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The Institutional Context of the 2004 General Elections in Malawi

Siri Gloppen, Edge Kanyongolo, Nixon Khembo,
Nandini Patel, Lise Rakner, Lars Svåsand,
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The Institutional Context of the 2004 General Elections in Malawi

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Introduction¹

Ensuring that elected political leaders play by the established rules of the political game and act in accordance with their mandate without violating citizens' rights is a key challenge for new democracies in sub-Saharan Africa. In Malawi, as across the continent, executive dominance is still the norm, and the many institutions in place to make governments more accountable are in most cases relatively weak. Why is this so? Elections and succession test the strength and legitimacy of political institutions in checking executive dominance. In some African states where democratic transitions took place in the early 1990s – such as in Tanzania, Kenya until 2002 and Namibia – incumbents have found ways to win electoral mandates without allowing for extensive political liberties and participation. Over time, this has resulted in increased consolidation of power by one party. Within this perspective, it is important to acknowledge that electoral processes essentially begin long before elections actually take place and that the analysis of electoral processes, therefore, requires a long time horizon. As an indicator of the effectiveness of institutions of accountability, we analyse the extent to which accountability institutions have managed to stem executive dominance when put to the test of the parliamentary and presidential elections held on 20 May 2004.

We have directed attention to four sets of core institutions of democratic governance and accountability: those responsible for *electoral administration*; the *party system*; *parliament*; and the *judiciary*. These four institutions are interdependent but also in some measure autonomous of each other. It is our claim that systematic analyses of the operation and interaction of these institutions when put to the test of elections are necessary in order for civil society, scholars, donors, and the political community to grasp the degree of democratic institutionalisation in a given country:

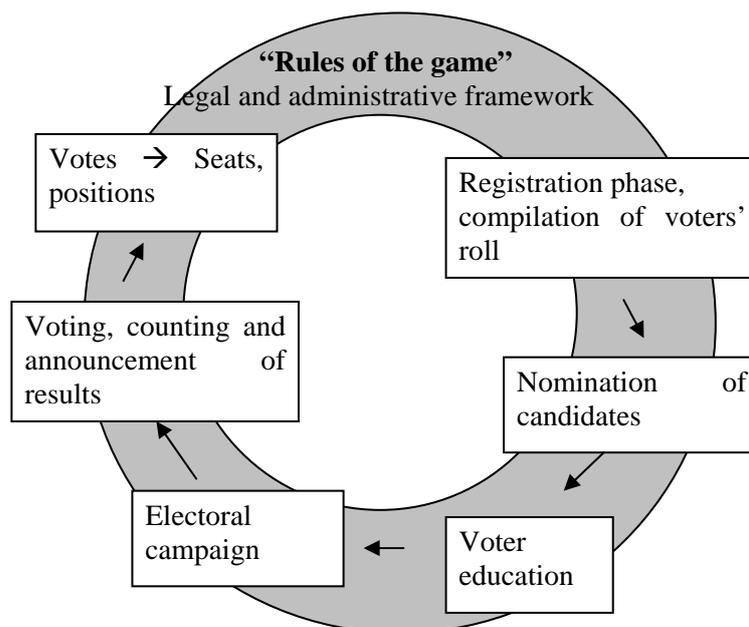
- *Elections* are an integral part of democracies as instruments for delegation of authority from citizens to representatives. The electoral commission is the central institutional mechanism for overseeing the implementation of the electoral process. However, in new democracies the organisation of this process is often characterised by ambiguous rules and/or problems associated with their enforcement.
- The *political party* has become *the* most significant actor in democratic governance. How political parties form and develop, function and interact with each other are crucial variables in processes of democratic institutionalisation. Parties also serve to link citizens with parliament. Parties constitute the components of government formation and opposition parties are supposed to present an alternative to the incumbent party. Party institutionalisation is therefore seen as a crucial ingredient of democratic consolidation.
- As an institution, *parliament* is partly representing the citizens and partly acting as an institutional check on executive power. Central topics include the extent to which members of parliament are representing their constituencies and how parliament as an institution is enabled or disabled to fulfil its functions vis-à-vis the executive.
- The *judiciary* is the ultimate interpreter of the constitution and “the referee of the political game”. To what extent the courts are willing and able to sanction political actors and institutions when they act in breach of laws and regulations are of central importance for

¹ In mid-2003 a team of researchers from the Chr. Michelsen Institute, the University of Bergen, the Centre for Social Research, and Chancellor College of the University of Malawi embarked on a joint research project to analyse the institutional context of the 2004 general elections in Malawi. Beyond this research endeavour the project – spanning a three-year period from mid-2003 until mid-2006 – included additional institution-building components which are not reported here. Funding was secured from the Norwegian Embassy in Lilongwe and the Programme for Development, Research and Education (NUFU) of the Norwegian Council for Higher Education.

the integrity of elections, preservation of political space and freedoms, and for the broader processes of democratic consolidation.

In line with current trends in the international literature we consider a new electoral period to be starting immediately following the previous election (see Figure 1 below).

Figure 1: The electoral cycle ‘wheel’



In this report we will assess the role of core institutions of democratic accountability in the 2004 electoral process in Malawi with an emphasis on six main stages in the electoral process. Each step in the process has an impact on the quality of the election and hence on how legitimate the actors – voters, parties and candidates – perceive the process to be. The foundation of the whole process lies in formulating and amending the rules of the political game, i.e. the legal framework and the institutional set-up for the elections. Although the rules are usually stable from one election to another, there may be cases where the rules are ambiguous or subject to change at various stages in the electoral process.

The six stages we identify as crucial steps in the process are:²

- *The registration of voters and the compilation of the voters' roll.* Most new democracies do not have permanent voter registers but perform voter registration during designated time periods. The registration process determines who among the eligible voters will actually be allowed to participate;
- *The nomination of candidates.* The choices that the voters face on election day are determined by the way in which political parties nominate candidates and the opportunities for independent candidates to run for office;

² This classification is a modification of the steps in Jørgen Elklit (1999): “Electoral institutional change and democratization: You can lead a horse to water but you can’t make it drink”, *Democratization*, Vol. 6, No. 4, pp. 28–51.

- *Civic and voter education.* For voters to make reasonable choices among alternatives and be engaged in the electoral process, voters must be familiar with the electoral process and the rights of individuals to participate in various capacities. The extent to which this is the case will not only influence the overall level of participation but also the acceptance of the results;
- *The electoral campaign.* Both individual voters as well as prospective candidates will be adversely affected if the electoral campaign is strongly skewed in favour of some candidates and parties;
- *The conduct of the polling exercise, including counting of ballots and the announcement of the results.* The management of the electoral process should be impartial and the results must be announced and generally accepted so that the elected office holders may legitimately assume office. Thus, there must be proper procedures in place to deal with post-election disputes;
- *The conversion of the electoral mandate into political positions.* After the elections, if the party with the largest number of seats does not command a majority in the national assembly, negotiations start between selected parties to form a coalition government, preferably with a stable basis in parliament.

Election results

The elections held on 20 May 2004 were the third presidential and parliamentary elections in Malawi since the return to a multi-party system after the referendum in 1993. In the presidential election the candidate with the most votes wins; no absolute majority is needed. In the parliamentary election the country is divided into constituencies (currently 193). In each individual constituency the candidate with the most votes wins; as in the presidential election, no absolute majority is needed. The tables below display the result of the elections held in 1994, 1999 and 2004.

Table 1: Malawi Parliamentary Election Results, 1994

Party	Votes	Seats
AFORD	563 417	36
MCP	996 047	56
UDF	1 375 878	85
Others	21 811	0
Total	2 963 612	177

Source: The Malawi Government Gazette 1994 (Vol. XXXI, No. 40)

Table 2: Malawi Presidential Election Results, 1994

Candidate	Votes
B. Muluzi (UDF)	1 404 754
Dr. K. Banda (MCP)	996 353
C. Chihana (AFORD)	562 862
K. Kalua (MDP)	15 624
Total	2 978 885

Source: The Malawi Government Gazette 1994 (Vol. XXXI, No. 40)

Table 3: Malawi Parliamentary Election Results, 1999

Party	Votes	Seats
AFORD	474 215	29
MCP	1 518 548	66
UDF	2 124 999	93
Indep.	319 936	4
Others	54 459	0
Total	4 492 157	192

Source: The Malawi Electoral Commission, 1999

Table 4: Malawi Presidential Election Results, 1999

Candidate	Votes
B. Muluzi (UDF)	2 442 685
G. Chakuamba (MCP)	2 106 790
K. Kalua (MDP)	67 856
D. K. Nkhumbwe	24 347
B. wa Mutharika	22 073
Total	4 663 751

Source: The Malawi Electoral Commission, 1999

Table 5: Malawi Parliamentary Election Results, 2004

Party	Votes	Seats
AFORD	114 017	6
MCP	785 671	57
UDF	801 200	49
Indep.	766 137	40
RP	231 002	15
NDA	256 713	9
PPM	98 548	6
Mgode	53 127	3
Petra	21 153	1
CONU	7 410	1
Others	26 609	0
Total	3 161 587	187

Source: The Malawi Government Gazette 2004 (Vol. XLI, No. 34)

Table 6: Malawi Presidential Election Results, 2004

Candidate	Votes
B. wa Mutharika (UDF)	1 195 586
J. Tembo (MCP)	937 965
G. Chakuamba (MCP)	836 118
B. Mpinganjira (NDA)	286 320
J. C. Malewezi (Indep.)	67 812
Total	3 323 801

Source: The Malawi Government Gazette 2004 (Vol. XLI, No. 34)

The 1994 parliamentary and presidential elections brought a new government to power: the United Democratic Front (UDF) and its presidential candidate, Bakili Muluzi, a businessman and former politician under Dr. Banda. Since 1994, Malawi has conducted two more presidential and parliamentary elections, in 1999 and 2004. Whereas only three parties gained parliamentary seats in 1994 and 1999, the number rose to nine following the 2004 elections. The 1994 election results displayed a regional voting pattern as the Alliance for Democracy (AFORD) won all the parliamentary seats in the north, the Malawi Congress Party (MCP) won the majority of the seats in the central region whereas the UDF captured the majority of the seats in the southern region. This pattern was also witnessed in the presidential elections. This regional pattern persisted in 1999 but was somewhat weakened in 2004 as both AFORD and the UDF lost some support in their traditional strongholds.

Competitiveness is significant feature of parliamentary and presidential elections in Malawi. The competitive nature of presidential elections in Malawi is reflected in the narrow margins of victory among presidential candidates. This trend is also pronounced in parliamentary elections, indicated by the significant turnover of candidates. For example, 51 out of 95 incumbent members of parliament (MPs) lost their seats in the 2004 parliamentary elections to newcomers and independent candidates.

Malawi's electoral system

The single-member plurality (SMP) electoral system employed in parliamentary elections has affected Malawian politics in two important respects.³ First, fair *representation* of the voters participating in elections has been compromised. As there is only one, undividable seat to win in each constituency, all votes cast in favour of losing candidates may be considered “wasted” as they are not reflected in the composition of the national assembly. The number of so-called “wasted votes” can reach high levels when the plurality electoral formula is used. At the national level, altogether 24 and 32 per cent of the votes cast were “wasted” on non-winning candidates in the 1994 and 1999 parliamentary elections, respectively. In 2004, nearly half of all votes (49 per cent) were cast in favour of losing candidates. In the 2004 elections in Nkhata Bay North-West constituency, the elected MP only acquired 2,445 of the 11,559 valid votes cast; the remaining 9,114 votes were “wasted” on losing candidates.

Due to the “winner-takes-all” nature of the SMP rules, the system of translating votes into seats may also produce unexpected results. In the 2004 parliamentary election, the UDF got more votes than the MCP (see Table 5). Nevertheless, the MCP received more seats than the UDF. This was also the case for the Republican Party (RP) and the National Democratic Alliance (NDA). Whereas the NDA garnered about 25,000 more votes than the RP, the former was only represented by nine MPs while the RP's parliamentary group was considerably larger.

Second, the SMP system has contributed to the *regionalisation* of party politics. The importance of the regions and regional identities is rooted in Malawi's colonial and authoritarian past when the administrative regions were played out against one another politically, economically, culturally and socially. In the multiparty system, the electoral system has contributed to the development of a regionally based political system. As every constituency elects one representative only and the winner is only required to win a plurality of the votes, the party that wins the most votes in each region becomes *over-represented* in terms of parliamentary seats. Parties that acquire a smaller proportion of the vote in the regions are *under-represented*. For example, in 1994, AFORD won all

³ This section is based on Mette Bakken (2005), *Electoral system design and the effects on representation and regionalisation in Malawi 1994–2004*. MA thesis, Department of Comparative Politics, University of Bergen, Norway.

(100 per cent) of the northern region's seats with only 85 per cent of the votes. The UDF and the MCP were also over-represented in their respective stronghold regions. With 68 per cent of the southern votes, the UDF secured 88 per cent of the seats in that region. In the central region, the vote-to-seat deviation counted 11 percentage points in favour of the MCP. The pattern of systematic over-representation of the stronghold parties was replicated in 1999: with 64 per cent of the northern votes, AFORD captured 85 per cent of the northern seats; the MCP gained 75 per cent of the central region's MPs with 58 per cent of the votes; and finally, the UDF's support base of 68 per cent in the south awarded the party 87 per cent of the southern parliamentary seats.

The 2004 elections brought about a new situation in the north and the south. As the number of contesting parties rose from three to nine and also the number of independent candidates winning in the constituency elections increased, both AFORD and the UDF lost substantial support in their traditional stronghold regions. The MCP, on the other hand, was able to strengthen its position in the centre. By winning 55 per cent of the votes cast the party won 80 per cent of the seats in the region and was thereby over-represented by 25 percentage points.

The fact that the SMP electoral system facilitates links between the voters and their elected representatives is regarded as an *advantage*, however. By electing only one representative, voters in the constituency are more likely to identify their representative and this may facilitate greater contact with the elected MP. The close and direct links provide extensive opportunities for the voters to hold the representatives to account. If an elected MP does not stick to his or her campaign promises, the voters know whom to blame and have a chance to show their dissatisfaction in the subsequent election. In Malawi, the voters have actually used the opportunity of parliamentary elections to show their satisfaction and dissatisfaction with their representatives. In 1999, a total number of 61 MPs chose to run for a second term of office. Altogether 59 were re-elected, signalling, perhaps, that the voters in these constituencies perceived that they were doing an acceptable job. In 2004 the situation changed as only 51 of the 95 incumbent candidates were re-elected.

Furthermore, the way in which the SMP system is open for independent candidates – that is, candidates that run without placing any party label behind his name on the ballot – played an important role in the 2004 election. Popular dissatisfaction with the way in which primary elections had been conducted, especially within the UDF, contributed to an extensive number of independent candidates who originally had been pushed away by the party in undemocratic nomination procedures. Altogether 39 representatives were elected on an independent basis, and 28 of these were elected in constituencies that were formerly held by the UDF. Faced with the threat of losing seats to independent candidates, it is possible that the SMP system may promote intra-party democracy and lead to the establishment of acceptable rules and procedures for nominating candidates.

How democratic elections are administered may be as critical to the outcome and the legitimacy of the elections as the electoral system used. We now turn to discuss the administration of the electoral process in Malawi's first three presidential and parliamentary elections 1994–2004.

The legal and administrative framework of the electoral process

It is increasingly recognised that the administration of elections has a significant impact on the legitimacy of the electoral process. Unless the electorates and candidates perceive the administration of the *electoral cycle* – which includes the pre-election, the election, and the post-election period – to have been conducted in an impartial manner, it is likely that the results will be disputed. The quality of electoral administration, therefore, has a direct impact on the perception of

the elections and the legitimacy of the outcome. The administration of elections takes place within an institutional framework comprising of an electoral management body, or electoral commission, the judiciary, political parties, the executive and parliament. In addition to the formal institutions, civil society in Malawi plays a major role in the electoral process with respect to civic education, mobilisation for voter registration and to the actual voting as election monitors.⁴ The constitution of Malawi (1994) establishes the Malawi Electoral Commission (MEC) as the main administrative unit in charge of the electoral process. MEC is also responsible for voter education and civic awareness related to the electoral process. Civil society organisations must, therefore, be accredited by MEC to participate in the electoral process.

The administration of the electoral process is a key factor in understanding the limited institutionalisation of democracy in Malawi. This section discusses core institutions of vertical democratic accountability: those charged with electoral administration. It covers multiple phases of the electoral cycle as depicted in the 'electoral cycle' (Figure 1).

The Electoral Commission Act (ECA) of 1998 states the appointment procedures of the commission and provides that the chair of MEC shall be a judge nominated by the judicial service commission and further that there shall be no less than six other commissioners. According to section 4 of the ECA, the President appoints the chair and other commissioners in consultation with leaders of the political parties represented in the National Assembly. The terms and conditions of service are to be determined by the Public Appointments Committee of parliament, which also can recommend the removal of commissioners to the President on grounds of incompetence or incapacity in the performance of their duties. The tenure of the commissioners is four years, renewable for a further term. MEC has eight committees, each headed by a commissioner, with membership from within MEC. The committees' mandates are: legal affairs; finance and administration; civic and voter education; campaign monitoring; research; training; logistics and operations; and media and public relations. MEC is serviced by a secretariat and the commission has six departments: personnel and administration; electoral services; media and public relations; civic education; finance and procurement; information technology. MEC has regional offices in all the administrative regions, respectively serving five districts in the northern region, nine in the central region and thirteen in the southern region. The regional offices do not have a permanent structure; at the time of elections MEC appoints a Returning Officer for each district.

Section 6 of the ECA states that MEC is an independent body, which shall perform its functions and exercise its powers independently of the direct interference of any public official. "For the purposes of accountability", according to the ECA, MEC shall report directly to the President on the overall fulfilment of its power and functions. ECA section 15 (3) states that MEC shall control its own funds. Funding is provided through the Ministry of Finance. The Parliamentary and Presidential Elections Act (PPEA) of 1993 requires MEC to manage the electoral process fairly, equitably and in a transparent and accountable matter.

Administering the electoral process in Malawi 1994–2004

Judged in terms of key dimensions of electoral administration, the quality of the electoral process in Malawi has declined since 1994. This finding is largely shared by MEC itself:

It is true, we do not have the capacity to conduct free and fair elections, we did indeed have better elections in 1994 than in 2004, we are not moving in the right direction. This is due to

⁴ Civil society input was co-ordinated by the Malawi Election Support Network (MESN) which acted as a forum between MEC and civil society.

capacity and planning. The election date is set in the constitution, we have a good five years to plan, but nevertheless elections are characterised by chaos.⁵

The poor quality of electoral administration affected the legitimacy of the electoral process and the results. It cast doubts on the legitimacy of the regime that was installed. Our discussions with political leaders before the 2004 elections indicated that there was lack of confidence in the independence and impartiality of MEC. As a result, the electoral results have been questioned in court both in 1999 and 2004. Below, we show that the administration of the electoral process in Malawi remains problematic because of the uncertainty of the rules and procedures guiding the electoral process combined with MEC's limited autonomy and capacity.

The registration of voters

All political systems distinguish between qualified and registered voters. However, the discrepancy tends to be larger in new democracies in the developing world such as Malawi, since they do not have permanent voter registers but perform voter registration during designated time periods. To be qualified to vote in Malawian elections one must be a resident citizen or have been permanently residing in Malawi for seven years. In addition, a potential voter must have reached a specified age requirement. Before the 1999 elections, the minimum age for registration as a voter was reduced from 21 to 18 years. Because Malawi does not have a comprehensive system for recording births, in practice there have been problems in implementing the age restriction for both registration and voting. As a result, according to local and international election monitor reports, people under the age of 18 have registered, and voted, in the presidential, parliamentary, and local elections. Similarly, lacking a national death registry, the voters' roll before each election has been inflated as no national system exists for deregistering the deceased.

The registration system records the basic information of the voter, such as first name, surname, age, sex, village, and Traditional Authority (TA). As very few Malawians have formal identification papers, in the 1994 elections the village headman or some other person of standing within the community confirmed the identities of the voters. Before the 1999 elections, the registration system was upgraded and an electronic registration form was employed and photos were taken and attached to the registration card. Despite the upgrade, a large number of voters were reported to be excluded from the voters' roll due to lack of registration materials. As many as 168,000 voters in opposition strongholds in the northern and central regions were reported to have been excluded from the voters' rolls.⁶ Therefore, the 1999 registration exercise was not able to secure equal participation of all eligible voters.

The registration process prior to the 2004 presidential and parliamentary elections also presented a number of challenges in terms of securing equal participation. As in 1999, the 2004 registration exercise was hampered by shortage of equipment, confusion about procedures, and inadequate time. At the end of the registration process, MEC indicated that 6.7 million people had been registered to vote. This represented an increase of 2.7 million voters from the 5.1 million people that were registered in 1999. The estimates of the Malawi National Statistics Office, however, put the number of voters at 5.6 million. After 'cleaning' the voters' roll, the number of registered voters in 2004 was reduced to 5.7 million.⁷ In the week leading up to the polling day, a number of political parties and NGOs petitioned the High Court arguing that the Electoral Commission had failed to conduct

⁵ Statement by Willie Kalyonga, Deputy Chief Elections Officer, Lilongwe, 1 July 2004.

⁶ Nandini Patel (2000), 'The 1999 elections in Malawi. Challenges and Reforms', in Martin Ott, Kings M. Phiri and Nandini Patel (eds.), *Malawi's Second Elections: Process, Problems, and Prospects*. Blantyre: Kachere Books, p. 34.

⁷ Boniface Dulani (2004), 'The Elections Under Scrutiny: Process - Results - Lessons' in Martin Ott, Bodo Immink, Bhatupe Mhango and Christian Peters-Berries (eds.), *The Power of the Vote: Malawi's 2004 Parliamentary and Presidential Elections*, Zomba: Kachere Books, p. 10.

an efficient registration of voters and had not allowed sufficient time to inspect the voters' roll. As in 1999, the problems experienced during the registration process led the courts to order a postponement of the polling date. Owing to the inadequacies of the registration exercise, three reference documents were used to identify eligible voters during the 2004 voting process: the computerised voters' roll, the manual voters' roll of 1999, and the record cards. This caused delays and possibly the disenfranchisement of some voters.

Popular participation in electoral processes is often used as an indicator of the quality of the electoral process. As table 7 indicates, a number of challenges remains for the Malawi electoral process to fulfil its stated objective of guaranteeing all eligible voters equal participation. Both the 1999 and 2004 presidential and parliamentary elections were declared not fair by local and international election monitors, in part due to the inadequate registration procedures. In both the 1999 and 2004 elections the voter registration period was extended which led to the postponement of elections: in 1999 by convening an extraordinary sitting of the parliament and in 2004 the elections were postponed by a few days. These extensions helped to enhance voter registration. Table 7 shows an increase in the number of polling centres, which may have reduced the administrative burden of voting for Malawian voters. However, as indicated by both the total number of valid votes cast and the percentage of voters among the registered voters, the voting population in Malawi decreased significantly from the 1999 to the 2004 elections.

Table 7: Voter registration in parliamentary and presidential elections, 1994–2004

Year	Registered voters	Total vote	Vote/Reg %	Total valid votes	Polling centres
1994	3,775,256	3,004,835	80.54	2,934,285	n.a.
1999	5,071,822	4,755,422	93.76	4,663,751	3,698
2004	5,752,028	3,413,565	59.35	3,323,801	4,500

Source: Malawi Government Gazettes

The registration of candidates

A fair and impartial election campaign requires that the rules for establishing political parties are neutral. Furthermore, the rules for candidate nominations and for individuals to aspire to office on their own must be transparent and applied impartially. In Malawi, the formation of political parties is regulated in the Political Parties Registration and Regulation Act (1993). These rules are, in a comparative perspective, very liberal and do not represent a significant barrier against new party initiatives. The rules for registering as a candidate are also simple and the nomination fees – Kwacha 10,000 for parliamentary candidates and 50,000 for presidential candidates – are comparative low.

The enabling environment for candidates and parties to contest elections caused the number of political parties to increase after 1994. In 1994, there were less than 10 political parties in the country, in 1999 there were 18 registered political parties, and in 2004 altogether 28 parties had registered. There was a similar increase in candidacies. In the 2004 parliamentary elections, a record total of 1,267 candidates registered to contest.⁸ Altogether 372 contestants, or 29 per cent of the total number of candidates, stood as independents. In the 2004 presidential race, six candidates contested, including one independent candidate. Thus, the formal rules for registration of parties

⁸ Boniface Dulani, 'The Elections Under Scrutiny: Process – Results – Lessons', in Martin Ott, Bodo Immink, Bhatupe Mhango and Christian Peters-Berries (eds), *The Power of the Vote: Malawi's 2004 Parliamentary and Presidential Elections*, Zomba: Kachere Books, p. 15.

and candidates in Malawian elections appear to fulfil the requirements of a free and fair electoral process. The way on which the individual parties select candidates through primary elections have, however, been criticised for lack of transparency of rules. The selection of candidates for the 2004 general elections generated a number of court cases as candidates took their respective parties to court over irregularities in the party primaries.

Voter education

According to Malawi's constitution (section 75), MEC's responsibility in the electoral process includes the provision and dissemination of voter awareness information and civic education. According to MEC's Civic and Voter Education Policy, civil society organisations are invited to provide voter education in an impartial manner. The requirement for any civil society organisation wishing to participate in the voter education process is accreditation by MEC.

Malawi's civil society was an active participant in the transition that led to the 1994 multiparty elections. Maybe not surprisingly, therefore, civil society organisations were co-managers of the electoral process, playing an important role in terms of voter education. Analyses of the 1999 elections suggest that the impact of civil society in voter education was limited.⁹ According to Wiseman Chirwa, MEC lacked a clear policy on how to involve civil society in voter education.¹⁰ It was argued that the accreditation process lacked transparency and that accreditation came too late for most institutions. Given the time constraint, most civil society organisations provided inadequate training of personnel and the monitoring was poorly co-ordinated.

For the 2004 elections, 22 organisations were accredited to provide voter education. In September 2003 these organisations formed an alliance called Malawi Election Support Network (MESN). The accredited organisations provided voter education before the registration period and before polling day. Compared to the 1999 elections, co-ordination through MESN reduced overlaps and eased communication between the various civic education initiatives. According to observers of the 2004 electoral process, the fact that civil society became involved in voter education and the electoral process more generally as late as September 2003 reduced its impact. Furthermore, the low number of accredited organisations and the fact that these organisations were to cover large geographical areas reduced the relevance of civil society in voter education.¹¹ MESN and its member organisations also argued that voter education was limited due to insufficient funding, late accreditation by MEC and the late change from tripartite to presidential and parliamentary elections.

Regulation of the electoral campaign

The regulation of the electoral campaign should guarantee the security and freedom of all candidates and parties to communicate with the voters. First, to ensure a free and fair electoral process, state controlled media, radio, TV, and newspapers should present the political alternatives neutrally. Second, all contesting parties should be granted equal opportunity to present their views publicly at rallies and public demonstrations. Finally, access to public resources for campaigning and running for office should be equally available or not available at all. But, the elections conducted since 1994 have suggested that MEC and a number of other relevant institutions have

⁹ Chirwa, W. and M. S. Sichinga (1999), 'NGO potential involvement in elections', Lilongwe: UNDP.

¹⁰ Wiseman Chirwa (2000), 'Civil society in Malawi's democratic transition', in Martin Ott et al. (eds.), *Malawi's second democratic elections. Process, problems and prospects*, Blantyre: Kachere Books.

¹¹ Bodo Immink and Gerard Chigona (2004), 'Between apathy and participation: The role of civil society and the faith communities', in Martin Ott, Bodo Immink, Bhatupe Mhango and Christian Peters-Berries (eds.), *The Power of the Vote: Malawi's 2004 Parliamentary and Presidential Elections*, Zomba: Kachere Books, p. 144.

faced serious challenges in terms of facilitating a fair electoral process and securing a level playing field.

In terms of access to media, section 63 of the Parliamentary and Presidential Elections Act (PPEA) states that every political party is entitled to have the substance of its campaign reported on the Malawi Broadcasting Corporation (MBC) and any newspaper in circulation in Malawi. Furthermore, the act commits the MBC to neutrality in its news reporting. The act also empowers MEC to play a role in overseeing that the MBC ensures a fair base for political competition. The constitution specifies an official election campaign period, starting eight weeks prior to polling day.

In view of the transitional nature of the 1994 elections from a one-party system it is perhaps not surprising that the radio coverage of the 1994 campaign was dominated the MCP. The MCB carried mainly reports of Banda's tours around the country. The opposition, on the other hand, dominated foreign broadcasting. As a result, political parties, civil society, local and international election monitors concluded that media coverage was fairly balanced in the 1994 elections.

In the 1999 election campaign, however, both local and international election observers reported that the playing field was not level. It was found that the MBC did not provide fair coverage of all the parties contesting the elections. The incumbent party, the UDF, predominated. In order to ensure a more balanced media coverage of the 2004 general elections, a number of steps were taken in collaboration between political parties, MEC, civil society organisations and the donor community. Most importantly, a media monitoring unit was established within MEC. Nevertheless, the 2004 elections' campaign was reported to be biased in favour of the incumbent party. In the 15-week period prior to the polling date, the MBC gave 92.9 per cent of positive election news in main news bulletins to the governing UDF/AFORD/NCD alliance, leaving 7.1 per cent to be shared between all opposition parties and candidates.¹² On the other hand, some newspapers and private radio stations provided voters with more balanced information. Comparisons of media coverage indicate that MEC had failed to secure a level playing field for the various contesting parties and candidates in the electoral process. The unclear responsibilities between Malawi Communications Regulatory Authority (MACRA) and MEC and the MBC in terms of enforcing the electoral guidelines suggest that the rules and regulations guiding the electoral process in Malawi were ambiguous in this regard.

The use of state resources in electoral campaigns also indicates a bias in favour of the incumbent candidate and party. In Malawi, political parties that gain a minimum of 10 per cent of the seats in parliamentary elections are entitled to state funding. But as these funds do not cover the costs of maintaining a party organisation or finance electoral campaigns, all parties rely on sponsors. Inadequately defined boundaries between the state and the party suggests that the incumbent party's political campaign is regarded as 'national affairs' and, therefore, supported by the government. Electoral reports of the 1999 presidential and parliamentary elections found that that the UDF and the State President used state resources, including government vehicles, to conduct their campaigns. The 2004 election campaign witnessed newspaper reports and televised events showing the incumbent party's (UDF) presidential candidate handing out money at public rallies. Vehicles from government parastatals were also used for campaign purposes. The Malawi Electoral Commission did not act on the openly displayed misuse of state funds for political campaigns.

¹² Tim Neale (2004), 'Malawi's Media – 2004 and Beyond', in Martin Ott, Bodo Immink, Bhatupe Mhango and Christian Peters-Berries (eds), *The Power of the Vote: Malawi's 2004 Parliamentary and Presidential Elections*, Zomba: Kachere Books, p. 185.

Voting in Malawian elections

The main focus of any electoral process is that of voting itself. For the elections to carry any weight it is essential that the voting process proceeds in an unbiased manner and that the process is transparent and open to scrutiny by national and international observers. Having cast their votes, voters must be confident that each vote is counted, counted only once, that votes are counted for the alternatives they were intended and that no votes except those dropped in the ballot boxes were included in the tally. As discussed above, the 1994, 1999 and 2004 parliamentary and presidential elections have displayed administrative shortcomings. In general, however, both local and international monitoring reports have observed that the actual voting process have been carried out in a transparent manner in all elections since 1994. This finding is borne out by the fact that problems related to the voting procedures were not reported half as frequently as those related to the registration process in the 1999 general elections.

Tabulating and announcing the results

The tabulation and announcement of results showed shortcomings in the 1994, 1999, and 2004 presidential and parliamentary elections. Election observers of the 1999 elections noted that the transmission of results from polling stations to Returning Officers was undermined by delays and errors of documentation. Possibly due to the increased number of contesting parties and candidates, local and international observers found the tallying of the 2004 parliamentary and presidential to be marred by irregularities to a greater extent than in the 1999 elections. The processing and declaration of results in the 2004 elections highlighted a number of flaws that impacted on the credibility of the results. In the days after polling closed on 20 May 2004, the Malawi Electoral Commission failed to display all results for verification by stakeholders before announcement, which led to announcing and gazetting of different sets of election results. Mirroring the shortfalls experienced in the 1999 elections, the processing and declaration of results by MEC was delayed. The delays fuelled suspicion of manipulation. Furthermore, as MEC decided not to address complaints about irregularities before declaring the results, the results released were incorrect, particularly for parliamentary seats. The attempt to correct the errors by changing the results further diminished the credibility of MEC.

Handling of election complaints

The Malawi courts have played a significant role in terms of solving disputes arising during the electoral process between contesting parties. Compared to the 1994 electoral process, the 1999 election results were to a greater extent disputed, and the judiciary became involved in a number of cases. In 1994, a few court interventions took place that involved the legal framework. In 1999, the courts intervened to a greater extent at the campaign stage. The 2004 elections indicated an increased level of conflict as the courts became centrally involved in the electoral process from cases involving electoral rules, the voter registration process, the candidate selection, the election campaign, the polling process, the counting of the ballots, and the integrity of the results.¹³ The impact of the courts in terms of safeguarding free and fair elections was particularly important in securing the contesting parties and candidates' access to public rallies and demonstrations. Nevertheless, the number of election petitions brought before the courts after the 2004 elections indicate that the electoral process continues to be marred by irregularities that affect the legitimacy of the election results.

In August 2003, the National Elections Consultative Forum (NECOF) was established in order to provide a forum for discussing and resolving issues of electoral conduct between the political parties, NGO representatives and MEC. A similar structure was established at the district level

¹³ Siri Gloppen and Edge Kanyongolo (2004), 'The role of the judiciary in the 2004 general elections in Malawi', Bergen: Chr. Michelsen Institute, CMI Working Paper WP 2004.

referred to as Multiparty Liaison Committees (MPLC). By bringing together the stakeholders and discussing election related issues, the intention behind NECOF was to improve the credibility and impartiality of MEC in the eyes of the opposition and civil society. In the period leading up to the 2004 presidential and parliamentary elections, NECOF was scheduled to meet every month, but lack of commitment on the part of some members meant that only a few meetings were held. Most observers noted, however, that the MPLCs had been fairly successful in resolving political conflict at the district level.¹⁴

The fact that electoral contests are referred to the courts may reflect a lack of trust in the political institutions charged with the administration of the electoral process. Whereas observers described the 1994 electoral exercise as 'free and fair', the 1999 general elections were characterised as 'substantially free and fair' by international observers. The 2004 general elections were judged to be 'free but not fair' due to inadequacies in the administration of the electoral process. Civil society organisations as well as local and international election monitors have, in particular, emphasised the need to restructure MEC in order to improve its performance and, thereby, ensure the legitimacy of the election results.

¹⁴ Nandini Patel (2004), 'Troublemakers and Bridge Builders: Conflict Management and Conflict Resolution', in Martin Ott, Bodo Immink, Bhatupe Mhango and Christian Peters-Berries (eds), *The Power of the Vote: Malawi's 2004 Parliamentary and Presidential Elections*, Zomba: Kachere Books, p. 22.

Political parties and the party system

There's a time for everything. There's a time for joining parties. And there's time for quitting. And then there's a time for joining other parties.

Kenneth Lipenga, Minister of Information, cited in *The Nation*, 17 February 2005.

A common perception of political parties is that they balance between three primary objectives: winning elections, winning office, and implementing policies. These competing objectives mean that parties place more emphasis on some parts of the electoral process than others. Parties pursue their goals against the legal background of party registration, campaign regulations, internal party rules and traditions, and the perception of how close it is necessary to abide by the rules. During the electoral process, the selection of candidates and the electoral campaign are the main stages of concern to the parties. To some extent parties contribute to voter education, but the main preoccupation of the individual party is to convince voters that their candidate and their own political message are preferable to any of the competitors. Winning office and winning election are related, but not identical aims. Maximising votes is a good, but not a sufficient condition for winning office. Pending the outcome of the election and the institutional rules for the selection of office holders, minor parties may be more likely than larger ones to occupy governmental offices, if there is a need to build a coalition. The legitimacy of the process impacts on how easily the losers accept the outcome. Depending on the electoral result, inter-party relationships in the aftermath of the election are the most important determinant of party success in occupying various types of offices.

The 2004 election was a step in the fragmentation of the Malawian party system, shaped by the competition for political offices. The fragmentation was eased by the institutional rules of the game and the leadership-obsessed nature of the parties.

Background to the 2004 election

In the 2004 presidential and parliamentary elections there were five presidential candidates and 1,267 candidates seeking parliamentary seats, almost double the figure from 1999. These figures illustrate the fragmentation of the party system. This trend must be seen against the backdrop of the development of political parties in Malawi, which may be divided into four phases.

First, in the 1950s and early 1960s Malawi was a multiparty state in which the United Federal Party (UFP), the Christian Democratic Party (CDP) and the Congress Liberation Party (CLP) existed alongside the Malawi Congress Party (MCP).¹⁵ However, soon after independence in 1964 a conflict known as “the cabinet crisis” erupted. Differences between cabinet ministers bordered on regionalism as Dr. Banda was accused of neglecting the northern and southern regions in favour of his home region in the centre. These differences led to intra-party conflicts and power struggles within the MCP which later erupted in the cabinet crisis. Consequently, some senior ministers fled into exile and others were detained in the country.

¹⁵ The MCP was founded in 1959, but its history goes back to 1944 when it was established as the Nyasaland African Congress.

A fall-out from the cabinet crisis was the introduction in 1966 of a one-party state when the MCP was declared the only legitimate party. The need to foster national unity, expedite national development and consolidate the young state and nation were arguments in favour of abandoning the multi-party system. Thus, during phase two, the MCP enjoyed a monopoly for almost three decades until 1993 when a referendum opened for a multiparty system: the start of the third phase in the history of party developments.

From 1994 until the so-called 'third term' debate in 2003, Malawi's party system can best be described as a three-party system, where the UDF, AFORD and the MCP predominated, reflecting regional divisions with the UDF dominating in the south, the MCP in the centre, and AFORD in the north. The fourth phase started in the run-up to 2004 elections and continued into the post-election period. The fourth phase is characterised by fragmentation and restructuring because of party splits, mergers and alliances.

The three-party period (1994–2003)

Within Dr. Banda's MCP there emerged pressure groups favouring a multi-party system of government. Two of these factions developed around former businessman and politician under the MCP regime, Bakili Muluzi, and a trade union leader, Chakufwa Chihana. They formed new political parties which contested in the 1994 and 1999 elections: the United Democratic Front (UDF) and Alliance for Democracy (AFORD). Both of these parties emerged from pressure groups within the MCP and together with the MCP they made up the 'three-party system' that dominated Malawi until 2003.

In the 1994 parliamentary election, only three political parties – the MCP, the UDF and AFORD – fielded candidates in all, or nearly all, of the 177 constituencies, while other parties confined themselves to a minority, and in some cases only a few, constituencies. In the 1999 (and 2004) elections, AFORD's number of candidates was reduced as the party concentrated on its stronghold in the northern region. The dominance of the three parties was also evidenced in the parliamentary election results, reflecting a regional distribution of support. AFORD dominated in the north, the old state-carrying party, the MCP, in the centre and the UDF in the south (see Tables 1 and 3). The UDF won almost half of the seats, the MCP slightly less than a third and AFORD a fifth of the 1994 seats. In 1999, AFORD's share of the seats declined, but in terms of actual numbers it remained the same. The decline of the share was caused by the increase in the total number of seats from 177 to 193. All of the new seats were allocated to the southern and central regions, while AFORD's stronghold was in the northern region.

The relationship between the three largest parties shifted between competition and alliance. Thus, during the first parliament, the MCP and AFORD established a parliamentary alliance. However, AFORD joined the UDF as a junior partner in government in 1995 until 1996 when the party split over the issue with some MPs continuing as part of the government and the rest as part of the opposition. In the 1999 election campaign AFORD was aligned with the MCP. As the third-term issue emerged in 2003, AFORD again joined the UDF government.¹⁶ As we shall see, the fragmentation of the party system prior to and in the wake of the 2004 elections furthered changed the alliance and competition patterns.

Other parties, such as the Social Democratic Party (SDP) formerly the Christian Democratic Party of Eston Kakhoma; the Malawi Democratic Party (MDP) of Kamlepo Kalua; and the Malawi Democratic Union (MDU) of Amunandife Mkumba were unsuccessful in securing seats. Between the 1994 and 1999 elections, the number of registered parties increased to 18, but the five new

¹⁶ Colin Legum (ed.) (2001), *Africa Contemporary Record*, Vol. XXV, London: Africa Publishing Company, pp. B606–609.

parties that appeared on the ballot in 1999 – the Congress for National Unity (CONU) of Bishop Mnkumbwe; the Mass Movement for Young Democrats (MMYG) of Christopher Chaima Banda; the Malawi National Democratic Party (MNDP) of Tim Mangwazu; the United Party (UP) of Bingu wa Mutharika; and the Sapatwa National Democratic Party (SNDP) of Mrs. F. Chirwa – all failed to secure seats. Only one independent candidate was successful in the 1999 election.

Table 8: Percentage of seats for the major party alternatives, 1994–2004

	MCP	UDF	AFORD	Ind.	RP	PPM	NDA	Mgode	Petra	CONU
1994	31.6	48.0	20.3	0						
1999	34.2	48.7	15.0	2.1						
2004	31.5	26.7	3.2	20.9	8.0	3.7	4.3	1.6	0.5	0.5

Fragmentation and party restructuring

In the run-up to the 2004 elections the number of registered parties increased to 29, four times as many as at the start of the multiparty era. All of the established parties, the MCP, the UDF and AFORD experienced breakaways, partly because of long-standing internal conflicts over leadership, and partly because of conflicts over alliances and the “third-term” issue.

The MCP inherited a legacy of internal divisions and factions when Dr. Banda retired from politics. The front bench politicians who took over the party, Gwanda Chakuamba, John Tembo, Louis Chimango, Kate Kainja and Hetherwick Ntaba had all been key figures under Dr. Banda. This meant that past political differences and fights for recognition were carried over into the new multiparty setting. Chakuamba, who was the MCP president soon clashed with his Vice President, John Tembo, over the party presidency. The party was divided over the “third-term” issue, and the two sides each called a national convention, each electing a party president. The dispute over who was the party’s legitimate leader was in the end settled by the court in Tembo’s favour. It was against this backdrop that splinter parties emergence towards the 2004 elections. In December 2003, the former MCP publicity secretary, Hetherwick Ntaba, registered his own party: the New Congress for Democracy (NCD), followed by two other MCP MPs. A few days into 2004, the vice-president of the MCP, Gwanda Chakuamba, after he had lost the party presidency to Tembo, also defected and announced the formation of his own party, the Republican Party (RP), and nine MPs followed him to join the RP. Finally, Kate Kainja, left the post of MCP Secretary General only in 2005 and joined the cabinet of Dr. Bingu wa Mutharika that came to power in May 2004.

Towards the end of the second electoral term of President Muluzi, the issue of the presidential term limit emerged and caused divisions with the UDF as the governing party. The party was internally divided between people supporting and opposing the lifting of the term limitation. In the process several people defected, or were excluded. Three parties may be said to have originated from the UDF, although other activists were recruited to these parties from elsewhere as well: the National Democratic Alliance (NDA) and Peoples Progressive Movement (PPM) prior to the 2004 elections, and the Democratic Progressive Party (DPP) after the 2004 elections.

The National Democratic Alliance (NDA) started as a pressure group within the UDF, but registered as a party in January 2003. Its leader, Brown J. Mpinganjira, had been a cabinet member but opposed to the attempt by President Muluzi to alter the constitution to allow him to stand for a third term.

The Peoples Progressive Movement (PPM) started as a political movement outside parliament, led by Korea Mpatsa and Mark Katsonga Phiri. However, several UDF members defected, or were forced out, during the third term debate and joined the party. One of these was Aleke Banda, a former cabinet member in the UDF government. He became president of PPM.

When President Muluzi realised that the bid to secure a third term had failed, he nominated Dr. Bingu wa Mutharika as the UDF presidential candidate in 2004 through the party's national convention, despite the fact that Mutharika held no senior position in the party. On the contrary, he had contested the presidential elections in 1994 on his own party ticket, the United Party (UP). The nomination of Mutharika triggered the resignation of the Malawian vice-president, Justin Malewezi, from the UDF. He later joined and became party vice-president of the PPM, from which he was later excluded when he registered as an independent presidential candidate, against his party's coalition candidate.

Divisions inside AFORD emerged as a consequence of the leadership's decision in 2003 to join the UDF as a coalition partner. This was controversial and spurred some of its MPs to oppose the coalition. The "third term" issue also played its part in splitting the party. AFORD's convention had asked the party not to support the UDF on the third-term issue. But this resolution was ignored by the party leadership and provided the seeds that germinated into the Movement for Genuine Multiparty Democracy (MGODE). At least three other AFORD MPs resigned from the party during the last year of the sitting parliament, with one member joining the NDA and another joining the RP (see below).

Malawi Forum for Unity and Development (MAFUNDE) was registered as a party in October 2002. It was launched by a group of businesspersons, but it also attracted people from other parties, including the former secretary-general of AFORD. Another party alternative that saw the light of day at the same time as MAFUNDE was the People's Transformation Party (PETRA), which was formed in December 2002. Its main base is in the northern region where it won a parliamentary seat.

The fragmentation of the party system resulted from a combination of factors: the political system in Malawi is clearly presidential, which encourages ambitious politicians to position themselves to maximise their chance of winning that office. Forming a political party is an option that is available to those politicians that are not nominated by one of the existing parties. The rules regulating party formation are conducive to new party formations (see below) and the electoral system does not act as a barrier either. Moreover, internal party rules are unclear on many issues and erratically applied which tends to result in lack of legitimacy among losing contenders in the party. Consequently, they easily defect to other parties or run as independents.

In the following sections we look at the party system in light of four of the phases in the 'electoral wheel':

- the formal regulation of political parties,
- the nomination of candidates,
- the election campaign,
- the fall-out of the election result.

The legal framework of party organisations

The formation of political parties in Malawi is regulated in the Political Parties Registration and Regulation Act, 1993. These rules are comparatively speaking extremely liberal, and do not represent a significant barrier against new party initiatives. In addition, once a party is registered it remains registered even if it does not take part in elections by nominating candidates. This act has

remained in force without any changes since it was enacted. It stipulates that to be registered a party must provide a list of names and addresses of no less than 100 registered members that are eligible voters and Malawi citizens, a list of the party's officers, and a copy of the party constitution and manifesto.

The nomination process

There is no legislation regulating internal party affairs or how political parties should nominate candidates for the presidency or for parliamentary offices; this is the prerogative of each individual party. In the absence of legislated rules for intra-party affairs, in effect, each party elects a president in a national convention and the party president is the party's de facto presidential candidate. The only exceptions are:

- if the party is in an electoral alliance with other parties, in which case only one of the party presidents can stand a presidential candidate, as was the case with the alliance between AFORD and the UDF in 2004, and with the Mgwirizano coalition in 2004, or
- as in 2004 when outgoing President Muluzi was constitutionally barred from re-election but nevertheless continued as party president of the UDF.

A candidate may also run as an independent, which former vice-president Malewezi did in 2004.

a) Presidential nominations

For the ruling parties, the UDF and AFORD, the presidential candidate issue was left to the UDF alone to decide; even the vice-presidential candidate was picked unilaterally by the UDF. The AFORD leadership seemed content to have the second vice-presidential position reserved exclusively for Chakufwa Chihana in the next government. Ntaba, who had launched his own party, the NCD, in early 2004 initially sought to join the Mgwirizano coalition talks, and thus presented himself as part of the opposition against the UDF/AFORD government. However, a few weeks before the elections he was offered a cabinet post and shortly thereafter withdrew from the presidential race.

The fragmentation of the opposition meant that the ruling party alliance – the UDF and AFORD – might be winning the election even if their electoral support was dwindling. To prevent this from happening, civil society organisations, primarily different Christian denominations, initiated a process of dialogue and negotiation among opposition parties with the objective of forming a grand election coalition and fielding a joint presidential candidate. As the talks progressed, seven political parties, mostly new and small parties, signed up for the coalition. This coalition became known as Mgwirizano (Unity). President of the RP, Gwanda Chakuamba, led the coalition as its presidential candidate together with PPM president, Aleke Banda, as his running mate; senior politicians who broke away from the MCP and the UDF had found a new political niche in Mgwirizano. This move was only partly successful. The largest opposition party (MCP) chose not to join the coalition, the NDA jumped ship during the talks, and a third party (NCD) was denied access to the deliberations because the other coalition partners considered it too close to the ruling UDF/AFORD alliance. In the end, altogether five opposition candidates filed papers for the presidential nominations. The incumbent party alliance fielded Bingu wa Mutharika as its presidential candidate with Cassim Chilumpha as his running mate. The RP President, Gwanda Chakuamba, was nominated as the Mgwirizano coalition's candidate, with the president of the PPM, Aleke Banda as his running mate. John Tembo ran on behalf of the MCP, Brown Mpinganjira for the NDA, and Justin Malewezi as an independent. Hetherwick Ntaba ran on his own party ticket, the NCD. He later withdrew from the race, however, and supported the ruling UDF/AFORD alliance candidates.

The case of Justin Malewezi illustrates perfectly how important the presidential office is and how inconsequential party affiliation became as the 2004 elections were approaching. Malewezi had in 1999 been re-elected as vice-president on the UDF ticket. On 1 January 2004 he announced his resignation from the party. After the third term bill had been defeated and withdrawn in 2003, the UDF had to nominate a candidate to succeed the outgoing president, Bakili Muluzi. However, instead of nominating a candidate in a participatory, democratic, transparent and accountable manner, the party, with the help of the outgoing president, nominated a relatively new member, Bingu wa Mutharika, as its presidential candidate. Later, at the MAFUNDE party convention some factions wanted Malewezi as their presidential candidate, but this initiative did not succeed. At the same time, Malewezi was also negotiating with the PPM. At this own party's convention (PPM) he was elected vice-president but was apparently not satisfied. As the Mgwirizano coalition talks evolved it was agreed, furthermore, that whoever they nominated as their presidential candidate, he/she had to be president of his/her party. This agreement in effect blocked Malewezi's candidature. Therefore, he filed his own nomination papers as an independent, while he was still vice-president of the PPM. He justified his candidature by arguing that Malawi would benefit from having a president not affiliated to any political party. Malewezi was subsequently expelled from his party.

b) Parliamentary nominations

The nomination of parliamentary candidates does not follow a standard procedure. In established parties, such as the MCP, the UDF and AFORD, a primary election is held in each constituency in which prospective candidates seek support. Since parties do not have a clearly defined membership, it is not always possible to identify exactly who are legitimate voters in the constituency primaries. Also, several press reports from the primary elections indicate that the procedures were not consistently applied in several constituencies. In some constituencies voting took place by voters lining up behind the preferred candidates, with the candidates blind-folded, or facing away from the voters, while in other constituency the candidates could identify who had supported them. Other press reports pointed to inadequate information about when and where the primary election would be held. Taken together, these ambiguities undermined the legitimacy of the process and resulted in protests from losing candidates. Particularly in the UDF many candidates appealed to the party for a re-run of the primaries, while in other cases the losing candidates appealed to the courts to have the nomination overturned. In many cases dissatisfied candidates decided to run as independents. The number of independents also increased when the leadership of the UDF agreed not to nominate candidates in most of the constituencies in the north, the stronghold of its party ally, AFORD. However, inside the UDF many prospective candidates did not accept this deal and ran as independents. Thus, these internal party problems largely explain why the number of independent candidates was significantly higher in 2004 than in the previous election (see Table 10.)

Table 9: Number of constituencies where parties nominated candidates

Party	1994	1999	2004
AFORD	159	75	40
UDF	177	191	164
MCP	177	187	167
CSU	6		
CONU		5	2
MDP	29	24	10
MDU	2	7	
MNDP	10		
UFDM	36		
MMYG		1	
NPF		4	
SDP		10	
SNDP		2	
MAFUNDE			21
PPM			112
MGOE			22
NDA			187
NSM			1
NUP			9
NCD			23
PFP			2
PETRA			18
RP			110
Independents	12	114	373
Total (candidates)	608	668	1268
Total (constituencies)	177	193	193

Source: Malawi Electoral Commission: Parliamentary election candidates 1994, 1999 and 2004.

The party splits and the newly formed parties changed the political landscape ahead of the 2004 elections. Splits in the MCP and the UDF reduced the number of seats these two parties contested. Of the new parties, the NDA fielded candidates in all but six constituencies and the PPM and the RP in more than 100 constituencies. Although there were also many other party alternatives, most of them nominated candidates in only a minority of the constituencies and AFORD emerged as an exclusively regional party in the north.

c) Women in politics

Prior to the 2004 elections political leaders agreed to strive for the goal set by the Southern African Development Community (SADC) that 30 per cent of the elected MPs ought to be women. The total number of female candidates was 154 in 2004, or 12.4 per cent of all candidates. However, the parties did not contribute very much to promoting women in politics. Only one of the new parties, PETRA, came close to the SADC target by nominating 27.8 per cent women. Most of the women ran as independents, 29 per cent of all female candidates.¹⁷ Thus, the SADC target was not achieved, but the trend of female representation during a decade of multiparty system is positive (see Table 11). In 2004 nearly 15 per cent of the elected MPs were women, almost triple the number ten years previously.

¹⁷ Martin Ott et al. (eds.) (2004), *The power of the vote. Malawi's parliamentary and presidential elections*, Zomba: Kachere Books. Tables 9 and 10 compiled by Kimberley Smiddy.

Table 10: Women in Malawi's Parliament 1994–2004

Year	Number of woman MPs	Percentage of woman MPs
1994	10	5.65
1999	17	8.85
2004	27	14.44

Source: Malawi Electoral Commission

The election campaign

The official election campaign is limited to the eight weeks prior to polling day, but in reality the campaign period is longer, particularly for the ruling party as it is almost impossible to distinguish between the official functions of the president and the upcoming election campaign. We have previously seen the problems the opposition parties have faced with access to the official media. Here, we shall briefly summarise what the official party policy positions were, as revealed in the parties' electoral manifestos. It should be mentioned that the manifestos themselves were difficult to obtain, even from the party headquarters, indicating their peripheral role in the election campaign.

The UDF prepared an extensive election manifesto, running to almost 100 pages.¹⁸ The party promised, above all, continuity in terms of policies and spent considerable space outlining its achievements. Seven issues were highlighted in the programme, six of which dealt with various aspects of economic development: economic development in order to eradicate poverty; increase employment by developing the private sector; agricultural development to guarantee food security; investment in rural areas; empowering women economically and politically, and similarly for youth; and finally consolidating democracy and human rights. The party's overall ambition was to see an annual GDP growth rate of at least six percent.

On the one hand, the UDF manifesto envisaged a massive investment programme. It promised increased or continuing investments in roads, bridges, hospitals, schools, equipment in the educational and health sectors and expansion of these services. While many of these investment plans were of a general nature, some were very specific: 1000 new auxiliary nurses for a two-year educational programme, a new hospital for Blantyre; two other hospitals with new specialised units; and three additional teacher training colleges by 2008.

The manifesto is less clear about the financing of all this. The idea underpinning the whole endeavour was the strengthening of the private economic sector to achieve national growth. The party promised "a favourable tax policy" to encourage investments, particularly in agriculture. Private enterprises would be involved in managing public infrastructure and tax holidays would encourage industries to provide educational scholarship and housing for their employees.

Clearly, economic development constituted the most salient issue for the UDF and in spite of the very ambitious government investment programmes the party can be located ideologically towards the centre-right in terms of economic policy: the private sector is to be strengthened and tax incentives are the mechanisms to achieve this aim.

¹⁸ Apart from the substance of the manifesto, it contains telling illustrations that indicate the respective roles of outgoing president and the party's presidential candidate. President Muluzi features in all photos and in the few photos that also depict the presidential candidate (Mutharika) the latter is presented as listening to Muluzi. The preamble of the manifesto talks about what "I" (presumably referring to Muluzi) have achieved while in office, not the party. The photos partly present the president as an ordinary Malawian, standing in a line together with other people, as a caring person visiting patients in a hospital together with the first lady, partly as the statesman, when reviewing the guard of honour.

Compared to the UDF's extensive election programme, the Mgwirizano coalition manifesto was limited to 20 pages. As an opposition group, the coalition had no previous policies to defend. As a coalition of several parties, there may have been less to agree upon. Moreover, the main part of the negotiations leading to the coalition was devoted to selecting a joint presidential candidate. All of this may explain why the election manifesto of the Mgwirizano coalition was rather limited.

The coalition emphasised governance issues more than the UDF did. 'Good governance', in the coalition's view, had deteriorated under the UDF. Among the governance issues mentioned were reform of the Malawi Electoral Commission; greater transparency of the finances of individual politicians and political parties; limited size of the cabinet; more emphasis on merit for civil service appointments; and fighting corruption. Good governance was seen as the "prerequisite for sustainable government". The Mgwirizano manifesto had aims similar to those of the UDF – economic development through such mechanisms as stimulating the private sector – but promised to reverse the policies which were claimed to have caused decline. Ideologically, the Mgwirizano coalition was clearly more rightist than the UDF: "We will pursue a free market economy with minimal but strategic state intervention". They saw stricter budgetary policies as key to improving the national economy: reducing the budget deficit through expenditure control; establishing targets and monitoring expenditure levels for various sectors; and reducing tax avoidance through increasing the efficiency of the Malawi Revenue Authority. Subsidised agricultural inputs would be used in the short run, but would be phased out in favour of commercialisation. Similar to the UDF, the Mgwirizano coalition also promised increased investments in education, health, and infrastructure projects.

The previous state-carrying party, the MCP, had – like the UDF – a comprehensive electoral manifesto of 80 pages. It started by reminding the voters that the MCP ended colonialism. It continued by claiming that its experience as a governing party made it qualified to reverse "the declining trends experienced over the last 10 years under the rule of the UDF administration." The largest share of the manifesto – 45 pages – was devoted to economic issues, with agriculture accorded priority. The MCP saw irrigation and diversification as the keys to increasing agricultural production. It listed fifteen different proposals for increasing the production capacity of smallholders. Other measures were proposed for the larger estates. Some form of fertiliser subsidies would be re-introduced. As for the other parties, also the MCP promised expansions in the health and educational sectors, including allowing a role for private institutions.

As we have seen, there were some differences between parties in terms of issue saliency, but less in terms of the direction of policy. The opposition parties were more concerned with governance reforms than the UDF. All parties favoured free market economic policies, although with more governmental involvement in agriculture than in other sectors. All parties promised significantly more investments in the health and educational sectors. The minor policy differences, particularly along the left-right dimension is not surprising given Malawi's dependence on donors and the international finance institutions. In reality, any government in Malawi would be constrained in its economic policy options.¹⁹

However, most of the election campaign did not address future policy promises but arguments about who would be the most reliable, honest and capable president. The opposition's main allegations concerned corruption and mismanagement of the incumbent regime.

¹⁹ One issue that tended to recur in several campaign meetings we observed was that of fertiliser subsidies. The UDF/AFORD blamed the donors for pressurising them into removing the fertiliser subsidies while the opposition promised to bring them back.

The post-election fall-out

The long time it took for MEC to announce the official results fuelled suspicions among the parties that not everything had been conducted correctly. The Mgwirizano coalition candidate later joined the MCP, and other parties called on the courts to annul the elections. Notwithstanding this fact, the very same actors, except the MCP, joined the new president's cabinet. This manoeuvring further fragmented the party system.

Although Mutharika was nominated and elected president as the candidate for the UDF, the outgoing president, Bakili Muluzi, was still the party's national chairman. When the newly elected president embarked on an anti-corruption campaign, in which several of Muluzi's cabinet members were arrested, conflicts intensified between the Muluzi and the Mutharika factions in the UDF. Mutharika eventually resigned from the UDF in February 2005 and registered his own party the Democratic Progressive Party (DPP), which became the 35th registered party in Malawi.

Further restructuring of the party system was a fall-out from the parliamentary elections and the need to build majority support for the president. Since the UDF did not win a majority of seats in parliament, it became necessary for the party to form a coalition government. Thus, a Memorandum of Understanding was signed by the leaders of political parties to lure them into a UDF government. Under these agreements, the leaderships of the RP, MCODE, the NDA and MAFUNDE joined the UDF-led government. However, this was not accepted by all MPs of those parties and party activists down the ranks. For example, the president of the RP, Chakuamba, was appointed vice-president of the new DPP. He succeeded in having 'his' own party de-registered after several rounds in court. However, during September 2005 his relationship with President Mutharika soured and he resigned from the government but was now left with no party to go back to. He subsequently went on to re-register his old party under the name of the New Republican Party.

Although Malawi's party system as a whole is characterised by fluidity, the old state-carrying party, the MCP, has continued to display extraordinary resiliency. It has been able to survive several crises, internally, such as leadership struggles and party splits, as well as externally, such as three consecutive electoral defeats. Nevertheless, it remains the strongest organised party in Malawi. By the time of writing the instability of the party system is evolving, with reports of MPs defecting from one party to another with calls for improved intra-party processes, such as demand for a national convention to elect party office holders, rather than the appointment of such personnel by the party leader.

Parliament and the electoral process

There is something shameful happening in this House.

MP Mapuyu Joseph Njobvuyalema, cited in *Nation Online* on 27 October 2005

As Malawi's supreme legislative body, parliament plays a pivotal role in setting the legal framework for the electoral process – both in terms of constitutional provisions and subsidiary legislation. In other words, parliament sets and changes 'the rules of the political game'. A celebrated case is the struggle over the open/third term issue, which saw parliament prevail over executive dominance. Otherwise, in presidential systems such as that of Malawi the legislature is generally weak.

With minor exceptions, the legal framework is unequivocal and most contestants acknowledge that. The fact that some stakeholders want to change the legal framework does not stem from a perception that the existing rules are unclear. Rather, some stakeholders seek changes that would make the system more just in terms of representation (e.g. re-demarcating the constituencies) and more efficient.

Whenever disputes arise over the rules of the game it is overwhelmingly because some players are alleged to have violated them, be they public authorities or parties to the electoral contest. Such cases are brought before the judiciary for adjudication (see section on the judiciary). In other cases, interested parties may misuse the recourse to the courts in order to discredit opponents, regardless of the legal merits of the cases.

With regard to the granting of funds for electoral purposes, the role of parliament has been much weaker. The cash budget system provides the executive with clout that exceeds its formal powers because it tends to elude the principle of transparency. Executive arrogance as in the case of the special activities vote further weakens parliament in money matters.

Once the electoral contest has produced an outcome in terms of the distribution of seats, parliament again plays a key role – in conjunction with the political parties' leadership and caucuses – in determining how votes and seats are converted into positions, above all the composition and party foundation of the cabinet.

The role of parliament in the Malawian electoral process is twofold. First, parliament is the supreme legislative body in the land and sets the overall legal framework for the electoral process. Second, parliament grants money for political parties and for the administration of the elections by the Malawi Electoral Commission. Parliamentary powers to intervene in the electoral process derive from those two functions. As such, parliament is a meta-institution in terms of the electoral cycle 'wheel' laid out above. Consequently, its roles are not directly related to the phases of the electoral cycle in the same way that those of other institutions are. Even so, attempts may be made to change the rules of the game within the cycle, thus putting parliament to the integrity and accountability test. This section provides examples of parliamentary endeavours to exercise its authority in order to set and protect the existing parameters of the electoral contest.

The pre-1994 era

From the dawn of independence with self-rule in 1963 and in the subsequent post-independence era from 1964 until 1994, the Malawian parliament was responsible for conducting elections in the country. The general elections in those days were essentially parliamentary elections as Dr. Hastings Kamuzu Banda served as life president until the referendum for multiparty democracy on 14 June 1993. Thus, Parliament administered the parliamentary elections in 1961, 1964, 1978, 1983, 1987 and 1992.²⁰

The elections unit within parliament was led by the Clerk of Parliament, who, during elections, would also serve in the capacity of Chief Elections Officer (CEO). The CEO would deploy parliamentary staff placed at his disposal as his secretariat. While several developments took place since 1961, such as the increasing number of legislative assembly members from 28 seats in 1961 to 141 in 1992, the conduct of the parliamentary elections in this period only served to satisfy the constitutional requirement of the one-party era. The President could nominate individuals to serve as MPs, of whom there were ten in 1992.²¹

Dr. Banda's Malawi Congress Party (MCP) landmark victory in 1961 shaped the political life of the nation in the 33 years that followed. As the MCP soon became the only party in the legislative assembly, the elections were mere administrative exercises, especially between 1964 and 1992.²² The multiparty era, however, ushered in by the 1993 referendum, raised the need for an independent electoral body.

Establishing the Malawi Electoral Commission

The independent Malawi Electoral Commission (MEC) was established in terms of Part II of the Parliamentary and Presidential Elections (PPE) Act of 1993, which stipulated the procedures for the appointment of the members of the MEC, their terms and conditions of service and the functions of the Commission. Section 4(1) of that act stated: "for the first general elections members of the electoral commission shall be appointed by the President on the recommendation of the Council." Its establishment was subsequently enshrined in chapter VII (sections 75–77) of the 1995 Malawi Constitution. Section 75(1) of the Constitution states that "[t]here shall be an Electoral Commission which shall consist of a Chairman who shall be a judge nominated in that behalf by the Judicial Service Commission and such other members, not being less than six, as may appointed in accordance with an Act of Parliament." Part II of the 1993 PPE Act was repealed and superseded by the Electoral Commission Act of 1998, which spells out in section 4(1) the procedure for the composition of the electoral commission thus: "The President shall, subject to the Constitution and in consultation with the leaders of the political parties represented in the National Assembly, appoint suitably qualified persons to be members of the Commission on such terms and conditions as the Public Appointments Committee of Parliament shall determine."

Since 1998, the appointment of commissioners has been based on the recommendations of the parties represented in parliament. Furthermore, the parties' parliamentary strength has determined the number of commissioners they can nominate. The act does not suggest that the commissioners be representatives of their respective parties. On the contrary, section 6(1) explicitly stipulates that the commissioners shall conduct themselves independently of any party or interest. However, the

²⁰ Malawi Electoral Commission, Report to Parliament. Number of Parliamentary Constituencies and the Boundaries of Each Constituency, 5 February 1994.

²¹ *A Brief history of parliamentary general elections 1961–1992*. Document extracted from Parliament's library files.

²² AWEPA (European Parliamentarians for Southern Africa), *Report of an observer mission at the Malawi election, 17 May 1994*, p. 4

last two elections have raised serious concern over the independence and impartiality of the commissioners. Civil society institutions and legal bodies have made recommendations and suggestions as to the impartiality and independence of the commission.²³

The Law Commission recommended in 1998 that no appointment of any member of MEC should take effect until the appointment had been approved by the National Assembly by a two-thirds majority, and further that the Judicial Service Commission and the President in making appointments should endeavour to appoint impartial persons known as such in the community. A suggestion was also made from civil society that instead of party leaders in parliament nominating election commissioners, a system should be devised to draw commissioners on a professional basis from society at large.²⁴

MEC's accountability to the Public Appointments Committee

In preparation for the 2004 elections, parliament through its Public Appointments and Declaration of Assets Committee (PADAC) drew up a code of conduct for MEC in a move to stop the misuse of public resources. The chair of PADAC, Henry Mussa, disclosed observations made by his committee that some of the commissioners were flouting their conditions of service and terms of reference. The committee also noted that the commissioners were getting involved in the day to day running of the commission which was the task of the secretariat.²⁵ It was further observed that the commissioners themselves were using 20 vehicles while the secretariat had to hire vehicles. Misuse of vehicles has been a major issue in the conduct of MEC. Later in 2003, two of the UDF-nominated commissioners, Flora Chirwa and Augustine Mtendere, were dismissed at the recommendation of PADAC on grounds of misconduct as commissioners. Although the authority to appoint and dismiss commissioners rests with the President, this case shows that Parliament was not without clout in pushing for dismissal.

The public debate and concern over the conduct of the 2004 polls continued for several months after the polls were completed. The European Union observer mission released its final report in August 2004 and minced no words when saying that the 20 May 2004 elections were below acceptable standards.²⁶ Against this backdrop, Parliament also asserted its right to exercise its powers to hold MEC to account. In September 2004, the Public Appointments Committee summoned the Chair of the MEC, Justice James Kalaile, to explain the sub-standard conduct of the general elections.²⁷ After the meeting, the chair of the committee, Kate Kainja, told the press that the MEC chair could not answer all the questions put to him and that the committee would summon other public officers to explain. The deputy chair of the committee, Katsonga Phiri, said that the committee intended to summon MEC commissioners, the CEO and all electoral staff to explain why there was a public outcry over the conduct of elections.²⁸

Demands for the resignation of the chair of MEC were made from many quarters of civil society during the electoral process. However, the security of the chair's position was such that he would resign only if the authority who appointed him demanded his resignation – the Judicial Service Commission and the President. A few days before he was summoned by the Public Appointments Committee, the MEC chair had indicated that he would resign voluntarily.

²³ 'Restructure MEC, observers advice', *The Daily Times*, 13 July 2004.

²⁴ 'MEC should go', *The Daily Times*, 10 August 2004.

²⁵ 'Parliament attacks EC', *The Nation*, 14 February 2003.

²⁶ 'Republic of Malawi. Presidential and Parliamentary Elections 20 May 2004. European Union Election Observation Mission Final Report', European Union, August 2004.

²⁷ 'Parliament summons Kalaile', *The Nation*, 17 August 2004.

²⁸ 'Kalaile fails to answer queries', *The Nation*, 2 September 2004.

Parliament and the re-demarcation of constituencies

Section 76, subsections (2)(a) and (b) of the constitution stipulates that MEC is responsible for reviewing existing constituency boundaries at intervals of not more than five years and alter them in accordance with criteria such as population density, ease of communication, geographical features and administration areas. In connection with the 1994 elections MEC reported to parliament on these matters.²⁹

Prior to the 1999 general elections, the re-demarcation of constituencies emerged as a critical issue. A study undertaken by the International Foundation for Election Systems (IFES) indicated that if constituencies were to be apportioned by population densities as accurately as possible without crossing the district and regional boundaries, the northern region would lose some of its constituencies to the southern region.³⁰ If the number of constituencies remained at 33 in the northern region as before, the central and southern regions would gain 19 and 29 additional constituencies, respectively. This would significantly enlarge the size of parliament. When MEC presented its report to parliament, proposing 70 additional constituencies the opposition rejected the proposal on grounds of political bias in favour of the ruling party and the financial implications of a much larger national assembly.³¹ An agreement was finally reached to add 17 constituencies, 5 in the central region and 11 in the southern, thus bringing the total number of constituencies to 193. It is not clear how this figure was arrived at. It emerged clearly from the re-demarcation debate, however, that the general public and parliamentarians in particular entertained a notion that a re-demarcation exercise would necessarily result in an increase of constituencies. Furthermore, district, regional and the boundaries of the traditional authorities should be treated as sacrosanct. Ultimately, parliament decided to postpone a major re-demarcation exercise, mainly due to financial constraints.

Polling date set by an act of parliament

The legal framework of the election management process in Malawi has been commended internationally for being well laid out. For example, it was remarked by the SADC Parliamentary Forum Election Observer Mission in 2004 that it is uncommon in the region that the constitution stipulates the date for the holding of general elections. Section 67 (1) of the Malawian constitution states that the national assembly shall stand dissolved on 20 March in the fifth year after its elections, and the polling day for the general elections for the next national assembly shall be the Tuesday in the third week of May that year. If not practicable for polling to be held on the Tuesday in the third week of May, the polling shall be held on a day, within seven days from that Tuesday, as determined by MEC.

This section was applied in both of the 1999 and 2004 elections. In 1999 the voter registration exercise came to a close on 14 May 1999 after two extensions, which left only 11 days to the polls. Section 29 of the PPE act, however, stipulates that there should be at least a 21-day interval between the closing of registration and polling. If MEC had gone ahead with the polls on 25 May 1999, it would have violated the PPE act. The opposition party leaders obtained a High Court injunction, restraining the commission from holding the elections on 25 May 1999. The court gave two options: either amend section 67 (1) of the constitution or amend section 29 of PPE Act. The President convened an extraordinary session of parliament which unanimously voted to postpone the elections

²⁹ Malawi Electoral Commission, *Report to Parliament. Number of Parliamentary Constituencies and the Boundaries of each Constituency*, 5 February 1994.

³⁰ International Foundation for Election Systems (IFES), *Report on the Issues in Preparation for the 1999 General Elections in Malawi*, 1998.

³¹ Malawi Electoral Commission, *Report to Parliament on the number of Parliamentary constituencies and the boundaries of each constituency*, 7 January 1999.

and hold them some time between 25 May and 15 June 1999.³² They were finally held on 15 June 1999.

In the case of the 2004 elections, the High Court in Blantyre ordered that the day of polling be postponed by at least two days and maximum seven day to allow more time for inspection of the voters' roll.³³ In response, MEC decided to postpone the polling data by two days only – i.e. on 20 May.

The Parliamentary and Presidential Elections (Amendment) Bill of 2003

In the December 2003 sitting of Parliament, barely five months before the 2004 polls, the Parliamentary and Presidential Elections (Amendment) Bill of 2003 was tabled in parliament, based on recommendations made by MEC. The bill contained a long list of proposed amendments:

1. Insertion of a new section allowing MEC to procure electronic voting machines for use in elections;
2. Insertion of a new section stating that the minister may, on the recommendation of MEC, at least 60 days before the polling day, make regulations with respect to the manner of casting votes;
3. Repeal of the existing PPE act, to be replaced by a new act authorising the minister, on the recommendation of MEC, at least 60 days before the polling day, to make regulations with respect to null and void votes;
4. Amending section 99 of the principal act (dealing with the publication of election results within 8 days from the last polling day) by deleting 8 days and substituting it with 30 days;
5. Amending section 104 in order to facilitate the orderly holding of presidential, parliamentary and local government elections simultaneously in May 2004;
6. Authorising the Commission to determine the conditions of service for the Chief Elections Officer (CEO).

The bill raised serious concern from civil society and the opposition in parliament. The holding of tripartite (presidential, parliamentary and local) elections was supported overwhelmingly by all stakeholders. There was no disagreement that holding tripartite elections would be cost effective and also ensure a higher voter turn-out for local government elections which attracted barely 14 per cent of the voters in the 2000 polls. MEC had been promoting tripartite elections all along and a number of NGOs had already prepared voter/civic education material for that purpose. What defeated the bill, however, was its overburdening with other unacceptable amendments such as extending the announcement of polling results to 30 days and MEC generally seeking wide-ranging powers when its credibility was already at stake.

The opposition vehemently resisted the government's attempts to push the bill through. Opposition MPs, Hetherwick Ntaba and Sitsi Nkhoma, questioned the Attorney-General why the existing law had failed MEC and why it was demanding more powers. Nkhoma expressed strong concern that "[w]e do not want to put the CEO under the whims of these vindictive commissioners who are out to grind an axe with him. There is something sinister here which the Attorney-General is failing to explain."³⁴ In the heat of the debate the deputy leader of the House, Kaliyoma Phumisa, asked for an adjournment for a late tea break to allow MPs to cool off and to facilitate consultations between the government and the opposition. After the tea break, the House had to be adjourned an hour ahead of

³² Martin Ott, Kings M. Phiri and Nandini Patel (eds.), *Malawi's Second Democratic Elections: Process, Problems and Prospects*, Blantyre: Kachere Books, 2000.

³³ 'Elections postponed', *Weekend Nation*, 15–16 May 2004.

³⁴ 'House adjourns amid confusion', *The Nation*, 4 December 2003.

schedule because there was no quorum as only 10 MPs had returned.³⁵ The proposal to extend the period for announcement of results to 30 days also drew criticism from civil society groups who questioned MEC's motive. The general feeling was that 30 days were far too long a period during which any doctoring of the results might happen.

Dismissal of the CEO and substitution by the Clerk of Parliament

George Chimwaza, who had been the Chief Elections Officer for seven years, was dismissed in April 2004 on charges of corruption. His wife, who was running as an independent candidate for a parliamentary seat, had been seen using a MEC vehicle during her campaign. To fill the resulting gap, the Clerk of Parliament, Roosevelt Gondwe, was brought in temporarily to substitute as CEO. In the 1999 elections, the CEO was also replaced around election time without the reasons clearly stated to the public and similarly the Clerk of Parliament was brought in as a temporary substitute. The repetition of this action in 2004 fuelled already mounting suspicions. The Clerk of Parliament serving as the CEO was reminiscent of the one-party era. It seemed to continue as a matter of tradition although concern had been raised in many quarters about the unceremonious removal of the CEO and the bringing in of the Clerk of Parliament at the eleventh hour before elections. Although constitutionally MEC enjoys autonomy from any arm of government, in practice, however, parliament demonstrated again that it does exercise some influence over the operations of the electoral body as the above case shows.

Election funding

In principle, Parliament controls the national purse. However, in reality it has been observed repeatedly that the national assembly is at the mercy of the treasury for funds, even for its sittings and the working of the committees. Allocation of funds to MEC for electoral purposes is no exception. The local government elections, for example, meant to take place on 17 May 2005 after the expiry of the five-year term of office for the councillors on 20 March 2005, would not take place until a year later because no budget allocation had been made for the exercise.

With regard to the 2004 presidential and parliamentary elections there was a tussle between the executive and parliament. Opposition members queried the passing of the special activities vote. Louis Chimango of the MCP and chair of the Budget and Finance Committee said in the House that the opposition would not be party to approving the vote in the absence of detailed breakdown of the MWK 3,220,088,466 allocation for the special activities fund, especially the MWK 1.5 billion earmarked for MEC.³⁶ The opposition demanded detailed information and the Finance Minister responded that the information was available and that it would be photocopied and distributed to all members. At that time, parliament was about to adjourn for the day and the information had not been made available to MPs. Eventually, the vote was passed and the opposition leaders accused the minister for muzzling the parliamentary process and rushing through the vote against the spirit of transparency and accountability.

MEC complained repeatedly that the monies provided for the various phases of the election process were inadequate, despite contributions from donors beyond state funding through the Treasury. This may have adversely affected the administration of the elections.

³⁵ *Ibid.*

³⁶ 'Controversy shrouds special activities vote', *The Nation*, 1 August 2003.

The open/third term debacle

The Open/Third Term Bills were attempts to amend the constitutional tenure regulation of the presidency. 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. On 4 July 2002 the bill to amend the constitution was moved before the National Assembly as a private member's bill by Khwauli Msiska. The voting was done through a roll call where 125 members voted for the amendment, 59 against and 3 abstained. In other words, the required two-thirds majority was not achieved. President Muluzi accepted the defeat and called on all political players to bury all the differences the bill had caused between its proponents and opponents.

The initial defeat, however, did not put the matter to rest. 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, Henry Phoya. It had been renamed the Third Term Bill instead of the previous Open Term Bill, because the proposed number of terms was limited to three consecutive ones. Civil society, including the faith communities campaigned vigorously against the amendment which had caused a public outrage. Tension ran high and the public condemnation of the repeated attempt to extend the presidential term of office was loud and clear.

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. 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 which had stood its ground in defence of constitutionalism.

The aftermath of the 2004 elections

The 2004 elections produced a more chequered parliament than previously in the sense that the number of parties increased. Above all, the number of independents rose dramatically. Only 17 MPs are serving their third term while 58 are serving their second. Altogether 118 were elected for the first time; in other words, more than 60 per cent of the current MPs are newcomers. This high turnover of parliamentarians and the inexperience of many MPs added to the uncertainty. As in previous parliaments, no one party enjoyed an absolute majority enabling it to form a cabinet alone. Hence, forging a coalition was unavoidable.

The new situation – with multiple parties and inexperienced independents – created, in turn, fertile ground for horse trading between parties and independents in their jockeying for positions. Many elected MPs changed party allegiance and a large number of independent found their way back into the fold of the original party (UDF) from which most of them had defected for various reasons before the elections. Most significantly, Gwanda Chakuamba, the leader of the Republican Party and presidential candidate of the Mgwirizano electoral coalition, decided to join forces with elected President Bingu wa Mutharika. MCODE also agreed to join a coalition with the UDF. The upshot was a coalition government with Mutharika and his UDF as the main players.

Mutharika increasingly asserted his independence and embarked on an anti-corruption drive. He appointed a new Director of Public Prosecutions who directed the corruption searchlight at former political heavyweights who were close associates of former president Muluzi. In response, Muluzi, still the chair of the UDF, threatened to expel Mutharika from the party. However, Mutharika pre-

empted such a move by leaving the UDF on his own volition to form his own party – the Democratic Progressive Party (DPP).

The opposition, now largely consisting of the MCP and MPs who had remained in the UDF, initiated impeachment procedures against Mutharika. The motivation of former UDF stalwarts close to Muluzi was to remove the President in order to prevent criminal charges of corruption being brought against them. The MCP, on the other hand, supported impeachment in the hope that its president John Tembo, would be instated as State President upon the downfall of Mutharika, at least temporarily. Tembo was the runner-up in the 2004 elections. Although the legal grounds for impeachment are probably too weak to be successful, the underlying political motives have been too strong to put the matter to rest. In late October 2005, the UDF succeeded in tabling the impeachment motion in Parliament, but proceedings were halted by the constitutional court pending a judicial review of the impeachment procedures. Even if the court finds the procedures in order, it is unlikely that the opposition will succeed in mustering the two-thirds majority required to pass the impeachment motion. Pending an outcome, however, Mutharika has been spending much energy in fending off the impeachment motion, which has distracted him from other pressing matters, such as addressing the famine and development issues in general.

The judiciary and the electoral process

The judiciary is the final arbiter in disputes over the interpretation of ‘the rules of the political game’ as laid down by parliament in constitutional provisions and other legislation. As a result, the courts can – and do – intervene in every phase of the electoral cycle. The judiciary was involved in disputes arising at every stage of the 2004 electoral process. It decided legal battles over the ‘rules of the game’ and the integrity of the institutions responsible for making and administering them; disputes over the registration of voters and candidates; complaints regarding electoral administration; challenges to the role of the media in the campaign; as well as petitions challenging the outcome of the elections. In addition, there were cases that on their face were not directly election-related, but where the political implications and motivations were clear.

The political transition and the role of the courts.

The courts have played a significant role in Malawian politics since the democratic transition in the mid-1990s. In the period between 1993 and 1996 the judiciary established itself as the primary custodian of the values of democracy. Unlike the executive and parliament which were undergoing radical transformation, the judiciary survived the transition intact, with the same personnel and largely the same institutional framework. In the lacuna created by the transitional state of the executive and legislative branches, the judiciary was able to assert and expand its authority. If we compare the role of the courts in the 2004 election process with the two previous elections in 1999 and 1994, we see that the judiciary has gradually taken on a more interventionist role at the various stages of the election process and also intervened in new arenas. Most notably, in 2004 the courts were adjudicating cases involving intra-party disputes over candidate selection. The courts have also increasingly acted as a safety valve, dissipating tension and preventing violence.

Both ‘push’ and ‘pull’ factors contribute to the evolving role of the courts and their increasing centrality to the election process. One reason why people take political cases to court is the reputation that the judiciary has built since the start of the democratic transition, as a comparatively quick and reliable institution for settling such disputes. This in turn is enabled by the wide powers and jurisdiction given to the courts in the 1994 constitution. A major factor driving the flow of disputes is that the elections are more hotly contested than before, giving rise to more disputes. This should also be seen against the individualistic nature and commercialisation of politics in Malawi. Crudely speaking, each candidate is in it for himself or herself. The material benefits of office is a major driving force, which also push cases into the courts, as individual candidates seek to secure their investments. Another important push factor is the weakness of alternative institutions, most evident when courts are called up to decide in matters of parliamentary procedure, or intra-party disputes arising in the context of party nominations.

Cases bearing on the legal framework for elections

In the context of the 2004 elections, the High Court made a number of decisions that directly and indirectly affected laws and rules governing the elections.

The most significant battle over the ‘rules of the electoral game’, was the attempt to amend the constitution in order to allow the president to run for unlimited terms of office (later changed to three consecutive terms). Although the attempt failed and the matter as such never reached the courts, the judiciary played a significant role in the process. The president’s ban on demonstrations

for or against the proposal was successfully challenged in the High Court.³⁷ The decision created political space to mobilise against the amendment, and, more generally, to publicly debate the constitutional framework governing elections. The court's decision in this case had a positive effect on the participatory quality of the political process leading up to the elections. Furthermore, the High Court in 2001 reviewed a decision by the Speaker of Parliament forcing seven opposition MPs to vacate their seats for breaching parliamentary rules against floor-crossing, and thus prevented the ruling party from altering the political balance in parliament, which would have secured the passing of the proposed third/open term amendment.³⁸

The courts also declared unconstitutional an amendment to the "floor-crossing clause" (section 65 of the constitution) that purported to effectively bar MPs from joining associations or organisations that are political in nature. This affected the course of the 2004 elections because it allowed MPs who opposed the bid for an extension of presidential terms of office to join NGOs such as the Forum for the Defence of the Constitution (FDC) in their campaign against the proposed extension.

Yet another case concerned the composition of MEC, centering on whether a Justice of the Supreme Court was qualified to be appointed chair of MEC.³⁹ The constitution states that the chairperson of MEC must be a judge. One could argue that there are substantive reasons why the MEC chair should not simultaneously sit on the body which is the ultimate authority in disputes regarding the conduct of MEC. However, the petitioners argued the case purely along semantic lines, relying on the legal meaning of the word "judge" as distinguished from "justice of the Supreme Court".⁴⁰ The court held that the word judge includes a Supreme Court justice and dismissed the suit. Although the court thus maintained the status quo in the structure of MEC, the case drew public attention to the alleged general unfitness of the MEC chair, and therefore served the political interests of the political opposition, which had initiated the suit.

In summary, it may be noted that the judiciary protected the integrity of the electoral rules by securing the position of the opposition in parliament, and by expanding the space for public debate over the proposal to lift constitutional limitations on presidential terms. In addition, the courts provided a platform for voicing criticism against MEC, although it did not lead to its re-organisation or its legislative framework. Previous elections did not see attempts by the incumbent to change the rules of the game comparable to the third-term bid. Still, both in 1994 and in 1999, there were court cases regarding the legal framework of the elections. The High Court found that a person who is registered to vote qualifies for nomination to contest for any parliamentary seat, not only in the constituency of registration,⁴¹ and that prisoners have the right to be registered as voters.⁴² It also ruled that a presidential candidate can contest with a vice-presidential candidate from another party, and thereby facilitated an electoral alliance between the MCP and AFORD.⁴³ A significant dispute over the rules of the game came in the aftermath of the 1999 presidential election, when the losing candidates contended that the constitution requires that the president must be elected by an absolute majority of registered voters, not a mere plurality of votes cast.⁴⁴

³⁷ High Court of Malawi, Misc. Civil Cause No. 78 of 2002.

³⁸ See Peter VonDoepp (2005) 'The Problem of Judicial Control in Africa's Neopatrimonial Democracies: Malawi and Zambia in Comparative View'. *Political Science Quarterly*, Vol. 120, No.2, pp. 275–301.

³⁹ *Sabwera and People's Progressive Movement v Attorney General*, Constitutional Case No. 1 of 2004.

⁴⁰ The case was argued by Ralph Kasambara, who represented the opposition in many of the important cases, and who has subsequently been appointed Attorney-General.

⁴¹ *Re Nomination of J.J. Chidule* Civil Cause No. 5 of 1995.

⁴² *Phambala v Chairman, Electoral Commission* Civil Cause No. 34 of 1999.

⁴³ *Chakuamba and Chihana v The Electoral Commission* Civil Cause No. 25 of 1999.

⁴⁴ *The Attorney General v Chakuamba, Kalua and Mnkumbwe*, Civil cause no 1b of 1999. Section 80(2) of the Constitution, states that "The President shall be elected by a majority of the electorate through direct, universal and equal suffrage" The court decided to uphold the lowest threshold, requiring only a simple plurality of votes cast, which in this case meant that the incumbent continued in office.

The role of the courts in the registration and education of voters

In relation to voter registration, the courts performed various functions: penal aspects of the electoral law on voter registration were applied (such as when a person was sentenced by a magistrate for registering twice).⁴⁵ More significantly, the courts compelled MEC to provide sufficient opportunity for stakeholders to inspect the voters' roll, a decision with far-reaching consequences for the electoral process as a whole. In the week leading up to the scheduled polling day on 18 May, a number of political parties and NGOs petitioned the High Court on the grounds that MEC had failed to run an efficient registration of voters and had not permitted enough time for the inspection of the voters' roll. The High Court ruled that the polling day for the presidential and parliamentary elections be postponed for any period from two up to seven days to allow for inspection and verification of the voters' roll.⁴⁶

By postponing the election date, the High Court not only required MEC to be accountable, but also provided a safety valve for the release of frustration that several actors had experienced during the registration process. The judicial order for the transparency of the voters' roll provided an opportunity for people to allay their anxieties over the integrity of the registration process, thereby preventing the consequences of unvented frustration. In this sense, the courts made a positive contribution to the peacefulness of the elections.

In some cases, the mere prospect of judicial action appeared to have an effect. For example when a number of NGOs threatened to take MEC to court for not allowing people in some areas sufficient time to register, the period for registration was extended. It is likely that the prospect of legal action played a part in MEC's decision.

Sometimes the impact of court rulings are undermined by the reluctance of other institutions to comply with their letter and spirit, as illustrated by the ruling to postpone the elections. When the court ordered the postponement for a maximum of seven days to allow sufficient time for the inspection of the voters' roll, MEC only postponed polling for two days, which did not provide stakeholders the maximum time that the High Court order had allowed. This limited the effectiveness of the High Court order in ensuring transparency of voter registration. To forestall this, the court could have made a ruling leaving less discretionary powers to MEC.

The role of the courts in the nomination of candidates

The selection of candidates generated a greater number of court cases than any other stage of the electoral process. Court cases concerning nomination of candidates have also arisen in the context of the previous elections.⁴⁷ However, the elections of 2004 were the first in which disputes involving candidate selection within political parties came up for judicial resolution. These cases represented a new development in the sense that the courts intervened to set standards for the conduct of the internal affairs of political parties. Judicial action over candidate selection was brought mainly by members of the UDF, and to some extent the MCP and the NDA against their respective parties. There is also a marked geographical pattern, in that these cases almost exclusively arose in the southern and central regions. The cases involved complaints about the unfairness of the candidate selection processes. They ended up in the courts due to lack of effective internal dispute resolution mechanisms and reflected a lack of trust within the parties. This was exacerbated by the increasing

⁴⁵ *The Republic v Chikhadwe and Chikhadwe*, First Magistrates Court, Lilongwe Case No. LL/CR/60/1/2004.

⁴⁶ *Weekend Nation*, 15–16 May 2004.

⁴⁷ The 1994 case of *Nomination of J.J. Chidule*, discussed above, where the court decided that candidates could contest other constituencies that where they had registered, is relevant here, as in another 1994 case, *Malenganzoma v the Electoral Commission*, in which the High Court held that the Electoral Commission has the authority to determine whether a parliamentary candidate has the necessary language proficiency required by the constitution.

commercialisation of Malawian politics. With the increasing economic benefits of political office, the contest over positions has heated up. Party nominations are the first and the most crucial stage for candidates aiming for political office, particularly in constituencies regarded as party strongholds. In more economically developed constituencies, candidates invest substantial funds in the party primaries – and when they lose they resort to the courts to recover their costs.⁴⁸ Some of the litigants claiming to have lost in unfair primaries, explicitly asked to be compensated for the resources spent in their campaigns, using the judicial process as political leverage.

That the losing candidates chose to take their grievances to court also suggest trust in the court system among the political players, which was noted as positive by the judges interviewed. Others, however, saw it as a symptom of the immaturity of the political system, and indicated that ideally these matters should be settled by the parties themselves. There was also some fear that if this trend continued, the courts would be overwhelmed next time around. All agreed that “at the time there is nowhere else to go”, owing to the weakness or absence of other institutions for intra-party dispute resolution; the alternative would in many cases be violence.⁴⁹

The standard-setting by the judiciary in the candidate selection phase contributed positively to the electoral process by extending the requirement of accountability and transparency from state institutions to political parties. Judicial intervention also served to diffuse tension that the primaries generated among supporters of competing candidates, and thereby provided a much-needed safety valve that minimised the possibility of violence and disorder.

The courts’ role in disputes relating to the electoral campaign

A critical phase of the 2004 electoral process was the campaign period. The main judicial disputes that arose during this phase were over the ability and willingness of MEC and other relevant institutions to ensure the fairness of elections. In this connection, High Court intervention was sought on a number of matters, most notably access to the media and the use of state resources for campaign purposes.

The role of the judiciary in the campaign stage of the election process should be seen in light of the precedent set in the previous election.⁵⁰ A landmark case regarding media access arose in the context of the 1999 elections.⁵¹ It held that the publicly funded (MBC was guilty of bias in its radio coverage of the 1999 campaign by giving free access to the corporation’s radio stations for the incumbent party while denying the opposition similar access. In the context of the 2004 elections, the MBC continued its previous practice of routinely covering ruling party campaign functions, while excluding those of the opposition. In reaction, a case was brought against MEC and the MBC requesting the High Court to declare that these institutions had failed in their legal duties to ensure equal access for all parties to the publicly funded media.⁵²

⁴⁸ This also explains why the nomination cases almost exclusively come from the Central and Southern regions, rather than in the North, and why they arose predominantly in the then ruling party (UDF), where the stakes were highest. Court cases were also predominantly found within parties that conduct primary elections, rather than appoint candidates through party conventions.

⁴⁹ Interviews with members of the Supreme Court of Appeal and the High Court in Blantyre and Lilongwe in February and July 2004.

⁵⁰ In addition to the case discussed in the text, there were rulings directing the Electoral Commission to ensure that elections were free and fair (*Khembo v Electoral Commission*, Civil Cause No. 70 of 1999.); and to set the date of polling in accordance with the Constitution regardless of a contrary provision in the Parliamentary and Presidential Elections Act (*Mungomo v Electoral Commission*, Civil Application No. 23 of 1999).

⁵¹ *Kafumba v Electoral Commission and Malawi Broadcasting Corporation*, Matter No. 35 of 1999.

The applicants lost, mainly because they did not submit sufficient admissible evidence to support their case. This was surprising, particularly since systematic media monitoring reports prepared on behalf of MEC were now available (unlike in 1999) documenting extreme bias in MBC and TVM coverage.⁵³ The case was dismissed on technical grounds. The complainants had not followed the correct procedure of submitting such evidence, which meant that, in legal terms, they were making allegations without proof.⁵⁴ The petitioners thus carried responsibility for the failure of the case. However, the judges could have adopted a more creative and less formalistic approach, finding ways to take judicial notice of the publicly available documentation, which after all was authorised by MEC who was the defendant in the case. The timing of the case was also unfortunate. The MBC and the TVM had been biased since the early stages of the election period and had persisted in the same vein throughout. Yet, it was only at the beginning of the official campaign period, two months before polling day, that the Public Affairs Committee (PAC) sought judicial intervention on the matter, and one month to go when the NDA “took over”.⁵⁵ Why so late, given that the time factor is crucial in order for the judgment to have an impact on the campaign? Several factors are relevant to grasp this. There was an understanding that lodging a case prior to the official 60 days campaign period would be premature. PAC’s decision to vacate the case and leave litigation to the NDA also delayed matters and might explain why it was rushed in a way that eventually proved unsuccessful. However, it also emerged from interviews with key informants that there was a lack of confidence in the ability of judicial pronouncements to change the biased coverage of the MBC and the TVM. This was based on the experience after the 1999 judgment when the MBC virtually ignored the ruling. The judiciary was, therefore, viewed as having minimal impact in ensuring the accountability of the MBC.

The courts were also asked to ensure accountability in other aspects of the campaign, such as the use of government resources by the incumbent UDF for campaign purposes. A complaint alleging abuse of public resources was brought against the UDF.⁵⁶ It also involved MEC’s failure to control the UDF in this regard. While the court eventually ruled against the UDF and MEC in this case, the judgement came at the end of the election period and thus did not have material impact. Nor did the commencement of the judicial proceedings appear to have influenced the conduct of the UDF on the ground. There was no obvious change in the use of public resources for party campaigning. The judiciary, therefore, had little practical impact on the fairness of the electoral process in this regard.

On the other hand, the judiciary appears to have had some impact on the accountability of authorities that regulate public demonstrations. In March 2004 the Mgwirizano coalition sought to hold a rally that the authorities did not approve of. Para-military police officers sought to halt the rally, but when the organisers obtained a court injunction against the police and the Blantyre city authorities they were allowed to proceed.⁵⁷ This should be seen in the light of a 2001 case (*Chupa*)⁵⁸ in which the plaintiff had successfully applied to the High Court for an order to stop the defendants,

⁵² *National Democratic Alliance (NDA) v Electoral Commission, MBC and TVM*, Constitutional Cause No.3 of 2004. See also *The Daily Times*, 12 March 2004; and *The Nation*, 21 April 2004.

⁵³ The biased reporting was extreme. In some of the periods the MBC and the TVM gave the ruling coalition 100 per cent positive coverage while ignoring the opposition. (see Mabwuto Banda, ‘MBC, TVM covered UDF only – Report’, *The Nation*, 23 February 2004.

⁵⁴ This is particularly surprising since Ralph Kasambara (the current Attorney-General), who handled the case is one of Malawi’s most experienced lawyers.

⁵⁵ The case was originally brought by the Public Affairs Committee (PAC). After PAC had lodged the case, there had been signals indicating that the Supreme Court might tighten the position on legal standing, which had recently been relaxed by the High Court in a landmark judgment. The PAC thus feared being thrown out of court on procedural grounds, as lacking an interest in the case, which would preclude a decision in time for the election. Since the NDA, as a political party, had a clearer standing, it ‘took over’ the matter, adding Television Malawi (TVM).

⁵⁶ This case was brought by the Republican Party acting for Mgwirizano against MEC, the UDF and the Attorney-General.

⁵⁷ *The Daily Times*, 12 March 2004.

⁵⁸ *Chupa v Mayor of the City of Blantyre and others*. Civil Cause No. 133 of 2001.

including the police, from effecting a ban on a public meeting that his political pressure group intended to hold. When the mayor and police ignored the court order and disrupted the rally, they were convicted of contempt of court. This probably explained why the mayor and the police officers who had been involved in the Chupa case did not participate in disrupting the Mgwirizano coalition rally. It is also probably the reason why, after initial attempts by other officials and para-military police officers to halt the rally, it was allowed to proceed when the organisers obtained a court injunction.⁵⁹ In both cases, the judicial proceedings also served as a safety valve for tensions that might otherwise have erupted into violence. The crowds gathered at the rallies were reassured that the matters were being handled by the courts and this calmed them down.

The role of the courts in the conduct of polling and in converting the electoral mandate into political positions

The process of polling, counting and announcing the results of an election can be the most controversial of all stages of the electoral process. This was true in the 2004 elections. While there was general agreement that polling was peaceful, the acquisition of ballot papers and keeping them in custody proved controversial.

It emerged that MEC had ordered more ballot papers than the number of registered voters. Some stakeholders expressed fear that the extra ballot papers would be used for rigging purposes. The matter came up for judicial consideration and the High Court held that MEC should surrender any ballot papers in excess of the number of registered voters and be held in custody by the court for safe keeping. On a subsequent appeal to the Supreme Court of Appeal lodged by MEC, the order was reversed. The Supreme Court held that MEC was the only institution that was mandated to administer elections and keep election materials in custody. This decision seemed to have a somewhat negative impact on public confidence in the integrity of the electoral process.

After the election results were announced, a number of petitions were lodged contesting the outcome of both the presidential and parliamentary elections. A presidential election petition was lodged by the Mgwirizano coalition of opposition political parties.⁶⁰ Their main argument was that the electoral process had been marred by so many irregularities that the outcome announced by MEC was not a fair reflection of the wishes of the electorate. At the time when the case was lodged it served as a useful safety valve by reassuring Mgwirizano supporters and the opposition more broadly that their grievances would be handled by the courts. This dissipated the tensions that had been running so high and erupted into violence in some areas of Blantyre soon after the announcement of the results.

When Gwanda Chakuamba, the Mgwirizano coalition's presidential candidate, was appointed to a ministerial position in the new government he withdrew from the election petition. The petition as such continued, however, and gained momentum when, two months after the election, John Tembo's Malawi Congress Party was allowed by the High Court to join the case. A year later, in July 2005, the Supreme Court, found that the High Court had erred in letting Tembo and the MCP join the petition. This, in effect, led to the collapse of the case, with the opposition concentrating on alternative means to contest the president's legitimacy, notably through impeachment.

Election petitions were also filed with regard to parliamentary elections, with losing candidates of the various parties complaining that the electoral process had not been free and fair. On 10 November 2004 the High Court, sitting in Mzuzu, handed down their decision in the most high

⁵⁹ *The Daily Times*, 12 March 2004.

⁶⁰ *The Republican Party v The Malawi Electoral Commission (2004)*

profile case when it nullified the results for the Mzimba West constituency, where the former Deputy Speaker of Parliament, Loveness Gondwe, had been elected. The court found proof of gross anomalies during the election process, including the use of a parliamentary vehicle during the campaign period. The ruling was appealed, and in April 2005, the Supreme Court overturned the High Court's decision and reinstated Gondwe, holding that as an MP she was entitled to use her vehicle for private purposes.⁶¹ The decision was widely criticised and seen to signal to incumbents that it is acceptable to use public resources for campaigning purposes.⁶²

Also in 1999 the presidential election was challenged by the losing candidates, and also in this case the petitioners lost.⁶³ In this sense, there is continuity in that the judiciary has tended to rule in favour of the incumbent in high-profile election cases. There is, however, an interesting tendency emerging in these cases suggesting that the High Court is being more favourable to the petitioners than the Supreme Court of Appeal.

Election petitions may, however, serve important functions even when they are lost. In the first place, they seek to bring MEC and other election-related institutions to account and to contribute to setting standards for future elections. They also act as a face-saving exit strategy for candidates who genuinely lost the elections. And, lastly, but not least important, they provide disgruntled supporters of the candidates with an outlet for their frustration and may thus prevent it from taking on violent forms.

In general, the courts made a positive contribution to the election process, constraining abuse of power and promoting democratic principles. However, while the role of the judiciary is evolving and in some respects widening, the picture of the courts' performance is mixed when held against the normative standards of a democratic judiciary. Important decisions are followed by other that are weak or questionable. Lack of accountable government remains a great problem in Malawi, and the quality of the democratic process has deteriorated in important respects. The 2004 elections were far from flawless – the playing field was not level and the integrity of the results in some cases doubtful. In this perspective, the courts in Malawi can be said to have failed to secure accountability to the rules and to “unblock the democratic channels”.

⁶¹ Henry Chilobwe, “Supreme Court reinstates Gondwe as MP”, *The Nation*, 12 April 2005; Edwin Nyirongo, “Supreme Courts judgement on MP questioned”, *The Nation*, 14 April 2005.

⁶² *The Nation*, 10 November 2004.

⁶³ *The Attorney General v Chakuamba, Kalua and Mnkumbwe*, Civil cause no 1b of 1999.

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SUMMARY

This report summarises the findings of a joint research project undertaken by the Centre for Social Research, Chr. Michelsen Institute and the Universities of Malawi and Bergen. Ensuring that elected political leaders play by the rules of the political game and act in accordance with their mandates without violating citizens' rights is a challenge for new democracies in sub-Saharan Africa. Electoral processes essentially begin long before elections actually take place. The analysis of electoral processes, therefore, requires a long time horizon. Central political institutions of accountability are analysed to determine the extent to which they have managed to stem executive dominance when put to the test of the parliamentary and presidential elections held on 20 May 2004. Attention is drawn to four key institutions of democratic governance: (a) those responsible for electoral administration; (b) the party system; (c) parliament; and (d) the judiciary. The electoral cycle – comprising the entire time period from one election to the next – is analysed in six phases: (i) registration of voters and compilation of voters' roll; (ii) nomination of candidates; (iii) civic and voter education; (iv) the electoral campaign; (v) the polling exercise, including counting of ballots and announcement of results; (vi) conversion of electoral mandate into political positions. The 2004 general elections were judged to be 'free but not fair' due to inadequacies in the administration of the electoral process. Civil society organisations as well as domestic and international election observers have emphasised the need to restructure the Malawi Electoral Commission to improve its performance and ensure the legitimacy of the election results.

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