

The Role of the Judiciary in the 2004 General Elections in Malawi

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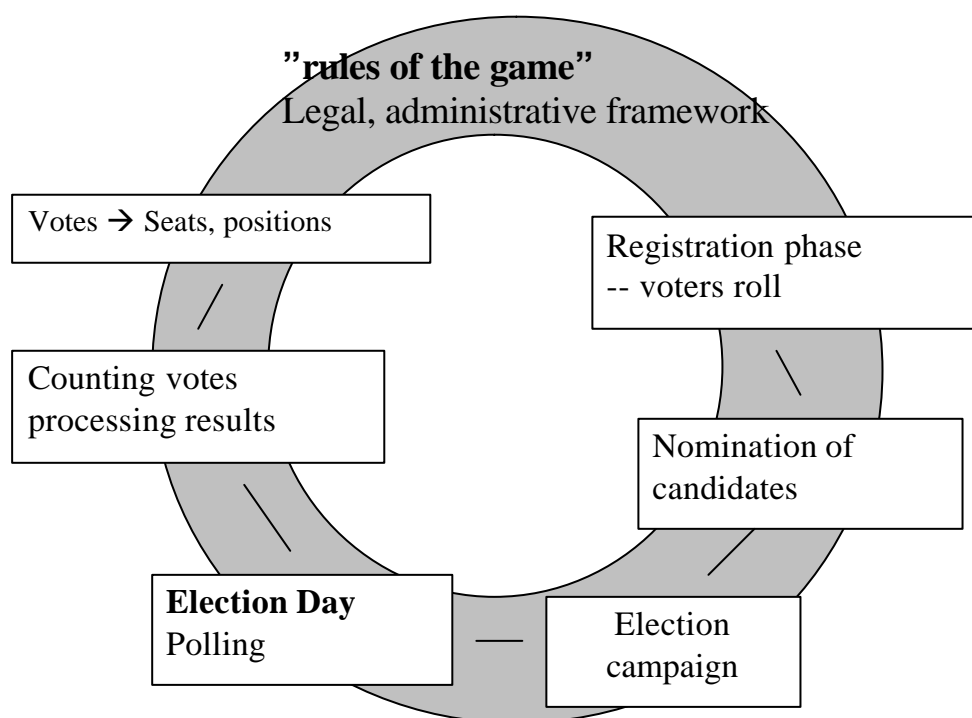
Introduction

The judiciary has played a central role in Malawian politics since the political transition, and in the context of the 2004 presidential and parliamentary elections, this was more striking than ever. The courts were involved – directly or indirectly – at every stage:

- in the pre-election battles over “the rules of the game” – the legal framework and institutional set-up for the elections;
- in the registration and education of voters and compilation of the voters roll;
- in the nomination of candidates;
- in disputes relating to the campaign;
- in relation to the conduct of the polling process on election day;
- with regard to the vote count and the integrity of the results; and
- in the process of converting the electoral mandate into political positions.

In the context of this project 'electoral period' is defined broadly. In line with current trends in the international literature we regard that a new electoral period starts immediately following the previous election.¹ The figure below indicates how elections are continuous processes, with different types of issues typically arising at particular stages of the process. Changes in the electoral framework may arise at all stages, but are most likely in the early stages of the process. In the immediate post-election period, the parties tend to be uncertain as to how changes in the rules of the electoral game will affect their interests.

Figure 1: The Electoral Process



¹ See Elklit, J.(1999): “Electoral institutional change and democratization: You can lead a horse to water but you can’t make it drink”, *Democratization*, Vol. 6, No. 4, pp. 28-51.

The role of the judiciary in the 2004 electoral process was played within an institutional framework comprising mainly of the Electoral Commission, political parties, the Executive and Parliament. The first part of this paper will take you through the courts' involvement in the period from pre-election to election and immediate post-election. The aim is to show how, within the institutional framework of the electoral process, the judiciary has assumed four crucial functions, which we will term: *accountability function*; *safety-valve*; *internal arbiter*; and *political leverage*.

A) The Malawian courts have (to a varying extent and with shifting success) assumed what is often seen as the primary mandate of the judicial branch in a democratic society: namely to “unblock the democratic channels”.² We term this the *accountability function* of the courts. To safeguard the integrity of the electoral process is at the core of this accountability function, and the courts may do so in various ways:

- by sanctioning violations of electoral rules and regulations, and the broader democratic principles laid down in the constitution;
- by preventing self-serving alterations of the legal and institutional framework for the elections;
- by protecting the rights of actors in political and civil society, and by preserving space for them to perform a meaningful role in the electoral process.

The core concern is to prevent those in positions of power from “tilting the playing field” and “drawing up ladder”, using their power to manipulate the electoral contest. We can thus say that the court acts on their constitutional mandate to provide horizontal accountability, in order to enable the mechanisms of vertical accountability.³

The accountability function is traditionally the focus in analyses of the courts' political role in relation to elections, but there are also other functions performed by the courts in Malawi that are worth noticing:

B) The courts in Malawi have assumed an important function as a *safety valve* in the political system.

- They diffuse tension (and avert the use of violence) by providing an arena where the parties can fight out heated political battles “by proxy”, through their lawyers. The cool-off period provided by the formalities of the legal process, is central here.
- Another aspect, or variety of this role, is that it represents a face-saving option – it provides a way to let ‘lost’ disputes fizzle out and die in the process, outside the public eye.

² Ely, J. H. (1980). *Democracy and Distrust: A Theory of Judicial Review*. Cambridge, Mass., Harvard University Press.

³ On the concepts of horizontal and vertical accountability see Schedler, A. et al. (eds.) (1999). *The self-restraining state: power and accountability in new democracies*. Boulder, Colo. and London, Lynne Rienner Publishers; Mainwaring, S. and C. Welna (eds.) (2003). *Democratic accountability in Latin America*, Oxford, Oxford University Press; on the accountability function of courts specifically see Gloppen S. et al (eds.) (2004) *Democratization and the Judiciary. The Accountability Function of Courts in New Democracies*. London, Frank Cass.

- C) The Malawian courts have increasingly assumed the role of *internal arbiter* for the political parties participating in the electoral contest, in particular on disputes related to the selection of candidates for public office. That the courts are given such a prominent role in party-internal battles is a recent phenomenon in Malawi, and unusual in comparative terms.
- D) Lastly, in Malawi, as in many other countries, different actors on the political scene use the courts to gain *political leverage*, or blackmail-potential. This takes different forms.
- ‘Non-political’ cases – typically criminal cases involving allegations of fraud, corruption and treason – may be used to discredit political opponents, or persuade them into cooperation. (Threatened charges may have a similar effect).
 - Similarly, cases directly related to the electoral process may be used as bargaining chips. Agreements to drop (or abstain from laying) election petitions, may for example be part of negotiations over cabinet positions.

We will argue that in the context of Malawian politics, the first two functions are particularly crucial. By taking them on, the courts have – beyond any doubt – contributed positively to the electoral process. Nevertheless, the growing prominence of the courts in the political arena is a cause for concern. The fact that political battles to an increasing extent end up in the courts, seems to reflect a lack of trust in the political institutions and a weakening of their ability to function as arenas for peaceful conflict resolution. It also makes the courts vulnerable; the more major political battles are channelled into the legal arena, the more important it becomes to have control over the judicial branch. In this context the question is whether the courts can sustain a significant accountability function. The Malawian courts have demonstrated a considerable degree of independence throughout the election period, but there are also some worrying signs.

Before we start examining the performance of the courts in the current electoral process, it may be useful to take a brief look at what occurred prior to this. In the last part of the paper we discuss some of the factors that have enabled the Malawian courts to take on such a central political role.

Judicial politics in Malawi 1993 – 2003

The Malawian judiciary's political role is of recent origin – at least in the narrow sense of adjudicating matters related to the competition for political office. Previously, during the subsistence of the colonial and post-independence one party state, the judiciary played an important political role only in the broader sense, by upholding the dominant economic, social and economic relations of the time. However, it was during the political transition that culminated with the adoption of a liberal democratic constitutional order in 1994 that it started to take on what we have referred to above as an accountability function.

The 1993 referendum

The most significant formal political event of Malawi's transition from a one-party state run by a "Life President" was the National Referendum held on 14 June 1993. The referendum question was whether Malawi should become a multiparty state. The referendum and the political dynamics surrounding it gave rise to a number of disputes whose resolution by the judiciary was indicative of an emerging willingness by the judiciary to assert itself in constraining the abuse or excess of power by state institutions such as the Independent Referendum Commission, government ministries and the police.

The High Court was particularly active in deciding cases arising out of the referendum. It was this court that: reversed a decision of the Referendum Commission barring members of the army and police from voting;⁴ constrained the police from operating permanent roadblocks;⁵ from banning certain people from addressing public rallies,⁶ and from barring people in custody from meeting their lawyers without the permission of the Inspector General of Police.⁷ And when Du Chisiza, a popular actor who acted in plays that were perceived by the government as campaigning against it in the referendum debate, was effectively banned from performing in secondary schools, the High Court held that the ban issued by the Minister of Education was an abuse of power and, therefore, invalid.⁸

The involvement of the High Court in resolving conflicts arising out of the referendum was significant in at least two respects. In the first place, the decisions of the court enabled various individual stakeholders to enjoy their specific right of being able to participate fully in the referendum. Secondly, the decisions had a significant impact on the broader legal and institutional framework. In both instances, the courts effectively sought to unblock the channels of participation and level the referendum playing field, and thus performed a democratic accountability function – in the context of a non-democratic regime.

These judgments, decided in the last period of the Banda dispensation, before the adoption of the democratic constitution, also shows that if lawyers and judges are sufficiently creative in the use of procedural laws, they can circumvent restrictions that may undermine accountability. This is how the High Court managed to rely on the general unwritten principles of democracy to protect the exercise of key rights such as the right to vote, the freedom of expression, the right to freedom of movement and the right to legal representation even though the Constitution in force at the time provided no explicit guarantees of human rights.

Although the courts in the transition period on important occasions constrained the abuse of power, safeguarded human rights and promoted democratic principles, this was not always the case. In a number of cases – most notably *Chakufwa Chihana v The*

⁴ *Nkhwazi v Referendum Commission* Civil Cause No. 96 of 1993.

⁵ *National Consultative Council v Attorney General*, Civil Cause No. 958 of 1994.

⁶ *Aaron Longwe v Attorney General*, Miscellaneous Civil Application No. 11 of 1993.

⁷ *Mhone v Attorney General* Civil Cause No. 511 of 1993.

⁸ *Du Chisiza jnr v Minister of Education* Civil Cause no. 10 of 1993.

Republic,⁹ and *Muluzi and Thomson v Attorney General*,¹⁰ – the courts upheld laws that undermined the enjoyment of human rights and democratic participation. In both cases, the High Court (and in the former case, the Supreme Court of Appeal as well) made decisions that did not advance the process of democratisation. The courts justified the conservativeness of their decisions on narrow technical grounds, namely the technical meaning of the term “sedition”, in the *Chihana* case and the exemption of government from injunctions by the rules of civil procedure. As indicated earlier, the High Court had, in most referendum cases, managed to uphold various human rights in the absence of explicit guarantees of human rights by appealing to broad principles. The failure of the courts in the *Chihana* and *Muluzi & Thomson* cases to overcome the technical limitations in favour of broad principles of democracy was, therefore, probably attributable to political choice rather than conceptual inevitability.

The 1994 elections

The courts were also actively involved in the events surrounding the parliamentary and presidential elections held in 1994, performing its accountability function by enforcing “rules of the game”. The courts performed this function in relation to nominations, such as in *In Re Nomination of J.J. Chidule* in which the High Court held that a person qualifies for nomination to contest for a parliamentary seat if he or she is registered in any constituency in Malawi, and not necessarily in the constituency in which he or she intends to contest.¹¹ An in *Malenganzoma v the Electoral Commission*, the High Court upheld the authority of the Electoral Commission to determine whether a prospective parliamentary candidate has the necessary language proficiency required by the Constitution.

The courts also enforced the rules of the game at other stages of the electoral process, including polling and counting of votes.¹² In the aftermath of the elections, when the parties were converting their electoral mandate into positions and power, the judiciary

⁹ *Chakufwa Chihana v The Republic*, Criminal Appeal No.9 of 1992 involved a charge of sedition against the leader of a pressure group that was agitating for the adoption of a multiparty system of government. Both the High Court and Supreme Court of Appeal held that the accused was guilty as charged although he had not advocated violence in his anti-government speeches. The courts chose to apply the existing law despite arguments by defence lawyers that the law contravened various international human rights standards.

¹⁰ In the High Court case of *Muluzi and Thomson v Attorney General*, Civil Cause No.66 of 1993, the plaintiff's claim was for an injunction to restrain the Malawi Police Force from unlawfully stopping them from publicising the holding of a public meeting. The court rejected the application for an injunction, relying on a provision of the Civil Procedure (Suits by or Against the Government or Public Officers) Act (Cap. 6:01) of the Laws of Malawi, providing that: “Nothing in this Act contained shall be constituted as authorising grant of relief by way of injunction for specific performance against the Government, but in lieu thereof the court may make an order declaratory of the rights of the parties.” The case could have been decided differently had the courts and lawyers been as creative as those in the earlier mentioned case of *Longwe v Attorney General*, in which the High Court declared a police directive barring certain named individuals from addressing a political campaign meeting to be outside the powers of the police. Because the police had no power to issue the ban, their directive was invalid and of no effect. In effect, this ordered the police not to proceed with enforcement of the ban and produced the same result as would have been obtained using an injunction.

¹¹ Civil Cause No. 5 of 1995.

¹² Election petitions include *Chikweza v The Electoral Commission*, Civil Cause no. 1061 of 1994; and *Phoso v The Electoral Commission* Civil Cause No. 1271 of 1996.

was also called upon to decide disputes over representation¹³ and the division of powers between the different political bodies.¹⁴

The period between 1993 and 1996 should be seen as the time when the judiciary established itself as the primary custodian of the values of democracy. During this period, the political authority of the judiciary was consolidated by default because unlike the executive and parliament which were undergoing radical transformation, the judiciary survived the transition intact, with the same personnel and largely the same institutional framework. In the lacuna created by the transitional state of the executive and parliament, therefore, the judiciary was able to assert and expand its authority and power, with little or no resistance from the other branches.

The 1999 elections

In comparison to the 1994 elections, the 1999 elections generated more judicial intervention both qualitatively and quantitatively. A wider range of institutions involved in the electoral process came under judicial scrutiny and the range of issues became more varied. In terms of institutions, the Electoral Commission was the object of most judicial action. The High Court and the Supreme Court of Appeal exercised their accountability function in relation to the Commission by ordering it to comply with a wide range of legal duties related to the electoral process. In a number of cases, the courts constrained the Commission from abusing its power. In the politically significant cases, the Commission was ordered:

- to register prisoners as voters;¹⁵
- to accept the nomination papers of a presidential candidate who had chosen to contest with a vice-presidential candidate from another party;¹⁶
- to ensure that elections were free and fair;¹⁷ and
- to set the date of polling in accordance with the Constitution regardless of a contrary provision in the Parliamentary and Presidential Elections Act.¹⁸

In all these cases, the courts promoted democracy by enhancing voter participation, facilitating “coalitions” among contesting parties by allowing them to contest jointly in the presidential election and promoting constitutionalism over the dictates of

¹³ The High Court upheld the freedom of action of a Member of Parliament over the right of constituents to have representation during all debates in the National Assembly (*Chakuamba v Ching'oma*, Civil Cause No. 99 of 1996).

¹⁴ In the case of *Mponda Mkandawire v The Attorney General* the High Court was called upon to interpret the constitutional powers of the President to appoint Ministers. The court leaned in favour of an expansive interpretation that empowers the President to appoint any person to become a Minister without consulting the political party to which he or she belongs.

¹⁵ *Phambala v Chairman*, Electoral Commission Civil Cause No. 34 of 1999.

¹⁶ *Chakuamba and Chihana v The Electoral Commission* Civil Cause No. 25 of 1999. The facts of the case were that the two plaintiffs were the presidents of the Malawi Congress Party and the Alliance for Democracy political parties respectively. In the run up to the 1999 presidential elections, the two parties had formed an electoral alliance, one of whose terms was that the plaintiffs would contest the elections as presidential and vice presidential candidates respectively. A few months before the elections, The Electoral Commission ruled that the plaintiffs could not contest the presidential election on the same ticket, as this would breach statutory provisions regulating permissible electoral symbols. The plaintiffs successfully petitioned the High Court for a declaration that the ruling of the Electoral Commission was wrong in law.

¹⁷ *Khembo v Electoral Commission*, Civil Cause No. 70 of 1999.

¹⁸ *Mungomo v Electoral Commission*, Civil Application No. 23 of 1999.

statutory electoral laws. The fact that the decisions were made against the Electoral Commission, however, had the potential of adversely affecting the relationship between the Commission and the courts, with the Commission feeling that the latter was usurping its authority to set standards for the conduct of the elections.

To be fair though, the courts did not question the Commission's authority in all cases. On at least two occasions, the High Court upheld decisions of the Commission: In the case of *The Attorney General v Chakuamba, Kalua and Mnkumbwe* in which the results of the presidential election were challenged by most of the candidates who had contested in it, the courts upheld the Commission's pre-eminent authority to conduct elections. The High Court reiterated this view in the case of *Kafumba v Electoral Commission*,¹⁹ in which it held that the Electoral Commission had the primary authority to handle complaints related to the elections and that a complaint related to elections cannot be lodged with the courts unless it had first been made to the Commission.

Another institution that came under judicial scrutiny in the 1999 election period was Parliament. In the period between 1994 and 1999, the relationship between the courts and Parliament was shaped through cases questioning the extent to which the courts could legitimately "interfere" with decisions made by Parliament, which was authorised by the Constitution to regulate its own procedure. In the only case that the High Court has decided on political party funding, the court took an interventionist approach and reversed a parliamentary decision suspending the disbursement of funding to the Malawi Congress Party which was boycotting parliamentary sittings in protest against what the party considered to be unprocedural conduct of business by Parliament.²⁰ The court held that Parliament's constitutional duty to disburse funding to parties that had won at least 10% of the vote at the last national election could not be abrogated by the National Assembly, even during a period in which the party was boycotting sittings of the Assembly. The courts were, however, not consistent in their willingness to intervene in "internal" affairs of Parliament. For example, in the case of *The State v the Electoral Commission, ex. p. Chakuamba*, the High Court declined to deal with a complaint of a Member of Parliament regarding action taken by the Speaker in the National Assembly on the ground that the Constitution gives the Speaker immunity.²¹

In addition to the Electoral Commission and Parliament, the Malawi Broadcasting Corporation also found itself the subject of judicial action in relation to the election. In the case of *Kafumba v Electoral Commission and Malawi Broadcasting Corporation*, the High Court ordered the Malawi Broadcasting Corporation to give balanced coverage of campaign activities of both the ruling party and the opposition.²²

As a general assessment the judiciary performed its accountability function reasonably well in this period. Although there were clear deficiencies in the way the 1999 elections were conducted, the courts contributed positively to the integrity of

¹⁹ Civil Cause No. 30 of 1999.

²⁰ *Attorney General v Masauli* Civil Appeal No. 28 of 1998.

²¹ Miscellaneous Civil Cause No. 68 of 2000. The judge noted with concern that the decision of the Speaker to suspend a Member of Parliament adversely affected the interests of the MP's constituents, but nevertheless, upheld the immunity of the Speaker from having that decision judicially reviewed.

²² Civil Cause No. 30 of 1999.

electoral process.²³ This was helped by the fact that, in general, the government and other institutions complied with adverse judgments. A notable exception was the *Kafumba* case where the High Court ordered the Malawi Broadcasting Corporation to give a balanced coverage of campaign activities. As we shall see in relation to the discussion of the 2004 elections, the MBC has continued to defy the principle laid down by the court in *Kafumba* (and the laws on which it was based) as it routinely covered ruling party campaign functions, while excluding those of the opposition.²⁴

Compared to the 1994 electoral process, the 1999 elections the results were to a greater extent disputed – including the presidential election – and what we have referred to as the *safety valve function* of the courts became more prominent.

The Malawian Judiciary in the context of the 2004 elections

As noted in the introduction, the courts were centrally involved throughout the most recent electoral process in Malawi. This include cases regarding the electoral rules and framework for administration of the elections; regarding the voter registration process; candidate selection; the electoral campaign; the polling process; the counting of votes and the integrity of the results, and cases regarding the distribution of positions and privileges on the basis of the election results. As indicated in figure 1, these categories of cases represent different stages in the electoral process. Although in practice cases from various categories may overlap in time, this reflects the logical sequence of the electoral process, and in the following we use it to structure the discussion.

Cases regarding the legal framework for the elections

A framework of laws and rules to govern elections is a fundamental requirement in a democratic political system. Interpreting these laws and rules and applying them in concrete cases is the constitutional preserve of the judiciary. It is the judiciary, therefore, that ultimately decides the meaning of various laws and rules, and the meaning that the judiciary accords to the laws and rules may promote or hinder the democratic process. The framework for the administration of elections is a basic aspect of the political system and may be contested at any time during the electoral cycle. It is therefore necessary to examine judicial action involving matters that arise even before the commencement of what is normally regarded as the election period.

In the context of the 2004 elections, the High Court made a number of decisions that related directly or indirectly to laws and rules governing various aspects of the elections, including the eligibility of presidential candidates; “crossing of the floor” by MPs elected on party tickets; and the necessary qualifications for the Chairperson of the Electoral Commission.

²³ This assessment is echoed by several observers, see for example Martin Ott et al. (eds) (2000). *Malawi's second democratic elections : process, problems and prospects*. Blantyre, Malawi: Christian Literature Association in Malawi; Clement Ng'ong'ola (2001), “Judicial Mediation in Electoral Politics in Malawi” in Harry Englund (ed) *A Democracy of Chamelions*, Uppsala, Nordiska Afrikainstitutet, pp 62-86. ...

²⁴ This has attracted much protest from donors such as the European Union, civil society organisations such as the Public Affairs Committee and opposition parties.

Since the 2004 election period commenced (at the end of the 1999 elections), three factors dominated the political discourse and activity. The first was the campaign for an extension of the term of office of the President beyond the maximum two consecutive terms stipulated by the Constitution. The second was the capacity of the Electoral Commission to conduct free and fair elections, while the third was the role of civil society organisations in the electoral process. The judiciary played a significant role in all three areas. In a number of cases, the High Court and the Supreme Court of Appeal enforced the principle of accountability, resolved disputes and provided a safety-valve for venting political frustration. In other cases, parties used the courts to gain political leverage.

One of the most significant political developments during the early part of the 2004 electoral period was the attempt by the United Democratic Front to secure an amendment of the Constitution in order to allow presidents to be in office indefinitely or for a maximum of three consecutive terms. Some sections of the public planned to stage protests but the President banned demonstrations for or against the proposal. The ban was challenged in the High Court which eventually ruled that the ban was unconstitutional. This decision, among other things, created the space within which the constitutional framework governing elections could gain legitimacy through free debate in all forms, including assemblies and demonstrations. The action of the court in this case had a positive effect on the participatory quality of the political process leading up to the 2004 elections, and arguably contributed to democratic consolidation.

The case was probably one of the most significant of the 2004 elections for the additional reason that it was one of the exceptional cases in which the courts articulated explicitly the broad democratic principles that underlay the framework of rules for the elections. The court went beyond merely stating that the President's ban was contrary to section of the Constitution that guarantees every person the right to freedom of assembly and demonstration. It conceptualised the protection and enforcement of specific human rights, as a means to the higher-level objective of democracy. In response to the argument that the ban was necessary to maintain order, even if this was at the expense of some freedoms, the court stated as follows:

Every Malawian who is mature enough will remember that for 30 years, this country "enjoyed" peace and quiet, law and order that was devoid of the rights and freedoms and the social justice now enshrined in our Constitution. Taking judicial notice of the cases brought before this Court and the events in our National Assembly, very few Malawians want that kind of peace and quiet, law and order.

In assessing the significance of this case, it is important to acknowledge the few other cases that linked specific legal rules within the framework of elections to broader political issues. In the 1999 election period, the High Court had unpacked a technical argument by lawyers of both sides in the case of *Chakuamba and Chihana v Electoral Commission* and identified the central contentious issue in the case to be the existence of an alliance between the Malawi Congress Party and the Alliance for Democracy. Similar candidness by the courts on the broader political implications of their decisions was also apparent in the case of *Chupa v Mayor of City of Blantyre*. This case

involved a purported ban of a public rally by the Mayor of Blantyre and the police. In overturning the purported ban, the High Court defined the balancing process between the needs of the right to assemble and demonstrate and those of public order as not only a legal but also a political one.

In connection with the 2004 elections, the courts also performed an accountability function vis-à-vis Parliament. The courts decided a number of cases involving the part of the regulatory and administrative framework that governs the translation of votes into seats in Parliament. In these cases, decisions of the High Court and Supreme Court of Appeal helped to define the relationship of the courts to Parliament. In one group of cases, the two courts defined the relationship as one of co-equal branches of government whose powers were separate and independent from each other. In the other group of cases, the courts adopted a more interventionist role for the judiciary, assigning to it powers of oversight over Parliament.

One issue that emerged as a major subject of judicial interaction with Parliament was that of “crossing the floor” by Members of Parliament. The critical importance of the legal and administrative framework of elections motivates contesting parties to seek control over the law-making and administrative machinery of the state. Since 1994, section 65 of the Constitution has provided parliamentary parties the instrument with which they have tried to re-shape the balance of power in the National Assembly after elections. The section empowers the Speaker of Parliament to declare vacant the seat of any Member of Parliament who have “crossed the floor” by voluntarily resigning from the party that sponsored him or her during the elections or joining an organisation or association that is political in nature.

The courts have decided numerous cases relating to this provision since 1994, and in all but one of these cases the MPs in question obtained injunctions which were not challenged by the Speaker and retained their seats. (Only in the case of *Nseula v Attorney General* did the court uphold the decision of the Speaker to declare a seat vacant). In the vast majority of cases, the High Court practically overruled decisions made by Parliament and ordered the reinstatement of the members whose seats had been declared vacant. The decisions served to preserve space for the opposition, and restricted the ability of the United Democratic Front who had the largest number of Members of Parliament to use its numerical dominance to force through charges of “crossing the floor” against opposition Members of Parliament or rebellious members of their own party. The issuing of judicial injunctions against almost all the attempts to declare various seats vacant served the interests of democratisation by preventing arbitrary alterations of the parliamentary balance.

It was also in the numerous “crossing the floor cases” that the judiciary sought to define its proper relationship with Parliament. In the landmark *Nseula* case, the High Court took the view that notwithstanding the traditional immunity of Parliament and its constitutional power to regulate its own procedure, courts may intervene and review its decisions. According the Supreme Court of Appeal in that case, declarations of vacant seats by the Speaker under section 65 of the Constitution involves constitutional interpretation and “neither [the Speaker] nor the National Assembly itself can extend parliamentary privilege to the interpretation of the fundamental law of the country which is and must remain the constitutional responsibility of courts”. This position, therefore, meant that the courts became the

final arbiters in the battles to re-shape the balance of power in Parliament. Using this power, the courts largely prevented the alteration of the balance in almost all cases in which there were attempts to do so and preserved the balance as determined at the ballot box in the 1999 elections.

The preservation of the balance of power in Parliament was not the only consequence of judicial intervention in respect of section 65 of the Constitution. In another landmark case decided in 2002, *Public Affairs Committee v Attorney General*, the courts upheld the right of Members of Parliament to freely associate with civil society groups in political advocacy campaigns. They declared that an amendment to section 65 that purported to effectively bar MPs from joining associations or organisations that were political in nature was unconstitutional because it unduly restricted freedom of association and other human rights of MPs. Apart from reiterating the censorial power of the courts over Parliament, the decision also affected the course of the 2004 elections because it allowed MPs who opposed the bid for an extension of presidential terms of office to join the campaign against the proposed extension which was mounted by NGOs such as the Forum for the Defence of the Constitution (FDC).

This decision promoted the principle that the legal framework regulating the relationship between voters and their representatives, and the actions of parliamentarians, must respect constitutional provisions, in this case the right to freedom of association. The judiciary also unblocked the democratic process by permitting MPs more freedom to associate with civil society groups without being held to violate (unduly restrictive) laws governing the conditions of parliamentary representation. In this case, the court also acted as a safety valve by diverting the political contests underlying the declarations of vacant seats away from the more volatile arena of the National Assembly to the more sedate judicial process.

The only other significant case that directly involved electoral regulations and administration was one that centered on the composition of the Electoral Commission, the body responsible for administering elections in the country.²⁵ The central question in the case was whether a Supreme Court Judge is qualified to be appointed to chair the Commission since the constitutional provision that establishes the Commission states that the chairperson of the Commission must be a “judge”. The application was brought by one of the contesting parties in the election whose interest in the case was not as narrow as the charge suggested. The party was in fact using the judicial process to disqualify the incumbent Chairman of the Electoral Commission whom they, and other opposition parties and civil society organisations, perceived to be biased in favour of the ruling United Democratic Front. One could argue that there are substantial reasons why the Election Commission Chair should not simultaneously sit on the body which is the ultimate authority on disputes regarding the conduct of the commission. The case was, however, argued purely along semantic lines, relying on the legal meaning of the word “judge” as distinguished from “justice of the Supreme Court”. The court held that the word judge includes a Supreme Court justice. But although the party lost the case, and the court maintained the status quo in the structure of the Commission, the case nevertheless succeeded in drawing public attention to the alleged general unfitness of the Chairperson to head the Commission,

²⁵ Sabwera and People’s Progressive Movement v Attorney General, Constitutional Case No. 1 of 2004.

and therefore served the political interests of the political opposition which had initiated the suit.

In summary, it may be noted that the judiciary affected the integrity of electoral rules by expanding the space for public debate over the constitutional limitations on the eligibility of the President to contest for successive terms of office. In addition the courts provided a platform for voicing criticism of the unfairness of the Electoral Commission, although the criticism did not lead to any re-organisation of the Commission or its legislative framework.

Voter registration process

During the voter registration stage of the elections, the courts performed a number of functions, including applying penal aspects of the electoral law on voter registration and compelling the Electoral Commission to provide sufficient opportunity to stakeholders to inspect the voters' roll. An example of the application of penal provisions occurred in a case in which a person was sentenced by a Magistrate for registering twice²⁶. It was, however, in connection with the inspection of the voters' roll that the role of the courts had more far-reaching consequences for the electoral process as a whole. In the week leading up to polling day, a number of political parties and NGOs petitioned the High Court on the grounds that the Electoral Commission had failed to run an efficient registration of voters and had not permitted enough time for the inspection of the voters' roll. The High Court ruled that the polling day for the presidential and parliamentary elections be postponed for any period up to seven days to give the opposition parties and other stakeholders a chance to inspect and verify the voter's roll.²⁷

By postponing the election date, the High Court not only required the Electoral Commission to be accountable, but also provided a safety-valve for the release of the frustration that several actors in the electoral process had experienced during the registration process itself. The judicial order for transparency of the voters' roll provided an opportunity for people to allay their anxieties over the integrity of the registration process, thereby preventing the consequences of un-vented frustration. In this sense, the courts made a positive contribution to the peacefulness of the elections and played a safety-valve function in addition to the accountability one.

In some cases, the mere prospect of judicial action appeared to have affected the conduct of institutions such as the Electoral Commission. At some point during the process, for example, a number of non-governmental organisations threatened to take the Commission to court for not allowing people in some areas sufficient time to register. The Commission accommodated the demands by extending the period for registration to compensate for the delays that it had caused. It is likely that the prospect of legal action played a part in the Commission's decision. The latent authority of the courts was, therefore, used to secure accountability on the part of the Commission and promote democracy by providing voters ample opportunity to register in order to vote.

²⁶ *The Republic v Chikhadwe and Chikhadwe* (First Magistrates Court, Lilongwe Case No. LL/CR/60/1/2004.

²⁷ Weekend Nation 15-16th May.

The authority of the courts and their potential to contribute positively to the electoral process can, however, be undermined by the reluctance of other institutions to comply with the letter and spirit of court judgments. The case involving the postponement of the elections is the best illustration of this point. The Electoral Commission had opposed the application for a postponement of the elections that the court eventually ordered. When the court ordered the postponement for a maximum of seven days to allow sufficient time for the inspection of the voters' roll, the Commission only postponed polling for two days. The shortness of the postponement did not provide stakeholders the maximum time that the High Court order had allowed.

The Commission did not state a justification for postponing polling for only two days and its decision limited the effectiveness of the High Court order in ensuring transparency of voter registration. The Constitution in fact allowed the court to postpone the elections for a maximum of seven days. In the case under discussion, therefore, the High Court order could have ensured maximum transparency by postponing the elections for seven days, effectively setting polling day on 25 May. Instead the court chose to leave the final determination to the Electoral Commission in the belief that it had the discretionary power to do so and would exercise it reasonably bearing in mind the need for sufficient time for inspection of the voters' roll. While the decision is illustrative of the judiciary's recognition of the authority of the Electoral Commission, it also indicates that judicial restraint may permit abuses or abdication of discretionary power at the expense of democratic principles.

Candidate selection

The selection of candidates for the 2004 elections generated by far a bigger volume of cases that were brought before the courts than any other stage of the electoral process. The impact of the judicial decisions in the cases had both a historical and institutional significance. From the historical perspective, the elections of 2004 were the first in which disputes involving candidate selection within political parties came up for judicial resolution. From the point of view of the institutional framework of the elections, the cases represent the most intrusive exercise of judicial power in Malawian elections, in the sense that the courts intervened to set standards for the conduct of the internal affairs of political parties.

Judicial action in the candidate selection phase was commenced by members of the United Democratic Front (U.D.F.), the Malawi Congress party (M.C.P.) and National Democratic Alliance (N.D.A.) against their respective parties. Typically, the cases involved complaints about the unfairness of the candidate selection processes. Candidates who took their parties to court over irregularities in their party primary elections included the following:

CANDIDATE	CONSTITUENCY	PARTY
Symon Bwanali	Balaka North	UDF
Symon Bwanali ²⁸	Balaka North	UDF
Weston Kanjira	Balaka West	UDF
David Banda ²⁹	Blantyre Malabada	UDF
Benedicto Nyirenda	Blantyre Malabada	UDF
Clement Khembo	ChikwawaEast	UDF
Lewis Kadammanja ³⁰	Chiradzulu North	UDF
Rosemary Lapukeni ³¹	Mchinji South West	UDF
Ludoviko Shati ³²	Mchinji West	UDF
Wilson Ndomondo ³³	Zomba	UDF
Kadzongwe ³⁴		MCP
Adden Mbowani ³⁵		MCP
Kumachenga ³⁶		MCP
Fanwell Kwanjana ³⁷	Lilongwe East	MCP
Jossy Nthani ³⁸	Mchinji West	MCP
Jodder Kanjere ³⁹	Ntcheu North East	MCP
Steve Tchauya ⁴⁰	Lilongwe North West	NDA

Source: Transcripts of court High Court records.

The evidence gathered from the cases and interviews with various key informants indicated that intra-party electoral disputes were often taken to the courts because the parties tended to lack effective internal dispute resolution mechanisms. The broad constitutional mandate of courts facilitated the tendency towards taking intra-party disputes to the courts for resolution, because it made the judiciary receptive to political disputes, including those involving internal matters of political parties. Even if parties had internal dispute resolution mechanisms, the judiciary was more attractive than the internal mechanisms because it commands considerable public trust and confidence.

Although the courts were quite willing to intervene in the intra-party disputes relating to candidate selection, there was evidence that, to some extent, the judiciary would rather have such disputes settled internally by the parties themselves. This was stated by Justice Nyirenda in the case of *Fanwell Kwanjana v Malawi Congress Party*, a

²⁸ Civil Cause No. 429 of 2004.

²⁹ Civil Application No. 22 of 2004.

³⁰ *Kadammanja v Shati and United Democratic Front* Civil Cause No. 305 of 2004.

³¹ *Lapukeni v Katsonga and United Democratic Front* Civil Cause No. 436 of 2004.

³² *Shati v United Democratic Front* Civil Cause No. 485 of 2004.

³³ Civil Cause No. 484 of 2004.

³⁴ *Kadzongwe v Malawi Electoral Commission* Civil Cause No 13 of 2004.

³⁵ *In Re Adden Mbowani* Civil Cause No.15 of 2004.

³⁶ *Kumachenga v Majoni and Malawi Electoral Commission* Civil Cause No 18 of 2004.

³⁷ *Fanwell Kwanjana v MCP & E. Mwale* Civil Cause No. 143 of 2004.

³⁸ *Nthani v Regional Elections Coordinator (MCP) et. al.* Civil Cause No 140 of 2004.

³⁹ *Kanjere v Malawi Congress Party and Kakhome*, Civil Cause No. 520 of 2004.

⁴⁰ *of Steven Maliko Tchauya v Rose Miriam Matchaya & National Democratic Alliance* [Civil Cause No. 176 of 2004].

position that he also adopted in the *Tchauya* case, in which he stated that: "... let me reiterate what I said in the case of *Edmington Kwanjana v MCP & E. Mwale*, Civil Cause No. 1432 of 2004 that matters like these are best resolved by the political clubs themselves. The instant case is typical of such cases that require the intervention of party authorities especially owing to time constraints that surround the cases..." The court's preference that political parties should settle their internal disputes without resorting to the courts had also been stated in earlier cases which revolved around the long-running contest for the leadership of the Malawi Congress Party between Messrs Gwanda Chakuamba and John Tembo.⁴¹

Despite the restraint expressed in some cases, the judiciary generally engaged in resolving intra-party disputes over various aspects of the parties' primaries. The ambivalence towards involvement in intra-party matters was also pronounced in interviews conducted with members of the judiciary. On the positive side, a number of judges pointed to the trust gained in this process "all the parties come to the courts – even where they didn't trust each other, they trusted the courts". However, other judges feared that the courts would lose credibility in the long run by "jumping in", without a clear legal framework "to solve matters that are political in nature that we are not equipped by training or skills to do"; others were concerned that if the process continues, the courts would be overwhelmed next time around. All seemed to agree that "at the time there is nowhere else to go", due to the weakness or absence of other institutions for party-internal dispute resolution – the alternative would in many cases be violence.⁴²

What is clear, is that this type of court intervention represented a historic change. It was the first time for the judiciary to intervene at this stage of the electoral process. In the 1994 and 1999 elections, the judiciary intervened mainly after polling when election petitions were presented to it, and were not called upon to resolve disputes arising out of the candidate selection process. It was also the first time that the courts intervened so intrusively to regulate the "internal affairs" of a critical institution in the electoral process. From the perspective of the parties themselves, this was the first time that their respective hierarchies were challenged by their members so extensively.

The standard-setting by the judiciary in the candidate-selection phase contributed positively to the electoral process by extending the requirement of accountability and transparency from state institutions to political parties. Judicial intervention also served to diffuse the tension that the primary elections generated among supporters of competing candidates, thereby, providing a much-needed safety valve that minimised the possibility of violence and disorder.

The positive impact of the judicial intervention at the candidate-selection phase has to be weighed against the (possible) negative consequences of the degree of intrusion that the cases represented, including increased politicisation of the courts.

⁴¹ *In Re Constitution of Malawi Congress Party and Re a Convention and Part 4 Article 40 of the Constitution of the Malawi Congress Party* Civil Cause No. 645 of 2001 and *Chiwona v Chakuamba* Civil Appeal No. 40 of 2000.

⁴² Authors' interviews with members of the Supreme Court of Appeal and the High Court in Blantyre and Lilongwe in February and July 2004.

These cases are also indicative of a striking trend in Malawi, namely the growing commercialisation of politics. With the increasing economic importance of political office, the contest over positions has heated up. Party nominations are the first, and in constituencies regarded as party strongholds, the most crucial stage for candidates aiming for political office. Particularly in the more economically developed constituencies, candidates invest substantial funds in the party primaries – and when they lose they come to the courts to recover their costs.⁴³ Some of the litigants claiming to have lost in unfair primaries, explicitly asked to be compensated for the resources that had spent in their campaigns, using the judicial process as political leverage.

The campaign

A critical phase of the 2004 electoral process was the campaign period. The main question that featured in the various judicial disputes that arose during this phase was the ability and willingness of the Electoral Commission and a number of other relevant institutions to facilitate the fairness of the elections. In this connection High Court intervention was sought on a number of matters:

Access to media

Historically, contestants in Malawian elections have always competed fiercely for access to public media. This contestation has inevitably drawn a broad spectrum of institutions into the discourse and provided them with the opportunity to define their interrelationships. For the judiciary, the debate over access to media involved the relationships between the courts, on the one hand, and the Electoral Commission and the media, on the other. As has been indicated earlier in this paper, the relationship between the courts and the Electoral Commission is one in which the latter is subject to the review of the power of the former.

The landmark case in this area arose in the context of the 1999 elections and was that of *Kafumba v Electoral Commission and Malawi Broadcasting Corporation*, Matter No. 35 of 1999. It held that the publicly-funded Malawi Broadcasting Corporation was guilty of bias in its radio coverage of the 1999 elections by giving the ruling party the opportunity to campaign on the corporation's radio stations while denying the opposition similar access. Despite that ruling, however, in the context of the 2004 elections, the Malawi Broadcasting Corporation appeared defiant of the *Kafumba* principle (and all the laws on which it was based) and routinely covered ruling party campaign functions, while excluding those of the opposition.⁴⁴ In reaction, one of the country's most active NGOs, The Public Affairs Committee (PAC), commenced legal action in the High Court requesting it to declare that the Electoral Commission and the Malawi Broadcasting Corporation had failed in its legal duties by failing to grant equal access to the publicly-funded Malawi Broadcasting Corporation (MBC) radio.⁴⁵ Before the case was argued, though, PAC withdrew ostensibly because the opposition

⁴³ This also explains why the nomination cases almost exclusively come in the Central and Southern regions, rather than in the North, and why they arise predominantly in the ruling party (UDF), where the stakes are highest. Court cases are also predominantly found within parties that conduct primary elections, rather than appoint candidates through party conventions.

⁴⁴ This has attracted much protest from donors such as the European Union, civil society organisations such as the Public Affairs Committee and opposition parties.

⁴⁵ *The Daily Times*, March 12, 2004.

party, the National Democratic Alliance (NDA) also commenced its own case on the same grounds against not only MBC but also including Television Malawi (TVM) which is also publicly-funded.⁴⁶

The case of *National Democratic Alliance (NDA) v Electoral Commission, MBC and TVM*,⁴⁷ was significant in at least three respects. Firstly, the judges in this case differed with the judgment in the *Kafumba* case regarding the relationship between the courts and the Electoral Commission. It will be recalled that in *Kafumba*, the High Court held that the Commission has exclusive original jurisdiction over electoral complaints. In contrast, the judges in the National Democratic Alliance case took the following position:

“.. We wish to reiterate our disagreement in our April 30th ruling with the procedure the Court adopted in the initial filing of the *Kafumba* case, of making the lodging of a written complaint with the Electoral Commission a precondition for commencing an action in the High Court. We took the view and still stand by it that, empowered as this Court is, under clear constitutional provisions ... we will not allow litigants, on matters concerning the violation of fundamental rights, to be blocked from accessing justice in this manner.

Secondly, the applicants lost the case mainly because they did not submit sufficient admissible evidence to the support their case. Unlike the position in 1999 when the *Kafumba* case was decided, in 2004, there were systematic media monitoring reports prepared by the Media Monitoring Unit on behalf of the Electoral Commission showing the bias of MBC and TVM.⁴⁸ Despite the availability of such evidence, the complainants surprisingly failed to follow the correct procedure of submitting such evidence by calling witnesses who would formally present the reports and the original evidence on which they were based. Instead, the complainants only submitted the reports in their affidavits, which was insufficient because, in legal terms, their deponents were then making allegations without proof and were basing their statements on their belief and not knowledge.

The third significant feature of the case was its timing. MBC and TVM had displayed bias in the early stages of the 2004 election period and had continued to do so throughout the entire period. Yet, it was only two months before polling day that the Public Affairs Committee (PAC) sought judicial intervention on the matter, and one month to go when the National Democratic Alliance (NDA) lodged its case. Why so late, given that the time factor is crucial in order for the judgment to have an impact on the campaign? Several factors are relevant to understand this. Firstly, there was an understanding that to lodge a case prior to the official 60 days campaign period would

⁴⁶ The Nation, 21 April, 2004.

⁴⁷ Constitutional Cause No.3 of 2004.

⁴⁸ The bias in reporting was extreme, in some of the reported periods Malawi Broadcasting Corporation and Television Malaw gave the ruling coalition 100% positive coverage while ignoring the opposition. (see Mabwuto Banda, “MBC, TVM covered UDF only – Report” Malawi Nation 2/23/2004 at <http://www.nationmalawi.com>)

be premature.⁴⁹ Secondly PAC, who originally lodged the case in mid March, at the beginning of the campaign period, for strategic reasons decided to vacate it and leave the litigation to the NDA.⁵⁰ This also explains why the NDA case was rushed in a way that the end proved unsuccessful. And thirdly, it emerged from interviews with key informants that there was a lack of confidence in the ability of judicial pronouncements to change the biased coverage of MBC and TVM. This was based on the experience that even after the 1999 *Kafumba* judgment MBC virtually ignored the court's judgment and proceeded to broadcast in its usual biased manner for the following five years. In this regard, the judiciary was, therefore, viewed as having minimal impact in ensuring accountability of the MBC during this period and no impact on the fairness of the 2004 elections in so far as this depended on fair media coverage, particularly by the state-sponsored radio stations.

The courts were also asked to ensure accountability in other aspects of the campaign, such as the use of government resources by the UDF for its campaigning purposes. This case was brought by the Republican Party acting for Mgwirizano against the Malawi Electoral Commission, the UDF and the Attorney General. The complaint was based on the UDF's alleged abuse of public resources for partisan campaign purposes and the Commission's failure to control the UDF in this regard. In the event, neither the prospect nor actual commencement of the judicial proceedings appears to have had any impact on the conduct of the UDF on the ground. There was no obvious change in the use of public resources for party campaigns. The judiciary, therefore, had little practical impact on the fairness of the electoral process in this regard.

On the other hand, the judiciary appears to have had some impact on the accountability of authorities that regulate public demonstrations. In the case of *Chupa v Mayor of the City of Blantyre and others*⁵¹, which was decided in 2001, the plaintiff had successfully applied to the High Court for an order stopping the defendants, including the police, from effecting a ban on a public meeting that the plaintiff and his political pressure group intended to hold. When the mayor and police ignored the court order and disrupted the rally, they were convicted of contempt of court in a subsequent High Court hearing. This probably explained why when the opposition Mgwirizano coalition sought to hold a rally that the authorities did not approve of, the mayor and the police officers who had been involved in the *Chupa* case did not participate in disrupting it. And why, after initial attempts by other officials and para-military police officers to halt the rally, it was allowed to proceed when the organisers obtained a court injunction against the police and the City authorities.⁵² In both cases, the judicial proceedings also served as a safetyvalve for tensions that might otherwise have

⁴⁹ Authors' personal communication with Ralph Kasambara ,who handled the case for the PAC, February 2004. The view reflects the lack of clarity in the legislative framework in Malawi as to who is responsible for ensuring fair coverage of election related matters prior to the campaign period, when this falls within the responsibility of the Electoral Commission. Otherwise MACRA is the regulatory body for the media, but their mandate in these matters is disputed.

⁵⁰ After PAC had lodged the case, there had been signals indicating that the Supreme Court might tighten the position on standing, which had recently been relaxed by the High Court in a landmark judgment). PAC thus feared being thrown out of court on procedural ground, as lacking an interest in the case, which would prevent a decision in time for the election, Since the NDA, as a political party had a clearer standing, they 'took over' the matter, (Authors' communication with PAC representatives, Lilongwe, July 2004).

⁵¹ Civil Cause No. 133 of 2001.

⁵² *Daily Times* : March 12, 2004).

erupted into violence. The crowds gathered for the rallies were assured that the matters were being handled by the courts and this calmed them. The safety valve function was, of course, in addition to the accountability function whereby the courts required accountability from institutions responsible for regulating public order such as the police and City Assemblies.

During the election period a number of cases that came up before the courts were not explicitly related to the electoral process although in essence they were. The notable ones in this regard included the criminal case against opposition politician Gwanda Chakuamba in which he was being prosecuted for allegedly forging the President's signature and the case brought against the same Chakuamba by the Malawi Congress Party which sought to evict him from a Malawi Congress Party house soon after he had resigned from the party and formed his the Republican party. Arguably, in these cases, the government and the Malawi Congress Party were using the judiciary to gain political leverage against Chakuamba.

The polling process, counting of votes and the integrity of the results

The process of polling, counting and announcing the results of an election can be the most controversial of all stages of the electoral process. This was true in the case of the 2004 elections in Malawi. While there was general agreement that polling went on peacefully, the process of acquisition of ballot papers and keeping custody of them proved to be controversial. It emerged that the Electoral Commission had ordered more ballot papers than the number of registered voters. Some stakeholders expressed the fear that the extra ballot papers would be used for rigging the result of the elections. The matter came up for judicial consideration in the case in which opposition parties applied to have the elections postponed to allow sufficient time for verification of the voters roll. The additional decision of the High Court in that case was that the Commission should surrender any ballot papers in excess of the number of registered voters to the court which would keep them in its custody.

On a subsequent appeal to the Supreme Court of Appeal lodged by the Commission, the order related to custody of excess ballot papers was reversed because in the view of the Supreme Court, the Commission was the only institution that was mandated to administer elections and keep custody of election materials. This decision of the Supreme Court had some negative impact on public confidence in the integrity of the electoral process. Opposition parties and several NGOs had expressed the suspicion that the extra ballot papers had been deliberately imported by the Commission for purposes of rigging the elections. The court's decision to entrust the excess ballot papers to the Commission was, therefore seen by some as creating an opportunity for the Commission to do such rigging. Had the High Court decision stood, it would have fundamentally changed the institutional framework of the elections in Malawi by giving the judiciary a direct role in the administration of elections. This would have made jurisdictional conflicts between the judiciary and the Electoral Commission likely. In the event, the Supreme Court's decision averted this by underscoring the Commission's primary mandate over administration of elections.

Since the results of the elections were announced, there have been a number of election petitions. The first was brought by the Mgwirizano coalition of opposition political parties. Their main argument was that the electoral process had been marred

by so many irregularities that the outcome announced by the Electoral Commission was not a fair reflection of the wishes of the electorate. This case is on-going and, therefore, little can be said about its broad impact on the electoral process, except that it served a useful safetyvalve function by assuring Mgwirizano supporters that their grievances would be handled by the courts. This dissipated the tensions that had been so high and had erupted into violence in some areas of Blantyre soon after the announcement of the results by the Electoral Commission.

In addition to the petition by Mgwirizano, a number of other petitions have also been filed with the High Court since the results were announced. They include complaints by candidates of the various parties complaining that the electoral process had not been free and fair.⁵³ Below is an indication of some of the petitions before the High Court by 24 June 2004.

CANDIDATE	CONSTITUENCY	AFFILIATION
Margaret Mbilizi	Blantyre Malabada	UDF
Ken Ng'oma	Lilongwe Kumachenga	UDF
Salim Bagus	Chikwawa central	UDF
Ibrahim Mdala	Zomba Malosa	Independent
Frezza Nihorya	Mulanje Limbuli	Independent
Ephraim Kachingwe	Blantyre	
Catherine Gothari Hara Mkandawire	Mzimba West	UDF

The petitions mentioned above serve various functions. In the first place, they seek to make the Electoral Commission and other election-related institutions accountable and contribute to setting standards for future elections. They also act as a face-saving exit strategy by candidates who genuinely lost the elections. And, lastly, but not least important, they present disgruntled supporters of the candidates an outlet for their frustration and dissatisfaction with the process.

In most of the cases judgement is still outstanding, but on 10 November the High Court, sitting in Mzuzu, passed judgment in the last of the cases listed above. In the ruling, the court nullified the results for the Mzimba West constituency, where the former Deputy Speaker of Paliament Loveness Gondwe's was elected. The court found proof of gross anomalies during the election process, including irregular campaigning on election day and use of a parliamentary vehicle during the campaign period.⁵⁴ Whether the ruling will be appealed, and if so, whether this will be the final outcome of the case, remains to be seen.

Assessing the political role of the courts

As we have seen, the political role of the courts in Malawian politics became significant and has gradually expanded since the on-set of the transition in the early 1990s. The new political role of the judiciary was played in the form of arbitration of

⁵³ For example, see *Ng'oma v Chikhadwe and Electoral Commission and Gaffar v Kadzamira and Electoral Commission* Miscellaneous Application No. 22 of 2004

⁵⁴ This is the facts as they are reported in the Nation on 10 November 2004. See www.nationmalawi.com/articles.asp?articleID=9321

disputes involving institutions involved in the political process, in general, and elections in particular. Between 1993 and 2003, the courts intervened in cases involving the President, Ministers, Parliament, individual Members of Parliament, political parties, the Electoral Commission, the police and the state broadcaster, the Malawi Broadcasting Corporation. In the 2004 elections, the judiciary played a more interventionist role at every stage of the process than they had done in the 1994 or 1999 elections. They intervened at new stages in the process and were more willing to adjudicate in internal matters of political parties. In 1994, most of the significant interventions emerged in relation to the legal framework and the polling itself. In 1999, the courts intervened at the campaign stage, while in 2004 the courts also intervened at the political party registration and candidate-selection stages, and sought to enforce accountability in relation to internal disputes of institutions such as political parties. In most of the cases, the courts authority was accepted and they were able to enforce accountability and compliance with the rules, and act as a safety valve and internal arbiter of various political disputes. In general, therefore, the courts made a positive contribution to the democratisation process in Malawi, constraining abuse of power and promoting democratic principles.

We hasten to add that lack of accountable government remains a great problem in Malawi, and that the quality of the democratic process has deteriorated in some respects. The 2004 elections were far from flawless – the playing field was not level and the integrity of the results in some cases doubtful.⁵⁵ In this perspective the courts in Malawi can be said to have failed to secure accountability to the rules and “unblock the democratic channels”. However, despite examples of cases where the courts from a democratic perspective could – and possibly should – have ruled differently, they have played a central role and made positive contributions throughout the democratic period, and have undoubtedly assumed a significant accountability function. It is thus appropriate to ask: Why did this happen? What enabled the courts to emerge from their subordinate position during one-party era, to start acting as an institutional constraint on government?

Underpinnings of the Malawian courts accountability function

In order to understand why the courts in Malawi has come to occupy such a central role in the political process, and has managed to establish a significant accountability function vis-à-vis the government, it is important both to look at *what has prevented the government* from reigning in the judiciary, *what has motivates judges* to take up such a role, and *what has motivated the parties* to lodge political cases in the courts.

We start by asking: *What has prevented the government from controlling the Malawian judiciary?*

Our assumption is that the following five factors are of key importance in order for judiciaries to establish and maintain their independence:⁵⁶

⁵⁵ Observers described it as “free but not fair” and as more lacking in terms of electoral administration and a level playing field than the two previous elections (whthe the 1994 elections being described as “free and fair” and the 1999 elections “substantially free and fair”. The lack of a level playing field is most strikingly reflected in the reports from the Media Monitoring Unit referred to above.

⁵⁶ See also Gloppen et al. (2004). The growing theoretical literature on judicial accountability includes Mark Ramseyer (1994), “The Puzzling (In)dependence of the Courts: A Comparative Approach,”

- The *formal constitutional mandate* that the courts operate within, determining the width of their mandate and the extent of their powers
- The arrangements in place to provide the judiciary with *structural independence* from the political branches (appointment procedures, procedures for promoting, disciplining and removing judges, security of tenure, remuneration, budgets)
- The *resources* available for the courts (infrastructure, staff, running costs, training, legal material) determines their ability to effectively process cases and deliver judgements.
- The *professional competence* of the judiciary, the personal and professional qualities of the judges on the bench (which is related to recruitment patterns, education and training – and the existence of professional forums that establishes professional standards and makes professional reputation matter.)
- And, last, but not least, the extent to which the courts have *protective constituencies* that make it costly for the government to encroach on their independence.⁵⁷ (Either due to their general legitimacy in society or to support from politically significant groups, such as business or donors)

By systematically investigating these factors, we may gain an understanding of the conditions under which judges operate and their *possibilities* for assessing their independence vis-à-vis other political bodies, but not why they choose to act on it. So, we need to ask: *What motivates Malawian judges to establish the judiciary as an independent institution holding political power holders to account?*

Our assumption is that the motivation for judges to establish and maintain their independence in the face of government pressure depend on:

- Their ethical standards – the norms of professionalism in the legal community and their judges perception of their own role
- The opportunity structures open to the judges (what they gain/stand to lose from acting contrary to the government versus supporting it)
- The predictability of the political context (in particular the ability to calculate who will be in power after the next election).⁵⁸

Since the legal system in Malawi is litigation- or lawyer-driven, in the sense that the judges can only pronounce on cases placed before them, and not take up cases on their own initiative, we also need to understand why cases are brought to the court. *What motivates the various actors on the political scene in Malawi to make use of the courts to further their aims?*

Journal of Legal Studies 23 (June) pp. 721-748; Peter H. Russell and David M. O'Brien, eds. (2001), *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World* (Charlottesville, VA: University Press of Virginia); Steven B. Burbank and Barry Friedman (2002) *Judicial independence at the crossroads : an interdisciplinary approach*. Thousand Oaks, Calif.: Sage Publications; and Andr as S ajo, A. and Lorri R. Bentch (2004) *Judicial integrity*. Leiden ; Boston, Mass.: Martinus Nijhoff Publishers.

⁵⁷ On this see also Widner, J (1999) "Building Judicial Independence in Common Law Africa," in A. Schedler et al. eds., *The Self-Restraining State: Power and Accountability in New Democracies* (Boulder, CO: Lynne Rienner), 180. and Widner, J. A. (2001). *Building the Rule of Law*, W.W. Norton & Company.

⁵⁸ See Peter VanDoepp (2003) "The Problem of Judicial Control in Africa's Neopatrimonial Democracies: Malawi and Zambia in Comparative View" (forthcoming in *Political Science Quarterly*).

We assume that the motivation for using the courts to resolve political matters, rather than concentrating energy and resources on fighting out contentious matters politically (or by other means), depend on:

- Prevailing norms regarding which matters fall within the scope of judicial authority.
- The costs of litigation (financial and in terms of time) versus the potential benefits
- The trust in the judiciary relative to other institutions (whether potential litigants may expect to get a fair hearing)
- The accessibility of other institutions for resolving disputes and for holding political power-holders accountable)

To investigate each of these dynamics in detail, looking at developments over time, go beyond the scope of this paper, but we will use the framework to highlight some important factors.

What has prevented (more extensive) government control of the judiciary?

Several of the factors assumed to be important for the ability of the government to control the judiciary, were altered radically at the time of the democratic transition in Malawi.

Formal constitutional mandate

A most important factor is that 1994 Constitution provides the courts with a broad mandate and extensive powers of judicial review. The judiciary has the responsibility of “interpreting, protecting and enforcing the Constitution and all laws in accordance with the Constitution in an independent and impartial manner with regard only to relevant facts and prescriptions of law”⁵⁹ Any apparent narrowness of the mandate that this section may suggest is compensated for by other sections which suggest a broader mandate for the judiciary which allows it to resolve political questions. Section 11(2)(a) of the Constitution provides that in interpreting the Constitution, courts must promote “the values which underlie an open and democratic society”. Obviously, such values are political and require the judge to know them and consciously promote them.

The Constitution mandates the judiciary to take full account of the “underlying principles” and the “principles of national policy” in the interpretation of any of its provisions.⁶⁰ The mandate of the judiciary to engage actively in the political process is further reinforced by constitutional provisions which declare that the Constitution – whose interpretation is the preserve of the judiciary- is the supreme arbiter, not only in the interpretation of all laws, but also “the resolution of *political* disputes” (emphasis supplied).⁶¹

The Constitution gives a broad and explicit “accountability-mandate” to the judiciary not only by expressly authorising it to resolve political disputes, in accordance with democratic values, but also by giving courts specific powers that enable them to hold to account individuals and public and private institutions. The Constitution gives the

⁵⁹ Section 9.

⁶⁰ Sections 11(2)(b).

⁶¹ Section 10(1).

judiciary wide powers of deciding for itself the scope of matters that it can handle, giving the courts the power to determine all issues of a judicial nature and the power to decide whether any particular issue is of a judicial nature.⁶² More to the point, the Constitution grants the High Court the authority and power to enforce accountability by providing that “the High Court has jurisdiction to review any law and any action or decision of the Government in addition to any other powers that may be conferred by the Constitution or any other law”.⁶³

No doubt then, the Malawian judiciary has a sound formal basis for adjudicating political disputes and asserting its authority over other arms of government.

Structural independence

In Malawi the institutional protection of judicial independence improved with the restructuring of the legal system that accompanied the transition from a one party dictatorship to a pluralistic constitutional democracy in the early 1990s. In the one-party state, judicial power had been vested in two sets of institutions. One system was based on the English legal system and had a judiciary consisting of Subordinate Courts, the High Court and the Supreme Court of Appeal. These courts enjoyed a fair amount of structural independence. However, their jurisdiction was increasingly restricted to non-political cases. The other set of legal institutions – the Traditional Courts – were loosely based on indigenous customary laws. These courts were not structurally independent. They operated under the control of the Minister of Justice. In the early 1970s, the upper echelons of the traditional courts were given power to try serious crimes including murder, treason and sedition. This enabled the state to get its will, but with hindsight probably contributed to the legitimacy of the current judiciary, by relieving the common law courts of the most politically tainting cases under the one-party regime.

The 1994 Constitution integrated the lower grades of Traditional Courts⁶⁴ into the English-based judicial system and dissolved the higher-level courts, thereby strengthening the structural independence of the judiciary as a whole. The 1994 Constitution also explicitly requires that judicial power must be exercised “independently of the influence and direction of any other person or authority”,⁶⁵ and provides structural mechanisms to insulate the judiciary from undue political influence in the form of special procedures for appointment of judges, security for tenure and conditions of service. Structural independence is strengthened by self-regulation in matters of promotion and discipline which fall under the Judicial Service Commission.⁶⁶

⁶² Section 103(2).

⁶³ Section 108(2).

⁶⁴ That is, the Regional Traditional Courts and National Traditional Appeal Court. In the integrated system, the highest court is the Malawi Supreme Court of Appeal, below which is the High Court, followed by Magistrates’ Courts.

⁶⁵ Section 103(1).

⁶⁶ Independence does not negate accountability. Thus, the judiciary is also subject to constitutional oversight by other institutions, the most important of which is Parliament and the President who acting in concert may effect the removal of a judge from office using the impeachment procedure outlined in Section 119 of the Constitution.

Still, there is significant scope for executive influence, both in the appointment process and in the 'reward and punishment' structure.⁶⁷ A number of stakeholders interviewed expressed the view that the appointment powers of the President limit the objectivity and independence of the process of selecting judicial officers. The executive retains considerable influence over appointments – particularly of High-Court judges, as well as over selection of judges to attractive and lucrative positions, such as commission chairs. The appointment process is open to manipulation that can undermine judicial independence because it lacks adequate scrutiny by the public and is predominated by powers of the President.⁶⁸ There is no public participation in the work of the Judicial Service Commission. Some see the lack of public participation in the selection of judicial officers and their appointment as a factor that threatens judicial independence – and the legitimacy of the judiciary – in Malawi.⁶⁹ Some academic commentators have also made similar observations.⁷⁰ Overall, though, our interviews with central stakeholders indicate that the judiciary was regarded as predominantly independent despite the concerns about the lack of independence and transparency of the appointments process.

The powers of Parliament and the President to impeach judges under section 119 of the Constitution can also be abused to undermine the structural independence of the judiciary.⁷¹ This was arguably the case in 2001 when Parliament passed a motion for

⁶⁷ The selection of judges of the High Court and Supreme Court of Appeal is open to criticism for not being sufficiently objective and transparent. Objectivity is limited mainly because the President has an undue influence on the process. The President appoints High Court and Supreme Court judges. He consults the Judicial Service Commission but they only make non-binding recommendations to him or her. In any case, members of the Judicial Service Commission are themselves appointed by the President. The power to appoint members of the Judicial Service Commission enhances the President's ability to determine the composition of the courts.

⁶⁸ Although in matters of internal regulation, the judiciary enjoys substantial structural independence, in terms of appointment, that independence can easily be subverted because transparency is virtually non-existent in the judicial appointment process. Vacancies are advertised widely but the names of applicants for judicial office are not made public, neither are the reasons for the final selection. Given that the Judicial Service Commission does not have members of the public or their representatives, the absence of publication of information about the process shields it from public or other external scrutiny. At best, this makes it easy for some people to allege that the selection is based on irrelevant considerations. At worst, it conveniently conceals the actual political manipulation of the judicial process through strategic appointment or exclusion of particular individuals, that actually takes place behind the veil of confidentiality.

⁶⁹ The latest appointments to the High Court bench did, in fact, cause some controversy when one of the applicants for appointment who had not been appointed suggested that he had been left out only because he came from the Northern Region of the country, and commenced legal proceedings against the Judicial Service Commission alleging bias. The case had not been concluded at the time of writing this report.

⁷⁰ For example, see P. Mutharika, "The 1995 Democratic Constitution of Malawi" [1996] *Journal of African Law* 205-219, 215-216; W. Dodge *et. al.*, *A Commentary on the Provisional Constitution of Malawi* (Washington D.C. 1994), F. Kanyongolo, "Human Rights in Polarised Societies: A Comparative Analysis of Malawi and South Africa", PhD Thesis, University of East Anglia, 1999.

⁷¹ The Constitution provides that a judge of the High Court or Supreme Court of Appeal may be removed from office only on two grounds: incompetence in the performance of the duties of his or her office or for misbehaviour. The tenure of judges is further secured by the constitutional provision that requires the removal of judges to be done in accordance with an elaborate procedure that protects the judge against unjustified or unfair removal from office. The President has the power to remove a judge from office after consulting the Judicial Service Commission. However, this is permitted only where the National Assembly has submitted a petition to the President seeking the removal of the judge. Such petition must be preceded by a debate in the National Assembly on the proposal to remove the judge

the impeachment of three High Court judges on questionable allegations of incompetence and misbehaviour. In the event, the President did not remove the judges from office not least because there was an outcry from local and international civil society organisations and donors. The attempt to remove the judges can partly be understood by seeing it as a reaction by Parliament to what it perceived as the judiciary's encroachment into parliamentary business in the various cases of judicial review in which the courts asserted a review power over decisions made by Parliament.⁷² Interestingly, both members of the judiciary and external observers and stakeholders indicate the Malawian judiciary emerged stronger from this 'crisis'. As one of the judges who had been subjected to impeachment said "we received support from the general public, from churches, NGOs and international donors, so we felt quite secure".⁷³

Professional competence

While structural independence is important, it is certainly no guarantee of judicial independence. There is ample evidence of independent minded judges in contexts where the structural conditions for independence are weak – and of executive minded judges in conditions where the judiciary enjoy excellent insulation from political interference. The personal integrity and attitude of the judges are always a crucial factor, but the legal culture, and level of professionalism in the judiciary is also of key importance. The judiciary is more likely to take on a role as guardians of the constitution and its democratic values where the judiciary has a degree of professionalism, and where judicial independence is among the standards set for professional conduct by the legal culture.

In Malawi, the judges from the one-party era remained on the bench after the ascendancy into power of the democratically elected government in 1994 (although this situation would over time change with an increasing number of new appointees). It might be expected that such judges would have been socialised into a pliant judiciary that was not independent of the executive branch of government and would continue to reflect this in the new dispensation. However, as noted earlier, the judiciary in Malawi – due to their politically marginalised status – retained a measure of independence and professionalism even under the one-party era.

Most stakeholders interviewed and most literature reviewed indicated that the judiciary is currently perceived as being, by and large, independent and professional. Nevertheless, some pointed out the need to further improve on professionalism by exposing judges to specialised training. In this connection, the judiciary indicated that it had plans to establish a Judicial Training Institute which will "provide training in judicial work, judicial administration, staff development, operational needs and

and can only be submitted to the President if it is passed by a majority of the votes of all the members of the Assembly. The Constitution requires that the removal of a judge must also abide by the principles of natural justice. The elaborate procedure laid down by section 119 is deliberately intended to guard against whimsical and arbitrary removal of judges from office: the grounds for removal are restricted to incompetence and misbehaviour, there are at least three institutions involved in the process and the procedure must accord with principles of natural justice.

⁷² For a more detailed discussion of the impeachment process see van Doepp (2003).

⁷³ Interview with authors, July 2004. The lack of support from within the judiciary and the Malawian legal community was, however, criticised, and the need to set up procedures for handling these types of cases, were underscored – but no such process has been initiated so far.

reform initiatives.”⁷⁴ Training initiatives for judges from several countries in the region were discussed.

Obviously, the ability to build and sustain capacity and competence in the judiciary as an institution as well as that of individual judges also depend on the resources at their disposal. It is, therefore, important to consider the availability of resources in the judiciary.

Resources

The availability – and predictability – of resources (for infrastructure, staff, running cost, library resources, training etc.) are crucial for courts' ability to build the capacity to fulfil an accountability function. But while important, resources in itself may be of little use without the institutional will and administrative ability (including technical support) to turn use them to build the required institutional strength.

An assessment by the United Nations Development Programme in 2001 concluded that by and large, the judiciary had demonstrated independence but that “judicial independence faces a threat from financial dependence on the Executive and the Legislature”.⁷⁵ It must also be pointed out, though, that in the past two years, some measures have been taken to enhance the financial autonomy of the courts. Most notable in this regard was the enactment of the Judicature Administration Act which, *inter alia*, authorises the judiciary to retain any money that court users pay in the form of fees and other payments. The demand for financial autonomy had been made by the judiciary for over ten years before it was finally enacted into law.⁷⁶ In its strategies for the period 2003 to 2008, the judiciary plans to secure that financial independence by, among other things, establishing “direct reporting by the Chief Justice to Parliament for all budgetary matters”.⁷⁷

The judiciary’s own assessment of the situation in the Malawi Judiciary Development Programme 2003-2008 is that: “Inadequate provision of fundamental legal resources, such as books, case reports, statute books and gazettes, greatly constrains the performance of the judiciary in its administration of justice.” But, although the judiciary does not have adequate resources, its situation must be placed within the broader context of the national economy. From that perspective, some argue that the judiciary is relatively better off than other public institutions,⁷⁸ while others, comparing conditions in the courts with those of the civil service, conclude that the judiciary is being starved of funds.⁷⁹

⁷⁴ Malawi Judiciary Development Programme 2003/11-2008/10, p. 15.

⁷⁵ United Nations System in Malawi, Common Country Assessment of Malawi: 2001 Report (Lilongwe, 2001)

⁷⁶ Following a Seminar on Judicial Administration organised in August 1993 by the Magistrates and Judges Association of Malawi, participants observed that: “for the better dispensation of justice, the government should provide [human, financial and other] resources adequately to the judiciary and [such resources] should be independently controlled by the judiciary”.⁷⁶ (my italics)

⁷⁷ Malawi Judiciary Development Programme 2003-2008, p. 18.

⁷⁸ This view is shared by United Nations agencies in the country who have observed that: “the shortage of funds is a problem faced by all branches of government and the financial constraints experienced by the judiciary should not be construed as intended to prejudice the courts.” (United Nations System in Malawi, Common Country Assessment of Malawi: 2001 Report, p. 31.)

⁷⁹ Personal communication with Justice Ministry official.

In Malawi, the higher judiciary (at the High Court and Supreme Court of Appeal level) – where the political cases are handled – has been relatively successful both with regard to secure funds, and in transforming them into institutional strength. Political cases in particular are disposed of swiftly. In the lower courts the situation is very different, with few resources and huge backlogs. This is disturbing with regard to another important factor underpinning an independent judiciary, namely the social legitimacy of the institution.

Legitimacy and 'protective constituencies'

People are motivated to refer their disputes to certain institutions, partly because they trust that its decisions are likely to be enforced. This is particularly the case where decisions are made against the government. In such cases, one critical factor that determines the enforcement of the court's decisions is the willingness of the government to comply with court decisions. The government's willingness to accept adverse judgements by the courts, depend to a large extent on whether the courts have secure social basis. If the judiciary has the trust and backing of important constituencies, it becomes costly for the government to ignore or override unfavourable judgments. If the weakness of the lower judiciary means that the formal courts system is irrelevant to the lives of most people, this may weaken the ability of the higher courts to stand up against the government.

In Malawi there are important constituencies backing the courts and their accountability function. In terms of popular support, the churches are probably the most significant. The churches (most prominently the Catholic Church) have been consistent and outspoken in their support for democratic ideals and the courts as institutions to safeguard citizens' rights. Another factor is that almost all actors on the political scene regularly turn to the courts. This indicates a measure of trust in the institution among political elites, which is a crucial resource. And, lastly, but of central importance: support from donors and the international community is an important resource for the judiciary. International recognition depends on being seen to respect the rule of law and the independence of the judiciary. This is of particular relevance for donor dependent countries like Malawi. Signals that encroachment on judicial independence may have negative consequences for the dispersing of funds (as happened in relation to the impeachment proceedings against three High Court Judges) may act as a deterrent against the most blatant strategies to constrain judicial independence.

Combined, these factors may explain why the Malawian government has not to a greater extent managed to escape the control of the judiciary. But we also need to understand the Judges motivation for taking on such a role. As the theoretical framework outlined above indicate, we assume that judges are led by a combination of normative considerations (a desire to be good judges) and strategic considerations (furthering their own career opportunities).

Given that most of the current judges were appointed – and all of them trained – in the one-party era, one might expect the professional norms and standards of judicial behaviour to be predominantly deferential and executive minded, and detrimental to the emergence of an assertive judiciary holding the government to account. However,

while there are compliant judges, this do not characterized the Malawian judiciary as a whole. And several judges express strong views on judicial independence. Why is this so? In this context the Banda administration's marginalisation of the common law courts – shielding them as it were from politically sensitive cases – seems to have been conducive in this regard, in the sense that within their confined jurisdiction, the courts maintained professional standards and independence.⁸⁰ That about half of the judges have studied outside the country (mainly in Britain, and some in the US) and more have been abroad for shorter periods of training, may also have shaped the norms of appropriateness within the judiciary in a more liberal direction.⁸¹ Given the small size of the judiciary, individuals also matter, and it has probably made a difference that certain influential judges have flagged strong views on judicial independence, both in their judgements and in other forums. Last, but not least, the constitution itself established new standards for judicial behaviour and an explicit accountability mandate. This is highly significant as it meant that also from a conservative, legal positivist perspective it is legitimate for the courts to overrule the political branches. In sum, although there are differences within the legal community, the legal norms of the Malawian judiciary seem to be relatively conducive to the development of an assertive role vis-à-vis the political institutions.

What about the judges personal incentives? On the one hand, there are the personal incentives (carrots as well as sticks) that the government may make use of to get compliant judges. These may be legal (such as expectations of appointment to lucrative positions), in a grey zone (such as concerns for family business interests), or illegal (threats or “money changing hands”). But there are also incentives for maintaining an independent stance. For one, it is a matter of recognition in the legal community and the broader public. For ambitious Malawian judges, who may see international careers as an attractive option, a record of independence is a great asset. And, thirdly, and perhaps most important, in an unpredictable political situation, where it possible or likely that there will be a shift in power, the safest bet for strategic minded judges, may actually be to maintain an independent, neutral, stance.⁸² Thus, given the political context in Malawi there are good reason for judges to signal their independence, particularly in the run-up to an election where the outcome of the contest is open, as in the recent elections.

We have now indicated possible factors explaining why the government in Malawi has not been able to completely control the courts, and why (some of) the judges have opted for a politically assertive role. It remains, however, to look at factors that may explain why the parties choose to use the courts – despite the costs of litigation – rather than other arenas to fight out their disputes.

Several informants have noted that the “winner take all” nature of judicial decisions are favoured by the political elites in Malawi – there seems to be a perception that it is better to have the courts settle matters once and for all than to go on negotiating and

⁸⁰ According to some informants, resentment against the way the courts were sidelined in the Banda, era also created a desire to get back into a more prominent role.

⁸¹ Although the British legal tradition itself is built around a principle of parliamentary rather than constitutional supremacy.

⁸² See also von Doepf (2003).

compromising politically.⁸³ That people with legal training figure prominently on the political scene in Malawi may have affected perceptions of which matters that belong in the courts, versus in the political domain, thus driving litigation.

Litigation is costly, in Malawi as elsewhere, good lawyers are very expensive, but this does not seem to deter parties from taking cases to the courts.⁸⁴ One reason may be that the costs are small relative to the potential economic benefits from gaining political office. Another factor may be that the legal route in many cases may be perceived as quicker and more reliable. The courts in Malawi have also been relatively quick in resolving political cases – and in particular with regard to the urgent applications that often arise in the election process, they may provide ‘instant relief’. Although the issue of cost is relatively minor to most of the litigants that have taken cases to court, it is a crucial one in relation to the broader population. While political parties and NGOs can easily afford the costs of litigation, the average Malawian voter cannot. This is probably the reason why among the elections cases decided since 1994, none was commenced by a typical Malawian voter who lives in the rural areas below the poverty line.

However, the main factor explaining the extent to which political cases are taken to court in Malawi is probably the level of trust in the judiciary relative to other institutions. During the past decade, the courts have built a record of independence (although not untainted), and even those who express doubt in the independence of the judiciary will take cases to court and expect to get a fair hearing. Sometimes the reason given is that there are no real alternatives, the representative institutions – parties, parliament – are not seen as viable routes to go. In this sense the centrality of the judiciary in Malawian politics should be seen both as a result of developments in the courts themselves, and as a consequence of the weakness of the vertical channels for holding government to account.

Concluding remarks

In this paper we have aimed to describe the nature and extent of the role played by the courts in Malawian politics in the context of the 2004 presidential and parliamentary elections. We have also sought to explain why the courts have come to occupy such a central position on the political scene in Malawi, looking at the recent history, as well as factors that explain why it has been difficult for the government to fully control the courts; what has motivated the judges to assume a political role; and what motivates the parties to bring political disputes to the courts.

We have shown that the courts have been involved at every stage of the process, interacting with the various stakeholders (the Electoral Commission, political parties, the Executive, Parliament). In doing so, the judiciary has assumed four politically significant functions:

⁸³ Other informants disputed this view, holding that adversarial conflict resolution is alien to Malawian culture.

⁸⁴ According to some of the lawyers interviewed, the political parties were bad clients in terms of paying for services rendered, but good for business in the sense that high-profile political cases gave opportunities for positive exposure – particularly if the litigation was successful.

On several occasions the judiciary has taken on an *accountability function*-- sanctioning violations of electoral rules and broader democratic principles; acting to hinder self-serving alterations of the legal and institutional framework for the elections and preserve space for actors in political and civil society to perform a meaningful role in the electoral process.

The courts have also functioned as a *safety-valve* at various stages of the electoral process. They have diffused tension, for example when electoral results are disputed, by providing an arena where the contesting parties can fight out their battles through their lawyers, after a cool-off period. In such cases, the courts also provide the losing parties with a face-saving option, they can use strong rhetoric and be seen to “do something”, and subsequently let the case fizzle out and die, outside the public eye.

In the 2004 elections, the courts also took on a new role, namely that of an *internal arbiter* in intra-party disputes. A large number of disputes regarding the parties’ selection of candidates went to the courts.⁸⁵ The courts do not have a clear legal basis for holding party leadership accountable to party-internal procedures for candidate selection. Still, there were few questions as to whether it is legitimate or prudent for the courts to adjudicate in these cases, which previously and in other countries are handled internally by party structures, and this seems to reflect a lack of legitimate and trustworthy mechanisms for dispute resolution within the parties.

Lastly, we have shown that different actors on the political scene in Malawi have used the courts to increase their *political leverage*. Criminal cases involving allegations of forgery, murder and treason (and threats of laying such charges) have been used by the government to discredit political opponents and as a means to persuade them into cooperation. While opposition parties have used court challenges (election petitions) as bargaining chips, withdrawing the case in return for cabinet positions.

The four roles that the courts have been cast in during the 2004 electoral process are all highly significant, affecting the nature of electoral politics in Malawi. But from the perspective of democratic consolidation and the integrity of the electoral process, the effects are ambiguous. While the accountability function is crucial from a democratic perspective, and the safety valve function is conducive to social peace in a situation where the political institutions are weak, the role of intra-party arbiter is more problematic. It may render the courts vulnerable to politicisation and also seems to contribute to the tendency of turning political disputes into matters of monetary compensation for individuals. The courts’ role in creating political leverage for the parties and individual candidates is in many instances directly anti-democratic in nature, undermining the influence of the voters and the vertical accountability relationships of the political system.

A main negative consequence of the judiciary’s increased political involvement is that it may be (and to some extent already has come to be) identified with particular vested interests, as various contestants in the political arena seek ways of controlling the judiciary in order to exploit its power for political gain. The critical challenge of any judiciary in this situation is to sustain its accountability function and institutional independence. In Malawi, courts have generally managed to sustain their

⁸⁵ Particularly from parties relying on primary elections.

independence and, therefore, been able to perform a significant accountability function. However, if the courts maintain – or continue to increase – their involvement in the political process, it is likely that the judiciary increasingly will be perceived as politically biased.

So while the Malawian courts have demonstrated a considerable degree of independence throughout the election period, and beyond doubt have contributed positively to the electoral process, there are also worrying signs.

Summary

The courts in Malawi have played a prominent role in political life since the democratic transition in 1993, which came about after three decades of repressive authoritarian rule. Whilst the quality of electoral politics have deteriorated, the courts have become increasingly central. In the 2004 elections they were involved at every stage of the election process. In this paper we argue that the Malawian judiciary has assumed four politically significant functions in the electoral process: it performs an accountability function, acts as a safety-valve, plays the role of an internal arbiter for the political parties; and functions as a source of political leverage. Furthermore, we argue that in order to understand this increasing politicisation of Malawian politics, it is important both to look at what has prevented the government from reigning in the judiciary, what has motivated judges to take up such a role, and what has motivated the parties to lodge political cases in the courts.

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