

**ADEQUACY OF EXCHANGE CONTROL ACT IN SAFEGUARDING THE
OPERATIONAL INDEPENDENCE OF THE RESERVE BANK OF MALAWI**

LLM (COMMERCIAL LAW) THESIS

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UNIVERSITY OF MALAWI

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LLM (COMMERCIAL LAW) THESIS

By

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LL. B (Honours) - Zanzibar University

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requirements for the award of the degree of Master of Laws in Commercial Law

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DECLARATION

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

OSCAR ASIMA TAULO

Full Legal Name

A handwritten signature in black ink, consisting of a large, stylized 'O' followed by a horizontal line extending to the right.

Signature

25th March, 2022

Date

CERTIFICATE OF APPROVAL

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

Signed _____ Date _____

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Supervisor

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ABSTRACT

It is the dream of every Malawian to see that the Regulatory institution such as Reserve Bank of Malawi is not being politicized. However, inadequacy and gaps in the legal framework that govern the operation of the bank can affect the realization of this dream. The Malawians may not realize this dream if the legislation in question does not adequately provide safeguards to operational independence of the Reserve Bank of Malawi. The Reserve Bank of Malawi just like any other central banks can be said to be independent if its legal framework meets the legal indicators of central bank independence and does not breach constitutional standards that enhance the operational independence of the Reserve Banks of Malawi. Unfortunately, in most democratic societies, where the people who are elected into political office have powers to enact laws, they always find ways to enact a piece of legislation that gives them an advantage. This problem is commonly known as political interference. This and other problems lead to the bank losing its independence and its control of foreign exchange. As a result, this in the end leads to the loss of forex as a nation. That in recent years we have witnessed the unscrupulous individuals sending forex abroad. Some have even been arrested at the airport when they attempted to externalize forex. This study, therefore, explores the adequacy of the Exchange Control Act in safeguarding the operational independence of the Reserve Bank of Malawi. The study examines whether and how the Exchange Control Act adequately safeguards the operational independence of the Reserve Bank of Malawi. To do this, the study applies legal indicators of central bank independence as well as constitutional standards that enhance the operational independence of the Reserve Bank of Malawi.

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4. *Grey V Pearson* (1857) 6 H.L. Cas. 61,
5. *Heydon's Case* (1584) 3 Co. Rep. 7a, 7b
6. *Peter Gauweiler and Others v Deutscher Bundestag*[2014] OJ C129/11
7. *Re Advocate* [1964] MLJ 1
8. *Sussex Peerage Case* (1836) 7 C. & P. 446;
9. *Three Rivers District Council v. Governor and Company of the Bank of England* (No. 3) [2000] 2 W.L.R. 1220

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background

Reserve Bank of Malawi is a central bank.¹ As such it is charged with many responsibilities just like any other central bank in the world which includes the attainment of price stability or low inflation and ensuring a sound financial system to facilitate economic growth and development.²

The Reserve Bank of Malaŵi was established under an Act of Parliament in July, 1964 (Caption 44:02) of the Laws of Malaŵi and started its operations in June, 1965.³ In April 1989 the Reserve Bank of Malaŵi Act was revised stipulating the Bank's principal functions of which are in the interest of the national economy and are in line with the economic policies of the government.⁴ The 1989 Act made the Reserve Bank of Malawi independent from Government under Section 4A.⁵ Again in 1994, a new Constitution was enacted and the Constitution provided for the establishment of the central bank known as the Reserve Bank of Malaŵi.⁶ Again under this new Constitution, the Reserve Bank of Malawi's principal function was defined.⁷ The Constitution further through section 185(2) authorizes the enactment or existence of the Reserve Bank of Malaŵi Act known as the Reserve Bank of Malaŵi Act.

¹ See Section 185 of the Constitution 1994.

² Speech by Mary C Nkosi, Deputy Governor of the Reserve Bank of Malawi, during African Bible College Students' visit to the Reserve Bank of Malawi, Lilongwe, 4 May, 2007 accessed at www.bis.org on 9th December, 2020.

³ Ibid footnote 2 above page 1

⁴ Ibid footnote 3 above page 1

⁵ Section 4A of Reserve Bank of Malawi Act Cap. 44:02 of Laws of Malawi

⁶ Constitution of Republic of Malawi of 1994, s 185 (1)

⁷ Section 185 of the Constitution of Republic of Malawi 1994

It is this Act that also provides for the establishment of the Reserve Bank of Malawi as separate legal instrumentality capable to sue and be sued and hold its own properties⁸. One of the Reserve Bank Malawi's (RBM) primary mandate is to ensure that the financial system is stable.⁹ One of the ways of fulfilling its mandate of ensuring that the financial system is stable, the Reserve Bank of Malawi provides an overall assessment of risks to the financial system and also describes the system's resilience to risks.¹⁰ The RBM considers financial stability as a condition represented by a sound financial system, capable of withstanding shocks to the economy; one that is able to allocate savings into investments, facilitate settlement of payments efficiently and manage risks in satisfactory manner.¹¹ The constitution of the Republic of Malawi provides for total independence of the RBM as it stipulates that it shall be controlled by the Board and that members of the Board shall be appointed in accordance with the Act of Parliament.¹² The Act of Parliament, known as the Reserve Bank of Malawi Act, in particular section 4A of the Act clearly states that the Reserve Bank of Malawi shall be independent from direction or authority of any person. This seems to allude to the fact that the Constitution provides for political and instrument independence of the RBM in order to achieve its objectives stipulated above without any form of interferences.

That said however, foreign exchange operations in Malawi are governed by the Exchange Control Act. The Exchange Control Act¹³ was enacted in 1984. The chief objective of the Act is to control foreign exchange, bullion and Malawi currency.¹⁴ The law gives the Minister of Finance and the Reserve Bank of Malawi authority to regulate the control of foreign exchange, bullion and Malawi currency.¹⁵ By giving the Minister of Finance powers to make regulations for the purpose of the control of foreign exchange, bullion and

⁸ Section 3 of the Reserve Bank of Malawi Act Cap. 44:02 of Laws of Malawi

⁹ Reserve Bank of Malawi; Financial Stability Report. December 2019. Accessed at www.rbm.mw on 3rd March, 2020 pg.5

¹⁰ Ibid (Footnote 9 above) page .2

¹¹ Ibid (Footnote 9 above) page .2

¹² Constitution of Malawi of 1994, s 185 (2)

¹³ The Exchange Control Act Chapter 45:01 of Laws of Malawi.

¹⁴ Section 3 of the Exchange Control Act Chapter 45:01 of Laws of Malawi.

¹⁵ Section 3 of the Exchange Control Act Chapter 45:01 of Laws of Malawi as read with Regulation 2, 4, 5 and 6 of Exchange Control Regulations.

Malaŵi currency it clearly shows that there is a room for actual or perceived direct political or governmental influence in the matters of exchange controls that ordinarily ought to have been exclusively left to the Reserve bank of Malawi. It also shows that the freedom of monetary policy makers is taken away from them.

In light of this room for actual or perceived political interference by the Minister of Finance as prescribed by law, the researcher undertakes to carry out a research with the aim of investigating whether the Exchange Control Act do adequately safeguard the operational independence of the Reserve Bank of Malaŵi.

The study seeks to determine the independence of the Reserve Bank of Malaŵi amidst political interference by the Minister of Finance, as per powers given to him/her by section 3 of the Exchange Control Act. It therefore looks at the effectiveness of the Exchange Control Act in providing such powers to the Minister of Finance, who is a political figure, in relation to the Constitutional provisions. It will determine this by looking at the legal indicators that incorporate the operational independence of the Reserve Bank of Malaŵi.

The researcher acknowledges that section 185 of the Constitution provides the basis of independence of the Reserve Bank of Malawi. Notwithstanding this the Researcher observes that section 3 of the Exchange Control Act gives more powers to the Minister to make Regulations relating to the exchange control matters. This section clearly seems to undermine the operational independence of the Reserve Bank of Malawi as it seeks to give more powers to the Minister than the Reserve Bank of Malawi. Furthermore, the entire Exchange Control Act does not directly recognize the existence of the Reserve Bank of Malawi as a state's principal institution for the exchange Control. It is only through its Regulation where the Reserve Bank of Malawi is recognized. The only institution that is recognized by the Act itself is the office of the Minister of Finance.¹⁶ Since the Minister is a political position, this section therefore creates an opportunity for the actual or perceived political interference. These are some of gaps that are apparent in the Exchange

¹⁶ Section 3 of the Exchange Control Act Cap 45:01 of Laws of Malawi.

Control Act that have potential of undermining the operational independence of the Reserve Bank of Malawi.

That said, the researcher intends to use this study to investigate whether the Exchange Control Act do adequately safeguard the operational independence of the Reserve Bank of Malaŵi. The researcher also acknowledges that notwithstanding the alleged gaps in the Exchange Control Act, both the section 185(2) of the Constitution and the Exchange Control Act have the objective of controlling foreign exchange and currency in Malawi.

The Constitution of Malawi provides that the RBM is the State's principal instrument for the control of money supply, currency and the institutions of finance.¹⁷ The provision creates the legitimate expectation that the Reserve Bank of Malawi will always control and protect foreign Exchange in Malawi without any external influences. The Reserve Bank of Malawi just like any other central bank, and as the only principal state institution in Exchange Control matters is supposed to be independent in terms of its operation.¹⁸ This study seeks to establish if indeed the independence of the Reserve Bank of Malaŵi is clearly undermined by the presence of the gaps such as those outlined above. Once the study managed to establish the same, this research will therefore recommend the reform in the law to amend some of provisions in the Exchange Control Act such as section 3 should it be found that the section has potential of undermining the independence of the Reserve Bank of Malaŵi.

1.2 Problem Statement

As demonstrated in the background, the Constitution of the Republic of Malaŵi¹⁹ gives mandate to the Reserve Bank of Malaŵi as a principal institution in control of money supply including foreign currency in Malaŵi.²⁰ Since the Reserve Bank of Malaŵi is given the mandate to control money supply, currency and the institutions of finance, it is crystal

¹⁷ Section 185 (1) of the Constitution as read with Section 4 A of Reserve Bank Act of Malawi Chapter 44:02 of Laws of Malawi.

¹⁸ Toure, A.A. Does Central Bank Independence have any effect on inflation in Sub-Saharan African Economies? (2019)

¹⁹ The Constitution of Republic of Malawi 1994, s 185 (1)

²⁰ Ibid (footnote 19 above, section 185(1))

clear that the Bank has constitutional power to control foreign currency exchange in Malaŵi. This power to control the foreign exchange is expounded and manifested in Reserve Bank of Malawi Act ²¹ and Exchange control Act.²² The objective of the Exchange Control Act is to safeguard the mandate of the Reserve Bank of Malaŵi which is managing exchange control and uphold the spirit behind section 185(1)²³ of the Constitution which gives ultimate power of controlling foreign exchange to the Reserve Bank of Malaŵi.

However, section 3 of the Exchange Control Act²⁴ makes provision that the Minister of Finance may make regulations on various exchange control matters. This section seems to create more problems in terms of the safeguarding the Reserve Bank of Malawi's operational independence.

Firstly, it appears to be not consistent with the Constitution of the Republic of Malaŵi as it creates two parallel structures of exchange control management, notwithstanding that the Constitution of the Republic of Malaŵi which gives the Reserve Bank of Malaŵi the mandate as the only principal institution in exchange control management. Therefore it may be invalid by virtue section 5 of the Constitution. Secondly, the section seems to weaken the operational independence of the Reserve Bank of Malaŵi in respect of its mandate to control foreign exchange since the Minister is given wider powers than the Reserve Bank of Malaŵi. The section 3 of the Exchange Control Act therefore seems to create an opportunity for actual or perceived political interferences in matters of exchange control management thereby undermining the operational independence of the Reserve Bank of Malaŵi. It is therefore, the aim of this study to investigate whether the Exchange Control Act, in particular, section 3 of the Act, do adequately safeguard the operational independence of the Reserve Bank of Malaŵi.

²¹ Reserve Bank of Malawi Act Chapter 44:01 of Laws of Malawi

²² Exchange Control Act Chapter 45:01 of Laws of Malawi

²³ Supra (Footnote 19 above s185(1))

²⁴ Supra (Footnote 19 above s185(1))

1.3 Research Questions

1.3.1 Main Question

The main research question that this study endeavors to address is:

- Whether the Minister's powers to make regulations under section 3 of the Exchange Control Act do adequately safeguards the operational independence of the Reserve Bank of Malaŵi?

1.3.2 Specific Questions

In answering the main research question, the following specific questions will be considered:

1. What are the legal indicators of central bank independence?
2. Whether and how the Exchange Control Act do actually meet the legal indicators of central bank independence?
3. What is constitutional implication of the section 3 of the Exchange Control Act on Malaŵi constitutional standards that enhances the operational independence of the Reserve Bank of Malaŵi?
4. What are proposed reforms in the Exchange Control Act that need to be put in place in order to adequately safeguard the operational independence of the Reserve Bank of Malaŵi, if there are no adequate safeguards.

1.4 Hypothesis

The study proceeds on the assumption that the Exchange Control Act does not adequately safeguard the operational independence of the Reserve Bank of Malaŵi.

1.5 Research Methodology and Data Analysis

Methodology

Methodology is defined as “the logical basis of research, of collecting data and of interpreting and analyzing the findings.”²⁵ The study adopted a post-positivist approach.

Approach

The study employed doctrinal research methodology. This is because the study exclusively concentrated on the analysis of the letter of the law which is a basic tenet of the doctrinal research. Doctrinal legal research involves research into legal doctrines through analysis of statutory provisions and cases by the application of power of reasoning and gives emphasis on analysis of legal rules, principles or doctrines.²⁶ Since this research will pay a particular focus to the Exchange Control Act in relation to the independence of the Reserve Bank of Malawi’s operations, the study will involve an analysis of the Exchange Control Act and indeed other such materials as cases, books and journal articles relevant to the study.

Thus study was undertaken through desk research. On desk research specifically the study was undertaken through literature review and research reports. In certain instances, in pursuit of the same desk research methodology the study also had regard to internet/online sources. The study also used desk research to find out the indicators of central bank independence.

Research Paradigms

The study adopted a qualitative paradigm which entails understanding a given research problem within a particular set up without having recourse to or focusing on statistical or numerical data.²⁷ Whilst the quantitative paradigm involves explaining a phenomenon by

²⁵ Mc Neil, *Research Methods* (1960) Routledge, pg. 14

²⁶ Khushal Vibhute and Filipos Aynale, *Legal Research Methods: Teaching Material* (2009) 70 <<http://www.chilot.files.wordpress.com>> Accessed: 3rd March, 2020; S Michael, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Pearson Education Limited, England 2007) 49-50

²⁷ Ibid (note 26 above) 15-17

collective numerical data that is analyzed using mathematically based techniques.²⁸ The former approach was adopted since the research aims at acquiring an in-depth understanding of the independence of the Reserve Bank of Malawi from the prevailing legal framework and will not require analysis of numerical or statistical data.

Data collection, Tools and Data Analysis

Data Collection

In order to answer the research questions in this study, the study employed the documentary review method of data collection, which reviews existing documents which is essentially desk research.²⁹ In terms of qualitative aspect, the documentary review method helped the researcher to review documents on independence of the Reserve Bank of Malawi and understand the political-economical motives behind its independence.

That in furtherance of desk research, the study had consulted secondary materials like books and journals. Even though books and journals are secondary materials, they are important because “they point the researcher to primary sources of law namely legislations and cases.”³⁰ Furthermore, Boslaugh stresses that, where gaps exist in the primary data, secondary data becomes useful.³¹ As such, the library was used for it was replete with the books and journals. Hence, desk research.

Description of Data and Data Analysis

The doctrinal legal research studies legal propositions based on secondary data of authorities such as conventional legal theories, laws, statutory materials, court, court decisions, among others.³²

²⁸ Ibid (note 26 above) 15-17

²⁹ ETA Evaluation Briefs, ‘Document Review’ (2009) 18 Data Collection Methods for Evaluation 2 <http://www.cdc.gov/healthyyouth/evaluation/index.htm>UTH retrieved on 19 November 2019

³⁰ Adilah Abd Razak, ‘Understanding Legal Research’ (Universiti Putra Malaysia) (Unpublished), pg. 22

³¹ S Boslaugh, Secondary Data Sources for Public Health: A Practical Guide (Cambridge University Press 1994) pg.

³² Khaler, A, 2018, Doctrinal Legal Research. Available at SSRN 3130525.

The data that was handier in this study is secondary data of authorities such as legal doctrines or principles and applicable laws on general concept of independence of central banks and Reserve Bank of Malaŵi in particular as well as its role in exchange control management. The legal doctrines or principles on independence of central banks could be found in case law both from Malawi and foreign jurisdiction. Another data that was useful in the study is relevant laws on independence of the Reserve Bank of Malaŵi and its role in management of exchange control matters. These kind of data could be found in the Constitution of the Republic of Malaŵi of 1994, and Acts of parliaments such Reserve Bank of Malaŵi and Exchange Control Act.

Data analysis is a process of selection, sharpening, sorting, focusing, discarding and organizing in order to make sense of data and draw conclusions as well as verify it.³³ It involves a number of closely related operations such as classification, categorisation, coding or tabulation.³⁴ Since this study was classified as qualitative, analysis was by way of categorisation and classification. On classification, the data was arranged in classes according their resemblance or affinity.³⁵ On the categorisation was based on the hypothesis formulated: *'Exchange Control Act does not adequately safeguard the operational independence of the Reserve Bank of Malaŵi.'*

Content analysis was also handy in this research because it was a qualitative data analysis. Content analysis is broadly defined as, "the process of summarizing and reporting written data-the main contents of data and their messages."³⁶ It looks for the presence of words in a text and endeavours to understand their meanings and relationships to each other.³⁷ The research did make use of this method by focusing on meanings of the key words. The

³³ Louis Cohen, Lawrence Manion and Keith Morrison, *Research Methods in Education* (6th Edn, Routledge London 2007), pg. 17

³⁴ Khushal Vibhute and Filipos Aynale (as note 26 above) pg. 58

³⁵ Ibid.pg (note 33 above) 475

³⁶ Ibid, pg. (note 33 above) 475

³⁷ B Matthews and L Ross, *Research Methods: A Practical Guide for the Social Sciences* (Longman Pearson 2010) pg 395

research therefore did classify and process data portraying the selected jurisdictions whose central banks are independent. This was aligned with the comparative aspect.

The research did group together and analyse the data by discussing the concept of central bank's independence. This will be helpful in understanding the philosophical justifications of the independence of the Reserve Bank of Malawi.

Analytical tools

In analyzing the statutes and the Constitution, the research did apply three analytical tools which are the literal rule, the golden rule and the mischief rule. On literal rule, when words of the statute are in themselves clear and precise, "then no more can be necessary than to expound those words in their natural and ordinary sense."³⁸ This essentially means that if the word of the statute was clear, it would be viewed as such even though they lead to absurdity. The golden rule will be used where the words of a statute led to an absurdity in departing from the ordinary meaning of the words.³⁹ In golden rule, to find the ordinary meaning of the words first.⁴⁰ In the mischief rule, words of a statute will be construed purposively, in order to understand the mischief that was being remedied.⁴¹ These three analytical tools did complement each other with an aim of coming up with an effective way of analyzing a statute.

In analyzing cases, a careful look at the facts and reasons behind the court decision to identify the legal principles as applied by the courts in reaching their decisions (*ratio decidendi*) was handy.⁴²

³⁸*Sussex Peerage Case* (1836) 7 C. & P. 446; Ronald Walker & Richard Ward, Walker and Walker's English Legal System (7th Edn Butterworths, London 1994), see generally Chapter 2; S.H. Bailey, J.P.L Ching and N.W. Taylor, The Modern English Legal System (5th Edn Sweet & Maxwell, London 2007), see generally Chapter 6

³⁹ *Grey V Pearson* (1857) 6 H.L. Cas. 61,

⁴⁰ *Re Advocate* [1964] MLJ 1

⁴¹ *Heydon's Case* (1584) 3 Co. Rep. 7a, 7b

⁴² Adilah Abd Razak, 'Understanding Legal Research' (Universiti Putra Malaysia) (Unpublished), pg. 22

1.6 Scope and Limitation of the Study

The scope of the study was within the domain of commercial law and its relation to operations of the central bank independence. The emphasis was on examining whether the Minister's powers to make regulations under the Exchange Control Act do adequately safeguard the operational independence of the Reserve Bank of Malaŵi. In terms of limitation, the study was limited to operational independence of the Reserve Bank of Malaŵi and the study did not focus on other forms of independence of the Reserve Bank of Malaŵi such as personal, financial and functional independence of the Reserve Bank of Malaŵi. The study focused only on operational independence of the Reserve Bank of Malaŵi in respect of Exchange Control Act and not focus on other piece of legal instrument such as the Reserve Bank of Malawi Act, Banking Act and Financial Service Act. The study was also limited to the Exchange Control Act in respect to the operational independence of the Reserve Bank of Malaŵi that are applicable to Malawian context. However, where material from other jurisdiction appear to be helpful then the study had to draw inferences from such material. There was a need to analyze the jurisprudence most of which was available only in hard copies (not uploaded) in particular foreign jurisdictions. Therefore, much if not all reliance was on (worldwide) literature. It is also very difficult to find locally written literatures on the topic in Malawi. However, despite these challenges, the researcher has managed to use the limited resources in order to enhance the quality of this work.

1.7 Literature Review

The study had considered the various literature on central bank independence as well as World Bank Reports on central bank's independence. A survey on the literature reveals conflicting views regarding the political independence of the central bank and its effects on the operations of the bank. The study has also considered various literature on the subject of exchange controls and how it relates to the work of the central bank, as well as how a central bank's control or lack thereof over exchange controls affects its work.

1.7.1 In support of political independence

The first view perceives the independence of the central bank from government influence as desirable. It stresses that the higher degree of political independence of central bank reduces disinflation costs.⁴³ According to Crowe and Meade, independence is greater when the central bank's management is insulated from political pressure by secure tenure and independent appointment.⁴⁴ The view maintains that the central bank enjoys greater freedom when the government cannot participate in or overturn its policy decisions.⁴⁵ It argues that, political independence can avoid inflation rising above what is deemed socially optimal by pushing back against the desire of the political authorities to exploit the curve trade-off.⁴⁶ By implication, this implies that the central bank can protect or even enhance its reputation by committing itself to a policy that is successful at preventing the discretion that may originate from political pressure on the monetary authorities.⁴⁷ Koop and Hanretty assert that a regulator must be independent in some sense to be considered as an Independent Regulatory Authority.⁴⁸ This school argues that for regulatory authority to be independent should meet the following three minimum requirements: the agency should have its own powers and responsibilities given under law, that it is organizationally separated from ministries and that it is neither directly elected nor managed by elected officials.⁴⁹

Another view is that the independence of central bank has an effect on inflation. This school believes that central bank independence is inversely correlated with the inflation rate.⁵⁰ Gu

⁴³Walsh, C.E. *Monetary Policy and Theory*, MIT Press, Cambridge (2003)

⁴⁴Christopher Crowe – Ellen E. Meade: *The evolution of central bank governance around the world*. Journal of Economic Perspectives, Vol. 21, Nr. 4. 2007, 69–90.

⁴⁵ Ahmad, R. Paiman. The Role of Central Banks in the Economy. Conference Paper (2016). Accessed at <https://www.researchgate.net/publication/311702578> on 3/3/2020

⁴⁶ Bordo, D. Michael & Pierre L. Siklos. *Central Banks: Evolution and Innovation in Historical Perspective*. Economic Working Paper 17105 (2017). Stanford University Press. Stanford. Pg. 12

⁴⁷ Ibid (Footnote 45 above) pg. 12

⁴⁸ Koop, C. and Hanretty, C., 2018. Political independence, accountability, and the quality of regulatory decision-making. *Comparative Political Studies*, 51(1), pp.38-75.

⁴⁹ Thatcher, M., & Stone Sweet, A. (2002). Theory and practice of delegation to non-majoritarian institutions. *West European Politics*, 25(1), 1-22.

⁵⁰ Eijffinger, S., De Haan, J. (1996). *The Political Economy of Central-Bank Independence*,

asserts that central bank independence and inflation are negatively correlated.⁵¹ This school argues that the independence of the central banks would lower the inflation rate. Agoba et al. support this view by asserting that “a well-developed financial systems and institutions improve the effectiveness of central bank independence in achieving lower inflation.”⁵²

Another view is that the central bank’s independence leads to stability in prices. According to Toure, the greater independence of the central banks has been translated into low level of price dynamics.⁵³

Thus, this school sees rationale in having central bank’s independent from political influence.

1.7.2 against the political independence

However, the general argument is that laws cannot specify explicitly the limits of authority between central banks and the political authorities under all contingencies.⁵⁴ This school argues that even when the laws are quite explicit, actual practice may deviate from them.⁵⁵ Lekachman argues that the political influence by the government authorities should be judged in light of the problem under consideration.⁵⁶

Most scholars challenge total political independence of the central banks from government authorities and say, autonomy or independence cannot prevent governments from eventually getting the monetary policy they want.⁵⁷ This school argues that the central bank

Special Papers in International Economics, No. 19, Princeton. Pg. 41

⁵¹ Gu, S., 2018. *An empirical analysis of central bank independence in sub-Saharan African countries* (Doctoral dissertation).

⁵² Agoba, A.M., Abor, J., Osei, K.A. and Sa-Aadu, J., 2017. Central bank independence and inflation in Africa: The role of financial systems and institutional quality. *Central Bank Review*, 17(4), pp.131-146

⁵³ Toure, A.A. Does Central Bank Independence have any effect on inflation in Sub-Saharan African Economies? (2019)

⁵⁴ Lekachman: *Economists at Bay*. McGraw-Hill Book Company, New York. (1976) pg. 44

⁵⁵ Ibid. footnote 53 above pg. 44

⁵⁶ Ibid. footnote 53 above pg. 45

⁵⁷ Bordo, D. Michael & Pierre L. Siklos. (note 52 above), pg. 6

remains a critical institution within government.⁵⁸ This school argues that independence does not mean that the central banks are free to engage in a monetary policy strategy of their own choosing.⁵⁹ Rather, the monetary authorities, at least in advanced economies, are given or negotiate a remit received from the political authorities.⁶⁰

This researcher builds on this divergence of views to inform himself independence related implications that would come with the central bank's independence. The fact that there are conflicting views should warn the researcher against making hasty inferences on the powers of the Minister of Finance as stipulated by the Exchange Control Act as having an impact on operational independence of the Reserve Bank of Malawi. Indeed, such divergence of views probably means that there are bound to be both positive and negative implications of central bank independence. However, the researcher relies on the anti-political interference school of thought to build normative basis of the study.

1.7.3 In support of exchange control laws

The first view perceives the exchange control laws in every country as desirable. It stresses that the exchange control with a greater or lesser degree of bilateralism, is a product born largely of necessity.⁶¹ According to Child exchange control has demonstrated its efficiency as means of maintaining a semblance of order in disorganized international markets.⁶² The view maintains that the exchange control is useful and flexible implement of commercial policy and that appropriate regulations will, for any one nation, increase or even maximize the gains from external trade.⁶³

Another view is that the exchange control is necessary to prevent capital flight from one country to another. This school believes that capital flight has effects of draining away the country's gold or devisen reserves as long as they last and thereafter result in exchange

⁵⁸ Ibid. (note 56 above), pg. 6

⁵⁹ Ibid. (note 56 above), pg. 9

⁶⁰ Ibid. (note 56 above), pg. 9

⁶¹ Child, N.A. *The theory and practice of exchange control in Germany: A study of monopolistic exploitation in international markets*, Vol 10, Springer Science & Business Media. 2013 pg. 1

⁶² Ibid (Footnote 60 above) pg.1

⁶³ Ibid (Footnote 60 above) pg.2

depreciation .⁶⁴ Simwaka & Mkandawire support this view by asserting that foreign exchange market intervention as a policy tool by central banks are necessary tool for macroeconomic stabilization.⁶⁵ According to Simwaka & Mkandawire the exchange control and exchange rate management in Malawi have been pursued with three major policy objectives in mind and this are:- (i) maintenance of a sustainable balance of payment positions; (ii) attainment of stable domestic prices; and (iii) Attainment of growth in real income.⁶⁶

Thus, this school sees rationale in having exchange control laws and how it relates to the work of the central bank, as well as how a central bank's lack of exchange control laws affects the work of the bank.

1.7.4 Against the exchange control laws

However, the general argument is that exchange control are not necessary and markets as well as capital flight should be left to run its course on the ground.⁶⁷ This school argues that capital flight cannot be sufficient justification for exchange control laws. Cassel argues that a flight of a capital is nothing dangerous for a national economy and process involved is too slow to cause serious disruptions of economy.⁶⁸

Another view is that of Child himself who considered two sides of the coin one being expressed above in support of exchange control laws and another against the exchange control laws. In his views against exchange control laws, Child argues that exchange control laws unfortunately also has great possibilities for further distortion of the pattern of world trade, for discrimination, and for economic exploitation – for economic effects

⁶⁴ Ellis, H.S., 1941. *Exchange Control in Central Europe* (Harvard Economic Studies, Vol. LXIX. Harvard University Press, Cambridge.Pg.8

⁶⁵ Simwaka K., & Mkandawile, K., 2012. *The efficacy of official intervention in foreign Exchange Market in Malawi*: African Development Review, Vol.24, No.2, pp.125-136, 25.

⁶⁶ Simwaka K.,2011. Journal of Economic and International Finance.Vol.3 No.7 pp.428-443.

⁶⁷ Cassel, G., Money and Foreign Exchange after 1914, New York.1992pg. 443-444.

⁶⁸ Ibid. footnote 60 above pg.2

generally considered undesirable.⁶⁹ This school argues that the exchange control are recipe for exploitation and destruction of economy of certain countries.⁷⁰

This researcher builds on this divergence of views to inform himself independence related implications that would come with the central bank's independence as well exchange control laws. The fact that there are conflicting views should warn the researcher against making hasty inferences on the powers of the Minister of Finance as stipulated by the Exchange Control Act as having an impact on operational independence of the Reserve Bank of Malawi. Indeed, such divergence of views probably means that there are bound to be both positive and negative implications of central bank independence. The divergence of views also probably means that there bound to be both positive and negative of exchange controls in relation to work of central bank. However, the researcher relies on the anti-political interference and pro exchange controls school of thought to build normative basis of the study.

1.8 Significance of the Study

On 25th May, 2016, on the official opening of the Reserve Bank of Malawi building in Mzuzu, Professor of Law and Former President of Malawi, Peter Mutharika indicated that Exchange Control Act was too old and had to be reviewed as a way of controlling illegal foreign exchange externalization in the country.⁷¹ In his own words, the President said “We need to secure what we already have but we cannot progress with an Exchange Control Act that is order than our democracy”⁷² In particular, the RBM has from 2012 embarked on foreign exchange liberalization process which is ongoing process.⁷³ In relation to the ongoing foreign exchange liberalization process by the RBM, the study will make two important legal contributions. First of all, it is relevant as it provides an in-depth understanding of the operational independence of the Reserve Bank of Malawi in exchange

⁶⁹Ibid. footnote 60 above pg.2

⁷⁰ Ibid. footnote 60 above), pg.2

⁷¹ The Nation newspaper, 8 August, 2016

⁷² Ibid. (note 60 above)

⁷³ Ibid. (note 60 above)

control management and how such independence in Malawi has been adversely affected by the presence of the Minister's power to make Regulations under the Exchange Control Act.⁷⁴ Secondly, the study will contribute to the effective administration of exchange control management as it will form a reference material for the policy makers and law makers in Malawi to champion law and policy reforms in exchange control laws. From these two contributions, the study will ignite a debate to policy makers or law makers on whether any reforms are necessary to address the gaps exposed by this study as far as Exchange Control Act is concerned.

1.9 Justification of the Study

The enactment of the Exchange Control Act No. 13 of 1984 is an important step towards ensuring that the legal environment in Malawi is conducive for Reserve Bank of Malawi to carry out its role in exchange control management.⁷⁵ " The Act, just like any other exchange control laws, controls the movement of currency, property or services in order to protect the exchange resources of a country.⁷⁶ The study is relevant as it will propose the solutions to the problems noted in the background⁷⁷. In other words, the research will expose the gaps that are present in the Exchange control Act and Regulations that has potential of undermining the operational independence of the Reserve Bank of Malawi. This can in return compel the law maker to revisit the Exchange Control Act and amend certain provisions that undermine the role of the Reserve Bank of Malawi.

1.10 Chapter Outline

Chapter 1 has provided the general background to the study topic, the problem that the research has addressed, the research questions, literature review, research methodology, scope, significant and justification for the study. Chapter 2 has broadly provided a conceptual and theoretical framework for the study and provided an insight on what ought

⁷⁴ Supra. (note 60 above)

⁷⁵ Team C (2018) Effort to restoring Integrity in Malawi's Public Management System.

⁷⁶ Williams, Extraterritorial Enforcement of Exchange Control Regulations under the International Monetary Fund Agreement, 15 VA. J. INT'L L. 319, 352 (1975)

⁷⁷ Problems noted in Paragraph section 1.3 of the Proposal

to be the legal indicators of central bank independence and its theoretical basis. Chapter 3 has specifically assessed whether the Exchange Control Act meets the legal indicators of central bank independence in respect of the indicators that has been explored in Chapter 2. Chapter 4 has specifically assessed the constitutional implication of section 3 of the Exchange Control Act on the Malawian constitutional standards that enhances the operational independence of the Reserve Bank of Malawi. Finally, Chapter 5 has provided the general conclusion and recommendations.

CHAPTER TWO

CONCEPTUAL AND THEORATICAL FRAME WORK

2.1 Conceptual Framework

2.1.1 Introduction

Previous researchers of central bank independence have developed definition of the term central bank independence as well as different indicators and measurement tools of independence of any central bank. Just as definition of central bank independence is subject to debate, these indicators have also generated a range of varied views.⁷⁸ Thus, different authors have described these indicators in different ways. It is the aim of this chapter firstly to define the term central bank independence and identify various existing indicators of central bank independence. Secondly the chapter examines these indicators briefly by critically analyzing how previous researchers have defined these indicators. Finally, the chapter justifies a multi-variate working definition based on the above listed indicators.

2.1.2 General Concept of Independence

Legal scholars and Court have already articulated well the general concept of independence of an institution or instrumentality of government across the globe.

⁷⁸ Ahsan A, Skully. M & Wickramanayake. J, Determinants of Central bank independence and Governance, 2006: Problems and Policy implications, JOOAG Vol.1 No. 2. Page 51; De Haan, J. and Eijffinger, S.C., 2016. The politics of central bank independence.

The leading case that expounded the Doctrine of independence is the case of ***First Nat. City Bank v. Banco Para el Comercio Exterior de Cuba***,⁷⁹ that stated that an institution of instrumentality is regarded as an independent instrumentality if it has an independent identity of governmental instrumentality created as separate and distinct juridical entity under the laws of the state that owns it.⁸⁰

2.1.2.1 Concept of Separate and distinct juridical status

The government instrumentality is said to be separate and with distinct juridical status when it is created by an enabling statute that prescribes the powers and duties of the instrumentality and specifies that it is to be managed by a board selected by Government in manner consistent with the enabling law.⁸¹ Further the instrumentality is typically established as separate entity with the power to hold and sell property and sue and be sued.⁸² And except for appropriation to provide capital or cover losses, the instrumentality is primarily responsible for its own finances.⁸³ The instrumentality is also run as a distinct economic enterprise; often it is not subject to the same budgetary and personnel requirement with which government agencies must comply.⁸⁴

This distinctive features permit government instrumentalities to manage their operation on an enterprise basis while granting them degree of flexibility and independence from close political control than generally enjoyed by government agencies.⁸⁵

⁷⁹ 462 U.S. 611, 103 S. Ct. 2591, 77 L. Ed. 2d 46 (1983).

⁸⁰ *Banco Nacio de cuba vs. First National City Bank*, 478 F2nd 191CCA2 (1973); De Jong, E., 2002. Why are price stability and statutory independence of central banks negatively correlated? The role of culture. *European Journal of Political Economy*, 18(4), pp.675-694.

⁸¹ *First Nat. City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 103 S. Ct. 2591, 77 L. Ed. 2d 46 (1983).

⁸² *Ibid* (foot note 69 above)

⁸³ *Ibid* (foot note 69 above)

⁸⁴ *Ibid* (foot note 69 above)

⁸⁵ *Ibid* (footnote 69 above); Bernholz, P., 2013. Independent central banks as a component of the separation of powers. *Constitutional Political Economy*, 24(3), pp.199-214.

2.1.2.2 Concept of Central Bank Independence

Role of Central Bank

There are a number of roles that central banks play in the economy of a country. Firstly, a central bank acts as the banks' bank⁸⁶ in three capacities. The first instance is in the exceptional circumstances that the central bank acts as the lender of last resort to the commercial banks.⁸⁷ For example, if a commercial bank is at the verge of collapse, the central bank will provide extra reserves to prevent the collapse.⁸⁸ Some scholars suggests that a central bank should be seen as a guarantor of financial stability by being a lender of the last resort.⁸⁹ The second instance is that the central bank is acts as a custodian of cash reserves of other commercial banks. Commercial banks of a particular country keep their portion of the demand and time deposits called cash reserve ratio with the central bank of that country. Lastly, the central bank acts as a clearing house for transfer and settlement of mutual claims of commercial banks.⁹⁰ This means that since all commercial banks have their accounts with the central bank, the claims of each other are settled by simple transfer.⁹¹

Second role of the central bank is to act as a government banker of a country in which the bank is located.⁹² This means that the central bank renders its services to the government just as any commercial bank renders its services to ordinary citizens which includes receiving deposits.⁹³ Further, a central bank keeps Government's cash balances in the current account and ultimately, a central bank accepts receipts and makes payments on behalf of government.

⁸⁶ Cranston R, *Principles of Banking Law*, (2008) pg. 110-112

⁸⁷ L. Kalilombe, 'Central Bank Governance, Accountability and Independence: The case of Reserve Bank of Malawi.' MA Thesis, Durban. (2008), pg. 2

⁸⁸ Ibid (footnote 76) page 111

⁸⁹ Bagehot, W. [1962], *Lombard Street: A Description of the Money Market* (Homewood, Ill.: Richard Irwin).

⁹⁰ Narura, D., Central Bank is Called as the Banker's Bank. Retrieved on 4th Mach 2020 from <https://www.toppr.com>.

⁹¹ Ibid (Footnote 79)

⁹² Cranston R, *Principles of Banking Law*, (2008) pg.111

⁹³ Ibid (Footnote 76) page 111

Thirdly, a central bank acts as a regulatory institution for monetary policy and operations of other financial institutions including commercial banks.⁹⁴ A central bank is a controller of credit and money supply through its monetary policy. The credit is controlled with the sole purpose of achieving price stability. Consequently, the monetary policy has three notable instruments namely; bank rate, open market operations and cash reserve ratio.⁹⁵ For instance, Reserve Bank of Malawi is under a legal obligation to issue promissory notes and other securities as it deems fit specifically for open market operations.⁹⁶ In all these efforts, a central bank regulates the exercises of other financial institutions and those of open markets.

Lastly, another duty of a central bank is to control foreign exchange transactions in accordance with the laws of a country.⁹⁷ A central bank undertakes to see that the external value of currency is maintained. For example, Reserve Bank of Malawi is mandated by law to manage foreign assets and maintain foreign exchange reserves at a level which is, in the opinion of the Bank, adequate for Malawi's international transactions.⁹⁸ These measures help in keeping the control exchange system effective.

Definition of Central Bank (Operational) Independence

The concept of central bank independence has been widely and worldly defined by different scholars. However, there is no one-fit-all definition of central bank independence. Notwithstanding the preceding fact, authors have attempted to provide different depictions of what amounts to central bank independence.

Posen for instance, define the central bank independence as the freedom of monetary policy makers from direct political or governmental influence in the conduct of policy.⁹⁹ On other

⁹⁴ Ibid (Footnote 76) page 111

⁹⁵ International Monetary Fund (IMF). 2007. Kyrgyz Republic—Financial System Stability Assessment—Update. *IMF Country Report No. 07/146*. Washington, DC: IMF.

⁹⁶ Section 28 (s) of the Reserve Bank of Malawi Act, Cap. 44:02 of the Laws of Malawi

⁹⁷ Ibid (Footnote 85) Section 27

⁹⁸ Ibid (Footnote 85) Section 25

⁹⁹ Posen, A. Why Central Bank Independence Does not Cause Low inflation. There is No Institutional Fix for Politics. In R. Obrien (ed.), *Finance and the International Economy*. Oxford: Oxford University Press 7

hand Radovic, Radonjic, and Djuraskovic define the term central bank independence as freedom to define its objectives and instruments for their implementation, without the influence of the government or another institution or individual.¹⁰⁰ Ahsan A, Skully. M & Wickramanayake. J, define the term central bank independence as the ability of the central bank to use the instruments of monetary control without instruction, guidance or interference from the government.¹⁰¹ De Haan, J. and Eijffinger, S.C state that the central bank independence means that monetary policy is delegated to unelected officials and that the government's influence on monetary policy is restricted.¹⁰² central bank independence has also been defined as a relationship between the central bank and the government that is comparable to the link between the judiciary and government.¹⁰³ It is so likened because a central bank is a body corporate with perpetual succession, capable of suing and being sued in its own name and may acquire and dispose of property. Hence, the government will not influence the direction of the bank just as it cannot influence the judiciary. This is so because central banks operate within a legal framework distinct from interference and being interfered in their operations.

The above definitions capture the concept of central bank independence to the extent of the following reasons. Firstly, there are policies and separate legal frameworks at national level that are put in place to regulate the operation of central banks.¹⁰⁴ The central banks therefore operate within those prescribed confines of the law and policy. Invariably, they do not function under any external influence whether political or economic influence.¹⁰⁵

However, the perception or description of central bank independence by Cranston R, is lacking as it completely disregards the natural fact that central banks do not strictly operate

(1993) pgs 40-65 at 42. Accessed at <https://www.peoples.ucs.edu>. On 4/4/2020; Cranston R, *Principles of Banking Law*, (2008)

¹⁰⁰ Radovic, M., Radonjic, M. and Djuraskovic, J., 2018. Central Bank Independence–The Case of the Central Bank of Montenegro. *Journal of Central Banking Theory and Practice*, 7(3), pp.25-40.

¹⁰¹ Ahsan A, Skully. M & Wickramanayake. J, Determinants of Central bank independence and Governance, 2006: Problems and Policy implications, JOOAG Vol.1 No. 1. Page 48; Garriga, A.C., 2016. Central bank independence in the world: A new data set. *International Interactions*, 42(5), pp.849-868.

¹⁰² De Haan, J. and Eijffinger, S.C., 2016. The politics of central bank independence.

¹⁰³ Cranston R, *Principles of Banking Law*, (2008)

¹⁰⁴ Sims, C.A., 2016, August. Fiscal policy, monetary policy and central bank independence

¹⁰⁵ De Haan, J. and Eijffinger, S.C., 2016. The politics of central bank independence.

in a political vacuum. This fact is also justified by Haan and Eijffinger,¹⁰⁶ who rightly prescribed that;

even the most independent central bank does not operate in a political Vacuum. For instance, in survey among 24 central banks, Moser-Boehm (2006) shows that central bankers and government officials frequently meet and also have formal ways for discussing (the coordination of) monetary and fiscal policy.

These learned scholars provided their own definition of central bank independence. In their remarkable work, these scholars stated that central bank independence (CBI) means that monetary policy is delegated to unelected officials and that the government's influence on monetary policy is restricted.¹⁰⁷ This definition by Haan, and Eijffinger is realistic to many situations or circumstances that most central banks specifically in Africa do not operate in political Vacuum for number of reasons. Firstly, the presented characterization acknowledges the representative fact that there is a possibility of exertion of external forces towards central banks. The prescription by Haan, and Eijffinger is a working definition as it acknowledges that there can never be absolute independence of central bank mainly from governmental influence. This definition is relevant to the topic because although the institution needs to be independent but certain control by government has to be exercised to avoid the central banks overstepping their power. This also agrees with the views of Smaghi ¹⁰⁸, who asserts that the independence should be in terms of operational independence.¹⁰⁹ According to Radovic, Radonjic, and Djuraskovic there are various forms of central bank independence and includes functional independence , personal independence , institutional or operational and financial independence. ¹¹⁰ Functional independence of central bank means that the main goal of the central bank is to maintain price stability.¹¹¹ Whereas the personal independence refers to the selection of central bank

¹⁰⁶ De Haan, J. and Eijffinger, S.C., 2016. The politics of central bank independence.

¹⁰⁷ Ibid (footnote 94 above).

¹⁰⁸ Bini Smaghi, L., 2008. Central bank independence in the EU: from theory to practice. *European Law Journal*, 14(4), pp.446-460.

¹⁰⁹ Ibid (Footnote 113) pg. 446-460.

¹¹⁰ Radovic, M., Radonjic, M. and Djuraskovic, J., 2018. Central Bank Independence–The Case of the Central Bank of Montenegro. *Journal of Central Banking Theory and Practice*, 7(3), pp.25-40.

¹¹¹ Ibid (note 99 above) pg.25-40

bodies, including the governor , as well as to the procedures for making the most important decisions.¹¹² Financial independence, on the other hand implies banning Monetary financing of central bank from the government and giving autonomy in budgeting to the bank.¹¹³

The operational or institutional independence of central bank, which is central focus of this study means banning the central bank from seeking or accepting instructions from other institutions or individuals outside the central bank , as well as banning political institutions from giving instructions to the central bank or interfering in its daily operations of the bank.¹¹⁴ That however, in terms of administration of the bank or appointment of the board of directors, the central bank may not be fully independent.¹¹⁵ central banks have to be accountable, for instance, to one of the branch of government such as parliament so that the bank does not breach its duties and function under the law regulating it.¹¹⁶

The central bank is therefore said to be independent from legal point of view if and only if firstly when it is created by an enabling statute that prescribes the powers and duties of the bank , and specifies that it is to be managed by a board of selected by government in manner consistent with the enabling law.¹¹⁷ Secondly the bank to be regarded independent must also have a separate and distinct juridical status with power to hold and sell property, power to sue and be sued. Lastly for central bank to be considered independent it must also , with exception for appropriation to provide capital and cover losses, be responsible to manage and depend on its own finances.¹¹⁸ This distinct features enable the bank to manage their operation on enterprise basis while granting them degree of flexibility and

¹¹² Ibid (note 99 above) pg.25-40

¹¹³ Ibid (note 99 above) pg.25-40

¹¹⁴Radovic, M., Radonjic, M. and Djuraskovic, J., 2018. Central Bank Independence–The Case of the Central Bank of Montenegro. *Journal of Central Banking Theory and Practice*, 7(3), pp.25-40; Ahsan A, Skully. M & Wickramanayake. J, Determinants of Central bank independence and Governance, 2006: Problems and Policy implications, JOOAG Vol.1 No. 1. Page 48; Garriga, A.C., 2016. Central bank independence in the world: A new data set. *International Interactions*, 42(5), pp.849-868.

¹¹⁵ Smith, D.B., 2007. *Cracks in the Foundations? A Review of the Role and Functions of the Bank of England after 10 years of Operational Independence* (Vol. 23). Economic Research Council.

¹¹⁶ Ahsan A, Skully. M & Wickramanayake. J, Determinants of Central bank independence and Governance, 2006: Problems and Policy implications, JOOAG Vol.1 No. 1. Page 48; Garriga, A.C., 2016. Central bank independence in the world: A new data set. *International Interactions*, 42(5), pp.849-868.

¹¹⁷ *Em Ltd., Nml Capital, Ltd V Banco Central De La República* Nos. 13-3819-Cv (L), 13-3821-Cv (Con).

¹¹⁸ Ibid (foot note 120 above)

independence from close political control than is generally enjoyed by government agencies.¹¹⁹

Similarly, in the case of **Banco Nacio de cuba vs. First National City Bank**,¹²⁰ the Court held that in order for a central bank to be regarded as independent instrumentality it should have separate juridical status, it should not be a mere arm of a government purely performing governmental function. The control of the bank should not be exclusively in the hands of government and should not be established solely to further government purposes. Lastly the central bank should not be totally dependent on government for financing, be required to remit all of its profit to the government and should not be managed and supervised by government.¹²¹

The legal scholars have also attempted to explain the concept of central bank independence. For instance Grilli, V., D. Masciandaro & G. Tabellini assert that historical, legal and *de facto* relationship between a country's government and its central bank is very complex, involving many aspects.¹²² These include but not limited to, the role of the government in appointing (and dismissing) members of the central bank governing board, the voting power (if any) of the government on the board, the degree to which the central bank is subject to budgetary control by the government, the extent to which the central bank must lend to the government, and whether they are clearly defined policy goals established in the central bank's charter.¹²³ Grilli, Masciandaro and Tabellini¹²⁴ assert that there are two key dimensions of independence; political and economic independence. Political independence encompasses those institutional characteristics that insulate the central bank

¹¹⁹ Ibid (foot note 120 above)

¹²⁰ 478 F2nd 191CCA2 (1973)

¹²¹ Ibid(Footnote 106 above)

¹²² Grilli, V., D. Masciandaro & G. Tabellini. *Political and Monetary Institutions and Public Financial Policies in the Industrial Countries*. Economic policy 6, 341-392

¹²³ Ibid (footnote 111) pg. 341-392

¹²⁴De Jong, E., 2002. Why are price stability and statutory independence of central banks negatively correlated? The role of culture. *European Journal of Political Economy*, 18(4), pp.675-694. Grilli, V., D. Masciandaro & G. Tabellini. *Political and Monetary Institutions and Public Financial Policies in the Industrial Countries*. Economic policy 6, 341-392 International Monetary Fund (IMF). 2007. Kyrgyz Republic—Financial System Stability Assessment—Update; *IMF Country Report No. 07/146*. Washington, DC: IMF; Bernholz, P., 2013. Independent central banks as a component of the separation of powers. *Constitutional Political Economy*, 24(3), pp.199-214.

from political influence in defining its policy objectives.¹²⁵ DeBelle and Fischer¹²⁶ call the political independence “goal independence.” Goal independence refers to the central bank’s ability to determine the goals of policy without the direct influence of the fiscal authority.¹²⁷ Posen (1995) considers that the interests of the political parties determine the degree of the central bank independence, as it can affect the inflation in the long-run.¹²⁸ A higher degree of central bank independence reduces disinflation costs.¹²⁹ In the United Kingdom, the Bank of England lacks goal independence since the inflation target is set by government. In Canada and New Zealand, the central bank governor and the ministry of public finance establish the long-term goals of the central bank.¹³⁰ Thus, the bank of Canada and New Zealand have no political independence.¹³¹ In the United States, the Federal Reserve’s goals are set in its legal charter. Thus, the Federal Reserve has a high level of goal independence. Similarly, the National Bank of Romania (NRB) has both goal and instrument independence as the governor establishes both the inflation target and the necessary instruments.¹³² Thus, NRB has total political independence in implementing the necessary instruments in order to achieve the stated goals.¹³³

The above definition captures the concept of central bank independence to the extent of the following reasons. Firstly, there are policies and separate legal frameworks at national level that are put in place to regulate the operation of central banks.¹³⁴ The central banks

¹²⁵ Ibid. (footnote 83) pg.341-392.

¹²⁶DeBelle, Guy. & S. Fischer. How independent Should a Central Bank Be? In J.C. Fuhrer (ed.), *Goals, Guidelines and constraints Facing Monetary Policy makers*. Federal Reserve Bank of Boston. (1994), 195-221; Larch, M. and Braendle, T., 2018. Independent fiscal councils: Neglected siblings of independent central banks? An EU perspective. *JCMS: Journal of Common Market Studies*, 56(2), pp.267-283.

¹²⁷ Ibid (footnote 85) pg.195-221.

¹²⁸Posen, A. *Declarations Are Not Enough: Financial Sector Sources of Central Bank Independence* (1995), in B. Bernanke and J. Rotemberg (eds.), *NBER Macroeconomics Annual*, Cambridge, MA: MIT Press, pp. 253-274

¹²⁹Walsh, C.E. *Monetary Policy and Theory*, MIT Press, Cambridge (2003)

¹³⁰ Delu Vasile, Central Bank independence. *Theoretical and Applied Economics*, Volume XIX (2012), No. 8(573), pp. 97-102 at 99; Bernholz, P., 2013. Independent central banks as a component of the separation of powers. *Constitutional Political Economy*, 24(3), pp.199-214.

¹³¹ Ibid.(Footnote 119) pg. 99

¹³² Ibid.(Footnote 119) pg. 99

¹³³ Ibid. (Footnote 119) pg. 99

¹³⁴ Sims, C.A., 2016, August. Fiscal policy, monetary policy and central bank independence

therefore operate within those prescribed confines of the law and policy. Invariably, they do not function under any external influence whether political or economic influence.¹³⁵

However, the perception or description of central bank independence by Cranston R, is lacking as it completely disregards the natural fact that central banks do not strictly operate in a political vacuum. This fact is also justified by Haan and Eijffinger,¹³⁶ who rightly prescribed that;

even the most independent central bank does not operate in a political Vacuum. For instance, in survey among 24 central banks, Moser-Boehm (2006) shows that central bankers and government officials frequently meet and also have formal ways for discussing (the coordination of) monetary and fiscal policy.

These learned scholars provided their own definition of central bank independence. In their remarkable work, these scholars stated that central bank independence (CBI) means that monetary policy is delegated to unelected officials and that the government's influence on monetary policy is restricted.¹³⁷ This definition by Haan, and Eijffinger is realistic to many situations or circumstances that most central banks specifically in Africa do not operate in political vacuum for number of reasons. Firstly, the presented characterization acknowledges the representative fact that there is a possibility of exertion of external forces towards banks. The prescription by Haan, and Eijffinger is a working definition as it acknowledges that there can never be absolute independence of central bank mainly from governmental influence. This definition is relevant to the topic because although the institution needs to be independent but certain control by government has to be exercised to avoid the central banks overstepping their power. Thus in the words of Smaghi ¹³⁸, the independence should be in terms of operational independence.¹³⁹ The operational independence of central bank means that the bank should be responsible for financing its

¹³⁵ De Haan, J. and Eijffinger, S.C., 2016. The politics of central bank independence.

¹³⁶ De Haan, J. and Eijffinger, S.C., 2016. The politics of central bank independence.

¹³⁷ Ibid (footnote 124 above).

¹³⁸ Bini Smaghi, L., 2008. Central bank independence in the EU: from theory to practice. *European Law Journal*, 14(4), pp.446-460.

¹³⁹ Ibid (Footnote 127) pg. 446-460.

administrations and own operations and as well as carrying out its day and day operations without influence from government or politics.¹⁴⁰ That said however, in terms of administration of the bank or appointment of the board of directors, the central bank may not be fully independent.¹⁴¹ Central banks have to be accountable, for instance, to one of the branch of government such as parliament so that the banks do not breach their duties and functions under the law regulating it.¹⁴²

2.1.3 Legal Indicators of Central Bank Independence

It must be borne mind that many authors have identified a number of indicators of central, including monetary policy independence,¹⁴³ political independence,¹⁴⁴ and transparency and independence. Ahsan and Wickramanayake tried to put several indicators in a single article titled determinants of central bank independence.¹⁴⁵ According to the authors some indicators of central bank independence includes legal independence, political independence, economic and policy independence and accountability and transparency independence.¹⁴⁶

¹⁴⁰ Ahsan A, Skully. M & Wickramanayake. J, Determinants of Central bank independence and Governance, 2006: Problems and Policy implications, JOOAG Vol.1 No. 1. Page 48; Garriga, A.C., 2016. Central bank independence in the world: A new data set. *International Interactions*, 42(5), pp.849-868.

¹⁴¹ Smith, D.B., 2007. *Cracks in the Foundations? A Review of the Role and Functions of the Bank of England after 10 years of Operational Independence* (Vol. 23). Economic Research Council.

¹⁴² Ahsan A, Skully. M & Wickramanayake. J, Determinants of Central bank independence and Governance, 2006: Problems and Policy implications, JOOAG Vol.1 No. 1. Page 48; Garriga, A.C., 2016. Central bank independence in the world: A new data set. *International Interactions*, 42(5), pp.849-868.

¹⁴³ Sims, C.A., 2016, August. Fiscal policy, monetary policy and central bank independence. In *Kansas City Fed Jackson Hole Conference*.

¹⁴⁴ De Haan, J. and Eijffinger, S.C., 2016. The politics of central bank independence.

¹⁴⁵ Curtin, D., 2017. 'Accountable Independence' of the European Central Bank: Seeing the Logics of Transparency. *European Law Journal*, 23(1-2), pp.28-44.

¹⁴⁶ Ahsan A, Skully. M & Wickramanayake. J, Determinants of Central bank independence and Governance, 2006: Problems and Policy implications, JOOAG Vol.1 No. 2. Page 51; Garriga, A.C., 2016. Central bank independence in the world: A new data set. *International Interactions*, 42(5), pp.849-868

2.1.3.1 Legal Independence

Legal independence is referred to as the degree of independence conferred on the central bank by law.¹⁴⁷ The bank is said to be legally independent if there is freedom or flexibility permitted to a central bank by legislation.¹⁴⁸ Alternatively, it is the degree of independence that the legislators meant to confer to the central banks.¹⁴⁹ Just as the definition of central bank independence is subject to debate, the legal independence of central bank also has wide range of views.

Bande and Parkin¹⁵⁰ state that legal independence reflects the relationship that exists between central bank legislation and financial and budgetary considerations.¹⁵¹ This view entails that when the central bank is given financial and budgetary freedom to fund its operations, it is likely going to be more independent than when all its funding and financial controls emanate from Government.¹⁵² This is because when the bank implements the policies that do not serve the interests of the executive branch of government, the government can easily withhold the funding as one way of frustrating the business of the bank. As a result of the pressure, the bank would easily be pressurized to change its policy even though it may not be in the interest of the general public.

Grilli, Masiandro and Tabellini suggest that legal independence of central banks is manifested through their legislative capacity to choose the final goals of policy.¹⁵³ In a research carried out in 18 OECD Countries, Grilli et al. found that the central bank's constitutional position is clearly strengthened if its role in preserving monetary stability is

¹⁴⁷ L. Kalilombe, 'Central Bank Governance, Accountability and Independence: The case of Reserve Bank of Malawi.' MA Thesis, Durban. (2008), pg. 2

¹⁴⁸ Ahsan A, Skully. M & Wickramanayake. J, Determinants of Central bank independence and Governance, 2006: Problems and Policy implications, JOOAG Vol.1 No. 2. Page 50.

¹⁴⁹ Ibid foot 7 page 52.

¹⁵⁰ Bade, R. & M. Parkin. 1988. Central bank laws and monetary policy. Department of Economics, University of Western Ontario, mimeo. 51; Bodea, C. and Hicks, R., 2015. Price stability and central bank independence: Discipline, credibility, and democratic institutions. *International Organization*, 69(1), pp.35-61.

¹⁵¹ Ibid (footnote 139) pg.51

¹⁵² Ibid(footnote 139) pg.51

¹⁵³ Ibid (footnote 139) page 51

explicitly stated in the constitutions.¹⁵⁴ The authors view represents a correct legal position that the constitution of any country is a supreme legislation of its country. Thus, by including the central banks' role in preserving monetary stability in the document known as constitution which is undisputedly supreme, the independence of central bank is strengthened.

Cukierman and Webb and discuss the concept of legal independence by dividing the variables into four clusters namely: turnover rate of governors, the policy formulation, the objective of the central bank and limitations on the ability of the central bank to lend to the public sector.¹⁵⁵

The first cluster looks at turnover of central bank governors. This indicator assumes that rapid turnover of governors beyond some threshold indicates lower levels of independence and creates dependence.¹⁵⁶ It assumes that frequent turnovers accord politicians the opportunity to choose governors who are subservient to the government.¹⁵⁷ Rapid turnover may also indicate that the government is firing the governors who challenge the government.¹⁵⁸ This can simply be exemplified by a subservient governor may stay in the seat for a longer time if he does what the politicians wants him to do.¹⁵⁹ Thus, this cluster entails that the central banks' governors should have security of tenure empowered by law.

Another cluster is manifested in the power of central bank to formulate financial policy and the authority to carry out their objectives. This becomes important as government also takes part in monetary policy formulation and one could only speculate as who would bare the final responsibility (who would shoulder the blame) if the central bank fails to meet its

¹⁵⁴ Ibid (footnote 139) page 51

¹⁵⁵ Cukierman, A., P.Kalaitzidakis, L. H. Summers & S. B. Webb. 1993. Central bank independence, growth, investment and real rates. *Carnegie-Rochester Conference Series on Public Policy*, Vol 29. pp. 95-140; Bodea, C. and Hicks, R., 2015. Price stability and central bank independence: Discipline, credibility, and democratic institutions. *International Organization*, 69(1), pp.35-61.

¹⁵⁶ L Kalilombe (Footnote 147above), pg. 19

¹⁵⁷ Ibid (Footnote 147 above), pg. 19

¹⁵⁸ Ibid (Footnote 147above), pg. 19

¹⁵⁹ Ibid (Footnote 136 above), pg. 20

targets.¹⁶⁰ It seems like where the bank has no full authority to formulate financial authority, the bank is robbed off its independence. Thus, a regulatory agency is robbed of its independence where the power to make policy or regulation is left to the elected individuals or ministries.¹⁶¹

The last cluster is the limitation that is placed on the Central Bank to lend to the government. Lending to the government cluster looks at how the central bank limits lending to government.¹⁶² central banks which have got tight rules for lending to government are regarded as very independent compared to those that have weaker rules.¹⁶³ These limitations encompass a number of more detailed variables such as advances and securitised lending and restrictions on maturities and on interest rates.¹⁶⁴ The comparability of various types of limitations is complicated because the limitations are specified in different ways in different countries based on the charter. In a small number of countries limitations on lending are specified in absolute cash amounts and in others, as a percentage of government's revenue from taxes and in a majority of cases as a percentage of government's expenditures.¹⁶⁵ However, other things being equal, the absolute cash limits are tougher than limits in terms of central bank liabilities which in turn are more binding than limits in terms of government revenues.¹⁶⁶ The most accommodative limits are those that are specified in terms of government's expenditures.

Limitations on lending are also classified as stricter the nearer the rates paid by government to market rates and the shorter the time maturities of the loans from the central bank are to the public sector.¹⁶⁷ The stricter and narrower the circle of institutions that are allowed to borrow from the central bank, the smaller the discretion of the executive branch to decide

¹⁶⁰ L Kalilombe (note 136 above), pg. 53.

¹⁶¹ Ibid (note 136 above), pg. 53.

¹⁶² Ibid (note 136 above), pg. 18.

¹⁶³ Ibid (note 136 above), pg.18.

¹⁶⁴ Ibid (note 1136 above), pg.18.

¹⁶⁵ A Cukierman, A., Web, S., and Neyapti, B. *Central Bank Strategy, Credibility, and Independence: Theory and Evidence*. Massachusetts: Massachusetts Institute of Technology Press (1994), pg 26

¹⁶⁶ L Kalilombe (note 136 above), pg.18.

¹⁶⁷ Ibid. (note 136 above), pg.18.

to whom and how much central Bank will lend.¹⁶⁸ In addition, central bank laws that prohibit the central bank from buying government bonds from the primary market are considered stricter than laws that do not contain such a prohibition.¹⁶⁹ The assumption is that central bank independence is at its strongest when it is not involved in securitized lending, followed by those that lend to government but with stricter rules and lastly those with no rules at all.

The courts around the world have attempted to define the term legal independence. For instance in the case *Em Ltd., Nml Capital, Ltd v. Banco Central De La República*,¹⁷⁰ a court observed that the bank is regarded as independent *intra alia* if it is accorded separate legal status and its capable of owning its on property.¹⁷¹ This independence and flexibility can only be conferred by enabling statute or law.¹⁷² This point was also stressed in the case of *First Nat. City Bank v. Banco Para el Comercio Exterior de Cuba*¹⁷³ where court had this to say:-

“A typical government instrumentality, if one can be said to exist, is created by an enabling statute that prescribes the powers and duties of the instrumentality, and specifies that it is to be managed by a board selected by the government in a manner consistent with the enabling law. The instrumentality is typically established as a separate juridical entity, with the powers to hold and sell property and to sue and be sued.”¹⁷⁴

The principles that comes clearly from the case is that the central bank is said to be independent in terms of its legal construction if it is created by an enabling statute that

¹⁶⁸A Cukierman, A., Web, S., and Neyapti, B (note 154 above), pg. 19

¹⁶⁹ L Kalilombe (note 136 above), pg. 19

¹⁷⁰ Nos. 13-3819-Cv (L), 13-3821-Cv (Con).

¹⁷¹ *Em Ltd., Nml Capital, Ltd v. Banco Central De La República* Nos. 13-3819-Cv (L), 13-3821-Cv (Con).

¹⁷² Ibid (note 146 above)

¹⁷³ *First Nat. City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 103 S. Ct. 2591, 77 L. Ed. 2d 46 (1983).

¹⁷⁴ Ibid (note 162above)

prescribes the powers and duties of the bank as well conferring separate legal status with power to hold and sell property and sue and sued.

The foregoing clearly confirm that a legal independence is a legal doctrine and has been recognized as the indicator of central bank independence by case law.

2.1.3.2 Political Independence

Debelle and Fischer call the political independence “goal independence.”¹⁷⁵ Goal independence refers to the central bank’s ability to determine the goals of policy without the direct influence of the fiscal authority.¹⁷⁶ This study calls it political independence. It is an indicator of central bank independence. The political independence reflects the degree to which the central bank is allowed to pursue its main objective(s) without interference from the political authorities.¹⁷⁷ Grilli, Masciandaro and Tabellini outline factors of central bank’s political independence namely; the procedures for appointing the central bank’s chairman and independence of board members as well as the term of office of central bank officials.¹⁷⁸ According to these authors, political independence is determined by the procedure for appointing the members of the central bank bodies; the relationship between these bodies and the government; and the formal responsibilities of the central bank. Posen (1995) considers that the interests of the political parties determine the degree of the central bank independence, as it can affect the inflation in the long-run.¹⁷⁹ It is therefore important for central banks to be free from political interference so as to avoid other people particularly politicians from using and abusing them. This view is also shared by Ahsan,

¹⁷⁵ Debelle, Guy. & S. Fischer. How independent Should a Central Bank Be? In J.C. Fuhrer (ed.), Goals, Guidelines and constraints Facing Monetary Policy makers. Federal Reserve Bank of Boston. (1994), 195-221

¹⁷⁶ Ibid. (note 164 above) pg. 195-221

¹⁷⁷ Ahsan A, Skully. M & Wickramanayake. J, Determinants of Central bank independence and Governance, 2006: Problems and Policy implications, JOOAG Vol.1 No. 2. Page 51; De Haan, J. and Eijffinger, S.C., 2016. The politics of central bank independence.

¹⁷⁸ Grilli, V., D. Masciandaro & G. Tabellini. *Political and Monetary Institutions and Public Financial Policies in the Industrial Countries*. Economic policy 6, 341-392 International Monetary Fund (IMF). 2007

¹⁷⁹ Posen, A. *Declarations Are Not Enough: Financial Sector Sources of Central bank independence* (1995), in B. Bernanke and J. Rotemberg (eds.), *NBER Macroeconomics Annual*, Cambridge, MA: MIT Press, pp. 253-274

Skully & Wickramanayake who state that political parties generally like to remain in power, so that they use or misuse central bank policy to fulfil their own political agendas.”¹⁸⁰

The authors seem to allude to the fact that the appointment and tenure of the office of the chairman or governor of the central banks has effect on the independence of the bank.

Crowe and Meade, independence is greater when the central bank’s management is insulated from political pressure by secure tenure and independent appointment.¹⁸¹ The authors advocate that tenure of the office of the Chairman or Governor should not be at the pleasure of the politicians such as president or Minister. If the term of the office of the chairman is dependent upon the pleasure of the president, the chances are high that the chairman will not be impartial in making decision. This in turn has negative implications on the independence of the central bank.

This study defines political independence as the absence of any possibility for politicians to influence central bank goals or personnel and operational independence as the ability to choose an instrument to achieve inflation goals.

The court in some occasion discussed the doctrine of political independence.¹⁸² In the case of *Em Ltd., Nml Capital, Ltd V Banco Central De La República*,¹⁸³ above the Court had this to say:-

“While measuring the level of control exercised over an instrumentality by a foreign sovereign is fact-intensive, courts have articulated several indicators to guide the inquiry. Among the factors that have been deemed relevant are whether the sovereign nation: (1) uses the instrumentality's property as its own; (2) ignores the instrumentality's separate status or ordinary corporate formalities; (3) deprives the instrumentality of the independence from close political control that is generally enjoyed by government

¹⁸⁰ Ibid (note166 above) pg. 5.

¹⁸¹Christopher Crowe – Ellen E. Meade: *The evolution of central bank governance around the world*. Journal of Economic Perspectives, Vol. 21, Nr. 4. 2007, 69–90.

¹⁸² See the case of *Em Ltd., Nml Capital, Ltd V Banco Central De La República* Nos. 13-3819-Cv (L), 13-3821-Cv (Con).

¹⁸³ Nos. 13-3819-Cv (L), 13-3821-Cv (Con).

agencies; (4) requires the instrumentality to obtain approvals for ordinary business decisions from a political actor; and (5) issues policies or directives that cause the instrumentality to act directly on behalf of the sovereign state. These factors are relevant to answering the touchstone inquiry for "extensive control": namely, whether the sovereign state exercises significant and repeated control over the instrumentality's day-to-day operations.

The case at hand clearly expound the doctrine of political independence by stating that one of the criteria to identify the independence of central bank from sovereign state. The central bank is said to be independent if it is deprived of close political control. Another case that also touched on this doctrine is the case of *First Nat. City Bank v. Banco Para el Comercio Exterior de Cuba*¹⁸⁴, Court had this to say,

The instrumentality is typically established as a separate juridical entity, with the powers to hold and sell property and to sue and be sued. Except for appropriation to provide capital or to cover losses, the instrumentality is primarily responsible for its own finances. The instrumentality is run as a distinct economic enterprise; often it is not subject to the same budgetary and personnel requirements with which government agencies must comply.

These distinctive features permit government instrumentalities to manage their operations on an enterprise basis while granting them a greater degree of flexibility and independence from close political control than is generally enjoyed by government agencies. These same features frequently prompt governments in developing countries to establish separate juridical entities as the vehicles through which to obtain the financial resources needed to make large-scale national investments.”

The case above also clearly establishes and expound the political independence indicator as a legal doctrine. According to the doctrine entails that the central bank should first be

¹⁸⁴ *First Nat. City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 103 S. Ct. 2591, 77 L. Ed. 2d 46 (1983).

conferred with distinctive features of separate status or legal personality. It is this feature that ultimately grant central bank independence from close political control.

It can therefore be concluded from the above cases that a political independence is a legal doctrine that has been recognized as an indicator of central bank independence by case law.

2.1.3.3 Exchange Rate Policy Independence

Exchange rate policy independence is another indicator of central bank independence. The exchange rate policy chosen affects the country's relative price structure between tradable and non-tradable goods and ultimately the overall level of domestic prices.¹⁸⁵ Thus, a particular exchange rate system chosen does have far-reaching effects on the entire economy.

From November 19, 1973, Malawi authorities responded to the movements in the international currencies by de-linking the Malawi Kwacha from the British Pound, and pegging it to a trade weighted basket of the British Pound and the US Dollar.¹⁸⁶ This system required the RBM to determine the exchange rate by setting daily buying and selling rates for the US Dollar and the British Pound in light of foreign exchange market developments.¹⁸⁷ This phase ended in June 1975 when authorities started pursuing an active exchange rate policy which involved announced devaluations of the Kwacha whenever a need arose.¹⁸⁸

In Malawi, the exchange rate policy is grounded from the objectives of the Reserve Bank of Malawi as follows;

*to implement measures designed to influence the money supply and the availability of credit, interest rates and exchange rates with the view to promoting economic growth, employment, stability in prices and a sustainable balance of payments position.*¹⁸⁹

¹⁸⁵ Reserve Bank of Malawi, Exchange and Interest Rate Determination in Malawi: Past and Present (2000) <http://www.rbm.mw/publications/documents/Exchange%20and%20interest%20Rate%20Determination%20in%20Malawi>. Accessed on 13 April, 2020

¹⁸⁶ Ibid. (note 174 above)

¹⁸⁷ L Kalilombe (note 136 above), pg. 29.

¹⁸⁸ Ibid. (note 136 above), pg. 29.

¹⁸⁹ Reserve Bank of Malawi Act, Cap. 44: 02 of the Laws of Malawi, s 4 (d)

The Reserve Bank of Malawi Act does not provide a clear description of the exchange rate policy. However, this is grounded in the provision stated because the Reserve Bank of Malawi has been mainly using exchange rates and interest rates adjustments as major instruments for monetary policy and to influence major macroeconomic variables such as growth and price stability.¹⁹⁰ This is grounded in the belief that the choice of an exchange rate policy in the country has an important role to play in creating the proper environment for economic growth.¹⁹¹

Scholars have argued that the degree of independence afforded to the central bank in respect of exchange rate policy is critical in the ability of the government to pursue exchange rate targets.¹⁹² Thus it is believed that if the ultimate responsibility of exchange rate policy is left to a central bank, it will mostly likely to attain its independence in terms of its operation. This observation is relevant to the study on account of the following reasons. Firstly, as it has been shown in the preceding chapter, implementation of foreign exchange policy is one of the major role played by central banks in the world. Therefore, where the government delegates the authority of implementing exchange control policies to the central banks, the question of independence of these banks becomes more imperative worth of researching.

2.1.3.4 Monetary Policy and Deficit Financing Independence

Ahsan et al. identify monetary policy and Deficit financing independence as an indicator of central bank independence.¹⁹³ Deficit financing is essentially a practice in which government spends more money than it receives as revenue, the difference being money from borrowings.¹⁹⁴ Some scholars believe that leaving monetary policy to the state has

¹⁹⁰ Reserve Bank of Malawi, Exchange and Interest Rate Determination in Malawi (note 33 above)

¹⁹¹ L Kalilombe (note 136 above), pg. 28

¹⁹² Baines, A. C. (2001). Capital mobility, perspective and Central bank independence: Exchange rate policy since 1945. *Policy Sciences*, Vol 34(2), pp. 171-193; Bodea, C. and Higashijima, M., 2017. Central bank independence and fiscal policy: can the central bank restrain deficit spending? *British Journal of Political Science*, 47(1), pp.47-70.

¹⁹³ Bodea, C. and Higashijima, M., 2017. Central bank independence and fiscal policy: can the central bank restrain deficit spending? *British Journal of Political Science*, 47(1), pp.47-70.

¹⁹⁴ International Monetary Fund (IMF). 2007. *Sri Lanka—Financial System Stability Assessment Update*. Washington, DC: IMF. (Prepared by the Monetary and Capital Markets and Asia and Pacific Departments, November).

several disadvantages and it is imperative to shield monetary policy from government and politicians. Alesina argues that macroeconomics and politics are deeply interconnected and that elections are either won or lost because of economic conditions.¹⁹⁵ In trying to establish the relationship between political cycles, inflation, economic growth and unemployment, Alesina argues that there are several issues that motivate politicians to behave this way. He notes that politicians are selfish in nature and they try to remain in office as long as possible.¹⁹⁶ Secondly politicians are usually partisan and they like to please their constituencies.¹⁹⁷ These motivations are usually at their peak during the times of elections.¹⁹⁸ They try to create the most favourable economic conditions just before elections even though these policies may have adverse effects.¹⁹⁹ This tendency according to Alesina is unnecessary and suboptimal since the timing of macroeconomic policy is artificially affected by the elections.

Johnson argues that central bank independence is a public good for democracies.²⁰⁰ The public prefers a lower rate of inflation than would obtain if politicians controlled the central bank, and central bank independence ensures that this public preference is respected.²⁰¹ Independent central banks can be blamed for implementing unpopular but beneficial monetary policies without taking into account the change in the political landscape more especially during election years.²⁰² Delegating authority over monetary policy to such technocrats requires a government that is ready to surrender its influence on macroeconomic variables to unelected officials for the greater good of the country.²⁰³

In *Peter Gauweiler and Others v Deutscher Bundestag*,²⁰⁴ the Court of Justice of European Union focused on the objectives of monetary policy rather than the effects of the

¹⁹⁵ Alesina, A. Politics and Business Cycles in Industrial Democracies, *Economic Policy*, 4 (8):55-98. (1989), pg. 57

¹⁹⁶ Ibid. (note 170 above), pg.57.

¹⁹⁷ Ibid. (note 170 above) pg. 59

¹⁹⁸ Ibid. (note 170 above) pg. 59

¹⁹⁹ Ibid. (note 170 above) pg. 59

²⁰⁰ J Johnson, Post-Communist Central Banks: A Democratic Deficit? *Journal of Democracy*, 17 (1):90-103 (2006), pg. 91

²⁰¹ L Kalilombe (note 122 above), pg. 8

²⁰² J Johnson (note 189 above), pg. 91

²⁰³ Ibid (note 189 above) pg. 95

²⁰⁴ [2014] OJ C129/11

measures under review. The CJEU declared the condition of OMT programme to be legal, since it ‘does not exceed the powers of the ECB in relation to monetary policy and does not contravene the prohibition of monetary financing of EU nations.’ In this case, the court held that central bank which is independent has discretion towards monetary policy. It defined discretion in the context of monetary policy as meaning;

*that the central bank can choose whichever monetary policy instrument it deems appropriate in the pursuit of the goal; discretion also means that the central bank can define what a generic goal such as price stability actually means. The content of such discretionary decision is not reviewable.*²⁰⁵

Monetary policy and deficit financing independence of a central bank can be determined by examining the effectiveness of the authorities responsible for the formulation of the monetary policy.²⁰⁶ It is however argued that deficit financing is mostly a result of government inefficiency. It further places government in debt to foreign creditors. Therefore, where there is deficit financing, the independence of a central bank is compromised as it cannot effectively discharge its major role which is implementing monetary policy. Again where the Government delegates the authority of formulating monetary policies, the question of independence of these banks becomes also more relevant to research on.

2.1.3.5 Accountability and Transparency Aspects

The last indicator of a central bank independence is accountability and transparency. Accountability and transparency started to take shape later than 1989, after the Reserve Bank of Malawi Act was formulated.²⁰⁷ This is because during the 1980's, debates mainly concentrated on central bank's independence and its impact on macroeconomic variables.²⁰⁸ Lastra discusses the two concepts of the accountability and transparency as follows;

²⁰⁵ *Peter Gauweiler and Others v Deutscher Bundestag*[2014] OJ C129/11

²⁰⁶ Ibid (note 194 above)

²⁰⁷ L Kalilombe (note 136 above), pg. 4

²⁰⁸ Ibid. (note 136above), pg. 4

Any recent discussion of accountability often includes a reference to transparency and vice versa. This poses the question of the relationship between the two concepts. Accountability is an obligation to give account of, explain, and justify one's actions, while transparency is the degree to which information on such actions is available. The provision of information is clearly an element of accountability. But accountability is not merely about giving information. It must involve defending the action, policy, or decision for which the accountable is being held to account. The provision of information (transparency) is hardly ever a neutral account of what happened or of what is happening; hence the need for an explanation or justification of the agency's actions or decisions (accountability).²⁰⁹

Accountability is a constitutive part of the design of an independent agency in a democratic system, whose aim is to bring back the central bank to the system of checks and balances.²¹⁰ Accountability does not necessarily politicize a central bank, rather it means that the central bank should provide a justification of its actions.²¹¹ A central bank is both an agency and a bank and, thus, it needs a special accountability regime.²¹² An accountable central bank should be judged for the reasonableness of its actions, by Parliament, by the executive, by the competent Courts of Justice and by the public.

The case of ***Three Rivers District Council v. Governor and Company of the Bank of England***²¹³ described central bank accountability with regard to monetary policy as being typically 'explanatory' (unless the law of the central bank is amended or the governor is removed from office, where there is little room for granting redress with regard to monetary

²⁰⁹ R Lastra (1996) Central banking and banking regulation, chapter 1. Financial Markets Group, London School

of Economics, London (1996), pg. 26

²¹⁰ R Lastra & Miller G., Central bank independence in ordinary and extraordinary times. In: Kleineman J (ed) central bank independence. The economic foundations, the constitutional implications and democratic accountability, The Hague, Boston: Kluwer law international (2001), p. 159

²¹¹ C. Goodhart & R. Lastra, Populism and Central bank independence. Hurst Publishers, London (2017), pg. 13

²¹² Ibid.(note 186 above) pg.13.

²¹³ (No. 3) [2000] 2 W.L.R. 1220

policy decisions). It described the accountability of the central bank in the field of prudential supervision as sometimes ‘explanatory’ and sometimes ‘amendatory.’²¹⁴ Thus, an accountable central bank must give account, explain and justify the actions or decisions taken, against criteria of some kind, and take responsibility for any fault or damage.

A transparent and accountable central bank is said to be independent when its objectives of the central bank is transparency, clear and easy to understand.²¹⁵ As rightly observed on possibility of government’s interference, a central bank should be and is mostly accountable to parliament instead of government, otherwise there is a possibility of being dictated by the government.

The next chapter will explore the link between Reserve Bank of Malawi’s independence on one side and accountability and transparency on the other by looking at how monetary policy should be implemented and how the Reserve Bank of Malawi should be organized to achieve this end.

2.2 Theoretical Frame work of Central Bank Independence

Legal theory of finance is the backbone of the study. It forms the basis for protecting the independence of the central bank from political influence.

2.2.1 Legal theory of independence: its Role in Enhancing the Independence of Central Bank

Legal theory of finance, (hereinafter referred to LTF), holds that financial markets are legally constructed and as such occupy an essentially hybrid place between state and market, public and private.²¹⁶ Pistor considers that finance is legally constructed; it does

²¹⁴ *Three Rivers District Council v. Governor and Company of the Bank of England* (No. 3) [2000] 2 W.L.R. 1220

²¹⁵ Curtin, D., 2017. ‘Accountable Independence’ of the European Central Bank: Seeing the Logics of Transparency. *European Law Journal*, 23(1-2), pp.28-44.

²¹⁶ Masciandaro, D. and Romelli, D., 2015. Ups and downs of central bank independence from the Great Inflation to the Great Recession: theory, institutions and empirics. *Financial History Review*, 22(3), pp.259-289.

not stand outside law.²¹⁷ According to LTF political authorities should not make attempt to interfere with the financial markets for financial markets are rule bound systems.²¹⁸ However, the theory provides for law finance paradox as it says where the strict adherence of legal regime will result into collapse of the whole economy, the enforcement of law has to be suspended to avoid the collapse.²¹⁹ Pistor says in times of financial crises when the full enforcement of legal commitments would result in the self-destruction of the financial system, the suspension of full force of law is allowed.²²⁰ The suspension is allowed because the survival of the system is at stake.²²¹ It is here that political power becomes salient.

According to the legal theory of finance, central banks are legal entities hence they enjoy independence.²²² The Reserve Bank of Malawi is the central bank in Malawi. The RBM exhibits a level of *de jure* independence. Its independence is guaranteed by the Reserve Bank of Malawi Act which provides that:

*Except as provided by this Act, the Bank shall be independent and shall not be subject to direction by any person or authority.*²²³

That said however, this study focus on assessing the adequacy of exchange control Act in safeguarding the independence of central bank. Therefore, by examining the Exchange Control Act which gives the powers to the Minister of Finance to make regulations relating to foreign exchange, the work supposedly to be done by the Reserve Bank of Malawi, the study is necessarily initiating a debate that is going to inform the law makers to amend the Exchange control Act in order to enhance the operational independence of the Reserve Bank of Malawi from political manipulation. This is consistent with what the Legal Theory

²¹⁷ K Pistor, 'Towards a Legal Theory of Finance.' Law Working Paper No 196/2013. Columbia Law School. http://papers.ssrn.com/abstract_id=21780666 accessed 5 March 2020

²¹⁸ Ibid (note 193 above) pg.192

²¹⁹ Masciandaro, D. and Romelli, D. (note 191 above).

²²⁰ K Pistor (note 206 above)

²²¹ Ibid.(note 206 above)

²²² Ibid (note 206 above)

²²³ Reserve Bank of Malawi Act. Cap. 44:02 of the Laws of Malawi, s 4A (1).

of Finance envisages. For Legal Theory of Finance envisages that political authorities should not interfere with financial markets unless there is financial crisis.

2.3 Conclusion

The chapter two has discussed in depth some of the conceptual and theoretical basis underlining central bank independence. In particular, this Chapter has managed to explore the basic concepts of central bank independence. Secondly the Chapter was also able to laydown theoretical foundation of central bank independence by examining the long standing theories of law and finance. Through close examination of this theory, one appreciates the justification and significance of creating a central bank which is independent in every nation. The chapter has also discussed the general overview of indicators of central bank alongside legal independence, political independence, exchange rate policy independence, monetary policy and deficit financing independence and accountability and transparency independence. The chapter has managed to really show that these indicators are measurement tools that can be used to measure central bank independence across the globe. The chapter has also managed to show that, just like the definition of central bank independence is subject to debate, the descriptions of these indicators also raise borne of contentions. However, in situations where there were various views on the definition of the indicators, the researcher was able to isolate the working definition that is very relevant to the topic under study.

CHAPTER THREE

AN ASSESSMET OF THE EXCHANGE CONTROL ACT’S PROVISION FOR INDEPENDENCE OF RESERVE BANK OF MALAWI WITH REFERENCE TO THE LEGAL INDICATORS OF CENTRAL BANK INDEPENDENCE

3.1 Introduction

For a central bank to be independent it has to meet general legal indicators of central bank independence. The law that guides central bank needs to meet some if not all of the central bank independence indicators. The previous chapter described some of the legal indicators of central bank independence. This Chapter will assess the Exchange Control Act’s²²⁴ provision for independence of the Reserve Bank of Malawi with reference to legal indicators established in the previous chapter. The aim is to analyze if the Act do actually meets the legal indicators of central bank independence.

3.2 Exchange Control Act

The term “exchange control” in international banking refers to “government regulations that limit outflows of funds from the country.”²²⁵ In Malawi, exchange control law dates back to 1984, when the Exchange Control Act was passed with an objective of controlling foreign exchange, bullion and Malawi currency.²²⁶ It is an enabling legislation which empowers the Minister of Finance to make regulations for the purpose of controlling foreign exchange, bullion and Malawi currency.

²²⁴ Cap. 45:01 of the Laws of Malawi

²²⁵ (See JK Shim & Constatas, Encyclopedic Dictionary of international finance and Banking (St Lucie press, (2001), 96.

²²⁶ Exchange Control Act Cap 45:01, s.3

The Reserve Bank of Malawi was established in July 1965 under the Reserve Bank of Malawi 1964 Act.²²⁷ This Act was amended in 1989. In 1989, the Minister of Finance made the Exchange control regulations.²²⁸ The regulations were passed after the enactment of the Reserve Bank of Malawi Act. This is evidenced by regulation 2 (1) of the Exchange Control Regulations which recognizes the existence of the Reserve Bank of Malawi. It is not known whether this Exchange Control Act meets the legal indicators of the central bank independence. This chapter will thus, assess whether the Act meets legal indicators of central bank independence.

3.3 The Constitutionality of the Exchange Control Act

Constitution of Republic of Malawi recognizes the Reserve Bank of Malawi as the state principal instrument for controlling of money supply, currency and the institutions of finance.²²⁹ The constitutionality of Exchange Control Act and its Regulations were challenged in *Moinuddian Mohammed Iqbar Sodogar vs. Attorney General & Reserve Bank of Malawi*.²³⁰ The court was called upon to determine whether the Exchange control Regulations substantially and significantly affected the applicant's fundamental rights and freedoms recognized by the constitution. The court was also called upon to rule whether these regulations were constitutional under Section 58(2) as read with Section 200 of the constitution. The court held that both the Exchange Control Act and Regulations are constitutional.²³¹ This means, the regulations despite being made by the Minister have the force of the law because the principal Act, Exchange Control Act, empowers the Minister to make such regulations. Once they have been made they are part of the Act as the Exchange Control Act is an enabling legislation. That being said however, as it will have discussed later on the Act is faulted mainly because of section 3 that gives the Minister, being a political office, wide powers to make regulations in matters of exchange control.

²²⁷ www.malawitradeportal.gov.mw accessed on 19 April, 2020

²²⁸ Sangala T, 'Reserve Bank of Malawi yet to review Exchange Control Act' *The Daily Times* (Blantyre, 8 August 2016)

²²⁹ Constitution of Malawi of 1994, s 185(1)

²³⁰ Constitutional Reference No.3 of 2017 (HC.),

²³¹ *Moinuddian Mohammed Iqbar Sodogar vs. Attorney General & Reserve Bank of Malawi*, Constitutional Reference No.3 of 2017(HC.LL)

3.4. Legal Indicators of Central Bank Independence and Exchange Control Act

As discussed in the preceding chapter, there are various legal indicators that are used to measure the independence of central banks globally. It is the aim of this section of the chapter to assess whether the Exchange control Act provides for each of the legal indicators of central bank identified in the previous chapter.

3.4.1 Exchange Control Act and Legal Independence

It was established in the previous chapter that legal independence entails the freedom or flexibility permitted to a central bank by legislation.²³² Basically, legal independence refers to the degree of autonomy that the legislators meant to confer to the central bank.²³³ In line with the Exchange Control Act it means the freedom or flexibility permitted to Reserve Bank of Malawi by Exchange Control Act. This section seeks to answer whether the Exchange Control Act meets the legal independence criteria as one of the legal indicators of central bank independence.

There is no section in the Exchange Control Act that directly or indirectly provides for legal independence. The Act does not recognize the central bank and to be specific Reserve Bank of Malawi. Hence, there no single section in the Act that seems to confer any degree of independence to the Reserve Bank of Malawi.

The above factual observation notwithstanding, the Exchange Control Regulations made under section 3 of the Exchange Control Act has certain provisions that confer certain degree of independence to the central bank. For example, Regulation 2(1) of the Exchange Control Regulations recognizes the existence of a Reserve Bank of Malawi. Regulations 11 (4) and 12(2) of the Exchange Control Regulations²³⁴ give the Reserve Bank of Malawi a legal authority to grant permission to any person to take or send foreign currency outside Malawi. These regulations seem to confer the Reserve Bank of Malawi the level of

²³² Ahsan A, Skully. M & Wickramanayake. J, Determinants of Central Bank Independence and Governance, 2006: Problems and Policy implications, JOOAG Vol.1 No. 2. Page 50

²³³ Ibid (note 221 above) pg.50

²³⁴ Section 3 of Exchange Control Act Chapter 45:01 of Laws of Malawi as read with Regulation 11(4) of Exchange Control Regulations.

independence. Thus, the Reserve Bank of Malawi is left to make legal decision in discharging its legal mandates independent of the influence of any nature.

Since Exchange Control Act itself does not directly provide anything related to Reserve Bank of Malawi, it can therefore be concluded that the actual Act does not meet the standard of legal independence as it does not confer central bank independence. However, the Exchange Control Regulations made in pursuant to section 3 of the Exchange Control Act show that the Reserve Bank of Malawi is conferred with certain degree of independence. In the case of *First Nat. City Bank v Banco Para el Comercio Exterior de Cuba*,²³⁵ the court held that an enabling statute prescribes the powers and duties of the instrumentality and specifies that it is to be managed by a board selected by the government in a manner consistent with the enabling law. The case highlighted that regulations made through enabling statute are regarded as part of the statute. The fact that the Exchange Control Regulations recognize the existence of the Reserve Bank of Malawi and that the Regulations are part of the Act then it can be concluded that the Exchange Control Act recognizes the existence of the Reserve Bank of Malawi. Since regulations confer a degree of independence to the Reserve Bank of Malawi, then it can be concluded that the Exchange Control Act do indeed confers legal independence to the Reserve Bank of Malawi.

Having considered the Legal independence generally, the study also looked at specific indicators of legal independence as set out below.

3.4.1.1 Exchange Control Act and Financial and Budgetary freedom

As it was previous observed one of the indicator of central bank Independence is legal independence. The legal independence as one of the indicators of central bank independence is measured by among other things by a financial and budgetary freedom.²³⁶ A central bank is said to be independent if there is an enabling legislation that provide for financial and budgetary freedom.²³⁷ On the other hand, where there is deficit financing,

²³⁵ 406 US 759 (1972)

²³⁶ Ahsan A, Skully. M & Wickramanayake. J, Determinants of Central Bank Independence and Governance, 2006: Problems and Policy implications, JOOAG Vol.1 No. 2. Page 51; De Haan, J. and Eijffinger, S.C., 2016. The politics of central bank independence.

²³⁷ Ahsan A, Skully. M & Wickramanayake. J, Determinants of Central Bank Independence and Governance, 2006: Problems and Policy implications, JOOAG Vol.1 No. 2. Page 57.

due to an impediment created as a result of lack of enabling legislation, the independence of a central bank is compromised as it cannot effectively discharge its major role which is implementing monetary policy.²³⁸ The exchange control Act nor its regulations do not specifically provide for central bank's financial and budgetary freedom. However, the Reserve Bank of Malawi Act has sections which state that the central bank which says that the central bank can be funded by Government in certain cases. For example, Section 54(1) is in the following terms:

"The Bank shall establish a General Reserve Fund to which allocations shall be made in accordance with section."

Section 54(2) is in the following terms;

"The profit of the Bank shall be distributed in the following order –

(a) Twenty –five per centre or one million kwachas, whichever is higher, to the General Reserve Fund until it reaches ten per cent of the mount of the currency (bank notes and coins) in circulation as it the end of the respective financial year.

Provided that if the profit is less than million kwachas whole of it shall be allocated to the General Reserve Fund.

(b) In the event of a loss incurred by the Bank, such loss shall be deducted from the General Reserve Fund and if the General Reserve Fund is exhausted, the Government shall immediately cover the remaining loss without an appropriation Act being necessary.

Section 54(3) is in the following terms;

"With the approval of the Minister further allocations may be made from time to time to the General Reserve Fund."

²³⁸ Ahsan A, Skully. M & Wickramanayake. J, Determinants of Central Bank Independence and Governance, 2006: Problems and Policy implications, JOOAG Vol.1 No. 2. Page 51; De Haan, J. and Eijffinger, S.C., 2016. The politics of central bank independence.

Section 54(4) is in the following terms;

The remainder of the net profits shall be transferred to the Government: Provided that in the event of outstanding promissory notes issued by the Government to cover losses from currency devaluation ten per cent of the net profit or one million kwachas, whichever is higher, shall be credited to special account to be used to redeem such outstanding amounts of promissory notes, and if the remainder of the net profits would be less than one million kwachas the whole of the remainder shall be credited to special account.

Section 54(5) is in the following terms;

Results from any devaluation or revaluation of the Malawi currency shall be posted directly into special account without affecting the Bank's profit and loss account and any devaluation losses shall be covered by promissory notes of the Government on such terms and conditions as shall be agreed upon between the Minister and the Bank.

These provisions clearly show that the that the Reserve Bank has no complete financial and budgetary freedom from Government. This is said so because the bank's financing is controlled partly by the Minister of Finance or Government.²³⁹ The moment the Bank is involved in financial arrangements or distribution of bank's profit then it means it does not have independence on financial and budgetary issues. That said however, it must be noted that the financial and budgetary freedom as legal indicator does not apply to the Exchange Control Act as demonstrated above. Thus there is specialized piece of legislation known Reserve Bank of Malawi Act which can be a proper and relevant medium of addressing this indicator. It thus left to the future study to assess whether the Reserve Bank of Malawi Act meet this financial and budgetary freedom as a legal indicator of central bank independence which is also beyond scope of this study.

²³⁹ Section 54(2) and (3) of Reserve Bank of Malawi Cap 44:02 of Laws of Malawi.

3.4.2 Exchange Control Act and Capacity to choose the final goals of Policy

It was argued in chapter 2 that the independent pursuit of monetary policy tends to be compromised by political interests and populist pressures. Therefore, autonomy and independence of the central bank is vital for monetary policy effectiveness and credibility. Scholars agree that a central bank is said to be independent where the ultimate responsibility to carry out monetary policy is left to it.²⁴⁰

The Reserve Bank of Malawi now uses the bank rate as an indicator of the stance of monetary policy.²⁴¹ Many times, the adjustment of the bank rate has led to adjustment of interest rates in the financial system.²⁴² The bank rate is set on the basis of interest rates on the treasury bill market as well as developments in inflation rates.²⁴³

The study has found that the Reserve Bank of Malawi is weak in the monetary policy formulation cluster. Zukerman et al. predict that those central banks with greater freedom and latitude in the formulation of monetary policy are more independent than those that do not have the freedom.²⁴⁴ They also predict that if the central bank conducts monetary policy alone without consulting government is more independent than those central banks that have no say on monetary policy.²⁴⁵ The Exchange Control Act nor its regulations do not specifically state that the Government should be involved in the formulation of monetary policy. However, the Reserve Bank of Malawi Act has sections which state that the central bank should consult government on monetary policy operations. For example, Section 40 is in the following terms:

²⁴⁰ Ahsan A, Skully. M & Wickramanayake. J, Determinants of Central Bank Independence and Governance, 2006: Problems and Policy implications, JOOAG Vol.1 No. 2. Page 54.

²⁴¹ L. Kalilombe (note 136 above), pg.32

²⁴² Ibid (note 136 above), pg.32

²⁴³ Ibid (note 136 above), pg.32

²⁴⁴ Cukierman, A., P.Kalaitzidakis, L. H. Summers & S. B. Webb. 1993. Central Bank independence, growth, investment and real rates. *Carnegie-Rochester Conference Series on Public Policy*, Vol 29. pp. 95-140; Bodea, C. and Hicks, R., 2015. Price stability and central bank independence: Discipline, credibility, and democratic institutions. *International Organization*, 69(1), pp.35-61.

²⁴⁵ Ibid (note 233 above)

*"If any time the Bank has any Government loans and advances outstanding, irrespective of maturity, the Bank may require the Government to issue to it treasury bills or promissory notes and other instruments as the Bank may deem fit for open market policy purposes, and the terms and conditions shall be agreed upon between the Bank and the Minister."*²⁴⁶

Section 41 is in the following terms;

*"The Bank shall be entrusted with the issue and management of Government securities publicly issued in Malawi upon such terms and conditions as may be agreed upon between the Minister and the Bank."*²⁴⁷

These two clearly provide that the Reserve Bank should consult government on monetary policy operations. The moment the Bank consults then it means it does not have independence on monetary issues.

The other important factor under this monetary policy cluster, according to Cukierman et al. is the provisions made to resolve conflicts about monetary policy between government and the central bank.²⁴⁸ The Exchange Control Act has weakness in that it does not clearly state who has the final authority as far as conflicts on monetary policy are concerned. The reserve Bank of Malawi Act does not also state on who has the final authority. Cukierman et al. argue that those central banks that have the final authority or the final say on issues that are clearly defined in the laws as its objectives have the greatest level of independence than those where the executive branch has unconditional priority on policy decisions. Therefore, the Reserve Bank of Malawi is weak on this aspect. Since the Exchange Control Act with its regulations does not provide for this then it makes the RBM to lack independence. That said however, it must be noted that the capacity to choose the final goals of policy as legal indicator does not apply to the Exchange Control Act as demonstrated above. Thus it is the Reserve Bank of Malawi Act which can be a proper and

²⁴⁶ s 40 Reserve Bank of Malawi Cap. 44:02 of the Laws of Malawi

²⁴⁷ Ibid (note 235 above), s 41

²⁴⁸ Cukierman, A., P. Kalaitzidakis, L. H. Summers & S. B. Webb. (note 33 above)

relevant medium of addressing this indicator. It is therefore also left to the future study to assess whether the Reserve Bank of Malawi Act meet this capacity to choose the final goals of policy as a legal indicator of central bank independence which is also beyond scope of this study.

3.4.3 Exchange Control Act and turnover rate of governors

It was discussed in Chapter two that political independence is also determined by the procedure for appointing the members of the Central Bank bodies. The study has used the informal indicator which looks at the turnover of the governors which was developed by Cukierman et al. This indicator was used on the presumption that at least above some threshold more rapid turnover of governors indicates a lower level of independence. More rapid turnover creates dependence because when politicians frequently take the opportunity to choose a new governor, they will usually choose those who will obey their wishes.²⁴⁹ Frequent turnover may reflect the firing of those who choose to challenge the government.²⁵⁰ However, a low turnover rate does not necessarily imply high central bank independence as a subservient governor may stay in office for a long time.²⁵¹ The study has found that since the inception of the multiparty system in Malawi a new governor is appointed a year after general elections.²⁵² For example, Matthews Chikaonda replaced Pereka moyo as governor in 1995 soon after the 1994 elections. Similarly Elias Ngalande in 2000 soon after the 1999 elections.²⁵³ Another instance is when Victor Mbewe replaced Ngalande in 2005 soon after the 2004 elections.²⁵⁴ The last occurrence is when Dr. Kabambe was replaced by Wilson Banda soon after the 2020 election and change of regime. The study concludes that there is some overlap between the political cycle and the turnover of Reserve Bank governors which compromises central bank independence. This is because the manner in which the decision makers are chosen does not conform to democratic principles. The Reserve bank governors are decision makers. The Sixth

²⁴⁹ L Kalilombe, 'Central Bank Governance, Accountability and Independence: The case of Reserve Bank of Malawi.' MA Thesis, Durban. (2008), pg. 3

²⁵⁰ Ibid (note 227 above), pg.3

²⁵¹ Ibid (note 227 above), pg.3

²⁵² Ibid (note 227 above), pg.3

²⁵³ Ibid. (note 227 above), pg.3

²⁵⁴ Ibid (note 238 above), pg.3

schedule of the regulations authorises the Minister to empower the governor to make regulations in pursuant to regulations 32 and 33. This violates the fundamental principles of democratic governance by concentrating immense power in the hands of one unelected individual, the central bank governor. Since the governor is appointed in that position a year after general elections, the manner of appointment seems to allude to the fact that the governor is politically elected.

In the study done by Cukierman et al. the Reserve Bank of Malawi scored 0.2 out of the possible 0.8 representing a percentage of 25% of central bank independence on executive cluster.²⁵⁵ This weakness stems from the fact that the executive branch is very influential and not transparent in the appointment or the dismissal of the central bank governor.²⁵⁶ For example, according to the Reserve Bank Act the President is responsible for the appointment of the Reserve Bank of Malawi Governor for a period of 5 years using an instrument of appointment stating conditions of service for the Governor and yet these conditions are not stated in the Act. The Act only stipulates that the conditions in the instrument shall not be changed to the disadvantage of the Governor during his term of office.²⁵⁷ That said however, it must be noted that the turnover rate of governors as legal indicator does not apply to the Exchange Control Act as demonstrated above. Thus it is the Reserve Bank of Malawi Act which can be a proper and relevant medium of addressing this indicator. It is therefore also left to the future study to assess whether the Reserve Bank of Malawi Act meet this turnover rate of governors as a legal indicator of central bank independence which is also beyond scope of this study.

3.4.4 Exchange Control Act and the ability of Central Bank to lend to the public sector

The exchange control Act nor its regulations do not directly or indirectly provide for any provision that gives mandate the Reserve Bank of Malawi to lend to the public sector. However, the Reserve Bank of Malawi Act, which is recognised in section 2 of the

²⁵⁵ L kalilombe (note 238 above)

²⁵⁶ Ibid (note 238 above), pg.3

²⁵⁷ S 12 (1-3), Reserve Bank of Malawi Act Cap. 44:02 Laws of Malawi

Exchange control Act, has sections which state that the central bank can lend the general public. For example, Section 46(1)²⁵⁸ is in the following terms:

“The Bank may grant advances to the banks or financial institutions for periods of not exceeding three months against promissory notes secured by the pledge with the Bank of financial institutions.

(a) Publicly issued treasury bills maturing within ninety-one days.”²⁵⁹

These provision clearly shows that the Reserve Bank has mandate to lend to the public sector. This is said so because the exchange control Act through section 2 makes reference of the Reserve Bank Act as enabling legislation regulating the bank. That said however, it must be noted that the ability of central bank to lend to the public sector as legal indicator does not apply to the Exchange Control Act as demonstrated above. Thus it is the Reserve Bank of Malawi Act which can be a proper and relevant medium of addressing this indicator. It is therefore also left to the future study to assess whether the Reserve Bank of Malawi Act meet this ability of central bank to lend to the public sector as legal indicator of central bank independence which is also beyond scope of this study.

3.4.5 Exchange Control Act and Political Independence

As discussed in chapter 3, political independence is the absence of any possibility for politicians to influence central bank goals. In line with the Exchange Control Act it means the absence of any politician or government to influence the Reserve Bank of Malawi operations. This section seeks to answer whether the Exchange Control Act meets the political independence criteria as one of legal indicators of central bank independence.

On the Minister having the legislative authority to make the regulations, the starting point is section 7 of the Constitution. It provides that the Executive initiates policies and legislation. According to section 8 only the Legislature must enact laws. Section 48(2) of the Constitution provides that an Act of Parliament shall have primacy over other forms of law, subject to the Constitution.

²⁵⁸ S 46(1), Reserve Bank of Malawi Act Cap. 44:02 Laws of Malawi.

²⁵⁹ S 46(1), Reserve Bank of Malawi Act Cap. 44:02 Laws of Malawi.

However, section 58 of the Constitution provides:

“Parliament may, with respect to any particular Act of Parliament, delegate to the executive... power to make subsidiary legislation within the specification and for the purposes laid out in that Act”

The General Interpretation Act²⁶⁰ provides that subsidiary legislation cannot be inconsistent with any Act of Parliament; such subsidiary legislation has no effect. The Executive therefore cannot enact any legislation that limits the power of Parliament to enact laws. The Constitution also expressly provides in section 5 that any law that is inconsistent with the provisions of the Constitution shall be invalid. Subsidiary legislation cannot repeal, suspend or amend substantive provisions of an Act of Parliament or the Constitution. Section 3 of the Exchange Control Act gives legislative authority to the Minister to make regulations for the purpose of controlling foreign exchange, bullion and Malawi currency. The Minister is mandated to make regulations relating to even the appointment of persons to perform prescribed functions, among others. Regulation 30 (2) provides that the Minister may give to any person who appears to the Minister to be in a position to give effect thereto such directions as appear to the Minister to be expedient. It is hard to ignore the imagery that this regulation evokes: that of the cliché “biting the finger that feeds you”. The Ministerial position is political one as Ministers are politically appointed.²⁶¹ When the Minister appoints persons to perform prescribed functions there is a likelihood of choosing people who are subservient to the government. That defeats the central bank independence. The Act further gives the room for the Minister who is a politician to interfere in the work of the RBM as it did in the case of **Republic v Gorge Chaponda**,²⁶² where the Minister issued a licence to Dr Chaponda without authority or knowledge of RBM, but nevertheless it was declared by the court that it was valid license having been duly issued under Regulations made under section 3 of the Exchange control Act. This is clearly example where the Minister of Finance used his power to interfere with the work of the Reserve Bank of Malawi.

²⁶⁰ General Interpretation Act, Cap. 1:01 of the Laws of Malawi, s.21

²⁶¹ Dogan, M., 2019. How to become a cabinet minister in Italy: unwritten rules of the political game. In *Pathways To Power* (pp. 99-139). Routledge.

²⁶² Criminal Appeal Case No. 15 of 2018

Since the Exchange Control Act allows for political interference by giving powers to the Minister of Finance, a politically influenced position, to make Exchange Control Regulations, it can therefore be concluded that the Exchange Control Act does not meet the standard of political independence. It can therefore be concluded that the Exchange Control Regulations made in pursuant to section 3 of the Exchange Control Act show that the Reserve Bank of Malawi is not free from political interference.

3.4.6 Exchange Control Act and Authority to formulate Exchange Rate Policy

It was observed in chapter 2 that if the ultimate responsibility of exchange rate policy is left to central bank, it will most likely attain its independence in terms of its operation.²⁶³ The exchange rate policy is grounded from the objectives of the Reserve Bank of Malawi as follows;

*...to implement measures designed to influence the money supply and the availability of credit, interest rates and exchange rates with the view to promoting economic growth, employment, stability in prices and a sustainable balance of payments position.*²⁶⁴

This provision provides clearly stipulates that the principal objectives of the RBM's monetary policy is price stability which is mainly guided by target growth and exchange rates. Malawi liberalized its economy and the exchange rate of the Malawian Kwacha was linked to target of seven currencies comprising the US Dollar, Pound, Sterling, Deutsche Mark, Rand, Yen, French Franc and Dutch guilder from 17th January to 1994.²⁶⁵ Although exchange control have been liberalized, Malawi still maintains exchange control on capital flows. However by section 3 of the Exchange Control Act, the ultimate responsibility of the exchange rate policy is given to the Minister and not the Central bank.²⁶⁶ For example, the power to make the Regulations is wide as it can be exercised either in relation to all cases or to all

²⁶³ Ahsan A, Skully. M & Wickramanayake. J , Determinants of Central Bank Independence and Governance, 2006: Problems and Policy implications, JOOAG Vol.1 No. 2. Page 51; De Haan, J. and Eijffinger, S.C., 2016. The politics of central bank independence.

²⁶⁴ Reserve Bank of Malawi Act, Cap. 44: 02 of the Laws of Malawi, s 4 (d)

²⁶⁵ L kalilombe (note 238 above), pg. 30

²⁶⁶ Section 3 of Exchange Control Act Chapter 45:01 Laws of Malawi.

of those cases subject to specified exceptions.²⁶⁷ Arguably, the Ministers powers herein extend to Exchange rate policy thereby interfere with the independence of a central bank.

However the Exchange Control Regulations made under section 3 of the Act seems to give powers to the Reserve Bank of Malawi to issue guide lines for the operation of the Regulations and to revise them.²⁶⁸ These guidelines include those of setting exchange rates policy.²⁶⁹ It can therefore be argued that although the Act in itself does not give the ultimate responsibility of dictating the Exchange rate policy to the Reserve Bank, the Regulations made thereunder do give certain responsibility to the Reserve Bank of Malawi to do so. Therefore, it can be concluded that the Regulations meet an indicator of central bank independence that is exchange rate policy. Since the regulations are part of the Act then it follows that the Exchange Control Act meets the Exchange rate policy of central bank independence.

3.4.7 Exchange Control Act and Accountability and Transparency Independence

The degree of accountability of central banks is broadly appropriate, but varies across the selected countries.²⁷⁰ In all instances, the laws require the central bank to submit an annual report to the parliament, including financial statements (generally based on international accounting standards), and more specific monetary policy reports.²⁷¹ The laws generally provide budgetary independence to the central banks and also clearly define the rules for sharing the central banks' profits and losses with the government.²⁷² Provisions for recapitalization of central banks have not always worked smoothly. As the study rightly observed in Chapter 3, specifically on possibility of government interference, that an

²⁶⁷Section 3 (5) of Exchange Control Act Chapter 45:01 Laws of Malawi.

²⁶⁸ Section 3 of Exchange Control Act Chapter 45:01 of Laws of Malawi as read Regulation 30(1) of Exchange Control Regulations.

²⁶⁹ See Banking Act No. 10 of 2010 as read with Banking (Foreign Currency Exposure Limits) Directive 2012.

²⁷⁰ S Akhtar, H. Lorie and A. Petersend, 'Effectiveness of Central Banks and their Role in the global financial crisis. Mandaluyong: Philipines (2009), pg. xi

²⁷¹ Ibid. (note 258 above), pg. xi.

²⁷² Ibid. (note 258 above), pg. xi.

independent central bank should be accountable but preferably to the National Assembly, otherwise there will be a possibility of being dictated by the government.²⁷³ Alternatively, an independent central bank is the one that is transparent and accountable to parliament and not to the executive or otherwise.

However, both the Exchange Control Act and the Exchange Control Regulations made under section 3 of the Act clearly show that the central bank is accountable to Minister and not parliament.²⁷⁴ For example, under regulation 11(4), the Minister or the bank may give to any person permission to take or send foreign currency out of Malaŵi. It follows that even if when the Reserve Bank of Malawi refuses to give a person permission to take or send foreign currency out of Malaŵi, the Minister can give that person permission as the law mandates them. In all event, it is the Bank that seem to be accountable to the Minister, after all he is the Minister who makes the regulations, ironically regulating the operations of a central bank. The Act therefore does not reflect trends of good governance such as transparency and accountability. It can therefore be concluded that the Exchange Control Act does not clearly indicate independence of a central bank in respect of accountability and transparency aspects.

3.5 Conclusion

Categorically, the chapter has assessed whether and how the Malawian Exchange Control Act meets the legal indicators of central bank independence in respect of legal independence, Political independence, Exchange Rate policy independence, Monetary policy and Deficit Financing independence as well as Accountability and Transparency. The overall picture showcased in this chapter is that the Exchange Control Act and the Exchange Control Regulations made under section 3 of the Act do not meet central bank independence in line of political independence and accountability and transparency independence as legal indicator of central bank independence. However, to a limited extent, the Act mainly through the Regulations do indicate central bank meet indicators of the

²⁷³ Curtin, D., 2017. 'Accountable Independence' of the European Central Bank: Seeing the Logics of Transparency. *European Law Journal*, 23(1-2), pp.28-44.

²⁷⁴ Section 3 of Exchange Control Act Chapter 45:01 of Laws of Malawi as read Regulation 11(4) of Exchange Control Regulations.

central bank independence in certain cases in respect of legal independence and exchange rate independence, Monetary policy. Critically, one wonders as to why the whole Act that is produced by informed lawmakers, leave out a vital facet of any central bank which is independence of the central bank. It is further wondered that the power to regulate Exchange Control, that is dependent on a central bank being independent, is wholly vested in a political individual. The whole circumnavigation of the legal parameters eats on the independence of a central bank.

CHAPTER FOUR

IMPLICATIONS OF SECTION 3 OF EXCHANGE CONTROL ACT ON CONSTITUTIONAL STANDARDS VIS-À-VIS THE OPERATIONAL INDEPENDENCE OF RESERVE BANK OF MALAWI

4.1 Introduction

For a central bank to be independent it has to derive its authority for independence from a supreme law of the land popularly known as constitution.²⁷⁵ The law that guides central bank needs to meet the standards that are set by the constitution of the country where the central bank is situated, in this case Malawi. The previous chapter described some of indicators of central bank independence. This Chapter will assess the implications of section 3 of Exchange Control Act²⁷⁶ on standards set by Malawi constitution that enhances the operational independence of the Reserve Bank of Malawi. The chapter will achieve this by firstly outlining the principles of constitutional interpretation as well as constitutional standards in respect to operational independence of the Reserve Bank of Malawi that are in our constitution²⁷⁷ and finally the chapter will assess whether the section 3 of the Exchange Control Act meets or breaches those constitutional standards.

4.2 Principles of Constitutional interpretation in Malawi

In order to appreciate fully the context of this chapter which largely constitutes the application of constitutional doctrine in relation the section 3 of the Exchange Control Act, it is very important to appreciate some of the principles of constitution interpretation in Malawi.

²⁷⁵ Ahsan A, Skully. M & Wickramanayake. J, Determinants of Central Bank Independence and Governance, 2006: Problems and Policy implications, JOOAG Vol.1 No. 2. Page 50

²⁷⁶ Cap. 45:01 of the Laws of Malawi

²⁷⁷ Constitution of Republic of Malawi 1994

4.2.1 The Principles of constitution interpretation embedded in the Constitution itself

Section 11 of the Constitution²⁷⁸ is the starting point of the principles of the constitutional interpretation. The section 11 provides as follows:

- (1) Appropriate principles of interpretation of this Constitution shall be developed and employed by the courts to reflect the unique character and supreme status of this Constitution.
- (2) In interpreting the provisions of this Constitution a court of law shall—
 - (a) promote the values which underlie an open and democratic society;
 - (b) take full account of the provisions of Chapter III and Chapter IV; and
 - (c) where applicable, have regard to current norms of public international law and comparable foreign case law.
- (3) Where a court of law declares an act of executive or a law to be invalid, that court may apply such interpretation of that act or law as is consistent with this Constitution.
- (4) Any law that ousts or purports to oust the jurisdiction of the courts to entertain matters pertaining to this Constitution shall be invalid.

The principles above were also encoed in the case of ***Mayeso Gwanda v The State***²⁷⁹ where the court had this to say:

“When interpreting the Constitution, Section 11 of the Constitution enjoins this Court as follows:

“(1) Appropriate principles of interpretation of this Constitution shall be developed and employed by the courts to reflect the unique character and

²⁷⁸ The Constitution of Republic of Malawi 1994

²⁷⁹ Constitutional case No. 5 of 2015

supreme status of this Constitution.

(2) In interpreting the provisions of this Constitution a court of law shall--

(a) promote the values which underlie an open and democratic society;

(b) take full account of the provisions of Chapter III and Chapter IV;

and

(c) where applicable, have regard to current norms of public international law and comparable foreign case law.

... ”

It was held in the Privy Council case of **Minister of Home Affairs and Another vs Fisher and Another** [1979] 3 All E.R. that constitutional approach calls for a generous interpretation, avoiding what has been called ‘the austerity of tabulated legalism,’ suitable to give to individuals the full measure of the fundamental rights and freedoms, thus, to treat a constitutional instrument sui generis, calling for principles of interpretation of its own, suitable to its character without necessary acceptance of all the presumptions that are relevant to legislation of private law.

Similar principles were also elaborated in the case of *Gwanda Chakuamba & Others v Attorney General*²⁸⁰ where court had this to say:

“Essentially, such are the circumstances in which I must interpret s.80(2). But before I do so let me refer to some fundamental principles regarding the interpretation of a Constitution. It is common ground that the interpretation of a Constitution is different from the interpretation of any ordinary statute. In this regard, I can do no better than offer the words of Banda, C.J. in delivering the judgment of the Supreme Court of Appeal in the case of **Fred Nseula -v- Attorney General and Malawi Congress Party** M.S.C.A. Civil Appeal No. 32 of 1997, when he said this:

²⁸⁰ Civil Cause No.1B of 1999

"A Constitution is a special document which requires special rules for its interpretation. It calls for principles of interpretation suitable to its nature and character. The rules and presumptions which are applicable to the interpretation of other pieces of legislation are not necessarily applicable to the interpretation of a Constitution."

This, however, is not to suggest that there are no rules of law which should apply to the interpretation of a Constitution. In this connection, a court must heed the reminder by Lord Willberforce in the lead case of **Minister of Home, Affairs and Another v. Fisher and Another**, (1980) AC 319 that even a Constitution is a legal instrument the language of which must be respected, when he said:

This is in no way to say that there are no rules of law which should apply to the interpretation of a Constitution. A Constitution is a legal instrument giving rise, among other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences.

And after referring to the above passage, the court in the Nseula case went on to say this:

The starting point therefore is that a Malawi court must first recognize the character and nature of our Constitution before interpreting any of its provision. The purpose of interpreting any legal document is to give full effect to what Parliament intended and you cannot give full effect to that

intention unless you first appreciate the character and nature of the document you are interpreting."

The Court then continued to say:

"Constitutions are drafted in broad and general terms which lay down broad principles and they call, therefore, for a generous interpretation avoiding strict legalistic interpretation. The language of a Constitution must be construed not in narrow legalistic and pendantic way but broadly and purposively. The interpretation should be aimed at fulfilling the intention of Parliament. It is an elementary rule of constitutional interpretation that one provision of the Constitution cannot be isolated from all others. All the provisions bearing upon a particular subject must be brought to bear and to be so interpreted as to effectuate the greater purposes of the Constitution."

The Court then referred to the Indian case of **Gapalan v, State of Madras** (1950) SCR 88 at page 109, in which the principle is stated in the following terms:

"The Constitution is a logical whole each provision of which is an integral part thereof and it is therefore logically proper and indeed imperative to construe one part in the light of the other provisions of the other parts."

What is coming out clearly from the foregoing legal doctrines is that one of the principles of the constitutional interpretation is that firstly the constitution should be treated as supreme document in its status and above all other statutes. This gives the foundation of section 5 that any provisions of Act of parliament that is inconsistency with constitution is null and void. Another principle of interpretation is that the language of a Constitution must be construed not in narrow legalistic and pendantic way but broadly and purposively. This means the provisions bearing upon a particular subject must be brought to bear and to be so interpreted as to effectuate the greater purposes of the constitution. The third principle

of interpretation worth noting is that the purpose of interpreting any legal document is to give full effect to what Parliament intended and you cannot give full effect to that intention unless you first appreciate the character and nature of the document you are interpreting. This call appreciating the historical background, objectives, the context and scope of the entire document such as statute that is called upon to be construed in relation to the constitution before embarking on the journey of interpretation.

4.3 Constitutional standards

Firstly, one of the constitutional principle that indirectly enhances operational independence of the Reserve Bank of Malawi that any law enacted by parliament or any delegated authority must be consistent with the provisions of the constitution, short of that the law will be declared null and void. This standard is provided for under section 5 of the Constitution.²⁸¹ Therefore the Section 5 is benchmark section that do actually nullify any law (other than provisions in the constitution) that is not consistent with the provisions of the constitution of the Republic of Malawi. The section 5 is in the following terms:

“ Any act of Government or any law that is inconsistent with the provision of this Constitution shall , to the extent of such inconsistency , be invalid. ”²⁸²

It must be noted however, that although the section 5 of the Constitution enhances the operational independence of the Reserve Bank of Malawi, the same cannot be seen when we consider the section 5 alone. The enhancement can only be felt if the section 5 is considered alongside with other provisions in the constitution, in particular section 185 and 199 of the Constitution. Therefore, how the section 5 of the Constitution enhances operational independence of the Reserve Bank of Malawi will become more clearly when the section 185 and 199 of the constitution is analyzed all together.

Secondly, another constitutional standard that enhances the operational independence of the Reserve Bank of Malawi is a constitutional demand that any legal authority to be valid

²⁸¹ Constitution of Republic of Malawi 1994

²⁸² Constitution of the Republic of Malawi of 1994

it must be provided by or under the constitution. This constitution standard is provided for under section 199 of the Constitution. The section 199 of constitution read as follows:

*“This Constitution shall have the status as supreme law and there shall be no legal or political authority save as is provided by or under this Constitution.”*²⁸³

The meaning of this provision when looked at the angle of exchange control matters, is that the authority to regulate exchange control matters must emanate from the constitution itself. Therefore, any legal authority or institution that maybe established outside the Constitution it is therefore invalid under section 5 of the constitution. Again, how the section 199 of the constitution enhances the operational independence of the Reserve Bank of Malawi can clearly be seen with the section is considered together alongside with section 5 and section 185 of the Constitution.

Lastly, another constitutional principle that enhances the operational independence of the Reserve Bank of the Malawi the constitutional provision that provide the constitutional basis of the Reserve Bank of Malawi as an instrumentality for the control of money supply, currency and institution of finance with normal functions of central bank.²⁸⁴ This constitutional standard is provided for under section 185(1) of the constitution. The section does not expressly provide for operational independence of the Reserve Bank of Malawi. However, the provision gives the Reserve Bank mandate as the principal institution in respect to the matters that concerns exchange control in Malawi. The 185 (1) read as follows:

“ There shall be established by the Act of parliament a Central Bank of the Republic, known as the Reserve Bank of Malawi Which shall serve as state’s principal instrument for the control of money supply, currency and institution of finance with normal functions of central bank.”²⁸⁵

²⁸³ Section 199 of the Constitution of the Republic of Malawi of 1994.

²⁸⁴ Section 185(1) of the Constitution of the Republic of Malawi of 1994.

²⁸⁵ Constitution of the Republic of Malawi of 1994

This section clearly suggests that there can be other institutions with related powers. However, it must be noted that from clearly wording of section 185 (1) although there can be other state institutions with related powers, however all those other institutions in relation to exchange controls must be subordinate to the Reserve Bank of Malawi and not otherwise. In other words, that there is no any other legal authority in Malawi that is superior to the Reserve Bank in respect to the exchange control matters. It can therefore be argued that it is this superiority in matters of exchange control which is in line with the amended section 4A of the Reserve Bank Act that has incorporated an aspect of the operational independence of the Reserve Bank of Malawi.

The section 4A (1) of the Reserve Bank of Malawi Act read as follows:

“Except as provided this Act, the Bank shall be independent and shall not be subject to direction by any person or authority.”

The section 4A (2) provides in the following terms:

“Any person who improperly seeks to influence the Bank, or director or employee of the Bank, in the performance of its or his functions, commits an offence and shall, on conviction, be liable to a fine of MK1,000,000 and to imprisonment for four years.”

It must be recalled that one of the principle of interpretation constitutional interpretation is that the purpose of interpreting any legal document is to give full effect to what Parliament intended and you cannot give full effect to that intention unless you first appreciate the character and nature of the document you are interpreting. Therefore to give effect of section 185 of the Constitution²⁸⁶ we need to interpret alongside the Reserve Bank of Malawi of Malawi. This so because you cannot appreciate the intention of the parliament unless one appreciate section 4A of the Reserve Bank of Malawi Act which give full effect of intention of the parliament to make the Reserve bank as both independent and principal state institution of exchange control. The Reserve Bank of Malawi Act is valid, relevant and constitutional because it derives its authority as enabling statute for the operations of

²⁸⁶ The Constitution of Republic of Malawi 1994

the Reserve Bank of Malawi from the Constitution itself, in particular, from section 185(2) of the Constitution. The section 185(2) of the Constitution read as follows:

“The Bank shall be controlled by a Board which shall consist of a chairman and members of the board who shall, subject to this constitution, be appointed in accordance with the Act of parliament by which the Bank is established.”

According to section 185 (2) it clearly entails that the Principal Act governing the operations of the Reserve Bank of Malawi is the Act that establishes the bank itself. By reading section 3 of the Reserve Bank of Malawi Act, one would tell that it is the Reserve Bank of Malawi Act that establishes the Reserve Bank of Malawi. The provision speaks for itself. The section 3 (1) of the Reserve Bank of Malawi Act reads as follows:

“The Reserve Bank of Malaŵi shall be a body corporate with perpetual succession and a common seal, capable of suing and being sued in its own name, and which, subject to this Act, may acquire, hold and dispose of movable and immovable property for the purpose of its functions Reserve Bank of Malaŵi shall be a body corporate with perpetual succession and a common seal, capable of suing and being sued in its own name, and which, subject to this Act, may acquire, hold and dispose of movable and immovable property for the purpose of its functions.”

Further the section 3 of the Reserve Bank of Malawi Act ²⁸⁷ again also establishes other elements of operational independence of the Reserve Bank of Malawi in that it has corporate legal personality with authority to sue and be sued on its own and capable of acquiring its own property. This is in line with doctrine cited in the case of *Em Ltd., Nml Capital, Ltd V Banco Central De La República*. ²⁸⁸

It can be therefore being argued that the section 185 (1) and (2) of Constitution as read with the section 3 and 4A of the Reserve Bank of Malawi Act gives full intention of the parliament by enhancing the operational independence of the Reserve Bank of Malawi.

²⁸⁷ The Reserve Bank of Malawi Act Cap of Laws of Malawi

²⁸⁸ Nos. 13-3819-Cv (L), 13-3821-Cv (Con).

4.3 Implications of Section 3 of the Exchange Control Act on the Constitutional Standards that enhances the operational independence of the Reserve Bank of Malawi.

The section 3 of Exchange Control Act ²⁸⁹ clearly gives the Minister , which is a political office, a wide powers to make regulations on various exchange control matters. This includes Regulations that give itself power to issue license.²⁹⁰ This as it shall be analyzed below is contrary to constitutional provisions, in particular the section 185(1) and (2) and section 199 of the Constitution as read with the section 4A of the Reserve Bank of Malawi Act that collectively enhances the operational independence of the Reserve Bank of Malawi therefore invalid under section 5 of the Constitution. It is therefore the aim of the part of this section of study to critically assess the implication of section 3 of the Exchange Control Act on the operational independence of the Reserve Bank of Malawi. To achieve this one of the principle of constitutional interpretation that state it is an elementary rule of constitutional interpretation that one provision of the Constitution cannot be isolated from all others. All the provisions bearing upon a particular subject must be brought to bear and to be so interpreted as to effectuate the greater purposes of the Constitution. In light with principle of interpretation, the study will refer to section 5, 185 and 199 as provisions that are bearing upon a subject of operational independence of the Reserve Bank of Malawi.

To begin with, as indicated above the section 3 of the Exchange Control Act gives the Minister of Finance wide powers and mandate of making Regulations in exchange control matters which was solely supposed to be left in the hands of the Reserve Bank of Malawi in accordance with this section 185(1) of the constitution. It may be recalled that the section 185(1) of the Constitution gives the mandate of regulating exchange control matters to the Reserve Bank of Malawi as a state's principal institution of exchange control matters. That if the constitution intended that Minister should also

²⁸⁹ Exchange Control Act Cap 45:01 of Laws of Malawi.

²⁹⁰ See Section 25 of Exchange Control Act Regulations made under Section 3 of Exchange Control Act Cap 45:01 of Laws of Malawi.

possess similar or same authority or superior powers in matters of exchange control it would have been expressly incorporated the same under section 185 of the constitution. In absence of such clearly stipulation, in our constitution, it can therefore be safely said that section 3 of the Exchange Control Act is therefore inconsistent with section 185(1) of the Constitution therefore invalid under section 5 of the constitution. It must

Secondly, it must also be recalled that by giving the minister powers to make Regulations in Exchange Control matters, the section gives a room for actual or perceived form of interferences by the Minister on exchange control matters which is against the spirit of section **4A** of the Reserve Bank of Malawi Act which derives its authority from section **185(2)** of the constitution. It can therefore be argued that section 3 of the Exchange Control Act hinges upon section 4A of the Exchange Control Act and therefore it is against the section 185(2) of the Constitution where section 4A of the Act derives its authority. The resultant effect of the section 3 of the Constitution is that it clearly breaches the section 185 (1) and (2) that enhances the operational independence of the Reserve Bank of Malawi through section 4A of the Reserve Bank of Malawi Act. In other words the section 3 of the Exchange Control Act through its Regulations²⁹¹, gives the Minister a power or a room to interfere the Reserve Bank's role in exchange control Management . This point is exemplified by the eloquent statement of His Honorable Justice Kapindu in the classical case of the Republic vs. George Thapatula Chaponda²⁹² , where the court stated at paragraph 144-145, that :

“...It is clear to the court that reference to section 25(1) of the Exchange Control Regulations... What is most significant is that there is a permit issued by a duly constituted authority, the Minister responsible for Finance in this case which authorized a person, the Respondent in this case, to hold foreign currency. In the instance case, the Minister unequivocally vouched

²⁹¹ For instance, Regulation 25 of the Exchange Control Regulations gives the Minister power to issue Permit to any person to possess foreign currency contrary section 4A of Reserve Bank of Malawi.

²⁹² Criminal Appeal Case No.15 of 2015(Unreported)

that he issued the permit that was presented in the court and that it was valid.”

The case above demonstrates that unless the section 3 of Exchange Control Act is amended, the Minister will continue interfering in the work of the Reserve Bank of Malawi as it did in the Chaponda case above. This clearly demonstrates that the section 3 of the Act is contrary to section 185(1) and (2) of the Constitution and therefore undermine the operational independence of the Reserve Bank of Malawi therefore it is invalid under section 5 of the Constitution of the Republic of Malawi.

Another point that need to be considered is that, the section 3 of the Exchange Control Act

which gives a minister a power to make regulations in Exchange control matters purports to establish an alternative legal authority on exchange control matters that is not provided for by or under the constitution. Firstly, it has to be recalled that under the section 199 of the Constitution no authority shall be valid unless it is provided by or under the constitution. It must also be recalled that under the constitution through the section 185(1), the mandate to regulate matters of exchange control is clearly vested in the Reserve Bank of Malawi alone. This means that the only institution that is authorized by or under the Constitution to regulates and manage exchange control matters is the Reserve Bank of Malawi and none else. In other words, the Minister is not recognized under the Constitution in exchange control matters. Therefore, section 3 of the Act which clearly purports to create or introduce a parallel authority or an institution contrary to the section 185(1) therefore is inconsistency with section 199 of the Constitution and it is therefore invalid and under section 5 of the Constitution. This therefore hinges upon the operational independence of the Reserve Bank of Malawi since the section 3 of the Exchange Control Act clearly gives the minister powers that ought to have been left to the Reserve Bank of Malawi alone. This in turn gives a room or a loophole for minister to interfere in matters that ought to have been left to bank alone as it did in the case of Chaponda above.

From the foregoing, it can therefore be said that since the section 3 of the Act is not consistent with section 199 of the Constitution, therefore it is invalid under section 5 of the Constitution. Since the section 199 through section 185(1) and (2) that enhances operational independence of the Reserve Bank of Malawi, it can therefore be concluded that the section 3 of the Exchange Control Act which is contrary to section 199 of the Constitution therefore breaches the constitutional standards that enhances operational independence of the Reserve Bank of Malawi.

In nutshell, the foregoing analysis, clearly demonstrates that the section 3 of Exchange Control Act fails to meet some of the constitutional standards in constitution that enhances the operational independence of the Reserve Bank of Malawi. That said however, in Malawi court had ruled that Regulations made under section 3 of the Exchange Control Act has been declared to be constitutional. The classical case that gives an instance, is the case of *Moinuddian Mohammed Iqbar Sodogar vs. Attorney General & Reserve Bank of Malawi*.²⁹³ The court in this case was called upon to determine whether the Exchange control Regulations substantially and significantly affected the applicant's fundamental rights and freedoms recognized by the constitution. The court specifically was called upon to rule whether the exchange Control regulations were constitutional under Section 58(2) as read with Section 200 of the constitution. The court held that both the Exchange Control Act and Regulations made section 3 of the Act are constitutional²⁹⁴ as the restrictions provided therein are reasonable, recognized by international human rights standards and necessary in an open and democratic society. Although that was the decision of the Court, observation of the author in this study that this case although it makes a valid point on the sections upon which Mr Sodogar sought the declarations, but maybe the decision would have been different if the court had considered the section 3 of the Exchange Control Act and Regulations made thereunder alongside with section 5, 185(1) and (2) and section 199 of the Constitution as well as section 4A of the Reserve Bank of Malawi Act that

²⁹³ Constitutional Reference No.3 of 2017 (HC.),

²⁹⁴ *Moinuddian Mohammed Iqbar Sodogar vs. Attorney General & Reserve Bank of Malawi*, Constitutional Reference No.3 of 2017(HC. LL)

enhances operational independence of the Reserve Bank of Malawi. In other words, maybe the constitutional court would have decided differently if the section 3 of the Exchange Control Act and Regulations made thereunder were challenged on account that it hinges on the constitutional standards that enhances the operational independence of the Reserve Bank of Malawi.

4.4 Conclusion

Categorically, the chapter has assessed the implications of the section 3 of the Exchange Control Act that gives the minister a wide power of making regulations in exchange control Act on the constitutional standards that enhances the operational independence of the Reserve Bank of Malawi. The study has done this specifically by analyzing the effect of section 3 of the Act on the standards that were set by section 5, 185(1) and (2) and section 199 of the constitution of the Republic of Malawi and section 4A of the Reserve Bank of Malawi Act as provisions that collectively enhances the operational independence of the Reserve Bank of Malawi. The overall picture showcased in this chapter is that the section 3 of the Exchange Control Act and the Exchange Control Regulations made under section 3 of the Act do not meet the constitutional standards as it clearly breaches constitutional standard that enhances the operational independence of the Reserve Bank of Malawi and it is therefore invalid under section 5 of the constitution. Critically, one wonders as to why the whole Act that is produced by informed lawmakers, leave out a vital facet of meeting the constitutional standards that enhances the operational independence of the Reserve Bank of Malawi. It is further wondered that why the section 3 of the Exchange control Act has not been declared invalid by our courts today with such glaring constitutional breaches. The whole circumnavigation of the legal parameters breaches fundamental principles that regulate every central bank and also eats on the independence of the Reserve Bank of Malawi. This then leave to the next chapter to recommend for some of the reforms that need to be undertaken in order to address the gap in the Exchange Control Act that have been identified above.

CHAPTER FIVE

FINDINGS AND RECOMMENDATIONS

5.1 Introduction

The purpose of this study was to investigate whether the Exchange Control Act do adequately safeguard the operational independence of the Reserve Bank of Malawi. This was from the background that the Minister of Finance under section 3 of the Exchange Control Act is empowered by the Act to make regulations for the purpose of the control of foreign exchange, bullion and Malaŵi currency which shows the direct political or governmental influence over Reserve Bank of Malawi's freedom of monetary policy making. The study proceeded on the assumption that the Exchange Control Act does not effectively safeguard independence of the Reserve Bank of Malawi.

The broad objective of the study was to analyse whether the Minister's powers to make regulations under section 3 of the Exchange Control Act do adequately safeguard the operational independence of the Reserve Bank of Malawi. To do that, the study utilized the legal theory of finance which argues that political authorities should not interfere with the financial markets for financial markets are rule bound systems. Using the central bank independence indicators concluded there from, the study then considered the Exchange Control Act whether it has legal independence, political independence, exchange rate policy independence, monetary policy and deficit financing independence and accountability and transparency independence. The study also considered the Act in relation to indicators that were considered and established in some of the relevant case law. It then went on to analyse the regulations, the constitutional provisions and the provisions in the Reserve Bank of Malawi based on the central bank independence indicators.

The study also assessed the doctrinal implications of section 3 of the Exchange Control Act in compliance with the constitutional standards established by the Constitution,²⁹⁵ that enhance operational independence of the Reserve Bank of Malawi.

This chapter therefore presents the entire findings of the study on the adequacy of Exchange Control Act in safeguarding the operational independence of the Reserve Bank of Malawi. Further, it demonstrates how the questions the study set out to answer have been answered this far, makes conclusions and closes with recommendations based on the findings.

5.1 Findings

As indicated above the main focus of the study was to assess whether the Exchange Control Act do adequately safeguard independence of the Reserve Bank of Malawi. In order to achieve this goal, the study had to firstly establish the legal indicators of Central bank independence. This was so decided because indicators generally act as a pointer of what certain institution or things ought to be like in ideal situation. Secondly, the study focused on provisions of the Exchange control Act in order to assess whether the Act meets the general indicators of central bank independence vis-a vis the operational independence of the Reserve Bank of Malawi. Thirdly, the study specifically analyzed the implications of section 3 of Exchange control Act on constitutional standards that enhances the operational independence of the Reserve Bank of Malawi.

5.2.1 Central bank independence legal indicators

That the study had used various literature and case law from various jurisdiction in order to establish the legal indicators of central bank independence. It is the finding of this study that the legal indicators of central bank independence include legal independence, political independence, exchange rate policy independence, monetary policy and deficit financing independence and accountability and transparency independence. The study also found that there are also other indicators that were laid down by Judges in course of deciding cases

²⁹⁵ The Constitution of Republic of Malawi 1994

and these include legal personality of the central bank, a capacity by a central bank to acquire property on its own, finally ability to sue and to be sued on its own and existence of enabling piece of statute that gives autonomy to the bank in regulating its affairs.

The study also found that the relevant theory that fit into our study is the Theory called Legal theory of Finance. This so because the theory to some extent it reinforces some of the indicators of central bank independence. For instance, the Legal Theory of Finance maintains that political authorities should not make attempt to interfere with the financial markets for financial markets are rule bound systems. It is being finding of the study that this theory is in line with political independence of central banks therefore it promotes independence of central banks.

5.2.2 Assessment of whether and how the Exchange control Act meets the legal Indicators of Central Bank Independence

The study specifically assessed whether the exchange control Act meets, the legal indicators outlined above. The study to achieve this aim had to survey the provisions of the Exchange control Act and see if they do actually meet the legal independence, Political independence, exchange rate policy independence, monetary policy and deficit financing, accountability and transparency independence.

Firstly, on legal independence, it was established that the exchange control Act itself does not give the flexibility to the Reserve Bank itself to run its affairs. However, it was the finding of this study that although this flexibility is not permitted by the Act itself, but the Act through its Regulations that are made under section 3 of the Exchange Control Act gives certain level of flexibility to the bank. For instant, it was found that the Regulations 11 (4) and 12(2)²⁹⁶ of the Exchange Control Regulations give the Reserve Bank of Malawi a legal authority to grant permission to any person to take or send foreign currency outside Malawi. It was the final finding of the study that, the fact that the Exchange Control Regulations recognize the existence of the Reserve Bank of Malawi and that the regulations are part of the Act then the Exchange Control Act recognizes the existence of the Reserve Bank of Malawi. Since regulations confer a degree of independence to the Reserve Bank

²⁹⁶ Section 3 of Exchange Control Act Chapter 45:01 of Laws of Malawi as read with Regulation 11(4) of Exchange Control Regulations.

of Malawi, then it was concluded that the Exchange Control Act do indeed confers legal independence to the Reserve Bank of Malawi.

On political independence, it was established that the Constitution provides that the Minister has legislative authority to make regulations. It was found that the Exchange Control Act gives legislative authority to the Minister to make regulations for the purpose of controlling foreign exchange, bullion and Malawi currency. It was found that Regulation 30 (2) provides that the Minister may give to any person who appears to the Minister to be in a position to give effect thereto such directions as appear to the Minister to be expedient. Furthermore, the Ministerial position is political one as Ministers are politically appointed.²⁹⁷ To this end it was the finding of this study that because of the wide authority is given to political position to make Regulations in respect to Exchange control matters, under this score alone, the Exchange Control Act does not meet political independence indicator as one of indicators of central bank independence. The author strongly believes that under this score alone, it is almost conclusive that the Exchange Control Act does not adequately safeguard the independence of the Reserve Bank of Malawi. The author also strongly believe that the Reserve Bank would have been more independent if the Minister was not given the wide powers of making the Exchange Control Regulations. This view is also supported Dr. Zolomphi Nkowani who asserts that "... Minister has unnecessarily wide powers with regard to the regulation of the financial and banking sector, which negates the operational independence of the supervisory authorities."²⁹⁸ To this end the study proposes that the section 3 of the Exchange Control Act that gives wide and unnecessary powers to the Minister ought to be removed in order to make the Reserve Bank of Malawi more independent. Other commonwealth jurisdiction such as Tanzania has managed to do so by leaving powers of making Regulations to the Governor of the Bank of Tanzania. For instance section 7 of Foreign Exchange²⁹⁹ gives power to the Governor to make Foreign Exchange Regulations. The section 7 of the Act read as follows:

²⁹⁷ Dogan, M., 2019. How to become a cabinet minister in Italy: unwritten rules of the political game? In *Pathways To Power* (pp. 99-139). Routledge.

²⁹⁸ Nkowani, Z. Supervision of banks and financial institutions in Malawi. *Malawi Journal* vol2; 2008 Page 84.

²⁹⁹ Act No.9 of 1992 Cap 271 of Laws of Tanzania

“Subject to section 6, the Governor may, make regulations, rules, orders, or directions, as the case maybe, relating to -

*(a) gold, currency, securities and transactions relating to them;
any foreign exchange transactions other than transactions referred to in paragraph (a);*

(b) any foreign exchange transactions other than transactions referred to in paragraph (a);”

Similarly, in the Republic of Uganda, the power to make Regulations is not left to the Minister. On the contrary, according to section 18 of Foreign Exchange Act³⁰⁰ this powers are left to the Bank of Uganda which is central bank of Uganda. The section 18 of the Foreign Exchange Act³⁰¹ read as follows:

“(1) The Bank of Uganda may by statutory instrument, make regulations generally for purpose of carrying out the provisions of this Act.”

Therefore, the author strongly believe that Reserve Bank of Malawi would have been independent if Malawi had adopted similar approach adopted by Tanzania of giving authority to make Regulations to the Governor of the Bank of Tanzania, the same being central bank of Tanzania. Therefore, power to make Exchange Control Regulations ought to be left to the Governor of Reserve Bank of Malawi if indeed the operational independence of Reserve Bank of Malawi is to be safeguarded.

On exchange rate policy indicator, it was established that if the ultimate responsibility of exchange rate policy is left to central bank, it will most likely attain its independence in terms of its operation. It was found that the Exchange Control Regulations give the ultimate

³⁰⁰ Foreign Exchange Act No.5 of 2004 of Laws of Uganda

³⁰¹ Foreign Exchange Act No.5 of 2004 of Laws of Uganda

responsibility of dictating the exchange rate policy to the Reserve Bank of Malawi. Since the regulations are part of the Act then the Exchange Control Act confers the ultimate responsibility to the Reserve Bank of Malawi of dictating the exchange rate policy. That said however, the author still feels that since the Exchange Control Regulations are enacted by the Minister of Finance who is a politician, this responsibility of dictating the exchange control is therefore delegated. As a delegated responsibility, there is nothing that can prevent the principal being Minister to exercise similar powers and dictate the exchange rate policy of the Reserve Bank of Malawi. This position can be exemplified by the statement by Justice Kapindu in the case of *Republic v George Chaponda*,³⁰² at page 53 paragraph 146 where the Judge had this to say:

“What is most significant is that there is a permit issued by a duly constituted authority, the Minister responsible for Finance in this which authorises a person, the Respondent in this case, to hold foreign currency. In the instant case, the Minister unequivocally vouched that he issued the permit that was presented in court and that it was valid.”

The argument following from the case above that as the law it is the Minister still a duly constituted authority in matters of exchange control and can therefore dictate even in exchange control matters such as dictating exchange rate policy of the Reserve Bank of Malawi. To this end it can therefore be concluded that the operational independence of Reserve Bank of Malawi can only be actualised if the powers to make Exchange Control Act are taken away from the Minister so that the Minister should not be able to enact any regulations that gives him power to dictate the exchange rate policy of the RBM.

On monetary policy and deficit financing independence, the study established that the independent pursuit of monetary policy tends to be compromised by political interests and populist pressures. The study also established that if the Central Bank conducts monetary policy alone without consulting government then it is more independent. It then found that the exchange Control Act nor its regulations do not specifically state that the Government

³⁰² Criminal Appeal Case 15 of 2015

should be involved in the formulation of monetary policy. However, the Reserve Bank of Malawi Act has sections which state that the Reserve Bank of Malawi should consult government on monetary policy operations. In the context of the present study, the normative is what the Minister ought to do in relation to making of regulations as powers conferred to him in relation to the Exchange Control Act. The Minister ought to have made the regulations to clearly stipulate that the Reserve Bank of Malawi should not consult the government in terms of monetary policy. That said however, the study found that the financial and budgetary freedom as legal indicator does not apply to the Exchange Control Act as demonstrated above. Thus there is specialized piece of legislation known the Reserve Bank of Malawi Act which can be a proper and relevant medium of addressing this indicator. It is thus left to the future study to assess whether the Reserve Bank of Malawi Act meet this financial and budgetary freedom as a legal indicator of central bank independence which is also beyond scope of this study.

On accountability and transparency, the study established that an independent central bank is the one that is transparent and accountable to parliament and not to the executive or otherwise. This is said so because the Parliament comprises of elected individuals who act in representative capacity on behalf of the Citizens. These elected members of legislature are accountable to people who elected them unlike Minister who is accountable to the President alone. The study found that the Reserve Bank of Malawi lacks on this indicator as it is accountable to the Minister and not the National Assembly. It is general observation of the author that as it is, there is gap in the Act which can leaves a room for actual and perceived political interference. This would not have been the case if the Exchange Control Act clearly spelled out that in matters of exchange control management the Reserve Bank of Malawi will be accountable to the parliament.

In conclusion, the overall finding showcased in this study is that the Exchange Control Act and the Exchange Control Regulations made under section 3 of the Act do not meet central bank independence in line of Political independence, monetary policy and deficit financing independence and Accountability and Transparency Independence. However, to a limited extent, the Act mainly through the Regulations do indicate central bank

meet indicators of the central bank independence in certain cases in respect of Legal independence and Exchange Rate independence. To that end it was finding of this study that the Exchange Control Act does not adequately safeguard the independence of central bank independence, in particular the operational independence of the Reserve Bank of Malawi.

5. 2. 3 The Implications of the section 3 of the Exchange Control Act on Constitutional standards that enhance operational independence of the Reserve Bank of Malawi

The study also focused on implications of the section 3 of the Exchange Control Act on the constitutional standards in relation to the independence of the Reserve Bank of Malawi. It was findings of the study that section 5,185(1) and (2) and section 199 are constitutional provisions that enhances the operational independence of the Reserve Bank of Malawi. The study therefore found that these provisions collectively set constitutional standards of enhancing the operational independence of the Reserve Bank of Malawi. On the implication of section 3 of the Exchange control Act on the constitutional standards, it was finding of this study that the section 3 of Exchange Control Act and the Exchange Control Regulations made under section 3 of the Act do not meet the constitutional standards that enhances the operational independence of the Reserve Bank of Malawi as it clearly breaches the section 185(1) and (2) and 199 of the constitution and it therefore invalid under section 5 of the constitution.³⁰³ It was therefore the overall findings that since the section 3 of the Act breaches fundamental principles or legal indicators that regulate every central bank and also eats on the operational independence of a central bank by failing to meet the constitutional standards that enhances the operational independence, the Act therefore do not adequately safeguard independence of central bank of Malawi. The author's perspective on the matter at hand is that as long as the section 3 of the Exchange Control Act is in force the Exchange control Act will be hinging upon constitutional standards that safeguard operational independence of Reserve Bank of Malawi. This therefore call for need to reform the Exchange control Act as recommended and provided below.

³⁰³ The Constitution of Republic of Malawi of 1994

5.3. Recommendations and overall conclusion

As stated above, the findings of this study have exposed a wide gap that exists in the provisions of Exchange Control Act as both legal indicators and constitutional standards that enhances the operational independence of the Reserve Bank of Malawi is not wholly met. To resolve this problem which could be the main source of the legislative authority given to the Minister the law has to evolve to respond to the changing needs and realities of society, the study therefore proposes one recommendation known as a law reform.

5.3.1 Law Reform

The study acknowledges the wide law reforms that occurred over the years especially in making regulations by the Minister. The study recommends that the Exchange Control Act should be reviewed. It should include a section that properly defines the Reserve Bank within the principal Act itself. This can be achieved by adding an interpretation words in section 2 of the Exchange Control Act that introduces the word “bank” with the meaning as ascribed thereto in the Banking Act³⁰⁴. The Act should further amend section 3 by replacing the words ‘the Minister’ with the Reserve Bank of Malawi or by rewriting the section to confer certain degree of authority of carrying out the provisions of the Act. These two sections can be fused into the same section to form a single section that addresses the issue or can be put separately. These amendments if incorporated will provide a safeguard to the operational independence of the Reserve Bank of Malawi by firstly conferring freedom and flexibility to the Reserve bank of Malawi in its operations. This recommendation was arrived at by not only considering the research findings but also referring to the Exchange Control Laws or Acts of both Tanzania and Uganda in which states similar issues in their respective interpretation Section as well as section that authorize the making of Regulations of their respective Acts.³⁰⁵

For instance in Tanzania, the section 4 of the Foreign Exchange Act³⁰⁶ provides as follows:

³⁰⁴ Cap. 44: 01 of the Laws of Malawi

³⁰⁵ Exchange Control Act of Siri Laka of 1986

³⁰⁶ Foreign Exchange Act No.1 of 1992 of Laws of Tanzania

“‘bank’ means a bank within the meaning of section 3 of the Banking and Financial Institutions Act, 1991.”

Further, the section 7 of the Foreign Exchange Act of Tanzania provides as follows:

“Subject to section 6, the Governor may, make regulations, rules, orders, or directions, as the case maybe, relating to- (a) gold, currency, securities and transactions relating to them; (b) any foreign exchange transactions other than transactions referred to in paragraph (a);

Similarly, in Uganda under Section 3 of Foreign Exchange Act ³⁰⁷ provides as follows:

“‘bank’ has the meaning assigned to it in the Financial Institutions Act, 2004.”

Further, the section 18 of the Foreign Exchange Act of Uganda provides as follows:

“The Bank of Uganda may by statutory instrument, make regulations generally for the purpose of carrying out the provisions of this Act.”

The author therefore strongly recommends that the similar approach taken by the two countries above should be adopted by Malawi by amending the section 2 and 3 of Exchange Control Act as proposed below. The author therefore suggests the following proposed amendments to sections 2 and 3 of the Act;

Section 2- *“bank” means the Reserve Bank of Malawi established under section 3 of the Reserve Bank of Malawi Act. Cap. 44:02*

Section 3- *The Reserve Bank of Malawi shall, as agent of the Government, may by statutory instrument be responsible for making regulations for purpose of carrying out the provisions of this Act.*

³⁰⁷ Foreign Exchange Act No.4 of 2004 of Laws of Uganda

The study recommends that the proposed section needs to be inserted, in the Exchange Control Act, immediately after section 3 that clearly spells out the independence of the Reserve Bank of Malawi in exchange control management. The proposed section could be framed in the following words:

Section 4- *The Reserve Bank of Malawi shall exercise its powers, functions and duties under this act independent of any direction or interference by other authority or any person.*

This proposed section if incorporated will enable the Act to adequately safeguard the operational independence of the Reserve Bank of Malawi as it will safeguard the bank from any external interferences including political interferences.

The study further recommends that another section should be introduced immediately after section 4 that will clearly indicate that the bank should be accountable in carrying out its duties and functions under the Act. It is an ideal that the bank should be accountable to the Parliament alone and not the minister to avoid government interference. The proposed section could be framed in the following words:

Section 5- *The bank shall be accountable to the National Assembly for the exercise of such powers and functions under this Act.*

This section if incorporated will most likely safeguard the operational independence of the Reserve Bank of Malawi.

The study further recommends that the Constitution has to be amended and another section should be introduced immediately after section 185(2) that will clearly indicate that the bank should be politically independent. This is possible because in the same constitution for instance there is section 158 of the very constitution which was introduced in the constitution³⁰⁸ in order to safeguard the independence of Malawi Police Service as one of institution established by the Constitution. The study recommends that similar approach be adopted by amending section 185 of the Constitution in order to introduce the new suggested provision that will safeguard the independence of the Reserve Bank of Malawi.

³⁰⁸ This section was introduced in the Constitution of Republic of Malawi of 1994 in 2001

The proposed section could be framed in the following words:

Section 85(3)- *The Reserve Bank of Malawi shall exercise its powers, functions and duties under this Constitution and under any act of parliament independent of any direction or interference by other authority or any person or political party.*

This section if incorporated in the constitution it will most likely safeguard the independence of Reserve Bank of Malawi. It is left for future research to consider whether the other piece of legislation such as the Reserve Bank of Malawi Act and Financial Service Act do they actually safeguard the independence of the Reserve Bank of Malawi. It is also left to future research to consider other form of the Reserve Bank of Malawi independence that have not been discussed in this study in depth such as personal independence, functional independence and financial independence.

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