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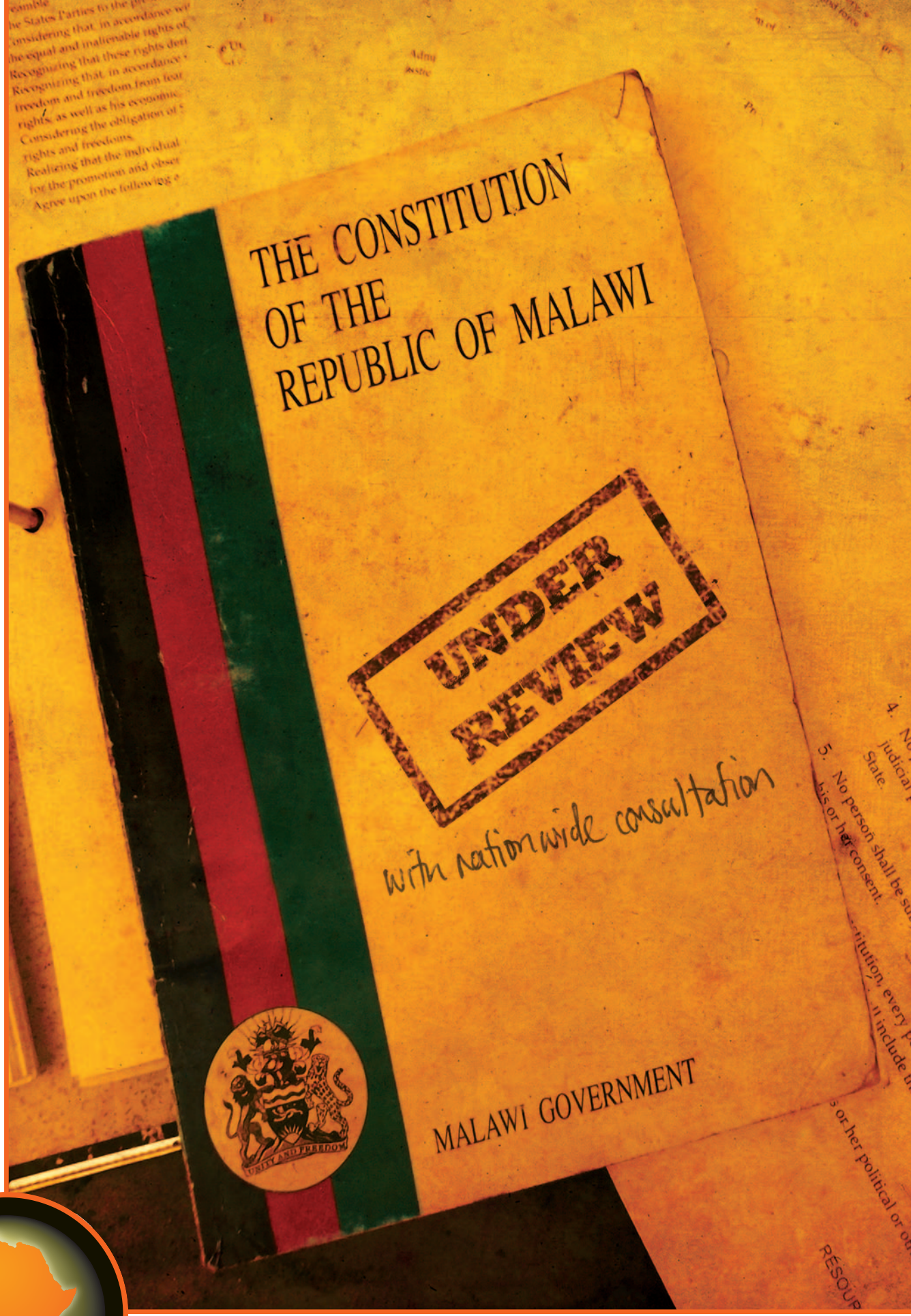


# DUTY OF CARE

## Constitutional and law reform, in Malawi

By Dr Janet Chikaya-Banda

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## The Author

Janet Chikaya-Banda graduated with a law degree from Chancellor College, University of Malawi in 1993. After completing her legal training, she joined the Ministry of Justice and Constitutional Affairs, representing the state in civil and criminal cases. In 1995, Janet was appointed principal state advocate.

In 1996, shortly after Malawi adopted a multi-party constitution, Janet went to the USA to complete a Master's degree in comparative constitutional law at the University of Georgia. On returning to Malawi, she joined the newly established Law Commission as its first law reform officer.

In 2002, Janet was appointed chief law reform officer at the Law Commission. In this capacity, she is responsible for all law reform programmes carried out by the commission and for managing its legal affairs division. She oversaw the constitutional review programme conducted by the Law Commission between 2004 and 2006, compiling the report which emanated from this review.

Janet completed a PhD at Birkbeck, University of London in 2012. Her doctoral thesis focused on land tenure in sub-Saharan Africa, particularly the relationship between land law and development. She continues to work at the Law Commission as the chief law reform officer.

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## Malawi timeline

**July 1964** – Malawi gains independence from Britain.

**July 1966** – Hastings Banda declares Malawi a republic, with him as the president. The Malawi Congress Party (MCP) is the only legally recognised political party.

**1971** – Hastings Banda declared *Wamuyaya* – president for life.

**1992** – Two underground opposition groups form – the United Democratic Front (UDF) and the Alliance for Democracy. International criticism of the Banda regime intensifies.

**March 1992** – A pastoral letter issued by Catholic bishops openly criticises the Banda regime. Student demonstrations and strikes reflect growing opposition to single-party rule.

**May 1992** – 38 people die after police open fire on protestors. Foreign donors suspend aid.

**August 1992** – The Public Affairs Committee, an inter-faith civil society organisation, is established. It becomes a powerful advocate of political reform.

**October 1992** – Hastings Banda pre-empts opposition demands by announcing a referendum on the introduction of multi-party politics.

**June 1993** – National referendum is held, in which 64% of voters favour a multi-party political system. Cross-party National Consultative Council appointed to oversee the transition to democracy and to draft a new constitution.

**December 1993** – Army forcibly disarms the Malawi Young Pioneers, the paramilitary wing of the MCP.

**May 1994** – Bakili Muluzi, leader of the UDF, wins presidential elections with 47% of the vote. A new constitution is provisionally adopted for one year.

**May 1995** – New constitution ratified by parliament. A provision enabling constituents to recall underperforming parliamentarians is repealed. Plans to establish a Senate are suspended.

**1996** – Malawi Law Commission established. Its constitutional mandate is to review all laws for conformity with the constitution, and make recommendations for amendments or repeal. It is also empowered to review the constitution and recommend changes.

**June 1999** – Bakili Muluzi re-elected as president for a second and final term.

**2004** – UDF candidate Bingu wa Mutharika elected president. Ministry of Justice asks the Law Commission to initiate a substantive review of the constitution. A nationwide consultation begins.

**February 2005** – President Mutharika leaves the UDF and forms the Democratic Progressive Party (DPP).

**March 2006** – First constitutional conference convened by the Law Commission to consider the report emanating from the constitutional review and nationwide consultation.

**April 2007** – Second constitutional conference convened by the Law Commission. The conference makes public the findings and recommendations of the special law commission following the constitutional review. Report and proposed legislation submitted to cabinet and parliament.

**May 2009** – President Bingu wa Mutharika re-elected. The DPP becomes the dominant party in parliament.

**December 2010** – Vice-president of the DPP – Joyce Banda – is expelled from the party following her refusal to back the nomination of the president's brother, Peter Mutharika, as the DPP candidate for the 2014 presidential elections. Banda establishes the People's Party.

**July 2011** – Public protests lead to the deaths of 19 people shot by the police. A coalition of civil society organisations issues a petition criticising the disregard of the constitution and rule of law by the government. The petition also demands that the Law Commission review recently enacted legislation.

**April 2012** – President Mutharika dies of a heart attack. Joyce Banda becomes president, as stipulated by the constitution.

# Foreword

"Constitutional democracy triumphs in Malawi" proclaimed the editorial headline in the *Times of Zambia* on April 9th 2012. As stipulated by the Malawi Constitution, the vice-president had acceded to the presidency following the death of the incumbent four days earlier. The transfer of power was invoked by the *Times of Zambia* as a reminder of "the importance of formulating a solid constitution".[1] At the time, neighbouring Zambia had recently embarked on its fifth attempt in two decades to draw up a constitution "which meets the aspirations of her people".[2] In Zimbabwe, the draft of a new constitution was the focus of much political wrangling.

A constitutional succession in Malawi was by no means a certainty. The vice-president – Joyce Banda – was a political outcast, having been expelled from President Bingu wa Mutharika's ruling Democratic Progressive Party (DPP) in December 2010. Banda had refused to endorse the nomination of the president's brother, Peter, as the DPP's candidate for the 2014 elections. But she retained her position as vice-president after the High Court ruled that a vice-president could be removed only by indictment or impeachment – for which there were no grounds.

After Mutharika's death, political adversaries attempted to thwart Banda's legitimate succession and install the president's brother in his stead. In law, as senior members of the judiciary made clear, this would have constituted a *coup d'état*. The Malawi Defence Force intimated that it would not support such a move. The Malawi Constitution – and Joyce Banda – prevailed.

Eighteen months of political and economic turmoil preceded the inauguration of Malawi's new president. In mid-February 2011, Dr Blessings Chinsinga – a political science lecturer at Chancellor College, University of Malawi – was questioned by the Inspector General of Police. His alleged "crime" was to allude in class to the similarity between conditions caused by Malawi's deliberately overvalued currency, and the associated acute shortage of foreign currency and fuel, and those which had sparked the "Arab Spring" uprisings in North Africa. The interrogation of Dr Chinsinga, a prominent and respected academic, provoked widespread outrage.

Lecturers at Chancellor College refused to teach until they received assurances about academic freedom – and an apology from the Inspector General of Police. President Mutharika ordered staff to return to work and accused Dr Chinsinga of inciting "academic anarchy". The Academic Staff Union (ASU) responded by obtaining an injunction against the president's order. At Mutharika's behest, the University Council then dismissed the acting president of the ASU and three other lecturers, including Dr Chinsinga. As protests by students and teaching staff grew increasingly heated – at Chancellor and elsewhere – the police were ordered to quash the unrest and close campuses. Several months of tussling in the courts ensued.

Meanwhile, Malawi's economic crisis worsened. The value of imports in the first half of 2011 exceeded exports by a factor of two. The cost of essential items escalated rapidly and power cuts became a daily occurrence. The price of tobacco, which generates almost two-thirds of the country's export earnings, collapsed during the year. Persistent advice from the International Monetary Fund (IMF) that the Malawi kwacha required substantial devaluation was steadfastly ignored by the government, leading to the IMF's suspension of a credit facility. Amid mounting tension, President Mutharika postponed local elections until 2014, pushed bills through the National Assembly which increased censorship and government powers, and altered the national flag without public consultation.

On July 20th, Malawians were shot by police during protests which turned into riots. Nineteen people died from their wounds. Leaders of the protests bore a petition asserting their "legitimate exercise of the rights and freedoms enshrined in the Constitution of the Republic of Malawi", and calling for an end to "economic mismanagement and democratic derogation by the incumbent leadership and administration". Recently enacted

laws were cited as evidence of "deliberate disregard of the Constitution and the rule of law by the Government". The petition demanded the appointment of the Malawi Law Commission to review, among other things, the "constitutionality" of a new anti-injunction law. Further protests were postponed for fear of incurring greater bloodshed.

The Malawian government's relations with foreign donor governments – source of some 40% of the annual budget – progressively soured. In April, the British High Commissioner was expelled for accusing President Mutharika of "becoming ever more autocratic and intolerant of criticism". After the July riots the Millennium Challenge Corporation suspended a grant of US$350 million earmarked for development of Malawi's energy sector.

In December 2011, the government referred a number of so-called "bad laws" to the Law Commission for review. Chancellor College reopened and the four academics sacked in February were reinstated. Any semblance of appeasement was temporary – and illusory. Political adversaries of the president were intimidated and threatened. In early March 2012, a combative press release from State House made it "blatantly clear that it will not stand by and condone [any] impudence" towards the president, a "true and practical democrat who swore to uphold the constitution". The laws of Malawi "provide for the total respect and protection of the Head of State", the statement continued.[3] President Mutharika accused the IMF, World Bank, and donors of scheming to oust him – and told them to "go to Hell".[4] A month later the president died of a heart attack.

The events of 2011–12 bore more than a passing resemblance to those of 1992–93, which had presaged the end of President Hastings Kamuzu Banda's repressive one-party state. In 1992, the detention of a trade union leader who called for a referendum to decide the political future of Malawi provoked widespread demonstrations. There were protests at Chancellor College and other campuses. Foreign aid was withdrawn. Eventually, Hastings Banda was forced to relax censorship laws and agree to a referendum on whether Malawi should remain a one-party state – which he lost.

In 2012, the Public Affairs Committee (PAC), an influential inter-faith civil society organisation, publicly condemned government repression – as it had done in 1992. On March 21st, a fortnight before the president's death, the PAC called on him to seek a fresh mandate within 90 days or face civil disobedience. In its 26 point communiqué, the PAC expressed disquiet that Malawi's predicament was the result of "having a constitution without constitutionalism".

The constitution adopted by Malawi in 1995 was intended to safeguard multi-party democracy, the separation of powers, and the rights of all Malawians. Section 132 provided for the creation of a permanent law commission with a mandate to review and propose amendments to the law – including the constitution. The Law Commission became operational in 1998.

Despite funding constraints, a small staff, and often inadequate external understanding of its purpose, the Law Commission embarked on a substantive review of the criminal justice system. This was a huge undertaking, and is ongoing. A plethora of draconian laws had been enacted by the Banda regime to consolidate its power. The conventional courts had been undermined by a parallel system of "traditional courts" used to deal with political adversaries. The Law Commission's review of the criminal justice system began with an examination of the Penal Code. In 2004, after Bingu wa Mutharika was elected president, the commission was also asked by the Ministry of Justice to commence a review of the constitution.

Dr Janet Chikaya-Banda has been the Law Commission's chief law reform officer since 2002. In *Duty of Care*, she describes the work of the commission and explains the importance of continuous law reform – especially to "young" democracies with legal systems of recent devising, and rapidly changing requirements. As part of its comprehensive two-year constitutional review – which

Dr Chikaya-Banda justifiably considers to be one of the commission's greatest achievements – a nationwide consultation was conducted. Two constitutional conferences followed the year long consultative process, after which the commission submitted its report and draft legislation to the government and parliament in 2007. The proposed legislation has never been enacted, or even tabled in parliament.

The frequency with which the Malawi Constitution and the importance of the rule of law were invoked by protestors and civil society organisations during 2011 was a stark reminder of the extent to which both have been routinely abused since 1994. The authority and leverage of a constitution is determined by the respect it commands from the governing as well as the governed. Among the measures recommended by the Law Commission following the constitutional review there are a number which seek to strengthen oversight and accountability in the political system.

During a visit to London in May 2012, President Joyce Banda emphasised that "a strong commitment to constitutionalism continues to provide the basic framework for the growth of our democracy".[5] The principal recommendation of Dr Janet Chikaya-Banda's *Policy Voice* is that the new government "needs to move things on" with regard to the recommendations of the constitutional review. The views of all Malawians who participated in the nationwide consultation have been ignored for five years. A "constitution without constitutionalism" will not suffice.

In the same speech in London, the new president also affirmed her commitment to "upholding human rights, the rule of law and good governance".[6] Malawi's judiciary has proved remarkably robust and independent in the face of attempts to subvert all of these. Indeed the assertion made some years ago by Edge Kanyongolo, a law professor at Chancellor College, that "the judiciary is probably the most credible branch of government in Malawi" remains valid.[7] As Dr Kanyongolo pointed out, "Malawians have learned well that without an independent judiciary their democratic constitution and the rights embedded in it is little more than a paper tiger".[8] The strength of the judiciary should not be taken for granted, and needs reinforcement.

Law reform can play a crucial role in upholding the credibility and effectiveness of the judiciary. But the implementation of recommendations from Malawi's dedicated law reform agency – the Law Commission – requires a sustained commitment at the highest levels of government, and in parliament. From the Law Commission's review of the criminal justice system, only bills which coincided with the government's political agenda were enacted in timely fashion. In contravention of Section 13 of the Law Commission Act, the commission is seldom consulted when significant alterations to its recommendations are made by the government or parliament. Evidence that President Joyce Banda espouses a less piecemeal and expedient approach than her predecessors to law reform – as well as constitutional reform – would convey a potent message to Malawians and non-Malawians alike.

Africa Research Institute (ARI) has maintained a keen interest in Malawi. In 2008, we published *Planting Ideas: How agricultural subsidies are working in Malawi*. The lead author was Blessings Chinsinga – a central figure in the events of 2011 and a member of ARI's advisory board. In 2011, as public protest became widespread in Malawi, we published Harri Englund's *Voices of disquiet on the Malawian airwaves* in our *Counterpoints* series. We are immensely grateful to Janet Chikaya-Banda for collaborating with us to produce a third publication on Malawi with relevance and policy implications much further afield.

**Edward Paice**

Director, Africa Research Institute

1 *Times of Zambia*, April 9th 2012
2 Mission statement of the Technical Committee on Drafting the Zambian Constitution (TCDZC)
3 State House press release, March 8th 2012
4 *Nyasa Times*, March 5th 2012
5 HE Joyce Banda, Chatham House speech, June 7th 2012
6 *Ibid.*
7 Edge Kanyongolo, State of the Judiciary Report: Malawi 2003, IFES, 2004, p.47
8 *Ibid.*, p.1

# 1. Introduction

Most of my professional career has been dedicated to promoting legal reform in Malawi. In 1993, I graduated with a law degree from Chancellor College, University of Malawi. After a stint in private practice, I joined the Ministry of Justice and Constitutional Affairs. I worked as a state advocate, representing government in civil matters and prosecuting criminal cases. In 1998, I moved to the newly established Malawi Law Commission as its first law reform officer. I became chief law reform officer in 2002.

Malawi has a history of one-party rule. In 1966, two years after gaining independence from Britain, Malawi was declared a republic. A constitution was adopted which defined the Malawi Congress Party (MCP) as the only legally recognised party. Our first president, Hastings Kamuzu Banda, ruled the country for 28 years. The MCP government manipulated the law to stifle civil rights and maintain its grip on power. Detention without charge was commonplace. The conventional court system was undermined and ultimately usurped by a parallel system of "traditional courts" used for political ends.

In 1994, following a trend sweeping the African continent, Malawi adopted a multi-party constitution. The new constitution explicitly defined the separation of powers between the executive, the legislature and the judiciary. The old legal system was replaced by one which guaranteed a full range of civil, political, social and economic rights denied during the Banda era. Freedom of expression and freedom of association, for example, were legally enshrined in a bill of rights.

The 1994 constitution fundamentally changed the institutional and legal framework of Malawi. Nevertheless, the country has failed to realise the political and democratic aspirations articulated in the constitution. Power remains highly concentrated in the hands of the president. Members of Parliament are easily influenced by the executive. The strength of the legislature is impaired by procedural limitations, and there is no upper house. Local government elections have repeatedly been postponed. The capacity and integrity of the Malawi Electoral Commission has been questioned. Weak and opportunistic political institutions continue to try to use the courts for political infighting.

The Malawi Law Commission was established in 1996. It became operational two years later when the first law reform officers were recruited. The first Law Commissioner was Justice Elton Singini. The commission has a mandate to review laws for conformity with the constitution, and make recommendations for amendments or repeal. It is also empowered to review the constitution itself, and to recommend changes.

As chief law reform officer, I manage the commission's legal services division and oversee all of the law reform programmes. It was my duty to co-ordinate all aspects of the comprehensive review of the constitution between 2004 and 2006, including development of the consultation paper presented to the first national constitutional conference. I was also responsible for the report generated by that conference.

In my professional career, I have witnessed many of the challenges Malawi has encountered in adhering to the spirit and letter of the 1994 constitution. I believe that the experience of the Malawi Law Commission is relevant to other African countries with a history of one-party rule, and has important implications for the consolidation of democracy on the continent.

# 2. Repression and referendum

In my childhood I witnessed routine violations of people's most basic rights. The government of Hastings Banda passed laws censoring free speech in public and in the media. The Decency in Dress Act prohibited women from wearing short skirts or trousers. Men were not allowed to

have long hair or beards. The Preservation of Public Security Act allowed for arrest without a warrant and detention without charge. The Forfeiture Act enabled the indiscriminate seizure of property.

Criticism of the one-party system reached its peak during my time at university. In March 1992, a pastoral letter drafted by eight Catholic bishops openly condemned the authoritarianism of Banda's regime. It was read in churches across Malawi. Membership of two underground opposition groups which formed in 1991 – the United Democratic Front (UDF) and the Alliance for Democracy (AFORD) – increased considerably. The climate of fear that stifled criticism of the government began to disperse. Industrial action by workers in a textile factory in Blantyre triggered nationwide strikes.

In May 1992, the World Bank Consultative Group froze all aid to Malawi, citing the Banda government's poor human rights record and widespread political repression. The withdrawal of western aid had a devastating impact on Malawi's economy. Teachers and nurses were not paid. Prices of basic commodities and petrol soared.

In August 1992, a group of religious leaders, business people and lawyers formed the Public Affairs Committee (PAC). The PAC became an influential pressure group, working for the introduction of new democratic structures and respect for human rights. Under pressure from Malawians – and donors – to show a commitment to democratic reform, President Banda announced a referendum on multi-party democracy.

## 3. A new constitution

President Banda was confident that Malawians would vote to retain the status quo – a one-party system with him as head of state. On June 14th 1993, 64% voted in favour of multi-party democracy. This was a momentous outcome. Article 4 of the constitution, which preserved the status of the MCP as the sole legal political party, was immediately suspended. A National Consultative Council (NCC) was established to oversee Malawi's transition to multi-party politics.

The NCC decided to introduce a new constitution. This was an ambitious undertaking, but an important step in signalling the creation of a new political and socio-economic order. Responsibility for drafting the constitution was delegated to a team of five Malawian experts. A British lawyer performed an advisory role.

The draft constitution drew on examples from many countries, including the United States of America, the United Kingdom, Germany, Namibia and South Africa. The team worked under great time pressure. On May 17th 1994, presidential and parliamentary elections were held. Bakili Muluzi, leader of the opposition UDF, won the presidency and his party secured 48% of the parliamentary seats. The following day, Malawi's new constitution was formally adopted.

The 1994 constitution guaranteed freedom of association, freedom of the press, and the right to form political parties. It limited the president to a maximum of two terms in office. There was a provision for the establishment of an upper house – the Senate – to oversee and strengthen parliament. Four new constitutional bodies – the Office of the Ombudsman, the Malawi Human Rights Commission, the National Compensation Tribunal and the Law Commission – were also instituted.

Despite the popular euphoria that greeted the introduction of a new constitution, laws remained on the statute books which were contrary to the ideals of a democratic nation. It was not possible to repeal or amend other statutes as quickly as the constitution. Penal laws on detention and arrest which had been manipulated and abused by the Banda regime needed to be reformed. Relics of the colonial era – such as the Africans on Private Estates Act – still await repeal.

### The Senate and the "recall provision" 1

Malawi's 1994 multi-party constitution was adopted for one year, due to the lack of popular participation in the drafting process. In February 1995, a conference was convened by the parliamentary constitutional committee to examine the interim constitution and, where necessary, propose amendments.

When parliament voted to adopt the constitution permanently in May 1995, two amendments which ignored explicit recommendations from the conference proved particularly controversial. These were the suspension of a provision for a Senate, and the repeal of the "recall provision".

The 1994 constitution provided for a directly elected National Assembly and an appointed Senate. The Senate was envisaged as a forum for representatives of the traditional authority, all of Malawi's districts, women, and the youth. Its prime function, as the upper house of parliament, was to be one of oversight – and to check potential abuses of power by an unrestrained National Assembly.

Opponents to the creation of a Senate cited its expense. Civil society groups challenged the authority of the National Assembly to amend unilaterally such an important provision of the constitution without public consultation. In 2001, the constitutional provision for a Senate was formally repealed. The parliament is unicameral.

Section 64 of the 1994 constitution empowered constituents to remove their Member of Parliament if he or she failed to perform their duties satisfactorily. The constitutional conference recommended that this "recall provision" be retained, in order to make MPs more accountable to the electorate. Since 1995, no government has moved to reintroduce Section 64 – despite considerable popular support for such a measure.

## 4. The Law Commission

I had just completed my legal training when the new constitution was adopted. I became a state advocate at the Ministry of Justice and Constitutional Affairs, which was inundated with cases. The new constitution opened the floodgates for civil suits against the government for violations committed during the Banda era. There was also a backlog of criminal cases, with many people detained in prison for years awaiting trial.

I knew that as the country made the transition to a multi-party democracy, law was going to play a central role in defending the rights of Malawians. I wanted to be involved in the development of an appropriate legal system for Malawi. My interest in constitutional law grew. In 1996, I went to the United States of America to study for a Master's degree in comparative constitutional law at the University of Georgia. Students on the course came from all over the world.

In 1998, I joined the Malawi Law Commission as its first law reform officer. Section 132 of the 1994 constitution provided for the establishment of a permanent, independent body to review the law. Our mandate covers all domestic laws, including the constitution. The fact that we are a permanent agency enables us to undertake our task in a systematic and thorough way. Continuous law reform enables the legal system to respond to the changing legal requirements and circumstances in Malawi. This is particularly important in a country with a young legal system.

The Law Commission had only a handful of staff when I started work there. It was the first institution of its kind in Malawi, and the public was largely unaware of our existence. The role and purpose of the commission's work was not fully understood by government departments. Ministers and Members of Parliament were often unclear about when an issue should be referred to us, and when it was a matter for the Ministry of Justice.

Tensions soon emerged in our relationship with the Ministry of Justice. Some people perceived the Law Commission to be usurping the ministry's mandate to draft laws. Attitudes changed as more people in the ministry became involved with our work. A dedicated civic education section also sought to raise the profile of the commission with members of the public. As more people took part in consultations, our approach became better understood.

The government has always funded our recurrent costs, but we were initially dependent on donors to finance law reform programmes. Typically, donors only supported programmes in areas of law which were of particular concern to them. This led to accusations in some quarters that the Law Commission served the agenda of foreign donors more than the interests of Malawians. By 2005, the government had begun to finance some of our reform programmes. This improved our ability to conduct law reform as we saw fit.

## 5. Consultation and law reform

The Law Commission receives submissions calling for changes to the law from individual and institutional sources, both public and private. Our annual work programme is drawn up after careful appraisal of priorities. The seriousness of an inconsistency, obsolescence, governmental priorities, and the urgency for resolution of an issue are taken into account. We can only carry out reviews where the substance or form of the law is inconsistent with the constitution or applicable international legal instruments, and in relation to the constitution itself.

Submissions to the Law Commission are assigned to law reform officers. They then conduct research to identify potential problem areas with the topic. These are set out in an "issues paper" which announces the inception and scope of the review. The Law Commission places great emphasis at this stage on consultation with relevant individuals, groups and sectors. Recent programmes which have involved public consultation include reviews of the law on domestic violence and the law on inheritance. A "consultation paper" and the issues paper are used to develop a "discussion paper" to guide a special law commission.

The Law Commission's use of special law commissions is a key feature of our approach. Special law commissioners are employed for the duration of a review programme. Chosen for their specific expertise, commissioners can be judges, lawyers or academics, but are also regularly drawn from non-legal fields. In the review of the law on intellectual property and patents, for example, we worked with experts from industry and the private sector. Representatives from civil society and traditional leaders also sit on special law commissions.

On average, ten people sit on a special law commission, although commissions have been empanelled with as few as five members. An individual sitting on a special law commission must have a doctoral degree or a minimum of ten years' experience in their field. Civil servants must be in managerial roles above the level of deputy secretary. Traditional leaders qualify by virtue of their stauts as "custodians of culture".

When the review process is complete, a report containing the findings and recommendations of the special law commission is submitted to the Minister of Justice. The report is usually accompanied by a proposed bill, or bills. The minister is required to publish the report in the *The Malawi Gazette* within 60 days of receipt.

The Law Commission has no power to enact legislation. We can only draw parliament's attention to our findings and recommendations. It is up to the government and MPs to take up the matter from there.

## 6. Reform of the Penal Code

When the Law Commission was established, our first task was to identify and examine laws which were contrary to the spirit of the 1994 constitution. The statute books were full of inappropriate laws inherited from the one-party system. Laws regulating the criminal justice system, such as the Penal Code and the Criminal Procedure and Evidence Code, and those regulating access to justice, such as the Traditional Courts Act and the Police Act, required urgent review. The Law Commission's

substantive review of the criminal justice system began with an examination of the Penal Code.

The Banda administration passed numerous draconian laws to maintain its grip on power. The Preservation of Public Security Act – a law which pre-dated independence – was amended in 1965 to allow for arrest without a warrant and detention for up to 28 days without charge. It was used to detain perceived opponents of the regime. The Forfeiture Act was amended in 1969 to enable the seizure of property belonging to people deemed "subversive or prejudicial to the safety or economy of the state". The amendment abolished the right of appeal and was used to transfer property to members of the ruling MCP. The broad definition of sedition under the Penal Code was used to arrest political "dissidents".

A parallel system of traditional courts was exploited by President Banda. These courts were initially only given jurisdiction over minor crimes. In 1971, an amendment to the Traditional Courts Act granted the president – who

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## An MP's perspective

**By Hon. Benjamin Chikusa**
Member of Parliament for Dowa North

Prior to becoming a Member of Parliament I was a secondary school teacher for nine years. In 2000, I started work at a teacher training college. Two years later I joined the Ministry of Sport. I was about to take up a position as deputy director of the ministry when representatives from Dowa asked me to stand for election as their MP.

Between 1994 and 2004, the southern region of Malawi was a stronghold of the United Democratic Front (UDF). The northern region was controlled by the Alliance for Democracy (AFORD). Dowa is in the central region, an area mostly represented by MPs from the Malawi Congress Party (MCP). I stood as an independent candidate in Dowa North in the 2004 parliamentary election. Independent candidates were a new concept for most people, particularly in the central region. I did not win the seat, but I moved back to Dowa and continued to meet with people to discuss possible projects and my future involvement in politics.

By 2009, the Democratic Progressive Party (DPP) – a breakaway from the UDF formed by President Mutharika four years earlier – had begun to make inroads in the central region. The political landscape was changing. I stood again as an independent candidate in Dowa North and this time I won the seat. After being elected, some of my constituents requested that I work with the government. They said that areas with an opposition MP usually struggled in terms of development and budget allocation, and that I would be able to achieve much more if I joined the DPP.

MPs have a key role in the lawmaking process. All new bills, including amendments to existing legislation, are voted on in parliament and require a majority to be passed. MPs are allowed to initiate new legislation. There is a dedicated drafting team which is supposed to assist parliamentarians with drafting laws for presentation to parliament. However, no one has used this service in the time that I have been an MP. The primary source of new laws and policy in Malawi has always been the executive.

MPs come under pressure from the executive to pass bills. Newly elected MPs are often easily influenced. Others are enticed by the prospect of cabinet posts and vote along party lines in order to position themselves favourably. As parliamentarians we are constantly trying to maintain a balance between addressing the expectations of our constituencies and fulfilling our roles in parliament. If we are particularly outspoken we risk alienating ourselves. Restriction of district budget allocation has been used to control MPs. If this happens, it is ultimately our constituencies which suffer.

A number of other factors hamper the ability of MPs to contribute more fully and effectively to the legislative process. The House Business Committee is responsible for drawing up the agenda for parliament each day. Despite this, business which has not been tabled is sometimes put before us. In these instances, MPs do not have sufficient time to prepare or access background information on the matter. Many of the issues that come before us are highly technical. Without adequate preparation time or access to specialised knowledge, we are not able to have informed debates on the topic under discussion.

was also Minister of Justice – the power to define their jurisdiction. This eventually exceeded the jurisdiction of the conventional courts, and the traditional courts became the regime's preferred arena for prosecuting opponents.

The Law Commission's comprehensive review of the criminal justice system is ongoing. It has been a huge undertaking. We tabled proposals for the repeal of the Traditional Courts Act, the replacement of the Police Act and the introduction of new laws to safeguard the rights of accused persons such as the Bail (Guidelines) Act. Many criminal laws have been amended to comply with international human rights legal instruments and norms. As part of the review, the commission is also examining the law regulating prisons.

An independent, dedicated law reform agency is conducive to a systematic and objective approach to law reform. However, enactment of proposals from the Law Commission by parliament cannot be described as systematic – and is seldom swift. For example, enactment of the amendments to the Penal Code submitted to parliament in 2000 did not occur until 2011. Similarly, the Legal Aid Act passed in 2011 was the result of a review published six years earlier. In contrast, the bill proposed by the bail guidelines review published in 2000 was enacted the same year.

## 7. A compromised legislature

The relationship between the executive and parliament is central to the lawmaking process. Malawi has a hybrid system of government with a directly elected president who appoints the cabinet. The executive has the power to draft new laws, and propose amendments to existing laws. The constitution requires the executive to initiate legislation "which embod[ies] the express wishes of the people of Malawi". When enacting laws, the legislature is required to "reflect in its deliberations the interests of all the people of Malawi".

**Private members' bills** 3

**1996 –** Amendment to the Reserve Bank of Malawi Act to require the currency of Malawi to bear politically neutral features. Bill not tabled.

**2002 –** Amendment to remove the presidential term limit. Bill tabled but defeated.

**2005 –** Amendment to require the Speaker of the National Assembly to declare vacant the seat of any MP elected under a particular status who chooses to alter his or her political status during the life of parliament. Bill tabled but defeated.

**2005 –** Amendment to the constitution to provide for a National Governing Council as an interim body in the event of the impeachment of the president. Bill not tabled.

Parliament is supposed to discharge most of its responsibilities through a system of committees. The legal affairs committee comprises 25 MPs. It is responsible for scrutinising all bills which are to be tabled in parliament, with the exception of money bills which are the responsibility of the budget committee. However, parliamentary committees meet infrequently and are poorly resourced. As a result, only bills of political significance are prioritised.

The legislature rarely initiates law reform. Individual MPs can independently propose bills or reforms through the use of a private members' bill. Only four such bills were brought before parliament between 1994 and 2011 **[see box 3]**. The sponsoring MP is required personally to cover the expenses associated with printing the bill for distribution in the house. It is far easier, and less expensive, for an MP simply to move a motion in the house and hope that government might respond by initiating the necessary legislation itself.

Some of the legal issues which deserve due attention by parliament are quite technical. The ability of MPs effectively to address or raise appropriate concerns requires thorough assessment. They have varying levels of education and expertise. Resources made available to MPs are limited. There is no established system for the

## "Crossing the floor"

4

Section 65 of the Malawian constitution stipulates that the Speaker of the National Assembly shall declare vacant the seat of a Member of Parliament who leaves the party on whose ticket he, or she, was elected. A by-election must then be held for the vacant seat. Section 65 has never been rigorously enforced, despite frequent occurrences of MPs "crossing the floor" between elections.

The provision against crossing the floor originally applied only to an MP who joined another party represented in parliament. In 2001, its scope was broadened to include all political parties and organisations. The High Court ruled that this amendment violated the right to freedom of association and, as such, was unconstitutional. The amendment was repealed.

In the 2004 elections, Bingu wa Mutharika, the United Democratic Front (UDF) candidate, secured the presidency but the Malawi Congress Party (MCP) won the most seats in parliament. The following year, Mutharika formed a new party – the Democratic Progressive Party (DPP) – which attracted sufficient MPs from other parties to wrest parliamentary dominance from the MCP. John Tembo, leader of the MCP, responded by calling for the application of Section 65 in the case of MPs who had defected to the DPP – and the UDF began impeachment proceedings against the president. The High Court confirmed the right of the Speaker to implement Section 65.

Fearing the loss of their seats if Section 65 were enforced, a group of DPP MPs obtained an injunction against the Speaker. The president requested a review of Section 65 on the basis that it violated MPs' freedom of association. A stand-off between the DPP and the other parties ensued. Non-DPP MPs refused to pass the 2007–8 budget – which required a two-thirds majority – unless Section 65 was put into effect. The DPP refused to discuss the issue until the budget was passed.

Public opinion turned against the opposition parties, which found themselves accused of jeopardising national stability. The opposition accepted what it perceived to be the temporary shelving, as opposed to quashing, of the Section 65 controversy and the 2007–8 budget was passed. However, when the injunction against the Speaker expired, Mutharika prevented any further debate by refusing to call a new session of parliament for more than six months. By then, Mutharika could count on sufficient support to block the application of Section 65 – and prevent any impeachment motion from proceeding.

In the 2009 elections, Mutharika was returned as president and the DPP secured victory in the legislature. As the parliamentary election effectively legitimised MPs' party allegiances, the charge of crossing the floor levelled at more than 80 MPs who had joined the DPP between elections was rendered obsolete.

Following the death of President Mutharika in April 2012, and the accession to the presidency of Joyce Banda, more than 40 MPs joined Banda's People's Party (PP). Some of them swiftly returned to their former parties when Section 65 was once again invoked. In June 2012, a PP parliamentarian obtained an injunction prohibiting the Speaker from enforcing Section 65 – a move widely interpreted as shelving the issue until after the 2014 elections.

exchange of information between the executive and MPs, or between parliament and government departments. In this context, law reform is compromised.

The president retains extensive power over government and state institutions. In the run-up to the 1994 elections, debate centred on the credentials of the individual presidential candidates. Little attention was paid to the type of presidency we wanted in Malawi. The new constitution removed the presidential right to appoint MPs, or suspend parliament without the agreement of the Speaker. But it also authorises the president to appoint a cabinet without stipulating its size. Most ministers are serving MPs. The result is that MPs strive to please the president in the hope of gaining a cabinet post, and this enables the president to manipulate parliament.

To some extent, this is not unusual. But in Malawi, the executive continues to focus disproportionately on exerting pressure on parliament to pass legislation in pursuit of its political goals, or to facilitate revenue collection and access to foreign loans. Sixteen of the 26 acts of parliament passed in 2011 were "money bills". Six statutes proposed by the Ministry of Justice were substantive law reforms, mostly aimed at implementing government policy in higher education and energy. Only

four substantive statutes addressing broad socio-legal issues – all of which originated in the Law Commission – were enacted during that year.

There is a widespread feeling in Malawi that MPs are more accountable to the president than to the voters. In the years since the creation of the 1994 constitution, this view has been reinforced by the repeal in 1995 of the "recall provision", which empowered voters to recall their MP; and by repeal of the provision for an upper house in 2001 **[see box 1]**. Section 65 of the constitution, which empowers the Speaker to declare vacant the seat of any MP who changes political affiliation while in office, has frequently been invoked, but never implemented **[see box 4]**.

## 8. Judicial restraint

The courts innately implement law reform on a daily basis, by passing judgments and hearing appeals. However, judges work on a case-by-case basis. They cannot reform and adapt the law to changing circumstances in a systematic way. The appeal process is also expensive, causing some significant legal questions to remain unresolved.

If judges come across an area of law obviously in need of reform, they can bring it to the attention of the Law Commission. This has often occurred during the criminal justice system reform programme. Judges also agree to act as special law commissioners. In this role, they contribute first-hand experience of interpreting and applying the law, and a thorough understanding of how the law has been functioning previously.

The judiciary in Malawi has retained a high level of independence throughout its history, despite repeated attempts to manipulate it for political ends. The courts have consistently upheld rights guaranteed in the constitution. The High Court reversed a decision by the executive which barred members of the army and police from voting in the 1993 referendum. In 1994, the High Court pronounced that President Muluzi had acted unconstitutionally when he dismissed the Inspector General of Police. In 2004, the Supreme Court of Appeal postponed election day to allow for further inspection of the electoral roll.

In many one-party states the reputation of the judiciary is undermined by politically motivated appointment of judicial officers. In Malawi, Hastings Banda operated differently – by marginalising the judiciary through the use of traditional courts as a parallel system. Although this was damaging in many ways, it insulated the judiciary from excessive political interference. At a time of widespread distrust of institutions, the judiciary emerged from the transition to multi-party democracy with its integrity intact, and as a key upholder of constitutionalism.

Security of tenure has helped the judiciary to withstand political interference. The Judicial Services Commission (JSC) is responsible for the appointment and removal of judges, not the executive. If the president wants to dismiss a judge, this can only take place in consultation with the JSC and with the endorsement of a parliamentary majority. Such procedures are designed to provide checks, although they can still be circumvented if a powerful executive exerts sufficient pressure on a pliant parliament.

On occasion, the executive and legislature have attempted to interfere with the judiciary. In 2001, proceedings to impeach three High Court judges on charges of misconduct, incompetence and partisanship were commenced in parliament. The judges in question had acted in a manner deemed unfavourable by members of the ruling UDF. The impeachment proceedings were eventually dropped due to a public backlash.

### The judiciary and law reform

5

**By Justice Ivy Kamanga**
High Court Judge

The introduction of the 1994 multi-party constitution was an important step in the development of the Malawian legal system. The one-party state did not recognise the independence of the judiciary. Judges could be moved anywhere at any time. One day you could be sitting in the High Court in Lilongwe, the next you would be sent to another part of the country. The conventional courts were also undermined by a traditional court system frequently used for political ends.

The 1994 constitution provided for the separation of powers between the executive, the legislature and the judiciary. The independence of the judiciary was explicitly guaranteed. The traditional courts were abolished. Mindful of recent history, the new constitution contained a provision prohibiting the establishment of a parallel court system with power equal to, or greater than, that of the High Court.

Judges are regularly invited to participate in the work of the Law Commission. We can contribute practical insights and experience as members of special law commissions. In turn, we may also gain a more thorough understanding of the motivation behind an amendment or a new piece of legislation.

Some people are critical of the involvement of practising judges in special law commissions. They believe that judges should concentrate on hearing cases rather than contributing to law reform programmes. Another criticism is that participation by serving judges in discussions held by special commissions might in some way adversely influence their future judgments.

I think one way to tackle these concerns would be to call more on the expertise of recently retired judges. They have in-depth knowledge of the legal system and are no longer required to hear cases.

## 9. Consulting the nation

As soon as the Law Commission was established in 1998 we started to receive submissions relating to the constitution. There was widespread discontent with the amendments that had been made to the constitution between 1994 and 1995. But we felt that insufficient time had passed to be able to judge how the constitution would work in practice. Instead, we opted to review the constitution for technical inconsistencies and typographical errors resulting from the amendments enacted by parliament and the document being drafted in haste.

In May 2004, with the election of a UDF candidate to the presidency – Bingu wa Mutharika – but an MCP majority in parliament, the relationship between the Law Commission and government improved. Legislation resulting from Law Commission reports presented to the previous administration in 2001 and 2002 was suddenly enacted, including amendments to the Legal Education and Legal Practitioners Act, the Corrupt Practices Act and the Fines (Conversion) Act.

In 2004, the Law Commission was approached by the Ministry of Justice to conduct a comprehensive review of the constitution. The drafting process of the 1994 constitution received very little input from the public. Everyone at the commission agreed that the constitutional review should include a nationwide consultation. We wanted as many people as possible to contribute.

I believe that our approach to the consultative process was very proactive. Public notices requesting submissions on any part of the constitution were published in newspapers and broadcast on the radio. Billboards announcing the review were mounted by the main roads. Law Commission officers went to all three regions of Malawi – northern, central and southern.

The consultation process took a year. There was extensive involvement from civil society. We held discussions with members of the traditional authority and met with special interest groups. For some constitutional issues – such as the death penalty – we formed specific focus groups to canvass opinion. The level of popular participation in the constitutional review process is, in my opinion, one of the greatest achievements of the Law Commission to date.

The content and form of submissions varied greatly. Members of the public arrived at the Law Commission office with handwritten slips of paper indicating which

areas of the constitution they felt should be reviewed, such as the age of marriage or the law of inheritance. Women's and youth groups worked to ensure that the concerns of the people they represented were expressed. Some of the issues raised had potential implications for all Malawians, others only affected minority groups.

A number of highly contentious matters came to the fore during the nationwide consultation. One topic hotly debated by the public was the desirability of specifying a national language. This raised emotive questions. Should the constitution stipulate a national language? If so, what should the national language be? Should the national language be the same as the official language? What was the best way to address the issue of the national language whilst recognising Malawi's linguistic diversity?

The issue of a minimum level of education for presidential candidates was also contentious. The constitution stipulates that a presidential candidate must be a citizen of Malawi and at least 35 years old. It does not mention prerequisite educational qualifications. Most submissions called for a minimum educational requirement, on the basis that the president must execute the duties of office professionally and represent the country credibly on the international stage. There was no clear consensus about what the minimal education requirement should be.

Other issues about which strong opinions were expressed during the constitutional consultation included:

- A minimum educational requirement for MPs
- An upper house of parliament
- Funding of political parties
- Citizenship laws
- The declaration of assets by the president
- The recall provision
- Crossing the floor

# 10. Constitutional conferences

As chief law reform officer, I was responsible for reporting on the submissions received by the Law Commission during the consultative process. In March 2006, I presented my report to the first national constitutional conference convened by the commission in Lilongwe. The conference was opened by President Bingu wa Mutharika and attended by academics, legal practitioners, senior government officials, traditional authorities and members of the Malawi Law Society. Civil society organisations and special interest groups representing women, youth and people with disabilities were also present. The conference was attended by about 250 people.

A special law commission was empanelled after the constitutional conference. This was led by Professor Zimani Kadzamira of the University of Malawi and included legal professionals, representatives of religious and civil society organisations, judges and academics. The purpose of the commission was to address matters raised during the consultation process and at the national constitutional conference.

A second constitutional conference was convened by the Law Commission in April 2007. It was opened by the Chief Justice, Leonard Unyolo QC, and provided a forum for members of the public to scrutinise the report of the special law commission. This second conference was attended by more than 200 people.

In relation to some of the issues already mentioned, the commission's final submission concluded that:

- The death penalty should only be retained for cases of murder
- No national language should be specified
- A first degree should be the minimum educational qualification for the president
- The Malawi School Certificate of Education (MSCE) should be the minimum educational requirement for eligibility to stand as an MP

- The provision for an upper house of parliament – the Senate – should be reinstated
- Political parties should continue to benefit from public funding
- The recall provision should be reinstated
- The provision against crossing the floor should be retained

After the second national constitutional conference, the special law commission finalised its report. This report was submitted to the Ministry of Justice in late 2007 and was accompanied by draft bills. These included:

- Constitution (Amendment) Bill
- Constitution (Amendment) (No. 2) Bill
- Impeachment of President Bill
- Political Parties Registration and Regulation (Amendment) Bill
- Electoral Commission (Amendment) Bill
- Parliamentary and Presidential Elections (Amendment) Bill
- Courts (Amendment) Bill
- Ombudsman (Amendment) Bill

The proposed legislation remains with cabinet. The stagnation of bills in cabinet or parliament is the greatest challenge to the work of the Law Commission.

# 11. Stagnation

The Law Commission's constitutional mandate is to reform and develop the law. We rely on the Minister of Justice to publish Law Commission reports and refer them to cabinet. The enactment of legislation is the responsibility of the legislature. If the recommendations submitted by the Law Commission are not taken up, there is little that we can do.

The law stipulates that if government does not approve the recommendations proposed by the Law Commission, it should send back the report for further consideration. This is to encourage government to enter into dialogue with the Law Commission and prevent arbitrary lawmaking. This provision is rarely observed. More commonly, bills are passed in an amended form without any further consultation with the commission.

The far-reaching nature of the recommended reforms to the constitution might explain the reticence of the executive and legislature. Some of the proposed legislation concerns politically sensitive issues. There are new guidelines for impeachment of the president. The amendment to the law on the regulation of political parties could have a significant impact on the political landscape of Malawi. Changes to the remit of the Malawi Electoral Commission and procedures for the conduct of elections could also be perceived as contentious, or even dangerous.

Vested interest is entrenched in the political system, and the legislature is reluctant to enact laws that might impact on those in political office. Sporadic and uneven adoption of the Law Commission's recommendations can lead to inconsistency in the law. In some instances, the efficacy of proposed legislation is dependent on simultaneous amendments to other laws identified in Law Commission reports.

# 12. Troubled times

In 2009, Bingu wa Mutharika secured a second term as president. The DPP also became the dominant party in parliament. Mutharika's cabinet swelled, eventually reaching 42 ministers and deputy ministers. A large cabinet enabled the executive to wield even greater influence over parliament. Despite this dominance, or because of it, there was no progress with enactment of the bills resulting from the constitutional review which the president himself had initiated in 2004.

The DPP began to push through unpopular and controversial laws. Some of these were widely criticised for advancing censorship and authoritarian powers. In January 2010, the Local Government Act was amended to empower the president to call off local government

elections. President Mutharika promptly postponed the local elections until 2014. Since the introduction of the 1994 constitution, local government elections have only been held once – in 2000.

Following a serious and protracted dispute in early 2011 between the presidency and lecturers at Chancellor College, where I studied for my law degree, an amendment to the Civil Procedure (Suits by or against the Government or Public Officers) Act was pushed through parliament. More commonly known as the "anti-injunction law", this piece of legislation prohibited the courts from granting *ex parte* injunctions against government or public officers. Critics of the amendment claimed it was unconstitutional. Both the anti-injunction law and the amendment to the Local Government Act were originated by government.

The enactment of some legislation originated by the Law Commission also proved controversial. In 2010–11, Section 46 of the Penal Code was amended to empower the Minister of Information to ban any newspaper considered "unsuitable for the public good"; Section 35 of the Police Act relating to the authority of the police to conduct searches without a warrant was amended; and the Local Courts Act was added to the statute books. The drafting of all these laws had involved substantial consultation. However, given the rapidly deteriorating political situation, they were open to misinterpretation and the timing of their enactment was inflammatory.

The Local Courts Act was generated by a review of access to justice in Malawi. In an effort to improve access, the special law commission proposed the establishment of a system of local courts in rural areas. In the atmosphere of the time, civil society organisations and members of the public were extremely concerned that the act signalled a return to the traditional court system used during the Banda era. In similar vein, the Media Council of Malawi and others criticised the amendment of Section 46 of the Penal Code for contravening the constitutional right to freedom of the press. They were concerned that the definition of "unsuitable for the public good" would be exploited by an increasingly authoritarian president.

During 2011, President Mutharika attracted voluble criticism from within Malawi and internationally. Shortages of fuel, electricity and foreign exchange, and high unemployment exacerbated mounting unrest. Demonstrations took place in Lilongwe, Blantyre and the northern city of Mzuzu. On July 20th, police shot dead 19 people and injured 58 in a rally in Lilongwe, sending shockwaves through the country. A petition criticising the "deliberate disregard of the constitution and the rule of law by the government" was ignored, as was its demand that the Law Commission should be asked to "revisit the Penal Code and the Injunctions Bill". Subsequent protests were postponed for fear of incurring further loss of life.

In April 2012, President Mutharika suffered a heart attack and died. The constitution provides that the vice-president should accede to the presidency if the president becomes seriously ill or dies. President Mutharika's closest allies tried to keep his death a secret while arranging to install his brother Peter as president. The attempt to disregard the rule of law immediately after the president's death led to a very tense situation. The Malawi Defence Force made clear that it would not countenance what would have amounted to a *coup d'état*. Joyce Banda was sworn in as president on April 7th 2012 – a crucial victory for constitutionalism in Malawi.

# 13. Conclusions

Since assuming office, President Joyce Banda has taken a proactive approach to the law. The controversial anti-injunction law and Section 46 of the Penal Code, which empowered the Minister of Information to ban any publication deemed "unsuitable for the public good", were swiftly repealed. The new government passed the Disability Act, which had been pending for almost eight years.

The president's actions received widespread acclaim in Malawi, and internationally. The executive and legislature

demonstrated their ability to enact rapid and substantive reform when the political will exists. But the first months of the new presidency were also a reminder that legal reform is always susceptible to being used for political mileage, or to satisfy the donor agenda. This might not always be in the interests of Malawi's citizens, for whose protection the constitution and law exist.

Opinions in the legal fraternity are mixed. The repeal of bad laws – like the anti-injunction law – was welcomed. But Section 46 of the Penal Code passed the constitutional test, and complied with international practice regarding censorship laws. The repeal of anti-homosexuality legislation promised by President Banda would usually only occur after comprehensive consultation and review.

Some decisions – such as appointing new heads of the Malawi Broadcasting Corporation and the Malawi Savings Bank – are not strictly within the president's constitutional remit. The law remains vulnerable in the face of a very powerful presidency, irrespective of whether the incumbent is regarded as "good" or "bad", "responsible" or "irresponsible". This is one of the major hindrances to the pursuit of the democratic ideals of the constitution.

I consider the conduct of the 2004–6 constitutional review to be one of the most significant achievements of the Law Commission. It is perplexing that this has still not been acted on. If this does not happen, the considerable costs in time, effort and money will have been wasted. More importantly, the views of all Malawians who participated in the consultation will have been ignored. Government needs to move things on and implement – or discuss – the recommendations made by the Law Commission.

Continuous dialogue with the government is essential to the work of the Law Commission. Since the constitutional review, relations between the Law Commission and individuals in government have mostly been cordial. We have a good working relationship with the Ministry of Justice. But the institutional commitment to law reform within government is weak. Amendments to the law which should be made only after consultation and joint deliberation are frequently made without this occurring. This needs to change. The input of an independent, dedicated law reform agency like the Law Commission is essential to a systematic and objective approach to law reform.

In my opinion, systematic law reform and constitutionalism are as important to the future of the nation as money bills – if not more so. A better balance needs to be struck with the enactment of legislation. For this to happen, MPs must become more engaged with committee work and the legislative process. They should not be in parliament simply to rubber stamp the wishes of the president and cabinet. Adequate funding for parliamentary training and processes is urgently required to improve the capacity of parliament to perform the role envisaged in the constitution. The political merry-go-round of "crossing the floor" should be stopped, by the strict enforcement of Section 65 of the constitution.

The Law Commission remains committed to executing its constitutional remit. There is still much work to do on a criminal justice system inherited from a one-party, repressive state – and many other areas. Having started in 1998 with a staff of two, we now have ten in-house lawyers. Our funding is more predictable, although in time it would be preferable if the government funded the commission exclusively. If this happens, it will send a clear and unambiguous message that the government is committed to systematic reform of the constitution and law in Malawi.

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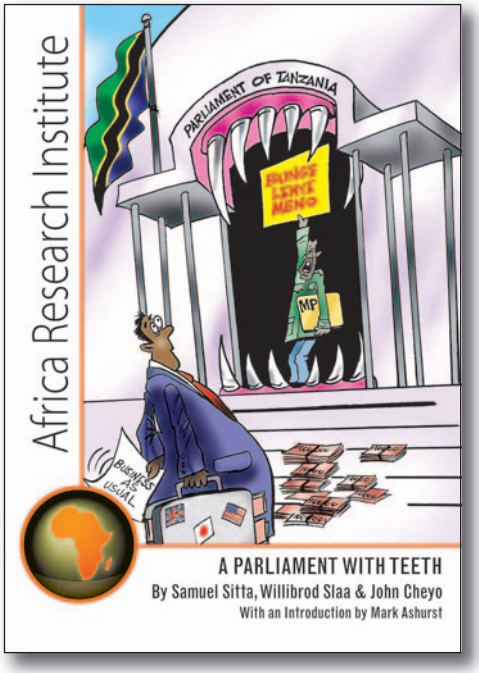


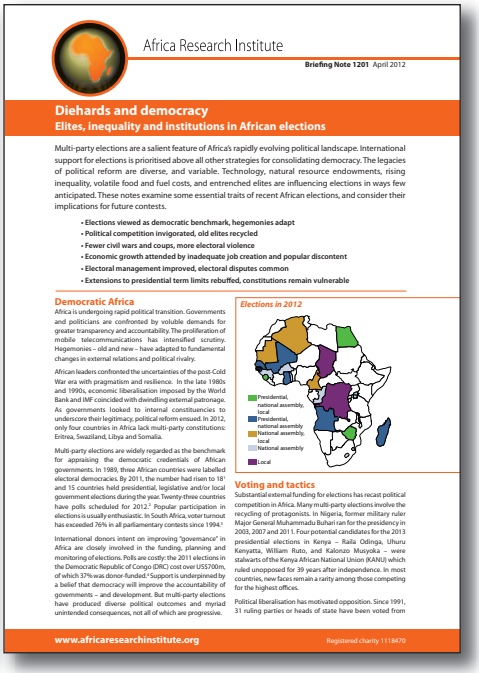


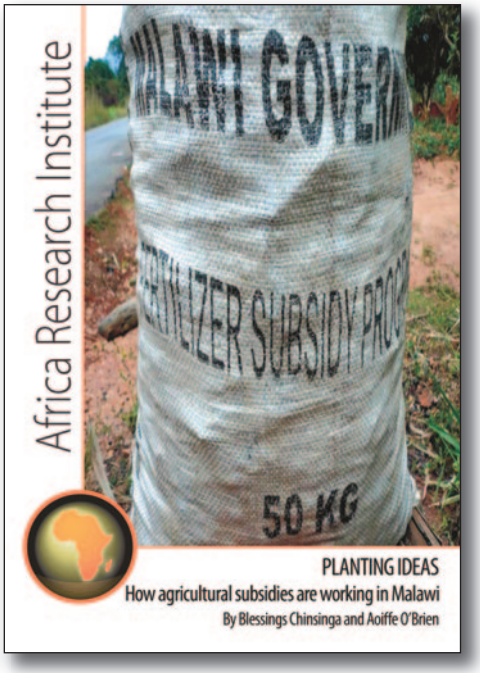


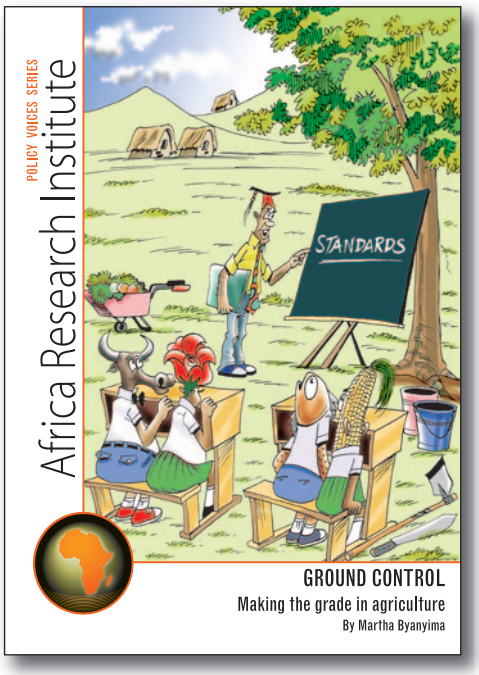


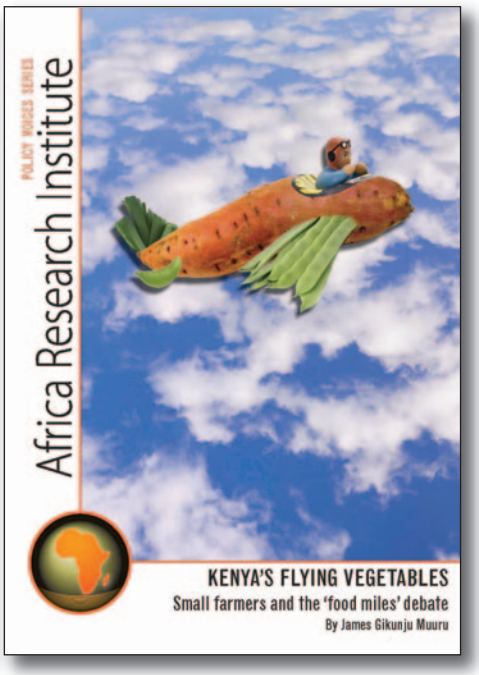


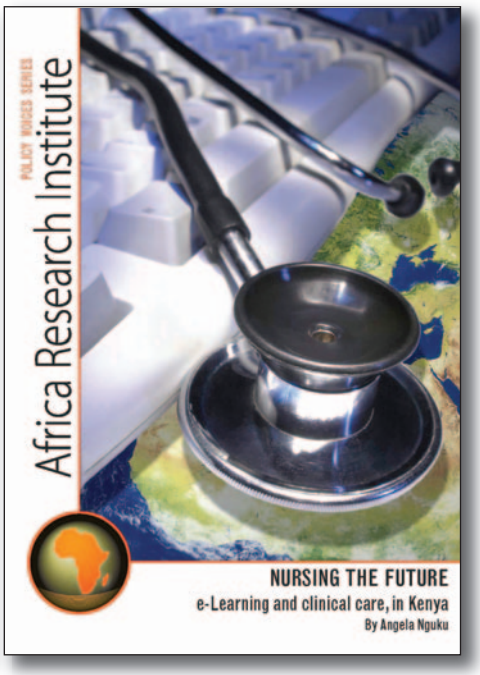


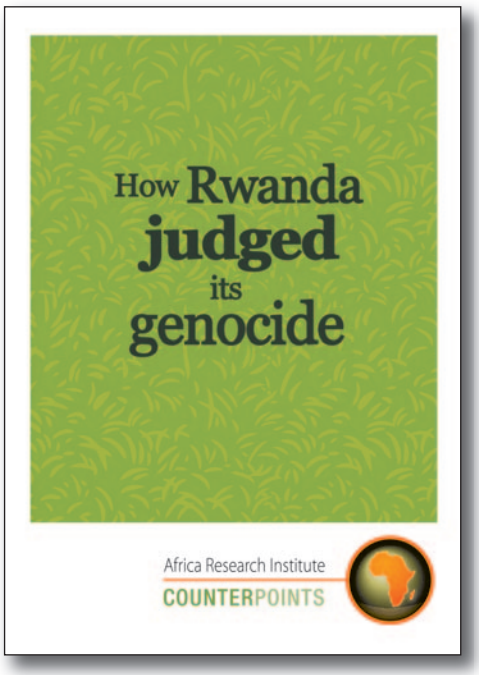


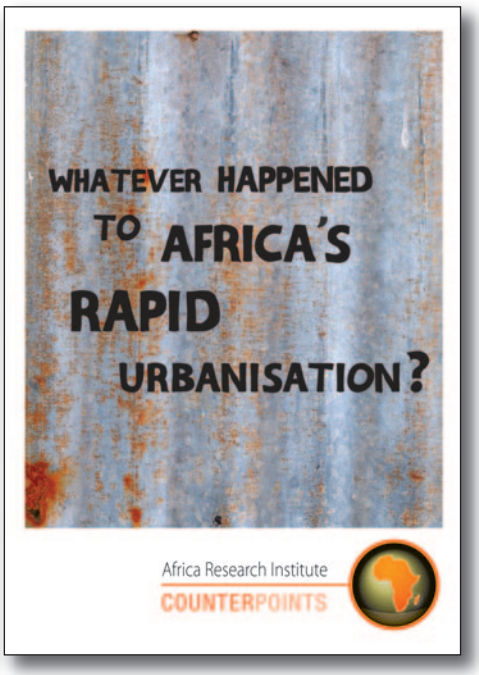


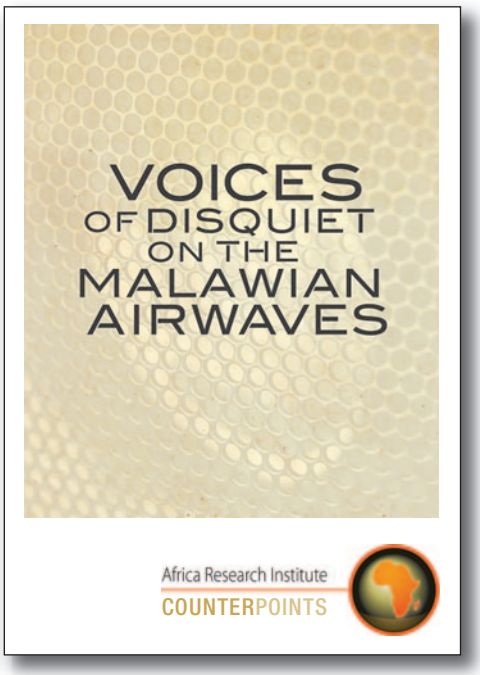

# DUTY OF CARE
# Constitutional and law reform, in Malawi

By Dr Janet Chikaya-Banda

In 2004–6 the Malawi Law Commission conducted a comprehensive two-year review of the constitution, at the behest of President Bingu wa Mutharika. The process included nationwide public consultation. After two constitutional conferences the Law Commission's report was submitted to government in 2007, accompanied by draft bills. A number of its key recommendations sought to strengthen oversight and accountability in the political system. Five years later, the proposed legislation remains before cabinet.

The constitution adopted by Malawi in 1995 was intended to safeguard multi-party democracy, the separation of powers and the rights of all Malawians. During the turbulent events of 2011–12, the constitution and the rule of law were frequently invoked by protestors. This was a stark reminder of the extent to which both have been routinely abused. The authority and leverage of a constitution is determined by the respect it commands from the governing as well as the governed.

The Law Commission is a permanent, independent institution with a constitutional mandate to review and propose amendments to the law – including the constitution itself. Janet Chikaya-Banda joined the commission in 1998 and has been its chief law reform officer since 2002. In *Duty of Care* she describes the work undertaken by the commission – including the ongoing review of a criminal justice system inherited from a repressive one-party state and the 2004–6 constitutional review. She also explains the importance of continuous, systematic law reform to "young" democracies, and the role that law reform can play in upholding the credibility and effectiveness of the judiciary.

Janet Chikaya-Banda considers the consultative approach taken by the Law Commission to be one of its key strengths – and the level of popular participation in the constitutional review to be one of its greatest achievements to date. In her timely account, she highlights impediments to the pursuit of democratic ideals articulated in the Malawi Constitution, the consequences of poor institutional commitment to law reform, and the vulnerability of the law in the face of a very powerful presidency. In her foremost recommendation, Janet Chikaya-Banda calls on Malawi's new government to implement the recommendations of the constitutional review in order to establish an unambiguous commitment to constitutional and law reform.

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