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## Parliamentary-Executive Relations in Malawi 1994–2004

Nandini Patel  
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**WP 2006: 10**



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Price: NOK 50

ISSN 0805-505X

ISBN 82-8062-151-2

This report is also available at:

[www.cmi.no/publications](http://www.cmi.no/publications)

### **Indexing terms**

Malawi

Parliament

Parliamentary-executive relations

Politics

### **Project title**

The Institutional Context of the 2004 Elections in Malawi

### **Project number**

23075/23055

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## Introduction

This article addresses the relationship between the legislative and executive branches of government in Malawi during the multi-party era from 1994 until 2004. The argument is threefold. First, the presidential nature of Malawi's political regime assigns parliament to a secondary role. Second, the general framework of parliamentary-executive relations laid down in the constitution gives scope for accentuating this subordinate position through iterative practices. Third, the persistence of personalised patronage in Malawian politics leads to the further reinforcement of parliamentary subservience where political principles and positions are sacrificed on the altar of venality. A perception has spread that parliament is a mere pawn in the political game or a rubber stamp of the executive's decisions. This article will seek to adduce empirical evidence to substantiate this argument.

## The nature of the Malawian political regime

We define a political regime as a set of rules and procedures for conducting politics – also referred to as the rules of the political game. They largely determine the distribution of power and prescribe who may engage in politics and how. These rules are formally codified in constitutions and other legislation but they may also be informal, embodying customs and habits to which the political players have become attuned and accepted through custom over the years (Bratton and van de Walle 1997:9). We consider the role of Malawi's parliament in the context of the country's political regime which we characterise as essentially presidential as distinct from a parliamentary one, although many variants and hybrids exist (Elgie 1998). In the latter regime, parliament is sovereign, which means that the head of government (the prime minister) and his/her cabinet is accountable to the majority in parliament and may be ousted by means of a simple majority vote of no confidence. In a parliamentary regime the executive branch comprises the head of state (a monarch or a president) with limited constitutional powers *and* the head of government (the prime minister) with executive powers.

By contrast, a presidential system – e.g. that of Malawi – confers extensive powers upon the incumbent of the office of president. The functions of head of state and government are usually vested in one and the same person. In some presidential systems, however, the position of prime minister does exist but without executive powers. Rather, in such dispensations the prime minister is rarely more than the leader of government business in parliament. Between elections a president can only be removed from office through the application of impeachment procedures which normally requires a two-thirds majority in parliament. Whereas heads of government (premiers) in parliamentary systems emerge from parliament, presidents are normally elected directly by the electorate or indirectly through an electoral college, and, as a rule, their tenure limited to a fixed number of terms. A president is at liberty to appoint his/her ministers and dismiss them at will without interference from the national assembly.

In contradistinction to *representative* democratic systems Guillermo O'Donnell (1994:59–61) has dubbed some such presidential systems *delegative* democracies, in which presidents winning elections are delegated authority to govern as they see fit, constrained only by the hard facts of existing power relations and a constitutionally limited term of office. Such presidents perceive themselves as the main custodians and definers of the nation's interests and typically project themselves as being above political parties and organised interests; parliament is just a nuisance. It is a singularly majoritarian system in which the winner-takes-all notion prevails. Hence, election

contests are fierce, emotionally charged, high-stakes events. Of course, a measure of delegation is present in all democratic systems of representation. But it is normally governed by stricter procedures of accountability than those found in delegative democracies as construed by O'Donnell.

Presidential systems are not inherently undemocratic or non-democratic. In the aftermath of independence, however, African presidential systems have tended to move in an authoritarian direction owing to the lack of horizontal accountability mechanisms that characterise parliamentary systems. Not only were wide powers conferred onto the presidency by the constitution at the expense of the national assembly, often justified by the need for decisive and rapid development that parliamentarianism was presumed to thwart. The formal constitutional provisions also combined with the informal neo-patrimonialism of African societies to reinforce the concentration of power in the presidency. The result was personalised rule by 'big men' whose position was often underpinned by a personality cult and systematic clientelism. Surrounding the president was a small ruling elite drawing on state resources to sustain its network of clients. Participation was replaced with rule by decree.

In Africa, an overwhelming majority of the countries that went through a democratic transition in the 1990s adopted a presidential system of governance (van de Walle 2003:309). As a result, the parliamentary functions have attracted less attention. Malawi was among the many African states that opted for presidentialism as its political regime after the transition from one-party authoritarianism to multi-party democracy in 1993. This choice was made despite three decades of experience with presidential authoritarianism under Kamuzu Banda, who in 1972 expressed its quintessence of personalised omnipotence in these words: "Nothing is not my business in this country: everything is my business, everything. The state of education, the state of the economy, the state of our agriculture, the state of our transport, everything is my business." (quoted in Bratton and van de Walle 1997:63).

The presidentialism of the Banda era is not, of course, the same as the presidentialism prescribed by the current constitution of Malawi. First, the new system is based on multi-partyism which allows for multiple presidential candidates to contest in free and fair elections. Second, a number of new extra-parliamentary institutions of horizontal accountability (ombudsman, human rights commission, etc.) has been introduced to restrain the way in which the president may wield power (Government of Malawi 2002). Third, there is greater vigilance among the populace and civil society since the democratic opening. Fourth, the mass media are better placed to monitor and expose the activities of the executive. Even so, the political regime remains a presidential one, in which the role of the national assembly is decidedly relegated to second spot. Moreover, apart from the formal features of the present political regime in Malawi, it is warranted to raise the question whether some of the informal attributes of Banda's authoritarian brand of presidentialism still linger. The attempt to amend the constitution so as to allow for an open/third presidential term suggests that some elements of old-style presidentialism remain such as coercion, bribery, intimidation and violence by means of the Young Democrats in the face of widespread popular resistance. Despite such harsh methods the amendment bill was eventually defeated. Its defeat can be seen as an example of the assertion of parliament's accountability role vis-à-vis the executive. At least it provides an example which suggests that Malawi might currently fall in the category of *consolidating* multi-party democracies rather than that of *dominant executive* systems in Nicolas van de Walle's schema of political regimes (van de Walle 2002:73). Other factors point decidedly in the direction of executive dominance, however.

## Parliamentary functions under presidentialism

The basic functions of parliament are three-fold: representation; legislation; and oversight or holding the executive to account. Parliamentary-executive relations centre on accountability. In terms of democratic theory and conceptually it may be useful to distinguish between two forms of accountability: horizontal and vertical. The vertical dimension refers to keeping elected officials accountable, mainly through the mechanism of periodic elections. Ideally, officials whose performance is considered below expected standards are unlikely to be re-elected. This is electoral accountability. The horizontal dimension refers to autonomous institutional mechanisms put in place to check the discharge of responsibilities by officials by calling into question and punishing improper conduct. The relationship of checks and balances between the three branches of government – the executive, the judiciary and parliament – forms the classical case of horizontal accountability. But there are additional special institutions of horizontal accountability that also restrain the executive: the ombudsman, the human rights commission, the auditor-general, etc. Their functions are enshrined in the Malawian constitution.

This paper is preoccupied with the way in which the Malawian parliament exercises its functions vis-à-vis the executive, in particular that of horizontal accountability in terms of oversight and substantive policy-making alike, within the context of a presidential system of governance. In order to do that, one needs to ask a number of questions about the specifics of that accountability relationship. What does it actually consist of? A multitude of terms have been used to describe the tasks of parliament in holding the government to account: monitoring, oversight, checks and balances, supervision, restraint, exposure, and punishment. All of them denote relevant aspects and may be used interchangeably. Notwithstanding the varying terminology, however, there are two dimensions that are critical to the exercise of this function: *answerability* and *enforcement* (O'Donnell 1998). The former refers to the obligation of public officials (in this case the cabinet and civil servants) to provide information about, explain and justify their actions *ex post facto* and their intentions *ex ante*. In other words the concept is both retrospective and prospective. It is also important to underscore that the answerable agency should volunteer information rather than providing it only when solicited. The Malawian constitution provides for some mechanisms of answerability in this sense, particularly section 89, sub-sections (3) and (4) (Government of Malawi 2002:41).

The enforcement function, on the other hand, denotes the capacity of accountability institutions (in this case parliament) to censure or impose sanctions on public office holders (the president, his ministers or civil servants) who have violated their public duties. It is central to the enforcement mechanism that it should be able to prevent abuse of power or neglect of duties as well as to enable remedial action. Sanctions might range from positive rewards to more or less severe punishment of miscreants. A weak form of sanction would be exposure and shaming, short of material punishment such as fines, payment of damages, etc. Loss of office, dismissal, indictment, or imprisonment would be even harsher forms of punishment. In between the slight embarrassment of exposure and the dramatic mechanism of impeachment in terms of section 86 of the constitution the parliament of Malawi has no means at its disposal for penalising representatives of the executive for failing to perform their duties (Government of Malawi 2002:38).

Agreed common features of parliaments worldwide include: (a) members are formally equal in status to one another (with the exception of MPs nominated by the president, as the case may be), which distinguishes parliaments from hierarchical institutions; and (b) the authority of the MPs stems from their representation of constituencies through elections. There is no corresponding consensus, however, about the functions of parliaments, probably because there is wide variation from one country to another (Copeland and Patterson 1998). It is clear, however, that holding the

executive to account is a main function, i.e. horizontal accountability, which is the primary concern of this article.

## Opportunities and constraints

Notwithstanding its subordinate position relative to the executive in a presidential regime, parliament remains a vital institution of government in Malawi's democratic dispensation. However, the degree to which parliament is able to fulfil its potential role to the full – despite its relative subordination – depends on a series of constraints that it is facing. These are both internal and external.

The constitutional powers conferred upon parliament define the framework within which it operates. They largely determine and delimit the room of manoeuvre that parliamentarians have when facing the executive. As opposed to parliamentary systems, in presidential systems the parliamentary powers do not include influencing cabinet formation, censure or dismissal of ministers, or ousting the cabinet by means of a vote of no confidence. Presidential regimes restrict parliamentary powers to passing laws, not only reactively by responding to bills tabled by the executive but also through the authority to initiate legislation. A particularly important power is the approval of the state budget, i.e. passing it as law, which determines the distribution of state resources in society.

In a representative organ such as parliament, the parties play a key role in articulating interests and grievances from the voters. Even though general party development is not the focus of this paper, how well the parties are able to perform their representative task in parliament bears on parliamentary-executive relations and is largely a reflection of how well they are organised within the legislature. How are the party groups organised? How effective is the party whip in fostering party discipline? What means of sanction does the party leadership have in case of disloyalty on the part of MPs? An important informal factor in the external environment is the degree of social legitimacy that parliament enjoys in the population and in the various social elites. If MPs are confident that they enjoy widespread popular or elite support their constitutional powers will be shored up.

The assertiveness of parliament vis-à-vis the executive is not only affected by the formal definition of its powers but also internal constraints. Even if parliament possesses formal powers it may be constrained in exercising them effectively due to internal constraints. These constraints may be grouped under three headings: the chamber itself; the committee system; and the organisation of party groups.

The way in which business in chamber is organised may influence outcomes. The parliamentary Standing Orders (SO) reflect this organisation (Malawi Parliament 2003). They determine who sets the agenda; what procedures to follow; how frequently and when to summon the chamber for sittings; how to organise question sessions; whether or not to allow mass media coverage, etc. The respective roles of the Speaker and the Clerk are important in exercising the measure of flexibility that the formal procedures allow.

A critical factor bearing on the effectiveness of parliament is its committee system (Shaw 1998:229). The committees specialise in certain policy fields and over the years their members accumulate considerable expertise that can be used to question and counter the bills and motions emanating from the executive. It is in the committees that the real substance of parliamentary business is conducted. Therefore, how well they function largely determine their degree of influence

on policy-making. What is their composition, including chairship? Are they permanent? What resources do they have at their disposal, such as secretarial and research assistance? What autonomous powers are vested in them and what is their jurisdiction? Such variables affect the efficiency of the committee system.

All of the above opportunities and constraints contribute to shaping the ability of parliament to withstand executive dominance. This ability is often summed up in the concept of *viscosity* which refers to the capacity of parliament to resist bills and motions tabled by the executive (Mezey 1985:737). Whereas low viscosity characterises compliant or subservient parliaments, high viscosity is the hallmark of autonomous and assertive parliaments.

## Indicators, explanatory factors and data sources

In our empirical examination of the way in which the Malawian parliament performs its horizontal accountability functions vis-à-vis the executive, we focus on three sub-structures: the chamber itself, the committee system, and the party caucuses.

With regard to the chamber, its ability to check the executive is to a great extent dependent on the frequency and duration of the sittings, which determines the time available for deliberation on bills and motions. Beyond the formal rules laid down in the constitution, the Standing Orders provide the parameters within which the House conducts its business. In turn, frequent waivers of the provisions of the SO may affect the degree to which parliamentary powers are curtailed.

The performance of the committee system is dependent, above all, on its available resources in terms of funding for sittings outside the ordinary plenaries of the House, secretarial and research support staff, and technical facilities. The inter-parties composition of the committees is also significant, as is their leadership and the calibre of their ordinary members.

The parliamentary party caucuses play an important role by instilling a measure of discipline and loyalty into their respective groups of MPs, especially in sensitive matters where much is at stake. More than anywhere else the prevailing political culture plays itself out in these fora, which are normally closed to outsiders.

In trying to explain the functioning of parliament in its efforts to restrain the executive, to oversee its operations and to contribute to law-making and policy-making, we look to explanatory factors at two levels: the structural and the individual. The structural factors comprise the formal rules and regulations of the constitution and the SO. Furthermore, the institutional resources are considered, including the structure of remuneration and other incentives.

At the level of the attributes of the individual MPs, we investigate their profiles in terms of age, education and experience, and occupational background. We also consider their values, orientation in terms of loyalty and relationship to their constituencies to determine whether they are 'service responsive' rather than 'policy responsive' (Norris 1997:29).

Our sources of information include available secondary material and official documents, complemented by data from interviews with a cross-section of MPs from the major parties and all regions, as well as with senior civil servants, and a few donors.

## The evolution of Malawi's political regime

The current constitution of the Republic of Malawi came into effect on 18 May 1995. It ranks among the most liberal constitutions in the world, guaranteeing basic rights and freedoms, providing for periodic competitive elections, and the separation of powers between the executive, legislative and judicial branches of government. However, the constitution fails to include adequate horizontal accountability mechanisms for checking the government.

The constitution is sometimes described as a hybrid creation, incorporating elements of both presidential and parliamentary types of government (Government of Malawi and United Nations Development Programme 2003:26). It is noteworthy that, when the provisional constitution of May 1994 was reviewed, the dangers of hybrid governmental structures were signalled. It was stated that “in attempting to craft distinctive mechanisms to strike the proper balance, there are a number of possible pitfalls, including the possibility that power will be diffused too widely ... [to the effect that] the government will not be able to function, the possibility that too much power will be left in the hands of one person or branch and the possibility that the structures will appear and perhaps be intended to disperse power but that in fact power will remain consolidated in the hands of one person or branch”.<sup>1</sup> Practices in the past seven years have proved that these warnings were not unfounded. The erosion of the spirit of the constitution in the conduct of government emerges as one of the main concerns facing Malawi's democracy.

Apprehensions about a parliamentary system seem to have been prevalent at the time of transition to multipartyism. It was feared that the leader of the ruling party with access to state resources could easily find ways and means to continue in power for ever. By contrast, a president for a fixed term of office, laid down in the constitution, was felt to be a safeguard against dictatorial tendencies. As a result, the principle of separation of powers with adequate checks and balances seemed appealing and appropriate. However, one could equally well argue that the constitution gives ample scope for executive dominance. For instance, section 94 of the constitution dealing with the appointment of cabinet ministers confers upon the President the power to appoint and dismiss ministers and deputy ministers and to fill cabinet vacancies without prior approval by the National Assembly. In the same vein, section 97 dealing with ministerial accountability states that all ministers shall be responsible to the President for the administration of their own departments, not to parliament.

## Issues in the struggle between parliament and executive

Malawi has adopted a system whereby cabinet ministers are recruited from the ranks of the legislators, although it is not an absolute requirement; non-elected technocrats can serve as ministers. In this regard, during the very first post-1994 session of parliament the issue of adherence to the principle of separation of powers arose when MPs from the Alliance for Democracy (AFORD) and the Malawi Congress Party (MCP) objected to the full-time participation in the assembly debates by those cabinet ministers who were not elected members of the assembly. A motion, introduced by an MP, referred to ministers without constituencies as ‘strangers in the House.’<sup>2</sup> The matter was referred to the High Court which ruled that ministers who were not elected MPs – for the reason that they were ‘strangers’ – should not be allowed to enter and remain in parliament unless specifically requested to do so. This judgment was annulled by the Supreme Court of Appeal which ruled that the courts have no jurisdiction to intervene when “the National

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<sup>1</sup> William Dodge, Mathew Frumi, Paolo Wright Carozza, A Commentary on the Provisional Constitution of the Republic of Malawi, 23 November 1994, pp. 5–6.

<sup>2</sup> ‘Court To Rule’, *Daily Times*, 5 July 1994.

Assembly, as a collective body, has decided, in its wisdom as manifested in the standing orders, that persons who are not members of parliament but are ministers are not strangers.”<sup>3</sup>

Most interviewed MPs felt that the doubling by ministers as MPs is an inappropriate practice. The arguments to underpin this position run along two strands. First, the practice is objectionable on principle. It negates the separation of powers laid down in the constitution. When ministers are doubling as MPs a conflict of interest arises. It is not possible to be serving the executive and the legislature at the same time. It becomes starkly unacceptable when nearly one-quarter of the MPs are also cabinet members. Second, doubling is unacceptable on pragmatic grounds. It is considered impossible to fulfil duties as both ministers and MPs simultaneously; ministers are likely to neglect their constituencies because their ministerial duties are so demanding. Ministers should serve the entire country, not only their constituencies.

The contrasting view in favour of the practice of doubling takes a more pragmatic approach: doubling is acceptable as long as the individuals involved are able to distinguish between their dual roles and keep them separate. Furthermore, it is an advantage for a minister to be an elected MP as well because it would ensure close contact with her/his constituency. Indeed, it was argued that ministers would be better placed to access resources for her/his constituency than ordinary MPs. By contrast, a non-elected minister would be detached from the grassroots she/he is expected to serve. Technocrats are accountable to the President only, not to the constituents and, as a result, they tend not to be respected. Some argued that doubling ensures a fruitful cross-fertilisation between the executive and legislative branches, which is good for effective implementation of policies. Ultimately, however, doing away with the practice of doubling would require Malawi to change its electoral system from the current ‘first-past-the-post’ plurality system to one of proportional representation based on party lists.

In September 1994 there was a cabinet reshuffle to accommodate members from coalition parties other than the incumbent party, the United Democratic Front (UDF). Furthermore, the position of second vice president was created by constitutional amendment to accommodate Chakufwa Chihana, the president of AFORD, UDF’s coalition partner. Chihana was also appointed minister for irrigation and water development. The legality of this constitutional amendment was questioned. Some members of civil society threatened to take the matter to court. John Tembo (MCP), Kamlepo Kalua (MDP) and the secretary-general of the Law Society of Malawi declared as unconstitutional the creation of the office of second vice president. Apprehensions were expressed that this move might be indicative of the conflation of executive and judicial powers and, *ipso facto*, an attempt to return to dictatorship.

The enlarged size of the cabinet at the same time also raised concerns from the parliamentary opposition as well as from the general public and the donor community. The number of cabinet ministers and deputy ministers rose from 22 in May 1994 to 35 (28 ministers and seven deputy ministers) in September 1994. It also became a trend to draw members of the cabinet from the National Assembly, which reinforced the executive dominance over the legislature. The cabinet remained large and peaked in 2003/2004 with 46 ministers and deputy ministers (see Table 1 below). The bloated size of the cabinet not only increased public expenditure by the Office of President and Cabinet (OPC), it also further tilted the balance of power in favour of the executive.

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<sup>3</sup> Malawi Supreme Court of Appeal, Civil Case No. 33 of 1994.

**Table 1: Cabinet size and composition 1994–2004**

Year	Number of Ministers	Ministers doubling as MPs	Ministers not elected MPs
1994 (1 <sup>st</sup> Cabinet)	22	11	11
1994 coalition cabinet of UDF and AFORD	35	23	12
1995	33	22	11
1996	33	23	10
1997	37	34	3
1998	30	27	3
1999	30	27	3
2000	33	26	7
2001	37	30	7
2002	40	34	6
2003	46	38	8
2004	30	25	5

Source: *The Hansard*, various issues.

Opposition parties in Malawi have normally emerged strong immediately after elections (see Table 2). The first post-1994 session of parliament demonstrated the strength of the opposition on a number of issues, such as the election of the Speaker of the Assembly, Rodwell Munyenyemba from AFORD, and both deputy speakers from the MCP. Furthermore, the opposition was well represented in all seven parliamentary committees and all of them were chaired by opposition MPs. These facts attest to the formidable strength of the opposition parties which at the time was envied throughout the Southern African region. This parliamentary constellation proved a threat to the minority UDF government; the opposition was too strong and, as a consequence, the government could not conduct its business and get bills passed. Foreign donors expressed concern about a weak executive, which might have serious repercussions on political stability. Despite their immediate post-election strength, however, opposition parties have tended to lose power and vigour as time goes by, partly due to defections or the crossing of the floor by their MPs, and partly due to coalition formation.

**Table 2: Party constellations in parliament 1994–2004**

Party	1994	1999	2004
Ruling coalition (UDF + AFORD)	85	94	56
Opposition	92	95	92
Independents	0	04	39
Total	177	193	187

The second term of the legislature (1999–2004) will go down in Malawi's democratic history as a period in which constitutionalism was put to the test. Several critical and sensitive constitutional amendments were passed with such velocity that parliament came to be associated with phrases like rubber stamping and ramrod politics. In effect, the position of the National Assembly vis-à-vis the Executive was thereby progressively undermined.

In January 2001 the National Assembly sat for a week to deliberate and pass important bills, among them the Abolition of the Senate Bill. This bill was tabled for the second time after it had been defeated during the previous sitting in 2000. It sought to repeal sections 68–72 of the constitution, which provided for the creation of a second chamber, the Senate. The move was strongly condemned by civil society and opposition parties as unconstitutional on the grounds that the Senate was protected under section 45 (8) of the constitution which states that: “Under no circumstance shall it be possible to suspend this Constitution or any part thereof or dissolve any of its organs, save as is consistent with the provisions of this Constitution.” Many quarters also drew attention to the fact that the abolition of the Senate touched the substance or effect of the constitution and, therefore, invoked section 196(3), which stipulates that any amendment which affects the substance or effect of the constitution requires a national referendum. Hence, civil society took the view that the abolition of the Senate would require a national referendum. The Malawi Human Rights Commission and the Malawi Human Rights Resource Centre sought an injunction from the High Court to prevent the bill from being tabled. However, while the High Court in Lilongwe was deliberating the matter, the government move swiftly, tabled, debated and passed the bill. After the repeal of the sections providing for a Senate, the National Assembly of Malawi became unicameral, which most observers consider to have strengthened the executive at the expense of the legislature.

Interviewed MPs preponderantly favoured the decision to abolish the Senate. Across the board cost considerations weighed heavily. It was asserted that the available resources were not even adequate for the proper functioning of one chamber, let alone two. However, the justifications varied. Although very few respondents voiced antipathy against traditional authorities (TAs) that were not elected democratically, some did state that unelected leaders had no place in a democratic system as a matter of principle. Others claimed that the TAs – having been appointed by the executive in the first place – would be inclined to side with the executive and be susceptible to bribery. A few argued that the Senate would broaden the democratic space in the Malawian polity by bringing more voices from the grassroots and civil society into the political process at the central level.

Party defections have been contentious and their justification has often been debated and criticised. In such cases the Speaker has invoked the controversial section 65 of the constitution to penalise the defectors and call for by-elections. The original section 65 authorised the Speaker to declare a seat vacant if a sitting MP crossed the floor or voluntarily left his/her original party. The section was amended in 2001 to the effect that it was sufficient grounds for declaring a seat vacant that a member, who at the time of his/her election was a member of a political party represented in the National Assembly, would join any other party or association or organisation whose objectives or activities are political in nature.

Ostensibly, the purpose of the amendment was to clarify in what precise circumstances a seat could be declared vacant in accordance with that section. The amendment bill based itself on the recommendations of the report of the Law Commission on the Technical Review of the Constitution, published in November 1998. The commission noted that the issue of vacancy of seats whose elected members from one party had voluntarily joined another party had been a matter of concern and debate. It further noted that section 65(1) was the purported constitutional justification for the spate of ‘independent’ members of parliament, i.e. that those members who had voluntarily left one party but who had not joined another party, did not fall under section 65 and that, as a consequence, the Speaker had not been able to declare their seats vacant. The commission also noted that if a member was elected under a particular party banner and subsequently resigned from that party, it was only appropriate that the said member should return to his/her constituency and seek a fresh mandate from the electorate. The commission recommended, therefore, that the section be amended so as to make it clear that it would be sufficient ground for the Speaker to declare the seat vacant under section 65(1) if: (a) a member voluntarily left the party on whose platform he/she

had been elected, or (b) a member joined another party represented in the National Assembly without formally resigning from the party under whose banner he/she had been elected originally.

Much as this clarification was necessary, the amendment bill went far beyond the Commission's recommendation, because it seriously curtailed the freedoms of assembly and association and contradicts those very same freedoms contained in the Bill of Rights of the constitution. The bill was widely condemned by opposition parties and civil society but it was eventually carried by the required two-thirds majority. Section 65 as amended was not only criticised on principle. Its selective application was also denounced. It appears that MPs who had fallen out with the ruling party leadership became victims of the subsequent practice of declaring seats vacant whose incumbents had allegedly associated with organisations with political objectives (Khembo 2004). Its repeated application in the third parliament after the 2004 elections has been a matter of continuous dispute.

The Constitution (Amendment) Act No. 3 of 2001, which *inter alia* reduced the required quorum of the National Assembly, was carried by 146 votes in favour, 1 against and 43 abstentions. The original section 50 (1) of the constitution stated that the quorum of the Chamber shall be formed at the beginning of any sitting of at least two-thirds of the members entitled to vote, not including the Speaker or a presiding member. The amendment to this section deleted the word "one-third" and substituted it by the words "one-half plus one". The justification was that the two-thirds majority was too high and rendered Parliament unworkable. The passage of this amendment lowered, in effect, the threshold for the executive to push through motions and bills, even when a large number of the MPs are absent. It was clearly an infringement on the autonomy of the legislature. Its underlying rationale is also questionable and flies in the face of the justification for increasing the number of constituencies. However, the new quorum stipulation applies to motions and regular bills only; it does not change the requirement of a two-thirds majority in the case of constitutional amendments or a referendum as the case may be under sections 196 and 197 of the constitution.

More than any other constitutional changes the Open/Third Term Bills stirred controversy. They were attempts to amend the constitutional tenure regulation of the presidency and epitomised executive arrogance. The constitution of Malawi clearly stipulates in section 83(3) that the President and the Vice-President shall serve a maximum of two consecutive terms. The 1999–2004 term was former President Muluzi's second consecutive one. Some of his close cabinet colleagues and party supporters started propagating the bid for another term for Muluzi at rallies. President Muluzi himself kept silent on the issue but his silence was seen as an indication that he did not oppose the call. There were closed door discussions as to whether a national referendum would be required or whether it could be done by a constitutional amendment requiring a two-thirds majority. Finally, on 4 July 2002 the bill to amend the constitution was moved before the National Assembly by an opposition (AFORD) member of parliament, Hon. Khwauli Msiska, as a private member's bill. The voting was done through a roll call where 125 members voted for the amendment, 59 against and 3 abstained. President Muluzi accepted the result and called on all political players to bury all the differences the bill had caused between its proponents and opponents. The venality of Malawian politics was at its height at this time when factions of both the major opposition parties supported the open term bill. There were clear indications of money changing hands, and the shifting of political allegiances that led to rupture within parties.

Civil society, mainly the faith communities took the issue on a war path and public outrage against this move spread like fire. The failure of the government and the ruling party to read and understand the country's mood on this critical issue surprised outside observers. The initial defeat, however, did not put the matter to rest once and for all. In the ensuing public debate the possibility that the bill might come back kept haunting the nation for months. The fears materialised when the bill reappeared in January 2003 when parliament was summoned for an extraordinary two-day sitting

without a pre-announced agenda. This time around the bill was introduced on behalf of the government by the Attorney-General cum Minister for Justice, Hon. Henry Phoya. It was this time renamed the Third Term Bill instead of the Open Term Bill, because the proposed number of terms was limited to three consecutive ones.

The Third Term Bill contained two substantive amendments. First, any president of Malawi may serve a maximum of three consecutive terms. Second, any future amendment of section 83 may be done only after any proposal to amend it has been approved by a majority vote of the people of Malawi in a referendum. Tension ran high and the public condemnation of the repeated attempt to extend the presidential term of office was loud and clear. The bill was debated at length and eventually referred back to the legal affairs committee. The defeat of the Open/Third Term Bills was certainly a victory for parliament; constitutionalism triumphed over venality and opened a new chapter in the democratisation process of Malawi.

The Speaker of the National Assembly presides over the deliberations of the House and is the principal custodian of its rules and regulations as laid down in the Standing Orders (Malawi Parliament 2003). He/she is elected by and among the MPs and is expected to assume an impartial position with respect to the parties represented in the House. There is no tacit understanding or established practice among the political parties that an MP from the opposition or from the incumbent party should occupy this key position. In principle, either the incumbent party or the opposition might occupy the positions of Speaker as well as the two deputies. It is a numbers game in which the MPs enjoying the greatest trust among their fellow parliamentarians will be elected.<sup>4</sup> Notwithstanding the fact that he/she is an MP elected on the platform of a political party, section 53(6) of the constitution stipulates that “he or she shall not be subject to the control, discipline, authority or direction of that party or any other political party in the discharge of the functions and duties of that office and in the exercise of the powers of that office.”

However, the June-July 2001 session of the National Assembly ended with a clear demonstration of the political bias of the Speaker. His declaration of two seats as vacant – Nsanje North and Lilongwe South East – was a flagrant violation of the constitution. The Speaker subsequently admitted that he had “erred” and recalled the two “expelled” MPs. The core of the issue was whether the amended section 65 of the constitution could be applied to an alliance formed by two political parties. The apparent motive behind the Speaker’s action was political, not legal. In an attempt to justify his “error” the Speaker stated his unawareness of the recent amendment as it had not yet been gazetted. Political alliances and coalitions are common features of party behaviour in multiparty democracies all over the world. By forming an alliance, members of the political parties involved do not relinquish their party identities or loyalties and cannot be construed to have crossed the floor.

This was not the first and only time the Speaker had overtly displayed partisanship. There were two earlier cases in point. One was the arbitrary dismissal of Hon. Gwanda Chakwamba from the National Assembly. The dismissal did not follow the established procedures. Instead of referring the matter to the Parliamentary Procedures Committee the Speaker opened up the issue for debate in the House, thereby wasting the time of the House.

The second case in point occurred when the High Court declared the conventions of both MCP factions null and void, thereby returning the leadership position of that party to the state of affairs that existed before the two conventions were held. Following the court order, the Speaker was obliged to reinstate Hon. Chakuamba as the Leader of the Opposition in the House. However the

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<sup>4</sup> Personal communication from former Speaker, Hon. Sam Mpasu, 30 March 2006.

Speaker defied the court ruling and continued to recognise the deputy president of MCP, Hon. John Tembo, as the Leader of the Opposition.

The question has been raised repeatedly whether the Speaker acts objectively and impartially. The overwhelming view among interviewed parliamentarians is that the Speaker does not always act impartially. It was felt that it can hardly be otherwise as long as he remains a politician. Many MPs favour the appointment of the Speaker on professional merit without party affiliation, yet thoroughly conversant with the procedures of the House. This not being the case, however, this office has been compromised; party allegiance has tended to take precedence over disinterested professionalism. Some respondents even alleged that the Speaker has on occasion attended Cabinet meetings.

Some MPs say, however, that even if the Speaker were appointed on professional merit, he would be under tremendous political pressure and susceptible to accepting bribes. The problem lies rather in the political culture which tends to defy the formal rules. Others claim that the Speaker only relates to the democratic majority of the House as reflected in numbers; majority rule is what democracy is about. Still others dismissed allegations of partiality for being based on personal grudges. The Speaker was likened to a football referee: whatever he does, he will always be blamed by one of the parties.

The power of parliament to hold the executive to account is to some degree entrenched in the constitution. The Executive may be scrutinised and held to account in three ways. First, the State President is required in terms of section 89(3) of the constitution to appear in Parliament and address the House on the state of the nation and the policies of government. He is also required to answer questions, which, indeed, he has done on a few occasions. Second, the ministers, under Section 96(1)(e), are required to be present in parliament and answer questions pertaining to their ministries when called upon to do so. This happens rather frequently, although some ministers are summoned more often than others. Ministers in charge of statutory corporations or parastatals are required to present annual reports to the National Assembly. Third, the select committees of Parliament may request documents from the Executive if and when required. Out of the departmentally related committees only about half of them are functional, some only sporadically. The rest are dormant. Notwithstanding the functionality of the committees, it should be noted that, even in cases where the committees have scrutinised cases and issues in the past and found proof of misconduct and/or irregularities, no further visible action has been forthcoming. Ministers stepping down on grounds of moral turpitude has not been heard of in the Malawian context. In other words, only the answerability function is taken care of, but the twin function of enforceability is non-existent.

The parliamentarians have not stood united in their oversight task over the executive. A case in point is when an MP demanded the removal of a former education minister on account of his involvement in a scandal over the procurement of notebooks (known as the Field York case), an MPs from the incumbent party side simply stated that parliament did not have the power to remove ministers because the constitution did not make provision for such action. Again an example of lacking enforceability.

A major constraint on parliamentary work in checking the executive is the frequency and duration of sittings, which determine the time available for deliberation on bills and motions. The MPs interviewed were unanimous in their view that the duration of sittings is grossly inadequate. One senior MP said that he was not aware of any parliament anywhere in the world that had as little time available for deliberation as that of Malawi. The Malawi parliament has only 75–100 sitting days per year. By comparison, in neighbouring Zambia parliament was in session between 220 and 290 days a year after the democratic opening in 1991 (Burnell 2003:49). The stated reason for the

brevity of sessions is lack of funds. Although the budget allocations for the National Assembly are in principle protected, it often happens that the meagre monies set aside are not released in their entirety, thus further hampering the work of the Assembly.

For a legislature to be effective in checking the executive, adequate time is needed to study policy proposals and bills, and to prepare for debate. The Standing Orders stipulate that parliament be given at least 21 days (28 days since the amendment in 2003 of the Standing Orders) from the tabling of a motion/bill until it is debated and decided upon (see Standing Order 116(1) Malawi Parliament 2003:45). The current 28-day rule of notice is unceremoniously waived rather frequently (waivers are provided for in Standing Order 117 Malawi Parliament 2003:46). During the second parliament (2000–2004) there were 12 waivers, which is representative of the frequency of this practice also during the first parliamentary term. Even in the case of the national budget, which is a very complex and important document, have waivers been given. The House in plenary makes the decision to waive the rule based on the Business Committee's recommendation. The cited justification is invariably urgency and time constraint plus postal delays. The opposition has little choice but grudgingly going along with the waivers owing to the composition of the Assembly.

Some MPs find that waivers are sometimes acceptable. While recognising that democratic rules should be adhered to, some flexibility is called for in applying the rules. But most MPs see the frequent waivers as an infringement by the executive on the powers of the legislature to hold the former to account. The MPs are thus disabled in exercising their duties because they get too little time for researching, soliciting technical advice from experts, and for consulting with their constituents. The result is brief and uninformed debates.

Notwithstanding the justification on account of urgency and time constraint, some MPs see the waivers simply as a result of poor planning by the line ministries. Above all, the Attorney-General's office, which prepares the bills, seems to be the bottleneck. Others take a more sinister view, seeing hidden agendas and suspecting the executive of deliberately creating urgent situations in order to bulldoze sensitive bills through parliament without proper debate. Inadequate time leads to mere rubberstamping of every proposal the executive puts before the assembly. For example, only twice between 1994 and 2004 has parliament been able to assert its power to change items in the state budget.<sup>5</sup> *Ad hoc* sittings are not considered helpful, and besides, in the view of many MPs, they are most often called at the behest of donors to address a matter of urgency to the donors. What is more, extra-ordinary sittings tend to exacerbate the funding problem because it is generally not cost-effective to summon the parliamentarians to Lilongwe for short sittings.

In a self-critical vein, some interviewees pointed out that the admittedly infrequent sittings are not used effectively (for the time schedule see Standing Order 18(1) Malawi Parliament 2003:12). The security argument against sittings after 5 p.m. is not deemed justified considering the nation's needs for decisions on matters of national public importance. Instead, pressing matters are left in abeyance for months. It is appreciated that too crowded Order Papers would defeat the purpose of committee deliberation outside the House in plenary. But many MPs feel that there is scope for considerably enhanced efficiency. Poor preparation by MPs and committees exacerbate the problem of low efficiency when the House *is* sitting.

## The functioning of the committee system

The committee system plays a key role in the functioning of the legislature. The committees are formed across party lines in proportion to party strength. But members are not always assigned to

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<sup>5</sup> Once when monies were shifted from the OPC item to education, and once when the allocated funds for a new National Intelligence Bureau were axed, because this unit was allegedly illegal.

committees on merits, capacity or interest; personal favouritism also plays a role. The efficiency of the House could be greatly enhanced if the committees were working well. For example, the time required for debating a motion or a bill in the plenary of the House could be shortened considerably if solid preparatory work were carried out in the committees.

However, the functioning of the committee system leaves a lot to be desired, although it has evidently improved tremendously since 1999. Apparently, a legislature strapped of funds can ill afford to provide an adequate financial basis for committee work. The Clerk prepares the budget every year, yet it is invariably cut by the Treasury. Thus, the executive effectively throttles the legislature and thus hampers the latter's ability to check the former.

In the absence of adequate domestic funding international donors have to some extent stepped in to fill the gap, i.e. the United States International Agency for Development (USAID) and the British Department for International Development (DFID) through the National Democratic Institute (NDI), and the Canadian International Development Agency (CIDA). It is an expression of extreme donor dependency, however, that the supreme law-making body is compelled to solicit external funds to be able to operate properly. It is also problematic that only those committees receiving funding from foreign sources are able to work satisfactorily. The donors have decided to provide selective funding for the committees they consider most important and to leave the others in the lurch. As a result, those committees without external funding are effectively dormant. This is a humiliating situation, indeed. Some donors are willing to contribute to a basket of funds and leave the decision to allocate the funds to, say, the parliamentary Business Committee. Others are adamant that such a procedure would lead to mismanagement and misappropriation. Even the suggestion that donors could be represented on whatever committee in charge of the allocation decisions – with adequate safeguard mechanisms of auditing – does not seem to satisfy some donors who insist on a hands-on approach.

Apart from lack of funds for allowances to committee members, facilities and support functions are inadequate. Altogether 17 committees share two researchers and four secretaries. Computer services are poor. Although the committees are at liberty to call on outside expertise, they are often unable to do so because the funds are not available.

Some respondents concede that funding is not the only problem. The calibre and dynamism on the part of committee chairs are also important. Likewise, their educational level, knowledge of the substance of their committees' briefs, and command of procedure are significant. If the chairs are dynamic and pro-active, additional funding might be secured from external sources. But without up-front financial contributions many of them tend to get despondent.

Moreover, the functioning of the committee system is adversely affected by the breach of reporting procedures. After inter-party deliberation within the committees, reporting back to plenary is not always allowed. Despite the cross-party composition of the committees, they do not seem to enjoy the confidence of the House in plenary. As a result, debates are repeated and valuable time wasted unnecessarily.

The administration of the Malawi Parliament has worked on solutions to the challenges enumerated above and undertaken an analysis of the Strengths, Weaknesses, Opportunities and Threats (SWOT). The SWOT analysis as contained in the "Malawi National Assembly Strategic Capacity Development Plan" confirms the seriousness of the bulk of the problems discussed in this paper, albeit couched in different words (Malawi National Assembly 2003). The implementation of most of the recommendations, however, pre-supposes considerable funds, which realistically can only come from external donor sources in the short term. But in the long run it is not tenable for a National Assembly to depend on foreign aid for its appropriate operation.

## Party caucuses

Strictly speaking, party caucuses do not feature in the parliamentary set-up (nor do parties for that matter). Reference is made to political parties in only two sections of the constitution, i.e. sections 40 (on party funding) and 65 (on crossing the floor). Otherwise, the constitution is largely silent on the political role of parties. The parliamentary Standing Orders assign a role for parties only in connection with the designation of members to the Business Committee ( see Standing Order 142(1) Malawi Parliament 2003: 54).<sup>6</sup> Notwithstanding the oblique references in the constitution and the parliamentary Standing Orders alike, political parties do play an important semi-formal function. Ideally, the functions of the party caucuses are to ensure cohesion within the party on policy matters after a free exchange of views, and to instil a measure of discipline in the party group. They are chaired and called by the party whips – normally before a sitting when the agenda is known or during a sitting if need be.

Many MPs do not consider their party caucuses to be democratic fora at all, where the issues can be discussed openly. It is claimed that there is no culture of deliberation and compromise. Instead, the caucuses are very hierarchical with prioritised lists of speakers. The primary function of the party caucuses is perceived to be an instrument for the party leadership to bully the ordinary MPs into submission on sensitive issues whenever there is discord in the ranks or when vital matters are at stake. MPs are simply told what to think and how to vote or else they are liable to be considered disloyal and risk facing the consequences. One MP even called his party caucus ‘a farce’. There is widespread fear that failure to toe the party line would lead to victimisation in some form, either relegation to insignificant posts or even expulsion in extreme cases.

A contrasting perception – perhaps because behaviour varies from one party to another – portrays the party caucus as more placid and democratic, where individual MPs may raise concerns on policy matters and contribute freely to the discussion. It is also said to function as a forum for communication and exchange of information on constituency affairs. For inexperienced MPs the party caucus may serve as a form of civic education and assist them in finding their feet in their new roles as legislators.

## The significance of political culture

The aspects of the relationship between the legislature and the executive discussed above are predominantly of a structural nature. A treatment of this relationship, however, would have been incomplete if there were no reference to political culture.

On the face of it, the rules governing parliamentary business in Malawi seem, by and large, straightforward and reasonable, perhaps with some exceptions. These rules form the normative basis of parliament as an institution and are designed to regulate the relationship between the National Assembly and the executive. They are intended to ensure predictability and afford protection for the two branches of government against abuse. The structures and formal procedures set some of the parameters for the evolution of a political culture that governs parliamentary business.

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<sup>6</sup> Personal communication from former Deputy Minister of Planning and Development, Khwauli Msiska, 31 March 2006.

However, another source of concern is that the formal rules are not always adhered to.<sup>7</sup> The practice of deviating from the formal rules results partly from practical obstacles and resource constraints, and partly from political expedience and lack of political will to uphold the rules. In effect, departures from established rules and regulations appear to have been so frequent that they themselves are perceived to have displaced the formalities and acquired status as more or less accepted *informal* norms that are not reflected anywhere in written documents. They constitute a tacit understanding among actors about how matters are *actually* dealt with. In other words, this understanding can be characterised as the *real* political culture of the polity at the elite level. Political culture thus constitutes an informal extension, however vague and elusive it might appear, of the rules of the political game beyond those formalised in the structures of government, the constitution, and other legislation and subsidiary regulations.

It can be argued that we are, in fact, dealing with *two* institutions. In a sociological sense an institution comprises a set or a pattern of relatively stable social relations. Within this pattern interaction is iterative over time and governed by formalised, written rules and agreements *as well as* informal, tacit understandings about acceptable behaviour. When the formal and informal rules reinforce each other, they contribute to consolidating and solidifying the institution. Conversely, if formality and informality pull in different directions in terms of the normative institutional foundation, scope is created for instability and unpredictability to arise. To some extent, this is what is being observed in the National Assembly of Malawi.

When the real political culture deviates considerably from the established formal rules, it may pose a threat to democracy or to the consolidation of democratic governance. A political culture strongly favourable to democracy is particularly important in times of crisis (Dahl 1989:263). Countries with a less supportive political culture might face a breakdown of democratic rule. It becomes especially worrisome if the dominant political culture is orientated towards *evading* the formal rules rather than respecting them. We have received testimony from parliamentarians that elements of such an insidious political culture exist in Malawi.

A fair number of MP respondents claim that they are not entirely free when taking part in deliberations in the House. To varying degrees they may be intimidated, harassed and ridiculed. In particular, inexperienced MPs are subjected to mockery and ridicule. Abusive language is not always censured by the Speaker despite rules against unparliamentary language (see Standing Order 85(3) Malawi Parliament 2003:38). Women MPs are subjected to sexist abuse; even the Speaker is not spared. A sexist remark was made in response to a warning to a particular MP by the First Deputy Speaker, Loveness Gondwe: "A warning from a lady?"

Others say that the shouting and jeering are without malice. Such behaviour reflects harmless inter-party rivalry. And new MPs are just being 'tested' or 'initiated' by their seniors. MPs must learn to become self-confident, one respondent said. Even so, some MPs may take offence and be intimidated by such behaviour.

Several respondents cite incidents of threats to life and property. Admittedly, such threats may be empty in the sense that those issuing them would not act upon them. But as long as they are taken seriously by those affected, their purpose is achieved. In a number of cases threats *have* been acted upon: cars and houses have been burned and people have been beaten up. The tension surrounding the third term issue, in particular, led to incidents of violence. One respondent said he had to go into hiding for two weeks after having voted against the Third Term Bill for fear of violent victimisation. During the party primaries and the 2004 election campaign violent incidents were

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<sup>7</sup> The frequent waiving of the 28-day notice rule has already been mentioned, but the Standing Orders formally provides for such exceptions.

reported in the mass media. Hateful and abusive speech that might have incited to violence was criticised by civil society organisations and the Electoral Commission but to no avail it seems. The contending parties appeared either unable or unwilling to curb such malpractices, which, in effect, were election offences.

The relationship between the executive and the legislature is by nature adversarial in the sense that the latter's function is to check the former. This reflects the separation of powers that structures the relationship between these branches of government. An adversarial relationship may still be cordial and mutually respectful. However, none of the respondents was prepared to characterise the relationship between the executive and the legislature as cordial. Rather, 'tense', 'conflictual', 'deep mistrust', 'mutual suspicion', and 'highly polarised' were seen as more apt terms. It was asserted that the executive does not respect the legislature and treats it "just like a baby" who can do nothing on its own unless endorsed by the executive. Thus executive dominance leads to the subjugation of the legislature and rubberstamping of motions.

There appears to be *excessive* respect for authority in political life and in society at large, which is not conducive to open, democratic debate. The hierarchical mode of thinking that seems to pervade Malawian society leaves too wide a scope for abuse. It permeates parliamentary business and leads to rubberstamping. The singularly strong position of the presidency is an expression of this hierarchical thinking and bears particularly strong on parliament's ability to hold the executive to account.

## Conclusion

In this paper we set out to depict, characterise and explain the nature of the relationship between the legislature and the executive in the Malawian polity. From a point of departure in the presidential nature of the political regime, we have focused predominantly on the structural determinants of the parliamentary-executive relationship as laid down in the constitution and subsidiary rules and regulations. Special emphasis has been put on the changing scope of manoeuvre for the legislature through a series of constitutional amendments in the second term, the inadequacies of the committee system, and lastly the role of the party caucuses. Finally, we have pointed to the significance of political culture beyond the formalities of parliamentary business.

We venture two conclusions. First, the presidential nature of Malawi's political regime has been reinforced successively during the decade that has elapsed since the introduction of multiparty politics in 1994 through a series of constitutional amendments. As a result, the already resource-starved legislature has become even more hamstrung in attempting to check the executive. Second, the defensive viscosity of Malawi's parliament has declined during the decade under review to the point of producing a subservient institution of government. The celebrated case of the Open/Third Term Bills stands out as perhaps the only exception in mitigating the image of parliament as subservient. In that case parliament was able to stand up to the executive and eventually scored a critical victory. Notwithstanding the parliamentary victory, the very same case also exposed the venality of Malawian politics, which might have tipped the balance in the opposite direction. The broad extra-parliamentary opposition to this constitutional amendment in civil society, working in tandem with the legislature, was probably decisive.

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## SUMMARY

This article addresses the relationship between the legislative and executive branches of government in Malawi during the multi-party era from 1994 until 2004. The argument is threefold. First, the presidential nature of Malawi's political regime assigns parliament to a secondary role. Second, the general framework of parliamentary-executive relations laid down in the constitution gives scope for accentuating this subordinate position through iterative practices. Third, the persistence of personalised patronage in Malawian politics leads to the further reinforcement of parliamentary subservience where political principles and positions are sacrificed on the altar of venality. A perception has spread that parliament is a mere pawn in the political game or a rubber stamp of the executive's decisions. This article will seek to adduce empirical evidence to substantiate this argument.

ISSN 0804-3639  
ISBN 82-8062-151-2

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