Malawi

Democracy and Political Participation

A review by AfriMAP
and the
Open Society for Southern Africa

Wiseman Chijere Chirwa

March 2014
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<tr>
<td>ACB</td>
<td>Anti-Corruption Bureau</td>
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<td>ACHPR</td>
<td>African Charter on Human and Peoples’ Rights</td>
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<td>ADC</td>
<td>Area Development Committee</td>
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<td>Agricultural Development and Marketing Corporation</td>
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<td>African Development Bank</td>
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<td>Alliance for Democracy</td>
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<td>AfriMAP</td>
<td>Africa Governance Monitoring and Advocacy Project</td>
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<td>AIDS</td>
<td>acquired immune deficiency syndrome</td>
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<td>APRM</td>
<td>African Peer Review Mechanism</td>
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<td>ART</td>
<td>antiretroviral treatment</td>
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<td>AU</td>
<td>African Union</td>
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<td>BADEA</td>
<td>Arab Bank for Economic Development in Africa</td>
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<td>BCHI</td>
<td>Body of Case Handling Institutions</td>
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<td>Bankable Feasibility Study</td>
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<td>Common Approach to Budget Support</td>
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<td>Country Assistance Strategy</td>
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<td>CCAP</td>
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<td>CONGOMA</td>
<td>Council for Non-Governmental Organisations in Malawi</td>
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<td>civil society organisations</td>
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<td>DAC</td>
<td>Development Assistance Committee</td>
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<td>Development Broadcasting Unit</td>
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<td>Development of Malawian Traders Trust</td>
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<td>DfID</td>
<td>Department of International Development (United Kingdom)</td>
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<td>DGSWAp</td>
<td>Democratic Governance Sector-Wide Approach</td>
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<td>Democratic Progressive Party</td>
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<td>EBVRS</td>
<td>Electronic Biometric Voter Registration System</td>
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<td>Employers’ Consultative Association of Malawi</td>
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<td>Financial Management and Accelerating Growth Project</td>
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<td>first-past-the-post</td>
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<td>gross domestic product</td>
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<td>gross national income</td>
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<td>HIPC</td>
<td>highly indebted poor countries</td>
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<td>HIV</td>
<td>human immunodeficiency virus</td>
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<td>International Covenant on Economic, Social and Cultural Rights</td>
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<td>Konrad Adenauer Foundation</td>
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<td>Local Development Fund</td>
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<td>LGBT</td>
<td>lesbian gay bisexual and transgender</td>
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<td>Acronym</td>
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<td>MACRA</td>
<td>Malawi Communications Regulatory Authority</td>
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<td>Malawi Forum for Unity and Development</td>
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<td>Malawi Safety, Security and Access to Justice</td>
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<td>Malawi Broadcasting Corporation</td>
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<td>Millennium Development Goals</td>
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<td>Malawi Democratic Party</td>
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<td>Malawi Economic Justice Network</td>
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<td>Malawi Electoral Support Network</td>
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<td>Malawi Growth and Development Strategy</td>
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<td>Malawi Health Equity Network</td>
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<td>Malawi-Germany Programme for Democracy and Decentralisation</td>
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<td>Malawi Institute of Journalism</td>
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<td>MISA</td>
<td>Media Institute of Southern Africa</td>
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<td>MMDGs</td>
<td>Malawi Millennium Development Goals</td>
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<td>Maravi People's Party</td>
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<td>MSCE</td>
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<td>Management Systems International</td>
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<td>National Aids Commission</td>
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<td>Nyasaland African Congress</td>
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<td>NAMISA</td>
<td>National Media Institute of Southern Africa (MISA)</td>
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<td>National Consultative Council</td>
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<td>National Democratic Alliance</td>
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<td>NDI</td>
<td>National Democratic Institute for International Affairs</td>
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<td>NEC</td>
<td>National Executive Council</td>
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<td>NEPAD</td>
<td>New Economic Partnership for Africa's Development</td>
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<td>NGO</td>
<td>non-governmental organisation</td>
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<td>NGO/GCN</td>
<td>Non-Governmental Organisations’ Gender Coordination Network</td>
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<td>Acronym</td>
<td>Full Form</td>
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<td>NIB</td>
<td>National Intelligence Bureau</td>
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<td>NICE</td>
<td>National Institute for Civic Education</td>
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<td>NIMD</td>
<td>Netherlands Institute for Multiparty Democracy</td>
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<td>NORAD</td>
<td>Norwegian Agency for Development Cooperation</td>
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<td>NPL</td>
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<td>NRP</td>
<td>New Republican Party</td>
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<td>NSO</td>
<td>National Statistical Office</td>
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<td>OAU</td>
<td>Organisation of African Unity</td>
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<td>ODA</td>
<td>official development assistance</td>
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<td>OPC</td>
<td>Office of the President and Cabinet</td>
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<td>OPEC</td>
<td>Organisation of Petroleum Exporting Countries</td>
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<tr>
<td>ORT</td>
<td>other recurrent transactions</td>
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<td>OSISA</td>
<td>Open Society Initiative for Southern Africa</td>
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<td>PAC</td>
<td>Public Affairs Commission</td>
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<td>PAC</td>
<td>Public Accounts Committee</td>
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<td>PACENET</td>
<td>Pan African Civic Educators Network Trust</td>
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<td>PAP</td>
<td>Poverty Alleviation Programme</td>
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<td>PETRA</td>
<td>People’s Transformational and Restoration Party</td>
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<td>PIF</td>
<td>Poverty Initiative Framework</td>
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<td>People’s Party</td>
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<td>SWAp</td>
<td>sector-wide approach</td>
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<td>TVM</td>
<td>Television Malawi</td>
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<td>UDF</td>
<td>United Democratic Front</td>
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<td>WB</td>
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<td>YD</td>
<td>Young Democrats</td>
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Preface

The transformation of the Organisation of African Unity (OAU) into the African Union (AU) saw renewed commitment to democratic governance by AU member states. Among these commitments are the provisions of the Constitutive Act of the AU, in which member states agree to promote human rights, democratic principles and institutions, popular participation and good governance. Other commitments are contained in the New Partnership for Africa’s Development (NEPAD) founding documents, the African Peer Review Mechanism (APRM) and the Convention on Preventing and Combating Corruption in Africa. The African Charter on Democracy Elections and Governance entered into force on 15 February 2012. It is the first time that a binding treaty on democracy elections and governance is in place in Africa. Despite these renewed commitments to strengthen democratic governance in Africa, compliance and implementation remain major challenges.

The Africa Governance Monitoring and Advocacy Project (AfriMAP) is an initiative established in 2004 by the Soros Open Society Foundation (OSF) Network’s four African foundations to monitor observance of standards relating to human rights, the rule of law and accountable government by African states. Similar studies have been done in Benin, Democratic Republic of Congo, Ghana, Kenya, Lesotho, Mozambique, Senegal, Sierra Leone, South Africa, Swaziland and Zambia. The studies are intended to facilitate and promote respect for these commitments by highlighting key issues, and providing a platform for national civil society organisations to engage in their own monitoring efforts. AfriMAP has now been integrated into OSF’s Africa Regional Office, which is responsible for coordinating OSF’s activities on the continent as well as implementing pan-African activities.

The methodology of the reports is based on standardised reporting frameworks that link respect for good governance and human rights to development that benefits poor people. Through a process of expert consultation, AfriMAP developed a reporting framework in three thematic areas: the justice sector and rule of law; democracy and political participation; and effective public service delivery. The research frameworks and reports on other countries are available on the AfriMAP website, www.afrimap.org.

The research is carried out by experts from the countries concerned in close collaboration with OSF’s foundations in Africa and AfriMAP’s own staff. Several drafts of this report were reviewed, debated and discussed by a wide range of experts and stakeholders, with their input
reflected in the final report. The aim is that the report will be a resource for activists, policy makers and implementers, scholars, development partners, and others working to promote and strengthen good governance in Africa.

Acknowledgements

The preparation and finalisation of this report would not have been possible without the valuable contributions of a number of individuals and organisations.

The report was researched and written by Professor Wiseman Chijere Chirwa, a social scientist with specialties in sociology, social history and political studies. He teaches at the University of Malawi. He has researched and written extensively on Malawi’s political transition, accountability and transparency in state and non-state institutions, democracy and governance monitoring, human rights, civil society and citizen participation in public policy formulation and implementation; and has served as a commissioner at the Malawi Human Rights Commission.

The Malawi Human Rights Resource Centre (MHRRC), a leading capacity building NGO that promotes a sustainable human rights culture in Malawi, played a critical convening role during the research process. The MHRRC was able to convene key actors such as parliamentarians, politicians, policy makers, students, civil society organisations, academics and development partners in validation workshops that discussed and debated drafts of the report. The input from the validation workshops contributed to the high quality of the report.

Staff at AfriMAP and OSISA, including Ozias Tungwarara, Jeggan Grey-Johnson and Roshnee Narrandes, played an important review and coordination role, commenting on drafts and coordinating the research process.

The report was subjected to rigorous editing by Jeanette Minnie of Zambezi FoX, an international freedom of expression and media consultant with extensive experience and knowledge of political developments in southern Africa and the continent.
Foreword

It is almost twenty years since Malawi returned to multi-party politics. After years of one-party dictatorship, Malawians placed unprecedented pressure on Dr Kamuzu Banda’s regime, which culminated in Malawi reverting to a plural political system. The pathway to consolidating Malawi’s nascent democracy has not been linear. Significant progress has been achieved in some areas while serious challenges continue to be faced in others. High levels of poverty impact negatively on political participation because a large number of Malawians are susceptible to political patronage. Unlike in other African countries where contestation for state power has morphed into violent armed conflict, Malawians have been able to resolve political differences through constitutional means.

Malawi ratified the African Charter on Democracy, Elections and Governance on 11 October 2012 and deposited its instrument of ratification on the 24th of the same month, signalling strong commitment to democratic principles and values. While there is concern with the ease and manner in which the constitution has been amended, the Malawian constitution enjoys a fairly high level of legitimacy. This provides for a credible legal framework for the governance of the country. It was on the basis of the constitution that a third term bid by former president Bakili Muluzi was halted. Adherence to the constitution also facilitated the succession of the late president, Bingu wa Mutharika, by the current president, Joyce Banda.

While elections have been held regularly and periodically since 1994, there have been concerns about the integrity of the electoral process. Issues such as the voters’ roll, the capacity of the Malawi Electoral Commission, intra-party democracy and the mutation of political parties from one election to another as well as the influence of development partners on Malawian politics, are some of the issues that the report discusses and makes recommendations on. The report finds, as in most other African countries, that regional loyalties are a key determinant in Malawi’s electoral politics.

Despite the guarantee of fundamental rights afforded by the constitution, the biggest challenge that Malawi’s democratic consolidation faces are weak institutions of governance such as Parliament, political parties, institutions of local governance, civil society organisations, and other institutions such as the electoral commission. The report seeks to provide more in-depth insights into some of these challenges and makes specific recommendations on how to address impediments to political participation.
The report is not intended as a score card about Malawi’s democratic performance, but rather as a contribution to an ongoing national dialogue about the quality of Malawi’s democracy. It is our sincere hope that the report will catalyse policy advocacy that will result in tangible policy reforms.

Ozias Tungwarara
AfriMAP Director
Part I

Malawi: Democracy and Political Participation

Discussion Paper
Introduction

For over a hundred years Malawians lived in a closed society. Seventy years of colonialism (1891–1961) were immediately followed by over thirty years of dictatorship (1961–1993). After decolonisation in 1964 the country had one of the most rigid and internationally isolated dictatorships in Africa. Opposition politics were not allowed. Neither were independent civil society organisations. The Malawi Congress Party (MCP), the single party in power after independence, controlled all aspects of political life. No democratic elections took place between 1961 and 1994. The 1966 constitution extended the lifespan of the existing Parliament for another five years. In 1971 and 1976 elections nominally took place, but President Dr Hastings Kamuzu Banda nominated just one candidate from each constituency. In elections in 1983, 1987 and 1992 there were between two and five candidates in most constituencies. All of them were members of the MCP and personally approved by Dr Banda himself.

To many analysts, Malawi would probably be regarded as a special case in the peaceful transition to democracy because the conditions could not have been worse at the time the process began. With a per capita income of between US$ 140 and US$ 220 between 1994 and 1997, the country was one of the ten poorest countries in the world, and ranked among the lowest 15 on the Human Development Index (HDI) by 1998. Close to 86% of its population relied on subsistence agriculture, in the countryside, away from the relatively better-informed and internationally connected urban communities. The country had an extremely low level of literacy at the time, with more than 44% of adults being unable to read or write. The civil war in Mozambique had forced some 1.3 million refugees into the country by 1987/1990, the largest recorded population of refugees from one country living in another country in the entire world. The social, political and economic effects of hosting such a large number of refugees were enormous.

Yet, compared to other African countries, Malawi’s experience in peaceful democratic transition has been a shade apart from the rest. The process was initiated and pursued by a risk-loving minority – a small urban population led by elites comprising intellectuals, religious groups and business people – coupled with a great deal of international pressure. In less than a year from April 1992, a mass movement was in the making. A referendum on the reintroduction of multi-party politics was called. The vote was taken on 15 June 1993, and 63% were in favour of an end to dictatorship and favoured the reintroduction of a multi-party system. With some 69% turning up at the polls, the referendum had, in African terms, a very high voter turnout – a fourfold increase on the last elections under the Banda regime in 1992. An 80% voter turnout at the first democratic parliamentary and presidential elections in 1994 and then an even higher...
turnout in 1999, at 94% – which is extremely high by international standards – clearly indicated a measure of stability and confidence in the democratic process.

The first elections under the new system, held on 14 May 1994, were judged largely free and fair by observers despite attempts by the MCP to influence the results. The leader of the United Democratic Front (UDF), Baliki Muluzi, was elected president, his party winning 87 of the 177 seats. Dr Banda and the MCP won about a third of the votes and the third candidate, Chakufwa Chihana of the Alliance for Democracy (AFORD), won just 19% of the vote. Muluzi and the UDF were short of four seats to obtain a majority in the National Assembly, and after a difficult negotiation period formed a coalition government with AFORD. Chihana and five AFORD MPs joined the Cabinet in September 1994 and the coalition was finally formally established in July 1995, but disbanded a year later.

A new constitution was adopted by the UDF-AFORD controlled Parliament on 18 May 1995, preceded by a constitutional review process involving a constitutional conference with broad societal participation. The new constitution put into place an era of multi-party and democratic politics, with new constitutional institutions established to oversee and check executive power. The state president was to be elected every five years and universal suffrage was set at 18 years of age.


After assuming majority control in 2009 the government of President Bingu wa Mutharika became increasingly authoritarian and autocratic. A number of new laws were passed, including measures granting the Minister of Information the power to ban any publication of his choosing under the guise of the ‘public interest’, and giving police the right to search properties without a warrant. It was announced that local elections, which had been continually delayed since 2005, would not be held until 2014 – the official reason being allegations of fraud concerning the Electoral Commission. In February 2011, a public policy lecturer at the University of Malawi was reprimanded by police for giving a lecture on the nascent Arab Spring. It was suggested that he was seeking to incite revolution. The event caused an eight-month closure of the university as protesting faculty members and students demanded guarantees for academic freedom and non-harassment by police. In April 2011, Britain’s High Commissioner to Malawi was deported for describing President Mutharika as ‘increasingly authoritarian and autocratic’ in a diplomatic cable which was subsequently leaked. Britain responded by also expelling Malawi’s High Commissioner to the UK. Fuel, foreign exchange, water and electricity shortages caused urban riots and demonstrations on 20 July 2011 in which 20 protestors were shot dead by police and hundreds arrested.

Political tensions were heightened by the uncertainty around a successor to President Mutharika at the end of his second term in 2014. The president’s preference was for his younger brother, Peter Mutharika. President Mutharika died of cardiac arrest in April 2012 and Vice President Joyce Banda, succeeded him after an attempt by a group of ministers to bar her from assuming office. Civil society groups, religious leaders, academics and security forces backed Banda in order to protect the integrity of the country’s constitution. Malawi’s constitution provides for the vice president to assume the office of president for the remainder of the term following the death of the incumbent.
Within a year and half of Joyce Banda’s coming to power, corruption and the theft of public funds resulted in development partners withholding budget support. In November 2013, bilateral and multilateral donors who were members of the Common Approach to Budget Support (CABS) group announced their suspension or withholding of aid to Malawi in response to the corruption and theft scandal that had resulted in the looting of more than US$ 250 million from government coffers. Dubbed ‘Cashgate’, coined from the American Watergate scandal of the 1970s, the massive theft and corruption also put at risk another US$ 20 million from the International Monetary Fund (IMF) under the Extended Credit Facility (ECF). The popularity of the Banda regime now hangs in the balance ahead of the May 2014 general elections.

1. Legal and institutional framework

The Malawi constitution enjoys broad-based legitimacy. Of concern, however, is the ease with which it can be amended with the real possibility of undermining processes and institutions of political participation. For example, between 1994 and 2005 no fewer than 205 items in the constitution were amended. The changes were of various kinds, ranging from the removal or addition of certain words or phrases, changing a part or the entire section, to the inclusion or repeal of sections. The most extensive changes to the constitution occurred in 1995, 1997, 1998, 1999, 2001 and 2010.

The amendments undertaken in 2001 included, controversially, the repeal of the sections relating to the Senate (sections 68–72); amendments to the section on crossing the floor (section 65); the reduction of functions and powers of the National Assembly (section 66); subjecting some of the powers and functions of the Electoral Commission (section 76) to the oversight of the executive; additions to the powers and duties of the president (section 89); and the reduction in the powers and functions of local government and local authorities (sections 146–151). The amendments were widely perceived as an attempt to consolidate the executive’s hold on power. The amendments relating to recall of members of Parliament, the abolition of the Senate and floor crossing by members of Parliament undermined the powers of the electorate, the popular political voice and local democratic governance.

Some of the 2010 amendments affected sections contained in the Schedule – such as sections 37, 44 and 45. The amendment procedure would be regarded as unconstitutional because the sections contained in the Schedule, including the Schedule itself, are protected and cannot be amended without a referendum, and a two-thirds majority in Parliament.

Regarding adherence to international law, Malawi is party to the main international treaties related to democracy and political participation and ratified the 2007 African Charter on Democracy, Elections and Governance on 11 October 2012. Although Malawi’s constitution is generally speaking in compliance with the provisions of these treaties in establishing a democratic system of government, its legitimacy has been undermined by a series of expedient reforms carried out by political parties for their own partisan purposes. Repeated reviews have yet to lead to a stable constitutional text that is accepted by all as the fixed foundation for Malawi’s political system.
As in the case of other common law countries, international treaties only have effect in Malawian law if they have been incorporated in an act of Parliament, though customary international law does have direct effect. International treaties are rarely used in court judgments or in reinforcing the legitimacy of Malawi's constitution.

Malawi's reporting record in relation to international treaties is very poor. Failure to meet reporting obligations is partly an issue of capacity, and partly also due to the lack of clarity regarding the roles and responsibilities of various government institutions to take on the task. The Ministry of Justice is regarded as the lead institution in this matter. The Ministry of Foreign Affairs, the Office of the President and Cabinet, and the Malawi Human Rights Commission contribute to the process. The poor reporting record suggests a general lack of commitment to fulfilling the requirements of adherence to international treaties.

One of the major achievements of the political transition has been the establishment of independent and constitutionally established oversight institutions, including the Malawi Human Rights Commission, the Law Commission, the Office of the Ombudsman, the Anti-Corruption Bureau, the Compensation Tribunal, the Prison Inspectorate and the Office of the Auditor General. Several other offices and institutions also play important roles in responding to individual complaints of government malpractice and other oversight functions. The capacity of these institutions is undermined by poor funding, donor dependency and chronic shortages of personnel. Recommendations from these institutions are also rarely addressed by the executive and the legislature. The mandates and powers of these institutions are therefore stronger on paper than in practice.

2. Equal citizenship

Citizenship is the foundation of the right to political participation. In Malawi citizenship is acquired by birth, descent, marriage, registration and naturalisation. The Malawi constitution only provides that those who were citizens before it came into force remain citizens, and that an act of Parliament shall establish rules for the acquisition or loss of citizenship for others. The constitution also prohibits the arbitrary deprivation or denial of citizenship.

At present the law governing citizenship in the country is the Citizenship Act of 1966, which provides the criteria for the acquisition of citizenship through birth, naturalisation and parental origin. Malawi is one of the handful of African countries that discriminate in granting citizenship on the grounds of race. While any person may become a citizen by naturalisation, section 4 of the Citizenship Act provides that every person born in Malawi shall become a citizen of Malawi on the date of their birth if one of their parents is a citizen of Malawi and is a person of African race. The same discrimination applies to those born outside the country with a Malawian father or mother: the children of citizens who are not ‘of African race’ (necessarily naturalised citizens) can themselves only naturalise as citizens and do not enjoy Malawian nationality from birth. Provisions on the registration of births in Malawi are also racially discriminatory: registration is only compulsory if one or both parents are of European, American, or Asiatic ‘race’ or origin. In common with about half of the African states, Malawi does not permit dual nationality for adults.
Unlike some other states, there have been no moves in recent years to change this position.

The Act also discriminates on grounds of sex. It provides that any woman who marries a Malawian man who satisfies certain conditions may be registered as a Malawian citizen while it makes no equivalent provision to apply to men who marry Malawian women (section 16). The Act requires every female Malawian citizen who marries a non-Malawian citizen to formally state her intention to either retain her Malawian citizenship and renounce any foreign citizenship acquired by virtue of her marriage or lose her Malawian citizenship (section 9). There is no equivalent requirement in respect of male Malawian citizens. Other provisions of the Act also discriminate in similar ways.

The Malawi constitution prohibits discrimination against persons in any form, and provides that all persons are, under any law, guaranteed equal and effective protection against discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, disability, property, birth, or other status. Despite these guarantees, sexual minorities in the country are not recognised and face extreme discrimination and stigma. The country’s laws, especially some sections of the Penal Code, by interpretation, criminalise same-sex sexual relationships. The law reforms that accompanied the transition to democracy at the beginning of the 1990s, and the adoption of the new constitution in 1995, have not resulted in positive changes in the legal framework related to same-sex sexual relationships.

Some Malawians, especially those on the conservative religious side, argue that same-sex sexual relationships are against Malawi's culture and morality (without providing any evidence), thus implying that whoever engages in them is not behaving in the Malawian way and loses his/her ‘Malawianess’. Sexual morality and lifestyles are therefore equated with national identity and nationality. Through such arguments, lesbian, gay, bisexual and transgendered persons are stripped of their national identity because they are not behaving in the ‘Malawian way’.

Malawi also faces significant challenges in overcoming historical discrimination. For example, the citizenship status of Malawians of Asiatic origins is controversial, with many questioning these people's citizenship based in part on a perception that they have an unduly advantaged economic status and do not integrate in Malawian society. On their part, the Malawians of Asiatic origins claim that they were racially segregated against both during the colonial period and the period immediately after. The result of such historical experiences is caution and reluctance to fully integrate into Malawian society.

During the 1980s, the state tried to apply regional or ethnic quotas in its employment practices, in the allocation of top positions in the civil service, and in awarding university scholarships. Selection to secondary school was also done on a regional/ethno-linguistic basis. The practice became politically charged and extremely unpopular among those who felt disadvantaged. In the early 1990s, university selection based on regional/ethno-linguistic quotas was challenged in court as being discriminatory. The policy was reintroduced in 2009 amidst its rejection by universities. The practice runs contrary to constitutional provisions on equality and non-discrimination.

Also discriminated against are refugees and political asylum seekers. Refugees coming to Malawi are expected to register with the staff of the United Nations High Commissioner for Refugees (UNHCR), which runs refugee camps in the country. At the point of entry the refugees
are interviewed by a committee comprising officials from the Immigration Department, the Police, the Ministry of Health, the District Commissioner and the UNHCR. After registering they are sent to refugee camps, where they are required to live. No full integration is allowed and refugees are also not allowed to work. Border jumpers are rounded up and repatriated, and sometimes fined.

Further evidence for discriminatory tendencies and divisions along regional, linguistic and ethnic fault lines is found in the voting patterns of the referendum of 1993 and the elections of 1994, 1999 and 2004. All these elections reflected regional and tribal or ethnic preferences. The northern and southern regions of the country overwhelmingly voted for the reintroduction of the multi-party system in the 1993 referendum while the central region overwhelmingly voted for the continuation of the one-party system. The central region was the home of Dr Kamuzu Banda, the first independence president who established one-party rule in the country. The presidential candidates in the 1994, 1999 and 2004 elections received the majority of their votes from their regions of origin.

While the constitution (section 30[i]) recognises inequalities in society and seeks to remedy them through protecting the right to development, in reality the levels of poverty and unemployment raise serious questions about the effectiveness of such laws. The 2010/2011 Integrated Household Survey (IHS) recorded a national poverty rate of 50.7%. More than half of Malawi’s population is therefore poor. The figure for the ultra-poor has in fact increased over time from 22% to 25%.

The high levels of poverty are compounded by the high levels of inequality. The 2010/2011 IHS noted that the richest 10% of Malawi’s population has a median per capita income that is eight times higher (MK 50 373/US$119 per person per annum) than the median per capita income of the poor (MK 6 370/US$15 per person per annum). Moreover, the richest 10% of the population has a median income that is three times higher than the overall median income in the country. Children, women in female-headed households, illiterate women and people from large households (more than seven members) are the more strongly affected by poverty and inequality. There are correlations between poverty on the one hand, and social category (social status, social vulnerability, marital status, age and the rural-urban divide), on the other.

Malawi has made positive efforts to acknowledge religious diversity – for example, by changing from teaching Bible Knowledge to teaching more inclusive Religious and Moral Studies in schools. However, there are some official school regulations that forbid certain religious practices. For example, the public schools’ dress code forbids Rastafarian dreadlocks.

3. Citizen participation and public access to policy processes

There is recognition and ample scope in Malawian law for the right to organise and participate in public policy debates by individuals and organisations. The Malawi constitution (section 40[i][c]) provides that every person shall have the right to participate in peaceful political activity intended to influence the composition and policies of the government.
There has been a great increase in the number of media outlets and the development of a flourishing civil society since the reintroduction of multi-partyism in 1994. There are no serious restrictions to the use of both print and electronic media, and no controls over social media. Government has also taken steps to consult more widely in the adoption of national development policies. Government strategies to reduce poverty, such as the Malawi Growth and Development Strategy (MGDS) and the Malawi Poverty Reduction Strategy (MPRS) that preceded it, were developed in a consultative manner. The formulation of some new social policies, for example on education, gender, land, reproductive health, maternal health, HIV and AIDS and orphans, has also been consultative.

There are three common ways through which civil society organisations (CSOs) are consulted by government on official policy. The first, and possibly the most effective way, is where they are included in the governing boards of state institutions. Some civil society institutions are given permanent seats on some governing boards of parastatal organisations. The second way is when CSOs are invited by government or by any state institution to take part in the formulation of a particular policy or law. The third is where CSOs are members of a permanent forum of engagement. Such cases are rare, but a key example is the forum for Tripartite Social Dialogue for trade unions and employers and the Ministry of Labour and Vocational Training. The Tripartite Social Dialogue is an initiative of the International Labour Organisation (ILO).

Since 2000, the Malawi government has adopted a consultative approach to budget formulation. Pre-budget workshops and ‘breakfast meetings’ organised by the Ministry of Finance are held every year between the months of February and May, before the budget session of Parliament in June. The participants are drawn from the civil society sector, faith-based organisations, universities and the private sector.

Despite this constitutional commitment, however, highly problematic legislation restricting freedom of expression and the media – the foundation of any citizen’s ability to engage in political life – remains on the statute books. Most of these laws have been carried over from the colonial era and from the one-party regime. The most notorious of these include the Preservation of Public Security Act (Act 58 of 1965), which makes it a criminal offence to publish anything that the Minister of Information may consider to be prejudicial to public security; the Penal Code (Act 22 of 1929), which criminalises the publication of anything that may cause public alarm; the Censorship and Control of Entertainments Act (Cap.21:01) enacted in 1968, which prohibits the publication of material that is considered by the Censorship Board to be ‘undesirable’, while the Communications Act places some limitations on political broadcasting by community radios (section 51).

Harassment and intimidation of critical journalists, academics and opposition politicians is common practice in Malawi. The government often uses criminal law to silence critical minds.

While plural media exists in the country, serious concerns have been expressed about the poor quality of journalism. Partly as a result of lack of capacity, mostly arising from inadequate training, and partly due to the partisan nature of the media, the low quality of journalism impedes effective participation in policy processes. Poor quality journalism results in the provision of uncritical and poorly analysed information to the public, which undermines the ability of the public to hold government and authorities accountable for their policies and actions.
In practice, the public broadcaster, the Malawi Broadcasting Corporation (MBC) lacks independence, and is monopolised by the incumbent party, while the private media are harassed when they become too critical of government. The Malawian government has resisted all advocacy for legislation to guarantee access to public information. Barriers to accessing information held by the government include the political and physical inaccessibility of government officials, the limited circulation of official documents, the editorial policies and political control of national broadcasting houses, and the institutional weaknesses related to the documentation and storage of official information. As a result, public access to official information is very uneven. All these constitute obstacles to political participation because they act as barriers to accessing government-held information.

Though Malawi has a vibrant and growing civil society that is actively involved in the country’s economic, social and political spaces, there are questions about the mandates of these institutions as to whether indeed they represent the broad interests of the poor. Most CSOs, except for the faith-based organisations, are concentrated in urban centres and have no constituencies in rural areas where the majority of the Malawian people live. Mistrust characterises the relationship between CSOs and the government. There do not appear to be formal institutions or processes to facilitate policy dialogue and the government appears to consult civil society in an ad-hoc manner regarding policy issues. The government is rather skeptical of critical CSOs and individuals, carefully choosing those who participate in policy dialogue. On their part, the CSOs have tended to be more event-driven than systematically issue-based in their approach to policy matters.

There are no known legal requirements for public hearings before a government decision is made to embark on a major development project that affects a large number of people. However, government practice has been to consult with various stakeholders before such a project is implemented. Consultation does not necessarily bind the government to accepting any view of a particular stakeholder, and may not necessarily result in changes to the plans put forward by the government.

Environmental impact assessments (EIAs) are routinely carried out for major development projects, but these are not necessarily made public, and comment is not necessarily invited about such projects, with the exception of experts and technocrats. CSOs have sometimes taken the initiative to demand access to relevant documents, analyse them and then inform the public of their contents.

A major limitation to the effectiveness of these institutions in policy dialogue in Malawi arises from the fact that civic engagement and social dialogue are not politically neutral processes. The state would like to preserve policy-making and implementation as its prerogative and therefore always questions the mandate of civic bodies in policy matters. The result is that CSOs that are regarded as ‘controversial’ and critical of government are often excluded from consultative fora and policy processes. As a result some of them have been forced to adopt a softer approach in order to participate to some degree in consultation processes.

Citizen participation in public life is further undermined by weak local governance structures. The failure of local elections since 1999 and the incomplete process of decentralisation have resulted in local governance structures remaining weak and unable to provide the citizenry
with venues, avenues and channels for popular participation.

Despite the observations above, the political and economic crisis of 2009–2012 defined a new role for Malawian civil society. Opposition parties were in disarray and the National Assembly was unable to play its role as a platform for national dialogue – which had been the case since at least 2005. Party-political battles from 2004–2009 resulted in an institutional breakdown throughout government, but especially in the opposition-dominated Assembly. The economic crisis plunged the country into even deeper trouble. While politicians largely stood in the wings, civil society leaders and activists, despite being ill-equipped for the task, stepped into the breach. They organised mass national demonstrations, which on 20 July 2011 left 20 people dead and hundreds arrested. Civil society demands centred on improvements to the social safety net, the rule of law, national infrastructure, fiscal policies, election processes, human rights protection, human capacity, livelihoods and university education. Although little was achieved in actual improvements to the state delivery of social services, the representative role and the organisational capacity of the CSOs was nonetheless tested. The event also demonstrated and provided evidence of the antagonistic relationship between the state and civil society in the country.

4. Electoral governance

The Malawi political transition has been characterised by relatively peaceful elections, starting with the 1993 referendum. Since then, there have been four presidential and parliamentary elections: in 1994, 1999, 2004 and 2009; and one set of local government elections in 1999.

Section 40(3) and section 77 of the Malawi constitution guarantee every Malawian citizen the right to vote in any general election, by-election, presidential election, local government election or referendum, to do so in secret and to stand for election for public office. The voting age is set at 18 years.

Enabling the constitutional provisions on elections are three key acts of Parliament: the Electoral Commission Act (No.11 of 1998); the Parliamentary and Presidential Elections Act (Cap. 2:01, No.31 of 1993); and the Local Government Elections Act (No.24 of 1996). Closely related to these is the Political Parties Registration and Regulation Act (Cap.2:07, No.15 of 1993) in the sense that it provides a framework for political parties and their candidates to participate in elections. The constitution and the related pieces of legislation provide an adequate legal framework for the conduct of democratic elections in the country.

All four general elections for the National Assembly and for the presidency have complied with the constitutional calendar, except for a two-day delay in the 2004 elections following a court challenge by opposition parties and civil society organisations. However, local government elections were not held in 1995 due to lack of enabling legislation, nor in 2005 following the 2004 general elections, allegedly for financial reasons. In 2010 some sections of chapter XIV of the constitution were amended (by Act 8 of 2010) to change the calendar for local government elections and to give the president the power to determine the election date in consultation with the Electoral Commission. In 2012 Parliament passed a new bill to provide for tripartite
elections in 2014, but the new law was not harmonised with the 2010 amendments of the Local Government Elections Act. Six issues have been a cause for concern in relation to elections:

1. The credibility of the Malawi Electoral Commission (MEC) – the body legally mandated to manage elections in the country;
2. The status of the national voters’ roll;
3. The weak enforcement of the electoral code of conduct;
4. The lack of a legislative framework for election funding;
5. The failure of local government elections; and
6. The shortcomings of the unmodified first-past-the-post system Malawi uses.

To a large extent, lack of confidence in the MEC centres on doubts about the institution’s independence and professional integrity. Although sections 75 and 76 of the constitution attempt to establish guarantees of the Commission’s independence, including stating that ‘the Electoral Commission shall exercise its powers, functions and duties ... independent of any direction or influence by another authority or any person’, the Commission remains susceptible to influence by the executive. The constitution also provides that the Chair of the Electoral Commission must be a judge nominated by the Judicial Service Commission and formally appointed by the state president, and that at least another six members shall be appointed in accordance with an act of Parliament, and approved by the Public Appointments Committee (PAC) of Parliament. The executive may remove a commissioner with the approval of the PAC. These legal provisions are regarded as lacking adequate safeguards to ensure the total independence of the Commission. The executive is seen to have undue influence through its powers to appoint the Chair of the Commission and to remove commissioners, albeit with the approval of the PAC. This is partly because the PAC includes members of Parliament from the executive’s political party.

The credibility of the MEC is further compromised by its inadequate capacity. For most of its election-related activities, the Commission uses and relies on members of the civil service such as district commissioners, who act as returning officers at the district level; school head teachers, who act as returning officers at the polling stations; teachers who act as election personnel at polling stations; various government clerks; police officers for security and others. Civil servants are under the direct control of the executive, which makes the election processes susceptible to manipulation and are therefore compromised. Incidents of corruption, fraud and other managerial malpractices within the Commission have also been a major cause for concern. Inadequate personnel have been a cause for delays in voter registration, civic education and other activities on the electoral calendar in every election. While the MEC is legally mandated to provide voter education, it has limited capacity to undertake the task, leaving the bulk of it to CSOs, who in turn depend on donor funding for this activity, rendering it unsustainable.

The status and management of the national voters’ roll has been a thorny issue every election year. To a large extent Malawi uses a manual roll that is not systematically updated. While an electronic roll exists, it is not fully synchronised with the manual roll. There have been times when both have been used. It is feared that the voters’ roll may be bloated with dead voters, those double registered, and those that have undergone multiple transfers between
constituencies. In the absence of a national civic register, updating and verifying the voters' roll is a real challenge. Malawi has only recently started the process of registering its citizens in a civic register, and, from 2013, adopted the Electronic Biometric Voter Registration System, which is expected to effectively update and improve the verification of the voters' roll for the 2014 elections and beyond.

Part V of the Parliamentary and Presidential Elections Act (Cap.2:01) establishes some provisions for a code of conduct for political parties during election campaigns. In section 62(2) the Act states that the Electoral Commission may prescribe a code of conduct to be complied with by every political party in conducting its campaign in an election. The code, among others, provides for open access to the national broadcaster, a task that is supposed to be regulated and enforced by the Malawi Communications Regulatory Authority (MACRA). The idea is to provide an even playing field for all political parties and candidates. In practice, the incumbent party has enjoyed significant advantages over others during the campaign period arising from: the use of state resources for the purpose of campaigning; the distribution of money at rallies often in the name of promoting or facilitating ‘development’; biased reporting by the state-owned electronic media; intimidation perpetrated by its agents; and the influence it has over traditional authorities or chiefs. Thus, on paper, elections provide an opportunity to change government, but in practice the advantages of incumbency are so overwhelming as to make the opportunity largely unrealistic.

Malawi does not have legislation regulating election funding. Parties and election candidates are not legally required to declare their sources and amounts of funding. The situation is therefore susceptible to abuse, with the possibility that some parties and election candidates can raise funding from criminal activities and groups. It also gives unfair advantages to the rich, who may use their economic prowess to buy off opposition parties and supporters.

The failure of local government elections undermines the emergence of a democratic culture at the local level. Since the transition began in the early 1990s, Malawians have not been given adequate opportunities to exercise democratic choices at the local governance level, and to establish democratic local governance institutions through the vote.

Malawi uses the first-past-the post (FPTP) form of the plurality/majority electoral system. This means that a contestant in an election who gets more votes than the others is declared the winner. The four general elections the country has held have brought to the fore the shortcomings of the unmodified FPTP electoral system, with no requirement for a run-off between the two leading candidates. The shortcomings include high levels of wasted votes, minority instead of majority rule, the failure to address gender inequalities and the entrenchment of regionalism.

The FPTP systems are usually credited with simplicity and the ability to produce a single-party government, avoiding the political uncertainties associated with coalition governments, and tending rather to create broad-based political parties, an important factor especially in regionally and ethnically divided societies. However, the electoral processes and outcomes in Malawi do not appear to have benefited from these advantages. Rather, Malawi has fallen foul of the biggest disadvantage of the FPTP system, the fact that where there are more than two main parties, a winning party or candidate can end up garnering a lesser percentage of the votes than the losing candidates combined. In real terms, therefore, the winning candidates end up
representing the minority. This, however, is not necessarily unique to Malawi. It is a general weakness and disadvantage of the FPTP system.

When coupled with the hybrid constitutional system that combines elements of presidentialism and parliamentarianism, the FPTP electoral system in Malawi has allowed a situation where minority governments are the norm, or where Parliament and the Presidency are controlled by different parties, leading to virtual political paralysis. The only exception to this was in the 2009 elections when the governing party won the majority of the parliamentary votes. Otherwise, the system has repeatedly handed victory to minority-supported candidates in most constituencies in all other elections.

In addition to the challenges highlighted above, the lack of systematic primary elections, the absence of open presidential debates, logistical problems with voting in prisons, and the absence of a voting system for Malawians abroad – including a system of postal ballots – contribute to the weaknesses in the county’s electoral system.

5. Political parties

The legal framework for the regulation of political parties in Malawi is found in four pieces of legislation: the country’s constitution, the Political Parties (Registration and Regulation) Act (Cap. 2:07), the Parliamentary and Presidential Elections Act (Cap. 2:01) and the Communications Act (No.41 of 1998).

Section 40 of the Malawi Constitution provides for the freedom to establish, join or campaign for a political party. However, it does not state any requirements for the registration of political parties in the country. In fact, there is no requirement to have a political party registered. The constitution does not even subject the registration and regulation of political parties to an act of Parliament.

The registration and deregistration of political parties is governed by the 1993 Political Parties (Registration and Regulation) Act (Cap. 2:07). The Act stipulates that a party may consist of not fewer than 100 members. The law requires that the application for registration of a party be accompanied by the party’s constitution and manifesto, plus the names and addresses of an interim executive committee. There is no mandatory requirement for parties to produce policy documents. As a result, most of the parties in the country do not have documented policies on issues of national importance, including nationality, land, the economy, gender, education, health and other matters. The law does not make it mandatory for political parties to declare their sources of funding. Party funding is therefore not properly regulated and is not transparent in practice.

However, section 40(2) of the constitution sets down that the state shall provide funds so as to ensure that, during the life of any Parliament, any political party which has secured more than one-tenth of the national vote in elections to that Parliament has sufficient funds to continue to represent its constituency. The constitution does not put any requirements on how the funding is to be used. The method of disbursement is not stated and there are no audit requirements. The Political Parties (Registration and Regulation) Act (Cap.2:07) does not provide for state funding
of political parties, and does not make any prescriptions on private funding of political parties in the country.

State funds are provided only for those political parties represented in Parliament, with the constitutional provision interpreted to mean that funding is provided for those parties with at least one-tenth of the seats in the National Assembly, rather than those with one-tenth of the popular vote. This funding is meant to meet some of the parties’ administrative expenses so that they continue to represent their constituency. The money is provided by the government treasury through Parliament and is subject to audit by the Auditor General just like any other public accounts. The amount disbursed depends on the proportion of seats the individual party holds in Parliament, provided those seats are not less than 10% of the total seats in the House.

Leaders of political parties are of the opinion that the constitutional provision on the funding of the parties with at least one-tenth of the national vote should include all parties that received at least 10% of the votes cast during the general elections, up to the next elections. That would allow parties to continue mobilising and strategising for the next elections, and avoid becoming dormant during the inter-election period.

Once formed, parties are registered with the Registrar of Political Parties in the Registrar General’s Office. The requirements to register a party are limited, and there is no system to monitor or enforce compliance by parties with any code of conduct between elections, or even compliance with their own constitutions. Once registered, parties are not deregistered or penalised if they violate their constitutions and indulge in undemocratic and unconstitutional behaviour. This shortcoming in the law governing the registration and regulation of political parties results in the absence of a proper legal and political framework for governing intra-party and inter-party conflicts. Parties are rather sceptical about introducing and following affirmative action policies, for example in relation to gender equity, in fielding candidates during elections.

The law does not allow non-citizens to join and become party members, even though the Malawi constitution states that non-citizens who are resident in the country for more than seven years may vote. This means that the non-citizens who have resided in the country for more than seven years may not stand for political office, but may exercise the right to vote.

The Parliamentary and Presidential Elections Act (Cap. 2:01) outlines political parties’ conditions and methods of participating in parliamentary and presidential elections, including the nomination of candidates, but does not make primary elections and pre-election debates by candidates a mandatory requirement. Malawian political parties therefore rarely hold organised primary elections for leadership positions or candidates for the National Assembly. Where these are held, they take place on an ad-hoc basis and are poorly organised. Such failures result in the electoral processes not allowing for genuinely representative candidates to emerge from the constituencies.

There is no mandatory requirement for party conventions in the legal framework for the regulation of political parties in the country. The Malawian parties therefore do not hold regular conventions and conferences. The only times they do so is when their executive committees want to endorse certain people for leadership positions or for nominations for general elections. Candidates for presidential elections are sometimes declared before party conventions have been convened to elect them, and they start campaigning way ahead of the conventions that are
supposed to elect them. Often there are no clear challengers to such people. The self-declared presidential candidates, usually the presidents of the parties, use their advantage to intimidate potential contenders.

The law also does not state the minimum number of candidates a party may field in a national election, nor the national distribution of the candidates. It is therefore possible for a party to field a candidate in just one district, constituency or ward. The absence of requirements on the number of candidates a party may field in a national election, and on the national distribution of the candidates, encourages parties to field candidates on regional bases. Most political parties are based on regional support and are often identified with their founders as opposed to a particular ideology.

Ethno-linguistic and regionalist characteristics among parties follow from their lack of ideological foundations and internal democracy. The non-discrimination clauses in the constitution would render unconstitutional any laws regarding the foundation of political parties on the basis of racial or ethnic loyalties. However, almost all the major parties in Malawi are regionally based, drawing their major membership and support from specific regions and ethnic groups, mostly based on where their founder or current leader came or comes from. Internal democracy within parties is almost non-existent, with no proper systems for the selection of candidates or the development of policy platforms.

The Communications Act (No.41 of 1998) outlines political parties’ equal access to the media during election times, and this access is also mentioned in the Parliamentary and Presidential Elections Act (Cap.2:01). The Communications Act does not allow the establishment of radio or television stations by political parties. Political parties in Malawi do not have their own media units though these are not necessarily disallowed by law.

Political parties in Malawi refer to the contents of their campaign manifestos as expressions of policies and as the points of ‘difference’ between them. In reality, however, the manifestos do not significantly differ from each other in terms of their ideological orientations or practical policies. Moreover, the contents of the party manifestos are not translated into or extracted from written policy documents.

In terms of their structures, and the functions of the structures, the parties are governed by their individual constitutions. These, in different ways, describe the hierarchy and the administrative structures of the individual parties. In most cases, the hierarchical structures start with branch committees at the village (or several villages) level, area committees (ward committee for some), constituency committees, district committees, regional committees and a national committee. These may have different names, depending on the individual party. For example, instead of branches some parties prefer to call them zones. Some parties do not have regional committees.

Within the party system the governing (often called ‘ruling’) party has an excessive dominance. Since the party that wins the presidency is regarded as the ‘ruling’ party, though the constitution does not provide for such, the tendency is to conflate the ‘ruling party’ with the government. As a result, there is no clear distinction between the government and the ‘ruling party’ in the minds of most ordinary Malawians.

The opposition political parties have serious weaknesses and are characterised by internal
frictions, factions, sometimes even disintegration, leadership crises, poor funding and lack of continuity and are active mostly only during elections. Although it is easy to register a political party in Malawi, the performance of political parties has generally been poor due to a lack of institutional capacity and training of party functionaries. In addition, the Malawian parties do not have effective mechanisms for identifying and recruiting members.

A most noticeable feature of political parties in Malawi is that there are no significant programmatic let alone ideological differences between them. As a result, they are not fundamentally different from each other. They are, by and large, purely vehicles for seizing power and gaining access to state resources, forming and re-forming around individual leadership.

Equally noticeable is the lack of accountability and responsibility on the part of the leadership of the political parties. They are neither responsible nor accountable to the rank and file for their actions. For example, there have been instances when party leaders have made decisions to form coalitions or alliances with other parties without consulting their party members. This leaves party members confused, and sometimes angry and frustrated. Against such a background it is difficult to hold the individual winners of elections or their parties responsible for their campaign promises.

Although the Parliamentary and Presidential Elections Act and the Local Government Act provides for the Electoral Commission to adopt codes of conduct during election periods, the Political Parties (Registration and Regulation) Act (Cap.2:07) does not have a code of conduct that applies outside of election periods, and there is no framework for a code of conduct for political parties in the constitution.

In practice, therefore, the enforcement of proper political conduct relies on the political parties’ internal disciplinary committees, and interpretations of the various provisions and clauses relating to discipline as found in the individual party constitutions. This system is inadequate.

6. The National Assembly

The role and powers of the legislature are established in chapter 6, section 48 of the Malawi constitution, which states that all legislative powers shall be vested in Parliament. Section 49(i) defines ‘Parliament’ as ‘the National Assembly and the President as Head of State’, confirming the hybrid nature of the Malawian system.

The legal framework establishing the institutions and composition of Parliament has been the site of some of the fiercest constitutional battles since multi-party democracy was restored to Malawi in 1994. In particular, provisions relating to the right of the public to recall members of Parliament (MPs), the existence of a Senate and especially the right of MPs to ‘cross the floor’ have caused heated debates.

In 1995, Parliament repealed section 64 of the constitution on the recall of MPs. The section provided for the recall of an MP by a petition to the Speaker signed by at least 50% of the registered voters in his/her constituency.

The constitution initially provided for an upper house in the form of a Senate. In 2001,
sections 68 to 72 and section 210, all relating to the Senate – its composition, vacancies, functions and powers, scrutiny of legislation and dissolution – were repealed. The definition of Parliament in section 49(i) was amended by removing references to the Senate. The repealed sections provided for a Senate that would enable political participation by chiefs, women and other interest and specialised groups in the legislative process of the country.

The amendment was proposed by the executive on the basis that the Senate would be too expensive to maintain for a poor country such as Malawi, and that local government and the decentralisation programme would cater for some of the functions of the Senate, since it would bring political power to the local government level, and people would participate in key decision-making processes related to development policy and other issues. In reality, the abolition of the Senate undermined the political participation of the country’s special groups in their national affairs and the opportunity for these groups to scrutinise legislation and executive decisions.

From the time the Senate was abolished, CSOs have continued to oppose these constitutional amendments, with petitions to Parliament and to political parties. For example, at the constitutional conference review at the end of March 2006, CSOs repeated their call for the reinstatement of the Senate and the recall provisions into the constitution. They did the same at the Public Affairs Committee (PAC) conference in 2012.

The repeal of the provisions on the Senate could be regarded as unconstitutional in light of the contents of sections 45(8) and 198 of the constitution. The former states that ‘under no circumstances shall it be possible to suspend this Constitution or any part thereof or dissolve any of its organs, save as is consistent with the provisions of this Constitution’. The latter states that ‘the Republic of Malawi, the organs of State and the offices referred to in this Constitution shall be defined and constituted in accordance with this Constitution’. Abolishing the Senate could be interpreted as dissolving an organ of the state defined and constituted in accordance with the constitution.

In 2001, an extremely controversial amendment to section 65 of the constitution removed the right of members of the National Assembly from keeping their seats if they left their party to join another party represented in the National Assembly, ‘or [have] joined any other political party, or association or organisation whose objectives or activities are political in nature’. The amendment meant that any MP who joined another party not represented in Parliament, or even a more general ‘association or organisation’ with political objectives, would also lose his or her seat.

The amendment has been the subject of numerous court cases, some of which have not been fully resolved. The section 65(1) debate has demonstrated the political vulnerability of the Malawi constitution, and the consequences of wanton amendments.

The Malawi National Assembly has 193 seats, all elected. Following the 2009 election, 166 were male and 27 were female. One additional female came in following the first round of by-elections in 2010. Malawi is a signatory to the SADC Protocol that requires that at least 50% of the composition of the national assembly should be female. Neither the government nor the individual political parties have put in place deliberative policies for the inclusion of more women in Parliament.
The Malawi electoral law does not provide for affirmative ethnic or racial quotas in the representative bodies, and it is not the policy of the Malawi government to implement ethnic quotas in representative bodies. This is partly because it would amount to ethnic favouritism and thus discrimination, which is contrary to the constitutional provisions. Furthermore, it has never been an issue of widespread public concern for the racial minorities. As such it has never been a public policy problem and has therefore never been placed on the government agenda. The inclusion of quotas for minority groups in the repealed Senate provisions was meant to cater for the representation of these groups. However, gender and racial quotas would probably be acceptable if implemented as affirmative action measures to address inequalities. With the exception of the lobbying by the Women’s Lobby Group and the Gender Network to implement the SADC Protocol, there has not been any national debate on affirmative action in relation to representation in Parliament.

Parliamentary election results suggest that elections in Malawi provide real opportunities to change or replace representatives. For example, out of the 187 contested seats in the 20 May 2004 parliamentary elections, 59 were retained by incumbents and 128 were won by new challengers. Among the major electoral casualties were 23 MPs who were in powerful positions as ministers or deputy ministers. The turnover was even higher in the 2009 election as only 48 of the sitting MPs were re-elected, representing only 24.9% of the House. The Malawi Parliament is therefore filled with novices at the end of its five-year tenure after every general election. Much as this may be good in the sense that the electorate is able to exercise its choice, the situation results in a weak institution filled by inexperienced members.

Judging from the number of bills passed by Parliament between 1994 and 2012, it can be argued that the National Assembly is an effective law-making body. However, the House has tended to prioritise financial or money appropriation bills, which pass rather easily. In most cases there is a general failure to align debates on the bills debated in the House with national policy. This has been the case especially when debating the national budget.

More important than the technical questions, however, is the frequent political paralysis of Parliament by factional splits and re-splits among the leading politicians that lead to highly partisan, but essentially content-free debates. In these debates, parties have used attempts to amend the constitution – sometimes successfully – for their own immediate political ends. Although the debates remain extremely partisan, and the motive for taking certain positions tend to be short-term political gain, lately Parliament has increasingly focused on issues of national importance. A substantial majority of Malawians therefore view the National Assembly’s law-making role as important.

In general, the Malawi Parliament has weak institutional capacity. Its effectiveness as an institution of political participation, representation and oversight is further eroded by a dominant executive. Parliamentary portfolio committees are also weak and meet rather irregularly, much as there has been some improvement over recent years. Most MPs are not easily accessible – they do not have constituency offices – and most rural MPs live in urban centres and rarely hold public constituency meetings. Documents and reports of the National Assembly, including the *Hansard*, are not readily available, thus impeding access to information regarding National Assembly deliberations and processes.
7. Local government

Chapter XIV of the Malawi constitution outlines the establishment, functions, composition, and jurisdiction of local government authorities in Malawi. Section 146(2) of the constitution states that local government authorities shall be responsible for the representation of the people over whom they have jurisdiction for their welfare and shall have responsibility for the promotion of infrastructural and economic development, through the formulation and execution of local development plans and the encouragement of business enterprise; the presentation to central government authorities of local development plans and the promotion of the awareness of local issues to national government; the consolidation and promotion of local democratic institutions and democratic participation; and such other functions, including the registration of birth and deaths and participation in the delivery of essential and local services, as may be prescribed by any act of Parliament.

Up to 2010, the constitution, in section 147(5) provided for local government elections to take place the year following parliamentary and presidential elections. In 1996, a Local Government Elections Act was adopted (Act. No.24 of 1996) to give effect to this provision, though in practice local government elections were not held until 2000, the year following the 1999 general election. In part, the delay in holding elections was due to delays in providing further detail on the constitutional provisions related to local government. Only in 1998 did the Malawi government introduce and sign into law the Local Government Act (Cap.22:01); and a National Decentralisation Policy was approved by Cabinet in the same year. These two documents provided the political and legal basis for the transfer of power, responsibilities and financial resources from central government to local government. In 2012 both the constitutional provisions on local government and the Local Government Elections Act were amended to allow for tripartite elections in 2014.

Under the Local Government Act, the district councils and the district administrations were merged into a new local authority structure called the district assembly (city, municipal or town assembly, in urban areas). The assemblies are expected to promote local participatory democracy through representatives of the community, who are partly elected and partly appointed as ex-officio members. Ward councillors are elected members and MPs are ex-officio members. Chairpersons of all political parties in the district, chiefs, representatives of CSOs, special interest groups and members of the business community are non-elected members.

Below the district assembly are the area development committees (ADCs), and below these are the village development committees (VDCs). The ADCs and VDCs are usually headed by traditional chiefs, though the practice is increasingly changing towards elected representatives from the local communities – especially for the VDC leadership, combined with government extension workers, and other representatives. The ADCs and VDCs are supposed to be elected by free, secret and equal suffrage by the registered voters in the local poll in the area over which the local government authority has jurisdiction. The assemblies, ADCs and VDCs function more or less as local-level parliaments. They are fora for debate on public issues, coordination points for development activities at the local level, and starting points for development plans. In practice
they are dominated by local chiefs at various levels.

Decentralisation, as outlined in the law and the policy framework, has two main objectives: to improve service delivery and to strengthen local democracy. Failure to hold local government elections as required by the constitution has greatly undermined the ability to fulfil these objectives. It has also grossly undermined citizen participation, and creates an unconstitutional environment in which the decentralisation policy is being implemented.

Civil society organisations are of the opinion that simply amending the constitution will not resolve the fundamental issues of poor funding for local polls, the logistical problems related to the administration and management of the local government election and the effective operations of the local government authorities. They argue that there is a need to review the constitution, the enabling law and the decentralisation policy because the system as it currently stands is expensive, unattainable and unsustainable. Strictly speaking, at present, local government structures and operations are not consistent with the law.

On paper, the structures of local authorities provide adequate mechanisms for popular participation. The committees set up from the villages to the district levels, if properly utilised, are designed in such a way that citizens can make effective input. Once a month the local assemblies are supposed to hold what are referred to as a full assembly to be attended by all representatives of local community members, plus any other ordinary persons wishing to do so. The VDCs and the ADCs are mechanisms for ensuring consultation at community level on matters that affect that community. These are mostly in relation to social services provision relating to health, education, agriculture, marketing of produce, water and infrastructure (such as roads and schools). The effectiveness of these processes varies between districts and villages. There are some areas where these processes are effective and others where they are not. Given the failure of local elections, these local structures are not properly constituted, hence the differences in their operations and levels of performance.

Local authorities are financed through government grants and through the revenue generated within areas of their jurisdiction. The division of the national budget between the central and the local government is not known. No clear formula is used. The system of decentralising and devolving line ministry budgets to the district assemblies started with the 2005/2006 national budget, but, to date, there is no specific minimum standard percentage of the ministerial budget earmarked for decentralisation to the local authorities.

The proportion of local authorities’ budget that comes from local sources depends on the size of the local authority and its economic endowment, as well as its capacity to collect revenue. The usual revenue sources are city and town rates, licensing of businesses and properties, market fees, and other fees and charges. The budgeting process for the local authority starts with the technical team and proceeds through various committees, especially the finance committee, to the assembly. The budget takes into consideration the needs identified by the ADCs, VDCs or other structures of the local authority.

However, there is no evidence for initiatives in participatory budgeting at the levels lower than the district, town, municipal or city assemblies. This is partly because such issues are technical in nature and the relevant technical expertise is not available at such levels. It is also because the local government and decentralisation laws recognise only the district, town,
municipal and city assemblies as the institutions responsible for the making of budgets, plans and policies. The laws do not provide any policy, planning or budgeting role for lower local government and decentralisation structures. The essence of decentralisation is to involve as broad participation in the budgetary processes as is practically possible. Such a process would benefit from the simplification of the budget documents and a proactive approach by the local authorities to involve members of communities.

Financing of the local authorities is supposed to be coordinated by the Local Government Finance Committee established under section 149 of the constitution. Its members include one member appointed by a caucus of all local authorities, the Principal Secretary in the Ministry of Local Government, one person qualified in matters of accounts appointed by the Public Appointments Committee of Parliament on the recommendation of the Minister of Local Government, the chairperson of the Civil Service Commission, one person nominated by the Electoral Commission, and the Principal Secretary in the Ministry of Finance or his/her representative. The powers and functions of the Committee include hearing submissions from each and every local government authority in respect of estimates of expenditure and requests for special disbursements. The Committee receives all estimates of revenue and all projected budgets of all local government authorities; examines and supervises accounts of all local government authorities subject to the recommendations of the Auditor General; makes recommendations related to the distribution of funds allocated to local government authorities; prepares a consolidated budget for all local government authorities; and makes application to the Minister of Local Government for supplementary budgets where necessary.

The district commissioners (in the case of the district assemblies) or the chief executives (in the case of the town, municipal or city assemblies), head the technical teams for each assembly, function as the controlling officers, and account for all the decentralised financial resources in their respective local authorities. They are also answerable to the Public Accounts Committee of Parliament, as well as to audit requirements from the Auditor General’s office.

Although the government has shown a willingness to promote decentralisation, the local government system is still weak and undeveloped due to the dependency on central government grants, the lack of administrative capacity, lack of experience and inadequate grassroots participation in local authority affairs. In fact, the decentralisation policy has not been fully implemented. Some ministries are still holding to some functions that ought to be decentralised. This is especially the case in relation to the implementation of the budget and the decentralisation and devolution of financial resources in general, and also in relation to the implementation of capital development projects. Much as the central government transfers financial resources from the national budget directly to the local government assemblies, in reality the assemblies do not get all the resources they need or when they need them. Cuts in the allocations are common, and such decisions are taken at the level of central government. The central Treasury uses its discretion in such matters. The resources to the local assemblies are not disbursed directly to them upon the passing of the national budget by Parliament. It is the Treasury that controls the disbursements, and this is done on a monthly or quarterly basis.

The transparency and accountability of CSOs represented in the local authorities is also questioned. There is no official requirement for these to declare their levels of income from grant
funding, to demonstrate the effectiveness of their programmes or to contribute to the budgets of their local authorities.

The inadequacy of women's participation in the local assemblies is also an issue. There are no quotas for women members of the assemblies. The integration or mainstreaming of gender issues in local planning is not a standard legal or policy requirement.

There are other technical weaknesses with the executive branches of local government structures and the implementation of decentralisation in law and practice. Most of these arise from conflicting legal and policy positions. There are policy gaps and sectoral laws conflicting with the Local Government Act (Cap.22:01), for example, in relation to the tenure of the members of the district assemblies. In the Act it is three years, while in the constitution it is five years. This was one of the issues the 2012 proposed amendments to the constitution and the Local Government Act was intended to address. Sectoral laws such as the Business Licensing Act (Cap.46:1), sections 7 and 33 are not consistent with the Local Government Act (Cap.22:01). The same applies to some sections of the Land Act (Cap.57:01), especially in relation to the collection and retention of licensing fees and land rent. In relation to land matters, the powers of the Minister of Lands contained in the Land Act (Cap.57:01) undermine the powers of the assemblies in the Local Government Act (Cap.22:01).

Inconsistencies also exist in the powers to hire and fire senior staff of the local assemblies. Section 147 of the constitution gives powers to the Local Government Service Commission (LASCOM) as the body responsible for the hiring and firing of senior staff at local level. The Local Government Act gives such powers to the assemblies and entails the dissolution of LASCOM, but the constitution, as a supreme law, takes precedence over an act of Parliament.

The constitution, the Local Government Act, and the National Decentralisation Policy do not provide adequate mechanisms for the review of by-laws, some of which have been inherited from the previous colonial and one-party regimes.

The lack of clarity about the linkages between budgeting and planning, and the lack of systematic integration of physical planning into development planning have also been noted. Similarly, there is no amalgamation of the existing funding mechanisms, through the central Treasury, with funding of micro-projects at the local level, such as those funded by the Malawi Social Action Fund (MASAF). The funding of capital development projects, such as that done by donors, is not pooled through the District Development Fund (DDF). The funding of capital development projects is still done through the central government, suggesting that the decentralisation process has not been completed.

8. Traditional authorities

Traditional authorities play an important role in the social life of Malawians, especially in the rural areas. They are managers of customary land, custodians of customary law, and guardians of tradition and culture. Chieftaincy is hereditary, along the paternal line for the patrilineal communities such as those in the northern part of the country, and along the maternal line for the matrilineal communities in the central and southern districts. In the patrilineal communities
chieftaincy is passed from the father to his sons, with the first son having the first call. In the matrilineal communities it is passed from a maternal uncle to his nephews, with the first son of his first sister having the first call.

The status of traditional leaders is partially recognised in the constitution and in the legislation and policy framework establishing local government authorities. Though the constitution does not specifically define the office, powers, functions and position of chiefs in the country, it contains a number of sections that recognise their existence and suggest the functions they could play. For example, in section 110(3), the constitution states that Parliament may make provision for traditional or local courts presided over by lay persons or chiefs – provided that the jurisdiction of such courts shall be limited exclusively to civil cases at customary law and such minor common law and statutory offences as prescribed by an act of Parliament. On its part, the Local Government Act recognises chiefs as non-voting members of local authority assemblies. At the ADC and VDC levels, chiefs are presiding heads of these local government structures.

The repeal of the constitutional provisions for a Senate, however, deprived the chiefs of any role at national level. Chiefs were therefore among those opposed to the repeal of the constitutional provisions for the Senate, which provided for the representation of traditional leaders in the upper house of Parliament.

In response they have advocated for the restoration of the Senate or the creation of a Chiefs’ Council. The chiefs also see their non-voting status in the district assemblies as a way of stripping them of their traditional authority and powers. They have constantly argued for greater participation in local government politics, including the right to vote in the assemblies. In addition, the chiefs are arguing for Parliament to pass the relevant law enabling the establishment of traditional or local courts to be presided over by them as was the case during the colonial and one-party eras, and as provided for in the constitution.

The Malawian traditional authority system, as elsewhere in Africa, has been exposed to major historical, political and socio-economic changes. After independence in 1964, chiefs in Malawi functioned as an extension of the executive. This was partly an inheritance from the colonial system of indirect rule, and partly also due to the centralised nature of the one-party regime, which did not allow for the existence of parallel structures of authority. Before the coming into effect of the Local Government Act (Cap.22:01) and the Decentralisation Policy, the chiefs reported to the district commissioner, whose office was under the Office of the President and Cabinet (OPC). This arrangement undermined the traditional nature of chieftaincy in the sense that the traditional authorities worked under the supervision of a government employee.

The 1967 Chiefs Act (Cap.22:03), which is still in force, recognises the existence of traditional authority according to the customs of the country, but subjugates chiefs to the Office of the President, who is given the authority to appoint them to or dismiss them from office. Chiefs therefore continue to be an extension of the executive arm of the government. This creates an awkward situation wherein the authority of a hereditary office is subjected to that of an elected official. Since the traditional authorities currently operate as an extension of the executive branch of government, there is potential for conflict with the judicial functions that they exercise.

Chieftaincy is a traditional institution. Malawian chiefs are not elected. They are chosen according to traditional norms and practices. Some of the functions they perform – such as
those in the administration of customary land, their quasi-judicial functions, and by being an extension of the executive arm of government – may be regarded to be state functions that require formal rules of accountability. They may arguably be in conflict with section 12(iii) of the constitution that provides for a political system based on public trust, accountability and representative democracy. The constitution states that the authority to exercise the power of the state is conditional upon the sustained trust of the people of Malawi and that trust can only be maintained through open, accountable and transparent government, and informed democratic choice. Hereditary office has no formal rules and mechanisms for public accountability and may not necessarily be sustained by public trust, and maintained by informed democratic choice of the governed. The chiefs’ dual roles (semi-executive and semi-judicial) also create an awkward situation for them in the country’s governance structure.

Of late, there is growing debate regarding the role of traditional leaders in customary land administration and management. The government embarked on a land reform programme in 1996, starting with a Presidential Commission on Land Matters, followed by the development and adoption by Cabinet of a new land policy in 2000. A Special Law Commission on Land Related Laws was empanelled in 2003. Among the major recommendations of this Commission is to codify the traditional or customary law relating to the administration and management of customary land and to give the chiefs more powers in matters of customary land. However, the land under a chief will be registered, and a land management committee created to handle matters of allocation, lease, transfers and others – in a way removing the chiefs’ exclusive monopoly over matters of customary land administration. Families and individuals will have their pieces of land registered and secured so that they are not arbitrarily alienated from them by government, chiefs, or any other person. The chiefs are of the view that the proposed land reform programme, and especially the proposed land law, will undermine their powers and authority because of the proposed registration of customary land. They argue that registration of customary land will have the effect of ‘privatising’ the land, and handing it over to individual hands. This will in turn result in the chiefs losing control over their territorial land.

Technical experts are, however, of a different view. They argue that, in fact, the proposed land law gives legal recognition and more powers and authority to the chiefs in land administration and management because all matters relating to customary land registration, leasing, transfers, administration and management will be in their hands. The chiefs will also maintain a land register for their respective areas.

The debates on the land issue, combined with those on the chiefs’ status in the local government structures, the chiefs’ constitutional status, and those relating to the traditional courts, raise the need for public debate on the future status of chiefs in the country.

9. Financial institutions and foreign governments

Malawi is highly aid-dependent in respect of its national budget, a situation that brings well-known problems in terms of policy conditionalities and problems in coordinating multiple
budget streams. About 80% of the development budget and 40% of the recurrent budget are donor supported. Levels of indebtedness are also high. As of end June 2011, the country’s total public external and domestic debt stock amounted to MK 313.49 billion (US$ 2 091.3 million), equivalent to 33.6% of gross domestic product (GDP), compared to MK 275.5 billion (US$ 1 838 million) or 34% of GDP in the corresponding period in 2010. The total public debt stock increased by 13.8% from June 2010, mainly due to external debt relative to domestic debt.

Reserve Bank of Malawi (RBM) 2013 first quarter financial and economic review figures indicated that Malawi’s external debt was at US$ 1.2 billion (MK 412 billion) in March 2013. The Ministry of Finance disputed the figure and put it at US$ 1.926 billion (MK 713 billion) instead, which was the same figure reported for June 2012. The ministry said that it was mainly worried about the ratio of domestic debt to GDP, which had reached a critical level at 20%. To bring the ratio down to a sustainable level, the government focused on repaying some of the domestic debt in the 2012/2013 budget. As of December 2012, the domestic debt stood at MK 180 billion (US$ 524.8 million) and this was expected to reduce further as government retired some of it in line with the Extended Credit Facility (ECF) arrangement with the IMF. The RBM figures indicated that the public debt stock in the first quarter of 2013 increased by 1% (US$ 12 million or MK 4 billion) to 25.2% of GDP if compared to the previous quarter. Of the US$ 1.2 billion external debt, 72.8% was from multilateral lenders, 26.5% from bilateral lenders, and 0.7% from commercial lenders.

For the most part, development assistance is given in the form of budgetary support, ensuring that aid flows are subject to the same rules as other national funds for their management. For example, from 2004/2005 to 2006/2007, Malawi received US$ 1 282 million in aid, of which the UK Department for International Development (DfID) provided US$ 345 million. Part of the latter was poverty reduction budget support (PRBS) that the DfID has given the government since 2001. The DfID committed a minimum of US$ 560 million in aid to Malawi each financial year from 2007/2008 to 2010/2011, of which 30% was PRBS. The European Union, Norway and the African Development Bank also provide PRBS to Malawi. The World Bank and the International Monetary Fund (IMF) are supportive of PRBS. The IMF’s Poverty Reduction and Growth Facility (PRGF) programmes, and the World Bank’s Poverty Reduction Support Credit (PRSC) are both given in support of poverty reduction strategies, and operate alongside other development partners’ PRBS. The African Development Bank uses a similar instrument, the Development Budget Support Lending (DBSL), and is working to align with other development partners.

Development partners have their own Country Assistance Strategies or Country Assistance Frameworks outlining the areas where they will assist. These are multi-year frameworks, and provide for specific projects in broad areas, often following a sector-wide approach (SWAp). Assistance is coordinated through the Common Approach to Budget Support (CABS) group, which currently comprises the DfID, EU, Germany, Norway, the African Development Bank (AfDB) and the World Bank. The CABS process links funding to a broad set of performance targets, with regular high-level dialogue on economic, political and sectoral issues. It also reinforces the structural reforms the government has agreed with the IMF, one of which is low exchange reserves – regarded as Malawi’s key economic risk.
The development partners consult the government in developing their Country Assistance Frameworks. The consultations are done at the executive level, but include other sectors and actors such as those in civil society. Through such consultations and participation the choice of critical areas requiring intervention is made.

In most cases, development partners align their assistance frameworks with government policy, for example with the Malawi Growth and Development Strategy (MGDS), and the Millennium Development Goals (MDGs). This is a way of ensuring local ownership of the development assistance frameworks, and to enhance the transparency and accountability of development assistance to the country.

A noticeable feature of the development assistance Malawi receives is its over-concentration in a few sectors. For example, the health sector was the largest recipient sector of overall development assistance in 2010/2011, receiving 29% of total aid flows. Education was second, with 16% of total disbursements. The top six recipient sectors (health; education; economic governance; roads, public works and transport; water and sanitation; and agriculture) received 84.2% of total annual disbursements. In contrast, the bottom six recipient sectors (information technology; public administration; energy and mining; gender, youth development and sports; vulnerability, disaster and risk management and integrated rural development) received 5.4% of total annual disbursements. These distribution figures suggest skewed development attention.

The figures further reveal considerable fragmentation within the development priority sectors in terms of sources of aid and the actual aid disbursements. For example, the health sector received assistance from 21 development partners across 115 activities in 2010/2011. Likewise, agriculture received support from 12 development partners across 82 projects; economic governance had 11 development partners across 34 projects (including budget support); education 12 of them across 41 projects; water, sanitation and irrigation ten across 17 projects; and roads, public works and transport had eight development partners across 17 projects. These figures show that even in sectors in which functioning SWAp arrangements existed, the share of discrete projects was high. These sectors included health, which received 56% of total sector funding for discrete projects in 2010/2011, meaning that the share of programme support was only 44%. Education received 72% of sector funding for discrete projects, and, out of the total funding to agriculture, 62% was for discrete projects while the share of programme support was only 38%.

Development partners have also played an important and large role in supporting and strengthening democratic institutions in Malawi since the transition began in the early 1990s. Financial institutions and foreign governments played a crucial role during the transition to multi-party politics in the country at the beginning of the 1990s. The suspension of aid to the country as a good governance conditionality in 1991 forced the Banda regime to speed up the process of political reform, resulting in the opening up of political space for pressure groups to emerge, and the call for a referendum in 1993. Since then Malawi has been a major recipient of what is commonly known as ‘democratisation aid’ or ‘aid for democracy’.

The major providers of ‘democratisation aid’ to the country are the bilateral donors, including the Norwegian Agency for Development Cooperation (NORAD), the European Union or European Commission, the German Agency for Technical Cooperation (GTZ) (now German Development Cooperation, GIZ), the United States Agency for International
Development (USAID) – including the Millennium Challenge Account (MCA), the Department for International Development (DFID) of the British government, the Swedish International Development Agency (SIDA), the Canadian International Development Agency (CIDA), and, up to a few years ago, the Danish Agency for International Development (DANIDA). Some of these, such as NORAD, also provide support through the United Nations Development Programme (UNDP). There is also democratisation aid that comes from multilateral institutions such as the European Union.

The Democratic Governance Programme coordinated by the UNDP is the largest multi-donor democratisation support programme in Malawi. It has five programming areas including democracy consolidation and the protection of human rights; support to tripartite elections; strengthening political parties; social cohesion and national peace; and the democratic governance sector-wide approach (DGSWAp).

All development partners have their respective frameworks for their ‘democratisation aid’, and this may change according to the dynamics of their foreign policy objectives. For example, much of the UNDP’s democratisation assistance is governed by the principle of good governance as outlined in its 1997 policy framework: *Governance for Sustainable Development*. The framework says that good governance is, among others, participatory, transparent and accountable. It is also effective and equitable. It promotes the rule of law, ensures that political, social and economic priorities are based on broad consensus in society and that the voices of the poorest and the most vulnerable are heard in decision-making over the allocation of resources in the development process.

The EC/EU’s Rule of Law programme supports strengthening the democratic process and good governance; competitive politics (elections); the legal and judicial systems; improving accountability and transparency in public institutions; providing information and access to justice and to human, economic and social rights; civic education; and fighting corruption. The GIZ (formerly GTZ) Programme for Democracy and Decentralisation supports competitive politics (elections); popular participation; decentralisation and local governance; certainty of the law and rule of law; civic education; respect for human rights; a market friendly and social economic order; strengthening civil society; fighting corruption; and performance of the security sector. The Good Governance, Democracy Consolidation, and Public Sector Management Reform Programme of NORAD/UNDP provides support to strengthening the capacity of state/government institutions; promoting decentralisation, local governance, and empowering communities; capacity building for civil society, civil society interface with the state; public policy making, planning and implementation processes; capacity for public accountability and ethical government; capacity for pro-poor service delivery; access to information; conflict mitigation, management, consensus building; and civic education. The US/USAID and the Millennium Challenge Account’s Threshold Project provides support to civil society–Parliament interface; democratic governance; accountability and transparency; participatory and competitive politics; democratic representation; ruling justly – access to justice, and lawful governance; investing in people – primary education and primary/public health; economic freedom; respect for human rights; and civic education.
Support to building the capacity of political parties mostly comes from private foundations and some public institutions, such as the German Konrad Adenauer Foundation (KAF), the Netherlands Institute for Multi-party Democracy (NIMD), the National Democratic Institute (NDI) and the International Republican Institute (IRI) of the United States; or specific governance programmes such as the Malawi-Germany Programme for Democracy and Decentralisation (MGPDD). Some of the public interest institutions raise their funding from public sources in their own countries. The support to political parties comes in the form of study tours to institutions of similar nature and to parliaments, training in party organisation techniques, and other capacity building activities.

Development partners, and particularly the bilateral partners and foundations, provide a wide range of assistance to civil society organisations working in the field of democracy and good governance. Much of this is in the areas of capacity building, lobbying and advocacy. It includes support for organisations that take up positions on issues of public policy, constitutional matters, and crucial political debates with implications for the success of the country’s governance and democracy. Support is provided to CSOs for programmes in governance, elections, civic education, capacity building, interface with Parliament, and local governance and popular participation.

A more recent initiative in providing support to democracy comes from the Malawi Tilitonse Fund, formerly known as the Civil Society Governance Fund. It is a multi-donor pooled grant-making facility that enables civil society to promote a culture of efficiency, accountability, and capable and responsive governance. This is done with the guidance of the government’s policy frameworks, especially the Malawi Growth and Development Strategy. As at the beginning of 2012, the total funding to the Tilitonse Fund stood at £ 12.5 million with the DfID, European Union, Irish Aid and the Norwegian Embassy as the participating development partners. The Fund will run for four years initially from October 2011 to September 2015, with the possibility of extension for three more years. Its intended outputs include increased capacity of CSOs to enable citizens, particularly poor and excluded groups, to claim their rights; increased access to information about rights, entitlements and responsibilities, particularly for poor and excluded citizens; strengthened monitoring by Malawian organisations of policy and budget commitments, service delivery and public resource management; and the improved engagement of Malawian organisations in influencing policies, strategies and resource allocations at local and national levels.

Given the significance of the role that development partners play, there is little debate about their policies in the National Assembly or other national fora. Proceedings of the National Assembly do not show clear evidence of debate on matters of foreign policy, and no evidence of the executive consulting on issues being considered in negotiations with external financial institutions or foreign governments. Even after the executive has negotiated a deal with development partners, it is not subject to further public discussion. During the October 2005 sitting of Parliament opposition parties demanded Parliament’s inclusion in government teams that negotiate international aid and other important foreign policy agreements. Such a demand was probably unreasonable given that the issues of foreign policy, and its execution, are a constitutional prerogative of the executive. The demand by the opposition could therefore
reflect their misunderstanding of their roles and responsibilities. However, at its discretion the executive may consult the opposition on matters of foreign policy. Consultation of such nature would be regarded as good political practice, but not necessarily as an executive obligation. The executive has a constitutional mandate to formulate and execute foreign policy. The mandate is also jealously protected.

Civil society organisations have also conducted minimal lobbying on issues related to foreign policy, including the ratification of treaties. The only major exception to this has been in the area of debt cancellation.

In November 2012 the IMF Resident Representative advised the Malawian authorities to come up with measures that would address the country’s economic challenges and ‘not put donor assistance as a priority’. He further cautioned that ‘donors do have their own priorities different from Malawi’s, therefore it is difficult to help always’. Such statements suggest that Malawi’s development partners could be experiencing some donor fatigue and would like to see the country do a little more in raising additional resources on its own.

General conclusions

There is ample evidence suggesting that democracy in Malawi is working, albeit with some obvious challenges. The country has a popularly accepted constitution that enjoys broad-based legitimacy, established institutions for democratic governance, and adequate mechanisms and opportunities for the promotion of popular participation in politics. Citizens’ rights are fully guaranteed and protected in the constitution. Citizens can participate through general elections held every five years, and representation in the National Assembly, civil society organisations and local governance structures.

The proliferation of media outlets enables Malawians to enjoy relatively unrestricted access to politically useful information, although harassment of critical journalists and media houses remains a common feature. Organised civil society, previously almost non-existent in Malawi, provides political space for the open deliberation of public affairs.

Political parties, though structurally and ideologically weak, are free to recruit mass membership and to mobilise their members and supporters for elections. ‘The founder’ syndrome and ‘the big man’ mentality entrench authoritarian predispositions and inhibit policy debates and competition for party leadership.

The unmodified first-past-the-post electoral system used in Malawi ushers in winners that garner a lesser percentage of the votes than the losing candidates combined. This, coupled with the lack of confidence in the Malawi Electoral Commission due to doubts about the institution’s independence and professional integrity, are matters of concern.

Of equal concern is the failure of local government elections, the incomplete process of decentralisation and the poor funding of local authorities. Local governance institutions are potentially the most accessible sites of political authority for ordinary citizens. The law provides that these institutions play a key role in the implementation of development projects and in social service delivery.
High levels of aid dependency and indebtedness have the potential to undermine spaces for popular political participation due to their associated conditionalities. There has been no clear public debate on these matters. Of late, development partners have made statements suggesting that they are experiencing some amount of donor fatigue. Malawi may soon face the challenge of having to find alternative ways of generating resources for its development.

Recommendations

To strengthen the constitutional provisions that provide for political participation, Malawi should ratify the African Charter on Democracy, Elections and Governance. It should also complete the constitutional review process by debating in Parliament the recommendations of the Special Law Commission on the Review of the Constitution and passing the proposed bills. This would make it more difficult to amend the constitution by protecting its key provisions in the Schedule, and reducing the number of sections that require only a simple majority vote for amendment. Key sections of the constitution should require a two-thirds majority and/or referenda to amend.

Malawi should ratify the UN Convention on the Reduction of Statelessness and the Convention relating to the Status of Stateless Persons to allow foreigners who have stayed in the country for long periods of time to fully participate in public affairs. Refugee policy should be reformed to facilitate local refugee integration, including the acquisition of Malawian citizenship after a period of residence.

The Law Commission should review the Citizenship Act with the aim of proposing amendments to remove racial, ethnic and gender discrimination and provide due process protections in relation to the granting and deprivation of citizenship and other matters. The debate on affirmative action should go beyond the issues of gender to include minority status in general, covering ethnic minorities, disabled people, the elderly, youths and children and other categories of persons.

The Penal Code should be reviewed, amended and aligned with the constitution to remove sections that may, by interpretation, criminalise political activities and those that limit political freedoms. The government should introduce to Parliament a bill to repeal those provisions of the Preservation of Public Security Act (Act 58 of 1965), the Penal Code (Act 22 of 1929) and the Censorship and Control of Entertainments Act that infringe on the rights to freedom of expression and the media. The proposed review of media laws, media policy and codes of conduct for the state-owned public broadcasters should be conducted as a matter of urgency. The proposed Access to Information Bill should be tabled and debated in Parliament with a view to passing it.

The NGO Act should be reviewed and amended to provide the necessary independence for CSOs. Consultation procedures between government and civil society bodies on issues of public interest should be clearly laid out and institutionalised so as to make consultation and public participation common practices.

To enhance the credibility of the national electoral system, the MEC should implement the recommendations of the international and national election observation teams, including most
importantly in relation to voter registration procedures and processes, and the management of the voters’ roll. The MEC should create a new voters’ roll well ahead of the next elections, and take steps to ensure that electoral abuses, including illegal use of state resources and violence against political opponents, are uniformly investigated. Prima facie cases should consistently be prosecuted under the law. The MEC should widely publicise and monitor compliance with the code of conduct adopted for political parties during election periods. But a code of conduct for political parties that governs the period between elections should also be established in law, with monitoring and enforcement by the Electoral Commission.

The Malawi Communications Regulatory Authority (MACRA) should strictly enforce the legal requirements for equal and equitable coverage of all political players by the public media in order to level the political playing field. Civic education and voter mobilisation for by-elections should be given the same priority as the general elections in order to reduce apathy and low voter turnout.

The unmodified FPTP electoral system does not appear to be serving Malawi well. It requires serious dialogue and debate leading to reform and the adoption of an appropriate electoral system.

Also requiring serious debate is the nature of political parties, particularly whether they promote political participation. Systemic tailor-made capacity building programmes for political parties should be put in place to enable them to work professionally, develop policy documents and take positions on issues of national importance.

The legal framework governing political parties in Malawi is inadequate, and requires review and reform. Clear rules should be established in law for state funding to be provided in accordance with an agreed interpretation of section 40(2) of the constitution. The terms on which such funding may be suspended should also be established in law. Legislation should be introduced to regulate privately raised political party funds. Political parties should be required to publish annual audited accounts, which should be accessible to the public. The government should introduce – and civil society should campaign for – legislation to be adopted by the National Assembly establishing rules of internal democracy for political parties, including in relation to the selection of candidates, primary elections prior to general elections and the adoption of policy platforms. The production of party policies should be part of the legal requirement for party registration and/or participation in general elections. Political parties should adopt measures to achieve the target of 50% representation of women in politics established by the SADC and the African Union.

More permanent and more systematic tailor-made parliamentary training programmes should be implemented to build the capacity of parliamentarians to handle debates in the House in a professional manner. The research capacity of Parliament should be enhanced by allocating adequate resources to the research department, purchasing necessary equipment and hiring qualified technical staff. Parliament should allocate more resources to the meetings and operations of its committees so as to enable them to meet regularly and to effectively discharge their duties. The executive should present the recommendations of the Special Commission on the Review of the Constitution on floor crossing, the recall provision and the Senate to Parliament for debate and possible adoption.
Both the constitution and the Local Government Act should clearly distinguish between the roles and mandates of local councillors and MPs so as to remove the inherent tensions between them. Local ward boundaries should be reviewed and re-demarcated to make them consistent with the boundaries of traditional authorities and those of constituencies. The numbers of wards should be reduced and rationalised based on demographic, physical and socio-economic features. The local government law should provide percentages for the revenue generated locally to be transferred to the central treasury and the percentages to be retained by the local authorities. The professional capacity of district executives, including councillors, should be enhanced so as to make them more professional in matters of local governance.

The legal framework for traditional authorities that subjects chiefs to the powers of the executive should be reviewed. The Chiefs’ Act should also be reviewed and the proposal for the establishment of the Chief’s Council should be adopted. The debate on the Upper House in Parliament should be reopened including the possibility of the representation of chiefs in a restored Senate. The non-voting status of chiefs in the district assemblies should also be reviewed because chiefs need to have voting rights in local government structures. Open and transparent public debate on the land law and its relationship with the authority of chiefs must also be introduced.

Civil society should campaign for, and government should initiate, open and transparent debate on Malawi’s foreign policy, and its governing principles. Debate about relations with development partners – including the possibility of subjecting aid agreements to a vote – should be introduced in Parliament. The executive should provide public access to information about aid agreements beyond what is published in newspapers – preferably through Parliament. Aid for democracy should prioritise programmes and other interventions that promote popular participation in public affairs, poverty reduction and the improvement of the socio-economic wellbeing of ordinary citizens. The delivery capacity of CSOs that receive aid for democracy should be enhanced and monitored, and the impact of their activities properly evaluated. Priority areas for aid flow should be publicly debated, preferably through Parliament, CSO networks, the media and local government structures.
Part II
Malawi: Democracy and Political Participation
Main Report
Historical background

Malawi was a colonial territory of Britain until 1964, known as Nyasaland. From 1944, the Nyasaland African Congress (NAC), succeeded by the Malawi Congress Party (MCP) in 1959, spearheaded a nationalist movement to overthrow the colonial system and establish a new political and social order. Dr Hastings Kamuzu Banda returned to Malawi on 6 July 1958, after four decades outside the country, to lead the independence struggle at the head of the MCP. The first parliamentary elections were held in 1961, during the lead-up to independence, and the MCP won all the seats, apart from those reserved for the white minority.

On independence on 6 July 1964, Malawi’s constitution provided for a multi-party parliamentary system following the British Westminster model, in which Banda became prime minister. Within three months of independence Banda was challenged by a coalition of younger politicians who criticised his key decisions and leadership style. The challenge was crushed, but it drove Banda to consolidate his power. He did so by introducing a new constitution in 1966 through which the parliamentary and multi-party system were abolished and the MCP became the sole legal political party. In 1971, the constitution was changed again to make Banda executive state president for life; a position which he held until 1994.

The MCP regime was characterised by very restrictive political participation. President Banda had almost unlimited power vested in him by the 1966 constitution. All Malawians were required to renew their membership of the MCP annually. President Banda controlled the Press Corporation that owned the only daily newspaper and which was arguably the largest private enterprise in the country. The Malawi Young Pioneers (MYP), a paramilitary arm of the League of Malawi Youth, the youth wing of the MCP, ensured that those who made even a critical comment of the government faced serious consequences. Banda also exerted close control over the judicial system, which was used to prosecute and imprison his
political opponents. A system of patronage rewarded loyal supporters. No independent civil society organisations were allowed to function, except for a few faith-based organisations, international non-governmental organisations (such as Oxfam and World Vision) and labour unions affiliated to the MCP.

No democratic elections took place between 1964 and 1994. The 1966 constitution extended the lifespan of the existing Parliament for another five years. In 1971 and 1976 nominal elections took place, but President Banda nominated just one candidate from each constituency. In elections in 1983, 1987 and 1992 there were between two and five candidates in most constituencies. However, all candidates had to be members of the MCP and needed Banda’s personal approval to stand.

Despite these and other human rights abuses, the regime continued to be supported by Western aid, which rewarded Banda for his anti-communist stance.

With the fall of the Berlin wall in 1989, however, two pro-democracy opposition groups formed. In 1991 a small group mostly from the southern region came together under the leadership of Baliki Muluzi, later to be known as the United Democratic Front (UDF). The Alliance for Democracy (AFORD) led by Chakufwa Chihana, drawing support mainly from the northern and southern regions, formed around the same time. The Roman Catholic and Protestant churches also began to use their nationwide organisational structure and international contacts to criticise the regime. Chihana was arrested at the Lilongwe airport in April 1992 for attempting to read a speech calling for democratic reforms. His trial for sedition gained large international interest and the international community began to put pressure on Banda to extend human rights and political freedoms. In May 1992 students’ and workers’ riots added to the pressure on the government, and Banda was left with no other option but to hold a referendum on whether a multi-party system should be introduced or not. This was held on 14 June 1993 and the Malawian people voted overwhelmingly for a multi-party democracy.

The first elections under the new system, held on 17 May 1994, were judged largely free and fair by observers despite attempts by the MCP to influence the results. The leader of the UDF, Baliki Muluzi, was elected president, his party winning 82 of the 177 seats. Banda and the MCP won about a third of the votes and the third candidate, Chihana of AFORD, won just 19%. Muluzi and the UDF were short of four seats for a majority in the National Assembly, and after a difficult negotiation period formed a coalition government with AFORD. Chihana and five AFORD MPs joined the Cabinet in September 1994 and the coalition was finally formally established in July 1995.

A new constitution was adopted by the UDF-AFORD-controlled Parliament on 18 May 1995, preceded by a constitution review process involving a constitutional conference with broad societal participation. The new constitution put into place an era of multi-party and democratic politics, with new constitutional institutions established to oversee and check executive power. The president was to be elected every five years and universal suffrage was set at 18 years of age.

The UDF-AFORD coalition disbanded in June 1996 with the resignation of Chihana from government. Some AFORD members refused to resign and remained in the UDF government whilst the remainder of AFORD members formed an unexpected alliance with the MCP. On 15 June 1999 Malawi held its second multi-party elections and the UDF under Muluzi ran against a
MCP-AFORD coalition. The UDF and Muluzi were re-elected, winning the presidency and 70% of parliamentary seats.

Malawi experienced its first transition between democratically elected presidents in May 2004, when Bingu wa Mutharika, the UDF’s presidential candidate, defeated two main challengers – John Tembo, the MCP candidate, and Gwanda Chakuamba, a candidate representing another group of opposition parties. Observers from the European Union (EU) and the Commonwealth said that even though the voting period was peaceful, they had reason to be concerned about serious inadequacies in the parliamentary poll. Unlike the 1994 and 1999 elections, the UDF did not win a majority of seats in the poll.

In February 2005, President Mutharika split with the UDF, in part because his new campaign against corruption was opposed by – and perceived as targeted at – Muluzi, his former sponsor, and other UDF members. Mutharika began his own party, the Democratic Progressive Party (DPP) and continued to rule as president. In October 2008, Mutharika was unanimously chosen by the DPP national governing council to be the party’s candidate for the May 2009 presidential elections. Running against him was Tembo of the MCP, backed by Muluzi of the UDF. The court barred Muluzi from standing in 2009 because he had already served as president for two consecutive terms as limited by the constitution. Mutharika was overwhelmingly elected for a second presidential term and his DPP won the majority of seats in Parliament.

After assuming majority control in 2009, the second Mutharika administration became increasingly authoritarian, autocratic and combative. A number of new laws were passed, including measures granting the Minister of Information the power to ban any publication of his choosing in the name of ‘public interest’, and giving police the right to search properties without a warrant. Many of these repressive laws were subsequently sent back to the Law Commission for review, though they were to remain active whilst the review process took place. It was announced that local elections, which had been continually delayed since 2005, would not be held until 2014 – the official reasons being allegations of fraud concerning the Electoral Commission, the complexity and cost of holding tripartite elections and the perceived non-commitment of donors to fund such elections. In February 2011, a public policy lecturer at the University of Malawi was reprimanded by police for giving a lecture on the nascent Arab Spring. It was suggested that he was seeking to incite revolution. The event caused an eight month closure of the university as faculty members demanded guarantees for academic freedom and non-harassment by police. Fuel, foreign exchange, water and electricity shortages caused urban riots and demonstrations on 20 July 2011 in which 20 protestors were shot dead by police and hundreds arrested.

In April 2011, Britain’s High Commissioner to Malawi was deported for describing President Mutharika as ‘increasingly authoritarian and autocratic’ in a diplomatic cable which was subsequently leaked. Britain responded by also expelling Malawi’s High Commissioner to the United Kingdom (UK).

Within the country, political tensions were heightened by the uncertainty around who was to succeed President Mutharika at the end of his second term in 2014. The president preferred his younger brother, Peter Arthur Mutharika, as successor. His vice president, Joyce Banda, was expelled from the DPP in December 2010, reportedly because she intended to put herself forward for the position. She subsequently founded her own People’s Party (PP). However,
Banda remained vice president, since President Mutharika was constitutionally unable to remove her from her position. President Mutharika died of cardiac arrest in April 2012 and Joyce Banda succeeded him after an attempt by a group of ministers to bar her from assuming office. Civil society groups, religious leaders, academics and security forces backed Banda in order to protect the integrity of the country’s constitution. Malawi’s constitution provides for the vice president to assume the Office of President for the remainder of the term following the death of the incumbent.

Within a year and half of Joyce Banda’s coming to power, corruption and theft of public funds forced development partners to withhold their budget support. In November 2013, the bilateral and multilateral donors who collectively form the Common Approach to Budget Support (CABS) group announced their suspension or withholding of aid to Malawi in response to the corruption and theft scandal that resulted in the looting of more than US$ 250 million from government coffers. Dubbed ‘Cashgate’, coined from the American Watergate scandal of the 1970s, the massive theft and corruption also put at risk another US$ 20 million grant from the International Monetary Fund (IMF) under the Extended Credit Facility (ECF). The popularity of the Banda regime now hangs in the balance ahead of the May 2014 general elections.
Legal and institutional framework

Malawi is party to the main international treaties related to democracy and political participation, and ratified the 2007 African Charter on Democracy, Elections and Governance on 11 October 2012. Although Malawi’s 1995 constitution is generally speaking in compliance with the provisions of these treaties in establishing a democratic system of government, its legitimacy has been undermined by a series of expedient reforms subsequently carried out by political parties for their own partisan purposes. Repeated reviews have yet to lead to a stable constitutional text that is acknowledged by all as the accepted foundation for the country’s political system.

A. International law

Malawi is a party to many of the key international and African human rights treaties and other conventions and protocols related to political participation and democracy. At the international level Malawi is party to the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic Social and Cultural Rights (ICESCR), the United Nations (UN) Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Elimination of All Forms of Racial Discrimination. Malawi’s reporting record in relation to these treaties is, however, very poor.1

At the African Union (AU) level, Malawi has ratified the African Charter of Human and Peoples’ Rights and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa. As a member state of the AU, Malawi is also bound by the principles of the Memorandum of Understanding on Security, Stability, Development and Cooperation in Africa, which urges member states to implement the African Charter for Popular

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1 For details, see AfriMAP, 2006, *Malawi: Justice Sector and the Rule of Law.*
Participation in Development and Transformation. Malawi has also shown its commitment to the New Partnership for Africa’s Development (NEPAD) and other African standards by signing the Memorandum of Understanding establishing the African Peer Review Mechanism (APRM), though it has made very limited progress towards implementing the self-assessment process required by the APRM. Malawi ratified the AU Charter on Democracy, Elections and Governance adopted by the AU in January 2007.

At the regional level Malawi is a member of the Southern Africa Development Community (SADC). Article 4 of the treaty establishing the SADC stipulates that ‘human rights, democracy and the rule of law’ are principles guiding the acts of its members. Article 5 of the treaty outlines the objectives of the SADC, which commits the member states to ‘promote common political values, systems and other shared values which are transmitted through institutions which are democratic, legitimate and effective’. It also commits member states to ‘consolidate, defend and maintain democracy, peace, security and stability’ in the region. Malawi subscribes to the SADC Principles and Guidelines Governing Democratic Elections, which are meant to provide a framework for conducting democratic elections, and has ratified most SADC protocols and treaties.

As in the case of other common law countries, international treaties only have effect in Malawian law if they have been incorporated in an act of Parliament, though customary international law does have a direct effect.

B. Legitimacy of the constitution

Malawi’s current constitution was first adopted in 1994, following a referendum the year before in which a majority of voters cast ballots in favour of adopting a multi-party system of government. This set in motion a process of political transition from one-party rule negotiated through a multi-party National Consultative Council (NCC) that acted as an interim Parliament.

The constitution was drafted by a broad-based technical team of international and local experts answerable to the NCC. The NCC had several committees, one of which was the constitutional committee whose responsibility was to mobilise technical and popular support

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4 The Charter was adopted by the AU in 2007 and came into force on 15 February 2012 when the requisite number of member states had ratified it.

5 The full list is found on http://www.sadc.int.

6 Constitution, section 211. See also AfriMAP, 2006, Malawi: Justice Sector and the Rule of Law.

7 There was also the National Executive Council (NEC) comprising the heads of all the parties that emerged after the referendum. These were at first pressure groups because the law did not provide for their existence. The NEC acted as the interim executive while the NCC acted as the interim Parliament.

for the drafting and adoption of a new constitution. The initial draft was subjected to a series of constitutional conferences at the regional and national levels organised by the NCC and were attended by cross-sections of the Malawi society. The conferences took place in Blantyre and Lilongwe and were attended by chiefs, religious leaders, academics, government officials, business people and other participants drawn from civil institutions. Status, prominence and leadership position in society, regional or geographical representation, gender and age representation and professional expertise were among the major criteria for invitation to the conferences. The consultative process allowed for the drafting team to receive popular inputs from the citizenry. The new constitution was provisionally adopted by both the NCC and the National Executive Council (NEC), which acted as the interim executive, on 16 May 1994, allowing for democratic elections the following day.

The 1994 constitution was subject to further review by a parliamentary constitution committee set up, as required by the constitution itself, with a mandate to carry out further public consultation, including the convening of a National Constitutional Conference. An amended version of the 1994 constitution, based on these consultations, entered into force in May 1995.

**Amendments to the constitution**

Section 195 of the Malawi constitution gives Parliament power to amend the constitution; while section 196 states that:

(i) Subject to this section, Parliament may amend this chapter and the sections of this constitution listed in the schedule only if –

The provision to be amended and the proposed amendment to it have been put to a referendum of the people of Malawi and the majority of those voting have voted for the amendment; and

The Electoral Commission has so certified to the Speaker.

(2) The Parliament may pass a bill proposing an amendment to which the conditions set out in subsection (i) have been satisfied by a simple majority.

(3) Notwithstanding subsection (i), Parliament may pass a bill containing an amendment to the provisions referred to in that subsection without a referendum where –

The amendment would not affect the substance or the effect of the constitution; and

The Speaker has so certified; and

The bill is supported by the majority of at least two-thirds of the total number of members of the National Assembly entitled to vote.

The process to be used to determine that an amendment does not affect the substance of the constitution is not stated in the constitution or in the standing orders of Parliament. Such a determination would probably be a matter for the courts given that it is the courts that are given

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9 In section 89(1)(i) the president is given powers to proclaim referenda and plebiscites in accordance with the constitution or an act of Parliament. The institution mandated to manage referenda is the Malawi Electoral Commission.
the powers to interpret the constitution as provided for in section 11(1). To date there has been no debate about the interpretation of section 196(3)(a).

Section 197 provides for amendment of those sections not listed in the Schedule: ‘Subject to section 196, Parliament may amend those chapters and sections of this constitution not listed in the Schedule only if the bill proposing the amendment is supported by at least two-thirds of the total number of members of the National Assembly entitled to vote.’ The vulnerable sections of the constitution are, therefore, those not listed in the Schedule because they may be easily amended by procedures laid down in section 197. In fact, none of the sections listed in the Schedule have been amended since the constitution was adopted.

In practice, the only referendum held in Malawi was held under the former constitution in 1993, for the people to decide whether to adopt a multi-party system of government or not. It was called by President Hastings Kamuzu Banda and endorsed by his party’s central executive committee and national convention, under pressure from both local and international pro-democracy activists.

From 1994 to 2005 no fewer than 205 items in the constitution were amended, in part or as a whole.10 The most extensive changes occurred in 1995, 1997, 1998, 1999 and especially in 2001 during the second term of the UDF government.

The amendments undertaken in 2001 by the UDF government included, controversially, the repeal of the sections related to the Senate (sections 68–72); amendments to the section on crossing the floor (section 65); functions and powers of the National Assembly (section 66); powers and functions of the Electoral Commission (section. 76); powers and duties of the president (section 89); and sections on local government and local authorities (sections 146–151). The amendments were widely perceived as an attempt to consolidate the UDF’s hold on power. The amendments related to the recall of members of Parliament (MPs), the abolition of the Senate and floor crossing are discussed in detail later in this report in chapter 7 on the National Assembly.

The amendments made during the 1994–1995 period, which was regarded as the period of the provisional application of the constitution, were also problematic in some respects. During that period Parliament amended sections related to disqualification factors for MPS;11 the authority to confer functions on committees of the National Assembly;12 the period for holding by-elections in case of vacancies in the National Assembly;13 repeal of the provision on the recall of members of the National Assembly by their constituents;14 and to introduce the office of the second vice president to be appointed from the opposition.15

10 The changes are of various kinds, ranging from removal or addition of certain words or phrases, changing parts of or entire sections, to inclusion or repeal of sections.
11 Section 51(2)(g). Initially anyone with a previous criminal record could not stand as a member of Parliament. The amendment limited the disqualification to a criminal record in the seven years prior to the elections.
12 Section 56(7)(c).
13 Section 63(2)(b). The period for holding by-elections is 60 days after the seat becomes vacant or, if the circumstances do not permit, ‘as expeditiously as possible after the expiry of that period’.
14 Section 64.
15 Section 79 and 80(5).
The controversy over some of these amendments is that they affected sections that were incorporated into the constitution as resolutions of the National Conference of 1995. Section 212(5) of the constitution states that ‘on the basis of the extensiveness of the proposals for amendments to this constitution, Parliament may repeal and replace this constitution during the period of provisional application, but no such repeal shall be made before, or in contradiction to the resolution of the National Conference referred to under section 4(b)’. The understanding is that the purpose of this section was to protect the peoples’ aspirations, will and interests as expressed through the resolutions of the National Conference. The recall provision was one of the resolutions of the National Conference. Its repeal during the period of the provisional application of the constitution may, therefore, be interpreted as unconstitutional and illegal.

Frequent amendments of the sections not listed in the Schedule have been a cause for concern in some quarters of Malawian society, and especially among political activists in civil society institutions. Those that hold this fear go further to argue that the constitution lacks adequate internal protective mechanisms, thus allowing Parliament to tamper with it almost at will. A counter-argument is that by allowing for such amendments to be made, the Malawi constitution becomes a living document that responds to the dictates and the dynamics of the time. Flexibility allows for greater participation of the country’s people in the interpretation and use of the constitution through Parliament as their representative body. This view is held mostly by politicians in political parties and in Parliament.

Reviews of the constitution
The large number of amendments and the ease with which they have been made have led to attempts at comprehensive revision of the constitution and the adoption of a more stable text. Only three years after its enactment, the Law Commission carried out a comprehensive review of the constitution and issued a report in 1998 with specific recommendations for both substantive and formal amendments that would touch almost every section of the document. This review was undertaken because, ‘the text of the constitution has been the subject of extensive public comment, extensive and sometimes heated debates in Parliament and differing interpretations in the courts’. In 2005 the Law Commission announced another review of the constitution. As part of the review, the commission conducted a series of consultation meetings with various community and special interest groups, prepared an Issues and Consultation Paper based on those consultations, and held a national conference in March 2006, which was aimed at establishing consensus on areas of the constitution requiring reform. The conference was followed on 5

16 Interviews with Ollen Mwalubunj, Centre for Human Rights and Rehabilitation (CHRR), 4 September 2005 and Jacobs Nkhambule, Church and Society Programme, Livingstonia Synod of the Church of Central Africa Presbyterian (CCAP), 9 September 2005.

17 These views were collected for the study on ‘Inter-Party Conflict in Malawi’ and ‘Intra-Party Conflict in Malawi’, 2003, in T.L. Maliyamkono and F.E. Kanyongolo (eds), When Political Parties Clash. Dar Salaam: TEMA Publishers Company Ltd.


June 2006 by the appointment of a ‘Special Law Commission’ Charged with the responsibility to undertake further public consultations, including a second national conference, before submitting to Cabinet recommendations for amendment of the constitution.

In April 2007, the Special Law Commission on the Review of the Constitution issued a report, noting that:

The current review exercise has been necessitated by three factors. First, the hurried manner in which the Constitution was drafted left a number of crucial gaps within the Constitution. This has been evidenced especially in relation to the functioning of the offices of the President and Vice President in case of vacancies including simultaneous vacancies. Second, the numerous amendments to the Constitution have not been made in a systematic way and have brought about some discord among some provisions. Third, the frequent court litigation especially among political players has given the perception that the Constitution is inadequate to address a number of governance issues. This image of the Constitution has compelled individuals and institutions to urge for the review of the Constitution.20

In addition, the report repeated views expressed during the constitutional review conference at the end of March 2006,21 and by the participants at the AfriMAP political participation workshop in July 2006,22 that the numerous amendments to the constitution ‘have been effected largely for political expediency as opposed to inadequacy of the substance of the constitution’.23

A further worry is that with frequent amendments that are done almost at will, it is difficult to know the correct version of the constitution. In 2006, one of the documents of the Special Law Commission on the Review of the Constitution noted that:

When one peruses through either the 1994 or the 2001 Constitutions, one hardly determines which provisions are operational and which ones are not. This casts a high and worrisome level of uncertainty over the Constitution’s textual accuracy. It is not too difficult to imagine one most easily mistakenly reading and considering a provision of the Constitution as the correct statement of the law without knowledge that it has since been amended.24

There is an urgent need to resolve these discussions and adopt a constitutional text that has broad agreement across the political spectrum and among Malawi’s citizens, and to make amendment for partisan political reasons very difficult. The recommendations of the Special Law Commission on the Review of the Constitution have not yet been debated on by Parliament and none of its proposed bills have been debated and passed.

22 Deliberations at the AfriMAP Political Participation Workshop for Political Parties, 18 July 2006.
Further and more controversial amendments

Additional and controversial amendments to some key sections of the constitution were made in 2010 (Act 11 of 2010). Most affected were chapter III on Fundamental Principles; chapter IV on Human Rights and chapter XIV on Local Government. In chapter III, section 12 an additional paragraph (paragraph 2) was added:

Every individual shall have duties towards other individuals, his or her family and society, the State and other legally recognised communities and the international community and these duties shall include the duty to respect his or her fellow beings without discrimination and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance; and in recognition of these duties, individual rights and freedoms shall be exercised with due regard for the rights of others, collective security, morality and the common interest.

This paragraph acts as a ‘bill of duties’ and/or obligations to counter the Bill of Rights in chapter IV. It is full of loaded and vague concepts that are subject to varied interpretations. The contents of concepts such as ‘duties’, ‘collective security’, ‘morality’, and ‘common interest’ are unclear. In many ways, this paragraph undermines the strengths of chapter IV as it provides loopholes for the state to emphasise ‘citizen obligations’ at the expense of ‘citizen rights’. The state can easily impose and enforce its discipline on citizens in the name of ‘corrective security’, ‘morality’ and ‘common interest’. In the name of ‘morality’ or ‘common interest’ the government can pass laws that limit individual rights. As discussed in the subsequent sections of this document, ‘morality’ arguments have, of late, influenced the enforcement of discriminatory laws against people who practise same sex relationships.

The Malawi Council of Churches has recently been among the main champions of arguments on ‘morality’, ‘Christian values’, ‘common interests’ and collective responsibilities. In November 2012, the Council issued a press statement that argued that any rights that are not backed by some kind of Christian morality negates itself. The statement advocated for the introduction of a dress code for Malawians, abolition of prostitution, censorship of movies and videos, and straight-talk anti-HIV/Aids programmes on radio and television.

Such statements pose serious threats to the right to personal liberty, right to privacy, right of access to information, right to one’s culture and language, freedom of association, opinion, expression and others. In a country where 82.7% of the population are Christians, statements coming from the country’s Council of Churches can influence opinion, or even incite a lot of people.

1: Malawi Council of Churches on morality and ‘common’ Christian values

*Freedom, Rights and Responsibilities*

The Malawi Council of Churches understands and supports that the Constitution of the Republic of Malawi guarantees rights and freedoms to its people. It also calls for responsibilities, however, the current situation where human rights start to be used as a key word to immoral and unchristian lifestyles, leaves a lot to be desired. As the Church, we remain unique as we uphold that rights that are God given should go together with responsibilities, failing which order is challenged. When a right overrides responsibilities and impinges on God’s authority and supremacy, then such rights are not worth entertaining. As a nation, we are reminded to also put emphasis on responsibilities, both individual and communal, in order to serve the common good. Every right that does not respect the influence of God automatically denies itself. The two must always go together for any democracy to be meaningful.

*Freedom of Dress*

As a Christian organisation the Council respects government in the manner it approaches critical issues, and therefore proposes that government addresses the general ‘code of dress’ amongst Malawians. The Council has noted with regret the degenerating and sometimes immoral dressing of the people, where some move around almost naked, with dropped trousers in [the case of] men and bare breasts in [the case of] women as some of the examples, despite our rich spiritual and cultural values. It has also unfortunately been noted that men use women’s dressing/clothes including earrings and go as far as braiding their hair. The basis of freedoms of fundamental rights originates from God – in the Garden of Eden where Adam and Eve were guided by God on what to and not to eat. Freedoms and rights must not override responsibilities.

*Prostitution in Malawi*

Noting the recent establishment of the Sex-Workers Association in Malawi, the Council wishes to categorically condemn the allowing of Biblically sinful, constitutionally prohibited, and culturally disparaged acts and associations. Prostitution is both sinful in the light of God and prohibited by the laws of Malawi and therefore the Malawi Council of Churches appeals to government to abide by the Penal Code which criminalises prostitution. The Bible says ‘do not commit adultery’ (Ex. 20:6) and the Council upholds this divine commandment and believes sanctioning of prostitution is wrong and misguided even under democracy.

*Censorship Board – Powers and Functions*

The Council wishes to sympathise with our beloved country on pornographic firms, photos and materials published and circulated through the media which tends to threaten and spoil our Christian values, tradition and culture. We are aware also of some television and media messages that rather send negative than intended positive messages to target audiences, such as Pakachere, Chencheni Nchiti and many other programs. These also include some disturbing messages on illustrations, posters, adverts and other mediums. We ask that the Censorship Board revisits its mandate and seriously act by its powers and functions to address the situation and use appropriate laws to stop the malpractice.

**Source:**

In chapter IV, section 37 on access to information was amended by deleting the phrase ‘subject to any act of Parliament’ at the beginning of the section to read: ‘Every person shall have the right of access to all information held by the State or any of its organs at any level of Government in so far as such information is required for the exercise of his or her rights.’ This was a positive amendment in the sense that it removed a limitation (subjection of the section to an act of Parliament) and thus strengthened access to information as a constitutional right without any limitations prescribed by law. However, the affected section is protected in the schedule and can therefore not be amended without a referendum. This applies to all other sections of chapter IV that were amended or had their paragraphs changed and rearranged without necessarily changing the substance of the sections. A good example is section 44 on Limitations on Rights and section 45 on Derogation and Public Emergency. These sections had some paragraphs rearranged and some phrases inserted. Both sections, however, and the entire chapter IV, are protected in the Schedule and cannot be amended without a referendum. The procedure followed in amending these sections was therefore inconsistent with the constitutional provisions.

C. Institutions of democratic governance

Malawi is a sovereign state with rights and obligations under the law of nations. Section 12 of the constitution provides for a political system based on representative democracy:

i. All legal and political authority of the state derives from the people of Malawi and shall be exercised in accordance with this Constitution solely to serve and protect their interest;

ii. All persons responsible for the exercise of powers of State do so on trust and shall only exercise such power to the extent of their lawful authority and in accordance with their responsibilities to the people of Malawi;

iii. The authority to exercise the power of State is conditional upon the sustained trust of the people of Malawi and that trust can only be maintained through open, accountable and transparent Government and informed democratic choice.

Malawi’s political system is underpinned by the doctrines of constitutional supremacy and the separation of powers. The system is a hybrid between parliamentary and presidential systems in a unitary state where legislative power is vested in Parliament, which consists of the National Assembly and the president as head of state. As for the presidential and parliamentary elections, in each constituency the members of the National Assembly and the president are elected through a majoritarian system based on the first-past-the-post principle. The one who gets the majority of the votes wins the election.

As noted in a report prepared in 2004 by the South African Institute of International Affairs (SAIIA) for the Malawi government in preparation for its review by the APRM, this electoral system has meant that: ‘Malawi has shifted from an electoral system demanding majority rule

26 Constitution, section 1.
27 Constitution, sections 48 and 49.
to one permitting presidential rule by a minority.\textsuperscript{28} The system in place not only gives the presidents and MPs a weak mandate, but it also undermines their legitimacy and ability to govern effectively (see further information below in chapter 5 on the electoral system).

The boundaries of the constituencies are determined by the Electoral Commission, and are supposed to be reviewed every five years. The last time the constituencies were reviewed was in the late 1990s, suggesting that the constitutional provision on the review of ward and constituency boundaries is not strictly observed. At the time of the last general elections in 2009 the National Assembly comprised 193 seats, the same figure as in 1999 and 2004. The seats were increased from 187 in the first general elections of 1994 to 193 in 1999. Ward boundaries were reviewed in early 2010 in an attempt to reduce the numbers and rationalise the sizes of wards in the country, and to make local government less expensive but more effective. The number of wards was reduced by more than half, from 864 to 420. The exercise created some confusion as the boundaries of constituencies in many districts cut across constituency boundaries, creating tensions between jurisdictions, ward councillors and MPs. Some councillors will exercise their authority in two or more adjacent constituencies.

Executive authority is vested in the president and Cabinet. The president is elected directly by a majority of the electorate exercising universal and equal suffrage.\textsuperscript{29} The president’s term of office is limited to two consecutive terms of five years each.\textsuperscript{30} The president can be removed from office if indicted and convicted through impeachment.\textsuperscript{31} The president appoints ministers to Cabinet at his or her choice, from within or without Parliament, who are accountable to the president for their management of government departments.\textsuperscript{32} The constitution does not restrict the president to choosing his or her ministers from either within or outside Parliament, and there are no restrictions on the size of the Cabinet. After the June/May 2009 elections President Bingu wa Mutharika appointed a 43-member\textsuperscript{33} Cabinet, all from within Parliament. After the demise of Mutharika in 2012 Joyce Banda also appointed her Cabinet from within Parliament, except for the Minister of Justice (who also doubled as Attorney General). The minister was previously in private practice and was Banda’s own personal lawyer.

State power is decentralised through line ministries to local government authorities as outlined in chapter XIV of the constitution and in the Local Government Act of 1998 (Cap.22:01),\textsuperscript{34} amended in 2013.

Judicial power is vested in the courts comprising the Supreme Court of Appeal, the High Court and subordinate courts. Judicial appointments are made by the president on the


\textsuperscript{29} Constitution, section 80(2).

\textsuperscript{30} Constitution, section 83(3).

\textsuperscript{31} Constitution, section 86(1).

\textsuperscript{32} Constitution, sections 92–97.

\textsuperscript{33} This includes the president and vice president.

\textsuperscript{34} See Ministry of Local Government and Rural Development (MLGRD) and Malawi-German Programme for Democracy and Decentralisation (MGPDD), 2005, \textit{Guide Book on Decentralisation and Local Government in Malawi}. Lilongwe: MLGRD and MGPDD.
recommendation of a Judicial Service Commission. The Chief Justice is appointed by the
president subject to confirmation by the National Assembly.\textsuperscript{35} Members of the Judicial Service
Commission are appointed by the president and consist of the Chief Justice, the chairperson of
the Civil Service Commission, an appeal justice, a legal practitioner and a magistrate.\textsuperscript{36}

One of the major achievements of the political transition has been the establishment
of independent and constitutionally established oversight institutions, including the Malawi
Human Rights Commission, the Law Commission, the Office of the Ombudsman, the Anti-
Corruption Bureau, the Compensation Tribunal, the Prison Inspectorate and the Office of the
Auditor General. Several other offices and institutions also play important roles in responding
to individual complaints of government malpractice and other oversight functions. Thirteen
of these institutions are grouped together as the Body of Case Handling Institutions (BCHI),\textsuperscript{37}
with their activities coordinated from an independent donor-sponsored secretariat.\textsuperscript{38} Although
the BCHI became affiliated to the Ministry of Justice and Constitutional Affairs from 2006,\textsuperscript{39}
its secretariat still remains a donor coordinated initiative, with no legal mandate of its own as a
government or state institution\textsuperscript{40} and with no financial allocation in the national budget. As a
result, from about 2010, due to the reduction in external support, lack of a clear mandate and no
clear evidence for performance, the BCHI exists largely only on paper.

In 2006, the Human Rights Commission, established under chapter XI of the Malawian
constitution, decided to examine respect for human rights in all three branches of government –
executive, legislature and judiciary. It documented human rights abuses in prisons, police cells,
the courts, hospitals, the immigration offices and in the education system.\textsuperscript{41} The report of these
investigations, published in 2007, also covered the absence of an internal conflict resolution
mechanism in the legislature, and the tendency of the legislature to spend time and resources
on partisan debates that had little or no connection with national interests. It also indicated that
parliamentarians do not respect the rule of law as demonstrated in the facts, arguments and legal
processes related to the debates over floor crossing in Parliament. Between January and March
2008 the Commission held roundtable discussions with the executive, the legislature and the

\textsuperscript{35} Constitution, section 111.
\textsuperscript{36} For detailed information on the judiciary see Malawi Justice Sector and Rule of Law, A review by AfriMAP and the Open Society
\textsuperscript{37} R. Skovbye et al., 2006, ‘Concept Paper – Strategic Coordination of Case Handling Institutions in Malawi – A Function Based
\textsuperscript{38} The Secretariat of the Body of Case Handling Institutions (BCHI) was established, more as a donor initiative, to coordinate
the activities of these institutions. At the time of this study the membership comprised: the Anti-Corruption Bureau, the Civil
Service Commission, the Malawi Electoral Commission, the Health Service Commission, the Human Rights Commission,
the Industrial Relations Court, the Judicial Service Commission, the Local Government Service Commission, the National
Compensation Tribunal, the Office of the Ombudsman, the Malawi Police Service, the Ministry of Justice and Constitutional
Affairs, the Ministry of Labour and Vocational Training, the Prison Service Commission and the Teaching Service Commission.
\textsuperscript{39} This information was provided by F. Kalawe of the Office of the Ombudsman at a meeting of the Forum for Constitutional
Bodies, 14 August 2006.
\textsuperscript{40} Interview W.C. Chirwa and L. Koechlin with S. Kalembera, Registrar of the High Court and K. Manda, Chief Resident
Magistrate and Deputy Registrar of the High Court, Lilongwe. These interviews were conducted for the Horizontal Capacity
Assessment of the Forum for Constitutional Bodies in Malawi, 16 February 2006.
\textsuperscript{41} Malawi Human Rights Commission, 2007, Executive Report on Human Rights Accountability in Malawi by the Three Arms of
judiciary on its report. There is no documented evidence of the executive taking action on the contents of the Commission’s report.

In 2012 the Commission issued another report that showed a persistent culture of human rights violations in the country:

The major human rights issues in the country included the use of excessive force by security forces which resulted in deaths and injuries, harsh and life-threatening prison conditions, and limits on freedom of speech, press, and political expression. Other human rights problems included arbitrary arrests and detentions, lengthy pre-trial detentions, official corruption, occasional mob violence, societal violence against women, trafficking in persons, discrimination against lesbian, gay, bisexual, and transgender (LGBT) persons, and child labour. In some cases the government took steps to prosecute officials who committed abuses, but impunity remained a problem.

D. Recommendations

• The constitutional review process should be completed by having the recommendations of the Special Law Commission on the Review of the Constitution debated in Parliament and the proposed bills passed.

• Civil society organisations (CSOs), or interested individuals, should challenge the 2010 constitutional amendments that resulted in chapter IV becoming unconstitutional by failing to follow the correct constitutional procedures.

• Parliament should make it more difficult to amend the constitution by protecting its key provisions in the Schedule, and reducing sections that need only a simple majority to amend. Key sections of the constitution should require a two-thirds majority and/or referenda to amend. CSOs should champion the debate and action on this.

• The executive should implement the recommendations of the Human Rights Commission as a demonstration of commitment to issues of human rights and good governance in general.

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43 For a comprehensive summary see http://www.state.gov/documents/organisation/204351.pdf.
Equal citizenship

Malawi faces significant challenges in overcoming historical and contemporary discrimination, whether based on race, ethnicity and language or sex. Malawi’s 1966 Citizenship Act includes provisions that discriminate both on grounds of sex and, more unusually, on grounds of race. These provisions are in contravention of both the non-discrimination provisions in Malawi’s constitution and the international treaties on non-discrimination to which Malawi is a party. In practice, the citizenship status of Asian Malawians is controversial, with many questioning the right to citizenship of those of Asian origin, based in part on a perception that Malawi’s residents of South Asian origin have an unduly advantaged economic status and do not integrate with Malawian society.

A. Citizenship laws

Citizenship is the foundation of the right to political participation. In Malawi citizenship is acquired by birth, descent, marriage, registration and naturalisation. The constitution provides that those who were citizens before it came into force remain citizens, and that an act of Parliament shall establish rules for acquisition or loss of citizenship for others. The constitution also prohibits arbitrary deprivation or denial of citizenship.\textsuperscript{44}

At present the law governing citizenship in the country is the Citizenship Act of 1966,\textsuperscript{45} which provides the criteria for the acquisition of citizenship through birth, naturalisation and parental origin. Malawi is one of the handful of African countries that discriminate in granting

\textsuperscript{44} Constitution, section 47.
\textsuperscript{45} Citizenship Act 28 of 1966.
citizenship on the grounds of race.46 While any person may become a citizen by naturalisation, section 4 of the Citizenship Act provides that ‘Every person born in Malawi ... shall become a citizen of Malawi on the date of his birth if one of his parents is a citizen of Malawi and is a person of African race.’ The same discrimination applies to those born outside the country to a Malawian father or mother: the children of citizens who are not ‘of African race’ do not have Malawian nationality from birth. They can only acquire citizenship through naturalisation. Provisions on the registration of births in Malawi are also racially discriminatory: registration is only compulsory if one or both parents are of European, American, or Asiatic ‘race’ or origin.47 In common with about half of the African states, Malawi does not permit dual nationality for adults.48 Unlike some other states, there have been no moves in recent years to change this position.

The Citizenship Act also discriminates on grounds of sex. It provides that any woman who marries a Malawian man who satisfies certain conditions may be registered as a Malawian citizen, while it makes no equivalent provision to apply to men who marry Malawian women (section 16). The Act requires every female Malawian citizen who marries a non-Malawian citizen to formally state her intention to either retain her Malawian citizenship and renounce any foreign citizenship acquired by virtue of her marriage or lose her Malawian citizenship (section 9). There is no equivalent requirement in respect of male Malawian citizens.49

Some Malawians seem to favour restricting the acquisition of citizenship by foreign men who marry Malawian women, partly on the grounds that Malawian women are often economically vulnerable and may be exploited by such men seeking to acquire property.50 There is, however, no evidence to indicate a prevalent practice of foreign men marrying Malawian women in order to acquire property.

The discriminatory provisions in the citizenship law are inconsistent with the constitution’s guarantee of the right to equality and should be amended to bring them into compliance with the constitution. They are also inconsistent with Malawi’s international obligations. The United Nations (UN) Convention on the Elimination of all Forms of Racial Discrimination, to which Malawi is a party, calls for states to guarantee the right to nationality without distinctions based on race, colour, or national or ethnic origin.51 The UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), to which Malawi is also a party, provides that ‘States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the

46 Other countries that discriminate on the basis of ethnicity or race include the Democratic Republic of Congo, Egypt, Liberia, Libya, Sierra Leone and Uganda. For this and other comparative information see Citizenship Law in Africa: A comparative study, Open Society Institute, 2009.
48 Citizenship Act, section 6.
49 Other provisions of the Act also discriminate in similar ways.
51 Article 5(d)(iii).
wife, render her stateless or force upon her the nationality of the husband.52

A person wishing to naturalise or register as a Malawian citizen (registration is an easier process established under the Citizenship Act for Commonwealth citizens or citizens of other African states) must satisfy the responsible minister (the minister for home affairs) that (among other things) he or she is ‘of good character’ and ‘would be a suitable citizen of Malawi’.53 Similarly, any naturalised citizen may be deprived of his or her citizenship if the minister is satisfied that such citizen has shown, by act or speech, that he or she is ‘disloyal or disaffected towards the Government of Malawi’.54 Despite the constitutional prohibition on arbitrary deprivation or denial of citizenship, the subjective nature of the minister’s discretionary power creates room for the victimisation of members of opposition political parties or some individuals or groups of people perceived to be political threats through spurious accusations of disloyalty and disaffection. For example, a University of Malawi female lecturer of Indian origin married to a Malawian of the same origin was denied naturalisation because of her critical comments on the government in 2001/2002. A deportation order was issued against her but was not effected. When she reapplied in 2005, she was assured that she would get her citizenship but because the deportation order was still on file, she was denied again. Further inquiries revealed that her application was turned down because she supported demonstrations by civil society organisations (CSOs) against the amendment of section 65 of the constitution on crossing the floor, and the debate on the declaration of assets by the executive and members of the legislature. By 2013 her deportation order was still on file and her citizenship was still officially denied.55

On the positive side, the 1966 Citizenship Act is unusual among similar African laws in specifically providing for the registration of stateless persons as citizens, if they can show that they are stateless, were born and are ordinarily resident in Malawi, intend to remain there, and have no serious criminal convictions.56 Nevertheless, Malawi is not a party to the 1961 UN Convention on the Reduction of Statelessness, or the 1954 Convention related to the Status of Stateless Persons.

The citizenship status of people of South Asian origin was the subject of debate at the 1995 National Constitutional Conference. It was argued by some delegates to the conference that Asians in Malawi should not expect to have certain political rights because most of them were unwilling to commit themselves sufficiently to the country to adopt Malawian citizenship.57 Such a proposition is fuelled by a prevalent perception that Malawian citizens and residents of Asian origin are economically advantaged compared to Malawians of indigenous ethnic origin and have not integrated into local communities – although the same applies to Malawians of European origin, they are fewer in number and their status has been less politically controversial.

52 Article 9(1). While Malawi entered reservations to the treaty, it did not mention this provision.
53 Citizenship Act, section 13(1)(c) and (d) and section 21(1)(c) and (d).
54 Citizenship Act, section 25(2)(b).
55 The details of this case, involving Dr Nandini Patel of the Department of Political and Administrative Studies at Chancellor College, University of Malawi, are regarded as highly confidential as some of the issues are still being contested.
56 Citizenship Act, section 18.
B. Non-discrimination and nationality

Section 20(1) of the constitution guarantees equality to all persons: ‘discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth, or other status’. The word ‘nationality’ was changed to ‘national’ in a 2010 amendment (Act 11 of 2010) as it is the common language in the international treaties. It looks like the phrase ‘nationality’ was simply a drafting error. In 1998 the Malawi Law Commission proposed its deletion. The report of the Special Law Commission on the Technical Review of the Constitution which held hearings in 1998 recommended the amendment of this provision by deleting the word ‘nationality’ and substituting it with the term ‘national origin’, in line with international conventions.58

Some forms of discrimination on the basis of nationality are normal in most states: notably, only citizens usually have the right to vote and stand for election. Malawi’s constitution elsewhere provides, indeed, that only citizens may vote (section 77), stand for president (section 80(6)), be appointed as a minister (section 94(2)(a)), or be a member of Parliament (section 51(t)(a)). At the same time, the constitution does not prohibit discrimination on the grounds of ‘national origin’, although discrimination on the grounds of race and ethnicity is forbidden.

Section 20(2) of the constitution states that ‘legislation may be passed addressing inequalities in society and prohibiting discriminatory practices and the propagation of such practices and may render such practices criminally punishable by the courts’. In accordance with this provision, the Employment Act of 2000 (Act 6 of 2000) contains some sections on non-discrimination though it does not propose any measures of affirmative action.

Though the constitutional provisions related to non-discrimination are fairly wide and adequate, some sections of the Penal Code are inconsistent with these. A good example was the attempt to include ‘indecent practices between females’ in the new section 137A introduced in December 2010. It criminalised same sex relationships between women: any female person who, whether in public or private, commits ‘any act of gross indecency with another female’ shall be guilty of an offence and liable to a prison term of five years. The criminalisation of same sex relationships is viewed by civil liberties bodies as an affront to human dignity, and seriously undermines Malawi’s human rights commitments under international law.59 These bodies argue that enforcing the Penal Code sections that criminalise same sex relationships violates fundamental rights enshrined in Malawi’s Constitution: specifically, section 20(1) of the constitution protects against discrimination ‘in any form’. Furthermore, the constitution guarantees that every person has the right to dignity, under section 19(1); freedom of association, under section 32; freedom of expression, under section 35; and the right to personal privacy, under section 21. Section 22 on marriage also does not exclude same sex marriage. The laws criminalising lesbianism and gayism are therefore contrary to constitutional provisions and to the international legal obligations (the human rights protocols and agreements) Malawi is a signatory to.

Some Malawians, especially those on the conservative religious side, argue that lesbianism and male homosexuality are against Malawi’s culture and morality (without providing any evidence), thus implying that whoever engages in these is not behaving ‘the Malawian way’ and loses his/her ‘Malawianess’. Sexual morality and lifestyles are therefore equated with national identity and nationality. Through such arguments, lesbians and gays are stripped of their national identity because they are not behaving in ‘the Malawian way’.

2: Malawi Council of Churches on homosexuality

We the Member Churches of the Malawi Council of Churches (MCC) gathered for an Annual General Meeting (AGM) at Shire Lodge in Liwonde, from 13–16 November 2012, hereby issue the following communiqué:

The Council membership appreciates the good working relationship government has with the Church and the guaranteed freedoms of worship and association in Malawi. However, the Malawi Council of Churches notes with concern the following contemporary issues:

**Homosexuality and Sodomy**

The Malawi Council of Churches believes that Malawi is a God-fearing country, and as such, continues to uphold that homosexuality and therefore sodomy cannot be part and parcel of the acceptable norms of our society.

The Council further expresses that it maintains its stand against any gay practices as they are: Biblically sinful (Lev. 20 vs. 13), morally unhealthy and divinely against God’s nature (Gen. 1:27, 2:18–25).

The Council is equally concerned that where homosexuality is made legal as some few non-governmental organisations and individuals are demanding, the issue of sodomy, which is another serious sinful act, will threaten the health and spiritual well-being of inmates in Malawi’s reformation centres or prisons. We uphold that any right that is outside God’s authority could lead us to death. Minority rights must not be prioritised over all other rights, especially when they offer no common good to the larger interests of the people.

**Source:**

C. Citizenship and property rights

While the 1995 Constitution prohibits discrimination, including on the basis of race and nationality (amended in 2010 as ‘national origin’), the rights of non-citizens, including long-term residents, to own property in Malawi is controversial. Sections 28 and 29 of the constitution provide that:
28(1) Every person shall be able to acquire property alone or in association with others.
(2) No person shall be arbitrarily deprived of property.

29 Every person shall have the right freely to engage in economic activity, to work and to pursue a livelihood anywhere in Malawi.

These sections, if read in combination with section 20(1) on non-discrimination, imply that it would be unconstitutional to discriminate against a non-Malawian in matters of property ownership, economic activity, employment and pursuance of a livelihood anywhere in the country.

The National Land Policy adopted by Cabinet in January 2002 could be regarded as discriminatory against non-citizens in respect of ownership of property. The government took the decision to bar non-Malawian citizens from acquiring titles to any new freehold estates. The Policy recommended that the amount of freehold land in Malawi owned by non-citizens should be frozen and limited to freehold land already registered to non-citizens as of 17 January 2002, the day of the adoption of the policy. Non-citizens and foreign companies would be permitted under the policy to lease land from the government or directly from private landowners for investment purposes only.

In 2003, a Special Law Commission on the Review of Land Related Laws reviewed this and other relevant documents. In its report, the Special Commission concluded that the National Land Policy was in line with practice in some countries where allocation or grant of land to non-citizens is restricted unless for the purposes of investment. The Commission was aware that the constitution, in section 20, prohibits discrimination on the basis of nationality, but concluded that granting non-citizens leasehold as opposed to freehold tenure could not be considered impermissible discrimination under the constitution.

In March 2006, a group of non-governmental organisations (NGOs) once again made recommendations to the Law Commission to have sections 20(1), 28 and 29 of the constitution tabled for consideration at the then on-going constitutional review because, in their opinion, the sections were subject to abuse by non-Malawian nationals. The issue was indeed considered by the Constitutional Review Commission, but the recommendations of the Commission were not tabled in Parliament.

Another potentially controversial constitutional provision regarding property rights and discrimination is section 209(1) that provides that ‘all persons who have rights in property at the date of the commencement of this constitution shall continue to have such rights under this constitution and any other law’. The only exceptions provided are in cases where the property was acquired unlawfully, or where it was acquired lawfully, but the law used did not provide for adequate compensation, or where the property was acquired through abandonment by reason of duress of circumstances. Section 209(1) therefore allows people of non-Malawian origin who

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had property in the country prior to the commencement of the constitution on 18 May 1994 to retain their right regardless of them not being naturalised. This would apply to the people who or whose parents or ancestors acquired the property during the colonial period, such as the white settlers. However, the exceptions outlined in section 209(2) allow for contestation of such property should there be proof that it was unlawfully acquired, or that the law used at that time did not provide for adequate compensation.

Though there has not been any test case on this constitutional provision, the opportunity is there for contestation of the right to property that was acquired unlawfully or without adequate compensation, whether during the colonial period or under the one-party regime.\textsuperscript{63} This provision should be sufficient to allow for challenge to economic advantage obtained in the past by those – whether of indigenous Malawian origin or otherwise – on unjust or illegal grounds.

**D. Ethnic diversity and ethnicity challenges**

Unlike most southern African countries, Malawi does not have large enough ethnic groups that can form meaningful bases for effective political mobilisation. However, ethnicity is a noticeable challenge. The country has three main ethnic, cultural, and linguistic groupings: Yao in the south, Chewa in the centre and Tumbuka in the north. Significant minorities exist within each of these regions. Altogether, the country’s population, estimated at 16 777 547 in July 2013,\textsuperscript{64} is made up of the Chewa, Nyanja, Tumbuka, Yao, Lomwe, Sena, Tonga, Ngoni, Ngonde, Sukwa, Lamba and others. There are also significant numbers of people in Malawi from other parts of Africa, Asia and Europe.\textsuperscript{65} As in other former British colonies in southern Africa, racial and ethnic categorisations were institutionalised under colonial rule, but clearly to a lesser degree than in the more extreme cases of South Africa and Zimbabwe (then Southern Rhodesia).\textsuperscript{66} The racial and ethnic labels attached to people in present Malawi are, to a large extent, those used during the colonial period.

Section 12(iv) of the constitution provides that the state and all persons must ‘afford the fullest protection to the rights and views of all individuals, groups and minorities whether or not they are entitled to vote’. Cultural minorities are, therefore, assured specific protection. Section 26 of the constitution also guarantees every person ‘the right to use the language and to participate in the cultural life of his or her choice’.

In practice, there are examples of discriminatory tendencies and of divisions along regional, linguistic and ethnic fault lines; though Malawians do not for the most part openly discuss these issues and Malawi has avoided ethnic violence of the type that has plagued some of its neighbours. For example, the voting pattern in the referendum of 1993 and the elections of 1994, 1999, and 2004 have reflected regional and tribal or ethnic preferences.\textsuperscript{67}

\begin{itemize}
\item \textsuperscript{63} During the one-party regime some members of the Jehovah’s Witnesses sect fled the country and abandoned their property under duress of political circumstances. Others had their property grabbed by the then ruling party functionaries as punishment for refusing to buy party cards.
\item \textsuperscript{64} www.cia.gov and http://exploredia.com/malawi-population-2013/.
\item \textsuperscript{65} http://www.nationsencyclopedia.com/africa/Malawi-ETHNIC-GROUPS.html.
\item \textsuperscript{66} http://institutionalisededthnicity.net/country-narratives/malawi/.
\end{itemize}
During the 1980s, the state tried to apply regional or ethnic quotas in its employment practices, in the allocation of top positions in the civil service, and in awarding university scholarships. Selection to secondary school was also done on a regional-cum-ethno-linguistic basis. The practice became politically charged and extremely unpopular among those who felt disadvantaged. At present, such a practice would probably run contrary to constitutional provisions on equality and non-discrimination, and its reintroduction in 2007 was rejected by the University of Malawi Senate.

### 3: Rejection of quotas at the University of Malawi

In 2007 the Council of the University of Malawi proposed to reinstate the quota system in the selection of students to the five constituent colleges of the university: Bunda College of Agriculture, Chancellor College (a liberal arts, education, science, social science and law college), the Kamuzu College of Nursing, the Polytechnic, and the College of Medicine. The five colleges have a total capacity of just over 5,000 students. The council argued that for potential students from all districts in the country to benefit from the university’s available openings, there was a need to allocate a quota of about ten spaces to each of the 28 districts, and the rest to be filled on a competitive basis. The proposal was rejected by the University Senate, which is responsible for academic policy, overruling the University Council.

All members, except one from Bunda College of Agriculture, rejected the system because they felt it was discriminatory and would bring mediocre students to the colleges. Instead, they suggested that they should look at poverty levels rather than districts in awarding preferential places at the colleges.

The Livingstonia Synod of the Church of Central African Presbyterian (CCAP) added its voice to the rejection of the quota system, arguing that it was discriminatory and had the potential to remind people, and especially those from the minority regions such as the northern region, of the discrimination and suffering of the one-party regime.

**Source:**

Though the University of Malawi Senate rejected selection of its students using district quotas, since 2009/2010 the practice has been to select at least 10 students by district of origin and the rest on the basis of merit, but distributed according to district populations. In reality the University of Malawi selects its students on the basis of a combination of district of origin and merit. This is called ‘an equitable’ system of selection. The system therefore contains elements of

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discrimination on the basis of district and ethnic origin. In this respect Malawi does not comply with article 26 of the Universal Declaration of Human Rights (1948) that provides for merit as a basis for accessing higher education. The article states that:

Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

The case of the Mulhako wa Alhomwe, provides further evidence of Malawi’s ethnic challenges. On 28 October 2008, President Bingu wa Mutharika launched the Mulhako wa Alhomwe, a Lomwe cultural association, with the argument that its function was to preserve Lomwe culture because it was facing possible extinction due to urbanisation and other influences. The emphasis was on the preservation of chiLomwe (their language), traditional dances, initiation rites and traditional cuisines. The development raised suspicion in the eyes of many non-Lomwe Malawians who viewed it as an ethnic association for the recruitment of the Lomwe into positions of influence in the private and public sectors, much as the Lomwe themselves denied such allegations. The meaning of the term Mulhako was itself controversial. The word means ‘door’ or ‘gateway’ and to critics it implied the Lomwe’s passage into politics, government positions, businesses and other privileges. How the association would become such a ‘door’ or ‘gateway’ was never fully explained. To the Lomwe, however, it meant ‘a gateway to the Lomwe culture and tradition’ because ‘the grouping aimed at developing, reviving and preserving the history, traditions, culture and customs of the Lomwe people with the view of enhancing their awareness, knowledge, understanding and appreciation of their origins, roots and heritage’.

Opposition politicians feared that the association would divide Malawians along regional and ethno-linguistic fault lines. There were claims that Bingu promoted the Lomwe in his Democratic Progressive Party (DPP) and gave them senior posts. It was further claimed that he also favoured, promoted and gave senior posts to the Lomwe in the civil service and parastatal organisations. It was also claimed that the DPP abused its president’s powers by giving salaries to employees and organisers of the Mulhakho wa Alhornwe events using public funds and that individuals and companies ‘were forced’ to donate to the association’s events, and that government and public institutions’ vehicles and other resources were used during the association’s celebrations.

By 2012, the association was increasingly viewed as ‘an employment bureau’ for the Lomwe for positions in government and other sectors.

to the presidency, no less than 20 Lomwes were either dismissed or retired from positions in the Cabinet, the civil service, and parastatal organisations.\textsuperscript{77} Executive members of the Mulhakho wa Alhomwe and chiefs from Lomwe areas alleged they were being victimised, and called for unity to ‘fight the common enemy’\textsuperscript{78} without specifying any action or identifying who the ‘common enemy’ was.

**Language controversies**

Malawi’s major languages include chiChewa, an official language spoken by over 57% of the population, including those that are not Chewa by ethnic origin, chiYao (10.1%) and chiTumbuka (9.5%).\textsuperscript{79} The Chewa and their language, chiChewa, were promoted as the dominant ethnic group and language under the government of Dr Hastings Kamuzu Banda, who was himself Chewa. Some academic accounts have shown how President Banda rhetorically referred to the supremacy of Chewa history and the distinctiveness of the Chewa culture; insisted that chiChewa be spoken ‘properly’ and taught ‘rightly’ in schools; and openly boasted of himself as a Chewa.\textsuperscript{80} Dr Banda periodically gave public lectures on chiChewa language and grammar at the university.

In 1968, chiChewa was declared a national language – though the constitution then made no provision for an official language.\textsuperscript{81} The 1968 declaration came as a resolution of the annual convention of the then governing Malawi Congress Party (MCP). It was also debated in the one-party Parliament and endorsed. The Ministry of Education subsequently introduced the learning of chiChewa – both language and grammar – as an academic subject. A Chichewa Board was later created for public instructions and guidance on the speaking and teaching of the language.

Since the advent of political pluralism in the 1990s, there has been an attempt to recognise other languages by including them on the state radio. News items and some special programmes are aired in chiNkhonde, chiTumbuka, chiTonga, chiYao, chiLomwe and chiSena in addition to English and chiChewa. However, the choice of these languages has been rather arbitrary, and politically driven.

There has also been a move towards recognising other languages as national languages.\textsuperscript{82} The 2006 Special Law Commission on the Review of the Constitution considered the issue of whether a national language should be reflected in the constitution. The Special Commission

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\textsuperscript{77} http://www.malawivoice.com/2012/10/31/lhomwes-claim-victimisation-by-pp-government-55093/.

\textsuperscript{78} http://www.malawivoice.com/2013/10/29/figurative-language-at-mulhako-lets-all-join-hands-to-fight-the-common-enemy/.

\textsuperscript{79} http://exploredia.com/malawi-population-2013/#sthash.kNw6ziHz.dpuf.


was aware that giving a national language constitutional status would not reflect the reality of the nation of Malawi which is a collection of various tribes with their own language. The Commission recognised that having the constitution declare one language as a national language may lead to the other languages being regarded as inferior. Hence, by necessary extension ethnic groups related to the languages may be regarded as either superior or inferior to others based on this. In order to avoid such a situation the Commission also considered whether the constitution should recognise an official language rather than a national language.\textsuperscript{83} In its April 2007 report, the Commission resolved that there was no need for the constitution to recognise a national language: ‘The Commission was of the view that the current position has not created any problems that need to be cured by the introduction of a national language in the Constitution.’ The Commission further considered that ‘giving constitutional recognition to chiChewa as a national language might only result in creating unnecessary tensions in the country.’\textsuperscript{84} Strangely, the Commission later backtracked and recommended the inclusion of chiChewa as a national language in the constitution.

However, the controversy over the national language or use of any other local vernaculars continues. For example, in February 2008, the Livingstonia Synod of the Church of Central Africa Presbyterian (CCAP) denounced the proposal to have chiChewa as a national language. The Synod proposed that, instead, other languages, including chiTumbuka, widely spoken in the northern region, be recognised at the national level.\textsuperscript{85} It went further to advocate that chiTumbuka and Swahili be included in the country’s school curriculum. The introduction of Swahili would be for reasons of linguistic integration and ease of communication with eastern and central African nations. The Synod was heavily criticised in the media as being tribal and regionalist because it was advocating the use of chiTumbuka in the school curriculum. The Synod’s critiques did not address the value of Swahili as a regional linguistic unifier and a medium for economic and socio-cultural integration.

Another contentious issue about language use is the official requirement that the deliberations in Parliament be in English.\textsuperscript{86} This contradicts the constitutional provision on the right of any person to use the language of his or her choice (section 26). The constitution further provides that a person shall not be qualified to be nominated or elected as a member of Parliament unless that person ‘is able to speak and to read the English language well enough to take an active part in the proceedings of Parliament ... ’ (section 5(1)(b)). Effectively, the constitution therefore disqualifies anyone who does not speak and read English well enough from standing for parliamentary elections. Where their ability to speak English well enough is in doubt, parliamentary candidates are subjected to an English proficiency test.

\textsuperscript{86} Constitution, section 56(6): ‘The proceedings of Parliament shall be conducted in the English language and such other languages as each Chamber may prescribe in respect of its own proceedings.’
Religious diversity

Malawi is also a country of religious diversity. The country’s constitution guarantees freedom of religion in section 33. The two main religions are Christianity and Islam, but some people ascribe to indigenous traditional beliefs and others to religions such as Hinduism and Buddhism. According to 2012 estimates, approximately 85% of the population are Christians, with the Roman Catholic Church and the Church of Central Africa Presbyterian (CCAP) making up the largest Christian groups.\(^87\) There are also sizeable numbers of Anglicans, Baptists, Evangelicals and Seventh Day Adventists.\(^88\) Around 13% of the population is Muslim, with most of the Muslim population being Sunni, of either the Qadriya or Sukkutu groups. Other religious groups within the country include Jews, Rastafarians, Hindus and Baha’is. Atheists make up around 4% of the population, although this number includes people who practice traditional African religions.\(^89\)

In general, Malawians do not openly display religious intolerance in their everyday interactions, and historically religion has not been a significant divisive factor. However, in 1999 religion appears to have been a factor in the burning down of about 17 mosques by people who were protesting against the declaration by the Electoral Commission that the former president, Dr Bakili Muluzi, a Muslim, had won a second term of office.\(^90\) In apparent retaliation, supporters of the president were also reported to have torched a number of Christian churches and prayer houses. This could be regarded as an indication of religious intolerance that was precipitated by perceived unfair political competition.

Much as Malawians do not openly demonstrate religious divisions and intolerance, there is ample evidence suggesting a connection between religion and political affiliation. For example, a 2006 study by the Story Workshop Trust based in Blantyre concluded that ‘often times what is seen as religious conflict is in fact political upheavals smeared onto worshippers by skimming and opportunistic politicians … These religious conflicts are often supported and cheered on either by financial-support seeking men of God or desperate religious fundamentalists wanting to make a name out of nothing.’\(^91\) The study warned that:

The faith community should not be surprised if donations from politicians increase in the run up to the 2009 general elections ... When the elections are near even the politicians who do not go to church and mosques at present will be busy patronising religious functions as one way of wooing voters.\(^92\)

The findings of the Story Workshop Study are important because they reveal not how religion may be used as a factor of discrimination, but rather as a potential tool for political manipulation, and the dangers of using religion for political ends.

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\(^91\) The study was done for the Story Workshop’s radio programme on the Malawi Broadcasting Corporation (MBC) entitled *Ndife Amodzi* (‘We are One’). As reported in the [Sunday Times](http://www.state.gov/g/drl/rls/irf/2007/90107.htm), 4 June 2006, p.6.

\(^92\) Ibid.
In early 2008, political tensions with religious overtones openly came to the fore, based on the Muslim or Catholic religious affiliations of the main party leaders. The Catholic Commission for Justice and Peace (CCJP) issued a statement opposing the comeback of Bakili Muluzi, a Muslim, into the presidential race for 2009.\footnote{See \textit{The Nation}, 7 February 2008, pp.1 and 3.} In their statement, the CCJP and other church officials opposed the former president’s comeback, describing it as ‘selfish and a disregard for national interests’.\footnote{The UDF issued a response in a press statement dated 5 February 2008, which also appeared in \textit{The Nation}, 7 February 2008, p.9.} Similar opposition was expressed by the Public Affairs Committee (PAC), at this time also headed by a Catholic. Some Muslims have interpreted the opposition to Muluzi as religious intolerance especially because the incumbent state president, Bingu wa Mutharika, was a Catholic. Their statements attracted the combined wrath of Mutharika’s party, the DPP, the PAC and the Catholic Church.

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4: Muslims vs Catholics in politics

The Muslim Association of Malawi (MAM) has accused the Catholic Church of playing partisan politics in their recent attack on the UDF leader, Bakili Muluzi, on his intention to contest the 2009 polls. MAM has also hit out at the Church for allegedly shielding President Bingu wa Mutharika’s constitutional violations. But the CCJP that issued a statement on Muluzi has reserved its comment on the allegations, saying the matter is subject to emotions. MAM has also asked the church to reconsider its position on political issues. Reacting to the stand the CCJP has taken over Muluzi’s desire to stand in the 2009 presidential elections, MAM Secretary-General Imran Sherif argued that the development amounts to disrespect for people’s freedoms and justice. ‘The (Catholic) Church should not act like the courts and law at the same time because such matters are well-handled in those two sectors,’ said Sherif. He questioned the motive for the statement when the issue of Muluzi’s candidacy is in court. Asked Sherif: ‘Before the court has made a ruling on whether Muluzi could stand or not, they have already made that ruling. Do they want to influence the courts’ decision on the matter?’ He said MAM is worried that the Catholic Church continues to attack Muluzi while shielding Mutharika because he is a Catholic. Sherif claimed that during Muluzi’s rule, different arms of the church – including the CCJP, the Catholic Development Commission in Malawi (CADECOM) and the mainstream church – issued pastoral letters condemning the former president yet it is silent on Mutharika. ‘Where are those pastoral letters? Are they saying the constitutional violations and political arrests Mutharika is carrying out are not evil? They need to be neutral because the people are questioning their stand.’

\textbf{Source:}
The ‘pork riot’\(^95\) of 27 November 2013 in Mangochi district revealed the hidden intensity of religious tensions in Malawi.\(^96\) A pork vendor, Christian by religion, was attacked by Muslims who confiscated his meat and buried it. The issue was taken to court and the magistrate ruled that no pork should be sold in the area because he ‘knew how strongly’ the Muslim community felt about it since he was married to a Muslim himself and because the members of the Muslim community had told the vendor not to sell pork in the area. The vendor should have respected the Muslim’s religious beliefs and rights. A group of Islamic believers demonstrated against pork selling and consumption in the area, looted and destroyed shops, and put up a banner declaring Mangochi district an ‘Islamic State’. The incident became a ‘national issue’\(^97\) with CSOs, other professional groups, and Christian bodies condemning it. The magistrate was heavily criticised for making a ruling that was contrary to section 29 of the Malawi constitution that states that: ‘Every person shall have the right freely to engage in economic activity, to work and to pursue a livelihood anywhere in Malawi.’ The rioters were condemned for declaring ‘an Islamic State’ within a secular sovereign state, for the looting of shops and the destruction of property in general, and for their ‘over-stretched religious extremism’.\(^98\) Joyce Banda, the country’s president, summoned the Muslim clergy to a meeting in the area and told them that:

I urge you to please put your religious differences aside and make sure that you live peacefully among yourselves. The issue of pork selling should not divide the people. If you start chasing non-Muslims away from Mangochi what will happen to Muslims from Mangochi who are scattered across the country? I appeal to market leaders to designate specific places for pork sellers to avoid friction amongst the people. Those selling pork should also respect other people that do not eat pork ... I appeal to my friends in the political field to demonstrate remorse on this issue and to avoid politicising it ... Please let us avoid bringing anarchy in the country.\(^99\)

E. Gender equality and women’s participation

Ensuring gender equality and women’s participation is critical to a democratic system of governance. The Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW), to which Malawi is a party, calls for all parties to grant women equal rights with men.\(^100\) The Malawi Constitution not only prohibits discrimination on the grounds of sex (section 20), but also provides specific provisions on the rights of women. In section 24(1) the constitution states that ‘women have the right to full and equal protection by the law, and have the

\(^{97}\) www.manaonline.gov.mw/index.php/national/general/item/.
\(^{100}\) See the Convention for the Elimination of All Forms of Discrimination Against Women, article 9, at http://www.unhchr.ch/html/menu3/b/cedaw.htm. ‘The parties shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband. States Parties shall grant women equal rights with men with respect to the nationality of their children and other documents.’
right not to be discriminated against on the basis of their gender or marital status which includes the right to be accorded the same rights as men in civil law; to enter into contracts; to acquire and maintain rights in property, independently or in association with others; to a fair disposition of property that is held jointly with a husband; to acquire and retain custody, guardianship and care of children; and to acquire and retain citizenship and nationality, among others’. In section 24(2) the constitution further states that ‘Any law that discriminates against women on the basis of gender or marital status shall be invalid and legislation shall be passed to eliminate custom and practices that discriminate against women’. Section 13(a) of the constitution states that ‘the State shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving, among others, gender equality’. However, the constitution makes no specific provision for quotas to ensure women’s representation in elective bodies, nor are there any other legal provisions.

Malawi has a gender policy aimed at promoting the economic and social empowerment of women. It covers wide ranging issues of employment, gender mainstreaming in public policy, income generation activities, family welfare and others. However, women still face serious challenges in acquiring and inheriting property and in standing for public office. Data on candidates for parliamentary elections further corroborates the challenges women face regarding participation in political processes. Political party nominations for parliamentary seats show there are far fewer female candidates than male candidates (see Table 13: Parliamentary candidates by sex, 2004).

The constraints that women face in competing for political office undermine Malawi’s commitment to the Southern African Development Community (SADC) Protocol on Gender and Development and the African Union Solemn Declaration on Gender Equality in Africa. The objective of the SADC Protocol is to ‘Provide for the empowerment of women, to eliminate discrimination and to achieve gender equality and equity through the development and implementation of gender responsive legislation policies, programmes and projects’. One of the Protocol’s targets is that women will hold 50% of decision-making positions in the public and private sectors by 2015.

In the run-up to the 2009 elections, a number of human rights groups in collaboration with the Ministry of Women stepped up their campaign for women candidates on party tickets. They mounted the 50/50 Campaign aimed at increasing the numbers of female parliamentarians to the same levels as those of men. The Human Rights Commission, the Non-governmental Organisations’ Gender Coordination Network (NGO/GCN), the Society for the Advancement of Women (SAW), the Pan African Civic Educators Network Trust (PACENET) and the Human

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Rights Consultative Committee (HRCC)\textsuperscript{106} began training aspiring female candidates in January 2008.\textsuperscript{107} They received financial and technical support from the United Nations Population Fund (UNFPA), the Canadian International Development Agency (Gender Equity Support Project) (CIDA/GESP), the Royal Norwegian Embassy, the German Agency for Technical Cooperation, OXFAM-Great Britain (OXFAM-GB), the Danish Church Aid and Action Aid International.

As discussed further below, much as the numbers of women in Parliament increased after the 2009 elections, the percentage is still below the targeted 50%. The Electoral Institute for the Sustainability of Democracy in Africa (EISA) has observed that the failure to translate the gender equality clauses in the constitution into practical measures to ensure that women are adequately represented in elective institutions, coupled with the first-past-the-post (FPTP) system that tends to marginalise women, has resulted in Malawi showing poor (though improving) statistics in the National Assembly in respect of women’s representation: 5.65% in 1994, 9.38% in 1999, 14.44% in 2004 and 20.83% in 2009. However, this is higher than other Southern African countries that follow the same electoral system: Botswana 11.48% (2004), Zambia 14% (2006) and Zimbabwe 14.29% (2008).\textsuperscript{108}

The percentage of women holding senior positions in the public service is also low. Malawi does not have a written employment policy, or an official statement on quotas for women in official positions in the civil service or any other public offices. The Ministry of Labour is in the process of consultations that, it is hoped, will lead to the drafting of a national employment policy that might address the issues of quotas for women in the public sector. This exercise is still at a very preliminary stage.\textsuperscript{109} As of 2013, women holding senior public positions included the Chief Justice, the Secretary to the President and Cabinet (who is also head of the civil service), the Law Commissioner, the chair of the Human Rights Commission, the Secretary to the Human Rights Commission, the Ombudsman, no less than four High Court and Supreme Court judges and nine Cabinet ministers and deputy ministers (July 2013 Cabinet). Some legislative measures have been taken to reduce gender inequality. In 1998, the inheritance law was amended to address discrimination against women and in 2006 legislation was adopted to provide for a more adequate response to violence against women.\textsuperscript{110} These address some elements of inequalities relating to the social status of women, inheritance of property and access to dispute resolution mechanisms, but fall short of addressing the issues of inequality in the economic sphere. A 2013 study has shown that much as Malawi has implemented a number of gender-related policies, these, to a large extent, deal with only the symptoms of the problem rather than the root causes of women’s disempowerment embedded deeply in the country’s social, political and economic structures, and cultural and religious beliefs.\textsuperscript{111}

\begin{itemize}
\item\textsuperscript{106} Human Rights Commission Board Papers for the Commission Meeting on 4 April 2008.
\item\textsuperscript{107} See, for example, The Nation, 8 April 2008, p.3. of national news; The Guardian, 10–11 March 2008, p.3; The Nation, 10 March 2008, p.1.
\item\textsuperscript{108} http://www.eisa.org.za/WEP/malquotas.htm.
\item\textsuperscript{109} W. C. Chirwa, 2005, \textit{A Cursory Review of the State of Employment and Labour in Malawi: Towards the Drafting of the National Employment Policy}, study commissioned by the Ministry of Labour.
\item\textsuperscript{111} UN Women study report at http://www.scotland-malawipartnership.org/documents/55-JessieKabweGenderIssuesinMalawiMay2013.pdf.
\end{itemize}
F. Poverty and exclusion

Section 30(1) of the constitution states that ‘all persons and people have a right to development and therefore to the enjoyment of economic, social, cultural and political development, and women, children and the disabled in particular shall be given specific consideration in the application of this right’. The constitution binds the state to ‘take necessary measures for the realisation of the right to development. Such measures shall include, amongst others, equality of opportunities for all in their access to basic resources, education, health services, food, shelter, employment and infrastructure’ (section 30(2)). In section 30(4) the constitution states that the state has the responsibility to respect the right to development and to justify its policies in accordance with this responsibility. Section 20(2) also allows for legislation to be passed addressing inequalities in society. A similar provision is found in section 30(3) which states that ‘the State shall take measures to introduce reforms aimed at eradicating social injustices and inequalities’.

The indicators for poverty in Malawi show that the state has not been able to live up to the expectations contained in these constitutional provisions. Poverty and inequality levels have not been reduced substantially over the last decade. According to the 2004/2005 Integrated Household Survey (IHS) conducted by the National Statistical Office (NSO), 52.4% of the Malawi population were poor, and 22% were ultra-poor.112 ‘That is, one in every five people lived in dire poverty such that they could not even afford to meet the minimum standard for daily recommended food requirement.’113 The 2010/2011 IHS recorded a national poverty rate of 39%, a decrease of 13.4% from the earlier figure.114 However, the figure for the ultra-poor has in fact increased over time from 22% to 25%.

In defining the poor and ultra-poor, the NSO used the total annual per capita consumption expenditure reported by a household. This measure was expressed in Malawi Kwacha (MK), the national currency. The poverty line used in distinguishing the poor from the non-poor was therefore ‘a subsistence minimum expressed in Malawi Kwacha based on the cost-of-basic necessities methodology’.115 It comprised two parts: the minimum food expenditure based on the food requirements of individuals and the critical non-food consumption. Food needs were tied to the recommended daily calorie requirement. Non-food needs were estimated based on the expenditure patterns of households whose total was close to the minimum food expenditure. Using this method, a poverty indicator was developed for the country – at MK 16 165 or just above US$ 106.35 per annum (in 2010). Those below this level were characterised as the poor, while the ultra-poor were those whose total consumption per capita on food and non-food items was lower than the minimum food expenditure. The indicator for the ultra-poor was at MK 10 029 (about US$ 66) per annum.

The levels of poverty in the country are compounded by the high levels of inequality. The IHS noted that ‘certainly, income inequality persists in the country’.116 The richest 10% of the...
population has a median per capita income that is eight times higher (MK 50,373 per person per annum) than the median per capita income of the poor (MK 6,370 per person per annum). Moreover, the richest 10% of the population has a median income that is three times higher than the overall median income in the country. Children were reported to be gravely affected by poverty. The incidence of child poverty among households in the lowest wealth ranking category was estimated at about 99% and at about 86% among households with high dependency ratios. Female-headed households recorded the incidence of child poverty at 69% while households with illiterate mothers recorded 68%. The rate of child poverty was about 66% in large households (more than seven members) and about 58% in households with five and six members. The child poverty rate was higher in rural areas at about 56% compared to about 25% in urban areas.

The above poverty and inequality indicators suggest that the state is not equitably distributing basic resources. In fact, the country does not have specific legislation in terms of section 20(2) to address inequalities in society. However, Malawi has made some attempts at introducing pro-poor policies and interventions, albeit against a rather weak legal framework.

In 2001/2002 the government outlined 12 key Priority Poverty Expenditure (PPE) areas within the context of the poverty reduction strategy (PRS). These are micro-credit provision; construction; upgrading and maintenance of rural feeder roads; community policing; agricultural extension services; provision of teaching and learning materials; teacher training; improvement of teacher salaries; provision of medicines; training of health workers; improvement of health worker salaries; construction of boreholes and the targeted input programme. The latter is an agricultural input subsidy programme. Since then the government commitment to spending the largest share of its income on the social sectors (38% of recurrent expenditures) has continued. From 2009, some of the PPEs, such as food security, education and infrastructure, became priorities within priorities, and received preference in the national budget.

However, some analysts\textsuperscript{117} have observed that the PPEs are poorly defined, their achievement indicators are not clear, their budgetary allocations are not protected and there are no guarantees that the budgetary allocations will indeed be spent on the stated PPEs. Thus, there is no real evidence that the sectoral allocations will indeed translate into actual spending on poverty reducing activities. In fact, all available evidence shows that the ‘non-poverty’ reduction sectors such as state residences, compensation for court cases the government has lost and for violated contracts, spending on public functions, and others of that nature, are allocated more resources than the PPEs.

From 2009, Malawi’s development agenda was anchored in the implementation of the Malawi Growth and Development Strategy (MGDS), a five-year medium-term national development framework aimed at lifting the country ‘out of poverty to prosperity’. The MGDS (Phase I from 2006/2007 to 2011/2012 and Phase II from 2011/2012 to 2015/2016) isolates and delineates nine priorities within priorities that guide the national development agenda:

\begin{itemize}
  \item Agriculture and food security;
  \item Transport infrastructure;
\end{itemize}

• Energy, industrial development, mining and tourism;
• Education, science and technology;
• Public health, sanitation, malaria and HIV/AIDS management;
• Integrated rural development;
• Greenbelt irrigation and water development;
• Child development, youth development and empowerment; and
• Climate change, natural resources and environmental management.

The belief is that in pursuit of these nine priorities, and in the implementation of the MGDS in general, Malawi will be able to measure its development achievements against the eight Millennium Development Goals (MDGs) that the UN designed for global development.

There is evidence suggesting that the pro-poor interventions, if consistently implemented, have the potential to reduce poverty levels, particularly among the rural poor. For example, an official report that highlighted the achievements of the MGDs (Phase 1) suggested that the reduction of poverty between 2005 and 2010 may have been due to interventions related to the positive effects of the subsidised agricultural inputs programme, the food for work programmes, and other social safety programmes of the government and supporting organisations. However, in view of the political and economic crisis from 2009, the administration that came after Mutharika prioritised two approaches:

• To unlock the potential of the Malawian people to regain their freedom, dignity and sense of pride and thereby giving them the opportunity to realise their social, political and economic freedoms; and
• To drive a people’s development agenda that enhances opportunities, reduces inequalities, and overcomes poverty through its political, social and economic programmes.

‘We will realise this’, proclaimed President Joyce Banda in her address to Parliament on 18 May 2012, ‘by exemplifying the values of integrity, honesty, tolerance, selflessness and stewardship within the leadership and the public at large whilst embracing three cornerstones of unity, equity and development’. In the end, the economic and political crisis forced the government to prioritise short-term political and economic recovery measures such as restoring the rule of law by reversing the bad laws enacted under the Mutharika administration, dealing with monetary, fiscal and revenue policies including foreign exchange rate adjustment and expenditure control, and cushioning the general population against the unintended socio-economic impacts of the exchange rate adjustment through nominal wage increases, food relief and other social safety nets measures.

G. HIV/AIDS and political participation

The high levels of poverty and inequality are further compounded by the high, though declining, HIV/AIDS prevalence rate. In 2012, 910,000 people lived with HIV, a drop from 930,000 in 2005 (including about 60,000 to 80,000 children and youth younger than 15 years).120 The HIV prevalence rate declined from 14.4% in 2003,121 to 14.0% in 2005 and 10.6% in 2012;122 and new annual HIV infections from 100,000 in 2003 to 46,000 in 2012.123 Of the new infections, at least half occurred among people aged between 15 and 24 years; and about 90,000 deaths occurring annually between 2005 and 2010.124 Up to 2009, at least 70% of Malawi’s hospital beds were occupied by people with HIV/AIDS-related illnesses, and the government spent over US$ 120,000 each year on funerals for civil servants who died of the disease.125 Much as the prevalence and new annual infection rates have declined over the years, AIDS is still the leading cause of death amongst adults in Malawi, and is a major factor in the country’s low life expectancy of just 54.8 years.126

In addition to the financial and human costs, the HIV/AIDS pandemic has several implications for politics. In the first place, HIV/AIDS is most prevalent among the voting age and thus having a deleterious effect on the voting population. This in turn affects the structure of the voters’ roll. With large numbers of the voters and potential voters dying at a high rate, the country’s voters’ roll requires regular updating to expunge the deceased. The management of the voters’ roll is therefore both challenging and expensive. Second, the pandemic kills political representatives. In 2000, the then Speaker of the Malawi National Assembly, Sam Mpasu, officially disclosed that 28 Malawian MPs had died of HIV/AIDS-related diseases between 1994 and 2000.127 Of these, 23 died in just about five years between 1994 and 1999; 12 died between 1999 and 2004, seven between 2004 and 2005,128 six between 2005 and 2009, and at least three between 2010 and 2013. It can be assumed that some of these deaths might have been due to HIV/AIDS-related causes. In fact, the sturdy decline in the deaths of MPs over the years suggests some correlation with the decline in the HIV prevalence and new annual infection rates. It could also be a reflection of the gains made in improved antiretroviral treatment (ART). Coverage of ART increased from 54% to 67% between 2010 and 2011.129 There have also been improved responses

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122 http://www.avert.org/hiv-aids-malawi.htm#sthash.tEpdaEA.dpuf.
to condom use, voluntary male circumcision, and other HIV/AIDS prevention strategies between 2005 and 2013.\textsuperscript{130}

In addition to the loss of representation, political experience and skills, the deaths of MPs result in expensive by-elections and negatively affects both electoral governance and the political system at large. Third, the attrition of representatives is not limited to MPs. It also applies to party cadres across the entire structure from the local branches to the national executives. Political parties lose experienced and skilled leadership at all levels. In addition, some studies have shown that the HIV/AIDS pandemic also seriously affects the levels of professional and technical staff in civil society bodies, in the police, among teachers, the civil service, and other public sector institutions that provide back-up services to the Malawi Electoral Commission in the management of electoral processes.\textsuperscript{131} On the part of those who are ill from AIDS, their participation in election related activities and in politics in general, is limited by the absence of special voting mechanisms such as mobile ballot boxes and they end up being politically marginalised or even excluded.

\textbf{H. Refugees and asylum seekers}

Refugees coming to Malawi are expected to register with the staff of the UN High Commissioner for Refugees (UNHCR), which manages refugee camps in the country.\textsuperscript{132} The UNHCR provides international protection and material assistance to refugees, asylum seekers and other persons of concern in the country; provides technical and material support to the government of Malawi through the Ministries of Home Affairs and Health; supports the government with resources and expertise in the refugee status determination process; identifies, promotes and facilitates resettlement, self-reliance and voluntary return of refugees; supports health, water, sanitation, community development, and education services for both refugees and nationals living around refugee camps; advocates and promotes positive perceptions of refugees and asylum seekers amongst the Malawian public; and supports the government on issues related to mixed migration.\textsuperscript{133}

At the point of entry the refugees are interviewed by a committee comprising officials from the Immigration Department, the police, the Ministry of Health, the District Commissioner and the UNHCR. After registering they are sent to the single remaining refugee camp at Dzaleka near Lilongwe, the capital city.

In 2013 Malawi hosted some 16 000 refugees and asylum-seekers, mostly from Rwanda, Burundi and the Democratic Republic of Congo, and a few more from Somalia.\textsuperscript{134} Although on the increase from 2009, this figure is much lower than the annual average influx of refugees in the late 1980s and early 1990s when Malawi accommodated more than a million refugees from


\textsuperscript{132} For detailed coverage of the UNHCR’s work in Malawi, visit http://www.unhcr.org/4c629c4d9.html.

\textsuperscript{133} These are found at http://www.unhcr.org/524d85139.html.

\textsuperscript{134} http://www.unhcr.org/pages/49e4856b6.html.
war-torn Mozambique alone.\textsuperscript{135} At the close of 2009, Malawi had a registered population of 10,716 persons of concern to UNHCR. Of these, 4,175 were recognised refugees while the remaining 6,541 were asylum seekers (both rejected and those awaiting the outcome of appeals). With the exception of 1,291 all were resident in the Dzaleka refugee camp.

Malawi is a signatory to both the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, as well as the 1969 Organisation of African Unity (OAU) Convention Governing Specific Aspects of Refugee Problems in Africa. The government has registered several reservations to the 1951 Convention, including article 17 (on the right to wage-earning employment) and article 26 (relating to freedom of movement).\textsuperscript{136}

During the 1980s and 1990s, before the adoption of the new constitution that enshrines the international instruments on the protection of such people, refugees were subjected to considerable controls and restrictions on movement, and access to relief supplies. A 1997 study of relief provision for Mozambican refugees in Malawi demonstrates the control, restrictions and abuses in the following words:\textsuperscript{137}

Women were the main targets of abuse linked to food aid. In 1989 and 1993, investigators found that women and girls were subject to various forms of abuse, generally at the hands of refugee food distributors and local relief officials. The women refugees had no authority in the refugee camps ... Girls and young women were more vulnerable to sexual abuse, whether by Mozambican ‘tippers’ distributing food, NGO officials dispensing clothes, local policemen or camp administrators ... Those that dared to question the abuses were told: ‘you are mere refugees, how is it that you are complaining. You don’t have any right at all to speak, and to complain, otherwise we shall send you to Mozambique’.

In 1989, the government placed some limitations on some clauses of the OAU Convention on the Specific Aspects of the Refugee Problem in Africa.\textsuperscript{138} The restrictions related to political participation, employment and free movement. These restrictions are a reflection of the political sensitivities of the government of the day. The one-party dictatorial government was extremely sensitive to the free movement of people, including its own citizens. There were elaborate ‘clearance’ procedures for those travelling across the political borders with the neighbouring countries for fear that they might be interacting with what were regarded as ‘dissidents’ living in those countries. Prior to travelling, particularly to Tanzania and Zambia, a person had to obtain police clearance, and had to inform local party officials. The reason was that Tanzania and Zambia hosted the Malawi opposition in exile. Since the re-introduction of multi-party politics the reservations have been removed and Malawi complies with UNHCR requirements regarding political freedoms of refugees.

Though the situation has improved since the Banda era, Malawi still excludes local integration of refugees – unlike Tanzania, which has taken generous steps to provide citizenship

\textsuperscript{135} See UNHCR website information on Malawi at http://www.unhcr.org/Malawi.
\textsuperscript{136} http://www.unhcr.org/4c629c4d9.html.
\textsuperscript{138} Available at www.africa-union.org/...%20conventions.../Refugee_Convention.pdf.
to refugees from Rwanda and Burundi over the years. Refugees in Malawi in practice find it difficult to naturalise as citizens, and are thus effectively prevented from participation in national politics. They are also confined to designated refugee camps, unless legally allowed to integrate with the local rural or urban communities.

Of late, there have been some official concerns about the increase in refugees and asylum seekers in the country. Immigration officials and the police fear that refugee status and asylum seeking may become conduits for human and drug trafficking, other cross-border crimes, spreading diseases, and activities that constitute security risks. There could be a thin dividing line between asylum seeking and other forms of illegal cross-border movements in eastern and southern Africa in general. Most of the ‘border jumpers’ travel without proper documents. They use Malawi only as a transit point en route to South Africa. The practice is entrenched. For example, on 1 September 2006 the media reported on the arrest of four young women and 50 young men, of Somali origin, all below 22 years of age. They were rounded up by the police in a medium density location in Lilongwe, Malawi’s capital. They had no travel documents of any kind and had been brought into the country by two unidentified men who rented a house in the location. They were all accommodated in one house for at least a week, a situation that surprised the house owner who decided to report the matter to the police. The young men and women were believed to be en route to Mozambique and South Africa, but claimed to be asylum seekers.

By December 2011 Malawi hosted no less than 279,000 illegal immigrants comprising Ethiopians, Somalis, Burundians, Rwandese, Indians, Pakistanis and Chinese. These were in addition to the documented refugees hosted at the Dzaleka camp. Police and immigration officials reported handling no less than 3,000 cases of illegal immigrants monthly in 2011. In December 2011 alone, 94 Ethiopians were intercepted in one border district while eight perished of hunger and fatigue at Lake Malawi where they had camped for four days on a boat belonging to a Tanzanian as they waited to elude security officials to get ashore. No less than 64 were intercepted in January 2012 by the Malawi authorities, and more were arrested by the Tanzanian authorities on the other side of the border. The UNHCR reported ‘seeing increased use of boats among migrants and asylum seekers travelling southwards from the Horn of Africa since January 2010’.

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139 This information was collected by W.C. Chirwa and M. Kapuye of Mlambe Consulting Firm for the Baseline Study for the Social Economic Impact Assessment of the Kayelekera Uranium Mine, Karonga District, June 2006. The study was commissioned by Paladin Africa and Knight Piesold.
141 The Nation, Friday 1 September 2006, p.3.
144 http://www.ethiopianreview.com/content/35557.
146 http://www.unhcr.org/4fe44c049.html.
I. Recommendations

- The Law Commission should review the Citizenship Act with the aim of proposing amendments to remove racial, ethnic and gender discrimination and to provide due process protections in relation to the granting and deprivation of citizenship and related matters.

- Malawi should ratify the UN Convention on the Reduction of Statelessness and the Convention relating to the Status of Stateless Persons.

- The Malawian government and political parties should make greater efforts to promote women’s participation in politics, including, by setting aside quotas and selecting women as candidates for national elections.

- The Malawi Electoral Commission should establish and implement an HIV/AIDS policy in respect of political participation and electoral issues.

- Political parties should formulate policies and approaches to management of the HIV/AIDS pandemic and to redress the impact of the pandemic on party structures and membership.

- The debate on affirmative action should extend beyond issues of gender to address the status of minorities in general, including ethnic minorities; disabled persons; children, the youth and the elderly; and other categories of persons as may be needed.

- Civil society organisations should launch public awareness campaigns on racial integration and schools should openly teach on the same.

- Racial integration awareness campaigns should involve Malawians of Asian origin in order to facilitate their recovery from past experiences of racial discrimination given that the current constitutional order allows for their full integration and participation in the public affairs of Malawian society.

- Parliament should reopen the debate about the national language so that other languages are recognised as national languages as well, at least for the purposes of conducting official business or simply for recognition as Malawian languages and for respecting the cultural diversity of the country.

- The refugee policy should be reformed to facilitate local refugee integration, including the acquisition of Malawian citizenship after a period of residence.

- The refugee law should be reviewed and amended to promote the integration of long-term refugees and ensure their ability to participate in national politics.
Participation in the policy process

Section 40(1)(c) of the constitution provides that every person shall have the right ‘to participate in peaceful political activity intended to influence the composition and policies of the government’. Despite this constitutional commitment, highly problematic legislation remains on the books restricting freedom of expression and the media – the foundation of any citizen’s ability to engage in political life. In practice, the public broadcaster lacks independence, while the (often politically partisan) private media are harassed when they are too critical of government. The government has resisted attempts to advocate for legislation to guarantee access to public information. Despite these challenges, however, there have been real gains since the reintroduction of multi-party rule in 1994, with a great increase in the number of media outlets and the development of a flourishing civil society. Government has also taken steps to consult more widely in the adoption of national development policies.

A. Freedom of expression and the media

Unlike the situation during the one-party era, which was characterised by severe curbs on free expression and media freedom, the 1994 constitution guarantees freedoms of association (section 32), opinion (section 34), expression (section 35) and the press (section 36), although the freedoms of association, opinion, expression and press are not included in the list of rights which may not be derogated from.\footnote{Section 44(1) of the constitution. Section 44(2) however provides that no restrictions or limitations shall be placed on the exercise of any of the rights provided in the constitution other than those provided by law, which are reasonable, recognised by international human rights standards and necessary in an open and democratic society.} However, though the government does not exercise overt censorship on the media, free expression and media freedom are often curtailed through a combination of practice and legislation.
There are still a number of laws carried over from the colonial era and from the one-party regime that restrict media freedom. The most notorious include:

- The Preservation of Public Security Act (Act 58 of 1965), which makes it a criminal offence to publish anything that the Minister of Information may consider to be prejudicial to public security;
- The Penal Code (Act 22 of 1929), which criminalises the publication of anything that may cause public alarm; and
- The Censorship and Control of Entertainments Act (Cap.21:01) enacted in 1968, which prohibits the publication of material that is considered by the Censorship Board to be ‘undesirable’.

In 1995 the government published a new proposed Printed Publications Bill, to replace the 1947 Printed Publications Act (Act 18 of 1947) that governs the print media and provides for the registration of newspapers with the Government Archives. The proposed bill would have required publishers, printers, editors and reporters to be named in their publications. The Bill was not signed into law as it was seen as unnecessarily retrogressive and thus unpopular with publishers, editors and journalists. Among others, the Printed Publications Act requires publishers to deposit their publications with the National Archive of Malawi for documentation purposes and for access by the public.

**Harassment and intimidation of journalists**

Though the situation has greatly improved since the end of one-party rule, harassment and intimidation of journalists and political opponents nevertheless continue. For example, on Sunday, 11 March 2012, Frank Mwenefumbo, the Democratic Progressive Party (DPP) Regional Governor for the north, issued a call for the government to ban advertising in some newspapers regarded to be critical of government, followed by instructions to government employees not to buy and read such papers:

... [these] newspapers have been writing bad things about the DPP and our president instead of reporting on good things ... If I see DPP loyalists, be it a minister or a Chief Executive, reading The Nation, we will suspect them; you should stop that forthwith ... If I see The Nation newspaper in your offices we will suspect you. Stop buying it. Stop advertising in it! If you want adverts, you can do that on the internet.

Government issued a similar ban on advertising in the *The Nation* newspapers in March 2010. The Media Institute for Southern Africa (MISA) Malawi Chapter responded to this with a strongly worded statement:

We find the recent order to stop advertising in NPL [Nation Publications Limited] as well

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as threats on journalists in general very strange and retrogressive for Malawi’s nascent democracy. Attacks on the media and civil society and human rights defenders in general are attacks on democracy and should not be condoned.151

Similar threats were made by officials of President Joyce Banda’s People’s Party (PP) in 2013.152 Throughout 2010, 2011 and 2012 there were cases of police, party supporters and government officials implicated in the arbitrary arrest, intimidation, and beating of journalists attempting to report on political events in the country.153 Such practices continued in 2013.154 For example, in April 2013, President Joyce Banda told a delegation of MISA at Sanjika Palace that she stopped reading newspapers because of the criticism of her administration which she claimed ‘some derive[d] from gutter journalism’.155

5: Beating of a female photo journalist

Thoko Chikondi, a photojournalist at Nation Publications Limited and a member of the Photographers Association of Malawi (Photama), was on Thursday 30 May 2013 subjected to verbal insults and physical attack by the Chief Security officer at the Malawi National Assembly, Youngson Chilinda.

Chikondi met her fate while on duty as she was taking pictures of a team of consumer rights activists who went to the Malawi Parliament to present a petition. To the surprise of many, Chilinda attacked the defenceless young female photojournalist, landing a few blows in her face, and in the process causing the photographer to lose her camera lens cover as the assaulter seemed intent on destroying the camera.

Photama condemned the ‘unpleasant encounter’, saying it was deeply amazed that Malawians could be subjected to brutal actions that were buried through the ballot paper two decades ago, and coming from a senior security officer working for an organ like Parliament after retiring from the country’s disciplined Defence Force at a senior post.

SOURCE:


Other notable examples of intimidation of the media during the multi-party era include:156

• In March 2004, the police went to *The Nation* newspaper at night and ordered it to stop printing an article that included references to a Cabinet meeting. Just about the same time, two journalists, Raphael Tenthani, a local agent of the British Broadcasting Corporation (BBC) and Mabvuto Banda of *The Nation* newspaper were arrested for broadcasting and publishing, respectively, a report to the effect that President Bingu wa Mutharika could not sleep in the new State House, also used as Parliament, because he was seeing and was afraid of ghosts. The State House saw this as demeaning and ridiculing the president, portraying him as a superstitious person. The two were charged under the Protected Emblems and Names Act (Act 10 of 1967). The case was dropped by the state.

• In 2005 the First Lady, Ethel Mutharika, sued *The Nation* newspaper for a story that alleged that she and her entourage went shopping in expensive shops in Scotland while her husband was pleading for aid. The case was dropped.

• On 2 February 2008, the police in Lilongwe arrested Blantyre Newspapers’ reporter Mike Chipalasa and the editor of one of Blantyre Newspapers’ publications, James Mphande, for publishing a ‘false story likely to cause fear and public alarm’ for reporting on an opposition statement that the government had hired experts to rig the 2009 elections.157 The statement is said to have been made by John Tembo, the president of the opposition Malawi Congress Party (MCP).

• On 12 March 2008, police in the northern city of Mzuzu arrested Wanangwa Tembo, a Blantyre Newspapers photo journalist for taking photographs of a police officer arrested by officials of the Anti-Corruption Bureau (ACB) after the police officer had attempted to receive a bribe from an arrested man.158 A few other journalists were physically harassed by the police when they demanded the release of their colleague and his camera.

• On 18 April 2008, Journalist Maxwell Ng’ambi was arrested by police on suspicion that he intended to interview a former Speaker of Parliament and Cabinet minister, Sam Mpasu, in prison without permission to do so. Mpasu was convicted by a magistrate’s court on 8 April 2008 on three charges of abuse of office involving procurement of education materials in 1994 and was sentenced to six years’ imprisonment. In a related development, the police also detained another journalist, Chinyeke Tembo, who went to enquire about the arrest of his colleague.

• On 12 September 2011, police arrested journalist Ernest Mahwayo for taking pictures of President Bingu wa Mutharika’s Ndata Farm, allegedly without permission. Mahwayo was an assistant editor for the *Mkwaso* newspaper, published by Montfort Media, a company owned by the Catholic Church in the Balaka district of eastern Malawi.

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On 15 October 2012, Justice Mponda of Malawi Voice, an online newspaper, was arrested for publishing articles deemed to be seditious, false and treasonous aimed at fomenting public anger against President Joyce Banda and her government.

The effect of such conduct by government officials and politicians is to intimidate and silence the press when it conducts itself as a critical voice.

**Broadcast media**

Until 1998, the Malawi Broadcasting Corporation Act (Cap.20:01) gave the Minister of Information direct control over the public media. It nearly also gave the Malawi Broadcasting Corporation (MBC) a monopoly over the country’s radio broadcasting. By law, broadcasting licensing was the prerogative of the Minister of Information, who also had power to determine the content of broadcasts by the MBC.

Since the enactment of the Communications Act in 1998 (Cap.41:98), licensing powers and the regulation of electronic media, including radio, television and internet have been vested in the Malawi Communications Regulatory Authority (MACRA). The act also contains sections that regulate the provision of postal services, fixed and mobile telecommunications, radio and television broadcasting, frequency allocation, internet services, communications policy and licensing. The Act provides for three regimes of radio broadcasting in the country: public, private and community. At present, the public broadcasters are the MBC and Television Malawi (TVM). The MBC operates the country’s two largest radio stations, and there are approximately 18 private radio stations, some with more limited coverage operating mainly in urban areas or as community radios in rural or urban areas, and a few covering the whole country; and at least three private television stations with just local coverage.

The Act gives the MBC and TVM some editorial independence by requiring balanced programming, fair and equal news coverage, access by all political parties, diverse ideas and opinions, critical analysis and investigative reporting. However, in practice, both MBC Radio 1 and 2, and TVM are regarded to be mouthpieces of the political party in power, giving ‘unstinted’ coverage to party personalities and events, failing to open up to the opposition and public to criticism.

In August 2013, and in the run-up to the May 2014 general elections, the MBC and TVM came under heavy criticism from civil society organisations, the private media, media...
analysts, academics, and religious bodies for failure to grant a fair and equitable voice to the opposition. They said the two state broadcasters were being used as a propaganda tool by the political party in power to castigate opposition politicians and critics of the government and airing unbalanced stories on pre-election events. Some civil society organisations and media analysts called for public protest against the MBC and TVM.

### 6: Why not a peaceful popular revolution?

From 2006 to 2009 the national budgets were passed mostly due to public pressure led by civil society (NGOs, churches and university students). For days, the public camped at the New State House to pressurise parliamentarians to pass the national budget. The opposition MPs capitulated and the budget was passed. This demonstrates that public pressure works. Some analysts have proposed that listeners, advertisers and donors should boycott the MBC. However, this cannot work because it would result in killing the MBC, a national asset. Punishing the MBC economically cannot work either because that will be tantamount to pushing it further into the hands of the party in power. Only public pressure through daily sit-ins and peaceful demonstrations can change the conduct of the MBC.

For public pressure to be exerted on the MBC, civil society needs to educate the public that through their taxes and their Malawian citizenship, they are shareholders in the MBC. The public should be schooled on why the MBC should not be left to defy the laws of the land. The public should be educated that the government, or the party in power, cannot change the MBC because it is the major beneficiary. The public should be oriented to the fact that the opposition cannot change the MBC because it is waiting for its time to dominate the public broadcaster. The international community cannot change the MBC because in its definition of democratic elections fair and equitable coverage by public broadcasters are weightless. But the public can demand change at the MBC. Civil society can. Churches can. University students can. We can. Today.

**SOURCE:**

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166 [http://www.nyasatimes.com/2013/09/09/political-will-key-for-a-better-malawi-broadcasting-corporation/](http://www.nyasatimes.com/2013/09/09/political-will-key-for-a-better-malawi-broadcasting-corporation/).
The public broadcasters have been criticised for political biases during every election since 1994. Election observers have highlighted the same concerns, but not much has changed, and there are fears that the 2014 elections may face the same challenges. As Freedom House has rightly observed, ‘in the present context, it is difficult to foresee the strength of various parties and players heading into the 2014 elections. President Banda appears to be operating in a “honeymoon” environment, while most former government officials are discredited’.

The independence of the public broadcasting regulatory system itself has always been under threat from the executive and its agents. Media analysts have observed that ‘the existing legal framework in public broadcasting allows for the involvement of the executive beyond the policy-making mandate. There are no limitations to the extent of the executive’s interference in internal governance and content censorship.’ For example, in April 2005, President Bingu wa Mutharika dissolved the MACRA board, accusing it of ‘stinking’, because it failed to control private broadcasters who were critical of his government. He replaced it with a new board on 2 March 2006, whose chairperson was a former executive member of the ruling DPP.

The Communications Act places some limitations on political broadcasting by community radios (section 51). The materials to be broadcast on community radios are confined to culture, entertainment and educational programmes. No factual news, no political coverage and no paid advertisements and programmes are allowed to be aired. Community radios are, therefore, not allowed to provide political information that Malawian citizens may need to fully exercise their political rights. This legal restriction can, therefore, be regarded as retrogressive.

Some analysts have maintained that some of the statutory restrictions on broadcasters are legitimate limitations of freedom that are necessary in any liberal democracy. However, some of the restrictions are too broad and detract from the principles of pluralism and diversity of opinion, especially of a political nature. Among the provisions that are unduly restrictive are provisions of the Penal Code (Cap.7:01) which, among other things, prohibit insulting ‘foreign princes’ and wounding the religious feelings of any section of the population. The restrictions may, therefore, be seen to limit the citizen’s right to free expression in the political sphere as provided for in sections 35, 36 and 37 of the constitution.

At face value the numbers of programmes with political content aired on radio stations, and the numbers of both private and public stations airing them, one would be tempted to believe that generally there is open and uncensored political debate in Malawi. Over time there have been such programmes as *Ufulu ndi Udindo* (‘Rights and Responsibilities’); *Phungu* (‘the Representative’ or ‘Your Member of Parliament’); the ‘Decentralisation Programme’ on TVM; *Ndine Nzika* (‘I am a Citizen’); *Kanthu N’khama* (Hard Work Pays) and the Development Broadcasting Unit’s (DBU) programmes on MBC Radio 1 and 2; *News Talk* on Capital Radio FM102.5 and the ‘Democracy Forum’ on the Malawi Institute of Journalism (MIJ) Radio. There are also numerous uncensored and unedited live phone-in programmes on topical issues on almost all radio stations in the country. However, the opposition’s access to public broadcasters, both radio and television, is rather restricted, not by law, but in practice – through direct instructions from officials of the political party in power, government ministers, state appointment of loyal editors and chief executives; and also through self-censorship on the part of journalists and reporters in state media who fear reprisals from the ruling party and government officials if they give a voice to the opposition.

At its 14th regular meeting on 28 September 2007, the Malawi Human Rights Commission deliberated on the conduct and performance of the public broadcasters – MBC and TVM – and on the conduct of the Malawi Communications Regulatory Authority. The Commission noted that in some of the public broadcasters’ programmes the language used was ‘inappropriate ... and had the capacity to incite violence’, and impinged on the rights and freedoms of people, especially in relation to receiving the right to information and freedom of expression.179 The Commission undertook an advocacy visit to the two public broadcasters and MACRA and came to the conclusion that indeed some political programmes ‘had the capacity to incite violence and lead to a situation as the one that was occasioned in Rwanda’.180 The Commission shared its findings and recommendations with the Media Committee of Parliament. A taskforce comprising the Commission, the Parliamentary Committee on the Media, MBC, TVM and MACRA was proposed to call for a roundtable discussion leading to the review of the media laws, media policy, and codes of conduct for the public broadcasters. The taskforce never met.

MISA Malawi and the Media Council of Malawi have repeatedly made similar calls.181 MACRA included a budget line for the review of the Communications Act in its 2009/2010 annual budget182 with a view to calling for a stakeholder workshop to debate the issue but no new recommendations were made to Parliament. In March 2013, MISA, with funding from the Open Society Initiative for Southern Africa (OSISA), organised a workshop to discuss the transformation of the MBC from state to public service broadcaster. Public views on the need to turn the MBC into a ‘real’ public broadcaster by reviewing and changing its governing law,

180 Ibid., p.3.
182 Information provided by James Chimera of MACRA to the Ethics and Disciplinary Committee of the Media Council of Malawi, 17 February 2009.
re-training and reorienting the staff and decentralising its broadcasting stations to the districts or regions, were gathered through phone-in programmes on private radio stations, and findings of studies commissioned by private media organisations. The government, as usual, promised some reforms within the year but no immediate action was taken. Some media analysts have expressed doubt and scepticism that the MBC will change soon and on its own without being forced by the public.

7: The travails of Joy Radio and TV

- 1 April 2002: MACRA grants Joy Radio a license to conduct broadcasting services. Joy Radio was founded by former President Bakili Muluzi.
- 25 March 2007: Joy Radio is attacked by five unidentified thugs for broadcasting a live meeting addressed by Muluzi, ignoring another meeting being addressed by President Mutharika.
- April 2007: MACRA bans all private media outlets from broadcasting political rallies live without prior permission. This move primarily affects the main private radio stations, Capital Radio, Joy Radio and Zodiac Broadcasting Station.
- 13 July 2007: the High Court of Malawi nullifies the composition of the MACRA board after a successful application by Joy Radio charging that the board was illegal and its composition flouted provisions of the Communications Act.
- 29 October 2007, MACRA orders Joy TV – an affiliate of Joy Radio that stood to be the nation’s first private television station – to immediately stop all television broadcasts until the station is issued appropriate radio and broadcasting licences. Tailos Bakili, the station manager, claimed that they did indeed have all the relevant licences.
- 9 July 2008: State House Press Office warns Joy Radio against what it termed embarking on a disinformation crusade, airing libellous and slanderous programmes and playing lyrics with derogatory references to President Bingu wa Mutharika. Former president Bakili Muluzi and the radio’s station manager Peter Chisale are accused of being the architects of the disinformation and slander campaign, something they have denied.
- 10 July 2008: Immigration officials storm Joy Radio’s premises searching for foreigners allegedly employed there. The officials also visit station manager Chisale’s home village to ascertain his citizenship after the State House press office alleged he was a Zambian and threatened to deport him.
- 17 October 2008: Joy Radio stops its broadcasts at 6pm (local time) after MACRA revokes its licence, accusing the station of violating provisions of the Communications Act and its broadcasting licence by transferring its ownership to politicians.

183  http://www.nyasatimes.com/2013/05/06/malawi-govt-pledges-to-transform-mbc-into-real-public-broadcaster/.
184 Correspondence and phone interview with Aludin Osman, media consultant and managing director of Capital FM, May 2013.
185  http://www.nyasatimes.com/2013/05/06/malawi-govt-pledges-to-transform-mbc-into-real-public-broadcaster/.
186 http://mwnation.com/can-mbc-be-fixed/.
• 19 October 2008: Joy Radio resumes broadcasting at 2:30pm (local time) after obtaining an injunction restraining MACRA from revoking its licence.

• 20 November 2008: Joy Radio stops broadcasting following a court injunction lifting the restraining order against MACRA.

• 27 November 2008: Joy Radio appeals to the Supreme Court over the lifting of an injunction restraining MACRA from revoking its licence.

• 16 December 2008: The Supreme Court of Appeal reinstates the injunction restraining MACRA from revoking Joy Radio’s licence. The injunction had been lifted by a lower court after the regulatory body appealed. Joy Radio resumes broadcasting the same day after a 30-day blackout.

• 16 January 2009: The High Court declares that MACRA’s decision to revoke Joy Radio’s licence was unconstitutional, ultra vires and unreasonable, effectively dismissing all cases that MACRA had brought against the private radio station. Passing his ruling, Justice Anacklet Chipeta said MACRA behaved most disgracefully and irregularly in a lot of instances.

• April 2012: President Mutharika dies, Joy Radio is spared from political harassment and possible closure.

**Source:** ‘Radio station wins case against regulatory body’, IFEX, 20 January 2009.

**Print media**

Prior to the political transition at the beginning of the early 1990s, there were only two regular newspapers in the country, *The Daily Times* and the *Malawi News*, both printed by Blantyre Print, a family enterprise of the first president, Dr Hastings Kamuzu Banda. There were a few government owned magazines and newsletters published on a monthly basis. With the coming of liberal politics at the beginning of the 1990s, a number of privately owned newspapers emerged. Some of these had a very short lifespan.187

Today, the print media represent a broad spectrum of opinion; ten independent newspapers are available, and of the eight major papers in circulation, six are privately owned and most are editorial.188 All the dailies are available on line. There are no less than five online newspapers.

Until recently, the major newspapers were owned and controlled by politicians189 who were in the governing party and in the government.190 Much as the nature of the governing party has  

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190 For a recent listing of the regular papers in the country see W.C. Chirwa and L.Z. Manda, 2009, *Unpacking Challenges in the Field of Research Communication: Media development and content and quality of media training in Malawi – A Formative Study*, commissioned by the Relay: Communicating Research Though the Media Programme of PANOS London (UK).
changed with the formation of the DPP after the resignation of Bingu wa Mutharika from the United Democratic Front (UDF), and the formation of the PP after Joyce Banda's resignation from the DPP. The major newspapers are still controlled by families with political connections – now mostly in the opposition. President Mutharika often accused the private media of being sponsored and manipulated by former president Bakili Muluzi and former Cabinet minister, Aleke Banda.191 After the demise of Bingu wa Mutharika, his successor, Joyce Banda, remained sceptical of the major newspapers in the country.192 The relationship between the private media and government is thus characterised by mistrust, while the opposition continues to doubt the integrity of the public media.

A report by the London-based freedom of expression organisation Article 19 in 2000 argued that through such newspapers the views of politicians are disseminated as fact and as real news, which may do a disservice to any reader in search of objectivity, in-depth analysis, or facts.193 Moreover, when articles are written and published in one paper and picked up, cited or re-run in a paper owned by a fellow party member, the views they carry become more credible and the stories they tell more compelling. When these are reiterated by the MBC, for example in its press review programme, they are regarded as fact. In such a situation, robust debate, diversity of opinion, and democracy suffer.

B. Access to information

In order to participate meaningfully in policymaking, citizens should have a legal right of access to official information. In southern Africa, Malawi and South Africa are considered as having the most comprehensive protection for the right to access information.194 Section 37 of the constitution provides for access to information in the following words:

Every person shall have the right of access to all information held by the State or any of its organs at any level of Government in so far as such information is required for the exercise of his rights [new version as amended by Act 11 of 2010].

To date, however, there is no act of Parliament implementing this constitutional provision though there have been promises by Parliament that it will debate a draft bill on Access to Public Information prepared under the auspices of the media fraternity in the country, led by the National Media Institute of Southern Africa (NAMISA), a national chapter of the regional NGO body, the Media Institute of Southern Africa (MISA). The proposed bill aims at providing for the right of access to information; defining the scope of information which the public has a right to access; establishing an (independent) Public Information Commission and defining its functions; and promoting transparency and accountability among public authorities.195

191 MiSa, 2005, So this is Democracy: Report On The State Of The Media In Southern Africa. Windhoek: MiSa.
195 http://search.yahoo.com/search+Malawi+access+to+Information+Bill.
Among others, it states that:\(^{196}\)

5 (1) Subject to this Act –

(a) every person shall have the right of access to information which is under the control of a public authority;

(b) every public authority shall make available to the general public or, on request, to any person information which is under its control;

(c) every public authority shall make available to the general public or, on request, to any person access to public meetings or to places where information may be obtained; and

(d) every private body shall make available, on request, information which it holds on the person requesting for the information, if reasonable evidence is shown regarding the purpose of the request.

(2) A person who requests for information in pursuance of the right in subsection (1) need not give any reason or justification for that person’s interest in the information being requested for.

In sections 9 to 12 the draft bill provides conditions under which a public authority may claim exemption where disclosure of information is required. The conditions include:\(^{197}\) where disclosure would, or could, reasonably be expected to cause damage to the security of Malawi, the defence of Malawi or would divulge any information or matter which relates to the defence or security of a foreign government; would or could reasonably be expected to disclose, or enable a person to ascertain, the existence or identity of a confidential source of information in relation to the enforcement or administration of the law or endanger the life or physical safety of any person; would or could reasonably be expected to cause substantial harm to the legitimate interests of Malawi in crime prevention and any preliminary investigation of crime or other unlawful acts; would or could reasonably be expected to cause substantial harm to the legitimate interests of Malawi in the protection of the deliberative process of a public authority insofar as it involves the expressing of an opinion, advice or recommendation by a public authority, an employee thereof, or any person acting for or on behalf of the public authority but not in respect of factual, statistical, scientific, or technical information; and where the disclosure could or would affect the interest of a third party. In the last case, the would-be affected third party would have to be notified first before the disclosure is made.

The proposed text of the draft bill would therefore provide fair and effective processes (including appeals) for determining when information is in the public interest and should be made available, and when the executive may claim it is confidential.\(^{198}\) However, despite intense lobbying by media organisations the Access to Information Bill has not yet been tabled in Parliament. In 2010 and 2012, the government promised that the bill would be debated in Parliament,\(^{199}\) but was not tabled.

\(^{196}\) The full text is found at \textit{http://www.humanrightsinitiative.org/programs/ai/rti/news/Draft%20MISA%20Malawi%20ATP%20Bill%20%20Apr-04.pdf}.

\(^{197}\) \textit{Ibid}.

\(^{198}\) See \textit{http://www.docstoc.com/docs/18653965/access-to-information-legislation-in-malawi}.

\(^{199}\) \textit{http://allafrica.com/stories/201306050584.html}. 
8: Government unwillingness to provide policy information

Between the end of 2001 and beginning of 2002 when Malawi qualified for the World Bank and International Monetary Fund’s (IMF) Highly Indebted Poor Countries (HIPC) programme, the Malawi government was not forthcoming with information on how it was using the financial resources from the HIPC programme for social policy delivery. In January 2002, CSOs grouped under the Council for Non-governmental Organisations in Malawi (CONGOMA), an umbrella body, complained to both the government and the donors about the issue. The government reacted angrily to the civil society complaints, accusing some NGOs of undermining it:

[The NGOs] said government was not providing the public with information and that on most cases they have had to use ‘unethical means’ to get information that is supposed to be public. ‘It is pathetic that we have to fight just to be told what is supposed to be public information. Do we really have to be unethical to get information? ... At times we get surprised at the way our colleagues in government behave. One gets questions like: what do you want to do with that information, are you government?’

The concern of the non-governmental organisations (NGOs) about lack of transparency in how government is using the HIPC [highly indebted poor county] debt relief resources may be valid but their approach to the problem appears to be confrontational and counterproductive. We learn that on Monday NGOs appealed to the donors to assist in persuading the government to account for its use of HIPC resources. This is jumping the gun ... Have the NGOs made the public aware of the problems in their working relationships with the government? Why not issue a statement, stating the problem and its implications, so that the public [is] informed about the inadequacies of their government? They have a right to know.

**Source:**

In practice there are significant barriers to accessing information held by the government in Malawi. These include the political and physical inaccessibility of government officials, the limited circulation of official documents, the editorial policies and political control of national broadcasting houses, and the institutional weaknesses relating to documentation and storage of official information. As a result, public access to official information is limited and uneven. A 2013 study on the enabling environment for CSOs in Malawi found that ‘the majority of CSO leaders experience difficulty with accessing timely information about government budget and policy decisions regarding development, and feel access to information has declined in the last five years’.200

With the exception of the formulation of the national budget, and some few cases of social policies (e.g. on education, gender, land, health, HIV/Aids and orphans), the government does

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not have a culture and practice of publishing all draft papers setting out proposals for discussion at an early stage of developing new policies and seeking public comment on them. Draft policy documents and legislation are not routinely published and distributed for comment, and thus there are no public hearings held on such documents. For example, studies on the consultation process leading to the formulation of the Malawi Poverty Reduction Strategy (MPRS) indicate that important official information was not made readily available to the public, and there was a general reluctance on the part of government officials to provide it.\footnote{See, W.C. Chirwa and M. Nyirenda, 2002. ‘Consultation by Helicopter: People’s Participation in Policy Making in Malawi. A Report for ChristianAid (UK). London: ChristianAid; W.C. Chirwa and R. James, 2002, Long Walk to Participation: Civil Society’s Participation in Malawi’s PRSP Formulation. OXFAM (UK and Malawi) Policy Briefing Paper, March 2002.}

The findings of the 2013 study on the CSO-enabling environment showed that the majority of CSO leaders felt the government strategy on CSOs was inadequate, and that CSO participation and coordination in development plans and implementation was also inadequate, and sometimes very poor.\footnote{K. Howard, 2013, ‘Strategies For enabling Civil Society’, In Colombia, Malawi, Rwanda, And Zimbabwe – Draft Report, for CIDSE and The Act Alliance (Unpublished), pp.32–33.}

**Harassment and intimidation of critics**

A factor that negatively affects sourcing and effective use of public information is the fear of harassment and intimidation by the state and its agents, and by the political party in power at a particular time. The 2013 study observed that CSO leaders felt that they were sometimes or frequently referred to in derogatory terms by the authorities, and some of them were stigmatised for working on issues perceived as ‘unconventional’, such as citizen mobilisation, human rights accountability and particularly sexuality.\footnote{Ibid.} In some cases, especially between 2009 and 2013, CSO leaders experienced some form of verbal or physical harassment, including threats to life, damage to homes and vehicles, and arbitrary detention.

State-sponsored and politically-motivated violence against CSO critics and opposition politicians is not uncommon in Malawi. Between 2009 and 2011, a number of vocal CSO leaders and politicians had their homes and offices torched or petrol-bombed by agents of the political party in power, intimidated by politicians and harassed by the police.\footnote{For details see US Department of State, 2009, Human Rights Report: Malawi at http://www.state.gov/g/drl/rls/hrrpt/2009/af/135963.htm.} For example, in September 2012, unknown assailants threw petrol bombs at the homes and offices of several government critics, including activists Mcdonald Sembereka and Rafiq Hajat and opposition politician Salim Bagus. Human rights activists alleged that the government and DPP supporters orchestrated the attacks. The police neither conducted any meaningful investigations nor arrested those responsible for the attacks.
9: Harassment of academic and CSO critics

Between 2009 and 2011 authorities also intimidated and harassed university lecturers and students who were at the forefront of criticising the government’s poor human rights and governance records.

In February 2011, the Inspector General of Police, Peter Mukhito, interrogated University of Malawi lecturer, Blessing Chisinga, after he delivered a lecture on the causes of mass protests in Tunisia and Egypt as examples of failure of public policy implementation. In reaction, university lecturers boycotted classes, demanding an apology from Mukhito and calling on the authorities to respect academic freedom. The Chancellor College section of the University of Malawi’s academic staff union supported the boycott and Jessie Kabwila Kapusula, the union’s acting president, received anonymous death threats. Kapasula and three colleagues were later dismissed by the university for supporting the boycott, but were saved by a court ruling.

Source:

In September 2011 plainclothes police interrogated administrative staff of the Polytechnic, a constituent college of the University of Malawi, about the existence of ‘a political group’, the Youth for Freedom and Democracy (YFD), and the student publication, the Weekly Political Update. Students called this move illegal and contrary to the Kampala Declaration which grants academic freedom, bars state invasion of academic campuses and interference with intellectual affairs. During the next week, Robert Chasowa, engineering student and political activist, vice president of YFD and outspoken government critic, was found dead at the Polytechnic campus with a deep cut to his head. Although police ruled his death a suicide, civil society activists accused the government of involvement in his death.

Source:

On 11 October 2011, police arrested five civil society activists – Habiba Osman, Billy Mayaya, Brian Nyasulu, Ben Chiza Mkandawire and Comfort Chiseko – on charges of ‘holding an illegal demonstration’. They were taking part in a small demonstration outside Parliament, calling on Mutharika to hold a referendum for his resignation and an early election. The activists were released on bail five days later.

Source:
Similar tactics are used against opposition politicians, often using criminal laws such as the Protected Emblems and Names Act (Act 10 of 1967) and laws on treason. Most of these are inconsistent with the current political and constitutional order.\textsuperscript{205} The Corrupt Practices Act (Act 18 of 1995, amended in 2004) has also been used to settle political scores and to silence critics.

- In 2005, Gwanda Chakuamba, the former vice president of Bingu wa Mutharika’s DPP was arrested for statements made at a political rally during which he is alleged to have referred to Mutharika as a ‘brute’ and a ‘drunkard’. He was charged under the Protected Emblems and Names Act (Act 10 of 1967) with insulting the president.\textsuperscript{206} He was convicted and given a suspended sentence because of his advanced age – over 60 years and could therefore not be given a term of imprisonment.

- At least ten members of the UDF were arrested following the arrest of Cassim Chilumpha, Malawi’s vice president on 28 April 2006, on charges of treason for allegedly plotting to assassinate the president. On Wednesday, 3 May 2006, police in Lilongwe, Blantyre and Zomba, arrested the 10 during the early morning hours in connection with Chilumpha’s treason case.\textsuperscript{207} The UDF condemned the arrests as a ‘political witch-hunt’. The politicians were released a few days later without any charges. A closer look at the list of those arrested suggests that the majority of them were Muslims, suggesting a religious connection with both Bakili Muluzi and Cassim Chilumpha.\textsuperscript{208} According to one of those arrested, the arrests were ‘a desperate attempt at silencing’ them.\textsuperscript{209}

- On 12 February 2012, Ralph Kasambara, a lawyer and human rights activist and a former Attorney General in President Mutharika’s government, was arrested for saying the president ‘has become more autocratic and thinks he has absolute power’ and calling on Malawians to stop recognising him as president and his administration. He spent about a week in jail and was then released on bail.

- On Tuesday, 20 March 2012, Atupele Muluzi, the son of Malawi’s former President Bakili Muluzi, and a youthful presidential aspirant of Malawi’s opposition UDF was arrested allegedly for inciting violence and public disorder. He had addressed a rally the previous Sunday in Lilongwe, Malawi’s capital, after police had attempted to block him. Atupele’s supporters and those interested in listening to him reacted by torching a police unit and police houses in the area. He was released on police bail after several days in prison.

\textsuperscript{205} For these see the AfriMAP Report on the Justice Sector: F.E. Kanyongolo, 2006, Malawi, Justice Sector and The Rule of Law, Johannesburg: AfriMAP.\textsuperscript{206} US State Department, 2005, Human Rights Report: Malawi.\textsuperscript{207} Those arrested included Kamulepo Kalua of the Malawi Democratic Party (MDP), Humphrey Mvula, Director of Research of the United Democratic Front (UDF), Hophmally Makande of the UDF, Muhammad Kulesi of the UDF and former Ambassador to Libya, Morris Kachimbwinda, John Banda, Ndaila Onani, Sheikh Daudi Afasi, and Mrs Kadango (in place of her husband Shabban Kadango who was at large).\textsuperscript{208} The Nation, Thursday, 4 May 2006.\textsuperscript{209} Kamlepo Kalua, president of the Malawi Democratic Party (MDP), one of the first parties to emerge during the fight for multi-party democracy during the early 1990s. Kamlepo Kalua’s response provided at the AfriMAP Advocacy Workshop for political parties, Cresta Hotel, Lilongwe, 19 August 2006.
In July 2013, thugs believed to be members or supporters of President Joyce Banda’s PP attacked the home of Judith Ngwira, a member of the Jubilee 50 Movement, a youth movement campaigning for political and economic transformation that is youth-friendly.\(^{210}\) The Jubilee 50 Movement is associated with Atupele Muluzi, the president of the UDF, but has a much wider agenda than party politics. It advocates for youth participation in politics and development.

Investigations of politicians and officials connected with the Muluzi UDF government by the ACB have also been seen as politically motivated. These have led to the arrest and trial in court, among others, of Friday Jumbe, former Minister of Finance; Philip Bwanali, a minister in the Muluzi government; Yusuf Mwawa, minister in both the Muluzi and Bingu governments (his father was a close family friend of the former president); Humphrey Mvula, member of the UDF central executive; and Sam Mpasu, former Speaker of the National Assembly in the Muluzi government.\(^{211}\) Much as these people may indeed have committed criminal acts, the manner and timing of their arrests are seen, by the opposition, as ‘being used to silence political opponents’.\(^{212}\)

A good illustration of poor timing of arrest is probably that of Bakili Muluzi who was arrested on 27 February 2009 and charged with over 80 counts\(^ {213}\) of fraud, abuse of office and corruption involving an amount of MK 1.7 billion (about US$ 12.14 million at the time of the arrest). The arrest took place shortly before the beginning of the official campaigning period for the 2009 election. Muluzi was at the time fighting for his come-back and planning to stand in the presidential race for a third time after having served two consecutive terms as required by the constitution. His arrest could therefore be regarded as a move to weaken his campaign. At the time of completion of this study his case was still in court, partly because the proceedings had been disrupted by his ill health that forced him to seek medical services in the United Kingdom, and partly also because preliminary issues related to the case were still being resolved in court.

These cases have led some analysts to argue that cases of corruption dealt with by the ACB are closely tied to neo-patrimonial politics:

This mission observed that the ACB is now perceived to be an extended arm of the government, prosecuting (albeit correctly) first and foremost prominent political adversaries. The Bureau’s image is thus tainted as a political instrument for dealing with the opposition. However, the truth is that most of the Bureau’s targets are people who were politically connected to those in power or were actually in power themselves and thus used such an advantage to shield themselves. Political patronage either facilitated or


\(^{213}\) The 80 counts were later consolidated and reduced to less than half the original figure.
shielded corrupt practices. Thus, the pervasive patronage politics that are such a dominant feature of the Malawian political context compound the issues in this debate.\footnote{See DfID, 2005. \textit{Drivers of Change Report}.} Although the integrity of individual politicians and senior civil servants may not necessarily be in doubt, the system of political favouritism, opportunism and dependence embedded in a culture of neo-patrimonial relations makes the pursuit of a truly independent mandate very difficult.\footnote{W.C. Chirwa and L. Koechlin, 2006, \textit{Horizontal Capacity Assessment Of The Constitutional Bodies, The Anti-Corruption Bureau, and Related Institutions in The Legislature, The Executive, Civil Society and The Informal Justices Sector Of Malawi}, commissioned by the Democracy Consolidation Programme (DCP) of the Inter-Ministerial Committee on Human Rights and Democracy (IMCHRD) and the United Nations Development Programme (UNDP). Lilongwe.}

The loud cries of political persecution are, therefore, meant to attract public sympathies and to intimidate those enforcing the law as criminal acts are hidden under political persecution.

Further evidence of neo-patrimonial politics in the ACB’s work has also come from politicians on the government side. For example, on Tuesday 20 November 2012, Hopfally Makande, Publicity Secretary for the PP accused the former head of the ACB, Alex Nampota, of costing Malawi a lot of public funds due to his inabilities and incompetence while serving in his position. Makande accused Nampota of ‘shielding fat corrupt cats during the Mutharika regime’. A few months before the accusations were levelled against him, Nampota was arrested and granted bail on abuse of office charges before being fired. There was more than a year left on his contract when President Joyce Banda, who became president after Mutharika’s death, fired the ACB director.\footnote{http://www.nyasatimes.com/malawi/2012/11/21/makande-blasts-fired-malawi-anti-graft-boss-nampota-he-lacked-professionalism/} A dispute over his contractual benefits also followed his dismissal.

\section*{c. Freedom of association}

Chapter IV of the constitution guarantees freedom of association (section 32), freedom of conscience (section 33), freedom of opinion (section 34), freedom of expression (section 35), freedom of assembly (section 38), and the right ‘to participate in peaceful political activity intended to influence the composition and policies of the government’ (section 40[c]).

In terms of legal identity, most NGOs in Malawi are registered under the 1962 Trustees Incorporation Act (Cap.5:03) as trusts or under the 1985 Companies Act (Cap.46:03) as companies limited by guarantee. In addition, the Non-governmental Organisations Act (Act 3 of 2001) requires the NGOs to register as members of the Council for Non-governmental Organisations in Malawi (CONGOMA), an umbrella body. The NGO Act creates a regulatory board whose chairperson is appointed by the president, and reports to the Ministry responsible for Social Welfare and Community Development. Some of the board members are nominated by the NGOs themselves, though the process for doing so is not established by law.
Some sections of the law are under review by CSOs with a view to recommending possible changes to the Malawi Law Commission because they conflict with constitutional freedoms. For example, there is a section that makes membership of CONGOMA a mandatory requirement for registered NGOs. This conflicts with the constitutional provisions on freedom of association, and freedom of assembly contained in sections 32 and 38 of the constitution.

Much as freedom of association is constitutionally guaranteed, there is ample evidence that some minority groups do not effectively enjoy it. For example, ‘lesbian, gay, bisexual, and transgender (LGBT) persons in Malawi face legal challenges not experienced by non-LGBT residents’. Same-sex sexual activity is, by interpretation, illegal in Malawi. The Penal Code prohibits ‘carnal knowledge against the order of nature’, attempts to commit ‘carnal knowledge against the order of nature’, and acts of ‘gross indecency’. In late December 2009, a trans woman, Tiwonge Chimbalanga, and a man, Steven Monjeza, were arrested after holding a traditional ‘engagement’ party. On 18 May 2010, they were found guilty of having committed ‘unnatural offences’ and ‘indecent practices between males’. Human rights activists and Malawi’s development partners argued that this was a violation of minority rights and freedom of association as enshrined in the country’s constitution. Some development partners withheld financial aid amounting close to US$ 400 million because, in their view, the government’s action was an indicator of bad governance.

On 29 May 2010, then President Bingu wa Mutharika pardoned both individuals. On 18 May 2012, President Joyce Banda announced her intention to repeal the laws criminalising same-sex sexual activity, and on 5 November 2012, the government suspended all laws that criminalised homosexuality, but the Malawi Law Society argued that it was unconstitutional for the government to arbitrarily suspend any law and would set a dangerous precedent for the future. Religious leaders were also strongly against the suspension. The laws were then sent to the Law Commission for review and the process has not been concluded. Human rights activists have observed that despite the move to suspend these laws, winning a total repeal will be an ‘uphill battle’ because the ‘Malawi culture remains conservative’ and ‘considers homosexuality a sin’.

Some religious minorities who are critical of government have, sometimes, also faced harassment and intimidation. The Rastafarians are a good example and were targeted by the Muluzi administration.
10: Arrest and death of a Rastafarian

On Friday 23 November 2001 the Malawi police in Blantyre arrested Evison Matafale, Malawi’s prominent reggae singer and a campaigner for social justice, on allegations that the musician had authored a defamatory letter. Matafele later died while in police custody.

According to a group of Rastafarians who stormed The Chronicle newspaper’s offices in Lilongwe on Wednesday 28 November, Matafale was arrested after he issued a hard-hitting letter accusing the government and the UDF of exploiting and ill-treating poor people in the villages. Matafale was said to have spent the night at Chileka police station outside Blantyre before being taken to Lilongwe police station.

The police maintained that he was taken to the hospital where he died of pneumonia. The circumstances surrounding his death raised suspicion in the minds of many Malawians. It is generally believed that the government of the day had a hand in his death.

**Sources:**

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D. Civil society

Malawi has a vibrant and growing civil society that is involved in the country’s economic, social and political sectors. Seventy years of colonial rule followed by thirty years of one-party state dictatorship had a negative impact on the growth and development of civil society in the country. Trade unions and farmers’ organisations in particular were closely aligned to the ruling party, though religious organisations remained independent with most of their activities taking place at community level and focusing on relief, charity and development. It is only more recently that Malawians have experienced living in an open and plural society. At the time of political change in the early 1990s, civil society institutions played a crucial role as the mouthpiece of the people and as process managers of change.224

While the end of dictatorship in Malawi created more space for citizens to associate freely through different civil society formations, civil society organisations still face serious challenges related to capacity, funding, legitimacy and effectiveness. Most of the advocacy organisations are urban-based, with weak links to rural communities that comprise the bulk of the poor that civil society organisations claim to represent. Most political leaders still perceive CSOs as a threat to their power. Almost all CSOs also have a weak financial base and lack organisational skills, leaving them vulnerable to donor influence and manipulation. Thus, organisations tend to shift

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and switch from one focus to the other, starting as governance CSOs and ending up as HIV/AIDS and orphan care institutions.²²⁵

Examples of NGOs that have established some form of legitimacy to the extent of being recognised by the government include coalitions such as the Public Affairs Committee (PAC), the Human Rights Consultative Committee (HRCC), the Malawi Economic Justice Network (MEJN), the Malawi Health Equity Network (MHEN), the NGO Gender Coordination Network (NGO/GCN), the Civil Society Coalition on Quality Basic Education (CSCQBE), the Civil Society Agriculture Network (CISANET), Landnet, Gender Network, the Church and Society Programme of the Church of Central Africa Presbyterian (CCAP), the Catholic Commission for Justice and Peace (CCJP), the National Media Institute of Southern Africa (NAMISA), the Malawi Media Council (MMC), and other individual NGOs. However, there aren’t as many think-tank institutions in Malawi. The few that exist are relatively new and small, such as the Institute for Policy Interaction (IPI). The Centre for Social Concern (CSC) in Lilongwe also sometimes acts as a think-tank institution. Lacking are public interest organisations with the capacity to link government with the public.

**Civil society engagement with development policy-making**

There are three common ways through which civil society organisations are consulted by government on official policy. The first, and possibly most effective way, is where civil society institutions are included in the governing boards of state institutions. Some civil society institutions are given permanent seats on some governing boards. For example, the Malawi Council for the Churches has permanent seats on the Malawi National Examinations Board (MANEB) that manages and administers schools examinations, on the National AIDS Commission (NAC) and on the Censorship Board.²²⁶ Civil society institutions also have seats in the Human Rights Commission, which are filled by nominations from the civil society institutions and appointed according to the procedures set out in section 131 of the constitution.

Second is in the case where civil society organisations are invited by government or by any state institution to take part in the formulation of a particular policy or law. Good examples of these include the inclusion of civil society institutions in the formulation of the Malawi Vision 2020 project in 1995/1996, the Poverty Alleviation Programme (PAP) at about the same time, the Malawi Poverty Reduction Strategy in 2001/2002 and the Millennium Development Goals (MDGs) in 2003/2004. On paper, the consultative nature of these public policy frameworks has resulted in more pro-poor policy pronouncements. Effective implementation will depend in part on the continued monitoring and involvement of civil society.

The Law Commission stands out as the best example of a state institution that uses a systematic consultative process in the way it works. It publishes the laws that it intends to review and calls for public comment on them. A good example of this is the 2006–2007 constitutional review. It was widely advertised in the newspapers, on both private and public radio stations, the national television and by banners and posters throughout the country – including the distribution

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²²⁶ Interview with Canaan Phiri, General Secretary, Malawi Council for the Churches, 14 September 2006.
of a special commemorative cloth for women showing the dates for the Constitutional Review Conference. Through inclusion in this and other special law commissions, CSOs have also become part of the law-making process.

The third case is where the civil society institutions are members of a permanent forum for engagement. Such cases are rather rare. The key one is the Tripartite Social Dialogue forum between the Ministry of Labour and Vocational Training, trade unions and employers (often represented by the members of the Employers’ Consultative Association of Malawi [ECAM]). The Social Dialogue is an initiative of the International Labour Organisation (ILO). It meets once a year, often in September or October, to discuss all matters relating to labour, including the tripartite relationship between the government, the employers and labour, labour legislation and related issues.

A major limitation to the effectiveness of these institutions in policy dialogue arises from the fact that civic engagement and social dialogue are not politically neutral processes. Naturally, the state would like to preserve policy-making and implementation as its prerogatives and thus will always question the mandate of the civic bodies in policy matters. The result is that most of the CSOs regarded as being controversial and critical of government are often excluded from consultative fora and policy processes. Some of them have been forced to adopt a softer approach.227

This is even true of relations between government and trade unions, in many countries regarded with less suspicion than ‘foreign-funded’ NGOs. The trade unions have always maintained that tenant workers on agricultural farms are not adequately covered in the employment laws of the country, since they are covered under land laws and are not treated as workers in their own right. The trade unions are also critical of the government’s failure to monitor and enforce the implementation of minimum wages228 and of the government’s raising of the retirement age for civil servants from 55 to 65. The unions view this development as being insensitive to the effects of the HIV/AIDS pandemic on the country’s workforce and the country’s unemployment problems.229

E. Civil society and citizen mobilisation

The political and economic crisis of 2009–2012 defined a new role for CSOs in Malawi.230 Civil society leaders stepped into the vacuum left by political parties.231 Opposition parties were in disarray, the National Assembly was unable to play its role as a ‘platform for national

227 Interviews with Ollen Mwalubunju on 4 September 2005, then Executive Director of the Centre for Human Rights and Rehabilitation; Jacobs Nkhambule, Programme Officer, Church and Society Programme, Livingstonia Synod of the Church of Central Africa Presbyterian, 9 September 2005; and Moses Mkandawire, Programme Manager, Church and Society Programme, Livingstonia Synod of the Church of Central Africa Presbyterian, 18 December 2005.
230 Interview with Moses Mkandawire, Programme Manager, Church and Society Programme, Livingstonia Synod of the Church of Central Africa Presbyterian, 2 September 2012; and with MacDonald Sembereka, Presidential Advisor on Religious Affairs, 30 October 2012.
231 D. Cammack, November 2011, ‘Malawi’s Political Settlement in Crisis’, Background Paper published on behalf of the Africa Power and Politics Programme (APPP) by the Overseas Development Institute.
dialogue’, which had been the case since at least 2005. Party-political infighting in 2004–2009 resulted in an institutional breakdown throughout government, but especially in the opposition-dominated Assembly. Since 2009 the DPP’s dominance and Mutharika’s control of the ruling party resulted in the Assembly being little more than a rubber stamp of the executive and few DPP MPs ever quarrelled with the president’s programme. With regard to party organisation it was business-as-usual across all parties: no internal democracy, leadership struggles, weak ideologies and programmes, centralised management and funding and the supremacy of a single ‘big man’. In a mature democracy the issues championed by civil society would have been addressed by both sides in Parliament. In Malawi, however, politicians largely stood in the wings as ill-equipped NGO activists took the lead. They organised mass national demonstrations on 20 July 2011 that left 20 people shot dead by the police and hundreds arrested. Their demands centred on improvements to the social safety net, the rule of law, national infrastructure, fiscal policies, election processes, human rights protection and human capacity and livelihoods.

11: List of CSO demands in July 2011

*Comments in italics by Diana Cammack*

- Ensure availability of and access to foreign exchange.
- Facilitate the importation of fuel without interruptions.
- Replace the top management of the Electricity Supply Corporation of Malawi (ESCOM) and the Water Board with independent experts to reverse shortages within three months.
- The Anti-corruption Bureau (ACB) to investigate those implicated in the Malawi Housing Corporation (MHC) scandal. (Peter Mutharika, the president’s younger brother, and other senior officials and politicians allegedly jumped the queue and received houses at knockdown prices.) The ACB to investigate all Cabinet ministers and public servants about unexplained wealth accumulated while holding office, and the Declaration of Assets bill to be ‘ratified’.
- President Mutharika to declare his assets and explain the source of funds for building his new Ndata Farm house (a photo was supplied).
- Nullify First Lady Callista Mutharika’s contract and repay her salary. (The First Lady was appointed as the Ambassador of Safe Motherhood). *She was appointed to a ‘volunteer’ job and was paid a generous salary by government. Dr Ntaba, the president’s spokesman, said in October hers wasn’t a ‘charity’ post, but a job for which she received a government salary.*

233 D. Cammack, November 2011, ‘Malawi’s Political Settlement in Crisis’, Background paper published on behalf of the Africa Power and Politics Programme (APPP) by the Overseas Development Institute.
234 Ibid.
Law Commission to review Penal Code (**the new section 46 allows the Minister of Information to ban publications**) and the new Injunctions Act (**delaying for three days any action on injunctions filed against government; Mutharika had signed the act into law even though there was an injunction filed against it**) and to make recommendations on their constitutionality within six months.

Mutharika to act in good faith toward Vice President Joyce Banda. **She was expelled from the DPP, has had her motorcade withdrawn, and has been barred from official duties as she is seen as a political threat to the DPP’s 2014 presidential candidate, Peter Mutharika. She started her own political party thereafter. The president filed a constitutional case to see if he could remove her from office, and in October there were rumours that she would be arrested for sedition.**

Government should hold local council elections within the next year.

The University Council should readmit the four dismissed lecturers and affirm that no spies will be allowed in lecture rooms.

Nullify the president’s order for NGOs to pay MK 2 million prior to any demonstration. *This decree was challenged in court.*

Halt the inequitable and politicised use of the public broadcasters (the MBC and TV Malawi). *This is a complaint going back to the pre-transitional period.*

The executive to stop disregarding court rulings and contempt of court charges.

Provide essential drugs to all hospitals and clinics. *This and following demands reflect the presence of health sector activists among the demonstration’s leadership. Other sectors have similar complaints but were not directly represented.*

Provide capacity building for health workers.

Pay back allowances (up to three years are overdue) to nurses.

Raise the national minimum wage to MK 25 000/month.

Ensure decent jobs and working conditions for all workers.

Institute a social protection system for the welfare of the poorest.

As Diana Cammack has rightly observed, ‘to meet these demands would be to develop Malawi’. However, none would be easily or quickly achieved, certainly not in a matter of months (e.g. water and electricity delivery). With political will, a few, such as local council elections, and ACB investigations of government officials could be initiated in relatively short order. But the demands were thrown together and not prioritised. Some, such as the one on Ndata Farm, were much less likely to be addressed than others. So the list was impossible to tackle sensibly. This undoubtedly slowed negotiations and probably made success impossible. By early September 2011, the UN-sponsored dialogue group had pared the list down to seven ‘key’ demands:

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235 D. Cammack, November 2011, *Malawi’s Political Settlement in Crisis*, Background Paper published on behalf of the Africa Power and Politics Programme (APP) by the Overseas Development Institute.
• Repeal of section 46 of the Penal Code, which gave the Minister of Information powers to ban publications such as newspapers. (The section was later repealed by the Joyce Banda administration.)

• Repeal of the ‘injunctions bill’, which stopped people from suing the government for three days. (This was also later repealed by the Joyce Banda administration.)

• Termination of the First Lady’s contract with government as the Ambassador of Safe Motherhood. (The contract was later terminated by the Joyce Banda administration.)

• The president to declare the source of his wealth and assets.

• Resolution of the academic freedom crisis at the University of Malawi. (This was done by the Mutharika administration.)

• Addressing the fuel shortages in Malawi.

This was still a mixed list and comprised items that could not be easily addressed, especially in the light of ongoing foreign exchange shortages, national political development and the president’s reluctance to lose face by reversing his own decisions or to be seen cooperating with or giving into pressure from civil society.

**Poverty reduction strategies**

Since 1994, poverty reduction has been the main development policy goal of the Malawi government. It was a campaign promise in the run-up to the adoption of multi-party politics between 1992 and 1994.

Even under the one-party regime, the ‘fight against the three dread enemies, ignorance, poverty, and disease’, was a pillar of official development strategy, under the Statement of Development Policy of 1967 and the Growth through Poverty Reduction document of 1989. The policy strategy centred on the provision of basic needs for human survival: adequate food, clothing and shelter, combined with increased access to education and medical and health facilities for the majority of the Malawi population.

Since 1994, however, the government has produced explicit policy frameworks for poverty reduction using a consultative approach. These include the national Poverty Alleviation Programme (PAP) adopted in 1995; the Vision 2020 document of 1997/1998; and the Malawi Poverty Reduction Strategy (MPRS) of 2000–2002, and the Malawi Growth and Development Strategy (MGDS) that subsequently replaced the MPRS. The development of these documents was a consultative process that involved cross-sections of the Malawian society, including the rural poor.

The making of the Vision 2020 document was probably the most consultative and the most participatory of all the three frameworks described above. Consultative meetings were arranged from the villages, to the district, to the regional and the national conferences. There were opportunities for the public to participate through radio programmes, and through written or oral submissions to the coordinators of the process. The participating institutions included women’s groups, youth organisations, trade unions, small businesses and community-based organisations.

The effectiveness of consultation for the development of the poverty strategies was, however, limited by the short timeframe given to the processes, the differences of understanding...
of what the framework was about, and the tensions between government and civil society organisations.\footnote{See W.C. Chirwa and M. Nyirenda, 2002, ‘Consultation by Helicopter’: People’s Participation in Policy Making in Malawi. A Report for ChristianAID (UK). London: ChristianAID; W.C. Chirwa and R. James, March 2002, Long Walk to Participation: Civil Society’s Participation in Malawi’s PRSP Formulation. OXFAM (UK and Malawi) Policy Briefing Paper.} The timeframe for consultation with the poor in the rural areas was rather limited, to the extent that the process stopped at the district headquarters. Initially, there was no common understanding of what this process was all about. To some people it was just a mechanism for accessing resources under the IMF/World Bank Highly Indebted Poor Countries (HIPC) initiative. To others it was a budgeting tool, and yet others took it for just another consultative process on public policy-making. It took a long period of time for a common understanding to emerge. Civil society organisations that participated in the process often complained of short notices for meetings, lack of access to key public information that was in the custody of the government, and lack of ownership of the process. The feeling was that the CSOs were being invited as ‘strangers’ rather than as co-owners of the strategy. On their part, government officials complained of the ‘militant attitude’ among some members of the key civil society organisations. Nevertheless, regardless of the tensions that characterised the process, the CSO institutions that participated in the process were quite effective in shaping the country’s pro-poor policies outlined in the document.\footnote{W.C. Chirwa and M. Nyirenda, 2002. ‘Consultation by Helicopter’: People’s Participation in Policy Making in Malawi. A Report for ChristianAID (UK). London: ChristianAID; W.C. Chirwa and R. James, March 2002, Long Walk to Participation: Civil Society’s Participation in Malawi’s PRSP Formulation. OXFAM (UK and Malawi) Policy Briefing Paper.}

Since 2006, the MPRS has been replaced by the Malawi Growth and Development Strategy 1. Since the MGDS is premised on the MPRS, Vision 2020 and the Poverty Alleviation Programme (PAP), its contents include the popular views and aspirations of the public obtained through the consultative process adopted in the making of the earlier documents. In addition to the consultations for the formulation of the PAP, Vision 2020 and MPRS, the Malawi government held consultations for the formulation of the MGDS 1 itself. To justify consultation, the preface to the MGDS 1 document states that:

The development process of the MGDS has been participatory throughout to incorporate views of all stakeholders. The consultation process included the Executive arm of Government, Parliament, Judiciary, Civil Society, and Donors. Apart from the above mentioned groups, the core team went on consultation at the regional level. This makes the MGDS a document for the nation. The activities underpinning this MGDS draws from the issues defined in the Malawi Economic Growth Strategy (MEGS), lessons from Malawi Poverty Reduction Strategy (MPRS) implementation, Malawi Public Sector Investment Programme (MPSIP), current government policies and other works and studies done by the civil society and research institutions... The MGDS is linked to vision 2020 and Malawi Millennium Development Goals (MMDGs) that are long-term development aspirations of the Malawians. In addition, the MGDS took note of the weaknesses found in the Malawi Poverty Reduction Strategy (MPRS) and the Malawi Economic Growth Strategy (MEGS).\footnote{Malawi Government, Ministry of Finance, 2006, The Malawi Growth and Development Strategy I. Lilongwe: Ministry of Finance, Preface.}
Like the other policy frameworks that preceded it, the development of the MGDS 1 was chaired by a steering committee drawn from the civil service. Leadership was provided by the Principal Secretary for Administration and Finance in the Ministry of Finance and the Secretary for Economic Planning and Development. Other members of the steering committee were the Secretary for Trade and Private Sector Development, the Chief Executive for the Malawi Investment Promotion Agency and the General Manager for Economic Services of the Reserve Bank of Malawi. These coordinated the work of a technical working group comprising 11 members, most of them drawn from government ministries and departments. Further technical support was provided by the MPRS review team, chaired by an official from the Ministry of Economic Planning, and from the National Statistical Office (NSO) under the leadership of the Commissioner for Census and Statistics and the staff of the NSO. The drafting of the document was done by a technical team from government and other professional institutions such as the University of Malawi. The development of the MGDS was, therefore, more technocratic than popular. Consultation was selective, often limited to the professional class, the key branches of government and the donors.

**Budget formulation**

Since 2000, the Malawi government has adopted a consultative approach to budget formulation. Pre-budget workshops and ‘breakfast meetings’ organised by the Ministry of Finance are held every year between the months of February and May, before the budget session of Parliament in June. The participants are drawn from civil society organisations such as the members of coalitions including the PAC, HRCC, MEJN, MHEN, CISANET and CSCQBE, individual NGOs, faith organisations and the universities. The government also places notifications in the newspapers for submissions from the public and CSOs. How the government processes and harmonises these submissions with its own set priorities, let alone with the prescriptions of the donors, is not clear.

CSOs, using the MPRSP (and now the MGDS) budget monitoring framework, have, on a number of occasions, taken the government to task on the inconsistencies between official budgetary priorities and the actual budget implementation. CSOs have also been quite effective in influencing the debate on the national budget. For example, when the opposition threatened to reject the 2007 national budget, the CSOs staged a vigil outside Parliament until the budget was successfully discussed and passed. The opposition wanted to use their numerical advantage in the house to force the Speaker to declare vacant the seats of opposition members who had crossed over to the government side contrary to section 65 of the constitution.\(^{239}\) The affected members obtained court injunctions against the Speaker.\(^{240}\) The opposition MPs in the house were unhappy with the development and threatened to boycott the debate on the national budget, as a bargaining position. They argued that debating section 65 and declaring vacant the seats of those regarded to have crossed the floor was as serious a matter as debating the budget was. The opposition used this argument in the subsequent sittings of Parliament up to 2012.\(^{241}\)

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example, they rejected some votes in the 2008 and 2009 national budgets for political reasons, including the section 65 issue. They specifically targeted votes for the Malawi Broadcasting Corporation (MBC) and Television Malawi (TVM) for the biased reporting that favoured the government, and for giving a platform to the MPs regarded to have crossed the floor to talk ill of the parties they had left. Lobbying by the Media Council of Malawi, a voluntary membership body that regulates the media in Malawi, paid no dividends. In 2012, the opposition again threatened to shoot down the budget if issues related to section 65 were not resolved.

Lobbying, political threats and some incidents of violent confrontations between CSOs and university students, on the one side, and the opposition MPs, on the other, have created an environment that forced the opposition not to reject the national budget every year between 2005 and 2012.

12: Budget monitoring by a civil society coalition

The Civil Society Coalition for Quality Basic Education (CSCQBE), a civil society membership-based organisation with some 60 members, monitored the 2004 education budget implementation. Early March 2005 it issued its report on how the Ministry of Education was implementing the education budget. Among its findings were that the ministry failed to account for close to MK 1 billion. The CSCQBE maintained that the ministry was unable to account for the funds allocated for the purchase of teaching and learning materials, but which was frequently used to pay for other educational areas of expenditure. The ministry could also not explain why this took place:

We established that there was allocation for teaching and learning materials but nothing was bought ... The Ministry should be able to account for this money. Nothing was bought but they can’t account for the money. Their reconciliation is not up to date. We wonder how the Ministry of Finance is still financing the Ministry of Education ... Out of MK 11.3 billion budget, close to MK 10 billion was allocated to salaries with the rest left to cater for other recurrent transactions (ORT) and purchase of teaching and learning materials, but nothing was bought.

On its part, the ministry counter argued that it used some of the money to pay off arrears to suppliers who sold it teaching and learning materials during the previous fiscal year: ‘Some suppliers had long-term contracts and were just supplying without a cut-off point. I don’t know why it was like this. So, we are paying the arrears’ (Fletcher Zenengeya, Principal Secretary in the Ministry of Education).

The ministry maintained that it was still buying teaching and learning materials despite having huge arrears that they could not reveal.

**Source:**
The Daily Times, Wednesday 29 March 2006.

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Major development projects
There are no known legal requirements for public hearings before a government decision is made to embark on a major development project that affects a large number of people. However, government practice has been to consult with various stakeholders before such a project is implemented. Consultation does not necessarily bind the government to accepting any view of a particular stakeholder, and may not necessarily result in changes to the plans put forward by the government.

Environmental impact assessments (EIAs) are routinely carried out for major development projects, but these are not necessarily made public, and comment is not necessarily invited for such major projects. Often these are for the use of experts and technocrats. In 2007 CSOs opposed the commencement of the mining of uranium by Paladin Resources of Australia, arguing that the project would have devastating environmental effects on the local areas and communities. The CSOs also observed that Malawi did not have a proper legislative framework for the management of the mine’s waste products. They threatened to sue the government to have the mining project stopped. Several consultative meetings followed before an agreement was finally reached and the government proceeded with the signing of an agreement with the uranium mining company.

A similar development occurred in 2012 when the government proposed to sign an agreement with Globe Metals and Mining Limited (Globe) in respect of the Kanyika Niobium Project and acquired shareholding in Globe Africa, a Malawian-based company. Globe carried out a Bankable Feasibility Study (BFS) for the Kanyika Niobium Project, which included an EIA.243 Malawian CSOs under the auspices of ActionAid organised a review of the EIA and developed some advocacy strategies around socio-economic issues affecting communities in the areas surrounding the proposed mining sites. Consultative meetings were held with stakeholders and local communities in the area.244 Consultations continued in 2013 to refine the Development Agreement (DA)245 to take into account the concerns of the CSOs and the local communities. As of December 2013, however, the final document had not been approved.246

Capacity building support for CSOs
Since the reintroduction of political pluralism in the early 1990s, a number of international institutions and development partners have supported Malawian CSOs in building citizen capacity for effective participation in policy processes.247 However, due to their small sizes, limited coverage, limited connectedness with international organisations and the private sector both locally and internationally, most CSOs in Malawi do not have a wide pool of possible sources of financial and technical support. Within the country, there are a limited number of foundations, philanthropic organisations and other international bodies that provide funding to CSOs on a

245 http://www.infomine.com/index/pr/PB299726.PDF.
246 http://mininginmalawi.com/tag/kanyika-niobium-project/.
large scale. Much of the funding is provided on a short-term basis and for small community-based projects. Very few local CSOs in Malawi have programmes that cover several districts and for several years. Pool or basket funding for CSOs is limited, the best example being the World Bank fund on governance only recently advertised, and the Tilitonse Fund. The latter is a grant-making facility jointly funded by the UK Department for International Development (DFID), the Royal Norwegian Embassy, Irish Aid and the EU. In line with the government of Malawi’s Policy Frameworks, especially the Malawi Growth and Development Strategy, the Tilitonse Fund supports civil society to play a role in promoting democratic governance. The overall goal of the fund is to support governance in Malawi that is increasingly inclusive, accountable and responsive to citizens. Tilitonse was designed with the underlying principle that increased levels of citizen voice and action and interaction with government, the private sector and others, can create increased responsiveness in duty bearers and power holders in and outside government and lead to greater social inclusion, increased accountability and improved delivery of basic services. Total funding to the Tilitonse Fund currently stands at £12.5 million to £14 million. The amount available for grants is £12 million. The Fund will run for four years initially from October 2011 to September 2015, with the possibility of extending it for another three years. The Tilitonse Fund aims to deliver the following four outputs:

- Civil society promotes transparent, accountable, capable and responsive governance;
- Civil society supports citizens to promote social inclusion;
- Civil society supports citizens to hold service providers to account for service delivery performance; and
- Civil society organisations are made capable, accountable and responsive to build coalitions with others.

By November 2012 the Fund had approved and financed not less than 33 CSO projects. For the period between 2012 and 2013, the fund will provide support to CSO activities aimed at:

- Increasing the capacity of CSOs to enable citizens, particularly the poor and excluded groups, to claim their rights;
- Increasing the poor and vulnerable people’s access to information on rights, entitlements and responsibilities;
- Strengthening monitoring of policy and budget commitments, service delivery and public resource management by Malawian organisations;
- Improving the engagement of Malawian organisations in influencing policies, strategies and resource allocations at local and national levels; and
- Improving transparency and accountability in the extractive (e.g. mining) industry.

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249 See details at http://tilitonsefund.org/.
I. Recommendations

- The government should introduce to Parliament a bill to repeal those provisions of the Preservation of Public Security Act (Act 58 of 1965), the Penal Code (Act 22 of 1929) and the Censorship and Control of Entertainments Act that infringe upon the rights to freedom of expression and the media.
- The proposed review of media laws, media policy and codes of conduct for the public broadcasters should be conducted as a matter of urgency.
- The Anti-Corruption Bureau should conduct its professional business in such a manner that it is not negatively perceived as a political agency and tool and should not prioritise the arrest and prosecution of politicians alone.
- The proposed Access to Information Bill should be tabled and debated in Parliament with a view to passing it.
- The NGO Act should be reviewed and amended to provide the necessary independence for civil society bodies.
- Consultation procedures between government and civil society bodies on issues of public interest should be clearly institutionalised so as to make consultation and public participation common practices.
- Development partners should increase basket funding mechanisms to create more opportunities for funding and assisting in building CSO and local communities' capacity to participate in policy formulation and implementation processes.
- The private sector should provide meaningful opportunities for philanthropic support to CSOs and social corporate responsibilities to local communities.
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Elections

The political transition has been characterised by relatively peaceful elections starting with the 1993 referendum. Since then, there have been four presidential and parliamentary elections: in 1994, 1999, 2004, and 2009; and one set of local government elections in 1999. Serious concerns have been raised regarding the conduct of elections that include: the capacity and credibility of the Malawi Electoral Commission (MEC), voter registration and the first-past-the-post (FPTP) electoral system. These concerns are sufficiently serious to have caused many citizens to view the result of the 1999, 2004 and 2009 general elections as not reflecting the popular will of the majority of Malawians.

A. Legal and institutional framework

The opening chapter of the constitution, in section 6, provides that ‘save as otherwise provided in this Constitution, the authority to govern derives from the people of Malawi as expressed through universal and equal suffrage in elections held in accordance with this constitution in a manner prescribed by an Act of Parliament’. Section 40(3), within the chapter on human rights, then elaborates that ‘save as otherwise provided in this Constitution, every person shall have the right to vote, to do so in secret and to stand for election for public office’. Elections are governed by chapter VII, sections 75 to 77, which provide for the establishment, powers, functions and mandates of the Electoral Commission, and for the criteria to be able to vote.

Enabling the constitutional provisions on elections are three key acts of Parliament: the Electoral Commission Act (No.11 of 1998), the Parliamentary and Presidential Elections Act (Cap.2:01, No.31 of 1993); and the Local Government Elections Act\(^\text{251}\) (No. 24 of 1996). Closely related to these laws is the Political Parties Registration and Regulation Act (Cap.2:07, No.15

\(^{251}\) Part II of this Act was repealed by Act No.7 of 1999.
of 1993) in the sense that it provides a framework for political parties and their candidates to participate in elections.

**Voting rights**

Section 77 of the constitution provides that ‘any person shall be eligible to vote in any general election, by-election, presidential election, local government election or referendum’. It then goes on to provide a person is qualified to register as a voter in a particular constituency if he or she:

a) Is a citizen of Malawi or, if not a citizen, has been ordinarily resident in the republic for seven years;

b) Has attained the age of eighteen years; and

c) Is ordinarily resident in that constituency or was born there or is employed or carries on a business there.²⁵²

The constitutional provisions thus permit long-term residents to vote in addition to citizens. Section 77(3) of the Malawi Constitution sets out restrictions on voting, stating that:

No person shall be qualified for registration as a voter in a constituency if that person –

a) Is under any law in force in the republic adjudged or otherwise declared to be mentally incompetent;

b) Is under sentence of death imposed by a court having jurisdiction in the republic, either before or after the appointed day; or

c) Is disqualified from registration as a voter on the grounds of his or her having been convicted of any violation of any law relating to elections passed by Parliament and in force at the time of, or after, the commencement of this constitution, but such disqualification shall be valid only with respect to registration for the election in question and the person so disqualified shall be qualified to be registered as a voter in the next or any subsequent election.

Ordinary prisoners are eligible to vote, but in practice this has not been the case. The Electoral Commission argues that the reasons for failing to provide voting facilities to prisoners are purely logistical.²⁵³ Also denied the right to vote are Malawians living outside the country at the time of the elections. Malawi does not use the postal vote system, and no voting facilities are provided to Malawians abroad. This issue has not yet attracted public debate in the country. Given the advances in technology and increasing globalisation, the postal vote is an idea worth considering for future elections.

**Requirements to run for office**

Sections 51 and 80 of the Constitution prescribe age and other requirements for nomination for Parliament, Senate and the Presidency, respectively: 21 years for Parliament, 35 years for the Senate (now repealed), and 35 years for the Presidency. The other qualifications include:

²⁵² Constitution, section 77(2).

²⁵³ Interview with Anthony Masanza, Chief Elections Officer, Electoral Commission, Blantyre, 31 September 2005.
• Malawi citizenship at the time of nomination;
• Ability to speak and read the English language well enough to take an active part in the proceedings of Parliament;
• Registration as a voter in a constituency; and
• Birth, residence, work or operation of business in a constituency where one wants to stand as a member of Parliament.

The constitution further states that no person shall be qualified for nomination if he or she:
• Owes allegiance to a foreign country;
• Is under any law in force in the republic, adjudged or otherwise declared to be mentally incompetent, or of unsound mind;
• Has within the last seven years, been convicted by a competent court of a crime involving dishonesty or moral turpitude;
• Is an undischarged bankrupt, having been adjudged or otherwise declared bankrupt under any law in force in the republic;
• [In respect of Parliament] holds, or acts, in any public office or appointment, except where this Constitution provides that a person shall not be disqualified from standing for election solely on account of holding that office or appointment or where that person resigns from that office in order to stand;
• [In respect of the presidency] is the holder of a public office or a member of Parliament, unless that person resigns;
• Is a serving member of the Defence Forces or Malawi Police Force; and
• Has, within the last seven years, been convicted by a competent court of any violation of any law relating to election of the president or election of a member of Parliament.

There are no educational qualifications stated in the electoral law, except for the ability to speak and to read the English language. In practice, the MEC sets the educational qualifications for nomination. In 2004, the required qualification was the Malawi School Certificate of Education (MSCE), equivalent to ‘O’ level General Certificate of Education (GCE) of the UK. Those with qualifications lower than the MSCE were required to sit for an English proficiency test.

There have been no public debates on the age requirements for nominations for Parliament or for the Presidency. However, there has been some debate on the age ceiling for the office of state president. The proposal by civil society organisations to the Constitutional Review exercise was that no person older than 80 years of age should serve as president. The minimum age for one to stand for the Presidency should remain at 35 years.

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254 Interview with M. Mkandawire, Coordinator, Civil Society Task Force on the Review of the Constitution, 13 February 2006; the same discussion came up at the first AfriMAP Political Participation civil society advocacy workshop, May 2006.
13: Imprisonment of a member of Parliament

The seriousness of the implications for not having the educational qualification to support candidature has been demonstrated in the case of the arrest, conviction and imprisonment of Lucius Banda, former member of Parliament for Balaka north, and a popular musician. During the controversial budget session meeting of 2005, Banda moved the motion for the impeachment procedures that resulted in another motion by Dominic Milanzi for the impeachment of then President Bingu wa Mutharika.

Offended by the moves, members of Parliament from Mutharika’s party revealed that Banda had a fake MSCE certificate for documentation supporting his candidature in 2004, while Milanzi had a criminal record after having been convicted of theft while he was an employee of the Development of Malawian Traders Trust (DEMAT). Milanzi’s criminal record fell within the constitutionally prescribed seven year limit, and therefore he should not have stood for the elections. The constitution bars anyone with a criminal record within a period of seven years prior to the elections to stand as an MP or as president. Both Banda and Milanzi were arrested. On Thursday 30 August 2006, Lucius Banda was convicted on two counts: on authoring a false document and on giving false information to a person employed in the public service. He was sentenced to 21 months imprisonment with hard labour on the first count, and to six months imprisonment with hard labour on the second count, but with the sentences running concurrently.

Though Banda was convicted on straightforward criminal charges, the cause was the non-possession of the educational qualification for his candidature in the 2004 elections. Milanzi was also convicted on the criminal charge of giving false information to a person employed in the public service. These convictions show the extent to which election-related cases, seemingly political in nature, can be ‘criminalised’.

Sources:

Timetable

In relation to the timetable for elections, section 67 of the constitution provides elements of a timetable for parliamentary elections, while section 80 provides a calendar for the election of the state president and his/her deputy. In section 67(1) the constitution states that the National Assembly shall stand dissolved on 20 March in the fifth year after its election, and the polling day for the general elections for the next National Assembly shall be the Tuesday in the third week of May that year, or as near as possible within one week. In section 80, the constitution provides for the election of the state president and his or her vice president concurrently with the general elections for the National Assembly. In section 147(5) the constitution states that local government elections shall take place in the third week of May in the year following the year of the general election of the National Assembly, with the same other provisions as for the general election.
All three general elections for the National Assembly and for the presidency have complied with the constitutional calendar, except for the two-day delay in the 2004 elections following a court challenge by opposition parties and civil society organisations. However, local government elections were not held in 1995, due to the lack of enabling legislation, nor in 2005 following the 2004 general elections, allegedly for financial reasons. In 2010 some sections of chapter XIV of the constitution were amended (by Act 8 of 2010) to change the calendar for local government elections and giving the president the power to determine the election date in consultation with the Electoral Commission (see also chapter 8 of this document on local government). The presidential power to determine the date for local government elections was removed in 2012 with the passing of the Tripartite Elections Bill discussed below in the sections on elections.

Electoral system and term limits

Malawi uses the first-past-the-post (FPTP) form of the plurality/majority electoral system. This means that a contestant of an election that gets more votes than the others is declared winner. Section 96(5) of the Parliamentary and Presidential Elections Act (Cap.2:01) states that:

Subject to this Act, in any election the candidate who has obtained a majority of the votes at the poll shall be declared by the [Electoral] Commission to have been duly elected.

The term of office for the president is outlined in section 83 of the constitution. The term for the presidential office is five years, and a person may hold it for two consecutive terms. There are no limits for members of the National Assembly or for members of the local government authority (chapters VI and XIV of the constitution, respectively).

B. Electoral administration

The institution responsible for managing elections in Malawi is the MEC (MEC) set up under chapter VII, sections 75 to 77 of the constitution. In addition to the constitution, the 1998 Electoral Commission Act, the 1993 Parliamentary and Presidential Elections Act, and the 1996 Local Government Act, define the mandate, powers, and functions of the Electoral Commission. Key functions of the Commission include management of the voters’ roll, provision of voter education, provision of electoral personnel and voting materials, supervision of the polls and announcement of results. It also has administrative functions that include determining constituency boundaries, reviewing existing constituency boundaries and determining electoral petitions and complaints.

Several studies on the conduct of elections in Malawi have shown that the management and administration of the electoral process in the country has been unsatisfactory. Among the major reasons for this has been the perceived lack of independence of the MEC. This has been

acknowledged by the MEC itself in a strategic planning document:

At the same time the electoral environment is experienced, by an increasing number of the electorate, as unfriendly and untrustworthy because of the many technical difficulties experienced in both the 1999 and 2004 elections\(^{257}\) and the lack of perceived impartiality and independence of the MEC. In essence the present political culture in Malawi militates against the delivery of a credible and legitimate election process not only because the electorate increasingly lacks faith in the MEC but also because the elected leadership is seen to be unaccountable to the people – with no real commitment to open and transparent governance – and have, in the final analysis, not been able to reverse the deteriorating social, economic and political conditions in the country. All these issues have a negative impact on public participation and voter turnout during elections.\(^{258}\)

To a large extent, lack of confidence in the MEC centres on doubts about the institution’s independence and professional integrity. Although sections 75 and 76 of the constitution attempt to establish guarantees of the Commission’s independence, including that ‘the Electoral Commission shall exercise its powers, functions and duties ... independent of any direction or influence by other authority or any person’,\(^{259}\) the Commission remains susceptible to influence by the executive. The constitution also provides that the chair of the Electoral Commission must be a judge nominated by the Judicial Service Commission and formally appointed by the president, and that at least another six members shall be appointed in accordance with an act of Parliament.\(^{260}\)

However, under the Electoral Commission Act (No.11 of 1998), the president appoints the other members of the Commission in consultation with political parties represented in Parliament, and on such terms and conditions as the Public Appointments Committee of Parliament shall determine. In practice, the political parties nominate their own representatives who are formally appointed by the president, who chooses among them. The president has constitutional powers to remove from office a member of the Commission on the recommendation of the Public Appointments Committee of Parliament on grounds of incapacity or incompetence in the performance of the duties of that office.

In practice, despite the constitutionally provided system for appointing the chair, the executive dominates the arrangement for appointments to and dismissals from the MEC. The appointments of the other members in consultation with Parliament means that the Commission is largely made up of politically partisan figures rather than respected and qualified members of Malawian society from a wide range of stakeholders. There have been at least two cases of the removal of members of the Electoral Commission on grounds of political bias and intolerance, and at least one case of resignation under pressure from civil society bodies and opposition political parties. A few months prior to the 2004 elections a number of civil society

\(^{257}\) Especially in relation to the voter registration process culminating in the voters’ roll.


\(^{259}\) Constitution, section 76(4).

\(^{260}\) Constitution, section 75(1).
organisations attempted to have the MEC chair removed from his office for what they referred to as ‘inefficiency’.261

Similarly, a few months in advance of the 2004 elections some opposition parties applied to the High Court to rule that the MEC chair was constitutionally not qualified for the post because he was not a judge, as required by the constitution, but a Justice of Appeal of the Supreme Court of Appeal.262 A three-judge panel of the High Court dismissed the argument as divorced from the common understanding of the term ‘judge’.263 However, following opposition from both political parties and civil society bodies that argued that the chair of the Commission was incompetent, inefficient, intolerant, and politically biased, he resigned. The critical problem in relation to appointments is in both the influence and the dominance of the executive. Much as the nomination process of the chair by the Judicial Services Commission is about as independent as it can get, the executive still has a final say in who is appointed to the position. Civil society bodies prefer public nominations to be posted in the papers and on the radio, followed by appointment by the president, and final confirmation or rejection by the Public Appointments Committee of Parliament.264

The problems with the appointments process were demonstrated again in March 2007, when new commissioners were appointed by the state president.265 Opposition parties challenged the appointments on the grounds that they were not consulted as required by the Electoral Commission Act. The opposition took the issue to court. Their lawyer argued that ‘the idea of the president consulting other parties [represented in Parliament] ... aims at ensuring that the appointees are acceptable by all parties ... ‘.266 For almost a year the new Commission could not be sworn in. The High Court ruled on the matter in January 2008, confirming the appointments, and the new Commission was sworn in on 18 January 2008.

The two opposition parties in Parliament, the Malawi Congress Party (MCP) and the United Democratic Front (UDF), indicated that they would work with the new Commission ‘under protest’, suggesting that they did not fully recognise its authority. Much as this created a situation of fear that the 2009 election results would possibly be challenged given that the electoral process was managed by a body whose credibility was doubted, the results were generally accepted. The challenge by John Tembo, one of the contenders in the presidential race was not about the authority of the Electoral Commission as such, but about irregularities in the actual management of the electoral process and the handling of the electoral figures in terms


262 Sabwera and PPM vs Attorney General, High court, constitutional case no.1 of 2004.


265 The composition of the new Commission is: Justice Anastazia Msosa (Chair), Professor Brown Chirmpamba (Chaired the Commission that managed the referendum in 1993), Ron Nkomba (a former diplomat), Dick Mzumara, Mrs Georgina Chikoko (served in the Commission before), Mrs Mary Manyusa, Miss Jane Nankwenya, and Oliver Mwenefumbo. Two declined the appointment: Rev. Silas Ncozana (also previously a diplomat) and James Naphambo, a lawyer.

of discrepancies between the figures coming from the field and those being reported from the national tally centre.

Civil society organisations with interests in electoral issues equally expressed their concern over the credibility of the new MEC commissioners and its implications for the management and outcome of the 2009 elections. For example, the Council for Non-governmental Organisations in Malawi (CONGOMA) advised that:

Much as we respect the High Court ruling on the case involving the legitimacy of commissioners of the MEC, the body must be recognised by all political players to achieve free and fair elections during the forthcoming polls. If the opposition is still not satisfied with the credibility of the commissioners, then the president needs to consider their concerns.267

After the elections the civil society bodies did not further pursue the issue. The Electoral Commission continued to function as if the pre-election queries and doubts about its credibility did not matter. In general, the MEC is trusted by only slightly more than a third of Malawians.268

Also questionable is the professional integrity of its Secretariat. Its technical management of the overall electoral process has been considered inadequate.269 During the 2004 election period, civil society organisations attacked it for ‘overall inefficiency’ and declared that they ‘no longer [had] any trust’ in it.270

During 2004, the Commission’s auditor was arrested and convicted for mishandling of fuel coupons worth millions of Malawi Kwacha, while the Chief Elections Officer was suspended from his post following opposition accusation that his wife was using MEC vehicles for her political campaign.271 She was standing as an independent candidate after losing in the primaries of the governing UDF. After the elections, the Commission failed to account for more than US$ 6 million, especially from the government contribution to the election funding. No less than US$ 1.5 million from the donor contribution was inappropriately used.272 The donors responded by suspending financial assistance to the MEC between July 2005 and January 2006, and requested the MEC to take appropriate action on these matters. The MEC took action by dismissing some members of its staff, and developing a strategic plan to guide its operations and as a way of strengthening its management systems.273

In its quest to deliver free and fair elections in 2009, the MEC formulated a five-year

272 Correspondence between the UNDP and the Malawi Electoral Commission made available to the researcher.
273 Malawi Electoral Commission (MEC), 2005, Between the Ballot Box Programme: A Strategic Plan of the Malawi Electoral Commission. Blantyre: MEC
strategic plan in response to the shortcomings that were identified in the 2004 presidential and parliamentary elections. Some of the major problems included inadequate and delayed funding disbursement to the Commission, inadequate civic and voter education that resulted in low voter turnout and a high number of null and void votes, and a flawed voter register. Development partners, coordinated by the UNDP in Malawi, supported the MEC reform programme. Under this project, the Commission achieved a number of tasks such as institutional capacity building for MEC staff, procurement of ICT equipment and institutionalisation of advisors to impart skills to MEC staff.\textsuperscript{274}

Despite the above initiatives and reforms, the MEC problems persisted. The voters’ roll was not fully updated, figures and voters’ images in the electronic and the manual registers did not tally and in some cases were completely misplaced. Cases of financial mismanagement again came to the fore in February 2009 when ten employees of the Commission were arrested on grounds of fraud. The police later cleared seven of them and charged the remaining three. They were reported to have misappropriated not less than MK 2 060 000 equivalent to US$ 14 507 (earlier reports put the figure at MK 397 940 000, equivalent to US$ 2 802 394) through the creation of ghost police officers to be deployed to various districts as part of the Commission’s security force.\textsuperscript{275} About two weeks before the May 2009 elections, the Deputy Chief Elections Office responsible for electoral matters was suspended from his position for reasons that were not made public. A few days before the elections, a representative of the opposition MCP queried the Commission at a briefing session in Blantyre to provide an explanation for the suspension of the Deputy Chief Elections Office, but the chair of the Commission was non-committal.\textsuperscript{276}

**Voter registration**

In the run-up to the 2004 elections, the voter registration process was marred by irregularities and logistical problems ranging from shortages of registration forms and equipment such as film, cameras, and batteries, to transportation of materials to registration centres.\textsuperscript{277} The registration period kept on changing and extending due to the logistical problems. According to the Commission’s calendar the registration was initially scheduled for the period from 5–18 January 2004 but was extended to February due to logistical problems.\textsuperscript{278} The extension was also


\textsuperscript{275} A detailed report on the case can be read in *The Daily Times*, ‘MK400m Case: Police Clear 7’, Tuesday, 7 April 2009, p.1.

\textsuperscript{276} The explanation was sought by Joseph Njobvuyalema of the MCP at the Commission’s briefing session at the Tally Centre, COMESA Hall in Blantyre, on 17 May 2009. The author attended the meeting.


a response to civil society observations that the registration period was just too short. Although the Commission extended the registration period, this was not followed by the provision of adequate resources, thereby rendering the extension of very little use. There was little or no voter education to raise awareness amongst potential voters. As a result, in some constituencies, especially in the northern districts, some qualified potential voters did not register. The 1999 elections suffered from similar problems.

During the second week of April 2004, the MEC announced that 6.5 million voters had registered for the presidential and parliamentary elections. Opposition political parties and other institutions in the country challenged this figure. Most critical was the National Statistical Office (NSO). It described the figure as ‘bogus’ because it did not conform to the country’s natural demographic trends. ‘It defies all logic’, observed the Weekend Nation, one of the country’s leading weekly papers. A mathematician and statistician at the Polytechnic, one of the constituent colleges of the University of Malawi, who was also Director of Publicity for the opposition National Democratic Alliance (NDA), described the figure as ‘absurd and a pointer to [election] rigging’. In 2003, with assistance from the US Bureau of Census, USAID, and the UN Population Fund (UNFPA), the NSO projected the country’s population above 18 years of age to reach 5.5 million in 2004. The country’s total population would be 12 million people. The 5.5 million would be the population qualified to register as voters. ‘Our projections [based on the last (1998/1999) national population census] are [that] the population has grown at an average rate of 3.2% ... But if you calculate the average rates at which the Commission’s figures are based, you will find that they are way above the normal population growth rate’, the NSO observed.

The MEC registered some 5,071,822 voters for the 1999 general elections. The figure for the 2004 elections suggested an increase of one million, despite the fact that some 106,086 registered voters were reported dead in the previous five years and were claimed to have been removed from the voters’ register. To some analysts, including the NSO, these figures just did not make much sense, especially if broken down into regional distributions. Malawi has three administrative regions: north, centre and south. Slightly more than 50% of the country’s population lives in the southern region, and just about 12% in the northern region; and about 38% in the central region. The comparative figures for the registered voters for the 1999 and

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279 Ibid.
282 Some records show a figure of 6.7 million registered at this time.
the 2004 elections, and the NSO population projections for the 18 years and above, were as follows:

**Table 1: Projected and initially reported voter registration, 2004 compared to 1999**

<table>
<thead>
<tr>
<th>Region</th>
<th>Registered voters</th>
<th>NSO projections</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1999</td>
<td>2004</td>
</tr>
<tr>
<td>Northern</td>
<td>678,906</td>
<td>924,879</td>
</tr>
<tr>
<td>Central</td>
<td>1,975,203</td>
<td>2,703,621</td>
</tr>
<tr>
<td>Southern</td>
<td>2,417,713</td>
<td>3,040,339</td>
</tr>
<tr>
<td>National</td>
<td>5,071,822</td>
<td>6,668,839</td>
</tr>
</tbody>
</table>

Source: NSO/MEC/Nation Newspapers.

According to the *Weekend Nation* ‘either [the adult] population is unknown or 6.5 million voters are from Mars ... Even if the Commission assumes a 100% registration rate – which is not possible even where people get punished for not registering – the 6.5 million figure cannot be accurate. There simply are not that many adults of 18 years and above in our country.’

Interestingly, in 1999 the NSO was criticised by academics and civil society organisations for ‘inflating’ the adult population of the southern region. It was interpreted as a move to facilitate the UDF’s winning of the elections that year, given that the southern region was viewed as the party’s stronghold. In 2004 the NSO used the same arguments against the MEC, either to save its own face or simply because the NSO itself had no confidence in the electoral database in general. It should be noted that the NSO’s figures were themselves mere projections. They were not based on a concrete recent national population census. The last census in Malawi was in 1998, and the next will be in 2008. It can therefore be concluded that at the centre of all these controversies is the integrity of the demographic databases in the country. Whose demographic statistics does one believe: those of the NSO or those of the MEC? The lack of integrity in the NSO’s demographic data is, itself, a major cause of lack of integrity in the MEC’s voter’s roll.

The management of the voters’ roll was further criticised by donors who provided technical and financial support for the elections. The MEC decided to use two parallel voters’ rolls: a computerised roll and a manual roll. The donors had recommended the use of only a computerised system. The MEC argued that they did not have adequate capacity to efficiently manage such a roll and that they would also face difficulties using a computerised roll in remote rural areas, where the manual roll would be easier to use.

The opposition parties interpreted the crisis over the voters’ roll as an attempt by the governing UDF to rig the elections. ‘It shows how the ruling party has orchestrated rigging

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by inflating figures ... [and] creating polling centres just to increase the number of voters,’
they argued. They accused the Electoral Commission of being used by the governing party to
manipulate the voters’ roll so as to enhance that party’s chances of winning the elections.292
The accusations included allegations that the UDF was trying to help some of its supporters
to register more than once so that they could cast multiple votes in the elections. There were
also reports that the governing party had embarked on a campaign to collect voter registration
certificates (used as identification cards) in the guise of ascertaining its support base.293 A leading
weekly paper reported: ‘Two days after the voter registration exercise closed, irregularities [had]
emerged with the ruling party being accused by civil society and opposition parties of offering
jobs and money, [and] distributing starter packs, in exchange for voter registration numbers.’294
The opposition parties and civil society organisations argued that the voters who lost their
registration certificates in this manner, like those that did not register, could be disfranchised.295

After much criticism from the opposition parties and civil society organisations, the MEC
undertook some ‘cleaning’ of the voters’ roll, that resulted in the reduction of the registered
voters from the 6.5 or 6.7 million announced earlier to 5.7 million. This suggests that between
0.8 to one million were indeed erroneously registered. The figure announced after the ‘cleaning’
exercise was closer to the NSO projection of 5.5 million potential voters by 2004.

Table 2: Revised voter registration by region, 1999 and 2004

<table>
<thead>
<tr>
<th>Region</th>
<th>Year</th>
<th>Difference (Increase)</th>
<th>Difference %</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1999</td>
<td>2004</td>
<td></td>
</tr>
<tr>
<td>National</td>
<td>5 059 736</td>
<td>5 752 028</td>
<td>692 292</td>
</tr>
<tr>
<td>Southern</td>
<td>2 418 848</td>
<td>2 622 532</td>
<td>203 684</td>
</tr>
<tr>
<td>Central</td>
<td>1 965 249</td>
<td>2 325 622</td>
<td>360 373</td>
</tr>
<tr>
<td>Northern</td>
<td>675 639</td>
<td>803 874</td>
<td>128 235</td>
</tr>
</tbody>
</table>


According to the official statement of the observer mission of the African Union:

the controversy surrounding the voters’ roll not only exposed the weaknesses of the Malawi
Electoral Commission in the management of the elections but also affected the morale and
conduct of the elections. The voters register is a very important document that determines

294 These are agricultural inputs comprising fertilisers and seeds. They are given to smallholder peasant farmers as start-up
295 Voting regulations in Malawi allow for a person who has lost his/her voter certificate to vote as long as he/she can be traced
on the voters’ roll on the polling day, and depending on the person’s possession of authenticated identification, or is positively
identified by the polling staff and monitors. The issue here had more to do with fear on the part of those that had lost their
certificates in this manner. They probably developed a belief or feeling that they could not vote because they no longer had their
voter certificates. It could also be due to lack of understanding of the voting regulations.
who may vote in an election. The very fact that there were problems in reconciling the figures of eligible voters, that the voters roll had not been finalised early enough to allow for proper verification and resulting in court action and a court order to change the election date, pointed to insufficient capacity of the Malawi Electoral Commission to adequately prepare for the elections.296

This state of affairs serves to undermine not only the credibility of the MEC, but also the outcome of the election. The fact that the problems encountered in the 2004 registration exercise were identical to those experienced in 1999 suggests not only poor planning on the part of the MEC, but also an abject failure to learn from past mistakes and rectify them.297 This, in turn, not only undermines public confidence in the electoral body, but also has the potential of undermining confidence in the elections and their outcomes. On its part, the Commission argued that most of the logistical problems arose from poor funding and delayed and inadequate technical and financial support from the donors. This argument, in itself, is a tacit admission of poor planning and donor dependency.

In the run-up to the 2009 elections the MEC proposed the abandonment of the entire national voters’ roll, and its replacement with a new, and seemingly reliable roll.298 The MEC engaged with some donors to seek financial and technical support for this exercise.299 The funds were provided under the general support for the elections. After debates, consultations and disagreements with various stakeholders, it was decided that the MEC should use both manual and electronic rolls newly compiled for the 2009 elections, and this indeed took place. Reconciliation of the two, however, caused a serious challenge for the Commission. The verification of the voters’ roll revealed glaring inconsistencies and mismatches between the figures of those registered, where they were registered, and matching of the names, faces, fingerprints and signatures.

Voter registration started in August 2008 and was scheduled to end on 29 November 2008, but on 20 November (by which time 3.5 million voters had been registered) it was announced that registration would be extended into December. This extension was caused by problems related to digital cameras that were necessary to the process,300 but were in short supply and had to be rotated. Between 2–6 February, presidential and parliamentary candidates submitted their nomination papers. The official campaigning period began on 17 March and was scheduled to conclude on 17 May. Parliament was dissolved on 20 March, in accordance with the constitution, and subsequently the MEC announced which candidates were eligible to stand for the elections.301

298 Interview conducted by the author with Anthony Masanza, Chief Elections Officer, Electoral Commission, Blantyre, 31 September 2005.
299 Interview conducted by the author with Anthony Masanza, Chief Elections Officer, and David Kambauwa, Deputy Chief Elections Officer, Electoral Commission, Blantyre, 31 September 2005.
For the first time, registration of voters was done in phases starting several months ahead of the election. Unfortunately, the initial days of the registration process encountered several challenges in some parts of the country as observed by the Malawi Electoral Support Network (MESN), a grouping of 75 accredited service providers for the 2009 elections. One of its terms of reference was to monitor the voter registration process. In September 2008, MESN conducted a nationwide spot check on the second phase of the voter registration exercise in over 25 voter registration centres. District commissioners, district election support teams, centre supervisors, camera operators, political party representatives and accredited service providers were interviewed during the spot check. At the end of the exercise the MESN issued a report with the following observations:

- There were still many logistical grey areas affecting the temporary electoral staff that had been hired by the MEC. Although contracts were signed between the two parties a number of issues urgently needed to be addressed such as honoraria, accommodation and other logistics. The amount of money being given to supervisors, camera operators and clerks was far too low to meet their daily expenses.

- There were many logistical challenges during the transition period from one registration phase to the next. There were no proper transportation and accommodation arrangements for the electoral staff and equipment. In the worst cases electoral staff had to sleep in the open while waiting for transport. [In some cases, transportation from one area to another was by military trucks in which the staff were tightly packed. These were very uncomfortable.] Some staff and equipment were left waiting at registration centres for collection for over two days after the centre had closed.

- In all the 25 voter registration centres monitored, one or two pieces of equipment were not working. In most cases, it was either a transformer or a camera. In these circumstances electoral staff were forced to use one camera and transformer for more than one station. This led to congestion in most centres and sometimes eligible voters were turned away at the centres without registering and told to come another day because it was late. This was a cause of frustration to eligible voters. The machines were also overstretched leading to more breakdowns.

- A number of centres were not able to work on the first day of the second phase of the voter registration due to technical and logistical problems. This meant that those centres would not meet the constitutional requirement of 14 days for voter registration.

- In all 25 centres, supervisors complained that they were promised they would be provided with airtime for their cell-phones to report any irregularities, but airtime had not been provided in the first phase (up to the point that the monitoring had taken place). In addition they were formally told to ‘flash’ or ‘beep’ the regional managers of the MEC on their cell phones whenever they faced a problem, but to their disappointment the regional managers had not called them back. This was a source of additional expenditure on the part of electoral staff as they were forced to phone MEC offices using their own airtime.

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302 For the MESN Interim Report see http://www.africanelections.org/malawi/knowledgecentre/.
304 Language edited without changing the contents of the report.
• There were consistent delays in the delivery of equipment to replace faulty or broken-down equipment. This was due to the fact that standby equipment was not provided for at district level and could only be sent out from one centralised point in the country.
• Young eligible voters were not coming to register. In most centres, it was the elderly that were seen waiting in the queues.
• It was only the National Initiative for Civic Education (NICE) that had monitors at all the centres. They were overstretched and could not compare notes with other civil society monitors and could not manage to monitor all stations.
• There was no proper servicing of the equipment after the first phase and faulty equipment was not replaced in some instances forcing electoral teams to borrow equipment from each other.

The response of Justice Msosa, the Chairperson of the MEC, to the MESN’s report and observations was as follows: ‘This is a very negative report and does not cover all aspects of the registration process. Thanks all the same’. 305

Some exchanges ensued between the MEC and the MESN as in the box below.

305 Email from: Anastazia Msosa, anastaziamsosa@yahoo.co.uk, Subject: Re: MESN report on voter registration, To: All (MESN) Members, on Tuesday 16 September 2008.
Thursday 18 September 2008

Dear Mr Mwakasungula,

Thank you for your comments. I would like to assure you that MEC is addressing most of the concerns raised by MESN. However my experience is that usually election observers and monitors do discuss such concerns and findings with the Management Election Body to find out if anything is being done to redress any shortcomings. This surely would form part of the report of the observer/monitor. I hope next time MEC will be given such an opportunity.

Justice Msosa

Thursday 18 September 2008

Dear Justice Msosa,

Thank you for your response and action MEC is taking in addressing some of the concerns raised by MESN. We totally agree with you that we need to engage each other more constructively in addressing shortfalls. Maybe we need to be given more space for interaction with MEC to avoid such approaches in future. Once again be assured MESN will be there to give you all the necessary support to making sure that we have credible elections in 2009.

Best regards

Undule Mwakasungula
MESN Vice Chair

SOURCE:
E-mail correspondence copied to all MESN members and stakeholders. The author was on the circulation list as a member of the civil society network on elections monitoring.

The challenges related to the voter registration process and the verification of the voters’ roll were tersely summarised by the Commonwealth Election Observer Mission in the following words:306

The voter registration process was a major undertaking by the MEC and represented a significant challenge. Initial delays in the process were exacerbated by the realisation after the public verification exercise in April, that the list contained numerous errors, including, but not limited to double entries, missing names and misallocation of voters to centres. In addition, it then became apparent that the paper work for the registration had in many instances not been completed to the requisite standard or was even absent.

At the end of the registration process, a total of 5 870 819 voters were registered out of a national potential figure of 6 216 432, being the population of 18 years and above as reported in the 2008 national population census.

TABLE 3: REGISTERED VOTERS 2009 COMPARED TO 2004

<table>
<thead>
<tr>
<th>Region</th>
<th>Year</th>
<th>Difference (Increase)</th>
<th>Difference %</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2004</td>
<td>2009</td>
<td></td>
</tr>
<tr>
<td></td>
<td>803 874</td>
<td>825 640</td>
<td>825 766</td>
</tr>
<tr>
<td>Northern</td>
<td>2 325 622</td>
<td>2 427 458</td>
<td>98 836</td>
</tr>
<tr>
<td>Central</td>
<td>2 622 532</td>
<td>2 617 721</td>
<td>-4 811</td>
</tr>
<tr>
<td>National</td>
<td>5 752 028</td>
<td>5 878 819</td>
<td>118 791</td>
</tr>
</tbody>
</table>


Noticeable in the above figures is the drop of 4 811 registered voters in the southern region – from 2 622 532 in 2004 to 2 617 721 in 2009. There is no clear explanation for this. There are three possibilities. First, the computation of the figures could be wrong. Second, given the registration challenges in 2004 and the debate that followed, that year’s figure could indeed be ‘bogus’ (see the discrepancies and inconsistencies in the figures in Tables 1 and 2 above). Third is the possibility that the southern region experienced some voter apathy in 2009. The likelihood of this happening was high because the courts had ruled that former President Bakili Muluzi, who had bounced back on the UDF ticket, could not stand again given that he had already served his two consecutive terms of office as stipulated in the constitution. The UDF draws much of its support from the southern region’s districts.

Compiling a new voters’ roll would best be done if combined with the compilation of the national civic register. Malawi does not have a national civic register as the country does not have a system of registering its citizens. In the absence of a civic register, updating of the voters’ roll will continue to be a problematic exercise. In 2005 the National Statistical Office made proposals for national registration to be undertaken as part of the national census.\(^{307}\) The National Registration Bill was formulated in the same year, and the National Registration Bureau\(^{308}\) was created in 2007. One of its immediate tasks was to create a National Civil Registration and Vital Statistics system for the compulsory registration of every Malawian citizen. The registration process started the same year with the distribution of village registers and the orientation of district commissioners, members of the district executive committees and chiefs throughout the country.\(^{309}\) The National Registration Act was passed in 2009, completing five years of efforts to review the legal framework\(^{310}\) for the establishment of a national civil register. The Act makes the registration of births compulsory and universal. It replaced the 1904 colonial law on the registration of births and deaths. In March 2012, compulsory birth registration also started.\(^{311}\) However, the process has been rather slow as only seven of the country’s 28 districts had actually established district birth registers by November 2013, and in these, 22 047 village heads were

\(^{307}\) This information came from a representative of the EU at the presentation of the first draft of this report at Cresta Hotel, Lilongwe, in February 2006.

\(^{308}\) http://www.housingfinanceafrica.org/country/malawi/.


Voter registration for the 2014 tripartite elections was organised in nine phases of 14 days each from 22 July – 18 December 2013. At the end of the exercise, 7 537 548 voters were registered representing 94.1% of the projected total of 8 009 734, 16% above the 2009 figure. The process was much better organised and with fewer hiccups than was previously the case. One major improvement in the process was the adoption of the electronic biometric voter registration system (EBVRS) to address the enormous challenges the MEC previously experienced in maintaining a credible voters roll. The EBVRS involves the use of biometric technologies with the use of computers, fingerprint scanners and digital cameras to capture the bio-data of a voter at the registration point. With this new technology it is hoped that the MEC will be in a position to detect and remove multiple registrations and to update and verify the voters roll speedily. However, the MEC did not implement the opposition political parties’ request that the voters roll should be verified after each phase of registration.

Voter education

The Electoral Commission Act mandates the MEC to provide voter education. The Commission has a department responsible for this task. It is observed that the Commission’s ability to successfully undertake this task is limited by inadequate capacity. The Commission does not have its own staff in the districts to carry out the task. It depends on civil servants and other public service employees. The Commission also lacks proper equipment and facilities of its own. As a result, the most effective institutions in delivering civic and voter education have been the civil society bodies. Despite their successes, they are themselves, limited by inadequate financial resources, personnel and other facilities. Further limitations come in the form of logistical hurdles created by the Electoral Commission itself, such as the Commission’s delays in releasing a pre-election calendar of events and in the slow and limited accreditation of these institutions. As a result, the efforts to provide voter education for all citizens are far from being adequate, including for those who live in remote locations or who are difficult to reach (such as displaced populations). This deters efforts to encourage people to register to vote, to learn how to cast a vote and to know what their electoral choices are.

The EU Observer Mission to the 2004 general elections noted the limitations in the provision of voter education in the following words:

The mission found that some voter and civic education had been undertaken by both the accredited NGOs, churches, civic organisations, other non-political party entities and the Commission. However, some of the accredited organisations were not able to undertake voter education because of lack of funds. All stakeholders, including the Commission, generally acknowledge the need for extensive and continuous voter and civic education. The need for a comprehensive and continuous civic and voter education programme

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312 http://plan-international.org/birthregistration/resources/country-case-studies/malawi.
313 http://www.nyasatimes.com/2013/12/30/7-5m-malawians-register-to-vote-in-tripartite-elections/comment-page-2/.
315 http://www.nyasatimes.com/2013/03/06/malawi-electoral-commission-adopts-electronic-voter-registration-system/comment-page-1/.
is consistent with the Norms and Standards for Elections in the SADC region. Such programmes should include awareness creation on the need for women’s participation and representation in positions of power and decision-making and voting procedure.\textsuperscript{316}

The Missions further recommended that:\textsuperscript{317}

- Civic and voter education should be conducted by state bodies (such as education and public information services) and civic society organisations. The police and National Intelligence Bureau (NIB) should not be involved in such work;
- Increased efforts should be made to target civic and voter education at women, young people, the illiterate and other vulnerable groups, particularly in remote areas; and
- Efforts should be made to increase public awareness of what can be expected from political representatives and leaders.

The Commission’s civic and voter education strategy was again put to test in February 2008 when political parties rejected it:

Political parties – including the ruling Democratic Progressive Party (DPP) – rejected the MEC’s Civic and Voter Education Strategy for the 2009 general elections and future polls, saying they were not consulted in its development. The parties’ stand saw the MEC, whose reasons for the function in Lilongwe was to launch the document having considered it a done deal, changing the agenda of the gathering from a launching ceremony to a consultative process. The parties – save the DPP in this particular case – also asked the Commission to remove the Malawi Broadcasting Corporation (MBC), Television Malawi (TVM) and the Ministry of Information from the MEC’s Civic and Voter Education Committee, saying the three institutions are not supposed to be in decision-making positions, [and] accusing them of being partisan.\textsuperscript{318}

Similar views were expressed by members of CSOs involved in the electoral processes in the country.\textsuperscript{319} Much as they applauded the Commission for coming up with the electoral calendar in a timely manner, they were concerned about delays in and inadequate consultation with political parties as the key stakeholders in the electoral process. The inclusion of the public broadcasters – the MBC and TVM – in the Civic and Voter Education Committee was also an issue of concern given the partisan orientation of the two state broadcasters.

In the run-up to the 2009 elections the MBC announced that it was not going to cover the electoral process because it did not have funding for the exercise. However, the political parties and the individual candidates were free to post their adverts on the radio at a fee, or to pay for coverage of their campaign rallies. The result was that the governing party, the DPP, dominated


\textsuperscript{317} European Union Election Observation Mission Final Report: Executive Summary, Conclusions and Recommendations.


\textsuperscript{319} Interview with Ted Nandolo, CONGOMA Executive Secretary, 28 February 2008; with Unandi Banda, Executive Director, NEST, 28 February 2008; Billy Banda, Executive Director, Malawi Watch, 28 February 2008.
the coverage on both the MBC and TVM with the argument that it paid for the coverage, or on the pretext of covering the activities of the state president. As observed by the European Union Election Observer Mission to the 2009 Malawi elections,320 ‘the state-owned media in particular failed to fulfil even their minimum obligations as publicly owned broadcasters as their coverage lacked any degree of balance and was openly biased in favour of the DPP’. At the same time, ‘the election coverage of Joy FM was also similarly biased to the advantage of the United Democratic Front (UDF) and the Malawi Congress Party (MC). In contrast, private radio stations Capital FM and Zodiak provided impartial and balanced coverage of the political parties contesting the elections as did newspapers’.321

**Voter turnout**

The irregularities in the registration process and the mismanagement of the voters’ roll may have affected the voters’ response to the 2004 elections. Compared to the referendum of 1993 and the general elections of 1994 and 1999, the 2004 general elections had a much lower voter turnout. Based on the results of the presidential election, just about 3.1 million voters cast valid votes, representing 54% of the registered voters. Another 4% cast null and void votes. The two figures suggest that 58% of those registered went to the polls. The comparative figures for the other elections are as follows:322

Table 4: Voter turnout as percentage of registered voters, 1993–2009

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Turnout %</td>
<td>69</td>
<td>80</td>
<td>94</td>
<td>58</td>
<td>78</td>
</tr>
</tbody>
</table>


The highest voter turnout was in 1999 (94%) during the second term of Bakili Muluzi. It was even higher than the 80% in the first multi-party general elections in 1994. The 2004 elections had the lowest voter turnout at 58%.

Voter turnout also varied according to regions. In percentage terms, the northern region had the highest voter turnout in the 2004 general elections. The southern region, the most populated region in the country, and where about 51% of the Malawian voters live, had the lowest voter turnout in 2004, which contributed to the low voter turnout for that year’s elections:

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322 For comparative figures for all the elections Malawi has had see http://africanelections.tripod.com/mw.html.
Table 5: Voter turnout by region, 2004

<table>
<thead>
<tr>
<th>Region</th>
<th>Reg. voters</th>
<th>Valid votes</th>
<th>Null &amp; void</th>
<th>Total voted</th>
<th>% Turnout</th>
</tr>
</thead>
<tbody>
<tr>
<td>Northern</td>
<td>803 874</td>
<td>508 448</td>
<td>6 464</td>
<td>514 912</td>
<td>64</td>
</tr>
<tr>
<td>Central</td>
<td>2 325 622</td>
<td>1 374 547</td>
<td>35 636</td>
<td>1 410 183</td>
<td>61</td>
</tr>
<tr>
<td>Southern</td>
<td>2 622 532</td>
<td>1 440 806</td>
<td>47 664</td>
<td>1 488 470</td>
<td>57</td>
</tr>
<tr>
<td>National</td>
<td>5 752 028</td>
<td>3 323 801</td>
<td>89 764</td>
<td>3 413 565</td>
<td></td>
</tr>
</tbody>
</table>


In addition to the mismanaged electoral process, there could be other reasons for the sudden decline in the voter turnout in 2004. Some have argued that enthusiasm for public participation in the electoral process is waning largely due to growing public dissatisfaction and disquiet on the conduct of politicians: ‘political power and influence are viewed merely as a means of access to comfort, wealth, self-aggrandisement and other egoistic pursuits ... Any benefits from politics that may accrue to the majority are merely incidental.’ Such views provide further evidence that elections in Malawi do not necessarily deliver democratic governance. With a lot of Malawians not seeing material benefits from their political labour, it is not surprising that they choose not to take part in elections.

C. Electoral malpractice

In its 2004 report, the European Union Election Observation Mission noted that the governing UDF party enjoyed significant undue advantages:

- The uneven playing field during the campaign period arising from (i) the use of state resources for the purpose of campaigning by the ruling party, (ii) the distribution of money at rallies by the ruling party, and (iii) biased reporting by the state owned electronic media;
- The intimidation perpetrated by the ruling party, in particular by the Young Democrats; and
- The influence of the ruling party over traditional authorities or chiefs.

Similar observations were made in 2009. The European Union Election Observation Mission noted that ‘the use of state resources for campaigning purposes was overt during the whole of the campaign period and there was a blurring of the boundaries between the office and campaigning

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that included the use of state owned vehicles, public media, police and security services. During the campaign the president also attended a number of official ceremonial openings of public and private sector projects that received wide coverage in the media.\footnote{EU Observer Mission Preliminary Report on \url{http://www.eueommalawi.org/pdf/eu/eom}.} On its part, the Commonwealth Observer Mission reported that ‘there has been an inordinate exploitation of the incumbency advantage, relating to the use of state institutions and resources, as well as state media ... the overwhelming impact of the exploitation of the incumbency advantage, especially the unashamed bias of the state TV and radio, created a markedly uneven playing field, tarnishing the otherwise democratic character of the campaign’.\footnote{The Commonwealth Observer Mission Interim Report on \url{http://www.thecommonwealth.org/document/177370/201038/2001_malawi_elections_interim_statement.htm}.}

**Weak enforcement of the electoral code of conduct**

Part V of the Parliamentary and Presidential Elections Act (Cap.2:01) establishes some provisions for a code of conduct for political parties during election campaign time. In section 62(2) the Act states that:

> The [Electoral] Commission may prescribe a code of conduct to be complied with by every political party in conducting its campaign in an election.

Similarly, section 45 of the Local Government Act of 1996 mandates the Electoral Commission to come up with a code of conduct for local government elections.

The Parliamentary and Presidential Elections Act (Cap.2:01) also lists some ethical norms during election campaigns. For example, in section 61(1) the Act states:

> Notwithstanding guarantees of freedom of expression, information and assembly under this Act, no person shall in campaigning in an election use language which is inflammatory, defamatory or insulting or which constitutes incitement to public disorder, insurrection, hate, violence or war.

In accordance with these provisions, the Electoral Commission has a standard published code of conduct for parliamentary and presidential elections, and local government elections. It also has a handbook for political parties and candidates for parliamentary and presidential elections which includes the code of conduct.\footnote{Malawi Electoral Commission (MEC), *Parliamentary and Presidential Elections: Handbook for Political Parties and Candidates*. Blantyre: MEC. MEC 037.}

However, with the exception of the electoral offences as outlined in the Parliamentary and Presidential Elections Act (Cap.2:07) there are no other mechanisms on paper to enforce compliance with the electoral codes of conduct as outlined in the electoral law.

There isn't much evidence for violations of the electoral codes of conduct in the country. This is probably not because such violations do not occur, but simply because they are not frequently reported. As noted by election observer missions,\footnote{African Union, 2004, Statement of the African Union Observer Team on the Presidential and Parliamentary Elections in the Republic of Malawi held on 20 May 2004; European Union Election Observation Mission Final Report: Executive Summary, Conclusions and Recommendations.} the Electoral Commission is renowned
for not enforcing its own regulations and decisions. The Commission is slow to respond to complaints when they are brought to it. However, there is enough evidence for widespread use of inflammatory and defamatory language, hate and insulting speech in Malawian politics, not only during election times, but all other times.\footnote{See E. Kayambazinthu and F. Moyo, 2002, ‘Hate Speech in the New Malawi’, in H. Englund (ed.). A Democracy of Chameleons: Politics and Culture in the New Malawi. Uppsala: Nordic Africa Institute.} As the African Union Election Observer Mission noted in relation to the 2004 elections:

The nature of the campaign was of great concern. The campaigns did not focus on issues as such but on personalities and character assassination. The use of language was often intimidating, provocative and insulting. The practice of handouts was a disturbing feature. The Observer Team will be happy to see a culture emerging in Malawi of clean and dignified campaigns that address issues and help the voters make informed decisions as they exercise their right to choose leaders.\footnote{African Union, 2004, Statement of the African Union Observer Team on the Presidential and Parliamentary Elections in the Republic of Malawi held on 20 May 2004.}

**Use of state resources**

Technically the law bars any public official, be it incumbent or otherwise, from the use of state resources to gain political advantage over others. However, in practice, the implementation of the law is problematic. Incumbents and government officials use state resources under the guise of performing the duties pertaining to their offices, and many times have managed to get away with it.

Section 193(4) of the constitution prohibits the use of public resources for political purposes. There are also restrictions on the use of civil service employees in political party activities. The constitution mandates the Civil Service Commission, set up under chapter XX of the constitution, to take up legal proceedings in the High Court against ‘a government or political party or member of a political party’ who contravenes these rules. Nonetheless, in 2004 the governing party did use public resources, such as vehicles from parastatal organisations for use in its campaigns.\footnote{These electoral malpractices are well detailed in the reports of the international observer missions – for example, in European Union Election Observation Mission Final Report: Executive Summary, Conclusions and Recommendations; The SADC Parliamentary Forum Election Observer Mission to Malawi Presidential and Parliamentary Elections, 2004, Final Report; Statement of the African Union Observer Team on the Presidential and Parliamentary Elections in the Republic of Malawi held on 20 May 2004; and Interim Statement by the EISA Election Observation Mission: Malawi Parliamentary and Presidential Elections 20 May 2004, Lilongwe, 22 May 2004.} There have been some cases where individuals have been legally challenged for the use of public resources to run private political campaigns, such as those of the First Deputy Speaker, Loveness Gondwe, and that of the wife of the Chief Elections Officer at the MEC (see box below).

As the Electoral Institute for the Sustainability of Democracy in Africa (EISA) Election Observer Mission rightly noted, it would be important to establish a code of conduct that should also regulate the use of public resources and hand-outs for political gains.\footnote{Interim Statement by the EISA Election Observation Mission: Malawi Parliamentary and Presidential Elections 20 May 2004, Lilongwe, 22 May 2004.}
15: Use of state vehicles by the ruling party

After the elections of 2004, MP for Mzimba West, Loveness Gondwe, previously First Deputy Speaker of the National Assembly, had her victory at the polls challenged on account that she used a vehicle belonging to Parliament during her campaign. Her seat in Parliament was suspended pending a court ruling. The High Court ruled that as First Deputy Speaker she was allowed to use her official car for her for personal purposes as well. She won the case, not because it was permissible to use a parliamentary vehicle for personal campaign activities, rather because the conditions for her position allowed for use of an official vehicle for personal use. Such conditions are applicable to top-ranking civil servants, as well as top-ranking officials in state institutions such as the Law Commission, the Human Rights Commission and others.

In a different case, the Chief Elections Officer in the Malawi Electoral Commission, George Chimwaza, was dismissed from his position at the Commission because his wife used a Commission vehicle for her political campaign. She was standing on a UDF ticket. The opposition parties, led by the Republican Party, challenged the Electoral Commission on the issue. The Commission responded by suspending and eventually dismissing its Chief Elections Officer. In addition to the fact that it was illegal for Mrs Chimwaza to use the Commission’s vehicle, the Commission feared that it would be seen as showing preference for the UDF.

Campaigning outside the official period

During the 2004 elections the MEC did not implement the legal requirements in relation to the campaign period. The electoral legal requirement is that the election period runs for two months as set out in section 57 of the Parliamentary and Presidential Elections Act (Cap.2:01). Campaigning outside the official campaign period is an electoral offence. The official campaign period for the 2004 elections was from 16 March 2004 to 16 May. The governing party launched its campaign more than four months prior to the elections and the MEC failed to discipline it despite many calls from various stakeholders for it to do so, including a court order.\(^{333}\)

Bias of public broadcasters

As noted in chapter 4 there are serious concerns about bias in the content of state broadcasting. This is particularly important at election time. A study of media coverage for the 1999 elections by the international freedom of expression organisation. Article XIX shows that there was a deliberate effort by the governing party to create a media disinformation campaign. A team of journalists and reporters were hired from media houses to distort opposition party election information, issue false reports, use inflammatory language, and provide positive coverage for the governing party only. When the party won the elections, the members of the media

disinformation campaign team were rewarded with promotions, new jobs, and other material benefits.334

Almost all Election Observer Missions to the 2004 elections similarly noted that the two public broadcasters did not provide a level playing field for all parties and individual candidates, contrary to the law.335 The two media institutions clearly demonstrated bias and misuse by the incumbent governing party. The ruling party was accorded up to 93% of all positive campaign coverage. The remaining 7%, which was largely negative coverage, was shared between the various opposition parties.336 In a statement issued at the beginning of February 2004, Malawi’s major donors expressed concern over the fairness of the elections given the monopoly of the public media by the governing party. ‘Regrettably’, observed the donors, ‘news broadcast by the MBC and TVM is dominated by reports that explicitly or implicitly favour the parties in government.’337 The donors, academic analysts, opposition parties and civil society organisations concluded that the failure by the MEC to level the playing field meant that although the opposition parties were allowed to contest, their chances of winning were significantly reduced in comparison to those of the ruling party. This, in turn, undermined the democratic credibility of the entire electoral process.

Thus, as Nandini Patel observed in 2005, equitable access to the public media during elections ‘continues to be a contentious issue’.338

The monopoly of the public media by the governing party was also a problem for the 2009 elections.339 A media monitoring project of the MEC produced regular reports on media coverage of the 2009 electoral events.340 The reports showed that the print media, though with some differences, provided fairly balanced coverage of the election activities of both the opposition and the governing sides. For example, in the ‘Times’ groups of newspapers (The Daily Times, Sunday Times and Malawi News) about 53% of the positive news was for the opposition while the governing side had 47% of positive coverage. The ‘Nation’ group (The Nation, Weekend Nation and the Nation on Sunday) gave 57% positive coverage to the governing side and 43% to the opposition. The public broadcasters, on the other hand, provided between 98% and 100% positive coverage for the governing party, the DPP, while 88% of the negative coverage went to

the opposition UDF alone, ‘about which party there was no positive coverage at all’.341

The Commonwealth Observer Mission expressed its concern about the over-use of the public broadcasters by the governing party in the following terms:342

We are extremely concerned at the conduct of state-owned media in its coverage of these elections. The Election Law provides that every political party shall have the right to have its ‘campaign propaganda’ broadcast on radio by the Malawi Broadcasting Corporation. In addition, major media had all signed a Code of Conduct highlighting the need for balanced and fair reporting. However, reporting and coverage of the President and DPP’s campaign by state radio and TV was unashamedly partisan. Monitoring by MEC concluded that in the weeks leading up to the day of the election the President and his party were afforded over 97% of airtime. At the same time, the same media refused to provide virtually any access to other candidates and parties or to abide by agreements to air party political broadcasts. Conversely, it was reported that Joy FM, a private radio station which offered extensive coverage to the opposition, was closed down on the eve of the election by police for allegedly breaking the campaign silence. We were pleased that more balanced coverage of the election was provided by some private radio stations, such as Zodiac and Capital, which is an encouraging development. While some opposition parties did have access to coverage in newspapers and private radio stations, this in no way compensates for the blanket coverage afforded to the President and the governing party by the state-owned media.

The public media defended themselves by arguing that they could not give equal coverage to all the political parties because Parliament had not approved their annual operational budgets for two fiscal years.343 They therefore did not have the resources to invest in the coverage of the election events. The public media took advantage of the election coverage to hit back at the opposition parties for their rejection of these bodies’ annual budgets. For two fiscal years the opposition parties approved only a nominal budget of MK 1 (One Malawi Kwacha) to the MBC, and the same amount also to TVM in the 2007/2008 fiscal year. The opposition parties did so on the argument that the two public broadcasters were politically biased towards the DPP and were unaccountable to the public.

Political violence and intimidation
Sporadic incidences of violence are not uncommon in Malawian politics. However, despite the cases cited below, electoral violence is not a widespread phenomenon in Malawi, and therefore does not significantly inhibit political participation.

343 This account comes from discussions between the Ethics and Disciplinary Committee (EDC) of the Media Council of Malawi and the Management of both TVM and MBC, and between the EDC and the members of the Parliamentary Committee on Media and Communication. The EDC was lobbying for funding for the two state-owned broadcasting institutions. The author was a member of the EDC and participated in the discussions.
Under the UDF government of President Muluzi, the youth wing of the UDF, the Young Democrats (YD), used violence against opposition parties. In the run-up to the 2004 elections, scores of YD members were reported to have beaten up the vice president of the National Democratic Alliance (NDA) in Kasungu. During the counting of votes after the election in May 2004, Emmie Chanika, the Executive Director of the Civil Liberties Committee (CILIC), was beaten up outside the Electoral Commission’s voting tally centre in Blantyre by three Young Democrats, allegedly acting on instructions of the UDF national campaign director. A year earlier, while the third term issue was being discussed in Parliament, the Central Region’s leader of the YD, Shabani Kadango, and two others were arrested in Lilongwe for violence against opposition politicians and destruction of a vehicle belonging to an opposition politician outside the Parliament building.

In the run-up to the 2009 elections, pre-election violence was reported in Mzimba in the north, and Machinga and Blantyre in the south, creating fears that such incidents would possibly increase as the campaign intensified towards the end of 2008 and the beginning of 2009. However, there were very few cases of protest and clashes between supporters of various parties during the campaign period. ‘On the whole, the election campaign was generally peaceful, with basic freedoms provided, and voters were offered a choice between political alternatives. Given the tensions which existed in the lead up to the election, it is a credit to political parties that the campaign was conducted in a largely peaceful manner,’ observed the Commonwealth Election Observer Mission.

A fair amount of violence by losing opposition party members and supporters was reported after the delayed and controversial announcement of the 2004 election results, leading to the fatal shooting of Ephtania Bonjesi, an orphan girl living with her aunt in the township of Bangwe in Blantyre. The girl was wantonly shot by the police who were chasing demonstrating crowds of opposition party supporters. Violent protests were also reported in other towns such as Mzuzu in the north. Similar developments occurred following the announcement of the presidential election results in 1999.

In the run-up to the 2014 elections, pre-election violence, especially during primary elections, was reported in the districts of Karonga in the north, Nkhotakota and Salima in the centre, and Mangochi, Mulanje and Nsanje in the south. Compared to the other pre-election periods, there were more incidences of pre-election violence in the run-up to the 2014 elections.

344 Telephone interview with Emmie Chanika, Executive Director, Civil Liberties Committee (CILIC), 11 October 2005.
D. The Electoral System Problems

The four general elections (1994, 1999, 2004 and 2009) have brought to the fore shortcomings of the unmodified first-past-the-post (FPTP) electoral system, including the absence of a requirement for a run-off between the two leading candidates. Other shortcomings include high levels of wasted votes (these are votes that do not end in the election of a representative or the votes cast for the losing candidates), minority instead of majority rule, failure to address gender inequalities and entrenchment of regionalism. FPTP systems are usually credited with simplicity and the ability to produce a single party government, avoiding the political uncertainties associated with coalition governments. However, electoral processes and outcomes in Malawi do not appear to have benefited from these advantages. Rather, Malawi has fallen foul of the biggest disadvantage of the FPTP system in the fact that, where there are more than two main parties, a winning party or candidate can end up garnering a lesser percentage of the votes than the losing candidates combined. In real terms, therefore, the winning candidates end up representing a minority of voters. This, however, is not necessarily unique to Malawi. It is a general weakness and disadvantage of the FPTP system.

When coupled with the hybrid constitutional system that combines elements of presidentialism and parliamentarianism, the FPTP electoral system has allowed a situation where minority governments are the norm, or where the Parliament and Presidency are controlled by different parties, often leading to political paralysis.

The FPTP system has repeatedly handed victory to minority-supported candidates in Malawi. In 1994, Bakili Muluzi of the UDF won the Presidency with only 47.16% of the votes, against a combined 52.84% for the losing three contestants; in 1999, he won again with less than 50% of the vote. A protracted legal challenge was launched by the losing candidates, who argued that the constitutional provision that a candidate should win with ‘a majority of the electorate’ meant 50 plus 1% of those registered to vote, rather than of those who actually voted. The High Court struck down the challenge. It did not rule on the technical definition of an electorate, but rather found that not declaring a winner would result in the extension of the term of office for the incumbent, thus creating a constitutional crisis.

Five candidates contested the 2004 presidential elections. The governing party, the UDF, fielded Bingu wa Mutharika, who also represented that party’s two electoral partners, the Alliance for Democracy (AFORD) and the New Congress for Democracy (NCD). The Malawi Congress Party (MCP) fielded John Tembo, while a coalition of seven smaller parties calling itself the Mgwirizano Coalition fielded Gwanda Chakuamba of the Republican Party (RP). The National Democratic Alliance (NDA) fielded Brown Mpinganjira. One independent candidate, the former state vice president to Bakili Muluzi of the UDF, Justin Malewezi, participated in the race.

355 With the exception of the MDP and NUP the coalition comprised predominantly new parties: the Malawi Forum for Unity and Development (MAFUNDE); Malawi Democratic Party (MDP); Movement for Genuine Democracy (MGOCE); the National Unity Party (NUP); the People’s Transformation Party (PETRA); the People’s Progressive Movement (PPM); and the Republican Party (RP).
Using the FPTP system, Bingu wa Mutharika of the UDF won the election. If the votes for just the two runners’ up are combined, they add up to 1,774,083 or 30.85% of the registered voters, and 51.97% of the total votes cast for the presidential election. The minority vote of the winner becomes even more glaring if the votes for all the losers of the election are combined. They add up to more than 60% of the valid vote. The FPTP therefore gave Malawi a president who was rejected by the majority of the voters. While Mutharika polled the most votes, he was not able to garner the majority of votes cast.

Losing the vote but winning the elections also applies to the parliamentary elections. In 1999, candidates that lost the vote but won the election by a minority won 29 out of 193 constituencies. In 2004, minority-supported candidates won 103 of the 193 seats in Parliament, with the most extreme case being the candidate from the Nkhata Bay north-west constituency who was opposed by 78.85% of the voters. ‘Consequently’, argues Chingaipe, ‘the concept of majority, which is a fashionable term and an indispensable factor in any definition of democracy, was defeated’.

In 2004, these deficiencies brought a constitutional crisis. The UDF candidate, Mutharika, won the presidential election with less than 36% of the vote, while the parliamentary election also did not produce a clear majority party. Of the nine parties that won seats, the party with the largest presence in the house was the MCP, with 57 seats, representing 29% of the total capacity

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**Table 6: Presidential election results, 2004**

<table>
<thead>
<tr>
<th>Candidate</th>
<th>Votes won</th>
<th>Votes as % of:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Registered</td>
</tr>
<tr>
<td></td>
<td></td>
<td>voters</td>
</tr>
<tr>
<td>Mutharika (UDF)</td>
<td>1,195,586</td>
<td>20.79</td>
</tr>
<tr>
<td>Tembo (MCP)</td>
<td>937,965</td>
<td>16.31</td>
</tr>
<tr>
<td>Chakuamba (Mgwirizano)</td>
<td>836,118</td>
<td>14.54</td>
</tr>
<tr>
<td>Mpinganjira (NDA)</td>
<td>286,320</td>
<td>4.98</td>
</tr>
<tr>
<td>Malewezi (Independent)</td>
<td>67,812</td>
<td>1.18</td>
</tr>
</tbody>
</table>


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359 Some of the parties dissolved and merged with others, for example, RP and MGODE emerged with the newly formed Democratic People’s Party (DPP) and the NDA with the UDF.
of Parliament. The UDF’s share dropped from 93 seats in 1999 to 50 in 2004, representing 26% of the seats, making that party the second largest in the house. However, on account of the UDF winning the presidency, it was still regarded as the ‘ruling party’. But in practical terms a parliamentary majority is needed to govern the country, even though the president is directly elected under section 78 of the constitution, while section 92(1) mandates him to form a Cabinet. Thus, an attempt was made to form a coalition government of the UDF, AFORD, RP and the Movement for Genuine Democracy (MGODE). In February 2005, however, President Bingu wa Mutharika resigned from the UDF and formed an alternative party, the Democratic Progressive Party (DPP), outside Parliament. The parliamentary coalition collapsed, resulting in a ‘hung Parliament’.

In this scenario, there is no clear indication in the constitution or other law of who has the mandate to govern the country, or who leads the business of Parliament. The practice has been that the party that wins the presidential vote also forms the government. In both the 1994 and the 1999 elections, this interpretation created no problems because the party that won the presidential elections also obtained the largest number of parliamentary seats. The results of the 2004 elections unveiled serious weaknesses in this understanding. The MCP, with the largest share of seats in Parliament, would have been best placed to form the government, rather than the UDF which only won the presidency.

The current approach creates problems for democratic governance because it allows for weak minority-led governments, led by a president elected by a minority at the expense of parties that might have majority representation in Parliament. This issue requires a national debate, and further academic analysis.

However, the 2009 presidential elections gave the winner, Bingu wa Mutharika, an overwhelming majority vote.

Table 7: Presidential election results, 2009

<table>
<thead>
<tr>
<th>Candidates</th>
<th>Parties</th>
<th>Votes</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bingu wa Mutharika</td>
<td>Democratic Progressive Party</td>
<td>2 946 103</td>
<td>65.98</td>
</tr>
<tr>
<td>John Tembo</td>
<td>Malawi Congress Party</td>
<td>1 370 044</td>
<td>30.69</td>
</tr>
<tr>
<td>Kamuzu Chibambo</td>
<td>People’s Transformation Party</td>
<td>35 167</td>
<td>0.79</td>
</tr>
<tr>
<td>Stanley Masauli</td>
<td>Republican Party</td>
<td>33 887</td>
<td>0.76</td>
</tr>
<tr>
<td>Loveness Gondwe</td>
<td>New Rainbow Coalition</td>
<td>32 160</td>
<td>0.72</td>
</tr>
<tr>
<td>James Mbowe Nyondo</td>
<td>Independent</td>
<td>27 328</td>
<td>0.61</td>
</tr>
<tr>
<td>Dindi Gowa Nyasulu</td>
<td>Alliance for Democracy</td>
<td>20 151</td>
<td>0.45</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td>4 464 840</td>
<td>100.00</td>
</tr>
</tbody>
</table>


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On 21 May 2009, the MEC declared that Bingu wa Mutharika had won the presidential election, after 93% of votes had been counted. After the final tally Mutharika gained 2.9 million votes with John Tembo, his nearest rival, winning 1.4 million. Tembo alleged that the government had committed electoral fraud with opposition poll agents being denied access to the vote counting centres. Unlike Tembo, Muluzi, president of the UDF, which contested the elections in a coalition with Tembo’s MCP, accepted the official results of the election. Tembo’s court case was not concluded.

Prior to 2009, election results suggested that Malawi’s current electoral system accentuates the regional nature of Malawian political parties, as opposed to promoting broad-based political parties that transcend the regional cleavages. It produces a false sense of proportionality as evidenced by the results of the 2004 parliamentary election. Due mainly to the concentration of party support in the three regions the MCP won 30% of the seats with 25% of the vote, the UDF won 27% of the seats with 25% of the votes, and AFORD won a little more than 3% of the seats with just under 4% of the votes. This apparent relatively proportional result does not amount to proportional representation when one considers that almost 50% of votes cast were wasted, because they were cast outside the regions where the party concerned could easily win.

In the 2009 elections, the DPP won 113 seats (though the election of the vice president created a vacancy in one of those), obtaining a strong majority in the 193-seat National Assembly, while independents were second with 32 seats; the MCP trailed distantly with 27 seats and the UDF with only 17. AFORD, MAFUNDE and the MPP, each won one seat (totalling three for the ‘smaller’ parties).

Table 8: Parliamentary results by party, 2009 (approx. 5 900 000 registered voters)

<table>
<thead>
<tr>
<th>Party</th>
<th>Number of seats (193)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Democratic Progressive Party (DPP)</td>
<td>113</td>
</tr>
<tr>
<td>Malawi Congress Party (MCP)</td>
<td>27</td>
</tr>
<tr>
<td>United Democratic Front (UDF)</td>
<td>17</td>
</tr>
<tr>
<td>Alliance for Democracy (AFORD)</td>
<td>1</td>
</tr>
<tr>
<td>Malawi Forum for Unity and Development (MAFUNDE)</td>
<td>1</td>
</tr>
<tr>
<td>Maravi People’s Party (MPP)</td>
<td>1</td>
</tr>
<tr>
<td>Independents</td>
<td>32</td>
</tr>
<tr>
<td>Vacant*</td>
<td>1</td>
</tr>
</tbody>
</table>

*The election was postponed in one constituency (Blantyre City Central) due to the death of a candidate. A by-election was held in August 2009, which was won by an independent candidate. The seat won by the vice president also fell vacant and a by-election was also won by an independent, increasing the number of independents to 34.

362 Note 99, p.27.
Mutharika and his DPP won an overwhelming victory in northern Malawi, but also performed well in the Central and Southern Regions, although those regions have been historically dominated by the MCP and UDF, respectively. Some analysts suggested that the 2009 election results marked a departure from Malawi’s traditional regional voting patterns. However, a critical look at the voting patterns still shows regional tendencies. All the 27 seats won by the MCP were in the Central Region and all 17 seats for the UDF were in the Southern Region—the respective strongholds of the two parties. The single seat won by AFORD was in the Northern Region where the party is dominant while the other two ‘smaller’ parties won seats where their party leaders contested—one in a southern district and another in a district in the Central Region.

Table 9: Regional distribution of seats per party, 2009

<table>
<thead>
<tr>
<th>Party</th>
<th>Northern</th>
<th>Central</th>
<th>Southern</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>DPP</td>
<td>24</td>
<td>37</td>
<td>52</td>
<td>113</td>
</tr>
<tr>
<td>Independents</td>
<td>8</td>
<td>8</td>
<td>18</td>
<td>34</td>
</tr>
<tr>
<td>MCP</td>
<td>0</td>
<td>27</td>
<td>0</td>
<td>26</td>
</tr>
<tr>
<td>UDF</td>
<td>0</td>
<td>0</td>
<td>17</td>
<td>17</td>
</tr>
<tr>
<td>AFORD</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>MAFUNDE</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>MPP</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>33</strong></td>
<td><strong>73</strong></td>
<td><strong>86</strong></td>
<td><strong>193</strong></td>
</tr>
</tbody>
</table>

Note: Elections were not held in one constituency in the south due to the death of a candidate during the campaign period. One seat in the south fell vacant when the winning candidate assumed the Office of Vice President as required by the constitution. In the by-elections that followed both seats were won by independent candidates.

The DPP victory in the northern districts was largely won on account of AFORD’s decline that started in the late 1990s. At the national level, the DPP victory came as a result of a combination of factors. Partly it was a result of the good economic performance of the DPP-led government—a strong economic growth of 8%365—and undoubted positive achievements in food security. The results of the Afrobarometer survey by the Centre for Social Research at the University of Malawi showed that Malawians provided an approval rate of 61% for Bingu wa Mutharika ‘because of his government’s investments in food security and infrastructure projects’. Since coming to power in 2004, Mutharika placed agriculture and infrastructure development, particularly in the road sector, as his priority areas and made sure that the two sectors received the lion’s share in the government’s annual budgets. Mutharika’s national economic development blue-print, the Malawi Growth and Development Strategy (MGDS), placed transport and infrastructure development, food security, and education among the top six priority areas, otherwise known as ‘priorities within priorities’.367

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Mutharika’s victory was also a result of the failure of the opposition parties to organise themselves for the elections, in particular, the failure of the UDF to contest the presidential election after the courts had ruled that Muluzi could not stand again because he had already served two consecutive terms. The UDF then went into a hurriedly arranged and rather loosely organised coalition with the MCP, which alienated a lot of supporters and sympathisers of both parties. The UDF decision to team up with the MCP greatly reduced the party’s support in some parts of both the Southern and the Central Region, while allowing the MCP presidential candidate to win some votes in the Southern Region districts dominated by the UDF. Good examples of these were in Machinga and Mangochi where Tembo, the MCP candidate, won more votes in some constituencies than did Bingu wa Mutharika.\textsuperscript{368} Otherwise, at the national level, the two parties entered the election process from a compromised and rather weak position which gave a huge advantage to Bingu wa Mutharika and his DPP.

On the positive side, however, both the Malawi Constitution and the Parliamentary and Presidential Elections Act (Cap.2:01 of 2002) allow for candidates to stand for election to Parliament as independent candidates, without being members of a political party. In practice, 362 independent candidates stood in the 2004 elections and 39 were elected, making the independents the third largest grouping in Parliament after the MCP and UDF.\textsuperscript{369} In the 2009 elections, 487 independents contested the parliamentary race and 32 of these won, making it the second largest group in Parliament following the DPP.

E. Recent by-elections

Seven by-elections were held between January 2010 and October 2012: four in 2010, one in 2011, and two in 2012. Of these, two were in the Southern Region, regarded to be the stronghold of the UDF and DPP; two in the Central Region, regarded to be the stronghold of the MCP; and three in the Northern Region, previously regarded to be the stronghold of AFORD – until about 2009.

There were four noticeable features of these by-elections: low voter turn-out, declining popularity of the DPP – the party in government – the problem of winning the election while losing the vote, and the trading of seats between the parties.

Except for Mzimba South-West in the north and Machinga South-East in the south, voter turnout was less than 50% in all the other constituencies, and as low as 33.04% in Dowa South-East in the Central Region. The DPP, riding on its 2009 popularity, won three of the 2010 by-elections – one in the Southern Region (Mangochi-Malombe constituency) previously held by the UDF; and two in the Central Region (Dowa South-East and Lilongwe North-West), previously held by the UDF and MCP respectively. The UDF retained its seat in Machinga South-East in the Southern Region. The 2011 by-election held in Rumphi Central in the Northern Region was won by AFORD. The seat was previously held by the DPP. Of the two 2012 by-elections (both in the Northern Region), one was won by an independent candidate and another by President Joyce


\textsuperscript{369} See Table 12: Candidates fielded and seats won at regional level, 2004.
Banda’s People’s Party (PP). The MCP did not win any by-elections, and lost one of its Central Region seats to the DPP in 2010. With the exception of Machinga South-East in the Southern Region, all the seats had changed hands in the by-elections.

Table 10: By-elections, 2010–2012

<table>
<thead>
<tr>
<th>Region</th>
<th>Constituency</th>
<th>Registered voters</th>
<th>Valid voted</th>
<th>Winner’s votes</th>
<th>Turnout (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>North</td>
<td>Rumphi Central</td>
<td>31 748</td>
<td>14 325</td>
<td>6 640 (46.35%)</td>
<td>45.43</td>
</tr>
<tr>
<td></td>
<td>Mzimba Central</td>
<td>41 740</td>
<td>20 293</td>
<td>9 412 (46.38%)</td>
<td>49.27</td>
</tr>
<tr>
<td></td>
<td>Mzimba South-west</td>
<td>34 816</td>
<td>17 765</td>
<td>9 695 (54.57%)</td>
<td>51.72</td>
</tr>
<tr>
<td>Central</td>
<td>Dowa South-east</td>
<td>41 973</td>
<td>13 573</td>
<td>8 360 (61.59%)</td>
<td>33.04</td>
</tr>
<tr>
<td></td>
<td>Lilongwe North-west</td>
<td>44 857</td>
<td>17 931</td>
<td>11 558 (64.46%)</td>
<td>40.66</td>
</tr>
<tr>
<td>South</td>
<td>Machinga South-east</td>
<td>41 297</td>
<td>20 110</td>
<td>8 796 (43.74%)</td>
<td>50.96</td>
</tr>
<tr>
<td></td>
<td>Mangochi Malombe</td>
<td>31 186</td>
<td>11 246</td>
<td>4 289 (38.14%)</td>
<td>37.13</td>
</tr>
</tbody>
</table>

Also noticeable was the declining popularity of the DPP from 2010, just a year after the general elections. The party did not win any of the by-elections held after October 2010, suggesting that it had lost its 2009 popularity. This was largely a result of the poor governance record of the Bingu wa Mutharika administration. Between 2010 and 2012, the Mutharika administration ‘seldom respected’ citizens’ rights and freedoms. The human rights situation in the country deteriorated significantly in 2011, with President Bingu wa Mutharika acting in an increasingly repressive manner. Police use of excessive force was common. Suspects could be apprehended without a warrant if a police officer had probable cause, resulting in frequent and numerous arbitrary arrests and detentions. The use of temporary remand warrants to circumvent the 48-hour bail rule was widespread. There were several attempts to restrict press freedoms. Fuel and foreign currency shortages, erratic water and power availability in towns, and increasing food prices, took a toll on the country, reversing the economic gains made during Mutharika’s first term in office. Those who dared to demonstrate or strike against these conditions were threatened with violence, and President Mutharika ordered his political agents to ‘deal with’ his critics. Political analysts and civil liberties activists feared that the country was fast ‘reverting to dictatorship’. Mutharika’s party, the DPP, thus became increasingly unpopular.

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F. Election observation

Part X of the Parliamentary and Presidential Elections Act (Cap.2:01 of 2002) provides for international observation of the Malawi elections. The scope of observation activities (in section 102) include:

a) To verify and monitor the impartiality and the functioning of the Commission and its officers in conformity with this Act;
b) To verify and monitor the impartiality and legality of the decisions taken by the Commission and its officers in settling disputes;
c) To verify and monitor the registration of voters;
d) To observe the course of the campaigning for elections;
e) To verify and monitor the voting process;
f) To verify and monitor the determination of the results of the elections at all stages of determination;
g) To observe access to and the use of the media.

The law provides unrestricted access to international observers, provided they have been accredited by the MEC. In section 109 of the Parliamentary and Presidential Elections Act, the observers are to have:

(b) unimpeded access to all election events and to observe all aspects of the civic education programmes, the registration of voters, the nomination of candidates, the campaign, the voting and the counting of the votes at all stages; (c) to enjoy freedom of circulation throughout Malawi; (d) to seek and obtain information on the official organs involved in the conduct of an election and regarding the election itself; (e) to communicate freely with any political party and with any organisation or person ... ; (j) to communicate to the local and international media.

The main international observer missions for the 2004 Malawi elections were the Commonwealth, the African Union, the SADC Organ on Politics, Defence and Security Cooperation, the SADC Parliamentary Forum Mission, the European Union Mission and the Electoral Institute of Southern Africa Mission.375 There were also other smaller missions of national parliaments in the southern African region, electoral commissions, the diplomatic corps and international NGOs.376

375 These were the missions that produced comprehensive reports. Copies of their reports are included in M. Ott, B. Immink, B. Mhango, and C. Peters-Berries (eds), 2004, The Power of the Vote. Malawi's 2004 Parliamentary and Presidential Elections. Zomba: Kachere Books. The list available at the Malawi Electoral Commission includes: the African Union, EISA, the Commonwealth, the SADC PF, the SADC Organ on Politics, Defence and Security Cooperation, the European Union, Danish Church Aid, the American Embassy, the German Embassy/GTZ, the Royal Norwegian Embassy, the South African High Commission, the Canadian International Development Agency (CIDA), the Japanese Embassy, the Netherlands Consulate, the Electoral Commission of Bangladesh, the Electoral Commission of Mozambique, the National Electoral Commission of Rwanda and the National Electoral Commission of Zimbabwe.

In accordance with the provisions in Part X of the Parliamentary and Presidential Elections Act (Cap.2:01 of 2002), the international observers were allowed multiple entry into the country for the entire period of their election observation. Some of them were deployed several weeks before the elections and covered most of the country. They remained in the country until all election procedures were finished.

In addition to the international observers, there were also a number of local observers. They included public interest organisations such as the Public Affairs Committee (PAC), the National Initiative for Civic Education (NICE), CSO coalitions such as the Malawi Electoral Support Network (MESN), the Human Rights Consultative Committee (HRCC), the Gender Network, the Women’s Lobby Group, Church and Society, the Catholic Commission for Justice and Peace (CCJP) and individual NGOs such as the Civil Liberties Committee (CILIC) and the Centre for Human Rights and Rehabilitation (CHRR). Together they covered all aspects of election observation in all districts of the country. Like the international observers they were given unimpeded access to all election events and the conditions in section 109 of the Parliamentary and Presidential Elections Act (Cap.2:01) also applied to them.

However, the law does not specifically provide for local observers. They are, in fact, accredited at the discretion of the MEC. The law, therefore, does not create a legal right for local observers to observe or monitor elections in the country. This omission in the electoral law creates a situation whereby the MEC can question any organisation in the country intending to observe or monitor elections as a right. The best a local organisation could do in such circumstances would be to defend its right to monitor elections on the basis of the general constitutional rights reserved for all citizens in the constitution.

The international observers noted that the political environment in Malawi had ‘somehow improved since the 1994 elections and there [were] reasons for optimism in relation to the political development of the country ... There were, however, many problems with the electoral process, some of which were so serious that confidence in the accuracy of the results was undermined. It is therefore vital that stakeholders continue developing democratic practice in Malawi.’377 The observers spoke to issues such as the elections legal framework, the campaign process, the representation of women, media coverage, the behaviour of the police and the counting and announcement of results. The local observers added a few more recommendations in relation to the role and mandate of the Electoral Commission, ownership of the electoral process, election funding, the electoral system and civil society representation (see Appendices 1 and 2). Some of these recommendations were confirmed by a post-election review of the 2004 election held in Blantyre in July 2004.378

To date, there is no clear evidence of the recommendations by the election observers being implemented by the Malawi Electoral Commission or any other state institution. One reason for this is because the Commission is not legally bound to implement the election observers' recommendations. The Parliamentary and Presidential Elections Act merely requires observers to submit their reports to the Commission. Beyond that, there is no legal or administrative

process of handling these reports. Much as the Commission is required to report to Parliament, neither the constitution nor the Electoral Commission Act (1998) categorically states what the Commission should report on, and whether the Commission is required to include the implementation of the recommendations of the election observers in its annual report.

It is noted that in 2005 the MEC prepared its five-year plan for the management of the electoral process in the country. This occurred more in the way of responding to donor requirements and pressure from civil society organisations, rather than in the way of implementing recommendations of observer missions. Some of the general recommendations of the observer missions are addressed in the strategic plan, but as the AfriMAP Justice Sector report has rightly observed, what Malawian institutions lack are not strategic plans, but the implementation of the plans.379 There is therefore no guarantee that the recommendations of the observer missions included in the MEC strategic plan will actually be implemented.

In the electoral calendar for the 2009 elections released in April 2008, the MEC claimed to have included the recommendations of the 2004 election observer missions in its planning.380 The Commonwealth Observer Mission noted that some efforts were made to incorporate some of the ‘criticism’ of the past: ‘given the strong criticism of the voter register during the 2004 elections it was encouraging that an attempt was made to create a brand new list of voters’, the mission observed. It further stated: ‘it is to its credit that the MEC made a major effort to respond to these shortcomings and hold the elections as scheduled on 19 May. But such a late effort was always going to be difficult and it possibly distracted the organisation from other key tasks so close to the election. Such a late production of the final register also meant that it was not possible for a final public verification or for parties to have timely access to the list.’381 It further noted some of the MEC weaknesses observed in the previous elections:

Some of the discontent focused initially on [the] MEC’s appointment by the President without due consultation with other parties, but later also on delays and shortcomings in the procurement process, allegations of financial impropriety against some MEC staff, confusion over the timing of the nomination process, claims by parties that [the] MEC was not as open and forthcoming with them as they should have been and problems in the registration of voters. [The] MEC also lacked the time to undertake the overdue demarcation of constituencies. Equal suffrage may not therefore have been fully provided for.382

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380 This is stated in Malawi Electoral Commission, Update on the 2009 Parliamentary and Presidential Elections. Blantyre: MEC. It also appears as a preamble in the MEC poster in The Nation, 8 April 2008 and The Daily Times, 8 April 2008.


The European Union Observer Mission also highlighted some of the previous weaknesses of the Malawi electoral process repeated in the 2009 elections. The fact that these were previously observed, but repeated in the subsequent election in 2009, demonstrated that the MEC had not fully complied with and not fully taken into consideration the recommendations of the international observers.

Noticeably absent in the MEC planned events were by-elections in at least eight constituencies that fell vacant due to deaths or dismissals of their MPs. Some of them had fallen vacant no less than 13 months before the 19 May general elections of 2009.

G. Acceptance of results

In 2004, the SADC Organ on Politics, Defence and Security Cooperation observer mission called upon all the stakeholders in Malawi ‘to accept the final results of the elections’ because they believed the results would be ‘a true reflection of the wishes of the people of Malawi, committed to further consolidation of peace, stability, freedom and democracy’ in the country. This view was not shared by most stakeholders in the country and the results were challenged by almost all the major opposition groups. Both the MCP and the Mgwirizano Coalition took the Electoral Commission to court. Although the Mgwirizano Coalition withdrew their case a few months later, the MCP did not.

Academic analysts generally view the results of the 2004 general elections as not reflecting the popular will of the majority of Malawians. They cite evidence from the low voter turnout, the large size of the wasted vote, and the victories awarded to winners with minority votes for their arguments.

Sections 93–98 of the Parliamentary and Presidential Elections Act (Cap.2:01) provide details for announcing election results. All counting is done at the polling station and the results at every station are announced on the spot. From the polling stations the results go to the district centre where constituency results are compiled and announced on the spot. A detailed report of all constituency and district results are then forwarded to the national tally centre of the Electoral Commission where the national results are compiled and announced as soon as all polling station, constituency and district results are tallied. The Electoral Commission Act (No.10 of 1998) mandates the Electoral Commission to release the official results within 48 hours.
hours of the conclusion of the elections, and the Parliamentary and Presidential Elections Act (Cap.2:01) mandates the Commission to publish the results within eight days of the conclusion of the elections. Publication is supposed to take place in the Government Gazette as well in a radio broadcast and in at least one issue of a newspaper in circulation in the country.

The system of announcing results, therefore, starts at the polling stations where the counting is done in the presence of all the interested parties, including local and international observers, if any. The presiding officer, appointed by the Electoral Commission as a returning officer, usually the headmaster of a school or a local head of a government department, presides over and supervises the process. From there the ballots go to the district centre where they are tallied and verified, presided over by the District Commissioner as Elections (or returning) Officer. There as well, the results are announced by the returning officers, who are officials appointed by the Electoral Commission, and then faxed or transmitted to the national tally centre of the Electoral Commission in Blantyre. At the tally centre the results are also announced as they come in from the districts. Totals are also calculated until all results are in and the final additions are made. The final results are then announced on the national radio.

The announcement of the 2004 results were characterised by serious delays due to the verification process of the results. There were parallel channels for the communication of results, through the MBC and through the Electoral Commission’s own tally centre.

H. Recommendations

- The MEC should implement the recommendations of the international and national election observation teams, including importantly in relation to voter registration procedures and processes.
- The MEC should create a new voters’ roll long in advance of the next elections.
- The MEC should strictly enforce electoral codes of conduct; take steps to ensure that electoral abuses, including illegal use of state resources and violence against political opponents, are uniformly investigated and that prima facie cases result in arrest and prosecution under the law.
- The MEC should widely publicise and monitor compliance with the code of conduct adopted for political parties during election periods, including the period between elections. The MEC should be given powers to sanction parties that do not abide by the code, including public reprimand, fines and disqualification of candidates in serious cases, with appeal to the courts.
- The Malawi Communications Regulatory Authority (MACRA) should strictly enforce the legal requirements for equal and equitable coverage of all political players by the public media in order to even the political playing field.
- CSOs and the MEC should give civic education and voter mobilisation for by-elections the same priority as the general elections in order to reduce apathy and low voter turnout.
- The country’s electoral system should be publicly debated very seriously with a view to possibly changing it.
• The National Registration Bureau should speed up and complete the creation of the national civic register. The MEC should use this as a resource for projecting registration and confirming the voters roll.
Political parties

The legal framework governing political parties in Malawi is inadequate, and in practice political parties are weak. The requirements to register a party are limited, and there is no system to monitor or enforce compliance by parties with any code of conduct between elections, or even compliance with their own constitutions. Internal democracy within parties is almost non-existent, with no proper systems for selection of candidates or development of policy platforms. Most political parties are based on regional support bases and are often identified with their founders as opposed to a particular ideology. Most of the parties do not have documented policies on issues of national importance such as nationality (whether foreigners could be members of political parties), the economy, gender equality and others. Political party funding is not properly regulated and is not transparent in practice.

A. Legal framework

The legal framework for the regulation of political parties in Malawi is provided in four pieces of legislation. First is the constitution in section 40, which provides for the freedom to establish, join or campaign for a political party. Second is the Political Parties (Registration and Regulation) Act (Cap.2:07), which provides the legal framework for the registration and deregistration of political parties. Third is the Parliamentary and Presidential Elections Act (Cap.2:01), which outlines political parties’ conditions and methods of participating in parliamentary and presidential elections, including nomination of candidates. Fourth is the Communications Act (No.41 of 1998), which outlines the equal access of political parties to the media during election times. Access to the media during election times is also mentioned in the Parliamentary and Presidential Elections Act (Cap.2:01).
The constitution does not state any requirements for the registration of political parties in the country. In fact, there is no requirement to have a political party registered. The constitution does not even subject the registration and regulation of political parties to an act of Parliament. In practice, the registration of political parties is governed by the 1993 Political Parties (Registration and Regulation) Act (Cap.2:07). Patel observes that ‘the law does not define political parties as such, although references are made to them in many sections of the constitution’. The Act stipulates that a party may consist of not fewer than one hundred members. The law requires the application for registration of a party to be accompanied by the party’s constitution and manifesto, plus names and addresses of an interim executive committee. Parties are registered with the Registrar of Political Parties in the Registrar General’s Office.

The Political Parties (Registration and Regulation) Act provides that non-citizens may not be party members, even though the Malawi Constitution states that non-citizens who are resident in the country for more than seven years may vote. This means that the non-citizens who have resided in the country for more than seven years may not stand for political office, but may exercise the right to vote. It means they can vote without becoming members of political parties.

While it is easy to form political parties, they are not deregistered or penalised if they violate their constitutions and indulge in undemocratic and unconstitutional behaviour. The shortcomings in the law governing the registration and regulation of political parties result in the absence of a proper legal and political framework for governing intra- and inter-party conflicts in the Malawian parties.

B. Party organisation and membership

As of December 2013 there were no less than 54 registered political parties in Malawi. Many of these are not functional in practice. Some parties merged or disbanded after the May 2004 elections, and again after 2009 elections. New parties formed in 2012 and in 2013 in the run-up to the 2014 elections. The main active parties are:

- The Malawi Congress Party (MCP), the party that led the country to independence and the party of former president Hastings Kamuzu Banda, in office from 1961 to 1994. The current leader of the party is the Reverend Dr Lazarus Chakwera, former president of the Assemblies of God Church in Malawi.

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388 Political Parties (Registration and Regulation) Act, section 5(4); Constitution, section 77. See also C. Ng’ong’ola, ‘Judicial Mediation in Electoral Politics in Malawi’, in Harri Englund (ed.), 2002, A Democracy of Chameleons: Politics and Culture in the New Malawi. Nordic Africa Institute, p.68.


390 Some sources put the figure at 53. See www.faceofmalawi.com/2014/01/new-party-launched-in-malawi.

391 There were about 46 registered parties by mid-2013, not less than four more registered during the second half of 2013. See http://www.malawivoice.com/2013/01/22/46-political-parties-is-it-worthy-for-malawis-democracy-10456/.
• The United Democratic Front (UDF), the party of President Bakili Muluzi, in office for two terms from 1994 to 2004. When Muluzi’s attempt to obtain a third term failed, his chosen successor as party leader, Bingu wa Mutharika, was elected president in 2004. Muluzi was again selected as the party’s presidential candidate for the 2009 elections. His son, Atupele Austin Muluzi, became the party president in October 2012 after being elected at the party’s convention.

• The Democratic Progressive Party (DPP), formed by Mutharika in 2005 when he fell out with the UDF leadership after becoming president, and thus regarded as the ‘ruling party’, despite clashes over the status of MPs defecting to it within Parliament (see the section on floor crossing and the amendment of section 65 of the constitution in the next chapter). After Bingu wa Mutharika’s death, his younger brother, Peter Arthur Mutharika, became the party’s president in April 2013.

• The Alliance for Democracy (AFORD), established in 1992 in opposition to Banda under the leadership of Chihana Chakufwa, and currently headed by Enoch Chihana, son to the party’s first president.

• The People’s Progressive Movement (PPM), founded in 2003 and led by Aleke Banda up to 2009. It won seven seats in the 2004 election and lost all of them in the 2009 elections. It is currently led by Mark Katsonga.

• The Malawi Democratic Party (MDP), first led by Kamlepo Kalua. It was one of the first parties to emerge during the fight for multi-partyism in the early 1990s. Kalua jointed Joyce Banda’s People’s Party in March 2013. The future of the MDP is uncertain.

• The Malawi Forum for Unity and Development (MAFUNDE), registered in the run-up to the 2004 elections. It won its first parliamentary seat in the 2009 elections and was represented in Parliament by its president, George Mnesa.

• The People’s Transformation and Restoration Party (PETRA), led by a Blantyre-based lawyer, Kamuzu Chibambo. It gained one seat in Parliament between 2004 and 2009. Its leadership has not changed.

• The Maravi People’s Party (MPP), registered in the run-up to the 2009 elections. It occupies one seat, but its president (who won the only parliamentary seat) defected to the PP in April 2012. The party’s future is uncertain.

• The Congress for National Unity (CONU), which won one seat in the 2004 elections, lost the seat in 2009 and has been less active since then.

• The People’s Party (PP), formed by Joyce Banda after falling out of favour with former president Mutharika. It benefited from defections of MPs from the DPP, the MCP and other parties between 2011 and 2013. It won one by-election in 2012.

In total, 17 parties contested parliamentary seats in the 2009 elections. The DPP provided the largest number of candidates at 193, the UDF fielded 171, the MCP fielded 134, the PPM fielded 51, the National Rainbow Coalition (NARC – a new party) fielded 35, AFORD fielded 29, the New Republican Party (NRP) fielded 25, PETRA fielded 16, the Congress of Democrats (another new party) fielded 12, the MPP fielded 11 and the Republican Party fielded 7. Some six ‘smaller’ parties fielded one candidate each. The largest group of candidates stood as independents, totalling
Judging by the numbers of candidates fielded, the DPP, UDF, MCP, PPM and NARC can arguably be regarded as having had a true national spread.

With the exception of the MCP, most of the parties in Malawi were founded in the period between 1992 and 2004. Four major parties: AFORD, the MDP, MCP and the UDF dominated the political scene between the first and the second general election, 1994–1999. A number of new parties emerged between 2001 and 2004, and of these, five – the now defunct Movement for Genuine Democracy (MGODE), the also defunct National Democratic Alliance (NDA), the People’s Transformation and Restoration Party (PETRA), the People’s Progressive Movement (PPM), the Republican Party (RP) and the Congress for National Unity (CONU) – won some seats in Parliament in 2004. Two new parties entered Parliament in 2009 – the Malawi Forum for Unity and Development (MAFUNDE) and the Maravi People’s Party (MPP). The DPP, which won the majority of seats, can also be regarded as a new party in Parliament because it came into being (in 2005) through defections when its founder Bingu wa Mutharika left the UDF, and then through by-elections in December the same year. Joyce Banda’s People’s Party (PP) followed the same route, when the party was founded after Banda left the DPP in 2011.

Due to the failure to obtain an absolute majority in Parliament, the party of the Presidency has tended to bargain and negotiate for both formal and informal alliances and coalitions with the opposition. For example, the UDF and AFORD formed a formal coalition in 1995 and again between 2001 and 2005, while an informal alliance existed between the UDF and MCP after the 2004 elections. After the demise of Mutharika, Joyce Banda formed a Cabinet comprising members from AFORD, DPP, the Maravi Party, PP and the UDF, dubbing it a ‘reconciliatory inclusive’ Cabinet.

In terms of their structures, and the functions of the structures, the parties are governed by their individual constitutions. The party constitutions, in different ways, describe the hierarchy and the administrative structures of the individual parties. In most cases, the hierarchical structures start with branch committees at the village level (or comprising several villages), an area committee (or a ward committee in some cases), a constituency committee, a district committee, a regional committee and national committee. These may have different names, depending on the individual party. For example, instead of branches some parties prefer to call them zones. Some parties, such as the PPM, do not have regional committees.

Within the party system the governing (often called the ‘ruling’) party has an excessive dominance. Since the party that wins the presidency is regarded as the ‘ruling’ party, the tendency is to conflate the ‘ruling’ party with the government. As a result, there is no clear distinction between the government and the ‘ruling’ party in the minds of most ordinary Malawians.392

The opposition political parties have serious weaknesses and are characterised by internal frictions and factions (sometimes even disintegration),393 leadership crises, poor funding and lack of continuity. Running political parties is a relatively new experience for the majority of the

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392 For detailed analysis on this see, for example, W.C. Chirwa and R. Poeschke, 1998, Socio-anthropological Conditions for Democracy in Malawi: Key Challenges. Bonn and Lilongwe: GTZ.

opposition parties and most of them are only active during elections. As Meinhardt and Patel have rightly observed, ‘although it is easy to register a political party in Malawi, the performance of political parties has generally been poor due to a lack of institutional capacity and a lack of training of party functionaries. In addition, parties do not have effective mechanisms for identifying and recruiting members.’

A 1998 study on political parties indicated that no party in Malawi had a clear idea of the size of its membership, and the parties did not distinguish between party members and party supporters. There is no reason to believe the situation has changed since then. The parties do not have membership requirements and membership registration systems. To the extent that some of the parties have organisational structures that reach down to local levels, these can be said to be broad-based, but most parties in Malawi are active only during election times.

### c. Policy platforms

A most noticeable feature of political parties in Malawi is that there are no significant programmatic, let alone ideological or policy differences between them. As a result, these parties are not fundamentally different from each other. According to the results of a study on inter- and intra-party conflict in Malawi published in 2002, political parties are, by and large, purely vehicles for seizing power and gaining access to state resources, and forming and re-forming around individual leadership.

Political parties in Malawi refer to the contents of their campaign manifestoes as expressions of policies and as the points of ‘difference’ between them. In reality, however, the manifestoes do not significantly differ from each other in terms of their ideological orientations or practical policies. Moreover, the contents of the party manifestoes are not translated into or extracted from written policy documents. Several studies on political parties in Malawi show total absence of any written party policy, party programmes, and or/and strategic plans. The political parties

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398 Examples of these are: Malawi Congress Party (MCP); Reconciliation, Reconstruction, and Development. Lilongwe: MCP; Mgwirizano Coalition, Governance for Sustainable Development. Blantyre: Mgwirizano Coalition; National Democratic Alliance (NDA), Towards Prosperous Malawi. Blantyre: NDA; United Democratic Front (UDF), Forging Ahead with Social and Economic Transformation – Unity, Democracy and Development. Blantyre: UDF.

contacted for this study were not in a position to produce clearly stated policy positions on the major issues facing the country.\textsuperscript{400} Also absent were methodologies for the development of party policy platforms. In the absence of regular conventions and conferences, processes of consultation are ill-defined and most crucial political decisions are not subjected to a democratic vote.

As Patel has observed, ‘even after a decade of democratic transition, Malawi’s political parties are based on personalities rather than ideologies, and it is difficult to distinguish one party from another on the basis of what they stand for’.\textsuperscript{401} The result is that ‘in spite of the political party system gaining ground in the country, the choice for the voter is severely limited … [as the] parties do not offer much choice to the electorate in terms of policies and ideologies’.\textsuperscript{402}

Rather than promoting political norms, beliefs and values, political parties in Malawi are structured as ‘issue pushers’ that appear incoherent, unsystematic and not committed to ideologies. That is, besides the availability of ideological resources in the country such as the existence of more than 80\% of the peasantry in the countryside, a sizeable workforce, students, the mass of farmers and the emerging political elite, parties fail to articulate particular interests of these social strata … Instead of cultivating class-based interests, world views, political norms, values and beliefs, these parties merely optimise regionalism and ethnicity.\textsuperscript{403}

At its convention in October 2012, the UDF unveiled its draft policy document and invited its members to provide comments on it. The document states that:

This policy framework is indicative of the broad policy direction the United Democratic Front (UDF) as a political party intends to adopt when elected into power … We, as a political party, reaffirm our declaration that we are guided by liberalism in political thought and practice. As liberals we commit ourselves to be informed by liberal beliefs, values and principles in the choice and formulation of policy, and design of governance programs. Our liberal orientation notwithstanding, we will guard against the temptation to be bogged down by our ideological conviction. To that end, where liberalism as the basis for policy choices has the potential to limit the deliverance of desired governance for the betterment of the citizens, we intend to take a pragmatic path. However our belief in liberal principles as the core basis for organizing and running the socio-political and economic affairs of our society is critical for an enduring pursuance of a cause. It suggests that we seek power not for its own sake with no guiding beliefs, values and principles, but for a clearly definable and durable cause.

\textsuperscript{400} Interviews with Wallace Chiurme, Former Secretary General and former Acting President, AFORD, 9 September 2005; Kate Kainja, former Secretary General, MCP, 10–11 September 2005; Paul Maulidi, former Secretary General, UDF, 13 September 2005.


We aspire to see Malawi as a high middle income country with a structurally balanced and rapidly growing economy with minimal income inequalities where unity is cherished and celebrated by diverse cultural and religious cleavages and democracy is established as the only viable form of reconciling competing views regarding organisation of social and economic life of our society.

The draft document outlined what the UDF’s political, social and economic beliefs and priorities are, and how the party would use these in its campaign manifestos. A revised version that incorporated the views of the party’s membership was presented at a special policy conference in October 2013. After deliberations the document was adopted, and a conference report was prepared. The policy document was then sent to the manifesto drafting committee to inform the drafting of the party’s manifesto for the 2014 elections and possibly beyond.

D. Internal democracy

Up to 2013, the Malawian political parties rarely held organised primary elections for leadership positions or candidates for the National Assembly. Where these were conducted, they were ad hoc and poorly organised. Such failures resulted in the electoral processes not allowing for genuinely representative candidates to emerge from the constituencies.

The Malawi Congress Party (MCP) was probably the only party that issued written guidelines for the conduct of primary elections for the 2004 nominations of parliamentary candidates. However, there is no evidence that these were widely circulated, let alone followed at any or all levels. The emergence of the independent candidates in 2004 was, to a large extent, a result of the failure of internal democracy. The DPP issued some guidelines for the conduct of primary elections in the run-up to the 2009 parliamentary and presidential elections, but in most cases these were not systematically adhered to. In some cases they were adapted by the local party officials to suit their own needs.

Nor did most of the Malawian parties hold regular conventions and conferences prior to 2013. The only times the parties held conventions was when their executive committees wanted to endorse certain people for leadership positions or for nominations for general elections. Candidates for presidential elections were sometimes declared before party conventions had been convened to elect them, and they started campaigning in the country for their parties way ahead of the conventions that were supposed to elect them. Often there were no clear challengers to such people. The self-declared presidential candidates, usually the presidents of the parties,
used their advantage to intimidate potential contenders.411

Partly as a response to criticism, and party also in preparation for the 2014 general elections, all the major parties (the PP, UDF, MCP, DPP, AFORD) held conventions between 2012 and 2013. For the PP this was the first convention at which its central executive committee was formalised. The UDF had suffered a leadership crisis after the retirement of its founding president, Bakili Muluzi. The interim party president was ineffective and the party had split into two factions. The convention was held to deal with these issues and to allow the party to start preparing for elections in 2014 with renewed vigour.412 For the MCP, the convention was for ‘renewal’ and ‘re-branding’, ‘but only at the top level’.413 At the National Executive Committee level, it resulted in new leadership with more than 80% of the former executive members losing their positions, including its president, John Tembo.414 Some of them were later on co-opted back into the Committee by the new president because the convention mandated him to appoint some members of the executive. This structural change at the top level was not replicated at the regional and local levels where conventions and elections were not held. The party may therefore not have fully ‘renewed’ and ‘re-branded’ itself.

The major reason for the big losses on the part of the UDF in both the 2004 and 2009 parliamentary elections was the mismanagement of its primary elections. The party executive imposed candidates from the top against the popular will of its members and supporters. This accounted for the emergence of the large numbers of ‘independents’ in the constituencies previously won by the party. In the 2009 elections the UDF national leadership issued a directive stopping primary elections in all the constituencies where the party had incumbent members of Parliament. This resulted in large numbers of independent candidates in such constituencies, with some of these winning seats in Parliament. In the case of AFORD, which also lost many seats in 2004 and 2009, the inconsistencies of the party’s executive constituted the primary reason for its decline. Instead of protecting the individual identity of the party, AFORD’s central executive selfishly entered into unworkable alliances with other parties from time to time, and broke such alliances almost at free will, without consultation with its membership.415 Between 1999 and 2009 the party split into several groups paying allegiance to several individuals, with no collective identity.

Between 2009 and 2012 political schisms also characterised the MCP and the UDF, and, to some extent, the DPP. In all these parties there were contending factions both at leadership and membership levels. In most cases the factions emerged immediately before or after the elections, suggesting problems in the internal management of electoral processes.

412 Interview with Bakili Muluzi, former chair of UDF and former president of Malawi, BCA Hill, Blantyre,
413 This is the view of Dr Augustine Magolowondo of the Netherlands Institute of Multiparty Democracy (NIMD), which supports Malawian political parties. Phone interview, 13 December 2013.

There is concern about communication at two levels. The first is the lack of communication across the various levels of the party, with the lower echelons of the party left out of the decision-making processes. The second is the language used by senior party members about colleagues who do not subscribe to their views. Far from instilling confidence in the membership, this creates a sense of disgust and disrespect of these members. [The] senior members also expose their differences in public and in the media.

Equally noticeable is the lack of accountability and responsibility on the part of the leadership of the political parties. They are neither responsible nor accountable to the rank and file for their actions. Patel further observes that ‘in recent times there have been instances where party leaders have made decisions to form coalitions or alliances with other parties without consulting their party members. This leaves party members angry and frustrated.’\footnote{Situsi Nkhoma, MCP MP for Kasungu South, presentation to the UNESCO Workshop on Parliamentary Training in the SADC Region, February 2006, Lilongwe; also Hon. Loveness Gondwe, AFORD MP, Mzimba West, response to the AfriMAP Round Table Meeting, Lilongwe, November 2005.}


\textbf{E. Party funding}

Neither the constitution nor the Political Parties (Registration and Regulation) Act (Cap.2:07) provides a legal framework for party financing. However, section 40(2) of the constitution sets down that:

The State shall provide funds so as to ensure that, during the life of any Parliament, any political party which has secured more than one-tenth of the national vote in elections to that Parliament has sufficient funds to continue to represent its constituency.
The constitution does not place any requirements on how the funding is to be used. The method of disbursement is not stated and there are no audit requirements. The Political Parties (Registration and Regulation) Act (Cap.2:07) does not provide for state funding of political parties, and does not provide any prescriptions for private funding of political parties in the country.

State funds are provided only for those political parties represented in Parliament, with the constitutional provision interpreted to mean that funding is provided for those parties with at least one-tenth of the seats in the National Assembly, rather than those with one-tenth of the popular vote. This funding is meant to meet some of the parties’ administrative expenses so that it ‘continues to represent its constituency’. The money is provided by the Treasury through Parliament and is subject to audit by the Auditor General, just like any other public accounts. The amount disbursed depends on the proportion of seats the individual party holds in Parliament, provided those seats are not less than 10% of the total seats in the house.

Leaders of political parties are of the opinion that the constitutional provision on the funding of the parties with at least one-tenth of the national vote should include all parties that obtained at least 10% of the votes cast during the general elections, up to the next elections. That would allow parties to continue mobilising and strategising for the next elections, and avoid becoming dormant during the inter-election period.

The provision of state funds to opposition parties have often been suspended for reasons such as the boycott of Parliament and the non-submission of audited reports, despite the fact that the constitution does not stipulate any such requirements for securing state funding.

Section 66 of the Parliamentary and Presidential Elections Act (Cap.2:01) also provides for private party fundraising as follows:

Every political party may, for the purpose of financing its campaign, appeal for and receive voluntary contributions from any individual or any non-governmental organisation or other private organisations in or outside Malawi.

There are no legal requirements for parties to publish their accounts, and in practice they do not do so, certainly not on a regular basis.

In practice, the parties tend to rely heavily on personal funding from their founders or leaders, and on certain individuals as main fundraisers. Such funding is not transparent and diminishes the collective ownership and accountability of parties, thereby diminishing political participation in these parties. This practice perpetuates neo-patrimonial and patronage systems.

Meinhardt and Patel further observe that some parties have links with the business sector, but the business enterprises do not openly support parties for fear of reprisals – especially when they support opposition parties. As a result there is a total lack of transparency and accountability on the part of political parties about private funding.

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420 Constitution, section 40(2).
421 These were the views of the party leaders at the AfriMAP Political Participation Advocacy workshop for political parties, Cresta Hotel, Lilongwe, 19 August 2006. The meeting was attended by leaders of AFORD, the DPP, MCP, PETRA and the PPM.
As of 2013, there were two incomplete parallel processes aimed at changing the legal framework for party funding in the country.\textsuperscript{423} The first was the work led by the Law Commission to amend the Parties (Registration and Regulation) Act (Cap.2:07) so that it includes provisions on party funding. The second was the joint exercise by CSOs and political parties themselves to come up with new legislation to replace the existing Act. This was supported by the Centre for Multiparty Democracy (CMD), a forum where the CSOs and political parties interface. Both processes resulted in draft documents presented to the executive, but no draft bill had been prepared for presentation to Parliament.

F. Ethnicity, regionalism and party politics
Ethno-linguistic and regionalist characteristics in parties arise from their lack of ideological foundations and internal democracy. The non-discrimination clauses in the constitution would render unconstitutional any laws regarding the foundation of political parties on the basis of racial or ethnic loyalties. However, almost all the major parties in Malawi are regionally based, drawing their major membership and support from specific regions and ethnic groups, mostly based on where their founder or current leader came or comes from.

As Table 11 shows, the distribution of seats won in the 2004 National Assembly elections corresponds to the regional origins of each party’s presidential candidates. The MCP draws much of its support from the Central Region where its president, John Tembo, comes from. The UDF draws much of its support from the eastern and Shire highlands districts of the Southern Region, where its leader, Bakili Muluzi, comes from. The NDA also drew much of its support from the Shire highlands district in the south, where its former leader, Brown Mpinganjira, came from. AFORD and the MGODE are regional parties in the north with leaders from the same region. The president of the Republican Party, Gwanda Chakuamba, is from the lower Shire in the Southern Region. His party won most seats in the two districts of the region: Nsanje and Chikwawa. The seats they won in the Northern Region were on account of the party’s pre-election coalition with the PPM whose president, the late Aleke Banda, was from the north and where it won most of its seats. Both the Congress for National Unity (CONU) and the PETRA won their single seats from the regions and districts where their presidents came from.

As indicated in Table 12, the numbers of candidates fielded in the 2004 elections demonstrate the potential for national coverage of each party and their capacity to campaign nationally in an election. The top five parties were the only parties that enjoyed national coverage.

Nonetheless, the varying regional distribution of seats over the 1994, 1999 and 2004 elections (Table 11) suggests that the regionalist characteristics of the parties can be undermined. The new parties that contested the 2004 elections gained inroads into the regional strongholds of the well-established parties. Although the MCP continued to dominate the Central Region, the UDF’s manipulation of candidatures during the primary elections led to a severe reduction in its votes in the Southern Region.

\textsuperscript{423} Discussion with Edge Kanyongolo, Associate Professor of Constitutional Law, Chancellor College, and the CMD’s consultant on the issue, 13 December 2014.
Table 11: Regional distribution of parliamentary seats by party affiliation 1994, 1999, 2004

<table>
<thead>
<tr>
<th>Party</th>
<th>Northern</th>
<th>Central</th>
<th>Southern</th>
</tr>
</thead>
<tbody>
<tr>
<td>1994</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>AFORD</td>
<td>33</td>
<td>3</td>
<td>–</td>
</tr>
<tr>
<td>MCP</td>
<td>–</td>
<td>51</td>
<td>5</td>
</tr>
<tr>
<td>UDF</td>
<td>–</td>
<td>12</td>
<td>73</td>
</tr>
<tr>
<td>1999</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>AFORD</td>
<td>28</td>
<td>1</td>
<td>–</td>
</tr>
<tr>
<td>MCP</td>
<td>4</td>
<td>54</td>
<td>8</td>
</tr>
<tr>
<td>UDF</td>
<td>1</td>
<td>16</td>
<td>76</td>
</tr>
<tr>
<td>2004</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>AFORD</td>
<td>6</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>MCP</td>
<td>0</td>
<td>56</td>
<td>1</td>
</tr>
<tr>
<td>UDF</td>
<td>3</td>
<td>8</td>
<td>39</td>
</tr>
</tbody>
</table>

INDEPENDENT, RP, NDA, PPM, AFD, MGOIDE, PETRA, CONU, MAFUNDE, NUP, NCD, OTHERS, INDEPENDENTS, NO ELECTIONS


Table 12: Candidates fielded and seats won at regional level, 2004

<table>
<thead>
<tr>
<th>Party</th>
<th>Candidates fielded</th>
<th>Seats Won</th>
<th>% Share</th>
</tr>
</thead>
<tbody>
<tr>
<td>MCP</td>
<td>174</td>
<td>0</td>
<td>57</td>
</tr>
<tr>
<td>UDF</td>
<td>164</td>
<td>3</td>
<td>8</td>
</tr>
<tr>
<td>RP</td>
<td>110</td>
<td>6</td>
<td>0</td>
</tr>
<tr>
<td>NDA</td>
<td>187</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>PPM</td>
<td>112</td>
<td>5</td>
<td>1</td>
</tr>
<tr>
<td>AFORD</td>
<td>40</td>
<td>6</td>
<td>0</td>
</tr>
<tr>
<td>MGOIDE</td>
<td>22</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>CONU</td>
<td>2</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>PETRA</td>
<td>18</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>MAFUNDE</td>
<td>21</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>NUP</td>
<td>9</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>NCD</td>
<td>23</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>OTHERS</td>
<td>3</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>INDEPENDENTS</td>
<td>372</td>
<td>6</td>
<td>5</td>
</tr>
<tr>
<td>NO ELECTIONS</td>
<td>...</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>TOTAL</td>
<td>1267</td>
<td>33</td>
<td>73</td>
</tr>
</tbody>
</table>

G. Gender disparities

Article 12 of the SADC Protocol on Gender and Development (2008) requires that ‘states parties shall endeavour that, by 2015, at least 50% of decision-making positions in the public and private sectors are held by women including the use of affirmative action measures as provided for in article 5’. The AU Declaration on Gender Equality in Africa (2004) provides for the promotion of gender equality and for women’s representation in decision-making. The Malawian political parties are heavily male dominated and make little attempt to promote women candidates. Table 13 demonstrates the serious degree of gender disparity regarding candidates for parliamentary elections.

Table 13: Parliamentary candidates by sex, 2004

<table>
<thead>
<tr>
<th>Party</th>
<th>Male candidates</th>
<th>Female candidates</th>
<th>Total</th>
<th>% of female candidates</th>
</tr>
</thead>
<tbody>
<tr>
<td>AFORD</td>
<td>34</td>
<td>5</td>
<td>39</td>
<td>12.8</td>
</tr>
<tr>
<td>CONU</td>
<td>2</td>
<td>0</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>MCP</td>
<td>161</td>
<td>11</td>
<td>172</td>
<td>6.4</td>
</tr>
<tr>
<td>MDP</td>
<td>8</td>
<td>1</td>
<td>9</td>
<td>11.1</td>
</tr>
<tr>
<td>MAFUNDE</td>
<td>19</td>
<td>2</td>
<td>21</td>
<td>9.5</td>
</tr>
<tr>
<td>MGODE</td>
<td>20</td>
<td>2</td>
<td>22</td>
<td>9.1</td>
</tr>
<tr>
<td>NDA</td>
<td>162</td>
<td>23</td>
<td>185</td>
<td>12.4</td>
</tr>
<tr>
<td>NSM</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>NUP</td>
<td>6</td>
<td>3</td>
<td>9</td>
<td>33.3</td>
</tr>
<tr>
<td>NCD</td>
<td>19</td>
<td>2</td>
<td>21</td>
<td>9.5</td>
</tr>
<tr>
<td>PETRA</td>
<td>13</td>
<td>5</td>
<td>18</td>
<td>27.8</td>
</tr>
<tr>
<td>PFP</td>
<td>2</td>
<td>0</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>PPM</td>
<td>104</td>
<td>6</td>
<td>110</td>
<td>5.4</td>
</tr>
<tr>
<td>RP</td>
<td>93</td>
<td>16</td>
<td>109</td>
<td>14.7</td>
</tr>
<tr>
<td>UDF</td>
<td>132</td>
<td>32</td>
<td>164</td>
<td>19.5</td>
</tr>
<tr>
<td>Independents</td>
<td>316</td>
<td>46</td>
<td>362</td>
<td>12.7</td>
</tr>
<tr>
<td>Total</td>
<td>1092</td>
<td>154</td>
<td>1246</td>
<td>12.4</td>
</tr>
</tbody>
</table>


In 2004, out of a total of 1,246 candidates, only 154 or 12.4% were female. Noticeable was the low numbers of female candidates in the large parties with a national character, such as the MCP, NDA, PPM and the UDF. Lack of party support was the major cause for women standing as independents. The majority of women who stood as independents had earlier been rejected by their political parties or had lost to men in the primaries, because their party executives and members preferred male candidates.

424 http://www.sadc.int/issues/gender/women-politics/.
The 2009 elections saw a number of breakthroughs in terms of women’s participation in the democratic process. A total of 238 women contested the parliamentary elections, representing 20.3% of the total number of candidates, and there was one female presidential candidate. In addition to the appointment of Malawi’s first female vice president, the elections saw 41 women winning parliamentary seats and a solid turnout from female voters. These achievements have largely been attributed to the joint campaign of civil society groups, international development partners and the government, popularly known as the 50/50 campaign – targeting 50% female representation in Parliament, which was however not achieved. The largest slice of funding for the campaign, aimed at helping female candidates campaign more effectively during the election period, came from Department of International Development (United Kingdom) (DFID) and the United Nations Population Fund (UNFPA). Another breakthrough was the appointment of 11 women to Cabinet positions, representing 26% of the Cabinet team – compared to seven out of 42 (or 17%) in the previous Cabinet. It was expected that ‘the existence of a female vice president and more female MPs [will] raise the profile of women’s, and children’s, issues in the country ... although there is still much work to be done to give women a bigger role in Malawi’s government, and indeed to reduce the marginalisation of women across society’. In 2012 Joyce Banda made history when she ascended to the Presidency following the demise of President Bingu wa Mutharika. She is the first woman president in Malawi and the first woman head of state in all of the SADC region.

H. Code of conduct

Although the Parliamentary and Presidential Elections Act and the Local Government Act provides for the Electoral Commission to adopt codes of conduct during election periods, the Political Parties (Registration and Regulation) Act (Cap.2:07) does not have a code of conduct that applies outside of election periods, and there is no framework for a code of conduct for political parties in the constitution. In practice, therefore, enforcement of proper political conduct relies on the political parties’ internal disciplinary committees and interpretations of the various provisions and clauses relating to discipline as found in individual party constitutions. This system is woefully inadequate.

I. Recommendations

- Clear rules should be established in law for state funding to be provided in accordance with an agreed interpretation of section 40(2) of the constitution. The terms on which such funding may be suspended should be established in law.
- Legislation should be introduced to regulate privately raised political party funds. Political parties should be required to publish annual audited accounts which should be accessible to the public.
- The government should introduce – and civil society should campaign for – legislation

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427 http://www.africanews.com/site/malawi_president_names_43member_cabinet/list-messages25519.
429 http://www.sadc.int/issues/gender/women-politics/.
to be adopted by the National Assembly establishing rules of internal democracy for political parties, including in relation to the selection of candidates and the adoption of policy platforms.

- Production of party policies should be part of the legal requirement for party registration or/and participation in general elections.
- Political parties should adopt measures to achieve the target of 50% representation of women in politics established by SADC and the African Union.
- A code of conduct for political parties that governs the period between elections should be established in law, with monitoring and enforcement by the Electoral Commission.
- Malawi should seriously debate the unmodified FPTP system, including the possibility of introducing the 50+1% requirement for declaring a presidential winner.
The Malawi Parliament has weak institutional capacity. Its effectiveness as an institution of political participation, representation and oversight is further eroded by a dominant executive. Parliamentary portfolio committees are also weak and up to 2013, met rather irregularly, though some improvement began in 2007. Most members of Parliament (MPs) do not have constituency offices and most rural MPs stay in urban centres and rarely hold public constituency meetings.

More important than the technical questions, however, is the frequent political paralysis of Parliament by factional splits and re-splits among the leading politicians has led to highly partisan but essentially content-free debates. In these debates, parties have used attempts to amend the constitution – sometimes successful, sometimes not – for their own immediate political purposes.

However, although debates remain extremely partisan, Parliament has increasingly focused on issues of national importance. A substantial majority of Malawians view the National Assembly’s law-making role as important.

A. Legal framework
The role and powers of the legislature are established in chapter 6 of the constitution. Section 48 states that:

1) All legislative powers of the Republic shall be vested in Parliament which shall have the powers and responsibilities set out in this Constitution.

2) An Act of Parliament shall have primacy over other forms of law, but shall be subject to the Constitution.
Section 49(1) of the constitution defines ‘Parliament’ as ‘the National Assembly and the President as Head of State’, confirming the hybrid nature of the Malawian system.

The legal framework establishing the institutions and composition of Parliament has been the site of some of the fiercest constitutional battles since multi-party democracy was restored to Malawi in 1994. In particular, provisions relating to the right of the public to recall MPs, the existence of a Senate, and especially the right of MPs to ‘cross the floor’ have caused heated debates.

**Recall of members**

In 1995, Parliament repealed section 64 of the constitution on Recall of Members of Parliament. The section provided for the recall of an MP by a petition to the Speaker signed by at least 50% of the registered voters in the constituency. Both the governing and the opposition sides of Parliament unanimously voted in favour of repealing this section arguing that it was prone to abuse by any person holding a grudge against a particular member. The effect of the repeal of section 64 is that it has reduced the accountability of political representatives to their constituents, while at the same time reducing the power of the electorate over their elected representatives. The only meaningful mechanism for the electorate to hold their representative accountable is through the ballot at the end of the tenure of their office, which is currently five years after the elections.

Efforts by civil society organisations to bring back the recall provision have not yielded any results. In March 2006, civil society organisations and chiefs submitted the issue to the Law Commission for consideration during the constitutional review process then expected to end in early 2007. The review process has been concluded and a final report has been issued for action by the executive and Parliament but not much progress has been made. By the time of this report in 2009 the constitutional review report or its related proposed bills had not been tabled in Parliament.

**Repeal of the provisions for a Senate**

The constitution initially provided for an upper house in the form of the Senate. In 2001, the United Democratic Front (UDF) government arranged for sections 68 to 72 and section 210, all relating to the Senate, its composition, vacancies, functions and powers, scrutiny of legislation, and dissolution to be repealed, and for the definition of Parliament to be amended to remove reference to the Senate. The repealed sections provided for a Senate that would enable political participation by chiefs, women and other interest and specialised groups in the legislative process of the country.

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430 By Act No.6 of 1995.
431 Constitution (Amendment) Act (No.4 of 2001).
432 The Senate was to have 80 members: 24 elected from among all voters; 24 elected from among chiefs; and the remaining 32 from among (i) interest groups, who shall include representatives from women’s organisations, the disabled and from health, education, farming and business sectors, and from trade unions; (ii) society, who shall be such persons as are generally recognised for their outstanding service to the public or contribution to the social, cultural, or technological development of the nation; and (iii) religion, who shall include representatives of the major religious faiths in Malawi. Constitution, 1994, pre-amendment, section 68.
The amendment was proposed by the executive on the basis that the Senate would be expensive to maintain for a poor country such as Malawi, and that the local government and the decentralisation programme would cater for some of the functions of the Senate since it would bring political power to the local level, and people would participate in key decisions relating to development policy and other issues. In reality, the abolition of the Senate undermined the political participation of the country’s special groups in their national affairs, and the opportunity for these groups to scrutinise legislation and executive decisions. From the time the amendment was made civil society has continued to oppose it, with petitions to Parliament and political parties. Between 2003 and 2006, the Church and Society Programme of the Livingstonia Synod of the Church of Central Africa Presbyterian (CCAP) spearheaded the lobbying campaign for the reinstatement of the provisions on the Senate. At the constitutional conference review at the end of March 2006 civil society institutions repeated their call for the reinstatement of the provisions on the Senate as well as the recall provisions of the MPs.\textsuperscript{433}

The repeal of the provisions on the Senate could be regarded as unconstitutional in light of the contents of sections 45(8) and 198 of the constitution. The former states that ‘under no circumstances shall it be possible to suspend this constitution or any part thereof or dissolve any of its organs, save as is consistent with the provisions of this constitution’. The latter states that ‘the Republic of Malawi, the organs of State and the offices referred to it in this constitution shall be defined and constituted in accordance with this constitution’. Abolishing the Senate could be interpreted as dissolving an organ of the state defined and constituted in accordance with the constitution.

**Floor crossing and the amendment of section 65 of the constitution**

In 2001, an extremely controversial amendment to the constitution removed the right of members of the National Assembly from keeping their seats if they left their party to become independents or if they joined a not previously represented party in the National Assembly. During 2001, the UDF was leading a campaign to change the constitution to allow a third term for President Muluzi and was facing increasing pressure on its control of Parliament from members who were either resigning from its ranks and declaring themselves independent, or joining extra-Parliamentary parties or other organisations opposed to changing the constitution. It took action to preserve its parliamentary majority and amended the constitutional provisions relating to ‘crossing the floor’ of Parliament. The original text of section 65(1) of the constitution on crossing the floor provided that:

\textit{The Speaker shall declare vacant the seat of any member of the National Assembly who was, at the time of his or her election, a member of one political party represented in the National Assembly, other than by that member alone but who has voluntarily ceased to be a member of that party and has joined another political party represented in the National Assembly.}

That is, an MP who was not the only representative in Parliament of his or her party, would on the face of it lose his or her seat on joining another party also represented in Parliament.

\textsuperscript{433} Moses Mkandawire, Civil Society Presentation to the Constitutional Review Conference, March 2006.
However, he or she could retain the seat if becoming an independent and not a representative of another party. A UDF-dominated Parliament, by Act No.8 of 2001, amended the section to read:

The Speaker shall declare vacant the seat of any member of the National Assembly who was, at the time of his or her election, a member of one political party represented in the National Assembly, other than by that member alone but who has voluntarily ceased to be a member of that party or has joined another political party represented in the National Assembly, or has joined any other political party, or association or organisation whose objectives or activities are political in nature.

The amendment meant that any MP who joined another party not represented in Parliament, or even a more general ‘association or organisation’ with political objectives, would also lose his or her seat.

In 2005, after President Bingu wa Mutharika resigned from the UDF and formed his own extra-Parliamentary party, the Democratic Progressive Party (DPP), this amendment was used against UDF members who had joined the DPP.

Around April 2005, all Cabinet ministers – except two who had been elected MPs under the ticket of the UDF – became independent MPs and joined the newly formed DPP, though the constitution does not necessarily require a Cabinet minister to be an MP. Soon thereafter, several MPs who had stood as independents during the elections also joined the DPP. In total, the DPP welcomed around 60 defectors from the MCP and UDF and 20 independent MPs, bringing its membership in Parliament to 80. In June 2005, MCP leader John Tembo presented to Parliament a Private Member’s Bill that sought to give power to the Speaker to declare vacant the seat of any MP who, after being elected under a particular political status, chose to alter his/her status during the life of the National Assembly to which he/she was elected. The bill failed to obtain the required number of votes for it to pass. The UDF then wrote to the Speaker on 2 October 2005 requesting him to declare certain MPs’ seats vacant, following those MPs’ change of their political status. The Speaker announced that he would make his ruling on the request on 31 October 2005. The ruling was, however, not made because the Attorney General, in the interim, applied for and obtained an order from the High Court restraining the Speaker from making the ruling, until further order.

Following these developments, the president requested the High Court to review section 65(1), using powers given under section 89(1)(h) of the constitution to refer disputes of a constitutional nature to the High Court. The issues which the High Court was asked to determine included whether or not the amended section 65(1) of the constitution was inconsistent with the provisions of the bill of rights on freedom of association, conscience and expression, and on the right to join a party or to participate in political activities (sections 32, 33, 34 and 40). In addition, the court was asked to rule on the interpretation of the constitutional provisions in relation to different scenarios for the election of MPs and their change of allegiance between parties or from independent to membership of a particular party, or appointment to be a minister by a president from another party.434

The matter attracted wide public interest. Several bodies, institutions and political parties

joined the proceedings as Friends of the Court. Among these were the Malawi Law Society, the Law School of the University of Malawi, the Registered Trustees of the Public Affairs Committee (PAC), the Civil Liberties Committee (CILIC), the Malawi Congress Party (MCP), the United Democratic Front (UDF) and the Alliance for Democracy (AFORD).

In November 2006, the three-member panel of High Court judges ruled unanimously that section 65(i) was not inconsistent with the Bill of Rights and was thus valid. Among other variations, a member of the National Assembly who was elected under a party ticket, who later decided to resign from that party and became independent, and later again joined another party represented in the National Assembly, crosses the floor, and his or her seat could be declared vacant. In relation to other permutations, the judges were split, with a majority deciding that an MP elected as an independent who joined a party in the National Assembly does not cross the floor, and that whether an MP appointed as a minister by a president from another party crossed the floor depended on the circumstances of the case.

The president appealed to the Supreme Court of Appeal, which in June 2007 confirmed the High Court’s decision that section 65(i) as amended was not inconsistent with the Bill of Rights and was valid. In interpreting the section, the Court of Appeal also confirmed the High Court’s ruling that members of the National Assembly elected as independents do not cross the floor when they join a party, represented or not represented, in the National Assembly. Finally, the court held that a member of the National Assembly does not cross the floor merely because he or she has accepted a ministerial appointment. He or she may however be deemed to have done so depending on his or her conduct after being appointed, depending on the facts of each case.

Following the Supreme Court ruling, the UDF and the MCP petitioned the Speaker of the National Assembly to declare the seats vacant of MPs who they claimed had crossed the floor, a step which would greatly reduce the DPP’s representation in Parliament. However, some MPs had obtained injunctions restraining the Speaker from making a ruling, arguing, instead, for a judicial review. There were no less than three injunctions and orders of stay in the High Court on the matter. Though two injunctions were subsequently withdrawn, at least one remained in force, and there was an order of stay on one other case that had not been discharged by the court. The petition for the judicial review was also not discharged. The Speaker could, therefore, not act on the matter.

The opposition responded by threatening to reject the 2007/2008 national budget until the Speaker had made a ruling on the affected MPs. For weeks the House went into chaos, until some ‘mob politics’ was applied by civil society activists and university students who mounted demonstrations against the opposition. The donors joined in the debate, until the opposition were forced back to the House to discuss and pass the budget. Soon after the budget session, President Mutharika prorogued Parliament, an action that further irked the opposition.

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436 Malawi Law Society press release on section 65 and related issues.

who threatened to shoot down government bills and the subsequent budget of 2008/2009. The budget was finally passed after agreements between the governing side and the opposition that the issues related to section 65 would be discussed after the budget session. However, the executive counter-responded by not convening the House for over eight months, fearing that the session would be dominated by the debate on section 65(1) derailing the government agenda.438

The section 65(1) debate has demonstrated the political vulnerability of the Malawi constitution, and the consequences of the wanton amendments.

B. Membership
The Malawi National Assembly has 193 seats, all elected. Following the 2009 election, 166 were male and 27 (13.9%) were female. One additional female came in following the first round of by-elections in 2010. Malawi is a signatory to the SADC Protocol that requires that at least 50% of the composition of the National Assembly should be female. Neither the government nor the individual political parties have put in place deliberate policies for the inclusion of more women in Parliament.

The Malawi electoral law also does not provide for affirmative ethnic or racial quotas in the representative bodies, and it is also not the policy of the government to implement ethnic quotas in representative bodies. This is partly because it would amount to ethnic favouritism and thus discrimination, which is contrary to the constitutional provisions. Furthermore, it has never been an issue of widespread public concern for the racial minorities: it has never been a public policy problem and so never got onto the government agenda. The inclusion of quotas for special interest groups in the repealed Senate provisions was meant to cater for the representation of these special groups. However, gender, ethnic, and racial quotas would probably be acceptable if applied in the context of affirmative action policies to address persistent inequalities. With the exception of the lobbying by the Women’s Lobby Group and the Gender Network to persuade the government to implement the SADC Protocol, there has not been any national debate on affirmative action in relation to the issue of representation in Parliament.

Qualifications
During the first tenure of the multi-party Parliament, the educational qualifications of the MPs were generally low, with over 40% below qualifications expected of those leaving secondary school at age 16 (see Table 14).439 With the exception of the constitutional requirement that the candidates for the National Assembly should be literate and able to speak the English language well enough to enable them to effectively participate in the National Assembly deliberations, there are no other statutory requirements for qualifications of MPs.

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438 ‘Civil society attacks decision to close Parliament’, UN IRIN, 26 September 2007.
439 See also W.C. Chirwa, The Malawi Parliamentary Training Programme Syllabus, 1996. The data were obtained from Parliament.
Table 14: Educational qualifications of members of Malawi Parliament, 1994–1999

<table>
<thead>
<tr>
<th>Qualification</th>
<th>% of 177</th>
<th>Observations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Doctorates (PhDs)</td>
<td>3.42</td>
<td>Medicine, history and law</td>
</tr>
<tr>
<td>Master’s degrees (MA/MSc)</td>
<td>2.28</td>
<td>Various fields: agriculture, education, law, etc.</td>
</tr>
<tr>
<td>First degrees (BA/BSc, etc.)</td>
<td>9.14</td>
<td>Majority in education, a few economists and other fields</td>
</tr>
<tr>
<td>College diplomas</td>
<td>23.4</td>
<td>Mostly in education, a few in agriculture</td>
</tr>
<tr>
<td>GCE/ ‘A’ levels/matriculation</td>
<td>2.28</td>
<td>Majority obtained outside Malawi</td>
</tr>
<tr>
<td>MCE/MSCE/ ‘O’ levels</td>
<td>22.29</td>
<td>These are local certificates: Malawi Certificate of Education (equivalent ‘O’ in UK) and Malawi School Certificate of Education are secondary qualifications</td>
</tr>
<tr>
<td>Junior Certificate (JC)</td>
<td>22.29</td>
<td>JC is a lower secondary school qualification</td>
</tr>
<tr>
<td>No or little secondary education</td>
<td>4.0</td>
<td>Secondary school drop outs, etc.</td>
</tr>
<tr>
<td>Unknown qualifications and Professional certificates</td>
<td>10.9</td>
<td>Majority with ‘trades’ certificates</td>
</tr>
</tbody>
</table>

Source: National Assembly Records.

In 2004 the situation improved somewhat. The educational qualifications of MPs were:

Table 15: Educational qualifications of members of Parliament, 2004

<table>
<thead>
<tr>
<th>Qualification</th>
<th>Total</th>
<th>% of 193</th>
<th>Observations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Higher degrees (Master's/PhDs)</td>
<td>24</td>
<td>12.44</td>
<td>Various fields: Agriculture, Medicine, Law, Education, History, etc.</td>
</tr>
<tr>
<td>First degrees (BA/BSc/BSoc Sc/BEEd)</td>
<td>21</td>
<td>10.88</td>
<td>Various fields: Engineering, Agriculture, Education, Business Administration, Law, etc.</td>
</tr>
<tr>
<td>Professional diplomas and certificates</td>
<td>28</td>
<td>14.51</td>
<td>Accounting, Administration, Education, Commerce, Teaching, Information Technology, etc. Mostly from academically non-accredited institutions</td>
</tr>
<tr>
<td>GCE/ ‘A’ levels/matriculation</td>
<td>5</td>
<td>2.59</td>
<td>Majority obtained outside Malawi</td>
</tr>
<tr>
<td>MCE/MSCE/ ‘O’ levels</td>
<td>63</td>
<td>32.64</td>
<td>These are local certificates: Malawi Certificate of Education (equivalent ‘O’ in UK) and Malawi School Certificate of Education are secondary school qualifications</td>
</tr>
<tr>
<td>Junior Certificate</td>
<td>11</td>
<td>5.70</td>
<td>Lower secondary school education</td>
</tr>
<tr>
<td>Others/Unknown</td>
<td>33</td>
<td>17.10</td>
<td>Not known or information not available</td>
</tr>
<tr>
<td>Vacant seats</td>
<td>8</td>
<td>4.15</td>
<td>Due to non-election or death</td>
</tr>
<tr>
<td>Total</td>
<td>193</td>
<td>100</td>
<td></td>
</tr>
</tbody>
</table>

Source: National Assembly Records.440

440 Some eight constituencies were vacant at the time of the compilation of these figures, and in some cases the members of Parliament had not provided their bio-data.
The major improvement was in the increase in the numbers of university degree holders in the House, and especially so with higher degrees. About 23% of the House had university degrees. However, given the larger numbers of those with just secondary school education (‘A’ and ‘O’ levels, plus Junior Certificate), constituting 40.9% of the House, and those with simple and ordinary professional certificates and diplomas from academically non-accredited institutions, constituting 14.5% of the House, it could be argued that the National Assembly was still characterised by low educational qualifications by this time. This was compounded by the existence of those whose qualifications were not known, 33 or 17% of the House. If the ‘others or unknown’ were added to those with lower than a university degree, the total was 140 or 72.5% of the total composition of the House. However, it should be observed that some of the professional diplomas and certificates, granted that they might have been obtained from academically non-accredited institutions, could be good enough as higher educational qualifications, and hence worth recognising.

Academic qualifications are not the only qualifications that would make a representative competent. Experiences in business, teaching, preaching, unionism and technical skills in various fields would contribute to the competence of these people. The members of Parliament come from varied backgrounds where they accumulate varied skills and experience that they may use in their work.

**Turnover**

Parliamentary election results suggest that elections in Malawi provide real opportunities to change or replace representatives. Out of the 187 contested seats\(^441\) in the 20 May 2004 parliamentary elections, 59 were retained by incumbents and 128 were won by new challengers.\(^442\) Among the major electoral casualties were 23 MPs who were in powerful positions as ministers or deputy ministers. For varied reasons, they lost their seats to independent and opposition candidates. The independents took 10 of the 23 seats, while 13 went to a total of six opposition parties, with the Malawi Congress Party taking six of those 13. When by-elections for the remaining six seats were held, they were all won by novices.

At the party level, it was only the MCP that maintained some limited level of stability in Parliament. The greatest victims have been AFORD and the UDF, due in large part to internal weaknesses in the parties themselves (see previous chapter). Nevertheless, quite a few MPs were re-elected to the 2004 Parliament based on different political affiliations, after changing parties. The 2004 Parliament was also characterised by further shifts and swings in the political allegiance of members.

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\(^{441}\) Six seats were not contested, one because a candidate from one party had died during the campaign period very close to the election date, and the others due to problems of election administration problems ranging from misprinted ballot papers to legal contestations.


<table>
<thead>
<tr>
<th>Party</th>
<th>Seats by 1994 election out of 177</th>
<th>Re-elected in 1999</th>
</tr>
</thead>
<tbody>
<tr>
<td>MCP</td>
<td>55</td>
<td>19</td>
</tr>
<tr>
<td>AFORD</td>
<td>35</td>
<td>10</td>
</tr>
<tr>
<td>UDF</td>
<td>86</td>
<td>43</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Party</th>
<th>Seats by 1999 election out of 177</th>
<th>Re-elected in 2004</th>
</tr>
</thead>
<tbody>
<tr>
<td>MCP</td>
<td>64</td>
<td>31 (one not consecutively)</td>
</tr>
<tr>
<td>AFORD</td>
<td>29</td>
<td>3</td>
</tr>
<tr>
<td>UDF</td>
<td>93</td>
<td>22</td>
</tr>
</tbody>
</table>

Source: Research Department, Malawi National Assembly.

The turnover was also experienced at the level of the geographical distribution of seats. In the Northern Region, out of the 31 seats contested, incumbents won in only five constituencies; in the Central Region, incumbents won in 34 of the 71 contested constituencies; while in the Southern Region the incumbents won in only 20 of the 85 contested seats.

The turnover was even higher in the 2009 election as only 48 of the sitting MPs were re-elected, representing 24.9% of the house. At the regional level, in both the Northern and Southern Regions, the MPs who retained their seats were less than a quarter in each region, while in the south they were just slightly more than a quarter of the total number for the region.

Table 17: Turnover of MPs at the regional level, 2009

<table>
<thead>
<tr>
<th>Region</th>
<th>Retained seat</th>
<th>New MPs</th>
<th>Total seats</th>
<th>% Retained</th>
</tr>
</thead>
<tbody>
<tr>
<td>Northern</td>
<td>7</td>
<td>26</td>
<td>33</td>
<td>21.2</td>
</tr>
<tr>
<td>Central</td>
<td>17</td>
<td>56</td>
<td>73</td>
<td>23.3</td>
</tr>
<tr>
<td>Southern</td>
<td>24</td>
<td>62</td>
<td>87</td>
<td>25.6</td>
</tr>
<tr>
<td>Total</td>
<td>48</td>
<td>145</td>
<td>193</td>
<td>24.9</td>
</tr>
</tbody>
</table>

Though there were some slight improvements in the numbers of seats retained in the Southern and Northern Regions, the turnover rate was still high for all the regions with the Central Region having the largest number of incumbent defeats. In all the regions, the incumbents started losing in the primaries and the figures rose higher in the actual elections, making the Malawi Parliament a house of novices.

The high turnover rate will continue after the 2014 elections. By November 2013, just about midway into the primary elections period, not less than 27 sitting MPs from various parties had lost primary elections.443 Some had withdrawn from the race, and more were expected to lose in the remaining period of the primary elections. These, plus those who will lose in the actual

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parliamentary elections, will contribute to the high turnover.

Death adds to the rapid turnover of MPs. As observed elsewhere in this document, between 1994 and 1999 the house lost 28 members to death; some 12 members died during the second tenure of the House between 1999 and 2004; seven between 2004 and 2005, six between 2005 and 2009, and at least three between 2010 and 2013. Such turnover causes serious problems of representation as the affected constituencies stay without representation for long periods if by-elections are not immediately held.444

Remuneration, support and training
In 2012, an MP in Malawi received a monthly salary of MK 150 000 (about US$ 600); a tax free housing allowance of MK 45 000 (about US$ 180), a tax free motor vehicle maintenance allowance of MK 275 000 (about US$ 1 100), a constituency allowance of MK 60 000 (about US$ 240), and a utility allowance of MK 100 000. The total amount was MK 630 000 (equivalent to just under US$ 2 520).446 These figures took effect after the revisions that occurred in July 2012. The overall amount was just about equivalent to the salary of a professor at the University of Malawi at the time, and compared favourably with the salaries of lower-ranking managers in some parastatal organisations in the country. However, the MPs augmented their salaries with sitting allowances received during parliamentary committee meetings, on average at least twice a year, but could increase to three or four times a year depending on the number of committees an individual MP sat on. Some committees, such as the Public Accounts Committee, Budget and Finance Committee and the Public Appointments Committee met more regularly due to the volume of work they did. The members of such committees therefore earned a little more from the sitting allowances.

The remuneration of a Malawian MP was more than, for example, that of an ordinary member of the Mozambican Assembly of the Republic, who earned a salary of around US$ 1 200, but less than the notoriously well-paid Kenyan MPs, who received a total monthly package equivalent to US$ 10 000.447 The Malawian MPs are not provided with allowances or salaries for research assistants and other support staff. In fact, the entire National Assembly, with 193 members, has only three research staff members. While, by Malawi standards, it can be argued that the MPs are adequately remunerated, they cannot be said to be adequately provided for in terms of the facilities they require to effectively perform their duties. Until recently, the Parliament library had no internet facility for the MPs, and there were no computers, not even for basic word processing functions.

The use of hand-held devices such as iPads, smartphones and laptops is prohibited in Parliament when the House is sitting.448 In June 2013, an MP wanted to know if such devices

446 These figures were provided by the Research Department of the Malawi National Assembly. Exchange rate as at 2004.
447 The figures cited here for Malawi and Kenya were provided by the Research Department of the Malawi National Assembly. The figures for Mozambique were obtained from Mozambique: Political Participation and Democracy, AfriMAP, 2009.
were allowed, after seeing that some members, including ministers were using them. The Speaker ruled that the devices were ‘a big distraction’ and much as they were used in some African countries such as Rwanda, Uganda and Botswana, the rule in the Malawi Parliament was that they ‘remain disallowed in the Chamber’.449

Up to 2009, Parliament, jointly with the University of Malawi, provided some modular training to members of the House on a number of topical issues relating to their roles. The training was done in three-week sessions for a total of 15–16 weeks for new MPs. The training was designed to be completed within the first 24 months of the parliamentary term. There were also civil society institutions that provided training to MPs on specialised or specific topics such as the budget and budget monitoring, human rights, democracy and governance, parliamentary standing orders, gender, effective communication, the environment, international cooperation and HIV/AIDS. Up to 2005/2006, the National Democratic Institute (NDI) offered specialised training on committee work to chairs and vice chairs of the parliamentary committees.

c. Activity and effectiveness

Section 59(2) of the constitution states that there shall be at least two meetings of the National Assembly in each session. In practice, the Assembly meets no less than three times a year, and holds extra-ordinary sessions when and wherever appropriate. The president, in consultation with the Speaker, may summon extraordinary sessions of the Assembly. Ordinary sessions are normally not less than three weeks long while extraordinary sessions could be as short as one day long.

The experience has been that up to 2009, Parliament did not meet according to the expected schedule. The reason given by the executive was that the government had not been able to raise adequate funding for Parliament to meet. The view of the opposition was that the Mutharika presidency was rather reluctant to finance Parliament because of the effectiveness of the opposition in challenging the government agenda.

Up to 2009, opposition parties always had the majority of seats in Parliament, effectively denying the governing party the potential to abuse power; but also causing a level of paralysis in the governing of the country. Due to the failure to obtain an absolute majority in Parliament, the ‘ruling’ side had tended to bargain and negotiate for both formal and informal alliances and coalitions with the opposition. Only from 2009 did Mutharika’s DPP win an absolute majority, and effectively ended the opposition dominance in the House.

According to the constitution (in section 7), the executive is responsible for the initiation of policies and legislation and for the implementation of all laws which embody the express wishes of the people of Malawi and which promote the principles of the constitution. The executive is also mandated to formulate and implement the budget. These constitutional mandates provide grey areas and loopholes for the executive to exercise excess power over the opposition.

The bulk of parliamentary work is done in committees. As reported below, up to 2009, the shortcoming was that most committees did not meet regularly. Only a few committees met regularly, and these tended to be those connected with accountability of donor support. The

main reason for the failure of the committees to meet regularly was the inadequacy of funding. However, during the 2007/2008 fiscal year, all committees of Parliament met at least twice a year. Committee meetings became more regular from 2009 to 2013 as Parliament prioritised committee activities in its annual budgets.

Debate
Parliament has been the site of furious debates since multi-party democracy was reintroduced in 1994. However, these debates have often tended to focus on issues of party membership and presidential control rather than policy decisions of importance to the ordinary people of Malawi. Partisan animosities have dominated at the expense of substantive policy content.

In 2002, for example, parliamentary debates were dominated by the attempt of the ruling UDF to amend the constitution to provide, initially, for an unlimited presidential term of office and, later, for a third term for President Muluzi. In 2005, the opposition parties in Parliament attempted to impeach President Mutharika, who had been Muluzi’s appointed successor when the third term effort failed.

In 2005, the working relationship between Parliament and the executive was particularly strained. While in the past Parliament had rejected government proposed bills,450 the rejection of two bills in one sitting, and no less than four candidates for public appointments could be attributed to partisan tensions within Parliament and between the executive and Parliament – culminating in an impeachment attempt (see box on page 176). Even where there were apparent differences on substantive policies, partisan politics dominated the debate.

During the budget session of June 2005 opposition MPs threatened to reject the budget following the president’s resignation from his party in February that year, and due to differences between the opposition parties and the government on universal fertiliser subsidies (the opposition parties wanted a universal scheme where government wanted a targeted scheme to benefit only poor people). After the budget was eventually passed, President Mutharika prorogued Parliament in October, and did not recall it for more than half a year, a decision that earned the ire of CSOs, religious bodies and the opposition parties alike.451 Though the president argued this was for financial reasons, in the view of the opposition, failure to call another sitting of Parliament was a way of getting even and punishing the opposition.

After this session, civil society organisations criticised the National Assembly for spending MK 56 million on a sitting of Parliament that only discussed what they regarded to be ‘unimportant issues’.452 Public opinion hostile to the preoccupation of Parliament with the impeachment and other partisan hostilities was expressed through demonstrations outside

450 For example, the Malawi Electoral Commission Bills in 2004, the third and open term bills in 2002, and the first attempt to pass the bill to repeal the Senate provision in 2001.
451 ‘Civil society attacks decision to close Parliament’, UN IRIN, 26 September 2007, The Daily Times, 21 February 2008, pp. 1 and 3. Section 59(1)(b) of the constitution states that: ‘The President may, in consultation with the Speaker of the National Assembly, prorogue the National Assembly.’ The constitution does not state conditions, length of period, or any consequences of proroguing Parliament.
452 These criticisms were expressed in petitions from various organisations and individuals submitted to the Speaker of the National Assembly. The most vocal organisation was the Human Rights Consultative Committee comprising more than 50 human rights organisations.
Parliament, petitions to the Speaker of the National Assembly, newspapers, and radio stations:

Our advice is that the Legal Affairs Committee does not need to do any consulting because Malawians have already shown that they don’t support this issue of impeachment because, contrary to protestations by others including some people at Blantyre Synod, it is clearly targeted at the incumbent president for purely selfish and malicious reasons. No less an authority than the Malawi Law Society has pointed out that there is no basis for this attempt, and so have Malawians through Capital Radio’s News Talk call-in programme. Therefore for the Committee to be asking people their views on the matter would be a waste of resources and an exercise in window-dressing.453

A number of civil society organisations, including the churches and donors requested the National Assembly to discuss more crucial issues such as the hunger situation in the country, fertiliser subsidies, and economic empowerment loans for the poor rural communities.454 Unsurprisingly, when Malawians were asked in 2004/2005 ‘how much do you trust each of the following officials or institution’, the National Assembly was trusted by only 37% of respondents – whereas 72% said they trusted the army.455

From 2006, Parliament demonstrated some serious attention to matters of national interest. The first of these was the manner in which the 2006/2007 and the 2007/2008 national budgets were debated. There was unanimity on most budget lines that had implications for national development. In particular, the issue of a universal fertiliser subsidy attracted a lot of debate in the House. Equally important was the debate on the Malawi Rural Development Fund (MARDEF), worth MK 5 billion, even though it was also caught up in the controversial stand-offs between the executive and legislature in 2005. The methodology of disbursement attracted considerable debate in the House. More recently, the debate on the hunger situation and the country’s food security has been conducted in a manner reflecting national concerns and interests. However, deviations from the set agenda of the House and politicking also disturbed the 2007 budgeting sitting of the house when the opposition parties prioritised their proposal to discuss the issue relating to section 65 on crossing the floor rather than the budget.

Some of these debates have had some practical outcomes, for example, the increase in the MARDEF fund, and the establishment of new procedures for its disbursement. Both the ruling and opposition side agreed to increase the fund from MK 5 million to MK 5 billion. They also agreed to the proposal that the Public Accounts Committee of Parliament jointly work with the Ministry of Finance, and the Board and Secretariat of MARDEF to establish disbursement procedures. When the procedures were designed and debated in the House, the report of the Public Appointments Committee was unanimously adopted by the House without the debate degenerating into a partisan discussion.

454 In relation to the proroguing of Parliament, some donors restrained themselves from making an intervention because they felt that ‘commenting on the matter in detail would be to pre-empt the President’s prerogative’. Statement by an official of the British Embassy in Malawi, Wendy Freeman, quoted in Malawi News, national news, p.3.
In 2002, the UDF and AFORD proposed to amend section 83(3) of the constitution to allow, at first for an open term, and later for a third term for President Bakili Muluzi, the UDF party leader. They argued that limiting the president’s term of office to two terms was undemocratic because it limited the electorate’s right to choose a person of their choice to that office. The electorate should be allowed to exercise their franchise without limitations and to choose a person of their choice for as many times as they wish. The opposition and civil society rejected the proposals. It resulted in nation-wide protests, some of which were very violent. As the 2003 Malawi State of Governance Report prepared by the UN Development Programme (UNDP) observed, ‘if there [was] anything that lacked national consensus and really shook the national fabric of the Malawi society, it was the question of the third term’. In the end, the attempts to change the presidential term to an open term or at least to three consecutive terms were defeated, as the UDF and AFORD could not get the required two-thirds majority in Parliament. As a result of the controversy the two parties split into factions of supporters and opponents of the suggested amendments. Both also performed poorly in the 2004 general elections as voters took the opportunity to cast protest votes.

Just three years later, in 2005, the UDF had parted ways with Muluzi’s appointed successor Bingu wa Mutharika, who was elected president after the third term effort failed. Far from attempting to entrench President Mutharika in office, the party led an effort to impeach him under article 86 of the constitution. On 18 October 2005, the National Assembly adopted impeachment procedures (previously not elaborated except for the constitutional provision itself) and proceeded on 20 October to adopt an impeachment motion charging President Mutharika with violating the law. The charges included election irregularities, the unlawful appointment of the head of the Malawi Police Service, and the use of state funds to establish the new Democratic Progressive Party (DPP). On 26 October 2005, the High Court issued an injunction against the procedures until their constitutionality was determined or the injunction was overturned. The matter has since been in abeyance.

In 2008, the Malawi MPs again prioritised their self-interest in their work. They agreed to have their fuel allowances raised to 500 litres (worth about US$ 714 or MK 100 000) a month. The executive refused to implement the decision arguing that it would be too expensive. The MPs took the executive to court (Miscellaneous Civil Cause No. 163 of 2008), among others, arguing that the executive had violated the terms and conditions of their service. The court ruled in their favour. Still the executive did not implement the decision. Every year, up to February 2013, the issue was at the centre of heated verbal confrontations between the executive and the legislature. Parliament in Malawi degenerated into chaos on Tuesday (26 February 2013) after


President Joyce Banda’s remarks that government will not bow down to demands by legislators to get MK 10 million (about US$ 27 778) in fuel allowances backdated to 2009.\textsuperscript{459} During the sitting for the mid-term review of the 2012/2013 budget in February 2013, the MPs expressed their dissatisfaction by absconding on some days while Parliament was in session and minimising their debating contributions to the motion by the Minister of Finance, leaving only ministers and their deputies to make contributions from the floor. The Speaker pleaded with them to contribute substantively to the debate. His plea was ignored and the reviewed budget passed without substantive contributions from the MPs, who simply made a few general remarks.

The tensions resurfaced, again during the October 2013 special sitting of the House called to discuss the ‘Cashgate scandal’.\textsuperscript{460} The sitting was opened by the Vice President Khumbo Kachale,\textsuperscript{461} who observed that corruption was largely happening through loopholes in a central payment system that the Malawi government used since 2005, called the Integrated Finance Management Information System (IFIMS). The reviews made so far of the system have revealed that huge sums of money have indeed been siphoned out of government accounts using private companies and individuals with no contracts with government for provision of goods, service or work,’ he said.\textsuperscript{462} Opposition MPs accused the executive of negligence, lack of control, and wastefulness and called for ‘immediate action’ on the issue.\textsuperscript{463} The executive promised to deal with the issue as a matter of national concern, and that they were ‘serious’ about it. They called on the opposition to take the special sitting of Parliament ‘as an opportunity to offer constructive criticism and suggest lasting remedies’ to the looting of public funds.\textsuperscript{464} On their part, the opposition maintained that it was the responsibility of the executive to ensure that public resources are protected and put to their right uses for the benefit of the Malawi citizens. They argued that the government did ‘not care at all’ and ‘had failed to demonstrate that it can be trusted with the public purse’.\textsuperscript{465}

\textbf{Parliament’s effectiveness as a lawmaker}

Judging from the number of bills passed by Parliament between 1994 and 1999 it can be argued that the National Assembly is an effective law-making body. A total of 72 financial or money appropriation bills, and 69 other bills were passed by the Malawi Parliament during this period.\textsuperscript{466}

A public opinion survey of citizens’ attitudes toward democracy found that 62% of Malawians are of the view that the National Assembly should make the laws for the country even if the president does not agree, as opposed to 31% that believes that the president should pass laws without having to worry about the National Assembly.\textsuperscript{467} In practice, however, the records

\textsuperscript{461} http://www.malawi-news.org/malawi-Parliament-meets-to-hear-cash-gate-report/.
\textsuperscript{462} http://www.voanews.com/content/malawi-Parliament-demands-action-on-10-million-corruption-scandal/1776965.html.
\textsuperscript{463} http://www.malawidemocrat.com/malawi-Parliament-demands-action-on-corruption-scandal/.
\textsuperscript{464} http://www.nyasatimes.com/2013/10/25/mps-asked-to-fully-discuss-cash-gate-scandal/comment-page-1/.
\textsuperscript{465} http://www.nyasatimes.com/2013/12/16/atupele-slams-joyce-banda-on-corruption-stop-pr-deal-with-big-fishes/.
\textsuperscript{466} Figures provided by the Research Department of the National Assembly.
show that all the bills passed so far have been introduced by government. No private member bills have ever become law. The reasons for this are unclear, but it could be an indication of the executive dominance of the Malawi system or because there was no adequate lobbying on the part of those who were introducing the bills. The president has the power to veto legislation, though his veto may be overruled by the National Assembly.\(^{468}\)

Some important bills promoted by civil society organisations, such as the Access to Information Bill, have not been tabled in Parliament. The reasons are varied. In the first place, bills in Parliament are tabled according to priority. It has always been the case that money appropriation bills receive the most priority, and take up the most time in the house. There is, therefore, little time for other types of bills. Second, between 2005 and 2007, sessions of Parliament were characterised by a lot of disturbances caused by the debates on controversial constitutional matters such as section 65 on crossing the floor and section 86 on impeachment. The third reason is just a basic one: there is a backlog of bills sitting with the relevant ministries that have originated from the process of law review by the Law Commission. No fewer than ten bills originating from the Law Commission between 1996 and 2007 were still with the executive without being tabled in Parliament for reasons including lack of capacity, a negative mind-set, and a lack of appreciation for the significance of the constitutional bodies to governance and to the country’s democratisation process.\(^{469}\)

The tendency of the executive has been to prioritise money appropriation bills. For example, during its mid-term 2011/2012 budget review sitting of 3 February – 2 March 2012, Parliament debated and passed no less than seven money appropriation bills that the executive prioritised. Just within nine days of coming to power in April 2012, President Joyce Banda signed all of them.\(^{470}\) In contrast, the Public Officers Declaration of Assets, Liabilities and Business Interest Bill, that calls for the declaration of assets by top government officials apart from the president and the vice president of the country, was not given the same priority.\(^{471}\) In October 2013, debate on the Bill was suspended in order to give priority to discussions on financial matters. It was passed only after the discussions on all money-related bills and other motions were concluded.\(^{472}\)

A 2001 study on policy-making and parliamentary accountability revealed that economic policy in Malawi remains an insulated and technocratic process, a prerogative of the executive, through the technocrats in the line ministries and heavily influenced by the perspectives and interests of the donors.\(^{473}\) The study further observed that Parliament, as a representative body, had almost negligible input into policy-making, except for when debating budgetary allocations.

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\(^{468}\) Constitution, section 73.

\(^{469}\) This information was provided by the Law Commissioner at the meeting of the Forum for Constitutional Bodies, Capital Hotel, 14 August 2006. See also W.C. Chirwa and L. Koechlin, 2006, *Horizontal Capacity Assessment of the Constitutional Bodies, The Anti-Corruption Bureau, and Related Institutions in the Legislature, The Executive, Civil Society and the Informal Justices Sector of Malawi*, commissioned by the Democracy Consolidation Programme (DCP) of the Inter-Ministerial Committee on Human Rights and Democracy (IMCHR&D) and the United Nations Development Programme (UNDP), Lilongwe.


The executive's preoccupation with economic matters and the related donor influence over such matters, play a part in the prioritisation of money appropriation bills over any other bills that go to Parliament.

**Parliament as an oversight body**

Section 66(1) of the constitution gives Parliament powers to receive, amend, accept or reject government bills and private bills. Government bills are those coming from the executive and laid before Parliament. In the same section, Parliament has the power to debate and vote motions in relation to any matter including motions to indict and convict the president or vice president. In section 88(A) the constitution recognises Parliament as an institution responsible for making legislation in relation to the prevention of conflict of interest of the president and Cabinet, including the declaration of assets. In section 89, the constitution states that:

(3) The President shall each year, immediately before the consideration of the official budget attend Parliament and shall –

(a) Address Parliament on the state of the nation and on the future policies of the Government at that time;

(b) Report on the policies of the previous year; and

(c) Respond to questions.

(4) The President shall be called to Parliament to answer questions at such times as may be prescribed by the standing Orders of Parliament or on a motion of the National Assembly.

These constitutional provisions offer adequate mechanisms for the Malawi National Assembly to effectively scrutinise the executive. The constitution puts obligations on the executive to report to the legislature. However, in practice, with the exception of the debates on the government bills and policies, and on the State of the Nation Address, the National Assembly has not successfully summoned the president to appear before it. An attempt was made towards the end of 2005, but the president successfully shunned it. This was at the peak of the impeachment debate, and the summoning of the president to Parliament was probably viewed as part of the impeachment agenda. The reason is that there are no prescribed sanctions against such developments in the constitution, apart from the possibility of an impeachment.

The constitution and the parliamentary standing orders provide other ways of dialogue with the executive: through the parliamentary committees (which take ministers to task on policy issues as well as implementation of specific programmes); question time in Parliament (during which ministers answer questions from MPs); and through ministerial statements on general or specific issues (by which ministers give information to the Assembly). Some executive appointments, such as to diplomatic missions, to state bodies such as the Anti-Corruption Bureau, Inspector General of the Police, are subject to confirmation by the legislature (see next section, on the role of committees).

Under section 86 of the constitution, the president or vice president may be removed from office where he or she has been indicted and convicted by impeachment by the National Assembly. This is a high-level mechanism for Parliament to scrutinise the executive. The
constitution provides that indictment and impeachment shall only be on the grounds of a serious violation of the constitution or serious breach of the written laws of the republic that either occurred or came to light during the term of Office of the President or the First Vice President. The constitution provides that the procedure for impeachment shall be as laid down by the standing orders of Parliament, provided that they are in full accord with the principles of natural justice. Until October 2005 there were no standing orders providing for impeachment procedures. In a hurriedly organised scheme, bent on the intentions to impeach the current president, the standing orders were put in place to enable an attempt to impeach President Mutharika.

Committees
At present (2009–2014 tenure) the Malawi Parliament has 15 portfolio committees, divided by theme.474 In addition, the Business Committee and the Parliamentary Development Coordination Committee, though not portfolio or ad-hoc committees, are provided for in the parliamentary standing orders. The HIV/AIDS Committee, the Women's Caucus, and the Parliamentary Service Commission, once ad-hoc committees, have been regularised as full committees of the House and are included in the schedule of meetings. There are also committees that deal with the House's external relations. These include the African, Caribbean and Pacific-European Union Joint Parliament Assembly, the Commonwealth Parliamentary Association Committee, the Pan African Union Parliament Committee, and the SADC Parliamentary Forum Committee. Including these, there are 21 full committees. Ad-hoc committees are constituted for specific purposes. They disband once they have submitted their respective reports on the issues that gave rise to their formation.

Parliamentary committees have powers to scrutinise the work of the different ministries as well as the operations of the House itself. The committees can summon ministers or any other government official to appear before them. During the tenures of the two previous sessions of Parliament, most committees were rather weak. They had no separate budgets, lacked skills, and rarely met. Only the Budget and Finance Committee, the Public Appointments Committee, and the Public Accounts Committee met more regularly. There was some improvement in the period between 2007 and 2009 when the committees met more regularly. All of them met at least twice in a year during this period. At the end of July 2009, a schedule of committee meetings for the new Parliament was announced for the period between August and October 2009.475 The Public Accounts Committee was scheduled to meet three times and the Budget and Finance Committee was scheduled to meet twice during this period – just to emphasise the dominance of the two committees.

In their operations, the committees may seek out specialised expertise to enable them to scrutinise government policy. During the 2004–2009 Parliament, there was demonstrable

474 The list includes the Budget and Finance Committee, the Public Accounts Committee, the Public Appointments Committee, the Legal Affairs Committee, the Agriculture Committee, the Health Committee, the Media Committee, the Education Committee, the Trade and Commerce Committee.

475 The schedule of parliamentary committee meetings for August–October 2009 was provided by Hon. Lonnie Chijere Chirwa. It also came out in the Malawi News, 8–14 August 2009 and the Weekend Nation, Saturday 8 August 2009.
evidence of the parliamentary committees’ scrutiny of executive decisions. During the heated 2005 session alone, the opposition-dominated Public Appointments Committee of Parliament rejected no fewer than four diplomatic appointments by the executive as well as the nomination for Inspector General of Police.476

The Budget and Finance Committee (BFC) has, for quite a long time, been the most powerful of all the parliamentary committees. For example, the BFC has issued a number of assessment reports of the economic policy frameworks proposed by the executive.477 It has also effectively commented on financial management and breakdowns in financial control and management in line ministries. During the October 2005 sitting of Parliament, the BFC submitted its report on MARDEF that was widely accepted by the House as professionally done. The 2004–2009 BFC was chaired by an experienced and professional retired civil servant who served as Principal Secretary in a number of ministries, including Finance and Treasury. At least five other members of the Committee are experienced ex-civil servants. With such vast experience the Committee is endowed with the relevant skills necessary to provide effective oversight of the executive.

The Public Accounts Committee (PAC) and the Budget and Finance Committee (BFC) have been quite effective in tracking over-expenditure. For example, between 1995 and 2001, the Budget and Finance Committee issued several reports on the implementation of approved budgets for various ministries. It observed that over-expenditure was a common practice in most ministries.478 In August 2005, the Public Accounts Committee issued a report that indicated that some officials in government ministries were creating accounts without the approval of Parliament. Such accounts were used by some Cabinet ministers as conduits for funding the activities of the president’s party, and for other unapproved activities. The report singled out the Special Clients’ Account used by a jailed former Minister of Education to fund his personal wedding.479 In September 2006, the Public Accounts Committee took a decision to hold a public hearing on the use of the account, and to question all ministers mentioned in the use or abuse of the account over time.480

The BFC and the Public Accounts Committee are also favoured by donors because of their accountability roles in relation to donor funds. For this reason, the members of these committees benefit from various capacity building training programmes sponsored by donors. Good examples are those funded by the CIDA (Canada) on economic governance, and the USAID/DFID programme on civil society interface with Parliament (as discussed in chapter 10: Financial institutions and foreign governments).

The 2013 ‘Cashgate scandal’ increased the oversight and accountability functions of the

476 The rejected public appointments include Mary Nangwale for Inspector of Police, Agrina Musa, Khwauli Msiska, Wallace Chiume, and Sam Kandodo, for diplomatic positions, and Tumalisye Ndovi for the Ant-Corruption Bureau (ACB).
479 See ‘Mwawa’s Account Case Rears up: House to Summon Ministers’ in Weekend Nations, vol.10 no.37, 9–10 September 2006, pp.1–2. Yusuf Mwawa was arrested and convicted for using a government account to pay for his wedding.
PAC. The Committee issued not less than four reports of its investigations into the matter.\(^{481}\) It also held several public hearings with the heads of government departments and parastatal organisations believed to be at the centre of the looting of public resources, including summoning and questioning the Reserve Bank Governor, Charles Chuka.\(^{482}\) The Committee made several recommendations on how the integrated finance management information system (IFMIS) could be strengthened, and the actions to be taken in respect of those believed to have looted public funds. The executive made no public response to the issues raised by the parliamentary committee.

Between 2012 and 2013 the committee also quizzed some chief executives of city and town assemblies and district commissioners mentioned in the Auditor General’s report to have overspent or believed to have mismanaged or misappropriated funds.\(^{483}\) The committee also made some recommendations on actions to be taken in respect of such officers, including the possibility of dismissals and court actions for possible refund of funds. There is no evidence that the executive followed the PAC’s recommendations.

### Control of parliamentary expenditure

The budget of the National Assembly is provided under vote number 008 of the budget book. Since National Assembly accounts are government accounts they are audited by the Auditor General and published as part of the Auditor General’s Report. In the event of any audit queries, the clerk of Parliament appears before the Public Accounts Committee just like any other controlling officer in government. In terms of allegations on misuse of allocations to the National Assembly, these have been not for embezzlement by individual MPs but rather on value for the money.

### D. Public participation

Public opinion surveys on democracy and governance in Malawi carried out in 1998, 1999, 2000 and 2001/2002, and a voter behaviour study done in 2001, indicate that the public has a rather low level of trust in their elected representatives and that individual MPs rarely meet with their constituents.\(^{484}\) This is particularly the case with those MPs who represent rural constituencies, who live in town and only periodically visit their constituencies. Most MPs do not have offices in their constituencies where they could meet the people they represent, and some rarely hold public meetings.

Proceedings of the National Assembly are published in the *Hansard*. Ideally, the *Hansard* is a public document copies of which can be obtained from Parliament. Unlike in the past, during the days of the one-party dictatorship, the *Hansard* is never published on time, and copies of

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\(^{483}\) See media coverage at http://www.nyasatimes.com/tag/public-accounts-committee/.

which are not often available to the public since they are not produced in large amounts – also because it is not exactly a publication that needs broad dissemination to the general public after all. When available, the _Hansard_ is for sale from the Government Printer. Inaccessibility also applies to the Order Paper, the official daily agenda of the House. Much as this document is displayed on the boards at Parliament itself, and on Parliament’s website, the general public have no open access to it. It is, therefore, not possible to find out in advance what is on the agenda of the National Assembly and its committees in order for the interested members of the public, journalists or civil society organisations to attend debates that could be of interest to them, or to lobby their representatives on particular issues. Bills are published in the _Malawi Government Gazette_ according to the law, which is obtainable from the Government Printer in Zomba, and also found in the national Archives in Zomba, and major libraries in the country. Reports of committee hearings become public only once presented in the House. The media rarely report on the activities of parliamentary committees unless there is a particular issue that has attracted their attention. However, any member of the public can book space and time (to avoid congestion) to attend the proceedings of the House.

Civil society organisations have often taken particular interest in the workings of parliamentary committees and the National Assembly as a whole. During the sitting of the House CSOs attend the proceedings by sitting in the public galleries of the House. Parliamentary committees also invite CSOs to address them on particular issues of interest to them or where expert opinion is required. For example, in 2004, CSOs actively lobbied for both parliamentary and public debate on the commercialisation of the Agricultural Development and Marketing Corporation (ADMARC). More recently, CSOs such as the Malawi Economic Justice Network (MEJN), the Human Rights Consultative Committee (HRCC), and the Consumers’ Association of Malawi (CAMA) played a crucial role in pushing for the tabling of the Money Laundering Bill and the Domestic Violence Bill.

**E. Recommendations**

- The executive should present to Parliament for debate and possible passing the recommendations on floor crossing, the recall provision and the Senate made by the Special Commission on the Review of the Constitution.
- Research capacity of Parliament should be enhanced by allocating adequate resources to the research department, purchase of the necessary equipment and hiring of qualified technical staff.
- The capacity of parliamentarians to handle debates in the House in a professional manner needs to be enhanced through tailor-made training sessions for them.
- Parliament should allocate more resources to the meetings and operations of its committees so as to enable them meet regularly and effectively discharge of their duties.
- The executive should implement the recommendations of the Public Accounts Committee on the ‘Cashgate scandal’ and on overspending and mismanagement of funds by some government and parastatal chief executives.
Local government

Decentralisation has two major objectives: to improve service delivery and to strengthen local democracy. Failure to hold local government elections as required by the constitution have greatly undermined the ability to fulfil these objectives. There are also technical weaknesses with the executive branches of local government structures and the implementation of decentralisation in law and practice.

A. Local government structures

Chapter XIV of the constitution outlines the establishment, functions, composition and jurisdiction of the local government authorities in Malawi. Section 146(2) of the constitution states that:

a) Local government authorities shall be responsible for the representation of the people over whom they have jurisdiction, for their welfare and shall have responsibility for –

b) The promotion of infrastructural and economic development, through the formulation and execution of local development plans and the encouragement of business enterprise;

c) The presentation to central government authorities of local development plans and the promotion of the awareness of local issues to national government;

d) The consolidation and promotion of local democratic institutions and democratic participation; and

e) Such other functions, including the registration of birth and deaths and participation in the delivery of essential and local services, as may be prescribed by any Act of Parliament.
Up to 2010, the constitution, in section 147(5) provided for local government elections to take place the year following parliamentary and presidential elections. In 1996, a Local Government Elections Act was adopted (Act. No. 24 of 1996) to give effect to this provision, though in practice local government elections were not held until 2000, the year following the 1999 general election (see further below).485

In part, the delays in holding elections was due to the delay in providing further detail on the constitutional provisions relating to local government. Only in 1998 did the Malawi government introduce and sign into law the Local Government Act (Cap.22:01). The National Decentralisation Policy was approved by Cabinet in the same year. These two documents provide the political and legal basis for the transfer of power, responsibilities and financial resources from central government to local government.486

The Local Government Act outlines the various structures and functions of local government authorities. These are further expanded in the National Decentralisation Policy, which outlines the functions of various local governance structures (district, city, municipal or town), and area and village development committees. The Decentralisation Policy aims at empowering the poor to effectively participate in economic affairs and decision-making processes and outlines the following objectives:487

- To create a democratic environment and institutions in Malawi for governance and development at the local level, which will facilitate the participation of the grassroots in decision-making;
- To promote accountability and good governance at the local level in order to help government reduce poverty; and
- To mobilise people for socio-economic development at the local level.

Prior to these reforms, district administrations, headed by district commissioners, under the Office of the President and Cabinet, directly reported to the Secretary, to the president and Cabinet. The district commissioner’s office coordinated the activities of all line ministries at the local level. The district councils were representative local government structures inherited from the colonial times through the independence period. They operated under the Ministry of Local Government.

Malawi did not retain a system of provincial administration after the colonial period. Where regional officers such as regional commissioners of lands, or of education, or of police exist, they work directly under the authority of the central government at the ministerial headquarters.

Under the Local Government Act, the district councils and the district administration were merged into a new local authority structure called the district assembly (or city, municipal or town assembly, in urban areas). The assemblies are expected to promote local participatory

485 Part II of this Act was repealed by Act No.7 of 1999.
democracy through representatives of the community who are partly elected and partly appointed as ex-officio members. The assemblies consist of elected ward councillors, MPs, chairpersons of all political parties in the district, chiefs, representatives of NGOs and special interest groups, and members of the business community.\textsuperscript{488} Below the district assembly are the area development committees (ADCs), and below these are the village development committees (VDCs). The ADCs and VDCs are usually headed by traditional chiefs though the practice is increasingly changing towards elected representatives from the local communities, combined with government extension workers (lower-ranking government employees at the local level), and other representatives.\textsuperscript{489} These bodies are all elected by free, secret and equal suffrage by the registered voters in the local poll in the area over which the local government authority has jurisdiction. The assemblies, ADCs and VDCs, therefore, function somewhat like parliaments on a smaller territorial level. They are fora for debate on public issues, coordination points for development activities, and starting points for development plans.

In addition to these elected and representative structures, local authorities receive technical support from civil servants who are employees of line ministries. The latter constitute the programme executing team (the district executive committee in the case of the district assembly) while the former constitute the policy body.\textsuperscript{490} Ideally, the district commissioner (for the district) or the chief executive (for the city, town or municipal assembly) reports to the elected head of the assembly. However, the limited technical capacity of the elected arms of the assemblies is such that effective oversight over the executive arm is rather limited, especially when it comes to technical matters such as the budget and formulation and implementation of development plans.

The central government, through the line ministries, is the custodian of government policy which is implemented by the local authorities. All local authority plans are supposed to fit in with the central government policy blueprints. The local authorities are therefore implementing agencies of central government policies. However, the local authorities have powers to undertake planning at their levels, and to pass their own by-laws.

As of 2009, there were 42 local authorities in Malawi.\textsuperscript{491} The Local Government Act provided for local government assemblies to be established in 38 local government areas. Four more were established between 1998 and 2003 without the process going through Parliament.

\textsuperscript{488} The Local Government Act provides in section 5(1), that: ‘For every local government area there shall be an Assembly consisting of: (a) One member elected from each ward within the local government area; (b) Traditional Authorities and Sub-Traditional Authorities from the local government area as non-voting members ex-officio; (c) Members of Parliament from the constituencies that fall within the local government area as non-voting members ex-officio; and (d) Five persons as non-voting members to be appointed by the elected members to cater for the interests of such special interest groups as the Assembly may determine.’

\textsuperscript{489} Interviews with M.O. Chimphepo, District Commissioner, Mulanje, 28 December 2008; Agnes Kondowe, Msani VDC, T/A Mkumbira, Nkhata Bay, 31 December 2007.

\textsuperscript{490} For a general outline of local government in Malawi see, Ministry of Local Government and Decentralisation, with United Nations Development Programme (UNDP), 1995, \textit{Report on Decentralisation in Malawi: Local Governance and Development}. Lilongwe: GOM/UNDP.

\textsuperscript{491} The assemblies are divided into four categories, all with the same legal status under the Local Authority Act: 28 district assemblies; eight town assemblies; and four city assemblies. See Malawi government website http://www.malawi.gov.mw/LocalGovt/Home%20LocalGovt.htm, accessed 26 February 2009.
They were simply proclaimed by the president at public rallies. There is no law in the country that gives a mandate to the president or any institution to declare or demarcate districts. In contrast, the demarcation and review of constituencies within the districts are the mandate of the Electoral Commission, but subject to the approval of Parliament. One would have expected that the declaration or/and demarcation of districts should also be subjected to a process that involves Parliament.

B. Funding

Local authorities are financed through government grants, and through the generation of revenue within areas of their jurisdiction. The proportion of local authorities’ budget that comes from local sources depends on the size of the local authority and its economic endowment, as well as its capacity to collect the revenue.

Financing of the local authorities is supposed to be coordinated by local government finance committees established under section 149 of the constitution. The powers and functions of the finance committee include hearing ‘submissions from each and every local government authority in respect of estimates of expenditure and requests for special disbursements’. The committee receives all estimates of revenue and all projected budgets of all local government authorities, examines and supervises accounts of all local government authorities subject to the recommendations of the Auditor General, makes recommendations relating to the distribution of funds allocated to local government authorities, prepares a consolidated budget for all local government authorities, and makes application to the Minister of Local Government for supplementary budgets where necessary.

The district commissioners, who head the technical teams for each assembly, are the controlling officers and account for all the decentralised financial resources in the district. They are also answerable to the Public Accounts Committee of Parliament, as well as to audit requirements from the Auditor General’s office.

Revenue generation is through city and town rates, licensing of businesses and properties, market fees, and other fees and charges. The budgeting process for the local authority starts with the technical team, through various committees, especially the finance committee, to the assembly. The budget takes into consideration needs identified by the ADCs, VDCs or other local structures of the local authority.

The division of the national budget between the central and the local government is not known, because the system of decentralising and devolving line ministry budgets to the district assemblies started only with the 2005/2006 national budget when MK 814 200 000 (about US$ 5 815 714) was allocated to the Ministry of Local Government and Rural Development, and MK 526 260 000 (about US$ 3 759 000) was allocated to the Local Government Finance 492 interviews with Director of Finance, Kasungu District Assembly, 12 October 2005; Deputy Director of Administration, Mzuzu City Assembly, 9 January 2006.

493 The members of the Local Government Finance Committee are: one member appointed by a caucus of all local authorities, the Principal Secretary in the Ministry of Local Government, one person qualified in matters of accounts appointed by the Public Appointments on recommendation of the Minister of Local Government, the chairperson of the Civil Service Commission, one person nominated by the Electoral Commission, and Principal Secretary in the Ministry of Finance or his representative.
Committee. The local assemblies started receiving their funding directly from the central Treasury after July 2005. Between July 2005 and March 2006, the central government devolved a total of MK 1 396 687 216.00 to the assemblies (about US$ 9 997 633).\textsuperscript{494}

In addition to the line ministry decentralised budget, the national budget splits the funding that goes to the local authorities (especially the district assemblies) into several separate funds that include the integrated rural development (IDR) – mostly for rural infrastructure and rural growth centres; the Local Development Fund (LDF) – mostly for social support programmes, safety nets, and community-based projects; the Constituency Development Fund (CDF) – controlled by members of Parliament; and the Malawi Social Action Fund (MASAF) – a World Bank loan for community-based projects and social support programmes. These create multiple channels through which local authorities are funded. For example, in the 2011/2012 budget, a total allocation of MK 4.9 billion (about US$ 30 061 349.7) was earmarked for the local development fund (LDF).\textsuperscript{495} Of this, MK 1.1 billion (US$ 6 748 466.3) was from locally generated resources while MK 3.8 billion (US$ 23 312 883.4) came from development partners. The IDR was allocated MK 2.5 billion (US$ 15 337 423) and the CDF was allocated MK 4 million (US$ 6 135) per constituency, for the 193 constituencies in the country.

An important source of local authority development funding is the Malawi Social Action Fund (MASAF), financed by a World Bank loan that will stretch over some 40 years. The Social Fund operates as a combination of mechanisms for economic and social welfare through provision of strategies for livelihoods, safety nets, communal asset generation and rehabilitation, income opportunities and employment creation. It is also a basket mechanism for the government’s Integrated Rural and Community Development Programme.

To date, two phases of the Social Fund have been completed: MASAF I from 1995 to 1998, and MASAF II from 1998 to 2003. By end of June 2003, an accumulative total of 2 255 projects had been approved under MASAF II alone. Of these, 1 877 had been completed, directly benefiting some 2 377 375 people. Most of these fell under what is called the ‘social support programmes’: construction of rural infrastructural facilities such as roads, schools, water wells and boreholes, bridges, and others. A major component of this phase was the provision of support to pro-poor economic growth through micro- and small enterprise development, and through the sponsored sub-projects programme. The third phase, MASAF III, began in November 2003. It envisaged a situation in which resources would be controlled at the district level, close to the poor people.\textsuperscript{496}

In the 2012/2013 national budget the government increased its resource allocation to four safety net programmes: the Intensive Public Works Programme, the School Feeding Programme, the School Bursaries Programme and the Cash Transfer Programme. A total of MK 27.5 billion (US$ 9 821 428) was allocated.\textsuperscript{497} The School Feeding Programme targeted 980 000 pupils in primary schools, the Bursaries Programme targeted 16 480 secondary school students, and the Cash Transfer Programme targeted 30 000 poor families.

\textsuperscript{494} Living Together in Peace and Harmony: State of the Nation Address by His Excellency Dr Bingu wa Mutharika, President of the Republic of Malawi on the Occasion of the State Opening of the 39th Session of the Parliament of Malawi, p.15.

\textsuperscript{495} The 2011/2012 Budget Statement delivered to the National Assembly by the Hon. Ken E Kandodo, Minister of Finance.

\textsuperscript{496} See Malawi Social Action Fund (MASAF), MASAF Annual Reports, 2000–2003.

\textsuperscript{497} The 2012/2013 Budget Statement delivered into the National Assembly of Malawi by Hon Ken K Kandodo, Minister of Finance, on 8 June 2012.
Interviews with government officials at the district level indicate that local government structures are not adequately funded. A senior assistant labour officer in Blantyre observed that during the 2005/2006 budget, his office was given only MK 47 000 (US$ 288.34) for administrative costs for payment of water and electricity bills, and for fuel. ‘That is even less than what a medium income family spends on utility bills in a year’, he observed. Worse affected by inadequate funding are the government departments with large operations such as the Departments of Agriculture, Education, and Health and those that require expensive machinery for their operations such as the Works Department.

C. Local elections

To date, there has been one set of local government elections, in November 2000. There were no local government elections in 1995 following the 1994 presidential and parliamentary general elections, as required by the constitution, because there was no enabling law specific to local government and local government elections at that time. Only in 1996 did the Local Government Elections Act enable the Electoral Commission to conduct local government elections, and the framework of new local government authorities was set out in 1998, by the Local Government Act.

The November 2000 local government elections were held the year following the 1999 general elections, as required by the constitution (though not strictly within the constitutional calendar, which specifies that the poll is to be held in the third week of May, or within seven days thereafter). They were characterised by a very low turnout, only about 14% of the registered voters compared to almost 94% for the parliamentary and presidential elections in the previous year. In a lot of the wards the candidates were elected unopposed. This was partly because of the mismanaged electoral process. Very little time was provided for the preparations for the local government elections, and political parties were not ready for them having just come out of the parliamentary and presidential elections a few months before.

No local government elections were held following the 2004 general elections. The reason given by government was lack of financial resources, given the food shortages in the country in 2004/2005 and the need to import maize. The government also embarked on a programme of fertilizer subsidisation the cost of which ‘was larger than planned as the cost of logistics went up due to high petroleum prices. Other challenges included the wage reforms, pension reforms

498 Interviews with Director of Finance, Kasungu District Assembly, 12 October 2005 and Deputy Director of Administration, Mzuzu City Assembly, 9 January 2006.
499 Interview with G.G.M. Chilonga, Senior Assistant Labour Office, Blantyre, 15 September 2006.
500 Interviews with C. Kumikundi, District Education Manager, Kasungu and with Y.L. Chiwanda, District Social Welfare Officer, Kasungu, 13 September 2006; Ms E.D. Mandala, District education Manager, Lilongwe urban, 14 September 2006; R. Chigadula, District Education Manager, Blantyre Urban and E. Kanjedza, District Education Desk Officer, Blantyre Urban, 15 September 2006.
501 Constitution, section 147(5).
503 Interview with A. Masanza, Chief Elections Officer, and Kambauwa, Deputy Chief Elections Officer, Electoral Commission, Blantyre, 31 September 2005; see also ‘Councillors’ absence not felt – Chaponda’, The Nation, national news, 23 May 2003, p.3.
and repayment of domestic debts.\textsuperscript{504} The government therefore did not disburse funds to the Malawi Election Commission to enable it to conduct the elections:

It was the wish of the Malawi Electoral Commission to discharge its mandate under the Constitution of the Republic of Malawi by conducting the local government elections in 2005, the year following the 2004 general elections. However, this was not possible due to funding problems ... the Commission never received any funding from the Treasury.\textsuperscript{505}

The tenure of the local government assemblies ended in November 2005, and they were then dissolved. The dissolution of the local assemblies has created tension in the implementation of the decentralisation policy given that these structures are required for policy guidance and implementation.

In March 2006, Minister for Justice and Constitutional Affairs, Henry Phoya was reported as saying that the government would have to change both the constitutional provisions and the relevant sections in the Local Government Act to be able to hold the local government elections. Opposition politicians accused the government of not being interested in development and good governance at the local levels.\textsuperscript{506} In April 2006, the Minister of Local Government informed the house that a bill had been prepared for presentation in Parliament to amend the constitution to allow for local government elections to be held outside the scheduled calendar. The statement attracted hostile responses from the opposition that felt that by taking part in the amendment of the constitution the opposition would be party to the unconstitutionality created by the government. In practice, the bill was never tabled.

During the budget sitting of Parliament between May and July 2006, the issue of the failure to hold local government elections caused a heated debate. Minister of Local Government, George Chaponda, was forced to make a statement on the effect of the dissolution of the local government structures. The minister claimed that the failure to hold local government elections and the subsequent dissolution of the local government structures had no effect on local governance and development, as the government offices were still functional at the local levels. Opposition politicians and other commentators called for his resignation:

Given the centrality of local councillors to local government, the essence and logic of Chaponda’s statement effectively means that there is no justification and value for [having] the Ministry of Local Government. This logic should therefore also extend to the value and relevance of the office of the Minister for that Ministry. Minister Chaponda should therefore do the most honourable thing and resign.\textsuperscript{507}

After the May 2009 general elections the government included funding for local government in its 2009/2010 budget – an indication that local polls would be held in 2010 or early 2011. This was not the first time that the government had done so. Local polls were budgeted for in

\textsuperscript{504} Living Together in Peace and Harmony: State of the Nation Address by His Excellency Dr Bingu wa Mutharika, President of the Republic of Malawi on the Occasion of the State Opening of the 39th Session of the Parliament of Malawi, p.4.
\textsuperscript{506} Weekend Nation, 25–26 March 2006, p.2.
2004/2005 but did not take place. In any case, there was need to amend some sections in the
constitution and in the Local Government Act, and especially those related to the calendar for
holding local government elections, before the local polls were held.

In 2010, Section 147, paragraph 5 of the constitution was amended to change the calendar
for local government elections. The amended section currently reads:

Local government elections shall take place every five years on a date to be determined
by the President in consultation with the Electoral Commission: Provided that the local
government authorities shall stand dissolved at the end of five years following an election.

Amendments were also made to the Local Government Act (Cap.22:01),509 affecting sections
on the composition of the local government council and its functions. MPs, though ex-official
members of the local government council, were given voting powers while chiefs were denied
the same.

CSOs criticise Parliament for these amendments, arguing that giving the president the
power to determine the date for local polls undermined the powers of the Electoral Commission
as the body mandated to handle matters of elections in the country. The amendment also created
room for manipulation of local government polls by the executive. Giving voting powers to MPs
in the local government councils was also abnormal in the sense that they were not elected in the
same manner as local councillors. At the same time, the MPs were sitting in two representative
chambers, the local councils and the National Assembly, as voting members in both. For the
decisions that originate from the local councils to the National Assembly, the MPs would be in a
situation where they would be making recommendations to themselves.

Between 2010 and 2011 the government prepared a bill for tripartite elections in 2014 under
pressure from development partners, the opposition and civic groups (as below):510

‘We expect government to bring the tripartite elections bill during this sitting of Parliament.
People in the country have been waiting for these local polls for so long, and I believe the
bill will be among the crucial bills to be presented,’ Mahamudu Lali, United Democratic
Front Spokesperson on parliamentary affairs said. ‘We can’t be talking about the same
time and again’, said Lali ... Malawi Congress Party Spokesperson for parliamentary affairs,
Jolly Kalero said in a separate interview the MCP wants the tripartite bill to be among the
issues to be discussed. Said Kalero, ‘people are anxious to know whether these local polls
will be held or not after so many postponements since 2005. Government should bring this
bill. The former ruling Democratic Progressive Party has also joined in the clarion call for
the tripartite elections bill to be tabled and passed. Apart from lawmakers, NGO’s and the
general populace have been calling for the tripartite elections in 2014’.

508 Amended by Act 8 of 2010.
509 Amended by Act 17 of 2010.
Rather reluctantly, and hurriedly, the government tabled the Constitutional Amendment Bill No.4 of 2012 in Parliament in November 2012\(^{511}\) seeking an amendment to the constitution to allow for the holding of tripartite elections. The news about the Bill excited CSOs and other civic institutions who immediately started to mobilise citizens in support for these elections:

Actionaid Malawi is running a short three months media programme with ZBS Radio Station [Zodiak Broadcasting Station] to advocate for tripartite elections in 2014. Focus is on the importance of local government elections as a serious governance deficit. The programming consolidates voices of the people from Neno, Phalombe, Lilongwe, Salima, Rumphi and Chitipa and various policy stakeholders like MESN, MEJN, Kalondondo Programme, Parliament and Government just to mention a few. Programmes are being aired as follows: Mondays: from 19:20, a documentary; Tuesday: 20:05, public debates; Saturdays: 19:30, drama.

Can [we] also suggest that we make a last minute effort and be at Parliament on the day the bill will be discussed to cajole and lobby the MPs to do the right thing? [Is there] anyone that wants to take a lead in mobilizing civil society to be present at Parliament? Let’s talk and take action. People in the village need real development. In the absence of councillors, this will remain a far-fetched dream.

On its part, the Public Affairs Committee (PAC) met with President Joyce Banda on 14 November 2012 where, among others, they told her that:

We wish to emphasize that Malawians are expecting to have tripartite elections in 2014. We believe failure to facilitate the implementation of this agenda may have a big impact on your administration. We believe these elections will give Malawians power to run their own affairs and will enhance participation of the community in developmental work. To this end, delegates demanded that an enabling environment for holding tripartite election in 2014 be put in place as soon as possible and organise efforts towards the realization of free, credible and fair elections ... \(^{512}\)

On 21 November the Bill was passed, with 148 MPs voting for it. The news was received with a lot of excitement by CSOs. ‘Bravo, it’s time to work!’,\(^{513}\) posted Nelson Mkandawire of the Economics Association of Malawi, while Chandiwira Chisi of ActionAid Malawi wrote:

We can have a sigh of relief now. The amendment bill to the constitution to pave way for tripartite elections has passed with all 148 MPs present having voted for it. I went to Parliament upon getting information on the last hour that the bill would be debated today. It was an electrifying moment. Now the job begins for civil society and the media\(^{514}\)


\(^{512}\) PAC Remarks Made to the Head of State on 14 November 2012 at Sanjika Palace by Bishop Montfort Sitima, PAC Trustee, Leader Of Delegation.

\(^{513}\) These statements were posted on the Malawi civil society network, civsoc-mw@sndp.org.mw, 21 and 22 November 2012.

\(^{514}\) These statements were posted on the Malawi civil society network, civsoc-mw@sndp.org.mw, 21 and 22 November 2012.
However, some critical minds within civil society feel that holding tripartite elections will resolve just one component of the problem, and a minor one for that matter. The real issues will be the relationship between the MPs and the councillors, and how the two will relate to the issues of development on the ground. Tensions in these relationships will not be resolved by simply holding tripartite elections:

It’s good news indeed, but ... I am not very positive about the relationship between councillors and MPs. The remuneration disparity matters will come to the fore and we are likely to witness so many bottlenecks on the development front. While councillors will get nothing, except a meagre sitting allowance during assembly meetings, MPs get fat checks at the end of each month and very high allowances during the sitting of Parliament. We need to find ways of reducing this gap by cutting down on MPs’ benefits and use that money to incentivize the councillors. Otherwise, this is good news BUT let’s brace up for real battles on the development front once councillors are put in place. (The) UDF faced this challenge during its rule. Development in cities, towns and villages went down as councillors and MPs spent too much time spurring one with another in readiness for the next Parliamentary elections. To me, this is possibly why Bingu decided to sit on local government elections. I am not sure though. He probably foresaw his government failing to develop communities due to battles between MPs and councillors. We all remember how Bingu made a significant difference in the state of community development in our cities and towns.515

The Constitutional Amendment Bill No.4 of 2012 did not repeal the 2010 amendments of the Local Government Act (Cap.22:01). The two laws were not harmonised. They were also not harmonised with the local government policy. The results of the 2014 tripartite elections are therefore unlikely to result in meaningful allocation of power and authority to local councillors, and changes in the relationship between them and MPs. Tensions between the local councillors and the MPs will be further heightened by the fact that the latter control the constituency development fund while the former do not have any special powers in respect of the development budget at either the assembly or local levels.

The failure of the government to hold local government elections grossly undermines citizen participation, and creates an unconstitutional environment in which the decentralisation policy is being implemented. Civil society organisations are further of the opinion that simply amending the constitution will not resolve the fundamental issues of poor funding for local polls,516 the logistical problems related to the administration and management of the local government elections, and the effective operations of the local government authorities.517 They argue that there is a need to review the constitution, the enabling law, and the decentralisation policy since the system as it currently stands is expensive, unattainable and unsustainable.

However, even though local elections have not been held to elect ward councillors, the local government structures have continued to function. Since the VDCs and ADCs are not dependent

515 Kent Mphepo, Story Workshop Trust, posting to civsoc-mw@sndp.org.mw, 22 November 2012.
516 Interview with Macdonald Sembereka, Presidential advisor on Civil Society, Blantyre, 30 October 2012.
517 These views were expressed at the second civil society advocacy workshop of the AfriMAP Political Participation report, Cresta Hotel, 18 August 2006.
on national elections, they have continued to exist, functioning at the local level and linking up with the district executive committee (DEC) at the District Assembly. The only representatives absent in the local government structures are the ward councillors. ADC representatives, MPs, representatives from civil society bodies and members of the DEC have continued to discharge their duties and functions in the district assemblies. 518

The key issue about local government democracy in Malawi is not just about the failure of the local polls. Rather it is whether the constitutional model as it stands at present is affordable and viable. Local government elections to be held in over 1 500 wards, and every five years, a year after the presidential and parliamentary elections may indeed be too expensive for a country that is so dependent on donor financing for its elections. It also raises serious questions on whether the Electoral Commission has the capacity to effectively carry out local government elections when it has serious problems effectively managing and administering presidential and parliamentary elections held on the same day. 519

D. Access to information

The implementation of decentralisation is accompanied by a civic education programme run by the decentralisation secretariat established under the Decentralisation Act of 1998. The secretariat has a civic education unit responsible for the civic education programmes run using a variety of information, education and communication methods. These include radio programmes such as Mphamvu ku anthu (meaning ‘power to the people’), Ndizotheka, (meaning ‘it is possible’), various MASAF programmes, and a television programme called Decentralisation. Some of the programmes of the decentralisation secretariat are contracted out to private firms such as Tribet Communications based in Lilongwe. A number of civil society organisations also run civic education programmes on local government and decentralisation. A good example of these is the National Initiative for Civic Education (NICE), a quasi-governmental/civil society programme with financial and technical support from the European Union. It has offices in all the districts in the country. The others include the Malawi-German Programme for Democracy and Decentralisation (MGPDD) and the Church and Society programme of the Church of Central Africa Presbyterian. These produce a variety of literature, pamphlets, and other documents that contain information on various aspects of local government and decentralisation that are made available to the public.

The decentralisation secretariat publishes district development, environmental and other plans and reports that are made available to the public. However, the capacity of the district assemblies to publish their key policy and legislative documents is limited:

The local government structures are still new and are not consolidated. The problem is that the administrative capacities in many districts are too weak to function effectively. The administrative local government structures are still quite inefficient. It is difficult, if not

519 This view was also expressed by H. Ntaba, Secretary General of the Democratic Progressive Party (DPP) at the AfriMAP Political Participation Advocacy Workshop, Cresta Hotel, Lilongwe, 19 August 2006; and by M. Mkandawire, Church and Society Programme, Livingstonia Synod of the Church of Central Africa Presbyterian at the AfriMAP Political Participation Advocacy workshop, Cresta Hotel, Lilongwe, 18 August 2006.
impossible to recruit well trained and qualified staff such as accountants and administrators. This is due to a shortage of qualified staff that is difficult to hire because it is more attractive for professionals to work in one of the cities than as poorly paid civil servants in remote district centres. [For example] in 2001, most of the councils were unable to present audited accounts because of lack of personnel.520

The lack of capacity and the inadequacy of resources make it difficult for the local assemblies to produce and make available to the public draft or final laws, policy documents as well as budgetary and financial information. It is also difficult for the assemblies to invite submissions on such matters as relating to policy and by-laws. The documents produced by the decentralisation secretariat, though readily available to the public, are, in practice, not so easily accessible. However, the various representatives in the assemblies make submissions from their constituents and the interest groups they represent.521

E. Participation in policy-making and budgetary allocations

On paper, the structures of local authorities provide adequate mechanisms for popular participation. The committees’ set-up from the villages to the district levels, if properly utilised, are designed in such a way that the citizens can make effective input. Once a month the local assemblies hold what they call the full assembly, which is attended by ordinary people.

The VDCs and the ADCs are mechanisms for ensuring consultation at community level on matters that affect that community. These are mostly in relation to social services provision including health, education, agriculture, marketing of produce, water and infrastructure (roads, school blocks, etc.). The effectiveness of these processes vary between districts and villages. There are some areas where these processes are effective and others where they are not.522

The Development Broadcasting Unit (DBU) of the Malawi Broadcasting Corporation (MBC) runs two social mobilisation programmes, Kanthu N’khama and Ndizathuzomwe, aired on the national radio. The programmes’ audio tapes, which are available at the DBU studios, indicate that VDCs and ADCs, wherever they are effectively functional, provide a good link between the local communities and the services providers, on the one hand, and, on the other hand, between the local communities and the district local government authorities.

However, there is no evidence of initiatives in participatory budgeting at the levels lower than the district, town, municipal, or city assemblies. This is partly because such issues are technical in nature and the relevant technical expertise is not available at such levels. It is also because the local government and decentralisation laws recognise the district, town, municipal and city assemblies as the institutions responsible for the making of budgets, plans and policies. The laws do not provide a similar role for the lower local government and decentralisation structures in


521 Interviews with Deputy Director of Administration, Mzuzu City Assembly, 9 January 2006; J. Dzooli Mwale, District Labour Officer, Kasungu, 13 September 2006. Similar information was provided by Kizito Chilunga from the Decentralisation Secretariat, 4 September 2006.

522 This information comes from the field reports of the Development Broadcasting Unit (DBU) of the Malawi Broadcasting Corporation (MBC), available at the DBU studios in Blantyre.
this regard. The essence of decentralisation is to involve as broad participation in the budgetary processes as is practically possible. Such a process would benefit from the simplification of the budget documents and a proactive approach by the local authorities to involve members of the communities.

CSOs have representation in local assemblies and at the lower levels in the area, village and community structures of local government. In some districts in the country there are local media and civil society organisations that monitor and carry out advocacy with the lower levels of government. Good examples of these are the Malawi Economic Justice Network (MEJN) working on budget implementation monitoring at district assembly level, the Church and Society Programme of the CCAP and the Public Affairs Committee (PAC), a public interest institution working on various aspects of people’s participation in national affairs. However, for their part, government officials in the local authorities complain that the CSOs are not fully transparent in what they do.523 Much as they are effective in calling for transparency and accountability in the public institutions, they, themselves, do not live up to the standards they set for others. Their budgets are not publicised, only their activities. They do not issue regular reports that are shared with others at the local authority level, and only report to their funding agencies. This study was unable to obtain CSO budgets at the assembly level in all the districts visited.

F. Evaluation of the decentralisation policy
Although the government has shown willingness to promote decentralisation, the local government system is still weak and undeveloped due to the dependency on central government grants, the lack of administrative capacity, lack of experience and inadequate grassroots participation in local authority affairs. In fact, the new policy on decentralisation has not been fully implemented. Some ministries are still clinging to some functions that ought to be decentralised. This is especially the case in relation to the implementation of the budget and the decentralisation and devolution of financial resources,524 and also in relation to the implementation of capital development projects. Much as the central government has transferred financial resources from the national budget directly to the local government assemblies, in reality the assemblies do not get all the resources they need and when they need them. Cuts in the allocations are also common, and such decisions are taken at the level of the central government. The central Treasury uses its discretion in such matters. The resources to the local assemblies are not disbursed directly to them upon the passing of the national budget by Parliament. It is Treasury that controls the disbursements, and this is done on a monthly or quarterly basis.

A 2004 joint government-donor review of the decentralisation process in Malawi observed a number of other limitations in the implementation of the decentralisation process in the country. These included:525

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523 Interviews with Director of Finance, Kasungu District Assembly, 12 October 2005; Moses Kuchingale, former chair, Mchinji District Assembly, 14 October 2005; Peter Chihana, and Chimwemwe Gondwe, Rumphi District Assembly, 5 November 2005.
524 Interviews with Director of Finance, Kasungu District Assembly, 12 October 2005; Moses Kuchingale, former chair, Mchinji District Assembly, 14 October 2005; Deputy Director of Administration, Mzuzu City Assembly, 9 January 2006.
• The legal framework is responsive and evolving. There are policy gaps and sectoral laws conflicting with the Local Government Act (Cap.22:01), for example, in relation to the tenure of the members of the district assemblies. In the Act it is three years, while in the constitution it is five years. Sectoral laws such as the Business Licensing Act (Cap.46:01), sections 7 and 33 are not consistent with the Local Government Act (Cap.22:01). The same applies to some sections of the Land Act (Cap.57:01), especially in relation to the collection and retention of licensing fees and land rent. In relation to land matters, the powers of the Minister of Lands contained in the Land Act (Cap.57:01) undermine the powers of the assemblies in the Local Government Act (Cap.22:01).

• The need to resolve the status of the Local Government Service Commission (LASCOM) enshrined in section 147 of the constitution as a body responsible for hiring and firing of senior staff at local level. However, the Local Government Act gives such powers to the assemblies and entails dissolution of LASCOM, but the constitution, as a supreme law takes precedence over an act of Parliament.

• Inadequacy of women’s participation in the local assemblies, and the integration or mainstreaming of gender issues in local planning.

• Lack of clarity on the linkage between budget development and planning; and lack of systematic integration of physical planning into development planning.

• Lack of amalgamation of existing funding mechanisms, through the central Treasury, with funding of micro-projects at the local level, such as those funded by the Malawi Social Action Fund (MASAF). The funding of capital development projects, such as that done by donors, is not pooled through the District Development Fund (DDF). The funding of capital development projects is still done through the central government, suggesting incomplete decentralisation.

• Inadequacy of mechanisms for the review of by-laws, some of which have been inherited from the previous regimes – both colonial and one-party regimes.

The critical failure to hold local government elections following the 2004 elections multiplied these problems considerably, depriving the local government assemblies of their democratic legitimacy.

G. Recommendations

• Both the constitution and the Local Government Act should clearly distinguish between the roles and mandates of the local councillors and those of the MPs so as to remove the inherent tensions between them.

• Parliament should harmonise the laws relating to local government and local government elections, the constitutional amendment of 2012 and the National Decentralisation Policy, with a view to creating a clear legal and policy framework for local governance in the country.

• The local government law should indicate the specific percentages of the revenue generated locally to be transferred to the central Treasury and the percentages to be retained by the local authorities.
• Local ward boundaries should be reviewed and re-demarcated to make them consistent with the boundaries of traditional authorities and those of parliamentary constituencies.
• Numbers of wards should be reduced and rationalised based on demographic, physical and socio-economic features.
• The professional capacity of district executives, including councillors, should be enhanced so as to make them more effective in matters of local governance.
Traditional authorities play an important role in local government in Malawi, and their status is partially recognised in the constitution and in the legislation and policy framework establishing local government authorities. The repeal of the constitutional provisions for a Senate, however, deprived them of any role at national level, and chiefs have advocated for the restoration of the Senate or the creation of a Chiefs’ Council. The legal framework governing the role of traditional leadership needs further public debate and resolution by Parliament.

A. Status of chiefs and relationship with local government

Traditional authorities play an important role in the social life of Malawians, especially in the rural areas. They are managers of customary land, custodians of customary law, and guardians of tradition and culture. Chieftaincy is hereditary, along the paternal line for the patrilineal communities such as those of the northern part of the country, and along the maternal line for the matrilineal communities of the central and southern districts. In the patrilineal communities chieftaincy is passed from the father to his sons, with the first son having the first call. In the matrilineal communities chieftaincy is passed from a maternal uncle to his nephew, with the first son of his first sister having the first call.

In their 2009 study of ‘town chiefs’, Diana Cammack, Edge Kanyongolo and Tam O’Neil observed that modern Malawian chiefs are ‘one type of hybrid political order or governance “mode” in Malawi; they operate within overlapping normative universes, and perform acts which have both historical resonance and modern purposes ... Their behaviour facilitates community action, social order and cohesion, producing a variety of public goods that we consider developmental. Some are less obviously so because they fall outside donors’ normal definition

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526 See the study report at https://www.academia.edu/4345302/Town_Chiefs_in_Malawi.
of developmental “outputs”, but they are deemed by us as key to bringing order and structure to communities that might otherwise be overwhelmed by diversity and discord. The study, among others, concluded that regardless of their status, all town chiefs appear to undertake similar functions, which can be organised into six spheres: cultural affairs, administration, land and property, justice and order, politics, and social and economic development. Traditional chieftaincies are themselves an institutional hybrid as a result of the historical process of state formation.

The Malawi traditional authority system, as elsewhere in Africa, has been exposed to major historical, political and socio-economic changes. The historical literature of Malawi reveals how the impact of the slave trade, pre-colonial migrations, Islam, Christianity, colonialism and the one-party dictatorship have led to changes in the traditional authority system and customary practices, and in the roles and powers of the chiefs and village headpersons.

After independence in 1964, chiefs in Malawi functioned as an extension of the executive. This was partly an inheritance from the colonial system of indirect rule, and partly also due to the centralised nature of the one-party regime that did not allow for the existence of parallel structures of authority. Before the coming into effect of the Local Government Act (Cap.22:01) and the National Decentralisation Policy, the chiefs reported to the district commissioner, whose office was under the Office of the President and Cabinet (OPC). This arrangement undermined the traditional nature of chieftaincy in the sense that the traditional authorities worked under the supervision of a government employee.

The 1967 Chiefs Act (Cap.22:03), which is still in force, recognises the existence of traditional authority according to the customs of the country, but subjugates chiefs to the OPC, who is given the authority to appoint them to or dismiss them from office, so that they became an extension of the executive arm of the government. This creates an awkward situation wherein the authority of a hereditary office is subjected to that of an elected official.

The 1994 constitution does not define the office, powers, functions and position of chiefs in the country. However, in a number of sections, the constitution recognises the existence of chiefs and suggests the functions they could play. Section 110(3) of the constitution states that:

Parliament may make provision for traditional or local courts presided over by lay persons or chiefs: Provided that the jurisdiction of such courts shall be limited exclusively to civil cases at customary law and such minor common law and statutory offences as prescribed by an Act of Parliament.

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In practice, the vast majority of civil disputes in Malawi are likely decided by such courts.\footnote{For a more detailed discussion of the judicial role of chiefs see AfriMAP, 2006, Malawi: The Justice Sector and the Rule of Law.}

Section 146(4) of the constitution states that:

Parliament shall ensure that the composition of local government authorities includes a prescribed number of persons serving as Chiefs in the area of jurisdiction of such authorities.

The 1998 Local Government Act recognises chiefs as non-voting members of local authority assemblies. At the ADC and VDC levels, chiefs are presiding heads of these local government structures.\footnote{A good analysis of this appears in M. K. Hussein, 2002, ‘Decentralisation and traditional authorities’, in The Lamp, no.36, July–August 2002.}

Through these the chiefs exert some significant influence over policy, though they do not vote in the local authority assemblies. Traditional leaders also play important roles in Malawi Social Action Fund (MASAF) committees, and in decision-making processes relating to MASAF projects.

The Malawi chiefs see their non-voting status in the district assemblies as a way of stripping them of their traditional authority and powers. They have constantly argued for greater participation in local government politics, including the right to vote in the assemblies. The chiefs are arguing for Parliament to pass the relevant law enabling the establishment of traditional or local courts to be presided over by the chiefs as was the case during the colonial and the one-party eras.\footnote{Interviews with Chief Nkhumba of Phalombe, Chief Kadewere of Chiradzulu and Chief Chitera of Zomba, 29 September 2005; Chief Lukwa and Chief Kaomba of Kasungu, 2 October 2005; Chief Khongoni of Lilongwe and Chief Nthondo of Ntchisi, 19 January 2006.}

Chiefs were also among those opposed to the repeal of the constitutional provisions for a Senate, which provided for representation of traditional leaders in the Upper House of Parliament.

Traditional leaders have also advocated for the establishment of a ‘Chiefs’ Council’ through which they could consult with government on matters of national interest.\footnote{These calls were made during the district consultative workshops organised by the Special Law Commission on the Review of Land Related Laws, July 2004. The field reports and notes are available at the Law Commission, Lilongwe.}

The idea of the Chief’s Council was discussed during the constitutional conference and the consultations that took place between 1993 and 1994 prior to the adoption of the new constitution in 1994. The issue was also constantly raised in the focus groups for the study that resulted in the establishment of the Malawi Safety, Security and Access to Justice (MASSAJ) Programme supported by the UK Department for International Development (DfID).

A Chiefs’ Council or revamped Senate could be an important alternative dispute resolution mechanism in addition to performing oversight functions.\footnote{These are recorded in International Organisation Development (IOD), Malawi Safety, Security and Access to Justice. Research on Primary Systems in Rural Malawi. Final Report. Report prepared for the Government of Malawi by International Organisation Development Ltd., with funding from the UK Department for International Development (DfID). IOD Project no.292. London: IOD.}
B. Roles of traditional/religious leaders in public life

Traditional chiefs are an important part of the leadership structure of Malawian communities. Chiefs allocate land, handle civil disputes, and offer moral guidance and protection to their communities. These functions are not provided for in the constitution, though they are implied in the Chiefs Act. A number of studies have revealed that some roles of chiefs are fast changing: ‘Traditional leaders play a significant role in the maintenance of peace, law and order in the areas under their jurisdiction but their authority is increasingly being challenged. People’s loyalty is divided between the traditional and the modern elected leaders, and other elites. The latter include religious figures, business people and other opinion makers.’

Data from the 2005 Afrobarometer survey indicate that chiefs are an important part of the Malawian society. Among public officials or leadership figures, the survey found that Malawians are most likely to have contacted traditional and religious leaders more than any other leaders (35% each). Next in line are local government councillors (18%), followed by party officials (14%), members of Parliament (MPs) (14%), other influential persons (11%) and lastly government officials (9%). However, some studies have indicated that chiefs are, in fact, among the most corrupt ‘officials’ in Malawi.

Information from the consultations with the chiefs done by the Special Law Commission for the Review of Land Related Laws between 2003 and 2004, indicates that the chiefs believe that the democratic transition and the new political order undermine their position and authority, and especially that their status is not clearly provided for in the constitution. Similar fears are expressed about their position in local government authorities where they only function as ex-officio members.

Data from field interviews for the MASSAJ programme conducted in 1999 showed a number of cases of the erosion of chiefs’ powers. A comment in a meeting of 12 men and women village heads and group village heads in Chief Likoswe’s area in Chiradzulu district noted that ‘the coming of democracy has led people to insult their own chiefs’. In Mchinji district, the chiefs attributed some of the problems of the erosion of their authority to the conflict between the traditional systems of justice and conventional law, the latter which has come to be used by more people since the advent of democracy.

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538 These views are contained in the field reports of the Special Law Commission for the Review of the Land Related Laws for the period March 2003 to July 2004, available at the Law Commission, Lilongwe. This view was also expressed by both Chief Khongoni of Lilongwe and Chief Rukwa of Kasungu at the first AfriMAP Political Participation Advocacy workshop, Cresta Hotel, Lilongwe, 19 February 2006.

The field data from the MASSAJ programme consultations also indicate that there is a perceived loss of trust in the chiefs partly due to the behaviour of the chiefs themselves: [in Thyolo district] ‘the people in the area have lost nearly all the land because it had been sold by the chiefs causing an acute land shortage’, [and in Salima district] ‘villagers engage in deliberate destabilisation tactics to get rid of the private property developers’; [and elsewhere in the central region] the women specifically said that they had no faith in the village headmen and chiefs because they were corrupt in issues of land or carrying out their responsibilities.\(^{540}\) In 2013 President Joyce Banda made several warnings against nepotism,\(^{541}\) bribery, harassment of people\(^{542}\) and corruption\(^{543}\) by chiefs.

The endorsement of a traditional leader plays an important part in the selection of elected or un-elected officials at the local level, though the general argument is that chiefs should be politically neutral. Election observation reports indicate the widespread use of chiefs by the ruling party to intimidate opposition party supporters and candidates.\(^{544}\) It is also practised by opposition politicians to frustrate the efforts of the party in power, to the extent that in June 2013 President Banda warned her fellow politicians ‘against using chiefs to score political mileage arguing that the tendency retarded development programmes initiated by her government’.\(^{545}\) ‘The tendency’, argued the Malawi president, ‘makes some chiefs to have divided loyalty towards government which results in low people’s participation in government’s development endeavours. Chiefs should be left alone to exercise their administrative neutrality for them to serve all their subjects with fairness regardless of their political, religious and tribal affiliations.’\(^{546}\)

President Banda, herself, has appointed and promoted more chiefs than any other Malawi president before her.\(^{547}\) In 2013 alone she promoted no less than nine chiefs to the levels of Traditional Authority, Senior Traditional Authority and Paramount Chief. She also made a directive for the creation of more chieftaincies at the level of village heads and group village heads throughout the country.\(^{548}\) Some critics, particularly in civil society and the media, have argued that the president’s actions amount to political manipulation\(^{549}\) and a ‘political gimmick’,\(^{550}\) as it comes just ahead of the next election period. It also creates avenues for tensions among families as it is likely to cause heightened competition for chieftaincies. In some cases the president has appointed or elevated individuals whose positions are contested in court and there are court

\(^{540}\) Ibid.


\(^{542}\) http://www.nyasatimes.com/2013/08/05/jb-issues-stern-warning-to-chief-juma-of-mulanje/.


\(^{549}\) http://allafrica.com/stories/20140109/malawi-president-told-to-open-her-ears-and-save-resources/.

orders and injunctions restraining the individuals from assuming and exercising the powers of the office of chief.

C. Accountability
The chieftaincy is a traditional institution. Malawian chiefs are not elected. They are chosen according to traditional norms and practices. However, tradition provides various mechanisms for the chiefs to consult with their ‘subjects’. Chiefs work with groups of *indunas* (counsellors), who constitute a kind of executive committee. They also perform the functions of a jury in the handling of civil cases and in other forms of dispute resolution. Though the *indunas* are not elected, they have the capacity to check on the excesses of the chiefs.

D. Role of chiefs in land administration
Since the mid-1990s, a debate has arisen, spearheaded by some civil society organisations and the chiefs themselves, regarding the role of traditional leaders in land administration and management. The government embarked on a land reform programme in 1996, starting with a Presidential Commission on Land Matters, followed by the development and adoption by Cabinet, of a new land policy in 2000. A Special Law Commission on Land Related Laws was appointed in 2003. Among the major recommendations of this process is to codify (make as part of the formal law) the traditional or customary practices relating to the administration and management of customary land and to give the chiefs more powers in matters of customary land. The chiefs are of the view that the proposed land reform programme, and especially the proposed land law, will undermine the powers and authority of chiefs in land matters because of the proposed registration of land. They argue that registration of customary land will have the effect of ‘privatising’ the land, resulting in the chiefs losing control over it. In June 2013, Parliament passed the new Land Bill, but deferred the Customary Land Registration Bill for further consultations because the chiefs and some CSOs expressed concerns about the manner in which it reduces the powers of chiefs. CSOs also feel that the proposed law ‘disempowers women’ and does not adequately provide for land ownership by women as a special category. The CSOs have however not shown how the proposed law ‘disempowers women’. In fact it has sections that provide for ownership of land by women.

Technical experts argue that, in fact, the proposed land law gives legal recognition and more powers and authority to chiefs in land administration and management because all matters relating to customary land registration, leasing, transfers, administration and management would reside in their hands. The chiefs would also maintain a land register for their respective areas.

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The debates on the land issue, combined with those on the chiefs’ status in the local
government structures, the chiefs’ constitutional status, and those relating to the traditional
courts, raise the need for public debate on chiefs in the country.

E. Recommendations

• Malawians should reopen debate in the upper house of Parliament about the
  representation of chiefs in a restored Senate.

• The Chiefs’ Act should be urgently reviewed and the proposal for the establishment of
  the Chief’s Council should be adopted.

• The new Chiefs’ Act should remove the hybrid and double-roles of chiefs that placed
  them in both the executive and the judicial arms of government at the same time.

• Parliament should review the non-voting status of chiefs in the district assemblies.
  Given their central place in local governance, chiefs need to have voting rights in local
  government structures.

• Land laws should clearly state the powers and functions of chiefs in land administration
  and management matters.
Malawi is highly aid-dependent in respect of its national budget, a situation that brings well-known problems in terms of policy conditionalities and problems in coordinating multiple budget streams. However, for the most part development assistance is given in the form of budgetary support, ensuring that aid flows for their management are subject to the same rules as other national funds. Development partners have also played an important and large role in supporting the strengthening of democratic institutions. Given the significance of the role that development partners play, there is little debate about their policies in the National Assembly or other national fora.

A. Level of aid dependency
Malawi’s dependency on donor aid is quite enormous. About 80% of the development budget and 40% of the recurrent budget are donor supported. From 2004/2005 to 2006/2007, Malawi received US$ 1.282 million in aid, of which the UK Department for International Development (DfID) provided US$ 345 million. Part of the latter was poverty reduction budget support (PRBS), which the DfID gave the government from 2001. Between 2007 and 2009 aid contributed approximately a fifth of the country’s gross national income (GNI). The DfID committed a minimum of US$ 560 million in aid to Malawi each financial year from 2007/2008 to 2010/2011, 30% as PRBS. The European Union, Norway and the African Development Bank (AfDF) also provide PRBS to Malawi. The World Bank and the International

Monetary Fund (IMF) are also supportive of PRBS. The IMF’s Poverty Reduction and Growth Facility (PRGF) programmes, and the World Bank’s Poverty Reduction Support Credit (PRSC) are both given in support of partner countries’ poverty reduction strategies, and operate alongside the DFID’s PRBS in many countries, including Malawi. The AfDF uses a similar instrument of development budget support lending (DBSL), and is working to align with other donors in some African countries which may eventually include Malawi.558

Donors have their own country assistance strategies or country assistance frameworks outlining the areas where they will assist. These are multi-year, and provide for specific projects in broad areas, often following a sector-wide approach (SWAP). The donors consult the government in developing their country assistance frameworks. The consultations are done at the executive level, but include other sectors and actors such as those in civil society. For example, the Malawi Economic Justice Network (MEJN) acted as a coordinating institution for civil society participation in the formulation of the World Bank and IMF-sponsored Malawi Poverty Reduction Strategy Paper (MPRSP). Through such consultations and participation the choice of critical areas requiring intervention is made. In most cases, most donors will align their assistance frameworks with government policy, for example, with the MPRSP, the Malawi Growth and Development Strategy (MGDS) which replaced it, and the Millennium Development Goals. This is a way of ensuring local ownership of the development assistance frameworks, and to enhance the transparency and accountability of donor assistance to the country.

Malawi receives aid from both multilateral (mostly banks, UN bodies and the European Union) and bilateral donors. Most of the country’s bilateral donors are members of the Development Assistance Committee (DAC).559 The numbers of the DAC donors, the amount of the aid given to Malawi, and the sectors into which the aid flows, have increased over the last two decades,560 especially with the increased attention given to democracy, governance and human rights issues. For example, data from the Debt and Aid Management Department of the Ministry of Finance indicate that there were 35 donor agencies that had committed funds to various projects in Malawi for the period 2003/2004–2005/2006.561 The World Bank (IDA) topped the list (15.6% share of total funding), followed by the AfDF (14.8%), the EU (12.5%), DFID (12%) and the UN Global Fund (11.8%).

By 2005/2006 donor funding was distributed to a total of 26 ministries or government institutions – a figure that changes with the configuration of government ministries as established by the president. The top five recipients accounted for 67.5% of donor funding, the top ten for 89.0%, while the top 20 account for 99.5%. The National AIDS Commission (NAC) topped the list (receiving US$ 149.0 million representing 18.3% share of donor funding),

559 The DAC members are: Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Japan, Republic of Korea, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom, United States, and European Union Institutions.
561 The data from the Aid Management Department of the Ministry of Finance were consolidated into one report by the Development Solutions, Deloitte, 2005, Profile of Donor Work in Malawi. Lilongwe: Deloitte.
562 The actual figures were: US$ 127.4 million from the IDA, US$ 120.8 million from the ADF, US$ 102.1 million from the EU, US$ 97.4 million from the DFID, and US$ 95.8 million from the UN Global Fund.
followed by Agriculture, Irrigation and Food Security (US$ 115.9 representing 14.2%), Education, Science and Technology (US$ 107.1 representing 13.2%), Health and Population (US$ 98.6 representing 12.1%), and Transport and Public Works (US$ 79.4 representing 9.7%). These were the government’s top five priorities for donor support. The large size of the amount that went to the NAC was on account of financial resources from the Global Fund and other foundations that financed HIV/AIDS programmes, and the amounts going to the Ministry of Agriculture was in response to the food crisis in the country and support to food security.

Malawi’s annual Aid Atlas reports show that in 2010/2011 general budget support (GBS) accounted for 10% of aid disbursements, sector support (discrete and pooled funding) for 23% and project support for 67%.[563] Malawi has been receiving GBS since the late 1990s, harmonised from the early 2000s onwards through the Common Approach to Budget Support (CABS) group which currently comprises the DFID, the EU, Germany, Norway, the AfDB and the World Bank.

The government recorded US$ 1 022 million in donor disbursements during the 2010/2011 fiscal year. This constituted a 7% increase from the previous year, which recorded US$ 955 million in donor disbursements.[564] Amongst the traditional donors, the United States Agency for Development (USAID) made the largest contribution to overall disbursements in 2010/2011 with US$ 125 million in support. The World Bank was the second largest donor with US$ 124 million in disbursements whilst the DFID disbursed US$ 110 million. Other major donors included the Global Fund (US$ 109 million), the EU (US$ 97 million) and Norway (US$ 41 million). The EU and DFID had been Malawi’s largest donor partners for the previous three fiscal years, contributing 11% and 14% of total official development assistance (ODA) to Malawi in the previous three financial years (2008/2009FY–2010/2011FY), respectively.

The People’s Republic of China committed approximately US$ 96 million of funds in the 2010/2011 fiscal year, although at least half of this amount was disbursed as loans. The Republic of India disbursed another US$ 73 million and the Arab donors contributed US$ 19 million.

In the 2010/2011 fiscal year, grants contributed 76.3% of total receipts while 22.9% were disbursed as loans. Loans were contracted to multilateral institutions like the AfDB, the World Bank, the Organisation of Petroleum Exporting Countries (OPEC) Fund, the Kuwait Fund, the Arab Bank for Economic Development in Africa (BADEA), and the International Fund for Agriculture Development (IFAD). A large proportion of funding from new donors like the People’s Republic of China and the Republic of India was in the form of loans. Technical assistance accounted for 0.8% of total aid. However, the actual proportion of technical assistance was unclear as donors did not generally report on it separately from grants. This raises a concern about the de facto tying of some aid, with source country consultants and companies brought into the country to do work that could potentially be done domestically. Lack of reporting also makes it difficult to establish the extent to which technical assistance has contributed to developing local capacities.

The health sector was the largest recipient sector of overall donor support in 2010/2011, receiving 29% of total aid flows. Education was second, with 16% of total disbursements.

564 This, and the information that follows, comes from Malawi Government, Malawi Aid Atlas 2010/11FY, Lilongwe, Ministry of Finance.
The six largest recipient sectors (health, education, economic governance, road, public works and transport, water and sanitation, and agriculture) received 84.2% of total annual disbursements. In contrast, the six smallest recipient sectors (information technology, public administration, energy and mining, gender, youth development and sports, vulnerability, disaster and risk management and integrated rural development) received 5.4% of total annual disbursements.

There was considerable fragmentation within the development priority sectors in terms of sources of aid and the actual aid disbursements. For example, the health sector received assistance from 21 donor partners across 115 activities in 2010/2011. Likewise, agriculture received support from 12 donors across 82 projects; economic governance from 11 donors across 34 projects (including budget support); education from 12 donors across 41 projects; water, sanitation and irrigation from ten donors across 17 projects; and roads, public works and transport had eight donors across 17 projects. These figures show that even in sectors in which functioning SWAP arrangements existed, the share of discrete projects was high. These sectors included health, which received 56% of total sector funding for discrete projects in 2010/2011, meaning that the share of programme support was only 44%. Education received 72% of sector funding for discrete projects, and, out of the total funding to agriculture, 62% was for discrete projects while the share of programme support was only 38%.

Donor aid was suspended in the 2011/2012 fiscal year due to the country’s poor governance record. When it resumed in the 2012/2013 fiscal year after changes in the country’s leadership, the UK pledged £23 million (US$36 million) for the stabilisation of the Malawian economy, and a further £10 million (US$16 million) to boost healthcare. The US restored a US$250 million assistance programme in the light of perceived good economic and political governance, and the IMF granted US$156.2 million under the extended credit facility (ECF) for the next three years.565 By 2013 it was clear that despite President Joyce Banda’s ‘dynamic vision for her country’s future, her administration currently has to rely upon foreign donors’566 just like any other previous administration.

**B. Role of development partners in promoting democracy**

Financial institutions and foreign governments played a crucial role during the transition to multi-party politics in Malawi at the beginning of the 1990s. The suspension of aid to the country as a good governance conditionality in 1991 forced the Banda regime to speed up the process of political reform resulting in the opening up of political space for pressure groups to emerge, and the call for a referendum in 1993.567 Since then Malawi has been a major recipient of what is commonly known as ‘democratisation aid’ or ‘aid for democracy’.568

The major providers of ‘democratisation aid’ to the country are the bilateral donors, including the Norwegian Agency for Development Cooperation (NORAD), the European Union

or European Commission, the German Agency for Technical Cooperation (GTZ, now GIZ), USAID – including the Millennium Challenge Account\(^{569}\) (MCA), the DFID, the Swedish International Development Agency (SIDA), the Canadian International Development Agency (CIDA), and the Danish Agency for International Development (DANIDA) through Danish NGOs such as the DanChurch Aid. Some of these, such as NORAD, provide support through the United Nations Development Programme (UNDP). There is also democratisation aid that comes from multilateral institutions such as the European Union.

In relation to ‘democratisation aid’ or ‘aid for democracy’ the governing principle is the foreign policy orientations of the donor, or foreign government from which the assistance originates (see Table 18 for a summary of donor projects). For example, much of the UNDP’s ‘democratisation aid’ is governed by the principle of good governance as outlined in its 1997 policy framework: Governance for Sustainable Development (UNDP, 1997). The framework says that good governance is, among others, participatory, transparent and accountable. It is also effective and equitable. It promotes rule of law that ensures the political, social and economic priorities are based on broad consensus in society and that the voices of the poorest and the most vulnerable are heard in decision-making over the allocation of resources in the development process. The UNDP’s ‘democratisation aid’ therefore fits into this framework. All the other donors have their own respective frameworks for their ‘democratisation aid’, and these may differ according to the dynamics of the donor’s foreign policy objectives.

In Malawi, much of ‘democratisation aid’ falls within the wider framework of good governance. This is the framework for assistance used by the top five financing agencies:

The Democratic Governance Programme\(^{570}\) coordinated by UNDP is the largest multi-donor democratisation support programme in Malawi. Its current (2012–2016) focus is on:\(^{571}\)

- **Democracy Consolidation and the protection of human rights**: Through the Democracy Consolidation Programme (DCP), UNDP works with the Malawi government to increase the effective participation of local communities in policy- and decision-making by enhancing their ability to advocate for changes to policies, laws, practices affecting their livelihoods and rights and in holding public bodies accountable. A related project is the Malawi human rights support project, in which the UNDP pooled resources together with the Royal Norwegian Embassy to promote and protect human rights. Among others, the project supports the formulation of a gender sensitive national human rights plan. Its budget volume is US$ 3.5 million. The key partners are the Malawi Human Rights Commission, the Office of the Ombudsman and the Ministry of Justice and Constitutional Affairs.

\(^{569}\) Malawi is in the preparatory stages of the Millennium Challenge Account. The financial support currently provided is meant to prepare the country for qualification for the MCA.

\(^{570}\) Details at http://www.undp.org/content/malawi/en/home/operations/projects/democratic_governance.html.

\(^{571}\) http://www.undp.org/content/malawi/en/home/ourwork/democraticgovernance/in_depth/.
<table>
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<tr>
<th>Agency</th>
<th>Democracy/Governance Programme</th>
<th>Focus areas</th>
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| EC/EU  | Rule of Law                   | Strengthening the democratic process and good governance  
|        |                               | Competitive politics (elections)  
|        |                               | Supporting the legal and judicial systems  
|        |                               | Improving accountability and transparency in public institutions  
|        |                               | Providing information and access to justice and to human, economic and social rights  
|        |                               | Civic education  
|        |                               | Fighting corruption |
| GTZ (now GIZ) | Programme for Democracy and Decentralisation | Competitive politics (elections)  
|        |                               | Popular participation  
|        |                               | Decentralisation and local governance  
|        |                               | Certainty of the law and rule of law  
|        |                               | Civic education  
|        |                               | Respect for human rights  
|        |                               | A market-friendly and social economic order  
|        |                               | Strengthening civil society  
|        |                               | Fighting corruption  
|        |                               | Performance of the security sector |
| NORAD/UNDP | Good Governance Democracy Consolidation Public Sector Management Reform | Strengthening capacity of state/government institutions  
|        |                               | Promoting decentralisation, local governance, empowering communities  
|        |                               | Capacity for civil society, civil society interface with state  
|        |                               | Public policy-making, planning and implementation processes  
|        |                               | Capacity for public accountability and ethical government  
|        |                               | Capacity for pro-poor service delivery  
|        |                               | Access to information  
|        |                               | Conflict mitigation, management, consensus building  
|        |                               | Civic education |
| US/USAID/ Millennium Challenge Account/Threshold Project | Good Governance Civil society/Parliament interface | Democratic governance, accountability and transparency  
|        |                               | Participatory and competitive politics, democratic representation  
|        |                               | Ruling justly, access to justice, lawful governance  
|        |                               | Investing in people: primary education and primary/public health  
|        |                               | Economic freedom  
|        |                               | Respect for human rights  
|        |                               | Civic education |

Support to tripartite elections: Through the Malawi Cycle Support project, the UNDP works with the Malawi Electoral Commission (MEC), development partners and all the elections stakeholders to plan and conduct free, fair and credible tripartite elections in 2014; and to undertake subsequent institutional development and electoral reform beyond the elections in line with the MEC’s 2012–2017 Strategic Plan. Approximately US$ 18 million has been budgeted for the project, which is currently funded by the DfID, the EU, Ireland, Norway, Japan and the UNDP. This constitutes about 40% of the entire elections budget and covers the costs of technical assistance and the procurement of selected election materials. The total elections budget as agreed by the government, the MEC and the development partners in early May 2013, was US$ 44.4 million.

Strengthening political parties: In collaboration with the Centre for Multiparty Democracy (CMD), the DfID and the Netherlands Institute for Multiparty Democracy (NIMD), the UNDP supports political parties to have clear ideologies and functioning internal democracy as well as help them build better inter-party relationships through the Strengthening Political Parties Project. On 13 February 2013, the UNDP signed a US$ 1.6 million ‘Strengthening Political Parties Project Support Document’ with the Centre for Multiparty Democracy – Malawi (CMD-M) and the British DfID.

Social cohesion and national peace: In line with section 13(t) of the Constitution, the UNDP supports the Office of the President and Cabinet in the establishment of national peace architecture (NPA) to provide a mechanism for conflict resolution in the country.

Democratic governance sector wide approach (DGSWAp): In the DGSWAp, the UNDP works with the Ministry of Justice and Constitutional Affairs, the European Union and UNICEF to strengthen the coordination of institutions working in the governance domain. The democratic governance sector in Malawi comprises the three different arms of government and various other stakeholders like constitutional bodies and CSOs. The DGSWAp aims to provide a platform for a common policy and planning framework for these institutions.

Support to building the capacity of political parties mostly comes from private foundations and institutions, such as the German Konrad Adenauer Foundation (KAF), the NIMD, the National Democratic Institute (NDI) and the International Republican Institute (IRI) of the United States, or specific governance programmes such as the Malawi-Germany Programme for Democracy and Decentralisation (MGPDD). Some of the public interest institutions raise the funding from public sources in their own countries. Support to political parties comes in the form of study tours to institutions of similar nature and to parliaments, training in party organisation techniques and other capacity building activities.

The two institutions providing the most visible support to political parties in Malawi are the NIMD and the KAF. The NIMD provides support to all the parties represented in Parliament, and at least one outside the House. Financial and technical support is provided through the Centre for Multiparty Democracy, an initiative of the IMD, established in 2005. The parties
access financial support for their activities based on the quality of their proposals and ability to effectively account for the funds.\textsuperscript{572} On its part, the KAF has, since 2001, been running a training programme for the youth wings of the political parties. The programme started as a partnership between the KAF and the Centre for Social Research of the University of Malawi\textsuperscript{573} but eventually evolved into a stand-alone programme with KAF support. Initially, three parties represented in Parliament – AFORD, the MCP and UDF – and one major party outside Parliament, the MDP, were the participating parties. The programme is intended to build the capacity of the political parties to integrate the youth into their structures and party activities, and to create a pool of future leaders, not only in the parties but in society as a whole.

\textbf{c. Coordination and integration of aid}

Much of the donor support is channelled through the national budget in the form of budgetary support, except for the aid that goes directly to supporting specific projects, and is aligned with the MGDS. Key donors coordinate their aid through the Common Approach to Budget Support (CABS) group which currently comprises the DfID, the EU, Germany, Norway, the AfDB and the World Bank. The CABS process links funding to a broad set of performance targets, with regular high-level dialogue on economic, political and sectoral issues. It also reinforces the structural reforms the Malawi government has agreed to with the IMF, one of which is low exchange reserves – regarded as Malawi's key economic risk.

Channelling aid through the national budget means that the resources are accounted for through the normal budget accounting and monitoring processes. External funds are, therefore, subject to the same rules as national funds in relation to auditing and reporting to the legislature and other institutions. The funds are predictable and granted on a multi-year basis. In some very specific cases they may be tied to use of particular suppliers or consultants, but the normal practice is to put all public procurement requirements through a tendering process.

Though the donors recognise the need and importance of using the country’s accounting systems, in practice, the accounting systems vary from one donor to the other. For example, the World Bank prefers to use its own standard procurement procedures. Other donors do not. The reason for the World Bank variation is that the institution uses this as a standard international procedure and requirement.\textsuperscript{574} It could also be because the bank does not have full confidence in the specific country’s systems. This creates a situation whereby the government uses more than one system of accounting to the donors, which raises questions about the capacity of the government to effectively account for donor support.

\textsuperscript{572} Discussion with Knox Valera, Secretary General, PPM, and executive member of the IMD, 19/08/06.

\textsuperscript{573} The researcher designed this programme in 2001 when he was Deputy Director of the Centre for Social Research.

\textsuperscript{574} Interview with K. Nthara, World Bank, Lilongwe, 2 September 2005.
**Vision**

**Overview:** Our plan takes as its starting point the Government of Malawi’s new Growth and Development Strategy (MGDS II: 2011–6). DFID has supported and contributed to its design. MGDS II, recently approved by Cabinet, highlights nine priorities (up from six in MGDS I). It contains a strong Results Framework that we can align and link to the Medium Term Expenditure Framework to guide multi-year budget allocations and improve aid predictability. In setting our future priorities, we have focused on how we can help Malawi to protect recent development gains and make some modest progress. We will give strong and sustained support to the Government of Malawi to help Malawi’s economy to recover and to protect the poor. We commit ourselves to work in close partnership with the current Government to improve the lives of Malawian citizens, especially girls and women. We will do this by building on programmes that are delivering impressive results, including in health, HIV, justice and agriculture. We will scale up in areas where we can have a high impact and which complement other work, including water and sanitation in underserved areas and girls’ education. Our planned interventions will be mutually reinforcing: e.g. girls need toilets, closer water points and protection from abuse to attend school, and their education will slow population growth, deliver better health outcomes and higher earnings for them and Malawi; improving sanitation will deliver better value for money in our health interventions. We will work in new ways including through results-based approaches, new NGO and private sector partnerships. We will help tackle underlying vulnerabilities and future risks by increasing communities’ ability to deal with weather shocks, helping to reduce the high fertility rate and tackling cultural and other barriers particularly affecting girls and women (e.g. preventing school attendance, feeding into the high maternal death rate). As well as improving the lives of Malawi’s poor today, we also need to invest in the country’s future. We will scale up work with the government, the private sector, other development partners and potentially through regional initiatives to help put the country on a more sustainable growth path and expand the private sector. Our priority is to protect economic stability and to tackle the top growth and export constraints. This is critical to fund future development, provide jobs and incomes. We will do this through DFID Malawi Wealth Creation programmes and support to Malawi’s IMF programme, should it be resumed. We will also consider whether General Budget Support should be resumed through the Common Approach to Budget Support (CABS) process, which links funding to a broad set of programme targets, with regular high level dialogue on economic, political and sectoral issues. CABS also reinforces the structural reform programme the Government has agreed with the IMF which tackles one of Malawi’s key economic risks – low foreign exchange reserves. Our work will be complemented by planned multilateral investments in regional infrastructure and trade facilitation, and DFID regional work including on the North-South Corridor and the Pan African Free Trade Area. Our governance work will continue to promote accountability, responsiveness and capability in the Malawian government, while underpinning the rest of our Plan by ensuring Malawi’s limited resources are used to maximum effect. This includes empowering local citizens, increasing local accountability and space for debate, protecting rights of vulnerable
groups, access to justice, including reducing violence against girls and women and a major
contribution to the fight against corruption. We will support the efforts of the new government
to improve the governance context and are preparing a programme of support for the 2014
elections and to strengthen democratic institutions. Our priorities and our approach in different
areas are influenced by lessons learnt from previous governance work and regular analysis of
political-economy dynamics in Malawi.

Alignment to DfID and wider UK Government priorities: This Operational Plan is aligned to
DfID’s Business Plan 2011–2015, with a strong focus on tackling challenges faced by girls
and women, and enhanced efforts to track impact and value for money. It also complements
planned DfID regional work e.g. promoting climate smart agriculture and food security,
maternal health, HIV, trade and regional integration and climate change. DfID, the BHC and the
British Council have a Joint UK Action Plan on Climate Change in Malawi. DfID’s bilateral work
focuses on local adaptation and energy efficiency. We have provided seed funding to the World
Bank on carbon finance mechanisms which have significant potential to leverage resources to
protect Malawi’s dwindling forests.

What we will stop doing: Our Operational Plan reflects a rationalisation that began in 2010,
based on where we can have the greatest development impact and add value to others’ work.
We have also tightened our focus to reflect UK Ministerial priorities, e.g. access to water and
sanitation in underserved areas, leaving infrastructure investments we had considered like large
scale irrigation to multilaterals, many of which DfID funds centrally.

The double accounting system also applies in the case where donors directly fund a project or
a programme that is specific to a government department or ministry. For example, the Rule of
Law programme supported by the European Union may directly provide funding to the Ministry
of Justice or to an institution such as the Prison Inspectorate or the police. Such institutions
would do the accounting for the project funds on top of the normal accounting for their
budgetary disbursements. There is thus no specific model for the coordination and integration
of project aid into national policies and accounting systems. In a recent horizontal assessment of
the constitutional bodies,575 the issue of coordinated funding in the form of a sector-wide basket
fund (the sector-wide approach, SWAP) was raised and discussed. It was noted that such an
approach has been tried in the funding for elections, as well as in the health sector. The election
basket funding received resources from American, British, German, and Norwegian sources,
coordinated by the UNDP.576 The experiences in the SWAP/basket funding approach have been
varied. While the health SWAP worked relatively well, the election basket funding experienced
some problems. These ranged from technical problems of coordination and accounting to the

575 W.C. Chiwa and L. Koechlin, 2006, Horizontal Capacity Assessment of the Constitutional Bodies, the Anti-Corruption Bureau,
and Related Institutions in the Legislature, the Executive, Civil Society and the Informal Justices Sector of Malawi, commissioned by the
Democracy Consolidation Programme (DCP) of the Inter-Ministerial Committee on Human Rights and Democracy (IMCHRD)
576 Discussion with UNDP Officials, 16 February 2006.
various donors, to bureaucratic hurdles in disbursement procedures.577

Until recently, government ministries based their budgets on the MPRSP, which has since been replaced with the MGDS. The MGDS is now used for this purpose. Through this, and through the channelling of assistance through the national budget, the donor activities are harmonised not only with the national policies and consultative processes but also among the donors themselves. The donors then monitor the extent to which the budget is based on the development framework, and the degree to which its implementation is consistent with the provisions of the same document, and particularly with the poverty priority expenditures (PPEs).578 These are the priority areas identified by the development frameworks as being crucial to poverty reduction. Priority budgetary spending is allocated to these.

**D. Aid and debt management**

Until very recently, the government was not good at managing its aid and debts.579 For example, within a year of signing a three-year PRGF agreement with the IMF in December 2000, Malawi was off-track with poor performance in poverty-related expenditures and a fiscal gap significantly below target. These developments negatively affected the relationship between the government and its donors. In February 2002 an IMF mission met the government to discuss the country’s deepening economic problems. Earlier, Britain suspended aid to Malawi citing government over-expenditure and the lack of fiscal discipline, and promised to continue to withhold at least US$18.6 million until the IMF approved the country’s macro-economic policy.580 The British Financial Secretary to the Treasury, Paul Boateng, emphatically maintained that ‘we want Malawi to be back on track on macro-economic targets. We have to be satisfied with the mechanisms in place for sufficient control of budget expenditure which will benefit the poor.’ In response, Malawi’s Finance Minister, Friday Jumbe, conceded that the national budget was off-track with a ballooning US$45 million deficit. He attributed the deficit to weak revenue, overspending and rising inflation rates. However, he encouraged the donors to stick to their aid pledges and go beyond the highly indebted poor countries (HIPC) programme. ‘It is our plea that donors must behave practically. Yes, they are willing to make the pledges, but their promises to the poor must be fulfilled, otherwise if we see trickles, like we have seen, then we will not get anywhere,’ said Jumbe.581

The relations between the government and its donors had partly soured in 2001 when the government purchased 39 new luxury vehicles for Cabinet ministers. Britain forced the government to resell the vehicles, accusing it of misusing development aid. On its part, the

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577 Correspondence and reports obtained from UNDP for the following: W.C. Chirwa and L. Koechlin, 2006, Horizontal Capacity Assessment of the Constitutional Bodies, the Anti-Corruption Bureau, and Related Institutions in the Legislature, the Executive, Civil Society and the Informal Justices Sector Of Malawi, commissioned by the Democracy Consolidation Programme (DCP) of the Inter-Ministerial Committee on Human Rights and Democracy (IMHRD) and the United Nations Development Programme (UNDP), Lilongwe.


579 For some details on debt relief see reports on http://www.jubileedebtcampaign.org.uk/?lid=3481.


581 Ibid.
The cooperation between the Government of Malawi and the European Commission over the period 2008–2013 will manifest itself through the alignment of support to the overriding policy objectives of the MGDS, which was approved by the Government on 3 November 2006. The main policy objective is to create wealth through economic growth and infrastructure development as a means of achieving poverty reduction. The five MGDS themes of sustainable economic growth, social protection, social developments infrastructure development and improved governance represent the broad national priorities. Within this context, the Government has singled out six specific priorities on which efforts will be concentrated in the next five years. These are agriculture and food security, irrigation and water development, transport infrastructure development, energy generation and supply, integrated rural development, and prevention and management of nutrition disorders, HIV and AIDS. These priorities are fully supported by non-state actors, which also underscore the importance of good governance.

The EC/GoM cooperation will be in close complementarity with support to be provided by the EU Member States and other main donors active in Malawi. Specific attention will be paid to seeking synergies attainable with EU Member States and the World Bank, under the coordination of the Government of Malawi. Development of sector programmes will be systematically promoted. In terms of financing modalities, in line with the Paris Declaration, budgetary aid will be the preferred modality whenever possible, followed by joint financing with other development partners.

The Malawi-EC Strategy under the 10th European Development Fund will be developed within both good governance and macro-economic stability frameworks. One of the main elements of EC/GoM development cooperation under the 10th EDF will be the provision of General Budget Support, which will foster the continuation of efforts made since mid-2004 to consolidate and improve the country’s macro-economic situation, strengthen public finance management systems and carry out policy reforms in the areas of education and health. Furthermore, the EC/GoM cooperation will concentrate on two focal sectors: i) Agriculture and Food Security in the context of national development and regional integration; ii) Regional Interconnection with focus on Road Infrastructure.

In relation to the non-focal sectors of cooperation, support will be provided to the following areas: a) Good Governance; b) Support to Economic Partnership Agreement – Investments and Trade; c) Support to fight HIV-AIDS and Promote Gender Equality; and d) Institutional Capacity-Building.

Other sectors like energy, water and sanitation can be financed via the EU-Africa Infrastructure Partnership and the investments from the European Investment Bank.

**SOURCE**
government maintained that the vehicles were purchased to replace an old fleet which had become too expensive to maintain. The British-Malawian debacle was followed by a diplomatic row with Denmark earlier in the same year. Denmark announced in January the withdrawal of aid to Malawi citing corruption, political intolerance and judicial interference. ‘In Malawi, political developments continue to move in a negative direction and for this reason both development and environmental assistance will be radically reduced in 2002 and finally phased out in 2003,’ read a statement issued by the Royal Danish Embassy in Lilongwe. The Danish government, through its development agency, DANIDA, had since 1997 assisted Malawi in the areas of health, education, governance, economy and environment to the tune of US$ 27.8 million in annual grants. However, the Malawi government defiantly said that Denmark withdrew its aid to Malawi because of its economic difficulties at home. But local commentators attributed the withdrawal of aid to a diplomatic row that ensued between Malawi and Denmark after Lilongwe threw a Danish ambassador out of the country the previous year: ‘The decision by Denmark will affect us drastically. I think the decision was taken out of anger. The action would bring a dark hour for the non-governmental organisations in Malawi. Denmark was one of the most reliable donors to the NGOs in this country,’ Ted Nandolo, executive director of the NGO Council in Malawi, was quoted as saying.

In 2003, there were some improvements in fiscal management. The IMF completed its first review of Malawi’s PRGF arrangement and approved a disbursement of US$ 9.2 million. However, by spring 2004 the PRGF programme was again off-track. Following the election of the new government in May 2004 the IMF prepared a Staff Monitored Programme and so far the performance of the new government has been good; within a period of a year key targets were met. Encouraged by improved expenditure management and the clamp down on corruption, the IMF began to discuss a new PRGF with the Malawi government that would open the way to the country reaching its HIPC Completion Point and receiving additional debt relief.

By 2005, Malawi’s total external debt stock was about US$ 3.2 billion. Of this, US$ 3.1 billion was cancelled in 2006. Malawi paid US$ 95 million to rich countries in 2005, which was nearly four times the aid that the UK previously gave to Malawi every year. The total external debt servicing after cancellation came down to US$ 5 million in 2006.

As of end June 2011, the country’s total public external and domestic debt stock amounted to MK 313.49 billion (US$ 2 091.3 million), equivalent to 33.6% of gross domestic product (GDP), compared to MK 275.5 billion (US$ 1 838 million) or 34% of GDP in the corresponding period in 2010. The total public debt stock increased by 13.8% from June 2010, mainly due to external debt relative to domestic debt. Of the outstanding total public debt stock in June 2011, the external debt stock amounted to MK 147.6 billion (US$ 984.6 million) while domestic debt was MK 165.9 billion (US$ 1 106.7 million), representing 47% and 53% of total debt stock respectively.

583 Ibid. At this time Denmark had taken similar action against Eritrea and Zimbabwe owing to suppression of the opposition and media in the two countries, while Burkina Faso, Uganda, Kenya and Egypt met a similar fate due to alleged human rights abuses.
584 See also http://www.iht.com/articles/ap/2006/10/19/business/EU_FIN_Malawi_Debt.php.
In terms of national output, the external and domestic debt stock was equivalent to 15.8% and 17.8% respectively.

Using the Reserve Bank of Malawi (RBM) 2013 first quarter financial and economic review figures, *The Nation* newspaper reported that Malawi’s external debt was at US$ 1.2 billion (MK 412 billion) in March 2013.\(^{586}\) The Ministry of Finance disputed the figure and put it at US$ 1.926 billion (MK 713 billion) instead, which was the same figure earlier reported for June 2012.\(^ {587}\)

The ministry said that it was ‘mainly worried about the domestic debt to GDP ratio, which has reached a critical ratio of 20%. To bring the ratio down to a sustainable level, the government is focusing on repaying some of the domestic debt in the 2012/2013 budget. An analysis of Malawi debt shows that all debt ratios have not been breached. If you apply a shock of say prolonged drought, declining terms of trade, the [domestic debt] ratio worsens to 27%. As of December 2012, domestic debt stood at MK 180 billion [US$ 524.8 million] and this is expected to reduce further as government retires some of this domestic debt in line with the [ECF] arrangement.’\(^ {588}\)

The RBM figures indicated that the public debt stock in the first quarter of 2013 increased by 1% (US$ 12 million or MK 4 billion) to 25.2% of GDP if compared to the previous quarter. Of the US$ 1.2 billion external debt, 72.8% was from multilateral lenders, 26.5% from bilateral lenders, and 0.7% from commercial lenders.

Debt relief is not a free lunch. It comes with conditionalities. To qualify for the debt relief Malawi had to complete the HIPC initiative,\(^ {589}\) a scheme criticised for being too limited, too slow and with harmful and undemocratic conditions attached. Malawi actually entered the HIPC initiative in December 2000, nearly six years prior to its debt cancellation. In the meantime, the country had paid out US$ 440 million in debt service to the rich world, as it struggled with the difficult conditions it was told it had to meet in order to get any debts cancelled. These conditions included requirements that Malawi privatise enterprises including the national telecommunications company and national airline, and ‘commercialise’ the state agricultural company (full privatisation was abandoned after strong public protest).

The IMF also told Malawi it had to cut back on spending at a time that the country needed huge public investment and was suffering an appalling HIV/AIDS crisis: one in seven adults being HIV positive against a ratio of one doctor to every 80 000 people (compared to one to every 600 people in the UK). At the time Malawi also suffered a food crisis brought on by drought, and donors did not timeously provide the assistance that was promised. Despite these huge problems and clear needs, the IMF still insisted that Malawi had to cut spending in order to receive debt relief. When it ‘overspent’ – at least in part on importing grain to feed its people – the IMF punished it by suspending debt relief (the reduction in debt payments it had been promised) and delaying the much-needed debt cancellation still further. According to the Jubilee 2000 Debt Cancellation Malawi Campaign, ‘now that Malawi has got past these appalling obstacles, it has the debt cancellation it deserves and needs. The rich world needs to


\(^{589}\) See Jubilee Debt Cancellation Campaign [http://www.jubileedebtcampaign.org.uk/heavily indebted poor countries initiative +97.twl](http://www.jubileedebtcampaign.org.uk/heavily indebted poor countries initiative +97.tlw).
ensure that all unjust and unpayable debts are cancelled without forcing more countries to go through the same pains as Malawi.590

E. Public debate about relationships with development partners
Proceedings of the National Assembly do not show clear evidence of debate on matters of foreign policy, and no evidence of the executive consulting on issues about negotiations with external financial institutions or foreign governments. Even after the executive has negotiated a deal with donors, it is not subject to further public discussion. During the October 2005 sitting of Parliament, opposition parties, led by the Malawi Congress Party,591 demanded Parliament’s inclusion in government teams that negotiate international aid and other important foreign policy agreements. Such a demand was probably unreasonable given that the issues of foreign policy, and its execution, are a constitutional prerogative of the executive. The demand by the opposition could therefore reflect a misunderstanding of their roles and responsibilities. However, at its discretion the executive may consult the opposition on matters of foreign policy. Consultation of such nature would be regarded as a good political practice, but not necessarily as an executive obligation to the opposition. There is no evidence that the opposition demand has been responded to. A major challenge to such consultation is that the executive has a constitutional mandate to formulate and execute foreign policy. This mandate is jealously protected.

Civil society organisations have also only lobbied minimally on issues related to foreign policy, including ratification of treaties. The only major exception to this has been in the area of debt cancellation. The civil society campaign on debt cancellation has been visible. The origins of the MEJN can be traced back to the debt relief campaign under Jubilee 2000. The network, comprising NGOs, trade unions, faith-based institutions, special interest groups and community-based organisations was formed in the year 2000 following an evaluation of the Jubilee 2000 campaign that operated for three years.592 The promotes participatory economic governance and focuses, among others, on international aid, international debt relief and world trade.

Malawi’s foreign policy was put to test in January 2008 when the government unprecedentedly severed its 42-year old diplomatic relations with Taiwan and switched to mainland China. There was an exchange of words between government officials on both sides.593 Much as some opposition members of Parliament and CSOs preferred the shift from Taiwan to mainland China to be debated in Parliament, their voices were rather muted – partly because of the recognition that matters of foreign policy are a prerogative of the executive, but partly also because of the anticipated economic benefits that were expected to derive from trade relations with mainland China. The latter is regarded as having a greater value as an importer of Malawian tobacco and other produce than Taiwan. Mutharika’s visit to China at the end of March 2008 yielded aid

593 The exchange was well-captured in The Daily Times, 18 January 2008, p.1; and The Nation, 18 January 2008, p.4.
pledges of over US$ 25 million, and China’s promise to take over all the major projects Taiwan was financing in Malawi.594

By 2012 it was clear that most of Malawi’s development partners were experiencing some amount of fatigue and would have liked to see the country’s leadership do a little more in raising additional resources locally. This message was aptly delivered by the IMF Mission Chief Tsidi Tsikata in November 2012:

I would advise the authorities to put up measures that will address the country’s economic challenges and not put donor assistance as a priority. Donors do have their own priorities different from Malawi’s, therefore it is difficult to help always.595

The same view was expressed by the IMF Executive Director for Africa, Moeketsi Majoro, at the time of resumption of aid to Malawi after the 2011/2012 suspension:

The traditional donors in Europe and America are also facing very, very serious financial difficulties at home and politically it is now difficult to be giving money away when they are running very large deficits. So, even though donors will commit to Malawi, it is not expected that in the medium to long term donor money will continue to be available to Malawi ... Malawi will, therefore, have to find itself a way of weaning from donor flows which are significant in the budget which go up to 30% to 40% and that is a very large amount of funding coming from outside and Malawi has a window in the next three years.596

During the mid-year budget review session of Parliament in November 2013, one opposition MP likened Malawi’s donor dependency to a family that depends on its neighbours for its food provisions and called it ‘a big shame’:

Every year the State of the Nation Address and the Budget Statement have clauses like ‘we are grateful to the donors’, ‘we should be thankful with the support that our development partners are giving us’ ... As a Malawian I am not happy that we are perpetually being thankfully to the donors. We should be making cautious efforts to wean ourselves from the support of the donors.597

F. Recommendations

• Institute greater debate in Parliament about relations with development partners – including the possibility of subjecting aid agreements to a vote in the National Assembly.
• The executive should provide public access to information about aid agreements beyond that which is published in newspapers – preferably through Parliament.
• Aid in support of democratisation should prioritise programmes and other interventions that promote popular participation in public affairs, poverty reduction and the improvement of the socio-economic well-being of ordinary citizens.

594 President Bingu wa Mutharika’s press conference at the State House, 4 April 2008.
• The delivery capacity of CSOs that receive aid for democracy should be enhanced and monitored, and the impact of their activities properly evaluated.

• Malawi, as a nation, should improve its wealth and revenue generation capacity, fiscal discipline and savings rates in order to increase its contribution to the national budget and gradually reduce its dependence on donors.
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Appendix 1: Observations and recommendations of international election observers


<table>
<thead>
<tr>
<th>No.</th>
<th>Issue/Topic</th>
<th>Observations</th>
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<tbody>
<tr>
<td>1</td>
<td>The legal context</td>
<td>The electoral calendar provided in the constitution meets the international standards. Malawi has managed, though with difficulties and shortcomings, to hold its parliamentary and presidential elections according to the calendar as stipulated in the country’s constitution.</td>
</tr>
<tr>
<td>2</td>
<td>The political environment</td>
<td>The political environment was generally peaceful as demonstrated by numerous political rallies, whistle-stop campaigns, some degree of tolerance among political party supporters, very few reported cases of election related violence, orderly queues on voting day and the display of great enthusiasm among Malawians to vote. The observers were concerned with the handing of cash and material inducements during some campaigns, although it was unclear if this was legal or ethical. The observers felt that this could undermine the democratic process.</td>
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<tr>
<td>3</td>
<td>Election administration</td>
<td>The lack of confidence by the stakeholders in the Malawi Electoral Commission, resulting from the perception that it favoured the ruling party. Poor quality of voter registration, particularly the Electoral Commission’s failure to meet verification deadlines, and when the voters’ roll was put up for verification, public access was difficult. Existence of three voters’ rolls: one for 1999, a manual roll and a computerised roll caused confusions in the administration of the elections. The involvement of the state security organisations in district election supervisory teams. The failure of the Electoral Commission to deal with complaints. The failure of the Electoral Commission to deal with biased reporting by public broadcasters. The incorrect printing of candidate information on ballot papers in some constituencies. The failure to provide adequate materials and supplies for the entire electoral process.</td>
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<td>4</td>
<td>Lack of level playing field</td>
<td>The uneven playing field during the campaign period arising from use of state resources by the ruling party and its candidates. The intimidation of opposition candidates and party members and supporters, especially by the Young Democrats. The influence of the ruling party over the chiefs in the rural areas.</td>
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<td>5</td>
<td>Media coverage</td>
<td>The coverage by the state-controlled broadcasters was tilted in favour of the ruling party. Female and opposition candidates received less media coverage. CSOs and faith-based institutions provided additional information about the elections.</td>
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<td>6</td>
<td>Conflict resolution mechanism</td>
<td>The establishment of conflict resolution institutions at national and district levels was commendable. These, in many local cases, helped resolve conflicts at an early stage.</td>
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<td>7</td>
<td>Actions of the police</td>
<td>The unchecked action of police particularly in relation to temporary closure of private broadcasters such as MIJ Radio. The use of live bullets against demonstrators.</td>
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<td>8</td>
<td>Gender representation and youth participation</td>
<td>Women were well represented as voters, but not as candidates, and as registration and election management officials. There was a high level of participation in the electoral process by the youth, which augurs well for the future of the country.</td>
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<td>9</td>
<td>Timing of Inauguration</td>
<td>The inappropriate timing of the inauguration of the president, which puts pressure on the results to be announced before aggregation had been properly completed.</td>
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<tr>
<td>1</td>
<td>Constitutional and legal framework</td>
<td>Legislation should be amended to clearly define the abuse of public resources and means that can be used to control this malpractice; clearly prohibit the distribution of money by political contestants to voters; require transparency in the declaration and use of campaign funds from private sources; and state that electoral complaints should be resolved before the president is inaugurated. Consideration should be given to introduce legal provisions to increase women’s representation. All MEC and other public officers breaching the electoral process should be held accountable for their actions.</td>
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<tr>
<td>3</td>
<td>Election management</td>
<td>Composition of the MEC and the structure of the election administration should be reviewed with a view to ensuring confidence among political contestants and efficient administration of elections. A code of conduct to regulate the use of public resources and hand-outs for political gains should be developed. The MEC should, among others: • Provide clear, timely and comprehensive written instructions as well as clarification to regulations where necessary; • Address complaints on issues within its competencies as outlined in electoral legislation; • Develop polling station forms that are easy to use, for example with carbon copies and serial numbers; • Introduce necessary reconciliation and ballot security procedures; and • Quickly publish results broken down by polling station as they are announced, including on the internet.</td>
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<td>No.</td>
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<td>4</td>
<td>Civic education</td>
<td>The MEC should develop a comprehensive and continuous programme of voter and civic education that is adequately funded and embraces other stakeholders. Civic education should be conducted by state bodies (such as education and public information services) and civil society organisations. Increased effort should be made to target women and young people. To increase public awareness on what can be expected from political representatives and leaders.</td>
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<td>5</td>
<td>The Media</td>
<td>The role of MACRA and the MEC in regulating the media during election campaigns should be clarified and clearly defined to remove the possibility of a power vacuum or clashes between the two. Action against the media should only be taken by the licensing authority and MACRA, and not by the police. Political debate and discussion programmes should be increased, particularly during the campaign period.</td>
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<tr>
<td>6</td>
<td>Political parties</td>
<td>Political parties should be required to declare their funding sources and how funds have been used. Training should be provided for political parties and candidates in a number of areas including: (i) policy development, (ii) manifesto preparation, (iii) communication with voters, and (iv) the role and rights of monitors.</td>
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<td>7</td>
<td>Civil society</td>
<td>Training and support should be provided to civil society to strengthen capacity to conduct civic and voter education and election observation, including parallel vote tabulation. Sufficient resources should be provided to enable civil society to conduct civic education and voter education and election observation in a comprehensive manner.</td>
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<td>8</td>
<td>Participation by women</td>
<td>Political parties should make serious efforts to (i) ensure that women are represented in senior positions, and (ii) to select more women candidates in order to reach the SADC target of 30% female representation in Parliament. The MEC should take steps to increase the representation of women in all levels of the election administration.</td>
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<td>9</td>
<td>Police</td>
<td>The police should be properly trained on the role they should play on election day, specifically that they should not perform the tasks of polling officials.</td>
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Appendix 2: Observations and recommendations of local election observers


<table>
<thead>
<tr>
<th>No.</th>
<th>Issue/Topic</th>
<th>Observations</th>
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<tbody>
<tr>
<td>1</td>
<td>Role and mandate of the MEC</td>
<td>The legislation on the composition of the Malawi Electoral Commission, its functions and mandate should be amended to allow for the total independence of the Commission, and not to be seen as partial to or subject to the will of the executive. The current MEC should step down because it failed to manage the 2004 elections in a professional and efficient manner. Government and donors should provide financial and technical support for long-term capacity building to the Secretariat of the Commission. The MEC Secretariat should be held accountable for its actions at all levels of election management, and not to be seen hiding behind the failures of the Commission itself.</td>
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<tr>
<td>2</td>
<td>Electoral system</td>
<td>The FPTP majoritarian system should be reviewed given the regionalisation of the country, and the deficiencies that the system has shown. The constitution should be reviewed for possibilities of incorporation of alternative electoral systems, preferably a mixed member system.</td>
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<tr>
<td>3</td>
<td>Election administration</td>
<td>The lack of confidence by the stakeholders in the Malawi Electoral Commission, resulting from the perception that it favoured the ruling party. Poor quality of voter registration, particularly the Electoral Commission’s failure to meet verification deadlines, and when the voters’ roll was put up for verification, public access was difficult. The existence of three voters’ rolls: one for 1999, a manual roll and a computerised roll caused confusion in the administration of the elections. The involvement of the state security organisations in district election supervisory teams. The failure of the Electoral Commission to deal with complaints. The failure of the Electoral Commission to deal with biased reporting by public broadcasters. The incorrect printing of candidate information on ballot papers in some constituencies. The failure to provide adequate materials and supplies for the entire electoral process.</td>
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<tr>
<td>4</td>
<td>Election funding</td>
<td>Reliance on donor funding for elections should be reduced. For this reason, the national budget should be reviewed towards the possibility of 100% domestic funding of elections.</td>
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<tr>
<td>5</td>
<td>Links with NEPAD/APRM</td>
<td>Election observation could be part of the peer review mechanism, which means that African missions only would observe African elections, in the context of NEPAD, rather than fielding observer missions from outside the African continent. Reports of observer missions could then also feed into the review mechanism of a country’s performance.</td>
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