questions as to their competence and financial probity.

(2) In any case where the Civil Service Commission has the

power of appointment of the Clerk or the Clerk-Assistant to the National Assembly, before exercising any of its power in relation to the Clerk or the Clerk-Assistant of the National Assembly, the Civil Service Commission shall consult the Speaker of the National Assembly.

#### Appointment

192. (1) The members of the Civil Service Commission shall be nominated by the President, subject to satisfying the Public Appointments Committee as to the competence of persons so appointed to perform their duties as Civil Service Commissioners.
- (2) A person shall not be qualified for appointment as a member of the Civil Service Commission if that person is President, Vice-President, a Minister or Deputy Minister, a Member of Parliament or a serving civil servant.
- (3) Subject to this section, the office of a member of the Civil Service Commission shall become vacant:
- (a) at the expiration of five years from the date of that appointment of that person, unless reappointed to a new five-year term; or
- (b) if any circumstances arise that, if he were not a member of the Commission, would cause that person to be disqualified for appointment as such.
- (4) (a) A member of the Civil Service Commission may be removed from office at the instance of the President if the Public Appointments Committee is satisfied that the member is not competent to discharge his or her duties.

Provided that nothing in this subsection shall prejudice the right of a member of the Civil Service Commission who is removed to appeal against the decision of the Public Appointments Committee to the High Court.

#### Vacancy

193. (1) (a) If the office of Chairman of the Civil Service Commission is vacant or the Chairman is for any reason unable to perform the functions of his or her office, then those functions shall be performed by the Deputy Chairman until that vacancy is filled or the Chairman is able to resume his duties.
- (b) If both the Chairman and the Deputy Chairman are unable to perform their functions, then another of the members of the Commission as may be designated in that behalf by the remaining members of the Commission shall perform the functions of a Chairman.
- (2) If at any time there are less than seven members of the Civil Service Commission and the Public Appointments Committee is not able to sit, either because of Parliament being dissolved

or some other reason, the Commission may appoint such persons as are required to act as members of the Commission, subject to the approval of the President.

Provided that the appointment of a person to act as a member of the Civil Service Commission in accordance with this subsection shall lapse on his appointment as a full member of the Commission in accordance with subsection 192(1), or else on the expiry of 30 days.

#### Independence of the Civil Service

194. (1) Members of the Civil Service shall ensure that the exercise of participation in political activities does not compromise their independent exercise of their functions, powers and duties as impartial servants of the general public.
- (2) The National Assembly may prescribe a category of civil servants, who by reason of their seniority shall not be able to directly participate in political activities.

Provided that:

- (a) members of the civil service, so restricted shall have the right to resign in order to participate directly in political activities;
- (b) nothing in this section shall be deemed to prejudice any member of the civil service having the absolute right to vote in accordance with this Constitution;
- (c) any civil servant whose functions are not directly concerned with the formulation and administration of government policies shall be exempt from restrictions under this section; and
- (d) nothing in this section shall prejudice the right of any member of the civil service to hold office in, or be a member of, any association, group or professional body, the purposes of which are principally to represent their members interests with relation to the terms and conditions of employment or the general carrying on of any profession or trade or the promotion of any interest, not pertaining directly to the promotion of a political party, campaign or philosophy.
- (3) No government or party shall cause any member of the civil service acting in that behalf to exercise functions, powers or duties for the purposes of promoting or undermining of any political party or individual member of that party, nor shall any member of the civil service acting in that behalf promote or undermine any party or member of a party, save as is consistent with the provisions in this section.
- (4) No government or party shall cause any member of the civil service, acting in that behalf to deploy resources, whether they be financial, material or human resources, for the

purposes of promoting or undermining any political party or member of a political party or interest group, nor shall any civil servant acting in that behalf cause such deployment, save as prescribed by this Constitution or an Act of Parliament consistent with the provision in subsection (1).

- (5) Any civil servant who contravenes this section shall be subject to such disciplinary measures as the Civil Service Commission considers appropriate, taking into account the gravity and circumstances of the contravention, subject to such regulations as may be prescribed.
- (6) Where the Civil Service Commission is satisfied that a government or political party or member of a political party has acted in contravention of subsection (3) or subsection (4), the Civil Service Commission may initiate proceedings before the High Court for punitive damages and, in the case of a contravention of subsection (4), the recovery of such resources or sums equivalent to the benefit of the enjoyment of those resources from the party of government, or political party or member of a political party who has so benefitted, as the case may be.

195. (1) The Civil Service Commission or the Public Appointments Committee, whichever is specified by an Act of Parliament, shall have the power to supervise the composition of any public board, commission or committee and the appointment or removal of holders of public office.

Provided that this section shall not apply to any board commission or committee or public office:

- (a) which is regulated by democratic election in accordance with this Constitution of any other law;
  - (b) which is otherwise regulated in accordance with this Constitution;
  - (c) which is neither a governmental nor statutory board, commission, committee or public office.
- (2) Where by virtue of this section or any Act of Parliament, subject to this Constitution, the Public Appointments Committee or Civil Service Commission has had conferred on it supervisory powers, the authority or person in whom is vested the power to regulate the composition of a public board, commission or committee or the appointment or removal of a public officer, shall act with due regard to the recommendations of the Public Appointments Committee or Civil Service Committee as the case may be.
  - (3) With respect to the powers conferred on it by this section, the Public Appointments Committee or the Civil Service Committee, as the case may be shall only make recommendations with regard to;

- (a) issues of competence and probity of office holders that have a direct bearing on the exercise of their functions powers and duties;
- (b) the extent to which the composition of a public board, commission or committee is representative of the interests to which its functions relate;
- (c) the extent to which the appointing body has availed itself of the expertise relevant to the functions of a public board, commission or committee which are at that time generally available.

## CHAPTER 21

### AMENDMENT OF THE CONSTITUTION

196. Parliament may not amend this Constitution, save as provided by this Chapter.
197. Those Articles of the Constitution and the sections which are listed in Schedule I, as well as this Chapter and the entirety of Schedule I shall not be amended unless;
- (1) the individual provision and the proposed amendment has been put to a referendum of the people of Malawi and the majority of those voting have voted for the amendment; and
  - (2) the results of the referendum shall be sent by the Electoral Commission to the Speaker of the National Assembly who might then allow a Bill which in its title is expressed to be a Constitutional Amendment and whose content is the amendment that has been accepted by the referendum of the people of Malawi.

Provided that the Speaker or such person as may be acting as Speaker of the National Assembly shall not accept to be laid, tabled or debated in the National Assembly any Bill with relation to the class of provisions to which this section relates, save he has had notification from the Electoral Commission that the people of Malawi have voted to amend a specified provision of their Constitution.

198. Those Articles of the Constitution and the sections listed in Schedule II and the entirety of Schedule II shall not be amended unless:
- (1) a Bill is introduced to the National Assembly which in its title is expressed to be a Bill to amend the Constitution; and
  - (2) that Bill is supported by more than two thirds of the members representing all the seats in the National Assembly, not being vacant by reason of a by-election.

Provided the President may not assent to such a Bill save that he

has had notification from the Speaker that the National Assembly has voted for such amendment and that the majority was such numbers would be required by this section for amending those class of provisions to which this subsection relates.

199. Those Articles of the Constitution and the sections listed in Schedule III shall be amended by the passing of an Act by a simple majority of the National Assembly, provided that in its title it is expressed to be an Act to amend the Constitution.
200. Notwithstanding section 197, a provision listed in Schedule III may be thereafter listed in Schedule II and notwithstanding section 184 a provision in Schedule II may be thereafter listed in Schedule I, provided the amendment which effects such listing is passed in the manner prescribed by section 198 or section 197, respectively.
201. Save where the context otherwise requires, any reference in this constitution to the Chief Justice, a Justice of Appeal, or a Judge shall be construed as including a reference to any person who, under this constitution, is for the time being performing the duties of Chief Justice, Justice of Appeal or Judge, respectively.

## CHAPTER 22

### TRANSITIONAL ISSUES

Coming into Effect of the Constitution.

202. The Republic of Malawi (Constitution) Act is hereby repealed.
203. The Republic of Malawi, the organs of State and the offices referred to in this Constitution shall be defined and constituted in accordance with this Constitution .

Status of the Constitution

204. This Constitution shall have the status as Supreme law and there shall be no legal or political authority save as is provided by or under this Constitution.

Saving of laws in force

205. Except insofar as they are inconsistent with this Constitution, all Acts of Parliament, common law and customary law in force on the appointed day shall continue to have force of law, as if they had been made in accordance and pursuance with this Constitution.

Provided that any laws currently in force may be amended or repealed by an Act of Parliament or be declared unconstitutional by a competent court.

Elections to the National Assembly

206. For the purposes of this Constitution the first National Assembly after the date of commencement of the Constitution shall be

composed of those persons successfully elected to the National Assembly in accordance with the Parliamentary and Presidential Elections Act.

#### Elections to the Presidency

207. For the purposes of this Constitution the first President after the date of commencement of the Constitution will be the person elected in accordance with the Parliamentary and Presidential Elections Act.

#### Saving of judicial powers

208. The High Court shall have the same jurisdiction, powers and procedures as before the commencement of this Constitution subject to amendment or repeal of such powers by an Act of Parliament

#### Pending legal actions

209. All legal actions currently pending or being undertaken before any court other than before a Grade A Traditional Court, a Grade A1 Traditional Court, or a Grade B Traditional Court or any Magistrates Court shall be commenced or continued before the High Court of Malawi or before such Magistrates' or Grade A Traditional Court, Grade A1 Traditional Court, or Grade B Traditional Court as the Registrar of the High Court shall direct.

210. All legal actions currently pending or being undertaken before any Magistrates Court before the commencement of this Constitution shall be commenced or continued before that court which shall have the same jurisdiction, powers and procedures as before the commencement of this Constitution subject to amendment or repeal of such powers by an Act of Parliament

211. All legal actions currently pending or being undertaken before any Grade A, Grade A1 and Grade B Traditional Court before the commencement of this Constitution shall be commenced or continued before that court which shall have the same jurisdiction, powers and procedures as before the commencement of this Constitution subject to amendment or repeal of such powers by an Act of Parliament.

212. All judgments or sentences pending execution shall be executed, as if such judgments or sentences were ordered in accordance with this Constitution, provided that where the Constitution provides new grounds for appeal, any such appeal shall act as a stay of execution.

#### Existing Appointments

213. Subject to the provisions of this Constitution, any person holding office under any law in force on the date of commencement shall continue to hold such office until such time as:

- (1) that person is confirmed under this Constitution in that post;

- (2) that person is replaced by another person appointed to that post in accordance with the Constitution; or
- (3) that person resigns or retires or is removed in accordance with the Constitution.

Provided that where the Constitution has created an office with a different designation, but an equivalent function is exercised by an office existing at the time of the date of commencement of this Constitution, a person occupying that office shall, from the date of commencement of this Constitution, have such powers, functions and designation as is prescribed for the equivalent office created by this Constitution.

214. For the purposes of subsection 53(2) and subsection 82(1), and only for that purpose, the person currently holding the office of Chief Justice shall be deemed to be appointed under this Constitution as Chief Justice.

#### Saving of rights in property

215. Subject to the provisions of this Constitution all lands and territories of Malawi are vested in the Republic.
216. The Government shall have title to all rights in property which are vested in the Government of Malawi on the date of commencement of this Act, save as otherwise provided by section 217(2) of this Chapter, and provided that the disposal of rights in property where title is vested in the Government shall not be made without the consent of Parliament.
217.
  - (1) All persons who have rights in property at the date of the commencement of this Constitution shall continue to have such rights, under this Constitution and any other law.
  - (2) This section shall not apply in respect of rights in property that have been acquired or vested by or on behalf of the government of Malawi where that property was acquired or vested at any time since the 6th of January 1964 and where that right in property was obtained from citizens or permanent residents of Malawi:
    - (a) unlawfully according to the laws then in force in Malawi;
    - (b) by virtue of any law passed by the government during that time that did not provide for adequate compensation; or
    - (c) through abandonment by reason of duress of circumstances;
  - (3) "Government" for the purposes of this section shall mean the President, the Cabinet, Ministries, other organs of the President and Cabinet and their agents, including individuals and bodies under the authority of the President and the Cabinet.

- (4) Rights in property which are not recognised by virtue of this section shall be liable to have their legal and equitable title vested in the National Compensation Fund and shall be disposed of in accordance with the principles procedures and rules of the National Compensation Tribunal.
- (5) Persons occupying or using property whose title is liable to be vested in the National Compensation Fund shall continue to occupy and use that property, as if they retained full legal and equitable title until such time as the National Compensation Tribunal otherwise orders.

#### The National Council

218. (1) Until the establishment of the National Council and the election and appointment of its members:
- (a) all legislation shall be enacted by the National Assembly as if this Constitution had not made provision for the Upper House, and Parliament had consisted exclusively of the National Assembly acting on its own without being subject to the review of the Upper House.
  - (b) this Constitution shall be construed as if no functions had been vested in the Upper House.

Provided that nothing in this section shall be taken or construed to effect the provisions laid out in Chapter 5.

#### International Law

219. (1) All rights and obligations in International law, including Customary International Law, which immediately before the commencement of this Constitution were vested in or binding on the Republic, shall be vested in or binding on the Republic under this Constitution.
- (2) International agreements ratified in accordance with this Constitution shall form part of the law of the Republic if so provided for in the Ratification Act of Parliament.
  - (3) International agreements entered into before the commencement of this Constitution and binding on the Republic shall form part of the law of the Republic if Parliament so provides.
  - (4) Customary International Law binding on the Republic on the Republic before the commencement of this Constitution, unless inconsistent with this Constitution or an Act of Parliament shall form part of the law of the Republic.