

Overall Score:

73 - Moderate

Legal Framework Score:

87 - Strong

Actual Implementation Score:

60 - Weak

Category 1. Non-Governmental Organizations, Public
Information and Media

1.1. ⁷⁶Anti-Corruption Non-Governmental Organizations

1. Are anti-corruption/good governance NGOs legally protected?

100

01a. In law, citizens have a right to form NGOs focused on anti-corruption or good governance.

Yes

No

Comments:

Section 32(1) of the Malawi Constitution provides that “every person shall have the right to freedom of association, which shall include the freedom to form associations.”

Section 32(2) meanwhile states that “no person may be compelled to belong to an association.”

References:

Constitution of the Republic of Malawi (1995), Sections 32(1) and 32(2).

Yes: A YES score is earned when freedom to assemble into groups promoting good governance or anti-corruption is protected by law, regardless of political ideology, religion or objectives. Groups with a history of violence or terrorism (within last ten years) may be banned. Groups sympathetic to or related to banned groups must be allowed if they have no history of violence. Non-governmental organizations (NGOs) are defined here as any organized group that is separate from the state working on issues of governance, transparency, and/or anti-corruption.

No: A NO score is earned when any single non-violent group is legally prohibited from organizing to promote good governance or anti-corruption. These groups may include non-violent separatist groups, political parties or religious groups.

01b. In law, anti-corruption/good governance NGOs are free to accept funding from any foreign or domestic sources.

Yes

No

Comments:

Article 33 of the NGO Act (2000) states that NGOs “may solicit and accept funds and contributions and engage in public fundraising for the furtherance of their public benefit purposes, subject to compliance with the reporting requirements prescribed by the Act and other written law.” This provision does not ban NGOs from accepting any domestic or foreign sources.

References:

Laws of Malawi, Non-Governmental Organizations Act, (2000), Article 33.

Yes: A YES score is earned if anti-corruption/good governance NGOs face no legal or regulatory restrictions to raise or accept funds from any foreign or domestic sources. A YES score may still be earned if funds from groups with a history of violence or terrorism (within last ten years) are banned.

No: A NO score is earned if there any formal legal or regulatory bans on foreign or domestic funding sources for NGOs focused on anti-corruption or good governance.

01c. In law, anti-corruption/good governance NGOs are required to disclose their sources of funding.

Yes

No

Comments:

Section 22(1)(a)(iv) of the NGO Act (2000) states that NGOs should present annual reports of their sources of funding to the Registry of the NGO Board.

Although the NGO Act requires NGOs to report their sources of funding, this is never enforced in practice because of capacity constraints at the NGO Board. However, on Aug. 9, 2011, the governor of the Reserve Bank of Malawi announced that all NGOs will be required to submit quarterly financial returns to the Central Bank and that they should also provide details of sources of foreign and local funding, account statements for the quarter and details on utilization of funds received during the quarter or earlier. If enforced, this will have the effect of enabling the government to track the sources of funding of NGOs.

References:

Section 22(1)(a)(iv) of the NGO Act (2000).

Anthony Kasunda, “Malawi Government shocks NGO on new directive,” The Nation newspaper, Aug. 10, 2011, http://www.nationmw.net/index.php?option=com_content&view=article&id=24032:malawi-govt-shocks-ngos-on-new-directive&catid=1:national-news&Itemid=3

Dr. Jonathan Makuwira, visiting senior lecturer, Bunda College of Agriculture (Malawi) and Royal Melbourne Institute of Technology University, Australia, Aug. 16, 2011

McBain Mkandawire, executive director, Malawi Youthnet and Counseling (YONECO,) Zomba, Aug 17, 2011

Yes: A YES score is earned if anti-corruption/good governance NGOs are required to publicly disclose their sources of funding.

No: A NO score is earned if no such public disclosure requirement exists.

2. Are anti-corruption/good governance NGOs able to operate freely?

67

02a. In practice, the government does not create barriers to the organization of new anti-corruption/good governance NGOs.

100 | 75 | 50 | 25 | 0

Comments:

Any group can register as an NGO with the NGO Board after fulfilling a number of requirements as stipulated under the NGO Act (2000). Among the key requirements are: provision of a certified copy of the group's constitution; payment of registration fees as prescribed by the NGO Board and the provision of a plan of activities.

The law further requires that the registration of new NGOs be approved by the government ministry that has responsibility for the activities to be undertaken, although this is rarely done in practice. In addition new NGOs have to provide evidence of membership to the Council for Non Governmental Organizations (CONGOMA), which serves as the coordinating body for all NGOs in Malawi. CONGOMA membership currently costs \$150, payable in the local currency. New NGOs seeking registration with CONGOMA are required to provide proof of memorandum of understanding or any other agreement between the ministry and the NGO; source of funding; address; names of directors and other executive board members; latest audited annual financial statements and annual report. To get around the long process of registering under the NGO Act, many new NGOs register their organizations under the Companies Act of 1984.

References:

Dr. Jonathan Makuwira, visiting senior lecturer, Bunda College of Agriculture (Malawi) and Royal Melbourne Institute of Technology University, Australia, Aug. 16, 2011, Lilongwe

McBain Mkandawire, executive director, Malawi Youthnet and Counseling (YONECO), Aug. 17, 2011, Zomba

Billy Banda, executive director, Malawi Watch, Sept. 16, 2011, Lilongwe

100: NGOs focused on promoting good governance or anti-corruption can freely organize with little to no interaction with the government, other than voluntary registration.

75:

50: NGOs focused on promoting good governance or anti-corruption must go through formal steps to form, requiring interaction with the state such as licenses or registration. Formation is possible, though there is some burden on the NGO. Some unofficial barriers, such as harassment of minority groups, may occur.

25:

0: Other than pro-government groups, NGOs focused on promoting good governance or anti-corruption are effectively prohibited, either by official requirements or by unofficial means, such as intimidation or fear.

02b. In practice, anti-corruption/good governance NGOs actively engage in the political and policymaking process.

Comments:

NGOs have recently asserted their role in engaging in the policymaking process. They are often consulted to provide input during the development of various government policies. However, the level of engagement is often limited to consultation, with no guarantee that the final outcome (i.e., policy) will incorporate all or any of the suggestions made by the NGOs.

NGO advocacy has also often brought conflicts with government, to the extent that the relationship between governance NGOs and government has at times become confrontational. In February 2011, for example, NGO leaders met with Malawi's President Bingu wa Mutharika to present him with a petition for government to undertake a series of measures and reforms to address several pressing economic and governance issues, including shortages of fuel and foreign exchange.

However, the meeting ended in a deadlock, with the president reported to have expressed anger with the NGO leaders. On July 20, 2011, several NGOs organized a series of public demonstrations to implore government to adopt new policies to address the ongoing problems of fuel and foreign exchange shortages and a number of issues that were captured in a 20-point petition to government. The government responded in a heavy-handed manner, dismissing the petition and used the might of the police to disperse the demonstrators. A total of 20 citizens were killed during these demonstrations while many more were treated for gunshot wounds.

In yet another sign that Malawi NGOs have limited input into government policy, the government completely ignored the Malawi NGOs' suggestion that the government should reconsider its plans to expel the former British High Commissioner to Malawi, Fergus Cochrane-Dyet on April 26, 2011. This was despite pleas from NGOs and other concerned Malawians to the government not to go ahead with the decision.

References:

Mabvuto Banda, "Inside Story of Bingu/NGOs meet," The Nation, Feb. 25, 2011, http://www.nationmw.net/index.php?option=com_content&view=article&id=15074:inside-story-of-bingungos-meet&catid=62:national-news&Itemid=59

Guardian Newspaper, April 27, 2011, "Malawi expels British ambassador," <http://www.guardian.co.uk/world/2011/apr/27/malawi-expels-british-ambassador>

Malawi Human Rights Commission, Preliminary Findings and Recommendations on Demonstrations-Related Violence on July 20, 2011, Lilongwe, Aug. 15, 2011

Dr. Jonathan Makuwira, visiting senior lecturer, Bunda College of Agriculture (Malawi) and Royal Melbourne Institute of Technology University, Australia, Aug. 16, 2011, Lilongwe

Albert Mungomo, State House press officer, "In the matter of giving the state president up to mid September ultimatum," press statement in the Daily Times, Sept. 7, 2011, page 14

100: Non-governmental organizations focused on anti-corruption or good governance are an essential component of the political process. NGOs provide widely valued insights and have political power. Those NGOs play a leading role in shaping public opinion on political matters.

75:

50: Anti-corruption/good governance NGOs are active, but may not be relevant to political decisions or the policymaking process. Those NGOs are willing to articulate opinions on political matters, but have little access to decision makers. They have some influence over public opinion, but considerably less than political figures.

25:

0: Anti-corruption/good governance NGOs are effectively prohibited from engaging in the political process. Those NGOs are unwilling to take positions on political issues. They are not relevant to changes in public opinion.

02c. In practice, no anti-corruption/good governance NGOs have been shut down by the government for their work on corruption-related issues during the study period.

Yes

No

Comments:

Although NGOs have not been shut down for their work, the relationship between NGOs and government has been strained during the study period. In some cases, government has provided inducements to NGO leaders in order to silence them from being too critical of government.

The government has also tried to frustrate the work of NGOs, including accusing them of colluding with foreign donors to withdraw aid to Malawi. In other instances, the government has worked to deprive NGOs of resources and materials intended for their projects. In May 2011, for example, the Malawi government confiscated materials belonging to two NGOs working to advance the cause of minority/gay rights, the Centre for Development of People (CEDEP) and the Centre for Human Rights and Rehabilitation (CHRR) without providing any credible reason.

References:

Thokozani Chenjezi, "Police impound CHRR, Cedep branded cloth" Daily Times, May 18, 2011, <http://www.bnltimes.com/component/content/article/1032-police-impound-chrr-cedep-branded-cloth-.html>

McBain Mkandawire, executive director, Malawi Youthnet and Counseling (YONECO), Aug. 17, 2011, Zomba

Kondwani Munthali, Kondwani Munthali, "Sembereka's house torched" The Nation, September 12, 2011, http://www.mwnation.com/index.php?option=com_content&view=article&id=25276:semberekas-house-torched&catid=1:national-news&Itemid=3

Billy Banda, executive director, Malawi Watch, Sept. 16, 2011, Lilongwe

Yes: A YES score is earned if there were no NGOs shut down by the government or forced to cease operations because of their work on corruption-related issues during the study period. YES is a positive score.

No: A NO score is earned if any NGO has been effectively shut down by the government or forced to cease operations because of its work on corruption-related issues during the study period. The causal relationship between the cessation of operations and the NGO's work may not be explicit, however the burden of proof here is low. If it seems likely that the NGO was forced to cease operations due to its work, then the indicator is scored as a NO. Corruption is defined broadly to include any abuses of power, not just the passing of bribes.

3. Are anti-corruption/good governance NGO activists safe when working on corruption issues?

100

03a. In practice, in the past year, no anti-corruption/good governance NGO activists working on corruption issues have been imprisoned.

Yes

No

Comments:

No activist was imprisoned for working on governance or corruption issues.

However, on several occasions, President Bingu wa Mutharika has threatened to arrest NGO leaders. In the run up to, and in the immediate aftermath of civil society-organized street demonstrations in July 2011 for example, Mutharika threatened to arrest several civil society leaders, citing the chairperson of the Human Rights Consultative Committee, Undule Mwakasungula, and the

executive director of CEDEP, Gift Trapence, the executive director of the Institute for Policy Interaction, Rafiq Hajat, among those the government was targeting for their advocacy work.

NGO/activist Billy Mayaya and four of his colleagues were arrested in October 2011 (See Amnesty international's piece "Malawi's activists detained after protest"). Thus, several civil society leaders in Malawi have been harassed and threatened with arrests, but there were no cases of formal arrests or imprisonment of NGO leaders in the time period of this report (June 30, 2010 – June 30, 2011).

References:

Evelyn Chibwe, Nyasatimes, Aug. 14, 2011, "Malawi ruler draws parallel with UK riots, threatens NGO leaders," <http://www.nyasatimes.com/national/malawi-ruler-draws-parallel-with-uk-riots-threatens-ngo-leaders/>

McBain Mkandawire, executive director, Malawi Youthnet and Counseling (YONECO), Aug. 17, 2011, Zomba

Amnesty International, "Malawi's activists detained after protest," Oct. 18, 2011, <http://www.amnesty.org/en/library/asset/AFR36/003/2011/en/5e2fbbc0-ad37-41f3-8881-28774558a1a1/af360032011en.html>

Yes: A YES score is earned if there were no NGO activists imprisoned because of their work covering corruption. YES is a positive score.

No: A NO score is earned if any activist was jailed in relation to work covering corruption. The causal relationship between the official charges and the person's work may not be explicit, however the burden of proof here is low. If it seems likely that the person was imprisoned due to his or her work, then the indicator is scored as a NO. Corruption is defined broadly to include any abuses of power, not just the passing of bribes. "Imprisoned" is defined here as detention by the government lasting more than 24 hours.

03b. In practice, in the past year, no anti-corruption/good governance NGO activists working on corruption issues have been physically harmed.

Yes

No

Comments:

Although President Mutharika told his supporters in March 2011 to defend him by fighting his critics, a group which included NGO leaders working on governance and corruption issues, no NGO leader was physically harmed during the report period.

References:

Sam Banda, "Bingu asks DPP to fight critics", Daily Times, March 7, 2011

Billy Banda, executive director, Malawi Watch, Sept. 16, 2011, Lilongwe

Yes: A YES score is earned if there were no documented cases of NGO activists covering corruption being assaulted in the specific study period. A YES score can be earned if there was an attack but it was clearly unrelated to the activist's work. YES is a positive score.

No: A NO score is earned if there were any documented cases during the study period of assault to an activist who covers corruption. Corruption is defined broadly to include any abuses of power, not just the passing of bribes.

03c. In practice, in the past year, no anti-corruption/good governance NGO activists working on corruption issues have been killed.

Yes

No

Comments:

Although no NGO activists have been killed during the study period, 19 demonstrators were killed by the police after the July 2011 demonstrations for good governance in Malawi.

Several NGO leaders have also faced threats to their lives during the study period. In April 2011, for example, the Centre for Human Rights and Rehabilitation (CHRR) received a threatening letter from a pro-government youth leader, threatening to deal with the centre's executive director, Undule Mwakasungula, who also chaired the Human Rights Consultative Committee, HRCC. A few days after this letter was received, the offices of CHRR were broken into and thugs requested Mwakasungula's home address from the centre's security personnel.

Following the July 20 demonstrations, the executive director of the Civil Society Coalition on Basic Quality Education (CSQBE), Benedicto Kondowe, received an anonymous phone call and was asked why he was part of the group criticizing the president of Malawi and was told that he was being monitored and that he would be killed as a consequence of his opposition to the government.

References:

Center for Human Rights and Rehabilitation, "CHRR Offices Broken into, Guard Assaulted," April 5, 2011, <http://www.hrcmw.org/2011/04/05/chrr-offices-broken-into-guard-assaulted/>

Malawi Voice, "OPHD reveals new death threats for activist Kondowe," July 26, 2011, <http://www.malawivoice.com/politics/ophd-reveals-new-death-threats-for-activist-kondowe/>

McBain Mkandawire, executive director, Youth Net and Counseling (YONECO), Aug. 17, 2011, Zomba

Yes: A YES score is earned if there were no documented cases of NGO activists being killed because of their work covering corruption in the specific study period. YES is a positive score.

No: A NO score is earned if there were any documented cases during the study period where a person was killed related to a corruption trial, scandal or investigation. The relationship between a mysterious death and an individual's history may not be clear, however the burden of proof here is low. If it is reasonable that a person was killed in relation to his or her work on corruption issues, then the indicator is scored as a NO. Corruption is defined broadly to include any abuses of power, not just the passing of bribes.

4. Can citizens organize into trade unions?

75

04a. In law, citizens have a right to organize into trade unions.

Yes

No

Comments:

Section 31(2) of the Malawi Constitution provides that all persons shall have the right to form and join trade unions or not to form or join trade unions.

Malawi is also a signatory to the International Labour Organization's Fundamental Conventions. Article 2 stipulates that workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization.

References:

Section 31(2) of the Malawi Constitution.

Professor Lewis Dzimbiri, dean of social science and professor of labour relations, University of Malawi, Chancellor College, Sept. 14, 2011, Zomba

International Labour Organization, "The International Labour Organization's Fundamental Conventions," Geneva: International Labour Office, 2003

Yes: A YES score is earned when trade unions are allowed by law, regardless of political ideology, religion or objectives. Groups with a history of violence or terrorism (within last ten years) may be banned. Groups sympathetic to or related to banned groups must be allowed if they have no history of violence.

No: A NO score is earned when any single non-violent trade union is legally prohibited by the government from organizing.

04b. In practice, citizens are able to organize into trade unions.

100 | 75 | **50** | 25 | 0

Comments:

There were a total of 27 trade unions in Malawi in September 2011. However, the proportion of the workforce that was unionized is extremely low, estimated at slightly more than 8 percent of the total workforce. The low union density in Malawi is attributed to several factors, which include: a very small formal sector workforce, ignorance about workers' rights; employer resistance to unions; lack of technical capacity, a weak financial base and the politicization of unions.

During the study period, employer resistance to trade unionism was vividly demonstrated when the Council of the University of Malawi dismissed the acting president of the Chancellor College Academic Staff Union (CCASU); her secretary general, CCASU's legal adviser and an additional member, for their role in leading an industrial action protesting against the government's decision to plant spies in lecturer rooms in contravention of the constitutional guarantees of academic freedom.

References:

Lewis Dzimbiri, May 2011, "Labour Market Analysis in Malawi," report submitted to the ANSA secretariat, Zimbabwe.

Ndala Machika, Nation Newspaper, Sept. 14, 2011, "Friendly warning to UNIMA Council," http://www.nationmw.net/index.php?option=com_content&view=article&id=25309:friendly-warning-to-unima-council&catid=32:feature&Itemid=27

Professor Lewis Dzimbiri, dean of social science and professor of labour relations, University of Malawi, Chancellor College, Sept. 14, 2011

100: Trade unions are common and are an important part of the political process and political discourse. Trade union organizers have widely understood rights. Trade unions are free from intimidation or violence.

75:

50: Trade unions exist, but are not always relevant to politics or policy debates. Barriers to organizing trade unions exist, such as intimidation at work, or retribution firings. Trade union organizers have some rights, but these may not be commonly known, or are difficult to defend.

25:

0: Trade unions are rare. Significant barriers to organization exist, including direct violence. Rights of union organizers are not widely known, or are ineffective in protecting organizers.

1.2. Media's Ability to Report on Corruption

5. Are media and free speech protected?

100

05a. In law, freedom of the media is guaranteed.

Yes

No

Comments:

Section 36 of the Malawi Constitution guarantees the right of the press to report and publish freely, within Malawi and abroad, and to be accorded the fullest possible facilities for access to public information.

In addition, Section 37 of the Malawi Constitution guarantees the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise of an individual's rights.

References:

Section 36 of the Malawi Constitution.

Section 37 of the Malawi Constitution.

Yes: A YES score is earned if freedom of the press is guaranteed in law, including to all political parties, religions, and ideologies.

No: A NO score is earned if any specific publication relating to government affairs is legally banned, or any general topic is prohibited from publication. Specific restrictions on media regarding privacy or slander are allowed, but not if these amount to legal censorship of a general topic, such as corruption or defense. A NO score is earned if non-government media is prohibited or restricted.

05b. In law, freedom of speech is guaranteed.

Yes

No

Comments:

Section 34 of the Malawi Constitution states that every Malawian has the right to freedom of opinion, including the right to hold opinions without interference to hold, receive and impart opinions.

Section 35 of the Malawi Constitution stipulates that every Malawian shall have the right to freedom of expression.

References:

Section 34 of the Malawi Constitution.

Section 35 of the Malawi Constitution.

Yes: A YES score is earned if freedom of individual speech is guaranteed in law, including to all political parties, religions, and ideologies.

No: A NO score is earned if any individual speech is legally prohibited, regardless of topic. Specific exceptions for speech linked with a criminal act, such as a prohibition on death threats, are allowed. However, any non-specific prohibition earns a NO score.

6. Are citizens able to form print media entities?

81

06a. In practice, the government does not create barriers to form a print media entity.

100 | 75 | **50** | 25 | 0

Comments:

As the leading advertising agency, government can create barriers to the formation and sustenance of a print media entity by choosing to withhold advertising in a particular print media house. In March 2010, for example, the Malawi government imposed a ban on advertising in the Nation Newspapers group, publishers of the Nation, the Weekend Nation, the Nation on Sunday and Fuko newspapers. The withdrawal of advertising had the effect of scaring off other potential investors in the media sector.

In November 2010, Parliament passed a new law amending the Penal Code to empower the Minister of Information to ban a publication if he has "reasonable grounds to believe that the publication or importation of any publication would be contrary to the public interest." This act threatens media independence in Malawi and its constitutionality has been challenged in the High Court with a decision pending.

References:

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

Sam Banda Jr., "Malawi bans adverts on private media," Africa News, March 9, 2010, http://www.africanews.com/site/Malawi_bans_adverts_on_private_media/list_messages/30432

Jones Njewa, "Malawi President approves media ban law," Malawi Democrat, Jan. 26, 2011, <http://www.malawidemocrat.com/national/malawi-president-approves-media-ban-law/>

Daniel Richey, "Malawi passes law permitting government to ban media outlets," Jurist, Jan. 27, 2011, <http://jurist.org/paperchase/2011/01/malawi-passes-law-permitting-government-to-ban-media.php>

100: Print media entities can freely organize with little to no interaction with the government. This score may still be earned if groups or individuals with a history of political violence or terrorism (within last ten years) are banned from forming media entities.

75:

50: Formation of print media groups is possible, though there is some burden on the media group including overly complicated registration or licensing requirements. Some unofficial barriers, such as harassment of minority groups, may

occur.

25:

0: Print media groups are effectively prohibited, either by official requirements or by unofficial means, such as intimidation or fear.

06b. In law, where a print media license is necessary, there is an appeals mechanism if a license is denied or revoked.

Yes

No

Comments:

The registration of the print media in Malawi is regulated under the Printed Publications Act, Act 18 of 1947. Under Section 5 of this act, newspaper publishers are required to provide the Office of the Government Archivist details about the of the paper, names and addresses for the paper's owners, editor and publisher, and a description of where the newspaper will be published. The act does not empower the government archivist to refuse registration so long as the required conditions have been met. Even where the required details have not been provided to the government archivist, the act states that any person who contravenes the requirements for registration shall be liable to pay a fine of 100 pounds.

While the act provides no appeals mechanism when registration is denied, the decision of the government archivist can be challenged through the process of judicial review. In October 2010, for example, the Malawi National Archives banned publication and circulation of the Weekend Times by Blantyre Newspapers Ltd. after accusing the paper of not being registered with the National Archives of Malawi. The publishers of the newspaper however sought and obtained a court injunction which allowed them to continue publishing until they were granted permission to continue publishing the paper by the government archivist.

References:

Printed Publications Act, Act 18 of 1947, Section 5.

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

Augustine Mulomole, information officer, MISA Malawi, Ban of the Weekend Times by the National Archives of Malawi, MISA Malawi press release, Nov. 1, 2010, http://www.mw.misa.org/index.php?option=com_content&view=article&id=82:ban-of-the-weekend-times-by-the-national-archives-of-malawi

Augustine Mulomole, information officer, MISA Malawi, "Government lifts ban on Weekend Times," MISA Malawi Communiqué, June 16, 2011, http://www.mw.misa.org/index.php?option=com_content&view=article&id=92:government-lifts-ban-on-weekend-times

Yes: A YES score is earned if there is, in law or in accompanying regulations, a formal process to appeal a denied print media license, including through the courts. A YES score is also earned if no print license is necessary.

No: A NO score is earned if there is no appeal process for print media licenses.

06c. In practice, where necessary, citizens can obtain a print media license within a reasonable time period.

100

75

50

25

0

Comments:

The current law governing registration of print media does not require the provision of a license. The government archivist simply

keeps records of all newspapers being published in a register for archival purposes. It is even possible for one to start publishing before registering with the National Archives although this would result in a fine of 100 pounds sterling.

References:

Chikosa Banda, head of the Department of Foundational Law, University of Malawi, Aug. 19, 2011, Zomba

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

100: Licenses are not required or licenses can be obtained within two months.

75:

50: Licensing is required and takes more than two months. Some groups may be delayed up to six months.

25:

0: Licensing takes close to or more than one year for most groups.

06d. In practice, where necessary, citizens can obtain a print media license at a reasonable cost.

100 | 75 | 50 | 25 | 0

Comments:

There is no cost for registering print media with the National Archives of Malawi.

References:

Chikosa Banda, head of the Department of Foundation Law, University of Malawi, Chancellor College, Aug. 19, 2011

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

100: Licenses are not required or can be obtained at minimal cost to the organization. Licenses can be obtained on-line or through the mail.

75:

50: Licenses are required, and impose a financial burden on the organization. Licenses may require a visit to a specific office, such as a regional or national capital.

25:

0: Licenses are required, and impose a major financial burden on the organization. Licensing costs are prohibitive to the organization.

7. Are citizens able to form broadcast (radio and TV) media entities?

07a. In practice, the government does not create barriers to form a broadcast (radio and TV) media entity.

100 | 75 | 50 | 25 | 0

Comments:

The government has been very reluctant to enable the operation of critical media in the country. The public broadcaster, Malawi Broadcasting Corp. TV (MBC TV), continued to be heavily biased and run several propaganda programs to advance the agenda of the ruling party. During this period, the government continued to refuse to grant a license to Joy Television, which belongs to the former president, Bakili Muluzi. Zodiak Broadcasting Services (ZBS) has also not been granted a television license despite having an application submitted to the Malawi Communications Regulatory Authority, MACRA. Blantyre Newspapers group, publishers of the daily Times, Weekend Times, Malawi News and the Sunday Times, also had their application for a television license rejected after more than a year. In all, it was estimated that there were more than 20 applications to MACRA for television licenses that had not been granted during the study period.

References:

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

Billy Banda, executive director, Malawi Watch, Sept. 16, 2011, Lilongwe

100: Broadcast media entities can freely organize with little to no interaction with the government. Media groups have equal access to broadcast bandwidth through a reasonably fair distribution system. This score may still be earned if groups or individuals with a history of political violence or terrorism (within last ten years) are banned from forming media entities.

75:

50: Formation of broadcast media groups is possible, though there is some burden on the media group including overly complicated registration or licensing requirements. Some unofficial barriers, such as harassment of minority groups, may occur. Division of broadcast bandwidth is widely viewed to be somewhat unfair.

25:

0: Broadcast media groups are effectively prohibited, either by official requirements or by unofficial means, such as intimidation or fear. This score is appropriate if the division of broadcast bandwidth is widely viewed to be used as a political tool.

07b. In law, where a broadcast (radio and TV) media license is necessary, there is an appeals mechanism if a license is denied or revoked.

Yes | No

Comments:

Under Section 20 of the Communications Act (1999), the Malawi Communications Regulatory Authority (MACRA) may grant or refuse the issuing of a license based on an assessment of four sets of criteria, namely: the applicant's capability to operate the network or service for which the license is sought, the published criteria by which the license will be issued, the extent to which issuing such a license would promote the government's goal of providing reliable and affordable communications services throughout Malawi, and whether or not the issue of such a license is in the public interest. Although the Communications Act does not provide for appeals mechanisms when a license application has been refused, MACRA, which also serves as the licensing authority, is required by law to provide written reasons for its decisions. As with other public entities, MACRA's decisions can be challenged in court by way of judicial review.

References:

Laws of Malawi, Communications Act (1999), Section 20.

Chikosa Banda, head of the Department of Foundational Law, University of Malawi, Aug. 19, 2011, Zomba

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

Yes: A YES score is earned if there is, in law or in accompanying regulations, a formal process to appeal a denied broadcast media license, including through the courts. A YES score is also earned if no broadcast license is necessary.

No: A NO score is earned if there is no appeal process for broadcast media licenses.

07c. In practice, where necessary, citizens can obtain a broadcast (radio and TV) media license within a reasonable time period.

100 | 75 | 50 | **25** | 0

Comments:

Section 20(4) of the Malawi Communications Act states that the Malawi Communications Regulatory Authority (MACRA) has to make a decision on an application for a broadcast license and provide feedback to the applicant within a period of six months. However, the process of obtaining a broadcast license is often very long and cumbersome, usually exceeding the six month requirement. This is the case in part because in making its decision on a license application, the MCRA may have to seek the direction of the line minister which often results in extensive political interference in the process. As a result, applications by media houses allied to opposition parties take too long to be processed and sometimes are never approved. For example, the MCRA has taken more than three years to make a decision on an application for a television license sought by Joy TV, which belongs to former president Bakili Muluzi. Other applications by Blantyre Newspapers and Zodiak Broadcasting Services also had not been responded to more than a year after the license applications had been submitted.

References:

Chikosa Banda, head of the Department of Foundational Law, University of Malawi, Aug. 19, 2011, Zomba

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

100: Licenses are not required or licenses can be obtained within two months.

75:

50: Licensing is required and takes more than two months. Some groups may be delayed up to six months.

25:

0: Licensing takes close to or more than one year for most groups.

07d. In practice, where necessary, citizens can obtain a broadcast (radio and TV) media license at a reasonable cost.

100 | 75 | **50** | 25 | 0

Comments:

There are no fixed rates for licensing fees for a broadcast media license. However, media houses have to pay an initial application fee for assignment and an annual payment to the Malawi Communications Regulatory Authority (MACRA). In 2011, these fees ranged from US\$356 assignment fee and an additional US\$178 annual fee for an FM radio station. The assignment fee for a television license was US \$1,780 and a further \$890 annual fee for VHF/UHF television. It is thus possible for an individual to obtain an FM radio broadcasting license for a total of US\$534. The license fees for television are meanwhile higher, at a combined total of US\$2,670. However, given the levels of investment required for television broadcasting, these rates can be considered reasonable.

While the prescribed costs of obtaining a broadcast license in Malawi are low, in reality, the process of obtaining a license takes too long and requires significant investment, both in terms of time and financial resources. So even if the actual media license fees might be low, the total costs on an investor tend to be very high as a result of trying to negotiate with MACRA.

References:

Malawi Communications Regulatory Authority, Fee Schedule, Terrestrial Services, http://www.macra.org.mw/admin/fees/licenceUpload/spectrum_fees.pdf

Chikosa Banda, head of the Department of Foundational Law, University of Malawi, Aug. 19, 2011, Zomba

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, Blantyre

100: Licenses are not required or can be obtained at minimal cost to the organization. Licenses can be obtained on-line or through the mail.

75:

50: Licenses are required, and impose a financial burden on the organization. Licenses may require a visit to a specific office, such as a regional or national capital.

25:

0: Licenses are required, and impose a major financial burden on the organization. Licensing costs are prohibitive to the organization.

8. Can citizens freely use the Internet?

100

08a. In practice, the government does not prevent citizens from accessing content published on-line.

100 | 75 | 50 | 25 | 0

Comments:

Although the Malawi government has expressed displeasure with some online news media critical of it, such as the Nyasatimes, the government does not have the capacity to prevent citizens from accessing content published online. As a result, the only restriction for online media access is whether one has Internet access or not. There is also no law allowing the government to prevent citizens from accessing online content.

References:

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

Billy Banda, executive director, Malawi Watch, Sept. 16, 2011, Lilongwe

100: The government does not prevent Internet users from accessing online content. While some forms of content may be illegal to download or own (such as child pornography), the government does not manipulate networks to prevent access to this information. This indicator addresses direct government intervention in the transfer of information, not indirect deterrents such as intimidation, surveillance or technical difficulties in countries with poor infrastructure.

75:

50: Internet users are prevented by the government from reaching online content in some cases. Government tactics may include firewalls preventing access to networks in other countries, or manipulating search engine results to exclude politically sensitive topics.

25:

0: Internet users are routinely prevented from accessing online content. Government restrictions are in place at all times for certain topics. Government tactics may include firewalls preventing access to networks in other countries, or manipulating search engine results to exclude politically sensitive topics.

08b. In practice, the government does not censor citizens creating content on-line.

100 | 75 | 50 | 25 | 0

Comments:

While the government has often expressed frustration with some online content, it has not been able to censor citizens from creating content online. This is more due to lack of capacity to do so, as government officials have put pressure on the Media Institute of Southern Africa (Malawi Chapter) to moderate online content, especially from websites critical of the government, such as Nyasatimes.

References:

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

Billy Banda, executive director, Malawi Watch, Sept. 16, 2011, Lilongwe

100: The government never removes online information or disables servers due to their political content. All political speech is protected with limited exceptions, such as legitimate intellectual property restrictions; direct calls to violence; or pornography.

75:

50: In some cases, the government restricts political speech by its citizens on the Internet. This is accomplished either directly by controlling servers hosting restricted content, or indirectly through threats or intimidation against the persons posting political content.

25:

0: The government regularly restricts political speech by its citizens on the Internet. This is accomplished either directly by controlling servers hosting the restricted content, or indirectly through threats or intimidation against the persons posting political content.

9. Are the media able to report on corruption?

09a. In law, it is legal to report accurate news even if it damages the reputation of a public figure.

Yes

No

Comments:

Section 36 of the Malawi Constitution guarantees the press the freedom “to report and publish freely, within Malawi and abroad, and to be accorded the fullest possible facilities for access to public information.”

In 2010, for example, the Nation newspaper published an article by Anthony Kasunda which highlighted abuse of resources in the administration of the Small Holder Fertilizer Revolving Fund. Following the publication of this story, the entire senior management of the Small Holder Fertilizer Revolving Fund was dismissed.

References:

Section 36 of the Malawi Constitution.

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

Yes: A YES score is earned if it is legal to report accurate information on public figures regardless of damage to their reputations. Public figures are defined broadly, including anyone in a position of responsibility in the government or civil service; any political leader; leaders of civil society groups including religious groups, trade unions, or NGOs; leaders or officers of large businesses. A YES score can still be earned if a reckless disregard for the truth (i.e. slander) is prohibited.

No: A NO score is earned if privacy laws protect any public figures (as defined in the YES coding) from accurate information.

09b. In practice, the government or media owners/distribution groups do not encourage self-censorship of corruption-related stories.

100

75

50

25

0

Comments:

The government, through its actions, indirectly encourages self-censorship. For example, critical journalists, particularly those from the private media, are often harassed at press conferences presided by the president and senior ruling party officials. Meanwhile, journalists from the public media houses often ask very leading questions that portray the government in a positive light. The withdrawal of adverts to the Nation newspapers group has also created a fear in the media industry, resulting in other media houses treading with caution in the coverage of issues including corruption. When the government decided to pay a salary to the first lady in December 2010 for example, the news was not reported in the Malawi media and only came out weeks after the online Nyasatimes had already publicized the matter.

References:

Our Malawi News, “Malawi papers gagged on First Lady’s story”, Feb. 16, 2011, <http://malawi.crowdmap.com/reports/view/247?l=it> IT

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

100: The government, its proxies, or media ownership/distribution groups make no attempt to restrict media coverage of corruption-related issues through unofficial means.

75:

50: The government, its proxies, or media ownership/distribution groups make some attempts to restrict media coverage of corruption-related issues through unofficial means, such as restricting access by disfavored media outlets, or other short-term consequences. Violent reprisals against media outlets are rare.

25:

0: The government, its proxies, or media ownership/distribution groups actively use illegal methods to restrict reporting of corruption-related issues. This may include harassment, arrests, and threats. Journalists and publishers take a personal risk to report on corruption, and media outlets who commonly report on corruption face long-term consequences or violent reprisals.

09c. In practice, there is no prior government restraint (pre-publication censoring) on publishing corruption-related stories.

100 | 75 | **50** | 25 | 0

Comments:

There were serious efforts to suppress media coverage of the story on the salary paid to First Lady Callista Mutharika and coverage of a story on the irregular purchase of government housing by senior government officials in 2011.

References:

Our Malawi News, "Malawi papers gagged on First Lady's story", Feb. 16, 2011, http://malawi.crowdmap.com/reports/view/247?l=it_IT

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

Billy Banda Executive Director, Malawi Watch, September 16, 2011, Lilongwe

100: The government never prevents publication of controversial corruption-related materials.

75:

50: The government prevents publication of controversial corruption-related material in cases where there is a strong political incentive to suppress the information. This score is appropriate if in countries where illiteracy is high, the government may allow a free print press but censor broadcast media.

25:

0: The government regularly censors material prior to publication, especially politically sensitive or damaging corruption-related material. This score is appropriate even if the government restricts only politically damaging news while allowing favorable coverage.

10. Are the media credible sources of information?

15

10a. In law, print media companies are required to publicly disclose their ownership.

Yes | **No**

Comments:

There is no law requiring media houses to publicly disclose their ownership.

References:

Chikosa Banda, head of the Department of Foundational Legal, University of Malawi, Chancellor College, Aug. 19, 2011, Zomba

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

Yes: A YES score is earned if print media companies are required by law to publicly disclose all owners of the company.

No: A NO score is earned if there is no such requirement or if the requirement is optional, only partially applicable, or exempts certain types of entities or agents from being publicly disclosed.

10b. In law, broadcast (radio and TV) media companies are required to publicly disclose their ownership.

Yes | **No**

Comments:

Broadcast (radio and TV) media companies are not legally required to publicly disclose their ownership. Although there is a general perception that politicians are not allowed to own broadcast media, one radio station (Joy radio) is owned by former President Bakili Muluzi.

References:

Chikosa Banda, head of the Department of Foundational Legal, University of Malawi, Chancellor College, Aug. 19, 2011, Zomba

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

Yes: A YES score is earned if broadcast media companies are required by law to publicly disclose all owners of the company.

No: A NO score is earned if there is no such requirement or if the requirement is optional, only partially applicable, or exempts certain types of entities or agents from being publicly disclosed.

10c. In practice, journalists and editors adhere to strict, professional practices in their reporting.

100 | 75 | **50** | 25 | 0

Comments:

Although journalists and editors in the majority of private media houses often adhere to strict, professional practices in their reporting, journalists working for public media houses are usually very biased toward the party in power. The public media often

broadcasts stories aimed at embellishing the image of the government while painting a negative picture of the opposition. Several journalists in the private media have also been accused of practicing check-book journalism, writing and publishing stories in return for payments.

References:

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

Billy Banda, executive director, Malawi Watch, Sept. 16, 2011, Lilongwe

100: Editors and journalists at the major media outlets abide by a strict journalistic code of conduct and are unwilling to alter their coverage of a particular issue, event or person in exchange for money, gifts, or other favors or remuneration.

75:

50: Editors and journalists at the major media outlets generally avoid altering coverage in exchange for favors but some exceptions have been noted. Not all newsrooms abide by a formal journalistic code of conduct.

25:

0: Editors and journalists are widely known to “sell” favorable or unfavorable coverage in exchange for money, gifts, or other remuneration. The major media outlets do not abide by any formal journalistic code of conduct.

10d. In practice, during the most recent election, political parties or independent candidates received fair media coverage.

100 | 75 | 50 | 25 | 0

Comments:

The public media (radio and television) were heavily biased in favor of the ruling party in the 2009 elections. According to the monitoring of campaign coverage by the Media Council of Malawi, the Electoral Commission and the Malawi Communications Regulatory Authority (MACRA), the two public radio stations (MBC 1 and 2) and the public television station (TVM) all gave 100 percent favorable coverage to the ruling Democratic Progressive Party while reporting negatively about the opposition parties.

Although the private media generally provided fair media coverage of the different political parties during the 2009 elections, some media houses, such as Joy radio, which is owned by former President Bakili Muluzi, gave almost 100 percent positive coverage to the opposition Malawi Congress Party and United Democratic Front. However, Joy radio was closed twice by MACRA in the run up to the 2009 elections. The first time was in December 2008 when MACRA revoked Joy radio's license on the grounds that the radio station was owned by a politician. After months of closure, Joy Radio's license was reinstated following a successful challenge of the decision in court. On May 20, 2009, Joy Radio was closed after MACRA accused the radio of broadcasting campaign material after the official election campaign period had expired.

References:

Media Council of Malawi, Baldwin Chiyamwaka, June 16, 2009 “Malawi's 2009 Parliamentary and Presidential Elections: The Role of the Media,” <http://www.mediacouncilmw.org/The%20Role%20of%20the%20media%20in%202009%20PPE%20-%20final%20draft.pdf>

Blessings Chinsinga, associate professor of political and administrative studies, Chancellor College, University of Malawi, Aug. 20, 2011, Zomba

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

100: All political parties and independent candidates have some access to media outlets. Individual media outlets may have biases, but on balance, the national media coverage reflects the interests of the electorate. Media groups generally act as

disinterested parties in an election. In places where a government is popular with the public, opposition viewpoints can access the public via media outlets.

75:

50: Major popular media outlets have a persistent bias regarding some parties or independent candidates. Some major parties may be partially excluded from media coverage, or draw more negative coverage. Media sectors may have distinct biases, such as newspapers favoring one party, while radio favors another.

25:

0: The mass media, on balance, have clear preferences in election outcomes and coverage is driven to achieve these goals. Some major parties or independent candidates are excluded or consistently negatively portrayed by mass media. Dissenting political opinions are only found on fringe or elite media outlets, such as Web sites.

10e. In practice, political parties and candidates have equitable access to state-owned media outlets.

100 | 75 | 50 | 25 | 0

Comments:

The state media in Malawi is heavily biased in favor of the ruling Democratic Progressive Party. Opposition parties are never granted coverage in the public media except for stories that paint a negative image of the opposition. On the other hand, the public media routinely run stories that paint a positive image of the ruling party and field different individuals that speak well of the ruling party. In 2010, for example, the public radio and television stations started to run a program entitled "The Road to 2014" in which different speakers endorse the brother of President Peter Mutharika to succeed him as president in the 2014 presidential elections.

References:

Blessings Chinsinga, associate professor of political and administrative studies, Chancellor College, University of Malawi, Aug. 20, 2011, Zomba

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

100: The government ensures that equal access and fair treatment of election contestants is provided by all state-owned media outlets, including all electronic and print media. This obligation extends to news reports, editorial comment, and all other content. All parties and candidates are offered consistent and equivalent rates for campaign advertising on state-owned media outlets.

75:

50: The government generally ensures equal access and fair treatment of all candidates and parties by state-owned media outlets but some exceptions exist. State-owned media may occasionally discriminate against particular parties or candidates and advertising rates may be confusing or non-transparent.

25:

0: The government uses state-owned media to routinely discriminate against opposition candidates and parties. Advertising space may be denied to opposition candidates and parties or higher rates may be charged.

11. Are journalists safe when investigating corruption?

11a. In practice, in the past year, no journalists investigating corruption have been imprisoned.

Yes

No

Comments:

Journalist Anthony Mahwahyo for Montfort Media was arrested on Sept. 12, 2011, while investigating a story about President Bingu wa Mutharika's acquisition of a farm and the construction of a mansion in the Thyolo district of Malawi. Mahwahyo was arrested while taking pictures of Mutharika's house and charged with the offense of "conduct likely to cause breach of the peace."

References:

Frank Namangale, "Another Night in custody for journalist Mahwayo," Nation Newspaper, Sept. 14, 2011, page 3

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

Yes: A YES score is earned if there were no journalists imprisoned related to work covering corruption during the study period. A YES score is positive.

No: A NO score is earned if any journalist was jailed because of his/her work covering corruption during the study period. The causal relationship between the official charges and the journalist's work may not be explicit, however the burden of proof here is low. If it seems likely that the journalist was imprisoned due to his or her work, then the indicator is scored as a NO. Corruption is defined broadly to include any abuses of power, not just the passing of bribes. "Imprisoned" is defined here as detention by the government lasting more than 24 hours.

11b. In practice, in the past year, no journalists investigating corruption have been physically harmed.

Yes

No

Comments:

There were no records of physical harm to journalists investigating corruption during the study period.

References:

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

Billy Banda, executive director, Malawi Watch, Sept. 16, 2011, Lilongwe

Yes: A YES score is earned if there were no documented cases of journalists being assaulted during the specific study period for their work covering corruption issues. A YES score is positive.

No: A NO score is earned if there were any documented cases of assault to a journalist covering corruption during the study period. Corruption is defined broadly to include any abuses of power, not just the passing of bribes.

11c. In practice, in the past year, no journalists investigating corruption have been killed.

Yes

No

Comments:

There were no records of journalists being killed for investigating corruption during the study period.

References:

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

Billy Banda, executive director, Malawi Watch, Sept. 16, 2011, Lilongwe

Yes: A YES score is earned if there were no documented cases of journalists being killed because of their work covering corruption-related issues during the study period. A YES score is positive.

No: A NO score is earned if there were any documented cases where a journalist was killed in relation to his or her work covering corruption-related issues in the study period. The relationship between a mysterious death and an individual's work may not be clear, however the burden of proof here is low. If it is a reasonable guess that a person was killed in relation to his or her work on corruption issues, then the indicator is scored as a NO. Corruption is defined broadly to include any abuses of power, not just the passing of bribes.

69 1.3. Public Requests for Government Information

12. Do citizens have a legal right to request information?

100

12a. In law, citizens have a right to request government information and basic government records.

Yes

No

Comments:

Section 37 of the Constitution guarantees the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise of his or her rights. However, there is no Parliament act in place covering the right to information, making its enforcement problematic.

References:

Section 37 of the Constitution.

Chikosa Banda, head of the Department of Legal Studies, Chancellor College, University of Malawi, Aug. 19, 2011, Zomba

Yes: A YES score is earned if there is a formal right to request government documents, including constitutional guarantees. Exceptions can be made for national security reasons or individual privacy, but they should be limited in scope. All other

government documents should be available upon a public request.

No: A NO score is earned if there is no such right.

12b. In law, citizens have a right of appeal if a request for a basic government record is denied.

Yes

No

Comments:

Section 37 of the Malawi Constitution provides guarantees for the public to get access to public information held by the government. Section 46 (2)(a) and (b) states that any person who claims that a right or freedom guaranteed by the Constitution has been infringed upon or threatened, shall be entitled to make an application to a competent court to enforce or protect such a right or freedom or to make an application to the Ombudsman or the Human Rights Commission in order to secure such assistance or advise as he or she may reasonably require.

References:

Section 37 of the Malawi Constitution, Section 46 (2)(a) and (b).

Yes: A YES score is earned if there is a formal process of appeal for rejected information requests. A YES score can still be earned if the appeals process involves redress through the courts rather than administrative appeal.

No: A NO score is earned if there is no such formal process.

12c. In law, there is an established institutional mechanism through which citizens can request government records.

Yes

No

Comments:

The National Archives of Malawi serves as a depository of record of all government publications and can be accessed by any member of the public through its three records centers in the cities of Lilongwe, Mzuzu and Zomba. Government information is also available on the Internet through government websites.

References:

Laws of Malawi, National Archives Act, (1975), Section 3

Micheal Roper, 1979, "Development of the National Archives" UNESCO, Paris

Stanley Gondwe, Librarian, National Archives of Malawi, Sept. 12, 2011, Zomba

Yes: A YES score is earned if there is a formal government mechanism/institution through which citizens can access government records available under freedom of information laws. This mechanism could be a government office (or offices within agencies or ministries) or an electronic request system.

No: A NO score is earned if there is no such formal mechanism or institution.

13. Is the right to information requests effective?

46

13a. In practice, citizens receive responses to information requests within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

Accessing government information is difficult, largely because official records are often published late and sometimes not at all. The record keeping at the National Archives is dependent on voluntary deposits by the various ministries, which sometimes are not made. However, the National Archives has been very proactive by liaising with the Government Printer to provide all published official documents directly for archiving.

Similarly, most government websites are usually not updated regularly.

All these challenges notwithstanding, there is a general perception that access to government information has become relatively easier compared to previous years, in large part because more information is being published online.

References:

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, Blantyre

Stanley Gondwe, librarian, National Archives of Malawi, Sept. 12, 2011, Zomba

100: Records are available on-line, or records can be obtained within two weeks. Records are uniformly available; there are no delays for politically sensitive information. Legitimate exceptions are allowed for sensitive national security-related information.

75:

50: Records take around one to two months to obtain. Some additional delays may be experienced. Politically-sensitive information may be withheld without sufficient justification.

25:

0: Records take more than four months to acquire. In some cases, most records may be available sooner, but there may be persistent delays in obtaining politically sensitive records. National security exemptions may be abused to avoid disclosure of government information.

13b. In practice, citizens can use the information request mechanism at a reasonable cost.

100 | 75 | 50 | 25 | 0

Comments:

Information that is available at the National Archives is available to the public for free in the library. Copies can be made at the cost of photocopying (US6 cents per page) for members of the public. While the economic position of many Malawians is very low, the cost of photocopying is not inordinately high such that if a particular document is of great value, people would fail to get it

photocopied. The only time when the costs are prohibitive is if one needs to photocopy many pages of a particular document or documents.

Other government information is also available for free at different government websites. Some publications are available for sale at low cost through the Government Printer.

References:

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

Stanley Gondwe, librarian, National Archives of Malawi, Sept. 12, 2011, Zomba

100: Records are free to all citizens, or available for the cost of photocopying. Records can be obtained at little cost, such as by mail, or on-line.

75:

50: Records impose a financial burden on citizens, journalists or NGOs. Retrieving records may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving records imposes a major financial burden on citizens. Records costs are prohibitive to most citizens, journalists, or NGOs trying to access this information.

13c. In practice, responses to information requests are of high quality.

100 | 75 | **50** | 25 | 0

Comments:

Public officials are often reluctant to release sensitive government information. Requests for sensitive information are often referred to higher officials, resulting in delays and sometimes no response or incomplete ones. For example, after the Malawi government decided to expel the British High Commissioner to the country, Fergus Cochrane-Dyet, in April 2011, the Minister of Foreign Affairs, Etta Banda, refused to make a public statement on the matter or to answer questions from journalists. Banda's deputy, Stevyn Kamwendo, meanwhile told the media that he was not aware of a deportation order being served on the High Commissioner.

References:

Raphel Tenthani and Abel Wezi, Maravipost, "Malawi expels British envoy over scathing remarks," April 18, 2011, <http://www.maravipost.com/malawi-politics/politics/5023-malawi-expels-british-envoy-over-leaked-scathing-comments.html>

Chikosa Banda, head of the Foundational Law Department, University of Malawi, Chancellor College, Aug. 19, 2011, Zomba

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

100: Responses to information requests typically address the requestor's questions in full and are not redacted or edited to remove sensitive information.

75:

50: Information requests are sometimes met with sufficient responses, but responses to information requests may be vague or overly general when sensitive information is sought.

25:

0: The government rarely or never replies to information requests with meaningful responses. If and when responses are issued, they are so overly general or heavily redacted as to render them useless.

13d. In practice, citizens can resolve appeals to information requests within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

Appeals for information requests can take a long time and sometimes are never responded to at all.

References:

Chikosa Banda, head of the Foundational Law Department, University of Malawi, Chancellor College, Aug. 19, 2011, Zomba

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

100: The agency/entity acts on appeals quickly. While some backlog is expected and inevitable, appeals are acknowledged promptly and cases move steadily towards resolution.

75:

50: The agency/entity acts on appeals quickly but with some exceptions. Some appeals may not be acknowledged, and simple issues may take more than two months to resolve.

25:

0: The agency/entity does not resolve appeals in a timely fashion quickly. Appeals may be unacknowledged for many months and simple issues may take more than three months to resolve.

13e. In practice, citizens can resolve appeals to information requests at a reasonable cost.

100 | 75 | 50 | 25 | 0

Comments:

It can be hard for citizens to resolve appeals for information requests at reasonable cost. In the event that a request for public information has been denied, citizens can take the matter to the High Court but would have to incur high legal costs to do so.

References:

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

100: In most cases, the appeals mechanism is an affordable option to middle class citizens seeking to challenge an access to information determination.

75:

50: In some cases, the appeals mechanism is not an affordable option to middle class citizens seeking to challenge an access to information determination.

25:

0: The prohibitive cost of utilizing the access to information appeals mechanism prevents middle class citizens from challenging access to information determinations.

13f. In practice, the government gives reasons for denying an information request.

100 | 75 | 50 | 25 | 0

Comments:

Government officials routinely do not give reasons for denying an information request. In many instances, they simply claim to be too busy, or promise to come back later but never do, or simply ignore such requests without offering any explanation. In a recent interview, for example, the director of the Malawi Broadcasting Corp. (MBC), Bright Malopa, when asked to comment on the controversy surrounding the merger of MBC Television and MBC radio, told the media that he does not have to talk to anyone.

References:

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

100: The government always discloses to the requestor the specific, formal reasons for denying information requests.

75:

50: The government usually discloses reasons for denying an information request to the requestor, with some exceptions. The reasons may be vague or difficult to obtain.

25:

0: The government does not regularly give reasons for denying an information request to the requestor.

Category 2. Elections

2.1. ⁶²Voting and Party Formation

14. Is there a legal framework guaranteeing the right to vote?

100

14a. In law, universal and equal adult suffrage is guaranteed to all citizens.

Yes

No

Comments:

The right to vote for all adult Malawian citizens aged 18 and above is enshrined under a number of constitutional provisions and subsidiary laws. Article 6 of the Malawi Constitution stipulates that the authority to govern derives from the people of Malawi as expressed through universal and equal suffrage in elections.

Section 77 (1) goes on to state that all persons shall be eligible to vote in any general election, by-election, presidential election, local government election or referendum, subject only to this section.

Section 80(2) further underscores the universal suffrage provisions by requiring that the president shall be elected by a majority of the electorate through direct, universal and equal suffrage.

Section 147.-(1) of the Constitution also reiterates the importance of universal suffrage in local government elections by stating that local government authorities shall consist of local government officers who shall be elected by free, secret and equal suffrage

References:

Article 6 of the Malawi Constitution.

Section 77 (1) of the Malawi Constitution.

Section 80(2) of the Malawi Constitution.

Section 147.-(1) of the Malawi Constitution.

Blessings Chinsinga, associate professor of political and administrative studies, Chancellor College, University of Malawi, Aug. 20, 2011, Zomba

Yes: A YES score is earned if the right to vote is guaranteed to all citizens of the country (basic age limitations are allowed). A YES score can still be earned if voting procedures are, in practice, inconvenient or unfair.

No: A NO score is earned if suffrage is denied by law to any group of adult citizens for any reason. Citizen is defined broadly, to include all ethnicities, or anyone born in the country. A NO score is earned if homeless or impoverished people are legally prohibited from voting.

14b. In law, there is a legal framework requiring that elections be held at regular intervals.

Yes

No

Comments:

Sections 67(2) of the Malawi Constitution provides specific details about the length of tenure of Parliament and the holding of fresh elections. This provision states that the National Assembly shall last for five years from the date of its swearing in and then shall automatically stand dissolved on March 20 in the fifth year after its election and general election. The provision goes on to state that elections for members of the National Assembly must take place on the Tuesday of the third week of May that year.

In addition, Section 63(2)(b) of the Malawi Constitution stipulates that by-elections to fill parliamentary vacancies should be held as expeditiously as possible, and in no event later than 60 days after the seat of any member of the National Assembly becomes vacant. However, in practice, this is never achieved, with by-elections often taking place months after the vacancy occurs.

Elections for the office of president are also to be held at regular five-year intervals.

References:

Malawi Constitution, Sections 67(2), 63(2)(b).

Blessings Chinsinga, associate professor of political and administrative studies, Chancellor College, University of Malawi, Aug. 20, 2011, Zomba

Yes: A YES score is earned if there is a statutory or other framework enshrined in law that mandates elections at reasonable intervals.

No: A NO score is earned if no such framework exists.

15. Can all citizens exercise their right to vote?

100

15a. In practice, all adult citizens can vote.

100 | 75 | 50 | 25 | 0

Comments:

Voter turnout in Malawi general elections has been consistently high. In the most recent elections held in May 2009, voter turnout was 78.3 percent.

References:

Africa Elections Database, Elections in Malawi, <http://africanelections.tripod.com/mw.html>

Electoral Institute for the Sustainability of Democracy in Africa "Voter Turnout Out Statistics," <http://www.eisa.org.za/WEF/comturnout.htm>, June 2010

Blessings Chinsinga, associate professor of political and administrative studies, Chancellor College, University of Malawi, Aug. 20, 2011, Zomba

100: Voting is open to all citizens regardless of race, gender, prior political affiliations, physical disability, or other traditional barriers.

75:

50: Voting is often open to all citizens regardless of race, gender, prior political affiliations, physical disability, or other traditional barriers, with some exceptions.

25:

0: Voting is not available to some demographics through some form of official or unofficial pressure. Voting may be too dangerous, expensive, or difficult for many people.

15b. In practice, ballots are secret or equivalently protected.

100 | 75 | 50 | 25 | 0

Comments:

Section 40(3) of the Malawi Constitution, 1995, guarantees the right to vote and that elections will be through a secret ballot.

Although rumors of ballot tampering during and after elections often abound, these rumors have never been substantiated.

References:

Blessings Chinsinga, associate professor of political and administrative studies, Chancellor College, University of Malawi, Aug. 20, 2011, Zomba

Dr. Henry Chingaape, director, Centre for Governance and Development Research, Sept. 15, 2011, Lilongwe

100: Ballots are secret, or there is a functional equivalent protection, in all cases.

75:

50: Ballots are secret, or there is a functional equivalent protection, in most cases. Some exceptions to this practice have occurred. Ballots may be subject to tampering during transport or counting.

25:

0: Ballot preferences are not secret. Ballots are routinely tampered with during transport and counting.

15c. In practice, elections are held according to a regular schedule.

100 | 75 | 50 | 25 | 0

Comments:

Section 67(1) of the Republic of Malawi Constitution stipulates that general elections to choose a new Parliament and a president will be held every five years on the Tuesday of the third week of May. Since 1994, presidential and parliamentary elections have been regularly held at these five-year intervals. The last general elections were held in May 2009 and the next ones will be in May 2014.

References:

Constitution of the Republic of Malawi, (1995), Section 67(1).

Blessings Chinsinga, associate professor of political and administrative studies, Chancellor College, University of Malawi, Aug. 20, 2011, Zomba

100: Elections are always held according to a regular schedule, or there is a formal democratic process for calling a new election, with deadlines for mandatory elections.

75:

50: Elections are normally held according to a regular schedule, but there have been recent exceptions. The formal process for calling a new election may be flawed or abused.

25:

0: Elections are called arbitrarily by the government. There is no functioning schedule or deadline for new elections.

16. Are citizens able to participate equally in the political process?

90

16a. In law, all citizens have a right to form political parties.

Yes

No

Comments:

Political parties are registered under the Political Parties (Registration and Regulation) Act of 1993. This act does not create any barriers against citizens forming political parties

References:

Section 32.-(1) of the Malawi Constitution provides every Malawian citizen the right to freedom of association, which includes the freedom to form associations.

Blessings Chinsinga, associate professor of political and administrative studies, Chancellor College, University of Malawi, Aug. 20, 2011, Zomba

Yes: A YES score is earned if citizens have the right to form political parties without interference from government. A YES score may still be earned if groups or individuals with a history of violence or terrorism (within last ten years) are banned from forming political parties. Non-discriminatory minimal criteria (e.g. minimum age) are also allowed.

No: A NO score is earned if there are any legal or regulatory restrictions or prohibitions barring any types of political parties from being formed.

16b. In law, all citizens have a right to run for political office.

Yes

No

Comments:

According to Sections 51(1) and Section 80(5) of the Malawi Constitution, citizens aged 21 and above can run for positions as members of Parliament while those aged 35 and above can seek the office of the president.

References:

Malawi Constitution, Sections 51(1) and Section 80(5).

Blessings Chinsinga, associate professor of political and administrative studies, Chancellor College, University of Malawi, Aug. 20, 2011, Zomba

Yes: A YES score is earned if all citizens (citizen is defined broadly, to include all ethnicities, or anyone born in the country) have the right under law to run for political office. A YES score may still be earned if individuals with a history of violence, terrorism, or criminality are banned from running for office.

No: A NO score is earned if there are any legal restrictions barring certain individuals or groups from running for political office.

16c. In practice, all citizens are able to form political parties.

100 | 75 | 50 | 25 | 0

Comments:

Political parties are registered under the Political Parties (Registration and Regulation) Act of 1993. It is very easy for citizens to form political parties in Malawi. The registration process involves the filing of an application form with the Registrar of Political Parties, giving the particulars of the proposed office bearers of the party and accompanied by 100 signatures. Although the 100 signatures are supposed to be of registered members of the party, the registrar does not have the mechanism to verify their authenticity. The cost of party formation and access to electoral contest is therefore low, and the legal threshold for political parties in Malawi remains very liberal, allowing for small groups of citizens to get together and form parties.

However, oftentimes, the registration process is slowed down by efforts on the part of the Registrar of Political Parties to frustrate efforts by new groups that pose challenges to the ruling party. In 2011, for example, the registrar refused to register the People's Party of Vice President Joyce Banda, arguing that that party's symbol resembled that of an existing party and that the acronym for the new party had the potential to be confused with another existing party. However, the vice president was subsequently able to successfully challenge the registrar's decision in court.

Similar efforts to frustrate the registration of new parties were also made with the National Salvation Front and the Forum for National Democracy (FOND), which were only registered after the intervention of the High Court.

References:

Editorial, Daily Times, June 12, 2011, "Let all parties register freely," <http://www.bnltimes.com/opinion-a-comment/1389-let-all-parties-register-freely-.html>

Simeon Maganga, Daily Times, June 27, 2011, "Party registration process weak – Dulani," <http://www.bnltimes.com/national/42-all/1666-party-registration-process-weakdulani-.html>

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

100: While there is no guarantee of electoral success, political parties can form freely without opposition.

75:

50: Some barriers to formation are present, such as burdensome registration requirements that may not be fairly applied. Some parties' political viewpoints may draw pressure from the government, such as surveillance or intimidation. Some political parties or organizations may have extra barriers to getting on a ballot.

25:

0: Some political parties are effectively barred from forming through some manner of official or unofficial pressure. This may include threats, arrest, or violence from competing parties or other groups.

16d. In practice, all citizens can run for political office.

100 | 75 | 50 | 25 | 0

Comments:

Under Section 51(1) of the Constitution, any Malawian citizen age 21 years and above, who is able to speak and to read English well enough and is a registered voter, is qualified to be nominated or elected as Member of Parliament.

Candidates seeking office as Members of Parliament can be sponsored in elections by a political party or choose to stand as independent candidates.

Section 80(5) further stipulates that all individuals who are Malawi citizens by birth or descent and are age 35 and above, can also seek the office of president.

However, the cost of running for Parliament or the presidency is often very high, which dissuades a number of individuals from seeking political office.

The Constitution also states that Parliamentary election candidates have to be able to speak and write English. In a country where the adult literacy rate stands at 73 percent, this means a sizable proportion of the population cannot seek election to the Parliament.

References:

Section 51(1) of the Malawi Constitution.

Dr. Henry Chingaape, director, Centre for Governance and Development Research, Sept 15, 2011, Lilongwe

100: While there is no guarantee of electoral success, anyone can run for office under transparent and equitable guidelines. There is a formal process for access to the ballot which is fairly applied. The costs of running a campaign are reasonable and do not deter candidates from entering a race.

75:

50: Some barriers exist to getting on the ballot and bureaucratic or regulatory requirements for doing so may be unfairly applied. The costs of running a political campaign are significant and result in dissuading some candidates from running for office. A system of party lists may discourage or prevent independent candidates from running for office.

25:

0: Citizens can effectively be barred from the ballot through government abuse of official rules and/or unofficial pressure. The costs of running a campaign are extremely high and result in most average citizens being unable to run an effective campaign for office.

16e. In practice, an opposition party is represented in the legislature.

100 | 75 | 50 | 25 | 0

Comments:

In the last general elections held in May 2009, five opposition parties won a combined 47 of the 193 seats in the Malawi National Assembly. In addition, 47 candidates won on an independent platform, although a majority of them subsequently declared their allegiance to the ruling party.

References:

Malawi Electoral Commission, "2009 Election Results," <http://www.mec.org.mw/Elections/2009ResultsReports/tabid/98/Default.aspx>

Africa Elections Database, "Elections in Malawi," http://africanelections.tripod.com/mw.html#2009_National_Assembly_Election

100: The opposition party always has some influence on the proceedings of the legislature. The opposition party can introduce legislation or bring pending matters to a vote without the consent of the ruling party.

75:

50: The opposition party has influence on the proceeding of the legislature, but it is limited in scope. The opposition's ability to force votes or publicly debate certain topics may be limited.

25:

0: The opposition party has only token participation in the legislature's proceedings and cannot advance legislation or force a debate.

2.2. Election Integrity

17. In law, is there an election monitoring agency or set of election monitoring agencies/entities?

100

17a. In law, is there an election monitoring agency or set of election monitoring agencies/entities?

Yes

No

Comments:

Election monitoring and management is entrusted in the hands of the Malawi Electoral Commission, which is established under Chapter VII of the Malawi Constitution. The Electoral Commission is mandated to, among several functions, determine constituency boundaries, to review existing constituency boundaries at intervals of not more than five years and alter them in accordance with the principles laid down in the subsection, and determine electoral petitions and complaints related to the conduct of any elections.

References:

Chapter VII of the Malawi Constitution.

Yes: A YES score is earned if there is a domestic agency or set of domestic agencies/entities formally assigned to ensure the integrity of the election process.

No: A NO score is earned if no domestic agency or set of domestic agencies/entities exists that monitors elections. A NO score is earned if elections are only monitored by an agency informally, such as poll booth monitoring by the police, only by international observers, or only by NGOs. A NO score is earned if the domestic election agency or set of domestic agencies simply facilitates the process of voting but is not empowered to report violations or abuses.

18. Is the election monitoring agency effective?

75

18a. In law, the agency or set of agencies/entities is protected from political interference.

Yes

No

Comments:

Section 76 (4) of the Malawi Constitution states that the Electoral Commission shall exercise its powers, functions and duties "independent of any direction or interference by other authority or any person."

Section 6 of the Electoral Commission Act (1998) also stresses the independence of the Electoral Commission in the discharging of its responsibilities.

The High Court has the right of judicial review over the Malawi Electoral Commission (MEC) to ensure that it acts in accordance with the Constitution and Acts of Parliament (Constitution 1994, Articles 76(3), (5)(a).

References:

Malawi Constitution, Section 76 (4).

Section 6 of the Electoral Commission Act (1998).

Malawi Constitution 1994, Articles 76(3), (5)(a).

Electoral Institute for the Sustainability of Democracy in Africa, "Malawi Electoral Commission", updated December 2009, <http://www.eisa.org.za/WEP/malec.htm>

Yes: A YES score is earned only if the agency or set of agencies/entities has some formal organizational independence from the bodies contesting in the election. A YES score is still earned even if the entity is legally separate but in practice staffed by partisans.

No: A NO score is earned if the election monitoring agency or set of agencies/entities is legally tied to bodies contesting the election (i.e. an executive branch agency such as the Interior Ministry, or a committee of the legislature). A NO score is automatically earned if there is no domestic election monitoring agency.

18b. In practice, agency (or set of agencies/entities) appointments are made that support the independence of the agency.

Comments:

The Malawi Electoral Commission is made up of a chairperson, who is a judge of the Supreme Court and is nominated by the Judicial Service Commission and other members, not fewer than six, who are appointed by the president in consultation with the leaders of the political parties represented in the National Assembly.

However, the current nine commissioners were appointed in 2007 by President Mutharika over the objections of the opposition parties represented in Parliament. Although opposition parties had rejected Mutharika's appointees, the president argued that consultation with parties in Parliament does not entail that he should take their suggestions in making the final decisions on whom to appoint. As a result, the appointees are largely seen as being sympathetic to Mutharika, thus undermining their credibility.

Technical appointments, on the other hand, follow a professional criteria.

References:

Rabecca Theu, Nation Newspaper, March 13, 2007, "Mutharika appoints MEC Commissioners," page 1.

Blessings Chinsinga, associate professor of political and administrative studies, Chancellor College, University of Malawi, Aug. 20, 2011, Zomba

100: Appointments to the agency or set of agencies/entities are made based on professional qualifications. Individuals appointed are free of conflicts of interest due to personal loyalties, family connections or other biases. Individuals appointed usually do not have clear political party affiliations.

75:

50: Appointments are usually based on professional qualifications. However, individuals appointed may have clear party loyalties.

25:

0: Appointments are often based on political considerations. Individuals appointed often have conflicts of interest due to personal loyalties, family connections or other biases. Individuals appointed often have clear party loyalties.

18c. In practice, the agency or set of agencies/entities has a professional, full-time staff.

Comments:

The Malawi Electoral Commission (MEC) has a full-time staff that is often well qualified and trained. However, at times, several vacancies exist due to normal staff attrition.

In December 2010, President Mutharika ordered the suspension of all Malawi Electoral Commission staff members over allegations of gross corruption at MEC. The offices of the commission were closed until the staff members were reinstated in March 2011.

References:

Austin Kakande, Malawi Voice, Dec. 3, 2010, "Bingu suspends Malawi Electoral Commission over MK1.4 billion disappearance: Police intensify office search," <http://www.malawivoice.com/latest-news/bingu-suspends-malawi-electoral-commission-over-mk1-4-billion-disappearance-police-intensify-office-office-search/>

100: The agency or set of agencies/entities has staff sufficient to fulfill its basic mandate.

75:

50: The agency or set of agencies/entities has limited staff, or staff without necessary qualifications to fulfill its basic mandate.

25:

0: The agency or set of agencies/entities has no staff, or such a limited staff that is clearly unqualified to fulfill its mandate.

18d. In practice, the agency or set of agencies/entities makes timely, publicly available reports following an election cycle.

100 | 75 | 50 | 25 | 0

Comments:

The Malawi Electoral Commission produces and publishes copies of results after every election cycle. However, there are usually delays in the publication of these results.

References:

Dr. Henry Chingaipe, director, Centre for Governance and Development Research, Sept. 15, 2011, Lilongwe

Billy Banda, executive director, Malawi Watch, Sept. 16, 2011, Lilongwe

100: Reports are released to the public on a predictable schedule, without exceptions.

75:

50: Reports are released, but may be delayed, difficult to access, or otherwise limited.

25:

0: The agency or set of agencies/entities makes no public reports, issues reports which are effectively secret, or issues reports of no value.

18e. In practice, when necessary, the agency or set of agencies/entities imposes penalties on offenders.

100 | 75 | 50 | 25 | 0

Comments:

Although the Electoral Commission does impose penalties on offenders, it is usually reluctant to penalize the ruling party and pro-government activists. During the last elections held in 2009, for example, the Electoral Commission did not act over allegations of abuse of state resources by the ruling party and failed to take action over the blatant bias by the public television and radio despite complaints by the opposition.

References:

Blessings Chinsinga, associate professor of political and administrative studies, Chancellor College, University of Malawi, Aug. 20, 2011

Dr. Henry Chingaipe, director, Centre for Governance and Development Research, Sept. 15, 2011, Lilongwe

100: When rules violations are discovered, the agency or set of agencies/entities is aggressive in penalizing offenders and/or in cooperating with other agencies in penalizing offenders.

75:

50: The agency or set of agencies/entities enforces rules, but is limited in its effectiveness. The agency may be slow to act, unwilling to take on politically powerful offenders, reluctant to cooperate with other agencies, or occasionally unable to enforce its judgments.

25:

0: The agency or set of agencies/entities does not effectively penalize offenders and/or cooperate with other agencies in penalizing offenders. The agency may make judgments but not enforce them, or may fail to make reasonable judgments against offenders. The agency may be partisan in its application of power.

19. Are elections systems transparent and effective?

92

19a. In practice, there is a clear and transparent system of voter registration.

100 | 75 | 50 | 25 | 0

Comments:

The Malawi Electoral Commission has a standing register of eligible voters. This is often updated before general elections or before by-elections to enable citizens who are not on the register to get their names added.

However, during every election cycle, several eligible voters complain that their names are missing from the register while some deceased individuals still appear on the register. These problems are largely a result of poor record keeping by the Electoral Commission which still relies largely on manual records.

References:

Blessings Chinsinga, associate professor of political and administrative studies, Chancellor College, University of Malawi, Aug. 20, 2011, Zomba

Billy Banda, executive director, Malawi Watch, Sept. 16, 2011, Lilongwe

100: There is a transparent system of voter registration that provides voters with sufficient time to understand their rights, check the accuracy of their registration, and ensure that errors are corrected before they vote.

75:

50: There is a transparent voter registration system that provides voters with sufficient time to understand their rights, check the accuracy of their registration, and ensure that errors are corrected before they vote but there are some problems. Voters

may have not access to registration lists with sufficient time to correct errors before voting or registration lists may at times be inaccessible.

25:

0: The system of voter registration is incomplete or does not exist. Government may routinely falsify registration lists to affect voting patterns and limit access to the polls. Double voting and “ghost” voting by non-existent voters is common.

19b. In law, election results can be contested through the judicial system.

Yes

No

Comments:

Sections 76 (3) and (5) of the Constitution and Sections 40 and 114 of the Parliamentary and Presidential Elections Act of 1993, as amended, provide that any decision of the Electoral Commission may be reviewed by the High Court and that any complaint regarding irregularities during the election process shall be submitted by way of petition to the Electoral Commission whose decision may also be appealed to the High Court in accordance with international standards.

The last general elections of 2009 were contested in court by the presidential candidate of the Malawi Congress Party (MCP), John Tembo.

References:

Sections 76 (3) and (5) of the Malawi Constitution.

Sections 40 and 114 of the Parliamentary and Presidential Elections Act of 1993.

Dr. Henry Chingaipe, director, Centre for Governance and Development Research, Sept. 16, 2011, Lilongwe

Yes: A YES score is earned if citizens or political parties can challenge allegedly fraudulent election results through the courts or other judicial mechanisms.

No: A NO score is earned if there is no legal right for citizens or political parties to challenge allegedly fraudulent election results in the courts or other judicial mechanisms.

19c. In practice, election results can be effectively appealed through the judicial system.

100

75

50

25

0

Comments:

Election results can be appealed on several grounds. After the May 2009 elections, one of the losing presidential candidates, John Tembo, challenged the validity of the election results in the High Court of Malawi. He cited irregularities ranging from voter rolls, acquisition of extra ballot papers, and abuse and monopoly of public radio. Several losing parliamentary candidates have also challenged election results in court.

Although election results can be appealed through the judicial system, the period provided for complainants to lodge their appeals is very short. Complainants are required to lodge their appeals within 48 hours of the declaration of results. This does not provide enough time for complainants to organize their cases adequately. Tembo’s legal challenge of the 2009 election results, for example, was dismissed on a technicality because it was lodged after the 48-hour rule had expired.

In another case, Rev. Wilson Ndomondo, who won a seat in Parliament on an opposition ticket in the 2009 elections, was disqualified by the Electoral Commission from taking his seat. While Ndomondo challenged his disqualification through the judicial system, a by-election was held and his seat filled.

In December 2010, Ndomondo won his case in the Malawi Supreme Court of Appeal but could not take his seat in Parliament.

References:

Reporter, AfroNews, "Malawi opposition petition thrown out of court," July 20, 2009, <http://afrol.com/articles/33798>

European Union Election Observation Mission Malawi "Final Report : Presidential and Parliamentary Elections, May 2009," 2009

Blessings Chinsinga, associate professor of political and administrative studies, Chancellor College, University of Malawi, Aug. 20, 2011, Zomba

100: The electoral appeals mechanism takes cases from both candidates complaining of flaws in the electoral process as well as citizens bringing complaints related to denial of suffrage or registration errors. There is an expedited process for resolving such complaints to avoid delaying a timely announcement of electoral results.

75:

50: The electoral appeals mechanism takes complaints from both candidates and voters but may not always act on complaints promptly. The appeals mechanism may be abused at times by parties or candidates seeking to delay the announcement of electoral results.

25:

0: The electoral appeals mechanism rarely or never acts on complaints brought by candidates or citizens. Citizens may not be able to bring complaints related to denial of suffrage or voter registration errors.

19d. In practice, the military and security forces remain neutral during elections.

100 | 75 | 50 | 25 | 0

Comments:

Although members of the security services are allowed to cast their votes for candidates of their choice during elections, they are barred from promoting the agenda of any particular political party. In the last elections held in 2009, there were no reports to suggest that the military and security forces sought to intervene in the electoral process to the benefit of a particular political party.

References:

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011

Dr. Henry Chingaipe, director, Centre for Governance and Development Research, Sept. 15, 2011, Lilongwe

100: The military, military officers, and other security forces refrain from overtly supporting or opposing political candidates or commenting on elections. The military or security forces refrain from physically interfering with political campaigns, rallies, or voting.

75:

50: The military, military officers, and security forces may be known to unofficially support or oppose particular candidates or parties. The military or security forces generally refrain from the use of force to support or oppose particular candidates or parties but there are exceptions.

25:

0: The military or other security forces are an active and explicit player in politics and overly support or oppose particular candidates or parties. The military or security forces routinely exercise the use of force to support or oppose parties or candidates.

19e. In law, domestic and international election observers are allowed to monitor elections.

Yes

No

Comments:

There is no law preventing domestic and international election observers from monitoring elections. The last general elections held in 2009 were monitored by a host of observers, both local and international. Local election observers were drawn from political parties, non-governmental organizations and church groups. International observers included those from the Commonwealth, the European Union, International Foundation for Electoral Systems (IFES), the African Union, Southern African Development Community (SADC), SADC Parliamentary Forum, the Electoral Institute for the Sustainability of Democracy in Africa (EISA).

References:

Blessings Chinsinga, associate professor of political and administrative studies, Chancellor College, University of Malawi, Aug. 20, 2011, Zomba

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

Yes: A YES score is earned if domestic and international election observers are allowed to monitor the electoral process.

No: A NO score is earned if there are any legal or regulatory prohibitions on the monitoring of the electoral process by domestic or international election observers.

19f. In practice, election observers are able to effectively monitor elections.

100

75

50

25

0

Comments:

In the last elections held in 2009, several election observer groups, both local and international, observed the elections and issued reports without interference from government or opposition parties.

References:

Electoral Institute for the Sustainability of Democracy in Africa, October 2010, Malawi: 2009 Election observer missions and statements, <http://www.eisa.org.za/WEP/mal2009eom.htm>

Commonwealth Secretariat, May 2009, Report of the Commonwealth Observer Group: Malawi Presidential and Parliamentary Elections, May 19, 2009, <http://www.thecommonwealth.org/files/211206/FileName/FINALREPORT.pdf>

Blessings Chinsinga, associate professor of political and administrative studies, Chancellor College, University of Malawi, Aug. 20, 2011, Zomba

100: Election observers have unfettered access to polling sites, counting stations, and voters themselves. The government does not interfere with the observers' activities.

75:

50: Election observers generally have access to polling sites, counting stations, and voters but encounter restrictions in certain areas. The government may impose burdensome regulatory or bureaucratic requirements on observers to discourage their involvement.

25:

0: Election observers' movements are significantly limited by the government and many polling and counting sites are restricted or barred from observers. The government imposes so many bureaucratic or regulatory burdens on the observers that their mission is rendered ineffective.

89 2.3. Political Financing Transparency

20. Are there regulations governing the financing of political parties?

0

20a. In law, there are limits on individual donations to political parties.

Yes

No

Comments:

There is no law setting limits on individual donations to political parties.

References:

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

Yes: A YES score is earned if there are any limits in size on individual contributions to political parties. A YES score is also earned if individual contributions are prohibited.

No: A NO score is earned if there are no limits on contributions from individuals. A NO score is also earned if limits are applied by the government on opposition parties in a discriminatory manner.

20b. In law, there are limits on corporate donations to political parties.

Yes | No

Comments:

There is no law setting limits on corporate donations to political parties.

References:

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

Chirwa, W., Patel, N., and Kanyongolo, F., Democracy Report for Malawi, (undated), IDEA, Sweden

Yes: A YES score is earned if there are any limits in size on corporate contributions to political parties. A YES score is earned if corporate contributions are prohibited.

No: A NO score is earned if there are no limits on corporate contributions to political parties. A NO score is also earned if limits are applied by the government on opposition parties in a discriminatory manner.

20c. In law, there are limits on total political party expenditures.

Yes | No

Comments:

There is no law limiting political party expenditures. The absence of limits on political party expenditures tends to disadvantage opposition political parties, as the ruling party often uses its access to state resources to spend far more than the opposition parties.

Although use of state resources for campaign purposes is prohibited under Section 193(4) of the Malawi Constitution, the ruling party often flouts this rule and often uses state resources during election campaigns. In the 2009 elections, for example, the opposition campaigns were hampered by limited resources while the ruling party was able to purchase fleets of vehicles that were complemented by state resources used by the president and other senior government officials during the campaign.

References:

Section 193(4) of the Malawi Constitution

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

European Union 2009 Malawi Election Observation Mission, "Final Report: Presidential and Parliamentary Elections 2009"

Yes: A YES score is earned if there are any limits in size on political party expenditures during the course of an election.

No: A NO score is earned if there are no limits on political party expenditures during an election. A NO score is also earned if limits are applied by the government on opposition parties in a discriminatory manner.

20d. In law, there are requirements for the disclosure of donations to political parties.

Yes | No

Comments:

There is no law requiring public disclosure of donations to political parties.

References:

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

Yes: A YES score is earned if there are any requirements mandating the disclosure of financial contributions to political parties.

No: A NO score is earned if there are no requirements mandating the disclosure of contributions to political parties, existing regulations do not require a donor's name or amount given, or the regulations allow for anonymous donations. Systems where only certain donation amounts are required to be made public (above a non-trivial amount) also earn a NO score.

20e. In law, there are requirements for the independent auditing of the finances and expenditures of political parties when financial irregularities are uncovered.

Yes | No

Comments:

There is no law requiring the independent auditing of the finances and expenditures of political parties when financial irregularities are uncovered. However, parties that receive funding from Parliament under Section 40(2) of the Constitution are obliged under the Public Finance Management Act to provide audited accounts of the funds received from Parliament. However, this requirement does not extend to privately sourced funds.

References:

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

Yes: A YES score is earned if there is a legal or regulatory requirement for the independent auditing of party finances and expenditures when irregularities are uncovered. The auditing is performed by an impartial third-party.

No: A NO score is earned if there are no legal or regulatory requirements for the independent auditing of political parties' finances and expenditures when financial irregularities are uncovered. A NO score is also earned if such requirements exist but allow for parties to self-audit.

20f. In law, there is an agency or entity that monitors the financing of political parties.

Yes | No

Comments:

There is no agency or entity that monitors the financing of political parties in Malawi.

References:

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

Yes: A YES score is earned if there is a domestic agency or set of domestic agencies/entities formally assigned to monitor and enforce laws and regulations around the financing of political parties. A YES score is earned even if the agency/entity is ineffective in practice.

No: A NO score is earned if there is no such agency or entity. A NO score is also earned if this monitoring is solely carried out by the media and non-governmental organizations.

21. Are there regulations governing the financing of individual political candidates?

0

21a. In law, there are limits on individual donations to political candidates.

Yes

| **No**

Comments:

There are no legal limits on individual donations to political candidates in Malawi.

References:

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

Dr. Henry Chingaape, director, Centre for Governance and Development Research, Sept. 16, 2011, Lilongwe

Yes: A YES score is earned if there are any limits in size on individual contributions to political candidates. A YES score is also earned if individual contributions are prohibited.

No: A NO score is earned if there are no limits on contributions from individuals. A NO score is also earned if limits are applied by the government on opposition candidates in a discriminatory manner.

21b. In law, there are limits on corporate donations to individual political candidates.

Yes

| **No**

Comments:

There are no legal limits on corporate donations to political candidates.

References:

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

Yes: A YES score is earned if there are any limits in size on corporate contributions to individual political candidates. A YES score is earned if corporate contributions are prohibited.

No: A NO score is earned if there are no limits on corporate contributions to individual political candidates. A NO score is also earned if limits are applied by the government on opposition candidates in a discriminatory manner.

21c. In law, there are requirements for the disclosure of donations to individual political candidates.

Yes | **No**

Comments:

There are no legal requirements for the public disclosure of donations to individual political candidates.

References:

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

Dr. Henry Chingaipe, director, Centre for Governance and Development Research, Sept. 16, 2011, Lilongwe

Yes: A YES score is earned if there are any requirements mandating the disclosure of financial contributions to individual political candidates.

No: A NO score is earned if there are no requirements mandating the disclosure of contributions to individual political candidates, existing regulations do not require a donor's name or amount given, or the regulations allow for anonymous donations. Systems where only certain donation amounts are required to be made public (above a non-trivial amount) also earn a NO score.

21d. In law, there are requirements for the independent auditing of the campaign finances of individual political candidates when irregularities are uncovered.

Yes | **No**

Comments:

There are no legal requirements for the independent auditing of the campaign finances of individual political candidates when irregularities are uncovered.

References:

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

Dr. Henry Chingaipe, director, Centre for Governance and Development Research, Sept. 16, 2011, Lilongwe

Yes: A YES score is earned if there is a legal or regulatory requirement for the independent auditing of an individual candidate's campaign finances and expenditures when financial irregularities are uncovered. The auditing is performed by

an impartial third-party.

No: A NO score is earned if there are no legal or regulatory requirements for the independent auditing of an individual candidate's campaign finances and expenditures when financial irregularities are uncovered. A NO score is also earned if such requirements exist but allow for candidates to self-audit.

21e. In law, there is an agency or entity that monitors the financing of individual political candidates' campaigns.

Yes | **No**

Comments:

No agency or entity exists that monitors the financing of individual political candidates' campaigns.

References:

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

Dr. Henry Chingaape, director, Centre for Governance and Development Research, Sept. 16, 2011, Lilongwe

Yes: A YES score is earned if there is a domestic agency or set of domestic agencies/entities formally assigned to monitor and enforce laws and regulations around the financing of individual political candidates' campaigns. A YES score is earned even if the agency/entity is ineffective in practice.

No: A NO score is earned if there is no such agency or entity. A NO score is also earned if this monitoring is solely carried out by the media and non-governmental organizations.

22. Are the regulations governing the political financing of parties effective?

4

22a. In practice, the limits on individual donations to political parties are effective in regulating an individual's ability to financially support a political party.

100 | 75 | 50 | 25 | **0**

Comments:

There are no legal limits on individual donations to political parties.

References:

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

Dr. Henry Chingaape, director, Centre for Governance and Development Research, Sept. 16, 2011, Lilongwe

100: Existing limits represent the full extent to which an individual can directly or indirectly financially support a political party. Limits are reasonably low enough in the context of the total costs of running a campaign.

75:

50: Existing limits generally represent the full extent to which an individual can directly or indirectly financially support a political party. However, exceptions and loopholes exist through which individuals can indirectly support political parties above and beyond those formal limitations. Such loopholes could include making donations to third-party groups that advocate on behalf of (or against) a particular party; unregulated loans to parties (rather than direct donations); or in-kind support that is not explicitly regulated by laws or regulations. The limits may be too high in the context of the overall costs of running a campaign.

25:

0: Existing limits are routinely bypassed or willfully ignored. The vast majority of individual contributions to a political party are made outside of the formal limitation system. There is no enforcement of violations. Limits are so high that they are meaningless in the context of the overall costs of running a campaign.

22b. In practice, the limits on corporate donations to political parties are effective in regulating a company's ability to financially support a political party.

100 | 75 | 50 | 25 | 0

Comments:

There are no legal limits on corporate donations to political parties.

References:

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

Dr. Henry Chingaipe, director, Centre for Governance and Development Research, Sept. 16, 2011, Lilongwe

100: Existing limits represent the full extent to which a company can directly or indirectly financially support a political party. Limits are reasonably low enough in the context of the total costs of running a campaign to be meaningful.

75:

50: Existing limits generally represent the full extent to which a company can directly or indirectly financially support a political party. However, exceptions and loopholes exist through which companies can indirectly support political parties above and beyond those formal limitations. Such loopholes could include making donations to third-party groups that advocate on behalf of (or against) a particular party; unregulated loans to parties (rather than direct donations); or in-kind support that is not explicitly regulated by laws or regulations. The limits may be too high in the context of the overall costs of running a campaign.

25:

0: Existing limits are routinely bypassed or willfully ignored. The majority of corporate contributions to political parties are made outside of the formal limitation system. There is no enforcement of violations. Limits are so high that they are meaningless in the context of the overall costs of running a campaign.

22c. In practice, the limits on total party expenditures are effective in regulating a political party's ability to fund campaigns or politically-related activities.

100 | 75 | 50 | 25 | 0

Comments:

There are no legal limits on total party expenditures. The absence of limits on total party expenditures often puts opposition parties at a great disadvantage during elections, as the ruling party is often able to generate bigger amounts of donations from the business sector in addition to using state resources during election campaigns. On Sept. 3, 2011, for example, President Bingu wa Mutharika toured Rumphi Central Constituency using state resources. Although this event was billed as a state function, the president used the occasion to urge the people of Rumphi Central Constituency to vote for his party's candidate in a by-election that was due to be held two days later.

References:

Nyasa Times, Lusubilo Sichali, Sept. 4, 2011, "Bingu 'pleads' with Rumphi Central ahead of polls," <http://www.nyasatimes.com/malawi/2011/09/04/bingu-%E2%80%98pleads%E2%80%99-with-rumphi-central-ahead-of-polls/>

Dr. Henry Chingaipe, director, Centre for Governance and Development Research, Sept. 16, 2011, Lilongwe

100: Existing limits represent the full extent to which political parties are able to finance their activities. Limits are reasonably low enough in the context of the total costs of running a party to be meaningful.

75:

50: Existing limits generally represent the full extent to which a political party can finance its activities. However, exceptions and loopholes exist through which parties can generate revenue or finance their activities beyond the scope of existing regulations. Such loopholes could include taking loans that are outside of the scope of regulations covering direct donations; links to revenue-generating business activities that are beyond the scope of electoral or campaign-related regulations; or accepting in-kind support that is not explicitly regulated by laws or regulations. The limits may be too high in the context of the overall costs of running a party.

25:

0: Existing limits are routinely bypassed or willfully ignored. The majority of expenditures are made outside of the formal limitation system. Limits are so high that they are meaningless in the context of the overall costs of running a party.

22d. In practice, when necessary, an agency or entity monitoring the financing of political parties independently initiates investigations.

100 | 75 | 50 | 25 | 0

Comments:

There is no agency or entity monitoring the financing of political parties.

References:

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

Dr. Henry Chingaipe, director, Centre for Governance and Development Research, Sept. 16, 2011, Lilongwe

100: The agency or entity aggressively starts investigations into allegations of wrong doing with respect to the financing of political parties, or cooperates well with other agencies that do. The agency is fair in its application of this power.

75:

50: The agency or entity will start investigations, but often relies on external pressure to set priorities, has limited effectiveness when investigating, or is reluctant to cooperate with other agencies in politically sensitive cases. The agency, though limited in effectiveness, is still fair in its application of power.

25:

0: The agency or entity rarely investigates on its own, is uncooperative with other agencies, or the agency or entity is partisan in its application of this power.

22e. In practice, when necessary, an agency or entity monitoring the financing of political parties imposes penalties on offenders.

100 | 75 | 50 | 25 | 0

Comments:

There is no agency or entity monitoring the financing of political parties.

References:

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

Dr. Henry Chingaipe, director, Centre for Governance and Development Research, Sept. 16, 2011, Lilongwe

100: When rules violations are discovered, the agency or entity is aggressive in penalizing offenders or cooperates well with other agencies that impose penalties.

75:

50: The agency or entity enforces rules, but is limited in its effectiveness. The agency or entity may be slow to act, unwilling to take on politically powerful offenders, reluctant to cooperate with other agencies, or occasionally unable to enforce its judgments.

25:

0: The agency or entity does not effectively penalize offenders. The agency or entity may make judgments but not enforce them, or may fail to make reasonable judgments against offenders. The agency or entity may be partisan in its application of power and may refuse cooperation with other agencies.

22f. In practice, contributions to political parties are audited.

100 | 75 | 50 | 25 | 0

Comments:

The sources of party funding in Malawi are largely kept a secret and there is no legal requirement for the parties to present audited accounts of their finances. The only contributions to political parties that are audited are those from international donors, such as those disbursed through the Malawi Centre for Multiparty Democracy (CMD).

References:

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

Dr. Henry Chingaipe, director, Centre for Governance and Development Research, Sept. 16, 2011, Lilongwe

100: Political party finances are regularly audited using generally accepted auditing practices. The auditing may be regular and comprehensive or only initiated after an initial review reveals irregularities. Auditing includes the auditing of nominally independent financial organizations that act as financial extensions of the party.

75:

50: Political party finances (as defined) are audited, but audits are limited in some way, such as using inadequate auditing standards, or the presence of exceptions to disclosed contributions. Contributions to the political party may be sufficiently audited, but the auditing of nominally independent extensions of the party may not be.

25:

0: Party finances are not audited, or the audits performed have no value in tracking contributions. Audits may be performed by entities known to be partisan or biased in their practices.

23. Are the regulations governing the political financing of individual candidates effective?

0

23a. In practice, the limits on individual donations to political candidates are effective in regulating an individual's ability to financially support a particular candidate.

100 | 75 | 50 | 25 | 0

Comments:

There are no limits on individual donations to political candidates.

References:

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

Dr. Henry Chingaipe, director, Centre for Governance and Development Research, Sept. 16, 2011, Lilongwe

100: Existing limits represent the full extent to which an individual can directly or indirectly financially support a political candidate. Limits are reasonably low enough in the context of the total costs of running a campaign.

75:

50: Existing limits generally represent the full extent to which an individual can directly or indirectly financially support a particular candidate. However, exceptions and loopholes exist through which individuals can indirectly support particular political candidates above and beyond those formal limitations. Such loopholes could include making donations to third-party groups that advocate on behalf of (or against) a particular candidate; unregulated loans to candidates (rather than direct donations); or in-kind support that is not explicitly regulated by laws or regulations. The limits may be too high in the context of the overall costs of running a campaign.

25:

0: Existing limits are routinely bypassed or willfully ignored. The vast majority of individual contributions to a particular political candidate are made outside of the formal limitation system. There is no enforcement of violations. Limits are so high that they are meaningless in the context of the overall costs of running a campaign.

23b. In practice, the limits on corporate donations to individual candidates are effective in regulating a company's ability to financially support a candidate.

100 | 75 | 50 | 25 | 0

Comments:

There are no limits on corporate donations to individual candidates.

References:

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

Dr. Henry Chingaipe, director, Centre for Governance and Development Research, Sept. 16, 2011, Lilongwe

100: Existing limits represent the full extent to which a company can directly or indirectly financially support an individual candidate. Limits are reasonably low enough in the context of the total costs of running a campaign to be meaningful.

75:

50: Existing limits generally represent the full extent to which a company can directly or indirectly financially support an individual candidate. However, exceptions and loopholes exist through which companies can indirectly support individual candidates above and beyond those formal limitations. Such loopholes could include making donations to third-party groups that advocate on behalf of (or against) a particular candidate; unregulated loans to candidates (rather than direct donations); or in-kind support that is not explicitly regulated by laws or regulations. The limits may be too high in the context of the overall costs of running a campaign.

25:

0: Existing limits are routinely bypassed or willfully ignored. The majority of corporate contributions to individual candidates are made outside of the formal limitation system. There is no enforcement of violations. Limits are so high that they are meaningless in the context of the overall costs of running a campaign.

23c. In practice, when necessary, an agency or entity monitoring the financing of individual candidates' campaigns independently initiates investigations.

100 | 75 | 50 | 25 | 0

Comments:

There is no agency or entity monitoring the financing of individual candidates' campaigns.

References:

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

Dr. Henry Chingaipe, director, Centre for Governance and Development Research, Sept. 16, 2011, Lilongwe

100: The agency or entity aggressively starts investigations into allegations of wrong doing with respect to the financing of individual candidates' campaigns, or cooperates well with other agencies that do. The agency is fair in its application of this power.

75:

50: The agency or entity will start investigations, but often relies on external pressure to set priorities, or has limited effectiveness when investigating. The agency, though limited in effectiveness, is still fair in its application of power. It may be reluctant to cooperate with other investigatory agencies.

25:

0: The agency or entity rarely investigates on its own, or the agency or entity is partisan in its application of this power. It does not cooperate well with other investigatory agencies.

23d. In practice, when necessary, an agency or entity monitoring the financing of individual candidates' campaigns imposes penalties on offenders.

100 | 75 | 50 | 25 | 0

Comments:

There is no agency or entity monitoring the financing of individual candidates' campaigns.

References:

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

Dr. Henry Chingaape, director, Centre for Governance and Development Research, Sept. 16, 2011, Lilongwe

100: When rules violations are discovered, the agency or entity is aggressive in penalizing offenders or in cooperating with other agencies that do.

75:

50: The agency or entity enforces rules, but is limited in its effectiveness. The agency or entity may be slow to act, unwilling to take on politically powerful offenders, reluctant to cooperate with other agencies, or occasionally unable to enforce its judgments.

25:

0: The agency or entity does not effectively penalize offenders. The agency or entity may make judgments but not enforce them, or may fail to make reasonable judgments against offenders. The agency or entity may be partisan in its application of power or may refuse to cooperate with other agencies.

23e. In practice, the finances of individual candidates' campaigns are audited.

100 | 75 | 50 | 25 | 0

Comments:

There is no legal requirement for the auditing of the finances of individual candidates' campaigns.

References:

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

Dr. Henry Chingaipe, director, Centre for Governance and Development Research, Sept. 16, 2011, Lilongwe

100: The finances of individual candidates' campaigns are regularly audited using generally accepted auditing practices. The auditing may be regular and comprehensive or only initiated after an initial review reveals irregularities.

75:

50: The finances of individual candidates' campaigns are audited, but audits are limited in some way, such as using inadequate auditing standards, or the presence of exceptions to disclosed contributions.

25:

0: The finances of individual candidates' campaigns are not audited, or the audits performed have no value in tracking contributions. Audits may be performed by entities known to be partisan or biased in their practices.

24. Can citizens access records related to the financing of political parties?

0

24a. In practice, political parties disclose data relating to financial support and expenditures within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

In the absence of any legal instrument requiring them to, Malawian political parties never disclose data relating to financial support and expenditures.

Although oftentimes party constitutions require presentation of accounts statements to party conventions, none of the major political parties has held a convention during the study period. As a result, even the party membership often has no knowledge of the party's financial standing, let alone the ability to query them.

References:

Wiseman Chirwa, professor of political history, Chancellor College, University of Malawi, Sept. 9, 2011, Zomba

Billy Banda, executive director, Malawi Watch, Sept. 17, 2011, Lilongwe

100: Political parties disclose their sources of funding and expenditures at least every quarter.

75:

50: Political parties disclose their sources of funding and expenditures only one or two times per year. Delays may occur when sensitive political information is involved.

25:

0: Political parties never publish their sources of funding or expenditures or publish that information only rarely with more than a year in between publication. Politically sensitive information is regular withheld from public disclosure.

24b. In practice, citizens can access the financial records of political parties within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

There are no public records of the finances of Malawian political parties.

References:

Wiseman Chirwa, professor of political history, Chancellor College, University of Malawi, Sept. 9, 2011, Zomba

Billy Banda, executive director, Malawi Watch, Sept. 17, 2011, Lilongwe

100: Records are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information.

75:

50: Records take two to four weeks to obtain. Some delays may be experienced.

25:

0: Records take more than a month to acquire. There may be persistent delays in obtaining politically sensitive records.

24c. In practice, citizens can access the financial records of political parties at a reasonable cost.

100 | 75 | 50 | 25 | 0

Comments:

Political parties in Malawi do not make their financial records publicly available. Even party members are not able to access the financial records.

References:

McBain Mkandawire, executive director, Malawi Youthnet and Counseling (YONECO), Aug. 17, 2011, Zomba

Wiseman Chirwa, professor of political history, Chancellor College, University of Malawi, Sept. 9, 2011, Zomba

100: Records are free to all citizens, or available for the cost of photocopying. Records can be obtained at little cost, such as by mail, or on-line.

75:

50: Records impose a financial burden on citizens, journalists or NGOs. Retrieving records may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving records imposes a major financial burden on citizens. Records costs are prohibitive to most citizens, journalists, or NGOs trying to access this information.

24d. In practice, the publicly available records of political parties' finances are of high quality.

100 | 75 | 50 | 25 | 0

Comments:

Political parties in Malawi do not make their financial records publicly available. Even party members are not able to access the financial records.

References:

McBain Mkandawire, executive director, Malawi Youthnet and Counseling (YONECO), Aug. 17, 2011, Zomba

Wiseman Chirwa, professor of political history, Chancellor College, University of Malawi, Sept. 9, 2011, Zomba

100: Publicly available records of political parties' finances are complete and detailed, itemizing all significant sources of income and expenditures.

75:

50: Publicly available records of political parties' finances are available but are often lacking in important details, are overly general, or are otherwise incomplete.

25:

0: Publicly available records of political parties' finances, when available, are so incomplete or overly general as to render them useless in understanding a party's sources of income and its expenditures.

25. Can citizens access records related to the financing of individual candidates' campaigns?

0

25a. In practice, individual political candidates disclose data relating to financial support and expenditures within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

Political candidates in Malawi never disclose data relating to financial support and expenditures. This situation applies to political candidates at different levels, including presidential and parliamentary candidates.

References:

Wiseman Chirwa, professor of political history, Chancellor College, University of Malawi, Sept. 9, 2011, Zomba

Dr. Henry Chingaape, director, Centre for Governance and Development Research, Sept. 16, 2011, Lilongwe

100: Individual candidates disclose their sources of funding and expenditures at least every quarter.

75:

50: Individual candidates disclose their sources of funding and expenditures only one or two times per year. Delays may occur when sensitive political information is involved.

25:

0: Individual candidates never publish their sources of funding or expenditures or publish that information only rarely with more than a year in between publication. Politically sensitive information is regular withheld from public disclosure.

25b. In practice, citizens can access the financial records of individual candidates (their campaign revenues and expenditures) within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

The financial records of individual candidates are never made public at any time.

References:

Wiseman Chirwa, professor of political history, Chancellor College, University of Malawi, Sept. 9, 2011, Zomba

Dr. Henry Chingaape, director, Centre for Governance and Development Research, Sept. 16, 2011, Lilongwe

100: Records are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information.

75:

50: Records take two to four weeks to obtain. Some delays may be experienced.

25:

0: Records take more than a month to acquire. There may be persistent delays in obtaining politically sensitive records.

25c. In practice, citizens can access the financial records of individual candidates (their campaign revenues and expenditures) at a reasonable cost.

100 | 75 | 50 | 25 | 0

Comments:

The financial records of individual candidates are never made public at any time.

References:

Wiseman Chirwa, professor of political history, Chancellor College, University of Malawi, Sept. 9, 2011, Zomba

Dr. Henry Chingaipe, director, Centre for Governance and Development Research, Sept. 16, 2011, Lilongwe

100: Records are free to all citizens, or available for the cost of photocopying. Records can be obtained at little cost, such as by mail, or on-line.

75:

50: Records impose a financial burden on citizens, journalists or NGOs. Retrieving records may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving records imposes a major financial burden on citizens. Records costs are prohibitive to most citizens, journalists, or NGOs trying to access this information.

25d. In practice, the publicly available records of political candidates' campaign finances are of high quality.

100 | 75 | 50 | 25 | 0

Comments:

The records of political candidates' campaign finances in Malawi are never made available to the public.

References:

Wiseman Chirwa, professor of political history, Chancellor College, University of Malawi, Sept. 9, 2011, Zomba

Dr. Henry Chingaipe, director, Centre for Governance and Development Research, Sept. 16, 2011, Lilongwe

100: Publicly available records of political candidates' campaign finances are complete and detailed, itemizing all significant sources of income and expenditures.

75:

50: Publicly available records of political candidates' campaign finances are available but are often lacking in important details, are overly general, or are otherwise incomplete.

25:

0: Publicly available records of political candidates' campaign finances, when available, are so incomplete or overly general as to render them useless in understanding a candidate's sources of income and expenditures.

Category 3. Government Conflicts of Interest Safeguards & Checks and Balances

3.1. Conflicts of Interest Safeguards & Checks and Balances: Executive Branch

26. In law, can citizens sue the government for infringement of their civil rights?

100

26a. In law, can citizens sue the government for infringement of their civil rights?

Yes

No

Comments:

Section 15 of the Malawi Constitution (1995) states that any person or group of persons that have sufficient interest in the protection and enforcement of the rights enshrined in the Constitution are entitled to seek the assistance of the courts, the Ombudsman, the Human Rights Commission and other organs of government to ensure the promotion, protection and redress of grievance in respect of those rights.

Section 46 (2) states that any person who claims that a fundamental right or freedom guaranteed by the Constitution has been infringed or threatened is entitled to make an application to a competent court to enforce or protect such a right or freedom and to make an application to the Ombudsman or the Human Rights Commission in order to secure such assistance or advice as he or she may reasonably require.

Under Section 46(3) of the Constitution, courts are empowered to make any orders that are necessary and appropriate to secure the enjoyment of rights and freedoms and can also award compensation to any person whose rights or freedoms have been unlawfully denied or violated.

References:

Section 15 of the Malawi Constitution (1995).

Section 46 (2) of the Malawi Constitution.

Section 46 (3) of the Malawi Constitution.

Yes: A YES score is earned if all citizens (citizen is defined broadly, to include all ethnicities, or anyone born in the country) can receive compensation or redress through the courts for civil rights violations committed by the government, such as failure to follow due process of law when detaining suspected criminals.

No: A NO score is earned if any group of citizens is excluded from the right to sue the government, or no such mechanism exists.

27. Can the chief executive be held accountable for his/her actions?

75

27a. In practice, the chief executive gives reasons for his/her policy decisions.

100 | 75 | **50** | 25 | 0

Comments:

The president is required by law to attend Parliament every year at the beginning of the government's new financial year and address members of the Parliament on the state of the nation and on the future policies of the government at that time. This includes a requirement to report on policies from the previous year and respond to questions.

In 2010, President Mutharika delivered his State of the Nation address to the Malawi National Assembly on May 24th, 2010.

However, although President Mutharika delivered his State of the Nation Address to Parliament as required by law, he has not appeared before Parliament to take questions from legislators even though Section 89(4) empowers Parliament to summon the president to appear before the House to answer questions.

In June 2011, the Malawi Parliament requested the president to appear before it and address the House on issues relating to shortages of fuel and foreign currency. The president refused the invitation and never appeared before the House.

However, the president often addresses the nation on matters of national importance. In June 2011, for example, President Mutharika addressed Malawians on the issues of fuel and foreign exchange shortages and public concerns on the government's 2011/2012 "Zero Deficit Budget."

The president also tends to address the media and answer a variety of questions from journalists whenever he returns to the country from foreign visits.

References:

Rex Chikoko, Malawi Democrat, "Malawi Parliament summons president over fuel crisis," June 24, 2011, <http://www.malawidemocrat.com/politics/malawi-parliament-summons-president-over-fuel-crisis/>

Wiseman Chirwa, professor of political history, University of Malawi, Sept. 9, 2011, Zomba

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

100: The chief executive and/or cabinet ministers give formal explanations of all policy matters. The chief executive regularly takes critical questions from journalists or an opposition party, usually at least once a month. There is no censoring of such sessions.

75:

50: The chief executive and/or cabinet ministers give explanations of policy, but not always in a timely or complete way. The chief executive occasionally takes critical questions from journalists or an opposition party, but not in a regular or formalized process. Particular issues of political sensitivity may be censored by government broadcasters.

25:

0: The chief executive and/or cabinet ministers do not give substantial justifications for policy. Public appearances by the chief executive offer no exposure to critical questions. The government and government-run media routinely censor such sessions.

27b. In law, the judiciary can review the actions of the executive.

Yes

No

Comments:

Section 89(5) of the Constitution states that the president shall exercise his powers reasonably and in accordance with the Constitution. Although the president is granted immunity from any civil proceedings, Section 91(1) states that the Office of the President is not immune to orders of the courts concerning rights and duties prescribed under the Constitution.

Sections 4 and 5 of the Malawi Constitution state that the all holders of public office, including the president, are bound by the Constitution and that any act of government that is inconsistent with the provisions of the Constitution shall, to the extent of such inconsistency, be invalid.

References:

Malawi Constitution, Section 89(5), Section 91(1), Section 4, Section 5.

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

Yes: A YES score is earned if there is a formal process by which the judiciary can pass judgments on the legality or constitutionality of actions taken by the executive.

No: A NO score is earned if no such mechanism exists. A NO score is earned if judicial review is vaguely established in law or regulation without formal procedures. A NO score is earned if general exemptions exist with respect to executive actions that are reviewable (a national security exemption, for example).

27c. In practice, when necessary, the judiciary reviews the actions of the executive.

100

75

50

25

0

Comments:

The Malawi judiciary has regularly demonstrated its independence and impartiality from the executive by ruling against decisions by the executive that have contravened the Malawi Constitution and other laws.

However, the judiciary only acts when it is moved through a legal challenge by members of the public or concerned citizen groups, including those from opposition parties. For example, after the Malawi Law Society had petitioned the High Court of Malawi to rule on President Mutharika's decision to dismiss Commissioners of the Malawi Electoral Commission in December 2010, the court ruled against Mutharika's decision and reinstated the dismissed commissioners.

References:

Raphael Tenthani, Maravipost, Dec/ 9, 2010, "Court stops Bingu from sacking Malawi Electoral Commission," <http://maravipost.com/malawi-politics/politics/4404-court-stops-bingu-from-sacking-malawi-electoral-commission.html>

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

100: When constitutional or legal questions or possible violations are raised, the judiciary is aggressive in reviewing executive actions and can void illegal or unconstitutional actions. The judiciary is fair and nonpartisan in its application of this power. It does not need to rely upon the executive to initiate a constitutional or legal review.

75:

50: The judiciary will review executive actions, but is limited in its effectiveness. The judiciary may be slow to act, unwilling to take on politically sensitive issues, or occasionally unable to enforce its judgments.

25:

0: The judiciary does not effectively review executive policy. The judiciary may make judgments but not enforce them, or may fail to pass judgments on executive abuses. The judiciary may be partisan in its application of power. It must rely on instructions from the executive in order to initiate a legal or constitutional review.

27d. In practice, the chief executive limits the use of executive orders for establishing new regulations, policies, or government practices.

100 | 75 | **50** | 25 | 0

Comments:

The chief executive in Malawi routinely makes policy decisions at political podiums, issuing executive orders and directives without consulting Parliament. In March 2011, for example, President Mutharika ordered that all groups seeking permission to demonstrate should pay a K2 million deposit as a condition for being allowed to demonstrate. On other occasions, the president directed the police to adopt a policy of shoot to kill as a strategy of addressing insecurity in the country.

The president also often uses discretionary powers to appoint numerous advisers and other party loyalists to non-existent government positions.

In June 2011, President Mutharika ordered the reopening of Chancellor College and Malawi Polytechnic, two constituent colleges of the University of Malawi which had been closed over a dispute of academic freedom although he did not have powers to make such an order.

References:

Reporter, Star Radio, March 6, 2011, "Pay 2 million Kwacha if you want to march-Bingu," <http://www.starradiomw.com/?p=293>

Theresa Chapulapula, Daily Times, June 6, 2011, "Bingu assures academic freedom – Chanco, Poly to reopen July 4, vacate injunctions," <http://www.bnlimes.com/national/42-all/1311-bingu-assures-academic-freedom-chanco-poly-to-reopen-july-4-vacate-injunctions.html>

Wiseman Chirwa, professor of political history, University of Malawi, Sept. 9, 2011, Zomba

100: The chief executive utilizes executive orders only when there is no constitutional or legal requirement for official legislative action or approval. Executive orders are limited in number and narrow in scope.

75:

50: The chief executive sometimes relies on executive orders to implement policies and regulations opposed by the legislature. Some executive orders are overly broad in scope and are designed to circumvent constitutional or legal requirements for legislative action or approval.

25:

0: The chief executive routinely abuses executive orders to render the legislature practically useless. Executive orders are the norm, not the exception, and directly contravene constitutional or legal requirements for legislative action or approval.

28. Is the executive leadership subject to criminal proceedings?

28a. In law, the heads of state and government can be prosecuted for crimes they commit.

Yes

No

Comments:

Sections 91(1) and (2) of the Malawi Constitution grants the president immunity from civil and criminal proceedings while in office save for orders of the court concerning rights and duties under the Constitution. Section 91(3) goes on to state that once a person has left the office of president, he shall not be held personally liable for acts done in an official capacity during his term of office.

References:

Malawi Constitution, Sections 91(1) and (2) and (3).

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

Yes: A YES score is earned if the heads of state and government can be investigated, charged or prosecuted for criminal allegations. Figurehead officials (symbolic figures without day-to-day authority) may be exempt.

No: A NO score is earned if either the head of state or government cannot be investigated, charged or prosecuted for criminal allegations or the executive branch controls whether investigative or prosecutorial immunity can be lifted on the heads of state or government.

28b. In law, ministerial-level officials can be prosecuted for crimes they commit.

Yes

No

Comments:

Ministerial level officials do not enjoy any immunity from prosecution. In September 2011, for example, the Anti-Corruption Bureau indicated that it was still investigating the minister of natural resources and energy, Goodal Gondwe, and the minister of information, Patricia Kaliyati, over corruption allegations.

References:

Phillip Pemba, The Nation, Sept. 16, 2011, "ACB still probing Goodal, Kaliyati," http://www.nationmw.net/index.php?option=com_content&view=article&id=25416:acb-still-probing-goodall-kaliyati&catid=62:national-news&Itemid=59

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

Yes: A YES score is earned if ministerial-level officials, or their equivalents, can all be investigated, charged or prosecuted for criminal allegations.

No: A NO score is earned if any ministerial-level official, or equivalent official, cannot be investigated, charged or prosecuted for criminal allegations or the executive branch controls whether investigative or prosecutorial immunity can be lifted on ministerial-level officials.

29. Are there regulations governing conflicts of interest by the executive branch?

38

29a. In law, the heads of state and government are required to file a regular asset disclosure form.

Yes

No

Comments:

Section 88(3) of the Malawi Constitution states that the president and members of his Cabinet shall, within three months from the date of election or appointment, "...fully disclose all their assets, liabilities, business interests, and those of their spouses, held by or on their behalf as at that date," and that such "disclosure shall be made in a written document delivered to the Speaker of the National Assembly."

References:

Malawi Constitution, Section 88(3).

Yes: A YES score is earned if the heads of state and government are required by law to file an asset disclosure form while in office, illustrating sources of income, stock holdings, and other assets. This form need not be publicly available to score a YES. Figurehead officials (symbolic figures without day-to-day authority) may be exempt.

No: A NO score is earned if either the head of state or government is not required to disclose assets.

29b. In law, ministerial-level officials are required to file a regular asset disclosure form.

Yes

No

Comments:

As with the president, Cabinet ministers are bound by Section 88(3) of the Constitution to disclose their assets, liabilities, business interests, and those of their spouses, held by or on their behalf, within three months of their appointment.

References:

Malawi Constitution, Section 88(3).

Yes: A YES score is earned if ministerial-level officials, or their equivalents, are all required by law to file an asset disclosure form while in office, illustrating sources of income, stock holdings, and other assets.

No: A NO score is earned if ministers are not required to disclose assets. A NO score is earned if some ministers must disclose assets, but other ministers are not required.

29c. In law, there are regulations governing gifts and hospitality offered to members of the executive branch.

Yes

No

Comments:

The giving of gifts and hospitality to members of the executive branch of the Malawi government is governed by the Corrupt Practices Act (1995).

References:

Laws of Malawi, Corrupt Practices Act (1995), Section 24.

Yes: A YES score is earned if there are formal guidelines regulating gifts and hospitality offered to members of the executive branch of government.

No: A NO score is earned if there are no guidelines or regulations with respect to gifts and hospitality offered to members of the executive branch. A NO score is earned if the guidelines are overly general and do not specify what is and is not appropriate.

29d. In law, there are requirements for the independent auditing of the executive branch asset disclosure forms (defined here as ministers and heads of state and government).

Yes

No

Comments:

The law on declaration of assets for the executive branch only talks about declaration of assets and displaying what has been declared but does not go further to include the auditing of the declared assets. The National Assembly is mandated under Section 213(4) of the Constitution to establish a committee to ensure compliance with the declaration of assets. However, the mandate of this committee is limited to ensuring compliance but does not cover the auditing of the asset declaration forms.

References:

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

Yes: A YES score is earned if there is a legal or regulatory requirement for independent auditing of executive branch asset disclosures. The auditing is performed by an impartial third-party. Figurehead officials (symbolic figures without day-to-day authority) may be exempt.

No: A NO score is earned if there are no legal or regulatory requirements for the independent auditing of executive branch asset disclosures or if such requirements exist but allow for self-auditing.

29e. In law, there are restrictions on heads of state and government and ministers entering the private sector after leaving the government.

Yes

No

Comments:

There are no restrictions preventing members of the executive branch from entering the private sector after leaving the government. Indeed, there are no legal barriers preventing members of the executive from having businesses while they are still in office. However, Section 88(4) of the Constitution requires that such businesses be run as trusts on the executive government member's behalf until they leave office.

References:

Section 88(4) of the Malawi Constitution, 1995

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

Yes: A YES score is earned if there are regulations restricting the ability of heads of state/government and ministers to take positions in the private sector after leaving government that would present a conflict of interest, including positions that directly seek to influence their former government colleagues. Figurehead officials (symbolic figures without day-to-day authority) may be exempt.

No: A NO score is earned if no such restrictions exist.

29f. In practice, the regulations restricting post-government private sector employment for heads of state and government and ministers are effective.

100 | 75 | 50 | 25 | 0

Comments:

There are no regulations restricting post-government private sector employment for heads of state and government ministers.

References:

Jonathan Makuwira, visiting senior lecturer, Bunda College of Agriculture (Malawi) and Royal Melbourne Institute of Technology University, Australia, Aug. 16, 2011

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

100: The regulations restricting post-government private sector employment for heads of state/government and ministers are uniformly enforced. There are no cases or few cases of those officials taking jobs in the private sector after leaving government where they directly lobby or seek to influence their former government colleagues without an adequate "cooling off" period.

75:

50: The regulations are generally enforced though some exceptions exist. In certain sectors, heads of state/government or ministers are known to regularly take jobs in the private sector that entail directly lobbying or seeking to influence their former government colleagues. Cooling off periods are short and sometimes ignored.

25:

0: The regulations are rarely or never enforced. Heads of state/government or ministers routinely take jobs in the private sector following government employment that involve direct lobbying or influencing of former government colleagues. Cooling off periods are non-existent or never enforced. A zero score is also earned if heads of state and government or minister are allowed to hold private sector jobs while in office.

29g. In practice, the regulations governing gifts and hospitality offered to members of the executive branch are effective.

100 | 75 | 50 | 25 | 0

Comments:

There are no regulations governing gifts and hospitality offered to members of the executive branch.

References:

Jonathan Makuwira, visiting senior lecturer, Bunda College of Agriculture (Malawi) and Royal Melbourne Institute of Technology University, Australia, Aug. 16, 2011

Billy Banda, executive director, Malawi Watch, Sept. 17, 2011, Lilongwe

100: The regulations governing gifts and hospitality to members of the executive branch are regularly enforced. Members of the executive branch never or rarely accept gifts or hospitality above what is allowed.

75:

50: The regulations governing gifts and hospitality to members of the executive branch are generally applied though exceptions exist. Some ministers in certain sectors are known to accept greater amounts of gifts and hospitality from outside interest groups or private sector actors than is allowed.

25:

0: The regulations governing gifts and hospitality to members of the executive branch are routinely ignored and unenforced. Ministers and other members of the executive branch routinely accept significant amounts of gifts and hospitality from outside interest groups and actors seeking to influence their decisions.

29h. In practice, executive branch asset disclosures (defined here as ministers and above) are audited.

100 | 75 | 50 | 25 | 0

Comments:

The asset disclosures of the executive branch are never audited. After the 2009 general elections, for example, the president and his ministers were reported to have declared their assets, but the records were never made public. Since then, despite several changes in the composition of the Cabinet, there have been no reports of the new Cabinet ministers declaring their assets as required by law.

References:

Chikosa Banda, head of the Department of Foundational Law, University of Malawi, Aug. 19, 2011, Zomba

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

100: Executive branch asset disclosures are regularly audited using generally accepted auditing practices.

75:

50: Executive branch asset disclosures are audited, but audits are limited in some way, such as using inadequate auditing standards, or the presence of exceptions to disclosed assets.

25:

0: Executive branch asset disclosures are not audited, or the audits performed have no value. Audits may be performed by entities known to be partisan or biased in their practices.

30. Can citizens access the asset disclosure records of the heads of state and government?

25

30a. In law, citizens can access the asset disclosure records of the heads of state and government.

Yes

No

Comments:

Section 88(3) of the Constitution, which requires the president and Cabinet ministers to declare their assets, further states that such declarations should be submitted in a written document to the Speaker of the National Assembly who shall in turn deposit the documents with a public office specified by the Parliamentary Standing Orders. As a public document, the asset disclosure forms can thus be accessed by citizens who can use Section 37 of the Constitution, which guarantees Malawian citizens the right to access all information held by the state or any of its organs.

References:

Malawi Constitution, Section 88(3), Section 37.

Yes: A YES score is earned if the heads of state and government file an asset disclosure form that is, in law, accessible to the public (individuals, civil society groups or journalists).

No: A NO score is earned if there is no asset disclosure for either the head of state or government. A NO score is earned if the form is filed, but not available to the public.

30b. In practice, citizens can access the asset disclosure records of the heads of state and government within a reasonable time period.

100

75

50

25

0

Comments:

Following the 2009 elections, it was reported by the Office of the President and Cabinet that the president and his Cabinet ministers had declared their assets. However, when the privately owned Zodiak Radio requested to get copies of the forms, the Speaker of the National Assembly is reported to have refused to release the information, saying that the law is silent on whether such information can be released to the public.

References:

Dickson Kashoti, Malawi Digest, Aug. 27, 2009, "Dr. Mutharika and Cabinet declare assets," <http://malawidigest.blogspot.com/2009/08/bingu-ministers-declare-assets.html>

100: Records are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information.

75:

50: Records take around two weeks to obtain. Some additional delays may be experienced.

25:

0: Records take more than a month to acquire. In some cases, most records may be available sooner, but there may be persistent delays in obtaining politically sensitive records.

30c. In practice, citizens can access the asset disclosure records of the heads of state and government at a reasonable cost.

100 | 75 | 50 | 25 | 0

Comments:

The asset disclosure records of the heads of state and government are never made publicly available. On one occasion, the Speaker of the National Assembly has refused to release the records, saying the law is silent on whether the records can be made publicly available.

References:

Dickson Kashoti, Malawi Digest, Aug. 27, 2009, "Dr. Mutharika and Cabinet declare assets," <http://malawidigest.blogspot.com/2009/08/bingu-ministers-declare-assets.html>

100: Records are free to all citizens, or available for the cost of photocopying. Records can be obtained at little cost, such as by mail, or on-line.

75:

50: Records impose a financial burden on citizens, journalists or NGOs. Retrieving records may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving records imposes a major financial burden on citizens. Records costs are prohibitive to most citizens, journalists, or NGOs trying to access this information.

30d. In practice, the asset disclosure records of the heads of state and government are of high quality.

100 | 75 | 50 | 25 | 0

Comments:

With the records being kept a secret, there is no way of knowing whether the asset disclosure records of the heads of state and government are of high quality or not.

References:

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

100: The asset disclosure records of the heads of state and government are complete and detailed, providing the public with an accurate and updated accounting of the individuals' sources of income, investments, and other financial interests.

75:

50: The asset disclosure records of the heads of state and government contain some useful information but may be lacking important details, including politically sensitive investment or other financial arrangements in which the individual has an interest.

25:

0: The asset disclosure records of the heads of state and government are overly general, lack any meaningful detail, and do not provide a clear accounting of the individuals' sources of income, investments, and other financial assets.

31. In practice, official government functions are kept separate and distinct from the functions of the ruling political party.

50

31a. In practice, official government functions are kept separate and distinct from the functions of the ruling political party.

100 | 75 | 50 | 25 | 0

Comments:

State resources in Malawi are routinely used to advance the activities of the ruling party. This includes use of state vehicles, appointments of party activists to government positions, requiring civil servants to attend ruling party functions and promote the interests of the ruling party, using state-funded media as a propaganda tool for the ruling party and using state resources to campaign for the ruling party. However, the fact that there are discrete examples of the ruling party using state resources suggests that there is a distinction between political party and government resources, even if the government often tries to cross that line.

In December 2010, for example, it was reported that the secretary general for the ruling Democratic Progressive Party, Bintony Kutsaira, had been given the mayor's office at the Lilongwe City Council at Civic Centre to operate from.

References:

Bright Sonani, The Nation, Dec. 7, 2010, "Kutsaira Operates from Lilongwe Civic Offices," http://www.mwnation.com/index.php?option=com_content&view=article&id=10684:kutsaira-operates-from-lilongwe-civic-offices

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

Dr. Henry Chingaipe, director, Centre for Governance and Development Research, Sept. 15, 2011, Lilongwe

Billy Banda, executive director, Malawi Watch, Sept. 16, 2011, Lilongwe

100: Clear rules are followed distinguishing state functions from party activities. Government funds are never used for party activities. The civil service is completely distinct from party bureaucracy.

75:

50: The ruling party is, in principal, separate from the state, but exceptions to this standard sometimes occur. Examples may be the use of civil servants to organize political rallies, use of government vehicles on campaign trips, or use of government funds for party purposes.

25:

0: The government bureaucracy is an extension of the ruling party. There are few boundaries between government and party activities. Government funds, equipment and personnel are regularly used to support party activities.

3.2. Conflicts of Interest Safeguards & Checks and Balances: Legislative Branch

32. Can members of the legislature be held accountable for their actions?

100

32a. In law, the judiciary can review laws passed by the legislature.

Yes

No

Comments:

Section 108 (1) and (2) of the Malawi Constitution grants the High Court of Malawi unlimited jurisdiction, including the power “to review any law, and any action or decision of the government for conformity with the Constitution...”

References:

Malawi Constitution, Section 108 (1) and (2).

Yes: A YES score is earned if there is a formal process by which the judiciary or constitutional courts can pass judgments on the legality or constitutionality of laws passed by the legislature.

No: A NO score is earned if no such mechanism exists. A NO score is earned if judicial review is vaguely established in law or regulation without formal procedures. A NO score is earned if general exceptions exist exempting certain legislative actions from being reviewed (a national security exemption, for example).

32b. In practice, when necessary, the judiciary reviews laws passed by the legislature.

100 | 75 | 50 | 25 | 0

Comments:

In June 2011, the Malawi High Court granted an injunction stopping President Mutharika from assenting to a bill that had been passed by Parliament to prevent the granting of ex-parte injunctions against the government.

References:

Anthony Kasunda and Bright Sonani, Nation newspaper, June 21, 2011, "NGOs get injunction against injunctions bill," http://www.mwnation.com/index.php?option=com_content&view=article&id=21533:ngos-get-injunction-against-injunctions-bill&catid=1:national-news&Itemid=3

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

Billy Banda, executive director, Malawi Watch, Sept. 17, 2011, Lilongwe

100: When constitutional or legal questions or possible violations are raised, the judiciary is aggressive in reviewing laws passed and can void illegal or unconstitutional actions. The judiciary is fair and nonpartisan in its application of this power.

75:

50: The judiciary will review laws passed, but is limited in its effectiveness. The judiciary may be slow to act, unwilling to take on politically sensitive issues, or occasionally unable to enforce its judgments.

25:

0: The judiciary does not effectively review laws passed. The judiciary may make judgments but not enforce them, or may fail to pass judgments on executive abuses. The judiciary may be partisan in its application of power.

32c. In law, are members of the national legislature subject to criminal proceedings?

Yes | No

Comments:

Although Section 60(1) of the Constitution grants the speaker, every deputy speaker and every member of the National Assembly immunity "while going to, returning from or while in the precincts of the National Assembly" from any other action or proceedings in any court, this immunity is temporary. The immunity does also not extend to cases of treason.

References:

Malawi Constitution, Section 60(1).

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

Yes: A YES score is earned if all members of the legislature can, in law, be investigated and prosecuted for criminal allegations.

No: A NO score is earned if any member of the legislature cannot, in law, be investigated and prosecuted for criminal proceedings. A NO score is also earned if the legislative branch itself controls whether investigative or prosecutorial immunity can be lifted on members of the legislature.

33. Are there regulations governing conflicts of interest by members of the national legislature?

36

33a. In law, members of the national legislature are required to file an asset disclosure form.

Yes

No

Comments:

Section 213(1) (a) of the Malawi Constitution states that “a member of the National Assembly” shall “within three months from the date of his or her election ... fully disclose all of his or her assets, liabilities and business interests as at that date.”

References:

Malawi Constitution, Section 213(1) (a).

Yes: A YES score is earned if all members of the legislature are required by law to file an asset disclosure form while in office, illustrating sources of income, stock holdings, and other assets. This form does not need to be publicly available to score a YES.

No: A NO score is earned if any member of the legislature is not required to disclose assets.

33b. In law, there are restrictions for national legislators entering the private sector after leaving the government.

Yes

No

Comments:

There is no law that restricts national legislators from entering the private sector after leaving the government. In any event, any such law could be seen to contradict the right to economic activity and pursue a livelihood as provided for in Section 29 of the Constitution.

References:

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

Yes: A YES score is earned if there are regulations restricting national legislators' ability to take positions in the private sector after leaving government that would present a conflict of interest, including positions that directly seek to influence their former government colleagues.

No: A NO score is earned if no such restrictions exist.

33c. In law, there are regulations governing gifts and hospitality offered to members of the national legislature.

Yes

No

Comments:

The giving of gifts and hospitality to members of the national legislature in Malawi is regulated by the Corrupt Practices Act of 1995.

Although the Corrupt Practices Act does not penalize all gifts and hospitality to members of the national legislature, Section 24 of the act classifies the receipt of any “advantage as an inducement or reward for doing or forbearing to do, or having done or forborne to do, anything in relation to any matter or transaction, actual or proposed” as amounting to corruption which is punishable under the act.

References:

Corrupt Practices Act of 1995.

Yes: A YES score is earned if there are formal guidelines regulating gifts and hospitality for members of the legislature.

No: A NO score is earned if there are no guidelines or regulations with respect to gifts or hospitality offered to members of the legislature. A NO score is earned if the guidelines are general and do not specify what is and is not appropriate.

33d. In law, there are requirements for the independent auditing of the asset disclosure forms of members of the national legislature.

Yes

No

Comments:

Section 213(4) of the Constitution only stipulates that “there shall be a committee of Parliament appointed by the National Assembly which shall have the function of monitoring the compliance with the requirement on the disclosure of assets.” The law is otherwise silent on the independent auditing of the asset disclosure forms.

References:

Section 213(4) of the Malawi Constitution

Yes: A YES score is earned if there is a legal or regulatory requirement for independent auditing of legislative branch asset disclosures. The auditing is performed by an impartial third-party.

No: A NO score is earned if there are no legal or regulatory requirements for the independent auditing of legislative branch asset disclosures or if such requirements exist but allow for self-auditing.

33e. In practice, the regulations restricting post-government private sector employment for national legislators are effective.

100	75	50	25	0
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Comments:

There are no regulations restricting post-government private sector employment for national legislators in Malawi.

References:

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

Dr. Henry Chingaipe, director, Centre for Governance and Development Research, Sept. 15, 2011, Lilongwe

100: The regulations restricting post-government private sector employment for national legislators are uniformly enforced. There are no cases or few cases of legislators taking jobs in the private sector after leaving government where they directly lobby or seek to influence their former government colleagues without an adequate “cooling off” period.

75:

50: The regulations are generally enforced though some exceptions exist. In certain sectors, legislators are known to regularly take jobs in the private sector that entail directly lobbying or seeking to influence their former government colleagues. Cooling off periods are short and sometimes ignored.

25:

0: The regulations are rarely or never enforced. Legislators routinely take jobs in the private sector following government employment that involve direct lobbying or influencing of former government colleagues. Cooling off periods are non-existent or never enforced. A zero score is also earned if legislators are allowed to hold private sector positions while in office.

33f. In practice, the regulations governing gifts and hospitality offered to national legislators are effective.

100	75	50	25	0
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Comments:

There are usually accusations that the Anti-Corruption Bureau is selective in its enforcement of the regulations governing gifts and hospitality to members of the national legislature by focusing on investigating and penalizing members of the opposition while leaving members of the ruling party free.

In August 2010, the Anti-Corruption Bureau launched an investigation into the then minister of information and tourism, Patricia Kaliyati, who is also a member of Parliament, over allegations that she received kickbacks in return for favors for issuing mobile telephone licenses and an eco-tourism concession. However, the investigation has stalled and there have been allegations that this is because of Kaliyati’s position as a senior figure in the ruling Democratic Progressive Party (DPP).

References:

Phillip Pemba, Nation Newspaper, Sept. 16, 2011, “ACB still probing Goodall, Kaliyati,” http://www.nationmw.net/index.php?option=com_content&view=article&id=25416:acb-still-probing-goodall-kaliyati&catid=62:national-news&Itemid=59

Dr. Henry Chingaipe, director, Centre for Governance and Development Research, Sept. 15, 2011, Lilongwe

100: The regulations governing gifts and hospitality to national legislators are regularly enforced. Legislators never or rarely accept gifts or hospitality above what is allowed.

75:

50: The regulations governing gifts and hospitality to national legislators are generally applied though exceptions exist. Some legislators in certain sectors are known to accept greater amounts of gifts and hospitality from outside interest groups or private sector actors than is allowed.

25:

0: The regulations are rarely or never enforced. Legislators routinely take jobs in the private sector following government employment that involve direct lobbying or influencing of former government colleagues. Cooling off periods are non-existent or never enforced.

33g. In practice, national legislative branch asset disclosures are audited.

100 | 75 | 50 | 25 | 0

Comments:

The asset disclosure records of Malawian legislators are never made public and usually the process ends with the submission of the disclosure forms after which they are filed and never audited.

References:

Dr. Henry Chingaipe, director, Centre for Governance and Development Research, Sept. 15, 2011, Lilongwe

Billy Banda, executive director, Malawi Watch, Sept. 17, 2011, Lilongwe

100: Legislative branch asset disclosures are regularly audited using generally accepted auditing practices.

75:

50: Legislative branch asset disclosures are audited, but audits are limited in some way, such as using inadequate auditing standards, or the presence of exceptions to disclosed assets.

25:

0: The regulations are rarely or never enforced. Legislators routinely take jobs in the private sector following government employment that involve direct lobbying or influencing of former government colleagues. Cooling off periods are non-existent or never enforced.

34. Can citizens access the asset disclosure records of members of the national legislature?

25

34a. In law, citizens can access the asset disclosure records of members of the national legislature.

Yes | No

Comments:

Citizens who want to access the asset disclosure records of members of the national legislature can theoretically use Section 37 of the Malawi Constitution, which guarantees the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise of an individual's rights.

References:

Malawi Constitution, Section 37.

Yes: A YES score is earned if members of the national legislature file an asset disclosure form that is, in law, accessible to the public (individuals, non-governmental groups or journalists).

No: A NO score is earned if there is no asset disclosure for members of the national legislature. A NO score is earned if the form is filed, but not available to the public.

34b. In practice, citizens can access legislative asset disclosure records within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

Members of the Malawi Parliament often submit the disclosure forms of their assets late, if at all. This is in part because the law is silent on what should happen to legislators who fail to disclose their assets. As a response, the Law Commission has recommended that a new proviso be added to the Constitution to stipulate that public officers who fail to submit the declaration of asset forms be dismissed from public office. However, this recommendation has yet to be enacted into law.

In the event that members of Parliament declare their assets, the records are filed and the officials are usually unwilling to release the information to the public.

References:

Blessings Chinsinga, associate professor of political and administrative studies, Chancellor College, University of Malawi, Aug. 20, 2011, Zomba

Dr. Henry Chingaipe, director, Centre for Governance and Development Research, Sept. 15, 2011, Lilongwe

100: Records are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information.

75:

50: Records take around two weeks to obtain. Some delays may be experienced.

25:

0: Records take more than a month to acquire. In some cases, most records may be available sooner, but there may be persistent delays in obtaining politically sensitive records.

34c. In practice, citizens can access legislative asset disclosure records at a reasonable cost.

Comments:

Records of asset disclosure by members of the legislative branch are submitted to Parliament very late or often not at all. In the current Parliament, where members were elected in 2009, there have been no reports to indicate that any member has declared assets. Even when such declarations are made, the records are rarely made public and there is a reluctance by the parliamentary officials to make those records public.

In 2009, for example, the Speaker of Parliament refused to release asset declaration records of President Mutharika and his Cabinet ministers when requested by Zodiak Radio, arguing that the law is silent on the matter.

References:

Dickson Kashoti, Malawi Digest, Aug. 27, 2009, "Mutharika and Cabinet declare assets," <http://malawidigest.blogspot.com/2009/08/bingu-ministers-declare-assets.html>

Blessings Chinsinga, associate professor of political and administrative studies, Chancellor College, University of Malawi, Aug. 20, 2011, Zomba

100: Records are free to all citizens, or available for the cost of photocopying. Records can be obtained at little cost, such as by mail, or on-line.

75:

50: Records impose a financial burden on citizens, journalists or NGOs. Retrieving records may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving records imposes a major financial burden on citizens. Records costs are prohibitive to most citizens, journalists, or NGOs trying to access this information.

34d. In practice, the asset disclosure records of members of the national legislature are of high quality.

Comments:

Since the asset declaration records are not usually made public, it is impossible to ascertain the veracity or quality of what is submitted. The fact that the records are not audited also means that members of the legislature are at liberty to declare what they want and leave out other important factors without running the risk of being penalized.

References:

Blessings Chinsinga, associate professor of political and administrative studies, Chancellor College, University of Malawi, Aug. 20, 2011, Zomba

Billy Banda, executive director, Malawi Watch, Sept. 17, 2011, Lilongwe

100: The asset disclosure records of members of the national legislature are complete and detailed, providing the public with an accurate and updated accounting of the individuals' sources of income, investments, and other financial interests.

75:

50: The asset disclosure records of the members of the national legislature contain some useful information but may be lacking important details, including politically sensitive investment or other financial arrangements in which the individual has an interest.

25:

0: The asset disclosure records of the members of the national legislature are overly general, lack any meaningful detail, and do not provide clear accounting of the individuals' sources of income, investments, and other financial assets.

35. Can citizens access legislative processes and documents?

83

35a. In law, citizens can access records of legislative processes and documents.

Yes

No

Comments:

Two constitutional provisions govern public access to records of legislative processes. First, Section 37 of the Malawi Constitution (1995) states that "every person shall have the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise of his or her right." Additionally, Section 56(4) states that "The National Assembly shall provide access to the press and members of the public, except where a motion is passed with reasons prohibiting public access in the national interest."

References:

Malawi Constitution, Section 37, Section 56(4).

Yes: A YES score is earned if there is a general legal right to access records of legislative proceedings including voting records. A YES score can still be given if there are formal rules for specific exemptions to the right to disclosure (special secret sessions related to national security).

No: A NO score is earned if there is no general right to access documents recording legislative proceedings. A NO score is earned if there are exemptions to the general right that are not clearly defined by formal rules.

35b. In practice, citizens can access records of legislative processes and documents within a reasonable time period.

100

75

50

25

0

Comments:

Verbatim records of parliamentary proceedings are published in the Hansard, which is the publication of record of the Malawi National Assembly. However, the publication of the Hansard is often behind, sometimes by months. On the parliamentary website, for example, the most recent Hansard posted is for May 21, 2007. However, most key parliamentary events are covered by the media, including both print and broadcast media, with the Malawi Broadcasting Corp. (MBC) providing live radio coverage while MBC Television provides a recorded summary of proceedings when Parliament is in session.

References:

Hansard, Malawi Parliament website, <http://www.parliament.gov.mw/docs.php?mode=hs>

Blessings Chinsinga, associate professor of political and administrative studies, Chancellor College, University of Malawi, Aug. 20, 2011, Zomba

Dr. Henry Chingaape, director, Centre for Governance and Development Research, Sept. 15, 2011, Lilongwe

100: Records are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information.

75:

50: Records take around two weeks to obtain. Some delays may be experienced.

25:

0: Records take more than a month to acquire. In some cases, most records may be available sooner, but there may be persistent delays in obtaining politically sensitive records.

35c. In practice, citizens can access records of legislative processes and documents at a reasonable cost.

100 | 75 | 50 | 25 | 0

Comments:

The parliamentary Hansards are usually available at modest cost from the Government Printer. They can also be accessed through the Parliamentary library and other libraries for free. Copies of the Hansard are also posted on the Malawi Parliament website and can be downloaded for free, although the web page is not regularly updated.

References:

Hansard, Malawi Parliament website, <http://www.parliament.gov.mw/docs.php?mode=hs>

Dr. Henry Chingaape, director, Centre for Governance and Development Research, Sept. 15, 2011, Lilongwe

100: Records are free to all citizens, or available for the cost of photocopying. Records can be obtained at little cost, such as by mail, or on-line.

75:

50: Records impose a financial burden on citizens, journalists or NGOs. Retrieving records may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving records imposes a major financial burden on citizens. Records costs are prohibitive to most citizens, journalists, or NGOs trying to access this information.

3.3. Conflicts of Interest Safeguards & Checks and Balances: Judicial Branch

36. Are judges appointed fairly?

92

36a. In law, there is a transparent procedure for selecting national-level judges.

Yes

No

Comments:

Appointment of national-level judges is governed by Section 111 of the Constitution. Under this section, the president is granted the power to appoint the chief justice. All other judges are appointed by the president on the recommendation of the Judicial Services Commission (JSC). However, there is no requirement for the JSC to be transparent in the selection process.

Section 112 of the Constitution further provides a clear set criteria for qualification of individuals eligible for appointment as judges. This includes a requirement that all appointees be or should have been a judge of a court having unlimited jurisdiction in criminal or civil proceedings, and are qualified to practice as a legal practitioner or an advocate or a solicitor.

References:

Malawi Constitution, Section 111, Section 112.

Yes: A YES score is earned if there is a formal process for selecting national level justices. This process should be public in the debating and confirmation stages. National-level judges are defined as judges who have powers that derive from a national law or constitution; are nominated/appointed by a national governmental body (head of state/government or national legislature); and/or are elected nationally.

No: A NO score is given if there is no formal process of selection or the process is conducted without public oversight. National-level judges are defined as judges who have powers that derive from a national law or constitution; are nominated/appointed by a national governmental body (head of state/government or national legislature); and/or are elected nationally.

36b. In practice, professional criteria are followed in selecting national-level judges.

100

75

50

25

0

Comments:

The president's role is limited to choosing from among the names of candidates that have been pre-selected and submitted to him by the Judicial Service Commission. The fact that their names have reached his desk means that they have been deemed as qualified by the Judicial Service Commission based on set criteria.

However, oftentimes, the president exercises discretionary power on who to appoint from among the list of recommended names. This has sometimes created challenges in that the president tends to appoint mostly individuals perceived to be more likely to be loyal to him over more qualified individuals.

In June 2011, for example, President Mutharika was accused by the Malawi Law Society of favoritism in his judicial appointments after he appointed Lilongwe chief resident magistrate, Chifundo Kachale, as a High Court judge, bypassing the registrar of the Malawi High Court and Supreme Court of Appeal, Dorothy Kamanga. Mutharika was also queried on his decision to promote Justice Jane Ansah and Richard Chinangwa to serve on the Malawi Supreme Court of Registry, over Justice Rezine Mzikamanda, who had seniority over the newly promoted Justices of Appeal. The president of the Malawi Law Society, John Mwakhwawa, expressed his shock and described the appointments as raising eyebrows, especially since those that were left out had more experience. He went on to suggest that in the future, the nominees for judicial positions should be further vetted by a committee of Parliament.

References:

Nation Newspaper, "Law Society queries judge appointments," June 15, 2011, http://www.mwnation.com/index.php?option=com_content&view=article&id=21179:law-society-queries-judge-appointments&catid=1:national-news&Itemid=3

Malawi Democrat, "Malawi Law Society queries judge appointments," June 15, 2011, <http://www.malawidemocrat.com/politics/malawi-law-society-queries-judge-appointments/>

Prof. Fidelis Kanyongolo, Associate Professor of Constitutional Law, University of Malawi, 13th September, 2011, Zomba

100: National-level judges selected have relevant professional qualifications such as formal legal training, experience as a lower court judge or a career as a litigator.

75:

50: Most national-level judges selected meet these qualifications, with some exceptions.

25:

0: National-level judges are often unqualified due to lack of training or experience.

36c. In law, there is a confirmation process for national-level judges (i.e. conducted by the legislature or an independent body).

Yes

No

Comments:

Judicial appointments are made by the president on the recommendation of the Judicial Service Commission. The law does not require that the appointees go through a confirmation process. Only the appointment of the chief justice goes through a parliamentary confirmation process.

References:

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

Yes: A YES score is earned if there is a formal process establishing a review of national-level judicial nominees by an agency or entity independent from the body appointing the judges.

No: A NO score is earned if there is no formal review. A NO score is earned if the review is conducted by the same body that appoints the judges (such as the Prime Minister approving judicial nominees put forward by the Minister of Justice, both of whom are part of the executive).

37a. In law, members of the national-level judiciary are obliged to give reasons for their decisions.

Yes

No

Comments:

Section 29 of the Courts Act (1958) states that the High Court shall operate under the Rules of the Supreme Court.

Rule Number 27 of the Supreme Court states that the “judgment of the court shall be pronounced in open court” and a certified copy of the written judgment shall be filed by the registrar.

References:

Courts Act (1958), Section 29.

Supreme Court, Rule Number 27.

Yes: A YES score is earned if there is a formal and mandatory process for judges to explain their decisions.

No: A NO score is earned if justices are not required to explain decisions. A NO score is earned if there is a general exemption from explaining some decisions (such as national security).

37b. In practice, members of the national-level judiciary give reasons for their decisions.

100

75

50

25

0

Comments:

In accordance with the rules of the Supreme Court of Malawi, members of the judiciary always give written reasons for their decisions

References:

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

Billy Banda, executive director, Malawi Watch, Sept. 17, 2011, Lilongwe

100: Judges are formally required to explain their judgments in detail, establishing a body of precedent. All judges comply with these requirements.

75:

50: Judges are compelled to give substantial reasons for their decisions, but some exceptions exist. These may include special courts, such as military courts or tribunals.

25:

0: Judges commonly issue decisions without formal explanations.

37c. In law, there is a disciplinary agency (or equivalent mechanism) for the national-level judicial system.

Yes

No

Comments:

Sections 118(b)(c) and 119(2) and (3) of the Constitution state that one of the powers of the Judicial Service Commission is to exercise such disciplinary powers in relation to persons in judicial office and recommend their removal on the grounds of incompetence in the performance of their duties of office or for misbehavior. The law also requires that any motion to remove a judge be debated in the National Assembly and be passed by a majority of the votes of the National Assembly and be passed to the president as a petition for the removal of the judge.

References:

Malawi Constitution, Sections 118(b)(c) and 119(2) and (3) .

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

Yes: A YES score is earned if there is a disciplinary agency (or equivalent mechanism) for the judicial system. A disciplinary agency is defined here as an agency or mechanism specifically mandated to investigate breaches of procedure, abuses of power or other failures of the judiciary. A YES score can still be earned if the judicial disciplinary agency (or mechanism) is internal to the judiciary.

No: A NO score is earned if no agency or mechanism is specifically mandated to act as a disciplinary mechanism for the national-level judiciary.

37d. In law, the judicial disciplinary agency (or equivalent mechanism) is protected from political interference.

Yes

No

Comments:

Section 117 of the Malawi Constitution ensures the independence of the Judicial Service Commission by excluding from its membership non-political members. Members of the commission include the chief justice as chairperson, the chairperson of the Civil Service Commission, a justice of appeal or of the High Court and a legal practitioner.

References:

Constitution, Section 117.

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

Yes: A YES score is earned if there are formal rules establishing that the judicial disciplinary agency (or equivalent mechanism) is protected from political interference by the executive and legislative branches.

No: A NO score is earned if there are no formal rules establishing the independence of the judicial disciplinary agency (or equivalent mechanism). A NO score is given if the judicial disciplinary agency or equivalent mechanism function is carried out by an executive ministry or legislative committee.

37e. In practice, when necessary, the judicial disciplinary agency (or equivalent mechanism) initiates investigations.

100 | 75 | 50 | 25 | 0

Comments:

There have been no records of investigations initiated by the Judicial Service Commission during the study period. However, there were reports that one High Court Judge was being investigated by the Anti-Corruption Bureau for professional misconduct. There were also media reports of judge shopping involving the chief justice that have not been investigated by the Judicial Service Commission.

References:

Deogratias Mmana, Nation, June 25, 2010, "ACB probes high court judge," http://www.mwnation.com/index.php?option=com_content&view=article&id=1630:acb-probes-high-court-judge&catid=63:local-news&Itemid=62

Evelyn Chibwe, Nyasatimes, Sept. 27, 2011, "Chief Justice implicated in Unima 'judge-shopping' move," <http://www.nyasatimes.com/malawi/2011/09/27/chief-justice-implicated-in-unima-%E2%80%98judge-shopping%E2%80%99-move/>

Carolyn Somanje, The Nation, Dec. 15, 2011, "High Court Judge escapes arrest," <http://www.mwnation.com/index.php/the-nation-current/28385-high-court-judge-escapes-arrest.html>

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

100: The judicial disciplinary agency (or equivalent mechanism) aggressively starts investigations — or participates fully with cooperating agencies' investigations — into judicial misconduct. The judicial disciplinary agency (or equivalent mechanism) is fair in its application of this power.

75:

50: The judicial disciplinary agency (or equivalent mechanism) will start or cooperate in investigations, but often relies on external pressure to set priorities, or has limited effectiveness when investigating. The judicial disciplinary agency (or equivalent mechanism), though limited in effectiveness, is still fair in its application of power.

25:

0: The judicial disciplinary agency (or equivalent mechanism) rarely investigates on its own or cooperates in other agencies' investigations, or the judicial disciplinary agency (or equivalent mechanism) is partisan in its application of this power.

37f. In practice, when necessary, the judicial disciplinary agency (or equivalent mechanism) imposes penalties on offenders.

100 | 75 | 50 | 25 | 0

Comments:

In September 2011, the Judicial Service Commission interdicted Magistrate Mzondi Mvula who had been charged by the Anti-Corruption Bureau of abuse of his office and accepting a bribe of \$30,000 in order to pass a favorable verdict.

References:

Frank Namangale, Nation, Sept. 7, 2011, "Magistrate Mvula interdicted," http://www.nationmw.net/index.php?option=com_content&view=article&id=25128:magistrate-mvula-interdicted&catid=1:national-news&Itemid=3

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

100: When rules violations are discovered, the judicial disciplinary agency (or equivalent mechanism) is aggressive in penalizing offenders or in cooperating with other agencies who penalize offenders.

75:

50: The judicial disciplinary agency (or equivalent mechanism) enforces rules, but is limited in its effectiveness. The judicial disciplinary agency (or equivalent mechanism) may be slow to act, unwilling to take on politically powerful offenders, resistant to cooperating with other agencies, or occasionally unable to enforce its judgments.

25:

0: The judicial disciplinary agency (or equivalent mechanism) does not effectively penalize offenders. The judicial disciplinary agency (or equivalent mechanism) may make judgments but not enforce them, does not cooperate with other agencies in enforcing penalties, or may fail to make reasonable judgments against offenders. The judicial disciplinary agency (or equivalent mechanism) may be partisan in its application of power.

38. Are there regulations governing conflicts of interest for the national-level judiciary?

29

38a. In law, members of the national-level judiciary are required to file an asset disclosure form.

Yes

No

Comments:

There is no law requiring members of the national-level judiciary to file an asset disclosure form.

References:

Chikosa Banda, head of the Department of Foundational Law, University of Malawi, Aug. 19, 2011, Zomba

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

Yes: A YES score is earned if all members of the national-level judiciary are required by law to file an asset disclosure form while in office, illustrating sources of income, stock holdings, and other assets. This form does not need to be publicly available to score a YES.

No: A NO score is earned if any member of the national-level judiciary is not required to publicly disclose assets.

38b. In law, there are regulations governing gifts and hospitality offered to members of the national-level judiciary.

Yes

No

Comments:

The offering of gifts and hospitality to members of the national-level judiciary is regulated by the Corrupt Practices Act (1996).

References:

Chikosa Banda, head of the Department of Foundational Law, University of Malawi, Aug. 19, 2011, Zomba

Yes: A YES score is earned if there are formal guidelines regulating gifts and hospitality for members of the national-level judiciary.

No: A NO score is earned if there are no guidelines or regulations with respect to gifts or hospitality offered to members of the national-level judiciary. A NO score is earned if the guidelines are general and do not specify what is and is not appropriate.

38c. In law, there are requirements for the independent auditing of the asset disclosure forms of members of the national-level judiciary.

Yes

No

Comments:

Members of the national-level judiciary are not legally required to disclose their assets.

References:

Chikosa Banda, head of the Department of Foundational Law, University of Malawi, Aug. 19, 2011, Zomba

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

Yes: A YES score is earned if there is a legal or regulatory requirement for independent auditing of national-level judiciary asset disclosures. The auditing is performed by an impartial third-party.

No: A NO score is earned if there are no legal or regulatory requirements for the independent auditing of national-level judiciary asset disclosures or if such requirements exist but allow for self-auditing.

38d. In law, there are restrictions for national-level judges entering the private sector after leaving the government.

Yes

No

Comments:

There is no law that restricts national-level judges from entering the private sector after they leave government. The former chief justice, Richard Banda, for example, opened a private law firm after he retired from the judiciary after reaching the retirement age of 65.

References:

Chikosa Banda, head of the Department of Foundational Law, University of Malawi, Aug. 19, 2011, Zomba

Yes: A YES score is earned if there are regulations restricting national-level judges' ability to take positions in the private sector after leaving government that would present a conflict of interest, including positions that directly seek to influence their former government colleagues.

No: A NO score is earned if no such restrictions exist.

38e. In practice, the regulations restricting post-government private sector employment for national-level judges are effective.

100 | 75 | 50 | 25 | 0

Comments:

There are no laws restricting post-government private sector employment for national-level judges.

References:

Chikosa Banda, head of the Department of Foundational Law, University of Malawi, Aug. 19, 2011, Zomba

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

100: The regulations restricting post-government private sector employment for national-level judges are uniformly enforced. There are no cases or few cases of judges taking jobs in the private sector after leaving government where they directly lobby or seek to influence their former government colleagues without an adequate "cooling off" period.

75:

50: The regulations are generally enforced though some exceptions exist. In certain cases, judges are known to regularly take jobs in the private sector that entail directly lobbying or seeking to influence their former government colleagues. Cooling off periods are short and sometimes ignored.

25:

0: The regulations are rarely or never enforced. Judges routinely take jobs in the private sector following government employment that involve direct lobbying or influencing of former government colleagues. Cooling off periods are non-existent or never enforced. A zero score is also earned if judges are allowed to hold private sector jobs while serving on the bench.

38f. In practice, the regulations governing gifts and hospitality offered to members of the national-level judiciary are effective.

100 | 75 | 50 | 25 | 0

Comments:

There are no records to suggest that Malawi judges accept gifts or hospitality above what is allowed. In the case of Magistrate Mzondi Mvula, when the Anti-Corruption Bureau charged him with accepting a bribe and abusing his office, he was promptly interdicted on the recommendation of the Judicial Service Commission.

However, there have been unsubstantiated claims that certain judges are paid by agents of the ruling party or other litigants to make favorable rulings. This was the accusation leveled against Justice Joseph Manyungwa, who was accused of delivering a judgement over a matter that had been heard by a different judge without the latter's knowledge. Although this matter was picked up by the Anti-Corruption Bureau, the investigation has stalled a year after the allegations were first made.

References:

Deogratias Mmana, Nation, June 25, 2010, "ACB probes high court judge," http://www.mwnation.com/index.php?option=com_content&view=article&id=1630:acb-probes-high-court-judge&catid=63:local-news&Itemid=62

McBain Mkandawire, executive director, Malawi Youthnet and Counseling (YONECO) Aug. 17, 2011, Zomba

100: The regulations governing gifts and hospitality to members of the national-level judiciary are regularly enforced. Judges never or rarely accept gifts or hospitality above what is allowed.

75:

50: The regulations governing gifts and hospitality to members of the national-level judiciary are generally applied though exceptions exist. Some judges are known to accept greater amounts of gifts and hospitality from outside interest groups or private sector actors than is allowed.

25:

0: The regulations are rarely or never enforced. Judges routinely take jobs in the private sector following government employment that involve direct lobbying or influencing of former government colleagues. Cooling off periods are non-existent or never enforced.

38g. In practice, national-level judiciary asset disclosures are audited.

100 | 75 | 50 | 25 | 0

Comments:

Members of the national-level judiciary in Malawi are not legally required to disclose their assets.

References:

Chikosa Banda, head of the Department of Foundational Law, University of Malawi, Aug. 19, 2011, Zomba

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

100: National-level judiciary asset disclosures are regularly audited using generally accepted auditing practices.

75:

50: National-level judiciary asset disclosures are audited, but audits are limited in some way, such as using inadequate auditing standards, or the presence of exceptions to disclosed assets.

25:

0: The regulations are rarely or never enforced. Judges routinely take jobs in the private sector following government employment that involve direct lobbying or influencing of former government colleagues. Cooling off periods are non-existent or never enforced.

39. Can citizens access the asset disclosure records of members of the national-level judiciary?

0

39a. In law, citizens can access the asset disclosure records of members of the national-level judiciary.

Yes

No

Comments:

Members of the national-level judiciary in Malawi are not legally required to disclose their assets.

References:

Chikosa Banda, head of the Department of Foundational Law, University of Malawi, Aug. 19, 2011, Zomba

Billy Banda, executive director, Malawi Watch, Sept. 17, 2011, Lilongwe

Yes: A YES score is earned if members of the national-level judiciary file an asset disclosure form that is, in law, accessible to the public (individuals, civil society groups or journalists).

No: A NO score is earned if there is no asset disclosure for members of the national-level judiciary. A NO score is earned if the form is filed, but not available to the public.

39b. In practice, citizens can access judicial asset disclosure records within a reasonable time period.

100

75

50

25

0

Comments:

Members of the national-level judiciary in Malawi are not legally required to disclose their assets.

References:

Chikosa Banda, head of the Department of Foundational Law, University of Malawi, Aug. 19, 2011, Zomba

Billy Banda, executive director, Malawi Watch, Sept. 17, 2011, Lilongwe

100: Records are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information.

75:

50: Records take around two weeks to obtain. Some delays may be experienced.

25:

0: Records take more than a month to acquire. In some cases, most records may be available sooner, but there may be persistent delays in obtaining politically sensitive records.

39c. In practice, citizens can access judicial asset disclosure records at a reasonable cost.

100 | 75 | 50 | 25 | 0

Comments:

Members of the national-level judiciary in Malawi are not legally required to disclose their assets.

References:

Chikosa Banda, head of the Department of Foundational Law, University of Malawi, Aug. 19, 2011, Zomba

Billy Banda, executive director, Malawi Watch, Sept. 17, 2011, Lilongwe

100: Records are free to all citizens, or available for the cost of photocopying. Records can be obtained at little cost, such as by mail, or on-line.

75:

50: Records impose a financial burden on citizens, journalists or NGOs. Retrieving records may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving records imposes a major financial burden on citizens. Records costs are prohibitive to most citizens, journalists, or NGOs trying to access this information.

39d. In practice, the asset disclosure records of the national-level judiciary are of high quality.

100 | 75 | 50 | 25 | 0

Comments:

Members of the national-level judiciary in Malawi are not legally required to disclose their assets.

References:

Chikosa Banda, head of the Department of Foundational Law, University of Malawi, Aug. 19, 2011, Zomba

Billy Banda, executive director, Malawi Watch, Sept. 17, 2011, Lilongwe

100: The asset disclosure records of the national-level judiciary are complete and detailed, providing the public with an accurate and updated accounting of the individuals' sources of income, investments, and other financial interests.

75:

50: The asset disclosure records of the national-level judiciary contain some useful information but may be lacking important details, including politically sensitive investment or other financial arrangements in which the individual has an interest.

25:

0: The asset disclosure records of the national-level judiciary are overly general, lack any meaningful detail, and do not provide a clear accounting of the individuals' sources of income, investments, and other financial assets.

3.4. Budget Process Oversight & Transparency

40. Can the legislature provide input to the national budget?

67

40a. In law, the legislature can amend the budget.

Yes

No

Comments:

The budget is tabled in Parliament by the minister of finance by way of a government bill. Under Section 66(1)(a) of the Malawi Constitution, 1995, Parliament can "receive, amend, accept or reject government bills and private members bills."

Although the law empowers Parliament to amend the budget, in practice, the minister of finance has strong control over the process and amendments can only happen after a process of intense negotiation with the minister of finance and senior officials in the ministry.

References:

Malawi Constitution, 66(1)(a).

Dr. Henry Chingaipe, director, Centre for Governance and Development Research, Sept. 15, 2011, Lilongwe

Yes: A YES score is earned if the legislature has the power to add or remove items to the national government budget.

No: A NO score is earned if the legislature can only approve but not change details of the budget. A NO score is earned if the legislature has no input into the budget process.

40b. In practice, significant public expenditures require legislative approval.

100 | 75 | 50 | 25 | 0

Comments:

While in principle all significant expenditures require legislative approval, sometimes approvals have been given after the expenditures have already been made. This was the case in 2010 when government explained to Parliament its rationale for purchasing a new presidential jet a year after the transaction had been made.

References:

Kondwani Munthali, Nation, June 23, 2010, "Government justifies jet purchase," http://www.nationmw.net/index.php?option=com_content&view=article&id=1439:government-justifies-jet-purchase&catid=1:national-news&Itemid=3

Dr. Henry Chingaape, director, Centre for Governance and Development Research, Sept. 15, 2011, Lilongwe

Billy Banda, executive director, Malawi Watch, Sept. 17, 2011, Lilongwe

100: All significant government expenditures (defined as any project costing more than 1% of the total national budget), must be approved by the legislature. This includes defense and secret programs, which may be debated in closed hearings.

75:

50: Most significant government expenditures (as defined) are approved by the legislature, but some exceptions to this rule exist. This may include defense programs, an executive's personal budget, or other expenses.

25:

0: The legislature does not have the power to approve or disapprove large portions of the government budget, or the legislature does not exercise this power in a meaningful way.

40c. In practice, the legislature has sufficient capacity to monitor the budget process and provide input or changes.

100 | 75 | 50 | 25 | 0

Comments:

Members of the Malawi legislature do not have professional support staff to help them monitor the budget and other legislative processes. Often, the input from legislators on the budget is to support the position adopted by their parties.

In the current Parliament, which is dominated by the ruling party, there is very little critique of the budget. The 2011/12 National Budget, for example, was passed without a single amendment after legislators from the ruling party passed a motion to curtail the time allotted for debate.

References:

Suzgo Khunga, Daily Times, July 1, 2011, "K303bn zero-deficit budget passed," <http://bnltimes.com/national/42-all/1783-k303bn-zero-deficit-budget-passed-.html>

Reporter, Malawi Democrat, July 1, 2011, "Malawi \$2bn budget approved, President bans foreign trips," <http://www.malawidemocrat.com/politics/malawi-2bn-budget-approved-president-bans-foreign-trips/>

Dr. Henry Chingaape, director, Centre for Governance and Development Research, Sept. 15, 2011, Lilongwe

100: Legislators benefit from a sufficient and qualified staff as well as adequate financial and physical resources. Lack of capacity is never a reason why legislators cannot carry out their duties effectively.

75:

50: Legislators have some staff and financial resources but are limited by a shortfall of resources to adequately perform all of their budgetary oversight functions. Legislators are occasionally overwhelmed by the volume of work to be performed.

25:

0: Legislators have little to no staff and virtually no financial resources with which to perform their budgetary oversight role. Lack of resources is a regular and systemic problem that cripples the performance of the legislature.

41. Can citizens access the national budgetary process?

83

41a. In practice, the national budgetary process is conducted in a transparent manner in the debating stage (i.e. before final approval).

100 | 75 | 50 | 25 | 0

Comments:

In 2010, Malawi had a score of 47 on the Open Budget Index, placing it in the middle tier of countries with “some” transparency. Malawi’s OBI score in 2010 was 8 among 27 African countries on the Index. The budget session of Parliament is covered by the media, including live coverage on radio by the Malawi Broadcasting Corp. Legislators contributing to the debate are known and can be identified by name. However, changes to budget line items are only made at the discretion of the minister of finance, usually behind closed doors with the top leadership of the ruling party and only presented in the legislature for formal approval. Most members of Parliament in Malawi also lack the expertise necessary to scrutinize the budget adequately. So although the process is sufficiently transparent, there are usually very minimal submissions made for adjustments.

References:

Dr. Henry Chingaipe, director, Centre for Governance and Development Research, Sept. 15, 2011, Lilongwe

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

100: Budget debates are public and records of these proceedings are easily accessible. Authors of individual budget items can easily be identified. Nearly all budget negotiations are conducted in these official proceedings.

75:

50: There is a formal, transparent process for budget debate, but major budget modifications may be negotiated in separate, closed sessions. Some items, such as non-secret defense projects, may be negotiated in closed sessions. Authors of individual line items may be difficult to identify.

25:

0: Budget negotiations are effectively closed to the public. There may be a formal, transparent process, but most real discussion and debate happens in other, closed settings.

41b. In practice, citizens provide input at budget hearings.

100	75	50	25	0
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Comments:

The minister of finance holds budgetary consultation meetings with various sectors of society for the purpose of soliciting ideas and input from members of the public. Civil society organizations are among the key stakeholders that are consulted in this process. However, the extent to which the information gathered from these consultation meetings affects the final budget itself is not very clear.

References:

Austin Kakande, Malawi Voice, April 4, 2011, "Kandodo kick-starts pre-budget consultation tour," <http://www.malawivoice.com/business/kandodo-kick-starts-pre-budget-consultation-tour/>

Dr. Henry Chingaipe, director, Centre for Governance and Development Research, Sept. 15, 2011, Lilongwe

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

100: Citizens, usually acting through NGOs, can provide information or commentary to the budget debate through a formal process. This information is essential to the process of evaluating budget priorities.

75:

50: Citizens or NGOs can provide input, but this information is often not relevant to budget decisions.

25:

0: Citizens or NGOs have no formal access to provide input to the budget debate.

41c. In practice, citizens can access itemized budget allocations.

100	75	50	25	0
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Comments:

It is possible for citizens to access itemized budget allocations, although the process of obtaining the budget documents can be time-consuming as one has to go through frustrating bureaucratic procedures. Since the 2007/2008 financial year, the Ministry of Finance has also been posting copies of the budget statements and specific sector allocations online at: <http://www.finance.gov.mw/index.php>

References:

Malawi Ministry of Finance, website, <http://www.finance.gov.mw>

Dr. Henry Chingaipe, director, Centre for Governance and Development Research, Sept. 15, 2011, Lilongwe

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

100: Citizens, journalists and NGOs can access itemized lists of budget allocations. This information is easily available and up to date.

75:

50: Citizens, journalists and NGOs can access itemized lists of budget allocations but this information may be difficult to access, incomplete or out of date.

25:

0: Citizens cannot access an itemized list of budget allocations, due to secrecy, prohibitive barriers or government inefficiency.

42. In law, is there a separate legislative committee which provides oversight of public funds?

100

42a. In law, is there a separate legislative committee which provides oversight of public funds?

Yes

No

Comments:

Standing Order Number 163 of the Malawi Parliament establishes a Public Accounts Committee whose responsibilities include examining the audited public accounts showing the appropriation of the sums granted by the National Assembly meet the public expenditure and examining such other public accounts laid before Parliament.

The Malawi National Assembly has two types of committees: the first group includes four committees that are established under the Constitution. the second category includes committees established under the parliamentary standing orders. The Public Accounts Committee belongs is in this second group.

References:

Standing Order Number 163 of the Malawi Parliament.

Dr. Henry Chingaipe, director, Centre for Governance and Development Research, Sept. 15, 2011, Lilongwe

Yes: A YES score is earned if there is a dedicated legislative committee (or equivalent group located in the legislature) that oversees the expenditure of public funds.

No: A NO score is earned if no such body exists within the legislature. A NO score is earned if there is a body executing this function but it is not part of the legislature (such as a separate supreme audit institution).

43. Is the legislative committee overseeing the expenditure of public funds effective?

50

43a. In practice, department heads regularly submit reports to this committee.

100 | 75 | 50 | 25 | 0

Comments:

Heads of ministry or Cabinet-level agencies often delay in submitting reports to the Public Accounts Committee of Parliament. The Public Accounts Committee has regularly complained about missing information and on a number of occasions, has sent back heads of ministries to prepare adequately before reappearing before the committee.

References:

Dr. Henry Chingaape, director, Centre for Governance and Development Research, Sept. 15, 2011, Lilongwe

Billy Banda, executive director, Malawi Watch, Sept. 17, 2011, Lilongwe

100: Heads of ministry- or cabinet-level agencies submit regular, formal reports of expenses to a budget oversight committee.

75:

50: Agency heads submit reports to a budget oversight committee, but these reports are flawed in some way. The reports may be inconsistently delivered, or lacking important details.

25:

0: There is no budget oversight committee or equivalent, or heads of agencies do not submit meaningful reports to the agency.

43b. In practice, the committee acts in a non-partisan manner with members of opposition parties serving on the committee in an equitable fashion.

100 | 75 | 50 | 25 | 0

Comments:

The current Public Accounts Committee has a total of 22 members, distributed in proportion to the partisan composition of Parliament. According to this criteria, the majority of the membership of PAC (14 members) come from the ruling Democratic Progressive Party. The main opposition Malawi Congress Party has four members and the United Democratic Front has three. One member is independent. Both the chair of the committee and his deputy are from the ruling DPP.

References:

Malawi Parliament, Public Accounts Committee Composition, <http://www.parliament.gov.mw/mps.php?mode=com>

Dr. Henry Chingaape, director, Centre for Governance and Development Research, Sept. 15, 2011, Lilongwe

Billy Banda, Executive Director, Malawi Watch, Sept. 16, 2011, Lilongwe

100: The committee is comprised of legislators from both the ruling party (or parties) and opposition parties in a roughly equitable distribution. All members of the committee — including opposition party members — are able to fully participate in the activities of the committee and influence the committee's work to roughly the same extent as any other member of the committee.

75:

50: The committee is comprised of legislators from both the ruling party (or parties) and opposition parties although the ruling party has a disproportionate share of committee seats. The chairperson of the committee may be overly influential and curb other members' ability to shape the committee's activities.

25:

0: The committee is dominated by legislators of the ruling party and/or the committee chairperson. Opposition legislators serving on the committee have in practice no way to influence the work of the committee.

43c. In practice, when necessary, this committee initiates independent investigations into financial irregularities.

100 | 75 | **50** | 25 | 0

Comments:

The Public Accounts Committee of Parliament has on a number of occasions initiated investigations into cases of financial irregularities. However, these investigations often take too long or stall when they are overtaken by other events. As a result, the conclusions of most of the investigations are never made public, or in some cases, investigations are simply dropped before reaching a conclusion.

References:

Dr. Henry Chingaipe, director, Centre for Governance and Development Research, Sept. 15, 2011, Lilongwe

Billy Banda, executive director, Malawi Watch, Sept. 17, 2011, Lilongwe

100: When irregularities are discovered, the committee is aggressive in investigating the government.

75:

50: The committee starts investigations, but is limited in its effectiveness. The committee may be slow to act, unwilling to take on politically powerful offenders, or occasionally unable to enforce its judgments.

25:

0: The committee does not effectively investigate financial irregularities. The committee may start investigations but not complete them, or may fail to detect offenders. The committee may be partisan in its application of power.

Category 4. Public Administration and Professionalism

4.1. ⁷⁹Civil Service: Conflicts of Interest Safeguards and Political Independence

44. Are there national regulations for the civil service encompassing, at least, the managerial and professional staff?

44a. In law, there are regulations requiring an impartial, independent and fairly managed civil service.

Yes

No

Comments:

Section 198 (1) of the Malawi Constitution states that members of the civil service shall ensure that the exercise of participation in political activities does not compromise their independent exercise of their functions, powers and duties as impartial servants of the general public. Additionally, the Malawi Public Service Act (1994) requires that civil servants be impartial and independent in discharging their responsibilities.

References:

Malawi Constitution, Section 198 (1).

Malawi Public Service Act (1994).

Yes: A YES score is earned if there are specific formal rules establishing that the civil service carry out its duties independent of political interference.

No: A NO score is earned if there are no formal rules establishing an independent civil service.

44b. In law, there are regulations to prevent nepotism, cronyism, and patronage within the civil service.

Yes

No

Comments:

Section 193(4) of the Malawi Constitution states that no government or political party shall cause any civil servant, acting in that behalf to deploy resources, whether they be financial, material or human resources, for the purposes of promoting or undermining any political party or member of a political party or interest group, nor shall any civil servant acting in that behalf cause such deployment.

References:

Malawi Constitution, Section 193(4).

Yes: A YES score is earned if there are specific formal rules prohibiting nepotism, cronyism, and patronage in the civil service. These should include competitive recruitment and promotion procedures as well as safeguards against arbitrary disciplinary actions and dismissal.

No: A NO score is earned if no such regulations exist.

44c. In law, there is an independent redress mechanism for the civil service.

Yes

No

Comments:

Under Section 123 of the Malawi Constitution, individuals, including both serving and retired civil servants, who have suffered any form of injustice and do not appear to have any other remedy through court proceedings, may complain to the Ombudsman who is mandated to investigate any such cases, and the Ombudsman can direct appropriate administrative action to be taken to redress the grievance.

References:

Section 123 of the Malawi Constitution.

Yes: A YES score is earned if there is a mechanism to which civil servants and applicants for the civil service can take grievances regarding civil service management actions. The mechanism should be independent of their supervisors but can still be located within the government agency or entity (such as a special commission or board). Civil servants are able to appeal the mechanism's decisions to the judiciary.

No: A NO score is earned if no such mechanism exists, or if the only recourse civil servants have is directly through the courts.

44d. In law, civil servants convicted of corruption are prohibited from future government employment.

Yes

No

Comments:

Section 40 of the Corrupt Practices Act (1995) states that "any person convicted of an offense of corruption shall, by reason of such conviction, be disqualified for a period of seven years from the date of such conviction from being elected or appointed to, or from holding or continuing to hold, any office or position in any public body."

References:

Section 40 of the Corrupt Practices Act (1995).

Yes: A YES score is earned if there are specific rules prohibiting continued government employment following a corruption conviction.

No: A NO score is earned if no such rules exist or if the ban is not a lifetime ban.

45. Is the law governing the administration and civil service effective?

56

45a. In practice, civil servants are protected from political interference.

Comments:

Although the law requires civil servants to be independent, senior government officials often have to demonstrate loyalty to the ruling party and president in order to keep their jobs. In a number of cases, senior government officials are appointed on the basis of their loyalty to the president and the ruling party.

During the period under review, for example, there were regular reports that that government was prioritizing the appointment of individuals from the president's ethnic group, the Lomwes, into senior government positions.

The president also frequently spoke in defense of senior public officials deemed to be his loyalists. In March 2011, for example, President Mutharika spoke in defense of the Inspector General of Police, Peter Mukhito, after Mukhito was accused of compromising academic freedom at the University of Malawi following his decision to summon one of the university lecturers over matters covered in class.

Following President Mutharika's order to Mukhito telling him not to apologize, the inspector general refused to apologize as demanded by the university lecturers, resulting in the indefinite closure of Chancellor College of the University of Malawi from February 2011 to the date of writing.

In a bid to demonstrate their loyalty to the president and the ruling party, most senior government officials feel pressured into attending all presidential events, including those that are of a purely partisan nature.

References:

Mphatso Namathanga, Malawi Democrat, March 11, 2011, "Wa Mutharika dares lecturers, Police IG won't apologize," <http://www.malawidemocrat.com/politics/wa-mutharika-dares-lecturers-%E2%80%98police-ig-wont%E2%80%99-apologise%E2%80%99/>

Mercy Jamali, head of the department of political and administrative studies department, Sept. 13, 2011, Zomba

Dr. Henry Chingaipe, director, Centre for Governance and Development Research, Sept. 15, 2011, Lilongwe

100: Civil servants operate independently of the political process, without incentive or pressure to render favorable treatment or policy decisions on politically sensitive issues. Civil servants rarely comment on political debates. Individual judgments are rarely praised or criticized by political figures. Civil servants can bring a case to the courts challenging politically-motivated firings.

75:

50: Civil servants are typically independent, yet are sometimes influenced in their judgments by negative or positive political or personal incentives. This may include favorable or unfavorable treatment by superiors, public criticism or praise by the government, or other forms of influence. Civil servants may bring a case to the judicial system challenging politically-motivated firings but the case may encounter delays or bureaucratic hurdles.

25:

0: Civil servants are commonly influenced by political or personal matters. This may include conflicting family relationships, professional partnerships, or other personal loyalties. Negative incentives may include threats, harassment or other abuses of power. Civil servants are unable to find a remedy in the courts for unjustified or politically-motivated firings.

45b. In practice, civil servants are appointed and evaluated according to professional criteria.

Comments:

While appointments at the junior and technical ranks of government follow clear professional criteria, performance appraisals at higher levels of the civil service tend to place greater weighting on how one performs according to the wishes of the top political leadership. In some cases, individuals are transferred to government departments where they have no expertise to make room for government sympathizers to replace them.

In August 2011, for example, several employees were redeployed from the Malawi Broadcasting Corp. (MBC) to different government departments without respect to their qualifications and expertise. In one case, a former principal editor at MBC Radio who holds a bachelor's degree in journalism and in the final stages of a finishing a master's degree in political science, was redeployed to the Ministry of Education to serve as a clerical officer, with a new salary that was four and half times less than his previous position.

References:

Caroline Somanje, The Nation, Aug. 31, 2011, "Pay reductions, demotions at MBC," http://www.nationmw.net/index.php?option=com_content&view=article&id=24914:pay-reductions-demotions-at-mbc&catid=1:national-news&Itemid=3

Mercy Jamali, head of the department of political and administrative studies department, Sept. 13, 2011, Zomba

100: Appointments to the civil service and their professional evaluations are made based on professional qualifications. Individuals appointed are free of conflicts of interest arising from personal loyalties, family connections or other biases. Individuals appointed usually do not have clear political party affiliations.

75:

50: Appointments and professional assessments are usually based on professional qualifications. Individuals appointed may have clear party loyalties, however.

25:

0: Appointments and professional assessments are often based on political considerations. Individuals appointed often have conflicts of interest due to personal loyalties, family connections or other biases. Individuals appointed often have clear party loyalties.

45c. In practice, civil service management actions (e.g. hiring, firing, promotions) are not based on nepotism, cronyism, or patronage.

100 | 75 | **50** | 25 | 0

Comments:

President Mutharika has been accused of nepotism in appointing individuals to senior government positions. In early 2011, it emerged that the government had ordered that First Lady Callista Mutharika should be drawing a monthly government salary of K1.1 million (about \$6,670) for her voluntary position as Safe Motherhood Ambassador. This amount is higher than the salaries of Cabinet ministers.

There have also been accusations that government has given priority to members of President Mutharika's Lhomwe ethnic group for appointments to several top government positions.

Also, a number of senior ruling party officials have been absorbed into government without going through any proper interviews. For example, after being dismissed from his position as secretary general of the ruling Democratic Progressive Party (DPP), Bintony Kutsaira was appointed into a newly created position of presidential adviser on youth development, located in the office of the President and Cabinet.

References:

Gregory Gondwe, Feb. 9, 2011 "Callista Mutharika drawing salary for a charitable cause," http://gondwe-gregory.blogspot.com/2011/02/callista-mutharika-drawing-salary-for_09.html

Justice Mponda, Malawi Voice, March 4, 2011, "Callista deserves K1.1 million salary: she has unimpeachable credentials to attract such hefty salary-Ntaba," <http://www.malawivoice.com/latest-news/callista-deserves-k1-1-million-salary-she-has-unimpeachable-credentials-to-attract-such-hefty-salary-ntaba/>

Austin Kakande, Malawi Voice, Sept. 2, 2011, "Bingu appoints Binton Kutsaira as presidential adviser on youth development," <http://www.malawivoice.com/politics/bingu-appoints-binton-kutsaira-as-presidential-advisor-on-youth-development/>

Mercy Jamali, head of the department of political and administrative studies department, Sept. 13, 2011, Zomba

100: Nepotism (favorable treatment of family members), cronyism (favorable treatment of friends and colleagues), and patronage (favorable treatment of those who reward their superiors) are actively discouraged at all levels of the civil service. Hirings, firings, and promotions are based on merit and performance.

75:

50: Nepotism, cronyism, and patronage are discouraged, but exceptions exist. Political leaders or senior officials sometimes appoint family member or friends to favorable positions in the civil service, or lend other favorable treatment.

25:

0: Nepotism, cronyism, and patronage are commonly accepted principles in hiring, firing and promotions of civil servants.

45d. In practice, civil servants have clear job descriptions.

100 | 75 | 50 | 25 | 0

Comments:

There are usually very clear job descriptions for civil servants. The only exception to this rule are the positions appointed at the discretion of the president, such as his advisers.

References:

Mercy Jamali, head of the department of political and administrative studies department, Sept. 13, 2011, Zomba

Billy Banda, executive director, Malawi Watch, Sept. 17, 2011, Lilongwe

100: Civil servants almost always have formal job descriptions establishing levels of seniority, assigned functions, and compensation. Job descriptions are a reliable representation of positions in terms of a person's authority, responsibility and base pay.

75:

50: Civil servants often have formal job descriptions, but exceptions exist. Some civil servants may not be part of the formal assignment of duties and compensations. Some job descriptions may not map clearly to pay or responsibilities in some cases.

25:

0: Civil servants do not have formal roles or job descriptions. If they do, such job descriptions have little or nothing to do with the position's responsibilities, authority, or pay.

45e. In practice, civil servant bonuses constitute only a small fraction of total pay.

100 | 75 | 50 | 25 | 0

Comments:

Malawi civil servants do not receive any extra bonuses apart from their salaries.

References:

Mercy Jamali, head of the department of political and administrative studies department, Sept. 13, 2011, Zomba

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

100: Civil servant bonuses constitute no more than 10% of total pay and do not represent a major element of take-home pay.

75:

50: Civil servant bonuses are generally a small percentage of total take-home pay for most civil servants though exceptions exist where some civil servants' bonuses represent a significant part of total pay.

25:

0: Most civil servants receive bonuses that represent a significant amount of total take-home pay. In some cases bonuses represent the majority of total pay to civil servants.

45f. In practice, the government publishes the number of authorized civil service positions along with the number of positions actually filled.

100 | 75 | 50 | 25 | 0

Comments:

The government has not published the number of authorized civil service positions and the number of positions actually filled for a long time. This is supposed to be the responsibility of the Civil Service Commission which has not been appointed for more than a year. In June 2011, it was reported that the Malawi government had frozen new recruitment in the civil service because the 2011/12 budget made no provision for the recruitment of new staff to fill new or existing vacancies as part of cost-cutting measures.

References:

Phillip Pemba, The Nation, June 29, 2011, "Malawi freezes civil service recruitment," http://www.nationmw.net/index.php?option=com_content&view=article&id=21974:malawi-freezes-civil-service-recruitment&catid=1:national-news&Itemid=3

Mercy Jamali, head of the department of political and administrative studies department, Sept. 13, 2011, Zomba

100: The government publishes such a list on a regular basis.

75:

50: The government publishes such a list but it is often delayed or incomplete. There may be multiple years in between each successive publication.

25:

0: The government rarely or never publishes such a list, or when it does it is wholly incomplete.

45g. In practice, the independent redress mechanism for the civil service is effective.

100 | 75 | 50 | 25 | 0

Comments:

The main sources of redress for civil servants are the Office of the Ombudsman and the courts. While the courts have served as a constant redress mechanism for Malawi's civil servants, the Office of the Ombudsman was hampered from operating between 2009 and late 2010 when government failed to fill the position of the Ombudsman after the previous holder had retired. In the absence of an Ombudsman, all requests for redress could not be investigated or processed as such action requires the Ombudsman's approval.

References:

Abel Wezi, Maravipost, Oct. 1, 2010, "Retired justice Chizumila new Ombudsman," <http://www.maravipost.com/-life-and-style/people/4090-retired-justice-chizumila-new-ombudsman.html>

Mercy Jamali, head of the department of political and administrative studies department, Sept. 13, 2011, Zomba

100: The independent redress mechanism for the civil service can control the timing and pace of its investigations without any input from the bodies that manage civil servants on a day-to-day basis.

75:

50: The independent civil service redress mechanism can generally decide what to investigate and when but is sometimes subject to pressure from the executive or the bodies that manage civil servants on a day-to-day basis on politically sensitive issues.

25:

0: The civil service redress mechanism must rely on approval from the executive or the bodies that manage civil servants on a day-to-day basis before initiating investigations. Politically sensitive investigations are almost impossible to move forward on.

45h. In practice, in the past year, the government has paid civil servants on time.

100 | 75 | 50 | 25 | 0

Comments:

Over the last year, there have been regular reports of civil servants being paid late. The explanations for these delays have ranged from payroll changes, technical problems arising from a new requirement for all civil servants to be paid through direct deposit in banks, and cash flow shortages due to the withdrawal of donor aid pending governance and economic reforms.

In early August 2011, for example, it was reported that over 80 percent of Malawi's civil servants had not been paid their July salaries due to cash flow problems although the government attributed the delay to network upgrading.

References:

Rex Chikoko, Malawi Democrat, Aug. 5, 2011, "Malawi fails to pay civil servants after donor pullout," <http://www.malawidemocrat.com/politics/malawi-fails-to-pay-civil-servants-after-donor-pullout/>

Mercy Jamali, head of the department of political and administrative studies department, Sept. 13, 2011, Zomba

100: In the past year, no civil servants have been paid late.

75:

50: In the past year, some civil servants have been paid late.

25:

0: In the past year, civil servants have frequently been denied due pay.

45i. In practice, civil servants convicted of corruption are prohibited from future government employment.

100 | 75 | 50 | 25 | 0

Comments:

The Corrupt Practices Act states that persons convicted of corruption should be disqualified from being appointed, elected or holding any public positions for at least seven years. This is generally adhered to, although the Anti-Corruption Bureau often stalls in investigating and prosecuting senior officials from the ruling party. In the absence of convictions, these individuals can continue to serve in public office.

For example, in mid 2010, President Mutharika dropped Patricia Kaliyati from his Cabinet after she had been accused of corruption in the award of mobile telephone licenses and a tourism concession. However, although the ACB indicated that it had launched investigations into the matter, not much progress had been made. In September 2011, when President Mutharika reshuffled his Cabinet, he appointed Kaliyati back into her old position as minister of information despite the fact that the corruption allegations had not been resolved.

References:

Phillip Pemba, The Nation, Sept. 16, 2011, "ACB still probing Goodall, Kaliyati," http://www.nationmw.net/index.php?option=com_content&view=article&id=25416:acb-still-probing-goodall-kaliyati&catid=62:national-news&Itemid=59

Blessings Chinsinga, associate professor of political and administrative studies, Chancellor College, University of Malawi, Aug. 20, 2011, Zomba

100: A system of formal blacklists and cooling off periods is in place for civil servants convicted of corruption. All civil servants are subject to this system.

75:

50: A system of formal blacklists and cooling off periods is in place, but the system has flaws. Some civil servants may not be affected by the system, or the prohibitions are sometimes not effective. Some bans are only temporary.

25:

0: There is no such system, or the system is consistently ineffective in prohibiting future employment of convicted civil servants.

46. Are there regulations addressing conflicts of interest for civil servants?

44

46a. In law, senior members of the civil service are required to file an asset disclosure form.

Yes

No

Comments:

Section 213(1)(b) of the Constitution of the Republic of Malawi requires senior-grade public officers to fully disclose their assets, liabilities and business interests and those of their spouses within three months of their appointment.

References:

Malawi Constitution, Section 213(1)(b).

Yes: A YES score is earned if senior members of the civil service are required by law to file an asset disclosure form while in office, illustrating sources of income, stock holdings, and other assets. This form does not need to be publicly available to score a YES.

No: A NO score is earned if any senior member of the civil service is not required to disclose assets.

46b. In law, there are requirements for civil servants to recuse themselves from policy decisions where their personal interests may be affected.

Yes

No

Comments:

The Malawi Constitution provides in the section on principles of national policy that government shall introduce measures “which shall guarantee accountability, transparency, personal integrity and financial probity and which by virtue of their effectiveness and visibility, shall strengthen confidence in public institutions.” To this end, several laws, such as the Public Procurement Act (2003); the Public Enterprises (Privatization) Act 1995, and the Corrupt Practices Act (1995), to mention but a few, require public officials to declare their interest and recuse themselves from making decisions that would benefit them directly or their family members.

References:

Malawi Constitution (1995), Section 13(o).

Laws of Malawi, Public Procurement Act (2003), Section 19.

Laws of Malawi, Public Enterprises (Privatization) Act 1995, Section 17 (1 and 2).

Laws of Malawi, Corrupt Practices Act (1995), Section 25B.

Yes: A YES score is earned if there are requirements for civil servants to recuse themselves from policy decisions where their personal interests, including personal financial interests as well as those of their family and friends, are affected.

No: A NO score exists if no such requirements exist in regulation or law.

46c. In law, there are restrictions for civil servants entering the private sector after leaving the government.

Yes | **No**

Comments:

Laws that restrict civil servants from entering the private sector after leaving government could be deemed unconstitutional as they would contradict the right to economic activity enshrined in Section 29 of the Malawi Constitution.

References:

There is no law restricting civil servants from entering the private sector after leaving government.

Mercy Jamali, head of the department of political and administrative studies department, Sept. 13, 2011, Zomba

Yes: A YES score is earned if there are regulations restricting civil servants' ability to take positions in the private sector after leaving government that would present a conflict of interest, including positions that directly seek to influence their former government colleagues.

No: A NO score is earned if no such restrictions exist.

46d. In law, there are regulations governing gifts and hospitality offered to civil servants.

Yes | No

Comments:

Section 24 of the Corrupt Practices Act (1995) makes it an offense for any public officer to receive or solicit a gift "as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, anything in relation to any matter or transaction, actual or proposed, with which any public body is or may be concerned..."

References:

Laws of Malawi, Corrupt Practices Act (1995), Section 24

Yes: A YES score is earned if there are formal guidelines regarding gifts and hospitality given to civil servants.

No: A NO score is earned if there are no such guidelines or regulations.

46e. In law, there are requirements for the independent auditing of the asset disclosure forms of senior members of the civil service.

Yes

No

Comments:

Section 213(4) of the Malawi Constitution (1995) states that there shall be “a committee of Parliament appointed by the National Assembly which shall have the function of monitoring the compliance with the requirement on the disclosure of assets.” However, this provision only covers the enforcement of the asset disclosures but does not cover the auditing of the disclosure forms.

References:

Malawi Constitution, Section 213(4) (1995).

Yes: A YES score is earned if there is a legal or regulatory requirement for independent auditing of civil service asset disclosures. The auditing is performed by an impartial third-party.

No: A NO score is earned if there are no legal or regulatory requirements for the independent auditing of civil service asset disclosures or if such requirements exist but allow for self-auditing.

46f. In practice, the regulations restricting post-government private sector employment for civil servants are effective.

100

75

50

25

0

Comments:

There are no restrictions on post-government private sector employment for civil servants in Malawi. Any such restrictions, had they existed, could also be challenged under Section 29 of the Constitution which guarantees the right for every person to freely engage in economic activity, to work and to pursue a livelihood anywhere in Malawi.

References:

Mercy Jamali, head of the department of political and administrative studies department, Sept. 13, 2011, Zomba

Catherine Kabango, public education officer, Anti-Corruption Bureau, Sept. 16, 2011, Lilongwe

100: The regulations restricting post-government private sector employment for civil servants are uniformly enforced. There are no cases or few cases of civil servants taking jobs in the private sector after leaving government where they directly lobby or seek to influence their former government colleagues without an adequate “cooling off” period.

75:

50: The regulations are generally enforced though some exceptions exist. In certain sectors, civil servants are known to regularly take jobs in the private sector that entail directly lobbying or seeking to influence their former government colleagues. Cooling off periods are short and sometimes ignored.

25:

0: The regulations are rarely or never enforced. Civil servants routinely take jobs in the private sector following government employment that involve direct lobbying or influencing of former government colleagues. Cooling off periods are non-existent or never enforced.

46g. In practice, the regulations governing gifts and hospitality offered to civil servants are effective.

100 | 75 | 50 | 25 | 0

Comments:

The regulations governing gifts and hospitality offered to civil servants are often applied selectively. While junior civil servants are regularly penalized for receiving gifts and hospitality under the Corrupt Practices Act (1995), senior public officials, including the president himself, are never questioned or investigated for receiving gifts and hospitality.

During 2011, for example, there were accusations that President Mutharika has been benefiting from gifts from a private construction company that has built a mansion for him in his home village in Thyolo district in return for securing government contracts.

References:

Anthony Kasunda, The Nation, July 22, 2011, "Bingu must explain his wealth," http://www.nationmw.net/index.php?option=com_content&view=article&id=23165:bingu-must-explain-his-wealth&catid=1:national-news&Itemid=3

Wiseman Chirwa, professor of political history, University of Malawi, Sept. 9, 2011, Zomba

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

100: The regulations governing gifts and hospitality to civil servants are regularly enforced. Civil servants never or rarely accept gifts or hospitality above what is allowed.

75:

50: The regulations governing gifts and hospitality to civil servants are generally applied though exceptions exist. Some civil servants in certain sectors are known to accept greater amounts of gifts and hospitality from outside interest groups or private sector actors than is allowed.

25:

0: The regulations governing gifts and hospitality to the civil service are routinely ignored and unenforced. Civil servants routinely accept significant amounts of gifts and hospitality from outside interest groups and actors seeking to influence their decisions.

46h. In practice, the requirements for civil service recusal from policy decisions affecting personal interests are effective.

100 | 75 | 50 | 25 | 0

Comments:

In the majority of cases, civil servants recuse themselves from policy decisions affecting personal interests. However, a substantial number try to get around these rules to promote decisions that are beneficial to themselves, their families and friends. In April 2011, for example, it was reported that the Malawi Housing Corporation (MHC) had decided to sell off 22 houses at heavily discounted prices to groups of people that included several senior ruling party politicians and senior employees of the Housing Corporation. Among the beneficiaries was MHC General Manager Golden Matiya and his wife, as well as other senior officials at MHC who took part in the decision without recusing themselves or declaring their interest in the matter.

References:

Theresa Chapulapula, The Daily Times, April 20, 2011, "MHC loses K105 m on house sell," <http://fairreporters.wordpress.com/investigative-headlines/mhc-loses-k105-m-on-house-sell/>

Mercy Jamali, head of the department of political and administrative studies department, Sept. 13, 2011, Zomba

Billy Banda, executive director, Malawi Watch, Sept. 17, 2011, Lilongwe

100: The requirements that civil servants recuse themselves from policy decisions where their personal interests are affected are routinely followed by most or all civil servants.

75:

50: The requirements that civil servants recuse themselves from policy decisions where their personal interests are affected are followed by most civil servants though exceptions exist. In certain sectors, civil servants are known to routinely participate in policy decisions where their personal interests are affected.

25:

0: Most civil servants routinely ignore recusal requirements and continue to participate in policy decisions where their personal interests are affected.

46i. In practice, civil service asset disclosures are audited.

100 | 75 | 50 | 25 | 0

Comments:

Only senior civil servants are required to declare their assets, although this is often never done. As a result, there are no asset disclosure forms to be audited. The Corrupt Practices Act (1995) also empowers the Anti-Corruption Bureau to investigate cases of officials' unexplained property — public officials who are deemed to maintain a standard of living that is above that which is commensurate with their present or past compensation or other known sources of income. However, there have been no known cases where senior public officials have been investigated and prosecuted for this offense.

References:

Mercy Jamali, head of the department of political and administrative studies department, Sept. 13, 2011, Zomba

Billy Banda, executive director, Malawi Watch, Sept. 17, 2011, Lilongwe

100: Civil service asset disclosures are regularly audited using generally accepted auditing practices.

75:

50: Civil service asset disclosures are audited, but audits are limited in some way, such as using inadequate auditing standards, or the presence of exceptions to disclosed assets.

25:

0: Civil service asset disclosures are not audited, or the audits performed have no value. Audits may be performed by entities known to be partisan or biased in their practices.

47. Can citizens access the asset disclosure records of senior civil servants?

47a. In law, citizens can access the asset disclosure records of senior civil servants.

Yes

No

Comments:

The law governing the disclosure of assets by senior-grade civil servants (Section 213 of the Constitution) states that the asset disclosure records be deposited with a public office specified in the standing orders of Parliament. This means that the documents become public and can be requested by citizens under Section 37 of the Malawi Constitution, which guarantees the right of access to all information held by the state.

References:

Malawi Constitution, Section 213, Section 37.

Yes: A YES score is earned if laws or regulations guarantee that citizens can access the asset records of senior civil servants.

No: A NO score is earned if senior civil servants do not file an asset disclosure. A NO score is earned if senior civil servants file an asset disclosure, but it is not available to the public.

47b. In practice, citizens can access the asset disclosure records of senior civil servants within a reasonable time period.

100

75

50

25

0

Comments:

There are no records of any senior-level civil servants who have disclosed their assets in Malawi. As a result, there are no asset disclosure records that can be accessed by ordinary Malawi citizens. Judging from the reluctance of public officials mandated with keeping the asset disclosure forms of the president, members of Cabinet and legislators to release any existing asset disclosure records, it is also very doubtful that any asset disclosure records of senior-level civil servants, if they existed, would be publicly accessible.

References:

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

Mercy Jamali, head of the department of political and administrative studies department, Sept. 13, 2011, Zomba

100: Records are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information.

75:

50: Records take around two weeks to obtain. Some delays may be experienced.

25:

0: Records take more than a month to acquire. In some cases, most records may be available sooner, but there may be persistent delays in obtaining politically sensitive records.

47c. In practice, citizens can access the asset disclosure records of senior civil servants at a reasonable cost.

100 | 75 | 50 | 25 | 0

Comments:

The asset disclosure records of senior-level civil servants are not available and, thus, cannot be accessed by citizens.

References:

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

Mercy Jamali, head of the department of political and administrative studies department, Sept. 13, 2011, Zomba

100: Records are free to all citizens, or available for the cost of photocopying. Records can be obtained at little cost, such as by mail, or on-line.

75:

50: Records impose a financial burden on citizens, journalists or NGOs. Retrieving records may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving records imposes a major financial burden on citizens. Records' costs are prohibitive to most citizens, journalists, or NGOs trying to access this information.

47d. In practice, the asset disclosure records of senior civil servants are of high quality.

100 | 75 | 50 | 25 | 0

Comments:

Although the law requires them to, senior-level civil servants in Malawi do not disclose their assets.

References:

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

Mercy Jamali, head of the department of political and administrative studies department, Sept. 13, 2011, Zomba

100: The asset disclosure records of senior civil servants are complete and detailed, providing the public with an accurate and updated accounting of the individuals' sources of income, investments, and other financial interests.

75:

50: The asset disclosure records of senior civil servants contain some useful information but may be lacking important details, including politically sensitive investment or other financial arrangements in which the individual has an interest.

25:

0: The asset disclosure records of senior civil servants are overly general, lack any meaningful detail, and do not provide a clear accounting of the individuals' sources of income, investments, and other financial assets.

4.2. Whistle-blowing Protections

48. Are employees protected from recrimination or other negative consequences when reporting corruption (i.e. whistle-blowing)?

88

48a. In law, civil servants who report cases of corruption, graft, abuse of power, or abuse of resources are protected from recrimination or other negative consequences.

Yes

No

Comments:

Section 51A of the Corrupt Practices Act (1995) protects whistle-blowers and other informers and makes any act of retribution against such informers a crime that is punishable by a fine of up to K50,000 and imprisonment for two years.

References:

Section 51A of the Corrupt Practices Act (1995).

Yes: A YES score is earned if there are specific laws against recrimination against public sector whistleblowers. This may include prohibitions on termination, transfer, harassment or other consequences.

No: A NO score is earned if there are no legal protections for public-sector whistleblowers.

48b. In practice, civil servants who report cases of corruption, graft, abuse of power, or abuse of resources are protected from recrimination or other negative consequences.

100

75

50

25

0

Comments:

There were no records of civil servants who report cases of corruption, graft, abuse of power, or abuse of resources suffering any form of recrimination or other negative consequences. Whistle-blowers are protected from identification and the Anti-Corruption Bureau strives not to require whistle-blowers to appear in court as witnesses when the corruption cases they reported are being prosecuted.

References:

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

Catherine Kabango, public education officer, Anti-Corruption Bureau, Sept. 16, 2011, Lilongwe

100: Public sector whistleblowers can report abuses of power without fear of negative consequences. This may be due to robust mechanisms to protect the identity of whistleblowers or may be due to a culture that encourages disclosure and accountability.

75:

50: Public sector whistleblowers are sometimes able to come forward without negative consequences, but in other cases, whistleblowers are punished for disclosing, either through official or unofficial means.

25:

0: Public sector whistleblowers often face substantial negative consequences, such as losing a job, relocating to a less prominent position, or some form of harassment.

48c. In law, private sector employees who report cases of corruption, graft, abuse of power, or abuse of resources are protected from recrimination or other negative consequences.

Yes

No

Comments:

Section 51A of the Corrupt Practices Act (1995) protects both public and private sector employees who report cases of corruption and makes any recrimination against such informers a crime punishable with a fine of K50,000 and two years in prison.

References:

Section 51A of the Corrupt Practices Act (1995).

Yes: A YES score is earned if there are specific laws against recrimination against private sector whistleblowers. This may include prohibitions on termination, transfer, harassment or other consequences.

No: A NO score is earned if there are no legal protections for private-sector whistleblowers.

48d. In practice, private sector employees who report cases of corruption, graft, abuse of power, or abuse of resources are protected from recrimination or other negative consequences.

100

75

50

25

0

Comments:

The Corrupt Practices Act (1995) guarantees anonymity and legal protection for corruption whistle-blowers, be they from the public or private sectors. Any recrimination of corruption whistle-blowers is also a punishable offense.

References:

The Corrupt Practices Act (1995)

Billy Banda, executive director, Malawi Watch, Sept. 17, 2011, Lilongwe

Catherine Kabango, public education officer, Anti-Corruption Bureau, Sept. 16, 2011, Lilongwe

100: Private sector whistleblowers can report abuses of power without fear of negative consequences. This may be due to robust mechanisms to protect the identity of whistleblowers or may be due to a culture that encourages disclosure and accountability.

75:

50: Private sector whistleblowers are sometimes able to come forward without negative consequences, but in other cases, whistleblowers are punished for disclosing, either through official or unofficial means.

25:

0: Private sector whistleblowers often face substantial negative consequences, such as losing a job, relocating to a less prominent position, or some form of harassment.

49. In law, is there an internal mechanism (i.e. phone hotline, e-mail address, local office) through which civil servants can report corruption?

100

49a. In law, is there an internal mechanism (i.e. phone hotline, e-mail address, local office) through which civil servants can report corruption?

Yes

No

Comments:

Section10(1)(b) of the Corrupt Practices Act (1995) mandates the Anti- Corruption Bureau (ACB) to “receive any complaints, report or other information of any alleged or suspected corrupt practice or offense.” In order to fulfill this responsibility, the ACB has several mechanisms for receiving corruption complaints that includes a free telephone hotline, email, letters and offices for receiving corruption complaints.

References:

Section10(1)(b) of the Corrupt Practices Act (1995).

Catherine Kabango, public education officer, Anti-Corruption Bureau, Sept. 16, 2011, Lilongwe

Yes: A YES score is earned if there is a mechanism, or multiple mechanisms for multiple national government agencies, through which civil servants can report cases of graft, misuse of public funds, or corruption.

No: A NO score is earned if no such mechanism (or equivalent series of mechanisms) exists.

50. In practice, is the internal mechanism (i.e. phone hotline, e-mail address, local office) through which civil servants can report corruption effective?

81

50a. In practice, the internal reporting mechanism for public sector corruption has a professional, full-time staff.

100 | 75 | 50 | 25 | 0

Comments:

The Anti-Corruption Bureau operates reporting centers in Lilongwe, Blantyre and Mzuzu. These centers, which have a staff of five each, manage a free telephone hotline for receiving complaints about corruption. Complainants can also write letters, send emails or walk in at any of the bureau's offices in Lilongwe, Blantyre and Mzuzu to report cases of corruption. There is also an option on the ACB's website for members of the public to report cases of corruption.

References:

Anti-Corruption Bureau website, Report Corruption, <http://www.anti-corruptionbureau.mw/report-corruption/>

McBain Mkandawire, executive director, Malawi Youthnet and Counseling (YONECO), Aug. 17, 2011, Zomba

Catherine Kabango, Public Education Officer, Anti Corruption Bureau, September 16, 2011, Lilongwe

100: The agency/entity has staff sufficient to fulfill its basic mandate.

75:

50: The agency/entity has limited staff, a fact that hinders its ability to fulfill its basic mandate.

25:

0: The agency/entity has no staff, or a limited staff that is clearly unqualified to fulfill its mandate.

50b. In practice, the internal reporting mechanism for public sector corruption receives regular funding.

100 | 75 | 50 | 25 | 0

Comments:

The Anti-Corruption Bureau (ACB) is funded by government while donors also directly fund the Anti-Corruption Bureau to enable it to fulfill its responsibilities. The corruption reporting centers are attached to the ACB's investigations unit which has its own separate budget line.

References:

Catherine Kabango, public education officer, Anti-Corruption Bureau, Sept. 16, 2011, Lilongwe

100: The agency/entity has a predictable source of funding that is fairly consistent from year to year. Political considerations are not a major factor in determining agency funding.

75:

50: The agency/entity has a regular source of funding but may be pressured by cuts, or threats of cuts to the agency budget. Political considerations have an effect on agency funding.

25:

0: Funding source is unreliable. Funding may be removed arbitrarily or as retaliation for agency actions.

50c. In practice, the internal reporting mechanism for public sector corruption acts on complaints within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

When an Anti-Corruption Bureau reporting center receives a complaint, it is submitted to a Complaints Review Committee, which meets once a week to review the complaints and make recommendations on which ones need further investigation. However, resolution over issues can take long as the Anti-Corruption Bureau is limited by the number of investigators it can allocate on all complaints received.

References:

Mercy Jamali, head of the department of political and administrative studies department, Sept. 13, 2011, Zomba

Catherine Kabango, public education officer, Anti-Corruption Bureau, Sept. 16, 2011, Lilongwe

100: The agency/entity acts on complaints quickly. While some backlog is expected and inevitable, complaints are acknowledged promptly and investigations into serious abuses move steadily towards resolution. Citizens with simple issues can expect a resolution within a month.

75:

50: The agency/entity acts on complaints quickly, with some exceptions. Some complaints may not be acknowledged, and simple issues may take more than two months to resolve.

25:

0: The agency/entity cannot resolve complaints quickly. Complaints may be unacknowledged for more than a month, and simple issues may take more than three months to resolve. Serious abuses are not investigated with any urgency.

50d. In practice, when necessary, the internal reporting mechanism for public sector corruption initiates investigations.

Comments:

The Anti-Corruption Bureau (ACB) is often very quick to initiate investigations. However, oftentimes, when allegations are made against senior officials from the ruling party, the investigations stall and very little progress is made. In April 2011, for example, the ACB indicated that it had initiated investigations after the media exposed a scam at the Malawi Housing Corporation (MHC) involving the sale of public housing at discounted pricing to senior officials from the ruling party, including the brother to President Mutharika. However, as of September 2011, not much progress had been made on those investigations.

References:

Theresa Chapulapula, Daily Times, April 27, 2011, "ACB probes MHC scam," <http://www.bnlntimes.com/business/834-acb-probes-mhc-scam.html>

Mercy Jamali, head of the department of political and administrative studies department, Sept. 13, 2011, Zomba

Catherine Kabango, public education officer, Anti-Corruption Bureau, Sept. 16, 2011, Lilongwe

100: When irregularities are discovered, the agency/entity is aggressive in investigating the government or in cooperating with other agencies' investigations.

75:

50: The agency/entity starts investigations, but is limited in its effectiveness. The agency/entity may be slow to act, unwilling to take on politically powerful offenders, reluctant to cooperate with other investigative agencies, or occasionally unable to enforce its judgments.

25:

0: The agency/entity does not effectively investigate. The agency/entity may start investigations but not complete them, may refuse to cooperate with other investigative agencies, or may fail to detect offenders. The agency/entity may be partisan in its application of power.

90

4.3. Government Procurement: Transparency, Fairness, and Conflicts of Interest Safeguards

51. Is the public procurement process effective?

80

51a. In law, there are regulations addressing conflicts of interest for public procurement officials.

Yes

No

Comments:

Section 18(1)(c) of the Public Procurement Act (2003) states that public officials involved in requisitioning, planning, preparing and conducting procurement proceedings, and administering the implementation of procurement contracts shall “at all times avoid conflicts of interest, and the appearance of impropriety, in carrying out their duties and conducting themselves, and shall not interfere in the work of Internal Procurement Committees.”

Subsection (d) of the same provision states that procurement officials shall “not commit or abet corrupt or fraudulent practices, including the solicitation or acceptance of improper inducements.”

Section 19(1) and (2) of the act further state that public officials or a member of an Internal Procurement Committee who acquire any pecuniary interest, direct or indirect, in any matter to be determined by the committee, “shall declare the interest and recuse himself or herself from acting in any way in that matter and shall not take part in consideration or discussion of, or vote on any question with respect to the matter.” Contravention of this subsection amounts to a crime and is punishable by a fine of K50,000 and imprisonment for two years.

References:

Section 18(1)(c) and 18(1)(d), Section 19(1) and 19(2) of the Public Procurement Act (2003).

Yes: A YES score is earned if there are specific formal regulations defining and regulating conflicts of interest between official public duty and private interests for public procurement officials. A YES score is earned if such regulations cover all civil servants, including procurement officials.

No: A NO score is earned if no such rules exist.

51b. In law, there is mandatory professional training for public procurement officials.

Yes

No

Comments:

Section 11 of the Public Procurement Act (2003) states that procurement units shall be “staffed with personnel trained in public procurement, and shall include at least two specialists whose professional qualifications have been certified by the director to meet requirements that shall have been issued by the director.”

Section 12 of the act meanwhile stipulates that the director of the Office of Public Procurement “shall develop and recommend to the minister a career development and management program, and a system for selection, appointment and termination of appointment for the cadre of procurement professionals.”

Special courses on public procurement, including supply chain management, are being offered at the University of Malawi’s Polytechnic campus in Blantyre.

References:

Section 11, Section 12, of the Public Procurement Act (2003).

Mercy Jamali, head of the department of political and administrative studies department, Sept. 13, 2011, Zomba

Yes: A YES score is earned if public procurement officials receive regular mandatory training to ensure professional standards in supervising the tendering process. A YES score is earned if such training is mandated for portions of the broader civil service, to include procurement officials.

No: A NO score is earned if there is no regular required training of public procurement officials or if training is sporadic, inconsistent, unrelated to procurement processes, or voluntary.

51c. In practice, the conflicts of interest regulations for public procurement officials are enforced.

100 | 75 | 50 | 25 | 0

Comments:

Although the Procurement Act has provisions regulating conflicts of interests for procurement officials, people often find ways of getting around the regulations by establishing businesses in the names of family members.

References:

Mercy Jamali, head of the department of political and administrative studies department, Sept. 13, 2011, Zomba

Billy Banda, executive director, Malawi Watch, Sept. 17, 2011, Lilongwe

100: Regulations regarding conflicts of interest for procurement officials are aggressively enforced.

75:

50: Conflict-of-interest regulations exist, but are flawed. Some violations may not be enforced, or some officials may be exempt from regulations.

25:

0: Conflict-of-interest regulations do not exist, or are consistently ineffective.

51d. In law, there is a mechanism that monitors the assets, incomes and spending habits of public procurement officials.

Yes | No

Comments:

There is no law that either establishes an agency to monitor the assets of public procurement officials or provide mechanisms for any such monitoring.

References:

Mercy Jamali, head of the department of political and administrative studies department, Sept. 13, 2011, Zomba

Catherine Kabango, public education officer, Anti-Corruption Bureau, Sept. 16, 2011, Lilongwe

Yes: A YES score is earned if there is a formal mandate to some agency to monitor the assets, incomes and spending habits of public procurement officials, such as an inspector general, or ombudsman.

No: A NO score is earned if no such mandate exists.

51e. In law, major procurements require competitive bidding.

Yes

No

Comments:

Section 30 of the Public Procurement Act (2003) states that the method of tendering for goods and services shall be "by means of open tendering proceedings." Any diversion from this requirement has to be approved by the director of the Office of Public Procurement. Section 31 of the act sets out the specific details to be followed in the open tendering process.

References:

Sections 30 and 31 of the Public Procurement Act (2003).

Yes: A YES score is earned if all major procurements (defined as those greater than 0.5% of GDP) require competitive bidding.

No: A NO score is earned if competitive bidding is not required by law or regulation for major procurement (greater than 0.5% OF GDP).

51f. In law, strict formal requirements limit the extent of sole sourcing.

Yes

No

Comments:

Section 30(10) of the Public Procurement Act (2003) sets out very specific details about sole sourcing. Sole sourcing is allowed only on the basis of four circumstances: when the estimated value of the procurement does not exceed the amount set in the regulations; when only one supplier has the technical capability or capacity to fulfill the procurement requirement; when there is an emergency need for the goods, works and services; and when the procuring entity, having procured goods, works and services from a supplier, determines that additional goods, construction or services, must be procured from the same source for reasons of standardization or because of the need for compatibility with existing goods, equipment, technology, construction or services.

References:

Section 30(10) of the Public Procurement Act (2003).

Yes: A YES score is earned if sole sourcing is limited to specific, tightly defined conditions, such as when a supplier is the only source of a skill or technology.

No: A NO score is earned if there are no prohibitions on sole sourcing. A NO score is earned if the prohibitions on sole sourcing are general and unspecific.

51g. In law, unsuccessful bidders can instigate an official review of procurement decisions.

Yes

No

Comments:

Under Section 37(1) of the Public Procurement Act, “Any bidder that claims to have suffered, or that may suffer, loss or injury due to a breach of a duty imposed on the procuring entity by this Act or the Regulations, may seek review.”

References:

Section 37(1) of the Public Procurement Act.

Mercy Jamali, head of the department of political and administrative studies department, Sept. 13, 2011, Zomba

Yes: A YES score is earned if there is a formal appeal process for unsuccessful bidders.

No: A NO score is earned if no such process exists.

51h. In law, unsuccessful bidders can challenge procurement decisions in a court of law.

Yes

No

Comments:

Section 38(13) of the Public Procurement Act grants jurisdiction to the High Court of Malawi to hear cases over actions and other petitions seeking the review of decisions made by review bodies, or of the failure of those bodies to make a decision.

References:

Section 38(13) of the Public Procurement Act.

Yes: A YES score is earned if unsuccessful bidders can use the courts to appeal a procurement decision.

No: A NO score is earned if no such process exists.

51i. In law, companies guilty of major violations of procurement regulations (i.e. bribery) are prohibited from participating in future procurement bids.

Yes

No

Comments:

Section 20 of the Public Procurement Act (2003) empowers the director of the Office of Public Procurement to “exclude a bidder or supplier from participation in procurement” for any acts of misconduct after providing reasonable notice to the bidder or supplier and after providing reasonable opportunity for that bidder or supplier to be heard and consultation with the affected procuring entities.

References:

Section 20 of the Public Procurement Act (2003).

Mercy Jamali, head of the department of political and administrative studies department, Sept. 13, 2011, Zomba

Yes: A YES score is earned if there are formal procurement blacklists, designed to prevent convicted companies from doing business with the government.

No: A NO score is earned if no such process exists.

51j. In practice, companies guilty of major violations of procurement regulations (i.e. bribery) are prohibited from participating in future procurement bids.

100 | 75 | **50** | 25 | 0

Comments:

There are no available records of companies that have been prohibited from participating in future procurement bids on account of having committed major violations of procurement regulations. However, the Office of the Director of Public Procurement reports to have such lists.

References:

Mercy Jamali, head of the department of political and administrative studies department, Sept. 13, 2011, Zomba

Billy Banda, executive director, Malawi Watch, Sept. 17, 2011, Lilongwe

100: A system of formal blacklists and cooling off periods is in place for companies convicted of corruption. All companies are subject to this system.

75:

50: A system of formal blacklists and cooling off periods is in place, but the system has flaws. Some procurements or companies may not be affected by the system, or the prohibitions are sometimes not effective.

25:

0: There is no such system, or the system is consistently ineffective in prohibiting future hiring of blacklisted companies.

52. Can citizens access the public procurement process?

100

52a. In law, citizens can access public procurement regulations.

Yes | No

Comments:

Section 5(1)(b) of the Public Procurement Act (2003) states that one of the functions of the director of the Office of Public procurement is to “ensure the availability and the accessibility to public officials and the general public of this act and regulations.”

References:

Section 5(1)(b) of the Public Procurement Act (2003).

Yes: A YES score is earned if procurement rules are, by law, open to the public. These regulations are defined here as the rules governing the competitive procurement process.

No: A NO score is earned if procurement rules are officially secret for any reason or if there are no procurement rules.

52b. In law, the government is required to publicly announce the results of procurement decisions.

Yes

No

Comments:

Section 26 of the Public Procurement Act (2003) requires all procuring entities to “promptly publish notice of all procurement contract awards when the price of the award exceeds the level set by regulation, and the notice, which shall indicate the contract price and the name and address of the successful bidder, shall be published in the Gazette.”

References:

Section 26 of the Public Procurement Act (2003).

Yes: A YES score is earned if the government is required to publicly post or announce the results of the public procurement process. This can be done through major media outlets or on a publicly-accessible government register or log.

No: A NO score is earned if there is no requirement for the government to publicly announce the results of the public procurement process.

52c. In practice, citizens can access public procurement regulations within a reasonable time period.

100

75

50

25

0

Comments:

Public procurement regulations can be obtained from the Office of the Director of Public Procurement. The regulations are also readily available from internal procurement committees. The Office of the Director of Public Procurement also publishes the regulations on its website, www.odpp.gov.mw

References:

Office of the Director of Public Procurement, www.odpp.gov.mw

Mercy Jamali, head of the department of political and administrative studies department, Sept. 13, 2011, Zomba

100: Records are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information. These records are defined here as the rules governing the competitive procurement process.

75:

50: Records take around two weeks to obtain. Some delays may be experienced.

25:

0: Records take more than a month to acquire. In some cases, most records may be available sooner, but there may be persistent delays in obtaining politically sensitive records.

52d. In practice, citizens can access public procurement regulations at a reasonable cost.

100 | 75 | 50 | 25 | 0

Comments:

Public procurement regulations can be obtained from the Office of the Director of Public Procurement or from internal procurement committees at the cost of photocopying. The Office of the Director of Public Procurement also publishes the regulations on its website, www.odpp.gov.mw, where they can be downloaded free of charge.

References:

Office of the Director of Public Procurement, www.odpp.gov.mw

Mercy Jamali, head of the department of political and administrative studies department, Sept. 13, 2011, Zomba

Dr. Henry Chingaipe, director, Centre for Governance and Development Research, Sept. 15, 2011, Lilongwe

100: Records are free to all citizens, or available for the cost of photocopying. Records can be obtained at little cost, such as by mail, or on-line. These records are defined here as the rules governing the competitive procurement process.

75:

50: Records impose a financial burden on citizens, journalists or NGOs. Retrieving records may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving records imposes a major financial burden on citizens. Records costs are prohibitive to most citizens, journalists, or NGOs trying to access this information.

52e. In practice, major public procurements are effectively advertised.

100 | 75 | 50 | 25 | 0

Comments:

Major public procurements are advertised in the media and on the website of the Office of the Director of Public procurement (www.odpp.gov.mw).

References:

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

Mercy Jamali, head of the department of political and administrative studies department, Sept. 13, 2011, Zomba

100: There is a formal process of advertising public procurements. This may include a government website, newspaper advertising, or other official announcements. All major procurements are advertised in this way. Sufficient time is allowed for bidders to respond to advertisements.

75:

50: There is a formal process of advertisement but it is flawed. Some major procurements may not be advertised, or the advertising process may not be effective. The time between advertisements and bidding may be too short to allow full participation.

25:

0: There is no formal process of advertising major public procurements or the process is superficial and ineffective.

52f. In practice, citizens can access the results of major public procurement bids.

100 | 75 | 50 | 25 | 0

Comments:

Results of major procurement bids are always published in the print media. Section 27 of the Public Procurement Act (2003) also requires all procuring entities to keep records of procurement proceedings, including originals of bids received. These records have to be kept for a minimum of five years and to make these records available to any individual on request during that time.

References:

Section 27 of the Public Procurement Act (2003)

Mercy Jamali, head of the department of political and administrative studies department, Sept. 13, 2011, Zomba

Billy Banda, executive director, Malawi Watch, Sept. 16, 2011, Lilongwe

100: Records of public procurement results are publicly available through a formal process.

75:

50: Records of public procurements are available, but there are exceptions to this practice. Some information may not be available, or some citizens may not be able to access information.

25:

0: This information is not available to the public through an official process.

4.4. Privatization of Public Administrative Functions: Transparency, Fairness, and Conflicts of Interest Safeguards

53. Is the privatization process effective?

83

53a. In law, all businesses are eligible to compete for privatized state assets.

Yes

No

Comments:

The Public Enterprises (Privatization) Act of 1997, which governs the privatization of state assets, does not bar any type of businesses from being eligible to bid for privatized state assets.

References:

The Public Enterprises (Privatization) Act of 1997.

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

Yes: A YES score is earned if all businesses are equally eligible to compete for privatized assets. A YES score is still earned if the government did not privatize any state-owned assets during the study period.

No: A NO score is earned if any group of businesses (other than those blacklisted due to corruption charges) is excluded by law.

53b. In law, there are regulations addressing conflicts of interest for government officials involved in privatization.

Yes

No

Comments:

Section 25D of the Corrupt Practices Act (1995) requires that all government officials who have a public interest in a matter being decided should declare their interest and should not take part in or be in attendance during the discussion or consideration of the contract being proposed. Any contravention of this provision is considered a punishable crime.

References:

Section 25D of the Corrupt Practices Act (1995).

Yes: A YES score is earned if there are specific formal regulations defining and regulating conflicts of interest between official public duty and private interests for privatization officials. A YES score is earned if such regulations cover all civil servants, including privatization officials.

No: A NO score is earned if there are no such formal regulations.

53c. In practice, conflicts of interest regulations for government officials involved in privatization are enforced.

100 | 75 | **50** | 25 | 0

Comments:

The prevailing feeling is that some government officials find ways around the regulations governing conflict of interest in privatization processes. This is done by public officials enrolling family members or friends to take part in the privatization process on their behalf.

References:

Wiseman Chirwa, professor of political history, University of Malawi, Sept. 9, 2011, Zomba

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

Lewis Dzimbiri, dean of social science and professor of labor relations, Chancellor College, Sept. 14, 2011, Zomba

100: Regulations regarding conflicts of interest for privatization officials are aggressively enforced.

75:

50: Conflict-of-interest regulations exist, but are flawed. Some violations may not be enforced, or some officials may be exempt from the regulations.

25:

0: Conflict of interest regulations do not exist, or are consistently ineffective.

54. Can citizens access the terms and conditions of privatization bids?

80

54a. In law, citizens can access privatization regulations.

Yes | No

Comments:

The Privatization Commission publicizes privatization regulations in the media and on the commission's website (<http://www.privatisationmalawi.org/>). The privatization rules are set out in the Public Enterprises (Privatization) Act (1996) which is also posted in full on the Privatization Commission's website.

References:

The Privatization Commission (<http://www.privatisationmalawi.org/>).

Public Enterprises (Privatization) Act (1996)

Yes: A YES score is earned if privatization rules (defined here as the rules governing the competitive privatization process) are, by law, open to the public. Even if privatization is infrequent or rare, the most recent privatization should be used as the basis for scoring this indicator.

No: A NO score is earned if privatization rules are officially secret for any reason or if there are no privatization rules.

54b. In practice, privatizations are effectively advertised.

100 | 75 | 50 | 25 | 0

Comments:

The Malawi Privatization Commission is required under Section 38 of the Public Enterprises (Privatization) Act to publicize in at least two newspapers in general circulation in Malawi details about public enterprises to be privatized and the mode of privatization. The commission always adheres to this requirement and also publishes additional details on the commission's website. Bidders are given sufficient time to respond to these adverts. There are also usually incentives to encourage indigenous investors to get a chance to acquire a stake in the privatized entities.

References:

Privatization Commission, <http://www.privatisationmalawi.org/>

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

Mercy Jamali, head of the department of political and administrative studies department, Sept. 13, 2011, Zomba

100: There is a formal process of advertising privatizations. This may include a government website, newspaper advertising, or other official announcements. All major procurements are advertised in this way. Sufficient time is allowed for bidders to respond to advertisements.

75:

50: There is a formal process of advertisement but it is flawed. Some privatizations may not be advertised, or the advertising process may not be effective. The time between advertisements and bidding may be too short to allow full participation.

25:

0: There is no formal process of advertising privatizations or the process is superficial and ineffective.

54c. In law, the government is required to publicly announce the results of privatization decisions.

Yes

No

Comments:

The law does not require the Privatization Commission to announce publicly the results of privatization decisions. However, Section 38 of the Public Enterprises (Privatization) Act obligates the commission to “keep proper and maintain records of the bidders and bid prices; the successful bidders and the reason for selecting such bidders and the price of shares and any other special conditions of the sale of shares.” This information can then be made available to any member of the public having an interest in the privatized entity on request.

References:

No law exists.

Yes: A YES score is earned if the government is required to publicly post or announce the results of the privatization process. This can be done through major media outlets or on a publicly-accessible government register or log.

No: A NO score is earned if there is no requirement for the government to publicly announce the results of the privatization process.

54d. In practice, citizens can access privatization regulations within a reasonable time period.

100

75

50

25

0

Comments:

The rules governing the privatization process are available online at the Privatization Commission's website (<http://www.privatisationmalawi.org/>). The regulations are also routinely published in the media and can also be obtained from the offices of the Privatization Commission.

References:

Privatization Commission Website, <http://www.privatisationmalawi.org/>

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

Mercy Jamali, head of the department of political and administrative studies department, Sept. 13, 2011, Zomba

100: Records (defined here as the rules governing the competitive privatization process) are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information.

75:

50: Records take around two weeks to obtain. Some delays may be experienced.

25:

0: Records take more than a month to acquire. In some cases, most records may be available sooner, but there may be persistent delays in obtaining politically sensitive records.

54e. In practice, citizens can access privatization regulations at a reasonable cost.

100 | 75 | 50 | 25 | 0

Comments:

The privatization regulations can be downloaded free of charge from the Privatization Commission's website at the cost of the Internet connectivity. They can also be obtained from the Privatization Commission at the cost of photocopying.

References:

Privatization Commission Website, <http://www.privatisationmalawi.org/>

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

Mercy Jamali, head of the department of political and administrative studies department, Sept. 13, 2011, Zomba

100: Records (defined here as the rules governing the competitive privatization process) are free to all citizens, or available for the cost of photocopying. Records can be obtained at little cost, such as by mail, or on-line.

75:

50: Records impose a financial burden on citizens, journalists or NGOs. Retrieving records may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving records imposes a major financial burden on citizens. Records costs are prohibitive to most citizens, journalists, or NGOs trying to access this information.

Category 5. Government Oversight and Controls

5.1. National Ombudsman

55. In law, is there a national ombudsman, public protector or equivalent agency (or collection of agencies) covering the entire public sector?

100

55a. In law, is there a national ombudsman, public protector or equivalent agency (or collection of agencies) covering the entire public sector?

Yes

No

Comments:

The Office of the Ombudsman is established under Chapter X of the Malawi Constitution (1995). Section 120 of this Malawi Constitution states that "There shall be a public office known as the Office of the Ombudsman which shall have such powers, functions and responsibilities as are conferred upon that office by this Constitution and any other laws."

References:

Chapter X, Section 120 of the Malawi Constitution (1995).

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

Yes: A YES score is earned if there is a specific agency or set of agencies whose primary mandate is to investigate the actions of government on the behalf of common citizens. This agency or set of agencies should be specifically charged with seeking out and documenting abuses of power.

No: A NO score is earned if no such agency or set of agencies exists, or that function is a secondary concern of a larger body, such as the legislature.

56. Is the national ombudsman effective?

75

56a. In law, the ombudsman is protected from political interference.

Yes

No

Comments:

The independence of the Ombudsman is guaranteed by the Constitution, which states in Section 121 that "in the exercise of his or her powers, functions and duties, the Ombudsman shall be completely independent of the interference or direction of any other person or authority." In addition, the Ombudsman Act (1996) grants the office of the Malawi Ombudsman further independence in its operations.

References:

Malawi Constitution, Section 121.

Ombudsman Act (1996).

Dr. Henry Chingaipe, director, Centre for Governance and Development Research, Sept. 15, 2011, Lilongwe

Yes: A YES score is earned only if the agency (or set of agencies) has some formal organizational independence from the government. A YES score is earned even if the entity is legally separate but in practice staffed by partisans.

No: A NO score is earned if the agency is a subordinate part of any government ministry or agency, such as the Department of Interior or the Justice Department.

56b. In practice, the ombudsman is protected from political interference.

100 | 75 | 50 | 25 | 0

Comments:

While the Office of the Ombudsman is protected from political interference, there have been several attempts by the ruling political elites to influence the choice of Ombudsman in a bid to influence the office's operations. After the term of office of the previous Ombudsman had expired, the Malawi government did not nominate any new candidates for the office for a period of one year. This brought paralysis in the operations of the office as any decision on whether to accept or reject submissions to the office are supposed to be made by the Ombudsman.

References:

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

Dr. Henry Chingaape, director, Centre for Governance and Development Research, Sept. 15, 2011, Lilongwe

100: This agency (or set of agencies) operates independently of the political process, without incentive or pressure to render favorable judgments in politically sensitive cases. Investigations can operate without hindrance from the government, including access to politically sensitive information.

75:

50: This agency (or set of agencies) is typically independent, yet is sometimes influenced in its work by negative or positive political incentives. This may include public criticism or praise by the government. The ombudsman may not be provided with some information needed to carry out its investigations.

25:

0: This agency (or set of agencies) is commonly influenced by political or personal incentives. This may include conflicting family relationships, professional partnerships, or other personal loyalties. Negative incentives may include threats, harassment or other abuses of power. The ombudsman cannot compel the government to reveal sensitive information.

56c. In practice, the head of the ombudsman agency/entity is protected from removal without relevant justification.

100 | 75 | 50 | 25 | 0

Comments:

The Ombudsman can only be removed from office by the Public Appointments Committee of Parliament under terms that are set up by the Constitution. These reasons are spelled out in section 128(2) of the Constitution and include gross misconduct and reaching the age of 65.

References:

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

Dr. Henry Chingaape, director, Centre for Governance and Development Research, Sept. 15, 2011, Lilongwe

100: The director of the ombudsman (or directors of multiple agencies) serves a defined term and cannot be removed without a significant justification through a formal process, such as impeachment for abuse of power.

75:

50: The director of the ombudsman (or directors of multiple agencies) serves a defined term, but can in some cases be removed through a combination of official or unofficial pressure.

25:

0: The director of the ombudsman (or directors of multiple agencies) can be removed at the will of political leadership.

56d. In practice, the ombudsman agency (or agencies) has a professional, full-time staff.

100 | 75 | **50** | 25 | 0

Comments:

Since the Ombudsman Act empowers the Ombudsman to hire his/her own staff, these discretionary powers are often abused to appoint unqualified or underqualified individuals into key positions in return for a variety of patronage favors. For example, the current holder of the post of chief investigations officer was originally recruited as a secretary but was promoted to the current position without holding the requisite qualifications. There are also a lot of vacancies, contributing to a vacancy rate of around 25 percent. This is notwithstanding the fact that the current personnel compliment at the Office of the Ombudsman is not enough to cater to the full demands on the office.

References:

Fidelis Kanyongolo, associate professor of constitutional law, University of Malawi, Sept. 13, 2011, Zomba

Dr. Henry Chingaipe, director, Centre for Governance and Development Research, Sept. 15, 2011, Lilongwe

100: The ombudsman agency (or agencies) has staff sufficient to fulfill its basic mandate.

75:

50: The ombudsman agency (or agencies) has limited staff that hinders its ability to fulfill its basic mandate.

25:

0: The ombudsman agency (or agencies) has no staff, or a limited staff that is clearly unqualified to fulfill its mandate.

56e. In practice, agency appointments support the independence of the ombudsman agency (or agencies).

100 | **75** | 50 | 25 | 0

Comments:

In terms of operational independence, the staff appointments support the independence of the office of the Ombudsman. But the Ombudsman is entitled to appoint his/her own staff, and this has at times been abused to hire people for positions for which they

lack the requisite qualifications. For example, one individual who was trained as a secretary was appointed to the position of investigator, a position that required some legal training.

References:

Dr. Henry Chingaipe, director, Centre for Governance and Development Research, Sept. 15, 2011, Lilongwe

Billy Banda, executive director, Malawi Watch, Sept. 16, 2011, Lilongwe

100: Appointments to the agency (or agencies) are made based on professional qualifications. Individuals appointed are free of conflicts of interest due to personal loyalties, family connections or other biases. Individuals appointed usually do not have clear political party affiliations.

75:

50: Appointments are usually based on professional qualifications. Individuals appointed may have clear party loyalties.

25:

0: Appointments are often based on political considerations. Individuals appointed often have conflicts of interest due to personal loyalties, family connections or other biases. Individuals appointed often have clear party loyalties.

56f. In practice, the ombudsman agency (or agencies) receives regular funding.

100 | 75 | **50** | 25 | 0

Comments:

Although the Ombudsman's office tends to receive adequate funding for salaries, allowances and other employment benefits, it does not usually get sufficient operational funds. In many cases, the office has to rely on donor funding to support its activities.

References:

Nandini Patel, 2009, "Promoting the effectiveness of democracy protection institutions in Southern Africa: The Malawi Human Rights Commission and the Office of the Ombudsman," Electoral Institute of Southern Africa Research Report No. 46, <http://www.eisa.org.za/PDF/rr46.pdf>

Chikosa Banda, head of the Department of Foundational Law, University of Malawi, Aug. 19, 2011, Zomba

Dr. Henry Chingaipe, director, Centre for Governance and Development Research, Sept. 15, 2011, Lilongwe

100: The agency (or agencies) has a predictable source of funding that is fairly consistent from year to year. Political considerations are not a major factor in determining agency funding.

75:

50: The agency (or agencies) has a regular source of funding, but may be pressured by cuts, or threats of cuts to the agency budget. Political considerations have an effect on agency funding.

25:

0: Funding source is unreliable. Funding may be removed arbitrarily or as retaliation for agency functions.

56g. In practice, the ombudsman agency (or agencies) makes publicly available reports.

100 | 75 | 50 | 25 | 0

Comments:

The Office of the Ombudsman is required by Malawi Constitution, under Section 127, to present yearly reports to Parliament. These reports have to include a record of all complaints and applications made to the office; a record of the exercise of powers in relation to the applications, of the remedies afforded to applicants and also a general recommendation from the Ombudsman in respect to grievances.

While the Ombudsman has honored this obligation, the challenge has been the lack of response from Parliament, which has in the past failed to even debate the Ombudsman's reports. And since the obligation on the Ombudsman is to report to Parliament, the reports have not been readily available to members of the public.

References:

Section 127 of the Malawi Constitution, 1995

Dr. Henry Chingaipe, director, Centre for Governance and Development Research, Sept. 15, 2011, Lilongwe

100: The agency (or agencies) makes regular, publicly available, substantial reports either to the legislature or directly to the public outlining the full scope of its work.

75:

50: The agency (or agencies) makes publicly available reports to the legislature and/or directly to the public that are sometimes delayed or incomplete.

25:

0: The agency (or agencies) makes no reports of its activities, or makes reports that are consistently out of date, unavailable to the public, or insubstantial.

56h. In practice, when necessary, the national ombudsman (or equivalent agency or agencies) initiates investigations.

100 | 75 | 50 | 25 | 0

Comments:

The Ombudsman's office does a good job of investigating complaints that are deemed to not be frivolous or vexatious. The office has a special investigations unit, whose job it is to investigate complaints received deemed to be worthy investigating. An evaluation report of the Ombudsman's Office in Malawi noted that Malawian non-governmental organizations and government agencies have a very positive view of the Office of the Ombudsman, suggesting that it is "an important institution and in fact the major institution for citizens to make complaints against misuse of public office in Malawi." The office has been very active in taking on cases and making determinations, many of which have gone against the government.

References:

Bard Andreassen and Thor Oftedal, 2007, "The Office of the Ombudsman (OoO) in Malawi: An Appraisal," <http://www.norad.no/en/tools-and-publications/publications/norad-collected-reviews/publication?key=109612>

Wiseman Chirwa, professor of political history, University of Malawi, Sept. 9, 2011, Zomba

Dr. Henry Chingaipe, director, Centre for Governance and Development Research, Sept. 15, 2011, Lilongwe

100: The agency aggressively starts investigations — or participates fully with cooperating agencies' investigations — into judicial misconduct. The agency is fair in its application of this power.

75:

50: The agency will start or cooperate in investigations, but often relies on external pressure to set priorities, or has limited effectiveness when investigating. The agency, though limited in effectiveness, is still fair in its application of power.

25:

0: The agency rarely investigates on its own or cooperates in other agencies' investigations, or the agency is partisan in its application of this power.

56i. In practice, when necessary, the national ombudsman (or equivalent agency or agencies) imposes penalties on offenders.

100 | 75 | 50 | 25 | 0

Comments:

The Ombudsman has regularly used the powers derived from the Constitution and the Ombudsman's Act (1996) to impose penalties on offenders, including directing that appropriate administrative action be taken to redress grievances and recommending to the director of public prosecutions to prosecute offenders.

References:

Wiseman Chirwa, professor of political history, University of Malawi, Sept. 9, 2011, Zomba

Dr. Henry Chingaipe, director, Centre for Governance and Development Research, Sept. 15, 2011, Lilongwe

100: When rules violations are discovered, the agency is aggressive in penalizing offenders or in cooperating with other agencies who penalize offenders.

75:

50: The agency enforces rules, but is limited in its effectiveness. The agency may be slow to act, unwilling to take on politically powerful offenders, resistant to cooperating with other agencies, or occasionally unable to enforce its judgments.

25:

0: The agency does not effectively penalize offenders. The agency may make judgments but not enforce them, does not cooperate with other agencies in enforcing penalties, or may fail to make reasonable judgments against offenders. The agency may be partisan in its application of power.

56j. In practice, the government acts on the findings of the ombudsman agency (or agencies).

100 | 75 | 50 | 25 | 0

Comments:

The government tends to delay in complying with determinations of the Ombudsman. Sometimes respondents have had to appeal to the High Court to enforce compliance.

References:

Wiseman Chirwa, professor of political history, University of Malawi, Sept. 9, 2011, Zomba

Dr. Henry Chingaipe, director, Centre for Governance and Development Research, Sept. 15, 2011, Lilongwe

100: Ombudsman's reports are taken seriously, with negative findings drawing prompt corrective action.

75:

50: In most cases, ombudsman's reports are acted on, though some exceptions may occur for politically sensitive issues, or particularly resistant agencies.

25:

0: Ombudsman's reports are often ignored, or given superficial attention. Ombudsman's reports do not lead to policy changes.

56k. In practice, the ombudsman agency (or agencies) acts on citizen complaints within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

Due to capacity constraints, both in terms of personnel and finances, the Office of the Ombudsman in Malawi is often unable to attend to all applications in a timely manner. During the more than one year period when the position of Ombudsman was vacant, all complaints were filed and not acted on, which created a long backlog. During the study period, there was a case from 2003 that was yet to be decided.

References:

Wiseman Chirwa, professor of political history, University of Malawi, Sept. 9, 2011, Zomba

Dr. Henry Chingaipe, director, Centre for Governance and Development Research, Sept. 15, 2011, Lilongwe

100: The agency (or agencies) acts on complaints quickly. While some backlog is expected and inevitable, complaints are acknowledged promptly and investigations into serious abuses move steadily towards resolution. Citizens with simple issues can expect a resolution within a month.

75:

50: The agency (or agencies) acts on complaints quickly, with some exceptions. Some complaints may not be acknowledged, and simple issues may take more than two months to resolve.

25:

0: The agency (or agencies) cannot resolve complaints quickly. Complaints may be unacknowledged for more than a month, and simple issues may take more than three months to resolve. Serious abuses are not investigated with any urgency.

57. Can citizens access the reports of the ombudsman?

67

57a. In law, citizens can access reports of the ombudsman(s).

Yes

No

Comments:

Section 127 of the Malawi Constitution requires the Ombudsman to present to “the National Assembly a report which shall include a record of all complaints and applications to the Office of the Ombudsman, a record of the exercise of powers in relation to applications, of the remedies afforded to applicants in respect of grievances and shall also include a record of the general recommendations of the Ombudsman in respect of grievances.”

Once the Ombudsman’s reports are presented to Parliament, they become public records that can be accessed by members of the public. Copies are deposited with the National Archives and can be accessed by the public.

References:

Republic of Malawi Constitution (1995), Section 127

Dr. Henry Chingaipe, director, Centre for Governance and Development Research, Sept. 15, 2011, Lilongwe

Yes: A YES score is earned if all ombudsman reports are publicly available.

No: A NO score is earned if any ombudsman reports are not publicly available. This may include reports made exclusively to the legislature or the executive, which those bodies may choose not to distribute the reports.

57b. In practice, citizens can access the reports of the ombudsman(s) within a reasonable time period.

100

75

50

25

0

Comments:

The Ombudsman’s reports to Parliament are public documents which can be copied by members of the public. However, in reality, these reports are often not readily available to the public. Record keeping at the Ombudsman’s office is also poor and the procedure for accessing a report can be laborious and very time consuming. It is possible for one to obtain these reports but doing so might require spending some time in the parliamentary library or through a direct request to the Ombudsman, which might take time.

References:

Wiseman Chirwa, professor of political history, University of Malawi, Sept. 9, 2011, Zomba

Dr. Henry Chingaipe, director, Centre for Governance and Development Research, Sept. 15, 2011, Lilongwe

100: Reports are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information.

75:

50: Reports take around two weeks to obtain. Some delays may be experienced.

25:

0: Reports take more than a month to acquire. In some cases, most records may be available sooner, but there may be persistent delays in obtaining politically sensitive records.

57c. In practice, citizens can access the reports of the ombudsman(s) at a reasonable cost.

100 | 75 | **50** | 25 | 0

Comments:

The reports can be accessed through the Ombudsman's office and the National Archive. The University of Malawi libraries also often receive copies that are available for public use. Paper versions of the reports can also be obtained from the Government Printer and Parliament at a modest cost, although this requires trips to the Government Printer offices in Lilongwe.

References:

Dr. Henry Chingaipe, director, Centre for Governance and Development Research, Sept. 15, 2011, Lilongwe

Billy Banda, executive director, Malawi Watch, Sept. 16, 2011, Lilongwe

100: Reports are free to all citizens, or available for the cost of photocopying. Reports can be obtained at little cost, such as by mail, or on-line.

75:

50: Reports impose a financial burden on citizens, journalists or NGOs. Retrieving reports may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving reports imposes a major financial burden on citizens. Reports costs are prohibitive to most citizens, journalists, or NGOs trying to access this information.

5.2. Supreme Audit Institution

58. In law, is there a national supreme audit institution, auditor general or equivalent agency covering the entire public sector?

58a. In law, is there a national supreme audit institution, auditor general or equivalent agency covering the entire public sector?

Yes

No

Comments:

Malawi has an Office of Auditor General, which is established under Section 184 of the Constitution. This provision stipulates that “there shall be the Office of the Auditor General who ... shall audit and report on the public accounts of Malawi.”

Section 6 of the Public Audit Act (2003) spells out in greater detail the functions and duties of the Office of the Auditor General, including the mandate to “undertake a program of audits, examine transactions, books and accounts, and other public records of every ministry, statutory office, office, agency, board, commission and bureau of the government, and public funds received by a nonprofit organization, including relevant international organizations.”

References:

Malawi Constitution (1995) Section 184.

The Public Audit Act (2003), Section 6.

Yes: A YES score is earned if there is a specific agency whose primary mandate is to audit and track the movement of money through the government. This agency should be specifically charged to investigate and document the misuse of funds. A system of agencies located in each department is equivalent.

No: A NO score is earned if no such agency exists, or that function is a secondary concern of a larger body, such as the executive.

59. Is the supreme audit institution effective?

59a. In law, the supreme audit institution is protected from political interference.

Yes

No

Comments:

Section 184(7) of the Malawi Constitution states that “in the exercise of the duties and powers vested in the Office of the Auditor General, ... the person holding that office shall not be subject to the direction or control of any other person or authority.”

References:

Section 184(7) of the Malawi Constitution.

Yes: A YES score is earned only if the agency has some formal organizational independence from the government. A YES score is earned even if the entity is legally separate but in practice staffed by partisans.

No: A NO score is earned if the agency is a subordinate part of any government ministry or agency, such as the Department of Interior or the Justice Department.

59b. In practice, the head of the audit agency is protected from removal without relevant justification.

100 | 75 | 50 | 25 | 0

Comments:

The auditor general can only be removed from office by the president on grounds that are specified by the Malawi Constitution. These include incompetence in the exercise of his or her duties; being compromised in the exercise of his or her duties to the extent that his or her financial probity is in question; incapacitated or over the retirement age.

During the study period, no holder of the Office of Auditor General had been removed from office.

References:

Section 184(6) of the Republic of Malawi Constitution, 1995

Dr. Henry Chingaipe, director, Centre for Governance and Development Research, Sept. 15, 2011, Lilongwe

100: The director of the agency serves a defined term and cannot be removed without a significant justification through a formal process, such as impeachment for abuse of power.

75:

50: The director of the agency serves a defined term, but can in some cases be removed through a combination of official or unofficial pressure.

25:

0: The director of the agency can be removed at the will of political leadership.

59c. In practice, the audit agency has a professional, full-time staff.

100 | 75 | 50 | 25 | 0

Comments:

While the Auditor General's Office has a professional full-time staff, this staff does not appear to be adequate to enable the office to carry out timely audits. As a result, the auditor general's reports to Parliament are often a few years behind. This is acknowledged in the Strategic Plan for the Malawi National Audit for the years 2009-2013, where it is noted that the National Audit Office has been "functioning below the required human resource capacity and has accumulated significant audit backlog." As a result, the office was not meeting its "statutory requirement of producing quality and timely audit reports. ... Delays were the order of the day. In some instances, the Public Accounts Committee was meeting to discuss audit issues which were over five years old."

References:

Malawi Nation Audit Office, 2009, "Strategic Plan, 2009-2013," http://www.nao.mw/pdf/final_approved_SP.pdf

Mercy Jamali, head of the department of political and administrative studies department, Sept. 13, 2011, Zomba

Dr. Henry Chingaape, director, Centre for Governance and Development Research, Sept. 15, 2011, Lilongwe

100: The agency has staff sufficient to fulfill its basic mandate.

75:

50: The agency has limited staff that hinders its ability to fulfill its basic mandate.

25:

0: The agency has no staff, or a limited staff that is clearly unqualified to fulfill its mandate.

59d. In practice, audit agency appointments support the independence of the agency.

100 | 75 | 50 | 25 | 0

Comments:

There were no records of appointments that compromised the independence of the Office of Auditor General.

References:

Mercy Jamali, head of the department of political and administrative studies department, Sept. 13, 2011, Zomba

Dr. Henry Chingaape, director, Centre for Governance and Development Research, Sept. 15, 2011, Lilongwe

100: Appointments to the agency are made based on professional qualifications. Individuals appointed are free of conflicts of interest due to personal loyalties, family connections or other biases. Individuals appointed usually do not have clear political party affiliations.

75:

50: Appointments are usually based on professional qualifications. Individuals appointed may have clear party loyalties.

25:

0: Appointments are often based on political considerations. Individuals appointed often have conflicts of interest due to personal loyalties, family connections or other biases. Individuals appointed often have clear party loyalties.

59e. In practice, the audit agency receives regular funding.

100 | 75 | 50 | 25 | 0

Comments:

The Auditor General's Office receives regular funding from the government budget, although this is usually insufficient to enable the office to fulfill its mandate to the fullest extent possible.

References:

Mercy Jamali, head of the department of political and administrative studies department, Sept. 13, 2011, Zomba

Dr. Henry Chingaape, director, Centre for Governance and Development Research, Sept. 15, 2011, Lilongwe

100: The agency has a predictable source of funding that is fairly consistent from year to year. Political considerations are not a major factor in determining agency funding.

75:

50: The agency has a regular source of funding, but may be pressured by cuts, or threats of cuts to the agency budget. Political considerations have an effect on agency funding.

25:

0: Funding source is unreliable. Funding may be removed arbitrarily or as retaliation for agency actions.

59f. In practice, the audit agency makes regular public reports.

100 | 75 | **50** | 25 | 0

Comments:

The auditor general does fulfill the requirement to make annual reports to Parliament. In addition, the auditor general often appears before a select committee of Parliament to explain the contents of his reports. These meetings are widely publicized in the media. However, the auditor general's reports are often a couple of years behind.

References:

Mercy Jamali, head of the department of political and administrative studies department, Sept. 13, 2011, Zomba

Dr. Henry Chingaape, director, Centre for Governance and Development Research, Sept. 15, 2011, Lilongwe

100: The agency makes regular, publicly available, substantial reports to the legislature and/or to the public directly outlining the full scope of its work.

75:

50: The agency makes publicly available reports to the legislature and/or to the public directly that are sometimes delayed or incomplete.

25:

0: The agency makes no reports of its activities, or makes reports that are consistently out of date, unavailable to the public, or insubstantial.

59g. In practice, the government acts on the findings of the audit agency.

100 | 75 | 50 | 25 | 0

Comments:

Because the auditor general's reports often elicit widespread media coverage, the government is usually compelled to respond and take action on the reports.

References:

Mercy Jamali, head of the department of political and administrative studies department, Sept. 13, 2011, Zomba

Dr. Henry Chingaape, director, Centre for Governance and Development Research, Sept. 15, 2011, Lilongwe

100: Audit agency reports are taken seriously, with negative findings drawing prompt corrective action.

75:

50: In most cases, audit agency reports are acted on, though some exceptions may occur for politically sensitive issues, or particularly resistant agencies.

25:

0: Audit reports are often ignored, or given superficial attention. Audit reports do not lead to policy changes.

59h. In practice, the audit agency is able to initiate its own investigations.

100 | 75 | 50 | 25 | 0

Comments:

The Auditor General's Office operates independently from the executive and the legislative branches. However, in some cases, when there have been allegations of abuse of public funds, the auditor general is usually requested to carry out investigations. In December 2010, for example, the auditor general was requested by the president to carry out a forensic audit of the Malawi Electoral Commission after reports of financial irregularities at the commission.

References:

Mercy Jamali, head of the department of political and administrative studies department, Sept. 13, 2011, Zomba

Dr. Henry Chingaape, director, Centre for Governance and Development Research, Sept. 15, 2011, Lilongwe

100: The supreme audit institution can control the timing and pace of its investigations without any input from the executive or legislature.

75:

50: The supreme audit institution can generally decide what to investigate, and when, but is subject to pressure from the executive or legislature on politically sensitive issues.

25:

0: The supreme audit institution must rely on approval from the executive or legislature before initiating investigations. Politically sensitive investigations are almost impossible to move forward on.

60. Can citizens access reports of the supreme audit institution?

83

60a. In law, citizens can access reports of the audit agency.

Yes

No

Comments:

Under Section 184(2) of the Malawi Constitution, the auditor general is required to present annual reports to the National Assembly. These reports subsequently become public documents that can be made available to the public on request.

References:

Section 184(2) of the Malawi Constitution.

Mercy Jamali, head of the department of political and administrative studies department, Sept. 13, 2011, Zomba

Yes: A YES score is earned if all supreme auditor reports are available to the general public.

No: A NO score is earned if any auditor reports are not publicly available. This may include reports made exclusively to the legislature or the executive, which those bodies may choose not to distribute.

60b. In practice, citizens can access audit reports within a reasonable time period.

100

75

50

25

0

Comments:

The auditor general's reports can be obtained through Parliament and through the National Audit Office (NAO) website. However, the process of getting a report can be laborious, as the reports have to be passed by Parliament first before they become public documents. The NAO website also is not regularly updated. As of September 2011, the latest available report on the website was for the financial year 2004.

References:

Reports, National Audit Office website, <http://www.nao.mw/>

Mercy Jamali, head of the department of political and administrative studies department, Sept. 13, 2011, Zomba

Dr. Henry Chingaipe, director, Centre for Governance and Development Research, Sept. 15, 2011, Lilongwe

100: Reports are available on-line, or records can be obtained within two days. Reports are uniformly available; there are no delays for politically sensitive information.

75:

50: Reports take around two weeks to obtain. Some delays may be experienced.

25:

0: Reports take more than a month to acquire. In some cases, most reports may be available sooner, but there may be persistent delays in obtaining politically sensitive records.

60c. In practice, citizens can access the audit reports at a reasonable cost.

100 | 75 | 50 | 25 | 0

Comments:

The reports that are published on the National Audit Office website are available for free to the public, at a cost of one's Internet connection for downloading and printing. The reports from Parliament can also be obtained through the Government Printer at modest cost. The reports can also be accessed through the parliamentary library and the National Archives library at no cost.

References:

Reports, National Audit Office website, <http://www.nao.mw/>

Dr. Henry Chingaape, director, Centre for Governance and Development Research, Sept. 15, 2011, Lilongwe

100: Reports are free to all citizens, or available for the cost of photocopying. Reports can be obtained at little cost, such as by mail, or on-line.

75:

50: Reports impose a financial burden on citizens, journalists or NGOs. Retrieving reports may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving reports imposes a major financial burden on citizens. Report costs are prohibitive to most citizens, journalists, or NGOs trying to access this information.

90
5.3. Taxes and Customs: Fairness and Capacity

61. In law, is there a national tax collection agency?

61a. In law, is there a national tax collection agency?

Yes

No

Comments:

National tax collection is the responsibility of the Malawi Revenue Authority, created under Section 3 of the Malawi Revenue Authority Act (1998).

References:

Section 3 of the Malawi Revenue Authority Act (1998).

Yes: A YES score is earned if there is a national agency formally mandated to collect taxes.

No: A NO score is earned if that function is spread over several agencies, or does not exist. A NO score is earned if national government ministries can collect taxes independently.

62. Is the tax collection agency effective?

100

62a. In practice, the tax collection agency has a professional, full-time staff.

100

75

50

25

0

Comments:

The Malawi Revenue Authority is one of the few government agencies that has a full complement of professional full-time staff.

References:

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

Mercy Jamali, head of the department of political and administrative studies department, Sept. 13, 2011, Zomba

100: The agency has staff sufficient to fulfill its basic mandate.

75:

50: The agency has limited staff that hinders its ability to fulfill its basic mandate.

25:

0: The agency has no staff, or a limited staff that is clearly unqualified to fulfill its mandate.

62b. In practice, the tax agency receives regular funding.

100 | 75 | 50 | 25 | 0

Comments:

Section 20(1) (a) and (b) of the MRA Act (1998) provides that the Malawi Revenue Authority shall be paid 3 percent of the revenue estimated in the financial estimates for each financial year to be collected by the authority and 5 percent of the revenue actually collected in each successive three-month period in the financial year in excess of the amount estimated to be collected during that period.

The Malawi Revenue Authority is one of the best funded agencies. Its staff enjoy attractive salaries with bonus incentives for revenue generated.

References:

Section 20(1) (a) and (b) of the MRA Act (1998).

Mercy Jamali, head of the department of political and administrative studies department, Sept. 13, 2011, Zomba

100: The agency has a predictable source of funding that is fairly consistent from year to year. Political considerations are not a major factor in determining agency funding.

75:

50: The agency has a regular source of funding, but may be pressured by cuts, or threats of cuts to the agency budget. Political considerations have an effect on agency funding.

25:

0: Funding source is unreliable. Funding may be removed arbitrarily or as retaliation for agency actions.

63. In practice, are tax laws enforced uniformly and without discrimination?

50

63a. In practice, are tax laws enforced uniformly and without discrimination?

100 | 75 | 50 | 25 | 0

Comments:

While Malawi Revenue Authority strives to enforce tax laws uniformly and without discrimination, oftentimes there is favoritism given to individuals who have family or friends within the authority or in government. Small-scale importers often complain of excessive tax burdens and there are regular reports of people having to haggle to get their taxes lowered.

The Nyasatimes online newspaper, for example, reported that the ruling Democratic Progressive Party regional governor for the Southern region, Noel Masangwi, had been involved in a multimillion Kwacha tax evasion for some time and that this had accumulated to about MK41. The newspaper went on to suggest that Masangwi was being shielded by President Bingu wa Mutharika.

References:

Nyasatimes Reporter, Nov. 7, 2011, "Masangwi in K41m tax evasion scam," <http://www.nyasatimes.com/malawi/2011/11/07/masangwi-in-k41m-tax-evasion-scam/>

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

Billy Banda, executive director, Malawi Watch, Sept. 16, 2011, Lilongwe

100: Tax laws (which may be economically unfair as written) are enforced consistently for all citizens. No general group of citizens is more or less likely to evade tax law than another.

75:

50: Tax laws are generally enforced consistently, but some exceptions exist. For example, some groups may occasionally evade tax law. Some arbitrary and discriminatory tax rules exist.

25:

0: Tax law is unequally applied. Some groups of citizens are consistently more or less likely to evade tax law than others. Tax regulations are, as a rule, written to be discriminatory and/or arbitrary.

64. In law, is there a national customs and excise agency?

100

64a. In law, is there a national customs and excise agency?

Yes

No

Comments:

Section 28 (a) and (b) of the Malawi Revenue Authority Act places all responsibility over customs and excise in the Malawi Revenue Authority.

References:

Section 28 (a) and (b) of the Malawi Revenue Authority.

Yes: A YES score is earned if there is an agency formally mandated to collect excises and inspect customs.

No: A NO score is earned if that function is spread over several agencies, or does not exist.

65. Is the customs and excise agency effective?

100

65a. In practice, the customs and excise agency has a professional, full-time staff.

100 | 75 | 50 | 25 | 0

Comments:

The Malawi Revenue Authority is one of the few government agencies that has a full complement of professional full-time staff.

References:

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

Mercy Jamali, head of the department of political and administrative studies department, Sept. 13, 2011, Zomba

100: The agency has staff sufficient to fulfill its basic mandate.

75:

50: The agency has limited staff that hinders its ability to fulfill its basic mandate.

25:

0: The agency has no staff, or a limited staff that is clearly unqualified to fulfill its mandate.

65b. In practice, the customs and excise agency receives regular funding.

100 | 75 | 50 | 25 | 0

Comments:

Section 20(1) (a) and (b) of the Malawi Revenue Authority Act (1998) provides that the authority shall be paid 3 percent of the revenue estimated in the financial estimates for each financial year to be collected by the authority and 5 percent of the revenue actually collected in each successive three-month period in the financial year in excess of the amount estimated to be collected during that period.

References:

Sections 20(1) (a) and (b) of the Malawi Revenue Authority Act (1998).

Billy Banda, executive director, Malawi Watch, Sept. 16, 2011, Lilongwe

100: The agency has a predictable source of funding that is fairly consistent from year to year. Political considerations are not a major factor in determining agency funding.

75:

50: The agency has a regular source of funding, but may be pressured by cuts, or threats of cuts to the agency budget. Political considerations have an effect on agency funding.

25:

66. In practice, are customs and excise laws enforced uniformly and without discrimination?

50

66a. In practice, are customs and excise laws enforced uniformly and without discrimination?

100 | 75 | 50 | 25 | 0

Comments:

While the Malawi Revenue Authority strives to enforce customs and excise laws uniformly and without discrimination, oftentimes there is favoritism given to individuals that have family or friends within the authority or in government. Small-scale importers often complain of excessive tax burdens and there are regular reports of people having to haggle to get their taxes lowered.

During the study period, for example, former President Bakili Muluzi was answering charges of abusing his position when he was president to import hundreds of vehicles which he distributed to his party supporters without paying duty.

References:

Raphaeil Tenthani, Maravipost, Sept. 14, 2010, "Muluzi pleads not guilty to 12 counts of graft," <http://www.maravipost.com/malawi-politics/district/4006-muluzi-pleads-not-guilty-to-12-counts-of-graft.html>

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

Billy Banda, executive director, Malawi Watch, Sept. 16, 2011, Lilongwe

100: Customs and excise laws (which may be economically unfair as written) are enforced consistently for all citizens. No general group of citizens is more or less likely to evade customs than another.

75:

50: Customs and excise laws are generally enforced consistently, but some exceptions exist. For example, some groups may occasionally evade customs requirements.

25:

0: Customs and excise laws are unequally applied. Some groups of citizens are consistently more or less likely to evade customs and excise laws than others.

5.4. Oversight of State-Owned Enterprises

67. In law, is there an agency, series of agencies, or equivalent mechanism overseeing state-owned companies?

67a. In law, is there an agency, series of agencies, or equivalent mechanism overseeing state-owned companies?

Yes

No

Comments:

The Department of Statutory Corporations, which falls under the Office of the President and Cabinet, has the mandate to ensure the optimal utilization and management of resources by the parastatal sectors. The department provides financial, administrative and managerial oversight to the parastatal sector.

The Public Accounts Committee of Parliament is also mandated under Section 18(d) of the Public Audit Act to promote “the accountability of statutory bodies and those other persons charged with the management of public money and public resources.”

References:

Office of the President and Cabinet website: http://www.malawi.gov.mw/index.php?option=com_content&view=article&id=31&Itemid=115

The Public Accounts Committee of Parliament, Section 18(d) of the Public Audit Act.

Yes: A YES score is earned if there is an agency, series of agencies, or equivalent mechanism tasked with overseeing the conduct and performance of state-owned companies on behalf of the public. A YES score can be earned if several government agencies or ministries oversee different state-owned enterprises. State-owned companies are defined as companies owned in whole or in part by the government.

No: A NO score is earned if this function does not exist, or if some state-owned companies are free from government oversight.

68. Is the agency, series of agencies, or equivalent mechanism overseeing state-owned companies effective?

68a. In law, the agency, series of agencies, or equivalent mechanism overseeing state-owned companies is protected from political interference.

Yes

No

Comments:

Appointments to the Department of Statutory Corporations are usually at the discretion of the president. Meanwhile, the Public Accounts Committee of Parliament is dominated by partisans of the ruling Democratic Progressive Party (18 of 26 members). Membership of parastatal boards is meanwhile entirely at the discretion of the president, who often uses his powers to appoint ruling party partisans to these boards.

References:

Dr. Henry Chingaipe, director, Centre for Governance and Development Research, Sept. 15, 2011, Lilongwe

Yes: A YES score is earned only if the agency, series of agencies, or equivalent mechanism has some formal operational independence from the government. A YES score is earned even if the entity is legally separate but in practice staffed by partisans.

No: A NO score is earned if the agency, series of agencies, or equivalent mechanism is a subordinate part of any government ministry or agency.

68b. In practice, the agency, series of agencies, or equivalent mechanism overseeing state-owned companies has a professional, full-time staff.

100 | 75 | 50 | 25 | 0

Comments:

The Department of Statutory Corporations, which is one of eight departments that fall under the Office of the President and Cabinet, has a very small staff assigned to it. This staff is however too little considering the size of the large state-owned sector in Malawi.

Although the Public Accounts Committee (PAC) of Parliament meets more often than other parliamentary committees, its work is affected by the fact that Malawian legislators do not have staff to help them in their work. Parliamentary committees, such PAC, also do not have staff dedicated to assist in their work. As a result, committees fail to draw upon professional input to assist them in carrying out their work.

References:

Mercy Jamali, head of the department of political and administrative studies department, Sept. 13, 2011, Zomba

McBain Mkandawire, executive director, Malawi Youthnet and Counseling (YONECO), Aug. 17, 2011, Zomba

Billy Banda, executive director, Malawi Watch, Sept. 16, 2011, Lilongwe

100: The agency, series of agencies, or equivalent mechanism has staff sufficient to fulfill its basic mandate.

75:

50: The agency, series of agencies, or equivalent mechanism has limited staff that hinders its ability to fulfill its basic mandate.

25:

0: The agency, series of agencies, or equivalent mechanism has no staff, or a limited staff that is clearly unqualified to fulfill its mandate.

68c. In practice, the agency, series of agencies, or equivalent mechanism overseeing state-owned companies receives regular funding.

100 | 75 | 50 | 25 | 0

Comments:

Funding to the Department of Statutory Corporations falls under the Office of the President and Cabinet (OPC). By law, funding for the OPC is protected and cannot be revised by Parliament, a fact that is honored in practice. As a result, the Office of the President and Cabinet gets all the funding requirements that is requested in the national budget.

References:

Wiseman Chirwa, professor of political history, University of Malawi, Sept. 9, 2011, Zomba

Billy Banda, executive director, Malawi Watch, Sept. 17, 2011, Lilongwe

100: The agency, series of agencies, or equivalent mechanism has a predictable source of funding that is fairly consistent from year to year. Political considerations are not a major factor in determining agency funding.

75:

50: The agency, series of agencies, or equivalent mechanism has a regular source of funding, but may be pressured by cuts, or threats of cuts to the agency budget. Political considerations have an effect on agency funding.

25:

0: Funding source is unreliable. Funding may be removed arbitrarily or as retaliation for agency functions.

68d. In practice, when necessary, the agency, series of agencies, or equivalent mechanism overseeing state-owned companies independently initiates investigations.

100 | 75 | **50** | 25 | 0

Comments:

The Public Accounts Committee of Parliament does occasionally carry out investigations when there have been cases of malpractice within the state-owned enterprises sector. However, this depends on the issue of the malpractices being raised by other agents, such as the media as well as there being political will to follow up on cases involving senior government officials.

The Department of Statutory Corporations rarely initiates investigations even when there have been glaring cases of mismanagement. In the case of the sale of housing to senior government officials at below market prices that was raised in the media in early 2011, for example, neither the Public Accounts Committee of Parliament nor the Department of Statutory Corporations initiated investigations into the matter despite the Malawi Housing Corporation being one of the major state-owned enterprises.

References:

Billy Banda, executive director, Malawi Watch, Sept. 16, 2011, Lilongwe

Wiseman Chirwa, professor of political history, University of Malawi, Sept. 9, 2011, Zomba

100: When irregularities are discovered, the agency, series of agencies, or equivalent mechanism is aggressive in investigating and/or in cooperating with other investigative bodies.

75:

50: The agency, series of agencies, or equivalent mechanism starts investigations, but is limited in its effectiveness or in its cooperation with other investigative agencies. The agency, series of agencies, or equivalent mechanism may be slow to act, unwilling to take on politically powerful offenders, or occasionally unable to enforce its judgments.

25:

0: The agency, series of agencies, or equivalent mechanism does not effectively investigate financial irregularities or cooperate with other investigative agencies. The agency, series of agencies, or equivalent mechanism may start investigations but not complete them, or may fail to detect offenders. The agency may be partisan in its application of power.

68e. In practice, when necessary, the agency, series of agencies, or equivalent mechanism overseeing state-owned companies imposes penalties on offenders.

100 | 75 | 50 | 25 | 0

Comments:

There were no records of the Department of Statutory Corporations or the Public Finance Committee of Parliament imposing penalties on offenders within the state-owned enterprises sector during the study period. For example, after the media revealed a case at the Malawi Housing Corporation (MHC) where houses were sold to some senior politicians and senior members of staff at the corporation without the approval of the MHC board in April 2011, the Department of Statutory Corporations did not take any action on the matter despite reports that suggested the transaction had caused MHC to lose millions of Malawi Kwacha. However, there were no other recorded cases of mismanagement at state-owned enterprises apart from the MHC case.

References:

Billy Banda, executive director, Malawi Watch, Sept. 16, 2011, Lilongwe

Wiseman Chirwa, professor of political history, University of Malawi, Sept. 9, 2011, Zomba

100: When rules violations are discovered, the agency, series of agencies, or equivalent mechanism is aggressive in penalizing offenders and/or in cooperating with other agencies that impose penalties.

75:

50: The agency, series of agencies, or equivalent mechanism enforces rules, but is limited in its effectiveness or reluctant to cooperate with other agencies. The agency, series of agencies, or equivalent mechanism may be slow to act, unwilling to take on politically powerful offenders, or occasionally unable to enforce its judgments.

25:

0: The agency, series of agencies, or equivalent mechanism does not effectively penalize offenders or refuses to cooperate with other agencies that enforce penalties. The agency, series of agencies, or equivalent mechanism may make judgments but not enforce them, or may fail to make reasonable judgments against offenders. The agency, series of agencies, or equivalent mechanism may be partisan in its application of power.

69. Can citizens access the financial records of state-owned companies?

70

69a. In law, citizens can access the financial records of state-owned companies.

Yes | No

Comments:

The Public Audit Act (2003) empowers the auditor general to carry out annual audits of all institutions that receive public funds and submit these reports to Parliament. Section 18(18) of this act states that the auditor general should make “available such information as will enable the National Assembly to be informed of the management of public expenditure, public money and public resources.” Furthermore, Subsection (d) makes specific reference for the auditor general to work toward “promoting the accountability of statutory bodies and those other persons charged with the management of public money and public resources.” Once these reports are presented to Parliament, they become public records that can be accessed by any member of the public. The auditor general also publishes these reports on the website for the Office of the Auditor General, www.nao.mw

References:

The Public Audit Act (2003), Section 18(18).

The Office of the Auditor General website: www.nao.mw

Yes: A YES score is earned if the financial information of all state-owned companies is required by law to be public. State-owned companies are defined as companies owned in whole or in part by the government.

No: A NO score is earned if any category of state-owned company is exempt from this rule, or no such rules exist.

69b. In practice, the financial records of state-owned companies are regularly updated.

100 | 75 | **50** | 25 | 0

Comments:

There is a huge variation in the availability of the financial records of state-owned enterprises. While some regularly provide their financial records, some are unable to provide quality information at regular intervals. The reports of the auditor general are also usually out of date. For example, the latest report posted on the auditor general’s website is for the 2003 financial year.

References:

Auditor General’s Office reports, www.nao.mw

Billy Banda, executive director, Malawi Watch, Sept. 16, 2011, Lilongwe

Wiseman Chirwa, professor of political history, University of Malawi, Sept. 9, 2011, Zomba

100: State-owned companies always publicly disclose financial data, which is generally accurate and up to date.

75:

50: State-owned companies disclose financial data, but it is flawed. Some companies may misstate financial data, file the information behind schedule, or not publicly disclose certain data.

25:

0: Financial data is not publicly available, or is consistently superficial or otherwise of no value.

69c. In practice, the financial records of state-owned companies are audited according to international accounting standards.

100 | 75 | 50 | 25 | 0

Comments:

By law, the auditor general of Malawi is required to carry out audits of state-funded bodies to international standards. Meanwhile, all state-owned enterprises are also required to have internal audit departments. These requirements are adhered to in practice.

References:

Mercy Jamali, head of the department of political and administrative studies department, Sept. 13, 2011, Zomba

Wiseman Chirwa, professor of political history, University of Malawi, Sept. 9, 2011, Zomba

100: Financial records of all state-owned companies are regularly audited by a trained third party auditor using accepted international standards.

75:

50: Financial records of state-owned companies are regularly audited, but exceptions may exist. Some companies may use flawed or deceptive accounting procedures, or some companies may be exempted from this requirement.

25:

0: State-owned companies are not audited, or the audits have no functional value. The auditors may collude with the companies in providing misleading or false information to the public.

69d. In practice, citizens can access the financial records of state-owned companies within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

It is extremely difficult to obtain the financial records of state-owned companies in Malawi. They are not usually publicly available except where they have been submitted to Parliament and become public documents. Otherwise, the process would take too long to obtain them.

References:

Wiseman Chirwa, professor of political history, University of Malawi, Sept. 9, 2011, Zomba

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

100: Records are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information.

75:

50: Records take around two weeks to obtain. Some delays may be experienced.

25:

0: Records take more than a month to acquire. In some cases, most records may be available sooner, but there may be persistent delays in obtaining politically sensitive records.

69e. In practice, citizens can access the financial records of state-owned companies at a reasonable cost.

100 | **75** | 50 | 25 | 0

Comments:

When available, the financial records can be had at minimal cost. However, since the records are rarely made publicly available, the issue of cost becomes redundant.

References:

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

Billy Banda, executive director, Malawi Watch, Sept. 17, 2011, Lilongwe

100: Records are free to all citizens, or available for the cost of photocopying. Records can be obtained at little cost, such as by mail, or on-line.

75:

50: Records impose a financial burden on citizens, journalists or NGOs. Retrieving records may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving records imposes a major financial burden on citizens. Records costs are prohibitive to most citizens, journalists, or NGOs trying to access this information.

73

5.5. Business Licensing and Regulation

70. Are business licenses available to all citizens?

69

70a. In law, anyone may apply for a business license.

Yes | No

Comments:

Section 29 of the Malawi Constitution guarantees the right for “every person to freely engage in economic activity, to work and to pursue a livelihood anywhere in Malawi.”

Section 13 of the Business Licensing Act (1961) states that the issuing, renewal or transfer of a business license can be denied, among several reasons that include: if the applicant is under 21 years of age; the applicant, or his or her husband or wife, is an undisclosed bankrupt person; the applicant, his wife or her husband, has been convicted of a bankruptcy offense within the last three years preceding the application; or the carrying on of the business in question is likely to cause a nuisance or annoyance.

References:

Section 29 of the Malawi Constitution.

Section 13 of the Business Licensing Act (1961).

Yes: A YES score is earned if no particular group or category of citizens is excluded from applying for a business license, when required. A YES score is also earned if basic business licenses are not required.

No: A NO score is earned if any group of citizens are categorically excluded from applying for a business license, when required.

70b. In law, a complaint mechanism exists if a business license request is denied.

Yes

No

Comments:

Section 17 of the Business Licensing Act (1961) provides for an appeals mechanism to the minister for applicants that are aggrieved by the decision of the licensing authority.

Section 17(7) states that any determination, order or reference made by the minister “shall be final and shall not be called in question in any court.”

However, since the Constitution under Section 103(2) grants jurisdiction over “all issues of judicial nature,” to the courts it is possible that any determination by the minister under the Business Licensing Act can be reviewed by the courts.

References:

Section 17 of the Business Licensing Act (1961).

Malawi Constitution, Section 103(2).

Yes: A YES score is earned if there is a formal process for appealing a rejected license.

No: A NO score is earned if no such mechanism exists.

70c. In practice, citizens can obtain any necessary business license (i.e. for a small import business) within a reasonable time period.

100	75	50	25	0
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Comments:

The process of obtaining a business license in Malawi is very time consuming. Among 46 African countries ranked in the World Bank's Doing Business Index, Malawi is ranked 21st. Among the challenges that are highlighted in the Doing Business Index in Malawi include: starting a business, dealing with construction permits, getting electricity and trading across borders.

The difficulty of starting a new business in Malawi is in large part due to the fact that the Office of the Registrar General, which is responsible for registering businesses, is so short staffed and lacks adequate resources to make timely decisions. The office relies on a manual system of registration, which lengthens the time it takes to register a business. Applications for business licenses take a long time to be processed and sometimes the applications go missing. Staff often demand bribes to process applications in a reasonable time.

References:

World Bank, Doing Business Index 2011, <http://www.doingbusiness.org/rankings>

Francis Kachale, business manager, Incah Holdings, Sept. 12, 2011, Blantyre

Billy Banda, executive director, Malawi Watch, Sept. 16, 2011, Lilongwe

100: Licenses are not required, or licenses can be obtained within roughly one week.

75:

50: Licensing is required and takes around one month. Some groups may be delayed up to a three months

25:

0: Licensing takes more than three months for most groups. Some groups may wait six months to one year to get necessary licenses.

70d. In practice, citizens can obtain any necessary business license (i.e. for a small import business) at a reasonable cost.

100	75	50	25	0
-----	----	----	----	---

Comments:

While the official cost of obtaining a business license is low, the cost often goes up due to the need to visit the Office of the Registrar General multiple times as well as the demands for bribes to speed up the process. As a result, the overall cost of starting a business tends to be very high, a fact that is reflected in the World Bank's Doing Business Index, which ranks Malawi 26th in sub-Saharan Africa in terms of the ease of starting a business. According to the Doing Business Index, overall, doing business in Malawi has actually worsened between 2010 and 2011, with Malawi dropping from a ranking of 141 in 2010 to 145 out of 183 countries in 2011.

References:

World Bank, Doing Business Index 2011, <http://www.doingbusiness.org/rankings>

Francis Kachale, business manager, Incah Holdings, Sept. 12, 2011, Blantyre

Billy Banda, executive director, Malawi Watch, Sept. 17, 2011, Lilongwe

100: Licenses are not required, or licenses are free. Licenses can be obtained at little cost to the organization, such as by mail, or on-line.

75:

50: Licenses are required, and impose a financial burden on the organization. Licenses may require a visit to a specific office, such as a regional or national capital.

25:

0: Licenses are required, and impose a major financial burden on the organization. Licensing costs are prohibitive to the organization.

71. Are there transparent business regulatory requirements for basic health, environmental, and safety standards?

67

71a. In law, basic business regulatory requirements for meeting public health standards are transparent and publicly available.

Yes

No

Comments:

The Occupational Safety, Health and Welfare Act (1997) sets out guidelines for basic health, environmental, and safety standards for businesses. Section 13 (1) of this act stipulates that "it shall be the duty of every employer to ensure the safety, health and welfare at work of all of his employees."

References:

The Occupational Safety, Health and Welfare Act (1997), Section 13 (1).

Yes: A YES score is earned if basic regulatory requirements for meeting public health standards are publicly accessible and transparent.

No: A NO score is earned if such requirements are not made public or are otherwise not transparent.

71b. In law, basic business regulatory requirements for meeting public environmental standards are transparent and publicly available.

Yes

No

Comments:

The Occupational Safety, Health and Welfare Act (1997) focuses almost exclusively on the safety of the workplace but does stipulate public environmental standards.

References:

Billy Banda, executive director, Malawi Watch, Sept. 16, 2011, Lilongwe

Yes: A YES score is earned if basic regulatory requirements for meeting public environmental standards are publicly accessible and transparent.

No: A NO score is earned if such requirements are not made public or are otherwise not transparent.

71c. In law, basic business regulatory requirements for meeting public safety standards are transparent and publicly available.

Yes

No

Comments:

Part IV of the Occupational Safety, Health and Welfare Act (1997) sets out clear regulations for meeting public safety standards in the workplace. The law stipulates that workplaces have to be kept clean, should not “be so overcrowded as to cause risk of injury to the health of the persons employed therein,” “have effective and suitable provision for securing and maintaining the circulation of fresh air in each workroom,” “have effective provision for securing and maintaining sufficient and suitable lighting,” have “sufficient and suitable sanitary conveniences for persons employed in the workplace,” as well as wash facilities and drinking water.

Copies of the law are readily available and can be obtained at modest cost.

References:

Laws of Malawi, Occupational Safety, Health and Welfare Act (1997), Part IV

Billy Banda, executive director, Malawi Watch, Sept. 17, 2011, Lilongwe

Yes: A YES score is earned if basic regulatory requirements for meeting public safety standards are publicly accessible and transparent.

No: A NO score is earned if such requirements are not made public or are otherwise not transparent.

72. Does government effectively enforce basic health, environmental, and safety standards on businesses?

50

72a. In practice, business inspections by government officials to ensure public health standards are being met and are carried out in a uniform and even-handed manner.

100

75

50

25

0

Comments:

Business inspections by government officials to ensure public health standards are carried out only intermittently, in large part due to staff shortages and financial limitations.

A news feature story by Frazer Potani in May 2011, for example, noted that an investigation carried out by the Labour Commission's office in Blantyre district found that a number of bakeries lock up their workers at night while their bosses go to sleep. In one case, the bakery caught fire at night and the workers could not escape and a number of them died in the blaze. It is only after such stories come out in the media that government officials are forced to act. In other words, the enforcement mechanisms tend to be reactionary instead of being proactive to ensure compliance of the standards.

A good case in point relates to one Samson Chimdima, a security guard, who was bitten by dogs at his workplace in July 2010. It was only after Chimdima was bitten that Minister of Labour Yunus Mussa intervened and promised to push through legislation in Parliament banning certain breeds of dogs being kept as guard dogs.

References:

James Chimpweya, Nation, Aug. 7, 2010, "Chimdima's son applauds public support," http://www.mwnation.com/index.php?option=com_content&view=article&id=3851:chimdima-son-applauds-public-support

Christopher Jimu, Nation Newspaper, Feb. 2, 2011, "Plight of the Malawi Worker," http://www.nationmw.net/index.php?option=com_content&view=article&id=13775:plight-of-malawian-worker&catid=55:job-market&Itemid=255

Frazer Potani, Africa News.com, May 12, 2011, "Some jobs putting workers' safety at risk," http://www.africanews.com/site/list_message/34431

Billy Banda, executive director, Malawi Watch, Sept. 16, 2011, Lilongwe

100: Business inspections by the government to ensure that public health standards are being met are designed and carried out in such a way as to ensure comprehensive compliance by all businesses with transparent regulatory requirements.

75:

50: Business inspections by the government to ensure public health standards are met are generally carried out in an even-handed way though exceptions exist. Bribes are occasionally paid to extract favorable treatment or expedited processing.

25:

0: Business inspections to ensure that public health standards are met are routinely carried out by government officials in an ad hoc, arbitrary fashion designed to extract extra payments from businesses in exchange for favorable treatment.

72b. In practice, business inspections by government officials to ensure public environmental standards are being met are carried out in a uniform and even-handed manner.

100 | 75 | **50** | 25 | 0

Comments:

Section 5(3) of the Environment Management Act (1996) states that "Any person who has reason to believe that his or her right to a clean or healthy environment has been violated by any person may ... file a written complaint to the minister outlining the nature of his or her complaint and particulars, and the minister shall, within 30 days from the date of the complaint, institute an investigation into the activity or matter complained about and shall give a written response to the complainant indicating what action the minister has taken or shall take to restore the claimant's right to a clean and healthy environment, including instructing the attorney general to take such legal action on behalf of the government as the attorney general may deem appropriate."

Thus in principal, the enforcement of public environmental standards are carried out in a uniform and even-handed manner. However, since the enforcement is dependent on individuals submitting complaints to the minister, the process is difficult for individuals from poor households who feel that the minister is less likely to act on their complaints. Meanwhile, wealthy individuals can use their influence to stop the enforcement of standards or to get decisions that go in their favor.

References:

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

Billy Banda, executive director, Malawi Watch, Sept. 16, 2011, Lilongwe

100: Business inspections by the government to ensure that public environmental standards are being met are designed and carried out in such a way as to ensure comprehensive compliance by all businesses with transparent regulatory requirements.

75:

50: Business inspections by the government to ensure public environmental standards are met are generally carried out in an even-handed way though exceptions exist. Bribes are occasionally paid to extract favorable treatment or expedited processing.

25:

0: Business inspections to ensure that public environmental standards are met are routinely carried out by government officials in an ad hoc, arbitrary fashion designed to extract extra payments from businesses in exchange for favorable treatment.

72c. In practice, business inspections by government officials to ensure public safety standards are being met are carried out in a uniform and even-handed manner.

100 | 75 | **50** | 25 | 0

Comments:

Since there are very few inspections that are carried out proactively, business owners tend to ensure only the barest public safety standards. In some cases, business owners, place more premium on profit over the safety of their employees. For example, in the recent past, there have been cases where employees were locked in a bakery throughout the night to avoid cases of theft by the servants. However, when one of the buildings caught fire, the workers were unable to escape with some dying in the blaze as a result.

References:

Christopher Jimu, Nation Newspaper, Feb. 2, 2011, "The plight of the Malawi Worker," http://www.nationmw.net/index.php?option=com_content&view=article&id=13775:plight-of-malawian-worker&catid=55:job-market&Itemid=255

Billy Banda, executive director, Malawi Watch, Sept. 16, 2011, Lilongwe

100: Business inspections by the government to ensure that public safety standards are being met are designed and carried out in such a way as to ensure comprehensive compliance by all businesses with transparent regulatory requirements.

75:

50: Business inspections by the government to ensure public safety standards are met are generally carried out in an even-handed way though exceptions exist. Bribes are occasionally paid to extract favorable treatment or expedited processing.

25:

0: Business inspections to ensure that public safety standards are met are routinely carried out by government officials in an ad hoc, arbitrary fashion designed to extract extra payments from businesses in exchange for favorable treatment.

6.1. ⁸⁴Anti-Corruption Law

73. Is there legislation criminalizing corruption?

100

73a. In law, attempted corruption is illegal.

Yes

No

Comments:

Section 24(1) of the Corrupt Practices Act (1995) makes attempted corruption illegal.

References:

Section 24(1) of the Corrupt Practices Act (1995).

Yes: A YES score is earned if corruption laws include attempted acts.

No: A NO score is earned if this is not illegal.

73b. In law, extortion is illegal.

Yes

No

Comments:

Section 24(1) of the Corrupt Practices Act (1995) makes extortion illegal.

Section 91 of the Penal Code of Malawi also makes extortion a crime punishable with an imprisonment term of not less than five years but not exceeding 12 years.

References:

Section 24(1) of the Corrupt Practices Act (1995).

Yes: A YES score is earned if corruption laws include extortion. Extortion is defined as demanding favorable treatment (such as a bribe) to withhold a punishment.

No: A NO score is earned if this is not illegal.

73c. In law, offering a bribe (i.e. active corruption) is illegal.

Yes

No

Comments:

Section 24(2) of the Corrupt Practices Act (1995) makes offering a bribe illegal.

References:

Section 24(2) of the Corrupt Practices Act (1995).

Yes: A YES score is earned if offering a bribe is illegal.

No: A NO score is earned if this is not illegal.

73d. In law, receiving a bribe (i.e. passive corruption) is illegal.

Yes

No

Comments:

Section 24(1) of the Corrupt Practices Act (1995) makes receiving a bribe a crime.

References:

Section 24(1) of the Corrupt Practices Act (1995).

Yes: A YES score is earned if receiving a bribe is illegal.

No: A NO score is earned if this is not illegal.

73e. In law, bribing a foreign official is illegal.

Yes

No

Comments:

Although the Corrupt Practices Act (1995) makes no specific mention of bribing foreign officials, Section 24(1) and (2) of the act state that offering a bribe to any individual in return for any advantage, is illegal. The provision does not distinguish between whether the official receiving the bribe is local or foreign.

References:

Corrupt Practices Act (1995), Sections 24(1) and (2).

Yes: A YES score is earned if bribing a foreign official is illegal.

No: A NO score is earned if this is not illegal.

73f. In law, using public resources for private gain is illegal.

Yes

No

Comments:

Section 25B(1) of the Corrupt Practices Act (1995) states that “Any public officer who uses, misuses or abuses his public office, or his position, status or authority as a public officer, for his personal advantage or for the advantage of another person or to obtain, directly or indirectly, for himself or for another person, any advantage, wealth, property, profit or business interest shall be guilty of an offense.”

References:

Section 25B(1) of the Corrupt Practices Act (1995).

Yes: A YES score is earned if using public resources for private gain is illegal.

No: A NO score is earned if this is not illegal.

73g. In law, using confidential state information for private gain is illegal.

Yes

No

Comments:

Using confidential state information for private gain is illegal under Section 25B(2) of the Corrupt Practices Act (1995).

References:

Section 25B(2) of the Corrupt Practices Act (1995).

Yes: A YES score is earned if using confidential state information for private gain is illegal.

No: A NO score is earned if this is not illegal.

73h. In law, money laundering is illegal.

Yes

No

Comments:

Section 35 of the Money Laundering Act (2006) makes money laundering a criminal offense in Malawi punishable by imprisonment of 10 years and a fine of K2 million for persons and a fine of K10 million for corporations in addition to the loss of business authority.

References:

Section 35 of the Money Laundering Act (2006).

Yes: A YES score is earned if money laundering is illegal. Money laundering is defined as concealing the origin of funds to hide wrongdoing or avoid confiscation.

No: A NO score is earned if this is not illegal.

73i. In law, conspiracy to commit a crime (i.e. organized crime) is illegal.

Yes

No

Comments:

Section 35 of the Corrupt Practices Act (1995) makes conspiracy to commit a corrupt act an offense.

Several provisions in the Penal Code provide that conspiracy to commit a crime is a punishable offense. For example, Section 109 of the Penal Code states that conspiracy to defeat justice and interference with witnesses is a punishable offense. Section 148 makes conspiracy to defile an offense punishable with a maximum of three years imprisonment. Section 227 of the Penal Code also makes conspiracy to murder a crime punishable with imprisonment of up to 14 years.

References:

Section 35 of the Corrupt Practices Act (1995).

Penal Code, Sections 109, 148, and 227.

Yes: A YES score is earned if organized crime is illegal.

No: A NO score is earned if this is not illegal.

6.2. Anti-Corruption Agency or Equivalent Mechanisms

74. In law, is there an agency (or group of agencies) with a legal mandate to address corruption?

100

74a. In law, is there an agency (or group of agencies) with a legal mandate to address corruption?

Yes

No

Comments:

Section 4 of the Corrupt Practices Act (1995) establishes the Anti-Corruption Bureau, which is mandated under Section 10 of the act to take necessary measures for the prevention of corruption in public bodies and private bodies and to receive, investigate and prosecute corruption complaints.

References:

Section 4 of the Corrupt Practices Act (1995).

Yes: A YES score is earned if an agency is specifically mandated to address corruption. A YES score is earned if there are several agencies or entities with specific roles in fighting corruption, including special prosecutorial entities.

No: A NO score is earned if no agency (or group of agencies/entities) is specifically mandated to prevent or prosecute corruption.

75. Is the anti-corruption agency effective?

67

75a. In law, the anti-corruption agency (or agencies) is protected from political interference.

Yes

No

Comments:

Section 4 (3) of the Corrupt Practices Act (1995) states that the Anti-Corruption Bureau “shall exercise its functions and powers independent of the direction or interference of any other person or authority.”

References:

Section 4 (3) of the Corrupt Practices Act (1995).

Yes: A YES score is earned only if the agency (or agencies) has some formal organizational or operational independence from the government. A YES score is earned even if the agency/agencies is legally separate but in practice staffed by partisans.

No: A NO score is earned if the agency (or agencies) is a subordinate part of any government ministry or agency, such as the Department of Interior or the Justice Department, in such a way that limits its operational independence.

75b. In practice, the anti-corruption agency (or agencies) is protected from political interference.

100 | 75 | **50** | 25 | 0

Comments:

The Anti-Corruption Bureau (ACB) is regularly accused of ignoring major corruption accusations leveled against senior government officials. The president's powers to hire and fire the director of the ACB also means that the bureau's independence is compromised as the director often acts in a manner that seeks to please the appointing authority. As a result, accusations of corruption by several senior ruling party officials often stall and rarely reach the prosecution stage.

For example, there has been very little progress made on investigations into allegations of purchase of government houses below their market prices by several senior government officials, including the president's brother, Minister of Foreign Affairs Peter Mutharika. Another senior Cabinet minister and deputy president of the ruling party, Goodall Gondwe, had also been under investigation on allegations of corruption for more than a year but his case stalled and had not cleared the investigation stage by September 2011.

References:

Charles Kufa, Nyasatimes, Aug. 10, 2011, "Goodall 'buying' freedom from corruption prosecution," <http://www.nyasatimes.com/malawi/2011/08/10/goodall-%E2%80%99buying%E2%80%99freedom-from-corruption-prosecution/>

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

Billy Banda, executive director, Malawi Watch, Sept. 16, 2011, Lilongwe

100: This agency (or agencies) operates independently of the political process, without incentive or pressure to render favorable judgments in politically sensitive cases. Investigations can operate without hindrance from the government, including access to politically sensitive information.

75:

50: This agency (or agencies) is typically independent, yet is sometimes influenced in its work by negative or positive political incentives. This may include favorable or unfavorable public criticism by the government, political appointments, or other forms of influence. The agency (or agencies) may not be provided with some information needed to carry out its investigations.

25:

0: This agency (or agencies) is commonly influenced by political or personal incentives. These may include conflicting family relationships, professional partnerships, or other personal loyalties. Negative incentives may include threats, harassment or other abuses of power. The agency (or agencies) cannot compel the government to reveal sensitive information.

75c. In practice, the head of the anti-corruption agency (or agencies) is protected from removal without relevant justification.

100 | 75 | 50 | 25 | 0

Comments:

Section 6 (2) of the Corrupt Practices Act (1995) empowers the president to remove the director of the Anti-Corruption Bureau, with the confirmation of the Public Appointments Committee, for inability to perform the functions of his office (whether arising from infirmity of body or mind or from any other cause) or for misbehavior. The president also retains the power to suspend the director from exercising the duties of the office of director pending investigations to determine whether or not the director may be removed from office if the president deems that to be in the public interest.

In the past, the president has dismissed ACB directors who refused to pursue politically motivated investigations.

References:

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

Billy Banda, executive director, Malawi Watch, Sept. 16, 2011, Lilongwe

100: The director(s) cannot be removed without a significant justification through a formal process, such as impeachment for abuse of power.

75:

50: The director(s) can in some cases be removed through a combination of official or unofficial pressure.

25:

0: The director(s) can be removed at the will of political leadership.

75d. In practice, appointments to the anti-corruption agency (or agencies) are based on professional criteria.

100 | 75 | 50 | 25 | 0

Comments:

While the majority of the technical staff at the Anti-Corruption Bureau are appointed using professional criteria, the appointment of the director of the bureau is usually made by the president based on loyalties to the chief executive and sympathy toward the ruling party.

References:

Billy Banda, executive director, Malawi Watch, Sept. 16, 2011, Lilongwe

Wiseman Chirwa, professor of political history, University of Malawi, Sept. 9, 2011, Zomba

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

100: Appointments to the agency (or agencies) are made based on professional qualifications. Individuals appointed are free of conflicts of interest arising from personal loyalties, family connections or other biases. Individuals appointed usually do not have clear political party affiliations.

75:

50: Appointments are usually based on professional qualifications. Individuals appointed may have clear party loyalties, however.

25:

0: Appointments are often based on political considerations. Individuals appointed often have conflicts of interest arising from personal loyalties, family connections or other biases. Individuals appointed often have clear party loyalties.

75e. In practice, the anti-corruption agency (or agencies) has a professional, full-time staff.

100 | 75 | 50 | 25 | 0

Comments:

The Anti-Corruption Bureau (ACB) strives to fill all its positions with professional full-time staff. However, a number of employees often leave seeking greener pastures, leading to the creation of vacancies on a regular basis at the bureau.

References:

Dr. Henry Chingaipe, director, Centre for Governance and Development Research, Sept. 15, 2011, Lilongwe

Billy Banda, executive director, Malawi Watch, Sept. 16, 2011, Lilongwe

Catherine Kabango, public education officer, Anti-Corruption Bureau, Sept. 16, 2011, Lilongwe

100: The agency (or agencies) has staff sufficient to fulfill its basic mandate.

75:

50: The agency (or agencies) has limited staff, or staff without necessary qualifications to fulfill its basic mandate.

25:

0: The agency (or agencies) has no staff, or a limited staff, that is clearly unqualified to fulfill its mandate.

75f. In practice, the anti-corruption agency (or agencies) receives regular funding.

100 | 75 | 50 | 25 | 0

Comments:

The Anti-Corruption Bureau (ACB) receives its operations budget from the government. It also receives additional funding from donor organizations that fund the bureau's activities. However, in 2011, the British and Norwegian governments withheld funding for Malawi, which has affected the operations of the ACB.

For example, a classified report leaked to Nyasatimes reported in September 2011 that the ACB has only been able to initiate investigations on just slightly more than half of the complaints received in the first quarter of 2011 due to insufficient funding.

References:

Reporter, Nyasatimes, Sept. 3, 2011, "Malawi: Anti-Corruption Bureau mired in delays and staffing problems," <http://www.nyasatimes.com/malawi/2011/09/03/malawi-anti-corruption-bureau-mired-in-delays-and-staffing-problems/>

Catherine Kabango, public education officer, Anti-Corruption Bureau, Sept. 16, 2011, Lilongwe

Dr. Henry Chingaape, director, Centre for Governance and Development Research, Sept. 15, 2011, Lilongwe

100: The agency (or agencies) has a predictable source of funding that is fairly consistent from year to year. Political considerations are not a major factor in determining agency funding.

75:

50: The agency (or agencies) has a regular source of funding, but may be pressured by cuts, or threats of cuts to the agency budget. Political considerations have an effect on agency funding.

25:

0: The agency's funding sources are unreliable. Funding may be removed arbitrarily or as retaliation for agency actions.

75g. In practice, the anti-corruption agency (or agencies) makes regular public reports.

100 | 75 | 50 | 25 | 0

Comments:

The Anti-Corruption Bureau (ACB) fulfills the requirement to submit annual reports of the activities carried out by the bureau in the preceding year to the National Assembly, the president and Cabinet and the responsible line minister. However, these reports are sometimes submitted late.

Through its public education department, the bureau also publishes an anti-corruption newsletter that highlights the main activities being carried out. However, the frequency of the newsletter is irregular. Additionally, the ACB also seeks to publish details about ongoing and concluded cases on the bureau's website, although there was no information available on the relevant links when the website was checked in September 2011.

References:

Anti-Corruption Bureau website, <http://www.anti-corruptionbureau.mw/>

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

Catherine Kabango, public education officer, Anti-Corruption Bureau, Sept. 16, 2011, Lilongwe

100: The agency (or agencies) makes regular, publicly available, substantial reports to the legislature and/or to the public directly outlining the full scope of its work.

75:

50: The agency (or agencies) makes publicly available reports to the legislature that are sometimes delayed or incomplete.

25:

0: The agency (or agencies) makes no reports of its activities, or makes reports that are consistently out of date, unavailable to the public, or insubstantial.

75h. In practice, the anti-corruption agency (or agencies) has sufficient powers to carry out its mandate.

100 | 75 | **50** | 25 | 0

Comments:

Although the Anti-Corruption Bureau has sufficient powers to initiate and prosecute corruption cases, it is limited in the exercise of these powers whenever senior officials from the ruling party are the main suspects. Usually, investigations involving senior ruling party officials stall and remain unresolved while cases involving low-level public officers are investigated and prosecuted very quickly.

When the media reported that the Malawi Housing Corporation had sold houses at below market prices to a number of senior government officials that included the president's brother, for example, the ACB failed to initiate an investigations into the matter until members of Parliament from opposition parties raised the issue in Parliament. Although the ACB indicated in June that it had launched investigations into the matter, there were no reports of progress on the investigations as of September 2011.

References:

Phillip Pemba, The Nation, April 28, 2011, "Fire Ministers, officials in houses scam-Uladi," http://www.mwnation.com/index.php?option=com_content&view=article&id=18507:fire-ministers-officials-in-houses-scamuladi&catid=1:national-news&Itemid=3

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

Billy Banda, executive director, Malawi Watch, Sept. 16, 2011, Lilongwe

100: The agency (or agencies) has powers to gather information, including politically sensitive information. The agency (or agencies) can question suspects, order arrests and bring suspects to trial (or rely on related agencies or law enforcement authorities to perform such functions).

75:

50: The agency (or agencies) has most of the powers needed to carry out its mandate with some exceptions.

25:

0: The agency (or agencies) lacks significant powers which limit its effectiveness.

75i. In practice, when necessary, the anti-corruption agency (or agencies) independently initiates investigations.

100 | **75** | 50 | 25 | 0

Comments:

The Anti-Corruption Bureau is usually reluctant to investigate senior officials from the ruling party. In the past, the heads of the ACB who have pursued cases involving senior ruling party officials have been removed from their positions.

References:

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

Billy Banda, executive director, Malawi Watch, Sept. 16, 2011, Lilongwe

100: When irregularities are discovered, the agency (or agencies) is aggressive in investigating the government or in cooperating with other investigative agencies.

75:

50: The agency (or agencies) starts investigations, but is limited in its effectiveness or is reluctant to cooperate with other investigative agencies. The agency (or agencies) may be slow to act, unwilling to take on politically powerful offenders, or occasionally unable to enforce its judgments.

25:

0: The agency (or agencies) does not effectively investigate or does not cooperate with other investigative agencies. The agency (or agencies) may start investigations but not complete them, or may fail to detect offenders. The agency (or agencies) may be partisan in its application of power.

76. Can citizens access the anti-corruption agency?

88

76a. In practice, the anti-corruption agency (or agencies) acts on complaints within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

While some complaints on corruption are attended to promptly, some, particularly those involving senior officials from the ruling party, take months to be acted on. For example, it was only in September 2010 that former President Bakili Muluzi was officially charged with corruption committed during his time as president between 1994 and 2004. However, cases involving junior-level public officials are investigated and prosecuted very quickly, with decisions coming within a few weeks.

References:

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

Billy Banda, executive director, Malawi Watch, Sept. 16, 2011, Lilongwe

100: The agency (or agencies) acts on complaints quickly. While some backlog is expected and inevitable, complaints are acknowledged promptly and investigations into serious abuses move steadily towards resolution. Citizens with simple issues can expect a resolution within a month.

75:

50: The agency (or agencies) acts on complaints quickly, with some exceptions. Some complaints may not be acknowledged, and simple issues may take more than two months to resolve.

25:

0: The agency (or agencies) cannot resolve complaints quickly. Complaints may be unacknowledged for more than a month, and simple issues may take more than three months to resolve. Serious abuses are not investigated with any urgency.

76b. In practice, citizens can complain to the anti-corruption agency (or agencies) without fear of recrimination.

100 | 75 | 50 | 25 | 0

Comments:

Any citizen can complain to the Anti-Corruption Bureau (ACB) without fear of reprisal. The Corrupt Practices Act (1995) provides robust mechanisms for protecting complainants and whistle-blowers, who are also not required to serve as witnesses for the ACB when the matters come to court.

References:

Chikosa Banda, head of the Department of Foundational Law, University of Malawi, Aug. 19, 2011, Zomba

Billy Banda, executive director, Malawi Watch, Sept. 16, 2011, Lilongwe

Catherine Kabango, public education officer, Anti-Corruption Bureau, Sept. 16, 2011, Lilongwe

100: Whistleblowers can report abuses of power without fear of negative consequences. This may be due to robust mechanisms to protect the identity of whistleblowers, or may be due to a culture that encourages disclosure and accountability.

75:

50: Whistleblowers are sometimes able to come forward without negative consequences, but in other cases, whistleblowers are punished for disclosing, either through official or unofficial means.

25:

0: Whistleblowers often face substantial negative consequences, such as losing a job, relocating to a less prominent position, or some form of harassment.

85

6.3. Judicial Independence, Fairness, and Citizen Access to Justice

77. Is there an appeals mechanism for challenging criminal judgments?

67

77a. In law, there is a general right of appeal.

Yes

No

Comments:

Section 42(2)(f)(viii) of the Malawi Constitution states that “every person arrested for, or accused of, the alleged commission of an offense shall have the right ... to recourse by way of appeal or review to a higher court than the court of first instance”

References:

Section 42(2)(f)(viii) of the Malawi Constitution.

Yes: A YES score is earned if there is a formal process of appeal for challenging criminal judgments.

No: A NO score is earned if there is no such process.

77b. In practice, appeals are resolved within a reasonable time period.

100

75

50

25

0

Comments:

Due to shortages of judges, legal officers and court staff, appeals often take very long to resolve. In some cases, appeals take years before they are resolved.

References:

Kanyongolo, F. E., “Malawi: Justice Sector and the Rule of Law,” a review by AFRIMAP and the Open Society Initiative for Southern Africa: Cambridge, 2006

Chikosa Banda, head of the Department of Foundational Law, University of Malawi, Aug. 19, 2011, Zomba

Billy Banda, Executive Director, Malawi Watch, September 16, 2011, Lilongwe.

100: Appeals are acted upon quickly. While some backlog is expected and inevitable, appeals are acknowledged promptly and cases move steadily towards resolution.

75:

50: Appeals are generally acted upon quickly but with some exceptions. Some appeals may not be acknowledged, and simple cases may take years to resolve.

25:

0: Most appeals are not resolved in a timely fashion. Appeals may go unacknowledged for months or years and simple cases may never be resolved.

77c. In practice, citizens can use the appeals mechanism at a reasonable cost.

100 | 75 | 50 | 25 | 0

Comments:

In his assessment of impediments to access to justice in Malawi, F. E. Kanyongolo (2006:19) notes that “financial barriers consist mainly of the relatively high financial cost of paying court and lawyers’ fees and transport costs. Although court fees may appear to be low, the majority of Malawians live below the poverty line, on an income of less than K140 (approximately US\$1) per day. These income levels also mean that only a minuscule number of Malawians can afford to hire private lawyers, who demand as much as K10000 (approximately \$70) for an initial deposit and K7000 (approximately \$50) per hour thereafter. Unfortunately, neither the Ministry of Justice’s Department of Legal Aid nor non-governmental organizations have sufficient resources to provide the poor with a way around the barrier of lawyers’ fees.”

References:

Kanyongolo, F. E., “Malawi: Justice Sector and the Rule of Law,” a review by AFRIMAP and the Open Society Initiative for Southern Africa: Cambridge, 2006

Chikosa Banda, head of the Department of Foundational Law, University of Malawi, Aug. 19, 2011, Zomba

Billy Banda, executive director, Malawi Watch, Sept. 16, 2011, Lilongwe

100: In most cases, the appeals mechanism is an affordable option to middle class citizens seeking to challenge criminal judgments. Attorney fees are not a barrier to appeals.

75:

50: In some cases, the appeals mechanism is not an affordable option to middle class citizens seeking to challenge criminal judgments. Attorney fees present somewhat of a barrier to pursuing appeal.

25:

0: The prohibitive cost of utilizing the appeals mechanism prevents middle class citizens from challenging criminal judgments. Attorney fees greatly discourage the use of the appeals process.

78. In practice, do judgments in the criminal system follow written law?

100

78a. In practice, do judgments in the criminal system follow written law?

100 | 75 | 50 | 25 | 0

Comments:

Court judgments in the criminal system follow written laws, as provided for under the Criminal Procedure and Evidence Code of 1968, as amended.

References:

Kanyongolo, F. E., “Malawi: Justice Sector and the Rule of Law,” a review by AFRIMAP and the Open Society Initiative for Southern Africa: Cambridge, 2006

Chikosa Banda, head of the Department of Foundational Law, University of Malawi, Aug. 19, 2011, Zomba

100: Judgments in the criminal system are made according to established legal code and conduct. There are no exceptional cases in which individuals are treated by a separate process. Political interference, bribery, cronyism or other flaws are rarely factors in judicial outcomes.

75:

50: Judgments in the criminal system usually follow the protocols of written law. There are sometimes exceptions when political concerns, corruption or other flaws in the system decide outcomes.

25:

0: Judgments in the criminal system are often decided by factors other than written law. Bribery and corruption in the criminal judicial process are common elements affecting decisions.

79. In practice, are judicial decisions enforced by the state?

75

79a. In practice, are judicial decisions enforced by the state?

100 | 75 | 50 | 25 | 0

Comments:

Judicial decisions are almost always enforced by the state. However, in certain instances, government takes too long to enforce decisions, especially those that go against the state. In July 2011, for example, President Bingu wa Mutharika signed into law a bill that had been passed by Parliament despite the High Court issuing an injunction preventing him from doing so.

References:

Kondwani Munthali, The Nation, July 14, 2011, "Bingu signs injunctions bill," http://www.nationmw.net/index.php?option=com_content&view=article&id=22790:bingu-signs-injunctions-bill&catid=1:national-news&Itemid=3

Kanyongolo, F. E., "Malawi: Justice Sector and the Rule of Law," A review by AFRIMAP and the Open Society Initiative for Southern Africa: Cambridge, 2006

Chikosa Banda, head of the Department of Foundational Law, University of Malawi, Aug. 19, 2011, Zomba

Billy Banda, executive director, Malawi Watch, Sept. 16, 2011, Lilongwe

100: Judicial decisions are enforced quickly regardless of what is being decided or who is appearing before the court. Failure to comply brings penalties enforced by the state.

75:

50: Judicial decisions are generally enforced by the state, with some exceptions. Certain areas of law may be ignored, or certain parties appearing before the courts may evade or delay enforcement.

25:

0: Judicial decisions are often ignored. The state lacks the will or capacity to consistently enforce these decisions.

80. Is the judiciary able to act independently?

94

80a. In law, the independence of the judiciary is guaranteed.

Yes

No

Comments:

The independence of the judiciary in Malawi is guaranteed under Section 103 of the Constitution (1995) which states in Subsection (1) 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."

References:

Section 103 of the Constitution (1995).

Yes: A YES score is earned if there are formal rules establishing that the judiciary is independent from political interference by the executive and legislative branches. Independence includes financial issues (drafting, allocation, and managing the budget of the courts).

No: A NO score is earned if there are no formal rules establishing an independent judiciary.

80b. In practice, national-level judges are protected from political interference.

100

75

50

25

0

Comments:

Although national-level judges are protected from political interference, the president, as the appointing authority of judges, has been accused of appointing individuals to the bench that have sympathies to the president and the ruling party.

In June 2011, for example, the Malawi Law Society raised concerns about the appointments of new judges to the Malawi High Court and Supreme Court. The Law Society accused the president of preferring individuals who had a history of making favorable rulings for government while ignoring those who had made several rulings that went against government.

References:

Frank Namangale, The Nation, June 15, 2011, "Law Society queries judge appointments," http://www.nationmw.net/index.php?option=com_content&view=article&id=21179:law-society-queries-judge-appointments&catid=1:national-news&Itemid=3

Billy Banda, executive director, Malawi Watch, Sept. 16, 2011, Lilongwe

100: National-level judges operate independently of the political process, without incentive or pressure to render favorable judgments in politically sensitive cases. Judges never comment on political debates. Individual judgments are rarely praised or criticized by political figures.

75:

50: National-level judges are typically independent, yet are sometimes influenced in their judgments by negative or positive political incentives. This may include favorable or unfavorable treatment by the government or public criticism. Some judges may be demoted or relocated in retaliation for unfavorable decisions.

25:

0: National-level judges are commonly influenced by politics and personal biases or incentives. This may include conflicting family relationships, professional partnerships, or other personal loyalties. Negative incentives may include demotion, pay cuts, relocation, threats or harassment.

80c. In law, there is a transparent and objective system for distributing cases to national-level judges.

Yes

No

Comments:

The allocation of judges to cases to High Court and Supreme Court judges in Malawi is governed by the Rules of the Supreme Court, as stipulated in the Supreme Court of Appeal Act (1964). Cases are allocated by the Registrar of the High and Supreme Court on the basis of a rotating list of case judges.

References:

Supreme Court of Appeal Act (1964).

Chikosa Banda, head of the Department of Foundational Law, University of Malawi, Aug. 19, 2011, Zomba

Yes: A YES score is earned if there is an objective system that is transparent to the public that equitably or randomly assigns cases to individual judges. The executive branch does not control this process.

No: A NO score is earned if the case assignment system is non-transparent or subjective where judges themselves have influence over which cases they adjudicate. A NO score is also earned if the executive branch controls this process.

80d. In law, national-level judges are protected from removal without relevant justification.

Yes

No

Comments:

National-level judges in Malawi can be removed only by the president and only on the grounds of incompetence in the performance of duties or of misbehavior as stipulated in Section 119 (2) of the Constitution. However, the power of dismissal can only be exercised by the president only in consultation with the Judicial Service Commission which itself can act only if a majority of members of the National Assembly have voted for the removal of the judge in accordance with the rules of justice.

References:

Section 119 (2) of the Constitution.

Yes: A YES score is earned if there are specific, formal rules for removal of a justice. Removal must be related to abuse of power or other offenses related to job performance.

No: A NO score is earned if justices can be removed without justification, or for purely political reasons. A NO score is earned if the removal process is not transparent, or not based on written rules.

81. Are judges safe when adjudicating corruption cases?

100

81a. In practice, in the last year, no judges have been physically harmed because of adjudicating corruption cases.

Yes

No

Comments:

There were no cases of judges being physically harmed because of adjudicating corruption cases in the previous year.

References:

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

Billy Banda, executive director, Malawi Watch, Sept. 16, 2011, Lilongwe

Yes: A YES score is earned if there were no documented cases of judges being assaulted because of their involvement in a corruption case during the specific study period. YES is a positive score.

No: A NO score is earned if there were any documented cases of assault to a judge related to his/her participation in a corruption trial. Corruption is defined broadly to include any abuses of power, not just the passing of bribes.

81b. In practice, in the last year, no judges have been killed because of adjudicating corruption cases.

Yes

No

Comments:

There were no cases of judges being killed because of adjudicating corruption cases in the previous year.

References:

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

Billy Banda, executive director, Malawi Watch, Sept. 16, 2011, Lilongwe

Yes: A YES score is earned if there were no documented cases of judges being killed related to their involvement in a corruption case during the study period. YES is a positive score.

No: A NO score is earned if there were any documented cases where a judge was killed because of his/her participation in a corruption trial. The relationship between a mysterious death and a judge's involvement in a case may not be clear, however the burden of proof here is low. If it is a reasonable assumption that a judge was killed in relation to his or her work on corruption issues, then the indicator is scored as a NO. Corruption is defined broadly to include any abuses of power, not just the passing of bribes.

82. Do citizens have equal access to the justice system?

61

82a. In practice, judicial decisions are not affected by racial or ethnic bias.

100 | 75 | 50 | 25 | 0

Comments:

There is no evidence to suggest that judicial decisions are affected by racial or ethnic bias. Malawi judges are known for their professionalism in handling cases without looking at the racial or ethnic backgrounds of the individuals appearing before them.

References:

Kanyongolo, F. E., "Malawi: Justice Sector and the Rule of Law," a review by AFRIMAP and the Open Society Initiative for Southern Africa: Cambridge, 2006

Chikosa Banda, head of the Department of Foundational Law, University of Malawi, Aug. 19, 2011, Zomba

Billy Banda, executive director, Malawi Watch, Sept. 16, 2011, Lilongwe

100: Judicial decisions are not affected by racial or ethnic bias.

75:

50: Judicial decisions are generally not affected by racial or ethnic bias, with some exceptions. Some groups may be occasionally discriminated against, or some groups may occasionally receive favorable treatment.

25:

0: Judicial decisions are regularly distorted by racial or ethnic bias. Some groups consistently receive favorable or unfavorable treatment by the courts.

82b. In practice, women have full access to the judicial system.

100 | 75 | 50 | 25 | 0

Comments:

One of the fundamental principles outlined in Section 13 of the Malawi Constitution is gender equality. This provision calls for the implementation of principles of non-discrimination and the implementation of policies to address social issues such as domestic violence against women, security of women, access to maternal services and benefits and rights to property. Accordingly, the Malawi judicial system gives full access to women without exception.

References:

Kanyongolo, F. E., "Malawi: Justice Sector and the Rule of Law," a review by AFRIMAP and the Open Society Initiative for Southern Africa: Cambridge, 2006

Chikosa Banda, head of the Department of Foundational Law, University of Malawi, Aug. 19, 2011, Zomba

Billy Banda, executive director, Malawi Watch, Sept. 16, 2011, Lilongwe

100: Women enjoy full and equal status in the eyes of the courts. There are no exceptions or practices in which women are treated differently by the judicial system. For this indicator, discrimination against women should reflect specific biases that confront women in the justice system as opposed to difficulties resulting from broader socio-economic disadvantages or discrimination against women.

75:

50: Women generally have use of the judicial system, with some exceptions. In some cases, women may be limited in their access to courts, or gender biases may affect court outcomes. For this indicator, discrimination against women should reflect specific biases that confront women in the justice system as opposed to difficulties resulting from broader socio-economic disadvantages or discrimination against women.

25:

0: Women generally have less access to the courts than men. Court decisions are commonly distorted by gender bias. Women may have to go through intermediaries to interact with the court, or are unable to present evidence. For this indicator, discrimination against women should reflect specific biases that confront women in the justice system as opposed to difficulties resulting from broader socio-economic disadvantages or discrimination against women.

82c. In law, the state provides legal counsel for defendants in criminal cases who cannot afford it.

Yes

No

Comments:

Section 42(2)(f)(v) of the Malawi Constitution (1995) guarantees the right "to be represented by a legal practitioner of his or her choice or, where it is required in the interests of justice, to be provided with legal representation at the expense of the state, and to be informed of these rights."

References:

Section 42(2)(f)(v) of the Malawi Constitution (1995).

Yes: A YES score is earned if the government is required by law to provide impoverished defendants with legal counsel to defend themselves against criminal charges.

No: A NO score is earned if there is no legal requirement for the government to provide impoverished defendants with legal counsel to defend themselves against criminal charges.

82d. In practice, the state provides adequate legal counsel for defendants in criminal cases who cannot afford it.

Comments:

The Department of Legal Aid in Malawi is one of the most understaffed government departments. Even after the government recruits new lawyers to fill the many vacant positions in the Legal Aid Department, many leave as soon as they get opportunities to work in the private sector. As a result, there are very few legal officers available to represent the needs of the many Malawians who require services from this office. Oftentimes, the quality of legal aid is poor as officers are in a hurry to attend to other cases.

In 2011, the enactment of a new Legal Aid Act, which establishes legal aid centers in all districts of Malawi, has the potential of bringing legal aid services closer to the people. However, the new centers were yet to be established as of September 2011 and it was not clear whether the government would be able to attract enough lawyers to fill the positions.

References:

Sonya Donnelly, Aug. 4, 2011, "Pre-Trial Detention & Legal Aid in Malawi," <http://www.humanrights.ie/index.php/2011/08/04/pre-trial-detention-legal-aid-in-malawi/>

Pacharo Kayira, "Malawi Criminal Justice System," in Open Society Initiative for Southern Africa, "Pre-trial detention in Malawi: Understanding case-flow management and conditions of incarceration," OSISA, 2011

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

100: State-provided legal aid is basic, but well-trained and effective in representing the rights of impoverished defendants.

75:

50: State-provided legal aid is available, but flawed. Legal aid may be unavailable to some impoverished defendants. Legal aid/public defenders may be sometimes unable or unwilling to competently represent all defendants.

25:

0: State-provided legal aid is unavailable to most impoverished defendants. State legal aid/public defenders may be consistently incompetent or unwilling to fairly represent all defendants.

82e. In practice, citizens earning the median yearly income can afford to bring a legal suit.

Comments:

While the cost of filing a legal suit is very low (less than \$1), attorney fees in Malawi are very high, averaging around \$100 per hour. In a country where the average per capita income stands at \$328, attorney fees would take up a substantial portion of the income of the median earner in the country.

References:

Kanyongolo, F. E., "Malawi: Justice Sector and the Rule of Law," a review by AFRIMAP and the Open Society Initiative for Southern Africa: Cambridge, 2006

Chikosa Banda, head of the Department of Foundational Law, University of Malawi, Aug. 19, 2011, Zomba

Billy Banda, executive director, Malawi Watch, Sept. 16, 2011, Lilongwe

100: In most cases, the legal system is an affordable option to middle class citizens seeking to redress a grievance. Attorney fees do not represent a major cost to citizens.

75:

50: In some cases, the legal system is an affordable option to middle class citizens seeking to redress a grievance. In other cases, the cost is prohibitive. Attorney fees are a significant consideration in whether to bring a case.

25:

0: The cost of engaging the legal system prevents middle class citizens from filing suits. Attorney fees are high enough to discourage most citizens from bringing a case.

82f. In practice, a typical small retail business can afford to bring a legal suit.

100 | 75 | 50 | 25 | 0

Comments:

Due to a shortage of private practice lawyers, attorney fees in Malawi are very high, averaging around \$100 per hour. The cost of legal representation is consequently unfordable for most small retail businesses in the country.

References:

Kanyongolo, F. E., "Malawi: Justice Sector and the Rule of Law," A review by AFRIMAP and the Open Society Initiative for Southern Africa: Cambridge, 2006

Chikosa Banda, head of the Department of Foundational Law, University of Malawi, Aug. 19, 2011, Zomba

Billy Banda, executive director, Malawi Watch, Sept. 16, 2011, Lilongwe

100: In most cases, the legal system is an affordable option to a small retail business seeking to redress a grievance. Attorneys fees do not represent a major cost to small businesses.

75:

50: In some cases, the legal system is an affordable option to a small retail business seeking to redress a grievance. In other cases, the cost is prohibitive. Attorney fees are a significant consideration in whether to bring a case.

25:

0: The cost of engaging the legal system prevents small businesses from filing suits. Attorney fees are high enough to discourage most small businesses from bringing a case.

82g. In practice, all citizens have access to a court of law, regardless of geographic location.

100 | 75 | 50 | 25 | 0

Comments:

The High Courts are only available regionally in the cities of Blantyre, Lilongwe, Mzuzu and Zomba. Magistrate courts are available at the district level and in a number of small rural towns. Generally, however, the courts are far from most Malawians who live in rural areas. To make matters worse, some court buildings exist but are not staffed due to shortages of personnel. As a result, most people are forced to rely on alternative dispute resolution mechanisms through local village courts presided over by traditional leaders.

References:

Kanyongolo, F. E., "Malawi: Justice Sector and the Rule of Law," a review by AFRIMAP and the Open Society Initiative for Southern Africa: Cambridge, 2006

Chikosa Banda, head of the Department of Foundational Law, University of Malawi, Aug. 19, 2011, Zomba

Billy Banda, executive director, Malawi Watch, Sept. 16, 2011, Lilongwe

100: Courtrooms are always accessible to citizens at low cost, either through rural courthouses or through a system of traveling magistrates.

75:

50: Courts are available to most citizens. Some citizens may be unable to reach a courtroom at low cost due to location.

25:

0: Courts are unavailable to some regions without significant travel on the part of citizens.

6.4. Law Enforcement: Conflicts of Interest Safeguards and Professionalism

83. Is the law enforcement agency (i.e. the police) effective?

50

83a. In practice, appointments to the law enforcement agency (or agencies) are made according to professional criteria.

100 | 75 | 50 | 25 | 0

Comments:

Appointments to most junior-level police ranks are done according to professional criteria. However, the criteria for promotions is hazy, with some long-serving officers languishing in junior ranks while new entrants can be promoted on the spot. Appointments to the senior most ranks also tend to be politicized. This is particularly the case with the Office of Inspector General of Police. Sometimes those in lower ranks are promoted to the top rank because of their perceived loyalty to the president.

References:

Austin Kakande, Malawi Voice, March 11, 2011, "Bingu says Mukhito won't apologize and gives him a

medal," <http://www.malawivoice.com/latest-news/bingu-says-mukhito-won%E2%80%99t-apologise-and-gives-him-a-medal/>

Mercy Jamali, head of the department of political and administrative studies department, Sept. 13, 2011, Zomba

Anonymous police officer, Malawi Police Service, Sept. 19, 2011, Lilongwe

100: Appointments to the agency (or agencies) are made based on professional qualifications. Individuals appointed are free of conflicts of interest due to personal loyalties, family connections or other biases. Individuals appointed usually do not have clear political party affiliations.

75:

50: Appointments are usually based on professional qualifications. Individuals appointed may have clear party loyalties, however.

25:

0: Appointments are often based on political considerations. Individuals appointed often have conflicts of interest due to personal loyalties, family connections or other biases. Individuals appointed often have clear party loyalties.

83b. In practice, the law enforcement agency (or agencies) has a budget sufficient to carry out its mandate.

100 | 75 | **50** | 25 | 0

Comments:

The Malawi police service receives its funding from the government. However, the levels of funding are almost always inadequate. As a result, the police are often short of staff and resources to carry out the full range of their responsibilities. The Malawi police stations and units often complain of having insufficient transport, lacking computers and other necessary materials.

References:

Africa Police Network, Malawi, http://www.aprn.org.za/countries/countrydetail.asp?cnt_id=15

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

Mercy Jamali, head of the department of political and administrative studies department, Sept. 13, 2011, Zomba

100: The agency (or agencies) has a budget sufficient to fulfill its basic mandate.

75:

50: The agency (or agencies) has limited budget, generally considered somewhat insufficient to fulfill its basic mandate.

25:

0: The agency (or agencies) has no budget or an obviously insufficient budget that hinders the agency's ability to fulfill its mandate.

83c. In practice, the law enforcement agency is protected from political interference.

Comments:

The Malawi police service is often heavily influenced in its actions by senior-level political figures, especially those from the ruling party. The president has often given directives to the police to commit actions that are often illegal. During the July 20 demonstrations organized by the civil society organizations, the police battled against unarmed citizens and killed as many as 20 citizens.

The police also have been quick to jump to the defense of government. In late September 2011, for example, a final-year university of Malawi student, Robert Chasowa, who was a vocal critic of government, was murdered but his death was staged to appear as if it was a suicide. Although there is no evidence that the police were actually involved in the actual killing of Chasowa, the police have been accused of being complicit in covering up the murder by quickly embracing the claim that it was a suicide case.

References:

Mtando Jonathan Mtando, Nyasatimes, Oct. 2, 2011, "Malawi Police: protectors or murderers?" <http://www.nyasatimes.com/malawi/2011/10/02/malawi-police-protectors-or-murderers/>

Wiseman Chirwa, professor of political history, University of Malawi, Sept. 9, 2011, Zomba

Anthony Kasunda, chairperson, Media Institute of Southern Africa (Malawi Chapter), Sept. 12, 2011, Blantyre

100: The agency (or agencies) operates independently of the political process and has operational independence from the government. All laws can be enforced regardless of the status of suspects or the sensitivity of the investigation.

75:

50: The agency (or agencies) is typically independent, yet is sometimes influenced in its investigations or enforcement actions by negative or positive political incentives. This may include favorable or unfavorable public criticism by the government or other forms of influence. The agency (or agencies) may not be provided with some information needed to carry out its investigations.

25:

0: The investigative and enforcement work of the agency (or agencies) is commonly influenced by political actors or the government. These may include conflicting family relationships, professional partnerships, or other personal loyalties. Negative incentives may include threats, harassment or other abuses of power by the government.

84. Can law enforcement officials be held accountable for their actions?

88

84a. In law, there is an independent mechanism for citizens to complain about police action.

Yes

No

Comments:

Section 155 of the Malawi Constitution establishes the Malawi Police Service Commission, which is empowered to exercise disciplinary control over persons holding or acting in any police capacity. In addition, citizens can also complain to other constitutional bodies such as the Malawi Human Rights Commission, the Ombudsman and the Director of Public Prosecutions.

References:

Section 155 of the Malawi Constitution.

Yes: A YES score is earned if there is a formal process or mechanism by which citizens can complain about police actions. A YES score is earned if a broader mechanism such as the national ombudsman, human rights commission, or anti-corruption agency has jurisdiction over the police.

No: A NO score is earned if there is no such mechanism

84b. In practice, the independent law enforcement complaint reporting mechanism responds to citizen's complaints within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

Agencies that are mandated to respond to citizen complaints against the police, such as the Ombudsman, the Human Rights Commission and the Police Service Commission, are often under-staffed, lack resources and often are pressured against acting against officers connected to the senior-level political elites.

During the academic freedom struggle that arose after Inspector General of Police Peter Mukhito summoned a university of Malawi lecturer, Associate Professor Blessings Chinsinga, in February 2011, for example, the police were shielded from being held responsible by President Bingu wa Mutharika.

Although the Malawi Human Rights Commission launched investigations into the killings of unarmed citizens during the July 20 demonstrations and issued a report that was critical of the police, the government has showed no interest in acting on the findings. Instead, President Mutharika offered monetary rewards to the police officers involved in perpetrating the crimes against ordinary citizens during the demonstrations.

References:

Raphael Tenthani, Maravi Post, March 11, 2011, "Mutharika dares 'varsity dons': Mukhito won't apologize," <http://www.maravipost.com/malawi-politics/district/4836-mutharika-dares-varsity-dons-mukhito-wont-pologise.html>

Lusubilo Sichali, Malawi Democrat, July 29, 2011, "Bingu rewards trigger-happy police officers," <http://www.malawidemocrat.com/politics/bingu-rewards-trigger-happy-police-officers/>

McBain Mkandawire, executive director, Malawi Youthnet and Counseling (YONECO), Aug. 17, 2011, Zomba

100: The agency/entity responds to complaints quickly. While some backlog is expected and inevitable, complaints are acknowledged promptly and investigations into serious abuses move steadily towards resolution. Citizens with simple issues can expect a resolution within a month.

75:

50: The agency/entity responds to complaints quickly, with some exceptions. Some complaints may not be acknowledged, and simple issues may take more than two months to resolve.

25:

0: The agency/entity cannot resolve complaints quickly. Complaints may be unacknowledged for more than a month, and simple issues may take three to six months to resolve. Serious abuses are not investigated with any urgency.

84c. In law, there is an agency/entity to investigate and prosecute corruption committed by law enforcement officials.

Yes

No

Comments:

Section 10 of the Corrupt Practices Act (1995) mandates the Anti-Corruption Bureau (ACB) to investigate and prosecute corruption “in public bodies and private bodies” in Malawi. Law enforcement officials, such as the police, are among public officials and can therefore be investigated and prosecuted by the ACB when they commit corrupt offenses.

References:

Laws of Malawi, Corrupt Practices Act (1995), Section 10.

Yes: A YES score is earned if there is an agency/entity specifically mandated to investigate corruption-related activity within law enforcement. This agency/entity may be internal to the police department (provided it has a degree of independence, such as an internal affairs unit) or part of a broader national mechanism such as the national ombudsman, human rights commission, or anti-corruption agency.

No: A NO score is earned if no such agency/entity exists.

84d. In practice, when necessary, the agency/entity independently initiates investigations into allegations of corruption by law enforcement officials.

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Comments:

The Anti-Corruption Bureau has arrested and prosecuted several cases of corruption by law enforcement agencies in Malawi. In 2010, for example, the Anti-Corruption Bureau concluded investigations on allegations that police officers Laxwell Chirwa and Brian Chingwalu of Elangeni Police Unit in Mzimba District had received one tobacco bale valued at MK33,800 as an inducement to release Tenson Mtonga and Jackson Mbunysera from police custody. The Anti-Corruption Bureau also investigated allegations that Brian Chingwalu received MK700.00 from Neverson Chinengo for transporting accused persons Tenson Mtonga and Jackson Mbunysera to the police unit.

References:

Egrita Ndala, public relations officer, Anti-Corruption Bureau, Aug. 19, 2010, “The Anti-Corruption Bureau arrests officers from the department of civil aviation, forestry (chikangawa) and Malawi police service,” <http://www.anti-corruptionbureau.mw/2010/08/25/acb-arrests-officers-from-the-department-of-civil-aviation-forestry-chikangawa-and-malawi-police-service/>

Catherine Kabango, public education officer, Anti-Corruption Bureau, Sept. 16, 2011, Lilongwe

100: When irregularities are discovered, the agency/entity is aggressive in investigating government law enforcement officials or in cooperating with other investigative agencies.

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50: The agency/entity starts investigations, but is limited in its effectiveness or is reluctant to cooperate with other investigative agencies. The agency/entity may be slow to act, unwilling to take on politically powerful offenders, or occasionally unable to enforce its judgments.

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0: The agency/entity does not effectively investigate or does not cooperate with other investigative agencies. The agency may start investigations but not complete them, or may fail to detect offenders. The agency may be partisan in its application of power.

84e. In law, law enforcement officials are not immune from criminal proceedings.

Yes

No

Comments:

Section 61 of the Police Act of 1946, as amended, states that “Nothing in this act shall exempt any person from being prosecuted under any other act or law for the time being in force for any offense made punishable by this act, or from being liable under any other act or law to any other or higher penalty or punishment than is provided for such offense by this act.”

References:

Section 61 of the Police Act of 1946.

Yes: A YES score is earned if law enforcement officers are fully accountable for their actions under the law and can be investigated and prosecuted for their actions.

No: A NO score is earned if law enforcement enjoys any special protection from criminal investigation or prosecution.

84f. In practice, law enforcement officials are not immune from criminal proceedings.

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Comments:

A number of police officers have been prosecuted and convicted for crimes including corruption, theft and even murder. In March 2011, for example, police arrested Godfrey Msulira, a former police officer who was at the time stationed at Kasungu police station, for raping a 21-year-old female suspect. Another police officer, Harold Thawe, was arrested in Salima district for stealing drugs that were being stored as a court exhibit.

References:

Austin Kakande, Malawi Voice, March 26, 2011, “Police officer arrested for raping female convict,” <http://www.malawivoice.com/latest-news/police-officer-arrested-for-raping-female-convict-let-wheels-of-justice-take-its-full-course-ngo/>

Austin Kakande, Malawi Voice, undated, “Police officer arrested for stealing chamba from court’s exhibit room,” <http://www.malawivoice.com/latest-news/police-officer-arrested-for-stealing-chamba-from-court%E2%80%99s-exhibit-room/>

100: Law enforcement officers are subject to criminal investigation for official misconduct. No crimes are exempt from prosecution.

75:

50: Law enforcement is generally subject to criminal investigation but exceptions may exist where criminal actions are overlooked by the police or prosecutors. Some crimes may be exempt from prosecution, such as actions taken in the line of duty.

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0: Law enforcement enjoys a general protection from most criminal investigation. This may be due to a formal immunity or an informal understanding that the law enforcement community protects itself.
