

TOWARDS THE CONSOLIDATION OF MALAWI'S DEMOCRACY

Essays in honour of the work of Albert Gisy
German Ambassador in Malawi (February 2005–June 2008)

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CONTENTS

| | |
|---|-----------|
| Abbreviations | ix |
| | |
| CHAPTER 1 | |
| Introduction: Malawi's development course on a knife's edge – do the politicians care? | 1 |
| <i>Ingo Scholz</i> | |
| | |
| CHAPTER 2 | |
| Malawi's democracy project at a crossroads | 7 |
| <i>Blessings Chinsinga</i> | |
| | |
| CHAPTER 3 | |
| The representational challenge in Malawi | 21 |
| <i>Nandini Patel</i> | |
| | |
| CHAPTER 4 | |
| Political parties in Malawi: Minimising electoral fortunes | 39 |
| <i>Samson Lembani</i> | |
| | |
| CHAPTER 5 | |
| Dikastocracy: Is it undermining democracy in Malawi? | 49 |
| <i>Marshal Chilenga</i> | |
| | |
| Chapter 6 | |
| Opening space for participation in Malawi | 57 |
| <i>Peter Chihana</i> | |

| | |
|--|------------|
| CHAPTER 7 | |
| Social capital and the fight against corruption in Malawi | 69 |
| <i>Florence Phiri</i> | |
| | |
| CHAPTER 8 | |
| Kayelekera and the uranium mining saga in Malawi | 75 |
| <i>Rafiq Hajat</i> | |
| | |
| References | 97 |
| | |
| Occasional Paper Series | 101 |
| | |
| Ambassador Albert Gisy | 102 |

ABBREVIATIONS

| | |
|--------|--|
| ACB | Anti-Corruption Bureau |
| AFORD | Alliance for Democracy |
| CDF | Constituency Development Fund |
| CSMNM | Civil Society Mining Network of Malawi |
| CSO | Civil society organisation |
| DED | German Development Services |
| DPP | Democratic Progressive Party |
| EIA | Environmental impact assessment |
| GDP | Gross domestic product |
| GOM | Government of Malawi |
| HMS | Heavy mineral sands |
| Masaf | Malawi Social Action Fund |
| MCP | Malawi Congress Party |
| MEC | Malawi Electoral Commission |
| MP | Member of parliament |
| NGO | Non-governmental organisation |
| OST | Open Space Technology |
| PaFERD | Pachichi Foundation for Education, Research and Development |
| PPM | People's Progressive Movement |
| UDF | United Democratic Front |

1

INTRODUCTION: MALAWI'S DEVELOPMENT COURSE ON A KNIFE'S EDGE – DO THE POLITICIANS CARE?

Ingo Scholz

Malawi has ranked consistently as one of world's least developed countries and relies heavily on concessionary development aid. Many country analyses conclude that this situation will prevail for the foreseeable future. The list of development constraints facing Malawi is long. For example: the country lacks mineral and oil resources;¹ it is landlocked and surrounded by poor neighbours; the market is small with little purchasing power; there are no attractive targets for foreign investment; there is no significant local industry; illiteracy levels are high; and there is a high rate of HIV/Aids infection.

There is little reward for Malawi's hard-working population. More than 80% of now 14 million Malawians survive from subsistence agriculture and almost half the population live below the poverty datum line. Years of low rainfall mean a low growth rate (2000: 1.6%; 2005: 2.7%), which is often below the population growth rate (2.2–2.6%) and far from the 6% envisaged by the World Bank and International Monetary Fund as necessary for poverty reduction. Expectations are modest: the Malawi Confederation of Chambers of Commerce and Industry, for example, considers a 5% growth rate as 'good'.

Prospects for the near future indicate that Malawians must be prepared to tighten their already taut belts: international terms of trade for tobacco, which provides two-thirds of Malawi's foreign exchange

earnings, are volatile and unlikely to rise; energy prices are likely to continue to rise; and world food prices are on the increase. The world food crisis would put the people at risk if another drought hits Southern Africa. The government's existence would also be threatened if the automatism of food aid fades in future, because 'maize is life' (*chimanga ndi moyo*).

Malawi's room for manoeuvre is small. This is especially true as Malawi's economic, geographic and meteorological constraints are compounded by poor governance, endemic corruption, insufficient capacity, limited transparency, inadequate accountability and lack of political will.

Faced with these dire and significant issues, one is struck by the lack of will among Malawi's politicians to commit to a long-term, development-oriented agenda which would demand political and social dialogue, concessions and compromise for the benefit of the whole nation. Instead, politicians in Malawi seem to be preoccupied with preserving power, gaining power and preventing others from getting power. The scope of action seems to extend until the next general election only. President Muluzi's second term in office, in particular, confirmed that instead of focusing on development, politicians in Malawi focus on the consolidation of power, rent and resources to maintain their patronage networks – even when donors threaten to withhold their aid disbursements, which is the country's lifeline.

In the first paper of this volume **Blessings Chinsinga** gives an outline of Malawian politics in 2008. He characterises Malawi as a 'defective democracy' which is showing no trend towards the consolidation of a functioning liberal democracy with effective institutions. The fragility of Malawi's democratic project has become more visible since the rift opened between the present and the former state presidents. But considerable changes would be needed even when the politics of survival, which has been practised of late and which has prevented any meaningful reform, ends. Chinsinga identifies the problems inherent in Malawi's parliament, political parties, governance and elections – the four institutions which are responsible for ensuring that the democratisation project 'stays the course'. While democracy depends on a credible, trustworthy leadership, Malawi has not experienced significant leadership turnover since the demise of the one-party system.

Nandini Patel analyses the shortcomings of parliament and members of parliament (MPs). The latter find themselves dependent on,

or even subordinated to, a dominant executive; yet they tend to cultivate their own 'big bwana' image at home, do not communicate with their constituencies and avoid the responsiveness expected of them by their constituents. Although the people have learned to reject candidates with bad track records as representatives (140 of 193 seats in the 2004 general elections were filled by new MPs), after elections the MPs seem to change tack and are more concerned with party loyalties than loyalty to their constituents. The current situation shows that the main competences of parliament – namely, legislation, oversight and representation – have suffered a severe setback in Malawi.

Samson Lembani's paper captures the attitudes, expectations and behaviour of Malawi's political parties. Lembani shows that the weaknesses of the parties and of the party system as a whole are, to a great extent, self created. As long as there is no willingness to learn from past mistakes, and while party leaders continue to be misled by their unfounded optimism regarding prospective results and underestimate the damage caused by their autocratic rule, parties will deliberately reduce their influence. The future lies with parties that strive for the sympathy of the public as a whole, and which constantly realign themselves. Lembani's criteria for the success of a party require an end to the old-style African clientele party; unfortunately, the learning process still seems to be on going.

The current role of the judiciary in Malawi is also not ideal and far from the classical perception of a horizontal separation of powers. **Marshal Chilenga** uses the term 'dikastocracy' to describe the situation in Malawi. By this he means that it is not the elected representatives who govern the country, but rather the unelected judges who are (mis)used by both the opposition and government politicians. The tendency by the opposition and government elite to revert to the courts for nearly all political disputes substantially impairs the political neutrality of the judges, thereby subjecting the judiciary to public contempt and ridicule. The regular onslaught by the government on some judicial officers whose judgments are deemed to be unfavourable to the government is a further manifestation of the poor inter-institutional trust and mutual confidence that exists among the executive, legislature and judiciary.

Malawi's room for manoeuvre is small, indeed; but there *is* room. Some progress in terms of good governance, e.g. financial discipline, has allowed Malawi to benefit from important aid instruments such as the Poverty Reduction and Growth Facility, the Highly Indebted Poor Countries Initiative, and lately the Multilateral Debt Relief Initiative.

The three branches of government must, however, reach many more targets. Important areas that require attention include the public administration, the education system, political parties and parliament, and respect for judicial independence.

Another main objective should be to achieve inclusive politics, as the remaining three papers demonstrate with regard to the importance of civil society.

Peter Chihana shows in his empirically founded conclusions how the people can become the main actors and attain significant development results if their self-initiative and self-organisation is encouraged. Participation calls for the transfer of power to the people; then, and only then, may we call it 'participation'. Participation has all too often been used as a label for forced compliance and manipulation by authorities with the power to control and sanction. Such methods have created the false image of people lacking initiative, lacking demand for projects, or even being passive and lazy. This has encouraged external 'mobilisers' to offer their services – a role identification that is questioned by Chihana. He advises donors and supporting agencies to concentrate on reinforcing self-mobilisation and self-initiative and to encourage people to take responsibility for their own change.

More participation is also the way forward when it comes to dealing with one of Malawi's major challenges, namely, corruption. **Florence Phiri** argues that social groups in Malawi must get more involved if corruption is to be eliminated. Up until now, anti-corruption activities have not been sufficiently embedded within the population. Phiri thus sees a need to grow social capital, with groups taking the anti-corruption mission into their set of norms. Although the Anti-Corruption Bureau would act as the facilitator, civil society is encouraged to be a 'co-creator' with government.

Rafiq Hajat provides empirical proof that more participation is beneficial to all involved stakeholders. In the case of uranium mining in Malawi, Hajat shows how civil society's involvement will result in the protection of natural resources and the livelihoods of the population. Importantly, it will lead to a more comprehensive policy for extractive industries, which will benefit the whole country in economic, social and environmental terms. Hajat illustrates that civil society in Malawi is willing and able to act as a responsible partner and that transparent decision making should include existing traditional authorities. Transparency and participation in this case will also secure adequate royalties for the country's budget and the best use of scarce resources.

The list of positive experiences appeals for a more comprehensive development approach with respect to stakeholders and methods. Most existing priority lists and action plans for Malawi are exclusively executive-oriented. Although there is no doubt that the executive is largely responsible for development and must be the main actor, it also holds true that there are other important players, besides government, who must get more involved if the people of Malawi are to truly benefit most from internal resources and external aid.

ENDNOTE

- 1 This has been the perception so far. Rafiq Hajat's paper indicates, however, that Malawi does have some significant mineral resources.

2

MALAWI'S DEMOCRACY PROJECT AT A CROSSROADS

Blessings Chinsinga

SETTING THE SCENE

Malawi goes to the polls next year for the fourth consecutive time since that country's remarkably successful transition to multiparty democracy in May 1994. The transition to democracy was widely billed as a success because it was carried out without major blood letting and largely outside the international limelight.¹

There is no doubt that the transition to democracy inspired high hopes for a favourable political, economic and social setting than was the case under the autocratic one-party state. It was in fact widely perceived as a panacea for the untold ills perpetrated by the Malawi Congress Party (MCP).

While the liberal democratic constitutional framework is generally acceptable to all stakeholders as the basis for organising political competition, the events of recent years clearly underlie the fact that the democratisation project in Malawi remains fragile and incomplete in most respects. The fundamental democratic structures are broadly considered legitimate but there are clearly tendencies to retreat backwards insofar as democratic practices are concerned.

These tendencies have become particularly pronounced in the past four years following the fallout between Bingu wa Mutharika and Bakili Muluzi. This destructive power struggle saw the former ditching the

party that sponsored him into power, the United Democratic Front (UDF), to form his own party, the Democratic Progressive Party (DPP), which is currently at the helm of government. As a handpicked successor – and seen by many as a political light weight – it was widely expected that Mutharika would be Muluzi's obedient successor and Muluzi in turn would continue to pull the strings from his position as the ruling party's chairman.

Broadly speaking the Muluzi–Mutharika fallout has plunged Malawi into a state of persistent tension, which on several occasions has left the country teetering on the brink of political paralysis.

The repercussions of this fallout have further battered and exacerbated the institutional fragility of the foundations of Malawi's democracy. These have included, among other things, political parties, parliament, the judiciary, the media and independent constitutional governance bodies. These institutional pillars of democracy are in a state of flux, yet they are the cornerstones of democratic governance. And this has only served to aggravate the already gloomy conditions that existed at the onset of the transition process. These conditions included:

- extremely low levels of economic and social development;
- very weak foundations for a market economy;
- very low levels of education, even by African standards;
- a high degree of social inequality;
- a barely existent civic tradition;
- inefficient government administration; and
- a very weak rule of law tradition.

Consequently, the optimism that characterised the transition to democracy more than a decade ago is rapidly waning. For scholars like Bratton and Van de Walle this should be a huge paradox. They, *inter alia*, projected that emerging democracies would face teething problems in the initial years of the democratisation project but that these would improve with the passage of time.² The reason for this would be that voters, candidates and administrators would have gained adequate experience with multiparty electoral contests. In other words, the political culture of the emerging democracies would adapt to the intrinsic demands of a democratic dispensation.

But on the eve of Malawi's fourth general elections, it appears that the inherent problems and challenges plaguing the democratisation project are not getting any better, with a fair share of Malawians

ironically itching for a possible return to the one-party era – at least according to the Afrobarometer surveys.³

This paper therefore quickly takes stock of the current status of democracy in Malawi, with the view to drawing preliminary implications for the African democratic project. The assessment is institutionally orientated and focuses on parliament, political parties, governance and elections.

These are some of the key building blocks of a democratic dispensation to the extent that they affect the way in which powers are exercised, particularly with regard to openness, participation, accountability, effectiveness and coherence.

The main lesson drawn from Malawi's experience for the wider African democratic project is that leadership is a critical requirement for the success of the democratisation project. Leadership is vital because credible and trustworthy leadership complements the institutional framework of democratic governance, providing the necessary stability and a climate for sustainable development, peace and prosperity.

UNDERSTANDING THE CONSTRAINTS

The main constraint facing the African democratisation project is the failure of the emerging democracies to consolidate their democracies successfully. A democratic regime is considered consolidated if and when the rules of the democratic game are respected and considered legitimate by all significant groups.⁴ Democratic consolidation becomes a reality if, and only if, democracy is the only game in town.

It is, however, important to note that democracy consolidation is not necessarily the continuation of the transition. It is an entirely different process, the beginnings of which overlap with the second phase of the transition (after the founding elections) and which in most cases continues after the end of the transition until a characteristic threshold is reached.⁵

Most emerging democracies are, however, fumbling on the path to democracy consolidation and are instead moving towards defective democracies. These are those regimes in transformation which have not achieved the consolidation to liberal democracy, but at the same time can no longer be considered autocratic regimes because they have established an electoral regime which functions along democratic lines.⁶

Defective democracies are thus by no means necessarily transitional regimes mainly because 'they are able to form stable links to their

environment and are seen by considerable parts of the elites and the population as adequate solutions to acute problems experienced in the previous authoritarian regimes'.⁷ This means that defective democracies are more than just a phase on the path towards the consolidation of a liberal democracy. There are four sub-types of defective democracies, namely:

- exclusive democracy;
- illiberal democracy;
- domain democracy; and
- delegative democracy.

The attributes of these forms of defective democracy are as follows:

- *Exclusive democracy*
 - Develops when one or more segments of all adult citizens are excluded from voting.
- *Domain democracy*
 - Obtains if veto powers such as the military take certain political domains out of the hands of democratically elected representatives.
 - Occurs by constitutional as well as extra constitutional means.
- *Illiberal democracy*
 - Executive and legislative control of the state are only weakly limited by the judiciary.
 - Constitutional norms have little binding impact on government actions.
 - Individual civil rights are either partially suspended or not yet fully established.
 - The principle of the rule of law is damaged, affecting the equal freedom of all individuals.
- *Delegative democracy*
 - The legislature and judiciary have only limited control over the executive.
 - Actions of government are seldom committed to constitutional norms.
 - Systems of checks and balances are effectively undermined.

- Shift of the balance of power in favour of the executive, especially if the incumbent is of charismatic character.

Defective democracies arise mainly in the context of institutions and in the daily practice of constitutional order. Most defects are a consequence of the weaknesses and non-implementation of the norms and rules of governance and of the guarantees of human and civil rights, the authority of which depends on the formal and institutional quality as well as on the society's general respect for these formal and institutional mechanisms.⁸

THE STATUS OF DEMOCRACY IN MALAWI

Malawi's democracy is clearly displaying attributes of a defective democracy, gravitating between the illiberal and delegative dimensions. This is a huge challenge because defective democracies are not a stage leading to democracy consolidation; they are a grey zone which could last and be relatively stable.⁹ This might be the case because the inconsistencies that characterise defective democracies do not necessarily produce sufficient antagonism and dynamics to trigger the system to move in search of something like the lost equilibrium, be it a relapse into authoritarianism or progress towards a more liberal democracy.¹⁰ In these regimes democracy is not the only game in town.

The status of democracy in Malawi can be illustrated through a rapid assessment of the following institutions, which are generally instrumental in ensuring that the democratisation project stays the course.

PARLIAMENT

Parliaments are increasingly being considered as the institutional key to buttressing the processes of democratisation. It is in fact argued that it is not so much the type of constitutional system that determines the level and quality of a country's democratisation process but rather the power and effectiveness of its legislature.

Parliaments are privileged because they embody the will of the people and carry all their expectations that democracy will be truly responsive to their needs.¹¹ For this reason parliaments can potentially function as a forum for inclusive national dialogue given the diversity that they embrace. This means that parliaments can greatly contribute to resolving wider disagreements and conflict in the society.

However, Malawi's parliament, especially since 2004, appears to be a huge misnomer. Instead of functioning as a platform for dialogue, elimination of fear and mistrust, Malawi's parliament has degenerated into a primary source or hotbed of political tension and conflict. It has invariably turned into a partisan battleground. A number of issues can be cited in this regard:

- *Questionable rejection of presidential nominees for senior public offices.* Taking advantage of their numbers in parliament, opposition members of parliament (MPs) have often turned down proposed appointments to senior public positions for reasons that border largely on political vendetta. They often hide behind the privilege of having not to disclose the reason for rejecting the nominees. This has often crippled the functioning of some key governance institutions such as the judiciary, the Auditor General's Office and the Anti-Corruption Bureau (ACB).
- *The section 65 vs budget standoff which almost paralysed government operations.* The government had to operate for close to three months without a budget because of the opposition's insistence on the implementation of section 65, which regulates floor crossing by MPs in parliament. This is an issue following the Supreme Court's ruling that section 65 is valid. Invoking his referral powers the president had sought the court's interpretation regarding the constitutional validity of section 65, which states that legislators who join another party represented in parliament cross the floor and must therefore seek a fresh mandate from their constituents. The president's argument was that section 65 contradicts section 32 of the same constitution, which provides for freedom of association. He observed that since section 32 is entrenched in the Bill of Rights, it was therefore logical that given the contradiction, section 65 should be deleted from the constitution. The president sought the court's interpretation since out of over 60 MPs that support his party, only six have been legitimately elected on the DPP's ticket. The court's ruling notwithstanding, the government is creating unnecessary roadblocks to let the speaker of parliament invoke section 65 on those MPs who have defected to the DPP. It is for this reason that opposition MPs held on to the budget as a bargaining tool to force the government to allow the speaker to invoke section 65 on these legislators during the 2007/08 budget session.

- *The Malawi–Mozambique Electricity Interconnection Bill scandal.* The scandal involved the president assenting to the Malawi–Mozambique Electricity Interconnection Bill, which was never tabled let alone debated in parliament. The speaker of the National Assembly has since taken responsibility for the glitches that led to the president assenting to a bill that was never tabled in parliament. However, this raises serious questions about the integrity of parliament as a forum for honestly brokering competing interests of the nation. It remains a mystery how the bill escaped scrutiny and the elaborate stages through which a bill must pass before the president assents to it.
- *The president's decision to prorogue parliament.* The president's decision to prorogue parliament by invoking section 58 of the constitution, essentially abrogating the deal struck with the opposition to have the budget passed first before turning to section 65, made matters worse. The opposition had agreed to proceed with the debate on the budget, on the understanding that they would deal with section 65 afterwards. But before parliament could turn to proceedings on section 65 the president moved to prorogue parliament, effectively ending the 2007 parliamentary session. While the president insisted that parliament would not convene until the opposition agreed not to discuss section 65, it is likely that the meeting of parliament which commenced on 28 April 2008 will be marred by the same old controversies and disruptions, unless the executive and the opposition reach a consensus regarding parliament's agenda.

These developments have further cemented an atmosphere of distrust between the government and the opposition. It is therefore doubtful whether parliament will be in a position to engage in meaningful debate and dialogue when it eventually meets. This is a cause for concern because there are numerous outstanding bills and legislative enactments that have to be concluded in readiness for the 2009 general elections. There is thus no doubt that parliament is failing to function as an effective and inclusive national forum for dialogue.

POLITICAL PARTIES

Political parties are one of the key players in the democratisation processes. It is axiomatic that democracy without political parties is

inconceivable.¹² The primary function of political parties is to capture power with the view to forming government, failing which they must serve responsibly as alternative governments in waiting. Some of the major political parties in Malawi are the DPP led by Bingu wa Mutharika, the UDF, the People's Progressive Movement (PPM) and the Malawi Congress Party (MCP) led by John Tembo.

The challenge, however, is that nearly all the major political parties in the country are in a state of flux mainly due to a lack of internal democracy. All the major political parties are beset by perennial leadership problems, destructive power struggles and domination by a single leader.¹³ This has contributed greatly to the progressive disengagement of the electorate from the parties, manifested through the phenomenon of independent candidates. From none in the founding elections of May 1994, the number of successful independent candidates in 2004 was 38.

The current status of political parties is probably the root cause of the prevailing political tensions, including the drama around section 65 and its repercussions, as well as the incumbent president's decision to ditch the UDF and to form his own political party. The main challenge for political parties in Malawi is that they do not have viable institutional mechanisms for succession. Consequently, they tend to focus little energy on tangible issues and invariably get absorbed in never ending intra- and inter-party squabbles. It is therefore not surprising that the DPP has declared Mutharika as its presidential candidate for next year, while Muluzi has been endorsed by the UDF and Tembo has been anointed as the MCP's torch bearer.

GOVERNANCE

Governance in Malawi – broadly construed as the rules, processes and behaviour that affect the way in which powers are exercised, particularly regarding openness, participation, accountability, effectiveness and coherence – has recently been largely shaped and influenced by Mutharika's decision in February 2005 to ditch the UDF.

In a much more nuanced sense, governance is the process of decision making and the process by which decisions are implemented and not implemented.¹⁴

Taking advantage of their combined parliamentary strength, the UDF and MCP have strategically manoeuvred to frustrate government's legislative programme through blocking appointments, threats of

impeachment and the invocation of section 65 on MPs who are deemed to have defected to the DPP from these two parties. The major effect of the opposition using parliament as a political turf is that key governance institutions (for instance, the ACB, Auditor General's Office, the Directorate of Public Prosecutions and even the judiciary) have been operating without controlling officers for unacceptably long durations, rendering the democratisation project much more fragile.

This tense political atmosphere has pushed the governing party into practicing politics of survival. The following examples illustrate how government has contravened the basic tenets of governance in a desperate attempt to hold on to power in an environment where the opposition is intent on bringing it down.

- The government has failed to hold local government elections, which were scheduled for May 2005. While various justifications have been flagged for the delay, it is apparent that the government is not comfortable holding the elections when it is uncertain of its electoral stature.
- The government has stuck to appointments even when these have been rejected by parliament.
- The government 'invented' a constructive resignation of the vice president, principally because he remained loyal to the UDF.
- There have been wrangles over the appointment of Malawi Electoral Commission (MEC) commissioners, despite the law stating that the president ought to appoint commissioners in close consultation with the party leaders represented in parliament.
- The handling of the Supreme Court's ruling regarding the validity of section 65 (see earlier discussion).
- The government has abused and manipulated traditional leadership institutions through doling out various incentives, notably the 1000% honoraria increase for traditional leaders.

Strikingly, the foregoing catalogue of governance issues has not caused any significant public outcry. This is a clear indication that Malawi still grapples with a political culture of docility which was

systematically cultivated during the one-party era.¹⁵ In addition, this is a reflection of the extent of the struggle for subsistence that the vast majority of Malawians have to endure on a daily basis, leaving them no time to get actively involved with their political environment. A large section of the public has clearly demonstrated a willingness to overlook the government's transgressions of the rule of law and to focus on its achievements in terms of food security and economic recovery. This situation is not helped by a reactive, fragmented and at times politically motivated civil society, which for its part fails to perform its watchdog role satisfactorily.

ELECTIONS

Elections are a means of filling public office via a competitive struggle for the people's vote. Elections are in fact described as the hallmark of democratic politics because they provide a unique opportunity for the electorate to indicate their priorities, interests and concerns by exercising the right to vote.¹⁶ But for elections to serve this purpose they must be free and fair. Elections are considered free and fair when citizen's fundamental rights and freedoms are respected, including the right to vote freely in secret balloting and without coercion, the right to have access to information and polling sites, as well as freedom of speech and assembly.

Next year's elections are promising to be competitive: Muluzi desires a comeback primarily to get rid of Mutharika; Tembo is itching to bring the MCP back into government, believing strongly that the last elections were stolen from him; and Mutharika is determined to stay on for a full second term, riding on the waves of success vis-à-vis food security and economic recovery.

While the past three elections have been fought along regional lines, the 2009 election has the potential to be different: two major parties are fiercely competing for influence in the southern region; the Alliance for Democracy (AFORD) is regrouping in the North; the DPP claims to have made substantial inroads in the Centre, the MCP's traditional stronghold; and the MCP is on the defensive for its stronghold and seems set to shore up its presence in the other regions. The key question is whether the government's track record on food security and economic recovery will persuade voters to rise above regional and ethnic considerations when voting for candidates.

A main concern regarding the forthcoming elections is whether they will be genuinely free and fair. There are a number of critical issues that

could potentially affect the freeness and fairness of the elections. These include the following:

- There has been much contention around the appointment of MEC commissioners. The ruling by the High Court that the president did not contravene the law in the appointment of the commissioners has created feelings of mistrust among some stakeholders about the independence of the MEC in overseeing the electoral process. This could potentially constitute grounds for the opposition to dispute the electoral outcome should it not go in their favour.
- The government is unwilling to convene sessions of parliament until the opposition relents on clamouring for the invocation of section 65 on legislators deemed to have crossed the floor. These delays are likely to have serious knock-down effects on the electoral calendar since there are numerous legislative and preparatory activities that have to be undertaken, such as the re-demarcation of constituencies, to guarantee free and fair elections. The prospects are even more daunting when one realises that the MEC is almost entirely new and thus lacks experience in managing and overseeing electoral processes.

The recent Kenyan crisis over the disputed December 2007 elections raises serious concerns for Malawi, especially when key stakeholders have already started drawing parallels in the lead up to Malawi's make or break 2009 polls. Sadly it would appear that incumbents in Africa do not organise elections to lose, save for the founding democratic elections over which they tend to have limited control and which were subjected to much international scrutiny.

It is therefore important for stakeholders in Malawi to realise that the freeness and fairness of elections cannot be judged on the basis of the quality of the election day alone, nor on the mere absence or presence of fraudulent activity during the vote. Attention needs to be focused on the series of critical, interdependent variables which are present well before, during and after polling.

CONCLUSION

There is no doubt that the African democratisation project is at a crossroads, if the Malawian experience is anything to by. Contrary to the

optimism that underpinned the transition, Malawi is clearly a defective democracy. It is stuck between being an authoritarian polity and a democracy. This could be attributed to the lack of capable leadership to steer the democratisation project.¹⁷ The potential for leadership to effectively manage the challenges of democratisation is greatly dependent on it embracing the principles of good governance. The principles of good governance underpin a leadership which is participatory, consensus orientated, accountable, transparent, responsive, effective and efficient, equitable and inclusive, and one which follows the rule of law. This ensures that corruption is minimised, that the views of minorities are taken into account, and that the voices of the most vulnerable and marginalised are heard in decision making.

The inauguration of the democratic project in Malawi, and indeed elsewhere on the continent, ignited hope for a crop of leadership that would organise politics in a radically different and innovative manner but within the context of non-violent opposition and acceptance of the basic democratic institutions. This paper shows, however, that Malawi's democratic project hangs in limbo because of deficient leadership to facilitate progressive development of the requisite institutions which are the cornerstones of democratic governance, namely: free and fair elections, a robust parliament, functioning political parties, an independent judiciary, and a free and vibrant civil society.¹⁸

This is the case because Malawi has hardly experienced significant leadership turnover. Up to two thirds of the incumbent leaders in the hitherto evolving democratic milieu are, in one way or another, remnants of the infamous Banda regime; their legacy in structuring the dynamics of political contestation in the democratisation process can, therefore, hardly be ruled out.

This demonstrates that the democratisation project needs leaders who can champion broader horizons, uplift spirits, mobilise the necessary resources and empower others to act in the best interests of the larger society.¹⁹ But perhaps more critically, this set of leaders must be masters of dialogue. Dialogue involves a deeper set of skills, namely, listening, empathy, open-mindedness, understanding and cooperation. This is the case because to cooperate, one has to understand; to understand, one has to be open-minded; to be open-minded, one has to empathise; and to empathise one has to listen. Since dialogue is a trained perspective that rejects violence and embraces understanding, open mindedness and empathy, it potentially holds the key to conflicts that have plagued the democratic project in Malawi.

Many of these conflicts have deep structural roots which require fundamental institutional transformation to broaden democracy and create equity and justice. A leadership well versed with dialogue and which subscribes to the core values of good governance is vital to the process of establishing capable democratic states that are engaged, flexible and adaptable, which continuously reassess their mission, governance structures, human resources and leadership capacity, and which partner with the private and public sectors in order to respond effectively to emerging challenges.

ENDNOTES

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3

THE REPRESENTATIONAL CHALLENGE IN MALAWI

Nandini Patel

INTRODUCTION

Surveys on parliament in Malawi demonstrate low public trust in government in general and a widening representational gap between parliament and the people.

The fact that 140 of the 193 members of parliament (MPs) elected in 2004 are new members, demonstrates that MPs are closely watched and judged by the people, and that those who do not deliver or adhere to proper conduct are not given another chance.

It is a common cry of the people that they do not see their MPs in their constituencies and do not see election promises carried out. The channels of communication between constituents and their MPs tend to be sporadic, thereby restricting the scope of vertical accountability. The constitutional framework, as well as some of the iterative practices in past years, have made the legislative arm subservient to the executive. This has had enormous bearing on reducing the competence of the legislature in the three broad spheres of activity, namely, legislative, oversight and representation.

This paper explores the challenges faced by aspiring candidates vis-à-vis electoral competition. It further explores the challenges faced by MPs in performing their role in general, and specifically that of representation.

BACKGROUND ON THE MALAWI PARLIAMENT

Emerging from a one-party scenario where parliament was largely a rubber stamp for decisions made by the executive, the advent of a multiparty legislature in Malawi placed high demands and expectations on this arm of government, which is the most accessible and visible of the three arms of government.

While on the one hand parliament is expected to perform the three broad roles of legislation, representation and oversight, on the other hand MPs have to balance their loyalties to their party, constituency and to the nation at large. These daunting demands are, of course, expected of parliamentarians across the globe and differentiate parliament from the other two arms of government; however, the cultural, historical context and socio-economic dynamics of Malawi further compound this challenge.

Since the advent of multiparty democracy in Malawi there has been visible executive dominance over the legislature. This emanates firstly from the presidential nature of Malawi's political regime, which assigns parliament a secondary role. Secondly, the general framework of executive-parliamentary relations laid down in the constitution provides opportunities for accentuating this subordinate position through iterative practices.

Last but not least, the persistence of personalised patronage in Malawian politics has encouraged a culture of parliamentary subservience.

The numerical strength of opposition parties in the legislature since 1994 created a situation of adversarial relations between the executive and the legislature, whereby the executive felt threatened owing to its relatively small number in the legislative body and resorted to retaining control by wresting the needed majority through overt and covert means without strengthening parliament as an institution. The strategy included the following:

- Parliament has been denied the resources necessary to operate, thereby transferring control to the executive.
 - Parliamentary sessions are held only when the executive needs parliamentary approval for sanctioning its operations, e.g. budget approval.
 - Parliamentary committee meetings are held only on the

availability of funding, and government funds are released only when committees are expected to focus and cooperate on an executive-driven agenda.

- The asymmetry in information resources between the executive and legislative branches is exploited.
 - The executive is well staffed, has access to expertise and is informed by its ministries, while the National Assembly must rely on an overworked and under-resourced support structure that lacks adequate capacity to render much needed support to legislative functions.¹
- While ensuring the weakness of the legislature, the executive uses its patronage and state resources to solicit legislative support by pandering to the individual self-interests of members.
 - Ministerial appointments have been used to woo MPs over to the president's cause.
 - The budget is also used as a tool for garnering support from MPs by the insertion of popular items, such as the creation of a constituency fund or an increase in sitting allowances which will not take effect until the budget is passed.

A number of these anomalies are addressed in the strategic plan for the National Assembly adopted in 2007; however, the political impasse that the country is currently facing has created an environment that is not conducive for implementing such a plan.

CONSTITUTIONAL AMENDMENTS AND THEIR IMPLICATIONS ON MP-CONSTITUENT RELATIONS

Over the years, a number of constitutional amendments of substantive nature have caused considerable public concern and anxiety. Three specific sections stand out as important in the context of the representational role of parliament, namely:

- *section 64: the Recall Provision* – dealing with MPs' allegiance to their constituencies;

- *section 65: Crossing of the floor* – dealing with MPs' allegiance to their parties; and
- *sections 68 to 72: the Senate* – widening the scope of representation in parliament.

THE RECALL PROVISION

Section 64 of the 1994 provisional constitution provided for the recall of MPs by their constituents for non-satisfactory performance. This section was a reflection of the deliberations during the making of the constitution through the National Consultative Conference held in 1994 and 1995. It embodies the public's desire to ensure vertical accountability of MPs to their constituencies; however, this section was repealed from the constitution even before its adoption in 1995.² The rationale for repealing this section was that it could be abused by the constituents, especially where there is a lack of agreed and common understanding of the role of the MP. Further, in a situation such as the one in Malawi where patronage systems and personality politics play a predominant role, recall could be used as a tool by the 'big men' of politics to change the legislature's composition in their favour.

Although a decade has passed since the section was repealed, public demand for the recall provision is undiminished, as seen by the feedback from stakeholders' meetings and opinion surveys carried out in the run-up to the 2006/07 constitutional review exercise. In the meetings conducted by the Malawi Law Commission, it was urged that, if reintroduced, the recall provision should be protected in the Schedule to avoid a repetition of what happened in 1995.³ The consultations highlighted the general concern that MPs are not seen in their constituencies once they get elected. It was believed that the recall provision would induce MPs to serve *constituents* rather than *political parties*.⁴

This view brings to the fore the conflicting demands made on MPs – representing the constituents vs. the political party. While there is consensus on reinstating the recall provision there is also realisation of the need to establish clear guidelines and procedures to avoid its abuse.

The debate on recall brings out two significant points:

- The people want to hold their elected officials to account.
- They desire effective mechanisms to demand accountability from the said officials.

THE SENATE

The constitution that came into force in May 1995 contained elaborate and well-structured sections on the Senate (section 68 to 72). The Senate was conceived so as to enhance wider representation of the society in the deliberative arm of government, and was therefore designed in such a way so as to have representatives from the district councils, the chiefs and various interest groups, including women, the disabled, farmers, minorities, business sectors and trade unions. It was intended to be primarily a deliberative body which would receive, scrutinise and amend bills from the National Assembly.

The sections on the Senate were, however, repealed by Constitutional Amendment Bill No. 4, 2000 passed in January 2001 when the National Assembly convened for a week especially to table three important bills, namely, the Local Government Bill, the NGO Bill and the Senate Bill.

The bill on the Senate was tabled for a second time after it had been defeated during the previous sitting in 2000. The move was strongly condemned by civil society and opposition parties as unconstitutional on the grounds that the Senate was protected under section 45(8) of the constitution, which states that: 'Under no circumstance shall it be possible to suspend this Constitution or any part thereof or dissolve any of its organs, save as is consistent with the provisions of this Constitution.'

Attention was also drawn to the fact that the abolition of the Senate touched upon the very substance and effect of the constitution and, therefore, invoked section 196(3), which stipulates that any amendment which affects the substance or effect of the constitution requires a national referendum. Based on these aspects, civil society took the view that the abolition of the Senate could not proceed without a national referendum.

The Malawi Human Rights Commission and the Malawi Human Rights Resource Centre sought an injunction from the High Court to prevent the bill from being tabled; however, the government moved with unseemly haste by tabling, debating and passing the bill while the High Court in Lilongwe was still deliberating on the matter. After the repeal of these sections, the National Assembly of Malawi became unicameral, which most observers consider as having strengthened the executive at the expense of the legislature.

Some 35 MPs from the 1999–2004 parliament were interviewed on a range of issues, including the Senate, and they were preponderantly in favour of the decision to abolish the Senate, citing cost considerations as

a decisive factor. It was asserted that the available resources were not even adequate for the proper functioning of one chamber, let alone two, however the justifications varied. Although a few respondents voiced antipathy against traditional authorities that were not elected democratically, some went even further to state that, as a matter of principle, unelected leaders had no place in a democratic system. Others claimed that the traditional authorities – having been appointed by the executive in the first place – would be inclined to side with the executive and be susceptible to bribery, but omitted to apply the same argument to MPs being appointed as ministers by the president. A few argued that the Senate would broaden the democratic space in the Malawian polity by bringing more voices from the grassroots and civil society into the political process at the central level.⁵

The Senate, if duly constituted, would have not only provided a forum for representation but would have provided a stabilising influence through checks and balances on the National Assembly. By abolishing the Senate, therefore, a vital mechanism for ensuring accountability was neutralised. The Senate continues to be a contentious topic in all public forums, and surveys reveal that the public demand for this institution prevails.

SECTION 65: CROSSING OF THE FLOOR

Party allegiance and loyalty is a powerful tool for ensuring accountability of elected officials to their constituencies. This was the fundamental purpose behind adopting the first-past-the-post system of (elections) representation. The logical step to guarantee this was to enshrine section 65 of the constitution, which prevented any whimsical floor crossing by MPs by stating that:

The Speaker shall declare vacant the seat of any member of the National Assembly who was, at the time of his or her election, a member of one political party represented in the National Assembly, other than by that member alone, but who has voluntarily ceased to be a member of that party **or has joined another party represented in the National Assembly, or has joined any other political party, or association or organization whose objectives are political in nature.**

The highlighted excerpt was added by the subsequent Constitutional Amendment Act No. 8 of 2001, which was successfully challenged in the

High Court in the case of the *Registered Trustees of Public Affairs Committee vs. The Attorney General and Others* in 2003, where the court held the extension to be unconstitutional and invalid. But parliament failed to revert section 65 back to its original form – which led to even more complications later on.

In the first term of a multiparty government (1994–999), half of about 25 by-elections held were directly due to floor crossing. The second term of multiparty government (1999–2004) saw more defections – especially in the wake of the open/third term bid for the extension of presidential tenure by Muluzi. There was also a spate of MPs declaring themselves as ‘independent’, though they were, in reality, re-aligned with another party or forming a new party. The silence of section 65 on the status of ‘independent’ members was used as a convenient refuge by prospective defectors. During the technical review of the constitution in 1998, the Law Commission was urged to look into the loose language of section 65, which allowed manipulation for short-term political gain.

Although the practice of floor crossing has been going on since 1994, it grew by an alarming proportion in the post-2005 scenario, with the president defecting from the party that sponsored him for the presidency (the United Democratic Front – UDF) and forming a new party. This escalated the already tense relations between the executive and the legislature – resulting in one crisis after another.

At the Constitutional Review Conference in 2006, the state president in his opening speech called for the repeal of section 65, arguing that it was inconsistent with certain sections of the constitution, namely: s32(1) freedom of association; s33 freedom of conscience; s35 freedom of expression; and several political rights embodied in s40. In the ensuing deliberations, the call from most segments of society for the retention of section 65 was indisputably unequivocal, with the most vociferous being the chiefs who enjoy more trust and confidence of the people than any of the public institutions.⁶ The final endorsement for section 65 came from the much awaited Supreme Court ruling (No. 44 of 2006), which upheld section 65 as an integral part of the constitution.

WHY DO MPS CROSS THE FLOOR?

- *MPs wooed.* MPs are wooed by the lure of development projects in their constituencies, i.e. bridges, roads, etc., that are usually given as rewards to loyalists by the president. MPs who do not agree to toe the line of the party in power, tend to be sidelined and thus undermined

within their constituencies. This is virtual suicide for MPs – they survive by perpetuating the same 'big bwana' syndrome at the local level which the president perpetuates at the national level.

- *Monetary inducement.* The executive has in the past bribed MPs to pass 'wrong and unprincipled' bills, as can be evinced by the infamous 'Brown Envelope' saga during the open/third term bid for the presidency in 2001, where envelopes containing cash rewards were handed out to MPs for their vote in favour of the extension of presidential tenure amendment.
- *Not toeing the party line.* Floor crossing is not always due to bribery or political opportunism. There are cases of MPs who have been compelled to leave their party and join hands with other forces for opposing or not complying with party commands/directives from above based on moral, principled and ethical grounds.

The myriad problems facing political parties, manifested by flawed party primary elections, no regular and democratic conventions, lack of intra-party democracy, etc., are the fundamental causes of frustration and anger among aspirant leaders and party members, which leads to the eventual splintering and fragmenting of major political parties.

PROFICIENCY REQUIREMENTS LIMIT REPRESENTATION

Section 38 of the Parliamentary and Presidential Elections Act requires every candidate to the National Assembly, at the time of his/her nomination, to submit evidence that the candidate 'is able to speak and to read the English language well enough to take an active part in the proceedings of the National Assembly'.

The law inexplicably does not set educational qualification requirements for the president. However, the issue of educational qualifications for presidential aspirants attracted considerable debate in the 2006/07 constitutional conference.⁷ Many stakeholders were of the view that a university degree should be a minimum requirement, contending that it would enable the incumbent to carry out his/her demanding responsibilities efficiently and effectively.

This requirement that MPs be able to read and write in English to run for candidacy has been hotly debated for many years. Opponents of removing the English language requirement give three main reasons.

First, the requirement is not really about language proficiency, rather it is a proxy for a minimum level of education. MPs need to understand the issues that are up for debate and only education can enable that. Second, introducing a second language would necessitate simultaneous translation in the House and this would be costly. Third, picking one of the many vernacular languages in Malawi would estrange the others and could be divisive; thus English is a unifying factor under the current circumstances.

The proponents of Chichewa as a second language of deliberation in the House, dismiss language proficiency as proof of education. They also brush off the cost argument by saying that democracy is costly but worth the cost. Finally, they claim that Chichewa is virtually a *lingua franca* in Malawi. The views diverge on the language matter and there is some merit in all the arguments, but given the shortage of funds for parliamentary business in general, it is unlikely that any other language(s) will be introduced in the near future.⁸

But the above arguments miss a very fundamental issue touching the heart of the representational aspect of the legislature. In a country where 65% of the population cannot read and write, this requirement effectively closes the door for the majority from taking part fully in the legislative process. The suggestion for a university degree as a minimum requirement for the presidency further narrows the space for competition. In a country where illiteracy is high and opportunities for education are limited, a better option would be to provide opportunities for elected officials to improve their linguistic skills through adult literacy/distance learning programmes rather than making constricting preconditions.

The educational qualification requirement is also presumptuous in assuming that wisdom and appreciation of the plight of the poor is the prerogative of the literate. It is, by extension, disdainful of the traditional wisdom and 'real world' experience within the community, and ignores the fact that the world has produced many great grass root leaders in diverse parts of the world, who have stood up for the masses as effectively, or even more so, than their so-called 'literate' counterparts.

LACK OF FAIR REPRESENTATION IN CANDIDATE NOMINATIONS

All registered political parties can contest national elections. The legal framework is well laid out and nominations are made on the basis of three instruments, namely the Republican Constitution, the Presidential

and Parliamentary Elections Act and party constitutions. Qualifications for candidates for presidential and parliamentary seats are stipulated in the national constitution. Section 51 lays down the qualifications for members of the National Assembly and section 80(7) deals with eligibility for the office of the president. The selection of candidates is undertaken through procedures laid out in party constitutions or other documents, which stipulate the procedures for the selection of candidates for the parliamentary and presidential elections, in line with stipulations in the Republican Constitution.

For instance, the Malawi Congress Party (MCP) has formulated guidelines, which, though not part of the party constitution have been the basis for the party's selection of candidates. The guidelines are based on the constitutional requirements such as citizenship, English language proficiency, etc. for candidacy.⁹ The UDF's constitution in articles 39 and 40 lays out procedures for the selection of parliamentary and presidential candidates.¹⁰ The constitution of the Alliance for Democracy (AFORD) in section 7 deals with the nomination of candidates for parliament and the presidency.

However, in reality these clearly laid out guidelines and procedures are systematically and deliberately set aside, and the party high command retains the final say in the choice of party candidates for parliamentary seats as well as for the presidency.

This manipulative trend can be traced back to the election of party leadership, which is elected at a national convention. Candidates aspiring for leadership positions such as party presidents and membership of the national executive committee are first nominated at the convention and voted for by the congregation through a secret ballot. Incumbents, however, utilise centralised leverage to control the process of leadership selection and, in some cases, to impose a leader on the party through their established patronage networks within the party structures.¹¹

Most parties hold primary elections for choosing candidates for parliament. However, there are cases in past elections of candidates who were successful in the primaries, but were subsequently asked (compelled) to withdraw in order to make way for another candidate of the high command's choice. Favouritism coupled with violence, chaos and mismanagement of party primary elections frustrate many aspirants, and they express their discontent either by contesting elections as independent candidates in defiance of the hierarchical manipulation or resorting to litigation against perceived injustices. This was more in evidence in the

run up to 2004 elections when a number of cases revolving around party primary election irregularities were taken to court, especially from the UDF.

PARLIAMENT–CONSTITUENCY RELATIONS

Afrobarometer findings after the 1999 election indicated that 63% of the respondents felt that the presidency was interested in their welfare, whereas only 47% expressed similar sentiments towards parliament. While the expectations of MPs vis-à-vis visibility in their constituencies and delivery of development benefits are high, there is a corresponding frustration with the contrasting reality. Bratton, Mattes & Gyimah-Boadi describe this as a ‘representation gap’ – defined as the dearth of formal connectedness between political officials and their constituents.¹² The 2006 Afrobarometer report on ‘Responsiveness and Accountability in Malawi’ further explores the parliament–constituency relationship in Malawi and reveals that:

- Malawians expect MPs to be more responsive;
- MPs are expected to visit their constituencies more frequently; and
- MPs are expected to deliver development benefits directly to the constituency.

These demands/concerns are expressed in observations that MPs do not visit their constituencies frequently, and that they hardly listen to the views of their constituents.

The following data unpacks some interesting facts. Table 1 illustrates what constituents feel about the amount of time MPs actually spend in their constituencies, while Table 2 shows how much time constituents believe MPs should be spending in this constituencies.

Table 1: How often do MPs visit their constituencies?

| | | |
|------|-----|-----------------------|
| 56% | say | Never |
| 12% | say | At least once a year |
| 18% | say | At least once a month |
| 0.5% | say | At least weekly |
| 0.5% | say | Almost all the time |
| 0.5% | say | Don't know |

Source: Afrobarometer Briefing Paper No 31, April 2006, p 4.

Table 2: How often *should* MPs be in their constituencies?

| | | |
|------|-----|-----------------------|
| 41% | say | At least once a month |
| 27% | say | At least once a week |
| 26% | say | All the time |
| 0.3% | say | At least once a year |
| 0.2% | say | Not necessary at all |
| 0.3% | say | Don't know |

Source: Afrobarometer Briefing Paper No 31, April 2006, p 3.

An important element in analysing the MP–constituency relationship is the basis on which the constituents assess the performance of MPs. In other words, what do people perceive the responsibilities of MPs to be? (See Table 3.)

The scores for development (non) delivery indicate the following:

- The bodies responsible for development services are not performing their tasks.
- MPs make unattainable development promises in terms of bridges, etc. during their campaigning.
- There is visible tension between MPs and local councillors and/or other local development agencies as MPs regard their constituencies as virtual personal fiefdoms and resent any 'trespassing' into their domain.
- MPs project themselves as 'big bwanas' who can bestow gifts in

Table 3: What do people perceive the responsibilities of MPs to be?

| | |
|------------|--|
| 23% expect | MPs to deliver development, i.e. in form of bridges, schools, health clinics, etc. |
| 20% expect | MPs to represent them in parliament – one of the three arms of government |
| 11% expect | MPs to improve local and national infrastructure |
| 10% expect | MPs to look into national policies |
| Others | A range of areas like agriculture, security, etc. |

Source: Afrobarometer Briefing Paper No 31, April 2006, p 3.

terms of development to the constituency and distribute wealth (donations) to their grassroots.

Most of the challenges addressed above spring from the understanding, perception and wielding of power by the 'political elites', and the change in regime in 2004 has not brought about a change in that attitude.

Malawi's political culture continues to exhibit some features emanating from the days of one-party rule. Concentration of power at the top is a continuation of the past one-party, autocratic legacy, which in turn is the main reason for the absence of intra-party democracy, lack of political will for holding local government elections, and the lack of sincerity in securing 30% of seats in parliament for women and really empowering other marginalised groups. There appears to be excessive respect for authority in political life and in society at large, which hampers open, democratic debate.

The hierarchical mindset that seems to pervade Malawian society offers wide scope for abuse. This is counterbalanced by reflexive suspicion and even contempt towards apex institutions as well as the individuals in those institutions. The underlying mistrust, coupled with a lack of transparency and the free flow of communication, further exacerbated by administrative and logistical inadequacies, and compounded by laxity and ineptitude, has created a widening gap between governing institutions and the people.

Another factor widening the gap between the MPs and their constituents is the visible rise in the standard of living of MPs after they assume office, which leads to resentment, jealousy and friction between the people and their elected representatives; the rationale being that any positive change in the life of the MP through the vote must be reflected by a proportionate change in the life of the voter. These expectations of the constituents are encouraged by the handouts given during the campaign period, and further compounded by the numerous promises made by the MP as well as the sponsoring party.

REPRESENTATION OF WOMEN MPS

Although Malawi has not yet reached the 30% Southern African Development Community goal, there is a visible increase in the number of women MPs. Malawi now has 27 female MPs out of 185 (14.6%) seats contested in the May 2004 polls, while the previous parliament had only

17 women out of 193 (8.8%) seats – a 58.8% increase in female representation.

The 27 female MPs come from a wide range of occupational backgrounds. Five (18.5%) are former teachers or headmistresses, and one (3.7%) is a former university lecturer. The next largest category is businesswomen (four or 14.8%). Equal numbers of MPs (three or 11.1%) were secretaries, civil servants, farmers, and in the medical profession (nurses, pharmacists, etc.). Two were/are students (7.4%). One (3.7%) was a civil society leader, one was a housewife, and one was unemployed (she stated, 'Ndimangokhala' which means 'I was just sitting').

It has not been a smooth ride for these women MPs, who faced numerous challenges and obstacles to become candidates and ultimately MPs. Kimberly Smiddy points out that these women may have found supportive environments from their families, husbands or chiefs in their constituencies, but they still had to overcome enormous hurdles from within their parties due to the problems evident in party primaries. This study also helps to dispel the myth that chiefs are against women in leadership positions.¹³

THE IMAGE OF PARLIAMENT: REALITY VS. PROJECTION

The general public image of parliament is largely negative, conveyed through expressions like 'childish', 'waste of time', 'drain of resources', etc. Headlines depicting 'so many millions of Kwacha blown on the current sitting of Parliament' or capturing a lighter moment in parliament by saying that 'MPs waste Parliament's time at the cost of tax payers money', etc. are common in newspapers and media coverage during parliamentary sessions. The reality, however, is very different.

The duration of the sitting of parliament in Malawi is among the lowest in the region. The Malawi parliament sits for about 70 to 100 days on average a year, while in neighbouring Zambia, the House meets for about 200 days.¹⁴ Parliament in Malawi functions under many odd conditions that have been briefly touched upon earlier and it is not within the scope of this paper to examine these in detail, but the intention here is to highlight the antipathy and prejudice created by biased media portrayal.

This tendency of adverse reportage was vividly discernable during the extremely turbulent 2007 budget sitting of parliament, which rapidly degenerated into an impasse. The opposition insisted on debating the

section 65 issue before debating the budget, while the government side demanded that the budget must take priority. A number of civil society groups demonstrated outside the House in support of the budget. Some cars belonging to MPs were apparently damaged in the ensuing fracas outside the House and the affected MPs duly claimed compensation for the damage to their property. *The Weekend Nation's* (22-23 March 2008) headline was: 'Budget violence costs taxpayers millions as MPs get compensated for scratched cars'. This headline insinuates that the MPs were, in some obscure manner, responsible for the damage to their cars or, for that matter, for the fracas itself and were now adding insult to injury by claiming the money from the 'poor tax payer'. However, the same media does not maintain a similar tone when reporting on the other two arms of government. The budget of the State House or the Office of the President is not scrutinised or covered with the same intensity and fervour that is applied to parliament.

This public perception of parliament is further confirmed by the view of one Branco Mweneband, which the BBC captured in a programme on African parliaments:

African Parliamentarians do not represent their constituents because they are elected by a minority of votes (less than 20 % in most cases). As such, most people are not interested in whatever the parliamentarians are doing in parliaments. Most people feel that they can do without parliamentarians as the governments decide everything they want to do without the input of MPs. This is the case in Malawi now where the last time parliament met was in September 2007, but everything is moving.¹⁵

ENHANCING MP-CONSTITUENT RELATIONS

The visible representational gap between MPs and their constituents was raised as a matter of serious concern during consultations for the parliamentary reform programme, and therefore features as the seventh pillar entitled 'Enhancement of representational role of MPs'. The Mutharika government has since introduced the Constituency Development Fund (CDF), which is allocated to each MP for the *development* of his/her constituency. However, the CDF raises many questions.

First, will the CDF enhance relations between parliament and the district assemblies or widen the gulf between MPs and councillors who

are primarily responsible for local development? Will this not interfere with the efficacy of local government or, indeed, supplant certain vital roles of local government structures?

Further, what implications would the CDF have on the executive–legislature relationship by giving the executive yet another avenue to pursue a ‘carrot and stick’ method in order to garner support for its agenda? There are already demands from some MPs to raise the CDF amount, but this request is awaiting an assessment of the fund.

CONCLUSION

As LeDuc, Niemi & Norris cogently observe, competitive elections are not sufficient by themselves to ensure a healthy system of representative government.¹⁶ What is required is a range of characteristics including, but not limited to, transparency and accountability in government, vigorous party competition and regular rotation of parties in government and opposition, widespread respect for political rights and civil liberties, multiple channels of political communication, extensive opportunities for citizen participation, and a vibrant civil society connecting citizens and the state.

While all these characteristics are imperative in the context of enhancing the representational role of parliament in Malawi, the last three elements – channels of political communication, extensive opportunities for citizen participation and a vibrant civil society connecting citizens and the state – are particularly critical. The channels of political communication in Malawi are limited owing to weaknesses in political parties, which in normal circumstances would be one of the most important agents of political communication. The failure to hold local government elections in 2005 further limits and restricts citizens’ participation to general elections which are held once every five years. Further, civil society has not yet emerged out of its reactive role as a watchdog and does not engage with government in regular and constructive dialogue, which in turn continues to constrict the connection between the citizens and the state.

As much as these challenges and limits are serious, there are also reasons for hope and evidence of some improvement. Citizens have expressed concerns in various forums, such as the constitutional conference, for increasing focus on parliament and the need for rapid implementation of the parliamentary reform programme expressed by people, both within and outside government, and, above all, the

undiminished desire of the people to hold officials to account. These expressions of concern are indications that parliament will eventually have to become more responsible and responsive to the voices of the people – that is, a listening as well as a responding body.

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4

POLITICAL PARTIES IN MALAWI: MINIMISING ELECTORAL FORTUNES

Samson Lembani

BACKGROUND AND CONTEXT

Zimbabwe, Angola and Swaziland will hold elections in 2008, followed by South Africa, Namibia, Mozambique and Malawi next year. By tracking probability trends for political parties and independent candidates regarding who will win or lose elections in these fragile electoral democracies, it is not impossible to make relatively certain predictions concerning three possible electoral outcomes:

- Which political party(ies) is/are poised to form the next government and by extension, which ones will expectedly dispute loss but constitute an opposition.
- The relative power balance in the next parliament.
- Which political parties are likely to remain unrepresented in parliament.

Political parties in Malawi can be characterised by three factors: they are transient and election oriented; there is an absence of clear ideologies; and they have rudimentary structures for membership identification and mobilisation strategies. Due to their dismal electoral performance and

failure to win parliamentary seats, most political parties in Malawi are disillusioned and disappear, only to resurface at the next election.¹ It is evident from the most cursory analysis that the majority of the breakaway parties in Malawi were formed as a result of limited intra-party democracy and not because of ideological differences.

In Malawi, as elsewhere in the sub region, it does not require special talent to predict whether the next government will be a minority or simple majoritarian. Such predications are usually informed by: the multiplicity of a particular party's candidates contesting for the same constituency and/or position; the estimated membership of political parties anchored by the voting population of each party's stronghold; and the legitimacy of party candidates created by internal processes of identifying such candidates.

This paper argues that the expediency with which political parties respond to the dynamics cited above substantially determines whether a party will be in government or in opposition.

POLITICAL PARTIES: DIVIDED BY THE PAST, UNITED BY THE PRESENT

Although Malawi's political parties can be distinguished according to their longevity and the geographic origins of their leaders, they share many common features. For example, most of their leaders and followers believe that money can buy votes, they have poor internal democracy, the elite begrudge dissent, they have dysfunctional party structures and mixed-up local party membership, and they all fail to learn from past mistakes.

An inter-play of these forces results in various forms and shades of weakened and fragmented parties. These common elements are examined briefly below. It is worth mentioning that this short paper is not intended to satisfy academic or scientific exactitudes but is a personal reflection on some election issues and actors.

MONEY AND VOTES

Money cannot literally buy votes under a secret ballot; at best it can buy goodwill.² Elections have become an extension of the market place – it is a season of resource redistribution reflecting the 'who gets what, when and how' elements in the definition of politics. While party resources may be mobilised for presidential candidates, parliamentary candidates

usually do not get much money for campaigning; and if a candidate does not have a wealthy patron, his/her chances of success are limited.

Independent and party candidates in Malawi invest heavily in election campaigns. These costs are split into: glossy printed materials, caps, t-shirts, badges, pens, flags, umbrellas, etc.; slick advertisements on billboards, television, radio and in the print media; travel and communication. Over and above these are considerable overt and covert transactions and costs in terms of generous handouts to chiefs, benevolent inducements, campaign-oriented public appearances (at funerals, for example) and support to religious projects and functions to demonstrate one's social responsibility.

Yet the ultimate deciding factor for the voter usually lies beyond material inducements and in the character appeal of the candidate. Under the direct voting system for political representatives, voters are courted on the basis of affinity – that the candidate is one of 'us' based on religion, ethnic kinship and the party's democratic stature.

INTERNAL DEMOCRACY

The internal organisation of political parties can partly be explained in terms of Malawi's cultural and political heritage. Nearly all political parties still exhibit legacies reminiscent of the one-party era, including a sustained political culture of secrecy, silence and patrimonialism.³ The legacies of the past find their current political host in the post-independence Malawi Congress Party (MCP) leadership style.

The major 'democratic' political parties have remained under the same old leadership, which draws its experience in politics from the dictatorship era, providing leaders who are therefore, traditionally, non-democrats.⁴ The 'default mode' of politicians who learned at the feet of Dr Banda is reflexively undemocratic.⁵ Between and during elections, the centralised power in the elite serves to nurture clientalism and consolidate patronage and personality cult.⁶ This perpetuates mutual distrust and conflicts with and undermines popular participation within parties.⁷

DELAYED AND SELECTIVE PRIMARY ELECTIONS

Delayed primary elections increase tension and personal investment in anticipation of a win among numerous candidates of the same party in the same constituency. In recent times, there have been as many as five

or more candidates in a single constituency aspiring to run on one party's ticket.⁸ These candidates identify themselves with a political party early enough to court the party's support and candidature. However, while some candidates introduce themselves to and get accepted by the voters and the local party leadership *first* and to the elite *later*, others choose the opposite route. They show their credentials to and convince the elite *first* to introduce them to the voters and attempt to persuade the latter to sympathise with and accept them.

Dissenting opinions are begrudged, resented, suppressed and sanctioned especially when it comes to the choices around legislative, presidential and running mate candidates. The voters' choice is deemed inferior to that of the party elite. Often, incumbent members of parliament (MPs) feel deserving of the party's shielding from the 'intrusion' of new party candidates, and primary elections in those constituencies are delayed, manipulated or precluded in favour of incumbent MPs as a reward for being loyal to the party elite. Splits are thus inevitable, and independent MPs often emerge as winners in constituencies where the voters' confidence rests in a candidate who is not favoured by the party. This is regardless of the party's and the unpopular candidate's generosity in terms of material handouts. This ties in neatly with the weaknesses and ambiguity of internal party structures.

PARTY STRUCTURES AND MIXED LOCAL MEMBERSHIP

It is paradoxical that political parties and aspiring candidates with weak or nonexistent local party structures, questionable membership claims, vague manifestos and having the least prospects of being an attractive partner in electoral coalitions, still decide to participate in the highly commercialised and capital-intensive election campaign trail. When they invariably lose, it is more than a loss for elected office but the loss of a lifetime's worth of personal and family savings, and a decisive relegation to the outer margins of the political field.

The big question is: does this come as a surprise or is this an inevitable tragedy of the *faith* of politicians? Can this all be blamed on the unfair advantage of incumbency and unproved allegations of rigged elections? Is it enough to paint a new party office a different colour from the rival political party and assume that all members of the beleaguered party will instantly and sincerely join the new party? Why do parties continue to believe that all those who attend their meetings and don their

party colours are their members? Since one function of political parties is to articulate and harmonise the interests of their members, how is this achieved when party members have no forum through which to express themselves and ensure that their political interests are represented?

FAILURE TO LEARN FROM ONE'S OWN AND OTHER'S MISTAKES

It appears that each election in Malawi is another chance for political parties to try the same strategies that brought anguish in the past. Most mistakes and delays in preparation for and after general elections are simply re-runs of previous missed opportunities. Despite the fact that certain political options are legally too risky to be tried and others too obvious to be ignored, it is incredible how politicians calculate their risks. Unilateral decisions regarding electoral coalitions have had devastating consequences for political parties and individuals in the past. Likewise no great insight is required to warn politicians against handpicking presidential candidates and protecting incumbent parliamentary candidates.

Yet suspicion is the reward for those who give sincere advice in privacy. They are subtly scolded and ridiculed in public as betrayers. *Right* becomes *wrong* so long as it pleases the patron. That the electorate have become wiser and accept handouts yet withhold or divert their vote to another candidate is not news. That voters mostly in the North and partly in the Centre do not vote for a candidate purely on the basis of tribal linkages is also too obvious to be ignored. Electoral coalitions in the Malawi government or opposition, formed in time and in the best interest of the electorate, are today not a sign of weakness but a sure option for ensuring improved results and a stable legislature. Pre-2009 coalitions will, again, probably be formed unilaterally among elites based on a perceived common enemy and not on similar policies. Bizarrely, political parties simply do not take lessons from previous experiences and use these to improve on future electoral outcomes.

TOWARDS THE 2009 ELECTIONS

If articles in the print and electronic media are anything to go by, then the pre- and post-2009 scenario is predictable. Recent remarks from opposition officials suggest that the government is surviving on 'public sympathy'. While the definition of public sympathy is better left to the politicians and the public themselves, this paper seeks to review the

essence of such assertions by asking a few questions. How come the opposition received more public sympathy between 1999 and 2004 than they are receiving now? Were there some critical moments in the past few years when such sympathy was forfeited? What does this lack of sympathy mean for the opposition vis-à-vis the 2009 elections? If the government is indeed thriving on public sympathy, is it general sympathy or does it vary over issues and time? Lastly, how is the government ensuring that such sympathy is sustained? It is arguably easier to ask such poignant questions than to provide answers.

COURTING PUBLIC CONFIDENCE

In the considered view of the author, answers to the questions raised above are substantially located in the notion 'a responsive government/opposition'. In Africa generally, and in Malawi specifically, it seems that minority governments are more likely to inspire sympathy because they are compelled to cut down on displays of political arrogance and aggressiveness and do not take the public for granted – elements often associated with African majoritarian governments.

Minority governments are intrinsically obliged to be responsive to public opinion, to negotiate on public matters and to implement policies that impress the general public, civil society, religious groups, trade unions, university students and, inevitably, development partners. This is enhanced by public-driven constitutional reforms, bills presented and passed, attitude and tone at political rallies and incidences of public harassment by party and state agents. Minority governments are aware that in politics, public impressions and perceptions are treated as fact and truth. How much are politicians doing to inspire and attract public confidence?

Political sympathy from the public goes to those deemed as undeserving sufferers at the hands of those who use their power or numbers to disarm their 'innocent' victims. One essential ingredient of all political statements and conduct must be to guard jealously against diminishing levels of this vapour called *public sympathy*. It may be earned or lost over one critical act or reversal of earlier political decisions. It is only sustained either way by consistency.

Recent opinion poll data seems to suggest that the conduct of political parties during elections is not held in high regard in Africa. Despite the many weaknesses in governing parties, interviews conducted by Afrobarometer researchers in 15 African countries show

that opposition parties are the least trusted of all public institutions.⁹ These findings traverse the inimitable role of opposition parties in the functioning of a democracy.

IS THERE DELIBERATE PREPARATION TO BE IN OPPOSITION?

It is apparent that between and prior to elections, all political parties consider themselves to have an equal chance of constituting government. This is constitutionally and politically correct. They also believe that past misfortunes cannot dictate future prospects. This is also a positive political attitude. However, as long as politicians do the same things in the same way, they will get similar results. Change is a *must*, not an option, if one is to reverse the trend.

INVEST DIFFERENTLY TO BECOME AN EFFECTIVE OPPOSITION

In the view of the author, being found in unprecedented opposition is more tragic than becoming an effective legislative opposition. An opposition that provides relevant checks and balances in parliament and proposes constructive reforms to bills will inspire public attention. An opposition whose leadership listens to and speaks for the voiceless masses is but a government in waiting. This opposition will even attract the sympathy of a credible civil society. By contrast, when the general public, civil society, traditional leaders and university students consistently clash with the opposition, the latter has lost its position of being the people's *agent* and loses the people's favour. That opposition is booking fewer seats in the chambers if spared from having no legislative representation at all.

REDIRECT CAMPAIGN EXPENDITURE AND STRATEGY

Campaigning for a presidential candidate who is not likely to win the race as opposed to investing more on promising legislative candidates is imprudent. Political parties must realise that except for a few, most voters are already decided about whom to vote out of, or never to vote in to, office. Empty, redundant and personalised campaign rallies only confirm such cynicism and decisions. Political campaign rallies must be organised to influence these voting decisions otherwise.

Opposition parties hardly survive in parliament because their focus is more on taking control of government than being a viable opposition.

Such political parties nonetheless appear surprised when they eventually land on the opposition side of the 'floor' time and again. Yet in between elections, opposition parties grow weaker as governing parties lure more MPs to cross the floor in order to consolidate the latter's position in government. Post-election complaints such as the existence of under-age or multiple voters would not arise if opposition parties invested more in fielding capable and trusted election monitors or agents.

WHAT PARTIES COULD DO BETTER TO AVOID

There is much to both avoid and to do in order to be effective (not just survive) in government or opposition. Most politicians put their trust in opportunistic, costly and disillusioned 'advisors', and despise credible, free and sincere advice. This must be avoided. Advice that urges politicians to restrain from using abusive and inflammatory language at political rallies must be noted and acted upon.

Unilateral and divisive electoral coalitions, which have been tried unsuccessfully several times before, must be avoided. While the beneficiary parties may see the coalition as a 'free ride', the chief sponsor is left carrying the 'excess baggage', and the result of such ill-intended electoral coalitions is damaging for both sides. Having a common political enemy around which to coalesce is not enough if one cannot define a common agenda thereafter. Voters know that not all politicians' enemies are voters' enemies; hence voters are now critical of such publicly declared motives.

CONCLUSION

This paper has presented the author's personal reflections, informed by past and present political trends. It has no intention of being prescriptive, although perhaps instructive. It stresses that the survival of political parties both in government and in opposition is determined by the realisation of their relative strengths, and their constant realignment in the face of adversity.

Despite the challenges facing political parties, especially around elections, there is no alternative institution to usurp their unique role in a representative and multiparty democracy, including Malawi. Political parties are formed to assemble electoral support for candidates for public office, to offer voters alternative policies and choices, and to transfer

democratic political and cultural values across generations.¹⁰ Undoubtedly, the more competitive politics becomes, the greater the desire to control public resources and power, as well as to get some sort of personal return on the money invested during campaigning.

The discussion above provides an expurgated checklist against which political parties and their leaders can examine the operations of their institutions and their conduct. While Malawi has certainly made progress since 1994, we are nowhere near to where we want to be in terms of eliminating democratic deficits at both national and political party level. The 2009 elections provide an opportunity to revise campaign strategies and options in the light of past mistakes. Incumbent minority or majority governments in sub-Saharan Africa which become excessive and non responsive to public opinion should prepare themselves to play the political game from the opposition benches.

The role of local and international agencies in providing electoral support has been significant, and civil society is becoming more professional in providing impartial voter and civic education.

There will always be legal and administrative impediments to any election. The next 12 months, however, provide an opportunity for all political actors and political parties to reverse their fate or forego their electoral prospects.

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5

DIKASTOCRACY: IS IT UNDERMINING DEMOCRACY IN MALAWI?

Marshal Chilenga

INTRODUCTION

Malawi adopted a democratic constitution in 1995, which provided for a multiparty system of government, separation of powers and independence of the judiciary. The constitution has, however, been tested in a limited way of late.

In 2004, President Dr Bingu wa Mutharika took leadership of the government on the sponsorship of United Democratic Front (UDF), with the UDF holding a total of 49 seats in parliament. However, after a few months the president left the UDF and formed his own party, the Democratic Progressive Party (DPP). The government consequently became a minority government in the National Assembly and requested the courts to help run its affairs.

The judiciary (court system) has frequently come to the aid of government in order to foster the operations of government. Section 5 of the Constitution of Malawi provides that any act of government or any law that is inconsistent with the provisions of the constitution shall to the extent of such inconsistency, be invalid.

This paper examines the exercise of the powers under section 5 of the constitution as to the invalidation of acts of government and laws. Judicial independence has been entrenched in section 9 of the Constitution of Malawi with regard to interpreting, protecting and

enforcing the constitution and all laws. The exercise of these powers will also be examined.

SEPARATION OF POWERS

Government in Malawi comprises three branches, namely, the executive, legislative and judicial branches. Section 9 of the Constitution of the Republic of Malawi provides that the executive shall be responsible for the initiation of policies and legislation, as well as for the implementation of all laws which embody the express wishes of the people of Malawi and which promote the principles of the constitution. The president heads the executive.

All cabinet ministers and civil servants belong to the executive arm of government and the running of government departments is the responsibility of the president.

According to section 8 of the constitution, parliament – which comprises the president and the National Assembly – has all legislative powers in Malawi. Section 49(3) of the Constitution of Malawi provides that any question proposed for decision by the National Assembly shall be decided by a majority of the votes of the members present and voting. Government has, of late, had problems in getting decisions made in its favour since opposition members dominate the National Assembly. Some significant litigation has arisen from decision-making processes in the National Assembly, which will be discussed later.

The judicature is established under section 103 of the constitution. This section clearly provides for all courts and all persons presiding over those courts to exercise their functions, duties and powers independent of the influence and direction of any other person or authority. The judiciary shall have exclusive jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue is within its competence or not.

The courts in Malawi comprise the Supreme Court of Appeal, the High Court of Malawi, the Industrial Relations Court and the magistrate's courts. The High Court of Malawi (Constitutional Division) and the Malawi Supreme Court of Appeal adjudicate all constitutional matters. The High Court has unlimited original jurisdiction over all matters.

Separation of powers entails that the three branches of government will check each other. The executive will check the affairs of the legislature and visa versa, and the legislature will check the activities of

the judiciary and vice versa. However, the judiciary seems recently to have assumed the role of legislative authority, as will be examined later.

In the matter of certification of the Constitution of South Africa, Justice Mahomed said:

The constitutional principles are the lights of the runway within which you operate the plane: You can choose the spiced and the angle but it must be between the lights.

There is a duty on all persons exercising state authority to operate within the established constitutional framework. Section 5 prescribes that any act of government or law inconsistent with the constitution is invalid.

George Bizos, while submitting on re *Certification of the Constitution of the Republic of South Africa* 1996 (4) SALR 744 (CC), stated that there was need to refrain from dikastocracy – or rule by judges – which was in conflict with a democratically elected parliament and its ministers. Judges are not supposed to rule as they do not represent the electorate: they are, constitutionally, independent agents. In Malawi, however, there seems to be a tendency to entrust judges with the act of ruling the country, as the examples below illustrate.

SOME EXAMPLES OF DIKASTOCRACY IN MALAWI

APPOINTMENT OF INSPECTOR GENERAL

On 6 September 2004, the president appointed Mary Nangwale as inspector general of Police. On 30 March 2005, the leader of government business moved a motion in the National Assembly that the appointee be confirmed on her appointment. The National Assembly voted against the appointment. Nangwale subsequently commenced legal proceedings to challenge the decision on the ground that she was not heard and the decision to respect the appointment was unconditional.¹ The Constitutional Court heard the matter and said at p 31 of the judgment:

... it is not up to the Courts to dictate to the House on the yardstick of appropriate considerations in its debate. Once the Honorable members ... [get] into irrelevancies or become tangential the August House is on its own and must be trusted to have capacity to regulate the predicament.

The court also adopted the reasoning in *Fedsure Life Insurance Ltd v Greater Johannesburg Transitional Metropolitan Council and Others* (CT7/98 (1999) SA 374), where it was held that:

The deliberations (in Parliament) ordinarily take place in the assembly in public where members articulate their own views on the subject of the proposed resolutions. Each member is entitled to his or her own reasons for voting for or against any resolution and is entitled to do so on political grounds. It is for the members and not the courts to judge what is relevant in such circumstances.

The reasoning of the court did show that the courts were not willing to interfere in the internal operations of the National Assembly. The courts enforced sections 8 and 49 of the Constitution of the Republic of Malawi, which reserves legislative powers of the state to parliament. The judiciary therefore refused to intervene in a dispute involving the executive and the legislature. The judiciary thus reserved the matter to the legislature and affirmed the decision taken in the National Assembly not to confirm the appointment of Mary Nangwale as inspector general of Police.

However, due to an order of injunction and a stay on the proceedings, Nangwale continued exercising the powers of inspector general until the proceedings were concluded. The interim orders would be tantamount to rule by the courts.

CROSSING THE FLOOR (SECTION 65)

The President of the Republic of Malawi issued a fiat seeking interpretation of section 65 of the Constitution of the Republic of Malawi on whether members of parliament (MPs) can cross the floor by changing political parties in the National Assembly.²

The matter started in 2005 and the High Court gave judgment. The matter has attracted wide interest in the country and divergent views have since emerged. The High Court (Constitutional Court) comprising Twea J, Kapanda J and Potani J upheld section 65, which states that MPs who cross the floor and change political parties must seek a fresh mandate from their constituents via a by-election.

The president, being dissatisfied, appealed to the Malawi Supreme Court of Appeal. The matter was heard before five judges: Unyolo CJ, Kalaile SC JA, Tambala SC JA, Mtambo SC JA and Tembo SC JA.

The Supreme Court referred to the South African case *Re Certification of the Constitution of the Republic of South Africa* (1996)(ii) SA 744(CC) as follows:

An anti defection clause enables a political party to prevent defections of its elected members, thus ensuring that they continue to support the party under whose aegis they were elected. It also prevents parties in power from enticing members of small parties to defect from the party upon whose list they were elected to join the governing party. If this were permitted it could enable the governing party to obtain special majority which it might not otherwise be able to master and which is not a reflection of the views of the electorate.

The Supreme Court found that section 65 is consistent with the constitution and it is valid law. The court also held that the whole of section 65 is valid as no part of the constitution should be used to destroy another part.

Much debate ensued after this judgment was passed. President Mutharika issued a statement on the judgment, which in essence condemned it. The president was concerned about the ramifications of the judgment on government, especially since all cabinet ministers were previously UDF members in the National Assembly and had joined the DPP, which was formed after the 2004 elections and had become the ruling party. By upholding section 65, the court enforced the supremacy of the constitution and accorded the constitution due respect.

However, prior to judicial decision on section 65, President Mutharika had obtained an ex parte order of injunction restraining the speaker of parliament from acting on section 65 (i.e. deciding whether MPs had crossed the floor and taking the necessary action) until a ruling was made on the presidential referral.

The injunction was obtained in October 2005 and it was continued until June 2007, when final judgment was pronounced on the matter. That is dikastocracy at work.

Further, after the Supreme Court had pronounced judgment on the matter the Hon. Yunus Mussa (MP) and 43 others – which included all cabinet ministers and DPP MPs – went to court to seek judicial review of the decision of the speaker to require MPs to answer petitions that were made on floor crossing.³ The Hon. Yunus Mussa also obtained an order of injunction restraining the speaker from acting on the petitions and an order of stay of the issuing of petitions and requiring answers to be

made on petitions. The interim orders thus suspended the Supreme Court decision on section 65.

The orders were granted on 28 June 2007. With an injunction in place, the speaker could not exercise his powers under section 65 of the Constitution of the Republic of Malawi. The operations of the state have thus continued with section 65 un-enforced only by virtue of the court decision to grant an injunction on the matter. The courts have thus ordered the running of government in some manner, pending a final decision on the dispute. This is again dikastocracy, especially if the court is to rule at the end of the day against Hon. Yunus Mussa and others, as it did in the matter of the presidential referral. While the elected representatives (the MPs) would like to enforce the provision, they are being prevented from doing so by the interim relief granted by the courts. The powers of the elected representatives have therefore been suspended by the courts.

IMPEACHMENT PROCEDURE⁴

In 2005, members of the National Assembly filed a notice of motion to approve impeachment procedures against the President of the Republic of Malawi. An application was, however, made to the court for an order of injunction to stop the application of the procedures. The order of injunction was granted in 2005 but the matter was only decided in 2007, which meant that no action could have been taken on the matter for two years due to the prevailing injunction. The court eventually ruled that the procedures did not accord the parties natural justice.

CONCLUSION

Within their mandate under section 9 of the constitution, the courts have sought to uphold and interpret the constitution. However the interim relief of injunction has entrenched a culture of dikastocracy in Malawi, whereby parties are no longer in a hurry to have matters adjudicated if they benefit from the interim relief. Kanyongolo rightly states that:

the main cause of the various crises in constitutionalism is neither a lack of knowledge about basic norms of the constitution nor the poor drafting of constitutions; rather it is the failure to accept the constitution as the supreme arbiter in the definition of power relations, especially between the state and people.⁵

There is need for all branches of government and all political parties in Malawi to accept and uphold the constitutional principles. All political players must develop a culture of constitutionalism. Furthermore, the executive and legislative branches must refrain from using interim orders of injunction as a means of governing the country.

The remedy of judicial review has been employed in Malawi with greater latitude than anticipated and has had both positive and negative effects on the country. The courts, through interim remedies under judicial review and pending the conclusion of matters, have unwittingly perpetuated undesirable and unacceptable rule that goes against the wishes of the people. Lawyers and judges therefore have a duty to expedite all constitutional matters so that there is popular and democratic rule in Malawi and they must prevent the abuse of injunctions such as 'interim relief' in judicial review.

The power of elected representatives becomes meaningless if the courts essentially rule the country. Dikastocracy undermines democracy and must be guarded against if democracy is to become entrenched in Malawi.

ENDNOTES

- 1 *The State v Speaker of the National Assembly and the Attorney General Ex Parte Mary Nangwale*, Misc. Civil No. 1 of 2005.
- 2 Presidential Referral No. 44 of 2006.
- 3 Misc. 61 of 2007, Lilongwe District Registry.
- 4 In the Matter of Presidential Referral Under Section 89 of the Constitution, Constitutional Cause No. 13 of 2005.
- 5 Kanyongolo FE, The limits of liberal democratic constitutionalism in Malawi, in Phiri KM and Ross KR (eds), *Democratisation in Malawi: A Stocktaking*. Blantyre: CLAIM, 1998.

6

OPENING SPACE FOR PARTICIPATION IN MALAWI

Peter Chihana

INTRODUCTION

Malawi, like many countries in sub-Saharan Africa, is experiencing major challenges in the implementation of its local government act, especially in the light of decentralisation. One challenge is how to translate the rather academic concept of participation into the practical reality of people engagement.

Several prescriptions have been made in an attempt to operationalise participation both from the National Assembly side through, for example, the village and area development committees, and the civil society side through various non-governmental organisations (NGOs). In spite of all these efforts, there is a general complaint from service providers about citizens' lack of initiative, ownership and demand for projects, as well as a 'waiting' culture, also described as laziness.

This paper attempts to shed light on some of the reasons why the poor find it difficult to take the initiative and demand projects that address their needs, and instead prefer to wait for solutions even where waiting causes suffering. It also explores the possibilities for transformation, drawing lessons from the Open Space Technology (OST) pilot project in Malawi, which was funded by German Development Services (DED), with the Pachichi Foundation for Education, Research

and Development (PaFERD) as the implementing partner, and with supplementary micro-project financing from the German Embassy.

To do this, the paper summarises the major lessons learned from forced participation during the colonial era and under the one-party system. With this background in mind, we shift attention to the unintended effects of forced participation. The paper then examines OST as a large-group intervention tool piloted in Rumphi, Mchinji, Zomba and Mangochi, with examples from Rumphi.

The role of micro-project funding mechanisms as determinants of sustainability of engagement, as demonstrated through the German Embassy, is also explored. Before turning to the conclusion, the paper summarises lessons from the OST approach to participation which is working in Malawi.

FORCED PARTICIPATION

Participation is not a new phenomenon in Malawi. What is new is the means for achieving it. For example, the Nyasas¹ participated in government programmes during the colonial era. However, such participation created problems because it was achieved through coercion and fear, leading John Chilembwe almost a century ago to confront the Thangata system and free the people from forced labour. Four decades later, the compulsory creation of contour bands to prevent soil erosion sparked a second wave of rebellion, with Kamuzu leading the liberation from colonial oppression and promising to bring an end to forced participation.

In these two cases we observe that one driver of the fight for freedom and change was forced participation: the people did not want to be forced to do things, even if these were for their own good. The short-term effect of forcing participation, in today's language, was that people developed a lack of demand for projects, lack of initiative, lack of responsibility, lack of ownership, and so forth. The elites of the day tried to cure the reluctance to participate through forced manipulation, using power, hierarchical control and sanctions. This was tolerated to a degree, but forced participation eventually triggered the so-called Chilembwe uprising of 1915 and the 1959–64 fights for freedom.

Interestingly, after three decades of independence, Malawi had drifted back into the old trap of using coercion to achieve participation, the consequences of which did not spare the then Malawian liberator. The lesson from history, therefore, is that forced participation has the

tendency to trigger non-compliance in the short term and outright rebellion in the long term.

The 1994 multiparty system is based on a legal framework that allows for voluntary participation. It denounces a reliance on manipulation through the use of power, hierarchical control and sanctions and instead promotes the concepts of empowerment, participation, transparency and accountability.

THE UNINTENDED EFFECTS OF FORCED PARTICIPATION

In spite of this historical experience, participation in the first ten years after 1994 has shown signs of drifting back to a reliance on coercion and sanctions. For example, councillors engaged people to mould bricks for development projects.

The rules of participation were clear: those who did not participate would face sanctions. For example, if parents did not come to mould bricks for a school block, their child was not allowed in to class. The child was only readmitted if the parents began working or paid a fine to the school committee. If people did not participate in constructing a borehole, they were not allowed to drink water from it unless they paid a fine. People therefore participated because they were afraid of sanctions.

Development NGOs and government-funded agencies such as Masaf found it attractive to work with chiefs on development projects. This is because chiefs, unlike councillors, have the raw power to manipulate and could guarantee forced participation. In the language of the 1999–2004 period, people listened more to chiefs than to councillors.

The actual reason for this compliance is that chiefs have power over land. This meant that those who did not participate in an activity organised by the chief could be asked by the chief to leave the village and find another home. And since Malawians have no property rights to customary land, no law could be used to stop an expulsion. Thus, the fear of loss of property, especially land, made it undesirable to go against the chiefs' powers. With this power, chiefs could even whip elected members of parliament (MPs) into compliance.²

Therefore, the fear of consequences of non-compliance with the chiefs – both from the chieftaincy as an independent institution and from their connections with government – gave them effective teeth for achieving forced participation. In contrast, councillors who did not have such connections or power were effectively redundant.

This approach to participation created a polarisation in terms of local development. On the one side were the mobilisers, or those who enjoyed a certain amount of power – for example, the chiefs, councillors, MPs, district commissioner, NGOs and donor agencies. On the other side were those 'to be mobilised', that is, the people. In this context, project demand, ownership, initiative, mobilisation and organisation became the responsibility of the mobilisers, while the 'to be mobilised' became tools for meeting the interests of the mobilisers.

The reaction of the people towards this forced participation showed the usual short-term effects of forced participation, such as the lack of demand for projects, lack of initiative, lack of responsibility and lack of ownership. The people were non-compliant and waited for pressure from the mobilisers before engaging. Participation became contingent on factors external to and outside the control of the people. As a remedy, the mobilisers set up so called capacity-building exercises and sensitisation meetings in an effort to create mechanically the lacking elements, and purely for the sake of sustaining programmes and mimicking a semblance of participation. This explains why those involved in Masaf projects underwent a one-week training programme and received allowances, while councillors carried out their projects without such luxuries. This marked the genesis of buying participation through allowances, which NGOs picked up on and became efficient in utilising.

It is not relevant for us to focus here on the mobilisers' legitimacy. What is of relevance to us is their role and attitude towards the people. Mobilisers set the agenda for participation and convene meetings of the 'to be mobilised'. In addition, they have at the back of their minds preconceived outcomes of the participation process. Therefore, participation becomes a process of steering the people towards predefined and premeditated outcomes. This 'game' is called speaking or representing the voiceless and the marginalised.

Experience shows, however, that such representation has a tendency towards the exploitation of people. People's participation is transformed into a fundraising tool for the mobilisers, whereby the citizens become both the excuse for getting funding and the exploited cheap labour. This also opens avenues for the development of corrupt practices championed by mobilisers, and creates a situation in which divergent and critical opinions are regarded as unacceptable and participation is understood as a rubber-stamping process. The mobilisers become experts in doing proposals in the name of representation, speaking for the 'voiceless' and mobilising for participation (cheap labour).

In the final analysis, the main actors in the participation game are the mobilisers, while the people are merely a tool in their hands. If a project is successful, the mobilisers take all the credit; and if the results are poor, the people are blamed and criticised for being lazy and lacking ownership and initiative.

WHERE TO FROM HERE?

The 2004 Review of the National Decentralisation Programme identified lack of political and technical commitment as affecting decentralisation implementation. This was largely due to inadequate popular awareness and understanding of, as well as lack of demand and pressure for, decentralisation. The review uncovered strategic challenges and identified the need for fundamental socio-political transformation.

In the light of the discussion above, we need an approach that truly involves the local population and grants them the space to identify the problems that most concern them. The approach must also help them to prioritise issues and develop ways to address those problems themselves. This should lead the way for mobilisers to determine the extent of their role and support.

In the absence of a 'one cures all' strategy, the DED, in collaboration with PaFERD, in February 2006 recommended an Open Space cycle and follow-up interventions in three Malawi districts representing the north (Rumphi), central (Mchinji) and south (Zomba), around the theme: 'What are the opportunities and challenges for us as civil society groups to work together with local authorities for the development of our district?'

The large-group intervention tool is based on the assumption that local civil society plays an important role in service delivery and the implementation of national development plans. Local civil society is also important for ensuring a transparent and participative process insofar as it can exercise pressure on local governments and can control their actions.

The major challenge, however, is how, on the one hand, to provide the poor with information and, on the other, to obtain information on their situation in order to tackle poverty effectively. It was also realised within the DED that high-level planning alone cannot achieve satisfactory results when it comes to the overall goal of poverty reduction. Rather, there is urgent need for the active involvement of civil society at local level, which integrates the interests of marginalised

groups. In other words, how does one achieve participation based on self-initiative and self-organisation as opposed to relying on manipulation, power, control and sanctions?

There is a maze of literature on the 'how to' question, but most of this literature builds from the perspective of the mobilisers. It makes the assumption that people are not experts in the mobilisation game and must be on the receiving end of a prescribed system of interaction. The OST approach, however, is different.

OST: LARGE-GROUP INTERVENTION TOOL

Open Space is a large-group intervention tool for civil society engagement whose focus is not merely on implementation, but on the larger issues of transformation from within. It asserts that participation introduces much complexity, especially because of the high level of diversity among actors, the high level of actual and potential conflict among actors and the need for quick decision-making. The complication comes in because there is a high degree of connectedness; nothing stands in isolation. Systems are merging while new systems are emerging, and everything seems to inter-penetrate and influence everything else at levels of complexity that simply numb the human mental capacity to track down details, let alone think about them. Therefore, it is impossible to conceive a closed governmental or non-governmental system or even to think of control as a universal tool for keeping things in order.

What makes the OST approach attractive is its compatibility with our complex context and situation. It acknowledges that participation takes place within a context of multiple actors and that some of them are competing based on self-interest, which might mean that the total sum of their behaviours could have a boomerang effect on other stakeholders or even on the overall intention of the system of interaction. It further acknowledges that the seemingly competing multiple actors are parts of one system. OST takes care of the power games within the interaction by creating space for those without power, without necessarily upsetting those with power.

This introduces multiple possibilities of creating self-determined complementarities and integrations that could help steer the system towards a self-determined direction by key stakeholders. Open Space recognises the people ('to be mobilised') as the main actors. This idea converges well with the concepts of decentralisation, empowerment, demand-driven activities and self-initiative. By making the people the

main actors, OST shifts their disposition from that of waiting for solutions from mobilisers and depending on solutions whose implementation is contingent on the actions of externals, to taking responsibility themselves.

Similarly, the position of the mobilisers shifts to that of a catalyst for self-organisation, mobilisation and initiatives. What emerge are self-organised groups that are not based on the mobilisers' interests but on the interests of those concerned and on existing potential in the local area. The people form groups around their interests and begin to work towards self-determined issues, priorities and needs. New, well-coordinated networks form around issues based on complementarities, focusing on what local people can do on their own.

The outcome of the OST pilot projects in Rumphi, Mchinji, Zomba and Mangochi shows an unprecedented increase in self-organised groups, irrigation farmers and linkages between service providers ranging from public to civil society. It seems that the approach is the right step towards the integration of implementation at district level and towards planning frameworks both at district and national level. Above all, Open Space transforms citizens into the main actors while creating opportunities for them to be part of what is happening around them.

THE RUMPHI CASE STUDY

The first Open Space meeting took place in Rumphi district on 14 February 2006. The official invitation was for 200 people, but 638 people attended the meeting. The guiding theme was: what are the opportunities and challenges for us as civil society groups to work together with local authorities for the development of Rumphi district? In brief, the citizenry prioritised irrigation as the first strategy to tackle poverty and contribute to the development of Rumphi. After the Open Space meeting, self-mobilisation, self-initiative and demand for support was triggered. Some of the agencies approached for support were the local government, Total Land Care and the German Embassy.

The German Embassy responded quickly, donating 60 treadle pumps to citizens in Rumphi district. The added advantage is that these treadle pumps are easy to use by women, the old and the youth. This is in contrast to the big treadle pumps being distributed by other agencies, which are difficult to work and require a minimum of three people to operate.

The result is that within one year Rumphi transformed into one of

the biggest irrigation districts in the country. In 2007, Rumphi for the first time supplied irrigation produce to neighbouring districts, the urban areas of Mzuzu, Ekwendeni, Karonga, Chilumba, Chiweta, Mlowe and even to Tanzania. This was managed through 600 self-mobilised irrigation groups, comprising about 9,000 people. The resultant challenge emerging from the over-production was that of marketing.

It was interesting to see how farmers solved the marketing problem themselves. The Chimwemwe irrigation scheme, for example, contributed money and sent one of its members to approach vendors in Mzuzu, Ekwendeni and Karonga, who distributed information about the products. This led to the 'sale by phone' strategy, which eased the complicated process of having to sell excess produce. In addition, citizens wanted a central point for selling irrigation produce. PaFERD approached the German Embassy in this regard, which again rose to the challenge. Construction of the market has recently been finalised, paving the way for the first farmers' irrigation outlet in Malawi.

It comes as no surprise that the 2007 agriculture show for irrigation produce was held in Rumphi and that Rumphi was chosen as the 2008 Greenbelt best example of modern technology adoption for agriculture.

The key to achieving successful self-initiatives, as demonstrated in the Rumphi case, seems to depend on ensuring that financing complements the efforts of the people. If participation is to work, what people discuss and agree to must drive the financing mechanisms. The people must:

- come up with the issues and discuss and prioritise them;
- start doing something about the issues; and
- the support must be in line with what they want and discuss.

This approach is self-reinforcing in that the people will feel that taking responsibility yields results.

LESSONS LEARNED

From an OST perspective, the *main actor* is the citizenry – as individuals and collectively. This is in harmony with the modern, popular concepts of decentralisation, empowerment, demand-driven actions and self-initiatives. Community participation, therefore, must not be understood with two groups in mind – that is, mobilisers on one hand and the 'to be mobilised' on the other. OST targets transformation of the people into

the main actors, shifting their outlook from one of waiting and dependence to a citizenry that takes the initiative, utilises what is available and demands what is possible.

Additionally, OST focuses the main actors on the *now*, not the future or the past. The focus is on *what* the main actors can do and *how* they can do it with what they have. The result is an action orientation whereby implementation is entirely the responsibility of the creators (that is, the citizens, public institutions and civil society groups).

OST does not conflict with the district development planning framework since in the Open Space approach, all stakeholders look at the future of their district from single as well as multidimensional perspectives. This helps them appreciate the role of others in the implementation. Besides, various interest groups take small bites from the global plan for implementation within their potential and limitations. OST is therefore not interested in who is in charge or who is wrong, but rather what is not as it should be and what we, the main actors, should do to make it work better.

Since there is a broad representation of stakeholders and all interest groups, the outcome of a meeting is their agreed course of action, and reconciliation, integration and complementarities become part of the natural process. Collaboration is therefore not built mechanically and enforced, but is agreed upon. The result is self-organisation based on the perceptions of the local actors, and a new form of leadership based on interest. Such self-organisation does not contradict already existing groups but rather fills the implementation gap created by power games.

Open Space therefore seems to allow for shifts in mindset about systems of interaction and how to get things done given the context. Acting differently proceeds from change in perceptions. The Mangochi experience demonstrated that the deliberate linkage of urban assembly planning processes to OST has the potential to improve the steering ability of local governments, especially where there is convergence of issues and their prioritisation. The key to success when it comes to self-initiative seems to reside in the approach demonstrated by the German micro-project funding system of linking financing to the specific needs of the people.

CONCLUSION

The history of Malawi proves that achieving participation through reliance on power, hierarchical control, authority and manipulation is a

sure recipe for participation hurdles. The early signs of such hurdles manifest in the failure to tap into existing potential, which is seen as a lack of initiative, lack of ownership, lack of demand for projects, and a waiting/lazy culture. In the light of the decentralisation review paper, it seems both urgent and necessary that the participatory process shifts from relying on power and manipulation and instead focuses on encouraging self-mobilisation and initiative, creating self-organising and demand-driven projects and building a sense of self-responsibility for change.

In the short term, the effect of forced participation can temporarily and mechanically be pushed under the carpet through so called 'sensitisation and capacity building' programmes for specific projects. There seems, however, to be need for a more sustainable approach in the long term.

Experience shows that sensitisation or capacity building must be understood as a means towards a self-determined change of mind set. In this regard, the subjects of change (participants) become the determinants of the change they must be. To achieve this, a different type of participation is required; one that opens space for the participants to be, to learn from that being and to determine what they want to become. Put differently, the service providers and experts, be they governmental or non-governmental, should not replace participants in the process of changing their lives.

The OST-approach pilot projects in Rumphu, Zomba and Mchinji show that such transformation is possible within the Malawian context. However, success depends on opening the space for the citizenry to be the main actors in the participatory process, and fine-tuning service provision and financing mechanisms to ensure that they support the main actors' goals.

Governmental agencies, NGOs and donor agencies therefore need to re-engineer their service provision and financing mechanisms towards the reinforcement of self-mobilisation, self-initiative and responsibility for change. This will automatically undermine the waiting culture, which means that solutions to issues will no longer be contingent on factors outside the control of participants.

The Open Space, DED/PaFERD pilot project has demonstrated that the 'to be mobilised' can become the self-mobilised. The German Embassy's micro funding in this case proves that development efforts can be speeded up, and with fewer resources, if financing is linked to the specific needs of the self-mobilised groups.

ENDNOTES

- 1 A term given to the people of the then Nyasaland (which later became Malawi), a British colony from 1891–1964.
- 2 A classic example was the chiefs' contribution to the Third Term Bill, 2003.

7

SOCIAL CAPITAL AND THE FIGHT AGAINST CORRUPTION IN MALAWI

Florence Phiri

INTRODUCTION

The Corrupt Practices Act was passed in the Malawian parliament in 1995 and paved the way for the establishment of the Anti-Corruption Bureau (ACB) in 1997, which became operational in 1998. The ACB is mandated by the Corrupt Practices Act to prevent corruption, educate people about corruption and investigate and prosecute offenders.

Although the public education section in the ACB has been sensitising people about corruption, two recent survey reports seem to indicate that citizens are not taking the fight against corruption as their own. They seem to be aware of the extent of the corruption problem in Malawi but do not know what their role is in combating it. The question is: can social capital play a role in the civic education efforts that are being undertaken by the ACB?

Corruption is manifested by demands for bribes by public officials from members of the public in search of services, the payment of commissions by business people to public officials as facilitation fees, distortions in the dispensing of justice, nepotism and patronage.

The quality of services that government delivers, such as social services (i.e. health and education), is an essential measure of governance in any country. Another measure of the strength of governance is the level of integrity and honesty and, inversely, corruption.¹ In Malawi,

users (comprising households and businesses) generally rated the quality of services of key public agencies as being below expected standards. Topping the list of public institutions that received low evaluations are responses regarding the traffic police, immigration department, administrator general and the Road Traffic Directorate.

In addition corruption perpetuates poverty by depriving the poor of the ability to lift themselves out of poverty. For example, if a public official accepts a bribe from an unqualified contractor, it is the children who suffer as classes may have to be cancelled in the cold and rainy seasons. In the long run these children will fail to complete their studies and will remain poor.

Recent studies undertaken in Malawi show that there is a high prevalence of corruption in the country.² The challenge facing Malawi is that the citizens do not seem to understand how corruption affects them adversely at a personal level. Malawians' role in the fight against corruption has been mainly that of whistle blowing, which a lot of the respondents in the two surveys admitted never to participate in.

This paper is therefore suggesting that there must be other ways in which Malawians can participate in the fight against corruption. This is done recognising that the people themselves are the key in this fight rather than government or the ACB, whose real role is that of facilitating the process. The paper suggests that if Malawi as a nation is to win the fight against corruption other efforts need to be undertaken including, for example, social capital in the civic education efforts on corruption.

USING SOCIAL CAPITAL IN THE FIGHT AGAINST CORRUPTION

The purpose of this paper is to show how social capital can be included in the civic education efforts to make the fight against corruption every person's responsibility through the creation of civic mindedness and strong social networks. The aim is to make the people co-creators with government and not mere recipients, by increasing their sense of ownership and responsibility as citizens. In this way the people are more in control when faced with a corrupt public official.

According to Putnam, who is regarded as an authority on the issue, social capital refers to 'social organisation such as trust, norms and networks that can improve the efficiency of society by facilitating coordinated actions'.³ Putnam believes that social capital can be measured by the amount of trust and 'reciprocity' in a community or between individuals.

Social capital is built within a social group.⁴ A social group can be described as a collection of individuals who interact in systematic ways with one another and can be big or small. Miruka argues that 'social capital is an important theoretical instrument [which] facilitates cooperation, risk sharing and collective action leading to mutual benefits'.⁵ What social capital actually does is that it creates norms – expected and trusted practices and behaviours. It vests authority in leaders, which facilitates efficient decision taking and action. Social capital allows for the sharing of expertise, and information groups share benefits with larger communities thereby creating obligation, trust and reciprocity.⁶

As part of building a spirit of solidarity in the fight against corruption, education on corruption can be incorporated in the school syllabus in a subject such as Social Studies. This subject teaches, among others, the rights and responsibilities of people, democracy and good governance. Anti-corruption efforts fall under one of the tenets of good governance, which is accountability and financial probity. Therefore the teaching will centre on all these important issues in a democracy.

As cited in literature, people in many of the older democracies know what is expected of them because they have been taught about this since they were young. As they grow older, displaying behaviour such as participation in matters to do with their county is therefore easier and voluntary. This is not to say that the older generation should be ignored; literature indicates that frequency of education is also important for those who are not in school. Malawi as a new democracy can learn from such countries as the United States in this regard.

To bring about such civic engagement, emphasis should be put on active civic education methods whereby the people get involved in, for example, role playing and dramatisations. Once people are empowered with information they can use it, as demonstrated by the people of Sofala in Mozambique; armed with information on their role in a democracy, they wrote a letter as a group complaining about the disappearance of funds which they had contributed for the construction of a school. This forced the administration to pay back the money, which was eventually used to build a school.

Investing in training of trainers can greatly contribute to the establishment of social groups or the introduction of the issue of corruption in pre-existing groups. This will then allow messages on corruption to be discussed in depth within anti-corruption groups, non-governmental organisations (NGOs), civil society organisations (CSOs), faith-based organisations and community-based organisations. Working

with pre-existing groups has the advantage of introducing the subject of corruption in an established social group in which norms of behaviour are already established. In such groups, people know that they can count on each other for support and solidarity. For example, parents may stand together and agree not to bribe examination invigilators to allow their children to cheat during examinations. If there is no agreement some parents may pay, which can serve to perpetuate the corrupt behaviour.

Through social groups Malawians can be empowered and mobilised to take part in the fight against corruption. This is not to say that CSOs and NGOs should stop doing their normal work, but issues of corruption can be interwoven with the needs of the people for a lasting impact. Furthermore, addressing corruption together with the needs of the people will increase the frequency of civic education efforts, which is important for influencing change.

Participatory research appraisal has worked in the past when it comes to getting people to change their mentality, for example in the area of girls' education in Malawi. The same method can be used in the fight against corruption: researchers go to an area and study what happens, then call the people together and perform a role-play of what they have observed. Afterwards the role players can engage the people in a discussion about what is happening in the area. This method not only increases participation but also presents an opportunity for the people to ask questions.

The frequency of civic education programmes is important for influencing change. Since the ACB cannot be everywhere at all times, partnerships with pre-existing NGOs and CSOs could prove handy as corruption issues can be discussed while members of these groups are going about their normal business. Active methods (role-playing, dramatisation) of teaching the public that deal with real life, such as the court process, leave a long-lasting impression and are bound to encourage change.

When teaching people how to fight corruption, emphasis should be placed on collective action or doing things as a group. As Putnam points out, social cohesion is related to economic development;⁷ thus where there are strong networks, norms and trust, these influence positive social and economic change. Issues of trust in institutions and those in authority need to be taken into consideration, especially since there is a correlation between trustworthiness and quality of service delivery: the higher the perceived integrity of an institution, the better the quality of their services.

According to Kay, social capital involves building mutual trust, constructing shared futures, strengthening collective identity and working together in groups.⁸ It is in groups such as NGOs and CSOs that information can be shared, leading to consensus building. This in turn can induce collective action, which is an indicator of increased social capital. Also, officers from the relevant departments should be available to give talks and answer questions at, for example, ACB public meetings.

Another way in which to increase citizens' ownership and responsibility of what is happening in the country is to allow the people to hold the public and private sector leadership accountable. Not only will the people's voice be heard, but they will become real co-creators with government as their suggestions are taken on board and implemented.

CONCLUSION

The battle against corruption in Malawi can only be won by shifting the responsibility of fighting corruption from the ACB to the people. This is because corruption happens among the people and negatively affects them. Such an approach will not only help in the fight against corruption but will also get people to participate more in the affairs that affect them, making the definition of democracy as 'government for the people, by the people' a reality.

ENDNOTES

- 1 Consulting Group, *Governance and Corruption Baseline Survey: Final Report*. Malawi: Millennium Consulting Group, 2005, p 5; and *Corruption in Selected Regions*, 2006.
- 2 Ibid.
- 3 Putnam R, *Making Democracy Work: Civic Traditions in Modern Italy*. New Jersey: Princeton University Press, 1993, p 167.
- 4 Giddens A, *Sociology* 4th ed. Oxford: Blackwell, 2004, p 380.
- 5 Miruka C, 'Social Capital and Good Governance in Kenyan Public Provisioning'. PhD thesis, University of the Witwatersrand, Johannesburg, South Africa, 2007, p 73.
- 6 Hart G, Social capital: A fresh vision for public libraries in South Africa?, *SA Journal for Libraries and Info Science* 73(1), 2007, p 17.
- 7 Putnam, op cit.
- 8 Kay A, Social capital, the social economy and community development, *Community Development Journal* 4(2), April 2006.

8

KAYELEKERA AND THE URANIUM MINING SAGA IN MALAWI¹

Rafiq Hajat

INTRODUCTION

There is a new buzzword in Malawi – ‘Kayelekera’. A hitherto unknown village situated amidst rolling woody hills approximately 50 km from Karonga in the northernmost region of Malawi, Kayelekera has become synonymous with uranium mining in Malawi – which is remarkable since this country was not historically regarded as being well endowed with mineral wealth. Indeed, the late Dr Kamuzu Banda used to rally the people to greater efforts by stating that although Malawi did not have gold, diamonds and copper, it had something just as valuable – fertile soil and plentiful water. Malawians were thus urged to work hard in the fields to grow more maize – our ‘green gold’.

The lack of development in the mineral sector is therefore not strange in view of the general ignorance that existed and continues to prevail in Malawi. This paper strives to shed some light on the realities on the ground in the context of recent developments in the Kayelekera saga.

BACKGROUND

MINERAL RESERVES IN MALAWI

It now appears that we were sorely misled and Malawi is actually endowed with various minerals such as corundum (ruby), coal, bauxite,

agate, vermiculite, monzanite and uranium, among others. Table 1 offers more detail on mineral deposits throughout Malawi.

Although not comprehensive, the table illustrates the potential mineral wealth that could be tapped in Malawi – with great benefits to the people, the economy, the infrastructure and the country as a whole – but only if proper legislative and monitoring infrastructure is put in place.

Such legislation needs to ensure that the nation in general, and the people in particular, receive an equitable share of this wealth, thereby providing a launching pad to catapult Malawi out of the perennial poverty trap in which it has languished for so many decades.² This would need unflinching political will, impeccable integrity and

| Table 1: Mineral reserves in Malawi | | |
|--|---|--|
| Deposit | Location | Delineated reserves (million tonne/grade) |
| Bauxite | Mulanje | 28.8/43.9 Al ₂ O ₃ |
| Uranium | Kayelekera Karonga/ Chitipa | 2.4 |
| Monzanite/ Strontianite | Kangankunde – Balaka | 11.0/8%Sr, and 2% REO |
| Corundum | Chimwadzulu – Ntcheu | 8.0/75.6 gm per m ³ |
| Graphite | Katengedza – Dowa | 2.7/5.8%C |
| Limestone | Malowa Hill – Bwanje | 15/48% CaO, 1.2% MgO |
| Titanium Heavy | Salima – Chipoka | 700/5.6% HMS |
| Mineral Sands | Mangochi (Makanjira) | 680/6.0%HMS |
| Vermiculite | Feremu – Mwanza | 2.5/4.9% (Med + Fine) |
| Coal | Mwabvi – Nsanje | 4.7/30% ash |
| | Ngana – Karonga | 15/21.2% ash |
| Phosphate | Tundulu – Phalombe | 2/17% P ₂ O ₅ |
| Limestone | Chenkumbi – Balaka | 10/46.1% CaO 6.3% MgO |
| Pyrite | Chisepo – Dowa | 34/8% S |
| Glass sands | Mchinji | 1.6/97% SiO ₂ |
| Dimension stone | Chitipa, Mzimba, Mangochi, Mchinji | Black and blue granite, pink granite, green granite |
| Gemstones | Mzimba, Nsanje, Chitipa, Chikwawa, Rumphi, Ntcheu | N/A |

Source: Government of Malawi, 'Malawi Annual Mining Economic Report', 2002.

ungrudging inclusivity on the part of the government, and sobriety, maturity, capacity and objectivity on the part of civil society.

Unfortunately, this has not been the case thus far. Table 2 shows the paltry revenue that has accrued from mining operations in Malawi. For example, the extractive industry in Malawi contributed a mere MK7,216,217 (US\$1 equalled approximately MK150 in 2008) towards the national coffers in 2003/04. This figure equates to a mere 2.5% of the sale value, which is undeniably inadequate when taken in the context of common practices such as 'transfer pricing', which minimise the values declared in the source country while maximising the profits realised by the 'investors' on the world market.

Table 2 also reveals a puzzlingly low figure realised by the

| Mineral/ product | Production sold | Sales value (MK) | Processing fees | Royalty (MK) | Total revenue GOM (MK) |
|-------------------------------------|----------------------------|-----------------------------|----------------------------|-------------------------|---------------------------------------|
| Coal | 8,773 t | 41,543,437 | 750 | 300,000 | 300,750 |
| Quarry Rock Aggregate | 23,780m ³ | 37,609 793 | 3 000 | 1,881,487 | 1,884,487 |
| Cement Limestone | 4,910 t | 24,538 | - | 1,227 | 1,227 |
| Agric. Lime | 1,826 t | 7,528,180 | - | 4,246 | 4,246 |
| Gemstones & Mineral Specimens | 580kg | 466,255 | 4 250 | 46,130 | 46,130 |
| Blue Agate | 49 t | 1,685,000 | 4 250 | 168,500 | 168,500 |
| QUARTERLY TOTAL | | 88,857,208 | 12,250 | 2,401,590 | 2,413,840 |
| July–December total | | 208,336,654 | 17,750 | 4,784,627 | 4,802,377 |
| Cumulative total to-date | | 297,193,862 | 30,000 | 7,186,217 | 7,216,217 |

Source: Government of Malawi, Quarterly Mining Bulletin, January–March 2004.

Conversion rates: US\$1 = approx. MK100 in 2004

gemstones sector, which is inconsistent with reports on the extremely high prices offered on the international market (approximately US\$100 per carat) for Nyasa rubies from the Chimwadzulu Mine in Ntcheu. This low rate of return is contradicted by data gleaned from credible independent sources (see Table 3).

Thus, while the official quarterly bulletin shows that 580 kg of gemstones were extracted, Thomas Yager differs with a figure of 1,820 kg. This tends to heighten concerns that Malawi is being 'short-changed' by unscrupulous speculators who are plundering natural resources with impunity by taking advantage of the loopholes and weaknesses in the legislative framework, and governmental human resources which are inadequate to monitor and control extractive activities. It further gives rise to suspicions of corrupt connivance between the so-called 'investors' who are all too ready to grease the palms of government officials in order to induce them to look the other way – all at the expense of the sixth poorest country in the world.

**Table 3: Production of mineral commodities in Malawi, 2000–04
(in metric tonnes unless otherwise specified)**

| Commodity | 2000 | 2001 | 2002 | 2003 | 2004 |
|--|-------------|-------------|-------------|-------------|-------------|
| Cement; hydraulic | 155,920 | 180,761 | 174,283 | 190,000 | 190,000 |
| Coal; bituminous | 34,260 | 34,410 | 43,372 | 47,037 | 40,891 |
| Lignite | - | - | - | - | - |
| Dolomite | - | 49.4 | 394.5 | 400 | 5,400 |
| Gemstones Kg | 1,200 | 1,800 | 2,305 | 2,297 | 1,820 |
| Kaolin | 719 | 825 | 636 | 800 | 800 |
| Lime | 21,886 | 6,177 | 6,776 | 18,877 | 23,095 |
| Ornamental stones | N/a | n/a | 120 | 450 | 320 |
| Sodium Silicate | 1,538 | - | - | - | - |
| Stone: crushed for aggregate | 125,200 | 594,979 | 113,992 | 159,952 | 168,600 |
| Dimension: crude & partly worked | 78 | 483 | 170 | 130 | 130 |
| Limestone: for cement | 144,000 | 167,000 | 86,234 | 23,965 | 21,224 |
| Vermiculite | - | 1 | - | - | - |

Source: Coakley GJ & Yager TR, 'The Mineral Industry of Malawi'. US government study, 1999

LEGISLATIVE FRAMEWORK

Mineral activities in Malawi are covered by the Mines and Minerals Act (1981), the Mines and Minerals (Mineral Rights) Regulation (1981), and the Petroleum (Exploration and Production) Act of 1983. The Mines and Minerals Act of Malawi was passed during the single party era of Dr Kamuzu Banda on 1 July 1981 and thus relates to a time that bears little relevance to the current scenario. In those days, it was the norm to vest everything in the then Life President (Dr Banda) on behalf of the people of Malawi, as he viewed Malawi as his personal fiefdom. All minerals were thus seen as Banda's private property to dispense with at his pleasure and discretion.³ It is further interesting to note that commitments and obligations (no matter how inequitable) that were entered into by the British Colonial Administration prior to 1965 are upheld, safeguarded and, indeed, legitimised.⁴

After Malawi's transition to a democratic dispensation in 1994, a new constitution, which, among other things, dismantled the preponderance of presidential power and importance, was drafted in 1994 and adopted in 1995. A review of extant legislation was subsequently conducted against a backdrop of rapidly changing global environmental realities, and additional provisions that were deemed appropriate were inserted in the Mines and Minerals Act. This included the stipulation that an environmental impact assessment (EIA) be submitted to the Department of Research and Environmental Affairs for review with each mineral rights application.

However, the extant pieces of legislation were reviewed/amended in a piecemeal manner and did not take a holistic approach to a serious problem. In other words, the Act was amended merely to reflect a semblance of environmental concern, but there were no fundamental substantive changes to reflect new social, political, economic and environmental developments that had transpired in Malawi since 1990, including the need for prior consultations with stakeholders in observance of local ownership, and the corresponding need for inclusivity before unilaterally granting mining concessions to potential investors.

Thus the system used in assessing and granting approvals for applications for prospecting and mining licences still vests too much power in ministerial discretion. It does not provide for broad-based consultations with stakeholders such as civil society, traditional authorities and professional bodies, augmented by the inclusion of parliamentary scrutiny and oversight roles in the appraisal of mineral

extraction applications of national significance, such as the Kayelekera Uranium Project. This was clearly manifested by the minister of finance's refusal to disclose specific terms of the Kayelekera Uranium Mining Agreement to parliament, citing the 'confidentiality clause' in the Mines and Minerals Act (1981). (See Appendix 1 for more information on the types of mining licences and the number of mining/prospecting licences that were granted during the period January to March 2004. Appendix 2 outlines the mining companies currently operating in Malawi.)

There were, indeed, some initiatives to formulate and adopt a National Mining Policy in 1995; however, its current status is unclear, as is the degree of inclusivity to ensure that the views and aspirations of local communities – especially within the immediate proximity of extractive operations – are realised. When adopted, this policy would in any case be a stepping stone to a new Mines and Minerals Act, and it is hoped that Malawi will eventually develop a comprehensive act that would provide an effective framework to prevent abusive exploitation of Malawi's precious (finite) mineral resources.

Times have indeed radically changed since 1981, and these archaic pieces of legislation must be reviewed without delay to keep up with today's rapidly changing technological, geopolitical and global declining resource equations. In addition, it is necessary to recognise that Malawi has a track record of faltering in the implementation of legislation that on paper seems very impressive. This can be attributed to numerous factors such as corruption and lack of capacity, expertise, and human and financial resources. It is therefore imperative to develop the local capacity of both the implementing ministry and civil society groupings to ensure that any future (revised) legislation will achieve the desired results.

Since the uranium project is the latest development in the extractive industry in Malawi, and in view of the unprecedented media and public attention that has been aroused, it may be appropriate to explore the potential ramifications of this venture in greater depth.

KEY ISSUES REGARDING PALADIN'S URANIUM EXTRACTION IN MALAWI

Four Australian companies are currently exploring for uranium in Malawi and 12 potential uranium sites have been located recently in the country. The most prominent site is at Kayelekera in Karonga (northern Malawi). Other exploration licences overlap with Nyika (northern Malawi), Majete (southern Malawi) and National Parks.⁵

Paladin Resources recently signed a uranium mining agreement with the Malawi government after having submitted its draft EIA in October 2006 against a bankable feasibility study for the Kayelekera deposit. Kayelekera is estimated to yield 35 million tonnes, from which 10.5 million tonnes of ore graded at 0.11% would yield 9,900 tonnes of triuranium octaoxide (U₃O₈). The total uranium resource is estimated at 13,630 tonnes at 300 parts per million cut-off and 10,690 tonnes at 600 parts per million.

MAIN COMMUNITY CONCERNS REGARDING PALADIN

A snap survey conducted by civil society groups shortly after the government announced the mining agreement with Paladin revealed the following issues:

- Site clearance activities were purported to have started even before Paladin was issued a mining licence and allegedly destroyed shrines sacred to local residents, thereby angering local chiefs. This is illustrative of the lack of pre-consultation for the protection of local social, cultural and environmental value systems.
- No information was given on health and environmental risks and the negotiation process was not transparent.
- Divide and rule tactics were employed, i.e. paying some local leaders and excluding others.
- There was non-disclosure of waste management plans leading to increasing concern since the mine is within a catchment area.
- Fears that water extraction and usage may conflict with local needs.
- Fears that power and electricity usage for the mine would take preference over local people.
- No tangible arrangements were made for local benefits sharing and Paladin refused to commit to a corporate social responsibility plan.
- Fears of a potential for increased alcoholism, with the accompanying exacerbation of domestic violence and other social ills.

- Fears of HIV/Aids proliferation since empirical evidence shows significant increases of HIV/Aids within mining areas. There was no proposed management, training or civic education to counteract this looming crisis.
- It was unclear whether the relocation of families would comply with Malawian human rights commitments, i.e. ILO 160 and international standards, e.g. the World Bank resettlement policy.

OTHER CONTENTIOUS ISSUES

- *Awarding of mining licence:* The Government of Malawi granted a mining licence to Paladin Resources by basing its decision on a *draft* EIA and was unmoved by numerous challenges from civil society on this deviation from normal procedures.
- *Failure to provide information on scoping documents:* Paladin Resources refused to provide scoping documents to local community organisations, which should be provided under Malawian environmental laws before undertaking the substantive EIA. These scoping documents would ensure that community input is provided at an early stage in the process. Similarly, Paladin refused to respond to queries as to which water sources would be utilised and affected.
- *Corruption potential:* Paladin is alleged to have made direct payments to chiefs in the villages, thereby undermining local decision-making processes by effectively putting local leaders 'on their payroll'. In addition, it was rumoured that Paladin Resources pays about \$900 to government engineers in the Ministry of Natural Resources as monthly allowances, and also charters flights for senior government officials, including a minister who also happens to be the member of parliament (MP) for the constituency where the Kayelekera uranium mine is situated. Local communities were promised various things, but little or no explanation or discussion of the risks and likely impacts of uranium mining occurred.
- *Water and power usage:* Paladin's lawyers drafted an agreement on rights to water and electricity between the investor and the government that effectively overrides existing rights of local communities, and imposes no obligation to compensate for any

losses emanating therefrom. This is contrary to the Malawian constitution as well as the United Nations Declaration on Civil, Cultural and Political Rights.

- *Threats to the waterline environment:* The challenges inherent in the weak legislative framework and monitoring capacity are compounded by the fact that the Paladin site is situated in a catchment area of the Rukuru River, which flows directly into Lake Malawi – the third largest freshwater lake in Africa. Lake Malawi has a unique ecological system and is a vital source of protein for millions of Malawians (the famous ‘Mpassa’ – lake salmon), in addition to having huge tourism potential. The Rukuru River, which flows near the mine, is a source of local domestic water use, and is also used for irrigation by farmers downstream. Furthermore, Lake Malawi drains via the Shire River into the Zambezi River, which runs through Zambia and Mozambique. Thus any pollution of Lake Malawi would eventually impact downstream and affect these other countries. There is thus considerable concern regarding insufficient safeguards against potential risks posed by uranium mining.

THE CIVIL SOCIETY RESPONSE

Public suspicion about the project was first aroused with rumours that the Malawi State President, Dr Bingu wa Mutharika, had taken a discreet detour to Australia during a state visit to the Far East, where he stayed as a ‘guest’ of Paladin for seven days. The public wondered what this ‘private visit’ entailed, but no credible explanation was forthcoming.

Suspicious were heightened when news of the uranium mining project was featured in the media. Civil society groups began studying the draft EIA that had been conducted by Knight Piésold Ltd, a consultancy firm based in South Africa and hired by Paladin. These civil society organisations (CSOs) received a frosty reception from government and had to contend with traditional authorities in and around the concessional area who had succumbed to the lure posed by short-term gains emanating from the project. However, the CSOs persisted undaunted in their quest to extract the truth on the Kayelekera concession and prepared a detailed study on the shortfalls prevalent in the project plans (see Appendix 3).

The CSOs’ questions and observations were of a general, non-technical nature and thus required more expert input in order to counter

the technical advantage of Paladin, who could draw upon a team of highly qualified experts to back up its proposals. The Civil Society Mining Forum thus proceeded to enlist the services of Dr Gavin M Mudd, a course director in Environmental Engineering at Monash University in Clayton, Australia, to review the EIA and provide a report on the potential technical flaws that may be invisible to the untutored eye.

Dr Mudd visited Malawi in January/February 2007 to conduct an on-site analysis and subsequently proceeded to voice serious reservations at a press conference in Blantyre. Dr Mudd's presentation is summarised in Appendix 4 since the report is too lengthy for full coverage in this paper. The report highlighted serious fundamental issues that needed to be addressed and corrected before the project was allowed to proceed.

The aforementioned CSOs coalesced into a loose network entitled the Civil Society Mining Network of Malawi (CSMNM) and mounted a desperate campaign to redress the perceived shortfalls. The CSMNM came up against acrimonious opposition from the government, traditional authorities and, indeed, much of the citizenry who did not understand the issues that were being raised, and instead chose to succumb to the 'smear' counter-campaign that had been initiated by unknown agencies who appeared to have vested interests in the uranium mining project.

In early 2007, the CSMNM initiated litigation in the High Court against the Government of Malawi for entering into an agreement with a foreign investor for the exploitation of finite mineral resources without due regard for the interests and aspirations of local communities in particular and of Malawians in general (Paladin Resources was named as second respondent). The court granted an interlocutory injunction preventing any work on the site until the issues raised had been fully explored by both litigants and defendants. This action increased pressure on the government to 'come clean'. Paladin was more directly affected by virtue of adverse publicity generated in Australia, with a resultant fall in its share price on the stock exchange.

Numerous attempts to initiate dialogue between the protagonists by various entities, including government ministers from Karonga, failed to achieve a breakthrough. The stalemate was finally broken in the last week of October 2007, on the eve of the court hearing. Members of the CSMNM were invited to a meeting with Paladin Resources convened by the Department of Mines and chaired by deputy minister for Water

Development, the Hon. Frank Mwenifumbo (MP), at Capital Hotel in Lilongwe. This was a last ditch effort to find common ground for an amicable agreement rather than risk protracted (and costly) court proceedings that could delay the mining project for an indefinite period. The meetings ran for five nights, commencing at 6 pm and generally ending at midnight.⁶

The mood during the first encounter was truculent, with both sides showing unwillingness to make any concessions; but the atmosphere soon warmed up when it was established that civil society was not against mining *per se* but was merely outraged by the ‘raw deal’ that militated against the interests of the local communities and the nation as a whole. Indeed, by the second evening, the Honourable Minister insisted on handing over the chair to a member of the CSMNM (the author, in fact) as a gesture of confidence in the ability of CSMNM members present to extract tangible benefits for the grass roots communities, while acknowledging that the government had been unable to ‘go the extra mile’.

The meeting gained further gravitas by the arrival of Paramount Chief Kyungu accompanied by four traditional authorities from Karonga, who announced that they wished to observe the proceedings to ensure that the best interests of the people of Karonga were being upheld. After five nights of hard negotiations, which entailed four re-writes of the out of court settlement deed, the meeting finally reached an amicable consensus premised on a series of undertakings by each party in the negotiation. Table 4 provides an overview of the pledges of each group.

Table 4: Kayelekera out of court settlement

| Paladin Resources Ltd. | Government of Malawi | CSMNM members |
|---|---|--|
| Up to US\$8.2 million towards a water treatment plant for potable water to serve the 30,000 residents of Karonga. | Review and update the Mines & Minerals Act (1981) in line with internationally accepted best practice standards – with the active participation of the CSMNM. | Withdraw the court action and not revive it on the issues that had already been agreed upon. |
| US\$1.8 million to be deposited into a fund for community development projects – to be decided | Develop supporting legislation for the | Cease the campaign against the Kayelekera mining operation and Paladin Resources Ltd. |

| | | |
|---|--|--|
| upon by the people of Karonga. | transportation and handling of radioactive and hazardous substances that conforms to internationally accepted best practice standards – with the active participation of the CSMNM | Provide competent participation in the monitoring committee. |
| Upgrade the Karonga Aerodrome to international standard, thereby creating a new international air hub in that region. | | Respect confidentiality of all information gleaned during monitoring exercises. |
| Refurbish and upgrade dirt road from the airport to the mining site to a tar road, which would be able to cope with the heavy traffic that would ensue in due course. | Set up, with the active inclusion of specific CSMNM members, a monitoring committee to oversee and evaluate all aspects of the mining operation at Kayelekera. The committee would be given free access to all areas of operations and be granted the power to stop mining operations in the event of any serious violation or transgression discovered. | Perform a positive and creative role as a partner in future issues emanating from the development of extractive industries in Malawi, by being a conduit for, amongst other things, local aspirations, alternative views and unheeded expertise. |
| Introduce Jatropha to farmers in the region and trans-esterification processing plants that would produce bio-diesel as a cost effective and environmentally friendly alternative to the importation of diesel for the generators at the site. This would establish Karonga as a valuable source of bio-fuel in the northern region – even after closure of the mine. | The CSMNM would be consulted as a partner in all future mining agreements entered into by the government. | |

The out of court settlement was duly signed at the hotel on 1 November 2007, witnessed by Paramount Chief Kyungu and his entourage. The chief expressed great satisfaction at the conclusion and extended his gratitude to all the participants for their diligence and goodwill.

RIPPLE EFFECTS

The out of court settlement attracted mixed reaction: some sections of the public hailed it as a stunning victory for the grassroots, while others, who appeared to be dancing to a different tune, slammed it as a civil society 'sell out'. However, the magnitude of the achievement was

confirmed by the Minister of Finance, Hon. Goodall Gondwe, who admitted in a newspaper article that government 'underestimated' civil society. This comment has great significance when taken in the context of his previous contemptuous attitude towards the same grouping.

A further commendation was received from CSOs in Zambia who were fighting with little discernable success for more equitable terms in the mining agreements entered into by their government with foreign investors in the Copperbelt. CSMNM members were invited by Caritas to Lusaka in December 2007 to inform their counterparts on how this achievement had been realised by the CSMNM, given the embryonic status of the extractive industry in Malawi, when all similar efforts in Zambia, which has been mining copper for 80 years, have come to naught. The Government of Zambia realises a pathetic 0.4 of 1% as royalties from copper. The mining companies there enjoy duty free and tax free status and operate with virtual immunity from employment and environmental rules and regulations. Human rights violations occur with callous disregard and the Kafue River has become a cesspool of toxic chemicals and acids.

The conference in Lusaka issued a joint communiqué that deplored the current state of affairs in the mining sector in Zambia and called upon the Government of Zambia to revisit the mining agreements and introduce some semblance of equity for the people of Zambia. The CSMNM members were honoured by being included in the drafting committee for the communiqué.

CONCLUSION

Malawi now stands at a crossroads that is unique in its agro-based history, by virtue of being the source of rare minerals that are of major global strategic significance. Malawi thus has to rely on all the available expertise in order to develop a framework that provides the best mechanisms for an equitable realisation of the optimal benefits that could accrue therefrom. It is entirely conceivable that Malawi could find the path towards shedding its poverty stricken image forever – provided it proceeds with caution and applies methodologies that are inclusive, equitable and free of corruption and vested personal interests.

It is apparent that the Malawi government is aiming at generating economic growth by augmenting the country's largely agro-based gross domestic product (US\$1.8 billion) with new inflows from non-traditional sources such as the mining industry, uranium in particular, as a potential

avenue to boost the economy by as much as 20%. This may have induced the government to 'bend the rules' and relax requirements in order to lure investors such as Paladin Resources, but this strategy has major potential pitfalls which would manifest when unchecked exploitation of finite natural resources adversely effect the environment and local communities. One must weigh the pros and cons very carefully before rushing into agreements with investors who may not have the requisite sensitivity towards local needs, aspirations or, indeed, future consequences. The recent agreement between the Government of Malawi and Mainland China could presage a new era of untrammelled exploitation of our precious resources, which, in the absence of a strong legal and monitoring framework, may lead to grievous consequences or, in a worst case scenario, catastrophe in the form of utter environmental desolation for Malawi.

The choices that are made at this crucial juncture will determine the economic and environmental future of Malawi. It is therefore imperative to ensure that all decisions are made in a transparent and inclusive manner that will harness the active participation of all stakeholders. It is reassuring in this context that civil society is now regarded by the government as a responsible and equal partner in this area and can thus play a meaningful role in ensuring that justice is, indeed, being done.

Any divergence or compromise in favour of personal agendas or any other reasons whatsoever could spell disaster, from which there will be no return. Further to the above, it is essential for the CSMNM to ensure that any windfalls gained are used for developing Malawi's infrastructure and productive capacity rather than for short-term consumptive satisfaction. One can only hope and pray that future generations will not find cause to judge us harshly for the decisions that are now being made on their behalf.

ENDNOTES

- 1 This paper is based on an earlier version, which was published by the Southern Africa Resource Watch – Hajar R, *Malawi and its Minerals – Are Malawians Really Benefiting?*. Johannesburg: SARW, 2007.
- 2 In 2004, Malawi's gross domestic product (GDP) amounted to about \$7 billion at purchasing power parity. GDP rose by 4.3% in 2004 compared with 3.9% in 2003. Manufacturing accounted for 11% of the GDP; construction, 2%; electricity and water, 1%; and mining and quarrying, 1%. In 2003, the mining sector grew by 23.5%, and the construction sector by 4%. Formal employment in the mining sector amounted to about 2,700 workers.

- 3 Preamble of the Mines & Minerals Act 1981: 'The entire property in, and control over, minerals in land in Malawi are vested in the President on behalf of the people of Malawi; but without prejudice to the exercise of any right under or pursuant to this Act.'
- 4 Mines and Minerals Act 1981 Cap 61:01: 'Nothing in subsection (1) shall operate so as to affect any interest of a person in earth, clay, granite, limestone, marble, sand, stone or other similar substance upon or in land, being an interest created by virtue of any Certificate of Claim or ownership of land or other disposition made by or on behalf of the British Crown.'
- 5 Australia is the world leader in 'yellow cake' (uranium) production and has a highly regulated framework. Despite this, uranium mining in that country has had a negative impact on the surrounding environment and food sources of local people (e.g. the Ranger mine).
- 6 Participants included the following: Deputy Minister for Water Development, Hon. Frank Mwenifumbo (MP); Mr CP Msosa, Principal Secretary, Dept. of Mines; Ms Rosemary Kanyuka, State Advocate; Mr Michael Blakestone, attorney for Paladin; Mr Keith Hamilton, Advisor (Taxation) to the Ministry of Finance; Mr Greene Mwamondwe, past MP for Karonga (observer); Mr Gustav Mvalo, attorney for CSMNM; Paramount Chief Khyungu and 4 T/As; Mr Undule Mwakasungura, Executive Director of CHRR (CSMNM), Mr Reinford Mwangonde, Executive Director of CFJ (CSMNM), Mr Rafiq Hajat, Executive Director of IPI (CSMNM).

APPENDIX 1: MINING LICENSING IN MALAWI

There are three types of mining licences currently used in Malawi:

- Mineral permits/rights.
- Exclusive prospecting licences.
- Mining licences, which are submitted to the Commissioner for Mines and Minerals for further consideration and approval by the Licensing Committee.

The normal processing time for the granting of mining licences, which are transferable, can take anywhere from two to 12 months.

| Mining licences granted between January and March 2004 | | | | | |
|---|---|--------------------------------------|---|----------------------------|---|
| <i>Mining licence</i> | <i>Exclusive prospecting licence</i> | <i>Reconnaissance licence</i> | <i>Reserved Minerals licence</i> | <i>Mining claim</i> | <i>Non-exclusive prospecting licence</i> |
| 5 | 7 | - | 7 | | 11 |
| <i>Source: Government of Malawi, Quarterly Mining Bulletin, Jan-March 2004.</i> | | | | | |

**APPENDIX 2: MINING COMPANIES CURRENTLY OPERATING
IN MALAWI**

MILLENNIUM MINING LIMITED (MML)

MML holds licence numbers: EPL 096/2000, 103/2000 and 0115/2002 for the exploration of three heavy mineral sands (HMS) projects in Salima, Makanjira (Mangochi) and Lake Chilwa (Zomba) respectively, which aim to extract ilmenite, rutile and zircon. A feasibility report and EIA were submitted for the Halala HMS project in the Lake Chilwa area and a deposit of 15 million tonnes with economic grades for ilmenite and zircon has been delineated.

ALLIED PROCUREMENT AGENCY LIMITED (APA)

APA is developing the Chipoka HMS project for the extraction of ilmenite, rutile, zircon and garnet. Since Chipoka is a freshwater harbour on Lake Malawi, this project envisages conveyance of concentrate by pipeline from the mine to the harbour and thence onwards by barges. Sources indicate that although this project is at an advanced stage, it may have temporarily stalled due to technical difficulties.

LISUNGWI MINERAL RESOURCES LIMITED (LMRL)

LMRL together with ACA Howe International carried out compilation and analysis of geological, geochemical and geophysical data, and identified three gold and platinum targets for detailed exploration work, including drilling, to be carried out during the dry season of 2004. At Chimwadzulu, the analytical results indicate platinum and palladium concentrations.

It is worth noting that this area also has the Chimwadzulu ruby mine in Ntcheu, which has been owned and operated by the Hargreaves family since 1964. The mine is the only known source of the world famous 'Nyasa Ruby' that fetches premium prices on the global market, but it is not known exactly what benefits have accrued to Malawi or the local population due to the shroud of secrecy that cloaks the mine and its owners.

The Likudzi prospect has been sampled and the analytical results may justify trenching to bedrock. Historical result analysis seems to indicate a positive position for better grade gold mineralisation in an

inclined shaft. Sampling results in old workings seem to be comparable with the historical values at the surface level. Further work will consist of drilling at least one drill hole to examine the setting of mineralisation and to confirm the grade and thickness of mineralisation. Auger sampling will be carried out along strike from the old workings.

MCHENGA COAL MINES LIMITED (MCML)

MCML is involved in coal extraction in the Chiweta mountain range (near Karonga) and plans to increase production of coal to some 5,000 tonnes a month with exploration for additional coal resources within the Livingstonia coalfield. The site is an eyesore and a health hazard. A thick coating of black coal dust is visible on all buildings, machinery and vegetation, and the local community complain of proliferating lung diseases with no school, hospital or service infrastructure to provide essential services.

ALBIDON LIMITED

Albidon holds concessions for four areas comprising Mpemba Hill, Kapeni River in the southern region, and Linthipe and Katakwi in the central region in respect of nickel, copper and platinum group metals (PGM) exploration. Albidon and its joint venture partner Western Mining Corporation, both Australian companies, were involved in the interpretation of airborne geophysical data acquired over their licence area of the southern region.

MARAVI MINERALS DEVELOPMENT LIMITED (MMDL)

MMDL is exploring the Thambani Mountains and Mzimba pegmatites for tantalite minerals, zircon and corundum, under EPLs 0118/2002 (Thambani) and RL 033/2002 (Mzimba).

RARE EARTH COMPANY

Rare Earth is developing the Kangankunde Hill monazite and strontianite deposit under mining licence ML 0122/2003 and plans for full-scale operations are well under way.

GONDO RESOURCES

Gondo Resources is a new player in the field that seeks to exploit the bauxite reserves in Mulanje Mountain. The company's lack of experience, coupled with the complexity of extraction in a very delicate ecological environment that has been recognised as a World Heritage site, does not inspire much confidence. Further, it will be necessary to import huge amounts of electricity from Cabora Bassa in Mozambique to power the extractive process, resulting in outflows of revenue from Malawi. This is compounded by the fact that the ore will not be refined in Malawi but will be transported by rail to Mozambique, where processing plants are already in existence. This means that Malawi will merely export crude ore, with no value adding spin-off benefits that could make a huge difference in the revenues realised from this project. It is therefore unclear what benefits, if any, will accrue to Malawi and its people when compared to the potential ravages that could be wreaked on a unique and breathtakingly beautiful natural site that has great potential for eco-tourism.

PALADIN RESOURCES LIMITED

Paladin Resources of Australia has conducted a bankable feasibility study and infill diamond core drilling on its Kayelekera uranium prospect under EPL 0070. This project is at an advanced stage and Paladin has signed an extraction agreement with the Government of Malawi and reached an out of court settlement with concerned civil society groups.

**APPENDIX 3: CIVIL SOCIETY CONCERNS REGARDING THE
KAYELEKERA URANIUM MINING PROJECT**

- One would assume that a project to extract a metal of such global strategic importance as uranium would have to be conducted with the utmost transparency and offered to investors through an international tendering process, yet no such procedure was followed in identifying a potential investor for this project and all subsequent negotiations were conducted behind closed doors.
- It is unclear whether there was any involvement of international monitoring bodies such as the International Atomic Energy Agency, who would naturally be interested in ensuring that all safety and security standards would be adhered to without compromise.
- The consultant hired by the investor would not possess the impartiality necessary to produce an undiluted EIA report that would provide a comprehensive picture, including issues that could militate against the client's interests, and the government's failure to produce an independent EIA that could be used as a comparative standard and a reliable source of unpalatable information tilts the balance in favour of the investor.
- The mine is situated next to the Rukuru River, which feeds directly into Lake Malawi. It is a pristine freshwater resource that is home to numerous unique fish species. Lake Malawi has an extremely fragile ecosystem that would not be able to withstand any discharge of effluent from the mine, or any inadvertent seepage that may occur through human error or by *force majeure*. The shores are inhabited by hundreds of thousands, if not millions of people that depend on the lake for their livelihood and very survival. Thus, one has to ask who would shoulder the responsibility in the event of any disaster. Will it be Paladin, or the Government of Malawi or both? How would Malawi cope with a scenario of such irreversible catastrophic magnitude as a Chernobyl-type scenario here? In the final analysis, would it be worth the risk?
- Uranium mining poses serious risks to human health and the environment. There is no existing expertise or capacity in Malawi to

engage with the serious issues around uranium mining, or to monitor such developments effectively. This must be addressed before any mining activity proceeds. The Malawian government and civil society need capacity development to be able to engage in this issue in an informed and constructive manner.

- The Malawi government was rumoured to have granted a 15-year tax-free status to the Paladin project, which was only slated to last for seven years. Amidst the subsequent hue and cry, the government quickly backtracked by admitting that there had been a 'typographical error', and that the true figure was a five-year tax concession; but even that was deemed to be exorbitant in view of the fact that it was more than two thirds the entire life of the project. Civil society believed that a more reasonable figure would be a maximum of two years, especially in view of the fact that in Australia (where Paladin is based), the company would get no tax holidays at all. Paladin apparently pledged to build a school and a hospital for the community living in the Kayelekera area, and this was used as justification for the large tax holiday. But the CSOs argue that this explanation is flimsy since the government could build many more schools and hospitals from the tax revenue, if the tax holiday were not granted.
- The CSOs were aghast upon learning that the Government of Malawi would receive a mere 5% from the revenues earned by the project. This is a gross variance from the Australian scenario, where Paladin would have had to share at least 20% with the Government of Australia, in addition to posting a 4.5% bond towards the upliftment of the aboriginal community who resides in that area. The general feeling that Malawi is getting the short end of the stick in this deal, indeed seems to be justified. This was further confirmed during a session of parliament in March 2007, when it was revealed that the Government of Malawi would hold a 15% stake in the mine. However, the government refused to disclose any substantive details on the agreement to the MPs, who were outraged by the government's assertion that the agreement was 'confidential'. The MPs promptly proceeded to move a motion to suspend the project until full disclosure – as befitting a matter of national interest.
- Malawi has very porous borders, which could be infiltrated by any

determined group in pursuance of their agendas. In view of the post 9/11 global scenario, the war on terrorism and the current focus on preventing the proliferation of nuclear weapons, one would assume that any uranium extraction facility would need maximum security measures to prevent terrorist raids on the mine. Malawi would therefore need to implement extra security measures along its borders and in the vicinity of the mine, but does not have the resources to do so. The government would probably source the requisite funding from the paltry 5% that accrues from the mine, thereby further reducing the potential benefits that could be realised by the people of Malawi.

- Australian mining companies must operate by the same stringent standards as they would in Australia and in any other Western country. This is particularly important to address the risks of uranium mining.
- Paladin Resources and other companies must respect the civil and cultural rights of the people and must consult with local communities and civil society in a transparent and accountable manner before making any moves.

APPENDIX 4: INDEPENDENT TECHNICAL REPORT ON KAYELEKERA

By Dr Gavin Mudd, Environmental Engineering, Monash University,
Clayton, Australia

This independent technical review has been prepared at the request of Citizens for Justice (Malawi), based on the author's extensive experience with assessing EIA reports for Australian uranium projects and his ongoing role in advising numerous communities on the management and impacts of uranium mining (especially the Ranger and Jabiluka Uranium projects on Mirarr land in northern Australia).

The review is a detailed analysis and critique of the currently proposed Kayelekera Uranium Project by Paladin, and identifies

numerous technical issues in the project and flaws in the current EIA. For example, there is:

- A lack of adequate, high-quality environmental and radiological baseline data;
- A lack of sufficient technical engineering design detail for critical project components;
- A lack of references and discussion of models for numerous critical design issues;
- Missing key baseline radiological data, especially pre-mining radon flux;
- Completely inadequate figures and maps to present and visualise the proposed project;
- Lack of an appropriate strategic, long-term tailings management plan;
- Poorly argued project alternatives and inappropriate dismissal of viable project options;
- Inadequate characterisation and discussion of potential acid mine drainage issues;
- A completely minimal and inappropriate rehabilitation plan;

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