

Freedom House  
Report prepared by Rachel Ellett, PhD



# Politics of Judicial Independence in Malawi

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## List of Acronyms

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<b>AFORD</b>	Alliance for Democracy
<b>CILIC</b>	Civil Liberties Committee
<b>DPP</b>	Democratic Progressive Party
<b>HRCC</b>	Human Rights Consultative Committee
<b>MBC</b>	Malawi Broadcasting Corporation
<b>MCP</b>	Malawi Congress Party
<b>MEC</b>	Malawi Electoral Commission
<b>MLS</b>	Malawi Law Society
<b>PP</b>	People's Party
<b>NDA</b>	National Democratic Alliance
<b>UDF</b>	United Democratic Front

## Acknowledgments

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As always, the standard disclaimers apply. I am the sole author of this report and as such hold full responsibility for any errors, misstatements, misinterpretations or omissions contained herein.

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## Executive Summary

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Over the last twenty years political conflicts substantial and minor have arrived at the doorstep of the Malawian judiciary. The Parliament has been dysfunctional and unstable; the Executive has pushed the democratic limits of their power, whereas in contrast, the judiciary has represented a core stabilizing institution for Malawi's fledgling democracy.

Across southern Africa where we see the demise of the legislature, in both policy making and symbolic terms, the court becomes an even more important potential check on the power of the Executive. Democracy in southern Africa remains fragile and if the courts are to enhance their role as an effective check on autocratic behavior then it is imperative that their independence and autonomy are carefully guarded and fostered.

Malawi is a small, densely populated, landlocked country in southern Africa. Over 80% of the population lives in rural areas and despite impressive macroeconomic growth over the last decade, rates of poverty remain stubbornly high. Malawian politics are dynamic and volatile. On one hand, the comparatively high level of competitiveness and presidential turnover are positive indicators of democratic progress in a region that continues to be characterized by hegemonic party systems. On the other hand, a personalistic style of politics and the opportunistic cycling of politicians in and out of political parties continue to hinder the formulation of effective development strategies in Malawi. Newly elected President Peter wa Mutharika is facing the challenging prospect of dealing with the ongoing 'cashgate' corruption scandal and its concomitant suspension of donor aid, the continued threat of food insecurity, poor delivery of public services, and a political party with a minority of seats in the parliament.

This assessment of Malawi is part of a series of reports on the politics of judicial independence in southern Africa. The framework, developed for Freedom House in 2011, attempts to be holistic and interdisciplinary. By examining the structural relationships between courts and other institutions, groups and individuals, judicial independence is treated as a multidimensional, composite concept. Perhaps most importantly elements of judicial independence are located in relation to broad social, economic, political and legal change.

The centrality of the judiciary in Malawi's politics was evident once again in the 2014 elections. In the wake of a highly flawed election all three political parties rushed to the courts seeking injunctions. The High Court overturned Joyce Banda's unconstitutional attempt to nullify the results and the Malawi Electoral Commission declared the results within the mandatory eight days. The judiciary was simultaneously lauded and chastised, but overall appears to have emerged with its legitimacy intact. This is a reflection of the positive facets of judiciary independence in Malawi, as one senior observer of the Malawi judiciary captured, "[t]he fundamentals are in place."<sup>1</sup> The findings of this report align with this sentiment.

This study was conducted during 2013 and 2014 through a combination of desk research and field interviews with Malawian judges, court officials, lawyers and civil society organizations. The research is based upon a standard framework for analyzing judicial independence in southern Africa developed for a similar research report on Lesotho, published by Freedom House in 2012. This framework attempts to avoid conflating a politicized judiciary

with a lack of judicial independence and in so doing it analyses judicial independence from five angles:

- i. Scope of judicial power (judicial review and exclusive judicial authority)
- ii. Differentiation and separation of powers (an important indicator of institutionalization - including budgetary autonomy, judicial security and professional identity)
- iii. Internal institutional safeguards (adequate recruitment and appointment, tenure and retirement, advancement procedures)
- iv. Transparency (public access to proceedings, reporting of judgments, access to judgments/trial records)
- v. External institutional support (vibrant civil society, public attitudes and strong professional connections)

The report also presents a typology of government interference with judges and the judiciary.

After applying the judicial independence framework (see Figure 1) to Malawi three broad weaknesses were observed.

**Table 1: Key Weaknesses and Recommendations**

Key Weakness	Broad Recommendations/ Goals
<p><i>Differentiation and separation of powers/transparency:</i></p> <p>Chronic and acute under funding has undermined judicial independence in Malawi. At a functional level, judicial institutions run slowly and inefficiently. At a psychological level chronic resource restraints and salary disputes are demoralizing to staff and judges. The perception that the judiciary is “negotiating” its salary and benefits is damaging to institutional legitimacy. Donor funding does not appear to be driving transformative institutional reform, instead it has been driven by donor agendas in a piecemeal fashion. Judicial security is inadequate to non-existent. In short, structural obstacles represent a barrier to administrative reform. The dilemma is that improving the communication of budgeting needs and pressuring the government to act in a responsive manner remains a fundamentally political endeavor that could potentially weaken judicial independence.</p>	<p><b>Budgeting and Resources:</b></p> <p>Reform judicial representation of budgetary interests in government. Review administrative and leadership structure. Continue to push for devolution of responsibility from donors in planning and disbursement of funds and for a more holistic approach to projects.</p>
<p><i>Internal institutional safeguards:</i></p> <p>Despite a relatively robust track record of independent decision making by judges at the highest level of the judiciary, overall perceptions of judicial independence are weak. The appointments process in particular is undermining judicial legitimacy due to its opacity and the perceived/actual influence of the Executive. In addition, claims of judge or forum shopping persist and are particularly vocal in relation to political cases.</p>	<p><b>Transparency:</b></p> <p>Major areas to be addressed include the judicial appointments process, law reporting, assignment of cases, and a statutory adoption of a judicial ethics code.</p>

Key Weakness	Broad Recommendations/ Goals
<p><i>External institutional support:</i></p> <p>Malawi's political environment continues to represent a serious threat to judicial independence. On one hand the judiciary represents a critical institutional bulwark against potential regression into authoritarianism. However, on the other hand, the courts, as a central arena for the key political disputes of the day, risk further politicization, which in turn renders them vulnerable to interference.</p>	<p><b>Outreach and Communication:</b></p> <p>Work with civil society and media to better communicate the work of the courts. Improve dialogue with Malawi Law Society.</p>

## Summary Assessment Table

The findings of this research are captured in Table 2 below. The table presents a summary assessment of Malawi’s judicial independence according to the set of indicators contained in the judicial independence framework. Following assessment of the major challenges, each of the indicators was rated as ‘adequate’ or ‘inadequate’. Adequate indicates that current structures and practices align with international judicial independence standards<sup>2</sup> and best practices or contextual factors highlighted in the current rule of law literature (see Table 1 below). Because the independence indicators are compound categories, cases marked inadequate may reflect weak performance in all or perhaps just a few categories. This is further elucidated in the final recommendations column, where specific areas requiring attention are detailed.

**Table 2: Judicial Independence Indicators: 2013 Malawi Benchmarks**

Independence Indicators	Assessment for Malawi in 2013/14	Recommendation
<b>Scope of Judicial Power</b>		
Judicial review/ institutional structures	Adequate	Revisit the question of establishing a permanent Constitutional Court
Exclusive authority and established appellate procedures	Adequate	N/A
<b>Differentiation and Separation of Powers</b>		
Budgetary Autonomy and Adequate Resources/ Salary	Inadequate	<ul style="list-style-type: none"> <li>Ensure passage of the Law Reporting Act of 2012</li> <li>Establish a committee of judges to advocate for annual budget</li> <li>Ensure flexibility and continuous assessment in distribution of resources</li> <li>Review the position and responsibilities of the Chief Courts Administrator</li> <li>Increase pressure on government to deliver entire [not partial] promised budget in timely fashion</li> <li>Consider possibility of advocating for fixed percentage of national budget</li> <li>Continue to strive for strategic partnership for long term planning with the donor community</li> <li>Improve coordination amongst donors to avoid overlap in programming</li> </ul>

Independence Indicators	Assessment for Malawi in 2013/14	Recommendation
<b>Differentiation and Separation of Powers</b>		
Judicial Security/Buildings	Inadequate	Provide 24 hour security for all High Court and Supreme Court of Appeal judges Invest significantly in improving facilities in all four districts and at all levels of the judiciary Invest in creation of separate building for Supreme Court of Appeal Proceed with development of Lilongwe courts complex
Strong separation of powers provision	Inadequate	Address weaknesses in appointments processes (see more on this below), use of judges in Attorney General's office and budget dependence
<b>Internal Institutional Safeguards</b>		
Adequate Tenure and Retirement Provisions	Inadequate	Discuss possibility of increasing retirement age to 70 Formalize Judicial Code of Conduct
Objective advancement procedures and assignment of cases	Inadequate	Continue adoption of an electronic case management system and regularly review timeliness of judgments Produce and publicly disseminate annual reports outlining case data, budget, review of strategic priorities, etc. Regularly review and assess case assignment data, reviewing for allocation biases

<b>Independence Indicators</b>	<b>Assessment for Malawi in 2013/14</b>	<b>Recommendation</b>
<b>Internal Institutional Safeguards</b>		
Adequate recruitment, appointment and removal procedures	Inadequate	<p>Overhaul the Judicial Service Commission (JSC) in consultation with key stakeholders</p> <p>Make the workings of the JSC transparent and accountable</p> <p>Expand membership to include more legal practitioners, civil society and academics</p> <p>Specify and formalize JSC membership criteria beyond 'legal practitioner'</p> <p>Discuss possibility of opening up membership to contestation and/or rotation of members</p> <p>Discuss possibility of introducing tenure of office for JSC</p> <p>Improve the relationship between the Malawi Judges and Magistrates Association (MAJAM) and the Malawi Law Society (MLS) on one hand, and the JSC on the other</p> <p>Make transparent the criteria for promotion. How is seniority determined? Does seniority include time in private practice? Doesn't necessarily have to be exact formula</p> <p>Continue to advertise positions and conduct interviews for potential candidates</p> <p>Monitor gender parity carefully</p> <p>Investigate appointments to other key constitutional bodies – Attorney General (AG), while maintaining judgeship</p> <p>Strive towards raising bar on qualifications for magistracy</p>
Comprehensive ethics code and fair removal process	Inadequate	<p>Current ethics code should be reviewed, discussed, revised and statutorily adopted</p> <p>Extend application of the ethics code to DPP, AG, and other bodies with a judicial function Consider adoption of asset disclosure program for Judges. Link through amendment to existing 2013 Assets Declaration Act (expand to include upper levels of judiciary)</p> <p>Guarantee the right to a fair hearing, representation or appeal in judicial disciplinary disputes</p>
Strong institutional leadership	Inadequate	<p>Resolve relevant appointment issues (see above)</p> <p>Establish clear guidelines on limits to political activities for Chief Justice</p>
Stable/local composition of bench	Adequate	N/A

Independence Indicators	Assessment for Malawi in 2013/14	Recommendation
<b>Transparency</b>		
Public access to proceedings, reporting of judgments, access to judgments/trial records	Inadequate	Continue cooperation with Malawi Legal Information Institute and Malawi Law Society and Judiciary Conduct training with Malawi media for more effective and accurate judicial reporting Establish Judicial Conduct/Oversight Board for public complaints
<b>External Institutional Support</b>		
Vibrant civil society support	Inadequate	Provide media with access to information to promote fair and responsible reporting of court proceedings Train journalists on legal reporting Provide training for civil society organizations on monitoring cases and how to identify judicial corruption. “Demystify the judiciary” and inspire confidence Strengthen partnerships with the MLS for training purposes Identify judges who are willing to engage in these conversations/ training
Strong regional/ international professional connections	Inadequate	Strengthen role and visibility of Malawi Judges and Magistrates Association – both within the institution and publicly. Increase member dues Recognize and enhance role of a more active Malawi Women’s Judges Magistrates Association Secure funds for regular travel and participation in key regional and international professional associations
Non-threatening political environment	Inadequate	Political and judicial leadership should become more active in responding to individual anti-judge and institutional level anti-court rhetoric Public dialogue concerning politicization of court should be directed by judges and other key legal sector actors

# Part I: Introduction

## A Report Structure

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The goals of this report are two-fold: Part I assesses the current state of judicial independence in Malawi; Part II reviews the scope and type of executive interference experienced by the Malawi judiciary. While the introduction to this report provides analysis and description of the historical backdrop to contemporary Malawi, the greater part of the analysis focuses on the last ten years (2004-2014).

Each section of the report is structured around a taxonomy of judicial independence/interference. Judicial independence is compartmentalized into five broad descriptive categories; each of which contains a number of sub-elements. These sub-elements are captured through a combination of checklist items and descriptive analysis. Category i Scope of Judicial Power and Category ii Differentiation and Separation of Powers focus on the formal legal and political distribution of power as it relates to the judiciary. Category iii Internal Institutional Safeguards examines the internal factors – both formal and informal – that shape and protect judicial independence. Category iv Transparency speaks to the need for access to information in order to monitor judicial independence. Finally, Category v External Institutional support articulates the significance of judicial allies’ in buttressing strong judicial institutions. Seeking to move beyond a rigid constitutional definition of judicial independence to a more holistic approach, this framework is interdisciplinary and captures both the informal and formal relationships between courts, government, groups and individuals. The taxonomy of interference is captured across five major categories: Manipulation of Personnel, Institutional Assaults, Personal Attacks on Judges, Budget Manipulation and, Attempted Cooption of Judges. This section of the report is a straightforward description of the interference experienced by judges in Malawi over the last ten years.

## B Methodology

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Desk research on Malawian politics and history and review of recent court judgments was conducted in the United States. The author has been writing about and studying the judiciary and rule of law in Malawi over the last ten years. In 2013, Professor Ellett published a monograph entitled *Pathways to Judicial Power in Transitional States* (2013) in which Malawi was one of three longitudinal case studies. While this background knowledge was helpful in creating the political background, the major body of this report is based on ten days of fieldwork in South Africa and Malawi in 2013.

Twenty-two interviews were conducted in Johannesburg and Blantyre between July 11th and 20th 2013. Some interviewees were contacted directly by the author, others through referral from Freedom House. All interviews were conducted anonymously and included members of both the Court of Appeal and the High Court, lawyers, prominent businessmen, members of civil society (both legal and non-legal), non-practicing lawyers, members of

international organizations and academics. The interviews are coded (using letters) to maintain anonymity.

On July 15, 2013 a day long Roundtable discussion on Judicial Independence took place in Blantyre, Malawi. Twelve participants took part in an interactive discussion (led by the author) around the current structural impediments to judicial independence in Malawi and helped to identify areas for enhancing support mechanisms for judicial independence. Participants were drawn from academia, civil society, private legal practice and the Malawian government. The content of this discussion will be cited as “Rule of Law Roundtable, Blantyre, Malawi, July 15, 2013” throughout the report.

The dates of interviews are not specified so as to further protect the identities of interviewees. Interviews conducted ranged in length from 40 minutes to 2 hours. The interviews were semi-structured around a set of core questions generated from the judicial independence framework. The interviews were recorded and transcribed and for the most part took place in the offices of each interviewee.

A draft of the report was distributed to interviewees for comment and feedback in early 2014. The political scene in Malawi in the latter half of 2013 and early 2014 has been highly dynamic, this report attempts to incorporate as much of this as possible, but acknowledges the fluidity of the situation as Malawi looks beyond the May 2014 presidential and parliamentary elections.

## C Background to the Study

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As is the case in all democratic states, the establishment of mechanisms of accountability is critical to political and economic development in Malawi. To be truly effective these institutions must span the formal and informal sector and, they must transect horizontal and vertical dimensions of accountability.<sup>3</sup> Policy makers and academics have increasingly turned their attention to the foundational importance of strong, transparent and fully functional rule of law institutions to economic and political development. First and foremost the courts’ role in resolving conflict is essential to maintenance of the rule of law. A stable and predictable investment climate is rooted in the ability of courts to apply the law in a predictable and consistent manner. Second, in transitioning democracies the courts can play an important role in acting as a restraint on overzealous executives, hegemonic political parties and human rights abusers. Given the importance of the rule of law to both political and economic development, it is within this context that Freedom House has commissioned a report on judicial independence in Malawi.

Today most Southern African countries have the formal institutional trappings of democracy, including courts with power of judicial review. Yet judicial independence is institutionally and individually embedded in a complex web of political contingencies. The executive branch, political parties, the media and civil society and, regional political/legal dynamics all shape the evolution of judicial power and independence. Thus, if the goal is to fully grasp the factors through which judicial independence is both buttressed and undermined there is need to simultaneously peer inside and outside the courts.

While it is evident that in some settings multiparty elections and diffusion of political power go hand in hand with strong judicial institutions;<sup>4</sup> we increasingly see in Southern Africa that this is not the case. Corrupt hegemonic party systems tend to heighten political insecurity, which in turn create a hostile environment for judiciaries already institutionally weakened through budgetary neglect.<sup>5</sup> In unstable political settings incumbents lack faith in the ability of courts to deliver their short-term needs. It is thus self-evident that well insulated, independent courts do not necessarily make for strong political allies in volatile electoral settings. Compliant or malleable courts can, however, be powerful tools as part of a repertoire of control for political elites. Courts are one piece of a larger political puzzle, and even the most determined and independent-minded judge can be stymied by interference from a powerful executive.<sup>6</sup>

Although judicial independence is a contested concept, there is broad consensus in the scholarly literature that it can be captured within or across these three broad macro-level categories:

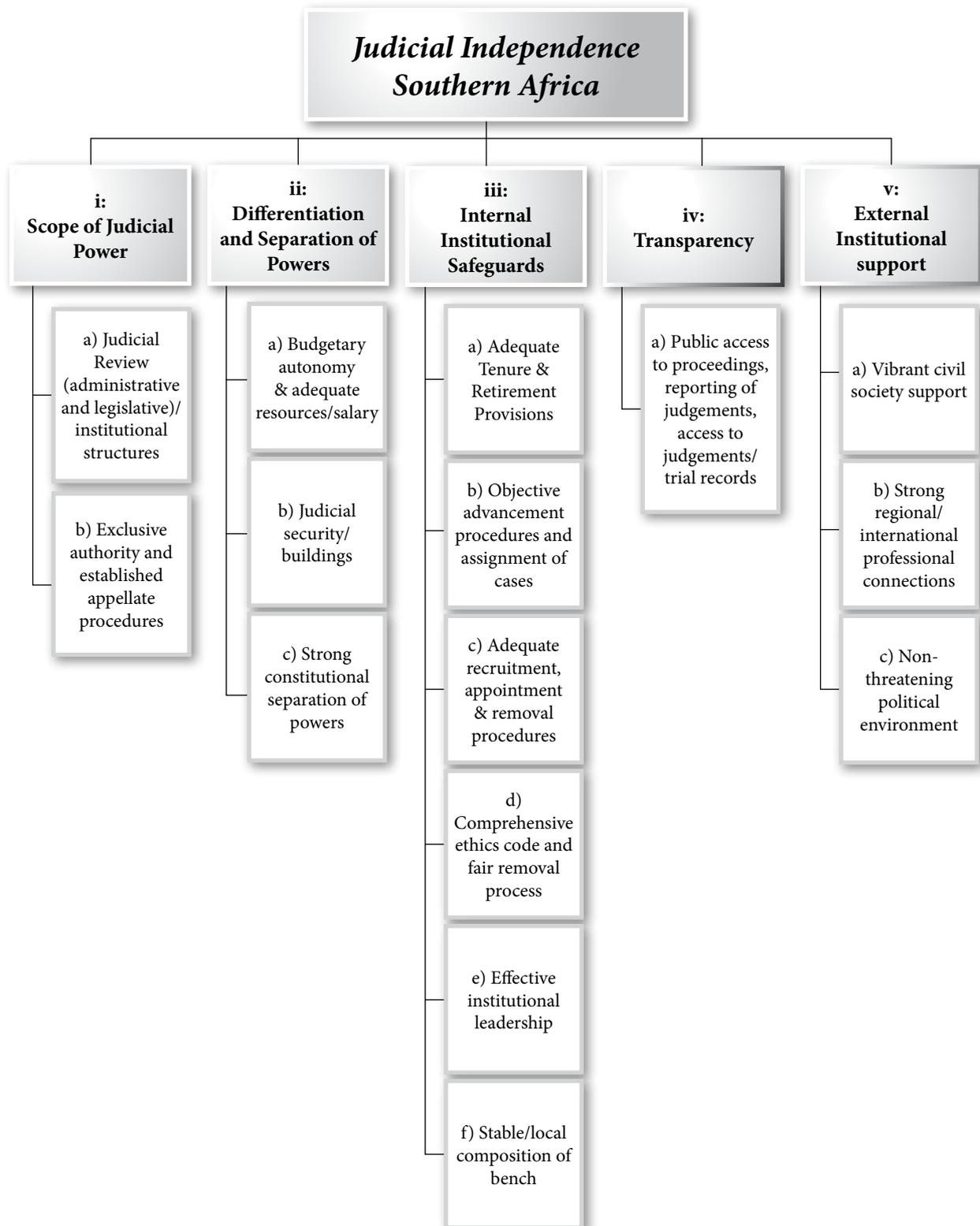
- Decisional impartiality
- Capacity of judges to see their preferences realized as outcomes, and
- Institutional rules and features that support these other aspects of independence<sup>7</sup>

In order to support the impartiality and capacity of individual judges to realize their preferences, there needs to be a combination of stable institutions with a generous degree of political insularity. To secure judicial independence we must focus on the peculiarities and specificities of that political setting in combination with universal frameworks and norms. In short, this framework seeks to move beyond a rigid, formal constitutional definition of judicial independence to a more holistic approach grounded in the political and economic realities of Southern Africa.

This framework attempts to avoid conflating a politicized judiciary with a lack of judicial independence through adopting the challenge issued by Frank Upham, “Instead of focusing on the depoliticization of the judiciary [. . .] international purveyors of the new rule of law orthodoxy should be concerned with the judiciary’s legitimacy and effectiveness, not its political purity.”<sup>8</sup> Courts are political institutions; but politics and corruption need to be carefully picked apart when analyzing judicial independence. The policy implications of this approach are that judicial reform cannot merely be a technical form of assistance. Indeed, a scenario is possible where the courts are so independent that they are rendered insulated from mechanisms of accountability and transparency.<sup>9</sup>

The framework organizes judicial independence into five broad descriptive categories (i-v in Figure 1 below). Within those broad descriptive categories are a number of sub-elements. These sub-elements are captured through a combination of checklist items and descriptive analysis. Category i Scope of Judicial Power and Category ii Differentiation and Separation of Powers focuses on the formal legal and political distribution of power as it relates to the judiciary. Category iii Internal Institutional Safeguards examines the internal factors – both formal and informal – that shape and protect judicial independence. Category iv Transparency speaks to the need for access to information in order to monitor judicial independence. Finally, Category v External Institutional support articulates the significance of judicial allies’ in buttressing strong judicial institutions.

**Figure 1: Judicial Independence Benchmark Framework**



## D Politics and the Malawian Judiciary 1993-2013

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A 2003 IFES report authored by a prominent Malawian legal scholar, on the state of the Malawi judiciary concluded:

[. . .] the overall state of the Malawian judiciary remains so weak that it is only able to fulfill its constitutional or international obligations in three out of the twelve areas analyzed [. . .] Constant budgetary battles to obtain the most basic resources necessary to function, including basic facilities, staff, legal information and minimal salaries, make the judiciary's struggle for independence even more difficult. Other fundamental, interrelated problems pertain to a non-transparent appointment process and poor access to basic legal information, legal representation and judicial accountability. It is remarkable that within this context the Malawian judiciary is as independent as it is and that it is viewed by the public as the most credible branch of the government. However, it is equally clear that without more political and financial support [. . .] the judiciary will remain under siege and its full development as an independent institution capable of rendering and protecting justice will not be realized in either theory or practice.<sup>10</sup>

Ten years later, while basic resources and facilities have improved, the majority of the problems outlined in the 2003 report remain. Perhaps more worrying, the public view of the judiciary as the “most credible branch of government” could potentially be under threat.

Why have the promises of post-cold war democratic transition not materialized? Are there specific historical legacies and contexts that explain continued institutional weaknesses in terms of the rule of law? Judicial power in colonial Malawi was severely circumscribed. In the context of deeply concentrated power in the colonial authorities, judicial review was virtually non-existent. The post-colonial Malawi judiciary has since struggled to institutionalize judicial independence and protect the separation of powers. Despite these challenges there is evidence that the judiciary has sporadically asserted itself vis-a-vis the executive and that judicial power has waxed and waned over time. A brief historical review of the major challenges to judicial independence and power in post-independence Malawi is outlined below.

### **Box 1: Role of the Courts in 2014 Election**

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‘In the course of vote tallying, there are cases being discovered where the total number of votes cast is more than the total registered voters for the centre.’

Maxon Mbendera, chair of the Malawi Electoral Commission addressing the disputed poll

While it was not surprising that the 2014 elections were closely contested and controversial, it was a surprise when incumbent Presidential candidate Joyce Banda announced that she would nullify the election results and she called for a new election within 90 days; an election in which she would not stand. At this time unofficial tallies put Banda in third place. Whether Banda had legal authority to nullify elections became the center of

an emerging legal storm. Chairman of the Malawi Electoral Commission (MEC), Maxon Mbendera, chose to continue with the vote count on the basis that the MEC has sole legal mandate over electoral affairs.<sup>11</sup>

Predictably each political party rushed to the courts seeking stay-orders and injunctions. The party leading in the polls at that time, the DPP, wanted the MEC to continue the vote tally and to announce the winner within the mandated 8 days. The second (MCP) and third ranked (PP) parties wanted the vote counting to halt and an electoral rerun to be held.

Banda initially won an injunction halting the vote count but this was subsequently overturned.<sup>12</sup> The contradictory judgments, the high level of uncertainty and confusion, represented a substantial challenge for the judiciary. Ultimately the various cases were consolidated into a single case under Justice Healey Potani. The case would not remain with Potani who was forced to recuse himself, further adding to the confusion and distracting from the key issues at hand.<sup>13</sup> Meanwhile the Malawi Law Society became a clear and important voice of authority in support of the MEC and Chairman Mbendera's refusal to order a recount.

The consolidated election case was assigned to Justice Nyirenda who upheld the power of the MEC to count and recount the vote, but not to extend the period beyond the mandated eight days after the election. Therefore the ruling, coming on May 30, left the MEC no choice other than to declare the results within a few hours of the Nyirenda's judgment.

Justice Nyirenda was undoubtedly under tremendous political strain from all sides and that he did not bow to the pressure of the incumbent President is a credit to this particular judge and the judiciary as a whole. In Nyirenda's words, there was no choice other than to uphold the electoral statute, for his job was not to "make law, but to interpret law."

This most recent political episode speaks less to questions of judicial independence in Malawi and more powerfully to the way in which law is used as a blunt political instrument by rival elites. While politicians should be applauded for rushing to the courthouse rather than to violence, there is a level of calculated cynicism and shallow adherence to the rule of law evident in the 2014 election episode. This is amplified when we consider the accusations of judge or forum shopping, the continued high rate of recusals in politically hot cases and contradictory judgments coming from within the high court.

In relation to judicial reform, there might be scope to consider the creation of an ad hoc panel of judges to form an 'electoral court'.<sup>14</sup> Ultimately the judiciary emerged from this high-stakes political dispute with its legitimacy relatively intact. This episode further underscored the importance of judicial support for the administrative branches of government and upholding administrative law, given the importance of the Malawi Electoral Commission (MEC), and in particular the leadership of its chairman, retired Judge Mbendera. Finally, it is noteworthy that the Malawi Law Society's vocal support of the MEC and opposition to the incumbent Presidential candidate was an important factor in maintaining stability and trust in the judiciary. This further stresses the importance of holistic approaches to rule of law reform across the entire justice sector. While judicial independence will always be necessary, it is a far from sufficient condition for strong rule of law.

## **i. Kamuzu Banda's Legacy and the Transition to Multi-partyism**

Since the transition to multi-partyism in the early 1990s Malawi has struggled to move away from the fragile political order bequeathed by Hastings Kamuzu Banda, to an institutionalized, stable democracy. Prior to 2014, Malawi had successfully held four presidential and parliamentary elections since independence, and had been led by three Presidents: Bakili Muluzi of the United Democratic Front (UDF); Bingu wa Mutharika, who was originally of the UDF but later split to form his own party, the Democratic Progressive Party (DPP); and Joyce Banda, who was originally of the DPP but later split to form her own party, the People's Party (PP).

The Malawian state under Kamuzu Banda was highly personalized and operated above the rule of law. The transition to multi-partyism – a consequence of both internal pressure for change and external leverage – therefore focused on preventing the concentration of power in one individual or party and securing the rights of Malawian citizens. In 1993 a referendum was held in which 63% of people voted in favor of transitioning away from authoritarian rule.

Throughout this period of popular upheaval the High Court played a pivotal role in preserving the space for dissent. Kamuzu Banda strategically allowed the courts more power when in August 1992 the laws on forfeiture and preventive detention were amended to provide for reviews of ministerial orders by a High Court judge and a Detention Review Tribunal, respectively.<sup>15</sup> This maneuver represented a small concession – a type of safety valve release – and points to the degree to which Banda underestimated the courts. Through carefully worded judgments, the courts were able to create a space for voices of democratization: by protecting political protestors, readmitting university students, and legalizing the press in exile. 1992 marked the first time judicial review was used in Malawi and this was significant in creating space for protest. For example, in *DuChisiza v. Minister of Education* (1993),<sup>16</sup> the court invalidated the Minister of Education's ban on all forms of non-government sponsored entertainment in schools. In *National Consultative Council v. Attorney General* (1994)<sup>17</sup> the use of road-blocks by the police was declared unconstitutional. Despite the fact that these cases were coming to a 'Banda court', a court without a bill of rights, the creative use of procedural law allowed the judges to circumvent undemocratic legal roadblocks.<sup>18</sup> This was important moving forward, because comparatively earlier on the court was able to assert its identity, legitimacy and autonomy. Shortly after the first multiparty election the judiciary began to receive important cases.

This is not to suggest that the court's record was irreproachable at this time. The events surrounding the trial of opposition activist Chakufwa Tom Chihana became an important part of the political narrative through the transition period. Both the High Court and Court of Appeal case illustrated the continued deference by the courts to the government.<sup>19</sup> The opposition activist, upon return to Malawi from Zambia, was detained. This in turn sparked large-scale protests in which over 40 people lost their lives. In the High Court case - *The Republic v. Chakufwa* (1992)<sup>20</sup> - the judge found that there was seditious intent in Chihana's documents, calculated to "bring into hatred or contempt or to excite disaffection against the Person of the President or Government."<sup>21</sup> Technically the courts had little room for maneuver regarding the release of Chihana; moreover, as Ng'ong'ola (1996) claims, the court was reluctant to engage in political posturing or realism.<sup>22</sup> Many perceived that the courts had actively colluded with the government. This theme of the courts taking the conservative status quo approach in times of political transition or uncertainty is a recurring theme in Malawi. However, the Chihana cases notwithstanding, the courts did exhibit

some bold decision-making in pushing back the boundaries of Banda's authoritarian regime, nudging the democratic door open in anticipation of the popular wave of support for multi-partyism that would follow.

## **ii. Muluzi Era**

“Malawi is probably one of the most litigious communities in Africa. Because people here will come to court for anything. And that explains to you why the politicians are afraid of us because they can't predict who will show up and when they will show up. And it explains to you why politicians will always run to court. Because in other countries it's the other way around, it's the court that runs to the politicians. But here somehow because we are litigious and we are independent those politicians are confident that they will go there and we will sort [it] out” (Author interview, Respondent F, Blantyre, Malawi, July 2013)

The first multiparty elections were held in 1994 and the results broke down almost entirely along regional lines.<sup>23</sup> Soon after the 1995 election, the United Democratic Front (UDF), from the south, entered into an alliance with the AFORD (Alliance for Democracy) party from the north. This however did not mark the beginning of a stable two-party system; they soon split and by 1999 AFORD had entered into an alliance with MCP in preparation for the second presidential and parliamentary election. Despite the failure of Malawi to develop a stable, two-party system, three parties have survived and have run (in various configurations) in the past four consecutive elections. Malawian politics remains volatile due to party leaders switching parties regularly, a phenomenon that decreases voter satisfaction and increases levels of cynicism toward politics in general.

Between 1994 and 2004 certain individual judges stood out, some for their independence and some for their perceived lack of independence. Despite rendering some bold judgments, the judiciary struggled to maintain their “actual independence” in the face of executive interference, as well as their “perceived independence” in the face of highly politicized, high-stakes cases. Generally the Malawian judiciary was, in the early post-transition years perceived to be relatively independent; while the reputation of Malawi's courts was tainted during the Banda regime, it was not dismal. In addition, they had played an important role during the transition to democracy. This contrasts with the institutional legitimacy of the legislature and executive branches that were comparatively weaker and experiencing greater flux. Therefore this institutional uncertainty created space for the judiciary to augment its authority with limited contestation.<sup>24</sup> Also significant is that the party in power, the UDF, was new, and at least in the early years was manufacturing its institutional capacity. Elites were disorganized and lacked cohesion, and party switching and defections were commonplace. This author has argued elsewhere that this combination of weak institutions, political parties, and volatile elites generate space for potential independent decision-making and empowerment.<sup>25</sup>

The 1999 election saw a continuation of the three-party system but Muluzi's victory was narrower. The judiciary heard a number of cases related to the 1999 elections: several before (selection/nomination of candidates),<sup>26</sup> during (campaigning and conducting of polls), and after (disputed results). After a significant delay, the election results stood. The delay in judgment is typical of such disputes across the region and could be interpreted as a strategic act on the part of judges. Months after the government had been reinstalled, it was seen as *fait accompli*. The question of whether this was a case of the judiciary simply rubber-stamping Muluzi's re-election remains contested.

After the 1999 elections, the courts were back in the political spotlight with a series of intraparty political disputes. In *Re Constitution of Malawi Congress Party (2001)*<sup>27</sup> and appeal *Chiwona v. Chakuamba (2000)*,<sup>28</sup> the Courts became entangled in two related cases, both decidedly political. After the 1999 election there was a major split in the MCP party between senior figures Gwanda Chakuamba and John Tembo. The split became so serious that the two factions held separate conventions. Justice Mwaungulu of the High Court declared that both conventions were null and void, and ordered the party leadership to resolve their internal conflict. The ruling was upheld on appeal [*Dr. Peter Chiwona v. Hon. Gwanda Chakuamba (2000)*].<sup>29</sup> Speaker of the House Mpasu characterized the ruling as a constitutional crisis: “It is a question of whether the Speaker should obey the National Assembly or a judge, this is a constitutional crisis. The Judge has put the Judiciary and the legislature on a collision course.”<sup>30</sup> Widespread public vilification of the judiciary was seen as an overt attack on judicial independence.

By entertaining these initial intra-party disputes, the court seemed to have opened the floodgates. In the lead-up to the 2004 election, the courts heard many candidate-selection dispute cases<sup>31</sup> and subsequently the level of public scrutiny endured by the judiciary as a consequence of these intense political disputes was immense. This was particularly true of the debate surrounding President Muluzi’s efforts to amend the constitution and run for a third term. In an effort to dampen dissent the President attempted to ban all political demonstrations and rallies protesting a possible third term. The first attempt at overturning the ban was successful in the High Court because Muluzi’s directive had been passed unconstitutionally. However, the Supreme Court of Appeal overturned the High Courts’ order after the plaintiffs failed to turn up. Both sides accused each other of “judge shopping.” The Malawi Law Society brought the case back to the High Court seeking to overturn the presidential directive [*Malawi Law Society, et al. v. The State and The President of Malawi (2002)*]<sup>32</sup> and won the case. This was a strong signal of judicial independence in the face of a very hostile political environment.

The worst incident of interference during this period was the attempted judicial impeachments.<sup>33</sup> Yet, despite the obvious political motivations behind the maneuver, the judiciary was able to experience a groundswell of support from both civil society and from the international community. Ultimately the threat of aid withdrawal and domestic public pressure was enough to force Muluzi to step down from the attempted impeachment proceedings. Despite the severity of this threat to judicial independence, counter-intuitively, in the short term, the attacks on the judiciary buttressed rather than diminished the legitimacy of the institution. Evidence suggests that having survived the attempted impeachment and secure in the knowledge that Muluzi would not be president after 2004, the judiciary began to show signs of increased confidence and assertiveness. This period thus represents the height of judicial power in Malawi’s history.<sup>34</sup>

### **iii. Mutharika Era**

“If Muluzi was uncomfortable with an independent judiciary, President Dr. Bingu wa Mutharika was incensed by it. Throughout his tenure wa Mutharika did not understand the idea of the separation of powers, or that the judiciary is not really an enemy of government but an essential partner whose commitment to truth and justice must be seen as integral to any conception of a good society.”<sup>35</sup>

Politics under newly-elected President Mutharika were characterized by continued corruption. Mutharika's post-election split from the UDF marked a new era of antagonistic politics as former President Muluzi remained on the scene and began to signal his intent to run again in 2010. The volatile political environment was reflected in the courts' workload, including a substantial increase in the number of judicial review cases. This period marks the height of the judicialization of politics in Malawi, but again, despite severe pressure, the courts maintained some independence. While the political elites continued to push cases forward, the courts were pulling them in by signaling a high level of receptivity, striking down very few applications for judicial review, and hearing almost everything.<sup>36</sup> The courts continued to be underfunded and neglected. Attempts at holding the government to account through the constitution by the Law Society were unsuccessful. (See Judicial terms and conditions of service case [State v Min of Finance et. al., ex p Malawi Law Society Const. Cause No.6 of 2006]). Financial neglect is discussed at length later in this report.

The major impetus behind the judicialization of Malawian politics was the continuing saga of the Constitution's crossing-the-floor provision. In 2005 President Mutharika left the UDF Party and established the Democratic Progressive Party (DPP). Several MPs followed, thereby "crossing the floor." At this time the High Court ruling reinstating the original conception of Section 65 still held – crossing the floor or switching political parties after election was unconstitutional. This automatically placed both the President and his new party in a compromised position. Mutharika went back to the courts and in 2006 the High Court finally issued its ruling upholding Section 65, and Mutharika appealed. There were two problems here. First, the appeal was filed before the High Court judgment had been delivered. Second, it was unclear how one could appeal from a Presidential Referral if one wasn't the "loser". Justice Twea opined: "The impression created is that the President has a predetermined position and that he has no confidence in the opinion of this Court until he hears from the Supreme Court." The judge went on to address the politicized nature of this case: "The Attorney General's office should be the last to reject a Court decision in anticipation. It sets a very wrong signal example to the bar and is capable of undermining the public confidence in the Judiciary." In 2007 the Supreme Court upheld the High Court ruling.

In the months following, the executive exhibited significant hostility toward the judiciary, ranging from harassment of individual judges to threats to exert its influence by doubling the size of the judiciary. Meanwhile, Mutharika attempted to delay the Speaker's enactment of Section 65 by not calling the legislature into session. When the legislature did convene, the opposition would boycott the proceedings. This constrained the government's ability to pass the annual budget until 2010, when Mutharika's DPP party won the election with a substantially improved majority.

Meanwhile, President Mutharika was locked in another legal battle. When Mutharika split from the UDF, Vice-President Cassim Chilumpha stayed, but reportedly ceased to perform his official duties, including his attendance at cabinet meetings. This battle within the executive played out in the courts, first around the concept of 'constructive resignation' and second, in relation to alleged treason charges.

Mutharika was also fighting a legal battle on a third front. The National Assembly initiated impeachment procedures against the President in response to his defection from the UDF. The President questioned the constitutionality of that action, and requested the court's opinion through another Presidential referral.<sup>37</sup> Meanwhile, the Attorney

General issued an *ex parte* summons for an injunction restraining the National Assembly from employing the adopted impeachment procedures pending the decision on the Presidential Referral. The injunction was granted while the court mooted the constitutionality of the impeachment process. Ultimately, the court denounced the procedures adopted by the National Assembly as unconstitutional. This was one of the most potentially far-reaching cases ever addressed by the judicial system. The court recognized it as such by acknowledging the political and economic consequences, including the potential for chaos and disorder. In October, the Standing Order was passed, and was followed by riots and violence engulfing the state house. The ruling had been slow in coming and speculation abounded that, once more, this could have been a strategy by the president to delay the onset of the impeachment process while he mobilized his defense. The strategic deployment of the courts for political delays can be seen as significantly undermining judicial independence.

Once again Mutharika's political security was intimately tied up in the courts. In addition to the headline grabbing political disputes, there were minor cases where the courts protected the freedom for private radio stations (including one owned by Muluzi) to broadcast, and the right of the opposition to hold political rallies.<sup>38</sup> The major disputes leading up to the 2009 election were related to former president Muluzi's bid to run again. In an attempt to restrain the former president, Muluzi was arrested on treason charges in 2008, and then again in 2009 on corruption charges.<sup>39</sup> In their ruling on Muluzi's candidacy [*State v. Ex-Parte Muluzi and Anor (2009)*],<sup>40</sup> the court concluded that Muluzi was not eligible to run again. Muluzi was one of Malawi's wealthiest businessmen, maintaining a virtual monopoly on the nation's lucrative sugar industry.<sup>41</sup> Money translates into political power through patronage networks and corruption. One of the ways in which regimes attempt to neutralize ex-presidents is through the use of legal prosecution on corruption charges. In contrast to previous elections, once the question of Muluzi's candidacy was removed there were no major cases for the courts after the 2009 election. The relatively low involvement of the courts in the 2009 election could also be symptomatic of the high-level politicization of the judiciary in Section 65 floor-crossing cases. However, there is not strong evidence to conclude that the lack of a significant role for the courts in 2009 was a consequence of a precipitous decline in trust.<sup>42</sup>

With a renewed majority in the legislature, Mutharika began his second term in a combative stance vis-à-vis the judiciary and with an increasing disregard for the rule of law.<sup>43</sup> As one interviewee noted, this appears to be a trend in Malawi, the second terms of both Muluzi and Mutharika were deeply troubling for the judiciary.<sup>44</sup> This was further compounded by a major economic downturn and by the split of Joyce Banda from Mutharika's ruling DPP party. Banda formed her own party - the People's Democratic Movement (PDM) - and when the government refused to register the PDM, it successfully sought relief through the courts [*Ex-Parte Msenga Mulungu & 8 Others (2010)*].<sup>45</sup> Banda was not constitutionally bound to vacate office, and despite Mutharika's legal challenges, remained as Vice-President. While the general disregard by the executive towards the rule of law continued, there were three particular episodes that once again brought the Malawian judiciary to center stage. First, the passage of the so-called "injunctions bill" in 2011. Second, the 2012 judicial strike, and finally, the role of the judiciary, in particular the Chief Justice, in the transfer of power to Joyce Banda in April 2012. The series of events was subject to a judicial investigatory commission led by a retired Malawian judge.<sup>46</sup> These episodes are discussed in greater detail elsewhere in this report.

Despite high levels of economic growth<sup>47</sup> Malawi remains one of the poorest countries in the world. Approximately 40 percent of the national budget between 2007 and 2009 came from foreign aid.<sup>48</sup> Beginning in 2011, political tensions heightened as the country faced severe fuel shortages, increased cost of living, limited foreign exchange, and inadequate delivery of basic services. Civil society continued to be snubbed by Mutharika, and in response began to plan a day of massive protest on 20 July 2012. At the last minute the High Court granted an injunction against the protests, in effect giving the police virtual *carte blanche* to use unprecedented violence<sup>49</sup> against the demonstrators. The injunction was removed immediately thereafter when it was discovered the plaintiffs' lawyer was not admitted to practice in Malawi.<sup>50</sup>

In sum, during the Mutharika era the courts received a growing number of high-stakes political cases and, in response, experienced unprecedented interference. In the early years of Mutharika's tenure, it was not clear that the courts could be relied upon as a pro-government mainstay. That said, a number of important injunctions were very helpful in delaying the Speaker's declaration that DPP MPs' seats were vacant. Ultimately, judicial independence was circumscribed through the continued withholding of funds, meddling with appointments, and attempts to circumscribe judicial review through the passage of the injunctions bill. These forms of judicial interference are discussed in further detail in Section E of this report.

#### **iv. Joyce Banda Era**

While the early period of Banda's presidential term was relatively peaceful, as Malawi geared up for the 2014 elections significant challenges emerged as it became apparent that reelection was far from guaranteed. Since the so-called 'cashgate' corruption scandal, there has been heightened tension and scrutiny around the courts. As Janet Chikaya-Banda recently highlighted, many of the same structural issues remain "[p]oor institutional commitment to law reform, and the vulnerability of the law in the face of a very powerful presidency [. . .]"<sup>51</sup> serve as obstacles to further democratic maturation. Yet, this elite dialogue and debate around the constitution and constitutionalism does not necessarily garner popular support in the face of continued serious economic challenges: "For most Malawians, spirited defence of the constitution – however vital – has changed little. [T]he economic situation is as parlous as in the last two years of the Mutharika presidency [. . .] According to a 2012 integrated household survey, 25% of the population is now trying to survive on an income of less than \$0.10 per day."<sup>52</sup>

As for the justice sector, President Banda attempted to focus less on the political aspects of the judiciary and more on the development aspects. At the July 2013 swearing in of new judges and the new Chief Justice, President Banda remarked: "The Judiciary [. . .] is supposed to demonstrate in the delivery of their services the virtues of honesty, fairness and selflessness. The Judiciary will need to [. . .] guarantee justice to the nation and the people [. . .]"<sup>53</sup>

After the release of the commission of inquiry report into Mutharika's death and the Presidential transition, President Banda indicted several high-level DPP members. This included the opposition Presidential candidate, now President Peter Mutharika, brother of the late Bingu wa Mutharika. In late 2013 several top-level government figures were arrested in response to charges of massive corruption – the so-called 'cashgate' scandal. The trial of the more than 100 public figures was scheduled to commence early in 2014. Donor pressure on former President Banda came to

a head when more than \$150 million worth of aid was suspended until corruption is addressed.<sup>54</sup> One of the more prominent trials involves the former justice minister, Ralph Kasambara. A commentator recently noted the ironies of the former justice minister's arrest and detention; Kasambara was detained in custody for longer than would perhaps be expected: "This could be interpreted as the judiciary taking a stand against the rich and well-connected [ . . . ] [or Malawi is] trying to show it is taking a strong approach to Kasambara's charges as it tries to convince its aid donors it can be trusted."<sup>55</sup>

The legal and political machinations related to 'cashgate' represent a weaker adherence to the rule of law and judicial independence on the part of Banda. There have been a number of incidents that suggest that former President Banda was indirectly, perhaps even directly meddling in the process. Accusations of 'judge shopping,'<sup>56</sup> slowing down the prosecution, and making public statements about cases still pending, fueled these perceptions. The prosecution of the corruption cases has indeed proceeded excruciatingly slowly, leading some observers to speculate that Banda was trying to avoid incriminating evidence surfacing before the elections. In April the Malawi Human Rights Commission (MHRC) wrote to the Attorney General accusing the government's handling of the cashgate prosecutions as 'suspicious.'<sup>57</sup> President Banda's public pronouncements regarding the guilt of Mr Kasambara - "[y]ou will end up rotten in jail because you committed a crime"<sup>58</sup> - could be interpreted as an abrogation of the basic rule of law principle of innocent until proven guilty in a court of law. Alleged interference by the Banda regime is discussed in further detail in the interference section at the end of this report.

As discussed in previous sections, the courts in Malawi have a long history of playing a central role in parliamentary and presidential elections, notably in 1999 and 2004. While the 2009 election was quiet as Bingu wa Mutharika cruised to an early victory, this would change dramatically in competitive 2014 presidential elections. In the midst of serious accusations of irregularities and anomalies the Malawi Electoral Commission (MEC) announced their decision to order a recount. Political parties rushed to the courts seeking injunctions. Ultimately it was a judgment by Justice Nyirenda - just an hour before the expiration of the mandatory eight days within which the MEC should release the results - that restrained the MEC from doing a recount. The MEC were forced to declare the results. In his judgment Justice Nyirenda stated, "My duty as judge is not to change the law."<sup>59</sup> Perhaps an implicit declaration of the pressure he must have experienced while formulating his judgment. The case was originally assigned to Justice Healey Potani, but at the last minute, due to pressure from the MCP lawyers, Potani recused himself.<sup>60</sup> Once again the political machinations surrounding the court cases were detrimental in terms of public perceptions of judicial legitimacy and independence.

To be sure, President Banda took a substantial political risk by creating so many enemies right before the election.<sup>61</sup> Despite the alleged use of familiar, corrupt campaign tactics, Banda would receive only 20% of the vote, coming in a distant third to her political rivals<sup>62</sup> reflecting that Malawians may have grown tired of corruption, poor public service and continuing cycles of food insecurity. The role of the courts in establishing a strong and ultimately responsive democracy will continue to be front and center for the new Peter Mutharika administration.

## v. Comparative Measures of Democracy and Rule of Law

While no numeric measure perfectly captures the state of democracy and rule of law in Malawi, the various international indices are a useful supplement to the in-depth qualitative narrative above. Highlighted below are some key measures from a range of respected international comparative indices.

The 1996-2012 World Bank Governance Indicators for Malawi demonstrated a slight decline in the areas of Political Stability and Absence of Violence, Regulatory Quality and Rule of Law.<sup>63</sup> However, in the last year there was improvement in Voice and Accountability. Malawi is described as being a “flawed democracy” and the 2012 Economist Intelligence Unit Democracy Index ranks it 75th out of 167 countries.<sup>64</sup> Freedom House 2013 ratings indicated Malawi remains a “partly free” country, despite noticeable improvement in the easing of repression and freedom of assembly post-Mutharika.<sup>65</sup> In 2013, 37% of Sub-Saharan African countries were classified as “partly free.”<sup>66</sup>

The World Justice Project ranks Malawi highly in terms of judicial independence, 4th in sub-Saharan Africa, below Botswana, Ghana and South Africa. Globally, Malawi ranks 65th out of 97 countries indexed. In certain areas Malawi performs better, for example, access to civil justice in Malawi ranks higher than many more-developed countries (35th out of 97). Perceptions of those surveyed are that Malawi’s judiciary is independent, but lacks resources, personnel and mechanisms to track the efficiency of the court.<sup>67</sup> The most recent Afrobarometer surveys showed that support for democracy in Malawi remains high at 76% in 2012. Yet there remains a gap between theory and performance, as satisfaction with democracy was at 53% and the perceived extent of democracy was 55%.<sup>68</sup>

Malawi continues to perform poorly across a range of socioeconomic measures. The Malawi adult literacy rate in 2010, was 75% (% ages 15 and above). Prevalence of HIV, total (% of population ages 15-49) is 10% in 2011. Life expectancy at birth is 54.1.<sup>69</sup> GNI per capita (PPP, US\$) is \$730 in 2012. By comparison, Malawi’s neighboring countries’ GNI is: Tanzania (\$1,560), Zambia (\$1,590), Mozambique (\$1000).<sup>70</sup>

## Part II: Assessing Judicial Independence in Malawi

### A Scope of Judicial Power

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As will become evident throughout this report, the gap between de jure judicial independence and de facto independence can often seem substantial in Malawi. However, there are concerns that de jure judicial independence may potentially be under threat due to the ease with which the Malawian constitution has been amended since its inception in 1994. From 1994 to 2005, 205 items in the constitution were amended, in part or as a whole. The most extensive changes occurred during the second term of the UDF government.<sup>71</sup> Perceptions are that the changes have been due to political expediency rather than constitutional necessity.<sup>72</sup>

In April 2007, the Special Law Commission on the Review of the Constitution issued a report, noting that: “[t]he 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.”

To date the proposed reforms remain at the Cabinet level and have not moved forward. Constitutional legitimacy is an essential foundation for judicial independence in Malawi. Reform of the constitution is critical at both the level of functional governance and in terms of symbolic legitimacy.

#### **Key Findings:**

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**Judicial Review** – Powers could be enhanced through the establishment of a permanent constitutional court. Concerns exist around the process of certifying cases as constitutional and the role of the Chief Justice.

**Exclusive Authority** – Exclusive authority resides in the judiciary.

The Malawi judiciary operates under the influence of the British common law tradition. The contemporary judicial structure of Malawi is comprised of a Supreme Court of Appeal, a High Court (sitting as ‘General Division’, ‘Commercial Division and ‘Constitutional Court’) and, subordinate courts and tribunals (Magistrates and Industrial Relations Courts). Both the Court of Appeal and the High Court have authority to hear constitutional issues. Chapter IX of the Constitution establishes the courts, their powers and mandates.

The successful creation of the Commercial division of the High Court has led to calls to establish other discrete divisions within the High Court. This could include, for example, Lands, Family, Fraud and Corruption. It is unclear to this author whether the up-front costs of establishing separate divisions would reduce the administrative costs and increase efficiency further down the road. One potential benefit is the increased specialization and expertise of individual judges operating within a narrower sphere of the law.

## **i. Judicial Review (administrative and legislation)/Institutional Structure**

Under section 108.2 of the Constitution, the High Court has unlimited and original jurisdiction to hear and determine any civil or criminal proceedings and to review executive and administrative action:

The High Court shall have original jurisdiction to review any law, and any action or decision of the Government, for conformity with this Constitution, save as otherwise provided by this Constitution and shall have such other jurisdiction and powers as may be conferred on it by this Constitution or any other law.

Section 9 of the Malawian Constitution states that, “The judiciary shall have the responsibility of interpreting, protecting and enforcing this Constitution and all laws in accordance with this Constitution in an independent and impartial manner with regard only to legally relevant facts and the prescriptions of law.” Malawi’s constitution includes an expansive bill of rights and a standard derogation clause. Section 196 of the Constitution provides that substantive amendments of the bill of rights require a national referendum.

Institutional structures may impact judicial power and independence. For example, the establishment of a permanent and separate constitutional court may attract a greater number of cases if it is adequately staffed, efficient and perceived to be independent. This could be good or bad. Potentially good through speeding up the creation of an autochthonous body of Malawian constitutional jurisprudence; specialization can encourage the development of expertise in the rapid handling of constitutional matters. Yet it could also be potentially bad through encouraging the proliferation of spurious litigation.

The current practice of the Chief Justice certifying cases as constitutional in order to convene the full panel of judges could be subject to politicization and possible corruption. In 2003 the Constitution was amended to require a panel of 3 judges to hear any constitutional matter and that the Chief Justice must certify cases. Allegations of failure to certify matters as constitutional under the former Chief Justice Menlo were made by a number of informants.<sup>73</sup> The challenging question becomes, what recourse do individuals have if their cases are not certified as constitutional? (*James Phiri v Bakili Muluzi and Attorney General, Constitutional Cause No 1 of 2008 (unrep)*). This procedure has come under increased scrutiny recently with the pending constitutional review of the Penal Code on sodomy. Justice Mwaungulu dismissed government procedural objections that claimed the proceedings had been irregularly commenced because the Chief Justice had not certified the matter.<sup>74</sup>

The author solicited opinions from a range of different stakeholders on the possibility of establishing a permanent constitutional court from a range of different stakeholders, , while the benefits of a permanent constitutional court were attractive for a range of different reasons, ultimately the paucity of resources in Malawi cannot currently justify the establishment of a permanent constitutional court. Those resources are needed elsewhere; more specifically at the lower levels of the magistracy.

## **ii. Exclusive Authority and Established Appellate Procedures**

### **Exclusive Authority**

Chapter 103 of the Malawian constitution reads:

1. All courts and all persons presiding over those courts shall exercise their functions, powers and duties independent of the influence and direction of any other person or authority.

2. The judiciary shall have jurisdiction over all issues of judicial nature and shall have exclusive authority to decide whether an issue is within its competence.
3. There shall be no courts established of superior or concurrent jurisdiction with the Supreme Court of Appeal or High Court.

This is similar to the 1996 South African Constitution which simply states that the “judicial authority of the Republic is vested in the courts.”

### **Established Appellate Procedures**

Under Section 104 of the constitution:

2. The Supreme Court of Appeal shall be the highest appellate court and shall have jurisdiction to hear appeals from the High Court and such other courts and tribunals as an Act of Parliament may prescribe Appellate procedures through the judicial hierarchy are clear and well respected.

The jurisdiction of the Malawi Supreme Court as final arbiter of legal disputes has been respected and appellate procedures followed. The Court would benefit from being housed in a separate building to enhance the sense of its separation from the High Court and increase the public’s level of trust and legitimacy.

### **Local Courts Act**

Politicization of parallel jurisdictions under President Kamuzu Banda resulted in the elimination of all local courts during the transition to multi-partyism. A 2009 Special Law Commission concluded that the reintroduction of local courts could aid in the augmentation of access to justice in rural areas. The bill was passed in February 2011. The bill “seeks to introduce a new genre of courts ... with the primary function of dispensing familiar and affordable justice for the ordinary Malawian in line with the spirit of the Constitution which aims at enhancing the right of access to justice by all citizens.”<sup>75</sup> “At the lower level, there will be multiple local courts established in each of Malawi’s 27 districts. These will be located near, if not in, villages, making it easier for people living in rural areas to access them. Appellate courts, called the District Appeals Local Courts, will be created in each district to hear appeals from the Local Courts.”<sup>76</sup>

The Local Courts Act was met with significant hostility on the part of former President Mutharika and the then Vice-President Banda. However, it is fairly self-evident that efforts to improve access to justice in the face of major gaps in service necessitate some action.<sup>77</sup> There are two important points about the proposed Local Courts – first they are local and not traditional courts. They will be part of the judiciary and not the government. Second, the courts will have very limited jurisdiction and power (Maximum penalty of 12 months’ imprisonment or a MW5,000 fine).<sup>78</sup>

One interviewee suggested that the major obstacle to implementation at this time is leadership and the resources to get the new courts up and running:

[I]t is not being implemented and nobody seems to know why. There was a program in the judiciary, a plan to start implement[ing] it. It requires the office of the Chief Justice to move so these things are done. Of

course you need resources and courtrooms. Apparently there are no local court rooms for it. They are not meeting anywhere [. . .] They are there on the books but not on the ground. I think it is a resource problem [. . .] it needs the budget for buildings and recruitment of the people to work there. [Chair Persons] would be employed and they would be supported by the Assessors who are likely to be elders in the community where the court is and very likely these assessors would be paid. They may not receive salaries but they would be paid for the work they do.<sup>79</sup>

The hope is that these courts will a) relieve pressure on the Magistrates courts and, b) improve access to justice for people in the more remote rural areas.<sup>80</sup> This issue is highly complex and subject to the specific historic contingencies in Malawi. It needs further in-depth consideration and research beyond the scope of this report.

## B Differentiation and Separation of Powers

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### **Key Findings:**

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**Budgetary Autonomy & Adequate Resources** – Malawi’s judiciary continues to face barriers in advocating for and receiving an adequate budget. Recommendations:

- Establish a committee of judges to advocate for annual budget
- Flexibility and continuous assessment in distribution of resources
- Review the position and responsibilities of the Chief Courts Administrator
- Increase pressure on government to deliver entire [not partial] promised budget in timely fashion
- Consider carefully the possibility of the Judiciary receiving fixed percentage of the national budget

**Judicial Security/Buildings** – Security for judges is inadequate at both the homes of judges and in the courthouse. Piecemeal investment in the physical infrastructure of the judiciary is inadequate to overcome the many years of neglect. Recommendations:

- Provide 24-hour security for all judges
- Invest significantly in courts complexes, including a separate building for the Supreme Court

**Strong Constitutional Separation of Powers** – Exclusive judicial authority is now vested in the judiciary and under Section 9 of the Constitution the Judiciary is responsible for preventing possible abuse of power by protecting, interpreting and enforcing all laws in Malawi. The safeguards on paper are strong but, as reflected in this report, there are a range of ways in which de facto separation of powers is undermined.

General recommendations:

- Address weaknesses in appointments processes, use of judges in Attorney General office and budget dependence

**i. Budgetary Autonomy & Adequate Resources/Salary**

The Malawi judiciary continues to be under-resourced across a number of key areas. The most recent international report on the state of judicial independence and effectiveness by IBAHRI (2012) concluded: “There is a severe shortage of judges in Malawi and the judiciary system suffers from: poor record keeping; a shortage of trained personnel, heavy caseloads; and a lack of resources. There is a large backlog of cases awaiting trial and little record of detainees.”<sup>81</sup>

The process of budgeting is not merely an administrative or technical issue, but is a profoundly political process and this presents a dilemma for judges. How can judges advocate for improved resources while maintaining their political neutrality? Judicial strikes related to salary disputes over the last decade have pushed the boundaries of political activism for Malawian judges.

Interviews and review of key documents indicate a series of major problems and weaknesses in regards to judicial funding:

**ii. Administrative Structure and Budgeting Process [Courts (Amendment) Act’s attempt to enhance autonomy to collect some revenue]**

Salaries, Continuing Judicial Education, Donor Funding and Donor Relations are individually addressed in separate sections below.

**a. Administrative structure**

In 2000, the judiciary was provided administrative autonomy through the Judicial Administration Act.<sup>82</sup> The benefits to achieving autonomy (which has not been uniformly achieved across eastern and southern Africa, where judiciaries have tended to remain under the control of the Ministry of Justice) range from allowing the judiciary to staff itself to greater internal budgetary control. This is important in establishing judicial autonomy, but yet, there have been unintended consequences in Malawi related to the high turnover of administrative staff. Staff within the judiciary have had their career paths restricted because administrative autonomy prohibits easy movement from ministry to ministry.<sup>83</sup> However, as Kanyongolo (2006) notes, judicial administrative autonomy goes only part way towards solving the problem because of the continuing financial dependence on the executive and legislature. The judiciary may be independent in forming the proposed budget and the internal allocation within the institution, but they rarely receive the full amount requested. This lack of financial autonomy is a direct threat to judicial independence. The judiciary is so overstretched that budget issues are not simply a matter of increasing the efficiency of the courts; they are a matter of survival for the courts.

The judiciary complains that government budgets are far below the projected annual fiscal needs of the courts. Two interviewees noted that the judiciary is treated as though it were another ‘Ministry’ rather than the third branch of government when it comes to setting budgets.<sup>84</sup> Furthermore, money is not always released on time, or in the amounts previously agreed upon. According to the Malawi Judiciary Development Programme this is a significant problem.<sup>85</sup> In the 2005/6 budget for example, the judiciary received 0.7% of the total national budget (Kanyongolo

2006). A representative within the judiciary informed me that this figure has stayed at or below 1% of the national budget since then. Some individuals have advocated for the judiciary to receive a fixed percentage of the national budget each year – perhaps 3%. Given Malawi’s economic performance, this seems to be an unrealistic proposition in the short-term.

While there is no shortage of plans on how to improve the functioning (and implicitly, the independence) of the judiciary, there appears to be a shortage of will and available funding to implement these plans by the government. With administrative autonomy there are concerns that the judiciary needs to have representation in parliament and access to the executive branch in order to defend its budget. The Registrar will meet at the committee level, but as one individual pointed out, this is different to standing in the chamber and publicly arguing the case of the judiciary: “Judges don’t have an audience.”<sup>86</sup>

The office of the Chief Courts Administrator was established under the Judicature Act (2000) and several respondents within the judiciary reported a level of dissatisfaction with the ability of an administrator/bureaucrat to adequately make the case to the government for increased budget.

The Chief courts administrator [...] is a step below the Registrar, because he has to report to the Registrar for control purposes. But he is now responsible for the bulk of the administration: budgeting, court inspections, and most of the things [...] at the regional level.

The beginning was very rough [...] Because as Chief Courts Administrator, you control money, there was lot of resistance from the judicial officers [...] I think people were looking at it from the power aspect but not from the delivery aspect. Because an administrator who is not a lawyer does not appreciate the core function of the judiciary [...] The moment you have a weak Registrar, funding has gone down, on the core functions of the judiciary. The moment you have someone who is perceived to be strong, he has made sure they push the budget which [defrays] the core deliverables of the judiciary.<sup>87</sup>

One solution posited was to achieve a greater level of deliberation and transparency within the judiciary before the budget is presented to Parliament. While such a committee exists, it appears to be ad hoc:

I think it’s an ad hoc committee because it meets usually before the budget is passed, we have a group of people who go to negotiate with the parliamentary committee or the treasurer [...] I think it will be better if we get ourselves well organized in the sense that when we have this budget, we should ensure it goes to prove the functions of the judiciary rather than the support services. Sometimes you get the sense that the support services are well provided for and the judicial services [...] well. But it’s funny because somehow, the Treasury or other administrators in the executive, they feel more comfortable dealing with administrators than judges.<sup>88</sup>

Although the judiciary does not operate under the Ministry of Justice, the issue of whether the Ministry of Justice can or even should represent the interests of the judiciary is contested.

[W]e know that the Ministry of Justice does not fully represent the interests of the judiciary because we are

all competing for the same resources. Even in parliament when the questions are raised, it's the Minister of Justice that answers. As much as theoretically we talk about independence, practically we are under the arms of the executive because the minister of justice is under the branch of the government.

[Y]ou know as judges in the judiciary, you really don't want to engage yourself into political issues. [E]ven the budget – in terms of the ceiling, how much the branch should get is determined by the cabinet so they should just give us a percentage because most of these judges won't be interested in having the CJ or the registrar sit in the cabinet, because half of the things we are not interested in. We are only interested in 2% of what they talk about. The issue is that we have to talk to the right person and talking their language because sometimes we talk too legalistically and because if we go to the Minister of Finance, they are just interested in figures. So maybe as an institution ourselves we should be talking the language which they can understand.<sup>89</sup>

Others note that one of the major obstacles to the efficient running of the judiciary is the uneven and/or slow disbursement of funds:

Not just for money, disbursement of money because it's monthly and you may come up with a cash flow but they may not disburse according to that cash flow so you spend your energy and time just fighting to get your money, as opposed to getting it at the beginning of financial year. And on top of that you will see that might have not advanced the entire money which was allocated by the parliament like some year you may have lost like 20 million kwacha [. . .] Not only that the executive get a huge chunk of the national cake but they are also holding us at ransom and you can't access the funds, it's a challenge.

A number of judges interviewed noted the inefficiencies in the distribution of resources, which merely serves to heighten the existing strain on limited resources. One of the tensions at work is again, the perceived gap between the Chief Administrator and the judges:

[W]hat money we are going to use should not be left for the Chief Administrator. He is supposed to report to us on what he is going to do and we vote [. . .] For example, myself I'm scrambling for paper here. Then I'm told there is no stationery. They give me 500 liters of fuel, which I can't use. But they think it's the entitlement they are giving to me. But what's the point because I'm not writing the judgment [. . .] Most people will vote and say we need this money for pencils, for computers because this helps me to work better or more efficiently. I'm trying to show if you give more power to the judges to look at that budget. I'm not saying we are going to talk to the politicians. But once the judges have endorsed this is what we are going to do. Normally they would just call the administrator and say we are only giving 2 million. Suppose it's all of us and saying this is the budget for this year, this is the work we are going to do.<sup>90</sup>

In short, the structural issues at work represent significant obstacles to administrative reform. Improving the communication of budgeting needs and pressuring the government to act in a responsive manner remains a political endeavor that potentially threatens judicial independence. To this, receiving a fixed percentage of the budget would eliminate at least the appearance of negotiation between the judiciary and government.

## b. Salaries

Under Section 14 of the Constitution judicial salaries should be determined by the National Assembly.

Between 1999 and 2001 the judiciary engaged in behind the scenes negotiations with the government, even drafting in an outside expert to support their case for increased salaries. However, in 2001, after parliament approved a new salary structure and raise, the government subsequently failed to implement it. At this time the judiciary decided to go public. There was significant publicity and coverage of this case in the Malawian media, although not always sympathetic to the judges. In the case of salary disputes there is a public perception that judges are already well paid; but the media coverage brings the dispute out into the open.

In 2004, the salary increases had not materialized, so the Malawi Law Society intervened on behalf of the judges filing a case on the basis of the government's failure to implement salary increases. There were many legal questions around this strategy, but by mobilizing a key ally – the Law Society – and by generating further publicity, the judiciary helped maintain pressure on the government. When this failed, there was a brief strike in 2005, primarily concerning vehicle benefits. Further parliamentary review and another set of promises by a new president in 2006 would not be implemented for more than four years. On 9 February 2007, the High Court ruled that since Parliament had reviewed the conditions of services for the Judiciary, the government must implement them.<sup>91</sup> It was a three-month strike in early 2012 and a subsequent change of regime that saw the final payment of back pay plus a salary increase. The courts were completely paralyzed as the government refused to comply with their ultimatum.

In February 2013 there was a 65 percent salary increase awarded to civil servants but judicial support staff were left out. In March 2013 judges submitted a revised Conditions of Service for Judicial Officers. According to a report in the Nation newspaper<sup>92</sup> the revised demands include three vehicles for the Chief Justice, two for the Justices of Appeal, judges and registrar (one of which shall be a Mercedes Benz), an increased subsistence allowance, fuel allowance, settlement allowances and diplomatic passports for themselves and their spouses. The proposed package is comparable to that of the Vice-Presidency. These types of demands could be seen as a bad public relations move on the part of the judiciary. The National Secretary of the Catholic Commission for Justice and Peace was quoted as saying: “The problem is that these judges want to match their perks to those received by some in the Executive branches.” He described these benefits as “sinful benefits.”<sup>93</sup>

The crisis continues due to the major currency devaluation. In July 2013, the judiciary was privately discussing the possibility of striking once more.<sup>94</sup> The perception that the judiciary is “negotiating” its salary and benefits is damaging to the institution. As a High Court judge stated in the recent judicial salary dispute case, “Negotiations involve compromises [ . . . ] Questions will always arise as to what the judiciary gave or took in order to get any suggested improvements to their Terms and conditions of service approved.” One defense tactic is for judges to cite regional and international standards of judicial pay and benefits.<sup>95</sup> Some have registered regrets about this tactic. As one lawyer noted,<sup>96</sup> “By accepting to negotiate, the judiciary kind of gave up on its rights to go by what parliament had approved and I feel it is that discussion which might have created a loophole.” The courts were completely paralyzed as the government refused to comply with their ultimatum.

Regular access to judicial training needs to be budgeted for at all levels of the judiciary and for all judges, not just a select few. Current resources are inadequate. Donor funded workshops tend to be isolated, one off events, rather than sustained engagement.

Access to appropriate research materials and resources would likely significantly speed up the administration of justice in Malawi. Judges typically do not have research assistants and have inadequate copies of basic legal reference materials, including current civil and criminal procedural code.

### **c. Donor Funding and Donor Relations**

Donors currently support approximately 40% of Malawi's annual budget. However, the vast portion of that money goes to the health and education sectors. From the perspective of the judiciary there has tended to be a lack of coordination amongst donors and significant overlap in programming. More recently judicial reform has become a key part of broader governance sector reform between the UNDP, Ministry of Justice and European Union. Support tends to be project driven, rather than holistic at the institutional level.

Major funding for the Malawi judiciary has come from:<sup>97</sup>

- World Bank
- Swedish International Development Cooperation Agency (SIDA)
- International Labour Organisation (ILO)
- Venice Commission
- Danish Institute of Human Rights
- United Nations Development Program (UNDP)
- National Aids Council
- Irish Aid
- USAID
- DFID/EU

Between 2003 and 2008 donor income to the Malawi judiciary was 14% of the total judicial budget, government funds made up 65% and the remainder came from court fees.<sup>98</sup> There have been serious ebbs and flows in donor funding to the judiciary over the last two decades and this has impacted the operations of the court. Major retractions of donor funding came in 2003, 2011 and now in 2013. The current suspension of \$150 million in donor aid will no doubt negatively affect the judiciary

Author interviews indicated that the projects involving the judiciary were top-down in nature and there appeared to be little ownership within the judiciary itself. The major donor focus has tended to skew towards the criminal justice sector (DFID's Malawi Safety, Security and Access to Justice (MASSAJ) Programme 2003-2006). USAID has been instrumental in attempting to computerize the judiciary through the supply of equipment. Other funds have come to the Malawi justice sector through the IMF Poverty Reduction and Growth Facility funds in 2005.<sup>99</sup>

Funded by the 10th European Development Fund (EDF) to the value of Euro 30 million over 5 years (2011-2016), the Democratic Governance Programme (DGP) has an overall objective to “Contribute to the reduction of poverty through improving Democratic Governance, including access to quality justice, greater participation of all Malawians in democratic decision-making, and increased democratic accountability.” This in turn means a “more effective and responsive judiciary.”<sup>100</sup>

The Malawi Judiciary Strategic Plan (2011:32) corroborates this view: “The priorities of the donors sometimes are at variance with the planned activities of the Judiciary, which can negatively impact on the implementation of those planned activities, reducing the efficiency of administration of justice.” The justice sector needs to be considered in its entirety and appropriate devolution of strategic decision making and budgeting needs to be owned by the leadership within the judiciary. As a report by the International Council on Human Rights Policy concludes:

[t]he administration of justice is not seen in a comprehensive way, either by national governments or donors. Reform plans, and assistance programmes proceed in a piecemeal fashion tackling individual parts of the justice system without understanding the linkages. National governments and donors should think of justice as a sector, as they think of health, education or agriculture. This would enable them to link the many roles that different official and non-official institutions and actors play in justice reform.<sup>101</sup>

This would seem to be a reasonable framework through which to consider future donor-judiciary partnerships in the future. However, operationalizing this framework in an era of continued political uncertainty and poor economic performance is an ambitious goal.

### **iii. Judicial Security/Buildings**

The courts complex in Blantyre has continued to suffer major neglect. The author first visited these courts in 2006, and seven years later, there appears to be little change to the primary building. There is a new administrative building. There are plans to construct a new court complex in Lilongwe<sup>102</sup> and construction of the new commercial court in Blantyre is underway. The site for the proposed court complex in Lilongwe has been established for over thirty years. It would appear to make sense that the three branches of government are seated next to one another, although it is not uncommon for the Courts of Appeal to be outside the major seats of government (Tanzania, Botswana, etc.). At a minimum, given the shifting of commerce away from Blantyre to Lilongwe, the Lilongwe bench will likely require greater resources and personnel in coming years.

The conditions of service of a judge entitles them to security overnight at their homes. However, currently the police claim they do not have adequate resources with which to deploy guards to the home of every high court judge.<sup>103</sup> “You find that rarely would you get even three hours [of police protection]. They will arrive at 8 and some of them will knock off at 2am. Because [of this] you are always cautious of what you are doing and somehow it affects the judges.”

The Malawi judiciary is remarkable for the lack of security at the court. Upon making hearing my observation, one interviewee responded:

I would like it to be tighter. I will give you a scenario. This happened at my home. One morning - I had a case, which the judgment was pending. One morning some lady comes [ . . . ] and she says I want your husband

because there is a case he is handling [...] fortunately my wife [...] told her, you can't be seen here at the house. If there are issues to do with the judgment or whatever, you can see him at the court and even at the court you can't see him directly. You have to go through the channels and she was told that you can't see me. So she left reluctantly. A week or two later, [at court] the marshal comes in and says I've brought this person. It wasn't a big case. She wanted a favour from me [...] So I'm saying maybe we need a policeman standing at the gate. Because when some people come, and see the guy standing there, they won't knock on the door. You can't trust the police 100% because at the times they are the same people who abuse [the system].<sup>104</sup>

Security for the Magistrates is an even more serious problem that requires significant attention – beyond the scope of this report. It was noted that security conditions have deteriorated under Mutharika:

During Muluzi's era, people just would not walk into magistrate's house because we were living in secure houses and visitors were being scrutinized at the gate, being screened there. That's not the situation today. We can't afford to pay for houses that have got brick fences. Because the money we get is too little. We can't afford to buy cars. Sometimes when we board minibuses, the moment you set your foot into the minibus someone in the back says can the court stand please? Now it's like you are in your house, someone just comes and knocks on your door because there is no security. You go to the sitting room and you find the [individual] who is being tried in the court. This person has entered the house and I don't know what he has in his pocket. I don't know what he will do to me.<sup>105</sup>

Judges should be free to decide their cases without fear or favor. The current security climate in Malawi provides inadequate protections.

#### iv. Strong Constitutional Separation of Powers

Exclusive judicial authority is now vested in the judiciary under the 1993 constitution. Under Section 9 of the Constitution the Judiciary is responsible for preventing possible abuse of power by protecting, interpreting and enforcing all laws in Malawi. These powers must be exercised independent of the other branches of government (Sec.104). The paper safeguards are strong, but as reflected in this report, there are a range of ways in which de facto separation of powers is undermined.

## C Internal Institutional Safeguards

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### Objective Advancement Procedures and Assignment of Cases –

- Continue adoption of an electronic case management system and regularly review time-frames within which judgments are delivered
- Produce and publicly disseminate annual reports
- Regularly review and assess case assignment data, reviewing for allocation biases

#### **Adequate Recruitment, Appointment and Removal Procedures –**

- Overhaul the Judicial Service Commission (JSC) in consultation with key stakeholders and make more transparent/accountable
- Expand membership to include more legal practitioners and civil society and academics
- Improve the relationship between the Malawi Judges and Magistrates Association (MAJAM) and the Malawi Law Society (MLS) on one hand, and the JSC on the other. Can only be achieved through greater transparency
- Make transparent the criteria for promotion. How is seniority determined? Does seniority include time in private practice? This doesn't necessarily have to be an exact formula
- Advertise positions and conduct interviews for potential candidates
- Make transparent the criteria for promotion and carefully monitor gender balance

#### **Comprehensive Ethics Code –**

- Current ethics code should be reviewed, discussed, revised and statutorily adopted

Formal institutional safeguards form the basic scaffolding of judicial independence. Many of these institutional safeguards are enshrined in the multitude of international standards on judicial independence.<sup>106</sup> The primary focus of this assessment is the structural and political impediments rather than the personal conduct of individual judges. Certainly institutional independence is a necessary, though not sufficient condition for securing the independence of the judiciary. Individuals must serve with integrity and possess a strong measure of incorruptibility; this concept is often referred to as the 'personal independence' of judges. Personal independence is secured by a series of internal institutional safeguards ranging from adequate tenure provision, to satisfactory remuneration to transparent appointment processes. Outlined below is an assessment of these key safeguards in reference to Malawi. As one respondent noted: "[I]f you are going to be a proper check on another institution [...] you yourself need to be good enough: It's the internal checks in the judiciary that make us powerful. Because in that analysis our appeal structure within which we will be reviewed by our peers, not somebody from outside but within. That's what gives us strength."<sup>107</sup>

#### **i. Adequate Tenure & Retirement Provisions**

The current retirement age for judges is 65 and 70 for magistrates. This is comparable to other courts across the region. Into the future, a case could be made for extending the retirement age to 70 for judges, particularly given the shortage of qualified judicial candidates in Malawi.

Judges are retiring from service at the correct age and not negotiating annual contract extensions as we see in other Commonwealth jurisdictions. Some retired judges have gone on to judicial postings outside of Malawi, such as the

retired Chief Justice Richard Banda who became Chief Justice in Swaziland. Accepting postings in non-democratic settings could pose problems in terms of institutional legitimacy.

Finally, while unsubstantiated, there have been allegations that former President Mutharika was putting pressure on certain judges to retire early.<sup>108</sup>

The process through which three judges had impeachment procedures brought against them highlighted potential weaknesses in institutional tenure protections in 2001. Under Section 199(3) of the Constitution of Malawi, a judge can be removed only for misbehavior and incompetence and the authority to ‘try’ judges lies with the JSC and not Parliament. This matter is discussed in-depth elsewhere, but demonstrates that in situations of acute politicization, parchment tenure protections may not be as strong as hoped. This also raises questions about the impotence/independence of the JSC which is discussed in further detail below.

## **ii. Objective Advancement Procedures and Assignment of Cases**

A number of interviewees expressed concerns around case assignment protocol. The notion of ‘judge-shopping’ or even ‘forum-shopping’ in countries with multiple jurisdictions is an unacceptable abrogation of judicial independence. This has been readily documented in Tanzania for example.<sup>109</sup> The courts are currently working on the adoption of a system of electronic case management. If this is successfully implemented it is hoped that it will reduce the case backlog and perceptions of ‘judge shopping’ that currently exist. As the Chief Justice noted in a media interview:

It is our hope that with the new system we shall achieve a first come first serve system of assigning dates to cases. It will also help in avoiding neglect of cases by members of the bar and such a system will assist that we do away with any perceptions of forum or judge shopping.<sup>110</sup>

As discussed in later sections, the continued current of politicized regionalism in Malawi feeds fuel to the fire of perceived judge shopping or case assignment. For example, one respondent noted: “There appears to be a trend in which certain cases are coming to a certain judge, cases coming to Mzuzu [for example].”<sup>111</sup> These perceptions spill over to the public, and as one former Registrar noted: [W]hen I was in the registrar’s office, I get people they’d want to know, who would be handling this case, and at the back of their mind they would be thinking no can’t we have that judge or something like that.<sup>112</sup> Transparency and systemization would significantly reduce perceptions of judge shopping.

Internal advancement procedures are addressed in Section c) iii. below.

## **iii. Adequate Recruitment, Appointment and Removal Procedures**

“I think traditionally, [the] judiciary works like the military. If they don’t pass you over, there must be a reason for a pass over so that everyone knows that these are the issues”<sup>113</sup>

Judicial appointments in Malawi are regulated by the Judicial Service Commission and approved by Parliament. The Chief Justice is appointed by the President and approved by the Legislature. The President on the recommendation

of the Judicial Service Commission appoints members of the High Court and Supreme Court of Appeal. Members of the Commission are appointed by the President and include (Sec.117 Constitution of Malawi):

- Chief Justice (Chair)
- Chairman of the Civil Service Commission
- Justice of Appeal of Judge who may be designated by the President in consultation with the Chief Justice.
- Legal Practitioner and Magistrate who may be designated by the President in consultation with the Chief Justice.

#### **a. Politicization of Appointments**

There is almost universal dissatisfaction with the current judicial appointment process in Malawi. The question is whether all appointments are political, or their perceived politicization is a result of the specific judge in question.<sup>114</sup> A second critique is that appointments are well known before they even officially arrive at the JSC. A third critique that contributes to politicization is the question of seniority being skipped in the appointment process.<sup>115</sup> Overall increased politicization of the judiciary over the last decade has heightened perceptions of a rigged and opaque appointments system.

Between 2006 and 2013 there were more judicial appointments in Malawi than the 20 years prior.<sup>116</sup> There have been some promotions to the Supreme Court of judges with a strong human rights record.<sup>117</sup> While increasing the size of the bench can be seen as an indication of strengthening judicial power, it can also be an opportunity for packing the court with sympathetic judges. Around the time of the Section 65 disputes, Mutharika reportedly intended to increase the size of the judiciary by adding thirty judges. Twenty-two would go to the High Court and eight to the Supreme Court. A source within the judiciary was quoted as saying that, “[W]e are surprised with the number and the fact that some procedures were not followed. It’s a worrisome development because we don’t know who they want to employ.” The informant also feared the government was trying to counter the “mercenary judges” President Mutharika had previously complained about.<sup>118</sup>

Below I include commentary from a range of interviewees both inside and outside the judiciary on the question of politicized appointments:

There are times when you find that there were qualified people but due to the political influence - considerations as to where one comes from - you find that the appointing authorities are bit hesitant to appoint well-qualified people. So they prefer to appoint people from their region or area in the hope when they are here they can handle their affairs with sympathy.

It was worse with Mutharika than with Muluzi. I can’t really say with the present government because it’s too soon. She has at least picked people at random. In the two appointments she made it’s been random. But at the time when I was being appointed [. . .] I was approached by some of the judges saying we’d like you to join us. My name had been on the table for some time. But because it would appear at that time the people who were recommended were only from some other region, I’m from the X region.<sup>119</sup>

[W]ith magistrates I don't see any problem but personally I see problems in how judges are appointed. Judges are appointed based on the political authority of the day [ . . . ] But what matters is the degree of participation in politics. As judicial officers we are not allowed to participate actively in politics [ . . . ] Now when they bring matters to court, it's like if I rule against them they would say, that one is not ours. When a judge rules in their favour, they would say he is ours. Yet maybe the judge is not a member of their party but they claim him. Judicial officers are human beings. We have friends. [It is] because they are appointed by the President. Of course the judicial commission service provides advice to the President but the one who appoints the judges is the president. These Presidents [ . . . ] will always go for a judge who has ruled in their favor or a judge who is flexible or available.<sup>120</sup>

More specific concerns regarding promotion procedures and seniority and drawing judges from private practice are discussed in separate sub-sections below.

### **b. Perceptions of Regionalism and Appointments**

“If people from one region are appointed on merit, I have no problems. But if they are appointed for the sake of making up numbers for particular regions, then I have problems.”<sup>121</sup>

Appointments in Malawi have a tendency to be politicized around region. As Kanyongolo reflects, for Malawians there is an “irresistible temptation” to rationalize particular judgments with reference to the judges’ regional identity.<sup>122</sup> While common perceptions are that particular judges from the North have displayed a strong anti-government record,<sup>123</sup> historically every effort has been made to balance appointments, at least in a numeric sense.

In 2013 the Supreme Court had four judges each from the north and south and three from the central region, whereas the High Court had six from the south, six from the North and three from the central region.<sup>124</sup> In 2008 there were nine judges from the North, ten judges from the Central Region, and eight judges from the South. In the Supreme Court: two from the South, three from the Central region and from the North. Thus, while the balance has been maintained at the Supreme Court level, there has been a notable shift at the High Court level. This gives credence to the argument that Mutharika, in particular (from the south) paid attention to region in his appointments. The over representation of judges from the north - relative to actual population distribution - is related to historical legacies. An executive member of the Malawi Law Society suggested the following:

[W]e know that in the past regime the president [Mutharika] would bypass the names recommended him. There was a lot of politics involved in the appointment of judges. It all had to do with whether you sing to his song or not. I know a judge, who openly said at a Law Society meeting, that he was a paid up member of the political party in power. The same year he was appointed a judge. The appointment was very questionable. I think a group of those appointed had those traits. Unfortunately, the people from the north at that time were not singing the government tune; they were more for the opposition. The mere fact that you are from that region you are perceived as being pro-opposition.

In 2003, President Muluzi approved the appointment of two High Court judges to the Supreme Court of Appeal.<sup>125</sup> Shortly after, the Civil Liberties Committee (CILIC) filed for an injunction to halt the swearing-in of the judges until

their appointments were reviewed by the Judicial Services Commission. CILIC stated that:

One of the applicants will swear in an affidavit in which he is saying that he was told by a member of the Judicial Service Commission that he would not be appointed because he comes from the Northern region [ . . . ] At least in the past the Law Society was consulted, but not in the instant case. This is a blatant lack of transparency.<sup>126</sup>

Not all individuals give credence to the regionalism argument. One senior member of the judiciary argued that the emphasis on region is perhaps misplaced: “In the end, proportionally they [Judges from the North] are having a larger share [ . . . ] I don’t think there is a deliberate policy.”<sup>127</sup> Issues of regionalism in the judiciary are an outgrowth of Malawi’s historical experiences, particularly during the Banda era. As one respondent explained:

Muluzi, according to me, politicized the judiciary. Kamuzu, during the one party era [ . . . ] They didn’t care where you came from, they would pick you to government and promote you. But one has to understand the history. [M]ost of the lawyers from the North their only source of employment was government [ . . . ] I would say 90% [of government lawyers]. I am not exaggerating. When I was joining the judiciary, all of the senior magistrates were from the North! So when it came to judges they also saw that there were so many judges from the north in the Supreme Court and also the high court so in the appointments of 2000 that’s when the problem started because they picked junior people to become judges.<sup>128</sup>

It is a curious situation that there is strong attention applied to the regionalism of judges, yet there are no strong patterns of bias in terms of decision making.<sup>129</sup> One explanation is that the judges are so acutely aware of the expectations of the public and the President they are at pains to avoid giving the impression of any kind of bias. Again, perception shapes reality in terms of judicial independence. Little can be done to address the specific dynamics around regionalism, this is the political reality in Malawi. Instead, attention should be paid to strengthening general appointment mechanisms and transparency.

### **c. Promotion Procedures and Seniority**

The Constitution does not state the basis upon which the President may promote judicial officers. Given the small pool of qualified individuals in Malawi, the trend appears to be, as long as one doesn’t antagonize the government or one’s peers, then advancement within the judicial hierarchy is close to guaranteed. It is very much a career judiciary where one starts at the bottom –the magistracy – works their way up through the judicial hierarchy. Current senior members of the court are clearly dissatisfied, as reflected in these comments from a senior member of the judiciary: “[i]t is the President that appoints them and then it goes to the parliament. He can choose anybody that he wants. We don’t seem to have some rules. At that level it might be politicized.” At least internally, there appears to be a connection between following seniority and legitimacy in the eyes of the judges:

But I know other people are consulted and told “can you apply?” For me seniority shouldn’t matter. It should be one of the factors that should be considered but it shouldn’t be the factor. Because one will be senior and because he knows there is no competition that comes, he becomes reckless. Should we really appoint this individual to the next stage? I don’t think so.<sup>130</sup>

The question of external appointments versus internal promotion is considered in further detail in the section below.

#### **d. Recruitment from Private Practice vs. Career Judges**

Appointments under Mutharika, particularly those from private practice were subject to increased scrutiny and critique.<sup>131</sup> Once again, the lack of transparency and the improper constituting of the Judicial Service Commission highlighted the political nature of the appointments process. Historically Malawi has drawn judges from within the internal institutional hierarchy. There are a number of reasons for this, but perhaps most prominent among them is the poor salary and working conditions of judges versus successful, prominent private practitioners.

The judiciary since I've joined has been a career judiciary where you expect someone who has worked in the system to be better. People [outside] were never interested [. . .]because of remuneration. Since the new constitution they found it interesting. But this has also to do with transparency [. . .][I]n the past they wouldn't advertise the position of judge. Some people didn't know that there was a vacancy. It was head hunting. Where the Chief Justice would say, let me go approach so and so. So if the CJ was interested in a particular individual, he would only say so to that individual.<sup>132</sup>

The recent appointment of Maxon Mbendera caused controversy both within and outside the judiciary. It was public knowledge that the judges themselves were dismayed at the way in which sitting Judge Frank Kapanda had been bypassed for promotion. Although Kapanda had a long history on the bench, his legal career was a little shorter than Mbendera's. Mbendera had a long and storied career in private practice; he was admitted to the bar in 1981.<sup>133</sup> Given Malawi's historically strong adherence to internal appointments based on seniority, this was controversial. Malawi, in this sense lags behind other SADC and East African countries where there has been an undeniable trend of appointing more and more judges from private practice. Kenya, for example, appointed more than 20 judges from the private sector, or with significant private practice experience between 2011 and 2012.<sup>134</sup> The question thus becomes, how does the JSC handle this increased complexity in appointments in Malawi?

I am sure that a lawyer from private practice is equally competent and brings to the bench enormous experience from the bar. I myself am on the conservative side when it comes to filling the judicial vacancies. The trend so far is to recruit people who are much younger than how we used to do in the past. Not that I'm against it but that is now reflected in what you are seeing now where judgments are being delayed for a long time and the explanation is not what most people think: that they are not working hard. They are probably working their lungs out. The difficulty is that they haven't reached the level of experience and the knowledge of their law by their few years of their leave.<sup>135</sup>

Mbendera would later be appointed to the office of Attorney General. This followed the appointment of former High Court judge Jane Ansah. Danwood Chirwa, Professor of Law at the University of Cape Town, recently wrote a scathing newspaper editorial on this issue:

Appointing a judge to serve as the top-most advisor of the executive undermines the independence and integrity of the judge concerned as well as violating the principle of separation of powers [. . .] [As Attorney General] Both Ansah and Mbendera were involved or acquiesced in decisions that were undemocratic and

unconstitutional. These included the introduction of draconian laws that sought to whittle down the powers of the courts to grant injunctions [ . . . ] The practice of dangling the carrot of attractive executive appointments to judges was coupled with promises of direct incentives of career advancement. The position of Mbendera is particularly curious as he is currently the chairperson of the Malawi Electoral Commission.<sup>136</sup>

Again, the question of temporary appointments outside of the judiciary while judges also maintain a seat on the bench has the potential to be a troubling conflict of interest. The former Chair of the Malawi Electoral Commission<sup>137</sup> for example, resigned under a veil of controversy after the 2004 election. As this interviewee notes:

It would be better to appoint the chairperson of the electoral commission, a retired judge. Who has nothing to do with cases. Those are some issues where we are saying this constitution I think is affecting the judiciary. There are so many judges who are working part time. Working in these constitutional bodies. Like Judge Kalaile who when he ran the 2004 elections, he had no a vote of confidence. And this is a Supreme Court judge and people were making fun of him [ . . . ] they removed him back to the Supreme Court. How can people have confidence in you when people are calling him names [ . . . ] This judge has no justice in him, he has mismanaged the elections and we don't know what type of justice he delivers on the court and the president saw that the judge was under pressure, he removed him and brought back Msosa.<sup>138</sup>

Given the increasingly large pool of legal personnel in Malawi, the need for multiple concurrent appointments appears to have significantly diminished. To avoid the appearance of politicized judges it should be avoided.

#### **e. Flaws in the Judicial Services Commission**

Universal dissatisfaction with the lack of transparency in the Judicial Service Commission represents a major threat to judicial independence in Malawi. The key perceptions of interviewees are that informal connections and conversations trump the formal mechanisms of the appointment body.

I was a member and what used to happen – I might be wrong [ . . . ] whenever there was a vacancy at that time, the Chief Justice would consult the senior members of the judiciary [ . . . ] But I wouldn't say that somebody picked up the phone and called because in the commission the job is done by the secretary. So for us, especially the members, maybe the Chief Justice he was the one who consulted. I was just a member.<sup>139</sup>

The power of the Chief Justice has, in the past, been portrayed as overt executive influence in the appointment process (given that her appointment is exclusively through the Executive). As interviewees expressed concern about the lack of transparency, the author followed with more specific questions about whether the Commission should increase in size and who should be included?

It has to be bigger. I think the major issue may be around the leadership. The JSC really see that their judiciary is the chief justice so it's up to the vision of the chief justice. What does she want? The constitution gives guidelines on who should be members, it should be the registrar, that it should be judges of high court but it can be said that one time they are just hanging onto each other when some members should have moved on and been replaced. But some of these things, you just decide to disregard it. That's why I think it's sometimes an issue of leadership.<sup>140</sup>

I was a member of the Judicial Service Commission... and prior to that, those who were being appointed were not applying. Of course now, if you don't apply they can still appoint you especially judges in the system. So in 199x I argued because they had appointed members from the outside, then our Chief Justice was Richard Banda. I was a member and I argued with him. I felt disappointed because here I am toiling looking that one day I will get that position and all of a sudden one day someone from outside comes and says here I am. That's when we started that they would advertise and let members apply.<sup>141</sup>

The second major area of emphasis was to follow through on reforms around advertising and interviewing positions. While most people supported the careful expansion of the Commission, not everyone was comfortable with the formal interview process and thought that individuals' track records should be adequate:

When the system was being changed from purely private consultations to an open one, now I have no idea how open it is because I'm no longer in that administration. But at that time those who wished to be considered for the appointment, when the vacancies were due, they would put up their names to the judicial services commission with their CV's and all those legal bodies would be consulted. So it would not be a private consultation [ . . . ] Well how far it's being done, I can't say. But that was the idea. That we don't need a huge body because then the law society and traditionally most of the senior counsel would be approached and asked 'do you think so-so could serve the country by being on the higher bench'? Interviews would be helpful but I think consultations too if they could be formalized. Consultations are important because interviews are just one part.<sup>142</sup>

Reform of the composition of the Judicial Service Commission would require a constitutional amendment and this is highly unlikely in the near future. The Law Society - 'a legal practitioner' - does have a seat on the Judicial Service Commission. But in the past that position has either not been filled,<sup>143</sup> or the individual appointed by the society is not effectively communicating back to the MLS. This specific position, therefore, could be better elucidated, if not in the constitution, then through the practices of the MLS themselves.

The 2007 Malawi Constitutional Review Commission<sup>144</sup> considered the make-up and powers of the JSC at length. Three major issues were discussed in their report:

1. **Representation** – The Commission noted an over-representation of the judiciary on the JSC. Concluding that “the mandate of the Judicial Service Commission under section 118 makes it prone to the satisfaction of the collective interest of the Judiciary above any other interest [and] that the current membership of the Judicial Service Commission creates a lingering perception that judicial self-interest is likely to take centre stage at the Commission.” To ameliorate this perceived problem the Commission recommended increasing membership from five to six and including nomination of a sixth non-lawyer member designated by the President in consultation with the Chief Justice.
2. **Role of the Chief Justice** – The Commission observed that under the current membership, there may be a perception that other members, on account of seniority within the judicial ranks, may find it difficult to disagree with the Chief Justice who is also the Chairperson. The Commission considered that, for the same reason, the legal practitioner may be reluctant to antagonize the Chief Justice. Having considered other pos-

sibilities, such as a retired judge or the chairperson of the Public Service Commission, they concluded that the Chief Justice should remain as the leader given the nature of the business of the JSC.

3. **Tenure for members of JSC** –observed that members should have security of tenure. In Uganda, for example, members serve for four years. The Commission put forth a proposed constitutional amendment in line with the Uganda case.

Finally, the Commission recommended a totally new section that included language stating that the JSC be “completely independent of the interference or direction of any person or authority.” In short, while the Constitutional Review Commission clearly identified a number of problems inherent in the JSC, their recommendations for reform were weak and insipid. In addition, their conclusions regarding the over-representation of judicial figures on the JSC goes against the current recommendations of the Commonwealth Magistrates and Judges Association who suggest the opposite.<sup>145</sup>

#### **iv. Comprehensive Ethics Code and Fair Removal Process**

Under Section 119 (2) of the Constitution judges may be removed for ‘misbehavior’ or ‘incompetence’. After a motion has been debated in the national assembly and a majority vote obtained, the President has broad powers to bring to decide the ultimate fate of judges. He must only ‘consult’ the Judicial Service Commission.

The President may by an instrument under the Public Seal and in consultation with the Judicial Service Commission remove from office any Judge where a motion praying for his or her removal on the ground of incompetence in the performance of the duties of his or her office or misbehaviour has been—

- (a) debated in the National Assembly;
- (b) passed by a majority of the votes of all the members of the Assembly; and
- (c) submitted to the President as a petition for the removal of the judge concerned:

Further, the President has the power to suspend the judge under investigation, pending the conclusion of the disciplinary proceedings. The President also has the power to reassign a judge to a different posting. Subjecting judicial conduct to debate within the National Assembly could be argued to be positive in terms of transparency (rather than simply allowing the President absolute powers of dismissal). But yet, it renders judges vulnerable to a highly politicized process that could be hijacked by one or more political parties. The impeachment proceedings of 2003 attest to this potential for politicization.

Malawi has a code of conduct for judicial officers, but it is not statutory. According to Kanyongolo, there has long been a need to develop a statutory code of conduct. Under the current code there is a wide range of issues for which judicial officers can be disciplined.<sup>146</sup> However, judges will only be subject to referral to the JSC in extreme cases. In 2011 a task force was set up to work on a code of conduct for judges.<sup>147</sup> Despite the 2001 impeachment crisis there are not clear impeachment/gross misconduct guidelines in the current code of conduct.<sup>148</sup>

#### **v. Effective Institutional Leadership**

Institutional leadership is a critical factor in establishing judicial independence. There are two facets of judicial independence at stake: external and internal. Internally the Chief Justice holds manifold important roles in the day-

to-day running of the court, for example oversight of case allocation, discipline and oversight of individual judges. A second internal facet of leadership relates to the creation and establishment of a positive institutional culture; particularly a sense of collegiality within the court. This is critical for the establishment of a strong institution. As former Swaziland judge Justice Masuku recently noted, “At the horizontal level, it is imperative that we refrain from uttering disparaging personal sarcastic remarks, criticisms or demeaning statements about our colleagues on the Bench [ . . . ] We are not called to like and glorify our colleagues on the Bench but we owe them respect, courtesy and civility in all our dealings with them, publicly or even privately.”<sup>149</sup> The leadership of the court serves dual-functions of legal administrative leadership and social cohesive leadership. An executive member of the Malawi Law Society suggested that the internal disciplining structure of the judiciary had declined in recent years, and opined on the strengths of former Chief Justice Banda:

The other Chief Justice [ . . . ] was able to control because they were afraid of him as a person. Towards the very end, when he knew he was going, he started to compromise. The new Chief Justice is good, but he is not as tough, he is soft spoken, such that [ . . . ] you hear some Judges they’ll say [ . . . ] nothing is going to happen to me, I can’t get fired.

Former Chief Justice Banda was viewed by many to be heavily partial towards the Muluzi government.<sup>150</sup> Presumably, this “most preferred” status with the President translated into considerable authority within the judiciary itself. After retirement, Chief Justice Banda briefly entered private practice, representing clients in cases before his former colleagues. In 2007, Banda was appointed Chief Justice of Swaziland by the Commonwealth.

In regards to the external function of the Chief Justice, there are a number of important functions to be fulfilled. Some of these functions are very public – serving as the de facto spokesperson of the judiciary<sup>151</sup> for example - other roles relate to behind the scenes negotiation of budgets or perhaps even resistance of political interference. It is in regards to these external functions that the tenure of form Chief Justice Lovemore Munlo has been seriously critiqued. His openly political preferences were highly problematic in the eyes of many during a time of increased politicization and hostility towards the judiciary. It was publicly known that the Chief Justice and President were friends; that they were from the same ethnic group; that the President attended the funeral of the mother of the Chief Justice; and that the Chief Justice would greet the President at the airport when returning from international trips.<sup>152</sup> Others have claimed that he was meeting with political party operatives in the middle of the night.<sup>153</sup> These political leanings finally came to fruition this year, when Munlo left the judiciary and openly declared his intent to bid for the MCP candidacy for the President of Malawi in 2014.<sup>154</sup>

#### **a. Former Chief Justice Munlo**

As one respondent noted it is the position of Chief Justice that is truly politicized, rather than the judges themselves. This issue became particularly stark with the appointment of Munlo:

[T]here’s been issues of judges who have tried to show some bias but they haven’t succeeded; [and] that’s why each government has had problems with the judiciary. That’s why I give some credit to our judiciary. Each government that has come they have had nightmares with the judiciary. They have not found a soft spot. Because the CJ has become closer to the executive and they are very uncomfortable with the judges because

the judges do what they think is right. So Justice Munlo when he came, Bingu thought he had appointed his home boy who will influence the judges but he failed. He tried some things but he discovered that this judiciary will not deal with nonsense and he was afraid that they wanted to expose him.<sup>155</sup>

In August 2007, the President selected a Chief Justice from outside the domestic judiciary. Lovemore Munlo was previously Registrar of the United Nations Special Court for Sierra Leone. At only 57 years of age he was far younger than the other sitting justices of the Supreme Court. Munlo, who has also served as Registrar of the UN Criminal Tribunal for Rwanda, rose through the ranks in the Malawian Ministry of Justice before Banda appointed him Attorney General in the early 1990s. It is not unusual for top judges to have had high-profile political or international appointments. During his tenure as Chief Justice, Munlo has not engendered the loyalty and support of his judiciary. There are accusations that he failed to certify cases as constitutional in matters that were clearly constitutional in nature.<sup>156</sup> Former President Joyce Banda alleged that the Chief Justice acted with obduracy in the face of political uncertainty surrounding the death of President Mutharika. With the Army standing behind Banda's ascent to power, Munlo was allegedly positioned at the home of the former president's brother. Ministers and MPs bowed to the inevitable and rallied around Banda. But she could not be sworn in without the Chief Justice, a Mutharika loyalist, who protested that he did not have his robes and wig. A car was sent to fetch them.<sup>157</sup>

Munlo was under heavy scrutiny during the Singini Commission<sup>158</sup> investigation for his role in the transition of power after Mutharika's death.<sup>159</sup> Despite several witnesses testifying that he was present at Peter Mutharika's residence on multiple occasions, when testifying before the commission Munlo categorically stated that "[t]he allegations that he had resisted the swearing in of the Vice President were all but lies."<sup>160</sup> While Munlo didn't resist the swearing in of Vice President Banda, as Chirwa suggests:

Munlo failed to rise to the demands of his office by failing to acknowledge the rightful heir to the office of the President [. . .] In his defense to the Singini Commission, Munlo argued that he could not acknowledge Mrs Banda as the rightful heir because he was aware of an impending court action to challenge her claim to the office. He thought that this meant he was acting neutrally.<sup>161</sup>

Instead it was the Minister of Justice and the Attorney General who slowed down the rush to court to seek an injunction against the swearing in of Banda and who ultimately decided to abandon it altogether. Mbendera threatened to resign if they proceeded with the court case. Munlo's subsequent political maneuvers far from exonerate his role in blocking the constitutional handover of power. As this respondent below highlights, Munlo's reign as Chief Justice was controversial from start to finish:

Munlo as chief justice - the way he came in was same as the way he went out. His coming in was not welcomed by the judiciary. Especially the Supreme Court because they thought he was like an outsider although he is a lawyer. So he was rejected by the parliament twice. They couldn't confirm him until there was a walkout by the opposition and they confirmed him quickly when the opposition walked out of the parliament. It was endorsed by the court because it was the court case that challenged his appointment...I think he brought even more controversy to the judiciary in the sense that from what I gathered he was divisive as leader. That's what I gathered but if you interview the judges you would know - He was judge in charge and he was divisive

in the sense not even a single day would he organize judges to a meeting. He lacked management skills. How to manage your colleagues. He had ideas, good ideas he brought from overseas. But he was not a manager of people.<sup>162</sup>

Whereas comparatively Chief Justice Unyolo, also a ‘career judge’, was less assertive. Positive aspects of Munlo’s tenure included paying greater attention to the judicial budget. Perhaps, as Respondent A reflects, this was as a result of his experience in the International Criminal Tribunal for Rwanda (ICTR) and Sierra Leone tribunals.

The office of Chief Justice is critical across a number of dimensions. While it is clear that the current Chief Justice comes with far less controversy or political baggage, her term is very short – due to retirement age - and it is unclear whether she will be able to pursue an agenda of ambitious reform in her short time in office.

Malawi’s current leadership structure does not allow for a Principal judge or a Deputy Chief Justice. The use of both these offices are common across eastern and southern Africa. As the work of the judiciary expands; so too does the administrative demands. In Uganda the Principal Judge becomes the administrative head of the High Court and the Deputy Chief Justice becomes the head of the Constitutional Court. The current system of Judge-in-Charge is not constitutionally recognized. Appointment criteria are as opaque as are the duties. It appears that the position is subject to multiple interpretations depending on the individual appointed.

The Malawi Judges and Magistrates Association (MAJAM) this body has been largely dormant since 2002/3.<sup>163</sup> One interviewee seemed to attribute the activism of this body to the leadership of the Chief Justice. Under former Chief Justice Banda the organization was quite active, but subsequent Chief Justices have not taken an interest in revitalizing the body.

Actually the former Chief Justice Richard Banda, [...] was very influential and he was even encouraging us to register as magistrates under the association. And at one time he was the President for Commonwealth Judges and Magistrates Association. So he was making sure that the MAJAM should be always active and alive. But from his retirement from the judiciary – I’m not saying that other chiefs justices have been bad - has seen MAJAM dying [...] a natural death.<sup>164</sup>

Funding for the body is a critical piece of the puzzle here. Membership dues currently stand at less than \$1 per month. With leadership it may be possible to formulate more ambitious programming within MAJAM that could be funded by donors. Moreover, in light of the continuing difficulties experienced due to budget shortfalls, it would seem logical that the judiciary could speak with one voice through this organization.

## D Transparency

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“What is interesting is that I always said that Malawi is the most independent [in the region] but we are not infallible. We make mistakes but we are independent. So if it’s just a mistake everybody knows that it’s just a mistake but we are so jealous of [guarding] our powers [...] generally most of our judges and Supreme Court judges anyone of

us could be suggested that we are being corrupt if it means in the criminal sense. But if it means just that we hold different political views or political opinions on any legal issue [ . . . ] those traits are in the community itself and when we become judges we are not any different. So we reflect that.” (Author interview, Respondent F, Blantyre Malawi, July 2013)

### **Key Findings:**

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- Public access to proceedings and judgments
- Continue cooperation with Malawi Legal Information Institute and Malawi Law Society and Judiciary
- Conduct training with Malawi Media for more effective and accurate judicial reporting

Opaque court processes prevent civil society, the media and, indeed the general public from monitoring the courts. If accountability mechanisms are unable to function then judicial independence is severely weakened. “Civil society needs greater access to information [ . . . ] We’ve treated the judiciary as a sacred cow, we need to demystify the judiciary [ . . . ] we are afraid of judicial contempt [ . . . ] we need close liaison with the Malawi Law Society.”<sup>165</sup>

#### **i. Public Access to Proceedings, Reporting of Judgments, Access to Judgments/Trial Records**

Public access to proceedings is provided for by the Constitution as an aspect of the right to fair criminal trial [s.42]. The Courts Act similarly requires that all judicial proceedings must be in open court [s.60].

While efforts to move materials online through the Malawi Legal Information Institute (MalawiLii) project are noteworthy, regular and reliable access to the internet continues to be a problem both inside and outside the courtroom. Currently some cases are accessible via the Malawi judiciary website and the MalawiLii project website.<sup>166</sup>

There is a Law Reporting Bill (2012) pending before Parliament. The “Malawi Council for Law Reporting Act” will establish a statutory council that will prepare and publish Law reports for Malawi.<sup>167</sup> The proposed make-up of the Council appears to be a light in terms of the representation of Judges (Chief Justice, Attorney General, Justice of Appeal nominated by the CJ, Judge of the High Court nominated by the CJ, a legal practitioner nominated by the MLS, Dean of the Faculty of Law at the University of Malawi or his designated representation, Law Commission and the Editor). Moreover, exclusively the Chief Justice appoints judges, a more transparent approach may be to empower the Malawi Judges and Magistrates Association (MAJAM) to elect multiple members to the Council. Selection of cases for law reports is a political process and should be recognized as such when filling the seats of the law reporting Council.

Independent and impartial reporting of cases is critical to the establishment of an autochthonous jurisprudence and, in turn, judicial independence. Law reports have not been published since 2004. These reports are an important means of highlighting and broadcasting the courts work to the public. Important cases should be available to those both within and outside the legal community.

## E External Institutional Support

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“There is a low level of understanding of the role and importance of the Judiciary within Malawi’s democratic system and the Judiciary needs to do more to engage with the public to increase their understanding and its reputation” (Malawi Judiciary Strategic Plan 2011-2016, p.20)

### **Key Findings:**

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#### **Vibrant Civil Society Support –**

- Provide media with more access to information to promoting fair coverage of trials
- Train journalists in legal reporting
- Strengthen horizontal partnerships with the MLS

#### **Strong Regional/International Professional Connections –**

- Strengthen the Malawi Judges and Magistrates Association. Increase member dues.

#### **Non-threatening Political Environment –**

- Political and judicial leadership should become more active in responding to individual anti-judge and institutional level anti-court rhetoric.
- Public dialogue re: politicization of court should be directed by judges and other key legal sector actors

In transitioning states, weakly institutionalized judiciaries tend to be more reliant on support from key allies than their counterparts in established liberal democracies. Legitimate public criticism is a way of ensuring judicial accountability and protecting judicial independence. Outlined below are key areas of external institutional support for judicial independence in Malawi:

### **i. Vibrant Civil Society Support**

#### **a. Malawi Law Society**

It is common for lawyers and judges to be working within a framework of mutual distrust entangled with a reciprocal dependency. Across sub-Saharan Africa the relationship between the bar and the bench is constantly strained by a number of competing tensions; the case of Malawi is no exception. Functional relationships can and do exist, but they hinge on strong and positive relationships between the leadership of the judiciary and the bar. Since its establishment in 1965, the Malawi Law Society has always been an active political player.<sup>168</sup>

The Malawi Law Society (MLS) is established as a body corporate by the Legal Education and Legal Practitioners

Act of 1965.<sup>169</sup> During the Banda years the MLS had very little role to play beyond the perfunctory supervision of the few private practicing attorneys. One lawyer recollected that, “During the Banda years we would meet, but not criticize.”<sup>170</sup> The size of the Malawian bar has grown significantly since the early years of post-independence. As of 2006 there were about 300 lawyers practicing. In a population of about 14 million this is about 1 lawyer for every 46,000 people. Thus membership of the MLS is quite small in comparison to countries such as Uganda and Kenya – where membership runs into the thousands. Reaching critical mass is certainly a significant factor in mobilization of lawyers.

The MLS came into its own during the transition period by agitating for political pluralism. One interviewee went so far as to claim that in 1993 and 1994 “all of the opposition was in the law society.”<sup>171</sup> One prominent attorney, Maxon Mbendera,<sup>172</sup> wrote a weekly column on legal issues in the Nation newspaper. Its goal was to educate the public on important legal issues. Members of the MLS would represent political prisoners, –which at the time – as one interviewee noted – took a lot of courage.<sup>173</sup> Lawyers used the courts to create space for opposition. The MLS was also a critical part of the writing and promulgation of a new multiparty constitution. They helped set up a board to write the constitution. One source argued, “[A]t that time we needed a Society bordering on being political advocates. The goal was more than just politics, we were changing the constitution, and the society had to take the lead. The circumstances justified the role the MLS assumed.”<sup>174</sup>

Throughout the 1990s the law society was quiet. As one interviewee noted, their man was in power and they had ‘won!’ There were a few points at which certain members felt that, “we thought the leadership had come too close to the UDF [ . . . ] Government were doing things we thought were wrong; but [MLS] statements were not really addressing the problems.”<sup>175</sup> But as Muluzi took an increasingly authoritarian turn and the economy not only failed to grow but also was showing signs of moving backwards, the MLS increasingly coalesced into an opposition. In the words of one former MLS executive member: “The government tried cozying up. One time [they] offered to give us Pajeros [four-wheel drive vehicles]. As a statutory corporation we were entitled to a subvention, but we didn’t want it.”<sup>176</sup> Another account of this period noted that the MLS did receive some money towards their operating budget – around the time of Muluzi’s third term bid and the judicial impeachment scandals. According to one source at an important meeting Peter Fachi (then Attorney General) reportedly accused the MLS of “being ungrateful; despite the fact money had been made available.”<sup>177</sup>

While the Society has succeeded in acquiring permanent headquarters and an Executive Secretary/CEO, there are still significant problems in collecting dues and pro bono time from lawyers. The lack of capacity thus hinders the ability of the MLS to conduct outreach, education and to file amicus briefs or test cases in the courts.<sup>178</sup>

The period between 2001-2003 was a time of heightened politicization for the Society. Depending on their political position, some interviewees saw this as either a strong point in MLS history or a time of politicization, weakness and delegitimation. After 2003 the society continued to speak out on behalf of the judiciary, attempting to protect the independence of the judiciary. Since 2001 the relationship has strengthened.<sup>179</sup> Indeed, at one point the MLS intervened on behalf of the judges filing a case on the basis of the government’s failure to implement salary increases.<sup>180</sup> At the same time the MLS has been critical on a number of appointments to the judiciary over concerns about

transparency and the apparent politicization of the process.<sup>181</sup> Although the MLS has a seat on the Judicial Service Commission they have not taken it in years. This speaks to organizational and capacity challenges.

The politicized former Chief Justice Munlo was cause for major concern and some individuals have expressed consternation that the MLS was not more vocal in critiquing the Chief Justice's behavioral missteps.<sup>182</sup>

One interviewee, when asked "What are the biggest threats to judicial independence?" responded:

Contrary to what people think, it's not always the executive. It can even be the public or even the lawyers. Do not vilify a judge personally for his decision. Challenge him. But investigate first. With a clean mind. In my view, the greatest threat to the judiciary still remains the executive but the case of the feud between the president and the former chief justice highlighted that even the law society doesn't always get it right. Which means we have a bigger problem on our hands than just executive interference.

I believe the public still doesn't understand what judicial independence means. In my view the public only understands you if you make a decision in the favor of a person that they like. The executive does the same thing and even the law society showed that trait. People think judicial independence is standing up for the person they want the judiciary to stand up for. It's as if – yes, the judiciary must stand up for the people who want them to stand up for, the ones we don't...

I don't expect much from the politicians. When the law society was standing for the judges, we had a bit of chance of taming the politicians. There was a time when the law society were the 'voice of the voiceless.' When they are speaking everybody stopped to listen. They used to have more authority. The politicians will get there but if the law society were to be as they had used to be, we would tame the politicians. Because the judges will make a decision that we don't like. They will make mistakes. I may hate what the judge has done but we must be able to distinguish between a corrupt judge and a professional judge who has made a professional error. I don't think those distinctions are made currently and that is what is affecting the independence of the judges.<sup>183</sup>

The MLS has a potentially powerful role to play in terms of guiding public debate on key rule of law issues and as both a critic and supporter of the judiciary. Yet, the challenges of maintaining neutrality are immense.

## **b. Media**

In Malawi journalists are generally free to cover the courts, but the quality of reporting is often poor. The use of the media by judges can be an effective strategy whereby the advance leaking of decisions can be a strategy to preempt government interference. Or judges may leak decisions to gauge government reaction in advance. The mass media appears to be more interested in publishing accounts of scandalous judicial behavior, public and private, rather than providing judges with an open platform through which they can defend themselves.<sup>184</sup>

On balance, the media has played an important role in shining a flashlight into the inner-workings of the Malawian judiciary. Important cases are followed closely and there is strong coverage of issues such as the under funding of the judiciary. All this is important in strengthening judicial independence in Malawi. That said, the media has also

played a significant role in politicizing the judiciary. Personnel disputes are sensationalized and play out like soap opera stories on a regular basis. This undermines the legitimacy, the perceived independence and the authority of the Malawi judiciary as an institution.

The Media Institute of Southern Africa (MISA) -Malawi has always argued that only dialogue between government and the media would provide a more enabling environment for media freedom, freedom of expression and ultimately citizen empowerment. That dialogue can only be facilitated through the receptivity of the judiciary themselves. Reporters always understand the limitations of judges commenting on cases pending. Judges don't always understand that they need to demystify the law and the processes of justice, which can be complex and muddled through jargon-type language. As one member of civil society noted when discussing the openness of judges, "[t]here are generational issues in terms of formality and protocol. There needs to be increased engagement, but the fear is that their own function is very sensitive [. . . ] They fear to compromise their independence."<sup>185</sup>

### c. NGOs

There are two important roles for NGO's to play with regard to supporting judicial independence. The first indirect support mechanism is education. Critical human rights and civic education organizations play an important role in educating the public on the principles of democracy, good governance and human rights and to inform and empower marginalized Malawians with regard to justice and development.

The second, more direct support mechanism includes the filing of important public interest litigation test cases. For example, the Civil Liberties Commission (CILIC) filed a number of important cases related to the impeachment scandal, attempts to amend the constitution to allow Muluzi to run for a second term amongst others. Also see, for example, Registered Trustees of the Public Affairs Committee v. Speaker of the National Assembly (PAC) (2005). NGOs can play an important accountability role due to their expertise and knowledge related to rule of law and justice. In regards to speeding up the filing of important public interest litigation, there could be scope here for coordination and partnership with the MLS. Coordination across organizations and sectors continues to hinder the work of NGO's in Malawi.<sup>186</sup> The MLS is an important member of civil society and as such should be a leader in regards to supporting the rule of law and constantly monitoring Malawi's democratic development.

Finally, it should be noted that there exists a degree of hostility and distrust between civil society groups and the judiciary. At a conference of the Southern Africa Chief Justices Forum it was resolved that "The NGOs, the Civil Society and the citizens of member Countries should be sensitized on the need to accept the independence of the Judiciary."<sup>187</sup> Facilitating dialogue between NGO's and the courts could be a way to improve understanding and dialogue. Due to the current political environment in Malawi many informants in the civil society sector expressed an across the board distrust of the government writ large. This unfortunately included the judiciary. There was a universal belief that the judiciary is enmeshed in networks of corruption and that the lack of transparency, particularly as related to the appointments process, was serving to hide high levels of malfeasance and corruption. When pushed to give specific examples, there were few, but perceptions are highly negative.<sup>188</sup>

## **ii. Strong Regional/International Professional Connections**

Beyond professional development, here are a number of important reasons why active membership in regional and international judges associations is important for judicial independence. These organizations can act as an important source of external support in the face of interference.

Budgetary constraints in Malawi have limited access to further education and to travel to international conferences. Despite this several prominent Malawians have taken leadership roles in international legal bodies – former Chief Justice Richard Banda was President of Commonwealth Magistrates’ and Judges’ Association for example. Several interviewees expressed concern over limited access to travel funds and continuing legal education.

Again, leadership of the Chief Justice on this matter appears to be a critical factor. First, funds need to be secured for travel to and membership of professional associations. Second, transparent and fair means of selection for travel to these meetings needs to be ensured. Priorities in terms of travel, workshops and specific areas of continuing professional education should be determined through discourse and consensus building within the judiciary.

## **iii. Non-Threatening Political Environment**

The relationship between Malawian politics and judicial independence over the last twenty years is discussed extensively in the opening section of this report. It would be redundant to review these issues again here. However, while the judiciary has little control over the shape and direction of Malawian politics there are two major areas that should perhaps be further considered:

1. Political and judicial leadership should become more active in responding to individual anti-judge and institutional level anti-court rhetoric.
2. Public dialogue concerning politicization of court should be directed by judges and other key legal sector actors

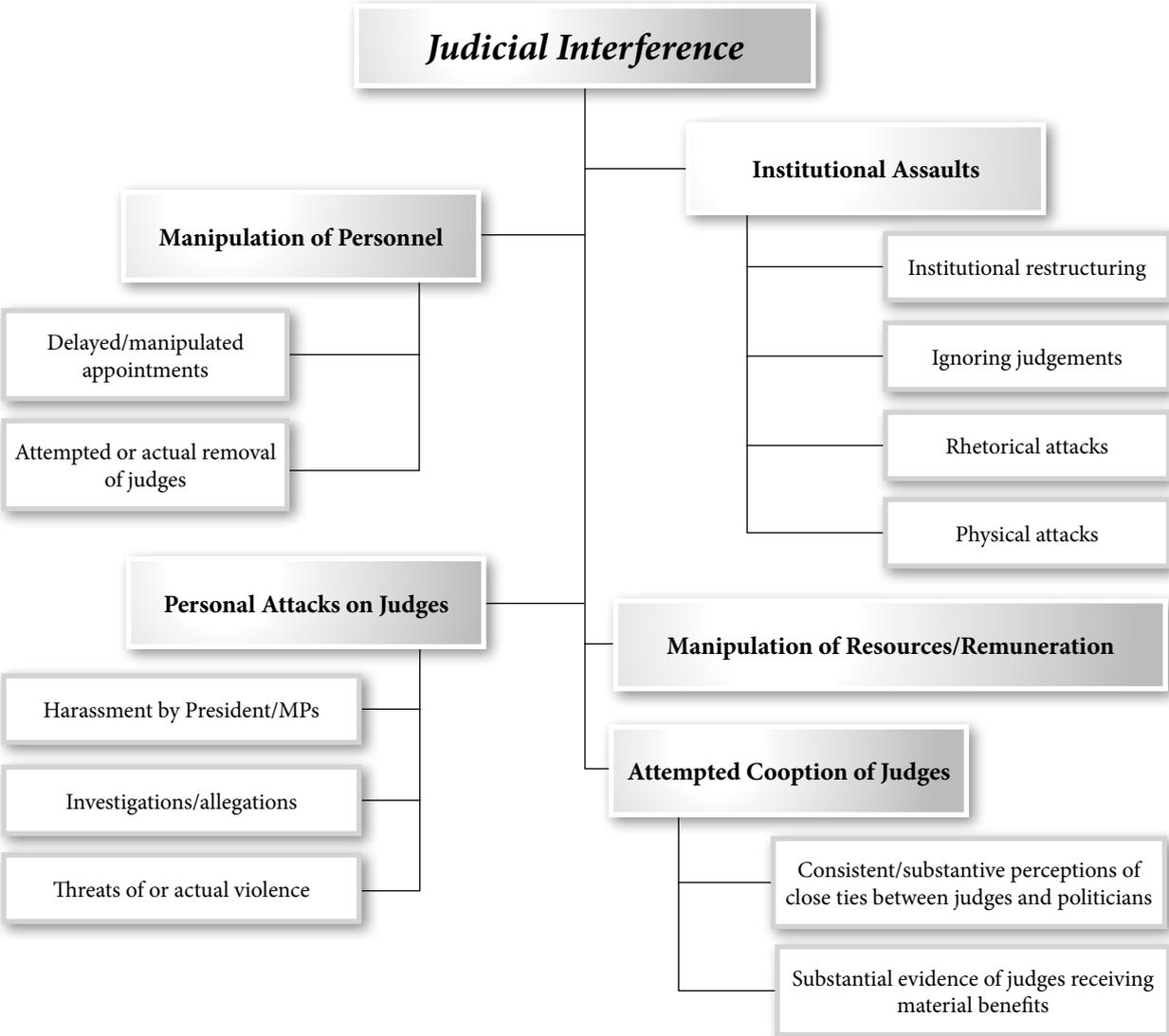
In short, the careful and strategic management of political and public hostility towards the judiciary, while not entirely ameliorative, could aid in protecting the institutional legitimacy of the judiciary. The judiciary should not shy away from public dialogue and should be open and transparent when addressing highly politicized cases or issues.

The volatile, unpredictable nature of Malawian politics is unlikely to change in the short-run. This author believes that the strategic use of off-bench outreach, as an offensive as well as defensive strategy, is essential for protecting judicial independence in the context of clientelist politics.<sup>189</sup>

# Part III: Analysis of Judicial Interference

Figure 2 below captures the variety of ways in which governments can engage in interference towards both individual judges and the institution as a whole. As will become evident when reading through the list and description of forms of interference in Malawi, they map quite clearly onto the major areas of concerns with regard to judicial independence. Significant points of weakness include the appointment process, the chronic under funding of the institution, the perception of close ties between judges and politicians – particularly in relation to the perceived political ties of the judicial leadership - and an apparent unwillingness on the part of the government to protect judges and the judiciary as a whole from rhetorical attack.

**Figure 2: Typology of Judicial Interference**



## A Manipulation of Personnel

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Manipulation of personnel was the most common form of interference cited in interviews. However, there was no direct or written evidence offered in support of this assertion. Most comments were speculative.

To accommodate the dramatic increase in case volume in Malawi, between 1992 and 2006 the High and Supreme Courts expanded from 9 to 28 Judges.<sup>190</sup> After assuming office, President Muluzi did not attempt to wipe out all of Banda's appointments, but instead started to expand the bench.<sup>191</sup>

It would require a longitudinal review of judgments for each individual judge, a mandate beyond the scope of this report, to ascertain any pattern of 'bias'. Manipulating judicial appointments is the most efficient form of interference available to a government. It is indirect and can potentially yield long-term benefits to those in power. Concerns around manipulation of appointments are discussed at length in the earlier discussion of appointment processes in this report.

Despite the universal dissatisfaction with the Judicial Services Commission and the current appointments procedure, no direct evidence of manipulation of appointments to the bench was uncovered. The weaknesses inherent in the current process and the structural problems associated with the Judicial Service Commission are addressed in earlier sections of the report.

## B Institutional Assaults

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### **Key Findings:**

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#### **Institutional attacks were most serious during Mutharika's second term and included:**

- Use of the Director of Public Prosecutions office for 'political witch-hunting'
- Attempts to prevent the courts from issuing injunctions against the government and a weak track record of adhering to judgments.
- Politicization of the office of the Chief Justice<sup>192</sup>
- Serious rhetorical attacks which directly undermined the central tenets of rule of law and judicial independence.

Under the Banda regime two judges have recused themselves from high-profile political cases citing interference and/or close connections to the defendants.

### **i. Office of the Director of Public Prosecutions (DPP)**

A number of individuals expressed concern about the lack of independence in the office of the DPP. That it is used for “political witch-hunting” which in turn raises questions about whether the office is following “another directive.”<sup>193</sup> One possible improvement would be for the DPP to make periodic reports to the legislature. Under s.99 Constitution-“(3) Subject to section 101 (2), the powers conferred on the Director of Public Prosecutions by subsection (2) (b) and (c) shall be vested in him or her to the exclusion of any other person or authority and whenever exercised, reasons for the exercise shall be provided to the Legal Affairs Committee of the National Assembly within ten days.”

According to one individual, “[the]DPP reports to the Attorney General, it should be a totally independent office. There is high turnover in this office, a sign that it is politicized.”<sup>194</sup> Other than instituting more stringent reporting procedures, appointments to this position need to be more transparent and accountable.

### **ii. Injunctions Bill**

Shortly before massive protests, the so-called “Injunctions Bill” was signed into law.<sup>195</sup> The context for the emergence of this bill was an increasingly vociferous opposition and general outcry in response to President Bingu wa Mutharika’s consolidation of power, continued control of key clients through patronage, consistent violation of the Constitution, and donor conditionalities.<sup>196</sup> The Bill effectively banned the judiciary from issuing injunctions against the government.<sup>197</sup> An editorial in *The Nation* reflects the widespread incredulity expressed across myriad sectors of Malawian society:

If Malawians needed any proof of dictatorial rule, this is it. President Bingu wa Mutharika has once again violated the very Republican Constitution he twice swore to defend and protect. With the stroke of a pen, the President has also undermined the Judiciary in ways that create a deficit of trust and an erosion of confidence in the country’s judicial system. It is scary. It also takes us more than 15 years backwards [ . . . ] We are particularly alarmed that the President can walk all over the courts and throw away the rule of law with such abandon [ . . . ] The arrogance of some government institutions such as the University of Malawi council and the Ministry of Finance, which have on separate occasions been ignoring court rulings and order, come at the behest of the President.<sup>198</sup>

The Bill was passed despite a court injunction obtained by a grouping of NGOs, halting its assent. Mutharika was quoted as saying, “Some of you judges are promoting stupid laws by giving too many unwarranted injunctions. You are behaving like foreigners who do not know what is happening in your own country.” Mutharika regularly accused the judiciary of passing “retrogressive” injunctions that impede Malawi’s development.<sup>199</sup> Some of the most outspoken criticism at this time came from the Malawi Law Society.

The possibility of blocking all potential suits against government attracted major attention from civil society actors, in particularly the Malawi Catholic Commission of Justice and Peace, who were ready to file a lawsuit to overturn this law. The bill was a clear violation of separation of powers and a fundamental violation of access to justice. Ultimately the Malawi Parliament repealed the bill at the end of May 2012, reverting back to the original provision.<sup>200</sup>

### **iii. Ignoring Judgments**

The question of compliance is not new. Back in 2006 a report by the Malawi Law Commission suggested that a constitutional amendment be introduced making clear that the government was legally obligated to abide by and respect the decisions of the judiciary.<sup>201</sup> Both the Parliament and the executive have since failed to follow up on the non-binding recommendations of the Law Commission.<sup>202</sup>

The 2012 IBAHRI delegation overall found that court orders are adhered to. However,

[T]here was a noted lack of enforcement where judgments have been made against the executive. Individuals that the IBAHRI delegation met with estimated that the rate of compliance to judgments range from about 30 to 40 percent.<sup>203</sup>

Prominent Malawian academics have gone so far as to claim a willful and strategic pattern of compliance depending on the interest or importance of case.<sup>204</sup> In a 2012 interview with the former Attorney General, Maxon Mbendera, the IBAHRI delegation was told that there is not a deliberate strategy to ignore or not comply with judgments.<sup>205</sup> One of the worse areas of non-compliance is with monetary orders, as one lawyer noted: “to get paid on a monetary judgment you must have connections or friends in the treasury. There is no way of enforcing the monetary judgment.”<sup>206</sup>

According to an MLS Communiqué of 2011, there are a wide range of judgments that were ignored by the Malawian government.<sup>207</sup> This list of cases includes a number of game-changing political judgments, including the Section 65 matter. If the most high profile of cases are not adhered to at the very highest levels of government the trickle down effects are significant. Rule of law means both citizens and politicians respect the law and its institutions. Furthermore, judicial independence cannot be secured if the impression given by the government is one where judgments are only adhered to when politically expedient to do so.

### **iv. Rhetorical Attacks**

“[B]ingu, he would speak on the public podium about judges delivering judgments which he wasn’t happy about. The judiciary does not have a podium which they can go on and respond.”<sup>208</sup>

As President Bingu wa Mutharika’s insecurities increased in response to Muluzi’s increasingly hostile opposition so his frustrations with the judiciary increased. In his 2007 New Year’s message, Mutharika accused the courts of being infiltrated by the opposition and that this created a barrier between the judiciary and the executive. He further claimed that the people of Malawi are:

[p]uzzled to notice that some judges have allowed hostility to guide their judgments and rulings against the government – based on facts that are entirely obscure. Some judges have been ill-advised by mercenary lawyers whose aim is simply to frustrate government.<sup>209</sup>

At this time President Mutharika started to frame the nature of the ‘problem’ as one of judicial activism, more specifically that Malawi was being governed through injunctions, and that in 2005 and 2006 Malawian courts had issued more injunctions than all Southern Africa Development Community (SADC) member states put together.

One respondent describes the resolute nature with which the judges responded to this heightened pressure:

[T]he worst period in Malawi was the Mutharika era. Because the president himself would stand on the podium showering abuse and insults [...] on the judiciary and the judges. The political authority could not even mention the names of judges they don't want just because judges are strong. I believe the judges that have been attacked are those that are very strong. Those who have not succumbed to the pressure. Now if a judge stands firm and rejects their pressure, they say that one is an enemy and won't be promoted. Even if it's a magistrate who has been very strong that person will not be appointed to a higher office. So you would see they would always go for who they think would support them. And there has been [a] lot of tribalism.<sup>210</sup>

Even if the judges rose above the relentless hostile rhetoric, the long term effects are damaging in terms of politicization of the courts. In the early part of her term, President Banda refrained from engaging in this kind of destructive polemicist rhetoric. However, as tensions increased in the build up to the election she rowed back on the rule of law rhetoric that was heard up to that point. As noted earlier, her comment regarding the Kasambara trial - “[y]ou will end up rotten in jail because you committed a crime”<sup>211</sup> – was alarming.

#### **v. Manipulation of Judicial Case Assignment System and Regional Jurisdiction**

Because he or she can assign cases to a particular judge, the Registrar is a very powerful position in Malawi's judiciary. One interviewee speculated that the former Chief Justice deliberately maneuvered a pro-Mutharika Registrar into position. The implication here is that getting certain cases before certain judges could potentially impact judicial decision making.<sup>212</sup> Once again, these accusations are speculative and while damaging in terms of perceptions of institutional legitimacy, risk degenerating into personal attacks, rather than focusing on the structural weaknesses inherent in the system.

As discussed in an earlier section on resources, further implementation and monitoring of the electronic case management system will go a long way both in terms of efficiency and perceptions of bias.

## **C Personal Attacks on Judges**

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“From the time that President Muluzi tried to impeach judges, you have a distinct impression that the judges will not succumb to that. So it makes the bench stronger because I don't think there's a judge who wants the system to break down.” (Author interview, Respondent H, Blantyre Malawi, July 2013)

#### **i. Attempted Impeachment Scandal 2001**

The attempted impeachment of three judges in 2001 was seen as a direct response to the judiciary's failure to bolster President Muluzi's third term bid. Parliamentarians voted in November 2001 to impeach three High Court judges<sup>213</sup> (for “incompetence” or “misbehavior”) after each had made rulings in separate cases perceived to be politically biased or which challenged the government. Up to that point this had been the most direct attack against individual

judges across the region. The parliamentary motion flouted an earlier High Court ruling by Justice Chiudza Banda, who had ordered that the impeachment proceedings be halted until a constitutionally mandated investigation had concluded.<sup>214</sup> The application for an injunction against Parliament was filed by CILIC. Under Section 199(3) of the Constitution of Malawi, a judge can be removed only for misbehavior and incompetence. In addressing the charges, lead counsel Ralph Kasambara argued the following:

Surely, My Lord, no sane person can say a judge who starts hearing a matter at 4:00 and finishes after 7:00 pm is incompetent and has misconducted himself . . . No reasonable person can argue that the exercise of one's academic freedom and indeed freedom of expression in commenting upon matters before the public domain is guilty of misconduct.

The parliament had no authority to “try” and “convict” the three judges; this authority lay with the Judicial Services Commission. In May 2002 the charges against the three judges were dropped by the President. In response to this development, the International Commission of Jurists sent a fact-finding mission to Malawi. The British threatened to withhold aid, citing interference in the operations of the judiciary as one reason. Denmark announced that it was cutting aid to Malawi because of the government's “attempts to limit judicial independence; politically motivated violence; and systematic intimidation of the opposition.”<sup>215</sup> The judiciary also had the support of the AFORD party in Parliament. AFORD walked out of Parliament in protest, and MP Chihana was quoted as saying, “we will go back into the law of the jungle and we can't be party to that. That is a refined version of what happened in 1960s, they are the same people.”<sup>216</sup> The author is hesitant to suggest that AFORD was supporting the judges because the judiciary was perceived as being pro-North. Instead this was an extension of the pre-existing political conflicts in the country. Indeed all the MPs that called for the impeachment of the judges were from the ruling UDF party. Ultimately, this appeared to be a shallow attempt by the UDF to set up the vote on the third term for Muluzi, by allowing the installation of pro-Muluzi judges.<sup>217</sup> A 2002 International Bar Association fact-finding mission report concluded that despite efforts by most judges to remain independent, there nevertheless existed pressure from the executive and “active political subversion of judicial independence” (IBA 2002:41).

The effect of the impeachment proceedings on the judiciary was cautionary, but did not scare the judiciary into total submission. The impeachment scandal did however expose an internal vulnerability within the judiciary. The judge allocation system was revealed to be problematic and it forced institutional change. The random assignment of cases to “young” or “inexperienced” judges was perhaps not always the wisest course of action. In the middle of the impeachment scandal, Justice Edward Twea was quoted as saying that the judiciary would not allow “judge-shopping” in allocating cases.<sup>218</sup> This problem was also addressed by a Supreme Court Justice of Malawi in an interview with the author in 2007:

[D]uring certain meetings we have read that the judge in charge of the registrar of the High Court (especially here in Blantyre), he complained that certain political cases, when he assigns them to certain judges they refuse. Someone will say, I've done several of this kind, I don't want to now . . . sometimes he has problems. He complained during that meeting. We tried to see how we could go about it. This scare is real.

The Judge then goes on to implicitly suggest that the judiciary as an institution needs to proceed with more caution, and to be aware of potential perceptions, particularly with regard to political matters.

Did we come out strongly? Maybe it made us aware - because the politicians might have exaggerated one or two things. Maybe there are certain things we in the judiciary, we are not sensitive to politicians. Not that we should decide in their favor. But maybe there are certain things we could do better [. . .] Personally I don't think it would be wrong for the Chief Justice to say to an experienced judge "you should handle this." But I know elsewhere, in the Commonwealth Judges Conferences, they say you should handle cases anonymously. I don't believe that in all cases we should assign anonymously.

The impeachment scandal forced the judiciary to become more transparent, and to seek to amend the law by insisting on a three-judge panel to sit on constitutional cases.<sup>219</sup> This innovation is indicative of the ability of the Malawian judiciary to find middle-ground and compromise.

## **ii. Attacks on Individual Judges under Mutharika**

As early as 1997, there are reports of individual judges experiencing pressure from within and outside of the judiciary.<sup>220</sup> These tensions turned into a full-scale assault with the attempted impeachments described above. While individual judges were singled out, it was seen as a warning or threat to the institution as a whole. As frictions built in Mutharika's second term, judges were singled out once again. Just hours after High Court Judge Joseph Mwanyungwe ruled against Mutharika's request for an injunction, the judge's home was raided by the Anti-Corruption Bureau.<sup>221</sup> The trend appears to be that when judges have high profile, sensitive cases they are subjected to increased levels of both scrutiny and pressure. At times this manifests as threats to their personal security, as one respondent noted:

I have always been concerned about the lack of security for judges. I think when you are not provided [with] security, it becomes as if it is a normal thing. You don't even feel it. It is only perhaps if you are tied to your watch. So I know for several judges apart from Justice Kamanga have had to have security provided for them at particular time especially after handling a sensitive case. But I feel that judges should be provided with security all the time even at residences.<sup>222</sup>

One of the recommendations of this report, is that 24 hour security be provided to all High Court judges and judges of the Court of Appeal.

During the treason trial, the judge in charge of the case, Justice Kamanga publicly spoke of the types of threats she received after she released several prominent figures on bail. Individuals – allegedly from the opposition party – were threatening to come and 'raid her house.' "[I]t sent the message that she was being watched."<sup>223</sup> The government did respond by scaling up the security (parliamentary security) at Kamanga's home.<sup>224</sup> Guaranteeing "[t]hat it will offer maximum security to Lilongwe-based High Court Judge Ivy Kamanga, who has been receiving threats for granting bail to 11 treason case suspects."<sup>225</sup> At one point it is believed that Justice Kamanga went into hiding,<sup>226</sup> which suggests that the heightened security was either inadequate, or the police themselves could not be trusted.

Kamanga later asked to recuse herself from the case. According to reports in the media:

[Kamanga] had earlier on asked both parties to have faith in her but she later announced that she is going to excuse herself because she knows some of the accused. “And my children are also close friends with children of some of the accused. I will therefore excuse myself from this case,”<sup>227</sup>

Malawi does not have a lengthy history of judges recusing themselves from high profile cases. It is hard to assess the real reasons at work. On one hand it could be regarded as a sign of independence, that judges are honestly afraid that their impartiality is being compromised. Or, on the other, it could be a sign that the particular judge is being subjected to pressure through informal, personal networks.

In early 2014 High Court Judge Esmie Chombo recused herself from the Ralph Kasambara attempted murder case. According to the defense attorneys, Chombo was “alleged to be under pressure in handling the case from corridors of power.” The decision to recuse herself was ultimately her own, the defense attorney declared “we have nothing against the judge [ . . . ] all we wanted was the case to be handled professionally without pressure from external forces.”<sup>228</sup>

Both these cases are worrying developments in a country that does not have a long history of judges recusing themselves from high profile cases. Neither does Malawi have a history of bringing in expatriate judges to hear cases, as often happens in smaller jurisdictions such as Lesotho. The damage to judicial independence is on multiple levels: symbolically, to the outside world it perpetuates the image of a court struggling against politicization. Within the institution itself it breeds a climate of fear amongst judges.

Finally, an alleged area of interference with individual judges is the transfer of certain judges at critical junctures. One individual opined that generally, there are “[a]llegations of politicized transfers, for example, Justice Chikopa from the north to the Commercial Court.”<sup>229</sup> Others cite the attempted transfer of Justice Mwaungulu to the North shortly after the impeachment scandal.<sup>230</sup> Mwaungulu refused to give his consent to the transfer, as was his right under the constitution at that time.<sup>231</sup>

## **D Budget Manipulation Resources/Remuneration**

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It is particularly challenging to document budget manipulation; particularly as it relates to intentional withholding of funds. Although there is physical evidence of poor availability of resources and buildings in disrepair, this is certainly not unique to the court. Moving from visual evidence to general claims about the deliberate manipulation of the judicial budget is a substantial leap. Many interviewees both within and outside the institution claimed that the Malawi judiciary has and continues to be deliberately neglected. The now quite protracted history of judicial strikes speaks to the severity of the budgetary challenges and the frustrations around judicial salaries and compensation. This is discussed in further detail in the earlier section on budgetary autonomy.

## E Attempted Co-option of Judges

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### i. Consistent/Substantive Perceptions of Close Ties between Judges and Politicians

More than one judge interviewed retold a story about being contacted by one or more parties to an ongoing case while the judgment was pending. In certain cases it could simply be that the party does not understand that contacting a judge outside the courtroom is inappropriate. But in other situations it seems clear it is an unwelcome form of coercion. A judge recounts:

I mean that is actually out of order - Why should someone call me and ask me? The case was before me. So one of the parties called and said you know this case we are just coming of hearing today. You don't need to call me. Come to court and find out. He was supposed to be legally represented. So come to court and contact your lawyer – I really can't talk to you. So you can see – how did they get the courage to be calling me? Yes it was one of the people from the government. I think it had to do with one of the media houses.<sup>232</sup>

From the outset, President Mutharika made public statements declaring that his administration would not interfere with the judiciary and would see that professionalism and total independence in justice were delivered. Prior to the Court of Appeal judgment in the Section 65 case, the President was seen publicly fettering judges. The Nation reported that the President had invited judges to a luncheon at the State House and one senior judge reflected, "Some judges feel there is something fishy about the invitation [ . . . ] They feel having lunch with the President would compromise them, especially on the Chilumpha case<sup>233</sup> currently being handled in the court."

This was the second time in a year that the President had invited judges to dine at his residence. The last dinner took place around the time the judiciary was handling the controversial 2004 election case; soon after, the judges were driving brand new Toyota Prados [four-wheel drive vehicles].<sup>234</sup> After the Section 65 decision, the President accused members of the judiciary of being "mercenary judges." Perhaps most striking were the events of August 2007. President Mutharika had attempted to acquire a court order that would force Parliament to debate and pass the national budget. Just hours after High Court Judge Joseph Manyungwa ruled against Mutharika's request for an injunction, the judge's home was raided by the Anti-Corruption Bureau.<sup>235</sup>

### ii. Substantial Evidence of Judges Receiving Material Benefits

Overall, the author was unable to uncover evidence of individual judges receiving substantial benefits. While speculation continues regards specific appointments and promotions there is nothing concrete to discuss here. The perception of new fleets of vehicles as quid pro quo for specific judgments, as discussed above, is worthy of mention but the judiciary would be the first to claim that these are not rewards but part of their statutory remuneration package.

## Conclusion

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In July 2014 Malawi celebrates 50 years of independence. As this report has demonstrated, while significant progress has been made towards consolidating democracy and improving the material conditions of all Malawians, many substantial hurdles remain. The politics of personality and corruption undermine efforts to strengthen key political institutions. The 2014 Presidential election episode and the ongoing ‘cashgate’ prosecutions speak to the continued importance of the courts in Malawi’s democratic development. The judiciary, it could be said, helped provide a level of legitimacy to an electoral process that lacked credibility and integrity.

However, the recent elections have also demonstrated the way in which the law often becomes a forum where political conflicts are played out. Law in this sense is a blunt political instrument designed to destroy opponents in a way that antagonizes rather than pacifies the political climate. The judiciary as an institution continues to be undermined by accusations of ethnic favoritism - in appointments and judgments – and through the politicization of the office of Chief Justice. But perhaps most importantly, the judiciary remains an under-resourced institution, vulnerable to interference. This interference maybe indirect, for example meddling in the appointments process, or direct, such as pressuring individual judges to decide a case in certain ways. Or, if there is little faith in an individual judge, pressure can come upon them to recuse themselves. In a country with a tight-knit group of elites, it seems as though there is always a case to be made for a judge to recuse themselves from high profile political cases.

This report has underscored the structural and political obstacles to judicial independence in Malawi. Out of this detailed qualitative, historical analysis there are three core areas for future judicial reform:

1. **Budgeting and Resources** – Reform judicial representation of budgetary interests in government. Review administrative and leadership structure. Continue to push for devolution of responsibility from donors in planning and disbursement of funds and for a more holistic approach to projects.
2. **Transparency** – Address judicial appointments process, law reporting, assignment of cases, and revisit the statutory adoption of a judicial ethics code.
3. **Outreach and Communication** – Work with civil society and media to better communicate the work of the courts and educate Malawians on the meaning of judicial independence. Improve dialogue with Malawi Law Society.

It is rare to find a President with such a lengthy and substantive career as a legal scholar and intellectual. While President Peter Mutharika’s stint as Minister of Justice was problematic, one hopes that the newly elected Mutharika will give serious attention to judicial independence and reform in Malawi. The minority position of Mutharika’s DPP political party in parliament will represent a serious obstacle to concrete policy reform. However, there is another, important leadership role the President can play in setting the rhetorical tone and context for the judiciary. If members of the bench are respected and judgments are consistently, not selectively adhered to, significant progress towards judicial independence will have been made. This does not require a parliamentary majority; it simply requires political leadership and will.

## Annex I

### Summary of Existing Policy Reports on the Courts and Rule of law in Malawi

The Malawian judiciary has been the subject of a series of important reports and studies on judicial independence and the rule of law by a number of external bodies. Two reports in particular, the 2006 AfriMAP Report “Malawi Justice Sector and Rule of Law” by Professor Edge Kanyongolo and the shorter 2011 IBAHRI Report “Rule of law in Malawi” paint a detailed picture of the successes and major challenges facing Malawi. In addition, the Malawi Judiciary has itself conducted a series of in-depth analyses and strategic planning. While these reports were heavily consulted in preparation for this current report and are cited throughout, they are listed and their main conclusions summarized below in a Table form. While this research adopts a new lens through which to address some of these challenges, this author acknowledges the importance of accumulating knowledge and positioning new research within the context of existing knowledge and policy proposals.

Year	Title and Author	Conclusions
1999	Rose Report (USAID) <sup>236</sup>	Mr. Rose was contracted by the USAID to review judiciary. Key recommendation was that Registrar and Chief Justice should move out of administration. Because they spend a lot of time on administration and neglect their judicial responsibilities. The position of the chief course administrator was established.
2003	International Foundation for Electoral Systems (IFES) State of the Judiciary Report (Prof. Kanyongolo) <sup>237</sup>	<p>The report concludes that the overall state of the Malawian judiciary remains so weak that it is only able to fulfill its constitutional or international obligations in three out of the twelve areas analyzed. This baseline Report paints a picture of a struggling but comparatively well-respected judiciary that is struggling to maintain and strengthen its independence from the Executive and legislative branches. Constant budgetary battles to obtain the most basic resources necessary to function, including basic facilities, staff, legal information and minimal salaries, make the judiciary’s struggle for independence even more difficult. Other fundamental, interrelated problems pertain to a non-transparent appointment process and poor access to basic legal information, legal representation and judicial accountability.</p> <p>It is remarkable that within this context the Malawian judiciary is as independent as it is and that it is viewed by the public as the most credible branch of the government. However, it is equally clear that without more political and financial support from both the Malawian Government and the donor community, as well as more public support from the Malawian public, the judiciary will remain under siege and its full development as an independent institution capable of rendering and protecting justice will not be realized in either theory or practice. (p.2 of report)</p>

Year	Title and Author	Conclusions
2003	Malawi Judiciary Strategic Plan 2003 - 2008	<p><b><i>Seven Strategic Issues to Address:</i></b></p> <ol style="list-style-type: none"> <li>1. Insufficient professional capacity</li> <li>2. Immense case backlog</li> <li>3. Complex and non-user friendly court procedures</li> <li>4. Poor physical infrastructure</li> <li>5. Lack of effective relations with other justice sector institutions</li> <li>6. Inadequate and irregular budgetary allocations</li> <li>7. Lack of efficient and effective management.</li> </ol> <p><b><i>Eleven Identified Action Areas:</i></b></p> <ol style="list-style-type: none"> <li>1. Use of Camp courts to reduce case backlog</li> <li>2. Review of all Magistracy court centres and commencement of extensive court rehabilitation.</li> <li>3. Establishment of Commercial Division, Child Justice Courts and Industrial Relations Court.</li> <li>4. Development of rule of procedure, Judicial Code of Conduct, etc.</li> <li>5. Establishment of Judicial Training Programme. Focus on the Magistracy.</li> <li>6. Provision of management training for support staff.</li> <li>7. Provision of new assets and equipment.</li> <li>8. Establishment of Court User Committees.</li> <li>9. Increase collaboration with other justice sector stakeholders.</li> <li>10. Increase number of judicial officers.</li> <li>11. HIV/AIDS awareness.</li> </ol>

Year	Title and Author	Conclusions
2006	AfriMAP Report – Malawi Justice Sector and Rule of Law (Prof. Kanyongolo)	<p>Report identifies a series of key issues across the justice sector:</p> <ul style="list-style-type: none"> <li>• The need to ensure that all statutory and customary laws of Malawi are aligned to the Constitution and to international law;</li> <li>• The challenge to match the relatively commendable diligence with which the Malawian government has respected internationally agreed economic management strictures with an equal respect for the law in all other matters, including political;</li> <li>• The urgent need to practically address the various challenges relating to the management of the justice sector that have been identified by the judiciary in its strategic plan, and affirmed through other initiatives;</li> <li>• The need to ensure that judicial appointments are seen to be totally free of political manipulation at all levels;</li> <li>• The reality that, while significant and commendable progress has been made in criminal justice reform, crime has been steadily increasing since 2001—no doubt principally on account of the high levels of poverty in the country—and that therefore strengthening of the prosecution service is of urgent concern;</li> <li>• The need for various further reforms in the criminal justice system, including regard to legal guarantees of fair trial, and in terms of prison conditions;</li> <li>• The critical need to improve access to justice for ordinary citizens, including the urgent call for a legal framework to govern customary forums through which the vast majority of Malawians access justice;</li> <li>• And the urgent need for a sector-wide approach for the coordination of development assistance in the justice sector.</li> </ul>
2010	Malawi Judiciary Strategic Plan 2011-2016	<p>Five Strategic Issues to Address:</p> <ol style="list-style-type: none"> <li>1. Access to and use of judicial system</li> <li>2. Quality of service provided to users of system</li> <li>3. Timeliness, coherence and enforcement of judgments;</li> <li>4. Effectiveness and efficiency of the judicial system’s administration;</li> <li>5. Use of performance monitoring and evaluation in decision-making.</li> </ol>
2012	IBAHRI Report Rule of Law in Malawi: The Road to Recovery	<p>“IBAHRI believes that the separation of powers enshrined in the Constitution must be protected. In guaranteeing the genuine independence of the judiciary, an independent Judicial Service Commission (JSC), which must be responsible for the appointment of all judges, is indispensable. This JSC should appoint judges in a transparent manner in which candidates are assessed based on agreed criteria centred on merit. In addition, there is need for a Code of Conduct for judges and magistrates that provides for the regulation of judges’ and magistrates’ professional conduct.” at p.7</p>

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- 1 Rule of Law Roundtable, Blantyre, Malawi, 15 July 2013
  - 2 The following are a selection of major international principles: UN Draft Principles on Independence of the Judiciary (1981); International Bar Associations Minimum Standards of Judicial Independence (1982); Montreal Universal Declaration on the Independence of Justice (1983); Beijing Statement of Principles of the Independence of the Judiciary (1995); Universal Charter of the Judge by the International Association of Judges (1999); European Association of Judges Charter (1999); Commonwealth Latimer House Guidelines on Judicial Independence (1999); Bangalore Principles of Judicial Conduct (2002).
  - 3 Horizontal accountability refers to the relationship between the various arms of government; vertical accountability refers to the relationship between the state and the people/civil society.
  - 4 See for example, Rebecca Bill Chavez. *The Rule of Law in Nascent Democracies: Judicial Politics in Argentina* (Palo Alto, CA: Stanford University Press, 2004); Pilar Domingo "Judicialization of Politics or Politicization of the Judiciary: Recent Trends in Latin America," *Democratization*, 11 (2004), 104-26; Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (New York: Cambridge University Press, 2003); Gretchen Helmke, *Courts Under Constraints: Judges, Generals and Presidents in Argentina* (New York: Cambridge University Press, 2005); Lisa Hilbink, *Judges beyond Politics in Democracy and Dictatorship: Lessons from Chile* (New York: Cambridge University Press, 2007); Pedro Magalhaes, "The Politics of Judicial Reform in Eastern Europe," *Comparative Politics* 23 (1999), 43-62; Shannon Smithy and John Ishiyama, "Judicial Activism in Post-Communist Countries," *Law & Society Review*, 36 (2002), 719-41.
  - 5 Trochev, Alexei. 2010 "Meddling with Justice: Competitive Politics, Impunity, and Distrusted Courts in Post-Orange Ukraine." *Demokratizatsiya*, 18, no. 2: 122-147; VonDoepp, Peter, and Rachel Ellett. 2011. "Reworking Strategic Models of Executive-Judicial Relations: Insights from New African Democracies." *Comparative Politics*, 43, no. 2: 147-165.
  - 6 "Going off-bench: Protecting Judicial Autonomy in Competitive Clientelist Regimes" with Alexei Trochev, *Journal of Law and Courts* Vol. 2, No. 1, Spring 2014, pp.67-91
  - 7 See Clark, Tom and Jeffrey Staton (2011) *Challenges and Opportunities of Judicial Independence Research*, *Law and Courts*, Vol. 2, No.2 (2011), pp.11-12.
  - 8 Upham, Frank. 2006. "Mythmaking in the Rule-of-Law Orthodoxy" in *Promoting the Rule of Law Abroad: In Search of Knowledge*. Ed. Thomas Carothers. Washington D.C.: Carnegie Endowment for International Peace, p.89.
  - 9 "Going off-bench: Protecting Judicial Autonomy in Competitive Clientelist Regimes" with Alexei Trochev, *Journal of Law and Courts* Vol. 2, No. 1, Spring 2014, pp.67-91
  - 10 IFES State of the Judiciary Report: Malawi 2003 Edge Kanyongolo. Available at [http://www.ifes.org/files/rule-of-law/SOJ/SOJ\\_Malawi\\_Final.pdf](http://www.ifes.org/files/rule-of-law/SOJ/SOJ_Malawi_Final.pdf)
  - 11 "MEC defies JB orders, proceed with vote counting: Kanyongolo, Kasambara laugh off decree" *Malawi 24*, May 24, 2014 <http://malawi24.com/mec-defies-jb-orders-proceed-with-vote-counting-kanyongolo-kasambara-laugh-off-decree/>
  - 12 "Court blocks Banda from annulling disputed poll" *Legal Brief Today* May 26, 2014 <http://www.legalbrief.co.za/article.php?story=20140526085113682>
  - 13 Before his recusal, Potani dismissed an application for an injunction previously issued to stop the recount. Earlier in the year Potani had recused himself in a matter concerning the MEC. "Court to decide election results today, new judges takes over" *Malawi Nation*, May 30, 2013
  - 14 As a comparative example, in Uganda the Supreme Court of Appeal has original jurisdiction for all Presidential election disputes. This prevents discordant judgments, perceptions of judge shopping and speeds up the process. However, it could be seen as undemocratic because there is no right of appeal from the apex court.
  - 15 Forfeiture (Amendment) Act No. 18 of 1992, and Preservation of Public Security (Amendment) Act No. 17 of 1992. For more, see Ng'ong'ola, Clement. (1996) "The Malawi Referendum of June 1993: Some Pertinent Legal Issues." In *Law and the Struggle for Democracy in East Africa*, (eds.) Kivutha Kibwana, Joseph Oloka-Onyango and Chris Maina Peter. Nairobi, Kenya: Claripress.
  - 16 Miscellaneous Civil Case No. 10 of 1993 (unreported)
  - 17 Civil Case No. 958 of 1994 (unreported)
  - 18 Gloppen, Siri, and Fidelis E. Kanyongolo. (2004) *The Role of the Judiciary in the 2004 General Elections in Malawi*. Bergen, Norway: Chr. Michelsen Institute, Development Studies and Human Rights, p.4
  - 19 Ellett, Rachel. *Pathways to Judicial Power in Transitional States: Perspectives from African Courts* Routledge, April 2013
  - 20 High Court, Criminal Case No. 1 of 1992
  - 21 Sec. 50(1) (a) of Penal Code
  - 22 Ng'ong'ola, Clement. (1996) "Managing the Transition to Political Pluralisms in Malawi: Legal and Constitutional Arrangements." *Journal of Commonwealth and Comparative Politics* 34 (2):85-110.

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- 23 AFORD 36 seats (North), MCP 56 seats (Central) and UDF 79 seats (South)
- 24 Gloppen, Siri, and Fidelis E. Kanyongolo. (2004) *The Role of the Judiciary in the 2004 General Elections in Malawi*. Bergen, Norway: Chr. Michelsen Institute, Development Studies and Human Rights.
- 25 Ellett, Rachel. *Pathways to Judicial Power in Transitional States: Perspectives from African Courts* Routledge, April 2013
- 26 See *Attorney General v. Gwanda Chakuamba and Chakufwa Chihana* (1999), M.S.C.A. Civil Appeal No. 7 of 1999
- 27 High Court Civil Cause No. 645 of 2001 (unreported)
- 28 M.S.C.A. Civil Appeal No. 40 of 2000 (unreported)
- 29 M.S.C.A. Civil Appeal No. 40 of 2000 (unreported)
- 30 "Section 65 in Court Monday," *Malawi Nation*, 19 August 2003
- 31 See Gloppen and Kanyongolo (2004:14) for complete list.
- 32 High Court Miscellaneous Civil Cause No. 78 of 2002 (unreported)
- 33 This is discussed in further detail in the interference section of this report
- 34 Ellett, Rachel. 2013. *Pathways to Judicial Power in Transitional States: Perspectives from African Courts* Routledge
- 35 "Malawi's Tainted Judiciary: Why urgent reform is needed" *Nyasa Times*, April 16, 2013
- 36 Author interview, Malawi High Court Judge, Blantyre, Malawi, May 2007. Note, that in the 1970s an average of 4 civil appeals were filed, in the 1980s an average of 19 civil appeals were filed, in the 1990s 33, in the 2000s 38 civil appeals were filed (Author data collected at Blantyre High Court Registry).
- 37 In the Matter of Presidential Reference of a Dispute of a Constitutional Nature under Section 89(1)(h) of the Constitution AND In the Matter of Section 86(2) of the Constitution AND In the matter of Impeachment Procedures Under Standing Order 84 adopted by the National Assembly on 20th October 2005 AND Malawi Congress Party (MCP), United Democratic Front (UDF) and Alliance for Democracy (AFORD) – Amicus Curiae (2005) High Court Constitutional Cause No. 13 of 2005 (unreported)
- 38 VonDoepp, Peter (2009) *Judicial Politics in New Democracies: Cases from Southern Africa*. Boulder, Colorado: Lynne Rienner Publishers, p.108
- 39 *R. v Muluzi* [2009] MWHC 18.
- 40 M.S.C.A. Civil Appeal No. 7 of 1999 (unreported)
- 41 See Cammack, D. and T. Kelsall. (2011) "Neo-patrimonialism, Institutions and Economic Growth: the Case of Malawi, 1964-2009." *IDS Bulletin* (42) 2: 88-96.
- 42 Gloppen and Kanyongolo (2011) suggest that there could have been more trust in the MEC to handle the electoral process and its disputes.
- 43 Reminiscent of the Banda era, this period saw a flurry of sedition related charges brought against members of the opposition or those who allied with the opposition. In 2010 a Malawian cleric was charged with sedition after saying his church would support Vice-President Joyce Banda in the 2014 presidential race (see "Malawian Cleric Released on Bail," *Legal Brief*, 25 August 2010).
- 44 Author interview, Respondent H, Blantyre, Malawi, 2013
- 45 High Court of Malawi Miscellaneous Cause 14 of 2010 (unreported)
- 46 "Ex-Judge Heads Bingu Death Probe," *The Nation*, 1 June 2012
- 47 Around 7 percent between 2004 and 2010 Wroe, Daniel (2012) "Donors, Dependency and Political Crisis in Malawi", p.135 *Afr Aff (Lond)* first published online January 4, 2012
- 48 Wroe, Daniel (2012) "Donors, Dependency and Political Crisis in Malawi", p.136 *Afr Aff (Lond)* first published online January 4, 2012
- 49 By the end of the day the army had been deployed, 19 people had been killed, many more injured, and around 500 people arrested (Wroe 2012).
- 50 "Court reverses Malawi Demo Injunction," *The Nation*, 21 July 2011
- 51 Cited in "The 'Gang of Three', 'Midnight Six' and 'Daniel Phiri': Unpacking Malawi's Alleged Coup Plot" *Think Africa Press*, 28 March, 2013.
- 52 "The 'Gang of Three', 'Midnight Six' and 'Daniel Phiri': Unpacking Malawi's Alleged Coup Plot" *Think Africa Press*, 28 March, 2013.
- 53 "JB urges Malawi judges to deliver timely judgments" *Nyasa Times*, July 9th, 2013
- 54 "Malawi Prepares for \$100 million 'cashgate' corruption trial" *The Guardian*, January 14, 2014 <http://www.theguardian.com/world/2014/jan/14/malawi-prepares-cashgate-corruption-trial>

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- 55 Charlotte Mackenzie, "Malawi: Justice for the Rich, Prison for the Poor" Think Africa Press <http://thinkafricapress.com/malawi/justice-rich-prison-poor>
- 56 "Judge Rebuffs Kasambara" Malawi Nation, November 13, 2013 <http://mwncation.com/judge-rebuffs-kasambara/>
- 57 "34 Prosecutors to Cashgate" Malawi Nation, April 26, 2014 <http://mwncation.com/34-prosecutors-cashgate/>
- 58 "JB Challenges Kasambara: Ready to Testify in Court" Nyasa Times, January 5, 2014 <http://www.nyasatimes.com/2014/01/05/jb-challenges-kasambara-ready-to-testify-in-court/>
- 59 "Court rules MEC should be declare winner of Malawi presidential polls" Nyasa Times, May 30, 2014 <http://www.nyasatimes.com/2014/05/30/court-rules-mec-should-declare-winner-of-malawi-presidential-polls/>
- 60 "Judge Potani recuses himself from the MEC case" Malawi Nation, May 29, 2014 <http://mwncation.com/judge-potani-recuses-mec-case/>
- 61 "Malawi Prepares for \$100 million 'cashgate' corruption trial" The Guardian, January 14, 2014 <http://www.theguardian.com/world/2014/jan/14/malawi-prepares-cashgate-corruption-trial>
- 62 "Why Malawi took so long to declare an election winner" Guardian May 30, 2014 <http://www.theguardian.com/global-development/2014/may/30/malawi-failed-declared-election-winner>
- 63 Worldwide Governance Indicators, Country Data Report for Malawi, 1996-2012, <http://info.worldbank.org/governance/wgi/index.aspx#countryReports>
- 64 EIU Democracy Index Report 2012 downloaded from [http://www.academia.edu/3312471/The\\_Economist\\_Democracy\\_Index\\_2012](http://www.academia.edu/3312471/The_Economist_Democracy_Index_2012)
- 65 Freedom House 2013 Freedom in the World Report downloaded from <http://www.freedomhouse.org/sites/default/files/FIW%202013%20Booklet.pdf>
- 66 A Partly Free country is one in which there is limited respect for political rights and civil liberties. Partly Free states frequently suffer from an environment of corruption, weak rule of law, ethnic and religious strife, and a political landscape in which a single party enjoys dominance despite a certain degree of pluralism.
- 67 World Justice Project Malawi Country Report. Available at [http://worldjusticeproject.org/sites/default/files/malawi\\_country\\_report.pdf](http://worldjusticeproject.org/sites/default/files/malawi_country_report.pdf)
- 68 Bratton, Michael, "Trends in Popular Attitude to Multiparty Democracy in Africa, 2000-2012," Afrobarometer, (Oct 2012), [http://www.afrobarometer.org/files/documents/briefing\\_papers/afrobriefno105a.pdf](http://www.afrobarometer.org/files/documents/briefing_papers/afrobriefno105a.pdf)
- 69 World Bank data, downloaded from <http://data.worldbank.org/country/malawi>
- 70 World Bank Data downloaded from <http://data.worldbank.org/indicator/NY.GNP.PCAP.PP.CD>
- 71 AfriMap Democratic Governance and Political Participation in Malawi (2014:44)
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- 73 Rule of Law Roundtable, Blantyre, Malawi, July 15, 2013
- 74 "Court boosts gay rights case throws out AG's objection" Nyasa Times, January 21, 2014 <http://www.nyasatimes.com/2014/01/21/court-boosts-malawi-gay-rights-case-throws-out-ags-objection/>
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- 76 Ibid
- 77 IBAHRI Report Rule of Law in Malawi: The Road to Recovery, 2012:31
- 78 Ibid, p.32
- 79 Author interview, Respondent J, July 2013, Blantyre, Malawi
- 80 Ibid
- 81 IBAHRI Report Rule of Law in Malawi: The Road to Recovery, (2012:42)
- 82 Act No. 11 of 2000
- 83 Author interview, Respondent A, Johannesburg, SA, July 2013.
- 84 Author interviews, Respondent H and I, Blantyre, Malawi, July 2013
- 85 The Malawi Strategic Judicial Development Programme was launched in 2003, attempting to map strategies for preserving judicial independence in Malawi ("K18m for Murder Cases Identified," The Nation, 31 July 2002).

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- 86 Rule of Law Roundtable, Blantyre, Malawi, July 15, 2013
- 87 Author interview, Respondent A, Johannesburg, SA, July 2013
- 88 Author interview, Respondent C, Blantyre Malawi, July 2013
- 89 Author interview, Respondent E, Blantyre Malawi, July 2013
- 90 Author interview, Respondent F, Blantyre, Malawi, July 2013
- 91 *The State v President of the Republic of Malawi & 2 Others ex parte Malawi Law Society Constitutional Cause Number 6 of 2006*
- 92 “Malawi judges’ new pay demands” *The Nation*, March 9, 2013
- 93 Ibid.
- 94 Author interviews, Blantyre, Malawi, July 2013
- 95 An interview with a senior judge in Malawi revealed that salary matters were discussed at Commonwealth judges meetings. The judge noted that, “in other countries, when a judge retires he gets his salary so he is not forced to come back and practice. In Zambia, they take 80% of salary of serving judges. We asked for that and the MPs refused, laughed it off, and said that they couldn’t give us that one. Now, you talk to anyone about that. Judges [say]no ‘ahhh, why should you be treated like that.’ But just across the borders they are doing it.”
- 96 “Judges Caused Own Pay Problems,” *The Daily Times*, 18 March 2012
- 97 Malawi Judiciary Strategic Plan 2011-2016, Annex 4: “Overview of Funding and Spending - 2003-2008 – Development Programme”
- 98 Ibid.
- 99 For more details on the history of donor funding see Kanyongolo, Fidelis Edge. (2006) *Malawi Justice Sector and the Rule of Law: A Review*. Braamfontein, South Africa: Open Society Initiative for Southern Africa. pp.164-168.
- 100 Responsibility for this project lies with the Ministry of Justice & Constitutional Affairs. The nine (9) Beneficiary Institutions of the DGP are: the Ministry of Justice & Constitutional Affairs (MoJCA) and its constituent departments, the Judiciary, the Malawi Electoral Commission (MEC), the Law Commission, the Malawi Human Rights Commission (MHRC), the Malawi Police Service, the Malawi Prison Service, the National Registration Bureau (NRB) and the Paralegal Advisory Service Institute (PASI).
- 101 International Council on Human Rights Policy (2000) “Local Perspectives: foreign aid to the justice sector” at p.11. Available at [http://www.ichrp.org/files/summaries/15/104\\_summary\\_en.pdf](http://www.ichrp.org/files/summaries/15/104_summary_en.pdf)
- 102 Malawi Judiciary Strategic Plan 2011-2016
- 103 Author interview, Respondent E, Blantyre, Malawi July 2013
- 104 Author interview, Respondent G, Blantyre, Malawi July 2013
- 105 Author interview, Interviewee I, Blantyre, Malawi, July 2013
- 106 The following are a selection of major international principles: UN Draft Principles on Independence of the Judiciary (1981); International Bar Associations Minimum Standards of Judicial Independence (1982); Montreal Universal Declaration on the Independence of Justice (1983); Beijing Statement of Principles of the Independence of the Judiciary (1995); Universal Charter of the Judge by the International Association of Judges (1999); European Association of Judges Charter (1999); Commonwealth Latimer House Guidelines on Judicial Independence (1999); Bangalore Principles of Judicial Conduct (2002).
- 107 Author interview, Respondent F, Blantyre, Malawi, July 2013
- 108 Author interview, Respondent K, Blantyre, Malawi July 2013
- 109 Ibid, p.397
- 110 “Malawi Judiciary to computerize case management system” *BNL Times*, October 02, 2013.
- 111 Rule of Law Roundtable, Blantyre, Malawi, July 15, 2013
- 112 Author interview, Respondent E, Blantyre, Malawi, July 2013
- 113 Author interview, Respondent G, Blantyre, Malawi, July 2013
- 114 Rule of Law Roundtable, Blantyre, Malawi, July 15, 2013 .
- 115 Ibid
- 116 Author interview, Respondent L, Blantyre, Malawi, July 2013

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- 117 Ibid
- 118 "K18m for Murder Cases Identified," *The Nation*, 31 July 2002
- 119 Author interview, Respondent G, Blantyre, Malawi, July 2013
- 120 Author interview, Respondent K, Blantyre, Malawi, July 2013
- 121 Author interview, Respondent D, Blantyre, Malawi, July 2013
- 122 Kanyongolo, Fidelis Edge. (2006) *Malawi Justice Sector and the Rule of Law: A Review*. Braamfontein, South Africa: Open Society Initiative for Southern Africa.
- 123 See VonDoepp, Peter. (2005) "The Problem of Judicial Control in Africa's NeoPatrimonial Democracies: Malawi and Zambia." *Political Science Quarterly* 120 (2).
- 124 Data was collected from the court human resources office in 2013. The region of each judge was identified by a court employee but has not yet been verified. Data available from author upon request.
- 125 "Court Defers Judges Case," *The Nation*, 20 March 2003
- 126 Banda, Mabvuto and Zainah Liwanda. March 3rd, 2006. "Bingu Invites Judges to Lunch" *The Nation*
- 127 Author interview, Supreme Court Judge, Blantyre, Malawi, April 2007
- 128 Author interview, Respondent A, Johannesburg, SA, July 2013
- 129 VonDoepp, Peter. (2005) "The Problem of Judicial Control in Africa's NeoPatrimonial Democracies: Malawi and Zambia." *Political Science Quarterly* 120 (2).
- 130 Author interview, Respondent K, Blantyre, Malawi July 2013
- 131 Author interview, Senior Private Practice Lawyer, Blantyre, Malawi, July 2009
- 132 Author interview, Respondent A, Johannesburg, SA, July 2013
- 133 *Malawi Judiciary Annual Report 2008-2009*, p.23.
- 134 Author data collected December 2013. Available upon request.
- 135 Author interview, Respondent F, Blantyre, Malawi, July 2013
- 136 "Malawi's tainted judiciary: Why urgent reform is needed" *Nyasa Times*, April 16, 2013
- 137 The Malawi Electoral Commission comprises of a Chairperson, a judge nominated by the Judicial Service Commission and at least six Commissioners appointed by the President in consultation with political parties represented in Parliament. The President appoints suitably qualified persons to be members of the commission and the Public Appointments Committee of Parliament determines their conditions of Service.
- 138 Author interview, Respondent A, Johannesburg, SA, July 2013
- 139 Author interview, Respondent D, Blantyre, Malawi, July 2013
- 140 Author interview, Respondent E, Blantyre, Malawi, July 2013
- 141 Author interview, Respondent D, Blantyre, Malawi, July 2013
- 142 Author interview, Respondent H, Blantyre, Malawi, July 2013
- 143 Author interviews, members of MLS, August 2009
- 144 Full report available for download at <http://www.sdn.org.mw/lawcom/docs/ConstitutionReviewFinalReport.pdf>
- 145 See full report and suggested model JSC clause at <http://www.cmja.org/downloads/latimerhouse/Judicial%20Appointments%20Commissions-%20CLA-CLEA-CMJA%20Report.pdf> June 4, 2014
- 146 Unaccounted for absences, negligent performance of duties, dishonesty or moral turpitude, etc. (Code of Conduct and Conditions of Service (2003:56). Cited in Kanyongolo (2006:n.288).
- 147 AfriMap 2011 Rule of Law in Malawi
- 148 Rule of Law Roundtable, Blantyre, Malawi, July 15, 2013
- 149 "PROFESSIONAL CONDUCT AND JUDICIAL ACCOUNTABILITY: ISSUES AND POSSIBLE ENFORCEMENT MECHANISMS" MASERU, LESOTHO, 28 and 29 JULY 2010 ICJ Conference.

- 150 VonDoepp, Peter. (2005) "The Problem of Judicial Control in Africa's NeoPatrimonial Democracies: Malawi and Zambia." *Political Science Quarterly* 120 (2), at p.294.
- 151 For example, in Uganda a full-time spokesperson has been hired.
- 152 Rule of Law Roundtable, Blantyre, Malawi, July 15, 2013
- 153 Ibid
- 154 "Munlo Joins Malawi Congress Party Presidential Contest" *Nyasa Times*, April 22, 2013 <http://www.nyasatimes.com/2013/04/22/munlo-joins-malawi-congress-party-presidential-contest/>
- 155 Ibid
- 156 Rule of Law Roundtable, Blantyre, Malawi, July 15, 2013
- 157 "Malawi's Joyce Banda Puts Women's Rights at Centre of New Presidency," *The Guardian*, 29 April 2012
- 158 The investigatory commission is headed by retired Judge Elton Singini.
- 159 "Munlo Appears Before Bingu Inquiry Commission," *The Nation*, 12 September 2012
- 160 According to Singini's report: "6.6.7 The Judiciary and the Transition  
From the totality of the evidence, the Commission established that there were no judges who gathered at Hon. Peter Mutharika's house on the 6th or 7th April 2012 for the purposes of swearing Hon. Peter Mutharika as Acting President of the country. The Commission however established that the Chief Justice went to the house of Hon. Peter Mutharika on Friday, 6th, and Saturday, 7th, April 2012 to offer his condolences to him on the death of the President as a family friend. Downloaded from <http://www.nyasatimes.com/2013/03/07/malawi-full-inquiry-report-on-bingu-wa-mutharikas-death/> on November 5, 2013.
- 161 "Malawi's tainted judiciary: Why urgent reform is needed" *Nyasa Times*, April 16, 2013
- 162 Author interview, Respondent A, Johannesburg, SA, July 2013.
- 163 Author interview, Respondent K, Blantyre, Malawi, July 2013
- 164 Ibid
- 165 Rule of Law Roundtable, Blantyre, Malawi, July 15, 2013
- 166 [http://www.judiciary.mw/index.php?option=com\\_phocadownload&view=category&id=3&Itemid=168](http://www.judiciary.mw/index.php?option=com_phocadownload&view=category&id=3&Itemid=168) and, <http://www.malawilii.org>

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3. The Council shall-
(a) be responsible for the preparation and publication of the reports to be known as the Malawi Law Reports, which shall contain judgments of the superior courts or record;
(b) undertake such other functions as in the opinion of the Council are reasonably related to or connected with the preparation and publication of the Malawi Law Reports; and
(c) perform any other functions conferred on the Council by this Act or any other Act of Parliament.

168 Section 25 of the Legal Education and Legal Practitioners Act. Cap. 3:04 (the Act) of the Laws of Malawi

169 The Malawi Law Society's (Society) objectives include:

1. to represent, protect and assist legal practitioners as regards conditions of practice and otherwise;
2. to present the views of legal practitioners and sustain and preserve their rights and status;
3. to engage in formal or informal activities designed to foster and extend the study of law and for the benefit both of members of the Society or other persons interested in the legal profession;
4. to protect and assist the public in Malawi on all matters touching, ancillary or incidental to the law;
5. to acquire, hold, develop or dispose of property and to deprive capital or income therefrom, for all or any of its objects;
6. to raise or borrow money for all or any of its objects in such manner and upon such security as may from time to time be determined by the Society;
7. to invest and deal with moneys of the Society not immediately required in such a manner as may be determined by the Society;
8. to do all such other things as are incidental or conducive to the attainment of its objects.

170 Author interview with Malawi lawyer, Blantyre, Malawi. July, 2009.

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- 171 Author interview, Chancellor lecturer, Zomba, July 2009.
- 172 Mbendera would later be appointed Attorney General under President Mutharika.
- 173 Author interview, MLS representative, Blantyre, July 2009.
- 174 Author interview, senior lawyer and former MLS executive, Blantyre, July 2009.
- 175 Ibid.
- 176 Ibid.
- 177 Ibid.
- 178 The Malawi Law Society (MLS) and the Civil Liberties Commission (CILIC) have filed cases related to judicial independence. In regards to the impeachment matter, CILIC successfully filed for an injunction against the legislature preventing them from debating the proposed impeachment motions. Further, CILIC filed a case in 2003 seeking to stop the swearing in of four new judges until a public review of their appointments were made.
- 179 See for example, "Law Society Defends Judges" Daily Times, August 9, 2007
- 180 Unfortunately the High Court case file only contained a rough draft of the judgment. This draft did not indicate the case name, number or the name of the Judge hearing the case.
- 181 "Lawyers Differ on SC Appointments", Daily Times, October 23, 2008.
- 182 Rule of Law Roundtable, Blantyre, Malawi, July 15, 2013
- 183 Author interview, Respondent I, Blantyre, Malawi, July, 2013
- 184 See for example, Nyamnjoh, Francis. (2005) *Africa's Media, Democracy and the Politics of Belonging*. London: Zed Books.
- 185 Rule of Law Roundtable, Blantyre, Malawi, July 15, 2013
- 186 Author interviews, Maseru, Lesotho, October 2011.
- 187 Conference Resolutions and Statement of the Southern African Chief Justices Forum Conference held in Johannesburg, South Africa, 13-14th August 2010.
- 188 Rule of Law Roundtable, Blantyre, Malawi, July 15, 2013
- 189 For more in-depth discussion of this approach, see "Going off-bench: Protecting Judicial Autonomy in Competitive Clientelist Regimes" with Alexei Trochev, *Journal of Law and Courts* Vol. 2, No. 1, Spring 2014, pp.67-91.
- 190 Author data collected at Human Resources Office for Judiciary in Blantyre. Since 2002 the Human Resources Office has maintained detailed data on the judges sitting in office – this includes their home region, dates of service and present court appointment. However, the Director informed me that records prior to 2002 don't exist.
- 191 Annus and Tavits (2004) conclude that working experience in the previous regime did not significantly alter judicial behavior. Given the difficulties of finding qualified judicial personnel in transitioning states, one has to consider the practical utility of establishing a brand new court under a new regime. "Our study indicates that in order to establish a qualitatively different judicial system under a new regime, it is not necessary to dismiss most of the old judges. Replacing the existing judiciary appears much less relevant than, for example, investing in the education and training of judges as well as in the resources of courts" (IBA 2002).
- 192 In-depth discussion of former Chief Justice Munlo's tenure is provided in the earlier section on 'leadership.'
- 193 Rule of Law Roundtable, Blantyre, Malawi, July 15, 2013
- 194 Rule of Law Roundtable, Blantyre, Malawi, July 15, 2013
- 195 Civil Procedure (Suits by or Against the Government or Public Officers) Amendment Act (2011)
- 196 Wroe, D. (2012) "Donors, Dependency, and Political Crisis in Malawi." *African Affairs*. 111 (442):135-44, at p.142.
- 197 The proposed bill would have read:
- 10 (1) The Court shall not, in any proceedings against the Government or a public officer, grant relief by way of an injunction if the application for such relief was made ex parte.
- (2) The Court shall not in any proceedings grant an injunction or make any order against the Government or a public officer if the effect of granting the injunction or making the order would be to give any relief against the Government or a public officer which could not have been obtained in a suit against the Government or a public officer.

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- (3) Nothing in this Act shall be construed as authorizing the grant of relief by way of specific performance against the Government, but in lieu thereof, the Court may make an order declaratory of the rights of the parties.' IBAHRI, (2012:33)
- 198 "Another Sad Day for Rule of Law in Malawi," *The Nation*, 14 July 2011
- 199 "Bingu is Not Above the Law," *The Nation*, 29 August 2011
- 200 "Repealing of Injunction law restores right to access to Justice – Kasambara" *The Malawi Democrat*, May 25, 2012.
- 201 Report of the Law Commission on the Technical Review of the Constitution (cited in Kanyongolo 2006:40)
- 202 Kanyongolo, Fidelis Edge. (2006) *Malawi Justice Sector and the Rule of Law: A Review*. Braamfontein, South Africa: Open Society Initiative for Southern Africa, at p.40.
- 203 IBAHRI (2012:43)
- 204 IBAHRI (2012:43); Ellett (2013)
- 205 *Ibid*, at p.44
- 206 Rule of Law Roundtable, Blantyre, Malawi, July 15, 2013
- 207 *The State v The President et al. ex parte Malawi Law Society*, In the High Court of Malawi, Principal Registry, Miscellaneous Civil Cause Number 173 of 2010 (Unreported) (on the President's directive to close the Electoral Commission and the subsequent contempt of court proceedings that have ensued); *The State v The Speaker of the National Assembly ex parte Honourable John Z.U. Tembo*, In the High Court of Malawi, Lilongwe District Registry, Miscellaneous Civil Cause Number 565 of 2009 (Unreported) (the 'Leader of Opposition' Case); *The State v Minister of Finance and the Secretary to the Treasury ex parte Honourable Bazuka Mhango and Others*, In the High Court of Malawi, Mzuzu District Registry, Miscellaneous Civil Cause Number 163 of 2008 (Unreported) (on fuel allowance for Members of Parliament); *The State v the Speaker of the National Assembly and the Minister of Finance ex parte Honourable Gerald Mponda and Another*, In the High Court of Malawi, Zomba District Registry, Miscellaneous Civil Cause Number 29 of 2007 (where the Honourable Justice Manyungwa was vilified in the media for issuing an 'injunction' 'outside working hours'); and *In the Matter of Presidential Reference of a dispute of constitutional nature*; and *In the Matter of Section 65 of the Constitution*; and *In the Matter of the Question of the Crossing the Floor by Members of Parliament*, In the Malawi Supreme Court of Appeal, MSCA Civil Appeal Number 22 of 2006 (Unreported) (the 'Section 65' Case)
- 2011 Communique of Malawi Law Society.
- 208 Author interview, Respondent E, Blantyre, Malawi, July 2013
- 209 *Daily Times*, January 2007
- 210 Author interview, Respondent K, Blantyre, Malawi, July 2013
- 211 "JB Challenges Kasambara: Ready to Testify in Court" *Nyasa Times*, January 5, 2014 <http://www.nyasatimes.com/2014/01/05/jb-challenges-kasambara-ready-to-testify-in-court/>
- 212 Author interview, Respondent A, Johannesburg, SA, July 2013
- 213 Chimasulu Phiri, Anaclet Phiri and Dunstain Mwangulu
- 214 Amnesty International Country Report (2002)
- 215 "3 Judges Impeached," *The Nation*, 15 November 2001
- 216 Nyasaland (1956)
- 217 *BBC News Africa*, November 2001
- 218 "Mwaungulu Turns Down 'Varsity Job,'" *The Nation*, 11 July 2002
- 219 As a footnote to the impeachment scandal, in July 2002 the government reportedly offered Justice Mwaungulu the chancellorship of Malawi University School of Law. Under Malawi law, if a judge is seconded to another position – for example, Justice Elton Singini and James Kalaila who are Law Commissioner and Electoral Commission Chair respectively, and later, Justice Ansah would become Attorney General -- that judge retains all the benefits and perks of their judicial office. Moving High Court or Supreme Court judges to other positions could be used as a perk, or in the case of the chancellorship of the Law School, as a way to get a meddlesome judge off the bench into a less politically significant position. Generally it appears that the movement of judges to parallel or higher positions within government is more often than not seen as a reward.
- 220 See VonDoepp, Peter, and Rachel Ellett. (2011) "Reworking Strategic Models of Executive-Judicial Relations: Insights from New African Democracies." *Comparative Politics* 43 (2):147-65.
- 221 "Government to Appoint new Judges," *The Nation*, 3 November 2007

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- 222 Author interview, Respondent C, July 2013
- 223 Rule of Law Roundtable, Blantyre, Malawi, July 15, 2013
- 224 Author interview, Respondent E, July 2012, Blantyre Malawi
- 225 “Malawi Govt offers maximum security to Judge in treason case” Nyasa Times, March 25, 2013
- 226 Rule of Law Roundtable, Blantyre, Malawi, July 15, 2013
- 227 “Judge cites conflict in Mutharika case” Daily Nation, November 14, 2013 <http://mobile.nation.co.ke/News/Judge-steps-down-as-Mutharika-pleads-not-guilty-to-treason/-/1950946/2073134/-/format/xhtml/-/6ofg37/-/index.html>
- 228 “Judge Chombo forced to recuse herself in the Mphwiyo shooting case: Updated”, Nyasa Times, February 5, 2014
- 229 Rule of Law Roundtable, Blantyre, Malawi, July 15, 2013
- 230 Ibid
- 231 Author interview, Respondent F, Blantyre, Malawi, July 2013
- 232 Author interview, Respondent E, Blantyre, Malawi, July 2013
- 233 Reference to treason case against vice-President Chilumpha
- 234 “Malawi Lawyer Says Government Intimidating the Judiciary,” Voice of America News, 8 August 2009
- 235 “Government to Appoint new Judges,” The Nation, 3 November 2007
- 236 Author was unable to secure a copy of this report. Key finding re administrative reform was recounted by Respondent A.
- 237 Report is organized around a set of twelve high priority issues and global judicial integrity principles critical to creating the legal and political enabling environment necessary to strengthen the independence and accountability of the judicial branch and promote a Rule of Law culture. It builds upon the action plan and monitoring and reporting mechanism established, under the leadership of Chief Justice Unyolo of Malawi and other reformers from eastern Africa, in the recent groundbreaking regional declaration called the Blantyre Communiqué.



