IFES State of the Judiciary Report Series

# STATE OF THE JUDICIARY REPORT:

## Malawi 2003

*April 2004*

Edge Kanyongolo

*Editor*

IFES

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This State of the Judiciary Report for Malawi was written by Edge Kanyongolo, J.D., L.L.M., Ph.D., a Malawian law professor with broad expertise in constitutional law, media law and human rights. Edge Kanyongolo has served as facilitator and presenter in many symposia, workshops and conferences on constitutional issues, human rights and civil liberties in Malawi and other African countries. He has worked as a consultant for UN agencies, bilateral donors, non-governmental organizations and others and has participated in the development and implementation of various development and Rule of Law programs in Malawi.

This State of the Judiciary Report for Malawi was edited by Keith Henderson, IFES Senior Rule of Law Advisor, and Violaine Autheman, IFES Rule of Law Advisor, who are the authors of the Executive Summary and of Chapter 1 of this Report. They are also responsible for the analytical conclusions in the tables which attempt to evaluate the level of compliance with the Judicial Integrity Principles, included in the Executive Summary and in Annex 2.

**STATE OF THE JUDICIARY REPORT**
**MALAWI, 2003**

**TABLE OF CONTENTS**

**Executive Summary and Analytical Evaluation, State of the Judiciary, Malawi, 2003** 1

**CHAPTER 1: State of the Judiciary Report, a Tool for Monitoring and Reporting on Priority Judicial Integrity Reforms** 3

I. Judicial Integrity Consensus Principles and Best Practices
II. IFES Rule of Law Toolkit
III. A Model State of the Judiciary Report: Multiple Purposes, Multiple Constituencies
IV. Blantyre Communiqué
V. Methodology

**CHAPTER 2: General Comments and Context for the State of the Judiciary Report, Malawi, 2003** 9

I. General Comments
II. Social, Economic and Political Context
III. Legal and Institutional Context

**CHAPTER 3: Level of Compliance with the Judicial Integrity Principles** 13

SECTION 1: Level of Compliance with the Judicial Integrity Principles Guaranteeing the Independence of the Judiciary as an Institution 15

JIP.1: Constitutional Guarantee of Judicial Independence
JIP.2: Institutional Independence of Judges

SECTION 2: Level of Compliance with the Judicial Integrity Principles Guaranteeing the Independence of Judges 19

JIP.2: Personal, Decisional Independence of Judges
JIP.4: Adequate Judicial Resources and Salaries
JIP.5: Adequate Training and Continuing Legal Education
JIP.6: Security of Tenure
JIP.9: Adequate Qualifications and Objective and Transparent Selection Process

I. Adequate Qualifications
II. Objective and Transparent Selection Process

JIP.13: Conflict of Interest Rules
JIP.14: Income and Asset Disclosure
JIP.15: Rules of Judicial Ethics

SECTION 3: Level of Compliance with the Judicial Integrity Principles Related to Guarantees of the Fairness of Judicial Proceedings and the Fundamental Rights of Litigants 37

JIP.1: Guarantee of the Right to a Fair Trial, Equality under the Law and Access to Justice

I. Guarantee of the Right to a Fair Trial
II. Guarantee of Equality under the Law
III. Guarantee of Access to Justice

JIP.7: Fair and Effective Enforcement of Judgments

SECTION 4: Level of Compliance with the Judicial Integrity Principles Guaranteeing Expression and Information Rights 43

JIP.17: Judicial Access to Legal and Judicial Information
JIP.18: Public Access to Legal and Judicial Information

**CHAPTER 4: Conclusions and Recommendations** 47

**ANNEX 1: Stakeholders Interviewed** 49
**ANNEX 2: Analytical Evaluation of the Level of Compliance with the JIP in Malawi** 51

## EXECUTIVE SUMMARY AND ANALYTICAL EVALUATION, STATE OF THE JUDICIARY, MALAWI, 2003

The 2003 State of the Judiciary Report on Malawi marks a strategic turning point in the country's and region's approach to promoting fundamental justice reform. For the first time, the Malawian public and others now have the kind of information necessary to properly evaluate the judiciary as a key government institution and to closely monitor the implementation of judicial independence reforms. Malawians have learned well that without an independent judiciary their democratic constitution and the rights embedded in it is little more than a paper tiger.

Unlike other judicial reform reports prepared in the past, this one is organized around a set of twelve high-priority issues and global judicial integrity principles critical to creating the legal and political enabling environment necessary to strengthen the independence and accountability of the judicial branch and promote a Rule of Law culture. It builds upon the action plan and monitoring and reporting mechanism established, under the leadership of Chief Justice Unyolo of Malawi and other reformers from eastern Africa, in the recent groundbreaking regional declaration called the *Blantyre Communiqué*.

This Report should be replicated annually so that progress and problems related to the independence and accountability of the Malawian judiciary can be systematically reported on and monitored by the judiciary, reformers, the media, donors, and, most importantly, civil society. It could also serve as a model for all other countries in the region and help promote the implementation of the *Blantyre Communiqué*.

An analysis of these issues, as reflected in the table on the next page, leads IFES to conclude that the overall state of the Malawian judiciary remains so weak that it is only able to fulfill its constitutional or international obligations in three out of the twelve areas analyzed. This unique, baseline Report clearly and methodologically paints a picture of a struggling but comparatively well-respected judiciary that is struggling to maintain and strengthen its independence from the Executive and legislative branches. Constant budgetary battles to obtain the most basic resources necessary to function, including basic facilities, staff, legal information and minimal salaries, make the judiciary's struggle for independence even more difficult. Other fundamental, interrelated problems pertain to a non-transparent appointment process and poor access to basic legal information, legal representation and judicial accountability.

It is remarkable that within this context the Malawian judiciary is as independent as it is and that it is viewed by the public as the most credible branch of the government. However, it is equally clear that without more political and financial support from both the Malawian Government and the donor community, as well as more public support from the Malawian public, the judiciary will remain under siege and its full development as an independent institution capable of rendering and protecting justice will not be realized in either theory or practice.

If the high-priority problems and reforms clearly presented in this Report and the *Blantyre Communiqué* are addressed, then the citizens of Malawi may finally be able to exercise their constitutional civil liberties and property rights fully. Until these steps are taken the Malawian people's dream and the constitution's promises will remain illusive. The people of Africa deserve no less than independent, accountable judiciaries, and this Report is an important step in this direction for Malawi.

## Malawi State of the Judiciary: Analytical Evaluation of the Level of Compliance with the Judicial Integrity Principles, JIP

| JIP | SCOPE OF THE JIP (NAME OF THE PRINCIPLE) | COMPLIANCE[1] |
|---|---|---|
| 1 | Constitutional Guarantee of judicial independence | |
| | Guarantee of the right to a fair trial | |
| | Guarantee of equality under the law | |
| | Guarantee of access to justice | |
| 2 | Institutional independence of the judiciary | |
| | Personal/decisional independence of judges | |
| 4 | Adequate judicial resources and salaries | |
| 5 | Adequate training and continuing legal education | |
| 6 | Security of tenure | |
| 7 | Fair and effective enforcement of court judgments | |
| 9 | Adequate qualification | |
| | Objective and transparent selection and appointment process | |
| 13 | Conflict of interest rules | |
| 14 | Income and asset disclosure | |
| 15 | Rules of judicial ethics | |
| 17 | Judicial access to legal and judicial information | |
| 18 | Public access to legal and judicial information | |

1 The level of compliance with each Judicial Integrity Principle (JIP) or each subcategory of a JIP is coded as follows: white corresponds to "satisfactory"; gray to "partially satisfactory"; and black to "unsatisfactory". There is an additional nuance in the assessment of the level of compliance as arrows pointed upwards or downwards indicate, respectively, improvement or regression within one category. The JIP were developed by IFES as key consensus principles of judicial integrity as found in most country constitutions, international obligations, international case law and emerging best practices. For more information on these principles, see IFES Rule of Law White Paper Series, White Paper #6, Framework for a State of the Judiciary Report, 2004 (available at IFES).

## CHAPTER 1

## STATE OF THE JUDICIARY REPORT, A TOOL FOR MONITORING AND REPORTING ON PRIORITY JUDICIAL INTEGRITY REFORMS

### I. Judicial Integrity Consensus Principles and Best Practices

Both the IFES Judicial Integrity Principles and the IFES Model State of the Judiciary Report were prepared over the course of a two-year timeframe during which IFES organized country and regional workshops and conferences in virtually all regions of the world. It was first presented formally during a Workshop on Judicial Integrity at the 11th Transparency International Global Conference held in Seoul, South Korea, May 25-28, 2003. Panelists and participants at various workshops and conferences, including judges, international and national human rights monitoring groups, donors and the business community, all strongly endorsed the need for a systematic monitoring and reporting framework as an effective tool to promote judicial integrity, priority transparency and accountability reforms, and more public confidence in the judiciary.[2]

**IFES Rule of Law Tools: Judicial Integrity Principles, JIP**

**JIP.1** Guarantee of judicial independence, the right to a fair trial, equality under the law and access to justice
**JIP.2** Institutional and personal/decisional independence of judges
**JIP.3** Clear and effective jurisdiction of ordinary courts and judicial review powers
**JIP.4** Adequate judicial resources and salaries
**JIP.5** Adequate training and continuing legal education
**JIP.6** Security of tenure
**JIP.7** Fair and effective enforcement of judgments
**JIP.8** Judicial freedom of expression and association
**JIP.9** Adequate qualification and objective and transparent selection and appointment process
**JIP.10** Objective and transparent processes of the judicial career (promotion and transfer processes)
**JIP.11** Objective, transparent, fair and effective disciplinary process
**JIP.12** Limited judicial immunity from civil and criminal suit
**JIP.13** Conflict of interest rules
**JIP.14** Income and asset disclosure
**JIP.15** High standards of judicial conduct and rules of judicial ethics
**JIP.16** Objective and transparent court administration and judicial processes
**JIP.17** Judicial access to legal and judicial information
**JIP.18** Public access to legal and judicial information

The JIP represent high priority consensus principles and emerging best practices found in virtually all global and regional governmental and non-governmental instruments and key international case law related to the independence and impartiality of the judiciary. They attempt to capture the current state-of-the-art meaning of the term "judicial independence", since this fundamental principle is found in virtually all democratic constitutions and many international treaties, guidelines and documents. The JIP also attempt to incorporate and build upon the principles and information contained in important monitoring tools and reports, such as the American Bar Association's Judicial Reform Index; the Open Society Institute Judicial Independence Accession

2 These panelists and participants included judges; parliamentarians; representatives of civil society organizations, such as human rights groups and the media; representatives of international organizations, such as the World Bank, the Inter-American Development Bank and the Council of Europe; bilateral donors; legal scholars; lawyers.

Reports; the International Commission of Jurists Reports; the US State Department's Annual Human Rights Reports, the United Nations, OAS and Council of Europe Human Rights and Anticorruption instruments; and the work of Amnesty International and Human Rights Watch.

More than anything else, however, the JIP global framework is geared towards prioritizing judicial reforms and democratizing judiciaries. Global lessons learned tell us that this is one of the key challenges confronting most established and emerging democratic countries over the next several decades and that this is the best way to establish broad-based support for more independent, accountable judiciaries worldwide. The JIP are intended as a global analytical tool designed to annually assess technical and actual compliance with core, judicial integrity principles and to promote a regional and global strategic judicial reform agenda on a country-by-country basis.

The JIP promote best practices, lessons learned and comparative, systematic research by focusing on and emphasizing a reform agenda aimed at fostering an enabling environment and legal culture necessary for the Rule of Law to take root. For purposes of this paper, "judicial integrity" covers a wide range of independence and accountability issues related to both the institution of the judiciary and judges as individual decision-makers. IFES believes using the term "judicial integrity" to capture the contemporary, full meaning of judicial independence, and then developing a strategic framework around that evolving definition, will help promote the concrete implementation of a fundamental constitutional principle. We believe it will also serve to emphasize how important it is to carefully balance independence and accountability issues and to simultaneously promote prioritized, inextricably linked reforms that also need to be undertaken.

## II. IFES Rule of Law Toolkit

The JIP represent the core framework principles that should be included in any country State of the Judiciary Report. The JIP and this annotated outline for a State of the Judiciary Report are components of the IFES Rule of Law Toolkit, which has been designed to provide civil society, reformers and other stakeholders with standardized and flexible tools to promote and undertake reform. While well-conceived regional and global indexes and reports provide necessary guidance and support to those using them, the key to their proper interpretation is that they take into account the country context within which they are developed.

The guidance provided by the IFES tools is considered to be a work in progress, and the tools are designed to integrate and promote evolving regional and international consensus principles. IFES has now formed a small, informal advisory group, the IFES Judicial Integrity Working Group, to refine these tools and methodology. Distinguished members of the working group include Judge Sandra Oxner of Canada, Judge Clifford Wallace of the United States, Chief Justice Hilario Davide, Jr. of the Philippines and Judge Luis Fernando Solano, President of the Constitutional Chamber of the Supreme Court of Costa Rica.

## III. A Model State of the Judiciary Report: Multiple Purposes; Multiple Constituencies

**IFES Rule of Law Tool:**
**Multiple Uses of the Annual State of the Judiciary Report**

**(i)** Making judicial integrity and justice sector reforms, particularly those related to human rights higher-priority reform issues across regions;

**(ii)** Developing broad-based coalitions and judicial reform strategies around a common justice reform agenda within countries and across regions;

**(iii)** Developing strategic concrete action plans designed to implement prioritized justice reforms based on global, regional and country best practices;

**(iv)** Presenting prioritized recommendations for the development of strategies and policies and for a legal and judicial reform agenda;

**(v)** Providing the public, the media and the broader indigenous and international legal communities with the essential information they need to promote justice reforms and develop public trust in the Rule of Law;

**(vi)** Reporting on justice reform progress or regression through uniform but flexible indicators and monitoring standards that could be used to justify more resources domestically and increased donor and technical assistance;

**(vii)** Promoting higher quality empirical research, monitoring and reporting as well as coordinated, strategic action among reformers and international organizations and donors and more peer pressure among all actors in the reform process;

**(viii)** Enhancing the importance of the judiciary and the status of judges;

**(ix)** Increasing the quality of information on the judiciary and key judicial integrity principles and access to that information;

**(x)** Increasing the public understanding of and respect for the judiciary;

**(xi)** Providing judges, the legal community, reformers and civil society with the tools and information necessary to advocate for reform and funding domestically and internationally; and

**(xii)** Qualifying for donor assistance through the new Millennium Challenge Account and meeting terms of conditionality through the international financial institutions and development banks, such as the IMF, World Bank, IDB, ADB and EBRD, and free trade and anti-corruption conventions and protocols.

After IFES reviewed a number of judicial reports from around the world, including those promulgated by various judiciaries or human rights groups, the need to design a standardized, structured framework for an annual report assessing the state of the judiciary became very clear. IFES found no model State of the Judiciary Report in any country in the world, including the United States. It also found minimal lessons learned, best practices or comparative information or research, including underdeveloped and non-prioritized judicial and legal reform measurements of progress, such as those under consideration by the new Millennium Challenge Account in the United States.

IFES believes the JIP may be used by civil society organizations and judges to prepare an annual State of the Judiciary Report that could serve to promote high-priority reforms and as a baseline monitoring, reporting and implementation tool for establishing the enabling legal environment to globalize the Rule of Law. These country-specific reports should be written in a participatory process, including the input of civil society organizations,

judges and legal practitioners. A country's annual report should be as "national" a product as possible, in order to be useful to the local judiciary and local civil society groups. It should also be understandable and accessible to all local stakeholders and include both a technical and applied analysis of the law and practice. At a minimum, IFES hopes the analysis and framework offered here will spark more debate and attention to what has been the most neglected and probably least appreciated institution in the democratizing world.

## IV. Blantyre Communiqué

In January 2003, IFES organized a regional conference on *The Separation of Powers in a Constitutional Democracy* along with the Chief Justice of Malawi and with financial support from USAID. The conference brought together a cross-section of government officials; legislators; judges; lawyers; and representatives of human rights organizations, the media, and civil society groups from countries of the Southern Africa Development Community (SADC) with a large participation of Malawians. The Conference culminated with the adoption of the *Blantyre Communiqué*, the first consensus document in the region to provide a living framework for monitoring and reporting on the reforms underway with participation from civil society groups and representatives of the three branches of government.

**Highlights of the *Blantyre Communiqué***

- Coalition to promote and support judicial independence and the Rule of Law;
- Commitment by the three branches of the State;
- Participation of civil society and the media;
- Adoption of country and regional monitoring and reporting mechanisms;
- Objective judicial selection process and security of tenure; and
- Fair and effective enforcement of judgments

The *Communiqué* highlighted underlying principles, highlighted key consensus findings and universal principles of judicial independence for the SADC Region, and proposed ten key recommendations to improve and promote the separation of powers and judicial independence. The Chief Justice of the Malawi Supreme Court of Appeal, Honorable Leonard E. Unyolo, certified the *Communiqué*. The conference participants expressed a general interest in seeing the conference become an annual SADC event, to holding similar events in every SADC country and to developing a reporting and monitoring mechanism designed to promote judicial independence throughout the region.

IFES believes that this *Communiqué* suggests the commitment of the judiciary to judicial reform and judicial independence and the need to adopt and implement a methodology for a State of the Judiciary Report (SOJ) for Malawi. The positive agreement reached by representatives of various constituencies throughout the SADC region to support the strengthening of judicial independence and the Rule of Law has the potential to counterbalance the negative image and inefficiency of the judiciary perceived by the Malawian population and the global community.

## V. Methodology of the State of the Judiciary Report

The IFES Model State of the Judiciary Framework is built around the need to implement and link up key reforms embedded in the JIP. The State of the Judiciary Report is developed through a multifaceted methodology that incorporates an array of information resources, including users of the legal system, necessary to assess the level of JIP compliance. The JIP and their accompanying Indicators serve as the guideposts with which to regularly measure implementation progress or regression. An eminent Malawian jurist authored the Malawian State of

the Judiciary Report. His work was supported through IFES's Rule of Law Division in Washington, DC.[3]

While all the JIP are important and their relevance in the country context varies, IFES's working assumption for the State of the Judiciary Report is that certain mutually supportive principles are essential to establishing the legal enabling environment necessary to build an independent, accountable judiciary and a Rule of Law culture. We also believe that for purposes of capturing global issues, lessons learned, model programs across borders, it is also important for all country reports to uniformly cover a specific set of principles. We also knew that preparing the first reports was going to require more time and resources than IFES alone could manage.

While one could debate exactly which principles should be part of any global project, the research and experience pointed us to the following seven principles: **JIP.1 (judicial independence guarantees); JIP.2 (institutional and personal independence); JIP.9 (selection); JIP.13 (conflict of interests); JIP.14 (asset disclosure); JIP.17 (judicial access to information); and JIP.18 (public access to information)**. As a result, we requested that country authors cover at least these seven issues. However, they were encouraged to place as much emphasis on these issues as they deemed appropriate and to include additional principles if the country context and need demanded it. In this case the Malawian author believed the following five JIP also needed to be highlighted in this first Report: **JIP.4 (resources); JIP.5 (training); JIP.6 (security of tenure); JIP.7 (enforcement); and JIP.15 (ethics).**

Assessment of the level of compliance with each of the JIP is guided by an examination of relevant laws and practices identified through a survey of legislation and jurisprudence and interviews of key stakeholders in the justice sector. There are three degrees of compliance:

- Formal compliance (laws and decrees);
- Compliance in practice (effective implementation of laws and decrees as well as of constitutional and conventional principles); and
- Quality and integrity of the compliance in practice (fair implementation for all).

The Report outlines, in the country context, the legal and institutional framework within which the judiciary operates. The Indicators[4] serve as guideposts for the analysis of the level of compliance with each of the JIP. This analytical process guides IFES, in close consultation with the Report's author, to make an overall judgment as to whether there is a "satisfactory", "partially satisfactory" or "unsatisfactory" compliance, with the possible nuance of "improving" or "regressing" and to present prioritized reform recommendations.

3 IFES is currently finalizing Guidelines for the completion of State of the Judiciary Reports in a standardized Handbook for use by any country or groups of reformers, jurists or civil society activists.

4 The Indicators for a State of the Judiciary Report are available at IFES upon request.

## CHAPTER 2

## GENERAL COMMENTS AND CONTEXT FOR THE STATE OF THE JUDICIARY REPORT, MALAWI, 2003

### I. General Comments

Before Malawi was colonized by Great Britain at the end of the 19th Century, judicial power was exercised by various traditional authorities who belonged to different political and legal orders organized mainly along ethnic lines. The introduction of the colonial State included the establishment of a judiciary. The High Court was established in 1902, and in the following years, other courts were created, organized and reorganized. The colonial administration did not, however, supplant the indigenous customary laws and institutions that they found. Further, decolonization and independence did not bring any radical changes to the basic structure of the judiciary. The High Court and its subordinate courts continued to operate parallel with the so-called traditional courts. Between 1964 and 1993, Malawi operated a one-party system of government, in which traditional courts were used to undermine the High Court system.

The judiciary in Malawi has not always enjoyed independence and has occasionally experienced interference by both the Executive and the legislature. One of the most serious incidents occurred in 1969 when, in response to the acquittal of the accused in a high-profile murder case, the law was amended, at the initiative of the executive, to grant "Regional Traditional Courts" jurisdiction that was concurrent with that of the High Court in respect to the offenses of murder, treason, sedition and many other criminal offenses.[5] The accused, who had been acquitted by the High Court, were then retried in the Traditional Court and, predictably, convicted.

In fact, the Traditional Courts established under the Traditional Court Act lacked the basic independence that courts require in order to be able to uphold the Rule of Law: members of the courts were appointed by the Minister of Justice.[6] The Minister could also dismiss or suspend any member of a Traditional Court if it appeared to him or her that the member had abused his power, was unworthy or incapable of exercising his or her power justly, or there was "other sufficient reason".[7] In addition, the judgments of Traditional Courts could be varied or set aside by an official of the Ministry of Justice called the Chief Traditional Courts Commissioner,[8] and parties appearing before the courts were not entitled to legal representation unless the Minister of Justice authorized such representation.[9] Clearly, then, these courts were not independent of the executive and were not able, therefore, to facilitate the Rule of Law.

Evidence of subsequent interference with judicial independence and, therefore, the Rule of Law, emerged upon the resignation of the Minister of Justice in March 1993. The Minister was quoted in the media saying that: "Because I did not want to intervene with the laws and proceedings of the courts by virtue of my position, I have quit the [C]abinet".[10] It was also during this period that it was shown that it is not only the government that may threaten the Rule of Law by interfering with judicial independence. Following the conviction by the High Court of leading pro-democracy activist, Chakufwa Chihana, for sedition in 1993, the Alliance for Democracy (AFORD), which was then a pressure group, called for the removal of the judge who had presided

5 Regional Traditional Courts (Criminal Jurisdiction) Order, GN 198 of 1970.
6 *Idem*, Section 4.
7 *Idem*, Section 5.
8 *Idem*, Section 32(1)(d) and (e).
9 *Idem*, Section 24.
10 "Why I Quit: Makuta Says he Refused to Sway the Courts", *The Malawi Financial Post*, March 24 – April 7 1993.

over the trial.[11] On the face of it, it could also be argued that it was also equally an interference with judicial independence for the Christian Council of Malawi to have called for "the immediate and unconditional release of Mr. Chihana" after he had been convicted by the High Court.[12]

In more recent times, the threat to judicial independence has emanated from the legislature. There are a number of ways in which the legislative branch of government may interfere with the judiciary and thereby undermine its independence. Passing legislation that subjects the judiciary to the control of another branch of government or some other institution is the most obvious way in which this might occur. Less obviously and, therefore, perhaps more invidiously, the legislature can also control the judiciary by under-funding it. But of more topical interest is the fact that the legislature may also undermine judicial independence by an injudicious use of its power to initiate the process of removal of judges.

## II. Social, Economic and Political Context

The total population of Malawi is approximately 11 million people. The population is characterized by severe poverty and wide inequalities. It is estimated that 65.3 percent of the population is 'poor', with 28.2 percent of the total population living in 'dire poverty'. In terms of income distribution, the richest 20 percent of the population consumes 46.3 percent of the resources, while the poorest 20 percent consume only 6.3 percent.[13] Literacy rates are low, estimated at 51 percent for women and 64 percent for men.[14]

## III. Legal and Institutional Framework

The basic law of Malawi is its Constitution which came into force in 1994 when Malawi transitioned from a one-party dictatorship to a multiparty democracy. The Constitution is remarkably elaborate in creating various state institutions of governance, including the judiciary. One whole chapter of the Constitution is dedicated to the judiciary, making provisions for judicial appointments, powers, independence and oversight by Parliament.[15] The Constitution also defines the responsibilities of the judiciary, as opposed to those entrusted to the legislative and Executive branches, as including the interpretation, protection and enforcement of the Constitution and of all laws.[16] 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".

The Constitutional provisions on the judiciary are supplemented by a number of statutes that regulate the more detailed operations of the courts. The Courts Act generally regulates various aspects of the operations of the High Court and subordinate courts, while the Supreme Court of Appeal Act governs the work of the Supreme Court of Appeal. For its part, the Labour Relations Act establishes the Industrial Relations Court and mainly empowers it to adjudicate labour disputes. The Malawi Supreme Court of Appeal, which is the highest appellate court, is required to have at least three Justices of Appeal and is headed by the Chief Justice, who is also overall

11 Alliance for Democracy Press Release, 29 March 1993. Also, see, rebuttal of the Press Release by the then pro-government paper *Daily Times*, 13 April 1993.
12 Christian Council of Malawi, Press Release, 21 December 1992.
13 Malawi Government, 2002, *Malawi Poverty Reduction Strategy Paper* (Lilongwe: Malawi Government).
14 Malawi Government, 1998, *Malawi Population and Housing Census* (Zomba: Government Printer).
15 Constitution of Malawi, Chapter IX (1994).
16 Constitution of Malawi, Section 9 (1994).

head of the judiciary. The High Court has unlimited original civil and criminal jurisdiction. It also hears appeals from subordinate courts which are at the bottom of the hierarchy and consist of magistrates' courts, the Industrial Relations Court, and traditional local courts.

In performing its functions, the judiciary is supposed to act independently and impartially. This means that courts should not base their decisions on external pressure or irrelevant considerations.

The Constitution expressly requires courts to base their decisions only on:

- Relevant facts and law;
- Underlying constitutional principles;
- The Constitution's principles of national policy;
- Human rights and values which underlie an open and democratic society;
- Applicable current norms of public international law; and
- Comparable decisions of foreign courts.[17]

17 Constitution of Malawi, Section 11(2) (1994).

## CHAPTER 3

## LEVEL OF COMPLIANCE WITH THE JUDICIAL INTEGRITY PRINCIPLES

The Malawian judiciary appears to be committed to the values of integrity that include independence and impartiality. Its mission statement, which reflects this and forms the basis for its development plans, is:

> *"To provide independent and impartial justice and judicial services that are efficient and that earn the respect, trust and confidence of society."*

The judiciary places emphasis on public confidence because "the integrity of the judiciary should never be in doubt to the public".[18] The judiciary has identified efficiency, transparency, consistency, and responsiveness as being critical to ensuring the integrity of the judiciary.

The IFES Judicial Integrity Principles (JIP) were accepted, in principle, by the Malawian judiciary. The *Blantyre Communiqué*, issued at the closing of a Regional Conference on the Separation of Powers held in Malawi in January 2003 and certified by the Chief Justice of Malawi, effectively endorsed many of these principles.

This first State of the Judiciary Report centers on an assessment of the level of compliance with twelve JIP, seven of which were selected by IFES as core principles for the establishment of the legal environment necessary to build an independent, accountable judiciary and a Rule of Law culture: **JIP.1 (judicial independence guarantees); JIP.2 (institutional and personal independence); JIP.9 (selection); JIP.13 (conflict of interests); JIP.14 (asset disclosure); JIP.17 (judicial access to information); and JIP.18 (public access to information)**. The other five were chosen for analysis by the Report's author as additional issues that needed to be highlighted in the Malawian context: **JIP.4 (resources); JIP.5 (training); JIP.6 (security of tenure); JIP.7 (enforcement); and JIP.15 (ethics)**. They are divided into four sections designed to present the analysis thematically.

The first section studies the degree of effectiveness of the JIP as they guarantee the independence of the judiciary as an institution. The second section analyzes the level of compliance with the JIP guaranteeing the independence of judges. The third section provides insight into the respect for JIP guaranteeing the fairness of judicial proceedings and the fundamental rights of litigants. The fourth and last section studies the level of compliance with the JIP guaranteeing expression and information rights.

18 *Malawi Judiciary Development Program 2003-2008*, p. 9.

## SECTION 1

## LEVEL OF COMPLIANCE WITH THE JUDICIAL INTEGRITY PRINCIPLES GUARANTEEING THE INDEPENDENCE OF THE JUDICIARY AS AN INSTITUTION

This Section studies the independence of the judiciary as an institution. Based on an analysis of the relevant JIP, no significant institutional interferences with the independence of the Malawian judiciary have been identified. This is due in part to the effective constitutional protection of the separation of powers, at least institutionally, and to guarantees of judicial independence. Moreover, the judiciary enjoys strong public support for its independence as an institution, especially from opposition parties and civil society.

This Section centers on the analysis of subcategories of two closely-related Judicial Integrity Principles:

- JIP.1 Guarantee of Judicial Independence (subcategory)
- JIP.2 Institutional Independence of Judges (subcategory)

### JIP.1: Constitutional Guarantee of Judicial Independence

**Satisfactory**: Several constitutional provisions guarantee the independence of the judiciary and set its parameters. Overall, Malawian stakeholders described the state of judicial independence, at least institutional independence, as healthy. One of the key factors contributing to this healthy state of judicial independence is the active support of opposition political parties, civil society groups and bilateral donors for the judiciary in cases where the ruling party or the executive attempts to undermine judicial independence.

Most commentators agree that Malawian courts are, by and large, independent. Some even go so far as to say that sometimes, the courts over-assert their independence. Judicial independence is protected by the Constitution, section 103(1) providing that:

> *"All courts and all persons presiding over those courts shall exercise their functions, powers and duties independent of the influence and direction of any other person or authority".*

The independence that is guaranteed in section 103(1) is underpinned by other provisions of the Constitution. For example, section 103(2), which provides that "the judiciary shall have jurisdiction over all issues of judicial nature and shall have exclusive authority to decide whether an issue is within its competence", serves to protect the independence of the judiciary by preventing external agencies from eroding the scope of judicial power.

Constitutional protection of judicial integrity is entrenched against arbitrary repeal or amendment because it is one of the constitutional provisions that cannot be amended by parliament without support in a national referendum.[19] The constitutional provisions specifically protected in this manner are those that provide for judicial independence, judicial appointment, remuneration and security of tenure.

To further protect the independence of the courts, the Constitution explicitly provides that the interpretation of law is the preserve of the judiciary.[20] The Supreme Court underlined this point in the case of *The Attorney General v. Nseula & Malawi Congress Party* when it observed that:

> *"[T]he interpretation of the Constitution is a primary function of the Judiciary as set out in section 9 of the Constitution … [The framers of the Constitution] wanted a good measure of separation of powers that would engender a measure of independence and autonomy of the three branches of Government … Somehow it was perceived that some excesses of the period before the Constitution could be attributed to the lack of clear separation between the branches of Government."*[21]

19 Constitution of Malawi, section 196 (1994), as read with the Schedule to the Constitution.
20 Constitution of Malawi, section 9 (1994).
21 Justice Mwaungulu in the case of *Nseula v Attorney General*, Civil Cause No.63 of 1996.

## JIP.2: Institutional Independence of Judges

**Satisfactory:** Institutionally, the judiciary is fairly independent. It is established as a branch of government separate from the others, and there are no institutional relationships that compromise its ability to exercise its autonomy.

Most of the key stakeholders interviewed for this report gave a generally positive assessment of the state of judicial independence in Malawi. Even those who were critical did not think that the shortcomings were serious enough to negate the principle and practice of judicial independence. The healthy state of judicial independence was attributed to a number of factors. One such factor was that, during most of the post-colonial period, the High Court and magistrate courts had been shielded from political pressure by the existence of a parallel "traditional court" system which handled the sort of "political" cases in which politicians were motivated to interfere. The traditional courts were the preferred forum for the State because they did not value individual rights and favored the State, particularly in trials in which the ruling elite had a direct political interest, such as treason and sedition.

The adoption of the current Constitution was accompanied by the abolition of the traditional court system on account of its incompatibility with the new order based on human rights and liberal democracy. Ironically, however, the abolition of the traditional courts meant that political cases have since then been handled by the Supreme Court, the High Court and Magistrates' Courts. This has made these courts vulnerable to pressure because politicians such as the President, Ministers and Members of Parliament have often had direct vested interests in the outcome of cases, particularly political ones.

Another factor that has sustained judicial independence is the active support for the principle by opposition political parties, non-governmental organizations and bilateral donors who have opposed any moves on the part of the government to undermine it. On the occasion when a ruling party Member of Parliament proposed the impeachment of some judges of the High Court, opposition parties attempted, albeit unsuccessfully, to block the move during the parliamentary debate of the proposal. On the same occasion, various local civil society groups, such as the Civil Liberties Committee, the Malawi Law Society, Malawi Career, the Center for Human Rights and Rehabilitation and others, used the mass media to defend the judiciary against the proposal which they saw as interference with judicial independence.

For their part, various donors also signaled their implicit support for the judiciary in their own discreet ways during the impeachment episode. For example, during the proceedings in the National Assembly, most of the major foreign embassies had high-level diplomats observing the proceedings from the public gallery of the chamber. In a broader sense, donors have also supported judicial independence by assisting the judiciary to build its capacity. The European Union and the governments of Great Britain and the United States of America have been most active in providing such assistance to the judiciary through programs such as the EU's *Rule of Law and Improvement of Justice Program*, Britain's *Malawi Access to Safety, Security and Justice* (MASSAJ) and those of the United States government which it implements through the Governance Program of the United States Agency for International Development (USAID). The largest of these programs is that run by MASSAJ, which has the ambitious aims of:

- Supporting reform initiatives of the Law Commission on sentencing laws and policies and other matters related to the custody of offenders;
- Enabling more paralegal, legal and rights initiatives;
- Supporting the reduction of the backlog of homicide cases;

- Helping courts improve case-flow administration;
- Supporting initiatives for raising judicial and court-user awareness of non-custodial punishments; and
- Supporting establishment of a fair and humane juvenile justice system.

## SECTION 2

## LEVEL OF COMPLIANCE WITH THE JUDICIAL INTEGRITY PRINCIPLES GUARANTEEING THE INDEPENDENCE OF JUDGES

This Section studies the independence of judges as individual members of the judiciary. While there are many rules regulating the status of judges, this Section takes into account those essential to the fair and effective administration of justice. Based on an analysis of the relevant JIP, it appears that the level of compliance with the core principles guaranteeing the independence of judges is only partially satisfactory at best. The level of compliance with principles that underscore accountability issues is particularly low and does not meet universally accepted standards.

There have been improvements in recent years, leading to improved capacity and skills for judges, especially at the High Court and Court of Appeals levels. The judicial selection process generally lacks the required objectivity and transparency, which opens the door to interferences by the executive with the independence of the judiciary. Finally, while corruption was not described as widespread or systemic, stakeholders nonetheless mentioned it, alongside direct interference in judicial proceedings, as a potentially harmful practice for the personal independence of judges.

This Section centers on the analysis of these closely-related Judicial Integrity Principles:

- JIP.2 Personal, Decisional Independence of Judges (subcategory)
- JIP.4 Adequate Judicial Resources and Salaries
- JIP.5 Adequate Training and Legal Education of Judges
- JIP.6 Security of Tenure
- JIP.9 Adequate Qualifications and Objective and Transparent Selection and Appointment Process
- JIP.13 Conflict of Interests Rules
- JIP.14 Income and Asset Disclosure
- JIP.15 Rules of Judicial Ethics (subcategory)

### JIP.2: Personal, Decisional Independence of Judges

**Partially satisfactory:** The personal, decisional independence of judges is not fully respected in practice. The most important threat to this aspect of judicial independence appears to be corruption, which is not described, however, as widespread or systemic by stakeholders. Direct interference with judicial proceedings has also been reported in cases involving politicians. In addition, comments by politicians, including the President, concerning on-going cases threaten the personal independence of judges.

Most of the stakeholders interviewed for this report believed that some corruption exists in the judiciary. They decried this as a threat to personal independence of judicial officers. They noted, however, that corruption was not widespread and was not currently a significant threat to judicial independence as a whole. In fact, there have been few cases in which corruption has been proven against judicial officers. These few cases have involved the lower ranks of the judiciary and not the High Court or Supreme Court of Appeal. Attempts to prove corruption against judges of these two courts have been unsuccessful.

Judicial Corruption

The most serious allegation in the country's history was that made by the Attorney General in mid-2003 against an individual judge who was hearing a case between the government and a Swiss pre-shipment company. The Attorney General asked the judge to disqualify himself from the case and claimed to have instructed the police to investigate certain undisclosed "serious allegations" against the judge. The judge challenged the Attorney General to bring the evidence forward. The Attorney General failed to bring any evidence to substantiate his innuendo, and the judge proceeded to preside over the case to its completion.

There has, however, been one case involving a reported attempt to bribe a judge in which the defense alleged that the judge, in fact, had solicited the bribe. The judge vigorously denied the allegation, and the case was underway at the time this report was prepared. Some stakeholders interviewed for this report said that even if the allegation against the judge was not true, he may have been guilty of exposing himself to the possibility of corruption or, at the very least, conflict of interest.

In 2003, the decisional independence of the judiciary was also undermined by international actors as the case study in the box below illustrates.[22]

22 See, http://www.icj.org/news.php3?id_article=2953&lang=en.

Pretrial Detention and Terrorism

Four people were arrested by Malawian security agents on suspicion of having connections to international terrorist networks. An urgent application was filed in the High Court by the lawyers of the four, and the court ordered that the four be brought before it to be told of the reason for their detention. The State failed to produce the suspects and later claimed that the Malawian government could not trace them. The speculation in the media was that the four had been handed over to secret service agents of the United States government who had flown them out of the country in defiance of the court order. The conduct of the government of the United States in this transaction contributed to undermining judicial independence in the Malawian judiciary. Some commentators, including the International Commission of Jurists, condemned the conduct of both the Malawi and United States governments.

Cases involving political parties and high profile politicians have emerged as the occasions when the decisional independence of the judiciary in Malawi has come under the most pressure. Judges who have decided such cases have been routinely accused of being influenced by external forces. Some commentators, including the State Department of the United States government, have on occasion found the allegations to be credible.[23] Protests against perceived bias have ranged from denunciatory editorials in partisan media to public marches, as happened on September 1, 2003, when supporters of the opposition Malawi Congress Party staged a demonstration and marched in protest at a judgment of the High Court that effectively barred their party's candidate from running for office in the 2004 presidential elections.

The independence of the judiciary in particular cases has also been undermined by direct interference with judicial proceedings, again mostly in cases involving politicians. In one particularly bad situation, alleged supporters of the ruling party disrupted proceedings by booing the lawyer who was cross-examining an official of their party and violently attacking witnesses. This led to a demand by the country's Deputy Chief Legal Aid Advocate for armed police officers to protect witnesses, suspects, judicial officers, lawyers and the press covering judicial proceedings.[24]

Another indirect but nevertheless significant limitation of judicial independence has been political speeches by senior politicians, including the President, commenting on on-going court cases in the media, including on national television and radio. Such comments are likely to place judicial officers under undue pressure and threaten their ability to exercise independent judgment. This situation is governed by section 113(1)(d) of the Penal Code (Cap.7:01), which makes it a criminal offence for any person, while a judicial proceeding is pending, to speak or write anything which misrepresents that proceeding, or prejudices any person in favor of or against any parties to such proceeding, or is calculated to lower the authority of any person before whom such proceeding is being had or taken.

23 See, http://cf.heritage.org/index/country.cfm?ID=91. Also, see, H. Meinhhardt and N. Patel, *Malawi's Process of Democratic Transition* (Lilongwe: Konrad Adenauer Foundation, 2003) p. 22 where the authors claim that, in some cases, "the Supreme Court, out of political expedience, overturned rulings of the High Court which were in line with the Constitution. Partisan considerations and personal loyalties seem to have played a role and taken precedence over righteousness and fairness. This has caused concern and suspicion regarding the independence of the judiciary."

24 *Daily Times*, March 6, 2003.

To the extent that this section criminalizes any statements that may prejudice any of the parties, it makes it a criminal offense for any person to say or write anything that seeks to influence a judicial officer presiding over a case. Influencing the judge in any way will prejudice one party or the other. The section, therefore, promotes judicial independence, albeit indirectly. In theory, therefore, those commenting on on-going cases may face prosecution. In practice, though, none has. Some of the comments are legitimate exercises of freedom of expression, but others violate the right to a fair trial of every citizen.

### JIP.4: Adequate Judicial Resources and Salaries

**Unsatisfactory**: Judicial resources are largely insufficient for the judiciary to function properly. Moreover, the level and allocation of resources is controlled by the Executive.

Despite general satisfaction with judicial independence, a number of significant impediments were noted by the stakeholders who were interviewed. One of these negative factors is that the allocation of resources to the judiciary by the Legislative and Executive branches of government, through the Treasury Department, can be used by the Executive as a tool to undermine judicial independence. A 2001 UNDP assessment concluded that although, by and large, the Malawian judiciary had demonstrated independence, "judicial independence faces a threat from financial dependence on the Executive and the Legislature."[25] A Member of Parliament, who is also Deputy Secretary General of one the country's largest political parties, suggested that the dangers for judicial independence posed by the current funding arrangements could be obviated by having a system in which all monies allocated to the judiciary by Parliament in the national budget would be immediately remitted to the Judiciary's own bank account.

However, 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 Act which, *inter alia*, authorizes the judiciary to retain any money that court users pay in the form of fees and other payments. The Act also gives the judiciary the freedom to raise its own funds directly.

The demand for financial autonomy had been made by the judiciary for over ten years before it was finally enacted into law. Following a Seminar on Judicial Administration organized in August 1993 by the Magistrates and Judges Association of Malawi, for example, 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****".*[26] *(emphasis added)*

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".[27]

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

26 Resolution No. 10, Seminar on Judicial Administration of the Malawi Magistrates and Judges Association held at Mzuzu Hotel, 16-18 August 2003.

27 *Malawi Judiciary Development Program 2003-2008*, p. 18.

### JIP.5: Adequate Training and Continuing Legal Education

**Partially satisfactory**: *Ad hoc* and donor-driven training programs for judges have been increasingly implemented since 2000. However, judicial training will not be sufficient to improve the quality and skills of judges as long as no permanent training institution or program is created.

To address any shortcomings in skills, it is important that the academic qualifications and work experience set down as minimum standards for appointment to the judiciary be reinforced by continuing education programs, particularly in emerging areas of law such as human rights law.[28] The Law Commissioner, for example, recommended the exposure of judges to judicial colloquia as a productive way of enhancing judicial knowledge and skills.

In fact, judges and senior magistrates routinely participate in workshops on various topics in specialist areas of law. For example, in the period 2000 to 2001, the United Nations High Commissioner for Human Rights organized the following workshops and seminars:

- 7-8 July 2000: *Human Rights in the Administration of Justice* – attended by six judges of the High Court and Supreme Court of Appeal, six senior magistrates, two registrars of the High Court and Supreme Court of Appeal and the Executive Secretary of the Malawi Human Rights Commission.

- 30 October – 3 November: *Human Rights and Conflict Resolution* – attended by members of the judiciary, the Malawi Human Rights Commission and civil society organizations.

- 18-23 June 2001: *Human Rights and Conflict Resolution* – attended by Magistrates.

- 1-6 August 2001: *Human Rights and Conflict Resolution* – attended by judges from Zambia and Malawi.

The judiciary's *Development Program 2003-2008* has observed, however, that such training workshops have mostly been *ad hoc* and donor driven and, therefore, limited in their contribution to the long-term comprehensive training of judicial officers.[29] In order to further enhance the skills and knowledge of judges, the judiciary also plans to establish a Judicial Training Institute which will "provide training in judicial work, judicial administration, staff development, operational needs and reform initiatives."[30]

28 One of the people who held this view was the Law Commissioner.
29 *Malawi Judiciary Development Program 2003-2008*, p.11.
30 *Malawi Judiciary Development Program 2003-2008*, p. 15.

## JIP.6: Security of Tenure

**Satisfactory**: Judges are generally guaranteed adequate security of tenure both formally and in practice.

In terms of security of tenure, the Constitution seeks to protect judicial officers from arbitrary removal from office, something which would adversely affect independence by inclining judges to perform their functions in a manner that would avoid antagonizing the authority which has the powers of removal. The Constitution provides that judicial officers are protected from arbitrary removal from office and that their salaries and benefits are secured from interference by the Executive branch of government.

Under the Constitution, a judge is entitled to remain in office until he or she reaches the age of 65. This provision has not attracted much attention, except in one case in which a judge who had reached the age of 65 in 2002 was assigned to decide a case in March 2003. The case involved an injunction that the Attorney General had obtained against a civil society group called the Forum for the Defense of the Constitution (FDC) which had planned to hold a demonstration against a proposal to amend the Constitution in order to extend the presidential term of office. The lawyer for FDC successfully objected to a judge who had reached the retirement age taking on fresh cases.[31] The retirement age of magistrates is 70. There is no apparent reason why there should be a difference between the respective retirement ages of judges and magistrates.

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 misbehavior. The tenure of judges is further secured by the constitutional provision that requires the removal of judges to comply with an elaborate procedure protecting judges 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 when 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 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.

31 *Daily Times*, 6 March 2004.

Judicial Security of Tenure under the Malawian Constitution

"(4) Where notice of intention to introduce before the National Assembly a motion praying for the removal of a Judge from his office has been lodged in the office of the Speaker, the President may, where after consultation with the Judicial Service Commission he is satisfied that it is in the public interest so to do, suspend the Judge from performing the duties of his office.

(5) The suspension of a Judge under subsection (4) may at any time be revoked by the President, after consultation with the Judicial Service Commission, and shall in any case cease to have effect where the motion is withdrawn before being debated in the National Assembly or, upon being debated, is not passed by a majority thereof.

(6) The prescribed age for purposes of subsection (1) shall be the age of 65 years or such other age as may be prescribed by Parliament:

Provided that a law made by Parliament, to the extent that it alters the age at which a Judge shall vacate his office, shall not have effect in relation to a Judge after his appointment unless he consents to its having effect."[32]

The elaborate procedure is deliberately intended to guard against whimsical and arbitrary removal of judges from office. The safeguards inherent to the removal procedure include (i) the restriction of the grounds for removal to incompetence and misbehavior; (ii) the involvement of at least three institutions in the process; and (iii) the compliance of the procedure with principles of natural justice. In relation to the latter, it has been said that:

> *"[a]s a matter of procedure, the duty to act fairly in relation to a judge threatened with removal requires that he have made clear the detailed charges against him, the source of complaint upon which they are formulated, enough time to prepare his defense, and an opportunity to be heard in his defense."*[33]

The only attempt at using this procedure to remove judicial officers was in November 2001 when more than 113 of the 193 members of the National Assembly passed motions petitioning the President to remove from office three judges of the High Court for the reasons outlined below:[34]

32 Constitution of Malawi, section 119 (1994).

33 See, *R. v Ramshay* [1852] 18 QB 173. On comparable procedures for removing federal judges in England and Wales and the United States of America, generally see respectively: M. Brazier "Judicial Immunity and the Independence of the Judiciary" [1976] *Public Law* 397 at 400 – 4 and Note: "Removal of Judges – New Alternatives to an Old Problem: *Chandler v Judicial Council of the Tenth Circuit*" 13 *UCLA Law Review* 1385, 1389 (1966).

34 http://www.icj.org/news.php3?id_article=2605&lang=en

- *Justice Dunstain Mwaungulu*: alleged misconduct for authoring a magazine article questioning the validity of the electoral victory of the incumbent President. During the course of the debate in the National Assembly, the mover of the motion, a ruling party Member of Parliament, added that the judge had also displayed disrespect towards the Supreme Court. No detail or direct evidence of this allegation was presented. Another Member of Parliament added, without detail, that Justice Mwaungulu had also delayed the delivery of judgment in certain cases for three to four years, while another stated that the judge was incompetent because he chose to be represented by a lawyer in defending himself against the impeachment.

- *Justice George Chimasula Phiri*: alleged misconduct for granting bail to an opposition politician who was in custody pending trial for alleged treason, in what the ruling party Member of Parliament who initiated the motion called "suspicious circumstances". The bail application was heard after official working hours, and bail was granted at 9pm. The judge was also said to have made "serious and unfounded" remarks that the arrest of the opposition politician showed the government's political intolerance. The judge was accused of being a sympathizer of the politician and acting as his "personal assistant". No evidence or detail of the allegations was provided.

- *Justice Anaclet Chipeta*: alleged incompetence for issuing an injunction against Parliament. The mover of the motion argued that what the judge had done was to challenge the principle of separation of powers. Some Members of Parliament who supported the motion erroneously claimed that parliament was the highest institution of the land (the highest authority is in fact the Constitution, ever since the doctrine of parliamentary supremacy was supplanted by that of constitutional supremacy).

When the President was petitioned to remove the judges, he declined to do so, after having consulted the Judicial Service Commission. The fact that there was an outcry against the proposed removal by numerous local and foreign interested groups, including the Malawi Law Society, the International Commission of Jurists and the United Nations Commissioner for Human Rights[35], who argued that the impeachment amounted to blatant interference with judicial independence, must have influenced the President's decision. It is hard to imagine that the President would have willingly gone against the wishes of the majority of his party's Members of Parliament had there been no such external pressure on him.

The attempted removal of the judges was faulty in at least two respects. The first was that, among the grounds on which the motions passed by Parliament for the removal of the judges were based, was that some of the judges had made errors of law.[36] What may be stated in this regard is that any system that deemed every error of law made by a judge to constitute incompetence for which the judge could be removed would not be conducive to independence. Such a system would engender such a degree of insecurity in judges that their ability to interpret the law fairly, to uphold the right to equality and to protect human rights would be considerably impaired. In any case, it would render the Malawi Supreme Court of Appeal redundant. Errors of law must engender appeals and not petitions for the removal of the judges who make them.

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35 See Press Release issued by the Special Rapporteur on the Independence of Judges and the Judiciary of the United Nations Commission for Human Rights, November 16, 2002: http://www.unhchr.ch/huricane/huricane.nsf/0/109CAF9F7D66B2E9C1256B060049307E?

36 This includes the charges that one judge heard a bail application in the evening; that another judge issued an injunction against the National Assembly; and that still another judge issued an order against the National Assembly.

The second observation that can be made about the process of removal of judges is that there are no clear rules of procedure for ensuring that a judge who is the subject of a National Assembly motion for removal is guaranteed the protections of natural justice. It is not sufficient that the Constitution states that rules of natural justice must be observed. Natural justice rules require elaboration in terms of such aspects as notice periods,[37] the right to cross-examine witnesses,[38] whether the hearing may be in written or oral form,[39] and rights to adjournments.[40] The Judicial Service Commission seeks to address the lacuna and was, at the time of writing this report, in the process of developing detailed rules to govern judicial disciplinary procedures, including those for removal of judges.

Some concern has also been expressed regarding the negative impact on judicial independence of section 119(7) of the Constitution.

Presidential Appointment Prerogatives under the Malawian Constitution

"Where the President considers it desirable in the public interest so to do, he may, with the consent of the person concerned, assign a person holding the office of Judge to any other office in the public service for such period as the President may determine during which that person may cease to perform the duties of his office as Judge; but so, however, that:

(a) Such assignment shall not be regarded as removal of that person under subsection (2) from his office as Judge;

(b) The resumption by that person of the duties of his office as Judge shall not require formal reappointment;

(c) The retirement age of that person shall be that prescribed for Judges under subsection (1)."[41]

The President's powers under section 119(7) can be used to undermine the judiciary. This section may be used as a means of effecting back-door removal of judges that the executive considers to be problematic. Such judges can be assigned to public offices where they may be less able to control the abuse of power by the Executive.

Ever since the Constitution came into force, the power in section 119(7) has been used only once when, in late 2002, the President assigned one of the country's most senior judges, and a possible contender for the position of Chief Justice, to become the head of the Anti-Corruption Bureau. At the time there was little public debate on whether the transfer of the judge was done in good faith to strengthen the legal expertise of the Anti-Corruption Bureau or for some less legitimate reason.

37 *R. v Thames Magistrates, ex p Polemis* [1974] 1 W.L.R. 1371.
38 *Kavanagh v Chief Constable of Devon and Cornwall* [1974] Q. B. 624.
39 *R. v Industrial Injuries Commissioner, ex p Moore* [1965] 1 Q.B. 456.
40 *Rose v Humbles* [1972] 1 W.L.R. 33 and *Ostreicher v Secretary of State for the Home* [1978] .
41 Constitution of Malawi, section 119(7) (1994).

## JIP.9: Adequate Qualifications and Objective and Transparent Selection Process

### I. Adequate Qualifications

**Unsatisfactory**: While there are constitutional provisions establishing the minimum qualifications required to become a judge of the High Court or Supreme Court of Appeal, no legal requirements exist for magistrates. In practice, lay magistrates are not even required to have any formal academic qualifications. Regarding High Court and Supreme Court of Appeal judges, the current application of the existing system facilitates the appointment of judges with low qualifications. Overall, judges and magistrates clearly lack the necessary level of qualification.

Most stakeholders recognized that judicial independence is promoted if judicial officers are well-qualified and experienced. Qualifications and experience give a judicial officer the self-confidence that he or she may require to demonstrate decisional independence. In order to ensure that only the most highly qualified candidates are appointed to judicial office, the judicial selection must be objective, transparent and accountable.

The current process requires varying levels of qualifications and experience for appointment to the different levels of the judiciary. The minimum qualifications required for appointment to the High Court or Supreme Court of Appeal are set down by the Constitution itself. According to section 112(1), a person may be appointed as a High Court judge if he or she is, or has been, a judge of a court with unlimited jurisdiction or has been entitled to practise law in such a court for a period of at least ten years. There are no legal provisions spelling out the minimum qualifications for magistrates. In practice, though, there are two distinct tiers of the magistracy: resident magistrates and lay magistrates. The minimum academic qualification for Resident Magistrates is a university law degree, while for lay magistrates it is a secondary school certificate; in a few cases experience has been accepted in lieu of formal academic qualifications.

The judiciary has acknowledged that "most lay magistrates are inadequately trained, resulting in poor service delivery and inconsistencies in some judicial decisions."[42] One of the main reasons for the low qualifications of serving magistrates is that some of them were incorporated into the magistracy from what had been known prior to 2004 as "Traditional Courts". Personnel in these courts had not been required to have much formal education, and their integration into the judiciary resulted in an increase in under-qualified and inexperienced magistrates. The judiciary offers a 9-month basic course in selected legal subjects mainly to school leavers, serving court clerks and former traditional court officers. Those who pass the course are appointed as lay magistrates. At least one stakeholder interviewed for this report expressed reservations about the adequacy of the course to prepare those who undergo it to handle the demands of judicial office.

Many stakeholders interviewed for this report felt that, to a large extent, the current system of selecting judicial officers had managed to facilitate the appointment of High Court and Supreme Court of Appeal judges who met the minimum qualifications. Concern, though, was expressed regarding the quality of justice delivered by a magistracy which was said to include judicial officers who had received only rudimentary legal education and lacked experience.

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42 *Malawi Judiciary Development Program 2003-2008*, p. 11.

## II. Objective and Transparent Selection Process

**Unsatisfactory**: The selection and appointment process is characterized by insufficient objectivity and transparency which may negatively affect the independence of the judiciary. The lack of objectivity and transparency is evidenced by (i) the attribution of all appointment powers to the President, opening the door to the manipulation of the composition of tribunals and the exercise of undue influence; (ii) the lack of publicity of vacancies and processes; and (iii) the lack of public participation. Moreover, there is clear gender imbalance among judges.

The Chief Justice, who is head of the judiciary in Malawi, is appointed by the President, but the appointment must be confirmed in the National Assembly by a minimum of two-thirds of members present and voting.[43] For their part, the members of the High Court and Supreme Court of Appeal are appointed by the President on the recommendation of the Judicial Service Commission.[44] The Commission is composed of the Chief Justice, the chairperson of the Civil Service Commission, a Justice of Appeal or a Judge, a Magistrate and a lawyer appointed by the President in consultation with the Chief Justice.[45] The Judicial Service Commission is also responsible for appointing Magistrates.

At the time of writing this report, the serving Chief Justice had been in office for one year. He had been appointed to replace his predecessor who had retired due to age. The appointment of the current Chief Justice, one of the most senior career judicial officers, had received widespread support; his appointment was approved in the National Assembly with a 100% vote in favor by both ruling and opposition party Members of Parliament. In addition to the Chief Justice, there are 5 judges of the Supreme Court of Appeal and sixteen judges of the High Court. There is only one woman among the judges of the Supreme Court of Appeal and only three on the High Court bench, an imbalance that the judiciary has undertaken to address through "gender mainstreaming in recruitment and promotion".[46] The Supreme Court of Appeal is located in the country's main commercial city, Blantyre, while the High Court has seats in Blantyre; the country's official capital city, Lilongwe; Zomba, the former capital; and Mzuzu, the Northern Region's main city. For their part, the more than one hundred magistrates operate from nearly two hundred court centers in a variety of urban and rural areas spread across the country.

The selection of judges of the High Court and Supreme Court of Appeal is open to additional 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 it only makes 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.

A number of stakeholders interviewed for this report expressed the view that the appointment powers of the President limit the objectivity and independence of the process of selecting judicial officers. They viewed this as a long-term threat to judicial independence. They also noted with disappointment that there is also no public

43 Constitution of Malawi, Section 11(1) (1994).
44 Constitution of Malawi, Section 111(2) (1994).
45 Constitution of Malawi, Section 117 (1994).
46 *Malawi Judiciary Development Program 2003-2008*, p.20.

participation in the work of the Judicial Service Commission. Some of the stakeholders saw the lack of public participation in the selection of judicial officers and their appointment as a factor that militates against judicial independence in Malawi. Some academic commentators have also made similar observations.[47] On the other hand, it has been argued that empowering politicians to participate directly in judicial appointments would in fact undermine the independence of the process and, thus, judicial independence.[48]

Some stakeholders were of the view that in order for the appointments process to be truly independent, the President should not be involved and appointments should be made by Parliament. The latest appointments to the High Court bench did, in fact, cause some controversy when one of the applicants for appointment suggested that he had been left out only because he came from the Northern Region of the country; he commenced legal proceedings against the Judicial Service Commission alleging bias. The case had not been concluded at the time of writing this report.

Some of the stakeholders also cast doubt on whether all those who had been appointed were indeed the best candidates among those who had shown interest in being appointed. Five people were appointed to the bench:

- A career judicial officer who at the time was serving as the Registrar of the High Court and Supreme Court of Appeal;
- A former magistrate who had worked as a corporate lawyer for some years after leaving the judiciary;
- A lawyer in private practice; and
- A lawyer who was at the time serving as the country's ambassador to Zimbabwe.

Transparency is virtually non-existent in the judicial appointment process in Malawi. The names of applicants for judicial office are not made public, neither are the reasons for the final selection. During interviews for this report, one of the respondents described the process as "hazy". 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.

The judicial appointment process in Malawi is open to manipulation that can undermine judicial independence because it lacks adequate scrutiny by the public and is dominated by powers of the President. Overall, though, most stakeholders felt that the judiciary was predominantly independent despite the concerns about the lack of independence and transparency of the appointments process.

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47 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 Polarized Societies: A Comparative Analysis of Malawi and South Africa*, PhD Thesis, University of East Anglia, 1999.

48 This was the view of the judiciary at the National Constitutional Conference in 1995: Mutharika, *op. cit.*, p. 216.

### JIP.13: Conflict of Interest Rules

**Unsatisfactory**: While there are a number of laws and principles regulating conflict of interest for judges, these rules are not applied in practice and judges regularly engage in activities that create such conflicts or at least their appearance.

A number of statutory provisions and common law principles that apply in Malawi seek to address the problem of conflict of interest in the judicial process. The most obvious of these norms are those that prohibit a judicial officer from deciding in a case in which he or she has an interest. A judge cannot adjudicate an appeal against his or her own decision.[49] Common law principles of natural justice are broader because they prohibit a judge from hearing a case if he or she has an interest which is likely to prevail over the merits of the case in determining the outcome.

A number of stakeholders interviewed for this Report were of the view that conflict of interest is a serious problem in the Malawian judiciary, with many judicial officers engaged in activities that make such conflicts certain or at least likely. Some of the interviewees underscored the point by referring to a particular case that was on-going at the time that this report was written.

Conflict of Interest and the Malawian Judiciary: Case Study

Two traders are being prosecuted for attempting to bribe a High Court judge. The charge alleges that the two traders. The judge was called as a prosecution witness and, In the course of cross-examination of the judge, it emerged that he had in fact had business dealings with the two accused people before the allegation of corruption. The judge conceded that in the course of those dealings, he had in fact borrowed some money from the two traders which he had not yet re-paid at the time of the trial. It was the defense's case that the judge's allegation of the attempted bribery was in fact an attempt to escape from his contractual obligation.

To complicate matters, one of the defense lawyers is the immediate former Chief Justice who was head of the judiciary at the time when the alleged offer of a bribe took place.

Some stakeholders, including the head of a constitutional body, felt that the case involved at least two types of conflict of interest that reflect negatively on judicial independence in Malawi. In the first place, the judge had placed himself in an invidious position by directly engaging in business ventures in which the demands of his judicial office for impartiality and objectivity would almost certainly clash with those of his business interests. With regard to the former Chief Justice, it was felt that, by acting as defense lawyer for a person accused of trying to corrupt a judicial official, the former Chief Justice had two conflicting interests to promote: those of his client and those of the institution he had headed at the time his client is alleged to have attempted to undermine it. The Law Commissioner's view of the role of the former Chief justice was shared by a Secretary General of one of the country's opposition parties.

49 Supreme Court of Appeal Act (Cap. 3:01), Section 4.

One of the situations of likely conflict of interest that some of those interviewed focused on was that of judges who engage directly in business activities. It was suggested that judicial officers should be prohibited from engaging in such activities or at least be very strictly regulated to prevent conflict of interest. A Secretary General of one of the opposition parties who also doubles as the Minister of Tourism, however, pointed out that restricting the business activities of judges might violate their constitutional rights, which include the right of every person "freely to engage in economic activity, to work and to pursue a livelihood anywhere in Malawi".[50]

The Controller of Legal Services for the Office of the Ombudsman agreed that judges should be free to engage in business activities provided that such activities do not interfere directly with their judicial responsibilities. He, however, expressed the view that the involvement of judges in various commissions of inquiry also created the likelihood of conflict of interest. In Malawi, High Court and Supreme Court of Appeal judges are often appointed to be members or chairpersons of various commissions, some of which are mandated to investigate or administer matters of public controversy. For example, judges currently head of the Electoral Commission, which administers presidential, parliamentary and local government elections and the Anti-Corruption Bureau.

Disquiet about the appointment of judges to extra-judicial commissions of inquiry has also been expressed by Judge Duncan Tambala of the Supreme Court of Appeal who has stated that:

> *"Some of the commissions or inquiries may involve controversial issues of a political nature and the judge involved in such commission or inquiry may be exposed to unfair criticism by those persons who may disagree with his report. Again use of judges to perform tasks of that kind may expose the judiciary to public criticism that the executive is using the judiciary for its own ends. That may have a negative effect on judicial independence."*[51]

50 Constitution of Malawi, Section 29 (1994).

51 Justice D.G. Tambala, *Separation of Powers and Judicial Independence*, paper presented at IFES Regional Conference on Separation of Powers, 29 January 2003, pp.15-16.

### JIP.14: Income and Asset Disclosure

**Unsatisfactory (improving):** Currently, there is no law or policy mandating income and asset disclosure for judges, but Parliament is in the process of extending to judges existing requirements applicable to senior public officials.

Since the country's transition from an authoritarian to a more liberal system of governance in the first half of the 1990s, the principle of transparency has been an integral part of legal and political discourse. Among other things, the principle has been touted as a means of preventing corruption; public scrutiny of the income and assets of public officials is considered to be both a deterrent against corrupt dealings and a means of gathering evidence of corruption. Section 88(3) of the Constitution requires the President and members of the Cabinet to declare their assets. Parliament is in the process of extending the requirement for declaration of assets and income to other senior public officials, including judges.

All the stakeholders interviewed for this report were of the view that judicial officers should indeed be required to disclose their incomes and assets. This would not only deter corruption but also expose it where it occurred. It would assist the Anti-Corruption Bureau, established under the Corrupt Practices Act (Act No. 18 of 1995), in the enforcement of section 32 of the Act which authorizes the Bureau to investigate any public officer for corruption if he or she has unexplained property.

It is the common view in Malawi that judicial corruption may be reduced if judicial officers are paid adequate salaries and allowances. Currently, the basic salary for a judge of the Supreme Court of Appeal is MK 707,040 (the equivalent of approximately US$ 7,000) per annum. This amount is half of what legislators are paid and less than the salary of a civil service Principal Secretary. The comparisons become worse the lower one goes down the judicial ladder. The Secretary General of one of the opposition parties, Alliance for Democracy (AFORD), said during the interview for this report that although the judiciary did not have adequate resources, its situation must be placed within the broader context of the national economy. From that perspective, the judiciary was relatively better off than other public institutions. This view is shared by United Nations agencies in the country who have observed that:

> *"[T]he 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."*[52]

52 United Nations System in Malawi, *Common Country Assessment of Malawi: 2001 Report*, p. 31.

### JIP.15: Rules of Judicial Ethics

**Unsatisfactory**: While there is a Judicial Code of Ethics, this code is unknown to most judges and is not enforced effectively.

The Malawian judiciary has a Code of Ethics that regulates the conduct of judges in relation to situations of conflict of interest. However, the Code is little known among most members of the judiciary and, therefore, does not influence their conduct in conflict of interest situations. The judiciary itself has admitted that the Code is not enforced effectively.[53]

53 *Malawi Judiciary Development Program 2003-2008*, p.10.

## SECTION 3

## LEVEL OF COMPLIANCE WITH THE JUDICIAL INTEGRITY PRINCIPLES RELATED TO GUARANTEES OF THE FAIRNESS OF JUDICIAL PROCEEDINGS AND THE FUNDAMENTAL RIGHTS OF LITIGANTS

The right to a fair trial, the aim of true justice, requires not only the independence of the judge, but also respect for the fundamental rights of litigants, such as the rights to equality under the law, due process and the fair and effective enforcement of judgments. This Section examines the independence of the judiciary from a fairness and rights perspective.

While the Constitution expressly guarantees the fundamental rights of litigants, these rights have not translated into a reality in practice for most Malawian. The situation of access to justice and equality under the law is even more dismal as most Malawians are virtually barred from the effective protection of the law or access to courts due to significant practical constraints or even institutionalized discrimination. The right to a fair trial and the effective enforcement of judgments are significantly, though not systematically, impaired by the lack of resources of both the judiciary and the Malawian population.

This Section centers on the analysis of these closely-related Judicial Integrity Principles:

- JIP.1 Guarantee of a Fair Trial (subcategory)
- JIP.1 Guarantee of Equality under the Law (subcategory)
- JIP.1 Guarantee of Access to Justice (subcategory)
- JIP.7 Fair and Effective Enforcement of Judgments

## JIP.1: Guarantee of the Right to a Fair Trial, Equality under the Law and Access to Justice

### I. Guarantee of the Right to a Fair Trial

**Partially satisfactory**: While the right to a fair trial is guaranteed under the Constitution, it has not translated to a reality in practice for most Malawians, mainly due to the lack of economic resources, both of citizens and of the justice sector.

The right to a fair trial is guaranteed by section 42(2)(f) of the Constitution which guarantees every person who is accused of any offense a number of rights.

Elements of the Right to a Fair Trial under the Malawian Constitution

- Trial in public "before an independent and impartial court of law within a reasonable time after having been charged";
- Information, in detail, of any charges against him or her;
- Presumption of innocence and right to remain silent during plea proceedings or trial;
- Right not to testify during trial;
- Right to adduce and challenge evidence;
- Protection against self-incrimination;
- Representation by a lawyer of his or her choice or, where it is required in the interests of justice, provision of a lawyer at the expense of the State;
- No conviction under retrospective criminal law;
- No prosecution more than once for the same offense as that for which the person was convicted or acquitted before;
- Possibility to appeal any court's decision;
- Trial in a language which he or she understands or, failing this, interpretation of proceedings, at the expense of the State, into a language which he or she understands; and
- Sentencing within a reasonable time after conviction.

In addition to the generally applicable right to a fair trial, every child accused of any offence is guaranteed the right not to be sentenced to life imprisonment without possibility of release and the right to be imprisoned only as a last resort and for the shortest period of time.

The economic realities of Malawi hamper the realization of a number of fair trial guarantees. The most obvious of these is the right to have legal representation. The vast majority of Malawians cannot afford to hire a lawyer. The low number of lawyers (about 400 for a population of 11 million people) also means that the State also has an inadequate number of lawyers to render *pro bono* services as required by the Constitution. According to the Inspectorate of Prisons:

*"In practice, most detainees who are awaiting trial do not benefit from legal representation. The Legal Aid Department of the Ministry of Justice is understaffed and under-resourced … This is not likely to change soon, given the small number of lawyers graduating each year, the inability of Government to provide adequate salaries to retain lawyers who end up leaving for the private sector …"*[54]

The State itself also suffers from a shortage of prosecutors, resulting in delays in the progress of cases and backlogs that militate against the realization of the right to fair trial by persons awaiting trial. In its 2002 Human Rights Report for Malawi, the US State Department observed that "during the year, the Department of Public Prosecutions had 7 prosecuting attorneys and 11 paralegals … Lack of funding and a shortage of attorneys created a backlog mainly in murder cases."[55]

## II. Guarantee of Equality under the Law

**Unsatisfactory**: While equality under the law is guaranteed under the Constitution, there is, in practice, institutionalized discrimination against women.

In terms of equality before the law, section 41(1) of the Constitution provides that every person has a right to recognition as a person before the law. The Constitution further makes specific provision for children and women. Section 23(1) provides that all children, regardless of the circumstances of their birth, are entitled to equal treatment before the law, while section 24(1) guarantees every woman the right to full and equal protection by the law. These guarantees are in addition to the general prohibition against discrimination under section 20 of the Constitution.

In practice, the existence of a system of traditional customary law and a patriarchal socio-cultural context of law in Malawi limit equality before the law for women. There have been a number of surveys that have concluded that there is institutionalized discrimination against women by the courts. One such survey was conducted by a renowned Southern African regional non-governmental organization called Women and the Law in Southern Africa Research Trust (WLSA). The survey found that women were treated less favorably than men, particularly in cases involving inheritance, domestic violence and divorce.[56]

## III. Guarantee of Access to Justice

**Unsatisfactory**: While access to justice is guaranteed under the Constitution, it is difficult or even impossible for the majority of Malawians to enjoy this right. Some of the factors contributing to the lack of access to justice include (i) the lack of awareness of citizens; (ii) language issues; (iii) geographic distance; (iv) the cost of justice; and (v) obstacles affecting directly women and other socially disadvantaged groups.

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

55 US State Department, *Human Rights Report for Malawi*, 2002, p.6.

56 Women and Law in Southern Africa, *In Search of Justice: Women and the Administration of Justice in Malawi* (Blantyre: Dzuka, 2000).

The Constitution also guarantees access to justice. Section 41(1) provides that every person has the right to recognition as a person before the law and to have access to any court of law or any other tribunal for final settlement of legal issues. In addition to this, section 41(3) guarantees every person "the right to an effective remedy by a court of law or tribunal for acts violating the rights and freedoms granted to him by this Constitution or any other law."

Although the law guarantees every person access to justice, there are a number of factors that make it difficult or impossible for the majority of people to have access to courts and other justice delivery mechanisms in practice. The most important of the constraining factors are:

- The low levels of awareness of the formal justice system on the part of the majority of people; [57]
- The use of English as the official language of courts and all other State institutions (the majority of people cannot speak or understand English and have to rely on interpretation which is often misleading and inaccurate);
- Prohibitively long distances to courts and other formal justice delivery institutions that tend to be located in urban and periurban centers of the country (over 80% of Malawians live in rural areas);
- Lawyers' and court fees which are unaffordable for the majority of Malawians. The deposit that most lawyers will demand for their services is the equivalent of three months' salary for the average employee with a university degree.

Access to justice is particularly problematic for women and other socially disadvantaged sections of the population. The poverty and illiteracy that people in these categories experience prevents their ability to access justice delivery institutions such as the courts. According to the head of the Society for the Advancement of Women, a women right non-governmental organization interviewed for this report, women also had problems accessing justice because courts sometimes applied traditional customary law which is inherently patriarchal. The Constitution in fact allows courts to apply customary law in certain cases. In this way, courts themselves contribute to the denial of justice to women, particularly in such areas as domestic violence, inheritance and custody of children. The United Nations Development Program/Malawi Government Democracy Consolidation Program has in fact identified lack of access to justice by the majority, especially vulnerable groups, as a barrier to the promotion of the rule of law in Malawi. [58]

57 International IDEA, *The State of Democracy: Democracy Assessments in Eight Nations Around the World* (The Hague: Kluwer Law International, 2002), p. 51.

58 UNDP/Government of Malawi, *Democracy Consolidation Program Phase II: 2002-2006*, Project Support Document, p.6.

### JIP.7: Fair and Effective Enforcement of Judgments

**Partially satisfactory**: The enforcement of judgments in civil cases and of judicial remedies is generally fair and efficient, but there are significant shortcomings due to (i) the lack of resources of enforcement agents and (ii) the defiance of court orders by the executive and legislature (infrequent). There are few significant complaints about the enforcement of criminal judgments.

The enforcement of judgments in civil cases is handled mainly by the Sheriff's Department of the judiciary. Some stakeholders interviewed for this report held the view that enforcement of remedies by this department was reasonably fair and efficient given its lack of resources. However, it was also pointed out that there has been a fair amount of anecdotal evidence suggesting that some officers of the department have on occasion been corrupted to delay, or fail to carry out, their enforcement duties in particular cases.

On a number of occasions, the enforcement of judicial remedies has also been undermined by defiance of court orders by the executive and legislative branches of government. A good example of executive defiance was the President's response to an injunction of the High Court which prohibited law enforcement officials from interfering with people who intended to hold a demonstration against a proposal for Parliament to amend the Constitution to allow the President a third consecutive term of office. The President called the High Court's granting of the injunction "irresponsible and insensitive", and insisted that, in spite of the court order, he would "instruct both the army and police that demonstrations should not take place."[59] Demonstrators who dared to rely on the court order and organized a demonstration were violently dispersed by police and ruling party activists, none of whom were arrested. In the end, the remedy granted by the courts proved to be illusory in practice.

The legislature has also been guilty of undermining the effective enforcement of judicial remedies on at least one occasion. As this report indicates, in November 2001, the National Assembly passed a motion calling for the removal of some judges of the High Court. Prior to the debate of the motion, the High Court issued an injunction stopping the National Assembly from proceeding with the impeachment proceedings on the basis of a number of legal reasons. The National Assembly defied the court order, referring to section 5 of the National Assembly Powers and Privileges Act (Cap.2:04), which provides that:

> *"No process issued by any court in the exercise of its jurisdiction shall be served or executed within the precincts of the Assembly while the Assembly is sitting or through the Speaker, the Clerk or any officer of the Assembly."*

The majority of Members of Parliament argued that the judge who had issued an injunction for service on the Speaker while the Assembly was in session had demonstrated incompetence because section 5 was clear. For his alleged incompetence, the judge who issued the injunction was himself added to the list of judges to be removed from office (although he was later removed for some other inexplicable reason). By deliberately choosing to defy a court order, the National Assembly undermined the effectiveness of the enforcement mechanism of the judiciary and discredited it.

59 See, http://news.bbc.co.uk/2/hi/africa/2024844.stm.

Although direct defiance of court orders as has been demonstrated by the President and the National Assembly is infrequent, it is nevertheless cause for concern for the long term prospects of judicial independence. Because it has been done by other branches of government, the defiance may gain a undue air of respectability in the eyes of the general public. It is therefore extremely important that the executive and legislature desist from further defiance of court orders to avoid permanent damage to the credibility of the judiciary.

In general, there have been few significant complaints about the enforcement of criminal law judgments. Sentences and orders passed by the courts have generally been implemented. The police and prison authorities who have the primary responsibility of ensuring the enforcement of court orders in criminal cases have generally ensured their effective and fair enforcement.

## SECTION 4

## LEVEL OF COMPLIANCE WITH THE JUDICIAL INTEGRITY PRINCIPLES GUARANTEEING EXPRESSION AND INFORMATION RIGHTS

It would not be possible to paint the picture of the state of the Malawian judiciary without an examination of the level of access to information available to the public and to judges. Based on a survey of available information and interviews with stakeholders, it appears that access to legal and judicial information is difficult, if not impossible, in Malawi. Most judges and the public have virtually no access to this information. Second-hand media reports are the only source of information for the public, but their access is largely illusory due to high illiteracy rates and poor communication networks in Malawi. The situation appears, however, to be slowly improving for judges, at least in major cities and higher courts, especially with the recent installation of Internet access.

This Section centers on the analysis of two closely-related Judicial Integrity Principles:

- JIP.17 Judicial Access to Legal and Judicial Information
- JIP.18 Public Access to Legal and Judicial Information

### JIP.17: Judicial Access to Legal and Judicial Information

**Unsatisfactory:** Judicial access to legal and judicial information is extremely poor or even non-existent in most lower-courts outside the main cities. The situation is slowly improving in higher courts since the provision of internet access.

It is of vital importance for the efficient and effective performance of the judicial functions that judges have access to adequate, appropriate and up-to-date information relevant to their work. Three factors appear to be critical to the provision of such information: the availability of the information, its accessibility and user-friendliness. In terms of availability of information, the judiciary stocks a small number of books and other printed materials in its main library in Blantyre, and even smaller collections in Lilongwe, Mzuzu and Zomba. On the other hand, few magistrates have available to them any significant amount of legal literature, apart from a few basic statutes. Most magistrates, particularly in remote rural areas, cannot even compensate for the lack of materials by going to public libraries because these do not exist in most areas of the country.

The general unavailability of printed legal and judicial information in the judiciary has been ameliorated at the higher levels by the availability of internet facilities to most judges of the High Court and Supreme Court of Appeal. The resources for this connectivity were provided mainly by the European Union under its Rule of Law and Improvement of Justice Program. Some judges have used the internet to source various types of legal and judicial information. It was not immediately clear whether aversion to technology among judges, particularly older, more conservative ones, was a significant obstacle to their benefiting from the resources available on the internet. This would be a reasonable likelihood. In any case, though, for the vast majority of judicial officers in Malawi, information is still generated, disseminated and obtained in printed form, and the internet is a far-fetched fantasy. For these officers, the majority of whom do not even have computers, access to legal and judicial information is severely restricted.

The judiciary's own inevitable assessment of the situation in the Malawi Judiciary Development Program 2003-2008 is that there is an 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.[60]

60 *Malawi Judicial Development Program 2003-2008*, p.11.

### JIP.18: Public Access to Legal and Judicial Information

**Unsatisfactory**: The public has virtually no access to legal and judicial information. The only information available is second-hand reports by the media, but high-levels of illiteracy and the poverty of the majority of Malawian make it virtually impossible for them to obtain this information. Moreover, information, communication and technological facilities in Malawi are rudimentary at best and non-existent at worst.

The public may gain access to legal and judicial information either first or second-hand. First-hand information may be acquired through direct observation of legal and judicial processes. The Constitution and various statutes guarantee people the right to acquire a wide range of information on legal and judicial processes. Members of the public can observe the law-making process in the National Assembly. However, the Speaker of the Assembly is empowered by section 8 of the National Assembly (Powers and Privileges) Act (Cap.2:04) to order any person who is not a Member of Parliament to leave the premises of the National Assembly. The Speaker may use this power to limit or prohibit the public's ability to acquire first-hand information on the legislative process.

Judicial officers have similar powers that may be used to exclude the public from judicial proceedings. Section 71 of the Criminal Procedure and Evidence Code (Cap.8:01) provides that all criminal proceedings must be held "in an open court to which the public may generally have access" except where a court decides that it is expedient in the interests of justice or propriety "or for other sufficient reason" to bar a particular individual or individuals or hold the trial or part of it behind closed doors. Although a person under trial is guaranteed a public trial by the Constitution[61] and international instruments to which Malawi is a party[62], it is accepted that the right may be legitimately limited in certain circumstances. Such limitation poses a potential restriction on the amount of legal and judicial information to which the public may have access.

But even where the public is not prohibited from attending a sitting of the National Assembly or a trial by a court, members of the public may still be unable to utilize the opportunity to learn about legislative and judicial processes because most of them live too far away from the National Assembly or any court. It is worth remembering that the majority of people in Malawi live in rural areas where there are very few courts or other institutions involved in legal and judicial processes. The extremely limited geographic distribution of courts and other institutions dealing with formal law is, therefore, a problem not only in terms of access to justice, as discussed earlier in this report, but also with regard to access to information about legal and judicial matters.

The reality is, therefore, that the vast majority of people in Malawi can obtain legal and judicial information only second-hand from the media and other sources. But even this has its own problems. Information, communication and technological facilities in Malawi are rudimentary at best and non-existent at worst. In addition, the majority of Malawians is poor and cannot afford to buy radios, let alone television sets. Even the cheapest radios are not affordable by the majority of Malawians, and a television set costs about ten times the monthly minimum wage. The country's high illiteracy rates also mean that many people cannot read newspapers, magazines and other text-based information sources.

61 Constitution of Malawi, Section 42(2)(f)(i) (1994).

62 For example, see African Charter of Human and People's Rights and International Covenant on Civil and Political Rights.

For people who have radios, information about the legal and judicial systems and their processes is available through various general education programs and news coverage of high profile trials. The only radio station that broadcasts nationally is the State broadcaster Malawi Broadcasting Corporation (MBC). The rest are FM stations whose reach is limited to urban centers. The MBC is bound by a number of different statutory provisions to act in the public interest, and not to be influenced by political bias. In practice, the station has historically tended to be biased in favor of the ruling party and has continued to be so despite various constitutional and statutory reforms aimed at compelling the station to be unbiased. Given its reach across the country, MBC is in a position to shape people's perception of the law and the judiciary. Through selective reporting of legal and judicial activities, judgmental editorial commentaries on activities of the courts and other institutions involved with the law, and propagandistic civic education programs, MBC has the potential to distort the picture of how the law and the judiciary operate. Depending on whether it will serve the interests of the ruling party in any given situation, MBC promotes or undermines judicial independence in the minds of the majority of Malawians.

One stakeholder suggested that MBC might provide the public with only partial judicial information because the judiciary itself might not be providing the radio station with the necessary programs. In his view, it should not be up to MBC to produce such programs; the judiciary itself must commission such programs with the MBC serving merely as broadcaster. It was suggested that, in this way, the judiciary would ensure that judicial information that is disseminated to the public is accurate, balanced and supportive of judicial independence and accountability. The only problem with this approach is that MBC would still retain final editorial control and, thus, decide on what information would ultimately be broadcast.

## CHAPTER 4

## CONCLUSIONS AND RECOMMENDATIONS

The judiciary is probably the most credible branch of government in Malawi. In spite of many political and economic pressures and constraints, it has remained relatively independent and has facilitated the realization of human rights including those to a fair trial, equality before the law and access to justice. To a large extent, the judiciary has been able to achieve this because it has a sound constitutional and legal basis for its authority and independence. The Constitution guarantees the judiciary independence from institutional and decisional interference. It also provides for security of tenure of judicial officers, setting a retirement age and restricting the removal of judges. Fair trial, equality before the law and access to justice are guaranteed in the form of human rights which cannot be easily abrogated.

At the normative level, therefore, judicial integrity may appear to be secured sufficiently. However, adverse socio-economic realities limit the practical realization of the various ideals set by the various laws. A general lack of public resources constrains the operational independence of courts and its efficiency. At a personal level, poverty makes most unable to afford legal representation thereby undermining the right to a fair trial. It also makes litigation costs prohibitively high, limiting the number of people who can access the legal and judicial systems.

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The factors that limit the realization of some of the Judicial Integrity Principles are not limited to socio-economic constraints, but also include normative shortfalls that compromise independence, transparency, and the integrity of the appointment process. The provision for the appointment of judicial officers does not guarantee transparency, and does not ensure that lay magistrates are properly qualified. The law also lacks clarity regarding conflict of interest that may undermine decisional independence. The Code of Conduct for judicial officers is effectively non-operational. Another gap in the law is that it does not require judicial officers to declare their assets and income. The various gaps may be exploited. The President can easily abuse his or her powers of appointment, and judicial officers may choose to benefit from conflict of interest situations, safe in the knowledge that there was no law that could be used against him or her.

Most of the public does not have access to legal or judicial information. Limited geographic distribution of courts and legal institutions contributes to this situation. The few people who have access to radios have some access to such information although sometimes this information is inaccurate and distorted, particularly if it is put out by biased broadcasters such as the Malawi Broadcasting Corporation. For their part, most judicial officers are only slightly better informed about legal and judicial developments than the general public. Most magistrates, who are based in remote rural areas, generally lack access to adequate and up-to-date information sources, such as books, case reports, official gazettes and statutes.

## ANNEX 1

## STAKEHOLDERS INTERVIEWED

| | |
|---|---|
| Chiume, Wallace | Secretary General, Alliance for Democracy (AFORD) |
| Kachika, Tinyade | Research Fellow, Women and Law in Southern Africa Research Trust |
| Kafumba, Steven | Controller of Legal Services, Office of the Ombudsman |
| Kainja, Kate | Deputy Secretary General, Malawi Congress Party (MCP) |
| Kaphale, Kalekeni | Lawyer and Member, Judicial Service Commission |
| Manda, Ken | Chief Resident Magistrate and Member, Judicial Service Commission |
| Munthali, Catherine | Executive Director, Society for the Advancement of Women (SAW) |
| Mwaungulu, Dunstan | Judge, High Court |
| Singini, Elton | The Law Commissioner |
| Twea, Edward | Judge, High Court |

## ANNEX 2

## ANALYTICAL EVALUATION OF THE LEVEL OF COMPLIANCE WITH THE JIP IN MALAWI

| JIP | SCOPE OF THE JIP (NAME OF THE PRINCIPLE) | COMPLIANCE* |
|---|---|---|
| 1 | Guarantee of judicial independence | |
| | Guarantee of the right to a fair trial | |
| | Guarantee of equality under the law | |
| | Guarantee of access to justice | |
| 2 | Institutional independence of the judiciary | |
| | Personal/decisional independence of judges | |
| 3 | Clear and effective jurisdiction of ordinary courts | |
| | Clear and effective judicial review powers | |
| 4 | Adequate judicial resources and salaries | |
| 5 | Adequate training and continuing legal education | |
| 6 | Security of tenure | |
| 7 | Fair and effective enforcement of court judgments | |
| 8 | Judicial freedom of expression and association | |
| 9 | Adequate qualification | |
| | Objective and transparent selection and appointment process | |
| 10 | Objective and transparent judicial career processes | |
| 11 | Objective, transparent, fair and effective disciplinary process | |
| 12 | Limited immunity from civil and criminal suit | |
| 13 | Conflict of interest rules | |
| 14 | Income and asset disclosure | |
| 15 | High standards of judicial conduct | |
| | Rules of judicial ethics | |
| 16 | Objective and transparent court administration | |
| | Objective and transparent judicial processes | |
| 17 | Judicial access to legal and judicial information | |
| 18 | Public access to legal and judicial information | |

* The level of compliance with each Judicial Integrity Principle (JIP) or each subcategory of a JIP is coded as follows: light gray corresponds to "satisfactory"; dark gray to "partially satisfactory"; black to "unsatisfactory"; and white to "not analyzed". There is an additional nuance in the assessment of the level of compliance as arrows pointed upwards or downwards indicate, respectively, improvement or regression within one category.

The JIP were developed by IFES as key consensus principles of judicial integrity as found in most country constitutions, international obligations, international case law and emerging best practices. For more information on these principles, see IFES Rule of Law White Paper Series, White Paper #6, Framework for a State of the Judiciary Report, 2004 (available at IFES).