
They keep saying, 'My President, my Emperor, and my All': Exploring the
antidote to the perpetual threat on constitutionalism in Malawi

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They keep saying, ‘My President, my Emperor, and my All’: Exploring the antidote to the perpetual threat on constitutionalism in Malawi

Enoch MacDonnell Chilemba*

“Zonse zimene nza Kamuzu Banda” (everything else belongs to Kamuzu Banda). This was a song that the people of Malawi used to sing in praise of Malawi’s first president Kamuzu Banda, who ruled between 1964 and 1994. The song demonstrates that Malawi conceptualised the president as the owner of everything. ‘The president has it ‘All’.

1 Introduction

Constitutionalism is the liberal democratic value that aims at having a constitutional government whose powers are capable of being effectively limited. A country’s constitution plays the major role in ensuring constitutionalism since it creates and allocates powers to the institutions of government and also seeks to control/restrain the exercise of such powers. It is noteworthy that state institutions comprise the Executive; the Judiciary and the Legislature. This paper analyses the role of the constitution in checking the powers of the president (who heads the Executive) in order to achieve constitutionalism in Africa’s democratic states. It singles out the presidency as it yields more powers compared to the other institutions and hence has crucial impact on constitutionalism. The paper focuses on the case study of Malawi to highlight how the unchecked presidential powers continue to stifle constitutionalism. It discusses how the 1966 and 1995 constitution-making processes in Malawi did not result in a constitution capable of adequately constraining the powers of the president. The unchecked presidential powers act as a recipe for the perpetual threat on constitutionalism in Malawi. In view of this, the paper seeks to analyse the constitutional measures that Malawi could explore to ensure a presidency whose powers are capable of being limited in order to promote constitutionalism.

The paper first gives the general introduction and background before analysing the concepts pertaining to constitutionalism, hegemonic presidency and constitution-making. It further analyses Malawi’s conceptualisation of constitution-making and its impact on the presidency in relation to constitutionalism by comparing the 1966 and 1995 constitution-making

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processes. Thereafter, the paper analyses and traces the constitutional conceptualisation of a strong presidency in Malawi whereby the person occupying the president's office continues to retain many powers and remains the centre of 'everything'. It further looks into the measures and institutions that the 1995 Constitution enshrines which have the potential to check the presidential powers (if properly utilised) before drawing the major conclusions.

2 Conceptualising constitutionalism, hegemonic presidency and constitution-making

2.1 The concept of constitutionalism

Understanding constitutionalism

Constitutionalism is the liberal democratic value that aims at having a constitutional government whose powers are capable of being effectively limited and checked.¹ Hence, a democratic constitution must ensure constitutionalism if it is not to be regarded as a hopeless piece of writing.² A constitution fosters constitutionalism if it does not leave room for excess powers by the president or any agent of government. Constitutionalism as a concept does not have a single agree definition. Although different literature exists that explains the concept, the correct literature is expected to acknowledge that constitutionalism is the spirit of the constitution that guarantees a limited government through the existence of a constitution.³ Hence, constitutionalism entails the constitution's ability to limit the power of the state, including checking the powers of the president.

¹ Allen M & Thompson B (eds) *Cases and Materials on Constitutional and Administrative Law* (1998) 13.

² See Okoth-Ogendo HWO 'Constitutions without constitutionalism: Reflections on an African political paradox' in Shivji I (ed) *State and Constitutionalism in Africa: An African Debate on Democracy* (1991)

³ Heywood A *Key Concepts in Politics* (2000) 124. Malawian authors such as Thoko Ngwira and Martha Kaukonde state that constitutionalism is a way of ensuring limited government as opposed to arbitrary rule of autocracy. See Ngwira T & Kaukonde M 'The role of the courts in the promotion of accountability by the government' (2003) 7(1) *UNIMA Student Law Journal* 1-18. This understanding reflects the essence of constitutionalism.³ On their part, Madalitso M'meta and Janet Kayuni state that constitutionalism is the spirit of the constitution, entirely concerned with the values of the constitution, which needs to be protected and that all actions that violate it should unequivocally be rejected. See M'meta M & Kayuni J 'Civil society and constitutionalism' (2003) 7(1) *UNIMA Student Law Journal* 34-44. However, such definition could be inadequate since adherence to the values or spirit of the constitution cannot be said to translate into constitutionalism if the said values do not promote a limited government.

Attributes of constitutionalism: Rule of law

Constitutions serve the purpose of creating the institutions of government; allocating power to these institutions; and controlling or restraining the exercise of such powers by government institutions, which include the presidency. Constitutionalism has a number of attributes through which it is expressed. The attributes refer to those constitutional or legal mechanisms that serve to facilitate limitations of governmental power. The attributes include the rule of law; constitutional supremacy; respect for human rights; regular periodic elections; and transparent and accountability.⁴ The rule of law facilitates constitutionalism by requiring political power to be used with restraint, efficiently, and for the good of all citizens.⁵ The rule of law emphasises limited government, separation of powers, checks and balances, and judicial review of executive actions or decisions.⁶ In fact, constitutionalism would be an illusion in the absence of the rule of law.⁷ Above all, constitutionalism ensures that government's power is limited by mechanisms in the law (rule of law) to avoid abuse.⁸ Hence, a very strong institution of government such as a presidency that is 'hegemonic' defeats constitutionalism by yielding unlimited powers and not respecting the rule of law.⁹

2.2 Of hegemonic presidency and constitutionalism

Hegemonic presidency refers to the presidency that is such powerful and strong that it dominates all other powers in a political system.¹⁰ Examples of hegemonic presidency include dictatorship and autocracy. Hegemonic presidency is no stranger to African politics as the presidency is seen as a key to 'everything' in most African countries.¹¹ It is perceived as a route to accessing state resources for personal abuse.¹² Hence, the hegemonic presidents and their

⁴ It is not within the scope of this paper to provide a detailed discussion of all these attributes of constitutionalism although it will briefly highlight the concept of rule of law

⁵ Banda J 'The Constitutional change debate of 1993–1995' in Phiri KM & Ross KR (eds) *Democratisation in Malawi: A stocktaking* (1998) 316.

⁶ Alder J *General Principles of Constitutional & Administrative Law* (2002) 27.

⁷ See Joseph R 'Africa, 1990-1997: From arberture to closure' in Diamond L & Plattner MF (eds) *Democratisation in Africa* (1999) 13, where it is stated that:

Constitutionalism and the rule of law are intrinsic elements of the armature of liberal democracy...whether or not countries make a successful transition to democracy depends in large part on their respect for constitutionalism, the rule of law and judicial independence.

⁸ Prempeh H 'Presidents untamed' (2008) 19 *Journal of Democracy* 109, 113.

⁹ The concept of hegemonic presidency is discussed in 2.2 below.

¹⁰ See generally Prempeh (2008) 110.

¹¹ Prempeh (2008) 110.

¹² Diamond L 'The rule of law versus the big man' (2008) 19 *Journal of Democracy* 138, 145.

supporters are not ready to relinquish the presidency due to the power and privilege for abuse associated with it.¹³ In addition, the dominant presidency is personalised. Consequently, it results in neo-patrimonial leadership constituting a political system of governance dominated by personalised authority and clientelism, private appropriation of public funds, selective resource distribution and nepotism.¹⁴ Accordingly, the persistent hegemonic presidency remains a major obstacle to constitutionalism in Africa.¹⁵

It can thus be observed that hegemonic presidency is incompatible with constitutionalism. Therefore, if a constitution leaves room for hegemonic presidency to flourish, there will be a constant threat on constitutionalism or no constitutionalism at all. In view of this, constitutionalism will be guaranteed if the 'makers' of the constitution ensure that elements of hegemonic presidency are not accommodated during constitution-making. Thus, there is a relationship between 'constitution-making' and constitutionalism.

2.3 Conceptualising constitution-making in relation to constitutionalism

Constitution-making refers to a process of coming up with a constitution and is considered to be a political act.¹⁶ There are a number of concepts or principles that underpin constitution-making.¹⁷ It is noteworthy that in so far as constitutionalism is concerned, the constitution-making process is equally as crucial as the constitution that is consequently adopted in guaranteeing constitutionalism. Indeed, it has been said that the more democratic the framers, then the more democratic the process; and consequently, the more democratic the final constitution that is adopted, which is more likely to ensure constitutionalism.¹⁸ It has further

¹³ Consequently, elections are rigged; opposition is repressed; human rights are violated; laws are manipulated; and all dirty tricks are employed just to ensure that the presidency goes to the ruling party.

¹⁴ Abbink J 'Introduction: Rethinking democratisation and election observation' in Abbink J & Hesselting G (eds) *Election observation and democratisation in Africa* (2000) 11.

¹⁵ It is not surprising that it has been suggested that it is a parliamentary, rather than presidential system of government, which can enhance democratisation and hence, constitutionalism in Africa. See Southall R 'Electoral systems and democratisation in Africa' in Daniel J et al (eds) *Voting for democracy: watershed elections in contemporary Anglophone Africa* (1999) 33.

¹⁶ See Nkhata MJ 'Popular involvement and Constitution making: The struggle for constitutionalism in Malawi' in Mbondenyi MK & Ojienda T (eds) *Constitutionalism and democratic governance in Africa* (2013) 219-242, 221; Elazar DJ 'Constitution-making: The pre-eminently political act' <http://www.jcpa.org/dje/articles3/constisramer.htm> (accessed 27 August 2013).

¹⁷ It is not within the scope of this paper to provide a detailed or exhaustive discussion on constitution-making, including its principles or concepts. Nevertheless, it highlights a few aspects that are closely relevant to constitutionalism.

¹⁸ See generally Ginsburg T et al 'Does the process of constitution-making matter?' (2009) 5 *The Annual Review of Law and Social Science* 2001, 214.

been stated that 'For a constitution to have real meaning it must be premised on consensual legitimacy'.¹⁹ This entails that the constitution-making process must embrace the concepts of popular participation and legitimacy, which are achieved through popular consultation and 'authorship.'

Concept of popular participation: Constitution of the people and by the people

Participation is considered to shape the principles and values in the constitution that is eventually adopted, in addition to its legitimacy and acceptability. Popular participation in constitution-making entails consulting the masses as regards the contents of the constitution.²⁰ This ensures an inclusive constitution-making process that could bring to light issues that serve the interest of the people, thereby making it acceptable by the populace. Public participation should be achieved both in terms of its 'degree and quality' in that it must involve a large number of actors/participants and also draw actors from diverse sectors with diverse interests, including the voices of the weak and the marginalised.²¹ In such case, the constitution will have been made by 'a majority' and also would have served the 'diverse interests' as opposed to accommodating only specific interests of the elite or the powerful.²² Thus, the constitution-making process must strive to adopt a constitution that is 'a product of the integration of ideas from all major stakeholders in a country'.²³

Concept of legitimacy: Constitution for and accepted by the people

Legitimacy of a constitution entails the popular feeling that the citizens must obey and respect the constitution that is adopted. Hence, legitimacy induces a 'grundnorm' from which the constitution derives its validity- the general feeling that the constitution ought to be obeyed.²⁴ For this reason, legitimacy 'centrally revolves around the reasons that make the citizenry feel

¹⁹ Nkhata (2013) 221.

²⁰ See Hatchard J et al *Comparative constitutionalism and good governance in the Commonwealth: An Eastern and Southern African perspective* (2004) 29.

²¹ Nkhata (2013) 224.

²² See e.g. Bejarano AM & Segura R 'Transforming politics into constitutions: The politics of constitution-making in Latin America' Paper presented at the Annual Meeting of the American Political Science Association, 2-5 September 2004, 10-11.

²³ Ndulo M 'The democratic state in Africa: The challenges for institution building' 1998) 16 *National Black law Journal* 70.

²⁴ See Dias RWM *Jurisprudence* (1985) 362. The grundnorm is the highest norm in the hierarchy of norms and the original source of authority from which all laws derive their validity. See generally Riddall JG *Jurisprudence* (2002) 128; Dias (1985) 361.

compelled to obey a constitution'.²⁵ It is noteworthy that the reasons (for obeying the constitution) are determined by the constitution's contents and the constitution's making process.²⁶ The contents of a constitution are also influenced by the constitution-making process (as discussed above). Accordingly, it can be concluded that legitimacy will also be influenced by the constitution-making process.²⁷ Indeed, the citizenry will be inclined to respect and obey a constitution that they adopted through their 'active' participation.

It is noteworthy that a democratic constitution is a sacred document that embodies the aspirations of the people.²⁸ The prevalent aspiration is to ensure a constitution that is founded on constitutionalism. In view of this, a legitimate democratic constitution is expected to have provisions that promote constitutionalism. It is undisputed that the constitution-making process has the dominant impact on determining whether the constitution that is adopted embodies constitutionalism. Hence, the constitution making process has to be consultative requiring the input of the people through their popular participation if it is to ensure constitutionalism.²⁹

3 The making of the 1966 and 1995 Malawi Constitutions

3.1 Making the 1966 Constitution

The post-colonial or independent Malawi has adopted three Constitutions, namely, the 1964, 1966 and 1995 Constitutions.³⁰ The 1966 Constitution, which replaced the 1964 Independence Constitution, was specifically designed to transform Malawi into a Republic.³¹ At that time, focus was on maintaining peace and unity in order to achieve development with the effect that provisions such a Bill of Rights and constitutional supremacy, which would facilitate constitutionalism, were sacrificed.³²

²⁵ Nkhata (2013) 225.

²⁶ Nkhata (2013) 226.

²⁷ See Nkhata (2013) 226.

²⁸ See *The Registered Trustees of the Public Affairs Committee v Attorney General & Another (PAC case)* Civil Cause No1861 of 2003 (High Court of Malawi, unreported).

²⁹ Olivier L & Ludman B *Constitutional review and reform and the adherence to democratic principles in Southern African Countries* (2007) 6-7.

³⁰ It is not within the scope of this paper to provide a detailed discussion relating to the 1964 Constitution.

³¹ Chirwa 'A full loaf is better than half: The constitutional protection of economic, social and cultural rights in Malawi' (2005) 49(2) *Journal of African Law* 207, 208; Nkhata (2013) 230.

³² See Chirwa (2005) 209.

The 1966 constitution-making process

Malawi became independent on 6 July 1964 under the 1964 Constitution with Kamuzu Banda as Prime Minister and head of government while the British Monarch acting through the Governor General was head of State. At that time, Banda's Malawi Congress party (MCP) was Malawi's only *de facto* political party after it had won a land slide majority in the 1963 General Elections. In 1965, Banda set up a Constitutional Committee to produce what was to become the new 1966 Republican Constitution of Malawi.³³ The Committee was made up of MCP members and was chaired by the Party's Secretary General, Aleke Banda.³⁴ The constitution-making process was geared at adopting a constitution that should aim at achieving unity and stability considering that Malawi was undeveloped and inexperienced in nationhood.³⁵ Within a period of only two months, the MCP dominated Constitution Committee managed to compile its proposal for the Constitution after holding deliberations and conducting consultative meetings in at least three places.³⁶

The proposals demonstrated the framers' intention to have a strong imperial presidency. For example, it was proposed that the president would serve as many terms as the support of the people would determine. In addition, the proposals pertaining to Parliament, among others, expected members of parliament (MPs) to declare their support for the president before standing for parliamentary elections.³⁷ The common perception during the constitution-making process was to have 'a very strong executive in general and a very strong presidency in particular',³⁸ which was based on the belief that centralised governance would facilitate development.³⁹ The Committee submitted the proposals to the MCP National Convention that took place between 13 and 17 October 1965. On 16 October 1965, the MCP Convention unanimously adopted the proposals and the Banda cabinet followed suite in endorsing the

³³ See generally Malawi Government *Proposals for the Republican Constitution of the Republic of Malawi* (1965).

³⁴ Nkhata (2013) 231.

³⁵ See Malawi Government *Proposals for the Republican Constitution* (1965) 3.

³⁶ Nkhata (2013) 231; Kanyongolo FE 'The limits of liberal democratic constitutionalism in Malawi' in Phiri & Ross (eds) (1998) 353, 359.

³⁷ For further details regarding the proposals, see Malawi Government *Proposals for the Republican Constitution* (1965).

³⁸ Nkhata MJ 'Rethinking governance and constitutionalism in Africa: The relevance and viability of social-trust based governance and constitutionalism in Malawi LL D thesis, University of Pretoria, 2010, 105.

³⁹ Malawi Government *Proposals for the Republican Constitution* (1965) 3; Phiri KM & Ross KR 'Introduction: From totalitarianism to democracy in Malawi' in Phiri & Ross (eds) (1998) 11; Nkhata (2010) 105-107.

proposals.⁴⁰ Eventually, the MCP dominated Parliament passed the 1966 Constitution which was comprehensively based on the proposals compiled by the MCP Constitutional Committee.⁴¹

It can be observed that the 1966 Republican Constitution was negotiated by the MCP (through the Constitutional Committee); proposed and endorsed by the MCP (through the National Convention and cabinet); and passed by the MCP (through the MCP dominated Parliament). Hence, the process only served the interests of the MCP. Such interests included the desire to avoid divisions and to create a unified (one party) state led by a 'hegemonic' president. The making of the Constitution contradicted the crucial principles of popular participation and legitimacy to have any probability of guaranteeing constitutionalism.⁴² Ultimately, as will be demonstrated below, the resultant 1966 Constitution created a hegemonic presidency principally because of the 'flawed process which, expectedly, bequeathed a defective product on the Malawi nation'.⁴³

3.2 Making the 1995 Constitution

Malawi became a multiparty state after the 1993 referendum.⁴⁴ It was agreed that Malawi would hold general elections in 1994 to elect president and MPs. In order to do away with the one party dictatorship, it was agreed that a new democratic constitution was to be adopted.⁴⁵

The 1996 Constitution-making process

Opposition forces made up of the newly formed opposition parties,⁴⁶ namely, the United Democratic Front (UDF) and the Alliance for Democracy (AFORD) pushed the government to establish the National Consultative Council (NCC) and the National Executive Committee (NEC)

⁴⁰ See Nkhata (2013) 231.

⁴¹ See Nkhata (2013) 231.

⁴² See e.g Nkhata (2013) 231-232; Kanyongolo (1998) 359 for the observation that there were no meaningful consultations in the constitution-making process which deprived the Constitution of its legitimacy.

⁴³ Nkhata (2013) 241. See 4 below for a discussion on how the 1966 Constitution consolidated hegemonic presidency in Malawi.

⁴⁴ Nkhata (2013) 232; Dzimbiri L 'The Malawi referendum of June 1993' (1994) *Electoral studies* 229.

⁴⁵ Banda (1998) 321.

⁴⁶ Before the 1993 referendum, the opposition groups acted as pressure groups since Malawi was constitutionally a one-party state. The 1966 Constitution had to be amended after the referendum to allow multiparty politics. See Constitution (Amendment (No 2)) Act 14 of 1993, which provided that Malawi was to be a multiparty state, and that the provisions of the Constitution were to continue to apply until the assumption of power of government following the first multiparty general elections.

to spearhead the transition from dictatorship to democracy.⁴⁷ The NEC was given appropriate executive powers while the NCC was allocated legislative powers to spearhead the necessary legal changes, including the adoption of the new Constitution.⁴⁸ The NCC comprised leaders from the ruling MCP, who were appointed by Kamuzu Banda, and the newly formed opposition parties in addition to leaders from churches who were appointed by their peers.⁴⁹ With respect to the adoption of the new Constitution, the NCC hosted a Constitutional Drafting Conference that was attended by individuals appointed by the various political parties and other delegates.⁵⁰ The Conference produced a draft Constitution that was adopted as 'an interim Constitution' by the MCP Parliament on 16 May 1994.⁵¹

The Constitution provisionally entered into force on 18 May 1994 under Bakili Muluzi's UDF party led government that had won the 1994 General Elections. The Constitution was given a one year period during which it was to remain provisionally in force. This was done based on the consensus that the Constitution had been adopted within a very short period of time (four months)⁵² that did not allow for consultations or popular participation.⁵³ In addition, the participants did not represent a wider cross-section of the various interests of the people and foreign experts dominated the discussion.⁵⁴ In view of this, a Constitution Committee was set up to review and propose changes to be made to the provisional/interim Constitution.⁵⁵ Among others, the Committee was mandated to facilitate national education and consultation relating to the Constitution; convene a national conference that had to be fully representative; and to ensure the compilation and wide dissemination of the reports of the proposals that would be received.⁵⁶

⁴⁷ Chirwa (2005) 210; Mutharika AP 'The 1995 Democratic Constitution of Malawi' (1996) *Journal of African Law*. 205, 208; Nkhata (2013) 234. For further discussion regarding the transition, see Ng'ong'ola C 'Managing the transition to political pluralism in Malawi: Legal and constitutional arrangements' (1996) 34 *Journal of Commonwealth and Comparative Politics* 85.

⁴⁸ This was done pursuant to the National Consultative Council Act (NCC Act) 20 of 1993. See e.g. NCC Act, sec 5(1). See also Nkhata (2013) 233; (2005) 211.

⁴⁹ See Chirwa DM 'Democratisation in Malawi 1994–2002: Completing the vicious circle' (2003) 19(2) *South African Journal on Human Rights* 316, 317–318; Chirwa (2005) 211; Nkhata (2013) 233.

⁵⁰ Chirwa (2005) 211; Banda (1998) 316, 321.

⁵¹ Republic of Malawi (Constitution) Act 20 of 1994.

⁵² See Chirwa (2003) 317.

⁵³ Chirwa DM *Human rights under the Malawian Constitution* (2011) 5; Chirwa (2005) 211; Ng'ong'ola (1996) 64-65.

⁵⁴ Chirwa (2005) 211; Meinhardt H & Patel N *Malawi's process of democratic transition: An analysis of political developments between 1990 and 2003* (2003).

⁵⁵ See 1994 Provisional Constitution, sec 212; Chirwa (2011) 5.

⁵⁶ Chirwa (2005) 212.

However, the general public was not made aware of the existence of the Committee and the Committee also failed to undertake the national education campaign on the Constitution.⁵⁷ Nevertheless, the Committee discharged the crucial task of holding of the Constitutional Review Conference in February 1995.⁵⁸ Unlike the 1994 Constitution Drafting Conference, the 1995 Review Conference was attended by a wider cross-section of people. The participants included politicians, traditional leaders, professionals, businessmen, women's groups and youth associations.⁵⁹ The proposals from the Review Conference were submitted to Parliament which adopted the 'apparently revised' Constitution (but only after making a few major amendments and rejecting most of the recommendations).⁶⁰ The revised Constitution came into force on 18 May 1995.⁶¹

It can be observed that although there were some improvements and positives in the 1995 constitution-making process as compared to the 1966 process, there were a number of drawbacks that affected the credibility of the process. First, the Constitution was negotiated, drafted and adopted within a very short period of time (four months),⁶² which made the process qualify as a 'hurried affair, conceived at the end of 1993 and executed at the beginning of 1994'.⁶³ Hence, there process was not done in accordance with the principles such as popular participation and legitimacy as there was no time for proper consultation.⁶⁴

Secondly, there was lack of proper popular involvement, consultation and participation in negotiating or coming up with the basic content of the Constitution, contrary to the crucial principles of legitimacy and popular participation.⁶⁵ In fact, the 1995 Constitution was 'made' or 'drafted' by the NCC that was made up of political party representatives and who did not take up their positions through elections but through appointments made by their parties.⁶⁶ Thus the NCC led constitution-making process lacked legal mandate from the people to draft the

⁵⁷ Chirwa (2005) 212; Chirwa (2003) 316, 318.

⁵⁸ Chirwa (2005) 212.

⁵⁹ Banda (1998) 322.

⁶⁰ Chirwa (2011) 5. For further discussion on the resolutions made at the Review Conference that were submitted to Parliament, see Banda (1998) 329-333.

⁶¹ Republic of Malawi (Constitution) Act 7 of 1995.

⁶² Nkhata (2013) 234; Chirwa (2003) 317, 318, 319-320.

⁶³ Banda (1998) 321.

⁶⁴ See Nkhata (2013) 234; Chirwa (2003) 317;

⁶⁵ Nkhata (2013) 235.

⁶⁶ Kanyongolo (1998) 364; Nkhata (2013) 235.

Constitution.⁶⁷ In addition, the NCC membership was bound to put the interests of their parties before those of the people during the constitution-making process.

Furthermore, despite being attended by a wider cross-section of the Malawian population as compared to the Drafting Conference,⁶⁸ the Review Conference did not remedy the shortfalls in the constitution-making process.⁶⁹ Among others, there was biased participation in favour of the elites and people from urban areas; the Conference was held for only four days (from 20 February to 24 February 1995) which were not enough to achieve meaningful consultations/deliberations; and Parliament subsequently undermined the Conference by rejecting most of the proposals or recommendations that the Conference had made.⁷⁰

Accordingly, it can be concluded that the 1995 constitution-making process still fell short of complying with the crucial principles of popular participation and legitimacy to ensure effective guarantees for constitutionalism.⁷¹ Indeed, the way a constitution is adopted has considerable repercussions on the fundamental principles relating to constitution-making and their impact on constitutionalism.⁷² Consequently, as will be demonstrated below, the 1995 constitution-making process resulted in the adoption of a Constitution that left sufficient loopholes for the mushrooming of a semi-hegemonic president in Malawi, which would act as a perpetual treat on constitutionalism.⁷³

⁶⁷ See Ngo'ng'ola (1996) 98.

⁶⁸ Banda (1998) 322. The Conference comprised 274 delegates, one army officer, civil servants, 2 High Court judges, 2 religious representatives, Non-governmental organisations (NGOs) & 50 individuals.

⁶⁹ Nkhata (2013) 235.

⁷⁰ See generally Nkhata (2013) 235-236. See also Lwanda J *Promises, power, politics & poverty: Democratic transition in Malawi 1961-1999* (1996) 192-196; Hara MH 'Popular involvement in constitution-making: The experience of Malawi' Paper presented at the World Congress of Constitutional Law, Athens, 11-15 June (2007)17.

⁷¹ See e.g. Nkhata (2013) 233 & 235.

⁷² See generally Kay RS 'American constitutionalism' in Alexander L (ed) *Constitutionalism: Philosophical foundations* (1998) 29-33. See 2 above for a discussion on the applicable concepts.

⁷³ See 4.2 below for a discussion on how the 1995 Constitution has so far failed to prevent the sprouting of elements of semi-hegemonic presidency in Malawi.

4 Impact of strong presidency on constitutionalism in Malawi

4.1 Hegemonic presidency under the 1966 Constitution: 1966-1994

The 1966 Constitution made Malawi a one party state under Kamuzu Banda's reign, which made Banda even more powerful.⁷⁴ The 1966 Constitution further concentrated state powers in the presidency.⁷⁵ Among others, it made President Banda the 'supreme executive authority of the Republic' with powers to appoint cabinet ministers and other top public executives as he deemed it fit; gave Banda the free way to act 'in his own discretion without following the advice tendered by any person';⁷⁶ and granted President Banda powers to assign any ministerial position or government post to himself.⁷⁷ It is noteworthy that in 1970 the Constitution was amended to make Kamuzu Banda life President of Malawi.⁷⁸ The life presidency further entrenched Banda's powers as he could act in any manner without any fear of being removed from office or being accountable to the people.

The Constitution further gave the presidency powers to control parliament with the effect that the MCP Parliament was subservient to Kamuzu Banda,⁷⁹ which gave the president additional impetus to entrench his already unlimited authority.⁸⁰ For example, the Constitution gave Banda as President powers, among others, to appoint no more than 15 MPs who held their seats at the will and pleasure of the president;⁸¹ to appoint or fire the Speaker of

⁷⁴ The Constitution recognised the MCP as the (only) national political party. See Malawi Constitution, 1966, sec 4; Chirwa (2011) 4. It should be noted that immediately after independence in 1964, there was a cabinet crisis in which a number of ministers fell out with Kamuzu Banda with the effect that the 'renegade' ministers had to flee into to exile. The crisis resulted in the elimination of Banda's political opponents which gave Banda the free way and justification to consolidate power. See generally, Ng'ong'ola C 'Judicial mediation in politics in Malawi' in Englund H (ed) *A democracy of chameleons* (2001) 63; Nkhata (2010) 119.

⁷⁵ It is said that the President had both political and economic power centralised in him to the extent that Banda had a close eye on all government business. See Nkhata (2010) 118-120; Pike J *Malawi: A political and economic history* (1968) 162-163.

⁷⁶ Republic of Malawi Constitution 1966, sec 8 & 47.

⁷⁷ Constitution 1966, sec 54, which provided that:

The president may by direction or in writing, assign to himself or any Minister or Deputy Minister responsibility for any business of Government, including the administration of any department of government.

⁷⁸ At a certain point, President Banda held six government positions. See Nkhata (2010) 118-120.

⁷⁹ Republic of Malawi Constitution 1966, sec 9 as amended by Republic of Malawi (Constitution) (Amendment) Act 3 of 1970.

⁸⁰ See Nkhata (2010) 119.

⁸¹ Muluzi B et al *Democracy with a price: The history of Malawi since 1900* (1999) 90.

⁸¹ Republic of Malawi Constitution 1966, secs 20 & 28(2)(i)).

Parliament at his will,⁸² and to dissolve Parliament at any time,⁸³ which could also be exercised if Parliament passed a vote of no confidence in the president or government or if Parliament insisted on enacting a Bill that the President had refused to assent to.⁸⁴ Such powers militated against the constitutionalism attributes of separation of powers and check and balances.

Furthermore, the 1966 Constitution did not contain a Bill of Right contrary to the tenets of constitutionalism.⁸⁵ The implication was that the president had powers to act in the manner that contravened human rights standards, especially if such action could be justified as falling within section 2(2) of the Constitution.⁸⁶ Therefore, it is not surprising that the 'Banda regime...was characterised by oppression, intolerance and lack of respect for human rights, the rule of law and constitutionalism', in addition to 'hero-worship, centralised authority structures, exclusiveness, and intimidation of potential critics'.⁸⁷ It can be observed that the hegemonic presidency that was created and sanctioned by the 1966 Constitution acted as a constant prevalent cause for the lack of constitutionalism during Banda's 30 year old rule (1964-1994).⁸⁸ Although Malawi enacted the new Democratic Constitution in 1995, the traces of hegemonic presidency were not completely eliminated.

⁸² Republic of Malawi Constitution 1966, sec 55.

⁸³ Republic of Malawi Constitution 1966, sec 45.

⁸⁴ Republic of Malawi Constitution 1966, sec 35.

⁸⁵ The only reference to human rights was a constitutional principle of government which stated that Malawi recognised the personal liberties enumerated in the Universal Declaration of Human Rights (adopted by General Assembly Res 217A (III) on 10 December 1948 (UN Doc A/18/810 at 71 (1948)). See Republic of Malawi Constitution 1966, sec 2(1)(iii).

⁸⁶ See Republic of Malawi Constitution 1966, sec 2(2), as introduced by Constitution (Amendment) Act 6 of 1968, which provided that:

Nothing in or done under the authority of any law shall be held to be inconsistent with or in contravention of the Universal Declaration of Human Rights to the extent that the law in question is reasonable and required in the interest of defence, public safety, public order or the national economy.

⁸⁷ Phiri KM & Ross K 'Introduction: From totalitarianism to democracy in Malawi' in Phiri & Ross (1998) 9, 10; Chirwa (2011) 4; Chirwa (2005) 209.

⁸⁸ Malawians used to sing a song in praise of Banda, which stated in the Chichewa vernacular language that '*zonse zimene nza Kamuzu Banda*', which can literally be translated as '*everything else belongs to Kamuzu Banda*'. The song underscores the fact that Malawi conceptualised the President as the owner of everything. Hence, if one had the presidency, he had it all- he was everything and all.

4.2 Semi-hegemonic presidency under the 1995 Constitution

Malawi adopted the 1995 Constitution as a means for reversing the Banda-type autocracy and for ushering in a fresh political and economic order based on constitutional democracy.⁸⁹ However, it was based to a larger extent on the lessons learnt from Banda's hegemonic presidency as opposed to mapping the future. Consequently, a number of changes were made regarding the strong presidency while other elements remained unchanged. Under the 1995 Constitution, the president remains the head of the government (Executive) and is assisted by ministers that he or she appoints.⁹⁰ The 1995 Constitution does not set the size of cabinet and does not prevent the president from holding ministerial positions. In addition, the president can appoint MPs or non-MPs, from his/her party or opposition party.⁹¹ The president is elected through elections together with a running mate who becomes vice president (VP).⁹² The president can also appoint second vice president, who must come from another party, if necessary in the public interest.⁹³ Furthermore, the president can only serve a maximum of 10 years or two terms in office.⁹⁴

However, despite the changes, the president continues to exercise other powers which the Constitution does not provide the means of checking.⁹⁵ Indeed, Malawi's 18 year experience in constitutional democracy has showed that the president still retains other unlimited powers that suffocate constitutionalism. This implies that some elements of presidential hegemony remain.⁹⁶

⁸⁹ J Banda 'The Constitution change debate of 1993-1995' in Phiri & Ross (1998) 320; Nkhata (2010) 131-132.

⁹⁰ 1995 Malawi Constitution, sec 229.

⁹¹ See *In the Matter of Presidential Reference of Dispute of a Constitutional Nature under Section 89(1)(h) of the Constitution and in the Matter of Section 65 of the Constitution and in the Matter of the Question of Crossing the Floor by Members of Parliament* Presidential Reference Appeal No 44 of 2006 (Malawi Supreme Court of Appeal, unreported); *Fred Nseula v Attorney General & Malawi Congress Party* Civil Cause No 63 of 1996 (High Court of Malawi); *Fred Nseula v Attorney General & Malawi Congress Party* MSCA Civil Appeal No 32 of 1997 (Malawi Supreme Court of Malawi).

⁹² See 1995 Constitution, sec 80(3) & (4).

⁹³ See 1995 Constitution, sec 80(5).

⁹⁴ There are other differences in terms of the presidency between the 1995 Constitution and 1966 Constitution. It is not within the scope of the paper to provide a detailed discussion of the differences. Nevertheless, a number of the differences will be highlighted in the course of the discussions contained in this section and the subsequent section.

⁹⁵ The discussion in this section and in 5 below further highlights the instances in which the powers of the president have been checked and other cases where the powers could not be controlled.

⁹⁶ Most of the recent actions of the president, especially those relating to President Bingu Mutharika and President Joyce Banda that have had an impact on constitutionalism have not yet been documented. In view of this, the paper has had recourse to sources from print and electronic media. The veracity of the sources is not in doubt.

Victimisation of the Vice President

Practical experience has shown the VP's office is at the mercy of the president who can victimise the VP and render the office irrelevant. Yet, the VP can only be removed from office by impeachment just like the president.⁹⁷ Hence, apart from protection of tenure, the Constitution does not protect the VP from being mistreated by the president. Indeed, president Muluzi, who ruled between 1994 and 2004, victimised Justine Malewezi, who served as Muluzi's VP. This happened after Malewezi and Muluzi had fallen out due to the fact that Muluzi had 'anointed' Bingu Mutharika to succeed him and stand as UDF presidential candidate in the 2004 General Elections. The Constitution could not protect the VP from such victimisation except for protecting his tenure as VP.

Similarly, when Mutharika became president in 2004 with Cassim Chilumpha as VP, Mutharika was able to victimise Chilumpha after the two had fallen out when Mutharika ditched the UDF to form his own party, the Democratic Progressive Party (DPP). Mutharika was able to render the VP office irrelevant for the greater part of Mutharika's first presidential term. Again, the Constitution just managed to protect Chilumpha from being removed as VP but did not provide any remedy as regards the victimisation and his being sidelined by the Mutharika government. During Mutharika's second presidential term, he again victimised Joyce Banda, who was his VP, for refusing to endorse Mutharika's 'anointing' of his brother, Peter Mutharika, to stand as DPP's presidential candidate (in the 2014 elections). Mutharika expelled Banda from the DPP and Banda formed her own party, Peoples' Party (PP). Mutharika sidelined the VP and continually castigated her. Once again, the office of Banda as VP was rendered irrelevant. The Constitution only protected her tenure.⁹⁸ The experience demonstrates that the person serving as president holds a lot of executive powers which can enable him or her get away with such deplorable victimisation of the VP.⁹⁹ This suggests the continuation of perceiving the president as a very powerful institution.

Tampering with the Judiciary

In terms of the 1995 Constitution, the president appoints the Chief Justice (who heads the Judiciary). The manner of the appointment is not really transparent provided Parliament

⁹⁷ See 1995 Constitution, sec 86.

⁹⁸ Whenever Mutharika travelled abroad, the second in command was never the VP (this applied in both cases of Banda and Chilumpha). The President had the power to disregard the VP completely. Mutharika's government could stop the VP (Chilumpha) from holding rallies

⁹⁹ For a detailed account of the conflicts between the presidents and VPs of Malawi, see Chilemba EM: 30 May 2012 'Malawi's vice-president mystery' <http://www.osisa.org/law/blog/malawis-vice-presidential-mystery> (accessed 29 August 2013).

confirms the appointment.¹⁰⁰ The president is capable of appointing a legal practitioner who is not serving as judge to become Chief Justice.¹⁰¹ In addition, the president can assign any judge to another public office.¹⁰² Some of the judges that have been such assigned have been appointed as Attorney Generals and later promoted to the Supreme Court.¹⁰³ The president also promotes judges from the High Court to the Supreme Court through a process whose transparency remains a mystery. The President can also make critical comments against judges in public for not deciding cases in the favour of the president or government. The Muluzi government tried to remove three judges who had decided cases against the government only to be saved due to local and international pressure. The powers that the president has over the judges and the courts give him the loopholes to tamper with the independence of the judiciary. This is contrary to constitutionalism.

Interfering in the Legislature

The 1995 Constitution gives the president the powers which could be used to have a stranglehold on the Legislature.¹⁰⁴ For example, the president has powers to prorogue Parliament at any time as long as it is done in consultation with Speaker.¹⁰⁵ Unfortunately, the Court's take on consultation means that the president must only inform and get the views of the party to be consulted before taking any action.¹⁰⁶ Such interpretation gives the president excessive powers to frustrate Parliament and to advance personal interest contrary to the Constitution.¹⁰⁷ Indeed, in 2008, Mutharika prorogued Parliament for the sole reason of preventing the House from deliberating on a motion that would have resulted in the expulsion of

¹⁰⁰ 1995 Constitution, sec 111(1). Historically, Parliament has always confirmed such appointments by the required two-thirds majority of MPs present and voting (not majority of the whole House).

¹⁰¹ 1995 Constitution, secs 112(1) & 111(1). Mutharika appointed Lovemore Munlo as Chief Justice at the time Munlo was not a judge. Furthermore, the President appoints judges on the recommendation of the Judicial Services Commission without Parliament playing any role. See 1995 Constitution, sec 111(2). The transparency of the process remains a mystery. Occasionally, the appointments have raised controversies.

¹⁰² 1995 Constitution, sec 119(7).

¹⁰³ This happened in the cases of Judge Ansah & Judge Mbendera.

¹⁰⁴ The paper uses the terms Legislature, Parliament and National Assembly interchangeably to refer to the house of Parliament made up of the Speaker and MPs. Of course, under the 1995 Constitution, Parliament is made up of the National Assembly (Speaker and MPs) and the President as the Head of State. See 1995 Constitution, sec 49(1).

¹⁰⁵ 1995 Constitution, sec 59(1)(b).

¹⁰⁶ See the case of *State and The President of the Republic of Malawi, ex parte Dr Bakili Muluzi & John Tembo* Miscellaneous Civil Cause No 99 of 2007.

¹⁰⁷ See e.g. sec 12 provides for fundamental principles of the Constitution. Sec 12(i) provides that:

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.

most of the DPP MPs for ‘crossing the floor’ after they had ditched the parties that sponsored them into Parliament to join the DPP.

In addition, the president is the one who in practice summons Parliament for a new session in consultation with Speaker.¹⁰⁸ Similarly, the President is the one who summons Parliament for any meetings in consultation with Speaker although it is supposed to be Speaker who must convene such meetings in consultation with the President.¹⁰⁹ In practice, Parliament cannot meet without President’s consent.¹¹⁰ During Mutharika’s first term, when the DPP did not command a majority in Parliament, Mutharika reduced Parliament to a budget passing institution since he regarded it as a threat. Mutharika refused to approve all meetings of Parliament except for the budget sessions. Yet, the Constitution requires Parliament to convene at least twice a year.¹¹¹ Mutharika was able to use his powers to summon Parliament to defeat such constitutional provisions.¹¹² Furthermore, the president can also remove the Speaker and assign a cabinet post or another position to him or her.¹¹³ This could be easily done if the Speaker is from the president’s party.¹¹⁴

It can be observed that the president still retains many powers which give him a stranglehold over Parliament, especially where the president’s party is in majority. Although Parliament can remove the president from office through impeachment,¹¹⁵ it is unlikely that this could happen in Malawi since the National Assembly is yet to adopt the required impeachment procedures in its Standing Orders 18 years after the adoption of the Constitution.¹¹⁶ Hence, the Constitution gives the president leeway to frustrate the role that Parliament could play in promoting the separation of powers or providing checks and balances.

¹⁰⁸ See 1995 Constitution, sec 59(1).

¹⁰⁹ See 1995 Constitution, secs 59(1)(a) & (2).

¹¹⁰ See 1995 Constitution, sec 59.

¹¹¹ See 1995 Constitution, sec 59(2).

¹¹² It is noteworthy that in the case of Muluzi, when his UDF did not have parliamentary majority, he formed an alliance with the AFORD party to have a working majority. Mutharika did not manage this, so he resorted to frustrating Parliament.

¹¹³ See sec 53(3)(c), which provides in part that:

The office of Speaker shall become vacant -

...

c. if the Speaker becomes President, Vice-President, a Minister or a Deputy Minister...

¹¹⁴ President Muluzi managed to remove Sam Mpasu from the position of Speaker and give him a ministerial post allegedly for frustrating Muluzi’s attempts to amend the 1995 Constitution to extend his presidential tenure.

¹¹⁵ See 1995 Constitution, sec 86.

¹¹⁶ The adoption of such procedures is a controversial issue on its own. It is unlikely that the procedures would be adopted in the foreseeable future. See 5 below for further discussion on the role of impeachment in checking the powers of the President.

Circumventing the constitutional requirement to declare assets

The Constitution requires the president (and members of cabinet, among others) to declare their assets, including business interests, upon assuming office.¹¹⁷ However, the constitutional obligation has often been ignored.¹¹⁸ It is expected that the declaration of assets would promote transparency and accountability and also prevent presidential abuse of office for material or financial gains. Ironically, even if the presidents do declare their assets, the declaration is made to the Speaker and such information is not made public. In addition, even after the wealth is later known, not much is done to make the president account for any unexplained enrichment. The law on declaration of assets is rather toothless to act as a check on the president's powers.

Presidents become instantaneous billionaires

Experience has shown that Malawi's presidents have all become instant billionaires upon assuming office. It could be reasonably suspected that there could be acts of corruption and abuse of office which account for this.¹¹⁹ In addition, this development could be related to the toothless law on declaration of assets. For example, it is believed that Mutharika was not a billionaire when he was assuming the presidency in 2004 since he had declared that he had about 154 million Kwacha worth of assets (less than 1 million United States Dollars).¹²⁰ Strikingly, only after being in office for close to eight (8) years, he managed to amass assets valued at about 61 billion Malawi Kwacha (about 152 million United States Dollars).¹²¹

Furthermore, Malawi's presidents suddenly attain the ability to give many donations worth a lot of money at anytime without explaining where they get the money. For example, President Joyce Banda distributes maize and cattle and also makes cash donations during her rallies and no explanation is given as to where such funds come from.¹²² Thus, the general

¹¹⁷ See 1995 Constitution, sec 88A(1).

¹¹⁸ See Nkhata (2010) 211.

¹¹⁹ This is in conflict with the Constitution, which requires the president and cabinet to avoid situations of conflict of interests and not to use their offices for personal gain. See 1995 Constitution, sec 88A(3).

¹²⁰ See *Malawi today*: 24 June 2013 'Bingu wa Mutharika amassed wealth worth K61 billion in 8 years of power, civil society cry foul' <http://www.malawitoday.com/news/129300-bingu-wa-mutharika-amassed-wealth-worth-k61-billion-8-years-power-civil-society-cry-foul> (accessed 30 August 2013).

¹²¹ See *The Nation*: 15 July 2013 'Bingu's wealth shocks British envoy' <http://mwnation.com/bingus-wealth-shocks-british-envoy/> (accessed 30 August 2013); *The Maravi Post*: 24 June 2013 'Malawi paper exposes Bingu wa Mutharika's K61 billion wealth' <http://www.maravipost.com/national/society/4037-malawi-paper-exposes-bingu-wa-mutharika-s-k61-billion-wealth.html> (accessed 30 August 2013). Similarly, President Joyce Banda is said to have assets worth billions in Kwacha. See *The Maravi Post*: 28 July 2013 'Malawi president Joyce Banda is also a billionaire!' <http://www.maravipost.com/scope/op-ed/4203-malawi-president-joyce-banda-is-also-a-billionaire.html> (accessed 30 August 2013).

¹²² See *The Maravi Post* (28 July 2013). President Muluzi also used to distribute money during his rallies.

perception is that a Malawian president always has a lot of money, with the effect that individuals and organisations (can) always go for help. This perception alone reinforces the belief that the presidency is a powerful and 'mighty' institution- almost hegemonic.

Disregarding court orders

The 1995 Constitution binds all institutions of government, including the presidency.¹²³ However, in practice, the Malawi president is capable of defying court orders and practice has shown that there is little that could be done about it while the president remains in power.¹²⁴ Legally, the Constitution recognises that the president is not immune to orders under the Constitution regarding human rights.¹²⁵ However, the presidents of Malawi have defied court orders on a number of occasions and they managed to get away with it.¹²⁶ For example, Mutharika defied a court order to restore Chilumpha's benefits as VP which had been withdrawn after Chilumpha's purported firing.¹²⁷ President Mutharika also defied a court order to 'open' the Malawi Electoral Commission (MEC) offices which he had sealed after he had 'suspended' MEC over allegations of fraud and abuse of funds.¹²⁸ The contempt of court proceedings which had been planned against the President died a natural death.¹²⁹

Furthermore, President Mutharika defied a clear court order restraining him from assenting to an enacted Bill into law which was being challenged before the courts.¹³⁰ He assented to the Injunctions Bill despite an injunction being in place restraining him from doing so.¹³¹ Lastly, President Joyce Banda defied a court order stopping her from installing Chief

¹²³ See 1995 Constitution, secs 4 & 12(vi). Sec 12(vi) provides that: '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.'

¹²⁴ See generally Malawi Law Society 'Communiqué of the Malawi Law Society' issued at Sunbird Nkopola, Mangochi, Malawi 26 February, 2011, revised at Blantyre, Malawi 9 March, 2011 <http://www.malawilii.org/content/communiqué-malawi-law-society> (accessed 30 August 2013).

¹²⁵ See 1995 Constitution, sec 91(1).

¹²⁶ See generally Kanyongolo FE *Malawi: Justice sector and the rule of law* (2006) 51-57.

¹²⁷ See *State v The President & Others ex parte Dr Cassim Chilumpha* Miscellaneous Civil Cause No 22 of 2006 (High Court of Malawi).

¹²⁸ *The State v The President & Others ex parte Malawi Law Society* Miscellaneous Civil Cause Number 173 of 2010 (High Court of Malawi, Principal Registry, unreported). See also Malawi Law Society 'Communiqué of the Malawi Law Society' (2011).

¹²⁹ Although it is believed that the President could face contempt of court proceedings for disobeying court orders, committal proceedings against the President have never been prosecuted as the aggrieved parties often stopped at the stage of filing the paper work for such proceedings in few cases.

¹³⁰ Civil Procedure (Suits by or against the Government or Public Officers) (Amendment) Bill of 2010.

¹³¹ See *Malawi Today*: 14 July 2011 'Bingu overlooks court injunction, signs Injunctions Bill' <http://www.malawitoday.com/news/871-bingu-overlooks-court-injunction-signs-injunctions-bill> (accessed 30 August 2013).

Chikowi.¹³² As is usually the case, there was no remedy for the presidential defiance. It can be observed that such disrespect of court orders by the president renders meaningless the concept of constitutional supremacy, which forms the bedrock of constitutional democracy and constitutionalism.

Wanton (hiring and) firing of top public officers

The Constitution gives powers to the President to hire and fire most top public officers.¹³³ The President is required to comply with the rules and procedure of administrative justice/fairness when removing such people from office in terms of section 43 of the Constitution.¹³⁴ Despite such safeguards, experience has shown that whenever a new president assumes power, he or she fires most of the top public officers, including those in government departments, statutory corporations and public Boards (usually without reasons) only to pay them huge sums of money in compensation for the otherwise 'unlawful' dismissals.¹³⁵ It would appear that the *Lunguzi case* set the precedent where the president can fire any public officer as long compensation is paid.¹³⁶ The intention of the law was to prevent such wanton firing. Unfortunately, practice has proved that such is not the case as the presidential powers cannot be contained. Consequently, huge sums of (tax payers') money are lost in paying for such compensations.¹³⁷ The implication of such presidential powers is that all top government/public officials are forced to serve the interests of the president (not the nation). The practice is similar to the one obtaining under the 1966 Constitution where public officers held offices at the president's pleasure.

The president- the 'untouchable'

The president of Malawi enjoys certain powers and status that make him or her 'untouchable' as a state institution. As indicated above, although the Constitution recognises the impeachment

¹³² She went ahead with the installation ceremony despite the injunction being in place stopping her from doing so. See *BNL Times*: 26 July 2013 'Malawi president defies court order on chieftaincy' <http://timesmediamw.com/malawis-president-defies-court-order-on-chieftainship/> (accessed 30 August 2013).

¹³³ See e.g. 1995 Constitution, secs 9(3) & (6); 101(1) & 102(2).

¹³⁴ See *Lunguzi case*.

¹³⁵ See e.g. *In re Constitution of the Republic of Malawi; In re Lunguzi (Lunguzi case)* [1994] MLR 72. See also *The Maravi Post*: 1 March 2013 'Donors to Malawi: Huge payouts to people fired by Banda's Govt unjustified' <http://www.maravipost.com/national/society/3178-donors-to-malawi-huge-payouts-to-people-fired-by-banda%E2%80%99s-govt-unjustified.html> (accessed 30 August 2013).

¹³⁶ The *Lunguzi case* is discussed in 5.3 below.

¹³⁷ President Muluzi removed Lunguzi from the post of Inspector General (IG) of Police without any reason immediately after assuming the presidency. Similarly, President Joyce Banda fired Mukhitho from his position as IG immediately after she became president. President Mutharika fired Kaliwo from his position as Director of Anti Corruption Bureau (ACB) for arresting Muluzi on corruption charges and when Wadi, who was Director of Public Prosecutions, discontinued the cases against Muluzi, Mutharika fired him as well. These public officers were paid huge sums of money in compensation.

process for the removal of the president, the required Standing Orders (outlining the impeachment procedures) through which to effect the impeachment have not yet been adopted. Hence, the president cannot practically be impeached. The president is also immune from criminal prosecution while in office.¹³⁸ The president further enjoys immunity from personal civil suits, except if the suits relate to specific orders under the Constitution or statute pertaining to human rights obligations.¹³⁹ Although such immunity is consistent with common practice of civilized nations and hence not a threat on constitutionalism, it adds to the unlimited and excess powers that the president yields.

Furthermore, there are a number of laws that create criminal offences against individuals for mere acts of making critical statements against the president. These include the offence of sedition and the offence of insulting the president.¹⁴⁰ The offences impinge on rights of free speech and freedom of expression. Such penal laws can be abused by the presidents to become immune from public scrutiny. Consequently, the immunity that the president enjoys; the fact that they cannot be impeached practically; and the penal laws that protect the president from criticisms facilitate the attainment of more presidential powers that ultimately make the president 'untouchable'- all to the detriment of constitutionalism.

¹³⁸ See 1995 Republic of Malawi Constitution, sec 91(2) , which provides as follows:

2. No person holding the office of President shall be charged with any criminal offence in any court during his [or her] term of office, except where he or she has been charged with an offence 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 but shall not otherwise be immune.

¹³⁹ See 1995 Constitution, sec 91(1), which provides that:

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.

See also *State v Lilongwe Chief Resident Magistrates Court & Others, ex parte Dr Cassim Chilumpha* Miscellaneous Civil Cause No 315 of 2005 (High Court (Constitutional Court) of Malawi, unreported).

¹⁴⁰ Such laws criminalise any comments or conduct that is deemed as capable of bringing the President into disfavour in the eyes of the public or any acts of saying words that are critical of the President to the extent of being deemed as an 'insult' on the President. See e.g. Penal Code, Chapter 7:01 of the Laws of Malawi, sec 51 as read with sec 50, which provide for the offence of sedition. See also the Protected Flag, Emblems and Names Act, Chapter 18:03 of the Laws of Malawi, sec 4, which provides (for the offence of insulting the President) as follows:

Any person who does any act or utters any words or publishes or utters any writing calculated to or liable to insult, ridicule or to show disrespect to or with reference to the President, the National Flag, the Armorial Ensigns, the Public Seal, or any protected emblem or protected likeness, shall be liable to a fine of £1,000 and to imprisonment for two years.

See also *Nyasa Times*: 18 July 2013 'Man arrested for "insulting" Malawi President Joyce Banda' <http://www.nyasatimes.com/2013/07/18/man-arrested-for-insulting-malawi-president-joyce-banda/> (accessed 29 August 2013).

Discretionally powers, through practice or tradition

The 1995 Constitution recognises that the president can exercise any other powers which are not given under law as long as they are exercised subject to written law and are deemed as incidental duties or functions.¹⁴¹ The provision gives the president a 'blank cheque' to exercise many additional powers as long as they do not contravene a clear legal provision. Such a position only serves to strengthen the otherwise already strong presidency. Although the courts would be expected to strictly interpret the provision in favour of constitutionalism, the position, nevertheless, embodies elements of hegemonic presidency.¹⁴² In view of this provision, the president has been called upon to intervene and resolve issues that do not ordinarily fall within the president's ambit. The president is thus expected to 'rule by decree', just like an 'Emperor'. For example, whenever teachers, university lecturers, university student, civil servants, vendors or many other people are staging protests over complaints, the president is normally expected to come in and resolve such impasses even though they within the purview of another institutional authority.¹⁴³ Thus, it is still believed that the president has powers to do 'anything' as long as it is not contrary to law. Such a position is inconsistent with constitutionalism.

In view of the above discussion, it can be observed despite the Constitution of 1995 going a long way to promote constitutionalism, the presidency continues to amass many unlimited powers that could negate the essence of constitutionalism. Nevertheless, there are a number of constitutional measures that could provide checks on the excessive powers of the president. Accordingly, it is relevant to explore such measures as they would act as the necessary antidote to the otherwise perpetual threat on constitutionalism in Malawi.

5 Malawi's constitutional mechanisms for checking the presidency

The Constitution embodies a number of mechanisms that have the potential to go a long way in limiting the presidential powers (if properly utilised).

¹⁴¹ See 1995 Republic of Malawi Constitution, sec 89(5), which provides as follows:

Subject to this Constitution and any Act of Parliament, the President shall exercise all other powers reasonably necessary and incidental to the functions of his or her office in accordance with this Constitution.

¹⁴² (It is noteworthy that in July 2013, the High Court of Malawi referred to the President of Malawi as the "sovereign" who cannot pay taxes to himself. See *In Re The State & Commissioner General of the Malawi Revenue Authority ex parte the Estate of Mutharika* Miscellaneous Civil Cause No 03 of 2013 (High Court of Malawi, unreported)).

¹⁴³ See e.g. *The Malawi Democrat*. 25 October 2011 'Bingu orders Chanco lecturers reinstatement' <http://www.malawidemocrat.com/bingu-orders-chanco-lecturers-reinstatement/> (accessed 30 August 2013).

5.1 Presidential term limit

The 1966 Constitution, as amended in 1971, provided for the life presidency. In seeking to avoid a repeat of this, the 1995 Constitution imposed a presidential term limit of two terms in section 83(3).¹⁴⁴ There were attempts by former President Muluzi to remove the term limit through the Open Term Constitution Amendment Bill.¹⁴⁵ The Bill was defeated in the national Assembly after it fell short of three votes to make the required two-thirds majority. If the Bill had passed, it would have created the possibility of a sitting president winning every subsequent presidential election to rule forever. This possibility would frustrate constitutionalism.

It is noteworthy that in 2009, Muluzi sought the intervention of the court in his quest to stand for presidency despite having already served two consecutive terms on the basis that the Constitution only prohibited serving as president continuously after two terms. The High Court, sitting as a Constitutional Court, clarified that whenever a person serves two terms of five years as president or vice president, he or she is precluded from standing again for the presidency.¹⁴⁶ In effect, therefore, section 83(3) acts as a limitation on the power of the person serving as president thereby promoting constitutionalism in Malawi.

5.2 Constitutional outline of presidential powers

The 1995 Constitution has a number of provisions that outline the president's powers. For example, section 89(1) lists the duties and functions of the president.¹⁴⁷ This position is a

¹⁴⁴ Sec 83(3) provides:

The President, the First Vice-President and the Second Vice President may serve in their respective capacities a maximum of two consecutive terms, but when a person is elected or appointed to fill a vacancy in the office of President or Vice- President, the period between that election or appointment and the next election of a President shall not be regarded as a term.

¹⁴⁵ Constitution (Amendment) Bill 1 of 2002.

¹⁴⁶ See case of *State & Electoral Commission v Bakili Muluzi & United Democratic Front* Constitutional Civil Cause No 2 of 2009, being Civil Cause No 36 of 2009 (High Court (Constitutional Court) of Malawi, unreported).

¹⁴⁷ Sec 89(1) provides as follows:

89 (1). The President shall have the following powers and duties of the President:-

- (a) To assent to Bills and promulgate Bills duly passed by Parliament;
- (b) To convene and preside over meetings of the Cabinet;
- (c) To confer honors
- (d) To make such appointments as may be necessary in accordance with powers conferred upon him or her by this Constitution or an Act of Parliament.
- (e) Subject to this Constitution, to appoint, accredit, receive and recognize Ambassadors, High Commissioners, Plenipotentiaries, Diplomatic Representatives and other Diplomatic Officers, Consuls and Consular Officers

departure from the 1966 Constitution as the president would be expected to discharge the duties specifically allocated under the Constitution.¹⁴⁸ The position also could facilitate constitutionalism by preventing arbitrary exercise of presidential powers. However, as discussed above, the Constitution in section 89(5) has the effect of neutralising the impact of the listed presidential duties as it allows the president to exercise any others powers as long s they do not contravene the law.¹⁴⁹ Nevertheless, the fact that the exercise of presidential powers must be consistent with the law could act as a check against abuse.

5.3 The courts judicial powers of review

The Malawi Judiciary plays a crucial role in putting a check on governmental power thereby promoting constitutionalism.¹⁵⁰ On a number of occasions, the courts have stepped in to constrain the exercise of presidential powers. As early as 1994, when Muluzi removed Lunguzi from the post of Inspector General of Police (IG) and assigned him a diplomatic post, the High Court and Supreme Court found that the President had acted unconstitutionally by removing Lunguzi without giving him reasons in writing contrary to section 43 of the Constitution.¹⁵¹ Hence, the courts made it clear that the president could no longer act in disregard of the Constitution and that the courts would move in to review presidential exercise of powers.¹⁵²

Quashing unconstitutional presidential decrees

In 2011, there was massive fraud at the headquarters of the Malawi Electoral Commission (MEC). Later, the President issue d a decree 'suspending' MEC and sealing the offices. The

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- (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 Inquiry;
 - (h) To refer to disputes of Constitutional nature to the High Court; and
 - (i) To proclaim referenda and plebiscites in accordance with this Constitution or an Act of Parliament.

¹⁴⁸ The 1966 Constitution allowed the President to act in any manner as it pleased him without the advice of anybody.

¹⁴⁹ See 4 above for further discussion in this regard.

¹⁵⁰ See 1995 Constitution, sec 108(2), which provides that:

The High Court shall have original jurisdiction to review any law, and any action or decision of the Government, for conformity with this Constitution, save as otherwise provided by this Constitution and shall have such other jurisdiction and powers as may be conferred on it by this Constitution or any other law.

¹⁵¹ See *Lunguzi case* [1994] MLR 72.

¹⁵² However, the drawback with the *Lunguzi case* decision is that the President still has the power to fire public officers as long as the government pays them huge amounts of money in compensation packages to the detriment of the interest of the tax payers. See 4 above for further discussion.

Malawi Law Society approached the High Court challenging the exercise of the powers by the President in this manner. The High Court granted a mandatory injunction ordering the President to 'open' the offices and lift the MEC suspension.¹⁵³ This order demonstrates that the President could not act in any manner he deemed fit.¹⁵⁴ The message from the Court was loud enough that the president must act according to law.

In the same year (2011), there was a stand-off between the government and the lecturers of the University of Malawi during the notorious 'academic freedom' battle.¹⁵⁵ The lecturers believed that the state was using student spies in class who were reporting to state authorities, including the Police whenever the lecturers made critical comments of the government during their teaching. The lecturers stayed out of class alleging that they were not safe places as they were infested with spies. The President ordered the lecturers to go back to teaching without addressing the lecturers concerns. The lecturers obtained an injunction against the president's directive and moved for judicial review of the decision forcing them to attend class when there were spies contrary to the right to academic freedom.¹⁵⁶ The courts further ordered that the injunction should subsist for the duration of the impasse.¹⁵⁷ The President, through the University Council, fired lecturers who were thought to be the ring leaders. The courts granted injunction orders stopping the firing. In the end, the President's orders came to nothing and he reinstated the lecturers who were fired and gave assurances for the respect of academic freedom after eight months of the impasse.

Similarly, when Muluzi issued a ban on all demonstrations for or against the proposed amendment to the presidential term constitutional provision (in section 83(3)) allegedly in the interests of national peace and security, the High Court found that the presidential decree was

¹⁵³ See *The State v The President & Others ex parte Malawi Law Society* Miscellaneous Civil Cause No 173 of 2010 (High Court of Malawi, Principal Registry, unreported).

¹⁵⁴ Although the President initially defied the court order forcing the Law Society to consider commencing contempt of court proceedings, the President later reversed his decision.

¹⁵⁵ See generally *University World News*: 28 August 2011 'Malawi: Collapsed dialogue, campuses stay closed' <http://www.universityworldnews.com/article.php?story=20110827181402793> (accessed 30 August 2013).

¹⁵⁶ See *State & President of the Republic of Malawi & Others, ex parte Chancellor College Academic Staff Union (Academic freedom case)* Miscellaneous Civil Cause No 2 of 2011 (High Court of Malawi, unreported).

¹⁵⁷ See e.g. *Academic freedom case* Miscellaneous Civil Cause No 2 of 2011 (High Court of Malawi, unreported); *Council of the University of Malawi & Others v Dr Jessie Kabwila (Sued in her own personal behalf capacity and on behalf of all members of CCASU and all academic staff of Chancellor College) & Others* Civil Cause No 24 of 2011 (as consolidated with Miscellaneous Civil Cause No 16 of 2011) (High Court of Malawi, unreported).

unconstitutional as it was not issued in writing and did not carry a presidential (public) seal as required by the Constitution.¹⁵⁸ The Court quashed the decree.

Stopping excessive exercise of presidential prerogatives

President Mutharika appointed a Commission of Enquiry to investigate the circumstances surrounding the academic freedom issue (discussed above) and assist in defining academic freedom. The University lecturers saw this as an attempt by the President to interfere with the right to academic freedom through the back door. Hence, they obtained a court injunction stopping the Commission from doing its work on the basis that the President had misconstrued his powers in, among others, seeking to interpret a constitutional provision instead of leaving it to the courts.¹⁵⁹ They also moved for judicial review of the exercise of the powers by the president. It is noteworthy that the appointment of commission of inquiries is one of the presidential prerogative powers under the Constitution.¹⁶⁰ In stopping the Commission, the Court sent out a message that the president cannot hide behind prerogatives to exercise powers contrary to the Constitution and that presidential prerogatives, just like any other powers, are reviewable and subject to the Constitution.

In another scenario, the Malawi Parliament had enacted a Bill amending a statute that regulated civil suits against government purporting to limit the court's exercise of powers to grant injunctions against government or public officers.¹⁶¹ The amendment sought to prohibit the grant of *ex parte* injunctions against the state. The amendment would have watered down the essence of injunctions as an effective protective remedy against the government.¹⁶² The High Court issued an interim injunction restraining President Mutharika from assenting to the passed Bill pending the determination of a judicial review hearing on the merits on the grounds that the law could be unconstitutional.¹⁶³ It is noteworthy that presidential powers to assent to Bills are

¹⁵⁸ See 1995 Malawi Constitution, sec 90; *Malawi Law Society & Others v The President of Malawi & Others*, Civil Cause No 78 of 2002 (High Court of Malawi, unreported).

¹⁵⁹ See generally *Malawi today*: 23 November 2011 'Lecturers stop Bingu's commission on academic freedom' <http://www.malawitoday.com/news/96251-lecturers-stop-bingu%E2%80%99s-commision-academic-freedom> (accessed 30 August 2013).

¹⁶⁰ See 1995 Constitution, sec 89(1)(g).

¹⁶¹ See Civil Procedure (Suits by or against the Government or Public Officers) (Amendment) Bill of 2010.

¹⁶² (It would not be possible to obtain urgent injunctions against the state without the government being heard and contesting if the Bill was assented into law.)

¹⁶³ See *Malawi Today*: 14 July 2011 'Bingu overlooks court injunction, signs Injunctions Bill' <http://www.malawitoday.com/news/871-bingu-overlooks-court-injunction-signs-injunctions-bill> (accessed 30 August 2013).

one of the prerogative powers under the Constitution.¹⁶⁴ Hence, by stopping the president from assenting to the law, the Court reiterated the position that presidential prerogatives, and all other powers, must be exercised in such a way that they do not violate the Constitution and the law.¹⁶⁵ Indeed, in the case of *The State and the President of the Republic of Malawi and another ex parte Joy Radio*,¹⁶⁶ the High Court declared the President Mutharika's exercise of his prerogative powers to appoint the Board of Malawi Communications Regulatory Authority (MACRA) illegal for being made in contravention of the Communications Act. The High Court quashed the appointment.

Stopping the unconstitutional removal of the Vice President

Towards the end of President Muluzi's reign, he fell out with Vice President Malewezi, who resigned from the ruling UDF party and took a six month leave that would run until the period of General Elections in 2004. The President through the Attorney General filed two cases before the court seeking a declaration that the Vice President had resigned 'constructively' by going on leave during an election year when the President needed someone to deputise him.¹⁶⁷ The Court observed that it could not be said that by going on leave, the Vice President had vacated his seat and that it had not been shown that the President would be prejudiced in any way since Malawi had a second vice president.¹⁶⁸ There were a lot of futile threats and intimidation to make the VP resign.

Mutharika assumed the presidency after the 2004 elections with Cassim Chilumpha as the Vice President. Mutharika later fell out with Chilumpha after Mutharika had ditched the ruling party, UDF, and formed his own party, the DPP while Chilumpha remained a UDF member. In 2006, Mutharika announced that Chilumpha had constructively resigned from the vice presidency as he was not attending cabinet meetings.¹⁶⁹ The High Court (Constitutional Court), by a majority decision, held that under the Malawian constitutional dispensation, the Vice President could resign constructively.¹⁷⁰ Hence, Mutharika did not succeed in firing Chilumpha.

¹⁶⁴ See 1995 Constitution, sec 89(1)(a).

¹⁶⁵ Although, the President defied the court and assented to the law, the injunction stood and it is unlikely that the courts would respect such law.

¹⁶⁶ Miscellaneous Civil Cause No. 198 of 2006.

¹⁶⁷ *Attorney General v Justine Malewezi* Civil Cause No 10 of 2004 (High Court of Malawi, unreported); *Attorney General v Justine Malewezi* Civil Cause No 370 of 2004 (High Court of Malawi, unreported).

¹⁶⁸ See *Attorney General v Justine Malewezi* Civil Cause No 370 of 2004 (High Court of Malawi, unreported).

¹⁶⁹ See *State v The President & Others ex parte Dr Cassim Chilumpha* Miscellaneous Civil Cause No 22 of 2006.

¹⁷⁰ See Namangale F: 22 December 2006 'Chilumpha can't constructively resign-court' <http://groups.yahoo.com/neo/groups/MALAWIANA/conversations/topics/12651> (accessed 30 August 2013).

These two cases demonstrate the courts' resolve to curtail the unconstitutional exercise of the president's powers since under the Constitution; the vice president can only be removed from office through impeachment.

In view of the foregoing discussion, it can be observed that the courts' powers to review the exercise of presidential powers for consistency with the Constitution acts as a check on the powers of the President and, hence, could promote constitutionalism in Malawi.

5.4 The Constitution's Bill of Rights

The 1995 Constitution contains a Bill of Rights that could play a role in checking the powers of the president. The Constitution expressly provides that everyone, including the president, is bound by the Bill of Rights that is contained in Chapter 4 of the Constitution.¹⁷¹ Indeed, the Constitution guarantees avenues for redress in cases of any threats to the enjoyment of the rights.¹⁷² In addition, the Constitution expressly prohibits any governmental or state action that negatively interferes with the enjoyment of the rights.¹⁷³ Hence, any presidential conduct that is contrary to the enjoyment of human rights contained in the Constitution could be invalidated.

The Courts have moved in to stop the president from acting in a manner that threatens the enjoyment of the rights. For example, in 2002 President Muluzi issued a ban on all demonstrations relating to the proposed constitutional amendment on presidential term limits in section 83(3) of the Constitution. The High Court quashed the presidential ban for violating the

¹⁷¹ See 1995 Constitution, sec 15 (1) , which provides thus:

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 prescribed in this Chapter.

¹⁷² See 1995 Constitution, sec 15(2), which states that:

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.

See also sec 44(2)(a), which provides that:

'Any person who claims that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled -

a. to make application to a competent court to enforce or protect such a right or freedom...'

¹⁷³ See 1995 Constitution, sec 46(1), which provides that:

Save in so far as it may be authorized 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.

Bill of Rights' provision on the right to demonstrate which is contained in section 38 of the Malawi Constitution.¹⁷⁴

It is noteworthy that human rights are not absolute. However, a limitation of the exercise of human rights must meet the limitation test in section 44 of the Constitution, which among others, require the limitation to be done by a law of general application.¹⁷⁵ Hence, the president will be forced to push in a law through parliament if he intends to pursue an enterprise that interferes with the enjoyment of the rights guaranteed in the Bill of Right. In view of this, the Bill of Rights serves as a limitation of the president's exercise of arbitrary powers. Indeed, it was held in the *SA Rugby Union Case* in respect of presidential prerogatives that: 'The exercise of powers must not infringe any provisions of the Bill of Rights.'¹⁷⁶ To this extent, where the President, while exercising his prerogative powers, contravenes any of the provisions of Chapter IV of the Malawi Constitution which contains the Bill of Rights, the exercise can be reviewed by the Courts for its constitutionality. By virtue of this position, the Bill of Rights strengthens the possibility of checking presidential powers in promoting constitutionalism.

5.5 Other measures: Declaration of assets and impeachment

The constitutional requirement on declaration of assets (as discussed above) could prevent abuse of power through unjust enrichment by the president if properly implemented. Unfortunately, the applicable law is toothless. The Constitution also provides for the removal of the President or VPs from office through impeachment (as discussed above).¹⁷⁷ The process of impeachment could provide checks on the exercise of the powers of the president unlike the 1966 Constitution which only recognised the death of the president as the means of removal. The impeachment can only take place pursuant to a procedure laid down in the standing orders of Parliament.¹⁷⁸ Unfortunately, Parliament is yet to adopt the required procedures despite the

¹⁷⁴ *Malawi Law Society & Others v The President of Malawi & Others*, Civil Cause No 78 of 2002 (High Court of Malawi, unreported).

¹⁷⁵ See e.g. the general limitation clause under the 1995 Constitution, sec 44 (2).

¹⁷⁶ *President of RSA and Others v South African Rugby Football Union and Others* 1999 (10) BCLR 1059. [1999] ZACC 11.

¹⁷⁷ See 1995 Constitution, sec 86(1)&(2)(a), which provide in part that:

1. The President or First Vice-President shall be removed from office where the President or First Vice-President, as the case may be, has been indicted and convicted by impeachment.

2. The procedure for impeachment shall be as laid down by the Standing Orders of the National Assembly, provided that they are 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 that either occurred or came to light during the term of office of the President or the First Vice President...

¹⁷⁸ See 1995 Constitution, sec 86(2).

fact that many years have gone since the coming into force of the 1995 Constitution. Although Parliament at one time purported to adopt the impeachment procedures to facilitate the impeachment of President Mutharika, the High Court invalidated the procedures on the grounds that they were unconstitutional for, among others, flouting the principles of natural justice.¹⁷⁹ In the absence of the procedures, the president cannot technically be impeached. Nevertheless, the fact that the Constitution provides for the impeachment acts as a check of the president's powers.¹⁸⁰

In view of the discussion in this section, it can be observed that unlike the 1966 Constitution, the 1995 Constitution requires the president to act in accordance with the Constitution and the laws of Malawi. This position presents an avenue for the existence of constitutional measures for checking the powers of the president in the quest to prevent and stop the continued suffocation of constitutionalism in Malawi. However, it has been demonstrated (in section 4 above) that the mechanisms still leave loopholes which the president could exploit, thereby perpetuating the threat on constitutionalism.

6 Conclusion

The purpose of a democratic constitution is generally to limit the powers of government.¹⁸¹ Hence, preserving constitutionalism is crucial to the sustenance of Malawi's democracy that the 1995 Constitution seeks to guarantee following the country's emancipation from Kamuzu Banda's dictatorship, which was created and nourished by the 1966 Constitution. However, the preservation of constitutionalism remains a challenge in Malawi. One of the major causes is the fact that the 1995 constitution-making process was apparently reactionary to Banda's rule. Hence, the 1995 'Constitution makers' only rectified those powers that Banda abused instead of

¹⁷⁹ See *In the Matter of Presidential Reference of a Dispute of a Constitutional nature under Section 89(1)(h) of the Constitution and In the Matter of Impeachment Procedures under Standing Order 84* Constitutional Cause No 13 of 2005 (High Court (Constitutional Court) of Malawi, unreported).

¹⁸⁰ The Constitution contains a number of (other) provisions that could be used to check the exercise of the powers of the president. See e.g. sec 12 (i), which provides that:

The Constitution is founded upon the following underlying principles:-

All legal and political authority of the State derives from the people of Malawi and shall be exercised in accordance with the Constitution solely to serve and protect their interests.

Therefore, the President, pursuant to Section 12 (i), cannot legally use his powers to serve personal or other interests contrary to the interest of Malawians. See also sec 88 (2) provides: 'The President shall provide executive leadership in the interest of national unity in accordance with this Constitution and the laws of the Republic.'

¹⁸¹ See Ridley F 'There is no British Constitution: A dangerous case of the Emperor's Clothes' 41 *Parliamentary Affairs* (1985) 340-43, 355-60.

checking all powers that could be potentially abused. Indeed, the framers put undue focus on correcting the mistakes that Banda had made by creating a new political structure without having an informed motivation as to how democracy should work in practice.¹⁸² Consequently, the 1995 constitution-making process, which was flawed as discussed above, resulted in the adoption of a Constitution that left sufficient loopholes for the mushrooming of a semi-hegemonic president in Malawi.

Nevertheless, it can be observed that Malawi's present constitutional dispensation presents an avenue for the existence of constitutional mechanisms for checking the powers of the president. The drawback is that the experience demonstrates that the president has the potential to act in any manner unless the courts come in to intervene. Thus, the only remedy available is for the people of Malawi to resort to the courts as they continue to explore the effective antidote to this perpetual threat on constitutionalism. The other option could be for Malawi to make use of the 'the periodic constitutional review process that the Malawi Law Commission undertakes' in addressing some of the gaps and loopholes in the Constitution.¹⁸³ Otherwise, Malawians have to continue to explore other viable avenues to identify appropriate constitutional measures that would be used to contain the exercise of presidential powers while they continue to rely on the courts.¹⁸⁴ Among others, Malawi could strengthen the law on declaration of assets to make the information declared public and to require the president to account for large disparities in terms of the wealth declared when assuming office and the wealth amassed when leaving office. Malawi should also enact the required procedures for the impeachment of the president and vice president. The separation of powers between the president, Parliament and the Judiciary should also be strengthened by limiting presidential

¹⁸² See e.g. Bampton K ' Making Constitutions: Raising public awareness' in Lewis J *et al* (eds) *Human rights and the making of constitutions: Malawi, Kenya, Uganda* (1995) 57-58, where it is argued that:

'[t]here simply was no education. This was the fundamental flaw of the Malawi Constitution. There was no consultation ... There was simply a political will among the Malawi politicians to form a new political structure: a political motivation...but a weak motivation. For it was not an informed motivation, not informed... in the context of an actual working democracy'.

¹⁸³ See Nkhata (2013) 219-242, 241. Indeed, the Law Commission conducted a Constitutional Review Conference in 2006. See generally Malawi Law Commission *Report of the Law Commission on the review of the Constitution* (2007). See also 1995 Malawi Constitution, secs 132 & 135(a) 7 (b), which provide for the establishment of the Commission and its powers relating to the review of the Constitution. (However, the recommendations made during the 2006 and 2007 Conferences are still at the cabinet level and have not yet been brought before Parliament with the effect that the process has not gone further).

¹⁸⁴ It is beyond the scope of this paper to delve into recommending or proposing measures, including reforms, which could be taken to ensure that the Constitution and the laws of Malawi provide effective checks on the powers of the President. Nevertheless, the paper makes brief suggestions in this section.

interventions in the Legislature and the courts. For example, the president should be liable for defying court orders and any assignment of judicial officers to other public posts should be done with the involvement of the Judicial Services Commission. In addition, section 89(5) of the Constitution could be revised or deleted to remove any loopholes that allow the president to exercise powers that are not backed by law. Above all, a subsequent constitutional review arrangement should look into exploring other measures of controlling the powers of the President.

As far as the 1995 Constitution of Malawi is concerned, it still allows the Malawi presidency to retain other powers that cannot be checked. Therefore, unless Malawi successfully explores the mechanisms that could be utilised to quell the otherwise unlimited powers of the president, the strong Malawian presidency will pose a perpetual threat on constitutionalism.¹⁸⁵ Malawi will have to continue with the search for the antidote.

¹⁸⁵ See also *Africa Review*, 21 October 2012 'Malawi lobby pushed for reduced presidential powers' <http://www.africareview.com/News/Malawi-lobby-pushes-for-reduced-presidential-powers/-/979180/1608380/-/urchqp/-/index.html> (accessed 29 August 2013); *The Malawi Democrat*, 8 August 2012 'Bakili Muluzi has a point on presidential powers' <http://www.malawidemocrat.com/bakili-muluzi-has-a-point-on-presidential-powers/> (accessed 29 August 2013).

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