

**POLITICS OF CONSTITUTION MAKING IN DEMOCRATIC MALAWI: A
STOCKTAKING OF NEW CONSTITUTIONALISM**

M.A. (POLITICAL SCIENCE) THESIS

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M.A. (Political Science) Thesis

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DECLARATION

I the undersigned hereby declare that this thesis is my own original work which has not been submitted to any other institution for similar purposes. Where other people's work has been used acknowledgements have been made.

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Certificate of Approval

The undersigned certify that this thesis represents the student's own work and effort and has been submitted with our approval.

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Dedicated to HIM that has brought me this far.

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ABSTRACT

This study is an examination of politics of constitution making in Malawi since democratization in 1994 with special focus on the constitutional review process between 2004 and 2008. The main purpose is to find out if the process has been representative. Towards this objective, the study set to find out the level of public participation and inclusiveness; and whether and how politics impacted on the process and constitutional choices that actors made.

The study was predominantly qualitative although some elements of quantitative approach were used. It involved interviews with various stakeholders including political party leaders and commissioners of the Special Commission on the Review of the Constitution; various documents were also reviewed; questionnaires were also administered to members of the general public.

The central argument of this study is that Malawi's democracy rests on weak foundation for the failure of the process of making the constitution that defines the democratic system. Findings of the study show that some strides have been made in departing from the path of undemocratic constitution making but the process remains undemocratic as far as representation is concerned. Popular participation is very low and political expediency remains a dominant, if not, the motivation for constitutional choices for the actors in the process.

TABLE OF CONTENTS

ABSTRACT.....	vi
APPENDICES.....	x
LIST OF FIGURES.....	xi
LIST OF TABLES.....	xii
LIST OF ABBREVIATIONS.....	xiii

CHAPTER ONE

INTRODUCTION AND PROBLEM ANALYSIS 1

1.0 Background and Problem Statement.....	1
1.1 Objective of the Study	6
1.1.1 Main Objective.....	6
1.1.2 Specific Objectives	6
1.2 Significance of the Study.....	7
1.3 Organization of the Thesis	7

CHAPTER TWO

AFRICAN CONSTITUTION MAKING AND BACKGROUND TO CONSTITUTION REVIEW PROCESS IN MALAWI..... 9

2.0 Introduction.....	9
2.1 Constitution, Constitutionalism and Democracy	9
2.2 “New Constitutionalism” Theory of Democratic Constitution Making	12
2.3 Participation, Representation and New Constitutionalism	16
2.4 Realist and Idealist Theories of Politics in Constitution Making	20
2.5 Experience of New Constitutionalism in Zambia and Malawi	24
2.5.1 Constitution Making in Zambia	24
2.5.2 Contextualising Malawi’s Constitution Review	27
2.6 Conclusion	32

CHAPTER THREE	
METHODOLOGY	33
3.0 Introduction.....	33
3.1 Research Design.....	33
3.2 Sampling	34
3.3 Data Collection	36
3.4 Data Analysis	38
3.5 Ethical Considerations	39
3.6 Limitation of the Study	39
 CHAPTER FOUR	
ANALYSIS OF PARTICIPATION AND INCLUSIVENESS IN MALAWI'S	
CONSTITUTION REVIEW PROCESS	40
4.0 Introduction.....	40
4.1 Examining the SLC.....	41
4.1.1 Process of Constituting the SLC and its Composition.....	41
4.1.2 Conduct of the SLC	47
4. 1. 3 Managing Constitutional conferences.....	52
4.1.4 Managing Submissions	56
4.2 Analysis of the Nature of Participation.....	58
4.2.1 Participation through Targeted Groups.....	58
4.2.2 Participation through Submissions to the SLC	60
4.2.3 Participation through National Constitutional Conferences	65
4.3 Factors that Affected Public Participation	70
4.4 Conclusion	73
 CHAPTER FIVE	
POLITICS AND THE CONSTITUTION REVIEW PROCESS.....	75
5.0 Introduction.....	75
5.1 Interplay of interests and Constitution Review Process	75
5.2 Political Party Submissions and Party Interests.....	78

5. 3 Analysing the Impact of Group Interests on Individual Reasoning.....	82
5.4 Analysis of Individual and Institutional Interests	84
5.5 Conclusion	87
CHAPTER SIX	
CONCLUSION	88
6.0 Introduction.....	88
6.1 Reflection on Findings of the Study	88
6.2 Implications of the Findings	92
6.3. Areas of further Study.....	95
REFERENCES.....	97

APPENDICES

Appendix 1: List of Members of The Slc	103
Appendix 2: Distribution of Direct Submission by Sex across Districts.....	104
Appendix 3: Questionnaire for the General Public.....	105
Appendix 4: Interview Guide for Political Parties and Groups that Made Submissions .	108
Appendix 5: Interview Guide for Members of the Special Law Commission	109
Appendix 6: Interview Guide For Experts.....	110

LIST OF FIGURES

Fig. 4. 1 Composition of the Special Law Commission by Sector	44
Fig. 4. 2 Composition of Special Law Commission by Sex	46
Fig. 4. 3 Distribution of Direct Submissions by District	61
Fig. 4. 4 Distribution of Direct Submissions by Sex	62
Fig. 4. 5 Distribution of Indirect Distribution by District.....	63
Fig. 4. 6 Proportion of Submissions Between Sexes across Districts.....	65
Fig. 4. 7 Participation at First Constitution Conference by Sector	66
Fig. 4. 8 Participation at the Second Conference.....	67
Fig. 4. 9 Women Participation in Constitutional Conferences	68
Fig. 4. 10 Media of Access to Information in Constitution Review	71
Fig. 4. 11 Time of Accessing Information on Constitution Review	72
Fig. 5. 1 Constitution Choices of CMD Members	85

LIST OF TABLES

Table 4. 1 Parties Position Compared With Final Recommendations By Slc*.....	50
Table 4. 2 Women Submission Compared With Recommendations By Slc.....	69
Table 5. 1 Comparison Of Public Position And Private Position Of CMDMembers.....	83

LIST OF ABBREVIATIONS

AFORD:	Alliance for Democracy
CMD:	Centre for Multiparty Democracy
DPP:	Democratic Progressive Party
MCP:	Malawi Congress Party
MGODE:	Movement for Genuine Democracy
MLC:	Malawi Law Commission
MP:	Member of Parliament
NCC:	National Consultative Council
NICE:	National Initiative for Civic Education
OSISA:	Open Society Institute for Southern Africa
PAC:	Public Affairs Committee
PCD:	Presidential Committee on Dialogue
PPM:	People's Progressive Movement
RP:	Republican Party
SLC:	Special Law Commission on the Review of the Constitution
TA:	Traditional Authority
UDF:	United Democratic Front

CHAPTER ONE

INTRODUCTION AND PROBLEM ANALYSIS

1.0 Background and Problem Statement

This study is about democratic constitution making in Malawi. It is an examination of public involvement in constitution making process with reference to the constitution review process undertaken in Malawi between 2004 and 2008. It emanates from the observation that discussion of constitution and constitutionalism in Malawi has hitherto focused on the contents of the constitution thereby obscuring the significance of a democratic process towards the making of a people's constitution. The assumption is that lack of attention given to the process, as opposed to the contents of the constitution, may be an indication that the importance of the former is neglected in practice of constitution making in Malawi. Whether this is the case, is the subject of this study.

One of the most significant developments on the political scene during the last three decades of the twenty-first century is the transformation of states from authoritarianism to democracy. This phenomenon was widespread across the continents. From 1974 many countries in Southern Europe, Latin America, East Asia, Eastern Europe and Africa began to transform from authoritarian regimes to democracies. Huntington (1991) describes this as the third wave of democratisation.

The transition to democracy heralded an opportunity for African countries, just like in the other continents, to correct the evils of the preceding dictatorships. Consequently,

processes of constitution making or remaking became a common feature of the transition. The processes were inspired by a belief in constitutionalism. Constitutionalism is defined in terms of imposing limitations on the powers of government, adherence to the rule of law and protection of fundamental rights (Lerner, 2004). It is crucial to democracy because a government that has no regard for the rule of law is considered undemocratic in liberal political discourse. Though the presence of a constitution does not imply presence of constitutionalism, a constitution is a requisite for constitutionalism and hence democracy (Kanyongolo, 1998a; Li, 2000). It is a route map around which political life of the nation is organised (Banda, 1998). This is why democratisation in Africa demanded new constitutions.

The history of constitution making in Africa posed a challenge to the new constitution process. Constitution making processes during decolonisation in the 1960s were elitist. The constitutions were negotiated between the outgoing colonialists and African elites in the capitals of the European masters. Most of the African elites had been ‘captured’ by European culture that they could not reflect the vision of ordinary people of the continent (Mbaku, 1998:506). Ordinary citizens did not participate in the process (Wamunyima, 2006). In countries with large populations of white settlers, like Southern Rhodesia (now Zimbabwe), the whites dominated the process to safeguard their economic interests (Mbaku, 1998). The processes were thus undemocratic and driven by self-interests of the political elites. However, these constitutions provided for protection of opposition parties, individual rights and independent courts (Prempeh, 2007: 473).

No sooner had the countries’ elites taken the reigns of power than they discarded the independence constitutions (Mbaku, 1998; Prempeh, 2007). This resulted in

undemocratic constitutions where the executive wielded concentrated power. This marked the beginning of governments that haunted Africa with brutality, where the laws of the country were but tools for legalising the acts of the dictators.

The foregoing account provides a perfect picture of Malawi's experience of constitution making. It was evident that a new political framework was needed when the country was transiting to democracy. Not only was the constitution supposed to change, but also the orientation of the constitution making process had to conform to dictates of a democratic dispensation. It was time of departure from what Selasie called the 'Lancaster model' of constitution making- characterised by few experts and elites, as was the case during constitution making at independence of African States – to 'new constitutionalism' (Selasie, 2006; Ihonvbere, 2000).

New constitutionalism refers to the approach to constitution making that is characterized by far reaching popular participation. (Moehler, 2006: 278). It is marked by putting premium on dialogue, debate and consultation and it is guided by principles such as diversity, inclusivity, participation and legitimacy (Igbuzor, 2001:3). In this approach, the constitution making process is as important as is the produced constitution (Hart, 2003). The body governing the process also needs to be legitimate. Legitimacy in this context is defined in terms of consent and acceptability among the people (Murray, 1996). As such, the body must be independent and composed of fair representation of different ethnic groups, religious groups, political parties and all the relevant sectors of the country (Mbaku, 1998; John, 2003).

The core element of new constitutionalism is the representativeness of the actors in the process. There are various theories of representation in politics. These include the

delegate theory; microcosmic or resemblance theory; trustee theory; and mandate theory of representation (Birch, 1990; Heywood, 2007). With reference to these theories of representation, the argument in new constitutionalism is that a representative sample of the population should participate in the process; and the leading actors should act on behalf of the general public and should be accountable to the people.

The subject in this study is the extent to which the new constitutionalism approach has been reflected in constitution making process in Malawi since adopting democracy in 1993. The study investigated how representative actors in Malawi's constitution making have been with special focus on the constitutional review process from 2004 to 2008. The Special Law Commission that managed this process submitted, in its final report, that its recommendations were an embodiment of views from a wide representation of the general public and various sectors of the country's (MLC, 2007: 13-16). However, this cannot be accepted without a thorough study. As Birch (1993) notes, in some cases popular involvement is invoked by authorities for the purpose of propaganda. They undertake limited efforts to involve the public without genuine intentions but just to be seen that they involve the people.

Malawi's experience of constitution making during transition to democracy arguably exemplifies 'popular involvement' for propaganda. A Constitution Committee of Parliament conducted constitutional hearings in all the 24 districts¹ of the country and organised a conference whose delegates came from various sectors of Malawi population (Chirwa, 2005; Hara, 2007). While acknowledging these efforts, it has been argued that there can be no valid claim of popular involvement in the process (Hara, 2007: 15) since the constitutional conference was only 'symbolic' (Meinhardt, 2004: 305), the body that

¹ The number of districts has increased to 28

drafted the constitution lacked mandate, and foreign actors dominated the process (Banda, 1998; Kanyongolo, 1998b). On this basis, the claim that the 2004-2008 constitution review process was representative calls for empirical analysis.

Furthermore, studies on constitution making in Malawi have lacked focus and depth with regard to representativeness of the process. Firstly, there is little focus on the process itself by scholars who have written on the constitution making in Malawi. Some present the process as mere background to their studies that focus on the contents of the constitution. These include Mutharika (1995), Kanyongolo (1998a) and Chirwa (2005). Others have discussed it only as part of Malawi's transition to democracy and constitutional development, not the actual process as a subject of concern. Examples here include Meinhardt (2004) and Banda (1998) and Kanyongolo (1998b). As a result the significance of the process itself in constitution making is overlooked or at least not revealed.

Hara (2007) made a significant step in studying popular involvement in constitution making in Malawi. However, he looked at representation in a narrow microcosmic way, focusing on whether actors were drawn from major sectors of the Malawi society. By not considering the behaviour and factors affecting the conduct of the 'representatives', the study assumed that mere presence of the 'representatives' means that they advance interests of the people they are said to represent. Thus the study was insensate to the fact that constitution making is a political process; actors do not operate in a vacuum. Consequently, the study overshadows an important aspect of representation, which is the need for 'representatives' to express interests of the people.

The question of what kind of interests representatives should advance is contested. Realist theorists argue that it is an integral element of constitution making process for representatives to advance personal interests and those of their respective groups (Carroll, 1985). On the other hand, idealists assert that the only motivation should be the common good of the state not individual or group interests (Carroll, 1985). The belief in popular involvement in constitution making, which is a tenet of new constitutionalism, aims at making sure that the constitution embeds common interests of the people not interests of a few. Therefore, in new constitutionalism as idealist posit, representatives are expected to advance the interest of the general public not their own.

In a nutshell, this study is motivated by two related concerns. First, is the need for empirical research to examine whether the constitutional review process was representative. Second is the need for a study focusing on the process including motivations of actors for constitutional choices to show if they represented the general public.

1.1 Objective of the Study

1.1.1 Main Objective

The purpose of the study is to inquire into the constitution making process in Malawi between 2004 and 2008 to find out if the process was representative.

1.1.2 Specific Objectives

- To establish how participatory and inclusive the constitutional review process was.
- To find out whether and how politics impacted on actors' behaviour and choices of constitutional design during the process.

1.2 Significance of the Study

This study makes a contribution to the discussion of the constitution and constitutionalism in Malawi's democracy by drawing attention to the significance of the process of the constitution making in ensuring a constitutional democracy. This is important because it shades light on the prospects of consolidating democracy through examining the legitimacy of the roadmap of the government, the constitution. The study also contributes to the discussion of the role of representatives in representative democracy by discussion how various interests of the representatives undermine their role and create a "constitutional government" by elites.

1.3 Organization of the Thesis

This thesis is divided into six chapters. This chapter has provided general introduction to the study focusing on problem. Chapter two covers literature review. This includes presentation and discussion of major theories and themes underpinning the study; and experience of constitutional review in Zambia, focusing on the involvement of the public in the process and how partisan politics has impacted on constitution matters, and Malawi's developments in constitution making since democratic change. The case of Zambia provides a comparative recent experience of constitution making in Africa from a country that share political history with Malawi. This is followed by methodology in chapter three. This is presentation of approaches and techniques used in collecting data and analysing it as well as the general conduct of the study.

The next two chapters cover discussion of findings of the study. Chapter four discusses the findings on level of participation and inclusiveness of the process. It

discusses the legitimacy and functions of the special law commission that managed the process; as well as the level and factors affecting public participation. It examines composition of the commission, its autonomy, and its how it managed public participation in the constitution review process; and the level of public involvement by various sectors of the society, geographical distribution and gender line. Chapter five deals with the subject of politics in the constitution review process. It examines the question of whether partisan politics was the motivation behind choices of constitutional designs and whether the general political environment affected the process and issues under review.

The last chapter concludes the thesis and discusses the implications of the findings presented in the preceding two chapters. It highlights the major findings of the study and explores their implications on the theory and practice of constitution making and democratic governance. It also suggests areas that require research to further illuminate of the constitution making process in Malawi.

CHAPTER TWO

AFRICAN CONSTITUTION MAKING AND BACKGROUND TO CONSTITUTION REVIEW PROCESS IN MALAWI

2.0 Introduction

This chapter covers concepts, literature review and constitutional evolution of Malawi. It includes presentation and discussion of major concepts and theories underpinning the study including the linkage between constitution, constitutionalism and democracy; new constitutionalism and other approaches to constitution making; representation, participation and new constitutionalism; and realist and idealist theories of politics in constitution making. It also reviews recent constitution making experience of Zambia for a comparative African picture, and the history of constitution making in Malawi focusing on the involvement of the public and how partisan politics has impacted on the process in the two countries.

2.1 Constitution, Constitutionalism and Democracy

The significance of a constitution lies in the context of the broad value of constitutionalism and democracy. In its material sense constitution means the established structures of political order whereas in its formal sense it is the written document created by legislative act (Lerner, 2004). A constitution is a framework by which relations between rulers and citizen as well as between different branches of the body politic are

regulated (Banda, 1998: 316). It is a body of fundamental principles according to which a state is acknowledged to be governed (Banda, 1998: 316). A constitution serves to create national government, and protect individual liberties (Chemerinsky, 2002). According to Heywood (2000: 196) constitutions exist in written and unwritten forms. However, many democratic states have written constitutions. It is this understanding of the constitution that informed this exploration of politics of constitutional making.

A constitution is more than just a framework of operation for the ‘framed’. It is a technique for the creation of durable, viable and civilized polity (Lerner, 2004). Aristotle argued “if the city is a form of association, and if this form of association is association of citizens in a constitution, it would seem to follow inevitably that when the constitution undergoes a change in form, and becomes a different constitution, the city will likewise cease to be the same city” (Lerner, 2004: 7). The constitution is thus an expression of the identity of the community that holds it. A constitution is supposed to be a reflection of a people’s history, aspirations and vision (Ebrahim, 2002). It is therefore an inherent contradiction to label as ‘constitution’ a book of laws that is not reflective of values and identity of the people.

The significance of a constitution in democracy lies in its relationship with constitutionalism. Broadly defined, constitutionalism refers to imposing limitation on the powers of government, adherence to the rule of law and protection of fundamental rights, and use of constitutional norms in political practice and discourse (Lerner, 2004; Hyden and Venter, 2001). It has been observed that there exists no inherent direct relationship between having a constitution on one hand and practice of constitutionalism in a state on the other (Lerner, 2004). This means a state can have a well-orchestrated constitution but

not the entrenchment of the elements of constitutionalism. The spirit of constitutionalism requires the internalization of the values of a polity by rule of law both on the part of the governors and the governed (Hyden and Venter, 2001:3).

However, a democratic constitution is a necessary condition for the development and the realization of democratic constitutionalism (Kanyongolo, 1998). Li (2000) also defines liberal constitutionalism in terms of several elements of which the first is the presence of “a higher law, either written or unwritten, called constitution”. By defining allocation of society powers and the relationship that should exist between the rulers and other members of the polity, the constitution lays the frame of operation that would enhance the upholding of constitutionalism. A constitution is therefore imperative for any truly democratic dispensation.

One of the central concepts in democratic politics is legitimacy. Legitimacy generally refers to sense of moral obligation for the citizen to obey a set of rules from which power is transformed into authority (Heywood, 2000). In democracy, a legitimate government is one that is not only legally rightful but also morally acceptable in the view of the citizenry. Democracy and constitutional government are inseparable. A constitutional government is not one that only possesses a constitution but one that also upholds the values of constitutionalism. As such legitimacy is indispensable to constitutionalism and indeed to the development of democracy. Being the paramount element of constitutionalism and hence of democracy, a constitution needs to be legitimate.

2.2 “New Constitutionalism” Theory of Democratic Constitution Making

Constitution-making should be conceived as a procedure through which new or amended norms receive democratic legitimacy by means of collective will and support (Fossum and Menendez, 2005). It is the involvement of strong and general publics that enables such a procedure to decide upon the fundamental norms of the political community (Fossum and Menendez, 2005). Constitution making is, therefore, a process not a-moment-task. It includes the initial making of a constitution, amendments of the constitution, as well as processes of reviewing it. Constitutional review should be understood in terms of what OSISA refers to as ‘contemporary constitutional review’ or ‘constitutional reform’ meaning a process that may culminate in a completely revised constitution or one that is amended to make its original form unrecognizable (OSISA, 2007).

There are many approaches that are adopted in constitution making. Gloppen (2000: 45-45) identifies four models of constitution making namely constitution making by design; constitution making by bargaining; constitution making by interpretation; and constitution making by deliberation. One distinguishing feature of these approaches is the nature of the actors in the process.

In constitution making by design the process is a domain of experts. The focus is not on how the constitution is made but what the constitution contains. Constitution making is regarded as a technical process towards achieving certain societal goals. The people trust that the experts have the ability to orchestrate the best means to achieve the best solution to their questions. The legitimacy of the process and the constitution is therefore based on this trust of the people on the experts.

When constitution making is by bargaining, the task belongs to political elites. Political parties define their respective interests and the process is about working out how these can be compromised. What is important in the process is that the resultant constitution should be considered representative of the views of all the parties. Therefore, the legitimacy of the constitution is based on the fairness of representation of the parties and the extent to which the contents reflect their interests. For the general public, the constitution developed in this manner is legitimate in so far as it reflects their interests.

Another mode of constitution making is by interpretation. This involves an ongoing process in which the constitution is developed by interpretation of common history. The process is gradual, based on particular tradition and incorporation of new values of the society. The major actors in this process are judges but there are many other including politicians and academics. A constitution made in this way claims legitimacy dependent on the authority of the interpreting agent.

A constitution can also be made through deliberation. The actors in this process are not only policy-makers but also members of the general public. The basic pillar of this process is that constitution making proceeds through public deliberation. There is wide spread participation and the process allows all views to be heard and the views are taken seriously. The process is open-ended such that constitutional norms are formed and reformed on continuous basis. The legitimacy of the constitution is dependent on the fact that the constitutional principles and norms are subjected to deliberation by the general public.

Constitution making by deliberation is increasingly becoming an aspiration because of its appeal to popular involvement which reflects the very meaning of democratic

governance. Hart (2003:4) notes, “one of the most striking innovations in the constitution-making practice of recent decades is that norms of democratic procedure, transparency, and accountability that are applied to daily political decision making are now also demanded for constitutional deliberations”. In the same vein, Ihonvbere (2000) observes that a study of the constitution-making across the world show that there is a new trend towards more direct participation by the people in the constitution making process, through popular consultation, rather than constitution drafting by legal experts (Ihonvbere, 2000). Some scholars have argued that this new trend in constitution making is the new constitutionalism (Ihonvbere, 2000).

New constitutionalism is an approach to constitution making marked by “far reaching popular participation in constitution making process, not only the election of constituency assemblies or voting in a referendum on a proposed constitutional text, but also in the form on civic education and popular consultation in the development of the constitution” (Moehler, 2006: 278). It is a drive towards realizing democratic constitutions through democratic ways. Constitution making is no longer viewed as an exclusive domain of experts or few elites or dominant figures of the society. New Constitutionalism, thus, simply means democratizing constitution making.

Igbuzor (2001) clearly explains this approach. Firstly, in new constitutionalism great significance is attached to the process as it done to the content of the constitution. The approach puts a lot of premium on dialogue, debate, consultation and participation. Diversity, inclusivity, participation, transparency and openness, autonomy, accountability and legitimacy are core principles of the process (Igbuzor, 2001; Ebrahim, 2002).

Inclusivity means that all voices including those of minority groups should be sought and reflected in the constitution (Igbuzor, 2001). Every identifiable community should be invited, assisted and encouraged to participate in the process. These include women, students, the armed forces, the illiterate, the disabled, the poor, the rural dwellers, professions, trade unions, religious groups, traditional rulers, civil society organizations, political parties and all quarters of the society. The principle of participation requires that the process must involve people at all levels in contributing to the content of the constitution. Efforts must be made to educate the people about the process and issues under debate.

It is also imperative that the people should have easy access to the process and the final constitution so that they understand it and use it in the defence of their individual and collective rights. To ensure transparency, all submissions in the process; analysis of the submissions and the draft constitution should be circulated widely; and those who made the submissions should be acknowledged. Guided by the principle of legitimacy, a national referendum should be conducted to test the popularity of the draft constitution. The referendum will further popularise the contents of the constitution and provide the people with an opportunity to cross-check that the constitution reflects their views.

The body responsible for managing the process is also critical. As Ebrahim (2002) points out, legitimacy of the body is dependent on the credibility of the people that serve in it. The body must reflect existing diversity in the society such as ethnic identity, language, religion and gender (Igbuzor, 2001). It must be independent from government control or any particular section of the society and must be accountable to the people through periodic publication of reports on progress of the process (ibid).

This approach is informed by a belief that legitimate constitution is one that is not only crafted to serve democratic ends (Dahl, 2001), but also made through democratic means (Lerner, 2004; Ndulo, 1996). That is, how the constitution is created is equally as important as the content of the constitution, as a means of ensuring legitimacy of the constitution (Amunyima, 2006). The argument is that the constitution must be made by the people themselves based on their values, expectations, interests, and customs (Mbaku, 1998). It is argued that when the people are involved in the process, they recognise that they endorsed the constitution and that it contains provisions that reflect interests worth defending; which encourages the governed and governors alike, respect the provisions of the constitution (Mbaku, 1998).

2.3 Participation, Representation and New Constitutionalism

The central theme in democracy from the old Greek city states to modern states is centrality of the people in running affairs of their society. While it was possible for the citizens in the city state to meet and directly discuss the affairs of their polity, it has become impossible for modern states because of the vastness and huge populations in modern states. As Montesquieu argued, democracy in modern states inevitably requires citizens to sacrifice some of their rights of decision making to representatives who will speak and act on their behalf (Bratton and Walle, 1997:11). Modern democracy has increasingly become synonymous with representative democracy.

However, it is important to note that “participation and representation are constitutive of each other” (Chandhoke, 2009: 819). Without participation, representatives wield immense power to act, as they will, without let or hindrance. On the

other hand without some mechanism of representation, citizens' participation is defeated by impracticality because it is impossible to assemble millions of people to deliberate matters of their country (Chandhoke, 2009: 819). Thus, there is no representation without participation and call for participation lacks practical significance without some form of representation.

Popular involvement in constitution making should best be considered in this mutually inclusiveness of representation and participation. Representation has been variously conceptualised in politics. First, representation refers to a relationship in which a person has an acknowledged duty of defending or advancing certain interests specifically instructed by his or her principal. This is according to delegate theory or model of representation (Birch, 1990: 71; Heywood, 2007: 249). McCrone and Kuklinski (1979) assert that there are two central conditions to the delegate theory of representation. The first one is that the representative must be obliged to behave in accordance with preferences of his or her constituency. The second condition is that the constituency must express their preference in such a way that the representative gets an accurate picture of its opinion.

The second theory of representation is 'microcosmic' representation or 'resemblance' representation (Birch, 1990: 72; Heywood, 2007: 25). This representation is also known as passive representation (Brichta and Dor, 1974). This is where representation refers to a sample of a population constituted in such a way that the main characteristics of the population are mirrored in the sample. The best example here is sample based on statistical methods. The main argument in this theory is that 'like must represent like'. For example, a woman can best serve the interests of women than a man.

The two elements of this theory are the diversity of representative in the process and their numbers. For example in population where 60% are women and 40% are men, a process will be regarded representative if those acting on behalf of this population are constituted in such away that 60% are women and 40% are men. It is also true that if too few members of a population are sampled, they may not mirror the characteristics of the population. This implies that in making collective decision for a community, which is the case with constitution making, the largest possible number of that population should be involved.

The third type is ‘trustee’ representation (Heywood, 2007: 249). This describes where a person with required understanding and knowledge of issues at hand acts in the interest of others who can not possibly act for themselves. The emphasis is that some members of a community are less disadvantaged than others especially in terms of education. Those who are more advantaged can serve the interest of the disadvantaged even without the instruction of the later. The implication of this theory on processes like constitution making is that those with technical expertise can make the constitution without necessarily involving the people. This is certainly contradictory to the values of democratic constitution making. However, the theory acknowledges the significance of expertise in the process and the fact that those holding the offices based on their knowledge do so on trust.

The last theory of representation is called mandate representation (Heywood, 2007: 251) or ‘elective representation’ (Birch, 1990: 74). In this theory ‘representatives’ are people that are authorised, through the process of election, to exercise certain powers and carry out whatever policy they outlined during campaign. There is a debate as what

extent the mandated representative should exercise independence from the people that mandated them. It is argued that holding regular elections is away of renewing this mandate. The significance of this theory in constitution making is that it touches on the debate of the role of parliaments in the process. Some scholars have argued against adopting constitutions through parliaments because institutional interests lead to less objective choices of constitutional design (Elster, 1995). At the same time, parliamentarians as law-makers are said to be representative of the people by way of the mandate they get through elections. The argument of independence of a representative from the people he/she represents has led to establishment of recall provisions in some constitutions whereby constituents can terminate the mandate of their representative.

Much as these theories of representation are not necessarily mutually exclusive, the variety shows the difficulty in identifying a representative and how real representations can be identified. For example, in Malawi, there have been accusations against civil society organisation for being out of touch with the realities of the masses that they pose to represent. For the purposes of this study, representation is focusing on microcosmic and delegate representation. That is: whether the process is representative is based on the following. First, the participants in the process should be of such a significant number as to reflect the whole population. Second, the participants should come from a wide spectrum in terms of geographical areas of the country. This is particularly important because the geographical distribution in Malawi has close association with tribes. The third factor is that those who take active role in coordinating the process or \considering the submissions on behalf of the general population should reflect the diversity of the population. Beside these conditions, as argued by the delegate theory of representation,

those who take the lead in the process should not take positions for their interests but those of the general public.

2.4 Realist and Idealist Theories of Politics in Constitution Making

Constitution making is a political process because it “is essentially about distribution of power” (Hart, 2003:9). Politics has been variously defined. It is the “activity through which people make, preserve, and amend the general rules under which they live” (Heywood, 2000:33). It can also be described as making of decision in which a ‘political action’ is involved; where political action means an activity which human beings formulate institutions and set conditions of their associations, make proposals about changes in these institutions and conditions, and try to persuade others of the desirability of the proposed changes (Oakeshott in Johari, 2005: 4). Leftwich (2004:103) defined politics “all activities of co-operation, negotiation and conflict, within and between societies, whereby people go about organizing the use, production or distribution of human, natural and other resources in the course of production and reproduction of their biological and social life.”

These definitions provide common elements worth noting in considering forces at play in constitution making. First, Politics involves many players. Second, the players have different interests. Third, the people are in the business of pushing their respective interests, including political power, onto the national or common agenda. The nature of these interests, which come as stakes in the process, impacts on the nature of the resultant constitution. It determines the extent to which the constitution would be regarded as

legitimate among various sectors of a society. Thus politics is critical in constitution making process.

Various interests act as motivations for actors' constitutional choices in various ways. (Elster, 1995) posits that framers of the constitution are swayed by a number motivations and certain assumptions about actors whose behavior to be regulated by the constitution. He identifies the motivations as interests, passions and reason. The interests may be that of a particular individual, a group of individuals or certain institutions. The individual may include the incumbent leaders of dominant political parties. Examples of groups may be political parties or ethnic religious or regional groups. Institutions responsible for the process such as adoption of the constitution like parliament may work to safeguard their interests. Passions as a motivation in constitutional making can be impulsive or permanent prejudices. These include matters of ethnicity and regions of origin of the players in the process. Reason is where concern for common good is paramount. This is where deliberate procedures are made to prevent institutional interests and passions.

The theoretical discourse of place of politics and interests in constitution making is dominated by idealist-realist debate. The idealists argue for the separation of partisan politics from the process of constitutional making because the process requires that the player make objective rational decisions. Carroll (1985:2) explains that the idealist perspective is based on the idea that constitutional conventions should be above politics which derives from jurisprudential notion that a constitution is higher-law document embodying principle upon which society approaches consensus. This higher law designation expects delegates to constitution making process to make objective, rational

decisions free from the pull and sway of partisan politics (Carroll, 1985:2). According to the idealists, deliberate provisions must be made to insulate the process to the influences that might be inconsistent with the mission of a higher law. Actors in constitutional making are expected to weigh issues on merit, make non-partisan decisions, and should not be concerned with who supports or advocates against particular issues. Their role should be a deliberative one in which rational consideration of the issues takes precedence over the demands of friendship, political parties, work groups and any other sections of the state (Carroll, 1985).

The realist perspective holds the contrary view. Constitutional making is not a neutral process and therefore partisan forces are part of the process (Carroll, 1985). In this view, constitutional making is not independent of the identities of parties taking part in the process. Influence of partisan interests is considered normal and a way towards the making of the constitution. The constitution is thus a product of the majority interests as various players bargain. Realists approach constitution making from a perspective similar to that of the state legislators, who view partisan influences and personal appeals for support as legitimate.

The realist perspective is descriptive of tendencies in most constitutional making processes. It would be naive to assume that the moment members of different groups engage in constitution making they discard all the allegiance to the interests of their groups. The realist perspective, however, loses the very heart of the constitution making, which is making a higher law. It assumes the best interest of the collective whole is always achievable through the interests of the dominant interests on the constitutional making process. If practice of constitution making proceeds on assumptions of realists,

there is a risk of the process being captured by dominant partisan interests since no efforts would be made to safeguard against these demands.

The significance of idealist perspective is underscored by the very values of democracy. As Elster (1995) argues, the constitution in a democracy serves to protect ethnic or religious minorities from oppression by the majority that may be driven by permanent passions and prejudice. Elster further argues that a constitution should be designed against those aspects of a country's harmful cultures and traditions. For diverse societies, the interests of the dominant section of the society may not reflect the interests of the whole society. As such the idealist appeal for sobriety and constitution making void of partisan influence aims to achieve the interest of the society as a collective whole. It is only those players in constitutional making that assume a position distinct from the sections they are representing that can formulate an independent and objective constitution. Partisan interests may not always be against national interests but to avert the perilous impact of such interests where the two are in conflict, deliberate measures should be taken that the process is insulated from such. The argument is that a constitution should, as nearly as possible, represent consensus, and that consensus is more likely to be reached if issues are decided on merit instead of party or factional interests and preferences (Elster, 1995). Where bargaining of interest is the norm, the whole process risks producing a constitution that is not owned by the people. This is a threat to the spirit of constitutionalism since constitutionalism requires that people own the constitution and take responsibility against its violation (Kanyongolo, 1998; Ndulo, 1996).

In this study, the recognition of the nature of motivational factors behind the choices that actors make during constitution making process is important in assessing the extent to which democracy is beyond an aristocracy of those who wield power at a particular time or a tyranny of the majority at the expense of the minority. For example, Malawian population is predominantly Christian but it is against the spirit of democracy for Christians to declare Malawi a Christian country just because Moslems and other faith groups are in minority.

2.5 Experience of New Constitutionalism in Zambia and Malawi

2.5.1 Constitution Making in Zambia

The overview of constitution making in Africa presented in the background is a broad picture that to a great extent resonates with the experience of Zambia. Zambia became independent on 24th October, 1964 (Mbao, 2007). Since then, she has undergone four major constitutional changes. At the end of colonialism, Zambia was governed by a constitution produced by a negotiated settlement between the outgoing British and nationalist leaders, Kenneth Kaunda and Harry Nkumbula (Mbao, 2007). The independence constitution was soon replaced by one party constitution in 1973 which created a one-party system in the country (Mbao, 2007).

Towards rebirth of democracy, the need for a new constitution arose. In 1990 president Kenneth Kaunda appointed a commission chaired by Patrick Mvunga with a broad mandate of creating a constitution enabling pluralism (Wamunyima, 2006). The commission held hearings across the country (Wamunyima, 2006). One of the crucial questions during the process was the method by which the new constitution would be

adopted. The commission rejected people's submissions demanding a Constitution Assembly to adopt the constitution (Mbao, 2007). Kaunda rejected most of the commission's recommendations. In turn opposition parties rejected the draft constitution that ignored the recommendations made by the commission. Consequently, instead of a constitution based on the work of the commission, Zambians got a constitution that was negotiated between the ruling and opposition parties (Mbao, 2007). As Simutanyi notes, the product did not reflect people's aspiration (Quoted in Mbao, 2007).

After getting into power, President Fredrick Chiluba instituted another commission headed by John Mwanakatwe in 1993 (Mwale, 2006). In accordance with Inquiries Act, the president set Terms of Reference for the Commission which also included laying down an appropriate method for adopting the reviewed constitution (Mbao, 2007). The commission conducted international tours and conducted consultations where many people demanded, among other things, that the constitution should be adopted through a broad-based Constitutional Assembly followed by a referendum (Mbao, 2007). Chiluba, in White Paper No1 of 1995, rejected 80% of Mwanakatwe Commission's recommendations which included the proposals on adoption of the constitution and 50% plus one requirement for presidential candidates to win (Mwale, 2006:6; Wamunyima, 2006). The constitution was adopted in parliament amid walk-out protest by opposition MPs in 1996.

Before 2001 presidential election, Chiluba attempted to change the constitution for him to contest for presidency for a third term against the two term limit. He failed and retired. His successor, Levy Mwanawasa started with rhetoric suggesting that he would be different from his predecessors noting that "Recent attempts at constitutional reforms

have in fact demonstrated that political survival considerations have been the sole and paramount motivation for these reforms.”² Another commission to review the constitution was empanelled in 2003 (Mbao, 2007). The Mung’omba Constitution review Commission was a first genuine attempt to involve a broad spectrum of Zambian society in constitution making process.³ It conducted public hearings in all the 153 constituencies of the country; held consultation meetings with various target groups; and went on study tours to learn from other countries. The emphasis of the need for people to participate was evident in the recommendation by the commission that the constitution should “explicitly reflect, in the Preamble as well as in the operative part that the people shall adopt, enact and give themselves the constitution” (Mbao, 2007:2). The report was submitted to government in December 2005. Again, the method of adoption of the constitution was raised. The commission recommended that the constitution be adopted by a Constituent Assembly not parliament. Mwanawasa rejected this, arguing that according to Zambian constitution, legislative power was vested in parliament and that there were technical impediments like resources; he went further to produce a road map of five years that would end up with parliament enacting the constitution adopted by the Constituent Assembly (Mbao, 2007: 21-22). He also rejected other proposals including requirement for a majority vote of 50% plus one for one to be president (Wamunyima, 2006). From 2005 through 2007 there was stalemate in the process because of political conflicts between the ruling MMD and opposition parties.

What followed was government enactment of National Constitutional Conference Act that legalised government’s roadmap to adopting the constitution. This Act was

². Statement made to members of the Constitution Review Commission (4 may 2003)

³. Ibid p. 29

condemned by Zambians because it discarded the recommendation of Mung'omba Commission (Kabanda, 2007). Among others, the Act provided that instead of repealing the 1996 constitution, the National Constitutional Conference would only change it; and that after adopting the constitution, the Conference would make a decision on the constitution on whether to have a referendum or not (Kabanda, 2007:1-2).

In summary, the constitution review process in Zambia is to a significant extent stuck in the path taken before democratisation. In terms of popular participation, great strides have been made to depart from the old tendencies as demonstrated in the Mung'omba Commission. The major impediments still remain in the form of political interests; the participation of the people is rendered redundant with the powers of political leaders who decide the course of the processes. The constitutional shortcomings in Zambia include centralisation of the process, mistrust between government institutions (like parliament) and the people; and lack of civic education on the current constitution, which is compounded by difficulties in finding copies of the constitution even for sale (Mwale, 2006: 6-7). The process has been marked by clash between need for people's participation and government's drive to remain powerful over the people.

2.5.2 Contextualising Malawi's Constitution Review

Malawi's experience is not very different from that of the rest of the African continent. Like other African countries, the failure of democratic approach during independence constitution making is well documented. The process also fell short of democratic standards during the democratization process.

Malawi became independent in 1964 under the independence constitution produced out of negotiation between the outgoing colonialists and the country's elites (Kanyongolo, 1998; Hara, 2007). The Malawi Congress Party assumed the monopoly of representing the interests of Malawians during the process (Kanyongolo, 1998). This was soon replaced by the 1966 Republican Constitution that was renowned for its authoritarian face marked by the removal of the bill of rights, which was in the independence constitution (Hara, 2007). The overriding motivation of legislation henceforth was to entrench the dominance of the dictator; these included the limitation of freedoms of association as exemplified by enactments like Public Security Regulation Act that provided room for Banda to detain political opponents without charge (Meinhardt, 2004). Malawi's dictatorship was one of the stable bastions of authoritarian rule following thirty years of strong rule of Dr Hastings Kamuzu Banda and his Malawi Congress Party. It was an era of personal rule where the president was the central figure and there was virtual absence of any legal limits on the powers of the president (Kanyongolo, 1998). Banda wielded power of life and death over his subjects and was once quoted declaring "...Everything I say is Law. It is a fact in this country" (Banda, 1998: 319). This history was brought to an end in 1993 when Malawians voted in favour of multiparty democracy in a referendum with an overwhelming 67% against 33% for single party government (Dzimhiri, 1998). In this referendum, Malawians voiced out their desire to turn a new chapter in the country's political history.

After the failure to seize on the constitution making during the decolonisation to usher in a stable democracy, the democratisation provided another opportunity for Malawians to formulate, through a democratic process, a new constitution embedding

democratic values and shaping the new social economic development of the country. The 1995 democratic constitution of the Republic of Malawi was drafted by the National Consultative Committee (NCC). This was a combination of Public Affairs Committee (PAC) on behalf of opposition groups on one hand, and the Presidential Committee on Dialogue (PCD) representing the Banda regime on the other hand (Kanyongolo, 1998). One of the problems with this constitution making body was that its membership was non-elected that it had no direct mandate from the people to formulate the constitution. In addition, the National Consultative Council was a body that was not accountable to the people (Mutharika, 1995). It lacked the popular legitimacy which should be an integral element of any institution responsible for constitution making or reform.

Second, the process itself was problematic in several aspects. There is generally consensus to the fact that the drafting of the Malawi's democratic constitution was a hurried affair (Banda, 1998). This suggests that there was not enough time to seriously consider the implication of the various elements of constitutional design. The fact that a good constitution requires time to formulate is a significant factor to consider. As Hart, (2003:12) argues, "a democratic constitution cannot be written for a nation, nor can one be written in haste without breaching requirements of democratic process." The constitution of Malawi failed in the authorship as it did with the time space. Members of the international community overpowered the local members of the National Consultative Council as to almost single-handedly drafted the constitution in the name of technical expertise which was lacking among the less experienced local members (Meinhardt, 2004).

Participation of the people is one crucial component of democratic constitution making. After a year of the interim constitution, an effort was made to popularize the constitution. A Constitutional Review Conference was convened in Lilongwe in February 1995, under the leadership of the Constitutional Committee of Parliament, and it was attended by representatives of a cross-section of the population including politicians, traditional leaders, professionals, businessmen, women groups, and young people's associations (Banda, 1998:322). However, the period of four days that the interim constitution was subjected to the representatives of various sectors of Malawi society in attempt to enhance legitimacy of the constitution was too short for the delegates to reasonably scrutinize the comprehensive document (Meinhardt, 2004). District hearings, which would provide the grassroots with room for participation, were hampered by unavailability of copies of the draft constitution to the rural people in local languages (Hara, 2006). In addition, broad participation was stifled by exclusion of the civil society, which were critical in mobilizing the masses during the transition, from the NCC; and lack of education and empowerment of the people (Hara, 2006). All in all "reflecting on the process, it becomes apparent that there can be no valid claim to popular involvement in the constitution making process" (Hara, 2007: 15).

It has been highlighted that the process was largely preoccupied with repudiating the ills of the Dr Banda regime (Mutharika, 1995). However, many motivation factors that occupied the making of our democratic constitution have not been widely discussed. Several cases of analysis of the constitution indicate that Malawi's constitution departs significantly from the realities and values of the people of Malawi (Kanyongolo, 1998; Hara, 2007). Some constitutional choices did not seem to reflect the overarching concerns

at the dawn of democracy. For example Banda (1998) puts forward that one of the major concern during the Constitutional Conference was to design a constitution that would not concentrate power in a chief executive for fear of the Dr Banda regime experience of brutal unquestioned leadership. However, Malawi settled for a presidential system where the president retains significant powers instead of the parliamentary system where the chief executive is checked by the parliament. Along the same lines, Mutharika wonders why the “winner-takes-all” single-member constituency system of parliamentary representation was adopted for a regionally fragmented Malawi (Mutharika, 1995). He observes that this state poses a danger of some minority parties withdrawing support from the constitutional arrangement, which is a threat to constitutionalism and therefore to democracy. Several other illustrations are given that show a disjuncture between socio-economic reality of the people and provisions of the constitution. Regarding participation in election, Kanyongolo points to provisions like one requiring a candidate to a parliamentary seat to be fluent in English language, which limit the right to participation (Kanyongolo, 1998). On accountability, he identifies the absence of the power of the constituents to remove their representatives if they fail them as defeating democratic principle of accountability.

The picture was clear that some work had to be done to improve the process towards the democratic trend. One of the requirements was remaking of the constitution where the vested interest of parties and groups are checked and that principles of the constitution dovetail with Malawi’s indigenous values. The constitution review that started in 2004 had to develop on the 1993-95 experience and correct the weaknesses of the process

including the problem of representation. The process took off when Malawi Law Commission put out a public notice on 20th august 2004.

2.6 Conclusion

This chapter has presented the concepts and theories as well as the practical background of constitution making in Zambia and Malawi that oriented this study. It has been noted that a constitution is important because it is requisite to constitutionalism which is a tenet of democracy. Legitimacy of a constitution is critical to ensuring democratic government. This legitimacy is based on the contents of the constitution but also the manner in which the constitution is made. With regard to the process, new constitutionalism is an approach of constitution making aimed at legitimate constitution through popular involvement of the people. The need for some actors to represent the general public is almost inevitable. The extent to which these representatives can formulate a legitimate constitution depends, to some extent, on them advancing interests of the general public not their own. The next chapter covers the methodology employed in the study.

CHAPTER THREE METHODOLOGY

3.0 Introduction

This chapter explains how the objectives outlined in chapter were operationalizing informed by the theoretical parameters presented chapter two. It first situates the study approach within the epistemological qualitative-quantitative dichotomy. It then presents the sampling procedures of the sources of information. This is followed by an account of data collection techniques used during the study and how this data was analyzed. The chapter concludes a statement of ethical considerations taken care of in the study; which is followed by an acknowledgment of limitations of the study.

3.1 Research Design

This study subscribes to a paradigm of realism (Healey and Perry, 2000) or critical realism (Hunt, 1991) or post-positivism within the epistemological debate of qualitative and quantitative paradigms (Denzin and Lincoln, 1994). Quantitative paradigm proceeds on the assumption that “reality is objective and predictable”; the researcher is independent of what is being researched on; and focus is on statistical measures to discover this reality (Johnstone, 2004:261; Winsker, 2001:137). On the contrary, qualitative paradigm assumes that reality is subjective; the research interacts with the researched phenomena; and the focus of research is on understanding meanings, beliefs

and experiences (Johnstone, 2004:261; Winsker, 2001:137). Critical realism holds that by combining several lines of sight, researchers obtain a better and more substantive picture of reality (Berg, 2004:5). As such critical realism argues that paradigms should not be held as rigid but should be combined where necessary (Johnstone, 2004: 262; Krauss, 2005).

The study therefore employed “mixed method design” or “dominant-les dominant design”. This is whereby the researcher presents the study within a single dominant paradigm but elements of the other paradigm are adopted to answer a particular question (Cresswell 1994; DePoy and Gitlin, 1994 quoted in Johnstone, 2004). In this study qualitative approach was the dominant paradigm with quantitative elements employed with regard to the question of levels of participation. The qualitative approach was largely employed because the study aimed at exploring subjective experiences and the meanings attached to the experiences of various actors in the process of the constitution review; this is best achieved through qualitative means (Marsh, 2002). It helped the researcher to unearth the deeper motivations in the process of constitutional making and explain the observed levels of public involvement. It allowed the researcher to probe, beyond the publicly avowed motivations, forces behind the behaviour and choices of constitutional design made by actors in the process.

3.2 Sampling

The study was conducted at national level and district level. At national level, the first group of respondents constituted key informants who were purposively sampled whereby those considered as rich sources of information on the subject were interviewed

(Robson, 2002). These included representatives of political parties that made submissions to the Special Law Commission, officers of the Malawi Law Commission, commissioners of the Special Law Commission on the Review of the Constitution, those with experience in the constitution making process of Malawi, Academics with relevant expertise, and members of the civil society. The political parties that were selected were the ones that made written submissions to the commission. These included the DPP, UDF, MCP, RP and AFORD. From the parties the numbers of Key Informants were: DPP, 1; UDF, 2; MCP, 2; RP, 1; AFORD, 1. From SLC, two commissioners were samples. 3 officers of the MLC were sampled including the Commissioner. In the academia, 1 Political Scientist and 1 lecturer in Law were sampled. The civil society bodies formed a coalition to coordinate their input into the process; it was the leadership of this network that was sampled. All respondents were sampled for their direct involvement in the process in order to get their experience, evaluation and sentiments regarding the process.

The second phase of sampling at national level involved submissions that people made to the Law Commission on issues under review. This was pure random sampling, which is a method whereby a particular number is picked at interval from the population under study, for example one in every ten (Wisker, 2001:137). The submissions were sent to the Law commission in boxes from various areas across the country. The sampling targeted a representative sample of 40% of the submissions. In the process of sampling, two in every five submissions made to the law commission were randomly sampled from the each box of submission. Through this way, submissions made by about 8000 out 20000 people were sampled. The sample was for purposes of determining the level of

participation across the country and distribution across the country's administrative districts and across gender lines.

At district level, the study employed stratified random sampling. Respondents from the general public, of the youth and adult group (aged above 15), were randomly sampled from each of the Traditional Authorities (TA) area in Zomba according to their relative proportions of population based on the 1998 National Population Census. The population of the district, of the youth and adult population, was 31900. A total of sixty respondents were. Based on relative population, the distribution of the sample across the districts was as follows: TA Kuntumanji 8; TA Mwambo, 11; TA Mkumbira, 0; TA Chikowi, 5; TA Mbiza, 12; TA Mlumbe, 12; TA Malemia, 5; and 7 from the city. This sample was used to provide insights into factors affecting the levels of public participation in the constitution review process besides those found out in the reviewed documents. The stratified random sampling was adopted in order to capture factors that were wide-spread across the district by giving room to all possible respondents but also taking care of the diversity of experiences that might exist across the geographical spread.

3.3 Data Collection

3.3.1 In-depth Interviews

In-depth interviews with the relevant key informants were the major method employed for data collection. As argued by Krauss, “face-to-face interaction is the fullest condition of participation in the mind of another human being, understanding not only their words but the meanings of those words as used by the individuals...allows us a glimpse into how and why and the meaning behind individual's behaviour” (Krauss,

2005: 764) Thus the in-depth interviews helped the researcher to get first-hand information regarding how and why stakeholders viewed the process, other stakeholders, and the issues under review. The key informants included representatives of political parties that made submissions. They provided information regarding why they made particular proposals; whether they regarded the Special Law Commission and the process as legitimate and appropriate. Members of the Special Law Commission were also interviewed to understand how the commission managed the process including submissions to arrive at recommendations, and find out measures put in place to make the process democratic. Experts in the fields of politics and law, and those with experience in constitution making in Malawi, were interviewed to provide the technical assessment of the process. Lastly, the researcher also interviewed some members of civil society organisations that participated in the constitution review process to find out their contribution towards broadening public participation and their evaluation of the whole process. Interview guides, with semi-structured questions, were developed for these in-depth interviews to allow respondents speak in their own words regarding the issues the researcher asked and others matters they felt were relevant (Robson, 2002), which made it possible to capture as much information for this study.

3.3.2 Review of documents

A review of documents was also carried out. Submissions by political parties were reviewed to determine whether they reflected their short-term partisan interests or broader national interests. Submissions from the general public were considered to find out the level of participation and how public involvement varied across districts, gender

and education levels of the population. Documents from civil society bodies were also gathered to gain the civil society perspective of the process. Various reports by the Special Law Commission on the progress of the process and its activities were reviewed to assess its performance towards democratizing the process and find out the extent to which the commission would be said to be autonomous and free from partisan political influences.

3.3.3 Questionnaires

Sixty questionnaires were administered. The aim was to find out the views of the general public regarding the constitutional review process including the factors accounting for their non-participation or involvement in the process. The questions were open-ended to allow the respondents present their varying attitudes but at the same time guard against unnecessary variations. To ensure high response rate, instead of the giving out questionnaires to the respondents to fill, the researcher administered the questionnaires and filled in the questionnaires as the respondents provided the answers. The respondents were randomly sampled from Zomba district (see section 1.2.2).

3.4 Data Analysis

Content analysis method was used to analyze the data from the in-depth interviews and documents that were reviewed. ““Content” refers to words, meanings, pictures, symbols, themes, or any message that can be communicated” (Mouton, 2005: 165). Because the study was exploratory and involved getting the different views (that needed streamlining) through open interview, the content analysis was deemed appropriate. This

involved segmenting information; developing coding categories; and generating categories, themes and patterns (Creswell, 1994:154).

3.5 Ethical Considerations

Some issues covered in this study were sensitive with regards political implications on the respondents interviewed. Some key informants expressly requested for anonymity. Because of this, for purposes of confidentiality, the thesis does not reveal names and identities of the key informants. In referring to the information provided by these informants, footnotes are used to describe their positions instead of citing their names in the text. For example, the respondents are identified as “UDF NEC member” or “DPP legislator.”

3.6 Limitation of the Study

Due to limitation of resources and time, the researcher relied on the questionnaires administered in Zomba regarding the factors that affected the participation of the public in the process. This could be more generalisable to the nation if a national representative sample was used. However the limitation was mitigated by the use of other secondary data regarding the other districts with reference to the insights drawn from Zomba.

3.7 Conclusion

This chapter has outlined how the study was carried out. It has shown the theoretical justifications of the methods and approaches that were used in the study. The next two chapters will present and discuss the findings of the operations presented in this chapter with regard to the purpose of the study stated in the first chapter.

CHAPTER FOUR

ANALYSIS OF PARTICIPATION AND INCLUSIVENESS IN MALAWI'S CONSTITUTION REVIEW PROCESS

4.0 Introduction

This chapter discusses the level of popular participation and inclusiveness of the constitution review process. It considers the level of participation to see whether the proportion of the population that was involved warrants the conclusion that the constitution was reviewed by Malawians. This participation is also analysed in terms of distribution across administrative districts and gender lines to find out if the participation reflected these sections of the country. Some of the factors that affected popular participation are also presented. Actors in the process are identified to find out if they reflected the cross-section of the country's population. These actors include members of the commission that managed the process as well as delegates to constitutional conferences. The nature and activities of the commission are also examined to find out if the commission was viewed as legitimate by other actors and if the process was managed in a way that was people-centred.

The chapter starts by considering the Special Law Commission on the Review of the Constitution (SLC). Its empanelment and composition is analysed first. This is followed by a discussion of SLC's conduct focusing on how autonomous and objective it was. Then, its management of constitutional conference is examined to see if it ensured that the event was a meaningful deliberative forum. The last item on the SLC is how it

managed submissions to make sure that the views of the people really shape the constitution.

The discussion proceeds to examine the level and nature of participation. This starts with participation through target groups. That is followed by participation through submissions people made to the commission; then participation at constitutional conferences. Finally factors that affected participation are discussed before concluding the chapter.

4.1 Examining the SLC

This section looks at the SLC considering how inclusive its composition was and how it enabled or undermined people's participation. The argument is that the nature and conduct of a constitution commission is critical to ensuring that people participate and their participation shapes the process. Its acceptability among actors is also crucial for the process to be seen as owned by the whole population. Preceding this discussion is a background and the framework of the operations of the SLC.

4.1.1 Process of Constituting the SLC and its Composition

In 1998 the Malawi Law Commission, a body constituted and mandated to review all statutory laws of Malawi under section 132 of the constitution, carried out a major review of the constitution. This process was called a Technical Review of the Constitution. The report of this exercise was published in Malawi government gazette on 16th November 1998.⁴ This process was highly technocratic as it was solely done without involving the citizenry. This process is not the subject of this study because it was one of the many

⁴ . MLC (2006) Consultation paper

constitutional developments besides numerous amendments of the constitution during the first decade of Malawi's democracy that preceded the constitutional review process being investigated in this study. However, it is significant in that it demonstrated how closed the process of constitution making was in Malawi. Even after this process, there were many legal conflicts and debates and complaints registered by the public regarding certain provisions of the constitution. It was amid these developments that the government directed that the Law Commission should open the process of reviewing the constitution.

Towards this 'open' process of reviewing the constitution, the Law Commission invited submissions from the general public through newspapers in 2004. There were also consultation meetings with various groups. This led to the development of an Issues Paper that summarised the views that the public submitted. Then, a constitutional conference was organised in March 2006 to present these views to representatives of various quarters of the country and receive more submissions from them. A combination of the Issues Paper and the further contribution at the conference culminated into the Consultation Paper. A special law commission was established; after which a second constitutional conference was organised. After this conference, the commission produced its report.

The Special Law Commission on the Review of the Constitution was empanelled in accordance with section 133 of the constitution of the Republic of Malawi in 2006 with the overall mandate of carrying out the review of the constitution.⁵ The SLC had to review the constitution with regard to the issues raised in the Issues Paper, the Consultation Paper and those raised during the first constitutional conference. It also had

⁵. Constitution of the Republic of Malawi

the duty of conducting further consultations and address any issues that arose during the process and present its preliminary findings to the second constitutional conference. Towards these objectives, the SLC met for three days once or twice every month for eight month to discuss the issues.⁶ It conducted study tours in Namibia, South Africa, Zambia and Uganda to understand how comparative provisions of the constitution were working. It conducted further consultations with stakeholders to accommodate more views. This wide role that the SLC played points to the significance of its impact on the process and therefore the need to study its legitimacy and performance.

The process of establishing the SLC involved the following procedure: Law Commissioner of the Malawi Law commission identified individuals on the basis of “integrity, knowledge, expertise, and what they would contribute”; the names were then sent to the Judicial Service Commission for scrutiny; then the selected individuals were contacted.⁷ These individuals were also selected because of the significance of the institutions they were affiliated to. The 24 member-commission was headed by Professor Z.D. Kadzamira from the University of Malawi. The vice chairperson was Mrs M. Nkosi from the Reserve Bank of Malawi (see Appendix 1 for the list of members of the commission and the institutions they came from).

There are arguments in support and opposition to the need for representation of a cross-section of the society in a constitution review body. Opponents argue that representation is not necessary because what is needed for such a body is expertise in the constitutional issues.⁸ On the other hand, it is significant that a body assigned with this

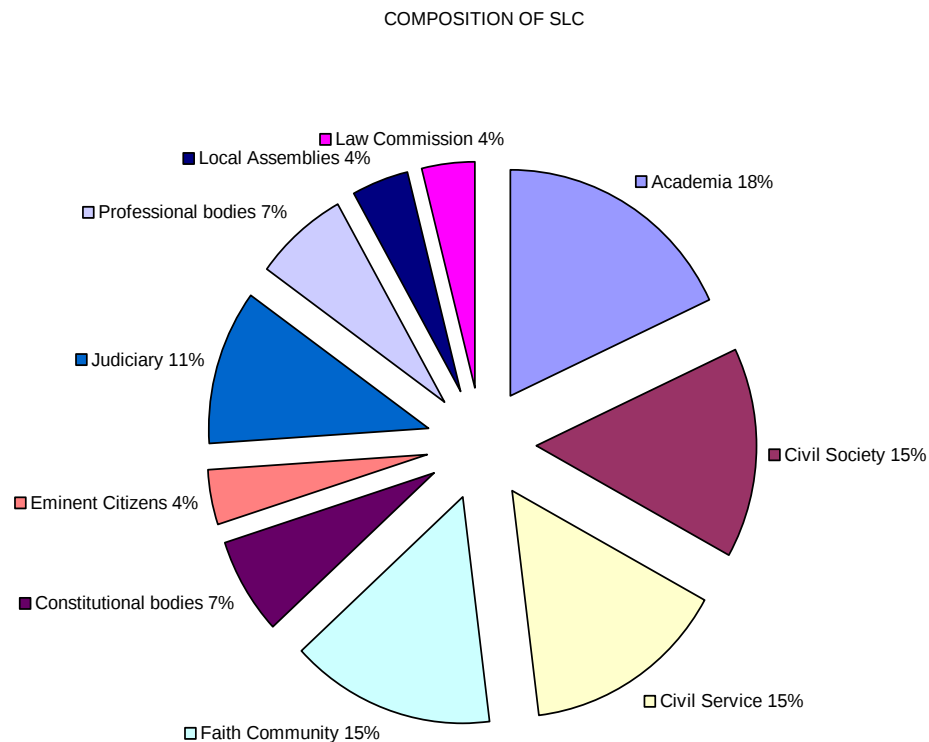
⁶ . MLC (2007) Final Report on the Review of the Constitution

⁷ . Law Commissioner (Personal interview). Also note that the Law Commissioner is appointed by the President in accordance with section 133 of the constitution of the Republic of Malawi

⁸ . Senior Lecturer in Law, University of Malawi (Personal Interview)

task be legitimate both legally and morally because it can shape the course of the resultant constitution and the attached sense of acceptability among the people. In terms of expertise, the members of the Special Law Commission were rich in their various fields ranging from the judiciary, through academia, to civil society. Regarding its representativeness, the commission had membership from diverse sectors of the Malawi Society. The figure below summarises the various publics represented in the Special Law Commission showing percentage representation of these sectors of the Malawi Society.

Fig. 4. 1 Composition of the Special Law Commission by Sector



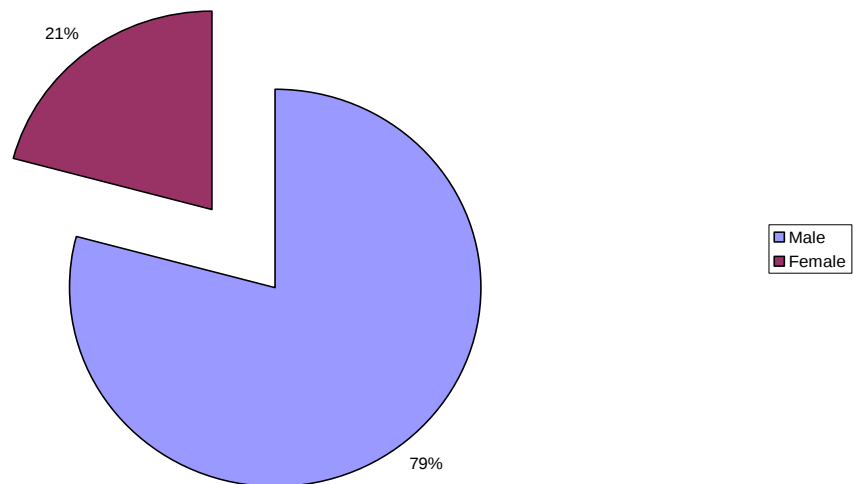
As shown in figure 3.1, the Special Law Commission was a blend of members with diverse backgrounds. On the question of expertise, there was a variety of professional fields such as Linguistics, Law, and Political Science.

However, some important stakeholders in the in Malawian society were conspicuously missing on the list of members of the SLC. These were representatives of political parties and traditional leaders. The exclusion of political parties was however necessary for the political neutrality and independence of the commission. If party representatives were to bargain their interests at the commission, there would be a risk of reaching decisions that did not reflect the views the commission got from the people. More importantly, the process of the review required that after the Law Commission had produced its report, the recommendations and draft bills be presented to the cabinet and the National Assembly where the politicians would deliberate them. Therefore it was not worthwhile to have them in the commission. As for traditional leaders, the question of necessary expertise was critical. Chieftaincy is hereditary such that most traditional leaders lack the proper education to understand the issues with reference to the overarching law and international law. However, in Malawi the chiefs are regarded as custodians of culture. As such they would be an important asset to the commission with regard to the cultural perspective of the constitutional issues. Thus, the exclusion of traditional leaders was a serious shortfall both in terms of representation and knowledge.

The significance of considering women as a special group in the general socio-economic and political life of any country in modern democracy is eminent. This is because of aspirations to correct history of gender imbalance in political processes. Thus in the constitutional review the, the position and representation of the women needed special attention. In the Special Law Commission, 5 of the 24 appointed commissioners were women. This is summarised in the figure below.

Fig. 4. 2 Composition of Special Law Commission by Sex

REPRESENTATION IN THE LAW COMMISSION BY SEX



This proportion of women was far from being representative. 21% representation of women in the commission was too low for a country where 51% of the population were females. For elected position, namely parliamentary seats, Malawi had a women representation of 14 percent. This means that there was need for gender balance in the commission in order to improve overall women representation in the process since the constitutional recommendations would be ‘in the hands of men’ at the time of parliamentary deliberations. At this time, SADC declaration on gender had set a target of 30% representation of women in decision making positions. The appointing authority would have made use of such appointments to improve the women representation.

Attached to the question of actual composition of the SLC is the way in which it was empanelled. This is significant because it determines the extent of the acceptability of the commission. Legally, the commission was established according to section 133 of the

Constitution of the Republic of Malawi. However, opposition political parties argued that the commission was not well constituted suggesting that the president should have consulted major stakeholders including political parties in order to come up with politically neutral commissioners. The UDF, MCP, RP and AFORD further contended that the commission was skewed towards the appointing authority and was full of sympathisers of president Mutharika and his ruling DPP (with RP citing the example of the chairperson of the commission, Professor Zimani Kadzamira).⁹ The opposition parties echoed sentiments like the following:

He (President Mutharika) selected people he could manipulate...just like the (Malawi) Electoral Commission, members of this commission are either Mutharika's classmates, friends or from Thyolo (Mutharika's home district).¹⁰

The essence of these sentiments does not rest in whether they are factually true but in that they undermine the acceptability of resultant constitution.

4.1.2 Conduct of the SLC

The principles guiding the operation of the SLC required that it be transparent and open to get the views of the general public. Towards these values, the commission was expected to be autonomous in its operation, adopt procedures that would solicit wider views and make its recommendations with full consideration of these contributions.

⁹. Members of UDF National Executive Committee and party representatives in constitution review process; MCP MPs and party representatives at in constitution review process; RP Legislator and representative in constitution review process; Aford Legislator and representative in constitution review process (Personal Interview)

¹⁰. UDF member of National Executive Committee (Personal Interview)

Section 136 of the Constitution of the Republic of Malawi stipulates the Malawi Law Commission should be independent from the political entities including government. So the SLC was expected to be independent to ensure objective and impartial decisions regarding submissions that were made during the process. The SLC noted that it was not under pressure from political or any other players to toe their line of interest.¹¹ However, while the ruling DPP upheld the SLC for its professional performance¹², all opposition parties interviewed during the study (UDF, MCP, AFORD, RP) complained of SLC biased conduct. The following statements summarise these sentiments by the opposition parties:

The position (of the commission) on Section 64 (recommendation that the Senate be re-introduced) was because the DPP feared Section 65(On crossing the floor).... Rejection of Chichewa as a national language and proposal to delete Section 65 despite parties' objection at Lilongwe Hotel (Parties consultation meeting) show that the commission was skewed towards the appointing authority.¹³

The commission was not autonomous; it was dancing to the tune of the president (Bingu Wa Mutharika).¹⁴

For example on Language, commissioner Kayambazinthu presented against making Chichewa a national language against her acknowledgement of overwhelming support during consultations....The recommendations it (the commission) made were in the interest of the DPP. Presidential age limit was suppressed to serve Bingu; presidential education limit was pushed ahead because

¹¹. Commissioner of the SLC (Personal Interview)

¹². Member of DPP Governing Council and cabinet minister (Personal Interview)

¹³. MCP legislator and representative in constitution review (Personal Interview)

¹⁴. Aford Legislator and representative in constitution review (Personal Interview).

of Muluzi; and it proposed Section 65 to be deleted even when people including chiefs held that it should be upheld.¹⁵

The authenticity of the claims that the SLC served the interest of the ruling DPP is contentious. Recommendations that the SLC made in its final report are possible indicators of whether the commission took position in the interest of DPP. That is, if the recommendations of the commission were consistently in line with the recommendations of the DPP and against the opposition parties, there would be reasonable basis for accusing the commission of bias. Some of the touchy issues on which political parties accused the commission of impartiality included the re-introduction of the senate; imposing age limit for presidential candidates; re-introduction of recall of MPs; stipulating a national language and Section 83(3) of the constitution on whether a former president who had served two consecutive terms could come back after another term.¹⁶ The following table summarises recommendations made by the SLC compared with positions of major political parties.

¹⁵. RP Legislator and representative in constitution review (Personal Interview).

¹⁶. UDF National Executive Committee members and party representatives in constitution review process; MCP MPs and party representatives at in constitution review process; RP Legislator and representative in constitution review process; Aford Legislator and representative in constitution review process (Personal Interview)

Table 4. 1 Parties Position Compared with Final Recommendations by SLC*

ISSUE	UDF	MCP	AFORD	RP	DPP	SLC
Sec 65 (Crossing the flow)	Maintained	Maintained	Maintained	Maintained	Removed	Maintained
Recall Provision	No recall if no duties of MP	Opposed	-----	No recall if no safeguards against abuse	Re-introduction	Re-introduced
(Senate)	No senate	No senate	No senate without safeguard mechanism	No senate without safeguard mechanism	Reintroduced	Re-introduction of the senate
Sec 83 (3) (Ex-president comeback)	Former president could stand again	Suggested clarity so that Ex-president does not stand	Accuse SLC of targeting Muluzi	Accuse SLC of targeting Muluzi	Former president could not comeback	Addition of requirement that one has not served two terms
Presidential age limit	-----	-----	Accused the SLC of suppressing it to shield Mutharika	Accused the SLC of suppressing it to shield Mutharika	-----	No age limit
Presidential education limit	Opposed			Opposed	Supported	Requirement of first degree
National Language	Supported	Supported		Supported	Supported	Chichewa recognised as national language

*This summary of party positions is based on parties' submissions and Interviews with their representatives. Summary of recommendations by the SLC is from its the final report on the review of the constitution

The table demonstrates no conclusive pattern of correspondence between recommendations of SLC and positions held by any particular political party. In the case of Section 65, president Mutharika and his DPP wanted it removed from the constitution but the commission recommended it be maintained as demanded by the opposition parties and other quarters. Regarding the re-introduction of the senate, the commission recommended its re-introduction as the DPP proposed. It can however be noted that this was one of the four issues that were singled out for Malawians to give their view through suggestion boxes. Majority of the population supported it.

With regard to former president not standing again in an election, the commission recommended that there should be an additional provision clearly stating a president who had served for two terms could not come back.¹⁷ This was almost exactly what the MCP demanded during consultations besides DPP supporting it.¹⁸ In addition to that, according to Afrobarometer survey (round 4), 63% of Malawians share the view presidential term limit. Therefore it can not be argued that the recommendation by the SLC was to please the DPP.

Language was another sticky issue. Whereas in its draft report the commission was against putting Chichewa in the constitution as a national language, it bowed to the pressure of the people and recommended it in the final draft.¹⁹ Thus, the interests of the people prevailed.

The observation under this section is that some actors in the constitution review process including opposition political parties were not impressed with the conduct of the SLC in as far as its impartiality is concerned. They held that the commission was working

¹⁷. MLC (2007) Final Report on the Review of the Constitution

¹⁸. MLC (2006) Issues paper; Former Law Commissioner (Personal Interview)

¹⁹. MLC (2007) Draft Report and Final Report the review of the Constitution

to advance the agenda of the ruling party. The recommendations made by the SLC, in its report, however do not reveal any indication of bias in favour of the DPP. Nevertheless, it is important that a constitution commission does the right thing but it is equally necessary that it must be seen to be doing the right thing by stakeholders.

4. 1. 3 Managing Constitutional conferences

During the process of the constitutional review, there were two constitutional conferences. The conferences were a measure to give the whole process credibility and legitimacy in pursuit of national building. The first National Constitutional Conference was held at the Capital Hotel in Lilongwe from 28th to 31st March, 2006. This conference served as a launching ceremony for the constitution review process. Second, it was a forum where the Law Commission presented matters that had been raised by members of the public and by stakeholder groups in their submissions and during the consultations the commission conducted. These matters were compiled in an Issues Paper and in a Consultation Paper. The third purpose of the conference was for the Law Commission to receive further issues pertaining to the constitution from the participants”²⁰

The second National Constitutional Conference was held at Capital Hotel, Lilongwe from the 17th to 19th of April 2007. As part of the consultation process, this conference served as a forum for the Special Law Commission to present to stakeholders its tentative recommendations on the review of the Constitution. This was to get further input from various stakeholders before producing the final report and recommendations due to be presented to the cabinet and the national assembly.

²⁰. MLC (2007) Final Report of the Review of the Constitution page 14

One of the observations made during the formulation of Malawi's constitution in 1995 was that the National Constitutional Conference that was held in February 1995 provided too short a time for reasonable discussion of issues. During the constitution review processes there were two constitution conferences. However like in 1995, the period accorded to this important exercise was too short. Each of the conferences took place within the period of four days. Although the conferences assembled a cross section of Malawian population, very little time was accorded to discussing the issues. In the first conference, the focus was on paper presentation from experts not discussing issues raised by the public and compiled into Issues Paper by the Law Commission. Besides focusing on the 15 expert presentations, participants from various sectors had room to make submission on the fourth day but not discuss them.

The experience was the same in the second conference. An illustration of how this short period would be described as window dressing of public participation can be with regard to two of the hottest issues during the review process: the executive and the legislature. In each case, the program of the conference involved two commissioners making presentations for thirty minutes and the participants (about 200) were given one hour for discussion.²¹ Thus, in the case of the executive, the participants had to exhaust issues regarding age limits; academic qualification of presidents; tenure of office; rotational presidency; succession to the presidency; method of electing the president; election of the vice president; vacancy in the office of the president and the vice; size of the cabinet; and all questions regarding the executive arm of government in one hour. Thus, the conferences were less of deliberative sessions and more of lectures and briefing sessions. As a result the representation of cross-section of Malawians was reduced to

²¹. MLC (2007) Program of events of the Second National Constitutional Conference

symbolic representation because the SLC could not claim to have based its recommendations on these short-time deliberations.

The second aspect of a national constitution conference is whether participants have fair opportunities to air their views and have them heard. During the National Constitution Conference, different sectors of the society including religious leaders, traditional leaders and political parties were free and were given the opportunity to express themselves. Representatives of the civil society, and all political parties interviewed during the study (DPP, UDF, MCP, AFORD, RP) acknowledging having a fair deal of room to make their contribution within the limited time. However, the first National Constitutional Conference was strained by the opening speech by the president of the Republic of Malawi, Bingu wa Mutharika. In his speech, he presented his stand and that of the DPP on some of the issues under review. The most sensitive issues was the anti-defection sections 65 of the constitution, which he argued was unconstitutional. The president's speech was a cause for concern because it had the potential of prejudicing the process by putting pressure on SLC (which he appointed) and other delegates whose survival was dependent on being loyal to the president like traditional leaders.

With respect to attention paid to the contributions presented by participants, civil society organisations and political parties accused the Special Law commission of imposing its views on the participants instead of listening to them as echoed in the following lines:

The Special Law Commission had its own agenda... Conferences were not participatory because the commissioners were just imposing their views on the issues under review...for example on rotational presidency, language.²²

It was not consultation but simply presentation of position of the commission.²³

I attended only one conference because I was not amused with the process in terms of the way the Commission was conducting itself... Conferences and consultation meetings were not open. The Commission was imposing its views²⁴

The controversy here may be multifaceted. In some cases, members of the commission wanted to determine the right and wrong constitutional choice based on study visits they had and their knowledge as well as preferences. A clear illustration was on the proposal to stipulate a national language in the constitution. The SLC acknowledged that according to 1998 population census report, 75% of Malawian could speak and understand Chichewa language. It also noted that during its survey, 88.7% of the population supported the proposal of making Chichewa a constitutional national language while only 7.5% objected. In spite of these facts, the commission went ahead to recommend against this proposal in its tentative recommendations that were presented at the first national constitutional conference.

²². Aford Legislator and representative in the constitution review process (Personal interview)

²³. MCP legislator and representative in the constitution review process (Personal Interview)

²⁴. RP Legislator and representative in the constitution review process (Personal Interview).

4.1.4 Managing Submissions

Any talk of public participation would be useless if the submissions made are not considered accordingly. In its final report, the SLC declared that “All submissions, comments and criticisms that were received by the Commission were considered and debated and, have been used in developing the final recommendations contained in this report.”²⁵ However, in this study it was found out that some of the submission boxes that had come to the Law Commission from districts were never opened at all. Furthermore, the Law Commission did not have compiled data indicating how Malawians had participated in the process such as how many submissions and what positions people were taking on the issues under review except for 132 people who directly wrote the Commission from 2001 to 2006.²⁶ Officers at the Law Commission alleged that they had lost the data they had entered regarding who participated.²⁷ This casts doubt on whether the recommendations made in its report could be people’s positions or the Commission’s views.

On the question of accountability in handling the submissions, the Commission was expected to acknowledge receipt of the submission. In letters dated 10 April 2007 and 13th April 2007, the Commission wrote to 53 individuals who had made submissions acknowledging their letters.²⁸ Besides these 53 individuals there was no evidence of any further correspondence between the public and the commission.

²⁵. MLC (2007) Final Report on the review of the constitution; page 16

²⁶. The 132 names were in a filed document 179 titled “List of People who made Submissions to the Review of the Constitution”.

²⁷. Officers of Malawi Law Commission.

²⁸. Filed documents 17 and 215

Beyond the ideal of accountability, transparency in the process of constitutional review is as significant. Transparency entails that the general public should be aware of the way their submissions are being considered and how the process is progressing. The Commission made efforts to inform the public of the process. There were adverts in the Newspapers, TV, radios and banners across the roads of the country. However, the information did not adequately reach the general public (see section 3.3). The Commission compiled in form of various documents the issues at various stages of the process that provided a picture of progress of the process. These included the “Issues Paper”, “Consultation Paper”, “Summary of Proceedings of the first National Constitutional Conference”, various issue-based “Discussion Papers”, and the “Final Report on the Review of the Constitution.” The challenge, nevertheless, was access to these documents. Months after the final report had been submitted to the Ministry of Justice representatives of various sectors in the process like political parties had not seen the report.²⁹ The documents were posted on the website of Malawi Law Commission but in a country where only 4 in 1000 people³⁰ access internet services, this could not count as away of providing information to the public. The documents were also available for sale at the Malawi Law Commission. Each of the seven Discussion Papers was selling at K300; the Consultation Paper and Issues Paper were also at K300 each; the final report was selling at K1600.³¹ Thus for one to clearly follow the process, it cost close to K5000 which most Malawians could not afford. This is limiting to meaningful participation in the process because people were not fully informed about the process.

²⁹. RP Legislator and representative in the constitution review process

³⁰ . UNDP (2008) Human Development Report

³¹. The prices were available at the library of the Malawi Law Commission

4.2 Analysis of the Nature of Participation

The SLC adopted several measures in its methodology to broaden participation. This was a deliberate effort of “confidence building particularly among the major political players and stakeholder interest groups.”³² “The Law Commission sought to instill a sense of ownership of the process to all Malawians to ensure legitimacy and credibility of the process.”³³ In this drive, the Commission invaded the media with various adverts and programs informing the public of the process and inviting contributions; banners were put across roads in cities and towns of the country; meetings were conducted with target groups of the Malawi society. The level of public participation in the review process can be tracked at three levels: consultation of target groups; submissions throughout the process; and during conferences. It is important to consider the diversity of participants in the process so that the process is representative of the major sectors of the society.

4.2.1 Participation through Targeted Groups

Meetings with target groups went right from the first phase of the process. Issues in the “Consultation paper” were a product of meetings with these targeted groups. The Consultation Paper built on the Issues Paper which the Commission developed from written submissions that it received from various sectors of the Malawian society from October 2004 to May 2005.³⁴ The aim of conducting these targeted meetings was to “take on board views of those Malawians who (did) not have an opportunity to write to the Commission to ensure that the consultation process was as inclusive as possible.”³⁵

³². MLC (2006) Consultation Paper page 11

³³. Ibid

³⁴. MLC (2006) Issues Paper page; 5

³⁵. MLC (2006) Consultation Paper; page 11

To that end, the Commission met with representatives of political parties both in Parliament and outside Parliament particularly the MCP, UDF, PPM, AFORD, MGODE, RP and DPP; Chiefs from all the three regions of Malawi, civil society organizations, the youths and children, faith groups, the media, academics from the University of Malawi and Mzuzu University, professional bodies, the Parliamentary Women Caucus, Principal Secretaries and Chief Executives of parastatals, Judges and Magistrates and Cabinet Ministers representing the executive.³⁶

A conspicuous picture here is that the target groups did not focus on the general public. The extent to which the targeted representatives of Malawi society would be said to represent the general public hinges on the principle of representation. The first one is on whether the targeting was inclusive of the diversities of the country. The second one is whether they presented the view and interests of the publics they were said to represent (this is discussed in chapter four).

With regard to the first question, it would be acknowledged that the most influential publics in any process in Malawi are: the executive, governmental institutions, religious groups, political parties, and civil society organizations. The position of less-advantaged groups in the society like women and children is increasingly getting focus in political processes across the globe. The academia and professional bodies are indispensable sources of expertise much needed in such a process as the reviewing of the constitution. Thus the targeted groups were reflective of the diversity of the Malawi population. The fact that in targeting traditional leaders, the SLC made sure that traditional leaders of all the regions of the country were involved is worth noting. This is significant towards a national constitution for a country which has been marked by politics of regionalism.

³⁶. Ibid

4.2.2 Participation through Submissions to the SLC

The first phase of the constitution review focused on soliciting and reviewing written submissions from the public to the Law Commission. The process of direct submissions to the Commission continued throughout the process. For some issues, submissions boxes were placed in NICE offices across the country where people could post their views to the commission.

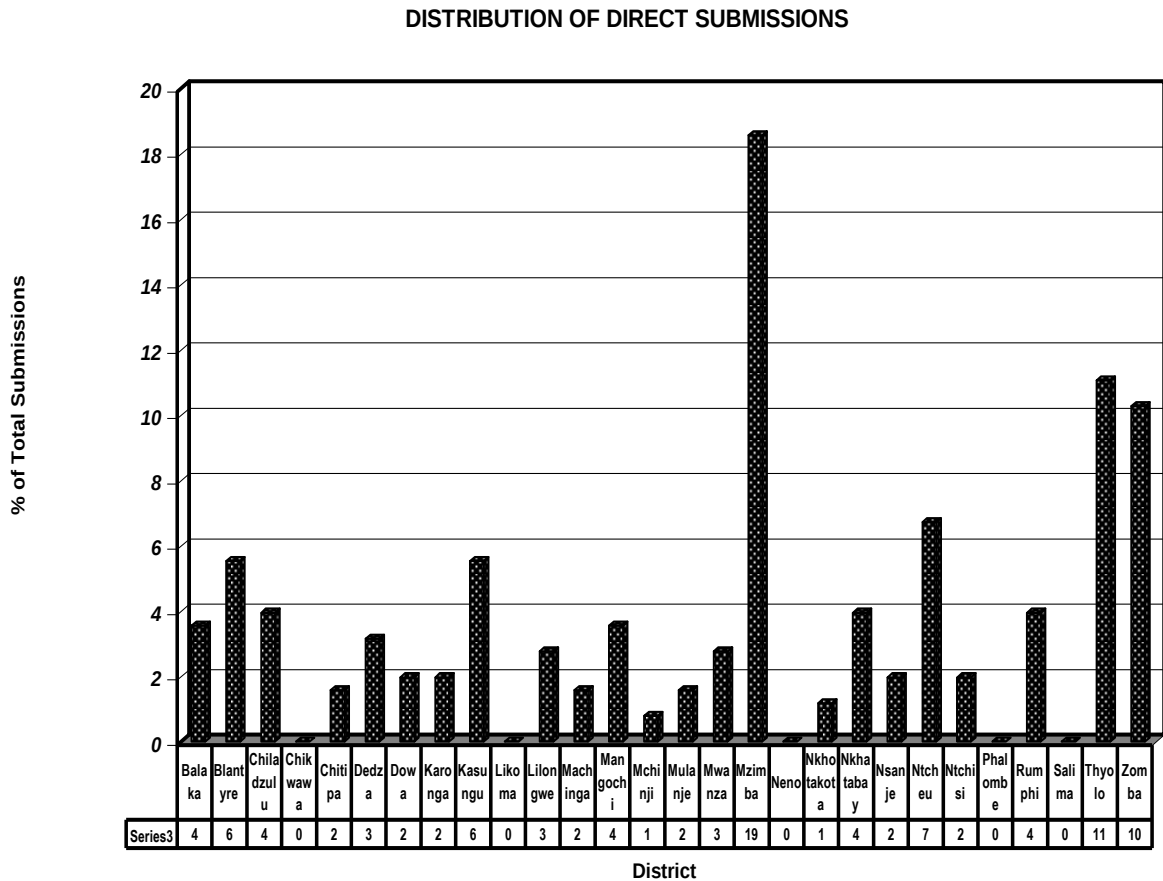
These direct submissions are probably the clearest indication of how the general public participated in the process. This is because the process of sending letters meant the use of resources and for some people it required travelling long distances to the Post Office. It also highlights the extent of accessibility of the process to the general public. There were a total of about 250 submissions direct to the commission.³⁷ With about 5 million people of Malawi population said to be literate, this represents 0.005 percent of all literate Malawians who could ably participate through writing to the commission.³⁸ This is certainly very low participation.

The representativeness across geographical and social groups is also essential in understanding whether the resultant revised constitution would be said to be a people's product. In terms of geographical distribution Mzimba made the highest submissions (47), followed by Thyolo and Zomba with Phalombe, Neno and Likoma making no submissions (see Appendix 2 for details of sources of submissions according to districts and sex). The figure below shows the distribution of submissions according to districts as percentages of total direct submissions to the Law Commission.

³⁷. The researcher physically counted the submissions filed by the Law Commission

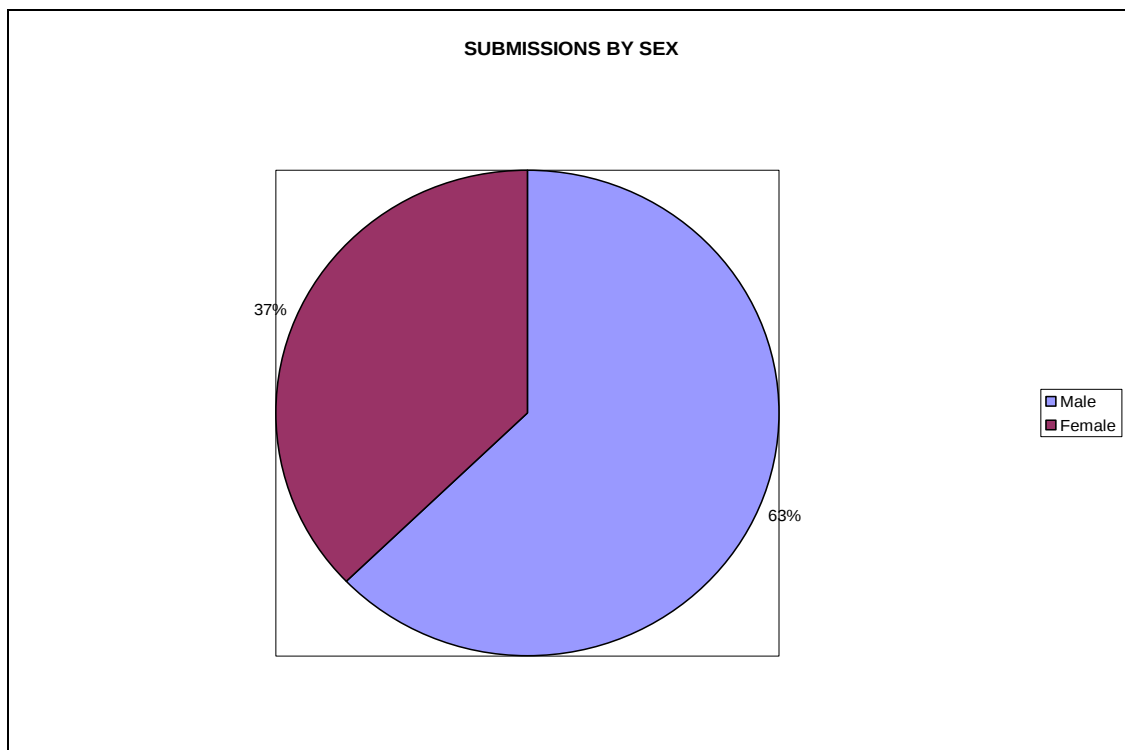
³⁸. Calculated based on NSO (1998) data on Literacy level in Population and Housing Census

Fig. 4. 3 Distribution of Direct Submissions by District



The figure shows that Mzimba accounted for about 19% of all written submissions followed by Thyolo with close to 11 and Zomba about 10; then Ntcheu with 7; 6 for Blantyre and Kasungu; 4 for Rumphi, Nkhatabay and Chiradzulu. It is very clear that the process was not representative and based on this pattern of submissions the constitution cannot be reflective of the characteristics of Malawi society. This distribution has very serious implications on the constitution making process because geographical regions are associated with tribal groups, and Malawi's politics is regionalistic in nature. In terms of gender lines, the performance of females was not representative. The national distribution of submissions by sex is presented below.

Fig. 4. 4 Distribution of Direct Submissions by Sex



The 37% participation is commendable if compared to representation of women on the SLC (21%) and national representation of women in parliament (14%); and considering that the SADC target of representation of women in decision making positions was 30%. However, this was not reflective of the fact that 51% of the population were females. One of explanations can be the disparity of formal education levels between males and females.³⁹

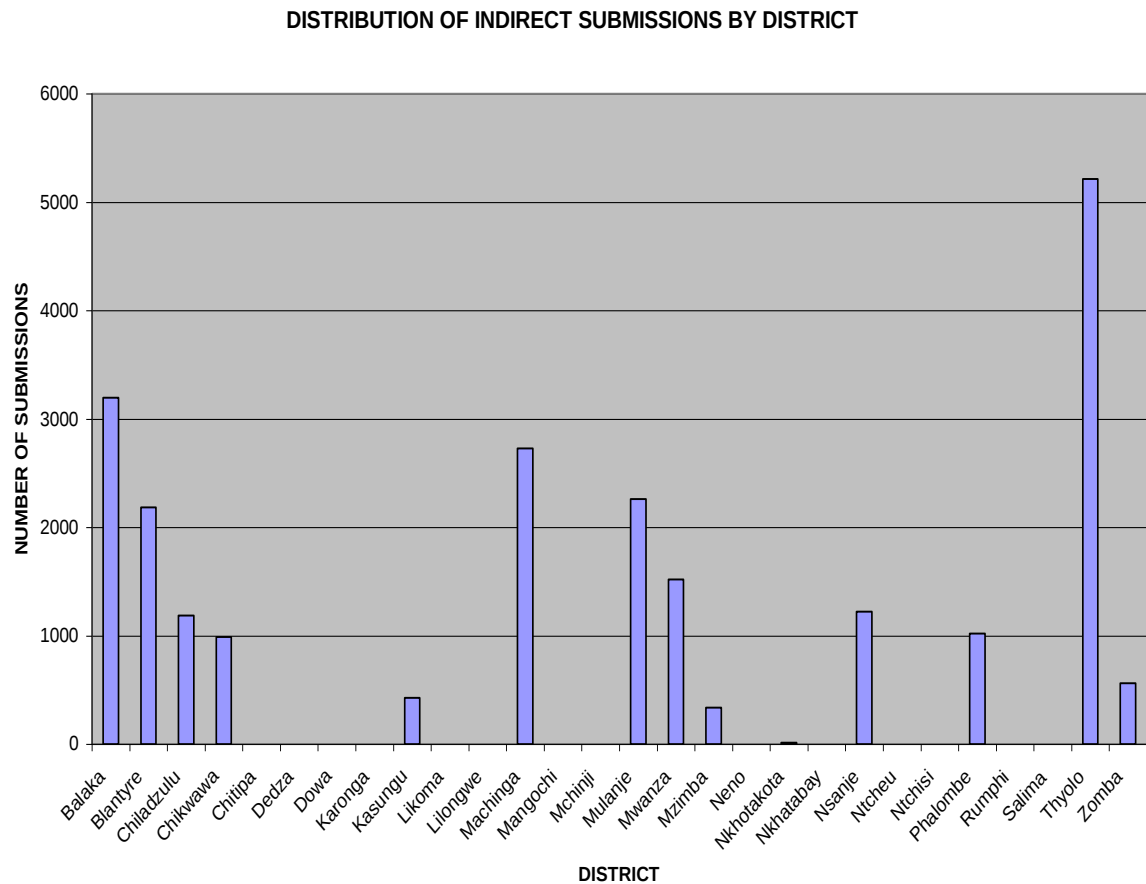
Besides the submissions made direct to Commission, district offices of the National Initiative for Civic Education (NICE) served as important centres for public submissions.⁴⁰ These were particularly for issues that needed wider consultation as

³⁹. Literacy rates among males and females was 64 and 51% respectively according to NSO (1998)

⁴⁰. MLC Law Reform Officer (Personal Interview)

specified by SLC namely: Re-introduction of the Senate; National language; Recall provision; and Death Penalty. The participation could arguably be said to be issue-driven and limited. The greatest number of Malawians made their submissions through this channel. Across the country about 20000 Malawians made their submissions through these voting boxes⁴¹. Of all the youth and adult Malawians (of above the age of 15), this accounts for 0.4%⁴². With regard to geographical representation in participation, the figure below shows the submissions by administrative district:

Fig. 4. 5 Distribution of Indirect Distribution by District



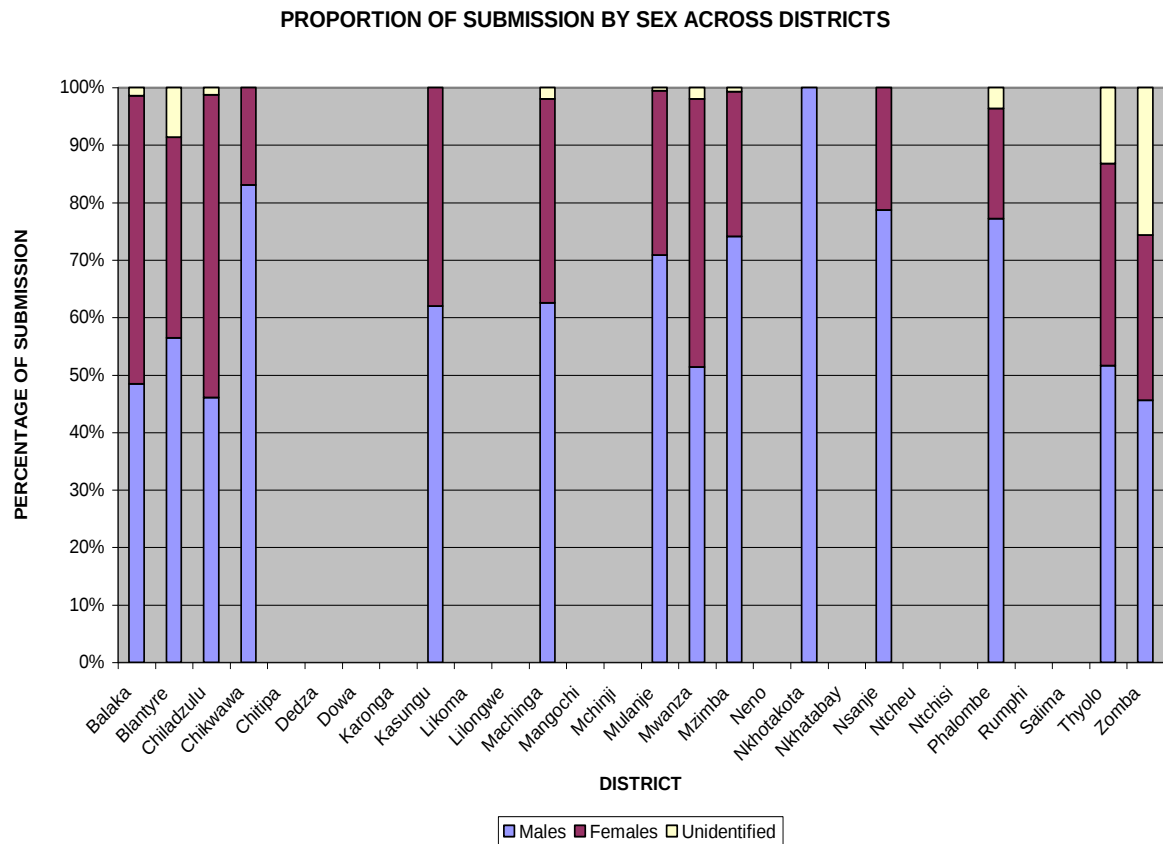
⁴¹. This is based on counting of submission from boxes at the Malawi Law Commission.

⁴². Calculated based on NSO (1998) data on Population and Housing Census

As shown in the figure 3.5, most of submissions accounting to close to 25 percent were from Thyolo, followed by Balaka and Machinga. The common feature of the districts that made large numbers of submissions was that the submission came in several boxes and envelopes labelled by names of villages, primary schools and other localised institutions. In Thyolo there were 18 of such centres; in Balaka had 14; and Chikwawa had 7. This suggests that the closeness to the point of making submissions was a significant factor determining the level of public participation. As noted in case of direct submissions, the wide disparity in participation across the districts means that the process was not representative; therefore the produced constitution cannot be regarded as representative of the Malawi population.

Even in these indirect submissions, the level of participation for males was higher than that of females. However in some districts the percentage difference between the sexes was very small. Balaka and Chikwawa registered almost equal proportion of submission between male and females. It should be noted that some submissions were not identified as made by either males or females because they had no names of authors. The figure below shows the distribution of submissions across the country with proportion of women for each district.

Fig. 4. 6 Proportion of Submissions between Sexes across Districts



It is clear from this figure that the process was not representative across the districts with regard to gender lines.

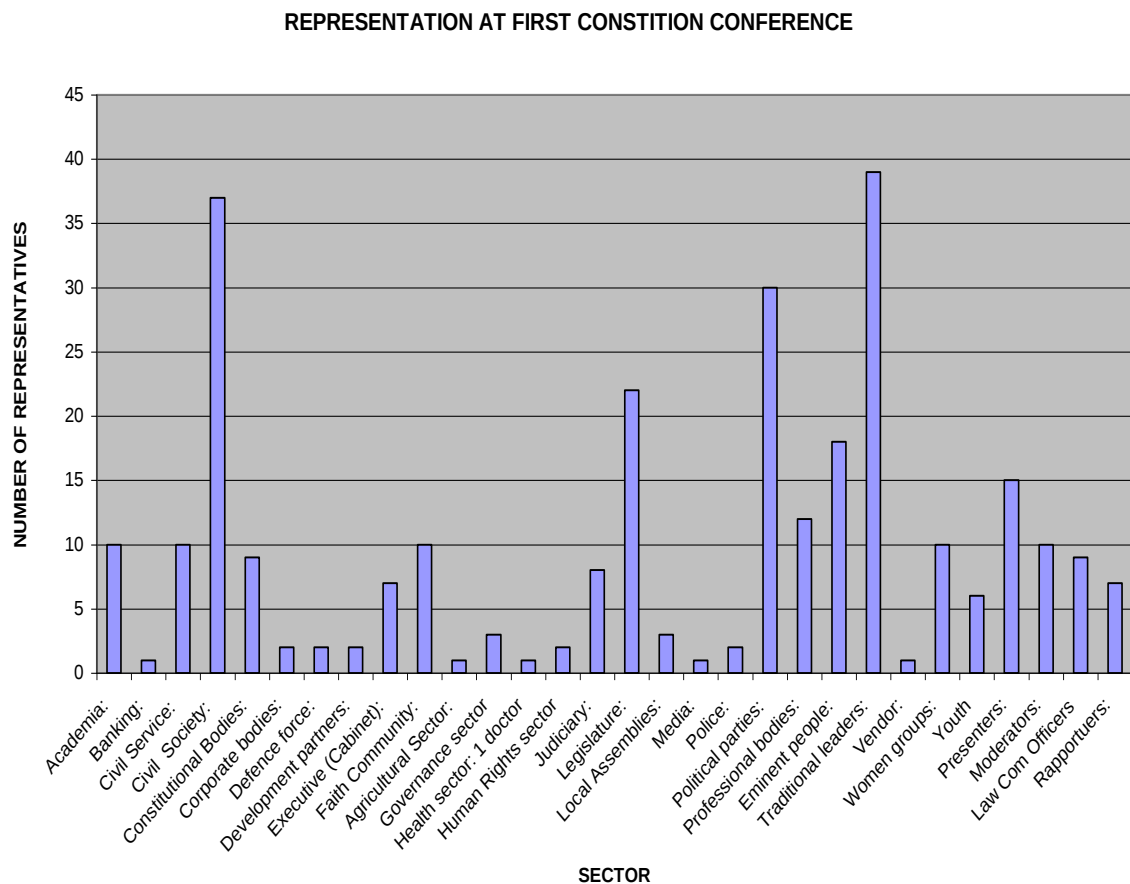
4.2.3 Participation through National Constitutional Conferences

Due to limitation of resources and need for quality discussions, national constitution conferences cannot accommodate every individual. Therefore those who get recognised to be participants at such conferences should be representatives of certain publics in the society. For this reason the choice of who should be invited to participate is crucial towards formulating a legitimate constitution. Two National Constitutional Conferences

were held during the process in 2006 and 2007 with different numbers of participants and differently composed.

The first National Constitutional Conference was broad based with about 300 delegates from various sectors. This was double the initial number planned by the commission because stakeholders protested during consultation meetings. The figure below shows representation of these publics at this conference.⁴³

Fig. 4. 7 Participation at First Constitution Conference by Sector



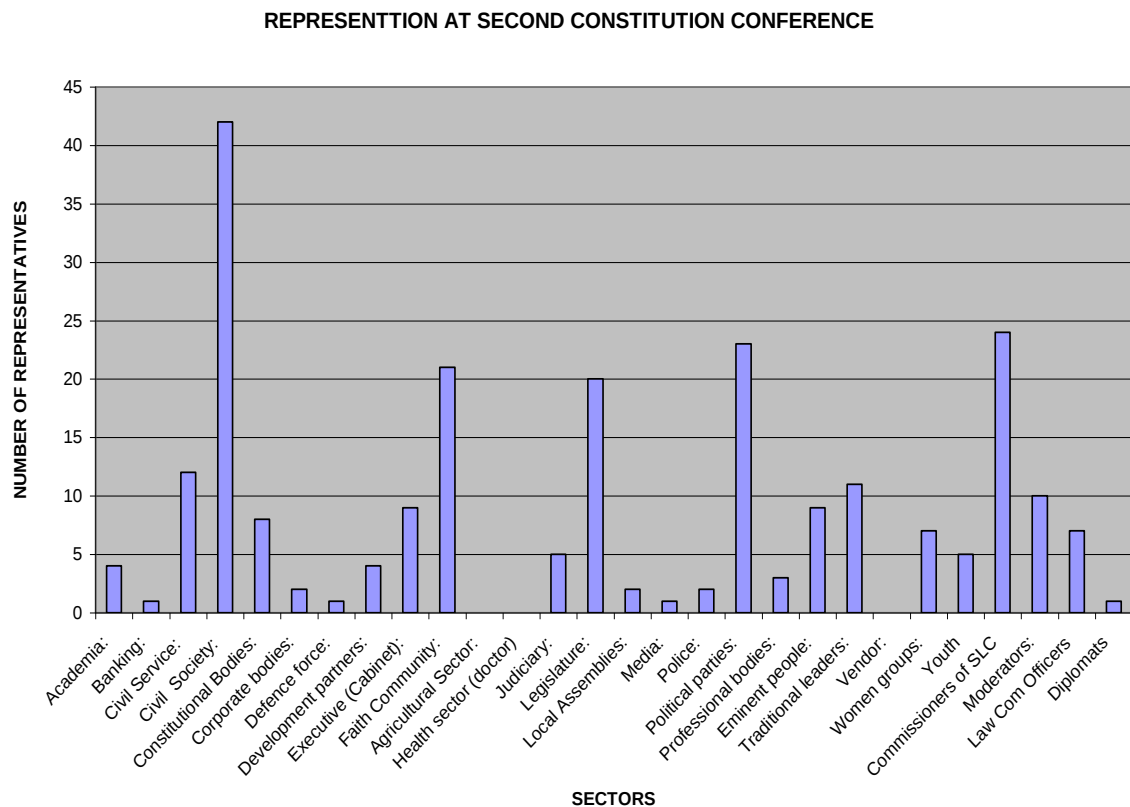
Traditional leaders constituted the greatest single bloc with 39 participating in the conference of close to 300 participants, seconded by civil society organisations with 37

⁴³. The figure is based on Law Commission's documentation in "Summary of the Proceedings of the First National Conference on the Review of the Constitution"

excluding two from human rights sector and three in the governance sector according to categorisation by the Law Commission in its selection of the participants. As figure 3.7 shows, delegates to the conference were drawn from a cross-section of the population such that the decisions of the conference could be regarded as representative if the delegates really presented the interests of their constituencies.

The number of participants in the Second Conference was reduced to just about two hundred from the three hundred in the first one. The justification for this reduction was financial constraints. However the diversity of the participants was as wide as during the first conference.⁴⁴ This is demonstrated in the figure below.

Fig. 4. 8 Participation at the Second Conference



⁴⁴. MLC (2007) Report on the Proceedings of the Second National Constitutional Conference

In both conferences, delegates were drawn from a diversity of publics. There were complaints that the conferences were dominated by people from the Northern Region of the country.⁴⁵ These allegations could not be established in this study because the participants to the conferences were only identified by sectors they came from not their districts of origin.

The representation of women was a problem in both conferences. This was also underscored by Aford's female parliamentarian, who argued that in other aspects, the representation was complete but women were too few. The figure below shows the representation of women relative to men in the first and second conferences.

Fig. 4. 9 Women Participation in Constitutional Conferences



Besides women who came to the conference in various capacities, women groups were allotted their quota of seats at the conference as shown in figure 3.8. However the

⁴⁵. RP Legislator and representative in the constitution review process (Personal Interview)

overall number of women was on the lower side compared to men presented by figure 3.9. This disparity reflects the fact that most decision making positions in the public as well as private sector of the country are held by men. Whether the low representation of women had impacted on the nature of the final recommendations by the SLC may not be conclusively asserted. However, the following table juxtaposes all submissions made by women groups (in the name of Gender Coordination Network- GCN) at the first constitution conference with final recommendations by the SLC. This is to find out if there is correspondence between the two.

Table 4. 2 Women Submission Compared with Recommendations by SLC

SUBMISSION BY GCN	RECOMMENDATION BY SLC
Marriage by repute should continue being legally recognized	Recognition of marriage by repute should be maintained
Foreign husbands of Malawian women should be allowed to attain Malawi citizenship if they so wish	Marriage alone should not be basis for attainment of citizenship. Citizenship Act should determine each particular case
Section 20 of the Constitution to include HIV and AIDS as status on which discrimination is prohibited	The term “other status” in the said section included HIV/AIDS such that there was not need explicitly state HIV/AIDS

From the table, ‘women issues’ did not receive positive recommendations from the SLC. However, issues raised by women groups (according to records of the conference) are too few to conclude that their low participation was the cause for the ‘negative’ recommendations. At the same time, it is logical to argue that if there were a representative number of women the support for ‘their’ issues would be stronger and this

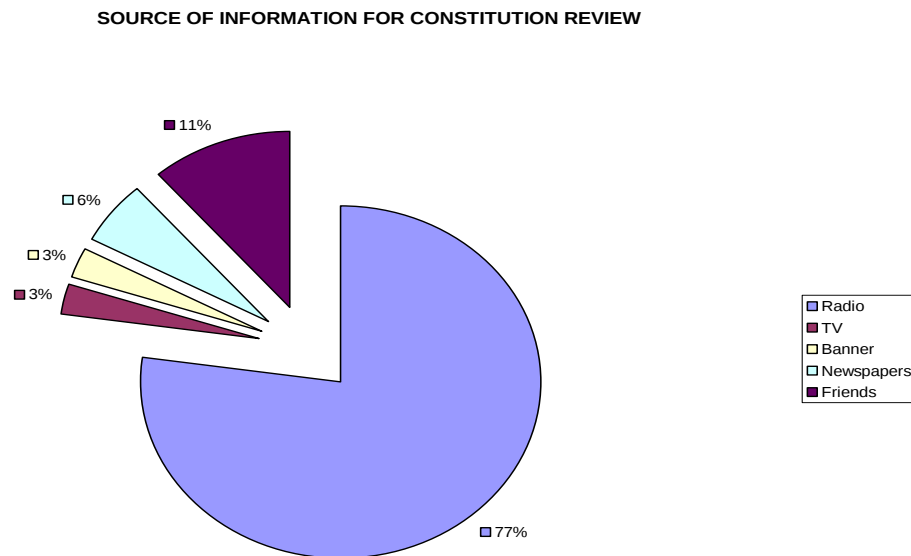
would attract the demanded constitutional choices. In the final analysis, the point remains that representation of women is in itself needed if the constitution making process is to be legitimate.

4.3 Factors that Affected Public Participation

It is worth noting that overall, the level of participation was low. In Zomba only 0.2% of the possible population of 15 years and above made their submissions. From the observation of nation distribution of submissions and the interviews with the members of the general public in Zomba, the following factors would account for the levels of participation. First, knowledge of the constitution and the significance of the issues under review. During the study in Zomba, 70% of the respondents did not know what a constitution is; 15% had seen a copy of a constitution of which 67% was in English and 33% in Chichewa. Without the knowledge of the constitution, it is obviously impossible for one to talk of participating. The fact that most of the available copies of the constitution were in English shows the missing effort to make the constitution available to the general public the majority of which cannot understand English.

The second major factor was access to information. The Special Law Commission used Radio stations, Television, Newspapers and banners to disseminate information on the process to educate the public and invite submissions. 58% of the respondents in Zomba had not heard compared to 42% who had heard of the constitution review process. The 42% got the information from various sources as presented in the figure below.

Fig. 4. 10 Media of Access to Information on Constitution Review

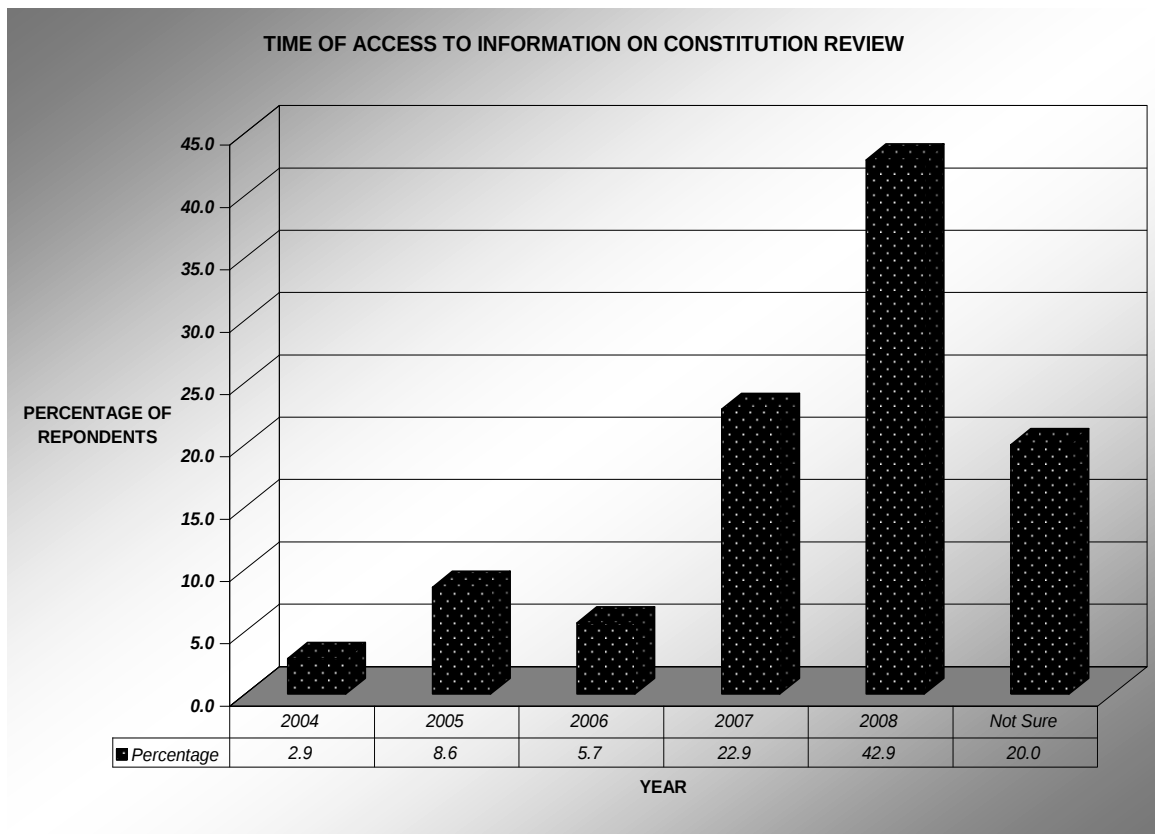


From the figure above, radios were the most accessible media. The large number of people who had not even heard of the process suggests that the Commission did not do enough to disseminate the information or the media channels employed were not very effective. The picture in Zomba may reflect that of the rest of the country because just over 50% percent of the total Malawi population had access to radios.⁴⁶

On the same point of access to information, the time when people got the information is as crucial. It defines whether people would participate or just get information for information sake. The figure below shows the time at which the respondents accessed the information on the constitutional review process in Zomba.

⁴⁶. NSO (1998) Population and Housing census

Fig. 4. 11 Time of Accessing Information on Constitution Review



Noting that by April 2007 a draft report on the review of the constitution had been prepared and by August 2007 the final report was ready, about 50% (as shown in the figure) did not have an opportunity to participate because they had not heard about it.

The third factor is closeness to points of access to the process. As noted on the level of participation, the districts that had high levels of participation like Thyolo had submission made at village centres or primary schools and submitted to NICE offices at the district. The need for decentralisation of submission centres was echoed by members of the general public in Zomba as expressed by one 61 year old respondent of TA Mwambo: “If they put a box at the chief’s place that we present our views there or if we

were gathered at the chiefs place....many of us would present our views.”⁴⁷ Thus the closer the point of contact the process is, the higher the likelihood that people would participate in the process.

4.4 Conclusion

In this chapter the focus was on the levels of participation across geographical and gender lines and other various sectors of Malawi society. It has been observed that members of the SLC were from diverse quarters including the academia, the clergy, professional bodies, and bureaucrats. It has also been noted that efforts were made to get the views of the general public through writing to the commission, submission boxes at district level, targeted consultations, and constitutional conferences. In the conferences, delegates were also representative of the major sectors of the Malawi population.

In spite of these observations, it has been presented that there were serious problems with the process that undermined the representativeness of the process. Firstly, the representation of women in the SLC, in making submissions, and among delegates to the two constitutional conferences was very low. Secondly, very few Malawians made submissions to the commission. In addition, some of the submissions that were made by the general public were not considered at all. Furthermore, the constitutional conferences were substantially sessions for experts and the SLC to school and inform the delegates regarding various constitutional issues not forums for deliberations. This undermined the essence of the presence of these representatives of the people. There were also problems of access, including the materials on the progress of the process and general information. The acceptability of the commission to actors in the process was also a serious

⁴⁷. A response to questionnaire.

undermining factor. The SLC was constituted, and conducted in a way that did not guarantee actors, like political parties, impartial decisions. These factors show that at best, the process was symbolically representative but substantively limited. The following chapter discusses the role of politics in the process and the choices of the ‘representatives’ of the people.

CHAPTER FIVE

POLITICS AND THE CONSTITUTION REVIEW PROCESS

5.0 Introduction

This chapter deals with the subject of politics in the constitution review process. It examines the extent to which the proposals and demands made by major political parties were a reflection of their respective short-term partisan interests; and how these partisan interests shaped the issues under review as well as the milieu of the constitutional review process.

The first section highlights the major developments in the politics of the country just before, and during the time of the constitution review. It presents how these issues influenced the behaviour of political parties in the process. The next section discusses the question of whether political parties' submissions were motivated by reason or their self-interests. This is followed by a discussion on the relationship between constitutional choices that party leaders held and the positions of their parties. The last section analyses whether constitutional choices by political leaders reflected their individual interests.

5.1 Interplay of interests and Constitution Review Process

The review of the constitution in Malawi was done at a time of high political tension in the history of Malawi's democratic era. It followed the resignation of president Bingu wa Mutharika from the party that ushered him into power, the UDF, to form the DPP. This was the beginning of a period of gridlock between the opposition dominated

National Assembly and the Executive. The opposition pushed for the invocation of Section 65 of the Malawi Constitution that threatened the removal from parliament of most MPs of the newly formed DPP that had crossed the floor from the UDF and RP after Mutharika dumped the UDF. The heat was evident in the National Assembly with opposition parties demanding the implementation of Section 65 before passing the budget; on the other hand the ruling DPP used the national budget to shield its members from the imminent eviction. Some members of the general public, led by civil society organisations, protested against the behaviour of many representatives in the parliament.

It was a time when the stakes were high on constitutional matters. The UDF was on the campaign of having former president, Bakili Muluzi stand again. His illegibility was contested with some arguing that he was not eligible because Section 83(3) required that a president who had served two terms would not contest again.⁴⁸ Others held a different view arguing that the phrasing of this section meant that if a president has served two consecutive terms and left office, he or she would contest again.

This political environment affected the constitutional review process. It shaped the perception of the stakeholders about the process and how it was conducted. The significance of the impact of the political environment was underscored even in very preliminary consultations. “The Law Commission was further cautioned to strategize properly on the timing for the presentation of its Report to take into account the political climate.”⁴⁹

During consultations with some political parties namely MCODE, RP and AFORD, the Commission was cautioned against relying on MPs as representative of the people

⁴⁸. Constitution of the Republic of Malawi

⁴⁹. MLC (2006) Consultation Paper, Page 13

because of the recent history of constituents complaining of lack of consultation by parliamentarians. Other stakeholders, for example civil society organizations in the Northern and Southern Regions, even questioned the necessity of involving the rural masses and the general public in the constitutional review process when at the end of the day parliamentarians, who normally pursue their own agenda, would have the final say on whether the recommendations of the people are to be enacted or not.⁵⁰ This was in reference to the fact that after finishing its job the commission had to present recommendations to the Minister of Justice and Constitutional Affairs. In turn, the Minister had to present it to parliament for deliberations.

During the process, there were skirmishes between the some stakeholders and the Commission. The UDF, for example held that the whole process was a political idea of the ruling Democratic Progressive Party against the UDF and its leadership:

the process was ill-conceived...the government instead of fighting Muluzi in political circles wanted to bar him through changing laws...that is why they don't want to look at the submissions because they know they cant achieve their goal through the parliament (If the amendments were presented to the parliament, the opposition would defeat them).⁵¹

The Commissioners were thus viewed as stooges of the DPP. This saw the UDF accusing the Commission of targeting its leader in its recommendations⁵² and the

⁵⁰. Ibid

⁵¹. Member of UDF National Executive Committee (Personal Interview)

⁵². Submissions by the UDF ; and Press release dated 23rd April 2007 by the Law Commission in response to UDF accusations

Commission accusing the UDF of feeling too superior and working to control the constitution review process.⁵³

The consideration of political interests also threatens the next stage of the process, where parliamentarians are going to consider the amendments to pass them into law. The ruling Democratic Progressive Party evaluated with various words of praise to the Special Law Commission. According to DPP, the process was “Open...accessible...transparent...consultations were well done...people had chance to air their views.”⁵⁴ In a sharp contrast, all the opposition parties’ appraisal point to the limitations of the process. For them, the process was politicised...not transparent...inadequate in consultation...the commission was imposing its views on the people.

5.2 Political Party Submissions and Party Interests

“As for DPP, the submissions we made to the Commission were views of the people in our constituencies...the Senate, for example, it is the people in our constituencies that said they want senate back.”⁵⁵ These are the views echoed by leaders of political parties, all positing to be representatives of the people not their own particularistic interests. These sentiments show that political leaders realise the significance of placing themselves above temporal party motivations and serve national common interests.

During the constitution review process, the parties presented positions that were sheer reflections of their interests. An analysis of the positions based on their submissions to the Commission shows that they were addressing their immediate concerns at the time

⁵³. MLC Law Reform Officer (Personal Interview)

⁵⁴. DPP member of National Governing Council and Cabinet Minister (Personal Interview)

⁵⁵. Ibid

of the review. Following are summaries of the positions of three main political parties on issues of their concern as presented in their written submissions to the commission and presented by their representatives during interviews for this study.

First, the United Democratic Front (UDF) presented written submissions on a wide variety of issues. It opposed the proposal to repeal an anti-defection provision of the constitution (Section 65). This was a time when it had lost its MPs to the ruling DPP and had petitioned the Speaker of the National Assembly to declare their seats vacant to punish these former UDF MPs. On the question of whether MPs should be allowed to double as cabinet ministers, the party proposed that MPs should be allowed to serve as ministers but the president should only appoint an MP from opposition parties after consulting their parties. The party had been a victim of movement of its former MPs to the ruling DPP to have cabinet positions. The party supported the status quo on party funding. The requirement was that parties should be represented in parliament and get at least 10% of national votes in elections. At this time, only the UDF and MCP qualified for this funding. Preventing other parties from accessing the funding would help the UDF maintain an advantage over others in terms of resources. On academic qualification for presidential candidates, the party argued that setting minimum education requirement was “not only unnecessary but also unusual.”⁵⁶ Being led by Bakili Muluzi who was not well educated, opposing this provision was in the interest of its leader. Following the experience of president Bingu Wa Mutharika dumping the UDF after it had sponsored him into power, the party proposed in its submissions that the constitution should stipulate a punishment for a president who dumps his/her sponsoring party. Further, the party argued that the proposal to re-introduce the senate should be accepted only if the

⁵⁶. UDF submissions

senator would be elected members not other leaders like chiefs as previously stipulated in the repealed provision. Chiefs and civil society organisations had been protesting against the conduct of MPs in recent parliamentary sessions. As such, the presence of chiefs in the senate was seen as a threat to the influence that the party had through the opposition-dominated parliament. In addition, the UDF had the history of using traditional leaders to advance its agenda when it was in power and was afraid that the DPP would employ the same tactics to undermine the influence of opposition parties including the UDF. Lastly, the UDF objected to the proposal of barring a former president, who had served two terms, from contesting again in elections. During the period of the review process, former president Muluzi had expressed interest to lead the party in 2009 presidential election.

The Democratic Progressive Party (DPP) proposed repealing of the Anti-defection section 65. It was a party that was formed by MPs who had defected from the opposition UDF, RP and MCP such that its survival was under threat after the parties had petitioned the Speaker of the National Assembly to declare vacant seats of the majority of the DPP MPs. The party also pushed for the re-introduction of a second chamber of the parliament, Senate. This would help it check the power of the first chamber that was dominated by the opposition; the opposition had been blocking the executive agenda in parliament as they demanded that the Speaker of the house should declare vacant the seats of most DPP MPs who had crossed the floor. Another position of the DPP was on the need to have education requirement of at least a university degree for presidential candidates. The party was under the leadership of Mutharika who had a PhD. They found this requirement suitable for them because it would exclude other leaders like Muluzi of the UDF who did not have a university degree. On party funding, the DPP submitted that

party funding should not be based on the votes a party gets in parliamentary elections but it should be based on number of seats a party has in parliament. It further argued that the funding should be changed when the number of seats a party holds changes. The DPP was a party that could not access state funding because it was formed after 2004 elections. Its MPs got into parliament through by-elections and the majority had defected from other parties.

The Malawi Congress party (MCP) submitted that Section 65 (Anti-defection law) should be retained and re-enforced to control defection of not only party but also independent MPs. The party was under threat of exodus of its MPs to the ruling DPP after three had left the party. With some former independent MPs crossing to the DPP, the MCP risked losing its status as a largest bloc in parliament in terms numbers of MPs. The party further submitted that political funding should be provided according to the status quo where a party had to get at least 10% of national vote and have representation in parliament. At the same time it opposed the proposal that parties should disclose their activities to account for the funds. This was a convenient position to the party because it had monopoly of the funds together with the UDF; it had also been in conflict with the government over its failure to account for the funds it had been receiving. On the recall provision (Section 64), the MCP argued that the repealed provision should not be re-introduced amidst fears that its MPs would be recalled after some members of the public had protested against the conduct of MPs after failing to pass the national budget in a standoff with the DPP over Section 65.

The foregoing discussion shows clear correspondence between the positions that parties took and their respective circumstances. This reveals that the primary determinant

of party positions was protecting their interests at the time of the review. In the constitutional review process, politicians like other delegates were regarded as channels of communication for the general public. The fact that political parties worked to advance constitutional provisions to safeguard their temporary interests undermined their representativeness and the required participatory process. Where party elites turn the process into a forum for trading interests, the process ceases to be about the general public. The resultant constitution is reduced to interests of the most powerful parties.

5. 3 Analysing the Impact of Group Interests on Individual Reasoning

During the constitution review process, it was established that politicians took some positions to serve the interests of their political parties for fear of hostility from their parties and leaders. Analysis of the positions they took public and the positions they held privately were contradictory. The publicly avowed position was one held by their respective parties.

At a consultation conference organised by the Malawi Centre for Multiparty Democracy to provide political parties room to discuss issues under review, participants were given questionnaires to privately provide their view on politically sensitive matters. Analysis of responses in the questionnaires contradicted the views that the participants presented in the plenary sessions of the conference. It should be noted that the Centre for Multiparty Democracy (CMD) is a membership organisation of all political parties represented in the National Assembly. The views of the members of CMD may not reflect those of the population countrywide. However, they are indicative of the motivation of a significant sector of the society that had direct influence on the

constitution review. This is because politicians (cabinet ministers, legislators and representatives of political parties) constituted 20% and 26% of participants in the first and second Constitution Conferences respectively.⁵⁷ At the two constitutional conferences, “it was evident that public forums do not give individuals sufficient freedom to make their own individual views known on certain sensitive topics, especially when they may affect their respective parties. As a result, participants tend to adopt party positions on certain matters for fear of facing threats from their respective parties.”⁵⁸ The table below summarises some contradictions in public and private choices of the members of CMD.

Table 5. 1 Comparison of Public Position and Private position of CMD members⁵⁹

Issue	Plenary Views	Private Views
Academic qualification for presidential candidates	Majority opposition	71% in support (of which 59% suggested BA and 7% PhD)
Age limit for presidents	Majority opposition	76% support; 24% objection (60% for 70 years; 28 for 75)
Education qualification for parliamentary candidates	Even split of support and opposition	74% support against 26%
Maximum age limit for MP	Consensus opposition	60% support; 40% opposition (50% suggesting 70 years)

⁵⁷. Based on the count of delegates at the two conferences as presented on reports of proceeding of the two conferences by the Malawi Law Commission.

⁵⁸. Dulani (2006:2)

⁵⁹. Based on the responses administered by Dulani at the conference.

On stipulating academic qualification, the position of major parties represented in parliament except for the DPP was that there was no need for setting requirement of academic qualification for presidential candidates. The RP, for example wondered what type of a University degree would be appropriate for presidency in its submission entitled “What Kind of a Degree?”⁶⁰ However the leaders of these parties personally supported this requirement mostly suggesting a Bachelors degree. On age limit, the parties objected to the proposal while an overwhelming majority (76%) reasoned that this provision was necessary. This contradiction underlines the fact that group/ constituency interests were behind the constitutional choices made in submissions and during conferences.

The fact that the views of members of political parties were suffocated under the forces of political parties and strong leaders reveals the artificiality of positions taken by political parties. Their positions cannot be regarded as view of their members. Yet at the conferences and consultation meetings they were regarded as representatives of their members. This implies that the views that party leaders were presenting during targeted consultations and national constitutional conferences were not a true reflection of their views but out of fear. Consequently it can be argued that the views were not based on reasoning but on interests of powerful politicians. Thus voices of the general public were thwarted by elite interests.

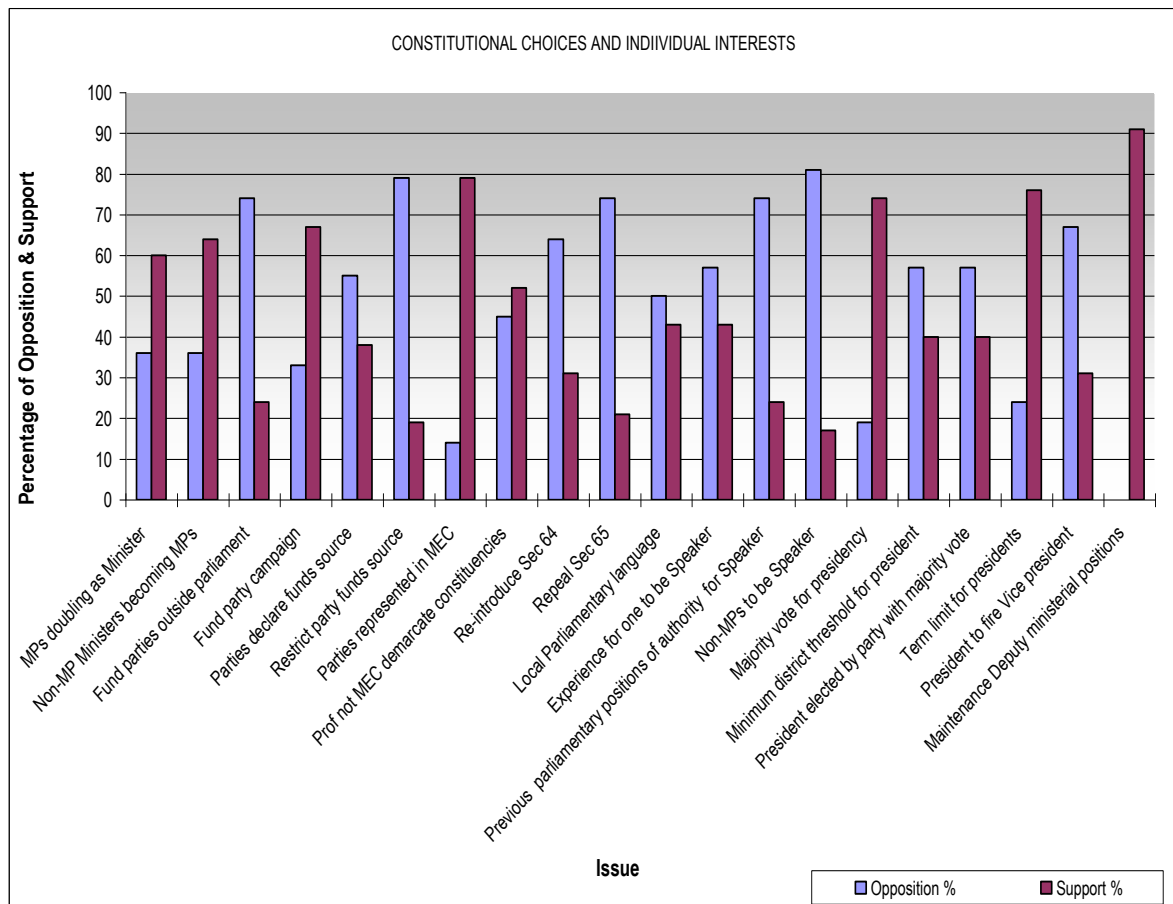
5.4 Analysis of Individual and Institutional Interests

The preceding section has discussed how interests of political parties and leaders constrained constitutional choices of party members. Beside these group interests, individual and institutional interests also served as ‘Maximands’ on for politicians issues

⁶⁰. Submission by the Republican Party

dovetailed with their interests. Analysis of the questionnaires referred to in section 4.3 shows that the positions the respondents took were motivated by individual interests. These individual interests were with their personal capacity or as representatives of political parties and for some as MPs. The figure below depicts this pattern of constitutional choices.

Fig. 5.1 Constitution Choices of CMD Members



As the figure shows, the respondents consistently took positions that were in line with their interests. They strongly opposed proposals that would negatively affect their interests and supported those that served their interests. For example, on the proposal that non-MPs who are qualified should be given chance to be Speaker of the National Assembly, the respondents who included MPs opposed. If this provision was successful,

the members would lose out to non-MPs on the position of the speaker thereby limiting their ambitions for political authority. They respondents also opposed the proposal to repeal of anti-defection section 65. Repealing section 65 was not in the interest of opposition parties, so the CMD members from opposition parties, who were in majority, had to oppose it. Almost all members strongly supported the proposal of having political party representative in the Malawi Election Commission. This would afford them as politicians and their parties chance to directly control elections.

Over 90% of the members supported maintaining positions of Deputy Ministers. These positions provided politicians access to state funds and more authority once in power such that scrapping off this position would limit these chances. Besides the positions demonstrated in the figure, the members were asked about the appointing authority of the Malawi Law Commission, the Majority (48%) responded in support of a constitutional provision stipulating Parliament as the appointing authority followed by 31% proposing the Judicial Service Committee against 14% for the status quo (president being the appointing authority). This demonstrates how the MPs wanted to strengthen their authority in the constitution as well as safeguarding their political careers.

The preceding discussion shows the correspondence between individual and institutional interests on one hand and the constitutional choices on the other. The implication is that the representative role of delegates to the constitutional review was compromised by their own interests. Thus the representativeness of the process was undermined by interests of the delegates, who were expected to speak on behalf of the public.

5.5 Conclusion

This chapter was concerned with whether constitutional choices were motivated by reasoning or interests. Several points have been discussed. Firstly, political development during the time of the review negatively shaped the perception of some stakeholders regarding the motive of the process. Secondly, it has been observed that there was close correspondence between the interests of political parties and the nature of the submissions they made. It has been also noted that the interest of political parties stifled the true views that people had. Finally, individuals made some constitutional choices based on their interests not those of their constituents.

The fact that constitution making is a political process is duly acknowledged. The argument, however, is that if partisan interests dominate the process and determine constitutional choices - with strong parties and individuals bulldozing their interests into the constitution – the essence of people's participation is eroded. The resultant constitution cannot be legitimate and not worth to be called a people's constitution. Constitution making should thus not be reduced to a battle field of power relations of which the product is the reflection of the partisan interests of the most powerful.

CHAPTER SIX CONCLUSION

6.0 Introduction

The first chapter of this thesis provided general introduction and analysis of the problem under investigation. Chapter two covered discussion of the major concepts and theories and review of literature on comparative experience of constitution making in Zambia and Malawi. This was followed by presentation of the methodology implied in the study in chapter three. Chapters four and five contain discussion of the findings of the study. This chapter reflects on these findings by picking the major observations with reference to the objectives of the study stated in chapter one; and analysing the implication of these findings on democratic governance.

The first section summarises the major findings of the study. This is followed by the implications of these findings on the practice and theories of representation, practice and theory of constitution making, the nature and legitimacy of the reviewed constitution, constitutionalism, and democracy in Malawi. After this, the chapter highlights some areas that need more research with regard to the review process and the resultant constitution.

6.1 Reflection on Findings of the Study

Before starting this reflection on the findings it is important to reiterate the purpose of this study. The objective of the study was to inquire into the constitution making process in Malawi between 2004 and 2008 to find out if the process was representative.

Towards this objective the study set to: establish how participatory and inclusive the constitutional review process was; and find out whether and how politics impacted on actors' behaviour and choices of constitutional design during the process. The observations presented below are in reference to these questions.

It is significant to note that the findings of this study show that steps were taken to involve Malawians in the formulation of their constitution and make the process representative of the diversity of the country's populations. First, the SLC that managed the process had adequate expertise and its membership was drawn from cross-section of the Malawi society. This was a significant step towards democratic constitution making. Second, there was broad-based representation of cross-section of the population during the national constitutional conferences. On this point, the fact that there were two constitutional conferences is a commendable improvement on the process leading to 1995 democratic constitution where there was only one conference. In addition, to increase people's participation, the Law Commission used the TV, radios and newspapers to pass information and invite submissions from the public. Furthermore, targeted consultations were conducted in the three regions of the country attracting members of the civil society, religious groups, traditional leaders, and representatives of political parties. District offices of NICE were used as centres where members of the general public could post their submissions to the commission. These were important efforts to make the process people-centred.

However, it was observed in this study that the process was marked by inadequacies that seriously undermined its quality in terms of representativeness and political legitimacy. First, the process of appointing commissioners of SLC was not representative

in spite of being legally procedural. This was one reason why opposition political parties questioned the political neutrality of the commission was questioned. Second, participation of the general public was very low. Only 0.005% of literate people wrote their views directly to the commission. The suggestion boxes that the commission put in NICE offices were for submissions on four issues only which the commission determined not whatever the public wished to raise. Combining those who directly wrote the SLC and those who submitted their views through suggestion boxes, less than 0.4% of youth and adult population participated. It can therefore be argued that the constitution was reviewed by a few elites.

Some factors that contributed to this low participation included the distance to post offices where people could post their submissions to the commission and difficult access to information because very few people could afford TVs, newspapers and radios. The fact that documents prepared by the SLC were for sale also served as a limiting factor to participation since people could not easily follow debates and the progress of the process.

Another observation was that national constitutional conferences were to a greater extent symbolic. Much as the conferences assembled delegates from a cross-section of Malawi population, the time for deliberations was too short during both conferences. The conferences were dominated by experts' presentations and briefings by the SLC.

Another important finding was that the process was unrepresentative with regard to participation of women and geographical locations of the country. In the SLC, during the constitutional conferences, as well as in terms of numbers of people who made submission, women participation was lower than that of men. In terms of geographical

dimension, some districts like Thyolo (for submissions through submission boxes) and Mzimba (for submission written direct to the Commission) dominated.

Last, it was observed that political developments preceding and during the period of constitution review negatively affected the process. These developments created an atmosphere of suspicion among political parties with regard to the intention of the process, the nature and operations of the SLC. In a related finding, it was evident that political interests of representatives/delegates were a significant motivation in the choices made by actors in the process. This meant that their assumed status of being representatives of the people boiled down to representation of individual interests and those of their parties and leaders.

This summary of the findings forms the basis for the conclusion of representativeness of the study. With reference to the first objective which was on participation and inclusiveness, it can be concluded that participation of the general public was low; the process was inclusive in microcosmic terms but the limited space for deliberation undermined the significance of this inclusiveness. Regarding the second objective on the question of impact of politics on the process and choices made by actors, it can be concluded that political environment negatively affected the process and pushing for interests undermined the representative role of the leading actors in the process. Thus with regard to the main objectives of this study the conclusion is that representativeness of the process was symbolic as the process was mostly done by elites.

6.2 Implications of the Findings

The findings of this study, (summarised in section 5.1) have profound implications on the theory and practice of representation, constitution making, the constitution, constitutionalism and democracy specifically for Malawi as well as general political discourse. The first is the question of extent to which representation can be relied on as effective replacement or complement of direct participation in democratic processes including constitution making. The fact that ‘representatives’ of the people may get absorbed into their particularistic interests poses a challenge of whether representative democracy is really government by the people. Perhaps the answer lies in the argument by McCrone and Kuklinski (1979) that delegate representation is conditioned on representatives feeling the obligation to serve interests of their constituents and the constituents clearly providing the representative with their interests. Practically, this means that the best ‘representatives’ are those which the public can hold accountable. For example elected representatives would be better delegates than members of the civil society organisations because if they do not serve the constituents they would be sanctioned during elections. A related implication is that in processes like constitution making, direct participation of the general public is much better than using representatives. The other implication is that representation should not be a substitute to participation. Constitutional decisions should be based much on the views of the general public not views expressed by representatives.

Second, is the question of how the constitution should be adopted. There is a debate on whether parliamentarians should adopt the constitution or the adoption should be done through a constituent assembly or indeed through a referendum. The implications of

findings of this study suggest that a referendum is a sure ideal way of adopting the constitution for it to have the necessary legitimacy and the contents that reflect the will of the people. This is based both on dissatisfaction with parliamentarians expressed by some actors in the process, and on the dominance of interests as motivations for constitutional choices made by the politicians. The other significance of having the referendum is that it would provide the public with more opportunity to familiarise themselves with the issues in the constitution as proponents and opponents campaign over issues.

The third implication is on expertise-representation debate regarding the composition of a constitution commission. There are those who argue that the membership of the constitution commission should focus on the expertise of the individuals. This is expressed in section 133 (b) of constitution of the republic of Malawi which stipulates that selection of commissioners to review certain laws should be based on individual's knowledge in legal matters or expert knowledge of the issues regulated by the laws being reviewed. The findings of his study, that some actors questioned the representativeness and political neutrality of the SLC, mean that there is need for to consider the question of representation besides the expertise. Thus there is need to reconsider the qualification for membership to review commissions. Similarly, the process for empanelling the commission should be transparent and consultative as is required with other bodies like the Electoral Commission for the product of that commission to have political legitimacy.

Another implication is on the prospects of consolidating democracy. The fact that few people have participated in the reviewing of the constitution means that the legitimacy of the constitution may be undermined. It also means a lot of people do not know what the contents of the reviewed constitution will be if it is not presented to the

public in a referendum. If the people don't know what the rules of the game are, they may not claim their individual and collective rights. Thus, the prospects of consolidating Malawi's democracy are under threat. This is because constitutionalism requires that both the governed and those who govern them should share the ownership of the values in the constitution and work towards safeguarding them.

The next implication is on how to achieve a people's constitution with regard to the role of politics in the constitution. The fact that interests, unlike reason, were a dominant motivation for constitutional choices reaffirms the idealist theory of constitution making that political interests need to be regulated. This is against the realist argument that these interests should be considered as rightful components of the process. However, this is not arguing that constitution making should be a technical process. The point is that if selfish interests are traded, the constitution will be a negotiated one or an embodiment of interests of the powerful parties. Cognizant of this fact, it would be naivety to assume that a people's constitution will be achieved without regulating the influence of interests. This is in line with most constitutions including the constitution of the Republic of Malawi (chapter XXI) where certain amendments cannot be done by parliament alone. They need a referendum; this recognizes the negative impact that politics can have on the process.

A further implication is with regard to the nature of the contents of the constitution. It has been observed that the 1995 constitution of the republic of Malawi failed to embody the socio-economic characters of the Malawi society. The fact that elites dominated the process both in the SLC and the constitutional conferences (they set the agenda for the conference by means of proving issues that should be discussed), implies

that there is high likelihood that the constitution will not reflect the identity of Malawian society.

Furthermore, the study has implications on the relationship between decentralisation and democracy. It was found out in this study that many submissions were made by members of the general public through boxes placed across districts and in some cases in primary schools. On the other hand only a few directly wrote to the Law Commission. This shows that Malawians are ready to take their part in democratic process if room is provided. It implies that a people's constitution is achievable if the process is open enough. More importantly it shows that democracy can be enhanced if government is brought close to the people, which is the theme of decentralisation.

6.3. Areas for further Study

This study focused on the question of representation in constitution review and the interplay between politics and the process of constitution making. There are some questions that need further research from the issues that have been presented or that were not the focus of this study.

First, the observation that the process was not representative theoretically means that the constitution will not be regarded as legitimate among Malawians. This area needs a study, once the reviewed constitution has been adopted, whether the general public will regard the constitution as legitimate. This would empirically assess the extent legitimacy of the constitution is based on the participation in the process of its making.

A further study of proceedings in the National Assembly when the amended draft constitution is tabled would be significant to find out the extent and impact of politicking

in constitution making. This would help in answering the question of whether there is real need for referendum in adoption of constitutions instead of the national assembly.

The last area is on factors that limit people's participation in constitution making in Malawi. This study has highlighted some factors but these were limited to the way the process was organised. Related areas can be analysed including the legal framework of governing constitution making in the country including on the role of the Law Commission and parliament.

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APPENDICES

Appendix 1: List of Members of the SLC

NAME	INSTITUTION
Professor Zimani D. Kadzamira	University of Malawi
Mrs Mary Nkosi	Reserve Bank of Malawi
Mrs Janet Laura Banda	Malawi Law Commission
Mr. Thouse R. O'dala	Office of the President and Cabinet
Justice Harris Michael Mtegha SC	Judiciary
Justice Frank Edgar Kapanda	Judiciary
Justice Lovemore Paulo Chikopa	Judiciary
Mr. Anthony Kamanga, SC	Ministry of Justice and Constitutional Affairs
Mrs Sophie M. Kalimba	Blantyre City Assembly
Mr. Ron Nkomba	University Trust Fund
Mrs. Gertrude Lynn Hiwa	Ministry of Justice and Constitutional Affairs
Mrs. Dorothy Grace Nyasulu	Malawi Human Rights Commission
Mr. Willie Samute	Rationalization and Public Sector Reform in OPC
Dr. Msaiwale Chigawa	University of Malawi
Mr Mabvuto H. Hara	Malawi Law Society
Dr. Mustafa Hussein	University of Malawi
Rev. Dr. Winston R. Kawale	Synod of Nkhoma
Dr. Edrinnie Kayambazinthu (Mrs.)	University of Malawi
Mr. Maxon Mbendera	Malawi Law Society
Mr. Moses Washington Kajawa	Church and Society
Mr A. Kapote Mwakasungura	Retired Civil Servant
Mr. Emmanuel Ted Nandolo	Council for Non-Governmental Organization
Sheikh Abdulqadir Sayini	Umunthu Foundation
Mrs. Bertha L. Sefu	Malawi Council for Churches
Rev. Father Dr. Boniface Tamani	Public Affairs Committe

Appendix 2: Distribution of Direct Submission by Sex across Districts

District	No. of Submissions	No. of Males	No. of Females
Balaka	9	6	3
Blantyre	14	12	2
Chiladzulu	10	5	5
Chikwawa	0	0	0
Chitipa	4	2	2
Dedza	8	5	3
Dowa	5	4	1
Karonga	5	4	1
Kasungu	14	7	7
Likoma	0	0	0
Lilongwe	7	5	2
Machinga	4	3	1
Mangochi	9	6	3
Mchinji	2	1	1
Mulanje	4	3	1
Mwanza	7	3	4
Mzimba	47	32	15
Neno	0	0	0
Nkhotakota	3	2	1
Nkhatabay	10	7	3
Nsanje	5	3	2
Ntcheu	17	11	6
Ntchisi	5	5	0
Phalombe	0	0	0
Rumphi	10	8	2
Salima	0	0	0
Thyolo	28	19	9
Zomba	26	13	13

Appendix 3: Questionnaire for the General Public

QUESTIONNAIRE IDENTIFICATION

Questionnaire Number:

Date of the Interview:

Time Period for the Interview:

From	To
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SOCIO-ECONOMIC PROFILE OF THE RESPONDENT

Age

15-30 Years	1
31-50 Years	2
Above 50 Years	3

Sex

Female	1
Male	2

Ethnicity/ Tribe

Lomwe	1
Yao	2
Mang'anja	3
Chewa	4
Ngoni	5
Tumbuka	6
Others (Specify).....	7

Level of Formal Education

Without Formal Education	2
Primary Education	3
Secondary Education	4
Tertiary Education	5

Occupation

Farmer	1
Student	2
Professional	3
Businessman	4
Other, Specify	7

On Level of Public Involvement in the Constitution Review Process and Special Law Commission's Performance in realizing this Involvement

- 106

18. Did you have updates of the process?
 1. Yes 2. No **[Go 24]**
19. How?
 1. SLC Reports and Publications 2. Radio 3. Newspaper
 4. Others (Specify)_____
20. Did you hear of Constitutional review conference?
 1. Yes 2. No
21. Did you follow the proceedings of the constitutional review conferences?
 1. Yes 2. No **[Go 27]**
22. How?
 1. SLC Reports and Publications 2. Radio 3. Newspaper
 4. Others (Specify)_____
- [Go 28]**
23. Why not?
 1. Not interested 2. Did not know how 3. Others (Specify) _____
24. Do you feel your views were represented at the conference?
 1. Yes 2. No
 Explain_____
25. Did you feel the delegate to the conference were representative of the various sectors of the country? Explain_____

SECTION B

On the Constitution Review Commission

26. Do you know the composition of the SLC?
 1. Yes 2. No **[Go 35]**
27. Did you feel it was representative of diversity of Malawi society?
 Explain_____
28. Do you think it was autonomous?
 1. Yes 2. No
 Explain_____
29. How do you rate the performance of the SLC with regard to enhancement of public involvement?
 1. Excellent 2. Very good 3. Good 4. Poor 5. Very Poor
 Explain_____

SECTION C:

General Observation

30. What recommendations would you make to improve the involvement of the public in constitution review?

Appendix 4: Interview Guide for Political Parties and Groups That Made Submissions

On Public Involvement in the Constitution Review Process and SLC Performance towards this Involvement

1. How important is the reviewing of the constitution to your party/organization?
2. How did you hear about the constitutional review process?
3. In what local languages are constitutions of the republic of Malawi available?
4. Were the submissions you made of own or other group/ individuals...Specify?
5. Did you receive acknowledgement of receipt of your submission from the Special Law Commission?
6. Did you have access to the submissions made by others on the same subject? How?
7. Did you have access to publications by the SLC on the review process?
8. Did you have a chance to argue for your views at the constitutional review conference?
9. Was the atmosphere free for all participants to present their views?
10. Were the delegates to the conferences diverse in terms of: Gender, Political Parties, Civil Society, Age, Ethnicity, Religion, Geographical origin.
11. Was the time for the deliberations enough?
12. Do you think a referendum is needed to adopt the reviewed constitution? Explain.

On the Constitution Review Commission/ SLC

13. Do you know the composition of the Special Law Commission?
14. Are you satisfied with the composition of the commission?
15. Do you think the Commission is autonomous?
16. How do you rate the conduct of the Commission in terms of organizing the whole process and opening the process for public involvement and unbiased operation?

On Motivations of Submissions

17. What motivated you to make the submissions you made?
18. Did you consult before making the submissions? Who and how?

**Appendix 5: Interview Guide for Members of the Special Law Commission
On the Special Law Commission (SLC)**

1. How was the SLC empanelled?
2. How autonomous is the SLC from the influence of political figures both in the government and the opposition? ---To whom is the Commission accountable?

Management of the Constitutional Review Process

1. What did the SLC do to make sure that people from various circles across the nation are able to participate in the process?
2. Were you satisfied with the level of participation in terms of:
-Debating of issues? -Making submissions? -Attending Constitutional Review Conferences?
3. How inclusive was the selection in terms of: -Political parties –Genders -Ethnic groups- religions –Professions –Ages -Socio-Economic statuses
4. Were all participants free to voice their views?
5. Were there any challenges that hampered some people from participating?
6. What was the working relationship between the SLC and other stakeholders?
7. Was the Commission acknowledging receipt of submission made to the one who have submitted?
8. Was the Commission updating the general public about the progress of the process? If yes, how?
9. Do you think there is need for a referendum before the reviewed constitution is adopted? Explain.
10. Was time enough for the Commission to properly fulfill its mandate?
11. What challenges has the Commission faced during its time of operation?
12. Did the challenges impact on the level of public participation? Explain
13. Why did the Commission in some cases make recommendations that were contrary to the popular views as reflected in the submissions and its research?

Recommendations

23. Do you think there have been improvements on the process relative to the time of democratic transition? Explain

Appendix 6: Interview Guide for Experts

On Public Involvement in Constitution Review

1. How important is the present constitution review process to Malawi?
2. To what extent can ordinary people participate in such a process?
3. What are the major challenges people face to participate in the review process?
4. Were the delegates to the constitutional review conferences representative of the various sections of the Malawi society?
5. Were all participants free to voice their views in during the conferences?
6. Do you think time was enough for deliberations at the conferences?
7. Do you think a referendum is needed for the adoption of the reviewed constitution?

On the Constitution Review Commission/ SLC

8. Is the membership of SLC representative of Malawian society?
9. Are the Commissioners who can command public trust?
10. Is the SLC autonomous in terms of being free from political influence?
11. How do you rate the performance of the SLC with regard to enhancement of public involvement and objective operation? Explain

On Motivations of Submissions

12. To what extent do you think the proposals submitted by various political groups represent partisan interests as opposed to national interest?

General observation

13. How would you compare the involvement of the public during the democratic change constitution making and the present constitutional review?