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DEMOCRACY REPORT

FOR

MALAWI

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INTRODUCTION

Before colonization, the territory which is now Malawi was occupied by a wide range of social groups, each with its own arrangements for determining rights, regulating the accountability of those in power and a measure of popular participation. Yet these pre-colonial systems overlooked such social anomalies as prejudice against sections of the community such as women. Nor was there a compelling reason for equality before the law, judicial independence, secure human rights, regular elections, encouraging popular participation in governance or otherwise facilitating civil society. Hence, democratic elements were undoubtedly present in precolonial Malawian society but were outweighed by more undemocratic features.

Colonial rule brought no fundamental improvement in the state of democracy, introducing undemocratic features of its own. The colonial constitutional arrangement was predicated on racial discrimination. Black 'natives' did not enjoy equality before the law or protection of their human rights. Despite being the overwhelming majority, they could not participate in choosing the government, and their few civil society organisations had limited influence on governance. Government was accountable to the British Colonial Office and not to the natives it governed.

The elections of 1961 marked a watershed in Malawi or Nyasaland as it was known. The franchise was based on equality: all people voted, including the black majority. Other elements of democracy such as the guarantee of human rights and civil society remained undeveloped till Independence in 1964 and the adoption of the Independence Constitution. The new Constitution built on the achievements of 1961 to ensure a range of human rights, judicial independence and regular elections, and severed the symbolic colonial link of retaining the British monarch as head of state.

These achievements were reversed in two years when Malawi became a republic. The 1966 Republican Constitution did not guarantee human rights, institutionalising instead one of Southern Africa's most undemocratic regimes under a Life Presidency. Sweeping powers enabled the appointment of an unlimited number of Members of Parliament, and establishment of a one-party state and a traditional court system with no independence. In practice, human rights were violated routinely, minorities had little legal protection, civil society and popular participation in the political process were virtually non-existent and state power was exercised by a largely unaccountable government. This system could not sustain itself indefinitely. By the early 1990s, the democratisation process gained a new lease of life.

Malawian 'transition' as it has come to be known is a remarkable story of people making politics. Protests drew in students and workers, enabling the Opposition to seize the moment. Multiparty elections, a balance between legislature and executive, and judicial independence have been adopted as norms. The contribution of the urban elite stands out though some sectional disputes remained. The obverse of this heightened participation was a seeming rural indifference: older people recalled only that President Banda had led them to Independence, not his autocracy. This was reflected in under-registration of voters (3.8 million in 1994 to 4.7 million in the 1993 referendum), despite a lowering of the voting age. The popular demand for change was also regionally uneven,

a problem that bedevils politics to this day. But the 1999 election saw record registration and ballots cast of 5.1 and 4.8 million respectively.

This sea change in visible politics was mirrored by a review of its constitutional form. In February 1994, a draft constitution was approved and adopted in May 1995. The unitary constitution is based on English common law. The President is head of state, and directly elected for a five-year term concurrently with the 193 members of the National Assembly. The President heads a cabinet, not all composed of elected legislators.

The electoral process seems to be working though there are lingering questions such as constituency demarcation and vote-seat conversion, whose importance reflects other weakness, strengthening the impression that democracy has yet to acquire depth. Local government elections were eventually held on November 21, 2000, six years behind. This delay has caused political and institutional concern, including over the role of the Senate whose three-year term is concurrent and which is required to include some locally elected officials. There is a plethora of political parties, whose total claim to popular support is twice the population of Malawi and four times the electorate. Perhaps eight parties are significant entities and command a wide following.

The process of democratisation appears to be as much about civil and political participation as about social and economic welfare and institutional maturation. On all these fronts there has been discernible movement. The 1990s witnessed a remarkable surge in civil society in unmistakable stages of development, but which in the end failed to act in concert with the state to pursue a socio-economic programme.

The population labours heroically to make a living by scarce means; adult literacy is 57 % (42% for women), infant mortality is high, and nutritional indicators are subject to the harvest and vagaries of household income. Malawi is among the poorest and most foreign-indebted countries in the world, nine-tenths of all people making a living from low-productivity agriculture, yet has borne a protracted refugee burden from Mozambique. Less than half of GDP comes from agriculture, though the high-value segment of the sector provides 90% of exports. Industry accounts for 12% of GDP; a third is agro-based for export. In the decades since Independence, Malawi has partaken of the continent's sharp fluctuations in growth. In the manner of other subSaharan countries, it has had to reform its economy without much improvement of its meagre productive base. Acute inflation and stagnant peasant agriculture characterize the economy. Creating jobs, guaranteeing food, strengthening infrastructure for production, correcting maldistribution, and reining in prices are priority socio-economic tasks in this young democracy.

0.1 Preliminary Data (time-line): historical summary of main staging posts and setbacks to democratisation, with dates of events

(Adopted from the APSO Country Briefing Manual, with modifications and additions)

Early Years	Bantu groups move into the area forcing others out
1600s & 1700s	Africans' initial contacts with Portuguese travellers
1859	David Livingstone, Scottish missionary and explorer, visits the Lake Nyasa (Malawi) region, notes the misery caused by the Arab slave traders.
1862	Universities Mission to Central Africa (Anglican) attempts to establish a mission
1875	Free Church of Scotland Livingstonia Mission arrives
1880s/1890s	Colonial settler plantation economy develops in the Shire Highlands, southern part of the country
1891	British Central Africa Protectorate proclaimed
	Elliot Kamwana Chirwa, a Watch Tower preacher leads the first millennial (religious) protest against colonial rule
1912	The first Native Welfare Association is formed, engages the colonial government on matters of African welfare
1915	John Chilembwe uprising
1944	The Nyasaland African Congress, the first political party, is formed
1947/1949	Trade Unions are registered, marking emergence of organized labour movement
1953	Nyasaland becomes part of the Central Africa Federation of Rhodesia and Nyasaland. (Northern Rhodesia is not Zambia; Southern Rhodesia is not Zimbabwe). - Strike by plantation workers sparks off rural protest against colonial rule and the settler plantation economy

1958	Dr Hastings Kamuzu Banda returns to Nyasaland to lead the Congress Party.
1959	State of Emergency declared. Dr. Banda and other political leaders are detained. - Orton Chirwa finds and leads the Malawi Congress Party, which later becomes the ruling party.
1963	Self government achieved
6 July 1964	Independence Day, Dr Banda is the Prime Minister
1966	Malawi is declared a Republic within the Commonwealth. Dr Banda is the first President
1971	Dr Banda is made life President of the Republic of Malawi
1992	Catholic Bishops issue a pastoral letter critical of government Chakufwa Chihana, a trade unionist, challenges Dr Banda, calls for a referendum and is arrested for two years. University students and urban unorganized workers stage demonstrations and strikes, sparking off popular protest against the regime The Alliance for Democracy (AFORD) and the United Democratic Front (UDF) emerge as pressure groups, later register as opposition parties
14 May 1993 Government	Referendum results in electorate choosing a multiparty system of
11 June 1994	Multiparty elections. United Democratic Front win with President Bakili Muluzi
25 November 1997	Dr H. Banda dies in South Africa
June 15 1999	The second multi-party Elections are held

0.2 Basic political facts, e.g. population, ethnic/linguistic/religious composition and division, constitutional form, unitary or federal system, electoral system, number of parties, electoral cycle, current government, etc. (See Economic Intelligence Unit, 1999)

Official name	Republic of Malawi	
Form of state	Unitary republic	
Legal system	Based on English common law and the new constitution adopted in May 1995	
National legislature	National Assembly of 193 seats, elected by direct universal suffrage for a five-year term	
National elections	June 15 th 1999 (presidential and legislative); next elections due by June 2004 (presidential and legislative); local government elections held on 21 November 2000	
Head of state	President, elected by direct universal suffrage for a term of five years; Bakili Muluzi was re-elected to a second term in June 1999 (legal challenges pending)	
National government	Blotted Cabinet of 36 members, chaired by the president, a new cabinet was named on June 27 th 1999; reshuffled in November 2000	
Key Political parties	United Democratic Front (UDF), the largest single party in the National Assembly; Malawi Congress Party (MCP), the main opposition party; Alliance for Democracy (Aford), Malawi's third party. Smaller parties not represented in the National Assembly include: the Malawi Democratic Party (MDP); Malawi National Democratic Party (MNDP); National Unity Party (NUP); National Patriotic Front (NPF); United Front for Multiparty Democracy (UFMD)	
Key ministries	President & minister of defence Vice-president Education, sports & culture Finance Foreign affairs Health and population Home affairs & internal security Information Justice and attorney-general Labour and vocational training Land, housing and physical planning Natural resources and environment Presidential affairs Tourism and wildlife Transport and public works Water development Women, youth and community services Poverty Alleviation	Bakili Muluzi Justin Malewezi

0.3 Economy and people, summary of relevant socio-economic indicators

(Latest available figures from Economic Intelligence Unit, 1999)

Economic indicators	1994	1995	1996	1997	1998
GDP at market prices (MKm)	10,251	22,435	34,853	41,703	52,405
Real GDP growth (%)	-12.9	13.5	14.5	5.2	3.3
Consumer price inflation (av;%%)	34.7	83.4	37.6	9.2	29.7
Population ^a (m)	9.46	9.79	10.14	10.44	10.81
Exports fob (\$m)	363	424	518	546	455 ^b
Imports fob(\$m)	639	631 ^c	618 ^c	597 ^c	537 ^b
Current-account balance (\$m)	-450	-410 ^c	-151 ^c	-65c	-307 ^b
Reserves excl gold (\$m)	43	110	226	162	270
Total external debt (\$m)	2,025	2,242	2,312	2,206	2,222 ^b
External debt-service ratio, paid (%)	20.6	26.2	16.2	12.4	24.5 ^b
Tobacco production ('000 tonnes)	97	130	141	158	134
Exchange rate (av;Mk:\$)	8.736	15.284	15.309	16.444	31.073

September 10th 1999 MK43.58:\$1

Origins of gross domestic product 1999c % of total Components of gross domestic product 1996 % of total

Agriculture	37.4	Government consumption	18.9
Small-scale	31.1	Private consumption	61.8
Transport & distribution	28.6	Gross fixed capital formation	11.5
Manufacturing	12.7	Change in stocks	2.3
Government	9.5	Net exports of goods and services	5.5
Utilities & construction	3.1	GDP at market prices	100.0
GDP at factor cost (incl others)	100.0		

Principal exports fob 1998^b	\$m	Principal imports cif 1996^c	\$m
Tobacco	178	Industrial	151
Tea	49	Petroleum	60
Sugar	24	Transport equipment	43
Coffee	12	Foodstuffs	40
Cotton	5		

Main destinations of exports 1997^d	% of total	Main origins of imports 1997^d	% of total
South Africa	12.8	South Africa	34.1
US	11.9	Zimbabwe	17.0
Germany	10.2	Zambia	7.5
Netherlands	9.2	UK	4.1

^a UN estimates; excludes Mozambique refugees; preliminary results from the 1998 census point to a lower population of 9.8m in 1998, but major revisions are expected. ^b EIU estimates. ^c Official estimates. Based on partners' trade returns, subject to a wide margin of error.

1.0 CITIZENSHIP, LAW AND RIGHTS

Is there public agreement on a common citizenship without discrimination?

Summary: In general, citizenship and nationhood have not been contentious issues, although in relation to citizenship, the Constitution's guarantee of equal protection of "all peoples" is undermined by legislation whose effect is to discriminate against people on the basis of their sex, and that which can be abused easily to deny or revoke the citizenship of members of minority groups. The population of Malawi is quite diverse in composition. Yet, the effectiveness of the few constitutional or political mechanisms for diffusing any tension which may arise between the different population groups is largely untested. The accretion of cultural differences before and since colonization seems to call for public policy though at present there is little cultural friction. Border disputes do not seem to be mixed up with cultural questions, though in the past Malawi caused some frustration by periodically hardening its Mozambican border, keeping aid from refugee camps. Some constitutional amendments, including those which affect the substance of the guarantees of human rights and those related to citizenship, require a referendum. All other amendments require a two-thirds vote of the National Assembly.

1.1 Nationhood and citizenship

1.1 How inclusive is the political nation and state citizenship of all who live within the territory?

The Constitution guarantees equal protection to "all the peoples of Malawi". In terms of the technical content of the concepts of citizenship and nationhood, the Constitution makes provision for the means of acquisition of citizenship, namely, "birth, descent, marriage, registration, naturalization or any other means prescribed by an Act of Parliament"; the primacy of Parliament in endowing or revoking such citizenship and the protection of citizenship against arbitrary denial or deprivation.

The 'protection' aspect is the start of social contract. This is extended by the content of 'citizenship', at once a right and a privilege, guaranteeing constitutional protection. This is then followed by the safeguard against 'arbitrary' denial (presumably to foreigners) and deprivation (to citizens). This full complement of citizenship attributes and safeguards is available to "all the peoples of Malawi", (emphasis added), presumably an assertion of substantive equality among diverse tribes, races, and ethnically different people.

Practically and politically, nationhood and citizenship do not seem to have been contentious issues except with respect to the position of Asians who have, on some

occasions, have experienced "restricted citizenship" (Boyle and Sheen: 36). In 1978, for example, the Business Licensing Act was amended by introducing provisions which prohibited all Asians, including those with Malawian citizenship, from carrying out trading activities in places other than a few urban centres designated as "business districts" in terms of the Business Licensing (Declaration of Business Districts) Order (Government Notice No.52 of 20 May 1978). The justification for this discriminatory law offered by Parliament was that black Malawians would no longer have to face competition from Asian traders in areas outside the so-called business districts (*Hansard Debates of Parliament*, 27 March 1978, pp.1000ff).

The citizenship status of Asians was also subject of debate at the 1995 National Constitutional Conference. It was argued by some delegates to the conference that Asians in Malawi should not expect to have certain political rights because most of them were unwilling to commit themselves to the country enough to adopt Malawian citizenship (Malawi Government, 1995). This argument is valid only up to a point. Asians, like all other people in Malawi are entitled to the human rights guaranteed by the Constitution, including the guarantee of rights which facilitate political participation, regardless of what the attitude of Asians towards Malawi is or what other people in Malawi think of Asians.

Section 25(2)(b) of the Malawi Citizenship Act provides that any naturalised citizen may be deprived of his or her citizenship if the Minister responsible for citizenship matters is satisfied that such citizen has shown, by act or speech, that he or she is "disloyal or disaffected towards the Government of Malawi". The subjective nature of the Minister's discretionary power creates room for the victimisation of members of particular individuals or groups through spurious accusations of disloyalty and disaffection. Equally, Parliament could abuse the power that it is granted by the Constitution to confer or withdraw citizenship in order to clamp down on particular individuals or groups, particularly those whose interests are not directly represented in Parliament.

Another problematic aspect of the Malawi Citizenship Act is its discrimination against people on the basis of sex. The Act requires every female Malawian citizen who marries a non-Malawian citizen to formally state her intention to either retain her Malawian citizenship and renounce any foreign citizenship acquired by virtue of her marriage or lose her Malawian citizenship. There is no equivalent requirement in respect of male Malawian citizens. The Malawi Citizenship Act is also discriminatory in that it provides that any woman who marries a Malawian man who satisfies certain conditions may be registered as a Malawian citizen while it makes no equivalent provision to apply to men who marry Malawian women. The discriminatory provisions are arguably inconsistent with the Constitution's guarantee of the right to equality and their validity can be challenged on that basis. In Botswana, a statutory provision with similar effect was declared invalid by the High Court in the case of *Dow v Attorney General* (1992) which involved a woman with Botswana citizenship married to a citizen of the United States of America.

It is not easy to amend the constitutional provisions relating to citizenship and nationhood because they cannot be amended except through a national referendum, or, if the amendment does not affect the substance of the Constitution, a two thirds vote of Members of Parliament. On the other hand, the current balance of power in Parliament is such that it would not be too difficult for the United Democratic Front, for example, to secure a two thirds vote on any proposal, including that to reduce or expand citizenship rights. Given that the current number of Parliamentary seats is 193, 129 votes in favour of any proposal is required to meet the two thirds threshold. The current distribution of National Assembly seats among political parties is as follows: the United Democratic Front, 99 seats, the Malawi Congress Party, 64 seats, the Alliance for Democracy, 30 seats. The Malawi Congress Party is however at present effectively split into two factions, one of which has largely been supportive of government policies. This faction which includes over 30 Members of Parliament could plausibly give sufficient support to the United Democratic Front Members of Parliament if they proposed to amend any provision of the Constitution requiring a two thirds vote.

Although the constitutional basis of citizenship has been said to be shaky because the Constitution was adopted hurriedly and without adequate debate, the Constitution has, by and large, stabilised over the first six years of its life. It has withstood the pressures of party politics and has been accepted as the supreme arbiter even in the case of the most serious political and economic crises as will be demonstrated in the section of this report that discusses the rule of law. It seems unlikely that provisions of the Constitution such as the one on citizenship can be arbitrarily amended to violate human rights.

1.2 How far are cultural differences acknowledged, and how well are minorities protected?

Section 12(iv) of the Constitution provides that one of its fundamental principles is that the State and all persons must "afford the fullest protection to the rights and views of all individuals, groups and minorities whether or not they are entitled to vote" (emphasis added). Cultural minorities are, therefore, assured specific protection by the Constitution. Moreover, section 26 of the Constitution guarantees every person "the right to use the language and to participate in the cultural life of his or her choice". This renders the question of culture a matter of individual choice. Yet, politicians have taken a macro view. For example, President Banda is widely identified with the elevation of the Chewa and their language, Chichewa, to majoritarian national status (Kishindo, 1998: 256-260, Chirwa, 1994: 59-62, 61.). Forster (1994) notes also President Banda's rhetorical invoking of Malawian distinctiveness within his homily on Africa's cultural riches. More

recently, the voting pattern in the 1995 and 1999 elections have been analysed for their regional/tribal/ethnic significance (Kaspin, 1995, Osei-Hwedie, 1998).

Chichewa is the main national language, but there are three main ethnic/cultural/linguistic groups and numerous subgroups. There are significant minorities: altogether, the population is made up of the following major indigenous ethnic groups: Chewa, Nyanja, Tumbuka, Yao, Lomwe, Sena, Tonga, Ngoni and Ngonde. There are also significant numbers of people from other parts of Africa, Asia and Europe. No chapter of the Constitution makes any mention of any requirement for ethnic/tribal representation in the composition of the National Assembly. The "interest groups" provided for in the Senate pertain only to occupational and disadvantaged groups, for example, trade unions, farmers, business (wo)men, the disabled, and women. The provision which requires that there be at least two senators from each district is also likely to facilitate some representation of regional and ethnic interests.

The country also has significant religious diversity. The two main religions are Christianity and Islam which break down as follows: 55% Protestant, 20% Catholic, and 20% Muslim. The rest of the population ascribes to indigenous traditional beliefs and other received religions such as Hinduism and Buddhism. The Constitution guarantees freedom of religion and historically, religion has not been a significant divisive factor. However, in 1999, the religious beliefs of the incumbent President appear to have been the reason why about 17 mosques were burned down by people who were protesting against the declaration by the Electoral Commission that he had won a second term of office (Pan-African News Agency, 26 June 1999). In apparent retaliation, supporters of the President were also reported to have torched a number of churches.

The acknowledgement of cultural differences and protection of minorities is evident in efforts by the Government to facilitate religious inclusiveness by such measures as the declaration of some Islamic holy days as official public holidays. Hitherto, the only religious public holidays were those commemorating events in the history of Christianity. The Government has also announced that it will facilitate consultations aimed at considering the replacement of "Bible Study" as one of the subjects on the secondary school curriculum with "Religious and Moral Education" which will acknowledge that religion in Malawi extends beyond Christianity. The proposed syllabus for Religious and Moral Education was developed in 1998 by the Malawi Institute for Education for the Ministry of Education, Sports and Culture (as it was then called) and is meant "to reflect the Malawi society which is pluralistic in terms of religion and politics" (Malawi Government, 1998). In its implementation, the syllabus is likely to face a number of problems because Malawi is not only pluralistic but also polarised in terms of religion, particularly between Christians and Muslims. For example, the syllabus creates room for bias in teaching depending on the religion of individual teachers and does not have

mechanisms for ensuring that teaching involves giving of information and not indoctrination (Breton, 2000).

1.3 How much consensus is there on state boundaries and constitutional arrangements?

There have been two significant border disputes in the past: one with Tanzania (see Mayall, 1973) and the other with Zambia. These were resolved through negotiation and there have not been any significant contention about international borders since then. In any case, for the vast majority of people who live alongside the international boundaries, these boundaries are no more than a technicality. Most of these people are part of communities which stretch across the borders. Since these boundaries are not adequately policed by the states on both sides, there is constant and unhindered passage across the borders by people visiting relatives, going to work in fields across the border or going to local markets in towns on the other side.

Internally, the issue of the boundaries of Malawi has been raised in connection with suggestions of federation and secession. In the period leading up to the presidential and parliamentary elections of 1994, there was a short-lived pressure group which advocated for a federal constitutional order for Malawi. There have also been occasional calls for secession by those who argue that the unitary state in its present form does not adequately serve the interests of marginalised regions. Although at present, secession by any region does not appear to be likely, the fact that the subject has been broached in Parliament (*Daily Times*, 22 June 2000), indicates that consensus about the current boundaries of the country cannot always be taken for granted. In this connection, it is worth noting that the more politically marginalised the less populous regions of the country are, the more seriously the people in those regions will consider alternative constitutional arrangements, including secession.

1.4 How far do constitutional and political arrangements enable major societal divisions to be moderated or reconciled?

Significant societal divisions in Malawi include those based on class, region of origin, sex and age. In general, the Constitution is very thin on societal divisions, which might as well not exist, and is predicated on the liberal democratic atomist conception of the individual. Thus, for example, the Constitution makes no specific mention of regional divisions although such divisions are so pervasive that they affect virtually all aspects of Malawian life, including the way the majority of the electorate votes in presidential and parliamentary elections. Nevertheless, the Constitution's guarantees of a wide range of human rights go a long way towards providing a mechanism which enables major societal divisions to be moderated or reconciled. The human rights guarantees perform this function by providing the ultimate standards to be used in moderating and reconciling divisions and conflicts in relation to civil and political as well as social, economic and cultural relationships between not only the State and individuals but also among the people themselves.

The Constitution also provides for the establishment of a Senate whose diversity of composition is facilitative of the moderation of some societal divisions, particularly those based on district, religion and gender. The Constitution requires the Senate to be composed of twenty four district council delegates, elected by each of the country's district councils; one hereditary traditional chief from each of the districts who shall be elected by his or her peers and thirty two delegates elected by the rest of the Senate from candidates nominated by various interest groups, including those representing women's organisations, disabled persons, trade unions, and religious groups (section 68). This point is also relevant in Section 5.5 of this report which considers how far the legislature reflects the social composition of the electorate

The Constitution further provides for the appointment of a Second Vice President "[w]here the President considers it desirable in the national interest so to do" (section 80(5)). This power has been used at least once before in an apparent attempt to diffuse regional tension after the 1994 elections: in September 1994, the President appointed Chakufwa Chihana, the president of the political party which was perceived to be a Northern Region party, to the position of Second Vice President in a government dominated by the political party which was perceived to be a Southern Region party. The power to appoint the Second Vice President can also presumably be used to bridge other societal divisions in addition to that based on region.

van Dijk in a study of religion suggests that a generation gap is emerging in urban Malawi (specifically, Blantyre). Rejecting explanations of 'urban confusion' nourishing "young puritan preachers", he ascribes their growth to resentment of traditional authority. Read with the age structure of the country, this polarization must be taken seriously and emerging religious cults viewed as a possible "arrangement", not for reconciliation but for channelling dissatisfaction.

1.5 How impartial and inclusive are procedures for amending the Constitution?

The National Assembly can amend the Constitution, ostensibly impartially. Most parts of the Constitution can be amended by the National Assembly if the amendment is supported in a National Assembly vote by at least two thirds of members of the Assembly. According to section 196(1) of the Constitution, provisions which guarantee human rights, as well as those which provide for the constitutive elements of statehood and fundamental principles of the Constitution, those which govern the appointment, independence and tenure of judicial officers, citizenship, the interpretation and application of the Constitution, elections and those which provide for the separate functions and status of the legislature, the executive and the judiciary cannot be amended unless either such amendment is supported by the majority of voters in a national referendum, or the requirement for a referendum is dispensed with because the Speaker of the National Assembly certifies that the amendment in question is non-substantive. In the latter case, the proposed amendment can be passed on the strength of a vote in support of the amendment by at least two thirds of members of the National Assembly.

Parliament comprises the National Assembly, the Senate, and the President. As indicated earlier in this report, the Senate is drawn from an electoral college and partly co-opted

from the country's districts and interest groups. The Constitution requires that every bill passed by the National Assembly must be scrutinised by the Senate and either passed or remitted back to the National Assembly. If after remittal, the majority in the National Assembly do not accept the amendments suggested by the Senate, the bill shall be sent to the President for assent. In effect, therefore, the Senate's power of scrutiny of bills from the National Assembly cannot stop the National Assembly from passing legislation which the majority in the Assembly supports. However, a full assessment of the Senate and the exercise of its powers can only be done if and when the Senate does get established in practice. The Constitution does not state when that will be, providing only that "[t]he Senate shall not be established before the end of May 1999" (section 210(1)).

The procedure for amending the Constitution appears to be impartial and inclusive enough, though opponents of an amendment which adversely affected a cultural, religious or other minority would remain in the hapless one-third and be forced to live with the vote. In practice, the prospects of such a situation arising are real because, as stated earlier with reference to the constitutional provision on citizenship, given the current permutations in the distribution of parliamentary seats among the political parties and current unofficial political alliance between the party with the parliamentary majority and a faction of one opposition party, the probability of two-thirds of Members of Parliament voting in favour of a Constitutional amendment, even a controversial one, is a quite high. If the amendment required a referendum, however, it would be likely that the costs of organising one would be prohibitive and unlikely to be borne by donor governments and agencies, whose sympathies might very well lie with the minority which would stand to lose by the amendment. If a referendum or an election was not financed in Malawi by donors, it would probably not take place, as was recognised by the High Court in the case of *Mungomo v The Electoral Commission* (1999).

1.6 What measures, if any, are being taken to remedy publicly identified problems in this field, and what degree of political priority and public support do they have?

There are very few safeguards in place to prevent short-term, politically-inspired manipulation of the National Assembly on citizenship and minority questions. The Senate, which can use its albeit limited power of scrutinising legislation to moderate any excesses by the majority in the National Assembly, has not been established yet. In fact, there is no significant pressure from political parties or civil society organisations to have it established.

However, the absence of the Senate and its counter-majoritarian influence has not resulted in a complete lack of protection for members of minority groups because their members can use alternative mechanisms to protect their interests. For example, a particular minority may have a degree of control and influence over the economy which enables it to use the threat of withdrawal from the economy to pressurise the majority against

passing laws that adversely affect the minority in any respect, including with regard to the citizenship matters. A similar flexing of economic muscle was witnessed in 1999 when, in reaction to perceived failures by the police to deal with violent crime apparently targeted at racial minorities, representatives of business people from those communities gave the government a 30-day ultimatum to deal with the crime or, in the words of one of the business people, "we will shut down this country, we will close the economy" (*The Nation*, 9 July 1999). The dangers of this method of safeguarding minority interests are that it is likely to exacerbate pre-existing hostility by the majority, attract a backlash from the majority. The method may also be easily abused to subvert the democratic will of the majority in a variety of circumstances.

The government has also taken some measures to improve the acknowledgement of linguistic differences. As noted earlier, the government has used its control of the Malawi Broadcasting Corporation- the only broadcaster with nationwide coverage - to have the minority languages such as Chitumbuka, Chisena, Chilomwe, Chinkhonde and Yao used in some news broadcasts. As indicated earlier, similar measures have been taken to remedy the problems related to religious differences and experienced mainly by religious minorities. The most obvious one is the proposal for the development of the secondary school Religious and Moral Education syllabus. Although these measures may be criticised for being ad hoc and poorly implemented, it is important to note that their principle is based on the constitutionally guaranteed right to freedom of culture and language and that to freedom of religion.

Another measure that may address the marginalisation felt by national minorities, if only incidentally, is the scheduling of local government elections for November 2000. It appears that the conflict between different sections of the population is often aggravated, if not created, by competition for national resources that are distributed nationally. With local government, competition with other groups for national resources and the political power to administer them is likely to be reduced significantly. With local government, competition will, to a remarkable extent, be at the local level largely among people belonging to the same region or ethnic group. This will contribute to the minimising of societal divisions.

There are also a number of measures which have been taken to remedy the problems faced by women in the area of law, citizenship and rights. Among civil society organisations, human rights non-governmental organisations have sought to encourage attitudinal and behavioural change through "civic education" programmes. Such programmes have typically involved public meetings, radio and television programmes, posters and leaflets through which activists have addressed various aspects of gender inequality, including the legal responses to it. Civil organisations such as the Civil Liberties Committee, the Association of Progressive Women, the Women's Lobby Group and others have also sought to improve the condition of women by lobbying for changes

in laws which disadvantage women and campaigning for an increase in the number of women in decision-making positions. The Civil Liberties Committee, the Malawi Centre for Advice, Research and Education in Rights and Women and Law in Southern Africa have also helped to improve the situation of women through the provision of free legal advice and representation to women for the vindication of their rights.

For its part, the government has committed itself, in the National Platform for Action which was articulated as a follow up to the Fourth World Conference on Women in Beijing, “to improve the status of women with the long term objective of equality and equity between women and men in the 21st century” (at p.4). In 2000, the government put in place a National Gender Policy which aims at securing gender justice. It has also enacted legislation to criminalise certain traditional customs and practices which justify the dispossession of widows by relatives of their deceased husbands. Government also appears to have the intention of amending the Wills and Inheritance Act with a view to affording better protection to widows and children (*Daily Times* and *The Nation* 21 and 22 June 2000), and the Law Commission has recommended the removal of provisions which discriminate against people on the basis of their sex from the Malawi Citizenship Act (Malawi Government, 1996).

It is not clear what degree of political priority the measures mentioned above have. Public support for them is also difficult to assess. However, to the extent that the measures are justified on the basis of the Constitution, they may have limited public support because the Constitution itself has been accused of failing to address some of the country’s most pressing social questions. The Constitution has in fact been perceived in some cases as a critical contributor to the creation or aggravation of those pressing social problems. For example, the Constitution’s guarantee of human rights has been blamed for encouraging a culture of defiance of authority and neglect of social responsibility. In a survey conducted in 1996 for the Malawi Centre for Advice Research and Education in Rights (CARER), the researchers found that whilst democracy was generally associated with freedom, “it often attracted unfavourable comments: ‘democracy implies chaos and insecurity’” (CARER, 1996; International Organisation Development, 1998: 38).

The Constitution has also been accused of undermining the deterrent effect of criminal law through its liberalisation of laws on bail and guarantee of the human rights of criminal suspects and convicts. This has been said to contribute to a rise in the rate of crime as the efforts of law enforcers appear to be negated by human rights claims (University of Malawi, 1999: 46).

One other specific area in which the Constitution may be argued to be unable to provide clear provision for the resolution of societal conflict is that of gender justice. The ideological tension in this area is that between constitutional liberalism and “customary”

conservatism. Section 20(1) of the Constitution prohibits discrimination based on, among other grounds, sex. Section 24(2) provides that any law that discriminates against women on the basis of gender and marital status shall be invalid and that “legislation shall be passed to eliminate customs and practices that discriminate against women..”. Yet, section 26 of the Constitution guarantees every person the right to participate in the culture of his or her choice, and section 200 provides that customary law has the force of law. In this connection, it is worth noting that many customary laws to which the majority of Malawians subscribe are discriminatory against women. Because the Constitution does not explicitly state which right will take precedence in the conflict between the right to equality and the right to culture it creates an ambiguity. The ambiguity arises because section 24(2) which declares all discriminatory laws to be invalid and section 26 which guarantees the right to cultural choice have equal weight since both are human rights guarantees under the Constitution.

Yet another pressing social problem which the Constitution has failed to address adequately is that of land shortages, particularly in areas such as Thyolo and Mulanje where, during the period of colonial rule, indigenous occupants were forced off their land in order to make room for white settlers and their plantations (Krishnamurty, 1972). Unlike the Constitution of South Africa which explicitly incorporates into its human rights provisions a framework for land reform, that of Malawi is more similar to that of Zimbabwe and does not establish any clear constitutional basis for land redistribution and corrective justice (Kanyongolo, 1999). The position remains, therefore, that in parts of Malawi citizens who are in the majority occupy marginal lands next to huge plantations owned by members of minority groups who are successors in title to colonial settlers. In the words of Traditional Authority Nchilamwera of Thyolo:

I was in Europe for one month. I did not see a single plot owned by an African. Why should they own vast land here when Malawians have no land. For us chiefs, land is authority, we need land.

See *The Nation* 21 September 2000

In conclusion it may be stated that although some measures have been taken to remedy publicly identified problems in the area of citizenship and nationhood, more is required if democracy is going to facilitate the implementation of the will of the majority without compromising the protection and inclusion of minorities. The absence of more measures to address current problems of regional, ethnic, linguistic, religious and racial divisions which cannot be moderated through existing constitutional norms and institutions, are jeopardising the process of democratisation.

2.0

THE RULE OF LAW

Are state and society consistently subject to the law?

Summary: The operation of the rule of law in Malawi is complicated by the fact that there are two regimes of law which are not always in concert. Traditional customary law governs many aspects of the personal lives of the vast majority of Malawians but it conflicts with state law in a number of important areas. Although there is no attempt to harmonise the rules of two bodies of law, their respective judicial systems have been integrated in practice since 1997. The resulting unified legal system has a high degree of institutional independence although its impartiality in some specific cases has been questioned. For the vast majority of people, however, the more immediate problem is that of the inaccessibility of the judicial system and justice, mainly due to low levels of rights awareness in the population and the prohibitive costs of legal services.

2.1 *How far is the rule of law operative throughout the territory?*

The rule of law is by and large effective throughout Malawi. However, it is important to note that "law" in Malawi refers to both state law and traditional customary law and that, in practice, if there arises any conflict between the two bodies of law, traditional customary law generally prevails. The consequence of this is that, from the perspective of state, some of its laws are not operative in most of Malawi. Among the relevant state laws are those which guarantee women and children human rights that ran counter to traditional customary law norms at the domestic level. Among such customary laws are those which sanction or encourage polygamy, domestic violence and disinheritance of widows and children (Women and Law in Southern Africa, 2000). Such customary laws adversely affect democratisation because they are invoked against assertions of the rights of women and children to equality, personal liberty, dignity and property rights which are critical to full individual participation by women and children in the process of democracy.

Similarly, to the extent that virtually all customary laws in Malawi provide for hereditary succession to traditional leadership, they undermine democratisation because they neither give people the opportunity to choose those who, in practice, exercise a wide range of administrative and judicial powers, nor encourage the traditional leaders themselves to be accountable to the people. Furthermore, section 68(1)(b) of the Constitution which makes some of these unelected traditional leaders part of the Senate, with power to scrutinise and delay legislation passed by the elected

National Assembly, only institutionalises the undermining of democratisation by customary law.

The lack of resources on the part of the police has also contributed to the undermining of the rule of law because the police service has not been able to enforce criminal law adequately (University of Malawi, 1999: 48). The lack of adequate police services has also resulted in a sense of insecurity for a large number of Malawians, with those who can afford it increasingly supplementing police coverage with the services of private neighbourhood watch schemes or private security firms.

In the period between 1994 and 1999, there were a significant number of cases in which people expressed their frustration with the police and the courts by taking the law into their own hands and subjecting criminal suspects to mob justice (International Organisation Development, 1998: 73). There appears to have been a decrease in the number of such incidents since then. One explanation for this decrease is that there is more public confidence in the criminal justice system so that people are handing suspects over to the police. On the other hand, it might be the case that fewer incidents of mob justice are being reported.

Any increase in public confidence in the judicial system in criminal cases is in contrast to the lack of similar levels of confidence in the courts in their resolution of legal disputes which have political overtones. Since 1994, no less than 20 such cases have been decided by the High Court and Supreme Court of Appeal and they have involved questions which arise directly out of the struggle for power among the post-Banda political class. such as whether Bakili Muluzi was constitutionally elected to the presidency in the 1999 presidential elections (*Chakuamba v Electoral Commission*); whether the President had appointed Chakufwa Chihana to be Second Vice President in accordance with the Constitution (*Attorney General v Kachere*); whether the President could appoint AFORD “rebels” to the Cabinet without consulting the leadership of that party (*Mkandawire v Attorney General*); and whether the statutory establishment of government control of the country’s biggest business empire established by the erstwhile Life President was constitutional (*Attorney General v Malawi Congress Party*).

With regard to “political” cases such as those mentioned above, the courts do not enjoy the confidence of both sides of the political divide. Recent research indicates that the courts are perceived variously as being generally biased in favour of the incumbent government in expectation of favours or of being biased against the government because of the regional affinities between some judges and the leadership of opposition parties (Kanyongolo, 2000)

2.2 *To what extent are all public officials subject to the rule of law and to transparent rules in the performance of their functions?*

Public officials are subject to the rule of law to a significant extent as evidenced by examples of instances in which transgressors have been brought to account. For example, in the case of *The Republic v Pillane*, a former Cabinet Minister is being prosecuted for corruption alleged to have been committed during his tenure of office. Equally prominent is the case of *The Republic v Kampunga Mwafulirwa* in which a Member of Parliament for the opposition Alliance for Democracy is being prosecuted for alleged tax evasion (*The Nation*, 15 June 2000). A Deputy Minister of Agriculture and a United Democratic Front Member of Parliament have also been prosecuted for manslaughter (*The Republic v Manduwa*) and murder (*The Republic v Lambat*) respectively, although in the event both of them were acquitted by the High Court after jury trials.

There have also been numerous instances in which decisions of public officials have been successfully challenged in judicial review proceedings. In essence, the judicial review procedure is intended to establish the legality of decisions or acts of public officials. When Malawian courts exercise the power of judicial review of administrative action, they have the power to nullify any such action if it has no legal basis. The legality of decisions of all public authorities, including the President, may be subjected to this process. Thus in *Re Removal of McWilliam Lunguzi as Inspector General of Police* the decision of the President to remove McWilliam Lunguzi from his position as Inspector General of Police was invalidated by the High Court for being unconstitutional because it did not satisfy some legal requirements. The High Court has also used its power of invalidating decisions for unconstitutionality to nullify the decisions of the Speaker of the National Assembly (*Nseula v Attorney General*) and the Minister of Education (*Mchawi v Minister of Education*), among other very senior figures in government. The immunity from suits and arrest which the President and Members of Parliament have under the Constitution do not negate the principle of equality before the law in that the immunity is narrowly circumscribed and to some extent temporary. Thus, for example, the immunity of the President regarding his personal conduct while in office comes to an end when he or she leaves office (section 91).

To a large extent, therefore, public officials are subject to the rule of law in the performance of their functions in so far as the rule of law requires that no person be above the law. On the other hand, mainly because of resource inadequacies in the systems for monitoring corruption, it continues to be a major contributing factor to the shortcomings in the state of the rule of law. The situation regarding resources is

illustrated may be appreciated by reference to the Anti-Corruption Bureau which in July 2000 had only one prosecutor to handle 1,600 cases involving corruption pending in court (*Daily Times* 17 July 2000).

Unfortunately, despite the importance of understanding the impact of corruption on democratisation, there has been no comprehensive documentation of its extent. What exists is merely anecdotal evidence of the routine corruption of some members of some institutions such as the police men and women in the traffic section of the police which is responsible for enforcing road traffic laws. Allegations of corruption have also been made against cabinet ministers and other high ranking politicians from the ruling party. Although such allegations have not been substantiated, it is significant that some of them have been made by a Member of Parliament of the ruling party itself (*Daily Times* and *Nation* 12 July 2000). More recently, the Anti-Corruption Bureau and the Public Accounts of Parliament has alleged massive corruption in the Ministry of Education in which the government is said to have lost the equivalent of nearly £2 million. The government's perceived slowness of response to this scandal has elicited some negative public comments from many quarters, including the governments of the United Kingdom, the United States of America and Denmark, as well as the International Monetary Fund (*The Nation* 13 October).

The degree of transparency in terms of the rules by which public officials operate is severely limited by legislation which promotes a culture of bureaucratic secrecy despite the constitutional guarantee of the right of people to have access to information. Statutes such as the Official Secrets Act, the Preservation of Public Security Act, the Statistics Act, the Police Act, the Army Act and the Parliamentary (Privileges and Immunities) Act are just some of the statutes which severely restrict the extent to which citizens can gain access to information related to the rules which regulate the official conduct of public officials.

2.3 How independent are the courts and the judiciary from the executive, and how free are they from all kinds of interference?

The independence of the judiciary is guaranteed by the Constitution. The courts and presiding officers have exclusive jurisdiction "over all issues of judicial nature" (section 103(2)), and are mandated to perform their duties free of "influence and direction of any other person or authority" (section 103(1)). Further, it is up to the judiciary to decide "whether an issue is within its competence" (section 103(1)). The judiciary in Malawi is therefore predicated on a liberal democratic view of judiciaries and their role.

At the margin, the judiciary is underwritten by the executive in that the President, who heads both state and government, appoints the Chief Justice, subject to confirmation by two-thirds of the National Assembly (section 111(1)). There is no provision for an eventuality in which the Chief Justice fails to get the necessary two-thirds support in the National Assembly. Parliamentary ratification of executive appointment of judicial personnel is not required in the appointment of all other judicial officers, although, even in the case of judges, the President does not act completely independently but relies on the advice of the Judicial Service Commission (section 111(2)).

However, the President does have some power whose exercise could interfere with the independence of the judiciary to some extent. The power in question is granted by the Constitution and enables the President to remove any judge of the High Court and appoint him or her to some other public service position "where the President considers it desirable in the public interest" (section 119(7)). Although such removal would require the consent of the concerned judge, it would put unnecessary pressure on any judge approached by the executive branch in this regard. However, it is not only the Executive which may threaten judicial independence.

On some occasions, Parliament has been the source of pressure exerted on the judiciary. In September 2000, for example, the High Court granted leave for judicial review to the disputed leader of the opposition Malawi Congress Party, Gwanda Chakuamba, who was seeking a review of the decision of the National Assembly to suspend him from the National Assembly for one year. The Speaker of the National Assembly was quoted in the media suggesting that Parliament might take action against the judge in question (*The Nation*, 28 September 2000). In fact in a letter dated 27 September 2000, addressed to the Chairperson of the Public Appointments Committee, the Speaker stated that he found the decision of the judge "extremely perturbing", and called on the Committee to investigate whether the judge had, among other things, displayed in his ruling incompetence and lack of independence. The Speaker continued:

In the interests of natural justice, I suggest that the learned judge be called to appear before your Committee to help you find answers to these disturbing questions. Needless to say that should your Committee find some or all of these answers fail to allay your fears, then you will draw the appropriate conclusions as to the competence of the learned judge. You will then make the appropriate recommendation.

This report has mentioned the rapid changes prefiguring the historic 1994 election. The courts played an instrumental if not consistently supportive role in reintroducing civil liberties. Political protesters felt protected, suspended students were readmitted,

the press in exile was legalized and the police and army were permitted to vote. The Electoral Commission, headed by Justice Anastasia Msosa, who was then a judge of the High Court, professed independence and may have set a benign example to her judicial colleagues (van Donge, 1995). According to Ng'ong'ola (1996), apart from the traditional courts which were under the direct control of the executive branch of government, the judiciary was the one arm of government which held out amid the institutional subjugation till 1994. The judiciary other than the traditional court system was antagonized by President. Banda, partly through the expansion in the jurisdiction of traditional courts to include all manner of serious charges such as theft by public servant, treason, and murder. Suspects were tried against their will even as they appealed in vain to conventional courts. Jones (1997) records "Banda's repressive use of the criminal jurisdiction of traditional courts to get rid of political opposition".

Traditional courts no longer form part of the formal court structure. It is magistrate courts within this structure which administer customary traditional law. At the National Constitutional Conference in February 1995, a caucus of traditional chiefs lobbied for the restoration of their judicial power, albeit not over criminal matters, and integration into the formal court system (National Democratic Institute, 1995). The current Constitution goes some way towards facilitating this by providing that "Parliament may make provision for traditional or local courts presided over by lay persons or chiefs" (section 110(3)). In practice, though, such courts have not been established and disputes requiring the interpretation of customary law are settled by either informal arbitration by traditional authorities or formal judicial proceedings presided over by magistrates.

2.4 How equal and secure is the access of citizens to justice, to due process and to redress in the event of maladministration?

There is a sound constitutional basis for equality in the access to justice by people in Malawi. One of the fundamental principles of the Constitution is that all people are equal before the law (section 12 (v)). In addition to this provision, the Constitution also guarantees every person the right to equal and effective protection under the law (section 20). There is also specific reference to children in sections 23 which provides that: "[a]ll children, regardless of the circumstances of their birth, are entitled to equal treatment before the law". In relation to women, the Constitution provides that "[w]omen have the right to full and equal protection by the law and have a right not to be discriminated against on the basis of their gender or marital status which includes the right: (a) to be accorded the same rights as men in civil law.."

In addition to the provisions related to equality before the law generally, there is explicit provision for "access to justice and legal remedies" in section 41 of the Constitution:

41. (1) Every person shall have the right to recognition as a person before the law.
- (2) Every person shall have access to any court of law or any other tribunal with jurisdiction for final settlement of legal issues.
- (3) Every person shall have the right to an effective remedy by a court of law or tribunal for acts
violating the rights and freedoms granted to him by this Constitution or any other law

The Constitution also guarantees every person the right to administrative justice by guaranteeing every person "lawful and procedurally fair administrative action" (section 43(1)) and the right to be furnished with reasons in writing for administrative actions which adversely affect his or her rights, freedoms, legitimate expectations or interests.

In practice, access to justice by the majority of people is adversely affected by a number of factors. The first is the prohibitive costs associated with acquiring legal services, including the costs of travelling to courts and hiring lawyers. The second is that although the majority of Malawians do not understand English, all proceedings in Malawian courts are in that language, and the majority of litigants have to rely on translation which is occasionally inaccurate and misleading. The third factor is the restriction by the courts of the category of people who can institute court proceedings. In the cases of *The President of the Republic of Malawi v Kachere (1994)* and *The State v The Registrar General, Ex parte Civil Liberties Committee (1999)*, the High Court held that only the direct victim of a violation of a breach of the Constitution has a right to be heard in judicial proceedings for the vindication of that right. This decision limits the scope of public interest litigation by civil society organisations such as human rights non-governmental organisations which would otherwise act as proxy for litigants for whom direct access to the courts is too intimidating or expensive.

In those cases which do go to trial, suspects stand a fair chance of a fair trial. The standard procedures do afford accused persons a reasonable opportunity to understand the charges against them, to cross-examine witnesses, to call for defence witnesses and not to incriminate themselves. In a number of cases, though, the definitions of offences violate the principle of fair trial by effectively reversing the presumption of innocence and placing the burden of proof on the accused instead of the prosecution. The

offences in question include theft by public servant, possession of illegal drugs and possession of illegal firearms. The reversal of the burden of proof is also evident in the law relating to confessions. This law effectively requires the accused person to prove that a confession was not voluntary if he or she wishes to rely on that argument, and although both the High Court and the Supreme Court of Appeal have expressed reservations about the constitutionality of this law, they have come short of declaring it invalid for unconstitutionality (*Nathebe v The Republic* (1997)).

Due to a general lack of knowledge about the current Constitution, particularly in the rural areas where the majority of Malawians live, the majority of Malawians would not know where to complain if they suffered due to maladministration. For those who would know, the office that they would be most likely to know of would be that of the Ombudsman. Since the current incumbent came to office, the wide remit of this office has been publicised in virtually daily media reports of its work. Nevertheless, the majority of people in Malawi have no access to print and electronic media and, therefore, remain ignorant of the Ombudsman or the other institutions from which redress can be obtained for maladministration. The record of complaints brought to the Ombudsman in the period between 1995 and 1999, as indicated by the annual reports of the office, for example indicates that those who have used the Ombudsman for redress in cases of maladministration mostly have been urban dwellers in the formal employment sector.

2.5 How far do the criminal justice and penal systems observe due rules of impartial and equitable treatment in their operations?

The Constitution requires the judiciary to interpret, enforce and protect the law "in an independent and impartial manner". In addition, the judiciary is also required to be free of externally induced partiality by section 103(1) of the 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". The requirement of impartiality is underpinned by the Constitution's guarantee of the right of every person to equality before the law (section 20).

In practice, though, the courts are often accused of bias. In cases with political overtones, the High Court and the Supreme Court of Appeal have been accused in the print media of favouring the government or the opposition, depending on the judgement or newspaper in question. In relation to the lower courts it is common for disgruntled litigants to accuse the courts of being biased against them due to the corruption of judicial officers. However, the accusations are almost invariably not substantiated. Nevertheless, they have a corrosive effect on public confidence in the impartiality of the judiciary and gradually

undermine the public confidence which the judiciary requires in order to sustain its authority as a key institution for the promotion of democratic values and norms.

Although the judiciary is the supreme arbiter in the interpretation of all laws, including those that underpin the criminal justice system, there are other equally critical institutions whose impartial and equitable treatment of people enhances the rule of law. The police is one such institution and its importance lies in the fact that, for most people, it is the first point of contact with the criminal justice system. During both the colonial and one-party government period, the police were generally not impartial or equitable in their treatment of people. During the two periods, the police were routinely used to suppress dissent against colonialism and one party dictatorship respectively, thereby losing any appearance of impartiality as between the ruling elite and the “dissidents”. An extreme example of the loss of impartiality by the police was in 1983, when apparently some politicians used various branches of the police to perpetrate the violent murder of three cabinet ministers and a Member of Parliament (Malawi Government, 1994).

Informed by the experiences of the past, the current Constitution does have provisions aimed at ensuring the impartiality of the police. Firstly, section 153(1) requires the police to be “independent”. Secondly, section 154(4)(b) provides that one reason for which the Inspector General of Police may be dismissed by the President is if the former cannot exercise his or her powers impartially.¹ Thirdly, section 158(1) requires members of the police service to act as “impartial servants of the general public and the Government of the day”. Fourthly, section 158(2) prohibits members of the police from participating directly in “political activities”. There is need for research into the extent to which the police observe due rules of impartial and equitable treatment in their operations in practice. But if public perceptions can be used as a guide, the police are still perceived by a significant proportion of the population to be biased. A research study of public perceptions of the police conducted by the Centre for Social Research of the University of Malawi in 1999 found that to a significant extent, the members of the public perceive the police to be politically biased (University of Malawi, 1999: 46), corrupt (ibid: 9 and 46) and discriminatory against the poor (ibid: 14).

For its part, the penal system has also come under some criticism for its lack of impartiality and equity in the treatment of offenders. Unlike in relation to the police, the Constitution does not impose any explicit obligation of impartiality on the prison system and its functionaries. Nevertheless, that obligation arises because section 20 of the Constitution prohibits discrimination generally. In practice, though, there is some

¹ This was the ground given for the dismissal of the Inspector General of Police in 1994 although subsequently, the High Court declared that the dismissal was unconstitutional because the Inspector General had not been given an opportunity to present his defence against the allegations of impartiality: see the case of *Re Removal of McWilliam Lunguzi as Inspector General of Police*

evidence of inequity in the treatment of remanded and convicted prisoners in that the conditions vary widely from prison to prison: for example, some prisons have no running water while others do (Malawi Government, 1996:46-47); some have proper kitchen facilities while some have no more than what amounts to “campfires” (ibid); and some prisons have resident medical personnel while others do not (ibid, at p.19). At a more personal than institutional level, prison officials have sometimes been accused of inequitable distribution of materials such as blankets to inmates (ibid, at p.22). Again, similarly to the position regarding the police, there is no information on which to make a definitive assessment of the degree to which the penal system is equitable and impartial in the performance of its functions.

Problems of impartiality of the criminal justice and penal systems must, however, be placed in the context of many other shortcomings of the systems. A 1996 assessment by consultants commissioned by the European Union concluded that “[t]he Malawi criminal justice system is currently in a state of virtual total breakdown, so much so that it is difficult to describe it as a functioning system” (European Union, 1996). Although this may appear to be an exaggeration, it is nevertheless true to say that the system is in crisis due to serious shortages of police officers, legal aid lawyers, judges and magistrates. Similarly, the penal system is in crisis, with deteriorating infrastructure, overcrowding, poor diet, inadequate health and medical facilities and poor conditions of service for prison officers. All these conditions create an environment in which prisoners are undernourished and exposed to diseases, and prison officials have low morale.

As noted above, therefore, the authorities responsible for the administration of the criminal and penal systems do have a sound constitutional basis for the impartial and equitable discharge of their obligations, but the available information is insufficient for an assessment of the extent to which the two systems have been impartial and equitable in practice. However, there is the perception in some quarters that the two systems are not completely impartial and equitable. Corruption has been cited as a possible explanation for the bias which exists in the systems although, in the case of the police, political partisanship has also been mentioned as the cause of the lack of impartiality and equity of treatment of suspects and prisoners.

2.6 How much confidence do people have in the legal system to deliver fair and effective justice?

People have little confidence in the formal legal system to deliver fair and effective justice. The system is generally inaccessible because it operates in a foreign language, is prohibitively expensive for the majority of Malawians and, unlike traditional customary legal systems, is not based on values and principles which are indigenous. It has been acknowledged for some time that there are problems inherent in transplanting legal

systems from one social environment to another (Allot, 1970). In the case of contemporary Malawi, the problems are made worse by the inability of the formal legal system to cope with the numbers of people who do rely on it. Inadequate numbers of lawyers and court buildings, inefficient information management technologies and poor communication facilities routinely cause adjournments, delays and inconveniences which reduce the confidence that people have in the formal legal system.

The preceding should not be read to imply that traditional customary systems enjoy the unqualified confidence of the public. Personnel in this system including chiefs have not been immune from accusations of bias. The fact that traditional authorities have since colonial times operated as agents of central government has always compromised their independence and appearance of impartiality, thereby eroding public confidence in the legal system over which they preside. Blatant manipulation of customary traditional norms and institutions occurred during the colonial period (Chanock, 1985) as well as during the post-colonial one party regimes. During the one-party regime, the manipulation was most evident in the use of Regional Traditional Courts and National Traditional Appeal Court to conduct trials of political dissidents. In these trials, culture and tradition were used as the justification for denying the accused the basic safeguards of fair trial. Given that experience, the Regional Traditional Court and the National Traditional Appeal Court were abolished when the current democratic regime was adopted in 1994. But as mentioned earlier, section 110(3) of the Constitution nevertheless recognises the value of preserving a traditional grassroots mechanism for the settlement of disputes and, therefore, authorises Parliament to make provision for “traditional or local courts presided over by lay persons or chiefs” provided that the jurisdiction of these courts will be limited to “civil cases at customary law and such minor common law and statutory offences as prescribed by an Act of Parliament”.

In the current phase of constitutional history, the manipulation of traditional authorities has been alleged mostly in connection with electoral politics. On the one hand, traditional authorities are called upon to be non-partisan because of the nature of their office. On the other hand, the fact that traditional authorities are formally appointed by the President, who may also remove them from office, and are paid government salaries makes them vulnerable to pressure from the government of the day in its pursuit of partisan interests. The perception that traditional authorities are not much more than civil servants undermines public confidence in their ability to act as impartial arbiters, particularly in matters affecting the government.

Traditional norms and institutions can lose the confidence of the people even further if they are perceived to be subject to political manipulation generally. In Malawi, such manipulation has been manifested most blatantly in the involvement of traditional leaders in partisan politics either on the side of the government or the opposition. This was alleged in the 1993 referendum and has also been alleged in every election and bye-

election since then. Despite the apparent compromise in the impartiality of the traditional authorities, it is probably true to agree with the conclusion of a May 1999 study, that there is, in rural Malawi, “a broad level of satisfaction with customary forms of justice” (International Organisation Development, 1999: 7).

The confidence of the people in the legal system in Malawi is, therefore, relative to a number of factors. There is little confidence in the formal system mainly because of its inaccessibility, while the political manipulation of traditional institutions has made them an unsatisfactory alternative. Diminished confidence in the legal system is likely to contribute to general public disillusionment with the notion of the rule of law as a central feature of the process of democratisation.

2.7 What measures, if any, are being taken to remedy publicly identified problems in this field and what degree of priority and public support do they have?

There have been some initiatives to remedy shortcomings in the various aspects of the rule of law. Some of the initiatives are aimed at addressing breaches of the rule of law which are attributable to corruption. In this regard, the Anti-Corruption Bureau has embarked on social mobilisation campaigns against corruption through programmes aimed at raising public awareness of the nature of corruption. The Bureau has also established community-based anti-corruption associations, particularly in educational institutions such as colleges of the University of Malawi.

The second type of initiative is that which aims at increasing the numbers of people who can have access to justice. The University of Malawi has steadily increased the number of law graduates that it contributes to the legal profession in order to alleviate problems of access to justice which are due to the inadequate number of lawyers, magistrates and judges. In this respect, it may be noted that the number of law students graduating in the four year period between 2000 and 2004 will be higher than the total number of those who graduated in the first twelve years of the existence of the Law Department. Estimates suggest that the University will produce over 100 law graduates in the period between 2000 and 2004, while in the period between 1971 and 1985, the university produced only... lawyers. The increase in the total number of law graduates has been accompanied by an increase in the proportion of women among that number. Out of the total of those who graduated in the period between 1971 and 1985, females constituted 26 % while in the period between 1996 and 2000, females constituted 40% of the total number of law students graduating within that period (University of Malawi, 2000).

There have also been a number of programmes run by both the government and NGOs to train paralegals. These will be most useful in addressing both problems of distance to courts and the cost of legal advice. Paralegals will be based at the community level and will normally not charge fees. Government is also training lay magistrates with the aim of increasing the number of judicial officers to speed up the process of litigation. Some of the magistrates trained under this programme will be deployed in the rural areas with the effect that the distance to courts for the rural Malawian will become less of a prohibitive factor for those wishing to gain access to the courts.

Regarding the lack of confidence in the judicial system, little has been done to redress the concerns outlined above. No legislation has been passed to establish traditional local courts, which by their nature will be more accessible to the majority of people than the magistrates courts, the High Court and the Supreme Court of Appeal. There has also been no attempt to remove the obstructive effect of the use of English as the primary language in court. Nothing has been done to minimise public perceptions of judicial bias. One possible initiative could, for example, be the amendment of the law to require that constitutional litigation in the High Court should always be before more than one judge, or to provide that the composition of the judiciary should be more demographically inclusive. This could be achieved by adopting a provision similar to section 174(2) of the Constitution of South Africa which provides that “the need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed”. In the case of Malawi, the basis of diversity could be defined broadly enough to include bases of identity other than race and gender.

On the other hand, there are measures that are being taken to make the operation of the criminal and penal systems consistent with the demands of the rule of law and respect for the rights of suspects and prisoners. With the assistance of the British Government’s Department for International Development, the police is undergoing a reform programme to orient its policies and practices to the requirements of a constitutional democracy. With regard to the prison service, there are proposals to increase the number of prisons in order to reduce the congestion which characterises most Malawian prisons. The Chief Commissioner of Prisons is reported as confirming the construction of two prisons: one in Chikwawa and another in Mzimba (*Malawi News* June 10-16). Another recent development is the establishment of prison farms to enable prisoners to grow their own food, enabling them to improve their food intake and fully enjoy the right to development in so far as it relates to access to food. There is also more consideration of the use of non-custodial sentences in appropriate cases in order to reduce congestion the prisons.

In general then, the rule of law is largely functional in Malawi although for how long this will be the case depends on whether fraud and corruption by senior government officials and politicians is dealt with speedily and in a transparent manner. It will also depend on whether institutions such as Parliament will resist the temptation to interfere with judicial

independence; whether those who wish to access justice will no longer face obstacles such as English as the language of law and litigation and the lack of adequate public sector lawyers; and whether traditional customary systems of justice will no longer be manipulated by politicians.

3.0 CIVIL AND POLITICAL RIGHTS

Are civil and political rights equally guaranteed for all?

Summary: Virtually all civil and political rights are guaranteed by the Constitution, although some appear to be protected in a discriminatory manner. Freedoms of association, religion, language and culture are equally guaranteed for all and are subject only to minimal limitations. Freedom of the press is also given extensive constitutional protection although in practice, it is arguable that print media have on some occasions had their freedom curtailed by being denied access to information held by government or political party officials, or having their reporters intimidated by officials. Freedoms of movement and assembly have also been undermined, particularly through the withholding of permits by the police for marches and demonstrations organised by protesters against government policies. Many people also live in fear of violent crime, although the levels of such crime do not appear to be as high as those that prevailed in 1999.

3.1 How free are all people from physical violation of their person, and from fear of it?

The Constitution recognizes the right to life and personal liberty (section 18); women are especially mentioned ("sexual abuse, harassment, and violence") (section 20(2)), and corporal punishment, torture and cruel, degrading or inhuman treatment or punishment are prohibited by the Constitution (section 19(3)). Despite these constitutional guarantees, however, in reality, the degree to which people in Malawi fear physical violence against them is significant enough to be a potential obstacle to the process of democratisation.

Children are routinely subjected to corporal punishment and other forms of violence, including in the home. For example, in a 1999 study, UNICEF Malawi concluded that, in a particular village in Central Malawi:

...there appeared to be considerable general child abuse by parents. The widespread deprivation of food to children as a form of punishment...is a case in point. It was also mentioned by both children and adults that...severe child beating is quite common. In one extreme case, a male participant [in a focus group discussion] narrated a story of how he killed his own child with a beating."²

² Incidentally, the UNICEF report does not make clear why the confessed child killer was not in prison.

UNICEF Malawi, *Customary Law and the United Nations Conventions on Women's and Children's Rights: Final Report* (Lilongwe, February 1999)

Cases of sexual abuse and harassment of women also appear to be quite common. For example, in January 2000, there occurred a number of gruesome murders in Chiradzulu district. The victims were exclusively women. These murders were particularly terrifying because the victims had parts of their bodies carved out, terrifying not only the people in the district but also across the rest of the country. On 6 October 2000, two people were convicted of the murders and sentenced to death after a jury trial which also saw the acquittal of a third accused person (*Malawi News* 7-13 October 2000).

For the population in general, violent crime is also a cause for constant concern. In most parts of Malawi, it is dangerous for people, particularly women, to walk alone at night. Although there was a time when the high crime rates were attributed by government spokespersons to returning Malawi Young Pioneers, this is rarely the case now and other factors such as poverty and the lack of resources on the part of law enforcement agencies are more likely to be blamed for the perceived rise in crime.

3.2 How effective and equal is the protection of the freedoms of movement, expression, association and assembly?

Chapter IV of the Constitution guarantees rights to personal liberty and to freedom of movement and residence, freedom of expression and the press, freedom of opinion, freedom of association and freedom of "peaceful and unarmed" assembly. Although in general, the various human rights guaranteed by the Constitution are enjoyed without undue restrictions, there have been a number of instances in which the exercise of these rights by opposition politicians and their supporters has been severely limited by legislative and executive measures.

The protection of freedom of movement is largely effective although in practice it has been difficult during political campaigns for politicians to move through areas that are considered to be strongholds of their rivals without harassment. The Constitution connects freedom of movement with freedom of residence. In terms of residence, the right has been seriously violated when people have been virtually expelled from certain areas of Malawi because those places were not their original homes. For example, it has been reported that soon after the announcement of the results of the presidential election of 1999, supporters of the losing contender, Gwanda Chakuamba, intimidated a number of supporters of the winner, Bakili Muluzi, into leaving parts of the Northern Region on the basis that region

was the stronghold of the Alliance for Democracy, a party which supported Chakuamba in the elections.

The right to freedom of movement is also undermined by the stationing of permanent roadblocks on the country's major roads at which travellers are routinely stopped and searched, ostensibly for contraband. This practice is almost invariably enforced on a discriminatory basis, with disproportionate attention being paid to (mostly poor) travellers using public transport. The mounting of permanent roadblocks continues despite the fact that as early as 1994, the High Court declared the practice to be a violation of freedom of movement (*The National Consultative Council v The Attorney General*).

The enjoyment of the right to freedom of expression is one of the areas in which it is easy to conclude that the process of democracy has made progress. There has been some fundamental change from the days of the one-party state when freedom of expression was severely curtailed by a plethora of security agents, "Youth Leaguers" and "Young Pioneers" of the Malawi Congress Party, unofficial informants and other opportunists, all legitimised by draconian legislation. Due to internal and external political pressure, however, the general human rights situation in the country improved and by 1992, people began to enjoy unprecedented levels of freedom of expression, exemplified by the emergence of a vibrant, if rudimentary, print media. Since then, freedom of expression has remained relatively secure although there are concrete reasons for concern in particular areas.

The print media is relatively free but still subject to occasional harassment which no longer takes the form of detention without trial or extrajudicial censorship, but the selective application of restrictive laws, which most recently have included those related to newspaper registration (*The Republic v The Registrar General, ex p. Civil Liberties Committee*) and national security (*The Republic v Somanje*). The right to freedom of expression has also been unduly limited by laws of defamation which hold a person liable for defamation if he or she makes a false statement regardless of whether he or she took all reasonable steps to verify the truthfulness of their statement. This may yet change as the High Court has said on at least one occasion that if a person takes steps to verify the defamatory statement he or she will be ordered to pay only nominal damages to the person defamed by the statement (*Sani v Simango and the Democrat*). Of course, the position most supportive of freedom of expression would be like that taken by the Supreme Court of the United States of America that if there is verification, there is no defamation (*New York Times v Sullivan*).

To the extent that freedom of expression entails that people must be able to receive a diversity of views from publicly funded media, it is clear that more needs to be done in Malawi. The only public radio (Malawi Broadcasting Corporation) and television

(Television Malawi) in the country generally do not broadcast views that are in opposition to or critical of the government of the day or the United Democratic Front ((Article 19-International Centre Against Censorship, 2000).). The lack of diversity within the public broadcasters is not compensated for in the private broadcasting sector where the licensing process has been questioned for so far issuing private broadcasting licences only to people with some connection to the current government (see Section 10.1 of this report). Admittedly some of the licensees such as Alaudin Osman of Capital Radio have a long association with championing freedom of expression and are professional media practitioners. Nevertheless, in the absence of a transparent licensing process, it is not surprising that his acquisition of a licence is linked to his position as Presidential Spokesperson.

Opposition politicians and parties have also had their freedom of expression threatened, although this has been infrequent and generally they have been able to express themselves at public rallies and in the print media. On at least one occasion, however, the opposition Malawi Congress Party, despite qualifying for State funding in terms of section 40(2) of the Constitution, was denied such funding by the majority party in the National Assembly for the reason that the Malawi Congress Party was boycotting the National Assembly. This adversely affected the rights of the party's Members of Parliament since, as has been said by the Zimbabwean Supreme Court, denial of access to state funding for political parties undermines freedom of expression (*United Parties v Minister of Justice, Legal and Parliamentary Affairs* (1998)). Eventually, the Malawi Congress Party did get the funding, but only after they had sued the government successfully (*The Attorney General v Masauli* (1998)).

The restriction of civil and political rights is not confined to opposition political parties. It also extends to institutions whose activities are central to the promotion of democracy such as trade unions. For example, the Malawi Congress of Trade Unions has had some of its public meetings declared unlawful by the government which has used its wide powers under the Police Act (*Mhango v The Attorney General* (1998)). This is ironic considering that, apart from the political pressure groups which were later converted into the political parties, the other group which made a significant contribution to the securing of these freedoms in the period 1992 to 1994 were workers. While the lantern letter released by Roman Catholic bishops in 1992 had a fermentative role in the 1990s revival of the process of democracy in Malawi (Ross, 1995: 32 and 42), it was the subsequent strikes and street demonstrations by workers which turned words into actions as workers extended their demands beyond better working conditions, to include the resignation of the government itself (Banda, 1995: 55). Of course there is no evidence to suggest that trade unions as such organised the strikes. In any case, the trade union movement had been effectively emasculated during the life of the single-party dictatorship in which civil society was disempowered and completely subjugated to the state (Chipeta, 1992: 39). Nevertheless the restriction of civil rights of workers through the victimisation of their unions is ironic.

Despite the limitations on civil and political rights exemplified by the cases cited above, the positive development is that contestations over the scope of permissible limitations of the rights have generally been channelled through the courts. Injunctions have been sought to stop government from interfering with the freedom of assembly of trade unionists (*Mhango v Attorney General op. cit.*), the arrest of journalists (*The Republic v Somanje*) and the anti-opposition bias of the Malawi Broadcasting Corporation have been successfully challenged in the High Court and *Kafumba v Electoral Commission and Malawi Broadcasting Corporation* (1999). Although in these and similar cases, the courts have not always interpreted the scope of civil and political rights liberally, the resort to the judicial process in itself indicates that there is some faith in the rule of law and the enforceability of the rights.

According to Human Rights Watch, “where a transition to democracy had hardly commenced, as was the case in Nigeria, or was only half complete, in countries such as Ghana, Kenya, Malawi, Uganda, Zambia, or Zimbabwe, a retreat from democratic and human rights reforms and tolerance for civil society was threatened in the face of economic problems.” (Human Rights Watch: 9). In the case of Malawi, this statement needs to be qualified in the light of experience. The country is currently facing what is probably its most serious economic problems ever, yet the democratic and human rights reforms commenced in 1994 do not appear to be under any immediate threat. On the contrary, institutions which are critical to the enforcement of rights remain functional and increasing numbers of people are becoming aware of their rights and willing to protect them from all threats.

In addition to state institutions whose role in the enforcement of rights is obvious, local and international human rights non-governmental organisations have also played a very important monitoring role. Campaigns by Amnesty International, Human Rights Watch and Article 19, as well as Malawian human rights NGOs such as the Civil Liberties Committee (CILIC), Malawi Institute for Democratic and Economic Affairs (MIDEA), Centre for Human Rights and Rehabilitation (CHRR) and Malawi Centre for Advice, Research and Education in Rights (CARER) have, at the very least, prompted government to proceed cautiously before undertaking activity which may violate human rights and liberties. In general, the long-established international human rights organisations, such as Amnesty International enjoy more public trust than do the local ones most of which are often accused of political bias (Kanyongolo, 1998).

3.3 How secure is the freedom for all to practise their own religion, language and culture?

There is no state religion. The constitution guarantees individual choice. Protection against discrimination is guaranteed, including by future legislation to this effect. President Muluzi has said his government would "encourage the Church to be the conscience of the nation", probably part of his efforts at cultivating Christian support. The one Muslim free school was shut in 1989, ostensibly to integrate children into the mainstream. Debates on the new Constitution rejected the establishment of sectarian schools on the grounds that they would introduce discrimination into a national resource. Under President Banda, "an informal presidential decree blocked the establishment of religions that were not registered with the government" (Boyle and Sheen, :36-7).

Society shows no significant overt intolerance, though the Pioneers did target people in a communal/ sectarian way for political reasons (*ibid*, page 37). Initial opposition to Banda was spearheaded by the church; the official media decried "meddling bishops" and the Malawi Congress Party debated their murder. Religious leaders were drawn into poll contests. Smaller religious minorities were persecuted or coopted. For example, the Jehovah's Witnesses religious group was declared to be an unlawful association and in at least one case (*The Director of Public Prosecutions v McLuckie*), a person was prosecuted for membership of the organisation and sentenced to a suspended sentence of 12 months imprisonment. van Dijk (1992) shows that the freedom of religious practice including cults was zealously guaranteed by the late Life President, provided it did not challenge political authority. In contrast to Jehovah's Witnesses being targeted for daring to refuse party membership, young charismatic preachers expanded their following by steering clear of politics, denouncing it as a worldly distraction. If van Dijk is right, the 1992 Bishops' letter which set the ball rolling for a referendum is thus the more courageous.

As noted earlier, the Constitution guarantees every person the right to use the language and to participate in a culture of his or her own choice. This right is reinforced by guarantees of other rights such as that which entitles criminal suspects to have the reasons for their arrest and court proceedings explained to them in a language they can understand (section 42(1)(a)). On the other hand, the value of the right of every person to use the language of his or her choice is diminished by the constitutional prioritisation of the English language which is done by the provision which disqualifies the majority of Malawians from contesting as candidates in parliamentary elections by making a certain level of knowledge of English a prerequisite for election to the National Assembly (section 51(1)(b)). In contrast, this English language requirement will not apply to candidates for election to the Senate when it does get established (section 68(1)(c)).

Chichewa is politically regarded as the language of the "majority" of people in Malawi. It was also actively promoted as the national language when Malawi was a one-party state. Despite this, minority languages such as Chilambya, Chinkhonde and Chisena did

not die out. On the contrary, their profile has been raised by the Malawi Broadcasting Corporation which, in 1998, replaced the duopoly of Chichewa and English on the national radio station with the plurality of Chichewa, English, Chilomwe, Chiyao, Chitonga, Chinkhonde and Chitumbuka. Another policy initiative which could be rationalised on the basis of its support for the right of every person to speak the language of his or her choice was that which would have allowed schools the liberty to choose the language of instruction of pupils in the first three years of their primary education.

3.4 How free from harassment and intimidation are individuals and groups working to improve human rights?

Most often, human rights workers in Malawi are able to undertake their activities with little harassment and intimidation. Since 1994, very few human rights activists have been arrested because of their human rights work. It remains relatively easy to form a human rights group and register it under the law. Since 1994, the Registrar General has registered scores of NGOs each of whose objectives include the improvement of human rights. Local human rights groups are able to receive foreign funding without government hindrance. Human rights workers have also been allowed into prisons to investigate conditions. They have also issued signed press releases and published reports critical of government without consequent direct retaliation in kind by government or its supporters. The generally positive assessment of the freedom of individuals and groups working for the improvement of human rights in Malawi must, however, be weighed against the experiences of those who have suffered as a direct result of their human rights work. Those experiences include public ridiculing and discrediting of particular human rights workers by senior politicians, as happened in February 2000 when Dr Vera Chirwa of Malawi CARER condemned the practice of women dancing at political functions (*Malawi News*, 4 - 12 February 2000). They also include the experiences of some local election observers and monitors from the Church/NGO Consortium and Article 19 who were denigrated and threatened during the 1999 parliamentary and presidential elections.

3.5 What measures, if any, are being taken to remedy publicly identified problems in this field, and what degree of political priority and public support do they have?

Government and civil society have taken some measures to remedy obstacles which hinder the realisation of the Constitution's promise of the civil and political rights which are equally guaranteed for all on paper. Some measures have been more effective than others in achieving their objectives. In the former category may be included measures such as the formulation and formal adoption of the National Gender Policy which, among other things, commits the government to the elimination of domestic violence; the Law Commission's initiative to review the effectiveness of laws against sexual

offences; and the enhancement of the institutional capacity of the judiciary to enable it to cope with increased pressure from a citizenry which, by and large accepting the rule of law, appears to be increasingly resorting to the courts for the settlement of disputes. In addition to the government, civil society groups have also taken measures to remedy the problems in the field of civil and political rights which militate against the full realisation of liberal democracy. Numerous NGOs have implemented various women's and children's rights advocacy programmes aimed at eliminating domestic violence. Organisations such as Women and Law in Southern Africa, Women's Voice, Society of Women Lawyers, the Civil Liberties Committee and Association of Progressive Women have all undertaken such advocacy. The effectiveness of such measures, however, is not easy to appreciate because the programmes have not been subjected to much systematic and comprehensive evaluation, if any.

In some areas of civil and political rights, there is very little public support or political priority given to addressing problems experienced by people wishing to exercise the rights. With regard to freedom of religion, for example, there appears to be no clear policy on how the state and the society will manage the potential conflict between Christians and Muslims. This conflict surfaced most recently in connection with the attempt by government to introduce Religious and Moral Education instead of Bible Knowledge in the primary school curriculum. The majority of Christian leaders reacted to the suggestion negatively. This prompted a counter-reaction from the leaders of the Muslim community who threatened to withdraw their children from the mainstream education system. The government has since deferred the syllabus change pending further consultations with all stakeholders. Given the potential divisiveness of the issue and the potential damage religious conflict can inflict on a society, the lack of urgency with which the issue is treated and the absence of any vigorous debate on it suggests that it is not a priority issue either for the government or society in general.

Another area in which no measures have been taken to address problems is that of lack of impartiality in the practical protection of the civil and political rights of people who oppose the government or its policies and those of people who support them. There has been no amendment of statutes that grant government discretionary powers which it can use to intimidate "opposition" journalists and undermine equal protection of freedom of expression. There has also been no change in the law which grants the police powers over assemblies and demonstrations which are so broad that they can be used to justify the selective banning of demonstrations involving perceived opponents of the government.

4.0 ECONOMIC AND SOCIAL RIGHTS

Are economic and social rights equally guaranteed for all?

Summary: The Constitution guarantees a range of social and economic rights. The realisation of these rights is, however, hampered by the limited capacity of the Malawian economy to generate resources. This is aggravated from time to time by natural disasters, such as drought, and inequitable distribution of the few resources that are available. High unemployment militates against the realisation of labour rights as employees have little bargaining power. The availability of food varies seasonally, and there is a general problem with the realisation of the other aspects of the right to development, particularly in relation to people's access to water and health services. The situation in education is mixed: enrolment is generally on the rise while learning materials and teachers remain in short supply. The scope of social and economic rights has been contested in the context of litigation, particularly in relation to employment and education.

4.1 How far is access to work or social security available to all, without discrimination?

Section 30 of the Constitution guarantees every person the right to development which entitles "[a]ll persons and peoples" to enjoy "economic, social, cultural and political development". The guarantee requires the State to take all necessary measures for the realisation of the right including "equality of opportunity for all in their access to basic resources, education, health services, food, shelter, employment and infrastructure". The extent to which "development" is made available to all without discrimination is not known, although recently it has been argued by opposition parties in Parliament that the government distributes development resources unequally. It has been argued, for example, that development projects, and the employment opportunities they entail, are not allocated equitably among the regions. It has been argued by some that the Southern Region enjoys the most benefit out of government development programmes while the Northern Region has the least benefits (*Hansard Debates of Parliament*, 13 March 1996, p.270). As indicated above, the Constitution intends the right to development to be inclusive and non-discriminatory in application. It makes specific mention of "persons and peoples" and "women... and the disabled" as beneficiaries of the right thereby recognizing cultural heterogeneity and social disadvantage. In practice, discrimination in the distribution of employment opportunities in particular circumstances, for example, is quite common and mainly disadvantages vulnerable social groups such as women and people with disabilities.

All the preceding has to be understood in the context of the country's high unemployment levels and lack of any formal social security system to ameliorate the effects of unemployment or poor conditions of employment. Such inadequate protection of economic and social rights is a potential source of social and political instability. In the case of Malawi, however, the prospects of such instability are reduced by the fact that the vast majority of the unemployed and other socially marginalised social groups are located in rural areas and not in urban concentrations in which political agitation might be easier. While jobs are only a means to achieving individual development, the Constitution directs the state to implement suitable policies and this can be stretched to mean effectively that the state has a duty to take measures to ensure adequate employment. Read with the further directive to the state to "introduce reforms aimed at eradicating social injustices and inequalities", employment policies to combat discrimination seem to be constitutionally assured. Further, Section 31, Chapter IV, provides guarantees to labour, ie, people in work: "every person shall have the right to fair and safe labour practices and to fair remuneration"; and "every person shall be entitled to fair wages and equal remuneration for work of equal value without distinction or discrimination of any kind, in particular on basis of gender, disability or race". Hence, unfair practices at work ought not to constitute a barrier to people looking for work. In practice, however, they often do.

The constitutional provision seems to encompass only waged work, likewise, the directive to the state to formulate relevant policies. Yet any meaningful discussion of work must take note of unviable maize production as the pervasive source of jobs: 80% of the population and 90% of the poor depend on farms a hectare or smaller. Though casual wage labour provides two-thirds of household income, subsistence is met by meagre maize yields. Sudden cash shortage has agricultural effects such as delayed sowing, with consequences for food security, especially for female-headed households. Interestingly, a trial inputs association collapsed in 1994 due to drought and election hype (Alwang et al, 1999. See also National Sample Survey of Agriculture 1994, conducted 1992-3).

4.2 How effectively are the basic necessities of life guaranteed, including adequate food, shelter and clean water?

Although the Constitution guarantees various rights whose enjoyment ought to facilitate people's access to basic necessities of life, in practice, most people do not have adequate food, shelter or access to clean water. According to UNDP's Malawi Common Country Assessment Report of 2000, about 40-50 per cent of Malawians have no food security due to small sizes of landholdings, land degradation, degradation of other natural resources, constraints on the acquisition of farm inputs and credit and marketing of produce, farm labour shortages aggravated by high morbidity and mortality resulting from the

HIV/AIDS pandemic and gender inequalities which prevent women from fully contributing to food production (UNDP, 2000: 18-19). Food insecurity in Malawi leads directly to food insufficiency.

To the extent that negative nutritional indicators are evidence of inadequacy of food, the situation of Malawians as aptly summarised in the following quotation, is not encouraging:

Malawi's nutritional indicators remain appalling and there has been limited improvement in nutritional indicators over the past decades. Malawi's nutritional indicators are among the poorest in the SADC Region. The nutritional situation in August 1998 was as follows: 30% of children under five years are underweight, 48% of children under five years are stunted and 7% of children are wasted.

Malawi Government, *Policy Analysis Initiative* (May 1999), pp. 213-214.

In terms of shelter, there is no evidence to suggest that homelessness in Malawi is as extensive as it is in other countries. It is also likely that in the past the phenomenon was extremely uncommon if not unknown in the rural areas where kinship ties operated strongly and facilitated the accommodation of destitute relatives. Such ties are coming under increasing stress and weakening extended families' urban rural linkages (Malawi Government, 1999: 214). Lack of shelter for members of vulnerable groups is a likely consequence of the weakening of extended family ties. Homelessness even in the rural areas is therefore a likely prospect for the future. Current estimates suggest that the lack of housing is likely to be a major social problem in the next few years. The following projections of the likely situation in the countries major cities in 2003 confirm the view that "there will be serious shortage of housing for the Low (sic) income groups, especially in urban areas":

Housing Need in the Year 2003

City	Total Population	"Traditional Housing Area" (low-income) Population	Plot/Housing Need	Supply	Shortfall
0Blantyre	743,202	619,425	66,649	42,300	24,349
1Lilongwe	675,130	526,601	55,210	32,670	22,540
2Mzuzu	117,481	101,209	10,912	6,320	4,592

Source: adapted from Chilowa, W, "Demographic Projections and their Implications for Urban and Rural Housing in Malawi", unpublished paper presented at the National Housing Policy Workshop. April, 1996.

Access to clean water is another aspect of the right to development. According to government estimates, in the period between 1997 and 1998, over 38% of the population do not have access to safe water. Perhaps predictably, more people had access to safe water in the urban areas than they did in the rural areas: in the urban areas 91.8% of the population had access to safe water compared to only 57.2% in the rural areas (Malawi Government: 1998).

Percentages of People With Access to Safe Water in Malawi

	Mala wi	Southern Region	Central Region	Northern Region	Rural Areas	Urban Areas
Safe Water	61.8	64.9	57.3	62.9	57.2	91.8
Unsafe Water	38.2	35.1	42.7	37.1	42.8	8.2

Source: Malawi Government, *Integrated Household Survey 1997-1998* (1998)

It is worth noting that although in general a high percentage of people in the urban areas have access to safe water, occasionally the percentage drops significantly because of technical problems with the water supply system and the drying up of sources (Malawi Government, 1999).

4.3 To what extent is the health of the population protected, in all spheres and stages of life?

Chapter III of the Constitution on Fundamental Principles voices the state's welfare concerns . The first paragraph of section 13 in that Chapter is on gender equality, and the following two on nutrition and health respectively. Nutrition is seen as the means to health and, intriguingly, to "self-sufficiency". The state is also charged with providing "adequate health care, commensurate with the health needs of Malawian society and international standards...." Recently, The National Commission for Women in Development bemoaned "the lack of adequate access for women to maternal and child health care, family planning information and services, education, training and skills development for employment". Given that 30% of households are headed by women earning low incomes, the health policy is in danger of failing those it is constitutionally bound to serve, and more widely,

their dependants whose conditions are precarious to begin with. It also suggests that the Commission is taking a rounded view of factors in health, notably the role of work, such as multiple demands and the very nature of employment.

The actual health protection afforded the population has been independently assessed by various organisations, including UNDP and UNICEF in cooperation with national ministries responsible for health, planning, population and family planning. Civil Society groups have also contributed. The assessments have included the Common Country Assessment Process (CCA), which in terms of health presents a very grim picture:

Health standards are low and the indicators continue to be among the worst in Africa. Life expectancy at birth is estimated at 48 years. Infant and under-5 mortality are respectively 134 and 211 per thousand live births. Maternal mortality is also very high. With 620 maternal deaths per 100,000 live births, Malawi has one of the highest maternal rates in the world....There are just over 500 static units providing health services and the doctor population ratio stands at around one doctor per 50,000. Most health facilities are poorly organised and ill-equipped with some of them having no stock of even basic drugs.

UNDP, *Malawi Common Country Assessment Report, 2000*, p.4

Despite the problems in the overall picture, there have been some successes in some particular areas in the health sector. For example, according to UNDP Human Development Report for the year 2000, rates of immunisation for one year old infants in the period between 1995 and 1998 were 100% and 90% for tuberculosis and measles respectively (UNDP, 2000 (2); 193). However, these cannot off-set the adverse consequences of the general failure of the health system to provide adequate preventive and curative health to the general population. Even in comparison to other similarly ranked developing countries, the situation of Malawi appears to be quite poor in a number of critical areas as the following data show:

HDI Rank	infants with low birth weight (%) 1990-97	pregnant women with anemia (%) (1975-91)	Tuberculosis cases (per 100,000 people-1997)	Malaria cases (per 100,000 people-1997)	People living with HIV/AIDS (total number-1997)

161 Gambia	..	80	116.1	27,369.4	13,000
162 Guinea	13	..	56.8	10,951.4	74,000
163 Malawi	20	55	205.0	..	710,000
164 Rwanda	17	..	79.3	20,309.9	370,000
165 Mali	16	58	43.7	3,688.3	89,000

Source of data: UNDP, *Human Development Report* (2000), p.193

The most prevalent diseases in Malawi are tuberculosis and malaria which have been compounded by HIV/AIDS. Most patients have no access to hospitals and will in most cases resort to buying drugs on the open market from traditional healers or travelling salesmen who peddle a wide array of antibiotics and other pills of dubious origins. Even among those patients who do resort to hospitals for treatment, it is not uncommon to find some who combine the hospital treatment with traditional medicines. In any case, as noted in the UNDP Common Country Assessment Report cited above, state hospitals usually have inadequate supplies of essential drugs. State hospitals also have insufficient numbers of health professionals. In his statement to the 2000 budget session of Parliament, the Minister of Health went so far as to describe the shortage of health professionals as the biggest challenge facing the health sector in Malawi (*The Nation*, 20 June 2000). Proper diet, potable water, and mosquito control can eradicate many of Malawi's health problems, although the disease AIDS is likely to reverse any gains which would accrue from the improvement of diet and water supply as well as mosquito control. By 1997, it was estimated that over 10% of the workforce in the military, education and health care sectors would die of AIDS and that since the epidemic started, overall demand for health care had increased by 50%, total national expenditure had increased by 81% and the mortality rate had increased by 200% (Conroy, 1999: 12-13). Malawi's health problems are unlikely to be eradicated in the foreseeable future. On the contrary, they are likely to become more serious as they get compounded mainly by insufficient public funding of the health sector, resulting partly from the use of public funds to service the country's foreign debt. As noted by the Malawi Programme Representative of OXFAM:

Malawi one of the poorest countries in the world, where one in four children die before the age of five, will have recently been spending a third of government revenue servicing its external debt rather than on education or health care.

A. F. Gibbon, Malawi Programme Representative of OXFAM, quoted in *The Daily Times* 29 September 2000

4.4 *How extensive and inclusive is the right to education, including education in the rights and responsibilities of citizenship?*

The constitutional right to education is extensive and inclusive, (Chapter III, Fundamental Principles). Accordingly, the state is directed to "provide adequate resources to the education sector and devise programmes" in order to:

- eliminate illiteracy in Malawi;
- make primary education compulsory and free to all citizens of Malawi;
- offer greater access to higher learning and continuing education; and
- promote national goals such as unity and the elimination of political, religious, racial and ethnic intolerance.

Hence, education contains aspects of utility, progress, participation, and, significantly, nation-building. Primary education elsewhere in the Constitution is spelt out as comprising five years, and educational development is elsewhere treated as a child right.

In March 1994, 25,000 teachers went on strike for pay and conditions in schools and colleges (ARB, 1994). Poor conditions of employment are common among teachers, particularly those who teach in primary schools. Most primary school teachers live in substandard housing, are lowly-paid and do not receive their salaries regularly. The adverse effect of this on the motivation and dedication of teachers is quite obvious as must be the connection between the lack of motivation and dedication of teachers and their inability to facilitate the realisation of the right to education through teaching. The problems faced by teachers are just some of the problems faced by the education sector as a whole in the 1990s. There have also been inadequacies in the numbers of qualified teachers and learning materials, shortages of proper infrastructure and administrative and academic problems in the national examination system. The introduction of Community Day Secondary Schools, for example, contributes to improving accessibility of education. However, such access will not be of much benefit because most of such schools will lack basic resources. Outside of the formal education system, there are very few educational opportunities. There are no simple newspapers to encourage adults to read and, even if they could, newspapers, magazines and books are prohibitively expensive - the cost of one daily newspaper is roughly equal to the daily minimum wage. Public libraries are few and far between. In 1999, there were less than ten public libraries in the whole country. Adult literacy classes which used to be organised in communities by the government appear to have been discontinued in most areas due to the lack of resources.

4.5 *How free are trade unions and other work-related associations to organise and represent their members' interests?*

Section 31 of the Constitution provides for "the right to form and join trade unions or not to form or join trade unions". Elsewhere, the composition of the Senate provides for trade union representation (section 68). The Constitution further provides recognition of the right to strike by requiring the State to "take all measures to ensure the right to withdraw labour". The provisions of the Constitution are supplemented by those of the 1996 Labour Relations Act which reiterates the rights of trade unions and those of workers to join them. Ihonvbere (1997) reports unprecedented anti-Banda strikes in 1992. Since the 1994 election, trade unions have enjoyed a degree of freedom of association guaranteed by the Constitution by organizing in various sectors. However, CTUC (1999) reports that serious problems beset the exercise trade union rights. The International Confederation of Free Trade Unions' *Annual Survey of Violations of Trade Union Rights, 1998*, accuses the Malawian government of "banning mass meetings, strikes and marches... (t)rade union officials were increasingly victimized" (CTUC 1999, page 29). A general strike against VAT and inflation on essentials was declared illegal and the police were brought onto city streets to ensure that the declaration was upheld. Employers fired union leaders and the government only entertained civil servant concerns over redundancies after international trade union support for the workers. The new EPZs are subject to labour law, but in practice unions cannot operate there and working conditions remain poor (ibid, page 30).

Despite the serious problems reported in the ICFTU's survey, the fact remains that since 1994, trade unions have gained in confidence and have increased their membership although workers are still generally wary of participating in trade union activities which they perceive to be without benefit, too militant, too financially demanding by way of subscription fees or too time consuming (Ministry of Labour, 2000). Nevertheless, Malawian trade unions currently enjoy more influence than they did during the dictatorship years when they were subdued together with the rest of civil society. There is an overall increase not only in numbers of the members of some unions but also in the number of new trade unions. According to the Registrar of Trade Unions, in by the middle of 2000, there were over 21 registered trade unions with a total estimated membership of over 80,000, the overwhelming majority of whom were men (Ministry of Labour, 2000).

The biggest threat to the effectiveness of trade unions appears to be the current divisions between unionists themselves. This divisive conflict underlies the current dispute between Malawi Congress of Trade Unions (MCTU) and the Congress of Malawi Trade Unions (COMATU) as well as that among members of the Civil Service Trade Union (CSTU). In the former dispute, the two unions are competing for leadership of the trade union movement in Malawi, while in the latter dispute, the disagreement is between two factions of the same union and relates to whether the current executive committee of the CSTU was elected in accordance with the constitution of the union. Non-unionised labour does not have the same legal protections as those available to members of trade union. The differences are however not particularly significant because of the

extensive protection afforded to all workers by the Employment Act of 2000. This Act safeguards all employees in terms of job security, conditions of employment and severance arrangements regardless of whether they belong to a union or not. Nevertheless, one advantage that unionised labour has is that it can more readily rely on the solidarity of workers in other establishments than non-unionised workers who do not have similar formal relationships with their counterparts in other places. This explains why categories of workers who have not had unions before are keen to establish them. The latest example is that of domestic servants who are in the process of establishing a union for workers in that sector. Of course, the solidarity which unions normally provide is likely to be diminished in Malawi if the internal divisions in the unions described above are not resolved.

Regional organisations such as SATUCC do not appear to be active in Malawi. The last time most people heard of this organisation was when its general secretary, Chakufwa Chihana, became one of the first political leaders to challenge the one party state when it was dangerous to do so. Since then, Chakufwa Chihana himself does not appear to have had an active part in trade union activities, perhaps because of his involvement in party politics. There also appears to be no evidence to indicate that he has used trade unions for his political ends.

4.6 How rigorous and transparent are the rules on corporate governance, and how effectively are corporations regulated in the public interest?

The Constitution provides that one of the goals of the principles of national policy is the achievement of a sensible balance between the creation and distribution of wealth through “the nurturing of a market economy and long-term investment in health, education, economic and social development programmes”. One way of nurturing the market economy is by providing of a regulatory regime which facilitates the establishment and operation of corporations. The principal statute for the regulation of corporations in Malawi is the Companies Act. The Companies Act is supplemented by the common law. Among other things, these laws include rigorous rules on various aspects of corporate governance, such as regular financial reporting to shareholders, the Registrar of Companies and the tax authorities. There are also statutory rules safeguarding the interests of minority shareholders. The rules on corporate governance are transparent because they are contained in publicly available laws. The Registrar of Companies, who is the main corporate regulatory authority, is a public office and is required by law to make information about public companies available to the public. In any case, like any other public office, the Registrar is also required by the Constitution to give information to people to enable them to exercise their human right to have access to information (section 37). The Registrar is also bound by the Constitution to give reasons for his or her administrative action, including decisions on corporate governance, because the Constitution guarantees every person the right to be given reasons in writing for administrative action which affects or threatens his or her rights, freedoms, legitimate expectations or interests (section 43(2)).

The Registrar of Companies also has some regulatory powers over external companies. For its part, the Reserve Bank of Malawi also has some regulatory powers over corporations, mainly in relation to the control of foreign exchange. In more recent times, the Anti-Corruption Bureau has played a significant watchdog role, particularly in monitoring transactions between the government and foreign companies. The Bureau is in the process of investigating at least two scandals. The first regarding irregularities in the awarding of a pre-shipment contract to a Swiss corporation while the second involves the grant of a contract to a foreign company to make national identity cards. The High Court has also been called upon to rule on various matters of corporate governance. The most recent major case is that which involves a prominent Malawian businessman, Mark Katsonga. The case involves the fate of Candlex Limited, a company which once epitomised corporate success by a Malawian but is now subject of contested control between the company's original Malawian owner and a German company which Candlex Limited allegedly owes vast sums of money. Issues arising out of the regulation of corporate governance of companies, partnerships and other corporations have not been the subject of much public debate because they do not have a visible relationship with the immediate concerns of the majority of Malawians. On the other hand, the governance of statutory and other public sector organisations has generated more interest and public debate.

Almost invariably, public sector organisations such as the statutory utility corporations are required to submit annual reports of their activities to Parliament. In this way, matters of internal accountability and public interest are exposed to public scrutiny and debate (*Saturday Nation*, 26 August 2000). In some ways, prospects of increased corporate transparency were set back by the High Court in 1994 when it decided in the case of *Attorney General v Wood Industries Corporation of Malawi*, that workers did not have sufficient interest in a statutory corporation to have the right to seek the assistance of the courts to stop its privatisation. In other words, the decision to privatise could have been properly reached after processes which need not have been communicated to the workers.

4.7 What measures, if any, are being taken to remedy publicly identified problems in this field, and what degree of political priority and public support do they have?

A number of measures are being taken to remedy the problems which undermine livelihoods. These measures are mostly at a policy level and are, therefore, contingent upon other variables for their translation into tangible programmes which benefit the people. For example, as mentioned earlier, one of the constraints on the realisation of the right to development, which includes the right of equal access to food, is the shortage of arable land. This problem has been publicly identified and the government instituted a Commission of Inquiry on Land Policy Reform whose research established the need to reorganise the imbalances between the majority and minority over land. Since the report of the research was released, however, there has been little follow up in terms of reforms of the relevant laws. It seems that despite its potentially explosive nature, the problem has generally lacked political priority. The extent of public support for land reform is also difficult to measure, although in the period between September

and October 2000, a number of non- governmental organisations became engaged with the issue by demanding that the government set up a special fund to buy off excess land from foreigners for distribution to the poor (*The Nation*, 21 September 2000) .

The proposed land reform programme would go a long way towards addressing the problem of lack of access to food. If implemented, the programme would improve people’s access to land which is the basic means of gaining access to food for the vast majority of Malawians. As recent events in Zimbabwe have shown, however, in the absence of sufficient resources at its disposal, a government cannot implement a land reform programme such as that proposed by the Malawian Land Policy Reform Commission of Inquiry, which involves purchasing land from private owners and redistributing it. Another possible constraint on a redistributive land reform programme in the case of Malawi is that it would inevitably have adverse international implications for Malawi since large tracts of land in such places as Thyolo and Mulanje which were acquired at little or no cost during the colonial period remain in the hands of foreign nationals and corporations. Apart from land reform, the government also plans to maximise productivity by facilitating the application of low cost technologies. For example, in 1998-99 fiscal year, government planned to invest US\$9 million to develop irrigation farming (Malawi Government, 1999: 235). The funding of irrigation projects exemplifies the extent to which a wide range of donors are also taking measures to address the publicly identified problems of food insecurity and insufficiency which negate the right to development guaranteed by the Constitution. In 1999, the following donors were reported to have had irrigation development activities in various parts of the country: the African Development Bank (ADB), the Danish International Development Agency (DANIDA), the International Fund for Agricultural Development (IFAD), The Food and Agriculture Organisation (FAO) and the European Union (EU) (*ibid*: 234).

For its part, the government has taken other measures to address the problems which have been identified so far in the area of food production. For example, the government has formulated the Agricultural and Livestock Development Strategies and Action Plan aimed at improving food self sufficiency and the nutritional status of the population. The donor aid mentioned earlier has also been more directly related to the provision of food than the funding of facilitative technologies such as irrigation. In the 1996/97 farming season, for example, donors financed the importation of 15,000 tonnes of maize to alleviate shortages and another 10,000 tonnes for the Strategic Grain Reserve. In 1998, the donors financed the importation of 30,000 metric tonnes of maize for the replenishment of Strategic Grain Reserves and another 30,000 tonnes for “Vulnerable Group Feeding” (*ibid*: 211). Donor commitments in grants and loans to the agricultural sector in general for the period 1999-2004 are worth the following amounts:

<u>Donor</u>	<u>Amount</u> (US\$ millions)
African Development Bank	79.0
World Bank	48.5

USAID	42.5
IFAD	38.9
European Commission	36.2
Japan	14.4
DFID	8.0

Source: Malawi Government, *Policy Analysis Initiative* 1999, p 240

Other measures intended to address the problem of nutritional inadequacies include the creation of an Inter-Ministerial Committee on Nutrition to coordinate interventions in the area; the implementation of a programme by the World Food Programme which assists selected communities in about ten districts to manage undernourished children at village level using food supplements; the dissemination by government to the public of information on nutrition, such as through the publication and translation of a booklet on Nutrition Facts for Malawian Families; the fortification of foods with micro-nutrients, including through the salt iodisation programme; and the promotion of dietary diversification using guidelines harmonised with the Southern Africa Development Community (SADC) regional standards (Malawi Government, 2000(2))³.

Improving people's access to water is another area in which some measures are being taken by various actors in order to improve the insufficiencies that were noted earlier. For example, there are a number of programmes which the government and non-governmental organisations are implementing in order to improve access to safe water in the rural areas by constructing and rehabilitating wells and boreholes. Among the current programmes are the District Based Shallow Water Rehabilitation, District Based Hand Augured Wells and Technology (Malawi Government: 1999(3)). The government has also formulated the Water Resources Development Policy Strategies whose stated objective is the management of water resources so that water is clean and available at an affordable cost without jeopardising the environment and future generations.

In the areas of education, it is obvious that the right to education cannot be enjoyed fully by Malawians unless the government invests adequate public funds into the education sector. In relation to other sectors, education appears to have been given the biggest share of recurrent expenditure in the 1998/99 budget as the following shows:

Allocation of Recurrent Budget

1 ³ Malawi Government, 2000(2), *Economic Report 2000* .

Ministry	Allocation (millions MK)	% of voted expenditure
Education	1,665	23.9
Health	837	12.0
Finance (extra budget)	625	9.0
Subventions	520	7.5
Defence	407	5.8
Lands and Housing	356	5.1
Agriculture	333	4.8
Finance (Ministry)	314	4.5
Foreign Affairs	282	4.1

Source: Malawi Government Budget Documents 1998/99

In the area of health, a number of measures are being taken by the Ministry of Health and other stakeholders to remedy the problems outlined above. Predictably, HIV/AIDS has been accorded a high priority in government responses to problems in the health sector. Among other things, since 1997, the government has had a Cabinet Committee on AIDS whose objective, among others, is to “mainstream HIV/AIDS-related activities in government and civil society” (Malawi Government, 1999: 121). In response to high maternal mortality rates, the government has introduced, among other things, the National Safe Motherhood Initiative which encompasses the training of nurses, midwives and health workers and supplying them with clean delivery kits (*The Nation* 21 July 2000). The Ministry of Health and Population is also in the process of developing its fourth five-year National Health Plan, with an Essential Health Package as an integral part of the plan. The programmes and service areas to be included in the Essential Health Package include programmes in the areas of water and sanitation, community based health care, nutrition, STD/HIV/AIDS, malaria control and safe motherhood (Malawi Government, 1999: 325).

The lack of adequate access to shelter, as an aspect of development, is being addressed by a number of actors. For example, the statutory Malawi Housing Corporation is reported to have plans to build over 5000 houses with funds provided by the Development Bank of Southern Africa, while the government is in the process of facilitating the building of at least 2,900 houses with the assistance of the government of Libya (*The Nation* 18 July 2000). At the same time, problems of housing are currently a matter of great concern to civil servants, following a

decision by the government not to provide subsidised housing with effect from 1 October 2000. Instead of providing housing, the government will give each civil servant a housing allowance at rates which, in reality, are not enough to enable recipients to pay rent for houses on the open market.

II. REPRESENTATIVE AND ACCOUNTABLE GOVERNMENT

5.0 FREE AND FAIR ELECTIONS

Do elections give the people control over governments and their policies?

Summary: General elections in Malawi attract large voter out and are peaceful and orderly. They are generally declared free and fair by local and international observers. However, elections are not yet fought on the basis of policies but on personalities. Parties enjoy the right to campaign although this right has certain limitations in terms of their access to the electronic media. The electoral process needs to be managed and conducted more efficiently. The 1999 elections were faced with numerous logistical and administrative inadequacies arising out of lack of adequate planning and co-ordination with the various stakeholders. This undermines the efficiency of the whole process. The elections have also brought to the forefront the need to restore the credibility of the Electoral Commission and to build the capacity and skills of the commission's secretariat.

5.1 How far is appointment to governmental and legislative office determined by popular competitive election, and how frequently do elections lead to change in the governing parties or personnel?

- ◆ **President:** The people directly elect the president. According to section 80 (2) of the Constitution, the election of the President and those of the members of the National Assembly are held concurrently on the basis of direct, universal and equal suffrage. The presidential and parliamentary elections of 1994 and 1999 were held on this basis and the results are presented below:

1999

CANDIDATE	TOTAL VOTES	% OF VOTES
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B. Muluzi	2,442, 6885	51.37
G.Chakuamba	2, 106, 790	44.30

Source: *Electoral Commission Report. 1999*

1994

CANDIDATE	TOTAL VOTES	% OF VOTES
H.K. Banda	996353	33.45
C. Chihana	562862	18.90
B. Muluzi	1404754	47.16

Source: *Electoral Commission Report 1994.*

The 1994 figures indicate that Bakili Muluzi emerged the winner with single largest number of votes of 47.16%. The other two candidates secured votes jointly coming to 52.3 votes. That election brought about a change of government from single party to multiparty and thus re-introduced the presence of opposition parties in the legislature since the election of 1961. In the 1999 elections Bakili Muluzi emerged the winner, polling 51.37% of the votes cast. The opposition presidential candidates contested the results on two grounds: that there had been rigging on the part of Bakili Muluzi and the United Democratic Front and that the Constitution required that for a candidate to be declared the winner of the presidential election he or she must have obtained a number of votes greater than 50% of all registered voters (*Chakuamba, Mkhumbwe and Kalua v the Electoral Commission*). On the criteria for winning the presidential election, the High Court has since decided the case in favour of Bakili Muluzi and the Electoral Commission and held that the winning candidate need only obtain over 50% of the votes cast. This decision has since been appealed to the Supreme Court of Appeal, while the aspect of the case related to allegations of rigging is yet to be decided by the High Court. The judicial challenge of the election results however, do not appear to have significantly affected the smooth running of the government.

- ◆ **The Cabinet:** Section 92(1) of the Constitution specifies that there shall be a cabinet consisting of the President, the Vice-President, the Second Vice-President and such ministers and Deputy Ministers as may, from time to time, be appointed by the President. Ministers and their Deputies are, therefore, appointed by the President. There is no requirement that they should be elected Members of Parliament. Indeed since 1994, the Cabinet has been composed of Ministers who are Members of Parliament as well as others who are not. Since 1994, at any given time, at least half of the members of the Cabinet have been elected Members of parliament. At least 78% the current Cabinet consists of members who are also serving Members of Parliament. The situation over the years may be summarised as follows:

Year	Total Number of Ministers	Number of Ministers who are also MPs	Number of Ministers who are not MPs
1994 the 1 st cabinet	22	11	11
1994 merger cabinet UDF + AFORD	35	23	12
1995 May	34	23	11
1998 March	37	31	06
1999 June	30	23	07
2000 March	33	26	07

Sources: *Hansard Debates of Parliament* 30 July 1994, 8 November 1994, 12 May 1995, 27 March 1998 and *Malawi Government Gazette* 2 July 1999, 1 March 2000.

- ◆ **Legislature:** The Constitution provides for a bicameral Parliament, consisting of the National Assembly and the Senate (section 49). The Constitution extensively deals with the formation, powers and functions, and dissolution of the Senate in Sections 68 to 72. In the first term of the new government the Senate was not formed, partly because the local government elections, which would have produced some of the members of the Senate, had not been held. The elections are now scheduled to take place during the last week of November 2000 and perhaps the Senate will then become functional.
- ◆ **The National Assembly:** Election to the National Assembly is based on the first past the post electoral system. Section 62 of the Constitution relates to the composition of the National Assembly and provides that: “[t]he National Assembly shall consist of such number of seats representing every constituency in Malawi, as shall be determined by the Electoral Commission.” The number of seats (which is also the number of constituencies) has been growing constantly for a number of years as the following indicates:

Year	Number of Parliamentary Seats/ Constituencies
1992	141
1993	177
1998	193

The seats/constituencies in the three regions of the country have been distributed among the political parties as follows:

Distribution of Seats following the 1999 Parliamentary Elections

Region	Political Party				
	MCP	UDF	AFORD	Independent	TOTAL
North	4	1	28	0	33

Centre	54	16	1	1	72
South	8	77	0	3	87
Total	66	94	29	4	193

Source: *Electoral Commission Report 1999*

As of August 2000, following some defections and deaths, the distribution of seats/constituencies is as follows:

Number	Political Party			
	MCP	UDF	AFORD	TOTAL
Seats	64	99	30	193

For a historical comparison, the seat/constituency numbers are outlined below:

Region	Political Party				
	MCP	UDF	AFORD	Independent	TOTAL
North	0	0	33	0	33
Centre	51	14	3	0	68
South	5	71	0	0	76
Totals	56	85	36	0	177

Source: *Electoral Commission Report 1994*

The statistics above indicate that although the United Democratic Front amassed the largest number of seats, it failed to get a majority in both elections. Therefore, in 1994 it had to form a coalition with AFORD for the purposes of gaining a parliamentary majority.

5.2 *How inclusive and accessible for all citizens are the registration and voting procedures, how independent are they of government and party control, and how free from intimidation and abuse?*

First consider the following statistics:

Number and Regional Distribution of Votes: Referendum 1993

Region	Registered	Voted	For Single Part	For Multi-Party	Null & Void
North	629,339	444 196	47,103	392,569	4,526
South	2,236,350	1,438,371	208,959	1,201,395	28,017
Central	1,833,820	1,270,881	832,413	400,032	38,436
Totals	4,699,509	3,153,448	1,088,475	1,993,996	70,979

Source: *International Observer Briefing Manual for the Parliamentary and Presidential Elections, 1994.*

Number and Regional Distribution of Votes: 1994 and 1999 Elections

(the figures in brackets are for 1994 and those outside for 1999)

Region	Registered	Voted	Null &Void	Valid.
North	(545,195)	(459 708)	(6,758)	(452,950)
	678,906	652, 505	5,096	647, 409
Central	(1,461,367)	(1,168,473)	(30,506)	(1,137,967)
	1, 975,203	1,839, 032	37,876	1,801,209
South	(1,768,694)	(1,376,654)	(33,286)	(1,343,368)
	2,417,713	2,263,885	48,759	2,215,126
Total	(3,775,256)	(3,004,835)	(70,550)	(2,934,285)
	5,071,822	4,755,422	91,731	4,666,751

Source: *Electoral Commission Report 1994 and Electoral Commission Report 1999.*

Voter turn out has been progressive from the time of Referendum to the 1999 elections. 67 % of total registered voters voted in the Referendum, 80.54 % in the 1994 elections, and 93.76 % in the 1999 elections. What has been difficult to establish is what percent of the eligible voting population registered as voters. From the above table we find that the Referendum registration

figures are much higher than the 1994 elections registration figures. An explanation for this has been given in the 1994 Electoral Commission report that:

The Commission decided to register voters afresh throughout the country because of, firstly, the unreliability of the 1993 National Referendum figures due to alleged multiple registration and, secondly, the need to introduce a new registration system which would ensure security for the entire electoral process and also enable computerisation of the electoral register.

The 1999 registration figures indicate a much higher registration figure yet it still left about 100,000 or so potential voters unregistered due to lack of adequate registration material. The inaccurate population figures were responsible for the shortages. Therefore, it is not possible to give an accurate assessment of registered voters out of the eligible voting population, though it is possible to assess the voter turnout. People have exercised their political rights by coming forward willingly with enthusiasm and vigour to participate in the registration and voting process in the elections held so far. There have been incidents of threats and intimidation but it appears that these have not been on such a scale as to substantially affect voter registration and turnout.

During the 1994 elections a case of alleged confiscation of voter registration certificates by opposing political parties was reported. This was checked by passing an amendment to the Parliamentary and Presidential Elections Act (Amendment Act No.10 of 1998). The Act now stipulates that any person found guilty of the confiscating the certificates shall be liable to a fine of K50,000 and to imprisonment for seven years (section 24(5)). Generally there have also been problems in the registration process such as lack of any written or official form of identification of voters. This is particularly the case with voters in rural areas. The Parliamentary and Presidential Elections Act allows for verbal or visual identification by a chief, headman or any one from the village. However, due to the lack of adequate communication, the message does not filter down to the people clearly. This problem was felt more in 1994 than in 1999. Registration by underage people is also a problem, as is registration by non-citizens, especially in districts bordering neighbouring countries.

During both 1994 and 1999, the registration period had to be extended. The Parliamentary and Presidential Elections Act stipulates that the registration period should not be less than 30 days and should expire not less than 21 days before the polling day. This period was reduced to 14 days by an Amendment Act No.16 of 1994 providing scope for further extension. In 1994 the registration period was extended to five weeks and in 1999 it was extended to six weeks. This extension caused difficulties in the exercise of other electoral activities. In the 1999 elections, the lack of adequate registration materials was compounded by other administrative and logistical problems. These adversely affected the registration and, thereby, the voting process, leaving out at least 100,000 potential voters unregistered. Despite suspicion, there appears to be no clear evidence to suggest that the freedom of the people to participate in the electoral process was or has been deliberately curtailed or challenged.

The performance of the Electoral Commission also came under scrutiny. From time to time, the Commission has faced accusations of incompetence and bias levelled by political parties and civil society. Even the High Court has on at least one occasion taken notice of these accusations, as is evident from the following quotation from a judgement in one of the cases brought to the court in the run up to the 1999 elections:

....there are other reports and documents showing and complaining about the weaknesses which surfaced at some stages of the electoral process.... It is clear from the statements of [election observers] that the Electoral Commission then had attitude problem (sic), ignored well intentioned advice, failed to stick to scheduled programmes and adopted style of management by crisis. This list is not exhaustive.

Chakuamba v Electoral Commission High Court Civil Application No.29 of 1999, p.

5.3. How fair are the procedures for the registration of candidates and parties, and how far is there fair access for them to the media and other means of communication with the voter?

The procedures for the registration of candidates and parties are generally fair. The qualifications for registration of candidates are inclusive and clear. Procedures for the registration of parties are also clear and not unduly cumbersome. Records held by the Registrar of Political Parties in accordance with the Political Parties (Registration and Regulation) Act indicate the following:

PARTIES REGISTERED DURING 1992-1994	PARTIES REGISTERED AFTER 1994
Alliance For Democracy – AFORD	Christian Democratic Party (CDP) Reg. 15-2-95
United Democratic Front – UDF	National Patriotic Front (NPF) Reg. 25-5-95
United Front For Multiparty Democracy – UFMD	National Unity Party (NUP). Reg. 1.8.95
Malawi Democratic Party –MDP	Malawi Freedom Party (MFP) Reg. 26-1-96
Malawi National Democratic Party – MNDP	Peoples Democratic Party (PDP) Reg. 10-10-96
Malawi Congress Party- MCP	Labour Party Reg.on LP 27-5-97
Malawi Democratic Union – MDU	United Party. (UP).Reg.on.15-8-97
The Congress For The Second Republic of Malawi – CSR	Sapitwa National Democratic Party (SNDP) Reg. 24-10-97
	The Forum Party (FP). Reg. 11-11-97
	Mass Movement For Young Generation (MMYG) Reg. 19-8-98
	National Solidarity Party (NSP). Reg. 17-2-99

	Congress For National Unity (CONU) Reg. 17-3-99
	National Independent Party (NIP) 3-12-99.

source: *Register of Political Parties* (held by the Registrar of Political Parties)

Part V of the Parliamentary and Presidential Elections Act deals with the right to campaign by political parties. Section 56 (1) of the Act guarantees all political parties the right to campaign in an election and sections 56 to 66 deals exhaustively with the rules and regulations guiding the exercise of political rights by parties. Parties have the right to campaign as well as the right to have the substance of their campaign propaganda reported on radio news broadcasts of the Malawi Broadcasting Corporation. The High Court has restated the requirement for fair coverage of political opponents by the Malawi Broadcasting Corporation in the case of *Kafumba v The Electoral Commission*. Political parties also have the right to monitor the registration of voters, the polling and the counting of votes in every registration/polling center.

Political parties have exercised these rights in the last two general elections. Both elections have witnessed rigorous campaign activities by the three major parties the MCP, UDF and AFORD. Political parties draw their support mainly from rallies and campaign meetings Campaign activities generally carry a colourful festive atmosphere. However, campaigns have not been free from violence and intimidation. Rallies of a party which is not predominant in the region tends to be disrupted by the supporters of the dominant party in that region. Though there were incidents of campaign violence, there were also measures taken to combat them through the civil society institutions and the Electoral Commission. And there were no gross violations of code of conduct or any major cause for concern that could undermine the level of the rights enjoyed by parties to political campaign. Section 63 of the Parliamentary and Presidential Elections Act guarantees the right of every political party to have the substance of its campaign propaganda reported on radio news broadcast s of MBC and in any newspaper in circulation in the country. The section in its sub clauses enumerates the ways in which this right of the parties may be exercised through the MBC. The Act also empowers the Electoral Commission to play a role in ensuring that Malawi Broadcasting Corporation provides a fair base for political competition. During the 1999 elections, the Malawi Broadcasting Corporation did not provide fair coverage of all the parties contesting the election (Article 19, 2000). Some individuals even successfully challenged the biased and one -sided coverage by the Malawi Broadcasting Corporation in the High Court (*Kafumba v The Electoral Commission*).

5.4.*How effective a range of choice does the electoral and party system allow the voters, how equally do their votes count, and how closely does the composition of the legislature and the selection of the executive reflect the choice they make?*

The electoral system happens to be one of those many practices and conventions inherited from the British. In the deliberations of the National Consultative Council (NCC) in the drafting of a new constitution, the issue of the electoral system was only briefly considered and alternate electoral systems were not discussed. So the “first past the post” system has been retained almost by default.

The 1994 elections established that regionalism is the basis for the Party system in Malawi – the UDF in South, the MCP in Central and AFORD in the North.

Each region and ethnic group supported a party and a candidate originating from its area polarizing the electoral vote and politics. Osie –Hwedie explains this with the cases of prominent individuals like Chibambo, Chizumila lost in the northern region to AFORD candidates in spite of themselves being northerners because they did not contest on AFORD tickets. So also prominent individuals like Chilumpha, Malewezi lost to MCP candidates in the central region although they came from the central region.

The influence of the regional factor does not preclude that of ethnic factor as a basis for building party support. This can be deduced from the southern region based UDF getting 14 parliamentary seats in the central region and the central based MCP getting 5 seats in the southern region and northern region based AFORD getting 3 seats in the central region. These 3 seats are from constituencies bordering the northern region and inhabited by ethnic groups predominantly found in the north. The same could be said of MCP won constituencies in the south and UDF seats in the centre. The high incidence of defections, floor crossing, party alliances and mergers between 1994 to 1999 has demonstrated tremendous flexibility and mobility between parties, and shifting of loyalties between party officials that weaken both regionalism and ethnicity and make them brittle in the face of money and power. In other words, the regional and ethnic barriers are not rigid and stable. Although by and large the 1999 elections reinforced the regional voting patterns of 1994, however, there appears to be a possibility of a movement towards less parochial voting patterns if the fact that in 1999, some of the political parties won seats in what had previously been considered to be the impenetrable strongholds of rival parties.

Granted the political party system gaining ground in the country, the choice for the voter is severely limited. This is because of the dominance of single parties in particular regions of the country, and the lack of opportunity and resources for the parties not represented in the Parliament to reach them. Parties do not offer much choice to the electorate in terms of policies and ideologies (see Section 6.1 of this report). The “first past the post” electoral system limits the chances for smaller parties to be represented in Parliament. Traditional structures like Village Chiefs and Traditional Authorities are increasingly used by political parties for partisan purposes. And these authorities command great respect and obedience from the people and therefore use their position to influence the public mind on their political choice. During the 1999 elections there were strong allegations that some of the Chief Executive Officers (then called District Commissioners) had compromised their political neutrality. The opposition MCP-AFORD alliance expressed concern at the way in which some senior civil servants were dismissed, transferred or forced to retire immediately before the election period. Some of the District

Commissioner's offices such as those in Lilongwe, Mzuzu, Blantyre, and Mangochi, were accused of possessing excess voter registration forms which, were released at night to some of the contestants.

5.5. How far does the legislature reflect the social composition of the electorate?

As political parties are mainly based on regionalism, the National Assembly represents the regional interests and aspirations of the people. It would be difficult to assess the ethnic representation in terms of percentages of each ethnic group among Members of Parliament. And at this point in time it may even be unwise to do that as it may create suspicion and fear in public minds. People who are not Malawian citizens, can vote if they have lived in the country for a period of at least seven years. The social diversity of the legislature is also reflected in the fact that among the Members of Parliament (and the Cabinet) there are a number of people of Asian and European origin. This racial diversity appears to be reflected in the composition of the executive committee of the UDF more than in the case of any other party.

As indicated earlier, the constitutional provision on the composition of the Senate addresses representation of interest groups representing health, education, farming, religious and business sectors. In this way, it contributes to making the legislature as a whole reflect the social composition of the electorate. The constitutional requirement for women to be included in the composition of the Senate also serves to contribute to the redressing of the gender imbalance in the composition of the legislature. At present, there are only 16 women Members of Parliament out of a total of 193 Members. This is despite the fact that women comprise more than 50% of the population of Malawi. Even with more women Senators, therefore, it is unlikely that the gender imbalance in the composition of the legislature will be corrected if no radical measures are taken to give women more access.

5.6 What proportion of the electorate votes, and how far are the election results accepted by all political forces in the country and outside?

As indicated earlier, general elections in Malawi attract a large voter turn out.(refer to ables in section 5.2.). However the same cannot be said of the subsequent by-elections. Turn out in by-elections have been very low and most of them preceded by serious intimidation and violence. The following table indicates the levels of voter turnout in by-elections in some of the districts in comparison to the turnout for the presidential and parliamentary elections:

Constituency	Elections	% Turnout	By-election	% Turnout
Mzimba East	1994	81.2	Dec. 1995	39.2
Nkhota-kota	1994	81.1	Sept.1995	40.3
Dowa West	1994	88	May 1997	24.3
Blantyre City	1994	84.9	May 1997	11.4
Kasungu North	1999	96.49	Aug 2000	69.3
Kasungu .NW.	1999	95.35	Aug.2000	47.63

Source:Malawi Electoral Commission, Parliamentary By-Elections: An Update 94-99.

General elections have been monitored and observed in Malawi since the time of Referendum. The local monitors are from political parties and NGOs and International Observers are from the Common Wealth, the International Foundation for Election Systems (IFES) the Organisation for African Unity (OAU) and in 1999 there was a SADC Electoral Commissions Forum. Elections have been generally declared as free and fair by these observers.

In spite of all the administrative and logistical inadequacies the 1999 elections were relatively peaceful. The turnout also surpassed that in previous elections. Any shortcomings were not generally considered by the Electoral Commission to be serious enough to justify the nullification of the elections. However, supporters of the MCP-AFORD Alliance expressed their dissatisfaction over the results by staging a peaceful march in the streets of the City of Blantyre. It was also mentioned earlier in this report that in the northern region, violence erupted as a sign of rejection of the poll results. Homes and mosques were set ablaze and properties vandalised. These incidents caused several deaths and rendered many people homeless. Furthermore, also as stated ealier, the results were contested (in the event, unsuccessfully) by the Alliance in the High Court. Throughout all this, the government continued to function normally and Parliament also met, albeit after an initial boycott by some Members of Parliament of the Alliance. The efforts of the church bodies and people's spirit of tolerance and accommodation soon contained the situation. Peace was restored and life returned to normal.

The assessment of elections as an outcome of a process involving an interplay between a number of actors and forces makes it extremely difficult to judge them as Free and Fair or as Unfree and Unfair. Taking the definition of democratic consolidation in terms of institutionalisation considering such things as the growth of the institutions like an emerging civil society, press freedom and growing consciousness of civil and political rights, would be hard to dismiss Malawi's electoral process as unfair.

5.7 What measures, if any are being taken to remedy publicly identified problems in this field, and what degree of political priority and public support do they have?

The 1999 elections have brought several issues to the surface and some remedial measures are being considered. Among the areas in which measures are being considered include: how to secure the credibility of the Electoral Commission? This issue has raised a debate on whom should the Commission consist of? Representatives of political parties, individuals on the basis of merit and integrity? And even if they are composed of party representatives as they are now, can there be a devise to secure professionally qualified, competent and committed individuals?

On the issue of regionalism as a divisive force in Malawian politics, the idea of introducing Proportional Representation for the National Assembly is being considered through informal discussions within the Electoral Commission, political parties, and other stakeholders. A national debate on this is likely to yield positive results political party officials, the Commissioners, and the people at large need education and training on the practicality of the system. Other measures that could be added relate to the need to reconsider the size of the National Assembly. The number could be scaled down from the present 193 within the conditions laid down by the constitution and without causing under-representation to any section or any part of the country. It is also important to take measures to facilitate logistical and administrative efficiency through better co-ordination between the Electoral Commission, the NGOs and the Donors. The National Consultative Group (NCG) did well to play a co-ordinating role. But there needs to be regular channels for such communication. In order to make elections domestically owned and managed, there is a need to reduce external donor dependency by striving for self-reliance and regional co-operation. There was an evident lack of co-ordination between the Electoral Commission and the donor agencies which, added to the delays in procurement of election materials. The advisory and consultancy services extended by some of them are not very relevant and therefore adequate to local conditions.

6.0. DEMOCRATIC ROLE OF POLITICAL PARTIES

Does the party system assist the working of democracy?

Summary: In the last six years political parties have proliferated in Malawi. There are twenty- one officially registered parties but only seven or so are functional. Registration of parties is extremely simple. About political parties in Malawi one feature that comes out clearly is a lack of perception of ‘What they stand for.’ Lack of an ideological perception and orientation towards clear policies and programmes is common among the parties. So also lack of adequate mechanism for keeping an approximate count of their members. Even in the case of the functioning parties interactions within the Party at various levels and between them are not common and inter party interactions are extremely limited. Party activities are too elections focused. Parties have not yet evolved democratic system of functioning within their own parties in terms of transparency, appointments, and appropriation of funds.

6.1 How freely are parties able to form, recruit members and campaign for office?

It is very easy to register as a political party in Malawi. In many respects, the performance of political parties has generally been poor, not due to the lack of freedom, but the lack of institutional capacity and training of party functionaries in the functions of political parties. Parties do not have effective mechanisms for identifying and recruiting their members. A study conducted in 1998 on political parties in Malawi revealed that the estimation of party membership or supporters was imprecise and subjective. This was due, in large part, to the absence of precise identification and recording mechanisms of party members and supporters (Kadzamira, Mawaya, Patel:1998). The former practice of the MCP of issuing party membership cards as part of the coercive tools of the state during the life of the one-party dictatorship has meant that party membership cards as a means of tracking membership has negative connotations. In the event, the current crop of political parties have no reliable way of establishing their membership, although they do recognise the need to have at least an estimate of their genuine following. Parties use public rallies as a forum for recruiting members and supporters. Often the turn out in such rallies is presumed to be their members and supporters.

What limits the competitiveness of parties is their limited perception of their long- term vision and programmes. The parties are also not clear in terms of what they stand for. As such their messages are not strong in terms of substantive matters.

There are no self-confessed communists here, no clear socialists, no religious fundamentalists agitating for a Christian, Islamic or Hindu State. There is not even a

labour movement campaigning for the interests of workers and peasants.(Kuntambila, 2000)

Even the major parties have problems in clearly formulating their ideologies and distinguishing themselves from each other. However they do have international affiliations which can be used as an indication of some ideological distinctions. In this connection, it is informative that the UDF is a member of Liberal International, AFORD has some association with Socialist International while the MCP historically had relationships with members of the Conservative government of Prime Minister Margaret Thatcher. The parties, however, do not make much of these international affiliations in public and do not use them to underscore any ideological distinctions between them. These deficiencies limit the capacity of the parties to compete and offer the electorate a genuine choice between different policies.

Positions within the parties are not always filled on the basis of elections. Competitive elections within parties are restricted because in many cases individuals are handpicked by top leaders on personal basis. Further lack of accessibility to the media especially the radio to members of opposition parties limit prospects for campaigning for posts in the party.

The Constitution requires the state to fund any party which secures more than one tenth of the national vote to ensure that it is able to continue to represent its constituency (section 40(2)). At present, only three parties that are represented in the parliament qualify for this public funding. It has been reported that, often, the opposition parties do not receive their funds on time. In 1998, the government withheld the annual allocation of funds for the political parties on the grounds that that the parties had not presented their audit reports to Parliament to enable it to ascertain if the money allocated in the previous year had been properly utilised. The constitution, which deals with allocation of funds to parties, does not make any reference to such withholding of funds. As was indicated earlier in this report (section 3.2), a member of the MCP took the matter to the High Court and the court decided that the withholding of funds was unconstitutional and should be stopped (*Attorney General v Masauli*). The withholding of the funds caused the opposition parties great difficulty in their preparation for the elections.

The parties which are not represented in Parliament have very limited resources. In the study on political parties mentioned earlier, various representatives of the parties indicated that they sometimes use personal resources to subsidise their parties although it was not clear what this meant. Some of the smaller parties unknowingly admit that the objective of their party is to acquire donor funding although they do not disclose more details about how this works. It also appears that parties sometimes get external assistance although information on this is not easy to obtain, partly because party funding remains an

unregulated area of political party activity and there are no legal obligations on parties to disclose the nature and sources of their funding.

6.2. How effective is the party system in forming and sustaining governments in office?

Out of the 21 parties currently registered, three parties are represented in Parliament – AFORD, MCP and UDF. Out of the other eighteen parties MDP, UP, CONU put up candidates for the presidential and the parliamentary elections and NPF put up some candidates for the parliamentary seats in the 1999 elections. Out of 21 parties only about six of them are significantly functional. The rest have either joined hands with the major parties or have dissolved.

The UDF government has sustained one term and is also likely to pass through the second. The credit for this goes to both the ruling and the opposition parties. In 1994 when the UDF did not have enough seats to form a parliamentary majority, it formed an alliance with AFORD. AFORD had earlier signed a Memorandum of Understanding with the MCP for an alliance similar to that it established with the UDF. So, what were the reasons for AFORD abandoning the MCP for the UDF? One possibility is that it was a marriage of convenience between UDF and AFORD. UDF needed AFORD for purposes of securing a parliamentary majority to facilitate the passing of its bills, while for its part, AFORD was worried of being blamed of secessionist tendencies and would be able to exercise some executive power in spite of its relatively small political base in the country. The other possibility is that there was pressure from donors for a UDF-AFORD alliance who did not like the idea of permanent legislative impasses caused by the situation of a UDF government unable to enact legislation because of the lack of a parliamentary majority. Such a situation had in fact arisen during the first sitting of the 1994 parliament when not even a single bill was passed. The UDF- AFORD alliance of course did not last long, although the four AFORD MPs who had been appointed to the Cabinet as part of the alliance agreement refused to resign their Cabinet positions despite calls from their parties for them to do so. In litigation related to the position of these Cabinet members, the High Court held that the continued retention of their Cabinet positions by the four was not unconstitutional (*Mkandawire v The Attorney General*). While not ruling out the fact that the personal desire for power and money may account for some of the decisions made in order to maintain a parliamentary majority, It is nevertheless true that the party system has allowed for such permutations and combinations as to keep the government going.

In 1999 the MCP –AFORD alliance performed impressively in the parliamentary elections in which they secured 95 out of the total of 193 seats. The UDF along with the four independents has managed a majority without many struggles. If sustainability of the government is to be judged not by numerical strength alone but also by the performance of the parties in Parliament then party system in Malawi is definitely *not* moving towards that direction. The opposition parties being too preoccupied with the modalities of the alliance is not playing the role of a viable opposition or a government in waiting. The ruling party being too over confident that it is there to stay for this whole term tends to

stretch the limits of the rules and procedures of Parliament. These trends are certainly not conducive to sustaining democracy and the party system in the long run.

6.3 *How free are opposition or non-governing parties to organise within the legislature, and how effectively do they contribute to government accountability?*

Within the legislature one forum for inter party dialogue and interaction to discuss policy matters is provided by the committees system of Parliament. The National Assembly has seventeen committees. These committees are standing select committees and ad hoc select committees and are composed of the members of all the parties represented in Parliament. Only six committees have been active. Interestingly committees on parliamentary procedures and privileges have been inactive. The Budget and Finance Committee has been active in both last and this parliament. The committees meet as and when there is a need. The committee system is at the formative stage and members are not clear about how to make it effective. But there is a great willingness and motivation on the part of all the parties to make it effective.

For the first time the opposition in Parliament met as a block to take a collective stand on an important and sensitive issue in the July 2000 sitting of the parliament. The Vice President of the MCP, John Tembo, for a meeting of MCP and AFORD to raise concern on the bill which intended to empower the President to appoint the Mayors and the Chairpersons of the City and District Assemblies before the local government elections. This special meeting was a great success in that it paved the way for the obstruction of the passage of undemocratic legislation. The opposition successfully stonewalled discussions on other issues in order to prevent the introduction of this bill.

During election times there are forums for inter-party dialogue facilitated through civil society organisations. But these meetings are too focused. Inter-party deliberations do not constitute a regular feature of the party system.

Sometimes a special session of Parliament may be convened to discuss and pass a motion on a matter of national importance. An example of this is the case of the date of polling for the 1999 election. The Parliamentary & Presidential Elections Act stipulates that there should be a 21 days interval between the closing of registration and the day of polling and the Constitution in section 67(1) states that the “the National Assembly shall stand dissolved on the 20th of March in the fifth year after its election, and the polling day of the general elections for the next National Assembly shall be the Tuesday in the third week of May that year.” The polling day had to be postponed if the 21 days interval requirement had to be abided but that postponement had to be done by the parliament as it required a

constitutional amendment. Therefore, parliament had to be convened specially to discuss only this issue. This session was indeed remarkable as all the parties unanimously agreed the date for the polls.

6.4 How fair and effective are the rules governing party discipline in the legislature, and to what extent is 'floor crossing' discouraged?

The Constitution is very clear about the issue of crossing the floor. Section 65 of the Constitution reads “The Speaker shall declare vacant the seat of any member of the National Assembly who was, at the time of his or her election, a member of one political party represented in the National Assembly, other than by that member alone but who has voluntarily ceased to be a member of that party and has joined another political party represented in the National Assembly.” However, occasionally, ‘crossing of the floor has taken place. As the difference between the ruling and opposition parties in their numerical strength in the Parliament is almost marginal, perhaps it is to be expected that parties will resort to different tactics of luring Members of Parliament away from rival parties and encouraging them to “cross the floor”.

The level of defections can be judged by looking at the parties’ numerical strengths at the beginning of the first term of the National Assembly in 1994 and after four years of their existence in 1998, which are indicated, in the following table:

YEAR	MCP	UDF	AFORD	INP.	VACANT	TOTAL
1994	56	85	36	0	0	177
1998	44	84	32	11	6	177
1999	66	94	29	4	0	193
2000	64	99	30	0	0	193

Source: *The Parliamentary Observer December 1998.*

Note: MCP lost two seats to each to UDF and AFORD.

It is clear that the opposition parties have been losing their numbers more than the ruling party and have been getting increasingly frustrated with the functioning of the party system. There has also been the emergence of independent candidates, a trend which caught up particularly in the 1999 elections.

There are a number of instances raising concern over the conduct of Parliament. A recent example is the suspension of Gwanda Chakuamba who was “leader of the opposition in Parliament”. In the budget session of Parliament in July 2000, Gwanda Chakuamba was suspended for one year for his long absence from Parliament. Questions still remain about whether this move was a genuine application of the established procedures of Parliament or was politically motivated. According to the Parliamentary Standing Order 104 (4, 5) if any member is suspended under this order his suspension on the first occasion shall continue for one week, on the second occasion for a fortnight and the next for a month, provided that no period of suspension shall extend beyond the end of the session during which the order of suspension was made. In the case of Chakuamba, this procedure was not followed and a majority in Parliament suspended him for one year. Parliament did not refer the case to the concerned Committees of Parliament. The constitutionality of the decision is currently the subject of judicial review proceedings, whose preliminary stages have involved a direct struggle for power between Parliament and the Judiciary (see Section 2.3 of this report).

6.5 How far are parties’ effective membership organisations, and how far are members able to influence party policy and candidate selection?

Registering as a political party in Malawi is extremely easy. A form has to be filled in at the office of the Registrar of Political Parties (currently the Registrar General), giving the particulars of the proposed office bearers of the party and accompanied by one hundred signatures. These one hundred signatories are supposed to be registered members of the party. A copy of the constitution, manifesto and rules of the party are to be enclosed with the form. Once the party is registered there is no check or accountability of the party to any authority. It is only during campaign for elections that there is a code of conduct for the parties.

According to a recent study on political parties (Kadzamira, Mawaya and Patel, 1998), parties claim that their supporters at the grass roots do influence party policies. Supporters are said to influence their parties through verbal and written opinions sent to any party office and sometimes to the President. Rallies, meetings, and seminars are also channels for such communication. It would be interesting to look at the number and level of conventions that parties have had since 1993 to 1998 in order to understand how democratic the parties are in their own conduct.

Number of Party Conventions and Delegates

LEVEL	AFORD		MCP		MDP		MDU	
	Delegates		Delegates		Delegates		Delegates	
National	4	570-620	3	500-600	1	500	2	100-200
Regional	2	280- 300	3	300	2	300-	2	200- 500

			330	
District	2 160-180	4 400	2 150 – 200	2 300-500

Source: Kadzamira, Mawaya & Patel, “Profiles and Views of Political Parties in Malawi,” December 1998.

The MCP held a convention in August 2000 to resolve the party presidentship issue arising out of Gwanda Chakuamba’s suspension from the National Assembly. The party infightings and tussle for leadership ended up in two conventions led by the leaders of the two factions and did not yield any conclusive results. The matter is now in the High Court where the issue is primarily which of the two conventions was legitimate and in accordance with the MCP constitution. The ruling UDF has not held any convention since 1993. AFORD has also not had a national convention for a number of years.

6.6.To what extent do parties cross ethnic, religious and linguistic division

Though it is quite obvious that parties have a regional basis and voting patterns tend to be on those lines, the defections, alliances, the floor crossings indicate that there is room for flexibility. The 1999 results also indicate that the MCP –AFORD Alliance facilitated the creation of some inroads for both parties in the other regions although AFORD did not benefit as a party in terms of gaining seats. It also brought some pressure on the UDF to build support in the other regions

Discussions with senior party officials in AFORD reveal that the Party with its strong northern base has become very conscious of ‘regional parity’ in filling candidates for important positions in order to break the northern monopoly in the party. But there is also a concern that this parity factor is coming in the way of choosing capable and experienced persons.

MCP and AFORD have not demonstrated any particular effort to accommodate national minorities. In contrast, as it was mentioned earlier, the UDF as a party does have some members from some minority groups like the Asians and the whites in the national executive of the party. The UDF has also shown a positive approach towards promoting greater participation of women as compared to the other major parties as the following statistics on the number of women among the Members of Parliament of the parties:

Number of Women MPs and their Parties

YEAR	MCP	UDF	AFORD	TOTAL
1994	04	05	01	10
1999	03	13	01	18

Note: One women candidate won as independent in 1999 and later joined the UDF.

6.7 *What measures, if any are being taken to remedy publicly identified problems in this field, and what degree of political priority and public support do they have?*

There are seminars; workshops and conferences organised from time to time for representatives of political parties to articulate themselves on issues and programmes. The needs for them to focus on their ideology and principles have been clearly brought out to them. The need for having twenty odd parties with most of them non-functional has been questioned.

There are also programmes like the parliamentary training programme for parliamentarians carried out by the UNDP to enhance the capacity of the parliamentarians to deliberate effectively in the house. The Committees of Parliament are being strengthened in order to facilitate deliberations on bills on specific issues. The National Democratic Institute (NDI) has been assisting in this area.

Defections and floor –crossing needs to be checked more stringently. The present measure of declaring the seat vacant of the member who has crossed the floor is not serving as an effective deterrent. The speaker must scrutinise the reason for defection and seek for a genuine reason from the member who wants to do so. It may be even worthwhile to call for a constitutional review on the issue.

With these measures there is a qualitative change in the performance of the parliament. However, there is a need for parties to concentrate on improving party discipline, internal democracy so as to pave way for a democratic conduct in the parliament. Leadership problems within the parties should be resolved within the precincts of conflict resolution mechanisms and parties should hold regular conventions.

7.0 GOVERNMENT EFFECTIVENESS AND ACCOUNTABILITY

Is government accountable to the people and their representatives?

Summary: Although democratic institutions like the party system are growing, the electoral system, press freedom and the participation of the masses in the democratic process over-concentrate on elections. There is a gap between the institutions at the top and the rest. There is a lack of adequate intermediary institutions to facilitate communication and co-ordination between the two. Issues touching the lives of the people like economic deterioration and deterioration in law, order, and security are causing serious frustrations among the people for which the government has not adequately responded. The cabinet is not as accountable to the legislature as it ought to be and the mechanisms to ensure such accountability are still fragile. Institutions like the Office of the Ombudsman, the Anti-Corruption Bureau are beginning to gain a high profile although the extent of their success is yet to be measured.

7.1 How far is the elected government able to influence or control those matters that are important to the lives of its people, and how well is it informed, organised and resourced to do so?

This question encompasses: bureaucratic and technocratic competence, political ability, and availability of resources for the executive. It has a strong bearing on "institutional development" which Hirschmann (1997) has analysed within the context of recent economic reform, arguing that the two are incompatible as things stand, ie, that hasty and sweeping economic reform is eroding the long term gains in institutional skill- and capacity-building. Ihonvbere (op cit) reports increased revenue collection since the 1994 election. However, he notes the "deformed and mismanaged economy" inherited by the new government, as well as the under-resourcing of the police and army, which breeds corruption. Where the government, like others in the region, has had to submit to loan conditionality, corresponding internal control over the economy may have been limited. For example, in the matter of trade liberalisation, Mulaga and Weiss (1996) note positive effects on manufacturing, explained by inefficient producers being discouraged to begin with on account of the narrowness of the domestic market and the compulsion to export competitively. While this seems to endorse the trend towards the free market, it is restricted to the modern sector. The sluggish peasant sector where markets may not be fully formed, but where most of the people live, is another matter.

The effectiveness of the Malawi government to serve the needs of its people is limited by a number of both internal and external factors. To begin with, the weak institutional set up and the low capacity in the public sector (see section 12 below) negatively affect the social and economic basis required for a healthy political reciprocity between the government and the people. Second, the economy is not adequately reformed, based on old-style large estates specialising in export agriculture, mixed with a weak but resilient peasant sector

specialising in subsistence production. The industrial base remains small, while the informal sector is rapidly expanding. In general, the economy 'still deformed and mismanaged.' The government relies heavily on tax revenues as a major source of income. While the mechanism of government for revenue collection has improved of late, the tax base has remained the same - concentrating on the formal economic sector. The irony is that more people live in the informal sector where they escape the social costs of their livelihoods and the economic burden falls on those (a relatively small group) in the formal sector. The budget for the year 2000 raises the taxable incomes from the minimum wage tax band of K1000 to K2000 per month while the tax rates moved from 38% to 35% aiming at creating more disposable income among workers.

The performance of the economy depends on favourable climatic conditions conducive for better agricultural output. The contribution from the manufacturing sector is still only about 11%. Although the economic indicators show real GDP growth as positive it has not been corresponded with distributive justice. The rate of unemployment, food insecurity, accesses to basic education, and basic health care is very low. Failure to garner resources locally and lack of effective management of available resources continues to leave Malawi as a donor dependent state. During the first quarter of 1997, the Economic Intelligence Unit (EIU, 1997:20-21 and 27) project that:

We expect Malawi's current-account deficit to widen from \$52m in 1997 to \$134m in 1998, and then narrow slightly to \$128m in 1999. The more pessimistic projections...reflect the impact of adverse weather conditions on the agriculture dependent economy. Imports are projected to rise by 16% from \$400m in 1997 to \$465 in 1998, as the government compensates for the vastly reduced 1997/98 harvest by purchasing food and feedstuffs from neighbours. ...our projections for average real GDP in 1997 and 1998, [is] 6.3% and 4.8%, respectively, and we have introduced a forecast of 5.8% for 1999. Although healthy economic expansion is expected during the rest of 1997, underpinned by a good harvest in 1996/97 and steady growth in the industrial sector, overall growth in 1997 will undershoot expectations due to the disappointing tobacco auctions.... The majority of the burley tobacco was sold at the below-market rate of \$1.38/kg, ... the poor prices will reduce the ability of farmers to purchase seed and fertilizers for the coming season.

In 1999, a real GDP growth of 4.25% was forecasted, up from 3.3% in the previous year. Much of this was due to the expansion in peasant production which was, itself, a result of government directly providing inputs to the small-holder farmers. The move was more of a political campaign for the general elections, than a concrete policy measure.

7.2. How much public confidence is there in the effectiveness of government and its political leadership?

As discussed in section 12 below, public confidence in the government and in the elected leaders is fast eroding. The reasons are vast: poor economic performance, rising corruption, weakness and effectiveness of the opposition leaders, rising cost of living, general decline in economic and social indicators. It is generally accepted that over the past six years the economic situation, law, order, and public security have deteriorated at an alarming rate. The conduct of political parties both inside and outside the parliament has not been to the effect of strengthening democracy. Public apathy is visible when it comes to voting in the by-elections.

The key issue here is that political changes have not been accompanied by any meaningful or substantial material benefits to the majority of the ordinary Malawian. Available evidence

suggests that levels of poverty have increased over the last six years. The Catholic Bishops (1998:9) recently observed that despite efforts at poverty alleviation:

All of us see that there is still so much poverty. Many people do not have access to the basic necessities of life.

The rural people and the urban labouring classes remain underpaid. They “find it extremely difficult to make ends meet”. This is mainly due to the sudden and frequent rises in prices of commodities and services which far exceed the rises in salaries and wages (*Ibid*:15). For the peasants, economic hardship is aggravated by the escalation of fertiliser prices – which have more than tripled over the last five years. This, is coupled with the falling real prices of agricultural products on the market.

Paradoxically, the government seems to be in good control of the rural population – especially in the southern district where the ruling party has the largest support. This is not because the government is effective, but rather because it has been good at buying support and deceiving the unsuspecting rural communities through the provision of agricultural inputs, especially during campaign times. Through these, and its poverty alleviation programs, the government portrays itself as being pro-poor, and hence temporary “winning” popular support. The truth, however, is that it clothes itself in a false garb of authority and popularity. When the harsh economic realities start biting, its political constituency will narrow down.

7.3*How effective and open to scrutiny is the control exercised by elected leaders and their ministers over their administrative staff and other executive agencies?*

For government to be effective and accountable, it requires an efficient and professional administrative sector – the civil service – which carries out the decisions of the executive directly, and without the inter-mediation of the law as a precondition (Mugore 1997: 4). It ensures the implementation of all the decisions of the different parts of the public sector. Mugore writes that whereas [constitutionally] the executive, in the Malawi system cannot direct the judiciary or the legislature as an institution or as individuals, it is in fact expected to give direction to the civil service within the framework of whatever internal checks and balances developed legislatively or administratively or any institutionalized delegation of decision making and implementation. It is the civil service, more than any other component, which has operated as the administrative, developmental and entrepreneurial arm of the state. It is the Civil Service that carries out important public functions all the way, from community development to international trade. Available evidence suggests that “in Malawi, there has been more and more centralization of once devolved powers, and deconcentration of government offices to the districts, and senior staff of councils have [essentially] remained as civil servants employed by the state”, witness Chief Executives of City Assemblies.

Mugore further observes that another nuance of the administrative sector or the civil service is the “parastal phenomenon”. “Due to the need for state intervention in the economy for whatever reason, and the perceived limitations of the civil service to carry out, in particular the entrepreneurial and developmental functions, parastals were created and they operated with more autonomy than the regular civil service. However, although they would have been created by legislation, they are still answerable to the executive, making them only academically distinguishable from the “mainstream civil service, except for the fatter packages”.

The Malawi Constitution (section 193) guarantees the independence of the civil service as “servants of the general public”. Both government and political parties are, constitutionally, forbidden from causing civil servants to engage in activities that promote or undermine the interests or affairs of any political party or individual members of any party. However, in practice, civil servants are answerable to the ruling political party through its government ministers and the party president who is the Chief Executive of the State. In fact, the State President, who is also the ruling party president, has powers to dismiss civil servants. A worrying aspect has been the appointment and/or promotion of civil servants, by the president, at open political rallies. Civil servants have also often been threatened with dismissals or suspensions if they do not serve the interests of the government of the day – read ruling party. The autonomy of the civil service is thus both undermined and limited by such acts.

7.4 How extensive and effective are the powers of the legislature to initiate, scrutinise and amend legislation?

The constitution allows members of parliament to initiate legislation through “private members bills” or motions. They may also initiate the amendment of laws through the Law Commission, which proposes such amends to cabinet. However, the Legislature has little influence on matters of fiscal and monetary policy. These are the prerogative of the Reserve Bank. It also has little effect on the laws affecting government finance. These are the prerogative of the responsible ministry and some executive agencies such as the Malawi Revenue Authority and the National Economic Council.

Section 66 of the Constitution describes legislative powers of the parliament extensively. The Constitution allows members of parliament to initiate through ‘private member bills’ or motions. The National Assembly has wide powers of law making, repealing, and proposing amendments to the cabinet. In the first term that is from 18th May 1994 to 25th

may 1999 the parliament had passed as many as 156 Bills out of which 74 were Financial Bills. Some Ministries have been more active like the Ministry of Justice which had initiated several bills which became laws like the Constitution of Malawi 1995, The Ombudsman Act, The National Compensation Tribunal Act, The Law Commission Act, and others. So also the Ministry of Trade has passed a number of legislations like fair-trading, business licensing, and so on.

However, there have been instances where the parliament had not followed the necessary procedures of law making and had rushed through the bills. One such case is the Press Trust Case which, can be taken as an example of a bill passed without adequate quorum. The press Trust created by the former head of state controlled about 40% of the private sector of the economy. The new government wanted to change the trust and presented a bill in the parliament called "The Press Trust Reconstruction Act." This bill was passed without quorum in the house. At the time of introduction of the bill there was quorum but later the opposition members walked out as a sign of protest against government act. So when the bill was passed there was no quorum. The High Court ruling went against the government saying that the bill was not validly passed. However, the Supreme Court ruling went in favour of the government and the bill was passed.

7.5 How extensive and effective are the powers of the legislature to scrutinise the executive and hold it to account?

On paper, the National Assembly has the power to scrutinize the executive and hold it to account. There are three important ways of doing this. First, the President is required by the Constitution to appear in Parliament and address Parliament on the state of the nation and policies of the government, and to answer questions (section 89(3)). The President has fielded questions in Parliament on at least one occasion. Secondly, the Constitution also requires individual ministers to be available in Parliament in order to questions pertaining to their ministries asked by members of Parliament (section 96(1)(e)). Thirdly, ministers in charge of statutory corporations or parastatal organisations are required to present annual reports to the National Assembly. This also allows the legislature to scrutinize the executive branch of government. In theory, the various select committees of Parliament may call for documents from the executive if there is a particular issue demanding such an action. To ensure accountability, ministers may present "ministerial statements" to the National Assembly on a particular issue.

The Public Accounts Committee is supposed to scrutinise every government department. The Budget and Finance Committee of the parliament which should play a really effective role in the allocation of funds to different ministries and scrutinise then is not playing that role effectively. However, some positive measures are under way to tighten the control on the executive like the Finance Minister's declaration that members serving in all boards of statutory corporations shall be under the scrutiny to ensure that right only appropriately skilled and experienced people hold those positions.

The legislature has been restricted and constrained from conducting its deliberations freely and as such has not been able to effectively hold the Cabinet responsible. This has been the case, particularly on the part of UDF Members of Parliament because of the presence and participation in the house by Cabinet ministers who are also senior figures in the party. This raises concerns over the applicability of the principle of separation of powers and the principle of checks and balances. At least two questions arise in connection with this observation. The first is whether a person can be both a Cabinet minister and a Member of Parliament at the same time? The second is whether a minister who is not also a Member of Parliament can participate in the deliberations of the Assembly?

The first question was answered affirmatively by the Supreme Court of Appeal in the case of *Nseula v Attorney General*. The court answered the second question in the case of *The Attorney General v Mapopa Chipeta*) by effectively allowing Parliament to decide for itself whether to allow participation by non-members or to treat them as “strangers”, holding that this was properly an area in which the judiciary could not interfere with Parliament’s Standing Orders. The relation between the executive and legislature is uneven, rough and generally not cordial. One reason for this is that the Committees of Parliament are still in the formative stages and as such are not able to secure adequate accountability from the cabinet. And further the ruling party takes advantage of its strength in the cabinet and in the legislature to suppress effective deliberations and proceedings of the Assembly.

7.6 How rigorous are the procedures for approval and supervision of taxation and public expenditure?

At the highest level the Minister of Finance draws up a budget which is presented to parliament for approval. No changes as such are made following the MPs debates and it may not be wrong to conclude that Parliament acts as a rubber stamp. With regard to supervision the expectation would be that the minister of finance should give interim reports to parliament about the state of the budget which is a particularly important with regard to public expenditure. However, judging from the response of the Finance Minister to a question at a pre-budget consultative forum recently, it seems there is yet to be such a practice.

The Constitution provides the legal framework of financial accountability by requiring that all revenues and public expenditure, including supplementary budgets, are debated, approved and authorised by the National Assembly. The Constitution also establishes the office of the Auditor General, responsible for auditing the accounts of government. The office of the Auditor General is supposed to produce annual reports, including audited accounts of all government ministries and all constitutionally established commissions. However, the effectiveness and efficiency of the office of the Auditor General remains to be evaluated. It is also unclear if the National Assembly sets aside time to discuss the Auditor General’s reports. Available evidence suggests that only once did a Member of Parliament use the Auditor General’s report to question the use of ex-migrant workers remittances from South Africa by the Information Minister. The Minister had said he used the money to buy equipment for an audio system for the State House.

7.7 How comprehensive and effective is legislation giving citizens the right of access to government information?

Chapter IV of the Republic of Malawi Constitution, which constitutes the Bill of Rights, provides for the citizens' right to information. Section 37 provides that:

Subject to any Act of Parliament, every person shall have the right of access to information held by the State or any of its organs at any level of Government in so far as such information is required for the exercise of his rights

The potential effectiveness of this provision is severely limited because there is no "freedom of information" legislation to provide the detailed rules and institutional framework pertaining to the exercise of the right.

In practice, Ministers and top government officials provide information to the public through press conferences and briefings. Going through newspapers, one gets the impression that the ministries that have had the largest number of press conferences have been the Ministry of Agriculture and the Ministry of Finance. Both of these had the largest number of press conferences when Aleke Banda was the responsible Minister – first as Finance Minister and later as Agriculture Minister. In the Ministry of Finance, the tradition has been maintained by the current Minister, Dr Mathews Chikaonda. However, the public access to government information is limited by pieces of legislation (mostly inherited from the colonial government) and political practices that preserve "state secrets" and perpetuate a culture of secrecy and dubious claims of confidentiality. The public may also not be in a position to distinguish between government propaganda and usable information. Very often, what comes out of government ministries are uncritical and unbalanced reports, presenting the positive view, or outlining government activities and plans. Worse still, the information coming from the national radio is basically a catalogue of the activities of the executive branch of government and its ruling party. The public is generally not able to use the official communication channels, including the national radio, to demand an explanation from the government.

For communication to be effective, it needs to flow both vertically and horizontally. In Malawi, "the alarming low level of trust and communication between parties and between the government and [the] civil society is striking" (Odendaal, 2000:8). Some people talk of a reigning "culture of silence". While some agree that informal communication between individuals from different groups occur, the consensus is that *reliable* channels of communication between parties is non-existent:

Party spokespersons 'shout' at each other in parliament, in the media, and from public platforms. There seems to be little opportunity for them to really listen to each other, share *accurate* information and develop *sufficient* trust to co-operate where issues of national importance are at stake. This culture of silence also extends to the legislative processes. Civil society representatives complain of the lack of opportunity to engage government and the opposition in debates over pending legislation. Government spokespersons, on the other hand, complain of the overly aggressive and biased manner with which some NGOs

and journalists relate to government... Another aspect of this 'culture of silence' is the perceived lack of information made available to the public. Against a background of high, and at times unrealistic, popular expectations, it is vital that *accurate* information is communicated to the public....

This situation of non-communication is breeding ground for deep suspicion, exaggerated perceptions and vicious rumours. It inevitably leads to deeper political polarization and poses a threat to the quality of democracy and political stability (Odendaal, 2000:9).

It should be noted, however, that the right to information is exercised without any limitation by independent bodies like the Ombudsman and NGOs like MIDEA for investigation and educational purposes. For the common people access to public information is through the media. The radio as has been said earlier is not free and objective. The press still operates under some of the old acts, which run contrary to the spirit of section 36 and 37 of the constitution such as:

The Official Secrets Act, The Protected Areas Act, The protected Flags, The Emblems and Names Act, The National Assembly Act, The Army Act and The Police Act. These Acts are used to restrict the freedom of the press. For instance, in January 1998, the Daily Times carries an article on the rate of HIV/AIDS in the military. The Army under the instruction of the Defence Minister attacked the offices of the Daily Times and destroyed their equipment and terrorised the journalists. This was done under the Army Act.

7.8 What measures, if any, are being taken to remedy publicly identified problems in this field, and what degree of political priority and public support do they have?

The greatest political opportunity Malawians have is that, in general, there is serious commitment and attempt to deal with political problems through constitutional means. Some degree of press freedom, particularly with regard to the print media, is respected. A Human Rights Commission and other important human rights instruments are in place. The Ombudsman has successfully challenged government officials on some specific issues. The vibrancy and frankness of political debate is striking, if considered against the background of the suppression of dissent under the previous regime (Odendaal, 2000:4).

The most important official measure to improve people's access to information has been through press briefings and press releases – sometimes aired on the national radio. The on-going public sector reform is also aimed at making government structures and processes, including information, more readily available to people. Creative ministries and departments have also worked closely with non-governmental organisations and other institutions of civil society running civic education programmes. Important information is transmitted through these. A notable example is that of the National Initiative for Civic Education (NICE) run by the Public Affairs Committee (PAC) with support from the German Technical Cooperation (GTZ).

What clearly emerges from the above sections is that the principle of checks and balances between the executive and

legislative branches of government is not explicit in the constitution and also is not being effectively put in practice. However, institutions like parliamentary committees are emerging and there is a willingness on the part of the parties to make them effective which will make parliament more effective in exercising its control over the executive. The judiciary has set its role rather effectively as an upholder of the constitution. It is also heartening to note the independent bodies like the Ombudsman and the Anti –Corruption Bureau are beginning to play their roles quite effectively. The media too plays an effective role in linking the government and the people. Measures are being taken by local and international bodies to further strengthen the institutions like the media, parliament, and so on. However, the issue of distributive justice needs urgent attention. The increasing economic hardships corresponded with security threats could negate the whole context of democracy. The signs of frustrations at the grassroots are visible and call for immediate corrective measures.

8.0 CIVILIAN CONTROL OF SECURITY

Are the military and police forces under civilian control?

Summary: The Constitution places the armed forces and the police force under the direct control of the civilian government. There have been instances which establishes that the army has no intentions to step into politics and would serve any government in power. The police force today is more open and accessible on information on public security and safety. The police have responded positively to the reform programmes. But there have also been cases of police high-handedness in dealing with protestors and handling peaceful demonstrations. Army, police and prison services are in the process or reform and with political will and technical support they could develop into institutions that are consistent with democratic norms and values.

8.1 How effective is civilian control over the armed forces, and how free is political life from military involvement?

Section 160(1) of the Constitution puts the defence forces under the direct control of the civilian government. The section provides that “[t]he Defence Forces of Malawi shall operate at all times under the direction of those civil authorities in whom this Constitution vests such power....” Chapter XV of the Constitution also stipulates mechanisms for civilian control of the police.

Two events have demonstrated the armed forces’ subjugation to civilian rule in practice. The first was the disarmament of the Malawi Young Pioneers (MYP) in December 1993 [see Chirwa 1994]. The MYP, a paramilitary wing of the then ruling Malawi Congress Party (MCP), was disarmed by the army, but the latter did not proceed to challenge the leadership of the MCP, or attempt to take over government. Only the offices of the ruling party were attacked, destroyed or searched. Though the opportunity was there for the armed forces to do more than that, they went back to the barracks. The second was after the controversial elections of June 1999. Media reports suggested that disgruntled supporters of the opposing parties that had lost the elections called on the armed forces to intervene, but they distanced themselves from such calls. They went further to issue a press statement that it was not in their interest to step into politics. They would serve any elected government.

Granted the above, there is evidence that the army has sometimes behaved rather harshly against civilians. For example, on 15 January 1998, armed soldiers of the Malawi Army raided the offices of the pro-opposition newspaper, the *Daily Times*, and cause damage to equipment on the pretext that a sister paper, the *Malawi News*, had published a “false” article about the army having the highest number of HIV/AIDS infections in the country.

During the raid, the soldiers harassed and intimidated the staff and threatened to kill the journalists if “they played games” with them. The soldiers indicated that they had the sanction of their bosses and authorities – but the authorities later apologized and distanced themselves from the operation [see Mhango, 1999:37].

Another area of concern is the use of the army to conduct internal policing operations. On a number of occasions, the army has been closely involved in civilian life when it has been used to fight crime in circumstances in which the task has appeared to overwhelm the police. Although this has generally received public support, it has the potential of encouraging the army to increasingly exercise power over civilians and threaten civilian control of the armed forces as a whole.

8.2. *How publicly accountable are the police and security services for their activities?*

The performance of the police service has been fraught with ambiguities. On the positive side, the police are one of the government institutions that has responded very positively to reform. The police reform programme, with financial and technical support from the British Government, is underway. The police have changed from a “police force” to a “police service” to reflect a people-oriented attitude relevant for a new democratic culture. A pilot community policing project has been completed and is being extended to the whole country. This enables the police to work more closely with local communities to combat crime. The police have also been quite good at holding press conferences and briefings to explain some of its activities and operations. Unlike in the past, both the press and ordinary citizens can now pick up a phone and call the police to ask for information or briefing on any issues of public safety and security. The office of the Public Relations Officer has been reasonably good at providing information to the public.

On the negative side, many incidents have been reported of the police using strong-arm tactics and high-handed measures in dealing with protesters, and those engaged in the peaceful exercise of their rights of expression and assembly. The major victims have been members of the trade union movement who, sometimes, have had their meetings interrupted by the police and their demonstrations crushed. Student protesters and rioting football fans have been tear-gassed. More recently, in June 2000, members of NGOs, labour unions, and other institutions of civil society had their demonstration disbanded, and were tear-gassed for protesting against donor conditionalities of aid. The behaviour of the police service suggests that it is caught between the demands of the politicians and the lawful exercise of their duty. This limits the police’s accountability to the public.

Another study by the Human Rights Resource Centre conducted between 1998 and 1999 reveals that the police are among the major violators of people's freedom of movement. They are also among the major violators of female sex workers' right to sale their labour the market of their choice. The sex workers gave graphic accounts of how the police sometimes rounds them up and charges them with the arcane offence of being "a rogue and vagabond", only to force them into unconsented for sexual acts [see DCHR, 1999a).

Closely related to the police is the prison service. Its performance has equally been fraught with ambiguities. A Prison Reform Programme is underway and has been received with a lot of enthusiasm by the authorities. A number of NGOs have worked closely with the government's Prison Inspectorate to monitor the conditions in the country's jails [see Penal Reform International 1996, Danish Centre for Human Rights, 1996). A human rights needs assessment survey conducted by the Danish Centre for Human Rights [now called the Malawian Human Rights Resource Centre] observed that "conditions in prisons are extremely dehumanising" (1999:43). Poor accommodation facilities, shortage of food, disease and harsh physical treatment by prison warders are among the factors cited. Cases of negligence resulting in the death of inmates, and, recently, the murder of an inmate in the Zomba prison, are among the cases that serve as evidence for the unaccountable and violent manner in which the prison service conducts itself.

8.3 *How far does the composition of the army, police and security services reflect the social composition of society at large?*

There is no evidence suggesting ethnic or tribal manipulation in the recruitment of personnel for the army or/and the police. The social compositions of the two institutions do not indicate obvious ethnic or tribal imbalances. However, there is evidence of gender imbalance. In both the police and the army, women are under-represented despite the recent efforts to address this. Both the police and the army have embarked on the recruiting and integration of women in these institutions. The first group of female army recruits finished their military training at Salima army base, amid controversies on whether the women would be trained and required for combat should situations arise. The army is rather hesitant, drawing heavy criticism from civil liberties and women's NGOs that view it as discrimination not to allow women in combat.

8.4 *How free is the country from the operation of paramilitary units, private armies, warlordism and criminal mafias?*

The threat of the former members of the MYP resurrecting or/and mounting some kind of guerrilla warfare or civil disturbance has virtually disappeared. There is also no evidence of paramilitary units, private armies or/and warlordism in operation in the country. However, the potential of these developing in future does exist. The political parties are regionally based, which creates opportunities for the emergence of loyalist paramilitary wings emerging from the party hierarchies, especially the youth wings, popularly known as “young democrats” – reminiscent of the Youth Leaguers of the past. Given that these are often easily mobilized for party purposes, and to disturb meetings of other parties, they have a potential to develop into paramilitary wings of the individual parties.

A worrying aspect is the chronic condition of insecurity along Malawi’s borders with its neighbours, particularly Mozambique and Zambia. Gangs of armed robbers cross the borders almost at will, creating a sense of insecurity. There have also been cases of cattle rustling in the lower southern parts of the country, suggesting the emergence of organised and armed criminal gangs operating across political borders. These may easily develop into criminal mafias. There is a suggestion that the impenetrable forests of Nkhotakota and Mzimba are now cannabis-growing areas, integrated into regional drug cartels looking for new growers and passage of harder narcotics to South Africa and Asia. This is a development that has the potential of further facilitating the emergence of criminal mafias.

8.5 *What measures, if any, are being taken to remedy publicly identified problems in this field, and what degree of political priority and public support do they have?*

The army, police and prison services are all currently undergoing processes of reform. With political will and guaranteed material and technical support, these institutions have the potential to develop into institutions that are consistent with the principles of a democratic culture. Cross-border co-operation and joint operations between the security institutions on the Malawi, Mozambique, and Zambia sides will assist in reducing the cross-border criminal elements, if properly and efficiently undertaken. Between 1998 and 1999, the national budget for internal security was increased, which shows the state commitment to the issues of public safety and security.

9.0. MINIMISING CORRUPTION

Are public officials free from corruption?

Summary: The law requiring declaration of assets by all MPs and public officials has not been vigorously applied and the mechanisms for its implementation are not clear. The Anti-Corruption Bureau which is still new has not yet been fully effective. A survey on corruption in the SADC region indicated that the practice is on the increase and general concern on corruption is high in Malawi. The government is estimated to lose over K22 million in a year to corruption alone, a figure which is too high for a small poor country like Malawi. Politicians and government officials and their relatives are the major beneficiaries of fraudulent acts some of the details of which are indicated in the following sections.

9.1. How effective is the separation of public office from the personal business and family interests of office holders?

Public officials, especially Members of Parliament, are required by law to declare their assets shortly after their swearing in. This requirement was not vigorously implemented until about June this year when the Speaker of the National Assembly gave a deadline for all Members of Parliament to declare their assets. The declaration did not include other public officials as required by Section 213 of the Republic of Malawi Constitution. The section states that the National Assembly shall specify the grades and positions of the officers required to disclose their assets. This constitutional provision has not been vigorously applied. Its implementation mechanisms are also rather unclear.

A further complication in the separation of public office from personal business and family interests of the office holders is the “politics of poverty”. Access to power or public office, and attain control of government are means of escaping poverty and creating economic opportunities for some individuals.

It is therefore understandable that for some groups competition for power has become a struggle for survival. State funding of political parties for running for election campaigns is limited. Stories [are] told of political candidates who mortgaged or sold almost all their assets to run their individual election campaigns - a very risky personal gamble, which resulted in considerable pain for those who lost.... Many civil society spokespersons also complained that, because of the economic issues outlined above, some candidates enter politics not out of a sense of public duty or responsibility, but purely as a means of escaping poverty. This, allegedly, has a negative impact on the quality of leadership provided by members of parliament.

9.2 How effective are the arrangements for protecting office holders and the public from involvement in bribery?

The Anti-Corruption Bureau is legally charged with the responsibility of investigating corruption and prosecuting its perpetrators. Recently, it has promised material rewards to anyone who reports to it incidents of corruption. However, the available evidence suggests that the Bureau has been rather ineffective. For example, in less than a year of its launch, between March 1997 and January 1998, the Anti-Corruption Bureau received a total of 3,100 written reports and complaints on corruption (see *The Nation*, 7 March 1998). None ended up in prosecution and conviction. The majority of the cases were directed at the Ministry of Education, particularly in relation to bribes and administrative malpractice in the selection of candidates for secondary school education. Also implicated are traditional leaders (chiefs) who -particularly for corruptly selling customary land to the urban elite and politicians-, the police service, the departments of Customs and Excise, Immigration, the Ministry of Health, Transport and Communication, and the Judiciary (see *The Daily Times*, 10 February, 1998; *The UDF News*, 11-12 February, 1998; *The Weekly Chronicle*, 16 March, 1998; *The Daily Times*, 16 March, 1998; *The Daily Times*, 9 April, 1998; *The Saturday Nation*, 18 April, 1998).

As has already been indicated, the Malawi government is estimated to lose over K22 million in a year to corruption alone. Although the figure is low by international standards, is too high for a small poor country (see *The Daily Times*, 10/2/98). Other indicators of fraudulent and administrative malpractice include government officials, including ministers, falsely claiming house allowances or spending large sums of money on hotel accommodation and meals even when they have official accommodation in town (see *The Daily Times*, 4 February 1998; *The Saturday Nation*, 18 April 1998; *The Truth and Reconciliation*, 2 April 1998); and the government paying "ghost workers" - especially teachers and other "junior" civil servants. In 1997 alone, the government is reported to have paid about K2.6 million to "ghost teachers" (see *Daily Times*, 4/2/98). More money has been lost to the "renting" of houses that do not exist, and to the granting of multi-million contracts and tenders to companies and suppliers that are either non-existent or exist only on paper. Between 1996 and 1997, the government paid close to, if not more than, K1 million to owners of "ghost houses" (see *The Nation*, 17 July 1997); and gave not less than K26.4 million worth of tenders and contracts to bogus tenderers and contractors in 1997 alone (see *The Daily Times*, 16 February, and 20 February, 1998; *The Nation*, 21 February, 1998; *The Malawi News*, 20-26 June 1998). As mentioned elsewhere in this document, in September 2000, the Public Accounts Committee of Parliament and the Anti-Corruption Bureau indicated that they were investigating a corruption scandal that involved the theft of over K126 million from the Ministry of Education, among other sections of the government.

Politicians and government officials (including their relatives) are the major beneficiaries of fraudulent acts, corruption and economic inequalities. A recent report of the Consumer Association of Malawi (CAMA) has shown that "over 70 per cent" of the sugar business in the country is in the hands of politicians (see *The Daily Times*, 17 April, 1998; *The Nation*, 17 April, 1998); and the rest is in the hands of relatives of politicians, influential bureaucrats in the civil service and parastatal organizations (the majority of them with political connections), and traders of Asian origin⁴. Ntaja Trading alone, a company owned or controlled by the country's President himself, has a sugar distribution quota of 479 tons per week, "accounting for 60 per cent of the trade" (*The Nation*, 17 April, 1998:1; *The New Vision*, 24 April 1998).

9.3 *How far do the rules and procedures for financing elections, candidates and elected representatives prevent their subordination to sectional interests?*

There is no legislation that regulates the financing of elections, candidates or elected representatives. There is, therefore, no legal sanction against the subordination of the public interest to sectional interests. Elections are mostly funded by external donors and, to the extent that the timing and organisation of the elections is determined to some extent by the availability of that donor funding, there is no guarantee against the electoral process being subordinated to the interests of donors at the expense of the public interest.

One distinct way by which the Constitution arguably seeks to minimise the undue influence of sectional interests of candidates and elected representatives is through the provision of state funding for some parties as was discussed earlier in this report. State funding reduces the need to rely on other private sources of funds whose funding will usually come with conditions attached. All the parties currently represented in the National Assembly receive funding from public coffers. A report of the *Profiles and Views of Political Parties in Malawi* produced in 1998 (Kadzamira, Mawaya and Patel, 1998:10) observed that nine of the eleven parties, representing 82% depended on personal donations in addition to other sources. The category "personal donations" was not clearly defined in the questionnaire although in one case the party president solely funds the party. Some 64% depend on "internal donors" (again not clearly defined). While 55% source funds from membership fees.

Given that the large proportions of party funding are from "personal donations" and "internal donors", one would not rule out the potential or/and possibility of heavy individual influence on the parties. The process of party funding is open to political abuse and corruption. Patron-client relationships and other sectional interests cannot be ruled out.

⁴ The two papers cited show the list of names of some key distributors with political connections.

9.4 *How far is the influence of powerful corporations and business interests over public policy kept in check, and how free are they from involvement in corruption, including overseas?*

The influence of powerful corporations and business interests on public policy remains to be researched. Given the on-going privatization of some of the corporations in the country, shady deals cannot be ruled out. The two alleged cases of corruption associated with business interests have involved Cabinet Ministers rather than corporations. In one recent case, the Finance Minister refused to approve a contract for national identification cards, previously dubiously approved by his predecessor, and requested government to ban "any dealings with a Swiss firm, Secucom Holdings International and its Ugandan link man Silas Majyambere:

As your Excellency will note, this amount [sic: K270 million, representing 18% of the K1.4 billion] would be paid to Mr Majyambere for merely acting as a go between and it represents quite a big loss to the government since it does not relate to the actual production cost of the service...[in view of the irregularity under the contract which was signed on December 19 last year] it is proposed that Secucom and Majyambere be banned from conducting any business in this country. *The Daily Times*, 10 July 2000.⁵

One of the reasons for the limited influence of the large corporations on public policy is that these are few and relatively small in size. The commercial sector is limited to a few medium-size international and local companies. Business interests pertaining to estate agriculture and tobacco exports are, to a large extent, in the hands of medium-sized companies, generally detached from the public. The only corporation with a major impact on public policy is the Press Trust. Previously known to be owned by the former President, Dr Kamuzu Banda, the Trust is now state owned, as a public enterprise. The proceeds go to financing public oriented facilities: flea markets for vendors, orphan care, education facilities, sports, culture and recreation facilities.

9.5 *How much confidence do people have that public officials and public services are free from corruption?*

The results of the just ended SADC-wide survey on corruption indicate that over 90 per cent of the 139 Malawi respondents maintained that corruption is a major concern in the country, and that it is on the increase.⁶ Popular literature and media reports give the same

⁵ The source cites the Minister's memo to the President Ref. 1/1/58, dated 20 March, 2000.

⁶ The survey results are still being processed. A report is expected at the end of July 2000.

impression. Recently, the Episcopal Conference of Malawi lamented that *katangale* (the Malawi derogatory term for corruption) is on the increase in the "new Malawi" and "no level of society is immune" (Catholic Bishops, 1996:n.7.8; 1998:11). Media reports cite numerous cases of such acts every year. For example, towards the end of 1997, the fiscal police were reported to have arrested two businessmen of Asian origin for conniving with Malawian bank staff to siphon some K10 million out of the country, and were suspected to have done this "for some time" (*The Nation*, 24 November 1997:1). In June 1998, the Department of Customs and Excise unravelled a K2 million duty evasion scam involving a Lebanese trader (*The Weekend Nation*, 20-21 June 1998). These traders take advantage of the relaxation of foreign exchange controls to siphon money out of the country, in the name of "foreign investments".

Proceedings of the National Assembly also indicate that members of the house are equally concerned with issues of corruption:

For all the corruption scandals at [the] the PCC [Petroleum Control Commission], it cannot be the General Manager alone. All these people, including the former minister for parastals and the then chair of PCC, must have been involved. Now, why are they being shielded? They should be brought to the book so that justice must take its course, not just picking on the General Manager....Our president has been preaching about corruption, but how do we get rid of it if we are busy harbouring some people? James Chikwenga, UDF MP, Mangochi Malombe constituency, *The Nation* 12 July 2000; *The Daily Times*, 12 July 2000.

9.6. *What measures, if any, are being taken to remedy publicly identified problems in this field, and what degree of political priority and public support do they have?*

It has already been indicated earlier that due to factors such as political bias, resource constraints, and others, institutions and measures currently in place for checking on corruption are such that they cannot deal with the problem effectively. They can neither deter corruption nor deal with the individual and corporate fortunes that have already been amassed. The Anti-Corruption Bureau has not concluded any meaningful case that can be used as a deterrent. There is also a general tendency towards resentment and denial in the executive branch and in the ruling party every time issues of corruption are raised.

On the other hand, the very critical remarks recently made by the British High Commissioner about the government's indecisiveness in punishing the culprits of the "K126 million scandal" suggests that the decisive measures for minimising corruption may be taken by the donors. The fact that other ambassadors backed the British High

Commissioner suggests that if local institutions for tackling corruption are perceived to be unwilling or unable to bring to account all those people involved, regardless of their political position, there may very well be pressure exerted from external sources. The departure from diplomatic niceties in this case may turn out to be the most important measure taken to minimise corruption.

10.0 MEDIA

Do the Media operate in a way that sustains democratic values?

Summary: Since 1992, at least 50 newspapers have been established although most of them were closed after publishing only a few issues. Today there are two dailies, three weekend papers and a few other papers appearing periodically. The print media is mostly privately owned whereas, the Malawi Broadcasting Corporation and Television Malawi are controlled by the government. While press freedom has grown on one hand there have also been numerous cases of harassment of media personnel and their institutions by the government forcing them to close down. The state monopoly over radio continues to be a matter of great concern. However, the passage of the Communications Act encompassing the MBC establishes Malawi Communications Regulatory Authority (MACRA) is a great step forward, which when fully operational will oversee the regulation of the postal service, telecommunications, broadcasting, frequency allocation, communication policy and licensing.

10.1. How independent are the media from government, how pluralistic is their ownership, and how free are they from subordination to foreign governments or multinational companies?

The transition period between 1992 and 1994 saw the liberalisation of the media. Many new publications were established and enjoyed a degree of freedom that had not existed during the era of the one party state. Since then, the print media has been characterised by more pluralism than the broadcast media. While the print media has been largely independent of government control, except through the application of restrictive laws on some occasions, broadcast media has mostly been under the total control of the government. The country's two national radio stations and the country's only terrestrial television service are supposedly public broadcasters but are in effect state-controlled, with their governing boards appointed by the President. Even the broadcasting regulator, the Malawi Communications Regulatory Authority (MACRA) is appointed and liable to dismissal by the President. There are a number of private and community radio stations which are ostensibly independent from government, although in respect of the former, it has been noted that the current licensees are mostly people with connections to the government (Article 19, 2000).

To further appreciate the media landscape in Malawi, it is important to identify the owners of the major publications that exist or have existed in the past. This is represented in the following table:

* (Y indicates they are in existence and X indicates their non- existence.)

Newspaper	Owner/Controller	Apparent Party Affiliation of Owner	Status
Daily Times	Blantyre Print	MCP	Y
The Nation	Aleke Banda, MP	UDF	Y
Malawi News	Blantyre Print	MCP	Y

Saturday Nation	Aleke Banda, MP	UDF	Y
Malawi Democrat	MD Trust	AFORD	X
The New Voice	The New Voice Pub.	AFORD	X
The Herald	Midas Publications	UDF	X
The Mirror	Brown Mpinganjira, MP	UDF	Y
The Enquirer	Lucene Publications	UDF	Y
Michiru Sun	Edward Chitsulo	Independent	X
Financial Post	Alaudin Osman	UDF	X
Financial Observer	Henry Wandale	unknown	X
The Watchers	Julius Kaliya	UDF	X
The Chronicle	Mr.Jameison	Independent	Y
New Express	Willie Zingani	AFORD	X
The Star	Lance Ngulube	Independent	X
National Agenda	unknown	MCP	X
Monitor	Clement Stambuli	UDF	X
Dziwani	unknown	UDF	Y
The Telegraph	unknown	UDF	X
Business Telegraph	Jere Jana	UDF	Y
UDF News	UDF	UDF	Y
The Independent	Mrs.J.Karim	Independent	Y
The Malawian	unknown	MCP	Y

Most papers have not survived due to the high cost of printing and poor markets. Generally newspaper printing operates in losses, except where there are commercial advertisements. The main source of these advertisements are government departments and parastatals and are therefore, monopolised by those papers having allegiance to the ruling party and the pro opposition papers have almost no access to them. This has affected not only the sustenance of these papers but also has affected their independent performance and fairness. There were other reasons for the closure of these papers including the fact that, according to Article 19, many of the papers were poorly written and printed and did not sell, some were sued for defamation and closed when they lost lawsuits, some could not find sufficient advertising, and many were short of capital

and could not manage as the cost of wages and inputs rose (Article 19, 2000:3).

At present, the only regular newspapers are the two dailies, *The Nation* and *The Daily Times*. Both are favourably disposed towards the current government and tend to be quite restrained in their criticism of the government and its policies. On the other hand, the fact that the two papers are not under the direct control of the government or any political party enables them to occasionally depart from the official line.

Regarding the radio, MBC 2, Power 101, and Capital Radio are all relatively new. The ownership and control of radio stations is as follows:

Radio Station	Owner/Controller
Malawi Broadcasting Corporation (MBC) Radio 1	Government
Malawi Broadcasting Corporation (MBC) Radio 2	Government
Power FM 101	Oscar Thompson
Capital Radio	Alaudin Osman
Dzimwe Radio	Malawi Media Women Association
African Bible College (ABC)	African Bible College
Radio Maria	Roman Catholic Church

Apart from the Malawi Broadcasting Corporation, the rest of the stations do not have nationwide coverage. Power 101 and Capital Radio are mostly music radio stations limited in coverage to a few urban centres. Dzimwe Radio is a community radio station which covers a part of Mangochi district. The same district is also the main area covered by the religious station Radio Maria. The other religious station, ABC Radio, is limited in coverage to the City of Lilongwe. Despite the fact that the airwaves are beginning to open up, there are still serious shortcomings in pluralism in the electronic media. For the majority of Malawians who live in the rural areas, the only accessible radio service is that offered by the Malawi Broadcasting Corporation. The pro-government bias of MBC radio services has already been noted and there is no alternative voice to that of the MBC which represents the official government view on virtually every point and does not normally grant access to views which are opposed to the official position.

Television is only about a year old in Malawi. The service started just before the 1999 elections and was used much as a campaign tool the ruling party for casting the UDF in positive light and portraying the opposition negatively (Article 19, 2000). Television Malawi has also displayed this bias in its reportage of bye-elections and the leadership dispute. But in the last couple of months it has picked up in terms of coverage and openness and its performance can be rated better than the MBC. However, its reach is limited largely to urban audience.

10.2 How representative are the media of different opinions and how accessible are they to different sections of society?

Over the last few years media as an instrument of public opinion has grown and matured in Malawi. It does represent to greater extent divergent viewpoints. There are many debates and discussions on the radio which focus on timely issues. Programmes like, *Zimachitika* (popular radio drama), *Kanthu N'khama* (a community-based magazine produced by village radio listeners' clubs) and *Tilitonse* – a story-telling workshop- captures critically the current issues in such a way that the messages reach the grassroots effectively. The press too covers a wide range of opinions. The art of political cartoons, unheard of in the

past, has picked up very quickly and captures sensitive day to day issues vividly. There is an attempt in these various media to present different opinions. It has also been pointed out earlier that there is some variety of opinion in the print media although this is limited in that the two biggest selling newspapers which used to broadly reflect opposing political views now appear to be converging in political outlook. In effect this is making the media as a whole less representative of different opinions.

The lack of different opinions is even worse in the electronic media. The Malawi Broadcasting Corporation and Television Malawi generally reflect the views of the government and the UDF. The rest of the electronic media are largely apolitical and do not tend to express any views that may be considered to be too critical of the establishment. It is important to note, though, that despite the lack of diversity of political opinions in the electronic media, the electronic media nevertheless represent different views in other areas such as religion. Thus, the MBC and Television Malawi broadcast regularly religious programmes by a divergence of religious denominations.

The lack of a diversity of voices in the media and its negative impact on the process of democracy must be put in perspective. Very few people have access to radio and television. In the case of radio, figures of radio ownership do not give a fair indication of the degree of access because the cost of batteries and electricity for the radios is prohibitive for the majority of Malawians. It is therefore only a small sector of the population which has access. Access to the print media is also limited mainly to urban areas due to low levels of literacy in the rest of the population. As indicated earlier, the cost of newspapers is also beyond the reach of most people, including the majority of workers, who in the event have to rely on borrowing from others (and in some cases, photocopying). The circulation of *Daily Times* and *The Nation* is only 12,000 to 15,000 copies. The radio reaches a much larger audience through out the country.

The other relevant factor to be considered in terms of access to media is language. MBC broadcasts a few of its programmes in a number of indigenous languages. This increases access by bringing in listeners who may not understand the dominant languages on radio, namely, English and Chichewa. Television Malawi mainly broadcasts in these two languages, thereby, further reducing the number of people who can access the content of its broadcasts. Language limitations also affect the accessibility of newspapers. The two daily papers, *Daily Times* and *The Nation*, are exclusively in English. It is only their sister weekend papers, *Malawi News* and *Saturday Nation*, and a few of the other weekly and bi-weekly papers such as *UDF News*, *The Enquirer* and *The Mirror* which have supplements in at least one indigenous language

10.3 *How effective are the media and other independent bodies in investigating government and powerful corporations?*

The media has played a relatively limited role in investigating government and powerful corporations in comparison to other independent bodies like the Anti-Corruption Bureau, the Ombudsman, the Human Rights Commission and the Public Affairs Committee. Needless to say that government-controlled media such as MBC and Television Malawi have almost never played that role. According to Article 19:

Right from the beginning of Muluzi's first term MBC staff learned that in spite of the transition, they were not to undertake investigative reporting and were to shift their political allegiance to the new ruling party. Soon after the election Information Minister Mpinganjira warned them that he would not protect any reporter who deliberately engages politicians.
(Article 19, 2000:13)

The print media has historically engaged in investigative journalism more frequently and with more success. It was the print media that investigated stories such as those related to the irregular importation of millions of Kwacha worth of school notebooks from the British company Fieldyork; the government's use of non-franchise holders to import Landrover vehicles; the purchase of expensive Mercedes Benz limousines for government Ministers in times of austerity; the leakage of school certificate examination papers from the Malawi National Examinations Board; the irregular awarding of contracts to some foreign corporations for

the supply of national identity cards; the various internal power struggles within the UDF and MCP; tribalism, regionalism and racism in some corporations; organised corporate tax evasion and fraud; and many others.

The limitations in the ability of the print media to pursue a more investigative agenda are caused by a number of factors, including the following: the lack of resources which can be dedicated to the exacting demands of proper investigative journalism and ill-trained and inexperienced journalists who mistake rumour mongering and gossip for investigative journalism. There is also a battery of statutory laws (which make the gathering of a wide range of information criminal offences) and common law rules which stipulate that the disclosure of information in certain circumstances is a breach of confidentiality for which the perpetrator will be liable to pay compensation.

10.4 *How free are journalists from restrictive laws, harassment, and intimidation?*

Although freedom of expression and other freedoms related to it are clearly guaranteed by Constitution (sections 35-37), journalists cannot be said to be free from both official and unofficial intimidation and harassment. Some of this harassment takes the form of (ab)use of laws such as those related to sedition, insulting the President, and similar ones in order to deter journalists from expressing certain opinions. In some cases, journalists will be charged with offences only to have them withdrawn after the journalist has already suffered the anxiety and anguish of a person awaiting trial for an impossibly crime (See the case of *The Republic v Somanje*). The various restrictive laws have been the subject of much criticism and the Law Commissioner has acknowledged the need to have these laws urgently reviewed in order to harmonise them with the Constitution.

Defamation suits have also been a common tactic of using restrictive laws against journalists. This report has stated earlier that the current law of defamation, particularly in its failure to provide a defence to alleged defamers who were not reckless in terms of the verification of the truth of the statement which is claimed to be defamatory. In its current restrictive state, it has been used by a number of politicians and other powerful social actors against journalists. The subject matter of the alleged defamation in such suits has ranged from corruption (*Muluzi v Jameison Publications* and *Banda v Jameison Publications*), parliamentary incompetence and currency offences (*Ntaba v Moto Publications*), fraud (*Mpasu v Democrat*), and drugs (*Chinkwita v Newsday*). In the cases decided by the High Court, the court generally applied the law correctly as it stood, although it is arguable that the results might have been different if the case had been argued and decided also by reference to the rights to freedom of expression and freedom of the press guaranteed by the Constitution (sections 35-36).

There have also been cases of more direct harassment and intimidation of journalists. For example, this report has indicated earlier how on one occasion, some soldiers raided the offices of a newspaper which had published a story mentioning the relative high incidence of HIV/AIDS in the Malawian military. The Defence Minister had earlier warned the newspaper of “consequences” for publishing this article. During the raid on the newspaper offices, equipment was damaged and destroyed and journalists were assaulted. The editor of the *New Vision*, a newspaper perceived to be sympathetic to the opposition was arrested for publishing false views. He was beaten by the police and was hospitalised for some time. The local BBC correspondent was beaten up while covering a political rally because he was perceived to have anti-UDF bias. More of such incidents could be cited.

In short, although the Constitution guarantees freedom of the press, many restrictive laws are still operational and judges may not always declare them to be unconstitutional. Although, the general situation in terms of freedom of expression is good, the continued harassment and intimidation of journalists by the police, government officials and

political party functionaries, abetted by the said restrictive laws, threatens the progress of democracy.

10.5 *How free are private citizens from intrusion and harassment by the media?*

Most Malawians are free from intrusion and harassment by the media. This may be true of most other countries but in Malawi, this is more the case because the media is so small and mostly urban-based, meaning that it has little or no access to the vast majority of people who live in rural areas which are difficult to reach. The limitations of Malawian investigative journalism mentioned earlier probably make journalism to consist of mainly telephone briefings, press conferences called by officials and similarly formal exercises. There are therefore very few of then type of investigative approaches that would make intrusion or harassment likely.

Although the print media occasionally invades the privacy of private citizens, there is no evidence of any significant harassment of private citizens by the media generally. There is also no evidence to suggest that the media in Malawi intrudes upon the privacy of private citizens.

10.6 *What measures, if any are being taken to remedy publicly identified problems in this field, and what degree of political priority and public support do they have?*

It is clear that nearly all the major media houses in the country are either owned or controlled by individuals with political affiliations. Journalists in some of these publishing houses work under duress to obey the political dictates of their bosses and are often forced to throw out their professional ethics. Journalists association like Journalist Association of Malawi (JAMA). Media Council of Malawi and the Media Institute of Southern Africa (MISA) are trying to find ways of securing the rights of journalists from such threats and oppressions. There is a consideration of forming Journalists Union.

There are also measures underway to bring in professionalism among journalists, as professional journalism did not exist under the former regime. Several workshops and seminars are organised towards this.

Much was expected in terms of an autonomous media through the Communications Act. The Act was passed in 1998. But it leaves several loopholes and discretionary powers in the hands of the President. This makes the future of freedom of expression in as far as it relates to the media doubtful.

11.0 POLITICAL PARTICIPATION

Q.

Summary: A common feature of the Malawian community life is the high degree of self-organisation in cultural, economic and political matters. A variety of formal and informal institutions and organisations exist at various levels of the social system. The capacity of these institutions can be enhanced by linking them to local government structures. The structures and functions for local government are not well known to the local people. Although district, town, municipality and town councils have been there for 50 years people are not able to link them with local government and decentralisation. This is also true in the economic field in which marketing associations, credit institutions have been there for long but they have failed to achieve their desired objectives of raising the standard of living of the members. Instead they have become instruments of exploitation of poor peasants. The Consumer Association of Malawi (CAMA) is urban based and it has also not been very effective.

11.1 *How extensive is the range of voluntary associations, citizen groups, social movements etc. and how independent are they from government?*

Malawi has a very long history of organized social, political, economic and cultural life that fits the definition of civil society, defined as:

“the realm of organised socio-political life standing between the individual and the state.” It is the arena of socio-political engagement which exists above the individual, yet below the state; a part of society that connects the individual citizens with the public realm and the state... or “an aggregate of institutions whose members are engaged primarily in a complex of non-state activities - political, economic, social and cultural production, voluntary associations and household life - and in this way preserve and transform their identity by exercising a variety of pressures, checks and controls upon state institutions. It includes a vast array of both formal and informal community organisations, religious institutions and movements, voluntary associations, trades unions and guilds, cultural institutions, co-operatives, fraternal and ethnic associations and human service delivery systems” - including the media - and all those loosely configured social practices which make up a discourse of manoeuvres on the part of the citizens shut out of the official economies and forms of governance.

Most of these were systematically suppressed by the state during the one party dictatorship between the early 1960s and the early 1990s (see Chipeta, 1992; Simkonda, 1992, Chirwa, 1997; Minnis, 1998; Chirwa and Ngwira, 1998). This weakened the foundation on which a strong *civil society* could be built in the immediate future. The

organization and structure of the *civil and political* life that had emerged prior to independence in 1964 were effectively destroyed by the state. As a result, most of the *civil society* organizations that emerged after the fall of the dictatorship in 1994 did not have a precedent on which to base their activities.

As a result of the political changes taking place in country, a number of human rights and good governance NGOs and CBOs have emerged over the last six (6) years (see Glasgow, 1993; 1997). Their aim is to reform both the state and society. Notable examples are the Public Affairs Committee (PAC), the Civil Liberties Committee (CILIC), the Malawi Institute for Economic and Democratic Affairs (MIDEA), the Centre for Human Rights and Rehabilitation (CHRR), the Centre for Advice, Research and Education on Rights (CARER), and the Catholic Commission for Justice and Peace (CCJP). There are also institutions and organisations that deal with, and cater for, the needs of specific groups and segments of society. These include the Centre for Youth and Children Affairs (CEYCA), the Youth Arm Organisation (YAO), the Society for the Advancement of Women (SAW), the Association of Progressive Women (APW), the Disabled Persons Association of Malawi (DIPAM), and many others. The efforts of all these are complemented by those of the CBOs attached to various religious organisations, and the donor-funded centres, programs and projects such as the Danish Centre for Human Rights (DCHR), the Malawi-Germany Program for Democracy and Decentralisation (MGPDD), and the Open Society Initiative (OSI). The activities and strategies of the human rights and good governance NGOs and CBOs include advocacy, lobbying, provision of training, dissemination of information on topical issues and the creation of public awareness through civic education.

The available scanty literature on these institutions and organisations reveal that, with the exception of the CBOs, they tend to be urban based, and thus lack a wider audience. Their constituencies are ill-defined, which affects their credibility and, in turn, their effectiveness. As was the case with those that preceded them, their relationship with the state is characterised by tensions, mistrust, fear, uncertainty and dishonesty despite the fact that the majority of them are registered under the laws of the country. Some of them do not operate within a properly defined legal framework that defines their status and mandate in the country. The majority of them are poorly funded; and lack adequate, qualified, and credible personnel and skills.

It is generally believed that in Malawi the institutions of civil society are rather weak.⁷ The reasons for this include:

⁷ This account comes from Chirwa and Ngwira (1998), *Civil Society and Poverty Reduction in Malawi*.

- **The political legacy of the past:** This is very evident. Political leaders perceive civil society institutions as a threat to their policies and political agenda. Often, the politicians react to statements from the institutions of civil society with irritation, anger and ridicule rather than reflective analysis. There is need to inculcate the values that would lead to the perception of civil society institutions as a necessary part of the configuration of democratic institutions. But for politicians to give attention to these institutions presupposes that they have such political and other resources and mandate that, if the politicians do not heed what these institutions say, they may find it hard to continue in office. It is thus important to develop the right kinds of the institutions of civil society. They should not be NGOs that are externally introduced on the scene, and remain so. It also follows that these institutions need to be democratic, transparent, accountable, responsible, and tolerant within and among themselves.
- **Inadequate understanding, on the part of the general populace, of the importance of strong *civil society* institutions:** There is general lack of understanding of the need for a vibrant civil society and its institutions. Its development is also not encouraged by politicians and technocrats. National leaders and the Malawian modern elite lack a solid vision of the type of society the country should have. The reproduction (or transformation) of the social and cultural values and conduct that can support economic development, is not the subject of any systematic and systemic planning efforts.
- **Political and social apathy:** The praxis of the general populace is to keep quiet when disturbing political or economic issues happen; or they may only respond in spurts. The reasons include ignorance, pessimism and conceit. The fear of the state, based on the experiences of the past, also play a major role, if the dominant role. Apathy is also a result of a long history of witnessing failure of action to influence government activities. Most Malawians feel that they cannot really bring about changes in the manner government functions, even when the political transition has proved otherwise. This leads to lack of assertion and the absence of an assertive spirit.
- **Opportunism on the part of the technocrats and professionals who are supposed to provide the guidance and leadership:** These tend to be involved in *civil society* politics only when there is immediate financial gain, or when they enhance individual status in society, rather than thinking of the **long-term common good**. The majority of the technocrats and professionals will shrug off politics as a career for the unenlightened.
- **Lack of organisational skills:** Even when people understand the need for action, their actions are generally ineffective, partly because of the opportunism of their leaders,

and partly also due to lack of skills to organise. In addition to these, there is general lack of the values, ethics and discipline to undergird the action. Much of the failure to organise effectively stems from the misunderstandings of democracy and freedom - which are often to mean "free for all", "freedom to do whatever one wants", or "every man for himself". The concept of the **common good**, and the need to consolidate the democratic transition into a self-sustaining and self-regenerating social process are not well grasped.

- **Inadequate flow of usable information:** Often the institutions of *civil society* in the country do not have access to the right and usable information. When and where they happen to have it, they do not adequately utilise it. A contributing factor to this is the weak and unprofessional media. Though some remarkable changes have occurred in the legal framework for the dissemination of information - for example, press freedom and the freedom of expression are enshrined in the national constitution - the country's media remains weak and unprofessional. Both the print and the electronic media are heavily controlled, monopolised and manipulated by political forces. This is partly because some laws that inhibit media freedom are still on the statute books. Part of the blame should be placed on the media men and women themselves. The majority of them are ill qualified, unprofessional, and lacking in ethics.

Public libraries, on their part, are poorly funded and poorly equipped in both personnel and technology. These problems are compounded by the lack of a reading culture in the institutions and organisations of civil society. For example, very few NGOs and CBOs in the country have libraries or research and documentation units or sections. The few that have often use them to create public impression, or to impress some important visitors. Rarely do their staff use such facilities. The result is that most of the times the people in these organisations work in a context of ignorance as they do not access important documents, facts and figures.

- **Failure to utilise academic literature:** The above problem is compounded by the failure to utilise the existing academic literature and facilities. There is considerable information on poverty and poverty reduction in Malawi in some academic works they are locally and readily available in the academic institutions and research centres. These are not effectively utilised by the staff in most institutions and organisations of *civil society*, and especially the NGOs. The failure could be a result of the low levels of educational qualifications of the staff members in these organisations. Very few NGOs in Malawi are staffed by college and university graduates. The normal pattern is to have a graduate or two at the managerial level, and the rest of the staff are either high (secondary) school graduates or drop-outs, and copy typists and secretaries. It is also due to the technical nature of the academic documents: they are, for the most part, not too easy to read, high on theory, and low on immediate practical value.

As a result of the above factors, and also due to the culture of fear, oppression, deceit and conceit, issues of national importance, and those that affect the every life of people, are mostly discussed in bars and taverns, and they end there. With some luck, they may get into newspapers where they are either satirised or "misanalyzed" to ludicrousness. Very rarely do newspapers do justice to the current topical issues and debates on the country's political, social and economic development. When they do so, like in the comment columns, they usually have apparent political leanings rather than clear and incisive technical analysis.

- **Weak Financial Base:** Most institutions of civil society in the country are overdependent on donor funding. They have limited capacity to generate resources internally and on their own. This affects their flexibility in the allocation of resources and the provision of services. It also makes them vulnerable to manipulation and control by the donor/funding agencies.
- **Over-emphasising Politics:** The political changes taking place in the country have resulted in the institutions of civil society concentrating of political issues. Little emphasis has been on economic issues. There is need for strong civil society institutions that deal with economic issues. This would, in turn, increase the chance of stable politics. The poor are now increasingly aware that their poverty is a result of an economic and social order that has potential to be changed. Civil society institutions that represent the poor have to be trained to put forward their cases and causes before the government and other concerned bodies. Also through such strong institutions, the people will be enlightened that though economic co-operation and participation in economic policy-making can bring a lot of good, economic wisdom has not yet progressed to a point whereby desirable changes can be ordered *a la carte*. The trouble with most Malawians is that they think otherwise, and when the economy misperforms, they feel misused by incompetent leaders. Economists of all persuasions are partly to blame for fostering this popular delusion by overstating the power of their ideas.

Strong civil society institutions dealing with economic issues are vital for the smooth running of the national economy because good economic policies do not always fit in the election cycle. Malawi needs independent and committed people who will bring continuity to economic policy making and implementation. The people and the *civil society* institutions should jointly participate in defining the national economic agenda. While politicians come and go, these people and the civil society institutions will provide continuity to the process. One way to achieve this, is to legislate these institutions as part of the policy-making machinery so that politicians do not replace or remove them willy-nilly.

However, despite the above difficulties, there have been some positive gains in the development of these institutions. Among these are:

- **Initiative in Self-organisation:** Malawians have a very strong culture of self-organisation, especially at the community level in the rural areas. With the current political changes, there is growing awareness and strong efforts to organize for, and participate in, governance. Not surprisingly, there has been the mushrooming of new institutions of civil society, especially in the areas of human and people's rights, good governance, the environment, gender, poverty alleviation, and other socio-economic and political areas of public concern. However, this has been accompanied by growing opportunism, greedy competition, and deceit.
- **Resilience of the NGOs:** The country has a long history of the emergence and functioning of NGOs. Political oppression and controls have not been able to entirely eliminated these institutions. The NGOs are crucial in raising awareness of both the urban and rural people to participate in socio-economic development (see Glasgow, 1993 and 1997). However, most of the NGOs use methods that mostly aim to perpetuate their existence rather than to really develop the communities to take responsibility for themselves.
- **A Long History of Participatory Approaches:** In addition to the resilience of the NGOs, there is a long history of participatory approaches to development, which are now being revived. Some of these use such concepts as "community participation", "co-management", "bottom-up approach to development", and "capacity building", which imply the participation of local communities. However, many of these potent concepts are used in a rather faddish manner.
- **New Training Orientation:** Over the last decade, government and public policy planning officers have received training (including higher degrees) that include issues of participatory project planning and implementation. They have been exposed to the need for people-oriented development processes. However, they tend to get straight-jacketed to respond to pressing and transient needs of politicians, and those of donors

11.2 How extensive is citizen participation in voluntary associations and self-management organisations, and in other voluntary public activity?

The key factor to the establishment of a strong civil society is initiative for self-organisation. Socio-anthropological studies show that a common feature of the Malawian community life is the high degree of self-organisation in cultural, economic and political matters (Chirwa and Poeschke, 1998). A variety of *formal* and *informal* institutions and organisations exist at various levels of the social system that serve these functions. For purposes of analysis we can group them under the following headings:

- **Cultural Institutions:** As forms of civil society, cultural institutions play two important roles: first, they are the main laboratories for belief, value, attitude, and character formation and formulation. It is in these institutions that "the habits of the heart and the mind" are shaped. Second, they are the channels and structures through which power and authority are exercised at the community level. Often, the structures of the cultural institutions define and express the power and authority structures of their communities. Anthropological studies show that in Malawi, the most influential cultural initiations are those that relate to the rites of passage: *nyau*, a "secret society" for the initiation of boys, *chinamwali*, a series of initiation rites for girls, *jando*, initiation for boys, and marriage. Some of these, especially the first one, have a direct influence on the country's politics (see Chirwa and Poeschke, 1998). Not clear are the linkages between these institutions, operating at the local community level, and the higher structures of society such as local government structures and political parties.
- **Popular Culture:** An important aspect of the cultural institutions is popular culture: theatre, dance troupes, sporting clubs and associations, and others of that nature. In socio-cultural terms, they play similar roles to those played by the other cultural institutions. Both academic and popular literature show that numerous associations, clubs and groups of popular culture exist in the country. In terms of strengthening civil society, they are important as channels for communication and expression (see Chimombo and Chimombo, 1996, Chirambo 1998). It is in these institutions that the culture of self-expression, confidence and articulation is shaped. Here again, the linkages between these and the higher level institutions and organizations for civil society are not elaborate.
- **District/Ethno-linguistic Associations and Foundations:** Over the last four years, there has been growing interest in reviving district/ethno-linguistic associations (see Chirwa, 1998; Chirwa and Poeschke, 1998). They existed during the colonial era as "native" associations, welfare societies, and "tribal" councils. Most of the current ones exist as "Friends" of specific districts (with such names as the Friends of Chitipa, Friends of Karonga); and/or as "development and cultural associations" (such as the Nkhata Bay Development and Cultural Association, and the Chilembwe Memorial). Some of them exist as "Foundations" for specific "developmental projects" such as education facilities (with such names as the Tukombo Foundation, the Kaporo

Foundation, the Phwezi Foundation); and those that deal with the advancement of specific cultural topics such as language - the associations for the advancement of chiNgoni and chiTumbuka are good examples. As was the case during the colonial period, they tend to be élitist, with the majority of their members and office holders resident in towns. By their very nature, the "tribal" or district associations cause a lot of suspicion to the state. They are viewed as avenues for secretarian interests, ethnic consciousness, and regionalist tendency. Given that in Malawi ethnicity and regionalism are the conerstones of political life (see Chirwa, 1994, 1995, and 1998a), "ethnic" or district associations are less likely to receive political blessing from the state. Historical experience and examples from other country's suggest that for purposes of strengthening civil society, these associations are important as the breeding grounds for career politicians and the other forms of leadership. They have great potential for political and social mobilisations; and, if properly run, they provide effective linkages between the urban elite and the rural local communities. Valuable professional skills such as those relating to administration and management of public/civic organisations may be learnt through these associations.

- **District/Ethnic Associations and Local Government:** The capacity of these institutions can be enhanced by linking them to local government structures. The current situation in Malawi is that these structures were dissolved in 1995, just a year after the multi-party elections. A recent study has shown that the structures and functions for local government are not well known to the local people (Chirwa and Poeschke, 1998). Though district, town, municipality and town councils existed in the country for over fifty (50) years, local people are unable to link these to the concepts of local government and decentralisation. From the colonial period, right up to the time after independence, local government structures were responsible for the construction and maintenance of districts markets, access (feeder) roads and bridges, education, settling of civil cases, and the provision of accommodation facilities at the district centres. The importance of the local authorities declined with the intervention of the political party into their operations. The party intervened in almost every aspect of local government, including elections and decision-making. As a result, party and local government structures were fused. The recent studies show that at present, the functions of the local government structures are not properly articulated. The dissolution of local councils in 1995 has further eroded people's knowledge of these structures and their functions. However, a resilient and recognisable institution of local government is the chieftaincy. It had, and still has, a headquarters with office buildings and a court, plus paid up staff. In most cases, there is a trading center or open market nearby. This constellation of administrative, judicial and economic activities in the same locality at the community level, provides potential for the linkages with the district/ethnic associations and foundations for political and economic empowerment at the grassroots levels. Recently the government passed the local government and decentralisation bill. Local elections are planned for this year.

- **Socio-cultural and Soci-economic Groups:** At every level of the Malawian rural society exists *informal* socio-cultural and socio-economic groups that shape the social interactions and the behaviour patterns of people. The most common of these are the communal labour groups and charitable and "friendship" associations. The examples are numerous and cannot be detailed here (see Kasmann and Chirwa, 1997; Chirwa and Poeschke, 1998). Among the good examples are:

- ⇒ **Chiwira:** A form of communal labour mostly practised among the Chewa and Tonga of central and northern Malawi, respectively. Several families or individuals come together to offer each/one another reciprocal labour in such tasks as weeding, harvest and construction.
- ⇒ **Dima:** Is a form of reciprocal labour among women in the Chewa society. Several women form a group to assist each other.
- ⇒ **Chinjira** (among the Lomwe of southern Malawi) and **chibala** (among the Tonga): are charitable and friendship associations. **Chinjira** means 'sisterhood' and **chibala** means 'daughterhood'. Both of them are relationships between women who are not related; usually between a woman who is materially well off and one who is not, or between a younger woman and an elderly one. The relationship involves the exchange of labour, gifts, ideas and advice, and emotional and moral support.
- ⇒ **Vidikiti** or **chidikiti** (singular): Is a form of labour mobilization among the Tumbuka of the northern districts. It occurs in two forms: as charitable work to assist those in need of labour because they are incapable of working, such as the elderly people; and as a fund club in which the members work for a fee in order to raise money for specific communal projects.

As forms of civil society these informal associations and clubs are important because they are at the center of community life and communal action. They are the channels through the "habits of the heart and the mind" are articulated. To the extent that they deal with material aspects of life, through the provision of labour, subsistence and other necessities, they can be regarded as important avenues for the alleviation of the harsh effects of poverty at the community and individual levels. They are important individual and communal survival mechanisms. What needs to be determined are their possible links with the higher institutions and organisations of civil society.

- **Producer and Consumer Associations:** Malawi has a long history of producer and marketing associations, credit institutions and clubs. Good examples of producer associations and credit clubs are farmers' clubs. They are the tail end of the Ministry of Agriculture and Livestock Development credit-and-extension system. The available literature suggests that these clubs have generally failed to achieve their stated objective of sustainably increasing the agricultural production and, by so doing, improve the living standards of their members. Instead, they have become instruments

for squeezing surplus from peasants. Furthermore, as producer and marketing associations, they are ineffective because they are constrained by inadequacy of skills to garner the few market and trade opportunities. They also operate in the context of unclear or non-supportive government policy and action. The situation is made worse by the guilistic self-interest of many leaders of these organisations.

With the changes in the country's politics, and as a way of facilitating the poverty alleviation policy, a number of credit NGOs and clubs have emerged in the country. Notable examples include the National Association for Business Women (NABW), the Women's World Banking (WWB), the National Association for Small and Medium Enterprises (NASME), and the Finance Company of Malawi (FINCOM). Their efforts are complimented by those of a variety of the lending and financing clubs operating at the local community levels. The main objectives of these associations are: to facilitate access to cheaper credit, provide training and skills in business enterprise, management and marketing, and to act as producer associations. They have been perceived by most Malawians as the most able way to empower the population in the efforts towards poverty reduction. The political leadership holds a similar view, such that since 1994 it has assisted in creating credit NGOs - especially for women, but also to meet the various financial needs of the emerging entrepreneurial class. The liberalisation dispensation has also enabled the emerging NGOs, and the already established financial institutions to diversify their credit lending practices. However, the performance of most of the credit clubs and NGOs has not been impressive. They have failed to achieve their objectives due to inadequate funding, poor managerial skills, lack of focus, improper market research, and absence of good business values and ethics.

There are few consumer associations in the country. They aim to define the needs of consumers, and to influence producers and providers of services to meet them. The needs of these groups could relate to product quality, price or location of delivery. Some consumer associations initiate action to consult with these groups. Consumer associations for farm produce are virtually non-existent in Malawi, but there is a general consumers association, the Consumers Association of Malawi (CAMA), which is urban based; and thus lacks nation-wide support. Even among the urban-based consumers CAMA is not all that effective. The majority do not understand and appreciate its objectives or what it can achieve.

Since the early 1990's, the emergence of economic institutions and organisations of civil society has provided an opportunity for participation in policy making which has not been fully utilised. The Malawi Chamber of Commerce and Industry and the government are now engaged in consultations to form a Business Council so that they plan together jointly rather than have the private sector re-acting to government action. The culture of allowing civil society to participate in policy making has to be cultivated. Most Malawians feel that "things ought to take care of themselves for their good", and civil servants resent

openness, and tend to hold on to the strategic planning data as talismans for their continued power and existence.

- **Labour Unions:** A larger section of the Malawian labour force is not unionized. As a result existing labour unions in the country have a small constituency, and thus generally lack the mandate to act on the behalf of the majority of the country's workers. From discussions with the officials of the Malawi Congress of Trade Unions (MCTU), it is clearly that there is growing awareness of the need to tackle issues of safety in the workplace: in terms of physical, health, disease and other considerations; and the job market: number of jobs available, being created, and being phased out. However, if there is a category of the Malawian civil society that remains considerably weak, it is organised labour. Though the history of organized labour and trades unions dates back to the 1940s, and though labour activism and militancy was common from the 1950s and 1960s (see McCracken, 1986, Woods 1992) the country's labour unions have very little impact on the political and economic trends in the country at present. A lot of the Malawian workers are still "ununionized". This is largely because of the legacy of the one-party dictatorship. Paradoxically, political protest during the transition period was fuelled by labour protest - by unorganized workers. During the transition, an alliance of labour and political pressure groups was created to question the ruling mandate of the government, and to call for a new political and economic order. The emerging literature suggests that after the transition, organised labour and political parties (former pressure groups) have drifted in their own ways. The relationship between the two sides is characterised by suspicion, mistrust and disrespect (see Banda, 1995; Chirwa, 1998b). The labour movement also suffers from internal tension, bickering and fission, with the civil service component pulling out of the MCTU.

11.3 *How far do women participate in political life and public office at all levels?*

Section 24 of the Malawi Constitution outlines the rights of women; and as citizens of the country, their freedoms of association, conscience, expression, access to information, assembly; and their political rights are covered in sections 32 to 40. During the run up to the 1999 elections, a few NGOs, notably the APW, CILIC, Women in Politics, and women's lobby groups campaigned for women to run for parliament. In some cases, these organizations campaigned for women candidates regardless of their party affiliation. As a result of this, and also partly because the political parties themselves encouraged women to compete for office, the number of women contesting the elections, especially at the primary levels, increased. A total of 18 women entered parliament, contrasted to about 10 in 1994. The UDF has the largest number of female representatives in the house:

Party	Total Seats	Male	Female
UDF	93	80	13
MCP	66	63	3
AFORD	29	28	1
Independent	4	3	1
Total	192	174	18

Note: These were the results after the polls. The composition of the house has since changed. All the independents joined the UDF during the first sitting of parliament. There have been some bye-elections that have contributed to the changes in the composition of the house.

As the above figures indicate, the percentage of women in parliament is still small. Women's organisations in the country argue that they would prefer to have at least one-third of the seats occupied by female representatives. The ruling party has taken initiative to include women in the cabinet. There are two female ministers and four deputy ministers. One female members of parliament is also second Deputy Speaker of the house.

Female participation in politic is most likely to increase with the upcoming local elections. It should also requires noting that a few women occupy important public offices: including a position on the Supreme Court; Principal Secretaries in ministries, and Chief Executives of district assemblies. A few influential NGOs headed by women. They include: the APW, CILIC, Malawi CARER, Women's Voice, and MAMWA. Up to until a few months ago, one small political party, the Sapitwa Democratic Party, has headed by a woman; and the leading opposition MCP has a female Secretary General. However, in general, female representation and leadership in political and public life is still on the low side. A directory of female leaders and political and public office holders has just recently been published.

11.4 *How equal is access for all social groups to public office, and how fairly are they represented within it?*

The Bill of Rights (Chap. IV of the Constitution) opens the opportunities to contest for public office to every citizen. However, there are strong indications that minority groups (including ethnic minorities), women and other socially vulnerable groups are at a disadvantage. The racial composition of parliament is a good example. There is only one

person of European descent, and less than ten of Asiatic and mixed blood. Strong ethnic and racial statements have some times been made in parliament, indicating less acceptance of Malawian citizens have “foreign” descent.

11.5 *What measures, if any, are being taken to remedy publicly identified problems in this field, and what degree of political priority and public support do they have?*

Several measures have been put in place to address some of the problems raised above. In the area of legislation, on a few occasions civil society institutions have challenged manipulations of legislation. Recent example is that of the proposal to amend the Local Government Act, as reported in The Nation newspaper on 20 July 2000:

Civil rights bodies have expressed dissatisfaction with the proposed amendment of the Local Government Act, saying giving the president powers to appoint mayors and their deputies will be defeating the essence of democracy at the local level. The government last week presented a bill in parliament to amend sub-section (1) of Section 7 of the Local Government Act (1998) to vest powers in the president to appoint assemblies’ chairmen and deputies. Currently the Act states that the elected councillors will choose among themselves assemblies’ chairmen and deputies. The proposed amendment has not been debated in parliament.

Mention has been made of the efforts of NGOs to increase female representation in political and public life. The government has also responded by establishing such ministries as the Ministry of Gender and that of the Disabled Persons to cater for these disadvantaged groups.

12.0 GOVERNMENT RESPONSIVENESS

Q.

Summary: The level of communication between parties and between the government and the civil society is alarmingly low. It has been described by some as a ‘culture of silence’. There is a strong element of resolving issues by consultation and dialogue which creates a favourable environment for the creation of public trust in the government. However, lack of adequate reliable channels of communication leads to an erosion of public trust in the government. Field research indicate that due to the prevailing patron-client relationship between the state and its citizens, the latter take advantage of every slight change to receive facilities from the former. The proliferation of civil society institutions with better focus and determination could provide alternative channels for communication and the delivery of services.

12.1 *How open and systematic are the procedures for public consultation on government policy and legislation, and how equal is the access for relevant interests to government?*

In Malawi, “the alarming low level of trust and communication between parties and between the government and [the] civil society is striking” (Odendaal, 2000:8). Some people talk of a reigning “culture of silence”, mistrust and suspicion. While some agree that informal communication between individuals from different groups occur, the consensus is that **reliable** channels of communication between parties is non-existent:

Party spokespersons ‘shout’ at each other in parliament, in the media, and from public platforms. There seems to be little opportunity for them to really listen to each other, share **accurate** information and develop **sufficient** trust to co-operate where issues of national importance are at stake. This culture of silence also extends to the legislative processes. Civil society representatives complain of the lack of opportunity to engage government and the opposition in debates over pending legislation. Government spokespersons, on the other hand, complain of the overly aggressive and biased manner with which some NGOs and journalists relate to government.... Another aspect of this ‘culture of silence’ is the perceived lack of information made available to the public. Against a background of high, and at times unrealistic, popular expectations, it is vital that **accurate** information is communicated to the public....

The situation of non-communication is breeding ground for deep suspicion, exaggerated perceptions and vicious rumours. It inevitably leads to deeper political polarization and poses a threat to the quality of democracy and political stability (Odendaal, 2000:9).

12.2 *How accessible are elected representatives to their constituents?*

A study on the socio-anthropological conditions for democracy (Chirwa and Poeschke, 1998), and one on the *Kanthu N'khama* radio program (Chirwa, Kayanula and Lijenda, 2000) reveal that in most parts of the country, constituents have very low opinion of their members of parliament. It is argued that the members of parliament are often busy running their own business; or, in some cases, are resident in towns, far from their constituencies. Very few MPs have constituency offices where they can sit, listen to, and discuss with their constituents. The *Kanthu N'khama* radio program, aired on the national radio station every Saturday at 2.00 pm highlights the problems constituents have with their members of parliament. Some of them have responded positively to the queries.

12.3 *How accessible and reliable are public services for those who need them, and how systematic is consultation with users over service delivery?*

The impression in Malawi is that once elected, the majority of the public figures do not effectively provide their services to those who need them. Their effectiveness is limited by a number of factors, including:

- **Low institutional Capacity in the Public Sector:** defined as “the complex array of organisations and institutional arrangements and processes which citizens in any country use to agree on their collective vision, goals and objectives and the rules to observe in the process of attaining these...” A consultancy report produced in 1997 (Mugore 1997:i) observed that several steps have been taken to transform the public sector in the country. However, these “have been hampered in part by lack of conceptual clarity and consequent distorted reform models, in spite of the extensive discussion and several reports”. The document recommends that for it to work effectively, the public sector reform “should be linked to national priorities expressed during the national referendum, the elections, the Vision 2020 process and other national development priorities expressed in different fora, and recorded in various documents, which it is intended to serve and for whose attainment it is being reformed.

- **The Cash budgeting:** Since its introduction in 1996 there is no concrete evidence that cash budgeting has worked. There have been complaints on time lags between the collection of revenue and the disbursement of budgeted allocations to ministries

and departments. Meanwhile the ministries and departments will have to operate on bank overdrafts and loans; or scale down on their activities. In the process, the delivery of services suffers, and government becomes ineffective. Over-expenditures have also been common.

- **Corrupt Practices:** There is also ample evidence that levels of corruption have increased in government (see below). This is partly a result of the poor working conditions in the public sector, and partly also because corruption has become a highroad to private accumulation, resulting in a process of “primitive accumulation”, meaning the use of public office to get access to, and to accumulate wealth and property.

12.4 How much confidence do people have in the ability of government to solve the main problems confronting society, and in their own ability to influence it?

Public trust in government institutions and personnel is vital for good governance and the effectiveness and accountability of government. A report of a field study sponsored by the German Technical Cooperation (GTZ) conducted between 1997 and 1998 reveals that public trust in the government is fast eroding. The reasons given are:

- The government has been high on promises but rather low on delivery.
- The quality of the delivered social services that are meant to benefit ordinary people are on the decline – witness shortage of drugs in hospitals, falling education standards, and rising unemployment.
- Attempts by the ruling party to undermine the opposition, sometimes using rather violent and unconstitutional methods: disrupting opposition meetings, buying off opposition leaders; and control of opposition access to electronic media.
- Increasing levels of corruption. This has been observed by some critical members of the ruling members of parliament. A good example is that of James Chikwenga, UDF Member of Parliament for Mangochi Malombe who told parliament that:

government’s commitment to fight corruption was not being taken seriously because it [government] was still keeping in its midst corrupt ministers and party officials... no one

can take government seriously in this regard when some ministers, who were putting on *patapata* [slippers] and walking on foot just six years ago, are now millionaires. How can this be?.

- Lack of ethics and exemplary behaviour among the politicians is regarded as among the major causes for loss of public trust. The politicians and public officials do not provide a mirror image that would portray them as role models.

The results of field research also reveal that due to the patron-client relationship between the state (or government) and its citizens, the latter take advantage of every slight change to receive facilities from the former. This results in a recipient mentality on behalf of the citizens. Viewed from a political angle, it is a false indication of public trust and confidence in the state/government. The reason is that it is based on material benefits and advantages rather than on political will.

A key factor affecting public trust in the government is the political tension created by the controversial results of the 1999 elections. Those in power do not want to admit that the country is in political crisis. Some analysts have observed that “at the heart of the current crisis is the occurrence of voting patterns largely along regional and ethnic affiliations.... In addition to regionalism and ethnicity, is the further complication of religious identity” (Odendaal, 2000:4). Religion too influence the pattern of voting. Furthermore:

One of the problems with the current pattern of political mobilization is that it has the potential of creating resentment amongst minorities who lack the numbers to successfully contest power. If mobilization happens on the basis of ethnic identity [*sic*: and religious affiliation] some Malawians may find themselves disadvantaged purely because they belong to a specific group. An acute sense of exclusion and descrimination may develop, which is a major cause of deep-rooted and intractable conflict world-wide.

Odendaal (2000:7) argues that “it is important to note that when groups feel marginalized because of their identity, exaggerated rumours and perceptions of disadvantage inevitably arise.” Even when the distribution of wealth and opportunity by those in power occurs on a more or less equitable basis, minority groups still harbour suspicion and interpret events accordingly. A number of such suspicions and perceptions are common in Malawi. They include:

the alleged irregular management of the election process; the governments’ misuse of the radio for party propaganda; an inadequate separation of interests between the state and the ruling party; senior officials losing their employment to ruling party supporters; supporters of the opposition parties losing contracts and other economic opportunities to

government supporters; the islamization of the country with foreign aid; and so forth. Though these perceptions may not be supported by objective facts, the fact that they exist is serious enough in itself as people's behaviour is driven as much by their perceptions as by objective facts.

An added factor is the failure of Malawians to unite behind symbols of national identity. "There seems to be little opportunity for Malawians to celebrate their national identity. events with symbolic national value appear to have been impacted on by the political polarization in the country." Members of the opposition claim that they do not receive invitations to national events, and government spokespersons claim that the opposition leaders are invited but deliberately boycott these events.

Whatever the case may be, it is cause for concern that the nation is left of opportunities to see and hear their various leaders affirm the overarching importance of the Malawian identity. Several people also feel strongly that the presidency needs to become a uniting factor in the country. Malawians want to identify with the president even though they belong to different parties. They want to see him having the interest of the whole nation at heart [sic: and not to be shouting his party's slogans at important national functions or/and public rallies].

Thus, given the infant shakiness of elected government, the issue of public confidence seems a bit premature. The groundswell which effected the 1992 change may have been rooted in harsh economic reality, but its surface was political. The two governments since 1994 have rode on goodwill; but the next government may reflect the extent of public confidence in the effectiveness of the present one. Political conduct, law and order, and delivering on the economy may be the test of elite politics.

12.5 *What measures, if any, are being taken to remedy publicly identified problems in this field, and what degree of political priority and public support do they have?*

In Malawi, there is a very strong element of resolving issues by consultation and dialogue. This creates a good environment for the creation of public trust in the government, elected leaders, and other officials. It also creates room for direct contacts between the public and those in offices. The proliferation of the civil society institutions provides alternative channels for communication and the delivery of services.

13.0 DECENTRALISATION

Q.

Summary: The decentralisation system under one-party rule consisted two parallel systems, namely, devolution through the local authorities and deconcentration through the District Administration. Firstly, the devolution of powers to local authorities was realised through the Local Government (District Council) No. 22:02 of 1965 governing the district local authorities and Local Government (Urban areas) No. 22:01 governing the urban areas, namely the cities, municipalities and towns. The local authorities derived additional powers and duties from other Acts such as the Education Act, Public Health Act, and Liquor Act and worked through such committees as the Education and Bursary, Health, Finance and Liquor Licensing committees. Currently, in the absence of councillors, the local government system is characterised by a high degree of central government control and unlimited authority over the local government functions. The local government system as of today is in a state of flux.

13.1 How independent are the sub-central tiers of government from the centre, and how far do they have powers and resources to carry out their responsibilities?

The local government system moved from centralisation during the colonial period to a brief devolution in 1961 and to re-centralisation by the MCP in 1966. By 1967 the government had stripped the local government of most of the functions based on the view that they lacked experience and direction. The central government reduced grants, withdrew some services like road maintenance and controlled staff appointments, promotion, discipline and dismissals. The local autonomy was further undermined by the passing of section 50 of the Local Government District Council Act of 1965, which repealed the council autonomy and decision making powers. The urban and district councils had no mandate to play a significant role in local governance and economic development and that over the past 30 years during which Malawi has been a one party state, many of the functional responsibilities held by the local authorities were appropriated by the central government.

The Ministry of Local Government and District Administration has become the controller of local authorities. The legal text tends to define the role of the ministry responsible for local government mainly as regulatory and controlling rather than facilitating. For instance, the local authorities are required to prepare annual estimates and prepare annual accounts in line with the ministries' guidelines. The minister retains the power to approve the local authorities, budget, sources of revenue, external borrowing and by-laws. The local authorities largely depend on the other agencies and line ministries to deliver services such road maintenance, education and health. Until the full decentralisation is

realised after the local government elections, the local authorities continue to be subjugated to the central government and its field agencies with minimal powers to carry out their responsibilities.

The local government system has been weak and resource starved for the past 30 years. The central government took over all the rates (taxes) except the rates on the assessable property. The district councils obtained their revenue from the central government grants, which were reduced and disbursed erratically. The funding of the various projects was routed through the DDC and the legally constituted district councils were by passed in all project-funding processes. The narrow resource base of the local authorities and the authoritarian attitude of the central government resulted in the decline of the local government finances that degenerated into inefficient and ineffective performance at the local level.

The creation of the DDC resulted in competition for financial and other resources from the central government. The DDC was responsible for the various projects including the aided self help projects previously dealt with through the Department of Community Development with grants made to the local authorities. Thus the establishment and strengthening of the DDC eroded the functions and capacity of the local authorities. (Miller, 1970; Apthorpe et al. 1995)

The local government system is facing problem to carry out its responsibilities because of the financial and human resource constraints. The system is characterised by insufficient revenue, inappropriate accounting and budgeting procedures and poor access to credit. The financial constraints are critical in district councils because of the narrow resource base in view of the absence of property tax. In cities, municipality and towns where property tax is realised, the challenges faced include tax evasion due to lack of effective management system in debt collection, unavailability of updated data on property owners and rates, among other logistical problems and corruption among officials. The accounting systems and budgetary procedures are not satisfactory as more often that not, the approvals from the Ministry of Local Government and District Administration often come after the financial has commenced. The local authorities responsibilities are not effectively carried due to inability to raise adequate funds from lending institution as a result of the narrow resource base.

The lack of finances has resulted in the failure by local authorities to attract and retain qualified personnel:

The available quality and quantity of manpower is very poor both at the ministerial and the local levels and it is insufficient to effectively discharge the numerous obligations. (Metcalf, et al. 1996)

The sporadic training programs, the failure to provide adequate funds for the training programs and the lack of appropriate courses that tackle professional and technical issues

relating to local government have aggravated the shortage of competent and adequate staff in key positions. The scarcity of qualified personnel in local authorities has led to problems in planning and prioritising the responsibilities, inefficiency in communication between councillors and local authority administrators, mismanagement and the general decline in the performance of the local authorities. To sum up, the capacity of local authorities is insufficient to ensure effective discharge of its obligation of guaranteeing local governance and local development.

13.2 How are these levels of government subject to free and fair authorisation, and to the criteria of openness, accountability and responsiveness in their operations

During the final years of the one-party rule both the district councils and the District Administration notably the DDC lacked accountability because they were subjected to the MCP's machine of politics of intimidation and domination. The centralisation of the administration of local government was accompanied by the politicisation of the local government system. The supremacy of the MCP resulted in the perpetuation of corruption and misuse of local authority properties.

The politicians utilised council services at no cost and they slept in council rest houses free of charge and used council vehicles and fuel without paying . (Kaunda, 1998)

With the declaration of one party state in 1966 all the councillors belonged to the MCP. Although such fora as the full council meetings, the finance, bursary, liquor license and public health committees provided an avenue for open the council's accountability and responsiveness to the public were curtailed by the strict control of the central government. Presently, the local authorities are running without the councillors; they are under the supervision of the newly created Ministry of Local Government and District Administration. The local government elections which were cancelled on the grounds of lack of funds are yet to be conducted and they are scheduled to take place in November 2000. Thus the local authorities are more responsive and accountable to the ministry than the electorate.

13.3 How extensive is the co-operation of government at the most local level with relevant partners, associations and communities in the formation and implementation of policy, and in service provision?

The local council provided an arena for co-ordination of self-help projects and representation of the interest of communities and associations and building partnership among the various public sectors at the district level. The full council committee meetings were open to the public and various representatives such as the heads of departments from line ministries, chiefs, NGOs, MP's and local residents. However, on the development arena the effective link is currently facilitated by the DDC which received inputs from representative such as chiefs, members of parliament and interaction with the various committees at the district level such as the DEC, District Council, Area Development Committees and Village Development Committees and Non Governmental Organisation's. The communication and co-ordination processes between the ministry of local government and district administration and the local authorities are nonetheless sporadic and ineffective. The ministry has not adequately responded to the changing demands for qualified personnel while the Local Government Service Commission (LASCOM), a body charged with the responsibility of recruiting local authorities staff, delays in filling the vacant positions.

13.4 What measures, if any, are being taken to remedy publicly identified problems in this field, and what degree of priority and public support do they have?

The introduction of the multiparty democracy in 1994 and the new Constitution, and the enactment of Act 1998 provided a new impetus and greater direction to the decentralisation initiative. The provisions in the Constitution and the Malawi Local Government Act of 1998 (Act 1998) envisage a substantially decentralised and reformed local government system with a new status and role. Section 146 (3) of the Constitution of 1994 states that Parliament shall, where possible, provide that issues of local policy and administration are decided at the local level under the supervision of local government authorities.

Thus various policy reforms measures have been initiated to remedy the problems. The division of responsibilities has been re-visited. The result is the allocation of a wide range of functional responsibilities to local councils. The responsibilities of local government outlined in section 146 (2) of the Constitution and repeated almost verbatim in section 6 (1) of Act 1998 include the promotion of infrastructure and economic development through the formulation and execution of local development plans and the encouragement of business enterprise; the presentation to central government authorities of local development plans; the promotion of the awareness of local issues to national government and the consolidation and promotion of local democratic institutions and democratic participation.

There are moves to strengthening the local government institutions. The attention is on the creation of strong local institutions that embrace participatory democracy. The objectives

of the decentralised local government provided in Section 3 of the Act, 1998 include the promotion of constitutional order based on democratic principles, accountability, transparency and participation of the people in decision making and developmental process. To this effect, a decentralisation secretariat based at the Ministry is co-ordinating and working hand in hand with donor agencies notably the world Bank, UNDP, DANIDA who have initiated studies, workshops, fields visits and capacity building of local institutions such as the 5 th Country Project.

Currently, the local government system is undergoing transformation. The recent amalgamation of the district councils and the district administration has resulted in the formation of a new local authority structure called the 'assembly'. The assemblies include the city, town and district assemblies. They are expected to be fully operational once councillors are elected during the local government elections scheduled to take place in November 2000. It is anticipated that the new structure will promote local participatory democracy through representatives of the community such as Members of Parliament (MPs), chairpersons of all political parties in the district, chiefs and representatives of Non-Governmental Organisations (NGO's), the business community and councillors in the assembly.

To improve on the financial and administrative capacity in local authorities, reform measures are underway. At the district level, the district development fund has been established and the revenue resource base has been broaden to include fees and charges on ' structure plans', water supplies among others. The merging of the district councils and the district administration personnel is expected to strengthen the administrative capacity by pooling the personnel under the assembly. In-service training programs have been strengthened by sending some members of staff for training at University of Birmingham, The Polytechnic and at the Government Staff Training College.

However, although the government is showing willingness to promote decentralisation, the local government system is weak and undeveloped due to the dependency on central government grants, the lack of administrative capacity, inadequate grassroots participation in local authority affairs. In the absence of the councillors the involvement of the public in local government affairs is almost non-existent.

IV. DEMOCRACY BEYOND THE STATE

14.0 [SUB-HEADING????]

Are the country's external relations conducted in accordance with democratic norms?

Summary: The governance of Malawi is not an exclusively internal matter. The dependence which Malawi has on donor governments and agencies makes it particularly vulnerable to external pressure. The relationship with donors is ostensibly based on principles of partnership and transparency, with donors consulting government over their programmes through various bilateral and multilateral fora, including those at a global level. The government appears to support United Nations human rights treaties and to respect international law. Perhaps the most vivid illustration of this is the continued reception and sheltering of refugees and asylum seekers from as far afield as the Democratic Republic of Congo and Ethiopia despite the country's serious economic problems.

14.1 How free is the governance of the country from subordination to external agencies, economic, cultural or political?

Donor pressure was a key factor in paving way for transition to democracy in Malawi. At the onset of the democratization process in the early 1990s, donors attached economic aid to good governance: "we are not asking other governments to replicate our parliamentary institutions", argued Sue Unsworth of the British Development Division in Southern Africa, "national traditions and circumstances differ from country to country", she added. She further explained that, however, development assistance would be tied to good governance:

By good governance we mean adherence to three basic principles: first, sound economic and social policies which allow a free operation of market forces and which enable poverty, illiteracy and disease to be tackled and opportunities to be created for popular participation...second, competent government institutions, accountable through democratic systems. Third, respect for human rights and the rule of law...

Quoted in the *Malawi Financial Post*, Feb. 12-18, 1992:5

Since then the donors presence and influence have been there in the democratic process in a number of ways. For example, in the conduct of the two general elections donor funding and technical assistance was significant; and especially in the 1999 elections when the registration exercise had to be extended and the elections had to be postponed. The overall cost of the elections went extremely high. Had it not been for the extended donor funding the elections would not have been held. The extended election funding came through two

channels: through a pool fund coordinated by the United Nations Development Programme (UNDP), and through direct contributions:

Through UNDP	US \$ 5,113,391
Direct Contribution	US \$ 9,784,694
Total	US \$ 14,898,085

Granted this, the general perception of donor support in Malawi is not very positive. A number of stakeholders have expressed concern over the fact that the priorities of the donors change too frequently for their local partners to accordingly adjust their programmes. More recently, Malawi has pleaded for debt cancellation. In the Consultative Group (CG) Meeting held in May this year the country was given two choices by the principal donors:

- (i) Debt cancellation under the Highly Indebted Poor Countries Scheme of Debt Cancellation (HIPC)
- (ii) Rescheduling and aiming for grants along the way to reduce burden. Malawi opted for HIPC although it would disqualify the country from certain international aid, and particularly from bilateral loans.

The civil society came out strongly to impress upon the donors to unconditionally write off the country's debts. A demonstration was organised by the Malawi Congress of Trade Unions (MCTU), the Malawi Institute for Democratic and Economic Affairs (MIDEA) and the Centre for Human Rights and Rehabilitation (CHRR).

While the arguments for debt cancellation are strong, it is important to take into consideration the fact that Malawi does not yet meet the debt relief criteria. The country has to first of all come up with a plan on how funds saved from debt relief will be spent; and assure the donors that the money will indeed be used for those purposes before being considered for the HIPC debt relief initiative. The donors demand financial discipline on the part of the government from time to time. It was observed that the government expenditure has risen sharply in the past because of weak control procedures. Budgetary resources have also been used for maize price stabilisation and to recover losses of the Petroleum Control Commission. Poor fiscal management and monetary policies have led to persistently high inflation rate, currently standing at 30%; and is extremely volatile. Some donors have spoken against what they describe as 'economic mismanagement' by the government saying that the Malawi government has to improve budget handling if it is to get further support for balance of payments and budgetary support from them in future. Verne Newton, the US Deputy Assistant Administrator for Africa pointed a finger at wasteful spending as a cause for all this:

Currently the budget is burdened by unauthorised and wasteful spending and inability of parastatals to service their debts. This has resulted in arrears that even the Ministry of Finance has difficulty reconciling." *The Nation* 18 May, 2000.

The donors have also made strong comments on increasing incidents of corruption. Recently, the British High Commissioner to Malawi flatly declared that:

We will not support corrupt governments. We will not back those leaders who are unwilling to take tough decisions. We will not subsidise economic mismanagement. These are evils which have failed Africa and we will not back failure...those guilty of abuse of office, conflict of interest, fraud or corruption should be made to pay a price. *The Nation*, 12 October, 2000. p1.

Some analysts have observed that the donors, themselves, are not without blame. The economic programmes they support often miss their intended targets. Thus, as the donors blame the government for mismanagement,

overspending and corruption, these analysts blame the donor funded economic programmes like the Structural Adjustment Programme (SAPS) and the Enhanced Structural Adjustment Facility (ESAF) for having no meaningful positive impact on alleviating poverty. Recently, a new programme, the Sector Wide Approaches Programme (SWAP) was adopted and is soon to be implemented. It aims to co-ordinate all donor aid and funded projects, and ensure their effective implementation.

There is sometimes the perception that donor pressure undermines the sovereignty of the country. In October 2000, for example, following criticism by the British High Commissioner of the government's slowness of response to the corruption scandal in the Ministry of Education, the President went out of the way to imply that such criticism was improper. According to the lead story in *The Nation* of 16 October 2000:

President Bakili Muluzi has said that he will not bow down to donor demands to arrest cabinet ministers involved in the K125 million Ministry of Education scam, saying that he does not have evidence to prosecute anyone.... "We are not a colony of any country. We are poor, yes, but we don't have to beg with our heads down (sic) like that. I am the elected head of state of this country."

14.2 How far are government relations with external donors based on principles of partnership and transparency?

Malawi's Foreign policy has clearly changed with the coming of democracy. The former regime was clearly pro-western, and pro-South Africa. The latter resulted in political isolation from the rest of the region. The new policy is that of friendship and good neighbourliness in the region. The external policy has also shifted from a staunch pro-western stand towards friendship with those nations previously the country did not have friendly ties with, such as Libya, and other states in the middle east. But what is of concern is the way these new relationships are being pursued. There are no clear assessment of the national interests in them, and no clarity of motives behind the assistance coming from these countries. The only basis has been

the existence or non-existence of areas of common interest from which mutual benefits might be derived, sooner or later. There is also a belief that the relations should not be governed by the colour or race of those controlling the states or by their domestic policies. Thus, soon after its formation the new government declared good neighbourliness as its priority and this was demonstrated by the Presidents' four-nation tour to Zimbabwe, Mozambique, Zambia and Botswana. Malawi was also at the forefront in the attempt to substitute PTA with COMESA for building regional economic stability and co-operation. To this effect, the country hosted the 1997 SADC Heads of State Summit.

Commitment to the regional cause is further illustrated through participation in jointly security programmes. For example, recently the Malawi army participated in the Blue Crane exercise in South Africa and in the Blue Hungwe exercise in Zimbabwe. They also took part in the peacekeeping exercise in Rwanda under the auspices of UNAMIR. The justification for these activities is that the prevalence of intra-state wars, as opposed to the inter-state wars, has "intensified the process of regional integration" (The *Nation*, 9th April, 1996, p.3.). The humanitarian operation (called Chithandizo) undertaken by the Malawi army during the devastating floods in Mozambique was also viewed in the same light.

14.3 How far does the government support UN human rights treaties and respect international law?

Malawi has been a member of the United Nations since 1 December 1964. When the country became a republic in 1966, its Constitution provided that one of the principles on which the government was founded was the recognition of "the sanctity of the personal liberties enshrined in the United Nations Universal Declaration of Human Rights" and "adherence to the Law of Nations" (section 2(1)(iii)). The current Constitution accords international human rights treaties, and international law in general, even more weight. The Constitution requires that when courts are interpreting the Constitution, they should have regard to "current norms of public international law" (section 11(2)(c)). In addition, the Constitution provides that the State should, as a matter of national policy, "govern in accordance with the law of nations and the rule of law and actively support the further development thereof in regional and international affairs" (section 13(k)). The Constitution also guarantees human rights extensively and permits limitation and restriction of virtually all the rights only if the limitation or restriction is, among other things, recognised by international human rights standards (section 44(2)).

Malawi has acceded to a number of treaties, among which are conventions which guarantee civil and political as well as social and economic rights. Among the key conventions which Malawi has acceded to (with the dates of that accession) are the

Convention on the Elimination of All Forms of Discrimination Against Women (12 March 1987), the Convention on the Rights of the Child (2 January 1991). The International Covenant on Civil and Political Rights (22 December 1993), the International Covenant on Social, Economic and Cultural Rights (22 December 1993), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (11 June 1996). Since these treaties are now part of Malawian law, the rights and obligations which they create are enforceable in Malawian courts. On the other hand are treaties which have not been incorporated into domestic law but which nevertheless impose international obligations on Malawi because it has ratified them. Such treaties include the International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, the African Charter of Human and People's Rights and three of the "core conventions" of the International Labour Organisation. With respect to the ILO conventions, Malawi has pleaded "economic difficulties" as obstacles to its ratification of those conventions which it has not yet ratified. Economic difficulties have also been pleaded as justification for the failure to ratify the convention aimed at the elimination of child labour.

The Supreme Court of Appeal has underlined the importance of international human rights law in Malawi by stating that the Universal Declaration of Human Rights is part of the law of Malawi (*Chihana v Rep* Crim App (1993)). The High Court has also taken the same position (*Mhone v Attorney General*, *Banda v Dimon*). It is fair to say that Malawi supports United Nations human rights treaties and respects international law to a substantial extent. Malawi's commitment to and undertaking of the many relevant treaty obligations is evidence of this. However, its failure to incorporate into domestic law such key treaties as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights undermines efforts to submit regular reports to the Human Rights Committee of the United Nations on steps taken to discharge its international obligations and its retention of some statutory laws which violate international human rights standards detracts from the apparent commitment of the State to human rights treaties and international human rights law in general.

14.5 protection of refugees and asylum seekers

With the influx of the Mozambican refugees during the late 1980s, the Malawi government acceded to the 1951 United Nations (UN) Convention and the 1967 Protocol relating to the Status of Refugees. It ratified the 1969 Organization of African Unity (OAU) Convention on refugees, and went further to enact the Refugee Act in 1989. These instruments provided the legal framework for the protection of refugees in the country. The 1989 Act adopted the definition of a refugee found in the OAU Convention (Kanyongolo, 1992:5) and incorporated sections of the 1951 UN Convention and the 1967 Protocol. Two definitions of a refugee were provided: as a person seeking asylum because of "a well-founded fear of persecution", and as a person seeking asylum "owing to

external aggression". The Act thus gave the concept of refugeehood in the country a liberal definition (see Kanyongolo, 1992 and Maluwa, 1992). The responsibility of conferring refugee status is given to the Refugee Committee comprising the Secretary to the President and Cabinet, the Attorney General, the Chief Immigration Officer, the Inspector General of Police, the Secretary for Community Services, and the Secretary for External Affairs.

The Malawi refugee law excludes some important articles of the international law. These include: article 7 - relating to exemption from reciprocity; article 13 - concerning the acquisition of property; article 15 - dealing with the right to association; article 17 - concerning wage employment opportunities; article 19 - relating to the practice of liberal profession; article 22 - concerning the provision of public education to refugees; article 24 - concerning labour legislation and social security; article 26 - on freedom of movement; and article 34 - on naturalization and assimilation of refugees (details in UN, 1995:172-179). It can therefore be argued that by excluding these articles the Malawi refugee law only provided partial protection to the refugees.

Currently there are less than 200 refugees housed at the N'dzaleka (Dzaleka) camp in Dowa district, just outside Lilongwe. An incident that attracted a lot of international concern was the killing by the police/prison officials of an Eretrian national seeking refugee/asylum in the country. A few Eretrians had entered the country seeking asylum/refuge status. They were rounded up by immigration officials and one of them was killed in a scuffle with the police/prison officials.

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