

# MALAWI

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## **I. Origins and Historical Development of the Constitution**

The Constitution of Malawi, like many other constitutions in the world, is a product of the country's socio-political and cultural history. Although the Constitution was only adopted in 1994,<sup>1</sup> it cannot be fully appreciated if one ignores the socio-political factors that influenced its adoption. The adoption of the Constitution in 1994 must, first and foremost, be seen as the culmination of a lengthy process by which Malawians sought to emancipate themselves from the excesses of the Malawi Congress Party (MCP) and its former leader and life President, Dr Kamuzu Banda. A look into Malawi's recent history is imperative in order to understand the current Constitution.

The territory now known as Malawi—then known as British Central Africa and later as Nyasaland—was declared a British protectorate in 1891. The establishment of the protectorate over Nyasaland was principally to safeguard the interests of British missionaries, planters, and traders against encroachment from other European powers.<sup>2</sup> The declaration of the protectorate represented the first attempt to form the state of Malawi into a single centralised entity. What is immediately notable, however, is that there was no attempt to garner consensus or to negotiate a proper compact among the various peoples then occupying Malawi in constituting the state.<sup>3</sup> Unsurprisingly, the political order that was introduced following the declaration of the protectorate did not reflect the interests of the vast majority of the people of Malawi and was merely designed to further the interests of the colonial regime.

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<sup>1</sup> The Constitution of Malawi (Act No 20 of 1994) entered into provisional operation on 18 May 1994 and became fully operational on 18 May 1995; D Chirwa, 'A full loaf is better than half: The constitutional protection of economic, social and cultural rights in Malawi' (2005) 49(2) *Journal of African Law* 207, 210–212.

<sup>2</sup> Z Kadzamira, 'Constitutional changes in Malawi 1891–1965', in G Smith and ors (eds), *Malawi: Past and Present: Selected Papers from the University of Malawi History Conference 1967* (1971) 80, 81.

<sup>3</sup> F Kanyongolo, 'The limits of liberal democratic constitutionalism in Malawi', in K Phiri and K Ross (eds) *Democratisation in Malawi: A Stocktaking* (1998) 353, 354.

Legally, Malawi was governed until 1902 under the British Central Africa Order in Council of 1889. In August 1902 a new Order in Council for British Central Africa came into force. The British Central Africa Order in Council of 1902 is often hailed as Malawi's first written constitution.<sup>4</sup> In this Order in Council, the first attempt was made to define the territorial limits of the protectorate within a constitutional document. The 1902 Order in Council also represented the first attempt to structure something akin to a 'constitutional' state in Malawi. The most important feature of the 1902 Order in Council was that it attempted to embody the concept of separation of powers.<sup>5</sup> It created, for the first time, an 'administration' headed by the Commissioner and a 'Court of Record', or High Court.<sup>6</sup> The High Court had 'full jurisdiction, civil and criminal, over all persons and over all matters in the Protectorate'.<sup>7</sup> The enactment of laws, however, was left within the powers of the Commissioner. Article 15(2) of the 1902 Order in Council contained the reception clause for English law in Malawi and established the English judicial model in Malawi.<sup>8</sup> Thereafter English law was applied in all courts, with the exception that customary law could be enforced in cases involving Africans, under Article 20 of the Order in Council. There were no provisions in this 'constitution' relating to human rights.

In 1907 the Nyasaland Order in Council was adopted, under which the name of the protectorate was changed from British Central Africa to Nyasaland.<sup>9</sup> The concept of the separation of powers, which had been 'introduced' in the 1902 Order in Council, was given stronger expression with the creation of a Legislative Council, consisting of the Governor and at least two other persons. This body was given power to legislate for the protectorate. Remarkably, the Governor was granted the right of veto with respect to the legislative functions of the Legislative Council. Clearly, the introduction of the Legislative Council did not alter the manner in which the protectorate was being run in any significant way. Firstly, Africans, who by far formed the majority of the population in the country, were not directly

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<sup>4</sup> M Chigawa, 'The fundamental values of the Republic of Malawi Constitution of 1994', Concept Paper No 1, Constitutional Review Conference 2006, Capital Hotel Lilongwe, 28–31 March 2006.

<sup>5</sup> Chigawa (n4).

<sup>6</sup> See arts 4 and 15 of the British Central Africa (BCA) Order in Council, 1902.

<sup>7</sup> Art 15(1) of the BCA Order in Council (n6).

<sup>8</sup> F von Benda-Beckman, *Legal Pluralism in Malawi: Historical Development 1858-1970 and Emerging Issues* (2007) 37.

<sup>9</sup> See Preamble to the Nyasaland Order in Council of 1907.

represented on the Legislative Council. Secondly, the Legislative Council was subordinate to the Governor and enacted legislation only at his direction.<sup>10</sup>

The constitutional order established by the 1907 Order in Council remained largely intact until 1961, except for a few changes in representation in the Legislative Council. While Malawi was formally granted independence from Britain in 1964, it is important to note that in 1953 Malawi was made part of a federation that included Northern Rhodesia (now Zambia) and Southern Rhodesia (now Zimbabwe).<sup>11</sup> It must be highlighted that the Federation of Rhodesia and Nyasaland, as it was then known, was established despite deep and bitter resistance by Africans in all three of the territories involved.<sup>12</sup> The establishment of the Federation of Rhodesia and Nyasaland galvanised African opposition to colonial rule and coincided with a rise in nationalist sentiment in the three territories. In Malawi, the opposition to colonial rule was manifested by the formation of several regional organisations representing the interests of the local population. In 1944, the various regional organisations came together to form the Nyasaland African Congress (NAC). In 1959, the NAC was transformed into the Malawi Congress Party (MCP), with Dr Kamuzu Banda as its leader. The first general elections were held in 1961, and the MCP won overwhelmingly. Formal independence was granted to Malawi on 6 July 1964, with Dr Kamuzu Banda as the Prime Minister and the Queen of England as the Head of State.<sup>13</sup> Independence was achieved under the 1964 Constitution of Malawi ('Independence Constitution'), which was negotiated in Britain by the nationalist leaders of Malawi and the colonial office representatives. The Independence Constitution, as with the constitutions in most British colonial territories,

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<sup>10</sup> Kadzamira (n2) 83.

<sup>11</sup> The passing of the Federation (Constitution) Order in Council, which received royal assent on 1 August 1953, confirmed the establishment of the Federation of Rhodesia and Nyasaland. The Federation of Rhodesia and Nyasaland must be understood as an attempt to preserve and entrench colonial hegemony not only in Malawi but also in the Rhodesias. The establishment of the Federation was meant to consolidate the dominant positions of power by the colonialists. The Federation was seen as a means of strengthening the sphere of British political influence in British Central Africa while at the same time preventing Southern Rhodesia from drifting towards Afrikaner South Africa. B Muluzi, *Democracy with a Price: The History of Malawi since 1900*, 53–54. It was the impending independence of Nyasaland, principally, that led to the dissolution of the Federation in 1962.

<sup>12</sup> For a detailed account of the Federation of Rhodesia and Nyasaland, see J Pike, *Malawi: A Political and Economic History* (1968) ch 4.

<sup>13</sup> While the Queen was the Head of State, and was represented in Malawi by a Governor General, this position was only ceremonial as all powers of state were vested in the Prime Minister. The last Governor General in Malawi was Sir Glyn Jones, who left Malawi after the country became a republic in 1966.

embodied a ‘Westminster model’ of governance.<sup>14</sup> On paper, such a constitution permitted political pluralism and competition for office through regular elections, and also incorporated a Bill of Rights.<sup>15</sup> This Constitution retained the three organs of government, namely the executive, the legislature, and the judiciary.

In July 1965, Dr Kamuzu Banda announced that Malawi would become a republic. He appointed a Constitutional Committee, which developed draft proposals for the Republican Constitution. The proposals for the Republican Constitution attempted to provide a ‘comprehensive’ justification for the constitutional order that was to be adopted.<sup>16</sup> For example, and as pointed out above, under the Independence Constitution the Head of State was the British monarch, who was represented by a Governor-General, and the Head of Government was the Prime Minister. In this connection, the Constitutional Committee proposed that the office of the Governor-General should fall away and the Prime Minister should become both the Head of State and Head of Government. The Constitutional Committee held the view that a system that divided authority between a ceremonial Head of State and a political Head of State was not viable for Malawi and was contrary to African traditions, generally.<sup>17</sup> The Constitutional Committee also rejected proposals for the office of the Vice-President, arguing that this ‘encourages an element of division of responsibility in the Executive.’<sup>18</sup> The Constitutional Committee also recommended that Malawi should become a one-party state.<sup>19</sup>

The general tenor of the proposals made by the Constitutional Committee leaned towards the creation of a very strong executive, generally, and a very strong presidency, specifically. As in most of post-independence Africa, a strong and centralised executive was defended throughout the 1960s until the late 1980s on the basis that it would promote development.<sup>20</sup>

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<sup>14</sup> J Hatchard and ors, *Comparative Constitutionalism and Good Governance in the Commonwealth* (2004) 15–17.

<sup>15</sup> C Ng’ongola, ‘Judicial mediation in politics in Malawi’, in H Englund (ed), *A Democracy of Chameleons* (2001) 62, 63.

<sup>16</sup> Government of Malawi, *Proposals for the Republican Constitution of Malawi* (1965).

<sup>17</sup> *Proposals for the Republican Constitution of Malawi* (n16) 4.

<sup>18</sup> *Proposals for the Republican Constitution of Malawi* (n16) 5.

<sup>19</sup> *Proposals for the Republican Constitution of Malawi* (n16) 7. The one-party state was confirmed in s 4 of the 1966 Constitution of the Republic of Malawi.

<sup>20</sup> KM Phiri and KR Ross, ‘Introduction: From totalitarianism to democracy in Malawi’, in KM Phiri and KR Ross (eds), *Democratisation in Malawi: A Stocktaking* (1998) 11.

The proposals of the Constitutional Committee were presented at the annual convention of the MCP, and were unanimously adopted by the delegates.<sup>21</sup> Cabinet also adopted the proposals and they were subsequently passed by an MCP-dominated parliament. On 6 July 1966, Malawi became a republic under a new Constitution.

From 1966 to 1994, Dr Kamuzu Banda presided over a one-party state that was notable for its autocratic and oppressive rule. The Republican Constitution was amended in 1971 to make him life President: thus, supposedly, confirming that he would rule Malawi for the remainder of his life.<sup>22</sup> For thirty years Dr Kamuzu Banda's one-party regime retained a firm grip on Malawi. The hallmarks of this period were an intolerant political culture, hero worship, centralised authority, intimidation of political critics, and exclusiveness.<sup>23</sup> From 1966 to 1992 no serious challenge was mounted against Dr Kamuzu Banda's rule.<sup>24</sup>

#### **A. The demise of Dr Kamuzu Banda's regime and the adoption of the 1994 Constitution**

Dr Banda's regime was able to remain in power for about thirty years, in part due to the prevailing global geo-politics. Against the backdrop of the Cold War, the regime was able to sustain support among Western powers on the basis of its anti-communist rhetoric. Ironically, it was this very support base that contributed to its demise.<sup>25</sup> The collapse of the Soviet Union in the late 1980s triggered profound changes in various political systems across Africa and Latin America.<sup>26</sup> The changes in the global political climate exerted pressure for the opening up of the political space in Malawi.

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<sup>21</sup> FE Kanyongolo (n3) 359.

<sup>22</sup> See s 9 of the 1966 Constitution.

<sup>23</sup> KM Phiri and KR Ross (n20) 10–11.

<sup>24</sup> M Nzunda and K Ross, 'Introduction', in M Nzunda and K Ross, *Church, Law and Political Transition in Malawi 1992-1994* (1995) 7.

<sup>25</sup> A significant contribution in this regard was the decision by the international donor community in May 1992 to suspend aid to Malawi until its record on human rights and good governance improved. M Nzunda and K Ross (n24).

<sup>26</sup> WC Chirwa, "'We want change": Transition or transformation', in M Tsoka and C Hickey (eds), *Democracy, Decentralisation and Human Development* (1998) 5–6.

As a result of pressure from various domestic<sup>27</sup> and international quarters, the Government of Malawi agreed to hold a national referendum in 1993,<sup>28</sup> in which most voters cast their ballots in favour of adopting a multi-party system of government.<sup>29</sup> The results of the referendum heralded significant changes to the Malawian political scene, which culminated in the adoption of a new Constitution in 1994.

It is generally agreed that the 1993 referendum marked a turning point in the history of Malawi.<sup>30</sup> Faced with defeat in the referendum, the Government was compelled to embark on a process of transition to multi-partyism and, ostensibly, democracy. The Government was also forced to initiate some immediate legal reforms to facilitate the transition. For example, the Constitution was amended so as to bring back the Bill of Rights that had been rejected in 1966,<sup>31</sup> presidential powers were also greatly reduced, and some repressive laws were repealed.<sup>32</sup>

For the purposes of managing the transition, the Government established the National Consultative Council (NCC) and the National Executive Committee (NEC) under the National Consultative Council Act of 1993, to ensure that the transition to multi-partyism was independently managed.<sup>33</sup> The NEC was entrusted with executive powers, while the NCC was given the task of initiating appropriate legislative measures for amendments to the Constitution that were necessary for holding the impending general elections, among other tasks.<sup>34</sup> In November 1993, however, it was decided not to amend the 1966 Constitution, but

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<sup>27</sup> From a domestic perspective, the transition to multi-partyism was set afoot on 8 March 1992, when the local Catholic bishops issued a pastoral letter entitled 'Living our Faith' which was read from pulpits across the country. The pastoral letter called for better wages, education, and health care, freedom of expression, justice and rights protection, a climate of openness, a more just distribution of wealth, and an end to corruption.

<sup>28</sup> FE Kanyongolo, *Malawi: Justice Sector and the Rule of Law* (2006) 35.

<sup>29</sup> In the referendum voters were asked to choose whether Malawi should remain a one-party state or if it should change to a multi-party system of government. 63% of the voters voted for a change to a multi-party system of government. L Dzimbiri, 'The Malawi Referendum of June 1993' (1994) 13(3) *Electoral Studies* 229–234.

<sup>30</sup> D Chirwa (n1) 210.

<sup>31</sup> Constitutional (Amendment No 3) Act of 1993.

<sup>32</sup> Some of the laws that were repealed include the Forfeiture Act, Cap. 14:06 of the Laws of Malawi and the Decency in Dress Act, Cap. 7:04 of the Laws of Malawi.

<sup>33</sup> For a succinct assessment of the legal aspects of the transition to multi-partyism in Malawi, see C Ng'ong'ola, 'Managing the transition to political pluralism in Malawi: Legal and constitutional arrangements' (1996) 34(2) *Journal of Commonwealth and Comparative Politics* 85–110.

<sup>34</sup> S 5(1) of the NCC Act.

to adopt a new one altogether.<sup>35</sup> In February 1994 the NCC hosted a Constitutional Drafting Conference that was attended by appointees of various political parties, and the result was the adoption of an Interim Constitution, on the basis of which the general elections of May 1994 were contested.<sup>36</sup>

It is apparent that the manner in which the transition to multi-partyism was managed has had serious repercussions for constitutionalism in Malawi. Firstly, the period in which the Constitution was negotiated and drafted is remarkable for its brevity.<sup>37</sup> The process of drafting the Constitution was a ‘hurried affair, conceived at the end of 1993 and executed at the beginning of 1994.’<sup>38</sup> It was negotiated, drafted, and adopted within four months.<sup>39</sup> Even though the Constitution was allowed a one-year provisional period of operation, it still holds the ‘dubious distinction, among constitutions, of being enacted in one day.’<sup>40</sup> All parliamentary processes were completed and presidential approval was given on 16 May 1994.

The haste with which the Constitution was adopted entails that there was insufficient time for proper and broad-based societal consultation and negotiation on its terms.<sup>41</sup> Additionally, the transition was occurring at a time when many other activities were taking place, foremost among which were preparations for the general elections. Amidst the hype of the first general election in about 30 years, it is clear that inadequate focus was paid to the process of drafting the new Constitution. This lack of thorough consultation has certainly detracted from the Constitution’s popular legitimacy and has made it problematic for the Constitution to serve as a sound basis for democratisation.<sup>42</sup> The implications of this lack of consultation, Chirwa

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<sup>35</sup> In deciding to adopt a new constitution it was argued, in part, that the 1966 Constitution contained provisions that were diametrically opposed to political pluralism and democratisation and that only a new constitution could remedy this. J Banda, ‘The constitutional change debate 1993–1995’, in KM Phiri and KR Ross, *Democratisation in Malawi: A Stocktaking* (1998) 316, 321.

<sup>36</sup> Banda (n35) 316, 321.

<sup>37</sup> Once the date for the 1994 general elections was set, it seems to have been the case that all players wanted the Constitution drafted and adopted before the date of the elections.

<sup>38</sup> As above.

<sup>39</sup> D Chirwa, ‘Democratisation in Malawi 1994–2002: Completing the vicious circle?’ (2003) 19 *South African Journal on Human Rights* 316, 317.

<sup>40</sup> C Ng’ong’ola (n33) 64–65.

<sup>41</sup> D Chirwa (n39).

<sup>42</sup> D Chirwa (n39) 318.

argues, are very easy to identify.<sup>43</sup> For example, the Constitution makes no commitment to addressing regionalism, which remains a major concern for the country. Further, the Constitution treats social and economic rights in a disappointing manner, in spite of their centrality to achieving social justice and alleviating poverty. The manner in which the Constitution was adopted clearly paid little heed to the fact that, to be viable, a constitution must be the product of consultation and consensus,<sup>44</sup> which allows for the ready acceptance of and identification with the final product.

Secondly, it is important to reflect on the players who actually influenced the basic content of the Constitution. It was, essentially, drafted by the NCC. Although the NCC was made up of representatives of the various political parties, none of its members belonged to the NCC by virtue of any popular elections.<sup>45</sup> The NCC lacked any direct and popular mandate from the people to determine ‘even the most basic framework of the Constitution’.<sup>46</sup> In the circumstances, there can be no valid claim to popular involvement in the making of the Constitution of Malawi.<sup>47</sup>

It may be argued that the lack of proper consultation and participation in drafting the Constitution was cured by the one-year provisional period of operation to which the Constitution was subjected, and the subsequent National Constitutional Review Conference that was convened in February 1995.<sup>48</sup> However, it is important to note that the Constitutional Review Conference did not redress the lack of consultation, participation, and representation that have been identified above. Although it has been argued that the Constitutional Review Conference was ‘unique in the extent to which it accommodated democratic impulses’ and was attended by a cross-section of Malawi’s population,<sup>49</sup> there are other subtle but equally

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<sup>43</sup> D Chirwa (n39) 319–320.

<sup>44</sup> T Maseko, ‘Constitution-making in Swaziland: The cattle-byre Constitution Act 001 of 2005’ at [[http://www.publiclaw.uct.za/usr/publi\\_law/Nairobi/Maseko\\_ConstitutionalismMakingInSwaziland.doc](http://www.publiclaw.uct.za/usr/publi_law/Nairobi/Maseko_ConstitutionalismMakingInSwaziland.doc)].

<sup>45</sup> FE Kanyongolo (n3) 364.

<sup>46</sup> FE Kanyongolo (n3) 364.

<sup>47</sup> MH Hara, ‘Popular involvement in constitution-making : The experience of Malawi’, paper presented at the World Congress of Constitutional Law, Athens, 11–15 June 2007 at [<http://www.enelsyn.gr/papers/w1/Paper%20by%20Mabvuto%20Herbert%20Hara.pdf>].

<sup>48</sup> By virtue of s 212, the Constitution came into provisional operation on 18 May 1994 for a period of 12 months. During the period of provisional operation a Constitution Committee was given the task of canvassing views on the document and also convening a National Constitutional Conference to review the Constitution.

<sup>49</sup> J Banda (n35) 322.

crucial issues surrounding the Conference that must also be appreciated. Firstly, despite the attempt to include a cross-section of Malawi's population, there was an urban bias in the list of participants,<sup>50</sup> which ignored the fact that the majority of Malawians live in rural areas. Secondly, the Conference was convened for only four days.<sup>51</sup> This was, in the light of the enormity of the task before the Conference, far from adequate for a proper and thorough discussion of the issues. Lastly, Parliament subsequently undermined whatever valuable contribution the Conference may have made by either overruling or ignoring the explicit recommendations arising from the Conference.<sup>52</sup> This clearly defeated the popular participation that the Conference had intended to achieve.<sup>53</sup>

## **II. Fundamental Principles of the Constitution**

Section 12 of the Constitution outlines the underlying principles upon which the Constitution is founded. While most of the Constitution's fundamental principles are directly traceable to section 12, these principles are supported by numerous other provisions within the Constitution. The fundamental principles of the Constitution are discussed individually below.

### **A. Supremacy of the Constitution**

This is a fundamental principle upon which the entire Constitution is based. It is, in part, intended to place the Constitution at the centre of Malawi's socio-political life, thus making the Constitution relevant to the daily lives of all Malawians. The net effect of this principle is that there must be no law above the Constitution. The validity of all laws is contingent upon their consistency with the Constitution. The clearest expression of this intent is in section 5 of

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<sup>50</sup> J Lwanda, *Promises, Power, Politics and Poverty: Democratic Transition in Malawi, 1961–1999* (1997) 192–195. Lwanda argues that some of the resolutions of the Conference were explicitly influenced by this urban bias.

<sup>51</sup> The National Constitutional Conference on the Provisional Constitution was held in Lilongwe from 20–24 February 1995.

<sup>52</sup> According to Hara, '[i]t is important to note that when the Constitution came before Parliament the UDF/AFORD majority in Parliament ignored all the decisions of the Conference on which the Conference had voted against their positions, and pushed through their own amendment proposals'. MH Hara (n47).

<sup>53</sup> For example, the Constitutional Conference recommended the retention of s 64 of the Constitution which allowed constituents to recall their parliamentarians in appropriate cases. However, the repeal of s 64 was one of the first things Parliament did after convening to consider the Conference's recommendations.

the Constitution, which provides that '[a]ny act of Government or any law that is inconsistent with the provisions of this Constitution shall, to the extent of such inconsistency be invalid.'<sup>54</sup>

Since the judiciary is given the responsibility of interpreting, protecting, and enforcing the Constitution,<sup>55</sup> it has fallen on the judiciary to pronounce on the constitutionality of actions by the executive or the legislature. The consistency with which the judiciary has affirmed the supremacy of the Constitution is remarkable. Most of the cases have pertained to the exercise of *ultra vires* powers by either the executive or the legislature. In an early indication of the judiciary's willingness to uphold the supremacy of the Constitution, the High Court declared an Act of Parliament that contravened constitutional provisions to be invalid.<sup>56</sup> Although this decision was overturned on appeal, it is interesting to note that the Supreme Court of Appeal also reaffirmed the fact that all laws must comply with the Constitution for them to be valid.<sup>57</sup> It is, arguably, in the same spirit that the High Court also declared an amendment to section 65 of the Constitution unconstitutional for infringing several provisions in the Constitution concerning human rights.<sup>58</sup>

In a clear statement to the executive, the judiciary has also stated that all executive actions, decisions, or conduct must always comply with the Constitution and where there is a failure to do so, such decisions, actions, or conduct will be struck down for unconstitutionality. For example, in May 1994, the President of Malawi at the time, Bakili Muluzi, verbally informed Mr Lunguzi, who was the Head of the Malawi Police Force, that he was being removed from his position and that he would be reassigned as a diplomat. The President did not provide Mr Lunguzi with any reasons for his decision, even though section 43 of the Constitution clearly

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<sup>54</sup> A similar sentiment is expressed in s 199 of the Constitution. The Malawi Supreme Court of Appeal has held that s 5 underlies the supremacy of the Constitution. It has also held that although the provision mandates courts in Malawi to invalidate law that is inconsistent with the Constitution, the word 'law' does not include the Constitution. A court can thus not pronounce on the (in)validity of a constitutional provision. *In the matter of a presidential reference of a dispute of a constitutional nature under section 89(1)(h) of the Constitution and in the matter of section 65 of the Constitution and in the matter of the crossing of the floor by members of the National Assembly*, Presidential Reference Appeal No 44 of 2006 (unrep).

<sup>55</sup> S 9 of the Constitution.

<sup>56</sup> *Malawi Congress Party and others and Attorney General et al* [1996] MLR 244 (HC).

<sup>57</sup> *The Attorney General v Malawi Congress Party and ors* [1997] 2 MLR 181 (SCA).

<sup>58</sup> *The Registered Trustees of PAC v The Attorney General and Speaker of the National Assembly*, Civil Cause No 1861 of 2003 (unrep).

stipulates that reasons must be provided for all administrative decisions. In subsequent proceedings, the High Court held that Mr Lunguzi's removal from office was unconstitutional.<sup>59</sup> On appeal, the Supreme Court of Appeal confirmed the decision and emphasised the fact that the President's removal of Mr Lunguzi from office without providing him with reasons was unconstitutional.<sup>60</sup> This decision, coming not long after the transition from one-party rule, signified a clear break with the autocratic tendencies of Dr Banda's regime.<sup>61</sup> The decision established that the judiciary would readily set aside executive acts, even those directly undertaken by the President, where they were done in contravention of the Constitution. It is not surprising, therefore, that when the President declared at a public rally that he had banned all public demonstrations in Malawi, the High Court subsequently invalidated that ban.<sup>62</sup>

Other instances in which the judiciary has affirmed the supremacy of the Constitution have not directly involved *ultra vires* conduct on the part of either the legislature or the executive. Most of these instances have arisen largely as a result of the disconnect that arose between the standards set out in the Constitution and some laws that were already in force when the Constitution was adopted. For example, in *Director of Public Prosecution v Hastings Kamuzu Banda and others*,<sup>63</sup> the Supreme Court of Malawi considered the validity of sections 313 and 314 of the 1967 Criminal Procedure and Evidence Code. Section 313 required that in all criminal cases, the High Court should call upon an accused person to enter his or her defence at the close of the prosecution's case. An accused person would then be obliged by section 314(1) to give his or her evidence. The Supreme Court held that the total effect of sections 313 and 314 was to deprive an accused person of the right to remain silent

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<sup>59</sup> *In the matter of the Constitution of the Republic of Malawi and in the matter of the removal of Mac William Lunguzi as Inspector General of Police* [1994] MLR 72 (HC).

<sup>60</sup> *Attorney General v Lunguzi and ors* [1996] MLR 6 (SCA).

<sup>61</sup> It is not far-fetched to assert that if Mr Lunguzi had found himself in the same position during Dr Banda's time, no court could have granted him the remedies he was able to access.

<sup>62</sup> *Malawi Law Society and ors v The State and the President of Malawi and others*, Misc Civil Cause No 78 of 2002 (unrep).

<sup>63</sup> [1997] 1 MLR 7 (SCA). In *Nathebe v The Republic*, Misc Criminal Application No 90 of 1997 (unrep), the High Court was also prepared to hold that s 283(1) of the Penal Code, which creates the offence of theft by public servants, infringes the presumption of innocence as it shifts the burden of proof to the accused person to establish that he or she has not stolen government property. See also MG Chipeta, 'The constitutionality of the reverse onus on cases of theft by public servant' (2007) 1(1) Malawi Law Journal 33.

at the close of the case for the prosecution, which was inconsistent with section 42(2)(f)(iii) of the Constitution. This constitutional provision, it must be pointed out, guarantees every accused person the right to a fair trial, which includes the right ‘to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial.’ It was the Court’s conclusion that sections 313 and 314 were invalid by reason of their inconsistency with the Constitution.<sup>64</sup> A similar conclusion was reached in *Kafantayeni and others v Attorney General*, in which the High Court declared unconstitutional section 210 of the Penal Code in so far as it decreed a mandatory death sentence for the offence of murder.<sup>65</sup>

In so far as the supremacy of the Constitution is concerned, one other incident deserves special mention. The Constitution, in section 83(3), provides that the President, the First Vice-President, and the Second Vice-President shall serve in their respective capacities a maximum of two consecutive terms.<sup>66</sup> It is worth noting in this connection that Bakili Muluzi was elected President of Malawi in 1994 and won a second term in 1999, which was terminating in 2004. As Bakili Muluzi’s second term in office was drawing to a close, his administration tabled a Bill before Parliament proposing to amend section 83(3) in such a manner that it would allow incumbent Presidents to serve an unlimited number of terms in office (the ‘Open Terms Bill’).<sup>67</sup> This Bill was tabled and debated in Parliament, but failed to gain the required majority for its passage into law.<sup>68</sup> Not long afterwards, however, another attempt was made by the Bakili Muluzi administration to amend section 83(3) of the Constitution, proposing an amendment to that provision to allow Presidents to serve a maximum of three terms in office (the ‘Third Term Bill’).<sup>69</sup> This amendment further

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<sup>64</sup> The validity of aspects of ss 313 and 314 of the Criminal Procedure and Evidence Code was also questioned in *Sudi Sulaimana and ors v The Republic*, MSCA Criminal Appeal No 7 of 1998 (being criminal case no 2 of 1998) (unrep).

<sup>65</sup> Constitutional Case No 12 of 2005 (unrep). For other decisions affirming the supremacy of the Constitution, see *Chidule v Electoral Commission and another* [1995] 1 MLR 46; *Mbewe v Registered Trustees of Blantyre Adventist Hospital* [1997] 1 MLR 403; and *President of Malawi and another v Kachere and others* [1995] 2 MLR 616 (SCA).

<sup>66</sup> The High Court has confirmed that s 83(3) bars anyone who has been President for two terms from seeking a third term irrespective of whether the terms were consecutive or not. *The State, The Electoral Commission Ex Parte Bakili Muluzi and United Democratic Front*, Constitutional Cause No 2 of 2009 (unrep).

<sup>67</sup> For a succinct analysis of the debate around the amendment of s 83(3) by the Bakili Muluzi administration, see FE Kanyongolo, ‘Constitutionalism and the removal of presidential term limits from the Constitution of the Republic of Malawi’ (2003) 7 (1) UNIMA Students Law Journal 59.

<sup>68</sup> Constitution (Amendment) Bill No 1 of 2002.

<sup>69</sup> Constitution (Amendment) Bill No 14 of 2004.

proposed to entrench section 83 by listing it in the Schedule to the Constitution so that, in future, any proposed amendment to the section would only be done with the approval of the majority vote of Malawians, expressed in a referendum.<sup>70</sup> This Bill was introduced in Parliament, but was subsequently withdrawn before it could be debated.<sup>71</sup> While the attempts to amend section 83 were defeated, the fact that they were made is an ominous sign for constitutionalism in Malawi. The purported amendment was eerily reminiscent of Dr Banda's life presidency in Malawi and the abuses that it engendered. As has been noted, the attempted amendment was a clear abuse of the powers of amendment that the Constitution creates, especially considering the discernible public opposition to the amendment.<sup>72</sup> More worrying is the fact that the proposed amendment would have diluted the accountability of persons who serve as President by unduly extending the period that they occupy office.

### **B. Separation of powers<sup>73</sup>**

As must be clear from the discussion under Part I of this Chapter, immediately after independence Dr Banda's regime embarked on a massive consolidation of authority in the executive, generally, and the presidency, specifically. The result was the marginalisation of both the legislature and the judiciary. The legislature was reduced to merely rubber-stamping decisions of the executive, while the judiciary was compromised by denying it space to independently discharge its duties.

To properly empower both the legislature and the judiciary, the Constitution distinctly demarcates the limits of the authority of each branch of government.<sup>74</sup> To implement the concept of separation of powers, the Constitution also creates a system of checks and balances to ensure that the branches of government always act within the limits of their authority. In line with the system of checks and balances, while each branch of government is

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<sup>70</sup> A Kamanga, 'Amendments to the Constitution since 18<sup>th</sup> May 1994' 28, Presentation at the National Constitutional Review Conference, 29 March 2006, Capital Hotel, Lilongwe, Malawi.

<sup>71</sup> It is likely that the Bill was withdrawn because of the opposition it was facing both inside and outside Parliament. The UDF may also not have wanted to be defeated twice on the same issue, especially after the 'Open-Terms Bill' had been defeated in Parliament.

<sup>72</sup> A Msowoya, 'Amendments to the Constitution and preservation of its sanctity' 26, Constitutional Review Programme: Discussion Paper No 7.

<sup>73</sup> The discussion under this section must be read together with that under Part IV below.

<sup>74</sup> Ss 7, 8, and 9 of the Constitution confirm the separate status and functions of the executive, legislature, and judiciary.

separate and independent from the others, some powers are deliberately shared between the branches to enhance transparency and accountability.

There are four principal areas in which the Constitution has deliberately intersected the powers of the executive and the legislature.<sup>75</sup> The National Assembly can override the President if he withholds assent to a Bill after allowing a twenty-one day cooling off period. The Constitution also deliberately divides the responsibility for the financial management of the country's finances between the Minister of Finance and the Budget Committee of the National Assembly. The National Assembly and the executive also share the power for treaty-making and treaty implementation, such that while it is the executive that negotiates treaties, it is the National Assembly that has the responsibility for incorporating them into law. The National Assembly is also given a role in the appointment of the Director of Public Prosecutions, the Inspector General of Police, and the Auditor General, among other senior government officials.

The judiciary has re-affirmed that the concept of separation of powers is the foundation for all democratic societies, including Malawi.<sup>76</sup> This entails that each branch of government must always operate within the limits prescribed by the Constitution. While the Constitution emphasises the separate status and functions of each of the three branches of government, the separation of powers envisaged by the Constitution is not a sanitised one. The principle of checks and balances allows the judiciary, for example, to review the manner in which the executive or the legislature are performing their duties for compliance with the Constitution. It is in this spirit that the judiciary has confirmed that the legislature cannot invoke parliamentary privilege to perpetuate violations of the Constitution. Accordingly, while courts will not interfere with legislative decisions that comply with the Constitution, once the legislature oversteps its powers, courts will readily intervene, as was the case in *Mary Nangwale v Speaker of the National Assembly and another*.<sup>77</sup> In this case, an application was brought before the High Court seeking judicial review of matters that arose in the National Assembly. The High Court held that parliamentary privilege will only protect the National

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<sup>75</sup> AP Mutharika, 'The 1995 democratic Constitution of Malawi' (1996) 40(2) *Journal of African Law* 205, 207.

<sup>76</sup> *Attorney General v Fred Nseula and another* [1997] 2 MLR 50 (SCA).

<sup>77</sup> Misc Civil Cause No 1 of 2005 (unrep) and *Mkandawire and others v Attorney General* [1997] 2 MLR 1 (HC).

Assembly from censure by the courts where the National Assembly itself acts within the law. The importance of parliamentary privilege, according to the High Court, is to allow parliamentarians to transact their business without undue hindrances, and not to shield illegality on their part.

### **C. Judicial independence**

It is said that democracy cannot thrive except where there is judicial independence.<sup>78</sup> Without an independent judiciary, democracy becomes meaningless.<sup>79</sup> It is thus not surprising that no pretence to democratic governance was made during Dr Banda's rule, as the judiciary was subverted while the executive exerted control over all levels of the court system in the country.<sup>80</sup> Largely because of its subservient position for the entirety of Dr Banda's rule, the judiciary did not make any contribution to the development of constitutionalism and human rights in post-independence Malawi.<sup>81</sup>

In section 103(1), the Constitution guarantees judicial independence by providing that '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.' Section 103(2) grants the judiciary jurisdiction over all issues of a judicial nature and the exclusive authority to decide whether any issue is within its competence. The Constitution also prohibits the establishment of any courts with superior or concurrent jurisdiction to the High Court or the Supreme Court of Appeal. Perhaps as an indication of the importance of the provisions on judicial independence, section 103—together with the provisions that regulate judicial appointment, remuneration, and security of tenure—cannot be amended without a national referendum.<sup>82</sup>

While judicial independence has largely been respected since the Constitution was adopted, threats to judicial independence are recurrent: some overt, and others covert. Arguably, the

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<sup>78</sup> D Chirwa (n39) 330.

<sup>79</sup> RR Mzikamanda, 'The place of the independence of the judiciary and the rule of law in democratic sub-Saharan Africa' at [[http://www.saifac.org.za/docs/res\\_papers/RPS%20No.%2043.pdf](http://www.saifac.org.za/docs/res_papers/RPS%20No.%2043.pdf)].

<sup>80</sup> FE Kanyongolo (n28) 79.

<sup>81</sup> D Chirwa (n 39) 330.

<sup>82</sup> Ss 114, 119, and 196 as read with the Schedule to the Constitution.

biggest threat to judicial independence to date occurred in 2001, when the majority of the Members of Parliament signed a petition for the removal of three High Court judges, allegedly on the grounds of misconduct and incompetence.<sup>83</sup> However, close scrutiny revealed that the move to impeach the judges was instigated by politicians who had not taken favourably to some of the pronouncements made by the judges concerned. After much local and international condemnation, the attempted impeachment was abandoned. Clearly the move to impeach the judges was a direct attempt by the legislature to interfere with the operations of the judiciary. The legislature's conduct revealed its propensity for interfering with the operations of another branch of government in an improper way.

While the Constitution has attempted to protect the judiciary, the provisions on appointments, promotions, and dismissals of judges are a source of concern.<sup>84</sup> Appointments to the judiciary involve three principal parties: the President, Parliament, and the Judicial Service Commission.<sup>85</sup> The Chief Justice is appointed by the President, subject to confirmation by the National Assembly, with a minimum of two-thirds of its members present and voting. Judges of the Supreme Court of Appeal and High Court are all appointed by the President on the recommendation of the Judicial Service Commission. Magistrates are appointed by the Chief Justice on the recommendation of the Judicial Service Commission.

While the provisions on judicial appointments are not wanting in clarity, there have been persistent allegations of manipulation in the appointments to judicial office, especially to the High Court and the Supreme Court of Appeal.<sup>86</sup> These allegations largely point towards executive interference in judicial appointments and promotions. Admittedly, it is difficult to substantiate the allegations of executive interference in judicial appointments, as the process of appointing judicial officers itself is not very transparent. The communications between the President and the Judicial Service Commission are never made public, and most comments about biased appointments are, to be fair, difficult to substantiate definitively.<sup>87</sup> The clearest

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<sup>83</sup> N Patel and ors, *Consolidating Democratic Governance in Southern Africa: Malawi* (2006) 45.

<sup>84</sup> FE Kanyongolo (n28) 81–82.

<sup>85</sup> S 111 of the Constitution.

<sup>86</sup> See, for example, comments made with respect to the recent appointments and promotions – The Malawi Democrat 'Malawi Law Society queries judge appointments' at [<http://www.malawidemocrat.com/politics/malawi-law-society-queries-judge-appointments/>].

<sup>87</sup> FE Kanyongolo (n28) 13.

way to avoid all allegations of bias in judicial appointments and promotions is to make the process more transparent, for example by holding public hearings when considering candidates for judicial office. A reduction of the President's powers in appointing judicial officers, for example by subjecting all appointments to the High Court to parliamentary approval, may also eliminate the allegations of bias in appointments and promotions.

The High Court, sitting as a Constitutional Court, has affirmed the importance of judicial independence in Malawi. In *The State and The President of Malawi and others Ex Parte Malawi Law Society*,<sup>88</sup> the Court had to determine whether the refusal by the executive to implement adjustments to salaries and allowances for judicial officers was a violation of the Constitution. The Court held that in line with section 114 of the Constitution, it is the National Assembly that is empowered to determine the terms and conditions of judicial officers, and this is in keeping with principles that underlie open and democratic societies. In the Court's words:

The framers of our Constitution, it is clear in our mind, intended that whatever was to be paid to judicial officers [serving or retired] as salary, pension gratuity or other allowances was to be determined by the National Assembly. And the reason should be clear enough. Issues of judicial remuneration touch on judicial independence and separation of powers. Judicial independence in turn revolves around three things: security of tenure, administrative independence and financial security ... Allowing, for instance, the Executive to by itself determine or have the final say on the Terms and Conditions of Service for judicial officers would in effect make judicial officers subordinate to the Executive.

As the Court further held, having the National Assembly determine the remuneration of judicial officers has two distinct advantages. Firstly, because it is made up of the peoples' representatives, it is essentially the people who are determining the remuneration when the National Assembly makes the determination. Secondly, determining judicial remuneration in the National Assembly makes the process open and democratic. Legislators of all persuasions are allowed to comment publicly on the matter, in contrast to the usual secrecy that shrouds most government business.

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<sup>88</sup> Constitutional Cause No 6 of 2006 (Being Miscellaneous Civil Cause No 165 of 2006) (unrep).

A vexing issue in terms of judicial independence in Malawi, and especially for executive/judiciary relations, is the powers vested in the President by section 119(7) of the Constitution. Under this provision the President may, when he considers it desirable in the public interest, reassign a serving judge to another position within the public service. Admittedly, such a reassignment can only be done with the consent of the person concerned. However, the existence of this power creates a not-so-subtle threat to the independence of the judiciary. It is arguable that when the President makes an approach to a judge under section 119(7), this may exert pressure on the person concerned to accept the appointment.<sup>89</sup> The manner in which this power has been utilised so far also raises some concerns about the integrity of the judiciary.<sup>90</sup> Surely the credibility of judges who have served in both the executive and the judiciary may be questioned by some people. It could be alleged that judges who have served in the executive are likely to be more sympathetic to the executive when they return to the bench. Importantly, however, just as justice must manifestly be seen to be done, it is arguable that judicial independence must also manifestly be demonstrable. This is principally because justice is rooted in public confidence and once this is eroded, democracy and the rule of law both suffer.<sup>91</sup>

#### **D. Rule of law**

The rule of law is one of the cornerstones of any functioning democracy.<sup>92</sup> The general theme that runs through the Constitution is that of limited government and the rule of law.<sup>93</sup> The exercise of both legislative and executive authority is subjected to the Constitution, and the judiciary has been endowed with the power to review all such action for conformity with the Constitution.<sup>94</sup>

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<sup>89</sup> N Patel and ors (n83) 44.

<sup>90</sup> For example, President Bingu wa Mutharika reassigned a sitting judge of the High Court, Justice Jane Ansah, to the position of Attorney General in July 2006. In June 2011 Jane Ansah was promoted to the Malawi Supreme Court of Appeal directly from her position as Attorney General, while Maxon Mbendera, another High Court judge, was appointed Attorney General.

<sup>91</sup> RR Mzikamanda (n79).

<sup>92</sup> RR Mzikamanda (n79).

<sup>93</sup> M Chigawa (n4).

<sup>94</sup> Ss 4 and 5 of the Constitution.

The crux of the rule of law is that all persons must be subject to the ordinary law of the land, and that no one is above the law. To ensure that everyone is subject to the ordinary law of the land, the rule of law also requires a legal system to have sufficient mechanisms by which anyone aggrieved can avail himself or herself of the appropriate remedies. In furtherance of the rule of law, section 4 of the Constitution stipulates that it shall bind all executive, legislative, and judicial organs of state, at all levels of government. In line with the provisions of section 4, all branches of government must comply with the Constitution in their operations, and the judiciary is granted the responsibility for interpreting and enforcing the Constitution.<sup>95</sup>

One of the cases in which the courts have affirmed the rule of law is *The State v The President and others Ex Parte Chilumpha*.<sup>96</sup> In this case, the applicant was a serving Vice-President of Malawi who was 'removed' from office by a letter from the President that purported to accept his constructive resignation. In subsequent judicial review proceedings, the High Court held that Malawi is a state governed by the rule of law as manifested by section 12(vi) of the Constitution (under a 2010 amendment, section 12(vi) is now section 12(1)(f)). It must be recalled that in section 12(vi), the Constitution stipulates that all institutions and persons shall observe and uphold the rule of law, and no institution shall stand above the law. The court further held that the executive was not at liberty to ignore complying with a court order that directed the restoration of all benefits to the Vice-President pending the resolution of the judicial review.

With regard to the rule of law in Malawi, it is executive non-compliance with court orders that seems to be the most prominent threat. The executive's record reveals a chequered picture with regard to its compliance with decisions in areas of social and political governance.<sup>97</sup> For example, in 2003 the executive disregarded a decision of the High Court which declared a presidential ban on public demonstrations unconstitutional by deploying the police to stop public demonstrations. In June 2003, the executive also defied a court order when it deported five men, arrested on suspicion of being involved in terrorist activities, to

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<sup>95</sup> S 9 of the Constitution.

<sup>96</sup> Misc Civil Cause No 22 of 2006 (unrep).

<sup>97</sup> FE Kanyongolo (n28) 52.

the United States, despite an injunction restraining their deportation. Recently, the President has signed into law a Bill intended to amend the Civil Procedure (Suits by or Against the Government) Act, in spite of a court order restraining him from doing so.<sup>98</sup>

While executive non-compliance with court orders may be the most significant threat to the rule of law, another insidious threat to the rule of law in Malawi has emerged from the constitutional amendments that Parliament has passed, largely at the behest of the executive. Admittedly, the Constitution has conferred on Parliament powers to amend it when appropriate conditions are met.<sup>99</sup> Aside from the fact that the Constitution of Malawi has been amended on numerous occasions,<sup>100</sup> it is worrying to note that most of the amendments seem to have been motivated by political expedience rather than principled necessity.<sup>101</sup> The number of amendments to the Constitution has been such that the current text is significantly different from the one that was adopted in 1994.<sup>102</sup> The flurry of amendments points to the absence of a commitment to constitutionalism in the country. A commitment to constitutionalism would allow for a proper and meaningful renegotiation of some of the terms of the Constitution where necessary, in contrast to what has been happening to date.<sup>103</sup>

In relation to the manner in which Parliament has exercised its powers to amend the Constitution, it is important to note that a constitution which is not amended haphazardly has the potential to generate greater public confidence in the entire constitutional set-up.<sup>104</sup> Public

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<sup>98</sup> K Munthali, 'Bingu signs Injunctions Bill' at [\[http://www.nationmw.net/index.php?option=com\\_content&view=article&id=22790:bingu-signs-injunctions-bill&catid=1:national-news&Itemid=3\]](http://www.nationmw.net/index.php?option=com_content&view=article&id=22790:bingu-signs-injunctions-bill&catid=1:national-news&Itemid=3).

<sup>99</sup> The powers of amendment are outlined in Chapter XXI of the Constitution. The Constitution has entrenched some of its provisions, making them more difficult to amend. Chapter XXI creates two broad avenues for amendment: for the entrenched provisions, Parliament can only amend these provisions if the proposed amendment has been put to a referendum and the majority of those voting have approved the amendment (s 196). For the non-entrenched provisions, Parliament can effect an amendment if the Bill proposing the amendment is passed by two-thirds of the total number of MPs entitled to vote (s 197).

<sup>100</sup> For an early audit on constitutional amendments in Malawi, see W Kita and C Chiphwanya, 'Constitutional amendment or disbandment' (2003) 7 (1) UNIMA Students Law Journal 19.

<sup>101</sup> See A Kamanga (n70) and Malawi Law Commission, 'Amendments to the Constitution and preservation of its sanctity', Constitutional Review Programme Discussion Paper No 7.

<sup>102</sup> D Chirwa (n3) 321–322.

<sup>103</sup> D Chirwa (n3) 321. Most amendments have been made without sufficient public consultation and in some cases, in the face of massive public criticism. Examples of such amendments include the amendment to s 80 creating the office of the second vice president and the amendment abolishing the Senate.

<sup>104</sup> B Dulani, 'A comparative study of the executive under the Constitution and five other constitutions', Constitutional Review Conference 28–31 March 2006, Lilongwe, Malawi, 4.

confidence in a constitution allows it to be used as a legitimating tool for the actions of a cross-section of public functionaries. The frequent amendments to the Malawian Constitution have meant that it has failed to assume a position of centrality in relation to validation of conduct in the public realm. Frequent amendments have also, arguably, detracted from the sanctity of the Constitution as the basic law in the country. Parliament has, seemingly, forgotten the imperative of preserving the sanctity of the Constitution.<sup>105</sup> The inescapable conclusion here is that Parliament's, and by derivation Malawi's, commitment to constitutionalism and democratic governance remains weak.

### **E. Transparency and accountability**

It is said that amongst the most significant and innovative norms introduced by the Constitution are those that set limits on the powers of government and those that require accountability and transparency on the part of public officers.<sup>106</sup> The Constitution deliberately crafts a system in which all public offices must be transparent and accountable to the populace. The basal premise that cuts across the Constitution is that public power is conferred on trust by the citizenry and that it must be exercised solely to protect and promote the interests of the citizenry.<sup>107</sup> The corollary of this stipulation is that public functionaries must be accountable for the exercise of all public power. The Constitution aims at ensuring that public officials and public institutions continue to command and enjoy the trust and confidence of the people of Malawi.<sup>108</sup> It is also the clear aim of the Constitution to ensure that public officials should not use their positions for personal gain and should avoid any conflict of interests between their private and official undertakings. The government is also enjoined to adopt policies that would promote accountability and transparency, and thereby strengthen public confidence in public institutions.<sup>109</sup>

It could be argued that the Constitution has, normatively, created sufficient guarantees to ensure transparency and accountability. The reality, however, reveals a bleak picture. For

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<sup>105</sup> 'It is imperative to preserve the sanctity of constitutions. The solemnity with which constitutions are adopted and expressed makes this imperative'. Malawi Law Commission (n101) 12.

<sup>106</sup> FE Kanyongolo, 'The rhetoric of human rights in Malawi: Individualisation and judicialisation', in H Englund and F Nyamnjoh (eds), *Rights and the Politics of Recognition in Africa* (2004) 64.

<sup>107</sup> Ss 12 and 13(o) of the Constitution.

<sup>108</sup> M Chigawa (n4).

<sup>109</sup> S 13(o) of the Constitution.

example, the Constitution requires that the President and cabinet ministers declare their assets within three months of being elected or appointed.<sup>110</sup> Since the adoption of the Constitution, however, successive governments in Malawi have shown a flagrant disregard for this requirement. The situation has been rendered more dismal by the fact that the law does not prescribe any penalties for failure to declare assets. This situation facilitates an erosion of accountability on the part of public functionaries. This is because without getting a clear idea of the wealth of senior public functionaries before they assume office, it is impossible to accurately determine whether any unjust enrichment has occurred in the course of them holding a particular office.

In relation to the presidency, section 86 of the Constitution creates the possibility of removing a President from office by way of impeachment when he or she is indicted and convicted of a serious violation of the Constitution or other laws. In spite of this, it is practically impossible to remove a sitting President by way of impeachment. This is because while the Constitution has provided for removal from office by impeachment, the specific procedures for attaining this have not yet been stipulated in any law. It must be evident that the presence of provisions embodying a clear procedure for impeachment would act as a spur towards generating a more diligent discharge of duties by the President. It is arguable that the unanimity of opinion on the retention of provisions pertaining to the impeachment of the President has been motivated by the desire to preserve a mechanism for ensuring accountability of the President.<sup>111</sup>

The accountability of the government to the populace in Malawi is also whittled down by a Constitution that does not allow constituents to recall a Member of Parliament during his or her term of office, irrespective of whether or not he or she has ceased to command their trust.<sup>112</sup> The repealed section 64 of the Constitution had made provision for constituents to

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<sup>110</sup> S 88A(1) of the Constitution. Additionally, s 213 also requires senior public officers to declare their assets as well. S 213, however, requires Parliament to draw up a list of senior grade public officers who are liable to asset disclosure. Parliament has yet to come up with this list.

<sup>111</sup> The 1995 Constitution Review Conference recommended the retention of the impeachment provisions. A similar recommendation was reiterated during the 2007 consultations for the review of the Constitution.

<sup>112</sup> FE Kanyongolo, 'The Constitution and the democratisation process in Malawi, in O Sichone (ed) *The State and Constitutionalism in Southern Africa* (1998) 1, 6.

recall parliamentarians who they felt were not performing their duties satisfactorily.<sup>113</sup> The National Constitutional Conference of February 1995 recommended the retention of that provision in the Constitution. In spite of this clear recommendation from the people, the repeal of section 64 was among the first amendments effected to the Constitution. Aside from the fact that this was not preceded by consultation with the citizenry, the repeal significantly watered down the accountability of Members of Parliament and also diluted their role in representing their constituents.<sup>114</sup> Needless to say, section 64 was a potent tool in the hands of the citizenry in ensuring the accountability of parliamentarians. The disinclination on the part of Parliament to re-enact section 64, in spite of clear popular agitation in favour of the provision's reintroduction, is very worrying.<sup>115</sup> This manifests a lack of willingness by parliamentarians to subject themselves to accountability mechanisms.

Although the Constitution contains clear propositions in support of transparency and accountability, it is important to highlight that they can only be attained if the citizenry is empowered. Only an empowered citizenry can exert sufficient pressure on government to remain accountable and transparent. While there are many avenues that can be utilised to achieve this, it is pertinent to highlight that civil society is likely to play a huge role in any drive towards the creation of an empowered citizenry. In Malawi, however, while there was an initial proliferation of civil society organisations subsequent to the transition to multi-partyism, civil society has generally faded into obscurity.<sup>116</sup> The irony here is that while civil society remains ill-positioned to help with both citizen empowerment and demanding accountability from public functionaries, it remains the only entity that can, if it actualises its potential, meaningfully help in both empowerment and accountability.<sup>117</sup>

### **III. Fundamental Rights Protection**

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<sup>113</sup> S 64 was repealed by Act No 6 of 1995.

<sup>114</sup> R Kapindu, 'Malawi: Legal system and research resources', at [<http://www.nyulawglobal.org/globalex/Malawi.htm>].

<sup>115</sup> The Malawi Law Commission has received numerous submissions calling for the re-enactment of s 64. The only notable opposition against the re-enactment seems to be coming from parliamentarians themselves: Malawi Law Commission, *Report of the Law Commission on the review of the Constitution* (2007) 47–50 and Malawi Law Commission, *Report of the proceedings of the second national constitution conference* (17–19 April 2007) 21.

<sup>116</sup> See WC Chirwa, 'Civil society in Malawi's democratic transition', in M Ott and ors (eds), *The Power of the Vote: Malawi's 2004 Parliamentary and Presidential Elections* (2004) 87.

<sup>117</sup> See H Englund, *Prisoners of Freedom: Human Rights and the African Poor* (2006).

Malawi's Constitution has been described as 'one of the world's most liberal Constitutions'.<sup>118</sup> In a typical liberal democratic fashion, the Constitution has an entire chapter dedicated to human rights. The extensive provision for human rights in the Constitution contrasts starkly with the 1966 Constitution, which expressly omitted provisions on human rights.

The Constitution provides for a range of civil and political rights, a few social and economic rights, and at least one provision on third generation rights.<sup>119</sup> While the Constitution is very detailed on the protection of civil and political rights, it is rather scant on social and economic rights.<sup>120</sup> Most of the latter are included as principles of national policy in Chapter Three of the Constitution.<sup>121</sup> The inclusion of social and economic rights as principles of national policy entails that these protections are merely directory in nature and cannot be directly enforced in a judicial forum.<sup>122</sup> Courts, however, are enjoined to have regard to the principles of national policy in interpreting and applying the Constitution or any law and in determining the validity of the executive's decisions.

The Bill of Rights is Chapter Four of the Constitution. There is a similar formulation to all human rights provisions in the Constitution. The rights are, almost uniformly, guaranteed to 'every person'. For example, section 18 provides that 'every person has the right to personal liberty'; section 16 provides that 'every person has the right to life ...' and section 33 provides that 'every person has the right to freedom of conscience, religion, belief and thought and to academic freedom.' The rights contained in the Constitution are thus, generally, for the protection of every person in Malawi. The only exception is with respect to political rights. While section 40, for example, provides for every person's right to form, join, and take part in the activities of a political party, this is subject to other provisions in the Constitution. In this connection, under section 77 some political rights, for example the right to vote, are

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<sup>118</sup> FE Kanyongolo (n3) 365.

<sup>119</sup> The only express reference to third generation rights in the Constitution is in s 30, which provides for the right to development.

<sup>120</sup> S Gloppen and FE Kanyongolo, 'Courts and the poor in Malawi: Economic marginalisation, vulnerability and the law' (2007) 5(2) *International Journal of Constitutional Law* 258.

<sup>121</sup> See s 13 of the Constitution.

<sup>122</sup> S 14 of the Constitution.

reserved for citizens. It must be stated that there is nothing strange in reserving some political rights for citizens only, as this is a common feature of most liberal democracies.

While the rights in the Constitution are generally afforded to everyone, it seems to be the case that not everyone can commence action seeking the enforcement of rights that have been violated. Section 15(2) of the Constitution, as amended in 2010, provides that:

Any person or group of persons, natural or legal, with sufficient interest in the promotion, protection and enforcement of rights under this Chapter shall be entitled to the assistance of the courts, the Ombudsman, the Human Rights Commission and other organs of Government to ensure the promotion, protection and enforcement of those rights and the redress of any grievances in respect of those rights.<sup>123</sup>

While there has been no litigation on the amended section 15(2), the pronouncements on the old section 15(2) remain instructive. Section 15(2) of the Constitution defines *locus standi* for purposes of the protection and enforcement of human rights. In interpreting the provision, the Malawi Supreme Court of Appeal has stated that section 15(2) requires that a potential litigant must demonstrate that the actions or conduct complained of adversely affected his legal rights or interest.<sup>124</sup> According to this standard, for one to have sufficient interest in a matter one must possess a legal or substantial right which is over and above that which the general public may possess in the same matter.<sup>125</sup> This has meant that one must prove that he or she has been directly affected by the action or conduct complained of before he or she can be allowed to commence an action to protect or enforce human rights.<sup>126</sup> The narrow and restrictive approach to *locus standi* has also meant that there is no room for public interest

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<sup>123</sup> Before the 2010 amendment, s 15(2) provided as follows: ‘Any person or group of persons with sufficient interest in the protection and enforcement of rights under this Chapter shall be entitled to the assistance of the courts, the Ombudsman, the Human Rights Commission and other Organs of Government to ensure the promotion, protection and redress of grievance in respect of those rights.’

<sup>124</sup> *Civil Liberties Committee (CILIC) v The Minister of Justice and the Registrar General*, MSCA Civil Appeal No 12 of 1999 (unrep).

<sup>125</sup> Some High Court decisions have differed with the position as espoused by the Supreme Court, but the doctrine of precedent entails that the state of law is as stated by the Supreme Court. For the High Court decisions differing with the Supreme Court, see *Thandiwe Okeke v Minister of Home Affairs and Controller of Immigration*, Miscellaneous Civil Application No 73 of 1997 (unrep) and *The Registered Trustees of the Public Affairs Committee v Attorney General and ors*, Civil Cause No 1861 of 2003 (unrep).

<sup>126</sup> FE Kanyongolo (n28) 138.

litigation.<sup>127</sup> While section 15(2) has been interpreted restrictively in terms of who can commence suit to enforce human rights under the Constitution, it must be noted that section 15(1) confirms both the vertical and horizontal justiciability of the Bill of Rights.<sup>128</sup> Given the broad applicability of the Bill of Rights, it is rather peculiar that the courts have adopted a restrictive approach to *locus standi*.

Section 46 of the Constitution provides for the enforcement of the rights provided for in the Bill of Rights. The provision begins by prohibiting the National Assembly or any other subordinate legislative authority, the executive, or other government agencies from making any law that abolishes or abridges any of the rights contained in the Bill of Rights.<sup>129</sup> This provision is meant to guard against legislative or executive excesses that may erode the protections provided by the Bill of Rights. As for any person claiming a violation of fundamental rights, section 46(2) creates several avenues of redress. Such a person is entitled to make an application to a competent court to enforce or protect such rights, or to make an application to the Ombudsman or the Human Rights Commission seeking assistance to remedy any violation. Under section 46(3), a court that finds that a right protected in the Constitution has been unlawfully denied or violated has power to make any orders as are necessary and appropriate to secure the enjoyment of the rights and prevent those rights from being unlawfully denied or violated. A court hearing a complaint alleging the violation of a right guaranteed in the Constitution has the power to award compensation.<sup>130</sup> The Constitution also directs that criminal penalties must be prescribed for violations of all rights that are non-derogable under the Constitution.<sup>131</sup> Unfortunately, no law has yet been passed to prescribe such penalties.

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<sup>127</sup> MJ Nkhata, 'Public interest litigation and locus standi in Malawian constitutional law: Have the courts unduly fettered access to justice and legal remedies?' (2008) 2(2) Malawi Law Journal 209.

<sup>128</sup> *Liquidator, Import and Export (Malawi) Ltd v JL Kankhwanga and ors*, Civil Appeal No 52 of 2003 (unrep) and S Banda, 'Constitutional mimicry and common law reform in a rights-based post colonial setting: The case of Malawi and South Africa' (2009) Journal of African Law 142, 144.

<sup>129</sup> S 46(1) of the Constitution.

<sup>130</sup> S 46(4) of the Constitution.

<sup>131</sup> S 46(5) of the Constitution.

Malawi has signed and acceded to numerous human rights instruments.<sup>132</sup> Most of the rights in the Bill of Rights are also covered in the major international human rights instruments to which Malawi is a party. This means that the jurisprudence emerging from the interpretation of these major human rights treaties remains very relevant for Malawi. Sadly, international human rights standards have had little practical impact in Malawi.<sup>133</sup> Malawi has rarely gone beyond ratification to give the international treaties domestic application. This has meant that most international human rights standards have remained irrelevant in constitutional interpretation.<sup>134</sup> Malawi's lackadaisical attitude with respect to international law is confirmed by the fact that it has repeatedly failed to account for its implementation of the various treaties to which it is party by not submitting its state reports.

#### **IV. Separation of Powers**<sup>135</sup>

Section 7 of the Constitution establishes the executive as the entity responsible for the initiation of policies and legislation and the implementation of all laws. The detailed powers of the executive are set out in Chapter Eight of the Constitution. The legislature is mandated with the enactment of laws and ensuring that its deliberations reflect the interests of all people of Malawi,<sup>136</sup> while the judiciary is tasked with interpreting, protecting, and enforcing the Constitution in an independent and impartial manner.<sup>137</sup> The full extent of the authority vested in the legislature and the judiciary is outlined in Chapters Six and Nine of the Constitution, respectively. It is the clear intention of the Constitution, as manifested by sections 7, 8, and 9, that each of the three branches of government be separate and autonomous from the other branches.

The basic structure of government in Malawi is neither presidentialist nor parliamentary.<sup>138</sup> The structure is often described as 'hybrid', since it combines elements of the presidentialist

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<sup>132</sup> For example, Malawi is a party to the International Covenant on Civil and Political Rights, the International Covenant on Economic Social and Cultural Rights, and the African Charter on Human and Peoples Rights.

<sup>133</sup> D Chirwa (n39) 328.

<sup>134</sup> D Chirwa (n39) 328.

<sup>135</sup> The discussion under this section must be read together with Part II.B of this Chapter.

<sup>136</sup> S 8 of the Constitution.

<sup>137</sup> S 9 of the Constitution

<sup>138</sup> AP Mutharika (n75) 206.

system with those of the parliamentary system. The Constitution provides for a directly elected President who is also given the power to appoint his own cabinet, while all legislative authority is vested in the legislature.<sup>139</sup> Although section 58 of the Constitution allows Parliament to confer the power to make delegated legislation to either the executive or judiciary, the same provision also prohibits Parliament from delegating any of its legislative powers in a way that would substantially and significantly affect the fundamental rights and freedoms recognised in the Constitution. It must be pointed out that the framers of the Constitution provided for a bicameral legislature, but the provisions on bicameralism were all repealed, and Malawi's legislature is unicameral.<sup>140</sup>

The President is elected by 'a majority of the electorate through direct, universal and equal suffrage'.<sup>141</sup> A presidential candidate is required to declare who will be his or her Vice-President should he or she be elected at the time of presenting his or her nomination.<sup>142</sup> This entails that both the President and the Vice-President are elected directly by the citizenry, with the result that the President does not have powers to dismiss the Vice-President.<sup>143</sup> The Constitution allows the President to appoint a Second Vice-President, if he or she considers it desirable in the national interest.<sup>144</sup> Where the President decides to appoint a Second Vice-President, the Constitution stipulates that the President's appointee must not come from the same political party as the President. While only one person has been appointed to serve as Second Vice-President since the Constitution was adopted, it is clear that the provision's intent is to allow a President to form a government of national unity where the situation so dictates.<sup>145</sup> With respect to members of cabinet, the Constitution confers wide discretionary

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<sup>139</sup> See the following provisions of the Constitution: s 80(2), s 92(1), s 94, and s 48.

<sup>140</sup> Act No 4 of 2001 repealed ss 68–72, which had provided for the Senate as the upper house of Malawi's legislature. For a discussion of the reasons for the repeal of those sections and the merits or lack thereof, see M Chigawa, 'The senate as the second chamber of parliament in Malawi: Its relevance, composition and powers', Paper for Presentation at the Malawi Law Journal Launch Conference 16–17 July 2008, Blantyre, Malawi.

<sup>141</sup> S 80(2) of the Constitution.

<sup>142</sup> S 80(3) of the Constitution.

<sup>143</sup> In the latest presidential referral under s 89(1)(h), President Bingu wa Mutharika was seeking the Court's opinion on whether he could legitimately deem that his Vice-President, who had formed her own political party, had resigned and could thus be removed from office: Presidential Referral N. 1 of 2011.

<sup>144</sup> S 80(5) of the Constitution.

<sup>145</sup> In 1995, Chakufwa Chihana of the Alliance for Democracy (AFORD) was appointed Second Vice-President of Malawi by Bakili Muluzi.

powers on the President as to who he or she can appoint into his cabinet.<sup>146</sup> The President can even appoint Members of Parliament who do not belong to his or her political party into his or her cabinet without consulting the political party concerned. The preceding point was confirmed in *Mkandawire and others v Attorney General*.<sup>147</sup> In this case, the then ruling party, the United Democratic Front (UDF), entered into a coalition agreement with an opposition party, the Alliance for Democracy (AFORD), and under the terms of the coalition agreement several AFORD members were appointed as ministers. When the parties fell out with each other, AFORD sought to withdraw from government all its members who were still ministers in the UDF government who had refused to resign voluntarily. At the same time, the President appointed two more AFORD Members of Parliament into his cabinet. AFORD commenced the action, seeking orders that would compel the Speaker of the National Assembly to declare that the AFORD members who were still in government had crossed the floor and their seats must be declared vacant. The Court held that the President's power to appoint ministers stems from section 94(1) of the Constitution, and there is no limitation in the Constitution regarding the political party from which ministers may be appointed. The court also held that the powers of the President to appoint ministers originate in prerogative powers, and thus cannot be subjected to judicial review.

In Malawi, a President is elected for a five-year term and must vacate office at the expiration of his or her term unless he or she secures a second term in the general elections. The Constitution bars a President from being in office for more than two terms.<sup>148</sup> While the expiration of a term in office is the routine reason for vacating office, a Malawian President is also subject to removal from office if he or she has been indicted and convicted by way of impeachment, as discussed in Part II.E above.

As alluded to above, although section 58 of the Constitution allows the National Assembly to delegate to the executive or judiciary the power to make subsidiary legislation, all legislative powers are vested in the National Assembly by virtue of section 48. It is for this reason that section 58 also directs that any subsidiary legislation must be laid before Parliament for

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<sup>146</sup> S 94 of the Constitution.

<sup>147</sup> [1997] 2 MLR 1 (HC). This decision was later confirmed by the Malawi Supreme Court of Appeal.

<sup>148</sup> S 83 of the Constitution and *The State, The Electoral Commission Ex Parte Bakili Muluzi and United Democratic Front*, Constitutional Cause No 2 of 2009 (unrep).

consideration. The National Assembly has been granted the prerogative of regulating its own procedure.<sup>149</sup> The comprehensive procedure for all business in the National Assembly is contained in the National Assembly's Standing Orders, which are revised and reviewed as the need arises. The functions and powers of the National Assembly are outlined in section 66 of the Constitution. These include the powers and functions to receive, amend, accept, or reject government Bills or private Bills; to initiate private members Bills; and to debate and vote on a motion, including motions to indict and convict the President or Vice-President by impeachment. Although the Constitution allows for the introduction into the National Assembly of both private Bills and private members Bills, almost all the legislation in Malawi is the result of government Bills. When a Bill is presented in the National Assembly it is debated and passed by the majority of the Members of Parliament in attendance—some Bills, however, depending on their nature, require a two-thirds majority of the total number of members entitled to vote before they can be passed.<sup>150</sup> If after the debate the Bill is still unsatisfactory to most Members of Parliament, it is referred back either to the Legal Affairs Committee of the National Assembly or to another of the specialised committees of the National Assembly, for revision and refinement.

Once a Bill has been debated and passed, it must be presented to the President for assent. The President must either assent or refuse to assent to any Bill within twenty-one days of the Bill being presented to him.<sup>151</sup> Where the President withholds assent to a Bill, it must be returned to the Speaker of the National Assembly with a notification that Presidential assent has been withheld, including the reasons for the withholding of the assent. Such a Bill must not be debated again until after the expiration of twenty-one days from the date of the notification of the withholding of the assent. If such a Bill is subsequently debated again after the expiration of the twenty-one days but before the expiration of three months and passed by the majority of the National Assembly, it must again be presented to the President for assent. This time the President must assent to the Bill within twenty-one days of its presentation. All Bills that have been passed must be immediately published in the Gazette. No law made by Parliament can come into force until it has been published in the Gazette.<sup>152</sup> Parliament, however, may

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<sup>149</sup> S 56 of the Constitution.

<sup>150</sup> S 196 of the Constitution.

<sup>151</sup> S 73 of the Constitution.

<sup>152</sup> S 74 of the Constitution.

prescribe that a law shall not come into force until a later date in spite of its publication in the Gazette. In such a situation, the law will ordinarily come into force upon the publication of a ministerial notice appointing the date for its coming into force in the Gazette.

## V. Federalism/Decentralisation

Malawi is a unitary state. All powers of state are vested in the central government, which operates through various ministries and departments. The Constitution provides that powers of state are split between the executive, the judiciary, and the legislature, supposedly on an equal basis. In reality, however, the Constitution over-concentrates authority in the executive, particularly the Presidency.<sup>153</sup> This is manifested, for example, by the wide-ranging powers that the President has in terms of appointments to senior government positions. Under the Constitution, the President is empowered to appoint, and also remove from office, the Attorney General,<sup>154</sup> the Director of Public Prosecutions,<sup>155</sup> the Auditor General,<sup>156</sup> and the Inspector General of Police.<sup>157</sup> Admittedly, some of the aforementioned presidential appointments are subject to approval by the Public Appointments Committee.<sup>158</sup>

Although debate on federalism surfaces every now and then, it is unlikely that Malawi will be taking steps to becoming a federal state any time soon.<sup>159</sup> Malawi has, however, experimented with decentralisation for a long time. In Malawi, decentralisation and local governance have a long but uneasy history, especially as a result of the extensive centralisation of the state that took place during the thirty years of rule by the Malawi

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<sup>153</sup> G Bauer, 'Malawi: Institutionalising Multipartyism', in G Bauer and SD Taylor, *Politics in Southern Africa: State and Society in Transition* (2005) 19, 32.

<sup>154</sup> S 98 of the Constitution.

<sup>155</sup> S 102 of the Constitution.

<sup>156</sup> S 184 of the Constitution.

<sup>157</sup> S 154 of the Constitution.

<sup>158</sup> The Public Appointments Committee (PAC) is established under s 56(7) of the Constitution and its principal task is to scrutinise appointments to senior government positions. While this should ordinarily be a check on presidential powers of appointments, experience has shown that the PAC is often compromised by partisan politics. See B Chinsinga, 'Malawi's democracy project at the cross roads', in *Towards the Consolidation of Malawi's Democracy* (2008) 7, 12.

<sup>159</sup> See, for example, BC Mkandawire, 'Federalism not divisive' at [[http://www.mwnation.com/index.php?option=com\\_content&view=article&id=19922:federalism-not-divisive&catid=23:my-turn](http://www.mwnation.com/index.php?option=com_content&view=article&id=19922:federalism-not-divisive&catid=23:my-turn)].

Congress Party (MCP).<sup>160</sup> It was only in the twilight of its time in power that the MCP government commenced a process of reviewing local governance in Malawi. These processes were, however, overtaken by the transition to multi-partyism and the adoption of the new Constitution in 1994. The Constitution recognises and regulates local government under Chapter XIV. This is supplemented by the Local Government Act,<sup>161</sup> which outlines how local governance must be practiced in Malawi.

The importance of decentralisation in Malawi is clearly recognised. This aside, the process of decentralisation itself has proceeded in fits and starts.<sup>162</sup> Several problems have dogged decentralisation in Malawi, but only three are highlighted here. Firstly, at the normative level, are the complexities that stem from the incompatibility between the provisions of the Local Government Act and several other statutes.<sup>163</sup> Decentralisation has been significantly hindered by the government's failure to amend a number of laws and bring them in line with the demands of decentralisation. Secondly, there is a general lack of awareness of the decentralisation processes that have so far taken place in the country. In most instances, the majority of the people still do not fully understand the functions or roles of their local assemblies.<sup>164</sup> The lack of awareness of local governance structures negatively affects the viability of decentralisation initiatives in the country. This, arguably, explains why popular participation in these processes remains very low. Thirdly, decentralisation in Malawi has been sabotaged by a lack of political will to support the process. While decentralisation generally involves the shifting of decision-making authority from the centre to the peripheries, there is discernible evidence that the centre is resisting the devolution of authority.<sup>165</sup> Perhaps the starkest manifestation of the lack of political will has been the

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<sup>160</sup> For a fuller perspective on the history of local governance in Malawi, see B Dulani, 'The status of decentralisation in Malawi', Research Report (2003) and J Kaunda, 'The state and society in Malawi' (1998) 36(1) Commonwealth and Comparative Politics 48, 52.

<sup>161</sup> Local Government Act, Ch 22:01 Laws of Malawi.

<sup>162</sup> See B Chinsinga, 'District assemblies in a fix: The perils of the politics of capacity in the political and administrative reforms in Malawi' (2005) 22(4) Development Southern Africa 529–548. For an analysis of some of the challenges that have been faced in relation to decentralisation, see AL Chiweza, 'Is the centre willing to share power?: The role of local government in a democracy' in M Tsoka and C Hickey (eds), *Democracy, Decentralisation and Human Development: Bwalo, Issue 2* (1998) 93.

<sup>163</sup> For a succinct expose of some of the major laws that are inconsistent with the decentralisation legislation in Malawi, see B Dulani (n160).

<sup>164</sup> Malawi Economic Justice Network, *Service delivery satisfaction survey (SDSS III) Report*.

<sup>165</sup> B Dulani (n160).

repeated failure to hold local government elections in the country.<sup>166</sup> It is striking to note that only one set of local government elections has been held since 1994.<sup>167</sup> During the first term of President Bingu wa Mutharika, no steps were taken towards the holding of local government elections.<sup>168</sup> As a further manifestation of the lack of political will in support of local governance, in the second term of the Bingu wa Mutharika administration, an amendment to the Constitution was sponsored that deferred the holding of local government elections to a date to be determined by the President in consultation with the Electoral Commission.<sup>169</sup>

Against this background, one should recall the fact that in spite of the widespread rhetoric on participation and empowerment that accompanied the transition to multi-partyism and the adoption of the Constitution, participation by the populace in the political processes remains very low.<sup>170</sup> Local governance thus remains a crucial component if participation and empowerment are to be given full meaning in Malawi. The democratisation process itself is largely hinged on whether and to what extent people participate in local-level decision-making. Where, as has largely been the case, there is a failure to allow people to participate and influence decisions, the internalisation of democratic values is jeopardised.<sup>171</sup> Decentralisation of government is thus a way of strengthening democracy and a means of bringing decisions closer to the people who are affected by the decisions. It is also a way of

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<sup>166</sup> These were last held in 2000. Under s 147(5) of the Constitution, local government elections must be held in the third week of May in the year following the general elections. S 147 has since been amended and local government elections will now be held on a date to be determined by the President, in consultation with the Electoral Commission.

<sup>167</sup> The failure to hold local government elections has stalled the process of citizenry empowerment in the country: N Patel, 'Malawi's 2009 elections: A critical evaluation' at [<http://www.cmi.no/file/?1014>].

<sup>168</sup> See 'Pressure Mounts on local polls', Nation Online at [[http://www.nationmw.net/newsdetail.asp?article\\_id=214](http://www.nationmw.net/newsdetail.asp?article_id=214)].

<sup>169</sup> At the moment, President Mutharika is likely to serve his two terms in office (10 years) without ever holding local government elections, as the proposal is to hold tri-partite elections in 2014. D Mmana, 'Malawi government to table bill for tri-partite elections' at [[http://www.nationmw.net/index.php?option=com\\_content&view=article&id=20953:malawi-govt-to-table-bill-for-tripartite-elections&catid=63:local-news&Itemid=62](http://www.nationmw.net/index.php?option=com_content&view=article&id=20953:malawi-govt-to-table-bill-for-tripartite-elections&catid=63:local-news&Itemid=62)].

<sup>170</sup> H Englund (n117) 6.

<sup>171</sup> H Englund (n117) 6.

enhancing participation by the citizenry. Decentralisation is the first step towards the attainment of democratic governance.<sup>172</sup>

## **VI. Constitutional Adjudication**

The court system in Malawi is made up of the Malawi Supreme Court of Appeal, the High Court of Malawi, and subordinate courts. The Malawi Supreme Court of Appeal is the highest court of record.<sup>173</sup> It has the power to hear appeals from the High Court and other courts and tribunals as may be prescribed by an Act of Parliament. The High Court is the second highest court in the country. The Constitution confers on the High Court unlimited original civil and criminal jurisdiction.<sup>174</sup> The High Court also has original jurisdiction to review the constitutionality of any law or any action or decision of the government for conformity with the Constitution.<sup>175</sup> The power of judicial review vested in the High Court is the principal means by which the courts contribute to making both the executive and legislature accountable.<sup>176</sup> The President is also given powers to refer disputes of a constitutional nature to the High Court for adjudication.<sup>177</sup> Below the High Court are subordinate courts, presided over by professional magistrates and lay magistrates.<sup>178</sup> The Constitution also provides for the establishment of specialised tribunals, one of which—the Industrial Relations Court—is established under section 110(2) of the Constitution. The specific powers vested in the High Court and subordinate courts are explained in the Courts Act.<sup>179</sup>

Originally, section 9 of the Courts Act provided that all proceedings in the High Court would be heard and disposed of by or before a single judge. However, in 2003 this provision was

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<sup>172</sup> AH Wingo, 'Fellowship associations as a foundation for liberal democracy', in K Wiredu (ed), *A Companion to African Philosophy* (2004) 450, 457.

<sup>173</sup> S 104 of the Constitution. The Supreme Court of Appeal Act, Cap. 3:01 Laws of Malawi, provides detail as to the jurisdiction and procedure before the Court.

<sup>174</sup> S 108(1) of the Constitution.

<sup>175</sup> S 108(2) of the Constitution.

<sup>176</sup> FE Kanyongolo (n28) 41.

<sup>177</sup> S 89(1)(h) of the Constitution.

<sup>178</sup> S 110 of the Constitution.

<sup>179</sup> Cap. 3:02 Laws of Malawi.

amended and the original section 9 became section 9(1). The amended section 9 provides as follows, in the new sections 9(2) and 9(3):

Section 9 (2) – Every proceeding in the High Court and all business arising there out, if it expressly and substantively relates to, or concerns the interpretation or application of the provisions of the Constitution, shall be heard and disposed of by or before not less than three judges.

(3) A certification by the Chief Justice that a proceeding is one which comes within the ambit of subsection (2) shall be conclusive evidence of that fact.

It must be pointed out that when the High Court is constituted pursuant to section 9(2) and 9(3), it has become common for the bench, the bar, and the public at large to refer to the Court so constituted as a ‘constitutional court’.<sup>180</sup> However, such reference should be taken to be no more than a colloquial one.<sup>181</sup> Neither the Constitution nor any other statute in Malawi creates a constitutional court. What the amendment to section 9 of the Courts Act achieved was to require the High Court to sit no less than three judges in all matters that expressly or substantively concern the interpretation or application of the Constitution. The Chief Justice’s certification of the matter is conclusive and none of the parties is at liberty to question the certification once it has been made.<sup>182</sup> Importantly, a matter is not constitutional merely because the parties have referred to constitutional provisions in framing their dispute. The dispute itself must relate to or concern the interpretation or application of the provisions of the Constitution.<sup>183</sup> The powers of the High Court sitting in a constitutional cause are the same as those of the High Court sitting in a non-constitutional matter. Appeals from the High Court sitting as a constitutional court lie to the Supreme Court of Appeal. The Supreme Court deals with appeals from the High Court sitting as a constitutional court in the same way it deals with other appeals from the High Court.

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<sup>180</sup> R Kapindu (n114).

<sup>181</sup> FE Kanyongolo (n28) 42.

<sup>182</sup> *James Phiri v Bakili Muluzi and Attorney General*, Constitutional Cause No 1 of 2008 (unrep). The rather vexing question, which has yet to be determined, relates to the remedies available to a party where the Chief Justice refuses to certify as constitutional a dispute that patently meets the requirements in s 9 of the Courts Act.

<sup>183</sup> Cf *Maziko Sauti Phiri v Privatisation Commission and The Attorney General*, Constitutional Cause No 13 of 2005 (unrep).

## VII. International Law and Regional Integration

### A. International law in Malawi

In so far as the applicability of international treaty law is concerned, Malawi is dualist.<sup>184</sup> This means that an Act of Parliament is required before an international agreement becomes part of the laws of Malawi. Where customary international law is at issue, Malawi is monist.<sup>185</sup> Section 211 of the Constitution, as amended, provides as follows:

Section 211 (1) Any international agreement entered into after the commencement of this Constitution shall form part of the law of the Republic if so provided by or under an Act of Parliament.

(2) Binding international agreements entered into force before the commencement of this Constitution shall continue to bind the Republic unless otherwise provided by an Act of Parliament.

(3) Customary international law, unless inconsistent with this Constitution or an Act of Parliament shall form part of the law of the Republic.

Section 211 notwithstanding, the practice in terms of incorporation of international treaties into Malawian law reveals a confused picture. There has been, to date, no specific legislation that sets out the appropriate procedure for the incorporation of international human rights standards into national law.<sup>186</sup> This, as Kanyongolo points out, has brought about two major consequences.<sup>187</sup> Firstly, it has granted Parliament the discretion to determine how best to incorporate particular international standards, resulting in an un-uniform domestication strategy. Secondly, it has produced uncertainty as to whether or not particular standards have been incorporated, especially because in some cases Parliament has passed domesticating statutes, while in many other cases nothing has been done.<sup>188</sup> In spite of the fact that Malawi

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<sup>184</sup> See T Maluwa, 'The role of international law in the protection of human rights under the Malawian Constitution of 1995' (1995) 3 African Yearbook of International Law 53 and TT Hansen, 'Implementation of international human rights standards through the national courts in Malawi' (2002) 46 Journal of African Law 31.

<sup>185</sup> D Chirwa (n39) 328.

<sup>186</sup> FE Kanyongolo (n28) 33.

<sup>187</sup> FE Kanyongolo (n28) 33.

<sup>188</sup> Examples of domesticating statutes in Malawi include the Refugee Act, 1989 (Act 3 of 1989), which was passed to domesticate the UN Convention Relating to the Status of Refugee of 1951, the 1967 Protocol, and the OAU Convention governing the specific Aspects of Refugee Problems in Africa (1969), and the Geneva Conventions Act, 1967, which domesticates the Geneva Conventions.

is dualist, what is immediately noticeable is that Parliament has rarely passed legislation specifically designed to domesticate the treaties to which Malawi is a party.

Largely as a result of legislative inertia, the judiciary's role with regard to the domestication of international law has remained prominent. The courts have made important pronouncements on the applicability of international law in Malawi. It must be immediately borne in mind that section 11(2)(c) of the Constitution enjoins courts, in interpreting the Constitution, to have regard, where applicable, to current norms of public international law and comparable foreign case law. It is unnecessary to reiterate that recourse to public international law and comparable case law is only in those cases where it is applicable, and not as a matter of course in all cases.<sup>189</sup> The courts are also enjoined to have regard to international human rights standards in evaluating limitations or restrictions on all rights provided for in the Constitution.<sup>190</sup>

In terms of the applicability of international law in Malawi, the most important judicial pronouncements are clearly those that have dwelt on section 211 of the Constitution. That aside, some decisions on the applicability of international human rights standards in Malawi have also helped clarify the relevance of various international human rights standards in Malawi. One such decision is *Chihana v R*,<sup>191</sup> in which the Malawi Supreme Court of Appeal held that the Universal Declaration of Human Rights was part of Malawian law. In the same decision, the Supreme Court of Appeal confirmed the dualist nature of the Malawian legal system when it refused to apply the African Charter on Human and Peoples Rights because Malawi had not yet adopted a statute incorporating it into local law. Two notable points must be made in relation to *Chihana v R*. Firstly, this case was decided on 29 March 1993, which was before the adoption of the Constitution. Secondly, the case has since been overruled in so far as it held that a domesticating statute was necessary for the applicability of treaty law in Malawi before the 2001 amendment to section 211 of the Constitution. Particularly with regard to the overruling of *Chihana v R*, the Supreme Court of Appeal has held that under the 1966 Constitution of Malawi, and before the amendment to section 211 of the Constitution,

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<sup>189</sup> *In re CJ (An infant)*, MSCA Adoption Appeal No 29 of 2009 (unrep).

<sup>190</sup> S 44(2) of the Constitution.

<sup>191</sup> *Chihana v R Criminal*, Appeal No 9 of 1992.

there was no need for Malawi to domesticate international agreements to which it was a party before they became applicable locally.<sup>192</sup>

From the totality of the judicial pronouncements on the applicability of international law in Malawi, several principles emerge.<sup>193</sup> All international agreements entered into prior to the Constitution or after the Constitution are binding on Malawi only if they are not in conflict with any domestic legislation. Thus international agreements, irrespective of when Malawi became a party to them, will be binding on Malawi as long as there is no domestic statute providing the contrary. As for customary international law, this is binding on Malawi as long as it does not contradict either the Constitution or any domestic statutes. In applying international law in Malawi, courts will strive to ensure an interpretation that does not contradict the Constitution or any domestic statutes, but where this is not possible, domestic law will always prevail. The courts, however, must strive to take judicial notice of all treaties that are binding on Malawi.

#### **B. Malawi and regional integration**

Malawi is a member of several regional and continental organisations and is also a party to several treaties negotiated under the aegis of these organisations. The principal organisations to which Malawi belongs are the African Union (formerly OAU), the Common Market for Eastern and Southern Africa (COMESA), and the Southern African Development Community (SADC).

The African Union (AU) is the premier continental organisation in Africa. The AU was established in 2002 as a successor organisation to the OAU. All African states, with the exception of Morocco, are members of the AU. The objectives of the AU, which are outlined in Article 3 of the Constitutive Act of the African Union, include achieving greater unity and solidarity between African countries and African peoples and accelerating political and socio-economic integration of the continent. Malawi joined the OAU in July 1964 and is a party to

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<sup>192</sup> *Malawi Telecommunications Limited v Makande and Omar*, Civil Appeal No 2 of 2006 (Being Civil Appeal No 70 of 2004) (unrep).

<sup>193</sup> Among the important pronouncements are the following: *Kalinda v Limbe Leaf Tobacco Ltd*, Civil Cause 542 of 1995; *In re CJ (An infant)*, MSCA Adoption Appeal No. 29 of 2009 (unrep); *Malawi Telecommunications Limited v Makande Omar*, Civil Appeal No 2 of 2006 (unrep); and *Evanse Moyo v Attorney General*, Constitutional Case No 12 of 2007 (unrep).

several human rights instruments adopted within the AU framework, and it has striven to play its part in the activities of the Union.<sup>194</sup> Perhaps as an indication of Malawi's involvement in the AU's activities, Malawi's President Bingu wa Mutharika held the rotating chairmanship of the AU between 2010 and 2011. Malawi is also currently involved in the AU peace-keeping operations in Ivory Coast and Sudan.

At the regional level, Malawi is one of the founding members of the SADC. The SADC traces its origins to the Southern African Development Coordination Conference (SADCC), which was established in 1980.<sup>195</sup> SADCC became SADC in 1992 with the adoption of the Treaty Establishing the Southern African Development Community (SADC Treaty). The objectives of the SADC, also referred to as the SADC Common Agenda, are outlined in Article 5 of the SADC Treaty. These range from promoting sustainable and equitable economic growth among member states, consolidating, defending, and maintaining democracy, peace, stability, and security, promoting common political values, systems, and other shared values that are transmitted through democratic, legitimate, and effective institutions, and mainstreaming gender in the process of community building. Again, just as is the case with the AU, Malawi is a party to several treaties negotiated within the SADC framework.<sup>196</sup> Malawi's former President Bakili Muluzi was also chairperson of SADC between 2001 and 2002.

In terms of Malawi's role in regional integration, it is comforting to note that Malawi is a member of several international organisations and has been taking steps towards the attainment of the objectives of these organisations. A related concern, however, relates to the possible conflicts of interest that can be generated as a result of membership to organisations operating within the same area, both geographically as well as thematically—for example, SADC and COMESA. While there are differing views on the probable implications of this, it is plausible to envisage that conflicts of interest may arise every now and then. Such conflicts

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<sup>194</sup> Among the treaties to which Malawi is a party are the African Charter on Human and Peoples Rights and the OAU Convention Governing the Specific Aspects of the Refugee Problems in Africa.

<sup>195</sup> At [<http://www.sadc.int/>].

<sup>196</sup> For example, Malawi is a party to the SADC Protocol on Gender and Development, which was also negotiated in Blantyre, Malawi.

may be detrimental to the objectives of both or all organisations concerned. Where integration is the ultimate objective, this may be considerably slowed down in the process.

### **VIII. Conclusion**

Malawi's 1994 Constitution was clearly adopted with the objective of ushering in a new beginning for the country. Since the Constitution was adopted, numerous reforms have been undertaken to align both law and policy with the dictates of the Constitution. The full entrenchment of constitutionalism and democratic governance, however, remains a day-to-day struggle. While it is clear that the citizenry retains a lot of hope and trust in the Constitution and the order it has created, challenges remain multifarious. It is thus the duty of every Malawian to ensure that the Constitution's terms are followed by all duty bearers, and at all times. Constitutionalism and democratic governance are clearly ideals towards which the country must continue to strive.

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