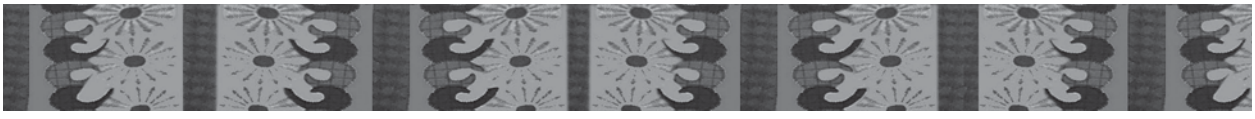
Malawi

Justice Sector and the Rule of Law



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and
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List of acronyms

ACB	Anti-Corruption Bureau
ADF	African Development Fund
CARER	Centre for Advice and Research and Education in Rights
CIDA	Canadian International Development Agency
CILIC	Civil Liberties Committee
DFID	Department for International Development (UK)
DPP	director of public prosecutions
EU	European Union
GTZ	Deutsche Gesellschaft für Technische Zusammenarbeit
IBA	International Bar Association
IMF	International Monetary Fund
NCSJ	National Council for Safety and Justice
NORAD	Norwegian Agency for Development
MASSAJ	Malawi Safety, Security and Access to Justice
MEJN	Malawi Economic Justice Network
NGO	non-governmental organisation
SADC	Southern African Development Community
SAW	Society for the Advancement of Women
SWAp	sector-wide approach
UNDP	United Nations Development Programme
UNICEF	United Nation's Children's Fund
USAID	United States Agency for International Development
WLSA	Women and Law in Southern Africa Research and Education Trust

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Preface

The Africa Governance Monitoring and Advocacy Project (AfriMAP) of the Open Society Foundation was established in 2004 to monitor observance of standards relating to human rights, the rule of law and accountable government, by both African states and their development partners.

African states have undertaken increasing commitments to good governance since the African Union replaced the Organisation of African Unity in 2002. Among these commitments are the provisions of the Constitutive Act of the African Union, in which member states agree to promote human rights, democratic principles and institutions, popular participation and good governance. Other newly adopted documents include the New Partnership for Africa's Development (NEPAD) and the African Peer Review Mechanism (APRM), as well as the Convention on Preventing and Combating Corruption. AfriMAP's research is intended to facilitate and promote respect for these commitments by highlighting key issues and by providing a platform for national civil society organisations to engage in their own monitoring efforts.

AfriMAP's methodology is based on standardised reporting frameworks that link respect for good governance and human rights to development that benefits poor people. Through a process of expert consultation, AfriMAP has developed reporting frameworks in three thematic areas: the justice sector and the rule of law, political participation, and the delivery of public services. The questionnaires that result, among them the questionnaire on the justice sector and the rule of law that guided this report, are available at the AfriMAP website: www.afrimap.org.

The reports are elaborated by experts from the countries concerned, in close collaboration with the Open Society Institute's network of foundations in Africa and AfriMAP's own staff. Drafts of this report were reviewed by a range of experts, and their comments and criticisms are reflected in the final content. These reports are intended to form a resource both for activists in the country concerned and for others working across Africa to improve respect for human rights and democratic values.

Foreword

The 1994 democratic Constitution that represented Malawi's decisive break with Banda's dictatorial regime ushered in a new set of human rights and democratic standards, aspirations and values. This included a commitment to ensure that Malawi complied with African and international norms and standards on human rights, the rule of law and democratic governance.

To what extent has Malawi lived up to this commitment, and what could be done by Malawian state institutions, civil society entities, and development partners to ensure that these intentions are realised?

This report, *Malawi: Justice Sector and the Rule of Law*, seeks to aid and focus the efforts of various players committed to Malawi's success in the area of justice delivery and rule of law observance. It is also a resource for African institutions seeking to enable Malawi to meet its commitments under the Constitutive Act of the African Union, the New Partnership for Africa's Development (NEPAD) and related African governance instruments. The report identifies a number of key challenges, including:

- The need to ensure that all statutory and customary laws of Malawi are aligned to the Constitution and to international law;
- The challenge to match the relatively commendable diligence with which the Malawian government has respected internationally agreed economic management strictures with an equal respect for the law in all other matters, including political;
- The urgent need to practically address the various challenges relating to the management of the justice sector that have been identified by the judiciary in its strategic plan, and affirmed through other initiatives;
- The need to ensure that judicial appointments are seen to be totally free of political manipulation at all levels;
- The reality that, while significant and commendable progress has been made in criminal justice reform, crime has been steadily increasing since 2001—no doubt principally on account of the high levels of poverty in the country—and that therefore strengthening of the prosecution service is of urgent concern;
- The need for various further reforms in the criminal justice system, including regard to legal guarantees of fair trial, and in terms of prison conditions;

- The critical need to improve access to justice for ordinary citizens, including the urgent call for a legal framework to govern customary forums through which the vast majority of Malawians access justice;
- And the urgent need for a sector-wide approach for the coordination of development assistance in the justice sector.

These challenges are not insurmountable. The intensive and considered inputs to this report by the Law Development Commission, civil society organisations, academics, funding partners, constitutional bodies, among others, demonstrated the potential collective political will that needs to be activated to realise these goals. For its part, the Open Society Initiative for Southern Africa will, as it has done in the past—and through its usual tools of advocacy, partnership building and intellectual investment—continue to accompany Malawian democratic reform and human development efforts in civil society and the state.

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Executive Director
Open Society Initiative for Southern Africa

Part I

Malawi Justice Sector and the Rule of Law

A Discussion Paper

Introduction

This discussion paper is based on the main findings and recommendations of a comprehensive report on the justice sector and rule of law in Malawi commissioned by the Open Society Initiative for Southern Africa (OSISA) and the Open Society Foundation's Africa Governance Monitoring and Advocacy Project (AfriMAP) in 2005. The paper is not a summary of the main report, although it draws from it the key challenges that face the promotion of the rule of law and justice in Malawi, based on the expert and public opinion that emerged in the course of the research for the main report. The paper is intended to be used as the principal tool in an advocacy initiative led by the Law Faculty of the University of Malawi, OSISA and AfriMAP, working with a wide range of stakeholders involved in the promotion of justice and the rule of law in Malawi.

The paper is also informed by certain basic characteristics of the justice sector in Malawi, including its purported philosophical connection to international values and principles; the limitations of the autonomy and accountability of institutions created by a state which historically has been highly centralised; the failure of the crime and punishment regime to modernise and cope with contemporary social and economic challenges; and the limited responsiveness of the formal justice system to the needs of the majority of the population, particularly those that are vulnerable and marginalised.

The paper makes recommendations for action which generally fall into three categories: legal and policy reforms; institutional restructuring; and changes in administrative and management practices. The recommendations vary in specificity and have not been prioritised. The latter 'omission' is deliberate in order to promote genuine discussion among practitioners who are better qualified to determine the order of priority of recommendations given their experience of what is practicable in the social, economic and political context. In any case, the list of recommendations in this paper cannot be regarded as exhaustive and remains open to informed debate and revision.

1. International human rights treaties

A. Gaps in legal tools for parliamentary domestication

The 1994 Constitution currently in force declares that customary international law which is consistent with the Constitution is an integral part of the law of Malawi, as are treaties which Parliament incorporates into domestic law. Until the early 1990s, Malawi's foreign policy was isolationist, its human rights record was poor, and the state was party to very few human rights treaties. Since the transition to a more liberal political regime in the early 1990s, the government has ratified most major global, African and regional human rights treaties, including many that relate to the justice sector and the promotion of the rule of law. The government, however, has failed to ratify several treaties that it has signed—including, most importantly, the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women and the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

As is the case in most Commonwealth countries, treaties do not confer rights that can be enforced in domestic courts unless they are domesticated through a ratification process. The Constitution provides that 'any international agreement ratified by an Act of Parliament shall form part of the law of the Republic if so provided for in the Act of Parliament ratifying the agreement' (Section 211(1)). The Law Commission has observed that the wording of the section is 'somewhat confused' and has proposed that section 211(1) should be re-written to read as follows: 'Any international agreement entered into after the commencement of this Constitution shall be subject to ratification by an Act of Parliament and shall form part of the law of the Republic if so provided for in the Act of Parliament ratifying the agreement.' This recommendation has not yet been translated into a constitutional amendment.

Neither the Constitution nor other legislation provides guidance on the form that the legislation for domesticating treaties should take. Thus, in practice, Parliament has the discretion to choose whether to reproduce the content of treaties in their incorporating acts, to incorporate by reference to the treaties, or to incorporate by implication, without direct reference to the treaty in question. This has resulted in a lack of uniformity in Parliament's approach to domestication and creates uncertainty as to whether particular international standards have been incorporated at all. There should be clear guidance on the matter by amending the Constitution so that it either sets out clearly what form should be taken by legislation that domesticates the state's treaty obligations or—like the Namibian constitution, for example—provides that any international agreement binding upon Malawi shall automatically form part of the law of Malawi.

B. The role of the Law Commission and the judiciary

The Constitution establishes the Law Commission as the institution responsible for harmonising national legislation with human rights standards. Section 135 of the Constitution mandates the commission to review and make recommendations regarding any matter pertaining to the laws of Malawi and their conformity with this Constitution and applicable international law.

The Law Commission makes its recommendations to the Minister of Justice and Constitutional Affairs who may then introduce them as proposed legislation in Parliament. The commission has made many recommendations for the reform of specific laws but most have not been acted upon by the executive. The situation is similar with regard to recommendations made by international bodies responsible for monitoring compliance with international treaties.

There are several possible reasons why proposals for law reform submitted by the Law Commission have not been implemented promptly or at all. The first is that the Law Commission is not the only source of proposals for law reform and its proposals have to compete for space on the government's legislative calendar. It is also possible that the Law Commission's priorities may be closer to those of the foreign donors who provide most of the funding for its programmes than to those of the executive, which may favour only legislation focused on the delivery of immediate social and economic benefits. Nevertheless, it is important that the outstanding proposals made by the Law Commission be given urgent attention by both the executive and the legislature; apparently abstract legal reforms can be just as important to national development objectives as more immediately populist measures. An amendment to the Constitution should require the executive to present to Parliament a bill to implement recommendations for law reform submitted by the Law Commission within one year of receiving them. The Constitution should further require the Law Commission to submit to Parliament copies of its submission to the Minister of Justice so as to enable members of Parliament to determine the correspondence between the bill presented by the executive and the original recommendations by the Law Commission. In the meantime, the Law Commission should develop an advocacy strategy aimed at increasing the prospects of its recommendations being adopted by the cabinet and passed into legislation by Parliament.

Courts can also play an important role in aligning national legislation to human rights standards that are guaranteed by international law and the Constitution. Section 5 of the Constitution gives the courts the power to declare any legislation invalid to the extent of its inconsistency with the Constitution. But even where the courts take up this power, the executive has not always taken action to amend the law or change the invalid practice. For example, in the 1995 case of *Director of Public Prosecutions v Hastings Kamuzu Banda et al.,* the High Court declared sections 313 and 314 of the Criminal Procedure and Evidence Code, which oblige an accused person in a criminal trial to enter a defence and give evidence, to be invalid because they violate the right of every person 'to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial.' The executive has taken no action to amend the Criminal Procedure and Evidence Code accordingly, and the status of these sections is unclear. In practice, they are still treated as valid in other courts. This is partly because of the poor publication of court judgments generally; as indicated later in this paper, law reporting is out of date and copies of unreported judgments are not always readily available, particularly to low-level justice sector officials who are often responsible for applying and enforcing the law on the ground. The executive should urgently introduce legislation to give effect to the judgment of the High Court in the *Banda* case and others where the courts have ruled that laws are unconstitutional.

c. Non-performance of treaty-reporting obligations

Malawi has largely failed to discharge its reporting obligations under the human rights treaties to which it is a party. As of 2003, Malawi had submitted only some of the reports due under the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child, and none of the reports due under the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment and the International Convention on the Elimination of All Forms of Racial Discrimination. In June 2004, the government made some effort to redress the situation by submitting a report which combined the second, third, fourth and fifth periodic reports on the Convention on the Elimination of All Forms of Discrimination Against Women; a shadow report was prepared by the Women and Law in Southern Africa Research Trust (Malawi Chapter), the Centre For Human Rights and Rehabilitation and the National Business Women's Association. The reports were considered by the Committee on the Elimination of Discrimination against Women during its 35th session (15 May to 2 June 2006). The committee's recommendations included that the government should 'set a clear time frame for the adoption of the revised Citizenship Act, Immigration Act and the Wills and Inheritance Act and for the new Marriage, Divorce and Family Relations Bill, designed to eliminate discrimination against women.'

According to the Malawi Human Rights Commission, the government has attributed its current failure to fulfil its treaty reporting obligations to the lack of human and material resources to fund the process of preparing the reports. The problem of lack of resources could be addressed by making specific provision for the reporting process in the budget of the relevant government ministries, including those of Justice and Constitutional Affairs and Foreign Affairs and International Cooperation. Development partners could also be approached to provide relevant financial and technical assistance as part of their aid programmes on governance. The preparation of these reports should not be seen as an isolated and irrelevant task, but as part of the government's strategic planning process, identifying necessary measures to bring domestic law and practice into compliance with international obligations.

The government—through the Ministries of Justice and Constitutional Affairs and Foreign Affairs and International Cooperation, in consultation with other relevant actors such as the Inter-ministerial Committee on Human Rights and Democracy, the Malawi Human Rights Commission, the United Nations High Commissioner for Human Rights and civil society organisations—should develop an action plan aimed at clearing the backlog of state party reports and instituting a strategy for ensuring that future reports are submitted on time. The strategy should also include a time-bound plan, with clearly assigned responsibilities, for implementing the recommendations made by the bodies to which the reports are submitted. The first set of recommendations that could form the subject of such a plan are those made in 2006 by the United Nations Committee on the Elimination of Discrimination against Women.

2. Government respect for the law

A. Executive disobedience of court orders

In recent years, government respect for the Constitution and legislation, regulations and internal procedures has been inconsistent. On the one hand, the trend since the new government came into office in 2004 is increased compliance with the Constitution and legislation, regulations and procedures in the area of fiscal management. Most of the national budget of Malawi is financed by external grants and loans and depends on the government fulfilling various conditions, particularly in the area of financial accounting and reporting. The government has thus introduced new laws to promote financial accountability (the Public Audit Act, the Public Finance Management Act, and the Public Procurement Act), and generally improved its compliance with the rules they establish.

In contrast, government obedience to the law is more inconsistent in the areas of social and political governance. Such disobedience is displayed most vividly in relation to court orders. In 2002, an investigation by the International Bar Association noted government disregard for court orders considered to be politically inconvenient. Three examples vindicate that assessment. In 2001, senior police officers and the mayor of the city of Blantyre disregarded a High Court order prohibiting the government and its agencies from interfering with a public rally organised by the opposition National Democratic Alliance. In June 2003, the government decided to deport to the United States five persons suspected of links with terrorism. The five men, suspected of channelling money to terrorist groups, were arrested by American and Malawian intelligence agents on 22 June 2003. They appealed their deportation order to the High Court, which issued an injunction to block the deportation and ordered the government to either charge them with an offence within 48 hours or release them on bail. Instead, the government on 23 June 2003 decided to hand the suspects over to American officials, who flew them to an unknown destination out of the country. In February 2006, the government defied a court order that required it to restore the security and other entitlements of the vice-president after these had been withdrawn on the grounds that the vice-president had constructively resigned from his position.

In some cases, however, government fails to comply with the law due to lack of resources rather than merely to satisfy narrow political interests. An example of this is the failure of the government to provide adequate resources to ensure that all indigent litigants have access to legal aid, as required by the Constitution, and that conditions of imprisonment are humane and consistent with the requirements of human rights standards. The government can minimise resource problems in the sector by reviewing its funding priorities based on a better appreciation of the importance of the sector to the strategic policy goals of the government. As the Malawi Economic Justice Network noted, the proposed 2004–2005 national budget allocated almost the same amount of funding to state residences and the Presidency as it had done to the Anti-Corruption Bureau, the Human Rights Commission and the Ministry of Justice and Constitutional Affairs headquarters combined. It is not possible for the government to argue that the funding shortfalls in the justice sector are due only to absolute financial constraints.

In the case of wilful disobedience of court orders, part of the solution might be to have a law that makes state officials personally liable for contempt of court if they instigate such disobedience or contribute to it. This would have a greater deterrent effect on public officials than contempt of court penalties paid by taxpayers through the public purse. Admittedly, personal liability for government decisions is difficult to enforce in many cases, because responsibility is often diffuse. Nevertheless, the few cases in which it would be possible to place responsibility for contempt of court with identifiable officials and make them personally liable might have the salutary effect of encouraging officials generally to perform their duties in a lawful manner.

B. Investigation of government breaches of the law

There are a number of mechanisms for investigating alleged breaches of the law by public officials and government ministries, departments and other agencies. The first is the internal inquiry, which involves the concerned governmental entity investigating the conduct of its own officials. Such internal investigations were promised by the police in 2001 and 2005, following allegations that police officers had violated the law that restricts the use of deadly force, leading to the illegal fatal shooting of civilians. Second, the Constitution empowers the president to institute commissions of inquiry into matters of public interest; the detailed content of this power is still set out in the 1914 Commissions of Inquiry Act. One such commission investigated the alleged violation by a minister of education of the law governing the invitation of tenders for the supply of school materials. The third mechanism for investigation of government violation of the law consists of independent agencies such as the constitutionally mandated Malawi Human Rights Commission and the Office of the Ombudsman.

Investigations of breaches of law by the government have been largely ineffective. Internal investigations are not transparent and there appear to be limited incentives to compel the governmental organs concerned to conclude the investigations and take appropriate follow-up action. Thus, the police have never published reports of the internal investigations into the 2001 and 2005 shootings and do not appear to have acted against any of the officers involved. Commissions of inquiry have also been quite limited in their impact, partly because their findings are submitted directly to the president, who is neither obliged to release them to the public, nor to respond publicly to their findings or recommendations. External investigations by independent agencies are constrained by jurisdictional limitations that apply to the various agencies. For example, the Malawi Human Rights Commission can only investigate governmental breaches of the law if they violate human rights, while the Office of the Ombudsman can only investigate cases involving injustices where judicial remedy is unavailable or impracticable. Both institutions are limited to making recommendations, and do not have enforcement powers.

The shortcomings in the existing mechanisms can be addressed by a number of legal reforms. One approach is to enact legislation which consolidates the legal regime for all investigations of alleged government abuses and illegality, other than those by independent institutions. Such legislation would govern both internal ministerial and departmental investigations as well as those by presidential commissions of inquiry. The recommended legislation must seek to make investigations more transparent and accountable, and establish a mechanism for

the effective follow-up of recommendations. As a minimum, the law must require reports of investigations to be published as widely as possible, including by being presented to relevant parliamentary committees. The relevant ministries and departments should be required to submit periodic reports indicating the action taken to implement any recommendations made following investigations.

C. Abuse of presidential discretion in granting pardons

The Constitution empowers the president, in consultation with the Advisory Committee on the Granting of Pardons, to pardon convicted offenders, grant stays of execution of sentence and reduce or remit sentences. In practice, the president has mostly exercised the power of the pardon for the benefit of individuals or groups of individuals either on humanitarian grounds or as part of a celebration such as the president's official birthday or Christmas. But on at least two occasions in the recent past, civil society organisations have alleged that the president abused his discretion in granting pardons to particular prisoners in whom he had a personal interest. The pardoned prisoner in one of the cases had been convicted of attempting to corrupt a judge of the High Court, while in the other, the prisoner in question had been found guilty of sexually abusing children.

Abuse of the power of the presidential pardon undermines the integrity of the justice system by effectively negating the judicial power to sentence offenders. In order to minimise such abuse, the process through which pardons are granted should be made more transparent. Membership of the Advisory Committee on the Granting of Pardons should be made public and should consist of people who are representative of a wide cross-section of interests, including representatives of civil society groups whose work involves advocacy for the rights of victims of crime and those of prisoners. The committee should operate on the basis of published principles and rules, and should be required to submit regular reports to the chief justice and the Legal Affairs Committee of Parliament.

3. Management of the justice sector

A. Sector-wide strategy and planning

Many state institutions in the justice sector developed institutional strategic plans between 2000 and 2005, including the Police Service, the Ministry of Home Affairs and Internal Security, the Ministry of Justice and Constitutional Affairs, the judiciary, the Malawi Human Rights Commission and the Office of the Ombudsman. During the same period, strategic plans were also developed and adopted by institutions active in the sector, including the Malawi Law Society and the Body of Case Handling Institutions (grouping together public bodies handling individual cases related to the administration of justice, including the Judicial Service Commission, Human Rights Commission and Office of the Ombudsman). However, the government did not formally adopt a sector-wide strategic plan. Although the Malawi Safety, Security and Access to Justice (MASSAJ) programme funded by the British Department for International Development (DFID) has created a sector-wide institutional framework and drafted a 'national policy frame-

work' as a proposed sector-wide plan, the government has not yet formally adopted it as such. Neither has the government developed any mechanism for coordinating development assistance in the sector through a sector wide approach (SWAp), as recommended in 2003 by DFID, the biggest donor to the sector.

The government should urgently adopt a sector-wide strategic plan and mechanism to coordinate funding, based on the national policy framework developed by the MASSAJ programme. It should also immediately create the conditions conducive to the implementation of a justice sector SWAp for donors, including the adoption of an annual sector expenditure programme and medium-term sectoral expenditure framework, strengthening government leadership of donor coordination and facilitating the establishment of an agreed framework among major donors for the provision of support to the sector.

Most important, the government must strengthen the justice sector's capacity to implement sector-wide strategies and plans. In order to achieve this, the government must ensure that the sector is provided with adequate and predictable resources; that public officials and senior civil servants sufficiently appreciate that their discretionary powers are restricted if sector-wide plans and strategies are implemented; and that there are properly qualified personnel to undertake effective and efficient monitoring and evaluation of the implementation of the strategies adopted. Responsibility for facilitating the adoption of the national policy framework and the creation of conducive conditions for a SWAp must be taken by the National Council on Safety and Justice (NCSJ), which is the highest policy-making body for the MASSAJ programme, chaired by the vice-president. However, the NCSJ must itself be restructured in order for it to perform its functions efficiently. Its current membership of 30 must be reduced and the chair should be given to a non-political expert.

B. Resource gaps

In general, government funding for the justice sector is unsatisfactory. Most operations of institutions in the sector are directly funded by donors, including DFID, the European Union, the United States Agency for International Development, the Norwegian Agency for International Development, the Danish Institute for Human Rights and others, rather than from the general government budget. In relation to central government funding to the sector, approved budgets are often much lower than estimated expenditures; funds may not be released from the Treasury according to approved budgets; and funds may be released irregularly and in greatly varying amounts. The inadequate funding for the sector is compounded by inequitable distribution of resources within particular institutions. For example, in determining its internal distribution of budgetary resources, the administration of the judiciary tends to unduly favour the High Court and Supreme Court of Appeal at the expense of subordinate courts.

Underfunding of justice sector institutions means that they cannot obtain material resources as basic as texts of legislation, law reports, vehicles, typewriters, computers and stationery—or even adequately maintained buildings. Perhaps more important, it means that justice sector personnel lack training in both professional and administrative fields.

Government should take over the provision of resources to the sector from donors (even if

funds for this purpose are still supplied by donors to the central government budget). In order to justify increased budgetary provision for the justice sector, it is important that civil society and other advocates articulate clearly the linkage between justice and the rule of law, on the one hand, and poverty reduction, on the other. Investment in justice and the rule of law is relevant to the immediate lived realities of the majority of people in Malawi, particularly the vulnerable and marginalised.

c. Record-keeping, research and publication of information

Record-keeping by justice sector institutions is generally poor. In the judiciary, for example, information is maintained manually in records that are labour intensive and, according to the Malawi Judiciary Development Programme, files, registers and case records are neither accurate nor secure, with the result that incorrect data is collected and management decisions and cases are delayed and/or made from an uninformed position. Only the police service appears to have an effective in-house system for collecting and analysing data about its operations, although the prisons department and the judiciary also appear to be moving in the same direction. Statistics are neither collected systematically by most institutions nor collated across the sector. The establishment of the Crime and Justice Statistics Division of the National Statistical Office is a welcome first step in addressing this problem. Given the potential of consolidated sector-wide statistics as a planning resource and a means for accounting to the public, the government and its development partners must invest in building the capacity of individual institutions to collect and manage information relevant to their operations and to facilitate the implementation of the National Statistical Office plan to collect and publish statistics on crime, justice and governance.

Sector-wide data and statistics are valuable not only as a planning resource and a means for accounting to the public. They are also a critical resource for research that can enrich both policy-making and the training of current and future justice sector personnel and legal practitioners. At present, linkages among the various research institutions in the sector, such as the Faculty of Law of the University of Malawi; the Crime and Justice Statistics Division of the National Statistical Office; the Centre for Social Research; the Research and Planning Branch of the Police Service; the Research and Planning Unit of the Prisons Department and others, are tenuous if not nonexistent. These institutions should establish a network to facilitate sharing of information, development of common research strategies and programmes, and establishing joint publications. A first practical step could be a meeting among representatives of the institutions aimed at mapping out possible areas of cooperation, identifying institutional and other challenges to increased research cooperation, and drawing up a draft action plan to guide future cooperation.

The justice sector is also poor at producing and publishing important legal materials such as texts of legislation, law reports and expert commentary on the law and other aspects of the sector. In general, only the higher-ranking staff of the justice system have ready access to the full set of the *Laws of Malawi* or copies of the *Government Gazette*. In any case, it is not easy be confident that available copies of legislation are up to date due to the irregularity of law revision by the Ministry of Justice, and the failure of most justice sector institutions and libraries to acquire copies of amendments in a timely and regular manner. Similar problems affect law reports,

which are mostly outdated—decisions made as long ago as 1994 have not yet been published—and unaffordable for most people. There are also few textbooks that comment specifically on the application of Malawian law and there is only one law journal published in Malawi.

The Internet and other electronic resources have not so far been able to fill the gap in the provision of legal information, due to infrastructural and technical constraints which make the option expensive and inefficient. Nevertheless, this is an option that should be explored further. Of course, the most obvious recommendations to improve the situation related to the provision of legal information are that the government must invest in the institutions responsible for publishing legislation, such as the Ministry of Justice and the Government Printer; ensure distribution of information resources particularly to rural justice centres; and undertake an audit of relevant electronic resources and recommend measures for increasing their efficient, cost-effective and user-friendly application to the information production and dissemination needs of the sector.

4. Independence and accountability of courts, prosecution authorities and lawyers

A. Financial autonomy of courts

The Constitution provides for the courts to be 'independent of the influence and direction of any other person or authority.' In general, this principle has been respected in recent years. The most serious threat to judicial independence in recent times occurred in 2001 when the National Assembly (the lower and currently only house of Parliament) used its power under the Constitution to petition the president to request the removal from office three judges of the High Court—allegedly for incompetence and misconduct, but in fact clearly for political reasons. Thanks to public outcry, the petition was, however, unsuccessful. Freedom from such political interference could be greatly increased by providing the courts with increased financial autonomy. The judiciary has derived some revenue from its own sources since the Judicature Administration Act of 2000 gave it the right to retain some of the payments made into court. However, most funding still comes from executive subventions and the courts' budget is centrally controlled by the Treasury. The financial autonomy of the judiciary is one of the factors that was identified by the Malawi Poverty Reduction Strategy Paper as being a critical element of governance.

The Malawi Judiciary Development Programme, 2003–2008, provides for the judiciary to secure financial independence by, among other things, establishing direct reporting by the chief justice to Parliament for all budgetary matters. The programme does not elaborate the form that direct reporting by the chief justice to Parliament would entail, though it is reasonable to expect that it would include submission of budgets and accounts to the relevant committees of Parliament for their scrutiny and approval. The judiciary should, as a matter of urgency, make a submission to the Ministry of Finance and the Budget Committee of Parliament which sets out in detail what specific measures and reforms in the budget formulation and implementation process it considers to be necessary to secure its financial autonomy.

B. Transparency and accountability of judicial appointments

The Constitution establishes safeguards for judicial independence by providing for most appointments to be made by the president on the recommendation of a Judicial Service Commission, and for the chief justice to be appointed by the president subject to confirmation by the National Assembly (section 111). The members of the Judicial Service Commission are appointed by the president and consist of the chief justice (who is the chair), the chairperson of the Civil Service Commission, an appeal justice, a legal practitioner and a magistrate. Occasionally, there have been concerns that some appointments have been made by the president without reference to the Judicial Services Commission. Since communications between the president and the Judicial Service Commission are not transparent, however, it is not possible to substantiate such allegations definitively. Similarly, it is unclear how eligibility for promotion within the judiciary is determined.

Judicial appointments must be made more transparent. The criteria on which judicial officials are appointed must be made public and those who fail to be appointed must be informed of the reasons for their failure. Similar rules must be introduced with regard to promotions. In addition, the process must become more accountable to the public through their democratically elected representatives. Membership of the Judicial Service Commission must be expanded to include representation from Parliament, at the very least. The appointment of judges of the High Court should be subjected to parliamentary confirmation (as for the chief justice) to further promote democratic accountability of the judiciary.

C. Enhancing operational independence of director of public prosecutions and Anti-Corruption Bureau

The law provides safeguards for the independence of the prosecution service. The service is headed by the director of public prosecutions (DPP), who is required by section 101(2) of the Constitution to be 'independent of the direction or control of any other authority or person and in strict accordance with the law' but subject to 'the general or special directions' of the attorney-general.

In practice, it has been alleged that the executive has occasionally interfered with the independence of the prosecution service by removing an incumbent DPP from office unconstitutionally and, in other cases, by directly interfering in prosecution decisions under the guise of directions made by the attorney-general. The office of the DPP itself has also been accused of undermining the independence of the Anti-Corruption Bureau, which is a quasi-autonomous state agency responsible for prosecuting corruption cases. Section 42(1) of the Corrupt Practices Act of 1995 requires the bureau to seek the consent of the DPP before commencing any prosecution. It has been alleged that in some cases, the office of the DPP has undermined the prosecutorial independence of the bureau by withholding consent for prosecution of cases on political grounds. The independence of the Anti-Corruption Bureau also appears to be open to interference by the president who is empowered by section 6(3) of the Corrupt Practices Act to suspend the director of the bureau if he or she 'considers it desirable in the public interest so to do' pending a decision whether the director should be removed from office. According to

section 6(2) of the act, the president can remove the director from office for inability to perform his or her functions or for misbehaviour, subject to confirmation by the Public Appointments Committee of Parliament.

In order to enhance the independence of the prosecution service, the DPP must not be subject to professional directions of the attorney-general. This necessitates the repeal of section 101(2) of the Constitution. Alternatively, the section must be amended to indicate that, notwithstanding any general policy directions by the attorney-general, the final decision on whether to commence or terminate any prosecution is a matter for the DPP and shall be subject only to judicial review. In relation to the Anti-Corruption Bureau, section 42(1) of the Corrupt Practices Act should be repealed so as to give the bureau the final decision in prosecution of corruption cases. Section 6(3) of the same act should require the president to base his or her decision to suspend the director of the bureau on more specific grounds than 'the public interest' and must lay down a time limit by which the director of the Anti-Corruption Bureau must either be removed from office in accordance with the act or have his or her suspension lifted.

D. Professional discipline of lawyers

The legal profession in Malawi is governed primarily by the Legal Education and Legal Practitioners Act of 1965, which empowers the High Court to suspend, strike off the roll or admonish any practitioner who breaches standards of professional conduct. The act also establishes the Malawi Law Society and its disciplinary committee, composed of the solicitor-general (a state legal officer) and two other members elected by the society. The disciplinary committee conducts inquiries into allegations of indiscipline made against practising lawyers and, in appropriate cases, may refer the matter to the attorney-general. The attorney-general may then apply to the High Court for an order suspending, striking off the roll or admonishing the lawyer in question. There are reported cases from the 1980s in which lawyers have been struck off the register of legal practitioners for stealing a client's money, misleading a client or charging excessive fees. More recently, the Law Society appears to have received a number of complaints against lawyers relating to allegations of overcharging for legal services, embezzlement of clients' money and failure to secure judgments that are satisfactory to the client. However, the system for enforcing discipline in the legal profession does not appear to be working effectively or efficiently, and few members of the public are aware of the disciplinary regime.

In order to improve the accountability of lawyers, the Malawi Law Society should publicise the mechanism through which members of the public may lodge complaints about the professional misconduct of lawyers. The effectiveness of the disciplinary mechanism must be made more effective and efficient, including by being allocated sufficient funding by the Law Society and the Office of the Solicitor-General. The Legal Education and Legal Practitioners Act should also be amended to give the disciplinary committee punitive powers, subject to appeal or review by the High Court. Subsidiary legislation outlining the procedure to guide the disciplinary committee should also be developed.

E. Professional independence of lawyers

In order for lawyers to effectively contribute to the promotion of justice and the rule of law, they must be able to conduct their professional duties free from harassment and intimidation. In practice, cases of physical or verbal harassment of lawyers in relation to the performance of their professional functions appear to be relatively rare.

A more common attack on the professional independence of lawyers is that which is perpetrated by the government against lawyers whom it perceives to be supporters or sympathisers of the opposition. In what the president of the Malawi Law Society termed 'white-collar harassment', for example, successive governments have been suspected of withdrawing their legal business from such lawyers as a way of penalising them. Similarly, perceived affiliation to the government in power for the time being appears to be a criterion for deciding which lawyers in private practice are hired to act on behalf of the government.

Although any government must retain the freedom to hire lawyers of its choice, it must be guided by principles of transparency and accountability in that exercise. One way of improving respect for these principles would be for the Ministry of Justice and Constitutional Affairs to maintain an open list of lawyers with a sound track record in respective areas of specialisation. Lawyers can then be selected in an open process that adheres to the transparent procedures that obtain in the procurement of goods and services under the legal framework set out in the Public Procurement Act of 2003. In order for the selection process to be fair, it is recommended that the Ministry of Justice and Constitutional Affairs should issue a public invitation to tender to all lawyers and not only to those on a pre-selected list.

5. Criminal justice

A. Harmonising penal statutes with human rights standards

Criminal conduct is defined by the 1929 Penal Code and other statutes enacted both prior to and after the current Constitution came into force. Some of the criminal offences created by the various penal statutes restrict the freedom of action of individuals to an extent inconsistent with constitutional and international human rights standards. This is the case mostly with provisions that create offences that relate to public order, public security and morality. Although it is accepted that there may be legitimate grounds on which to limit the enjoyment of human rights, the Constitution requires that limitations of human rights be reasonable, recognised by international human rights standards, necessary in an open and democratic society, and not such as to negate the essential content of a right. Among the most important provisions which require review are those creating offences of criminal libel and insulting the president.

The Law Commission should conduct a comprehensive review of penal statutes to determine whether the criminal offences they create are consistent with constitutional and international human rights standards. In this exercise, the commission should be guided by principle rather than populist rhetoric in which prejudice against non-conformism masquerades as

public morality and so-called cultural values. The Law Commission should also resist bogus or exaggerated claims of national security interests. Coalitions of human rights non-governmental organisations such as the Malawi Human Rights Consultative Council should urge the Law Commission to undertake the harmonisation process urgently and to complement it with the appropriate advocacy programmes.

B. Legal framework for policing and prisons

The Constitution establishes the Malawi Police Service as an independent organ of the executive, responsible for providing protection of public safety and the rights of persons according to the law. Members of the police are required to exercise their powers as 'impartial servants of the general public and the Government of the day' (section 158). The Police Act of 1946 which still governs the day-to-day work of the police, came into force during the colonial period, and the Law Commission has proposed a modernised statute more consistent with democratic principles and human rights standards. However, the executive has not yet introduced the Law Commission's proposal to Parliament so that it can be enacted into law; this should be remedied urgently.

Prisons are governed primarily by the Constitution and the Prisons Act of 1955. The Constitution obliges the Chief Commissioner of Prisons to ensure 'proper and efficient administration of penal institutions' in the country in a manner which protects rights and takes into account 'the direction of the courts' in relation to people who are incarcerated. The Constitution also creates an Inspectorate of Prisons with responsibility to 'monitor the conditions, administration and general functioning of penal institutions taking of due account of applicable international standards.'

The Prisons Act is palpably outdated. In 2002, the government commissioned the Prisons Service to prepare a draft Prisons Bill, aimed at bringing the legal framework for the prison regime in line with constitutional and international human rights standards. The executive has not yet presented the proposed bill and its subsidiary legislation to Parliament for enactment. The government must act to bring the draft into law, if the standards set by the Constitution are to have any practical meaning to prison officers and prison inmates.

C. Sentencing discretion

The 2004 National Crime Victimisation Survey reported that 85.5 per cent of respondents interviewed for the survey indicated satisfaction with the way the courts sentence perpetrators of crime. 59.7 per cent of respondents expressed confidence that courts hand down sentences which fit the crime. Nevertheless, sentences imposed in cases involving gender-based violence have often been criticised, mainly by human rights NGOs, for being too lenient and failing to take full account of the gravity of gender-based violence. Moreover, the courts rarely take advantage of provisions of the Penal Code allowing them to order that, in addition to or in substitution for any punishment, a person convicted of a crime may be ordered to pay appropriate compensation to the victim. It is recommended that the judiciary, in consultation with stakeholders including civil society organisations, should develop and implement a clear, coherent and accessible sentencing policy which properly balances the human rights of offenders and victims; is aimed at

enhancing consistency, compensation for victims, and use of non-custodial sentences in judicial practice; and has a mechanism for regular monitoring and evaluation.

The death penalty is still in force in Malawi. Section 16 of the 1994 Constitution guarantees every person the right to life *except* in cases in which a person has been sentenced to death by a court, and the Penal Code makes the death sentence mandatory in cases of murder and treason, and discretionary in cases of rape and some categories of robbery. In practice, no person sentenced to death has been executed since 1992. The fact that the moratorium has not generated any significant public opposition suggests that the climate may be right either to abolish the death penalty completely or, at the very least, to make the punishment discretionary in relation to the offences to which it applies. As a minimum, Parliament should amend the law so that the death penalty is never mandatory, but always subject to the discretion of judges.

D. Conditions of imprisonment and rehabilitation of offendors

According to official figures, the total number of people in prison on 26 September 2005 was 10 232. This represented a ratio of approximately 100 prisoners per 100 000 of the general population. Just over 26 per cent were awaiting trial, while 3 per cent were aged under 18 years and classified as juveniles. In general, the prison population has been rising: it was just 4 685 in 1993.

Reporting in 2001, the African Commission on Human and Peoples' Rights Special Rapporteur on Prisons and Conditions of Detention in Africa condemned several aspects of prison conditions in Malawi, including the quality and quantity of food and the severe overcrowding. The position remains largely unchanged. For example, Zomba Central Prison has an estimated capacity of 900, but in September 2005 had a total population of almost 2 000; some prison cells are so overcrowded that when inmates sleep, they are so tightly packed on the floor that they can only turn *en masse*. Almost all inmates in Malawian police and prison cells also sleep on the bare floor without beds or mattresses.

There are a number of urgently needed reforms that can improve the situation. The government should introduce to Parliament for discussion and enactment the Police Bill and Prisons Bill proposed by the Law Commission and the Prison Service respectively. Second, the government should form a cross-departmental group consisting of representatives of the police, the judiciary and the prison service, charged with developing a strategy for reducing prison overcrowding. Such a strategy should include a 'practice direction' issued by the chief justice instructing judicial officers to exercise restraint in imposing custodial sentences in criminal cases, particularly in relatively minor offences or involving young offenders. Third, the legal regime for the granting of pardons and remissions must be revised in order to increase the remission of sentences which may be granted under the Prisons Act, particularly for those convicted of relatively minor offences. Fourth, the government must construct more prisons and police cells, extend existing ones and equip them with proper facilities to improve not only the prisoners' welfare but also the conditions in which they can meet visitors and consult with lawyers.

The current conditions of imprisonment are not conducive to the implementation of activities aimed at rehabilitation of offenders, even though the Prison Department has promoted and set up various activities to help prisoners acquire academic qualifications and technical skills. The

success of the activities in preparing prisoners for reintegration into society appears to be limited because, among other things, they are not guided by any coherent strategy, nor properly targeted at providing offenders with usable or marketable skills. The rehabilitative programme also does not have the necessary mechanism to follow up offenders after their release, partly due to shortages of staff. The Prison Service should commission a critical review of the efficiency and effectiveness of the rehabilitative programme, and the possibility of establishing post-release follow up systems as a means of reducing re-offending in the long term. Such a review should involve not only the official correctional services establishment but also academic experts and relevant non-governmental organisations active in the prisons, including Penal Reform International, the Paralegal Advisory Service, Malawi CARER, and Prison Fellowship.

E. Protecting vulnerable groups

Another aspect of crime and punishment in Malawi which raises concern is the treatment of vulnerable groups within the penal system. The most obvious of these are juveniles. The Constitution provides that if a person accused of committing an offence is a child (under 18), he or she shall enjoy not only the rights associated with fair trial that are available to all accused persons, but also additional rights, including to be separated from adults when imprisoned; to be treated in a manner which takes into account his or her age; and to be dealt with in a form of legal proceedings that reflects the vulnerability of children. The Children and Young Persons Act of 1969 also requires that children in conflict with the law be treated humanely and in a manner consistent with their vulnerability, and that a child should not be imprisoned unless he or she 'is of such depraved character or so unruly' that it would be in her or his best interests to be imprisoned. It is counterproductive to characterise a child in conflict with the law with such a strong term as depravity; it is unduly condemnatory, stigmatising and likely to pre-empt any serious attempt at his or her rehabilitation. In any case, the provision runs counter to the spirit of the constitutional provisions which require that every child in conflict with the law should be treated in a manner which promotes his or her reintegration into society.

In practice, the constitutional principles are routinely violated. For example, according to the government's own admission, children are often tried as adults. The government has also admitted that some children are held in detention without charge, many are not informed of their right to bail, and their trials are delayed. Juveniles are also not always segregated from adult prisoners, although this problem has been partly addressed by the opening in 2004 of three juvenile-only facilities. The government must urgently update the Children and Young Persons Act and implement administrative measures to establish more juvenile-only institutions which also have adequate facilities to meet the constitutional requirement that any child in conflict with the law must be treated in a manner which 'promotes his or her re-integration into society to assume a constructive role'.

The law also seeks to protect the rights of people who become vulnerable through arrest and incarceration. The most extensive human rights provision of the Constitution is section 42, which lays out the rights of people who are arrested, detained or accused of crimes. The provision guarantees such people a wide range of rights including the right to be detained under condi-

tions consistent with human dignity and the right to not be compelled to make a confession or admission of an offence alleged against him or her. Despite these norms, abuse of people in police and prison custody has been one of the most serious and divisive human rights violations in Malawi. In 2001, the Special Rapporteur on Prisons of the African Commission on Human and Peoples' Rights reported allegations of police beatings and ill-treatment of suspects aimed at extracting confessions. In 2005, Amnesty International similarly observed that 'the torture and ill-treatment of suspects and deaths in custody were reported to continue.' The first obvious recommendation is that the police and prison services, working in close collaboration with the Malawi Human Rights Commission, must strengthen their internal investigation mechanisms and take strong action against any of their officers who are guilty of the abuse of people in custody. This must include referring the cases to the DPP for his or her action. More likely to be effective, however, is the establishment of an independent agency to investigate complaints against police abuses. Such an agency is proposed under the Police Bill which awaits enactment by Parliament; this is further reason for urgent enactment of the bill.

There are indications that intimidation of victims and witnesses has, in some cases, resulted in charges being brought or dropped. At least one study has found intimidation of complainants to be the reason for the withdrawal of charges in relation to crimes such as domestic violence, property grabbing from widows and similar offences arising in domestic settings. The vulnerability of witnesses in these cases is heightened because most of them are women. The only formal victim support in the criminal justice system is provided by the police service. Victim support units were established in 2001 at various police stations as part of a new community policing initiative. These units aim to assist crime victims who have suffered harm 'such that only special care and attention can restore their normal being', and includes cases that require victims to be assisted in private in order to respect their dignity. Between 2003 and 2005, 1 982 cases were reported to victim support units across the country. Of these, 38.2 per cent involved domestic violence, 13.4 per cent child or spousal neglect, 11.9 per cent defilement (sexual intercourse with a minor) and 8.5 per cent rape. The further expansion of victim support units need not await the enactment of the Police Bill and can be done administratively. It is recommended that the police service invest in the development of material and human resources available for victim support units, including by training more personnel, providing necessary physical facilities at police establishments and widely publicising the work of the units.

6. Access to justice

A. Impediments

By 2005, many actors in the justice sector were of the view that Malawians were generally aware of their rights and the institutions which are available to assist them, but that the vast majority of people are not able to enforce their rights because they cannot access formal justice delivery institutions, including the courts. Poor people, especially women, are disproportionately impeded by the various physical, financial and linguistic barriers.

Physical barriers are mainly geographical. The majority of the people live in remote rural areas, and in some cases, people have to walk for up to eight hours to reach their nearest court. The effect of the distance is made worse by the fact that most rural areas do not have regular public transport. Where public transport exists, it is prohibitively expensive. Asylum seekers and refugees are confined to camps, and thus are almost completely excluded from the formal justice system. The design of some courts and other justice institutions in Malawi make no provision for the mobility of people with physical disabilities; an example is the High Court in Blantyre which has no ramps for wheelchair access.

Financial barriers consist mainly of the relatively high financial cost of paying court and lawyers' fees and transport costs. Although court fees may appear to be low, the majority of Malawians live below the poverty line, on an income of less than K140 (approximately US$1) per day. These income levels also mean that only a minuscule number of Malawians can afford to hire private lawyers, who demand as much as K10 000 (approximately $70) for an initial deposit and K7 000 (approximately $50) per hour thereafter. Unfortunately, neither the Ministry of Justice's Department of Legal Aid nor non-governmental organisations have sufficient resources to provide the poor with a way round the barrier of lawyers' fees.

Another factor that limits access to the formal justice system by the majority of people is the fact that English is the official language of the courts—although it is estimated that only a negligible proportion of the population is fluent in it. The Constitution does guarantee every person the right to be tried in a language which he or she understands or, failing this, to have the proceedings interpreted, at the expense of the state. In practice, the judiciary ensures that there is an interpreter in any case in which the defendant does not understand English. However, standards of interpretation are generally poor, particularly in relation to technical words.

In order for the constitutional right to have access to justice and legal remedies to have practical meaning, the judiciary, the Malawi Law Society, the Ministry of Justice and relevant non-governmental organisations should develop a plan aimed at removing the major obstacles which impede access to formal justice, particularly by the poor and other marginalised social groups. Such a plan should include measures aimed at expediting the establishment of courts located close to the people in rural areas; improving the physical infrastructure of justice institutions so that they can be accessed by all, including people with physical disabilities; reducing court fees; expanding the availability of pro bono legal services; and introducing flexibility in the language policy of the courts to allow more use of local languages in official proceedings. The proposed plan to increase access to justice should take special account of the needs of historically disadvantaged groups. With regard to women, for example, the following recommendation made by the UN Committee on the Elimination of Discrimination against Women in June 2006 must inform the plan: '[The Committee] further urges [Malawi] to take special measures to enhance women's awareness of their rights, legal literacy and access to the courts to claim all their rights.'

B. Non-state fora and traditional courts

As a result of these barriers, most people in Malawi do not rely on formal court systems to deliver justice. Instead they depend on non-state institutions, of which the most frequently used are traditional leaders, traditional family counsellors (*ankhoswe*), religious leaders, and community, non-governmental and faith-based organisations. The most common types of disputes dealt with in these fora involve land, chieftaincy, marriage and domestic violence, and the most prolific of the various non-state justice fora are those presided over by traditional leaders. It has been estimated that the country has over 20 000 traditional leaders of varying levels of seniority who administer justice in almost every village. The activities of the non-state fora, which are sometimes referred to as primary justice or informal mechanisms, do not appear to be factored sufficiently into the strategy and plans of most state-connected justice sector institutions. Although the Constitution allows for 'traditional or local courts' to be established, no legislation has been enacted to give effect to this provision; the Traditional Courts Act dating from the colonial period and expanded in authority under the regime of Hastings Kamuzu Banda remains technically in force, but the courts it regulated were abolished with the transition to a multi-party system in the early 1990s.

The government should integrate the non-state or primary justice mechanisms more coherently into the planning and funding for the justice sector. If formally established and governed by legislation, 'traditional or local courts'—which the constitution provides shall be presided over by 'lay persons or chiefs'—have the potential to make the formal judiciary more accessible for more people. Some traditional authorities are likely to be integrated into the state's judicial structure if the Law Commission's current recommendations for the reform of the Traditional Courts Act are adopted and implemented by the state. However, in order for that accessibility to be optimised, the amendment of the Traditional Courts Act recommended by the Law Commission and subsidiary legislation should provide for the use of local languages in proceedings and fees that are affordable by the poor. The law should require traditional authorities who preside over traditional courts not to perform executive functions, in order to avoid violating international standards such as those set out in Chapter Q of the Guidelines and Principles on the Right to Fair Trial and Legal Assistance in Africa adopted by the African Commission on Human and Peoples' Rights in 2003. These include the requirement that traditional courts be independent of the executive branch.

Once the 'traditional or local courts' become operational, it will also be important for the chief justice to instruct them to uphold human rights, with emphasis on the right to equality of persons before the law—particularly as between male and female litigants, bearing in mind the poor record of most traditional institutions in perpetuating institutionalised socio-cultural bias against women. The state, in collaboration with other parties interested in improving access to primary justice such as civic education and human rights groups, as well as development partners, should provide basic training in constitutional principles of fair trial to primary justice institutions (such as traditional leaders) at all levels.

At its 35th session in June 2006, the United Nations Committee on the Elimination of Discrimination against Women recommended that '[Malawi] ensures the constitutionality of the

customary courts and that their rulings are not discriminatory against women' and expressed concern about 'the prevalence of a patriarchal ideology with firmly entrenched stereotypes and the persistence of deep-rooted cultural norms, customs and traditions' that discriminate against women and constitute serious obstacles to women's enjoyment of their human rights.

c. Office of the Ombudsman

The constitutionally established Office of the Ombudsman provides a means of accessing justice which is not affected by most of the impediments hindering access to the courts. The Ombudsman is mandated to provide, free of charge, remedies to people who have 'suffered injustice or violation of their human rights in circumstances in which there is no judicial or other remedy that is reasonably available'. The Ombudsman Act of 1996 restricts the jurisdiction of the Office of the Ombudsman to complaints arising from the conduct of public officials. However, because the Constitution grants the ombudsman the wider remit to handle 'any and all cases' of injustice, the ombudsman has in practice dealt with complaints against private institutions as well. The office therefore operates to some extent as a cheap substitute for the courts. Since its establishment, it has investigated a wide range of complaints against various government ministries, departments, statutory corporations and other institutions, making it a very popular means of accessing justice.

In spite of its strengths, the Office of the Ombudsman faces a number of challenges that limit its potential. The first challenge is posed by legal restrictions on the types of remedies that the ombudsman can grant. The other limitation is that the Office of the Ombudsman has offices only in the country's three main cities (Blantyre, Lilongwe and Mzuzu), although occasionally the ombudsman also visits some rural districts to handle complaints. The ombudsman should explore the possibility of working with other institutions in the justice sector which have a permanent presence in rural communities. The capacity of such institutions could be strengthened so that they are able to receive complaints on behalf of the ombudsman and transmit them to the ombudsman for action.

Despite the limited physical presence of the Office of the Ombudsman across the country, it has proved to be such a popular institution that it has been overwhelmed by the demand for its services, partly because it is perceived as a more efficient means of accessing justice. The popular demand has resulted in increasing inefficiency because it has not been matched by a corresponding expansion in the office's capacities. In recent years, the office has accumulated a considerable backlog of cases, resulting in significant delays in the handling of particular cases. If the office has to continue to act as the cheaper and more efficient alternative channel for accessing justice, the government must commit more financial and human resources to it. The government should also put in place a sustainability strategy that aims at weaning the office from its direct reliance on donors for most of its programme activities (currently as much as 80 per cent of the funding for the activities of the office). For its part, the Office of the Ombudsman should implement a practical and time-bound strategy and action plan to clear its backlog of cases and, therefore, regain its efficiency.

D. Human Rights Commission

The Human Rights Commission is established by the Constitution and has the primary mandate of protecting human rights and investigating their violation. The Constitution expressly states that the commission does not have any judicial powers but empowers it to receive applications from individuals or groups of people requesting it to discharge its mandate in relation to specific events or situations. In comparison to the Office of the Ombudsman, the mandate of the Human Rights Commission is narrower as it is limited only to the protection of human rights and does not cover other forms of injustice. Nevertheless, the commission has provided a means by which people have been able to get redress for a wide range of injustices, including suspicious deaths of criminal suspects in police custody; alleged abuse of firearms during the policing of public demonstrations; discriminatory allocation of housing benefits for civil servants; and undue restriction of the freedom of members of Parliament to belong to political associations outside Parliament.

The potential of the Human Rights Commission to make a significant contribution to improving people's access to justice is limited by a number of factors. The most obvious of these is that the commission lacks sufficient presence across the country. Although officers of the commission occasionally conduct field visits to various parts of the country, most of their time is spent at their headquarters in the capital city. The commission is, therefore, less physically accessible than the courts. In its annual report for the year 2000, the commission requested the government to fund the establishment of regional and district offices in order to alleviate the problem; this request is one that Malawi's development partners should also consider responding to as part of their assistance to the justice sector. As a supplementary strategy, as with the Office of the Ombudsman, the Human Rights Commission could establish strategic partnerships with institutions, including civil society organisations, that already have a presence across the country, particularly in rural areas. The commission may then act through such institutions to perform its investigative mandate as well as undertake activities aimed at raising rights awareness in communities.

E. Enhancing effectiveness of remedies

According to section 42 of the Constitution, the right of every person to have access to courts of law and other tribunals goes together with the right to be provided with effective remedies by those institutions. One factor constraining the delivery of effective remedies in Malawi is the delays with which most justice institutions dispose of matters before them. A survey conducted in 2005 found that court proceedings are characterised by long delays at all stages, including in delivering judgment after finishing hearing the case; as noted above, the Office of the Ombudsman increasingly shares this problem. Delays in the delivery of justice may not only render remedies ineffective but may also undermine public confidence in the justice system as a whole. The judiciary, the ombudsman and other institutions must undertake an in-depth empirical analysis of the fundamental causes of delays in their case-handling and institute measures to increase efficiency. Such research can build on preliminary studies that have already been undertaken by others.

Remedies may also be ineffective if they do not offer substantive correction of the injustice for which they were sought in the first place. This may be because the law has restricted courts or tribunals from granting certain remedies. Consider, for example, section 10(1) of the Civil Procedure (Suits by or against Government or Public Officers) Act, which prohibits courts from granting an injunction against the government. Yet, in some cases, the only effective remedy may be to stop the government from undertaking or continuing a particular action. Although this prohibition undermines the right to an effective remedy, the High Court has occasionally upheld it, while in other cases granting injunctions despite the provisions of the legislation.

In some cases, it is the Constitution itself which limits the effectiveness of remedies. This is the case in relation to the ombudsman who is restricted to offering only the following as remedies for injustice: directing that appropriate administrative action be taken to redress the grievance in question; causing the appropriate authority to ensure that there are, in future, reasonably practicable remedies to redress the grievance in question; and referring the matter to the DPP with a recommendation for prosecution. The ombudsman has no power to enforce his or her determinations and the High Court has held that it has no power to directly enforce determinations of the ombudsman. The Law Commission must review this restriction in order to propose legislation that would make remedies granted by the ombudsman more effective. Using similar reasoning, section 10(1) of the Civil Procedure (Suits by or against Government or Public Officers) Act should be repealed, as should all other legal provisions which unduly restrict the courts and other justice delivery institutions from granting remedies which substantively correct injustices.

Conclusion

Most of the recommendations in this paper require cooperation among institutions in the sector if they are to be implemented successfully, and discussion of the issues should be conducted at a sector-wide level. It is understandable that progress in this regard might be slow. However, most of the recommendations in this paper have also been made before; there are many strategies and plans that lie on the shelves of many institutions involved in the sector, including government ministries and departments, non-governmental organisations and donors. The most important issue is therefore how to ensure that these recommendations are implemented in practice. This will require a frank discussion of the political, economic and social challenges context of justice and the rule of law in Malawi, not as some intellectual justification for defeatism, but a necessary first step to devising realistic means for removing obstacles to reform.

Part II

Malawi Justice Sector and the Rule of Law

Main Report

Executive summary

The end of Banda's dictatorial rule and the adoption of a new, democratic Constitution in 1994 transformed the institutional and legal framework of Malawi. Since that turning-point, there has been considerable and laudable progress in the justice sector. Much however, remains to be done, and long-term commitment is needed from government to embed reforms, and enact further, critical improvements to the country's justice system.

Breaking with the one-party system established in 1966, the 1994 Constitution included a comprehensive bill of rights and created an environment conducive to ratification and domestication of the most important international human rights treaties. The Constitution provided for a comprehensive process of review of domestic laws that were inconsistent with international human rights obligations. Yet early reviews undertaken by Parliament immediately after the adoption of the Constitution have not been followed through and no consistent effort on domestication of international obligations has been pursued. As a result, statutory and customary laws that violate the Constitution and international law have been largely left untouched, though a number of these laws have been successfully challenged in court on grounds of unconstitutionality. Although the Constitution provided for a mechanism of law reform in the Law Commission, attempts to reform outdated legislation have been frustrated by a combination of competing processes, lack of institutional support and inadequate funding.

Recent attempts to impeach the president and remove him from office have brought into focus the issue of respect for the law by both the executive and the legislative branches of government in Malawi. While government action has respected the Constitution and legislation in the area of economic management, political expediency has often resulted in disobedience of the law in other areas. Since 1994, the legislative process in Parliament has generally respected international and constitutional standards.

Management of the justice sector has dramatically improved over the last ten years. Measures have been taken to strengthen autonomous administration of the courts, although executive control of the judiciary's budget means that this is still limited. Strategic plans have been developed as a basis for action both at a sector-wide level and within specific institutions of the sector. The effectiveness of strategic planning is, however, hindered by a number of constraints, including inadequate funding, insufficient well-trained administrative staff and poor record-keeping. Many of these problems have been recognised by the judiciary in its strategic

plan, but there is no evidence that they have been addressed in practice.

Under the Banda dictatorship, the judiciary was subordinated to the one-party system. The executive exerted control over all levels of the court system, and in particular, manipulated and extended the jurisdiction of 'traditional courts'. Since 1994, the situation has dramatically improved. Judges have been guaranteed independence and a number of mechanisms whereby the executive ensured control over judicial officers have been abolished. In practice, governments since 1994 have shown greater, though not total, respect for the independence of judges and lawyers. For judicial independence to be complete, judicial appointments need to be free of political manipulation.

Significant progress has been made in reforming the criminal justice system. Police officers have undergone extensive training in human rights and public order management aimed at transforming the police from an enforcer of the pre-1994 dictatorial rule to a more accountable institution. Laws that overtly deprived perceived or real political opponents of their rights to a fair trial have been repealed. Measures have been taken to introduce more civilian oversight of the prison system.

However, despite notable efforts in better policing, crime has been steadily increasing since 2001, driven principally by the country's high level of poverty. Because of staff shortages, the prosecution service is faced with a high backlog of cases, resulting in unacceptably long pre-trial detentions. Legal guarantees of fair trial introduced since the 1994 Constitution have not been followed in practice. Most criminal defendants are denied the right to legal representation as they cannot afford private lawyers, and government-provided legal aid has limited impact. Prison overcrowding is one of the most urgent challenges facing criminal justice in Malawi, with a growing prison population and deteriorating conditions of detention.

Court fees in Malawian judicial institutions have been kept relatively low so as to facilitate access to justice, and, in an attempt to reduce costs, small claims must be submitted to mediation before trial. But the high level of poverty in Malawi and the prohibitive costs of legal services mean that the majority of the population has no access to formal justice; this is limited to the wealthy elite. Newly created constitutional bodies such as the ombudsman and Human Rights Commission have played a useful role. Nevertheless, most Malawians seek resolution of civil disputes in various customary forums, of which there are estimated to be more than 20 000, including courts presided over by 'traditional authorities' recognised by the executive. Although the Constitution empowers Parliament to create 'traditional or local courts' to hear customary law cases, no such legislation has been adopted. A legal framework for these courts is urgently needed, as well as the allocation of adequate resources reflecting the scale of their contribution in providing access to justice for many citizens.

The justice sector in Malawi is heavily dependent on multilateral and bilateral donors. In this context, coordination of donor funds takes on added importance. Over the past years, donors have improved their coordination efforts, as has government. However, the impact of these efforts is limited by the absence of an effective, sectoral, strategic plan that would allow development assistance to be clearly linked to goals that cross-cut the sector. Although the creation of policy-making and coordinating bodies such as the National Council on Safety and Justice, and the Coordinating Group on Access to Justice is commendable, the government needs to formally adopt and implement a sector-wide plan and agree to a sector-wide approach with donors.

1

Legal and institutional framework

The adoption of a new Constitution in 1994 changed the institutional and legal framework of Malawi. Breaking with the one-party system established in 1966, the 1994 Constitution included a comprehensive bill of rights and created an environment conducive to ratification and domestication of the most important international human rights treaties. The Constitution provided for a comprehensive process of review of domestic laws that were inconsistent with international human rights obligations. However, early reviews undertaken by Parliament immediately after the adoption of the Constitution have not been followed through and no consistent effort on domestication of international obligations has been pursued. As a consequence, statutory and customary laws that violate the Constitution and international law have been left untouched, even though the constitutionality of a number of these laws has been successfully challenged in court. Although the Constitution provided for a mechanism of legal reform in the Law Commission, attempts to reform outdated laws have been frustrated by a combination of competing processes, lack of institutional support and inadequate funding.

A. International law, the Constitution and national legislation

The opening up of the Malawi political space following the 1994 multi-party elections and the 1995 National Constitutional Conference has resulted in much greater adherence to the most important international human rights standards. The move has been limited, however, because no significant efforts have been put toward the domestication of international human rights standards.

International law

Malawi has ratified most of the major relevant international and African human rights treaties.[1] In addition, Malawi has signed but not ratified or acceded to a number of other relevant global and regional agreements. These include the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, which Malawi signed on 7 September 2000,[2] and the Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and Peoples' Rights, which Malawi signed on 9 June 1998.[3] At the sub-regional level, Malawi has signed and ratified the main Southern African Development Community (SADC) instruments, which have a direct bearing on the administration of justice and promotion of the rule of law.[4]

In some cases, Malawi entered significant reservations in its ratification of treaties that establish human rights standards. In the case of the Convention on the Elimination of All Forms of Discrimination Against Women, for example, the government initially entered a general reservation against provisions of the convention that require immediate eradication of certain traditional customs and practices. Malawi entered this reservation because, in the view of the government, some traditional customs and practices that discriminate against women in Malawi are so deep-rooted as to make it difficult to eradicate them immediately as required by the convention.

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1 These include the African Charter on Human and People's Rights (ratified on 17 November 1989), the International Covenant on Economic, Social and Cultural Rights (ratified on 22 December 1993), the International Covenant on Civil and Political Rights (ratified on 22 December 1993), the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatments and Punishments (ratified on 11 June 1996), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (ratified on 22 March 1987), the Convention on the Rights of the Child (ratified on 2 January 1991) and the Rome Statute of the International Criminal Court (ratified on 19 September 2002). See Annex 1 for a list of human rights treaties acceded to by Malawi. The list is by no means comprehensive. The Treaty Series, which used to be the official record of all treaties to which the country was a party, has not been published by the government since 1986. In addition, the websites of the Ministry of Justice and Constitutional Affairs http://www.malawi.gov.mw/Justice/Home%20%20Justice.htm, accessed 21 June 2006, and Ministry of Foreign Affairs http://www.malawi.gov.mw/Foreign%20Affairs/Home%20ForeignAffairs.htm, accessed 21 June 2006, did not contain this information either. This is one example of poor record-keeping within the justice sector that is discussed in more detail elsewhere in this report. In the absence of readily available up-to-date comprehensive information at the Ministry of Foreign Affairs, information had to be sourced piecemeal from files held by the Ministry and other sources, including websites of United Nations agencies and other interested bodies.

2 United Nations Department of Economic and Social Affairs, Division for the Advancement of Women, Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, New York, adopted on 6 October 1999, available at http://www.un.org/womenwatch/daw/cedaw/protocol, accessed 20 December 2005.

3 African Commission on Human and Peoples' Rights, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Banjul, adopted on 9 June 1998, available at http://www.achpr.org/english/_info/court_en.html, accessed 15 December 2005.

4 Malawi has ratified the Protocol on Legal Affairs, Protocol on Immunities and Privileges, Protocol Against Corruption, Protocol on Politics, Defence and Security Cooperation, Protocol on Wildlife Conservation and Law Enforcement, and Protocol on Combating Illicit Drugs. In addition, Malawi has signed the Protocol on Extradition and the Protocol on Mutual Legal Assistance in Criminal Matters although it has yet to ratify them. It has also signed, and was not required to ratify, the Charter of Fundamental Social Rights. For detailed information on the dates on which Malawi signed and/or ratified Southern African Development Community protocols and other instruments, see Southern African Development Community, 'SADC Protocols, Status of Protocols, 2004,' available at http://www.sadc.int/index.php?action=a1001&page_id=protocols_status, accessed 15 December 2005.

However, the government withdrew the reservation in 1991.[5] In relation to the 1951 Convention Relating to the Status of Refugees, the government entered a number of reservations including one that reserved the right of the government to designate the place of residence of refugees and restrict their movements in the interests of national security and public order.[6]

Malawi has largely failed to discharge its reporting obligations under international human rights treaties. As of 2003, Malawi had submitted only some of the reports due under the Convention on the Elimination of All Forms of Discrimination against Women and under the Convention on the Rights of the Child. The government had also not submitted periodic reports due under these treaties as well as reports due under the International Covenant for Economic, Social and Cultural Rights; the International Covenant for Civil and Political Rights; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment and the International Convention on the Elimination of All Forms of Racial Discrimination.[7] In June 2004, the government submitted a report which combined the second, third, fourth and fifth periodic reports on adherence to the Convention on the Elimination of All Forms of Discrimination Against Women.[8] The government attributed its failure to fulfil the reporting obligations to, among other things, a lack of human and material resources to facilitate preparation of the reports.[9]

Very few cases alleging violation by Malawi of its international human rights obligations have been lodged before international bodies; largely because Malawi acceded to key human rights treaties only upon the adoption of the democratic Constitution in the early 1990s. A case alleging denial of the right to life lodged before the African Commission on Human and People's Rights in early 1990 was declared inadmissible on the ground that it was introduced prior to Malawi having become a party to the African Charter on Human and People's Rights.[10] On

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5 United Nations Department of Economic and Social Affairs, Division for the Advancement of Women, Declarations, Reservations and Objections to CEDAW, New York, 13 October 2005, available at http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm, accessed 25 January 2006.

6 See United Nations High Commissioner for Human Rights, Convention Relating to the Status of Refugees, Geneva, adopted on 28 July 1951, available at http://www.unhchr.ch/html/menu3/b/treaty2ref.htm, accessed 10 October 2005.

7 See Malawi Human Rights Commission, *Report for the Year 2003*, Lilongwe, undated, available at http://malawihumanrightscommission.org/docs/2003_annual_report.pdf, accessed 10 October 2005.

8 See Office of the United Nations High Commissioner for Human Rights, Reporting Status, Convention on the Elimination of All Forms of Discrimination Against Women, *Malawi: Reporting Round 3*, Geneva, 2005, available at http://www.unhchr.ch/tbs/doc.nsf/RepStatfrset?OpenFrameSet, accessed 10 October 2005. The reports were considered by the Committee on the Elimination of Discrimination against Women during its 35th session which was held from 15 May to 2 June 2006: see UN Committee on the Elimination of Discrimination against Women, 'Concluding comments of the Committee on the Elimination of Discrimination against Women: Malawi', 15 May to 2 June 2006, available at http://daccessdds.un.org/doc/UNDOC/GEN/N06/384/49/PDF/N0638449.pdf?OpenElement, accessed on 11 July 2006. Three non-governmental organisations also prepared and submitted a shadow report: see Women and Law in Southern Africa Research Trust (Malawi Chapter), 'Shadow Report to the Malawi Government Combined Cedaw Periodic Reports, Submitted to the CEDAW Committee's 35th Session, 15 May –2 June 2006 by WLSA Malawi, Centre For Human Rights and Rehabilitation, National Business Women's Association, Blantyre', Malawi, March 2006, available at http://www.iwraw-ap.org/resources/pdf/Malawi_SR.pdf, accessed 11 July 2006.

9 Malawi Human Rights Commission, *Annual Report of the Malawi Human Rights Commission for the year 2004,* p.6, available at http://www.malawihumanrightscommission.org/docs/2004_MHRC_AnnualReport_.pdf, accessed 21 June 2006.

10 AfCHPR Communication 42/90 (1990) *International PEN v Malawi*, available at http://www1.umn.edu/humanrts/africa/comcases/42-90.html, accessed 3 March 2006.

2 October 1995, the African Commission on Human and People's Rights issued the only ruling delivered since Malawi became a party to the charter, finding Malawi in violation of several provisions of the Charter, including the right to life, prohibition of torture, the right to liberty and the right to legal representation. The case was brought on behalf of two prominent political figures, Orton Chirwa, his wife, Vera Chirwa, and Aleke Banda. In 1981, the Malawi security officials took Orton and Vera Chirwa into custody; they were sentenced to death for treason at a trial in the Southern Regional Traditional Court. They had been abducted from Zambia where they had been living since 1964 because of political differences with Malawi's President Hastings Kamuzu Banda. Orton and Vera Chirwa were held in solitary confinement, given extremely poor food and inadequate medical care, shackled for long periods of time within their cells and prevented from seeing each other for years. Their sentences were upheld by the National Traditional Appeals Court. After international protest, the sentences were commuted to life imprisonment. When the case was filed, Aleke Banda had been imprisoned for twelve years and had yet to face a legal charge or a trial. The commission noted that Malawi had undergone important political changes after the case had been lodged; the commission, however, held that 'the change of government did not affect the existence of responsibility for human rights abuses by the previous administration.' Although the new, elected government of Malawi did not commit the human rights abuses complained of, the commission concluded, 'it is responsible for the reparation of these abuses.'[11] The government has since paid K5 million in compensation to Vera Chirwa, though her claim was for a considerably larger amount.[12] By 2006, the government had not made reparation to Aleke Banda, whose application to the National Compensation Fund remained pending because it had not been made within the statute of limitations set by the Constitution for reparations from the fund.[13]

Since this ruling, the general political environment in Malawi has changed. There are no political prisoners in the country. The government generally respects human rights. However, the government has not had an opportunity to show how it would respond to the ruling of an international body, particularly if such a ruling was in conflict with some perceived national interest.

The conformity of Malawi's national laws to international standards is also subject to review by the country's judiciary. Section 11(2)(c) of the Constitution obliges courts 'to have regard to current norms of public international law and comparable foreign case law' when interpreting the provisions of the Constitution.' The government has expressed its readiness to bring perpetrators of gross human rights violations to justice by becoming a party to the Rome Statute on the International Criminal Court.[14] Malawi's Geneva Conventions Act of 1967[15] is another law that

11 AfCHPR Communication 64/92 *Krischna Achutan (On behalf of Aleke Banda) v. Malawi*, 68/92 *Amnesty International (On behalf of Orton and Vera Chirwa) v. Malawi*, 78/92 *Amnesty International (On behalf of Orton and Vera Chirwa) v. Malawi*, available at http://www1.umn.edu/humanrts/africa/comcases/64-92b.html, accessed 3 March 2006.

12 Telephone interview with Vera Chirwa, 5 June 2006.

13 Telephone interview with Justice Dr Jane Ansah, Chairperson of the National Compensation Tribunal, 1 June 2006.

14 See International Criminal Court Assembly of States Parties, 'The States Parties to the Rome Statute,' 2005, available at http://www.icc-cpi.int/asp/statesparties.html, accessed 16 February 2006.

15 Geneva Conventions Act, 1967 (18 of 1967), Chapter 12:03, *Laws of Malawi*.

provides the legal framework within which Malawian courts can assume universal jurisdiction over anyone accused of crimes against humanity. Section 4(1) of the act provides that national courts may exercise universal jurisdiction over grave breaches of the Geneva Conventions. Malawi's courts, however, have never invoked these provisions.

Domestication of international law and review of national legislation

Section 211 of the Constitution provides for the incorporation of international human rights standards into national law, but practice in Parliament has resulted in uncertainty as to how international treaties are to come into force in Malawi. Sub-section 211(1) provides that 'any international agreement ratified by an Act of Parliament shall form part of the law of the Republic if so provided for in the Act of Parliament ratifying the agreement'. Sub-section 211(2) provides that binding international agreements entered into before the Constitution came into force continue to bind the state 'unless otherwise provided by an Act of Parliament.' The intention of sub-section (1), as the Law Commission has pointed out, 'would appear to be to require that under the new Constitution treaties shall bind Malawi only if they have been ratified by Parliament or through an Act. Its wording, however, is somewhat confused.'

Poor wording or not, there has been no specific legislation that sets out the appropriate procedure for the incorporation of international human rights standards into national law. Parliament is thus left with the discretion to determine how best to incorporate particular international standards into Malawian law. This has resulted in a lack of uniformity in the domestication strategy. It also has produced uncertainty as to whether particular international standards have been incorporated at all. In some cases, Parliament has passed legislation that expressly makes particular international standards part of Malawian law. This is the case with the Refugee Act (1989)[16], whose long title states that the aim of the act, among other things, is 'to give effect to refugee conventions as defined in the Act.' Section 2 of the act defines the relevant conventions to be the Convention Relating to the Status of Refugees (1951), the Protocol Relating to the Status of Refugees (1967)[17] and the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (1969).[18] Another example of a statute that expressly incorporates specific treaties into domestic law is the Geneva Conventions Act (1967).

A review of the country's statutory laws shows that Parliament has rarely passed special legislation to domesticate entire treaties. The more common practice is for Parliament to enact particular treaty obligations only by implication, through legislation that includes international

16 Refugee Act, 1989 (Act 3 of 1989), Chapter 15:04, *Laws of Malawi*.

17 United Nations High Commissioner for Human Rights, Protocol Relating to the Status of Refugees, Geneva, taken note of by the General Assembly on 16 December 1966, available at http://www.unhchr.ch/html/menu3/b/o_p_ref.htm, accessed 20 September 2005.

18 Organisation of African Unity, Convention Governing the Specific Aspects of Refugee Problems in Africa, Addis Ababa, adopted on 10 September 1969, available at http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Refugee_Convention.pdf, accessed 20 September 2005.

human rights standards without necessarily referring to them as such.[19] The most significant example of this approach is the inclusion in the Constitution of guarantees of rights relevant to justice and the rule of law.

The courts also contribute to the incorporation of international human rights standards into national law. In discharging its constitutional mandate to interpret the law, the judiciary is required, where applicable, to have regard to 'current norms of public international law and comparable foreign case law.'[20] Furthermore, in determining whether any limitation of the human rights guaranteed by the Constitution is permissible, one of the critical questions that the Constitution requires the courts to determine is whether the limitation is 'recognized by international human rights standards.'[21] On a number of occasions, the High Court has used international human rights standards in assessing the constitutional validity of purported limitations of human rights by domestic law. One notable case in point is that of *The Public Affairs Committee v The Attorney-General and The Speaker of the National Assembly, The Malawi Human Rights Commission–Amicus Curiae,*[22] in which the High Court declared that an Act of Parliament that sought to expand the meaning of 'crossing the floor' was invalid because, among other things, it restricted the freedom of association of members of Parliament to a greater extent than did any comparable international human rights standard.[23]

Constitution

Malawi adopted its first post-colonial Constitution in 1964. This Constitution established a democratic system of government and included a bill of rights.[24] The 1966 Constitution which replaced the 1964 Constitution, among other things stated that Malawi would 'recognise' the rights protected by the Universal Declaration of Human Rights; but the Constitution did not include a comprehensive bill of rights. The 1966 Constitution also undermined democratic principles by declaring Malawi to be a one-party state and, after an amendment in 1971, providing for a life-long term of office for the first post-colonial president, Dr Kamuzu Banda.[25] For the first twenty-three years of its independence, Malawi did not sign up to any international human rights instruments and, in practice, the government and its agents were responsible for widespread human rights violations.[26]

The major turning point in Malawian constitutional history occurred in 1994, when the 1966 Constitution was replaced by a Constitution designed to create a more liberal political

19 Such rights impose the same obligations on the state as do treaties to which Malawi is a party such as the International Covenant of Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the African Charter on Human and People's Rights, the Convention for the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child.

20 Ibid., Chapter II, Section 11(2)(C).

21 Ibid., Chapter IV, Section 44(2).

22 Civil Cause 1861 of 2003, available at http://www.judiciary.mw/civil/PAC_vs_Attonery_General_Speaker.htm, accessed 18 January 2006.

23 Page 65 of the transcript of the judgment.

24 See Simon Roberts, 'Constitution of Malawi, *Journal of African Law*, Vol. 8, London, 1964, p.178.

25 Constitution of the Republic of Malawi, 1966 (Act 16 of 1966) (as amended).

26 For a concise assessment, see Human Rights Watch, *Malawi*, New York, 1989, available at http://www.hrw.org/reports/1989/WR89/Malawi.htm, accessed 11 October 2005.

order. In 1993, after pressure from various domestic and international quarters, the government had conducted a national referendum in which a majority of voters cast ballots in favour of adopting a multi-party system of government.[27] This set in motion a process of political transition negotiated through a multi-party National Consultative Council that culminated in the adoption on 16 May 1994 of a provisional democratic Constitution and the holding of multi-party elections on the next day.[28] The 1994 Constitution was subject to further review by a parliamentary Constitution Committee set up—as required by the Constitution itself—with a mandate to carry out further public consultation, including the convening of a National Constitutional Conference. An amended version of the 1994 Constitution, based on these consultations, entered into force in May 1995.[29] The 1994 Constitution, as amended, among other things, limits the president to a maximum of two consecutive terms of office, explicitly guarantees independence of the judiciary and includes a bill of rights that guarantees a wide range of justiciable human rights. The Constitution also provides a framework in which the government can fully undertake its international obligations.

The Constitution did not last long before its implementation exposed its failings, and competing interpretations demonstrated the need for a comprehensive review. Only three years after its enactment, the Constitution underwent a comprehensive review during a three-month session of the Law Commission that ended in September 1998. The Law Commission issued a comprehensive report of the review with specific recommendations for both substantive and formal amendments that would touch almost every section of the Constitution. This review was undertaken because, 'the text of the Constitution has been the subject of extensive public comment, extensive and sometimes heated debates in Parliament and differing interpretations in the courts.'[30] At the time of the writing of this report, however, Parliament and the executive had not acted on these recommendations. In its work for the year 2005, the Law Commission announced another review of the Constitution.[31] As part of the review, the commission conducted a series of consultation meetings with various community and special interest groups, prepared an Issues and Consultation Paper based on those consultations, and held a national conference in March 2006 which was aimed at establishing consensus on areas of the Constitution requiring reform.[32] The conference was followed on 5 June 2006 by the appointment of a special commission charged with the responsibility to undertake further public consultations, including a second national conference, before submitting to cabinet recommendations for amendment of the Constitution.

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27 Bakili Muluzi, Yusuf Juwayeyi, Mercy Makhambera and Desmond Phiri, *Democracy with a Price: The History of Malawi Since 1900*, Heinemann, Oxford, 1999, pp.163-169.

28 Constitution of the Republic of Malawi, 1994 (Act 20 of 1994), available at http://sdnp.org.mw/constitut/chapter22.html#211, accessed 20 December 2005 (hereafter, Constitution, 1994).

29 Peter Mutharika, 'Malawi' in Herbert M Kritzer (ed.), *Legal Systems of the World: A Political, Social and Cultural Encyclopedia*, ABC-CLIO, 2002, pp.949-955.

30 Malawi Law Commission, Report of the Law Commission on the Technical Review of the Constitution, available at http://www.lawcom.mw/, accessed 8 March 2006.

31 Malawi Law Commission, Work Programme 2005, available at http://www.lawcom.mw/, accessed 8 March 2006.

32 Malawi Law Commission, First National Conference on the Review of the Constitution (28–31 March, 2006), available at http://www.lawcom.mw, accessed 24 April 2006.

National legislation

A number of statutory laws remain in force that are inconsistent with the 1994 Constitution and international human rights standards. The first category of these laws is those which impose vague and unreasonable limits on specific rights. For example, section 4 of the Protected Names, Flags and Emblems Act,[33] among other things, makes it a criminal offence for anyone to publish anything calculated to 'insult, ridicule or show disrespect' to the president.[34] Similarly, section 60 of the Penal Code[35] makes it a crime to publish 'false news' that is 'likely to cause fear and alarm to the public or to disturb the public peace.' Other laws grant wide powers to the executive to regulate the exercise of internationally guaranteed rights. This is the case with the wide discretionary powers granted by the Police Act[36] to the police to control and, in some cases, prohibit public assemblies and demonstrations. A recent use of the powers arose in July 2004 when the police fired teargas and shots—resulting in the death of a girl—to control people who were demonstrating against the results of the presidential elections announced by the Malawi Electoral Commission in favour of the ruling party candidate.[37]

Discriminatory laws are the second category of laws inconsistent with international human rights law and the Constitution.[38] An example of such legislation is the Citizenship Act,[39] which guarantees automatic citizenship to any woman who marries a Malawian citizen, but does not guarantee automatic citizenship to a man who marries a woman who is a Malawian citizen.[40] The act also provides that any Malawian woman who is married to a non-Malawian citizen may be deprived of her citizenship if she does not formally declare, within the first year of her marriage, that she has not acquired her husband's citizenship.[41] The act does not make similar provision for Malawian men who marry non-Malawian women.[42]

There is a third category of laws that are inconsistent with international human rights law and the Constitution. This category consists of laws that are inconsistent with human rights norms related to procedural justice, such as those that entitle every person accused of a crime to a fair trial. For example, section 283(1) of the Penal Code, which creates the offence of theft by

33 Protected Names, Flags and Emblems Act, (Act 10 of 1967), Chapter 18:03, *Laws of Malawi*.

34 In late September 2005, a local radio station commenced a legal challenge against the constitutionality of the Protected Names, Flags and Emblems Act, Chapter 18:03, *Laws of Malawi*. See Media Institute of Southern Africa, 'Radio station challenges law impeding media freedom.' Press release published by International Freedom of Expression eXchange, Toronto, 23 September 2005, available at http://www.ifex.org/fr/content/view/full/69446/, accessed 10 October 2005. The courts had not yet decided the case at the time this report was written.

35 Penal Code Act, 1929 (Act 22 of 1929), Chapter 7:01, *Laws of Malawi*.

36 Police Act, 1946 (Act 26 of 1946), Chapter 13:01, *Laws of Malawi*.

37 Amnesty International, *Report 2005 – Malawi*, 2005, available at http://web.amnesty.org/report2005/mwi-summary-eng, accessed 10 October 2005.

38 Women and Law in Southern Africa Research Trust, *Beyond Inequalities 2005: Women in Malawi*, Harare, 2005, pp.33-41.

39 Citizenship Act, 1966 (Act 28 of 1966), Chapter 15:01, *Laws of Malawi*.

40 Ibid., section 16.

41 Ibid., section 7.

42 This discrimination between Malawian men and women is inconsistent with article 9 of the Convention on the Elimination of forms of Discrimination Against Women, which requires states parties to the convention to grant women equal rights with men to acquire, change or retain their nationality, and is not covered by Malawi's reservations to the Convention. It is also inconsistent with the SADC Gender and Development Declaration of 1997 which requires states in the Southern African Development Community, which includes Malawi, to repeal all laws that discriminate on the basis of gender (Paragraph H(iv)).

public servant, provides that a public servant who fails to account for money or property that he or she had in his or her custody by virtue of his or her employment, 'shall, unless he [or she] satisfies the court to the contrary, be presumed to have stolen such money or other property, and shall be convicted of the felony of theft.' The High Court has stated that this provision is inconsistent with the presumption of innocence.[43] Other examples of laws in this category are sections 313 and 314 of the Criminal Procedure and Evidence Code,[44] which impose on the accused person in a criminal trial the obligation to enter his or her defence at the close of the case for the prosecution and to give evidence (for court challenges to these provisions, see further below, p.10).

Most of the Malawian laws that are inconsistent with international human rights law and the country's Constitution are a legacy of the colonial era. They were adopted and, in some cases, modified by the post-colonial government and survived the political transformation of 1994, which included the adoption of a Constitution with human rights guarantees. The Constitution declares that laws that are inconsistent with it are invalid; nevertheless, successive governments since 1994 have applied laws that courts have found to be inconsistent with human rights protection. The government has also permitted the continued application of customary laws that are arguably inconsistent with human rights standards.

In addition to legislation, some customary laws are discriminatory, such as those that prohibit women from marrying polygamously but do not impose a similar prohibition on men. These laws are applied on a daily basis among the majority of the population.[45] The position regarding polygamy may, however, change if the government adopts and Parliament enacts a proposal by the Law Commission to outlaw all polygamous marriages.[46]

Constitutional challenges to the law

Any law can be challenged on the grounds that it violates the Constitution. Section 5 of the Constitution declares that any act of government or any law that is inconsistent with the provisions of the Constitution shall, to the extent of such inconsistency, be invalid. Further, section 199 provides that the Constitution shall have the status as supreme law of the land and that there shall be no legal or political authority save as is provided by or under this Constitution. Finally,

43 *Nathebe v The Republic, Miscellaneous Criminal Application* 90 of 1997. For an academic discussion of the constitutionality of section 283(1) of the Penal Code, see Kandako Mhone, 'The Development of the Law of Theft by Public Servant in Malawi – The Debate Continues', *University of Malawi Students Law Journal*, Vol. 6, no.1, Zomba, 2000, pp.1-18. Section 42(2)(f)(iii) of the Constitution entitles every accused person to 'a fair trial, which shall include the right to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial.'

44 Criminal Procedure and Evidence Code, 1967 (Act 36 of 1967), Chapter 8:01, *Laws of Malawi*.

45 By not enacting a law to discourage polygamy, Malawi is acting inconsistently with Article 6(c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, which Malawi acceded to on 20 May 2005. In part, the provision obliges states party to the protocol to pass legislation that guarantees that 'monogamy is encouraged as the preferred form of marriage.' See African Union, 'List of Countries which have Signed, Ratified/Acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women,' Addis Ababa, undated, available at http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Protocol%20on%20the%20Rights%20of%20Women.pdf, accessed 10 October 2005. For the text of the protocol, see African Union, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Addis Ababa, adopted on 11 July 2003, available at http://portal.unesco.org/shs/en/ev.php-URL_ID=3963&URL_DO=DO_TOPIC&URL_SECTION=201.html, accessed 10 October 2005.

46 See Malawi Law Commission, *Report of the Law Commission on the Review of the Laws on Marriage and Divorce*, Lilongwe, 30 December 2005.

section 48(2) of the Constitution provides that an Act of Parliament shall have primacy over other forms of law but shall be subject to the Constitution, while section 9 requires the courts to interpret the Constitution and all laws in accordance with the Constitution.

Judges and magistrates are open to litigation to enforce rights, including economic and social rights. There are numerous cases in which decisions of the courts have facilitated the enforcement of a wide range of rights, including the right to property,[47] the right to marriage and family,[48] the right to fair labour practices,[49] the right to procedurally fair administrative action[50] and the right to non-discriminatory treatment.[51] Section 15(1) of the 1994 Constitution provides that any person or group of persons with sufficient interest in the protection and enforcement of human rights guaranteed by the Constitution has the right to be assisted by the courts, among other institutions, to ensure 'the promotion, protection and redress of grievance in respect of those rights'. However, this provision has been given a narrow interpretation by the courts in practice, as discussed below (see Chapter 6, section D).

In their enforcement of rights, the courts should be open to arguments based on rulings favourable to human rights by judges in similar jurisdictions or international fora by virtue of at least two provisions of the Constitution. The first is section 11(2) which provides that in interpreting the provisions of the Constitution, courts should, 'where applicable, have regard to current norms of public international law and comparable foreign case law.'[52] The second such provision is section 44(2), which permits limitation of human rights only if such limitations are, among other things, recognised by international human rights standards and necessary in an open and democratic society.

Since 1994, there have been a number of instances in which statutory provisions have been successfully challenged on the grounds of unconstitutionality. Provisions of the Criminal Procedure and Evidence Code were challenged in *Director of Public Prosecutions v Hastings Kamuzu Banda et al.*[53] This 1995 case involved an appeal by the director of public prosecutions against a High Court judgment which had acquitted the country's former head of state and a number of former state officials of the 1983 murder of three cabinet ministers and a member of Parliament. In the course of the appeal, the Supreme Court of Appeal considered the validity of sections 313 and 314 of the 1967 Criminal Procedure and Evidence Code.[54] Section 313 requires that, in every criminal case it tries, the High Court should call upon the accused person to enter

47 *The Administrator of the Estate of Kamuzu Banda v The Attorney-general*, Civil Cause 1839 of 1997, available at http://www.judiciary.mw/civil/Kamuzu_Attorney.htm, accessed 17 January 2006.

48 *Okeke v The Minister of Home Affairs*, Miscellaneous Civil Application 73 of 1997, available at http://www.judiciary.mw/civil/Thandiwe_Okeke_Min_Home.html, accessed 17 January 2006.

49 *Liquidator, Import and Export (Mw) Ltd. v Kankwangwa*, available at http://www.judiciary.mw/civil/import%20and%20export%20v%20kankhwangwa.htm, accessed 17 January 2006.

50 *Nkhoma and Others v Council of the University of Malawi*, Miscellaneous Civil Cause 54 of 1992, available at http://www.judiciary.mw/civil/Nkhoma%20and%20Others%20v%20University%20Council.htm, accessed 17 January 2006.

51 *Kafumba and Others v The Electoral Commission and Another*, Misc. Cause 35 of 1999, available at http://www.judiciary.mw/civil/KAFUMBA%20and%20others%20v%20MEC%20and%20another.htm, accessed 17 January 2006.

52 Constitution, 1994, section 11(2).

53 *Director of Public Prosecutions v Hastings Kamuzu Banda et al.*, Criminal Appeal 21 of 1995, available at http://www.judiciary.mw/criminal/MWANZA%20MURDER%20CASE%20SC.htm, accessed 23 December 2005.

54 Criminal Procedure and Evidence Code, 1967 (Act 36 of 1967), Chapter 8:01, *Laws of Malawi*.

his or her defence at the close of the case for the prosecution. The accused is then obliged by section 314(1) to give his or her evidence. If the accused refuses or neglects to give evidence, section 314(2)(b) permits the prosecution to comment upon such refusal or neglect, and permits the jury to take the prosecution's comment into account in arriving at its verdict. The Supreme Court held that the effect of sections 313 and 314 was to deprive accused persons of the option of remaining silent at the close of the case for the prosecution. The court found this to be inconsistent with section 42(2)(f)(iii) of the Constitution which guarantees every person accused of a crime the right to a fair trial, which includes the right 'to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial.' Consequently, the court concluded that sections 313 and 314 of the Criminal Procedure and Evidence Code were invalid.

In 1998, in the case of *Sulaimana, Chirwa and Nthenda v Republic,* the Supreme Court again considered the constitutionality of sections 313 and 314 of the Criminal Procedure and Evidence Code.[55] Without even mentioning that the question had already been decided, the Supreme Court proceeded to declare that sections 313 and 314 of the code were inconsistent with the Constitution but—unlike in the *Kamuzu Banda et al.* case—did not conclude that sections 313 and 314 were therefore invalid. Instead, the court merely stated that: 'we would recommend to the Law Officers to look at these provisions and take appropriate action.'[56]

More recently, the High Court declared invalid an Act of Parliament that amended section 65 of the Constitution to empower the speaker of the National Assembly (the lower house of Parliament, and the only one currently constituted) to declare vacant the seat of any member of Parliament who, having been elected to Parliament as a member of a particular political party, subsequently joined any other association or organisation with political objectives.[57] The High Court decided that such a law was inconsistent with the right to freedom of association of members of Parliament which should entitle them to join political associations and organisations outside of Parliament. The decision was never appealed, and the declaration of invalidity still stands.[58]

In 1993, during the transition to multiparty government, the National Consultative Council sought a declaration from the High Court that, among other things, the powers of the police under the Police Act[59] to mount roadblocks and carry out related searches were contrary to the constitutional right to freedom of movement and personal liberty. The council also sought a preliminary injunction to prevent such interference pending a decision on the substance of its

55 *Sulaimana, Chirwa and Nthenda v Republic,* Criminal Appeal 7 of 1998, available at http://www.judiciary.mw/criminal/Sulaiman&Others_Rep.htm, accessed 23 December 2005.

56 In 2003, the Law Commission submitted to the Minister of Justice recommendations for the necessary amendment to Sections 313 and 314 of the Criminal Procedure and Evidence Code to bring them in line with the Constitution's guarantee of the right to silence of an accused person, Malawi Law Commission, *Commission Report no. 10: Report of the Law Commission on the Review of the Criminal Procedure and Evidence Code*, Law, Lilongwe, December 2003. However, as has been mentioned elsewhere in this report, the recommendations in this report have not yet been enacted into law.

57 See *Registered Trustees of the Public Affairs Committee v The Attorney General and The Speaker of the National Assembly, The Malawi Human Rights Commission Amicus Curiae*, Civil Cause 1861 of 2003, available at http://www.judiciary.mw/civil/PAC_vs_Attonery_General_Speaker.htm, accessed 24 December 2005.

58 Constitution, 1994, sections 32 and 40.

59 Police Act, 1946 (Act 26 of 1946), Chapter 13:01, *Laws of Malawi.*

action. The High Court agreed with the National Consultative Council and declared that the mounting of permanent roadblocks was unlawful and a gross violation of the right to freedom of movement, the right against search without consent, and the right to personal liberty. However, in practice, the police continue to mount permanent roadblocks contrary to the ruling in the case.

In addition to the instances where laws made by Parliament have been declared invalid for being inconsistent with the Constitution, there have been cases in which the High Court has declared rules and regulations made by various institutions, including private entities, to be invalid because they violate the Constitution. An example of this is the case of *Blantyre Netting Ltd v Chidzulo et al.*[60] In its decision, the Supreme Court of Appeal upheld a High Court decision that focused on a rule in an employment contract stipulating that an employee was entitled only to one month's pay in lieu of three months' notice of the termination of his employment. The Supreme Court of Appeal held that the rule was invalid because it was inconsistent with section 31(1) of the Constitution which guarantees that every person has a right to fair and safe labour practices and to fair remuneration. The court ruled that the Constitution required parity between the period of notice and the period for which an employee would be paid in lieu of notice.

The impact of judicial findings of unconstitutionality is, however, extremely limited. Although the courts have declared statutory provisions to be invalid, such declarations do not always have any significant effect. Failure to respect court decisions became such an issue that the Law Commission had to suggest an amendment to the Constitution to make it explicitly clear that 'all organs of government should render the fullest respect to the decisions of the judiciary.'[61] The commission recommended that the following words be added to section 9 of the Constitution: '...and in recognition of its independence and impartiality, the decisions of the judiciary shall be accorded the fullest respect by all organs of the government and by the population as a whole.'[62] Neither Parliament nor the government have followed up on this recommendation.

B. Structure of the court system

The court system in Malawi consists of the Supreme Court of Appeal, the High Court and subordinate courts. Parliament can also establish specialised courts with limited jurisdiction. The Supreme Court of Appeal is the highest court of record; it currently has seven justices of appeal, who usually sit in three-person panels. It is the highest appellate court and has jurisdiction to hear appeals against decisions of the High Court and of any other courts and tribunals that may be prescribed by an Act of Parliament.[63] The Supreme Court of Appeal is located in Blantyre. The High Court is the second highest court and currently consists of twenty judges, two of whom are based in Mzuzu, four in Lilongwe, one in Zomba and ten in Blantyre. Occasionally, the judges of the High Court also travel to outlying districts of the country to try homicide cases.

60 *Blantyre Netting Ltd v Chidzulo et. al.*, Civil Appeal 17 of 1995, available at http://www.judiciary.mw/civil/Blantyre%20Netting%20v%20CHIDZULO%20SC.htm, accessed 15 December 2005.

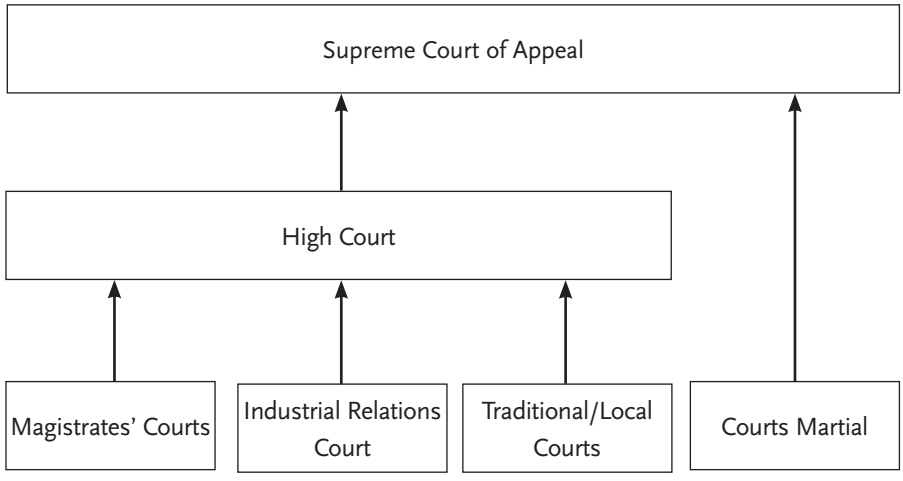
61 Malawi Law Commission, Report of the Law Commission on the Technical Review of the Constitution, available at http://www.lawcom.mw, accessed 8 March 2006.

62 Ibid.

63 Constitution, 1994, section 104(2).

The High Court has unlimited original civil and criminal jurisdiction.[64] The High Court also has the power to review any law and any action or decision of the government for conformity with the Constitution.[65] This power of judicial review is the principal means by which the courts contribute to the accountability of the executive and legislative branches of government. In addition to the power to decide cases that are brought directly to it, the High Court also decides cases in which people appeal against decisions of subordinate courts.[66]

The chart below presents Malawi's current court structure:



Section 110 of the Constitution provides for the establishment of subordinate courts to be presided over by professional and lay magistrates. At the time of writing this report, there were a total of 193 magistrates in post.[67] The magistrates' courts have the power to decide criminal and civil cases of various types. Under the Children and Young Persons Act, magistrates' courts may also sit as juvenile courts.[68] Magistrates fall into two categories: resident magistrates, who as a minimum have a law degree, and lay magistrates, who have basic legal qualifications below the level of a law degree. Out of the total of 193 magistrates in place, 30 are resident magistrates—four of them chief resident magistrates, eight, principal resident magistrates and 18, senior resident magistrates—while 163 are lay magistrates, consisting of 101 second grade magistrates and 62 first grade magistrates.[69]

According to the Courts Act, the civil jurisdiction of the highest ranking magistrate's courts, which are called chief resident magistrates' courts, extends to matters in which the amount in dispute does not exceed K50 000. The civil jurisdiction of the highest lay magistrates' courts, which are called the first grade magistrates' courts, is limited to matters in which the amount

64 Constitution, 1994, section 108(1).

65 Constitution, 1994, section 108(2).

66 Courts Act, 1958 (Act 1 of 1958), Chapter 3:02, *Laws of Malawi*.

67 Interview with Lorex Kapanga, Chief Human Resources Manager, Judiciary, 2 June 2006.

68 Children and Young Persons Act, 1969 (Act 7 of 1969), Chapter 26:03, *Laws of Malawi*, section 7(1) (2).

69 Interview with Lorex Kapanga, Chief Human Resources Manager, Judiciary, 2 June 2006.

in dispute does not exceed K40 000. In relation to criminal matters, resident and first grade magistrates may try any cases except those of murder, manslaughter and treason, and may pass any sentence, other than those of death or imprisonment, that exceeds fourteen years. Below the level of the first grade magistrates' courts are second, third and fourth grade magistrates' courts, whose jurisdiction is limited, in civil cases, to disputes whose subject matter does not exceed K30 000, K20 000 and K10 000 respectively. In criminal matters, the sentencing powers of second, third and fourth grade magistrates are limited to sentences that do not exceed five years or K1 000 fine, one year or K500 fine and six months or K250 fine respectively.

Specialised courts

Specialised courts are of two categories. The first category is composed of courts that are provided for by the Constitution. Section 110(2) provides for an Industrial Relations Court, subordinate to the High Court, with jurisdiction over cases that involve disputes between employers and employees relating to their contracts of employment. Normally, the Industrial Relations Court sits in Blantyre and Lilongwe, although the chairperson and the deputy chairperson periodically also sit in Chikwawa, Mulanje and Mzuzu. Section 110(3) of the Constitution also grants Parliament the power to enact laws that provide for the establishment of traditional or local courts whose mandate is to decide cases involving customary laws and some minor criminal offences. At the time of the writing of this report, Parliament had not passed the legislation envisaged by section 110(3) of the Constitution.

Other categories of specialised courts may be created by specific Acts of Parliament. Since 2004, there has been a move towards creating specialised courts in the areas of constitutional law and commercial law. In the area of constitutional law, an amendment to the Courts Act[70] effected in 2004 provides that every High Court matter which expressly and substantively relates to or concerns the interpretation or application of the provisions of the Constitution must be heard and disposed of by not fewer than three judges (rather than the usual one).[71] Although such sittings are colloquially referred to as 'constitutional courts', technically they are no different from other sittings of the High Court and have no distinct constitutional status. As is the case with appeals against decisions of the High Court in all other matters, those against judgments of the special panels of the High Court on constitutional matters lie to the Supreme Court of Appeal which, by virtue of section 104(2) of the Constitution, is the highest appellate court in all matters, including interpretation of the Constitution. The Supreme Court of Appeal does not have special panels to deal with constitutional matters and sits as it does in all other appeals. According to the Law Commission, some sections of the judiciary, civil society, academia and the political establishment have expressed the view that a permanent constitutional court should be established.[72] The immediate establishment of such a constitutional court would arguably be a welcome development, as it would, among other things, facilitate the consistent development of an indigenous constitutional jurisprudence. However, it is recommended that the Law

70 Courts Act, 1958 (Act 1 of 1958), Chapter 3:02, *Laws of Malawi*.

71 Courts (Amendment) Act, 2004 (Act 2 of 2004), section 9(2).

72 Malawi Law Commission, Constitution Review Programme Consultation Paper, pp.50-51, available at http://www.lawcom.mw/docs/consultationpaper.pdf, accessed 24 April 2006.

Commission should first undertake further analysis of the question in order to gather more evidence on the demand for such a court and to conduct a cost-benefit analysis of it in relation to demands in other areas of the judiciary.

With the support of the European Union (EU), the judiciary also plans to establish a specialised commercial court that will hear cases related to such matters as taxation, banking and trade. According to media reports quoting the registrar of the High Court and Supreme Court of Appeal, the planned commercial court will be allocated a total of six judges, with four based in Malawi's commercial capital, Blantyre, and the other two in the administrative capital, Lilongwe.[73] The proposed establishment of a commercial court appears to be largely driven by the government as part of its strategy to promote economic growth by, among other things, creating a conducive business climate in which commercial disputes are settled speedily.[74] The announcement of the proposal to establish the court was welcomed by representatives of the private commercial sector,[75] although there was no evidence that the private sector had publicly demanded the establishment of such a court prior to the announcement by the government.

The specialised courts that are currently operational include the Industrial Relations Court, which was established under the Labour Relations Act[76] with jurisdiction over labour disputes and any other disputes assigned to it by law.[77] Courts martial, established under the Defence Forces Act,[78] have jurisdiction to apply military law to members of the armed forces and, in very limited circumstances, to civilians who are employed in the service of the army when they are on active service.[79] Appeals against decisions of the Industrial Relations Court lie to the High Court[80] while those of courts martial lie to the Supreme Court of Appeal.[81]

Traditional courts

'Customary law' is recognised by the Constitution as an integral part of the law in Malawi,[82] though customary laws are not codified and there have been no calls to change this. The Constitution also states that 'Parliament may make provision for traditional or local courts pre-

73 See Arthur Chipenda, 'Commercial courts on,' *Nation Online*, Blantyre, 2 February 2006, available at http://www.nationmalawi.com/articles.asp?articleID=14977, accessed 2 February 2006, and 'Malawi to set up commercial court under EU assistance,' China View, Lilongwe, 31 January 2006, available at http://news.xinhuanet.com/english/2006-02/01/content_4124490.htm, accessed 1 February 2006.

74 See Bingu wa Mutharika, 'Delivering on Our Promises,' text of budget speech delivered at the opening of the 2005 Budget Session of the National Assembly, p.14, Lilongwe, 6 June 2005, available at http://www.sarpn.org.za/documents/d0001690/P2022-Malawi_Budget-speech_June2005.pdf, accessed 30 January 2006 and, International Monetary Fund, Malawi: Letter of Intent and Memorandum of Economic and Financial Policies, 18 July 2005, pp.5-7, available at http://www.imf.org/external/np/loi/2005/mwi/071805.pdf, accessed 24 April 2006.

75 See interview with the chief executive of the Malawi Confederation of Chambers of Commerce and Industry in 'Malawi to set up commercial court under EU assistance,' *China View*, Lilongwe, 31 January 2006, available at http://news.xinhuanet.com/english/2006-02/01/content_4124490.htm, accessed 1 February 2006.

76 Labour Relations Act, 1996 (Act 16 of 1996).

77 Ibid., section 64.

78 Defence Forces Act, 2004 (Act 11 of 2004).

79 Ibid., sections 93 and 238.

80 Labour Relations Act (Act 16 of 1996), section 65.

81 Defence Forces Act (Act 11 of 2004), section 141.

82 Constitution, 1994, sections 200 and 211.

sided over by lay persons or chiefs', with the jurisdiction of such courts limited 'exclusively to civil cases at customary law and such minor common law and statutory offences as prescribed by an Act of Parliament.'[83] To date, however, Parliament has not enacted legislation establishing such courts, which is one of the major shortfalls of the Malawian court system. One likely explanation for this failure is that there is little demand for formal traditional or local courts since most communities have informal traditional fora to which they have recourse for the settlement of disputes. The Law Commission is currently in the process of conducting consultations with a view to recommending the enactment of such legislation[84] and it appears that the Commission will recommend an amended version of the Traditional Courts Act of 1962.[85] (For further discussion on traditional courts, see Chapter 6, section H.)

The fate of traditional courts has evolved over time. Historically, Malawian courts have been governed by two separate bodies of law. In the pre-colonial period, traditional courts were established by, and applied, the various unwritten customary laws of the different communities. During the colonial period, the formal judicial system consisted of two types of courts: those modelled on the English system, which applied statutory laws, common law and principles of equity; and traditional courts, which were given statutory recognition and applied unwritten customary law and a limited range of statutes dealing with minor criminal offences.[86] These traditional courts were recognised after independence by the 1962 Traditional Courts Act.[87]

During the 1970s, under the strongly traditionalist rule of President Banda, successive amendments to this act extended the criminal jurisdiction of traditional courts and authorised the three regional traditional courts to try capital offences, including murder, rape and treason.[88] Below the regional traditional courts were several lower levels of traditional courts with varying jurisdictions to hear disputes based on customary law. However, the regional traditional courts soon became the court of choice for serious criminal charges brought against political opponents to then life-President Banda. Guarantees of fair trial previously attached to traditional courts under the 1962 Act were removed, including the right to legal representation and the right to appeal to the High Court.[89] The National Traditional Appeal Court was declared to be the final

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83 Constitution, 1994, section 110(3).

84 According to the Law Commission, the task of reviewing the Traditional Courts Act has been assigned to its Criminal Justice Reform Commission, see Malawi Law Commission, *Law Reform*, at http://www.sdnp.org.mw/~fred/law/reform.html, accessed 19 January 2006; and Malawi Law Commission, *Law Commission Report in the Workshop on the Review of the Traditional Courts Act (Chpater 3:03)*, Lilongwe, 2004.

85 See Malawi Law Commission, *Work Programme 2005*, Lilongwe, 2005, available at http://www.lawcom.mw, accessed 20 December 2005. Despite the indefinite suspension of the National Traditional Appeal Court and the Regional Traditional Courts and the conversion of lower-level traditional courts established by the Traditional Courts Act, the act itself was never repealed. The act, therefore, remains in force although none of the courts it provides for is operational.

86 Generally, see Louis Chimango, 'Tradition and the Traditional Courts of Malawi,' *Comparative and International Law Journal of Southern Africa*, Vol. 10, Pretoria, 1977, p.39.

87 Traditional Courts Act, 1962 (Act 8 of 1962), Chapter 3:03, *Laws of Malawi*.

88 See MCC Mkandawire, 'The Malawi Legal System,' *Journal of the Commonwealth Magistrates and Judges Association*, Vol. 15, No. 1, 2003, London, p.33.

89 For a concise discussion of the impact of the operation of traditional courts on fair trial, see Amnesty International, *Malawi: Preserving the one-party state. Human rights violations and the referendum*, 17 May 1993, available at http://www.amnestyusa.org/countries/malawi/document.do?id=8967CE00D30AC98C802569A600602E5A, accessed 19 January 2006.

court of appeal for cases in traditional courts.[90] Separation of powers was undermined by the fact that the traditional courts operated under the direct control of the executive branch of government: their presiding officers were appointed by the Minister of Justice who also had the power to dismiss or suspend any of them if it appeared to him or her that the member had abused his power, was unworthy or incapable of exercising his or her power justly, or there was 'other sufficient reason.'[91] The judgments of such courts could be varied or set aside by an official of the Ministry of Justice called the chief traditional courts commissioner.[92] The traditional courts system was part of the Ministry of Justice, while the 'English' system was not part of the executive branch: the two systems were structurally and operationally independent of each other—which meant that the 'English' system was at least partially shielded from the politicisation of the traditional court system under the Banda regime.

The next reform of the courts was effected during the political transition which culminated in the adoption of the 1994 Constitution. The forum through which the government and opposition pressure groups negotiated the transition to a democratic order resolved that the operations of the regional traditional courts and the National Traditional Appeal Court required review. Pending a broader statutory reform, the attorney-general suspended the operation of the four courts in October 1993. This was possible because the courts were established by ministerial warrant authorised by the Traditional Courts Act and did not require amendment of the act itself.[93] For all practical purposes, the indefinite suspension amounted to the abolition of the courts.[94] When the new Constitution came into force on 18 May 1994, it established a judicial structure which empowered magistrates' courts to hear cases involving customary law, with appeal lying to the High Court and the Supreme Court of Appeal.[95] The Constitution transferred all matters pending before regional traditional courts and the National Traditional Appeal Court to the High Court or such subordinate court 'as the Registrar of the High Court shall direct.'[96] The chairpersons of the lower courts in the traditional court system were appointed as magistrates and the courts themselves were re-designated as magistrates' courts and integrated into the formal judicial structure.[97] The former traditional courts are now indistinguishable from other magistrates' courts and are governed by the Courts Act, though the differences from the former traditional courts seem not to have been fully internalised by the public nor by court personnel.

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90 See MCC Mkandawire, 'The Malawi Legal System,' *Journal of the Commonwealth Magistrates and Judges Association*, Vol. 15, No. 1, 2003, London.

91 Traditional Courts Act, 1962 (Act 8 of 1962) Chapter 3:03, *Laws of Malawi*, sections 4 and 5.

92 Ibid, section 32(1)(d) and (e).

93 See Traditional Courts Act, 1962 (Act 8 of 1962), section 3.

94 Interview with Judge Edward Twea, registrar of the High Court and Supreme Court at the time, 2 June 2006.

95 For example, see the case of *Magombo v Magombo*, Civil Cause 23 of 2002, available at http://www.judiciary.mw/civil/Rose_Magombo_Luka_Magombo.htm, accessed 19 January 2006, in which a person who was dissatisfied with the dissolution of her customary marriage by a magistrates' court successfully appealed against that court's decision to the High Court. Another example of this in the case of *Gondwe v Gondwe*, Civil Cause 26 of 2002; the judgment is available at http://www.judiciary.mw/civil/Gertrude_Gondwe_Matiasi_Gondwe.htm, accessed 19 January 2006.

96 Constitution, 1994, section 204(1).

97 Heiko Meinhardt and Nandini Patel, *Malawi's Process of Democratic Transition: An Analysis of Political Developments Between 1990 and 2003*, Konrad Adenauer Foundation, Lilongwe, 2003, p.21, available at http://www.kas.de/db_files/dokumente/7_dokument_dok_pdf_4156_1.pdf, accessed 11 January 2006.

The High Court has in several cases reversed decisions that had been made by magistrates' courts which assumed that they retained the jurisdiction that they had had in their past life as formal traditional courts established by the Traditional Courts Act.[98]

c. Reform of the legal sector

The Constitution sets out clear roles for the three main branches of government in the development and adoption of laws. The executive is responsible for initiating and implementing laws, the legislature has the power to enact them, while their interpretation, protection and enforcement is the preserve of the judiciary.[99] The Constitution also allows members of Parliament to initiate legislation in the form of private members' bills[100] but the executive has initiated all legislation in recent memory.

Until 1994, the cabinet alone led law reform. The Constitution of 1994 changed this situation when it established a permanent Law Commission with a mandate to review the laws and propose reforms.

Civil society has been a driving force for reforms related to justice and the rule of law. Advocacy and lobbying by various local and international non-governmental organisations (NGOs) have made a significant contribution to various reforms in these two areas. Several organisations' contributions have been notable. Penal Reform International has been instrumental in the reform of the Prisons Act (Act 6 of 1955).[101] The Malawi Chapter of the Women and Law in Southern Africa Research and Educational Trust has lobbied for reforms to improve gender equality in the administration of justice, including the amendment of the Wills and Inheritance Act to protect the property rights of widows[102] and for the enactment of the Prevention of Domestic Violence Act (finally succeeding in 2006).[103] The Federation of People with Disabilities of Malawi has advocated successfully for the enactment of legislation protecting the rights of people with disabilities;[104] and the Malawi chapter of the Media Institute of Southern Africa has campaigned for the introduction of freedom-of-information legislation.[105]

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98 Cases since 2000 include *Nkwatawamba v Gilo,* Civil Appeal 44 of 2004; *Nusa v Fatchi,* Civil Appeal 49 of 2003; *Soya v Keyala,* Civil Cause 51 of 2002; *Dawa v July,* Civil Appeal 36 of 2002.

99 Constitution, 1994, section 7, 8 and 9.

100 Ibid., section 66(2)(c).

101 See Open Society Justice Initiative, *Penal Reform International: Malawi Programme*, 2003, available at http://www.justiceinitiative.org/db/resource2?res_id=102062, accessed 10 December 2005.

102 See Women and Law in Southern Africa Research and Education Trust, *In Search of Justice: Women and the Administration of Justice in Malawi*, Dzuka Publishing, Blantyre, 2000. Due in part to the efforts of the Trust, the Wills and Inheritance Act was amended in 1998 by the Wills and Inheritance (Amendment) Act, 1998 (Act 22 of 1998) to make it a criminal offence for any person to dispossess a widow or widower of her or his rightful inheritance. See some discussion of the amendment in Naomi Ngwira, Garton Kamchedzera and Linda Semu, *Malawi Strategic Country Gender Assessment*, Vol. 1, Main Report, presented to the World Bank and UNDP, June 2003, p. 44, available at http://siteresources.worldbank.org/EXTAFRREGTOPGENDER/Resources/MalawiSCGA.pdf, accessed 9 January 2006.

103 Act 5 of 2006. Telephone interview with Seodi White, Executive Director, Women and Law in Southern Africa Research and Education Trust (Malawi Chapter), 12 July 2006. Other actors involved in advocating for the enactment of the Act included the NGO Gender Network: Telephone interview with Emma Kaliya, Chairperson, NGO Gender Network, 26 January 2006.

104 See National Democratic Institute, Civic Update, December 2005, p.5, available at http://www.accessdemocracy.org/library/1972_citpart_civicupdate_120105.pdf, accessed 28 December 2005.

105 See MISA Malawi, 'Recent activities,' undated, at http://www.misa.org/malawi.html, accessed 20 January 2006.

The Law Commission

The Constitution provides for the Law Commission, among other matters, 'to review and make recommendations regarding any matter pertaining to the laws of Malawi and their conformity with this Constitution and applicable international law' and make recommendations to the Minister of Justice.[106] An independent entity, the Law Commission consists of a permanent law commissioner and subordinate staff members. Presently the Law Commission is staffed by five law reform officers and 26 other staff members in the administration, human resources, accounts and secretarial sections.[107] The law commissioner is appointed by the president on recommendation of the Judicial Service Commission and must be a legal practitioner or a person who is qualified to be a judge.[108] By virtue of section 133(b) of the Constitution, the law commissioner in consultation with the Judicial Service Commission appoints other persons from time to time, to participate in the law reform process because they have expert knowledge of a matter of law under review by the Law Commission, or expert knowledge of other matters relating to legal issues under review.

Since its establishment, the commission has emerged as the most active institution in promoting law reform in Malawi. By October 2005, the commission had been actively engaged in research, consultations, preparation of issue papers and publication of reports with recommendations for the reform of specific laws governing the justice system including the Constitution (Act 20 of 1994),[109] the Legal Education and Legal Practitioners Act (Act 20 of 1965),[110] the Police Act (Act 26 of 1946),[111] the Criminal Procedure and Evidence Code (Act 36 of 1967)[112] and the Penal Code (Act 22 of 1929).[113] Section 135 of the Constitution empowers the law commissioner to submit his or her recommendations for law reform to the minister of justice, who may then introduce it as proposed legislation in Parliament. In practice, the commission also submits a copy of its recommendations to Parliament.

In spite of the productivity of the Law Commission, most of its recommendations have not been adopted by the executive and have, therefore, not been introduced in Parliament as proposed legislation. In effect, this means that, while the establishment of the Law Commission in 1994 expanded the arena for law reform, it did not fundamentally change the fact that the pace of law reform was ultimately dependent on the willingness and ability of both the executive and legislative branches of government to drive it forward. By October 2005, there was a

106 Constitution, 1994, section 135.

107 Information available at http://www.lawcom.mw, accessed 8 March 2006.

108 Constitution, 1994, section 133.

109 See Malawi Law Commission, Technical Review of the Constitution, Lilongwe, 1998, available at http://www.lawcom.mw, accessed 20 December 2005.

110 See Malawi Law Commission, *Law Commission Report No. 7: Report of the Law Commission on the Review of the Legal Education and Legal Practitioners Act*, Lilongwe, September 2002.

111 See Malawi Law Commission, *Law Commission Report No. 9: Report of the Law Commission on the Review of the Police Act*, Lilongwe, July 2003.

112 Malawi Law Commission, *Law Commission Report No. 10: Report of the Law Commission on the Review of the Criminal Procedure and Evidence Code*, Lilongwe, December 2003.

113 Malawi Law Commission, *Law Commission Report No. 2: Law Commission Report on the Review of the Penal Code*, Lilongwe, May 2000.

significant backlog of recommendations, some of which had been awaiting implementation for as long as five years. Some of the major outstanding reforms related to the administration of justice and promotion of the rule of law were those recommended in reports on the review of the Penal Code, the Criminal Procedure and Evidence Code and the Police Act of 1946. In all three reports, the Law Commission had drafted bills that incorporated the recommendations outlined in the reports. Other outstanding proposals were related to the Censorship and Control of Entertainments Act and the Wills and Inheritance Act.

There are a number of reasons why proposals for law reform submitted by the Law Commission might have not been implemented promptly or at all. The first is that the Law Commission is not the only source of proposals for law reform and its proposals have to compete for space on the government's legislative calendar with proposals from other sources. Significant examples of legislation that derived from proposals made by institutions other than the Law Commission include the Employment Act of 2000 (Act 6 of 2000), the Workers Compensation Act of 2000 (Act 7 of 2000), the Non-Governmental Organisations Act of 2001 (Act 3 of 2001), the Irrigation Act of 2001 (Act 16 of 2001), the Biosafety Act of 2002 (Act 13 of 2002), the Public Audit Act of 2003 (Act 6 of 2003), the Public Finance Management Act of 2003 (Act 7 of 2003), the Public Procurement Act of 2003 (Act 8 of 2003), the Science and Technology Act of 2003 (Act 17 of 2003), and the Prevention of Domestic Violence Act of 2006 (Act 5 of 2006).

There is no evidence to prove that any special interest groups were responsible for obstructing the process of enacting Law Commission proposals into law. In at least one case, however, such obstruction is likely to arise. This is in relation to proposals to reform laws related to marriage and divorce, which were presented by the Law Commission in November 2005 at a national consultative workshop which drew participants from a wide cross-section of Malawian society. One proposal made by the commission recommends that polygamous marriages should be outlawed in Malawi.[114] This proposal runs counter to the rights claimed by a large number of men in Malawi under either traditional customary laws or religious norms, such as those governing Muslims. In fact, at the consultative workshop, representatives of the Muslim Association of Malawi indicated their opposition to the abolition of polygamy suggested by the Law Commission.[115] It is too early to say whether special interest groups championing customary law rights will join this opposition and whether it will block the process of translating the proposals by the commission into law. However, it is reasonable to expect that, at the very least, the expression of such opposition is likely to make the cabinet and Parliament proceed with caution in implementing such a radical law reform, lest it alienate traditionalists and adherents of religious faiths that consider polygamy to be a right.

Although the Law Commission is a constitutional body that is supposed to be funded by the government, most of the resources for its programmes are provided by external donors. The commission's 2003–2006 budget indicates that the review of gender-related laws was funded by the United Nation's Children's Fund (UNICEF), the Canadian International Development Agency

114 See Malawi Law Commission, *Report of the Law Commission on the Review of the Laws on Marriage and Divorce*, Lilongwe, 30 December 2005.

115 Personal interview with Chikosa Silungwe, Assistant Chief Law Reform Officer, Malawi Law Commission, Coventry, 24 January 2006.

(CIDA), the Norwegian Agency for Development (NORAD) and Oxfam; and the review of legal aid and courts' legislation was funded by the Department for International Development (DFID) through the Malawi Safety, Security and Access to Justice (MASSAJ) project.[116] In addition, the funding for the review of the Army Act (Act 4 of 1965), the Legal Education and Practitioners Act (Act 20 of 1965) and legislation related to land law, child rights and juvenile justice was provided by the EU through its Rule of Law and Improvement of Justice Programme.[117] The government was also only able to provide part of the funding required for the review of the Constitution which the commission initiated during the 2005–2006 financial year, and the commission has had to rely on donors to meet the shortfall.[118]

The heavy reliance on donor funding by the Law Commission raises the question of the extent of its independence and freedom of action in determining its programmes. There is no evidence to suggest that various donors dictate the Law Commission's programme. However, given that donors have their own priorities, it is reasonable to assume that despite having a degree of operational independence, the Law Commission's programme broadly mirrors the agenda and priorities set by the donors who fund it. Such agendas and priorities may not necessarily reflect those of the government or people of Malawi. This could explain why proposals made by the Law Commission are trumped on the list of priorities on the legislative agenda by proposals for legislation that are more likely to serve the interests of the people as perceived by the executive and Parliament. These bodies tend to favour only legislation intended to facilitate the delivery of immediate social and economic benefits and thus stand the government in good stead with the electorate.

116 See Malawi Law Commission, *Donor Funding on Various Projects from 2003–2006*, Lilongwe, 2006.

117 See The European Commission's Delegation, *Development cooperation in Malawi*, undated, available at http://www.delmwi.cec.eu.int/en/eu_and_malawi/cooperation/cooperation2/economic_and_public_affairs.htm, accessed 20 December 2005.

118 Malawi Law Commission, *Public Announcement of Constitutional Review*, Lilongwe, 24 August 2005, available at http://www.lawcom.mw/, accessed 22 December 2005. Also see Zainah Liwanda, 'Financial hiccups rock constitutional review process,' *Nation Online*, Blantyre, 8 December 2005, available at http://www.nationmalawi.com/articles.asp?articleID=14013, accessed 9 December 2005.

Case study: Judicial review of the constitutionality of legislation

The Press Trust Reconstruction Act, 1995 (Act 5C of 1995)

Parliament enacted the Press Trust Reconstruction Act (Act 5C of 1995) with the aim of restructuring a trust which had been created in 1983 by the country's former president, Dr Kamuzu Banda, ostensibly for the benefit of the Malawi nation. After Malawi's transition from a one-party into a multi-party state, the new government that entered office in 1994 introduced in Parliament the Press Reconstruction Bill, which, among other things, required replacement of the Press Trust's trustees appointed by Dr Banda with a new set to be appointed in accordance with the act. The Press Reconstruction Bill was passed in the National Assembly when there were less than two-thirds of the total number of members of Parliament present, mainly due to a protest boycott of proceedings by the Malawi Congress Party, the party that Dr Banda had led for over thirty years.

After the bill had become law, the Malawi Congress Party and some of its senior officials successfully challenged its validity in the High Court[119] on a number of grounds. They argued that the act was invalid because the Constitution required a quorum of two-thirds of members of Parliament in order to transact business[120] and that the replacement of the original trustees was a violation of their property rights. On appeal by the attorney-general,[121] the Malawi Supreme Court reversed the decision of the High Court and declared the act to be valid. The Supreme Court said the Constitution required a two-thirds quorum only at the beginning of the sitting—which had been satisfied in this case—and not throughout the transaction of business; that trustees do not have property rights of their own in the property in question and, therefore, could not claim to have had their rights to property violated by their replacement by other trustees; and that, even if it could be argued that the legislation effected expropriation of property, such expropriation was for a public utility and was, therefore, covered by section 44(4) of the Constitution which permits expropriation if it is done for public utility, with adequate notice and appropriate compensation.

The reasoning of the Supreme Court of Appeal has attracted some critical comment.[122] Nevertheless, the case remains a milestone in Malawian jurisprudence because it is the only one to date in which a whole statute was declared invalid by the High Court.

SOURCES:

Malawi Congress Party v Attorney-General, Civil Cause 2074 of 1995.

Attorney-General v Malawi Congress Party, MSCA Civil Appeal 22 of 1996.

Jan Kees van Donge, 'The Fate of an African 'chaebol': Malawi's Press Corporation after Democratization,' *Journal of Modern African Studies*, Vol. 40, No. 4, p.651, Cambridge, 2002.

119 *Malawi Congress Party v Attorney-general*, Civil Cause 2074 of 1995.

120 The section was amended in 2001 and the quorum is now one-half plus one of the members of Parliament.

121 See the case of *Attorney-general v Malawi Congress Party*, MSCA, Civil Appeal 22 of 1996, http://www.judiciary.mw/civil/Attorney_MCP.htm, accessed 23 December 2005.

122 For example, see Clement Ng'ong'ola, 'Constitutional Protection of Property and Contemporary Land Problems in Southern Africa,' paper presented at the third workshop of the Pan-African Programme on Land and Resource Rights Network, Nairobi 18-20 November 2002, p.19, available at http://www.acts.or.ke/paplrr/docs/Nairobi%20draft%20Paper%20-%20Ngongola.pdf, accessed 21 June 2006.

2

Government respect for the law

Attempts in 2006 to impeach the president and remove him from office have focused attention upon the issue of respect for the law by both the executive and the legislative branches of government in Malawi. Since 1994, the legislative process in Parliament has generally respected international and constitutional standards. While government action has respected the Constitution and legislation in the area of economic management, political expediency has often resulted in violations of the law in other areas.

A. The legislative process

In general, laws have been adopted by processes that are consistent with international, constitutional or legal standards. The landmark case of a law that had been adopted by a process that was in violation of constitutional and other legal standards was the enactment of the Press Trust Reconstruction Act, as discussed in the case study on the judicial review of the constitutionality of legislation (page 50).

B. Executive compliance with the law

Since 1994, government respect for the Constitution, legislation, as well as regulations and internal procedures has been inconsistent. On the one hand, the trend from 2004 is increased compliance with the Constitution, legislation, regulations and procedures in the areas of fiscal management. Most of the national budget of Malawi is financed by external grants and loans and depends on the government fulfilling various conditionalities, particularly in the area of fiscal management. According to the Ministry of Finance, 'about 80 per cent of the capital budget is

annually financed by grants and concessional loans from donors and creditors'.[123] The incentive for the government to comply with laws that promote financial accountability is, therefore, very high; and government compliance in this area appears to have improved since 2004 when the current government came into office.[124] Provisions of the Constitution as well as in legislation such as the Public Audit Act,[125] the Public Finance Management Act,[126] and the Public Procurement Act[127] as well as financial regulations and internal written procedures are largely obeyed, and breaches by government functionaries in this area appear to be taken seriously.

In contrast, government obedience of the law is more inconsistent in the areas of social and political governance. While the government appears to obey most laws in this area, there are a number of significant instances in which government disobedience was not due to excusable lapses but premeditated actions. In 2002, a delegation of the International Bar Association (IBA) reported that they had found evidence of government disregard for those court orders which it considered to be politically unpopular.[128] The report cited the example of the president's disregard of a decision of the High Court delivered on 3 June 2002, which declared unconstitutional a presidential order of 28 May 2002 banning public demonstrations about a proposal to amend the Constitution to grant the president a third term of office. Subsequent to the decision of the court, the president was reported to have stated that he would ignore the injunction, which he called 'irresponsible and insensitive.'[129] On 22 October 2002, the High Court reiterated its ruling that the presidential decree was unconstitutional because it violated the right to freedom of assembly and demonstration guaranteed by the Constitution.[130] Despite this ruling, police still dispersed an anti third term demonstration.[131]

In February 2006, the government was accused of defying a court order that required it to restore the security and other entitlements of the vice-president after these had been withdrawn on the grounds that the vice-president had by implication resigned from his position.[132] On 23 June 2003, the government defied a court order when it decided to deport to the United States five persons suspected of links with terrorism. The five men, suspected of channelling money

123 See Malawi Government, Ministry of Finance: Debt and Aid Management Department, available at http://www.malawi.gov.mw/Finance/FinanceIndex.htm#Debt%20and%20Aid%20Management%20Department, accessed 21 June 2006.

124 Government of Malawi, *2005/2006 Budget Statement*, Lilongwe, 2005, available at http://www.sdnp.org.mw/~hosea/budgetstatements/, accessed 28 December 2005, and Alan Whitworth, *Malawi's recent fiscal performance and prospects*, November 2005, p.8, available at http://www.sarpn.org.za/documents/d0001778/Fiscal_Paper_2005.pdf, accessed 7 February 2006.

125 Public Audit Act, 2003 (Act 6 of 2003).

126 Public Finance Management Act, 2003 (Act 7 of 2003).

127 Public Procurement Act, 2003 (Act 8 of 2003).

128 International Bar Association, *Report of Visit to Malawi*, London, 2002, p.81, available at http://www.ibanet.org/images/downloads/HRIMalawiReport.pdf, accessed 15 October 2005.

129 British Broadcasting Corporation, 'Muluzi and judiciary clash over third term,' London, 4 June 2002, available at http://news.bbc.co.uk/1/hi/world/africa/2024844.stm, accessed 31 December 2005.

130 See the transcript of the judgment, *Malawi Law Society and Episcopal Conference of Malawi v The State, the President of Malawi, the Minister of Home Affairs and the Army Commander*, Civil Cause 78 of 2002, available at http://www.judiciary.mw/civil/Malawi_Law_State.htm, accessed 31 December 2005.

131 See Amnesty International, *Report 2003: Malawi*, undated, available at http://web.amnesty.org/report2003/mwi-summary-eng, accessed 31 December 2005.

132 See Zainah Liwanda, 'Chilumpha sues AG for contempt,' *Nation Online*, Blantyre, 16 February 2006, available at http://www.nationmalawi.com/articles.asp?articleID=15209, accessed on 18 February 2006.

to terrorist groups, were arrested by a joint Central Intelligence Agency (US)/Malawi National Intelligence Bureau team on 22 June 2003. They appealed their deportation order to the High Court which issued an injunction to block the deportation and ordered the government either to charge them with an offence within 48 hours or release them on bail. Instead, the government on 23 June 2003 decided to hand the suspects over to American officials, who flew them to an unknown destination out of the country.[133]

It seems that the willingness of the government to obey court decisions against it depends on the subject matter in question. In cases in which the government stands to lose politically from complying with adverse rulings, it has acted contrary to the letter of the ruling in question or its spirit. An example of outright defiance was the decision in January 2004 by the police to disperse an opposition rally even though the High Court had ruled that people were entitled to hold the rally by virtue of their right to freedom of assembly guaranteed by section 38 of the Constitution.[134]

In 2005, a number of political parties alleged that the president had committed violations of the Constitution sufficiently serious to warrant his impeachment and removal from office. The violations alleged by the parties included the removal from office of the director of public prosecutions. They also included the alleged use of public funds to promote the interests of his political party and meet the school expenses of his grandchildren; making unauthorised expenditure of public funds to purchase a luxury vehicle for his personal use; dismissal of the commander of the defence forces, the inspector-general of police and several government principal secretaries without following constitutional procedures; and establishing the posts of chief secretary for the public service and chief secretary to the president and cabinet to replace the post of secretary to the cabinet established by section 92(4) of the Constitution.[135] However, on 9 January 2006, the notice of the motion of impeachment was withdrawn by the member of Parliament who had submitted it on the grounds that '[i]mpeachment is not in the interests of Malawians ... it has not been wholly accepted by Malawians.'

In Malawi, political expedience is not the only possible explanation for government violations of the law. Some violations of the law appear to be the result of a lack of resources to fulfil legal obligations,[136] such as the constitutional requirement that the state meets the costs of legal representation for every person accused of an offence if this is required in the interests of justice.[137] The government fails to meet this obligation, in practice, because it has neither enough lawyers in the Legal Aid Department of the Ministry of Justice, nor sufficient funds with which

133 See communiqué by the International Commission of Jurists, *US and Malawi: Rule of Law Compromised in Fight against Terrorism*, 1 July 2003, available at http://www.icj.org/news.php3?id_article=2953&lang=en.

134 Brian Ligomeka, 'Malawi High Court convicts Blantyre mayor, senior policemen,' Afrol/Africa Eye News Service, 5 February 2004, available at http://afrol.com/Countries/Malawi/Headlines2001/02_05.htm, accessed 31 December 2005.

135 See Gideon Munthali, 'Grounds for Bingu's removal filed', *Nation Online*, Blantyre, 20 July 2005, available at http://www.geocities.com/mcpmalawi/impeach_president_mutharika.html, accessed 31 December 2005.

136 Interview with Ralph Kasambara, attorney-general of the Republic of Malawi, Blantyre, 29 August 2005.

137 Constitution, 1994, section 42(2)(f)(v) provides that every person accused of an offence is entitled to be represented by a legal practitioner of his or her choice or, 'where it is required in the interests of justice, to be provided with legal representation at the expense of the State.'

to pay lawyers in private practice to provide legal aid.[138] Lack of funds may also partly explain the failure of the government to meet its constitutional obligation to provide prisoners with adequate food and medical treatment.[139]

In other cases, government violations of the law have involved breaches of regulations and other subsidiary legislation by government functionaries acting in their official capacities. The ombudsman has observed, for example, that the most serious acts of maladministration in Malawi include those that result from the failure of public officials to adhere to laid-down procedures.[140] Such procedures are provided for in part in the Malawi Public Service Regulations, Public Service Commission Regulations and financial procedures laid out in treasury instructions.[141] The current trend appears to be towards more government respect for regulations and internal regulations. There appear to be two reasons for this. First, decisions of the ombudsman against procedural injustices are reported regularly in the local media.[142] This has a strong deterrent effect on government officials who are tempted to act contrary to regulations and internal procedures. Second, the ombudsman has sensitised some human resource managers in the government to the importance of following laws, regulations and procedures through a number of workshops and seminars.[143] This reduces the number of cases in which the government violates the law solely due to the failure of a functionary to appreciate the legal significance of regulations and internal procedures as well as the consequences of disobedience.

C. Sanctions for executive violation of the law

In theory, the law in Malawi provided for judicial review of executive decisions even before the enactment of the current Constitution in 1994. Much of the activity in this area, however, was influenced by the fact that Malawi was a one-party state with an authoritarian executive that was virtually above the law. Judicial review was, therefore, limited in practice to challenges against the decisions of minor government functionaries, particularly police officers who had custody of criminal suspects. The 1994 Constitution expanded the arena of judicial review by providing unequivocally in section 108 that the High Court has jurisdiction 'to review any law and any

138 See Chapter 5, section C of this report, on legal representation.

139 Constitution, 1994, section 42(1)(b), provides that every person who is detained, including every sentenced prisoner, has the right 'to be detained under conditions consistent with human dignity, which shall include at least the provision of reading and writing materials, adequate nutrition and medical treatment at the expense of the State.'

140 Office of the Ombudsman, *Guide to Good Administrative Practice*, Lilongwe, undated, p.3.

141 See United Nations Division for Public Administration and Development Management, *Republic of Malawi Public Administration Country Profile*, New York, 2004, p.13, available at http://www.unpan.org/dpepa/country%20profiles/Malawi.pdf, accessed 20 January 2006.

142 An evaluation of the Office of the Ombudsman conducted by the Danish Centre for Human Rights in 2000 found that Malawian newspapers carried at least 10 articles per month on the ombudsman, including reports of public enquiries, interviews with the ombudsman and opinion pieces on the office and its work. See Adam Stapleton and South Consulting, The Malawi Human Rights Resource Centre (MHRRC) Evaluation Report – Final Evaluation Report: Strengthening of the ombudsman institution in Malawi, Danish Centre for Human Rights, Copenhagen, 2000, p.72, footnote 10, available at http://www.human-rights.dk/upload/application/f5b03a41/malawimanus.pdf, accessed 2 January 2006.

143 According to the Draft Strategic Plan of the Office of the Ombudsman, the office conducts quarterly training workshops on good administrative practice for public service personnel, see *Draft Strategic Plan*, p.24. For an example of a training workshop see Frank Namangale, 'ombudsman trains education officials', *The Daily Times*, Blantyre, 13 January 2006, available at http://www.dailytimes.bppmw.com/article.asp?ArticleID=736, accessed 20 January 2006.

action or decision of the Government for conformity with [the] Constitution…' The political conditions also changed, in that the all-powerful one-party government was replaced by a multiparty regime based on the principles of liberal democracy, including accountability. By 2005, judicial review of executive action was routine, and included review of decisions and actions of the president and other high-ranking public officials.

Judicial review has been used effectively to reverse government decisions made at various levels, from a decision of the president to ban public demonstrations[144] to the decision of the minister of education to dismiss a teacher at a government school for giving an example to his class which the minister considered to be disparaging of the president,[145] to the decision of the principal secretary for commerce and industry to withdraw an import licence that had been granted to an applicant without giving him reasons for the withdrawal.[146] Decisions of the Parliament of an administrative nature have also been reviewed.[147]

The procedure for judicial review of administrative action is governed by rules that are prohibitively complex for most people who are not lawyers. Although judicial review is based on the Constitution, its detailed procedures are derived from the Rules of the Supreme Court of England and Wales, as amended from time to time. Order 53 of the Rules sets down requirements that are more difficult to meet than those requirements in procedures for civil actions that are commenced by writs of summons or criminal actions. First, judicial review effectively involves two sets of proceedings: the first for leave to seek judicial review, and the second the review itself. The former must be supported by a statement setting out the grounds on which the relief is sought and by affidavits verifying the facts relied on. At this stage, disclosure of documents and cross-examination of witnesses is not automatic and is only granted if it is in the interests of justice. These and other additional technicalities make judicial review overly technical and best undertaken by lawyers. This limits its utility for those who cannot afford lawyers. In Malawi, that constitutes the majority of people.

The Civil Procedure (Suits by or against Government or Public Officers) Act further limits the effectiveness of judicial review.[148] Section 10(1) prohibits courts from granting an injunction against the government (that is, an order that the government not carry out some specific action). Section 10(2) prohibits courts from granting any person who sues an individual public servant a remedy that would not have been granted had the government been sued directly. Thus, for example, one cannot obtain an injunction against a public officer if this is effectively an injunction against the government. Section 4 of the act also requires that any person who wants to sue the government or any government official must

144 *High Court, Malawi Law Society, Episcopal Conference of Malawi and Malawi Council of Churches v The State et al.,* Civil Cause 78 of 2002, available at http://www.judiciary.mw/civil/Malawi_Law_State.htm, accessed 31 December 2005.

145 *Mchawi v The Minister of Education, Science and Technology,* Civil Matter 82 of 1997.

146 *The State v The Principal Secretary for Commerce and Industry ex. p. Fatchi,* Civil Cause 168 of 2002, available at http://www.judiciary.mw/civil/M_Fatchi_PS_Commerce.htm, accessed 20 January 2006.

147 One landmark case of judicial review that reversed a decision made by Parliament was that of *Masauli v Attorney General*, Civil Cause 36 of 1997 in which the High Court invalidated a decision of the National Assembly to suspend state funding for certain political parties because they were boycotting a sitting of Parliament.

148 Civil Procedure (Suits by or against Government or Public Officers) Act, 1946 (Act 37 of 1946), Chapter 6:01, *Laws of Malawi*.

give the attorney-general two months notice.[149]

Arguably, the prohibition on injunctions against the government under section 10(1) of the Civil Procedure (Suits by or against Government or Public Officers) Act is inconsistent with section 41(3) of the Constitution, which grants every person the right to an effective legal remedy by a court of law or tribunal for acts violating the rights and freedoms granted to him by the Constitution or any other law. In some cases, the only effective remedy may be to stop the government from undertaking or continuing a particular action (for example, halting road construction while the lawfulness of the demolition of a house is considered). The courts have not taken one clear position on this point. On the one hand, they have upheld the law that prohibits issuing injunctions against the government, and have not considered it to be in violation of section 41(3) of the Constitution.[150] On the other hand, the High Court has issued injunctions against the government on a number of occasions. In the case of *The Administrator of the Estate of Dr H Kamuzu Banda v The Attorney-General,*[151] for example, the High Court issued an injunction prohibiting the government from taking certain steps to acquire a cattle ranch that had been granted to the country's former president by a traditional authority. In the view of the court, the injunction was necessary partly because it would secure property rights guaranteed by the Constitution. The High Court also issued an injunction in the case of *Peter von Knipps v Attorney-General*,[152] ordering the government not to deport the applicant or deny him re-entry into Malawi pending the hearing of his application for judicial review of the government's decision to declare him to be a prohibited immigrant. The court justified its decision on the grounds that the injunction was necessary to facilitate the applicant's effective enforcement of his constitutional rights, including the right to an effective remedy.

If remedies litigants obtain against the government are to be fully effective and comprehensive, they must include injunctions. It is, therefore, recommended that section 10(1) of the Civil Procedure (Suits by or against Government or Public Officers) Act should be repealed. Pending such repeal, it is important that the courts should take one clear position regarding whether the law prohibiting the issuing of injunctions against the government is consistent with the Constitution's guarantee of the right of every person to an effective legal remedy. The courts should not leave room for uncertainty on this question, because it has a significant bearing on the broader question of the effectiveness of judicial review of executive action.[153]

Immunity from criminal prosecution granted to certain public office holders also limits judicial review. The Constitution grants immunity from prosecution to particular public officials

149 In *Kamanga v The Attorney-General*, Civil Cause 948 of 1995, the High Court justified the statutory requirement for the two-month notice period partly on the ground that it accommodated delays in communication which were to be expected in Malawi where 'there are still vast areas where modern technology [for transmission of communication] is still underdeveloped.' Presumably this was referring to the communication which is necessary between the attorney-general's office and the government ministries and departments whose, or whose officials', actions or decisions were the subject of the suit.

150 See the cases of *Mhango v Attorney-General*, Civil Cause 338 of 1998, and *Alufandika v Mgwadira*, Civil Cause 154 of 1995.

151 *The Administrator of the Estate of Dr H Kamuzu Banda v The Attorney General,* Civil Cause 1839(A) of 1997.

152 *Peter von Knipps v Attorney Genera*l, Civil Cause 11 of 1998.

153 For a critical review of the section, see Boniface Chimpango, 'Section 10 of Civil Procedure (Suits by or against Government or Public Officers) Act: An Anachronism in Malawi's Legal System', *University of Malawi Students Law Journal*, Vol. 6, No. 1, Zomba, 2000, pp.66-95.

in certain circumstances. Section 91 of the Constitution grants the president immunity from being charged with any criminal offence, except on impeachment, during his or her term of office. In addition to the president, members of parliament are immune from any action or proceedings in any court, tribunal or body other than Parliament for anything they say in the course of proceedings in the National Assembly.[154] The Constitution also grants immunity to the ombudsman in relation to acts done in the course of the performance of his or her official functions.[155] Examples of other laws that grant immunity to public officers include the Corrupt Practices Act, which grants immunity to the director, deputy director or other officers of the Anti-Corruption Bureau for anything they do or fail to do in good faith in the exercise of his or her duty under the act[156] and the Registered Land Act,[157] which grants similar immunity to the chief land registrar and all other officers of land registries.

D. Commissions of inquiry

In common with other Commonwealth jurisdictions, Malawi provides for judges to be involved in oversight of executive action, not only in the courts by judicial review, but also through the appointment of ad hoc judicial commissions of inquiry into matters of national concern.

The president is given the right to establish commissions of inquiry by section 89(1)(g) of the 1994 Constitution, though the detail of their operation is still governed by the colonial-era Commissions of Inquiry Act.[158] Commissions of inquiry established by the president are financed by money from the national budget channelled through the Office of the President and Cabinet. In theory, the president can interfere with the provision of funding for any particular commission and render it ineffective. There is no evidence, however, that this has ever happened in practice. In general, there is no evidence to suggest that the executive has sought to influence the findings of any commission of inquiry. The main use of such commissions of inquiry has been to respond to public demands that matters of political controversy be thoroughly investigated. Since 1994, the president has appointed a number of such commissions, including commissions that investigated the police assassination of three cabinet ministers and a member of parliament in 1983,[159] and a decision by the government to sanction the export of maize from the strategic grain reserve by the National Food Reserve Agency in the face of an impending

154 Constitution, 1994, section 60(1).

155 Ibid., section 125(c).

156 Corrupt Practices Act, 1995 (Act 18 of 1995), section 22, Chapter 7:04, *Laws of Malawi*.

157 Registered Land Act, 1967 (Act 6 of 1967), section 8, Chapter 58:01, *Laws of Malawi*.

158 Commissions of Inquiry Act, 1914 (Act 3 of 1914), Chapter 18:01, *Laws of Malawi*.

159 Although the report of the commission is not readily available, there are references to the work of the commission in other literature. For example, see United States Department of State, *Malawi Human Rights Practices*, 1994, Washington DC, February 1995, available at http://dosfan.lib.uic.edu/ERC/democracy/1994_hrp_report/94hrp_report_africa/Malawi.html, accessed 4 January 2006. The investigation by the commission also featured prominently as the basis for the prosecution of the country's former president and his alleged co-conspirators: see the transcript of the judgment of the Supreme Court of Appeal in the case of *The Director of Public Prosecutions v Dr Hastings Kamuzu Banda et al.*, MSCA Criminal Appeal 21 of 1995, available at http://www.judiciary.mw/criminal/MWANZA%20MURDER%20CASE%20SC.htm, accessed 4 January 2006.

country-wide food shortage in 2000.[160]

The effectiveness of these investigations is, however, limited by the degree to which the response to their findings is under the control of the executive. Reports of the findings and recommendations of presidential commissions of inquiry are submitted to the president, who has the discretion whether or not to release them to the public. The Commissions of Inquiry Act does not place any obligation on the president to publish reports of any commissions of inquiry he or she establishes. In some cases, the reports have been promptly published. For example, the report of the commission set up to investigate the sale of maize from the strategic grain reserve was submitted to the president on 29 August 2004 and was then released to the public within one month.[161] Another report into a matter of national interest which was also published after its presentation to the president was that into the suspicious deaths of three government ministers and one member of parliament in 1983, which was presented to the president in December 1994 and made public in early January 1995.[162] In practice, since 1994 reports of presidential commissions of inquiry have been published. However, since such publication is discretionary, there is no guarantee that these precedents will always be followed.

Reports of presidential commissions of inquiry have not been widely distributed and they have received the most exposure through extracts published in some media. None of the reports of presidential commissions of inquiry—nor, indeed, of any other internal investigations—are posted on the official Malawi government web site.[163] In fact, the only report of a presidential commission of inquiry that can be accessed online in its entirety is that of the commission on the strategic grain reserves posted by the Centre for Human Rights and Rehabilitation, a local human rights non-governmental organisation. [164]

In addition, there is no requirement under the Commissions of Inquiry Act for the president to respond publicly to the findings and recommendations made by commissions of inquiry, nor for the Parliament to debate such reports. Although judicial commissions of inquiry have played a useful role, their effectiveness could be greatly enhanced by amending the Commissions of

160 See Malawi Government, *Report of the Presidential Commission of Inquiry on Strategic Grain Reserves under the chairmanship of Khuze Kapeta*, CF, Blantyre, 24 August 2004, available at http://www.chrr.org.mw/downloads/Malawi%20Maize%20Scam%20Report%202002%5B1%5D.pdf, accessed 4 January 2006. In addition, others were set up to inquire into: land policy reform (Malawi Government, *The Presidential Commission of Inquiry on Land Policy Reform*, Lilongwe, March 1999, executive summary available at http://www.oxfam.org.uk/what_we_do/issues/livelihoods/landrights/downloads/mlwlpsum.rtf, accessed 25 April 2006); poor results in secondary school examinations in 1999 (Malunga, LB, *Presidential Commission of Inquiry into the Malawi School Certificate of Education (MSCE) Examination Results: A Report*, Lilongwe 2000); and the death in police custody in 2001 of a popular local musician who had been accused of authoring an allegedly seditious document (see Amnesty International, *Report 2002: Malawi*, available at http://web.amnesty.org/web/ar2002.nsf/afr/malawi!Open, accessed 25 April 2006).

161 See Centre for Human Rights and Rehabilitation, *Malawi Human Rights Report 2003-2004*, Lilongwe, 2005, available at http://www.chrr.org.mw/downloads/malawi_human_rights_report_2003_04.pdf, accessed 4 January 2006.

162 See account in Jan Kees van Donge, 'The Mwanza Trial as a Search for a Usable Malawian Past,' in Kings M Phiri and Kenneth R Ross (eds.), *Democratisation in Malawi: A Stocktaking,* Christian Literature Association in Malawi, Blantyre, 1998, p.21, at p.26. The article is also available at http://www.geocities.com/hastings_kamuzu_banda/mwanza_trial_malawi.html, accessed 5 January 2006.

163 See http://www.malawi.gov.mw/publications/index.publications.htm, accessed 5 January 2006.

164 See Malawi Government, *Report of the Presidential Commission of Inquiry on Strategic Grain Reserves under the Chairmanship of Khuze Kapeta*, CF, 24 August 2004, available at http://www.chrr.org.mw/downloads/Malawi%20Maize%20Scam%20Report%202002%5B1%5D.pdf, accessed 4 January 2006.

Inquiry Act to allow the commission greater operational independence, for example, by requiring that the Parliament fund them directly. The act should also be amended to require the president to publish promptly the reports of any commission of inquiry that he or she establishes promptly and to ensure that the findings and recommendations by any presidential commission of inquiry are formally laid before a relevant committee of Parliament for debate.

E. Amnesties and pardons

The Constitution and the Criminal Procedure and Evidence Code govern immunity from prosecution and early release from prison.[165] The government has never implemented a general amnesty, and political leaders or civil society organisations have never demanded such an amnesty. There is no evidence to suggest that any individuals have been granted immunity from prosecution in particular cases.

Section 89(2) of the 1994 Constitution empowers the president to pardon convicted offenders, grant stays of execution of sentence and reduce or remit sentences. All of the country's presidents have exercised this power to release prisoners during independence commemorations and other state occasions. The Constitution requires the president to make his or her decision on pardons in consultation with the Advisory Committee on the Granting of Pardons. Since 2000, there have been at least two occasions when the use of the presidential power of pardon has been criticised by civil society organisations. On one occasion, the criticism arose in relation to presidential pardon granted to a man who had been convicted of sexually abusing children and sentenced to twelve years' imprisonment.[166] The man, a British citizen who was teaching at a private school in Blantyre, had been found guilty of sexually abusing three boys after luring them away from a shelter for destitute children.[167] According to his lawyer, the pardon was granted on the basis of the man's remorse and good behaviour in prison and 'not because he was a British national.'[168] On the other hand, some non-governmental organisations expressed concern over the granting of the pardon, arguing that it might give the impression that the law favoured foreigners and that the victims were not consulted on the decision to grant the pardon as required by the Convention on the Rights of the Child.[169] The other controversial pardon was one granted in 2004 to a businessman who had been sentenced to five years' imprisonment after being convicted in 2003 of attempting to bribe a judge of the High Court.[170] The Malawi Law Society and some members of the public criticised the pardon, which was apparently granted due to the businessman's ill health in part, because it cast doubt

165 Criminal Procedure and Evidence Code, 1967 (Act 36 of 1967), Chapter 8:01, *Laws of Malawi*.

166 See *Hayles v Republic*, Criminal Appeal 8 of 2000.

167 See Brian Ligomeka, 'Briton gets five years and hard labour for sodomising boys,' *Lowveld Info*, Nelspruit, 23 January 2002, available at http://www.lowveldinfo.com/news/showstory.asp?story=1680, accessed 5 January 2006.

168 See 'Briton jailed for child sex wins pardon,' *Guardian Unlimited*, London, 21 May 2003, available at http://www.guardian.co.uk/child/story/0,7369,960114,00.html, accessed 5 January 2006.

169 See Centre for Social Concern, 'Civil society and churches,' *Malawi Press Review*, Lilongwe, May 2003, available at http://www.africamission-mafr.org/kanengomay03.htm, accessed 5 January 2006.

170 For the facts of the case, see the transcript of the High Court judgment in *The Republic v Suleman and Osman*, Criminal Case 144 of 2003, available at http://www.judiciary.mw/criminal/Republic%20_Suleman_and_another.htm, accessed 5 January 2006.

upon the seriousness of the government's fight against corruption.[171]

Most convicted prisoners whose sentences are reduced benefit not from presidential pardons, which depend on the occasional exercise of the president's discretion, but from the routine remission of sentences which is authorised by the law.[172]

171 See Francis Machado, 'Suleman's pardon stuns ACB,' *The Daily Times*, Blantyre, 5 July 2004, available at http://196.45.188.25/ruleoflaw/acb/news-25.html, accessed 5 January 2006, and Caroline Somanje, 'Law Society wary of Suleman's release,' *Malawi News*, Blantyre, 3–9 June 2004, available at http://196.45.188.25/ruleoflaw/acb/news-21.html, accessed 6 January 2006.

172 Prisons Act, 1955 (Act 6 of 1955), section 107, entitles any prisoner sentenced to more than one month of imprisonment to remission of one-third of his or her sentence for 'satisfactory industry and good conduct.'

Case study: Government disobedience of a court order

The State v The President, The Office of the Secretary and Cabinet, The Chief Secretary for the President and Cabinet, The Chief Secretary for the Public Service and The Attorney-General , Ex parte Dr. Cassim Chilumpha (High Court Miscellaneous Civil Cause 22 of 2006)

The president of Malawi, Bingu wa Mutharika, and the vice-president, Cassim Chilumpha, were elected to office in May 2004 on the same ticket sponsored by the United Democratic Front party (UDF). In February 2005, President Wa Mutharika resigned from the UDF while Vice-President Chilumpha remained a senior member of the party. The political divergence between the two damaged their working relationship to the point where the vice-president rarely attended cabinet meetings or state functions attended by the president.

In September 2005, the attorney-general applied for a High Court order to declare that the vice-president had, through his conduct, constructively resigned from his position. The attorney-general subsequently withdrew the case. But the president wrote the vice-president in February 2006, saying he had effectively accepted the vice-president's constructive resignation. Following this letter, the government withheld various benefits and privileges that the vice-president had been provided by virtue of his office, including vehicles, a security detail and a support staff.

The vice-president responded by applying for an injunction against the government action. The High Court granted the injunction and ordered the government to desist from construing and deciding that the applicant had of his own volition not performed his duties in accordance with his mandate as vice-president of the Republic of Malawi and therefore constructively resigned from the office of vice-president. The court also ordered the government to restore to the vice-president's personal security, administrative and support staff and his motor vehicles, and to stop withholding financial allocations, personal emoluments and all the other benefits and privileges to which he was entitled by virtue of being the vice-president.

The government chose not to challenge the injunction through judicial proceedings. Instead, notwithstanding the injunction, it did not immediately restore the vice-president's vehicles, his security detail or his personal staff. Lawyers for the vice-president commenced contempt proceedings in the High Court seeking commitment to prison of the president and various public officials involved in the defiance of the original court order (Miscellaneous Civil Cause 22 of 2006). Before the matter was concluded, however, the vice-president withdrew the case for contempt on the basis that the government had now largely complied with the order which it had earlier defied and in the interests of reconciliation. Within two months of the withdrawal of the contempt of court case, the vice-president was arrested and charged with treason. The government alleged that he had conspired with others to hire a person to assassinate the president. At the time of writing this report the vice-president remained in custody awaiting trial.

SOURCES:

'How Malawi's two top men fell out,' *BBC News*, 2 May 2006, http://news.bbc.co.uk/1/hi/world/africa/4965758.stm, accessed 10 May 2006.

'Malawian judge halts VP sacking,' *BBC News*, 10 February 2006, http://news.bbc.co.uk/2/hi/africa/4699912.stm, accessed 10 May 2006.

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Management of the justice system

Management of the justice sector has dramatically improved over the last ten years. Measures have been taken to strengthen the autonomous management of the judiciary, although control of the budget for the judiciary by the executive means that such autonomy is still limited. Strategic plans have been developed as a basis for action both at a sector-wide level and within specific institutions of the sector. The effectiveness of strategic planning is, however, hindered by a number of constraints, including inadequate funding for the justice sector, an insufficient number of well-trained administrative staff, and poor record-keeping. In its strategic plan, the judiciary has recognised many of these problems, but there is no evidence that they have been addressed.

A. Strategic planning and financial management

Planning in the justice sector

The past five years have seen a significant amount of planning in the justice sector. At the sector-wide level, this planning has been undertaken mainly within the framework of the Malawi Security, Safety and Access to Justice (MASSAJ) Programme. A Malawi government programme funded solely by the British Department for International Development (DFID), MASSAJ brings together a cross section of stakeholders in the justice sector. The programme's highest policy-making structure is the National Council for Safety and Justice (NCSJ) which is headed by the

country's vice-president.[173] Among other things, MASSAJ has almost completed the process of adopting a National Policy Framework which, in part, is intended to serve as a sector-wide plan for the justice sector. Similarly, the National Action Plan for the Promotion and Protection of Human Rights can also be said to be a sector-wide plan because it applies to the activities of all the key institutions in the sector, such as the Office of the Ombudsman, the Law Commission, the Malawi Law Society, the police, the director of public prosecutions, the judiciary, the prison service, Parliament, the Anti-Corruption Bureau, the Ministry of Justice and Constitutional Affairs and the Malawi Human Rights Commission.[174]

There was also strategic planning activity at the level of particular justice sector institutions in the period between 2000 and 2005. During this period, all the key institutions in the sector developed and adopted individual strategic plans. Among the state institutions, the police service and the Ministry of Home Affairs and Internal Security adopted strategic plans covering the period from 2002 to 2007; the Ministry of Justice and Constitutional Affairs adopted one for the period from 2004 to 2009 and the judiciary adopted a Malawi Judiciary Development Programme, based on its strategic plan, for the period between from 2003 and 2008. For their part, the Malawi Human Rights Commission and the Office of the Ombudsman adopted strategic plans covering the periods 2000 to 2004 and 2004 to 2009 respectively.[175] During the same period, strategic plans were also developed and adopted by non-governmental institutions active in the sector, including the Malawi Law Society which adopted its plan, covering the period 2003 to 2007, in March 2003,[176] and the Body of Case Handling Institutions which adopted a plan for 2004 to 2009 in 2004.[177]

Although some of the plans mention the mainstreaming of women and other vulnerable groups into institutional staffing and priorities, it is remarkable that this is not the case with the plans of some of the sector's key institutions. In the case of the judiciary for example, none of the 35 specific issues identified as requiring focus in the development of the judiciary make any explicit reference to women or other vulnerable groups, let alone to the need to mainstream them into staffing and priorities.[178] The same is true of the strategic plan of the Ministry of Justice and Constitutional Affairs.

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173 On MASSAJ generally, see Department for International Development – Malawi, *Malawi Safety, Security and Access to Justice Programme: Output-to-Purpose Review*, Lilongwe, September/October 2003, available at http://www.dfid.gov.uk/aboutdfid/foi/disclosures/malawi-justice-opr.pdf, accessed 6 January 2006; and Christopher Stone, Joel Miller, Monica Thornton and Jennifer Trone, *Supporting Security, Justice and Development: Lessons for a New Era, Vera Institute of Justice*, New York, 2005, p.4, available at http://www.dfid.gov.uk/pubs/files/security-justice-development.pdf, accessed 6 January 2006.

174 See Malawi Government, *National Action Plan for the Promotion and Protection of Human Rights 2004-2011*, Lilongwe, 2003, pp.114-121.

175 See Malawi Human Rights Commission, *Annual Report 2000*, p.31, available at http://www.malawihumanrightscommission.org/docs/ANNUAL%20REPORT%202000%20-%20MHRC.pdf, accessed 6 January 2006; and interview with Steve Kafumba, controller of legal services, Office of the Ombudsman, Blantyre, 15 October 2005. Kafumba also indicated that the ombudsman had recently developed a plan for the period 2004 to 2009.

176 See reference on the website of the Human Rights Institute of the International Bar Association, http://www.ibanet.org/humanrights/Africa.cfm, accessed 6 January 2006.

177 The Body of Case Handling Institutions is a grouping of public institutions which are involved in administering justice through the processing of cases related to alleged human rights violations, maladministration, corruption, electoral irregularities and violation of labour rights. Its membership includes the Judicial Service Commission, the Ombudsman, the Human Rights Commission, the Police Service and the Prison Service.

178 *National Action Plan for the Promotion and Protection of Human Rights 2004–2011*, pp.11-12.

In general, the effectiveness of planning for the sector appears to be significantly limited, particularly because plans do not necessarily form a basis for action for most institutions in the sector. The main problem is not a lack of plans but factors that constrain their implementation. Inadequacy of resources and unpredictability of their availability are cited as the major reasons for the failure of most institutions in the sector to implement their plans.[179] Implementation of plans within the justice sector is also hampered to some extent by the lack of political will to limit the discretionary power of public officials and senior civil servants.[180]

Another significant constraint on the effective implementation of plans for some institutions in the justice sector is their limited capacity to monitor and evaluate the implementation of plans. This is due to a number of factors, including, in the judiciary and other areas, a lack of personnel with the necessary qualifications and skills to undertake planning.[181] Institutions have failed to recognise the importance of planning, as is manifested in the fact that very few institutions in the sector have units or departments that focus on planning issues. The exceptions are the police service, which has a research and planning branch headed by an officer at the rank of commissioner, and the prison service, which has a planning unit headed by a superintendent.

Funding of the justice sector

In general, officials say funding for the justice sector is inadequate. The funding inadequacies probably reflect the fact that the justice sector does not appear to be high priority for the government despite its inclusion in the Poverty Reduction Strategy Paper.[182] The Malawi Judiciary Development Programme document sums up the problem concisely:

> [T]he justice sector in general is a low priority area for government. Approved budgets are much lower than estimated expenditure for the year would suggest. In addition, there is no guarantee that funds will be released from the treasury according to the approved budget. Funds are released on an irregular basis and with greatly varying amounts.[183]

In the 2005–2006 national budget for example, the approved budget figures for the major insti-

179 For examples, see David Nungu, Moses Mkandawire and Nellie Kabwazi, *A Social Audit into the Role and Performance of State Institutions in the Promotion of Human Rights and Constitutional Democracy in Malawi*, Church and Society Livingstonia Synod, Livingstonia, undated circa 2002, pp.11, 17 and 27 in relation to the Office of the Ombudsman and the Anti-Corruption Bureau. In relation to the Prison Service, see Malawi Prison Service, *The Department's Overview*, undated, available at http://www.mps.gov.mw/overview.htm, accessed 21 June 2006; and *Penal Reform International, Penal Reform in Africa: A Model for Good Prison Farm Management in Africa*, Siber Ink, Claremont, 2002, p.7, available at www.penalreform.org/download/prison_farms_eng.pdf, accessed 06 January 2006. In respect of the Ministry of Justice and Constitutional Affairs, see Ministry of Justice and Constitutional Affairs, *Strategic Plan 2004–2009,* Lilongwe, 2004, pp.16, 37 and 38, and Government of Malawi, *National Action Plan for the Promotion and Protection of Human Rights*, Lilongwe, 2003, pp.108-112.

180 Dick Durevall and Mattias Erlandsson, *Public Finance Management Reform in Malawi*, p.39, Sida, 2004, available at http://www.sida.se/shared/jsp/download.jsp?f=SIDA4483en_CER+2005-1+web.pdf&a=3406, accessed 26 April 2006.

181 See Dick Durevall and Mattias Erlandsson, *Public Finance Management Reform in Malawi*, p.11, Sida, 2004, available at http://www.sida.se/shared/jsp/download.jsp?f=SIDA4483en_CER+2005-1+web.pdf&a=3406, accessed 26 April 2006.

182 For example, see Department for International Development – Malawi, *Malawi Safety, Security and Access to Justice Programme: Output-to-Purpose Review*, Lilongwe, September–October 2003, p.27, available at http://www.dfid.gov.uk/aboutdfid/foi/disclosures/malawi-justice-opr.pdf, accessed 6 January 2006.

183 Malawi Judiciary, *Malawi Judiciary Development Programme*, Blantyre, 2003, p.31.

tutions of the justice sector were as shown in Table 3.1 below. The table includes figures for state residences and the office of the president and cabinet for purposes of comparison.

Table 3.1: Voted budget for selected justice sector institutions 2005/6[184]

Institution	**Amount voted** (Malawi Kwacha)	**US$ equivalent** (US$1=MK129.48, exchange rate on 30 January 2006)	**Percentage of total voted budget**
Office of the President and Cabinet	2001 750 000	15 459 917	3.15
Police Service	1 778 000 000	13 731 851	2.80
State Residences	505 000 000	3 900 216	0.80
Judiciary	476 761 965	3 682 128	0.70
Prison Service	319 050 000	2 464 087	0.50
Anti-Corruption Bureau	220 000 000	1 699 104	0.35
Human Rights Commission	210 900 000	1 634 836	0.33
Ministry of Justice Headquarters	84 600 000	65 338	0.13
Office of the Ombudsman	60 450 000	46 687	0.10
Law Commission	36 600 000	28 267	0.06
Registrar-General	28 950 000	22 359	0.05
Director of Public Prosecutions	24 550 000	18 961	0.04
Department of Legal Aid	23 050 000	17 802	0.04
Administrator-General	17 950 000	13 863	0.03

The figures in table 1 are indicative of the comparative funding priorities between the Presidency and justice sector institutions. It is quite telling that in the proposed 2004–2005 national budget, the government allocated almost the same amount of funding to state residences as it did to the Anti-Corruption Bureau, the Human Rights Commission and Ministry of Justice and Constitutional Affairs headquarters combined.[185]

Inadequacy in the funding of the justice sector must be understood in the context of the general problem of inadequacies in the funding of all public sector institutions. Nevertheless, a case can still be made for increasing justice sector funding even within the general limitations of the national budget. This view has been expressed by many, including a delegation of the IBA, which made this point in 2002 while acknowledging the general problem of public sector funding in Malawi. The IBA delegation recommended that the government commit itself to increasing the funding of legal aid, prosecution and legal education and training for students,

184 Based on figures in Malawi Government Budget, available at http://www.malawipublicfunding.org/budget/base.asp, accessed 26 January 2006.

185 See Malawi Economic Justice Network, *Response to the Proposed National Budget 2004/2005*, Lilongwe, 16 September 2004, Table 9, pp.17-18, available at http://www.internationalbudget.org/resources/howto/UDN04-05.pdf, accessed 20 January 2006.

lawyers and the judiciary.[186]

Inequitable distribution of resources within particular institutions compounds the problems of inadequate funding for the sector. For example, the judiciary tends to allocate the funding that it receives inequitably in favour of the High Court and at the expense of magistrates' courts.[187] The amount that is allocated to the justice sector in the national budget is determined by the executive with the approval of Parliament. Representatives of the various state institutions in the justice sector submit their requests to the Ministry of Finance, which then modifies the requests to fit within the national budget. Parliament has a decisive say on the amount of money allocated to the justice sector because under section 173(1)(b) of the 1994 Constitution, no government money may be withdrawn and used for any purpose without an act or a resolution of the National Assembly. In practice, the method in which funds are allocated to ministries on a monthly basis allows the executive to exercise control of funding for the justice sector even after the budget is passed. This system seeks to instil spending discipline in ministries but makes long-term planning difficult, particularly since the Ministry of Finance can vary the amounts disbursed.[188]

Pre-budget consultation

Civil society organisations are often invited to make inputs into the processes for budgeting for the government, including the justice sector. In the period between 2000 and 2005, the government has conducted pre-budget consultations with a wide range of stakeholders, including civil society organisations, particularly those with a special interest in economic matters such as the Malawi Economic Justice Network (MEJN).[189]

However, the information made available to civil society organisations is not released early enough or in sufficient detail to facilitate effective monitoring of expenditures.[190] Planning documents and budgets for the various institutions in the justice sector are not published widely. The information available is not detailed enough to give the breakdown of the budget by region and sector; within the justice sector for example, this information does not include the percentages allocated for salaries, court administration and specific core activities such as case-handling. Restrictions on access to information further limit civil society monitoring of the justice sector. Although section 37 of the 1994 Constitution entitles every person to have access to information held by the state, in practice, a wide range of statutes limit access to information held by the government. This position may improve if some civil society groups succeed in their current

186 International Bar Association, *Report of Visit to Malawi*, London, 2002, p.91, available at http://www.ibanet.org/images/downloads/HRIMalawiReport.pdf, accessed 12 October 2005.

187 Malawi Judiciary, *Malawi Judiciary Development Programme*, Blantyre, 2003, p.11.

188 Interview with Glyn Chimbamba, Deputy Chief Courts Administrator, Blantyre, 30 September 2005.

189 Adrian Fozzard and Chauncy Simwaka, *How, When and Why Does Poverty Get Budget Priority? Poverty Reduction Strategy and Public Expenditure in Malawi*, Case Study 4, Overseas Development Institute, London, May 2002, p.51, available at http://www.odi.org.uk/publications/wp166.pdf, accessed 30 January 2006.

190 For example, see observation by the Malawi Economic Justice Network in Malawi Economic Justice Network, *Comments on the proposed Malawi Budget 2001–2002: Report for Members of Parliament*, Lilongwe, 18 February 2002, p.4, available at http://www.sarpn.org.za/CountryPovertyPapers/Malawi/Feb02/MalawiBudget2002.pdf, accessed 30 January 2006.

efforts to lobby the government to enact freedom-of-information legislation.[191] In addition to the legal limitations, poor record-keeping in the justice sector also severely limits the amount of information that can be accessed by civil society organisations. As indicated later in this report, record-keeping in the sector is unsatisfactory.[192]

Budget management and auditing

The formal budget process[193] starts when a resource committee—consisting of representatives of the Ministry of Finance, the National Statistical Office, the Reserve Bank of Malawi and the Ministry of Economic Planning and Development—makes a forecast of economic growth and estimates the resources that will be available. The Ministry of Finance then conducts hearings during which ministries and departments present their goals, objectives and activities and indicate priorities. Next, the debt and aid section of the Ministry of Finance factors in aid in-flows through consultations with donors. The resource committee then determines sector allocations of resources and advises the ministries and departments of ceilings and available resources. Next, line ministries prepare their expenditure estimates in consultation with the Ministry of Finance. The ministry then holds consultations with civil society and the private sector before presenting the estimates to Parliament for approval. At the implementation stage, the determination of the allocation of resources to specific ministries is carried out by the Ministry of Finance's resource allocation committee.

In general, Malawi's financial auditing procedures are adequate to ensure accountability. Three Acts of Parliament passed in the period between 2000 and 2005 put in place strict financial procedures that apply to the custody, management and expenditure of public funds. The Public Audit Act,[194] the Public Finance Management Act[195] and the Public Procurement Act[196] apply to public institutions, including those in the justice sector. In addition to the requirements of the Public Audit Act, some institutions in the justice sector have within their founding statutes requirements for regular audits. In practice, audits of the justice sector have been detailed and, in some cases, have criticised financial mismanagement in institutions in the sector. However, the effectiveness of audits by the auditor-general has been limited by a number of factors that undermine the work of the office generally, including the absence of disciplinary action, follow-up investigations and prosecutions and inordinate delays in reporting caused in part by staff shortages.[197]

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191 See Media Institute of Southern Africa, MISA Malawi (NAMISA), 2005, available at http://www.misa.org/malawi.html, accessed 9 January 2006. A copy of the legislation proposed by the national chapter of the Media Institute of Southern Africa is available at http://www.humanrightsinitiative.org/programs/ai/rti/news/Draft%20MISA%20Malawi%20ATI%20Bill%20-%20Apr-04.pdf, accessed 22 June 2006.

192 See 'Court administration' on the next page.

193 This description of the process is based on Lise Rakner, Luke Mukubvu, Naomi Ngwira, Kimberly Smiddy, Aaron Schneider, *The Budget as Theatre – the Formal and Informal Institutional Makings of the Budget Process in Malawi*, 2004, p.11, available at http://www.odi.uk/pppg/cape/seminars/may04papers/Schneider_Political_Economy_Malawi.pdf, accessed 9 January 2006.

194 Public Audit Act, 2003 (Act 6 of 2003).

195 Public Finance Management Act, 2003 (Act 7 of 2003).

196 Public Procurement Act, 2003 (Act 8 of 2003).

197 See Dick Durevall and Mattias Erlandsson, *Public Finance Management Reform in Malawi*, pp. 34-36, Sida, 2004, available at http://www.sida.se/shared/jsp/download.jsp?f=SIDA4483en_CER+2005-1+web.pdf&a=3406, accessed 26 April 2006.

Most institutions in the justice sector are dependent on donors for their funding. This means that, in addition to the regular audit reports to the government, institutions in the sector also have to account directly to their various donors for the use of the funds that they provide. This poses a challenge to the institutions, because different donors have different reporting specifications. This may be partly addressed by the establishment of basket funding arrangements by which multiple donors pool their direct assistance to justice sector institutions and, in return, only require one report accounting for the pooled assistance. One basket funding arrangement currently operating in the sector involves NORAD and DFID assistance to the Office of the Ombudsman.[198] The necessity for institutions to report directly to donors is also likely to be reduced if donors adopt the budget support approach whereby they channel their funding for the sector through the national budget. In this set-up, state institutions in the justice sector will be funded mostly by the government and will, in turn, also only report back to the government to account for funds. Despite disadvantages it may have, direct budget support by donors has at least the benefit of consolidating reporting procedures.

B. Court administration

Despite the notable efforts to make the justice sector administratively autonomous, the executive branch's control of funding means that the judiciary is not immune from political influence through the budget process. Administration of the courts system in Malawi is further hindered by insufficient number of trained administrative staff and poor record-keeping.

Limited administrative autonomy

In practice, autonomous administration of the judiciary is still in its formative stages. The recently enacted Judicature Administration Act governs Malawi's system of court administration.[199] Prior to this act, the judiciary had inadequate administrative autonomy from the executive and its support staff was recruited, administered and disciplined centrally by the executive department responsible for human resource management in the public service. The Judicature Administration Act changed this by providing for a semi-autonomous court administration service. Headed by a chief courts administrator, the administration exclusively focuses on judicial administration and is accountable to the head of the judiciary. This provides court administration with a degree of formal independence that gives it some protection from inappropriate political influence.

However, freedom from such influence could be greatly increased by providing the courts with increased financial autonomy. Although the judiciary collects some of its own revenue by retaining some of the payments that are made into court, including fees paid for court processes,[200] most of its funding comes from executive subventions and its budget is centrally

198 See Greg Moran and Associates, *Institutional and Capacity Building of the Malawi Office of the Ombudsman Mid-Term Review*, Danish Institute for Human Rights, Copenhagen, 2003, p.4, available at http://www.humanrights.dk/upload/application/39096eco/rep._29_Ombudsman _final.pdf, accessed 9 January 2006.

199 Judicature Administration Act, 2000 (Act 11 of 2000).

200 This has been the case since the Judicature Administration Act, 2000 (Act 11 of 2000) came into force.

controlled by the Treasury.[201] The financial autonomy of the judiciary is one of the factors identified by the Malawi Poverty Reduction Strategy Paper as being a critical element of governance.[202] In its strategies for the period from 2003 to 2008, the judiciary plans to secure its financial independence by, among other things, establishing 'direct reporting by the chief justice to Parliament for all budgetary matters.'[203] The Malawi Judiciary Development Programme 2003–2008 does not elaborate the form that direct reporting by the Chief Justice to Parliament should entail. It is reasonable to expect that it would include submission to the Budget and Finance Committee of Parliament, in order to influence the committee as it performs its function of approving the national budget before it is debated by the full National Assembly.[204] Direct reporting would also probably require the judiciary to submit its expenditure reports directly to the Public Accounts Committee of Parliament for its scrutiny and approval.[205] The judiciary must, as a matter of urgency, make a submission to the Ministry of Finance and to Parliament, which sets out in detail what specific measures and reforms in the budget formulation and implementation process it considers necessary to secure its financial autonomy as envisaged in the Malawi Judiciary Development Programme 2003–2008.

Administrative staff

According to the Registrar of the High Court and Supreme Court of Appeal, the general effectiveness of administration and management of the judiciary must be strengthened.[206] The Malawi Judiciary Development Plan underscores the weakness of court administration by stating that there is little or no administrative support to the judiciary from its lower echelons and that service delivery by administrative staff is 'poor', due to insufficient training. The major cause for this is identified as the insufficiency of training of administrative staff.[207] In total the country has fewer than 2 000 court administrative staff.[208] As indicated earlier, the judiciary acknowledges that it has no human resource development plan and, even though the publicly-funded Staff Development Institute offers training to judiciary staff, the training is offered mainly to judicial officers and not administrative personnel. In any case, training activities tend to be 'ad hoc and donor-driven.' [209] The judiciary plans to address the shortage of trained court administrative personnel before 2008 by rationalising the allocation of available personnel to various courts and by implementing a training strategy and continuing career development for both judicial and court

201 Malawi Judiciary, *Malawi Judiciary Development Programme*, Blantyre, 2003, p.11.

202 Malawi Government, *Poverty Reduction Strategy Paper*, Lilongwe, 2002, p.30, available at http://www.delmwi.cec.eu.int/en/Malawi_PRSP.pdf, accessed 9 January 2006.

203 Malawi Judiciary, *Malawi Judiciary Development Programme 2003–2008*, Blantyre, 2003, p.18.

204 For a critical discussion of the role of parliamentary committees in the budget formulation and oversight process generally, see Lise Rakner, Luke Mukubvu, Naomi Ngwira, Kimberly Smiddy and Aaron Schneider, *The Budget as Theatre – the Formal and Informal Institutional Makings of the Budget Process in Malawi*, 2004, p.11, available at http://www.odi.uk/pppg/cape/seminars/may04papers/Schneider_Political_Economy_Malawi.pdf, accessed 9 January 2006.

205 Ibid., p.16.

206 Interview with Sylvester Kalembera, registrar of the High Court and Supreme Court of Appeal, Blantyre, 30 September 2005.

207 Malawi Judiciary, *Malawi Judiciary Development Programme 2003–2008*, Blantyre, 2003, p.11.

208 Interview with Glyn Chimbamba, deputy chief courts administrator, Blantyre, 30 September 2005.

209 Malawi Judiciary, *Malawi Judiciary Development Programme 2003–2008*, Blantyre, 2003, p.11.

administrative officers.[210] The judiciary also envisages establishing a Judicial Training Institute to meet the needs of both judicial and administrative staff. The importance of such an institution for judicial development cannot be overemphasised, and the Judicial Training Institute should be created as a matter of urgency.

Most of the time, court administrative and support staff are paid regularly. However, their salary levels are generally inadequate, particularly at the lower levels of the hierarchy. Under terms of conditions adopted by the judiciary in 2003, the lowest paid grade of judicial support staff is that of court marshal grade SC iv, whose starting salary is K32,550 (US$251.39) per annum.[211] Following a revision of civil service salaries in 2006, basic salaries of lower level staff in the judiciary are beneath those of civil servants at comparable levels. Thus, while the lowest salary in the judiciary is K32, 550 (US$251.39) per annum, the lowest salary in the civil service is K61 560.

The judiciary has an internal disciplinary mechanism through which allegations of corruption or other misbehaviour by court administrative staff may be addressed. The chief courts administrator is responsible for disciplining court administrative staff, although this is done through a committee. However, the judiciary itself has acknowledged that its internal disciplinary system is ineffective.[212]

Record-keeping

The judiciary considers a general lack of proper record-keeping to be one of its significant weaknesses:[213]

> [T]he management of information in the judiciary is very poor. Often, in courts and administrative units, information is maintained manually in records that are labour intensive. Files, registers and case records are neither accurate nor secure. Consequently, incorrect data is collected and management decisions and cases are delayed and/or made from an uninformed position.[214]

Although the sector experienced rapid computerisation in the period between 2000 and 2005, most records are still generated, stored, processed and retrieved manually. This adversely affects the efficiency of the institutions and makes it difficult to generate information that can facilitate monitoring and evaluation of the implementation of plans.

The fact that records are not secure means that their confidentiality cannot be guaranteed. In addition, the inaccuracy of the records makes it difficult for a party to find out easily at what stage his or her case is. The judiciary has plans to improve its record-keeping by, among other things, conducting a physical count of case files and reconciling them with registers, training court clerks in records management; providing court recording equipment in selected courts,

210 Ibid., p.17.

211 E-mail communication with Thomson Ligowe, Assistant Registrar of High Court, Lilongwe, 25 January 2006.

212 Malawi Judiciary, *Malawi Judiciary Development Programme 2003–2008*, Blantyre, 2003, p.10.

213 Malawi Judiciary, *Strategic Plan*, Blantyre, undated, p.9.

214 Ibid., p.12.

improving supervision of court registries, developing the recording and transcribing system, and developing a judiciary database and management information system.[215] Implementation of the plan had been scheduled to start in 2003 and to be completed by 2007 at the latest.[216] However, by mid-2006, most of the activities had not been completed, and it appeared unlikely that the plan would be implemented within the envisaged timeframe. While it is commendable that the judiciary recognises the critical importance of good record-keeping, it is important that it urgently develop a realistic strategy for implementation of plans to address current shortcomings in the area. Given the failure in the past to achieve results within the intended timeframe, any newly proposed implementation plan must be informed by a realistic and honest assessment of the reasons for the past failure, and must incorporate a mechanism for monitoring and evaluating progress. The plan must also explore ways in which it can draw on resources from cross-sector government policies in the areas of information and communication technology.[217]

Court facilities and physical conditions

Physical conditions and facilities at courts are unsatisfactory. Most court buildings are in a poor state of repair. The High Court and the Supreme Court of Appeal in Blantyre are housed in buildings that are old and poorly maintained and furnished. Toilet facilities for the public are in a state of almost total disrepair. The High Court building in Lilongwe is also poorly maintained. Only the High Court premises in Mzuzu are relatively new and in a reasonable state of repair.

In general, the judiciary has admitted that poor physical infrastructure is a significant problem that requires a strategic response, and has included in its development programme plans to rehabilitate and build court centres, as well as to establish building maintenance schemes.[218]

c. Availability of legislation and jurisprudence

Legislation

Once any piece of legislation has been passed, it is published in the *Government Gazette*, which any person or institution can subscribe to receive from the Government Printer upon the payment of a fee of K6 500 (US$50) per annum. Occasionally, the legislation is incorporated into the collection of the country's legislation, which is published as a set of ten volumes entitled *Laws of Malawi*. These may be purchased at K10 000 (US$77) from the Ministry of Justice and Constitutional Affairs headquarters in Lilongwe. Copies of individual acts of Parliament can also be purchased from the Government Printer in Zomba. In practice, only the higher-ranking staff of the justice system have ready access to the full set of the *Laws of Malawi* or copies of the *Government Gazette*. During visits to premises of a cross-section of justice sector institutions, including the national headquarters of the police service,[219] Zomba Central Prison,[220] the

215 Malawi Judiciary, *Malawi Judiciary Development Programme 2003–2008*, Blantyre, 2003, pp.24-25.

216 Ibid., pp.36-39.

217 See Malawi Government, *Malawi ICT for Development (ICT4D) Policy*, December 2005, available at http://www.malawi.gov.mw/publications/nationalICT4DPolicy.htm, accessed 26 April 2006.

218 Ibid., pp.16 and 18.

219 Visited 8 September 2005.

220 Visited 27 September 2005.

Ministry of Justice and Constitutional Affairs headquarters,[221] the Office of the Ombudsman, [222] the Malawi Human Rights Commission[223] and magistrates' courts in Lilongwe,[224] the researcher for this report observed that, while most senior staff in these institutions had ready access to the full set of the *Laws of Malawi*, those at lower ranks did not. In the judiciary, for example, only judges of the High Court and Supreme Court of Appeal and senior professional magistrates had full sets of the *Laws of Malawi* in their offices. In Lilongwe, the country's capital city, the researcher found an office shared by two resident magistrates which had virtually no statutes, law reports or textbooks.[225] Although the magistrates indicated that they borrowed copies of legislation from judges of the High Court whose offices are within walking distance of the premises of the magistrates' court, this is not satisfactory, and is only possible where magistrates' courts are close to one of the locations of the High Court.

Most mid to low level staff members of justice institutions gain access to texts of legislation only by borrowing copies from their senior colleagues or their institutions' libraries where these are available. However, library facilities in justice sector institutions are too few and too poorly resourced to be able to meet the demand for access to legal texts by staff of the institutions and others. The judiciary has a library only in Blantyre, and most magistrates, particularly in remote rural areas, do not have access to most legislative texts because they are located too far away from both the library in Blantyre and the offices of judges in Blantyre, Lilongwe and Mzuzu.[226] In general, library facilities in the other justice sector institutions are non-existent or do not hold adequate numbers of copies of texts of legislation that are up to date. Most mid- and low-level staff in the justice sector also cannot afford to purchase copies of legislation themselves because those that are offered for sale to the public are priced beyond their reach. For example, the Government Printer in Zomba sells a copy of the Constitution for K500 (US$3.86) and copies of the Penal Code and the Criminal Procedure and Evidence Code for K350 (US$2.70) each.[227] Malawians live on less than the equivalent of US$1.00 per day.

A number of lawyers and magistrates indicated that it was not easy to follow amendments to the law or to be confident that they were using the correct text of current legislation.[228] Some of them were not sure, for example, whether the Wills and Inheritance Act[229] was ever amended to criminalise the dispossession of widows and widowers of their rightful property by relatives

221 Visited 5 September 2005.

222 Visited 30 May 2005.

223 Visited 1 June 2005.

224 Visited 9 September 2005.

225 This was observed during a visit to the offices of senior resident magistrates Mzondi Mvula and Vikochi Ndovi in Lilongwe on 9 September 2005.

226 Interview with Sylvester Kalembera, registrar of the High Court and Supreme Court of Appeal, 30 September 2005. According to the registrar, the judiciary has sought to alleviate the problem, at least in part, by supplying district courts with copies of the legislation which relate most directly to their caseloads; in criminal cases, for example, the courts have been provided with copies of legislation which relate to the offences that are prevalent in the area of jurisdiction of particular courts.

227 Telephone interview with staff at the Government Printer, Zomba, 24 January 2006.

228 Interviews with lawyers in private practice, Chrispine Sibande and Gift Nankhuni, and senior resident magistrates Mzondi Mvula and Vikochi Ndovi, Lilongwe, 9 September 2005.

229 Wills and Inheritance Act, 1967 (Act 25 of 1967), Chapter 10:02.

of the deceased spouse.[230] They attributed their lack of certainty about amendments to the law to the irregularity of law revision by the Ministry of Justice, and the failure of law firms and the judiciary to acquire copies of amendments in a regular and timely manner in sufficient numbers to enable access by all staff.

Jurisprudence

Case law is not easily available to justice system staff. In 2002, the IBA observed that 'judges do not have access to comprehensive Malawian jurisprudence, and as such the development of Malawi's own constitutional and common law principles is compromised.'[231] This situation remains unchanged.

Reports of judgments of the High Court and Supreme Court of Appeal are published by the judiciary in the *Malawi Law Reports Series* (formerly called the *Africa Law Reports Malawi Series*). The published reports are out of date: decisions made as long ago as 1994 have not yet been published. The law reports are relatively expensive and the offices of most staff in the justice sector do not have them. In the absence of up-to-date comprehensive law reporting, texts of court judgments are available to the public as 'unreported cases'. Every person is entitled to subscribe to receive copies of all judgments of the High Court and Supreme Court of Appeal. In practice, inefficiencies in judgment delivery and post-delivery processing mean that even 'unpublished' judgments tend to be relatively out of date by the time a member of the public can access them.[232] Transcripts of judgments in the High Court and Supreme Court of Appeal are supplied to the participants in the case at a reasonable cost. However, there are significant delays in the preparation and supply of the transcripts. The problem also affects the processing of case records of magistrate court proceedings in preparation for appeals to the High Court. In the case of *Chirambo and Chirwa v The Republic*,[233] the High Court observed that: 'There are difficulties in processing appeals these days...The rules require the lower court to send to this Court a typed record of the lower court proceedings. Many times there is inadequate stationery. Most courts use typewriters. They have to redo the typescript every time there is a mistake.'[234] As it happened, in the *Chirambo* case, by the time the record of the proceedings in the magistrates' court was ready for the High Court appeal and that court quashed their original conviction, the appellants had already served their six-month sentence of imprisonment.

Expert commentary

Expert commentary on the law is not easily available to justice staff and to others. There are very few textbooks that comment specifically on the application of Malawian law. Such commentary is found mainly in journal articles and other formats; though there is only one law journal

230 See the discussion of the amendment in Chapter 1, section C, particularly footnote No. 107.

231 International Bar Association, *Report of Visit to Malawi,* 2002, p. 83, available at http://www.ibanet.org/images/downloads/HRIMalawiReport.pdf, accessed 10 October 2005.

232 Interview with Gift Nankhuni, lawyer in private practice, Lilongwe, 9 September 2006.

233 *Chirambo and Chirwa v The Republic*, Criminal Appeal Case 11 of 2000.

234 See p.2 of the transcript of the judgment.

published in Malawi.[235] This limits the opportunities available to academics to comment on development of the law. The judiciary's few libraries have a very limited number of journals and the overwhelming majority of judicial officers, particularly those in remote areas, have no access to expert commentary on the law. In general, court premises do not have adequate numbers of textbooks covering the areas of law that the courts deal with. Two magistrates interviewed in Lilongwe, for example, indicated that they had no access to basic legal textbooks in such important areas as the law of torts and criminal law.

The general unavailability of printed expert commentary in the justice system is ameliorated by the availability of internet facilities to most senior staff of justice sector institutions, which, in theory, they may use to access online journals and other commentaries. In practice, the utility of the internet as a means of acquiring legal commentaries is limited because, due to infrastructural and technical constraints, internet in Malawi is expensive and inefficient.[236] The vast majority of justice sector staff have no access to the internet and their best hope of accessing legal commentaries is through journals, books and other literature in printed form. In practice, these are generally in very short supply. The judiciary's own inevitable assessment of the situation in the Malawi Judiciary Development Programme 2003–2008 is that: 'Inadequate provision of fundamental legal resources, such as books, case reports, statute books and gazettes, greatly constrains the performance of the judiciary in its administration of justice.'[237] This welcome recognition of the problem must be followed up by initiatives aimed at improving the situation. These should include raising funds to invest in a large-scale expansion of facilities for printing, duplicating and distributing judgments of the High Court and Supreme Court of Appeal; raising the budgetary priority of funding for the acquisition of legal literature; developing fundraising proposals specifically aimed at soliciting donations of such literature from traditional and non-traditional development partners in the area of governance; and rationalising the current distribution of key resources such as statutes and law reports to ensure that they are widely available to all judicial personnel, including those who are based in rural areas.

Availability of information about the courts

The laws in Malawi affirm the general right of access to courts. In relation to criminal matters, section 42(2)(f)(i) of the Constitution provides that the right to a fair trial entitles a person charged with a criminal offence 'to *public trial* before an independent and impartial court of law'.[238] In addition, section 71(1)(a) of the Criminal Procedure and Evidence Code[239] provides that all criminal proceedings must be held 'in an open court to which the public may generally have access' except where a court decides that it is expedient in the interests of justice or propriety 'or

235 The journal, which is not peer-reviewed, is published by the University of Malawi Students' Law Society and consists of articles of variable quality contributed by students, faculty and practicing lawyers. For an indication of the subjects covered by the journal, see the table of contents of Vol. 8, No. 1, at http://www.sdnp.org.mw/ruleoflaw/lawfaculty/students/journal/contents.pdf, accessed 26 April 2006.

236 See Paulos Nyirenda, *Internet Scenarios in Malawi*, 7 May 2003, Slide 4, available at http://www.sdnp.org.mw/~paulos/communications/internet-scenarios-in-malawi-may-03/sld001.htm, accessed 30 January 2006.

237 Malawi Judiciary, *Malawi Judiciary Development Programme 2003–2008*, Blantyre, 2003, p.11.

238 Emphasis added.

239 Criminal Procedure and Evidence Code, 1967 (Act 36 of 1967), Chapter 8:01, *Laws of Malawi*.

for other sufficient reason' to bar a particular individual or individuals or hold the trial or part of it behind closed doors. Members of the public are entitled to attend all judicial proceedings by virtue of section 60 of the Courts Act[240] which provides that the proceedings of every court must be 'carried on in open court to which the public may generally have access'.

The right of the public to attend criminal trials does not extend to proceedings involving juvenile courts, hearings of cases involving people aged below 18 years or certain preliminary proceedings.[241] The law also empowers judicial officers to bar members of the public from any hearing if such exclusion is 'expedient in the interests of justice and propriety or for other sufficient reason'.[242] The scope of this power, which is not restricted, for example, to the protection of children or witnesses, is so wide as to be inconsistent with international standards relating to the public's access to trials.[243] There are no legal restrictions that are specifically targeted at journalists to limit their access of to information about the justice system or their reporting on it. Nevertheless, there are some laws of general application that could be used for this purpose on the pretext of national security, public order or morality.[244]

Prior to the establishment of the Crime and Justice Statistics Division of the National Statistical Office in 2002, the government did not have a mechanism for collating statistics from across various institutions in the justice sector. This might explain why the government did not make available statistics on the sector as a whole. Some individual institutions could make available statistics related to their operations. For example, information on the number of cases before the courts, the judgments rendered, and the appeals filed is always readily available from the registries of the High Court and Supreme Court of Appeal in Blantyre, Lilongwe and Mzuzu; statistics on the prison population and its distribution are readily available at the Prison Department headquarters in Zomba; and statistics on the police investigations and prosecutions are readily available at the headquarters of the police service in Lilongwe. The fact that statistics are collected by the various institutions and not consolidated means that there is no standardisation of their quality and their correlations cannot be established. The establishment of the Crime and Justice Statistics Division of the National Statistical Office is a welcome first step in addressing this problem as is the plan of the National Statistical Office to collect and publish statistics on crime, justice and governance on a regular basis.[245] It is recommended that this plan be implemented urgently; that it cover justice in its broadest sense and not focus only on criminal

240 Courts Act, 1958 (Act 1 of 1958), Chapter 3:02, *Laws of Malawi*.

241 Criminal Procedure and Evidence Code, 1967 (Act 36 of 1967), Chapter 8:01, *Laws of Malawi*, section 71(2).

242 Courts Act, 1958 (Act 1 of 1958), Chapter 3:02, *Laws of Malawi*, section 60; and Criminal Procedure and Evidence Code, 1967 (Act 36 of 1967), Chapter 8:01, *Laws of Malawi*, section 71(1)(a).

243 For example, article 3(f) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa permits the exclusion of the public only in the interests of justice 'for the protection of children, witnesses or the identity of victims of sexual violence', or for reasons of public order or national security 'in an open and democratic society that respects human rights and the rule of law'.

244 For a discussion of some such laws, see Raymond Louw (ed.), *Undue Restriction: Laws Impacting on Media Freedom in the SADC,* Media Institute of Southern Africa, Windhoek, 2004, available at http://www.misa.org/documents/undue.pdf, accessed 4 January 2006.

245 See Government of Malawi, *National Statistical Office Strategic Plan 2002–2006*, Zomba, 2002, p.32, available at http://www.nso.malawi.net/plans/strategic_plan.doc, accessed 6 January 2006.

justice; that its implementation be funded by the government rather than by donors; and that there be a well-defined time frame for the completion of capacity-building of local institutions by external institutions involved in the Crime and Justice Statistics Division, such as the Institute of Security Studies of South Africa.

Some information about the justice sector is available online. Almost all the key institutions in the sector have websites.[246] However, most of the sites contain limited information and are not updated regularly. This limits their utility as a source of reliable information. For example, in September 2005, the website for the judiciary had a list of justices of the High Court and Supreme Court of Appeal that had not yet been updated to reflect the retirement and appointment of judges made in 2004. There is an urgent need for institutions in the justice sector to set up and regularly update their websites. Given the importance of their role in the sector, some of the key institutions that need to set up websites as a matter of urgency are the Malawi Police Service and the Malawi Law Society. The rest of the institutions, including the judiciary, the Ombudsman, the Ministry of Justice and Constitutional Affairs, the Malawi Human Rights Commission and the Law Faculty of the University of Malawi must increase and update the content of their web pages also as a matter of urgency.

246 See for example, the judiciary, http://www.judiciary.mw; the Ministry of Justice and Constitutional Affairs, http://www.malawi.gov.mw/Justice/Home%20%20Justice.htm; the Law Commission, http://www.lawcom.mw; the Ombudsman, http://www.Ombudsman malawi.org; the Human Rights Commission, www.malawihumanrightscommission.org; the Anti-Corruption Bureau, www.anti-corruptionbureau.mw; The Prison Service, www.mps.gov.mw; the Ministry of Home Affairs, and Internal Security, www.malawi.gov.mw/Home%20Affairs/Home%20HomeAffairs.htm.

4

Independence of judges and lawyers

Under the Banda dictatorship the judiciary was subverted to become an organ of the one-party system. The executive exerted control over all levels of the court system, and in particular manipulated and extended the jurisdiction of 'traditional courts'. The situation has dramatically improved with the 1994 Constitution. Judges have been guaranteed independence and a number of procedures whereby the executive exerted its control over judicial officers have been abolished. In practice also, governments since 1994 have shown greater, though not total, respect for the independence of judges and lawyers. For judicial independence to be complete, however, judicial appointments need to be free of political manipulation.

A. Judges

Judicial independence

Judicial independence is protected by section 103(1) of the 1994 Constitution, which provides that: 'All courts and all persons presiding over those courts shall exercise their functions, powers and duties independent of the influence and direction of any other person or authority'. Section 103(2) grants the judiciary jurisdiction over all issues of a judicial nature and the exclusive authority to decide whether any issue is within its competence.[247] These constitutional provisions, and others which seek to protect judicial independence, including provisions that regulate judicial appointment, remuneration and security of tenure, cannot be amended without a national referendum.[248]

247 This provision is almost identical to Article 4(c) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa which secures the independence of the judiciary by preventing interference with the scope of judicial power.
248 Constitution, 1994, sections 103, 111, 114, 119 and 196, as read with the Schedule to the Constitution.

In keeping with international standards,[249] judges in Malawi are exempt from civil liability for the actions they properly undertake in the exercise of their official duties. Section 61(1) of the 1958 Courts Act (Act 1 of 1958) provides that '[n]o Judge, magistrate or other person acting judicially shall be liable to be sued in any court for any act done or ordered to be done in discharge of his judicial duty....' No law allows the removal of a judicial officer from office, or the application of disciplinary or administrative procedures, solely because his or her decision is overturned by a higher court on appeal.

There have been different views on whether the constitutional guarantees of judicial independence translate into independence of judges in practice. On the one hand, some people believe that judicial independence is generally upheld. In 2004, for example, the president of the Malawi Law Society, while noting the possibility that some individual judges might have compromised their independence and that judicial independence was limited by the judiciary's lack of financial autonomy, stated that: 'I'd say our judiciary is about 90 per cent independent.'[250] Others have held a much less enthusiastic opinion on the independence of Malawian judges. For example, the ombudsman has stated that '[j]udges are intimidated in this country.... The system is being tamed for the benefit of the few.'[251] Despite the latter view, however, the balance of evidence suggests that '[i]n spite of many political and economic pressures and constraints, [the judiciary] has remained relatively independent and has facilitated the realisation of human rights including those to a fair trial, equality before the law and access to justice.'[252] Independence of the judiciary as an institution and of judges as individuals is upheld certainly to a much higher degree than was the case before 1994, when Malawi was a one-party state and judicial independence was severely compromised, especially in the parallel 'traditional court' system.[253]

Although judicial independence has been better protected since Malawi adopted the 1994 Constitution, it has occasionally come under threat. The most serious of such threats occurred in 2001 when the National Assembly used its power under section 119 of the Constitution to petition the president to remove from office three judges of the High Court for alleged incompetence and misconduct.[254] One judge was accused of misconduct principally for authoring a magazine article questioning the validity of the electoral victory of the incumbent president; the alleged misconduct of the second judge was that he had granted bail to an opposition politician

249 See, for example, Article 4(n) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

250 See South African Institute of International Affairs, *Malawi and the African Peer Review Mechanism – A Review of National Readiness and Recommendations for Participation: Final Report to the Malawi Ministry of Economic Planning and Development*, Johannesburg, August 2004, p.37, available at http://www.sarpn.org.za/documents/d0000978/Malawi_APRM_Aug2004.pdf, accessed 11 January 2006.

251 Ibid.

252 Fidelis Edge Kanyongolo, *Malawi State of the Judiciary Report 2003*, International Foundation for Electoral Systems, Washington D.C., 2004, p.47, available at http://www.ifes.org/files/rule-of-law/SOJ/SOJ_Malawi_Final.pdf, accessed 12 January 2006.

253 Heiko Meinhardt and Nandini Patel, *Malawi's Process of Democratic Transition: An Analysis of Political Developments Between 1990 and 2003*, Konrad Adenauer Foundation, Lilongwe, 2003, pp.4-5, available at http://www.kas.de/db_files/dokumente/7_dokument_dok_pdf_4156_1.pdf, accessed 11 January 2006.

254 For a detailed discussion of the episode, see International Commission of Jurists, *Malawi Report: Factfinding Report 10–22 December 2001*; *Trial Observation*, 16 January 2002, available at http://www.icj.org/IMG/pdf/doc-81.pdf, accessed 28 April 2006.

after official working hours, thereby supposedly showing that he was politically biased; and the third was accused of incompetence for allegedly violating the principle of separation of powers by issuing an injunction against Parliament. The Judicial Service Commission investigated the allegations but its findings were not made public. In the meantime, there was an outcry against the proposed removal of the judges by numerous local and foreign interested groups, including the Magistrates and Judges Association of Malawi, the Malawi Law Society, the International Commission of Jurists and the United Nations Commissioner for Human Rights, who argued that the impeachment amounted to blatant interference with judicial independence.[255] In the event, the president did not remove the judges as requested by the National Assembly.

Appointment, promotion and dismissal of judges

The judicial appointments process involves the president, Parliament and the Judicial Service Commission. The chief justice, who is head of the judiciary in Malawi, is appointed by the president, but the National Assembly (the lower and currently only chamber of Parliament) must confirm the appointment with a minimum of two-thirds of members present and voting.[256] Justices of the High Court and Supreme Court of Appeal are appointed by the president on the recommendation of the Judicial Service Commission.[257] Members of the commission are themselves appointed by the president and consist of the chief justice (who is the chair), the chairperson of the Civil Service Commission, an appeal justice, a legal practitioner and a magistrate. The last three are appointed by the president in consultation with the chief justice.[258] Magistrates are appointed by the chief justice on the recommendation of the Judicial Service Commission.[259]

Despite these safeguards, there have been reports of political appointments in the judiciary. After its 2002 visit to Malawi, a delegation of the International Bar Association reported the existence of 'allegations that in the recent judicial appointments round, political appointments were made by the Executive without reference to the Judicial Services Commission (JSC), which under the Constitution is empowered with the responsibility for judicial appointments.'[260] Since communications between the president and the Judicial Service Commission are not transparent, it is not possible to substantiate such allegations definitively. However, in order to remove any suspicion that the Judicial Service Commission is bypassed in some judicial appointments, the whole process of judicial appointments must be made more transparent.

In order to make the judicial appointment procedures in Malawi more independent and, therefore, more consistent with international standards, the Constitution should be amended to reduce the current powers of the president in relation to the appointment of judges and members of the Judicial Service Commission. Concretely, the president's power of appointment

255 Ibid., p.11.

256 Constitution, 1994, section 111(1).

257 Ibid., section 111(2).

258 Ibid., section 117.

259 Ibid., section 111(3).

260 International Bar Association, *Report of Visit to Malawi*, 2002, p.83, available at http://www.ibanet.org/images/downloads/HRIMalawiReport.pdf, accessed 10 October 2005.

of High Court judges and members of the Judicial Service Commission should be subject to parliamentary confirmation as is the case with the power to appoint the chief justice.[261] The independence of the judicial appointments process can also be enhanced by amending the Constitution to introduce institutional checks on the president's power to appoint members of the Judicial Service Commission or to put in place a process by which members of the Judicial Service Committee are appointed by a body other than the Presidency, for example the Public Appointments Committee. Regardless of who the appointing authority is, it is also important to make the process more transparent, for example by requiring publication of full lists of applicants for judicial appointments and reports to the Public Appointments Committee of the reasons for not appointing unsuccessful applicants. If the membership of the Judicial Service Commission is more independent of the president, it will not only be less susceptible to political manipulation, but it will also be less likely to acquiesce to any attempt by the president to bypass it in the appointment of any judicial officer.

In considering the amendments to the Constitution suggested above, it is important to note that any substantive amendment of section 111, which provides for the appointment of judges, would require a referendum; while that of section 117, which relates to the appointment and composition of the Judicial Service Commission, would not.[262]

Once appointed, a judge enjoys security of tenure until the attainment of the retirement age of 65 years; magistrates, however, retire at the age of seventy years.[263] A judge in Malawi can be removed only for malfeasance or incompetence in the performance of his or her judicial duties.[264] The law does not permit the demotion of a judicial officer to a judicial position of lower rank and, in practice, no judicial officer has been so demoted. Appellate judges do not have the power to demote lower-level judicial officers.

Composition of the judiciary

The Constitution does not require the composition of the judiciary to be representative of the population. (By contrast, South Africa's constitution provides that 'the need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial appointments are made'.[265]) The most immediately obvious imbalance in the composition of the judiciary in Malawi is that of gender. Out of 24 justices of the High Court and Supreme Court of Appeal, only four are women.[266] This translates into 16.6 per cent of the total. Up-to-date records on the gender composition of magistrates' courts were not available; but in 2001, there were reported to have been 15 female magistrates out of a total of 138 magistrates in the whole

261 Constitution, 1994, section 111(1).

262 Ibid., section 196(1), as read with the Schedule to the Constitution.

263 Ibid., sections 119(1) and 119(6).

264 Ibid., section 119(2).

265 Constitution of the Republic of South Africa, 1996, section 174(2).

266 The full list of the judges is available on the judiciary's official website. For the position as at 11 January 2006, see 'Judges of the Supreme Court of Appeal and the High Court of Malawi' at http://www.judiciary.mw/Judges_of_Malawi.htm, accessed 11 January 2006.

country.[267] Women, therefore, constituted just slightly above 10 per cent of the total.[268]

The composition of the judiciary also does not reflect other demographic characteristics of the population. For example, the proportion of Muslims in the Malawian population is estimated to be between 20 and 30 per cent,[269] but none of the judges of the High Court and Supreme Court of Appeal is a Muslim, and almost all are Christian. Similarly, although the population consists of people of various races, all judicial officers in Malawi are black. There was no evidence to suggest that this has caused obvious public concern. The judiciary has not developed any strategy to address gender, racial or religious imbalances, and issues related to appointments in general are not included in the Malawi Judiciary Development Programme.[270]

It is less surprising that the judiciary has not addressed in its strategy a more controversial demographic characteristic: regional identity. One body of opinion holds the view that the regional composition of the judiciary is inconsequential to its functioning and is, therefore, irrelevant in considering the representativeness of its composition.[271] This view received judicial endorsement in the case of *Nkhonjera v Concrete Pipe and Precast Ltd* in which the defendant had applied for the judge in the case to recuse himself for fear of bias on the judge's part since the judge and the plaintiff originally came from the same part of the country. In refusing the application, the judge stated that: '[T]his court does not think that it is the law that judges should not hear cases which involve people from the same district as the judge. In this court's informed view, the test should be and remains, that the judge should not have interest in either the parties or the subject matter.'[272]

Another body of opinion suggests that regional affinity between a judicial officer and a party to a case may unduly influence the officer to decide the case in favour of the party. A few years ago, this was suggested in a well-known column in a popular local newspaper and led to a libel suit in the case of *Mwaungulu v Malawi News*.[273] The article in question had implied that in a number of his decisions, the plaintiff, who was the registrar of the High Court and Supreme Court of Appeal and whose judicial functions included the assessment of damages, had been biased in favour of parties from his region of origin. In part, the article alleged that:

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267 Naomi Ngwira, Garton Kamchedzera and Linda Semu, *Malawi Strategic Country Gender Assessment*, Vol. 1, Main Report, presented to the World Bank and UNDP, June 2003, Annex 1, p.59, available at http://siteresources.worldbank.org/EXTAFRREGTOPGENDER/Resources/MalawiSCGA.pdf, accessed 9 January 2006.

268 In South Africa, 28 of 207 superior court judges were women and 524 of 1 822 magistrates as of December 2004; *South Africa: Justice Sector and the Rule of Law*, AfriMAP and Open Society Foundation for South Africa, 2005; in Mozambique 33 out of 175 judges at all levels were women in 2005; *Mozambique: Justice Sector and Rule of Law*, AfriMAP and Open Society Initiative for Southern Africa, 2006.

269 For example, see United States Department of State, *International Religious Freedom Report 2003*, Washington DC, December 2003, available at http://www.state.gov/g/drl/rls/irf/2003/23718.htm, accessed 12 January 2006.

270 See Malawi Judiciary, *Malawi Judiciary Development Programme 2003–2008*, Blantyre, 2003, p.17.

271 This was the view of the majority of participants at the second roundtable meeting for the AfriMAP research on this report. The workshop was held in Blantyre on 15 October 2005. Participants were drawn from a cross-section of people from the justice sector, including judges of the High Court, the Attorney-general, the President of the Malawi Law Society, the Director of Public Prosecutions, the Director of Legal Services from the Malawi Police Service, the Controller of Legal Services from the Office of the Ombudsman and a Law Reform Officer from the Law Commission.

272 *Nkhonjera v Concrete Pipe and Precast Ltd*, Civil Cause 916 of 1997, p.2 of the transcript.

273 *Mwaungulu v Malawi News,* Civil Cause 518 of 1994.

> [A]t the moment, most of our present judges also come from the Northern Region.... Without any personal reflecting (sic) on the able judges from the Northern Region, some humble citizens have been concerned and suspicious about some recent judgments of the High Court where some persons (all from the Northern Region) have received extremely huge sums of money for damages awarded by a Judge/Registrar from the Northern Region.[274]

In the event, the defendants failed to substantiate their allegations and were found liable. However, the case showed that, in Malawi, public perceptions of likelihood of bias could be based on the regional identity of a judge.

Given that many facets of public life in Malawi are perceived through the prism of regionalism,[275] it is recommended that more in-depth research be carried out to determine the extent to which the regional composition of the judiciary influences public perceptions of judicial independence and impartiality. The view expressed at the second roundtable meeting held to discuss this report that the regional identity of judges is inconsequential requires more critical reflection. Its validity must be tested in the light of the position taken in the constitutions of similarly plural societies where it is felt necessary to correlate the composition of the judiciary to that of the population. One obvious method of testing the view is to conduct social research in which a representative sample of the Malawian population is asked whether they perceive the class, gender, regional and other characteristics of judicial officers to be relevant to their decision-making.

Qualification and remuneration of judges

In general, judicial officers are properly qualified. However, there is inadequate training among the lay magistracy. This is the cadre of magistrates who do not possess a law degree and have only received basic legal training as explained below. This does not adequately equip them to handle all cases, particularly those which involve relatively difficult legal questions or are argued by lawyers. More generally, there is also little continuing legal education for all judicial officers.

The minimum qualifications required for appointment to the High Court or Supreme Court of Appeal are set down by the Constitution. According to section 112(1), a person may be appointed as a High Court judge if he or she is or has been judge of a court with unlimited jurisdiction or has been entitled to practise law in such a court for a period of at least ten years.

There are no legal provisions spelling out the minimum qualifications for magistrates. In practice, though, there are two distinct tiers of the magistracy: resident magistrates and lay magistrates. The minimum academic qualification for resident magistrates is a university law degree; for lay magistrates it is a secondary school certificate, although in a few cases experience

274 'Zebedee Column,' *Malawi News*, 12–18 March 1994, Blantyre, p.3.

275 On the political, economic and social significance of regionalism in Malawi, see Wiseman Chijere Chirwa, 'Elections in Malawi: The Perils of Regionalism', *Southern Africa Report*, Vol. 10, No. 2, Toronto, December 1994, p.2, available at http://www.africafiles.org/article.asp?ID=3967, accessed 12 January 2006; Chijere Chirwa, 'The Politics of Ethnicity and Regionalism in Contemporary Malawi,' *African Rural and Urban Studies*, Vol. 1, No.2, Michigan, 1994, p.93; and Fidelis Edge Kanyongolo, 'Regionalism and the Politics of Human Rights Jurisprudence in Malawi', *University of Malawi Students Law Journal,* Vol. 6, Zomba, 2000, p.19.

has been accepted in lieu of formal academic qualifications. According to research conducted by the International Foundation for Electoral Systems in 2004, the judiciary has acknowledged that 'most lay magistrates are inadequately trained resulting in poor service delivery and inconsistencies in some judicial decisions.'[276] One of the main reasons for the low qualifications of serving magistrates is that some of them were incorporated into the magistracy from what had been known prior to 2004 as traditional courts. Personnel in these courts had not been required to have much formal education and their integration into the judiciary resulted in an increase in under-qualified and inexperienced magistrates.

Judges of the High Court and Supreme Court of Appeal and resident magistrates are generally holders of a law degree from the University of Malawi who would have undertaken the same course of study as all other lawyers. There is no specialised judicial training institution in the country and judicial officers learn their skills on the job. The only significant in-service training of judicial officers takes the form of informal short courses, seminars and workshops organised by various special interest groups including donors, human rights lobby groups, gender advocates and international judicial organisations. Such training is available to few judicial officers and has a limited impact on the knowledge and skill levels within the judiciary. This falls short of the requirements of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.[277] These shortcomings should be overcome by the establishment of a more structured judicial training programme. In the medium to long term, such a programme should be undertaken within the framework of the judicial training institute that has been proposed by the judiciary itself. However, in the interim, the judiciary and other institutions involved in legal training should hold consultations to explore the possibility of a training programme hosted by any one of the existing training institutions. It is important that any such arrangement be based on the clear understanding that the programme in question is not a generic legal training programme but one that is intended to impart specialist judicial skills.

The performance of judicial officers is evaluated by their superiors in the hierarchy. The mechanisms for such evaluation are not made public. Similarly, it is unclear how promotions are determined. The Constitution does not state the basis on which the president may promote judicial officers from the magistracy to the High Court and from the High Court to the Supreme Court. There are also no publicly available criteria for the elevation of a judicial officer to the position of chief justice.

In 1997, after years of lobbying by the judiciary and other interested groups, the government revised the terms and conditions of service for judicial officers. Prior to the revision, it had been widely acknowledged that the salaries and benefits of judicial officers had been very low. United Nations agencies in the country have in the past observed that the low salaries had been a reflection of the country's general situation rather than a deliberate attempt to undermine the

276 Fidelis Edge Kanyongolo, *Malawi State of the Judiciary Report 2003*, 2004, p.29, quoting the Malawi Judiciary Development Programme 2003–2008, p.11.

277 These Principles oblige states to 'ensure that judicial officials have appropriate education and training, to establish specialised institutions for the education and training of judicial officials and to ensure that judicial officials receive continuous training and education throughout their career including, where appropriate, in racial, cultural and gender sensitisation.' African Union, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Addis Ababa, 1999, section B(c).

courts.[278] Nevertheless, poor conditions of service, including low salaries, were one reason why the judiciary had difficulties in recruiting and retaining professional staff. The revision of conditions appears to have had a positive effect; to the extent that by 2001, the judiciary was attracting staff even from the private sector. In March 2001, for example, out of 11 candidates short-listed by the Judicial Service Commission for interviews for appointment to judicial office, 6 came from the private sector.[279] Although the conditions of service of the higher-level judiciary appear to be relatively adequate in the Malawian context, this is less true for the lay magistracy. The salaries in general also fall in real value as they are overtaken by inflation and declining foreign exchange value. Below (Table 4.1) is a summary of some of the key elements in the remuneration package of judicial officers.

Table 4.1: Remuneration of judges and magistrates

Level of judicial officer	Lowest salary per annum (approx. US$ equivalent)	Monthly housing allowance	Security allowance	Utilities Allowance
Supreme Court	8 838	500	150	90
High Court	8 370	500	150	80
Professional Magistrate	3 279	200	100	0
First Grade Magistrate	2 102	160	20	0

Source: Judiciary, *Terms and Conditions of Service* (Blantyre, 2003)

In addition to the remuneration and other benefits outlined in Table 4.1, judicial officers have other entitlements in common with other public servants of equivalent rank, including allowances for travel and subsistence as well as telephone communication connected to the discharge of their official duties. However, they do not receive emoluments on specific civil cases.

Training in human rights

Training of judges in human rights law is inadequate but improving. Most judges of the High Court and Supreme Court of Appeal underwent their basic legal training when Malawi was a one-party state and the curriculum of the University of Malawi generally avoided subjects that could be interpreted to be critical of the government and its poor governance record. Thus, the law curriculum did not cover human rights extensively. The content of the constitutional law course was also based on principles of English constitutional law and did not cover in any significant detail aspects of constitutional law fundamental to a liberal democracy. For this cadre of judicial officers, therefore, continuing legal education in human rights and constitutional law is a necessity. For any such programmes to be effective, they must not be ad hoc but systematic. They must also be grounded in the needs of the participants and not the priorities of whichever donor happens to fund them. With the passage of time, judges will increasingly come from the generation which underwent legal education in the post one-party state era when the curriculum

278 United Nations System in Malawi, *Common Country Assessment of Malawi: 2001 Report*, Lilongwe, 2001, p.31.
279 Malawi Government, *Organisation and Management Review of Ministry of Justice,* Lilongwe, 2001.

included extensive coverage of human rights and the constitutional bases of liberal democracy. For such judges, the need for continuing education in human rights and constitutional law will not be as high as it is now for their colleagues trained during the repressive environment of the one-party political order.

Most professional magistrates are recent law graduates who underwent their training at a time when the curriculum had been modernised to include a substantial amount of material on human rights and liberal democratic constitutional law. For their part, a substantial number of lay magistrates have also had some training in human rights and constitutional law as part of the basic training that all magistrates undergo at the Staff Development Institute.[280] In addition, some lay magistrates are also studying part-time for the University of Malawi Faculty of Law's diploma, whose course content includes human rights and constitutional law.[281] Although there are a number of opportunities for the formal academic training of magistrates in human rights and constitutional law, it has not been possible to accommodate all of them on the programmes. Nevertheless, some of them have benefited from various in-service training workshops, seminars and conferences that have been organised by state institutions and non-governmental organisations with specific interests in human rights and constitutional law, including the United Nations Office of the High Commissioner for Human Rights.[282]

The impact of human rights and constitutional law training on the quality of judicial work must be constantly monitored and evaluated. It should not be assumed that the training necessarily translates into an adequate appreciation of human rights by judicial officers. On the contrary, some magistrates who have received basic human rights and constitutional law training do not fully appreciate the practical significance of human rights, such as the right of a criminal defendant to remain silent.[283]

Standards of judicial conduct

At least three institutions are involved in the development and enforcement of standards of judicial conduct. The most important of these is the Judicial Service Commission established under section 116 of the Constitution. The powers of the Commission are provided for under section 118 and include the authority 'to exercise such disciplinary powers in relation to persons in judicial office subject to [the] Constitution....' The other institution that has responsibility for enforcing standards of judicial conduct is Parliament, which has power under section 119(2) of the Constitution to remove a judge from office for misbehaviour or misconduct.

The professional conduct of judicial officers is governed primarily by norms that are set out in the judiciary's Code of Conduct and Conditions of Service, 2003. The need for the code was

280 Telephone interview with Justice Rizine Mzikamanda, judge of the High Court and Chairman of the Judicial Training Committee, 13 February 2006.

281 Telephone interview with Lynda Kananza, head of the department of foundational law, University of Malawi, and lawyer in private practice, 10 February 2006. According to student records of the Faculty of Law as at 10 February 2006, out of 33 students in the class expected to be awarded diplomas in 2006, 13 were magistrates or judicial support staff.

282 For example, see Cees Flinterman and Marcel Zwamborn, *From Development of Human Rights to Managing Human Rights Development: Global Review of the OHCHR Technical Cooperation Programme, Synthesis Report*, September 2003, p.28, available at http://www.ohchr.org/english/countries/docs/global-reviewsynthesis.pdf, accessed 1 February 2006.

283 Telephone interview with Justice Frank Kapanda, judge of the High Court, 1 February 2006.

identified by a task force set up in 1996 by the chief justice to make proposals for reforms of the criminal justice system. The task force noted that there was no such code in place although the Constitution provided that matters of discipline of judicial officers should be prescribed by an Act of Parliament.[284] The Malawi Judiciary Development Programme 2003–2008 endorsed the idea,[285] and, following consultation, judicial officers adopted the code in 2003.[286] The code specifies the penalties that the Judicial Service Commission may impose on any judicial officer other than a judge who is guilty of violating the Code of Conduct.[287] Among the penalties specified by the code are severe reprimand, suspension with pay and dismissal. There is no code of conduct that applies to justices of appeal and judges of the High Court, and their discipline is governed by sections 118 and 119 of the Constitution which provides for an Act of Parliament to be adopted under which the Judicial Service Commission shall exercise disciplinary powers over all judicial officers. In addition, any judge guilty of misconduct or misbehaviour may be removed from office by the president following a petition by the National Assembly. Parliament has not passed any law to govern the disciplinary powers of the Judicial Service Commission over judges. It is, therefore, recommended that the Code of Conduct currently applicable to other judicial officers should also apply to judges, subject to the Constitution.

The Code of Conduct is not part of any statute, but is attached to the terms and conditions of service for judicial officers, and guides the Judicial Service Commission in assessing the fitness and suitability of any person for judicial office. The rules in the Code of Conduct oblige every judicial officer to uphold the integrity and independence of the judiciary; to avoid impropriety and appearance of impropriety in all activities; to perform the duties of judicial office impartially and diligently; to conduct extra-judicial activities so as to minimise the risk of conflict with judicial duties and to refrain from active political activities.[288]

Between 2000 and 2005, no judicial officer of any subordinate court was removed from office or disciplined. Similarly, no justice of appeal or judge of the High Court was removed from office. As stated earlier, in 2001, there was an unsuccessful attempt initiated by the National Assembly to exercise its powers under section 119 of the Constitution to have three judges of the High Court removed from office on allegations of misbehaviour or incompetence.[289] Following the National Assembly's petition for the removal of the judges, the Judicial Service Commission

284 Malawi Legal and Judicial Reform Project, *Report of the Task Force*, Blantyre, January 1996, p.15, and appendix X.

285 Malawi Judiciary, *Malawi Judiciary Development Programme 2003–2008*, Blantyre, 2003, pp.16-17.

286 Telephone interview with Justice Rizine Mzikamanda, Judge of the High Court and Chairman of the Judicial Training Committee, 13 February 2006.

287 Malawi Judiciary, *Code of Conduct and Conditions of Service*, Blantyre, 2003, p.64.

288 The Code of Conduct specifies the following as punishable acts of judicial misconduct: breach of any of the rules of conduct in the code; absence from the station without valid excuse or permission; negligent performance of duties; display of insubordination to any superior officer by word or conduct in the performance of duties; continued incompetence and inefficiency after being duly warned; being under the influence of drink or habit-forming drugs during normal working hours or during such time as the officer may be on duty; persistent pecuniary embarrassment likely to interfere with the efficient performance of duties; misappropriation of public funds and being convicted of any offence involving dishonesty or moral turpitude. Malawi Judiciary, *Code of Conduct and Conditions of Service*, Blantyre, 2003, p.56.

289 See Claire Martin, 'Malawi – Independent Judiciary?', *Commonwealth Human Rights Initiative (CHRI) News*, February 2002, available at http://www.humanrightsinitiative.org/publications/nl/articles/malawi/malawi_independent_judiciary.pdf, accessed 19 January 2006.

held disciplinary hearings relating to judicial officers for the first time in its history. The Commission had no rules of procedure to guide the process and when two of the judges were summoned to a hearing on 16 January 2002 (charges against the third judge had been dropped in the interim), no formal charges or complaints were laid against the judges and no complainants appeared, even though both the speaker of the National Assembly and attorney-general had been notified.[290] After the hearing, the Judicial Service Commission submitted a report to the president who, after reviewing it, decided not to proceed further with the matter.[291]

The fact that no judicial officer has been removed from office for disciplinary reasons does not necessarily indicate that there are no cases of misconduct. The Malawi Judiciary Development Programme concedes that the judiciary and the Judicial Service Commission have failed to discipline judicial officers, partly because the two institutions have failed to enforce the Code of Conduct for the judiciary.[292] This means that there have been no satisfactory means for proving any alleged misconduct or giving judicial officers accused of misconduct the opportunity to disprove such allegations. In order to address the problem, it is recommended that Parliament should pass legislation that gives legal force to the Code of Conduct for the judiciary and provides for the adoption of procedural rules to guide disciplinary hearings. Such legislation must conform to relevant international standards, including those contained in the United Nations Basic Principles on the Independence of the Judiciary and the Commonwealth (Latimer House) Principles on the Three Branches of Government.[293]

B. Prosecution service

The law provides safeguards for the independence of the prosecution service. The service is headed by the director of public prosecutions (DPP) whose office is established by section 99(1) of the Constitution. Section 101(2) of the Constitution provides that in the exercise of his or her powers, the director of public prosecutions is subject to 'the general or special directions of the attorney-general' but is otherwise 'independent of the direction or control of any other authority or person and in strict accordance with the law'. The attorney-general is the professional head of the Ministry of Justice and Constitutional Affairs and the prosecution service is a department under his or her office.[294] Directions from the attorney-general to the director of public prosecutions, therefore, have added weight because the former is higher in the administrative

290 International Commission of Jurists, Malawi *Report: Factfinding Report 10–22 December 2001*; *Trial Observation*, pp.14-16, January 2002, available at http://www.icj.org/IMG/pdf/doc-81.pdf, accessed 28 April 2006.

291 International Commission of Jurists, 'Malawi – charges against judges dropped,' *Press release*, 15 May 2002, available at http://www.icj.org/news.php3?id_article=2628&lang=en, accessed 27 April 2006.

292 Malawi Judiciary, *Malawi Judiciary Development Programme 2003–2008*, Blantyre, 2003, p.10.

293 Commonwealth (Latimer House) Principles on the Three Branches of Government, available at http://www.thecommonwealth.org/Templates/Internal.asp?NodeID=37744, accessed 27 April 2006.

294 According to Section 50 of the General Interpretation Act, 1966 (Act 36 of 1966), Chapter 1:01, *Laws of Malawi*, any power conferred or duty imposed on the attorney-general by any written law may, unless a contrary intention appears, be exercised or performed by the solicitor-general. The solicitor-general is the government law officer responsible for supervision and monitoring of the conduct of civil litigation, the drafting of legislation and the negotiation of loan agreements and other legal instruments for and on behalf of the government. He or she is also responsible for the operations of the Ministry in the performance of its legal functions and coordinates the various activities of the sections and departments of the Ministry. See Ministry of Justice and Constitutional Affairs website at http://www.malawi.gov.mw/Justice/Home%20%20Justice.htm, accessed 22 June 2006.

hierarchy than the latter. According to section 102(2) of the Constitution, the director of public prosecutions serves a five-year term of office, which may be renewed; and may be removed from office by the president prior to the expiry of the five-year term of office only on the grounds of incompetence, inability to exercise his or her functions impartially, incapacity or attainment of age of retirement.

But there have been instances where the executive has undermined the independence of the prosecution service by either violating the constitutional and legal guarantees of such independence or by using the attorney-general's powers of direction selectively to launch politically motivated investigations. Following elections held in May 2004, for example, the newly-elected president, Bingu Wa Mutharika, removed the director of public prosecutions from office before the expiry of his term of office on 31 December 2005. This decision was not justified by the president on either the grounds specified by section 102(2) of the Constitution or any other.[295] Subsequently, the dismissed director of public prosecutions took legal action against the president.[296]

The autonomy of the director of public prosecutions is restricted because he or she is required to act under 'the general or special directions of the Attorney-General.'[297] Historically, most attorneys-general have also been senior officials of their political parties. This increases the chances of an attorney-general using his or her constitutional power to give directions to the director of public prosecutions in order to advance narrow partisan interests over the public interest. The director of public prosecutions is also subject to the administrative authority of the attorney-general who occupies a higher level in the bureaucratic hierarchy of the Ministry of Justice and Constitutional Affairs than that of the former. Many participants at the second roundtable meeting to discuss the 2001 United Nations report[298] were of the view that in order for the director of public prosecutions to operate autonomously and in the public interest, his or her office must have operational independence from that of the attorney-general. This was underscored by an apparent clash between the two offices in May 2006 in connection with the prosecution of the vice- president for treason. Following a statement by the director of public prosecutions that the state had no evidence against one of the accused persons in the case, the attorney-general publicly overruled the director's decision in a statement made to the press.[299] When the president removed the attorney-general from office on 17 May 2006, the director of public prosecutions followed it up by stating to the press that he had taken full responsibility

295 See discussion in South African Institute of International Affairs, *Malawi and the African Peer Review Mechanism – A Review of National Readiness and Recommendations for Participation: Final Report to the Malawi Ministry of Economic Planning and Development*, Johannesburg, 23 August 2004, p.34, available at http://www.sarpn.org.za/documents/d0000978/Malawi_APRM_Aug2004.pdf, accessed 11 January 2006.

296 See 'Fired Malawian officials fight dismissal,' *Panapress*, Dakar, 18 July 2004, available at http://www.panapress.com/archive.asp?code=eng&dte=18/07/2004, accessed 20 January 2006.

297 In considering this recommendation, it must be noted that the part of section 101(2) which is proposed to be repealed was not part of the Constitution as originally enacted in 1994 and was only added by an amendment passed by Parliament in 1996. See Constitution Amendment Act, 1995 (Act 2 of 1995).

298 United Nations System in Malawi, *Common Country Assessment of Malawi: 2001 report*.

299 Staff Reporters, 'Mutharika is unpredictable,' *Nation on Sunday*, Blantyre, 21 May 2006.

for the case from the date when the attorney-general was dismissed.[300] In order to enhance the operational independence of the prosecution service in Malawi, it is recommended that section 101(2) of the Constitution which obliges the director of public prosecutions to receive directions from the attorney-general should be repealed.

A related suggestion aims at enhancing the political independence of the office of the attorney-general itself by requiring that the position should be held only by a public officer and never by a member of the cabinet, who is a politician by definition. This suggestion was made by a number of individuals and interest groups in submissions made to the Law Commission in the course of the constitutional review process in 2006. Adopting this idea requires an amendment to section 98(5) of the Constitution, which currently provides that the office of the attorney-general 'may either be the office of a Minister or may be a public office.'

Since 1994, there have been a number of occasions when some news media, non-governmental organisations and political parties have accused the government of the day of politicising the prosecution service. For example, between 2004 and 2005, the government initiated the investigation and prosecution of former President Bakili Muluzi and his allies, including at least three former cabinet ministers, the then deputy director of research of the United Democratic Front party, two of the party's members of Parliament and the current vice-president for alleged corruption and related offences.[301] On the one hand, the investigations and prosecutions were criticised by some as motivated by political malice rather than the legitimate interests of the public;[302] while on the other, the actions were justified as the legitimate performance of the government's obligation to uphold the principles of accountability and transparency.[303] There appears to be an element of truth in both assertions: the president himself has in the past admitted that, at least in the case of the prosecution of the two members of Parliament, the government's action was 'tit-for-tat' after they had moved the motion for his impeachment in the National Assembly;[304] at the same time, many agree that, during the tenure of President Muluzi,

300 Caroline Somanje, 'Wadi says he is in charge,' *Malawi News*, Blantyre, 20–26 May 2006.

301 See British Broadcasting Corporation, 'Malawi agents raid Muluzi's home,' *BBC News*, London, 27 October 2005, available at http://news.bbc.co.uk/1/hi/world/africa/4382318.stm, accessed 2 January 2006; International Bar Association, 'Malawi: former government ministers facing charges,' *Legal Briefs*, Issue 110, London, December 2004, available at http://www.legalbrief.co.za/publication/archives.php?mode=archive&publication=Legalbrief_Africa&issueno=110&format=html, accessed 2 January 2006; Olivia Kumwenda, '2005: Year of Muluzi, Bingu conflict,' *Nation Online*, Blantyre, 30 December 2005, available at http://www.nationmalawi.com/articles.asp?articleID=14393, accessed 2 January 2006; and British Broadcasting Corporation, 'Malawian VP appears in court,' *BBC News*, London, 16 November 2005, available at http://news.bbc.co.uk/1/hi/world/africa/4440888.stm, accessed 2 January 2006.

302 For example, see the comment by the mayor of Blantyre and Regional Governor of the United Democratic Front party in Mabvuto Banda, 'The mayor of Blantyre City, John Chikakwiya arrested for alleged theft,' *Nation Online*, Blantyre, 3 December 2004, available at http://malawiart.alphalink.com.au/John_Chikakwiya.html, accessed 20 January 2006; and observation in USAID, 'Malawi: Political Party Strengthening,' *CEPPS/IRI Quarterly Report: January 1 – March 31, 2005,* undated, p.2, available at http://pdf.dec.org/pdf_docs/PDACD687.pdf, accessed 20 January 2006.

303 See Bingu Wa Mutharika, *Speech by HE Dr Bingu wa Mutharika, President of the Republic of Malawi delivered to the Scottish Parliament, Edinburgh*, 3 November 2005, available at http://www.sarpn.org.za/documents/d0001742/index.php, accessed 2 January 2006.

304 See Olivia Kumwenda, '2005: Year of Muluzi, Bingu conflict,' *Nation Online*, Blantyre, 30 December 2005, available at http://www.nationmalawi.com/articles.asp?articleID=14393, accessed 2 January 2006.

a significant degree of corruption was perpetrated by high-ranking government officials and that very few of them have been brought to account.[305]

Political interference in the independence of the prosecution service has been most evident in prosecution of crimes of corruption. The law limits the formal independence of the Anti-Corruption Bureau which has emerged as an important prosecution agency under the Corrupt Practices Act.[306] The director of the bureau is appointed by the president, albeit with approval by the Public Appointments Committee of Parliament. Moreover, the law requires that the bureau must seek the consent of the director of public prosecutions before commencing any prosecution.[307] This means that prosecutions by the bureau are ultimately dependent on the approval of the executive branch of government. As the IBA noted, the proximity and close working relationship between the DPP and the attorney-general result in 'a clear risk of a lack of impartiality in investigating and prosecuting corruption cases.'

In September 2005, a former State House chief of staff made specific allegations of inappropriate political interference with the prosecution service. He was quoted by the media as having said that: '[The president] is using ACB [Anti-Corruption Bureau] to harass people he does not like. He is interfering with the Bureau, the office of the director of public prosecutions and the attorney-general.'[308] In February 2006, the director of the Anti-Corruption Bureau denied allegations that the bureau was not even-handed in its prosecution of people suspected of being involved in corruption and was being used by the government to fight its political enemies.[309] Such allegations of political interference must be understood in the context of the possible political motivations of those who make them. Nevertheless, they are damaging to the confidence that the public have in the prosecution service, particularly when they come from someone who worked close to the president.

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305 See Nixon Khembo, *National Integrity Systems: Transparency International, Country Study Report – Malawi 2004*, Transparency International, Berlin, 2004, pp.19-22, available at http://ww1.transparency.org/activities/nat_integ_systems/dnld/malawi.pdf, accessed 2 January, 2006.

306 Corrupt Practices Act, 1995 (Act 18 of 1995), Chapter 7:04, *Laws of Malawi*. Among the powers vested in the Anti-Corruption Bureau are to investigate corrupt practices and prosecute suspects. See Mustafa Hussein, 'Combating corruption in Malawi, an assessment of the enforcing mechanisms,' *African Security Review*, Vol. 14, No.4, 2005, p.96, at http://www.issafrica.org/pubs/ASR/14No4/EHussein.pdf.

307 Ibid., section 42(1).

308 George Ntonya, 'Zikhale Speaks Out,' *Weekend Nation*, Blantyre, 1–2 October 2005. The Anti-Corruption Bureau is a public body established under the Corrupt Practices Act, 1995 (Act 18 of 1995), Chapter 7:04, *Laws of Malawi*. Among the functions assigned to the bureau by section 10 of the act are the prevention, investigation and prosecution of corruption and related offences created by the act. More information on the bureau is available at http://www.anti-corruptionbureau.mw/, accessed 2 January 2006.

309 See Henry Chilobwe, 'ACB doesn't favour govt – Kaliwo,' *Nation Online*, Blantyre, 2 February 2006, available at http://www.nationmalawi.com/articles.asp?articleID=14972.

C. Lawyers

Composition of the law profession

By September 2005, the country had a total of 215 law graduates of the University of Malawi.[310] This small number reflected the limited law student intake of the university, which produced its first law graduates in 1974. Although law graduates of other universities may be admitted to the Malawi bar,[311] at present, the overwhelming majority practising are law graduates of the University of Malawi. It is, however, remarkable that out of a total of over 215 law graduates, only 170 had valid licences to practice in 2005.[312] It was not possible to account for the shortfall except to note that some lawyers practise law without renewing their licences, others have died, while yet others have left the country for work or study elsewhere. Given the country's population of over 11 million, the total number of lawyers represents a very low per capita ratio and cannot adequately service the population. The shortage impacts upon the poor and vulnerable disproportionately because they cannot afford to pay for lawyers working in private practice to enforce their rights. The critical shortage of lawyers in the public service also has a direct impact on government finances. Between 1987 and 2001, for example, the Ministry of Justice did not have enough lawyers to defend the government in some cases, which resulted in a loss to the government of an estimated K283 million in payment of compensation following default judgments.[313]

The composition of the legal profession is similar to that of the judiciary. According to records of the Malawi Law Society, out of the 170 lawyers who had renewed their licenses to practice by January 2006, only 10 per cent were women.[314] There were no reliable statistics on the breakdown of the composition in terms of race, religion or other demographic criteria. Despite its political sensitivity, however, such information should be considered relevant to the better understanding of the internal and external professional and political dynamics of the legal profession in Malawi, particularly given the impact that communitarian identities, such as those based on regionalism, generally have on professional, social and political relations in the country.

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310 Information supplied by Nita Chivwara, assistant registrar (Information), University of Malawi, 6 October 2005.

311 According to the Legal Education and Legal Practitioners Act, 1965 (Act 20 of 1965), Chapter 3:04, *Laws of Malawi*, as amended, a person may be admitted to practice if he or she is a Malawian citizen or has resided in Malawi for a continuous period of at least three months immediately prior to the date of his or her petition for admission if he or she holds a law degree from the University of Malawi or has been admitted to practice in the United Kingdom or the Republic of Ireland and has passed the Malawi Law Examination. A holder of a law degree from a university other than the University of Malawi may be admitted to practice if he or she is a Malawian citizen who has resided in Malawi for at least three months immediately prior to the date of his or her petition for admission, was admitted or was eligible to practice in the country in which he or she obtained the law degree, and has passed the Malawi Law Examination. The person's legal qualification must also have been obtained in a country which applies, as its prevailing system of law, the common law or Roman Dutch law as applied and practiced in Southern Africa.

312 Malawi Law Society, *2005 Malawi Law Society Membership*, Blantyre, 2005.

313 Government of Malawi, *Organisation and Management Review of Ministry of Justice*, Lilongwe, 2001.

314 Telephone interview with Mandala Mambulasa, Executive Director, Malawi Law Society, 11 January 2006.

Training of lawyers

The University of Malawi is the only institution that trains lawyers in the country. The minimum qualification to enter for training as a lawyer in Malawi is one year of University of Malawi training completed with a credit grade, a satisfactory A-levels certificate (school-leaving exams), a diploma with credit or a university degree. The training programme lasts four years and covers both academic and practical training in traditional courses such as criminal law, contract, torts, evidence, civil procedure and criminal procedure.

Since 1994, the University of Malawi has reviewed its curriculum for the Faculty of Law and included a substantial amount of content on human rights. The curriculum includes not only a full year course, but also human rights as an integral part of other courses, particularly Constitutional Law, Public International Law, Gender and the Law, Family Law, Labour Law and Criminal Procedure.[315] On successful completion of the four-years training programme, graduates are awarded a Bachelor of Laws degree. Upon being awarded the law degree, a graduate may then be admitted to practice unconditionally, if he or she is employed by the government in a legal or judicial capacity; or on condition that he or she works under, and with supervision and control by, a lawyer who has been in practice without conditions for at least three years.[316] After one year of being admitted conditionally, a lawyer may apply to the chief justice to have his or her conditions removed and if the chief justice receives 'satisfactory proof' that the applicant has met the necessary conditions, he or she shall order that the conditions be removed, thereby permitting the applicant to practise law independently.[317] There is neither any legal requirement for the Malawi Law Society to scrutinise new lawyers before their conditions to practice are removed, nor any evidence that the Malawi Law Society has done this in practice. On the other hand, the practice for initial admission of any lawyer is that the society is invited by the chief justice to indicate whether it has objections to the admission.

Ethics is discussed only as part of a broader course entitled Evidence, Advocacy and Ethics.[318] Little time is, therefore, available for a rigorous study of the ethical duties of lawyers in the contemporary social, economic and political context. In the circumstances, it is only possible to cover the basic framework of professional ethics for lawyers.[319] This does not adequately prepare lawyers for the ethical challenges that arise in practice.[320] In any case, the current legal framework for ethics in Malawi is inadequate because it consists only of the broad norms in the

315 See syllabi and course outlines of the various courses, at http://chambo.sdnp.org.mw/ruleoflaw/lawfaculty/CourseOutline.html, accessed 20 January 2006.

316 See sections 11(1)(a) and (b) and 11A(1) and (2), Legal Education and Legal Practitioners Act, 1965 (Act 20 of 1965), Chapter 3:04, *Laws of Malawi*.

317 Admission of lawyers to practice is governed by sections 9-12 of the Legal Education and Legal Practitioners Act, 1965 (Act 20 of 1965), Chapter 3:04, *Laws of Malawi*, as amended.

318 See University of Malawi, *Faculty of Law Course Outlines – Fourth year course outlines,* at http://chambo.sdnp.org.mw/ruleoflaw/lawfaculty/CourseOutline.html, accessed 20 January 2006.

319 Telephone interview with Kalekeni Kaphale, lawyer in private practice and assistant lecturer in Evidence, Advocacy and Ethics, University of Malawi, 24 January 2006.

320 Interviews with Chikosa Banda, lecturer in law, University of Malawi, and lawyer in private practice, and Thoko Ngwira, assistant lecturer in law and lawyer in private practice.

Legal Education and Legal Practitioners Act[321] and its subsidiary rules.[322]

There is no obligation on lawyers to undertake continuing legal education, although there is a definite professional need for it because economic, social and political developments are continually transforming the law and the context in which it is practised.[323] Lawyers, therefore, need to update their knowledge, not only of developments in law but also in its related disciplines, if they are to perform their functions effectively, efficiently and consistently with current norms of human rights.

Freedom from harassment

Cases of physical or verbal harassment of lawyers in relation to the performance of their professional functions appear to be relatively rare. No evidence points to any significant incidence of direct personal threats and abuse of lawyers by state agents, disgruntled clients, relatives of victims of crime and accused persons. However, there was some evidence to suggest that the government occasionally harasses lawyers who are perceived to sympathise with the opposition. In what the president of the Malawi Law Society termed 'white-collar harassment,' for example, successive governments have been suspected of withdrawing their legal business from such lawyers as a way of penalising them.[324] Similarly, perceived affiliation to the government in power for the time being appears to be a criterion for deciding which lawyers in private practice are hired to act on behalf of the government.[325] A different view expressed at the first stakeholders' workshop was that this was not harassment but a rational business choice by the government to do business with people it can trust.[326] However, even though 'white-collar' harassment may exist, it affects few lawyers and, in general, there does not appear to be any breach of Article 16 of the United Nations Basic Principles of the Role of Lawyers which requires governments to 'ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference.'

Although any government must have the freedom to hire lawyers of its choice, it must be guided by principles of transparency and accountability. In order to prevent the government from abusing its discretion by hiring and firing lawyers in a manner that is tantamount to harassment, some have suggested that the Ministry of Justice and Constitutional Affairs maintain a transparent list of lawyers with a sound track record in respective areas of specialisation. Lawyers, according to the suggestion, can then be selected in an open process that adheres to the transparent

321 Legal Education and Legal Practitioners Act, 1965 (Act 20 of 1965). For a discussion of the content of the Act, see 'Discipline in the legal profession' on the next page.

322 Telephone interview with Kalekeni Kaphale, lawyer in private practice and assistant lecturer in Evidence, Advocacy and Ethics, University of Malawi, 24 January 2006.

323 Telephone interview with Phoebe Chikungwa, lawyer for Limbe Leaf Tobacco Company, 24 January 2006.

324 Personal interview with Alick Msowoya, president, Malawi Law Society, Blantyre, 27 September 2005. Also see International Bar Association, *Report of Visit to Malawi*, London, 2002, p.49, available at http://www.ibanet.org/images/downloads/HRIMalawiReport.pdf, accessed 12 January 2006.

325 Telephone interview with Kalekeni Kaphale, lawyer in private practice and assistant lecturer in Evidence, Advocacy and Ethics, University of Malawi, 24 January 2006.

326 This was stated by various participants during the plenary session of the first roundtable meeting for the justice sector part of the Afrimap research in Malawi held on 24 September 2005 at Chancellor College, Zomba, Malawi.

procedures that obtain in the procurement of goods and services under the relevant legal framework.[327] The framework consists mainly of the Public Procurement Act (Act 8 of 2003), which requires that public institutions can only enter into contracts for the acquisition of goods and services after open tendering processes regulated and monitored by the Department of Public Procurement. In order for the selection process to be fair, it is recommended that the Ministry of Justice and Constitutional Affairs issue a public invitation to tender to all lawyers and not only to those on a pre-selected list of lawyers.

Discipline in the legal profession

The legal profession in Malawi is governed primarily by the Legal Education and Legal Practitioners Act (Act 20 of 1965). Section 21(1) of the act empowers the High Court to suspend, strike off the roll or admonish any practitioner who misleads the court; breaches certain standards of professional practice relating to the taking of instructions, fees and touting; is convicted of a criminal offence punishable by imprisonment for one year or more; or is guilty of conduct tending to bring the profession into disrepute. The High Court exercises this power either on its own initiative or upon application by the attorney-general. The Malawi Law Society, which is established by section 25 of the act, is also a critical part of the disciplinary system, particularly through its Disciplinary Committee. The committee is established under section 37 of the act and is composed of the solicitor-general[328] and two other members elected by the Society.

The act empowers the committee to conduct inquiries into allegations of indiscipline made against practising lawyers and, in appropriate cases, refer the matter to the attorney-general who may apply to the High Court for an order suspending, striking off the roll or admonishing the lawyer in question.[329] Where the committee is not satisfied that a prima facie case of indiscipline has been established against the lawyer, it is required to report this fact to the High Court, if the court had referred the matter to the committee in the first place, or to dismiss the case. Although it was not possible to access Malawi Law Society records on sanctions that have been imposed on lawyers for breaching discipline, the president of the Malawi Law Society suggested that the Society has received a number of complaints against lawyers mainly relating to allegations of overcharging for legal services, embezzlement of clients' money and failure to secure judgments that are satisfactory to the client.[330] He also indicated that in a large number of cases, some of the allegations were based on a misunderstanding of the law and legal practice by clients. In the few cases in which allegations against lawyers were considered worthy of further action, the matters were referred to the Disciplinary Committee established under section 37 of the Legal Education and Legal Practitioners Act for its action. In at least three instances, lawyers have been barred or suspended from practice following allegations of financial misconduct in relation to clients' funds.[331]

327 Telephone interview with Kalekeni Kaphale, lawyer in private practice, 24 January 2006.

328 See footnote 294.

329 Legal Education and Legal Practitioners Act, 1965 (Act 20 of 1965), section 37(2).

330 Interview with Alick Msowoya, president Malawi Law Society, Blantyre, 27 September 2005.

331 See the cases of *Attorney General v Mutuwawira*, Malawi Law Reports, Vol. 10, 1981–1983, p.352 and *Attorney General v Chirambo*, Malawi Law Reports, Vol. 11, 1984–1986, p.463. In the former case, the High Court ordered that a lawyer be struck off the register of legal practitioners for stealing a client's money. In the latter, the High Court suspended a lawyer from practice for three years after finding him guilty of misleading a client and charging excessive fees.

Both lawyers and members of the public feel that the system for enforcing discipline in the legal profession needs to improve in effectiveness and efficiency. In the opinion of the president of the Malawi Law Society, the system is inefficient because of structural reasons.[332] First, the solicitor-general, who has historically chaired the disciplinary committee, is based in the capital city Lilongwe, while most practising lawyers and the seat of the Malawi Law Society are in Blantyre, the country's main commercial centre. This makes it difficult to arrange full meetings of the committee. The law society president also attributed the inefficiency of the committee to the lack of specific funding for its operations. Although the attorney-general thought that funding could come from the Ministry of Justice, the judiciary and the Malawi Law Society,[333] none of these institutions had a specific budget provision for facilitating meetings of the disciplinary committee. The president of the Malawi Law Society also attributed the ineffectiveness of the regime for disciplining lawyers on the committee's lack of punitive powers[334] and the absence of rules of procedure. It has also been observed that the mechanism may also not be effective because few members of the public are aware of its existence.[335]

332 Interview with Alick Msowoya, president Malawi Law Society, Blantyre, 27 September 2005.

333 Interview with Ralph Kasambara, attorney-general of Malawi, 29 August 2005.

334 Section 37(4) of the Legal Education and Legal Practitioners Act empowers the committee only to make recommendations. Interview with Alick Msowoya, president, Malawi Law Society, Blantyre, 27 September 2005.

335 Interview with Chrispine Sibande, lawyer in private practice and part-time legal advisor to the Society for the Advancement of Women, Lilongwe, 9 September 2005.

Case Study: The challenges of accessing copies of High Court judgments

On 20 January 2006, Patrick Jamali was arrested following allegations that he had stolen K246 000 (about US$1 900) from his employers. On 23 January 2006, a lawyer that he had hired applied for his release on bail to the senior resident magistrates' court in Lilongwe. The police objected to bail on the grounds that their investigations were not complete. The lawyer counter-argued that this was not sufficient reason for denying bail since investigations ought to be completed first before a criminal suspect is arrested and not vice versa. The lawyer further argued that the state was required to provide the court with sufficient details justifying its claim that investigations could not have been completed before arrest. For this proposition, the lawyer relied on the case of *Chomela v Republic* (Miscellaneous Application 11 of 1995).

The case of *Chomela v Republic* is not reported and neither the lawyer nor the magistrate had a copy of it. The magistrate requested the lawyer to provide her with a copy before she could decide whether to grant bail to Jamali. At 10.30 am, she adjourned the case to the afternoon to allow the lawyer time to source a copy of the judgment. The lawyer asked the criminal registry of the High Court in Lilongwe to provide him with a copy but was told that the case had been decided by the High Court sitting in Blantyre and the Lilongwe registry did not have a copy of the judgment. The lawyer then requested a copy from two senior resident magistrates and three lawyers in private practice that he knew personally. All the people contacted acknowledged that they knew of the case but none of them had a copy of the judgment.

The lawyer then attempted to search the judiciary's official website (http://www.judiciary.mw), but it was inaccessible due to a technical problem. The lawyer had failed to get a copy of the judgment by the time the court resumed sitting at 2 pm in the afternoon. The senior resident magistrate ruled that since the lawyer had failed to provide a copy of the judgment that he relied on as case authority to support his application for bail, bail would be denied. Jamali was returned to police custody pending completion of police investigations, and was only released on 27 January following a successful application for bail that was made to the High Court.

It is arguable that Patrick Jamali would not have spent the four nights in custody, from 23 to 27 January 2006, if Malawi had a proper system of law reporting and copies of all judgments of the High Court were readily available in court registries and with lawyers.

SOURCES:
Telephone interview with Chrispine Sibande, lawyer for Jamali, 17 February 2006.
Malawi Judiciary website, (http://www.judiciary.mw/civil/index.htm).

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Criminal justice

Significant progress has been made since the 1994 Constitution in reforming the criminal justice system. Police officers have undergone extensive training in human rights and public order management aiming at transforming the police from an enforcer of the pre-1994 dictatorial rule to a more accountable institution. Laws that blatantly deprived perceived or real political opponents of their rights to a fair trial have been repealed. Measures have been taken to introduce more civilian oversight of the prison system.

However, despite notable efforts to produce better policing, crime has been on a constant increase since 2001, due principally to the level of poverty in Malawi. Because of staff shortage, the prosecution service is faced with a large backlog of cases, resulting in unusually long pre-trial detentions. Legal guarantees of fair trial introduced since the 1994 Constitution have not been followed in practice. Most criminal defendants are denied their right to legal representation because the level of poverty means that they cannot afford private lawyers and the government-provided legal aid has limited availability. Prison overcrowding has been one of the most urgent challenges facing criminal justice in Malawi as the prison population has constantly increased and conditions of detention have deteriorated.

A. Protection from crime

Incidence of crime

Malawi is listed as one of the poorest countries in the world,[336] and a direct link has been estab-

336 Malawi ranked 165th in terms of the 2003 United Nations Human Development Index. See http://hdr.undp.org/statistics/data/hdi_rank_map.cfm.

lished between extreme poverty and crime.[337] Theft and corruption, the two most common crimes, are directly linked to poverty, even though not completely explained by it.[338]

Recent efforts for better policing and internal reforms of the police service have not resulted in a decrease of crime. According to the 2004 Malawi National Crime Victimisation Survey conducted for the Crime and Justice Statistical Division of the National Statistical Office, 48.5 per cent of the respondents indicated that they believed that crime had been on the increase since 2001, while 38.3 per cent believed that crime had in fact declined.[339] The survey found that reporting of crimes in the country was relatively low, with the two most common crimes—theft of crops and theft of livestock—being the least reported.[340]

There are a number of mechanisms for collection of crime statistics in Malawi. The most comprehensive mechanism is operated by the police service through its Research and Planning Branch which collects, collates and analyses statistics gathered from all police stations across the country. However, these statistics are not widely published. They are primarily used to inform the police's own strategic and operational planning, thus the combination of research and planning activities into one branch of the police. Apart from collecting crime statistics, the branch is involved in coordinating strategic and operational plans of the various sections of the police, preparing annual operational plans and budgets and monitoring implementation of annual plans of the branches of the service.[341]

The National Statistical Office also collects crime statistics, mainly from surveys conducted by its Crime and Justice Division. The figures that the two mechanisms reveal are reasonably credible and useful. The statistics from the police are based on reports from stations that are directly involved in gathering of primary data on crime at a national level. For its part, the Crime and Justice Division of the National Statistical Office conducts scientific surveys whose credibility is implicit in the involvement of reputable organisations in the area such as South Africa's Institute for Security Studies which provides the Division with technical assistance.[342]

The prison service has also combined research and planning into one unit, so that research can feed directly into planning.[343]

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337 Patrick Burton, Eric Pelser and Lameck Gondwe, *Understanding offending: Prisoners and rehabilitation in Malawi*, ISS & Crime & Justice Statistical Division, National Statistical Office, November 2005, p.1, at http://www.iss.co.za/pubs/Books/UnderstandingOffending%20Nov05/UnderstandingOffending.pdf.

338 Ibid.

339 Eric Pelser, Patrick Burton and Lameck Gondwe, *Crimes of Need: Results of the Malawi National Crime Victimisation Survey,* Institute for Security Studies, Pretoria, 200, p.63, available at http://www.iss.co.za/pubs/Books/CrimesOfNeed/7Public.pdf, accessed 14 February 2006.

340 Ibid., p.50.

341 Interview with Lot Dzonzi, Commissioner and Head of the Research and Planning Branch, Malawi Police Service, Lilongwe, 19 September 2005.

342 The Division operates with technical assistance provided by the Institute and funding from the United Kingdom Department for International Development (DFID). It conducted the country's first national crime victimisation survey under the leadership of the Institute's advisor to the Division: See Institute of Security Studies, *Research – Malawi Liason Office*, 2005, available at http://www.iss.co.za/Res/malawi/index.htm, accessed 13 January 2006; and Pelser, Burton and Gondwe, *Crimes of Need*.

343 Interview with Barzirial Chapuwala, superintendent in charge of the Research and Planning Unit, Prison Services, Zomba, 27 September 2005.

Arrest, prosecution and punishment

According to data held by the Research and Planning Branch of the police service, during 2004 there were 151 530 reports of crimes made to the police, and arrests of 103 053 people as criminal suspects. Out of these, 49 435 were prosecuted, 43 062 of which were convicted. This means that 48 per cent of arrests resulted in prosecutions, while 87 per cent of prosecutions resulted in convictions.

These figures suggest either that most arrests are based on evidence that is not sufficient to justify prosecution, or that there is a large backlog in prosecutions. Director of Public Prosecutions Ishmael Wadi seemed to confirm the latter. In an interview in November 2005 he told a *New York Times* reporter that his office 'had a backlog of 44 untried fraud and tax-evasion cases, 173 robbery and theft cases, 388 fatal accident cases and 867 homicide cases.'[344]

These figures also indicate a remarkably high conviction rate, which may be a reflection of the effectiveness of the prosecutions and/or the limitations of the defence in most cases due to the lack of adequate legal representation for the vast majority of criminal defendants. Further research is required to determine definitively the reason why most people who are arrested are not prosecuted, and why the conviction rate among those who are prosecuted is so high. Such research would inform policy aimed at, among other things, improving the quality of criminal investigations and evaluating the quality of the defence in criminal prosecutions.

The low reported rate for crimes and the failure to prosecute reported crimes mean that these figures do not provide the full picture of the incidence of crime in Malawi. The 2004 National Victimisation Survey reported that victims of theft of crops and theft of livestock were most likely to say that the crime was not important enough to report or that there was no chance that their property would be recovered.[345] On the other hand, in the case of corruption, the next most common crime, failure to prosecute has been largely the consequence of the competing powers of the Anti-Corruption Bureau (ACB) and the DPP. Particularly, the requirement that the ACB seek the consent of the DPP before a case can be sent for prosecution has resulted in delays and impunity. According to a recent study, 'over the past ten years the ACB has been unable to proceed with certain cases despite full investigation owing to the DPP's reluctance to give his consent.'

Despite low reporting of theft and failure to prosecute a number of incidences of corruption, in general, impunity for criminal offences does not appear to be widespread. The police and the courts enjoy much public confidence. The 2004 National Victimisation Survey reported that public perceptions of the police and the courts were 'overwhelmingly positive', with 70.3 per cent of respondents reporting that they believed that the police were doing a good job, and 87.7 per cent of respondents saying that they believed that the courts were performing their functions satisfactorily.[346] The prosecution service also delivers high conviction rates, thereby contributing to the deterrent aspect of the criminal justice system. These findings indicate that the criminal justice system not only enjoys a high degree of legitimacy, but also that its institutions can rely

344 He added: 'When the offenses occur, they send the files to this office. The files keep on coming, so the number keeps increasing. So what do you do? You accumulate the files, keep them nice and put them on the shelves.' Michael Wines, 'Wasting Away, A Million Wait in African Jails,' *The New York Times*, 7 November 2005.

345 Pelser, Burton and Gondwe, *Crimes of Need*.

346 Ibid., p.72.

on public goodwill to support any requests for additional public funding to finance the various reforms that this report has recommended.

However, there have been a number of occasions when political influences have led to some degree of impunity being tolerated by key institutions in the system. A good example is the attitude the police showed at times during the political tension that surrounded the debate on the extension of the presidential terms of office in 2002. During this period, the media reported several incidents in which ruling party supporters assaulted some real and perceived opponents of the proposal to extend the presidential term. In one case, an opposition supporter was so badly injured that he required surgery yet no one was arrested or prosecuted for the offence although it had been committed in full view of several police officers.[347] Similarly, on the day the results of the 2004 elections were announced, the head of one of the country's most prominent human rights NGOs was assaulted by ruling party supporters in full view of several police officers outside the Electoral Commission's national tally centre; again, no one was arrested.[348] Since the effective change of government after the elections, the prosecution service has prosecuted some cases of political violence ignored under the previous regime.

B. Policing

Legal framework

The primary responsibility for public order and public safety is vested in the Malawi Police Service. The Malawi Police Service is established by the Constitution and regulated by the Police Act.[349] The police service has approximately 7 000 men and women, divided into the following branches: general duties, mobile service, criminal investigations, road traffic, community policing, prosecutions, research and planning, radio communications and public relations.[350] In 2005, this was estimated to represent a per capita ratio of 1:1 400.[351] The ratio in the same year

347 See 'Riot police teargas anti-Muluzi marchers,' *Independent Online*, Cape Town, 2 November 2002, available at http://www.int.iol.co.za/index.php?set_id=1&click_id=68&art_id=qw1036156860539B254, accessed 13 January 2006; Southern Africa Documentation and Cooperation Centre, *Court rejects ban on demonstrations*, 8 November 2002, available at http://www.sadocc.at/news2002/2002-334.shtml, accessed 13 January 2006; 'Special report: Police disperse demo against third presidential term,' *The Christian Post*, San Fransisco, 18 November 2002, available at http://www.christianpost.com/article/africa/12/full/special.report.police.disperse.demo.against.third.presidential.term/1.htm, accessed 13 January 2006.

348 Centre for Social Concern, *Malawi Press Review*, Lilongwe, May 2004, available at http://www.mafroma.org/kanengomay04.htm, accessed 13 January 2006.

349 Police Act, 1946 (Act 26 of 1946).

350 Interview with Tumalisye Ndovi, commissioner and head of prosecutions and legal services, Malawi Police Service, Lilongwe, 8 September 2005.

351 See International Monetary Fund, *Malawi: Poverty Reduction Strategy Paper Annual Progress Report*, June 2005, IMF Country Report No.05/209, Washington DC, June 2005, p.77, available at http://www.imf.org/external/pubs/ft/scr/2005/cr05209.pdf, accessed 13 January 2006. For discussions of the implication of low police:population ratio in Malawi, see Malawi Government, *Poverty Reduction Strategy Paper*, Lilongwe, 2002, p.75, available at http://www.imf.org/External/NP/prsp/2002/mwi/01/043002.pdf, accessed 13 January 2006; Mwakasungura, U and Nungu, D, 'Country Study: Malawi', in Chandre Gould and Guy Lamb, *Hide and Seek: Taking Account of Small Arms in Southern Africa*, Institute of Security Studies, Pretoria, 2004, pp.78-93, 86, available at http://www.iss.co.za/index.php?link_id=3&slink_id=205&link_type=12&slink_type=12&tmpl_id=3, accessed 22 June 2006.

was 1:395 for South Africa[352] and 1:277 for Botswana.[353] In total, the Malawi police is organised into 33 stations, eight sub-stations, 36 posts and 147 sub-units.[354]

The current Police Act, which is the main law governing the day-to-day operations of the police, has been in force since 1946. Although the act has been amended on a number of occasions since independence, the amendments have mainly involved minor restructuring of the administrative hierarchy of the police and reforms of its disciplinary regime. The amendments have not contributed to any fundamental change in the mission or the operations of the service. The major institutional reforms have not resulted from legal amendments but organisational re-orientation most notably through the police reform programme funded by DFID.[355] The programme became operational in 1997 and has helped the police to adapt to current norms of policing, including those that seek to protect human rights, uphold the rule of law and promote accountability and efficiency. The main effort to reform the law governing the police has been made by the Law Commission,[356] which has proposed the replacement of the Police Act with legislation that is more compliant with current requirements of the Constitution and international human rights standards. The proposals for reform suggested by the Law Commission and put forward in a draft Police Bill include a provision that would make 'the protection of fundamental freedoms and rights of individuals' one of the general functions of the police service.[357] Other innovations proposed by the Police Bill include provision for the independence of internal disciplinary committees and the establishment of community policing fora, a lay visitors' scheme and an independent police complaints commission.[358]

Another area where legal reform is needed is the regulation of intelligence services. In addition to the intelligence branches of the defence forces, Malawi also had a National Intelligence Bureau which operated without a specific statutory mandate until it was disbanded in early 2005.[359] The bureau had operated outside of the structures of the police and defence force structures and answered directly to the office of the president and cabinet. In order to make intelligence services more accountable, it is recommended that they must be established in accordance with clear legal mandates whose performance must be subject to accountability mechanisms.

In general, it is uncommon for military units to be used for civilian police work. The police mobile service is a paramilitary branch of the police that is engaged mainly in maintaining public order. It is also used in civilian police work to supplement the operations of other branches. On a number of occasions, the army has also been used to augment the police service in conducting

352 See South African Police Service, *Police Population Ratios*, available at http://www.saps.gov.za/_dynamicModules/internetsite/buildingBlocks/basePage4/BP444.asp, accessed 27 April 2006.

353 See United Nations Economic Commission for Africa, *Africa Governance Report 2005*, Addis Ababa, 2005, p.180, available at http://www.uneca.org/agr2005/, accessed 27 April 2006.

354 Interview with Lot Dzonzi, Commissioner of Police and Head of Research and Planning Branch, 2 June 2006.

355 See Christopher Stone, Joel Miller, Monica Thornton and Jennifer Trone, *Supporting Security, Justice and Development*, 2005, p.4, available at http://www.dfid.gov.uk/pubs/files/security-justice-development.pdf, accessed 6 January 2006.

356 See Malawi Law Commission, *Law Commission Report No. 9: Report on the Review of the Police Act*, Lilongwe, July 2003.

357 Police Bill proposed by the Law Commission, clause 4(d).

358 Ibid., clauses 58, 120, 124, and 128.

359 See Centre for Human Rights and Rehabilitation, *Statement on the disbandment of NIB,* 10 January 2005, available at http://www.chrr.org.mw/press_room/pr_disbandment_nib.php, accessed on 18 February 2006.

crime-fighting operations. The operations have involved army and police personnel in conducting widespread searches in certain urban areas to seek out stolen property and other evidence of crime. According to the police, during such operations overall command is retained by the police.[360]

Qualification, remuneration and training

The minimum academic qualification required to become a police officer is a pass in the Malawi School Certificate of Education, which is obtained after at least four years in secondary school. The requirement of a school certificate is fairly recent and there are many police officers who entered the service when the minimum requirement was lower. Such officers are likely to have limited literacy, which is likely to undermine their competence. The basic pay of a police officer entering at the lowest level is higher than for a person entering the civil service at a similar level. Nevertheless, at about K7 000 (the equivalent of US$54) per month, the pay is inadequate to provide police officers with a reasonable standard of living. In June 2006, the Centre for Social Concern, a reputable NGO, estimated that to meet the minimum requirements for basic necessities, a family of six living in Lilongwe requires a minimum of K27 106 (US$210) per month.[361]

The police service has three main training centres: Police Training School in Blantyre for the basic training of recruits, Police Training College in Zomba for in-service training of officer cadets and Mtakataka Police College wing for specialist training, particularly of the paramilitary Police Mobile Service. According to the police, training in all these institutions has been adapted in the recent past to include human rights standards and minimum use of force.[362]

Police officers also undergo ad hoc human rights training which is facilitated by various governmental agencies and NGOs. One governmental agency that has assisted the police in this regard is the Inter-Ministerial Committee on Human Rights and Democracy, which consists of representatives of various government ministries and aims at promoting human rights and democracy through projects implemented through governmental and non-governmental actors. Acting through its Democracy Consolidation Programme, the Inter-Ministerial Committee on Human Rights and Democracy has, among other things, provided funding to the police and an NGO, the Malawi Human Rights Resource Centre, to conduct a baseline survey on human rights knowledge levels in the police service, develop a human rights training manual for the police, develop and distribute a human rights source book and develop and disseminate public awareness campaign materials on human rights standards and law enforcement.[363] Training workshops in human rights for senior police officers have also been conducted by various NGOs. A recent example is a human rights training workshop for police executive managers conducted

360 Interview with Tumalisye Ndovi, Commissioner and Head of Prosecutions and Legal Services, Malawi Police Service, Lilongwe, 8 September 2005.

361 See 'Malawi breadbasket,' *The Lamp*, Balaka, May–June 2006, p.23; and Centre for Social Concern, *Malawi Press Review*, Lilongwe, June 2004, available at http://www.mafroma.org/kanengojune04.htm, accessed 13 January 2006.

362 Interview with Tumalisye Ndovi, commissioner and head of prosecutions and legal services, Malawi Police Service, Lilongwe, 8 September 2005.

363 Democracy Consolidation Programme, *2004 Annual Progress Report of the Democracy Consolidation Programme Phase II*, p.33, Lilongwe, undated.

by the Centre for Human Rights and Rehabilitation (CHRR) in collaboration with the Human Rights Resource Centre and the police service in June 2005.[364]

In addition to the police institutions, the government-supported Staff Development Institute offers a training programme in prosecution skills for police officers, which includes training in human rights and constitutional law.[365] A limited number of police officers have also received training in specialised techniques or approaches to modern policing, which takes into account the rights of the victim. A good example of such training is that which the Community Policing Branch delivered in the period between February and August 2005 to 75 victim support coordinators, 60 rapid response officers, and 32 urban zone policing officers.[366] However, it is also in specialised areas that the training levels in the police remain low, leading to critical shortages in the capacity of the service. For example, concern was expressed by at least one commissioner of police that there are critical gaps in the training of certain sections of the service, including those responsible for investigating crime.[367] It was pointed out that the whole service has no person trained in handwriting analysis, the only expert having died a few years ago. There is similarly no training or equipment in forensic techniques. In cases of need, samples of handwriting and other forensic evidence are sent at very high cost for analysis in countries such as South Africa. Although handwriting analysis does not have higher priority in comparison to other policing needs, the total absence of an expert in the country is a matter of concern. At least in other areas such as medico-legal expertise in sexual assault cases, the police's own resources can be supplemented by those of public institutions that exist in the country such as the University of Malawi, which has some expertise in medicine at the College of Medicine, and DNA analysis, at Chancellor College.

Code of conduct

Matters of police discipline are provided for in detail in the Police Act. Part V of the act is effectively a code of conduct, in that it sets out norms of both official and personal behaviour and lays down the punishments that may be imposed in cases of breach of the norms. Almost none of the provisions include any specific requirement that obliges police officers to comply with national or international human rights standards. The only exception is section 39(14), which makes it an offence for a police officer to threaten or use unjustifiable violence or to abuse any person in his custody. In effect, this requires compliance with the human rights standard which protects every person from torture or cruel, inhuman or degrading treatment or punishment.[368] The code also does not make reference to equal protection for all, something that will change when the Police Bill proposed by the Law Commission becomes law.

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364 See Centre for Human Rights and Rehabilitation, CHRR, *Partners Organise Human Rights Training for Police Executive Managers*, undated, available at http://www.chrr.org.mw/chrr_training_police_executive.php, accessed 13 January 2006. Titles of papers presented at the workshop included: 'Civil society role in policing', 'Human rights and the police', 'Human rights and public order', 'Overview of police experiences' and 'Presentation-community police.'

365 See Staff Development Institute, *Prospectus 2005/2006*, Blantyre, 2005, p.32, available at http://www.malawi.gov.mw/opc/sdi/PDF20SDI20PROSP2005.pdf, accessed 20 January 2006.

366 Malawi Police Service, *Report of Activities Conducted by Community Policing Services Branch*, Lilongwe, 2005, pp.3-5.

367 Interview with Tumalisye Ndovi, commissioner and head of prosecutions and legal services, Malawi Police Service, Lilongwe, 8 September 2005.

368 Constitution, 1994, section 19(3); and African Charter on Human and Peoples' Rights, article 5.

Since 1996, the Public Service Act has required all public service institutions to abide by the principle of non-discrimination. However, this obligation is not restated in the Police Act. This is one of the weaknesses of the act that the Police Bill proposed by the Law Commission addresses. Although the bill does not mention non-discrimination expressly, it does so by implication in the provision that one of the obligations of the service is the protection of 'fundamental freedoms and rights of individuals'[369] since one of the human rights that the Constitution expressly guarantees is that of every person not to be discriminated against.[370]

There is evidence to suggest that, in practice, police treat members of certain sections of the population less favourably than others. For example, according to the Malawi chapter of the Women and Law in Southern Africa Research and Education Trust (WLSA), women are treated less favourably than men when they seek police intervention, particularly where they are complaining of domestic violence.[371]

The police have also been accused of not providing equal protection to members and supporters of the party in power and those affiliated to opposition parties. A research study of public perceptions of the police conducted by the Centre for Social Research of the University of Malawi in 1998 found that to a significant extent, the members of the public perceived the police to be politically biased.[372] The perception appears to have persisted; in 2004, the EU Observer Mission to the 2004 elections found that the police were widely perceived to be close to the ruling party. The police were also perceived to provide preferential treatment at the expense of the poor.[373]

There is no readily available evidence to indicate definitively whether the police continue to be perceived to be, or are, biased against particular vulnerable groups. The recent establishment of Victim Support Units should help to improve support provided to victims of crime who belong to vulnerable groups. For a long time, the government's failure to enact legislation aimed at improving the protection of vulnerable people within the home, especially women and children, had limited the potential for implementing any strategy for action. In April 2006, the Prevention of Domestic Violence Act was finally enacted.[374] This is an important step forward, even though some civil society and professional organisations have criticised the act for failing to take sufficient account of Malawi's cultural realities and imposing unrealistic penalties on perpetrators of domestic violence.[375]

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369 See clause 4(1)(d) of the proposed Police Bill.

370 Constitution, 1994, section 20(1).

371 Women and Law in Southern Africa Research and Education Trust, *In Search of Justice*, 2000. Also see Don Kulapani, 'Gender issues paramount for police service,' *The Chronicle*, Lilongwe, 21 December 2001, available at http://www.afrol.com/News/mawo15_police_gender.htm, accessed 14 January 2006.

372 Sidon Konyani, *Police Perception Study*, Centre for Social Research, Zomba, 1998, p.46.

373 See European Union, *Republic of Malawi Presidential and Parliamentary Elections 20 May 2004: European Union Election Observer Mission Final Report*, (undated), p.22, available at http://www.eu.int/comm/external_relations/human_rights/eu_election_ass_observ/malawi/eu_eom_malawi_fin_rep_04.pdf, accessed 14 January 2006, p.14.

374 See 'Statement by Ho. Joyce Banda, M.P., Minister of Gender, Child Welfare and Community Services to the 35th session of the United Nations CEDAW Committee.' 13 May 2006, New York, available at http://www.un.org/womenwatch/daw/cedaw/cedaw35/pdf/Intro_statementMalawi_35th%20Session%20CEDAW.pdf, accessed 8 July 2006.

375 For example, see Bright Sonani, 'Lawyers caution on Domestic Violence Bill,' *The Nation*, Blantyre, 16 April 2006, available at http://66.249.93.104/search?q=cache:I8jKUsfU-dIJ:www.nationmalawi.com/articles.asp%3FarticleID%3D16227+malawi+domestic+violence+bill&hl=en&ct=clnk&cd=1, accessed 27 April 2006.

Police abuse

Historically, 'police abuse has been one of the most serious and divisive human rights violations in Malawi.'[376] However, since the introduction of the police reform project, attempts have been made to reduce the problem through various initiatives including training of police officers to maintain public order in a manner that is consistent with human rights and international standards of policing in democracies.[377] In spite of the reform efforts, however, there have been credible allegations of abuse in recent years.

In 2001, the Special Rapporteur on Prisons of the African Commission on Human and Peoples' Rights visited Malawian prisons and police stations and reported a number of serious allegations of abuse. The Rapporteur reported allegations of police beatings and ill-treatment of suspects mainly to extract confessions.[378] Instances of verbal, physical and sexual abuse of female suspects by individual police officers have also been reported.[379]

More recently, the same observation has been made by Amnesty International which, in its 2005 report, states that 'the torture and ill-treatment of suspects and deaths in custody were reported to continue' and cites the examples of the cases of Wekha Maguja and Gift Chikani, who were allegedly beaten, and Hannah Kapaluma, who was allegedly beaten and sexually assaulted by police officers. Other alleged abuses have been so serious as to have resulted in death. Examples cited by Amnesty International include the cases of Mabvuto Maguja, who died on 23 May 2004 after police apparently beat him following his arrest in Lilongwe; 10-year-old Epiphania Bonjesi, who was fatally shot during attempts by the police to quell a riot that had erupted in Blantyre following the announcement of the results of the 2004 presidential elections; and Fanikiso Phiri, a university student who was shot dead by police during a riot at a constituent college of the University of Malawi.[380] In June 2005, the media also reported the death in police custody of 12-year old Mabvuto Bakali.[381]

These reports by the media and human rights organisations suggest that police abuses are frequent enough to be a matter of urgent concern. The concern is heightened by the delay in the enactment into law of the Police Bill proposed by the Law Commission. Among other things, the bill states that one of the general functions of the police service is the protection of fundamental rights and freedoms.[382] According to the commission, reforms to police law may contribute to

376 Centre for Human Rights and Rehabilitation, CHRR, *Partners Organise Human Rights Training for Police Executive Managers*, 2005, available at http://www.chrr.org.mw/chrr_training_police_executive.php, accessed 13 January 2006.

377 Interview with Tumalisye Ndovi, commissioner and head of prosecutions and legal services, Malawi Police Service, Lilongwe, 8 September 2005.

378 African Commission on Human and Peoples' Rights, *Prisons in Malawi: Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa on Visit 17–28 June 2001*, Banjul, 2001, p.39, available at http://www.penalreform.org/download/rs/malawi_english.pdf, accessed 20 January 2006.

379 Interview with Catherine Munthali, executive director, Society for the Advancement of Women, Lilongwe, 20 September 2005.

380 Amnesty International, 'Malawi', in *Report 2005*, 2005, available at http://web.amnesty.org/report2005/mwi-summary-eng, accessed 15 January 2006.

381 'Malawi: Opposition leader asks security minister to resign,' *M&C News*, Glasgow, 21 June 2005, available at http://news.monstersandcritics.com/mediamonitor/article_1018537.php/Malawi_Opposition_leader_asks_security_minister_to_resign, accessed 15 January 2006.

382 Police Bill proposed by the Law Commission, clause 4.

a change of behaviour of police officers and enhance respect for human rights within the police service.[383]

Investigation of complaints against the police

There is no independent civilian mechanism to handle complaints about police conduct made by members of the public. The Police Act provides that any complaints against the activities of police personnel must be submitted to the police hierarchy for investigation; although in practice they may also be made to the Malawi Human Rights Commission, the ombudsman and the courts. The effectiveness of the mechanism for internal investigation of abuse in the police is debatable. For example, by February 2006, the police had not published reports of internal investigations into the use of live ammunition in 2001 and 2005 to control crowds, which in at least two cases had resulted in the death of civilians.[384] There is currently no specific legal obligation that requires the police to publish information related to their internal investigations of complaints or alleged abuse.

Although both the Human Rights Commission and the Office of the Ombudsman can investigate police abuse, the constitutional powers of the Human Rights Commission are very wide, covering the investigation of all human rights violations, and the commission does not specialise in nor necessarily prioritise investigation of complaints about police abuses. For its part, the Office of the Ombudsman has a considerable backlog of cases and cannot guarantee efficient handling of complaints against police abuses. The same is true of the courts.

Despite their limitations, the police, the Human Rights Commission, the ombudsman and the courts have been able to bring to account police officers who have abused their power. For example, the High Court has awarded damages to victims of police abuses who have sued the police for assault, battery and false imprisonment.[385] However, the seriousness with which some courts have taken police abuses is debatable because in assessing the compensation to be paid to victims they have treated such cases as if the perpetrators were ordinary citizens and not officers of the law. One example of such a case is that of *Makuludzo v Attorney General*,[386] where the High Court, in assessing damages in relation to an assault by police officers, cited a case involving an assault committed by a group of civilians. The court did not award punitive damages despite the legal principle that permits courts to award such damages for torts arising out of abuse of power

383 Malawi Law Commission, *Law Report No. 9: Report of the Law Commission on the Review of the Police Act*, Lilongwe, July 2003, pp.7-8.

384 See statement by the Inspector General of Police promising an inquiry into the use of firearms against demonstrating university students which resulted in one death quoted in Raphael Tenthani, 'Malawi student death sparks clashes,' *BBC News*, 14 December 2001, available at http://news.bbc.co.uk/1/hi/world/africa/1710847.stm, accessed 04 January 2006. Also see comments in Amnesty International, 'Malawi' in *Report 2005*, 2005, summary available at http://web.amnesty.org/report2005/mwi-summary-eng, accessed 4 January 2006, noting that no findings of any police investigation into the killing of a ten-year-old bystander during post-election demonstrations in May 2004 had been made public by the end of that year.

385 For example, see the case of *Makuludzo v Attorney General*, Civil Cause 2273 of 200, in which the High Court ordered the state to pay the victim of police assault, battery and false imprisonment.

386 *Makuludzo v Attorney-General,* Civil Cause 2468 of 2001.

by public officials.[387]

The courts have also not always demonstrated serious disapproval of police abuses in the area of criminal law. In some cases, courts have upheld section 176(1) of the Criminal Procedure and Evidence Code,[388] which, in part, permits courts to admit confessions as evidence even if they were 'not freely and voluntarily made.' This directly contradicts section 42(2)(2) of the Constitution which guarantees every person the right 'not to be compelled to make a confession or admission which could be used in evidence against him or her.' The High Court has held that the inconsistency between the two provisions either renders the former invalid[389] or, at the very least, compels the court to exclude the tainted evidence as a way of providing an effective remedy for a violation of a constitutional right.[390] Although this suggests that courts take the use of force or duress by the police seriously, there are other cases that send signals in the opposite direction. An example is the case of *Bokhobokho and Jonathan v The Republic*,[391] in which persons accused of murder claimed that they had made confessions as a result of beatings by the police. The Supreme Court of Appeal held that the confessions were admissible as evidence even if they may not have been made freely and voluntarily. Courts would give a clearer signal to the security forces that police abuses are unacceptable if they categorically refused to admit evidence obtained by duress.[392]

Internal investigations of the police appear to be ineffective. Although various other institutions handle complaints against the police, the Law Commission and others are calling for an independent authority that will focus exclusively on such complaints. The Law Commission's proposed Police Bill would establish such an authority.[393] The effectiveness of the proposed police complaints authority will depend on, among other things, public awareness of the authority and its mandate, the authority's adequate financial and operational independence, effective

387 It could be argued that the court was justified in not awarding exemplary damages, because these were not specifically applied for by the plaintiff. However, this argument would be weakened by the fact that in the same case, the court awarded special damages to compensate the plaintiff for the cost of spectacles that he required to correct an eye problem that resulted from the assault by the defendant even though such special damages had not been specifically pleaded. The court stated that refusing to award such damages would have been tantamount to punishing the plaintiff for an oversight on the part of his lawyer. The court could have equally overlooked the lawyer's oversight in failing to plead specifically for exemplary damages as a way of indicating how seriously it took police abuses.

388 Criminal Procedure and Evidence Code, 1967 (Act 36 of 1967), Chapter 8:01.

389 *The Republic v Mathews Chinthiti*, [1997] ICHRL 75 (4 August 1997), available at http://www.worldlii.org/int/cases/ICHRL/1997/75.html, accessed 16 January 2006.

390 For example, see *Jasi v Republic* [1998] ICHRL 60 (4 April 1998), available at http://www.worldlii.org/int/cases/ICHRL/1998/60.html, accessed 16 January 2006.

391 *Bokhobokho and Jonathan v The Republic,* Criminal Appeal 10 of 2000, available at http://www.judiciary.mw/criminal/Thomson_Bokhobokho_Republic.htm, accessed 20 January 2006.

392 It is doubtful that permitting evidence obtained by force would qualify as a limitation of the right guaranteed by the Constitution which is reasonable, recognised by international human rights standards and necessary in an open and democratic society. See the judgment of the House of Lords in England, which ruled that evidence obtained by torture is inadmissible in English courts, see *A(FC) et. al. v Secretary of State for the Home Department*; *A et al. v Secretary of State for the Home Department* [2005] UKHL 71, available at http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd051208/aand-1.htm, accessed 16 January 2006.

393 See clauses 128-148 of proposed Police Bill in Malawi Law Commission, *Law Report No. 9: Report of the Law Commission on the Review of the Police Act*, Lilongwe, July 2003.

mechanisms for enforcing the authority's accountability and the cooperation of the police service. It is recommended that Parliament enact the bill into law, and ensure that it includes provisions for a complaints authority which is independent, accountable and entitled to the cooperation of the police service.

Civilian input in policing decisions and work

There are few institutional mechanisms at national, regional or local level that facilitate consultations with civilians on policing strategies and deployment of police resources. At national level, significant civilian input into policing priorities occurs in Parliament during the budget debate and ministerial question time, and through oversight by Parliament's Committee on Defence and Security. In both cases, members of Parliament may influence the priorities of the police. Parliament and its committees are dominated by the party with the majority in Parliament and may, therefore, base their policing priorities only on narrow partisan interests. In any case, though, the effectiveness of Parliament's oversight powers over the process of formulating, implementing and evaluating the budget are limited by the lack of capacity and resources in the relevant parliamentary committees, including the Parliamentary Committee on Defence and Security, and inadequate commitment to the poverty reduction policy by which the budget ought to be driven.[394]

Although there is no legislation that specifically establishes formal community policing structures, the law makes some provision for a limited degree of civilian involvement in local policing. Section 14 of the Local Government Act[395] places upon local authorities the obligation to work with the police. However, a police survey conducted in July 2001 found that, in practice, there was no significant involvement by local authorities in community policing.[396] Despite the general ineffectiveness of the mechanisms under the Local Government Act, there is a significant degree of civilian involvement in policing at the local level through the community policing initiative established by the police service in 1997. In that year, the police service established a Community Policing Branch. Currently headed by a deputy commissioner of police, the branch has established a hierarchy of community policing structures, bringing together representatives of the community and the police. These fora can potentially facilitate effective civilian input into the development and implementation of policing priorities. By September 2005, the police service had facilitated the establishment of four regional committees, 33 station-level committees and 970 youth clubs.[397]

Among other things, the committees provide elected civilian members of the community whom they represent an opportunity to express their views on policing priorities in their area.

394 See L Rakner, L Mukubvu, N Ngwira and K Smiddy, *The Budget as Theatre – The Formal and Informal Institutional Makings of the Budget Process in Malawi*, 2004, p.11, available at http://www.odi.uk/pppg/cape/seminars/may04papers/Schneider_Political_Economy_Malawi.pdf, accessed 9 January 2006; Heiko Meinhardt and Nandini Patel, *Malawi's Process of Democratic Transition: An Analysis of Political Developments between 1990 and 2003*, Konrad Adenaur Foundation, Lilongwe, 2003, p.50, available at http://www.kas.de/db_files/dokumente/7_dokument_dok_pdf_4156_1.pdf, accessed 11 January 2006.

395 Local Government Act, 1998 (Act 42 of 1998).

396 Malawi Police Service, *Report on the Involvement of Local Government in Community Policing*, unpublished report of a stakeholder consultative workshop held in Mzuzu, 1–4 February 2005, p.1.

397 Malawi Police Service, *Eight Years of Community Policing Services in Malawi,* undated.

However, it is not clear whether such civilian input at the local level has any significant influence on policing priorities—which rather appear to be decided centrally. In any case, the committees operate in only a few communities in the country. The committees have the potential to be a critical point of contact between police and civilians and should be made more effective. It is, therefore, necessary to establish a mechanism to monitor and assess their current levels of effectiveness, and to identify the factors that affect that effectiveness with a view to recommending and implementing appropriate interventions. As a starting point, there should be a rapid assessment of the committees aimed at generating some baseline information in order to develop specific medium- and long-term recommendations.

The Police Bill proposed by the Law Commission includes provisions setting out the objectives of community policing and the establishment and functions of community police fora.[398]

In a number of cases, civilians have organised themselves in private neighbourhood watch schemes outside of the framework of the officially sanctioned community policing framework. It is difficult to judge the success of these unofficial neighbourhood watch schemes mainly because there is no readily available official information on them. Anecdotal evidence suggests that the schemes contribute to the deterrence of crime in the areas in which they operate. However, there are also indications that in some cases, neighbourhood watch groups have been guilty of the abuse of criminal suspects whom they apprehend. According to research conducted in 2005, unofficial neighbourhood watches are informal, gang-like vigilante organisations which respond to crime in an ad hoc manner, sometimes patrolling areas and, more often, tracking down the supposed offenders and handing out immediate, retributive justice.[399] A third of the respondents interviewed for the research who knew of such groups in their area of residence reported that these groups handed out punishment on their own without taking the suspect to the police; and nearly one-quarter of the respondents reported that they had personally seen these groups mete out such physical punishment to suspects.

C. Fair trial

Right to legal representation

Historically, legal representation of criminal defendants has not always received popular support in the country. The right to legal representation was further eroded within the climate of political hostility during the Banda dictatorship. The Legal Aid Act,[400] passed soon after independence, mandated the government to provide pro bono legal representation to civil litigants and criminal defendants. But the act was undermined in the 1970s when successive amendments to the Traditional Courts Act effectively granted traditional courts exclusive jurisdiction in murder, rape and treason cases pressed against real or perceived political opponents.[401] As a result, from 1969 to 1994, no person was entitled to legal representation in trials in traditional courts except if the

398 See clauses 119-123, Police Bill in *Malawi Law Commission, Law Report No. 9: Report of the Law Commission on the Review of the Police Act*, July 2003, pp.115-178.

399 See Pelser, Burton and Gondwe, *Crimes of Need*, p.83.

400 Legal Aid Act, 1964 (Act 8 of 1964), Chapter 4:01, *Laws of Malawi*.

401 See discussion of traditional courts in section B of Chapter 1 of this report.

minister responsible for justice authorised such representation.[402] The position changed with the 1994 Constitution, which guarantees every person the right to be represented by a lawyer of his or her choice; or, where it is required in the interests of justice, to be provided with a lawyer at the expense of the state.[403] This is broadly consistent with the standards set down in international human rights treaties and other norms such as the locally generated Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa.[404]

Due to staff shortages, the Legal Aid Department of the Ministry of Justice has limited capacity to fulfil its mandate. In September 2005, the department had a total of 10 lawyers and was, therefore, unable to meet the high demand that arises from the fact that most Malawians cannot afford to hire private lawyers.[405] This was underscored as follows in a report by the Prisons Inspectorate:

> In practice, most detainees who are awaiting trial do not benefit from legal representation. The Legal Aid Department of the Ministry of Justice is understaffed and under-resourced.... This is not likely to change soon, given [among other reasons] the small number of lawyers graduating each year, [and] the inability of Government to provide adequate salaries to retain lawyers who end up leaving for the private sector.[406]

Though there are no reliable statistics, judicial officers and lawyers estimate that fewer than 10 per cent of criminal defendants are represented.[407] The exception is in homicide cases in which the practice is that all defendants are represented either by private lawyers of their choice or lawyers supplied by the department of legal aid.[408] However, given the low numbers of lawyers with substantial experience, many defendants are not able to obtain the services of lawyers who meet the requirements of the United Nations Basic Principles on the Role of Lawyers (1990) which are that the right to legal representation entitles a person to have a lawyer of 'experience and competence commensurate with the nature of the offence' to provide 'effective legal assistance'.[409] As it happens, in Malawi, defendants charged with murder are sometimes

402 Traditional Courts Act, 1962 (Act8 of 1962), Chapter 3:03, *Laws of Malawi*, section 24.

403 Constitution, 1994, section 42(2)(f)(v).

404 The Lilongwe Declaration emerged from the Conference on Legal Aid in Criminal Justice: the Role of Lawyers, Non-Lawyers and other Service Providers in Africa. The conference was held in Lilongwe from November 22–24, 2004 and was attended by 124 delegates from 22 African countries. Among other things, the Declaration stated that 'governments are encouraged to adopt measures and allocate funding sufficient to ensure an effective and transparent method of delivering legal aid to the poor and vulnerable, especially women and children, and in so doing empower them to access justice.' Available at http://www.law.northwestern.edu/legalclinic/LilongweLegalAidDeclaration.pdf, accessed 13 October 2005.

405 Interview with Gilbert Khonyongwa, senior legal aid advocate, Ministry of Justice and Constitutional Affairs, Lilongwe, 9 September 2005.

406 Malawi Inspectorate of Prisons, *Report to Parliament: Activities Undertaken from July 1995 to September 1996*, Zomba, Malawi: Government Printer, October 1996.

407 Interview with Gilbert Khonyongwa, senior legal aid advocate, Ministry of Justice and Constitutional Affairs, Lilongwe, 9 September 2005.

408 Telephone interview with Reyneck Matemba, chief legal aid advocate, Ministry of Justice and Constitutional Affairs, 31 January 2006.

409 United Nations Basic Principles on the Role of Lawyers, article 6.

assisted by lawyers who have less than one year's experience in legal practice,[410] which, arguably, violates international guarantees of fair trial.[411]

A number of bodies have undertaken initiatives to supplement the provision of legal aid by the Department of Legal Aid. NGOs such as Civil Liberties Committee (CILIC), Centre for Advice and Research and Education in Rights (Malawi CARER), Women Lawyers Association and Malawi Law Society provide some pro bono legal services, including representation in litigation. The NGOs are supported in this activity by development partners and state institutions. A recent example is an arrangement which was agreed between the Lilongwe Chapter of the Malawi Law Society and the Malawi Human Rights Commission in August 2005. Essentially, the agreement requires the Commission, with funding from the United Nations Development Programme (UNDP), to facilitate the delivery of pro bono legal services to its complainants by lawyers who are members of the Malawi Law Society.[412]

In the absence of sufficient numbers of lawyers, paralegals provide a very valuable service in providing legal services to criminal defendants. The most extensive paralegal scheme in Malawi is the Paralegal Advisory Service. (See the case study below)

Case study: Non-governmental legal assistance

The Paralegal Advisory Service (PAS)

Since 2000, Penal Reform International, together with some local non-governmental organisations, has operated a programme called the Paralegal Advisory Service. The programme involves paralegals seconded from the Malawi Centre for Advice, Research and Education in Rights, Eye of the Child, Centre for Legal Advice and Youth Watch Society.

The paralegals conduct daily clinics in Chichiri, Kachere, Maula, Mzuzu and Zomba prisons aimed at those prisoners awaiting trial. The clinics inform the prisoners of aspects of trial from arrest and detention through summary trial to committal proceedings and trial in the High Court. Emphasis is placed on preparing prisoners to help themselves by role-playing bail applications, cross examination and pleas in mitigation.

The paralegals also work with prison officers to screen and filter prisoners so that those who have been lost in the system, or are in prison unlawfully or inappropriately, are brought to the attention of the authorities. Priority is given to vulnerable groups such as women, children, the elderly, those who are terminally or mentally ill and foreign nationals. The paralegals compile case lists, refer individual cases to the courts or police and follow up each individual case until

410 Interview with Gilbert Khonyongwa, senior legal advocate, Ministry of Justice and Constitutional Affairs, Lilongwe, 9 September 2005.

411 See, in particular, article 5 of the United Nations Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty, adopted by Economic and Social Council, Resolution 1984/50 of 25 May 1984, available at http://www.unhchr.ch/html/menu3/b/h_comp41.htm. Article 5 provides that defendants facing the death penalty must have 'adequate legal assistance at all stages'.

412 Malawi Human Rights Commission and Malawi Law Society – Lilongwe Chapter, *Cooperation Agreement*, Lilongwe, August 2005.

its conclusion. They also assist prisoners to fill in standardised bail forms agreed with the judiciary, which paralegals then lodge with the appropriate court and contact sureties to ensure they attend court at the right time.

Convicted prisoners are assisted with standard forms (also agreed with the judiciary) for appeals against conviction and sentence and for ensuring that sentences passed by the lower courts are confirmed by the High Court. In addition, paralegals have helped improve prison conditions by setting up low or no cost micro-projects such as sandal and soap-making. They have also established notice boards with newspapers attached so that prisoners are kept up-to-date with current affairs.

Between May 2000 and May 2002, the Paralegal Advisory Service conducted 578 clinics reaching over 10 000 prisoners; facilitated the release of over 1 000 prisoners through bail, discharge or release on compassionate grounds; drew the attention of the criminal registry to the plight of homicide remandees, some of whom have been waiting 10 years for trial; observed 91 homicide cases; and published a report to inform debate on the quality of justice delivered.

SOURCES:
Penal Reform International, *Energising the Criminal Justice System in Malawi: A Paralegal Aid Service*, (http://www.penalreform.org/english/pana_pas.htm).
Open Society Justice Initiative, *Penal Reform International: Malawi Programme*, 2003 (http://www.justiceinitiative.org/db/resource2?res_id=102062).

Interpretation

The official language of the courts in Malawi is English. Yet it is estimated that less than one per cent of the population can understand the language.[413] The Constitution does guarantee every person the right to be tried in a language which he or she understands or, failing this, to have the proceedings interpreted to him or her, at the expense of the state, into a language which he or she understands.[414] In practice, the judiciary ensures that there is an interpreter in any case in which the defendant does not understand English.

Nonetheless, language is a major barrier to defendants' understanding of proceedings. According to a study conducted in 2002, the use of English in magistrates' courts hampers communication between magistrates and litigants—standards of interpretation were poor, particularly in relation to technical words—and limits the ability of magistrates to write clear judgments that analyse evidence adequately.[415] It is recommended that courts be permitted to use Chichewa, the

413 Recent surveys by the National Statistical Office tend to group English in the category of 'other' languages with other minority languages and do not indicate the exact proportion of the population which is literate in English. For example, see Todd Benson, James Kaphuka, Shelton Kanyanda and Richmond Chinula, *An Atlas of Social Statistics, National Statistical Office*, Zomba, 2002, pp.61-62. One 1993 estimate put the number at 16 000 out of a population of over 11 000 000. See Gordon, Raymond G, Jr (ed.), *Ethnologue: Languages of the World*, 15th edition. SIL International, Texas, 2005 available at http://www.ethnologue.com/, accessed 27 April 2006.

414 Constitution, 1994, section 42(2)((f)(ix).

415 Wilfried Schärf, Chikosa Banda, Ricky Roentsch, Desmond Kaunda and Rosemary Shapiro, *Access to Justice for the Poor of Malawi? An Appraisal of Access to Justice Provided to the Poor of Malawi by the Lower Courts and the Customary Justice Forums – Report prepared for the Department for International Development*, Lilongwe, 2002, p.11, available at http://www.grc-exchange.org/docs/SSAJ99.pdf, accessed 19 January 2006.

national language, if it is clear that parties may not fully understand English. Second, only people who have a good working understanding of English should be appointed as magistrates; because even in cases in which Chichewa is used in proceedings, the magistrates have to keep their records in English.

Juvenile offenders

The Children and Young Persons Act establishes the procedure to be followed when dealing with juvenile offenders.[416] These procedures are generally consistent with Article 40 of the Convention on the Rights of the Child which requires that children in conflict with the law be treated humanely and in a manner consistent with their vulnerability, and that a child not be imprisoned unless he or she is of such depraved character or so unruly that it would be in her or his best interest to be imprisoned.

In practice, the principles are not deployed. The law provides for magistrates' courts to sit as juvenile courts when dealing with juvenile defenders. But according to the government's own admission, these courts rarely constitute themselves into juvenile courts and children are tried as adults as presiding magistrates do not declare that they are presiding over a juvenile court. The age of criminal responsibility for a child in Malawi is seven years, which is felt to be too low and may lead children as young as eight years old to be tried as adults. A number of other rights of juvenile offenders have been violated. The government's report to the Committee on the Rights of the Child found that 'some children are placed in prisons without charge; many are not informed of their right to bail; their trials are delayed.'

Delays in bringing cases to trial

The criminal justice system is characterised by delays, which, in some cases, undermine the fairness of trials. According to a 2005 study of a random sample of criminal cases,[417] the average duration of various stages of the criminal trial process was found to be as represented in the table below:

Table 5.1: Comparative periods of criminal trial stages in the High Court and magistrates' courts

Trial Stage	Average number of days in High Court	Average number of days in Magistrates' Court
Arrest to taking of plea	541	13
Taking of plea to first day of substantive hearing	205	20
First to last day of hearing	7	39
Last day of hearing to passing of judgment	5	21

Source: *Judicial Efficiency in Malawi: Research Report* (Asante Foundation, 2005)

416 Children and Young Persons Act, 1969 (Act 7 of 1969), Chapter 26:03, *Laws of Malawi*, section 7(1)(2).
417 Asante Foundation, *Judicial Efficiency in Malawi: Research Report,* Blantyre, February 2005.

According to the study, the criminal process in the High Court is more prolonged than that in magistrates' courts at the pre-substantive hearing phase. In the substantive hearing phase, however, the process in the High Court is significantly quicker than that in magistrates' courts. Delays in the pre-hearing stage in High Court cases have been longest in relation to homicide prosecutions, for which some suspects have spent more than eight years in custody before being taken for trial.[418]

The state has few lawyers and paralegals in its prosecution department. In 2002, the department had only seven lawyers and eleven paralegals.'[419] By 2005, the number of lawyers had increased only to ten.[420] The shortage of prosecution personnel results in delays in the progress of cases and backlogs that militate against the realisation of the right to fair trial by persons awaiting trial. Some of the delays in trials are excessive since they exceed the limits of reasonable delay set by the United Nations Human Rights Committee, which has found that, in relation to the International Covenant of Civil and Political Rights, a period of four years before a person is brought for trial constitutes unreasonable and excessive delay.[421]

Protection of victims and witnesses

In general, there is no legal mechanism that is specifically targeted at protecting witnesses. The exception is the Corrupt Practices Act[422] which sets out a regime for the protection of whistle-blowers which, among other things, makes it a criminal offence for any person to punish or victimise a whistle-blower.[423] There is also no systematic programme of witness protection operated by the police, other law enforcement agency or judicial authority. Intimidation of witnesses has, in some cases, resulted in charges being brought or dropped, although there is insufficient evidence to quantify the problem. At least one study has found intimidation of complainants to be the reason for the withdrawal of charges in a significant number of cases, particularly in relation to crimes such as domestic violence, property grabbing from widows and similar offences arising in domestic settings.[424] There have also been media reports of at least one case in which a person was charged with intimidating witnesses in a high-profile corruption case.[425]

The system to provide support to victims of crime throughout the criminal justice process is in its formative stages. The only formal victim support is provided by the police service. Established in 2001 as part of the community policing service, the police system for supporting crime victims takes the form of victim support units based at various police stations. The broad

418 See Penal Reform International, *The Quality of Justice: Trial Observations in Malawi,* undated, available at http://www.penalreform.org/english/dp_malawi.htm#note8, accessed 20 January 2006.

419 Ibid., p.6.

420 Interview with Gilbert Khonyongwa, Senior Legal Aid Advocate, Ministry of Justice and Constitutional Affairs, Lilongwe, 9 September 2005.

421 See *M'Boissona v Central African Republic*, Communication 428/1990, Reported in UN Document CCPR/C/50/D/428/1990.

422 Corrupt Practices Act, 1995 (Act 18 of 1995), Chapter 7:04, *Laws of Malawi.*

423 Ibid., section 51A(5).

424 Schärf, Banda, Roentsch, Kaunda and Shapiro, *Access to Justice for the Poor of Malawi*?, 2002, pp.18-19.

425 See Edwin Nyirongo, 'Witness in Mvula's case misses,' *Nation Online*, Blantyre, 26 May 2005, available at http://64.233.183.104/search?q=cache:reigME3GorIJ:www.nationmalawi.com/articles.asp%3FarticleID%3D10834+malawi+humphrey+mvula+witness+intimidation&hl=en, accessed 20 January 2006.

aim of the units is to assist victims who have suffered harm requiring special care and attention to restore their normal being, including cases that require victims to be assisted in private in order to respect their dignity.[426] Specifically, the units provide victim-friendly services to victims of crime and violence within a private setting. Community policing, of which victim support units are a part, currently operates as a branch of the police service. The Police Bill proposed by the Law Commission gives community policing statutory recognition by providing for the objectives of community policing, establishing community policing fora and prescribing their membership and functions.[427]

It is too early to assess the effectiveness of the victim support services provided by the police because they have been operational for a relatively short time. Official reports of activities indicate that the units are predominantly involved in preparatory activities such as raising public awareness, training and planning.[428] Although the unit is largely in its formative stages, it has provided support to many victims of crime. Between 2003 and 2005, 1 982 cases were reported to victim support units across the country. Of these, 38.2 per cent involved domestic violence, 13.4 per cent child or spousal neglect, 11.9 per cent 'defilement' (sex with a minor) and 8.5 per cent rape.[429]

Legal protections against abuse of process

The legal protections against abuse of process are largely adequate. First, the law provides for a formal process of habeas corpus under section 42 of the Constitution and section 16 of the Statute Law (Miscellaneous Provisions) Act.[430] Every person who is detained has the right to be released if such detention is unlawful.[431] Section 42 of the Constitution entitles every person who has been arrested the right to be released, or brought before a court and informed of the reason for his or her further detention within 48 hours of the arrest. Every person also has the right 'to challenge the lawfulness of his or her detention in person or through a legal practitioner before a court of law'.[432] The procedure for enforcing the right to habeas corpus is provided for under section 16(2) of the Statute Law (Miscellaneous Provisions) Act, which empowers the High Court to issue a wide range of orders commanding any person or institution to do or desist from doing a specified act.

One of the orders which the High Court is empowered to issue is that of habeas corpus, by which it orders that a person in custody be brought before it to be released or told the reason for

426 Malawi Police Service, *Presentation on sexual offences handled by Victim Support Services Units in the Malawi Police Service*, undated, Lilongwe.

427 Police Bill proposed by the Law Commission, clauses 119-122, in Malawi Law Commission, *Law Commission Report No. 9: Report of the Law Commission on the Review of the Police Act*, pp.167-168, Lilongwe, July 2003.

428 Malawi Police Service, *Presentation on Victim Support Services and Drop-in Centre*, Lilongwe, 2004; *Northern Region Victim Support Consolidated Quarterly Report for the Months of May, June and July 2004*, Lilongwe, July 2004; *Victim Support Unit activities carried out for the months of Jan–June 2004*, Lilongwe; and *Victim Support Unit Consolidated Report for Eastern Region Police Headquarters for the Year 2004*, Lilongwe, 2004.

429 Malawi Police Service, *Presentation on Sexual Offences handled by Victim Support Services Units in the Malawi Police Service,* undated.

430 Statute Law (Miscellaneous Provisions) Act, 1967 (Act 27 of 1967), Chapter 5:01, *Laws of Malawi*.

431 Constitution, 1994, section 42(1)(f).

432 Ibid., section 42(1)(e).

his or her continued incarceration. The High Court upholds the right to habeas corpus routinely. In relation to section 42 of the Constitution, the High Court has also said that the 'forty-eight hour rule is more than a right or ideal. It is a measure of the efficiency of the attorney-general's office and the Ministries of Home Affairs and Justice'.[433] The court has expressed the same view in the case of *Re Leveleve*.[434] However, the right of habeas corpus is seldom sought, given the low levels of rights awareness in the country, and the cost of access to the High Court.

Abuse of process can also be controlled through an appeals process that provides an effective remedy for the abuse. The Courts Act (Act 1 of 1958) guarantees every person convicted by a magistrates' court the right to appeal against his or her conviction if he or she had pleaded not guilty to the relevant charge. Such a person may also appeal against his or her sentence. On the other hand, a person convicted of an offence after pleading guilty is entitled to appeal only against his or her sentence.[435] In criminal matters the right to appeal to the Supreme Court is available to any person aggrieved by a final judgment of the High Court in its original jurisdiction.[436] A person can also appeal to the Supreme Court of Appeal against a decision by the High Court in its appellate capacity.[437] The right of appeal is also available to the director of public prosecutions, but he or she is limited to appealing only on points of law and not fact. In practice, the systems of appeals are limited in their effectiveness due to low levels of awareness of rights among convicted people, their inadequate access to legal representation, inefficiencies in the processing of court records and insufficient numbers of judicial officers in appeal courts.

D. Appropriate remedies and sentencing

In the 2004 National Crime Victimisation Survey, 85.5 per cent of respondents interviewed for the survey indicated satisfaction with the way the courts sentence perpetrators of crime. 59.7 per cent of respondents expressed confidence in sentencing because they believed that courts hand down sentences which fit the crime.[438] However, sentences imposed in cases involving gender-based violence have often been criticised, mainly by human rights NGOs, for being too lenient and failing to take full account of the gravity of gender-based violence. The Women and Law in Southern Africa Research and Education Trust has observed that, even though the Penal Code provides maximum sentence of death for rape, in appeal cases decided by the High Court between 1996 and 1998, men found guilty of rape were sentenced to no more than six years' imprisonment.[439]

There have been efforts to reform the sentencing regime in order to make it more appropriate to the demands of justice. A recent example of this is the amendment of section 34 of the Corrupt Practices Act, which originally provided that any person convicted of an offence under the act would be subject to a minimum sentence of five years' imprisonment. The amendment

433 In the Matter of Austin Nankwenya, Miscellaneous Criminal Application 62 of 2003.

434 Miscellaneous Criminal Application 195 of 2002.

435 The appellate powers of the High Court are provided for by the Courts Act, 1958 (Act 1 of 1958), Chapter 3:02, *Laws of Malawi*, section 18.

436 See Supreme Court of Appeal Act, Chapter 3:01, *Laws of Malawi*, sections 11 and 21.

437 Ibid., section 11(2)

438 Pelser, Burton and Gondwe, *Crimes of Need*, p.78.

439 Women and Law in Southern Africa Research Trust, *Beyond Inequalities 2005: Women in Malawi*, p.40, Harare, 2005.

removed the minimum sentence and only provided for a maximum.[440] This amendment addressed the injustice that arose in cases where five years' imprisonment amounted to excessive punishment considering the facts of the case. In 2003, the Law Commission submitted to the government a recommendation to update the levels of fines imposed in criminal cases since the original amounts have lost their deterrent effect because they have decreased in real terms due to inflation and depreciation of the value of the local currency.[441]

In addition to, or in substitution for any punishment, a person convicted of a crime may be ordered to pay appropriate compensation to the victim of the crime. This is provided for by section 32 of the Penal Code,[442] which states that any person who is convicted of an offence may be ordered to make compensation to 'any person injured by his offence.' The order for compensation of the victim depends on the discretion of the court. In practice, orders for the compensation of victims are rare, probably because courts trying criminal cases view their primary function as the imposition of proper punishment on guilty defendants rather than consolation of the victim. Since the law recognises the compensation of crime victims in principle, the government should establish a scheme for financing and administering such compensation autonomously from the criminal courts. The Law Commission should undertake a study of the matter and make appropriate recommendations, including the possibility of reducing the burden of such a scheme on the taxpayer by requiring the compensation fund to be financed by fines, forfeited bail money and proceeds of sales of forfeited property.

The death penalty debate

Malawi has not ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty. Nevertheless, its retention of the death penalty is contrary to international standards set by international bodies to which it subscribes. In 1999, the African Commission on Human and Peoples' Rights adopted a resolution urging states to 'envisage a moratorium to the death penalty', to restrict its application to the most serious crimes and to ensure full respect for the rights in the Charter for persons accused of such crimes.[443]

Section 16 of the Constitution guarantees every person the right to life except in cases in which a person has been sentenced to death by a court. The Penal Code[444] makes the death sentence mandatory in cases of murder and treason, and discretionary in cases of rape and some categories of aggravated robbery and burglary.[445]

Campaigns for the abolition of the death penalty have not achieved much progress. The last time that there was a significant public debate over the issue was at the National Constitutional

440 Corrupt Practices Act, 1995 (Act 18 of 1995), Chapter 7:04, *Laws of Malawi*.

441 Malawi Law Commission, *Law Commission Report No. 11: Report of the law commission on criminal justice reform on conversion of fines*, Zomba, Malawi: Government Printer, 2003.

442 Penal Code Act, 1929 (Act 22 of 1929), Chapter 7:01, *Laws of Malawi*.

443 Resolution Urging the State to Envisage a Moratorium on the Death Penalty (ACHPR/Res. 42 (XXVI) 99).

444 Penal Code Act, 1929 (Act 22 of 1929), Chapter 7:01, *Laws of Malawi*.

445 Ibid., sections 209, 38, 133 and 301.

Conference in 1995.[446] The conference debated the merits and demerits of retaining the death penalty, which had been provided for in the provisional constitution. Traditional chiefs were among those who argued strongly for retention, while a few human rights organisations, including some who were not represented at the conference but sent written submissions, argued against it.[447] After extensive debate, the matter was put to a vote in which all delegates were entitled to vote by secret ballot. The result of the vote indicated that more delegates voted for the retention of the death penalty than for its abolition. Since then, various international human rights organisations, such as Amnesty International, and local ones, such as the Civil Liberties Committee, have continued to campaign for its abolition.[448]

Although the campaigns have not resulted in the repeal of the laws that provide for the penalty, they have probably contributed to the de facto moratorium that is currently in place. There were no readily available statistics on the total number of people sentenced to death at the time of the study. Among the few available figures, however, were those indicating that 53 people were on death row in 2000.[449] No person sentenced to death has been executed since 1992.[450] The campaign for formal abolition of the death penalty in Malawi has recently been joined by EU member states, including Britain, whose High Commissioner to Malawi is reported to have encouraged the government to move towards abolishing capital punishment.[451]

The de facto moratorium on the death penalty should be formalised by the abolition of the penalty. This will require an amendment of not only the specific laws that provide for the penalty, but also section 16 of the Constitution which declares the imposition of the death penalty as a permissible limitation of the right to life. The amendment of section 16, as is the case with any other provision of Chapter 4 of the Constitution which guarantees human rights, would require a referendum. However, any difficulties in amending section 16 do not affect Parliament's ability to remove the death penalty from the specific provisions of the criminal law which provide for

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446 See Malawi Government, *Report of the National Constitutional Conference 1995*, Lilongwe, 1995, pp.2-7. The conference was organised by the Constitution Committee of Parliament under the authority of section 12(4)(b) of the Constitution of 1994. The conference was one way of soliciting public input into a subsequent parliamentary review of the constitution, which had come into force provisionally in 1994. Proposals by the conference were not binding on Parliament and, in the event, quite a number of the important proposals by the conference were rejected during debate in the National Assembly. For some discussion of the conference, see Jande Banda, 'The Constitutional Change Debate of 1993–1995,' in Kings M Phiri and Kenneth R Ross (eds.), *Democratisation in Malawi: A Stocktaking, Christian Literature Association in Malawi*, Blantyre, 1998, p.316.

447 For example, see Amnesty International, *Open letter on the death penalty to the Constitutional Conference*, London, 20 February 1995, available at http://www.amnestyusa.org/countries/malawi/document.do?id=DE9F5C37069A755A802569A500714E8D, accessed 17 January 2006.

448 See Akwete Sande, 'Malawi: Our concerns,' *ANB-BIA Supplement*, Issue/Edition No. 342 – 16/03/98, January 1998, available at http://ospiti.peacelink.it/anb-bia/nr342/e04.html, accessed 17 January 2006.

449 African Commission on Human and Peoples' Rights, *Prisons in Malawi: Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa on Visit 17–28 June 2001*, Banjul, 2001, p.7, available at http://www.penalreform.org/download/rs/malawi_english.pdf, accessed 20 January 2006.

450 See Amnesty International, *Death Penalty: 3 797 executed in 2004*, 4 May 2005, available at http://news.amnesty.org/index/ENGACT500112005, accessed 20 January 2006.

451 See 'EU Member States & the European Commission Appeal for the Abolition of Capital Punishment', *British High Commission* News, 10 October 2005, available at http://www.britishhighcommission.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1107292203700&a=KArticle&aid=1129039887009, accessed 17 January 2006.

it. As a first step, Parliament could amend the law so that the death penalty is never mandatory, but subject to the discretion of judges in particular cases.

E. Prisons

Legal and institutional framework

The Constitution establishes the Prisons Service,[452] the Office of the Chief Commissioner of Prisons,[453] the Prison Service Commission[454] and the Inspectorate of Prisons.[455] A detailed legal framework is provided in the pre-independence Prisons Act.[456] The constitutional provisions require proper and efficient administration of penal institutions, protection of human rights, respect for judicial directions and upholding of international standards. Section 164(2)(a) of the Constitution provides that one of the principal responsibilities of the chief commissioner of prisons is to ensure proper and efficient administration of penal institutions in the country in accordance with, among other things, 'the protection of rights'. The Constitution also provides that another consideration that must be taken into account by the chief commissioner of prisons in performing his or her administrative responsibilities is 'the direction of the courts' in relation to people who are incarcerated in prison.[457] The Constitution also requires the application of international standards in the prison service. Section 169(3)(a) provides that one obligation of the Inspectorate of Prisons is 'monitoring the conditions, administration and general functioning of penal institutions *taking due account of applicable international standards*' (emphasis added).

The Prisons Act, which first came into force in 1956, has been amended several times since independence, but does not adequately meet current requirements for the protection of human rights of prisoners, the obligation to abide by court directions related to them or the application of other international standards for their treatment. Unlike the Constitution, the Prisons Act does not prescribe the protection of rights as part of the mandate of the head of the prison service.[458] Nor does it make any reference to the duty to abide by court directions. It also does not make any mention of international standards for the treatment of prisoners. In so far as the Prisons Act is inconsistent with the Constitution, it is invalid.

In 2002, the government, with the assistance of consultants from Penal Reform International, prepared a draft Prisons Bill and began drafting the relevant subsidiary legislation.[459] The preparation of the bill was overseen by a steering committee, which included representatives of the Ministry of Home Affairs, the Ministry of Justice, the Malawi Prison Service,

452 Constitution, 1994, section 163.

453 Ibid., section 164.

454 Ibid., section 167.

455 Ibid., section 169.

456 Prisons Act, 1955 (Act 6 of 1955), Chapter 9:02, *Laws of Malawi*.

457 Ibid., section 164(2)(c).

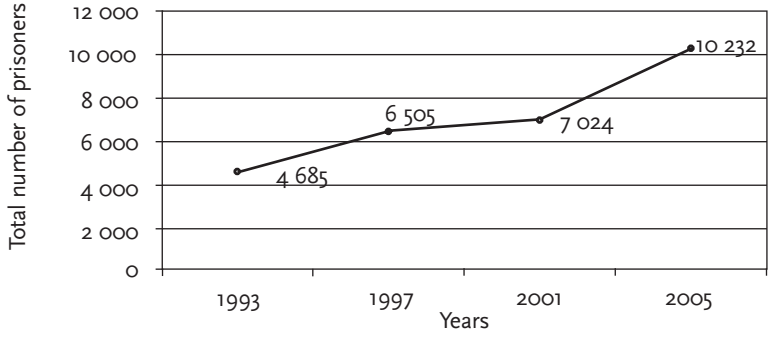
458 Ibid., section 13(1).

459 Penal Reform International, 'Information on projects and activities,' *Newsletter on Prison and Penal reform in Africa*, Issue No. 16, November 2002, available at http://www.penalreform.org/english/nla16.htm#malawi, accessed 17 January 2006.

the Prison Inspectorate, the Prison Service Commission, and the Law Commission.[460] The draft bill and its subsidiary legislation aim at making regulation of prisons consistent with the requirements of the Constitution and international standards applicable to prison regimes. In an example of the unsatisfactory provision of information in the justice sector, the Prison Service website includes a non-functional link to the full text of the draft bill.[461] There was no indication of when the bill would be introduced for passage in Parliament. If the bill becomes law, however, it will empower detainees to enforce the various rights that the Constitution and international human rights guarantee them.

It is recommended that the government should facilitate the speedy enactment of the Prisons Bill into law so that the prison regime is consistent with constitutional and international human rights standards. It is equally important that the government should also facilitate the urgent enactment of the Police Bill recommended by the Law Commission, particularly because it strengthens the regime for civilian oversight of the detention of people in police cells by making express provision for the Lay Visitors Scheme.[462]

Figure 5.1: Indicative trend in Malawian prison population



Source: Collated from Malawi Prison Service and International Centre for Prison Studies statistics.

Rate of imprisonment

According to recent reports, Malawi's prison population 'has more than doubled since the dictatorship ended in 1994.' Official figures put the total number of people in prison on 26 September 2005 at 10 232.[463] This represented a ratio of approximately 100 prisoners per 100 000 of the general population. Of this total, 2 368, representing just over 26 per cent, were awaiting trial; 3 per cent were aged under 18 years and classified as 'juveniles'; 7 368 inmates

460 Penal Reform International, 'Sub-Saharan Africa,' 2003, available at http://www.penalreform.org/english/region_africa.htm, accessed on 30 January 2006.

461 See Malawi Prison Service, *The Malawi Prison Act*, 31 January 2004, available at http://www.mps.gov.mw/acts.htm, accessed 22 June 2006.

462 See Police Bill, clauses 124-127, in Malawi Law Commission, *Law Commission Report No. 9: Report of the Law Commission on the Review of the Police Act*, pp.168-169, Lilongwe, July 2003.

463 Interview with Barzirial Chapuwala, Superintendent in charge of the Research and Planning Unit, Prison Services, Zomba, 27 September 2005.

were convicted male prisoners and 68 were convicted female prisoners. In general, the prison population has been rising. It was 4 685 in 1993, 6 505 in 1998, 7 024 in 2001, 8 566 in 2003[464] and, as indicated in Figure 5.1, 10 232 in 2005.

According to the Malawi Prison Service, the rapidly increasing number of prison inmates, which it considers to be its biggest challenge, arises from a number of factors: 'a rising crime rate due to poverty and deterioration in ethical standards and values, [and a] lack of bed space and other related infrastructure.'[465] Other factors mentioned elsewhere in this report, such as case backlogs due to the shortage of lawyers in the prosecution and legal aid services, are a major reason for the overcrowding.[466]

Conditions of detention

The Constitution sets out standards for the treatment of people in detention, including the right to be promptly informed of the reason for detention and the right to be detained under conditions consistent with human dignity, which include at least the provision of reading and writing materials, adequate nutrition and medical treatment at the state's expense.[467] The Constitution also guarantees any person in detention the right to consult confidentially with a legal practitioner of his or her choice, to be informed of this right promptly and, where the interests of justice so require, to be provided with the services of a legal practitioner by the state;[468] and to be given the means and opportunity to communicate with, and to be visited by, his or her spouse, partner, next-of-kin, relative, religious counsellor and a medical practitioner of his or her choice.[469] The guarantees of prisoners' rights outlined above are generally consistent with United Nations Standard Minimum Rules for the Treatment of Prisoners.[470]

In practice, however, conditions of detention in Malawi's police cells and prisons violate international and constitutional norms. By the end of 2005, the country had a total number of 77 police holding cells[471] and 26 prisons.[472] In Malawi, the practice is that people detained in police cells are not provided with any food by the state and have to make their own arrangements. In contrast, people held in prison are provided with food by the state. However, the food provided is generally inadequate and of poor nutritional quality. The Prison Service itself has admitted that, due to under-funding by government, it has failed to provide adequate and nutritious food to inmates, and that monotony in the diet and food insufficiency have been

464 International Centre for Prison Studies, *Prison Brief for Malawi*, 14 December, 2005, available at http://www.prisonstudies.org, accessed 17 January 2006.

465 Malawi Prison Service, Overview, available at http://www.mps.gov.mw/overview.htm, accessed 22 June 2006.

466 See discussion in Chapter 6, section C of this report.

467 Constitution, 1994, section 42(1)(b).

468 Ibid., section 42(1)(c).

469 Ibid., section 42(1)(d).

470 Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, available at http://www.hri.ca/uninfo/treaties/34.shtml, accessed 17 January 2006.

471 Interview with Lot Dzonzi, commissioner of police and head of research and planning, 2 June 2006.

472 Interview with Barzirial Chapuwala, superintendent in charge of the Research and Planning Unit, Prison Services, Zomba, 27 September 2005.

long-standing problems.[473] Following her visit to Malawi in 2001, the African Commission on Human and Peoples' Rights' Special Rapporteur on Prisons and Conditions of Detention in Africa also observed that the quality and quantity of food supplied to prisoners was inadequate and noted that '[p]risoners receive only one meal per day. Meals are not balanced as prisoners eat the same thing everyday.'[474]

The accommodation available in most of Malawi's police cells and prisons also falls short of the requirements of the Constitution and the United Nations Standard Minimum Rules which require the state to keep inmates in conditions that preserve their minimum comfort and dignity. In practice, most police cells and prisons are overcrowded. For example, Zomba Central Prison has an estimated capacity of 900, but in September 2005 had a total population of almost 2 000.[475] Some prison cells are so overcrowded that when inmates sleep, they are so tightly packed on the floor that they can only turn *en masse*.[476] Almost all inmates in Malawian police and prison cells sleep on the bare floor without beds or mattresses.[477] By the end of 2004, the government had initiated a number of activities to alleviate the problem of overcrowding and poor accommodation in prisons. These included renovating the country's major prisons,[478] re-opening prisons that had been closed and constructing a new prison with capacity to house 600 inmates.[479]

Prisoners generally feel that the cramped and congested sleeping and accommodation conditions increase the risk of diseases, as well as the sharing of blankets, the lack of mosquito nets, sleeping on the cold floor, poor hygiene and sanitation, poor bathing facilities and materials, poor hygiene in the preparation of food, poor diet and lack of exercise. According to a study commissioned by the Malawi government in November 2005, the diseases commonly found in prisons include tuberculosis, scabies, diarrhoea, sexually transmitted infections, coughs, malnutrition, malaria and bilharzia.[480] Efforts to address the problem in the past have included the deployment of health personnel in the prisons: by the end of 2004, each prison in the country

473 Malawi Prison Service, *Project Initiation*, 31 January 2004, available at http://www.mps.gov.mw/farming.htm, accessed 30 January 2006.

474 African Commission on Human and Peoples' Rights Special Rapporteur on Prisons and Conditions of Detention in Africa, *Prisons in Malawi, 17 to 28 June 2001: Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa*, 2001, pp.17-18, available at http://www.penalreform.org/download/rs/malawi_english.pdf, accessed 30 January 2006.

475 Interview with Barzirial Chapuwala, superintendent in charge of the Research and Planning Unit, Prison Services, Zomba, 27 September 2005.

476 See vivid description in Michael Wines, 'Wasting away, a million wait in African jails,' *The New York Times*, New York, 7 November 2005, and related slide show available at http://www.nytimes.com/slideshow/2005/11/05/international/20051106_PRISONS_SLIDESHOW_1.html, accessed 30 January 2006.

477 African Commission on Human and Peoples' Rights Special Rapporteur on Prisons and Conditions of Detention in Africa, *Prisons in Malawi, 17 to 28 June 2001: Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa*, 2001, pp.17-18, available at http://www.penalreform.org/download/rs/malawi_english.pdf, accessed 30 January 2006.

478 United States Department of State, 'Malawi,' in *Country Reports on Human Rights Practices 2004*, Washington DC, 28 February 2005, available at http://www.state.gov/g/drl/rls/hrrpt/2004/41613.htm, accessed 4 January 2006.

479 Bingu wa Mutharika, *Delivering on Our Promises*, text of Budget Speech delivered at the opening of the 2005 Budget Session of the National Assembly, Lilongwe, 6 June 2005, available at http://www.sarpn.org.za/documents/d0001690/P2022-Malawi_Budget-speech_June2005.pdf, accessed 30 January 2006.

480 Burton, Pelser and Gondwe, *Understanding Offending: Prisoners and Rehabilitation in Malawi*, p.54.

had at least one health attendant.[481] Despite government efforts, however, very few prisoners have access to medical care and inmates continue to die, mostly due to HIV/AIDS: a total of 259 prisoners died in the period between January 2003 and June 2004.[482] For its part, Amnesty International has stated that more than 180 people died in Malawian prisons during 2004 and that '[m]any of the deaths were HIV-related; others were the result of preventable illnesses caused or exacerbated by overcrowding, poor diet, unsanitary conditions and medical neglect.'

Article 8 of the United Nations Minimum Standards for the Treatment of Prisoners requires segregation of prisoners between male and female, untried and convicted, adult and young, and civil and criminal prisoners. Segregation is also required by the Prisons Act and the Constitution, whose section 42(2)(g)(iii) requires children who are in custody to be kept separately from adults. In practice, however, due to the general inadequacy of space and other facilities, most police stations and prisons do not have the capacity to segregate different categories of people effectively. There are no separate prisons for men and women; however, they are kept in separate cells within the same police stations or prisons.[483] On the other hand, juveniles are not always kept separately from adults, and un-convicted inmates are not always segregated from convicted prisoners.[484] In 1999, a number of human rights organisations in Malawi reviewed the legality of the detention of juveniles currently in prison. They interviewed 383 inmates of the juvenile sections of three prisons and found that approximately half of the inmates in the juvenile sections were not juveniles (i.e. persons under 18), but young adults.[485] The problem of segregation of juveniles from adults has been partly addressed by the opening in 2004 of juvenile-only facilities at Bvumbwe in Thyolo, Bzyanzi in Dowa and Kachere in Lilongwe.[486]

If the number of people in detention keeps rising and the rise is not accommodated in the funds provided to the police and prison services, it is unlikely that conditions of detention will comply with constitutional and international standards relating to segregation. Nevertheless, some progress is being made towards improving the supply of food to prisons through the opening or re-opening of prison farms.[487] This was reported to have significantly reduced the problem of inadequacy of maize meal in the prison food stock. It was also reported that prisoners were engaged in other activities that could supply food to the prisons, including vegetable growing; pig, poultry and fish farming; and bee-keeping.[488]

The prison authorities have made some efforts to comply with constitutional and inter-

481 United States Department of State, 'Malawi,' in *Country Reports on Human Rights Practices 2004*, Washington DC, 28 February 2005, available at http://www.state.gov/g/drl/rls/hrrpt/2004/41613.htm, accessed 4 January 2006.

482 Centre for Human Rights and Rehabilitation, *Malawi Human Rights Report 2003–2004*, p.26, Lilongwe, 2005, available at http://www.chrr.org.mw/downloads/malawi_human_rights_report_2003_04.pdf, accessed 30 January 2006.

483 United States Department of State, 'Malawi,' in *Country Reports on Human Rights Practices 2004*, Washington DC, 28 February 2005, available at http://www.state.gov/g/drl/rls/hrrpt/2004/41613.htm, accessed 4 January 2006.

484 See Malawi Human Rights Commission, *Annual Report 2004*, Lilongwe, 2005, p.13, available at http://www.malawihumanrightscommission.org/docs/2004_MHRC_AnnualReport_.pdf, accessed 17 January 2006.

485 Adam Stapleton, 'The State of Juvenile Justice in Malawi,' *Article 40*, Vol. 2, No. 1, Bellville, South Africa, February 2000, available at http://www.communitylawcentre.org.za/children/2000art40/vol2_no1_african.php, accessed 9 February 2006.

486 Malawi Human Rights Commission, *Annual Report 2004*, Lilongwe, 2005.

487 Malawi Prison Service, *Projects Initiation*, undated, available at http://www.mps.gov.mw, accessed 22 June 2006.

488 Interview with Barzirial Chapuwala, Superintendent in charge of the Research and Planning Unit, Prison Services, Zomba, 27 September 2005.

national standards on the rights of prisoners to be visited by, and communicate with, family, friends, religious representatives and others. A 2005 study commissioned by the government found that more than 60 per cent of the sample of prisoners surveyed reported that they received visitors and that, in addition to individual family visits, a number of churches and organisations were active in prison visits, meeting with inmates and providing support, spiritual guidance and at times gifts.[489] However, facilities at the prisons and police stations are not always conducive to the proper conduct of visits. For example, during visiting time at the country's biggest prisons, prisoners have to line up on one side of two wire fences, more than a metre away from their visitors, and conversations have to be practically shouted across, creating a din that makes communication difficult.[490] In addition, most police stations and prisons have no rooms dedicated to meetings between prisoners and their lawyers, and these normally have to take place in the administration office of the police station or prison.[491] This obviously compromises the confidentiality of the meetings and undermines the right of confidential communication.

Although the proposed Prisons Bill gives prisoners new rights, these are unlikely to be realised in practice unless there is investment in structural development and reforms in sentencing laws and policies. Overcrowding, lack of segregation, poor diet, inadequate facilities for private meetings with visitors and lawyers and inadequate health care facilities are likely to affect most people in detention and prevent the country from complying with the Constitution and United Nations standards for the treatment of people in detention.

Oversight of prison conditions

The Constitution establishes an Inspectorate of Prisons whose main mandate is 'monitoring the conditions, administration and general functioning of penal institutions taking due consideration of applicable international standards'.[492] The Inspectorate is composed of a justice of appeal or judge of the High Court nominated by the Judicial Service Commission, who chairs the Inspectorate; the chief commissioner of prisons or his or her nominee who must be a senior member of the prison service; a member of the Prison Service Commission nominated by the commission, a magistrate nominated by the Judicial Service Commission and the ombudsman.[493] Although the commission includes members of the prison service, it appears to operate independently in practice. The Inspectorate issues annual reports that document a sample of conditions in police cells and prisons following visits that the members make to the institutions. The operational independence of the Inspectorate is evidenced by the fact that the reports have not sought to cover up the government's failures.[494]

Prisons are also subject to inspection by judges of the High Court who are empowered by

489 Burton, Pelser and Gondwe, *Understanding Offending*, 2005, p.40.

490 See Malawi Human Rights Commission, *Annual Report 2004*, p.13, available at http://www.malawihumanrightscommission.org/docs/2004_MHRC_AnnualReport_.pdf, accessed 17 January 2006.

491 Interviews with Pasipau Chirwa, lawyer in private practice and assistant lecturer in law, University of Malawi, and Ngeyi Kanyongolo, lawyer in private practice and lecturer in law, University of Malawi, 10 February 2006.

492 Constitution, 1994, section 169(1) and (2).

493 Constitution, 1994, section 170(1).

494 See for example, Malawi Inspectorate of Prisons, *Report to Parliament: Activities Undertaken from July 1995 to September 1996*, Government Printer, Zomba, October 1996.

section 33 of the Prisons Act[495] to visit and inspect any prison at any time and, while doing so, may inquire into any complaint or request made by a prisoner. Prisons may also be visited and inspected by magistrates and ministers of the government acting in their capacity as 'visiting justices'.[496] In addition, prisons are also subject to inspection by 'official visitors' appointed by the Minister.[497] Prisons are also inspected by the Malawi Human Rights Commission, which is entitled to visit places of detention.[498] Visiting justices, the Malawi Human Rights Commission, official and lay visitors are free to report on prison conditions and may investigate complaints lodged by prisoners.[499]

The Prisons Act also grants the Minister of Home Affairs and Internal Security, responsible for prisons, the power to appoint committees of inquiry to investigate and report to him or her on the conduct, management or administration of any prison.[500] However, this power has not been used.

Reintegration of offenders

According to the Research and Planning Unit of the Prison Services, a wide range of education and training opportunities is available to people in prison.[501] Based on the philosophy of rehabilitation and reform, the Prison Services have promoted and set up mechanisms to facilitate the acquisition of academic qualifications and technical skills by people in prison. The programme seems to have been successful, if limited. People who have attended classes in prison have performed well in national school examinations. For example, in the 2003 Junior Certificate examinations, participants who wrote the examinations while in prison custody achieved pass rates of 97 per cent at Zomba Central Prison and 88 per cent at Maula Prison in Lilongwe. The head of the Unit, however, observed that, in general, the prison education programme did not attract many prisoners on sentences that are either too short or too long.

In addition to academic education, Malawian prisons also offer activities in the following areas to contribute to the rehabilitation of prisoners: agro farming, animal farming, vegetable farming, fish farming, rabbit keeping, carpentry, weaving, hospital skills, tailoring, tin-smithing, music, health education, spiritual activities, adult literacy, sports, laundering, plumbing, building and bricklaying, electrical engineering, chicken rearing, wheelchair making, painting and decorating, welding, cobbling and bicycle repairing. Some of these activities aim at supporting the functioning of the prisons. These activities are supported by various international and local development partners such as DFID, which has provided funding for tailoring and carpentry at Zomba Central Prison and St John of God mission, which has provided assistance for the maintenance of carpentry training facilities at Mzuzu Prison.[502]

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495 Prisons Act, 1955 (Act 6 of 1955), Chapter 21:03, *Laws of Malawi*.

496 Ibid., sections 34, 35 and 36.

497 Ibid., sections 38 and 39.

498 Malawi Human Rights Commission Act, 1998 (Act 27 of 1998), section 15.

499 For example, see Malawi Human Rights Commission, *Annual Report 2004*, Lilongwe, 2005, http://www.malawihumanrights-commission.org/docs/2004_MHRC_AnnualReport_.pdf, accessed 17 January 2006.

500 Prisons Act, 1955 (Act 6 of 1955), section 12.

501 Interview with Barzirial Chapuwala, superintendent in charge of the Research and Planning Unit, Prison Services, Zomba, 27 September 2005.

502 Burton, Pelser and Gondwe, *Understanding Offending*, 2005, p.70.

There is only one known facility that assists released prisoners to reintegrate into society. Known as the Balaka Halfway House, the facility is operated by a faith-based group, Prison Fellowship, which also provides counselling, education and health services in prisons. At the Balaka Halfway House, released prisoners receive counselling and learn livelihood skills in preparation for reintegration into their communities. The centre is located about 80 kilometres north of the country's biggest prison at Zomba and has facilities, including a bakery, classrooms, hostels and an administrative block constructed with sponsorship from the Malawi Safety, Security and Access to Justice Project which is largely funded by DFID.[503]

There is no precise indication of the percentage of prisoners who benefit from the various programmes aimed at facilitating reintegration into the community upon their release. In any case, though, the utility of the programmes as a whole is debatable for a number of reasons that were identified in the 2005 study conducted for the government by the Institute for Security Studies. The study found that:

> Rehabilitation within Malawi prisons is still in its infancy. In theory, very basic programmes aimed at providing skills and increasing productivity have been introduced in all the Malawi prisons. However, *these are by no means part of a coherent rehabilitation strategy*. [Emphasis added][504]

The study further found that the rehabilitative regime in Malawi prisons is premised, wrongly, on poverty as the sole cause of crime, leading to the assumption that increasing the income-generating skills of prisoners alone will remove their motivation for committing crime by increasing their earning potential upon release. In any case, according to the study, the various activities available to prisoners are not properly targeted at providing offenders with usable or marketable skills, and do not take full account of the general weaknesses of the labour market into which they are expected to reintegrate after release. The rehabilitative programme also does not have the necessary mechanism to follow up offenders after their release, partly due to shortages of staff. These shortages also mean that the prison service is unable to include in the rehabilitation programme psychological services to provide cognitive behavioural therapy, arguably an essential element of any successful rehabilitation strategy.

Several local and international institutions have called for improvements in prison conditions in Malawi.[505] In order for the rights of people in police and prison custody to be adequately protected, a number of steps must be taken immediately. First, the legal framework must be made compliant with constitutional and international human rights standards. This can be done by the urgent enactment of the Police Bill and Prisons Bill proposed by the Law Commission and the Prison Service respectively. Second is the formation of a cross-departmental group consisting of representatives of the police, the judiciary and the prison service charged with developing a

503 'Balaka Halfway House,' *MaSSAJ News*, Vol. 3, No. 1, March 2005.

504 Burton, Pelser and Gondwe, *Understanding Offending*, 2005, p.42.

505 For example, see Malawi Human Rights Commission, *Annual Report 2004*, Lilongwe, 2005, pp.14-15, available at http://www.malawihumanrightscommission.org/docs/2004_MHRC_AnnualReport_.pdf , accessed 17 January 2006; Amnesty International, *Prison conditions, cruel punishments and detention without trial,* undated, available at http://www.amnestyusa.org/countries/malawi/document.do?id=1783B4F6389546008025 69A600601B7E, accessed 17 January 2006.

strategy for reducing prison overcrowding. Such a strategy must be followed up by a 'practice direction' issued by the chief justice instructing judicial officers to exercise restraint in imposing custodial sentences in criminal cases, particularly in relatively minor offences and in the case of relatively young offenders. Third, the legal regime for the granting of pardons and remissions must be revised in order to increase the amount of remission of sentences which may be granted under section 107(1) of the Prisons Act, particularly for those convicted of relatively minor offences. Fourth, there must be an in-depth critical review of the efficiency and effectiveness of the rehabilitative programme currently implemented by the Prison Service, with a view to introducing psychological services, assessment of marketability of skills and post-release follow-up systems as a means of reducing re-offending in the long-term. Fifth, the government must construct more prisons, expand existing ones and equip them with proper facilities to improve not only the prisoners' welfare but also the conditions in which they can meet visitors and consult with lawyers.

6

Access to justice

Court fees in Malawi's judicial institutions have been kept relatively low so as to facilitate access to justice, and, in an attempt to reduce costs, small claims must be submitted to mediation before trial. But the high level of poverty in Malawi and the prohibitive costs of legal services mean that the majority of the population have no access to formal justice; this is limited to the wealthy elite. Newly created constitutional bodies such as the ombudsman and Human Rights Commission have played a useful role. Nevertheless, most Malawians seek resolution of civil disputes in various customary fora—of which there are estimated to be more than 20 000—including courts presided over by 'traditional authorities' recognised by the executive. Although the Constitution empowers Parliament to make provision for 'traditional or local courts' to hear customary law cases, no such legislation has been adopted. A legal framework for these courts is urgently needed. In addition, adequate resources should be allocated to traditional courts and other non-state mechanisms of conflict resolution, reflecting the scale of their contribution in providing access to justice for many citizens.

A. Knowledge of rights

There have been few surveys measuring public awareness of human rights. One of the most extensive of such surveys was conducted in 1998 and reported very low rights awareness among members of the general public.[506] Since then, numerous state institutions and non-governmental organisations have undertaken a wide range of initiatives aimed at imparting 'civic education' to the general population. Examples of such initiatives include radio and television discussion of

506 Centre for Advice, Research and Education in Rights, *Needs Assessment Survey*, Blantyre, 1998.

topics on various aspects of democracy and human rights,[507] public debates of governance-related topics conducted by the Lilongwe Press Club,[508] drama and musical performances aimed at conveying messages on gender equality.[509] By 2005, many actors in the justice sector were of the view that rights-awareness had increased significantly, even among the poor and vulnerable. In the view of many people interviewed during this study, the limitation that affects most Malawians is not lack of rights awareness but the ability and capacity to enforce their rights in practice.[510]

The International Foundation for Electoral Systems has noted that access to justice is particularly problematic for women and members of socially disadvantaged sections of the population, with poverty and illiteracy militating against their ability to access justice delivery institutions.[511] The United Nations Development Programme/Malawi Government Democracy Consolidation Programme has identified lack of access to justice by the majority, especially for vulnerable groups, as a barrier to the promotion of the rule of law in Malawi.[512]

B. Physical access

Lack of physical access to courts is a real barrier to justice for most Malawians. According to information provided on the judiciary's website, the country has a total of 195 magistrates' courts.[513] The courts are located mainly in urban and peri-urban areas or rural community centres. This means that for the majority of the people who live in remote rural areas, the nearest court might be as much as 40 kilometres away. In some cases, a person may have to walk for up to eight hours to reach the court nearest to his or her home.[514] The effect of such distances is made worse by the fact that most rural areas do not have regular public transport. Where public transport exists, it is prohibitively expensive for most Malawians. The bus fare for a 40 kilometre journey is almost the equivalent of a day's wages. The Supreme Court of Appeal, the High Court and the Industrial Relations Court are even less geographically accessible to most Malawians.

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507 An example of this is the series of programmes broadcast by the Malawi Broadcasting Corporation under the Ndizathuzomwe Civic Education Radio Project ,implemented by the Development Broadcasting Unit, funded by the United Nations Children Fund (UNICEF), the United Nations Development Programme (UNDP), Oxfam, the National Aids Council of Malawi, the Inter-Ministerial Committee on Human Rights and Democracy and the Open Society Initiative for Southern Africa (OSISA); see Radio for Development, *Development Broadcasting Unit, Malawi,* undated, available at http://www.rfd.org.uk/project_det.asp?P_ID=13, accessed 17 January 2006.

508 For a report on one such debate, see Gregory Gondwe, 'Malawi gender activists told not to fight men,' *The Chronicle*, Lilongwe, 3 May 2005, available at http://www.afrol.com/articles/16269, accessed 17 January 2006.

509 An example is the work of the Evangelical Lutheran Church of Malawi drama group. See Lutheran World Federation: Malawi, *Department for World Service Country Programs – Malawi*, undated, available at http://www.lutheranworld.org/What_We_Do/DWS/Country_Programs/DWS-Malawi.html, accessed 17 January 2006.

510 Interviews with Aiman Mussa, programme manager, Democracy Consolidation Programme, Lilongwe, 22 September 2005, and Tinyade Kachika, Programme officer, Women and Law in Southern Africa Research and Education Trust (Malawi), Blantyre, 27 September 2005.

511 Kanyongolo, *Malawi State of the Judiciary Report 2003.*

512 UNDP/Government of Malawi, *Democracy Consolidation Programme Phase II: 2002-2006*, Project Support Document, undated, p.6.

513 Malawi Judiciary, List of Courts in Intergraded (sic) Judiciary', undated, available at http://www.judiciary.mw/Courts_list.htm, accessed 17 January 2006.

514 Schärf, Banda, Roentsch, Kaunda and Shapiro, *Access to justice for the poor of Malawi?*, 2002, p.15.

In addition to distance, other factors limit physical access to courts for particular groups of people whose movements are restricted. This is the case with asylum seekers and refugees who are encamped mainly at Dzeleka and Luwani camps, located 45 kilometres away from the capital city Lilongwe.[515] Refugees are restricted to their camps and, consequently, are limited in their ability to physically visit courts and other institutions in the justice sector. In a reservation to the 1951 UN Convention relating to the Status of Refugees, the government of Malawi reserved 'its right to designate the place or places of residence of the refugees and to restrict their movements whenever considerations of national security or public order so require'.[516] The government's confinement of refugees in designated areas that do not have adequate justice institutions severely limits the right of the refugees to access justice. This problem can be addressed by removing restrictions on the right of refugees to move from camps or by establishing justice delivery mechanisms within the camps.

The physical design of some court premises in Malawi also generally denies access to people with physical disabilities that hinder them from using stairs. Most notable among such premises are those of the High Court and Supreme Court of Appeal in Blantyre and the High Court in Mzuzu where public access to the courtrooms and offices involves climbing flights of stairs. Most of the other courts in the country are located on ground floors.

c. Financial access

Court fees

Table 6.1: Court fees

Process	Fees payable	
	Kwatcha	US$ Equivalent
Writ of summons	60.00	US$0.46
Application for judicial review	70.00	US$0.54
Petition for divorce	60.00	US$0.46
Application to pay debt by installments	20.00	US$0.15
Notice of appeal to the Supreme Court	50.00	US$0.39
Petition for child adoption	70.00	US$0.54

Source: List of fees posted by the judiciary on its website at http://www.judiciary.mw/Court_fees.htm, accessed 17 January 2006.

515 By the end of 2003, Malawi was hosting approximately 16 000 refugees; see 'Refugee population swells in Malawi,' *News from Africa*, Nairobi, November 2003, available at http://www.newsfromafrica.org/newsfromafrica/articles/art_2326.html, accessed 17 January 2006. The majority of the refugees come from countries in the Great Lakes Region, Somalia and the Democratic Republic of Congo, see United Nations, *United Nations Development Assistance Framework Malawi 2002–2006*, Lilongwe, 2001, p.10, available at http://www.undg.org/documents/1657-Malawi_UNDAF__2000-2006__-_Malawi_2000-2006.pdf, accessed 7 February 2006.

516 See United Nations Treaty Collection, (as at 5 February 2002), 2002, *Convention relating to the Status of Refugees*, Geneva, 1951, available at http://www.unhchr.ch/html/menu3/b/treaty2ref.htm, accessed 17 January 2006.

The fees required at different stages in the trial process are reasonably low. Table 6.1 (on the preceding page) is a sample of some of the fees that are payable at the High Court. In comparison to other jurisdictions, the fees may appear to be low. However, in the context of Malawian income levels, they are likely to be prohibitive for a substantial number of people who might intend to lodge a case or move it forward. Although it was not possible to determine the specific extent to which this is the case, it is reasonable to assume that the vast majority of Malawians who live on less than the equivalent of US$1 per day[517] cannot afford to pay the fees that are required to commence judicial proceedings, let alone pursue them to a satisfactory conclusion.

In any case, the financial accessibility of the courts is not determined by the level of court (or even lawyers') fees alone. As indicated in the discussion of physical accessibility above, because of the long distances that most litigants and witnesses have to travel to reach their nearest courts, transport costs also add to the cost of litigation. In fact, a 2002 study found that, at about K30 (US$0.23) to K40 (US$0.31), the fees payable to commence proceedings in magistrates' courts were considered reasonable by magistrates, but that incidental costs, including the cost of travel for litigants and their witnesses, added up to amounts that were overwhelming for the poor.[518]

This is further complicated by the fact that the law allows certain categories of cases to be brought only before courts where proceedings entail great costs. For example, any case in which the value of the subject matter or amount of damages claimed exceeds K50 000 can only be tried by the High Court. Not only does this mean that the litigant pays higher fees than he or she would have paid in a magistrates' court, it also increases the cost of justice for many who have to travel to Blantyre, Lilongwe or Mzuzu, the only places where the High Court has premises. One way of addressing this problem is by substantially increasing the maximum amount of damages that magistrates may order or the value of subject matter which they could decide upon. For example, the maximum for a resident magistrate could be raised from K50 000 to K100 000 (about US$772). The maximum amounts that lower grade magistrates could order would then be pegged to their respective levels. For example, first grade magistrates could be limited to a maximum of K75 000 (about US$579), rather than the current K40 000 and second, third grade and fourth grade magistrates to K50 000 (about US$386), K20 000 (about US$154.40) and K10 000 (about US$77.20) respectively. The Law Commission should urgently address this problem and undertake reform of the law to increase the jurisdiction of magistrates' courts along the lines suggested and informed by the principle of improving access to justice.

Illegal payments

There is no evidence of any widespread public perception that a significant number of support staff in the judiciary routinely extract illegal payments in order to assist litigants. The registrar of the High Court and Supreme Court of Appeal could not recall any occasion when a member of the support staff had been successfully prosecuted for receiving bribes in connection with grant-

517 Malawi Government, Poverty Reduction Strategy Paper, Lilongwe, 2002, p.5, available at http://www.delmwi.cec.eu.int/en/Malawi_PRSP.pdf, accessed 9 January 2006.

518 Schärf, Banda, Roentsch, Kaunda and Shapiro, *Access to justice for the poor of Malawi?*, p.15.

ing any person access to the courts.[519] On the other hand, a second grade magistrate was convicted in 2002 for receiving a bribe after having received the sum of K2 000 as an inducement to pass a suspended sentence against a person he had been trying for carrying out an illegal abortion.[520] In October 2005, a resident magistrate was alleged in the press to have received a bribe of a refrigerator in exchange for granting lenient bail conditions in a particular case. The same month, the media also reported that the Anti-Corruption Bureau was investigating a chief resident magistrate for allegedly receiving money in a high-profile corruption case involving a close aide of the country's former president, although by January 2006 nothing more had been reported on the allegation.[521] This magistrate was reportedly arrested by the Anti-Corruption Bureau in February 2006 for allegedly demanding a K500 000 Malawi kickback from a refund of a bail bond that had been posted by an accused person in a case that the magistrate was handling.[522]

Cost of legal advice

The fees payable to lawyers in civil cases are governed by rules made under the Legal Education and Legal Practitioners Act.[523] In general, the cost of legal advice bars access to the courts for most people in Malawi. Consultation fees will vary depending on the seniority and experience of the lawyer, and may be as high as K7 000 (US$54.06) per hour.[524] Almost all lawyers will also request the client to pay an initial deposit of not less than K10 000 (approximately US$77) before they can commit themselves to represent him or her in litigation.[525] Put in perspective, this is higher than the approximately K233 (US$1.80) that the lowest paid police constable earns in a day, and even much higher than the minimum daily wage of K89.18 (US$0.69) that a court marshal earns. It is obvious that people earning less than the equivalent of US$1 per day—the average person in Malawi—cannot afford legal advice. It is noteworthy that the high cost of lawyers' fees disproportionately affects women because their incomes are generally lower than those of men.

The government provides legal aid in civil matters through the Department of Legal Aid of the Ministry of Justice and Constitutional Affairs.[526] However, the department has such a shortage of human and material resources that it cannot meet the huge demand for legal aid, even in criminal cases (as noted in the previous chapter). The government's Department of Legal Aid is also not physically accessible for the vast majority of Malawians because it operates through only

519 Interview with Sylvester Kalembera, registrar of the High Court and Supreme Court of Appeal, Blantyre, 30 September 2005.

520 See 'Magistrate slapped with 6 years imprisonment' reported on the Anti-Corruption Bureau website at http://www.anti-corruptionbureau.mw/report_on-going.html, accessed 17 January 2006.

521 *The Daily Times*, Blantyre, 12 October 2005.

522 See 'Malawi graft busting body nets senior magistrate', Angola Press, 22 February 2006, available at http://www.angolapress-angop.ao/noticia-e.asp?ID=418606, accessed 19 March 2006.

523 Legal Education and Legal Practitioners Act, 1965 (Act 20 of 1965), Chapter 3:04, *Laws of Malawi*. The rules are called the Legal Practitioners (Scale and Minimum Charges) Rules.

524 Telephone interview with Reyneck Matemba, chief legal aid advocate, Ministry of Justice and Constitutional Affairs, 15 February 2006.

525 Interviews with lawyers in private practice, Chrispine Sibande and Gift Nankhuni, Lilongwe, 9 September 2005.

526 See Malawi Government, *Department of Legal Aid*, undated, at http://www.malawi.gov.mw/justice/index.justice.htm, accessed 1 February 2006.

two offices throughout the country, located in the cities of Blantyre and Lilongwe.

Lawyers and paralegals working for a number of NGOs also offer pro bono legal advice in civil matters. Among the organisations that provide lawyers who offer free legal advice to indigent clients are the Centre for Advice and Research and Education on Rights (CARER), the Civil Liberties Committee (CILIC), the Society for the Advancement of Women (SAW), the Women Lawyers Association, the Malawi Law Society. CARER and the Paralegal Advice Centre (Parece), also offer free legal advice in civil matters through paralegals. Mainly with assistance provided by the United States Agency for International Development (USAID), the former provides at least 14 trained paralegals in 10 locations, including a number of rural areas, and in the first half of 2003 alone, the paralegals had provided assistance in more than 400 cases.[527] In addition to the trained paralegals, CARER also trained at least 450 community-based volunteers to provide legal advice in their areas.[528] For its part, Parece is an organisation run mainly by law students of the University of Malawi who operate a drop-in advice centre at their campus in Zomba.[529]

There are at least three limitations of the legal advice services offered by NGOs. First, given the low number of lawyers and paralegals available to do the work, the organisations cannot meet the demand. Second, the organisations' lawyers and paralegals are not physically accessible to most of their potential clients because, with the exception of CARER, they mostly operate from offices located only in the urban centres of Blantyre and Lilongwe. Third, the organisations do not coordinate their activities sufficiently to facilitate the establishment of common standards, optimisation of synergies and sharing of experiences and lessons.

In order to address the problems, organisations involved in providing free legal advice must develop a joint strategy for best delivering such service, particularly to the poor and the most vulnerable among them, such as women. The strategy must, among other things, put in place a mechanism for developing linkages with institutions that train lawyers and paralegals with a view to increasing the number of personnel that they train every year, and providing them with opportunities to do internships within the organisations as part of their training. Another element of the strategy must be to increase coordination among the organisations. Most of the organisations are members of the Malawi Human Rights Consultative Committee and could use it to establish a network of legal advice organisations to focus on matters of mutual interest.

Every person has a right to appear in person in the formal court system and there is no law that compels any person to have legal representation in proceedings in the formal court system. In practice, most people appear in person because they cannot afford to hire lawyers. However, their ability to defend and advance their interests is predictably constrained by their limited capacity to handle the procedural technicalities, language and alienating atmosphere of the formal courtroom. Any steps that can improve their access to legal aid must therefore be taken as a matter of urgency.

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527 See United States Agency for International Development, *Telling our story*, 16 January 2005, available at http://www.usaid.gov/stories/malawi/ss_malawi_law.html, accessed 30 January 2006.

528 Ibid.

529 See European Union Project Management Unit, *Institutional activities and achievements*, 2001, available at http://www.sdnp.org.mw/ruleoflaw/eu/accomp.html, accessed 30 January 2006.

Attempts to reduce costs

There have been several initiatives aimed at reducing the cost of access to the courts by improving the efficiency with which claims are processed. In the absence of small claims courts to enable individuals to litigate less valuable cases at low cost,[530] in 2000, the courts adopted the Subordinate Courts (Small Claims Procedure) Rules as subsidiary legislation under the Courts Act.[531] The rules permit magistrates to apply special, and more simplified, procedures to small claims. However, the potential of these to improve the ability of the majority of people to enforce their rights remains constrained by other factors discussed elsewhere in this report which limit access to the courts generally, including physical inaccessibility of the courts and the use of English as the official language in judicial proceedings. The reduction of some costs in litigation is, therefore, not enough to facilitate access to the formal court system for the majority of people who, consequently, have to rely mostly on informal systems of justice.

The Constitution identifies as a 'principle of national policy' that the state should set as one of its goals the peaceful settlement of disputes. To this end, it should adopt 'mechanisms by which differences are settled through negotiation, good offices, mediation, conciliation and arbitration.'[532] In the spirit of that principle and in the exercise of rule-making power granted under section 67 of the Courts Act,[533] the chief justice promulgated the Courts (Mandatory Mediation) Rules in August 2004.[534] The rules require all proceedings in certain matters to be mediated before being subject to trial.[535] Under this scheme, mediation is performed by mediators who are appointed by the parties to a dispute from a list compiled by the assistant registrar of the High Court and Supreme Court of Appeal with the approval of the chief justice.[536] Among other things, the rules also provide that, during mediation, the parties should strive to reduce cost and delay, and to facilitate the early and fair resolution of their dispute.[537] One limitation of these rules is that they are not applicable in a wide range of cases, including proceedings that involve interpretation of the Constitution, proceedings concerning the liberty of an individual, proceedings commenced under the Subordinate Court (Small Claims Procedure) Rules, and proceedings for judicial review, summary possession of land, injunctions, expedited originating motions and 'any such matters where by law or practice, the trial is expedited.'[538] In spite of these limitations, the mandatory mediation regime has the potential of reducing the cost of legal action in a significant number of cases. However, since the rules have been in

530 This has been said to be a significant factor that negatively affects the business climate in the country. See National Action Group/Ministry of Economic Planning and Development, *Ten Priority Actions for Improving the Business Climate in Malawi,* 22 October 2004, available at http://www.sarpn.org.za/documents/d0001018/P1145-NAG_Malawi_business_Oct2004.pdf, accessed 30 January 2006.

531 Courts Act, 1958 (Act 1 of 1958), Chapter 3:02, *Laws of Malawi*.

532 Constitution, 1994, section 13(l).

533 Courts Act, 1958 (Act 1 of 1958), Chapter 3:02, *Laws of Malawi.*

534 Malawi Judiciary, Courts (Mandatory Mediation) Rules, 2004, available at http://www.judiciary.mw/COURTS%20(MANDATORY%20MEDIATION)%20RULES,%202004%20(1).htm, accessed 28 December 2005.

535 Ibid., Rule 4.

536 Ibid., Rules 8 and 9.

537 Ibid., Rule 5(1)(a).

538 Ibid., Rule 3(a) to (d).

operation for a little more than one year, it is difficult to evaluate the extent to which this is the case in practice.

There is also a specific legal framework to facilitate arbitration. The Arbitration Act, 1989,[539] regulates a wide range of matters related to arbitration such as the effect of arbitration agreements, appointment of arbitrators and umpires, awards, costs and fees, and enforcement of awards. Other statutory provisions also make provision for arbitration in particular types of disputes. For example, section 46 of the Public Enterprises (Privatisation) Act of 1996 (Act 7 of 1996) provides that any dispute between an investor and the Privatisation Commission should be settled by arbitration.

The arbitration regime does not necessarily facilitate the reduction to costs associated with accessing courts to any significant extent because it is restricted to trade and investment disputes, which in practice do not affect the vast majority of Malawians, who live a subsistence life in rural areas. In some cases, it may imply higher costs than those likely to be incurred in litigation. The legislative framework for arbitration is outdated and needs to be reviewed in order to predicate it on the principles and values of the Constitution, particularly those that entitle people to have access to justice and effective remedies. Such a review could be part of a broader review of the alternative dispute resolution regime of which primary justice systems are a necessary, but not sufficient, component.

D. Right to appear: jurisdictional restrictions

Rules governing *locus standi* in Malawi are based on the common law,[540] the rules that govern judicial review[541] and the Constitution.[542] In general, the rules are similar to those that govern the right to be heard by the African Commission on Human and Peoples' Rights. In effect, they provide that only a person who is the direct 'victim' of the decision or action which is the subject of the judicial review, is entitled to be heard by the courts. Summing up the common law position, the High Court has stated that 'a person who has no sufficient interest in the matter has no right to ask a court of law to give him a declaratory judgment. He must have a legal right or substantial interest in the matter in which he seeks a declaration.'[543] This is also the position of Order 53 of the Rules of the Supreme Court, which states that a court cannot grant a person leave to apply for judicial review 'unless it considers that the applicant has a sufficient interest in the matter to which the application relates.'

Since the 1994 Constitution came into force, it has also governed *locus standi*, particularly in relation to applications for judicial review of decisions or actions that allegedly violate human rights. Section 15(2) of the Constitution provides that:

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539 Arbitration Act, 1989 (Act 10 of 1989), Chapter 6:03, *Laws of Malawi*.

540 The courts have used landmark English cases quite extensively. Cases such as *Regina v Inland Revenue Commissioners, ex-parte: National Federation of Self-Employed and Small Businesses Limited [1982] AC 617* and *Regina v Secretary of State for Foreign and Commonwealth Affairs Ex-parte World Development Movement Limited* (1995) 1 WLR 386 have been used by the High Court as sources of the common law on the subject.

541 See particularly Order 53 of the Rules of the Supreme Court (as amended), England and Wales.

542 See the Constitution, 1994, section 15(2).

543 *The President of Malawi v Kachere*, Civil Appeal 20 of 1995. Also see *United Democratic Front v Attorney General*, Civil Cause 11 of 1994 and *Attorney General v Malawi Congress Party*, Civil Appeal 22 of 1996.

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

The High Court ruled that the term 'sufficient interest' should not be interpreted restrictively, particularly in relation to judicial review of decisions that affect human rights because section 46(2) of the Constitution entitles '[a]ny person' who claims that 'a' fundamental right or freedom guaranteed by the Constitution has been infringed or threatened to make application to a competent court to enforce or protect such a right or freedom.[544] It has been suggested that a liberal interpretation of 'sufficient interest' is also made necessary in the context of Malawi in order to enable third parties, such as NGOs, to apply for judicial review on behalf of direct victims of decisions and actions whose access to the courts is likely to be limited due to poor awareness of rights, lack of resources, illiteracy and other socio-economic limitations that affect the majority of people in the country.[545]

Despite the arguments in favour of a liberal interpretation of 'sufficient interest,' the Supreme Court of Appeal has held that, in deciding the question of *locus standi*, 'sufficient interest' must be interpreted restrictively regardless of whether the court is dealing with a constitutional matter or not. The court stated this in the case of *Civil Liberties Committee v Attorney-General*[546] which it decided in April 2004. In this case, the court held that a human rights NGO did not have sufficient interest to give it *locus standi* to seek judicial review of a decision of the registrar-general to cancel the registration of a publishing company and to ban a newspaper the company published for alleged violation of registration laws. The court held that the NGO's interest in the matter was too remote since the only connection it could claim to the case was that it was a registered body established to promote, protect and enforce human rights, democracy and the rule of law. A similarly restrictive approach to the interpretation of 'sufficient interest' had been taken by the same court in an earlier case when it had held that, although the wording of section 46(2) of the Constitution provided that 'any person' could seek judicial review for infringement of 'a' (not 'his or her') human right, 'this cannot mean that any person can complain about an infringement affecting another person, otherwise it would conflict with the provisions of section 15(2) of the Constitution.'[547] In a much earlier case that also involved a constitutional matter, the Supreme Court of Appeal had been equally restrictive and held that in order to have *locus standi*, a person must have 'a legal right or substantial interest in the matter in which he seeks a declaration. 'Sufficient interest' is the one which is over and above the general interest.'

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544 *Registered Trustees of The Public Affairs Committee v The Attorney-General and Another*, Civil Cause 1861 of 2003, available at http://www.judiciary.mw/civil/PAC_vs_Attonery_General_Speaker.htm, accessed 18 January 2006.

545 See Fidelis Edge Kanyongolo, 'Courts, Elections and Democracy,' in Martin Ott, Bodo Immink, Bhatupe Mhango and Christian Peter-Berries (eds.), *The Power of the Vote: Malawi's 2004 Parliamentary and Presidential Elections*, Kachere Series, Zomba, 2005.

546 *Civil Liberties Committee v Attorney-General,* Civil Appeal 12 of 1999.

547 *The Attorney General v The Malawi Congress Party and Others, M.S.C.A,* Civil Appeal 22 of 1996, p.39, available at http://www.judiciary.mw/civil/cilic_Min_Justice.htm, accessed 18 January 2006.

The restrictive interpretation of 'sufficient interest' does not permit public interest litigation for which there is no specific legal provision in Malawi. In fact, in the High Court judgment of the *Civil Liberties v Attorney-General* case, the court expressly stated that public interest litigation was not available as a means of taking judicial action separately from the regular procedures which were subject to the (restrictive) rules of *locus standi*. The limitation on access to courts that the restrictive interpretation of 'sufficient interest' imposes is mitigated to some extent by the fact that the courts appear to be ready to allow *amicus curiae* petitions. In the case of *Registered Trustees of The Public Affairs Committee v The Attorney-General and The Speaker of the National Assembly, The Malawi Human Rights Commission – Amicus Curiae,* [548] which involved review of a decision of Parliament to pass an amendment to the Constitution which violated human rights, the High Court permitted the Malawi Human Rights Commission to file an *amicus curiae* petition. There is no evidence to indicate that any NGO has ever filed an *amicus curiae* petition that was rejected by the courts. In the light of the readiness with which the High Court allowed the amicus petition in the *Registered Trustees of The Public Affairs Committee v The Attorney-General and Another,* there is no reason to expect that the courts will have difficulties with accepting similar petitions filed by NGOs.

Although NGOs should be encouraged to use amicus curiae as a way of bringing to the attention of the courts the interests of vulnerable groups who may not have direct access to the courts, more needs to be done to make the rules on *locus standi* less restrictive. Since the country's highest court appears to be set in taking the restrictive approach, the more realistic option might be to request the Law Commission to recommend an amendment to section 15 of the Constitution that expressly permits public interest litigation on constitutional matters which is not subject to the restrictions of the 'sufficient interest' test set by the Supreme Court of Appeal.

E. Reasonable delay

According to an analysis of a random sample of over 90 cases in a research project, conducted for the NGO the Asante Foundation in 2005, whose results were presented to the chief justice,[549] the average duration of the hearing of civil trials before magistrates' courts is 45 days. This contrasts with the average of 408 days that it takes from the first to the last day of the hearing of a civil trial in the High Court. On average, there is a period of 141 days between the last day of hearing and the day when judgment is delivered in civil cases. This period lengthens even more when one factors in cases in which the period is inordinately long. Thus, in the sample that was covered in this research, the average was 249 days, when two inordinate cases in which approximately three years lapsed between the end of the hearing and the passing of judgment, were factored into the calculation. In some cases, the delays have been so serious that lawyers have written directly to judges to complain of the delays as happened in the case of

548 *Registered Trustees of The Public Affairs Committee v the Attorney-General and the Speaker of the National Assembly, The Malawi Human Rights Commission- Amicus Curiae,* Civil Cause 1861 of 2003, available at http://www.judiciary.mw/civil/PAC_vs_Attonery_General_Speaker.htm, accessed 18 January 2006.

549 Fidelis Edge Kanyongolo, 'Judicial Efficiency in Malawi: Final Report submitted to Asante Foundation,' Blantyre, 2005.

Mwadzangati v Daud Wood t/a Wood Consult[550] in which the lawyer for one of the parties wrote to the judge to complain about a judgment that had not been delivered almost two years after the last day of the hearing in the case. The research also found that, on average, it took 521 days between the day on which judgment was delivered in a civil case in the High Court to the first day of the hearing of the appeal in the Supreme Court of Appeal.

This substantiates the widely held view that there are long delays in the hearing of cases in Malawi. It also suggests that resources are not the only factor affecting efficiency of the judicial process since the High Court, which has more resources than the magistrates' courts,[551] is not necessarily more efficient, at least not in relation to civil trials. This points to the need for an in-depth empirical analysis of the fundamental causes of delays in judicial proceedings. Such an analysis should not only identify the causes but also indicate the financial cost of the delays as well as their impact on the individual rights of parties to the proceedings. It is recommended that the judiciary commission such research. Among the causes of delays that such research is likely to reveal are insufficient numbers of judicial staff and lawyers; cumbersome antiquated rules of procedure; use of English in proceedings which necessitates interpretation in the majority of cases; poor communication infrastructure which makes it difficult to notify parties and witnesses resident in remote areas of court dates; and inadequacy of library and other information resources which leads to inefficiencies in research by lawyers and judges.

F. Respect for court orders

There appears to be general respect of court orders by people and institutions other than government.[552] There have, however, been highly publicised cases in which court orders have been disobeyed in circumstances that undermine the authority of the courts. One such case involved the leader of the country's biggest opposition party, who disregarded a court injunction prohibiting him and some senior members of his party from holding a party convention whose constitutionality had been challenged by the party's president. The officials were found liable for contempt of court and each of them was ordered to pay a K200,000 fine.[553] Another high profile case involving defiance of a court order was that in which a group of rural peasants who had squatted on land belonging to a private tea plantation refused to obey an order of eviction issued by the High Court and were committed to prison for contempt of court. [554]

However, cases of disrespect for court orders by individuals are the exception rather than the rule and cases of disobedience often involve defendants who cannot afford to comply with court orders requiring the payment of money.[555]

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550 *Mwadzangati v Daud Wood t/a Wood Consult,* Civil Cause 2018 of 2000.

551 See Malawi Judiciary, *Malawi Judiciary Development Programme 2003–2008*, 2003, Blantyre, p.11.

552 Interview with Enock Chibwana, Ombudsman, Lilongwe, 18 May 2006.

553 *Kampanje Banda v Gwanda Chakuamba*, Civil Cause 1841 of 2001.

554 *Nchima Tea and Tung Estate v Concerned Persons*, Civil Cause 1665 of 1994.

555 Interview with Pasipau Chirwa, private legal practitioner and assistant lecturer in Law, University of Malawi, 6 June 2006.

G. Mechanisms to assert rights outside the court system

The right of every person to enforce his or her rights in official institutions other than the courts is guaranteed by section 15(2) of the Constitution which provides that: '[a]ny person or group of persons with sufficient interest in the protection and enforcement of rights under [the Constitution] shall be entitled to the assistance of the courts, the ombudsman, the Human Rights Commission and other organs of government to ensure the promotion, protection and redress of grievance in respect of those rights.' This is consistent with Article 7(1)(a) of the African Charter on Human and Peoples' Rights which provides that the right of every person to have his or her cause heard includes '[t]he right to an appeal to competent national organs against acts violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force.' In Malawi, the key institutions through which rights may be asserted outside the court system are the Office of the Ombudsman and the Human Rights Commission.

The Office of the Ombudsman

Section 120 of the 1994 Constitution establishes the Office of the Ombudsman; section 123 mandates the ombudsman to provide remedies to people who have suffered injustice or violation of their human rights in circumstances in which there is no judicial or other remedy that is reasonably available. Enforcing human rights through the Office of the Ombudsman is less expensive than going through the courts because the Office of the Ombudsman provides its service free of charge. The remit of the ombudsman in Malawi permits it to go beyond addressing complaints brought by members of the public regarding the conduct of government. Section 5(1) of the Ombudsman Act of 1996[556] restricts the ombudsman to handling complaints against abuse of power or unfair treatment by public officials. However, because wording of the Constitution is broader and permits the ombudsman to handle 'any and all cases' of injustice, in practice, the ombudsman has dealt with complaints against private institutions[557] covering a wide range of matters, including labour disputes.[558] To a large extent, therefore, the office does operate as a cheap substitute for the courts, except that, according to the Supreme Court of Appeal, the ombudsman cannot grant the same binding remedies that the courts can.

At the end of his or her inquiry into each case, the ombudsman makes a determination, recorded in writing. Section 9(1) of the Ombudsman Act of 1996 requires the ombudsman to submit a full report of every matter inquired into or investigated by him or her to the speaker of the National Assembly, with a copy to the cabinet and any other relevant organ of government. In addition, the ombudsman is required by the Constitution and the Ombudsman Act to submit annual reports of the activities of his or her office to the National Assembly and its speaker.[559]

556 Ombudsman Act, 1996 (Act 17 of 1996).

557 An example is a complaint against a charity which was the subject of the case of *The Trustees of Malawi Against Physical Disabilities v The State and the Office of the Ombudsman,* Civil Cause 22 of 2001. Cf. the case of *Central East African Railways Limited v The Ombudsman,* Civil Cause 56 of 2001, in which the High Court held that the ombudsman had jurisdiction to hear complaints against private entities only if the acts complained of arose out of the entities' performance of public duties or functions.

558 Adam Stapleton, South Consulting, *The Malawi Human Rights Resource Centre (MHRRC) Evaluation Report – Final Evaluation Report: Strengthening of the ombudsman Institution in Malawi*, Danish Centre for Human Rights, Copenhagen, 2000, p.50, available at http://www.humanrights.dk/upload/application/f5b03a41/malawimanus.pdf, accessed 2 January 2006.

559 Constitution, 1994, section 127; and Ombudsman Act, 1996 (Act 17 of 1996), section 9(2).

The full reports by the ombudsman are not widely available to the general public either in print or on the official website of the office,[560] although information on the activities of the office is regularly reported in the media.[561]

Since its establishment, the ombudsman has investigated a wide range of complaints against various government ministries, departments, statutory corporations and other institutions. Although the Office of the Ombudsman does not regularly publish reports of its cases, it has published a one-off undated publication titled *Guide to Good Administrative Practice* which contains an informative selection of cases and principles selected from them which are aimed primarily at guiding public officials in their handling of staff and members of the public.[562]

The effectiveness of investigations by the ombudsman is undermined by legal limitations that restrict the enforcement of the determinations or recommendations that flow from them. In the case of the ombudsman, for example, the Constitution provides that, following his or her investigation, the ombudsman can only do the following: direct that appropriate administrative action be taken to redress the grievance in question; cause the appropriate authority to ensure that there are, in future, reasonable practicable remedies to redress grievance; or refer the matter to the director of public prosecutions with a recommendation for prosecution.[563] Neither the Constitution nor the Ombudsman Act gives the ombudsman power to enforce his or her determinations. The High Court has also held that it cannot enforce a determination of the ombudsman because it is not specifically authorised to do so.[564] In effect, this limits the extent to which determinations by the ombudsman are treated as binding in practice.

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560 See http://www.Ombudsman malawi.org/press_reviews_&_publications.htm, accessed 22 June 2006, where the only report posted is the annual report for 2001. In contrast, see the numerous reports posted on the website of the South African Public Protector at http://www.polity.org.za/html/govt/pubprot/?rebookmark=1, accessed 5 January 2006.

561 See Adam Stapleton and South Consulting, *The Malawi Human Rights Resource Centre (MHRRC) Evaluation Report – Final Evaluation Report: Strengthening of the Ombudsman Institution in Malawi*, Danish Centre for Human Rights, Copenhagen, 2000, p.72, footnote 10, available at http://www.humanrights.dk/upload/application/f5b03a41/malawimanus.pdf, accessed 2 January 2006.

562 Cases reported in the publication include those in which the ombudsman found abuse of powers involving the assault of a criminal suspect by police officers, *MRM and Dedza Police Station*, Inquiry 38/2000; and the arrest, by the police, of members the family of criminal suspects who were at large as a way of inducing the suspects to surrender to the police, *SC (and others) and Soche Police Station*, Inquiry 42/2000. In relation to unfair labour practices, the publication reports a case in which the ombudsman decided that the Registrar of the High Court had wrongly exercised the powers of the Judicial Service Commission to determine whether a person was qualified to be appointed as a court reporter, *GKB and the Registrar of the High Court and Supreme Court of Appeal*, Inquiry 24/2000. Other cases concerning unfair treatment of employees related to failure by the Malawi Police Service to adjust the salary of a policeman who had successfully completed a technical course of study, *GRK and the Inspector General of Police*, Inquiry 35/2000, and dismissal of a Malawi Army soldier on the grounds that his wife's suicide had put the army to shame, *RM and the Malawi Army*, Inquiry 74/2000.

563 See Constitution, 1994, section 126.

564 See the case of *Munthali v Malawi Institute of Education*, Civil Cause 84 of 2003. The case involved a plaintiff who had lodged a complaint with the ombudsman against his employer for unlawful termination of his employment. The ombudsman had ruled in his favour and had directed that the employer take appropriate administrative measures including paying the complainant salary increments, leave grants, gratuity and other terminal benefits. Two years after the ombudsman's determination, the employer had not yet complied with the determination and the plaintiff applied to the High Court to have it enforce the determination. The High Court refused to enforce the determination, stating in part that 'once a person has opted to bring the matter to the Office of the Ombudsman, the case can only come to the High Court for purposes of judicial review [and not direct enforcement].'

The Human Rights Commission

Section 129 of the 1994 Constitution and the Human Rights Commission Act of 1998,[565] establish the Human Rights Commission, whose primary mandate is to investigate human rights violations and make recommendations aimed at protecting human rights. The most highly publicised investigations conducted by the commission have included those into the suspected killing by police of criminal suspects in custody[566] and the fatal shooting of demonstrators and people close to demonstrations.[567] The commission may enforce human rights through the courts as it has done on at least one occasion when it represented civil servants who complained of being discriminated against in a new housing allowance scheme introduced by the government.[568]

The Human Rights Commission is required by section 37 of the Human Rights Commission Act to submit annual reports of its work to Parliament. In 2004, the commission produced 600 copies of its 2003 Annual Report, supplied half of them to Parliament and distributed the rest to various stakeholders.[569] Hard copies of reports issued by the commission are not widely available to the public, although at the time of this study, the commission's website contained annual reports for 2000, 2003 and 2004 which provided useful statistical summaries of its investigations.[570]

For example, among the recommendations that the Human Rights Commission made in its 2000 Annual Report were those which requested the government to fund the establishment of regional and district offices of the commission in order to allow it to better discharge its mandate of investigating human rights violations; to take measures to reduce overcrowding and ensure separation of juveniles from adults in prisons; and to facilitate the discharge of its state party reporting obligations under various treaties.[571] By the beginning of 2006, only the last recommendation had been partially acted upon.

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565 Human Rights Commission Act, 1998 (Act 27 of 1998).

566 See United States Department of State, 'Malawi', in *Country Reports on Human Rights Practices 2003*, 25 February 2004, available at http://www.state.gov/g/drl/rls/hrrpt/2003/27737.htm, accessed 4 January 2006; and Amnesty International, 'Malawi', in *Report 2003*, summary available at http://web.amnesty.org/report2003/mwi-summary-eng, accessed 4 January 2006.

567 See Centre for Human Rights and Rehabilitation, *Introduction to the Situation of Civil and Political Rights in Malawi 2003–2004*, Lilongwe, 2004, available at http://www.chrr.org.mw/human_rights/civil_political_rights.php, accessed 4 January 2006; and United States Department of State, 'Malawi', in *Country Reports on Human Rights Practices 2002*, 31 March 2003, available at http://www.state.gov/g/drl/rls/hrrpt/2002/18213.htm, accessed 4 January 2006.

568 *Malawi Human Rights Commission v Attorney General*, Miscellaneous Case 1119 of 2000.

569 Malawi Human Rights Commission, *Annual Report 2004*, Lilongwe, 2005, p.23, available at http://www.malawihumanrightscommission.org/docs/2004_MHRC_AnnualReport_.pdf, accessed 17 January 2006.

570 See http://www.malawihumanrightscommission.org/doclinks.asp?group=ANNUAL%20REPORTS, accessed 5 January 2006. An interesting contrasting example is the South African Human Rights Commission which posts more detailed information on specific investigations on its website, see the South African Human Rights Commission, *Complaint Information*, available at http://www.sahrc.org.za/sahrc_cms/publish/cat_index_29.shtml, accessed 5 January 2006.

571 See Malawi Human Rights Commission, *Annual Report 2000*, Lilongwe, 2001, pp.63-64, available at http://www.malawihumanrightscommission.org/docs/ANNUAL%20REPORT%202000%20-%20MHRC.pdf, accessed 20 January 2006.

Case study: Access to justice

One woman's search for justice

Chanju Mwale is a female captain in the Malawi Defence Force. On 31 December 2004 she was at a party at army headquarters when she was insulted by a male lieutenant after she had refused to dance with him. In response, she slapped him, and a short while later, he hit her in the face with a beer bottle, causing injuries that resulted in her hospitalisation for four days.

On 13 April 2005, a disciplinary hearing was held by a brigadier who reprimanded Captain Mwale and the male lieutenant, and ordered the latter to contribute MK10 000 towards the former's medical expenses. Following the disciplinary hearing, Captain Mwale requested the commander of the defence force on a number of occasions to review the disciplinary decision because she felt the punishment of the lieutenant had been lenient. However, the army took no further action on the matter.

On 20 December 2005, Captain Mwale reported the matter to the police, but the lieutenant who had allegedly assaulted her was not arrested until one month later, after Captain Mwale had made several representations to the deputy commissioner of police complaining about delays in the matter. On 10 February 2006, the prosecution of the lieutenant commenced in a magistrate's court in Lilongwe where he was charged with causing grievous bodily harm and use of insulting language and conducting himself in a manner likely to provoke a breach of peace or commission of a crime. After the accused had entered a plea of not guilty on 16 February 2006, the case was adjourned to 29 March 2006 for hearing.

On 24 February 2006, Captain Mwale learned that the director of public prosecutions had decided to discontinue the prosecution of the male lieutenant without giving any reasons for the discontinuance. Three days later, Captain Mwale wrote to the Malawi Human Rights Commission seeking its intervention in the matter to have the criminal prosecution re-instated on the grounds that the discontinuance was unjustified. On 22 May 2006, the Malawi Human Rights Commission obtained leave to proceed with judicial review of the decision of the director of public prosecution to discontinue the case, and the decision of the attorney-general who, according to the commission, directed the director of public prosecutions to enter the discontinuance.

Shortly after the discontinuance, the lieutenant accused of assaulting Captain Mwale resigned from the Defence Force, where he was at the time serving as a pilot for the president, and left the country to take up a job he had earlier secured in West Africa. In the meantime, more than one year since the assault, Captain Mwale awaits justice.

Source:

Telephone interview with Captain Chanju Mwale and Redson Kapindu, director of legal services, Malawi Human Rights Commission, 1 June 2006.

The powers of the Human Rights Commission following investigations are limited to making recommendations and do not extend to the performance of any judicial or legislative functions.[572] The lack of enforcement powers has been identified as one of the main challenges that

572 Constitution, 1994, Section 130.

limit its effectiveness in protecting human rights.[573] It is also not clear whether the courts would be willing to enforce the recommendations of the commission since they refused to do so in relation to the determinations of the ombudsman in the case of *Munthali v Malawi Institute of Education*.[574]

H. Traditional and other non-state justice systems

Most Malawians cannot access the formal state mechanisms for resolving civil disputes. Consequently, they use non-state institutions and processes in what is known as the 'informal' or 'primary' justice sector. A 'rapid assessment' by the British Department for International Development (DFID) MASSAJ Primary Justice Pilot Project confirmed that most people depend on non-state institutions, of which the most frequently used were found to be traditional family counsellors (*ankhoswe*), traditional leaders, religious leaders and community, non-governmental and faith-based organisations.[575] The most common types of disputes dealt with in these fora involved land, chieftaincy, marriage and domestic violence.[576]

Application of customary law outside the formal court system

Although the Constitution recognises customary law as part of the law of Malawi (see above, Chapter 1, section B), the customary law regime consists in general of rules of conduct and institutions for their enforcement which are structurally and operationally independent of the institutional framework established by the Constitution. Although they share certain basic characteristics, customary laws vary across population groups in the country. The last comprehensive survey of customary law applicable to Malawi was conducted in the 1970s.[577]

It is likely that that the vast majority of civil disputes in Malawi are processed by customary justice fora presided over by traditional leaders.[578] It has been estimated that there are at least 24 000 such fora, which operate in almost every village.[579] Most communities in Malawi, particularly those in rural areas, recognise various levels of traditional leadership, including village headmen and women, group village headmen and women and senior 'traditional authorities' (chosen according to customary rules, but recognised by the president under the 1967 Chiefs Act).[580] Traditional authorities, also known as chiefs, are not only physically and financially accessible, but are also experienced in the customary law of the people and readily available. They also

573 See Malawi Government, *National Action Plan for the Promotion and Protection of Human Rights in Malawi 2004–2011*, Lilongwe, 2003, p.114.

574 *Munthali v Malawi Institute of Education,* Miscellaneous Case 84 of 2003.

575 Department for International Development, *Briefing: Non-state Justice and Security Systems*, May 2004, available at http://www.oecd.org/dataoecd/6/57/35243076.pdf, accessed 10 May 2006, pp.9-13.

576 GTZ Forum for Dialogue and Peace, 'Primary Justice Pilot Project of Malawi: Rapid Assessment Report', Lilongwe, June 2005.

577 See JO Ibik, *Law of Marriage and Divorce*, London: Sweet and Maxwell, 1970; and *Law of Land, Succession, Movable Property, Agreements and Civil Wrongs: Malawi* (Restatement of African Law S.), School of Oriental and African Studies, London, 1972.

578 DFID, *Briefing: Non-state Justice and Security Systems*, p.10.

579 Schärf, Banda, Roentsch, Kaunda and Shapiro, *Access to justice for the poor of Malawi?* p.39; Wilfried Schärf, *Non-state justice systems in southern Africa: How should governments respond?,* undated, p.41, available at http://www.ids.ac.uk/ids/law/pdfs/Schärf.pdf, accessed 22 June 2006.

580 Chiefs Act, 1967 (Act 39 of 1967), Chapter 22:03.

command the respect of their communities by virtue of their customary authority.[581] The experience, availability and respectability of traditional authorities enable them to deliver justice not only by presiding over adjudicative court processes, but also through mediation and arbitration, even though they have no state-sanctioned powers to impose or enforce punishments.

Different customary systems across the country have various levels of non-state traditional courts. These courts apply the customary law prevalent in their area of jurisdiction. One key similarity across the customary laws of many areas is the dominance of men in the membership of the courts. On the other hand, customary systems have significant differences among their traditional courts. In the Northern Region and in small parts of the Southern Region, the authority and power of the courts is based on patrilineal succession. In the Central Region and most of the Southern Region, however, traditional power and the authority to interpret and apply customary laws is based on rules of matrilineal succession. This does not mean that judges are necessarily female, but that chiefs are succeeded to office by their sisters' children rather than their own. There has been no comprehensive survey of the customary laws of Malawi for at least 30 years. Therefore, it is impossible to catalogue the similarities and differences among the many traditional courts that apply customary laws with any greater detail.[582]

The only link that exists between non-state traditional courts and the formal judiciary is that the High Court can in theory review any decision made by any person or institution, including traditional authorities, to determine whether it respects and upholds the human rights guaranteed by the Constitution. The constitutional duty to respect and uphold human rights is imposed not only on the three branches of government, but also all its agencies and all persons.[583] By definition this includes the traditional authorities, which are recognised by the president under the Chiefs Act, as well as those who operate non-state 'courts' outside the ambit of the act.

Some communities in urban and peri-urban centres also have 'chiefs' who play an important role in resolving civil disputes. Although they are modelled on the traditional authorities recognised by the president under the Chiefs Act, such 'chiefs' do not derive their authority from customary law as such, but operate by the general consent of the community.[584] However, because they operate without specific legal authorisation, decisions of such 'chiefs' are open to challenge by the government, particularly where they run counter to its policies and plans. An example of such situations is when the 'chiefs' resolve disputes related to land by allocating land for occupation in areas that are subject to government planning laws.[585]

Non-state traditional courts have benefited from the growing institutional and public interest in informal justice systems. This interest has resulted in interventions which aim to strengthen the informal sector and its institutions, including traditional courts. An example of

581 DFID, *Briefing: Non-state Justice and Security Systems*, p.13.

582 See JO Ibik, *Law of Marriage and Divorce*, London: Sweet and Maxwell, 1970; and *Law of Land, Succession, Movable Property, Agreements and Civil Wrongs: Malawi* (Restatement of African Law S.), School of Oriental and African Studies, London, 1972.

583 Constitution, 1994, section 15(1).

584 Wilfred Schärf, *Non-state justice systems in southern Africa: How should governments respond?* p.41.

585 For example, see Zainah Liwanda, 'Chaponda says no chiefs in urban areas,' *Nation Online*, Blantyre, 15 August 2005, available at http://www.nationmalawi.com/articles.asp?articleID=12054, accessed 15 August 2005; and Integrated Regional Information Network, *Malawi: Government threatens to evict informal settlers*, 11 August 2005, available at http://www.irinnews.org/report.asp?ReportID=48549&SelectRegion=Southern_Africa, accessed 18 January 2006.

such an intervention is the Primary Justice Pilot Project implemented by the German government's development agency, Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ), through its Forum for Dialogue and Peace project, with funding from the British government's Department for International Development (DFID). The aim of the Primary Justice Pilot Project was to 'strengthen access to justice for poor people through the improved accessibility of the primary justice system in Malawi'.[586] The pilot project was implemented in 14 districts and engaged with local communities to facilitate the work of 'service providers' in the informal justice system. Non-state traditional courts constitute one of those service providers and benefited from the capacity -building activities under the project, which included training, providing record-keeping materials and sharing knowledge with other actors in the sector.

Respect for human rights and fair trial by traditional courts

Proceedings before traditional courts broadly respect international and constitutional standards of due process, including the standards applicable to traditional courts set out in the Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa adopted by the African Commission on Human and Peoples' Rights in 2003. These rights include the right to dignity, the right to have an adequate opportunity to prepare a case, the right to interpretation of proceedings into a language which one can understand, a right to appeal and an obligation on the courts to hold all their hearings in public.[587]

However, traditional courts in Malawi are often in breach of at least two standards of fair trial. First, these courts do not uphold equality of persons before the law, particularly between male and female litigants, and tend to reflect institutionalised socio-cultural bias against women.[588] To the extent that this reflects the practice, it is a serious breach of Guideline Q(b)(1) of the Guidelines on the Right to Fair Trial which provides that, in all proceedings before traditional courts, 'equality of persons without any distinction whatsoever as regards race, colour, sex, gender, religion, creed, language, political or other opinion, national or social origin, means, disability, birth, status or other circumstances.' In addition, most non-state traditional courts are presided over by traditional chiefs who have executive as well as judicial responsibilities. This is a breach of guideline Q(c)(1) which requires traditional courts to be independent of the executive branch.

In the period between 2000 and 2005, various actors in the justice sector undertook initiatives to promote respect for human rights by traditional courts. A typical activity is that conducted by the Society for the Advancement of Women (SAW) in April 2005. The activity consisted of a three-day workshop attended by 30 traditional leaders covering democracy, rule of law, the Malawi Constitution, justice systems, land law and the Wills and Inheritance Act.[589] The Law Commission has also proposed that human rights training should be provided to judicial

586 GTZ Forum for Dialogue and Peace, 'Primary Justice Pilot Project: Outline of Re-Designed Concept for the Pilot Phase-Managing Agency Report,' Lilongwe, 19 July 2005.

587 African Union, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, available at http://www.achpr.org/english/_doc_target/documentation.html?../declarations/Guidelines_Trial_en.html.

588 Women and Law in Southern Africa Research and Education Trust, *In Search of Justice*, 2000.

589 See Society for the Advancement of Women, *Newsletter*, Lilongwe, July to September 2005.

officers of the 'traditional or local courts' provided for in the Constitution when they become operational.[590] One challenge that such training has to confront is the traditional authorities' distrust of the concept of human rights. The DFID-funded Primary Justice Pilot Project rapid assessment, for example, indicated that although traditional leaders expressed the need to be trained in the Constitution, some were critical of human rights protection, which they blamed for diminishing the cultural power of elders over girl children.[591]

In most cases, decisions by traditional courts are not written down as a matter of law or practice. This limits the accessibility of the record of proceedings and hampers the development of customary law jurisprudence. A judge of the High Court has observed that: 'Being flexible, unwritten and undocumented, [living customary law] is vulnerable to distortion and manipulation especially in the context of unequal power relationships.'[592]

Other non-state mechanisms for resolving civil disputes

Since 1994, Malawi has also experienced a very rapid increase in the number of active non-traditional faith-based and other NGOs. Some of these organisations are also actively involved in civil disputes mainly at the community level. The situation in the pilot districts of the DFID Primary Justice Project is probably representative of the position in most parts of the country. In those districts—Chikwawa, Lilongwe, Rumphi and Zomba—NGOs such as the Civil Liberties Committee (CILIC), Malawi CARER and Women's Voice are making a significant contribution to the resolution of civil disputes. However, NGOs have a presence in only few places. Their dispute resolution services are, therefore, not accessible to all communities. In contrast, community- and faith-based based organisations are more widespread across the country. This makes them more accessible to the majority of people than NGOs.[593]

The future role of traditional courts

There have been some moderately effective efforts to integrate the traditional court system into the plans and policy-making processes of the various institutions in the sector. For example, the National Council on Safety and Justice, which aims to be the highest policy-making body for the justice sector, includes among its members representatives of traditional authorities and civil society as well as relevant cabinet ministers and respective principal secretaries, and representatives of other justice related institutions and of the DFID.[594] However, such efforts suffer from the lack of a legal framework within which to operate.

Non-state mechanisms for resolving civil disputes fill a major gap left by the formal justice

590 Malawi Law Commission, *Law Commission Report in the Workshop on the Review of the Traditional Courts Act (Chapter 3:03)*, Lilongwe, 2004.

591 GTZ Forum for Dialogue and Peace, 'Primary Justice Pilot Project of Malawi: Rapid Assessment Report,' Lilongwe, June 2005, p.18.

592 Justice Andrew Nyirenda, 'Towards a Primary Justice System: Laws to be Administered and Human Rights Implications' in *Law Commission Report in the Workshop on the Review of the Traditional Courts Act (Cap.3:03)*, Lilongwe, 2004, pp.42-46.

593 DFID, *Briefing: Non-state Justice and Security Systems.*

594 See DFID, *Malawi: Malawi Safety, Security and Access to Justice Programme: Output-to-Purpose Review*, Lilongwe, September–October 2003, p.9, available at http://www.dfid.gov.uk/aboutdfid/foi/disclosures/malawi-justice-opr.pdf, accessed 6 January 2006.

system. Given their importance, urgent attention should be paid to the appropriate role of 'traditional' and other non-state mechanisms of dispute resolution in Malawi. Most importantly, there should be a legal framework that secures their authority, as provided for in section 110(3) of the Constitution. The work of the Law Commission in this regard is important, and the remit of the special commission that is examining traditional courts should be expanded to cover other non-state mechanisms with a view to making recommendations for an appropriate legal framework for them beyond the Traditional Courts Act. For example, some degree of recognition and mechanism for accountability should also be provided for urban 'chiefs' not currently recognised in the Chiefs Act or the Local Government Act.

Second, the state should support non-state mechanisms by providing them with resources to enable them to operate more efficiently and effectively. Allocation of government and development partner resources within the sector should reflect to a greater extent the scale of the contribution to it by informal traditional courts. The challenge in implementing this recommendation will be to establish an effective system through which the various non-state institutions can account for the resources that they will receive from the state.

Third, the state should facilitate a process of ensuring that dispute settlement by non-state mechanisms is done consistently with the Constitution's basic guarantees of fair trial. In this connection, the state should, in collaboration with other parties interested in improving access to primary justice, such as civic education and human rights groups as well as development partners such as DFID, develop strategic and action plans for providing basic training in constitutional principles of fair trial to primary justice institutions including traditional leaders at all levels.

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Development partners

The justice sector in Malawi is heavily dependent on multilateral and bilateral donors. In this context, coordination of donor funds takes on added importance. Over the past years, donors have improved their coordination efforts, as has government. However, the impact of these efforts is limited by the absence of an effective, sectoral, strategic plan that would allow development assistance to be clearly linked to goals that cross-cut the sector. Although the creation of policy-making and coordinating bodies such as the National Council on Safety and Justice, and the Coordinating Group on Access to justice are commendable, the government needs to formally adopt and implement a sector-wide plan and agree on a sector-wide approach with donors.

A. Development assistance and strategy in the justice sector

Malawi's economy is heavily dependent on foreign aid which consists of as much as 15 per cent of GNP.[595] Approximately 80 per cent of the development budget and 40 per cent of the recurrent budget is donor funded.[596] The justice sector in Malawi is heavily dependent on the assistance of multilateral and bilateral donors. In the case of non-judicial, oversight institutions, such as the ombudsman and the Law Commission, aid agencies provide as much as 80 per cent of the funding for core activities. Most of the external aid provided to the justice sector between 2000

595 Government of Malawi and European Union, Cooperation between the European Union and the Republic of Malawi: Joint Annual Report 2004, 15 July 2005, p.29, available at http://www.delmwi.cec.eu.int/en_and_malawi/Final%20JAR%202004-CTM-%2015%20July%202005.pdf, accessed 3 February 2006.

596 United States for International Development, Bureau for Policy and Programme Coordination, *General Budget Support and Sector Programme Assistance: Malawi Country Case Study*, November 2004, available at http://www.sarpn.org.za/documents/d0001021/PNADA999_malawi.pdf, accessed 6 February 2006.

and 2005 was given by DFID,[597] USAID and the Norwegian Embassy in Malawi. Multilateral donors include the UNDP, the EU, the International Monetary Fund (IMF), and the African Development Fund (ADF).

External assistance to the justice sector has been directed both at the government and civil society. Annex 2 of this report summarises the major programmes of assistance implemented by the country's development partners.

Any links between development assistance and strategy in the justice sector are a function of the linkages between development assistance in general and the government's overall policy strategy. Since 2002, this broad policy strategy has been poverty reduction, as captured in the Poverty Reduction Strategy Paper.[598] The poverty reduction strategy has four strategic pillars, one of which is good governance.[599] In turn, good governance is conceptualised as consisting of three elements, one of which is security and justice whose specific objectives are the reduction of crime; the improvement of access to, and delivery of, efficient and effective justice; and ensuring respect for the rule of law.[600]

There have been some attempts to link development assistance to the justice sector's broader strategic goal of poverty reduction and its more specific good governance objectives. This has happened within a number of structural frameworks, the most institutionalised of which is the MASSAJ Programme. This programme has been the main vehicle for the delivery of British development assistance to the sector and is 'the biggest foreign-funded intervention in a justice sector in the SADC region.'[601] There have been at least two main contributions of the programme to the linking of development assistance to strategy in the justice sector. The first was the creation of sector-wide policy-making and policy-coordination structures in the form of the National Council on Safety and Justice and the Coordinating Group on Access to Justice. The second is the on-going process of developing and adopting a national policy framework to establish national cross-cutting policy objectives, priorities and targets based on the safety, security and access to justice elements of the Poverty Reduction Strategy Paper.

There are a number of other fora that have the potential to link development assistance and strategy in the justice sector because they bring together representatives of various stakeholders in the sector and provide them with the opportunity to take a holistic view of the sector and its development assistance. The most critical of such fora is probably the Donor Committee on Governance. Formerly known as the Donor Sub-Group on Governance, the committee is a sub-group of heads of mission of Malawi's development partners whose meetings do not include government representatives. The latter instead interact with donors in other fora relevant to the justice sector such as the Task Force on Parliament and Anti-Corruption Bureau Partners.[602]

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597 DFID is by far the largest bilateral donor to Malawi.

598 Malawi Government, *Poverty Reduction Strategy Paper*, Lilongwe, 2002, available at http://www.delmwi.cec.eu.int/en/Malawi_PRSP.pdf, accessed 9 January 2006.

599 Ibid., p.19.

600 Ibid., pp.74-77.

601 Department for International Development, *Malawi: Malawi Safety, Security and Access to Justice Programme: Output-to-Purpose Review,* Lilongwe, September–October 2003, p.7, available at http://www.dfid.gov.uk/aboutdfid/foi/disclosures/malawi-justice-opr.pdf, accessed 6 January 2006.

602 Telephone interview with Jackie Peace, governance advisor, Department for International Development, 14 February 2006.

Another structure that provides the opportunity for coordination of justice sector assistance is the project steering committee of the EU Rule of Law and Improvement of Justice Programme which brings together a number of justice sector institutions to plan jointly the application of EU assistance to the sector and to review the implementation of activities. In the first phase of this programme, members of the committee included the Ministry of Justice and Constitutional Affairs, the Malawi Prison Service, the Faculty of Law of the University of Malawi, the Law Commission and the judiciary. The meetings of the committee were facilitated by the programme's Project Management Unit.

In order for the various opportunities and potentials for linking development assistance to strategy in the justice sector to be fully utilised and realised, there has to be sufficient overall coordination of donors, on the one hand, and justice sector institutions, on the other. On the part of the government, the Debt and Aid Management Department of the Ministry of Finance is the focal point within the Ministry and government for coordination and administration of all aid that the government receives from both multilateral and bilateral donors.[603] However, it has been observed that, due to capacity constraints, the government struggles to manage and lead donor coordination groups in various sectors, including that of governance.[604] From the donor side, the World Bank has observed that overall donor coordination in Malawi, which is done through the Aid Coordination Group, has been improving.[605] This view is shared by some of the country's major donors such as DFID, which rates donor coordination in Malawi as 'good';[606] USAID, which has stated that coordination is 'excellent';[607] and the EU, whose view in 2003 was that '[o]verall, donor coordination is good: donors meet regularly in the context of an established framework.'

In addition to coordination of donors among themselves and with the government, there must be sufficient strategic coordination of the plans of individual institutions in the sector and more effective implementation of those plans. To improve sector-wide coordination, the government must expedite the formal adoption of the National Policy Framework (see Chapter 3, Management of the justice system), and its harmonisation with the National Action Plan for the Promotion and Protection of Human Rights. More importantly, however, the government must take measures to ensure that the sector-wide plan is effectively implemented. Such measures must include institution of adequate financial systems and capacity for budget execution; provision of adequate and regular funding for activities; orientation of relevant public officials and senior civil servants to accept the restriction of wide discretion-

603 See Malawi Government, *Ministry of Finance*, undated, available at http://www.finance.gov.mw/dad.htm, accessed 3 February 2006.

604 See African Development Bank/African Development Fund, *Malawi country strategy paper 2005–2009*, September 2005, p.16, available at http://www.afdb.org/pls/portal/docs/PAGE/ADB_ADMIN_PG/DOCUMENTS/OPERATIONSINFORMATION/MALAWI-%20COUNTRY%20STRATEGY%20PAPER-%202005-2009%20(24.11.2005).PDF, accessed 4 February 2006.

605 The World Bank, *Malawi – country brief*, September 2005, available at http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/MALAWIEXTN/0,,menuPK:355882~pagePK:141132~piPK:141107~theSitePK:355870,00.html, accessed 2 February 2006.

606 DFID, *Country Profiles: Africa – Malawi*, 2006, available at http://www.dfid.gov.uk/countries/africa/malawi.asp, accessed 10 May 2006.

607 USAID, *Budget – Malawi*, 2005, available at http://www.usaid.gov/policy/budget/cbj2005/afr/mw.html, accessed 1 May 2006.

ary powers that sector-wide planning necessitates; and building capacity for monitoring and evaluation.

The sector-wide plan developed by the government can then be used as the basis for agreement with development partners on a sector-wide approach (SWAp) to delivery of development assistance to the sector, along the lines of the one which currently operates in the health sector.[608] The recommendation for the establishment of a justice sector SWAp is not new and was first made by the 2003 Output-to-Purpose Review conducted by the MASSAJ programme.[609] However, the recommendation has not yet been implemented, probably because most of the prerequisite conditions for the successful operation of a SWAp in the justice sector have not been created. Among such conditions identified in the Output-to-Purpose Review are: the existence of a comprehensive sector policy and strategy, an annual sector expenditure programme and medium-term sectoral expenditure framework, donor coordination which is government-led, and an agreed framework among major donors for the provision of support.[610] At the time of writing, however, the National Policy Framework developed by the Coordinating Group on Access to Justice (CGAJ) in 2004 had not yet been formally approved by the Malawi National Council on Safety and Justice (NCSJ) or formally adopted by the government.[611] There was also no sector-wide expenditure framework or programme; and the government's capacity to manage and coordinate external aid in general was weak.[612]

The process of advocating the formal adoption and implementation of a sector-wide plan can be driven by the NCSJ, which currently serves as the policy-making body for the MASSAJ programme and which facilitated the development of the National Policy Framework.[613] However, the NCSJ needs to be re-structured if it is to perform this task efficiently and effectively. Its membership must be reduced from the present 30 and its leadership must be made less political by removing the vice-president of the Republic from its chairmanship.

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608 For comment on the prospects of SWAPs in the health and education sectors, see United States Agency for International Development, Bureau for Policy and Programme Coordination, *General budget support and sector programme assistance: Malawi country case study*, November 2004, pp.9-10, available at http://www.sarpn.org.za/documents/d0001021/PNADA999_malawi.pdf, accessed 6 February 2006. For discussion of an example of a justice sector SWAp, see Amanda Sserumaga, *Sector-wide approaches in the administration of justice and promoting the rule of law: the Ugandan experience*, paper presented at the Seminar on the Rule of Law, European Initiative for Democracy and Human Rights, Brussels, 3–4 July 2003, available at http://www.grc-excahnge.org/docs/SSAJ107.pdf, accessed 6 February 2006.

609 See Department for International Development, *Malawi, Malawi Safety, Security and Access to Justice Programme: Output-to-Purpose Review*, Lilongwe, September/October 2003, pp.17-18, available at http://www.dfid.gov.uk/aboutdfid/foi/disclosures/malawi-justice-opr.pdf, accessed 6 January 2006.

610 Ibid., p.17.

611 Interview with Dorothy Degrabrielle, justice advisor, Malawi Safety, Security and Access to Justice Programme, 11 May 2006.

612 *Cooperation between the European Union and the Republic of Malawi Joint Annual Report 2004*, July 2005, p.29, available at http://www.delmwi.cec.eu.int/en/eu_and_malawi/Final%20JAR%202004-CTM-%2015%20July%202005-.pdf, accessed 10 May 2006. Also see African Development Bank/African Development Fund, *Malawi country strategy paper 2005–2009*, September 2005, p.16, available at http://www.afdb.org/pls/portal/docs/PAGE/ADB_ADMIN_PG/DOCUMENTS/OPERATIONSINFORMATION/MALAWI-%20COUNTRY%20STRATEGY%20PAPER-%202005-2009%20(24.11.2005).PDF, accessed 4 February 2006.

613 The NCJS is currently chaired by the vice-president of the Republic, with membership comprising cabinet ministers for stakeholder ministries and respective principal secretaries, representatives of other justice-related institutions, representatives of civil society, traditional authorities and Department for International Development. See Department for International Development, *Malawi, Malawi Safety, Security and Access to Justice Programme: Output-to-Purpose Review*, Lilongwe, September/October 2003, p.9, available at http://www.dfid.gov.uk/aboutdfid/foi/disclosures/malawi-justice-opr.pdf, accessed 6 January 2006.

Most development partners provide their assistance to the justice sector on the basis of multi-year plans that they develop internally within the broader context of their overall development assistance plans. The following are the planning timeframes of current assistance: DFID (through the MASSAJ programme) 2001–2002 to 2011–2012; USAID 2006–2009; Norway and Sweden 2005–2010; and the United Nations (UN Development Assistance Framework (UNDAF) 2002–2006. Within these timeframes, the various development partners implement plans whose objectives are linked to the government's reform efforts. The DFID assistance plan is explicitly linked to the justice objectives of the government's Poverty Reduction Strategy Paper.[614] The link is reinforced in practice since the government's MASSAJ programme, which sets the agenda for reforms in the justice sector, is almost entirely driven by DFID funding and planning, to the extent that it is often thought of not as a government programme, but as part of DFID.[615]

Other development partners do not link their assistance to the government's reform efforts as explicitly as DFID, although such links are nevertheless evident in the coincidence of objectives between the assistance plans and the government's strategic plan. An example of this is the assistance plan of USAID whose objectives include increasing citizen access to justice, increasing advocacy in support of the rule of law and making selected accountability institutions more responsive with citizen participation.[616] This clearly links with the framework for reforms set down by government in the Poverty Reduction Strategy Paper whose objectives in the areas of security and justice are the reduction of crime; the improvement of access to, and delivery of, efficient and effective justice; and ensuring respect for the rule of law.[617] The same is true of the EU; its assistance to the sector has been aimed at promoting the rule of law and greater access to justice in Malawi by strengthening and modernising those legal institutions primarily responsible for the administration of justice, resolving disputes, protecting human rights and consolidating democracy.[618] Norway states the main goal of its development assistance as support of Malawi's efforts to reduce poverty, and includes a focus on reducing corruption.[619] This links to the government's efforts to fight corruption, something the government has identified as a key element of its economic management policy.[620]

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614 Department for International Development, *Malawi Country Assistance Plan 2003/04–2005/06*, undated, pp.14-15, available at http://www.dfid.gov.uk/Pubs/files/capmalawi.pdf, accessed 7 February 2006.

615 See Department for International Development, *Malawi: Malawi Safety, Security and Access to Justice Programme: Output-to-Purpose Review*, Lilongwe, September–October 2003, p.13, available at http://www.dfid.gov.uk/aboutdfid/foi/disclosures/malawi-justice-opr.pdf, accessed 6 January 2006.

616 USAID/Malawi, *Triennial Review Report, Country Strategic Plan FY 2001–2005*, Lilongwe, 31 October 2003, p.11, available at http://pdf.dec.org/pdf_docs/PDABZ140.pdf, accessed 7 February 2006.

617 Malawi Government, *Poverty Reduction Strategy Paper*, Lilongwe, 2002, pp.74-77, available at http://www.delmwi.cec.eu.int/en/Malawi_PRSP.pdf, accessed 9 January 2006.

618 See European Union, *Development Cooperation in Malawi*, undated, available at http://www.delmwi.cec.eu.int/en/eu_and_malawi/cooperation/cooperation2/economic_and_public_affairs.htm#ruleoflaw, accessed 7 February 2006.

619 Norway, *Cooperation Norway–Malawi*, 2 September 2004, available at http://www.norway.mw/Development/Cooperation.htm, accessed 7 February 2006.

620 Bingu wa Mutharika, *Delivering on Our Promises*, text of Budget Speech delivered at the opening of the 2005 Budget Session of the National Assembly, Lilongwe, 6 June 2005, available at http://www.sarpn.org.za/documents/d0001690/P2022-Malawi_Budget-speech_June2005.pdf, accessed 30 January 2006.

For its part, the UNDP also closely links its assistance in the areas of justice and rule of law to the government's own reform agenda within the framework of the current United Nations Development Assistance Framework (2002–2006).[621] With the main goal of contributing to 'improvement in democratic governance, reduction of poverty and prevention, control and mitigation of the HIV/AIDS epidemic, based on human rights approach to development,'[622] the framework includes plans to deliver assistance in areas in which government is making reform efforts, including civic education on governance and human rights, provision of legal representation of accused persons and vulnerable persons, police reform aimed at transforming the police force into a benevolent and non-partisan service, and protection from intimidation and victimisation of members of the civil society.[623]

The discussion in the preceding paragraphs suggests that there is a significant degree of linkage between assistance plans of the donors and government reform efforts, particularly in relation to the identification of objectives and activities. However, in the absence of a fully operational government sector-wide plan,[624] there is no timeframe that integrates all the government's reform efforts in the sector, and to which the timeframes of the various donor assistance plans can be linked. Instead, what exist are separate strategic plans of the various institutions in the sector. These are not necessarily harmonised with the timeframes of the various plans of the different development partners, which are themselves unsynchronised. This is one aspect of donor coordination which appears not to have improved, despite the establishment of a government department with a remit that expressly includes donor coordination and the development of structures for regular meetings among donors[625] and between donors and government.[626] This situation needs to be addressed. Links between development assistance and the government's reform efforts must be based on synchronised or harmonised planning cycles both among the institutions in the sector and among their donors, and between the sector institutions and the donors. The adoption of a sector-wide plan would facilitate the alignment of the various timeframes. Pending the adoption of a full sector-wide plan, all stakeholders in the sector should hold joint annual or biannual planning meetings aimed at, among other things, reviewing the timing of sector activities in relation to the planning timeframes of the various institutions in the sector and their development partners. Such planning meetings could be convened jointly by the Ministry of Justice and Constitutional Affairs and the Donor Committee on Governance.

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621 United Nations, *United Nations Development Assistance Framework Malawi 2002–2006*, Lilongwe, 2001, available at http://www.undg.org/documents/1657-Malawi_UNDAF__2000-2006__-_Malawi_2000-2006.pdf, accessed 7 February 2006.

622 Ibid., p.xi.

623 Ibid., pp.37-38.

624 Although MASSAJ, as a structure which brings together key actors in the justice sector, has the potential to assist government in the development of such a plan, in practice, the national policy framework whose formulation it facilitated has not yet been formally adopted by government and the various institutions in the sector continue to plan autonomously from each other.

625 ACP-EU, *Country report: Malawi – Food security and transport: the Priorities of Malawi-EU cooperation*, Courier, No. 2001, November–December 2003, p.57, available at http://europa.eu.int/comm/development/body/publications/courier/courier201/pdf/en_056_ni.pdf, accessed 10 May 2006.

626 Telephone interview with Jackie Peace, governance advisor, DFID, 14 February 2006.

B. Donor projects and human resources

Donors hire their staff both locally and externally. One factor that undermines the capacity of the public sector to implement programmes effectively is that donors sometimes 'poach' good local staff.[627] However, there is no evidence to suggest that this is a significant issue in the justice sector. Recruitment of staff locally does not appear to have significantly drained human resources from the government or other local justice sector institutions. This is mainly because the number of local professionals hired as full-time staff by donor projects in the justice sector has been very low. For example, in 2005, only one lawyer was engaged on secondment on a donor programme.[628] Of more significance is the hiring of local professionals as consultants on projects. There are no statistics to indicate the extent to which local human resources are 'poached' temporarily by donors to work as consultants on projects in the justice sector. Collecting and analysing such information would be a worthwhile undertaking. Among other things this would inform current policy debates about the merits and downsides of shifting from projects to direct budget support as a way of delivering donor aid.

To a certain extent, the system for hiring staff by donors is open. Applications are invited through the local media and on the Internet, even for very senior positions, such as the UNDP Malawi office's senior governance advisor[629] and the DFID MASSAJ programme manager.[630]

C. Development assistance and promotion of respect for human rights

Most of the development assistance to the justice sector is designed to address human rights concerns, either broadly or in relation to specific rights. Promotion of human rights broadly is evident in the design of the programme of the UNDP, which predicates all its development assistance on a human rights based approach.[631] Assistance programmes to the sector are also designed to promote particular rights such as access to justice. As indicated in the discussion of links between development assistance and government's reform efforts, assistance provided to the sector by DFID, USAID, the EU and UNDP is, in part, explicitly aimed at promoting access to justice. Another right that features in the design of assistance to the sector is that to equality before the law, which is an integral part of the principle of the rule of law, a principle that is promoted explicitly in programmes of the EU and USAID. Other specific rights targeted in assistance programmes include the right to personal security, which is at the core of the assistance by DFID to the MASSAJ Programme and is part of the UNDP programme in so far as it aims at

627 See Diana Cammack, *Poorly Performing Countries: Malawi 1980–2002*, Overseas Development Institute, London, March 2004, p.21, available at http://www.odi.org.uk/pppg/activities/concepts_analysis/poorperformers/BackgroundPaper3-Malawi.pdf, accessed 7 February 2006.

628 She was a senior magistrate who had been seconded to the MASSAJ programme as a justice advisor.

629 See United Development Programme, Malawi, 'Job Opportunities', undated, available at http://www.undp.org.mw/vacancies/senior_advisor.html, accessed 7 February 2006.

630 See Civil Service Recruitment Gateway, 'Programme manager,' 29 June 2004, available at http://www.careers.civil-service.gov.uk/index.asp?txtNavID=117&txtOverRideDocID=8739&635132=&vacancysearchpage=true, accessed 7 February 2006.

631 See United Nations, *United Nations Development Assistance Framework Malawi 2002–2006*, Lilongwe, 2001, p.xi, available at http://www.undg.org/documents/1657-Malawi_UNDAF__2000-2006__-_Malawi_2000-2006.pdf, accessed 7 February 2006.

protecting members of civil society from intimidation and victimisation.[632]

Some assistance to the justice sector has also contributed to the promotion of economic and social rights, albeit indirectly. For example, it is arguable that assistance that is designed to contribute to the reduction of corruption, such as that provided by Norway and the African Development Fund,[633] in the long run promotes the right to development because, if unchecked, corruption tends to reduce the resources available for the government to spend on poverty-reducing activities,[634] and reinforces unequal distribution of wealth at the expense of the poor, the weak and the vulnerable in society.[635]

The last time that development assistance in general was linked to any sort of human rights conditionality to any significant extent was in May 1992 when most of the Western governments that provided aid to Malawi suspended that aid in protest at the government's failure to democratise and uphold human rights.[636] The imposition of that conditionality was one of the most critical factors that compelled the government to institute the reforms that led to the adoption of a multiparty system of government and the Constitution of 1994 with its extensive guarantees of human rights.[637] Since then, conditions on development assistance have related to demands by donors for various structural adjustment policies and fiscal management measures. The most recent experience of this was in 2001. Every year from 1994 to 2001, government expenditure exceeded the budget passed by Parliament and agreed with the IMF, as part of the condition for its assistance. Such expenditure also breached the condition for aid from the United Kingdom, the EU, Norway and Sweden, all of whom consequently suspended their assistance (other than humanitarian assistance) which represented 23 per cent of all budgeted revenue for the 2001–2002 financial year.[638]

Ultimately, the loss of budget assistance drastically reduced the amount of government funding for anything other than non-discretionary items such as payment of interest, transfers to the Malawi Revenue Authority and Malawi Roads Authority, pensions and gratuities and salaries and wages.[639] This excluded most operations of institutions in the justice sector and resulted in reduced funding for the operations of institutions that are supposed to facilitate protection of human rights, including the Human Rights Commission, the Office of the Ombudsman, the

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632 United Nations, *United Nations Development Assistance Framework Malawi 2002–2006*, Lilongwe, 2001, pp.37-38, available at http://www.undg.org/documents/1657-Malawi_UNDAF__2000-2006__-_Malawi_2000-2006.pdf, accessed 7 February 2006.

633 African Development Fund, *Loans and Grants Approvals – The African Development Fund supports good governance in Malawi*, 8 December 2004, available at http://www.afdb.org/portal/page?_pageid=293,158700&_dad=portal&_schema=PORTAL&page_start=81&search_length=4&press_type=2, accessed 9 February 2006.

634 Government of Malawi, *Poverty Reduction Strategy Paper*, Lilongwe, 2002, p.75, available at http://www.delmwi.cec.eu.int/en/Malawi_PRSP.pdf, accessed on 9 January 2006.

635 Ibid., p.82.

636 Diana Cammack, *Poorly performing countries – Malawi, 1980–2002*, 2004, Overseas Development Institute, March 2004, pp.23 and 63, available at http://www.odi.org.uk/pppg/activities/concepts_analysis/poorperformers/BackgroundPaper3-Malawi.pdf, accessed 7 February 2006.

637 Wiseman Chirwa, Fidelis Edge Kanyongolo and Nandini Patel, *Democracy Report for Malawi*, undated, p.123, available at http://www.idea.int/publications/sod/upload/Malawi.pdf, accessed 7 February 2006.

638 Alan Whitworth, *Malawi's recent fiscal performance and prospects*, November 2005, p.2, available at http://www.sarpn.org.za/documents/d0001778/Fiscal_Paper_2005.pdf, accessed 7 February 2006.

639 Ibid., p.4.

Department of Legal Aid, the judiciary, the Malawi Police Service and the Malawi Prison Service. This had a negative impact on the protection of women, the poor, prisoners and other vulnerable groups who rely on the assistance of such institutions.

By 2005, the government had re-established its discipline sufficiently to convince the IMF and the other donors to resume their assistance.[640] This augurs well for improved funding for justice sector institutions and their consequent ability to offer better protection of the human rights of vulnerable groups. The suspension of aid obviously dislocated on-going programmes of various justice sector institutions at the expense of their beneficiaries. However, to the extent that it provided the incentive for government, including justice sector institutions, to exercise more fiscal discipline, its long-term impact was positive. After all, if justice sector institutions have such discipline, it will ensure that resources are directed at benefiting their intended beneficiaries and are not wasted.

D. Access to information about development assistance to the justice sector

There are no obviously deliberate attempts by donors to the justice sector to restrict access to information about their assistance by interested parties. Representatives of donor and recipient institutions are often willing to provide such information in interviews and in the form of reports and budgets. In relation to Malawi government institutions in the justice sector, some of that information is also available as part of the information on the national budget. Some of the information about development assistance to the justice sector is available online, a source that proved to be extremely helpful in providing information necessary for the completion of this part of the report. The information that is available online includes copies of some of the cooperation agreements signed between the Malawi government and development partners;[641] general descriptions of the programmes of support;[642] reports of reviews and evaluations;[643] and details of support to specific institutions in the sector in relation to the national budget.[644]

640 Ibid., p.8.

641 For example, see Norway, *Cooperation Norway-Malawi*, 2 September 2004, available at http://www.norway.mw/Development/Cooperation.htm, accessed 7 February 2006.

642 For example, see European Union, *Development Cooperation in Malawi*, undated, available at http://www.delmwi.cec.eu.int/en/eu_and_malawi/cooperation/cooperation2/economic_and_public_affairs.htm#ruleoflaw, accessed 7 February 2006; and DFID, *Malawi Country Assistance Plan 2003/04–2005/06*, undated, pp.14-15, available at http://www.dfid.gov.uk/Pubs/files/cap-malawi.pdf, accessed 7 February 2006.

643 For example, see DFID Malawi, *Malawi Safety, Security and Access to Justice Programme: Output-to-Purpose Review*, Lilongwe, September/October 2003, p.9, available at http://www.dfid.gov.uk/aboutdfid/foi/disclosures/malawi-justice-opr.pdf, accessed 6 January 2006, and Adam Stapleton and South Consulting, *The Malawi Human Rights Resource Centre (MHRRC) Evaluation Report – Final Evaluation Report: Strengthening of the Ombudsman Institution in Malawi*, Danish Centre for Human Rights, Copenhagen, 2000, available at http://www.humanrights.dk/ipload/application/f5b03a41/malawimanus.pdf, accessed 2 January 2006.

644 For example, see Malawi, *Malawi government budget: Project for economic governance*, undated, available at http://www.malawipublicfunding.org/budget/base.asp, accessed 26 January 2006.

Case study: Donor assistance to the justice sector

The Malawi Safety, Security and Access to Justice Programme

The Department for International Development (DFID) of the British Government has been supporting the development of the Malawi Police Service since 1995. However, in the late 1990s it was realised that police reform in isolation would not guarantee safety, security and access to justice for the poor and vulnerable people of Malawi. Consequently, the assistance programme was broadened into the Malawi Safety, Security and Access to Justice (MASSAJ) programme, which commenced in March 2001 as a ten-year sector reform programme funded solely by DFID, with £35 million approved for the first five years. Aimed at improving safety of the person, security of property and access to justice, the programme consists mainly of the following components: legal, policy and institutional development; primary justice fora; democratic policing; courts, magistracy and judiciary; and prisons and penal reform.

In its first five years, the programme has facilitated the establishment of sector-wide policy making and implementation structures in the form of the National Council on Safety and Justice and the Coordinating Group on Access to Justice. It has also facilitated the development of a National Policy Framework whose mission is the promotion of an efficient, effective, independent, impartial, accountable, coordinated, professional and neutral safety, security and justice sector.

In addition to delivering strategic benefits to the sector, the MASSAJ programme has also facilitated interventions in specific areas of the sector which have led to concrete benefits for various stakeholders. Examples of such interventions have been the funding of court hearings for homicide cases and development of a best practice manual for improving the efficiency of the handling of homicide cases; funding of the Law Commission review of the Police Act and child rights legislation covering juvenile justice and children in need of care and protection; facilitating police training methods that meet the requirements of human rights and the rule of law, including investigative interview techniques that avoid excessive use of force or torture in the gathering of evidence; funding the construction of model police stations and establishment of victim support services; funding the revival of prison farms; financing the establishment of a Crime and Justice Division of the National Statistical Office and research projects by it on crime victimisation, prisons and rehabilitation, and domestic violence.

SOURCES:

DFID – Malawi, *Malawi Safety, Security and Access to Justice Programme: Output-to-Purpose Review,* Lilongwe, September–October 2003.

Christopher Stone, Joel Miller, Monica Thornton and Jennifer Trone, *Supporting Security, Justice and Development: Lessons for a New Era*, Vera Institute of Justice, New York, 2005.

Although information on development assistance to the sector is reasonably available, a number of factors make it difficult to collect the information efficiently and comprehensively. The major problem is that the information is not pooled into one comprehensive source giving a definitive picture of the total amount of assistance provided to the sector as a whole, its distribution among the various institutions in the sector and the proportion of the total aid budget in relation to the

national budget. In the event, the picture has to be built by collecting information from disparate sources of varying currency and credibility. This lack of an integrated database with comprehensive information on all programmes of assistance to the justice sector reflects the limited coordination of donors and justice sector institutions suggested above. Addressing this problem does not have to wait for the development of the sector-wide approach that was recommended as a response to the limitations of coordination. As a start, the Donor Committee on Governance and the Debt and Aid Management Department of the Ministry of Finance can develop a system for pooling all relevant information into an integrated database which can then be disseminated to all stakeholders, including civil society organisations, and published more widely online.

Annex A: International agreements

International agreements relevant to justice and the rule of law which Malawi has ratified, acceded to and/or signed:

International instruments ratified and acceded to	
International agreement	**Date of ratification/accession**
OAU Convention on the Specific Aspects of the Refugee Problem in Africa	4 November 1987
African Charter on Human and Peoples' Rights	17 November 1989
African Charter on the Rights and Welfare of the Child	16 September 1999
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment	11 June 1996
Convention on the Elimination of All Forms of Discrimination Against Women	12 March 1987
Convention on the Rights of the Child	2 January 1991
International Covenant on Civil and Political Rights	22 December 1993
International Convention on the Elimination of All Forms of Racial Discrimination	11 June 1996
Rome Statute of the International Criminal Court	19 September 2002
United Nations Convention against Transnational Organised Crime	17 March 2005
SADC Protocol on Legal Affairs	24 September 2002
SADC Protocol on Immunities and Privileges	5 May 1993
SADC Protocol against Corruption	27 September 2002
SADC Protocol on Politics, Defence and Security Cooperation	24 September 2002
SADC Protocol on Wildlife Conservation and Law Enforcement	31 May 2001
SADC Protocol on Combating Illicit Drugs	10 February 1998

International agreements signed but not ratified or acceded to	
International agreement	**Date of signing**
United Nations Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women	7 September 2000
Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights	9 June 1998
SADC Protocol on Extradition	3 October 2002
SADC Protocol on Mutual Legal Assistance in Criminal Matters	3 October 2002

Annex B: Donor assistance

Indicative summary of donor assistance to the justice sector in Malawi:

Donor	Description of assistance	Indicative funding
	Bilateral donors	
DFID	DFID is Malawi's largest development partner, spending £65m for 2005/06[645] on cross-sector aid, including to the justice sector. It has provided most of the funding for facilitating, among other initiatives, the Malawi Safety, Security and Access to Justice (MASSAJ) Programme and the Police Reform Programme. The MASSAJ Programme has supported the reform and strengthening of individual institutions and co-ordination between these. It has assisted with development of the Malawi Judicial Development Plan 2003–2008, has provided traditional logistical resources (cars, computers, training) to institutions such as the police, judiciary and prison department and worked across the sector with processes to clear bottlenecks in the administration of justice and increase communication, coordination and cooperation. MASSAJ has worked with traditional authorities, strengthening access, fairness and compliance with human rights, as well as looking at linkages between formal and informal systems of justice.[646] It has implemented a series of Primary Justice Pilots that engage state, traditional and non-traditional institutions to deliver effective dispute resolution at village level and in poor urban settlements. Through the MASSAJ Programme, DFID has also provided substantial budgetary support to the Office of the Ombudsman and the Malawi Law Commission.	Malawi: Country Assistance Plan 2003/04–2005/06 states that total funds for the 2003–2006 period amount to just under US$27 million (£15.3 million.)[647]

645 Department for International Development, 'Country Profiles: Africa, DFID Malawi,' 24 October 2005, available at http://www.dfid.gov.uk/countries/africa/malawi.asp, accessed 7 February 2006.

646 Department for International Development, 'Malawi Country Assistance Plan 2003/04-2005/06,' undated, pp.14-15, available at http://www.dfid.gov.uk/Pubs/files/capmalawi.pdf, accessed 7 February 2006.

647 Ibid.

USAID	Since 1994, the justice sector has been supported by the USAID which, after the UK, is one of the largest cross-sector bilateral donors. As one of its strategic objectives, the USAID/Malawi Country Strategic Plan 2001–2005 set out to increase civic involvement in the rule of law by increasing awareness of legal and human rights responsibilities and improving access to justice.[648] Most notably, USAID was instrumental in the provision of computers for the High Court, facilitating study visits for judicial staff and funding of training activities.[649] The High Court has improved its registry system with USAID support and has produced a book, *Comparative Analysis of Human Rights Provision (Chapter IV) of the Malawi Constitution in an International Perspective*, which will assist judges, magistrates, lawyers and members of the NGO community.[650] USAID is also currently meeting all the stationery needs of the judiciary.[651] In 2005, through USAID support to a legal aid civil society organisation, in 11 of Malawi's 29 districts, 14 paralegals (four women) and 732 community-based volunteers (30 per cent women) consulted on and helped to resolve 2 469 cases outside of the formal court system, with particular emphasis on labour issues, inheritance, divorce and property settlements, and domestic violence.[652]	USAID support for access to justice projects totalled US$355 000 in 2004.[653]
The Norwegian Embassy in Malawi	Malawi became a priority country for Norwegian development cooperation in 1997. Norwegian development assistance in the area of good governance has been mainly directed through the UNDP[654] but the ombudsman has been provided with significant financial assistance by the Norwegian government which has also been the major contributor to the budget of the Malawi Human Rights Commission.	Not available

648 USAID/Malawi, Triennial Review Report, Country Strategic Plan FY 2001–2005, Lilongwe, 31 October 2003, p.i, available at http://pdf.dec.org/pdf_docs/PDABZ140.pdf, accessed 7 February 2006.

649 Interview with Glyn Chimbamba, Deputy Chief Courts Administrator, Blantyre, 30 September 2005.

650 USAID/Malawi, 'Annual Report FY 2002,' March 2002, p.7, available at http://www.dec.org/pdf_docs/PDABW145.pdf, accessed 7 February 2006.

651 Interview with Glyn Chimbamba, Deputy Chief Courts Administrator, Blantyre, 30 September 2005.

652 USAID/Malawi, 'Annual Report FY 2005,' 16 June 2005, p.5, available at http://pdf.dec.org/pdf_docs/PDACD869.pdf, accessed 8 February 2006.

653 USAID, 'Budget: Malawi,' 14 January 2005, available at http://www.usaid.gov/policy/budget/cbj2005/afr/pdf/mw_cbj_fy05.pdf, accessed 8 February 2006.

654 2 September 2004, available at http://www.norway.mw/Development/Cooperation.htm, accessed 7 February 2006.

Multilateral donors		
United Nations	United Nations assistance is currently organised within the United Nations Development Assistance Framework: Malawi 2002–2006. Within this framework, UN agencies, with a total indicative total budget of US$178.2 million, plan to deliver assistance in a number of areas including institutional capacities of key justice sector institutions, promotion and protection of human rights, HIV/AIDS and cross-cutting issues including population and gender.[655] The UNDP has been significantly active in this area and, in June 2002, signed an agreement with the Malawi government under which the former would provide assistance aimed at consolidating democratic governance.[656] The assistance under the agreement is delivered through the Democracy Consolidation Programme of the government's Inter-Ministerial Committee on Human Rights and Democracy (DCP). The DCP focuses on civic education on governance, legal reform and administration of justice, parliamentary and political institutional strengthening and capacity-building in programme management. Some of the activities that were directly relevant to the justice sector and the rule of law included conducting baseline surveys to determine levels of public knowledge of governance, human rights and the rule of law; human rights training for community based educators, Ministry of Education officials and others; training of paralegals and provision of pro bono legal advice to indigent clients.	In 2004, UNDP funding for the DCP totalled the equivalent of US$1 104 798

655 United Nations, *United Nations Development Assistance Framework Malawi 2002-2006*, Lilongwe, 2001, p.3, available at http://www.undg.org/documents/1657-Malawi_UNDAF__2000-2006__-_Malawi_2000-2006.pdf, accessed 7 February 2006.

656 Inter-ministerial Committee on Human Rights and Democracy, *2004 Annual Progress Report of the Democracy Consolidation Programme Phase*, Lilongwe, 2004.

European Union	The EU Promotion of the Rule of Law and Improvement of Justice Programme ('the Rule of Law Programme') was established under the 7th and 8th European Development Fund (EDF) National Indicative Programmes. With funding of US$ 10.3 million (€8.5 million), the Rule of Law Programme became operational in 1999 and has since financed some activities of the judiciary, the Ministry of Justice and Constitutional Affairs, the prison service, the Law Commission, the Law Faculty of the University of Malawi, the National Compensation Tribunal, the National Archives and the Anti-Corruption Bureau.[657] The programme was initially intended to run only until 2003, but was extended upon the request of the Malawi government.	In anticipation that a new Poverty Reduction Growth Facility (PRGF) will be approved in 2005, the 9th EDF Mid-Term Review (MTR) programmed US$9.7 million (€8 million) for the new National Initiative for Civic Education (NICE) and US$ 24.2 million (€20 million) for the Rule of Law programme in 2005.[658]
IMF	In 2003 the Malawi Judiciary launched its five-year Strategic Plan and Development programme which received IMF support towards the fulfilment of goals set out in the Malawi Poverty Reduction Strategy (MPRS). Court procedures were streamlined and simplified. An alternative dispute resolution mechanism in the form of mediation was introduced in the court process. 60 magistrates and 16 judges were trained in mediation; mediators were appointed and gazetted from among doctors, insurers and engineers.[659] One of the core objectives of the MPRS is to develop capacity of all relevant human rights institutions and raise awareness of constitutional rights and their obligations to all the citizens. In 2004, among other achievements, 2,000 civil leaders were trained on cultural practices, 11 workshops were conducted on women and children's rights and 2,000 human rights newsletters, brochures and various human rights materials were produced and distributed.[660]	In 2005, the IMF approved a three-year arrangement for Malawi under the Poverty Reduction and Growth Facility of about US$55.9 million) to support the government's programme of economic reform and poverty reduction.[661]

657 See EU-Malawi, *European Union Project Management Unit*, 2001, available at http://www.sdnp.org.mw/ruleoflaw/eu/overview.html, accessed 15 February 2006.

658 Government of Malawi/European Union, *Co-operation between the European Union and the Republic of Malawi Joint Annual Report 2004 – annual report on the implementation of the ACP-EU Conventions and other co-operation activities*, 15 July 2005, available at http://www.delmwi.cec.eu.int/en/eu_and_malawi/Final%20JAR%202004-CTM-%2015%20July%202005-.pdf, accessed 7 February 2006.

659 Malawi Government, Ministry of Economic Planning and Development, *Malawi Poverty Reduction Strategy, 2003/2004 Annual Progress Report*, May 2005, p.72, available at http://www.imf.org/external/pubs/ft/scr/2005/cr05209.pdf, accessed 7 February 2006.

660 Ibid.

661 International Monetary Fund, 'IMF Executive Board approves US$55.9 million three-year arrangement for Malawi under the PRGF and additional interim assistance under the enhanced HIPC initiative,' *Press Release*, 5 August 2005, available at http://www.imf.org/external/pubs/cat/longres.cfm?sk=18481.0, accessed 7 February 2006.

African Development Fund	In 2004 the ADF approved a loan to the Republic of Malawi. The loan is intended to support improvements in the current framework governing the promotion of the rule of law, and access to justice through (i) ensuring respect for the rule of law by strengthening oversight bodies (ii) strengthening the law reform process (iii) improving access to justice for the poor and (iv) improving the detection and prosecution of corruption and fraud cases.[662]	The ADF loan amounts to US$18 million.

662 African Development Fund, *Loans and Grants Approvals – The African Development Fund supports good governance in Malawi*, 8 December 2004, available at http://www.afdb.org/portal/page?_pageid=293,158700&_dad=portal&_schema=PORTAL&page_start=81&search_length=4&press_type=2, accessed 9 February 2006.

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United Nations, *United Nations Development Assistance Framework Malawi 2002–2006*, Lilongwe, 2001 (http://www.undg.org/documents/1657-Malawi_UNDAF__2000-2006__-_Malawi_2000-2006.pdf)

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Annex D: List of persons interviewed

Aiman Mussa, programme manager, Democracy Consolidation Programme, Inter-Ministerial Committee on Human Rights and Democracy

Alick Msowoya, president, Malawi Law Society

Barzirial Chapuwala, superintendent in charge of the Research and Planning Unit, Malawi Prison Services

Catherine Munthali, executive director, Society for the Advancement of Women

Chikosa Banda, lecturer in Law, University of Malawi and lawyer in private practice

Chikosa Silungwe, assistant chief law reform officer, Malawi Law Commission

Chrispine Sibande, lawyer in private practice and part-time legal advisor to the Society for the Advancement of Women

Dorothy DeGabrielle, justice advisor, Malawi Safety, Security and Access to Justice Programme

Edward Twea, judge of the High Court (formerly Registrar of the High Court and Supreme Court of Appeal)

Emma Kaliya, Chairperson, NGO Gender Network

Enock Chibwana, ombudsman

Ernest Makawa, treaties officer, Ministry of Foreign Affairs

Frank Kapanda, judge of the High Court of Malawi

Gift Nankhuni, lawyer in private practice

Gilbert Khonyongwa, senior legal aid advocate, Ministry of Justice and Constitutional Affairs

Glyn Chimbamba, deputy chief courts administrator

Jackie Peace, governance advisor, Department for International Development

Jane Ansah, chairperson, National Compensation Tribunal

Kalekeni Kaphale, lawyer in private practice and assistant lecturer in Evidence, Advocacy and Ethics, University of Malawi

John Barker, legal advisor, EU Rule of Law and Improvement of Justice Programme

Lorex Kapanga, chief human resource manager, Judiciary

Lot Dzonzi, commissioner and head of the Research and Planning Branch, Malawi Police Service

Lynda Kananza, head of the Department of Foundational Law, University of Malawi

Mandala Mambulasa, executive director, Malawi Law Society

Mzondi Mvula, senior resident magistrate

Ngeyi Kanyongolo, lawyer in private practice and lecturer in Law, University of Malawi

Pasipau Chirwa, lawyer in private practice and assistant lecturer in Law, University of Malawi

Phoebe Chikungwa, lawyer for Limbe Leaf Tobacco Company

Ralph Kasambara, attorney-general of the Republic of Malawi

Reyneck Matemba, chief legal aid advocate, Ministry of Justice and Constitutional Affairs

Rizine Mzikamanda, judge of the High Court and chairman of the Judicial Training Committee

Seodi White, executive director of the Women and Law in Southern Africa Research Trust (Malawi Chapter)

Stella Kalengamaliro, primary justice project officer, Deutsche Gesselschaft für Technische Zusammenarbeit (GTZ)

Steve Kafumba, controller of legal services, Office of the Ombudsman

Sylvester Kalembera, registrar of the High Court and Supreme Court of Appeal

Thoko Ngwira, assistant lecturer in Law and lawyer in private practice

Tinyade Kachika, programme officer, Women and Law in Southern Africa Research and Education Trust

Tumalisye Ndovi, commissioner and head of prosecutions and legal services, Malawi Police Service

Vera Chirwa, applicant at African Commission of Human and Peoples' Rights (later appointed a member of the commission)

Vikochi Ndovi, senior resident magistrate