



# **Malawi: Comparison Between the Malawi Constitution and the U.S. Constitution (Focusing on Checks and Balances, Legislative Oversight, etc.)**

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**MALAWI**

**COMPARISON BETWEEN THE MALAWI CONSTITUTION AND THE U.S.  
CONSTITUTION (FOCUSING ON CHECKS AND BALANCES, LEGISLATIVE  
OVERSIGHT, ETC.)**

**Introduction**

The Constitution of Malawi, 1994 as amended,<sup>1</sup> is divided into 23 chapters: the Republic of Malawi, application and interpretation, fundamental principles, human rights, citizenship, the legislature, elections, the executive, the judicature, the Ombudsman, human rights commission, law commission, national compensation fund, local government, the police, the defense forces, prisons, finance, the reserve bank of Malawi, the civil service, amendments to this Constitution, transitional provisions, and a chapter to cover transitional matters. The Constitution was amended in 1994, twice in 1995, in 1997, and in 1999.

**I. Checks and Balances: Separation of Powers**

The government's three main branches are the Legislature (Ch. VI, secs. 48-74), the Executive (Ch. VIII, secs. 78-102), and the Judicature (Ch. IX, secs. 103-119). The institution of Ombudsman (Ch. X, secs. 120-128) and the Human Rights Commission (Ch. XI, secs. 129-131) enhance the system of checks and balances.

The Constitution of Malawi binds all executive, legislative, and judicial state organs at all levels of government, securing the protection of law for all Malawians according to section 4 of the Constitution. Any act of government or any law that is inconsistent with the constitutional provisions is void to the extent of the inconsistency under section 5 of the Constitution.

**A. Separation of Powers**

Sections 7 through 9 of Chapter I prescribe the concept of separation of powers and enshrine the system of checks balances. According to section 7, the Executive branch of the government of Malawi is responsible for the initiation of policies and legislation for the implementation of all laws that embody the express wishes of the people of Malawi and promote the principles of the Constitution. Section 8, on the other hand, requires that the Legislature when enacting laws shall reflect in its deliberations the interests of all the people of Malawi and shall further the values explicit or implicit in the Constitution. The Judiciary enjoys the responsibility of interpreting, protecting, and enforcing the Constitution and all laws in accordance with the provisions of the Constitution. The Judiciary must act in an impartial manner concerned only with legally relevant facts and prescription of law.

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<sup>1</sup> Malawi Supp., in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (G. H. Flanz ed., 1995).

## II. The Modicum of Checks and Balances

### A. The Legislature (Ch. VI, secs. 48-74)

All legislative powers of the Republic of Malawi are vested in Parliament (sec. 48). Parliament consists of the National Assembly, the Senate, and the President of the Republic as Head of State (sec. 49), as elected by the people of Malawi. The Constitution does not prescribe the total number of members in the National Assembly. However, the Senate must have 80 members (sec. 68). This prescription by Malawi is an attempt to model the legislature after the U.S. Congress—divided into the House and Senate. However, under the Malawian system, the two chambers are not similarly characterized.

Members of the National Assembly are popularly elected; members of the Senate are also elected, 24 by the District Councils, 24 by the Chiefs of each District, and 32 by the sitting members of the Senate. The latter shall be representative of certain interest groups, general society, and the major religious faiths of Malawi.

The attempt to model the legislative branch after its American counterpart is incomplete in that Parliament [Congress] consists of both chambers and the President (sec. 48). In Malawi, therefore, the President is part of the Legislature. The President either signs the bill into law or rejects it (sec. 73).<sup>2</sup> Section 7 clearly states that the executive is responsible for the initiation of policies and legislation and for the implementation of all laws. The initiation of legislation under the Malawian system is vested, first and foremost, in the executive, rather than in the legislature. The Legislature is not precluded from the process of the initiation of laws under its own powers, this is not its primary jurisdiction. The Legislature is vested with power to enact laws (sec. 8). To this extent, therefore, the power of initiation of legislation under the Constitution of Malawi is concurrent between the Legislature and the Executive, but primarily vested in the Executive branch of government.<sup>3</sup>

The Constitution of Malawi does not provide a clear demarcation concerning the relationship between Parliament and the President. It appears that the framers of the Constitution intended to enshrine the accountability of the President to the Parliament. However, only in section 86, dealing with impeachment, is this principle of accountability explicitly set forth.<sup>4</sup>

The National Assembly can override a presidential veto (sec. 73). Once the president has vetoed the bill, the bill may be debated again and passed by a majority of the National Assembly for the second time around. The President is then required to assent to the bill within 21 days

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<sup>2</sup> Franz observed: "...it is hardly accurate to characterize the legislature as a separate body. As in the British prototype, there is a fusion, rather than separation of powers." (Id. at xii) Opinions differ on the observations of Franz on the lack of specificity on which body initiates legislation under the Malawian Constitution.

<sup>3</sup> Id. at xii-xiii.

<sup>4</sup> "This is essentially a remedial approach to constitutionalism. In view of the abuses of power that the citizens of Malawi experienced in the recent past, one may suggest that a more preventive approach would have been desirable." Id. at xiii.

(sec. 73).

Initially, the framers of the Constitution appeared to have opted for a distinct separation of legislative and executive powers. However, the constitutional document as it stands currently indicates a movement towards parliamentary government or legislative supremacy. Indeed, the constitutional text itself is a quest for a more effective system of checks and balances. This is evident in the establishment of many new institutions under the Constitution, such as the Ombudsman and the Human Rights Commission.

#### B. The Executive (Ch. VIII, secs. 78-102)

The President and Vice President are established by sections 78 and 79. They are popularly elected, hold office for five years, and may serve a maximum of two consecutive terms (sec. 83). These provisions do not preclude a former President from returning in the future to stand for election to this office.

The President may be called to Parliament to respond to questions at such times as may be determined by the Standing Orders of Parliament or pursuant to a motion of the National Assembly or the Senate (sec. 89). All Ministers are responsible to the President for the administration of their own departments (sec. 97).

Chapter VIII does not contain a specific reference to presidential powers in times of emergencies. However, this part of his powers is addressed in the context of human rights provisions on “derogation and public emergency” (sec. 45).

Section 86 allows for the President and Vice President to be removed from office by the National Assembly in a process of indictment and conviction.

#### C. The Judicature (Ch. IX, secs. 103-119)

The members of the judiciary are appointed to office and vested with jurisdiction over all issues and enjoys exclusive authority. Therefore, all courts and persons who exercise judicial functions in these courts carry out their duties and powers independent of the influence and direction of any other person or authority.

The highest appellate court is the Supreme Court of Appeal. This is a superior court of record with a Chief Justice as the head, assisted by no less than three other associate justices. The second highest court is the High Court. This court is vested with unlimited original jurisdiction in both civil and criminal matters (sec. 108). It comprises no less than three judges.

Chapter IX seeks to safeguard the independence of the judiciary. Its provisions also ensure the effective organization of this branch of government. Section 119 deals with the tenure of judges. According to section 119 (2) “a person holding the office of Judge may be removed from office only for incompetence in the performance of the duties of his office or for misbehavior.” To remove a judge, the President must sign an instrument in consultation with the Judicial Service Commission. This instrument must be debated in the National Assembly and passed by a majority of the votes of all the members of the National Assembly. Thereafter, the instrument is then presented to the President as a petition for the removal of the judge.

Therefore, removal of a judge from office is a difficult undertaking.

On the other hand, a judge can be suspended by the President as long as a motion for his removal is in Parliament. But even in such a case, the President must consult with the Judicial Service Commission prior to the suspension.

#### D. Other Institutions Securing the System of Checks and Balances and Separation of Powers

##### 1. The Ombudsman (Ch. X, secs. 120-128)

The office of the Ombudsman is an added feature in the system of checks and balances as established in sections 120 to 128 of the Constitution. Pursuant to section 120, the Ombudsman has such powers, functions, and responsibilities as conferred on this office by the Constitution and any other law. Consistent with section 121 of the Constitution, in his/her powers, functions, and duties, "the Ombudsman shall completely be independent of the interference or direction of any other person or authority."

The Office of Ombudsman investigates any cases of alleged abuse of office. Any person who may have suffered any type of injury is free to lodge a complaint which will be investigated, determined, and remedies prescribed by this office outside the court system. It is also vested with powers of subpoena. It can also direct the courts to implement its decisions.

##### 2. The Human Rights Commission (Ch. XI, secs. 129-131)

Sections 129-130 state as follows:

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

The establishment of the Commission as an added protection and security of the guaranteed human rights provisions is important (secs. 15-46). Malawi, as other countries in the region, was under a one party system of government for a long time in which human rights violations were rampant. The Commission is intended to forestall such derogation, not only of the executive branch, but other branches of government as well including state security forces, the police, and the national defense forces.<sup>5</sup>

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<sup>5</sup> See generally the following publications by the author of this report: C. Mwalimu, Police and Human Rights Practices in Nigeria: A Primer Case Study Toward Complete Enjoyment of Fundamental Human Rights in Sub-Saharan Africa, in 5 EMORY INT'L L. REV. 516-569 (Fall, 1991); Police State Security Force and Constitutionalism of Human Rights in Zambia, in 21 GA J. INT'L & COMP. L. 217-243 (Summer 1991); Police, State Security Forces and Human Rights in Nigeria and Zambia: Dynamic Perspectives in Comparative Constitutionalism, in THIRD WORLD LEG. STUD. 85-132 (1990); The Influence of Constitutions on the Development of

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