

CHAPTER 3: PATTERNS IN GOVERNANCE AND CONSTITUTIONALISM IN MALAWI

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3.1 Introduction

Malawi has been an independent nation for over 45 years with a 'stable' and functioning central authority. This, arguably, is evidence that governance, in some form, has been practised in the country. Even more ubiquitous in the post-independence period has been the existence of a constitution as the basic framework for governance in Malawi at every point in the country's post-independence history. In further shaping the context for the discussion in Chapters Four and Five, this Chapter provides a contextualised discussion of governance and constitutionalism in Malawi. By looking at the history of governance and constitutionalism in Malawi an attempt is made to unearth and highlight the patterns that are discernible from governance and constitutionalism as practised in Malawi. This, it is hoped, should illuminate the background against which this study proposes social trust-based constitutionalism and governance as the way forward for Malawi. Even more importantly, the

history of constitutionalism and governance in Malawi will be presented in this Chapter because, as Clark argued, the personality of a country and the characteristics of its inhabitants stem directly from past events.¹ The history presented in this Chapter will, therefore, provide the context within which governance and constitutionalism in Malawi must be appreciated. Although the focus in this chapter is on governance and constitutionalism in Malawi after independence, a brief discussion of the situation before independence is also provided. The discussion in this chapter is conducted from a perspective that focuses on legal and political developments. The first part of this Chapter deals with the history of governance and constitutionalism in Malawi while the second part analyses the patterns that are discernible from the history discussed. The patterns discussed in the second part of the Chapter are derived from and should be understood together with the history discussed in the first part of the Chapter.

3.2 A brief history of constitutionalism and governance in Malawi

3.2.1 The pre-colonial period²

Like most countries in Southern Africa, Malawi's pre-colonial history remains largely unknown as it was never comprehensively written down.³ This means that there are no existing systematic records of the country's history before the advent of colonialism.⁴ The little that is known about this era has been pieced together from the accounts of various travellers to the area and also the first Europeans to settle in the area now known as Malawi. Archaeological and anthropological studies carried out from the 1950s onwards have also provided invaluable insights into Malawi's pre-colonial history.⁵

¹ J Desmond Clark "Prehistoric origins" in B Pachai (ed) *The early history of Malawi* (1972) 17.

² The 'pre-colonial period' is used here to generally refer to the period before the declaration of a protectorate over the area that is now known as Malawi. Because of its significance, colonialism is used as the epochal delineator of the periods under discussion in this chapter.

³ B Pachai "Introduction" in B Pachai (ed) (note 1 above) xv.

⁴ B Pachai's *The early history of Malawi* (note 1 above) arguably, represents the most comprehensive attempt at a compilation of Malawi's pre-colonial history. Tobias posits that 'scholars have probed the roots of Malawian history into the proto-historic past. They have found that, with deeper delving, fewer and fewer written records were available; more and more was it necessary to depend upon oral tradition, material culture, the languages men speak and spoke, to draw inferences about the comings and goings and the identity and way of life, of early inhabitants' – PV Tobias "The men who came before history" in B Pachai (ed) (note 1 above) 1.

⁵ J Desmond Clark (note 1 above) 18.

Malawi's earliest recorded history begins with the records of Portuguese travellers in the seventeenth century.⁶ The emerging picture indicates that pre-colonial Malawi was occupied by various social groups that exercised authority within their specific precincts. It is often agreed that the first people to occupy Malawi were the *Akafula*, also known as *Batwa* or 'pygmies'.⁷ These people were later displaced or absorbed by *Bantu* groups that moved into the region.⁸ Between the thirteenth and sixteenth centuries most of central and southern Malawi was settled by *Bantu*-speaking groups. These *Bantu*-speakers were at first 'a collective part of the vast and widely settled community of *Maravi* peoples.'⁹ Kanyongolo notes that the first inhabitants of Malawi did not live as part of an organised state in the modern sense.¹⁰ They did not have a common legal system and each group was governed by norms of tradition that were considered as binding only on members of that group. Two features, among others, stand out in the way these early inhabitants of Malawi organised themselves.¹¹ Firstly, they established structures of governance that in most cases were relatively centralised but they did not adhere to the notions of separation of powers as understood in modern constitutional law. Secondly, these societies did nevertheless provide a degree of protection for human rights even though this was 'mainly in relation to entitlements based on communal solidarity and patriarchy rather than on individualism and gender equality.'¹² In the 19th century the *Nguni* peoples from the south and the *Yao* from the southeast invaded and settled in large parts of Malawi. The most recent group to enter Malawi were the *Lomwe* who came from Mozambique in the late 19th century.¹³

It is clear, therefore, that when the first European settlers arrived in 1870, Malawi was populated by settled groups that exercised authority within their respective areas with

⁶ J Pike *Malawi: A political and economic history* (1968) 45. Clark argues that the records kept by travellers and other early visitors to Malawi, and arguably most of Africa, are notable for their lack of continuity in their handling of the subject matter and their ambiguity in both their meaning and also reference to places and people – J Desmond Clark (note 1 above).

⁷ DD Phiri *History of Malawi: From the earliest times to the year 1915* (2004) 14.

⁸ G Bauer & S Taylor *Politics in Southern Africa: State and society in transition* (2005) 21.

⁹ B Pachai *Malawi: The history of the nation* (1973) 4.

¹⁰ FE Kanyongolo "The Constitution" in N Patel & L Svasand (eds) *Government and politics in Malawi* (2007) 23 28.

¹¹ As above.

¹² As above.

¹³ G Bauer & S Taylor (note 8 above) 22.

varying degrees of effectiveness.¹⁴ As earlier intimated, the political and social organisation of these groups varied from one tribal group to the other.¹⁵ In spite of this, the supremacy of a chief over the tribal groups and their villages was, generally, recognised. However, how far a particular chief could exercise his rule largely depended upon his personal authority and power. During the pre-colonial era, judicial power was exercised by hereditary traditional authorities to reconcile or promote various social and political interests in the context of pre-capitalist communities.¹⁶ Almost all tribes had more or less institutionalised court procedures which used unwritten customary law to settle disputes and punish the guilty.¹⁷ Domestic disputes were first settled by the family elders and where this was unsuccessful the matter would be decided by the village elders against whose decision an appeal to the local chief could be made. Notably, however, the village elders and chiefs were only representatives of political and judicial power. This meant that they could not decide a dispute without the agreement of their advisers and the role of the chief was to confirm the decision proposed by the advisers.¹⁸ It is also clear that decision making in most pre-colonial Malawian societies was characterised by consultation and was very participatory.¹⁹ Although societies generally recognised chiefs as their leaders, there was often a deliberate insistence on consultation before making any decisions affecting the community at large.

It is immediately noticeable that even though the pre-colonial systems of Malawi manifest many elements that are commendable, for example, a large degree of democratic governance, these systems also evidence traits that are deplorable, for example, overt prejudice against women.²⁰ Clearly, therefore, if the history of Malawi during this period has

¹⁴ J McCracken *Politics and christianity in Malawi 1875-1940: The impact of the Livingstonia Mission in the Northern Province 1875-1940* (2000) 30-32.

¹⁵ F von Benda-Beckmann *Legal pluralism in Malawi: Historical development 1858-1970 and emerging issues* (2007) 33-34.

¹⁶ FE Kanyongolo "Courts, elections and democracy: The role of the judiciary" in M Ott & others (eds) *The power of the vote: Malawi's 2004 parliamentary and presidential elections* (2004) 195-197.

¹⁷ F von Benda-Beckman (note 15 above) 34.

¹⁸ As above.

¹⁹ Cf. G Clutton-Brock *Dawn in Nyasaland* (1959) 13.

²⁰ WC Chirwa & others *Democracy report for Malawi 2* <<http://www.idea.int/publications/sod/upload/Malawi.pdf>> (Accessed 20 February 2009). In the same vein, although this study calls for the involvement of traditional leaders in governance in Malawi it is also conceded that traditional leadership is caught up in societal power relations and may be utilised to victimise women and other less dominant groups in society. Traditional leadership has also demonstrated a tendency to favour the ruling party of

any importance at all, it is for the laudable traits that governance often followed – for example, consultation and participation in decision making – and not for its unacceptable attributes. It is to these admirable traits that resort must be had in devising governance paradigms and seeking inspiration for constitutionalism.

3.2.2 The colonial period

Three groups of Europeans, the Portuguese, Germans and British, in addition to the Arabs, were interested in Malawi before the territory was declared a British protectorate.²¹ The Portuguese were the first to arrive via Mozambique in the seventeenth century, followed by the Germans who entered through the North from Tanganyika. When the British arrived they had to contend with the Portuguese and the Germans, as well as the Arabs who were engaged in a 'lively trade in ivory and slaves.'²² During the mid-1800s significant missionary activity was also commenced in Malawi following the travels to the area by the Scottish missionary explorer Dr David Livingstone.

Pachai contends that the actual establishment of a British protectorate over Malawi took place in three stages.²³ Firstly, on 19 August 1889, John Buchanan, Acting British Consul, wrote to Serpa Pinto, leader of the Portuguese expedition to Malawi, telling him that the *Kololo* people living north of the Ruo River were placed under British protection. When the Portuguese rejected this claim, the British took the second step when Buchanan declared a British Protectorate over a wider area which he described as 'Makololo, Yao and Machinga Countries' on 21 September 1889. The third, and arguably most decisive step, was taken on 14 May 1891 when the territories adjoining Lake Malawi were added to the regions adjoining the Shire River as part of the British Protectorate. It must be appreciated, however, that the declaration of the protectorate was 'neither a sudden nor an automatic affair.'²⁴ The declaration of the protectorate in May 1891 was preceded by a long debate between the

the time thus compromising its neutrality, independence and accountability to its constituents. It is thus important to be cautiously optimistic about the role of traditional leadership in present day Malawi – Cf. RL Muriaas "Local perspectives on the 'neutrality' of traditional authorities in Malawi, South Africa and Uganda" (2009) 47 (1) *Commonwealth and Comparative Politics* 28 37.

²¹ G Bauer & S Taylor (note 8 above) 22.

²² As above.

²³ B Pachai (note 9 above) 81.

²⁴ Z Kadzamira "Constitutional changes in Malawi: 1891-1965" in G Smith & others (eds) *Malawi: Past and present, Selected papers from the University of Malawi history conference 1967* (1971) 80.

British Foreign Office and Harry Hamilton Johnston, the first Commissioner and Consul-General to the territory.²⁵ In as far as the motivation for establishing a protectorate over Malawi (then known as British Central Africa) is concerned, it is clear that Britain established the protectorate in order to safeguard the interests of the British missionaries, planters and traders against encroachment from other European powers, notably the Portuguese and the Germans. As Kadzamira puts it:²⁶

A protectorate was proclaimed because British interests in Central Africa could not be safeguarded in any other way. Thus British interests came first, those of the native inhabitants were secondary. This theme was endorsed with the establishment of the protectorate and was to continue throughout colonial rule in Malawi until major constitutional changes occurred some seventy years later.

Between the time the protectorate was proclaimed in 1889 up to 1907 the country was known as British Central Africa. In terms of administration, the protectorate was governed under the British Central Africa Order-in-Council of 1889 up to 1902. The early form of government in the protectorate may be described as direct rule.²⁷ There was a central administration headed by the Commissioner and Consul-General who was assisted by a Deputy Commissioner and Consuls. These were followed by Vice-Consuls under who served several administrative officials including a Secretary to the Administration and a judicial officer.

The next milestone in Malawi's constitutional history occurred in 1902. On 11 August 1902 a new Order-in-Council for British Central Africa came into force. The British Central Africa Order-in-Council of 1902 is widely regarded as the country's first Constitution.²⁸ The 1902 Order-in-Council also represents the first attempt to define the territorial limits of the

²⁵ Phiri suggests that there was a measure of deceit on the part of the early British settlers (the African Lakes Company, for example) especially in the manner in which they negotiated the treaties with the local chiefs and thereby acquired land particularly in Southern Malawi – DD Phiri (note 7 above) 200-202.

²⁶ Z Kadzamira (note 24 above) 81.

²⁷ Direct rule in Malawi was practised particularly between 1891-1896 - B Pachai (note 8 above) 83. Notably, indirect rule was only hesitatingly introduced in the late 1920s. The European settlers in Malawi were not enthusiastic about indirect rule for fear that it may strengthen the tribal rulers – B von Benda-Beckman (note 15 above) 40-41.

²⁸ F von Benda-Beckman (as above) 36 and M Chigawa "The fundamental values of the Republic of Malawi Constitution of 1994" Concept Paper No. 1 Constitutional Review Conference 2006, Capital Hotel Lilongwe, 28-31 March 2006.

protectorate within a constitutional document.²⁹ Importantly, the 1902 Order-in-Council heralded the introduction of several fundamental changes in the organisation of the protectorate. Arguably, the most important feature of the 1902 Order-in-Council was that it attempted to embody the concept of separation of powers.³⁰ It created, for the first time, an 'administration' headed by the Commissioner and a 'Court of Record' or High Court.³¹ The High Court had 'full jurisdiction, civil and criminal, over all persons and over all matters in the Protectorate'.³² The enactment of laws, however, was left within the powers of the Commissioner. Article 15(2) of the 1902 Order-in-Council contained the reception clause for English law in Malawi and established the English judicial model in Malawi.³³ Thereafter English law was applied in all courts with the exception that customary law could be enforced in cases involving Africans under article 20 of the Order-in-Council.³⁴ Notably, there were no provisions in this 'constitution' relating to human rights. Nevertheless, the 'constitution' required that in making ordinances, 'the Commissioner [should] respect existing native laws and customs except so far as the same may be opposed to justice or morality'.³⁵

The next important stage in Malawi's constitutional development came in 1907 when the Nyasaland Order-in-Council of that year was adopted.³⁶ Under this Order-in-Council, the name of the protectorate was changed from British Central Africa to Nyasaland.³⁷ The concept of the separation of powers was given stronger expression with the creation of a Legislative Council consisting of the Governor and at least two other persons. This body was given power to legislate for the Protectorate. However, in doing so, it had to observe any conditions, provisions and limitations prescribed by any instrument under His Majesty's Sign Manual and Signet. Remarkably, the Governor was given the right of veto in the making and

²⁹ See, Article 1 BCA Order-in-Council, 1902.

³⁰ M Chigawa (note 28 above).

³¹ See, Articles 4 and 15 respectively of the BCA Order-in-Council, 1902.

³² Article 15 (1) of the BCA Order-in-Council, 1902.

³³ F von Benda-Beckman (note 15 above) 37.

³⁴ Aside from the exception in article 20 the judicial institutions of African peoples were not formally recognised in the protectorate – F von Benda-Beckman (note 15 above) 38.

³⁵ Article 12(3) of the BCA Order-in-Council, 1902.

³⁶ The first and main Nyasaland Order-in-Council was adopted on 6 July 1907. There was another one (No.2), which was adopted on 21 December 1907. It clarified the law to be applied by the courts in the Protectorate.

³⁷ See, Preamble to the Order-in-Council of 1907.

passing of such Ordinances. Kadzamira accurately conveys the total effect of the aforementioned constitutional developments when he states that:³⁸

The introduction of a legislative council did not reduce the authority of the governor. In fact the governor not only had the final word on all governmental matters but he also had complete control over the legislature since its members were practically hand-picked by him. Thus the legislature was subordinate to the governor and enacted legislation only on his instructions. In theory the legislature had “power to make ordinances for the peace, order and good government of all persons in the Protectorate.” In practice, the main function of the legislative council was to consult European opinion especially from planters and traders.

Apart from minor constitutional amendments and changes in representation, the constitutional order of 1907 remained intact until 1961.³⁹ However, it is important to note that in the period before independence, Malawi (then Nyasaland) was involved in an ‘abortive’ federation with Northern Rhodesia and Southern Rhodesia. In 1953 the colonial administrators of Nyasaland and the two Rhodesias established the Federation of Rhodesia and Nyasaland. The passing of the Federation (Constitution) Order-in-Council, which received royal assent on 1 August 1953, confirmed the establishment of the federation, in spite of bitter opposition from Africans in the three territories involved.⁴⁰ African opposition to the federation was fuelled by fears that the federation would result in the entrenchment of the imperial order and thereby indefinitely postponing independence for the territories involved.⁴¹

It is worth noting that the establishment of the Federation of Rhodesia and Nyasaland coincided with a rise in nationalist sentiments across Malawi. In 1944 the various regional organisations then operating in the country had come together to form the Nyasaland African Congress (NAC). In 1946 the NAC was officially recognised by the colonial government and was also endorsed by the chiefs as a body representing the African population.⁴² Nationalist

³⁸ Z Kadzamira (note 24 above) 83. See, also, B Pachai (note 9 above) 238.

³⁹ Z Kadzamira (as above) 82.

⁴⁰ For a detailed account of the Federation of Rhodesia and Nyasaland see J Pike (note 5 above) Chapter 4. For an account of the Malawian opposition to the federation especially the role of Malawian traditional leaders see G Clutton-Brock (note 19 above) 43-57.

⁴¹ FE Kanyongolo “The limits of liberal democratic constitutionalism in Malawi” in KM Phiri & KR Ross (eds) *Democratisation in Malawi: A stocktaking* (1998) 355. Clutton-Brock also argued that the establishment of the Federation was motivated by the desire by the colonists to secure their interests in Central Africa – As above 35-42.

⁴² G Bauer & S Taylor (note 8 above) 23.

agitation for independence reached a crescendo in 1958 when riots broke out in the country and a state of emergency was declared. Subsequently most nationalist leaders, including Dr Banda, who had returned to the country earlier in the year to lead the nationalist movement, were detained and the NAC was banned.⁴³ In 1959 the NAC was transformed into the Malawi Congress Party (MCP) and when Dr Banda and other nationalists were released from detention in 1960 earnest negotiations were commenced to grant self government to Malawi. In that year, the Lancaster House Constitutional Conference gave Nyasaland a 'responsible' government.⁴⁴ In 1961 the first general elections were held and won overwhelmingly by the MCP.⁴⁵ This paved the way for eventual self-government in February 1963 and independence from Great Britain on 6 July 1964 with Dr Banda as the Prime Minister and the British monarch as the Head of State.⁴⁶

3.2.3 The post-colonial period

Needless to state that Malawi's post-independence history begins immediately with the grant of independence by Britain on 6 July 1964. In this discussion, and for better clarity, the post-independence period will be split into three broad segments and these are the immediate post-independence (1964-1966), the First Republic (1966-1994) and the Second Republic (1994 to date).

3.2.3.1 The immediate post-independence: 1964 –1966

The pre-independence negotiations between the nationalists and Britain yielded Malawi the 1964 Independence Constitution. This Constitution, which was negotiated in Britain, like in most British colonial territories, embodied a 'Westminster model' of governance.⁴⁷ On paper, such a constitution permitted political pluralism and competition for office through regular elections and also incorporated a Bill of Rights securing, mostly first generation civil and political rights.⁴⁸ The Independence Constitution retained the three organs of government,

⁴³ As above 25.

⁴⁴ M Chigawa (note 28 above).

⁴⁵ In the 1961 elections the Malawi Congress Party won 22 out of 28 seats in the Legislative Assembly and 5 out of the 10 positions in the Executive Council – F von Benda-Beckman (note 15 above) 44.

⁴⁶ For a fuller account of the processes surrounding Malawi's independence, see B Pachai (note 9 above) Chapter 17.

⁴⁷ J Hatchard & others *Comparative constitutionalism and good governance in the Commonwealth: An Eastern and Southern African perspective* (2004) 15-17.

⁴⁸ C Ng'ongola "Judicial mediation in politics in Malawi" in H Englund (ed) *A democracy of chameleons* (2001) 62 63. A similar situation obtained in Zambia, see ML Mbao "The politics

namely the executive, the legislature and the judiciary. However, the Head of State remained the Queen of England although the executive organ was headed by the Prime Minister, Dr Banda.⁴⁹

A significant event that occurred during this period which had considerable repercussions on constitutionalism and governance in Malawi in subsequent years is shorthandedly referred to as the 'Cabinet Crisis' of 1964. The Cabinet Crisis, an open manifestation of differences between Dr Banda and his ministers, erupted barely three months after independence. Although explanations vary, the Cabinet Crisis was essentially a challenge by Dr Banda's ministers against his increasingly autocratic tendencies and also a manifestation of ideological differences between Dr Banda and his ministers.⁵⁰ While ideological differences⁵¹ between Dr Banda and some of his younger ministers were, arguably, at the root cause of the Crisis it is evident that regional and ethnic differences exacerbated the rift.⁵² As a result of the impasse brought about due to the Cabinet Crisis, Dr Banda dismissed three of his ministers and four more ministers resigned in support of their dismissed colleagues.

The Cabinet Crisis had dire consequences for governance in Malawi.⁵³ Subsequent to the Cabinet Crisis all organised opposition was banned and the disgraced former ministers were forced to flee the country.⁵⁴ As Kaspin has argued, the Cabinet Crisis set the tone for the

of constitution-making in Zambia: Where does the constituent power lie?" <http://www.publiclaw.uct.za/usr/publi_law/Nairobi/Mbao_ConstitutionMakingZambia.doc> (Accessed 23 March 2010). As experiences in both Malawi and Zambia came to prove, the guarantees in the Independence Constitutions were quickly abrogated.

⁴⁹ See section 59 of the Independence Constitution.

⁵⁰ J Banda "The constitutional change debate of 1993-1995" in KM Phiri & KR Ross (eds) (note 41 above) 316-318. The Cabinet Crisis has been the subject of extensive scholarly analyses. For one of the most comprehensive analyses, see C Baker *Revolt of the ministers: The Malawi Cabinet Crisis, 1964-1965* (2001). See, also, FE Kanyongolo (note 10 above) 23-29.

⁵¹ The ideological differences included the question of commencing diplomatic relations with The Peoples Republic of China (which Dr Banda opposed) and also the maintenance of ties with apartheid South Africa and the general foreign policy stance with regard to Portugal and Mozambique (Dr Banda favoured the maintenance of ties with both Portugal and South Africa while his younger ministers were opposed to this). The rate of Africanisation, especially in the civil service, was also at issue. For a fuller discussion, see J Pike (note 6 above) Chapter 5.

⁵² L Vail & L White "Tribalism in the political history of Malawi" in L Vail (ed) *The creation of tribalism in Southern Africa* (1989) 178-181.

⁵³ J Banda (note 50 above) 318.

⁵⁴ G Bauer & S Taylor (note 7 above) 25.

parameters within which the Banda regime was to operate for the next thirty years.⁵⁵ A dominant feature of state politics in this era was the banning, detention, maiming and murder of all rivals and critics of government.⁵⁶ The state actively used its security apparatus to pursue all so called ‘dissidents’ both within and outside the country.⁵⁷ What is often not recognised, however, is that the Cabinet Crisis also deprived Dr Banda’s regime of a common legitimacy across the length and breadth of the country.⁵⁸ This crisis of legitimacy, arguably, explains why the Banda regime resorted to oppressive and exclusionary tactics to maintain itself in power. Ironically, it is this lack of legitimacy that also sustained opposition to Dr Banda’s regime in the early 1990s.⁵⁹

3.2.3.2 The First Republic: 1966 – 1994

In July 1965, Dr Banda, as the Prime Minister, announced that Malawi would become a republic.⁶⁰ He then appointed a Constitutional Committee which came up with draft proposals for the next stage of constitutional development.⁶¹ The proposals by the Constitutional Committee attempted to provide a ‘comprehensive’ justification for the

⁵⁵ D Kaspin “The politics of ethnicity in Malawi’s democratic transition” (1995) 33 (4) *Journal of Modern African Studies* 595 603.

⁵⁶ As above.

⁵⁷ Among those who fell foul of the regime are Orton and Vera Chirwa, who were ‘abducted’ from Zambia, tried and convicted for treason and sentenced to death – the sentences were commuted to life imprisonment but Orton died in jail. Attati Mpakati, leader of the Socialist League of Malawi, also died mysteriously in exile in Zimbabwe.

⁵⁸ WC Chirwa “‘We want change’: Transition or transformation” in M Tsoka & C Hickey (eds) *Democracy, decentralisation and human development* (1998) 5-6.

⁵⁹ This merely highlights the fact that there was significant domestic impetus for the subsequent breakdown of authoritarianism and re-introduction of multi-party politics - concededly, donors did play a role even though most of them continued supporting Dr Banda until 1991/1992 – W Breytenbach & C Peters-Berries “Malawi: Has the struggle for democracy just begun?” (2003) 33 (4) *Africa Insight* 71 72.

⁶⁰ It is arguable that the move to adopt the Republican Constitution was, from Dr Banda’s perspective, a way of preventing a repeat of the events that had led to the Cabinet Crisis. In any event Dr Banda was the prime driver behind the move to adopt the Republican Constitution; the population was ‘rallied’ behind the idea after the decision to adopt the Republic Constitution had already been made.

⁶¹ The Committee was chaired by Mr Aleke K Banda, then a close political ally of Dr Banda. Perhaps as a sign of the fragile political alliances that Dr Banda continually constructed and reconstructed, Mr Aleke K Banda was subsequently detained without trial for a lengthy period of time. A communication on his behalf was subsequently commenced before the African Commission on Human and Peoples Rights – *Achuthan and another (On behalf of Banda and others) v Malawi* (2000) AHRLR 144 (ACHPR 1994).

constitutional order that was to be adopted.⁶² For example, under the Independence Constitution, the Head of State was the British monarch who was represented by a Governor-General and the Head of Government was the Prime Minister. The Governor-General's office was purely ceremonial and all executive power rested with the Prime Minister. In this connection, the Constitutional Committee proposed that the office of the Governor-General should fall away and that the Prime Minister should become both the Head of State and also Head of Government. The Constitutional Committee held the view that a system that divided authority between a ceremonial Head of State and political Head of State was not viable for Malawi. The Constitutional Committee took the position that⁶³

[i]t [the splitting of authority between a ceremonial head of government and the prime minister] is, however, quite contrary to the tradition of Africa, where it is viewed as unnatural and illogical. The people of Africa are realistic and are accustomed to giving ceremonial honour and respect both publicly and privately to the rulers who actually exercise the authority and responsibility of governing them.

The Constitutional Committee rejected proposals for the office of the Vice President arguing that such a position 'encourages an element of division of responsibility in the Executive.'⁶⁴ The Constitutional Committee also recommended that Malawi should become a one-party state under the Republican Constitution. In the opinion of the Constitutional Committee:⁶⁵

Experience over recent years has convinced the present Government that the country cannot afford the wasteful disunity which is engendered by the existence of a number of small parties in opposition to the major ruling party It is felt that this essential unity can best be achieved in the Republican Constitution by providing for a One-Party state, to enable the Malawi Congress Party to devote itself to the development of the nation without the wasteful attrition engendered by small opposition groups.

The general thrust of the proposals made by the Constitutional Committee leaned towards the creation of a very strong executive, generally, and a very strong presidency, specifically. Like in most of post-independence Africa, the pattern of strong and centralised leadership

⁶² Government of Malawi *Proposals for the Republican Constitution of the Republic of Malawi* (1965).

⁶³ As above 4.

⁶⁴ As above 5.

⁶⁵ As above 7. The one party state was confirmed in section 4 of the 1966 Constitution.

was defended throughout the 1960s and 1970s on the basis that it would promote development.⁶⁶ The principle that the Constitutional Committee followed was stated thus:⁶⁷

There is a need in a country comparatively underdeveloped and inexperienced in nation-hood for a form of government which will afford the necessary degree of unity, resolution and stability to permit the maximum fulfilment of the country's human and physical resources in the shortest period of time.

The proposals of the Constitutional Committee were presented at the annual convention of the Malawi Congress Party (MCP) where the delegates unanimously adopted them.⁶⁸ Cabinet also adopted the proposals and they were subsequently passed by an MCP dominated parliament. On 6 July 1966 the country became a republic under a new Constitution.

From 1966 to 1994 Dr Banda presided over a one-party state that was notable for its suppression of any form of dissent. The Republican Constitution was amended in 1971 to make him president for life, thus, supposedly, confirming that he would rule Malawi for the remainder of his life.⁶⁹ For thirty years Dr Banda's one-party regime retained a firm grip on Malawi. The hallmarks of this period, as Phiri and Ross have stated, were an intolerant political culture, hero worship, centralised authority, intimidation of political critics and exclusiveness.⁷⁰ Further, as Kaunda has stated, from 1966 the MCP government was neither representative of the people nor did it have a popular mandate to formulate and implement development policy.⁷¹ From 1966 up to 1992 there was no serious challenge mounted to the total control by Dr Banda and his MCP.⁷² A deeper evaluation of this epoch is presented below under Part 3.4.

⁶⁶ KM Phiri & KR Ross "Introduction: From totalitarianism to democracy in Malawi" in KM Phiri and KR Ross (eds) (note 41 above) 11.

⁶⁷ Government of Malawi (note 62 above) 3.

⁶⁸ FE Kanyongolo (note 41 above) 359.

⁶⁹ See, section 9 of the 1966 Constitution.

⁷⁰ KM Phiri & KR Ross (note 66 above) 10-11.

⁷¹ JM Kaunda "The state and democracy in Malawi" Centre for Social Research 4 February 2002 (Unpub).

⁷² MS Nzunda & KR Ross "Introduction" in MS Nzunda & KR Ross (eds) *Church, law and political transition in Malawi 1992-1994* (1995) 7.

3.2.3.3 The Second Republic: 1994 to date

The survival of Dr Banda's regime was largely due to the continued support of the world's major Western powers in the context of Cold War politics. Dr Banda managed to sustain a considerable support base among Western powers based on his staunch opposition to communism. Ironically, it is this very support base that contributed to the demise of his regime.⁷³ The collapse of the Soviet Union engendered profound changes in the various political systems especially in Africa and Latin America.⁷⁴ The changes in the global political climate exerted pressure for the opening up of political space in Malawi. One must, however, not overemphasise the influence that external factors played in the democratisation of Malawi and most African countries in the late 1980s and early 1990s.⁷⁵ While external factors did indeed contribute to the democratisation of Africa, such factors are probably more limited than is often asserted.⁷⁶ In this connection it is important to realise that demands for democracy in any country are inevitably grounded in their own historicity. What the external factors achieved in Africa was merely to catalyse internal dynamics within African countries.⁷⁷

As a result of pressure from various domestic⁷⁸ and international quarters, Dr Banda agreed to hold a national referendum in 1993.⁷⁹ During the referendum the majority of the voters cast their ballots in favour of adopting a multi-party system of government.⁸⁰ The results of

⁷³ A significant contribution in this regard was the decision by the international donor community at its meeting in Paris in May 1992 to suspend development aid to Malawi until its record on human rights and good governance improved – MS Nzunda & KR Ross (as above).

⁷⁴ See, WC Chirwa (note 58 above).

⁷⁵ W Breytenbach & C Peters-Berries "Malawi: Has the struggle for democracy just begun?" (2003) 33 (4) *Africa Insight* 71 72.

⁷⁶ JF Bayart *The state in Africa: The politics of the belly* (1993) x-xi.

⁷⁷ As above.

⁷⁸ From a domestic perspective, the transition to a multi-party dispensation was set afoot on the first Sunday of lent, 8 March 1992, when the local catholic Bishops issued a pastoral letter entitled *Living our Faith* which was read from pulpits across the country. The pastoral letter called for better wages, education and health care, freedom of expression, justice and rights protection, a climate of openness, a more just distribution of wealth and an end to corruption. See also, D Cammack "Democratic transition in Malawi: From single party-rule to a multi-party state" in J Daniel & others *Voting for democracy: Watershed elections in contemporary Anglophone Africa* (1999) 183 186.

⁷⁹ FE Kanyongolo *Malawi: Justice sector and the rule of law* (2006) 35.

⁸⁰ During the referendum voters were asked to choose whether Malawi should remain a one-party state with the MCP as the sole political party or whether they wished that Malawi should change to a multiparty system of government. 63% of the voters voted for a change to a

the referendum heralded significant changes on the Malawian political scene, which culminated in the adoption of a new Constitution in 1994.

It is generally agreed that the 1993 referendum marked a turning point in the history of Malawi and was a major step in breaking with the country's past.⁸¹ Faced with defeat during the referendum, the government was compelled to embark on a process of transition to multi-partyism and ostensibly democracy. The government was also compelled to initiate some immediate legal reforms to facilitate the transition. The result was that, for example, the 1966 Constitution was amended to so as to bring back the Bill of Rights that had been rejected in 1966⁸² and presidential powers were also greatly reduced. Further, the life presidency was immediately discarded from the Constitution and several other oppressive and controversial laws were repealed or amended.⁸³

For the purposes of managing the transition, the government established the National Consultative Council (NCC) and the National Executive Committee (NEC) in terms of the National Consultative Council Act of 1993 (NCC Act) to ensure that the transition to multi-partyism was independently managed.⁸⁴ The NEC was entrusted with executive power while the NCC was tasked with, among other things, initiating appropriate legislative measures to amend the Constitution necessary for holding the impending General Elections and also the drafting of the electoral legislation.⁸⁵ The NCC was composed of leaders from the MCP appointed by Dr Banda and representatives from the newly formed opposition groups and

multipart system of government – L Dzimhiri “The Malawi Referendum of June 1993” (1994) 13 (3) *Electoral Studies* 229-234.

⁸¹ D Chirwa “A full loaf is better than half: The constitutional protection of economic, social and cultural rights in Malawi” (2005) 49 (2) *Journal of African Law* 207 210.

⁸² Constitutional (Amendment) Act No. 3 of 1993.

⁸³ M Chigawa (note 28 above) 13. Some of the laws that were repealed include the Forfeiture Act, Cap. 14:06 of the Laws of Malawi, repealed by Act No.22 of 1993; the Decency in Dress Act, Cap. 7:04 of the Laws of Malawi repealed in 1993. The Preservation of Public Security Act, Cap. 14:02 of the Laws of Malawi was not repealed as such but substantial amendments to it were made in 1993.

⁸⁴ For a succinct assessment of the legal aspects of the transition to multipartyism in Malawi, see C Ng'ong'ola “Managing the transition to political pluralism in Malawi: Legal and constitutional arrangements” (1996) 34 (2) *Journal of Commonwealth and Comparative Politics* 85-110.

⁸⁵ Section 5(1) of the NCC Act.

faith organisations appointed by their peers.⁸⁶ It soon became apparent that the 1966 Constitution needed to be abandoned altogether and that amending it would not suffice. The decision to adopt a new constitution rather than amend the 1966 Constitution was taken in November 1993 at a workshop convened by the NCC.⁸⁷ In February 1994 the NCC hosted a Constitutional Drafting Conference that was attended by appointees of various political parties and the result was the adoption of an Interim Constitution on the basis of which the General Elections of May 1994 were contested.⁸⁸

Bakili Muluzi of the United Democratic Front (UDF) won the presidency during the 1994 elections but his party failed to gain a sufficient parliamentary majority to enable him to move legislation easily through parliament.⁸⁹ The UDF's failure to gain a sufficient parliamentary majority created an environment for massive political machinations to enable it to govern with ease.⁹⁰ The second democratic elections were held in 1999. Bakili Muluzi of the UDF again won the presidency but his party was again unable to garner sufficient parliamentary seats to enable him to control parliament.⁹¹ Again, the UDF had to rely on alliances to enable it to assume a modicum of control in parliament.

For the purposes of governance and constitutionalism, the abortive attempt by Bakili Muluzi to amend the Constitution to allow him to serve a third term in office deserves further attention here. Bakili Muluzi's second term of office was destined to terminate in 2004 and by

⁸⁶ D Chirwa "Democratisation in Malawi 1994-2002: Completing the vicious circle" (2003) 19(2) *South African Journal on Human Rights* 316, 317-318.

⁸⁷ In deciding to adopt a new constitution it was argued, in part, that the 1966 Constitution contained provisions that were diametrically opposed to political pluralism and democratisation and that only a new constitution could remedy this – J Banda (note 50 above) 316 321.

⁸⁸ J Banda (note 50 above) 321.

⁸⁹ D Cammack (note 78 above) 193-201.

⁹⁰ This included an alliance with the Alliance for Democracy (AFORD) which soured not long afterwards. The UDF, however, persisted in keeping some AFORD Members of Parliament within its ranks resulting in lengthy litigation – *Mponda Mkandawire v Attorney General* Misc. Civil Cause No. 49 of 1996. The UDF/AFORD alliance, however, was preceded by an alliance between the MCP and AFORD which, by reason of its superiority in parliament, effectively crippled the UDF government in parliament. Some of the repercussions of this alliance were manifested in *Attorney General and others v MCP and others* MSCA Civil Appeal No. 22 of 1996 (The Press Trust Case) and prompted an amendment on the constitutional provision prescribing the quorum of the National Assembly.

⁹¹ For a comprehensive discussion of the General Elections of 1999, see M Ott & others *Malawi's second democratic elections: Process, problems and prospects* (2000).

virtue of section 83(3) of the Constitution he was barred from running for a third term in office.⁹² In spite of the express stipulations of the Constitution on the matter, in 2002 the Bakili Muluzi administration tabled a bill before parliament proposing to amend section 83(3) in such a manner that it would allow incumbent presidents to serve an unlimited number of terms in office (the Open Terms Bill).⁹³ This bill was tabled and debated in parliament but failed to gain the required majority for its passage into law.⁹⁴ Not long afterwards, however, another attempt was made by the Bakili Muluzi administration to amend section 83(3) of the Constitution. A Constitution Amendment Bill was published in the Gazette on 6 September 2002 proposing the amendment of section 83(3) to allow presidents to serve a maximum of three terms in office (the Third Term Bill).⁹⁵ This amendment further proposed to entrench section 83 by listing it in the Schedule to the Constitution so that, in future, any proposed amendment to the section would only be done with the approval of the majority vote of Malawians expressed in a referendum.⁹⁶ This bill was introduced in parliament but was subsequently withdrawn before it could be debated.⁹⁷ The implications of the Open Terms Bill and the Third Term Bill are analysed in greater detail under part 3.4 below. Suffice it to state that, as one commentator has pointed out, the proposed Third Term/Open Term Bills represented one of the worst forms of abuse of the powers of constitutional amendment in

⁹² Section 83(3) provides ‘The President, the first Vice-President and the Second Vice-President may serve in their respective capacities a maximum of two consecutive terms, but when a person is elected or appointed to fill a vacancy in the office of the President or Vice-President, the period between that election or appointment and the next election of a President shall not be regarded as a term.’ The High Court has confirmed that section 83(3) bars anyone who has been president for two terms from seeking a third term irrespective of whether the terms were consecutive or not - *The State, The Electoral Commission Ex Parte Bakili Muluzi and United Democratic Front* Constitutional Cause No. 2 of 2009.

⁹³ For a succinct analysis of the debate around the amendment of section 83(3) by the Bakili Muluzi administration, see FE Kanyongolo “Constitutionalism and the removal of presidential term limits from the Constitution of the Republic of Malawi” (2003) 7 (1) *UNIMA Students Law Journal* 59.

⁹⁴ Constitution (Amendment) Bill No. 1 of 2002.

⁹⁵ Constitution (Amendment) Bill No. 14 of 2004.

⁹⁶ A Kamanga “Amendments to the Constitution since 18th May 1994” 28, Presentation at the National Constitutional Review Conference, 29 March 2006, Capital Hotel, Lilongwe, Malawi.

⁹⁷ It is likely that the bill was withdrawn because of the opposition that it was facing both inside and outside parliament. The UDF may also not have been wanted to be defeated twice on the same issue especially after the ‘Open-Terms Bill’ had been defeated in parliament.

Malawi.⁹⁸ The attempts to tamper with the presidential term limits also rank among the greatest challenges that democratisation in Malawi has faced since 1994.⁹⁹

After failing to amend the Constitution to allow Bakili Muluzi to stand for another term, the UDF fielded Bingu wa Mutharika as its presidential candidate for the 2004 General Elections. The UDF duly won the election and Bingu wa Mutharika was sworn in as president. However, for the third time, the UDF failed to gain a parliamentary majority. Notably, as a result of differences within the UDF, Bingu wa Mutharika who had been elected president on a UDF platform, decided to resign from the UDF and form his own political party, the Democratic Progressive Party (DPP). This meant that the President had to govern with a political party that did not contest the General Elections and thus had no sitting Members of Parliament. This presented numerous governance challenges to the government of Bingu wa Mutharika and some of these challenges are discussed under part 3.4 below. Bingu wa Mutharika and his DPP did, however, record a landslide victory in the 2009 General Elections. This victory conferred a second term in office on Bingu wa Mutharika while granting him and his DPP a clear parliamentary majority as well.

3.3 Trends in constitutionalism and governance in Malawi

3.3.1 An evaluation of governance and constitutionalism in colonial Malawi

Colonial rule, Pike states, by its very nature, was short and sharp.¹⁰⁰ Short in the sense that most African countries were occupied by colonial powers for less than one hundred years.¹⁰¹ Colonial rule was, however, also remarkable for its disruptive influence. In the short expanse of time that colonialism reigned, it successfully destroyed ancient structures of tribal life among African peoples.¹⁰² As Hatchard and others have noted:¹⁰³

⁹⁸ A Mswoya “Amendments to the Constitution and preservation of its sanctity” 26, Constitutional Review Programme: Discussion Paper No. 7.

⁹⁹ B de Klerk “Is the face of democracy changing in Malawi?” (2002) 4 *Conflict Trends* 15-16.

¹⁰⁰ J Pike (note 6 above) 3.

¹⁰¹ In Malawi for example, the country was officially a protectorate only for seventy-three years (from 1891 to 1964).

¹⁰² Colonialism, argues Kiros, did not leave any stone unturned in its strategy of destroying the natives’ cultural heritage – T Kiros “Frantz Fanon 1925-1961” in K Wiredu (ed) *A companion to African philosophy* (2004) 216 218.

¹⁰³ J Hatchard & others (note 47 above) 14.

Colonial rule was philosophically and organisationally elitist, centralist and absolute and left no room for either constitutions or representative institutions. The colonial administration not only implemented policy, it made it as well. ... As colonial rulers sought expedient collaborators, they distorted or destroyed pre-colonial governance systems by creating or encouraging arrangements such as indirect rule, which made local chiefs more despotic and created new ones (warrant chiefs) where none had previously existed.

Colonial rule was, arguably, also naive if not obtuse.¹⁰⁴ From an initial belief that African societies were primitive, pagan and backward the desire to quickly 'civilise' African peoples was formed. It is now manifest that the civilising mission proceeded on a large number of misconceptions about Africa and its peoples' ways of life.¹⁰⁵ As independence came to pass it was, it seems, simplistically assumed by the departing colonialists that upon their departure societies in Africa would be constructed corresponding to a Western pattern.¹⁰⁶ Unsurprisingly, over half a century after independence, this simplistic assumption has not come to pass and is nowhere close to being fulfilled.

Like in other colonial territories across Africa, in spite of pretensions to benignity, colonial rule in Malawi was heavily repressive and brutal.¹⁰⁷ Although, as pointed earlier, the first attempt to constitute the territory and people of Malawi was supposedly achieved with the declaration of the Protectorate in 1889, it is notable that the declaration of the protectorate and the assumption of power over it were not based on any social compact between the colonialists and the people of Malawi.¹⁰⁸ It is unsurprising, therefore, that the new legal order did not reflect the interests of the vast majority of the population and was predicated on satisfaction of the objectives of the colonial regime. The colonial state and its apparatuses

¹⁰⁴ For a detailed analysis of the nature of colonial rule especially in the way it developed in Malawi and Zambia, see R Rotberg *The rise of nationalism in Central Africa: The making of Malawi and Zambia 1873-1964* (1965) especially Chapter II.

¹⁰⁵ K Wiredu "Introduction: African philosophy in our time" in K Wiredu (ed) (note 102 above) 1. According to Wiredu, colonialism involved a project of de-Africanisation which was, arguably, most prominently manifested in the sphere of religion.

¹⁰⁶ J Pike (note 6 above) 3-4.

¹⁰⁷ A thorough and enlightened analysis of the nature of the colonial state in Africa is offered by M Mamdani *Citizen and subject: Contemporary Africa and the legacy of late colonialism* (1996). Arguably, the pinnacle of colonial exploitation and oppression in Africa was witnessed in the Congo Free State (now Democratic Republic of the Congo). In A Hoschild's *King Leopold's Ghost: A story of greed, terror and heroism in colonial Africa* (1998) the horrors of Leopold's rule in the Congo are well captured.

¹⁰⁸ FE Kanyongolo (note 41 above) 354.

were central in the emergence and development of a process of accumulation in Malawi and in most of Southern Africa by Europeans.¹⁰⁹ From the moment the Protectorate was officially proclaimed, colonisation entailed, among others, the massive expropriation of African lands to enhance settler and corporate enterprises.¹¹⁰ Further, colonialism, under the guise of pacification and policing the natives, erected an elaborate legislative and administrative apparatus to meet the demands of colonial production.¹¹¹ In all these processes African interests and participation were systematically ignored and subordinated to the interests of the colonial state.

As Kanyongolo has argued, during colonial rule in Malawi, the power of the state was not exercised on the basis of any constitutional principles limiting the power of government or guaranteeing individual rights and liberties.¹¹² The denial of constitutional principles by the colonial regime was a calculated ploy because to allow a constitutional regime would have militated against the exploitative goals of colonialism. In this context, the question of constitutionalism did not arise. Societal power relations were thus constructed on the basis of the interests of the dominant class (the colonialists) and not by reference to any neutral constitutional principles. The colonial government was not at all accountable to the natives and instead remained accountable to the colonial office in London.¹¹³ The overall objective of the colonial strategy was to regulate the African population and entrench colonial hegemony.¹¹⁴ In the context of Malawi, colonialism entailed a political system of domination and subjugation that rationalised, reinforced and facilitated commercial agriculture activities based on the exploitation of the traditional sector as a cheap labour reservoir - this attribute, perhaps as an indication of the continuities between the colonial state and the post-colonial

¹⁰⁹ M Chipeta "Political process civil society and the state" in GCZ Mhone (ed) *Malawi at the crossroads: The postcolonial political economy* (1992) 34.

¹¹⁰ Writing on the British colonisation of Malawi, Kaunda notes that 'Colonial rule was designed for control and exploitation of the colonised people to maintain the Empire' – JM Kaunda (note 71 above) 1-2. Mbaku argues that Europeans established colonies in Africa through force and not by mutual agreement of the relevant stakeholders. Colonial institutions, hence, were primarily 'structures of exploitation, despotism, and degradation' - JM Mbaku "Constitutionalism and governance in Africa" <<http://www.westafricareview.com/issue6/mbaku.html>> (Accessed 24 August 2008).

¹¹¹ M Chipeta (note 109 above) 35.

¹¹² FE Kanyongolo (note 41 above) 354.

¹¹³ WC Chirwa & others (note 20 above) 2.

¹¹⁴ M Chipeta (note 109 above) 35.

state, survived the colonial state.¹¹⁵ Sadly, one notes that the post-colonial state in Malawi has persisted to manifest, albeit in a modified form, some of the same attributes that characterised the state during colonialism.¹¹⁶

Colonial rule in Malawi, as in most African countries, was also founded on explicit racial discrimination. Race was a determining feature in the allocation of rights and responsibilities.¹¹⁷ The use of race in societal relations was remarkably perverse from the onset of colonialism. It is thus not surprising that in spite of attempts to create a form of government that, supposedly, embodied the concept of separation of powers between 1902 and 1907, Africans in Malawi were only nominated to serve in the Legislative Council in 1945.¹¹⁸ Even with their nomination to the Legislative Council, it was only with the 1961 Elections that Africans began to influence decisions of the Legislative Council. Before 1961, African representation in government decision-making processes was severely constrained.¹¹⁹ It must be obvious, therefore, that colonial rule not only deliberately disenfranchised the majority of the population in Malawi but also effectively sidelined them in the governance processes. This merely confirms the non-participatory nature of the colonial governance framework in Malawi and other former colonial territories. What is remarkable in this regard is that colonial governance frameworks were non-participatory by design.

Racial discrimination was also manifested by colonialism's attitude towards local customary law and other traditional forms of governance. One notes that almost with a culture of superiority, colonialism subjugated all local customary laws and systems of governance to its dictates. The clearest evidence in this regard remains the assertion that native law, though the primary regulator of relations between natives, would only apply if it was not 'repugnant

¹¹⁵ GCZ Mhone "The political economy of Malawi: An overview" in GCZ Mhone (ed) (note 109 above) 1.

¹¹⁶ JM Kaunda (note 71 above). The continuities between the colonial and post-colonial state persist to this date and are largely as a result of the way in which some of the traits of the colonial state or attributes engendered by the colonial state have become embedded in the Malawian social fabric - See D Booth and others *Drivers of change and development in Malawi* ODI Working Paper 261 (2006) 20 <<http://www.odi.org.uk/resources/download/1318.pdf>> (Accessed 20 September 2009).

¹¹⁷ As Fanon noted, the colonial world was a compartmentalised world and what demarcated it was the fact of belonging or not belonging to a given race – F Fanon *The wretched of the earth* (1967) 29-31.

¹¹⁸ Z Kadzamira (note 24 above) 82-83.

¹¹⁹ JM Kaunda (note 71 above) 3.

to justice and morality.¹²⁰ The subsequent colonial resort to native institutions for governance purposes under the umbrella of indirect rule must be looked at with great circumspection.¹²¹ At the outset, indirect rule, though recognising African institutions of governance was principally aimed at easing the colonialists' governance problems and thus, arguably, enhancing productivity from the colonial territory.¹²² What is unmistakable is that where colonialism attempted to use traditional systems and structures, it grossly manipulated such systems to meet its own ends.¹²³ Traditional systems of governance when used at the behest of colonial administrations were no longer truly traditional systems of governance but distorted imitations.

Even the formation of the Federation of Rhodesia and Nyasaland must be understood as an attempt to preserve and entrench the colonial hegemony not only in Malawi but also in the two Rhodesias. As Kanyongolo has argued, the formation of the Federation was merely meant to consolidate the dominant positions of power by the colonialists.¹²⁴ As earlier pointed out the Federation was established in the face of clear and bitter opposition from both politicians and traditional rulers in Malawi.¹²⁵ The fact that the colonialists nevertheless went ahead with the Federation confirms the disregard that they had for African opinion on matters affecting African welfare. Even more revealing are the reasons why the Federation was constituted in spite of stiff African opposition to it.¹²⁶ From the British Government's perspective, the Federation was seen as a means of strengthening the sphere of British

¹²⁰ Article 20 BCA Order-In-Council of 1902 and Z Kadzamira (note 24 above) 82.

¹²¹ There is a broad consensus among scholars that the very nature of the colonial state was crucial in the creation of the despotism and authoritarianism that emerged in post-independence Africa – R Fattouh "Liberal democracy in Africa" (1990) 105(3) *Political Science Quarterly* 455-456.

¹²² The doctrine of indirect rule was pioneered by Lord Lugard and had been accepted in London in the 1920s as the best approach for governing natives. Indirect rule was an attempt to grant traditional rulers the status of independent organs by giving them limited political, administrative and judicial powers – See F Lugard *The dual mandate in British Tropical Africa* (1922).

¹²³ WC Chirwa & others (note 20 above) 29.

¹²⁴ FE Kanyongolo (note 41 above) 354.

¹²⁵ As early as 1938 the Bledisloe Commission recommended that there should be no unification of the three territories. Some of the reasons highlighted by the Commission were, firstly, the strong opposition to the idea by Africans, secondly, the differences in the African policies in the three territories and the differences both economically and constitutionally of the three territories - B Muluzi & others *Democracy with a price: The history of Malawi since 1900* (1999) 53-54.

¹²⁶ These reasons are succinctly summarised by Muluzi & others (as above) 60-61.

political influence in British Central Africa while at the same time preventing Southern Rhodesia from drifting towards Afrikaner South Africa. The settlers' motivation for the establishment of the Federation was principally the securing of white domination in British Central Africa. It was argued that the Federation would also bring about a viable integration of the economies of the three territories. As can be seen, and in line with the colonial system of governance, the promotion of African interests did not feature in the motivations for the establishment of the federation. Neither was there an attempt to garner consensus and use it as a basis for constituting the Federation.

Such was the nature of colonialism that even in formulating Malawi's Independence Constitution, it is arguable, that the departing colonialists did not necessarily act in the best interests of the majority of the population. Like in other countries making the transition from colonialism, the 1964 Constitution was largely a compromise between the departing colonialists and the nationalist leaders of the day.¹²⁷ This process of compromise was such that while the nationalists were eager to acquire the reins of power, the colonialists were concerned with the welfare of their nationals that would stay behind in the now independent territory. The departing colonialists were thus especially keen to ensure that the property rights of their nationals were safeguarded from arbitrary interference.¹²⁸ Needless to state, therefore, that the Independence Constitution of Malawi was not a product of comprehensive and broad based consultations and it thus did not embody any consensus about the basis for the future governance of the country. The process for the adoption of the 1964 Constitution was clearly flawed.¹²⁹ As Kanyongolo has noted, the negotiations for a new Constitution were conducted, from the Malawian side, by small delegations representing narrow political interests.¹³⁰ Consequently, the Independence Constitution was offered to the people of Malawi as a *fait accompli*. The Independence Constitution was thus lacking in authority for want of popular legitimacy and it is not surprising that the holders of state power

¹²⁷ FE Kanyongolo (note 41 above) 356-357.

¹²⁸ A telling indication of this intention was the almost universal inclusion of a right to property guarantee in most Independence Constitutions – See section 16 of the Independence Constitution of the Republic of Malawi. Unsurprisingly, no concession was made with regard to the obviously unfair manner in which the property rights sought to be protected were acquired.

¹²⁹ It is arguable that it is not only the process of adopting the 1964 Constitution that was questionable. The imposition of a liberal democratic framework in the 1964 Constitution also evidenced deliberate obliviousness to the material context.

¹³⁰ FE Kanyongolo (note 41 above) 357.

did not feel themselves bound to exercise power in line with its stipulations.¹³¹ Conversely, this lack of legitimacy also meant that the population did not feel particularly strong about any constitutional violations on the part of the holders of state power. The lack of ownership of the constitutional document was a massive detracting factor for constitutionalism and good governance in the country.

For the purposes of this study's thesis it is important to note that the most enduring and dangerous attribute that colonisation bequeathed to Africa was the invasion and colonisation of African cultures and African independent imaginations of the world.¹³² As Fanon recognised, colonialism was not content with merely holding the colonised in its grip.¹³³ It went further by distorting, disfiguring and destroying the history of all colonised people. In disrupting and obliterating the cultural life of the conquered people colonialism often resorted to the introduction of new legal relations and the banishment of natives and their customs.¹³⁴ In Ramose's words: ¹³⁵

[Colonial conquest was not only genocidal but] also epistemicidal at the same time. Coupled with its mission to Christianise and "civilise", colonisation was by intention and inspiration poised to annihilate and obliterate all the experiences of the indigenous conquered peoples, replacing their experience and knowledge with its own unilaterally defined meaning of experience, knowledge and truth. It succeeded to a very large extent in doing so. Its success was a veritable intellectual and spiritual holocaust from which the indigenous conquered peoples are yet to recover.

Unfortunately, this 'epistemicide' continues to influence most African countries largely as a result of 'coloniality'. 'Coloniality' refers to the existence of colonial situations in contexts where direct colonial administrations have been replaced.¹³⁶ Coloniality, it is further argued, captures the crucial fact of the continuity of the colonial forms of domination after the end of direct colonial administrations. The 'mythology of decolonisation', however, obscures the

¹³¹ As above.

¹³² S Ndlovu-Gatsgeni & G Dzinesa "Liberal democracy and the African context: The experience of South Africa" in K Matlosa & others (eds) *The state, democracy and poverty eradication in Africa* (2008) 91 99.

¹³³ F Fanon (note 117 above) 169.

¹³⁴ As above 190.

¹³⁵ MB Ramose "In memoriam: Sovereignty and the 'New' South Africa" (2007) 16 (2) *Griffith Law Review* 310 313.

¹³⁶ S Ndlovu-Gatsgeni & G Dzinesa (note 132 above) 99.

realities of coloniality in Africa. One must constantly recall that in the interaction between Western and African cultures there has constantly been present a prejudicial otherness with which Africa has been perceived.¹³⁷ This prejudicial otherness has often been utilised to denigrate anything that claims to be authentically African. Clearly, in articulating discourse on governance and constitutionalism in Africa one must be mindful of both the persisting 'coloniality' and the 'epistemicide' that Africa has had to endure. Even more importantly, one must consciously seek to transcend these factors.

3.3.2 An evaluation of governance in post-colonial Malawi: The First Republic, 1964-1994

While marking formal independence, the departure of the colonialists in July of 1964, for Malawians, was, ironically, also a harbinger for a subtler form of oppression which was, arguably, worse than colonialism.¹³⁸ In one sense, therefore, while independence, supposedly, shifted the reins of power to Africans the mechanisms of the state retained their colonial form and in some cases even consolidated their oppressive tendencies. This, arguably, represents what Fanon referred to as decolonisation without a proper transition.¹³⁹ It is now clear that the formal transfer of power from the colonialists was not accompanied by a structural change in the exercise of state power. The result was that the promise that independence held was never transformed into tangible benefits for the citizenry.¹⁴⁰

As earlier pointed out, one of the defining moments in newly independent Malawi was the 1964 Cabinet Crisis. From a governance perspective the result of the Cabinet Crisis was that the flight into exile of the ministers who had fallen out with Dr Banda allowed him to freely

¹³⁷ A Mbembe *On the post-colony* (2001) Chapter 1.

¹³⁸ B Muluzi & others (note 125 above) viii.

¹³⁹ F Fanon (note 117 above) 27. According to Fanon, decolonisation without a transition is simply the replacing of a certain species of men by another species of men. For effective decolonisation, Fanon argued, there must be a change of structure from the bottom up. Such a change must thus be willed by the collective consciousness of the people.

¹⁴⁰ Almost invariably the leadership that had led a particular country to independence transformed themselves into an elite that was became primarily interested in amassing personal wealth and maintaining patronage networks to secure their tenure of office. Davidson argues that the failure of the independence states in Africa was largely as a result of the alien origins of the concept of the state and the attempt to plant it in Africa without serious regard to local conditions - B Davidson *The Blackman's burden: Africa and the curse of the nation state* (1992) 9-18. Arguably the most succinct history of post-colonial Africa is provided by M Meredith *The state of Africa: A history of fifty years of independence* (2006).

embark on a process of consolidating his power.¹⁴¹ The departure of the ministers left Dr Banda with a very subservient cabinet and parliament and it became very easy for him to take steps towards the entrenchment of his authority.¹⁴² For example, the 1966 Constitution, adopted after the Cabinet Crisis, formally declared Malawi a one-party state¹⁴³ and an amendment in 1970 made Dr Banda President for life.¹⁴⁴ The same Constitution also declared that the President would have the 'supreme executive authority of the Republic' with power to appoint ministers and other executive officers as he saw fit and to act 'in his own discretion without following the advice tendered by any person.'¹⁴⁵ The President was also handed effective control of parliament through provisions that enabled him to appoint not more than fifteen Members of Parliament¹⁴⁶ and also provisions that allowed him to dissolve parliament at any time¹⁴⁷ or when it passed a vote of no confidence in the government or when it insisted on passing a bill that the President could not assent to.¹⁴⁸ It must be pointed out that the centralisation of the state and the concentration of authority in the person of Dr Banda did not augur well with the traditional forms of governance that prevailed in pre-colonial Malawi. The form of governance adopted by Dr Banda cannot be said to be congruent to the values that underlie ubuntu especially for the manner in which avenues for participation and consultation were curtailed.¹⁴⁹ Overall, in spite of Dr Banda's 'triumph' during the Cabinet Crisis, it is clear that he remained suspicious of any form of opposition and undertook very draconian steps to stifle any opposition both within the country and outside it as well. The result was that during his reign Malawi was virtually turned into a police state.

¹⁴¹ C Ng'ong'ola (note 48 above) 63.

¹⁴² B Muluzi & others (note 125 above) 90.

¹⁴³ Section 4 of Constitution of the Republic of Malawi, 1966.

¹⁴⁴ Republic of Malawi (Constitution)(Amendment) (No. 3) Act No. 35 of 1970.

¹⁴⁵ Sections 8 and 47 Constitution of the Republic of Malawi, 1966.

¹⁴⁶ Section 20 Constitution of the Republic of Malawi, 1966.

¹⁴⁷ Section 45 Constitution of the Republic of Malawi, 1966.

¹⁴⁸ Section 35 Constitution of the Republic of Malawi, 1966. It is notable here that in traditional Malawi and most African societies, leaders could be removed from office for blatant failures to discharge their duties. Dr Banda, by shielding himself, from any such possibility was clearly denying a role for traditional norms of governance in Malawi.

¹⁴⁹ Participation in government during Dr Banda's time was limited to agreeing with the government's policies. One disagreed with Dr Banda at his own peril.

Posner has identified three broad trends that came to characterise politics in Malawi after the Cabinet Crisis.¹⁵⁰ The first was the centralisation of political and economic power in the hands of Dr Banda. Politically, Dr Banda assumed several cabinet portfolios for himself.¹⁵¹ Parliament was completely subjugated to the executive and this subjugation was made even more thorough by the 1966 Constitution. As the MCP had been made the only lawful political party in the country after 1966¹⁵² all political activity had to be conducted within the framework and discipline of the MCP. Even more striking was Dr. Banda's insistence that the Annual Convention of the MCP was the 'primary' parliament in Malawi.¹⁵³ This meant, in effect, that the decisions and resolutions that were made by the MCP took precedence over those of parliament. This was confirmed by the fact that a number of legislative enactments, including the 1966 Constitution, had their origins from Final Resolutions of MCP Annual Conventions. Clearly, parliament was not only subservient to the executive but also to the MCP.¹⁵⁴

From a constitutional perspective, the subordination of parliament to the executive was manifested through several provisions in the 1966 Constitution. For example, the President had power to appoint the Speaker of Parliament as well as to dismiss him.¹⁵⁵ This meant that the head of the legislative organ held his office at the pleasure of the President. Again, and as pointed out earlier, the President had power to appoint fifteen people into parliament as nominated members of the National Assembly.¹⁵⁶ These people held their office at the exclusive pleasure of the President. The President had constitutional powers to direct that any such member should vacate his seat in the National Assembly.¹⁵⁷ Further, all Members

¹⁵⁰ D Posner "Malawi's new dawn" (1995) 6 (1) *Journal of Democracy* 131 134-135.

¹⁵¹ After independence Dr Banda assumed responsibility for a number of ministries and at one stage he was holding six portfolios as well as keeping a 'close watch' on all government business – J Pike (note 6 above) 162-163. Notably, under the 1966 Constitution the President could assign any portfolio to himself. Section 54 provided that 'The President may by direction in writing, assign to himself or any Minister or Deputy Minister responsibility for any business of Government, including the administration of any department of government.'

¹⁵² Section 4 Constitution of the Republic of Malawi, 1966.

¹⁵³ M Chigawa (note 28 above) 7.

¹⁵⁴ As above.

¹⁵⁵ See, section 25 Constitution of the Republic of Malawi, 1966.

¹⁵⁶ Section 20 Constitution of the Republic of Malawi, 1966.

¹⁵⁷ See, section 28(2)(i) Constitution of the Republic of Malawi, 1966.

of Parliament had to be members of the MCP.¹⁵⁸ If a Member of Parliament ceased to be a member of the party, he was required to vacate his seat in the National Assembly.¹⁵⁹ Although parliaments are normally supposed to offer a check on executive authority, the combination of the preceding factors meant that parliament, during Dr Banda's rule, never performed any such checking or general oversight functions. Parliament could thus not act as an effective counterweight to Dr Banda's excessive authority because any attempt to do so would have put it at the risk of dissolution.¹⁶⁰ As Ihonvbere has noted, parliament in Malawi during Dr Banda's time was no more than a joke, set up and manipulated by Dr Banda to confer a veneer of democracy on the regime.¹⁶¹

The position was not fundamentally different in relation to the judiciary.¹⁶² As regards the judiciary, one notes that the President had the power to appoint the Chief Justice¹⁶³ and the other judges were appointed by the President in consultation with the Judicial Service Commission.¹⁶⁴ The President could, however, remove a person from the office of judge if he considered it in the public interest so to remove him. The judiciary, as will be demonstrated later in the Chapter, was rendered largely obsolete by the creation of the Traditional Courts and could not assert its relevance to governance and constitutionalism.¹⁶⁵

¹⁵⁸ See, section 23 (d) Constitution of the Republic of Malawi, 1966.

¹⁵⁹ See, section 28(2)(h) Constitution of the Republic of Malawi, 1966.

¹⁶⁰ C Ng'ong'ola (note 84 above) 87.

¹⁶¹ JO Ihonvbere "From despotism to democracy: The rise of multiparty politics in Malawi" (1997) 18 (2) *Third World Quarterly* 225-247.

¹⁶² For a fuller discussion of the relationship between the presidency and the judiciary and cabinet during Dr Banda's era, See M Chigawa (note 28 above).

¹⁶³ Section 63(1) Constitution of the Republic of Malawi, 1966 provided that 'The Chief Justice shall be appointed by the President.'

¹⁶⁴ Section 63(2) stipulated that 'The Judges shall be appointed by the President after consultation with the Judicial Service Commission.' By virtue of section 71 of the 1966 Constitution, the Judicial Service Commission consisted of; the Chief Justice, as Chairman, the Chairman of the Public Service Commission or his delegate and such Justice of Appeal or Judge as may be designated by the President acting in consultation with the Chief Justice. Although the President was not a member of the Judicial Service Commission, section 72 of the 1966 Constitution effectively gave him power to appoint judicial officers as this provision vested all powers to appoint judicial officers in the President.

¹⁶⁵ After falling out with High Court judges Dr Banda initiated the creation of the Traditional Court system. The judges in the Traditional Courts were chiefs with no formal legal training and rules of evidence did not apply. These courts were given jurisdiction over treason and murder and were routinely used to try Dr Banda's opponents. For a discussion of the Traditional Court system see M Machika *The Malawi legal system: An introduction* (1983) 1-30.

As earlier pointed out, the net effect of the above described situation was the creation of a very strong presidency in Malawi during the First Republic. From a governance and constitutionalism perspective, it is important to note that all these machinations effectively nullified several fundamental values associated with constitutionalism and good governance.¹⁶⁶ Dr Banda's absolute authority negated any meaningful operationalisation of the concept of limited government, separation of powers, the rule of law and judicial independence. For example, the sweeping powers that the President had in relation to parliament meant that it could not perform any meaningful role in checking the exercise of power by the executive. The powers of the President in relation to the judiciary ensured that it remained subservient to the executive. As Chigawa has stated, since the tenure of office of the judges was effectively in the hands of the executive it was very improbable that any sitting judge could antagonise the executive.¹⁶⁷

The second trend identified by Posner in relation to the First Republic is the ruthless treatment of political opponents and the total control of public life by the MCP and its affiliates.¹⁶⁸ As Meredith aptly notes, Dr Banda run Malawi as his personal fiefdom demanding not just obedience but servility.¹⁶⁹ He insisted on personally directing even the smallest details of Malawi's affairs. He is alleged to have once stated that everything was his business in the country and that his word was the law in Malawi.¹⁷⁰ It is arguable that during Dr Banda's time Malawi was not just a one-party state but effectively a one-man state.¹⁷¹ During Dr Banda's era political space was significantly shrunk and proscribed. Participation in the political arena was uniformly dependent on membership of the MCP and also only to support the government. There was no room for dissent of any form. Political dissenters were routinely detained and sometimes even tortured.¹⁷² Those that fled into exile were often tracked, abducted and brought home to stand trial for treason, as happened with Orton and Vera Chirwa in 1981, or assassinated in exile as happened with Attati Mpakati in 1983 and

¹⁶⁶ M Chigawa (note 28 above) 12.

¹⁶⁷ As above 11.

¹⁶⁸ Posner (note 150 above) 134-135.

¹⁶⁹ M Meredith (note 140 above) 164-165.

¹⁷⁰ As above 165.

¹⁷¹ D Venter "Malawi: The transition to multiparty politics" in J Wiseman (ed) *Democracy and political change in Sub Saharan Africa* (1995) 155.

¹⁷² G Bauer & S Taylor (note 8 above) 2.

Mkwapatira Mhango in 1989.¹⁷³ Cabinet was routinely reshuffled so as to prevent the emergence of any political rivals.¹⁷⁴ The media was heavily censored and used for propaganda purposes. Civil society organisations were proscribed or co-opted into the ruling party.¹⁷⁵ The disdain for dissent was mirrored in the Constitution which stated that the government was founded upon the 'four cornerstones' which were unity, loyalty, obedience and discipline.¹⁷⁶ Mhone has argued that the four cornerstones were an obvious reflection of the paternalistic, authoritarian and fascist intent of the regime.¹⁷⁷ From a governance angle what is worrying, however, is the perpetuation of the values behind the four cornerstones in present day democratic Malawi. It seems to be the case that Malawians, generally, tend to stifle initiative, creativity, tolerance and dissent.¹⁷⁸ Even after fifteen years of a multi-party dispensation dissent, opposition and protest are, seemingly, only grudgingly tolerated.

The third trend that characterised Dr Banda's regime, according to Posner, was the 'crystallising of regional identities.' Just like in most of Southern Africa, ethnic identities have figured prominently in the post-colonial politics of Malawi.¹⁷⁹ Admittedly, the rhetoric during Dr Banda's regime reiterated the promotion of national unity and 'Malawianness' and deeply discouraged regional and ethnic allegiances.¹⁸⁰ However, as a result of colonial policies, ethnicity, if not regionalism, were already firmly established and entrenched facts of life when Dr Banda assumed office in 1964.¹⁸¹ The government was, arguably, fully aware of the

¹⁷³ As above 26.

¹⁷⁴ This was clearly a direct result of the Cabinet Crisis and the insecurity that subsequently seemed to haunt Dr Banda in relation to his Cabinet.

¹⁷⁵ While it cannot be said that civil society was non-existent during Dr Banda's era, it was the co-opting of civil society into the party structures that effectively neutralised the potential of civil society in Malawi. According to Chipeta, the affiliation of most civil society organisations with the nationalist movement was actually their death-knell. In the aftermath of the Cabinet Crisis, the Government used every pretext to stifle civil society organisations and some organisations, by their affiliation to the nationalists, found themselves incapable of constructively criticising the Government – M Chipeta (note 109) 36 -38. See, also, B Muluzi & others (note 125 above) 96.

¹⁷⁶ Section 2(1)(i) Constitution of the Republic of Malawi, 1966.

¹⁷⁷ GCZ Mhone (note 115 above) 9.

¹⁷⁸ D Booth & others (note 116 above).

¹⁷⁹ D Posner (note 150 above).

¹⁸⁰ MJ Nkhata & AWA Mwenifumbo "Ethnicity, politics and the right to development in latently polarised societies: The Malawian experience" (Forthcoming publication).

¹⁸¹ WC Chirwa "Democracy, ethnicity and regionalism: The Malawian experience, 1992 – 1996" in KM Phiri & KR Ross (note 41 above) 52 57.

problem. The most notable feature of Dr Banda's regime was, however, the constant and repeated attempts to deny the prevalence of regionalistic or tribalistic tendencies by means of state propaganda vindicating national unity.¹⁸² Commentators on the dynamics of ethnicity, regionalism and tribalism in post-independence Malawi are agreed that in the period after independence, contrary to the official rhetoric on national unity, Dr Banda's regime actively pursued policies that were ethnically biased.¹⁸³ Specifically, it is noticeable that in the period between 1964 and 1994, interests and aspirations of the *Chewa* peoples were actively nurtured and promoted at the expense of those classified as non-*Chewa*.¹⁸⁴ The Banda regime also deliberately conflated *Chewa* identity with the national identity.¹⁸⁵ *Chewa*-ness was deliberately equated with 'Malawianness' and numerous steps were undertaken by the state towards the realisation of this goal.¹⁸⁶ Perhaps the most important fact in this regard is that Dr Banda did not only privilege his own *Chewa* ethnic group but his regime also discriminated against those classified as non-*chewa*.¹⁸⁷ Ironically, it is this very marginalisation that ensured that a viable opposition to Dr Banda's regime was present in the country when the winds of change blew across Malawi.¹⁸⁸

¹⁸² It is perhaps comical that while Dr Banda's regime was clearly cognisant of the ethnic currents in Malawi it went to great lengths to portray the impression of ethnic homogeneity. Dr Banda's public speeches provide a poignant illustration of this. Dr Banda constantly harped on his *Chewa* roots while at the same time mouthing the mantra of national unity. See, L Vail 'Ethnicity, language and national unity: The case of Malawi' in P Bonner *Working papers in Southern African studies* (1981) 121.

¹⁸³ See, for example, D Kaspin (note 55 above); WC Chirwa (note 181 above) and B Osei-Hwedie, 'The role of ethnicity in multiparty politics in Malawi and Zambia' (1998) 16(2) *Journal of Contemporary African Studies* 227. For a slightly different take on ethnicity during Dr Banda's rule, see H Englund *Whither Malawi: Competing discourses on the post-colony* Working Paper 3/95 Institute of Development Studies, University of Helsinki.

¹⁸⁴ WC Chirwa (note 181 above) 59-63. A more comprehensive account on the point is offered by L Vail & L White in L Vail (ed) (note 52 above) 151.

¹⁸⁵ D Kaspin (note 55 above) 608.

¹⁸⁶ The declaration of *Chichewa* as the national language was only one of the many steps undertaken in this regard. The emphasis during Dr Banda's era was to use language as a unifying agent in an ethnically and linguistically divided country – P Kishindo "Politics of language in contemporary Malawi" in KM Phiri & KR Ross (eds) (note 41 above) 252.

¹⁸⁷ G Bauer & S Taylor (note 8 above) 28.

¹⁸⁸ The clamour for change was not even across the country's three regions as the results of the referendum in 1993 showed. While the Northern and Southern regions voted overwhelmingly for change the Central region, where Dr Banda hailed from, voted to maintain the status quo – D Cammack (note 78 above) 191.

In as far as governance and constitutionalism are concerned; one notes that the prevailing paradigms did not leave room for the exercise of state authority on the basis of set constitutional principles. The exigencies of maintaining the patronage networks invariably superseded principled governance and the development of constitutionalism in the country. As earlier pointed out, there was thus no room for the development of constitutionalism and good governance in the country during the entirety of Dr Banda's reign. The executive's overbearing influence constantly subordinated the other branches of government to its whims and there were no means of exercising any checks on its authority. The 1966 Constitution, it must be stated, was a strong factor in negating constitutionalism and good governance in Malawi for the entirety of Dr Banda's reign. Structurally, the 1966 Constitution did not even attempt to construct an edifice on which constitutionalism could be based. The practice of government itself, especially after 1966, was diametrically at odds with the demands of both constitutionalism and good governance. Further, the justification for the adoption of the 1966 Constitution also manifested a 'perverted' recourse to supposed norms of African traditions which must be avoided at all times. This is because the Constitutional Committee alleged that African tradition justified the creation of a strong executive and an 'all powerful' presidency.¹⁸⁹ What was conveniently ignored was the overwhelming evidence that strongly pointed to how African traditions checked the exercise of societal power to prevent tyranny and insisted on consultation and consensus in decision making.¹⁹⁰

3.4 An evaluation of governance and constitutionalism in post-colonial Malawi: The Second Republic (1994 to date)

In evaluating governance and constitutionalism during the Second Republic it is prudent to conduct the evaluation under two separate but related subheadings. Although Dr Banda's rule was formally ended in 1994, the process of transition had been afoot for almost two years before that. Having regard to the origins of some of the governance complications that have manifested themselves in the country, it is proposed to first dwell specifically on the transition from the one-party state to the multi-party dispensation (the transition) and then separately look at the emerging trends from the time the first democratically elected

¹⁸⁹ Government of Malawi (note 62 above).

¹⁹⁰ See, for example, G Clutton-Brock (note 19 above) 13; K Wiredu "Society and democracy in Africa" in T Kiros (ed) *Explorations in African political thought: Identity, community, ethics* (2001) 173; G Mwakikagile *Africa and the West* (2000) 33; J Nyerere "One party government" (1961) 2 *Transition* 9 and E Anyaoku "Democracy in Africa: The challenges and the opportunities" Speech to the South African Parliament, 1 June 1998 <http://www.thecommonwealth.org/speech/34293/35178/35200/democracy_in_africa_the_challenges_and_the_opportu.htm> (Accessed 20 June 2010).

president took office. In this way, it is hoped, the sources of some of the current problems in governance and constitutionalism, in so far as they are related to the manner in which the transition was managed, will become apparent.

3.4.1 Managing the transition to multi-partyism in Malawi

Dr Banda's defeat during the Referendum of 1993 signalled the end of the one-party state and the re-introduction of multi-party politics after a hiatus of about thirty years.¹⁹¹ Unfortunately, even with Dr Banda's defeat in the Referendum it was not immediately clear what should happen subsequently.¹⁹² No schedule of measures to be undertaken in the event of a vote in favour of multi-party rule had been drawn up. One month after the Referendum, the Public Affairs Committee (PAC)¹⁹³ and the Government agreed to form a body to oversee the transition to democratic rule.¹⁹⁴ This body was called the National Consultative Council (NCC). The composition and the role of the NCC in managing the transition has already been discussed under part 3.2.3.3 above. As earlier pointed out, in November 1993 the NCC initiated debate on changing the 1966 Constitution and it was agreed not just to amend the 1966 Constitution but to draft a new Constitution altogether. Subsequently, the NCC convened a Constitutional Drafting Conference in February 1994 which resulted in the production of an Interim Constitution on the basis of which the General Elections of 1994 were conducted.¹⁹⁵ In a bid to refine the Interim Constitution, a Constitutional Review Conference was convened in February 1995. This conference reviewed the Interim Constitution and made recommendations to parliament for

¹⁹¹ Contrary to common perceptions, the 1994 General Elections were not the first multi-party elections in Malawi, the first multiparty elections were held in 1961 – AS Muula & ET Chanika *Malawi's lost decade 1994-2004* (2005) 21.

¹⁹² D Cammack (note 78 above) 191.

¹⁹³ The Public Affairs Committee (PAC) was a 'pressure group' formed in 1992 to, among other things, pressure the government to look into national grievances and also to enter into dialogue with the government for the resolution of the grievances. PAC was initially composed of faith-based organisations though its membership subsequently included the Malawi Law Society and the Associated Chamber of Commerce and Industry in Malawi – B Muluji & others (note 125 above) 143-146.

¹⁹⁴ As above 170 -172.

¹⁹⁵ J Banda (note 50 above) 321-322.

improvement of the document.¹⁹⁶ The Final Constitution was adopted by parliament in May 1995.¹⁹⁷

Several notable points are evident about the manner in which the transition was managed. It is this study's contention that the manner in which the transition was managed has had serious repercussions for governance and constitutionalism in Malawi.¹⁹⁸ This study, however, does not only take issue with the process leading to the adoption of the Constitution but also the final product itself. Firstly, the period in which the Constitution was negotiated is remarkable for its brevity. The process of drafting the Constitution, as Banda has pointed out, was a 'hurried affair, conceived at the end of 1993 and executed at the beginning of 1994.'¹⁹⁹ The Constitution was negotiated, drafted and adopted within a space of four months.²⁰⁰ Even though the Constitution was allowed a one year interim period of operation, it still, according to one commentator, holds the 'dubious distinction, among constitutions, of being enacted in one day.'²⁰¹ All parliamentary processes were completed and the presidential approval given on 16 May 1994. As a matter of fact, the disbanded one-party parliament had to be recalled solely for the purpose of enacting the Constitution.

Clearly, the haste with which the Constitution was adopted entails that there was insufficient time for proper and broad-based societal consultation and negotiation on the terms of the Constitution.²⁰² Additionally, the transition was occurring at a time when many other activities were taking place, foremost among these activities being the preparations for the General Elections. This necessarily meant that inadequate focus was paid to the process of drafting the new Constitution.²⁰³ This lack of thorough consultation before the adoption of the

¹⁹⁶ For a comprehensive summary of resolutions of the National Constitutional Conference on the Provisional Constitution, see J Banda (as above) 329-333.

¹⁹⁷ Constitution of the Republic of Malawi Act, Act No. 7 of 1995.

¹⁹⁸ This is because constitutions derive their legitimacy principally from the historical-political act that precedes their adoption. What commands obedience to a constitution is not the way the text is framed or the words used but the intentional historical-political act that creates constitutions – RS Kay "American constitutionalism" in L Alexander (ed) *Constitutionalism: Philosophical foundations* (1998) 16 29-33.

¹⁹⁹ J Banda (note 50 above) 321.

²⁰⁰ D Chirwa (note 86 above) 317.

²⁰¹ C Ng'ong'ola (note 48 above) 64-65.

²⁰² D Chirwa (note 86 above) 317.

²⁰³ The political climate prevailing at the time, argues Mutharika, was such that the Banda regime was in the decline while the NCC was in the ascendancy. The result was that various

Constitution, among others, has certainly detracted from the document's popular legitimacy and made it problematic for the Constitution to act as a sound basis for democratisation.²⁰⁴ The implications of this lack of consultation, Chirwa argues, are very easy to identify in the Malawian Constitution.²⁰⁵ For example, the Constitution makes no commitment to addressing regionalism which remains a major concern to the country. Further, the Constitution treats social and economic rights in a very disappointing manner in spite of their centrality to achieving social justice and alleviating poverty. The manner in which the Constitution was adopted was oblivious to the fact that, to be viable and acceptable, a constitution must be the product of consultation and consensus.²⁰⁶ Consultation and consensus does not mean that everyone's view will take the day but rather ensures that 'everyone' is involved in the process of coming up with a constitution. Involvement allows for easy acceptance and identification with the final product.

The circumstances surrounding the adoption of the Constitution have operated to detract from the Constitution's role in governance and constitutionalism. It is arguable that public functionaries' unwillingness to voluntarily and consistently abide by the terms of the Constitution is, in part, traceable to a failure to identify with the principles embodied in the Constitution. Relatedly, one also notes that the Constitution is a very detailed document.²⁰⁷ While the extensive detail in the Constitution may be explained as an attempt to provide for all conceivable situations and prevent a repeat of the excesses of Dr Banda's regime, the detail also creates fertile ground for avoidable litigation.²⁰⁸ It is patent that some of the issues that the Constitution provides for could have better been addressed in separate and specific legislative enactments.²⁰⁹ A more thorough and deliberate reflection during the negotiation of the Constitution would easily have brought this to light.

opposition parties attempted to push for inclusion in the Constitution of provisions that would promote their interests – See AP Mutharika “The 1995 Democratic Constitution of the Republic of Malawi” (1996) 40 (2) *Journal of African Law* 205-206.

²⁰⁴ D Chirwa (note 86 above) 318.

²⁰⁵ As above 319-320.

²⁰⁶ T Maseko “Constitution-making in Swaziland: The cattle-byre Constitution Act 001 of 2005” <http://www.publiclaw.uct.za/usr/publi_law/Nairobi/Maseko_ConstitutionalismMakingInSwazil and.doc> (Accessed 23 March 2010).

²⁰⁷ AP Mutharika (note 203 above) 205-206.

²⁰⁸ As above.

²⁰⁹ This includes the provisions on local government, the Malawi Police Service and the Malawi Defence Force which could have easily been incorporated in legislation on local governance, the police and the defence force, respectively.

Secondly, it is important to reflect on the players that actually influenced the basic content of the Constitution. The Constitution was, in essence, drafted by the NCC, which, as stated earlier, was made up of representatives of the various political parties. What is notable is that the NCC engaged in the process of drafting the Constitution even though none of its members were in the NCC by virtue of a popular election.²¹⁰ The entire NCC thus lacked any direct and popular mandate from the people to determine ‘even the most basic framework of the Constitution.’²¹¹ Commenting on the process, Hara concludes that ‘there can be no valid claim to popular involvement in the Constitution-making process [in Malawi].’²¹² Clearly, and as pointed out in respect of the 1964 Independence Constitution, there still remains a legitimacy gap in relation to the Constitution of Malawi.²¹³ Such a gap makes the entrenchment of constitutionalism and good governance problematic as the citizenry are wont to find it difficult to identify with such a document and its stipulations. This merely highlights the need for full citizen participation in the adoption of constitutions if meaningful progress for governance and constitutionalism is to be attained across Africa.

It may be argued that the lack of proper consultation and participation in drafting the Constitution was cured by the one year interim period of operation that the Constitution was subjected to and the subsequent National Constitutional Review Conference that was convened in February 1995.²¹⁴ It is this study’s argument, however, that the February Constitutional Review Conference did not redress the lack of consultation, participation and representation that has been identified above. Admittedly, others have argued that the Constitutional Review Conference was ‘unique in the extent to which it accommodated democratic impulses’ and how it was attended by a cross-section of Malawi’s population.²¹⁵

²¹⁰ FE Kanyongolo (note 41 above) 364.

²¹¹ As above.

²¹² MH Hara “Popular involvement in constitution-making: The experience of Malawi” Paper presented at the World Congress of Constitutional Law, Athens, 11-15 June 2007, at <<http://www.enelsyn.gr/papers/w1/Paper%20by%20Mabvuto%20Herbert%20Hara.pdf>> (Accessed 22 April 2010).

²¹³ According to Ng’ong’ola, the transition was entrusted to institutions which, strictly speaking, had no legal mandate to manage it - C Ng’ong’ola (note 84 above) 98.

²¹⁴ By virtue of section 212(1) of the Constitution, the Constitution came into provisional operation on 18 May 1994 for a period of 12 months. During the period of provisional operation a Constitution Committee was given the task of canvassing views on the document and also convening a National Constitutional Conference to review the Constitution.

²¹⁵ J Banda (note 50 above) 322.

There are, however, other subtle but equally crucial issues surrounding the Constitutional Review Conference that one must also appreciate. In the first place, in spite of the attempt to include a cross-section of Malawi's population, one notices an obvious urban bias in the list of participants.²¹⁶ This urban bias ignored the fact that the majority of Malawians live in rural areas. The Conference thus retained an elitist composition. In the second place, the Conference was convened for four days only.²¹⁷ This was, in the light of the enormity of the task before the Conference, far inadequate for a proper and thorough discussion of the issues. Lastly, subsequent events clearly undermined whatever valuable contribution that the Conference may have attained. Most importantly, one notices that parliament subsequently ignored or overruled explicit recommendations from the Conference.²¹⁸ This, clearly, defeated the popular participation that the Conference had intended to achieve.²¹⁹ This merely reinforces the earlier assertion that the Constitution suffers from a serious popular legitimacy deficit.

Thirdly, in terms of the product of the transition, one notes that the transition bequeathed a liberal democratic Constitution to the country.²²⁰ Rather disturbing, however, is the fact that there was virtually no ideological debate on the appropriateness of the liberal democratic

²¹⁶ J Lwanda *Promises, power, politics and poverty: Democratic transition in Malawi, 1961 – 1999* (1997) 192 -195. Lwanda argues that some of the resolutions of the Conference were explicitly influenced by this urban bias. He states that 'This conference, for example, allowed only 51 chiefs, 10 trade unionists, 8 women's delegates, 3 smallholder farmer delegates and 3 disabled as opposed to 60 MPs, 17 political party delegates and 10 big business delegates. When we examine the rest of the list, the urban bias is even more obvious and this together with the political inexperience of most of the delegates showed how politicians were able to be so influential at the conference: the church 7, lawyers 2, university 5, journalists 3, professionals 8, Asians 3, Europeans 2, human rights bodies 5. Even more telling was the lack of briefing given to the chiefs at the constitutional conference. Chief Mchilamwera of Thyolo admitted on the MBC [Malawi Broadcasting Corporation] that he had only been given the draft of the constitution when he arrived at the conference.'

²¹⁷ The National Constitutional Conference on the Provisional Constitution was held in Lilongwe from 20 to 24 February 1995.

²¹⁸ According to Hara 'It is important to note that when the Constitution came before Parliament the UDF/AFORD majority in Parliament ignored all the decisions of the Conference on which the Conference had voted against their positions, and pushed through their own amendment proposals' – MH Hara (note 203 above).

²¹⁹ For example, the Constitutional Conference recommended the retention of section 64 of the Constitution which allowed constituents to recall their parliamentarians in appropriate cases. However, the repeal of section 64 (repealed by Act No. 6 of 1995) was one of the first things parliament did after convening to consider the Conference's recommendations.

²²⁰ FE Kanyongolo (note 41 above) 364.

model for Malawi during the drafting process.²²¹ It seems to be the case that it was assumed, without consideration of the alternatives, that liberal democracy was not just the best but also the only sound ideological basis on which to premise the Constitution. The result is that Malawi has, arguably, one of the world's most liberal constitutions even though this seems to be more by accident than deliberate choice. This lack of debate on the ideological basis of the Constitution ignored, among others, the fact that liberal democracy never historically developed as a part of the indigenous Malawian political culture and that liberal democracy is not a self evident truth.²²² It seems, however, that the lack of sufficient time to consider the proposals for the Constitution also contributed to the absence of an informed debate on the form that the Constitution was supposed to take. While all politicians were agreed on the need to adopt a new Constitution, there was a marked absence of an informed motivation to drive the entire process.²²³ As Phiri and Ross accurately observe, the lack of reflection on the form and content of the transition immediately reveals the limitations of the entire transition.²²⁴ It is now clear that the pro-multiparty movement had no definite policy agenda for the country, aside from replacing Dr Banda and his MCP. Overall, one notes glaring omissions in the manner in which the transition, especially the process of drafting the Constitution, was handled. Without doubt some of the current shortcomings with respect to governance and constitutionalism are traceable to the processes that took place between 1992 and 1994.

3.4.2 Governance and constitutionalism in Malawi beyond the transition

The 1994 Constitution forms the overarching framework for both governance and constitutionalism in Malawi. The fact that the Constitution should be central to governance and constitutionalism was, clearly, one of the strong motivating factors in the adoption of the Constitution rather than the mere amendment of the 1966 Constitution. It must be recalled that the adoption of a new Constitution was seen as a key instrument for the negation of Dr

²²¹ As above.

²²² As above 370- 371. These points are discussed at greater length in Chapter 4 of this study.

²²³ K Bampton in J Lewis & others (eds) *Human rights and the making of Constitutions: Malawi, Kenya, Uganda* (1995) 57-58. In Bampton's words 'There simply was no education. This was the fundamental flaw of the Malawi Constitution. There was no consultation. ...There was simply a political will among the Malawi politicians to form a new political structure: a political motivation to embody human rights but a weak motivation. For it was not an informed motivation, not informed on the nature of human rights nor the problems of implementing human rights in the context of an actual working democracy.'

²²⁴ KM Phiri & KR Ross (note 66 above) 12.

Banda's autocracy and the creation of a new political and socio-economic order.²²⁵ The Constitution was thus designed to lay a foundation for the protection of human rights, making those in power accountable, upholding the rule of law and maintaining checks and balances between the different arms of government. In the words of Kanyongolo:²²⁶

The 1994 Constitution was a direct product of the popular demand for a democratic order to replace autocratic political system which had developed with the blessings of the Constitution of 1966. The 1994 Constitution was therefore intended to be the basic framework for facilitating the democratisation process in Malawi.

In constructing the above-referred to framework, the framers had the delicate task of coming up with a document that gave the democratically elected government enough powers to discharge its duties while at this same time checking the emergence of any excesses comparable to the Dr Banda regime.²²⁷ In evaluating the trends in governance and constitutionalism from 1994 to date focus will, in this study, be placed on the following areas: the relationships between the branches of government, public resource management and accountability of public functionaries and citizenry empowerment. These thematic areas have been chosen for their overt connection to governance and constitutionalism and are used merely for illustrative purposes without in any way suggesting that governance and constitutionalism is exhaustively about these thematic areas. It is hoped that analysing developments under the chosen themes will centrally shed light on governance and constitutionalism in Malawi. It is in connection to these same thematic areas that Chapter Five will demonstrate the relevance and viability of social trust-based governance and constitutionalism in Malawi.

3.4.3 The relations between the branches of government

The basic structure of government under the Constitution is neither presidential nor parliamentary.²²⁸ The Constitution creates a hybrid system which provides for a directly elected president who has power to appoint his own ministers while legislative powers are vested in parliament. Needless to state that the Constitution recognises three branches of government; the executive, legislature and judiciary. In the following sections an attempt is

²²⁵ J Banda (note 50 above) 320.

²²⁶ FE Kanyongolo "The constitution and the democratisation process in Malawi" in O Sichone (ed) *The state and constitutionalism in Southern Africa* (1998) 1.

²²⁷ AP Mutharika (note 203 above) 209.

²²⁸ As above 206.

made to explore how each of the three branches of government has related with the other branches from the perspective of governance and constitutionalism.

3.4.3.1 The executive

Section 7 of the Constitution establishes the executive as the entity responsible for the initiation of policies and legislation and ‘for the implementation of all laws which embody the express wishes of the people of Malawi.’ A full elaboration of the powers of the executive is provided in Chapter VIII of the Constitution. It is not this study’s intention to dwell on a description of the powers vested in the executive under the Constitution but the focus will be on how the executive has conducted itself since 1994. Suffice it to point out that the executive is headed by a President, who is also the Head of State. The President is assisted in his constitutional duties by a cabinet which he must appoint.²²⁹ The Constitution does not spell out a limit to the size of the cabinet. Under Malawi’s hybrid system, the President may appoint sitting Members of Parliament (MPs) as cabinet ministers.²³⁰ The President is elected directly by the electorate but must, at the time of his nomination, declare who shall be the Vice-President should he/she be elected.²³¹ The President may also appoint a Second Vice-President if he/she considers it in the national interest to do so.²³²

A number of incidents involving the executive give an indication of its commitment to governance and constitutionalism. An early test in constitutionalism was offered in May 1994, just a week after the democratically elected government of Bakili Muluzi took office. On 24 May 1994, the new President verbally informed Mr Lunguzi, who was then the Inspector General of Police, that he was being removed from his position as head of the Malawi Police Force. Mr Lunguzi was also told that he was being appointed a diplomat to be accredited to Canada. No reasons were given by the President for removing Mr Lunguzi from his post as is required by section 43 of the Constitution. In a subsequent suit commenced by Mr Lunguzi contesting the constitutionality of his removal from office, the High Court held that Mr Lunguzi’s removal from his post was unconstitutional.²³³ On appeal

²²⁹ Section 92 of the Constitution of the Republic of Malawi.

²³⁰ *Mponda Mkandawire and others v Attorney General* (note 90 above) confirmed that the President can appoint opposition Members of Parliament into his cabinet. This is in spite of section 65 of the Constitution which bars ‘floor crossing’ by parliamentarians.

²³¹ Section 80 of the Constitution of the Republic of Malawi.

²³² Section 80(5) of the Constitution of the Republic of Malawi.

²³³ *In the matter of the Constitution of the Republic of Malawi and in the matter of the removal of Mac William Lunguzi as Inspector General of Police* Misc. Appl. No. 55 of 1994.

by the Attorney-General, the Malawi Supreme Court of Appeal upheld the High Court's decision, holding that the President had acted unconstitutionally in dismissing Mr Lunguzi.²³⁴ This decision unequivocally signified the end of an era in which the President was considered to be above the law and the commencement of an era marked by the rule of law and accountability.

Further, one may also wish to dwell on the conduct of President Bakili Muluzi towards the conclusion of his second term in office. As pointed out earlier, by virtue of section 83(3) of the Constitution, the President is not allowed to serve more than two consecutive terms in office. In spite of this clear stipulation, Bakili Muluzi attempted to extend his time in office by supporting a bill that proposed to remove term limits altogether and when this failed he 'initiated' a bill purporting to extend the limit to three terms.²³⁵ Relatedly, one may also reflect on the presidential directive that banned 'all forms of public demonstrations' while the bill proposing the abolition of presidential term limits was pending in parliament. Faced with growing public unrest on the question of the extension of term limits, Bakili Muluzi, while addressing a public rally, announced that that no-one would be allowed to hold demonstrations on the term limits issue. This directive was subsequently challenged and the High Court declared it unconstitutional.²³⁶ The High Court held that the directive did not pass the constitutionality prescriptions in section 44(2) because it was unreasonable and unduly wide such as to be incapable of enforcement.²³⁷

It is evident that the attempts to amend section 83(3) were motivated by interests that could not be said to be in synchrony with constitutionalism and governance.²³⁸ Accepting that the Constitution represents a compact amongst Malawians (albeit an imperfect one in the light of the facts presented earlier) as to governance and constitutionalism, the attempts at amending section 83(3) were an attempt by a select group of people to circumvent the compact. Important to note is the fact that the proposed amendment would have directly

²³⁴ *Attorney General v Lunguzi et al* MSCA Civil Appeal Cause No. 23 of 1994.

²³⁵ G Bauer & S Taylor (note 8 above) 32.

²³⁶ *Malawi Law Society and others v The State and the President of Malawi and others* Misc. Civil Cause No.78 of 2002 Per Twea J.

²³⁷ Section 44(2) provides: 'Without prejudice to subsection (1), no restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law, which are reasonable, recognised by international human rights standards and necessary in an open and democratic society.'

²³⁸ See B de Klerk (note 99 above).

undermined the accountability of former presidents that the Constitution seeks to guarantee.²³⁹ The fact that an attempt at amending the Constitution to alter the provision on term limits was undertaken also reveals the continuity of traits that were prevalent during Dr Banda's rule. It is arguable that the proponents of the amendment were, effectively, promoting another entrenched presidency and also one that would not be fully accountable to the populace. The ban on demonstrations on the Third/Open Terms Bills was also reminiscent of Dr Banda's regime when the President would routinely rule by decree. These are some manifestations of failures in governance and constitutionalism in Malawi.

More recently, one may also reflect on the decision by President Bingu wa Mutharika to 'suspend' the Vice-President Cassim Chilumpha. In as far as can be discerned, in February 2006 the Vice-President received a letter from the President which indicated that the President had accepted the constructive resignation of the Vice-President. In an application for judicial review by the Vice-President contesting his purported constructive resignation, the High Court, in affirming the supremacy of the rule of law in Malawi granted an injunction restraining the President from 'accepting' the 'resignation'.²⁴⁰ What is notable, however, is that the executive did not immediately comply with the court's decision on the matter. It took a further application seeking the enforcement of the initial orders made by the High Court before the executive attempted to comply with some of the court's directives.²⁴¹ The executive's disregard of court orders, where it perceives the same to be unfavourable to its interests, is deplorable.²⁴² Even more crucially this undermines the integrity of the judiciary and denigrates the rule of law. A more encouraging situation would be where the executive takes the lead in complying with judicial pronouncements even where these are not exactly congruent with its immediate interests.

The institutional set up of the executive under the Constitution seems to have explicitly acknowledged that the executive remains the institution most likely to overstep its

²³⁹ FE Kanyongolo (note 93 above) 64-65. Notable in this regard is section 91 of the Constitution which provides immunity from all suits to a sitting President.

²⁴⁰ *Ex Parte Chilumpha* Misc. Civil Cause No. 22 of 2006 HC.

²⁴¹ Part of the initial decision had directed the executive to restore all the privileges that the Vice-President ordinarily enjoyed prior to the purported 'constructive resignation.' No attempt by the executive to restore the privileges was made until the second application.

²⁴² For further examples of instances in which the executive has demonstrated reluctance to follow court orders, see FE Kanyongolo (note 79 above) 51-57.

boundaries hence the elaborate mechanisms to keep it in check.²⁴³ In spite of the constitutional mechanisms for checking excesses on the part of the executive, experience has already shown that checking the executive is not easy. On several occasions, it has taken the intervention of the judiciary to rein in the executive. With a written constitution that expressly spells the ambits of powers conferred on the executive it is rather unfortunate that the executive has recalcitrantly demonstrated a tendency to overstep its limits. It would be a measure of the entrenchment of constitutionalism if the executive, of its own accord, began to consciously recognise and implement constitutional limits on its authority.

In as far as the management of activities of the state on a day to day basis (governance), the executive has fared pretty miserably since the transition.²⁴⁴ For example, the ten years, corresponding with Bakili Muluzi's two terms in office, witnessed serious mismanagement of the public realm, high levels of corruption and a decline in the capacity of the state to consistently formulate and implement policies.²⁴⁵ The result was that household incomes fell considerably²⁴⁶ while access to the state was largely conceived as a means of obtaining and accumulating wealth.²⁴⁷ While some effort was made to reverse some of the excesses of Bakili Muluzi regime by President Bingu wa Mutharika during his first term in office, Malawi still remains on the edge of an 'economic and governance abyss'.²⁴⁸ It remains to be seen what President Bingu wa Mutharika's second term in office will bequeath to the country in terms of governance and constitutionalism. Importantly, as will constantly be alluded to in this study, changes of leadership in Malawi have, surprisingly, not engendered significant discontinuities. The state has thus, since independence, functioned in a predominantly similar manner in spite of regime changes. Changes, for governance, have often been

²⁴³ Malawi Law Commission "The Constitution and the executive branch of government" Discussion paper No. 4, 43.

²⁴⁴ For an in-depth analysis of the performance of the post transition state up to 2005 see D Booth & others (note 116 above).

²⁴⁵ Remarkably, former President Muluzi is embroiled in a corruption trial the charges of which relate to the time when he was President. See, "Former president of Malawi arrested to face corruption charges" <<http://africanpress.wordpress.com/2009/02/28/former-president-of-Malawi-arrested-to-face-corruption-charges/>> (Accessed 7 August 2010).

²⁴⁶ Writing in 2003, Breytenbach and Peters-Berries noted that Malawians were ' ... worse off than in 1994, as the average per capita income has remained the same, but purchasing power has dropped, social and extension services crumbled and the HIV/Aids epidemic reached alarming proportions ' - Breytenbach & Peters-Berries (note 59 above) 73.

²⁴⁷ P Von Doepp "The Kingdom beyond zasintha: Churches and political life in Malawi's post authoritarian" era in KM Phiri & KR Ross (eds) (note 41 above) 102 106-10.

²⁴⁸ D Booth & others (note 116 above) 6.

farcical and motivated by exigencies rather than outcomes of consciously thought out interventions.

3.4.3.2 The legislature

Under the original scheme devised by the Constitution, parliament was made up of a directly elected National Assembly, and an indirectly elected senate and the President as Head of State.²⁴⁹ By an ‘amendment’ to the Constitution, the National Assembly abolished the senate.²⁵⁰ Parliament is now the National Assembly and the President as Head of State. All legislative powers of the Republic are vested in parliament.²⁵¹ In its deliberations parliament is enjoined to ‘reflect the interests of all the people of Malawi’ and also further the values explicit or implicit in the Constitution.²⁵² Members of Parliament (MPs) are elected directly representing constituencies demarcated by the Electoral Commission²⁵³ and they are liable to losing their seats should they be deemed to have crossed the floor.²⁵⁴ At the outset one must note that parliament, as constituted under the Constitution, is significantly different from the manner in which it was conceptualised under the 1966 Constitution. For example, the President can no longer appoint MPs and presidential powers in relation to parliament are very circumscribed.²⁵⁵ Even more significant is the ascendancy of the concept of

²⁴⁹ Section 49(1) of the Constitution of the Republic of Malawi.

²⁵⁰ Act No. 4 of 2001. There is still ‘controversy’ about the propriety of the abolition of the senate. Aside from the merits or demerits of a two-chambered parliament there is the question of the constitutional competence of the National Assembly to dissolve an organ established by the Constitution especially in the light of section 45(8) – M Chigawa “The Senate as the second chamber of parliament in Malawi: Its relevance, composition and powers” Paper for Presentation at the Malawi Law Journal Launch Conference 16-17 July 2008, Blantyre, Malawi. Section 45(8) provides; ‘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.’ Although a number of reasons were cited in support of the senate’s repeal, the dominant reason was stated to be the lack of funds to manage a second chamber of the National Assembly.

²⁵¹ Section 48(1) of the Constitution of the Republic of Malawi.

²⁵² Section 8 of the Constitution of the Republic of Malawi.

²⁵³ Section 76(2) of the Constitution of the Republic of Malawi.

²⁵⁴ Section 65 of the Constitution of the Republic of Malawi. This provision has been the subject of extensive litigation in the country. For a scholarly expose of the issues underlying crossing the floor in Malawian constitutional law, see M Chigawa “The concept of crossing the floor under Malawian constitutional law” (2008) 2 (2) *Malawi Law Journal* 185.

²⁵⁵ For example, although the President has power to prorogue parliament, this is a power that must be exercised in consultation with the Speaker of the National Assembly – section 59 of the Constitution of the Republic of Malawi.

constitutional supremacy in place of parliamentary supremacy which had held sway for almost 30 years.²⁵⁶

In its relations with the other branches of government, two examples may well illustrate how parliament has conducted itself. The first major incident occurred in 2001 when the majority of the MPs signed a petition for the removal of three High Court judges allegedly on the grounds of misconduct and incompetence.²⁵⁷ Close scrutiny, however, revealed that the move to impeach the judges was actually instigated by politicians who had not taken favourably to some of the pronouncements made by the judges concerned.²⁵⁸ After much local and international condemnation the purported impeachment was abandoned. Secondly, one may also wish to reflect on the generally acrimonious relationship between parliament and the executive between 2004 and 2009. As a result of political differences between the President and the majority of the MPs, parliament routinely refused to approve nominations forwarded by the President for crucial public positions.²⁵⁹ This effectively hamstrung the operations of several crucial government departments during the first term of Bingu wa Mutharika.²⁶⁰

The above illustrates several worrying trends. In the first place, the move to impeach judges on what were plainly flimsy grounds was a direct attempt by the legislature to interfere with the operations of the judiciary. In spite of the fact that the petition was withdrawn, by showing its hand, the legislature demonstrated its propensity for interfering with the operations of

²⁵⁶ Malawi Law Commission “The character of the legislature under the Constitution of the Republic of Malawi 1994” Constitutional Review Programme Discussion Paper No. 2, 1.

²⁵⁷ N Patel & others *Consolidating democratic governance in Southern Africa: Malawi* (2006) EISA Research Report No. 33, 45.

²⁵⁸ Under section 119 of the Constitution, the President may remove from office any judge but he must consult the Judicial Service Commission and a motion for the particular judge’s removal must have been debated and passed by a majority vote in parliament.

²⁵⁹ The Constitution requires that the President must seek parliamentary approval for appointments to several senior public positions; for example, the Auditor General (section 184(3)) and the Inspector General of Police (section 154(2)). It is clear that the rejections had nothing to do with the competence of the persons concerned – See B Chinsinga “Malawi’s democracy project at the cross roads” in *Towards the consolidation of Malawi’s democracy* (2008) 7 12 Konrad Adenauer Occasional Paper No. 11.

²⁶⁰ The crux of the disagreement between the DPP and the UDF stemmed from President Bingu wa Mutharika’s decision to resign from the UDF which sponsored his presidential nomination and form his own party, the DPP. The result was that the President and his DPP had a perpetual parliamentary minority during the President’s first term in office and had to rely on alliances to pass legislation through parliament.

another branch of government in an improper way. In the second place, the above also illustrates the incapability of parliament, thus far, to make a distinction between national issues and party issues in spite of the explicit direction in section 8 of the Constitution. The failure by parliament to approve most appointments by Bingu wa Mutharika to public office was largely a spill over of the dispute between the UDF and the DPP as a result of Bingu wa Mutharika's resignation from the UDF. This manifests a failure by parliament to prioritise the interests of the entire nation in its deliberations.

An area in which the role of parliament has remained prominent in relation to governance and constitutionalism relates to the manner in which it has discharged its power to amend the Constitution. Admittedly, the Constitution has conferred on parliament powers to amend it when appropriate conditions are met.²⁶¹ Aside from the fact that the Constitution of Malawi has been amended on numerous occasions,²⁶² it is worrying to note that most of the amendments seem to have been motivated by political expedience rather than principled necessity.²⁶³ As Chirwa posits, the number of amendments to the Constitution has been such that the current text is significantly different from the one that was adopted in 1994.²⁶⁴ The frequency of the constitutional amendments confirms the two points that were earlier highlighted. Firstly, the spate of amendments confirms that the Constitution was indeed adopted in too short a period of time to enable a sufficient agreement by the populace on its terms. Secondly, the flurry of amendments also point to a more fundamental problem and this is the absence of a commitment to constitutionalism in the country. Clearly, a commitment to constitutionalism would have allowed for a proper and meaningful renegotiation of some of the terms of the Constitution where necessary as contrasted to

²⁶¹ The powers of amendment are outlined in Chapter XXI of the Constitution. The Constitution has entrenched some of its provisions making them more difficult to amend. Chapter XXI creates two broad avenues for amendment; for the entrenched provisions, parliament can only amend these provisions if the proposed amendment has been put to a referendum and the majority of those voting have approved the amendment – section 196. For the non-entrenched provisions, parliament can effect an amendment if the bill proposing the amendment is passed by two-thirds of the total number of MPs entitled to vote – section 197.

²⁶² For an early audit on constitutional amendments in Malawi, see W Kita & C Chiphwanya “Constitutional amendment or disbandment” (2003) 7 (1) *UNIMA Students Law Journal* 19..

²⁶³ See A Kamanga “Amendments to the Constitution since 18th May 1994” Constitutional Review Conference 28-31 March 2006, Capital Hotel Lilongwe and Malawi Law Commission “Amendments to the Constitution and preservation of its sanctity” Constitutional Review Programme Discussion Paper No. 7.

²⁶⁴ D Chirwa (note 86 above) 321-322.

what has been happening so far.²⁶⁵ The lack of commitment to constitutionalism, this study argues, is, in part, related to the lack of autochthony of the liberal democratic model in Malawi. The lack of autochthony, it is further argued, deprives the Constitution of legitimacy in the perception of most people. In Chapters Four and Five, this study thus argues for a re-conceptualisation of constitutionalism and governance to adequately factor in traditional norms and institutions. The expectation is that such a blended framework will generate greater fidelity by reason of its identifying with values that are indigenous to Malawi and in some cases Africa generally.

By way of illustration, one of the most ‘contested’ amendments that parliament has effected in Malawi pertains to the repeal of section 64 of the Constitution.²⁶⁶ Section 64 had made provision for constituents to recall parliamentarians that they felt were not performing their duties satisfactorily. The National Constitutional Conference of February 1995 recommended the retention of the provision in the Constitution. In spite of this clear recommendation from the people, the repeal of section 64 was amongst the first amendments that the democratically elected parliament effected. Aside from the fact that the amendment was not preceded by consultation with the citizenry, the repeal significantly watered down the accountability of MPs and also diluted their role in representing their constituents.²⁶⁷

In relation to the manner in which parliament has exercised its powers to amend the Constitution, it is important to note that a constitution which is not amended willy-nilly has the potential to generate greater public confidence in the entire constitutional set up.²⁶⁸ Public confidence in a constitution allows the constitution to be used as a legitimating tool for the actions of a cross-section of public functionaries. Parliament’s conduct has thus denied the assumption of centrality by the Constitution in relation to validation of conduct in the public realm. Frequent amendments have also, arguably, detracted from the sanctity of the Constitution as the basic law in the country. Parliament has, seemingly, forgotten the

²⁶⁵ As above 321. Most amendments have been made without sufficient public consultation and in some cases in the face of massive public criticism. Examples of such amendments include the amendment to section 80 creating the office of the second vice president and the amendment abolishing the senate.

²⁶⁶ Repealed by Act No. 6 of 1995.

²⁶⁷ R Kapindu “Malawi: Legal system and research resources” <<http://www.nyulawglobal.org/globalex/Malawi.htm>> (Accessed 20 April 2009) and FE Kanyongolo (note 226 above) 6.

²⁶⁸ B Dulani “A comparative study of the executive under the Constitution and five other constitutions” Constitutional Review Conference 28-31 March 2006, Lilongwe, Malawi, 4.

imperative of preserving the sanctity of the Constitution.²⁶⁹ The inescapable conclusion here is that parliament's, and by derivation Malawi's, commitment to constitutionalism and good governance remains feeble.

3.4.3.3 The judiciary

Section 9 of the Constitution provides that the judiciary has the responsibility of interpreting, protecting and enforcing the Constitution and all laws in an independent and impartial manner. Chapter IX of the Constitution provides the parameters within which the judiciary must operate. One notes that the Constitution pays considerable attention to the judiciary and this, arguably, is meant to reverse and banish the subversion of judicial independence that prevailed during Dr Banda's era.²⁷⁰ As earlier highlighted,²⁷¹ during Dr Banda's rule the judiciary was subservient to the executive and the powers of the High Court were effectively negated by the creation of the traditional courts. The Constitution, aside from guaranteeing the independence of all persons presiding in the courts, also prohibits the establishment of courts of concurrent or superior jurisdiction to the High Court.²⁷² The Chief Justice is appointed by the President subject to confirmation by two thirds of the MPs present and voting.²⁷³ All other judges are appointed by the President on the recommendation of the Judicial Service Commission.²⁷⁴ Remuneration of all judicial offices is determined not by the executive but by parliament and it cannot be reduced during a period of service without the consent of the person concerned.²⁷⁵

²⁶⁹ 'It is imperative to preserve the sanctity of constitutions. The solemnity with which constitutions are adopted and expressed makes this imperative' - Malawi Law Commission (note 263 above) 12.

²⁷⁰ AP Mutharika (note 203 above) 215.

²⁷¹ Under part 3.4.2 above.

²⁷² Section 103 of the Constitution of the Republic of Malawi.

²⁷³ Section 111(1) of the Constitution of the Republic of Malawi.

²⁷⁴ Section 111(2) of the Constitution of the Republic of Malawi. The Judicial Service Commission is composed of the Chief Justice, the Chairman of the Civil Service Commission or his delegate, a Justice of Appeal or Judge designated by the President acting in consultation with the Chief Justice and a legal practitioner or magistrate designated by the President acting in consultation with the Chief Justice – section 117 of the Constitution of the Republic of Malawi.

²⁷⁵ Section 114 of the Constitution of the Republic of Malawi. See also *The State and The President of the Republic of Malawi, Minister of Finance, Secretary to the Treasury Ex Parte Malawi Law Society Constitutional Cause No. 6 of 2006* (Being Misc. Civil Cause No. 165 of 2006).

In stark contrast to what obtained during Dr Banda's regime, the judiciary has been very active in the period after the transition to multi-partyism.²⁷⁶ It has delivered numerous judgments affirming and vindicating the rights guaranteed in the Constitution. Perhaps to the judiciary's chagrin, in the new dispensation the judiciary has also emerged as a primary locus of political activity routinely being seised of cases with overt political overtones.²⁷⁷ For example, in the aftermath of the 1999 Parliamentary and Presidential Elections opposition politicians approached the courts to nullify the results.²⁷⁸ Further, on numerous occasions Members of Parliament have had to ask the courts to reinstate them in parliament on the occasion of their seats being declared vacant by the Speaker of the National Assembly under the crossing the floor provision.²⁷⁹ Even the executive has had to make referrals on the construction of what were essentially political questions.²⁸⁰

In spite of everything, the judiciary has commendably discharged its constitutional mandate.²⁸¹ Unsurprisingly, some of the greatest challenges to the judiciary have emerged

²⁷⁶ D Chirwa (note 86 above) 330.

²⁷⁷ As to the factors that often lead to 'political' questions being increasingly resolved through judicial adjudication, see RU Yepes "The judicialisation of politics in Colombia: Cases, merits and risks" (2007) 6 (4) *SUR International Journal on Human Rights* 49. See, also, FE Kanyongolo (note 16 above) 205-208.

²⁷⁸ *Chakuamba and others v Attorney General and others* Civil Cause No. 1B of 1999, heard on appeal as *Chakuamba and others v Attorney General and others* MSCA Civil Appeal No. 20 of 2000.

²⁷⁹ One of the first cases was *Fred Nseula v Attorney General and Malawi Congress Party* Civil Cause No. 63 of 1996 (High Court), heard on appeal as *Nseula v Attorney General and Malawi Congress Party* MSCA Civil Appeal No. 32 of 1997. Others include *Mpinganjira and others v Speaker of the National Assembly and Attorney General* Misc. Civil Cause No. 3140 of 2001.

²⁸⁰ For example, *In the matter of a presidential reference of a dispute of a constitutional nature under section 89(1)(h) of the Constitution and in the matter of section 65 of the Constitution and in the matter of the question of the crossing of the floor by members of the National Assembly*, Presidential Reference No. 2 of 2005, Heard on appeal in the Malawi Supreme Court of Appeal as Presidential reference Appeal No. 44 of 2006. One notes that at the core of these referrals was the very survival of the DPP regime in office. Since the DPP did not contest the 2004 General Elections it was governing with the aid of Members of Parliament that has 'defected' from other parties. If the Speaker of the National Assembly had declared the seats of the Members of Parliament who supported the DPP vacant, under section 65 of the Constitution, the DPP regime, already facing a hostile opposition in parliament, would have collapsed.

²⁸¹ For an early treatise paying homage to the increasingly vibrant role of the judiciary, see M Nzunda "The quickening of judicial control of administrative action in Malawi 1992-1994" in KM Phiri & KR Ross (note 41 above) 283.

in its relationship with the executive and the legislature. The attempt to impeach some judges of the High Court, earlier discussed, remains one of the most blatant ways in which the legislature attempted to interfere with the judiciary. On another occasion, the Speaker of the National Assembly publicly questioned the competence and integrity of a High Court judge after he had made a ruling that did not favour the National Assembly.²⁸² In relation to the judiciary's relations with the executive, the powers that section 119(7) of the Constitution confers on the President are a constant source of worry for judicial independence. Under this provision the President may reassign a serving judge to any other position in the civil service.²⁸³ Although such a reassignment can only be made with the consent of the person concerned, it is arguable that an approach by the President to a particular judge may put the judge under unnecessary pressure to accept the appointment.²⁸⁴

In spite of the challenges, the judiciary's assumption of its place in the country's constitutional structure is a commendable development. This entails that the judiciary is adequately poised to participate in the entrenchment of both good governance and constitutionalism. Only a judiciary that properly appreciates its role in the constitutional structure can, when called upon, enforce the standards and principles on which a constitution is founded.

3.4.4 The approach to public resource management

Public resources are pivotal to a country's development and the facilitation of well-being because they determine a society's capacity for the attainment of social justice and human rights goals.²⁸⁵ The centrality of public resources to a country's development entails that it is the availability of a proper calibre of managers of public resources and their regulation that is crucial to the attainment of development goals than the mere availability of the resources themselves.²⁸⁶ It is, therefore, imperative that a proper normative framework should be devised and recognised that directs that managers of public resources prioritise the

²⁸² WC Chirwa & others (note 20 above) 23.

²⁸³ For example, President Bingu wa Mutharika reassigned a sitting judge of the High Court, Justice Jane Ansah, to the position of Attorney General in July 2006.

²⁸⁴ N Patel & others (note 257 above) 44.

²⁸⁵ G Kamchedzera "The law and the disregard of the interests of the people of Malawi in the management of public resources" Paper presented at a symposium on the law and the recovery of benefits unjustly accruing to public functionaries: solutions for Malawi, Blantyre, Malawi, 29 December 2004.

²⁸⁶ Resources as understood in this study are not confined to monetary resources but extend to human and organisational resources as well.

citizenry's interests in their actions. It is a truism that a society's well-being is largely predicated on the manner in which the management of public resources is regulated.²⁸⁷

Several constitutional provisions provide the basis on which public resources, in all their diverse forms, must be managed in Malawi.²⁸⁸ The constitutional provisions are supported by several pieces of legislation that are specifically aimed at enhancing accountability and integrity in the management of public resources. The Constitution contains various guidelines directed at public functionaries detailing the manner in which they must exercise their powers. At the outset, the Constitution directs that all legal and political authority must be exercised to serve and promote the interests of the people of Malawi.²⁸⁹ Further, such authority can only be exercised to the extent of its lawful authority and only in accordance with the responsibilities that public functionaries owe the people of Malawi.²⁹⁰ Additionally, an open, accountable and transparent government and informed democratic choice are stipulated as the basis on which the continued exercise of state authority is premised.²⁹¹ Among the principal pieces of legislation aimed at contributing to an efficacious management of public resources in Malawi are the Public Finance Management Act,²⁹² Public Procurement Act,²⁹³ Public Audit Act²⁹⁴ and the Corrupt Practices Act.²⁹⁵

²⁸⁷ MJ Nkhata *The social trust and leadership roles: Revitalising duty bearer accountability in the protection of social and economic rights in Malawi and Uganda* LLM Thesis: University of Pretoria (2005) 4. <http://repository.up.ac.za/dspace/bitstream/2263/1153/1/nkhata_mw_1.pdf> (Accessed 21 September 2009).

²⁸⁸ For example, Chapter XVIII of the Constitution detailedly outlines how public funds must be managed.

²⁸⁹ Section 12(i) of the Constitution of the Republic of Malawi.

²⁹⁰ Section 12(ii) of the Constitution of the Republic of Malawi.

²⁹¹ Section 12(iii) of the Constitution of the Republic of Malawi.

²⁹² Act No. 7 of 2003.

²⁹³ Act No. 8 of 2003. The Office of the Director of Public Procurement is established under section 4 of this Act.

²⁹⁴ Act No. 6 of 2003.

²⁹⁵ Chapter 7:04 Laws of Malawi. The Anti-Corruption Bureau is established under section 4 of this Act.

In the post-1994 period, corruption has remained the greatest challenge to public resource management and in the main to governance and constitutionalism in Malawi.²⁹⁶ Although there is evidence of corrupt practices during Dr Banda's rule, it seems to be the case that during Bakili Muluzi's presidency corruption was 'democratised' to sustain the huge patronage network that the regime had spawned.²⁹⁷ Generally, therefore, there was an increase in the number of incidents in which public functionaries routinely but corruptly utilised public resources to serve their personal needs.²⁹⁸ Widespread corruption and general abuse of public offices have thus contributed to a steady decline of public confidence in the government generally.²⁹⁹

Perhaps more worrying has been the increasing incidence of political corruption in the post-1994 period.³⁰⁰ Political corruption has largely been manifested by the use of public resources to serve the interests of certain societal groups to the exclusion of other similarly placed groups. Prime examples in this connection have been the 'buying' of opposition parliamentarians in order to allow the government of the day to have the requisite majority in parliament.³⁰¹ This has also been extended to courting traditional leaders to support particular parties. On the whole, a culture of political corruption has steadily infiltrated Malawian society to the extent that some politicians, arguably, believe they can buy the public mandate and vote.³⁰² This, as may be obvious, completely negates democratic accountability. For how can a politician who is convinced his wealth brought him into office realise that he has a duty to be accountable to his constituents? Corruption has thus steadily eaten away at the foundations on which democratic governance and constitutionalism can be built. Needless to add that corruption diverts resources that would otherwise be used to support better governance and constitutionalism. It also further marginalises the poor and

²⁹⁶ This is not to suggest that corruption is the only hindrance to constitutionalism and governance in Malawi but merely that it is one of the biggest hindrances. Corruption is thus used merely as an example.

²⁹⁷ D Booth & others (note 116 above) 13.

²⁹⁸ G Kamchedzera & C Banda "We are people too': The right to development, the quality of rural life, and the performance of legislative duties during Malawi's first five years of multiparty politics" 35 Research Dissemination Seminar Number Law/2001-2002/001, <<http://www.sarpn.org.za/documents/d0001966/index.php>> (Accessed 20 May 2008).

²⁹⁹ WC Chirwa (note 20 above) 76.

³⁰⁰ Transparency International *Country study report: Malawi 2004* (2004) 17-18.

³⁰¹ As above, for further examples.

³⁰² N Khembo "The multiparty promise betrayed: The failure of neo-liberalism in Malawi" (2004) 29 (2) *Africa Development* 80 96.

entrenches their deprivation since resources meant for their well-being invariably do not reach them. Public resources thus rarely get used for their designated purposes.

In Malawi, some forms of corruption involve pure preying on public resources by public functionaries and manifest an outright betrayal of public trust. Even with the existence of a specialised agency, the Anti Corruption Bureau,³⁰³ to deal with cases of corruption it has been difficult to charge and try most high ranking politicians for corruption.³⁰⁴ The few cases that have been tried, however, reveal the magnitude and proliferation of the problem. For example, in one case a high-ranking official of the UDF (Mr John Chikakwiya) was charged with theft and abuse of public funds when he was in charge of the Blantyre City Assembly as a Mayor. On 12 December 2005, the Supreme Court of Appeal upheld his conviction, relating to abuse of office and imposed upon him a sentence of nine months imprisonment.³⁰⁵ This was an affirmation of the need for accountability and financial probity on the part of public officials. In another case, Mr Yusuf Mwawa, a former Minister of Education was on 3 February 2006 found guilty of misusing funds from the Special Clients Account in the Ministry of Education.³⁰⁶ He was found to have used this money to pay for a private wedding reception at a hotel in Blantyre. More recently, another former Minister of Education and Speaker of the National Assembly, Mr Sam Mpasu, was also convicted and sentenced to a long jail term for his role in corruptly breaching procurement procedures when he was Minister.³⁰⁷

While the above prosecutions should offer hope in the fight against corruption, it is important to be cautiously optimistic as all regimes after 1994 have held very ambivalent attitudes on the eradication of corruption. The ambivalent attitude to combating corruption is best illustrated by the manner in which Mr Sam Mpasu's case was prosecuted. While the allegations of corruption surfaced as early as 1994, his trial was only commenced around 2005 and concluded in 2008.³⁰⁸ It is arguable that the reason why the matter lay dormant for the ten years of Bakili Muluzi's rule was simply because of Mr Mpasu's close personal

³⁰³ Established under section 4 of the Corrupt Practices Act, Chapter 7:04 of the Laws of Malawi.

³⁰⁴ Transparency International (note 300 above).

³⁰⁵ See, *Daily Times*, 2 January 2006, at p. 7.

³⁰⁶ See, *Malawi News*, 4-10 February 2006, at p. 1.

³⁰⁷ *The Republic v Sam Mpasu*, Lilongwe Chief Resident Magistrate's Court.

³⁰⁸ *The State v Sam Mpasu* Lilongwe Chief Resident Magistrate's Court Criminal Case No.17 of 2005 (Sentencing ruling) Delivered on the 8th day of April 2008.

relationship with Bakili Muluzi. Only a change of leadership finally managed to bring some movement on the matter. This palpable lack of political will in pursuing matters of corruption continues to haunt the work of the Anti-Corruption Bureau to this date.

3.4.5 Accountability of public functionaries and the empowerment of the citizenry

Ultimately the cliché that ‘power resides with the people’ assumes concrete meaning where the holders of public power properly account for their exercise of the power to their constituents. Importantly though, only an enlightened and empowered citizenry can demand, where appropriate, accountability from public functionaries. Proper accountability thus goes hand in hand with citizen empowerment.

Again, one must look to the Constitution to appreciate the accountability framework that public functionaries are expected to conform to in Malawi. The basic premise that cuts across the Constitution is that public power is conferred on trust by the citizenry and it must be exercised solely to protect and promote the interests of the citizenry.³⁰⁹ The corollary of this constitutional stipulation is that public functionaries must be accountable for the exercise of all public power. At this level, the aim of the law is to ensure that public officials and public institutions continue to command and enjoy the trust and confidence of the people of Malawi.³¹⁰ It is also the clear aim of the law to ensure that public officials should not use their positions for personal gain. They should, as much as possible avoid any conflict of interests between their private and official undertakings. The government is also enjoined to adopt policies that would promote accountability and transparency and thereby strengthening public confidence in public institutions.³¹¹

Noticeably, the dominant accountability mechanism in most liberal democracies remains elections. The underlying presupposition is that through regular and periodic elections the citizenry will have an opportunity to express their confidence or lack thereof in the various public functionaries. Thus, supposedly, the electorate will not return candidates in whom they have lost their confidence replacing them with new ones. This assertion, however, is fraught with dangerous assumptions. It, for example, presumes the presence of a sufficiently empowered and enlightened electorate that would uniformly recognise breaches of a

³⁰⁹ Section 12 and Section 13(o) of the Constitution of the Republic of Malawi.

³¹⁰ M Chigawa (note 28 above).

³¹¹ Section 13(o) of the Constitution of the Republic of Malawi.

constitution and unite in the effort to remove particular public functionaries from office.³¹² This is hardly ever the case and especially in most Third World countries.³¹³ Notably, the engendering of citizen empowerment is often left to civil society organisations. Needless to state that diverse factors necessarily affect the rate at which empowerment occurs in a particular society.³¹⁴ Clearly, while elections remain a powerful accountability and empowerment mechanism, one must be mindful of the limitations that elections have in enhancing accountability and empowerment of the citizenry.³¹⁵ As reiterated by various scholars, the holding of regular multi-party elections by itself is not a sufficient indicator of democratisation and good governance.³¹⁶

Accountability of public functionaries and citizen empowerment are matters on which Malawi has performed discouragingly. This can be illustrated by focussing on three areas, by way of illustration. Firstly, and in relation to citizen empowerment, one may get the initial impression that the increased level of civil society activity in the post-1994 period is evidence of higher citizen empowerment in Malawi. Concededly, there has been a proliferation of civil society organisations with the opening up of political space subsequent to the 1993 Referendum. Notably, however, while civil society organisations were very instrumental during the transition, this initial momentum was soon lost with the advent of pluralism.³¹⁷ Currently, civil

³¹² This presumption also ignores the influence that local conditionalities may have on election. In Africa, for example, ethnicity and patrimonialism have proven crucial in determining electoral outcomes.

³¹³ As eloquently put by Tribe 'Power may be accountable to the people and to the Constitution both by voting out of office those who abuse their power and by punishing them for specific offences. The first of these sanctions, enforced directly by the voters at election time, obviously provides only a limited check on executive abuses ... Moreover there are the intrinsic limitations that an electoral check has no impact on a Chief Executive's second term ... In any event, the electorate may choose not to punish office holders who commit offences against groups or persons disfavoured by a majority of the electorate itself' – LH Tribe *American constitutional law* (1988) 268.

³¹⁴ The level of education and general political awareness are obvious crucial factors here.

³¹⁵ It is also quite poignant to note that elections as an accountability mechanism only affect elected public functionaries and do not affect the appointed functionaries.

³¹⁶ This is commonly referred to as the electoral fallacy, see ES Herron "The electoral fallacy revisited: A comparative analysis of election quality" <http://www.allacademic.com/meta/p_mla_apa_research_citation/1/9/9/3/9/pages199394/p199394-2.php> (Accessed 12 November 2009).

³¹⁷ For a deeper interrogation see WC Chirwa "Civil society in Malawi's democratic transition" in M Ott & others (eds) (note 16 above) 87. Some of the reasons for the lack of dynamism among civil society have been the co-opting of civil society leaders into government, lack of

society by and large remains peripherally involved in the democratisation process. The irony here is that while civil society in Malawi remains ill-positioned to help in both citizen empowerment and demanding accountability from public functionaries, it remains the only entity that can, if it actualises its potential, meaningfully help in both empowerment and accountability.³¹⁸

Secondly, although the Constitution requires that the President and cabinet ministers to declare their assets within three months of being elected or appointed, actual practice has shown a flagrant disregard of this stipulation.³¹⁹ The situation has been rendered more dismal by the fact that the law does not prescribe any penalties for failure to declare assets. More fundamental though is the erosion of accountability on the part of public functionaries that the current situation engenders. Without getting a clear idea of the wealth of senior public functionaries before they assume office it is practically impossible to accurately determine if any unjust enrichment has occurred in the course of them holding a particular office.

Thirdly, and arguably the biggest dent on accountability and empowerment in Malawi was the repeal of section 64 of the Constitution which, as earlier stated, provided for the recall of parliamentarians by their constituents. Needless to state that section 64 remained a potent tool in the hands of the citizenry in as far as ensuring accountability of their parliamentarians was concerned.³²⁰ What is more worrying is the discernible disinclination on the part of parliament to re-enact section 64 in spite of clear popular agitation in favour of the

financial support and the lack of experience and amateurism on the part of some civil society leaders.

³¹⁸ For, arguably, the most incisive analysis on the role of civil society organisations in the empowerment of the populace in Malawi, see H Englund *Prisoners of freedom: Human rights and the African poor* (2006). Englund's analysis offers some illuminating insights into the hollowness of civic education as conducted by most civil society organisations in Malawi.

³¹⁹ Section 88A(1) of the Constitution. Additionally section 213 of the Constitution also requires senior public officers to declare their assets as well. Section 213, however, requires parliament to draw up a list of senior grade public officers that are liable to asset disclosure. Parliament has yet to come up with this list.

³²⁰ Kanyongolo posits that "The accountability of the government to the people through parliament is also limited by the constitution which does not empower constituents to recall a member of parliament during his or her term of office regardless of whether he or she ceased to command their trust and confidence as a representative." – FE Kanyongolo (note 226 above) 5.

provision's reintroduction.³²¹ This manifests a lack of willingness by parliamentarians to subject themselves to accountability mechanisms.

The above are obvious signals of very worrying developments in Malawi in as far as governance and constitutionalism are concerned. This entails that in spite of the transition to multi-partyism there has been little attempt to properly institutionalise accountability and establish meaningful participation mechanisms. In a relatively young democracy, the floundering of civil society does not augur well with the need for consolidation of democracy in the country. Civil society remains an integral component of any democratisation process³²² and this is even particularly true in Malawi with a history of civil society repression. The mobilisation of the citizenry, so essential in the democratisation process, cannot be achieved without a vibrant civil society. It is also clear that the values of accountability and transparency have yet to be internalised by both the public and private sector in Malawi.³²³ As a survey by scholars from the University of Malawi established, political and bureaucratic functionaries in Malawi do not account to their constituents.³²⁴ It has also been established that 'the principles of separation of powers and procedures to ensure governmental accountability are yet to become firmly entrenched and institutions of government do not adhere strictly to set norms and procedures in the conduct of their affairs.'³²⁵ It is in relation to the entrenchment of these principles, not just among public functionaries but also the citizenry, generally, that civil society acquires heightened importance. It is incumbent on civil society to assist in the generation of the necessary degree of awareness among the populace to allow them meaningfully participate in the governance of their country.

³²¹ The Malawi Law Commission has received numerous submissions calling for the re-enactment of section 64. The only notable opposition against the re-enactment seems to be coming from parliamentarians themselves – Malawi Law Commission *Report of the Law Commission on the review of the Constitution* (2007) 47-50 and Malawi Law Commission *Report of the proceedings of the second national constitution conference* 17-19 April 2007 21.

³²² JR Minnis "Prospects and problems for civil society in Malawi" in KM Phiri & KR Ross (eds) (note 41 above) 127 129-130.

³²³ Transparency International (note 300 above) 24.

³²⁴ G Kamchedzera & C Banda (note 298 above) 3.

³²⁵ N Patel & H Meinhardt *Malawi's process of democratic transition: An analysis of political developments between 1990 and 2003* Konrad Adenauer Occasional Papers, November 2003 22.

3.5 Conclusion

This Chapter has presented and analysed the trends that have emerged in Malawi in as far as governance and constitutionalism are concerned – beginning with the pre-colonial period, of which very little is recorded through the colonial period to the present. The discussion in this Chapter has demonstrated the existence of some important continuities in the regime structures between the colonial and post-colonial periods in Malawi. The most important continuity in this regard is the manner in which the state, in the immediate post-colonial period, ‘quickly’ entrenched the despotic attributes that had characterised the colonial state. The entrenchment of despotism in Malawi created an environment in which governance and constitutionalism were not prioritised. Governance and constitutionalism were sacrificed in order to ensure the survival of the regime in power. Notably, the state in Malawi still retains some of the attributes that characterised the post-independent state even though the adoption of the Constitution was motivated by a desire to break with that past.

Significant changes in governance and constitutionalism occurred in Malawi as a result of the transition to multi-partyism in 1994. These were also discussed in this Chapter. Principal among the changes during the transition was the adoption of a new Constitution spelling out a new framework for governance and constitutionalism. With regard to the new Constitution, this Chapter highlighted several shortfalls with the processes that culminated in the adoption of the Constitution. Aside from the shortfalls in the processes, the Chapter also highlighted some deficiencies in the final product – the Constitution. It was also argued that the deficiencies in both the processes preceding the adoption of the Constitution and in the Constitution itself have had a strong influence on governance and constitutionalism in the country.

In the later part of the Chapter an attempt was made to decipher how successive regimes, after 1994, have performed when compared to the stipulations in the Constitution. The emerging picture, while inspiring hope in some respects, remains mixed and outright discouraging in other respects. The reasons for some of the failures of governance and constitutionalism even under the 1994 Constitution were also discussed. The Chapter argued that these failures stem directly from the ‘flawed’ process for the adoption of the Constitution which processes bequeathed a ‘defective’ Constitution on the nation – the Constitution, it must be conceded, is only part of the problem. These failures, it is argued, centrally beg the question whether or not it is proper to think of alternatives in terms of both governance and constitutionalism. In Chapter Four the study interrogates the question of alternatives for governance and constitutionalism in Malawi. Noting that the current

Constitution is heavily influenced by liberal democratic theory, Chapter Four considers the case for an alternative paradigm for constitutionalism and governance in Malawi. By dwelling on some of the lessons in governance and constitutionalism that have emerged especially since 1994, Chapter Four attempts to explain how an alternative paradigm can be constructed and on what basis it is to be founded.