



**International Commission of Jurists**

**Malawi Report**

**Fact-Finding Mission  
16 - 22 December 2001**

**Trial Observation  
16 January 2002**

## Table of Contents

I.	Executive Summary.....	3
II.	Introduction.....	5
III.	Background.....	6
IV.	Removal Proceedings.....	8
V.	Constitutional Framework	
	1. Background.....	12
	2. Judicature.....	12
	3. Constitutional Provisions Relevant to Removal.....	13
VI.	International Standards.....	17
VII.	Conclusions and Recommendations.....	19
VIII.	Annexes.....	22

## I – Executive Summary

This is the report of two Missions sent by the International Commission of Jurists (ICJ) to Malawi to investigate attacks on the independence of the judiciary and the rule of law. The ICJ, an international non-governmental organization founded in 1952, consists of judges and lawyers representing all regions and legal systems in the world who are working to uphold the rule of law and the legal protection of human rights.

The first Mission to Malawi, which was of a fact-finding nature, took place from 16 – 22 December 2001. The mandate of this Mission was to evaluate the overall state of judicial independence and assess the constitutionality of Parliament’s recommendation for removal of three High Court judges, Justice Dunstain Mwaungulu, Justice George Chimasula Phiri and Justice Ancaclet Chipeta.

Judging from information gathered first-hand during its Mission, the ICJ found that the attacks on the judges seriously imperilled national and international standards on the independence of the judiciary. The ICJ found that in its haste to remove the judges in question, Parliament pre-empted the proper procedure contemplated by the Constitution which vests judicial appointment, promotion and removal procedures in the Judicial Service Commission (Sections 118 and 119 of the Malawi Constitution). This body had already been seized of the matter and there was a High Court injunction staying Parliamentary proceedings. Nevertheless, Parliament ignored these events and chose to take matters into its own hands.

The case against the judges was all the more problematic as the complainants did not attempt to invoke normal appellate procedures as provided by the Constitution. Thus, rather than appealing the rulings of the High Court to the Supreme Court, certain MP’s chose to short-circuit the process and debate removal of the judges in Parliament without the presence of the “accused” and without the possibility of hearing evidence.

Although the Mission was unable to obtain an interview with the President, the delegation held meetings with the Chief Justice, the Attorney General/Minister of Justice, the Speaker of Parliament and some leading members of the Opposition. In addition, the delegation met with the judges concerned as well as other members of the judiciary, Magistrates and Judges Association of Malawi, Malawi Law Society, individual lawyers, the Ombudsman, parliamentarians, journalists, church groups, human rights activists, and diplomats. The list of persons with whom the ICJ consulted is attached to this Report as **Annex A**.

On 14 January 2002, the ICJ sent a Preliminary Report of its Mission to the President, the Chief Justice, the Attorney General/Minister of Justice, Speaker of Parliament, the United Nations Special Rapporteur on the independence of judges and lawyers, the Malawi High Commissioner to the UK, Magistrates and Judges Association of Malawi, Commonwealth Magistrates and Judges’ Association, Malawi Law Society, and defense counsel for the judges and the

two judges in question themselves. This Preliminary Report is attached as **Annex B**.

Based upon its findings, the ICJ sent a follow-up Mission to Malawi on 16 January 2002 to report on the disciplinary proceedings on the judges in question. The ICJ's follow-up Mission concluded that there were fundamental substantive and procedural defects in the 16 January Judicial Service Commission hearing. Some of these defects were: 1) No clear charges were presented against the judges in question - rather, the entire process proceeded on the basis of vague and diffuse Parliamentary debate characterized by rhetoric rather than fact; 2) The debate took place in the absence of the judges; 3) It was not clear from whom the allegations emanated and who the cognizable complainants were; 4) Two members of the Commission could have been complainants or witnesses; 5) Conclusions drawn in Parliament on the removal of the judges may have tainted the minds of the Commission members who were faced with the unusual situation of serving as a *de facto* appellate body - a scheme that was clearly not contemplated in the Constitution. The Report of the follow-up Mission on the Judicial Service Commission Hearing of 16 January is attached as **Annex C**.

The ICJ is, however, gratified to learn that after having considered the findings of the Judicial Service Commission, President Muluzi dismissed the removal charges against Justice Dunstain Mwaungulu and Justice Chimasula Phiri on 8 May 2002 (charges against Justice Chipeta had been dropped earlier). The Commonwealth Magistrates and Judges' Association, which had received this information from the Chief Justice, in turn, informed the ICJ of the President's decision on 10 May 2002. The ICJ wishes to congratulate President Muluzi and the Chief Justice for this momentous decision and for upholding the independence of the judiciary and the rule of law in Malawi.

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The fact-finding Mission team consisted of Justice Johann Kriegler, (Judge, Constitutional Court of South Africa and Head of the Mission); Mr. Rajeev Dhavan, ICJ Commissioner and Senior Advocate, Supreme Court of India; and Ms. Linda Besharaty-Movaed, Legal Advisor, ICJ Secretariat. The ICJ representative who monitored the disciplinary proceedings was Mr. Otiende Amollo, Human Rights Advocate, Secretary and Board member of the Kenya Section of the ICJ.

The ICJ is grateful to all who assisted and gave of their time particularly Dr. Karen Brewer of the Commonwealth Magistrates and Judges' Association in London and Katherine English of USAID in Lilongwe for providing useful information and contacts in Malawi.

The ICJ wishes again to commend the positive decision of President Muluzi and the Chief Justice who acted in an independent, impartial, and judicious manner. This decision augurs well not only for the people of Malawi but for the entire region which will look to Malawi as an example in upholding respect for the independence of the judiciary and the rule of law.

## I – Introduction

In early November 2001, the ICJ received information that members of the ruling political party (United Democratic Front) in the Malawi Parliament were seeking to remove three High Court judges Justice Mwaungulu, Justice Phiri and Justice Chipeta for their politically unsatisfactory rulings.

After further research and preliminary verification of this information, on 15 November, the ICJ intervened with an urgent communication to H.E. Dr. Bakili Muluzi, the President of Malawi, expressing its concern and seeking the Government's response. In particular, the ICJ was concerned about the method by which Parliament was seeking to remove judges – a method that did not grant the judges the right to defend themselves in accordance with principles of natural justice before a competent tribunal, as envisioned in the Constitution pursuant to Sections 118 and 119. In its intervention, the ICJ also referred to Section 103(1) of the Malawi Constitution on judicial independence which states:

"All courts and all persons presiding over those courts shall exercise their functions, powers and duties independent of the influence and direction of any person or authority."

The ICJ also pointed to governing international standards on the judiciary such as the African Charter on Human and Peoples' Rights and the United Nations Principles on the Independence of the Judiciary. These standards impose a duty upon States to uphold the independence of the judiciary. The ICJ requested that the charges against members of the judiciary be brought before the Judicial Service Commission and that Parliament cease from interfering in the affairs of the judiciary.

There was no response and the ICJ decided that in light of the seriousness of Parliament's actions and their chilling effect upon the independence of the judiciary, an urgent fact-finding Mission was warranted to meet the various actors involved in the matter, obtain a clearer understanding of the situation and make constructive recommendations.

Thereafter, on 28 November, the ICJ sent a second letter to the Government, through the Malawi High Commissioner in London, informing it of the ICJ's intention to send a fact-finding Mission to Malawi and requesting that meetings with the President and Government officials be facilitated. Once again there was no response nor was there any Government assistance in facilitating the appointments. However, once the Mission was *sur place*, it was able to secure meetings with important officials, including the Chief Justice, the Attorney General/Minister of Justice and Speaker of Parliament.

The Mission's specific aims were to: 1) examine first-hand whether Parliament's initiatives to remove Justice Dunstain Mwaungulu, Justice Chimasula Phiri and Justice Chiopeta violated constitutional, international and regional standards on judicial independence and, 2) see if some resolution to the impending crisis could be found.

## II – Background

The Republic of Malawi in South East Africa is a country with an estimated population of 13 million. Established in 1891, the then-known British protectorate of Nyasaland became independent in 1964. In 1966, Dr. Hastings Kamuzu Banda was elected President and adopted a new Constitution for a single-party political system. In 1971, Dr. Banda amended the Constitution to make himself President-for-Life. By 1992, Dr. Banda's critics called for an end to one party rule by the Malawi Congress Party (MCP). The country held multiparty elections in 1994 under a provisional Constitution which took full effect on 18 May 1995. President Bakili Muluzi and the United Democratic Front (UDF) were voted into office.

Constitutional power is now shared between the President and the 193-member Parliament. The UDF has 96 seats in the National Assembly, the MCP has 61 seats, the Alliance for Democracy (AFORD) has 30 seats, and there are 6 independent members. Members are elected for a 5-year term. The MCP is currently split into two factions, both of which claim leadership of the MCP. This leadership wrangle has been playing out in the courts. The John Tembo faction of MCP, which includes 32 MP's, is in alliance with UDF giving the latter a large majority. The Gwanda Chakuamba faction of MCP has 28 MP's.

In 1999, President Muluzi was re-elected to serve a second five-year term, defeating Gwanda Chakuamba, who had been the joint presidential candidate of the two leading opposition parties, MCP and AFORD.

The delegation's interviews with a cross-section of Malawi society revealed that the backdrop to the current crisis revolves around perceived intentions of the ruling UDF party to secure an amendment to the Constitution to allow for the President to run for a third term. The next Parliamentary and Presidential elections will be held in 2004. However, section 83 (2) of the Constitution limits the President or Vice-President's term to "a maximum of two consecutive terms." The only possible way to remove this limitation would be through an amendment of the Constitution.

The effects of Constitutional amendments are described in a recent Daily Times article, based on an interview with Professor Kanyogolo of the Zomba Law Faculty. Dr. Kanyangolo describes the Malawi Constitution as "probably the most amended constitution in the world"- so far, this six-year old Constitution has been amended more than 100 times. The article states that, "The experts argue that while it is legally acceptable for the country's supreme law to be subjected to amendments, the frequency and motives behind the amendments raise a lot of suspicion." Another expert, Chancellor College political scientist, Blessings Chisinga is quoted as stating that "(Malawians) are going back to a one party system where Parliament is becoming supreme over the constitution and only meant to save political interests."<sup>1</sup>

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<sup>1</sup> Daily Times, "Parliament rewriting Malawi Constitution", by Rex Chikoko, 23 December 2001.

Furthermore, the delegation accepts that there are many countries going through a transition that seek to amend their constitution to suit the nation's needs. But there is a difference between amendments that fulfil national objectives and those which cater to the immediate political needs of a regime, a party in power, or the opposition. While judges do not examine the bonafides of a legislative body as a whole when examining legislation or constitutional amendments, they are entitled to examine whether the prescribed procedure has been followed; and inter alia, whether the basic structure of the constitution was violated. Such scrutiny of constitutional procedures falls within the purview of the judiciary and becomes a bulwark against amending a constitution out of existence.

Many Malawians we spoke to felt that the attacks on judges were politically motivated in that the targeted judges were identified as those would be most likely to stand in the way of a Constitutional amendment. The people we encountered did not fail to perceive that this represented a breakdown in the rule of law. As one worried person we interviewed stated, "The Constitution is not for the people but for the lawmakers...this has broken the hearts of the people"<sup>2</sup>.

However, President Muluzi's dismissal of removal charges against Justice Mwaungulu and Justice Phiri pursuant to the report of the Judicial Service Commission has undeniably restored much faith in the Constitution and in the political process. The people will now see that the Constitution is not just a tool for lawmakers, but that it does indeed protect the independence of the judiciary and the rule of law.

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<sup>2</sup> Name withheld upon request.

### III. Removal Proceedings

Displeased and angered by certain rulings of Justice Dunstain Mwaungulu, Justice Chimasula Phiri and Justice Chipeta on matters concerning politicians, UDF-controlled Parliament served notice on 2 November 2001 on these judges to appear before the House on 6 and 7 November 2001. The allegations were that the judges had misbehaved and/or were incompetent as follows:

- **Justice Mwaungulu** for writing and publishing an article on a 1999 presidential elections case over a year ago when he was a scholar in the UK. The case concerned a challenge to the 1999 Presidential election results by the loser of the elections, Gwanda Chakuamba, leader of the Malawi Congress Party.
- **Justice Phiri** for sitting after hours to grant bail on medical grounds to Brown Mpinganjira, a former UDF cabinet minister and the current leader of the National Democratic Alliance - an opposition group.
- **Justice Chipeta** for issuing a ruling that the Speaker of Parliament did not have constitutional authority to suspend an MP from the National Assembly, namely Gwanda Chakuamba, President of the MCP for "crossing the floor".

Subsequently, on 5 November, Justice Batheil Chiuza Banda granted the injunction filed by the Civil Liberties Committee to restrain Parliament from proceeding with the debate on the motions for removal. Justice Banda granted the injunction "in the national interest".

The Chief Justice also made an appeal, as Chair of the Judicial Service Commission, to the Speaker of Parliament to allow the Commission to first examine the allegations. The Speaker agreed to this and on 7 November, the Commission served notice on the judges to appear before that body on 9 November for an investigation pursuant to section 118 of the Constitution on allegations of "misconduct and incompetence". These allegations were not specified, rather they were described as being "the same as those which were served on you by Parliament".<sup>3</sup> As two days was not enough time for the judges to prepare their defense, the Commission later advised the Speaker of Parliament that the proceedings had been adjourned until 10 December 2001.

However, Parliament took matters into its own hands again. Explaining why he decided to intervene again, the Speaker explained to the ICJ delegation on 20 December 2001 that "Neither the Chief Justice nor the Judicial Service Commission did anything...and judges began to believe that they can't be censured."<sup>4</sup> The Speaker also stated that, "the Chief Justice had been complaining to the Attorney General about his own judges." Therefore, the Speaker saw fit to refer the matter back to Parliament. (However, the Chief Justice informed the ICJ in a fax dated 24 January that he did not complain

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<sup>3</sup> Two notices dated 7 November 2001 from Judicial Service Commission to Justice Mwaungulu and Justice Chiamsulu Phiri, respectively.

<sup>4</sup> This reiterates earlier statements made by the Speaker to the Daily Times as follows, "People in Malawi have been complaining about the poor quality of justice since 1994 but neither the Judicial Service Commission nor the Chief Justice himself were doing anything to discipline the judges." Daily Times, 24 November 2001.



about the judges to the Attorney General and had no reason for doing so as he does not report to the Attorney General).

Thus, despite the fact that the Commission was seized of the issue, on 9 November, Parliament moved three Motions to remove Justice Mwaungulu, Justice Phiri and Justice Chipeta. On 12 November, Parliament served a “Notice of Intention” on each of the judges indicating that it would introduce the Motions in the National Assembly. The judges were summoned to appear before Parliament on 14 November to defend themselves in the removal proceedings. The judges refused to submit to trial by Parliament and did not attend the debate on the motion to remove them on 14 November. A letter from Justice Mwaungulu setting out his position on the proper procedure was served on 13 November on the Speaker and Attorney General. The letter was circulated to MP’s but was not read out in Parliament. AFORD party members walked out of Parliament calling it “a house of terrorists” and accusing it of seeking to “terrorize judges”.<sup>5</sup>

At the outset of the debate in the National Assembly, the Speaker decided that pursuant to the National Assembly Powers and Privileges Act of 1968, no court papers (injunction) may be served upon the him as Speaker of Parliament. Calling the injunction “illegal and unconstitutional”<sup>6</sup>, the Speaker criticized Justice Chiudza Banda, the judge who had issued the injunction. In fact, Justice Banda’s name was added to the list of judges to be removed. However, the charges against Justice Banda were later dropped. By whom or by what authority is not clear.

The debate in the National Assembly turned upon general, vague and hearsay statements against the judges by various MP’s affiliated and/or in alliance with UDF. The article that Justice Mwaungulu had written in 1999 on the elections case challenging President Muluzi as the winner of the elections formed the basis of the case against him. However, this article was never circulated for evaluation.

During the debate, no detailed or direct evidence was referred to and various allegations and complaints were freely brandished in the absence of the judges. Comments about Justice Mwaungulu included assertions that he was arrogant, that he was incompetent, and that he did not respect Supreme Court judges.<sup>7</sup> In fact, Parliament believed that Justice Mwaungulu’s critique of some rulings of Supreme Court judges was deemed to be a sign of incompetence. The motion concerning Judge Mwaungulu was changed from the one first circulated in that an additional general allegation was made that he “has criticized Judges of the Supreme Court of Malawi who have overturned his decisions.”<sup>8</sup>

Another sign of Justice Mwaungulu’s alleged incompetence was that he had chosen to be represented by a foreign lawyer.<sup>9</sup> One of the most revealing and

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<sup>5</sup> Hansard, 14 November 2002

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

astonishing comments which reflected the mood of certain MP's and indicated a lack of understanding of the independence of the judiciary was:

"Instead of dealing with civil cases, he [Justice Mwaungulu] jumps on political cases, delivering judgements in a way not favourable to the Government, *which he should not forget is his paymaster.*" (italics added)<sup>10</sup>

The Motion against Justice Phiri was on grounds of misbehavior. The debate centered on the judge's alleged incompetence as well as misbehavior for having heard a bail application by Brown Mpinganjira, NDF member, who was charged with treason.<sup>11</sup> This Motion was introduced and debated despite the fact that Judge Phiri was the duty judge on the day in question, that he relied upon a medical report for release of the bail applicant and that it is not irregular to hear a bail application on a Friday afternoon (4:00 to 7:00 p.m.) since the next working day would be Monday – particularly when there are medical grounds. By granting bail to this opposition MP, several UDF and UDF-aligned members of Parliament alleged that Justice Phiri proved that he was in the pockets of the opposition and should therefore be removed.

The Motion against Justice Chipeta was on grounds of incompetence and misbehavior. This Motion, again, lacked detail and specificity and no supporting documentation was circulated for MP's to consider. Justice Chipeta had ruled that the Speaker could not remove an MP for crossing the floor, and reinstated Gwanda Chakuamba as leader of the MCP. (As indicated above, a breakaway group of MCP members, led by John Tembo allied with UDF was challenging this finding). In short, the three judges in question were paying the price for being seen to block - through their judicial decisions – future UDF ambitions. As one Malawian observer told us, "There is a monster behind this impeachment"<sup>12</sup>.

After debate on each judge had ended, the Speaker called for a voice vote.<sup>13</sup> A petition to be signed and presented to the President for the removal of each judge was thereafter circulated. When Parliament rose in the evening, there had been no official count of the signatures on any of the three petitions (the petitions were to be signed in the closed Parliamentary session and not circulated to MP's who were not present for signature). However, there is reliable information that the following morning, the petitions were still being circulated for signature of those MP's who had not been present the previous day. The President was thereafter presented with the recommendation for removal of Justice Mwaungulu, Justice Phiri and Justice Chipeta.

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<sup>10</sup> Ibid.

<sup>11</sup> The significance of the treason case against Brown Mpinganjira and four others is that as leader of the NDA, Mr. Mpinganjira is seen to represent a direct challenge to the UDF in the South, which is his stronghold. Mr. Mpinganjira, who was reported to have formerly been close to President Muluzi, now allegedly harbors presidential ambitions himself. If he had been charged with treason, he would have received a seven-year sentence which would have effectively removed him from the political arena.

<sup>12</sup> Name withheld upon request.

<sup>13</sup> Pursuant to Section 119 3(b), the Motion for removal of judges must be passed by a majority of the votes of all the members of the Assembly, and (c) submitted to the President as a petition for the removal of the judge concerned.

Having reviewed the proceedings in Parliament in detail, read the tenor of the discussion and considered the manner of the voice vote, the ICJ felt that the proceedings fell far short of constitutional standards of rigor. The ICJ is also of the opinion that having embarked on the correct procedure of letting the Judicial Service Commission examine a prima facie case, the Parliamentary procedure to take over the case and arrive at a conclusion purely on the basis of allegations and counter-allegations in a general political debate without due process was not warranted. Parliament's resolution had an indicatory effect, impacted judicial reputations and undermined judicial independence. Such practice and procedure should not be followed anywhere in the world. Indeed, if this is the method by which judges are to be recommended for impeachment, the independence of the judiciary - to which a prized constitutional premium is attached - would become a chimera and the rule of law would be undermined.

Civil society including human rights and lawyers groups, the Magistrates and Judges Association of Malawi, as well as church groups, diplomats and important donors sharply criticized Parliament's attacks on the judiciary and the breakdown in the rule of law. The United Nations Special Rapporteur on the independence of judges and lawyers issued an urgent press statement on 16 November 2001 condemning the removal process as contrary to the Malawi Constitution and called for respect of international principles on the independence of the judiciary.

The President then decided to refer the matter back to the Judicial Service Commission. Thereafter, the Commission sent yet another notice to Justice Mwaungulu and Justice Phiri summoning them to attend a hearing on 17 December at 9:00 a.m. on allegations of misconduct and misbehavior. This hearing was later re-scheduled for 16 January 2002. The case against Justice Chipeta was dropped. In the minds of some observers, this seemed to indicate that the other judges were deemed to be "guilty" as the charges against them were left hanging. In any event, the rationale for actions regarding Justice Chipeta remains unknown.<sup>14</sup> Without going into the width and extent of the President's power to dismiss removal charges, the delegation believes that the President should have further examined the files of Justice Mwaungulu and Justice Phiri in the same way as he did the file of Justice Chipeta to consider whether to drop the charges. We had suggested this in our Interim Report.

As indicated above, the ICJ sent a follow-up Mission to report on the Judicial Service Commission hearing on the removal of Justice Mwuangulu and Justice Phiri on 16 January in Blantyre. However, due to unexpected technical problems with his flight, the ICJ observer was unable to be present at that hearing. Nevertheless, the same evening and the following day, he was able to secure interviews with the Chief Justice, defense counsel and the two judges in question.

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<sup>14</sup> On 5 November, Justice Chipeta withdrew from Mpingajira's treason trial. BBC News, at [http://news.bbc.co.uk/hi/english/world/africa/newsid\\_1639000/1639948.stm](http://news.bbc.co.uk/hi/english/world/africa/newsid_1639000/1639948.stm) visited on 11/12/01.

## IV. Constitutional Framework

### 1. Background

In 1967-68, unhappy with the rulings of some High Court judges, then-President Banda reinvigorated a parallel system of judiciary, namely the much-feared Regional Traditional Courts and the National Traditional Court of Appeal. These Courts, which had existed since 1913 and were manned by Traditional Authorities were, in effect, usurping the power of the High Courts. The Authorities did not always have a legal background despite the fact that they heard serious cases such as murder, treason, armed robbery, and rape. President Banda also exercised discretionary power to remove or transfer judges who did not suit him. The power of the Traditional Courts was largely reduced in 1993.<sup>15</sup> Pursuant to the present Constitution, these Courts can still be created by an Act of Parliament, however this legislation has not been made.<sup>16</sup>

The current Malawi legal system is based upon the 1994 Constitution.<sup>17</sup> Before adoption of this Constitution, the formal legal framework was based on the Westminster parliamentary system which reflected English common law. Under the Westminster system, Parliament had supreme authority and was answerable to no other institution under the National Assembly Powers and Privileges Act of 1968.<sup>18</sup> However, this Act is inconsistent with the 1994 Constitution which provides for three branches of government. The Constitution is thus a significant departure from the way in which power was formerly dispensed.

### 2. The Judiciary

The Constitution provides for an independent judiciary and vests sole authority in this body for interpreting the Constitution.<sup>19</sup> This concept has recently been severely tested by recent events. The judicial branch consists of

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<sup>15</sup> Letter from Church of Central Africa Presbyterian, 14 November 2001, to President Muluzi.

<sup>16</sup> Section 110(3) of the Malawi Constitution provides that, "Parliament may make provision for traditional local courts presided over by lay persons or chiefs provided that the jurisdiction of such court shall be limited exclusively to civil cases at customary law and such minor common law and statutory civil cases as prescribed by an Act of Parliament.

<sup>17</sup> Chapter 11, Article 11(1) of the 1994 Malawi Constitution states, "In the interpretation of all laws and in the resolution of political disputes the provisions of this Constitution shall be regarded as the supreme arbiter and ultimate source of authority.

<sup>18</sup> "The UK system of government is based on the principle of parliamentary sovereignty...The UK constitutional system does not guarantee the independence of the judicial body as a whole through the doctrine of the separation of powers, but rather it provides guarantees for the independence of individual judges through their tenure and conditions of work." *Attacks on Justice*, 10th Ed., Jan. 1999 - Feb. 2000, International Commission of Jurists, pp. 429-432.

<sup>19</sup> Chapter 1, Section 9 of the Malawi Constitution guarantees the independence of the judiciary stating, "The judiciary shall have the responsibility of interpreting, protecting and enforcing this Constitution and all laws in accordance with this Constitution in an independent and impartial manner with regard only to legally relevant facts and the prescriptions of law." The principle of independence of the judiciary is affirmed in Chapter IX, Section 103 (1) which states that, "All courts and all persons presiding over those courts shall exercise their functions, powers and duties independent of the influence and direction of any other person or authority."

the Supreme Court of Appeal, the High Court and sub-ordinate magistrate Courts. The Supreme Court consists of a Chief Justice and five other judges. The High Court has fifteen judges who sit as follows: four in Lilongwe, eight in Blantyre, one in Zomba and two in Mzuzu. Furthermore, the Constitution creates three courts sub-ordinate to the High Court.<sup>20</sup> These are the Magistrate courts (composed of 230 lay and professional Magistrates who exercise jurisdiction by statute); the Industrial Relations Court which handles labor relations; and the Traditional Courts.<sup>21</sup>

The Chief Justice, currently the Hon. Richard A. Banda, is appointed by the President and confirmed by the National Assembly.<sup>22</sup> Other judges are appointed by the President, following a recommendation by the Judicial Service Commission.<sup>23</sup> The retirement age of the Chief Justice as well as other judges is 65<sup>24</sup>. Although tenure is guaranteed, judicial remuneration is a matter of much concern. The Constitution provides that judges may only be removed for reasons of “incompetence” or “misbehavior”.<sup>25</sup>

The caseload of the judiciary is overwhelming and severely hampered by a lack of resources. As indicated by one report, the judicial system is “inefficient and is handicapped by serious weaknesses, including poor record keeping, a shortage of attorneys and trained personnel, a heavy caseload and a lack of resources”.<sup>26</sup> Judges share a limited number of secretaries and do not have research assistants. Even though it appears that most judges have recently had access to computers (but still require extensive training), Justice Phiri informed us that he did not have one.

### **3. Constitutional Provisions Relevant to Removal**

Disciplinary provisions relating to members of the judiciary are outlined in sections 118 and 119 of the Constitution. Parliament has argued that it has acted in conformity with the provisions of section 119. However, we are of the opinion that this is a narrow, and incomplete reading of section 119 as it does not take into consideration *other* provisions of the Constitution specifically referring to supremacy of the Constitution<sup>27</sup>, the independence of the judiciary<sup>28</sup>, and the role of the judiciary in interpreting laws.<sup>29</sup> The Constitution also specifically prohibits the National Assembly from making

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<sup>20</sup> Section 110 of the Malawi Constitution.

<sup>21</sup> Ibid.

<sup>22</sup> Section 111 (1) of the Malawi Constitution.

<sup>23</sup> Ibid.

<sup>24</sup> Section 119 of the Malawi Constitution.

<sup>25</sup> Ibid.

<sup>26</sup> U.S. Dept. of State, Country Reports, Malawi, February 2001.

<sup>27</sup> Section 10 of the Malawi Constitution indicates that, “In the interpretation of all laws and in the resolution of political disputes the provisions of this Constitution shall be regarded as the supreme arbiter and ultimate source of authority.”

<sup>28</sup> Section 103 (1) of the Malawi Constitution states, “All courts and all persons presiding over those courts shall exercise their functions, powers and duties independent of the influence and direction of any other person or authority”.

<sup>29</sup> Section 9 of the Malawi Constitution reads as follows, “The judiciary shall have the responsibility of interpreting, protecting and enforcing this Constitution and all laws in accordance with this Constitution in an independent and impartial manner with regard only to legally relevant facts and the prescriptions of law.”

any law or taking any action “which abolishes or abridges the fundamental rights and freedoms...”<sup>30</sup>

The composition of the Judicial Service Commission is governed by Section 117 as follows: 1) the Chief Justice who shall be the Chairman; 2) the Chairman of the Civil Service Commission (or any other member designated by him); 3) a Justice of Appeal or Judge (designated by the President after consultation with the Chief Justice); and 4) a legal practitioner and magistrate (designated by the President after consultation with the Chief Justice). It should be noted that the Judicial Service Commission has never heard disciplinary proceedings relating to judicial officers. At the time these events were taking place, the Commission had no guidelines or operating procedures in place .

Pursuant to section 118 of the Constitution, judicial nomination and removal procedures are vested in the Judicial Service. Regarding removal, Section 118 provides that:

The Judicial Service Commission shall have the authority to –

(b) exercise such disciplinary powers in relation to persons in judicial office subject to this Constitution as shall be prescribed by an Act of Parliament, subject to this Constitution;

(c) recommend subject to section 119, the removal of a person from judicial office.

Thus, section 118 is to be read in conjunction with section 119. The latter section addresses the circumstances by which a judge may be removed from office. Section 119 (2) provides that,

A judge may be removed from office only for **incompetence** in the performance of the duties of his office or for **misbehaviour**.”

The *procedure* by which this must be done has created some confusion.

Section 119 (3) states:

The President may by an instrument under the Public Seal and in consultation with the Judicial Service Commission remove from office any Judge where a motion praying for his removal on the ground of incompetence in the performance of the duties of his office or misbehaviour has been –

(a) debated in the National Assembly.

(b) Passed by a majority of votes of all members of the Assembly; and

(c) Submitted to the President as a petition for the removal of the judge concerned:

Provided that the procedure for the removal of a judge shall be in accordance with the principles of natural justice.

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<sup>30</sup> Section 46 (1).

Sections 118 and 119 should be read together in the context of the supremacy of the Constitution, the separation of powers, the independence of judiciary, and principles of natural justice, as provided in the 1994 Constitution.

However, the Speaker and Attorney General, who have allegedly been the driving forces behind the push to remove the three High Court judges disregarded these constitutional provisions and claimed that they followed proper procedures. However, this argument is fundamentally flawed in several aspects as follows:

- 1) Parliament ignored section 118 which envisages that removal proceedings should be initiated by the Judicial Service Commission;
- 2) Parliament should not have interfered in the affairs of the Judicial Commission Service when the latter had already been seized of the matter;
- 3) Parliament violated the principle of separation of powers when it summoned, then tried the judges in absentia in Parliamentary session. By doing so, Parliament arrogated to itself the role of prosecutor, judge and jury;
- 4) Parliament violated the separation of powers by ignoring a High Court injunction to stay the removal proceedings (and subsequently trying to remove the judge who issued the injunction);
- 5) The official count of MP signatures for removal was defective in that the petition for removal was allegedly still circulating after the debate had been closed; and
- 6) Principles of natural justice were not respected because the judges were not present at the debate, no clear charges were framed, and no means were available for the judges to defend themselves.

The ICJ is furthermore concerned that when the matter was finally referred back to the Commission on 16 January 2002, no formal charges or complaints were drawn against the judges and no complainants appeared even though both the Speaker and Attorney General had been notified. In fact, the secretary to the Commission notified the defense that the allegations were “the same as those served on you by Parliament.”<sup>31</sup> The ICJ finds that in the absence of a complainant and properly framed charges, there was nothing for the judges to rebut and the matter should not have proceeded any further.

Furthermore, appeal against or review of the decision of the Commission also poses a problem. Section 119 (e) provides that the decision of the Commission may be appealed to the Supreme Court of Appeal. However, the Chairman of the Commission is Chief Justice Banda and two other members of the Commission are also Supreme Court judges. This overlap of roles creates a situation whereby judges who had original jurisdiction of the case will be same ones hearing the case on appeal. This is not compatible with a fair and independent review.

The ICJ believes that provisions dealing with the independence of the judiciary should not be opened to the political process and Parliamentary voice votes with easy facility. Articles 118 and 119 must be interpreted to achieve the purpose for which they were introduced. These articles were not to create a forum for dissent every time some political parties, the government

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<sup>31</sup> See, ICJ Report on the Judicial Service Commission hearing, p. 8.

or even Parliament disagrees with a court decision for political or any other reasons. The object of these provisions is to create a rigorous due process, both to protect the judiciary and to ensure constitutional action where judges behave in a biased or improper manner. That is why the first step has to be a rigorous examination by the Judicial Commission itself to see if a prima facie case is made out. Even this would be subject to judicial review although the modalities of such a review would have to be worked out so as to exclude the members of the Commission from sitting on the Bench that hears the review. Such principles are part of an ordinary due process and are even more necessary to safeguard in allegations of impeachment. In the case against Justice Mwaungulu and Justice Phiri, the Judicial Commission was examining allegations to determine if there was a prima facie case, but as stated previously, Parliament intervened and took matters into its own hands.



## International Standards

Malawi is a State party to several important international human rights instruments<sup>32</sup>. These include the *International Covenant on Civil and Political Rights* to which Malawi acceded in 1993, and its *Optional Protocol* to which Malawi became a State party in 1996. Article 14 (1) of the *Covenant* provides for an independent judiciary.

Furthermore, Malawi ratified the *African Charter on Human and Peoples' Rights* in 1989. This instrument imposes a duty upon State parties to respect the independence of the judiciary. Pursuant to Article 26 of the *Charter*,

“States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.”

In addition to these binding international treaties, other international instruments are also relevant. Specifically, the *United Nations Principles on the Independence of the Judiciary* establish more detailed standards of judicial independence. Although not formally binding, these standards represent an authoritative set of internationally recognized norms adopted by the United Nations General Assembly.<sup>33</sup> The following Principles are the most important and relevant ones to the present case:

Principle 1, “The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the laws of the country. It is the duty of all government and other institutions to respect and observe the independence of the judiciary.”

Principle 2, “The judiciary shall decide matters before it impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.”

Principle 3, “The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.”

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<sup>32</sup> United Nations Human Rights – Treaty Bodies Database: (<http://www.unhcr.ch/tbs/doc.nst>) last visited 22/02/02

<sup>33</sup> *Basic Principles on the Independence of the Judiciary*, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan 1985, and endorsed by the UN General Assembly (A/RES/40/32, 29 November 1985). The UN General Assembly “welcomed” the Principles and invited governments “to respect them and to take them into account within the framework of their national legislation and practice” (A/RES/40/146, 13 December 1985).

Principle 4, “There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision.”

Principle 17, “A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential unless otherwise requested by the judge.”

The *Latimer House Guidelines*<sup>34</sup> are another set of international standards on the independence of the judiciary. One of the sponsors of the Colloquium that drew up the *Guidelines* is the Commonwealth Magistrate’s and Judges Association of which Chief Justice Banda is the President.

The *Guidelines* call “for a commitment, made in the utmost good faith, of the relevant national institutions, in particular the executive, parliament and the judiciary, to the essential principles of good governance, fundamental human rights and the rule of law, including the independence of the judiciary, so that the legitimate aspirations of all the peoples of the Commonwealth should be met.

On the discipline of judges, the *Guidelines* establish that:

- V.1 (a)(i) In cases where a judge is at risk of removal, the judge must have the right to be fully informed of the charges, to be represented at a hearing, to make a full defence, and to be judged by an independent and impartial tribunal...
- (iii) Disciplinary procedures should not include the public admonition of judges. Any admonitions should be delivered in private, by the chief judge.

Other relevant sections of the *Guidelines* to be consulted are sections I, II.1, and III.

The ICJ is gratified that these international standards on the independence of judges and on procedures for their discipline were considered and respected during the deliberations of the Judicial Service Commission chaired by the Chief Justice and in the final decision of President Muluzi to drop the removal charges against Justice Mwaungulu and Justice Phiri.

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<sup>34</sup> A joint Colloquium on “Parliamentary Supremacy and Judicial Independence...towards a Commonwealth Model” was held at Latimer House in the UK in June 1998. Over 60 participants attended. The *Guidelines* for the Commonwealth are a result of the deliberations during the Colloquium. The Colloquium was sponsored by the Commonwealth Lawyers’ Association, the Commonwealth Legal Education Association, the Commonwealth Magistrate’s and Judges Association and the Commonwealth Parliamentary Association with the generous support of the Commonwealth Foundation, the Commonwealth Secretariat and the United Kingdom Foreign and Commonwealth Office.

## VII. CONCLUSIONS AND RECOMMENDATIONS

As stated in the Executive Summary, the ICJ is gratified to learn that President Muluzi dismissed the charges against Justice Dunstain Mwaungulu and Justice Chimasula Phiri on 8 May 2002, after having considered the findings of the Judicial Service Commission. The ICJ applauds this decision which demonstrates respect for the independence of the judiciary pursuant to the Constitution of Malawi. The decision also complies with international standards and principles contained in instruments such as the African Charter on Human and Peoples' Rights, the UN Principles on the Independence of the Judiciary, and Latimer House Principles.

### **Separation of Powers**

Despite the positive outcome of the case against the judges, the ICJ remains concerned about the manner in which Parliament brought about removal charges and in doing so, infringed the separation of powers.

The cardinal principle of the separation of powers must be respected in any democracy. This holds especially true in a country such as Malawi which has but a brief history of a true separation of powers with an independent judiciary mandated to protect constitutional sovereignty. Parliament seriously imperilled Malawi's budding democracy and the rule of law when it interfered in the affairs of the judiciary.

Unhappiness with judicial decisions must never result in attempts to impeach or remove judges through Parliamentary debate. This inevitably draws the judiciary into the political arena and publicly indicts judges without minimum due process guarantees. Malawi has a proper hierarchy of courts and the appellate machinery should be invoked in instances where judicial rulings are seen to be unsatisfactory. In the instant case, Parliament not only overstepped its bounds, but, in doing so, violated the principles of natural justice when it summoned, then tried the judges, acting as prosecutor, judge and jury. Parliament's initiatives were all the more objectionable considering the content and nature of the debate concerning the judges and the fact that the Judicial Service Commission had already been seized of the matter. Furthermore, Parliament also violated the separation of powers by ignoring a High Court injunction to stay the removal proceedings. The ICJ urges Parliament - in the interests of the democracy it is sworn to protect - to respect and promote the independence of the judiciary.

### **Interpretation of Articles 118 and 119 of the Constitution**

Provisions to protect the independence of the judiciary while keeping judges accountable, need to be carefully examined and interpreted to attain a proper balance. Articles 118 and 119 vest judicial appointment, promotion and removal procedures in the Judicial Service Commission. This is in conformity with international norms. These provisions should be read together in the context of the supremacy of the Constitution, the separation of powers, the independence of the judiciary and principles of justice.

Having regard to the degree of confusion surrounding the interpretation of Articles 118 and 119, it would be advisable to undertake a thorough examination and reappraisal of these articles with a view to avoiding any recurrence of the type of situation that arose in this instance. In particular, consideration should be given to replacing the present provisions under Article 118 3(a) and (b) for the removal of judges from office by a provision requiring investigation and proof of alleged misbehavior or incapacity to be carried out by an appropriate judicial body.

### **Judicial Service Commission**

The ICJ is aware that this was the first time that the Judicial Service Commission held a hearing. However, the composition of the Judicial Service Commission and its rules of procedure, including appellate procedures, should be defined and clarified. Appeal or review of decisions of the Commission to the Supreme Court of Appeal poses a problem as long as the Chairman of the Commission is the Chief Justice and two other members of the Commission are also Supreme Court judges. This creates the possibility of an irresolvable conflict arising where judges who participated in the disciplinary hearing before the Judicial Service Commission will be needed for a quorate court on appeal/review.

Furthermore, this case underscores the desirability of drafting a code of conduct for judges and making adequate provision for disciplinary proceedings against members of the judiciary only on clearly formulated charges that are cognizable under the code. Indeed, a major flaw in the proceedings against Justice Mwaungulu and Justice Phiri was the absence of formal charges. The Secretary of the Judicial Service Commission merely notified the judges that the allegations were "the same as those served on you by Parliament". The diffuse and vague allegations made in Parliament should not have been made in the first place and rendered it impossible to fathom the true content of the "charges".

In addition, no complainants appeared at the disciplinary proceeding despite the fact that both the Speaker and the Attorney General had been notified. Whereas it may be arguable that the Judicial Service Commission need not have a "complainant" where the Judicial Service Commission acts *suo motu* in conducting an inquiry, it behoves the Commission in a case such as this, where the Commission clearly does not act *suo motu*, to identify the source of the complaint and afford an opportunity for the allegations to be tested and controverted in evidence, otherwise the process may not be seen to be independent and legitimate.

Having regard to the serious reflection that the mere institution of an enquiry casts on the judges concerned, it would also be advisable to provide a preliminary mechanism for sifting out frivolous or vexatious complaints before formal proceedings are commenced.

### **Case Allocation**

However vague or undefined the allegations made during the parliamentary debate may have been, they do demonstrate how crucial it is that a clear system of case allocation be instituted. This would not only ensure that judicial work is divided equally between judges, but would promote confidence in the impartiality of the judiciary. The case allocation system should be transparent and manifestly refute the suspicion that specific judges are picked for specific cases - or worse - that judges choose the cases they are to hear. The case allocation system could fall under the general purview of the Chief Justice and must be continually monitored and evaluated to ensure manifest fairness. This will go a long way in protecting judges from allegations of picking and choosing their cases.

### **Resources for the Court**

The caseload of the judiciary is heavy and the judges are hampered by a lack of resources. This, in turn, creates systemic delays in the High Court and is the source of serious complaints. Remedial action is necessary, ranging from a stricter policy towards unnecessary adjournments and other delays to an increase in the number of full-time judges or the use of retired judges.

There is substance in the February 2001 report of the United States Department of State which indicated that the judicial system is "inefficient and is handicapped by serious weaknesses, including poor record-keeping, a shortage of attorneys and trained personnel, a heavy caseload and a lack of resources." The ICJ is cognizant of financial limitations, however, it encourages the Government, in as much as possible, to dedicate more resources to the judiciary, including office equipment, research clerks, secretaries and a library. It also recommends that judges be given basic computer training and access to the internet which is a cost-effective method for conducting research.

## VIII. Annexes

- A. List of Interviewees
- B. ICJ Preliminary Report of Mission to Malawi
- C. ICJ Report on Judicial Service Commission Hearing
- D. The Constitution of Malawi, Chapter IX, The Judicature
- E. United Nations Basic Principles on the Independence of the Judiciary
- F. Latimer House Guidelines
- G. "Parliament rewriting Malawi Constitution", Daily Times, 23 December 2001
- H. Notice dated 7 November 2001 from the Judicial Service Commission to Justice Mwaungulu
- I. Particulars of Motion for Removal of Justice Mwaungulu - undated
- J. Notice dated 7 November 2001 from the Judicial Service Commission to Justice Phiri
- K. Particulars of Motion for Removal of Justice Phiri- undated
- L. "Mpasu Teaches CCAP on Judges", Daily Times, 29 November 2001
- M. Notice of Proceedings in the National Assembly to Justice Mwaungulu, dated 12 November
- N. Notice of Proceedings in the National Assembly to Justice Phiri, dated 12 November
- O. Notice of Disciplinary Proceedings from Judicial Service Commission dated 6 December 2001 to Justice Mwaungulu
- P. Notice of Disciplinary Proceedings from Judicial Service Commission dated 6 December 2001 to Justice Phiri
- Q. BBC News, "Malawi treason trial judge resigns" dated 5 November 2001
- R. Letter from the Magistrates and Judges Association of Malawi (MAJAM) to international organizations dated 13 November 2001
- S. Letter from the Magistrates and Judges Association of Malawi (MAJAM) to President Muluzi dated 13 November 2001

- T. Public Affairs Committee Press Statement dated 15 November 2001
- U. Letter from Church of Central Africa Presbyterian to President Muluzi dated 14 November 2001
- V. Malawi Human Rights Commission Press Release of 6 November 2001
- W. Malawi Law Society Press Release of 4 November 2001