



Malawi National Integrity System Assessment Report 2013





Introductory Information

Between 2012 and 2013, Transparency International (TI) in partnership with Malawi Economic Justice Network (MEJN) and Africa Institute for Corporate Citizenship (AICC) conducted a National Integrity System (NIS) assessment on Malawi. The purpose of the NIS Assessment is to assess systemic corruption risks faced by a country, and produce a set of recommendations on how to mitigate those risks in the future. Those recommendations can then be used by actors in civil society, government and the private sector for promoting integrity in the country.

To date, assessments have been completed in more than 100 countries. While each country context is unique, this research gave the collaborating institutions experience of the challenges that Malawi is facing as well as appreciating the strides being made in dealing with these challenges. It is the hope of TI, MEJN and AICC that the Malawi assessment will generate debate and concrete actions for the key institutions and local actors to pursue in order to strengthen transparency, accountability and integrity. The assessment should also provide a set of good governance benchmarks for the citizens of Malawi to hold their government and elected officials to account.

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Every effort has been made to verify the accuracy of the information contained in this report. All information was believed to be correct as of December 2013. Nevertheless Africa Institute for Corporate Citizenship, Malawi Economic Justice Network, and Transparency International cannot accept responsibility for the consequences of its use for other purposes or in other contexts.

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Abbreviations

ACB	Anti-Corruption Bureau
AFORD	Alliance for Democracy
AG	Attorney General
AICC	Africa Institute for Corporate Citizenship
BAAC	Business Action Against Corruption
CMD	Centre for Multiparty Democracy
CONGOMA	Council for Non-Governmental Organisations
CPA	Corrupt Practices Act
CSC	Civil Service Commission
CSO	Civil Society Organisation
DFID	Department for International Development
DHRM	Department of Human Resources and Management
DPP	Director of Public Prosecutions
ECAMA	Economics Association of Malawi
EMB	Electoral Management Body
ERP	Economic Recovery Programme
FIU	Financial Intelligence Unit
GDP	Gross Domestic Product
IG	Inspector General
JSC	Judicial Service Commission
MACRA	Malawi Communications Regulatory Authority
MAFUNDE	Malawi Forum for Unity and Development
MEJN	Malawi Economic Justice Network

MCCCI	Malawi Confederation of Chambers of Commerce and Industry
MCP	Malawi Congress Party
MDG	Millennium Development Goal
MEC	Malawi Electoral Commission
MEJN	Malawi Economic Justice Network
MESN	Malawi Electoral Support Network
MGDS	Malawi Growth and Development Strategy
MHRC	Malawi Human Rights Commission
MISA	Media Institute for Southern Africa
MoU	Memorandum of Understanding
MP	Member of Parliament
MPP	Malawi People's Party
MRA	Malawi Revenue Authority
MSE	Malawi Stock Exchange
NAO	National Audit Office
NCIC	National Construction Industry Council
NGO	Non Governmental Organisation
NIS	National Integrity System
OPC	Office of the President and Cabinet
PAC	Public Accounts Committee
PAO	Principal Administrative Officer
PP	People's Party
PPEA	Presidential and Parliamentary Elections Act
PSC	Public Service Commission
PSCR	Public Service Commission Regulations
SME	Small and Medium Enterprise
TI	Transparency International
UDF	United Democratic Front

About the NIS Assessment



The National Integrity System assessment approach used in this report provides a framework to analyse both the vulnerabilities of a given country to corruption as well as the effectiveness of national anti-corruption efforts. The framework includes all principal institutions and actors that form a state. These include all branches of government, the public and private sector, the media, and civil

society (the ‘pillars’ as represented in the diagram below)¹. The concept of the National Integrity System has been developed and promoted by Transparency International as part of its holistic approach to fighting corruption. While there is no blueprint for an effective system to prevent corruption, there is a growing international consensus as to the salient institutional features that work best to prevent corruption and promote integrity.

A National Integrity System assessment is a powerful advocacy tool that delivers a holistic picture of a country’s institutional landscape with regard to integrity, accountability and transparency. A strong and functioning National Integrity System serves as a bulwark against corruption and guarantor of accountability, while a weak system typically harbours systemic corruption and produces a myriad of governance failures. The resulting assessment yields not only a



¹ In the Malawi NIS assessment, an additional pillar. “Traditional Leaders” was added, making a total of fourteen pillars.

comprehensive outline of reform needs but also a profound understanding of their political feasibility. Strengthening the National Integrity System promotes better governance across all aspects of society and, ultimately, contributes to a more just society.

Definitions

The definition of ‘corruption’ which is used by Transparency International is as follows:

‘The abuse of entrusted power for private gain. Corruption can be classified as grand, petty and political, depending on the amounts of money lost and the sector where it occurs.’²

‘Grand corruption’ is defined as ‘Acts committed at a high level of government that distort policies or the functioning of the state, enabling leaders to benefit at the expense of the public good.’³ ‘Petty corruption’ is defined as ‘Everyday abuse of entrusted power by low- and mid-level public officials in their interactions with ordinary citizens, who often are trying to access basic goods or services in places like hospitals, schools, police departments and other agencies.’⁴ ‘Political corruption’ is defined as ‘Manipulation of policies, institutions and rules of procedure in the allocation of resources and financing by political decision makers, who abuse their position to sustain their power, status and wealth.’⁵

Objectives

The key objectives of the National Integrity System assessment was to generate:

- an improved understanding of the strengths and weaknesses of Malawi’s National Integrity System within the anti-corruption community and beyond
- momentum among key anti-corruption stakeholders in Malawi for addressing priority areas in the National Integrity System

The primary aim of the assessment is therefore to evaluate the effectiveness of Malawi’s institutions in preventing and fighting corruption and in fostering transparency and integrity. In addition, it seeks to promote the assessment process as a springboard for action among the

² *The Anti-Corruption Plain Language Guide*, Transparency International, 2009, p.14. http://www.transparency.org/whatwedo/pub/the_anti_corruption_plain_language_guide [accessed 21 December 2012].

³ *Ibid.*, p.23.

⁴ *Ibid.*, p.33.

⁵ *Ibid.* p.35.

government and anti-corruption community in terms of policy reform, evidence-based advocacy or further in-depth evaluations of specific governance issues. This assessment should serve as a basis for key stakeholders in Malawi to advocate for sustainable and effective reform.

Methodology

In Transparency International's methodology, the National Integrity System is formed by 13 pillars representing all key public and private institutions in a country. As pointed out above, in the case of Malawi, an additional pillar, "Traditional Leaders" was added taking into account in the importance of this institution in the fight against corruption.

Core Governance Institutions	Public Sector Agencies	Non-Governmental Actors
1. Legislature 2. Executive 3. Judiciary	4. Public sector 5. Law enforcement agencies 6. Electoral management body 7. Ombudsman 8. Supreme audit institution 9. Anti-corruption agency	10. Political parties 11. Media 12. Civil society 13. Business 14. Traditional Leaders

Each of the 14 pillars was assessed along three dimensions that are essential to its ability to prevent corruption:

- its overall capacity, in terms of resources and independence
- its internal governance regulations and practices, focusing on whether the institutions in the pillar are transparent, accountable and act with integrity
- its role in the overall integrity system, focusing on the extent to which the institutions in the pillar fulfil their assigned role with regards to preventing and fighting corruption

Each dimension was measured by a common set of indicators. The assessment examined for every dimension both the legal framework of each pillar as well as the actual institutional practice, thereby highlighting any discrepancies between the formal provisions and reality in practice.

As it is the case with the NIS assessment, the Malawi NIS assessment did not seek to offer an in-

Dimension	Indicators (Law and Practice)
Capacity	Resources Independence
Governance	Transparency Accountability Integrity
Role within governance system	Pillar-specific indicators

depth evaluation of each pillar. Rather it sought the breadth, covering all relevant pillars across a wide number of indicators in order to gain a view of the overall system. The assessment also looked at the interactions between pillars, as weaknesses in a single institution could lead to serious flaws in the entire system. Understanding the interactions between pillars helps to prioritise areas for reform.

In order to take account of important contextual factors, the evaluation is embedded in a concise analysis of the overall political, social, economic and cultural conditions – the ‘foundations’ – in which the 14 pillars operate.

Politics	Society	Economy	Culture
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The National Integrity System assessment is a qualitative research tool. It is guided by a set of ‘indicator score sheets’, developed by Transparency International. These consist of a ‘scoring question’ for each indicator, supported by further guiding questions and scoring guidelines. The following scoring and guiding questions, for the resources available in practice to the judiciary, serve as but one example of the process:

PILLAR	Judiciary
INDICATOR NUMBER	3.1.2
INDICATOR NAME	Resources (practice)
Scoring question	To what extent does the judiciary have adequate levels of financial resources, staffing and infrastructure to operate effectively in

Guiding questions	Is the budget of the judiciary sufficient for it to perform its duties? How is the judiciary's budget apportioned? Who apportions it? In practice, how are salaries determined (by superior judges, constitution, law)? Are salary levels for judges and prosecutors adequate or are they so low that there are strong economic reasons for resorting to corruption? Are salaries for judges roughly commensurate with salaries for practising lawyers? Is there generally an adequate number of clerks, library resources and modern computer equipment for judges? Is there stability of human resources? Do staff members have training opportunities? Is there sufficient training to enhance a judge's knowledge of the law, judicial skills including court and case management, judgment writing and conflicts of interest?
Minimum score (1)	The existing financial, human and infrastructural resources of the judiciary are minimal and fully insufficient to effectively carry out its duties.
Mid-point score (3)	The judiciary has some resources. However, significant resource gaps lead to a certain degree of ineffectiveness in carrying out its duties.
Maximum score (5)	The judiciary has an adequate resource base to effectively carry out its duties.

The guiding questions, used by Transparency International worldwide, for each indicator were developed by examining international best practices, as well as by using our own experience of existing assessment tools for each of the respective pillars, and by seeking input from (international) experts on the respective institutions. These indicator score sheets provide guidance for the Malawi assessment, but when appropriate the lead researcher has added questions or left some questions unanswered, as not all aspects are relevant to the national context. The full toolkit with information on the methodology and score sheets are available on the Transparency International website.⁶

To answer the guiding questions, the research team relied on four main sources of information: national legislation, secondary reports and research, interviews with key experts, and written questionnaires. Secondary sources included reliable reporting by national civil society organisations, international organisations, governmental bodies, think tanks and academia.

⁶ www.transparency.org/policy_research/nis/methodology.

To gain an in-depth view of the current situation, a minimum of two key informants were interviewed for each pillar – at least one representing the pillar under assessment, and one expert on the subject matter but external to it. In addition, more key informants, that is people ‘in the field’, were interviewed. Professionals with expertise in more than one pillar were also interviewed in order to get a cross-pillar view.

The scoring system

While this is a qualitative assessment, numerical scores are assigned in order to summarise the information and to help highlight key weaknesses and strengths of the integrity system. Scores are assigned on a 100-point scale in 25-point increments including five possible values: 0, 25, 50, 75 and 100. The scores prevent the reader getting lost in the details and promote reflection on the system as a whole, rather than focusing only on its individual parts. Indicator scores are averaged at the dimension level, and the three dimensions scores are averaged to arrive at the overall score for each pillar, which provides a general description of the system’s overall robustness.

VERY STRONG	81-100
STRONG	61-80
MODERATE	41-60
WEAK	21-40
VERY WEAK	0-20

The scores are not suitable for cross-country rankings or other quantitative comparisons, due to differences in data sources across countries applying the assessment methodology and the absence of an international review board tasked to ensure comparability of scores.

Consultative approach and Validation of findings

The assessment process in Malawi had a strong consultative component, seeking to involve the key anti-corruption actors in government, civil society and other relevant sectors. This approach had two aims: to generate evidence and to engage a wide range of stakeholders with a view to building momentum, political will and civic demand for reform initiatives.

In Malawi, the NIS assessment was undertaken by two institutions: the Malawi Economic Justice Network and the Africa Institute for Corporate Governance. The two collaborating institutions

established a joint Coordination Group that oversaw the implementation of the whole NIS Assessment. The research was undertaken by a team researchers led by Dr. Henry Chingaibe. All the reports produced by the Lead Researcher underwent a rigorous validation process. The draft reports were first reviewed by the aforementioned joint Monitoring Group. Thereafter, these reports were submitted to Transparency International for their review and quality control. The reports were then revised by the Lead Researcher and presented to the Advisory Group for their input and peer review. The Advisory Group was comprised of the following experts:

Name	Institution of affiliation	Position	Specialization
Marry Phombeya	Ant-Corruption Bureau	Chief Corruption Prevention and Public Education Officer	Economist
Mr. Isaac Ziba	Office of the President and Cabinet	Sent to Dr. Magolowondo	
Mr. Chandiwira Chisi	Independent Expert	Consultant	Governance
Mr. Joe Ching'ani	National Construction Industry Council	National Chairperson for COST / Chairperson for Construction Committee for TEVETA	Construction diploma holder
Mr. Matthews Chikankheni	Malawi Confederation of Chambers of Commerce and Industry	Chairperson for COMESA business council / President Malawi Confederated Chambers of Commerce and Industry	Economist
Dr. Augustine Magolowondo	Netherlands Institute for Multiparty Democracy	Africa Regional Programme Coordinator	Political Scientist

The Advisory Group had the following specific roles:

- Advising the implementation team on main aspects of the project implementation;
- Reviewing and commenting on draft report;
- Validating NIS Indicator Scores and

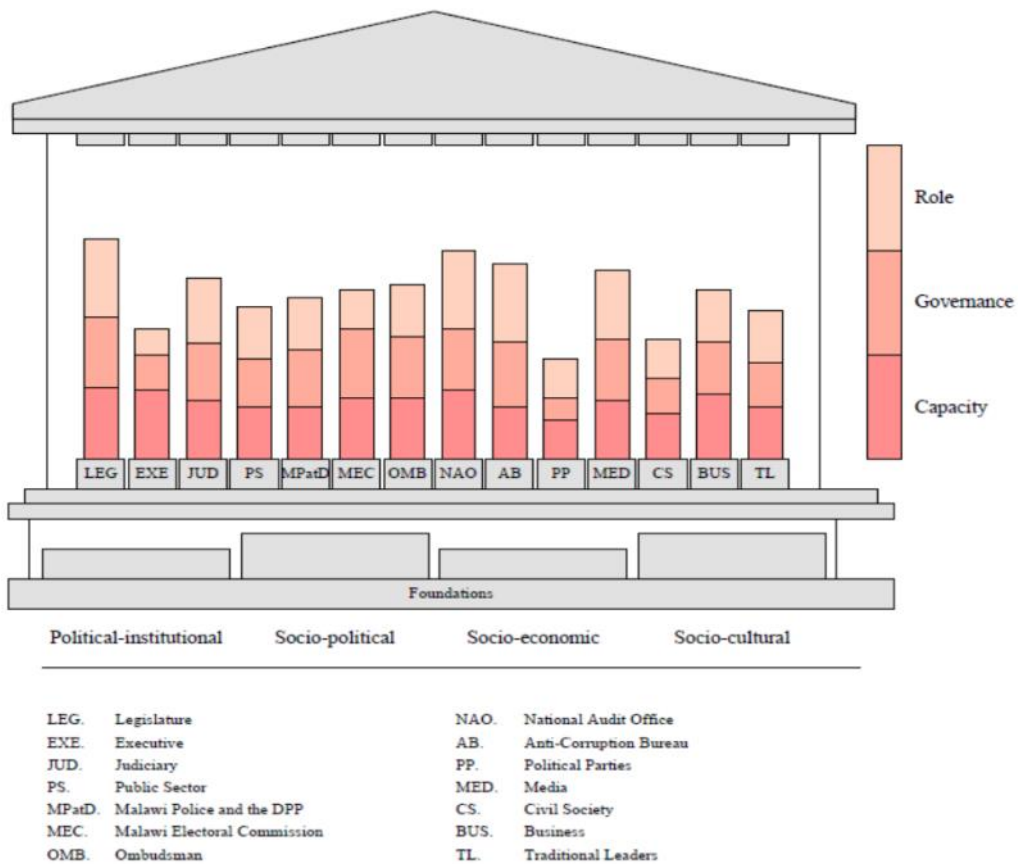
Throughout the Malawi NIS Assessment process, the Advisory Group met for a total of four times. The reports that had been reviewed by the Advisory Group were then presented for validation at the National Stakeholders' Workshop that took place on 27th September 2013. Comments and

observations from this national validation workshop were then incorporated into the reports before this NIS Assessment Report could be launched on 22 November 2013.

Executive Summary

The Malawi National Integrity System, as represented by the “NIS Temple” below clearly shows that on balance, Malawi has a weak National Integrity System as only five out of the fourteen pillars examined in this study can be described as “strong” (the Legislature, the National Audit Office (NAO), The Anti-Corruption Bureau (ACB), the Judiciary and the Media). Their strength is particularly noticeable with regard to the respective roles that these institutions play in the fight against corruption and (consequently) in upholding the NIS in Malawi. On the side of the non state actors, it is the media and, to some extent, the business sector that demonstrate some relative strength.

Malawi National Integrity System: An Overview



The comparative weaknesses of the Executive and Political Parties are not only prominent but also a great cause for concern considering the fact that both of these institutions are comprised predominantly of politicians who ultimately wield enormous influence in society. Regulations for internal governance mechanisms for Political Parties are almost non-existent while the Executive, despite being endowed with considerable capacity, is failing to play a meaningful role in the deepening of the NIS. It is important to also observe that the very low score of the Executive for the role dimension reflects this important institution's failure to create and support an enabling environment that would ensure that the other actors are able to effectively deliver on their respective mandates.

On the overall, a common feature of the Malawian NIS is the considerable gap between law and practice. With the exception of the Police and Traditional leaders whose score on the transparency dimension is higher in practice than in law, the dominant pattern of the Malawian NIS presents a picture of institutions that are strong from the point of law but weak in practice. In some instances, the margin between the law and practice is as wide as 50, indicating a serious challenge of a culture of not respecting what the law stipulates. Borrowing from the legal scholarship, the Malawian NIS underscores the challenge of having a constitution without constitutionalism. This is a sign of serious weakness in the system.

NIS Context

On balance, the foundations for the Malawian NIS are encouraging particularly when considered from the socio-political and the socio-cultural perspectives. Admittedly, the political party system is fragmented, unstable and with shallow roots in society. However, the country has not experienced any significant violent confrontation. Similarly, the study establishes that in general terms, Malawians show support for norms of integrity and ethical behaviour. The strength of the political-institutional and the socio-economic foundations is however just average. As this study illustrates, political institutions in Malawi such as the Executive and Political Parties have not been supportive to the evolution of an effective NIS. Furthermore, the socio-economic conditions in Malawi remain strikingly low and therefore inimical to the fight against corruption.

Nevertheless, Corruption remains a significant problem in Malawi. It ranges from high level political corruption to petty bribery as well as patronage and nepotism that exacerbate inequality and poverty in society. In addition, there is also a tendency amongst public officials not to separate public office from personal business and family interests of the office-holders.

Every government that has come to power since 1994 has, however, made the fight against corruption central in its policies. In general government is making positive strides in containing corruption. This is manifested in a number of relevant institutions, legislations, policies and strategies that are in place including a National Anti-Corruption Strategy. A legally independent Anti-Corruption Bureau continues to pursue a number of corruption related cases.

Results arising from the various efforts being made have, on balance, been mixed. For instance, while there is a law requiring senior elected representatives and public officers including the president to declare their assets, the effectiveness of this law is hugely deficient. An Access to Information Bill exists but it is yet to be passed by Parliament. In addition, the ACB, which is legally independent, is hampered not only by lack of resources, but also by the often perceived political interference whereby important high-profiled cases are protracted and sometimes inconclusive.

NIS Pillars

A detailed analysis of the findings of this study shows that the National Integrity System in Malawi is in need of urgent attention as a majority of the pillars are generally weak with the exception (in relative terms) of five pillars: the Legislature, NAO, ACB, Judiciary and Media.

The *Legislature* and the *NAO* are the strongest institutions of the Malawian NIS. Both of these institutions are particularly strong with regard to their respective roles in the fight against corruption. The governance dimension of the Legislature is, however, weak in comparison to the other two dimensions of “role” and “capacity”. Key challenges here include the weak accountability mechanisms of the Members of Parliaments (MPs) and the absence of a Code of Conduct to regulate MPs’ conflict. One critical challenge the NAO faces is its limited capacity, both in law and practice when it comes to sanctioning those that are responsible for financial irregularities and/or misconduct. In addition, the NAO also faces resource constraints for it to undertake regular and up to date audits.

While it is an equally critical institution in upholding Malawi’s NIS, the *Judiciary’s* strength is particularly noticeable with regard to the role it is playing in the fight against corruption whereby it has demonstrated its independence in the way cases presented before it have are being handled. The Judiciary, however, faces key challenges with regard to resources and inadequate rules governing integrity of judicial officers.

Of the key public institutions that are reviewed in this study as pillars of the Malawian NIS, the *Executive* is found to be in dire need of attention if it is to play any meaningful role. This is a pillar that has adequate resources or is in control of resources. It also wields enormous influence over the other institutions, directly or otherwise. However, the study finds that the Executive has not effectively played a positive role in the upholding of the NIS. A critical area of concern here is the level to which political considerations influence the decision making process within the Executive, especially when it comes to the role this pillar is supposed to play in aiding the other pillars. Three institutions that appear to be directly affected by the way the Executive delivers on its mandate are the Public Sector, Law Enforcement Agencies (interpreted as the Police and Department of Public Prosecutions) and the Anti Corruption Bureau.

The *Public Sector* is particularly weak in respect of its internal governance mechanisms of accountability, transparency and integrity. Here, the main area of concern is the role politics plays in the way the public sector functions. For instance, the study finds out that there is very little transparency in the way appointments to senior positions in the public service are made. Similarly, the *Police* are sometimes compromised by the way its top leadership is removed or replaced thereby creating a sense of insecurity at that level. Similarly, the *Anti-Corruption Bureau* is constrained by among other things, the fact that it cannot independently prosecute corruption cases without the authority of the Director of Public Prosecutions, which is the office within the Executive.

As already noted, among the non state actors, it is the *Media* that in relative terms demonstrates some strength as a pillar of Malawian NIS, particularly with regard to the role that this institution is playing in holding public officers and those in elective positions accountable. On the other hand, *Civil Society* which ordinarily is expected to play a significant role especially in promoting transparency and accountability as part of the watch dog institutions is quite weak. The weaknesses are dominated by lack of effective mechanisms that would

strengthen integrity mechanisms within the civil society institutions and also the limited resource base as almost all actors in this sector are donor dependent.

The *Business* sector (here understood to mean the private sector) is another important institution in upholding the NIS. It is this particular sector that is the main provider of goods and services in society hence the main beneficiary also of contracts and tenders. In the case of Malawi, the private sector is considered to have some relative strength measured particularly in terms of the capacity it has, especially with regard to resources. The business sector, especially the construction industry, has also undertaken measures that are contributing to curbing corruption while at the same time promoting integrity within the sector.

Traditional Leaders is a pillar that is unique to Malawi as it is not an institution that is part of the NIS assessment in a majority of countries where the assessment has been conducted. In Malawi, the Traditional Leaders have a pivotal role in mass mobilisation and awareness raising as well as in setting standards in terms of integrity at the local level. In addition, Traditional Leaders also play an active role in decision making processes in local councils since chiefs from the level of Traditional Authority on wards are ex-official members of the local councils. The findings of this study show that despite the importance of Traditional Leaders in Malawi, this institution is generally weak as a pillar of the Malawian NIS. Its role is compromised by the political influence of the executive and political leaders compounded by the absence of a code of conduct for Traditional Leaders.

Policy Recommendations

At the end an assessment of each pillar, the study presents a number of recommendations that are specific to that particular pillar. There are however some recommendations that are predominant or cross cutting. They include the following:

- Bridging the law-practice divide.
- Effective coordination and operational harmonisation of NIS pillars that are systemically inter-dependent.
- Reviewing powers of the Executive.
- De-politicising the public service.
- Improving relevant legal instruments in further strengthening the NIS.

Country Profile: Foundations for National Integrity System

IV.

1. Political institutional foundations

Score: 50

To what extent are the political institutions in the country supportive to an effective national integrity system?

Despite its transition to democracy, consolidation of Malawi's democracy has remained largely problematic. Malawi has been characterised as a 'defective democracy' which is showing no trend towards the consolidation of a functioning liberal democracy with effective institutions.⁷ The challenge rests on how political institutions such as political parties, among others are able to constitute critical anchors for democratic culture and practice, and in particular, how political parties and parliament provide a solid institutional foundation for a working democracy.⁸

However, as an emerging democracy, principles of democratic participation in Malawi are gradually but progressively evolving. Some aspects of citizen participation, such as elections, are constitutionally guaranteed. The legal framework governing elections in Malawi is generally conducive and is incorporated in various pieces of legislation which guarantee freedom of choice and participation in multiparty elections. Such legislation includes the Constitution of Malawi (Constitution), the Malawi Electoral Commission Act, the Parliamentary and Presidential Elections Act and the Political Parties Registration and Regulation Act. Thus, citizens have the right to vote in presidential and parliamentary elections every five years and for the upcoming 2014 elections, local government elections will also be held simultaneously with presidential and parliamentary

⁷ Nandini Patel (2007).

⁸ Matlosa, (2007:1).

elections.

Furthermore, for elections to serve their democratic purpose, they must be perceived as a means of filling public office via a competitive struggle for the people's vote.⁹ Unfortunately, it is only the 2009 presidential and parliamentary elections, though characterized by an uneven playing field in favour of incumbents that are considered to have been the most fair and competitive since the first multiparty elections in 1994.¹⁰ But even for the 2009 elections, the main opposition to the incumbent Democratic Progress Party, and the two parties to offer a credible challenge, was the alliance between United Democratic Front and Malawi Congress Party (MCP) whose presidential candidate was John Tembo, the presidential candidate for MCP for at least three presidential elections since 1994. Thus, it would appear that Malawi has not experienced significant leadership turnover in the political arena. A considerable number of incumbent political leaders are, in one way or another, remnants of the dictatorial regime of Malawi's first president, Kamuzu Banda.¹¹ This presents cause for worry as a *decent* level of competitiveness of elections is central to the democratic values of self-government, accountability and responsiveness of elected representatives.¹² Where competition is low, non-existent or alternations in power virtually absent, this can be taken as a factor that degrades the democratic quality of the electoral process.

However, on a positive note, the upcoming 2014 elections in Malawi are expected to be more competitive as compared to previous years in consideration of the fact that some "new faces" in the political sphere have expressed interest to contest. In spite of the same, it is highly unlikely that opposition parties or candidates would have a fair chance of securing leadership positions.

Elections in Malawi, like in most African countries with fledgling democracies, take place in a high-stake environment, i.e. an environment in which winning an election is tantamount to capturing the state and monopolizing access to its resources.¹³ The obsession held by governments in retaining power has thus led them to engage in other irregularities such as political intimidation and the distribution of basic necessities as an inducement to gain votes prior to elections.¹⁴ Thus ruling party candidates in Malawi have been seen to possess all the advantages on their side specifically in regard to access to resources, better press coverage from state-owned television and radio houses,¹⁵ some control over the members of the Malawi Electoral

⁹ Blessings Chisinga, 2008:16

¹⁰ Freedom House Report 2012

¹¹ Blessings Chisinga (2008: 18).

¹² Staffan Lindberg, 2004

¹³ Joram Rukambe, (2010: 2)

¹⁴ For further information, please refer to elections observation reports for Malawi from 1999,2004 and 2009.

¹⁵ For instance, the Malawi Electoral Commission's (MEC) Media Monitoring Group indicated that between 17 January and 24 April 2009, 97.62% of all Malawi Broadcasting Corporation's (MBC) electoral coverage was dedicated to the governing Democratic Progressive Party (DPP). During the same period, electoral coverage by the public Television Malawi (TVM) stood at 98.4% in favor of the DPP. (BTI 2012 Report).

Commission and state security.¹⁶ It is for such reasons that the ruling party has never lost an election since the attainment of democracy. An examination of the various election observation reports for Malawi since 1999 would lead to the conclusion that the government, under the auspices of the ruling party, does not conduct elections in good faith with an aim to provide a fair and credible opportunity both for candidates to compete for votes and for citizens to choose their leaders.

Past surveys on Malawi's parliament demonstrate low public trust in government in general and a widening representational gap between parliament and the people.¹⁷ Voters have indicated that political leaders are known to promise a lot during the campaign period and yet deliver little once elected into office.¹⁸ This undermines the scope of vertical accountability. Lack of a senate in Malawi has also contributed to this representation gap. The 1995 Constitution provided for the establishment of the senate but this provision was repealed by Parliament. However, the Special Law Commission on the Review of the Constitution recommended for its re-introduction.

Nevertheless, the World Justice Project (Malawi Country Report for 2012-2013) reveals that Malawi has a relatively open government, ranking 6th in sub-Saharan Africa and 5th among low income countries. Citizens in Malawi were seen to participate more in discussion on government policies and actions, and were more likely to exercise their right to petition as compared to other African countries.

In regard to civil liberties, Malawi has embraced a liberal constitution that guarantees basic rights and freedom in Chapter IV. According to the Freedom House definition, civil liberties allow for the freedoms of expression and belief, associational and organizational rights, rule of law, and personal autonomy without interference from the state.¹⁹ The Malawi Constitution provides for all of the above. Nevertheless, protection of civil liberties deteriorated during the past two years under the regime of late President Mutharika. Thus, the 2012 civil liberties report by Freedom House ranked Malawi as being partially free. Much concern was raised in regard to government actions against opposition and civil society activists. Some improvement in regard to respect for civil liberties has been observed under President Joyce Banda's regime when compared to the immediate past administration of late President Bingu wa Mutharika.²⁰ However, according to the 2012-2013 World Justice Project Report, Malawi's performance in the area of fundamental rights is at its weakest, ranking 81st in the world and 12th in Africa. Malawi underperforms, when compared to its regional and income group peers, in several dimensions of due process and

¹⁶ See EU Report for the 2009 Presidential and Parliamentary Elections.

¹⁷ Nandini Patel, 2007:21

¹⁸ Ibid.

¹⁹ Freedom House Report 2012.

²⁰ Freedom House Report 2012.

rights of the accused including in the protection of rights of prisoners, the provision of legal assistance, torture and abusive treatment of suspects, and arrest and pre-trial detention.

Rule of law, as defined by the World Justice Project,²¹ refers to a system in which four universal principles are upheld: These are :-I. the government and its officials and agents are accountable under the law. II. The laws are clear, publicized, stable, and fair, and protect fundamental rights, including the security of persons and property. III. The process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient. IV. Justice is delivered by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the make-up of the communities they serve. When compared to other African countries, Malawi possesses an effective system of checks and balances, including an independent judiciary, ranking 4th in sub-Saharan Africa.²² Section 41 of the Malawian constitution maintains that citizens have the right to an effective remedy by a court of law or tribunal for acts violating their rights and freedoms. In addition, the Constitution provides for several oversight institutions designed to enhance transparency and accountability. These include the Anti-Corruption Bureau, the Law Commission, the Malawi Human Rights Commission, and the Ombudsman. However, when asked about problems in the judiciary, experts identified three serious problems: lack of adequate judges or court personnel, lack of adequate resources to effectively perform, and lack of mechanisms to track the efficiency of the courts.²³ More recently, a positive step for constitutionalism and the rule of law was realised when, as the '2012/2013 Commission of Inquiry Report on the events leading up to former President Mutharika's death' reveals, the Army Commander successfully resisted any move to derail Joyce Banda's succession and insisted on a constitutional transition of power.

2. Socio-political foundations

Score: 75

To what extent are the relationships among social groups and between social groups and the political system in the country supportive to an effective national integrity system?

Malawi's party system is fragmented and unstable, with shallow roots in society. The major factor behind this fragmentation is the strong personalization of party politics, individuals' greed for political office, and the promise of private wealth that accompanies a political career.²⁴ While there is a plethora of civil society organizations present in Malawi to address and mediate on

²¹ World Justice Project; Malawi Country Report 2012-2013

²² World Justice Project; Malawi Country Report 2012-2013

²³ World Justice Project; Malawi Country Report 2012-2013. Please also refer to the judiciary pillar report on page... for further information.

²⁴ BTI report, 2012

such issues, their diverse nature means they struggle to act together, and present coherent demands to the government.²⁵

Significant societal divisions exist in Malawi, including those based on class. However, the Constitution of Malawi does not provide for substantial coverage of societal divisions in spite of the fact that regionalism seems to have ample influence on politics and society. Instead, the Constitution makes provision for the respect of various human rights including prohibition of discrimination on the basis of any status such as ethnic or social origin. Perhaps the Constitution's docile approach may be best as its general provisions regarding equality and non-discrimination provides an acceptable universal standard upon which any kinds of societal divisions may be addressed. It is worth noting that should the Senate have been retained as was previously provided for by the Constitution, it would have served as an appropriate forum to address some of the existing societal divisions as the Senate was to be composed of diverse social groups (i.e. gender, regional diversity etc).²⁶ Wiseman Chijere Chirwa et al in their 'Democracy Report for Malawi' also suggest that the provision of a second vice president in the Constitution, where 'national interest dictates,' is partially meant to address societal divisions. They cite the case of the aftermath of the 1994 elections where Chakufwa Chihana was appointed as second vice president by former President Muluzi (who originates from the Southern Region) so as to win support from the Northern Region where Chihana was originally from and enjoyed popularity. More recently, some people from the northern region claim to have experienced hostility from the Mutharika administration in the wake of policy changes that reduced the region's access to institutions of higher education.²⁷

However, although such divisions do exist, Malawi has no significant tribal, religious, regional, ethnic, or racial tensions that could be expected to lead to violent confrontation.²⁸ The rights of religious and ethnic minorities are generally respected in Malawi and relations between groups remain largely amicable.²⁹

²⁵ UNU-WIDER working paper on democratic consolidation and donor activity in Malawi, 2012

²⁶ Malawi Law Commission, Report of the Law Commission on the Review of the Constitution, Law Commission Report No. 18, August 2007.

²⁷ Freedom House Report, 2012

²⁸ US Department of State, 2012 Investment Climate Statement for Malawi

²⁹ Freedom House Report, 2012

3. Socio-economic foundations

Score: 50

To what extent is the socio-economic situation of the country supportive to an effective national integrity system?

Malawi has a national development plan- the Malawi Growth and Development Strategy (MGDS II, 2011-2016)- which identifies nine key priority areas. The MGDS is a policy framework meant to reduce poverty through economic growth and empowerment of the poor in a bid to achieve the Millennium Development Goals. In spite of this, effective management of the economy deteriorated substantially during the second presidential term of Bingu Wa Mutharika resulting into fuel shortages and inadequate supplies of foreign exchange which limited the ability of businesses to import vital items and materials.³⁰ Thus, Malawi's economic growth in 2011 slowed to 5.8% from 6.7% in 2010.³¹ In addition, economic growth in Malawi has not been pro-poor. It has been a common and major challenge for governments to improve the quality of economic growth by adopting pro-poor policies and ensuring that growth is broadly shared in terms of generating employment, ensuring poverty reduction and attaining the Millennium Development Goals. Poverty in Malawi is also heavily concentrated in rural areas and among disadvantaged groups, especially women, youth and informal sector operators.³²

However, the 2010/11 Integrated Household Survey (IHS)- which provides an update of the country's socio-economic situation, including indicators on poverty, education, health, and household enterprise - shows that the incidence of poverty as measured through the Headcount Index has declined slightly from 52.4% (in IHS 2 conducted in 2005) to 50.7% in HIS 3 . The poverty levels for urban areas declined from 25.4% to 17.3% but such progress was not as apparent in rural areas - 55.9% to 56.6%. In terms of ultra-poverty, 24.5% of the population is in this category at the national level, and the corresponding proportions are 4.3% and 28.1% for urban and rural areas respectively. Income distribution has also deteriorated from 0.39 in 2005 to 0.45 in 2011. Thus, Malawi's Human Development Index value for 2012 is 0.418—in the low human development category—positioning the country at 170 out of 187 countries and territories.³³ The most recent survey data available for estimating Multidimensional Poverty Index (MPI) figures for Malawi were collected in 2010 where 66.7% of the population lived in multidimensional poverty while an additional 23.4% were vulnerable to multiple deprivations.³⁴ The MPI identifies multiple deprivations in the same households in education, health and standard

³⁰ Malawi- Africa Economic Outlook Report, 2011

³¹ Malawi- Africa Economic Outlook Report, 2011

³² Billy Mayaya, 2012

³³ UNDP Human Development Index, 2012

³⁴ UNDP, HDR MPI data, 2010

of living. In addition and according to the 2009 Welfare Monitoring Service, only 8% of employed persons aged 15 and above received a salary (30% in urban areas), while 78% are subsistence farmers.

In spite of the dire situation reflected above, Malawi has no social safety net able to compensate effectively for poverty or any other social risks.³⁵ Only a tiny percentage of the population employed in the formal economic sector enjoys the benefits of a basic social safety net set up by the government, which guards against risks associated with old age, illness, disability and unemployment.³⁶ However, the government implements a subsidy program for agricultural inputs such as fertilizer and seeds to the very poor though institutional support for effective implementation remain weak. Education and health is also highly subsidized and in some instances, free. The government has also been implementing a social cash transfer scheme targeting the ultra-poor in selected few districts through the support of development partners.³⁷ Government ministries that specifically support vulnerable groups such as women, children, people living with disabilities etc also exist but their effective operation is limited by inadequate resources.³⁸

Though Malawi's economy predominantly depends on agricultural productivity (which contributes to more than 80% of the country's GDP), the agriculture sector faces key challenges in productivity and cost efficiency due to lack of infrastructural support. Malawi is a landlocked country and heavily depends on the transport infrastructure to support its economic activities. However, poor roads, underdeveloped freight and rail access and limited air links remain a challenge.

In terms of the Doing Business Report by the World Bank, Malawi has fallen 6 places from its rank of 151 in 2012 to 157 (out of 185) in 2013.³⁹ Thus, Malawi's business sector is somewhat unstable.

However, since May 2012, the government has been implementing tough but critical macro and structural reforms aimed at positively transforming the economy.⁴⁰ These include devaluation of the local currency by close to 50% and then allowing it to float. Unfortunately, the depreciation of the Kwacha has triggered fluctuations in the prices of fuel and inevitably contributed to the rising costs of other essential commodities.⁴¹ In addition to the reforms, the government has launched an

³⁵ BTI Report 2012

³⁶ Ibid.

³⁷ BTI Report 2012

³⁸ For example: Ministry of Gender, Children and Social Welfare, Ministry of Disability and Elderly Affairs. Please visit to the Malawi government website for further information on ministerial activities.

³⁹ World Bank, Doing Business 2013 data

⁴⁰ Freedom House Report 2012

⁴¹ The World Bank 'Malawi Country Data' available at <http://www.worldbank.org/en/country/malawi> (accessed 24 August 2013).

18 month Economic Recovery Plan (ERP) that focuses on a few priorities that are “pro-growth, represent quick wins, and are highly effective.” This plan stresses need for social protection programs (Farmer Input Support Program (FISP)) and other assistance to priority areas as identified in the MGDS II.⁴²

4. Socio-cultural foundations

Score: 75

To what extent are the prevailing ethics, norms and values in society supportive to an effective national integrity system?

Malawians are generally known to embrace a culture of passivity and apathy through an obedient and docile citizenry. Such stance is often considered not to be consistent with democracy.⁴³ However, there is progressive change in this regard as compared to the period during the authoritarian rule of Dr Kamuzu Banda through the introduction of increased structures that enable effective and informed public participation.⁴⁴ Prior to democracy, levels of trust amongst society were minimal mainly due to fear of being persecuted by the one party regime. Since the advent of democracy, there is more openness and trust amongst the Malawian people. In comparison to other African countries included in Afrobarometer, levels of interpersonal trust in Malawi are not particularly low.⁴⁵ Malawians tend to trust their fellow citizens, with 33% affirming they trust them a lot and an additional 22% trusting them somewhat, according to the 2008 Afrobarometer survey.⁴⁶ However, with incidences of corruption and crime, society trust amongst each other has been adversely affected. Malawians generally show support for norms of integrity and ethical conduct though the same is not always strongly upheld. In spite of the fact that the number of civic associations, interest groups and trade unions is very small, approval of democracy and integrity norms among the population is fairly high.⁴⁷

⁴² The World Bank, Malawi Economy report, 2012

⁴³ See Blessings Chinsinga 'Reflections on the Amendments to the Electoral and Local Government Acts' available at <http://community.eldis.org/.59ee456c/Local%20government%20acts.pdf> (accessed 16 August 2013) p 7 and 13.

⁴⁴ For more information, please refer to Asiyati Lorraine Chiweza 'Participation: Reality or Rhetoric in Rural Communities of Malawi (2005) available at http://www.tanzanet.org/int/journal/tznetjournal_07_2005_partic_reality_rural_comm.pdf (accessed 16 August 2013). Also see Wiseman Chijere Chirwa 'Democracy and political participation' available at <http://www.eldis.org/vfile/upload/1/document/1106/Malawi%20Democracy%20and%20political%20participation.pdf> (accessed 16 August 2013),

⁴⁵ BTI Report 2012

⁴⁶ Ibid.

⁴⁷ BTI Report 2012

Corruption profile V.

Transparency International defines corruption as “the abuse of entrusted power for private gain.” After about 30 years of autocratic rule in Malawi, in which corruption prevailed unchecked, and it was almost taboo to refer to it, combating corruption took prominence after the advent of multiparty democracy in 1994.⁴⁸ However, corruption remains a significant problem in Malawi although it is not as serious as in other countries in the region.⁴⁹

The country suffers from various types of corruption – from high level political corruption to petty bribery that impedes service delivery as well as patronage and nepotism that exacerbates inequality and poverty in Malawi society.⁵⁰ In addition, there is also a tendency amongst public officials not to separate public office from personal business and family interests of the office-holders.⁵¹ In terms of petty bribery that impedes service delivery, the World Justice Project Rule of Law Index found that Malawians are most likely to have to pay a bribe when dealing with the police, followed by registry and permit services. In addition, there have been serious allegations of corruption in the area of customs and excise tax, traffic police, and government procurement.⁵² According to the Global Corruption Barometer, political parties are also considered to be extremely corrupt.⁵³ In addition, in 2011 Malawi slipped in its ranking on the World Bank’s Doing Business Index, from 132 to 141 where corruption was seen to be one of the contributing factors for the decline. However, the 2011 assessment by Global Integrity found that, overall, Malawi experiences moderate levels of corruption.

⁴⁸ Mustafa Hussein, 2005:2

⁴⁹ World Justice Project, Malawi country report 2012 -2013

⁵⁰ Transparency International, ‘Overview of corruption and anti-corruption in Malawi,’ 2012

⁵¹ Nandini Patel, (2007: 28)

⁵² US Department of State, 2012 Investment Climate Statement for Malawi

⁵³ Transparency International ‘Global Corruption Barometer 2013-Malawi’ available at <http://www.transparency.org/gcb2013/country/?country=malawi>

While there is no consensus on the causes of corruption in Malawi, research indicates that important drivers of corruption include - high levels of poverty and inequality, insufficiently funded and inefficient public sector, and extensive patronage networks.⁵⁴

Transparency International conducted a survey in 2011 (entitled 'Daily Lives and Corruption: Public Opinion in Southern Africa') with citizens in Malawi about their views of and experiences with corruption. The results of the survey show that the majority of Malawians think corruption is on the rise. More than one in two people pay bribes to access public services they are entitled to and should often be free of charge. Similarly, the 2013 Global Corruption Barometer on Malawi indicates that only 1 percent state that corruption has decreased a lot in the country while 44% stated that it had increased a lot.⁵⁵ As highlighted by the ACB Anti-Corruption Strategy 2008, such prominence undermines development efforts, threatens democratic values and violates human rights.⁵⁶

⁵⁴ Transparency international, 'Overview of corruption and anti-corruption in Malawi,' 2012

⁵⁵ Transparency International 'Global Corruption Barometer 2013-Malawi' available at <http://www.transparency.org/gcb2013/country//?country=malawi>

⁵⁶ See also NSO, Baseline Survey on Democratic Accountability in Malawi – Draft Report (Zomba; Government of Malawi, 2012

Anti-corruption activities VI.

Malawi is perceived to have strong anti-corruption laws and institutions coupled with initiatives by the private sector to complement governmental efforts. For instance, in regard to political corruption, public officials, such as the President, cabinet ministers, Members of Parliament, are required in terms of section 213 of the Malawi Constitution to declare their assets upon assuming office. This provision is considered to be an important safeguard against corruptive practices by high level public officials. Unfortunately, the provision is not vigorously applied and its implementation mechanisms are also rather unclear. Hence, since the adoption of the Constitution, successive governments in Malawi have shown a flagrant disregard for the requirement to disclose assets.⁵⁷ Thus as experts rightly observe, there is still a significant gap between law and practice.⁵⁸ Hence the 2011 assessment by Global Integrity found that a relatively sound legal framework exists to protect against corruption, which received a score of 87 out of 100. On the other hand, actual implementation of anti-corruption measures received a score of 60 out of 100, leading to an implementation gap of around 26.

Malawi also has a National Anti-Corruption Strategy which was launched in 2008/2009. This strategy included a plan to establish "integrity committees" in public institutions. However, a February 2010 report by Global Integrity indicated that the Anti-Corruption Bureau has largely focused on low-level civil servants while avoiding high-ranking officials under political pressure.

From 2006-2008, the Malawi government worked with the Millennium Challenge Corporation to improve government capacity to fight corruption. This included efforts to enhance the National Audit Office, leading to advances in the number and quality of audits conducted, and efforts to

⁵⁷ Mwiza Nkhata, 2011:22

⁵⁸ Transparency International, 'Overview of corruption and anti-corruption in Malawi' 2012.

improve the capacity of the Office of the Director of Public Procurement.⁵⁹ This was done in light of the fact that embezzlement of government money is enabled by a lack of effective supervision. According to the Malawi Economic Justice Network Report of 2009, the Auditor General's office is understaffed and lacks financial resources. Hence, government bodies do not submit their annual accounts on time for audit, and when submitted the accounts do not follow accounting standards and often contain serious mistakes. President Joyce Banda recently announced that she would elevate the status of the office of the Auditor General, a move that could enhance the independence of the institution.⁶⁰ In addition, a survey conducted by Transparency International ('Daily Lives and Corruption: Public Opinion in Southern Africa,' 2011) reveals that Malawians are willing to get involved in the fight against corruption. 91 per cent of respondents said they would get involved in the fight against corruption whilst 88 per cent said they would report an incident of corruption. Willingness to get involved in the fight against corruption in Malawi is higher than in any other Southern African country. Such public support is crucial in realising an end to the high corruption levels in Malawi. Similarly, the Global Corruption Barometer reveals that 70% of the respondents in Malawi felt that ordinary people can make a difference in the fight against corruption.⁶¹

⁵⁹ Freedom House report 2012

⁶⁰ Freedom House 2012.

⁶¹ Transparency International 'Global Corruption Barometer 2013-Malawi' available at <http://www.transparency.org/gcb2013/country//?country=malawi>

The National Integrity System VII.

1. The Legislature

Summary

The modern Legislature of Malawi is established by section 48 of the Republican Constitution adopted after the transition to multi-party democracy in 1994. It is vested with all legislative powers of the Republic and recognized as one of the three branches of the government, the other two being the Judiciary and the Executive.⁶²

The primary finding in this assessment is that the legal framework for the integrity of the Assembly and its members is fairly adequate although it requires strengthening. New legislation is needed on declaration of assets by members and access to public information. Enforceable Codes of Conduct for members should also be put in place as part of legislation or rules of the Assembly. The secondary claim is that practice is not in line with what the law says in so far as all assessment indicators are concerned as shown in the Table on the next page.

⁶² These represent significant changes because in the one-party state that lasted until 1993, legislative powers vested mainly in the President and in the Annual Party Conference of the Malawi Congress Party while Parliament only rubber-stamped such decisions and it was simply a department within the Office of the President and Cabinet.

The Legislature

Overall Pillar Score: 70.15/100

Dimension	Indicator	Law	Practice
Capacity 68.75/100	Resources	100	50
	Independence	75	50
Governance 66.7/100	Transparency	75	75
	Accountability	100	50
	Integrity Mechanisms	50	50
Role 75/100	Oversight	75	
	Legal Reforms	75	

Table with indicator scores

Structure and organisation of National Assembly

At the dawn of multiparty democracy in 1994, a bicameral system of the Legislature was adopted. However, the provision of the Upper House (i.e. Senate) was repealed before the first senate could be constituted. Consequently, Malawi's Legislature is unicameral and consists of the President in his or her capacity as Head of State and the National Assembly which consists of 193 elected members from single member constituencies. Members are elected using the first-past-the-post electoral system. Following the results of 2009 general elections, the composition of the Assembly by political affiliation was as follows:

Political Affiliation	Number of seats
Alliance for Democracy (AForD)	1
Malawi Forum for Unity and Development (MAFUNDE)	1
Maravi Peoples Party (MPP)	1
Independents	32
Malawi Congress Party (MCP)	27
United Democratic Front (UDF)	32
Democratic Progressive Party (DPP)	113

Source: Parliamentary and Presidential Elections- May 2009 p.63

Following the death of the President of the Republic who was also President of the Democratic Progressive Party, in April 2012, the composition of the Assembly has become fluid due to defections to the Party in Government, the Peoples Party.⁶³

The members of the National Assembly are elected every five years. Cabinet members sit in the Assembly whether appointed by President from elected members or outside the Assembly. The National Assembly is headed by the Speaker of the Assembly who is elected from amongst members for the duration of the Assembly. The Speaker chairs the Parliamentary Service Commission and the Business Committee and presides at meetings of the Assembly. Two Deputy Speakers also elected by the Assembly assist the Speaker in the discharge of the functions of the office. Furthermore, political parties in the National Assembly appoint Parliamentary Leaders and Whips – all of whom sit in the Business Committee of the Assembly and help the Speaker to enforce discipline among members of their parties. The administrative and support services to the Assembly are provided by the parliamentary service headed by the Clerk of Parliament.

The functions of the Assembly are in the main law making, representation and oversight. The Constitution, statutes and standing orders give the Assembly necessary powers for the discharge of its functions.

⁶³ The People's Party was founded by President Joyce Banda when she fell out of grace with the DPP but remained Constitutional Vice President of the Republic.

Assessment

1.0. CAPACITY.

1.1.1 Resources (Law)

Score: 100

To what extent are there provisions in place that provide the legislature with adequate financial, human and infrastructure resources to effectively carry out its duties?

The National Assembly does its work through meetings in plenary and committees. Under the Constitution, expenditure incurred to convene Parliament⁶⁴ and to ensure the effective functioning of Parliament, including its committees, is classified as protected expenditure charged on the Consolidated Fund.

The same spirit may be discerned from the functions of the Parliamentary Service Commission under the Parliament Service Act.⁶⁵ One of the functions of the Parliamentary Service Commission is to prepare its own budget and exercise budgetary control over the Parliamentary Service.⁶⁶ The budget as prepared is expected to be presented to Treasury for inclusion in the National Budget without amendment.

1.1.2. Resources (Practice)

Score: 50

To what extent does the legislature have adequate resources to carry out its duties in practice?

Contrary to the provisions of the law, the National Assembly does not determine its own budget. Each year, it prepares estimates against a Credit ceiling predetermined by the Ministry of Finance and submits the same to the Treasury. The estimates are then included in the national budget which is presented to Parliament by the Minister responsible for finance, before the commencement of the next financial year. This is the practice for all government ministries and agencies. The Assembly has not been spared in spite of the law cited in the foregoing section. To the extent that it does not determine its own budget, it is not adequately financed and therefore unable to fill vacancies within the Parliamentary service; produce a record of its proceedings

⁶⁴ S.183(3)(d), Constitution

⁶⁵ Cap 2:08 Laws of Malawi

⁶⁶ Ibid:s.11(1)(a)

(Hansard) on time; hold committee meetings as frequently as scheduled; and report committee proceedings verbatim.⁶⁷ Furthermore, the Minister of Finance is yet to designate any accounts of the Consolidated Fund as ‘protected expenditures’ as required by section 183 of the Constitution so much that in practice, financial resources earmarked for parliamentary business are subjected to reductions, delayed disbursements or re-allocation.

However, National Assembly has been able to train staff from its annual budget and donor resources. While National Assembly has a purpose built building which is sufficient for plenary and committee work, it does not have sufficient office space for some senior staff who share offices.⁶⁸ In the recent past, the number of parliamentary staff has increased especially when the national Assembly moved into the purpose-built premises.⁶⁹

1.1.3. Independence (Law)

Score: 75

To what extent is the legislature independent and free from subordination to external actors by law?

The Constitution provides that the National Assembly dissolves automatically on 20th March in the fifth year after its election.⁷⁰ A dissolved Assembly may be recalled, however, by the President if, in the opinion of the President, a constitutional crisis or emergency has arisen which requires urgent legislation or consideration by the National Assembly.⁷¹ The President has no role in the dissolution of the National Assembly. This means the Assembly may debate and vote on any matter without fear of dissolution of the Assembly by the President.

On electing the Speaker and Deputy Speakers, the Assembly is the body responsible for the election of a Speaker and two Deputy Speakers. They may also be removed from office by the Assembly in a vote by secret ballot with a two thirds majority. The Speaker and his/her deputies ought to perform their duties without interference or direction of anybody or authority.⁷²

In regard to recruitment of staff, the Parliamentary Service Commission may hire and fire staff in the Assembly including a Clerk of Parliament who is appointed by the President on recommendation of the Commission.⁷³

⁶⁷ Oral Interview with senior staff of National Assembly on 20th September, 2012.
⁶⁸ Ibid.
⁶⁹ Ibid.
⁷⁰ S.67(1), Constitution

⁷¹ S.67(4) Constitution

⁷² S.53(5) Constitution

⁷³ Ss 16,19 Parliament Service Act(Cap 2:08)

With reference to bills debated in the House, most if not all bills debated in the House are Government bills. There have been no private members bills tabled in recent years.⁷⁴ There is, however, provision in the rules of the Assembly for Government to assist members to draft bills and National Assembly to meet expenses of publishing and printing private members bills. Nonetheless, bills have not been forthcoming from private members.⁷⁵

With regard to membership of parliamentary committees, a Minister or Deputy Minister of Government is barred from being a member of any standing committee by rules of the Assembly.⁷⁶ This rule promotes the accountability of the Executive to the Assembly. However, a minister may be a member of the Business Committee which sets the agenda for the Assembly and allocates time for the same.⁷⁷

On parliamentary privileges, no utterances or speeches made by members in the course of parliamentary meetings [in plenary or committee] can be used in the courts of law against a member.⁷⁸ Erring members are subject to the discipline of the Assembly and not courts for speeches made in the Assembly or committees.

Another guarantee of independence is with regard to the fact that a member may not lose his or her seat because of voting against the recommendation of a political party represented in the National Assembly, of which he/she is a member. However he/she may lose his/her seat for crossing the floor under section 65(1).⁷⁹

Besides this, the assessment reveals that there is a strong Executive arm of government in Malawi which plays a prominent role in law making process, thus performing a legislative role. An independent expert on governance and development said that “the extent of Executive influence over the legislative branch is particularly evident in the law making process, as all the government bills are firstly initiated at the Cabinet meeting chaired by the President before passed by the Parliament and the President also becomes the last person to assent and promulgate the Bill which he or she initiated at the Cabinet meeting”.⁸⁰

⁷⁴ Before 2009, at least two private Members Bills were tabled to amend certain provisions of the Constitution. However, the bills were defeated through a parliamentary voting process.

⁷⁵ Standing Orders(SO): 113(3) and 112(2)

⁷⁶ SO 185

⁷⁷ Ibid.

⁷⁸ S.60(1), Constitution

⁷⁹ S.65(1), Constitution

⁸⁰ Interview with the author, 5th December 2012

The Constitution also provides that the National Assembly may regulate its own procedure by Standing Orders or otherwise.⁸¹ This provision enhances the independence of the Assembly on matters internal to it unless its decisions impinge on the interpretation of the Constitution, in which case courts have jurisdiction to intervene.⁸²

A member who has committed an offence may be arrested just like any other citizen except in a few cases when he/she may be immune from such arrest under law. A member may not be arrested for any criminal offence in the precincts of the Assembly while the Assembly or committee is sitting without the consent of the Speaker.⁸³ Except for treason, a member cannot be arrested while going to or returning from National Assembly or within the precincts of the Assembly.⁸⁴ Nor may any process issued by any court in the exercise of its jurisdiction be served or executed within the precincts of the Assembly while the Assembly is sitting or through the Speaker, Clerk or any Officer of the Assembly.⁸⁵

To the extent that court process may not be served in the precincts while the Assembly is sitting, members are protected from unnecessary harassment by the public or indeed state institutions.

1.1.4. Independence (Practice)

Score: 50

To what extent is the legislature free from subordination to external actors in practice?

While the Parliamentary Service Act (1998) provides for the Commission to recruit staff for the service, such recruitment is subject to seeking and obtaining authority from the Executive. And further, Executive authority is also sought to make financial resources available for the vacancies to be filled. In other words, National Assembly may not fill vacancies in its establishment without the approval of the Executive branch of Government.

To the extent that the source of most legislation emanates from the Executive, the Assembly fails to assert its independence in terms of the agenda and progress of bills in the Assembly. A case in point is Bill no. 27/2010 [*Civil Procedure [Suits by or against the Government or Public Officers [Amendment]*] which was introduced by a Minister and then referred to Legal Affairs Committee at second reading. The Legal Affairs Committee reported to Assembly that it should be redone by

⁸¹ S.56(1)

⁸² Attorney General v Nseula and another (1997) 2MLR 50.

⁸³ S.4 NAPPA CAP 2:04

⁸⁴ S.60(1), Constitution

⁸⁵ S.5 ibid

Government but it still passed without being redone by Government as recommended by Committee on 16th June, 2011. The Act was repealed on 24th May, 2012 by the same Assembly after change in the Presidency of the Republic.⁸⁶ Some members have also questioned whether the Assembly is as independent as other branches of Government if the Speaker can be stopped from making a decision on section 65 of the Constitution (which provides for crossing the floor) because of injunctions by courts obtained by its own members.⁸⁷ The inability of the Speaker to invoke section 65(1) against defecting members has caused great concern to the public to the extent of taking it as a disregard of the Constitution in spite of claims by the Speaker that inability to act is due to court injunctions by defecting members.⁸⁸ However, a common public perception is that defections are due to promises of office or money to members by those in power and those who are enticed by the same must be punished for deserting them.

Governance

1.2.1. Transparency (law)

Score: 75

To what extent are there provisions in place to ensure that the public can obtain relevant and timely information on the activities and decision-making processes of the legislature?

All proceedings of the Assembly are open to the public except that the Speaker reserves the right of admission to the precincts of the National Assembly.⁸⁹ The Speaker or Chairperson may also ask a member of the public who is already admitted to withdraw from the chamber.⁹⁰

Parliamentary committee meetings are also open to the public and the media.

Voting is done either by secret ballot or through voice vote and the public is able to have access to the records of such voting.⁹¹

The media has access to the parliamentary proceedings. The public also has access to such information through live broadcasting but also through the Hansard which is a verbatim record of all parliamentary proceedings.

⁸⁶ Hansard, 10th December, 2010 p:752; 16th June, 2011 p:789; Hansard 24th May, 2012.p 216

⁸⁷ Hon Dr. G ChapondaMP, The Daily Times, 28th January, 2013 p:3

⁸⁸ Pac, Speaker tackle sec 65 in Daily Times of 21/01/13

⁸⁹ S.8 National Assembly (Powers and Privileges) Act, Cap 2:04

⁹⁰ SO 220

⁹¹ Refer to Part XXI of the Malawi Standing Orders on procedures for voting.

All bills, unless justified on grounds of urgency⁹², are introduced in the House after being in public circulation for 28 days.⁹³ Bills may be referred to committees by the Clerk for public input before introduction in the Assembly.⁹⁴ Bills may also be referred to committees at second reading (as was the case with the injunctions bill) for further consideration and public input under the rules of the Assembly.

Members of the public are permitted access to Parliament by submitting such request for visitation to Parliament secretariat upon which they shall be allocated a time and date for visitation.

Parliamentary committee reports (on their activities and recommendations) are tabled before parliament.

1.2.2 Transparency (Practice)

Score: 75

To what extent can the public obtain relevant and timely information on the activities and decision-making processes of the legislature in practice?

The Assembly is an institution of record and as such its timetables of meetings are made public before meetings commence. However, the agendas of meetings are not indicated in the notice of meetings placed in the print media or in summons by the Speaker to members.⁹⁵

The National Assembly has a public relations and civic education unit for its engagement with the public. The public (including students from schools and constituents of sitting members) may arrange visits to the Assembly with management and request to be provided with literature on the operations of the Assembly or indeed ask questions on the bills passed and how they were passed.⁹⁶

While Standing Orders of the Assembly provide for publishing bills and referring them to Committees before introduction in the Assembly,⁹⁷ this appears to be an ideal, as in most cases, bills are passed without being referred to Committees. Committee proceedings are open to the public unless the committee decides otherwise in which case the reason for holding a meeting in

⁹² SO 117

⁹³ SO116(1)

⁹⁴ SO 116(3)

⁹⁵ See Standing Order 52 on access to journals and records.

⁹⁶ Interview with a Parliamentary Official.

⁹⁷ *ibid*

private must be publicly stated and noted in committee minutes.⁹⁸ However, a majority of members of the public are not aware that parliamentary committee meetings are open and that they have the right to observe. As a result, public attendance has often been limited to the media.

Proceedings of the Assembly are published in the Hansard and Votes and Proceedings. Votes and Proceedings, which are minutes of the proceedings taken down by Clerks -at -the Table, are not for public circulation. Hansard, on the other hand, which is a verbatim record of proceedings including voting records by members on bills and any other matter, is circulated to the public. Although the Hansard is available to the public, not every one may afford the price at which it is offered by the National Assembly. So it may be said that accessing parliamentary record of proceedings at rates the public may afford remains a problem.

TV and radio companies may cover parliamentary proceedings after obtaining consent from leadership of the National Assembly. Currently, a private Broadcaster covers live proceedings of National Assembly. However not everyone owns a radio in the country and some people continue to remain ignorant of what is going on in the Assembly. In addition, even where media houses have been granted permission to do live coverage of parliamentary proceedings, the same can be interrupted by other priorities such as presidential functions, as may be the case with the public broadcaster. The situation may, however, soon improve as Parliament has obtained a licence to have its own dedicated radio and television stations.

1.2.3. Accountability (Law)

Score: 50

To what extent are there provisions in place to ensure that the legislature has to report on and be answerable for its actions?

The High Court has jurisdiction to review any law and any action or decision of Government, for conformity with the Constitution.⁹⁹ National Assembly is part of Government and as such its actions or decisions are subject to review by the High Court for conformity with the Constitution. Similarly, any person affected by its decision may go to court for judicial review of the decision of the National Assembly.

⁹⁸ SO 171

⁹⁹ S.108(2), Constitution

Under the Standing Orders, committees of the Assembly may consult the public for their input on bills introduced in the Assembly.

The public are not allowed to assemble and demonstrate within the precincts of parliament building or an open space within a radius of one hundred meters from such building unless authorized by the Speaker.¹⁰⁰ However, the public is permitted to submit petitions on concerns that they may have to Parliament for the Member's noting/action.¹⁰¹

1.2.4. Accountability (Practice)

Score: 50

To what extent do the legislature and its members report on and answer for their actions in practice?

There are three dimensions upon which MPs are accountable. Firstly, MPs represent and are accountable to the constituents who have voted them into office and other citizens in their constituencies.¹⁰² They are also accountable to the respective political parties that they belong to, and on whose platform they were elected.¹⁰³ Lastly, they are accountable to the nation as members of parliament.¹⁰⁴ This sometimes creates confusion in regard to which of these three interests they should be loyal to.¹⁰⁵ Through interviews conducted, it has been revealed that the orientation of MPs is above all to their constituencies.¹⁰⁶ MPs are thus 'considered to be 'service responsive' vis-à-vis their constituencies in a tangible sense, rather than 'policy responsive' in relation to the general needs of the nation as expressed by political parties and other societal stakeholders.'¹⁰⁷ The demands and grievances from constituents are articulated directly through personal visits to the MPs' homes, or through letters.¹⁰⁸ Political rallies also play a role in crystallising demands, as do area committees.¹⁰⁹

The Assembly has petition procedure under the Standing Orders which provides for citizens through their members to place public grievances before the House. The petition procedure appears sterile because it does not allow any reference in a petition to any debate in the

¹⁰⁰ S. 103, Police Act, Act no. 12 /2010.

¹⁰¹ See Part xvi of Standing Orders on Petitions And Papers

¹⁰² Nandini Patel and Arne Tostensen 'The legislature' in *Government and politics in Malawi-A Text book*.P.95.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid. 96.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ Nandini Patel and Arne Tostensen 'The legislature' in *Government and politics in Malawi-A Textbook*. P96

Assembly presumably because the matter was receiving attention by the Assembly. Practice has shown that the public appears frustrated by the procedure because petitions are not dealt with as matters of concern to the public in that a member may or may not speak to the petition.¹¹⁰ It does seem therefore that the only existent mode of effective accountability for the Assembly for its actions or decisions at present is the election itself in the fifth year of the Assembly's term.

As earlier stated, committees of the Assembly may consult the public for their input on bills introduced in the Assembly. Hence, committees put public notices in the local newspapers with wide circulation calling for submissions on the bills.

Parliament also has its own official website (<http://www.parliament.gov.mw/>) where information on its activities such as parliamentary proceedings, committee reports, as well as information on bills passed is provided. However, not all information is updated.

1.2.5. Integrity mechanisms (law)

Score: 50

To what extent are there mechanisms in place to ensure the integrity of members of the legislature?

Laws to ensure the integrity of members of the National Assembly exist but such laws are work in progress. While the Constitution requires members within three months from the date of election to fully disclose all their assets, liabilities and business interests and those of their spouses,¹¹¹ there is no requirement to review the same periodically, or any sanctions if a member does not comply. Such disclosures are delivered to the Speaker.¹¹² The public office has not yet been specified by the Orders. The Constitution also provides that a Committee of Parliament shall monitor compliance by members with disclosure provisions.¹¹³ The committee known as the Public Appointments and Declaration of Assets Committee of the Assembly, is in place, but it is not effective because there are no supportive pieces of legislation for sanctions in cases of default by members nor for periodic reviews of declarations.

A member is required by the Constitution to disclose his/her material interest in the matter being debated in the Assembly and not be entitled to vote unless the Assembly gives its leave for him/her to do so otherwise it is contempt of the Assembly.¹¹⁴ The provision ensures that members are

¹¹⁰ SO 45(2)

¹¹¹ S.213(1)(a) Constitution

¹¹² *ibid*

¹¹³ *Ibid* S.213(4)

¹¹⁴ S.61 Constitution

not involved in conflict of interest issues without the knowledge of fellow members thereby preventing bringing into the House business which promotes their own interests.

It is an offense for any member to accept or agree to accept, for himself or for any other person any bribe, or other benefit to vote or act as such member or to refrain from speaking or voting.¹¹⁵ A member suspected of having committed the crime is prosecuted with the consent of the Director of Public Prosecutions.¹¹⁶

1.2.6 Integrity mechanisms (Practice)

Score: 50

To what extent is the integrity of legislators ensured in practice?

There was an attempt by the Assembly to develop a code of conduct for the members but the work appears to be still going on. Parliamentary staff interviewed for this assessment were unable to say the stage at which the matter is. 'Codes of conduct focus on making MPs' interests more transparent, particularly by disclosing their finances, and further defining incompatibilities, proscribing certain activities and outside occupations; and they are also much needed in combating corruption and perceptions of corruption.'¹¹⁷

1.3 ROLES

1.3.1. Executive oversight

Score: 75

To what extent does the legislature provide effective oversight of the executive?

The National Assembly exercises oversight over the Executive by overseeing appointments of public officers made by the Executive; raising questions to ministers on public affairs of state; discussion of the national budget in the Assembly and through the exercise of power of investigation and subpoena.

¹¹⁵ S. 20 NAPPA

¹¹⁶ S.30,ibid

¹¹⁷ Global Parliamentary Report, p52

Other appointments or removals from public office made by the Executive in which National Assembly has a role under the Constitution and statutes are:

- Auditor General is appointed by President and confirmed by National Assembly ¹¹⁸;
- Director of the Anti- Corruption Bureau is appointed by President subject to confirmation by Public Appointments Committee under the Corrupt Practices Act ¹¹⁹;
- Inspector General of Police is appointed by the President and confirmed by National Assembly ¹²⁰;
- Electoral Commissioners may be removed from office by the President on the recommendation of the Public Appointments Committee; ¹²¹
- Ambassadors are appointed by the President and confirmed by the Public Appointments Committee ¹²²

Any member of the National Assembly may also ask questions to ministers on public affairs for official action or information for which ministers or deputy ministers are responsible. ¹²³ The questions could be wide ranging as long as they do not offend rules of decorum of the House.

The Constitution provides that the National Assembly and any Committee of the National Assembly shall each have power to conduct investigations and exercise the power to subpoena the attendance of any person or office holder whosoever as required in connection with the prudent exercise of the functions of the National Assembly. ¹²⁴ Where a public official (which in some instances include members of the Executive) fails to appear without cause before a committee, the committee may charge him with contempt or report such matter to the Speaker of the House. ¹²⁵ The Assembly has power to summon the President to Parliament to answer questions. ¹²⁶ However, this power lies dormant in spite of state matters requiring answers from the President. Instead the practice has been that Ministers answer questions in Parliament.

The National Assembly has a role in scrutinizing the budget through the Budget and Finance Committee and plenary debates on the budget. In executing that role, the Assembly may suggest amendments to the budget and with the consent of the minister responsible for finance, such amendments may be effected to the budget by the Assembly because amendments to increase allocations to votes may only be moved by the Minister. ¹²⁷ The National Assembly however has no direct role in monitoring public contracting by the Executive.

¹¹⁸ S.184(3) ibid

¹¹⁹ S.5 Corrupt Practices Act cap 7:04

¹²⁰ S.152(2) Constitution

¹²¹ S.75(4)ibid

¹²² S.190, ibid

¹²³ SO 49

¹²⁴ S.60(3), Constitution

¹²⁵ ibid

¹²⁶ S.89(4) Constitution

¹²⁷ SO 210(2)

While the Assembly has a role in appointments of some public officers as indicated herein, the law does not provide roles to the legislature in the removal of the said officers except for the Director of the Anti-Corruption Bureau. Even for the Director, the Deputy Director bemoaned the inability of the Assembly to assert itself in defence of the Director to probe the Executive on the propriety of the decision to “unceremoniously” remove a Director before expiry of contract period.¹²⁸ It is suggested that the Assembly in plenary be involved in the removal of public officers by the Executive whose appointments are confirmed by it to protect the public purse and integrity of the officers.¹²⁹

1.3.2. Legal reforms

Score: 75

To what extent does the legislature prioritise anti-corruption and governance as a concern in the country?

There have been no legal reforms by National Assembly in the anti-corruption regime except those done in 2004 and 2006. Parliament amended the Corrupt Practices Act (Cap 7:04) by Act number 17 of 2004 to expand the definition of public officer to include Members of Parliament. Following the amendment, a member of Parliament is like any other holder of public office in the eyes of law relating to corrupt practices including abuse of public office. The Act was further amended by providing that the court may infer that property was obtained as a result of the commission of an offence where there is evidence established that the value (after commission of the offence of all the property of the accused) exceeds the value of all his property (before the commission of the offence), and the court is satisfied that his income from sources unrelated to the offence he is alleged to have committed cannot reasonably account for that increase in value.¹³⁰

Parliament passed the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act [Cap 8:07] in 2006. The object of the Act is to enable the unlawful proceeds of all serious crime to be identified, traced, frozen, seized and eventually confiscated; and also to establish a Financial Intelligence Unit for the better prevention, investigation and prosecution of money laundering. The Act defines serious crime as one which underwritten law in Malawi or a law of foreign state] for which the maximum penalty is death or imprisonment for life or other deprivation of liberty for a period of not less than twelve months and includes money laundering.

¹²⁸ Interview with Author.

¹²⁹ Interview of Parliamentary officers and Assistant Bureau Director.

¹³⁰ S.36 B, Corrupt Practices Act Cap 7:4

The Deputy Director of Anti-Corruption Bureau (ACB) said that Parliament needed to respond to initiatives to strengthen the anti-corruption drive. He suggested that the declaration of assets bill and access to information bill, are critical to the anti-corruption drive and the sooner the Executive introduced them in Parliament for consideration the better.¹³¹ A report of the Public Appointments and Declaration of Assets Committee of June 2011 says that the formulation process of the Declaration of Assets Bill started in 2004. However, the report did not recommend the need for the Bill to be introduced in the Assembly within a stated time frame except that the bill do include more senior officers in corrupt-prone positions and that matters of declaration be held in strict confidentiality.¹³²

The Deputy Director further suggested that the ACB Annual Reports tabled in Parliament are not allocated time for plenary debates thereby denying the public information contained in the reports about the work of the Bureau and its challenges.

Recommendations

- Parliament needs to be supported to realise its plans to have its own dedicated radio and television stations in order to improve transparency;
- There is also a need to produce some parliamentary records (like Hansard) in the vernacular language.
- Outreach or town-hall meetings would serve a better purpose than the print media to solicit public input on issues to be discussed by parliamentary committees since a large section of the public does not read the newspapers. Thus the Assembly should also be adequately funded to hold the desired meetings suggested which would capture a larger section of the public for the desired public input.
- It is imperative that the Parliament should realise the idea of having a code of conduct for members of parliament.
- There is a need to lobby and advocate for a legislative reform on separation of powers whereby Cabinet Ministers do not double as MPs

¹³¹ Interview with Deputy Director of the Anti-Corruption Bureau on 20/09/12

¹³² Report of the Public Appointments and Declaration of Assets Committee, June 2011 pp 5,7

2. The Executive 2.

Summary

Malawi's political executive consists of four offices namely, the President, the Vice President, Cabinet Ministers and Deputy Ministers. The Executive is synonymous to Cabinet by definition.¹³³ The President is directly elected through adult universal suffrage using the 'first-past-the post' electoral system and serves in two capacities, namely, Head of state and Head of Government. The Vice President is elected on the same ballot of the President as a 'running mate'.¹³⁴ All Cabinet Ministers and their deputies are appointed by the President and they hold office at the President's pleasure. The President is at liberty to appoint cabinet ministers and their deputies from among members of parliament or from outside parliament, subject only to the eligibility criteria set out in section 94 of the Constitution.

The table below presents summary quantitative assessment results of the Executive in terms of its capacity, internal governance and its role within Malawi's integrity system. The remainder of the report presents the qualitative results that explain the numerical scores. The assessment finds that financial and human resource for the Executive is fairly adequate. However, there are concerns surrounding the abuse of such resources and the lack of an effective audit system. Laws on the independence of the executive are generally sufficient. However and in practice, their independence is highly affected by partisan politics. The accountability of the executive is worrisome, especially with regard to weak laws and implementation on disclosure of assets.

¹³³ According to Section 92 (1) of Malawi's Constitution, Cabinet consist, *inter alia*, of the President, the Vice President, and the Second Vice President if one has been appointed, Ministers and the deputies.

¹³⁴ Under the Constitution, the President can appoint a Second vice president who must come from a political party other than that of the President.

The Executive

Overall Pillar Score: 41.66/100

Dimension	Indicator	Law	Practice
Capacity 66.67/100	Resources	-	75
	Independence	75	50
Governance 33.33/100	Transparency	50	25
	Accountability	25	25
	Integrity Mechanisms	50	25
Role 25/100	Oversight	25	
	Legal Reforms	25	

Source: Authors own compilation and assessment

Structure of the Executive in Malawi

Chapter VIII of the Constitution of Malawi indicates that the Executive comprises the President, the Vice President, Cabinet Ministers, the Attorney General and the Director of Public Prosecution (DPP).¹³⁵ The working relationship of the Executive is consultative, and their paramount function is policy-making. The cabinet is empowered to discharge functions and exercise powers assigned to it by the Constitution or an Act of Parliament and are responsible for advising the President on any policies and any other matter referred to it by the President.¹³⁶ Collectively, they are required to provide political and administrative leadership in the running of government.

The Constitution and the Public Service Regulations Act of 1994 do not provide a specific limit on the size of the Cabinet. This gives the President constitutional powers to appoint any number of people to the Cabinet.¹³⁷ Consequently, the size of Cabinet varies from time to time and is often

¹³⁵ The assessment in this report excludes the Director of Public prosecutions because that office is assessed under the 'Law Enforcement' Pillar. It also excludes the Attorney General because in the last four years the Attorney General is different from the Minister of Justice and Constitutional affairs. While the Minister is part of the Executive in so far as NIS methodology is concerned, the Attorney General is part of Public Sector/Law Enforcement.

¹³⁶ Malawi Law Commission (2006), Discussion Paper No.4: The Constitution and the Executive Branch of Government. Prepared by Mrs. Fiona AtupeleMwale, Assistant Chief Law Reform Officer

¹³⁷ Dulani, Boniface., 2007:67

dictated by the logic of patronage politics. Although all Ministers and Deputies are regarded as equal in status within their groups, there is an informal hierarchy that shapes perceptions of the relative importance of Cabinet Ministers. The informal ranking is based on a classification of government portfolios. The portfolios are categorized into three, namely, General Administration,¹³⁸ Economic Services and Social and Community Services.¹³⁹ The perception is that portfolios in the first category are more important and so too are the Ministers and Deputy Ministers that lead them.¹⁴⁰

Assessment

2.1.1 Resources (Practice)

Score: 75

To what extent does the Executive have adequate resources to effectively carry out its duties?

There are no major issues that hinder the performance of the Executive in terms of financial, human or infrastructural resources. The financial resources appropriated for the Executive in the National Budget are generally adequate and are always disbursed in a timely manner. The amount of approved funding for the presidency, State Residences, Office of the President and Cabinet (OPC) and Office of the Vice President has increased in recent years from MK 5.3¹⁴¹ billion in 2011/2012 fiscal year to MK 6.4¹⁴² billion in 2012/2013, representing 21% increase. The budget appropriated for the Executive is subject to the approval of Parliament as well as to audits by the Auditor General. The Executive has a significant human resource complement to support its operations. For instance, the Office of the President and Cabinet (OPC) is staffed by the Chief Secretary to Government and several technocrats who provide policy advice to the President and Ministers. Furthermore, the President and the Vice President have several personal-to-holder advisers¹⁴³ on a range of issues including politics, economy, education, gender, agriculture, religion, health, the media, social issues etc and all of them are on government payroll. This cadre of advisers is personally recruited by incumbents and there is no known recruitment criterion. Furthermore, the President and/or Vice President is at liberty to

¹³⁸ This category includes the following ministries: Justice and Constitution Affairs; Foreign Affairs; Land, Housing and Urban Development; National Defense; Internal Affairs and Public Security; Development Planning and Cooperation; and, Finance.

¹³⁹ See the Official Website for the government of the Republic of Malawi on http://www.malawi.gov.mw/index.php?option=com_content&view=article&id=32&Itemid=2

¹⁴⁰ Interview of Cabinet staff with Author.

¹⁴¹ Budget Document No.3, Approved 2011/2012 Financial Statement

¹⁴² Budget Document No.3, Approved 2012/2013 Financial Statement

¹⁴³ These are special assistants to the president and his/her vice, who are on the government payroll but whose office tenure are dependent upon the president/vice-president's office's tenures.

create any advisory role.

There are however, some problems with the institutional structure of the Office of the President. Firstly, the number of employees serving the Office of the President, as well as the number of services and institutions that report to the President appears to be unnecessarily high and costly to Malawi's economy. Secondly, there is inadequate training capacity for the Cabinet members. Interviewees argued that this results in a situation where the Cabinet includes individuals who lack necessary skills, knowledge, and expertise to carry out their job effectively.¹⁴⁴

2.1.2 Independence (Law)

Score: 75

To what extent is the Executive independent by law?

The Constitution of Malawi provides for separation of powers where the Executive is independent from the other two branches of government namely the Legislature and Judiciary. The Cabinet Handbook, presently being revised, contains a number of important provisions and guidelines designed to reinforce the independence and credible administration of the government machinery by the Executive such as the principle on collective responsibility. On the part of the President, the law also gives him or her absolute independence in Section 91 which says that, "no person holding the office of the President or performing the functions of the President may be sued in any civil proceedings..."¹⁴⁵ This law gives power to the President in that, he or she performs and exercises his or her power and roles as stipulated in Section 89 of Malawi Constitution without being hindered unnecessarily. Besides this, his or her security of tenure is guaranteed. While the President can only stay in the office for a maximum of ten years, he or she can only cease to hold the office or be removed from office before his or her term is over on four grounds: impeachment;¹⁴⁶ death;¹⁴⁷ resignation;¹⁴⁸ and incapacity.¹⁴⁹

¹⁴⁴ Interview with the author, 7th December 2012; See also Dulani, Boniface., 2007

¹⁴⁵ Constitution of the Republic of Malawi.

¹⁴⁶ Section 86 (1) of the Malawi Constitution

¹⁴⁷ Section 84 of the Malawi Constitution

¹⁴⁸ Section 87 (6) of the Malawi Constitution

¹⁴⁹ *Ibid.*

2.1.3 Independence (Practice)

Score: 50

To what extent is the Executive independent in practice?

In practice, the independence of the Executive is limited by pressures from the political parties including their own for narrow and particularistic interests¹⁵⁰ and by civil society organizations¹⁵¹ and representatives of the international community especially those donors in the Common Approach to Budget Support such as the World Bank, IMF, DFID.

While the President is immune from prosecution, other members of the Executive do not enjoy this privilege and aggrieved individuals can seek administrative remedies and sue the ministers on the basis of the Bill of Rights provided in Chapter IV of Malawi Constitution or any other relevant laws.

Recently, lack of parliamentary majority for the ruling parties has also proved to be a limiting factor on the independence of the Executive. Since the President is elected separately from MPs, a person can become President without commanding a corresponding parliamentary majority. The absence of an absolute majority in Parliament significantly attenuates the independence of the Executive and its ability to govern.¹⁵²

There is also no clear definition and distinction on the roles of the President as the head of state and as the head of government. In practice, these roles are fused and sometimes create integrity dilemmas.¹⁵³

¹⁵⁰ See Chingaipe (2010) *Business and the State in Malawi: The Politics of Institutional Formation, Maintenance and Change* (PhD Thesis, University of York).

¹⁵¹ For example, demands of CSOs that led to a mass protest on 20th July 2011.

¹⁵² Dulani, Boniface., 2007

¹⁵³ Interview with the author, 7th December 2012

2.2.1 Transparency (Law)

Score: 50

To what extent are there regulations in place to ensure transparency in relevant activities of the Executive?

The Constitution sets standards for transparency. Similarly, government circulars as well as standard operating procedures provide obligations for members of the Executive to be transparent. In fact other legislations, such as the Public Finance Management Act, Public procurement and Public Service spell out the acceptable ways of finance management in public institutions, open and credible procurement processes as well as integrity and transparency of the public service. However, provisions that are designed to enforce transparency are affected by legal provisions in other legislations. For instance, the Official Secrets Act limits how much information can be officially released about the activities of the Executive. For example, proceedings of the Cabinet are treated as secret. Thus, minutes of the Cabinet are not ordinarily made public. Neither are declarations of assets by the members of the Executive made public. The law is silent on disclosure of information on declared assets. No formal regulations exist to specifically ensure transparency in the work of the Office of the President. In addition, activities of the executive are not required to be recorded in a government information system that would be accessible to the public. On the other hand, the government budget is laid and debated before Parliament and thus available for public scrutiny. In addition, section 213(1) of the Constitution mandates the President and members of the cabinet to disclose their assets.

2.2.2 Transparency (Practice)

Score: 25

To what extent is there transparency in relevant activities of the Executive in practice?

There is very minimal level of wilful transparency from the Executive. In fact in the recent past, the Executive has interfered in the award and cancellation of business contracts without explanation or by citing some unclear insignificant irregularities. However, it is common knowledge, that the interference has been because of desires to reward businesses that support the ruling part and punish those that are known to support opposition parties. Furthermore, the Executive has been in the forefront arguing against the disclosure of contractual agreements that the government has with mining interests when there is a clear demand for the information.

Besides this, there is some minimal level of fiscal transparency in the executive branch through various mechanisms, including the work of the Public Accounts Committee of Parliament and budgetary processes. However, there has been absence of state capacity for external audit and

lengthy delays in audit reports to the legislature. This has signaled that the government is not being held accountable by the legislature and the public for its actions.

2.2.3 Accountability (Law)

Score: 75

To what extent are there provisions in place to ensure that members of the Executive have to report and be answerable for their actions?

The Malawi Constitution and the cabinet handbook includes elaborate provisions regarding the accountability of the Executive. In both documents the emphasis is that the Executive is there to serve and fulfil the legitimate expectations of the people of Malawi.¹⁵⁴ For the President, a key provision for accountability is the obligation for the President to make appearance in the Parliament to fulfil requirements for accountability. Specifically, the Constitution states that, “the President shall each year, immediately before the consideration on the official budget attend the parliament and shall; (a) address the Parliament on the state of the nation and on the future policies of government at that time; (b) report on the policies on the previous years; and (c) respond to questions”.¹⁵⁵ This subjects the President to parliamentary review and to account for all the actions and omissions of the government. Furthermore, section 89 (4) states that, “the President shall be called to Parliament to answer questions at such time as may be prescribed by the Standing Orders of Parliament or on a motion of the National Assembly¹⁵⁶”. Ministerial accountability is also provided for. Section 97 of the Constitution provides that “all Ministers shall be accountable to the President for the administration of their own departments”. Furthermore, in the performance of their functions¹⁵⁷, “ministers are accountable to Parliament”. This does not involve Ministers in individual liability for every action of public servants. It does, however, imply that Ministers accept two responsibilities: firstly, for the overall administration of their own portfolios, both in terms of policy and management; and secondly for carriage in parliament of their accountability obligations to that institution.¹⁵⁸

The Executive is also limited by the provision of checks and balances in the other branches of government. For instance, the Executive cannot legislate by decree. All legislative authority vests in Parliament and the Executive can only make law by making their case in Parliament.

¹⁵⁴ See Chapter VIII of Malawi Constitution and Cabinet Handbook 2000

¹⁵⁵ Section 89 (3) (a, b & c) of the Constitution

¹⁵⁶ Section 89 of Malawi Constitution

¹⁵⁷ Cabinet Handbook (2000) Section 4.1 of Chapter One

¹⁵⁸ Cabinet Handbook 2000:2

Furthermore, any acts of the Executive are open to legal challenge in the courts of law¹⁵⁹ through judicial review. Other administrative decisions or actions of the Executive that impinge on the rights of people are subjected to challenge at the office of the ombudsman.

Furthermore, the executive exercise of power is subject to checking by the Ombudsman as well as the Malawi Human Rights Commission (MHRC).¹⁶⁰ Thus, although the laws provides for the independence of the Executive, in practice the independence of the Executive is not absolute.

The Constitution of Malawi under Sections 88 A (1) and Section 213 also requires the President, members of Cabinet and any person holding a senior public office to fully disclose their assets within three months from the date of election or appointment. However, the law on the declaration of assets is grossly inadequate. There are no procedures of following up on the declarations, the information is kept under key and lock by the Speaker of Parliament so much that the whole thing passes for a mere façade. Furthermore, there is no enabling legislative framework to help implement the constitutional provision. There is a clear need for an Act of Parliament on this issue and other observers have further suggested the constitutional provision itself. For instance, it has been suggested that , section 88 A (1) and Section 213 of the Constitution should be amended to require that one should declare one's assets with one's nomination in the case of a President and Vice President and before assuming office in the case of other Cabinet Ministers.¹⁶¹ Furthermore, the National Assembly should list down all posts in the public service whose incumbents should become subjected to the requirement of declaring assets.¹⁶²

Cabinet Ministers in Malawi are bound by the principle of collective responsibility and loyalty to the President. The principle of collective responsibility requires that, Ministers should be able to express their views during Cabinet meetings frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached.¹⁶³

Cabinet members are also required to attend sessions of the National Assembly to answer questions pertaining to the legitimacy, astuteness, efficacy and direction of government policies.

¹⁵⁹ Section 5 of the Constitution

¹⁶⁰ Constitution of the Republic.

¹⁶¹ Malawi Law Commission (2006), Discussion Paper No.4: The Constitution and the Executive Branch of Government. Prepared by Mrs. Fiona Atupele Mwale, Assistant Chief Law Reform Officer

¹⁶² Section 213 of the Constituion

¹⁶³ Interview with the author, 10th December 2012

2.2.4 Accountability (Practice)

Score: 25

To what extent is there effective oversight of Executive activities in practice?

Addressing Executive irregularities and holding Executive members accountable for their actions as the Constitution of Malawi allows for, has proved problematic. Although under the Constitution the entire Executive is answerable to parliament, in practice, only Ministers respond to questions from MPs in Parliament. The president makes speeches to Parliament but never has there been an occasion for the President to directly respond to questions from Members of Parliament. Presidents have resisted calls to answer questions in Parliament for fear of political embarrassment. For instance, in 2010 opposition MPs summoned late President Mutharika to appear before Parliament on the state of the nation and respond to questions from opposition MPs over what was described as *"Poor economic and democratic governance in Malawi"*. The President snubbed Parliament. Instead, he organised a *"public lecture"* at the State Residence where he lectured to invited guests on a range of topics including sovereignty, political independence, zero deficit budget, human rights and fuel and forex crises that the country was experiencing. It is further observed that *"the lecture was organised to shift attention from the 20th July demonstrations organised by civil society leaders to protest bad political and economic governance by late Mutharika's government"*.¹⁶⁴

Ministerial accountability to the President has also been problematic in some aspects. For instance, the Ministry of Finance and the Malawi Revenue Authority illegally borrowed money amounting to MK7 billion from commercial banks with the aim of showing donors and the IMF that the zero deficit budget of President Mutharika was working.¹⁶⁵ The loans were presented to Parliament as revenue collected by the MRA. The loans were later paid back with 17.5% interest. The Minister of Finance refused to resign for misleading Parliament and lying to the Nation. A cabinet inquiry on the matter cleared both the Minister of Finance and the MRA Commissioner of wrong doing but acknowledged that 'something went terribly wrong'.

Parliamentary question time remains one effective facility that is used to force transparency and accountability from the Cabinet on a number of issues. However, the use of this facility depends on the ability of Members of Parliament to raise issues.

¹⁶⁴ Interview with the author, 10th December 2012

¹⁶⁵ Suzyo Khunga, "MRA Spills the bean: MK14.3 Billion loan not for revenue" in Daily Times Newspaper of 18th May 2012.

Executive accountability has also partly been limited because of inadequate access to information by a majority of citizens fuelled by a culture of lack of transparency. Although the Republican Constitution espouses the separation of powers between the three branches of government and attendant system of checks and balances, it is observed that the Executive usually deploys informal rules to control and influence the work of the other branches of government. For instance, Oversight committees of Parliament are starved of resources to carry out their work. Furthermore, the doubling of Ministers as Members of Parliament in a largely presidential system of government diminishes the scope of accountability especially in the legislative process.¹⁶⁶

Furthermore, although the Constitution of Malawi under Sections 88 A (1) and Section 213 requires the President, members of Cabinet and any person holding a senior public office to fully disclose their assets within three months from the date of election or appointment, implementation has been problematic. So far declarations of assets have been done by MPs, the President and the Vice President by simply completing forms and submitting them to the Speaker of Parliament. There is no evidence that new Ministers appointed in the course of a political term have had to declare assets. In fact, the current President, Mrs. Joyce Banda has categorically refused to declare her assets upon assuming the office of President. Her argument, supported by the Attorney General is that she already declared her assets as Vice President.

The incumbent President exercises executive powers across all the divides and this according political expert hampers the effectiveness on the checks and balances.¹⁶⁷ It is evident that, “there is too much presidentialism in Malawi.” Malawi’s system revolves around the formal and informal powers of the President”.¹⁶⁸ This sentiment is evident as in the Executive and the public arena the President appoints the Head for nearly every post. For instance, the Constitution gives powers to the President to appoint Ministers without subjecting his appointments to any form of checks and balances. He or she also appoints most constitutional office holders, the Attorney-General, the Director of Public Prosecutions, the Solicitor-General, the Auditor-General, the Secretary to the Cabinet, the Chairman and Commissioners of the Electoral Commission, Director of the Anti-Corruption Commission, etc. subject to ratification by the National Assembly. The common perception is that most of these appointments tend to be based on patronage and clientelist practices.

¹⁶⁶ over 90% of members of the Cabinet double as Ministers and MPs as often times the President chooses Cabinet members who come from within the President’s party. See also NIS Botswana Report 2007:11

¹⁶⁷ Interview with the author, 4 December 2012.

¹⁶⁸ Ibid 2012

2.2.5 Integrity (law)

Score: 50

To what extent are there mechanisms in place to ensure the integrity of members of the Executive?

The institutional arrangement for ensuring the integrity of members of the executive is in place. They include oaths of offices, constitutional provisions on declaration of assets and accountability and statutory provisions on the management of public finances and public procurement. There is no known code of conduct apart from the various pieces of law and the Cabinet Handbook.

Section 88A (1) of the Constitution provides that the president and members of the cabinet shall not hold any other public office and shall not perform remunerative work outside the duties of their office. It proceeds to state that three months after the date of election or appointment, they shall fully disclose their assets, liabilities and business interests and those of their spouses.

Section 88A (3) of the constitution also provides that the president and cabinet members shall not use their respective offices for personal gain or place themselves in a situation of conflict of interest. To enhance the integrity of the President and his Cabinet Ministers in the management of national resources, the constitution bars them participating in the management of their business interests. Section 88A (2) stipulates that "any business interests held by the president and members of the cabinet shall be held on their behalf in a beneficial trust which shall be managed in such manner as to ensure conformity with the responsibilities and duties of their office".

2.5.6 Integrity Mechanism (Practice)

Score 25

To what extent is the integrity of members of the executive ensured in practice?

While there are several laws and institutional arrangements put in place to promote and enhance the integrity of the executive, the biggest problem is enforcement. The political system has so much deference of the Executive that most of the time they behave as if they were above the law. The members of the Executive adhere to the oath of their offices, particularly the requirement of loyalty to their appointing authority, the President. The main motivating factor for this compliance is the fact that the Members of the Executive hold their positions at the pleasure of the President only. Thus, the fear of being dropped instantaneously pushes them to be loyal. However, the degree of personal loyalty sometimes actually leads to loss of integrity as members of the Executive sometimes compete among themselves in demonstrating their personal loyalty to the President.

On declaration of assets, members of the Executive do indeed declare their assets to the Speaker of Parliament. However, this appears to serve no further useful purpose as the law is silent on subsequent activities and processes related to the declaration of assets. At the moment, there is no law requiring or regulating disclosure of the declarations of assets. On involvement in the management of their business ventures, the law remains untested. In practice, however, Ministers and Deputy Ministers as well as Presidents and Vice Presidents continue to get involved and there is not much evidence made available for the formation of beneficial trusts as required by law.¹⁶⁹ According to one study, the law creates a business risk on this matter because Members of the Executive (apart from the President and Vice President) are vulnerable to instant dismissals so they cannot effectively give up their rights to oversee the affairs of their businesses.¹⁷⁰

Although the law requires that members of the Executive do not use their offices for personal gain, it is a common informed perception in Malawi that Members of the Executive influence the award of government business contracts to chosen or preferred firms and companies which turn out to be their own or of their close business associates. For example, in recent times, after the death of President Mutharika, President Joyce Banda is on record to have instructed cancellation of some business contracts and their award to new firms with which they are perceived to have connections.¹⁷¹

2.3.1 Public Sector Management (law and practice)

Score 25

To what extent is the Executive committed to and engaged in developing a well-governed public sector?

In policy pronouncements, the political Executive can be said to be committed to developing a well-managed public sector as they have championed various public sector reforms over the years, often at the behest of international advisers such as the World Bank. Besides the Public Service Commission, the Executive relies on the support of other specialised commissions in the management of the public sector. These include the Parliamentary Service Commission (PSC), the Judicial Services Commission, The Malawi Health Commission, the Public Private Partnerships Commission, the Civil Service Commission, among others.

¹⁶⁹ Except in recent times when President Mutharika formed the Bineth Trust and others but he was directly involved in their management

¹⁷⁰ Chingaipe Henry (2010) *Business and the State in Malawi: The Politics of Institutional formation, Maintenance and Change* (PhD Thesis, University of York)

¹⁷¹ Cancellation of contracts for the supply and transportation of agricultural inputs under the Farm Input Subsidy Programme; cancellation of management contract for the Bingu International Conference Centre.

The scheme of incentives for the public sector presents a mixed bag. Parastatal organisations tend to have better salaries and other benefits while the mainstream civil service suffers from very low salaries, uncondusive work environment and the absence of other work-related benefits. However, transparency awards are unheard of across the entire public service. While there are monitoring and evaluation systems in place, good performance is not matched with financial or other incentives for civil servants but some parastatal organisations award their employees for performance.

Overall, the Executive's pursuit in developing a well-governed public sector has rather been below the mark. In the recent past, narrow, partisan and ethnic interests of the political Executive under late president Mutharika shaped the recruitment of personnel and award of most contracts in the public sector. Essentially, the Executive redefined the rules of the Public Service and compromised its independence and operational effectiveness, and undermined institutional development of the sector. In short, while there are laid down mechanisms and structures to enable the Executive to develop a well-governed public sector, it is mainly patronage politics that the members of the Executive play over the public sector that is responsible for the weak institutional development of the public sector.

2.3.2 Legal system

Score 25

To what extent does the Executive prioritise public accountability and the fight against corruption as a concern in the country?

The Executive in the last few years have enacted a number of legislations to combat corruption and to promote accountability. For instance, in the late 1990s, the Corrupt Practices Act was enacted and created the Anti-corruption Bureau which is the lead agency in the fight against corruption. In addition to this law, the Executive proposed and got enacted other legislations including the Public Finance Management Act, Public Procurement Act and the Public Audit Act. In 2004, President Mutharika announced the Zero tolerance anti-corruption strategy of his government and projected a renewed sense and commitment to administering the relevant laws and tackle corruption.¹⁷² However, in practice the anti-corruption drive has been simply reduced to a way of appeasing donor while using the anti-corruption law and instruments to inflict punishment and secure obedience or compliance from political opponents.

¹⁷² Hall-Mathews, David (2007) 'Tickling Donors and Tackling Opponents: The Anti-Corruption Campaign in Malawi' in Sarah Bracking (ed.) *Corruption and Development: The Anti-Corruption Campaigns* (Palgrave MacMilan):77-102.

There have been numerous calls over the years from a diverse group of stakeholders calling for the reform of the legal framework on anti-corruption. The main issue has been to amend the law to allow the Director of the anti-corruption Bureau to be able to prosecute corruption cases without seeking the consent of the Director of public prosecutions.¹⁷³ However, the Executive has not heeded these calls. Neither have they heeded calls to enact enabling legislation on declaration of assets by themselves and other senior officials in government.

In short, over the years, the Executive has put in place a legal framework for tackling corruption and promoting accountability in the public even though it has been at the behest of donors and there are still a few areas that require improvement. However, it is the implementation that continues to be weak. The ultimate explanatory factor for the weak implementation is the lack of political will by the Executive to decisively tackle corruption and promote a culture of accountability.

Recommendations

- Advocate and lobby for legal reforms that would ensure that cabinet ministers do not double as both MPs and ministers in order to strengthen checks and balances between the executive and the legislature;
- Advocate for an enabling legal framework that would oblige the executive to make public cabinet decisions to promote scrutiny and public monitoring of implementation;
- Advocate for strengthening of the law on declaration of assets to make it clear as to who is supposed to make such declarations among the public officers and also to ensure that such declarations are made public at a time the concerned officer are assuming office and that there are regular audits of these declarations including at a time of leaving office;
- Review and limit executive powers with regard to appointment of senior public officers to ensure that appointment into senior positions in the public service is based on merit and is open;
- Advocate and lobby for security of tenure of senior public officers.

¹⁷³ See for example the Report of the Legal Affairs Committee of Parliament, March 2007.

3. THE JUDICIARY 3.

Summary

The Judiciary remains one of the most important components in the Malawi integrity system. It is not only one of the three arms of government tasked with upholding a system of checks and balances, but it is also tasked with interpreting the constitution and all other laws of the country. The assessment finds that the Judiciary's performance is barely satisfactory. Though the constitution provides adequate protection of the Judiciary to ensure its independence, and in spite of the Government's effort to provide the Judiciary with reasonable resources within a tight budget, resources still remain inadequate and there is a lack of transparent recruitment procedures. There are also serious concerns surrounding the lack of adequate rules on integrity and also lack of enforcement of the available rules.

The table below presents the indicator scores which summarize the assessment of the Judiciary in terms of its capacity, its internal governance and its role within the Malawian integrity system. The remainder of this section presents the qualitative assessment for each indicator.

The Judiciary

Overall Pillar Score: 57.7/100

Dimension	Indicator	Law	Practice
Capacity 56.3/100	Resources	-	75
	Independence	75	50
Governance 54.2/100	Transparency	50	25
	Accountability	25	25
	Integrity Mechanisms	50	25
Role 62.5/100	Oversight	25	
	Legal Reforms	25	

Structure and Organisation

The structure of the Judiciary consists of the Malawi Supreme Court of Appeal (MSCA) at the apex. Below the Supreme Court is the High Court. There are two specialised courts at the High Court tier apart from the ordinary High Court which has a wider jurisdiction as prescribed under the Constitution and other statutes. The specialised courts are the Constitutional Court and the Commercial Court. It is important to note that the constitutional court is only empanelled by the Chief Justice as and when need arises. It is only the Chief Justice who is the competent authority to determine whether the matter presented before him or her is of constitutional in nature or not. Below the High Court, there are Subordinate Courts. These are the Magistrate Courts and other specialised courts such as the Industrial Relations Court. The jurisdiction, powers and functions of these courts are set out in the Constitution and other enabling Acts of Parliament like the Courts Act¹⁷⁴, Supreme Court Act¹⁷⁵, Judicature Administration Act¹⁷⁶, Civil Procedure (Suits by or against Government or Public Officers) Act,¹⁷⁷ and the Criminal Procedure & Evidence Code.¹⁷⁸ The Judiciary is headed by the Chief Justice who is appointed by the President and confirmed by National Assembly.¹⁷⁹ All other judges are appointed by the President on the recommendation of

¹⁷⁴ Chapter 3:02 of Laws of Malawi

¹⁷⁵ Chapter 3:01 of Laws of Malawi

¹⁷⁶ Chapter 3:10 of Laws of Malawi

¹⁷⁷ Chapter 6:01 of Laws of Malawi

¹⁷⁸ Chapter 8:01 of Laws of Malawi

¹⁷⁹ Constitution, section 111(1)

the Judicial Services Commission (JSC).¹⁸⁰ Magistrates and other judicial officers are appointed by the Chief Justice on the recommendation of the JSC.¹⁸¹

ASSESSMENT

Capacity

3.1.1 Resources (Law)

Score: 50

To what extent are there laws seeking to ensure appropriate salaries and working conditions of the judiciary?

The Constitution stipulates that judicial officers shall be paid salaries and other employment benefits. These cannot be reduced without the consent of the officer affected.¹⁸² The salaries and benefits of the Chief Justice, Justices of Appeal and judges of the High Court are protected expenditure under the Constitution and are charged to the Protected Expenditure Fund.¹⁸³ The Protected Expenditure Fund is a special fund within the Consolidated Fund upon which certain protected expenditures are charged.¹⁸⁴ According to section 172 of the constitution, 'all revenues or other moneys raised or received for the purposes of the government shall... be paid into and form into one fund, to be known as the Consolidated Fund.' To this end, no money can be withdrawn from the Protected Expenditure Fund, except (in this particular case) for purposes of paying such salaries, allowances and other benefits to the Chief Justice, Justices of Appeal and Judges of the High Court.¹⁸⁵

The salaries of judicial officers are determined by the National Assembly,¹⁸⁶ by way of recommendations from the Public Appointments Committee of Parliament.¹⁸⁷ The JSC is responsible for making the terms & conditions of service for judiciary staff.¹⁸⁸ There is however no specific legal provision which mandates the Judiciary to participate in the budget formulation although the budget is based on estimates provided by the Judiciary itself. There is no legal

¹⁸⁰ *Ibid.*, section 111(2)

¹⁸¹ *Ibid.*, section 111(3)

¹⁸² Constitution, section 114 (1) & (2) reads that: '(1) the Chief Justice and all the other holders of judicial office shall receive a salary for their services and, on retirement, such pension, gratuity or other allowances as may, from time to time, be determined by the National Assembly. (2) the salary and any allowance of a holder of judicial office shall not without his or her consent be reduced during his or her period of office and shall be increased at intervals so as to retain its original value and shall be a charge upon the consolidated fund.'

¹⁸³ *Ibid.*, section 183 (3)

¹⁸⁴ *Ibid.*, section 183 (1)

¹⁸⁵ See section 183 (3) (b) of the Malawi Constitution.

¹⁸⁶ *Ibid.*, section 114 (1)

¹⁸⁷ Standing Orders of Parliament (2003), Standing Order 162(g)

¹⁸⁸ Judicature Administration Act, Regulation 5 (b) (iii)

provision stipulating a minimum percentage of the general budget to be apportioned to the Judiciary. The Judicature Administration Act allows the Judiciary to directly use the resources it gets from court fees, and grants in addition to the parliamentary appropriation.¹⁸⁹

Although the provisions for salaries appear adequate, these prescriptions on salaries and benefits do not cover magistrates and judicial support staff. The effect of this loophole is that magistrates who preside over the majority of the cases in the country are left unmotivated.¹⁹⁰ Furthermore, the failure to extend this incentive to judicial support staff has resulted in industrial actions which have paralyzed the workings of the Judiciary. This has been demonstrated by a recent strike by judicial support staff which brought all the business of the Judiciary to a halt for over two months.¹⁹¹

3.1.2 Resources (Practice)

Score: 50

To what extent does the judiciary have adequate levels of financial resources, staffing and infrastructure to operate effectively in practice?

According to the Deputy Registrar of the Judiciary, the budgetary allocation for the Judiciary has always been inadequate due to financial constraints on the Government as a result of the fragile economic situation of the country.¹⁹² The budget has often been lower than what the judiciary had proposed. For instance, the Other Recurrent Transaction^(ORT) budget for 2010/11 was MK446 million and the figure has remained the same for the 2011/2012 budget despite 49 per cent devaluation of the local currency and inflationary elements.¹⁹³

Concern has also been raised that the funds remitted to Judiciary are not equitably distributed within the Judiciary. It has been noted, for example, that the High Court and the Supreme Court benefit more at the expense of subordinate courts.¹⁹⁴ The inadequacy of the resources as well as the 'inequitable' distribution of such resources within the judiciary affects not only the salaries, but also the provision of infrastructure and logistical support among others.¹⁹⁵

The budget for the judiciary is not apportioned. The salaries of judges and others are determined

¹⁸⁹ *Ibid.*, section 4

¹⁹⁰ Interview with court official.

¹⁹¹ Daily Times "SADC Lawyers bemoan judicial strike", (1st February 2012) <http://www.bnltimes.com/index.php/daily-times/headlines/national/4146-sadc-lawyers-bemoan-judicial-strike> (accessed on 4th July 2012)

¹⁹² Interview with court official.

¹⁹³ Interview with the Deputy Registrar, 5th July, 2012

¹⁹⁴ Interview with court official.

¹⁹⁵ Kanyongolo E., Malawi; justicesector&rule of law, pp.10&11 (available www.afriamap.org/english/images/report/Malawi%20Report%20justice.pdf)

by Parliament after recommendations from the Public Appointments Committee of Parliament. According to the Deputy Registrar, the process is initiated by the Conditions of Service Committee of the judiciary which proposes the salaries. The committee may seek input from the ministry responsible for finance and the department of Public Service Management. The recommendations of this committee are then forwarded to the Public Appointments Committee of Parliament. The committee can consult with the Ministry responsible for finance and the department responsible for public service referred to above. The committee then makes recommendation to Parliament which makes the final decision on these recommendations.¹⁹⁶

It was observed during this assessment that the salaries of judges are not so low that they compel judges to resort to corruption. These salaries are very competitive within the public service, but incommensurate with those of practicing lawyers or the private sector which are remarkably higher.¹⁹⁷

On the other hand, there is generally an adequate number of court clerks although vacancies appear from time to time when the clerks are promoted and/or when new court houses are opened. However, the government has been flexible with the Judiciary by allowing it to recruit despite a recruitment freeze within the public service.¹⁹⁸ There is also general stability of human resources with very few judges and some senior staff taking up jobs mostly with international organizations.¹⁹⁹ However, there are few ad hoc training opportunities for support staff as well as judges due to financial constraints. In short, training is not institutionalized as most of it is provided by NGOs who have specific areas of interest.²⁰⁰

The Judiciary is also short on library resources with only the Blantyre Registry having a relatively well stocked library. While each judge is largely provided with core literature, this arrangement does not extend to other junior judicial officers. All judges are provided with computer equipment although the usage may not be extensive.²⁰¹

The funds accruing to the Judiciary from court fees and grants are used by the Judiciary itself under the Judicature Administration Act but they are far too insufficient.

¹⁹⁶ Interview with court official.

¹⁹⁷ Interview with the Deputy Registrar, 5th July, 2012

¹⁹⁸ *Ibid*

¹⁹⁹ *Ibid*.

²⁰⁰ *Ibid*

²⁰¹ *Ibid*

3.1.3 Independence (Law)

Score: 75

To what extent is the Judiciary independent by law?

The independence of the Judiciary is guaranteed under the Constitution which provides that all courts and persons presiding shall be independent of the influence and direction of any person or authority.²⁰² The Constitution provides for a stringent amendment process for the provisions regarding the highest court. These provisions can only be amended by way of a national referendum.²⁰³ The Constitution further provides for the process of appointing judges. The Chief Justice is appointed by the President and confirmed by National Assembly by a majority of two thirds of members present and voting. All other judges are appointed by the President on the recommendation of the Judicial Services Commission. Magistrates and other judicial officers are appointed by the Chief Justice on the recommendation of the Judicial Services Commission.²⁰⁴ As noted above, the appointment of judicial officers is done both by politicians (the President & National Assembly) and professionals (Judicial Service Commission 'JSC' hereinafter). However, the criteria for appointments are so general that it does not provide clear guidance for the selection of candidates.²⁰⁵ Some concerns have also been raised that for appointments to higher courts, educational requirements are rather low, which ultimately affects the capability of judicial officers in executing their functions.²⁰⁶ Furthermore, the law does not provide minimum legal qualifications for lay magistrates²⁰⁷ and there is also no clear criteria used for promoting judges.

The Constitution further provides for an independent JSC which is mandated with the regulation of judicial officers.²⁰⁸ The JSC is headed by the Chief Justice (ex-officio), Chairman of the Civil Service Commission (ex-officio), a Judge/Justice of Appeal, magistrate and legal practitioner who are designated by the President after consultation with the Chief Justice.²⁰⁹ This means that the Executive branch of Government (the President in his/her consultation role) and the legal profession are involved in the appointment of judges, through the JSC.

The Constitution provides criteria that a candidate for the post of judge has to satisfy. Such a

²⁰² *Ibid.*, section 103

²⁰³ *Ibid.*, section 196 as read together with the Schedule of the Constitution

²⁰⁴ *Ibid.*, section 111

²⁰⁵ Kanyongolo E., State of the judiciary report; Malawi 2003, pp.30 & 31, available: www.ifes.org/~media/Files/Publications/.../SOJ_Malawi_Final.pdf

²⁰⁶ One only needs to possess an LLB (Hons) Degree and at least ten years of experience in legal practice or in the ranks of the Judiciary. There is now a growing view that High Court Judges should possess at least an LLM degree.

²⁰⁷ *Ibid.*, p. 29

²⁰⁸ *Ibid.*, section 116

²⁰⁹ Constitution, section 117

person must be entitled to practice law in Malawi and must have so practiced for at least 10 years before the appointment.²¹⁰ The Constitution also provides for tenure of office for judges. A judge shall vacate office upon attaining the age of 65 years unless he/she is removed on grounds of incompetence or misbehaviour.²¹¹ There is no appointment for life. Under the Constitution, the President may, with the consent of the judge concerned, assign the judge to another public office where the public interests so requires.²¹² It is however difficult to state with certainty whether in practice, the Judge would have the right to refuse such appointments. In addition, we cannot also completely rule out the possibility for political considerations to influence the President's decision in this matter.

The Constitution provides guidelines on how to proceed with the removal of judges in cases of misconduct. This helps to ensure that judges are not arbitrarily removed from office. If a President seeks to depose a judge, the President is obliged by law to consult with the JSC on the issue, after which the President shall move the National Assembly to debate the motion. A resolution for removal can only be passed by a two-thirds majority of all the members of Parliament.²¹³

The law further provides protection from undue influence on judges. All courts and persons presiding over the courts shall be independent from the influence and direction of any person or authority.²¹⁴ Further the Judiciary has the exclusive jurisdiction over all issues of judicial nature and exclusive jurisdiction to decide whether an issue is within its competence.²¹⁵ The Constitution also prohibits establishing any courts superior or concurrent to those established under the Constitution.²¹⁶

The law does not provide any room for civil society participation in the appointment of judges making the process somewhat obscure.

3.1.4 Independence (Practice)

Score: 50

To what extent does the judiciary operate without interference from the government or other actors?

The Deputy Registrar observed that judges are appointed on the basis of professional criteria as

²¹⁰ *Ibid.*, Section 112

²¹¹ *Ibid.*, section 119 (5)

²¹² *Ibid.*, section 119 (7)

²¹³ *Ibid.*, section 119 (1) to (5)

²¹⁴ *Ibid.*, section 103 (1)

²¹⁵ *Ibid.*, section 103 (2)

²¹⁶ *Ibid.*, section 103 (3)

provided under the law.²¹⁷ However, as mentioned above, the criteria are so general that it does not provide clear guidance for the selection of candidates.²¹⁸

There have been concerns in the public domain that the President dominates appointment processes especially within the higher echelons of the Judiciary²¹⁹. This is compounded by the fact that the President is also responsible for the appointment of members of the JSC.²²⁰ For instance, in recent times, media reports have alleged that the Government has made offers to some senior officers in the public service to serve as judges of the High Court simply because they have been deemed to be politically undesirable in their present positions. There is no indication that the JSC was consulted in these situations.²²¹ Furthermore, the power of the President to assign judges to any public office²²² has raised the concern that it weakens the judiciary because it is robbed of the much needed personnel. It has also been observed that appointments to positions of high political controversy, such as Chairperson of the Malawi Electoral Commission, expose the judges to destructive criticism and there is a growing public perception that the President uses the judiciary for his/her own ends thereby diluting the perception of independence of the judiciary.²²³

Although there have been political attempts to remove judges before the end of their term of office, there has never been any successful removal of any judge since the inception of the current removal procedures.²²⁴ The last attempt was in 2001²²⁵ when Parliament passed a resolution to remove three judges on purely political grounds. The President then refused to act on the petition after attracting enormous pressure locally and internationally. The cited reasons for the attempted removal were that one of the judges had written an academic article critiquing a Supreme Court ruling on an elections case. This was viewed by concerned politicians as a sign of incompetence. Another judge was also considered incompetent after granting bail to an opposition politician, whilst another was added to the list because he had granted an injunction restraining parliament to continue with the debate on the removal of the two.²²⁶

217 Interview with the Deputy Registrar, 5th July, 2012

218 Kanyongolo E., State of the judiciary report; Malawi 2003, pp.30 & 31, available: www.ifes.org/~media/Files/Publications/.../SOJ_Malawi_Final.pdf

219 *Ibid.*, p. 31

220 Constitution, section 117

221 Nyasatimes 'Controversy as Katopola not yet kicked out' 23 May, 2012, available: <http://www.nyasatimes.com/malawi/2012/05/23/controversy-as-katopola-not-yet-kicked-out/>

222 Constitution, section 119(7)

223 Kanyongolo E., 'Malawi; Justice sector&rule of law', pp.11&12, available: www.afrimap.org/english/images/report/Malawi%20Report%20justice.pdf

224 Deputy Registrar, interview with the author, 5th July, 2012

225 'International Commission of Jurists; Malawi Report; Fact-Finding Mission' 16 - 22 December 2001 p.4, available: http://www.icj.org/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal_Documentation&id=21392

226 *Ibid.*, p4

According to the Deputy Registrar, no judge has ever been demoted or transferred because of the content of their decisions. The legal foundation for the highest court has been stable.²²⁷ The Deputy Registrar observed that notwithstanding the presence of penal provisions for the use of undue influence,²²⁸ there have been cases of external pressure being exerted on the Judiciary mainly.²²⁹ For instance, the Executive constantly expressed displeasure at the Judiciary for granting *ex parte* injunctions against the Government. Consequently, the Executive branch introduced a law which prohibited the Judiciary from granting *ex parte* injunctions against the government.²³⁰ This law has, however, been recently repealed because of increasing public discontent with it.

Governance

3.2.1 Transparency (Law)

Score: 50

To what extent are there provisions in place to ensure that the public can obtain relevant information on the activities and decision-making process of the judiciary?

There is no law requiring the Judiciary to make public any information. The same applies to the JSC. The law under the Constitution,²³¹ the Courts Act²³² and the Criminal Procedure & Evidence Code²³³ ('CPEC' hereinafter) state that unless otherwise provided, all judicial proceedings shall be held in an open forum. Further to this, any court record is considered to be a public record and can thus be accessed by any member of the general public. There is also no requirement to make public information on the appointment and removal of judges. However, in view of the procedure for the removal of judges, the information surrounding the removal, i.e. reasons for removal and evidence would be invariably public as they will be debated in Parliament whose proceedings are open to the public.²³⁴ However and as illustrated earlier, there is need to enact laws that would allow for public access to information on the appointment of judges to cushion the process from political manipulation and speculation.

There is no specific law requiring judges to disclose their assets.²³⁵ There is, however, a general

²²⁷ Deputy Registrar, interview with the author, 5th July, 2012

²²⁸ Penal Code, section 113(1)(d)

²²⁹ Deputy Registrar, interview with author, 5th July, 2012.

²³⁰ Civil Procedure, (Suits by or against Government or Public Officers) Act, Amendment Act (No. 11 of 2011)

²³¹ *Ibid.*, section 42 (2) (f) (i)

²³² Court Act, section 60

²³³ Criminal Procedure & Evidence Code, section 71

²³⁴ Constitution, section 119

²³⁵ Constitution, section 88 (3)

provision requiring 'public officers of senior grade or position' to disclose their assets within three months of their appointment.²³⁶ However, this provision has never been actualized because the National Assembly is yet to specify the grades and positions which are subjected to this constitutional requirement.²³⁷ This had effectively put the legal provision in abeyance and compromised a potentially effective tool for promoting integrity in the public service. There is, therefore, a need for civil society to lobby the National Assembly (i.e. the Legal Affairs Committee) to specify the grades and positions of public officers who shall be required to disclose their assets.

3.2.2 Transparency (Practice)

Score: 50

To what extent does the public access judicial information and activities in practice?

The Deputy Registrar stated that the Judiciary publishes annual reports in which it generally tackles issues of administration and management of the Judiciary (e.g. spending, governance, levels of staff) as well as operational issues such as providing adequate statistics on the cases handled in the reporting period.²³⁸ However, it has been observed that the compilation of the statistics is done manually with negative effects on accuracy and security of the data. There is no systematic collection of judicial data, thereby making it unreliable.²³⁹ Furthermore, retrieval of the data is a problem as one has to find a hard copy of the compilation²⁴⁰ due to the fact that the data is often not stored in electronic form. Nevertheless, copies of the reports are distributed to various stakeholders such as civil society, selected parliamentary committees, development partners and Government agencies. Plans are currently underway to make them available online after the Judiciary website is re-launched.²⁴¹

Information on court cases is increasingly available to the public. For court users that are not familiar with legal or judicial jargon, the Judiciary trains its clerks and librarians to assist members of the public who wish to understand these procedures. During trial, if a person is not conversant with the procedures and does not have the benefit of legal counsel, the presiding officer is obliged to guide the person on procedural matters.²⁴² Furthermore, prosecutions are generally conducted in public as required under the law.²⁴³

²³⁶ *Ibid.*, section 213 (b)

²³⁷ Constitution, section 213 (2)

²³⁸ A copy of the *Malawi Judiciary Annual Report, 2008 – 2009* was provided

²³⁹ *Ibid.*

²⁴⁰ Kanyongolo E., Malawi; Justice sector & rule of law', p.13 (available www.afri-map.org/english/images/report/Malawi%20Report%20justice.pdf)

²⁴¹ Interview with the Deputy Registrar, 5th July, 2012

²⁴² Deputy Registrar, Interview with the author, 5th July, 2012

²⁴³ Criminal Procedure

Information about appointment processes to senior judicial positions is not accessible to the public. This may be the case in a bid to avoid embarrassment of the unsuccessful applicants. Some observers, however, have raised concern that without making such information public, the whole selection process becomes less transparent and increases the likelihood of Executive interference.²⁴⁴ Allegations have been raised that some appointments are made by the President without consulting with or seeking recommendation from the JSC. Since communications between the president and the Judicial Service Commission are not transparent, however, it is not possible to substantiate such allegations definitively.²⁴⁵

In sum, there is a need to explore possibilities of introducing legal provisions to make it mandatory for the judiciary as well as the JSC to avail the public with information regarding appointments of judges. For instance, the JSC may be required to produce annual reports covering new appointments and other matters that may be useful for promoting integrity within the judiciary.

3.2.3 Accountability (Law)

Score: 75

To what extent are there provisions in place to ensure that the judiciary has to report and be answerable for its actions?

Judges are required under the law to give reasons for their decisions as provided under the Courts Act²⁴⁶ and the CPEC.²⁴⁷ Failure to give reasons for a judicial decision is sufficient ground for appeal.

The JSC is responsible for investigating complaints against judges.²⁴⁸ The Public Service Regulations ('PSR' hereinafter) provides for a formal complaint/disciplinary procedure to which judges are subjected. While judicial officers are immune from prosecution or civil suit when they exercise their judicial discretion. There is no immunity for them in corruption cases or any criminal offences. Furthermore, the Judiciary has its own internal management formal disciplinary procedures which are used to handle minor disciplinary cases for judges and the entire

²⁴⁴ State of the judiciary report; Malawi 2003 by E. Kanyongolo, p. 21, available: www.ifes.org/~media/Files/Publications/.../SOJ_Malawi_Final.pdf

²⁴⁵ 'Malawi; Justice Sector & Rule of Law' by E. Kanyongolo, p.13 (available www.afrimap.org/english/images/report/Malawi%20Report%20justice.pdf)

²⁴⁶ Section 54 of the Courts Act

²⁴⁷ Section 259 of the Criminal Procedure & Evidence Code

²⁴⁸ Section 118 (b) of the Constitution

Judiciary;²⁴⁹ and judicial officers including judges can be censured, reprimanded, fined, suspended or removed as prescribed under the Code of Ethics.²⁵⁰

Although there are comprehensive legal provisions regarding accountability for the Judiciary, the provisions fail to address the aspect of protection of complainants. This failure has resulted in some people shying away from complaining against judges due to fear of reprisals. There is need to introduce comprehensive regulations within the disciplinary procedure providing protection to complainants or whistle-blowers.

3.2.4 Accountability (Practice)

Score: 50

To what extent do members of the judiciary have to report and be answerable for their actions in practice?

Judges and all other judicial officers provide reasons for their decisions which can easily be understood by court users. Failure to provide reasons for decisions is dealt with during the trial process and is a ground for appeal against such a decision. This means that there is no possibility to sanction a judge who fails to give reasons for his/her decision.²⁵¹

There are concerns that although there have been several convictions of judicial officers on corruption charges, these have been limited to junior judicial officers only.²⁵² Likewise, it is observed that the JSC, which is responsible for investigating complaints, is fairly effective especially in investigating junior presiding officers and general members of staff²⁵³. Concerns have also been raised on the pace at which it handles cases involving judges.²⁵⁴ For example, it has taken the JSC more than a year to resolve a case in which one judge was accused of delivering a judgement in a matter that was assigned and heard by another judge. The 'illegitimate' judgment was in favour of a party against whom the legitimate judge had ruled.²⁵⁵

²⁴⁹ Interview conducted with the Deputy Registrar, 5th July, 2012

²⁵⁰ Judicial Code of Ethics, Penalties

²⁵¹ Interview with Deputy Registrar, 5th July, 2012

²⁵² Kanyongolo E., State of the judiciary report; Malawi 2003, p. 20, available: www.ifes.org/~media/Files/Publications/.../SOJ_Malawi_Final.pdf

²⁵³ *Ibid.*

²⁵⁴ *Ibid.*

²⁵⁵ The Nation On-line Newspaper 'Judge Manyungwa Arrested' 6th April, 2012, available: http://mwnation.com/index.php?option=com_content&view=article&id=2795:nomads-knocked-out-of-bingu-cup&catid=166:eds-letter&Itemid=159

Failure to expedite the conclusion of such cases serious undermines the credibility of the JSC.²⁵⁶ These delays may be resolved by providing regulations on the timeframe within which a complaint has to be concluded.

3.2.5 Integrity (Law)

Score: 50

To what extent are there mechanisms in place to ensure the integrity of members of the judiciary?

There are no specific laws or provisions which require members of the judiciary to disclose their assets to the JSC or any other body. However, although guidance can be drawn from the provisions of the Corrupt Practices Act ("CPA" hereinafter) which provides for the offence of having 'unexplained wealth',²⁵⁷ this is clearly not sufficient. As noted earlier, judges and other senior judicial officers are required to disclose their assets as stipulated under the Constitution.²⁵⁸ However, the National Assembly is yet to prescribe the grades and positions of the public officers who are covered under this provision.

Under its internal organizational structure, the Judiciary has a comprehensive Code of Ethics. The code has regulatory rules on reimbursements, compensation, honoraria in connection with private trips or work. The Judicial Code of Ethics further provides regulations governing gifts and hospitality by prohibiting judicial officers or their family members from receiving gift, bequest or other favors from a person who could be perceived as intended at influencing performance of judicial functions.²⁵⁹ Citizens cannot challenge the partiality of a judge who fails to step down from a case under the Code of Ethics. However, a party to the proceedings can ask a judge to recuse (excuse) himself from a case.²⁶⁰ The request must be supported with adequate reasons. The judge's decisions should also be supported with reasons.²⁶¹ The party may appeal against a judge's decision refusing to recuse himself.

In addition, the Constitution provides guidelines on conflict of interest for presiding officers.²⁶²

²⁵⁶ Deputy Registrar, Interview with the author, 5th July, 2012

²⁵⁷ Corrupt Practices Act, section 32

²⁵⁸ Constitution, section 213 (b)

²⁵⁹ Judicial Code of Ethics, Rule 5(a)

²⁶⁰ *Ibid.*, Rule 3

²⁶¹ *Ibid.*, Rule 3 (C)

²⁶² *Ibid.*, section 107

These officers are not allowed to preside over cases where they are party to the proceedings as presiding officers at lower court, or as counsel, or as an interested party or any other reason.²⁶³

There is no legal restriction for judges entering the private sector or any other employment after leaving service in the Judiciary. The absence of post-employment regulations of judicial officers have negative consequences as judicial officers are tempted to compromise their independence in exchange for future employment benefits upon his or her retirement.

In sum, though a code of ethics exists, it does not adequately address all necessary integrity issues. The Deputy Registrar noted that the Code of Ethics mostly covers issues of conflict of interest but does not have provisions for other issues such as restrictions on post-employment pursuits.

3.2.6 Integrity (Practice)

Score: 50

To what extent is the integrity of members of the judiciary ensured in practice?

It has been noted that the code is not well known to most judges and it is not evenly and consistently enforced. Consequently, the code does not have any influence on the conduct of judicial officers in matters of apparent conflict of interest.²⁶⁴ The Judiciary has also acknowledged this problem.²⁶⁵

The internal disciplinary committee for the Judiciary (for minor breaches and all cases for other staff except for judges) and the JSC are responsible for ensuring compliance with the Code of Ethics but have insufficient resources and time to enforce the code. Furthermore, lack of restriction on post-employment pursuits of judicial officers has resulted in situations where several judges have opened law firms soon after retirement.²⁶⁶

In sum, though a code of ethics exists, it lacks ownership on the part of the judicial officers themselves due to poor publicity on its contents. There is also a lack of consistency in its application and this sometimes due to lack of resources to effectively enforce it where necessary.

²⁶³ *Ibid.*, section 107 (2), further common law principles of natural justice prevent any person to be a judge in his own cause

²⁶⁴ Kanyongolo E., State of the judiciary report; Malawi 2003, p. 35, available: www.ifes.org/~media/Files/Publications/.../SOJ_Malawi_Final.pdf

²⁶⁵ *Malawi Judiciary Development Program*, 20003-2008, p. 10

²⁶⁶ Interview with the author, 5th July, 2012

ROLE

3.3.1 Executive Oversight

Score: 75

To what extent does the judiciary provide effective oversight of the executive?

The courts have the jurisdiction under the Constitution to review actions and administrative decisions of the Executive through a procedure called Judicial Review.²⁶⁷ The Deputy Registrar noted that a review of these decisions is routine. This has been effective over the years so that several Government decisions have been rescinded or modified to comply with the court's ruling.²⁶⁸ The Deputy Registrar further observed that court judgments that overturn Executive decisions have generally been complied with by the Government although there have been some exceptions.²⁶⁹ Two recent examples include the refusal of the Executive to restore security and other benefits to a Vice President who had fallen out with the President; and the refusal of the Executive to obey a court bail release order for a detained human rights activist on the grounds that the order was illegally obtained as the courts were closed.²⁷⁰ Yet the Government had also obtained a search warrant from the same court to search the house of the activist.²⁷¹

In some instances the Government has resorted to limiting or circumventing the powers of the Judiciary by way of amendment of statutes in response to situations where its decisions are reversed by the courts. The case in point is where the Government enacted an amendment to prohibit the judiciary from granting *ex parte* injunctions against government.²⁷²

However, it has been noted that the Government does not disobey court orders out of habit, and that in some instances, Government's lack of compliance has been due to lack of resources to implement court decisions (where such judgment demands so).²⁷³

²⁶⁷ Constitution, sections 5, 44, 46, 103 (2) & 108 (2)

²⁶⁸ Interview with the author, 5th July, 2012

²⁶⁹ *Ibid.*

²⁷⁰ Interview, Deputy Registrar of High Court with Author.

²⁷¹ Amnesty International Press Release "Malawi: Former Attorney General returned to prison despite bail order" available: <http://www.amnesty.org/en/for-media/press-releases/malawi-former-attorney-general-returned-prison-despite-bail-order-2012-02-1>

²⁷² Civil Procedure, (Suits by or against Government or Public Officers) Act, Amendment Act (No. 11 of 2011)

²⁷³ Kanyongolo E., Malawi; Justice sector & rule of law, p.7 (available www.afrimap.org/english/images/report/Malawi%20Report%20justice.pdf)

3.3.2 Corruption Prosecution

Score: 50

To what extent is the judiciary committed to fighting corruption through prosecution and other activities?

Efforts of the judiciary in combating corruption are often limited to the number of cases brought up by the prosecuting authorities who operate completely beyond the control of the Judiciary.²⁷⁴ The majority of corruption cases brought before courts are followed up on although, as noted above, there are noted delays in prosecuting and concluding corruption cases involving high profile political personalities.²⁷⁵ One example of such a case involves the former Head of State and has been in the courts for over five years.²⁷⁶ The delays appear to be caused partly by lack of provisions requiring conclusion of cases within a set time line. This has resulted in drawn-out trials some of which do not seem to be headed for any logical conclusion.

The Judiciary does not have separate statistics for corruption cases for the public, although it is trying to record such statistics for its internal usage.²⁷⁷

The broader contribution of the Judiciary to anticorruption reforms, meanwhile, is rather indirect. So far the main channel has been through involvement in seminars/training workshops where they may air t suggestions on desirable reforms. The Judiciary is, however, not formally involved in suggesting these reforms directly to Government.²⁷⁸ Law reform is a constitutional obligation of the Malawi Law Commission.

Furthermore, while judicial officers cooperate with foreign authorities in corruption cases with a cross-border element, such cooperation is a rare occurrence as most of these requests are handled by other departments of the Government.²⁷⁹

Thus, although the Judiciary is perceived to be less active in anti-corruption efforts, the reasons are

²⁷⁴ In Malawi prosecution of corruption and other related offences are vested in the Anti Corruption Bureau and the Director of Public Prosecutions which operate completely outside the control of the judiciary

²⁷⁵ Deputy Registrar, Interview with the author, 5th July, 2012

²⁷⁶ Malawi Today, 'Bakili Muluzi's graft case in limbo as prosecutor Alex Nampota is not available' available: <http://www.malawitoday.com/news/125716-bakili-muluzis-graft-case-limbo-prosecutor-alex-nampota-not-available>

²⁷⁷ Deputy Registrar, Interview with the author, 5th July, 2012

²⁷⁸ *ibid.*

²⁷⁹ *ibid.*

systemic. The prosecution of corruption cases (just like any other prosecutions) is vested in other constitutional and/or statutory agencies that have the absolute mandate to prosecute. The Judiciary only deals with what is presented for determination.

Recommendations

- A study should be undertaken to assess as to whether there is need for a permanent court to deal with constitutional matters as it is the case in other jurisdiction such as the Republic of South Africa.
- Any review of salaries and benefits for the judicial staff need to be extended to support staff to ensure fair labor practices and harmonization of incentive structures within the same sector
- The case record management system should be improved to ensure better tracking and documentation of cases related to corruption.
- The judiciary should introduce regulations/guidelines requiring corruption cases to be concluded within a given time frame.
- Appropriate legal and policy frameworks need to be put in place to ensure that the financial autonomy for the Judiciary is realized in practice. .
- There is a need to allow for public hearings in the appointment of judges to enhance transparency in the process. This should include extending the confirmation process to the appointment of all judges, inclusion of parliamentarians in the JSC, and lastly appointment to the JSC should be done by an independent body upon application by those interested.
- The appointment process should also be more transparent by making public the selection criteria as well as making public all information regarding appointment of judicial officers.
- Public awareness campaigns should be conducted to ensure that the public is adequately informed on the independence of the judiciary vis-à-vis other arms of government.
- There is need to ensure enforcement of legal provisions which prohibit interference with the judicial processes. Section 113(1)(d) of the Penal Code provides that it is an offence for anyone to speak or write anything prejudicial or aimed at lowering the authority of the court.

4. THE PUBLIC SECTOR

Summary

The public sector in Malawi consists of the Civil Service which is created under Chapter 20 of the Constitution and a number of para-statal organizations that are created by the respective Acts of Parliament. The public sector is mandated to provide public goods and services in an impartial manner and implement all Government policies. It is meant to be an *'obedient servant'* of the state and is designed on the basis of Weberian principles of bureaucracy which potentially enhance its credibility and integrity in the performance of its roles. However, in practice, the Malawian public sector suffers from partisan politicization and other narrow, particularistic interests that effectively undermine its professionalism and operational independence. Integrity mechanisms for the public sector are thus not as effective. Levels of accountability are also moderate. Thus, in many respects, the Malawi public sector falls below the "Nolan Principles" of public affairs management which include Selflessness, Integrity, Transparency, Accountability, Objectivity, Openness, Honesty and Serving as a role model in the management of public affairs.

The Table below presents summary results of the assessment. The remainder of this chapter presents the qualitative assessment for each indicator.

The Public Sector

Overall Pillar Score: 48.6100

Dimension	Indicator	Law	Practice
Capacity 50/100	Resources	-	50
	Independence	75	25
Governance 45.8/100	Transparency	50	50
	Accountability	50	25
	Integrity Mechanisms	75	25
Role 50/100	Public Education	50	
	Cooperate with Public Institutions	50	
	Reduce Corruption Risk	50	

Structure of the Public Sector in Malawi

The public sector in Malawi includes all institutions that fall within the three different branches of Government, namely; the Legislature, Judiciary and the Executive as illustrated as follows: National state departments and ministries, Local Government authorities, Public enterprises that are created by the relevant Acts of Parliament, and Regulatory departments.²⁸⁰ Its hierarchical structure is very complex. The President is responsible for the public service. The Chief Secretary to Government is the head of the civil service and oversees the management of the public sector. He or she is supported by two deputies; one responsible for Malawi public service and another one responsible for the Cabinet service. The Department of Human Resource Management and Development (DHRMD) located within the Office of the President and Cabinet is the Central Government Agency responsible for overall policy on the management of human resources in the

²⁸⁰ Richard Tambulasi and Happy Kayuni 'Public Sector Reforms' in *Government and Politics in Malawi: A Textbook* (2007) p 328.

public service.²⁸¹ The public sector is very large and it accounts for more than 70% of all employees in the country.²⁸² In addition, the Malawi Government runs a total of 54 statutory corporations with different reporting line systems. While some report directly to the Department of Statutory Corporations, others report to their parent technical ministries depending on the technical work. For instance, the Malawi Revenue Authority reports directly to the Ministry of Finance.

The public sector in Malawi straddles the public and business sectors of the economy. It is directly involved in producing some goods and services as well as overseeing and regulating the provision of other goods and services by non-state actors (NGOs and business establishments).²⁸³

The public sector in Malawi has undergone several swings of institutional reforms associated with structural adjustment programmes and the drive to build state capacity to deliver goods and services in an effective and efficient manner.

Assessment

4.1.1 Resources (Practice)

Score: 50

To what extent does the public sector have adequate resources to effectively carry out its duties?

Civil servants within Malawi's public sector are spread across forty-eight Government Ministries and departments. According to the Department of Human Resources Management and Development (DHRMD), there are currently 194,194 civil servants and as illustrated above, this accounts for more than 70% of all employees in Malawi. In other words, the Government is the largest employer in Malawi.

In general, the Malawi public sector has substantially qualified technical and professional personnel to deliver quality services to the public in an efficient, effective and responsive manner in order to satisfy national aspirations and promote the advancement of the people of Malawi.²⁸⁴

²⁸¹ Interview with the author, 14th January 2013

²⁸² Richard Tambulasi and Happy Kayuni 'Public Sector Reforms' in *Government and Politics in Malawi: A Textbook* (2007) p 329.

²⁸³ Tambulasi R & Kayuni H., (2007)

²⁸⁴ Malawi Public Service Charter Programme (MPSCP)

However, some observers have argued that, Malawi public sector is overstaffed in the lower ranks of the hierarchy and there are too few technical and professional employees at the top levels.²⁸⁵

In terms of financial resources, Malawi's public sector receives funding from the Government through the national budget except for some statutory corporations which generate their own resources. Budgets between Ministries and Departments vary a great deal depending on a number of variables including scope of activities, size of workforce, and Government policy priorities. On the one hand, the funding each Ministry and department receives from the treasury is not enough considering the scope of activities these Ministries and Departments are required to perform within a given fiscal year. On the other hand, the Revenue generation base of Government (Financial Resource Envelope) is small and cannot satisfy the ever increasing financial requirements of the Government Ministries and Departments

Thus, two major problems with the resources availability to Malawi's public sector that jeopardizes integrity in the sector. Firstly, the number of employees appears to be too high and costly to the economy. A work force of about 200,000 in the civil service negatively affects the level of wages and salaries which in turn affects the performance of public employees. Consequently, many civil servants have opted for moonlighting and covert means of extracting resources from the system in order to supplement their salaries.²⁸⁶ The second problem relates to inefficiency. Service delivery satisfaction surveys conducted by the Malawi Economic Justice Network (MEJN) over the years have consistently shown that many people are not satisfied with the service delivery of the public sector as compared to the private sector.²⁸⁷ It is often alleged that many public service providers behave as if providing the services they are required to constitutes a privilege for service users or beneficiary i.e. citizens are simply seen as 'help-seekers'.²⁸⁸ Hardly is public service delivery regarded as a duty.

4.1.2 Independence (Law)

Score: 75

To what extent is the independence of the public sector safeguarded by law?

The Malawi Constitution, the Malawi Public Service Regulations (MPSR), Public Service Act of 1994, Malawi Public Service Charter (MPSC) and Public Service Commission Regulations (PSCR)

²⁸⁵ See Msosa (1998) and also Tambulasi R & Kayuni H., (2007:335)

²⁸⁶ Interview with Public Service Commission official

²⁸⁷ Tambulasi R & Kayuni H., (2007:335)

²⁸⁸ Tambulasi R & Kayuni H., (2007:335)

have extensive provisions regarding the independence of Malawi's public sector. Section 193 of the Constitution of Malawi, for instance, deals specifically with the question of civil service independence by providing that, 'members of the civil service shall ensure that the exercise of participation in political activities does not compromise their independent exercise of their functions, powers and duties as impartial servants of the general public.'²⁸⁹ This independence is considered as one of the core values for the Civil Service Commission (CSC) , as their strategic and implementation plan for 2011 – 2016 stipulate that, CSC shall not be influenced by any outside forces in its decision pertaining to appointments, disciplinary actions and all other functions as stated in Chapter 20 of the Constitution of Malawi.

Government departments have independent commissions that are responsible for the recruitment, promotion as well as firing of its staff.²⁹⁰ Such commissions are responsible for different Government departments or ministries.²⁹¹ All of these commissions follow prescribed procedures when recruiting staff.²⁹²

Within the public sector, the office of the Ombudsman primarily deals with cases regarding the arbitrary use of power by public officials. Thus civil servants can access this office to seek assistance even with regard to unfair dismissals. The Industrial Relations Court is also available to the Malawians (including civil servants) to seek redress for cases of unfair dismissals.

4.1.3 Independence (Practice)

Score 25

To what extent is the public sector free from external interference in its activities?

A majority of senior public service managers are political appointees who often have no clearly defined security of tenure . As a result, they are vulnerable to removal from their posts on the basis of political considerations. Consequently, many of them serve in a manner that retains the patrimonial authority and status of the Executive especially the President. In such a highly appointive system, political neutrality of the public bureaucracy remains difficult to attain. However, there is a view within the public service that indicates tolerance of political interference. For instance, an official from the Public Service Management Unit intimated that independence of the civil service must be looked at within the political context. "As long as public administration

²⁸⁹ See Section 193 of the Constitution of Malawi

²⁹⁰ Richard Tambulasi and Happy Kayuni 'Public Sector Reforms' in *Government and Politics in Malawi: A Textbook* (2007) p. 331.

²⁹¹ Ibid.

²⁹² Ibid.

cannot be neatly separated from politics, independence of the public service will always be a challenge. However, people should always understand that, this is just a working relationship that exists in every government.²⁹³

Furthermore, the independence of the public service has been questioned due to the presence of the extensive patronage networks. Patronage works through appointments in public sector positions, awards of lucrative contracts, and enticements of party loyalists and opposition MPs with cash and favours.²⁹⁴ The practice has been worsened by the requirement that public servants must be loyal and committed to the policies and programmes of the Government of the day regardless of one's political, religious, social or cultural belief.²⁹⁵ Any perceptions or suspicions by the Political Executive of any senior public servant not being on their side based on such parochial factors as tribe, has led to demotions, transfers, or dismissal of the public servants.

While there is a lot of political interference for appointments to senior positions, recruitment to middle management positions and lower is more meritocratic. The CSC generally appoints, confirms, and promotes persons and exercises disciplinary control over them in an independent, fair and impartial manner.²⁹⁶ As earlier illustrated, in the event of unfair disciplinary action, public servants are free to seek redress from the Ombudsman or the Malawi Human Rights Commission or the judiciary (Industrial Relations Court). In practice, civil servants are generally able to seek such services. However, their accessibility is often hindered by the overall problems of access to justice in Malawi.²⁹⁷ As the judiciary and Ombudsman pillars have pointed out, these institutions have capacity challenges and thus remain overburdened with work which in turn limits their accessibility and effectiveness.

In terms of managing public information, there are no legal requirements to publish procedures and criteria for administrative decisions such as land allocation, granting permits and issuing of licenses.

²⁹³ Interview with the author, 16th January 2013

²⁹⁴ Hussein (2005),

²⁹⁵ GoM(undated Malawi) Public Service Charter

²⁹⁶ Interview with the author, 16th January 2013

²⁹⁷ For further information, please refer to the 'Access to Justice in Malawi Report 2012' by UNDP and Malawi Ministry of Justice.

Governance

4.2.1 Transparency (Law)

Score 50

To what extent are there provisions in place to ensure transparency in financial, human resource and information management of the public sector?

The law on disclosure (i.e. section 88 and Section 213 of the Constitution) requires any person holding public office to disclose and declare his or her personal assets, income, financial interests etc. within three months from the date of election or appointment.

Laws pertaining to public information management in Malawi are not adequate. Generally, Section 37 of Malawi Constitution grants the right of access to information held by the State or any of its organs at any level of Government. Unfortunately, such right is not absolute and is limited by other pieces of legislation such as the Official Secrets Act. The absence of legislation to promote access to information also has a negative effect. Thus, despite the constitutional provision on access to information, most of the legislative framework effectively limit rather than enhance access to information.

4.2.2 Transparency (practice)

Score : 50

To what extent are the provisions on transparency in financial, human resource and information management in the public sector effectively implemented?

Disclosure of assets by senior public servants is a requirement. However there is a lack enforcement mechanism to ensure disclosure. As such, it is not clear as to whether senior public servants covered under this provision adhere to this requirement since such information cannot be accessed by the general public since section 213 of the constitution only requires that such information be deposited with the Speaker.

In practice, vacancies are advertised publicly and the existent of independent commissions to oversee the recruitment process helps in ensuring fair recruitment. However, it is difficult to say with certainty whether recruitments are entirely free from undue interference.

In spite of the fact that the government has created the Office of the Director of Public Procurement in a bid to create transparency and competitiveness in the procurement of goods and services in

the public sector, the process of competition administration in the country is still weak.²⁹⁸ This is partly due to the competition agency's lack of capacity to enforce the law. In addition, there is also inadequate public awareness as to the existence of the law, and little familiarity with the mandate and operations of the relevant institution.²⁹⁹

4.2.3 Accountability (Law)

Score 50

To what extent are there provisions in place to ensure that public sector employees have to report and be answerable for their actions?

The relevant legal provisions relating to accountability in the public sector are found in the Corrupt Practices Act. The Act provides that 'A public officer to whom any advantage is corruptly given, promised or offered shall make a full report of the circumstances of the case to a police officer or an officer of the Bureau within forty-eight hours of the occurrence of the event; and if he fails to do so without reasonable cause he shall be guilty of an offence and liable to a fine of K10,000 and to imprisonment for three years'.³⁰⁰ Furthermore, the Act makes the following provisions:

Any public officer who by himself, or in conjunction with any other person, corruptly solicits, accepts or obtains, or agrees to accept or attempts to receive or obtain, from any person for himself or for any other person, any advantage as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, anything in relation to any matter or transaction, actual or proposed, with which any public body is or may be concerned shall be guilty of an offence.³⁰¹

Any person who by himself, or by or in conjunction with any other person, corruptly gives, promises or offers any advantage to any public officer, whether for the benefit of that public officer or of any other public officer, as an inducement or reward for doing or forbearing to do anything in relation to any matter or transaction, actual or proposed, with which any public body is or may be concerned shall be guilty of an offence.³⁰²

²⁹⁸ BTI Report 2012.

²⁹⁹ Ibid.

³⁰⁰ Section 36 of the Corrupt Practices Act

³⁰¹ Section 24 (1) of CPA

³⁰² Section 24 of corrupt practices Act

On corrupt use of official powers, the law provides that

Any public officer who, being concerned with any matter or transaction falling within, or connected with, his jurisdiction, powers, duties or functions, corruptly solicits, accepts or obtains, or agrees to accept or attempts to receive or obtain for himself or for any other person any advantage in relation to such matter or transaction shall be guilty of an offence.³⁰³

Any person who, being concerned with any matter or transaction falling within the scope of authority, or connected with the jurisdiction, powers, duties or functions of any public officer, by himself, or by or in conjunction with any other person, corruptly gives, promises or offers any advantage, whether directly or indirectly, to such public officer either for himself or for any other person shall be guilty of an offence.³⁰⁴

Section 51 A of the Corrupt Practices Act provides for protection of whistle-blowers and other informers' Specifically, it provides for the concealment of the identity of whistle-blowers unless the demands of justice require such disclosure and the court so orders.

In terms of management of the public funds, all expenditures are required to be internally audited and are further audited by the National Audit Office (NAO).³⁰⁵ In addition to this, at the end of every financial year, every Government institution prepares a financial statement and this has to be certified by the Accountant General in line with the Public Finance Management Act.³⁰⁶ Besides the supreme audit institution, the public sector is also answerable to the legislature and the ACB.³⁰⁷ Similarly, any cases involving violation of rights by public servants can be raised through the Malawi Human Rights Commission, the Judiciary and the Ombudsman.³⁰⁸

³⁰³ Section 25 (1) of CPA

³⁰⁴ Section 25(2) of CPA

³⁰⁵ See pillar 8: Supreme Audit Institution

³⁰⁶ Interview with the author, 16th January 2013

³⁰⁷ See pillar reports on Legislature and Supreme Audit Institution

³⁰⁸ See pillar reports on Judiciary and Ombudsman

4.2.4. Accountability (practice)

Score: 25

To what extent do public sector employees have to report and be answerable for their actions in practice?

Accountability is a problem in the public sector because of weaknesses in the enforcement of the relevant laws but also the primacy of patrimonial politics which permeates public appointments and the performance of senior officers.³⁰⁹

However, the culture of accountability in the public sector is very minimal. Many commissions, omissions, decisions and indecisions of public servants go unexplained or unjustified.³¹⁰ One reason for this is that civil servants rarely report each other on misconduct and mismanagement. Not every public institution is audited every year due to lack of capacity of the National Audit Office and the AG's office. Another formidable challenge of accountability within the public sector in Malawi has been the extensive patronage networks. Patronage and clientelist networks are known to play an important role in fostering corruption in the system of Government and inhibiting accountability. It is commonly perceived that presidents often make appointments of senior people in the public sector based on such other consideration as tribe and/or party affiliation.³¹¹

Incidents of abuse and misappropriation of public resources have been reported in public sector institutions.³¹² Some of these have involved large sums of money, indicating weak external and internal audit capacities.³¹³

Efforts are however underway to enhance accountability of senior public servants. For instance, organizational performance agreements (OPAs) have been introduced that are signed between the OPC and each Principal Secretary (PS). As part of the OPAs, the PS reports on progress being made with respect to his/her agreement to the Project Implementation, Monitoring and Evaluation Department (PIMED)

³⁰⁹ Mathews- Hall, David (2007)

³¹⁰ Author interview, Civil Service Commission

³¹¹ See Afrobarometer survey reports for Malawi Round 3 and 4.

³¹² BTI Report 2012.

³¹³ Ibid.

With the passage of the Public Finance Management Act and the establishment of the Office of the Director of Public Procurement (ODPP), procurement management has improved, although concerns over specific procurement processes remain.³¹⁴ The purchase of a presidential jet in 2009 showed a lack of efficiency in the utilization of public resources, particularly considering the fact that this procurement request did not go through parliament.³¹⁵

A 2010 national audit report exposed serious misappropriation of public funds within the National Assembly and government ministries, it also exposed the fact that there are insufficient financial and human resources to audit all public offices effectively.³¹⁶ Furthermore, the audit reports are often very late. The Public Accounts Committee has always been working behind schedule and this sometimes has caused problems because responsible officers get transferred or retire or die before they have appeared before the committee.

4.2.5 Integrity Mechanism (Law)

Score: 75

To what extent are there provisions in place to ensure the integrity of public sector employees?

There are common law rules and codes of conduct that regulate civil service integrity and ensure professionalism and honour in the system. Such is incorporated in the Malawi Public Service Regulations as well as the Public Service Charter. These regulate issues such as accepting of gifts, any form of active and passive bribery, bribing a foreign official, and abuse of office. Other general provisions such as Malawi's Penal Code and the Corrupt Practices Act (on bribery) also provide guidance on integrity issues. There are no rules regulating or restricting the employment of public servants once they leave office. Unauthorized use of official property and assets is forbidden by the public service regulations and reinforced in numerous circulars and notices. The rules on declaration of interest are available in the public service regulations, the public procurement Act as well as in the Corrupt Practices Act. The OPC has also recently directed that integrity committees should be introduced in all government ministries and departments.

³¹⁴ BTI Report 2012.

³¹⁵ Ibid.

³¹⁶ BTI Report

4.2.6 Integrity Mechanisms (practice)

Score: 25

To what extent is the integrity of public sector employees ensured in practice?

Public sector integrity is rather very low. Corruption is perceived to be widespread and taking all possible forms, often running through entire chains of command in the different institutions.³¹⁷ Civil servants have been implicated in many cases of corruption.³¹⁸ One of the most common types of corrupt activity is when public servants demand payment for services that are meant to be free.³¹⁹ In addition, the ACB has often reported cases of corruption in the award of contracts, both in Central Government and in local assemblies.³²⁰

Unjustifiable monetary allowances are common within the civil service³²¹ largely seen as a way of pilfering resources from the public coffers. For example, some officers at the Ministry of Agriculture are on record to have drawn allowances for more than a thousand days in a year or forty days per officer in a month.³²²

With regards to procurement processes, the system is weak on enforcement and perceived to be mostly corrupt. It is alleged that suppliers tend to give 10% of their total bid to some members of the internal procurement committees if their bid has been successful.³²³ Corrupt practices are rampant because of low salaries, lack of incentives for public officials, and lack of corruption reporting systems within the public sector.³²⁴

Most of the public servants undergo training on aspects of public service including expected codes of behavior. These training sessions are organized by the Staff Development Institution (SDI) and range from induction modules for newly recruited public servants to more specialized modules on human resource management practices, civil service procedures and procurement among others.³²⁵

³¹⁷ Chinsinga, Blessings and Happy Kayuni (2011) *Governance and Corruption Survey* (Lilongwe: ACB)

³¹⁸ Richard Tambulasi and Happy Kayuni 'Public Sector Reforms' in *Government and Politics in Malaw: A Textbook* (2007) 333.

³¹⁹ Ibid.

³²⁰ Ibid.

³²¹ Perhaps the worst case remains the scandal in the Ministry of Agriculture where Officials claimed out of duty station allowances of up to a thousand days in a year (see *Special Audit Report on Allowances Scam in Ministry of Agriculture*, 2010).

³²² Chingwede W., (2013) "Abuse in age of Austerity" in *Weekend Nation* of 16th February 2013.

³²³

³²⁴ See The World Bank, (2006) and *Malawi Governance and Corruption Baseline Survey*,

³²⁵ Interview, Official of the Civil Service commission.

Roles

4.3.1 Public Education

Score: 50

To what extent does the public sector inform and educate the public on its role in fighting corruption?

Public education on corruption within the public service has been championed by the Anti-Corruption Bureau through its Public Education Section (PES). The PES derives its mandate from Section 10 (1) (a) (iii) and (iv) of the Corrupt Practices Act to provide public education on corruption and provide information on the evils of corruption and how to resist and report corruption.³²⁶

Furthermore, the Bureau has initiated several seminars and workshops and has conducted lectures targeting the Public Accounts Committee and Budget, Finance Committee of Parliament and the Police since 1997³²⁷ aiming at ensuring that, the general public is well-informed on evils of corruption and where to report corruption cases.

The Malawi Government adopted a Declaration on Zero Tolerance on Corruption in February 2007. In addition, the Malawi Growth and Development Strategy (MGDS) adopted by the Government in 2006 included "Good Governance" as one of the five themes instrumental in Malawi for ensuring integrity. As a way of ensuring this, each Ministry has established Inter-Ministerial Integrity Committees. According to information sourced from DHRMD³²⁸, it shows that these integrity committees have been in the forefront providing public education relating to corruption. The problem has been that, ACB has not been forthcoming in providing orientation and capacity on how intra-ministerial Integrity Committees should function.

³²⁶ See <http://www.anti-corruptionbureau.mw/civic-education/>

³²⁷ Ibid

³²⁸ Author interview

4.3.2 Cooperate with public institutions, CSOs and private agencies in preventing/ addressing corruption

Score : 50

To what extent does the public sector work with public watchdog agencies, business and civil society on anti-corruption initiatives?

Public sector agencies cooperate with other agencies within the state to combat corruption. For instance, the civil service collaborates with the Anti-Corruption Bureau to establish and sustain ministerial integrity committees. A number of MoUs have, to this effect, been signed between the ACB and a number of government ministries. It also cooperates with the ODPP through compliance with Procurement Act by establishing Internal Procurement Committees which receive training and support from the ODPP but also seek authorization for different types of procurements as required by the Public Procurement Act. The public sector agencies also work with the Auditor General and authorities exercising monitoring and oversight over public procurement pursuant to the laws of Malawi.³²⁹ There are also a number of forums that provide a platform for senior public officers to be subjected to scrutiny by civil society. They include the annual meetings organized by the Economic Association of Malawi (ECAMA) and the regular engagements that MEJN has with relevant ministries and department.

However, cooperation between the public sector with CSOs and private sector players has not been forthcoming except through the National Integrity Committee. One reason for this is that discourses on corruption are large accusatorial of the public sector and the perception is that the accusations are levelled by CSOs and disadvantaged private sector elements.³³⁰

4.3.3. Reduce Corruption Risks by Safeguarding Integrity in Public Procurement

Score 50

To what extent is there an effective framework in place to safeguard integrity in public procurement procedures, including meaningful sanctions for improper conduct by both suppliers and public officials, and review and complaint mechanisms?

The law requires open bidding as general for all public procurement in Malawi. Section 18 of the

³²⁹ See Section 40 of the Public Procurement Act 2003

³³⁰ Hall-Mathews (2007). See also Afrobarometer Survey reports for Rounds 3 and 4.

Public Procurement Act for instance, spells out conduct of the public officials and bidders who are directly involved in procurement using public funds. This legal provision ensures that, there are meaningful sanctions for improper conduct by both suppliers and public officials. Furthermore, under Section 18 (1) (a), the Act stipulates that, public officials involved in requisitioning, planning, preparing and conducting procurement proceedings and administering the implementation of procurement contracts shall discharge their duties impartially so as to assure fair competitive access to public procurement by bidders. This legal framework intends to safeguard integrity in public procurement procedures. However, in practice, there is a huge public perception of undue influence in public procurements especially by the political Executive. Contracts are cancelled without regard to the laws and mainly to benefit ruling politicians or their associates.³³¹ Furthermore, businesses that are known to have links with opposition politicians or other interests are not awarded public contracts for fear of financing political activities of the opposition against the government. There is anecdotal evidence that suggests that huge public contracts as used as an indirect way of mobilizing political finances for the ruling parties.³³²

Recommendations

- Appointment of senior officers in the public sector should be insulated from political interference by making the recruitment open and competitive;
- Advocate for security of tenure of senior officers in the public sector;
- The law on declaration of public assets should be clear on who within the public sector is subjected to this law
- The OPAs should apply not only to officers at the level of PS but from the position of Director on wards. Results of the assessment of these OPAs by the PIMED should have consequences by way of having sanctions for non-performance.
- The term "Senior Officers" should be defined. for example, any Officer in a super scale post may be defined as Senior Officer

³³¹ For example, the cancellation of FISP and Hotel contracts by President Joyce Banda and their subsequent award to bidders associated with her party (FISP contracts) and to a hotel management company from South Africa that did not submit a bid.

³³² Chinsinga, Blessings and Happy Kayuni (2010) Governance and Corruption Survey (Lilongwe: ACB).

5 Malawi Police Service and the Office of Director of Public Prosecutions

5.

Summary

The assessment finds that the law enforcement agencies are marginally satisfactory.³³³ There are however major areas of concern for the Police which need to be addressed to improve its effectiveness. These include inadequate financial and human resources for undertaking its tasks in detail and depth that is required. The Police also appears to suffer under the weight of Executive influence despite clear legal provisions insulating it from such influence. There has also been a general public feeling of lack of professionalism and at times indiscipline within the Police.

However, the Constitution and the Police Act³³⁴ (referred to as ‘the Act’ hereinafter) generally provide a good foundation for the Police and the office of the Director of Public Prosecutions (referred to as ‘the DPP’ hereinafter) to effectively perform their law enforcement functions in Malawi. There are however legislative and regulatory gaps which need immediate attention. There is also need for the office bearers to implement the existing legal framework in order to enhance the service provision of these two important law enforcement agencies.

As is the case in government funded institutions in Malawi, the Police and the office of the DPP also suffer acute funding gaps and problems with staff retention among other problems. The two institutions have strived to execute their mandate as prescribed in the Constitution and other relevant legislation. However their public standing has been called into question with constant public outcry of lack of professionalism, political interference and general perceptions of corruption.

³³³ The assessment here is mainly limited to the police and the office of the Director of Public Prosecutions. Admittedly, it would have been equally important for the assessment to look at other law enforcement agencies such as the Department of Immigration and Malawi Prison Services. This has not been possible due to time constraints.

³³⁴ Chapter 13:01 of the Laws of Malawi

The table below presents the indicator scores which summarize the assessment of the law enforcement agencies, specifically the Police Service and the DPP's office in terms of their capacity, internal governance and role within the Malawian integrity system. The remainder of this section presents the qualitative assessment for each indicator.

The Malawi Police Service & Directorate of Public Prosecutions

Overall Pillar Score: 51.4/100

Dimension	Indicator	Law	Practice
Capacity 50/100	Indicator	Law	Practice
	Resources		25
Governance 54.2/100	Independence	100	25
	Transparency	25	50
	Accountability	75	50
Role 50/100	Integrity Mechanisms	75	50
	Corruption Prosecution	50	50

Structure and Organisation

The entire law enforcement system of the country is rooted in the Constitution³³⁵ and related pieces of legislation³³⁶. All law enforcement agencies are under the Ministry of Internal Affairs and Public Security.³³⁷ These agencies are the Malawi Police Services, the Malawi Prison Services, the Immigration Department and the Refugees Department. There is also another agency, the National Intelligence Bureau, it is not governed by any legal framework and it is not clear how it is structured and to whom it reports.³³⁸ For the purposes of this study, the concentration shall be on the Malawi Police Services and the office of the DPP where the former

³³⁵ Constitution, chapter XV

³³⁶ The Police Act (chapter 13:01), Immigration Act (chapter 15:03), Prisons Act (chapter 9:02)

³³⁷ http://www.malawi.gov.mw/index.php?option=com_content&view=article&id=58&Itemid=13

³³⁸ *The Daily Times*, "Government spies operating 'illegally'" 11th March, 2013, available; <http://www.bnltimes.com/index.php/daily-times/headlines/national/14098-government-spies-operate-illegally>

legally falls under the supervision of the Attorney General and operationally under the Ministry of Justice.

The Malawi Police Service (referred to as ‘the Police’ hereinafter) is the single most important law enforcement agency in the country. The other ancillary institutions are the Malawi Prisons Services, the Immigration Department and the Refugees Department which are responsible for prison, immigration and refugees service respectively. All these institutions fall under the Ministry of Internal Affairs and Public Security. The Police is one of the oldest integrity institutions and has over the years turned into the current form through a series of legislative reforms.³³⁹ The Police is primarily tasked with the provision of public safety and the rights of persons in Malawi.³⁴⁰

Both the Police and the DPP are set up under the Constitution³⁴¹ and further under the Police Act³⁴² and the Criminal Procedure and Evidence Code (hereinafter referred to as ‘the CPEC’).³⁴³ These two institutions are the critical institutions amongst the law enforcement agencies. The Police is principally responsible for prevention and detection of crime, general public safety and preservation of law and order, the protection of property and the due enforcement of all laws in the country.³⁴⁴ The office of the DPP is responsible for instituting and undertaking criminal proceedings against any person before any court.³⁴⁵

The Police has its headquarters in Lilongwe but with four regional offices (Southern, Eastern, Central and Northern) and district offices throughout the country.

There are three distinct prosecutors in Malawi. These are the state advocates who are employed under the Ministry of Justice and are under direct supervision of the DPP. There are also public prosecutors who are non-civilian and are recruited by the Police and are under the supervision of the IG. Further to this, the DPP can also delegate prosecutorial powers to legal practitioners who are working in public institutions who have specific offences under their mandate. The DPP can also delegate prosecutorial powers to private practicing lawyers to privately prosecute any offence in the country (this is done under on behalf of the DPP). The DPP offices are located in Lilongwe, with regional offices in all four regions.

³³⁹ At one point it was called the Malawi Police Force (section 3 of the old pre-independence Police Act), now it is referred to as the Malawi Police Service (Constitution, section 152, Police Act (2010), section 3)

³⁴⁰ Constitution, section 153(1)

³⁴¹ Constitution, sections 99 and 152

³⁴² Police Act, section 3

³⁴³ Criminal Procedure & Evidence Code, section 76

³⁴⁴ Constitution, section 152(1)&(2) and Police Act, section 4

³⁴⁵ Constitution, section 99(2)(a) and CPE Code, section 76(1)

ASSESSMENT

5.1.1 Resources (Practice)

Score: 25

To what extent do law enforcement agencies have adequate levels of financial resources, staffing, and infrastructure to operate effectively in practice?

The Principal Administrative Officer (referred to as 'the PAO' hereinafter) for the Ministry of Internal Affairs & Public Security ³⁴⁶ stated that the budget for security institutions is inadequate and this affects their operations and execution of their legal mandate. Media reports are rife of Police failure to combat crime because of lack of basic tools like motor vehicles due low budgetary allocation which affects the execution of their mandate.³⁴⁷ On his part, the Director of Public Prosecutions ('the DPP' herein after)³⁴⁸ stated that budgetary constraints also affect the operations of his office.

The PAO stated that revenue collected from services (immigration department), fines (traffic police) and others go directly to the government main account and not to the Ministry.³⁴⁹ However, it was noted that the Ministry has sought and has been given financial assistance from various donor partners including Department for International Development of the United Kingdom, and European Union among others.³⁵⁰ The DPP stated that as far as budget issues are concerned, they are handled by the Ministry of Justice which his office falls under. It was also indicated that there are projects run by cooperating partners that have directly targeted his office. These include the EU Rule of Law programme and others.³⁵¹

The inadequacy of the budget has affected the remuneration packages for law enforcement agencies in Malawi. Both the PAO and the DPP indicated that the salaries for the security institutions and prosecutors are inadequate and cannot be considered as motivating. It is for this reason that most of these agencies including their respective ministries have failed to attract and retain professional staff. As noted in the previous chapter, it has been reported that the already

³⁴⁶ Mr. Sado is the PAO for the Ministry of Internal Affairs & Public Security and was interviewed by the author on 31st May, 2013

³⁴⁷ *Nyasatimes*, 'Officers decry low funding of Malawi Police units' 10th June, 2013, available; <http://www.nyasatimes.com/2013/06/10/officers-decry-low-funding-of-malawi-police-units/>

³⁴⁸ Mr. Bruno Kalemba was appointed to the office of DPP on 30th May, 2013. He was interviewed by the author on 7th June 2013

³⁴⁹ Interview with the author, 31st May, 2013

³⁵⁰ *Ibid*

³⁵¹ Interview with the author, 7th June, 2013

low salaries of the civil service have been further strained by the devaluation of the Malawi currency and rising inflation.³⁵² The low budgetary allocation has also been blamed by both the PAO and the DPP as the cause of the inadequacy of computer equipment which is also outdated with their institutions.³⁵³

The PAO for Ministry of Internal Affairs and Internal Security stated that there have always been budget cuts. The proposed budgets by the Ministry have always been reduced on approval by the Ministry of Finance. He gave an example of the current 2013/2014 budget which underwent serious cuts in the budgets for the police and other security apparatus falling under the Ministry. It was noted that formal complaint was lodged with the relevant authorities but there has been no response.³⁵⁴ On his part, the DPP indicated that budgetary issues are directly handled by the Ministry of Justice under which his office falls.³⁵⁵

It is clear, therefore, that the law enforcement agencies in Malawi suffer from inadequate funding which appears to be a Government wide problem. However, the impact is more pronounced because of the vastness and reach of these security institutions.

5.1.2 Independence (Law)

Score: 100

To what extent are law enforcement agencies independent by law?

The Police is set up under the Constitution.³⁵⁶ The Police is headed by the IG³⁵⁷ who is appointed by the President subject to confirmation by Parliament.³⁵⁸ Furthermore, the Public Appointments Committee of Parliament shall enquire into the competencies and abilities of the person so appointed.³⁵⁹ The appointment of any officer above the rank of inspector other than the IG is done by the Police Service Commission (referred to as 'the Commission hereinafter')³⁶⁰ whilst officers below the rank of inspector are appointed by the IG in a manner prescribed by the Commission.³⁶¹ The devolving of appointment powers from the Minister as it was in the previous legislation is aimed at ensuring that recruitments are done on merit.

³⁵² *Nation Online*, Malawi's civil servants to go slow' available; <http://www.mwnation.com/national-news-the-nation/14886-malawi-s-civil-servants-to-go-slow>

³⁵³ Interview with the author on 31st May 2013 and 7th June, 2013 respectively

³⁵⁴ Interview with the author, 31st May, 2013

³⁵⁵ Interview with the author, 7th June, 2013

³⁵⁶ Constitution, section 152 (see also Police Act, section 3)

³⁵⁷ *Ibid.*, section 154(1)

³⁵⁸ *Ibid.*, section 154(2)

³⁵⁹ *Ibid.*

³⁶⁰ Police Act, section 31(1)

³⁶¹ *Ibid.*, section 31(2)

In relation to prosecutorial powers, the law sets up the office of the DPP which is provided for in the Constitution³⁶² and operating under the Ministry of Justice & Constitutional Affairs. The DPP is appointed by the President, subject to confirmation by the Public Appointments Committee of Parliament which shall confirm the competencies and capabilities of the person so appointed.³⁶³ As regards other officers who work for the DPP, there are two main categories. The first category comprises of State Advocates who are legal practitioners recruited by the Ministry of Justice. Those interested in prosecutorial work are then drafted into the DPP's office. The recruitment is purely based on merit. The second category is that of police prosecutors who are recruited in line with the Police Act.³⁶⁴ There are no legal provisions guiding the prosecutorial career including issues of promotion of prosecutors.

The Constitution prevents political interference in the activities of the Police. It is provided that Police shall act impartially to serve the general public and the government of the day³⁶⁵ and that no member of the Police shall be allowed to directly participate in politics³⁶⁶ although they are allowed to vote.³⁶⁷ The Government and any political party is also prevented from using the Police to achieve political gain.³⁶⁸ It further provides that where a Government or a party has used Police resources to achieve political gain, the Police can apply to Court for punitive damages and restoration of the resources so used.³⁶⁹

As noted earlier, prosecutorial powers in Malawi are vested in the Director of Public Prosecutions.³⁷⁰ The Constitution provides that the DPP shall be under the general and specific directions of the Attorney General but shall otherwise act independent of any direction or control of any authority or person.³⁷¹ In instances where the DPP decides not to prosecute any case, the decision shall solely be of the DPP and he is required to disclose such reasons to the Legal Affairs Committee of Parliament.³⁷² The DPP is also required to give account of how he has used his powers under the law to the Legal Affairs Committee.³⁷³

³⁶² Constitution, section 99

³⁶³ *Ibid.*, section 101

³⁶⁴ Police Act, section 31

³⁶⁵ Constitution, section 158(1)

³⁶⁶ *Ibid.*, section 158(2)

³⁶⁷ *Ibid.*, section 158(2)(b)

³⁶⁸ *Ibid.*, section 158(3)&(4)

³⁶⁹ *Ibid.*, section 158(6)

³⁷⁰ *Ibid.*, section 99(1)

³⁷¹ *Ibid.*, section 101(2)

³⁷² *Ibid.*, section 99(3)

³⁷³ *Ibid.*, section 101

5.1.3 Independence (Practice)

Score: 25

To what extent are law enforcement agencies independent in practice??

Although the law has ensured that the Police and the DPP are recruited on merit, the process is shrouded in political manoeuvring and there is no open competition for these positions. This process has eventually created perceptions of political influence of these two offices by the appointing authority. The PAO for the Ministry stated that despite the principle that appointments should be made on the basis of clear professional criteria, in practice that has not always been the case.³⁷⁴ There have also been reports of political manipulation in appointment of the IG. In 2005, Parliament rejected the appointment of Mary Nangwale as IG and she challenged the decision of Parliament in court on, among other grounds, that some of the MPs who had 'material interest' were allowed to debate and vote without disclosing their interest.³⁷⁵ The Court dismissed her argument. There is also a trend of replacing the IG once there is a change in the Executive, indicative of undue political pressure. Recently, government replaced the IG after President Joyce Banda ascended into power in 2012.³⁷⁶

On his part, the DPP stated that the appointment of the headship to the office is based on merit and that the appointment of other officers follows the civil service regulations.³⁷⁷ However the same trend continues i.e. that of replacing the DPP once there is a change in the Executive despite the incumbent having not finished his term of office. The current DPP, for example, was appointed after his predecessor was dismissed when the new government came to power in 2012.³⁷⁸ The PAO stated that politicization of the security apparatus has been a call for concern mainly from the opposition parties. Recent reports indicate that one of the main opposition parties in the country has bemoaned the use of the Police by the current People's Party Government to suppress and terrorise opposition leaders although the Government has vehemently denied the accusation.³⁷⁹

The PAO stated that there is a general public feeling that external interference exists.³⁸⁰ Media

³⁷⁴ Interview with the author, 31st May, 2013

³⁷⁵ *The State v The Speaker of National Assembly, The Attorney General, ex parte Mary Nangwale*, Misc. Civil Case No. 1 of 2005

³⁷⁶ *Nyasatimes*, 'Mukhito fired, Dzonzi new Malawi Police chief', 8th April, 2012, available; <http://www.nyasatimes.com/2012/04/08/mukhito-fired-dzonzi-new-malawi-police-chief/>

³⁷⁷ Interview with the author, 7th June, 2013

³⁷⁸ *Malawi Today*, 'Govt hires Kalemba as new Director of Public Prosecutions', 30th May, 2012, available; <http://www.malawitoday.com/news/125319-govt-hires-kalemba-new-director-public-prosecutions>

³⁷⁹ *Nyasa Times*, 'DPP, activist, accuse PP of abusing Malawi Police into stifling democracy' 2nd April, 2013, available <http://www.nyasatimes.com/2013/04/02/dpp-activist-accuse-pp-of-abusing-malawi-police-into-stifling-democracy/>

³⁸⁰ Interview with the author, 31st May, 2013

houses have reported on several specific instances where there has been Executive influence on the investigations by the law enforcement agencies. In the *Chasowa case*, it was reported that the Police, under pressure from the Executive, deliberately botched the investigation into the death of a college student whose death had political overtones. This prompted the Malawi Human Rights Commission to institute a separate investigation following a public outcry.³⁸¹

The DPP, meanwhile, indicated that prosecutors work without intimidation in the country and that since taking the position, the only 'interference' he has so far experienced is media pressure which has at times forced the political leadership to put pressure on his office to address the apparent public pressure.³⁸² He said this has in some instances backfired as the office does not do a good thorough job when there is such pressure. He gave the example of the *Chasowa case* where he says the evidence is difficult to work with as it was collected in haste because of public pressure fanned by the media.³⁸³

In contrast, independent reports indicate that there has been a history of Executive interference in the work of the DPP.³⁸⁴ Freedom House expressed concerns over potential interference of this office of the DPP by the Attorney General's office which legally has supervisory powers of the DPP.³⁸⁵ One example cited is that of the DPP who was fired in 2006 for apparently not succumbing to the Executives attempt to influence the discharge of his duties.³⁸⁶ Media reports indicate that the perception of political interference has not abated and that the DPP is perceived to be at the mercy of the Executive.³⁸⁷

5.2.1 Transparency (Law)

Score: 25

To what extent are there provisions in place to ensure that the public can access the relevant information on law enforcement agency activities?

There is no legal provision requiring any part of the work of law enforcement agencies to be

381 *Nyasatimes*, '20 to testify in Chasowa's senseless murder; Mutharika, Masangwi implicated' 13th July, 2012, available; <http://www.nyasatimes.com/2012/07/13/20-to-testify-in-chasowas-senseless-murder-mutharika-masangwi-implicated/>

382 Interview with the author, 7th June, 2013

383 *Ibid*

384 *Freedom House*, 'Countries at the Crossroads 2012; Malawi', p.9, available <http://www.freedomhouse.org/report/countries-crossroads/2012/malawi>

385 *Ibid.*, at p. 12

386 *Ibid.*, at p. 9

387 *Nation Online* 'Treason suspects say case political' 1st May, 2013, available; <http://www.mwnation.com/national-news-the-nation/18694-treason-suspects-say-case-political>

publicly disclosed and no special provision for victims of crime to access their case files. The only provision that may entail disclosure of aspects of law enforcement is the requirement of the Independent Complaints Commission to make annual reports to Parliament.³⁸⁸ Such a report, once submitted to Parliament is considered as public information. However, this means that the information is only limited to the amount and nature of complaints made to the commission. Otherwise, it is an offence for any officer to disclose any information about any investigation or any police or departmental matter without authority.³⁸⁹

The Constitution requires all senior public officials which includes those working in the law enforcement agencies to disclose their assets upon appointment within three months of their appointment.³⁹⁰ As noted in the previous Chapter, the Constitution requires Parliament to specify what grades are subject to this disclosure of assets requirement.³⁹¹ Unfortunately, to date, Parliament has not promulgated any law specifying these grades and activating this Constitutional provision.

Thus the workings of the law enforcement agencies remain shrouded in secrecy. This situation has not been helped by the establishment of an additional unit within the law enforcement agencies called the National Intelligence Bureau which has no legal framework for its establishment and guiding its operations. This has raised concerns that without such a legal framework, the bureau is operating illegally and illegally allocated funds by the government.³⁹²

5.2.2 Transparency (Practice)

Score: 50

To what extent is there transparency in the activities and decisions of the Law Enforcement Agency in practice?

Both the PAO for the Ministry of Internal Affairs and Public Security and the DPP stated that without the activation of the constitutional provision and in the absence of any other legal framework, there is no disclosure of assets by any of the officers in the law enforcement agencies.³⁹³ However, the Police Service periodically (mid-year and end of year) publishes

³⁸⁸ Police Act, section 146

³⁸⁹ Code of Disciplinary Conduct for Police Officers, section 13 (Schedule of Police Act)

³⁹⁰ Constitution, section 213(1)(b)

³⁹¹ *Ibid.*, section 213(2)

³⁹² Reports of the Budget and Finance Committee of Parliament (June 2011; June 2012)

³⁹³ Interview with the author on 31st May, and 7th June, 2013, respectively

information on crime statistics especially focussing on occurrence of the different types of crimes and also by region. There have also been efforts to ensure that the Police is accessible to the media as evidenced by the introduction of Police Spokespersons at all levels (district, regional and national). Furthermore, the media practitioners do regularly interact with the current Inspector General of Police with ease. There is also within the Police a Victims' Support Unit.. Victims of crimes have a general right to information and can access their case files. However, this is not yet a common practice and is also dependent on the attitudes of prosecutors.

5.2.3 Accountability (Law)

Score: 75

To what extent are there provisions in place to ensure that law enforcement agencies have to report and be answerable for their actions?

The Constitution sets the tone to open up the justice system to all persons who have a legal issue to be resolved. This includes both civil and criminal.³⁹⁴ The DPP prosecutes criminal cases on behalf of the public³⁹⁵ but the law allows for private legal practitioners to prosecute privately if so requested by the victims or where the circumstances so require. In such circumstances, the DPP is allowed to delegate powers of prosecution to any qualified person to privately prosecute any case.³⁹⁶ Using this procedure, individuals have applied for private prosecution of certain offences.

The DPP may be summoned by the Legal Affairs Committee of Parliament to account for how he has used the powers given to him under the Constitution and any other laws.³⁹⁷ More specifically, if the DPP decides not to prosecute any case, the decision shall solely be of the DPP but he is required to disclose such reasons to the Legal Affairs Committee of Parliament.³⁹⁸

The law provides for an Independent Police Complaints Commission³⁹⁹ which is mandated to receive and investigate public complaints against the Police.⁴⁰⁰ Further to this, there is an internal disciplinary procedure which handles allegations of misconduct against police officers.⁴⁰¹ Outside the police set up, complaints by the public have routinely been handled by the office of the Ombudsman⁴⁰² and the Malawi Human Rights Commission.⁴⁰³

³⁹⁴ *Ibid.*, section 41(1), (2), & (3)

³⁹⁵ *Ibid.*, section 99(1)

³⁹⁶ Criminal Procedure & Evidence Code, section 79(1)

³⁹⁷ *Ibid.*, proviso to section 101

³⁹⁸ *Ibid.*, section 99(3)

³⁹⁹ Police Act, Part XIII

⁴⁰⁰ *Ibid.*, section 129

⁴⁰¹ *Ibid.*, section 51

⁴⁰² Constitution, section 123

⁴⁰³ *Ibid.*, section 130

The powers to investigate and prosecute corruption by members of the Police are held by the Anti Corruption Bureau which is an independent institution set up under the Corrupt Practices Act tasked to investigate and prosecute all instances of corruption.⁴⁰⁴

There is no immunity from prosecution and the Constitution sets the tone by providing that no person is above the law.⁴⁰⁵ More specifically, the law provides that an officer can be prosecuted for a criminal act.⁴⁰⁶ There is also a list of disciplinary misconduct e.g. use of live ammunition without lawful orders, for which an officer can also be found criminally liable.⁴⁰⁷ Upon conviction, however, such officer cannot be sued for civil liability in regards to the same matter.⁴⁰⁸

5.2.4 Accountability (Practice)

Score: 50

To what extent do law enforcement agencies have to report and be answerable for their actions in practice?

The DPP stated that the accounting his office does is more reactive than periodical. The accounting is also made to specific offices/stakeholders and not to the public.⁴⁰⁹ Firstly and as a matter of practice, the Legal Affairs Committee may inquire into the reasons for discontinuing a case and secondly may from time to time summon the DPP to explain on certain matters. He further stated that the Attorney General may from time to time seek explanation on how he is handling matters.⁴¹⁰

The DPP emphasized that he is required under the law to give reasons for discontinuance of a prosecution.⁴¹¹

The Independent Complaints Commission has not been set up despite the legal provisions to establish it. The other complaints handling mechanisms however are functioning. For instance, the Malawi Human Rights Commission handled the *Chasowa case* by undertaking investigations into the matter after the deceased's family was dissatisfied with the police investigations.⁴¹²

⁴⁰⁴ Corrupt Practices Act, section 11

⁴⁰⁵ Constitution, section 12(f)

⁴⁰⁶ Police Act, section 49(1)

⁴⁰⁷ *Ibid.*, section 51

⁴⁰⁸ *Ibid.*, section 49(2)

⁴⁰⁹ Interview with the author, 7th June, 2013

⁴¹⁰ *Ibid*

⁴¹¹ Constitution, section 99(2)

⁴¹² MHRC Report on the Death of Robert Chasowa, May, 2013.

As regards other offences, law enforcement officers are not immune from the hand of the law and on numerous occasions they have also been called upon to account in the courts of law. The DPP pointed to the recent example where Police officers were charged with various offences, including murder, for their heavy handedness in suppressing public demonstrations which saw about twenty protesters killed.⁴¹³ This matter has also been widely reported in the Malawi media.⁴¹⁴

It is clear that despite having the legal provisions, the law enforcement agencies have not effectively accounted for their actions except where the issues touch on criminality. The much touted Independent Complaints Commission has not yet been set up three years after the law was passed for its establishment.

5.2.5 Integrity Mechanism (Law)

Score: 50

To what extent is the integrity of law enforcement agencies ensured by law?

There is a Disciplinary Code of Conduct for police⁴¹⁵ which is set out in the schedule to the Police Act. The Ministry of Justice has also compiled a Code of Conduct for Prosecutors in Malawi⁴¹⁶. On the one hand, the Disciplinary Code of Conduct for Police Officers does not have any provisions relating to conflict of interest. The Code of Conduct for Prosecutors on the other hand has rules on conflict of interest for prosecutors. These are found in rules requiring the independence of prosecutors⁴¹⁷ rules requiring impartiality of prosecutors⁴¹⁸ and the roles of prosecutors in administration of justice.⁴¹⁹ All these provisions have elements of conflict of interest among other issues.

The Disciplinary Code of Conduct for Police has rules relating to gifts and hospitality. It provides that no officer shall accept any gift from the public in respect of anything he has done in the course of his employment without the knowledge and consent of the IG.⁴²⁰ The code of conduct for prosecutors, on the other hand does not specifically provide for gifts and hospitality. Neither the Disciplinary Code of Conduct for Prosecutors nor the Code of Conduct for Prosecutors has any provisions for post-employment restrictions. Further to this, neither code has any provisions relating to declaration of assets.

⁴¹³ *Ibid*

⁴¹⁴ *Nyasatimes* 'Malawi cops on murder rap freed on bail' 13th May, 2013, available; <http://www.nyasatimes.com/2013/05/13/malawi-cops-on-murder-rap-freed-on-bail-july-20-killings/>

⁴¹⁵ Police Act, section 52

⁴¹⁶ Criminal Procedure & Evidence Code, Section 76(2)

⁴¹⁷ Code of Conduct for Prosecutors, Part 2

⁴¹⁸ *Ibid.*, Part 3

⁴¹⁹ *Ibid.*, Part 4

⁴²⁰ Disciplinary Code of Conduct for Police Officers, section 12

Thus, although both the police and the office of the DPP have codes of conduct, the same are not comprehensive in that some important integrity issues have either not been adequately addressed or not addressed at all.

5.2.6 Integrity Mechanism (Practice)

Score: 50

To what extent is the integrity of members of law enforcement agencies ensured in practice?

The PAO stated that for the Ministry of Internal Affairs and Public Security indicated that the code of conduct has not been very effective in curbing unethical behavior.⁴²¹ On the other hand, the DPP stated that the code of conduct for prosecutors has been effective in ensuring ethical behaviour of the prosecutors especially those under his charge.⁴²² He indicated that his charge only relates to civilian prosecutors, thus those under the Ministry of Justice (State Advocates), those working with public institutions mandated to prosecute specific offences under their mandate, and those he provides consent to do private prosecution. He indicated that prosecutors under the Malawi Police Service are under the charge of the Inspector General although they are also guided by the same code.⁴²³

Both the PAO and the DPP indicated that police officers and prosecutors undergo training on the code to familiarise themselves with their obligations under the code.⁴²⁴

Unlike the Code of Conduct for Prosecutors, the code governing the police has a special disciplinary committee. For officers above the rank of inspector, the Police Service Commission shall be responsible for their discipline⁴²⁵ whilst those below the rank of sub-inspector, the IG shall deal with their disciplinary issues through police disciplinary committees.⁴²⁶ The DPP indicated that the code is enforced by the general ministry's disciplinary committee under his supervision.

⁴²¹ Interview with the author, 31st May, 2013

⁴²² Interview with the author, 7th June, 2013

⁴²³ *Ibid*

⁴²⁴ Interview with the author, 31st May, and 7th June 2013, respectively

⁴²⁵ Police Act, section 53(1)(a)

⁴²⁶ *Ibid.*, section 53(1)(b)

ROLE

5.3.1 Corruption Prosecution

Score: 50

To what extent do law enforcement agencies detect and investigate corruption cases in the country?

The PAO said that within the Police, there is the Fiscal Police Unit which is dedicated to investigating financial crimes and at times crimes touching on corruption. But since the establishment of the Anti Corruption Bureau, most of the corruption related investigations are referred to it since it has the direct mandate under the law to handle these investigations.⁴²⁷ The same sentiments were shared by the DPP who indicated that although his office can handle corruption related cases under the Penal Code, the trend has been to defer such cases to the ACB.⁴²⁸ The DPP stated that prosecutors may be involved in investigations but only as advisors to guide the investigators in collecting and processing evidence which may eventually be used for prosecuting an offence.⁴²⁹

The DPP indicated that the powers of the police and prosecutors in relation to corruption are adequate.⁴³⁰

The DPP stated that corruption statistics can be found with the ACB now that they defer such cases to it.⁴³¹

Recommendations

- Although there are elaborate legal provisions to ensure that appointments of the IG and the DPP are done on merit and without political machinations, experience has shown that the appointment is a reflection of the overall country political outlook. Without opening these positions to open competition and with heavy political spinning, these appointments cannot be said to be insulated from politics. This situation has translated itself in the influence the

⁴²⁷ Interview with the author, 31st May, 2013

⁴²⁸ Interview with the author, 7th June, 2013

⁴²⁹ Interview with the author, 7th June, 2013

⁴³⁰ *Ibid*

⁴³¹ *Ibid*

executive exerts on these two offices. There is therefore an urgent need to re-examine the appointment processes, security of tenure and operational set up of these two offices to ensure their independence and professionalism.

- Government should be lobbied to increase allocation to the security apparatus. One way of improving the financial situation is for government to allow these institutions to retain the revenue they realise in the course of their work. As for the investigatory powers on corruption related cases, the law now mandates the ACB to undertake investigations of corruption cases.⁴³²
- There is need to engage the relevant stakeholders to fine tune the code of conduct so that they can be effective and conclusive tools to be used in guarding issues of integrity for the law enforcement officers.
- Government and all relevant stakeholders should be lobbied to set up the Independent Complaints commission and also address the legal gaps relating to disclosure of information by the law enforcement agencies.
- There is need for elaborate regulations relating to disclosure of assets.

⁴³² Refer to Anti Corruption agency pillar

6. ELECTORAL MANAGEMENT BODY

Summary

The Election Management Body is established by the Constitution of Malawi as the (Malawi) Electoral Commission (MEC). It is mandated by the Constitution and other laws including the Electoral Commission Act, the Presidential and Parliamentary Elections Act and the Local Government Elections Act. Its overall mandate is to exercise general direction and supervision over the conduct of every election for political office in Malawi. Section 76 of the Constitution mandates the Commission to review and determine constituency and ward boundaries; determine electoral petitions and complaints and ensure compliance with constitutional provisions and any other Acts of Parliament in so far as they relate to the conduct of elections. Thus, the Electoral Commission is the principal duty bearer for the delivery of free, fair and credible elections. Although the Commission has successfully delivered four consecutive general elections since the transition to multiparty democracy, there are still challenges that impact negatively on the effectiveness of the MEC and sometimes compromise its integrity. These challenges relate to the operational independence of the Commission, access to financing and elements in the legal framework that govern the Commission and the electoral processes. Unlike other election management bodies elsewhere, the Malawi Electoral Commission has no role in regulating campaign finance of political parties and candidates.

The Table below presents the indicator scores which summarize the assessment of the Malawi Electoral Commission in terms of capacity, internal governance and their roles within the Malawian integrity system. The remainder of this section presents the qualitative assessment for each indicator.

Electoral Management Body Overall Pillar Score: 54.2/100

Dimension	Indicator	Law	Practice
Capacity 58.3/100	Indicator	Law	Practice
	Resources		50
Governance 66.7/100	Independence	75	50
	Transparency	50	75
	Accountability	75	75
Role 37.5/100	Integrity Mechanisms	75	50
	Campaign regulation	0	
	Election Administration	75	

Structure of the Malawi Electoral Commission

The structure of the MEC is spelled out in the Electoral Commission Act. It comprises of the Commission which consists of a chairperson, who has to be a judge and such as other members not being less than six. The commissioners are supported by the MEC secretariat which is headed by the Chief Elections Officer and has a number of directorates. The Commission is responsible for policy making, recruitment of management staff and exercising oversight over the secretariat. The Chief Elections Officer is supported by Directors of various portfolios established for the purpose of effective and efficient discharge of the duties of the Commission and managing daily operations of the Electoral Commission.

The MEC has three regional offices. In election years, the MEC structure extends to districts where the District Commissioners and other public servants are called upon to help with the management

of electoral activities and processes. For the delivery of civic and voter education, MEC also accredits civil society organisations.⁴³³

ASSESSMENT

6.1.1. Resources (Practice)

Score: 50

To what extent does the electoral management body have adequate resources to achieve its goals in practice?

The financial resources of the MEC come from different sources including government appropriation through the national budget and grants from development partners. Section 15 of the Electoral Commission Act provides for many sources of funds for the Commission. These include appropriation by parliament and sums of money received by the Commission in the course of discharging its duties e.g. candidate fees; grants, subsidies, bequests, donations, gifts, voluntary contributions and subscriptions from the government or any other person, foreign government, international agency or other external body of persons, corporate or unincorporated. In practice, the MEC is financed mostly by the government and development partners with the government providing most of the resources for running the commission (i.e. administrative expenses) and the development partners focussing on capacity development and other strategic activities.⁴³⁴

However, funding for electoral activities, especially for general elections, is often delayed and inadequate to enable timely procurements or implementation of the electoral calendar. A recurrent observation is that while the MEC has adopted an election cycle approach to the management of elections, government and donors in so far as their funding practices are concerned, tend to treat elections as an event that will take place every fifth year.⁴³⁵ Consequently, between elections not enough money is given to the MEC to do the ground work for subsequent elections. Resources for electoral activities begin to flow in the year before the election. This leaves very little time to do thorough preparations.⁴³⁶

⁴³³ MEC (2013) Civic and Voter Education Strategy for the 2014 Tripartite Elections (Blantyre:MEC).

⁴³⁴ Chingaipe Henry and Jeff Kabondo (2013) Report on the Review and Assessment of the Implementation of the 2009 CVE strategy (Blantyre:MEC).

⁴³⁵ Chingaipe, Henry (2013) The state of Preparedness for the 2014 Tripartite Elections, presentation made at a National Consultative Conference organized by the Malawi Electoral Support Network

⁴³⁶ EISA, Report on the 2009 general elections in Malawi.

The annual budgets for MEC have been variable. For the appropriation from Government, there have been increases based on rates of macro-economic variables that inform the national budget and specific requests that are built into the budget. However, the increases have been minimal as most election-related expenditures tend to be postponed to the actual election year.⁴³⁷ The actual election budgets also increase from one general election to another as the electoral processes get modernised in a staggered fashion. Furthermore, for the forthcoming elections in 2014, budget negotiations between MEC, the government and development partners have been protracted because of disagreements on whether to adopt a biometric registration system or not.⁴³⁸

The Commission has enough personnel for the periods between elections.⁴³⁹ However, in the election years staff numbers are found to be grossly inadequate. The Commission is allowed, under section 13 of the Electoral Commission to recruit temporary staff and to ask for officers to be seconded from other government departments to assist with the work of the Commission. Under this provision, the Commission has, in previous elections, received support from seconded staff in Information Technology, Finance Department and Electoral Services. Similar arrangements are already underway for the 2014 elections including the recruitment of temporary staff as civic and voter education assistants at constituency level.⁴⁴⁰ The Commission is a typical bureaucracy providing a career ladder and continuously upgrading the skills of staff members through local and international trainings including participation in election observation missions.

Furthermore, during the election, MEC receives logistical and transport support from the Malawi Defence Forces. Other government departments too are required to surrender some of their vehicles for use in running the elections.⁴⁴¹ Nevertheless, the administrative structure of the MEC during elections is far too insufficient to reach all the corners of the country and the permanent personnel are far too few.⁴⁴² The MEC has the central office and three regional offices only. However, the MEC administers the electoral process through structures of the local government system. In this regard, section 19 of the Electoral Commission Act obligates all District Commissioners, Clerks of Local Councils to give MEC the support and collaboration necessary for the running of the elections.

The MEC has institutional memory to the extent that most of its senior technical and management

⁴³⁷ Interviews of MEC senior staff and Commissioners with author.

⁴³⁸ A decision was finally made not to adopt a biometric system because there was not enough time to do the procurements and roll out the system and the estimated cost was deemed to be rather too high.

⁴³⁹ Interview with senior staff of the MEC

⁴⁴⁰ MEC (2013) Civic and Voter Education Strategy for the 2014 Tripartite Elections (Blantyre).

⁴⁴¹ Interview with senior Management Officer of the Commission.

⁴⁴² Author interview with a Commissioner of the MEC.

staff have been in the service for many years. However, record keeping and data management could be better to enable retrieval of information. A key weakness in this regard is that the Commission does not yet have a monitoring and evaluation unit.⁴⁴³

6.1.2. Independence (Law)

Score: 75

To what extent is the Election Management Body independent by Law?

The Malawi Electoral Commission is established by Section 75 of the Constitution of the Republic of Malawi as an independent administrative unit in charge of organising and supervising all public elections in Malawi. Similarly, Section 76(4) of the Constitution provides that “the electoral commission shall exercise its powers and duties ... independent of any direction or interference by other authority or any person”. In law, the Commission is a body corporate with perpetual succession and with all rights and duties of a legal personality⁴⁴⁴ The constitutional mandates of the Electoral Commission are further operationalized and enabled by several Acts of Parliament namely; Parliamentary and Presidential Elections Act of 1993 as amended, the Electoral Commission Act of 1998, the Political Parties (Registration and Regulation) Act of 1993, the Communications Act of 1998 and provisions of the 1930 Penal Code as amended.

Section 6(1) of the Electoral Commission Act further provides that every individual member and employee of the Commission shall perform the functions and exercise the powers provided for in the laws independently of the direction or interference of any public officer, any organ of the government, any political party, any candidate or any person whatsoever or organisation whatsoever. Besides endowing the Commission with operational independence, the legal framework, through various provisions sufficiently implies the requirement for the Commission to act with impartiality. However, a proviso to section 6 of the Electoral Commission potentially attenuates the provision for operational independence. It requires that “for the purpose only of accountability, the Commission shall be answerable, and report directly, to the President on the overall fulfilment of the functions and powers of the Commission”. It is difficult to see how in practice this excludes the possibility of the President giving instructions or directions to the Commission or its individual members.

The MEC, nonetheless, has the mandate to regulate its own procedures by standing orders and

⁴⁴³ Chingaipe and Kabondo (2013) supra.

⁴⁴⁴ Section 3 of the Electoral commission Act

powers to vary, suspend or revoke those standing orders. Further, the Minister of Justice, on recommendation of the Electoral Commission, may introduce regulations to enable it to improve its work.⁴⁴⁵ Thus, the legal framework sets generally adequate provisions entrenching the independence of the MEC.

Members of the Commission (i.e. the commissioners) are appointed under section 4 of the Electoral Commission Act (1998). The provision empowers the President, in consultation with the leaders of the political parties represented in the National Assembly, to appoint suitably qualified persons to be members of the Commission. The law excludes political office holders and persons holding public office⁴⁴⁶, and candidates for political office⁴⁴⁷ from being appointed as commissioners for the electoral commission. However, the law does not specify any other qualifications in terms of levels of education, professional experience etc. Section 12 of the Electoral Commission Act further mandates the Commission to appoint and determine terms and conditions of the Chief Elections Officer and other professional, administrative and support staff constituting the Secretariat. Recruitment of staff into the secretariat of the Commission is based on competition and is expected to follow the conventional channels of a transparent and meritocratic recruitment of the public service. While the other members of staff are usually on open term contracts, the Chief Elections Officer is employed on five year term contracts. Section 12 (2) provides that the Chief Elections Officer shall hold office for a period of five years and shall be eligible for re-appointment for a further period of five years. The law, however, does not spell out how and on what grounds the Chief Elections Officer can be removed before the expiry of his or her contract. This omission may be good or bad depending on the subjective inclinations of individuals. The omission may be good in that it protects the incumbent from removal until the expiry of contract. It therefore offers high security against arbitrary removal from office. It may be bad because if the incumbent is incompetent, the Commission may have to put up with mediocrity for far too long with potential detriment to the integrity of the electoral process.

6.1.3. Independence (Practice)

Score : 50

To what extent does the electoral management body function independently in practice?

The Malawi Electoral Commission enjoys the confidence and trust of the citizens even though there have been instances when public opinion has been skewed against it especially for its

⁴⁴⁵ Electoral Commission Act

⁴⁴⁶ Section 75(2) of the Constitution

⁴⁴⁷ Section 5 of the electoral commission act

decisions on specific issues in the electoral process. For Instance, in the 2009 general election, the commission allowed the incumbent President to use his first name on the presidential ballot instead of his surname as required by law. This act enabled the President's name to come first on the ballot and there is evidence from voter behaviour studies that this gave the President an unfair competitive edge.⁴⁴⁸ Similarly, when a retired President wanted to run again in the 2009 elections based on a narrow interpretation of the constitutional provision limiting presidential terms, the Commission skilfully used the law to postpone making a decision on the matter. When it finally decided, it was too late for the affected political party to reorganise in readiness for the election. An assessment of civic and voter education of the 2009 election found that this matter was responsible for the high number of null and void votes in the eastern region of the country.⁴⁴⁹ There was also a widespread perception that the MEC had been influenced by the ruling party in its conduct on this matter and therefore gave it competitive advantage in the electoral process.⁴⁵⁰

Members of staff are recruited through competitive processes overseen by the Commissioners and all senior staff have a minimum of university degree. However, in the recent past during the presidential tenure of Bingu wa Mutharika, there were alleged political machinations to have a Chief Elections Officer that was a loyal tribesman of the President but this did not come to pass.⁴⁵¹

Nonetheless, the people of Malawi have reasonably high levels of trust in the MEC as shown by Afro-barometer data.

The 2012 Afro-barometer reports for Rounds one, two, three and four for Malawi⁴⁵² shows that the proportions of the population with a lot of trust and with no trust at all in the MEC were almost identical in 2002. Since then the proportion of people without trust has been decreasing while that with a lot of trust has been increasing. Similarly the proportions of people with a little or somewhat trust in the MEC have been increasing especially since 2005. When the data is condensed between two categories i.e. No trust and trust, it shows that in 2012 about 66 per cent of the population had trust in MEC while only 29 per cent did not trust MEC.

⁴⁴⁸ Chinsinga, Blessings (2011) 'A Critical stock take of Malawi's 19 May 2009 Elections: Processes, Outcomes and Challenges', *Journal of African Elections*, 9(1).

⁴⁴⁹ Chingaipe and Kabondo (2013) Report on Assessment of the Implementation of the 2009 Civic and Voter Education Strategy (Blantyre: MEC).

⁴⁵⁰ Ibid.

⁴⁵¹ During this period, appointments in the public service were generally ethnicised in favour of the President's tribe. Stories related to the appointment of the Chief Elections Officer were awash on web based news outlets.

⁴⁵² available at www.afrobarometer.org.

The favourable levels of public trust in the MEC are due to the fact that the Commission and its core staff have maintained their autonomy by not taking partisan lines in the discharge of their duties. However, in a political system where Executive powers are overbearing, the conduct of the Presidency in particular has oftentimes raised questions pertaining to the independence of the Commission from the Executive branch of the government. In the recent past, two acts committed by two different Presidents stand out. In 2010, President Mutharika unilaterally and abruptly closed down the MEC, had the offices sealed and deployed armed policemen to guard the premises. This act had no legal basis and raised questions about the independence of the MEC.⁴⁵³ The second act was committed by President Joyce Banda when she ostensibly provided for cabinet oversight over the MEC. The Vice President, Khumbo Kachali, was designated as Minister responsible for a number of institutions including the MEC. This act generated a lot of resistance and criticism from the Electoral commissioners, electoral stakeholders including development partners and the general public as captured in print media and numerous phone-in radio programmes on various radio stations. The designation was rescinded, arguably, to cool off vehement criticism as the government argued that the president was simply delegating to the vice president her role assigned by the proviso in section 6 of the Electoral Commission Act as cited earlier above. The appointment of Electoral Commissioners under section 4 of the Electoral Commission Act (1998) has, in practice, led to squabbles among political parties especially during the presidential tenure of Bingu wa Mutharika. Unlike his predecessor who used to ask for nominations from political parties, Mutharika made all the nominations and instead of consulting with the parties, they were simply informed. The court ruled that the President was not legally required to ask for nominations and the mode of consultation was left to the discretion of the President.⁴⁵⁴ Thus, other than through the leaders of political parties represented in Parliament, there are no other serious mechanisms to avert abuse of presidential discretion in the appointment of electoral commissioners. Furthermore, the role of the political leaders is merely consultative to the extent that the President is under no legal obligation to take their proposals or recommendations. This arrangement has, for all practical purposes, raised questions about the independence as well as impartiality of appointed commissioners and, by extension, the neutrality of the Electoral Commission itself.

The independence of the Commission is also compromised by pre-emptive political statements, often made by the propaganda machinery of the ruling parties. For example, prior to the 1999 Presidential and Parliamentary Elections Malawi Congress Party (MCP) and Alliance for Democracy (AFORD), went into an alliance which resulted into a presidential candidate and his running mate coming from different political parties. On March 2nd, 1999 the MCP/AFORD

⁴⁵³ The closure was purportedly done because there was a case of alleged fraud.

⁴⁵⁴ MCP and UDF V Attorney General, Miscellaneous Civil Cause No.xxx of 2007.)

Alliance sought the Electoral Commission's clarification, on the basis of the PPEA, as to whether the commission could print two different symbols for one electoral ticket. The President announced the Electoral Commission's decision on the issue at a political rally before an official announcement was made by the Commission. The subsequent determination of the Commission was that it would not accept nominations of a presidential candidate whose registered party is different from that of his running mate.⁴⁵⁵ The decision was challenged and reversed in the High Court but the question that remained was about the extent to which the Malawi Electoral Commission is impartial and independent from the President under the current arrangement. Similarly, during the 2009 election period, ruling party functionaries pre-empted the decision of the Commission on whether retired president Bakili Muluzi could run again for office after a five year break by running propaganda programmes on this issue on both radio and television stations controlled by the state.

On another note, there has also been an outcry from stakeholders over the role of District Commissioners as District returning officers during elections.⁴⁵⁶ The concerns revolved around the fact that District Officers are civil servants in the Office of the President and answerable to the President. Furthermore, there was observed a trend in which the Office of the President used to transfer and reallocate District Commissioners during the election year in order to place more loyal District Commissioners in strategic districts for the ruling party where they could serve as returning officers and possibly act in favour of the party in government. This arrangement was perceived as creating conflict of interests on the part of District Commissioners. The Electoral Commission has finally decided to no longer use District Commissioners as returning Officers beginning with the general election in 2014.⁴⁵⁷

Overall, then, the Electoral Commission enjoys a reasonable degree of operational autonomy. However, there are common perceptions, given the over-powering presidency that Malawi has, that there is a modicum of executive influence in the Commission.

⁴⁵⁵ Patel, Nandini (2000) *The 1999 Elections: Challenges and Reforms in* Martin Ott, Kings Phiri and Nandini Patel (eds.) *Malawi's Second Democratic Elections: Process, Problems and Prospects* (Kachere Books).

⁴⁵⁶ Chinsinga, Blessings (2011) 'A critical stock take of Malawi's 19 May 2009 Elections: Processes, Outcomes and Challenges', *Journal of African Elections*, 9(1); EISA (2009): *Malawi: EISA Election Observer Mission Report No.30*.

⁴⁵⁷ Interview with MEC Commissioner for Electoral Services.

6.2.1. Transparency (law)

Score: 50

To what extent are there provisions in place to ensure that the public can obtain relevant information on the activities and decision-making processes of the Election Management Body?

Legislation on transparency on the conduct of the Electoral Commission is not cast in one provision of the law. It is mainstreamed in the stages of the electoral process itself. The Electoral Commission and its agents are required to make public different pieces of information at different stages in the electoral process. For example, information on polling stations, names of candidates, election results etc is required to be published in the Government Gazette and in other print media outlets. While money plays a very significant role in politics, particularly in the electoral process, there is no legal framework in Malawi that regulates this. Because of these legislative limitations, neither the Electoral Commission nor any other body has mandate to regulate the way political parties and candidates finance their campaign or political activities in general. (see also 6.3.1 in under this pillar report).

6.2.2. Transparency (Practice)

Score: 75

To what extent are reports and decisions of the electoral management body made public in practice?

The election periods in Malawi are often accompanied with a lot of hype which creates pressure on the Electoral Commission to be responsive to information needs of civil society organisations and the general public. Consequently, The Electoral Commission has adopted an electoral cycle approach to the management of elections and conducts regular consultative meetings to update stakeholders or to seek inputs on specific issues.⁴⁵⁸ Furthermore, there is a strong watch dog and advocacy role played by civil society organisations, especially, the Malawi Electoral Support Network (MESN) which monitors the implementation of the electoral cycle and organises accountability and information sharing sessions involving the Electoral Commission, development partners and other election stakeholders. Furthermore, the Electoral Commission has a directorate of Media and Public Relations During election periods, press conferences by Electoral

⁴⁵⁸ Author Interview with the Deputy Chief Elections Officer.

Commissioners, press releases by the Chairman and Chief Elections Officer and television and radio entries are used to provide information to the general public. Although dates for the general election are set by the Constitution, the electoral calendar is not fixed or predetermined. While the Commission releases its Operational plan in good time, it has been a common observation that release of information on the electoral calendar for the 2014 election has been unduly delayed.⁴⁵⁹

The Electoral Commission has a website (www.mec.org.mw) providing information on its functionality and role. However, the website is not regularly updated.

6.2.3. Accountability (Law)

Score 75

To what extent are there provisions in place to ensure that the EMB has to report and be answerable for its actions?

The Electoral Commission has many external stakeholders including political parties, civil society organisations, development partners, candidates for political office and voters. The legal framework, comprising of the Constitution, the Electoral Commission Act, the Presidential and Parliamentary Elections Act and the Local Government Act defines relations with the stakeholders subject to the actual say that they have in the electoral process. For example, for Civil society organisations, relationships range from being partners in providing civic and voter education to one in which CSOs become electoral observers.⁴⁶⁰ For some of the relationships, for example with CSOs accredited to provide civic and voter education, there are more detailed memoranda of understanding or codes of conduct which help in operationalizing provisions of the law.⁴⁶¹

All decisions of the Electoral Commission which affect the rights of any person or organisation and party are subject to review. The Commission has internal mechanisms for the review process on decisions such as accreditation of CSOs to provide civic and voter education⁴⁶², nomination of candidates, declaration of electoral results etc.⁴⁶³ Furthermore, under section 76(5)(a) of the Presidential and Parliamentary Elections Act, complainants have rights to ask for judicial review of the decisions of the Electoral Commission. However, for some decisions, there have been

⁴⁵⁹ Communique of Malawi Electoral Support Network on the State of Preparedness for the 2014 Tripartite Elections.

⁴⁶⁰ Kanyongolo, Edge (ed.) Democracy in Progress: Malawi's 2009 Presidential and Parliamentary Elections (Blantyre: Kachere Books).

⁴⁶¹ See sample agreements in MEC (2013) Civic and Voter Education Strategy for the 2014 Tripartite Elections (Blantyre: MEC)

⁴⁶² Interview with MEC commissioner for Civic and Voter Education and with the Director of Civic and Voter Education.

⁴⁶³ Electoral Commission Act

concerns with the timeframes required by law. For example, a decision on the results of the election could only be challenged if the complaint were registered within 48 hours after the declaration of results. This time limit was considered by political parties and election observers⁴⁶⁴ to be too restricting as it was not possible within 48 hours to gather the evidence and lodge a formal complaint. This law was, however, amended in July 2013 so that starting with the 2014 elections, the period for complaints will be seven days⁴⁶⁵ especially for presidential results because the President is sworn in very quickly before complaints related to his election are resolved.

The Electoral Commission is by law required to produce various reports on various matters and the reports are made public. For example, reports on constituency and ward (re)demarcations are filed with Parliament under section 76(5)(b) of the constitution. Financial reports of the Commission are required by section 16 of the Electoral Commission Act and are made public by publishing in the Gazette and presented to parliament by the Minister in accordance with the requirements of the Public Finance Management Act and Public Finance Audit Act. Furthermore, the provisions under this section require the commission to keep books of accounts, avail them for auditing by the Auditor General or by independent professional auditors.

For all electoral irregularities, political parties and candidates are afforded legal rights to seek redress. Sections 113 and 114 of the Presidential and Parliamentary Elections Act and sections 96 and 97 of the Local Government Elections Act provide for complaints and appeals by candidates and political parties with respect to any irregularity in the electoral process.

6.2.4. Accountability (Practice)

Score: 75

To what extent does the EMB have to report and be answerable for its actions in practice?

The Chief Elections Officer is designated as the accounting officer for the Electoral Commission and appears before Parliamentary Committees and other relevant authorities to account for the work and activities of the secretariat.⁴⁶⁶ The MEC files all the reports required by law even though sometimes submission is delayed.⁴⁶⁷ However, Parliament lacks sufficient time to properly consider

⁴⁶⁴ EISA (2009) Malawi: Election Observation Report for the 2009 General Elections (Johannesburg: EISA).

⁴⁶⁵ Chingaipe, Henry and Joseph Thombozi (2013) Evaluation Report of the MESN-OSISA Project on Electoral Reforms for the 2014 Tripartite Elections (Blantyre: MESN).

⁴⁶⁶ Electoral Commission Act

⁴⁶⁷ Interview with MEC senior Management Officer.

and dispose the reports. Consequently, there are often no parliamentary debates on the reports or the debates come way too late. For example Audit reports are considered after a year or more by the Parliamentary Committee on Public Accounts.

Political parties and candidates seek redress for electoral irregularities at different levels. Multiparty liaison committees at district and sub district levels are usually the first structures that receive complaints. These committees are structures sanctioned by the Electoral Commission as mechanisms for ensuring prevention of election related conflicts. Complaints that are not resolved at district level are referred to the Commission. There was, for example, at least 228 complaints lodged with MPLCs, Police, MEC and courts in 2009.⁴⁶⁸ Complaints that have not been resolved by the Commission or to which the Commission is a party have been dealt with by the courts.⁴⁶⁹ Electoral disputes have so far been resolved peacefully as there has been no civil strife emanating from them. The courts have been able to resolve some disputes and therefore set precedents for the future.

6.2.5. Integrity (Law)

Score 75

To what extent are there mechanisms in place to ensure the integrity of the electoral management body?

The members of staff of the Electoral Commission and the Electoral Commissioners are regulated by principles explained in the standing orders of the Commission and in operational handbooks. These require them to uphold high standards of integrity especially on such matters as declaration of conflict of interest, ethical behaviour, non-partisanship and impartiality and commitment to free and fair electoral processes. For the Commissioners, section 6(2) of the Electoral Commission Act requires them to take oath of office before the Chief Justice through which they bind themselves to standards of integrity required for effective and impartial discharge of the duties of their offices. Similarly, section 13 (6) of the said Act requires every employee including the Chief Elections Officer to take oath of office before a Commissioner of oaths through which they commit to

⁴⁶⁸ See MEC Civic and Voter Education Strategy (CVE) Strategy for the 2014 Tripartite Elections and Mwale, Doc and Rachel Etter (2011) *Impact Survey of Multiparty Liaison committees, Malawi*(March, 2011; Lilongwe).

⁴⁶⁹ See Kanyongolo (2004) Courts, Elections, Democracy: The Role of the Judiciary in Martin Ott et al (eds.) *The Power of the Vote: Malawi's 2004 Parliamentary and Presidential Elections* (Kachere Books No.14) and Kanyongolo , Edge (2009) 'Back to the courts: The Role of the Judiciary in the 2009 Elections', in Martin Ott and Fidelis Kanyongolo (eds.) *Democracy in Progress: Malawi's 2009 Parliamentary and Presidential Elections* (Kachere Books No.48).

uphold the guiding principles of independence, impartiality, integrity, transparency, efficiency, professionalism and service-mindedness in conducting their duties. However, after their service in the Electoral Commission, both commissioners and staff are not subjected to any restrictions in relation to their post-service employment.

Furthermore, the Electoral Commission has developed codes of conduct for other key stakeholders in the electoral process. For example, there is a code of conduct for all providers of Civic and Voter Education providers obliging them to provide accurate, non-partisan information to voters etc. There is also a code of conduct for political parties and candidates primarily aimed at prevention and peaceful resolution of electoral conflicts.

6.2.6. Integrity (Practice)

Score 50

To what extent is the integrity of the electoral management body ensured in practice?

The code of conduct for staff is enforced reasonably well. In case of breaches, the appointments and disciplinary committee of the Commission deals with the matter in a manner provided in the terms and conditions of service.⁴⁷⁰

However, over the years, there have been concerns on the conduct of some commissioners. For example, in 1999 The Chairman of the Commission was forced to resign amidst pressure from civil society organisations for bypassing his fellow Commissioners and making a unilateral decision that compromised the independence and neutrality of the commission from the then ruling United Democratic Front.⁴⁷¹ Similarly, in 2004, the Forum for the Defence of the Constitution petitioned President Muluzi to dismiss the Chairperson of the Electoral Commission for distributing a document he obtained from Pakistan, among fellow judges that gave insights on how the doctrine of necessity could be used to keep President Muluzi in power if his bid for a third term flopped in Parliament.⁴⁷² The Chairperson was accused of cooperating with the UDF on a purely partisan manner that would affect the integrity of subsequent elections.⁴⁷³

⁴⁷⁰ Interview with senior staff of the Electoral Commission.

⁴⁷¹ Ott, Martin et al (eds.) Malawi's second Democratic Elections: Process, Problems and Prospects (Kachere Series)

⁴⁷² In Pakistan, the application of the doctrine gave the President powers overriding other laws or constitutional provisions; to make further constitutional changes as he saw fit; and to dismiss an elected National Assembly including the Prime Minister under the Legal Framework Order.

⁴⁷³ Ott, Martin et al (2004) The Power of the Vote: Malawi's 2004 Parliamentary and Presidential Elections (Kachere Series)

The other codes of conduct have a rather mixed track record of enforcement. For example, the civic and voter education code is generally adhered to but the commission lacks sufficient mechanisms in practice for enforcing it when breaches occur.⁴⁷⁴ Similarly, the Commission is handicapped when it comes to enforcing media standards, especially for public (state-owned) media houses to level the playing field for political parties and candidates.⁴⁷⁵

Roles of the Election Management Body

6.3.1. Campaign Regulation

Score: 0

Does the electoral management body effectively regulate candidate and political party finance?

The Electoral Commission is not mandated to regulate candidate and political party finance in Malawi. In fact the legal framework governing financial oversight of political parties in Malawi is not very clear. The Political Parties Registration and Regulations Act, however, provides that the Registrar of Political Parties or any person authorised in writing by the Registrar may at any reasonable time inspect and take or extract from copies of records, manifestos and/or other documents of a registered political party.⁴⁷⁶ However, the Act does not explicitly establish the Registrar as a designated authority responsible for oversight and regulation of political party finances. The Act fails to outline when reports or records are due, in what format and does not spell out sources of funds which are to be subjected to inspection. With no legal requirement for political parties to submit their accounts to the Registrar of Political Parties, there are no punitive measures spelt out for political parties that fail to avail the records or documents to the Registrar for inspection. Thus, candidate and political party finance is simply unregulated. In fact section 66 of the Presidential and Parliamentary Elections Act and section 50 of the Local Government Act allow every candidate and political party to appeal for and receive voluntary contributions from any individual or non-governmental organisation or other private organisation in or outside Malawi.

⁴⁷⁴ See Chingaipe and Kabondo (2013) Report on the Assessment of the Implementation of the 2009 Civic and Voter Education Strategy.

⁴⁷⁵ EISA (2009) Malawi: Election Observation Report on the 2009 General Election (Johannesburg).

⁴⁷⁶ . Section 14(1)(2) of the Political Parties Registration and Regulations Act (1994)

6.3.2. Election Administration

Score 75

Does the EMB ensure the integrity of the electoral process?

In accordance with its mandate and international and regional standards the Electoral Commission has organised four General Elections since 1994 in a largely independent and impartial manner. Although the MEC faces many logistical and organisational challenges, it manages to prepare for an election day that largely guarantees universal suffrage. For example, in the 2009 general election, the Commission was able to mobilise and register over 80 per cent of eligible voters and secured a voter turn-out of 78.8 per cent of registered voters.⁴⁷⁷ Minority groups have specially been targeted by both commitments in the strategic documents of the Commission and by actual practice. For example the Commission has made consistent effort to accredit organisations that represent minority groups to provide civic and voter education and advocacy targeted at those groups.⁴⁷⁸ Registration of voters, however, is often beset by logistical challenges and inadequate capacity especially with respect to equipment and finances. Consequently, the process is staggered to allow movement of equipment and some potential voters are consequently unable to register. However, the Commission provides opportunities to all voters, candidates and political parties to inspect the voters roll and verify that they have been duly registered for elections.⁴⁷⁹

The MEC is mandated to oversee the implementation of civic and voter education programme. However, monitoring and evaluation has been weak.⁴⁸⁰

Election materials, especially ballot papers have so far been secure. There have been no reports of fake ballot papers. However, it has been observed that significantly more ballot papers have been printed before and there have been unproven allegations of ballot box stuffing. However, electoral observers, both local and international as well as political parties have not adduced evidence of the allegations. The MEC has, in the past, been able to properly count the results and collate them.

⁴⁷⁷ MEC (2009) Report on the General Election of 2009 (Blantyre: MEC).

⁴⁷⁸ Chingaibe and Kabondo (2013) Report on the Assessment of the Implementation of the 2009 Civic and Voter Education Strategy (MEC: Blantyre); MEC (2013) Civic and Voter Education Strategy for the 2014 Tripartite Elections (MEC: Blantyre).

⁴⁷⁹ Author interview with MEC senior staff and Commissioners.

⁴⁸⁰ Chingaibe and Kabondo (2013) Report on the Assessment of the Implementation of the 2009 Civic and Voter Education Strategy (MEC: Blantyre); MEC (2013) Civic and Voter Education Strategy for the 2014 Tripartite Elections (MEC: Blantyre).

Recommendations

- Advocate and lobby for a legal framework that ensures that appointment of Electoral Commissioners is insulated from possible influence of partisan and executive influence;
- Advocate and lobby for passing of a legislation that empowers the Malawi Electoral Management Body to regulate campaign financing in particular and party financing in general;
- Advocate and lobby for a secure and sustainable funding of the Malawi Electoral Commission

7. OMBUDSMAN 7.

Summary

The Office of the Ombudsman is an institution established to ensure accountability and good governance by safeguarding against arbitrary use of power, especially by public sector actors. Sections 15(2) and 46(2)(b) of the Constitution provide that a person or group of persons who feel that human rights guaranteed under the Constitution have been violated or threatened may approach the Ombudsman for assistance or relief. The institution of the Ombudsman is, therefore, an important part of Malawi's accountability systems as it offers people a means through which their claims vis-à-vis the state and other powerful interests can be supported in an environment where other remedies – such as the court system- operates too slowly or inefficiently.⁴⁸¹

The Table on the next page presents the indicator scores which summarize the assessment of the Office of the Ombudsman in terms of its capacity, internal governance and its roles within Malawi's integrity system. The remainder of this section presents the qualitative assessment for each indicator. The assessment finds that the Office of the Ombudsman faces serious resource constraints. In addition, there have been instances of political interference on the independence of the Ombudsman including open defiance by government agencies when it comes to implementation of the Ombudsman's determinations. In spite of this, the office enjoys good levels of public trust. Integrity mechanisms are however weak and would require further strengthening.

⁴⁸¹ Mario Classen, Carmen Alpin-Lardies, *Social Accountability in Africa: Practitioners' Experiences and Lessons* (African Books Collective : 2010) 96.

Ombudsman

Overall Pillar Score: 55.53/100

Dimension	Indicator	Law	Practice
Capacity 58.33/100	Resources	-	25
	Independence	100	50
Governance 58.33/100	Transparency	75	50
	Accountability	75	50
	Integrity Mechanisms	50	50
Role 50/100	Investigation	50	
	Promoting good practice	50	

Structure and Organisation

The Office of the Ombudsman is a constitutional body, established by Sections 120-128 of the Constitution of Malawi. It commenced its operations in the country in 1996. According to section 123 (1) of the Constitution, the Ombudsman investigates cases where it is alleged that any person has suffered injustice, and it does not appear that there is any remedy reasonably available by way of proceeding in the court or by way of appeal from a court or where there is no other practicable remedy. However, the powers provided to the Office of the Ombudsman are not meant to oust the jurisdiction of the courts. Thus, the decisions and exercise of powers by the Ombudsman is reviewable by the High Court on the application of any person with sufficient interest in a case that the Ombudsman has determined. Though the wording of the Constitution provides the impression that the office of the Ombudsman can investigate complaints from both the private and public sector, the Ombudsman's work in practice is limited to the public sector.

The main offices of the Ombudsman exist in the three major cities of the country- Mzuzu, Lilongwe Blantyre in the Southern Region. Their headquarters is located in Lilongwe where they also have a regional office serving the Central Region. However, the Ombudsman makes efforts to visit rural communities so as to attend to complaints or investigations. At times, depending on the matters arising, the Ombudsman may issue a determination there and then.

Assessment

7.1.1. Resources (practice)

Score: 25

To what extent does an ombudsman have adequate resources to achieve its goals in practice?

The Constitution of Malawi, in section 125, provides that the government must make available to the Ombudsman's office adequate resources enabling it to effectively discharge its functions.⁴⁸² In addition, section 12 of the Ombudsman Act provides that all costs of running the office must be paid by Parliament.⁴⁸³ This raises the assumption that adequate money is reserved by Parliament for the effective functioning of the Ombudsman's Office. However, in practice, the Ombudsman's office is grossly underfunded. For instance, in December 2012, only 30% of the required funding was provided.⁴⁸⁴ Interviews conducted also reveal that due to limited funding, the Office struggles to conduct investigations on complaints raised in various districts of Malawi.⁴⁸⁵ Past studies reveal that funding of the office is largely unpredictable such that financial allocations can be reduced anytime without consultations.⁴⁸⁶ In addition, the procedure for disbursing money to the Ombudsman's office is too centralized in the Ministry of Finance and this results in delayed release of funds and affects the execution of important activities.⁴⁸⁷

The Ombudsman's Office has, however, benefited from some donor funding. Unfortunately, such funding has also been unreliable. Donor funding presently focuses upon crucial programmes such as clearing the backlog of cases and it is hoped that the funding will continue on a sustainable basis to ensure achievement of results. However, it is generally accepted that government must take the leading role in ensuring progressive and sustainable funding for the Ombudsman's office.

Another limitation is the fact that the Ombudsman's offices only exist in the three major cities of

⁴⁸² Section 125 of the Constitution reads: 'A person holding the office of Ombudsman shall (a) be provided with the necessary resources to discharge the functions of that office;'

⁴⁸³ Section 12 of the Ombudsman's Act reads: 'The expenditure in connexion with the office of the Ombudsman and the exercise of his power and the performance of his duties and functions shall be paid from moneys appropriated by Parliament for that purpose.'

⁴⁸⁴ Interview with MrLodzeni, Executive Secretary- Office of the Ombudsman.

⁴⁸⁵ Interview with MsNayeja, Chief Legal Officer- Office of the Ombudsman.

⁴⁸⁶ For instance see N. Patel *Promoting the effectiveness of democracy protection institutions in southern Africa the Malawi human rights commission and the office of the ombudsman*(2009) p 22. Also see BA Andreassen and T Oftedal, 'The Office of the Ombudsman (OoO) in Malawi - An Appraisal', NORAD Collected Reviews (May 2007) Commissioned by the Royal Norwegian Embassy, Lilongwe. Also see Report of the International Bar Association's Human Rights Institute (August 2012) p. 28.

⁴⁸⁷ Interview with MrLodzeni, Executive Secretary- Office of the Ombudsman.

Malawi (Lilongwe, Blantyre and Mzuzu). However, plans are underway to open outreach offices in two more districts.⁴⁸⁸ To address the current limitation of office space, the Ombudsman makes efforts to visit rural areas in order to attend to complaints and investigations. The unavailability of adequate vehicles, however, makes it difficult to undertake such travels as is necessary.⁴⁸⁹

In regard to human resources, there is also considerable turn-over of Ombudsman staff.⁴⁹⁰ The problem is a result of poor conditions of service and claims bordering on abuse of office by senior officers. Regarding the former, all other constitutional bodies⁴⁹¹ offer better conditions of service than the Ombudsman's Office⁴⁹² and this sometimes leads to staff demotivation or seeking better opportunities elsewhere.

There is also lack of career development and training opportunities for staff due to limited financial resources. In spite of the above, many staff are well qualified for their positions with at least over 25 of them being university graduates in relevant fields.⁴⁹³ Nevertheless, there is still need for constant skills development programs, especially in investigations skills, for staff.⁴⁹⁴

In sum, there is high risk of government easily frustrating the operation of the Office by withholding funds and thus compromising its independence. In addition, though evidence suggests that staffs are well qualified for their positions and that continuous attempts are being made to ensure that vacant positions are filled, staff turnover remains a considerable challenge mainly due to the Office's poor conditions of service. Skill development programmes for staff are also largely non-existent and this is often a demotivating factor for staff. In addition, subtle hostilities over concerns of nepotism amongst some members of staff have somewhat contributed to demotivation and disloyalty.

⁴⁸⁸ Interview with MrLodzeni, Executive Secretary- Of- fice of the Ombudsman.

⁴⁸⁹ Interview with MsNayeja, Chief Legal Officer- Office of the Ombudsman.

⁴⁹⁰ Ibid.

⁴⁹¹ Like the Malawi Human Rights Commission and the Malawi Law Commission.

⁴⁹² Interview with MrLodzeni, Executive Secretary- Of- fice of the Ombudsman

⁴⁹³ Interview with MrLodzeni, Executive Secretary- Of- fice of the Ombudsman.

⁴⁹⁴ Interview with MsNayeja, Chief Legal Officer- Office of the Ombudsman.

7.1.2 Independence (law)

Score: 100

To what extent is the ombudsman independent by law?

Section 121 of the Malawi Constitution⁴⁹⁵ and section 13(j) of the Ombudsman Act⁴⁹⁶ provides for the independence of the Ombudsman.

An important safeguard of independence also rests upon security of tenure and appointment. Thus, it is Parliament that appoints the Ombudsman. Sections 122 of the Malawi Constitution stipulates that nominations for appointment as Ombudsman should be obtained from the public through a public advertisement placed by the clerk of the National Assembly and that the successful candidate should be appointed by the Public Appointments Committee. Section 121 illustrates that the Ombudsman reports to the National Assembly whilst section 128 (2) provides that the Ombudsman shall only be removed from office for reasons of gross misconduct or upon reaching the retirement age of 65 or for reasons where that person would have been disqualified from being appointed.

In addition, to avoid conflict of interest, the appointee may not be the President, Vice-President, a Minister or Deputy Minister, serving public officer or Member of Parliament.⁴⁹⁷ Section 128 of the Constitution lays down a five-year term of office which may be extended for a further five years if the Public Appointments Committee considers it appropriate to do so.

In addition, the immunity that the Ombudsman enjoys helps to ensure independence. Section 125 of the Constitution guarantees the Ombudsman the same protection and privileges as those enjoyed by Members of Parliament in so far as they are appropriate. Similarly, section 11 of the Ombudsman Act provides that the Ombudsman or any member of staff of the Ombudsman shall not be liable in respect of anything done or performed in good faith under the Act. The Ombudsman's salary, which may not be reduced without his or her consent, is paid out of the Consolidated Fund.⁴⁹⁸

⁴⁹⁵ Section 121 of the Malawi Constitution reads: 'in the exercise of his or her powers, functions and duties the Ombudsman shall be completely independent of the interference or direction of any other person or authority but shall otherwise be answerable to Parliament.'

⁴⁹⁶ 'Any person who—does anything calculated improperly to influence the Ombudsman in respect of any matter being or to be considered by the Ombudsman in relation to any inquiry or investigation shall be guilty of an offence...'

⁴⁹⁷ See section 122 (2) f.

⁴⁹⁸ See section 125 (d) of the Constitution.

In a bid to deliver efficiently and effectively the service required by the Constitution, the Ombudsman Act in section 4 empowers him/her to recruit staff to assist him/her.

7.1.3 Independence (practice)

Score: 50

To what extent is the ombudsman independent in practice?

There is potential for the Ombudsman to operate independently in practice. However, this is largely dependent upon the personality of the Ombudsman and the practice of the government in power to either respect or undermine the role of the Ombudsman.⁴⁹⁹ This is observed in light of the fact that parliamentary oversight functions are largely weak.⁵⁰⁰

However, credit is given towards the security of tenure strongly enshrined in the Constitution. It is uncommon to hear that an Ombudsman has been removed due to political interference prior to the end of his/her term.⁵⁰¹ Similarly, it is not common for staff to be removed in such a manner.⁵⁰² Terms and conditions of service are clear on proper procedures for removal of staff in the Ombudsman's office. However, since the Ombudsman Act empowers the Ombudsman to hire his/her own staff, it is alleged that these discretionary powers are sometimes abused to appoint unqualified or under-qualified individuals into key positions in return for a variety of favours.⁵⁰³

There is also public openness regarding the operation of Ombudsman's office such that complaints by victims to the Ombudsman's Office are usually presented without fear of retaliation. Government agencies generally do not hinder would-be-complainants to access the Ombudsman's Office though once recommendations against the respective agencies are made, there is a tendency of non-compliance by such agencies.⁵⁰⁴ However, there are some concerns regarding complaints filed by employees or former employees of the Malawi Defence Force (MDF) who have indicated that they have experienced some form of retaliation (i.e. intimidation to withdraw their complaints from the ombudsman) by MDF because of the complaints filed.⁵⁰⁵ To counter this hostility, the Ombudsman is currently making efforts to ensure the MDF's cooperation.⁵⁰⁶

⁴⁹⁹ Interview with MsNayeja, Chief Legal Officer- Office of the Ombudsman.

⁵⁰⁰ MwizaNkhata 'Rethinking Governance and Constitutionalism in Africa : the relevance and viability of social trust-based governance and constitutionalism in Malawi' (2010) Phd Thesis p. 218-219. Also refer to accountability indicator for further information.

⁵⁰¹ Interview with MsNayeja, Chief Legal Officer- Office of the Ombudsman.

⁵⁰² Ibid.

⁵⁰³ Farzana Nawaz *Overview of corruption and anti-corruption in Malawi* Transparency International: 2012.

⁵⁰⁴ See United States Department of State '2011 Country Reports on Human Rights Practices – Malawi.'

⁵⁰⁵ Interview with Ms Nayeja, Chief Legal Officer-Office of the Ombudsman

⁵⁰⁶ Ibid.

7.2.1 Transparency (law)

Score: 75

To what extent are there provisions in place to ensure that the public can obtain relevant information on the activities and decision-making processes of the ombudsman?

Section 127 of the Constitution stipulates that the Ombudsman must submit a report to the National Assembly comprising a record of 'all complaints and applications to the Office of the Ombudsman, a record of exercise of powers in relation to applications, of the remedies afforded to applicants in respect of grievances and a record of the general recommendations of the Ombudsman in respect of grievances.' Thus the Ombudsman is expected to submit annually, not later than 31st March, such report to the Speaker of the National Assembly regarding all the Ombudsman's activities the previous year.⁵⁰⁷ The report is also open for public scrutiny and is laid before parliament as well as distributed to various stakeholders.

The law also safeguards the confidentiality of certain information that the Ombudsman may come into contact with. Hence, in cases where the Ombudsman's report contains information which may not be made public on grounds of confidentiality, that report is to be laid before the National Assembly as a confidential paper for submission to a select committee of the National Assembly.⁵⁰⁸ Consideration of the question of whether the report contains such confidential information is made by such select committee of the National Assembly and no person having access to that report is to disclose such information. Section 10 of the Ombudsman Act also proceeds to state that the Ombudsman and his/her staff are to aid in preserving secrecy in respect of the instances or matters that may come to their knowledge in the performance of their duties. Thus, Section 13 (e) of the Ombudsman Act provides for offences and penalties applicable to any person who discloses the contents of any document in the possession of the Ombudsman or his/her staff.

However, in relation to declaration of assets, the Ombudsman and his/her senior staff are not required to disclose their assets upon appointment/recruitment. The possession of assets and the lack of disclosure vis-à-vis the Ombudsman's Office has not raised substantial concern in the past nor in the present.⁵⁰⁹

⁵⁰⁷ Section 9 (2) of the Ombudsman Act.

⁵⁰⁸ Section 9(4) of the Ombudsman Act.

⁵⁰⁹ Interview with MrLodzeni, Executive Secretary- Office of the Ombudsman.

7.2.2 Transparency (practice)

Score: 50

To what extent is there transparency in the activities and decision-making processes of the ombudsman in practice?

The report produced by the Ombudsman on its activities is publicly available. Though efforts are made to disseminate the report to various stakeholders, the general public's accessibility to it is limited. In addition, in spite of credible attempts by the current Ombudsman to ensure production of annual reports within the timeframe set by legislation, resource limitations and poor coordination and preparation have made it difficult to do so.⁵¹⁰ Thus the report is often overdue.

The Ombudsman also does not have an official website through which information on its functionality and role can be published. However, there have been on-going plans to establish the same.⁵¹¹ Information on the role and functioning of the Ombudsman is thus often made available through brochures produced by the Ombudsman's office. The office does also have a facebook page where it interacts with the public. Using this facility, the public can also lodge complaints and there is an effort to get back to the complainant within 48 hours. The civic education department is the unit responsible for the production of such information. Resource limitations hinder wide scale public awareness programmes to be undertaken by the department.⁵¹² However, public outreach programmes have been strategically planned for the year 2013, some of which are supported by donor aid through avenues such as the Human Rights Support Project.⁵¹³ Nevertheless, the International Bar Association Human Rights Institute's study on Malawi reports of concerns that the current Ombudsman is not as visible in the community as was the previous Ombudsman.⁵¹⁴ However this is attributed to gross lack of resources to enable the office and the Ombudsman operate effectively thereby compromising the visibility aspect.⁵¹⁵

7.2.3 Accountability (law)

Score: 75

To what extent are there provisions in place to ensure that the ombudsman has to report and be answerable for its actions?

The Ombudsman is accountable to Parliament. Section 127 of the Constitution stipulates that the

⁵¹⁰ Interview with MsNayeja, Chief Legal Officer- Office of the Ombudsman.

⁵¹¹ Ibid.

⁵¹² Ibid.

⁵¹³ Ibid.

⁵¹⁴ International Bar Association's Human Rights Institute Rule of law in Malawi: the road to recovery (August 2012 report)

⁵¹⁵ See also NSO, Baseline Survey on Democratic Accountability in Malawi – Draft Report (Zomba; Government of Malawi, 2012

Ombudsman must submit a report to the National Assembly comprising a record of his/her activities in the previous year. The Ombudsman is also expected to compile a full report in respect of every matter inquired into or investigated by him/her which has not been rectified or remedied to the satisfaction of the Ombudsman.⁵¹⁶

The Speaker of the National Assembly is mandated by law to lay before the National Assembly every report submitted within fourteen days of its submission or fourteen days after the commencement of its next sitting.⁵¹⁷

In addition, the decisions and powers of the Ombudsman are subject to judicial review. Thus, section 123 (2) of the Constitution stipulates that the powers of the Ombudsman “shall not oust the jurisdiction of the courts and the decisions and exercise of powers by the Ombudsman shall be reviewed by the High Court on the application of any person with sufficient interest in a case the Ombudsman has determined.” Similarly, section 6 of the Ombudsman Act provides that the Ombudsman or any of his/her staff is compellable to answer any question in any proceedings in a court of law or institution established under any law in connection with any information which came to his/her knowledge.

At the same time, the law strikes a balance by stipulating in Section 1111 of the Ombudsman Act that the Ombudsman or his/her staff shall not be liable in respect of anything done in good faith under the Ombudsman’s Act.⁵¹⁸ Hence, the Ombudsman is given sufficient latitude to freely and effectively discharge his/her duties through the protection guaranteed by law but at the same time, is to be held accountable for any questionable conduct undertaken during the course of his/her work.

7.2.4 Accountability (practice)

Score: 50

To what extent does the ombudsman report and is answerable for its actions in practice?

The Ombudsman does make a commendable effort to submit its annual reports to Parliament. However, due to resource constraints and poor coordination, the report is rarely submitted in proper time.⁵¹⁹ When submitted, the information is also rarely debated in practice in spite of the requirement of the law that the Speaker is to lay it before Parliament.⁵²⁰ Thus, Parliament shows a

⁵¹⁶ Section 9(1) of the Ombudsman Act

⁵¹⁷ Section 9 (3) of the Ombudsman Act.

⁵¹⁸ Also read with section 125 (c) on the immunity enjoyed by the Ombudsman.

⁵¹⁹ Interview with MsNayeja, Chief Legal Officer- Office of the Ombudsman.

⁵²⁰ Interview with Mrlodzeni, Executive Secretary- Office of the Ombudsman.

lack of commitment in effectively discharging its oversight role in regard to the Ombudsman's functions. However, the Legal Affairs Committee of Parliament does periodically summon the Ombudsman and holds her to account over certain actions.⁵²¹ In such cases, the Legal Affairs Committee will follow up on certain cases or request updates on the activities being undertaken by the Ombudsman. However, a thorough debate over the contents of the Ombudsman's annual report is not undertaken by the Committee. Thus, the overall oversight role that Parliament assumes over the Ombudsman's functionality is weak.

7.2.5 Integrity Mechanisms (law)

Score: 50

To what extent are there provisions in place to ensure the integrity of the Ombudsman?

The Office of the Ombudsman does not have its own code of conduct that addresses integrity issues. However, the Ombudsman and her staff draw guidance from the Malawi Public Service Regulations and the Public Service Code of Conduct which have provisions on conflict of interest and other integrity concerns.⁵²² Furthermore, the Office of the Ombudsman also uses the International Ombudsman Institute Code of Conduct. In addition, terms and conditions of service, also provide guidance on integrity issues and expected staff conduct though not comprehensively.⁵²³ Ombudsman staffs are also required to swear an oath of secrecy to ensure that they safeguard confidential issues in the conduct of their work.⁵²⁴ In addition, the Ombudsman Act makes provisions for the preservation of confidentiality by the Ombudsman and his/her staff.⁵²⁵ Further guidance on integrity issues are also sought from the Corrupt Practices Act which has regulations on gifts and hospitality offered to civil or public servants as well the Malawi Public Service Act which also provides for impartiality and independence from political interference of the public work service.

In spite of the above, loopholes still exist that necessitate the establishment of a coordinated legal framework that addresses integrity concerns. For instance, the swearing of an oath of secrecy for staff members is undoubtedly crucial. However, the oath of secrecy in and of itself is brief and does not adequately address issues of integrity. In fact, it only emphasizes the need to preserve secrecy over confidential information obtained when discharging one's duty. This therefore overlooks other important aspects of integrity such as gift and hospitality regulations. There are also no regulations regarding asset declaration for the Ombudsman and senior staff.

⁵²¹ Interview with MsNayeja, Chief Legal Officer- Office of the Ombudsman.

⁵²² Interview with MrLodzeni, Executive Secretary- Office of the Ombudsman.

⁵²³ Ibid.

⁵²⁴ Interview with MsNayeja, Chief Legal Officer- Office of the Ombudsman.

⁵²⁵ See Section 10 of the Ombudsman Act.

7.2.6 Integrity Mechanisms (practice)

Score: 50

To what extent is the integrity of the Ombudsman ensured in practice?

In spite of the gap in the law in addressing integrity issues, the practice is somewhat promising though still inadequate. For instance staff are still trained on integrity issues, including issues of confidentiality and conflict of interest.⁵²⁶ Unfortunately, training sessions are not regular due to resource constraints.⁵²⁷ Hence, the approach to addressing integrity issues is more reactive than proactive; where alleged instances of misbehaviour or misconduct are dealt with through an internal disciplinary mechanism as they arise. Though such incidences occur, they are relatively few in number as staff are mostly aware of integrity conduct when discharging their duties.⁵²⁸

Media reports also reveal that some Ombudsman staff were suspended for reporting to Parliament concerns about nepotism and abuse of office by their superiors.⁵²⁹ Although it is generally agreed that the procedure of airing out their grievances was not proper, there is also discomfort amongst some staff that the position of Parliament on the matter amounted to an attempt that stifle expressing legitimate concerns against the practices of the incumbent Ombudsman.⁵³⁰ In any case, whether such claims are justifiable or not, they seem to be of such significant concern to some lower level staff and thus affecting their motivation for work and loyalty towards the office.

7.3.1 Investigation

Score: 50

To what extent is the ombudsman active and effective in dealing with complaints from the public?

The process of lodging a complaint with the Ombudsman is not complicated. Complainants can approach the office through a written complaint or in person. However, the main problem hindering use of the Office by would-be-complainants is lack of access to the Office. The 2011 Democratic Accountability Baseline Survey reveals limited access of the Office by the public.

⁵²⁶ Interview with MrLodzeni, Executive Secretary- Office of the Ombudsman.

⁵²⁷ Interview with MsNayeja, Chief Legal Officer- Office of the Ombudsman.

⁵²⁸ interview with MrLodzeni, Executive Secretary- Office of the Ombudsman.

⁵²⁹ Malawi Today News 'Ombudsman suspends own staff for petitioning against her' 14 August 2012.

⁵³⁰ Interview with Ombudsman staff who requested anonymity.

However, for the few that access the Office, there appears to be commendable support and trust in its effectiveness as compared to other institutions such as the police. In fact the Ombudsman is perceived as being effective in investigating and prosecuting lower level maladministration cases though experts have raised strong concerns about their treatment of politically significant persons and interests.⁵³¹

However, a major hindrance is the on-going concerns of non-compliance in regard to recommendations issued by the Ombudsman.⁵³² The law does not provide the office with any Enforcement Mechanisms. All cases of non-compliance are included in the Annual Report which is sent to Parliament. It is Parliament which is supposed to take to task these non-complying officers. In practice however parliament does not perform this function hence the need to have a law in place to enable the office of the Ombudsman to enforce its decisions / determinations. As such, it is generally concluded that the capacity of the Ombudsman to influence enforcement and compliance with its recommendations is limited.⁵³³

The Ombudsman's Office is also mostly reactive in its role. As such, the Office will often only deal with complaints as they arise. Instances where the ombudsman would initiate investigations after suspecting misbehaviour without receiving a formal complaint are very rare. However, there are subtle instances where the Ombudsman has been somewhat proactive in initiating investigations in its own accord.⁵³⁴ However and in spite of such efforts, an assessment by Global Integrity in 2011 found the Office of the Ombudsman as only being moderately effective in this regard.

7.3.2 Promoting good practice

Score: 50

To what extent is the ombudsman active and effective in raising awareness within government and the public about standards of ethical behaviour?

Where appropriate, the Ombudsman undertakes consultations before issuing out any recommendations on a particular complaint insofar as it will assist in information gathering on that particular matter. However, in a bid to safeguard its independence, such collaboration is minimal so as to avoid any perceptions of undue interference from other agencies. Public campaigns for government agencies on ethical conduct are always 'planned for' activities which are never fully

⁵³¹ Farzana Nawaz *Overview of corruption and anti-corruption in Malawi* (Transparency International: 2012).

⁵³² interview with Mr Lodzeni, Executive Secretary- Office of the Ombudsman.

⁵³³ Global Integrity Report: Malawi Scorecard 2011.

⁵³⁴ Interview with Ms Nayeja, Chief Legal Officer- Office of the Ombudsman.

implemented.⁵³⁵ This has been attributed to limited financial resources to undertake such a programme. However, the presence of a Civic education department which is primarily responsible for raising awareness is a welcome and necessary attribute. In addition, through current donor support (in particular through the International Institute for Democracy and Electoral Assistance (International IDEA programme), efforts are being made to ensure a more proactive approach by the Ombudsman in dealing with cases before they arise by means of public awareness.

Recommendations

- The practice demonstrates a significant gap between the Ombudsman's role and the oversight functions of Parliament. It is recommended that the government and donors must collaborate to strengthen initiatives meant to enhance the capacity of Parliament to effectively discharge its oversight functions over institutions such as the Ombudsman.
- It is also recommended that senior management in the Ombudsman's office must lobby with the Department of Human Resource and Development for better conditions of service that should be at par with other constitutional bodies..
- Subsidiary rules, such as a code of conduct for the Ombudsman's Office to deal with conflict of interest issues, should be developed to supplement the position of the law on independence.
- Since resource constraints is the major challenge hindering public awareness programs, it is recommended that the ombudsman's office should explore opportunities to collaborate with organisations that have permanent presence in communities (especially rural communities) so as to extensively undertake public awareness campaigns.
- The status that the Office enjoys and the prominent role that it plays in the overall anti-corruption system would necessitate, as a matter of good prudence, declaration of assets for Ombudsman and senior staff.
- It is recommended that there should be an extensive and deliberate implementation of an outreach programme meant to increase awareness and visibility of the Ombudsman's office. Such a programme could be presented to donors or the Democratic Governance SWAp for possible funding (in addition to government funds). Other than print media, the Ombudsman's office should utilize other effective avenues of communication such as radio and television. Collaboration with traditional leaders and chiefs would also ensure that awareness messages

⁵³⁵ Interview with MsNayeja, Chief Legal Officer- Office of the Ombudsman.

are passed on to and embraced by rural communities. This is proposed in light of the fact that rural people have even less access to such information and are more vulnerable to abuse by powerful government agencies .

- There is need to lobby for passing of an enabling legal framework that would empower the Office of the Ombudsman to enforce its determinations.

8. National Audit Office

8.

Summary

The National Audit Office of Malawi (referred to as 'NAO' hereinafter) is another critical institution tasked by statute to provide financial oversight to Government entities and departments. NAO is generally mandated under the law to undertake audits for public funds in a bid to safeguard and optimise the use of public funds.

The assessment finds that there are major areas of concern for NAO which need to be addressed to improve its effectiveness. These include inadequate financial and human resources to discharge its duties. NAO also has problems in attracting, recruiting and retaining professionals. Lack of oversight in its operations has also resulted in the office being relaxed in its own operational requirements.

Otherwise it is noted that the Public Audit Act (2003)⁵³⁶ (referred to as 'the Act' hereinafter) provides a firm ground for providing the NAO to operate as an effective and robust oversight institution. NAO however has to strengthen its internal controls and regulatory framework to ensure that it walks the talk it preaches to other Government institutions.

NAO has, with the limitations and environment it has been working in, sought to ensure that public funds are used for the purpose they are intended for. However, reports of public funds being abused continue to dominate the public discourse. This is only underscores the fact that the role of safeguarding public funds is not limited to the NAO alone. Other actors also need to play

⁵³⁶ Chapter 37:01 of the Laws of Malawi

their part, particularly in following up on findings and recommendations of the NAO .

The table below presents the indicator scores which summarize the assessment of the NAO in terms of its capacity, its internal governance and its role within the Malawian integrity system. The remainder of this section presents the qualitative assessment for each indicator.

National Audit Office

Overall Pillar Score: 66.7/100

Dimension	Indicator	Law	Practice
Capacity 66.7/100	Resources		50
	Independence	75	75
Governance 58.3/100	Transparency	75	50
	Accountability	50	50
	Integrity Mechanisms	75	50
Role 75/100	Effective Financial Audits	75	
	Detecting and sanctioning misbehaviour	75	
	Improving Financial Management	75	

Structure and Organisation

The NAO has its foundation in the Constitution which is eventually translated in substance in the Public Audit Act. The Public Audit Act was passed echoing the precepts of the Constitution by setting up the office of the Auditor General and the National Audit Office and further providing for its operational framework.⁵³⁷ It is provided that the Auditor General's Office and NAO shall be independent of any direction or control of any authority.⁵³⁸ Although the law envisages an

⁵³⁷ Public Audit Act, section 4

independent and stand-alone institution, operationally, NAO is under the Ministry of Finance.

NAO is headed by the Auditor General.⁵³⁹ However, operationally, there is a Deputy Auditor General although the law does not recognize such an office.⁵⁴⁰ The Auditor General is appointed by President, subject to the confirmation of Parliament.⁵⁴¹ The Public Appointments Committee of Parliament is mandated to enquire into the competence of the appointee.⁵⁴² The Auditor General is assisted by members of staff of NAO who are public servants appointed just like any other civil servant. NAO has two major functions which are auditing and reporting on public funds. The NAO has its headquarters in Lilongwe, the capital city with regional offices in Blantyre and Mzuzu.

ASSESSMENT

8.1.1 Resources (Practice)

Score: 50

To what extent does the audit institution have adequate resources to achieve its goals in practice?

The Deputy Auditor General stated that the budget the institution gets is insufficient. This has been caused mainly because of the overall budgetary constraints of the Government. To make matters worse, donor partners who were vital in the area of trainings and capacity building recently stopped supporting the institution thereby exerting more pressure on an already overstretched Government budgetary allocation.⁵⁴³ Local media have reported that cooperating partners like the Royal Norwegian Embassy and Department for International Development (DfID) of the UK suspended its aid to NAO because of an audit finding that NAO had misallocated huge sums of donor funds.⁵⁴⁴

The assessment further established that the budget for NAO is controlled by Government through the Ministry of Finance which is in charge of the overall process from preparations to disbursements. The Ministry proscribes a ceiling within which the NAO has to budget. Even after

⁵³⁸ Constitution, section 184(7)

⁵³⁹ Public Audit Act, section 4

⁵⁴⁰ For further information, please see *Daily Times*, 5th September, 2012, 'Auditor General's absence affects PAC work' available: <http://www.bnltimes.com/index.php/daily-times/headlines/national/11448-auditor-generals-absence-affects-pac-work>

⁵⁴¹ Constitution, section 184(3)

⁵⁴² *Ibid*

⁵⁴³ Interview with Auditor General, 7th December, 2012

⁵⁴⁴ *Nation Online*, 'Malawi donors lose confidence in Audit Office' available; <http://www.mwnation.com/national-news-the-nation/8974-malawi-donors-lose-confidence-in-audit-office>

approval of the budget which has been prepared within the provided ceilings, the budgeted activities are not always funded in time and in full. He further said that the Government uses a Central Payment System (CPS) whereby all funds are drawn by the Accountant General which is a process riddled with delays.⁵⁴⁵

It was further noted during this assessment that there are no regular increases in financial resources for the institution. The amount allocated to the institution is determined by Government and is dependent on the competing needs in other Government departments and commitments. He further stated that NOA cannot apply directly to the Legislature in situations where the resources are insufficient. It can however make a recommendation in the reports to Parliament about the lack of adequate funds hampering its activities.⁵⁴⁶

The Deputy Auditor General observed that although the institution has strived to maintain its staff, there still remains a huge vacancy rate of about 42%. This he said has been caused because of delays by the Government to attend to its requests to recruit and in some cases failure by the institution to provide adequate and competitive packages to its staff.⁵⁴⁷ He went on to say that all staff have adequate academic backgrounds although they may have varying work experience. He indicated that currently, all auditors and accountants have to have a minimum of a diploma for them to be recruited.⁵⁴⁸ Although members of staff have had training opportunities within the institution, training outside the institution has now dwindled because of the withdrawal of donor partners who were key in supporting trainings and other capacity building activities. The current situation means that trainings have been reduced to bare necessities.

8.1.2 Independence (Law)

Score: 75

To what extent is there formal operational independence of the NAO?

Section 13 of the Constitution provides for principles of national policy which among other things requires the government to 'introduce measures which will guarantee accountability, transparency, personal integrity and financial probity and which by virtue of their effectiveness and visibility will strengthen confidence in public institutions'.⁵⁴⁹ Following through this theme, the Constitutional amendment of 1995 provides for the appointment of the Auditor General⁵⁵⁰ who shall be the head of the NAO.⁵⁵¹ This means that the NOA is both constitutional and statutory institution.

⁵⁴⁵ Interview with the Auditor General, 7th December, 2012

⁵⁴⁶ *Ibid*

⁵⁴⁷ *Ibid*

⁵⁴⁸ *Ibid*

⁵⁴⁹ Constitution, section 13(o)

⁵⁵⁰ *Ibid.*, section 184(1)

Both the Constitution and the Public Audit Act provide for the independence of the Auditor General and the National Audit Office. The Constitution provides that the Auditor General shall not be subject to direction or control of any person or authority⁵⁵² and that no person shall inhibit the Auditor General when conducting his functions.⁵⁵³ The Public Audit Act restates the position of the Constitution.⁵⁵⁴ Although the law envisages that NAO should be an independent institution, operationally it is under the Ministry of Finance. This operational arrangement has affected NAO not only in its inability to control its finances (and consequently agenda), but also compromises its independence as the Ministry is one single large target of NAO in executing its functions. It is therefore not surprising that NAO has started calling for its full independence from the Government machinery.⁵⁵⁵

By law, there is no state body that can influence the NAO's agenda. NAO carries out audits in a self-determined programme and methods as provided under the National Audit Office of Malawi Auditing Standards 2005.

The law also provides clear professional criteria for the Auditor General. The Constitution sets the tone by stating that the Public Appointments Committee of Parliament shall enquire into the competency and financial probity of the person being appointed as Auditor General.⁵⁵⁶ The Public Audit Act expands on this by providing that the Auditor General should have formal relevant qualifications, and significant experience in audit work.⁵⁵⁷ The law strives to ensure that the appointment of the Auditor General ensures his/her independence. The appointment is done by the President but subject to the confirmation of Parliament⁵⁵⁸ and that the confirmation shall be by a simple majority.⁵⁵⁹ The Public Appointments Committee shall also enquire into the competency of the appointee.⁵⁶⁰ These provisions operate as a check on possible Executive capture of the office of the Auditor General.

The law provides restrictions on activities the Auditor General and staff can undertake to ensure that they perform their functions without undue influence. The Public Audit Act stipulates for

⁵⁵¹ Public Audit Act, section 4

⁵⁵² Constitution, section 184(7)

⁵⁵³ *Ibid.*, section 184(8)

⁵⁵⁴ Public Audit Act, section 4(3)

⁵⁵⁵ In an interview with the Deputy Auditor General, the author was told that the institution is working on achieving total independence. See also *Nation Online*, 'Malawi donors lose confidence in Audit Office' available; <http://www.mwnation.com/national-news-the-nation/8974-malawi-donors-lose-confidence-in-audit-office>, where this sentiment was restated by NAO

⁵⁵⁶ Constitution, section 184(3)

⁵⁵⁷ Public Audit Act, section 5(2)

⁵⁵⁸ Constitution, section 184(3)

⁵⁵⁹ *Ibid*

⁵⁶⁰ *Ibid* as read together with Parliamentary Standing Order 163(d)

'incompatible functions' which the Auditor General and his/her staff cannot undertake.⁵⁶¹ The Auditor General and his/her staff are prohibited from undertaking, performing, or engaging in any duty or function that is inconsistent with the performance of their duties or functions imposed on him under this Act.⁵⁶² Further, the Act prevents the Auditor General and his/her staff from holding any other public office or other Government position while being employed at the National Audit office.⁵⁶³

Further to this, the Code of Ethics of NAO stipulates that all staff of NOA should maintain political neutrality and further that emphasizing the position of the Malawi Public Service Regulations which prevents any public servant from running election for any political office.⁵⁶⁴

Although these provisions do not specifically refer to political activities, political activities that may affect independence are applicable. The legal and code language seem not to specifically prevent staff of NOA from participating in political activities so long as they maintain political neutrality in their work.

The term period for the Auditor General is provided for in the law. It is stated that the Auditor General shall hold office for a term of five years⁵⁶⁵ and may be reappointed to another term not exceeding 5 years.⁵⁶⁶ The Auditor General may however not be reappointed if he has reached the mandatory retirement age of 65 years.⁵⁶⁷

The Auditor General is protected from removal without justification by the law. The Constitution provides four specific grounds on which the Auditor General can be removed from office⁵⁶⁸ and these are incompetence,⁵⁶⁹ when the Auditor General is compromised,⁵⁷⁰ when the Auditor General is incapacitation⁵⁷¹ and lastly when the Auditor General has reached his retirement age.⁵⁷² However, the law only provides that the Auditor General can be removed on any of such grounds by the President, without any requirement for confirmation by National Assembly as is the case with his/her appointment. This gap in the law may expose the Auditor General to otherwise unfair removal because there is no institution to verify or confirm the case for removal. Further to this, these provisions safeguarding tenure of office do not cover other members of staff of NAO. It is assumed that these are covered under the general labour laws.

⁵⁶¹ Public Audit Act, section 12

⁵⁶² *Ibid.*, section 12(1)

⁵⁶³ *Ibid.*, section 12(2)

⁵⁶⁴ Code of Ethics, chapter 5

⁵⁶⁵ Public Audit Act, section 5(4)

⁵⁶⁶ *Ibid.*

⁵⁶⁷ *Ibid.*, section 5(5)

⁵⁶⁸ Constitution, section 184(6)

⁵⁶⁹ *Ibid.*, section 184(6)(a)

⁵⁷⁰ *Ibid.*, section 184(6)(b)

⁵⁷¹ *Ibid.*, section 184(6)(c)

⁵⁷² *Ibid.*, section 184(6)(d)

The law provides for civil immunity to the Auditor General and his/her staff for any action done in good faith and in the scope of their work.⁵⁷³ The law is silent on criminal liability implying that NAO officers can be prosecuted for any criminal activity they do within the course of their employment.

The legal provisions are adequate although the nature of the Code of Ethics appears to be an instructive tool rather than a document to be used for prosecuting or bringing officers to book for misconduct. Further to this, the procedure for removal of the Auditor General does not require confirmation by Parliament or any other institution. This situation opens up a situation where the President can remove the Auditor General on insufficient grounds. Inevitably, this situation leaves the Auditor General subservient to the President.

8.1.3 Independence (Practice)

Score: 75

To what extent is the NAO free from external interference in the performance of its work in practice?

It was noted during the assessment of the NAO that this institution has strived over the years to operate in a non partisan manner. This has been made possible by the legal framework which has allowed the NAO to act independently.⁵⁷⁴ Notwithstanding this situation, the Deputy Auditor General raised concerns with the lack of financial independence of the institution. He indicated that lack of financial independence means that although the institution can be operationally autonomous, it will still depend on the Executive to undertake its activities. This situation has affected the operations of NAO because of the inadequacy of funds and delays in disbursements.⁵⁷⁵

It was further noted that that there has never been any instance of political influence in the appointment of NAO's officers or indeed in carrying out its activities.⁵⁷⁶ On the reports by the Government that the rejection of an appointee to the position of Auditor General was politically motivated,⁵⁷⁷ the Deputy Auditor General stated that some politics in these processes cannot be completely ruled out but that may be the Parliament had its reasons for deciding in that manner.⁵⁷⁸

⁵⁷³ Public Audit Act, section 9

⁵⁷⁴ More specifically, NAO has the exclusive power to determine its annual programme which the Executive cannot change although it may request NOA to include in its programme some specific assignments which the Executive has concerns with

⁵⁷⁵ *Interview with the Deputy Auditor General on 7th December, 2013*

⁵⁷⁶ *Ibid*

⁵⁷⁷ *Daily Times*, 'House rejects auditor general' 7th December, 2012, available; <http://www.bnltimes.com/index.php/malawi-news/headlines/national/12811-house-rejects-auditor-general>

⁵⁷⁸ Interview with the author on 7th December, 2012

The Deputy Auditor General also indicated that there have been no instances where the members of staff of NAO have been engaged in activities which are not permitted under the law or indeed any activities which may compromise NAO's independence.⁵⁷⁹

The Deputy Director indicated that all the Auditor Generals appointed under the Public Audit Act have always been re-appointed to finish their second terms according to the law. He indicated that first Auditor General under this Act was reappointed to the second term but unfortunately he passed away before he could complete it. The second Auditor General was also reappointed to his second term but voluntarily opted for an early retirement.⁵⁸⁰ The Deputy Auditor General stated that senior NAO staff have never been removed from their offices without justification. He challenged media reports that the former Auditor General was forced to resign by the Executive stating that he was personally and officially informed that the early retirement was voluntary.⁵⁸¹

Thus, although the NAO appears to be largely independent, the appointment process of the Auditor General appears to be exposed to mainstream politics given that it is initiated by the Executive without any competitive processes. Further to this, the lack of financial autonomy of the institution has resulted in failure to fully execute planned activities and failure by the institution to fill vacancies. The legal framework needs some refinement to ensure proper political insulation of the appointment process which also ensures competition. There is also need to speed up the structural and systemic independence of the institution so as to ensure it financial independence.

8.2.1 Transparency (Law)

Score: 75

To what extent are there provisions in place to ensure that the public can obtain relevant information on the relevant activities and decisions by the NAO?

NOA is required to submit several reports to the Legislature. The Constitution requires the NOA through the Auditor General to submit annual Auditor General's Reports for audits carried out on to the public accounts and the accounts of public authorities and bodies.⁵⁸² This position is slightly different under the Public Audit Act⁵⁸³ which unlike the Constitution where the Auditor General is required to report to Parliament through the Minister of Finance whilst, the Act envisages a

⁵⁷⁹ *Ibid*

⁵⁸⁰ *Ibid*

⁵⁸¹ *Ibid*

⁵⁸² Constitution, section 184(2)

⁵⁸³ Public Audit Act, section 15

situation where the Auditor General can report directly not only to Parliament but also to the President.⁵⁸⁴

The law provides a restrictive approach to the dissemination of information held by NAO. Apart from the Annual Report and any other reports the institution may issue, all information held by the Auditor General and his staff is confidential and cannot be disclosed to any person or authority.⁵⁸⁵

The Auditor General has the right under law to provide opinion on draft laws that affects his/her office and he may provide comments in writing to the Minister responsible for introduction of the Bill and to the Speaker of Parliament.⁵⁸⁶

Annual reports contain information relating to the audits and reviews undertaken under the Public Audit Act or any other written law, together with such other information as the Auditor General considers desirable.⁵⁸⁷ The law allows the Legislature to deliberate on the reports submitted by the Auditor General.⁵⁸⁸ More specifically, the law provides that the Speaker should give ample time to the members to study and comment on the report.⁵⁸⁹

Further to this, the Public Accounts Committee of Parliament is mandated to scrutinize in greater detail the reports submitted by the Auditor General⁵⁹⁰ and then report to the Whole House on its findings.⁵⁹¹ The Committee can summon the Auditor General or any individual to answer questions relating to the contents of the Auditor General's report.⁵⁹²

Apart from the report it makes to Parliament, NAO may also communicate with the President, Controlling Officers or any other person upon any matter which is the subject to audit, review, investigation or inquiry.⁵⁹³ The Auditor General may also report to the responsible person who is failing to comply with the requirements of this Act or any other written law, or of any failure by any person to comply with the recommendations or address the concerns raised in the Auditor General's report.⁵⁹⁴ This information may not be readily available to the public.

The Constitution generally requires the Auditor General to submit reports annually to the Legislature which eventually become public information.⁵⁹⁵ The law stipulates that although the

⁵⁸⁴ *Ibid*

⁵⁸⁵ *Ibid.*, section 25

⁵⁸⁶ *Ibid.*, section 26

⁵⁸⁷ Public Audit Act, section 15(1)

⁵⁸⁸ *Ibid*

⁵⁸⁹ *Ibid.*, section 15(3)

⁵⁹⁰ *Ibid.*, section 19(1)(a) as read with Parliamentary Standing Order 163(d)

⁵⁹¹ Public Audit Act, section 19(1)

⁵⁹² *Ibid.*, section 20(1)(b)

⁵⁹³ *Ibid.*, section 16(1)

⁵⁹⁴ *Ibid.*, section 16(2)

⁵⁹⁵ Constitution, section 184(2)

Auditor General may submit any report at anytime, the annual report shall be submitted by 31 December of each year.⁵⁹⁶

Although the law may appear to be restrictive, it makes sense (to a certain extent) that some of the information held by NAO should be confidential to ensure the integrity of the audits it undertakes. Making all information publicly available would not only compromise the work of the institution, but also put the lives of the officers in jeopardy. However, other information as the Auditor General considers desirable is contained in the annual report. Unfortunately, this is subject to the Auditor General's discretion.

8.2.2 Transparency (Practice)

Score: 50

To what extent is there transparency in the activities and decisions of the NAO in practice?

This study found out that NAO prepares all the documents which it is legally required to prepare and submit to the relevant authorities⁵⁹⁷ (namely the Auditor General's Annual Audit Report of all the public accounts). In the recent past, NAO has produced other reports which it has submitted to Parliament. These are generally performance audit including the Auditor General's Report on Local Assemblies FY 2006 - 2008⁵⁹⁸, and Performance Audits Report on the Supply of Teaching and Learning Materials Programme under MoEST, 2011⁵⁹⁹, Performance Audit Report On The Economic Performance And Environmental Sustainability Of The Vipha Plantations In MoNRE&EA, 2011.⁶⁰⁰ It was also learned in the course of the assessment that the NAO is envisaging undertaking and producing other performance audit reports for statutory corporations, donor funded programs, and other Performance Audits.⁶⁰¹

The study further noted that that NAO has always submitted these reports as required under the law. However the reports for the 2012 may not be submitted on time because of the vacancy in the office of the Auditor General.⁶⁰² This concern has also been shared by the Public Accounts Committee of Parliament which raised concerns that the vacancy would affect the operations of

⁵⁹⁶ Public Audit Act, section 15(3)

⁵⁹⁷ Interview with the Deputy Auditor General, 7th December, 2012

⁵⁹⁸ Auditor General's Report Local Assemblies for FYs 2006 – 2008, available; <http://www.nao.mw/Reports/Auditor%20General%20Report%20on%20Assemblies.pdf>

⁵⁹⁹ Performance Audit on the Supply of Teaching and Learning Materials Programme under MoEST, 2011, available; <http://www.nao.mw/Reports/Teaching%20and%20learning%20materials.pdf>

⁶⁰⁰ Performance Audit Report On The Economic Performance And Environmental Sustainability Of The Vipha Plantations In MoNRE&EA, 2011, available; <http://www.nao.mw/Reports/Vipha%20Final%20report%20October%202011.pdf>

⁶⁰¹ Interview with the Deputy Auditor General, 7th December, 2012

⁶⁰² *Ibid*

NAO.⁶⁰³ It was also observed that apart from the information contained in the Auditor General's reports, NAO does not make any other information public.⁶⁰⁴

The Deputy Auditor General indicated that his institution does not provide details of its activities apart from what is contained in the Auditor General's report where they also comment on its use of public funds made available to it.⁶⁰⁵ The Deputy Auditor General however stated that there is some information on the operations of the NAO readily available on its website.⁶⁰⁶ A perusal of the website shows a well maintained website although some of the information has been overtaken by events. The site also has information on the history of the institution, a list of its core activities, and several reports which it has produced over the recent past.⁶⁰⁷

The Deputy Auditor General indicated that the website is open to all members of the public. He further stated that those interested in hard copies of some of the information can access it at its offices.⁶⁰⁸

In summary, NOA has managed over the years to produce and submit the reports as required by the law. However this information does not include detailed reports on the activities of the institution itself. Further to this, the legal provisions and their interpretations have affected the submission of these reports. Currently there is a fear that the vacancy in the office of the Auditor General would delay the submission of the annual report despite the fact that the reports are ready and the office of the Deputy Auditor General is fully functional.

8.2.3 Accountability (Law)

Score: 50

To what extent are there provisions in place to ensure that the SAI has to report and be answerable for its actions?

The Constitution provides generally for submission of annual reports.⁶⁰⁹ The Constitution does not provide a specific deadline except that the report shall be submitted to Parliament through the

⁶⁰³ *Daily Times*, 'Auditor General's absence affects PAC work' 5th September 2012; <http://www.bnltimes.com/index.php/daily-times/headlines/national/11448-auditor-generals-absence-affects-pac-work>

⁶⁰⁴ Interview with the Deputy Auditor General, 7th December, 2012

⁶⁰⁵ *Ibid*

⁶⁰⁶ <http://www.nao.mw/index.htm>

⁶⁰⁷ *Ibid*

⁶⁰⁸ Interview with the Deputy Auditor General, 7th December, 2012

⁶⁰⁹ Constitution, section 184(2)

Minister of Finance not later than the first meeting of the National Assembly after the completion of the report. The Public Audit Act⁶¹⁰ however provides for the specific deadline which is before the 31 December of each year.

The Public Audit Act stipulates that the NOA shall be audited by external auditors appointed by the Public Accounts Committee of Parliament.⁶¹¹ These auditors are required to compile a report which is submitted to the Speaker of Parliament together with the financial statements not later than six months from the end of the financial to which the audit relates to.⁶¹² There is no provision relating to reports on other activities of the institution. These external auditors shall be independent of NOA.

All agencies and individuals subjected to an audit are entitled to a copy of the audit report and are entitled to respond and challenge any audit findings within fourteen days of receiving the audit report from the Auditor General.⁶¹³

The Constitution sets out the relationship between the NOA and Legislature. It provides that the Auditor General shall present an Annual Report to Parliament through the Minister of Finance.⁶¹⁴ The Public Audit Act restates and expands on this position by providing that the Auditor General shall present Annual Reports by 31st December of each year to the President and the Speaker of the National Assembly.⁶¹⁵ There is however a conflict between the Constitution and the Act in that the Constitution envisages that the report to Parliament should be submitted through the Minister of Finance whilst the Act envisages that the reporting be done directly to Parliament.

Further to this, the Auditor General has a legal relationship with the Public Accounts Committee of Parliament whose functions include detailed review of the Auditor General's annual report and overseeing the functions of the office of the Auditor General.⁶¹⁶ This position is further shared by the prescripts of Parliamentary Standing Order⁶¹⁷ which gives power to the committee to scrutinize the Auditor General's annual report.

⁶¹⁰ Public Audit Act, section 15(2)

⁶¹¹ *Ibid.*, section 28

⁶¹² *Ibid.*, section 28(1)

⁶¹³ Section 14(1) of the Public Audit Act.

⁶¹⁴ Constitution, section 184(2)

⁶¹⁵ Public Audit Act, section 15(1)

⁶¹⁶ *Ibid.*, section 19(1)

⁶¹⁷ Parliamentary Standing Order 163(d)

8.2.4 Accountability (Practice)

Score: 25

To what extent does the NAO have to report and be answerable for its actions in practice?

The NAO is required under section 14 of the Public Audit Act to submit reports on the activities of the Office, including annual audit reports and other audit reports. These reports are submitted to the Speaker of the National Assembly as well as heads of organizations or departments that have been subjected to an audit as well as individuals that may have been specifically mentioned in the audit. The annual audit report is required to be submitted by the 31st December of each year.⁶¹⁸ However, currently the NAO audits its own financial activities through internal auditors contrary to the legal requirement that such audits must be executed by external auditors.⁶¹⁹ Section 28 of the Public Audit Act requires that the Public Accounts Committee of Parliament should appoint competent public auditors to audit the NAO and that the audit report as well as the financial statements be submitted to Parliament within six months of the end of a financial year. NAO has consistently ignored legal prescriptions to have external auditors to audit its finances. Neither has the Public Accounts Committee of Parliament initiated the process in practice as required by law.

Challenging audit findings in practice take two forms. The first is when relevant officers respond to draft findings directly to the auditors before a final report is produced. The second is when relevant officers appear before the Public Accounts Committee of Parliament when it is considering the Auditor General's report to make presentations and answer questions.⁶²⁰ During these appearances, the concerned department can provide the committee with information or explanations contradicting the findings of the NAO.⁶²¹

A potential limiting factor on the accountability of the NAO is that the law restricts the submission of Audit reports to the person holding the office of Auditor-General without possibility of delegation. This has the potential to stall the reports in the event of a vacancy in the office of the Auditor General.

⁶¹⁸ Section 14 of the Public Audit Act.

⁶¹⁹ Author Interview with Deputy Auditor General.

⁶²⁰ Ibid., section 20(b) and Parliamentary Standing Order 163(d)

⁶²¹ Ibid

8.2.5 Integrity (Law)

Score: 50

To what extent are there mechanisms in place to ensure the integrity of the NAO?

The NOA has its own code which governs issues of ethics. It is called the National Audit Office of Malawi Code of Ethics (referred to as 'the Code' hereinafter). The Code tackles several issues including, gifts and hospitality⁶²² post-employment restrictions⁶²³ independence, impartiality and objectivity⁶²⁴ political neutrality, conflict of interest⁶²⁵ and confidentiality among others. A perusal of the Code however does not cover all issues relating to integrity and in some issues it is not specific on what conduct is acceptable and what consequences would follow for errant behavior. Apart from a lack of stringent enforcement of the Code of ethics, the Code itself has inherent loopholes which make it a very weak tool to govern the complex area of staff integrity and conduct in such a highly sensitive institution.

However, the Code does not provide for specific consequences for breach thereof. The Code is more of guide than anything else discussing various ethical issues the officers may encounter.

8.2.6 Integrity (Practice)

Score: 50

To what extent is the integrity of the NAO ensured in practice?

The Deputy Auditor General indicated that the Code is generally effective in regulating staff integrity and conduct matters.⁶²⁶

The Deputy Auditor General stated that all members of staff are trained on the Code of Ethics as part of their orientation.⁶²⁷ He went on to say that members of staff are also trained on the general legal framework which regulates the operation of the NAO. Further to this, each member of staff is required to sign an integrity document relating to each and every audit they undertake.⁶²⁸

⁶²² NAO Code of Ethics, chapter 4

⁶²³ *Ibid*

⁶²⁴ *Ibid*

⁶²⁵ *Ibid.*, chapter 5

⁶²⁶ Interview with the author, 7th December, 2012

⁶²⁷ *Ibid*

⁶²⁸ *Ibid*

The Deputy Auditor General stated, however, that there have been violations of the Code ranging from trivial to serious violations. The instances of breaches included impersonating a tax collector by a NAO officer to simple absconding of one's duties. These instances attracted differing sanctions including interdiction, suspension and dismissal.⁶²⁹ As noted above, however, the local media has produced reports indicative of more serious breaches of the Code whereby the NAO was accused of misappropriating about K79million.⁶³⁰ There have no reported cases of officers taken t task over this issue.

Although the NAO strives to enforce the code of ethics, it is clear that the enforcement has not been as effective to the extent that serious breaches appear to continue unabated. The reported misappropriation of K79million by the NAO is indicative of a more serious ethical problem within the institution.

ROLE

8.3.1 Effective financial audits

Score: 75

To what extent does the NAO provide effective audits of public expenditure?

The Deputy Auditor General indicated that NAO routinely undertakes assessment of internal audit within Government departments.⁶³¹ This assessment includes the effectiveness of the internal auditors and management oversight and reaction to the internal audit's recommendations.⁶³²

The Deputy Auditor General stated that NAO also undertakes various performance audits. So far it has undertaken the performance audits for Viphya Plantations,⁶³³ and the performance audit for the Supply of Teaching and Learning Materials Programme⁶³⁴ The Deputy Auditor General further stated that NAO is currently undertaking performance audits on the Supply and Distribution of Drugs in the country, the National Road Traffic Directorate and the Administrator General Office in relation to administration of deceased estates.⁶³⁵

⁶²⁹ *Ibid*

⁶³⁰ *Daily Times*, 'Kampanje retires abruptly' 27th August, 2012, available;<http://www.bnltimes.com/index.php/daily-times/headlines/national/11398-kampanje-retires-abruptly>

⁶³¹ Interview with the author, 7th December, 2012

⁶³² *Ibid*

⁶³³ Performance Audits Report on the Economic Performance and Environmental Sustainability of the Viphya Plantations, October, 2011, available; <http://www.nao.mw/Reports/Viphya%20Final%20report%20October%202011.pdf>

⁶³⁴ Performance Audit on Supply of Teaching and Learning Materials Programme, March 2011 <http://www.nao.mw/Reports/Teaching%20and%20learning%20materials.pdf>

⁶³⁵ Interview with the deputy auditor general, 7th December, 2012

The Deputy Auditor indicated that these reports are comprehensive and detailed but are not regular as they are resource intensive which is a handicap of the institution.⁶³⁶ These performance audit reports are submitted to Parliament just like the Annual Auditor's Report.

In sum, while the NAO strives to undertake more comprehensive audits outside the traditional audits, these efforts are seriously curtailed by the limited resources.

8.3.2 Detecting and sanctioning misbehaviour

Score: 75

Does the NAO detect and investigate misbehaviour of public officeholders?

The Public Audit Act empowers the Auditor General to access any document, require any person to give information and to inspect any building or item as part of the audit process.⁶³⁷ Further to this, the law gives the power of subpoena to the Auditor General.⁶³⁸

The Deputy Auditor indicated that the powers granted to NAO audit government finances can be interpreted as power to investigate and in fact they do investigate.⁶³⁹ Where NAO is confident that the findings point to criminality, the matters are referred to conventional investigatory bodies like the fiscal police and Anti Corruption Bureau.⁶⁴⁰

In sum, the NAO's responsibility is limited to detecting and investigating malfeasance relating to public funds. The assignment of sanctions is within the jurisdiction of the Fiscal Police and the Anti Corruption Bureau.

8.3.3 Improving financial management

Score: 75

To what extent is the NAO effective in improving the financial management of government?

The NAO contributes to improving financial management by making recommendations which are

⁶³⁶ *Ibid*

⁶³⁷ Public Audit Act, section 7

⁶³⁸ *Ibid.*, section 8

⁶³⁹ Interview with the deputy auditor general, 7th December, 2012

⁶⁴⁰ *Ibid*

contained in the audit reports. The recommendations are of two categories. The first set, called interim recommendations, suggests immediate solutions to problems that can be fixed in the short term. The second types are more comprehensive and strategic recommendations which are aimed at addressing systemic failures in the public finance management system.⁶⁴¹

The NAO has several mechanisms for following up on its recommendations. The first vehicle is the Public Accounts Committee of Parliament. This committee presents its report to Parliament containing recommendations of the NAO that the Committee adopts. Once the Committee's report is adopted by the House, the committee monitors the implementation of the recommendations by the Executive and any other targeted agencies. The NAO also monitors the implementation of the recommendations.⁶⁴² Where an officer or a department is found to be persistently not implementing the recommendations, NAO reminds errant officers about the recommendations through management letters⁶⁴³ and the Public Accounts Committee of Parliament prepares Treasury Minutes which are sent to Treasury of Government and Cabinet for necessary action. Another monitoring mechanism lies in subsequent audits which first assess the level of implementation of prior recommendations.⁶⁴⁴ There is evidence that government acts on NAO reports. For example, there have been disciplinary actions including dismissal of officers, prosecutions but also new rules on finance management including the adoption of a centralized payment system managed by the Accountant General.⁶⁴⁵

Recommendations

- The government should strive to prioritize resource allocation to the institution which would in turn enhance efficient use in other departments thereby reducing loss and abuse of the very scarce resources. Further to this government should consider granting the institution financial autonomy so that it can effectively control its finances.
- The law should specifically provide that the NAO should compile a separate report on its activities which should be scrutinized by an independent institution over and above the reports by external auditors.
- The institution's website needs constant updating to keep information current and up to date.
- There is need to have legal or administrative requirements for the NAO to produce reports on its activities.

⁶⁴¹ See for example, *The Report of the Auditor General for the Financial year 2010 to 2011*.

⁶⁴² Interview with the author, 7th December, 2012

⁶⁴³ *Ibid*

⁶⁴⁴ *Ibid*

⁶⁴⁵ *Ibid*

- There is need to expand the legal provisions surrounding who can submit the Auditor General's reports.
- The NAO should be well equipped with both the financial and human resources competent enough to deal with matters that are, technical in nature and which may consequently pass undetected. In this connection, it is further recommended that the NAO should be beefed up professionals well versed for example in matters about construction, mining, petroleum technology for example would not be a bad idea
- Advocate for a law that would ensure that the NAO reports directly to Parliament.

9. ANTI-CORRUPTION BUREAU

9.

Summary

The Malawi Anti-Corruption Bureau ('ACB') is mainly tasked with the fight against corruption through prevention, investigation and prosecution of the offences. Proactively, the Bureau undertakes various preventative initiatives as a means of combating corruption, including mass civic education, providing advice and technical support to institutions intending to improve their operational systems to minimise corruption and coordinating various preventive initiatives as provided under its Strategic Plan.

The assessment finds that the ACB's performance is generally satisfactory. There are, however, major areas of concern which need to be addressed to improve its effectiveness. These include inadequate resources, subtle interference with its independence characterized by an ominous political presence in the recruitment and operations of the Bureau, among other problems. There are serious concerns surrounding the accessibility of information about the operations of the Bureau making the public view it with constant suspicion.

Otherwise it was noted that the Corrupt Practices Act ('the CPA' hereinafter) provides somewhat adequate footing to ensure independence of the Bureau notwithstanding some 'claw-back clauses'⁶⁴⁶ which seem to work against this scheme.

The Bureau has made strides in combating corruption and other related offences with a recorded decline in corruption levels in the past five or so years. However, these gains appear to slipping away with perceptions (backed by studies) indicating some sharp increase in corruption incidents and low prosecution.

⁶⁴⁶ Limiting provisions.

The table below presents the indicator scores which summarize the assessment of the ACB in terms of its capacity, its internal governance and its role within the Malawian integrity system. The remainder of this section presents the qualitative assessment for each indicator.

Anti-Corruption Bureau ⁶⁴⁷

Overall Pillar Score: 62.5/100

Dimension	Indicator	Law	Practice
Capacity 50/100	Resources	50	50
	Independence	50	50
Governance 62.5/100	Transparency	75	25
	Accountability	75	50
	Integrity Mechanisms	75	75
Role 75/100	Prevention	75	
	Education	75	
	Investigation	75	

Structure and Organisation

The Anti-Corruption Bureau has its foundation in the Constitution which is translated into substance in the Corrupt Practices Act (the 'CPA' hereinafter). The Constitution provides principles for national policy, one of which mandates government to introduce measures that will guarantee accountability, transparency, integrity and financial probity.⁶⁴⁸ With this concise policy direction, Parliament passed the Corrupt Practices Act in 1995.⁶⁴⁹ Although the law states that the ACB is a government department, the Bureau is in fact not under any government ministry. It operates as a stand-alone government entity. The Bureau consists of a Director and his Deputy who head the

⁶⁴⁷ The overall pillar score is a simple average of the scores of the three dimensions capacity, governance and role. The dimension scores are simple averages of the respective indicator scores.

⁶⁴⁸ Constitution, section 13 (c)

⁶⁴⁹ Chapter 7:04 of Laws of Malawi

institution and other staff.⁶⁵⁰ The Director and his Deputy are appointed by the President and confirmed by the Public Appointments Committee of Parliament.⁶⁵¹ The Bureau consists of other officers⁶⁵² who are appointed just like other public officials in the public service.⁶⁵³ The Bureau has three major functions which are investigatory, prosecutorial and preventive.⁶⁵⁴ The Bureau has its headquarters in Lilongwe, with regional offices in Mzuzu for the northern region and in Blantyre for the southern region. The Lilongwe office also serves as the central region office.

ASSESSMENT

9.1.2 Resources (Law)

Score: 50

To what extent are there provisions in place that provide the ACB with adequate resources to effectively carry out its duties?

It is stipulated under the CPA that the finances of the Bureau shall be charged to the Consolidated Fund.⁶⁵⁵ According to section 172 of the Constitution, all revenues received for purposes of the Government is paid into the Consolidated Fund. Although there is no legal provision, the ACB always prepares its own budget which is submitted to the Minister of Finance. These budget estimates are however prepared within guidelines or ceilings provided by the Ministry of Finance. This budget is then incorporated in the national budget which is further processed through Parliament.⁶⁵⁶

There is no formal guarantee of fiscal stability over time for the ACB. There is no indicator for determining the budget for ACB by the government. The budget depends on the availability of resources the government has, and the needs in other government departments and agencies. However, performance statistics are important for ACB when negotiating budgetary support with the Development partners who support various activities of the Bureau. All the proceeds of confiscated assets revert to government and are directly deposited into government's main account.⁶⁵⁷ The ACB has no direct access to these resources.

In conclusion, although there are no special provisions regarding resourcing the Bureau, existing government fiscal procedures under the Constitution and other procedural prescriptions cater for

⁶⁵⁰ CPA, section 4 (1)

⁶⁵¹ CPA, sections 5 (1) and 7 (1) respectively

⁶⁵² CPA, section 4 (1)

⁶⁵³ CPA, section 9

⁶⁵⁴ CPA, Part III

⁶⁵⁵ CPA, section 4 (2)

⁶⁵⁶ Constitution, section 57

⁶⁵⁷ CPA, section 37

the ACB just like any government agency. The existence of legal or administrative provisions may enhance the independence of the Bureau, but would make minimal impact on the question of adequacy considering an environment where resources are generally inadequate. It is therefore proposed that the Bureau be encouraged to intensify recovery of stolen assets and the existing legal provisions be amended to allow the Bureau to directly use the resources it recovers for its operations. This proposal would boost resources for the Bureau.

9.1.2 Resources (Practice)

Score: 50

To what extent does the ACB have adequate resources to achieve its goals in practice?

The former Director of the ACB stated that the budget for the Bureau is always insufficient for the Bureau to fully undertake its activities and satisfactorily execute its mandate as provided under the law. He pointed out that the Bureau has serious inadequacies in terms of human resources, logistical support, and infrastructure.⁶⁵⁸ The DFID and Royal Norwegian Embassy echoes these sentiments and further notes that although there is government commitment to resource the Bureau, this competes with other government interests.⁶⁵⁹

The former Director further noted that there is no regular increase in the financial resources provided by the government. The annual increments are merely aimed at mitigating the effects of inflation and devaluation of the currency. He however noted that notwithstanding the fact that the Bureau is short in terms of human resources, there has been a consistent increment in the number of critical staff. For instance, the number of prosecutors has risen from none in 2007 to fourteen in 2012. There have been not more than 3 resignations. He stated that this has been achieved by improving the conditions of service for Prosecutors which has allowed the Bureau to attract and retain critical staff.⁶⁶⁰ This statement is, however, contradicted by the DFID and RNE which noted that the Bureau has had staff retention problems with the prosecutions department hard hit mainly because of non competitive remuneration packages.⁶⁶¹ They, however, noted that the ACB management has remained stable which has had a positive effect in the implementation of initiatives.⁶⁶²

⁶⁵⁸ Former Director Alex Nampota Interview with the author, 27th September, 2012

⁶⁵⁹ Hechler H., Parkes B., Annual review of DFID/RNE Malawi's Anti Corruption Bureau support programme, 2010, at p. 6, available; http://www.norad.no/en/_attachment/207029/binary/145901?download=true

⁶⁶⁰ Alex Nampota, Interview with the author, 27th September 2012

⁶⁶¹ Hechler H., Parkes B., Annual review of DFID/RNE Malawi's Anti Corruption Bureau support programme, 2010, at p. 6, available; http://www.norad.no/en/_attachment/207029/binary/145901?download=true

⁶⁶² *ibid*

The former Director of the Bureau stated that new Bureau officers have to undergo stringent ethics screening to check propensity of being corrupt. This includes a thorough background check, interviews with listed referees and former employers. He went on to state that the Bureau usually employs staff with little previous experience and trains them in their respective fields using the Bureau's Competency Framework. New staff also undergo an induction on the operations of the Bureau and other procedural issues. Officers also undergo specialised training in their respective field of operation. Further to this, all new officers work under the supervision of a senior officer to ensure that they settle into the system with ease.⁶⁶³

There is no open competitive recruitment for the Director of the Bureau. The appointment may be said to be *quasi*-political as the President appoints the Director and his Deputy.⁶⁶⁴ These appointments are subject to the approval by the Public Appointments Committee of Parliament ('PAC' hereinafter) which assesses the competencies and qualifications of the appointee.⁶⁶⁵ If the PAC refuses to confirm, then the appointment is rescinded.⁶⁶⁶ There have been scenarios where PAC has refused to confirm some appointees.⁶⁶⁷

The former Director of the Bureau stated that there are opportunities for further training for Bureau staff although these are constrained by availability of resources. He further indicated that Development Partners, more particularly DFID, have been supporting training and career development initiatives for the Bureau.⁶⁶⁸

The Bureau is also one of the public institutions which are heavily supported by development partners which, to a certain extent, helps to fill the gap left by government funding.⁶⁶⁹ For instance, the joint DFID/RNE support programme to the Bureau has provided about USD 7million for various initiatives including training in a space of four years.⁶⁷⁰ The former Director of the Bureau explained that donor support to the Bureau is twofold. Firstly, the general budgetary support which is specifically earmarked for the Bureau and secondly, direct support to the Bureau for various initiatives and activities from Development Partners.⁶⁷¹

⁶⁶³ Alex Nampota, Interview with the author, 27th September, 2012

⁶⁶⁴ CPA, sections 5 and 7 respectively

⁶⁶⁵ *ibid*

⁶⁶⁶ *Ibid*, section 8

⁶⁶⁷ *The Daily Times*, 'PAC rejects JB appointments' 30th July, 2012, available; <http://www.bnltimes.com/index.php/daily-times/headlines/national/11130-pac-rejects-jb-appointments> where it is reported that PAC rejected the appointment of Victor Banda as Deputy Director of the ACB.

⁶⁶⁸ Alex Nampota, Interview with the author, 27th September, 2012

⁶⁶⁹ *Ibid*.

⁶⁷⁰ Hechler H., Parkes B., Annual review of DFID/RNE Malawi's Anti Corruption Bureau support programme, 2010, at p. 6, available; http://www.norad.no/en/_attachment/207029/binary/145901?download=true

⁶⁷¹ Alex Nampota, Interview with the author, 27th September, 2012

9.1.3 Independence (Law)

Score: 50

To what extent is the ACB independent by law?

The Bureau is a government entity whose foundation is the Constitution's section 13(o) which provides for the principles of transparency and accountability. Formally the Bureau is established under s. 4(2) of the CPA as a government department, although it is envisaged to operate independent of any direction or interference of any person or authority.⁶⁷² Although the law states that the ACB is a government department, the Bureau is in fact not subsumed under any government ministry. It operates as a stand-alone government agency.

Notwithstanding the provisions on independence, the law further provides that the ACB can only prosecute any offence under the CPA upon seeking consent from the Director of Public Prosecutions (DPP).⁶⁷³ Under the Constitution, only the DPP has the power to prosecute all offences in the country.⁶⁷⁴ Thus the mandate to seek consent is a constitutional requirement. The situation can only be remedied by setting the Bureau under the Constitution thereby giving it direct powers to prosecute. Further to this, administratively, the Director cannot promulgate any Standing Orders under section 18 of CPA in relation to control, direction and administration of the Bureau, discipline of staff, financial regulations and other rules of administration unless these are approved by the Minister. In the absence of these Standing Orders, general government circulars apply to the Bureau.

The recruitment of the Director, his Deputy and his staff are required to be based on professional criteria. Sections 6(1) and 7(2) provide that the person appointed as Director and Deputy Director, respectively, should be a person of highest integrity and qualification. The appointment of other staff members is governed under s. 9 of the CPA. By implication of this provision the requirements and process of the public service would be applicable, including the need for minimum qualifications.

The law does not provide for restrictions on political activities for the Director. The CPA only proscribes activities for which the Director gets emoluments apart from the remuneration he gets as Director of the Bureau.⁶⁷⁵ Further to this, the law does not specify the term limit for the

⁶⁷² CPA, section 4 (3)

⁶⁷³ CPA, sections 10 (1) (f) and 42

⁶⁷⁴ Constitution, section 99 (3)

⁶⁷⁵ CPA, section 5 (2)

Director. Section 5 of the CPA only provides that the Director shall be appointed on such terms and conditions as the president may deem fit. The CPA stipulates that upon appointment, the Director or Deputy Director can only be removed from their position on grounds of inability to perform their functions or misbehaviour.⁶⁷⁶ He can also only be removed by the President on grounds of inability to continue executing the functions for reasons of infirmity of body or mind or any other reason, or he is guilty of misbehaviour. This removal has to be confirmed by the Public Appointments Committee.⁶⁷⁷

Other officers can only be removed after following internal disciplinary procedure. Any officer who is dissatisfied with the decision of the Bureau is allowed to challenge the decision through Judicial Review in court or by lodging a complaint with the office of the Ombudsman.

The Director and his staff are immune from civil suits arising out of their execution of their mandate under the law. Section 5A of the CPA stipulates that in such a scenario, the suit shall be in the name of the public office of the Director and not the Director personally. Further, the prescription of the Civil Procedure (Suit by or against Government or Public Officers) Act shall apply in that the suit shall be against the government and not the Director as an individual. Further to this, the CPA provides general immunity from any action or proceeding for the Director and his staff for any act done in good faith in the execution of the functions of the Bureau.⁶⁷⁸

Although the law appears to provide adequate independence of the Bureau, provisions relating to prosecution and internal administration seem to erode this independence. The current recruitment process of the Bureau's leadership also exposes the Bureau and its operations to political interference. This situation is made even more precarious because of the absence of provisions restricting the Director and his staff from active political participation. The law however provides adequate protection to the Director and his staff from removal from office without justification. Further, the law provides adequate immunity to the Director and his staff from legal suits for actions done in execution of the mandate of the Bureau.

⁶⁷⁶ *Ibid*, section 6 (2)

⁶⁷⁷ *Ibid*

⁶⁷⁸ CPA, section 22

Independence (Practice)

Score: 50

To what extent is the ACB independent in practice?

The former Director of the Bureau stated that ACB is independent though funding issues have eroded its independence.⁶⁷⁹ Just like most government agencies, he lamented that the Bureau is at the mercy of the government for funding and this may affect the execution of its mandate since government can easily frustrate the operation of the Bureau by limiting funding.⁶⁸⁰ As earlier illustrated, the CPA allows the Director to promulgate Standing Orders for the operational guidelines of the Bureau subject to the approval of the Minister.⁶⁸¹ The former Director lamented that the approvals for the Standing Orders so far promulgated have been cumbersome leaving the Bureau exposed to government interference.⁶⁸²

There have been concerns that although the Bureau has made strides in prosecuting corruption, its efforts have been limited to low level government officials leaving out top level government officials and those with political connections.⁶⁸³ Global Integrity also noted with concern that the Bureau is not adequately protected from political interference.⁶⁸⁴ The former Director of the Bureau challenged these concerns indicating that the Bureau has investigated and prosecuted top government officials including the former President, Cabinet Ministers, Principal Secretaries, among others. He explained that in most of these cases the investigations start whilst the person is in power and are only concluded after the person has left office or has been moved.⁶⁸⁵

Nevertheless, the former Director of the Bureau admitted that there is some political influence on the Bureau especially during the appointment and removal of the Director/Deputy Director.⁶⁸⁶ He stated that his removal which he is challenging in court is an example of such political interference.⁶⁸⁷ Attempts by the government to fill the Deputy Director's position were rebuffed by

⁶⁷⁹ Alex Nampota, Interview with the author, 27th September, 2012

⁶⁸⁰ *Ibid*

⁶⁸¹ CPA, section 18

⁶⁸² Alex Nampota, Interview with the author, 27th September, 2012

⁶⁸³ US Department of State, 2010 Human Rights Report; Malawi, available; <http://www.state.gov/j/drl/rls/hrrpt/2010/af/154356.htm>

⁶⁸⁴ Global Integrity, Scorecard 2011; Malawi 2011, available; <http://www.globalintegrity.org/report/Malawi/2011/scorecard>

⁶⁸⁵ Alex Nampota, Interview with the author, 27th September 2012. Also refer to Role indicators for specific examples.

⁶⁸⁶ *Ibid*

⁶⁸⁷ *Capital Radio FM*, Court case halts appointment of new ACB director', 21st September, 2012, available; <http://www.capitalradiomalawi.com/index.php/news-flash/826-court-case-halts-appointment-of-new-acb-director> See also; *Nyasa Times*, 'PAC throws a spanner in the appointment of new Malawi anti-graft body boss' 11th October, 2012, available; <http://www.nyasatimes.com/malawi/tag/anti-corruption-bureau/>

the Public Appointments Committee, demonstrating possible political interference⁶⁸⁸. Other reported cases of political influence include that of Patricia Kaliati, a former Cabinet Minister for Tourism, whom the Bureau failed to prosecute despite the Director of Public Prosecutions granting consent to prosecute her.⁶⁸⁹ Some commentators have stated that numerous cases have been fully investigated and ripe for prosecution, but nothing has been done.⁶⁹⁰ The mechanism of seeking consent from the Director of Public Prosecutions has also been criticised as a means by which politically connected people can intervene and frustrate the prosecution by prevailing over the DPP not to grant or delay in granting consent to prosecute.⁶⁹¹

There is no fixed term of office for the Director and his Deputy. Although the law appears to provide an open term, in practice the arrangement has been that the Director is given a contract for 4 years. This was devised to avoid the Director being caught in the grading systems of the mainstream civil service. Under this arrangement, the Director ought to indicate interest to renew the contract six months before the expiry of the contract⁶⁹². Removals have been common for those holding the position of the Director.⁶⁹³ However, so far all the removals of the four former Directors have been done without establishing a case for inability and/or misbehaviour and without confirmation of the removal by the Public Appointments Committee of Parliament as required under section 6(2) of the Corrupt Practices Act.⁶⁹⁴ The former Director indicated that removal of other officers is rare and mostly done after proof of misconduct.⁶⁹⁵

The former Director of the Bureau stated that although the Bureau is an independent entity, it operates in an area with shared responsibilities and mandates which inevitably makes the Bureau work with other institutions in fulfilling its mandate.⁶⁹⁶ Some of these institutions include the Malawi Police Service, the Financial Intelligence Unit (FIU), and the National Audit Office (NAO), and others.⁶⁹⁷ It was noted that the relationship with the Malawi Police Service has been important as the Bureau relies on the hardware and facilities of the service in its everyday operations. He stated that although the relationship is good, there are problems when the Bureau's leadership is in friction with the Executive.⁶⁹⁸ The relationship with the FIU has been

⁶⁸⁸ *The Daily Times*, 'PAC rejects JB appointment' 30th July, 2012, available; <http://www.bnltimes.com/index.php/daily-times/headlines/national/11130-pac-rejects-jb-appointments>

⁶⁸⁹ *Face of Malawi*, 'Anti-Corruption Bureau stalled Kaliati's corruption case' 5th August, 2012, available; <http://www.faceofmalawi.com/2012/08/anti-corruption-bureau-stalled-kaliatis-corruption-case/>

⁶⁹⁰ Kamanga I., *Combating Corruption; Challenges in the Malawi legal system*, available; http://www.unafei.or.jp/english/pdf/RS_No76/No76_17PA_Kamanga.pdf

⁶⁹¹ *Ibid*

⁶⁹² Alex Nampota, Interview with Author.

⁶⁹³ Alex Nampota, Interview with the author, 27th September, 2012

⁶⁹⁴ Alex Nampota, Interview with Author.

⁶⁹⁵ Alex Nampota, Interview with the author, 27th September, 2012

⁶⁹⁶ *Ibid*

⁶⁹⁷ *Ibid*

⁶⁹⁸ *Ibid*

important in exposing corruption and other related offences. Though the NAO is an important basis for the Bureau to undertake its mandate, the Director raised concerns that the relationship is not as well developed. He also cited some instances where the Annual Audit Report has been hidden from the Bureau. He speculated that senior government officials deliberately weaken the relationship of the Bureau and NAO for fear of exposing their misconducts and bringing them to book.⁶⁹⁹ The former Director of the Bureau stated that all these institutions have independent investigative powers and reporting mechanisms, just like the Bureau. However where there are inter-linkages in the issues being investigated, they inevitably need the hand of other institutions to facilitate or co-investigate.⁷⁰⁰

Although the Bureau has been said to be independent, in practice it has faced serious challenges. There are numerous instances of political interference in its prosecution. There is also a growing perception that the Bureau is only effective in prosecuting junior government officials whilst senior government officials and politically connected personalities remain unprosecuted. The relationship of the Bureau with some key institutions is yet to be formalised and it only works depending on the personalities heading the institutions.

9.2.1 Transparency (Law)

Score: 75

To what extent are there provisions in place to ensure that the public can obtain relevant information on the activities and decision-making processes of the ACB?

The Bureau is required to prepare Annual Reports which are submitted to the National Assembly, the President and the Minister (in this case the Minister responsible for Finance).⁷⁰¹ The Bureau is not required under law to produce opinions on draft laws although the Bureau continuously comments on corruption related legislation when the Law Commission consults with stakeholders.

As noted above, the Bureau is only required to submit Annual Reports within three months after the end of each year.⁷⁰² Upon receipt of the report, the Minister is required to formally lay these Annual Reports before Parliament within fourteen days of the report if Parliament is sitting.⁷⁰³ If it is not sitting, then the Minister is required to lay the report within fourteen days of the next sitting of Parliament.⁷⁰⁴

⁶⁹⁹ *Ibid*

⁷⁰⁰ *Ibid*

⁷⁰¹ CPA, section 21

⁷⁰² CPA, section 21 (1)

⁷⁰³ CPA, section 21 (2)

⁷⁰⁴ *Ibid*

The legal provisions exist that ensure public access information on the activities of the Bureau, though they are not adequate. The Annual Reports alone are also not adequate as the public may need some information which may be needed before the publication of the Annual Report.

9.2.2 Transparency (Practice)

Score: 25

To what extent is there transparency in the activities and decision-making processes of ACB in practice?

The former Director of the Bureau stated that the ACB provides information of some of its activities and some of this information is publicly available although the Bureau has not published any Annual Report as required by the law.⁷⁰⁵ He indicated that the majority of its activities can be found on its website.⁷⁰⁶ A perusal of the website shows that the Bureau has posted some information of its activities although the information is shallow and at times indicative than informative. Most of the tabs are yet to be populated with the relevant information.

The Bureau however does not provide statistics on investigations, complaints, cases successfully prosecuted and statistics indicative of a decline or increase in cases handled. The former Director of the Bureau⁷⁰⁷ indicated that these statistics are available on the Bureau's website; however a perusal of the website shows that the tabs for these statistics have no information.

The former Director of the Bureau indicated that the public is assumed to access the Bureau's Annual Report once it is laid before Parliament since then the report becomes public. He further indicated that once the report has been laid before Parliament, the Bureau would post it on the website. Posting it before then would pre-empt the functions of Parliament. He however conceded that the Bureau has never submitted any such reports since its inception, hence absence of any such report on its website.⁷⁰⁸ He explained that the reason for not publishing such reports has been that there is a serious backlog of the reports and any subsequent Director is removed before completing the work.⁷⁰⁹ This however does not explain why some Directors have been on the job for over 12 months without publishing any report. Further to this, the report does not depend on the presence of the Director as this is a report for the institution.

⁷⁰⁵ Alex Nampota, Interview with the author, 27th September, 2012

⁷⁰⁶ www.anti-corruptionbureau.mw/

⁷⁰⁷ Alex Nampota, Interview with the author, 27th September, 2012

⁷⁰⁸ Alex Nampota, Interview with the author, 27th September, 2012

⁷⁰⁹ *Ibid*

Although the Bureau is mandated to provide some information through the Annual Reports, it has not published any such report since its inception in 1995. The information on the website is so rudimentary that it does not provide any information on the decisions and how decisions of the Bureau are reached.

9.2.3 Accountability (Law)

Score: 50

To what extent are there provisions in place to ensure that the ACB has to report and be answerable for its actions?

The Bureau is accountable to the National Assembly, the President, the Cabinet and the Minister (Minister of Finance) by way of Annual Reports.⁷¹⁰ Further to this, the Bureau is required to make reports to the President and Minister on the general conduct of the Bureau.⁷¹¹

There is no provision expressly stating that Annual reports by the Bureau should be public other than merely laying it before Parliament. The Bureau is however not required to file reports on its investigations.

There are several provisions which provide for the protection of whistleblowers to the ACB. Firstly, information relating to a whistleblower cannot be admitted in evidence. This information relates to the name and/or address or any other information that may lead to the discovery of the whistleblower.⁷¹² Secondly, in instances where documents need to be admitted in evidence, any parts relating to the identity, address or any other information that may identify or ease the discovery of the whistleblower shall be redacted.⁷¹³ Lastly, it is an offence for any person to victimize and/or punish any informant of the Bureau or whistleblower.⁷¹⁴ This protection, however, is not available to any person who willfully provided the Bureau with information he knew to be false, or did not believe to be true.⁷¹⁵

The Bureau is required to be audited by the Auditor General.⁷¹⁶ The audit is in its statements of accounts which the Bureau is required to maintain pursuant to section 19 of the CPA.

⁷¹⁰ CPA, section 21

⁷¹¹ CPA, section 4 (4)

⁷¹² CPA, section 51A (2)

⁷¹³ CPA, section 51A (3)

⁷¹⁴ CPA, section 51A (5)

⁷¹⁵ CPA, section 51A (4)

⁷¹⁶ CPA, section 20

There is no special procedure provided under the CPA for the public to file complaints against the Bureau. On this point, all actions/decisions of the Bureau are subject to Judicial Review just like actions/decisions of any public institution.⁷¹⁷ The Bureau is also subject to the oversight of the Legal Affairs Committee of Parliament only.⁷¹⁸

There are fairly adequate provisions on this subject save for absence of provisions mandating the Bureau to provide information about its investigations and more regular provision of information apart from the Annual Report.

The former Director of the Bureau stated that the Bureau has not developed whistle blowers policy, but relies on the prescription of the CPA.⁷¹⁹

9.2..4 Accountability (Practice)

Score: 50

To what extent does the ACB have to report and be answerable for its actions in practice?

The former Director of the Bureau stated that its reporting to the Executive is only on general operations of the Bureau and it is merely done to put the Executive on notice of events rather than seeking direction.⁷²⁰

Although the law requires the Director of the Bureau to submit Annual Reports,⁷²¹ no such report has been submitted since the Bureau came into operation. He explained that the failure has been mainly caused by constant changes of the leadership of the Bureau.⁷²² Since no report has been submitted, none has been uploaded or printed for public access. He however was upbeat that the annual report being prepared currently would provide adequate information about cases being prosecuted, details and statistics of completed cases, statistics of complaints, investigations and prosecutions, among other details.⁷²³

The Annual Reports⁷²⁴ the Bureau is meant to submit provides details of cases being prosecuted but does not include cases under investigation as doing so may not only jeopardise the

⁷¹⁷ CPA, sections 5A & 5B

⁷¹⁸ Parliamentary Standing Orders, S.O. 161

⁷¹⁹ CPA, section 51 and restated under Bureau Standing Order C/4 paragraph 2

⁷²⁰ Alex Nampota, Interview with the author, 27th September, 2012

⁷²¹ CPA, section 21

⁷²² Alex Nampota, Interview with the author, 27th September, 2012

⁷²³ *Ibid*

⁷²⁴ *Ibid*

investigations, but may also injure personalities especially when no wrong doing is eventually found.⁷²⁵ The cases under investigation however are captured under general statistical presentations.⁷²⁶ Further to this, the Director may be summoned by any competent Committee of Parliament to respond to questions surrounding the contents of the report and generally regarding the operations of the Bureau⁷²⁷. Parliamentary procedure has designated the Legal Affairs Committee as the relevant committee to look into the operations of the Bureau which may include requiring provision of some information for the benefit of the public.⁷²⁸

He further indicated that so far there has been no officially reported case of whistle-blower intimidation or victimization which the Bureau received and investigated.⁷²⁹ Some commentators have however indicated that intimidation especially by politically connected personalities has forced other informants not to inform the Bureau of corrupt activities.⁷³⁰ The former Director of the Bureau responded to this observation by stating that although the Bureau has been registering high number of complaints indicative of people not fearing retaliation, he cannot rule out the possibility of some fearing retaliation as 'fear of retaliation is a natural human reaction'.⁷³¹

The Legal Affairs Committee of Parliament has the oversight functions over the Bureau through considering the report the Bureau submits to Parliament.⁷³² The committee has on various occasions queried the decisions and conduct of the Bureau.⁷³³ The effectiveness of the committee has however been questioned as it has not prevailed over any Director to submit the Annual Reports as required by law.

All decisions and actions of the Bureau are subject to judicial review just like those of any public institution. Several reviews have been instituted against the Bureau. One of the high profile judicial review proceedings have been instituted by the former Director of the Bureau who is challenging his removal from the position (of Director of ACB) by the government.⁷³⁴

⁷²⁵ Alex Nampota, Interview with the author, 27th September 2012

⁷²⁶ *Ibid*

⁷²⁷ CPA, section 21 (3)

⁷²⁸ Parliamentary Standing Orders, S.O. 161 (d)

⁷²⁹ Alex Nampota, Interview with the author, 27th September, 2012

⁷³⁰ Business Anti-Corruption Portal, 'Malawi Country Profile', available; <http://www.business-anti-corruption.com/country-profiles/sub-saharan-africa/malawi/>

⁷³¹ Alex Nampota, Interview with the author, 27th September, 2012

⁷³² Parliamentary Standing Orders, S.O. 161 (d)

⁷³³ *Ibid*

⁷³⁴ *Capital Radio FM*, Court case halts appointment of new ACB director', 21st September, 2012, available; <http://www.capitalradiomalawi.com/index.php/news-flash/826-court-case-halts-appointment-of-new-acb-director>

9.2.5 Integrity (Law)

Score: 75

To what extent are there mechanisms in place to ensure the integrity of members of the ACB?

There exists a Code of Conduct and Ethical Behaviour⁷³⁵ which provides for rules of conduct by the Bureau and its officers. The Code is reasonably comprehensive and touches almost on all critical aspects of ethical conduct. For instance, the Code provides for declaration of financial assets upon employment,⁷³⁶ stringent rules on conflict of interest⁷³⁷ and rules on gifts and hospitality for the Bureau staff.⁷³⁸ Although the Code restricts former officers from using information they got when in the employment of the Bureau,⁷³⁹ the Code does not provide for any restrictions on post-employment.

The Bureau has a Standard Integrity Screening Practice which all prospective officers undergo before being formally admitted to the Bureau. This screening process involves not only following prospective professional and academic backgrounds, but also seeks information regarding the general character of the prospective staff.

In conclusion, the Bureau has a Code of conduct which governs its integrity issues although there are some aspects which need to be incorporated. The Bureau also has a standard integrity screening practice.

9.2.6 Integrity (Practice)

Score: 50

To what extent is the integrity of members of the ACB ensured in practice?

The former Director of the Bureau stated that these rules of conduct as prescribed in the Code of Conduct have been effective although some divergent behaviour has been reported. Further to this, all officers of the Bureau undergo regular training on rules of conduct and integrity requirement although the frequency of these trainings depends on availability of funds.⁷⁴⁰

⁷³⁵ Appendix 1 of the Bureau Standing Orders

⁷³⁶ Bureau Code of Conduct and Ethical Behaviour, paragraphs 3.5, 8.1

⁷³⁷ *Ibid*, paragraphs. 4.7, 6.3, and 8.1 to 8.3

⁷³⁸ *Ibid*, paragraphs 11.1 to 11.4

⁷³⁹ *Ibid*, paragraphs 15.1 to 15.2

The Bureau has experienced some breaches of the rules of the Code by its members of staff. These violations have been at various levels, some serious, whilst others are minor. The punishment is meted out after a thorough internal disciplinary process⁷⁴¹ and the punishments range from mere reprimands to dismissals. The former Director of the Bureau noted one case involving a member of staff for the Bureau who wanted to use his position to improperly influence the Malawi Revenue Authority in the assessment of his import tax obligations. The matter was reported to the Bureau and the officer was subsequently fired.⁷⁴² There have also been reports that the former Director himself may have breached the rules of conduct by shielding alleged relations from the Bureau's hand.⁷⁴³ No action was taken for this alleged misconduct.

All in all, the Bureau has strived to enforce the rules of integrity as provided in its Code of conduct despite concerns that misconduct at the higher level of the Bureau has gone unpunished. The oversight Committees have not done enough to correct this situation considering that it would be very difficult for the internal procedures of the Bureau to handle a case against their own head.

ROLE

9.3.1 Prevention

Score: 75

To what extent does the ACB engage in preventive activities regarding fighting corruption?

The Bureau has competencies in corruption prevention. The law prescribes some of the initiatives under this aspect.⁷⁴⁴ These include examining practices and procedures for institutions and identifying weak points,⁷⁴⁵ advising institutions on how to prevent or mitigate corrupt practices through procedural requirements and amendments, provision of technical support to institutions on anti-corruption initiatives like drafting service charters and ethical codes of conduct⁷⁴⁶ disseminating information through public education among other ways,⁷⁴⁷ and enlisting and

⁷⁴¹ As provided under Bureau Standing Order D/18 and Bureau Code of Conduct and Ethical Behaviour paragraph 14

⁷⁴² Alex Nampota, Interview with the author, 27th September, 2012

⁷⁴³ Global Integrity, Global Integrity Scorecard; Malawi 2009, available; <http://report.globalintegrity.org/reportPDFS/2009/Malawi.pdf>, where it was reported that the Director failed to initiate proceedings against Clerk of Parliament Matilda Katopola for abuse of office despite a clear audit report pointing to such misconduct

⁷⁴⁴ CPA (Amendment) 2004, section 10 (a) and Bureau Standing Order C/32

⁷⁴⁵ CPA, section 10 (a) (i)

⁷⁴⁶ CPA, section 10 (a) (ii)

⁷⁴⁷ CPA, section 10 (a) (iii)

fostering public support on the fight against corruption.⁷⁴⁸

The Bureau is also tasked to coordinate anti-corruption activities in the country.⁷⁴⁹ For this purpose a new department was set up to oversee and coordinate the implementation of all activities under the National Anti Corruption Strategy which has a catalogue of anti-corruption activities for the entire country.⁷⁵⁰ The former Director of the Bureau stated that this initiative has so far made important strides. The Bureau has a Research Unit with two staff who have acquired research and intelligence gathering skills. The Bureau publishes a newsletter online every month and numerous press statements as a way of providing the public with information.⁷⁵¹ The Bureau's Report Center⁷⁵² has an advice component embedded in its functions which receives requests from the public and provides advice.⁷⁵³

The Bureau makes submissions to various institutions who have anti-corruption initiatives or whose mandate intertwines with the Bureau. These include the Financial Intelligence Unit (FIU), and the National Audit Office (NAO). The Bureau has also made several submissions to the Parliamentary Legal Affairs Committee. The former Director indicated that the Bureau has also made several recommendations to the Law Commission on law reform relating to the fight against corruption and related offences in the country.⁷⁵⁴

Although the Bureau appears to be engaged in many preventive initiatives, their success is yet to be fully seen.

ROLE

9.3.2 Education

Score: 75

To what extent does the ACB engage in educational activities regarding fighting corruption?

The Bureau has competence in the area of educational activities in the fight against corruption. The Bureau has a Public Education Section set up under the Bureau Standing Orders⁷⁵⁵ which

⁷⁴⁸ CPA, section 10 (a) (iv)

⁷⁴⁹ *Ibid*

⁷⁵⁰ *Ibid*

⁷⁵¹ Alex Nampota, Interview with the author, 27th September 2012

⁷⁵² Report Centers are set up under Bureau Standing Order C/3 paragraph 3

⁷⁵³ *Ibid*

⁷⁵⁴ Alex Nampota, Interview with the author, 27th September, 2012

⁷⁵⁵ Bureau Standing Order C/33

leads in the education initiatives. The Bureau has engaged staff trained in public education and marketing to head this initiative.⁷⁵⁶ Under its Public Education section of the ACB website⁷⁵⁷ the Bureau has two main activities. These are Dissemination of Information and Enlisting and Fostering Public Support. Under the Dissemination of Information the Bureau undertakes the following activities; anti-corruption rallies, Electronic and print media programmes and initiatives, participating in Trade Fairs, and commemorating the Anti Corruption Day. Under the Enlisting and Fostering Public Support, the Bureau works with 56 clubs on civic education, and making presentations to various institutions on the anti corruption drive.⁷⁵⁸

The Bureau works with various civil society organizations in the country working in the governance area especially on anti-corruption and public education.⁷⁵⁹ The Bureau also provides training on anti-corruption issues to both the public and private sector. The training may include helping the institutions draft service charters, and codes of conduct.⁷⁶⁰

The Bureau does assess the impact of its initiatives through the Governance Surveys which it conducts every 5 years. The last surveys were done in 2005⁷⁶¹ and 2010⁷⁶² show an improvement.

The Bureau undertakes various educational initiatives as part of its anti-corruption tool-kit. It has been noted that the depth and breadth of these initiatives have been limited because of the budgetary constraints and people's perception which at times have worked against these initiatives.⁷⁶³

⁷⁵⁶ *Ibid*

⁷⁵⁷ www.anti-corruptionbureau.mw/civic-education/main-activities/

⁷⁵⁸ *Ibid*

⁷⁵⁹ Alex Nampota, Interview with the author, 27th September, 2012

⁷⁶⁰ *Ibid*

⁷⁶¹ Malawi Government, Governance and Corruption Baseline Survey 2005, available; http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/1740479-1143042582963/malawi_final_survey.pdf

⁷⁶² Chinsinga B., and others, Governance and Corruption Survey, 2010, available; <http://www.anti-corruptionbureau.mw/corruption-prevention/governance-and-corruption-survey-2010/>

⁷⁶³ Alex Nampota, Interview with the author, 27th September, 2012

ROLE

9.3.3 Investigations

Score: 75

To what extent does the ACB engage in investigation regarding alleged corruption?

The Bureau has competencies in investigations with an Investigations department which has specifically trained investigators.⁷⁶⁴ The number of investigators is however limited compared to the task at hand because of resource constraints the ACB faces.⁷⁶⁵

The investigative competencies of the Bureau are distinguished from other law enforcement agencies and are specifically provided for under the law. The Bureau is mandated by the CPA⁷⁶⁶ to investigate any allegation of corruption or related offences as prescribed under the CPA, and any offence under any other written law which the Bureau comes across in the course of investigating offences under the CAP⁷⁶⁷. Further to this, the Bureau has special investigative powers as provided under section 12 of the CPA. The Bureau is empowered under this provision to investigate any bank account, share account, purchase account, expense account or any other account, or any safe box in any bank. This can be done after obtaining a warrant from a Magistrate Court. The investigative powers and parameters of the Bureau are further expanded under the Bureau Standing Orders.⁷⁶⁸

The Bureau has been accused of focussing its investigative and prosecutorial powers on junior public officials whilst avoiding high ranking officials.⁷⁶⁹ Global Integrity also noted with concern that the Bureau is not adequately protected from political interference and hence senior government officials and politically connected persons are not targeted by the Bureau.⁷⁷⁰ The former Director of the Bureau countered this perception and insisted that the Bureau has investigated several senior officials.⁷⁷¹ He gave the following examples to support his assertion; the Bureau investigated and intervened when the former president, Dr. Bakili Muluzi wanted to purchase a government house in South Africa at a huge discount. Upon investigations, the Bureau

⁷⁶⁴ Alex Nampota, Interview with the author, 27th September, 2012

⁷⁶⁵ *Ibid*

⁷⁶⁶ CPA, section 10 (c) and (d)

⁷⁶⁷ CPA, section 10 (e)

⁷⁶⁸ Bureau Standing Order C/5 and C/11

⁷⁶⁹ US Department of State, 2010 Human Rights Report; Malawi, available; <http://www.state.gov/j/drl/rls/hrrpt/2010/af/154356.htm>

⁷⁷⁰ Global Integrity, Scorecard 2011; Malawi 2011, available; <http://www.globalintegrity.org/report/Malawi/2011/scorecard>

⁷⁷¹ Alex Nampota, Interview with the author, 27th September, 2012

recommended that the sale would be at a loss to the government and subsequently the sale was halted. The Bureau also initiated investigations on the current USD11million case against the former President Muluzi when he was in power.⁷⁷² The former Director of ACB further stated that it is common knowledge that the Bureau has successfully prosecuted Mr. Yusuf Mwawa⁷⁷³ and Sam Mpasu,⁷⁷⁴ both former ministers for Ministry of Education, and also investigated and prosecuted the former Secretary to Treasury Milton Kutengule,⁷⁷⁵ among other top ranking government officials. Recent initiatives of the Bureau include the investigation of former Minister of Finance Goodall Gondwe⁷⁷⁶ and former Minister of Tourism Patricia Kaliati,⁷⁷⁷ who had to be removed from Cabinet by the President upon being notified by the Bureau of its investigations.⁷⁷⁸ Other top ranking officials investigated ,James Chikago who was, at the material time of investigations, the Malawian Ambassador to Japan,⁷⁷⁹ and a number of Cabinet Ministers including Yusuf Mwawa⁷⁸⁰ and Sam Mpasu⁷⁸¹ who were at their respective times Ministers for the Ministry of Education. Recently, there has been a series of arrests of top ranking officials who commentators have speculated that it is political witch hunting⁷⁸² whilst others have stated that these officials could not be brought to book in the previous regime as they were politically protected.⁷⁸³ The arrests have netted the Clerk of Parliament,⁷⁸⁴ the former Director of the ACB,⁷⁸⁵ and the Ombudsman⁷⁸⁶ who have been arrested for abuse of office and other allegations.

⁷⁷² *BBC*, 'Malawi: Ex-President's corrupt trial opens', 8th March, 2011, available; <http://www.bbc.co.uk/news/world-africa-12675552>

⁷⁷³ *PanaPress*, 'Ex-Malawi education minister guilty of graft', 3rd February, 2006, available; <http://www.panapress.com/Ex-Malawi-education-minister-guilty-of-graft-13-578698-17-lang1-index.html>

⁷⁷⁴ Phiri, F., 'Its our turn to eat', in *The Global Integrity Report*, 2009 available; <http://report.globalintegrity.org/Malawi/2009/notebook/print>

⁷⁷⁵ US Department of State, 2007 Human Rights Report; Malawi, available; <http://www.state.gov/j/drl/rls/hrrpt/2007/100491.htm>

⁷⁷⁶ *Malawi Today*, 'Anti-Corruption Bureau implicates GoodallGondwe' 27th July 2012, available; <http://www.malawitoday.com/news/126033-anti-corruption-bureau-implicates-goodall-gondwe>

⁷⁷⁷ *Face of Malawi*, 'Anti-Corruption Bureau stalled Kaliati's corruption case', 5th August, 2012, available; <http://www.faceofmalawi.com/2012/08/anti-corruption-bureau-stalled-kaliatis-corruption-case/>

⁷⁷⁸ Alex Nampota, Interview with the author, 27th September, 2012

⁷⁷⁹ *Ibid*

⁷⁸⁰ *PanaPress*, 'Ex-Malawi education minister guilty of graft', 3rd February, 2006, available; <http://www.panapress.com/Ex-Malawi-education-minister-guilty-of-graft-13-578698-17-lang1-index.html>

⁷⁸¹ Phiri, F., 'Its our turn to eat', in *The Global Integrity Report*, 2009 available; <http://report.globalintegrity.org/Malawi/2009/notebook/print>

⁷⁸² *Malawi Voice*, 'Finally NGOs fault Joyce Banda's 100 days' 18th July, 2012, available; <http://www.malawivoice.com/2012/07/18/finally-ngos-faults-joyce-bandas-100-days-87939/>

⁷⁸³ *Ibid*

⁷⁸⁴ *The Nation*, 'Katopola arrested, released on bail' 27th June, 2012, available; <http://www.mwnation.com/national-news-the-nation/7251-katopola-arrested-released-on-bail>

⁷⁸⁵ *Zodiak Online*, 'ACB Director Nampota arrested' 29th June, 2012, available; http://www.zodiakmalawi.com/zbs%20malawi/index.php?option=com_content&view=article&id=5250:acb-director-nampota-arrested&catid=42:banner-stories&Itemid=102

⁷⁸⁶ *Malawi News*, 'Ombudsman arrested' 13th October, 2012, available; <http://www.bnltimes.com/index.php/malawi-news/headlines/national/11878-ombudsman-arrested->

The Bureau strives to balance between corrective (investigations and prosecutions) and preventative initiatives.⁷⁸⁷ The Director of the Bureau, however, lamented that the media and the public only seem to be interested in the corrective aspect of the Bureau and completely ignore the preventive aspect.⁷⁸⁸ It was observed that notwithstanding this *status quo*, the Bureau has proceeded with its preventive work and hoped that the next Governance Survey due in 2015, will show clear quantifiable gains on the preventive side.⁷⁸⁹

The Bureau has its own investigative powers and it has so far strived to investigate corruption at all levels. Concerns, however, still linger around lack of aggression to investigate politically connected individuals including senior government officials. The Bureau also needs to improve in its data collection and presentation to the public.

Recommendations

- Undertake a comprehensive baseline survey regarding the resource requirements for the better functioning of the ACB so that the Bureau is better placed to negotiate its budget with both government and development partners based on tangible resource gaps;
- Advocate for an amendment to the law that requires the ACB to seek consent from the DPP in prosecuting cases related to corruption;
- In order to enhance transparency of its activities, the ACB should regularly publish statistics related to the corruption cases that it is investigating and/or prosecuting
- Lobby for the strengthening of the law that protects whistle blowers;
- Lobby for a constitutional amendment that could provide for making the Anti-Corruption Bureau to be one of the constitutional bodies

⁷⁸⁷ Alex Nampota, Interview with the author, 27th September, 2012

⁷⁸⁸ *Ibid*

⁷⁸⁹ Chinsinga B., and others, Governance and Corruption Survey, 2010, available; <http://www.anti-corruptionbureau.mw/corruption-prevention/governance-and-corruption-survey-2010/>

10. POLITICAL PARTIES

Summary

Since the transition to democratic governance in the early 1990s, political parties exist as the primary units for political participation and engagement. However, there are still challenges to developing a democratic, competitive and accountable party system. The functioning and performance of political parties are affected by intra-party feuds mostly around issues of leadership, organisational structures, and class and ethnic interests. Political parties lack independent funding to the extent that they are effectively beholden to the interests of their funders and leaders. This is worsened by the fact that there are no effective laws on internal governance of political parties and there is a general preference among politicians to maintain the status quo.

The Table next page presents the indicator scores which summarize the assessment of political parties in terms of their capacity, internal governance and their roles within the Malawian integrity system. The remainder of this section presents the qualitative assessment for each indicator.

Political Parties

Overall Pillar Score: 31.9/100

Dimension	Indicator	Law	Practice
Capacity 37.5/100	Resources	75	25
	Independence	50	0
Governance 20.8/100	Transparency	0	0
	Accountability	25	0
	Integrity Mechanisms	75	25
Role 37.5/100	Interest aggregation	25	
	Anti-corruption	50	

STRUCTURE AND ORGANISATION

In Malawi the right to form or join a political party is enshrined in the Constitution of Malawi, specifically under section 32(1) on freedom of association and section 40 on the right to form, join or participate in a political party. A legal framework regulating the formation of political parties is found in the Political Parties Registration and Regulation Act.

In Malawi, each party needs to have a party constitution to be registered, but the exact form of the party constitution is left to the individual party's discretion.⁷⁹⁰ Traditionally, political parties have a role in maintaining competitive political processes by providing alternative policy options to the electorate.⁷⁹¹ However, political parties in Malawi are, in practice, not distinguished from each other by having different social and economic policies and beliefs but by personalities and ethnic rivalries.⁷⁹² In addition the majority of the political parties are not well established.⁷⁹³ However, most parties have a party president who also serves as chairperson of the national executive committee. The party president is often elected at the national convention. The national executive committee would comprise chairpersons from the Regional Executive Committee, District

⁷⁹⁰ Lars Svåsand and Nixon S. Khembo 'political parties in Malawi' in *Government and Politics in Malawi-A textbook* P 223.

⁷⁹¹ Asiyati Chiweza 'Local Government' in *Government and Politics in Malawi-A textbook*. P. 171.

⁷⁹² Ibid. p 171.

⁷⁹³ Ibid.

Executive Committee, Constituency Committee, Ward committee, Area Committee, Traditional Authority Area and the Local Branch and any other persons appointed by the President or ex-officio members of the National Executive Committees.⁷⁹⁴ The party system is fragmented and has about 48 registered political parties, most of which are moribund. The main active parties have geographical anchorage that is based mainly on regionalism and ethnicity.⁷⁹⁵

ASSESSMENT

10.1.1 Resources (Law)

Score: 75

To what extent does the legal framework provide an environment conducive to the formation and operations of political parties?

Legal provisions for the registration and operations of political parties in Malawi are generally considered as reasonable and in line with international and regional standards relating to freedom of association.⁷⁹⁶ The legal framework for the formation and operation of political parties consists of the Constitution of the Republic of Malawi (1995), the Political Parties Registration and Regulation Act (1993), the Presidential and Parliamentary Elections Act (1993) and the Electoral Commission Act (1998). However, the last two pieces of legislation are concerned with the regulation of political parties only with respect to their participation in elections.

The Constitution provides for the political rights of citizens including the right to form, join and participate in the activities of a political party as well as to participate in political activities intended to influence the composition and policies of the Government.⁷⁹⁷ The Political Parties Registration and Regulation Act establishes a regulatory framework and principles for the registration of political parties and allows any citizen of Malawi who has reached the age of 18 years to be a member of a political party of his or her choice. The Act requires that a party seeking registration should consist of no fewer than a hundred members and should submit its application, together with the party's constitution and manifesto, to the Registrar of Political Parties

⁷⁹⁴ See for example, The MCP, the DPP and UDF Constitutions.

⁷⁹⁵ Chinsinga, Blessings (2011) *Benchmarking the Core Capacities of Political Parties* (Lilongwe: Centre for Multiparty Democracy).

⁷⁹⁶ Article 25 ICCPR, United Nations Human Rights Commission, General Comment No. 25, paragraph 26: "The right to freedom of association, including the right to form and join organizations and associations concerned with political and public affairs, is an essential adjunct to the rights protected by article 25." See also Article 10 of the African Charter of Human and Peoples' Rights OAU Document CAB/LEG/67/3 rev, 1986 and African Union Declaration on the Principles Governing Democratic Elections in Africa, IV. Elections: Rights and Obligations, paragraph 5: "Every citizen shall have the freedom to establish or to be a member of a political party or Organization in accordance with the law."

⁷⁹⁷ Section 40(1) of the Constitution of the Republic of Malawi

in the Ministry of Justice and Constitutional Affairs. Currently, there are 45 registered political parties.

The law requires registration of political parties to be refused or cancelled for those parties whose purposes and objectives are unlawful. Such unlawful elements include ethnic, racial or religious discrimination; seeking political change through violence or aiming secession of any part of the territory of Malawi. If the registration of a political party is refused or cancelled, the decision can be challenged in the High Court.⁷⁹⁸ Beyond the Constitution and the statutes, the Courts in Malawi have played a pivotal role in deciding the direction and course of registration and operation of political parties. As such, court judgments are a critical source of law on these matters.

Furthermore, the Constitution provides for state funding for political parties in order to ensure that parliamentary parties are able to continue representing their constituencies in the National Assembly. Section 40(2) requires the State to provide money to any registered political party that has secured more than 10 percent of the national vote and secured parliamentary seats. Furthermore, section 66 of the Parliamentary and Presidential Elections Act stipulates that in order to finance the election campaign, political parties are allowed to receive contributions from any individual, any non-governmental or private organisations either inside or outside Malawi. The legal framework does not provide for any limitation on campaign expenditure. Neither does it require disclosure of the amounts and sources of funding. However, section 193(4) of the Constitution, prohibits the use of state resources, other than parliamentary funding, for campaign purposes of any political party.

In spite of the fairly adequate legal framework for the registration and operations of political parties in Malawi, there are some pertinent concerns about its comprehensiveness to promote the development of vibrant political parties capable of delivering on their core mandates as agents for democratization and institutionalization of good governance. This concern is raised on the understanding that party law should at the minimum be able to constitute “state based regulations that determine the legal status of political parties and specify what constitutes party membership, how parties must be organized, how they should campaign, how they must raise and handle party funds etc”⁷⁹⁹. The Political Parties Registration Act is rather too narrow as it mainly covers aspects of registration and deregistration of parties.

⁷⁹⁸ For instance, the application for registration of the country’s 45th political party Maravi People’s Party was initially rejected on the basis that the name Maravi is very similar to Malawi which is a protected name under the Protected Names and Emblems Act. However, the applicants sought court interpretation and were relieved by the court ruling that ordered the Registrar to register the party

⁷⁹⁹ Janda K (2005) Political Parties and Democracy in Theoretical and Practical Perspectives: Adopting Party Law (National Democratic Institute for International Affairs (NDI), USA.

10.1.1 Resources (Practice)

Score: 25

To what extent do the financial resources available to political parties allow for effective political competition?

Party funding and resource mobilization is a problematic element in Malawi. There is a lack of clarity on how political parties should raise funds and mobilize resources. This lack of clarity serves ruling parties very well as they are able to use resources from public coffers through budgetary appropriations to the presidency and other allocations. Ruling parties also receive donations from undisclosed private sector actors in practices that can be described as rent seeking.⁸⁰⁰ This situation disadvantages opposition political parties which are unable to mobilize resources for their campaign activities. Furthermore, the pervasive patrimonial politics and the centrality of the state to business success constrain many businesses from financing opposition political parties for fear of reprisals.⁸⁰¹ This state of affairs is a concern to the integrity system of the country because it blurs the divide between the public and private sectors. Furthermore, despite constitutional guarantees of freedom of people to join and act on behalf of their political parties, critical opposition party functionaries are often targeted for various punitive measures aimed at choking their financial sources including personal businesses.⁸⁰²

Furthermore, the legal provision requiring political parties to secure at least 10 percent of the national vote and legislative representation favours big political parties at the expense of smaller ones. This is particularly the case because in practice the 10 percent threshold is used to marginalize those parties which get very few seats in Parliament. The main reason for this is the working of the first-past-the-post electoral system which allows many candidates to contest in a given constituency thereby splitting the votes thinly across the candidates. For those parties that qualify at the threshold, a proportional formula based on number of seats secured in the National Assembly is used.⁸⁰³ Such practices reward bigger parties and effectively discourage competition from smaller parties. However, what has been more disconcerting is that there has been no accountability for the money that parliamentary parties receive from the State. There are reports that nearly always, cheques for party funding from Parliament have been issued not in the names

⁸⁰⁰ Chingaibe (2010) *Business and the State in Malawi: The Politics of Institutional Formation, Maintenance and Change* (PhD Thesis, University of York).

⁸⁰¹ Ibid.

⁸⁰² Chisinga (2011) *Benchmarking Core Capacities and Competencies of Political Parties In Malawi*, (Lilongwe: Centre for Multiparty Democracy).

⁸⁰³ Some people view this as a convenient way of sharing out the allocation for party funding rather than using the proportion of votes amassed by each parliamentary party. The law does not spell out how the money should be shared among the parties that qualify for funding.

of the parties but individuals in the party.⁸⁰⁴ Calls to audit party funding have been resisted vehemently by the political parties.⁸⁰⁵

Despite the limitations set by the Constitution on the use of state resources for electioneering, the use of these resources by ruling parties is usually overt as their campaign rallies are graced by the State President and the use of state resources is justified as legitimate expenditures for presidential functions. For example, the European Union noted that state resources had been used for campaigning as the President travelled throughout the country for campaign rallies using a range of state resources including military helicopters, parastatal and government vehicles for his campaign team and supporters and security services. State-owned media also provided an exclusive platform for the activities of members of the ruling Democratic Progressive Party.⁸⁰⁶ A report by the Commonwealth Observer Group also noted that cabinet Ministers and their deputies abused Government resources for campaigning and that some parastatal organisation, the Malawi Communications Regulatory Authority (MACRA) financed the production of campaign materials, including t-shirts, for the ruling party.⁸⁰⁷

Other funding for political parties comes from the Centre for Multiparty Democracy (CMD) which works on 'promoting a well functioning multiparty political system and accountable political parties in Malawi'⁸⁰⁸ CMD provides project funding to political parties for institutional capacity development and appropriates money for work on reforming the legal and administrative framework for political parties in the country.⁸⁰⁹ This support, however, is only available to political parties that have parliamentary representation and is given on the basis of clear project proposals from the parties.

In short, ruling political parties have a disproportionate advantage over opposition parties in accessing resources. Access to financial resources also translates into differences in administrative capacities and competencies of political parties. Almost inevitably, ruling parties tend to have large administrative work forces as well as decent infrastructure such as offices. The other parties operate from houses of their leaders and occasionally from hotel lobbies and conference rooms.⁸¹⁰ Political competition among parties is thus inevitably skewed towards larger and ruling parties.

⁸⁰⁴ Interview with party officials and Parliamentary staff, July 2010. See also CMD (2012) Sensitivities and Benefits of Paid Up Party Membership (Lilongwe: CMD).

⁸⁰⁵ Author Interview with Parliamentary Official. See also Chinsinga (2011) Benchmarking core capacities of Political Parties (Lilongwe: CMD)

⁸⁰⁶ Kanyongolo, Edge and Martin Ott (eds.) Democracy in Progress: Malawi's 2009 Presidential and Parliamentary Elections (Kachere Books No.48).

⁸⁰⁷ EISA (2009) Malawi: Election Observation Report (Johannesburg:EISA).

⁸⁰⁸ Interview with Executive Director of CMD. See also CMD (2012) Strategic Plan 2012-2015 (Lilongwe, CMD)

⁸⁰⁹ *ibid*

⁸¹⁰ Author observation from various media reports.

10.1.2 Independence (Law)

Score: 50

To what extent are there legal safeguards to prevent unwarranted external interference in the activities of political parties?

In Malawi, there are no significant legal provisions endowing the State with undue powers to prevent political parties from ably carrying out their mandates, as long as parties act within the precincts of the law. Thus, in law, political parties can claim and make use of as much political space as any other civic entity in the country.

In general, the law provides that all political parties have the right to conduct their legitimate activities freely and in a fair environment. The main provisions include the right to equal access to public places to hold rallies and affix campaign material and equitable access to the media, especially public broadcasters.⁸¹¹ They also prohibit the use of inflammatory, defamatory or insulting language or incitement to public disorder, violence or intimidation and any defacement or removal of election material⁸¹². In terms of campaign rallies, political parties are required to inform District Commissioners and the police of planned mass events in order to maintain public security and order.⁸¹³

However, the law does not stipulate punitive measures for actors or agencies who act against the guaranteed rights of political parties. This is a serious legislative gap. In short, the gap effectively undermines the letter and spirit of the laws safeguarding the rights and independence of political parties.

Furthermore, the Malawi Electoral Commission's Code of Conduct for Political Parties and Candidates (2002) lays down requirements for political parties or candidates in the electoral process including requiring them to inform the local Police authorities and the District Commissioner of the venue and time of any proposed meeting well in time so as to enable the Police to make necessary logistical arrangements for controlling traffic and maintaining peace and order.⁸¹⁴

⁸¹¹ Presidential and Parliamentary Elections Act.

⁸¹² Ibid.

⁸¹³ Ibid.

⁸¹⁴ Malawi Electoral Commission (2002) Code Of Conduct For Political Parties And Candidates (Prescribed under Section 61(2) of the Parliamentary and Presidential Elections Act No. 31 of 1993 and under Section 45 of the Local Government Elections Act of (1996)

10.1.3 Independence (Practice)

Score: 25

To what extent are political parties free from unwarranted external interference in their activities and practice?

A general observation is that while the law is clear against political parties perpetrating unlawful acts and practices, in practice political parties are not penalised or deregistered for indulging in undemocratic and unconstitutional behaviour.⁸¹⁵

Intimidation of opposition politicians by operatives of ruling parties has been prevalent. More often than not, ruling political parties, especially the United Democratic Front (UDF) and the Democratic Progressive Party (DPP) have used their youth wings to perpetrate violent intimidation against opposition politicians or members of their own parties who held different views from those of the party leadership.⁸¹⁶ Youth wings of ruling parties have been used to bar leaders of opposition political parties from conducting political activities especially in areas considered as strongholds for the respective ruling parties.⁸¹⁷ Such undemocratic and unconstitutional acts have at times been perpetrated in full view of the Police who have felt “*duty bound*” to turn a blind eye on ruling party functionaries harassing opposition party counterparts.⁸¹⁸ Such acts have mainly taken the form of mounting illegal roadblocks purposely aimed at preventing opposition political party leaders from getting to designated venues of political gatherings and/or ransacking political podiums. For instance, In March 2011 the Police was deployed to disperse supporters of the then opposition United Democratic Front even though the leadership of the party had informed both the Police and the District Commissioner for Lilongwe District about a meeting that had been planned to take place in the district. The key speaker at the meeting Atupele Muluzi was later arrested and his supporters took to the streets of Lilongwe. In 2007, the Military was deployed to cordon off former President Bakili Muluzi, then leader of opposition United Democratic Front, from addressing a party meeting in Mulanje. Supporters who had already convened were roughed up and dispersed by the Military despite that the Military’s mandate borders on protecting the country from external threats. Such interference in the work of political parties has sometimes been mitigated by the Judiciary through granting relief to opposition political parties. For example, courts have made rulings allowing opposition political parties to proceed with planned activities in spite of acrimony from agents of the ruling parties.

⁸¹⁵ Patel, Nandini (2005)

⁸¹⁶ For the activities of the ‘young democrats’ of the UDF, see Kalua (20

⁸¹⁷ Interview, Clement Makuwa, President of Young Politicians Union

⁸¹⁸ For example, Members of the National Democratic Alliance (NDA) were prevented from attending Parliament by a group of UDF young democrats who also set on fire one vehicle belonging to an NDA.

The legal requirement obliging political parties to inform the Police and District Commissioners about impending political meetings, has largely been misinterpreted as a requirement for political parties to seek permission in order to conduct their meetings. Where the ruling party has been uncomfortable with an impending meeting by opposition political parties, District Commissioners have been coerced not to grant clearance for the venues. Furthermore, ruling parties especially the UDF and DPP also significantly interfered with the operations of opposition political parties through the institution of traditional leadership which is directly controlled by the state presidency. Traditional leaders have prevented political parties, especially those in opposition, from carrying out their activities in respective areas. These include arbitrary decisions by traditional leaders not to grant access to campaign venues as parties and candidates follow cultural norms of seeking permission from them.⁸¹⁹

Furthermore, the office of the Registrar of Political Parties, which is overseen by the Minister of Justice and Constitutional Affairs, is perceived to have been used by ruling parties to adversely affect the operations of opposition parties. New parties have been denied registration on flimsy grounds but on orders from ruling party executives.⁸²⁰ Some older parties have been deregistered by the Registrar on request by individuals who have defected from these parties to the ruling parties. However, aggrieved parties have been able to seek redress in the courts.⁸²¹

Thus, the security apparatus of the State and agents of the ruling party occasionally interfere with the activities of opposition political parties. The interference ranges from non-severe verbal attacks to severe physical attacks and arrests instilling fear or instigating violence among opposition party functionaries and supporters.

Since the law does not stipulate punitive measures for actors or agencies who act against the guaranteed rights of political parties, this allows state-based actors to act with impunity against the rights and independence of political parties especially those parties in the opposition.

⁸¹⁹ See EU Elections Observation Mission Report 2009. Also refer to traditional leaders pillar.

⁸²⁰ For example, the Peoples Party was registered only through the Courts in 2011.

⁸²¹ For example, the Republican Party fought against deregistration by its leader and founder when the leader joined the party in government, the DPP.

10.2.1 Transparency (Law)**Score: 25**

To what extent are there regulations in place that require parties to make their financial information available?

Although the State provides funding to parliamentary parties, there is no express law that obliges the political parties to make information about the use of the money available to the public. It has been argued in the media and other reports that the provisions of the Public Finance Management Act, which are applicable to all public finances including the State's allocation to parliamentary parties, must apply to political parties too.⁸²² However, this interpretation has been resisted by the politicians on the basis that some of the expenditures incurred by political parties cannot be receipted.⁸²³

10.2.1 Transparency (Practice).**Score 0**

To what extent can the public obtain relevant financial information from political parties?

Lack of an enabling legal framework coupled with financing practices of political parties make it virtually impossible for the public to access substantive financial information from Malawian political parties. Political parties lack institutionalized structures, systems and processes through which party resources should be channelled and handled in a transparent manner which could be easily accessed by the public. Financial records are sketchy even to executive members of the parties themselves. Due to overdependence on party leaders for financial mobilisation, not even party Treasurer Generals have all the details pertaining to respective party funds - they are just figureheads who do not manage funds as their position would suggest.⁸²⁴ The bottom line is that political parties in Malawi do not make their financial information publicly available and no law clearly requires them to do so.

⁸²² Chinsinga (2011).

⁸²³ MCP administrative Secretary, Interview with Author; Also interview with Parliamentary Official.

⁸²⁴ Chinsinga (2011), *ibid.*

10.2.3. Accountability (Law)

Score: 25

To what extent are there provisions governing financial oversight of political parties by a designated State body?

The legal framework governing financial oversight of political parties in Malawi is not clear. Although the Political Parties Registration and Regulations Act provides that the Registrar of Political Parties or any person authorised in writing by the Registrar may at any reasonable time inspect and take or extract from copies of records, manifestos and/or other documents of a registered political party⁸²⁵, the Act does not explicitly designate the Registrar as a State body responsible for oversight and regulation of political party finances. The Act does not even specify when reports or records should be due and the format they should take. Neither does it specify finances that should be subjected to inspection.

With respect to state funding of parliamentary parties, as noted above, it has been argued that the provisions of the Public Audit Act should be applicable to political parties. However, this has been resisted so much that the only aspect of state funding that is known to the public is the overall budgetary allocation for political parties. Neither the specific amounts given to each qualifying political party nor the details of expenditure are made public.

10.2.4. Accountability (Practice)

Score 0

To what extent is there effective financial oversight of political parties in practice?

Practical financial oversight is a very weak element in the accountability of political parties in Malawi. Although the Political Parties Registration Act empowers the Registrar of Political Parties to inspect party accounts and records, this does not happen. There are three possible reasons for the lack of oversight. Firstly, the law gives the Registrar of political parties discretion whether to inspect the records of parties or not. Thus, there is no express obligation for the registrar to discharge this duty. Secondly, like many offices in the civil service, the office of the Registrar is short on capacity to effectively carry out all its duties. Thirdly, there are no details for

⁸²⁵ Section 14(1)(2) of the Political Parties Registration and Regulations Act (1994)

operationalizing the legal requirement for political parties to submit their accounts to the Registrar and there are no punitive measures for political parties which fail to make the records available to the Registrar for inspection. The situation is worsened by the prevalence of a deeply entrenched mentality, especially among the party leaderships, that politics cannot and should not be audited. The main reason for this mentality is that political party leaders are the primary financial benefactors of their parties so much that probing party finances would quickly lead to probing their personal and business finances.⁸²⁶

10.2.5. Integrity (Law)

Score 75

To what extent are there organisational regulations regarding the internal democratic governance of the main political parties?

All registered political parties have party constitutions⁸²⁷ which lay down the *modus operandi* of the parties on various elements. Malawian political parties have more or less standardized structures with minor variations through which their day-to-day decisions and activities are organized and implemented. Generally, parties are organized at five different levels, namely; national, regional, district, area and branch levels. The Constitutions spell out standard procedures for holding periodic elections/conventions to fill positions in party committees at the various levels. Thus, political parties have a hierarchy with a decision-making and recruitment system that stretches from the national level to the branch level. All positions at the different party levels are to be filled through popular elections within the parties. Furthermore, all registered and active political parties have decision making fora at the different levels designed to cultivate the culture of open discussions on policy issues in a free and fair manner. Consequently, constitutions for the different political parties are flexible in terms of flow of decisions with room for some decisions to be made at the top level flowing downwards as well as policy proposals flowing from the bottom structures up the party hierarchy.⁸²⁸

⁸²⁶ Chingaibe, Henry (2010) *Business and the State in Malawi: The Politics of Institutional Formation, Maintenance and Change* (PhD Thesis, University of York)

⁸²⁷ It is a legal requirement for registration.

⁸²⁸ See the Constitutions of MCP, UDF, AForD and DPP.

10.2.6. Integrity (Practice)

Score: 25

To what extent is there effective internal democratic governance of political parties in practice?

Different studies of political parties in Malawi have bemoaned low levels of intra-party democracy in the country.⁸²⁹ Parties are, almost perennially, marred by intra-party feuds mostly around issues of leadership, organisational structures, class and ethnic interests.⁸³⁰ Party leaders tend to develop oligarchic tendencies and there are shortfalls in complying with institutional mechanisms to cultivate a culture of democratic governance within the parties. Although party constitutions stipulate that leadership positions shall be filled through periodic competitive elections, the dominant practice is that party positions are filled through appointments made by party presidents or a small number of people who are close to the party president and exert inordinate influence within the party. For instance, of the five leading political parties in the last three years,⁸³¹ only the Malawi Congress Party had a President and other leaders who were elected at a party convention. In the rest of the parties, leaders had been appointed or imposed contrary to the letter and spirit of their own Constitutions.

Furthermore, the overreliance on party leaders as funders or resource mobilisers has contributed to undermining the drive for, intra-party democracy and promoted and entrenched patronage politics⁸³². It is common that party members that hold dissenting views are regarded as rebels and usually attract reprisals including expulsion from the parties.⁸³³

10.3.1 Interest aggregation and representation.

Score: 25

To what extent do political parties aggregate and represent relevant social interests in the political sphere?

Aggregation of popular interests and aspirations of party constituents' remains an underdeveloped role in Malawian political parties. The extent to which political party positions on

⁸²⁹ Kasinje, K (2011) *Opposition Political Parties and Democracy Consolidation Nexus: An Appraisal of Malawi's Opposition Politics from 2004-2011*, Lembani, S (2007) *The Influence of Institutional Arrangements on intra-party Democracy in Malawi* (Lambert Academic Publishers) Mpesi, Andrew (2011) 'Political Parties and Their manifestoes: Inferring Party Policy Positions in Malawi since 1994', *Forum for Development Studies*, 38(1): 25-41.

⁸³⁰ Chinsinga (2011)

⁸³¹ The People's Party, Democratic Progressive Party, Malawi Congress Party and the United Democratic Front),

⁸³² Chinsinga (2011) *ibid.*

⁸³³ Lembani, S (2007) *The Influence of Institutional Arrangements on intra-party Democracy in Malawi* (Lambert Academic Publishers); Chinsinga (2011).

topical policy and legislative issues are representative of the wishes of the people has continuously been questioned since the transition to multiparty democracy.⁸³⁴ For example on proposals to change presidential term limits; impeach some judges of the High court; enactment of repressive media and other laws; effecting anti-defection law on nomadic members of parliament, etc. . The lack of coherent policy frameworks coupled with either the absence or weak party secretariats has undermined political party capabilities to effectively aggregate popular interests into policy programmes. Although most political parties have research directorates, they rarely have a specialized cadre of personnel that takes lead in thinking about strategies for collecting and aggregating popular interests and developing policy positions and advocacy strategies based on the results.⁸³⁵

Party conferences which are conventional means of collecting and aggregating voices of the people have not been regular and whenever they have been held, they have not been used as platforms for policy development, debate and discussion. Even development of party manifestoes for elections is often contracted out to external experts. However, the manifestoes are never discussed or validated at party conventions where the main focus is on ratifying the wishes of the ruling elites through, inter alia, constitutional amendments and endorsement of their supporters to key party positions.⁸³⁶ Furthermore, while conventional practice is for party conferences to be forums for the party membership to speak freely, it is somewhat ironic that delegates to party conferences are chosen in a way that ensures that the interests of the party leadership prevail at any cost. The lower party structures are not mandated to engage in policy dialogue and debate yet they are closer to the actual points of action where popular interests germinate from. Instead of taking advantage of the fact that lower level party structures have basic policy relevant information in key sectors at their respective levels they are preoccupied with mere less important issues such as entertaining visiting party leaders and delegations.⁸³⁷

In sum, the elitist nature of policy development has contributed to weak interest aggregation and mobilization capacity of political parties in the country as the grassroots are delinked from critical policy issues with a direct bearing on their livelihoods which in turn renders politics irrelevant to them as they lack appreciation of how politics is linked to their day-to-day livelihoods.

⁸³⁴ See for example CCJP (2012) Parliamentary Audit Report.

⁸³⁵ Chinsinga (2011), Kalua (2009)

⁸³⁶ Author observations and Strategic Plan of the Centre for Multiparty Democracy (2012 -2017).

⁸³⁷ Chinsinga (2011), *ibid*

10.3.2. Anti-corruption commitment

Score 50

To what extent do political parties give due attention to public accountability and fight against corruption?

Since the transition to multiparty democracy political parties in Malawi have demonstrated, through their election manifestoes and campaign speeches, policy commitment to fight corrupt practices. For example, the former ruling Democratic Progressive Party was famous and popular for its rhetoric on anti-corruption efforts which was christened as the policy of “zero tolerance on corruption in Malawi”⁸³⁸. Furthermore, in the 2009 general election campaign all key political parties vowed to fight corruption once voted into office.⁸³⁹

However, there are serious questions about the sincerity of political parties on their pledges to fight corruption. Studies on corruption in Malawi continue to indicate that corruption is increasingly getting worse and its key perpetrators are political actors, especially those who in ‘State power.’⁸⁴⁰ Lack of transparency on party finances has provided a fertile ground for speculations about amounts of money politicians raise for parties and how the money is used. Parties receive monetary incentives from local and international business interests. This, however, is not limited to ruling parties. Opposition political parties that demonstrate real potential to win government also receive clandestine funding dubbed ‘insurance fees’ from businesses in order to guarantee them business favours once the party wins government.⁸⁴¹ This institutional deficiency gives the impression that political parties are a vehicle for making easy dirty money whether in Government or not, despite their podium pledges to fight corruption.

In short, all political parties rank highly on anti-corruption rhetoric but is low on practice. Even the architect of the famous zero tolerance on corruption, confessed seven years after the strategy was launched that that he did not know whether the war against corruption was being won.⁸⁴² A common perception, however, is that the war was lost much earlier than its fighters recognized.

⁸³⁸ Hall-Mathews, D (2007) *Tickling Donores and Tackling Opponents: The Anti-Corruption Campaign in Malawi* in Sarah Bracking (ed.) *Corruption and Development: The Anti-Corruption Campaigns* (Palgrave: MacMillan)77-102.

⁸³⁹ Author observations. See also Manifestoes of MCP, UDF and DPP for the 2009 election

⁸⁴⁰ Chinsinga, Blessings, Happy Kayuni and Sidon Konyani (2011) *Governance and Corruption Survey 2010* (Centre for Social Research for Anti-Corruption Bureau: Zomba and Lilongwe); Millenium Consulting (2006) *Malawi: Governance and Corruption Baseline Survey* (Lilongwe: Anti-Corruption Bureau).

⁸⁴¹ Chingaape (2010), *ibid*.

⁸⁴² Speech of President Bingu Mutharika delivered as National Address to Parliament, June 2011.

Recommendations

- Advocate for the introduction of a legal framework for political parties that will also ensure that political parties' internal functioning and management are subjected to law for them to abide by basic democratic practices in the way they operate;
- Advocate for reduction on the constitutional threshold (of 10% of the national vote) for political parties to qualify for public funding to ensure that a majority of political parties that have secured representation in Parliament can also access public funding;
- Advocate and lobby for introduction of a legal framework that will regulate private and campaign financing of political parties;
- Undertake a targeted public awareness campaign on the role and functions of political parties in the advancing of democracy in general and the fight against corruption in particular;
- Advocate for the need to for political parties to have a clear stand on the fight against corruption as one of the key agendas in their manifestoes;

11. MEDIA

Summary

The Malawian media stands out as an integral player in the promotion of integrity and anti-corruption particularly through dissemination of investigative reports and civic education programmes on a wide range of topics within the anti-corruption discourse. The legal environment for the media is generally conducive. While there are not many limitations on the media, political interference with media houses has been common especially between the 2009 general election and the death of President Mutharika in April 2012. The table below presents the indicator scores which summarize the assessment of the Media in terms of its capacity, its internal governance and its role within the National integrity system. The remainder of this section presents the qualitative assessment for each indicator.

Media

Overall Pillar Score: 60.4/100

Dimension	Indicator	Law	Practice
Capacity 56.3/100	Resources	75	50
	Independence	50	50
Governance 58.3/100	Transparency	50	75
	Accountability	50	50
	Integrity Mechanisms	75	50
Role 66.7/100	Investigating and exposing cases of corruption practice	75	
	Informing the public on corruption and its impact	50	
	Inform public on governance issues	75	

Structure and Organization

The Media in Malawi comprises public and private media houses. Public media houses comprise both the print and electronic media and are created by Act of Parliament and are wholly owned by the Malawi Government. The public electronic media operates under the banner of the Malawi Broadcasting Corporation (MBC) and includes MBC (TV), MBC Radio 1 and MBC Radio 2 FM.⁸⁴³ The Print media operates directly under the Ministry of Information and Civic Education. Through the Malawi News Agency (MANA), they publish Boma Lathu and MANA is also accessible online under www.manaonline.mw.

The Private Media Houses are owned and run by either individuals, religious groups, Non-Governmental Organizations (NGOs) or Communities. While some of them are purely

⁸⁴³ For some more detailed information and discussion see Chiyamwaka, B. (2009). "The Media: Political Players or Honest Brokers?", *Democracy in Progress: Malawi's 2009 Parliamentary and Presidential Elections* (Martin Ott & Edge Kanyongolo, Eds.), Kachere Series, Zomba.

commercial (i.e. focusing on profit maximization) others have particular agendas such as the propagation of their faith and dissemination of development experiences from communities in their catchment areas. They constitute both the print and the electronic media.

Assessment

CAPACITY

Resources (Law)

Score: 75

To what extent does the legal framework provide an environment conducive to a diverse independent media?

The cardinal provisions governing the media in Malawi are in the Constitution. It provides that “The Press shall have the right to report and publish freely, within Malawi and abroad, and to be accorded the fullest possible facilities for access to publish information”.⁸⁴⁴ Additionally, sections 34 on the freedom of opinion, 35 on freedom of expression and 37 on access to information provide a normative basis for the functioning of the media. Other important legislations include The Communications Act (1998)⁸⁴⁵ which creates a regulatory body, the Malawi Communications Regulatory Authority (MACRA) with powers to license all and exercises oversight over broadcasters. All media firms, including print media, are required to register with the Registrar of Companies and to be licensed for business by the Ministry.

The only legal limitation to broadcasting is the need for a license.⁸⁴⁶ However, the Communications Act does not make provision for an appeal process in the event that an application for a licence is refused. The Act, nonetheless, provides criteria that MACRA can use to grant or refuse a licence.⁸⁴⁷ However, the criteria leaves too much discretion to MACRA as the provisions are worded in a way that gives substantial latitude for generality.⁸⁴⁸ The legal framework provides a conducive environment for public, commercial and community broadcasting.⁸⁴⁹ Furthermore, the law requires MACRA to promote media diversity in its activities and decisions. In particular, it requires MACRA to regulate the provision of broadcasting in Malawi in a manner which it considers is best suited to promote the provision of a diverse range of broadcasting services on a national and local level⁸⁵⁰. Although there are no legal limitations

⁸⁴⁴ Section 36 of The Constitution of the Republic of Malawi

⁸⁴⁵ See the Communications Act (1998) for a comprehensive overview.

⁸⁴⁶ Section 46 of the Communications Act.

⁸⁴⁷ Section 37(3) of the Communications Act

⁸⁴⁸ For example

⁸⁴⁹ Section 47 of the Communications Act

⁸⁵⁰ Section 45 (e) of the Communications Act

on entry to journalism as a profession, there are institutions which regulate the standards in the practice of journalism and these are the Media Council of Malawi and the Journalists Association of Malawi which regulate and effect a Code of Ethics and Professional Conduct.⁸⁵¹

11.1.2 Resources (Practice)

Score: 50

To what extent is there a diverse independent media providing a variety of perspectives?

The media in Malawi is quite diverse. There are 47 licensed electronic media houses of which 21 are not yet operational.⁸⁵² Of those that are operational, only two are Television stations of which one is public and the other is owned by a community of interest.⁸⁵³ The remaining 24 operational stations are sound (radio) broadcasters. Of these only two are state-run while 22 are either private or owned by a community of interest. Out of the 24 radio stations only seven have limited geographical coverage while the rest broadcast nationally. The diversity in the ownership of the media houses ensures a diversity of news perspectives.

In terms of outreach, most perspectives from the print media target the urban middle class who can afford to buy the Newspapers. Most newspapers are in English and thus their readership is quite low mainly due to the high levels of illiteracy.⁸⁵⁴ The most popular Daily papers-The Nation and The Daily Times- are also mostly urban-oriented. This is despite the fact that 80% of the Malawi population is based in the rural areas.⁸⁵⁵

Efforts have however been made to make the respective papers more accessible to rural masses. For instance, the Weekend Nation and Malawi News publish vernacular pages weekly targeting the rural masses. The Weekend Nation publishes other outlets in vernacular languages.⁸⁵⁶ In addition, the Montfort Media also publishes a Chichewa weekly called Mkwaso. However, MBC TV and radio tends to cover rural areas better than the print or other electronic media, because of advantages of economies of scale.⁸⁵⁷

⁸⁵¹ For more detailed discussion see; So This is Democracy? State of Media freedom in Sothern Africa 2008: Annual publication of the Media Institute of Southern Africa (MISA), John Meinert printing, Windhoek, Namibia.

⁸⁵² Most of the unoperational ones are TV stations

⁸⁵³ The stations are MBC TV and Luntha Tv. The latter is owned by the Catholic Church through Montfort media.

⁸⁵⁴ BTI Report 2012.

⁸⁵⁵ Ibid.

⁸⁵⁶ Fuko in Chichewa and chiTumbuka.

⁸⁵⁷ African Media Barometer Malawi 2012.

11.1.3 Independence (Law)

Score: 75

To what extent are there legal safeguards to prevent unwarranted external interference in the activities of the media?

As Baluleet *a/* (2004) observe, media freedom is expressly guaranteed in Malawi. Section 35 of the Malawi Constitution recognizes the right to freedom of expression as a basic human right. Media houses are not subjected to any legal provisions regulating their editorial policies. Despite this, Malawi has on its statute book a number of laws that unduly restrict media freedom and in some instances confer arbitrary powers on the authorities to ban or take other action against the media. These laws include the Official Secrets Act (1913), the Printed Publications Act (1947) and the Penal Code and section 46 of the Penal Code (Cap. 7:01).⁸⁵⁸ This part of the penal code gave the Minister very wide discretionary powers that would have been easily used to ban publications that would be deemed undesirable by the Government, ruling party or any of their agents. Specifically, it mandated the Minister to ban 'any publication contrary to the public interest' but left 'public interest' undefined, thereby creating room for abuse. This law, however, was repealed in the first parliamentary sitting after the death of President Mutharika.⁸⁵⁹

It should also be observed, that the independence of the regulating authority is undermined by the manner of appointment of its members. The involvement of the President in the appointment of members, together with the presence of two senior civil servants, seriously compromises its independence. Under the Communications Act (1998) which establishes MACRA, MACRA shall consist of a chairperson and six members together with two ex-officio members being the Secretary to the President and Cabinet and the Secretary for Information. The President, who appoints the chairperson, also appoints members of MACRA. Given the configuration of power and the political culture surrounding presidential appointments in Malawi, board members of any parastatal organisation tend to comply with the wishes and dictates of the political regime. However, in recent times, the new Board of MACRA did resist, although without success, the unprocedural attempts by the Joyce Banda administration to rubber stamp the re-appointment of the MACRA's Chief Executive Officer.⁸⁶⁰

There is a draft law on Access to Information which has not yet been tabled in the National

⁸⁵⁸ For a comprehensive list of all the laws that impede the Media in Malawi see, Balule B. T. et al (2004). *UNDUE Restriction: Laws impacting on media freedom in the SADC*, Media Institute of Southern Africa, Windhoek, Namibia.

⁸⁵⁹ OSISA News available at <http://www.osisa.org/media-and-ict/malawi/bingus-repressive-media-law-repealed>

⁸⁶⁰ Weekend Nation, 4-5th January, 2012.

Assembly. In as much as this law borders more on the transparency of public institutions, it is crucial for the media in so far as it will further safeguard the right of the media to access information from public institutions without fear of reprisals. Progress has also been made with regard to the formulation of the Access to Information Policy which as of September 2013 was reported to be awaiting debate by cabinet.

11.1.4 Independence (Practice)

Score: 50

To what extent is the media free from unwarranted external interference in its work in practice?

The Malawi media faces a number of challenges and continually has to safeguard its independence from explicit and implicit interferences and reconcile the contradictions between media-related legislation and practice. There is high level of political interference with MACRA and the public broadcasters as well continued vilification of other non-public media houses especially when they force through perspectives that contradict the government's position on any issue.⁸⁶¹ This has led to the compromising of editorial independence and has fostered a culture of self-censorship.⁸⁶² For the other non –state media houses, their ownership by politicians is deemed by many to influence their editorial policies as well. For example, Joy Radio which is associated with the Muluzi family and Galaxy radio which is associated with the Mutharikas are seen as mouthpieces of the political agendas of the UDF and DPP respectively.

For private media, political interference has taken different forms including threats of legal suits, vilification at political rallies and sometimes through the actions of MACRA.⁸⁶³ For instance, MACRA refused to licence Joy TV during the tenure of Bingu Mutharika and his DPP for no clear reason except that they did not want to be seen to be promoting the interests of the political opposition or its agents.⁸⁶⁴ However, during the same period, MACRA licensed Galaxy TV and Radio and Mulhako Radio, both associated with the political elites of the DPP.⁸⁶⁵ The Public Media, continues to offer a perspective that portrays the Government and the ruling party in positive image.⁸⁶⁶

⁸⁶¹ Media Sustainability Index 2008

⁸⁶² Media Sustainability Index 2006-2007, page 196.

⁸⁶³ *ibid*

⁸⁶⁴ For instance, see Southern Africa Documentation and Cooperation Centre' Joy Radio allowed to resume broadcasting' (17 December 2008) available at <http://www.sadocc.at/news/2008/2008-195.shtml>

⁸⁶⁵ Refer to Media Sustainability Index 2008 available at http://www.irex.org/system/files/2-Africa_08_malawi.pdf.

⁸⁶⁶ See The Malawi Electoral Commission's (MEC) Media Monitoring Group Report on coverage of MBC radion and TV.

Although the Media Council of Malawi operates independently of the State, there is unwarranted state influence in the other entities of the Media. For instance, the State intervenes in the media by influencing decisions of the Regulatory Authority, MACRA, against any non-state electronic media house that projects a position contrary to that of the ruling party.⁸⁶⁷ As noted above, MACRA is vulnerable to political influence because its board as well as the Director General are appointed by the President.

For the Media houses, there is a lot of external influence, especially from politicians in government.⁸⁶⁸ The one thing that makes media houses most vulnerable to unhealthy political interference is that government or its agencies make up the largest proportion of the advertising market. The Government puts pressure on the media houses to tow its line by threatening, sometimes publicly, to withdraw its advertisements. There are also reports that some private sector companies also exercise similar influence.⁸⁶⁹

In the private media there is not much censorship. Journalists are free to withhold their sources and there are no restrictions on the nature of information that media houses can disseminate. However, the State media is always controlled by the extant political regime. Self-censorship is widespread. Although journalists do assert their right to freedom of expression, there is always fear because of defamation and laws on sedition and threats of law suits by "powerful" people.⁸⁷⁰ There have been isolated cases where journalists have been persecuted but this has not been a recurring phenomenon. For instance, until April 2012 (when President Banda took over) a number of journalists received threats from known and unknown sources while in the process of news collection.⁸⁷¹ During the July 2011 mass demonstrations 23 journalists were assaulted and a car belonging to the Zodiak Broadcasting Station was torched.⁸⁷²

There is no transparency in the way licenses are issued and there are perception about political influence on who gets the license.⁸⁷³ This is seen mainly whereby each regime licenses organizations that seem to have connections to the ruling elite.⁸⁷⁴ Following pressure from MISA Malawi and the NGO Media Council of Malawi, MACRA issued 15 licenses in July 2012, adding to the nine that were issued in December 2011.⁸⁷⁵

⁸⁶⁷ 2008 Media Sustainability Index.

⁸⁶⁸ Interview with MISA-Malawi Chairperson

⁸⁶⁹ Ibid

⁸⁷⁰ ibid

⁸⁷¹ Media sustainability report 2012.

⁸⁷² Ibid.

⁸⁷³ See Media Sustainability Report 2012.

⁸⁷⁴ Ibid.

⁸⁷⁵ Ibid.

GOVERNANCE**11.2.1 Transparency (Law)****Score: 50**

To what extent are there provisions to ensure transparency in the activities of the media?

Section 108(2) of MACRA Act provides that MACRA shall keep a register of every license issued or renewed as well as a record on the register details of the ownership, control of and the holding by any person of a financial or voting interest in each licensee. In addition, the same section provides that MACRA shall hold the register for inspection by interested persons at its premises and shall, at the request of any person and on payment of a reasonable fee, furnish that person with copy of any license issued by MACRA. This means that ownership details of a licensed electronic media house are well known and upon request, a copy of the license can be made available to any individual.

The print media is registered with the Registrar General and at the GPO. The information about ownership is well detailed and usually written on the first page and at the back page of the publication as a practice. The media also generally makes information available on its internal staff, reporting and editing policies publicly available. For instance, newspapers often publish the names on the first page of the paper. TV broadcasters also often do the same at the beginning or end of each TV program.

11.2.2 Transparency (Practice)**Score: 75**

To what extent is there transparency in the media in practice?

The media generally operates in a transparent manner. There is clear information on media ownership and location of premises for easy access. All media outlets publish or announce information about their reporting and analysis staff. Those with functional websites such as capital FM MUJ FM, and Zodiak Broadcasting Station also provide details of their staffs including management personnel. Details of editorial policies are not easily available for many media houses. However, the intentions and strategic directions of the different media houses are usually well known to their audiences because they are repeatedly played on electronic media while for print media, excerpts or principles for such policies tend to be flagged as part of the mottos of the media houses.

11.2.3 Accountability (Law)

Score: 50

To what extent are there legal provisions to ensure that media outlets are answerable for their actions?

There are in place some institutional mechanisms that regulate the media. These include the Media Council of Malawi (MCM) and the Malawi Communications Regulatory Authority (MACRA). With 43 institutional members that include electronic, print, video and publishing houses, the mandate of the MCM is to promote professionalism in the media industry by setting professional standards in the interest of the public in Malawi and to uphold the values of integrity, accountability and excellence.⁸⁷⁶ It processes the accreditation of media practitioners and also issues Press Cards to journalists. The MCM also has mandate to receive and adjudicate on complaints and grievances that may be brought to its attention against any accredited journalist or media outlet⁸⁷⁷. Furthermore, MACRA regulates and monitors the activities of media licensees to ensure compliance with the terms and conditions of their license, the code of conduct and applicable regulations, and related activities⁸⁷⁸. MACRA is mandated to hold public hearings on any alleged breaches and hear representations on the same.⁸⁷⁹ All electronic media houses make regular announcements advising their listeners and viewers to submit their complaints to MACRA. Failure to comply with conditions set out in the license or any other law can lead to revocation of license⁸⁸⁰

Based on the media code of ethics as well as the Communications Act, the media is required to correct erroneous information in a timely manner. Furthermore, any aggrieved party against any media practitioner or house has a legal right to sue in a court of law for judicial ventilation on any issues.

⁸⁷⁶ See, www.mediacouncilmalawi.org

⁸⁷⁷ Article 9.1 of MCM Constitution

⁸⁷⁸ See Section 5 of the Communications Act (1998)

⁸⁷⁹ Section 54 of the Communications Act (1998)

⁸⁸⁰ Section Communications Act

Accountability (Practice)**Score: 50**

To what extent can media outlets be held accountable in practice?

The Media Council of Malawi has a permanent committee responsible for receiving and handling complaints.⁸⁸¹ It consists of six members three of whom are media practitioners and the other three are drawn from the general public but one of them has to a representative of the Law Society. The MCM has not been very active in the last few years due to a number of reasons including resource constraints. Consequently, the Ethics and disciplinary Committee has not been functional. Infact, there were very few complaints in the last three years submitted to the MCM and there was no significant action taken on those complaints.⁸⁸² There are also no clearly defined mechanisms to deal with complaints arising from online media outlets which have proliferated in the recent past. Furthermore, other important media bodies such as MISA Malawi appear to be more inclined towards promotion and protection of interests and freedoms of media practitioners and not that of disciplining the same if need arise. MACRA's regulatory work has been effective in other areas except the enforcement of accountability. A conspicuous case is the highly partisan performance of state broadcasters in favour of ruling parties especially during election years. In this regard MACRA publishes data on how the electronic media houses cover different political parties and candidates. However, despite their own data indicating undue bias of state broadcasters, there has been no serious effort to reverse the trend and make MBC account for the partisan propaganda that they engage in.⁸⁸³

The media in Malawi provide for the right of reply to any person or organization who feels aggrieved by any publication. Retractions and corrections are common.⁸⁸⁴ Furthermore, newspapers have developed several mechanisms of getting feedback from the public such as letters to the editor, opinion pages and citizen journalism. Radio stations have phone-in programmes that give an opportunity for people to give their input and inform programming.⁸⁸⁵ All media houses have set grievance and complaints procedures. People are free to complain to the Chief Executive Officers of the media outlets, preferably in writing or they can forward their complaints to the Media Council of Malawi or MACRA

⁸⁸¹ The full name of the Committee is Ethics, Complaints and Disciplinary Committee established under article 9.1 of the MCM Constitution.

⁸⁸² Interview, Mr Vales Machila, Executive Director, MCM.

⁸⁸³ Civic and political Space Platform (2010) State of Governance Report (Lilongwe: DanChurch Aid)

⁸⁸⁴ Section 4.1 of Malawi Media Code of Ethics, Complaints and Disciplinary Procedures.

11.2.5 Integrity Mechanism (Law)

Score: 75

To what extent are there provisions in place to ensure the integrity of media employees?

There are professional standards and a code of ethics that govern the media. The Media Code of Ethics and Professional Conduct, adopted in 1994, is a self-regulatory regime for all media; broadcasters must also adhere to the codes of conduct stipulated in the Communications Act and their respective licenses.⁸⁸⁶

The Third Schedule of the Communications Act (1998) also has a Code of Conduct for Broadcasting Services which among other aspects stipulates that Broadcasting licensees shall not broadcast any material which is indecent or obscene or offensive to public morals (including abusive or insulting language) or offensive to the religious convictions of any section of the population or likely to prejudice the safety of the Republic or public order and tranquility. Furthermore, the Schedule places on the media outlets the obligation to exercise due care and sensitivity in the presentation of material which depicts or relates to acts of brutality, violence, atrocities, drug abuse and obscenity. The Communications Act also requires the Broadcasting licensees to exercise due care and responsibility in the presentation of programmes where a large proportion of the audience is likely to be children.

In news broadcasts, the media houses and journalists are required to report news truthfully, accurately and objectively. News should be presented in an appropriate context and in a balanced manner without intentional or negligent departure from the facts.⁸⁸⁷ In instances where a report is founded on opinion, supposition, rumour or allegation, the Act stipulates that it should be presented in such a manner as to indicate clearly that such is the case. Most media houses also have their own codes of conduct and in-house complaints procedures, overseen by the managing editor.⁸⁸⁸ Furthermore, where it subsequently appears that a broadcast report was incorrect in a material respect, the Act requires that it should be rectified forthwith, without reservation or delay. Cheque-book journalism is discouraged by the MCM. The Ethics Code provide that a journalist shall not offer, demand or accept payment in order to include or exclude material on a story he/she is writing.⁸⁸⁹

⁸⁸⁵ For example, the *Maganizo a Omvera* (Listeners' views and opinions)) program on MBC Radio; Interview with MISA -Malawi Chapter Chairperson.

⁸⁸⁶ Media sustainability report 2008.

⁸⁸⁷ Communications Act and Malawi Media Ethics, Complaints and Disciplinary Procedures.

⁸⁸⁸ African Media Barometer Malawi 2012.

11.2.6 Integrity Mechanisms (Practice)

Score: 50

To what extent is the integrity of media employees ensured in practice?

Malawian journalists strive to follow the code of conduct though the same is not always adhered to. Journalists rarely receive independent instructions on ethics. However, the Media Council of Malawi does, from time to time, organize refresher courses on ethical and responsible journalism to its members.⁸⁹⁰

There have been instances where the media in Malawi has been accused of bribery. For instance, The Media Council of Malawi and the National Media Institute of Southern Africa (NAMISA) have been accused of wrongfully using Government resources to denounce a story that was published in an online publication, Nyasa Times.⁸⁹¹ In addition, it is common practice in Malawi for sources to offer journalists “lunch money” of around K3,000 (US\$12) to cover a particular story.⁸⁹² Non-governmental organisations, for example, know that they will receive coverage which is most likely positive, if they offer such incentives, and this makes it harder for journalists to resist such offers.⁸⁹³ There have been reports of MBC journalists refusing to cover some events if no ‘lunch allowance’ is provided.⁸⁹⁴

However, efforts have also been made by various media houses to curb such integrity malpractices. For instance, in 2011, two journalists from the Weekend Times were dismissed for having asked sources for money in order not to publish a controversial story (relating to the sale of body parts) and for requesting payment of K50,000 (US\$200) in order to guarantee the publication of a particular story.⁸⁹⁵ The Nation, for instance, also has an editorial policy stipulating that it is wrong to get allowances from sources, and that the newspaper will cover any necessary expenses.⁸⁹⁶ Similar approaches have also been adopted by Capital Radio.⁸⁹⁷ The Media Council of Malawi has in recent times also denounced this practice.⁸⁹⁸

The Media Council of Malawi also tries to defend journalists from political and ill-founded attacks

⁸⁸⁹ Section 1.7 of the Malawi Media Ethics, Complaints and Disciplinary procedures.

⁸⁹⁰ Interview with MISA-Malawi Chapter chairperson

⁸⁹¹ Gregory Gondwe ‘Malawi’s media institutions accused of bribery’ 30 Apr 2009 available at <http://www.bizcommunity.com/Article/415/15/35464.html> (accessed on 7 July 2013).

⁸⁹² African Media Barometer Malawi 2012.

⁸⁹³ Ibid.

⁸⁹⁴ Ibid.

⁸⁹⁵ Ibid.

albeit without much success due to limited resources. However, MISA has made it clear that it would not defend unprofessional conduct on the part of the media.⁸⁹⁹ However, journalists are not obliged to declare gifts or hospitalities that they receive in the course of their duty.

Allegations do arise that some published or broadcasted stories are sometimes one-sided, although this more reflected in instances where the state-broadcaster is involved.⁹⁰⁰ Thus, the 2012 African Media Barometer report on Malawi illustrates that most media in Malawi try to offer balanced and accurate reports, and the standard of reporting is generally considered to be high.⁹⁰¹ The MBC, however, was highlighted for biased political coverage (skewed towards the ruling party at the time) and for reporting out of context.⁹⁰²

ROLE

Score: 75

Investigate and expose cases of corruption practice

To what extent is the media active and successful in investigating and exposing cases of corruption?

Investigative journalism in Malawi is still in its infancy. Most reporting is event-driven.⁹⁰³ Nevertheless, some media houses have some journalists designated as investigative journalists. In the print media it is the Daily Times, Malawi News, the Nation and Weekend Nation published by Blantyre Newspapers and Nation Publications Ltd respectively which carry out extensive investigative journalism. The Nation, for example, has a dedicated investigative desk, with three reporters and an editor.⁹⁰⁴ These have exposed serious scandals and cases bordering on fraud

⁸⁹⁶ Ibid.

⁸⁹⁷ Ibid.

⁸⁹⁸ Ibid.

⁸⁹⁹ 'MISA will not shield unprofessional scribes' 22 April 2013 available at <http://www.thezambesian.com/malawi/misa-will-not-shield-unprofessional-scribes/2/> (accessed 7 July 2013).

⁹⁰⁰ For instance, see EU Observation report on elections in Malawi.

⁹⁰¹ 2012 African Media Barometer report on Malawi.

⁹⁰² Ibid.

⁹⁰³ EU Observation report on elections in Malawi

⁹⁰⁴ Ibid.

and corruption which have at times led to prosecutions.⁹⁰⁵ In the electronic media, Zodiak Broadcasting station has a window of special reports under which investigative reports which expose sub-optimal performance, corruption or integrity deficits are exposed and their implications highlighted⁹⁰⁶. Investigative journalism is starting to have a powerful effect on Malawian society, with a few Ministers being fired after stories on corruption were published in the print media.⁹⁰⁷ However, the development is currently limited to private media houses.

11.3.2. Inform public on corruption and its impact

Score: 50

To what extent is the media active and successful in informing the public on corruption and its impact on the country?

The role of the media in informing the public on corruption and its impact is considerably visible when the news item is sensational and has serious integrity questions around an important office or individual in society, the approach is often post-facto i.e. reactionary. However, it is NGOs and other public organizations working in the governance realm such as the Anti-Corruption Bureau, Office of the Director of Public procurement that have informative, proactive programmes on corruption and its impact and the media participate by disseminating the information through sponsored programmes.⁹⁰⁸

Results of a recent survey on civic education show that up to 93.6 per cent of respondents demonstrated awareness of corruption and observed that the same proportion was recorded in 2006.⁹⁰⁹ These results show that information on corruption and its impact has effectively been transmitted. The study further shows that the media (radio, newspapers, television), play a significant role as highlighted in the figure on the next page:

⁹⁰⁵ For instance see: Weekend Nation October 27 2012: Payout Frenzy (exclusive report), Taxpayers pick up bills from poor decisions Weekend Nation October 27 2012. Malawi News October 27 – November 2 2012: POLICE FRAUD: GOVT BLOCKS MK600M PAY.

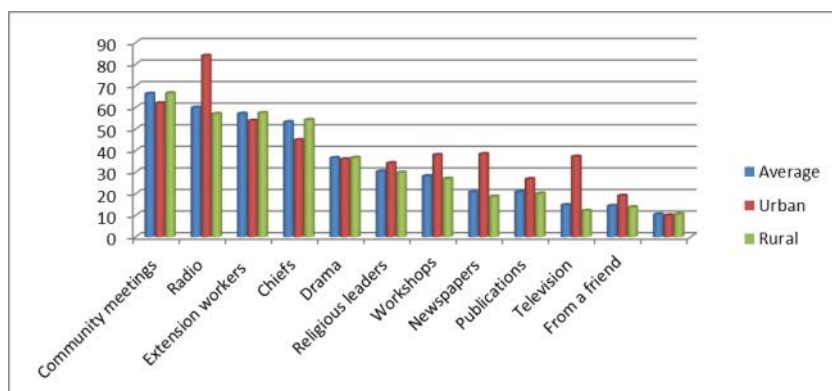
⁹⁰⁶ Interview, Gloria Masanza, ZBS Deputy Chief Reporter.

⁹⁰⁷ African Media Barometer Malawi 2012.

⁹⁰⁸ Interview, MISA Malawi Chairperson.

⁹⁰⁹ DCP (2012) Survey

Preferred methods of civic education across the urban and rural divide



Source: DCP (2012:160)

11.3.3 Inform public on governance issues

Score: 75

To what extent is the media active and successful in informing the public on the activities of the government and other governance actors?

The Media in Malawi is very active and successful in informing the public on the activities of the government and other governance actors. Apart from the ordinary news bulletins, media houses run special programmes which deal with various government and governance issues. Radio stations have panel discussion programmes among others. The print media too has specialized columns which tackle topical governance issues.⁹¹⁰

In addition to conventional approaches, the media gets involved in the implementation of governance projects of various civil society organisations. For example, the Malawi Electoral support Network incorporated a media task force in its advocacy project for local government elections in 2014. Through this, the media were able to inform the general public on a range of topics in the discourse on local government and decentralisation.⁹¹¹ Furthermore, media houses are increasingly accessing funding from donors in the governance arena. For instance, Radio MIJ, ZBS, Maziko Radio station and Nation Publications Ltd have all accessed grants from the Tilitonse programme to implement projects on governance focusing on the promotion of accountable and

⁹¹⁰ Examples of radio programmes include: Tiuzeni zozona on ZBS; Sunday Round Table on Capital FM; Malamulo Akutinji? On Galaxy Radio; and Young Politicians Forum on Transworld Radio. Columns include Talking Political Economy in the Sunday Times; Raw Stuff in the Weekend Nation, Political Index in The Nation.

⁹¹¹ Chingaipe, Henry and Joseph Thombozi (2013) Report on the Evaluation of MESN's Advocacy Project for Tripartite Elections in 2014 (Limbe: MESN)

inclusive governance.⁹¹² Similarly, Maziko Radio accessed funding from DanChurch Aid under the Malawi Civic and Political space Programme⁹¹³

Recommendations

- Advocate and Lobby for a legal framework that ensures that the Board of MACRA is insulated from political interference;
- Advocate and lobby for terms and conditions of employment that provide security of tenure for the Director General of MACRA;
- Advocate and lobby for improved working conditions for journalists;
- Lobby for the speedy passing of the Access to Information Bill into law by, among other things, engaging in public awareness that promotes a better understanding especially among the public officers and politicians on the importance of this piece of legislation

⁹¹² See www.tilitonsefund.org

⁹¹³ Chingaipe, Henry and Kondwani Chikadza (2011) Report on the Evaluation of the Malawi Civic and Political Space Programme of DanChurch Aid (Lilongwe: DCA).

12. CIVIL SOCIETY

Summary

One of the most notable results of the transition to multiparty democracy was the rebirth of civil society and the emergence of civil society organizations as primary agents for progressive politics and governance i.e. providing an arena where ordinary people organize to make their lives better and also as a site of resistance to oppressive, unfair or unpopular policies or programmes.

The assessment finds that Malawian Civil Society Organizations (CSOs) have access to barely adequate resources. While the law provides for their operational autonomy, in practice CSOs experience all sorts of interference and constraints mainly from ruling political parties and State agents. Despite working in a politically difficult environment, CSOs have been able to push the agenda on public accountability but their performance on securing policy and institutional reforms has been dismal. The Table below summarizes the assessment by indicator scores.

Civil Society

Overall Pillar Score: 38.2/100

Dimension	Indicator	Law	Practice
Capacity 43.8/100	Resources	50	50
	Independence	50	25
Governance 33.3/100	Transparency	-	25
	Accountability	-	50
	Integrity Mechanisms	-	25
Role 37.5/100	Hold government accountable	50	
	Policy reform	25	

Structure and organisation

The Malawi Civil Society comprises different types of groups of people and organisations that conceptually occupy the space between the state or government and private/business sector. It includes Non-Governmental Organizations (NGOs), Community Based Organizations (CBOs), and Faith Based Organisations (FBOs that engage in advocacy for democratic governance, ethical behaviour in public life and service delivery. Historically, the Malawian civil society has evolved out of welfare societies, cultural associations, trade and workers unions, producers and consumer cooperatives and independent religious organizations during the colonial period.⁹¹⁴ During the one-party era, civil society organizations lost autonomy and were substituted by the state machinery. Those supported by international development assistance were limited to the provision of developmental, charitable and social services. The most successful organizations were those attached to religious organizations.⁹¹⁵ The 1990s witnessed a rapid growth of human rights and good governance organizations, labour and student organizations, FBOs and the media and slowly started to organize themselves better in umbrella bodies and networks.⁹¹⁶ CSOs are registered with the Non-Governmental Organisations Board of Malawi (NGO board) and

⁹¹⁴ Chingaïpe, Henry (2013) Particularistic concertation: state–business relations and state formation in colonial Malawi’ in Kunal Sen (ed.) State –business relations and state formation in colonial Malawi (London: Routledge).

⁹¹⁵ Caesar, Karoline (2011) Civil Society and Good governance in Malawi: Players, Interests, Potential (Lilongwe: GIZ)

⁹¹⁶ Ibid.

Council for Non-Governmental Organisations (CONGOMA).⁹¹⁷ The latter is regarded as the mother body of CSOs. The Malawian civil society is diverse. CSOs work at national or at local level, and for some of them the two levels are not connected. The rural-urban disjuncture is seen as especially worrying as national CSOs claim to speak “on behalf” of the people, while they do not have a link to constituents, no structures on the ground and they do not found their arguments on inquiries on the ground.⁹¹⁸

12.1.1. Resources (Law)

Score: 50

To what extent does the legal framework provide an environment conducive to civil society?

Civil society organisations exist in Malawi on the basis of Constitutional provisions which guarantee freedom of association which includes freedom to form associations or organisations. The Constitution further obliges the state and those acting on its behalf i.e. the Executive, Legislature and Judiciary and all other organs of the Government and its agencies to respect and protect all freedoms guaranteed by the constitution.⁹¹⁹ However, in law civil society organisations (CSOs) can be registered under many organisational forms: as an NGO under the NGO Act, as a trust under the Trustees Incorporation Act, or as a limited company by guarantee under the Companies Act among others. Each Act is administered by a different authority. This has led to uncoordinated work and subsequently weakened the voice of the CSOs in helping to consolidate Malawi’s democracy.⁹²⁰ However, the NGO Act is widely seen as the primary piece of legislation governing the registration and activities of CSOs in Malawi. The Act stipulates in detail the requirements for registration of a CSO.⁹²¹

An application for registration can be accepted or rejected by the NGO Board within a period of ninety days from the date of the application. In the event of a rejection to register, the Board is obliged by law to provide reasons to the applicants. Furthermore, the board is mandated to de-register any organisation and the aggrieved organisation has a right to apply to the High Court for judicial review.

The law exempts some CSOs from registration. An ‘exempt organisation’ is an CSO or NGO that is exempted from the provisions of the NGO Act. They include those that are deemed as informal

⁹¹⁷ NGO Act

⁹¹⁸ Caesar Karoline (2011),supra.

⁹¹⁹ Section 15 (1) of the Constitution.

⁹²⁰ Kamlomo,Gabriel 2012.

⁹²¹ Section 20 (3) of the NGO Act.

and do not have a written Constitution. Mostly, these fall in the category of community-based organisations and are usually registered with respective local government assemblies.

Overall, the legal framework provides for the development of a strong independent civil society and facilitates the formation and effective functioning of NGOs for the benefit of the general public⁹²² It calls for constructive collaboration and partnership between CSOs and the Government in furtherance of the public interest;⁹²³ and obliges them to affirm the human rights provisions enshrined in the Constitution.⁹²⁴ However, the law is not explicit enough on the CSO – Government relationship in matters of advocacy. There are no institutionalised mechanisms for interface meetings or policy dialogues. Moreover, over the past five years, the Government has shifted responsibilities for NGO coordination from the Office of the Vice President to the Office of the President and Cabinet and then to the Ministry of Gender. The changes have affected the development of institutionalised mechanism of interaction between CSOs and the Government.

Registration for service delivery organizations has not been controversial because they are generally viewed as partners to the Government. However, CSOs working on human rights and governance issues have largely been seen as foes of the Government and has earned them tense relations with the government especially in the period between the 2009 general election and the death of President Mutharika in April 2012.⁹²⁵ The result is that new organisations intending to work in these areas may face difficulties registering. It is also difficult for an organization to register if its name includes the word “Malawi”. This is because the name of the country is protected under the Protected Names and Emblems Act. A CSO wishing to use the word “Malawi” in its name must obtain the consent of the Minister of Justice, which often takes long to be approved.⁹²⁶

The one area that is most unpredictable for CSO resources relates to taxation. CSOs are not liable for corporate tax but have a duty to remit all other taxes levied on their taxable activities or payments, unless they are using tax-exempt funding from foreign donors.⁹²⁷ Even in this case, CSOs are required to pay taxes up-front and then get reimbursed. The Finance Minister in Malawi enjoys a surfeit of authority and discretion to change the tax regime affecting CSOs through announcements in the budget statement. For example, in 2011 when the government was cash-strapped, the Minister announced that CSOs would no longer be automatically tax-exempt. Instead, they would have to go through a time-consuming process of seeking authorization from

⁹²² (section 3 (a));

⁹²³ (3(d))

⁹²⁴ (3) (e).

⁹²⁵ Wroe, Daniel (2012) Donors, Dependency and Political Crisis in Malawi, *African Affairs*, 111/442: 135 -144.

⁹²⁶ USAID: 2011

⁹²⁷ NGO Act

the Minister. In addition, the Finance Minister decided that no CSOs or NGOs, including churches, would be exempted from paying taxes on building materials and capital equipment such as vehicles.⁹²⁸

CSOs are free to engage in income-generating activities and compete for Government contracts. However, most CSOs/NGOs do not take sufficient advantage of opportunities to generate income because either they lack resource mobilization strategies or they limit their fundraising to applying for grants through calls for project proposals. In practice, only some service delivery organizations take advantage of the legal possibility to earn revenue by engaging in income-generating activities or competing for Government contracts.⁹²⁹

In sum, while there are legal provisions for the establishment and operation of CSOs in Malawi, additional legal requirements are required to ensure smooth operations. The lack of legal provisions on CSO-Government relationships has led to tensions and suspicions that hinge on trust and the political space where both interact. The length of the legal procedure for establishing a CSO is also prohibitive.

12.1.2 Resources (Practice)

Score: 50

To what extent do CSOs have adequate financial and human resources to function and operate effectively?

Malawian CSOs are highly dependent on foreign funding and competition for resources and visibility is high. While some organizations are able to access funds from both international and local foundations and trusts, very few CSOs have truly diverse sources of funding as a result of limited proposal development capacity, weak resource mobilization strategies, and the global financial crisis.⁹³⁰ Most CSOs survive from one project to another. CSOs are therefore vulnerable to resource constraints due to donor fatigue, austerity measures pursued by foreign governments and the general politics of international development aid. This has led to weak institutional capacity to most of the CSOs due to their inability to attract and retain skilled professionals. With the decline in donor support there is uncertainty about the future of Malawian CSOs.⁹³¹ Another

⁹²⁸ Lipenga, Ken (2011) Budget Statement for the 2011/2012 financial year.

⁹²⁹ Malunga Chiku (2013) Presentation on CSO sustainability, 26th August, 2013, Tilitonse Civil Society Conference, Golden Peacock Hotel.

⁹³⁰ Wroe, Daniel (2012) Donors, Dependency and Political Crisis in Malawi, African Affairs, 111/442:135-144.

⁹³¹ Boniface Dulani, 2012.

serious problem with CSOs in Malawi is the founder syndrome. They CSOs tend to be built around individuals. This has further weakened the institutional capacity of the SCOs since the organisations tend to be holden to individual's idiosyncrasies and interests⁹³² than to organisational mission. Urban CSOs generally have basic offices and capital assets, including motor vehicles and motorcycles, most of which are purchased with donor funding at a project's inception. However, district-level CSOs do not have the funding to purchase or maintain adequate office equipment⁹³³ and donors are increasingly unwilling to invest in capital equipment for CSOs⁹³⁴

The level of professional staff attracted by CSOs depends on the size and strength of the organisation. Often, community based CSOs have less competent and professional staff as compared to national level CSOs. Local NGOs have fewer staff and less capacity than their international counterparts. Volunteer and membership based CSOs do not appear to suffer as many human resource gaps as other CSOs.⁹³⁵ Finally, despite civil society achievements on voice and accountability, there is a considerable deficit of technical competence among CSOs especially those in the governance sector. This is reflected in their lack of critical analysis and proposals for policy and institutional alternatives in different domains.⁹³⁶

12.1.3 Independence (Law)

Score: 50

To what extent are there legal safeguards to prevent unwarranted external interference in the activities of CSOs?

Section 40 (1) of the Constitution allow citizens to form and engage in groups regardless of political ideology, religion or objectives. However, the NGO Act and the Republican Constitution do not provide specific provisions either to prevent or justify State interference. This is the case because, as noted above, the two documents are silent on the relationship between Government and CSOs. The NGO Act aims at facilitating a relationship between NGOs and the Government involving constructive collaboration and partnership in furtherance of the public interest; and to affirm the human rights enshrined in the Constitution of the Republic of Malawi. However, no practical mechanisms have been spelled out anywhere as to how these provisions would be

⁹³² Chingaïpe, Henry (2013) Report on the Proceedings of the Tilitonse Civil Society Conference held on 26th August, 2013, Golden Peacock Hotel, Lilongwe (www.tilitonse.org).

⁹³³ Caesar, Karoline (2011)

⁹³⁴ Chingaïpe, Henry (2013) Report on the Proceedings of the Tilitonse Civil Society Conference (www.tilitonse.org)

⁹³⁵ Nyondo, Justin; Henry Chingaïpe and Stanley Nyirenda (2012) Report on the Capacity Assessment for Democratic Governance: Democratic Accountability Sub-sector (Lilongwe: UNDP); Chingaïpe Henry and Joseph Thombozi (2013) Consolidated Report on Capacity Assessment of Tilitonse Grantees (www.tilitonse.org).

⁹³⁶ James and Malunga, 2006.

actualised. The registration requirement in the NGO Act of a memorandum of understanding between the Ministry responsible for the activities to be undertaken by the NGO/CSO and the NGO/CSO provides room for unwarranted Government interference in the work of NGOs/CSOs. Furthermore, the NGO board is mandated to de-register any CSO but grounds for de-registration have not been spelled out resulting in a grant of discretion to the board.⁹³⁷ This too provides room for Government to interfere with the work of CSOs especially if the NGO Board is beholden to political whims.

Section 9 of the Act on the removal of Board members has given a lot of powers to the Minister⁹³⁸ in consultation with CONGOMA to remove board members. This is a weak link within the Act considering that the Minister is an interested party in matters of politics, hence connecting the removal and appointments of the board members to some political influence.

In short, the legal framework provides room for the operations of CSOs but lacks clarity and specificity on the nature of relationship between Government and civil society organisations. In fact some legal provisions provide opportunities for Government to interfere with the work of CSOs.

12.1.4 Independence (Practice)

Score: 25

To what extent can civil society exist and function without undue external interference?

Although the law grants Malawian CSOs freedom of activity, a practical limitation has been the attitude of political authorities who have projected an understanding that the freedom is conditioned on CSOs not involving themselves in political activities. However, what constitutes 'political' activities is left to the discretion of political authorities themselves. In practice, this has been taken to mean any activity or voicing of any opinion that is against the interest of the political authorities themselves. Consequently, between 2009 and the death of former president Bingu Wa Mutharika in April, 2012 CSOs working on governance and human rights, and their personnel faced all sorts of hostilities from the government and its agents including acts of arson

⁹³⁷ Section xx of the NGO Act

⁹³⁸ The Act does not specify which Minister. However, in practice, NGO affairs have been handled by the Minister of Gender before the portfolio was shifted to the Vice Presidency.

and organised burglary on CSO offices and houses of CSO leaders.⁹³⁹ Furthermore, CSOs were targeted for public castigations by ruling politicians at rallies and press conferences for their advocacy work on a range of governance issues and were branded as mercenaries of and sell outs to of foreign governments.⁹⁴⁰

Furthermore, the Government has often used the requirement under the Police Act for organizers of any demonstration or public rally to seek permission from the Police or Local government councils to frustrate mobilisation efforts of CSOs. For example, nationwide demonstrations organized by CSOs on July 20, 2011 to protest the Government's inaction in addressing the worsening economic and socio-political environment in the country were characterised by court injunctions and confusion over whether the proper permissions were received in advance. Many CSO leaders were assaulted and arrested for leading the demonstrations and there were anonymous threatening messages sent to CSO leaders through phone text messages to silence them.⁹⁴¹

Similarly, in October 2011, five human rights activists were arrested for protesting during the Common Market for Eastern and Southern Africa (COMESA) Heads of State meeting. The activists carried banners denouncing the dictatorial tendencies of the President and Malawi's hosting of Sudanese President Omar al Bashir of North Sudan, who was wanted by the International Criminal Court for genocide in Darfur.⁹⁴² Arrests and detentions of civil society actors were common before April 2012 especially over any issues related to unpopular Government policies which prompted the civil society leaders to raise voices or act.⁹⁴³

Civil society organisations have also been compromised in their work in the governance sector through the co-optation of their leaders into Government structures. The late President Mutharika created a presidential advisory council involving civil society leaders which attenuated the capacity of the leaders to raise questions on bad political and economic governance.⁹⁴⁴ After April 2012, co-optation has continued and key personalities in civil society now serve in different

⁹³⁹ Offices of the Institute for Policy Interaction were petrol-bombed, so too was the house of Macdonald Sembereka of the Human Rights Consultative Committee.

⁹⁴⁰ President Bingu Wa Mutharika's opening address, 3rd February, 2012. Journalists were not exempted from castigation and torture as at one point the police had to rescue them from party zealots – Daily Times, November 22, 2011.

⁹⁴¹ Chingaipe, Henry and Tinyade Kachika (2013) Assessment of Democratic Governance in Malawi: Political Participation, Civic Education and Democratic Accountability (Lilongwe: UNDP).

⁹⁴² Suzgo Khunga, Daily Times, October 20, 2011.

⁹⁴³ Rev. Levi Nyondo of Livingstonia Synod, UnduleMwakasungula of Centre for Human Rights and Rehabilitation and John Kapito of Malawi Human Rights Commission were among those threatened with arrests.

⁹⁴⁴ Author interview with a former member of the advisory council.

posts in government on appointment by the president.⁹⁴⁵ There is a public perception that civil society has become too close to the Government for the comfort of many who are concerned with broadening and deepening democratic governance and integrity in public affairs.⁹⁴⁶ Of course, the co-optations have translated into muted voices on governance and policy slippages of the current government. The effectiveness of the co-optations in silencing or attenuating the critical voice of civil society organisations suggests that there is a deficit of alternative leadership in the sector.⁹⁴⁷

In short, civil society organisations are constantly subjected to interference by external authorities, especially Government, the ruling parties and their agents. This is mainly the case because the legal framework and the political environment allow Government interfere with civil society.⁹⁴⁸

Governance

12.2.1 Transparency (Practice)

Score: 25

To what extent is there transparency in CSOs?

The NGO Law requires organizations to submit annual and periodic reports to the responsible Ministry. Most Malawian CSOs do not publish or disseminate annual reports since the enforcement of the NGO Act is weak.⁹⁴⁹ The observed pattern is that the degree of transparency varies with the extent to which transparency is a donor condition for funding of particular projects in NGOs. Very few NGOs volunteer information to the public on their funding and expenditures. This information is a preserve for their boards and their donors.⁹⁵⁰

Although the NGO Law requires organizations to submit annual and periodic reports to the

⁹⁴⁵ For example, Rev Sembereka of Human Rights Resource Centre was appointed Presidential Advisor to President Joyce Banda, Dalitso Kubalasa of Malawi Economic Justice was appointed Commissioner at Malawi Human Rights Commission; Martha Kwataine of Malawi health Equity was appointed Board Chairperson of the Malawi Communications Regulatory Authority; Dorothy Ngoma of Nurses Organisation was appointed Coordinator of the President's Initiative on Safe Motherhood.

⁹⁴⁶ Chingaipe, Henry 'Reflections on Democracy in Malawi' in the Lamp, (Sept to October 2012) and (November to December 2012)

⁹⁴⁷ Mabvuto Bamusi is one of those who were co-opted in the government of Mutharika.

⁹⁴⁸ Research which was done by CCJP (2010-2012) shows the gap in relationship between CSOs and government that is prone to manipulation. It calls for an institutionalised relationship between the two.

⁹⁴⁹ USAID: 2011

⁹⁵⁰ Nyondo, Justin, Henry Chingaipe and Stanley Nyirenda (2012),supra.

responsible Ministry, this has not been enforced due to the absence of an NGO board until mid 2012. Again, the NGO board has not developed capacity to effectively implement the Act. Consequently, most Malawian CSOs do not publish or disseminate annual reports.

12.2.2 Accountability (Practice)

Score: 50

To what extent are CSOs answerable to their constituencies?

Most CSOs have governance systems and structures that clearly segregate organisational authority. In such CSOs, upward accountability is enforced in which the Management of the CSOs account to their Boards as well as to their donors both on the operations and activities of the CSOs as well as on finances.⁹⁵¹ However, other CSOs lack an appropriate division of responsibilities between their boards of directors and staff members and consequently lacking effective governance systems altogether.⁹⁵² Furthermore, as noted above, many local CSOs suffer from “founder syndrome,” in which the founders make all organizational decisions without effective supervision from their boards, and their boards are comprised of the founder’s friends and associates.⁹⁵³ Such CSOs have problems with upward accountability especially on how well they use monetary resources.

In the last part of 2011, the Government of President Bingu introduced rules requiring CSOs to submit financial, operational and results reports to the Government. The requirement was resisted heavily because there was huge perceptions that the rule was introduced with bad motives to unduly monitor and consequently interfere with NGOs internal operations. It remains to be seen how well the NGO board will play its oversight role over CSOs and enhance their accountability. However, it is not clear whether the CSOs/NGOs that were registered under laws other than the NGO Act are subject to the mandate of the NGO Board.

Malawian CSOs generally are less accountable for the results of their work and less accountable to the communities that they serve. Although some CSOs have started disclosing the amounts of resources available for their projects to their targeted communities (e.g. those sponsored by DanChurch Aid), the practice is still in its infancy and there is still resistance to it.⁹⁵⁴

⁹⁵¹ Ibid.

⁹⁵² Ibid.

⁹⁵³ Ephraim Nyondo: 2012 points at CSOs with founder syndrome - among them Civil Liberties Committee (Cilic), Institute for Policy Interaction (IPI), Centre for Human Rights and Rehabilitation (CHRR) and Consumer Association of Malawi (CAMA). One common thing he has noticed is that these CSOs have always been led by the same people.

⁹⁵⁴ Chingaape and Chikadza (2011) End of Programme Evaluation for the Malawi Civic and Political Space Programme of Dan Church Aid, Lilongwe.

12.2.3 Integrity (Practice)

Score: 25

To what extent is the integrity of CSOs ensured in practice?

The integrity of CSOs is not systematically and effectively enforced due to weakness in the enforcement mechanisms. CONGOMA developed a code of conduct for NGOs and the same was ratified and adopted by the General Assembly on 25th April, 1997. However, at the time of the adoption, new legislation for NGOs was being developed and it was enacted by Parliament in 2001.⁹⁵⁵ In the aftermath of the enactment of the new legislation, some NGOs felt that the Act had given excessive powers to government and CONGOMA and would restrict the freedom and activities of NGOs.⁹⁵⁶ Thus, the civil society has been divided over this Act with some supporting it and others opposing. It is further observed that the 1997 Code of conduct found itself to be inconsistent with the Act but calls to review and revise the code were resisted by some members of CONGOMA because for them it was important to get the legislation amended first and on that basis amend the code of conduct.⁹⁵⁷ The contestation has made CONGOMA to have weak authority over the NGO sector and the code of conduct has not been fully embraced by all civil society Organisations. Furthermore, the current version of the code is not widely disseminated so much that in the last three years, there have been about seven complaints only⁹⁵⁸. CONGOMA has recently developed an NGO Governance charter which is scheduled to be debated and adopted at the annual general meeting in late 2013.

Role

12.3.1. Hold government accountable (practice)

Score: 50

To what extent is civil society active and successful in holding government accountable for its actions?

Generally CSOs in Malawi have achieved some levels of success in pushing for accountability

⁹⁵⁵ Author interview with the Executive Director of CONGOMA, 16th September, 2013.

⁹⁵⁶ Meinhardt and Patel, 2003.

⁹⁵⁷ Author interview with Executive Director of CONGOMA, 16th September 2013.

⁹⁵⁸ *ibid*

from the Government or its agents on various issues including budget performance, service delivery and a whole range of actions and inactions, decisions and indecisions.⁹⁵⁹ In the recent past the raising of voices on the need for senior government officials and politicians to declare their assets has been particularly noticeable.⁹⁶⁰ Overall, Malawian CSOs have been better at raising voices for accountability but their achievement in bringing about the actual accountability has been low. The main reason for this low achievement is that government authorities are less responsive to citizen demands so much that voices for accountability have either been silenced by the authorities or have just been ignored.⁹⁶¹

CSOs have also demanded transparency from public officers to declare assets as a way to reduce corruption. One ground for the July 2011 mass demonstration against Bingu wa Mutharka's government was to force the President to explain his accumulation of wealth over a very short period of time.⁹⁶²

This has been the case because most CSO programming in the governance sector has been informed by the voice and accountability framework.⁹⁶³ As noted above, after the 2009 general election, the Government of Bingu wa Mutharika was against CSOs that raised contrary policy opinions. It became increasingly difficult to hold the Government accountable for anything. However, after the death of Bingu wa Mutharika, a general perception is that CSOs have hugely relented on voice and accountability mainly because of their co-optations into Government structures.⁹⁶⁴

Therefore the success of civil society in holding the Government accountable depends on the configuration of power within the Government and the character of the ruling regime. In periods such as the abovementioned 2009 election period, civil society was fighting more for survival than playing a watchdog role to the government.

⁹⁵⁹ Wroe, Daniel (2012) *supra*.

⁹⁶⁰ Kasunda, Anthony 'PAC Pushes JB on Assets'. *Weekend Nation*, 14th September, 2013.

⁹⁶¹ Chingaibe Henry and Tinyade Kachika (2013) *Assessing Democratic governance in Malawi: Political Participation, Civic Education and Democratic Accountability* (Lilongwe: UNDP).

⁹⁶² Sixth proposal, July 20, 2011 petition.

⁹⁶³ Civil Society has been instrumental in organizing mass action against bad governance. In 2003 they successfully prevented the amendment of the Constitution to allow Bakili Muluzi a third term in office as president. Between 2004 and 2009 they helped the minority government of Bingu to have the national budget passed when the opposition political parties demanded the implementation of section 65 before the debate on budget. Recently they have made Joyce Banda recede the appointment of Khumbo Kachali the vice president as overseer of the electoral Commission.

⁹⁶⁴ Richard Munthali observed that CSOs were very vocal during the time of Bingu and since the coming in of Joyce Banda as president most of them have been quite despite of other inviting issues. This in a way vindicates Blessings Chinsinga's observation that CSOs are more reactive than proactive and act when problems go to the extreme. See also *Week end Nation Vox pop* December 29, 2012.

12.3.2 Policy Reform (Practice)

Score: 25

To what extent is civil society actively engaged in policy reform initiatives on anti-corruption?

Malawian CSOs have generally played a passive role in the fight against corruption in recent times. The fight has largely been left for the Anti-corruption Bureau (ACB). One main reason for the low engagement is that the participation of civil society in anti-corruption work is dependent on donor funding, often through the ACB. However, donors froze funding to the ACB⁹⁶⁵ over governance concerns which in turn also affected the engagement of civil society organisations in anti-corruption drive. However, only a few organisations such as the African Institute for Corporate Citizenship (AICC) in conjunction with Deloitte have been active in mobilising a business coalition against corruption. However, their focus has been rather narrow, focusing on whistle-blowing and promotion of integrity but not targeting holistic policy reforms.⁹⁶⁶

However, Civil Society engagement in policy formation in other domains is remarkable. Many CSOs participate in district-level decision-making processes and forums, including the District Executive Committees. The Government at various levels also consults with CSOs and CSO coalitions on sector-related policy issues, in part because donors require this. At the national level, CSOs have several opportunities to engage in policy making by participating in different government-initiated mechanisms, including Thematic Working Groups (TWGs), Sector Working Groups (SWG), Malawi Growth and Development Strategy (MGDS) reviews, and Sectoral Parliamentary Committees, including the Budget and Finance Committee. At these different levels, policy discussions are or may be only tangential to corruption.

Recommendations

- Civil society organizations need to strengthen their corporate governance systems and procedures to ensure that they gain and sustain their own integrity, public confidence and credibility;
- Government and development partners should explore possibilities of setting up a joint fund for the benefit of civil society organizations for them to continue their engagement and operations in the governance sector;

Civic society organizations need to strengthen their professional capacity particularly in carrying out evidence based research and advocacy

⁹⁶⁵ Refer to ACB pillar for further information.

⁹⁶⁶ Imani Development (2011) Corporate Social Responsibility (CSR) in Malawi – Update (Lilongwe: RNE).

13. BUSINESS

Summary

The transition to multiparty democracy saw the rise of a market economy ideology for the business sector. Unlike in the one-party era, freedom of economic activity as well as the sanctity of private property became enshrined in the Constitution. Consequently, there has been a legal and policy reform that collectively provides a legal and policy framework that is favourable for the business sector and promotes the integrity of the sector across the three assessment dimensions. However, in practice, the performance of the business sector across the three dimensions is barely average. The main reason is to do with weaknesses in enforcement mechanisms. Furthermore, the assessment finds that private sector engagement in anti-corruption policy is barely average while its engagement and support for civil society efforts on anti-corruption is still scanty. The table below gives a summary view of the scores across the dimensions and indicators of the assessment.

The Business Sector

Overall Pillar Score: 54.16/100

Dimension	Indicator	Law	Practice
Capacity 62.5/100	Resources	75	50
	Independence	75	50
Governance 50/100	Transparency	75	25
	Accountability	75	50
	Integrity Mechanisms	50	25
Role 50/100	Anti-Corruption policy engagement	75	
	Support for/engagement with civil society	25	

Structure of the Business sector

The business sector in Malawi is quite diverse. The formal corporate sector is quite small and consists of mainly oligopolistic firms (small number of firms that control the market). The informal sector is quite large⁹⁶⁷. Activities of the business sector are regulated by a number of legislations which are administered by different agencies. This assessment focused mainly on the formal corporate sector. While in the case of Malawi, this sector is also dominated by state owned public enterprises, this assessment is however limited to private companies that are listed or not listed on the Malawi Stock Exchange (MSE).

⁹⁶⁷ Chingaipe, Henry (2010) Business and the State in Malawi, Chapter 1.

Assessment**13.1.1. Resources (Law)****Score: 75**

To what extent does the legal framework offer an enabling environment for the formation and operations of individual businesses?

Since the transition to multiparty democracy in 1994, the legal framework offers a more enabling environment for the formation and operations of individual businesses. The cardinal provision is in section 29 of the Constitution which gives every person the right to “freely engage in economic activity, to work and to pursue a livelihood anywhere in Malawi”. This provision is particularly important because it removed the obstacles that the one-party state of the Malawi Congress Party had imposed on the business community for decades.⁹⁶⁸ Over the years, the Malawi Government has enacted strategic measures aimed at free operation of the private sector. These include but not limited to the elimination of price controls, the termination of import restrictions and the need for import licenses and the divestiture of state owned companies. The law on the incorporation of companies is very permissive. It provides that any two or more persons associated for any legal purpose may subscribe to a memorandum of association and register or form an incorporated company.⁹⁶⁹ Similarly, the Business Licensing Act allows any person or group of persons who intend to operate a particular business to apply for the relevant license. Licenses are issued annually on the 1st of April in each and expire on 31st March of the following year.⁹⁷⁰ Licenses are issued only after 21 days have elapsed in order to provide enough time for any interested person to lodge complaints against the issuance of the license applied for.⁹⁷¹

In terms of operations, the law makes detailed regulatory requirements for incorporated companies.⁹⁷² The other types of business entities are not subjected to similar regulations. However, Malawi is a free market economy since the early 1990s so prices are generally regulated by forces of demand and supply. However, there are other strategic commodities such as petroleum whose prices are regulated by independent state bodies.

The length of time taken to start a business depends on the type of business, the nature of the business entity and the geographic location. There are 10 procedures involved in starting a business in the country, these 10 procedures take approximately 39 days to finalize, with filing an

⁹⁶⁸ See Chingaipe, Henry (2010), *Business and the State in Malawi* (Chapter 5).

⁹⁶⁹ Section 4 of the Companies Act (1984)

⁹⁷⁰ Section 4(2) of the Business Licensing Act.

⁹⁷¹ Section 9, *ibid.*

⁹⁷² Companies Act

application form to obtain a license from the City Assembly taking 29 days as the most days of the procedure.⁹⁷³ Companies that engage in production and take the form of incorporated companies and want to operate in towns, take much longer to get started. It is estimated that it takes about 2.6 years for a company/business to be formed in the country.⁹⁷⁴ Other businesses, such as mere trading' start rather quickly as all they need is a license for plying their trade. There are, however, efforts to improve the registration process of businesses in Malawi. There has been recently a presidential directive to the effect that the total number of days required for registration of business to 21. Furthermore, it is the desire of the current administration to improve Malawi's standing on the doing the business ranking from the current 157 to below 100. OPC has also directed that public sector reforms should include reforms aimed at improving the "doing business ranking". To this effect, the Malawi Investment and Trade Centre (MITC) has started a process of entering into MoUs with key institutions such MRA, Department of Immigration, among others to explore ways of improving the business environment.

Contract law is enforced through the judiciary which has specialised courts for the business-related cases i.e. High Court (commercial Division), Industrial Relations Court.⁹⁷⁵ Intellectual property rights are protected through the Patents Act. The law lays down an elaborate procedure for applying for a patent and for enforcing it through the Registrar and the courts.⁹⁷⁶ Right to property is protected by section 28 of the Constitution which was a direct response to the repeal of the Forfeiture Act of the one-party state under which government was able to take away businesses from individuals.⁹⁷⁷ The law also provides for security of foreign as well as domestic investment, which includes compensation to property damaged through civil strife or political unrest.⁹⁷⁸

The winding up of businesses is regulated by the companies Act. It provides that winding up can be either by the court or it may be voluntary.⁹⁷⁹ The amounts and nature of liabilities for members of the companies varies with whether the company is limited by shares or by guarantee.⁹⁸⁰ The Act further provides that any creditor, including prospective creditor of the company can petition the court to wind up a company.⁹⁸¹

⁹⁷³ <http://www.doingbusiness.org/data/exploreeconomies/malawi/>

⁹⁷⁴ *ibid*

⁹⁷⁵ See Judiciary pillar report.

⁹⁷⁶ Patents Act, Chapter 49:02 9(Laws of Malawi).

⁹⁷⁷ See Chingaipe, Henry (2010) Chapter 5.

⁹⁷⁸ See www.mccci.org/investment_promotion.php

⁹⁷⁹ Section 204, Companies Act.

⁹⁸⁰ Sections 205 – 207, Companies Act.

⁹⁸¹ Section 12, Companies Act.

13.1.2 Resources (practice)

Score: 50

To what extent are individual businesses able in practice to form and operate effectively?

The process of forming and running an individual business can be said not to be among the best as the 'doing business' ranking puts Malawi at number 157. The survey shows that only 9 % of firms in the country identified business licensing and permits as the major constraints when trying to establish a business⁹⁸² survey carried out by the World Bank Group in 2013¹² On average, it takes 69 days to gain a business operating license or register a company in the country at the cost of 3.6 % of the property value. Within the 69 days there are 6 procedures done in order to finalize the process of registration. These include search for encumbrances at the lands registry (takes 1 day and costs MWK 5000); obtaining city rates clearance certificate (takes about 1 day to 1 week and costs MWK 500); apply to the Ministry of Lands for consent to transfer the property (this takes 1.5 to 2 months on average and costs MWK 5000); obtain a Tax Clearance Certificate from the Malawi Revenue Authority, this takes 7 days and has no direct financial costs; stamping of the conveyance deed at the Registrar General's office, takes 1 day and costs 3% of the property value; and application for registration at the Deeds Registry, which takes 7 days and costs MWK 5000. The law on the registration of companies is consistently enforced by the relevant authorities. The main reason for Malawi's low rank on the 'doing business index' is the regulatory regime, which has tended to constrain private enterprise development and resulted in a large informal sector in Malawi.⁹⁸³ The bureaucratic and legal steps that an entrepreneur must complete to incorporate and register a new firm remain cumbersome⁹⁸⁴ and provides ground for corrupt practices. For example, a 2009 survey found that 10.8 % of Malawian firms are expected to give gifts to public officials 'to get things done' while 11.4 % are expected to give gifts in meetings with tax officials and 12.6 % are expected to give gifts to get an electrical connection.⁹⁸⁵

However, to cut down on the length, the Malawi Investment and Trade Centre (MITC) is in the

⁹⁸² www.doinbusiness.org/data/exploreconomies/malawi.

⁹⁸³ Anti Corruption Bureau Strategic Plan

⁹⁸⁴ Doing Business Report 2013; World Bank/IFC

⁹⁸⁵ www.enterprisesurveys.org/Data/ExploreEconomies/2009/malawi

process of developing a mechanism which will involve investment liaison officers at MITC to do all the processes for investors so that investors only interface with one organisation.⁹⁸⁶ For incorporated companies, the laws on insolvency are enforced through the judiciary as evidenced by applications and determinations relating to bankruptcy as well as applications relating to winding up of companies through liquidation.⁹⁸⁷ However, for small medium enterprises, the laws on insolvency are hardly enforced mainly because of the relative high costs associated with the enforcement mechanisms.

The property rights of business in Malawi are effectively in practice. Besides being a signatory of the International Convention for Settlement of Investment Disputes (ICSID) and Multilateral Investment Guarantee Agency (MIGA), there is in place a Riot Damages Act. Under this Act the Malawi government is obliged to offer compensation to investors occasioned by civil strife or political unrest.⁹⁸⁸ For example, Mulli Brothers Limited, a local conglomerate was recently awarded MK700m by the High Court under the Riot Damages Act for damages incurred by their subsidiaries: Sunrise Pharmaceuticals and Chombe Foods Ltd during political demonstrations of July 20, 2011.⁹⁸⁹

13.1.3 Independence (Law)

Score: 75

To what extent are there legal safeguards to prevent unwarranted external interference in activities of private businesses?

In Malawi, there are no significant legal provisions providing the State with excessive and unjustified powers to prevent any person or group of persons to venture into business lawfully.. However, the law , provides a bigger role for public officials in terms of start-up of private business rather than during the operation of private businesses. A company/ business to start-up in Malawi requires that it goes through several government offices to acquire the necessary documents and permits⁹⁹⁰ such a business registration certificate,⁹⁹¹ operational license⁹⁹² and tax certificates from the MRA. Once a business is operational, there are very few lawful spaces for

⁹⁸⁶ MITC CEO, on signing Memorandum of Understanding with MRA, 19 September 2013, www.mitc.mw/

⁹⁸⁷ <http://www.malawitoday.com/news/125685-mulli-brothers-chitakale-plantation-faces-closure>; see also www.judiciary.mw/cases/commercial

⁹⁸⁸ See www.mccci.org/investment_promotion.php; Riot Damages Act.

⁹⁸⁹ <http://www.nyasatimes.com/2013/03/26/malawi-govt-to-compensate-mulli-k700m-court-orders-report/>

⁹⁹⁰ Depending on the nature of the business, these include the Ministry of Industry and Commerce; The Malawi Investment and Trade Centre, The Registrar –General, the Malawi Revenue Authority, the Ministry of Lands, Housing and Physical Surveys and several other regulatory bodies such as MACRA.

⁹⁹¹ See Malawi Companies Act No7 of 2013

⁹⁹² Business Licensing Act

government interference in businesses except through industry regulators. For example, in the energy sector, the Malawi Energy Regulatory Authority, issues new guidelines including pump prices for petroleum products, electricity tariffs etc. Similarly, the Malawi Communications Regulatory Authority, issues guidelines and instructions to business entities in the telecommunications and broadcasting fields.⁹⁹³

However, the law does not provide detailed and explicit legal safeguards to prevent unwarranted government interference in the activities of private business beyond that provided in sections 28 and 29 of the Constitution. The repeal of the Forfeiture Act and the said provisions are deemed effective to prevent government interference in business.

13.1.4 Independence (practice)

Score 50:

To what extent is the business sector free from unwarranted external interference in its work in practice?

The business sector in Malawi is not entirely independent of government and political interference. There is a huge public perception that governing politicians at any time interferes with the business operations by influencing award of contracts as well as soliciting money to finance political activities including electoral campaigns. Hard evidence is hard to come by but there is a reasonable amount of proxy evidence to support these perceptions. For example, a governance survey found that 55% of people worry of contributions of businesses to political parties⁹⁹⁴ as fuelling corruption and that about 33% of interactions between business and Internal Procurement Committees in public institutions result in requests for gratification.⁹⁹⁵ On award of contracts, the observation is that ruling politicians or parties tend to have their own preferred business entities who support their cause. For example, in the last few years, Mulli Brothers was widely seen as a favoured company connected to the Mutharika regime. It is reported that the new government of President Joyce Banda interfered with the contractual processes that were on-going at the time of President Bingu's death and removed Mulli Brothers and its subsidiaries from the list of potential suppliers. The Minister of Justice and Constitutional Affairs issued a formal 'stop order' for doing business with Mulli Brothers and another company belonging to a known supporter and member of President Mutharika's party.⁹⁹⁶

⁹⁹³ See Communications Act, 1998 and also the Media pillar report.

⁹⁹⁴ Chinsinga, Tsoka and Konyani (2012) p. 35

⁹⁹⁵ Ibid, p.45

⁹⁹⁶ <http://www.malawitoday.com/news/129312-malawi-government-and-world-bank-clash-over-sidelining-mulli-brothers>

The issues concerning abuse of office by government officials and corruption in relation to the business sector have also been noted. The World Bank enterprise survey showed that bribery depth in Malawi is at 8.4% since most public transactions require a 'gift' or an informal payment is requested by the government officials. For example 11.4% of firms were expected to give gifts in meeting with tax officials; 2.8% of firms were expected to give gifts to secure government contract; 3.5% of firms were expected to give gifts to get an operating license; 4.9% of firms were expected to give gifts to get a construction permit; and 12.6% of the firms were expected to give gifts to get an electrical connection.⁹⁹⁷ Furthermore, 12.8% of the firms identified corruption as a major constraint when a firm is trying to start a business in the country. The practice has become so common by the government officials that up to 10.8% of the private sector firms have accepted the tendency of handing out gifts to the public officials "just to get things done". The expropriation of private property by the state is a largely a thing of the past as it was common during the one party era when the Forfeiture Act was enforced.⁹⁹⁸ However, in the recent past land grabbing by powerful people has been attempted or occasioned. For instance Mulli Brothers Ltd attempted to use his association with President Mutharika to acquire private land in Mulanje district. When the company lost the case in court, the Ministry of lands issued a new lease to another person for the land in question, leading to a new case in which the owners of the land have sued the Ministry of Lands and the Commissioner for Lands⁹⁹⁹.

The public sector in Malawi remains the biggest consumer in the economy. As a result, it is a significant client for many business enterprises. This dominant position gives the state some level of authority in the market and as observed earlier creates room for corrupt practices that subverts the rule of law. The decision of the government to sideline Mulli Brothers and the reaction of the World Bank to that decision as cited above, shows that the state acquires, de-facto, undue influence on the economy.

However, business entities are always free in law and practice to file law suits against the behaviour of public administration or civil servant either for judicial review of the decisions or for any other relevant remedies. The case in which a British National is suing the Ministry of Lands (cited above) illustrates the point.¹⁰⁰⁰

⁹⁹⁷ www.enterprisesurveys.org/data/exploreeconomies/2009/malawi.

⁹⁹⁸ see Chingaipe, Henry (2010) Business and the State in Malawi, Chapter 5.

⁹⁹⁹ <http://mw-nation.com/woodworth-sues-lands-ministry/>

¹⁰⁰⁰ <http://mw-nation.com/woodworth-sues-lands-ministry>

Governance

13.2.1 Transparency (law)

Score: 75

To what extent are there provisions to ensure transparency in the activities of the business sector?

The laws are generally weak in so far as they relate to auditing and reporting standards. A company does not need to appoint an auditor, unless exempted by regulations made under the Act. However, the board of every company has to ensure that within six months the true and fair view of the state of affairs of the company at the balance sheet date is presented together with its profits or losses and cash flows for the accounting period.¹⁰⁰¹ The 6 months period can be extended where the registrar considers it appropriate. The audits of private companies are not required to be published and it is not necessarily a requirement for private companies to be audited annually by external auditors.¹⁰⁰² The law allows the directors of private companies not to appoint external auditors and they can choose to use the internal auditors.¹⁰⁰³ The general practice however for limited liability companies is to have yearly audits as without these it becomes difficult or hard for companies to obtain financial services from financial institutions; to bid for certain Government contracts where proof of being capable to carry out the assignment is required and for tax purposes.

However, companies listed under the Malawi stock exchange are obliged to a strict scheme of auditing and financial reporting. The requirements for listing on the MSE require that financial statements must be drawn up in accordance with the national law and must be prepared and independently audited in accordance with standards regarded by the MSE Committee as appropriate for listed companies. In particular, the statements should comply with international Accounting Standards; and that the auditors must have reported on the financial statements without any qualification. Further regulations are provided in sections 2.17 to 2.19 of the Rules. The Audits of listed companies are required to be published for the general public and are also submitted to the Registrar of Companies and Malawi Revenue Authority.

¹⁰⁰¹ Malawi Companies Act No. 7 of 2013, Division 2- General Obligations for Private Companies under section 244 (1).

¹⁰⁰² Ibid

¹⁰⁰³ Companies Act N.7 of 2013.

Accountants are professionally governed by the Society of Accountants in Malawi (SOCAM) which seeks to promote ethical behavior and integrity of the accounting profession in Malawi. However, SOCAM does not have a Malawi-specific code of conduct for its members. Instead SOCAM adopted the International Federation of Accountants (IFAC) code as its own.¹⁰⁰⁴ The code ensures that accountants of private companies comply with any orders made under the Act or any accounting standards issued by a prescribed body or authority, or with international financial regulations reporting standards (IFRS) or the IFRS for SME's when preparing financial statements.¹⁰⁰⁵ SOCAM requires all auditors to follow the International Standards of Auditing and the Auditors' independence is governed by the Professional Code of Ethics promulgated by SOCAM, which is based on the IFAC Code of Ethics.¹⁰⁰⁶

13.2.2: Transparency (practice)

Score: 25

To what extent is there transparency in the business sector in practice?

There is selective transparency in so far as information about the activities of private companies are concerned. Large corporations report and publicize their efforts in relation to corporate social responsibility because these acts improve their image in the public domain.¹⁰⁰⁷ However, not all company donations are made public. For instance, political financing is not disclosed.¹⁰⁰⁸ Furthermore, financial reports of many companies are not publicized. There is no obligation for private companies to publish their financial reports except those listed on the MSE. The matter is discretionary. This, according, to one observer, has provided room for private companies to engage in practices devoid of integrity in which some companies prepare three versions of accounts: One for the MRA for tax purposes; another for the banks for purposes of securing credit and the third for themselves because they have to know the true value of their business.¹⁰⁰⁹ For companies listed on the MSE, they publish their audited accounts in the local press, on their websites and provide the MSE with copies and the MSE also posts them on its website.¹⁰¹⁰

¹⁰⁰⁴ www.socam.mw/membership.html

¹⁰⁰⁵ Malawi Companies Act No 7 of 2013, 246 (3), Division III- Financial Statements, p139.

¹⁰⁰⁶ See The World Bank- Report on Observance of Standards and Codes (ROSC), Malawi, June 2007

¹⁰⁰⁷ See for example websites for Press corporation, Limbe Leaf Tobacco, Illovo Sugar etc

¹⁰⁰⁸ See pillar report on political parties and Election Management Body.

¹⁰⁰⁹ Interview with National Bank Risk Analyst, Blantyre.

¹⁰¹⁰ See www.mse.co.mw/news/htm for records of various companies that go back to 2003.

The adherence of accountants to financial auditing and reporting standards is effectively enforced as noted in the ten listed member companies of SOCAM, who showed that they complied with the IFRS standard of auditing¹⁰¹¹. SOCAM acts as a third party verifier for its member companies to see whether and how well they comply with the IFRS standards.

13.2.3. Accountability (law)

Score: 75

To what extent are there rules and laws governing oversight of the business sector and governing corporate governance of individual companies?

The Companies Act No. 7 of 2013 provides a very comprehensive law dealing with corporate governance. It requires that directors of private companies comply with the corporate governance standards and imposes fines for non-compliance. This Act further requires director(s) upon formation of their company, to incorporate principles of corporate governance in the running of the business. In particular, the Act provides that "The director of private companies shall be required to comply with corporate governance standards in force in Malawi that apply to companies as directed by the registrar."¹⁰¹² The current version of the standards was promulgated in 2001 through a collective effort that draw participants from different subsectors of the private sector, including Society of Accountants in Malawi (SOCAM), Malawi Stock Exchange, institute of Internal Auditors, the Department of Statutory Companies, the Institute of Bankers, and several large listed companies¹⁰¹³. The code also includes a code of ethics for private enterprises and those who deal with them.¹⁰¹⁴ The Code is based on the King Report on Corporate Governance (South Africa), the Commonwealth Association of Corporate Governance Guidelines, and the Kenyan Principles and Sample Code. Thus, the code draws on international experiences and best practices and is designed to be applied to all enterprises.

In terms of business oversight, there are industry regulators established by law. For instance, the Reserve Bank of Malawi oversees banks and non-bank financial institutions;¹⁰¹⁵ the Malawi Energy Regulatory Authority exercises oversight on energy business including electricity and

¹⁰¹¹ See The World Bank- Report on Observance of Standards and Codes (ROSC), Malawi, June 2007

¹⁰¹² Malawi Companies Act No. 7 of 2013, Division VII- Core Requirements for Private Companies, p52

¹⁰¹³ Code of Best Practices for Corporate Governance in Malawi (2001) available at [http://www.track.unodc.org%2FLegalLibrary%2FLegalResources%2FMalawi%2FLaws%2FCode%2520of%2520Best%2520Practice%2520for%2520Corporate%2520Governance%2520\(2001\).pdf&ei=E-c-UovGCsSptAag_ICABw&usg=AFQjCNGaRgaA6wNAPJjSgAagY9ZNseMog](http://www.track.unodc.org%2FLegalLibrary%2FLegalResources%2FMalawi%2FLaws%2FCode%2520of%2520Best%2520Practice%2520for%2520Corporate%2520Governance%2520(2001).pdf&ei=E-c-UovGCsSptAag_ICABw&usg=AFQjCNGaRgaA6wNAPJjSgAagY9ZNseMog)

¹⁰¹⁴ Appendix I to the Code.

¹⁰¹⁵ http://www.rbm.mw/stats_mcsu.aspx

fuels,¹⁰¹⁶ Malawi Communications Regulatory Authority exercises oversight on telecommunications Industry and broadcasting, the Competition and Fair Trading Board deals with all issues related to unfair trading practices.

13.2.4. Accountability (practice)

Score: 50

To what extent is there effective corporate governance in companies in practice?

An assessment of compliance with good corporate governance principles established that the legal framework and traditions on corporate governance are enforced to protect shareholder rights and boards of listed companies generally perform the roles that are assigned to them¹⁰¹⁷. However, the assessment focused only on public interest business entities which included financial institutions, parastatal companies and companies listed on the MSE¹⁰¹⁸. Nonetheless, the enforcement of good corporate governance in parastatal companies is compromised. Studies have established about four main reasons. These include unclear roles of various government bodies that execute ownership rights of government; fragmentation of oversight bodies; lack of clear ownership policy; and the primacy of partisan politics in the nomination of the boards and senior management.¹⁰¹⁹ Furthermore, the accounting and auditing standards have not been complied with in full by every company and has led to meting out of fines and sometimes forced mentorship.¹⁰²⁰

Oversight bodies have been effective but only to some extent that is less than optimal. For example the ROSC Report (2009) found that the Reserve Bank and the Malawi Stock Exchange are constrained by limited resources and inadequate legal mandates to maximize their oversight roles¹⁰²¹. In the other sectors, Regulatory authorities such as MERA and MACRA are less concerned with the corporate governance issues of the concerned companies than with operational and pricing issues of the services and products of the companies.

Although there are widespread calls by the anti-corruption Bureau for people and organizations to report corruption, the state does not provide any particular incentives to companies to disclose any anti-corruption relevant information.

¹⁰¹⁶ <http://www.meramalawi.mw/>

¹⁰¹⁷ World Bank (2009) ROSC: Corporate Governance Country Assessment Malawi.

¹⁰¹⁸ Ibid.

¹⁰¹⁹ Ibid; Chingaipe, Henry (2010) Business and the State in Malawi, chapter 6.

¹⁰²⁰ Ibid., p.11

¹⁰²¹ Ibid.

13.2.5 Integrity mechanisms (law)

Score: 50

To what extent are there mechanisms in place to ensure the integrity of all those acting in the business sector?

In 2006, Malawian companies launched the initiative called Business Action Against Corruption (BAAC). The forum developed a code of conduct guiding business enterprises to conduct honest and corruption-free business transactions.¹⁰²² The code binds its members to operate within certain ethical standards and provides a range of programs to enable member companies and their representatives to effectively deal with corruption¹⁰²³ by providing training, resources, concerns, monitoring and reviews. The BAAC codes of conduct are very comprehensive, since they obligate member companies to prohibit corrupt practices in any form whether direct or indirect. The business entities commit to the fundamental values of integrity, transparency and accountability and companies are encouraged to create and maintain a trust-based and inclusive internal culture in which corruption is not tolerated. The code states that companies should commit to implementing of a programme to counter corruption.¹⁰²⁴

The BAAC code of conduct covers individual behaviour and even extends to the board. The code prohibits corrupt practices by any employee, agent, or any other person under the employment or authority of the company. It further gives the company authority to make corruption by an employee subject to severe disciplinary measures. In its extension to the board the code requires them to establish a system for recruiting employees with high integrity, and a system for promoting and separating with employees that is not arbitrary and is based on fairness, openness, ability and performance. According to the BAAC code of conduct the board of every company is supposed to set up and maintain effective mechanisms to oversee and detect failures to meet standards and enforce the high standards of the code. The board has to ensure that the employees are trained to understand and practice honest, ethical and appropriate behaviour, are able to avoid conflicts of interest, and to report acts of corruption to the relevant authorities. The code mandates the board to protect whistle-blowing employees from repercussions for reporting corruption.¹⁰²⁵

Besides the BAAC code, the code on corporate governance contains an Annex that spells out guidelines for ethical conduct of private enterprises and those who deal with them.

¹⁰²² See Anti-Corruption Resource Centre, www.U4.no

¹⁰²³ See www.baacafrika.org/w/ops_malawi.php

¹⁰²⁴ See business Code of Conduct for Combating Corruption in Malawi

¹⁰²⁵ See business Code of Conduct for Combating Corruption in Malawi

Matters of bribery are addressed in the Corrupt Practices Act. Bribery is a common form of corruption and is prohibited by law. Any case of bribery, whether in the public or private sector is amenable for prosecution under the corrupt practices Act. The Anti-corruption law in Malawi covers both personal and corporate liability. The Public Procurement Act requires that bidders of public contracts must be duly registered with the relevant authorities to do their business in Malawi. However, the Act does not require that bidders should have ethics programmes as a qualification criterion.

13.2.6 Integrity mechanisms (practice)

Score: 25.

To what extent is the integrity of those working in the business sector ensured in practice?

Although the codes of conduct are subscribed to by many companies (35 for BAAC code¹⁰²⁶), they only help companies to express intentions of conducting their businesses in an ethical manner. The codes lack effective enforcement mechanisms except in sectors where there are public regulators. Thus, there is no systematic follow up and collection of data on how the codes of conduct have been or are being operationalized in the different companies. Consequently, there is no register of blacklisted companies.¹⁰²⁷ Nonetheless, there is a general concern within and outside the private sector for promoting integrity in business as evidenced by their development and subscription to codes of conduct, subscriptions to a deloitte mechanism of 'Tip-off Anonymous' by companies.¹⁰²⁸ Bribery is a prevalent form of corruption in Malawi. Bribery depth i.e. percentage of public transactions where a bribe or informal payment is asked is estimated at 8.4% while the percentage of firms experiencing at least one bribe payment request is 13.7%¹⁰²⁹. Furthermore, in a survey of typical patterns of corruption 20% of business respondents reported that businesses offer bribes while 31 % reported that it is government officials who ask for bribes. Data from the public sector respondents show that 38% reported that businesses offer bribes while about 34% reported that it is government officials who ask for bribes.¹⁰³⁰ About 12% of business sector respondents and 18% of Public sector respondents reported that the amount of bribe to be paid is known beforehand.¹⁰³¹

¹⁰²⁶ <http://businesscombatingcorruption-africa.ccps-africa.org/PROJECTSCASESTUDIES/MALAWIBUSINESSACTIONAGAINSTCORRUPTION/tabid/575/Default.aspx>

¹⁰²⁷ The Finance Intelligence Unit (FIU) may have some information of companies engaging in money laundering but they were not forthcoming with information.

¹⁰²⁸ See below.

¹⁰²⁹ www.enterprise-surveys.org/ExploreEconomies/2009/Malawi.

¹⁰³⁰ Chinsinga, Tsoka and Konyani (2010) p.47.

¹⁰³¹ Ibid.

Roles

13.3.1 Anti-corruption policy engagement

Score 75:

To what extent is the business sector active in engaging the domestic government on anti-corruption?

The business sector in Malawi is engaged in constructive policy dialogues with the government on anti-corruption initiatives. For instance, the development of the corporate governance code was a collective effort that involved government, private sector and a few civil society organizations.¹⁰³² Furthermore, every financial year during consultations for the national budget with the Ministry of Finance, both SOCAM and MCCCCI make submissions on how to improve efficiency and curb graft in the execution of the national budget.¹⁰³³ Furthermore, the private sector, through the MCCCCI and other sectoral business associations advocates to government on fair procurement procedures that are transparent and corruption-free.¹⁰³⁴

The business sector is identified as a pillar in the national integrity system in Malawi. Consequently, private sector representatives sit in the National Integrity Committee where they engage with government and other stakeholders on anti-corruption efforts and strategies.¹⁰³⁵

A remarkable initiative of private sector policy engagement is in the Construction sector where the National Construction Industry Council (NCIC) is implementing a project i.e. Construction Sector Transparency (CoST) Initiative aimed at promoting integrity in the sector by advocating for more transparency transactions between government and contractors, ensuring adherence to construction standards, timeliness of projects, award of contracts and resource tracking etc. However, policy making remains the domain of government and policy uptake from the suggestions of the private sector is on the increase.¹⁰³⁶

¹⁰³² Code of Best Practice for Corporate Governance in Malawi.

¹⁰³³ Author interview, Economist for the Chamber of Commerce.

¹⁰³⁴ Chingaïpe, Henry (2010) Business and the state in Malawi, Chapter 6.

¹⁰³⁵ ACB (2010) National Anti-Corruption Strategy (Lilongwe: ACB).

¹⁰³⁶ Author Interview, Economist, MCCCCI.

13.3.2. Support for/engagement with civil society

Score: 25

To what extent does the business sector engage with/provide support to civil society on its task of combating corruption?

Collaboration between the private sector and civil society organisations in the fight against corruption is at nascent stage. Apart from the CoST Initiative of the NCIC, there is only the Business Action Against Corruption (BAAC) championed by the African Institute for Corporate Citizenship (AICC) that demonstrates collaboration between business and CSOs. The BAAC is chaired by private sector personnel but is funded by GIZ and UK DFID. Besides the BAAC, there is also another project run by Deloitte & Touche called TIP OFF Anonymous. This is essentially a private sector initiative aimed at enabling reporting of corrupt practices in companies, CSOs and any other interested organisation.¹⁰³⁷ Organizations that are interested in promoting integrity and anti-corruption subscribe to the project. Informers report any acts and behaviors in the organization and Deloitte collates the information and presents it to the relevant authorities in the concerned organizations for their further action.¹⁰³⁸ Currently, Tip – Off Anonymous has 72 client-companies.¹⁰³⁹

Recommendations

- Government through MITC and Public Sector Reform and Management Unit (PSRMU) should be more proactive and accelerate the necessary reforms aimed at improving the “doing business” environment by among other measures, reducing the red tape involved in the registration of companies;
- Advocate for BAAC to be recognized by law so that non-compliance can be sanctioned;
- Advocate for mainstreaming of the “Tip Off Anonymous” to all key institutions both in the private and public sector.

¹⁰³⁷ http://www.deloitte.com/view/en_ZA/za/services/riskadvisory/service-offerings/tip-offs-anonymous/46707ecf079e2210VgnVCM100000ba42f00aRCRD.htm

¹⁰³⁸ Ibid.

¹⁰³⁹ Author interview with Mrs Vanda Phekani, Deloitte & Touche, Tip-Off Anonymous programme.

14. TRADITIONAL LEADERS

Summary

The role of traditional leaders (i.e. Chiefs) in the governance arena goes back to pre-colonial tribal states. Over the decades, the institution of chieftaincy has undergone changes in terms of internal hierarchy and roles in the Malawian society. Of particular importance is that chiefs have been identified as a pillar of integrity in public life in Malawi's Anti-corruption Strategy. This is the case because chiefs are deemed to exercise a lot of influence in the political arena and in public governance generally. The assessment finds that chiefs have relatively high capacity to deliver on their mandates but their internal governance is quite low, particularly with regards to accountability, as summarised in the table below:

Traditional Leaders

Overall Pillar Score: 47.2/100

Dimension	Indicator	Law	Practice
Capacity 50/100	Resources	-	50
	Independence	50	50
Governance 41.7/100	Transparency	25	50
	Accountability	50	25
	Integrity Mechanisms	50	50
Role 50/100	Community mobilisation to demand services	50	
	Community representation	50	

Structure and Organisation of Chieftaincy in Malawi

Chieftaincy is an important enduring institution in most African countries in the sub-Saharan region and was the centre of political authority in pre-colonial tribal states. In the era of modern states, roughly associated with colonialism, African chieftaincies were either excluded or co-opted into state structures. In Malawi the legal foundation for the recognition of chiefs (i.e. traditional leaders) was made in 1912 through the District Administrative Ordinance. The Ordinance created a hierarchy of Chiefs in the style of Principal and Village Headmen. It also gave them the responsibility to maintain law and order; encourage taxpaying; provide sanitation; control cattle movement and oversee general welfare. Amendments to the Ordinance in 1924 and 1929 extended powers of the Principal Headmen to civil cases, from collecting taxes, issuing licences and controlling afforestation. The hierarchy of chiefs was revised by the 1933 Native Authority Ordinance. The Principal headmen became Native Authorities and the Village headmen were divided into Sub-Native Authorities, Group Village Headmen, and Village Headmen. The Native Authorities were entrusted with powers of local government including making rules and orders to regulate their own districts, adjudicate cases, and allocate customary farm land.

When Malawi became independent in 1964 the Constitution provided that the “institution of Chieftaincy shall be recognised in the Republic, so that the chiefs may make the fullest contribution to the welfare and development of the country in their traditional fields.”¹⁰⁴⁰ However, despite this recognition, chief’s powers continued to be curtailed and their customary functions and autonomy were reshaped, restricted and at times appropriated and politicised, particularly in relation to the Traditional Courts. As a result the 1994 Malawi Constitution no longer expressly provided for the recognition of institution of chieftaincy, although chiefs were included in the composition of the senate. The inclusion of the chiefs in the senate was to ensure participation of traditional authorities in matters of national interest since the functions of the senate include initiating legislation, voting motions to confirm or remit Bills passed by the National Assembly. Consequently, the repeal of the Senate in 2001 left out chiefs from effective participation in issues of national interest.¹⁰⁴¹

Malawi enacted the Chiefs Act in 1967 which provided for the recognition, appointment, and functions of the Paramount Chiefs, Senior Chiefs, Chiefs, Sub-Chiefs, Councillors, Group Village Headmen, and Village Headmen. The areas of jurisdiction for these chiefs at District level, Sections of the District and Sub-section of Districts have been clearly spelt out in the Chiefs Act¹⁰⁴².

¹⁰⁴⁰ The 1966 Malawi Constitution

¹⁰⁴¹ Stella Kalengamaliro (2009) *The interface between traditional authority and the state in democracy consolidation: a case study of Lilongwe district,* “ Unpublished MA Thesis

¹⁰⁴² Section 3, Chiefs Act 1967.

It should be noted that the Chiefs Act provides for Chiefs staff and clearly stipulates the conditions of services for the staff.

In Malawi, chiefs perform a number of functions. The chiefs Act mandates the President to specify the functions of the office of Paramount Chief in the appointing documents.¹⁰⁴³ However, the Act has made specific provisions in the general functions of a chief. These functions include; preservation of public peace, carrying out traditional functions of the office in accordance with customary law, assisting in the collection of tax, and general administration of the District and carrying out and enforcing lawful directions of the District Commissioner¹⁰⁴⁴. In addition, in the current decentralization discourse, chiefs are expected to perform the following functions; (a) to participate in council deliberations, (b) to ensure that council decisions are not in conflict with cultural values, (c) to mobilise communities to participate in local development, (d) to mobilise local resources for development implementation, (e) to act as advisor to Area Development Committee.

Assessment

14.1.1 Resources (Law)

Score: 50

In law, do traditional leaders have resources to discharge their duties?

Under the Chiefs Act,¹⁰⁴⁵ every Paramount Chief, Senior Chief, Chief, Sub-Chief and Chairman of the Chief's Council is entitled to receive remuneration in order to enable them maintain their status and carry out functions of their office in a fit and proper manner. The Act further provides for the appointment of Tax Clerks and Chief's Messengers for the purpose of serving every Chief in the discharge of his/her duties. Power to appoint, suspend or remove any person from the office of tax clerk or chief's messenger and to exercise disciplinary control over the person serving any chief is vested in the District Commissioner of the district in which the person holds the office. In other words the District Commissioner determines the appointment of such officers to the office of the Chief. Under section 9 (1),¹⁰⁴⁶ it is incumbent upon a Chief to appoint such a number of Group Village Headmen and Village Headmen, as he may consider necessary to assist him in carrying out his functions.

¹⁰⁴³ See section 6 of the Chiefs Act of 1967

¹⁰⁴⁴ See section 7 of the Chiefs Act of 1967

¹⁰⁴⁵ See section 16 of the Chiefs Act of 1967 as amended 1999

¹⁰⁴⁶ Chiefs Act

There are, however, a number of issues in the existing law on chief's resources and other remuneration for the chiefs. Firstly, the president is mandated to determine such remuneration periodically. It is also up to the President to determine whether and how much should be paid to chiefs as pension upon his/her voluntary retirement or removal from office. In short, so much depends on the discretion of the President in so far as the resources to be made available to chiefs are concerned.

14.1.2 Resources (Practice)

Score: 50

To what extent do the traditional leaders have adequate resources to effectively discharge their duties?

Chiefs receive monthly honoraria from Government which is determined by the president at his or her discretion. The president determines and announces increases in remuneration for chiefs on a political podium without even taking into account the implication of such a decision on the national budget.¹⁰⁴⁷ Chiefs are remunerated according to their ranks¹⁰⁴⁸ but they are not capacitated with sufficient resources to perform their work. The official staff compliment is rather very low and for some chiefs of lower ranks they rely on the traditional system to supply them with people to help in the discharge of their duties. For their transport, most chiefs look up to District Commissioners to provide transport for specific occasions. The most senior chiefs (e.g. Paramount chiefs), however, tend to be given vehicles by government, pretty much as a matter of courtesy as such provisions are not laid down in writing.¹⁰⁴⁹

The Chiefs Act does not specifically provide for remuneration for chiefs below the rank of sub-chief. However, over the years, Group Village Headmen and Village Headmen have been receiving remuneration from government in the form of monthly honoraria. Similarly, although the law does not provide for the provision of such amenities like houses, furniture etc, government has embarked on projects to construct houses for chiefs of the rank of Sub Traditional Authority and above.¹⁰⁵⁰

¹⁰⁴⁷ Chingaipe, Henry (2010) 'Traditional Leadership and Multiparty Democracy in Malawi', Paper for the Canadian Journal of African Studies.

¹⁰⁴⁸ At the moment monthly remunerations-honoraria for chiefs is as follows; Paramount Chiefs MK50000; Senior Chiefs, MK30000; Chiefs (TAs), MK180000; Sub-Chiefs, MK8000; Group Village Headmen, MK1000; Village Headmen, MK500

¹⁰⁴⁹ Author interview with government official in the Directorate of Chiefs, Ministry of Local Government.

¹⁰⁵⁰ Author interview with Ministry of Local Government Official.

14.1.3 Independence (Law)

Score: 25

In law, how independent are traditional leaders from the influence or interference of other authorities?

The law guarantees independence of chiefs only from authorities other than the presidency. Section 22 of Chiefs Act criminalises the conduct of those who interfere with the exercise of powers of the traditional leaders. However, the same legislation mandates the President to interfere with chieftaincy in many ways including the following:

- The president to appoint as Paramount Chief, Senior Chief, or Chief such person as he shall recognize as being entitled to such office.¹⁰⁵¹
- Where the President considers that the holder of an office of Paramount Chief, Senior Chief, Chief or sub-Chief is unable to fulfil the functions of his office satisfactorily due to age, infirmity or any other reason, the President may appoint such other person to act in that office as he may think fit.¹⁰⁵²
- The President to remove chiefs from their positions on the following grounds; (a) a person ceases to be entitled under customary law or tradition to be a chief; (b) the person has lost confidence of the majority of people under his or her jurisdiction; and (c) the removal is necessary and it is in the interest of good governance.¹⁰⁵³ The Act further provides that once a chief is removed from office and the President is satisfied that the presence of such a person in any area would be prejudicial to the maintenance of public order in that area, the Act mandates the President, by notice under his hand, to prohibit such a person from being within any area specified in the notice.¹⁰⁵⁴

These provisions present challenges in so far as the independence of chiefs, especially from ruling politicians, is concerned. The most critical challenge is the involvement of chiefs in partisan politics in favour of ruling parties against the general expectation of neutrality.¹⁰⁵⁵

¹⁰⁵¹ section 4 (1) of Chiefs Act. The law further provides that President's power to appoint should only be exercised only if the person appointed is entitled to hold the office under customary law prevailing in the area and that the appointee has the majority support of the people of the area.

¹⁰⁵² See section 10 of the Chiefs Act

¹⁰⁵³ Chiefs Act section 11

¹⁰⁵⁴ Section 15 (1) of the Chiefs Act

¹⁰⁵⁵ Chingaipe, Henry (2010) Traditional Leadership and Multiparty Democracy in Malawi', Paper for the Canadian Journal of African Studies

14.1.4 Independence (Practice)

Score: 25

To what extent are traditional leaders independent in practice?

Chieftaincy in Malawi is one of the governance institutions whose independence is highly compromised by political interference. There have been many instances of political and direct government interference in the activities of the chiefs particularly appointment, elevation or promotion of chiefs. For example, when he promoted Senior Chief Chikowi to Paramount Chief of the Yao tribe, President Mutharika declared that “I have decided to promote Senior Chief Chikowi due to his loyalty and hardworking spirit. He has remained loyal to my government and myself and for this he has to be rewarded”.¹⁰⁵⁶ Furthermore, Presidential interference in chieftaincy leads Chiefs to partisan politics. Sometimes chiefs have been used to drum up support for unpopular government policies such as a change of constitutional presidential term limit in support of President Muluzi’s bid for a third term and the Government’s plan to change the national flag during the Presidency of Bingu wa Mutharika.¹⁰⁵⁷ It is therefore argued that power and rights of the President over chieftaincy should be removed. Chiefs, like other public servants, should not engage or be drawn into public and overt party politics. This is because chiefs are culturally respected and enjoy obedience to their traditional authority in their tribal territories. However, their subjects are in the first place citizens of the republic and have different political affiliations. It is therefore undemocratic for chiefs to use their traditional authority to shore up partisan support by coercing people of their areas to support a particular party, often times, the party in government.¹⁰⁵⁸

14.2.1 Transparency (Law)

Score: 25

In law, are there provisions to ensure transparency of traditional leaders in the discharge of their functions? To what extent are there provisions in place to ensure that the public can obtain relevant and timely information on the activities and decision-making processes of traditional leaders?

The 1967 Chiefs Act makes chiefs part of the executive branch of government and assistants to

¹⁰⁵⁶ Eggen, Oyvid (2011) Chiefs and Everyday Governance: Parallel State Organisations in Malawi, *Journal of Southern African Studies*, 37(02):313-331.

¹⁰⁵⁷ Chingaipe, Henry (2010) Traditional Leadership and Multiparty Democracy in Malawi’, *Paper for the Canadian Journal of African Studies*

¹⁰⁵⁸ Ibid.

the District Commissioners and their offices which implicitly obliges them to be transparent in the way they operate. In general the legal framework in Malawi beginning with the Constitution requires all institutions of public governance to be transparent. However, there are no specific legal provisions targeting chiefs and requiring them to make available information on their activities. Nonetheless, the decentralization framework and the Local Government Act assigns responsibilities to chiefs which ordinarily require a considerable level of transparency. For example Chiefs are required to participate in local council deliberations; to ensure that council decisions are not in conflict with cultural values; to mobilise communities to participate in local development; to mobilise local resources for development and to act as advisor to Area and Village Development Committees. These are functions that attract several stakeholders and their successful execution requires Chiefs to be transparent.

14.2.2 Transparency (Practice)

Score: 50

To what extent can the public obtain relevant and timely information on the activities and decision-making processes of traditional leaders in practice? To what extent are traditional leaders transparent in the discharge of their functions?

Although the legal framework lacks specificity in requiring chiefs to be transparent, chiefs tend to be more transparent on some issues and less so on others.¹⁰⁵⁹ For instance, in their adjudication of matters under customary law, they are generally transparent as the trials are held in public and the chiefs are assisted by a panel of elders.¹⁰⁶⁰ However, due to capacity problems to document and keep records, most quasi-judicial decisions are oral and their documentation is scanty or sketchy or completely nonexistent. This lack of capacity limits the extent of their transparency. In the selection of beneficiaries for welfare handouts, the degree and form of transparency varies from one chief to another based on the nature of incentive schemes in the programmes.¹⁰⁶¹ The one area where transparency of chiefs is in very short supply is when they are used by ruling politicians to champion a political agenda of the ruling party on the pretext that the chiefs are the true representatives of the people.¹⁰⁶² It is not known how chiefs ascertain that all the people in their jurisdictional areas are supportive of the ruling party's positions.

¹⁰⁵⁹ Traditional authority Nthondo of Ntchisi in Chingaipe Henry and Kondwani Chikadza (2011) Report on the Evaluation of the Malawi Civic and Political Space Platform (Lilongwe: DCA).

¹⁰⁶⁰ *ibid*

¹⁰⁶¹ Chinsinga, Blessings (2009) *The Political Economy of Cash Transfers* (London: ODI); Chinsinga, Blessing (2011) *The Future of the Farm Input Subsidy Programme: Four Scenarios* (Lilongwe: CISANET).

¹⁰⁶² Chingaipe, Henry (2010) *Traditional Leadership and Multiparty Democracy in Malawi*, Paper for the Canadian Journal of African Studies

14.2.3 Accountability (Law)

Score: 25

In law, are there provisions in place to ensure that traditional leaders report and answer for their actions?

The 1967 Chiefs Act is the only primary law that makes provision for chiefs to be answerable to the President and the District Commissioner. They are appointed, promoted or removed by the President. Besides the President, they are expected to be answerable to the District Commissioner. The Decentralization Policy framework (2000) and Local Government Act (1998) do not oblige chiefs to account for the discharge of any of the functions assigned to them.

The legal framework for ensuring that chiefs are accountable is weak. While chiefs can be tried for abuse of power or other offences under the penal code and other laws, the legislation on chiefs does not spell out accountability mechanisms for chiefs. The Act only provides for offending chiefs to be punished either by a suspension from office or by removal.

14.2.4 Accountability (Practice)

Score: 25

To what extent do the chiefs report on and answer for their actions in practice?

Addressing irregularities and holding chiefs responsible for violations has proved problematic in the current political and governance system.¹⁰⁶³ One main problem for the lack of accountability is that there is no forum or body through which chiefs can exercise collective voice and therefore be held accountable for their actions or inactions, decisions or indecisions or simply for them deliberate on matters concerning their work, their welfare, and the development of customary law and tradition. Attempts to create a Chiefs Council which were allegedly financed by President Muluzi as part of the campaign for the third term did not bear fruit.¹⁰⁶⁴

Furthermore, due to politics of patronage that takes place between chiefs and ruling party politicians, especially the Presidency, chiefs are less accountable to their subjects and have

¹⁰⁶³ Chiweza, Asiyati (2007) 'The Ambivalent Role of Chiefs: Rural Decentralisation Initiatives in Malawi', in Lars Buur and Helene Maria Kyed (eds.) *State Recognition and Democratisation in Sub-Saharan Africa: A New Dawn for Traditional authorities?* (Palgrave MacMillan, New York):53-78.

¹⁰⁶⁴ See Chingaipe, Henry (2010) 'Traditional Leadership and Multiparty Democracy in Malawi', Paper for the Canadian Journal of African Studies

increasingly become more accountable to politicians of ruling parties at any point in time.¹⁰⁶⁵ The government has in some situations protected chiefs from facing the full wrath of the law when they have committed offences. For instance, when Late Chief Chikowi was convicted by the High Court in Zomba and given a custodial sentence, the President immediately pardoned him even before the convict chief could serve a single day in prison.

On a positive note, traditional leaders promote local accountability by holding regular and need-based village meetings; summoning individuals and families to the chiefs court to provide feedback on issues as need be; and working with the '*nduna za mfumu*' (i.e. village jurors) in all matters of mediation and decision making.¹⁰⁶⁶

14.2.5 Integrity (Law)

Score: 25

To what extent are there mechanisms in place to ensure the integrity of traditional leaders?

Currently, there is no written or formal Code of Conduct for traditional leaders. The Chiefs Act only has a limited number of provisions that relate to offences or discipline. Section 22 of the Act only define offences in relation to the institution of chieftaincy and prescribes appropriate penalties for the said offences. The offences in question relate to other persons who in one way or another engage in conduct that interferes with the exercise of power by traditional leaders. The Chiefs Act does not regulate any post-installation employment and the constitutional provisions on Asset Declaration do not include traditional leaders.¹⁰⁶⁷ On the other hand the Corrupt Practices Act (also applicable to traditional leaders) categorizes receiving gifts as an act of corruption, and this is in direct conflict with the cultural practice in which subjects of chief offer gifts of different types on different occasions.

Likewise, it has been noted that most affairs of traditional leaders are administratively taken care of by the Ministry of Local Government and Rural Development (Decentralization Policy 2000; Local Government Act 1998). Thus, traditional leaders themselves have not been given any room for voicing their views and contributions on the welfare of the subject of traditional leadership in general, or for commenting or contributing on matters concerning the development of customary law and practice or tradition. Importantly, the law has not provided the mechanism through which

¹⁰⁶⁵ Chinsinga, Blessings, 'Talking political Economy: No More Chiefs in Malawi', Malawi News, 18 september, 2010.

¹⁰⁶⁶ Stella Kalengamaliro (2009) The interface between traditional authority and the state in democracy consolidation: a case study of Lilongwe district," " Unpublished MA Thesis

¹⁰⁶⁷ Unless an argument can be won that chiefs are part of 'public officers'.

traditional leadership can discipline itself within their ranks and customs.

14.2.6 Integrity (Practice)

Score: 50

To what extent is the integrity of the chiefs ensured in practice?

The absence of code of conduct for traditional leaders is a huge vacuum in the integrity discourse. Although there are threats of sanctions against misconduct, these are not in any way institutionalized. As long as the traditional leader has a good standing with the ruling elites, she/he has implicit immunity from sanctions or prosecution because the only authority to which chiefs are accountable is the President of the country.¹⁰⁶⁸ However, the integrity of chiefs in practice is informed and enforced by informal rules and practices. For example, as leaders chiefs are not expected to tell falsehoods or untruths or to be involved in corrupt practices of any kind. These social expectations pile pressure on chiefs to behave appropriately. Deviance from such social norms becomes big news and a source of ridicule for individual chiefs¹⁰⁶⁹

Roles

14.3.1 Community mobilisation

Score: 50

To what extent do traditional leaders mobilise their subjects to demand accountability from and promote integrity among public duty bearers?

The Decentralisation Policy framework and Local Government Act (1998) provide that traditional leaders should be advisory members of Area and Village Development committees (ADC and VDC), and also as *ex-officio* members at the District assembly. In practice, chiefs have been more than mere advisers to development committees and have often assumed the chairmanship of the committees.¹⁰⁷⁰ Other studies found that 'chiefs have systematically been the key actors in facilitating the identification and selection of community needs, selecting project implementation committees, and mobilising communities for the implementation of community projects arising out of the decentralised planning system. In all these processes, chiefs have been at the forefront of

¹⁰⁶⁸ See section on accountability.

¹⁰⁶⁹ Chinsinga, Blessings, 'Talking political Economy: No More Chiefs in Malawi', Malawi News, 18 september, 2010.

¹⁰⁷⁰ Chingaipe, Henry and Chimwemwe Msukwa (2011) Assessing Citizen Participation in Public Policy and Development Processes in Malawi (Lilongwe: MEJN/Irsh Aid).

organising community meetings and acting as a link between local communities and the area and village development committees ... which were mostly composed of chiefs and their traditional counselors' (Chiweza: 2007: 68).¹⁰⁷¹

Chiefs mobilize community residents to understand and appreciate the importance of doing development work, or self-reliance, and of encouraging communities to take an active role in development activities by having bricks or some material ready in order to "attract" funding'. Chiefs' authority to do so stems from their position as both 'intermediaries and gatekeepers to the rural community' for actors external to the community.¹⁰⁷² Traditional leaders are dominant in community decision making, but it must be remembered that their opportunity to influence government development policy and resource-allocation, beyond the project level, is itself limited and the District Development Committees DDCs have historically served as a mechanism for enforcing top-down policy and orders.¹⁰⁷³

14.3.2 Community representation

Score: 50

To what extent do chiefs represent community interests and promote integrity in local governance structures?

The representative role of chiefs goes back to the colonial period but over time, representation has taken different forms. In recent times, their representative role at national level was recognized in the 1994 Constitution included a provision for a Senate, comprising of a 'Senator from each District, being a Chief registered as a voter in that District and elected by a caucus of all the Chiefs of that District'.¹⁰⁷⁴ However the provision for the senate was repealed in 2001. At district level, the Local Government Act (1998) designates chiefs (TAs and sub-TAs) as *ex officio* (i.e. non-voting members) of the District and Town/City Assemblies. In the absence of functioning local councils (2004 -2014) chiefs also became key players in the decentralized governance and provided the legitimacy for decisions made by technocrats and the District Commissioner at district level.¹⁰⁷⁵ Administratively, chiefs have continued to assist the DC by providing the DC with

¹⁰⁷¹ Chiweza, Asiyati Lorraine (2007) 'The Ambivalent Role of Chiefs: Rural Decentralization Initiatives in Malawi', in Lars Buur and Helene Maria Kyed (eds), *State Recognition and Democratization in Sub-Saharan Africa: A New Dawn for Traditional Authorities*. Basingstoke: Palgrave Macmillan.

¹⁰⁷² Chiweza, Asiyati Lorraine (2007) 'The Ambivalent Role of Chiefs: Rural Decentralization Initiatives in Malawi', in Lars Buur and Helene Maria Kyed (eds), *State Recognition and Democratization in Sub-Saharan Africa: A New Dawn for Traditional Authorities*. Basingstoke: Palgrave Macmillan.

¹⁰⁷³ Cammack, Kanyongolo and O'Neil (2009) "Town Chiefs in Malawi," *Africa Power and Politics; Overseas Development Institute; Working Paper No.3*

¹⁰⁷⁴ Section 68 b.

¹⁰⁷⁵ Chingaipe, Henry and Chimwemwe Msukwa (2011).

information about crime, demographic changes, local needs or priorities, and development and relief activities, and they perform their executive duties by helping to enforce government orders and policy.¹⁰⁷⁶ As a result, chiefs and DCs have a close working relationship that is well established historically, and chiefs cite assisting the government of the day as one of their main tasks alongside their customary functions.¹⁰⁷⁷

However, in the current configuration of power, the roles of traditional chiefs shade into those of other leaders with democratic authority especially Members of Parliament and Ward Councilors.¹⁰⁷⁸ Consequently there have been duplication of roles but also contestations for policy space and voice at local level between chiefs, councillors and Members of Parliament.¹⁰⁷⁹ Furthermore, the representative role of Chiefs has been compromised by lack of independence especially from the Presidency. As a result, chiefs have been paraded on national television and featured on propaganda radio programmes of ruling parties to endorse, on behalf of the people, unpopular or undemocratic decisions of the government such as the open terms bill; the changing of the national flag, the premature endorsement of a president's brother to be the next President etc.¹⁰⁸⁰ Nonetheless, it is widely recognised that chiefs are closest to the rural population because they live among them and enjoy their trust and confidence.¹⁰⁸¹ Furthermore, the Government uses them on selected modernization projects especially where tradition and custom are identified as barriers to uptake. For instance, all chiefs now are taking leading roles in advocating for safe motherhood and discouraging practices associated with traditional birth attendants socially constructed but unsupportive roles of men in child bearing and child-raising.

14.3.3 Quasi-judicial functions (Law and Practice)

Score: 25

To what extent are traditional leaders committed to fighting corruption and promoting integrity through discharging their quasi-judicial functions?

The Constitution (1994: Sec. 110(3)) makes provision for the establishment of formal 'traditional courts' headed by chiefs or lay persons, subordinate to the High Court, and with jurisdiction limited exclusively to civil cases of customary law and such minor common law and statutory civil

¹⁰⁷⁶ Cammack, Kanyongolo and O'Neil (2009) "Town Chiefs in Malawi," *Africa Power and Politics: Overseas Development Institute*; Working Paper No.3

¹⁰⁷⁷ Chingaipe, Henry (2010) Traditional Leadership and Multiparty Democracy in Malawi', Paper for the Canadian Journal of African Studies

¹⁰⁷⁸ Cammack.et.al (2009)

¹⁰⁷⁹ MESN (2012) Report on the State of Preparedness for the 2014 Tripartite Elections (Limbe: MESN).

¹⁰⁸⁰ See Chingaipe, Henry (2010) Traditional Leadership and Multiparty Democracy in Malawi', Paper for the Canadian Journal of African Studies

¹⁰⁸¹ Afrobarometer Survey, Malawi Round 4 Results at www.afrobarometer.org

cases as prescribed by an Act of Parliament. In 2007 the government of Malawi established a commission to review the possibility of extending the authority of traditional courts. After the completion of the review, the government proposed a bill that would provide the courts with the ability to prosecute some criminal cases. The 2011 Local Courts Act states that local courts should primarily handle nuisance crimes as well as crimes such as defamation.¹⁰⁸² Some Malawian politicians and human rights activists derided the bill, characterizing it as a plan for Kangaroo courts that could be used for political repression.¹⁰⁸³ The opposition argued that the courts would provide too much power to local chiefs and could devolve into a "draconian system". They condemned the plan as incompatible with a multi-party democracy claiming that it will unconstitutionally take away power from the judicial branch of government.¹⁰⁸⁴

However, corruption matters are outside the judicial jurisdiction of traditional courts. Consequently, chiefs do not try such cases. Their judicial roles contribute to promoting integrity at local level in local issues.

Recommendations

- Advocate for a Code of conduct for traditional leaders which should contain guidelines on how traditional leaders ought to conduct themselves.
- Initiate a debate on the role of traditional leaders in a democracy;
- Based on the outcome of the debate, review and/ or amend the legal framework governing traditional leaders

¹⁰⁸² Sonani, Bright (20 January 2011). "Govt to create local courts". *The Nation* (Blantyre, Malawi). Retrieved 5 February 2011.

¹⁰⁸³ *ibid*

¹⁰⁸⁴ *ibid*

VIII. Conclusion and Recommendations

As noted at the outset, the purpose of this NIS assessment is to assess the systemic corruption risks in Malawi and to subsequently produce a set of recommendations on how to mitigate those risks in future. In this final chapter, we present an overview of the strengths and weaknesses across Malawi's NIS. Furthermore, we also give an overview of those vulnerabilities which arise from the inter-play between the various pillars. The chapter then recaps on key strengths and weaknesses of each of the pillars assessed above before wrapping up with a set of recommendations for strengthening the integrity system and reducing corruption risks in Malawi.

A holistic view on the Malawian National Integrity System

The NIS concept presupposes that a weakness in a single institution could lead to negative snowballing effects in the entire system. Thus, having a holistic view, focusing particularly on the inter-play between pillars is a key part of assessing the system's overall strength. As this assessment has demonstrated, the influence of politics particularly with regard to the way the Executive plays its roles in the NIS negatively affects not only its own performance but also the performance of other institutions such as the Public Sector, the Law Enforcement Agencies, the Anti-corruption Bureau and the Judiciary, among others. Similarly, the weaknesses of Political Parties particularly in terms of institutional capacity and internal democratic governance mechanisms mean that they cannot effectively aggregate and represent societal interests and set good practice in the fight against corruption. In addition, the lack of resources that characterise the NAO imply that no regular and up to date audits can be undertaken thereby denying the Legislature an important basis upon which they can anchor their role of bringing the Executive in check.

The assessment has also shown that there is a significant gap between law and practice indicating that Malawi's sound legal provisions are often not complied with thoroughly and consistently. This is an entrenched systemic problem and a great cause for concern as it is reflected across the entire NIS. This problem needs to be better understood by contextualising it within the wider political society in Malawi in which the culture of respecting laws, rules and regulations is grossly lacking and politics is dominated by patron-client relationships. Thus, the challenges facing the Malawian NIS, particularly the law-practice divide and the excessive influence the Executive has, is a reflection of a deep-seated culture of impunity and patronage. In a situation like the one that obtains in Malawi, laws in themselves are not adequate. Rather, it is also the re-orientation of the mindset that equally deserves attention.

National Integrity System Pillars: Key Strengths and Weaknesses in a Nutshell

In the following section, a summary of the most important strengths and weaknesses of Malawi's NIS pillars as identified in the preceding chapters is presented.

National Integrity System Pillars: Key Strengths and Weaknesses in a Nutshell

NIS Pillar	Key Strengths	Key Weaknesses
Legislature	<ul style="list-style-type: none"> The legal provisions in place are generally strong to ensure that Parliament has the capacity to play its oversight functions over the Executive with a great deal of independence. 	<ul style="list-style-type: none"> The fragmented and unstable political party system coupled with lack of consistency in the application of the constitutional provisions that prohibit MPs from switching party affiliation without seeking fresh mandate affect stability in the political configuration in Parliament. Past experience has shown that when Parliament is dominated by the same party that controls the Executive, Parliament has the potential to be turned into a rubber stamp

National Integrity System Pillars: Key Strengths and Weaknesses in a Nutshell

NIS Pillar	Key Strengths	Key Weaknesses
Executive	<ul style="list-style-type: none"> The Executive has access to and controls public resources. 	<ul style="list-style-type: none"> The enormous powers conferred upon this institution, particularly in the presidency, are pervasive. Not only do they sometimes go unchecked because of the weak push back mechanisms available but such Executive powers are also executed with a great degree of partisanship.
Judiciary	<ul style="list-style-type: none"> Over the years, it has gained public confidence and trust as an institution that ensures that it puts into practice the much needed independence as provided for by the Constitution. 	<ul style="list-style-type: none"> The Judiciary suffers resource constraints; There is very little transparency in the appointment of Judges The practice to systematically track and document corruption related cases is yet to exist
Public Sector	<ul style="list-style-type: none"> From a point of law, the public service enjoys a favourable legal framework that if put into practice, can allow it to operate with a great deal of professionalism and independence; There is political will to strengthen integrity mechanisms that would ensure that the public sector is oriented towards serving the public informed by the desire to realise the common good. Has well qualified personnel. 	<ul style="list-style-type: none"> There is enormous political interference in the operations of the public service particularly within the upper ranks

National Integrity System Pillars: Key Strengths and Weaknesses in a Nutshell

NIS Pillar	Key Strengths	Key Weaknesses
Law Enforcement Agencies	<ul style="list-style-type: none"> The Constitution and the Police Act provide a good foundation for the Police and office of the Director of Public Prosecutions to effectively perform their functions 	<ul style="list-style-type: none"> Political interference and general perception of corruption negatively affect Law Enforcement Agencies Law Enforcement Agencies suffer resource constraints
Electoral Management Body	<ul style="list-style-type: none"> A sound and progressive constitutional framework that would ensure independence of the Electoral Management Body is in place 	<ul style="list-style-type: none"> There is an absence of a legal framework that would ensure that the Electoral Management Body plays an active role in regulating money in politics, particularly with regard to campaign financing; Present public funding arrangements make the electoral Management Body to be dependent on the executive
Ombudsman	<ul style="list-style-type: none"> A sound and progressive constitutional framework that would ensure independence of the Electoral Management Body is in place 	<ul style="list-style-type: none"> There is highly inadequate public funding that creates an impression as of this is not a priority of government; The Ombudsman lacks powers to sanction non-compliance of its determinations

National Integrity System Pillars: Key Strengths and Weaknesses in a Nutshell

NIS Pillar	Key Strengths	Key Weaknesses
Supreme Audit Institution	<ul style="list-style-type: none"> The Public Audit Act provides firm ground for providing the NAO to operate as an effective and robust oversight institution 	<ul style="list-style-type: none"> The NAO lacks powers to sanction institutions/ controlling officers that are found to have issues that need to be addressed; There is a lack of adequate resources for the NAO to undertake regular and timely audits.
Anti-Corruption Agency	<ul style="list-style-type: none"> Partnership agreements (MoUs) with a number of key institutions are in place that could aid the operations of the ACB in its fight against corruption with a multi-sectoral approach; The legal framework is generally favourable 	<ul style="list-style-type: none"> Seeking consent of the Director of Public Prosecution (DPP) for the ACB to prosecute corruption cases undermines the independence on this institution Failure by the ACB to pursue or successfully deal with high profile corruption cases creates a perception of the ACB being influenced by politics in its operations
Political Parties	<ul style="list-style-type: none"> Foundation for the existence of political parties is entrenched in the Constitution; Legal requirements for the formation of political parties are not prohibitive 	<ul style="list-style-type: none"> There is no legal framework governing the internal functioning and financing of political parties;

National Integrity System Pillars: Key Strengths and Weaknesses in a Nutshell

NIS Pillar	Key Strengths	Key Weaknesses
Media	<ul style="list-style-type: none"> The legal environment for the media is generally conducive 	<ul style="list-style-type: none"> The absence of the Access to Information Act negatively affects the Media There are cases of political interference particularly with respect to the State Media
Civil Society	<ul style="list-style-type: none"> The legal framework gives a great degree of autonomy for Civil Society to thrive 	<ul style="list-style-type: none"> There is a limited resource base for the civil society initiatives to be sustainable; Weak internal corporate governance mechanisms compromise civil society's own standing in the fight against corruption
Business	<ul style="list-style-type: none"> The private sector has, on its own, been undertaking progressive reforms that aim at improving the role that this sector can play in the upholding of the Malawian NIS 	<ul style="list-style-type: none"> There are delays by government in implementing legal and policy reforms that could improve the "doing the business" environment in Malawi.
Traditional Leaders	<ul style="list-style-type: none"> A generally accepted local institution that is deeply connected with society and has the potential to play a pivotal role in the NIS 	<ul style="list-style-type: none"> There is no code of conduct for chiefs The politicisation of traditional leadership structures means that politicians tend to (ab)use some traditional leaders for their own partisan interests

Policy Recommendations

At the end of each pillar assessment, the study has presented a number of recommendations that are specific to that particular pillar. We do not intend to reproduce them here except to highlight those that are predominant or cross cutting. They include the following:

- *Bridging the law-practice divide.* As this study demonstrates, if the assessment was to focus only on what obtains in law, it is apparent that the overall picture for Malawi's NIS would have, mistakenly, been much better than it is. This is because the legal framework so far in place is quite supportive of the evolution of a vibrant NIS although the practice is far from this. Thus, in the coming years, the relevant stakeholders need to undertake measures that target on what can be referred to as the "soft-ware" part of the NIS. Specifically, it is recommended that civil society organisations such as MEJN and AICC should embark on transformative civic education and advocacy programmes aimed at changing the mindset to facilitate evolution of a law abiding society. In addition, there is need for civil society organisations to have capacity to effectively track and lobby for enforcement of laws, policies and other measures that authorities put in place in order to fight corruption..
- *Effective coordination and operational harmonisation of NIS pillars that are systemically inter-dependent.* The study underscores the fact that the pillars are not mutually exclusive. To the contrary, they tend to depend on each other. In the coming years, it is important for each pillars to identify the areas of concern that need to be addressed by other pillars if its role in the upholding of the Malawian NIS can be effective and also to ensure better coordination and harmonisation of efforts. In this regard, it is recommended that a study be undertaken to identify overlaps and complementarities that exist in terms of mandates and functions between and among the various pillars in so far as the upholding of a Malawian NIS is concerned.
- *Reviewing powers of the Executive.* Although Malawi's political system is said to be a hybrid- combining aspects of the presidential and parliamentary system, it is on balance the presidential political system model that dominates the political practice. Consequently, Malawi has an all powerful presidency that has enormous influence the life of almost the rest of the other institutions. These powers need to be reviewed and where possible to be counter-balanced with other mechanisms that would enhance checks and balances. Against this

background, it is strongly recommended that civil society organisations, in partnership with the Law Commission and Ministry of Justice should revive the 2006-2007 Malawi National Constitutional Review initiative whose report contains a number of progressive reforms aimed at limiting powers of the executive.

- *De-politicising the public service.* As noted in the study, the interface between politics and public service is quite prominent in Malawi. Government should therefore institute reforms that would, among other things, ensure that the recruitment process at all levels in the public sector is not only transparent, but is also competitive, merit based and with security of tenure.
- *Improving relevant legal instruments in further strengthening the NIS.* A number of weaknesses in the legal framework have been identified. One such framework that is in need of urgent attention is the law governing declaration of assets. There is need for a systematic law review to ensure better harmonisation and enforcement of the various relevant legal instruments in the Malawian NIS.

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