LIMITING PRESIDENTIAL APPOINTMENT POWERS OF SENIOR GOVERNMENT OFFICIALS: LESSONS FOR MALAWI

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Abstract

Presidential appointment powers have come under judicial and parliamentary challenges in Malawi. The Constitution of the Republic of Malawi and a number of enabling statutes provide limits for the powers of the President to appoint senior government officials. On several occasions, members of opposition parties have either instituted legal challenges against the presidential appointments or refused to pass legislation that contains presidential appointment powers on the basis of exercising checks and balances between the legislative and executive branches of government. Judicial intervention in the recurring legal challenges has not solved the problem. This study considers the impact of a stronger intervening role by the judiciary in questioning appointments made by the President. The study draws lessons mainly from the law and practice in Ghana and Kenya, considers developments in other jurisdictions and proposes strong judicial intervention in limiting presidential appointment powers.

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List of Abbreviations

CoP:	Clerk of Parliament
EC:	Electoral Commission
GEA:	Gender Equality Act
IGP:	Inspector General of Police
MP:	Member of Parliament
MPSRC:	Malawi Public Service Reform Commission
NPM:	New Public Management
PAC:	Public Appointments Committee
PSA:	Parliamentary Service Act
PuSA:	Public Service Act
PSC:	Parliamentary Service Commission

Introduction

"Ghana's President defends appointing 'elephant-size' government of 110 ministers", [1] the headline of *The Independent Online* shockingly screamed in March 2017. To deal with problems posed by the exercise of presidential appointment powers, there are three outstanding options. The first option is amendment of legislation while the second is strengthening cooperation between the President and other authorities involved in the appointment process, particularly members of opposition parties. The third option is stronger intervention by the judiciary. This thesis examines the impact of a stronger intervening role by the judiciary in questioning appointments made by the President through interpretation of the law in line with constitutional principles and social context. To a lesser extent, the impact of a stronger intervening role by the judiciary in questioning appointments made by the President is also examined from the perspective of drafting appropriate legislation to facilitate the task of the judiciary.

Existing work indicates ways in which some jurisdictions have responded to the problem of presidential appointment powers but there is a gap in scholarly work relating to the problem in Malawi. For instance, in France, a developed democracy, Ducoulombier examined reforms of the 1958 Constitution made in 2008.[2] The reforms include a procedure which requires submission of presidential appointments of members of the Constitutional Council, among other important decisions, to be scrutinised by a standing committee in the National Assembly and the Senate.[3] Further, other developed democracies including New Zealand and the United Kingdom require merit-based appointments of public officials through the New Public Management (NPM). The

[1] Chloe Farand, 'Ghana's President defends appointing 'elephant-size' government of 110 ministers' *The Independent Online* (18 March 2017). Available at http://www.independent.co.uk/news/world/africa/ghana-president-nana-akufo-addo-appointment-110-ministers-government-a7636921.html Accessed on 22 March 2017.
[2] See Peggy Ducoulombier, "Rebalancing the power between the Executive and Parliament: the experience of French constitutional reform", *Public Law*, 2010, pp. 608-708.
[3] Peggy Ducoulombier, ibid, 697-698.

NPM places emphasis on "outputs of the bureaucratic process rather than its inputs, and modification of the incentive structure of the senior bureaucracy."[4] In this vein, the English NPM model of bureaucracy and public administration includes the salient features of recruitment on the basis of 'merit', 'expertise' or 'ability', unlike "personal or political connections"; and political neutrality or 'serial partisanship', which is "faithful service to the government of the day, whatever its political complexion".[5] In developing democracies in Africa, for instance in Ghana, Prempeh approached the problem from the perspective of traditional common law interpretation of legal texts which is in a "mechanical and literal fashion."[6] Prempeh observed that this approach to constitutional interpretation "tends to resolve textual ambiguity in favor of conventional understandings."[7] Focusing on Ghana and Nigeria, Atudiwe asserted the need to take into account "political" and "constitutional experiences of the people" as the "basic denominator for any preferred theory of constitutional interpretation for a country."[8] In Kenya, Ochieng examined the emergence of judicial supremacy in relations between the judiciary and the executive following the 2010 Constitution.[9] The existing work thus partly contributes to an area lacking scholarly attention in Malawi.

In Malawi, presidential appointment powers are contentious. The Constitution of the Republic of Malawi (the Constitution) requires that powers of the President to appoint senior

[4] Peter Cane, *Controlling Administrative Power: An Historical Comparison* (Cambridge, Cambridge University Press, 2016) p. 438.
[5] ibid 439-440.
[6] H. Kwasi Prempeh, "Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa", Vol. 80:1 *Tulane Law Review* (2006), 1-84, at p. 73.
[7] ibid, 74.
[8] Atupare P. Atudiwe, "Courts, Constitutions and Interpretation in Africa: A Focused Inquiry into Comparative Constitutional Interpretation in Ghana and Nigeria" 7 *Malawi Law Journal* 57 2013, p. 57. Available at http://heinonline.org/HOL/PDFsearchable?handle=hein.journals/malawi7&collection=journals&section=6&id=&print=section&sectioncount=1&ext=.pdf&nocover= Accessed on 9 March 2017.
[9] See Walter Khobe Ochieng, 'Judicial-Executive Relations in Kenya Post-2010: The Emergence of Judicial Supremacy?' in Charles M. Fombad (ed.), *Separation of Powers in African Constitutionalism* (Oxford, Oxford University Press, 2016), pp. 286-299.

government officials be exercised in accordance with the law. However, presidential appointments of senior government officials have been legally challenged for alleged bad faith on the basis of the President's rejection of some names and the illegality of the appointments.[10] On the one hand, judicial intervention has not solved the problem as legal challenges still persist.[11] This arises mainly from interpretation and application of legislation. On the other hand, public service reforms launched by the government in 2015 to improve public service delivery implicitly acknowledge the problem posed by the exercise of presidential appointment powers.[12]

The law and practice in comparable jurisdictions provide lessons in four areas in proposing strong judicial intervention and limiting presidential appointment powers. The four areas include appointments of Clerk of Parliament, members of the Electoral Commission and senior civil servants above the position of Under Secretary; and adjudication of the appointments. Further, the study considers appointments of corresponding officials in Ghana and Kenya. On the one hand, Ghana is traditionally considered as a jurisdiction with a strong record in the rule of law.[13] Like

[10] For instance, in *The State and The State President and The Attorney General, ex parte Enock Chihana and 3 Others*, Misc. Civil Cause No. 86 of 2015 (High Court, Mzuzu District Registry) (unreported). Available at http://www.malawilii.org/mw/judgment/high-court-general-division/2015/439/The%20State%20Vs.%20The%20President%20and%20%20The%20Attorney%20General_%20%20Ex-Parte_%20Enock%20%20Chihana%20and%203%20others_%20Misc.%20Civil%20No.%2086%20of%202015.doc Accessed on 19 December 2016.

[11] Some cases for legal challenges of this nature include (1) *In the Matter of the Constitution of the Republic of Malawi and In the Matter of the Removal of Mac William Lunguzi as the Inspector General of Police and In the Matter of Judicial Review*, Misc. Application No. 55 of 1994 (High Court, Principal Registry) (unreported); (2) *The State and Speaker of the National Assembly and The Attorney General, ex parte Mary Nangwale*, Misc. Civil Case No. 1 of 2005 (High Court, Lilongwe District Registry) (unreported). Available at http://www.malawilii.org/mw/judgment/high-court-general-division/2005/80 Accessed on 10 September, 2016; and (3) *The State and The State President and The Attorney General, ex parte Enock Chihana and 3 Others* (n 10).

[12] See Malawi Public Service Reform Commission, Final Report, 'Public Service Reforms: Making Malawi Work', 2015, p. 40. Available at https://info.undp.org/docs/pdc/Documents/MWI/Malawi%20Public%Service%20Reform%Report(1)%20(2).pdf. Accessed on 10 September, 2016.

[13] For instance, in 2015 Ghana ranked among ten best performing countries in terms of governance in Africa. See 2016 Ibrahim Index of African Governance: Ghana Insights, p. 4. Available at http://s.mo.ibrahim.foundation/u/2017/03/08200203/Ghana-Insights-2016-IIAG.pdf?_ga=1.71050512.1405676859.1489090780 Accessed on 9 March 2017.

Malawi, Ghana is a common law jurisdiction and courts have had occasion to interpret presidential appointments made "on the advice of" a particular body. On the other hand, Kenya is considered as an example of a jurisdiction that has a stronger intervening role by the judiciary in questioning appointments made by the President and cabinet secretaries. The stronger intervention is both *de jure*, due to the fact that the 2010 Constitution provides for more possibilities to intervene and *de facto*, due to a more courageous and active judiciary as illustrated by case law. Kenya is also a common law jurisdiction and courts have handled disputes of presidential appointments made "on the recommendation of" or "in consultation with" a particular body but with a different approach from Ghana and Malawi. The research goes beyond formal reading of the text of the Constitution and contextual judicial decisions, identifies underlying factors for challenges against presidential appointment powers and suggests some solutions.

The study responds to the recurrence of challenges against presidential appointment powers in Malawi. It contributes to checks and balances; and the role of judicial intervention in the observance of the doctrine of separation of powers. Further, the study contributes to the identification of ways and means by which Malawi can improve or reform its system of presidential appointments. To achieve this objective, the study applies the comparative method by examining to what extent Malawi could learn from the experiences of other jurisdictions, mainly Ghana and Kenya. Taking into account the availability of resources, the study utilises primary sources, including the Constitution, the Gender Equality Act,[14] the Parliamentary Service Act[15] and the Public Service Act.[16]

[14] No. 3 of 2013.
[15] Laws of Malawi, Cap. 2:08.
[16] Laws of Malawi, Cap. 1:03.

The first chapter covers the legal framework for presidential appointment powers of senior government officials in Malawi; practical aspects of making the appointments; and probable intervention of public service reforms in presidential appointments. The second chapter analyses the role of the judiciary in controversies surrounding presidential appointments; considers judicial review of presidential appointments; and determinations made by the judiciary and their implications on checks and balances as well as horizontal separation of powers. The third chapter reflects on comparative examples from Ghana and Kenya. Finally, the fourth chapter draws lessons from judicial intervention in Ghana and Kenya, relates the lessons to public service reform in Malawi and highlights the implications.

Ultimately, the research provides practical applications which include considerations to be taken by the judiciary when resolving disputes involving presidential appointment powers; consideration of merit-based selections and relevant factors only by bodies and authorities mandated to make appointments of government officials; and cooperation between the President and authorities involved in the process of making presidential appointments.

Chapter One – Presidential Appointment Powers of Senior Government Officials in Malawi

This chapter outlines the legal framework for presidential appointment powers of senior government officials in Malawi. Further, the chapter considers the practice followed in making the appointments and finally points out the probable intervention of public service reforms and its problems.

1.1 The Legal Framework for Presidential Appointment Powers

The legal framework for presidential appointment powers includes the Constitution and several enabling statutes. The relevant enabling statutes include the Public Service Act, the Parliamentary Service Act and the Gender Equality Act. First, under the Constitution, the President exercises his or her powers and duties pursuant to section 89. Section 89(1)(d) of the Constitution provides as follows:

> (1) The President shall have the following powers and duties—
> (d) to make such appointments as may be necessary in accordance with powers conferred upon him or her by this Constitution or an Act of Parliament;

Appointments made by the President pursuant to section 89 of the Constitution include appointments of Second Vice-President;[17] Ministers and Deputy Ministers;[18] Attorney General;[19] Director of Public Prosecutions;[20] Acting Justices of Appeal;[21] Chief Justice;[22] all other Judges;[23] Justice of Appeal or Judge,[24] legal practitioner and magistrate[25] to serve in the Judicial Service

[17] Section 80(5) of the Constitution.
[18] Section 94(1) of the Constitution.
[19] Section 98(3) of the Constitution.
[20] Section 101(1) of the Constitution.
[21] Section 106(1) of the Constitution.
[22] Section 111(1) of the Constitution.
[23] Section 111(2) of the Constitution.
[24] Section 117(c) of the Constitution.
[25] Section 117(d) of the Constitution.

Commission; Law Commissioner;[26] Inspector General of Police;[27] Commander of the Defence Force of Malawi;[28] Chief Commissioner for Prisons;[29] legal practitioner to serve as member of the Police Service Commission[30] or the Prisons Service Commission;[31] and filling vacancies in the Cabinet[32] and judicial offices.[33]

Second, the Public Service Act[34] provides for the administration of the public service. The President exercises appointment powers for a person in the public service to a post above the rank of Under Secretary, subject to the Constitution.[35] Third, the Parliamentary Service Act[36] establishes a Parliamentary Service and a Parliamentary Service Commission.[37] Under section 16(1) of the Act, the President appoints the Clerk of the National Assembly on the recommendation of the Parliamentary Service Commission. The Clerk of the National Assembly is the chief executive officer and manages day to day affairs of the National Assembly.[38]

Finally, among other purposes, the Gender Equality Act seeks to "promote gender equality, equal integration, influence, empowerment, dignity and opportunities, for men and women in all functions of society".[39] Section 11(1) of the Act requires appointment of at least forty per cent and not more than sixty per cent of men or women in departments of the public service, "notwithstanding anything contained in the Public Service Act". However, section 11(2) provides the following exceptions to the application of section 11(1):

[26] Section 133(a) of the Constitution.
[27] Section 154(2) of the Constitution.
[28] Section 161(2) of the Constitution.
[29] Section 166(1) of the Constitution.
[30] Section 157(1)(e) of the Constitution.
[31] Section 168(1)(c) of the Constitution.
[32] Section 94(1) of the Constitution.
[33] Section 113(2) of the Constitution.
[34] Laws of Malawi, Cap. 1:03.
[35] Section 6 of the Public Service Act, Cap. 1:03.
[36] Laws of Malawi, Cap. 2:08.
[37] See long title to the Parliamentary Service Act, Cap. 2:08.
[38] Section 16(3) of the Parliamentary Service Act, Cap. 2:08.
[39] See long title to the Gender Equality Act, No. 3 of 2013.

(a) lack of relevant experience or qualifications on the part of the applicant;

(b) non-acceptance of offer by the applicant; or

(c) unavailability or non-identification of a person with relevant qualifications or experience required for the post.

The International Institute for Democracy and Electoral Assistance (International IDEA) observed that a constitution can promote or hinder substantive equality for women.[40] This observation is considered against the application of the Gender Equality Act, enacted to implement the constitutional mandate of equality.

1.2 Legal Requirements in Making Presidential Appointments

Provisions on presidential appointments may be grouped into several categories according to the wording and procedure provided by the Constitution. These categories are for purposes of illustration only, as such the categorisation is not extracted from the Constitution. The categories are as follows:

(a) appointments that only mention the President as the appointing authority;[41]

(b) appointments made by the President in consultation with a particular body;[42]

(c) appointments made by the President on the recommendation of a particular body;[43]

(d) appointments made by the President but confirmed by the Public Appointments Committee (PAC) of the National Assembly;[44] and

[40] International Institute for Democracy and Electoral Assistance, 'Constitution Assessment for Women's Equality', Stockholm, International IDEA, 2016, p. 7. Available at http://www.idea.int/publications/constitution-assessment-for-womens-equality/loader.cfm?csModule=security/getfile&pageID=79597 Accessed on 30 September, 2016.
[41] For instance, the appointment of Attorney General (section 98(3) of the Constitution).
[42] For instance, the appointment of members of the Electoral Commission (section 4(1) of the Electoral Commission Act, Cap. 2:03).
[43] For instance, appointments of Judges require consultations with the Judicial Service Commission (section 111(2) of the Constitution).
[44] For instance, the appointment of Director of Public of Prosecutions (section 101(1) of the Constitution).

(e) appointments made by the President but confirmed by the National Assembly.[45]

In addition, the President may make some appointments alone[46] or subject to confirmation by the National Assembly,[47] but PAC may inquire into the competence of the appointee.

While it may appear that presidential appointment powers have adequate checks to avoid problems, including abuse of power, the reality is different. Generally, appointments made by the President alone, with or without confirmation by PAC or the National Assembly, in some instances attract criticism. However, it is appointments made by the President, either in consultation with or on recommendation of a specific body, that have attracted fierce criticism to the extent of being challenged in court. This part focuses on two categories that have been subject to challenges and asserts that the challenges emanate from the practice followed in making the appointments.

1.3 Appointments involving Consultations or Recommendations

On the one hand, the appointment of members of the Electoral Commission provides an example of circumstances where the President is required to consult leaders of political parties with representation in the National Assembly.[48] In practice, consultations have been treated as a formality by appointing persons not suggested by the consultees thus leading to High Court proceedings against the presidential appointments.[49] On the other hand, the appointment of the Clerk of the National Assembly is an example where the President has to act on the recommendation of a body, namely the Parliamentary Service Commission.[50] In practice, the

[45] For instance, the appointment of Chief Justice (section 111(1) of the Constitution).
[46] For instance, the appointment of Chief Commissioner for Prisons (section 166(1) of the Constitution).
[47] For instance, the appointment of Inspector General of Police (section 154(2) of the Constitution).
[48] Section 4(1) of the Electoral Commission Act, Cap. 2:03.
[49] *The State and The President of the Republic of Malawi, ex parte Dr. Bakili Muluzi and John Z.U. Tembo*, Misc. Civil Cause No. 99 of 2007 (High Court, Principal Registry) (unreported). Available at http://malawilii.org/mw/judgment/high-court-general-division/2008/2/2_0.pdf Accessed on 10 September, 2016. The decision is considered in detail in Chapter Two.
[50] See section 16(1) of the Parliamentary Service Act, Cap. 2:08.

President disregarded recommendations in appointing the Clerk of Parliament on the basis of gender equality.[51] Unsatisfied with the justifications, members of Parliament from opposition parties challenged the appointment.[52] The cases and challenges posed by these two examples are analysed under Chapter Two and Chapter Three. The aim is to establish the understanding and application of "consultation" and "recommendation" not only in Malawi, but also in the context of the Commonwealth legal tradition.

1.4 Probable Intervention of Public Service Reform in Presidential Appointments

Generally, Malawians expect appointments of government officials to be based on merit as the foremost guiding principle. Section 11(2) of the Gender Equality Act[53] (GEA) expresses this aspiration. In addition, section 14 of the Public Service Act[54] (PuSA) provides for a general approach in management of the public service and seeks to fulfil the following requirements:

(a) efficient and effective delivery of service to the public;
(b) concern for the welfare of public officers, as employees;
(c) adherence to law;
(d) administration of staff regulations with sensitivity to the social and economical impact of such administration on the individual public officer.

Where the practice in appointment of certain senior government officers is compromised, the requirements of section 11(2) of the GEA and section 14 of the PuSA, among others, cannot be attained. For instance, where considerations of merit are not taken into account in the application of the GEA and the PuSA. Reforms launched by the government in 2015 to improve public service take cognisance of the existence of these challenges. In particular, the Malawi Public Service Reform Commission (MPSRC) noted the politicisation of the public service which includes

[51] See *The State and The State President and The Attorney General, ex parte Enock Chihana and 3 Others* (n 10).
[52] ibid. The decision is discussed in detail in Chapter Two.
[53] No. 3 of 2013.
[54] Laws of Malawi, Cap. 1:03.

appointments of senior government officials, and the need for depoliticisation.[55] The MPSRC expressed the problem as follows:

> Since 1994 (the Public Service Act of 1994), the power to appoint senior officers in the public service, of positions above Under Secretary is vested in the President and that there has been no provision for a due process of competitive interviews. As a result, selection, appointments and promotions have mostly been based or seen as based on connections to one's superiors or politicians rather than merit.[56]

Positions above Under Secretary referred to by the MPSRC in the civil service[57] include positions of Principal Secretary, Deputy Secretary to the Cabinet, and Secretary to the Cabinet, who is the head of the public service.[58] Positions of Deputy Ministers and Ministers are political positions regulated by a different appointment regime under section 94 of the Constitution while the positions in the civil service and public service are considered as technical.

One of the functions of the MPSRC was to ensure "a modern, efficient and effective public service."[59] Having identified the problem stated above and in line with its functions, the MPSRC recommended as follows:

> The appointment of public officers above the post of Grade F should be on a fair, competitive, transparent, and merit-based selection process which responsibilities should be conferred on the Public Service Commission. The President's powers of appointing should be limited to the approval of the results of the selection process from Public Service Commission. The relevant legislation and regulations should be amended accordingly.[60]

This recommendation entails amending the PuSA. Further, the recommendation requires limiting presidential appointment powers. However, presidents seem unwilling to have their appointment powers limited despite campaign promises to trim the powers.[61] It is against this background that

[55] Malawi Public Service Reform Commission, Final Report (n 12) 40.
[56] ibid.
[57] In the public service, comparable positions may have different titles and grades but the civil service is in most cases the basis for comparison.
[58] Section 16 of the Public Service Act, Laws of Malawi, Cap. 1:03.
[59] Malawi Public Service Reform Commission, Final Report (n 12) 5.
[60] ibid, 41.
[61] See Gregory Gondwe, 'Peter Mutharika 'clings to power'' *The Times Group* (17 November, 2015). Available at http://www.times.mw/peter-mutharika-clings-to-power/ Accessed on 3 December, 2016. The article states that the President is reported to have reneged on his promise to trim presidential powers by refusing to relinquish his authority

the thesis seeks to buttress probable intervention by the MPSRC from the perspective of strengthening the judicial branch. In addition, Chapter Four of the thesis demonstrates that the recommendation by the MPSRC is not sufficient as it does not mention critical issues that would still make it possible to appoint a person based on considerations other than the recommended selection criteria. The following chapter analyses the role of the judiciary in controversies surrounding presidential appointments.

to appoint board members and Directors General for the Malawi Communications Regulatory Authority (MACRA) and the Malawi Broadcasting Corporation (MBC), respectively.

Chapter Two – The Role of the Judiciary in Controversies Surrounding Presidential Appointments in Malawi

This chapter analyses the role of the judiciary in controversies surrounding presidential appointments in Malawi. The chapter considers judicial review of presidential appointments and the implications of the determinations on checks and balances as well as horizontal separation of powers. The judiciary plays a crucial role in resolving disputes. In South Africa, the Constitutional Court is applauded for sustaining and civilising "the tensions inherent in the repeated referral and contestation of political differences in the postapartheid era."[62] In Malawi, the High Court has intervened in controversial presidential appointments through judicial review. The following sections analyse three of the cases which have had a profound impact on administrative and constitutional law in relation to the exercise of presidential appointment powers in Malawi, beginning with stronger, then weaker judicial intervention.

2.1 A Promising Direction for Judicial Intervention

The decision in *In the Matter of the Constitution of the Republic of Malawi and In the Matter of the Removal of Mac William Lunguzi as the Inspector General of Police and In the Matter of Judicial Review*[63] signalled a promising direction for judicial review of presidential appointment powers or removal from office. Mr. Lunguzi was appointed Inspector General of Police (IGP) in 1990 during the one-party era.[64] On 24 May 1994, he was summoned by the newly democratically elected President to the President's residence.[65] Mr. Lunguzi was verbally informed that he was being removed from the constitutional office of IGP to that of a diplomat in Canada,

[62] Heinz Klug, 'Constitutional Authority and Judicial Pragmatism: Politics and Law in the Evolution of South Africa's Constitutional Court' in Diana Kapiszewski, Gordon Silverstein and Robert A. Kagan (eds.), *Consequential Courts: Judicial Roles in Global Perspective* (Cambridge, Cambridge University Press, 2013) p. 109.
[63] Misc. Application No. 55 of 1994.
[64] Page 1 of the transcript.
[65] Pages 1-2 of the transcript.

without being given reasons.[66] He politely declined to become a diplomat and he was told to go home until further instructions.[67] In the afternoon of the same day, he was summoned again by the President and was informed that he had been removed from the post of IGP to become Principal Secretary in the Office of the President and Cabinet (Special Duties).[68] The change was with immediate effect thus, as instructed, he handed over his responsibilities to Mr. Feyani Chikosa[69] and later reported at the Office of the President and Cabinet.[70] Mr. Lunguzi then applied for judicial review of the President's decision making process to the High Court and argued that principles of natural justice that a person should not be condemned without being heard under section 43 of the Constitution had been violated.[71]

The Court illustrated strong judicial intervention by finding that section 43 of the Constitution which provides for fair treatment and is a restatement of the principles of natural justice, was not complied with.[72] The removal of Mr. Lunguzi from office was thus unlawful and unconstitutional.[73] The defendant submitted that Mr. Lunguzi was so compromised in the exercise of his duties as IGP during preparations for the 1994 presidential and parliamentary elections that his capacity to exercise the powers of the office fell into question.[74] The defendant exhibited letters between the Electoral Commission and Mr. Lunguzi but the Court could not determine whether Mr. Lunguzi had compromised his position and stated that it was only examining "the decision-making process and nothing more."[75] The Court stated that if Mr. Lunguzi had compromised his

[66] Page 2 of the transcript.
[67] ibid.
[68] ibid.
[69] ibid.
[70] ibid.
[71] ibid.
[72] Page 7 of the transcript.
[73] ibid.
[74] Pages 6-7 of the transcript.
[75] Page 7 of the transcript.

position and could not continue to serve as IGP for any reason under section 154(4) of the Constitution, he should have been informed of the reasons and given an opportunity to be heard, as the principles of natural justice demand.[76]

The High Court rightly held that the process followed by the appointing authority to remove the IGP from office was unlawful and unconstitutional. However, the Court noted that Mr. Lunguzi was not clear as to the relief that was sought in another ground and thus held that if he wanted the Court to nullify the appointment of his successor, the Court could not provide that kind of relief. In general, the Court boldly checked the exercise of power by the executive branch. In contrast, the cases that are analysed next illustrate weakening judicial intervention.

2.2 Weaker Judicial Intervention in Appointments involving Consultations

The case of *The State and The President of the Republic of Malawi, ex parte Dr. Bakili Muluzi and John Z.U. Tembo*[77] illustrates weaker judicial intervention in disputes involving presidential appointment powers, in contrast to the position taken in *In the Matter of the Constitution of the Republic of Malawi and In the Matter of the Removal of Mac William Lunguzi as the Inspector General of Police and In the Matter of Judicial Review*.[78] The applicants led two major political parties with representation in the National Assembly.[79] The President of the Republic of Malawi (the respondent) appointed members of the Electoral Commission (EC), a body established to oversee national electoral processes.[80] The applicants were concerned that the

[76] Page 7 of the transcript.
[77] Misc. Civil Cause No. 99 of 2007.
[78] Misc. Application No. 55 of 1994.
[79] Page 2 of the transcript.
[80] ibid.

appointments were made without being consulted, contrary to law.[81] The applicants moved the High Court to annul the appointments.[82]

To appreciate the background to the disputed appointments, the Court noted that prior to the case, the respondent initially appointed members of the EC in 2006.[83] Five political parties challenged the appointments in the High Court, citing the respondent's failure to make consultations in accordance with section 4 of the Electoral Commission Act.[84] The respondent conceded that the political parties were not consulted following a discovery that letters written to the parties were not delivered. A consent order made in January 2007 nullified the appointments.[85]

The significance of the Electoral Commission in a democratic society like Malawi need not be overstated thus on 7 February 2007, the respondent wrote to leaders of parties in the National Assembly on contemplated fresh appointments.[86] The respondent sought feedback from the addressees on the intended officials.[87] However, parties represented in the National Assembly communicated a common stand that consultation entailed each party making its own nominations of representatives so that the respondent could appoint the nominees of the parties.[88] In a response written on 22 February 2007, the respondent disagreed, citing the need for a neutral EC as one of the reasons.[89] On 12 March 2007, the respondent appointed proposed appointees appearing in the letter dated 7 February 2007 as members of the EC.[90] Publication of the appointments was made

[81] Pages 2-3 of the transcript.
[82] Page 3 of the transcript.
[83] ibid.
[84] ibid.
[85] Page 4 of the transcript.
[86] ibid.
[87] ibid.
[88] Pages 4-5 of the transcript.
[89] Page 5 of the transcript.
[90] Page 6 of the transcript.

on 15 March 2007.[91] Following the publication, on 23 March 2007 the applicants commenced proceedings to challenge the appointments.[92]

It is disappointing for efforts to limit presidential appointment powers to note that the Court was convinced that the respondent gave sufficient information to enable the applicants provide advice on whether the intended appointees were suitable for appointment.[93] The Court stated that it took about thirty-three days between the respondent's provision of information to the applicants and making the appointments.[94] Further, the Court stated that "in a sense" the applicants tendered advice through the second applicant's letter written on 30 January 2007 but was apparently received by the respondent on 22 February 2007, where the second applicant suggested five nominees.[95] The Court considered that the respondent's position against the common stand taken by opposition parties in the National Assembly indicated "that there was deliberation over the matter."[96] The Court stated that following the respondent's letter dated 22 February 2007 the applicants did not provide any further advice thus the respondent made the disputed appointments.[97]

Further, it is worrisome that the Court found that the proposal suggested by the applicants could not bind the respondent and stated that "consultation should not be confused with recommendation as the latter entails the final step before a decision is made and plays a prominent role in the final decision while consultation has very little effect on the final decision."[98] The Court upheld the respondent's rejection of the proposal by the applicants and observed that the case went

[91] Page 6 of the transcript.
[92] ibid.
[93] Pages 19-20 of the transcript.
[94] Page 20 of the transcript.
[95] Pages 6, 17 and 20 of the transcript.
[96] Page 20 of the transcript.
[97] ibid.
[98] Page 22 of the transcript.

beyond rejection of the views by the applicants.[99] Nevertheless, the Court found that the respondent disregarded "an established convention."[100] Applicants argued that Electoral Commissioners who oversaw elections in 1994, 1999 and 2004 (since the adoption of the post-one party era Constitution in 1994) were all appointed through nominations from political parties represented in Parliament thus establishing the convention.[101] The Court agreed that "the practice of making appointments from nominees of political parties represented in the National Assembly" had some precedence and had "gained some normativity."[102] However, the Court held that it lacked jurisdiction to enforce breach of convention.[103] This was in line with the general understanding in the legal tradition of the Commonwealth, that "[t]he violation of a constitutional convention might result in serious *political* costs, for example an absence of cooperation by opposition members in Parliament…."[104] However, it is not legally enforceable.[105]

The High Court demonstrated reluctance to nullify appointments made by the President by focusing on strict interpretation of the appointment process and was satisfied that consultations had been made. The Court held that the respondent satisfied requirements for consultations and had acted within the law.[106] The Court dismissed the application. Although the Court was satisfied that the applicants provided advice during the consultations "in a sense",[107] this formulation of the Court's position apparently demonstrates its own lack of confidence in the manner that consultations between the President and the applicants were held. The Court, while observing that

[99] Pages 22-23 of the transcript.
[100] Page 28 of the transcript.
[101] Page 10 of the transcript.
[102] Page 25 of the transcript.
[103] Page 30 of the transcript.
[104] W.J. Waluchow, *A Common Law Theory of Judicial Review: The Living Tree* (Cambridge, Cambridge University Press, 2007) p. 28.
[105] ibid.
[106] Page 30 of the transcript.
[107] Pages 6, 17 and 20 of the transcript.

the appointment of members of the EC bore a significant role in national electoral processes necessary for a young democracy,[108] did not consider the effect that the determination would have on the exercise of power by the executive.

There is a contrary view that courts are not above the law and that it is the role of courts to review whether the relevant executive institutions have applied the law correctly. Against this background, interpretation of terms and conventions as done by the High Court is important; and the crucial issue becomes whether there would be an option of appointment available that gives more decisive power to Parliament and how such provisions could be worded. While this view is accepted, it is worth noting that the exercise of unfettered powers by the executive branch is a threat to democracy but can be controlled partly by a bold judicial branch to check the executive. The analysis of judicial intervention in Kenya provides some insight in the following chapter.

Further, it may be argued that in essence the Court impliedly suggested that to enforce conventional procedure, the wording of the relevant provisions be adjusted from "consultation" to "on the recommendation of" as "the term consultation is a much less forceful term than 'recommendation.'"[109] However, the following case illustrates that even if there would be such an adjustment, courts are still deferential to the President on appointments made "on the recommendation of" a body or authority.

2.3 Weaker Judicial Intervention in Appointments involving Recommendations

In *The State and The State President and The Attorney General, ex parte Enock Chihana and 3 Others*,[110] the High Court continued to illustrate a trend of weaker judicial intervention in disputes involving presidential appointments, as in *The State and The President of the Republic of*

[108] Page 4 of the transcript.
[109] Page 22 of the transcript, citing *Morobe Provincial Government v. The State and Somare* (1984) PNGLR 212. The case is from Papua New Guinea, a common law jurisdiction.
[110] Misc. Civil Cause No. 86 of 2015.

Malawi, ex parte Dr. Bakili Muluzi and John Z.U. Tembo.[111] Briefly, in October 2015, the Parliamentary Service Commission (PSC) conducted interviews for the post of Clerk of Parliament (CoP). The PSC interviewed eight candidates and made a resolution to submit the name of the successful candidate to the President (the first respondent).[112] The PSC instructed the Speaker of Parliament (the Speaker) to communicate the resolution, which recommended Justice M.C.C. Mkandawire to be appointed as CoP, to the first respondent.[113] In response, the first respondent asked the Speaker to submit three names that also took into account gender considerations.[114] The PSC convened another meeting and noted that there was a problem with the proposal by the President as candidates were selected on merit.[115] The PSC agreed to resubmit the same name of Justice M.C.C. Mkandawire and to meet the first respondent to resolve the disagreements before resubmission of the name.[116] On the same day, the Speaker communicated the resolution to the first respondent.[117] In response, the first respondent stated that the practice in "our" government was that three names are sent to the President for the President to select from the list.[118] He thus requested top three shortlisted names, including a woman on the shortlist "in the interest of gender diversity."[119]

Under apparent pressure from the first respondent, the Speaker later issued a memorandum and submitted three names, curriculum vitae and scores for the interview.[120] The names and the scores submitted were Justice M.C.C. Mkandawire 89%; Grace Malera 83%; and Fiona Kalemba

[111] Misc. Civil Cause No. 99 of 2007.
[112] Pages 2-3 of the transcript.
[113] Page 4 of the transcript.
[114] ibid.
[115] ibid.
[116] ibid.
[117] Pages 4-5 of the transcript.
[118] Page 5 of the transcript.
[119] ibid.
[120] ibid.

80%. In response, the first respondent stated that he had selected Fiona Kalemba to be Clerk of Parliament.[121] Following the directive, the Speaker wrote a letter of appointment to Mrs. Fiona Kalemba.[122]

The appointment illustrated the problem with presidential appointment powers and the need to limit the powers thus four opposition party members of Parliament (the applicants) applied for judicial review of the decision to appoint Mrs. Fiona Kalemba as CoP.[123] The applicants argued that the appointing authority erred in law by disregarding the recommendation of the PSC which submitted the name of Justice M.C.C. Mkandawire. In the alternative, the applicants argued that if the appointing authority had wanted to appoint a woman, then Mrs. Grace Malera who was on the second position during interviews should have been selected for the position.[124] The judgment stated that the PSC succumbed to requests by the first respondent and submitted three names as a recommendation for the first respondent to appoint one individual, being Mrs. Fiona Kalemba who was on position three during the interviews.[125]

The Court, once again with weakening intervention, stated that the positions of the candidates during interviews were mere guidelines for the first respondent to follow in making the appointment.[126] In its determination, the Court considered the meaning of a recommendation and, among other sources, cited the case of *The State and The President of the Republic of Malawi, ex parte Dr. Bakili Muluzi and John Z.U. Tembo*[127] (considered above) as regards the meaning of a recommendation.[128] The Court thus concluded that, at law, the President was not mandated to

[121] Pages 5-6 of the transcript.
[122] Page 6 of the transcript.
[123] Page 2 of the transcript.
[124] Page 15 of the transcript.
[125] Page 8 of the transcript.
[126] Page 19 of the transcript.
[127] Misc. Civil Cause No. 99 of 2007.
[128] Misc. Civil Cause No. 99 of 2007, page 22 of the transcript.

make the appointment of Justice M.C.C. Mkandawire because the PSC made a "mere recommendation aiding the candidate favourably to the appointing authority."[129] Further, the Court stated that "[i]f the President were gagged to appoint a recommended name, that would reduce his powers to mere rubber stamping and thereby removing the power of the executive branch to check on the other branches of government."[130] The same reason applied to the choice of Mrs. Fiona Kalemba, on third position, over Mrs. Grace Malera who was on second position. The position of the Court sounds logical on its face. However, the Court disregarded an attempt made by the Parliamentary Service Commission to meet the President before submitting names of other candidates as the President had requested. The President disregarded the meeting which would have perhaps helped to make an acceptable appointment without the involvement of the judiciary.

The Court further made a worrisome finding that a recommendation does not bind the appointing authority but "simply advises", thus the first respondent had power to pick any individual "from a list of three or more or not to pick anyone at all."[131] The Court observed that section 16 of the Parliamentary Service Act (PSA), which provides for appointment of Clerk of the National Assembly omitted the word "merit" thus it would be unprocedural for the Court to fault the appointing authority.[132] The Court concluded that care must be taken when challenging the use of discretion as there has to be "evidence of abuse, unreasonableness and bad faith" and that it was wrong for courts "to intervene and substitute their own decisions for that of the authority which was charged with the duty to exercise that power."[133] However, the President's call for inclusion of a woman on names to be resubmitted by the PSC did not have any practical effect "in

[129] Page 17 of the transcript.
[130] ibid.
[131] ibid.
[132] Page 20 of the transcript.
[133] Page 21 of the transcript.

the interest of gender diversity."[134] It is clear that the President sought to avoid selecting the best performing candidate at the interviews. Although the Court agreed with escaping the consideration of "merit" under section 16(1) of the PSA, the consideration could not be escaped under section 11(1) of the Gender Equality Act (GEA), which provides for the following exceptional circumstances to appoint a person regardless of his or her sex:

(a) lack of relevant experience or qualifications on the part of the applicant;

(b) non-acceptance of offer by the applicant; or

(c) unavailability or non-identification of a person with relevant experience or qualifications.

The exceptions were not applicable to the case concerning the appointment of the CoP and a reading of section 11(1) of the GEA demonstrates that the drafting of the provision took into account considerations of merit. Since Mrs. Grace Malera had performed better than Mrs. Fiona Kalemba during the interviews, there was no justification for the selection of the latter if gender diversity was the real consideration. From the perspective of the GEA, the three exceptions apply only to justify the appointment against a gender balance as Mrs. Grace Malera was qualified both on the basis of gender balance as well as on merit. Against this background, reasons for the selection of a different person attract speculation. Further, the Court did not take into account the social context of the dispute, including the launch of the Malawi public service reform programme which emphasised "merit" as a basis for appointment of senior public officers.[135] The Court sought "evidence of abuse, unreasonableness and bad faith" when challenging the use of discretion[136]

[134] A reason given by the first respondent, as stated on page 5 of the transcript.
[135] Malawi Public Service Reform Commission, Final Report (n 12) 40.
[136] Page 21 of the transcript.

thereby foreclosing consideration of issues such as nepotism, cronyism and patronage which are relevant considerations for such challenges.

Ultimately, the motion for judicial review by the applicants failed and weaker judicial intervention in disputes involving presidential appointment powers prevailed, thereby perpetuating the precedence set by *The State and The President of the Republic of Malawi, ex parte Dr. Bakili Muluzi and John Z.U. Tembo*.[137] The Court stressed that it was "a Court of justice which is guided by law and evidence"; that "Parliament is not above the Constitution and the doctrine of the separation of powers"; and that it is "amenable to be checked by the Executive and the Judicature."[138] Ultimately, the Court found that there was no error of law in the appointment of Mrs. Fiona Kalemba because the process leading to her appointment did not violate any law. The Court directed that Mrs. Kalemba could proceed to take oath of office and allegiance in accordance with the Constitution.

Although the Court stated that in judicial review, the applicant should show a departure from accepted norms and that "the decision making process has been characterized by illegality, procedural impropriety and irrationality" in what it called "a tripartite distinction",[139] it only focused on illegality and disregarded the examination of procedural impropriety and irrationality. Beyond focusing on the illegality of appointment processes, it is suggested that courts should be more proactive in the interpretation of separation of powers as a device for controlling the executive branch.

Despite the negative aspects of the decision, the Court commendably stated that in recent times courts have adopted a broader and flexible approach of *locus standi* to the extent that "[t]he

[137] Misc. Civil Cause No. 99 of 2007.
[138] Page 22 of the transcript.
[139] Page 13 of the transcript.

more important the issue and the stronger the merits, the more readily will a court grant leave to move for judicial review notwithstanding the limited personal involvement of the Applicant."[140] Be that as it may, the implication of the determination on checks and balances and horizontal separation of powers is that the judiciary once again demonstrated its weakness to check illegality of the exercise of power by the executive branch. The prevailing social context, which was disregarded in the determination, tends to support this view. Opposition members of Parliament (MPs), in December 2016 rejected a bill for the establishment of a national planning commission and to empower the President to appoint commissioners.[141] The MPs cited lack of efficiency in institutions where the President appointed officers and argued that making the President the appointing authority would "fan corruption."[142] Curiously, the Malawi Public Service Reform Commission (MPSRC) addressed similar issues but its mandate expired on 31 January 2017[143] and the future as well as its achievements seemed to be unclear. The MPSRC submitted its exit report to the President on 10 March 2017[144] but it was not available for analysis.

In conclusion, determinations of the High Court have failed to fully check the exercise of power by the executive in relation to appointments of senior government officials. This is due to the weaker intervening role in disputes of this nature illustrated in *The State and The President of the Republic of Malawi, ex parte Dr. Bakili Muluzi and John Z.U. Tembo*[145] and *The State and The*

[140] Pages 12-13 of the transcript.
[141] 'Malawi Parliaments [*sic*] shoots down presidential appointments in National Planning Commission' *Malawiana*. Available at http://malawiana.net/malawi-parliaments-shoots-down-presidential-appointments-in-national-planning-commission/ Accessed on 17 December 2016.
[142] ibid.
[143] 'Malawi govt announces public service reforms commission mandate expires Jan 31, 2017' *The Maravi Post*. Available at http://www.maravipost.com/malawi-govt-announces-public-service-reforms-commission-mandate-expires-jan-31-2017/ Accessed on 12 February 2017.
[144] 'APM Receives Reforms Exit/Implementation Report, As Four Ministers Sign Performance Contracts' *Malawi Voice*. Available at http://www.malawivoice.com/apm-receives-reforms-exitimplementation-report-as-four-ministers-sign-performance-contracts/ Accessed on 11 March 2017.
[145] Misc. Civil Cause No. 99 of 2007.

State President and The Attorney General, ex parte Enock Chihana and 3 Others.[146] The failure illustrates a departure from the position in *In the Matter of the Constitution of the Republic of Malawi and In the Matter of the Removal of Mac William Lunguzi as the Inspector General of Police and In the Matter of Judicial Review*,[147] where the High Court had laid down a promising start for stronger intervention in judicial review cases. Further, the failure ignores the opportunity that Waluchow asserts the common law provides, which is "a long, established history… of successfully combining (in various ways) fixity with adaptability."[148] In turn, opposition members of Parliament (MPs) who have instituted proceedings over disputed appointments might lose faith in the ability of the judiciary to provide checks and balances. If the opposition MPs have sufficient numbers in the National Assembly, they may resort to blocking the passing of legislation that provides for appointment powers by the President as demonstrated in December, 2016. The following chapter analyses presidential appointment powers of comparable public officials in Ghana and Kenya; and adjudication of disputes involving presidential appointment powers.

[146] Misc. Civil Cause No. 86 of 2015.
[147] Misc. Application No. 55 of 1994.
[148] W.J. Waluchow, *A Common Law Theory of Judicial Review: The Living Tree* (n 104) 204.

Chapter Three – Presidential Appointment Powers and Adjudication in Ghana and Kenya

This chapter analyses presidential appointment powers of comparable public officials in Ghana and Kenya to those considered in the preceding chapters for Malawi. The chapter further analyses court determinations in disputes involving presidential appointment powers and relates the effects of the adjudication to the strength of judicial intervention in checking the executive branch and the contribution to separation of powers.

3.1 Presidential Appointment Powers of Public Officials

Ghana and Kenya are common law jurisdictions like Malawi. With a shared Commonwealth legal tradition, there are similarities and differences in presidential appointment powers of public officials, as well as court interpretation of the appointment powers. The following section first analyses presidential appointment powers of public officials in Ghana and Kenya in comparison with Malawi, then court decisions in Ghana and Kenya.

3.1.1 Appointment of Members of the Electoral Commission

Compared to Malawi, appointments of members of the Electoral Commission in Ghana and Kenya are progressive. In Ghana, article 43(2) of the Constitution requires the President to appoint members of the Electoral Commission in line with article 70 of the Constitution. Article 70(2) of the Constitution requires the President, acting on the advice of the Council of State, to "appoint the Chairman, Deputy Chairmen, and other members of the Electoral Commission." Article 89 of the Constitution establishes the Council of State, which comprises one former Chief Justice, one former Chief of Defence Staff of the Armed Forces of Ghana and one former Inspector General of Police (appointed by the President in consultation with Parliament); "the President of the National House of Chiefs"; "one representative from each region of Ghana elected … by an electoral college comprising representatives from each of the districts in the region nominated by

the District Assemblies in the region"; and "eleven other members appointed by the President."[149] The Council of State, whose advice the President acts upon to appoint the officials, is itself appointed by a wide consultative process.

The three stage appointment process in Kenya is more progressive as the President's decision follows approval by the National Assembly. Chapter 15 of the Constitution of Kenya, 2010 provides for "commissions and independent offices", including the Independent Electoral and Boundaries Commission.[150] Article 250 of the Constitution stipulates the procedure for appointment to commissions and independent offices which includes identification and recommendation for appointment as "prescribed by national legislation",[151] approval by the National Assembly[152] and appointment by the President.[153] Through this process, it is unlikely for a challenge against the President's decision to originate from the National Assembly unlike in Malawi as the case of *The State and The President of the Republic of Malawi, ex parte Dr. Bakili Muluzi and John Z.U. Tembo*[154] illustrates.

3.1.2 Appointment of Clerk or Clerks of Parliament

The appointment of the Clerk or Clerks of Parliament in Ghana and Kenya is progressive as the process does not involve the President, unlike in Malawi. In Ghana, article 124(4) of the Constitution requires the Parliamentary Service Board, in consultation with the Public Services Commission, to make the appointment of Clerk to Parliament. In Kenya, the legislative assembly is bicameral, unlike in both Ghana and Malawi where the legislative assembly is unicameral. Article 128(1) of the Constitution of Kenya thus requires the Parliamentary Service Commission

[149] Article 89(2) of the Constitution of the Republic of Ghana.
[150] Article 248(2)(c) of the Constitution of Kenya, 2010.
[151] Article 250(2)(a) of the Constitution of Kenya, 2010.
[152] Article 250(2)(b) of the Constitution of Kenya, 2010.
[153] Article 250(2)(c) of the Constitution of Kenya, 2010.
[154] Misc. Civil Cause No. 99 of 2007.

to appoint two Clerks of Parliament, one for each House, and approval by the relevant House. The progressive appointment procedures in Ghana and Kenya reduce the potential for judicial involvement if appointments of Clerk or Clerks of Parliament are challenged for political reasons. For instance, where politicians attempt to challenge presidential appointments on the basis of perceived attempts by the President to assert dominance over the legislative branch through the appointees.

3.1.3 Appointments of Public Officers

On the one hand, the appointment procedure of public officers in Ghana does not specify the rank above which the President appoints a person in the public service as section 6 of the Public Service Act does in Malawi.[155] On the other hand, the appointment procedure for public officers in Kenya is apparently progressive as it does not provide for presidential involvement in making appointments or promotions of public officers, unlike in Malawi where the President appoints persons to the public service if the position is above the rank of Under Secretary. In Ghana, article 195(1) and (2) of the Constitution provides for the power to appoint persons "to hold or to act in an office in the public service" to the President. In making the appointments, the President acts "in accordance with the advice of the governing council of the service concerned given in consultation with the Public Services Commission."[156] Further, the Public Services Commission Act, 1994[157] is the enabling Act and section 8 of the Act reflects article 195 of the Constitution of the Republic of Ghana.

In Kenya, the President is not involved in appointments to the public service. Article 234(2) of the Constitution provides appointment powers to the Public Service Commission (the

[155] Laws of Malawi, Cap. 1:03.
[156] Article 195(1) of the Constitution of the Republic of Ghana.
[157] Act 482.

Commission). The powers include making appointments of persons to offices in the public service and confirmation of appointments.[158] Further, the Commission has a mandate to "promote the values and principles mentioned in Articles 10 and 232 throughout the public service".[159] The following are some of the "values and principles" referred to in article 234:

> 1. The values and principles of public service include-
> …
> g. subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions;
> h. representation of Kenya's diverse communities; and
> i. affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of-
> i. men and women;
> ii. the members of all ethnic groups; and
> iii. persons with disabilities.[160]

Article 234(3) provides that clauses (1) and (2) do not apply to some offices in the public service, for instance an office or position subject to the Judicial Service Commission.[161] Generally, the system in Kenya is not prone to abuse as is the case in Malawi.[162]

3.2 Adjudication of Cases involving Presidential Appointment Powers of Public Officials

In Ghana and Kenya, the accessible cases do not reveal challenges of presidential appointment powers involving the same positions that the cases examined in Malawi illustrate. However, the cases indicate challenges relating to presidential appointments made "on the advice of" or "on the recommendation of" a specified body or authority, which is comparable to the issues in the cases from Malawi and partly involve interpretation of such phrases within the context of appointment powers in the legal tradition of the Commonwealth.

[158] Article 234(2)(a)(ii) of the Constitution of Kenya, 2010.
[159] Article 234(2)(c) of the Constitution of Kenya, 2010.
[160] Article 232(1) of the Constitution of Kenya, 2010.
[161] Article 234(3)(c)(ii) of the Constitution of Kenya, 2010.
[162] See the recommendation of the Malawi Public Service Reform Commission and the discussion in Chapter One of this thesis, pp. 10-12.

3.2.1 Determinations by Courts in Ghana

Determinations made by the Supreme Court of Ghana are similar to those made by the High Court in Malawi in cases involving presidential appointment powers. On 20 July 2016, the Supreme Court of Ghana dismissed an application where the Ghana Bar Association (GBA) challenged the President's appointment of two justices of the Supreme Court.[163] The plaintiffs (GBA) sought an order for the President's compliance with article 144(2) and (3) of the Constitution which requires the President to seek "the advice of the Judicial Council in appointing justices to the Bench."[164] The plaintiffs submitted that since the adoption of the 1992 Constitution, presidents do not act fully on the advice of the Judicial Council when appointing Superior Court Judges.[165]

The plaintiffs further sought the Court to determine whether the Judicial Council had a constitutional obligation to advise the President as to specific persons who were suitable to be appointed as justices of the Superior Courts of Judicature and whether the President would be bound by the advice.[166] The plaintiffs were of the view that the Judicial Council had violated its constitutional duties by not giving advice to the President on appointments to the Superior Courts or not ensuring that the advice was strictly followed, by taking measures including court action.[167] Finally, the plaintiffs argued that judicial independence would be undermined if presidential power to appoint justices of Superior Courts was interpreted in a manner that did not restrict the President to act within the Judicial Council.[168] The plaintiffs considered it "insufficient" for the President to

[163] Fred Djabanor, 'GBA suit against Supreme Court judges' appointment dismissed' *Citi FM Online*. Available at http://citifmonline.com/2016/07/20/gba-suit-against-supreme-court-judges-appointment-dismissed/ Accessed on 11 March 2017.
[164] 'Appointing SC Judges, EC Boss: JC, CoS Advice Not Binding On President: SC' *Peace FM Online*. Available at http://m.peacefmonline.com/pages/politics/politics/201607/286065.php Accessed on 11 March 2017.
[165] ibid.
[166] ibid.
[167] ibid.
[168] ibid.

merely state that he had made an appointment "on the advice of the Judicial Council, regardless of the exact nature of the Judicial Council's advice…."[169] However, the Court decided that "as far as the interpretation of article 144(2) and (3) is concerned, the advice of the [J]udicial [C]ouncil in appointing justices of the Superior Court, is not binding on the President."[170]

The determination covered a suit which raised important issues by Richard Sky, a journalist working for a private radio station.[171] Richard Sky (the plaintiff) challenged the President's appointment of the Chairperson of the Electoral Commission by seeking clarity on allegedly two conflicting provisions regarding the appointment.[172] The first provision is article 70(2) of the Constitution which provides for appointment of members of the Electoral Commission, as considered earlier on in this chapter. The second provision is article 91(3) of the Constitution which provides as follows:

> The Council of State may, upon request or on its own initiative, consider or make recommendations on any matter being considered or dealt with by the President, a Minister of State, Parliament or any other authority established by this Constitution except that the President, Minister of State, Parliament or other authority shall not be required to act in accordance with any recommendation made by the Council of State under this clause.

The plaintiff was of the view that the kernel of his claim was to determine "whether the operative phrase "acting on the advice of the Council of State" had any mandatory binding effect."[173] Further, the plaintiff was of the view that the phrase had not been used accidentally thus it had a binding effect taking into account "the context of the 1992 Constitution."[174]

The arguments of applicants in cases from both Ghana and Malawi seemed to point out dissatisfaction with the exercise of presidential appointment powers due to the available wide

[169] 'Appointing SC Judges, EC Boss: JC, CoS Advice Not Binding On President: SC' *Peace FM Online* (n 164).
[170] ibid.
[171] ibid.
[172] ibid.
[173] ibid.
[174] ibid.

discretion; and the aspiration to contextualise interpretation of constitutional provisions. From Prempeh's perspective, the problem is that "[t]he traditional common law jurist approaches the interpretation of legal texts in a mechanical and literal fashion, concerned as she is with enforcing strictly the expressed will of a sovereign legislature."[175] Prempeh further observed that, consistent with the cases examined in this study, "decisions rendered by Africa's courts in a number of constitutional cases continue to reflect the enduring influence of the common law's tendency toward mechanical and narrow interpretation."[176] Prempeh plausibly concluded that this approach to constitutional interpretation "tends to resolve textual ambiguity in favor of conventional understandings."[177] In search for a solution, Atudiwe's assertion that courts should take into account "political" and "constitutional experiences of the people" as the "basic denominator for any preferred theory of constitutional interpretation for a country"[178] is illuminating. The assertion could be helpful in moving from strict adherence of interpretation in the Commonwealth legal tradition to respond to new challenges discernible in the disputes brought before the courts.

3.2.2 Determinations by Courts in Kenya

In Kenya, the High Court illustrated stronger intervention in determinations involving presidential appointment powers. In *Law Society of Kenya v. Attorney General & another*[179] the National Assembly enacted the Statute Law (Miscellaneous Amendment) Bill, 2015.[180] One of the amendments concerned the Judicial Service Act, 2011 (the Act) and sought to prescribe the period

[175] H. Kwasi Prempeh, "Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa" (n 6) 73.
[176] ibid, 74.
[177] ibid.
[178] Atupare P. Atudiwe, "Courts, Constitutions and Interpretation in Africa: A Focused Inquiry into Comparative Constitutional Interpretation in Ghana and Nigeria" (n 8) 57.
[179] Constitutional Petition No. 3 of 2016; [2016] eKLR. Available at http://kenyalaw.org/caselaw/cases/view/122379/ Accessed on 8 March 2017.
[180] Para. 13.

for transmitting names of candidates to be appointed by the President on the recommendation of the [Judicial Service] Commission.[181] The petitioner submitted that amending section 30(3) of the Act contradicted article 166(1)(a) of the Constitution which empowered the Judicial Service Commission (the Commission) to forward one name for the position of Chief Justice or Deputy Chief Justice.[182] The new amendment was thus taking away "this constitutionally guaranteed power by requiring the Commission to forward three names."[183] One of the issues that the petition raised was whether the amendments were consistent with the Constitution.[184]

The Judicial Service Commission joined the case alongside several other interested parties and made submissions which are to the effect of urging stronger judicial intervention in limiting presidential appointment powers. The Commission urged the Court to grant seven orders, but this discussion considers only three. First, a declaration that the President was bound by the recommendation of the Commission.[185] Second, the Commission sought a declaration that amendments to the Act attempted to limit the independence, constitutional mandate of the Commission and violated the Constitution.[186] Finally, the Commission sought a declaration that it should recommend only one name to the President to be appointed as Chief Justice or Deputy Chief Justice.[187]

The High Court in Kenya took a different and progressive approach compared to the approach taken in Malawi and Ghana. The Court did not specifically interpret the phrase "on the recommendation of" the Judicial Service Commission. Instead, the Court considered the sharing of responsibilities and stated that the appointment of the Chief Justice and the Deputy Chief Justice

[181] Para. 13.
[182] Para. 18.
[183] ibid.
[184] Para. 23.
[185] Para. 124.1.
[186] Para. 124.3.
[187] Para. 124.7.

involved selection of the candidate by the Commission, followed by submission to Parliament for approval and finally appointment by the President.[188] The three stages involved different branches of government to ensure that one branch did not influence the outcome.[189] Further, the procedure was not meant to give the President any role to determine the name to be submitted for approval by Parliament.[190]

Unlike in Malawi where the High Court entertained submission of more than one name to the President, the Court in Kenya rejected the amendment to introduce mandatory submission of three names to the President and stated its position as follows:

> To provide for a mandatory three names to be submitted to the President in our view opens an avenue for manipulation of the process and even horse-trading. To do so would open the process to contamination by the ills that informed the transformation in which Kenyans discarded the old process of appointment of judges which was besmirched with partisanship, nepotism, negative ethnicity and tribalism, cronyism, patronage and favouritism with the current one that is meant to espouse the values and principles of governance set out in Article 10 of the Constitution which include non-discrimination, good governance, integrity, transparency and accountability. In other words, the people of the Republic of Kenya set out to eradicate all the negative tenets of appointment of Judges which in their view had hitherto impacted negatively on the integrity of the judicial system.[191]

Further, the Court was of the view that the selection process was exclusively for the Commission, beginning with the advertising of vacant posts up to submission of names of successful candidates to the President.[192] The Court further stated that during this process, none of the branches of government could dictate how the Commission was to conduct its mandate.[193] Ultimately, the Court made the determination that as the amendments "compelled the Judicial Service Commission to submit three names to the President for appointment of the Chief Justice and the

[188] Para. 263.
[189] ibid.
[190] ibid.
[191] Para. 272.
[192] Para. 279.
[193] ibid.

Deputy Chief Justice respectively, the … amendments violated the letter and the spirit of Article 166(1) of the Constitution."[194] The Court annulled the amendment to section 30(3) of the Act.[195]

The High Court in Kenya commendably took into account many factors including constitutional values and principles of governance as well as the historical context of presidential appointments in its determination. The Court further made a statement alluding to "partisanship, nepotism, negative ethnicity and tribalism, cronyism, patronage and favouritism".[196] These considerations do not appear in legislation or judicial decisions in Malawi. One of the reasons is that they are formally considered as sensitive matters yet they form topics of social discourse and media coverage in relation to presidential appointments.[197]

The High Court in Kenya also boldly checked the executive in making appointments in *Abdi Yusuf v. Attorney General and 2 Others*.[198] The Court barred the President from resubmitting nominees for appointment as commissioners of the Teachers Service Commission to the National Assembly for fresh approval[199] because the list of nominees had already been rejected.[200] The Court held that once nominees were rejected, the President could not submit "fresh nominations" containing a nominee who had already been rejected by the National Assembly.[201] The Court stated that the rule of law and legality required the President to make appointments in accordance with

[194] Para. 307.
[195] Para. 309.1.
[196] Para. 272.
[197] For instance, the following is one of the most recent online media articles citing patronage: Dickson Kashoti, 'Public appointments should be on merit' *The Times Group*. Available at http://www.times.mw/public-appointments-should-be-on-merit/ Accessed on 11 March 2017.
[198] Petition No. 8 of 2013; [2013] eKLR. Available at http://kenyalaw.org/caselaw/cases/view/87296 Accessed on 11 March 2017.
[199] Para. 24.
[200] Para. 10.
[201] Para. 18.

statutory enactments.[202] Ochieng hailed the decision as one of the decisions where the judiciary circumvented "attempts by the president to abuse his power of appointment."[203]

Finally, the High Court in Kenya further boldly checked the executive in making appointments in *Amoni Thomas Amfry & Another v. Minister for Lands & 8 Others*.[204] A selection panel conducted shortlisting and interviews of candidates before forwarding names of members of the National Land Commission to the President.[205] The President, in consultation with the Prime Minister, nominated the Chairperson and members of the Commission.[206] The National Assembly approved the names and forwarded them to the President to be gazetted.[207] The President did not gazette the appointments within seven days as provided by law. The High Court was petitioned to determine whether it could direct the President to gazette the appointments.[208] The Court held that compliance with provisions of the Constitution and statute "goes to the heart of the rule of law", which was a recognised national value and the Court had to give it effect.[209] The Court directed the President to comply with the National Land Commission Act and officially make the appointments within seven days from the date of the order.[210]

In conclusion, the considered decisions clearly demonstrate that the judiciary in Kenya plays a very active role in the intervention of public appointments made by the executive as opposed to the intervention by the judiciary in Malawi. In terms of control of administrative powers exercised by the executive branch, Cane made the following observation:

[202] Para. 22.
[203] Walter Khobe Ochieng, 'Judicial-Executive Relations in Kenya Post-2010: The Emergence of Judicial Supremacy?' (n 9) 296.
[204] Petition No. 6 of 2013; [2013] eKLR. Available at http://kenyalaw.org/caselaw/cases/view/86280 Accessed on 11 March 2017.
[205] Para. 3.
[206] ibid.
[207] ibid.
[208] Para. 1.
[209] Para. 19.
[210] Para. 27(a).

> …superior courts in the English and Australian systems have authority to make law independently of the function of interpreting and applying statutes and other constitutional documents. Put differently, Anglo-Australian courts have much more extensive authority than US federal courts to make 'independent' common law.[211]

The judiciary in Kenya illustrates that it draws closer to the observation made by Cane. The judiciary in Malawi thus has the potential to exercise greater control of the executive branch through checks and balances as illustrated by the judiciary in Kenya, both jurisdictions being legal systems that developed from English common law. The following chapter draws lessons from Ghana and Kenya on judicial intervention in disputes involving presidential appointment powers of government officials.

[211] Peter Cane, *Controlling Administrative Power: An Historical Comparison* (n 4) 519.

Chapter Four – Lessons from Ghana and Kenya on Judicial Intervention in Presidential Appointments

This chapter draws lessons from Ghana and Kenya on judicial intervention in disputes involving presidential appointment powers of government officials. The chapter further relates the lessons to public service reform in Malawi and highlights the implications.

4.1 Lessons from Ghana

There are four lessons that the procedure for presidential appointments of senior government officials in Ghana provides. First, the Council of State is involved in appointments of members of the Electoral Commission. The composition of the Council of State is more diverse than leaders of parties represented in Parliament whom the President is required to consult before appointing members (other than the Chairperson) of the Electoral Commission in Malawi.[212] In fact, in Malawi a body comparable to the Council of State does not exist. The procedure in Ghana reduces the potential of disputes arising from rivalry between the President and leaders of opposition political parties. Where the latter contested in preceding elections against the President and lost, they would capitalise on such opportunities to oppose the President's nominations. This would particularly be the case if there is lack of cooperation between the two sides, which is evident in the case from Malawi.[213]

Second, in Ghana the President is not involved in the appointment of the Clerk to Parliament. The responsibility of appointment of the Clerk to Parliament is left to "the Parliamentary Service Board in consultation with the Public Services Commission."[214] This

[212] Section 75(1) of the Constitution of the Republic of Malawi requires the Chairperson to be a Judge nominated by the Judicial Service Commission.
[213] The case of *The State and The President of the Republic of Malawi, ex parte Dr. Bakili Muluzi and John Z.U. Tembo* (n 49).
[214] Article 124(4) of the Constitution of the Republic of Ghana.

possibly ensures reduced conflict between the President and opposition members of Parliament as the case in Malawi illustrates.[215] Further, the procedure ensures greater independence of the Parliamentary Service Board unlike in Malawi where the Parliamentary Service Commission apparently succumbed to the pressure exerted by the President to appoint a different person as Clerk of Parliament, contrary to the recommendation of the Commission.

Third, the procedure for presidential appointment powers of public officers only illustrates that the procedure does not specify the rank above which the President appoints a person in the public service as section 6 of the Public Service Act does in Malawi.[216] Finally, in terms of adjudication of disputes involving presidential appointment powers, the cases considered in Ghana reveal that the judiciary maintains "the common law's tendency toward mechanical and narrow interpretation."[217] The approach taken by the judiciary is thus similar to that followed by the judiciary in Malawi.

4.2 Lessons from Kenya

The procedure for presidential appointments of senior government officials in Kenya provides four lessons. First, the appointment of members of the Independent Electoral and Boundaries Commission[218] follows a three step process which involves identification and recommendation for appointment as prescribed by national legislation;[219] approval by the National Assembly;[220] and, finally, presidential appointment.[221] Through this procedure, it is unlikely for a challenge against the President's decision to originate from the National Assembly unlike in

[215] The case of *The State and The State President and The Attorney General, ex parte Enock Chihana and 3 Others* (n 10).
[216] Laws of Malawi, Cap. 1:03.
[217] H. Kwasi Prempeh (n 6) 74.
[218] Article 248(2)(c) of the Constitution of Kenya, 2010.
[219] Article 250(2)(a) of the Constitution of Kenya, 2010.
[220] Article 250(2)(b) of the Constitution of Kenya, 2010.
[221] Article 250(2)(c) of the Constitution of Kenya, 2010.

Malawi.[222] In turn, the judiciary may be spared from intervening in political matters as the process controls the executive branch through approval by the National Assembly.

Second, the President is not involved in the appointment of Clerks of Parliament. Article 128(1) of the Constitution of Kenya provides the responsibility to appoint Clerks of Parliament to the Parliamentary Service Commission and approval to the particular House of Parliament to which the Clerk is appointed. This procedure probably reduces the potential to draw the judiciary into political disputes if appointments of Clerk or Clerks of Parliament are challenged for political reasons. Further, the procedure limits the possibility for the President to assert direct dominance over the legislative branch through the Clerks of Parliament. Such dominance could only indirectly arise from the voting pattern in Parliament to approve or disapprove the appointments, but not directly from the President as in Malawi where the President exerts direct pressure on the Parliamentary Service Commission to appoint a particular person.

Third, the appointment procedure for public officers in Kenya does not provide for presidential involvement in making appointments or promotions, unlike in Malawi where the President makes appointments of persons to the public service if the position is above the rank of Under Secretary. Further, the Constitution links appointments and promotions of public officers and functions of the Public Service Commission to values and principles of public service stipulated under articles 10 and 232 of the Constitution. The constitutional framework for presidential appointments to the public service is covered by provisions which expressly mention considerations of "fair competition and merit as the basis of appointments and promotions",[223]

[222] As illustrated by the case of *The State and The President of the Republic of Malawi, ex parte Dr. Bakili Muluzi and John Z.U. Tembo* (n 49).
[223] Article 232(1)(g) of the Constitution of Kenya, 2010.

"representation of diverse communities",[224] and "affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service".[225]

Finally, adjudication of disputes involving presidential appointment powers in Kenya is progressive and reveals a different approach from that taken in Ghana and Malawi. In *Abdi Yusuf v. Attorney General and 2 Others*,[226] the High Court reiterated that principles of the rule of law and legality required the President to make appointments in accordance with statutory enactments. Similarly, in *Amoni Thomas Amfry & Another v. Minister for Lands & 8 Others*,[227] the High Court directed the President to comply with the law by officially making appointments to the National Land Commission.[228] The Court placed emphasis on the rule of law as "a recognised national value" which had to be given effect.[229] The two decisions provide the lesson that the judiciary in Kenya does not regard presidential appointment powers as merely ceremonial.

In *Law Society of Kenya v. Attorney General & another*,[230] the High Court commendably considered many factors including constitutional values and principles of governance as well as the historical context of presidential appointments. The Court did not specifically interpret the phrase "on the recommendation of" as the judiciary in Malawi would presumably have done. Instead, the Court demarcated responsibilities among all the authorities involved in the process of making appointments[231] and rejected an amendment to introduce mandatory submission of three names to the President.[232] This is contrary to the approach taken in Ghana and Malawi which culminates into judicial deference in intervening in presidential appointments. Implications of the

[224] Article 232(1)(h) of the Constitution of Kenya, 2010.
[225] Article 232(1)(i) of the Constitution of Kenya, 2010.
[226] Petition No. 8 of 2013; [2013] eKLR (n 198).
[227] Petition No. 6 of 2013; [2013] eKLR (n 204).
[228] Para. 27(a).
[229] Para. 19.
[230] Constitutional Petition No. 3 of 2016; [2016] eKLR (n 179).
[231] See para. 263.
[232] See para. 272.

judicial deference illustrated in the cases from Malawi may encourage the President to replicate his or her intervention in other appointments, for instance of the Chief Justice, as the amendment in Kenya sought to establish. Further, the Court in Kenya did not shy away from what may be considered as sensitive issues in Malawi, for instance nepotism and patronage.

The lessons in all the decisions considered are that, in interpreting the law, the judiciary in Kenya goes beyond the text of legislation and considers the implications of the decisions on the rule of law. The decisions further illustrate the boldness of the judiciary to check the executive branch. This boldness could be both *de jure*, from the perspective of clarity of the applicable legislation; and *de facto*, from the perspective of the willingness to interpret and apply the law within the prevailing social context. In the same vein, Edlin made the following assertion:

> The law that exists at the start of the adjudicative process and the law that is made, interpreted, or applied through that process are determined, in part, by the judge's subjective beliefs, values, and perspectives toward the law as expressed to a community through the form of a legal judgment. The meaning of that legal judgment is then constructed by the community through a process of evaluation and reception.[233]

By singling out the community, Edlin illustrated that consideration of social context in interpreting the law could be important for stronger intervention by the judiciary in judicial review. Stronger judicial intervention in limiting presidential appointment powers could thus respond to aspirations of the community, for instance merit-based appointments, expressed through relevant legislation.

4.3 Relating the Lessons to Public Service Reform in Malawi

Unlike in Kenya, where the High Court considered nepotism and patronage,[234] among others, as relevant matters in appointments of government officials, in Malawi the MPSRC did not mention these matters in its report on public service reforms.[235] For instance, the MPSRC noted

[233] Douglas E. Edlin, *Common Law Judging: Subjectivity, Impartiality, and the Making of Law* (Ann Arbor, University of Michigan Press, 2016) p. 124.
[234] Constitutional Petition No. 3 of 2016; [2016] eKLR (n 179) para. 272.
[235] Malawi Public Service Reform Commission, Final Report (n 12).

that selection, appointment and promotion of senior officers of positions above Under Secretary in the public service is vested in the President and without provision for a process of competitive interviews.[236] The MPSRC further noted that the selection, appointment and promotion of senior officers were mostly "based or seen as based on connections to one's superiors or politicians rather than merit."[237] However, the MPSRC did not define the meaning of "connections" which, in the context of Malawi, could include nepotism, cronyism, patronage and favouritism.

The MPSRC recommended the appointment of senior public officers to be "fair, competitive, transparent, and merit-based",[238] which is consistent with the lesson provided by the judiciary in Kenya and underpinning values of the New Public Management.[239] However, the recommendation that the selection process should be the responsibility of the Public Service Commission while limiting the President's power to approval of results following the selection process[240] brings to the fore three problems discussed in the appointment cases from Malawi as the following paragraphs illustrate.

First, even though the MPSRC suggested that its recommendation would limit appointment powers of the President, the recommendation does not make any difference between similar cases where the President can abuse the limited powers and prevail in judicial proceedings due to inconsistencies in legislation, among others.[241] Second, the MPSRC recommended the amendment of relevant legislation and regulations to reflect the involvement of the Public Service Commission and the President in making the appointments.[242] However, unless the amendments expressly

[236] Malawi Public Service Reform Commission, Final Report (n 12) 40.
[237] ibid.
[238] ibid, 41.
[239] See pp. 1-2 for an explanation of the New Public Management.
[240] Malawi Public Service Reform Commission, Final Report (n 12) 41.
[241] For instance, in the case of *The State and The State President and The Attorney General, ex parte Enock Chihana and 3 Others* (n 10).
[242] Malawi Public Service Reform Commission, Final Report (n 12) 41.

include considerations of merit; matters which could be covered under what the MPSRC terms as "connections", for instance nepotism, cronyism, patronage; and favouritism, the amendments can be circumvented. Appointing authorities can use one ground as a basis for appointment while covering up the real basis if it is not expressly mentioned in legislation. This can be affirmed by the strict interpretation of legislation that the judiciary seems to follow in disputes arising in this context and the type of evidence that the courts seem willing to accept.[243] However, if the sensitive areas are expressly recommended, taken into account in drafting the amendments and enacted by Parliament, enforcement of the provisions through judicial review could be easier and the limits of exercising power by the appointment authorities could be clearer.

Third, presidents appear to be uninterested in having their appointment powers limited. This is a challenge beyond the MPSRC but potentially manageable by the judiciary if it can duly exercise checks and balances in disputes involving presidential appointment powers. Public service reforms in presidential appointments could be a futile aspiration if the judiciary is not as bold as in Kenya.

[243] For instance, in the case of *The State and The State President and The Attorney General, ex parte Enock Chihana and 3 Others* (n 10).

Conclusion

Presidential appointment powers of senior government officials in Malawi are prone to demonstrable abuse. Limiting the powers is in the interest of good governance, rule of law, constitutionalism and checks and balances. In recognition of the significance of merit-based appointments of senior government officials and improved public service delivery, the government initiated public service reforms. The Malawi Public Service Reform Commission (MPSRC), acknowledged the problems related to presidential appointments of senior government officials and recommended limiting the powers.[244] Further, the MPSRC recommended amendment of legislation where applicable.[245]

In reality, limiting presidential appointment powers is not easy as presidents seem uninterested. In addition, judicial determinations illustrate that it is possible to circumvent the requirements of legislation that limits presidential appointment powers. However, these challenges are surmountable if the amendments expressly state issues that lead to the abuse of presidential appointment powers. The rationale is to prevent presidents from manipulating loopholes in legislation to make appointments based on reasons that are contrary to law. Examples include express reference to merit-based appointments and prohibition of irrelevant considerations, such as nepotism, cronyism, patronage and favouritism, when making the appointments. Identification of these issues is partly guided by the constitutional framework and judicial pronouncements in Kenya. Further, the challenges can be overcome if the judiciary exercises greater intervention in disputes concerning presidential appointments as also illustrated by Kenya.

Finally, public service reforms, amendment of legislation and stronger judicial intervention may not be adequate as a lesson on cooperation from France, a developed democracy, illustrates.

[244] Malawi Public Service Reform Commission, Final Report (n 12) 41.
[245] ibid.

Amendment of article 13 of the 1958 Constitution in 2008 gave Parliament "the opportunity to directly exercise control over important presidential decisions."[246] Under the new procedure, standing committees in the National Assembly and the Senate scrutinise and give their opinion on appointments of candidates but the nomination cannot be blocked by a simple majority.[247] However, when "the sum of the negative votes in each committee represents at least three fifths of the votes cast by the two committees",[248] the choice of the President may be vetoed. Ducoulombier thus observes that the procedure requires members of standing committees to ignore partisan differences when considering a controversial candidate.[249] Further, Ducoulombier argues that textual reforms may not necessarily allow Parliament, especially "members of Parliament belonging to the majority, to fully play its role."[250]

Cases considered in the context of Malawi illustrate the absence of real cooperation between the President and leaders of political parties or bodies conducting interviews when making presidential appointments. Real cooperation between the President and members of Parliament or relevant bodies could assist in limiting presidential appointment powers and overcoming the challenges against the exercise of power by the President when making the appointments.

The study recommends legal, judicial and political reforms to limit presidential appointment powers of senior government officials. First, legal reforms include amendment of legislation which does not provide for consideration of merit in the appointment of an officer, for instance section 6 of the Public Service Act[251] and section 16(1) of the Parliamentary Service

[246] Peggy Ducoulombier, "Rebalancing the power between the Executive and Parliament: the experience of French constitutional reform" (n 2) 697.
[247] ibid, 698.
[248] Article 13 of the Constitution of October 4, 1958 (France).
[249] Peggy Ducoulombier, "Rebalancing the power between the Executive and Parliament: the experience of French constitutional reform" (n 2) 698.
[250] ibid.
[251] Laws of Malawi, Cap. 1:03.

Act,[252] to provide certainty to the law. Further, the amendments should expressly provide for all relevant considerations in making appointments, including issues that are regarded as sensitive or divisive, for instance nepotism, cronyism, patronage or favouritism. Inclusion of these considerations could first assist parties to a dispute to provide evidence which would not be treated as hearsay as the basis would be in legislation. Secondly, determinations made by courts pursuant to clearly stated considerations under the law could reflect social realities. Finally, future constitutional review processes could consider constitutional amendments to remove presidential powers in some appointments.[253]

Second, judicial reform would ensure application of constitutional principles and taking into account policy considerations and social context, among others, in court decisions. The judiciary should fully provide checks and balances on the exercise of power by the executive while promoting the rule of law and constitutionalism. Last but not least, the President should engage in dialogue with representatives of political parties or bodies empowered to make recommendations or be consulted when making presidential appointments. Real cooperation or dialogue could assist in limiting presidential appointment powers and reducing or eliminating legal challenges against presidential appointments. The practicality of these recommendations is more relevant following the recent appointment of an 'elephant-size'[254] cabinet in Ghana, which has attracted criticism and illustrates the extent to which presidential appointment powers can be abused.

[252] Laws of Malawi, Cap. 2:08.
[253] For instance, the appointment of Clerk of Parliament, as in the case of Ghana and Kenya.
[254] Chloe Farand, 'Ghana's President defends appointing 'elephant-size' government of 110 ministers' *The Independent Online* (n 1).

Bibliography

2016 Ibrahim Index of African Governance: Ghana Insights. Available at http://s.mo.ibrahim.foundation/u/2017/03/08200203/Ghana-Insights-2016-IIAG.pdf?_ga=1.71050512.1405676859.1489090780 Accessed on 9 March 2017.

'APM Receives Reforms Exit/Implementation Report, As Four Ministers Sign Performance Contracts' *Malawi Voice*. Available at http://www.malawivoice.com/apm-receives-reforms-exitimplementation-report-as-four-ministers-sign-performance-contracts/ Accessed on 11 March 2017.

'Appointing SC Judges, EC Boss: JC, CoS Advice Not Binding On President: SC' *Peace FM Online*. Available at http://m.peacefmonline.com/pages/politics/politics/201607/286065.php Accessed on 11 March 2017.

Atudiwe, A.P. "Courts, Constitutions and Interpretation in Africa: A Focused Inquiry into Comparative Constitutional Interpretation in Ghana and Nigeria" 7 *Malawi Law Journal* 57 2013. Available at http://heinonline.org/HOL/PDFserachable?handle=hein.journals/malawi7&collection=journals&section=6&id=&print=section&sectioncount=1&ext=.pdf&nocover= Accessed on 9 March 2017.

Cane, P. *Controlling Administrative Power: An Historical Comparison* (Cambridge, Cambridge University Press, 2016).

Constitution of October 4, 1958 (France) (rev. 2008). Available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/constitution_anglais.pdf Accessed on 1 April 2017.

Constitution of the Republic of Ghana, 1992 (rev. 1996). Available at https://www.constituteproject.org/constitution/Ghana_1996?lang=en Accessed on 1 April 2017.

Constitution of the Republic of Malawi, 1994. Available at https://www.constituteproject.org/constitution/Malawi_1999?lang=en Accessed on 1 April 2017.

Djabanor, F. 'GBA suit against Supreme Court judges' appointment dismissed' *Citi FM Online*. Available at http://citifmonline.com/2016/07/20/gba-suit-against-supreme-court-judges-appointment-dismissed/ Accessed on 11 March 2017.

Ducoulombier, P. "Rebalancing the power between the Executive and Parliament: the experience of French constitutional reform", *Public Law*, 2010.

Edlin, D.E., *Common Law Judging: Subjectivity, Impartiality, and the Making of Law* (Ann Arbor, University of Michigan Press, 2016).

Farand, C. 'Ghana's President defends appointing 'elephant-size' government of 110 ministers'

The Independent Online (18 March 2017). Available at http://www.independent.co.uk/news/world/africa/ghana-president-nana-akufo-addo-appointment-110-ministers-government-a7636921.html Accessed on 22 March 2017.

Fombad, C.M. (ed.), *Separation of Powers in African Constitutionalism* (Oxford, Oxford University Press, 2016).

Gender Equality Act, No. 3 of 2013. Available at http://malawilaws.com/g/99-CHAPTER%2025-06GENDER%20EQUALITY.html Accessed on 1 April 2017.

Gondwe, G. 'Peter Mutharika 'clings to power'' *The Times Group* (17 November, 2015). Available at http://www.times.mw/peter-mutharika-clings-to-power/ Accessed on 3 December 2016.

International Institute for Democracy and Electoral Assistance, 'Constitution Assessment for Women's Equality', Stockholm, International IDEA, 2016. Available at http://www.idea.int/publications/constitution-assessment-for-womens-equality/loader.cfm?csModule=security/getfile&pageID=79597 Accessed on 30 September, 2016.

Kapiszewski, D., Silverstein, G. and Kagan, R.A. (eds.), *Consequential Courts: Judicial Roles in Global Perspective* (Cambridge, Cambridge University Press, 2013).

Kashoti, D. 'Public appointments should be on merit' *The Times Group*. Available at http://www.times.mw/public-appointments-should-be-on-merit/ Accessed on 11 March 2017.

'Malawi govt announces public service reforms commission mandate expires Jan 31, 2017' *The Maravi Post*. Available at http://www.maravipost.com/malawi-govt-announces-public-service-reforms-commission-mandate-expires-jan-31-2017/ Accessed on 12 February 2017.

'Malawi Parliaments [*sic*] shoots down presidential appointments in National Planning Commission' *Malawiana*. Available at http://malawiana.net/malawi-parliaments-shoots-down-presidential-appointments-in-national-planning-commission/ Accessed on 17 December 2016.

Malawi Public Service Reform Commission, Final Report, 'Public Service Reforms: Making Malawi Work', 2015. Available at https://info.undp.org/docs/pdc/Documents/MWI/Malawi%20Public%Service%20Reform%Report(1)%20(2).pdf. Accessed on 10 September, 2016.

Parliamentary Service Act (Cap. 2:08) of the Laws of Malawi. Available at http://malawilaws.com/revised-statutes/volume-i/13-chapter-3-01supreme-court-of-appeal.html#Ch0208s16 Accessed on 1 April 2017.

Prempeh, H.K. "Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa", Vol. 80:1 *Tulane Law Review* (2006).

Public Service Act (Cap. 1:03) of the Laws of Malawi. Available at http://malawilaws.com/p/4-CHAPTER%201-03PUBLIC%20SERVICE.html Accessed on 1 April 2017.

Public Services Commission Act, 1994 (Act 482). Available at https://www.psc.gov.gh/images/stories/PSC_ACT.pdf Accessed on 1 April 2017.

The Constitution of Kenya, 2010. Available at https://www.constituteproject.org/constitution/Kenya_2010?lang=en Accessed on 1 April 2017.

Waluchow, W.J., *A Common Law Theory of Judicial Review: The Living Tree* (Cambridge, Cambridge University Press, 2007).

Cases

Abdi Yusuf v. Attorney General and 2 Others, Petition No. 8 of 2013; [2013] eKLR. Available at http://kenyalaw.org/caselaw/cases/view/87296 Accessed on 11 March 2017.

Amoni Thomas Amfry & Another v. Minister for Lands & 8 Others, Petition No. 6 of 2013; [2013] eKLR. Available at http://kenyalaw.org/caselaw/cases/view/86280 Accessed on 11 March 2017.

Ghana Bar Association v. Attorney General as cited in Djabanor, F. 'GBA suit against Supreme Court judges' appointment dismissed' *Citi FM Online*. Available at http://citifmonline.com/2016/07/20/gba-suit-against-supreme-court-judges-appointment-dismissed/ Accessed on 11 March 2017 and 'Appointing SC Judges, EC Boss: JC, CoS Advice Not Binding On President: SC' *Peace FM Online*. Available at http://m.peacefmonline.com/pages/politics/politics/201607/286065.php Accessed on 11 March 2017.

In the Matter of the Constitution of the Republic of Malawi and In the Matter of the Removal of Mac William Lunguzi as the Inspector General of Police and In the Matter of Judicial Review, Misc. Application No. 55 of 1994 (High Court, Principal Registry) (unreported).

Law Society of Kenya v. Attorney General & another, Constitutional Petition No. 3 of 2016; [2016] eKLR. Available at http://kenyalaw.org/caselaw/cases/view/122379/ Accessed on 8 March 2017.

Morobe Provincial Government v. The State and Somare (1984) PNGLR 212.

Richard Sky v. Attorney General as cited in 'Appointing SC Judges, EC Boss: JC, CoS Advice Not Binding On President: SC' *Peace FM Online*. Available at http://m.peacefmonline.com/pages/politics/politics/201607/286065.php Accessed on 11 March 2017.

The State and Speaker of the National Assembly and The Attorney General, ex parte Mary Nangwale, Misc. Civil Case No. 1 of 2005 (High Court, Lilongwe District Registry) (unreported). Available at http://www.malawilii.org/mw/judgment/high-court-general-division/2005/80 Accessed on 10 September, 2016.

The State and The President of the Republic of Malawi, ex parte Dr. Bakili Muluzi and John Z.U. Tembo, Misc. Civil Cause No. 99 of 2007 (High Court, Principal Registry) (unreported). Available at http://malawilii.org/mw/judgment/high-court-general-division/2008/2/2_0.pdf Accessed on 10 September, 2016.

The State and The State President and The Attorney General, ex parte Enock Chihana and 3 Others, Misc. Civil Cause No. 86 of 2015 (High Court, Mzuzu District Registry) (unreported). Available at http://www.malawilii.org/mw/judgment/high-court-general-division/2015/439/The%20State%20Vs.%20The%20President%20and%20%20The%20Attorney%20General_%20%20Ex-Parte_%20Enock%20%20Chihana%20and%203%20others_%20Misc.%20Civil%20No.%2086%20of%202015.doc Accessed on 19 December 2016.