

Countries at the Crossroads

COUNTRIES AT THE CROSSROADS 2012: MALAWI

INTRODUCTION

Author's note: On April 5, 2012, President Bingu wa Mutharika died of a heart attack. He was succeeded by Vice President Joyce Banda, who had been one of Mutharika's chief political adversaries. Despite some effort by regime insiders to prevent her from taking power, the constitutional stipulations for succession were followed. Since Joyce Banda came to power, a number of highly positive developments have taken place, reversing the anti-democratic tendencies witnessed under President Mutharika. On President Banda's initiative, government repealed legislation that gave the executive the authority to ban publications deemed threatening to public interest. A new law that limited the power of the courts to issue injunctions has also been repealed. The head of the national police has been replaced, and the new Inspector General has pledged to respect academic freedom. New electoral commissioners have been appointed, in full consultation with opposition parties – a practice eschewed by the late president. Finally, the environment for civil society groups has improved considerably with groups and activists no longer facing the threats and attacks that they incurred in the two years before Mutharika's death. In this context, relations with donors have warmed considerably, seen most clearly in the normalization of relations with Britain. The present context offers real possibilities for deeper governance reforms to help consolidate democratic rule in Malawi.

In May of 2009, President Bingu wa Mutharika was re-elected to the presidency of Malawi for his second term of office. His re-election as an incumbent was not very surprising, yet the degree to which he and his political party, the Democratic Progressive Party (DPP), dominated their opponents and were able to claim a broad national mandate was striking. Mutharika won a full 66 percent of the vote, while his only real rival, John Tembo of the Malawi Congress Party (MCP) obtained 30 percent. This was the widest margin of victory for a presidential candidate in Malawi since 1994. Beyond the margin of victory it is also striking that Mutharika overcame established regional patterns of voting. Mutharika not only won a majority in the south of the country, he also won a majority in the central region (home to his chief opponent) and dominated the northern region despite the fact that neither he, nor his running mate, nor his party, were strongly associated with the north. Meanwhile in the parliamentary races, the DPP won 113 out of 192 seats (or 58 percent), taking a majority of seats in every region. Observers generally accepted the results as a credible reflection of the will of the Malawian people.¹

The resounding victory by Mutharika and the DPP can be understood with reference to three issues.² First, Mutharika could claim that he had delivered the economic goods. Economic growth had been remarkably high during the last three years of his first term (2004-2009), driven largely by returns to agriculture, and hence to agricultural producers who make up the bulk of the population. This also allowed Malawi to achieve unprecedented levels of food security. Coupled with this, Mutharika could claim to have provided substantial public goods, especially in terms of roads. Mutharika's campaign specifically focused on such issues. Notably, public opinion research in advance of the election clearly indicated strong support for Mutharika.³ Second, owing to political machinations in the preceding years, the opposition had garnered a

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reputation as obstructionist and as bent on merely displacing the executive. As the economy grew, this obstructionist label became a liability for the opposition. Finally, the failed candidacy of former-president Bakili Muluzi, ending just months before the polls, forced Mutharika's opponents to create an ad-hoc coalition in support of John Tembo that never obtained traction.

In the aftermath of the elections many Malawians and international observers were decidedly upbeat about the prospects for the country. Many anticipated Mutharika would continue to focus on development issues, as he had during his first term. Moreover, many expected the governance climate to actually improve. Despite his accomplishments in the economic sector and in the provision of public goods, Mutharika's first term had been characterized by considerable acrimony, gridlock, and policy paralysis as the president was locked in conflict with the opposition-controlled legislature. At a minimum, DPP control of the legislature would abate these problems.

Yet Malawi's governance climate deteriorated considerably in the two years after the election. Rather than pursue a broad-based inclusive style of governance, Mutharika clearly catered to his own Lomwe ethnic group, favoring them for appointments to the state administration and providing patronage to Lomwe traditional leaders and cultural organizations. Meanwhile, other groups, most notably in the northern region, perceived marginalization from Mutharika. Furthermore, and far more dramatically, the president and his supporters demonstrated very anti-democratic and power-centralizing tendencies. Starting in 2009, but especially from mid-2010 forwards, the government undertook measures that undermined basic civic freedoms, weakened institutions designed to promote accountability within the state, and concentrated greater power in the hands of the executive. In this context, government accountability to the constitution and the law was decreased, and many of the organizations and institutions that might have resisted and challenged such developments were weakened.⁴

Coupled with perceptions of increased high-level corruption and the onset of economic problems associated with fuel and foreign currency shortages, this situation generated considerable popular and civil society resentment against Mutharika's government. Targeting these issues, major public protests erupted on July 20, 2011,⁵ to which security forces responded with excessive force leading to the deaths of at least 19 people.⁶ In the aftermath, civil society activists and suspected government opponents were subject to incendiary rhetoric from the government and actual violence perpetrated by anonymous regime supporters. The latter included arson attacks and the apparent murder of one student activist.⁷

ACCOUNTABILITY AND PUBLIC VOICE

Presidential and parliamentary elections are held every five years and the overall legal framework provides for free and fair contests. Malawi's electoral laws demand equal news coverage of all parties from public media outlets and specify the rights of candidates and parties to assemble and express themselves during the campaign period. Elections are supervised by the Malawi Electoral Commission (MEC), which by constitutional design is intended to be highly independent.

Electoral contests in Malawi have tended to generate periods of volatility and tension, with violence between party operatives and frequent accusations of bias on the part of key institutions, such as the MEC and public media. Legal challenges have often followed these contests. This was also the case in 2009, despite the fact that international observers regarded

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the polls as more free and fair than those conducted in 1999 and 2004. Parties were free to organize and operate, and campaigning was generally peaceful. However, the government enjoyed substantial advantages in the form of state resources utilized during the campaign period and heavy biases toward the incumbency on state-controlled media outlets.⁸ In the present context, it is difficult to foresee the strength of various parties and players heading into the 2014 elections. President Banda appears to be operating in a “honeymoon” environment, while most former government officials are discredited. This bodes well for her re-election prospects.

Concerns have also emerged about the independence of the MEC because of the executive’s power over appointments to the body. The Judicial Service Commission (JSC) nominates a judge to chair the MEC, whose appointment the president must confirm. The president subsequently appoints other MEC members, numbering no fewer than six. By law, these appointments should occur in consultation with the leaders of political parties represented in the parliament. In 2007, however, President Mutharika appointed commissioners who did not have the approval of other political parties. A protracted legal battle over these appointments was decided in favor of the president.⁹

Under election laws, political parties that received at least 10 percent of the vote in previous parliamentary polls are entitled to public funding. No limits are placed on private funding, the amount a candidate may raise or spend, or on the sources from which funds may be received. There are no provisions requiring disclosure of donations or spending amounts. During the 2009 campaign, some observers raised concerns over the use of state funds for campaigning purposes and lavish spending by the incumbent during the campaign.¹⁰

Local government elections are a major area of concern. Mutharika dissolved local councils in 2005. Local government elections were tentatively scheduled for 2010 and then again for 2011. However, in the wake of an audit report revealing the loss of substantial sums of money during the 2009 polls, President Mutharika suspended the MEC in December of 2010. This then provided a pretext for (again) delaying local government elections, which are now scheduled for 2014.

Although Malawi’s constitution provides for the separation of powers among the judiciary, executive, and the legislative branches of government, the extent to which checks and balances have operated effectively has varied. Prior to the May 2009 elections, executive-legislative relations were characterized by gridlock and policy paralysis that undermined governance in the country. In this context, the legislature did effectively assert itself as an independent political force and displayed independent capacity as an institution. For example, between 2005 and 2009, each of the 13 committees in the legislature met, as committees, for the first time in history.¹¹ This signaled positive efforts to develop institutional capacity and greater legislative policy expertise.

Up until his death, the president’s party controlled nearly 60 percent of the seats in the legislature. As such, the legislature’s past pattern of assertiveness faded and it remained largely subservient to the executive. Some observers have criticized the failure to scrutinize and generate debate on key legislation.¹² Another problem has been the bypassing of normal parliamentary procedures when controversial legislation is before the assembly. A standing order that requires a bill to be sent to MPs 28 days before a first reading has been waived repeatedly since May 2009. Added to this, draft legislation is neither routinely published nor distributed for comment and public scrutiny; this further undermines the capacity of the legislature to question the executive.¹³

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The current political context has also exacerbated existing challenges for the legislature in terms of its capacities and independence from the executive. For example, while the legislature sets its own budgetary priorities, its funding, including both amounts and the timing of disbursement, is de facto controlled by the Ministry of Finance. As a result, support requests have been underfunded and the funding stream has been unpredictable. In addition, the legislature has few trained staff offering support services to MPs. Illustrating this problem, in 2011 it was reported that the legislature only had one researcher.¹⁴

Malawi's constitution vests civil service personnel decisions with the Civil Service Commission, in an effort to insulate the state bureaucracy from political influence. However, the politicization of the upper echelons of the civil service has remained an issue of concern in the country, as many appointments to key positions are held by individuals from the south, and, more particularly, from President Mutharika's Lomwe ethnic group. According to one report, of 18 Principal Secretaries in the government, 12 came from the south, while the remaining six went to the other two regions of the country. Additionally, Lomwe have held a disproportionate number of top positions in the state, including those in the security establishment, major parastatals, and those dealing with fiscal and monetary matters.¹⁵

Malawi's civil society has played an important and visible role in political life since the onset of democratic rule, drawing public attention to governance concerns, corruption, development priorities, and government inaction on issues such as gender equity. Key civil society groups include high visibility public interest or "governance" nongovernmental organizations (NGOs), including the Institute for Policy Interaction (IPI) and the Malawi Human Rights Consultative Committee (MHRCC), an umbrella group of human rights NGOs, and those rooted in faith communities such as the inter-faith Public Affairs Committee (PAC), the Catholic Commission for Justice and Peace (CCJP), and the Church and Society programs of the Presbyterian Synods. In addition to these are more specific NGOs including the Law Society, those representing various professional and economic groups, and those organized around select issues such as health, the environment or education. Historically, these groups have used a variety of methods to articulate their interests and advocate on policy and governance concerns. These have included public outreach and education, direct contact with the executive and legislative branches, litigation, and engagement with the media.

NGOs are required to officially register and the costs of registration can potentially be prohibitive,¹⁶ as can the costs of complying with government regulations. The 2002 Non-Government Organization Act established a ten-member NGO board, appointed by the government, in consultation with the Council for Non-Government Organizations in Malawi, to register and regulate NGO activities. The body has not been used to control NGOs, and indeed took oppositional stances vis-à-vis the government in 2011.¹⁷ To qualify as NGOs, organizations must have at least two Malawian citizens as directors or trustees, provide a plan of activities and sources of funding, and pledge not to engage in partisan politics. NGOs must provide audited accounts and a description of activities to the board on an annual basis. A directive in August 2011 from the Reserve Bank of Malawi required all NGOs to file quarterly reports with the bank, including information on foreign and local sources of funds and details of utilizations of funds. This was interpreted as part of the government effort to crack down on NGOs, which heightened in 2011.¹⁸

Malawi's Bill of Rights guarantees freedom of expression, freedom of the press, and freedom of opinion. Malawi has approximately ten independent papers, two of which come out daily. There are 20 radio stations, 15 of which are privately owned, and four of which are

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community owned.¹⁹ These outlets compete with the Malawi Broadcast Company (MBC), which is heavily biased in favor of the government. The vast majority of Malawians obtain their news from radio.²⁰ There are four television stations, only one of which, the state-owned TV Malawi (TVM), broadcasts nationally.

While Malawi has enjoyed a relatively free press and a variety of media outlets offering a diversity of opinion, rights to freedom of expression and freedom of the press have been severely challenged during the period under review. Actions against the media included new legislation signed into law in early 2011 that enabled the minister of information to ban any publication deemed threatening to public interest; a government effort in late 2010 to close *The Weekend Times*, a weekly newspaper, which was ultimately halted by the courts; a ban in early 2010 on advertising in *The Nation*, one of the most respected dailies in the country; a specific threat from Mutharika to close newspapers that reported on the food security situation in the country; and physical assaults and intimidation of reporters by the police and members of the ruling party and their allies. Harassment of journalists included the beatings of nearly 20 reporters during the July 20 demonstrations, arson attacks on the vehicles of an independent radio station, and an increasing number of death threats against journalists in late 2011.²¹ Several journalists were also arrested throughout 2011. As a reflection of this environment, editors, publishers, and broadcast media directors have indicated that self-censorship has increased over the past two years in Malawi. Others have indicated that many reporters have been bribed by powerful individuals to refrain from reporting critically about government.²²

The broadcast media are regulated by MACRA (Malawi Communications Regulatory Authority), which has the authority to allocate broadcast licenses and ensure compliance with broadcast regulations.²³ The board of MACRA is appointed by the executive and the agency has been accused of political bias and inappropriate interference with the media.²⁴ For example, MACRA barred two private radio stations from live-broadcasting from events during the July 20 demonstrations. MACRA has also delayed issuing a license to one church organization that has taken oppositional stances toward the government.²⁵ Some within the community of independent broadcasters also indicated that they have encountered difficulties in accessing foreign currency from the central bank in order to purchase equipment necessary for their operations. Licensing fees to MACRA are paid in foreign currency.

The status of the government-controlled MBC and TV Malawi, the dominant outlets in the country, has remained a particular issue of contention. In the lead-up to the 2009 elections, broadcasts from these outlets took a strongly pro-government position. In more recent times, they have openly served as propaganda tools for government. In the lead-up to the July 20 demonstrations, these outlets spread disinformation about the planned protests claiming that they were pro-gay rallies.

Although internet use is confined largely to individuals in urban areas, its importance in disseminating information has increased dramatically over the past few years. During the July 20 demonstrations, reports indicated that social networking sites had been closed down, although these reports turned out to be false. However, opposition websites were the target of cyber attacks in and around the period of the demonstrations.

CIVIL LIBERTIES

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Malawi's constitution protects against torture and other forms of physical violence. However, protection of civil liberties deteriorated markedly over the past two years under President Mutharika. This has been especially evident in government actions against opposition and civil society activists.

Over the course of 2011, Malawi witnessed severe setbacks in basic protections against terror and physical abuse from the state (and its allies). President Mutharika took a highly aggressive stance towards critics in civil society. In March of that year, he called on his supporters to "discipline" those opposing him. Anonymous threats against civil society activists, already a feature of political life, increased in the wake of this threat, as did actual harassment. A NGO security guard was beaten by thugs who were looking for the director of the organization. Just prior to the July 20 demonstrations, ruling party thugs were also seen on the streets of major cities brandishing machetes in a clear effort to intimidate protesters.

In the wake of those demonstrations, President Mutharika specifically targeted civil society groups that helped to organize the protests, vowing to "smoke out" the activists. In the months that followed, the homes and offices of two civil society activists were the target of arson attacks, while thugs attacked the home of the director of the Catholic Commission for Justice and Peace. One student activist at the Polytechnic in Blantyre was found dead under very mysterious circumstances, while another was beaten by ruling party functionaries in Zomba. Several activists claim that these attacks were part of an organized effort by Mutharika to target and torture opponents.

Police have been actively involved in the government's efforts against activists in the opposition and civil society by arresting individuals on often exaggerated charges, sometimes using colonial era anti-sedition and treason charges. In November 2009 a DPP official who criticized Mutharika's policies was arrested and charged with inciting violence. In February 2010 three civil society activists were arrested and charged with inciting violence after they criticized government plans to disburse development funds to DPP youth. In August 2010 police arrested a leading Presbyterian cleric after he made statements critical of the government at a funeral. Finally, in February 2011, ranking police officers summoned and threatened a university professor in response to a lecture he gave regarding the fuel shortage in the country. This kind of direct assault on academic freedom was unprecedented in Malawi.

Police have also used violence against regime opponents. Despite government claims to the contrary, credible reports indicate that live ammunition was used against demonstrators during the July 20 demonstrations, leading to the deaths of at least 19 people. Moreover, as indicated, a number of demonstrators and journalists were beaten by police during the protests.

Conditions for prisoners and suspects have historically been terrible in Malawi. Prisons are characterized by high levels of abuse at the hands of authorities and deplorable standards for those in prison and awaiting trial. Several reports were issued that documented and detailed this situation prior to 2009. Local monitoring of the prison system has been more limited over the review period of this report, in part because of decreased funding for and harassment of the Malawi Human Rights Commission by the government. According to one account, the commission was specifically instructed by the executive to cease investigations into prison conditions.²⁶

There is little evidence to indicate that prison conditions have improved since 2009. International observers, such as Amnesty International, report that prisons remain characterized by poor nutrition, poor sanitation, and inadequate health facilities for inmates. Beyond this, prisons are overcrowded, with the prison system holding more than double its capacity. This

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situation is exacerbated by prolonged pre-trial detention, with pre-trial detainees forming up to 20 percent of the prison population.²⁷ There are efforts currently underway to deal with this problem through the construction of a new prison in Lilongwe.²⁸

Human trafficking remains a problem in Malawi. A 2008 study indicated that 500-1,500 women and children were trafficked within the country each year.²⁹ Most of those trafficked remain within Malawi, though Malawian victims of sex and labor trafficking have also been identified in the broader region and even Europe. Malawi is a transit point for foreign victims from the southern African region.³⁰ The U.S. State Department maintains that the government does not fully comply with the minimum standards for the elimination of trafficking; however, it is making significant efforts to do so. In June 2010, for instance, parliament passed and the president signed into law the Child Care, Protection and Justice Bill, which defines child trafficking in Malawi and imposes a penalty of life imprisonment for convicted traffickers. In addition, the Malawi Law Commission recently completed comprehensive draft anti-trafficking legislation. The State Department also reports increased efforts to provide protection to victims of trafficking through the development of victim support units in police facilities and working with NGOs addressing trafficking problems.³¹

Section 41 of the Malawian constitution maintains that citizens have the right to an effective remedy by a court of law or tribunal for acts violating their rights and freedoms. The constitution provides for several oversight institutions designed to enhance transparency and accountability. These include the Anti-Corruption Bureau, the Law Commission, the Malawi Human Rights Commission, and the Ombudsman. Of these, the latter two have tended to stand out as the more significant given their broad legal mandates and activism in recent years. The Malawi Human Right Commission's mandate includes the authority to investigate violations of human rights on its own or upon complaints received from any person. Enabling legislation also gives the commission the mandate to comment publicly as it sees fit on any general or specific violation of human rights and to recommend initiatives for change. In the past the body was quite active in monitoring and reporting on human rights, including investigations of conditions in prisons and police service, and issued a regular bulletin describing its activities. The Ombudsman is mandated to provide remedies for those subjected to injustice or maladministration that arise in public office.

Both of these institutions were relatively marginalized during Mutharika's second term. After over a year without a senior officer, owing to appointment delays on the government side, a new ombudsman came into office in October 2010. The office faces a substantial backlog in reporting and in cases to address and has limited resources at its disposal.³² The Human Rights Commission, on the other hand, has faced threats to have its funding cut while its leadership has been openly harassed by the executive, which has sought his removal from office. At one point in 2011, President Mutharika accused the chair of the commission of treason,³³ while ruling party cadres threatened him with violence.³⁴ Still, as the governance situation deteriorated in 2011, the MHRC remained active, joining two court cases challenging government actions and issuing a very critical report of government and police actions surrounding the July 20 demonstrations. In early 2011, the government passed new legislation to update legal aid services, by expanding the type of services offered by the Department of Legal Aid and enhancing the independence of the department, both of which will require substantial budgetary increases.

In 2011 the government also passed legislation to create a system of local courts, which holds the potential to improve access to formal justice for many citizens. However, the legislation also generated concerns that these courts could serve in a similar function as the

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“traditional courts” that were used during the single party era to repress and brutally punish suspected political opponents. Although staffing decisions for these courts, including determination of presiding officers, will rest in the hands of judiciary, concerns have also arisen over the potential role of traditional authorities in the new system, given their connection to government.³⁵

Although constitutional and legal structures offer women protections from discrimination, and despite the fact that some advances in gender equality have been registered in recent years, in practice women remain unequal citizens. The constitution specifies that women have the right “not to be discriminated against on the basis of their gender or marital status,” calls for the elimination of laws that discriminate against women along with the passing of legislation to eliminate customs and practices that discriminate against women.³⁶ In this spirit, in 1998, the inheritance law was amended to address discrimination against women and, in 2006, legislation was adopted to address violence against women. On the political front, significant symbolic advances for gender equity were achieved with the 2009 elections, when Malawi elected its first woman as vice president and the number of parliamentary seats held by women rose from 14 to 28 percent. Despite this, discrimination and violence against women remain serious problems in Malawi. Women face cultural barriers to participation in public life.³⁷ Poverty and illiteracy rates are higher among women-headed households. Women and girls also are often victimized by traditional practices that leave them relatively powerless on issues of inheritance, choice of marriage partner, and land rights. Abusive practices against girls include forced marriages, the selling of girls to pay off debts, and the secret initiation of girls into adult roles through forced sex with older men. Reports of gender-based violence appear to be getting increased attention in the press. Despite the presence of more women in parliament, gender-related bills have not come up for discussion in recent sittings.

Section 13 of the constitution requires the government to support the disabled through greater access to public spaces, fair employment opportunities, and full participation in all spheres of society. The Ministry of Social Development and Persons with Disabilities was established in 1998 to take charge of all government matters pertaining to persons with disabilities. The Employment Act of 2000 prohibits discrimination against the disabled for employment. A disabilities bill calling for increased services and protections for the disabled was drafted and submitted in 2005, although it has not yet been tabled in parliament.³⁸ Further, a lack of resources has kept government from effectively protecting the rights of the disabled, including their ability to obtain educational opportunities.³⁹ Societal attitudes towards the disabled remain problematic.⁴⁰

Malawi has been severely affected by the HIV-AIDS pandemic and societal discrimination against those with the disease remains a problem. Although government has undertaken efforts to address the problem of discrimination against people living with HIV/AIDS, pending legislation on this issue has raised concerns for local and international human rights groups. The legislation specifically prohibits and criminalizes discrimination against persons with HIV, and seeks to prevent cultural practices that have increased infection rates among women. However, other provisions of the law, such as the criminalization of “deliberate or negligent transmission” of the disease and the instatement of mandatory testing for pregnant women, are regarded by some as violations of more fundamental human rights.⁴¹

The rights of religious and ethnic minorities are generally respected in Malawi and relations between groups remain largely amicable. At the same time, many in the north perceived

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hostility from the Mutharika administration in the wake of policy changes that reduced the region's historic advantage in access to institutions of higher education.

Malawi's constitution respects the right to assemble and associate. Trade unions are active and collective bargaining is practiced, but union membership is limited owing to low levels of formal employment. Rights of assembly, however, were subject to substantial setbacks over the past two years. On at least five occasions police have halted or broken up demonstrations and gatherings sponsored by civil society groups and the political opposition. These have included demonstrations sponsored by religious organizations and cultural groups.⁴² Other planned demonstrations received threats of violence from Mutharika's party. As indicated above, violence has also been perpetrated against demonstrators.

RULE OF LAW

Malawi's judiciary has enjoyed a reputation for independence and impartiality, with high-quality, competent individuals staffing the bench and administration. Protections for judicial independence are enshrined in the constitution, and few concerns have been raised about the appointment of judges. Over the last decade, no judges have been dismissed or even threatened with dismissal, although one judge is under investigation by the Anti-Corruption Bureau. Moreover, while there was a pattern of acute government interference with the courts during Mutharika's first term, this appears to have dissipated in the more recent period. On their part, the courts have continued to display a willingness to render judgments against the government. In 2009, for example, the Supreme Court negated government efforts to alter the rules of parliament regarding selection of the official leader of the opposition, while a High Court judge upheld the right of university lecturers to strike in 2011.

The government has undermined the rule of law in important ways over the past two years. In early 2011, for example, President Mutharika called on police to shoot to kill robbers, adding that he would ensure that they would be denied bail.⁴³ Later, the president announced that those seeking to hold demonstrations would need to post a substantial sum before doing so, adding "I don't care whether this is in our laws or not."⁴⁴ Further, the president demonstrated disrespect for court orders. In late 2010 the president refused to halt the dissolution of the Electoral Commission despite a court injunction ordering him to do so. In 2011 he ignored a court order forbidding him from signing a specific piece of legislation. Finally, the government passed legislation in 2011 that limits the power of the courts to issue injunctive relief to individuals who are challenging government action.

Those accused of crimes in Malawi have the right to a public trial and are assumed innocent until proven guilty. The law also specifies that defendants have the right to present and challenge evidence and witnesses, the right of appeal, and the right to be represented by an attorney of their choice. If indigent, they are entitled to an attorney at the state's expense. As indicated above, however, the limited capacities of the court lead to effective denials of expeditious trials for the accused. In 2010 the Department of Public Prosecutions had 27 prosecuting attorneys, more than double the number from two years prior. Nonetheless, retention of government attorneys remains a problem.⁴⁵

The Office of the Director of Public Prosecutions (DPP) prosecutes all criminal cases in the country. In the past, the executive has been accused of interfering with the Director of Public Prosecutions, most notably in 2006 when the DPP was unconstitutionally removed from office.⁴⁶

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These concerns abated during Mutharika's second term. Concerns have also emerged about the potential for interference with the DPP from the attorney general, who has authority to direct the office of the DPP.⁴⁷ Although some lower level public officials have recently been arrested, prosecutions of such individuals has not been common in the past few years.

Constitutionally, the police force is an independent organ of the executive and is required to exercise its powers and duties impartially. The government is also forbidden from directing the police to serve partisan purposes.⁴⁸ Police actions against the political opposition and against civil society over the last two years—sometimes in defiance of established constitutional rights—appear to have violated these stipulations. As indicated, police have actively and aggressively intervened against demonstrations and played a key role in undermining academic freedoms. On top of this, many have raised concerns about the role of leading police officers in the September 2011 death of a student activist. The activist, Robert Chasowa, was thought by some to be connected to police efforts to monitor and influence civil society. Although police ruled his death a suicide, circumstances surrounding his demise and, apparently, an autopsy report, strongly suggest foul play.⁴⁹ Recently inaugurated President Joyce Banda has established a commission of inquiry to investigate the death.⁵⁰

Although the army has historically played a restrained role with respect to politics, it has been more visibly involved in recent years. In 2008 several ranking army officers were among those accused of plotting to overthrow the president. Their case was subsequently dismissed. Although the army was involved in efforts to restore and keep order during the July 20 demonstrations, by most accounts they took a less aggressive approach than their counterparts in the police forces, leading to rumors that Mutharika was angered by their being too soft on the demonstrators. This may be one reason why the top army leadership was replaced immediately after those demonstrations. Rumors also circulated that the ruling party was developing its own para-military force,⁵¹ and that the government had hired Zimbabwean mercenaries to deal with future demonstrations.⁵²

In the wake of Mutharika's death, it was alleged that several senior politicians and cabinet ministers sought to derail Banda's succession to the presidency and instead elevate the president's brother to the office. Army commanders apparently supported Banda and sent troops to her house to protect her – a move largely interpreted as a positive step for constitutionalism and the rule of law.⁵³

Property rights have generally been respected in Malawi, and the government and court system have been supportive of contract laws. Land or other types of property seizures have not taken place nor emerged as a topic of popular discourse.

ANTICORRUPTION AND TRANSPARENCY

Malawi witnessed substantial gains in the fight against corruption during Mutharika's first term, a trend corroborated by World Bank Governance Indicators. Several officials from the previous administration were prosecuted on corruption charges, as were a number of sitting government and parastatal officials. From 2006-2008, the government worked with the Millennium Challenge Corporation to improve government capacity to fight corruption. This included efforts to augment the National Audit Office, leading to advances in the number and quality of audits conducted, and efforts to improve the capacity of the Office of the Director of Public Procurement.⁵⁴ More recently, new-President Banda announced that she would elevate the status

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of the office of the Auditor General, a move that could enhance the independence of the institution.⁵⁵ Despite these improvements, there were several worrying developments during Mutharika's second term, especially with respect to the broader economic environment. For example, in 2011 Malawi slipped in its ranking on the World Bank's Doing Business Index, from 132 to 141. Challenges in property registration were singled out as one area that experienced deterioration in recent years.⁵⁶

State involvement in the economy has increased, while effective management of the economy has deteriorated substantially. President Mutharika, for example, demonstrated great hostility to international firms purchasing Malawian products. In May 2009, he publically criticized tobacco purchasers from multi-national firms for the low prices offered to producers, and four representatives of such firms were served with deportation orders in September of that year. In August 2010, the president banned the exportation of unprocessed cotton so that processing of the crop could be undertaken domestically.

As economic conditions deteriorated over the past few years, government actions exacerbated problems. Since 2008, Malawi has faced inadequate supplies of foreign exchange, limiting the ability of businesses to import vital items and materials. The government, in turn, resisted devaluing the currency to deal with this situation, and instead moved to rationing foreign exchange. Mutharika also lashed out at Asian and other international businesspeople, as well as international financial institutions, for causing the problems. Fuel shortages, especially acute in 2011, caused substantial disruption to the economy in 2011. In response, the government forbade the purchase of fuel in containers, a move that undermined the ability of individuals in rural areas to operate mills for maize, the staple food in the country.⁵⁷

The Malawi Revenue Authority (MRA) is responsible for assessment, collection, and accounting for tax revenues. From 2006-2008, the body received support from a Millennium Challenge Corporation (MCC) threshold program, aimed at improving its efficiency and capacity. An independent assessment indicated that improvements contributed to the recovery of lost revenues by the MRA.⁵⁸ The body has an internal audit division, although concerns have recently been voiced the division has not been audited by external agents for the better part of ten years.⁵⁹ Concerns have also arisen over the "exploitation" of cross-border traders by MRA officials⁶⁰ and inappropriate collusion between importers and MRA officials that lead to undercharging of levies and tax evasion.⁶¹ More recently, it was alleged that the agency had inappropriately borrowed from commercial banks in order to present an image of national fiscal solvency during the economic crisis that occurred from 2010 forwards.⁶²

Over the past two years, an increasing number of questions and concerns have arisen about the connection between public and private interests. Political allies of President Mutharika allegedly benefited from government contracts and license allocations for major undertakings.⁶³ Other reports have indicated that members of the ruling party have had privileged access to agricultural marketing opportunities.⁶⁴ In addition, several leading government figures have been implicated in a scam to purchase houses from the government at well below market value.⁶⁵ Beyond this, civil society activists have raised concerns about the apparent wealth that President Mutharika had acquired and many were calling for him to account for it.

The Malawi constitution demands public declarations of assets but there is presently no related enabling legislation. This is true despite the fact that an MCC threshold program called for the enacting of such legislation and even facilitated the drafting of such legislation by the Malawi Law Commission.⁶⁶

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The key body charged with fighting corruption is the Anti-Corruption Bureau. Although its leadership faced substantial turnover during Mutharika's first term, it has been under stable leadership since 2007. The body is constrained by legislation, enacted in 2004, which requires that it obtain the consent of the Director of Public Prosecution before prosecuting a matter. During the first term, opposition politicians claimed that the body was being used as a tool of intimidation and harassment of Mutharika's opponents. Most notably, former-President Muluzi was investigated and charged for corruption-related offenses. His trial is ongoing. More recently, the body has been criticized for an excessive focus on lower level administrative staff, while avoiding high-ranking officials.⁶⁷ In this vein, the opposition has criticized the body for its slow response to the housing scandal described above.⁶⁸ More generally, although the bureau has been active in arresting and undertaking efforts to prosecute public officials, trials are somewhat infrequent and tend to befall lower level officials. In 2011, some ranking political figures who were the target of corruption-related investigations and were dismissed from cabinet positions, were subsequently reappointed to cabinet positions, despite the fact that investigations into corruption allegations were still ongoing.⁶⁹ Both of these cabinet members lost their positions in the aftermath of Mutharika's death and investigations continue.

Cases and allegations of corruption are discussed in the media. The press, in particular, has played a role in promoting awareness and exposing corruption, in some cases leading to investigations and prosecutions.⁷⁰ However, journalists who have investigated corruption related issues have been the target of threats and intimidation.⁷¹ Amendments to the Corrupt Practices Act in 2004 designated protections for corruption whistle blowers and the legal regime for them is considered "moderate" by the Global Integrity Report.⁷² This said, in the view of some, protections for whistle blowers remain inadequate.⁷³

Corruption has affected educational institutions, with problems ranging from teachers asking for bribes in return for passing grades to school officials asking for extraordinary payments to allow students to write exams.⁷⁴ Concerns about exam leakage have dissipated in the wake of a 2007 scandal wherein secondary school exams became available for purchase on the black market.⁷⁵ Major problems with corruption have also recently characterized the health sector. A February 2011 audit report indicated that government had provided drug-related procurement deals to many unqualified bidders who then failed to deliver the items. This contributed to a massive shortage in drug supplies and demands by donors that government account for such irregularities.⁷⁶

The Malawi government operates with limited transparency about key issues and public policy decisions. For example, very little is known to the public about formal or informal agreements between the Chinese and Malawian governments, despite the growing presence of Chinese influence in the country. Moreover, even basic information about the schedule of legislation to be tabled and debated in parliament can be hard to access.⁷⁷ Section 37 of the constitution provides that "subject to any act of Parliament, every person shall have the right to access all information held by the state or any of its organs."⁷⁸ However, legislation to enable this provision has not been enacted. The Access to Public Information bill, which offers specification of these rights and creates mechanisms to protect them, has been drafted; however, the bill has yet to be tabled before parliament.⁷⁹

The budget process in Malawi, by convention, has included "pre-budget" consultations conducted in all three regions of the country wherein various sectors of society offer input on the formulation of the budget. Commentaries include those offered by civil society groups, most notably the Malawi Economic Justice Network (MEJN) which represents a network of

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organizations focused on economic issues. The tabling of the budget bill in parliament also provides opportunities for public commentary on the budget. In spite of this, the legislature has proved weak and ineffective in analyzing, scrutinizing and substantially modifying the budget over the last two years. In part, this is the result of limited capacity of key committees and legislators to effectively review the budget. However, it also reflects limited time being provided for effective scrutiny and debate on the budget, sometimes in contravention of parliamentary standing orders.⁸⁰

Malawi has a National Audit Office, which donor programs, especially those undertaken under the MCC Threshold Country Plan, have helped to improve in recent years. Today it is viewed as one of the more effective government agencies. In November 2011, it was reported that the body would begin reporting to parliament rather than the executive and that steps would be taken to increase the independence of the office of Auditor General. Parliament is also served by a Public Accounts Committee, which is charged with scrutinizing expenditures. Given the lack of access to information legislation, it is generally difficult for the public to obtain information about public finances.

As indicated above, problems exist in the process of awarding government contracts, especially in relation to political allies obtaining such contracts. Few issues have surfaced with respect to foreign assistance, which historically has gone to support the development budget.

RECOMMENDATIONS:

- Government should restore and continue to improve the climate for civil society groups and the media, both of which were targets of attacks over the past few years.
- Government should work to pass the Access to Public Information Bill.
- Government should reinvigorate the Malawi Human Rights Commission, which was substantially weakened during Mutharika's administration.
- The legislature and public should be granted more time and opportunities to comment and scrutinize pending legislation.

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