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Rule of Law in Malawi: The Road to Recovery

August 2012

Report of the International Bar Association's Human Rights Institute (IBAHRI)
Funded by the Open Society Initiative for Southern Africa (OSISA)

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(www.factfindingguidelines.org)

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List of Acronyms

AFDB	African Development Bank
AU	African Union
BHC	British High Commission
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CHRR	Centre for Human Rights and Rehabilitation
CHRREA	Centre for Human Rights, Rehabilitation, Education and Advocacy
CONGOMA	Council for Non-governmental Organisations in Malawi
CSOs	Civil society organisations
DFID	Department for International Development (United Kingdom)
DPP	Director of Public Prosecutions
EU	European Union
IBAHRI	International Bar Association's Human Rights Institute
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
IMF	International Monetary Fund
JSC	Judicial Service Commission
MACRA	Malawian Communications Regulatory Authority
MCC	Millennium Challenge Corporation
MEC	Malawi Electoral Commission
MHRC	Malawi Human Rights Commission
MISA	Media Institute of Southern Africa
MLC	Malawi Law Commission
MLS	Malawi Law Society
NGOs	Non-governmental organisations
OSISA	Open Society Initiative for Southern Africa
SADC	Southern African Development Community

UN United Nations

UNDP United Nations Development Programme

Executive Summary

The International Bar Association's Human Rights Institute (IBAHRI) appointed a delegation of legal experts who conducted a fact-finding mission in Malawi from 8–14 January 2012. The aim of the fact-finding mission was to assess the state of the rule of law in Malawi. Particular emphasis was placed on assessing the independence of the judiciary and the legal profession. Other issues covered were the state of human rights in the country, particularly following the 20 July 2011 riots. Since the mission, recent events in Malawi have changed the political landscape in the country. On 5 April 2012, President Bingu wa Mutharika died of a cardiac arrest. Former Vice President Joyce Banda was appointed as the new President on 7 April 2012. The present report is a reflection on the state of the rule of law at the time of the IBAHRI mission in January 2012, but takes into account the changes that have taken place since President Banda's accession to power. The report includes recommendations with a view to ensure enhanced adherence to the rule of law, as the new government is beginning its term.

In 2002, an IBAHRI mission to Malawi found that the rule of law was under threat and this appeared to have worsened since that time. The challenges to the rule of law cut across all sectors of society. The IBAHRI believes that there is a pertinent need to ensure that the government of Malawi adheres to the country's Constitution. Particularly, there is a need to ensure the independence of the judiciary. In this regard, the IBAHRI believes that the separation of powers enshrined in the Constitution must be protected. In guaranteeing the genuine independence of the judiciary, an independent Judicial Service Commission (JSC), which must be responsible for the appointment of all judges, is indispensable. This JSC should appoint judges in a transparent manner in which candidates are assessed based on agreed criteria centred on merit. In addition, there is need for a Code of Conduct for judges and magistrates that provides for the regulation of judges' and magistrates' professional conduct.

Apart from the independence of the judiciary, other key institutions tasked with the promotion of the rule of law must also be independent. Notably, the Directorate of Public Prosecutions (DPP) must be independent from the executive in the execution of its prosecutorial decisions. Furthermore, the Malawi Human Rights Commission (MHRC) and the Malawi Electoral Commission (MEC) must be given the space to conduct their constitutionally enshrined duties.

The conduct of the police must be regulated so as to ensure that they do not abuse the powers granted to them in the Constitution to serve and protect the population.

The Malawi Law Society (MLS) has served to ensure that the legal profession remains independent. However, allegations of intimidation of lawyers must be investigated and, where substantiated, steps taken to ensure non-repetition.

The African Union (AU) and the Southern African Development Community (SADC) must work to support the rule of law in Malawi. Furthermore, the United Nations (UN), the European Union (EU), the Open Society Foundation (OSF) and other donor organisations and states should support and strengthen the promotion of rule of law and human rights in Malawi. In particular, international donors should provide support for essential reforms to the Malawian state, including strengthening

judicial independence, the independence of the legal profession and institutions such as the MEC and the MHRC. In addition, there is a need to provide appropriate human rights training for the police and magistrates.

The international donors should also support the Malawian media and civil society to provide coherent and accurate reports and analysis of violence, human rights violations and threats to the rule of law in the country. In addition, the donors can lend support to initiatives that aim to improve freedom of expression. Civil society and the media must also be encouraged to bring the findings of the IBAHRI mission to the attention of local policy-makers, institutions and media. The IBAHRI undertakes to publicise this report widely to local, regional and international stakeholders primarily via its country reports webpage: www.ibanet.org/Human_Rights_Institute/HRI_Publications/Country_reports.aspx.

Chapter 1: Introduction to the IBAHRI's Work in Malawi

The International Bar Association (IBA), established in 1947, is the world's leading organisation of international legal practitioners, bar associations and law societies. The IBA's membership includes over 40,000 lawyers and 203 bar associations and law societies from across the world. The IBA influences the development of international law reform and shapes the future of the legal profession throughout the world. The IBAHRI works to promote, protect and enforce human rights under a just rule of law, and to preserve the independence of the judiciary and the legal profession worldwide.

As part of its work the IBAHRI conducts fact-finding missions in select countries to assess various aspects of the rule of law and human rights. The IBAHRI also offers technical assistance where necessary.

In May 2002, the IBAHRI conducted a fact-finding mission in Malawi to assess the functioning of the legal system and its compliance with international and regional standards on the rule of law, in particular human rights standards.¹ The fact-finding mission found that democracy, good governance and the rule of law in Malawi were under threat, particularly from the executive's interference in the separation of powers. The 2002 fact-finding mission provided a number of recommendations to key stakeholders aimed at strengthening democratic governance, the rule of law and the promotion of human rights in Malawi.

In 2004, the IBAHRI, with the support of the Open Society Initiative for Southern Africa (OSISA), sent a Legal Specialist to work with the MLS.² The project aimed to improve operations of the Secretariat of the MLS through, inter alia, training of its staff and the creation a newsletter to help facilitate communication in the legal profession. The project also aimed to assist the MLS in the review of its governing statute and to improve the provision of legal aid. In 2007, the IBA sent another Legal Specialist to Malawi to help the MLS maintain relations with domestic and international funding bodies.³

1.1 Background to the 2012 mission and mission objectives

In 2011, the IBAHRI appointed a high-level delegation of legal experts who conducted a fact-finding mission in Malawi from 8–14 January 2012. The terms of reference⁴ of the delegation were that they would:

- 1) examine the independence, needs and challenges of the judiciary and the Attorney-General's office;
- 2) examine the independence of the bar association and of members of the legal profession;
- 3) examine laws related to the justice sector;

1 International Bar Association, 'Report on a mission to Malawi by the IBA' (August 2002) 13 available at: www.ibanet.org/Human_Rights_Institute/Work_by_regions/Africa/Malawi.aspx#Malawi_FF.

2 A summary of the IBAHRI's work in Malawi is available at: www.ibanet.org/Human_Rights_Institute/Work_by_regions/Africa/Malawi.aspx.

3 *Ibid.*

4 See Annex A: Terms of Reference.

- 4) assess compliance of legislation related to the justice sector and freedom of expression with the rule of law;
- 5) analyse the international and domestic legal norms applicable to freedom of expression and their implementation in Malawi; and
- 6) write and publish a report containing the findings of the mission, with recommendations.

In assessing the state of the rule of law in Malawi, the delegation focused particularly on judicial independence and independence of the legal profession. The delegation also looked more broadly at issues concerning human rights protection, freedom of expression and the state of governance in Malawi.

The members of the delegation were:

Justice Leona Theron, Judge of the Supreme Court of Appeal of South Africa

Justice Leona Theron was appointed to the Supreme Court of Appeal of South Africa in 2010. Prior to her appointment at the Supreme Court of Appeal, Judge Theron served as a judge of the KwaZulu-Natal High Court, where she was the first black female judge to be appointed. At the time, she was the youngest judge appointed in South Africa. Judge Theron acted as the head of the IBAHRI delegation to Malawi.

Professor Christine Chinkin, Professor of International Law at the London School of Economics and Political Science

Christine Chinkin is Professor of International Law at the London School of Economics and Political Science and a barrister, a member of Matrix Chambers in London. She was a member of the UN fact-finding mission to Gaza in 2009 and a contributor to the subsequent report. Professor Chinkin has an expertise in international human rights law and women's human rights.

Tinoziva Bere, Lawyer and President of the Law Society of Zimbabwe

Tinoziva Bere is a partner with Bere Brothers Legal Practitioners in Mutare. Prior to his election as President of the Law Society of Zimbabwe, he became Vice President in 2009 and has been a councillor and committee chair since 2001. Mr Bere has been a councillor of the Commonwealth Lawyers Association since 2005. He is currently chairman of the board of Zimbabwe Election Support Network, an electoral observation and advocacy NGO, and immediate past board member of Zimbabwe Lawyers for Human Rights.

Otilia Anna Maunganidze, researcher for the Transnational Threats and International Crime Division at the Institute for Security Studies (ISS), South Africa

Otilia Anna Maunganidze is a Researcher for the Transnational Threats and International Crime Division at the Institute for Security Studies. Her main focus is on international crime; international, regional and domestic criminal justice mechanisms to deal with international crimes and the centrality of international human rights law from a social anthropo-legal perspective. Ms Maunganidze also acted as rapporteur for the delegation.

Marie-Pierre Olivier, Senior Programme Lawyer, IBAHRI

Marie-Pierre Olivier is a lawyer and a member of the Quebec Bar in Canada. Her portfolio at the IBAHRI includes management of fact-finding missions and Legal Specialist programmes, mainly in African countries. She has conducted projects in the Democratic Republic of Congo, Zambia, Zimbabwe and Malawi, among others, and she also works on the IBAHRI's international criminal law training and publications.

The delegation visited Lilongwe, Blantyre and Zomba, where they met a variety of stakeholders. The mission was funded by the OSISA and was conducted in accordance with the Guidelines on International Human Rights Fact-Finding Visits and Reports (The Lund-London Guidelines – www.factfindingguidelines.org).

1.2 Meetings and consultations

The terms of reference of the delegation stated that they would meet: judges; government officials; lawyers and lawyers' organisations; non-governmental organisations (NGOs); human rights organisations; representatives of civil society, international and regional organisations; as well as embassies (if needed).

All the meetings were arranged by the IBAHRI and the delegation managed to meet most of the intended individuals. Between 9–13 January 2012, the IBAHRI delegation met: members of government, the judiciary and lawyers; representatives of statutory bodies; as well as members of civil society and the staff of embassies and international organisations. The delegation met: senior government officials, including the then Minister of Justice and Constitutional Affairs, Hon Ephraim Mganda Chiume; the then Attorney-General, Justice Maxon Mbendera; the Solicitor-General, Mr Anthony Kamanga; and the then Director of Public Prosecutions, Ms Rosemary Kanyuka. Although the Chief Justice had agreed to meet the delegation, he was unavailable at the scheduled meeting time and another meeting could not be rescheduled. The delegation met the Chair of the MHRC and a representative of the Malawi Law Commission (MLC). The delegation also held meetings with one former senior member of the judiciary, senior members of the MLS as well as several lawyers in private practice and a law professor. In addition to the government, judicial and legal officials, the delegation had several meetings with civil society representatives, representatives of the EU mission, the British High Commission (BHC) and the United Nations Development Programme (UNDP).

During the course of the fact-finding mission, the delegation received a wide range of views on selected matters. The IBAHRI delegation has made every effort to accurately reflect these views in this report. The report is based primarily on the meetings and consultations that the fact-finding delegation held with various stakeholders. In compiling the report, reference was made to other sources of information, including background reports and analyses on Malawi and its institutions, as well as media reports. The report aims to provide a balanced and impartial assessment of the state of the rule of law in Malawi.

Recent events in Malawi have already impacted the relevance of some of the findings in this report. On 5 April 2012, the President of Malawi, Bingu wa Mutharika, passed away following a heart attack. Vice-President Joyce Banda was sworn in as President on 7 April 2012, in adherence with the Malawi Constitution. The IBAHRI commends the smooth and peaceful transition and the fact that the transfer of power to the Vice-President took place in accordance with the provisions of the Constitution. President Banda has publicly proclaimed her commitment to the rule of law and has already begun some reform efforts, including the creation of a commission of inquiry into student Robert Chasowa's death.⁵ The IBAHRI presents the conclusions and recommendations included in the present report as opportunities for President Banda to address some of the problematic and systemic issues regarding the rule of law in Malawi, and offers its assistance in that regard.

The IBAHRI fact-finding delegation would like to extend its appreciation to everyone it met and hopes to engage further in promoting the rule of law in Malawi.

⁵ Discussed below in Section 2.2.2.

Chapter 2: Background to Malawi



Source: CIA World Factbook

Malawi is a developing country in Southern Africa bordered by Zambia to the west, Tanzania to the north and east, and Mozambique to the south and east. It covers an area of 118,480 sq km. Malawi's capital, Lilongwe, is in the central region of the country. The country's economic capital is further south in Blantyre.

Malawi attained independence from Britain on 14 June 1964. From independence until 1994, Malawi was a one-party state. Malawi held its first multiparty elections in 1994.

On 18 May 1995, Malawi's new Constitution came into force. The Constitution of Malawi is the supreme law of the country.⁶

2.1 Socio-economic situation

Malawi is one of the world's poorest countries.⁷ Over half of Malawi's population lives in poverty.⁸ Malawi's economy is heavily dependent on agriculture, which represents approximately 40 per cent of the country's gross domestic product (GDP).⁹ Nevertheless, agriculture accounts for approximately 90 per cent of Malawi's labour force and almost 85 per cent of all exports.¹⁰ The country's main exports are tobacco, tea and processed sugar.¹¹ Malawi also produces maize, sugar cane, groundnuts, cotton, wheat, coffee and rice.¹² As a result of Malawi's poor economy, the country relies heavily on foreign aid.¹³

Historically, Malawi maintained good foreign relations with major donor countries such as the United Kingdom (UK) and the United States of America (US). However, these have become increasingly strained since 2011 following the release of a document written by the Ambassador of the UK to Malawi in which he criticised Malawi's then President, Bingu wa Mutharika.¹⁴ Wa Mutharika expelled Ambassador Fergus Cochrane-Dyett from Malawi.¹⁵ The UK responded by expelling Malawi's High Commissioner to the

6 US Department of State, 'Background Note: Malawi' available at: www.state.gov/r/pa/ei/bgn/7231.htm.

7 BBC, *Malawi Profile* (20 July 2011) available at: www.bbc.co.uk/news/world-africa-13881367.

8 *Ibid.*

9 *Ibid.*

10 *Ibid.*

11 'About Malawi: Economy' The Malawi Project Inc available at: www.malawiproject.org/about-malawi/economy.

12 *Ibid.*

13 'Economy Watch: Malawi Economy' available at: www.economywatch.com/world_economy/malawi.

14 Reuters, 'Malawi expels British ambassador', the *Guardian* (27 April 2011) available at: www.guardian.co.uk/world/2011/apr/27/malawi-expels-british-ambassador.

15 *Ibid.*

UK.¹⁶ Furthermore, in July 2011, the UK announced the suspension of its budgetary aid to Malawi and instead redirected the funds to local communities.¹⁷ Concerns that Malawi may be becoming a fragile state prompted the International Development Committee of the UK's House of Commons to announce in December 2011 that it was opening an inquiry into the development situation, obtaining evidence from both within and outside Malawi.¹⁸ The inquiry is still ongoing, and in light of recent events in Malawi, the Committee extended the deadline for submissions of contributions to 24 May 2012.¹⁹

In July 2011, the US government froze its US\$350m Millennium Challenge Corporation (MCC) Compact.²⁰ The US decision was based on concerns with regards to the Malawian government's alleged suppression and intimidation of demonstrators and civil society, restrictions on the freedom of the press and the use of violence by the police.²¹ The US Ambassador to Malawi reminded Malawi to 're-affirm its commitment to political pluralism, human rights, and the rule of law through concrete, positive actions', in order to restart the Compact.²² The MCC announced the lifting of the suspension against Malawi and the reinstatement of the Compact on 21 June 2012.²³

In addition to soured diplomatic relations with the UK and the US, Malawi also lost substantial aid from other donors including the African Development Bank (AfDB), the EU, the World Bank and Norway.²⁴ In June 2011, the International Monetary Fund (IMF) declared its programme in Malawi 'off-track' following the government's failure to review a credit facility aimed at strengthening foreign exchange shortfalls.²⁵ Furthermore, in November 2011, the Malawian government criticised the EU's plans to redirect aid to the country's NGOs.²⁶ Under the Common Approach to Budgetary Support, the AfDB, EU, Germany, Norway, the UK's Department for International Development (DFID) and the World Bank Group, urged the Malawian government to address economic and governance concerns and revive the IMF Extended Credit Facility in order to facilitate the resumption of aid.²⁷ The IMF recently announced a loan of US\$157m to Malawi.²⁸

16 BBC, 'UK and Malawi in tit-for-tat diplomatic expulsions', (27 April 2011) available at: www.bbc.co.uk/news/world-africa-13205729.

17 BBC, 'UK cuts aid to Malawi government', (14 July 2011) available at: www.bbc.co.uk/news/world-africa-14154485.

18 M Jobani, 'UK's House of Commons open inquiry on Malawi', *The Nyasa Times (Malawi)* (16 December 2011).

19 House of Commons, International Development Committee, 'The development situation in Malawi' (4 May 2012) available at: www.parliament.uk/business/committees/committees-a-z/commons-select/international-development-committee/news/malawi-further-written-evidence.

20 US Department of State, see n 6 above.

21 *Ibid.* See also C Kandiero, 'Malawi government optimistic on MCC funding', *The Daily Times (Malawi)* (16 December 2011) available at: www.bnltimes.com/index.php/daily-times/headlines/business/2981-malawi-govt-optimistic-on-mcc-funding-on-hopes-for-a-revival-of-the-fund.

22 'US insists Malawi MCC aid resumption dependent on good governance', *Malawi Today* (21 October 2011) available at www.malawitoday.com/news/68471-us-insists-malawi-mcc-aid-resumption-dependent-good-governance [last accessed on 13 August 2012].

23 Embassy of the United States to Malawi, 'MCC Reinstates Malawi Compact' (22 June 2012) available at: <http://iipdigital.usembassy.gov/st/english/article/2012/06/201206227909.html#axzz1yt9RYgRH>.

24 'Malawi: Development' available at: <http://uk.oneworld.net/guides/malawi/development>.

25 'Government upbeat on economic recovery in 2012', *Nyasa Times* (16 December 2011) available at: www.nyasatimes.com/malawi/2011/12/16/govt-upbeat-on-economic-recovery-in-2012.

26 S Mangana, 'EU annoys Malawi government on aid', *The Daily Times (Malawi)* (23 November 2011) available at: www.bnltimes.com/index.php/daily-times/headlines/national/2605-eu-annoys-malawi-govt-on-aid.

27 MISA, 'Government recommends review of draconian laws' (press release) (13 December 2011) available at: <http://allafrica.com/stories/201112140129.html>; and F Jomo, 'Malawi's Major Donors Call for Urgent Action on Economy', Bloomberg (8 December 2011) available at: www.bloomberg.com/news/2011-12-08/malawi-s-major-donors-call-for-urgent-action-on-economy-1-.html.

28 Following President Banda's appointment and her contacts with the IMF, an IMF delegation visited Malawi in May 2012 to design a new support package. 'IMF working on new Malawi support package', Reuters (14 May 2012), available at: <http://af.reuters.com/article/investingNews/idAFJOE84D08A20120514?feedType=RSS&feedName=investingNews>.

The loss of aid had a negative impact on Malawi and created a serious crisis. In fact, the crisis has particularly affected businesses and farmers, due to fuel and electricity shortages. During the fact-finding mission, the IBAHRI delegation observed long queues of vehicles seeking to refuel due to fuel shortages. The delegation was informed that such queues were the norm and not all vehicles in the queue would be able to refuel. In addition to the fuel crisis, urban centres are afflicted with constant electricity outages. Furthermore, the delegation also found that there was an alarming shortage of foreign currency in the country. Compounding these crises, several international companies operating in Malawi, including Unilever and the oil company Puma, have warned of closures and retrenchments if foreign exchange and fuel shortages are not resolved.²⁹ Two Malawian think tanks, the Economic Empowerment Action Group and the Economics Association of Malawi, warned the Malawian government of a 'looming economic disaster' unless urgent action is taken to address the country's problems.³⁰ In December 2011, the head of the Consumers Association of Malawi, John Kapito, also chair of MHRC, called Malawi a 'failed state'.³¹

Since her accession to power, President Banda has made efforts to restore the economy and mend relationships with donors and international institutions, which has resulted in the reinstatement of some of Malawi's aid packages, such as the US MCC Compact. The announcement of the IMF loan also illustrates the confidence shown by international institutions in the Banda administration. However, not all donors have agreed to resume their aid to Malawi and the UK, for example, has not fully resumed its financial support.³²

2.2 Human rights in Malawi

Alongside the socio-economic crises, there has been an increase in human rights concerns in Malawi. Of major concern is the limitation to academic freedom and the use of excessive force by the police, particularly following the July 2011 protests. The continued criminalisation of homosexuality also attracted international attention.

2.2.1 ACADEMIC FREEDOM

In February 2011, Chancellor College at the University of Malawi was closed after lecturers protested against alleged government spies at the university, and the police summonsed a lecturer who reportedly likened the causes of the Arab Spring to Malawi's fuel and foreign currency shortages.³³ Then President wa Mutharika, who was also the university's Chancellor, directed the University Council to fire four lecturers blamed for the boycott and rejected demands for the Inspector General of Police to apologise for the summons, but issued a directive for the lecturers to be reinstated in

29 G Sande, 'Another company shrinks, dying away in Malawi', *Nyasa Times (Malawi)* (18 December 2011) available at: www.nyasatimes.com/malawi/2011/12/18/another-company-shrinks-dying-away-in-malawi.

30 'Malawi heads for economic disaster - think tanks', *Malawi Today* (13 December 2011) available at: www.malawitoday.com/news/113375-malawi-heads-economic-disaster-think-tanks.

31 'Government has effectively collapsed – Cama', *Malawi Today* (8 December 2011) available at: www.malawitoday.com/news/112747-government-has-effectively-collapsed-cama.

32 M Tran, 'Andrew Mitchell praises Malawi but holds back on budget support aid', *Guardian* (13 June 2012) available at: www.guardian.co.uk/global-development/2012/jun/13/andrew-mitchell-malawi-budget-aid.

33 J Butty, 'Malawi Authorities Close Two Colleges Over Teacher Boycott', *Voice of America* (4 April 2011) available at: www.voanews.com/content/butty-malawi-lecturers-update-kabwila-kapasula-05april11-119233329/157827.html [last accessed 13 August 2012].

November.³⁴ The lecturers have applied for a judicial review of a presidential Commission of Inquiry established to examine the lawfulness of the boycott and the issue of academic freedom.³⁵ The lecturers argued that President wa Mutharika was acting *ultra vires* 'and undermining the authority of the courts by inquiring into, among others, whether [their] cessation of teaching was a strike let alone an illegal one when that issue, among others, has already been determined by a competent court'.³⁶ By the end of 2011, Chancellor College had reopened, albeit with several issues unresolved. At the time of the IBAHRI mission, lectures were under way at Chancellor College.

2.2.2 POLICE USE OF FORCE

Another worrying development is the use of excessive force by the police, especially in the context of handling political dissent. Notably, the police have been widely criticised for the handling of the July 2011 demonstrations, in which several people died as a result of the use of force by the police.³⁷ In meetings with the IBAHRI delegation, the then Justice Minister and the then chief of police sought to discount the impact of the police's use of force on human rights by alleging that those targeted by the police during the demonstrations were looters rather than demonstrators.³⁸ Excessive use of force by the police is compounded by an increase in politically motivated violence in which the police have also been implicated.³⁹

The head of the EU delegation to Malawi expressed concerns about the use of excessive force by the police and politically motivated violence.⁴⁰ He explained that there is a need for the authorities to swiftly and independently investigate, among other issues, recent arson attacks on civil society members as well as the suspicious death of student activist and Youth for Freedom and Democracy Vice President, Robert Chasowa. Chasowa was found dead at his polytechnic campus on 24 September 2011.⁴¹ A post-mortem report contradicted police claims that Chasowa committed suicide. Instead, the post-mortem stated that his injuries were most likely due to assault.⁴² Before his death, Chasowa received threats for his criticism of the government⁴³ and was wanted by police for publishing details of high-level corruption within the government.⁴⁴ The IBAHRI notes with satisfaction that President Banda, shortly after the start of her mandate, appointed a commission of inquiry to investigate Chasowa's death.⁴⁵

34 J Majamanda, 'University Council reinstates the fired four lecturers at Chancellor College', *Malawi Today* (28 October 2011) available at: www.malawitoday.com/news/74738-university-council-reinstates-fired-four-lecturers-chancellor-college.

35 Meeting with Lecturer of Law at Chancellor College, University of Malawi, 13 January 2012.

36 M Musa, 'Court halts academic freedom inquiry', *The Daily Times* (23 November 2011) available at: www.bnltimes.com/index.php/daily-times/headlines/national/2604-court-halts-academic-freedom-inquiry.

37 See Section 3.4.1 below for more on the police.

38 Meeting with the Minister of Justice, 9 January 2012; Teleconference with the Inspector General of Police, 13 January 2012.

39 Meeting with the MLS, 12 January 2012.

40 Meeting with the Head of the EU Delegation in Malawi, 10 January 2012.

41 'Donors worried with Malawi "politically-motivated violence"', *The Nyasa Times (Malawi)* (7 October 2011) available at: www.nyasatimes.com/malawi/2011/10/07/donors-worried-with-malawi-%E2%80%98politically-motivated-violence%E2%80%99.

42 'DPP top official implicated in Chasowa's murder', *The Nyasa Times (Malawi)* (6 October 2011) available at: www.nyasatimes.com/malawi/2011/10/06/dpp-top-official-implicated-in-chasowa%E2%80%99s-murder.

43 Reporters without Borders, 'Journalists must be allowed to investigate the death of activist Robert Chasowa' (20 October 2011) available at: <http://en.rsf.org/malawi-journalists-must-be-allowed-to-19-10-2011,41241.html>.

44 T Chiumia, 'Bingu orders probe on Chasowa murder, "satanic" riots', *The Nyasa Times (Malawi)* (6 October 2011) available at: www.nyasatimes.com/malawi/2011/10/06/bingu-orders-probe-on-chasowa-murder-%E2%80%98satanic%E2%80%99-riots.

45 F Ngalauka, 'Malawi swear in Chasowa inquiry commissioners', *Nyasa Times* (20 April 2012) available at: www.nyasatimes.com/malawi/2012/04/20/malawi-swear-in-chasowa-inquiry-commissioners.

2.2.3 SEXUAL ORIENTATION

On the issue of homosexuality, although the Malawian Constitution prohibits – technically – all forms of discrimination, homosexuality is an offence under the Penal Code and is punishable by up to 14 years in prison.⁴⁶ On 20 May 2010, Tiwonge Chimbalanga and Steven Monjeza were sentenced to the maximum penalty of 14 years in prison for marrying but were later unconditionally pardoned on ‘humanitarian grounds’,⁴⁷ by President wa Mutharika, who nevertheless stated that homosexuality was a crime in Malawi.⁴⁸ According to some government representatives interviewed by the IBAHRI delegation, the two men had been funded by international organisations and were not in fact homosexual. However, the IBAHRI delegation was unable to obtain information to corroborate this assertion.

In 2011, an activist was arrested for breaching the peace after putting up posters in support of gay rights and received a community service sentence.⁴⁹ Moreover, individuals routinely suffer discrimination in Malawi on the grounds of their sexual orientation. In July 2011, two leading LGBT activists reportedly went into hiding to escape alleged treason charges.⁵⁰ In December 2011, media reports suggested that the Penal Code’s prohibition of homosexual acts had been sent to the MLC for review.⁵¹ However, the IBAHRI delegation found that the MLC was not currently reviewing specific provisions in the Penal Code relating to the prohibition of homosexuality. In fact, despite what had been indicated in media reports, the IBAHRI delegation was informed by the MLC, during a meeting with one of its representatives, that it had not been asked to review specifically the provisions regarding ‘indecent practices’ and ‘unnatural acts’ in the Penal Code.⁵² The IBAHRI notes that President Banda has announced in her first state of the nation address to parliament that the laws against unnatural acts and indecency would be reviewed ‘as a matter of urgency’.⁵³

2.3 Sources of law

Malawi is a constitutional democracy, whose law derives from various sources. The main sources of law are the Constitution, legislation and international law. In addition to these, the other sources of law include the common law, customary law and religious law.

46 Article 153 of the Malawi Penal Code criminalises ‘unnatural offences’:

‘Any person who–

(a) has carnal knowledge of any person against the order of nature; or

(b) has carnal knowledge of an animal; or

(c) permits a male person to have carnal knowledge of him or her against the order of nature, shall be guilty of a felony and shall be liable to imprisonment for fourteen years, with or without corporal punishment.’

47 J Butty, ‘Malawi: Reviewing, Not Repealing Anti-Gay Law’, *Voice of America* (13 December 2011) available at: www.voanews.com/english/news/africa/Butty-Malawi-Anti-Gay-Laws-Kamanga-13december11-135488318.html.

48 US Department of State, Bureau of Democracy, Human Rights, and Labor, 2010 Human Rights Report: Malawi (8 April 2011) 18 available at: www.state.gov/g/drl/rls/hrrpt/2010/af/154356.htm.

49 Commonwealth Human Rights Initiative, ‘Malawi’ available at: www.humanrightsinitiative.org/lgbti-interactive-map/malawi-info.php.

50 P Canning, ‘LGBT rights activists in Malawi threatened with arrest for “treason”’, SDGLN, (26 July 2011) available at: <http://sdgln.com/news/2011/07/26/lgbt-rights-activists-malawi-threatened-arrest-treason>.

51 J Butty, ‘Malawi: Reviewing, Not Repealing Anti-Gay Law’, see n 48 above; M Nkawihe, ‘Malawi to review gay ban, bad laws – Justice Minister’, *Nyasa Times* (08 December 2011) available at: www.nyasatimes.com/malawi/2011/12/08/malawi-to-review-gay-ban-bad-laws-justice-minister; D Smith, ‘Malawi to review homosexuality ban after US aid threat’, *Guardian* (9 December 2011), available at: www.guardian.co.uk/world/2011/dec/09/malawi-homosexuality-ban-review.

52 Meeting with the MLC, 11 January 2012.

53 ‘Malawi to overturn homosexual ban, Joyce Banda says’, BBC (18 May 2012) available at: www.bbc.co.uk/news/world-africa-18118350.

2.3.1 THE CONSTITUTION

The 1994 Constitution is the supreme law of Malawi.⁵⁴ In terms of the Preamble, the constitutional order in Malawi is ‘based on the need for an open, democratic and accountable government’.⁵⁵ The Constitution guarantees a democratic, multiparty state. The Constitution contains a Bill of Rights, which guarantees certain fundamental rights to all people of Malawi.⁵⁶ Non-derogable rights contained within the Bill of Rights⁵⁷ include the rights to life,⁵⁸ dignity,⁵⁹ equality⁶⁰ and the right to freedom of conscience, belief, thought and religion and to academic freedom.⁶¹ Other rights protected by the Constitution include freedom of expression, freedom of information, freedom of movement and freedom of assembly.⁶² Any limit or restriction imposed on rights and freedoms must be consistent with Malawi’s obligations under international human rights law.⁶³

The Constitution guarantees the separation of powers and independence of the judiciary.⁶⁴ The Constitution can be amended by a two-thirds majority of the National Assembly⁶⁵ but the substance of the Constitution can only be changed following a referendum of the people of Malawi.⁶⁶ A number of amendments to the Constitution have been made to date.⁶⁷

2.3.2 INTERNATIONAL LAW

Malawi has a dualist system. While pursuant to Article 211(1) of the Constitution, any international agreement that was binding before or at the creation of the 1994 Constitution remains binding; any international agreements made thereafter require an Act of Parliament to take effect as domestic law.⁶⁸ Section 11 of the Constitution provides that in interpreting the Constitution, courts shall ‘where applicable, have regard to current norms of public international law and comparable foreign case law’.⁶⁹

Malawi is a member of SADC, the AU, the UN,⁷⁰ the Commonwealth, the Common Market for Eastern and Southern Africa (COMESA) and the International Labour Organization (ILO).

54 Constitution of Malawi, section 4.

55 *Ibid*, Preamble.

56 *Ibid*, Chapter IV.

57 For a full list of the non-derogable rights see section 44 (1) of the Constitution of Malawi. Note that in terms of section 45 some rights, including freedom of expression and freedom of information, may be derogated from during a state of emergency in Malawi.

58 Constitution of Malawi, section 16.

59 *Ibid*, section 19.

60 *Ibid*, section 20.

61 *Ibid*, section 33.

62 *Ibid*, sections 32, 34–38.

63 *Ibid*, section 44(2).

64 *Ibid*, sections 4, 7–9.

65 *Ibid*, sections 195 and 196. For more details, see section on legislature below.

66 *Ibid*, section 196.

67 The Constitution was amended in: 1994 (Republic of Malawi (Constitution) (Amendment) Act, 1994, Act No 31 of 1994); 1995 (Constitution (Amendment) Act, 1995, Act No 6 of 1995); 1997 (Constitution (Amendment) (No 2) Act, 1997, Act No 1 of 1997); 1998, (Constitution (Amendment) Act, 1998, Act No 38 of 1998); 1999 (Constitution (Amendment) Act, 1999, Act No 11 of 1999); 2001 (Constitution (Amendment) Act, 2001, Act No 4 of 2001 and Constitution (Amendment) (No 2) Act, 2001, Act No 8 of 2001 and Constitution (Amendment) (No 3) Act, 2001, Act No 13 of 2001); 2004 (Constitution (Amendment) (No 2) Act, 2003, Act No 4 of 2004); and 2010 (Act No 8 of 2010 and Act No 11 of 2010). Amendments addressed a variety of topics, including the abolition of the Senate (2001) and raising the minimum age to marry to from 15 to 16 (2010).

68 Constitution of Malawi, section 211(2).

69 *Ibid*, section 11(2)(c).

70 Including UN agencies such as the UN Conference on Trade and Development (UNCTAD), the UN Educational, Scientific, and Cultural Organization (UNESCO), and the UN Industrial Development Organization (UNIDO).

Malawi is party to several international and regional human rights treaties:⁷¹

- African Charter on Human and Peoples' Rights (1981);
- Convention on the Elimination of All Forms of Discrimination against Women (1987);⁷²
- African Charter on the Rights and Welfare of the Child (1990);
- Convention on the Rights of the Child (1991);
- International Covenant on Civil and Political Rights (1993);
- International Covenant on Economic, Social and Cultural Rights (1993);
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1996);
- First Optional Protocol to the International Covenant on Civil and Political Rights (1996);
- Convention on the Elimination of All Forms of Racial Discrimination (1996);
- Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2005);
- Convention on the Rights of Persons with Disabilities (2009);
- Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2009); and
- Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2010).

However, despite becoming a party to these instruments, Malawi has a poor record of reporting under the human rights treaties to which it is a party.⁷³ During the Universal Periodic Review of Malawi before the Human Rights Council in 2010, it was noted that Malawi had never submitted a report before the Committee on the Elimination of Racial Discrimination (CERD),⁷⁴ and that all of its six reports were overdue, including the initial one that had been due since 1994. Similarly, Malawi's initial report to the Committee on Economic, Social and Cultural Rights (CESCR) has been due since 1994, its initial report to the Human Rights Committee was due in 1995 and its initial report to the Committee against Torture is overdue since 2000.⁷⁵

71 Dates in brackets indicate when Malawi ratified or acceded to the relevant treaty. No reservations have been made unless otherwise indicated.

72 Originally made a reservation based on protecting traditional customs; withdrew it in 1991.

73 Meeting with the MHRC, 10 January 2012.

74 CERD itself noted with concern in its Concluding Observations in 2003 that 'between 1988 and the present, the only report submitted [by Malawi] was the initial report to the Committee on the Rights of the Child in August 2000.' 'CERD, Concluding observations of the Committee on the Elimination of Racial Discrimination: Malawi' (10 December 2003) UN Doc CERD/C/63/CO/12.

75 UNGA, Human Rights Council, Working Group on the Universal Periodic Review Ninth session, 'Compilation prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1' (4 August 2010), UN Doc A/HRC/WG.6/9/MWI/2.

In addition to the above international treaties, Malawi has signed but not ratified the following instruments:

- Protocol on African Court of Human and Peoples' Rights (1998); and
- Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (2000).

Malawi is also a party to the 1998 Rome Statute of the International Criminal Court (ICC). However, in October 2011, Malawi did not arrest Sudanese President Omar al-Bashir, for whom the ICC has issued an arrest warrant for war crimes, crimes against humanity and genocide. Malawi has been criticised for receiving al-Bashir and not arresting him in accordance with its obligations under the Rome Statute.

Malawi maintained that it could not arrest al-Bashir due to its commitments to an AU decision against cooperation with the ICC in the arrest of al-Bashir – who they argue enjoys immunity from arrest and prosecution as a sitting head of state.⁷⁶ The ICC disagreed with the AU and Malawi's position, arguing that head of state immunity does not apply in instances where an individual is indicted on charges related to the commission of international crimes.⁷⁷ The ICC informed the UN Security Council of Malawi's failure to comply with its obligations under the Rome Statute.⁷⁸ In January 2012, the AU responded to this referral defending Malawi and expressing its grave concern with regard to the conduct of the ICC.⁷⁹ Malawi also threatened to withdraw from the Rome Statute in January 2012.

Since her accession to power, President Joyce Banda has adopted a radically different approach and has made it clear that President al-Bashir was not welcome to Malawi, where the AU Summit was due to take place in July 2012.⁸⁰ This position, of which the AU disapproved, led Malawi to cancel the summit, which was subsequently moved to Addis Ababa in Ethiopia.⁸¹ The IBAHRI notes with approval this effort by Malawi to respect its international legal obligations under the Rome Statute.

2.3.3 OTHER SOURCES OF LAW

Section 200 of the Constitution provides that common law and customary law in force at the time of adoption of the Constitution is enforceable, '[e]xcept in so far as they are inconsistent with this Constitution'.⁸² It also states that as they evolve, customary law and common law should respect the provisions of the Constitution.⁸³ In addition, religious law is respected and enforced in certain instances, notably in marriage and inheritance matters.⁸⁴

76 AU Decision Assembly/AU/Dec 245(XIII) 13th Ordinary Session of the Assembly of Heads of State and Government, Sirte, Libya, July 2009.

77 ICC Pre-Trial Chamber I, *Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir* (12 December 2011) ICC-02/05-01/09-139.

78 ICC 'Pre-Trial Chamber I informs the United Nations Security Council and the Assembly of States Parties about Chad's non-cooperation in the arrest and surrender of Omar Al Bashir' (press release), 13 December 2011 available at: www.icc-cpi.int/NR/exeres/371A3E88-35C6-4C54-8C98-60B92D3E140A.htm; see also Pre-Trial Chamber I (12 December 2011) ICC-02/05-01/09-139.

79 AU Press Release No 002/2012 on the Decisions of Pre-Trial Chamber I of the ICC, Pursuant to Article 87(7) of the Rome Statute on the alleged failure by the Republic of Chad and the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of President Omar Hassan al Bashir of the Republic of the Sudan, Addis Ababa, 9 January 2012.

80 BBC, 'Sudan's Bashir demands AU summit moves from Malawi' (7 June 2012) www.bbc.co.uk/news/world-africa-18359924.

81 BBC, 'Malawi not to host summit after row over Sudan leader' (8 June 2012) www.bbc.co.uk/news/world-africa-18364947.

82 Constitution of Malawi, section 200.

83 Constitution of Malawi, section 10(2).

84 RE Kapindu, 'Malawi: Legal System and Research Resources', *GlobaLex*, Hauser Global Law School Program, New York (January 2009), 16 available at: www.nyulawglobal.org/globalex/malawi.htm#d.

Chapter 3: The Government of Malawi

The Constitution, as the supreme law of Malawi, is binding on the state at all levels.⁸⁵ According to section 4 of the Constitution, all peoples of Malawi are entitled to equal protection under the law. Notably, the Constitution provides that any act of government or any law inconsistent with the provisions of the Constitution ‘shall to the extent of such inconsistency, be invalid’.⁸⁶ Sections 7 to 9 clearly provide for the separation of powers and obligations of three distinct and independent branches of government. These branches of government are the executive, the legislature and the judiciary.⁸⁷

3.1 The executive

The executive consists of the President, Vice-President and Cabinet. The President is the head of state and government.⁸⁸ The role of the executive is to propose policies and laws and to implement laws in accordance with the will of the people in line with the provisions of the Constitution.⁸⁹

At the time of the IBAHRI mission, the President of Malawi was Bingu wa Mutharika of the Democratic Progressive Party. At the time of his death on 5 April 2012, late President wa Mutharika was serving his second and final term in office since re-election in 2009. The presidential term is limited to two consecutive terms of five years each.⁹⁰ The President is responsible for, inter alia: assenting to Parliamentary Bills; calling and chairing Cabinet meetings; making government appointments; and negotiating and entering into international agreements.⁹¹

The Constitution provides for one or two Vice-Presidents. The first Vice-President is appointed at the same time as the President.⁹² The President can appoint the second Vice-President from another political party if s/he wishes.⁹³ Prior to his death, President wa Mutharika fell out with then Vice-President Joyce Banda, and on 8 September 2011, the office of the Vice-President was left out in the Cabinet reshuffle.⁹⁴ However, following wa Mutharika’s death, in line with constitutional provisions, Joyce Banda is serving as the interim President until the next elections, due to take place in May 2014.

The Constitution also provides for a Cabinet as part of the executive. The Cabinet serves an advisory role to the office of the President.⁹⁵ Its members include the President, First Vice-President, Second Vice-President and other Ministers appointed by the President.⁹⁶ Functions of the Cabinet include

85 Constitution of Malawi, section 4.

86 *Ibid*, section 5.

87 *Ibid*, sections 7, 8 and 9.

88 *Ibid*, section 78.

89 *Ibid*, section 7.

90 *Ibid*, section 83 (3) and Section 83 (1).

91 *Ibid*, section 89.

92 *Ibid*, section 79.

93 *Ibid*, section 80.

94 ‘Malawi Cabinet Snub’ (9 September 2011) available at: www.afriquejet.com/malawi-cabinet-snub-2011090921991.html.

95 Constitution of Malawi, section 96.

96 *Ibid*, section 92.

initiating bills for submission to the National Assembly, preparing the budget and assisting the President in determining what international agreements are to be concluded.⁹⁷

3.1.1 MINISTRY OF JUSTICE AND CONSTITUTIONAL AFFAIRS⁹⁸

In respect of the rule of law and human rights, the Ministry of Justice is of particular importance. Officials of the Ministry of Justice include the Attorney-General, the Solicitor-General and the DPP, who are all appointed by the President. The President also has the power to remove them on the grounds of incompetence, incapacity or being compromised in the performance of their duties.⁹⁹

The Minister of Justice is the political head of the Ministry. The Minister is responsible for the Malawi legal sector and reports directly to President and Cabinet, as well as to the people through Parliament. The Attorney-General is the principal legal adviser to the government.¹⁰⁰ In addition to advising the government on all legal matters, the Attorney-General conducts civil litigation for and on behalf of the government. The Solicitor-General supervises and monitors civil litigation, the drafting of legislation and the negotiation agreements for and on behalf of the government.¹⁰¹ The Solicitor-General is also responsible for the operations of the Ministry of Justice in the performance of its legal functions. In practice, the Solicitor-General also acts as the Secretary for Justice. Since the time of the IBAHRI mission, the Minister of Justice, Ephraim Mganda Chiume, and the Attorney-General, Maxon Mbendera, have been replaced by former Attorney-General Ralph Kasambara, who now combines the two positions.

In respect of criminal cases, the DPP is responsible for all public prosecutions.¹⁰² The DPP, though a functionary of the executive working under the special direction of the Attorney-General,¹⁰³ must exercise her duties independently without fear, favour or prejudice. However, the IBAHRI delegation heard concerns that the DPP could be linked to the executive in the exercise of her duties. Rose Kanyuka, who was the DPP at the time of the IBAHRI delegation's visit, served as chief counsel acting on behalf of the government prior to her appointment as DPP. It was also noted that the DPP often consults the Attorney-General on a variety of matters.

The DPP's perceived proximity to the executive could undermine the independence and effectiveness of the DPP's prosecutions and open the door to politically motivated prosecutions.¹⁰⁴ It has also been noted by commentators that the wording of article 101(2) of the Constitution itself creates the possibility of interference by the Attorney-General in prosecutions.¹⁰⁵ The article states that the DPP 'shall be subject only to the general or special directions of the Attorney General but shall otherwise act independent of the direction or control of any other authority or person and in strict accordance with the law'. Commentators have indicated that this article should either

97 *Ibid*, section 96.

98 Hereafter, 'Ministry of Justice'.

99 Constitution of Malawi, sections 95, 98 and 102.

100 *Ibid*, section 98 (1).

101 See generally section 50 of the General Interpretation Act, Chapter 1:01 of the Laws of Malawi for the instances in which the Solicitor General may take on the roles of the Attorney General and vice versa.

102 Constitution of Malawi, section 99.

103 *Ibid*, section 101(2).

104 See n 1 above, 4.

105 FE Kanyongolo, 'Malawi: Justice Sector and the Rule of Law', (OSISA, 2006) 14 available at: www.afrimap.org/english/images/report/mal-eng-part-2-chapter-4.pdf.

be repealed or amended to specify that the DPP shall make the final decision on prosecutions, notwithstanding directions given by the Attorney-General.¹⁰⁶ The IBAHRI delegation was not provided with examples of direct influence from the executive in the DPP's prosecutorial decisions, but it reiterates the importance of maintaining the independence of the DPP's office. In June 2012, President Banda replaced Rose Kanyuka with Bruno Kalemba as DPP.¹⁰⁷

In ensuring promotion of rule of law and respect for human rights, the office of the DPP is meant to play a pivotal role. A serious impediment to fulfilling this role effectively is the fact that the office of the DPP is currently severely understaffed. At the time of the fact-finding mission, the IBAHRI delegation found that there were only 25 prosecutors working as public prosecutors in the office of the DPP. Of these prosecutors, 18 were junior. The lack of prosecutors, particularly experienced ones, in the office of the DPP is a major challenge; not only for the office, but also for the criminal justice system. The DPP noted that the lack of prosecutors resulted in delays in prosecution.¹⁰⁸ In this regard, the DPP noted that criminal cases are long delayed, taking two to three years on average before trial. She added that the lack of experienced prosecutors in her office was also a challenge, and that the judiciary had complained about the fact that the prosecutors were too inexperienced.¹⁰⁹ Mrs Kanyuka described the situation regarding staffing as a 'crisis' and underlined the urgent need to employ more lawyers. She noted that low salaries of government employees posed an obstacle to recruitment. She also indicated that the relationship between the office of the DPP and the judiciary, though tense, had improved considerably in the past year.

3.2 The legislature

Legislative power belongs to the Parliament, which may delegate the power to make subordinate legislation to the executive or the judiciary.¹¹⁰ The Constitution provides that legislation must conform to the principles of the Constitution.¹¹¹

Malawi's Parliament consists of a National Assembly and the President as Head of State.¹¹² Malawi's unicameral National Assembly consists of 193 members¹¹³ who represent constituencies in the country.¹¹⁴ Each Member of Parliament is elected by a simple majority of votes for a term of five years.¹¹⁵ The last National Assembly elections in Malawi were held on 19 May 2009 and will be held again in May 2014.¹¹⁶

106 *Ibid.*

107 'JB appoints Kalemba new Malawi Director of Public Prosecution', *Nyasa Times* (29 May 2012) available at www.nyasatimes.com/malawi/2012/05/29/jb-appoints-kalemba-new-malawi-director-of-public-prosecution.

108 Meeting with Rose Kanyuka, 10 January 2012.

109 *Ibid.* The NGO CHREAA also indicated to the delegation in a meeting on 13 January 2012 the lack of preparation shown by most prosecutors.

110 Constitution of Malawi, section 58.

111 *Ibid.*, section 5.

112 *Ibid.*, section 49.

113 *Ibid.*, section 49 (1); 48 (1).

114 *Ibid.*, section 62.

115 *Ibid.*

116 Election Guide, *Country profile: Malawi* available at: www.electionguide.org/country.php?ID=130.

The original Constitution provided for a Senate, to serve as a second supervisory Chamber to the National Assembly¹¹⁷ consisting of 80 members¹¹⁸ from various interest and religious groups, such as women's organisations, trade unions, the business sectors and representatives of the main religions in Malawi.¹¹⁹ However, in practice, this Chamber has never been implemented and the Malawian Parliament abolished its provision in the Constitution in 2001 on the grounds that the country could not afford to run a second Chamber.¹²⁰

The IBAHRI learnt that the legislature has been executing its duties efficiently. It should be noted that due to the fact that an overwhelming majority of Members of Parliament are from the ruling DPP Party, often the decisions and policies of the legislature are closely aligned to the views of the executive.

3.3 *The judiciary*¹²¹

The third arm of government is the judiciary.¹²² The responsibilities of the judiciary are essentially threefold. Fundamentally, the judiciary is responsible for preventing possible abuse of power by protecting, interpreting and enforcing all laws in Malawi.¹²³ The judiciary must also ensure the compatibility of laws with the Constitution.¹²⁴ In line with the separation of powers, the judiciary must exercise these functions independently.¹²⁵

The Malawian courts' structure was inherited from the British colonial system, consisting of a Supreme Court of Appeal, High Courts and Magistrates' Courts. The Supreme Court of Appeal is the highest appeal court in Malawi and is located in Blantyre.¹²⁶ The High Courts have both civil and criminal law jurisdiction. In addition they are tasked with hearing appeals from Magistrates' Courts, and reviewing legislation and government decisions to ensure their compatibility with the substance of the Constitution.¹²⁷ There is a High Court located in each of Malawi's cities. The lower courts in Malawi are the Magistrates' Courts.¹²⁸ These lower courts are present in each district and city in Malawi. Magistrates' Courts have jurisdiction over both criminal and civil cases.¹²⁹ They are divided into sections: the courts of Resident Magistrates; followed by First, Second and Third Grade courts.¹³⁰

117 Constitution of Malawi, section 70.

118 *Ibid*, section 68.

119 *Ibid*.

120 Constitution (Amendment) Act, 2001, Act No 4 of 2001. The Act repealed sections 68 to 72 that created and detailed the functioning of the Senate. See also 'No go for Malawi Senate', BBC (12 January 2001) available at: <http://news.bbc.co.uk/1/hi/world/africa/1113585.stm>.

121 See Chapter 4 below for a detailed overview of the judiciary in Malawi.

122 Constitution of Malawi, Chapter IX.

123 *Ibid*, Article 9.

124 Justice Dr Jane Mayemu Ansah, 'The 1994 Malawi Constitution and the role of the judiciary', paper presented at The First National Conference on Review of the Constitution, Lilongwe, Malawi (28–31 March 2006), 3 available at: www.lawcom.mw/docs/role_of_judiciary.pdf.

125 Constitution of Malawi, section 103.

126 *Ibid*, section 104.

127 *Ibid*, section 108 (2).

128 *Ibid*, section 110 (1).

129 Courts Act, section 35.

130 *Ibid*, section 34 (3).

In addition to the formal court system, Malawi had a traditional court system, which operated in the rural areas. However, former President Bakili Muluzi abolished these traditional courts in 1994.¹³¹ In April 2011, the legislature passed the Local Courts Act, which effectively formalised the traditional court system, creating lower courts below the Magistrates' Court level. The Local Courts Act has been sent to the MLC for review and will be discussed in section 3.5 below.

3.4 Other key constitutional institutions

There are other key institutions whose work is meant to impact on the rule of law, good governance and human rights in Malawi. These institutions support and supplement the work of the government. The IBAHRI delegation met with and discussed the work of the police, the MHRC, the MLC and the police. In the course of meetings, the office of the ombudsperson and the MEC were also discussed.

3.4.1 MALAWI POLICE SERVICE¹³²

The Malawi Police Service (the MPS or 'police'), in terms of the Constitution and the Malawi Police Service Act, are an independent arm of the executive and serve to protect the people and ensure public safety.¹³³ The Inspector General heads the police and they operate under the auspices of the Ministry of Internal Affairs and Public Security.

The police have a code of conduct – however, they have been accused of brutality and use of excessive force.¹³⁴ Notably, the police have been criticised for opening fire on unarmed protesters during mass anti-government demonstrations held in July 2011, which resulted in at least 19 deaths.¹³⁵ In a report on the protests, the MHRC indicated that it found at least 15 policemen had used excessive (at times fatal) force in quelling protests.¹³⁶ Then President wa Mutharika denied claims that he ordered the shootings but defended the police, arguing that they acted 'within their own mandate' to maintain the country's peace and security.¹³⁷ According to the former Minister of Justice, a balance should have been struck between the use of force by the police and the right of people to demonstrate. He added that even though the right to demonstrate is enshrined in the Constitution, people need to follow the rules.¹³⁸ Other individuals with whom the IBAHRI delegation met shared the Minister's opinion.¹³⁹ Particularly, the former Inspector General of Police indicated that, while it was regrettable that several people died as a result of the use of force by the police, he was of the opinion that given the level of civil disobedience, the force used was proportionate.¹⁴⁰ However, the IBAHRI found that despite some

131 Encyclopedia of Nations, Malawi Judicial System, available at: www.nationsencyclopedia.com/Africa/Malawi-JUDICIAL-SYSTEM.html.

132 Constitution of Malawi, Chapter XV.

133 *Ibid*, section 152 (1).

134 Human Rights Watch, 'Malawi: Use Restraint in Upcoming Protests' (17 August 2011) available at: www.hrw.org/news/2011/08/17/malawi-use-restraint-upcoming-protests.

135 'Malawi: Human rights report faults police handling of 20 July events in Malawi' (16 August 2011) available at: www.afriquejet.com/events-in-malawi-2011081620648.html; 'One post-mortem conducted for July 20 fatalities, inquiry told', *The Malawi Democrat* (13 December 2011) available at: www.malawidemocrat.com/politics/one-post-mortem-conducted-for-july-20-fatalities-inquiry-told.

136 M Jobani, 'UK's House of Commons open inquiry on Malawi', *The Nyasa Times (Malawi)* (16 December 2011) available at: www.nyasatimes.com/malawi/2011/12/16/uk%E2%80%99s-house-of-commons-open-inquiry-on-malawi.

137 T Chiumia, 'Bingu orders probe on Chasowa murder, "satanic" riots', *The Nyasa Times (Malawi)* (6 October 2011) available at: www.nyasatimes.com/malawi/2011/10/06/bingu-orders-probe-on-chasowa-murder-%E2%80%99satanic%E2%80%99riots.

138 Meeting with Ephraim Mganda Chiume, then Minister of Justice, 9 January 2012.

139 Meeting with then Attorney General Maxon Mbendera and the Solicitor General, 9 January 2012; Teleconference with the Inspector General of Police, 13 January 2012.

140 Teleconference with the Inspector General of Police, 13 January 2012.

individuals defending the actions of the police, there was general consensus that the entire issue could have been better managed. The then Attorney-General noted that the police lacks training in dealing with protests of such a magnitude and further that the number of police deployed to quell the protests was insufficient.¹⁴¹

The protests are currently the subject of a Commission of Inquiry established by then President wa Mutharika.¹⁴² Several high-ranking officials, including the former Inspector General, have given evidence to the Commission of Inquiry.¹⁴³

In addition to this, the police have an internal disciplinary committee chaired by the Inspector General.¹⁴⁴ The disciplinary committee is meant to investigate abuses; however, resources are limited, and the committee meets sporadically. There was no indication that the disciplinary committee has met to investigate alleged police brutality during the July 2011 protest.

In addition to the traditional functions of the police, there is also provision for police prosecutors, who are meant to operate under the direction of the DPP.¹⁴⁵ They only prosecute cases at Magistrates' Court level. There were concerns raised by a variety of stakeholders on the role of the police in prosecuting crimes.¹⁴⁶ Notably, all police prosecutors are meant to report directly to the DPP; however the IBAHRI delegation found that there was a lack of communication between the police prosecutors and the DPP. In addition, the DPP indicated that the police lacked investigation expertise and that some of the dockets transferred to the office of the DPP contained incomplete information.¹⁴⁷ Given the numerous challenges encountered, the DPP indicated that she hoped that Malawi could in the future move away from the system of police prosecutions. However, she indicated that this would require better staffing at the DPP to be able to fill the gap that would ensue. At present, with the lack of lawyers in public service, police prosecutors continue to serve a role.

In addition to the above-mentioned issues, there are indications that there is a general lack of capacity within the police to investigate crimes and to prosecute offenders independently and effectively. To address this, police prosecutors should be located in the office of the DPP. The police could benefit from specialised investigations and prosecutions training to better equip them to effectively execute their duties. The DPP indicated that the police's prosecution department offers training on prosecution, but the DPP is not involved in the delivery of this training. Further, the police could benefit from training on human rights issues to better equip them to handle investigations and prosecutions in accordance with international human rights standards.

141 Meeting with then Attorney General Maxon Mbendera and the Solicitor General, 9 January 2012.

142 M Mudika, 'Malawi leader announces inquiry into 20/7 killings' (10 August 2011) available at: www.malawidemocrat.com/politics/malawi-leader-announces-inquiry-into-207-killings.

143 Teleconference with Inspector General of Police, 13 January 2012.

144 US Department of State, *2010 Human Rights Report: Malawi*, see n 49 above, 4.

145 Meeting with former DPP Rosemary Kanyuka.

146 Meeting with CHREAA, 13 January 2012.

147 Meeting with former DPP Rosemary Kanyuka, 10 January 2012.

3.4.2 MALAWI HUMAN RIGHTS COMMISSION¹⁴⁸

The creation of a Human Rights Commission is provided for in the Malawi Constitution.¹⁴⁹ In accordance with the provisions of the Constitution, the MHRC was formed in 1996 under the leadership of the holders of the positions of Ombudsman and Law Commissioner.¹⁵⁰ However, it only became fully functional in 1998 following the appointment of five more members. The rules and procedures of the MHRC are contained in Malawi's Human Rights Commission Act, No 27 of 1998.

The MHRC's primary function is to investigate alleged violations of the constitutionally entrenched human rights and to protect individuals accordingly.¹⁵¹ In terms of Article 130 of the Constitution, the MHRC has powers to make reasonable recommendations necessary for the effective promotion of human rights. However, the MHRC does not have legislative or judicial functions.¹⁵² The MHRC can intervene in court cases and it has acted as *amicus curiae*.¹⁵³ The IBAHRI delegation found that the current MHRC is an independent institution. The IBAHRI further found that the independence of the MHRC was particularly exhibited through the concerted efforts of the outgoing chair of the MHRC, John Kapito.¹⁵⁴ Kapito has openly criticised the state practices and has consequently been subject to threats and harassment from the executive under the Mutharika government.¹⁵⁵

The 2002 IBAHRI report found that the effectiveness of the Commission was threatened, as no commissioner had been appointed.¹⁵⁶ Though this limitation was addressed on 23 May 2009 by the appointment of seven commissioners, there are indications that the effectiveness of the work of the MHRC is undermined and its sustainability could be threatened. Notably, several interviewees highlighted the lack of resources of the MHRC,¹⁵⁷ some of them adding that the government underfunds the MHRC and suggesting that the executive's decision to limit the resources (both financial and human) of the MHRC was a tactic designed to weaken the institution.¹⁵⁸

In addition, the effectiveness of the MHRC is further limited by the lack of enforceability of its decisions¹⁵⁹ and its inability to effect policy changes.¹⁶⁰ However, despite these challenges, the MHRC continues to execute its mandate to the best of its ability. According to the head of the EU delegation in Malawi, the MHRC has played an effective leadership role in promoting human rights in Malawi.¹⁶¹

148 Constitution of Malawi, Chapter XI.

149 *Ibid*, section 129.

150 *Ibid*, section 131.

151 *Ibid*, section 129.

152 *Ibid*, section 130.

153 Meeting with the Chair of the MHRC, John Kapito, 10 January 2012.

154 Meeting at the BHC, 10 January 2012.

155 OSISA, 'Malawi human rights commissioner threatened' (1 July 2011), available at: www.osisa.org/hrdb/malawi/malawi-human-rights-commissioner-threatened; OSISA, 'Malawi Human Rights Commissioner arrested' (19 March 2012) available at: www.osisa.org/law/malawi/malawi-human-rights-commissioner-arrested.

156 See n 1 above, 68.

157 Meeting with the BHC, 10 January 2012; meeting with Head of EU Delegation, 10 January 2012; meeting with MLS, 12 January 2012.

158 Meeting with UNDP, 11 January 2012; meeting with MLS, 11 January 2012.

159 Constitution of Malawi, section 130.

160 Meeting with commissioners and lawyers of the MHRC, 10 January 2012.

161 Meeting with the Head of the EU delegation in Malawi, 10 January 2012.

The MHRC has regional offices¹⁶² and individual thematic committees to address particular rights, such as the rights of children and prisoners. Nevertheless, the MHRC's work has been concentrated in urban centres and it thus needs to expand on its work to reach the majority of Malawians who are located in rural areas.¹⁶³

The MHRC alleges that certain members of the judiciary appear aligned to the executive and that this undermines the effectiveness of the MHRC.¹⁶⁴ The effectiveness of the MHRC has been hampered by the inaction or delayed action of the executive and judiciary on certain matters. For example, the MHRC requested certification from the Chief Justice to send the section 46 (Penal Code) matter to the Constitutional Court, but had not received a response a year later. The chairman of the MHRC added that issues of human rights are not immediately addressed by courts, but when the executive needs judicial relief, it is immediately provided by the courts, citing as an example that when then President Mutharika asked the Chief Justice for a referral to the Constitutional Court regarding the possibility of firing the Vice-President, he obtained a response within a week.¹⁶⁵

The IBAHRI delegation recommends that the MHRC should be supported and provided with sufficient means to fulfil its mandate.

3.4.3 OFFICE OF THE OMBUDSMAN¹⁶⁶

The Office of the Ombudsman is a constitutional body created in terms of Chapter X of the Malawi Constitution. The Office is tasked with investigating and litigating on government abuses or legal violations on behalf of individuals without other source of redress.¹⁶⁷ Sections 15(2) and 46(2) (b) of the Constitution state, inter alia, that a person or group of persons who feels that human rights guaranteed under the Constitution have been violated or threatened may approach the Ombudsman for assistance or relief. Therefore, the Office of the Ombudsman has an important role to play in the area of protection and enforcement of human rights. Ideally, the Office of the Ombudsman would thus serve as an avenue for realisation by the people of their right of access to justice.¹⁶⁸ However, the Office lacks adequate resources to execute its mandate effectively.¹⁶⁹ Between August 2009 and October 2010 there was no Ombudsman in office and though the Office did conduct investigations in ongoing cases, during this period it did not take on new ones.¹⁷⁰ The current Ombudsman, Justice Tujilane Chizumila, was appointed by then President wa Mutharika in October 2010.¹⁷¹

The Office of the Ombudsman is located in Lilongwe and is therefore not readily accessible for most Malawians. Some of the individuals that the IBAHRI fact-finding delegation met indicated that

162 N Patel, *Promoting the effectiveness of democracy protection institutions in Southern Africa – The Malawi Human Rights Commission and the Office of the Ombudsman*, EISA, Johannesburg, 2009 available at: www.eisa.org.za/PDF/rr46.pdf 124.

163 Patel, *Promoting the effectiveness of democracy protection institutions in Southern Africa*, see n 163 above, 124.

164 Meeting with the Chairman of the MHRC, 10 January 2012.

165 *Ibid.*

166 Constitution of Malawi, Chapter X.

167 *Ibid.*, section 123 (1).

168 RE Kapindu (2009), 'Malawi: Legal System and Research Resources' available at: www.nyulawglobal.org/globalex/Malawi.htm, section 7.

169 BA Andreassen and T Oftedal, 'The Office of the Ombudsman (OoO) in Malawi – An Appraisal', NORAD Collected Reviews (May 2007), Commissioned by the Royal Norwegian Embassy, Lilongwe, 5 available at: www.norad.no/en/tools-and-publications/publications/publication?key=109612.

170 US Department of State, *2010 Human Rights Report: Malawi*, see n 49 above, 13.

171 P Maulidi, 'Ombudsman Absence: Malawians Feel the Pinch' (4 October 2010) *Zodiak Malawi* available at: www.zodiakmalawi.com/a%20move%20on/index.php?option=com_content&view=article&id=1148%3Aombudsman-absence-malawians-feel-the-pinch-&Itemid=81.

the current Ombudsman was not as visible in the community as was the previous Ombudsman.¹⁷² Furthermore, some interviewees indicated that there seems to be a general lack of willingness on the part of the office to investigate allegations of abuses of power by members of the executive on behalf of the indigent public.¹⁷³ The IBAHRI delegation made a brief courtesy visit to the Ombudsman, but due to scheduling issues, did not have the opportunity of a longer meeting with her. As such, the IBAHRI delegation was unable to raise the allegations levelled against her office with the Ombudsman and hear her point of view.

3.4.4 MALAWI LAW COMMISSION¹⁷⁴

The MLC is a constitutionally mandated body with the power to review the laws of Malawi to ensure that they are in accordance with the Constitution and relevant international laws.¹⁷⁵ The MLC is made up of 11 lawyers – nine of whom have at least a master's degree.

The MLC is currently undertaking a review of recently enacted laws referred to it by the government, which have received widespread criticism. Once the law has been reviewed, the MLC issues recommendations contained in a report to Parliament, which, where necessary, includes a draft Bill. However, the MLC indicated that often laws are sent for review without clear information as to what specific aspects of the laws need to be assessed.¹⁷⁶

3.4.5 MALAWI ELECTORAL COMMISSION

The MEC was created by the 1994 Constitution and is chaired by a Supreme Court judge nominated by the JSC. It also consists of at least six additional members appointed by the President in consultation with leaders of political parties represented in Parliament.¹⁷⁷ During the last presidential and parliamentary elections held in 2009, EU election observers noted the MEC's impartiality and independence but blamed many 'logistical and organisational challenges'¹⁷⁸ for limiting its capacity. Its position was further weakened when then President wa Mutharika suspended MEC commissioners and ordered the MEC's temporary closure in late December 2010 on the grounds of alleged misappropriation of funds. Consequently, local government elections were postponed from April 2011 to 2014.

Shortly after the start of her term, President Banda appointed new commissioners,¹⁷⁹ thereby rendering the MEC functional. A new Chief Election Officer was also appointed in June 2012.¹⁸⁰ The IBAHRI notes this positive development and recommends that the government ensures the MEC has the appropriate resources to undertake its work effectively and independently.

172 Meetings in Blantyre, 12 and 13 January 2012.

173 *Ibid.*

174 Constitution of Malawi, Chapter XII.

175 *Ibid.*, section 132.

176 Meeting with the MLC, 11 January 2012.

177 Constitution of Malawi, section 75.

178 EU, 'European Union Election Observation Mission to Malawi – Final Report on the Presidential and Parliamentary Elections, 2009', 2009, 3 available at: www.eueomalawi.org/PDF/EU%20EOM%20Malawi%202009%20final%20report.pdf.

179 T Mwanyongo, 'Malawi electoral Commissioners appointed', *Nyasa Times* (19 May 2012) available at: www.nyasatimes.com/malawi/2012/05/19/malawi-electoral-commissioners-appointed.

180 J Moyo, 'Malawi Electoral commission has new CEO – Kalonga', *Nyasa Times* (26 June 2012) available at: www.nyasatimes.com/malawi/2012/06/26/malawi-electoral-commission-has-new-ceo-kalonga.

3.5 Review of controversial laws

In the period 2009 to 2011, the Malawi legislature enacted a number of controversial laws. In response to calls from civil society¹⁸¹ and international donors, the wa Mutharika government referred to the MLC for review several pieces of legislation, including: the Local Courts Act, which extended the jurisdiction of traditional leaders;¹⁸² the amendment to the Civil Procedures Act, which restricts the right of citizens to challenge government decisions through court injunctions;¹⁸³ a law enabling the police to conduct warrantless searches;¹⁸⁴ and a law banning ‘indecent practices and unnatural acts’, under which homosexuality is criminalised. An amendment to the Penal Code, empowering the Information Minister to ban media publications,¹⁸⁵ which was also referred to the MLC, was repealed by Parliament at the end of May 2012.¹⁸⁶

The former Minister of Justice stated that the MLC will undertake its review comprehensively and in accordance with its mandate under the Constitution and the Law Commission Act, following which it is expected to submit appropriate recommendations to the government for consideration.¹⁸⁷ Political commentators view the government’s decision to seek to review the laws as a means of attracting donor aid,¹⁸⁸ while two Malawian NGOs, the Centre for Human Rights and Rehabilitation (CHRR) and the Centre for the Development of People remain sceptical of the government’s commitment to the process, preferring the authorities to ensure the repeal of the problematic laws rather than simply facilitating their review.¹⁸⁹ The IBAHRI delegation was informed that the government does not always adopt recommendations made by the MLC.¹⁹⁰ Furthermore, the IBAHRI delegation found that many interviewees were of the view that laws should have been sent back to the Parliament, and that referral to the MLC could be an attempt to delay (or derail) the review process.¹⁹¹

Former Minister of Justice Chiume defended the government’s position and asserted that there is technically nothing wrong with the laws, and that the public outcry that led to them being sent for review could be because the government has not done enough to effectively market the laws to the population.¹⁹² This notwithstanding, the MLC indicated that the problem is that the legislature has not indicated what the benchmark or basis is for review and thus reviewing some of the laws can be difficult.¹⁹³ The MLC indicated that the referrals of the various laws were made with no guidelines or specific instructions and no deadline. In light of this lack of clarity, the MLC wrote to the government

181 W Gwede, ‘Malawi dialogue group wants bad laws repealed’, *Nyasa Times* (4 November 2011) available at www.nyasatimes.com/malawi/2011/11/04/malawi-dialogue-group-wants-bad-laws-repealed [last accessed on 13 August 2012].

182 An Act to make provision for the establishment and constitution of Local Courts, the jurisdiction thereof, the procedure therein and for the proper administration of justice by some courts, (8 April 2011).

183 Civil Procedure (Suits by or against the Government or Public Officers) (Amendment) Act, 2010.

184 Police Act, 2009, section 35.

185 Penal Code (Amendment) Act, 2009. Section 31 amends section 46 of the Penal Code.

186 R Lee, ‘Bingu’s repressive media law repealed’, OSISA (5 June 2012) available at: www.osisa.org/media-and-ict/malawi/bingus-repressive-media-law-repealed.

187 L Sichali, ‘Phoya takes on Bingu government over bad laws’, *The Nyasa Times* (25 November 2011) available at: www.nyasatimes.com/malawi/2011/11/25/phoya-takes-on-bingu-govt-over-bad-laws.

188 R Chikoko, ‘Malawi President wants “bad laws” changed’, *Africa Review* (8 December 2011) available at: www.africareview.com.

189 ‘EU welcomes review of “bad laws” but insist on tangible developments’, *Malawi Today* (13 December 2011) available at: www.malawitoday.com/news/112745-eu-welcomes-review-bad-laws-insist-tangible-developments.

190 Meeting with the MLC, 11 January 2012.

191 Meeting with Human Rights Commission, 10 January 2012; meeting with the BHC, meeting in Blantyre, 13 January 2012.

192 Meeting with the former Minister of Justice, 9 January 2012.

193 See n 190 above.

asking for clarification of the context in which the laws needed to be reviewed.¹⁹⁴ As of the date of the mission, the MLC had not received any response to its query. The laws referred to the MLC will be examined in more detail below.

3.5.1 LOCAL COURTS ACT

The Local Courts Act of Malawi provides for a Local Court and District Appeals Local Court in each district in close proximity to villages.¹⁹⁵ This system of courts runs parallel to the modern court structure, subject to the supremacy of the High Court. The Act provides for the management of the Local Courts and District Appeal Courts by a chairperson who must: be aged 35 or above; hold a Malawi School Certificate of Education; and understand the law of the area.¹⁹⁶ Assessors supervise the operation of the Local Courts, and while the Local Courts are able to hear both criminal and civil cases, they are not allowed to hear cases that relate to the title of land, inheritance, custody of children, witchcraft or chieftaincy.¹⁹⁷

The Act was fiercely opposed by Malawi's former Vice President (and current President) and opposition United Democratic Front, who argued against the wide jurisdiction of Local Courts to hear and punish criminal cases. One parliamentarian also questioned the low academic and professional qualifications required of the chairpersons of the Local Courts.¹⁹⁸

It should be noted, however, that traditional courts have been the main source of redress for the majority of Malawians. Despite the infamy of the misuse of the traditional courts, because of their use during former President Hastings Banda's time by the executive to entrench his autocracy,¹⁹⁹ they still serviced the majority of Malawians. Given that their abolishment led to a vacuum in the judicial system, some commentators are of the view that the review and eventual reinstatement of courts at this level was necessary.²⁰⁰

The former Minister of Justice noted that the Local Courts Act is attempting to address this gap and decongest the justice system by assigning the adjudication of petty offences to lower-level courts.²⁰¹ Nevertheless, the perception created by the traditional courts during Hastings Banda's era motivated the need to reassess the Local Courts Act in such a way that clarifies the distinction between the past

194 *Ibid.*

195 Local Courts Act, section 4. See also M Crouch, 'Improving Legal Access for Rural Malawi Villagers', *JURIST* (18 August 2011) available at: <http://jurist.org/datetime/2011/08/megan-crouch-local-courts-malawi.php>.

196 Local Courts Act, section 6.

197 *Ibid.*, section 18.

198 J Njewa, 'Local Courts bill passed: Chilumpha protest', *The Malawi Democrat* (10 February 2011) available at: www.malawidemocrat.com/politics/chilumpha-atupele-khwauli-say-no-to-local-courts. Section 7(1) of the Local Courts Act provides that the assessors must meet the following requirements:

- a) has attained the age of fifty (50) years;
- b) is able to read and write;
- c) has adequate knowledge of customary law of the area;
- d) has adequate command of the language of the Local Court;
- e) has no criminal record involving dishonesty or moral turpitude;
- f) is non partisan; and
- g) is otherwise a fit and proper person.

199 See Kanyongolo, n 106 above, 44. Traditional courts had jurisdiction on capital offences, such as murder and treason, and were used to try political opponents.

200 *Ibid.*, 21. 'If formally established and governed by legislation "traditional or local courts" [...] have the potential to make the formal judiciary more accessible for more people.'

201 Meeting with former Minister of Justice Chiume, 9 January 2012.

courts and the new Local Courts.²⁰² The MLC perceives the outcry against the Local Courts Act as baseless since the new Local Courts will be part of the judiciary and not the executive.²⁰³

It should be noted that the proposed Local Courts are subordinate courts of the High Court with limited jurisdiction. Local Courts have jurisdiction over civil cases at customary law²⁰⁴ and criminal matters, dealing with minor offences.²⁰⁵ Notably, the maximum penalty at the Local Court will be 12 months' imprisonment or a MWK5,000 fine.²⁰⁶ However, individuals found to be in contempt of court can be fined up to MWK20,000.

The IBAHRI found that some individuals were of the view that the Local Courts are important and that they must be understood in their proper context.²⁰⁷ Essentially, these proposed lower-level courts will handle the majority of minor issues that arise in the rural areas. Thus, the intention behind (re)establishing courts at this level is well meant. However, given Malawi's history with the traditional courts, it is imperative that people are made aware of the distinction between the local courts under the new law and the traditional courts that existed in the past. The Local Courts will not achieve the intended goal, which is to bring justice closer to the people, if people do not trust them. This is a particularly important point because in rural areas customary law governs most conduct and people have used alternative dispute resolution and/or chieftain level procedures to deal with transgressions. In the words of an eminent Blantyre-based lawyer met by the IBAHRI delegation, 'No matter how close you bring the creature (courts) to the people, they will still prefer the system that they are more familiar with.'²⁰⁸ He however stressed the importance for the Local Courts to deal only with small cases that do not require formal legal training.²⁰⁹ The level of legal knowledge required from the chairpersons and the assessors is limited to 'knowledge of customary law of the area', according to section 7(1) of the Local Courts Act, and the law does not make provisions for any training of the chairpersons and assessors.

3.5.2 AMENDMENT OF SECTION 10 OF THE CIVIL PROCEDURE ACT

The amendment of section 10 of the Civil Procedure (Suits by or against the Government or Public Officers) Act,²¹⁰ commonly referred to as the 'injunction law', was referred to the MLC for review but has since been repealed by the Malawi Parliament at the end of May 2012, thereby reverting to the original provision.²¹¹ The amendment was aimed at ensuring that the government is heard before an injunction is granted.

202 *Ibid.*

203 See n 190 above.

204 Local Courts Act, section 18(1).

205 *Ibid.*, section 22. Such offences include prohibition of carrying offensive weapons, destroying evidence, common assault, offences related to judicial proceedings. See Local Courts Act, First Schedule.

206 Local Courts Act, section 23 (1).

207 Meetings with former Justice Minister Chiume, 9 January 2012; MLC, 11 January 2012.

208 Meeting in Blantyre, 12 January 2012.

209 *Ibid.*

210 An Act to amend the Civil Procedure (Suits by or against the Government or Public Officers) Act, Act No 11 of 2011.

211 'Repealing of Injunction law restores right to access justice – Kasambara', *The Malawi Democrat* (25 May 2012) available at: www.malawidemocrat.com/politics/repealing-of-injunction-law-restores-right-to-access-justice-kasambara.

The amended section 10 would have read as follows:

‘10 (1) The Court shall not, in any proceedings against the Government or a public officer, grant relief by way of an injunction if the application for such relief was made *ex parte*.

‘(2) The Court shall not in any proceedings grant an injunction or make any order against the Government or a public officer if the effect of granting the injunction or making the order would be to give any relief against the Government or a public officer which could not have been obtained in a suit against the Government or a public officer.

‘(3) Nothing in this Act shall be construed as authorizing the grant of relief by way of specific performance against the Government, but in lieu thereof, the Court may make an order declaratory of the rights of the parties.’

Essentially, this provision would have removed the possibility of *ex parte* applications against the government or public officers. According to the terms of the amendment, matters against the government or public officers would therefore only be heard *inter partes*. The bill was widely criticised and some described its effect as essentially that the government protects itself from suits.²¹² Critics of the amendment indicate that even where individuals seek to sue the government, if the Attorney General chooses to not attend, then the suit cannot proceed.²¹³ In June 2011, the Malawi Catholic Commission for Justice and Peace indicated that it intends to take legal action against the government if the amendment is enacted.²¹⁴ Furthermore, other civil society organisations (CSOs) have condemned the ‘Injunction law’ as having a potential negative impact on democracy.²¹⁵

3.5.3 SECTION 35 OF THE POLICE ACT (2010)

Section 35 of the Police Act, Act No 12 of 2012, relates to the powers of police officers in searching without a warrant. Related to this section is section 34 (5) – (6). The sections are contained in Part V of the Police Act on ‘Powers, duties and privileges of police officers’. The provision provides for searches and seizure without a warrant under the following circumstances:

‘35(1) Where a police officer of or above the rank of sub-inspector has reasonable grounds for believing that any thing necessary for purposes of an investigation into an offence which he is authorised to investigate may be found in any place and that such thing cannot in his opinion be otherwise obtained without undue delay, such officer may, after recording in writing the grounds of his belief and specifying in such writing, so far as is possible, the thing for which search is to be made, after giving a the copy of a record thereof to the owner or occupant of the place to be searched, *search without a warrant or cause search without a warrant to be made*, for such thing in any place and, if such thing be found, seize and carry it before the nearest magistrate empowered to take cognizance of the offence to be dealt with according to law.’ [emphasis added]

212 ‘Wa Mutharika assents to Injunctions Act’, *The Malawi Democrat* (13 July 2011) available at: www.malawidemocrat.com/politics/wa-mutharika-assents-to-injunctions-act.

213 ‘Wa Mutharika assents to Injunctions Act’, *The Malawi Democrat* (13 July 2011); ‘Malawi rights groups slam Injunctions law’, *The Malawi Democrat* (17 June 2011) available at: www.malawidemocrat.com/politics/malawi-rights-groups-slams-injunctions-law.

214 ‘Malawi rights groups slam Injunctions law’, *The Malawi Democrat* (17 June 2011).

215 *Ibid*.

According to the CHRR, the proposed amendment is also in contravention of international standards in respect to the right to privacy.²¹⁶ The UN Human Rights Committee also expressed its concern regarding section 35(1) and recommended to Malawi to take all necessary measures to repeal it, ‘in order to prevent arbitrary searches and interference with liberty and privacy’.²¹⁷ The universal starting point is Article 17 of the International Covenant on Civil and Political Rights (ICCPR), which states that:

‘No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home and correspondence, nor to unlawful attacks on his honour and reputation.’

Furthermore, in terms of General Comment 16 of the Human Rights Committee (1988)²¹⁸ of the UN Human Rights Committee,²¹⁹ it is ‘precisely in State legislation above all that provision must be made for the protection’ against both unlawful and arbitrary interference. Malawi has entrenched the right to privacy in its Constitution in section 21 (1):

‘21(1). Every person shall have the right to personal privacy, which shall include the right not to be subject to:

- (a) searches of his or her person, home or property;
- (b) the seizure of private possessions; or
- (c) interference with private communications, including mail and all forms of telecommunications.’

In a meeting with the IBAHRI delegation, the former Justice Minister explained that section 35 of the Police Act remedies situations in places where only one magistrate is available, particularly in rural locations, and the police are not able to obtain a search warrant. Given that the majority of Malawi’s population is rural, this section could alleviate the administrative and logistical strain on the police to seek a magistrate to issue a search warrant. The Law Commission explained to the IBAHRI delegation that section 35 needs to be understood in its context and that its wording was actually the recommendation of the Law Commission in its review of the Police Act in 2003. The Law Commission had concluded that:

‘the power to search premises envisaged under section 16(1) [of the former Police Act and which became section 35(1) of the 2010 Police Act] is a necessary reserve power which may be used in particular cases to prevent tampering with evidence which can be occasioned by delays to execute the search.’²²⁰

Due to the discretion given to police officers in section 35 and the potential for abuse, the IBAHRI recommends that the provision be carefully reviewed and police powers better defined so as to avoid breaches of the right to privacy.

216 CHRR, *Malawi: Submission to the UN Universal Periodic Review at the Ninth session of the UPR Working Group of the Human Rights Council* (December 2010) 4 available at: <http://chrr.ultinets.net/wp-content/uploads/2010/11/CHRR-submission-to-the-UPR-process-4-MWs-review.pdf>.

217 UNCHR, ‘Consideration of reports submitted by States parties under article 40 of the Covenant – Concluding observations of the Human Rights Committee, Malawi’ (18 June 2012) UN Doc CCPR/C/MWI/CO/1.

218 UNCHR, ‘General Comment No 16 – The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art 17)’ (8 April 1988) UN Doc HRI/GEN/1/Rev.9 (Vol I) (27 May 2008), 191, para 2.

219 Treaty body that monitors States Parties’ compliance of their obligations under the ICCPR.

220 MLC, *Report of the Law Commission on the review of the Police Act*, Law Commission Report No 9 (July 2003), 29.

3.5.4 AMENDMENT TO THE PENAL CODE

The amendment of the Penal Code process began in 2000 and was finalised in 2011. However, the amendment of section 46 of the Penal Code, which deals with the power of the Minister of Information to ban publications, has not been well received. Under President Banda, section 46 has been repealed entirely and removed from the Penal Code.

The original section 46 used to read as follows:

‘If the Minister is of the opinion that the importation of

(a) any publication; or

(b) all publications published by one person

would be contrary to the public interest, he may, in his absolute discretion, by order, prohibit the importation of such publication or publications, and in the case of a periodical publication may, by the same or subsequent order, prohibit the importation of any past or future issue thereof.’

The proposed amendment would have replaced section 46 with the following provision:

‘If the Minister has reasonable grounds to believe that the publication or importation of any publication would be contrary to the public interest, he may, by order published in the Gazette, prohibit the publication or importation of such publication.’

Before the amendment, the section gave absolute powers to the Minister of Information to prohibit importation of seditious publications. Thus, the amended section 46 was a move away from the Minister of Information wielding absolute power. However, as amended, the section was still perceived to amount to censorship and subject to arbitrary abuse.²²¹ Of importance, however, is the fact that the original section 46 and the proposed amendment are contrary to section 36 of the Constitution, which stipulates that, ‘the press shall have the right to report and publish freely, within Malawi and abroad, and to be accorded the fullest possible facilities for access to public information’.

However, this is not to suggest that certain information must not be kept private in the public interest. The IBAHRI delegation found that a number of individuals were of the opinion that in order to pass constitutional muster, the limitation to the right to freedom of expression would have to be assessed using a strictly adhered to reasonableness test. This test would require an evaluation of the Minister of Information’s determination of what is the ‘public interest’. It was noted that it was likely that any decision by the Minister of Information would be challenged. However, the Malawi Parliament has decided to repeal section 46 altogether and remove it from the Penal Code; a decision that has met with approval from CSOs.²²²

²²¹ MISA Malawi and the Media Council have legally challenged the constitutionality of section 46 of the Penal Code for promoting self-censorship.

²²² R Lee, ‘Bingu’s repressive media law repealed’, (5 June 2012) OSISA, available at: www.osisa.org/media-and-ict/malawi/bingus-repressive-media-law-repealed.

3.6 Other bodies

3.6.1 CIVIL SOCIETY AND NON-GOVERNMENTAL ORGANISATIONS

CSOs in Malawi have been key in criticising the executive for abuses of power. CSOs are very vocal on national socio-political and economical issues. In addition, NGOs involved in rule of law, governance and human rights work have also been active. All NGOs and CSOs must be registered members of the Council for Non-governmental Organisations in Malawi (CONGOMA).²²³ There are also many faith-based organisations in Malawi. Particularly, the Catholic church has been active in criticising violations of human rights and abuses of power by the government.

CONGOMA continues to champion the rights of Malawians through various organisations; however in the absence of resources it remains challenging. CONGOMA engages in capacity-building, advocacy and institutional growth. In respect of justice issues, CONGOMA relies on CSOs and NGOs working on issues related to justice, the rule of law and human rights. Malawi's civil society is relatively strong and public trust has generally continued to increase. However, it is not always easy to mobilise people to demonstrate and there have been reports that civil society has been disintegrating since late 2011.²²⁴

Nevertheless, CSOs and NGOs continue to engage in a variety of initiatives aimed at strengthening the voice of civil society in the public domain. In 2011, one of the notable initiatives that CSOs and NGOs engaged in was the drafting of a 20-point agenda of issues that needed addressing by the government. The agenda highlighted, among other issues: the need for the government to address the lack of foreign currency in the country; the shortage of fuel; bad governance; concerns over the University of Malawi (Chancellor College); the fact that the First Lady received a salary; and censorship of the media. The culmination of this process was the 20 and 21 July 2011 protests following the failure by government to address any of these issues. Since the protests, according to CONGOMA there has been no progress on any of the issues.²²⁵ This is despite the fact that the IBAHRI delegation was told that there was an existing dialogue between the Malawi government and civil society.²²⁶ In fact, prior to the July 2011 protests, several government/NGO forums were convened. However, issues were not resolved.

The government put together a committee to meet the CSOs following the protests, but according to CONGOMA, the meeting has not yet materialised and CONGOMA is not aware of the composition of the committee.²²⁷ CONGOMA indicated that the continued inaction of the Malawi government could prompt another nationwide protest – a point reiterated in February 2012 by the spokesperson for the CSOs Negotiations Team.²²⁸

223 Meeting with CONGOMA representative, 12 January 2012.

224 Meeting with UNDP officials, 12 January 2012.

225 Meeting with CONGOMA, 12 January 2012.

226 *Ibid*, and Teleconference with Inspector General of Police, 13 January 2012.

227 See n 226 above.

228 Meeting with CONGOMA, 12 January 2012; 'March 28 dialogue deadline – Malawi civil society' *The Malawi Democrat* (20 February 2012), available at: www.malawidemocrat.com/national/march-28-dialogue-deadline-malawi-civil-society.

3.6.2 THE MEDIA

The Constitution guarantees both the right to freedom of expression²²⁹ and freedom of the press.²³⁰ Thus, in theory, the media has both freedom of expression and freedom of the press. However, human rights defenders and journalists critical of the government face intimidation and harassment, which are reportedly inadequately investigated by the authorities.²³¹ Five human rights defenders were on trial for holding a peaceful demonstration outside Malawi's National Assembly building in October 2011, which police say was illegal.²³² The demonstrators had not been granted permission to hold the protest as required by the Police Act. The activists urged then President wa Mutharika to call a referendum for an early election, and called for the resignation of then Police Inspector General Peter Mukhito and an investigation into his alleged involvement in Robert Chasowa's death.²³³ At the end of June 2012, the DPP dropped the charges against the five accused.²³⁴

The IBAHRI delegation heard that, although the media remained relatively free, incidents of intimidation did occur. Representatives of the BHC and the DFID indicated that they regularly engage with the media and that they were aware that the media works under pressure.²³⁵ Furthermore, the IBAHRI delegation found that the late President wa Mutharika's daughter publishes a pro-government newspaper and that the national state broadcaster, Malawi Broadcasting Corporation (MBC) is also pro-government.²³⁶ These, the IBAHRI found, were the primary sources of information for many Malawians. The IBAHRI delegation also found that only approximately 40,000 copies of two of the country's widely read newspapers were sold daily.²³⁷ Given that the country has a population of almost 15 million,²³⁸ the low rate of sale indicates a likely low readership.

With regard to instances of intimidation, the BHC representative indicated that, among other instances, the most notable was the burning of vehicles of independent radio service Zodiak. Several commentators reiterated the view that the independent media operated under difficult conditions. Journalists have also reportedly received death threats²³⁹ and were particularly singled out for arrest and attack by police in the July 2011 demonstrations, during which the government ordered a media blackout and banned the press from broadcasting live reports of the protests, arguing that

229 Constitution of Malawi, section 35.

230 *Ibid*, section 36.

231 'Malawi: Trial of five human rights defenders in Malawi after peaceful protest' *Frontline Defenders*, (23 November 2011), available at: <http://frontlinedefenders.org/node/16644>; Meetings with representatives of the BHC, DFID and the Head of the EU delegation to Malawi, 10 January 2012.

232 'Malawi: Trial of five human rights defenders in Malawi after peaceful protest', see n 232 above.

233 Amnesty International, 'Malawi urged to release activists' (press release), (17 October 2011), available at: www.amnesty.org/en/news-and-updates/malawi-urged-release-activists-2011-10-17. Peter Mukhito was fired by President Banda on 9 April 2012.

234 'Malawi government drops case against human rights activists', *Voice of Malawi* (28 June 2012) available at: www.faceofmalawi.com/2012/06/malawi-govt-drops-case-against-human-rights-activists.

235 Meeting with representatives of the BHC and the DFID, 10 January 2012.

236 Meetings with representatives of the BHC, DFID and the Head of the EU delegation to Malawi, 10 January 2012.

237 Meeting with the Head of the EU delegation to Malawi, 10 January 2012.

238 World Bank: 'Malawi Population', available at: www.google.co.za/publicdata/explore?ds=d5bncppjof8f9_&met_y=sp_pop_totl&idim=country:MWI&dl=en&hl=en&q=malawi+population.

239 T Chiumia, 'Misa Malawi condemns death threats against journalist', *The Nyasa Times (Malawi)* (20 October 2011), available at: www.nyasatimes.com/malawi/2011/10/20/misa-malawi-condemns-death-threats-against-journalist.

they fuelled the demonstrations.²⁴⁰ Reporters Without Borders reported that several journalists were beaten and detained for covering the protests.²⁴¹

An experienced lawyer met by the IBAHRI delegation noted however that although the executive is criticised as heavy-handed towards the media, media houses still operate despite their public criticism of the executive.²⁴² He added that the section 46 amendment (censorship provision) would effectively give the State extra power to control the media.

Malawi's newspapers continue to present a diversity of opinion,²⁴³ although Malawi's printed media practises self-censorship following instances of State interference and harassment. In 2010, the government prevented the largest independent daily from advertising after it published unflattering articles about then President wa Mutharika's family.²⁴⁴ President wa Mutharika also threatened to close down newspapers that reported on potential food insecurity in the country.²⁴⁵ In September 2011, the Malawian Chapter of the Media Institute of Southern Africa (MISA) condemned reported death threats against Joseph Mwale, a journalist who was fired by a national broadcaster after publishing a recording of a private conversation between then President wa Mutharika's brother and a former deputy minister,²⁴⁶ and wa Mutharika's spokesman accused local media of an anti-government bias.²⁴⁷

The media is also subject to tight regulation through strict licensing and registration provisions.²⁴⁸ The Malawian Communications Regulatory Authority (MACRA) has also been criticised for accepting only 8 of 30 applications for broadcasting licences; two of which are linked to late President wa Mutharika's family members and staff.²⁴⁹ Former President Muluzi's Joy TV, which has been denied a licence by MACRA, was recently allowed by the Zambian government to register and broadcast from Zambia.²⁵⁰

240 Media Institute Southern Africa, 'MACRA Issues Warning to Capital FM, Radio Islam' (press release), 12 October 2011, available at: <http://allafrica.com/stories/201111101499.html>.

241 Reporters without Borders, 'Journalists beaten and detained to prevent them covering protests' (22 July 2011), available at: <http://en.rsf.org/malawi-journalists-beaten-and-detained-to-22-07-2011,40679.html>.

242 Meeting in Blantyre, 13 January 2012.

243 Freedom House, Freedom in the World 2011 – Malawi, 12 May 2011, available at: www.unhcr.org/refworld/docid/4dcbf516c.html.

244 *Ibid.*

245 *Ibid.*

246 MISA Malawi, 'Statement On Death Threats On Journalist Joseph Mwale' (press release), 28 September 2011, available at: www.mw.misa.org/index.php?option=com_content&view=article&id=113:misa-malawi-statement-on-death-threats-on-journalist-joseph-mwale.

247 T Chiumia, 'Malawi media is biased – presidential aide', *The Nyasa Times (Malawi)* (19 October 2011), available at: www.nyasatimes.com/malawi/2011/10/19/malawi-media-is-biased-presiden=tial-aide.

248 US Department of State, *2010 Human Rights Report: Malawi*, see n 49, above, 8.

249 S Khunga, 'Kaliati: More TV licences soon', *The Daily Times (Malawi)* (16 November 2011), available at: www.bnltimes.com/index.php/daily-times/headlines/national/2400-more-tv-licences-soon-kaliati.

250 'Joy TV will be 'free to air' in southern Africa –Atupele', *The Nyasa Times (Malawi)* (26 October 2011), available at: www.nyasatimes.com/malawi/2011/10/26/joy-tv-will-be-%E2%80%98free-to-air-%E2%80%99-in-southern-africa-atupele.

In October 2011, MACRA issued warnings to private radio stations Capital FM and Radio Islam: the former's in relation to a programme in which an anonymous caller reportedly insulted then President wa Mutharika, and the latter's in relation to a religious programme denigrating other beliefs; both in contravention of the Communications Act, which prohibits licensees from broadcasting 'any material which is indecent, obscene or offensive to public morals (including abusive or insulting language) or offensive to the religious convictions of any section of the population...'.²⁵¹ MISA Malawi criticised MACRA's decision as a 'superfluous, unconstitutional and retrogressive' violation of the Malawian Constitution, which deprived people of their right to access information.²⁵² In its 2011–2012 World Press Freedom Index, the organisation Reporters without Borders ranked Malawi as 147th out of 179 countries – a drop of 67 places from the previous year.²⁵³

In contrast, freedom of expression on the internet seems to be largely unrestricted.²⁵⁴ There are numerous Malawian news websites; however, International Telecommunications Union statistics indicate that only two per cent of the Malawian population had access to the internet in 2008, thus limiting its effectiveness as a method of communication for many Malawians.²⁵⁵

251 'MACRA Issues Warning to Capital FM, Radio Islam', see n 239 above.

252 *Ibid.*

253 Reporters without Borders, 'World Press Freedom Index' (25 January 2012), available at: http://en.rsf.org/IMG/CLASSEMENT_2012/C_GENERAL_ANG.pdf.

254 US Department of State, *2010 Human Rights Report: Malawi*, see n 49 above, 8.

255 *Ibid.*

Chapter 4: The Judiciary

4.1 Appointment and composition of the judiciary

The head of the judiciary, the Chief Justice, is appointed by the President with the agreement of two-thirds of the National Assembly.²⁵⁶ Justices of the High Court and Supreme Court of Appeal are recommended by the JSC and then appointed by the President.²⁵⁷ The President does not need to give reasons for his or her selection, and the MLS has alleged in 2011 that the President had overlooked more experienced judges and asked for more transparency in the appointment process.²⁵⁸ The Chief Justice, following recommendations from the JSC, appoints magistrates. In 2002, the IBA reported allegations that the executive made politically motivated judicial appointments without consulting the JSC.²⁵⁹

The Constitution does not provide that the judiciary must be representative of the population.²⁶⁰ Although recent figures of the female composition of the judiciary are not available, a 2003 report commissioned by the World Bank indicated that fewer than ten per cent of judges were female.²⁶¹

4.2 Conditions of employment and Code of Conduct

Members of the judiciary retain their positions until retirement, with judges retiring at the age of 65 and magistrates at 70.²⁶² Although judges can be removed for misconduct,²⁶³ they are exempt from civil liability for the consequences of their judicial duties.²⁶⁴ Judges however do not have a codified Rules of Conduct and are subject only to discipline by the JSC in exceptional cases. In 2011, a taskforce was set up to work on a Code of Conduct for judges.

At the time of the fact-finding mission, judicial officers and support staff embarked on a strike against menial wages.²⁶⁵ Judges later joined the strike, which ended at the end of March 2012, after an agreement on salaries was reached with the government. The strike was based on the fact that salaries for the judiciary should be reviewed every three years.²⁶⁶ However, the last review of salaries was conducted in 2006. All the individuals that spoke to the IBAHRI delegation acknowledged that the remuneration of judges and judicial support staff is a serious problem.²⁶⁷ As a result, allegations have emerged that some judges might be more inclined to look to other, sometimes improper, ways

256 Constitution of Malawi, section 111(1).

257 *Ibid*, section 111(2).

258 'Malawi Law Society queries judge appointments', *The Malawi Democrat* (15 June 2011), available at www.malawidemocrat.com/politics/malawi-law-society-queries-judge-appointments.

259 See n 1 above, 83.

260 FE Kanyongolo, *Malawi: Justice Sector and Rule of Law: A review by AfriMAP and Open Society Initiative for Southern Africa*, (OSISA, 2006), 82.

261 N Ngwira, G Kamchedzera and L Semu, 'Malawi: Strategic Country Gender Assessment (SCGA)', report presented to the World Bank and UNDP (June 2003), available at: <http://siteresources.worldbank.org/EXTAFRREGTOPGENDER/Resources/MalawiSCGA.pdf>.

262 Kanyongolo, see n 261 above, 82.

263 Constitution of Malawi, section 119(2).

264 Courts Act, section 61(1).

265 'Malawi: Judicial Strike Shuts Down Courts' (9 January 2012) available at: <http://allafrica.com/stories/201201100118.html>. As of 20 February 2012, the strike was still ongoing.

266 Section 114(2) of the Constitution provides that judges' salaries must be 'increased at intervals so as to retain its original value'.

267 Meeting with former Attorney-General Mbendera and Solicitor General, 9 January 2012.

of earning extra income. It was the general consensus that: judges must be given appropriate salaries; that sector-wide salary reviews were necessary; and that recommendations should be implemented.

Nevertheless, the former Minister of Justice and the former Attorney-General both noted in their meeting with the IBAHRI delegation that, given the economic situation in the country, it is likely that the salaries of judicial officers, as well as other civil servants, will remain low.²⁶⁸ Unfortunately, this has resulted in people opting instead to work in the private sector. Consequently, there are only a small number of judges for the work available. The current number of High Court judges is 27, while the Attorney General estimates that 42 would be needed to meet the needs.²⁶⁹ Furthermore, the Attorney-General stated that the number of judges at the Supreme Court should be 13 (including the Chief Justice), instead of the current seven.

To further compound the problems, judges – who have often not specialised in particular areas of law – do not have any research assistants and personal assistants to help them with the effective execution of their duties. As a result, there are often delays in rendering judgments. Sometimes, judgments can be issued after more than five years. However, according to the then Attorney-General, there has been an improvement in the speed of judgment delivery in the past four to five years. Some of the judgments are written and can be accessed in hard copy. Through the assistance of the OSISA, the Southern African Legal Information Institute (SAFLII) and the Kenya Law Reports, the MLS set up a website – the Malawi Legal Information Institute (www.malawilii.org/content/home) – through which more recent judgments can be accessed online. It should be noted however that the majority of Malawians do not have access to the internet.

4.3 Education of the judiciary and human rights training

An individual may be considered for a judicial position in the High Court or Supreme Court of Appeal if that person ‘is or has been a judge, or has been able to practise law for 10 years or more’.²⁷⁰ In contrast, no exact qualifications are required for magistrates, although in reality there are two types of magistrates with different levels of expertise: resident magistrates, who usually have a university law degree; and lay magistrates,²⁷¹ who usually only have a secondary school certificate.²⁷² The consequence of this, according to the International Foundation for Electoral Systems, is that ‘most lay magistrates are inadequately trained, resulting in poor service delivery and inconsistent [sic] in some judicial decisions’.²⁷³ In addition, there is no special training in place for the judiciary apart from short, informal courses organised by various interest groups.²⁷⁴ It should be noted that the AU’s Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa sets out that states should ensure that judicial officials are provided with continuing legal education.²⁷⁵ The

268 Meetings with former Attorney-General Mbendera and former Minister of Justice Chiume, 9 January 2012.

269 *Ibid.*

270 Constitution of Malawi, section 112.

271 First, second and third-grade magistrates.

272 See n 261 above.

273 F E Kanyongolo, *State of the Judiciary Report: Malawi 2003*, IFES State of the Judiciary Report Series, (April 2004), available at: www.ifes.org/~media/Files/Publications/Conference%20Papers%20and%20Reports/2004/148/SOJ_Malawi_Final.pdf, 29.

274 See n 261 above, 85.

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

IBAHRI met with a retired senior judge, who indicated that no orientation training was offered to new judges.²⁷⁶ There is currently no Code of Conduct for judges in place. A Code of Conduct exists for judicial officers, but it does not form part of any statute.²⁷⁷ Commentators have recommended the adoption of a code of conduct for judges, as well as the enactment of a law that would give legal force to the Code of Conduct both for judicial officers and judges.²⁷⁸ This position has been reiterated to the IBAHRI delegation by a senior retired judge.²⁷⁹

Most judges in the High Court and Supreme Court of Appeal obtained their law degrees during the one party era, when human rights were not covered extensively in the curriculum.²⁸⁰ Organisations such as the United Nations Office of the High Commissioner for Human Rights have organised workshops and seminars on human rights for the judiciary.²⁸¹ In contrast, the Lower Courts are more likely to consist of recently graduated magistrates who will have covered human rights law during their law degrees.²⁸²

4.4 Independence and effectiveness of the judicial system

As mentioned above, the President appoints the Chief Justice. The President does not have to give reasons for his or her selection. Although the JSC initially selects the justices of the Supreme Court and High Court, the members of the Commission are themselves appointed by the President, which may compromise judicial independence. However, the IBAHRI delegation found that the judiciary was largely perceived to be independent.²⁸³ According to the UNDP, an indication that the judiciary is independent is that the courts have passed some judgments against the government without fear or favour.²⁸⁴ However, the IBAHRI heard that some judges are seen to be toeing the Democratic Progressive Party/executive line.²⁸⁵ Notably, according to the MLS, the Chief Justice has acted in ways that reflect a lack of objectivity and independence.²⁸⁶ The MLS indicated that the Chief Justice has been seen in public to represent the interests of the executive and that he has compromised on the staff conditions of judicial officials and support staff – particularly in respect of their salaries. With regard to compromising staff conditions, the MLS is of the view that the Chief Justice has not shown public support of the calls for salary reviews for judicial officials and support staff.

With regard to the effectiveness of the judiciary, there is a severe shortage of judges in Malawi and the judicial system suffers from: poor record-keeping; a shortage of trained personnel; heavy caseloads; and a lack of resources.²⁸⁷ There is a large backlog of cases awaiting trial and little record of detainees.²⁸⁸ The MLS has blamed the shortage of judicial officers and low salaries for corruption

276 Meeting with a retired senior judge, 9 January 2012.

277 See n 261 above, 88.

278 *Ibid.*, 89.

279 See n 277 above.

280 See n 261 above, 86.

281 *Ibid.*, 85.

282 *Ibid.*, 86.

283 Meetings with several stakeholders, 9–13 January 2012.

284 Meeting with UNDP representatives, 11 January 2012.

285 *Ibid.*

286 Meeting with the MLS, 12 January 2012.

287 See n 49 above, 6.

288 *Ibid.*

in the sector.²⁸⁹ However, none of the individuals that the IBAHRI delegation met with intimated that there was a culture of corruption within the judiciary.

Issues raised concerning the effectiveness of the judiciary related to actions of the executive. The MHRC indicated to the IBAHRI delegation that they were concerned with some actions of the executive, especially with regard to interfering with judicial integrity, independence and effectiveness. Regarding judicial integrity, it is alleged that the executive – particularly then President wa Mutharika – undermined the judiciary by making public inflammatory statements indicating that the judiciary is subordinate to the executive. In addition, the actions of the executive in cases before the courts concern the MHRC. There have been allegations of continued interference. In the opinion of the MHRC, the MLS²⁹⁰ is meant to speak out on such issues; however they are limited in that they cannot lodge a complaint with the MHRC. There are no procedures in place for complaints and at present there is no mutual understanding between the MLS and the MHRC on a way forward on this. Instead, the MLS issues public statements regarding alleged misconduct by the executive.

Since the closure of traditional courts in Malawi in 1994, the effectiveness of the judicial system has been hampered, due to reduced access to justice. Despite the limitations of the traditional courts, they were readily accessible and fairly popular with the majority of the Malawian population.²⁹¹ It should be noted that the poor and rural population of Malawi continues to struggle to access the formal courts – primarily due to lack of access to transport to the location of the courts.²⁹² Furthermore, the few that do manage to access the courts often face other difficulties linked to covering costs for the court process.²⁹³ In April 2011, the Malawian parliament approved a Local Courts Act²⁹⁴ to mitigate the issue of access to justice for the majority of the population. The Local Courts Act was sent back to the MLC for review. This, and other new pieces of legislation, have been covered in greater detail in Section 3.5 above.

4.5 Enforcement of court orders

The IBAHRI delegation found that court orders are generally adhered to. However, there was a noted lack of enforcement where judgments have been made against the executive. Individuals that the IBAHRI delegation met with estimated that the rate of compliance to judgments ranged from about 30 to 40 per cent.²⁹⁵ According to the MHRC, non-compliance of the executive is not limited only to court orders, but also to recommendations by the MHRC itself and decisions of the Ombudsman.²⁹⁶ A senior lecturer of law at Chancellor College regards the lack of compliance with court orders by the government as symptomatic of a lack of a ‘culture of continuous obedience of the law’.²⁹⁷ He added that the government obeys the law mostly when it is convenient and that the government is often strategic about which orders to obey.

289 Meeting with the MLS, 12 January 2012; S Maganga, ‘Why Judiciary is corrupt’, *The Daily Times (Malawi)* (6 December 2011), available at: www.bnltimes.com/index.php/daily-times/headlines/national/2810-why-judiciary-is-corrupt.

290 See Chapter 5 below for a discussion of the legal profession.

291 M Crouch, ‘Improving Legal Access for Rural Malawi Villagers’, *JURIST* (18 August 2011).

292 See n 261 above, 20.

293 *Ibid.*

294 Local Courts Act, 2010, Act No 9 of 2011.

295 Meetings with the MHRC and MLS, 10 and 12 January 2012.

296 Meeting with the MHRC, 10 January 2012.

297 Meeting with a senior law lecturer, 13 January 2012.

Both the MHRC and the MLS have tried to take up the matter of non-compliance, but this has proved very difficult due to the apparent lack of commitment on the part of government to address this. However, in a meeting with the IBAHRI delegation, the then Attorney-General indicated that the government does not deliberately ignore judgments or not comply.²⁹⁸ In his opinion, it does comply with court decisions, but within the means of the government. A senior lawyer indicated that he believed the lack of compliance on the part of government was primarily due to a lack of funds.²⁹⁹ He added that most of the judgments are default judgments, and thus it is likely that the executive might not know of all them. In his opinion, the non-compliance did not equate to disrespect of the law.

The IBAHRI delegation found that the government viewed itself in a precarious position between court decisions against it and a limited budget. According to the then Attorney-General, there has been considerable improvement in payment in the past few years.³⁰⁰ However, the value of outstanding claims is estimated in billions of Malawian kwacha.

Whether the government's economic argument is justified, there appears to be a perception that it does not comply with court orders. The MHRC expressed the opinion that the population was losing interest in going to court due to the lack of compliance from the executive.³⁰¹ This could have an impact on the credibility of the justice system and the situation should be remedied by the Malawi government.

298 Meeting with the former Attorney-General Mbendera and the Solicitor General, 9 January 2012.

299 Meeting with senior lawyer, Blantyre, 13 January 2012.

300 See n 298 above.

301 Meeting with the Chairman of MHRC, 10 January 2012.

Chapter 5: The Legal Profession

5.1 Background to the legal profession

All legal practitioners in Malawi are known as legal practitioners or lawyers. In order to practise law in Malawi, one must be a Malawian citizen or have lived in Malawi continuously for at least three months, and hold a degree or diploma in law, or already be qualified to practise law in one of the countries listed in the First Schedule of the 1965 Legal Education and Legal Practitioners Act, in addition to passing the Malawi Law Examinations.³⁰²

The Legal Education and Legal Practitioners Act established the Malawi Council of Legal Education (the ‘Council’), which regulates legal education in Malawi. The Council consists of the Attorney-General, a High Court Judge, a magistrate, two legal practitioners and two law teachers. The Council oversees legal education, creates relevant training programmes and coordinates examinations.

The University of Malawi is the only institution in Malawi that offers law degrees.³⁰³ The university’s legal course includes a one-year specialisation in human rights.³⁰⁴ Having completed the university’s four-year law degree, graduates can practise law if they gain employment with the government or work under the supervision of a qualified lawyer with at least three years’ experience.³⁰⁵ After a year, they may request permission from the Chief Justice to practise on their own.³⁰⁶ Once qualified, lawyers are not required to undertake further legal education.³⁰⁷ Notably, since the construction of new law faculty buildings in 2010, the university has been able to increase its annual intake from 15–20 law students to 60.³⁰⁸ However, at present there is still an extreme shortage of lawyers, especially in the public service; which negatively impacts on the effectiveness of the criminal justice system.³⁰⁹ It is hoped that the increased intake at the law faculty will help augment the number of lawyers in the public sector.³¹⁰ Nevertheless, the private sector offers higher financial rewards and as such, this continues to reduce the number of lawyers in the public sector.

Under the Legal Education and Legal Practitioners Act, both the High Court³¹¹ and the MLS³¹² have the power to discipline lawyers. However, in practice, the MLS does not discipline lawyers itself – this is the remit of the Solicitor-General, who is part of the Ministry of Justice. The IBAHRI delegation found that there are concerns about the effectiveness of the Solicitor-General in disciplining lawyers.³¹³ The Disciplinary Committee only meets when the Solicitor-General calls a meeting and currently this is in abeyance.

302 Legal Education and Legal Practitioners Act, 1965 (Act 20 of 1965), Chapter 3:04, *Laws of Malawi*, as amended.

303 See n 261 above, 94.

304 *Ibid.*

305 *Ibid.* Admission of lawyers to practice is governed by sections 9–12 of the Legal Education and Legal Practitioners Act, see n 303 above.

306 See n 261 above, 94.

307 See n 261 above, 95.

308 Meeting with a senior law lecturer, 13 January 2012.

309 Meetings with the Minister of Justice, the Director for Public Prosecutions and a senior law lecturer, 9–13 January 2012.

310 Meeting with a senior law lecturer, 13 January 2012.

311 Legal Education and Legal Practitioners Act 1965, section 21 (1).

312 *Ibid.*, section 25.

313 Meetings with the MLS and a senior lawyer, 12 and 13 January 2012.

The MLC has completed a review of the Legal Practitioners and Legal Education Act, which has not yet been published at the time of the present report, with recommendations and a draft bill.³¹⁴

5.2 The legal profession, promotion of the rule of law and human rights

All lawyers are members of the MLS. According to the MLS committee, the MLS is very united and has taken a leading role in ensuring that issues of rule of law, governance and democracy are adhered to.³¹⁵ Members of the MLS noted that in recent years, the MLS has become more vocal and visible, brought about by the increase in alleged human rights abuses. As a result, the relationship between the government and the MLS has become increasingly tense.

In February 2011, the MLS issued a public communiqué raising various concerns in which issues of rule of law were raised. The MLS called upon the government to respond to various issues including disrespect of court decisions and failure by the executive to respect the rulings of courts. The MLS also gave support to the 20 July protests, and following the protests some members of the MLS have taken up cases on behalf of victims of the violence that ensued. In this regard, the MLS hopes to work with the MHRC, which has also taken up many cases on behalf of victims. With regard to the conduct of the police, the MLS is drafting an action against the police for their conduct, as they do not believe the government-established Commission of Inquiry will be effective. Due in part to their activism and vocal criticism of government misconduct, the leadership of the MLS alleges that the threats they have received are from the government.

While there have not been any reports of assault or manhandling of the leadership of MLS, incidents of harassment and assault of lawyers have occurred. Notably, several lawyers have received threats for seeking to represent landowner Mary Woodworth. Woodworth is embroiled in a legal battle with the Mulli brothers over land in Mulanje. The Mulli brothers are known associates of late President wa Mutharika. In February 2012, the former Attorney-General and vocal critic of the late President wa Mutharika, Ralph Kasambara, was assaulted and arrested following insulting remarks he made about the then President.³¹⁶

In its efforts to promote the rule of law and human rights, the MLS works as partner to civil society on various issues. However, the MLS has chosen to maintain its independence from civil society and therefore does not identify itself as civil society. The MLS also has a healthy working relationship with the judiciary and has defended the actions of the judiciary on a number of occasions. In January 2012, during the judicial services strike, the MLS supported the striking workers.

³¹⁴ Meeting with the MLS, 12 January 2012. Correspondence with the MLC, 25 July 2012.

³¹⁵ *Ibid.*

³¹⁶ IBAHRI News Release (20 February 2012) *IBAHRI calls for the immediate release of Malawian lawyer Ralph Kasambara*. Mr Kasambara has now been appointed Minister of Justice and Attorney-General by President Banda.

5.3 Access to legal assistance and legal aid

Under Article 42(2) (v) of the Constitution, every citizen has the right to legal assistance funded by the state if required in the interests of justice. To this end, the Legal Aid Act provides for legal aid in both civil and criminal cases, although priority is given to the latter.³¹⁷ In addition, organisations such as the Malawi Care Organisation's Paralegal Project and the Civil Liberties Committee have contributed to improving the accessibility of legal assistance in the country.³¹⁸

It should be noted, however, that under section 12 of the Legal Aid Act, the Minister of Justice has the discretion to refuse representation to a particular person,³¹⁹ and lawyers are able to choose their clients and refuse to act in cases as they so wish.³²⁰ Legal aid provision is thus not compulsory and the Malawian Legal Aid Department is understaffed.

In October 2011, three lawyers from an Irish Aid funded programme joined the Malawian Legal Aid Department and DPP's Office for one year to assist with the provision of legal aid.³²¹

The Centre for Human Rights, Rehabilitation, Education and Advocacy (CHRREA) coordinates another initiative that has helped enhance access to legal assistance. The initiative is the paralegal advice programme. It consists of a network of four NGOs located in different regions. These NGOs offer paralegal advice to prisoners on a daily basis. Paralegal services fill in an important gap in the criminal justice system in terms of human rights; particularly the rights of prisoners. The IBAHRI delegation found the justice system in Malawi was very slow and that as a result, pre-trial detention could last up to nine years.³²² In addition, there was also a long waiting period between conviction and the passing of sentence, with the average wait being between 18 months to two years, while some convicts wait up to six years.³²³

317 Kapindu, section 8.

318 See n 1 above, 54.

319 See n 317 above.

320 See n 1 above, 54.

321 'Irish lawyers join Malawi legal aid as volunteers', *Malawi Democrat* (28 October 2011) available at www.malawidemocrat.com/national/irish-lawyers-join-malawi-legal-aid-as-volunteers [last accessed on 13 August 2012].

322 Meeting with the CHRREA, 13 January 2012; Meeting with the BHC, 10 January 2012; Meeting with CONGOMA, 12 January 2012.

323 Meeting with the BHC, 10 January 2012.

Chapter 6: Conclusions and Recommendations

6.1 Conclusions

The IBAHRI visited Malawi in January 2012, in a context where the state of governance and the rule of law was a cause for concern. The fragile socio-political and economic situation in the country, concerns about freedom of expression and donors withdrawing their aid to the country were all causes for concern and were negatively impacting on upholding the rule of law and compliance with international human rights standards. The IBAHRI found at the time of the mission that fundamental principles entrenched in the country's Constitution were often disregarded by the executive, particularly the separation of powers and the observance of basic human rights.

Since President wa Mutharika's death, the new President, Joyce Banda, has taken a number of actions to ensure better respect for the rule of law in the country. The launch of a Commission of Inquiry into student Robert Chasowas's death, Malawi's refusal to welcome Sudanese President Omar Al-Bashir on its territory as he is under a warrant of arrest from the ICC, and the repeal of section 46 of the Penal Code, were all positive steps and the IBAHRI welcomes these positive developments. This change of direction has also had an impact on donor funding, which is progressively being restored.

Even though Malawi's current situation is in many aspects very different from the one observed by the IBAHRI delegation in January 2012, some issues still need to be remedied in order for Malawi to fully restore the rule of law. On an international level, Malawi does not currently comply with its reporting obligations under international human rights treaties and it has a high number of reports overdue.

As regards the justice system, the IBAHRI delegation was told of the executive's frequent disregard for court orders. This situation is of concern and the government should ensure it is complying with court decisions from now on and take action to make sure past court orders are enforced. This situation – and the perception it has created in the population that the government simply ignores court orders – can have damaging effects on the credibility of the justice system.

The IBAHRI found that the judiciary is largely independent and effective, despite challenges faced in the administration of justice. Delays in the justice system and the lengthy pre-trial detention faced by most suspects are a cause for concern. Shortage of human resources is a critical issue and the number of judges, as well as the number of prosecutors, is insufficient for the system to cope. The IBAHRI also found that there were insufficient checks and balances on executive control over the selection, appointment, promotion and removal of judges.

The legal profession maintains a high degree of professionalism and independence. However, there is a clear need to increase capacity in the legal profession, particularly in the public sector, to deal effectively with cases. The MLS is an independent and transparent institution serving the interests of the legal profession, while adhering to rule of law and human rights principles.

The IBAHRI was informed of allegations of intimidation and harassment by the police of people in opposition to the government. There is general concern in Malawi about the arbitrary and excessive

use of force by the police. As the report of the Commission of Inquiry in the July 2011 riots is now in the public domain, it is hoped that the persons identified as having potentially committed crimes, including police officers, will be brought to trial.

The IBAHRI found that institutions supporting the rule of law and good governance, such as the MHRC, the MLC and the Office of the Ombudsman, retain their independence for the most part. However, limited human and financial resources impact negatively on their work. The appointment of commissioners, in order to render the MEC effective, constitutes a positive development under Joyce Banda's regime.

At the time of the IBAHRI's visit to Malawi, four controversial laws had been referred to the MLC. Since then, one of them, section 46 of the Penal Code on the power of the Minister of Information to ban publications, has been repealed by parliament. The MLC explained that there was no clarity regarding the procedure for reviewing these controversial laws and that the government had not replied to its request for more context around the review. This is problematic and casts doubt over the effectiveness of the review process.

The IBAHRI was also informed that, despite ratification of regional human rights instruments, the MHRC and civil society in Malawi have not utilised African human rights institutions such as the African Commission on Human and Peoples' Rights. The Chairman of the MHRC attributed this to a lack of capacity and a lack of awareness of these mechanisms by NGOs.

6.2 Recommendations

In light of the findings made at the time of the mission, combined with a review of the changes that have taken place since President Banda's accession to power, the IBAHRI issues the following recommendations and offers its assistance to the Malawian government and institutions, as well as to civil society, in their efforts to uphold the rule of law in the country.

To the government of Malawi:

- I Malawi must comply with its international legal obligations, including its human rights and reporting obligations. The reports due to the various UN treaty bodies should be compiled and filed as soon as possible.
- II Cognisant of the fact that the country depends heavily on foreign aid, the Malawi government should continue its current efforts to address issues that have led to the deterioration in the relationship between the government of Malawi and donor nations and organisations.
- III There is an urgent need to augment the capacities in the criminal justice sector, notably to reduce the length of pre-trial detention. The DPP should be staffed adequately with qualified lawyers and the shortage of judges should also be rectified.

- IV The concerns relating to the arbitrary and excessive use of force by the police should be addressed, notably by ensuring that police officers involved in the July 2011 riots be brought to trial and punished accordingly if found guilty. Police officials who arbitrarily use force should be appropriately sanctioned.
- V Strict adherence to the Constitution must be fostered, particularly the separation of powers and independence of the judiciary.
- VI The government must comply with court orders and address the situation of past court decisions that have not been complied with.
- VII The government should review the report of the Commission of Inquiry on the July 2011 protests and ensure that individuals suspected of acts of brutality are investigated and prosecuted without delay.
- VIII Attention must be paid to strengthening institutions supporting the rule of law and good governance, particularly the MHRC, the MLC, the MEC and the Office of the Ombudsman. These institutions should be provided with adequate funding and human resources to fulfil their mandate.
- IX The government must respond to requests for information from the MLC regarding the review of controversial laws to ensure that the review process is completed in an efficient manner.
- X The office of the DPP and that of the Minister of Justice should be separated to ensure the independence of the DPP. The consultation between the executive, through the Attorney-General, and the DPP must cease.
- XI The process for judicial selection must be transparent and there must be institutionalised checks and balances on executive control over the process. The JSC's independence needs to be reasserted.
- XII Although the repeal of section 46 of the Penal Code is a positive step, the government should ensure that legal provisions dealing with media and freedom of the press respect constitutional provisions and international obligations.
- XIII The public needs to be better informed about the respective roles of institutions such as the MHRC, the MLC and the Office of the Ombudsman, which are necessary to advance the rule of law and human rights.

To civil society in Malawi:

- XIV The MLS should continue its work promoting the rule of law and human rights principles, as it serves to counterbalance potential abuses of power by the executive.
- XV Malawian civil society should utilise African human rights institutions such as the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights to protect and promote human rights, where necessary.

To the international community:

- XVI The international donor community should direct funding towards building capacity in the media and civil society and should support institutions such as the MHRC, the Office of the Ombudsman, the MEC and the MLC.
- XVII The international community should monitor the changes taking place in Malawi and look for opportunities to support efforts made towards the restoration of the rule of law.

Annex A: Terms of Reference

The International Bar Association's Human Rights Institute (IBAHRI) will undertake a fact-finding mission to Malawi to assess the state of the rule of law, with a specific focus on the independence of the judiciary and the legal profession.

The delegation will:

- 1) examine the independence, needs and challenges of the judiciary and the Attorney-General's office;
- 2) examine the independence of bar associations and of members of the legal profession;
- 3) examine laws related to the justice sector;
- 4) assess compliance of legislation related to the justice sector and freedom of expression with the rule of law;
- 5) analyse the international and domestic legal norms applicable to freedom of expression and their implementation in Malawi;
- 6) write and publish a report containing the findings of the mission, with recommendations.

The IBAHRI team of legal experts will be meeting with:

- judges;
- government officials;
- lawyers and lawyers' organisations;
- NGOs;
- human rights organisations;
- representatives of civil society;
- international and regional organisations; and
- embassies (if needed).



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